No. S203526
(Court of Appeal No. C070851)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRADLEY S. WINCHELL,
Petitioner,

v.

MATTHEW CATE, Secretary, California
Department of Corrections and Rehabilitation,
and
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION,
Respondents,

MICHAEL ANGELO MORALES,
Real Party in Interest.

MOTION FOR JUDICIAL NOTICE AND SUPPORTING DECLARATION OF SARA J. EISENBERG

McBREEN & SENIOR
DAVID A. SENIOR (No. 108579)
dsenior@mcbreensenior.com
1900 Avenue of the Stars, 11th Floor
Los Angeles, California 90067
Telephone: 310.552.5300
Facsimile: 310.552.1205

*Attorneys for Real Party in Interest
Michael Angelo Morales*

No. S203526
(Court of Appeal No. C070851)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRADLEY S. WINCHELL,
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MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation,
and
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondents,

MICHAEL ANGELO MORALES,
Real Party in Interest.

MOTION FOR JUDICIAL NOTICE

Pursuant to California Evidence Code Sections 452(d) and 459, as well as Rule 8.252(a) of the California Rules of Court, Real Party in Interest Michael Angelo Morales respectfully requests this Court take judicial notice of the documents attached hereto as Exhibits A and B.

The documents are authenticated by the declaration of Sara J. Eisenberg, which follows.

These documents are relevant to the above-captioned matter because they relate to actions currently underway by the California Department of Corrections and Rehabilitation ("CDCR") to effectuate Penal Code 3604, establish a lethal

injection protocol and carry out executions. *See* CAL. R. CT. 8.252(a)(2)(A).

Neither document was originally presented in a trial court in this case because Petitioner sought original review of this matter on April 19, 2012, in the Court of Appeal, Third Appellate District. *See* Declaration of Sara J. Eisenberg ("Eisenberg Decl.") ¶5

Exhibit A was presented to the Court of Appeal in this case, which took judicial notice of the document. *See id.* ¶6; *see also* CAL. R. CT. 8.252(a)(2)(B).

Exhibit B, which was not presented to the Court of Appeal in this case, relates to proceedings that occurred after the Court of Appeal summarily denied the Petition for Writ of Mandate. *See* Eisenberg Decl. ¶7; *see also* CAL. R. CT. 8.252(a)(2)(C).

Exhibit A is a copy of the Notice of Appeal, filed in the Superior Court of Marin County on April 26, 2012, in the matter of *Sims v. California Department of Corrections and Rehabilitation*, giving notice that "defendants the California Department of Corrections and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims." It further states that, pending appellate review, "the California Department of Corrections and Rehabilitation will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty."

Exhibit B is a copy of the Declaration of Thomas S. Patterson, Supervising Deputy Attorney General for the State of California, submitted on July 13, 2012, to the Superior Court of Los Angeles County in the matter of People v. Sims, No. A591707, stating that "[the] CDCR is already considering the relief that the Los Angeles District Attorney seeks,

namely, the development of a single-drug protocol [for carrying out lethal injections]."

Evidence Code Section 452(d) authorizes this Court to take judicial notice of "[r]ecords of . . . any court of this state." Evidence Code 452(h) authorizes this Court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Exhibits A and B reflect official records of courts of this state. The statements contained within them are "not reasonably subject to dispute."

DATED: July 16, 2012.

Respectfully,

MCBREEN & SENIOR
DAVID A. SENIOR

By: David A. Senior /SJE
DAVID A. SENIOR

Attorneys for Real Party in Interest Michael Angelo Morales

31919627vF

DECLARATION OF SARA J. EISENBERG

I, Sara J. Eisenberg, declare:

1. I am an attorney admitted to practice before the Bar of the State of California. I am an associate with the law firm of Arnold & Porter LLP, attorneys for Mitchell Sims in *Sims v. California Department of Corrections and Rehabilitation*, Marin County Superior Court case number CIV1004019, and I have appeared on Mr. Sims's behalf in recent proceedings initiated by the Los Angeles County District Attorney in *People v. Sims*, Los Angeles County Superior Court case number A591707. I make this Declaration upon personal knowledge and, if called upon to testify, could and would testify competently hereto.

2. As counsel of record for Mr. Sims in *Sims v. California Department of Corrections and Rehabilitation*, I was served by the CDCR with a copy of the document attached hereto as Exhibit A, which is also in the Marin County Superior Court's file.

3. I was also served by the CDCR with a copy of the document attached hereto as Exhibit B, which is also in the Los Angeles County Superior Court's file.

4. The documents attached as Exhibits A and B are true and correct copies of the documents with which I was served.

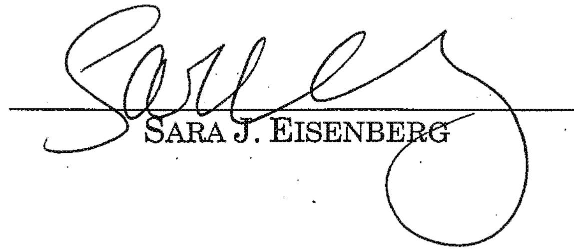
5. Neither Exhibit A nor Exhibit B was presented to a trial court.

6. Exhibit A was presented to the Court of Appeal, and judicial notice of the document was taken by that court.

7. Exhibit B, which was not presented to the Court of Appeal, was filed in the Los Angeles County Superior Court after the Court of Appeal summarily denied the Petition for Writ of Mandate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of July, 2012, in San Francisco, California.



SARA J. EISENBERG

31919627vF

EXHIBIT A

KAMALA D. HARRIS
Attorney General of California
THOMAS S. PATTERSON
Supervising Deputy Attorney General
State Bar No. 202890
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5727
Fax: (415) 703-5843
E-mail: Thomas.Patterson@doj.ca.gov
Attorneys for Defendants
California Department of Corrections and Rehabilitation and Matthew Cate

(Exempt from filing fees—
Gov. Code, § 6103.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

MITCHELL SIMS, Plaintiff, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al., Defendants.	Case No. CIV1004019 **NOTICE OF APPEAL**

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that defendants the California Department of Corrections and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims.

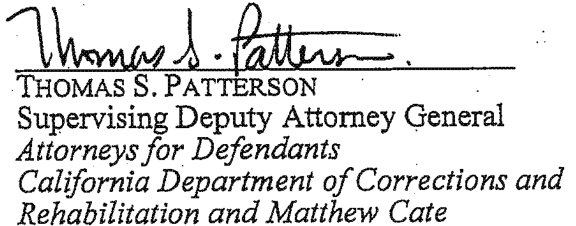
The state has expended significant time and resources developing a three-drug lethal-injection protocol for carrying out the death penalty, and this protocol conforms with a procedure that has been upheld by the United States Supreme Court. This notice of appeal is filed because the state's three-drug protocol is the law of California and should not be abandoned without

appellate review, and because the superior court made fundamental errors in issuing its decision. At the same time, appellants recognize that the availability of the three drugs comprising the current protocol is uncertain. If it becomes certain in the future that the drugs needed to implement the protocol have, in fact, become unavailable, appellants will reevaluate whether this appeal, or any portions of it, should continue to be prosecuted. In the meantime, under the Governor's direction, the California Department of Corrections and Rehabilitation will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty.

Dated: April 26, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California



THOMAS S. PATTERSON
Supervising Deputy Attorney General
Attorneys for Defendants
California Department of Corrections and Rehabilitation and Matthew Cate

SF2010201806
20596991.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **M. Sims v. CDCR, et al.**
No.: **CIV1004019**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 26, 2012, I served the attached

NOTICE OF APPEAL

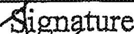
by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Sara J. Eisenberg, Esq.
Howard Rice Nemerovski Canady
Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4024
Attorney for Plaintiff
Mitchell Sims

Norman C. Hile
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 94814-4497

Jan B. Norman
Attorney at Law
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2012, at San Francisco, California.

T. Oakes	
Declarant	Signature

SF2010201806
20597697.doc

EXHIBIT B

KAMALA D. HARRIS
Attorney General of California
THOMAS S. PATTERSON, State Bar No. 202890
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
E-mail: Thomas.Patterson@doj.ca.gov
Telephone: (415) 703-5727
JAY M. GOLDMAN, State Bar No. 168141
Deputy Attorney General
E-mail: Jay.Goldman@doj.ca.gov
Telephone: (415) 703-5846
Fax: (415) 703-5843
Attorneys Specially Appearing for the California Department of Corrections and Rehabilitation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. **MITCHELL CARLTON SIMS,** Defendant.	Case Nos. A591707 **DECLARATION OF THOMAS S. PATTERSON SUPPORTING THE SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE** Date: July 13, 2012 Time: 10:00 a.m. Dept: 106 Judge: Judge Larry Fidler Action Filed: May 2, 2012

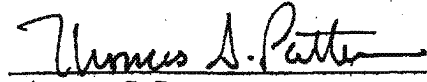
I, Thomas S. Patterson, declare:

1. I am a Supervising Deputy Attorney General in the California Attorney General's Office, and am assigned to represent and specially appear for the California Department of Corrections and Rehabilitation in this matter. I am competent to testify to the matters set forth in this declaration, and if called to do so, I would and could so testify. I submit this declaration in support of CDCR's response to the two orders to show cause issued in the above-captioned cases, which order CDCR to appear before this Court and show cause why an execution using a single-drug method sought by the Los Angeles District Attorney cannot be performed on two condemned inmates, Defendants Cox and Sims.

2. The Marin County Superior Court, in the case of *Sims v. CDCR*, Case No CIV1004019, issued a permanent injunction on February 21, 2012, which prohibits the CDCR from "carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injections are promulgated in compliance with the Administrative Procedure Act." A copy of this judgment and injunction is attached as exhibit 1.

3. CDCR is already considering the relief that the Los Angeles District Attorney seeks, namely, the development of a single-drug protocol, although CDCR's protocol would apply to all condemned inmates, not just Sims and Cox. The notice of appeal in the *Sims* action, which was filed on April 26, 2012, states that the Governor has directed CDCR to "begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty." A copy of the notice of appeal filed in the *Sims* action is attached as exhibit 2.

4. The United States District Court for the Northern District of California in *Morales v. Cate*, Case Nos. 5-6-cv-219 and 5-6-cv-926, issued an order granting Defendant Sims's motion to intervene and for a stay of execution on January 19, 2011. A true and correct copy of this order is attached as exhibit 3. The order granted Sims a stay to the same extent as the court had previously granted some of the other plaintiffs in that matter against "all proceedings related to the execution of [the condemned inmate's] sentence of death, including but not limited to preparations for an execution and the setting of an execution date . . . ."

1 I declare under penalty of perjury that the foregoing is true and correct. Executed at San
2 Francisco, California, on June 28, 2012.
3

4 Thomas S. Patterson
5 SupervisingDeputy Attorney General

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PROOF OF SERVICE

I, Phyllis M. Montoya, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024. On July 16, 2012, I served the following document described as

MOTION FOR JUDICIAL NOTICE AND SUPPORTING DECLARATION OF SARA J. EISENBERG

by placing it 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 on the next business day, July 17, 2012, on the interested parties in this action addressed as follows:

Hon. Pete Wilson
355 S. Grand Avenue, 45th Floor
Los Angeles, CA 90071

Attorney for Petitioner Bradley S. Winchell

Hon. George Deukmejian
Kent S. Scheidegger, Esq.
Criminal Justice Legal Foundation
2131 L Street
Sacramento, CA 95816

Attorneys for Petitioner Bradley S. Winchell

Thomas S. Patterson
Supervising Deputy Attorney General
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Attorneys for Respondents Matthew Cate, Secretary of California Department of Corrections and Rehabilitation; and California Department of Corrections and Rehabilitation

Clerk of Court
California Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on July 16, 2012

Phyllis M. Montoya

31922997 92166/001

No. S203526
(Court of Appeal No. C070851)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRADLEY S. WINCHELL,
Petitioner,

v.

MATTHEW CATE, Secretary, California
Department of Corrections and Rehabilitation,
and
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION,
Respondents,

MICHAEL ANGELO MORALES,
Real Party in Interest.

MOTION FOR JUDICIAL NOTICE AND SUPPORTING DECLARATION OF SARA J. EISENBERG

MCBREEN & SENIOR
DAVID A. SENIOR (No. 108579)
dsenior@mcbreensenior.com
1900 Avenue of the Stars, 11th Floor
Los Angeles, California 90067
Telephone: 310.552.5300
Facsimile: 310.552.1205

Attorneys for Real Party in Interest
Michael Angelo Morales

No. S203526
(Court of Appeal No. C070851)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRADLEY S. WINCHELL,
Petitioner,

v.

MATTHEW CATE, Secretary, California
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and
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondents,

MICHAEL ANGELO MORALES,
Real Party in Interest.

MOTION FOR JUDICIAL NOTICE

Pursuant to California Evidence Code Sections 452(d) and 459, as well as Rule 8.252(a) of the California Rules of Court, Real Party in Interest Michael Angelo Morales respectfully requests this Court take judicial notice of the documents attached hereto as Exhibits A and B.

The documents are authenticated by the declaration of Sara J. Eisenberg, which follows.

These documents are relevant to the above-captioned matter because they relate to actions currently underway by the California Department of Corrections and Rehabilitation ("CDCR") to effectuate Penal Code 3604, establish a lethal

injection protocol and carry out executions. *See* CAL. R. CT. 8.252(a)(2)(A).

Neither document was originally presented in a trial court in this case because Petitioner sought original review of this matter on April 19, 2012, in the Court of Appeal, Third Appellate District. *See* Declaration of Sara J. Eisenberg ("Eisenberg Decl.") ¶5

Exhibit A was presented to the Court of Appeal in this case, which took judicial notice of the document. *See id.* ¶6; *see also* CAL. R. CT. 8.252(a)(2)(B).

Exhibit B, which was not presented to the Court of Appeal in this case, relates to proceedings that occurred after the Court of Appeal summarily denied the Petition for Writ of Mandate. *See* Eisenberg Decl. ¶7; *see also* CAL. R. CT. 8.252(a)(2)(C).

Exhibit A is a copy of the Notice of Appeal, filed in the Superior Court of Marin County on April 26, 2012, in the matter of *Sims v. California Department of Corrections and Rehabilitation*, giving notice that "defendants the California Department of Corrections and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims." It further states that, pending appellate review, "the California Department of Corrections and Rehabilitation will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty."

Exhibit B is a copy of the Declaration of Thomas S. Patterson, Supervising Deputy Attorney General for the State of California, submitted on July 13, 2012, to the Superior Court of Los Angeles County in the matter of People v. Sims, No. A591707, stating that "[the] CDCR is already considering the relief that the Los Angeles District Attorney seeks,

namely, the development of a single-drug protocol [for carrying out lethal injections]."

Evidence Code Section 452(d) authorizes this Court to take judicial notice of "[r]ecords of . . . any court of this state." Evidence Code 452(h) authorizes this Court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Exhibits A and B reflect official records of courts of this state. The statements contained within them are "not reasonably subject to dispute."

DATED: July 16, 2012.

Respectfully,

McBREEN & SENIOR
DAVID A. SENIOR

By: David A. Senior /SJE
DAVID A. SENIOR

Attorneys for Real Party in Interest Michael Angelo Morales

31919627vF

DECLARATION OF SARA J. EISENBERG

I, Sara J. Eisenberg, declare:

1. I am an attorney admitted to practice before the Bar of the State of California. I am an associate with the law firm of Arnold & Porter LLP, attorneys for Mitchell Sims in *Sims v. California Department of Corrections and Rehabilitation*, Marin County Superior Court case number CIV1004019, and I have appeared on Mr. Sims's behalf in recent proceedings initiated by the Los Angeles County District Attorney in *People v. Sims*, Los Angeles County Superior Court case number A591707. I make this Declaration upon personal knowledge and, if called upon to testify, could and would testify competently hereto.

2. As counsel of record for Mr. Sims in *Sims v. California Department of Corrections and Rehabilitation*, I was served by the CDCR with a copy of the document attached hereto as Exhibit A, which is also in the Marin County Superior Court's file.

3. I was also served by the CDCR with a copy of the document attached hereto as Exhibit B, which is also in the Los Angeles County Superior Court's file.

4. The documents attached as Exhibits A and B are true and correct copies of the documents with which I was served.

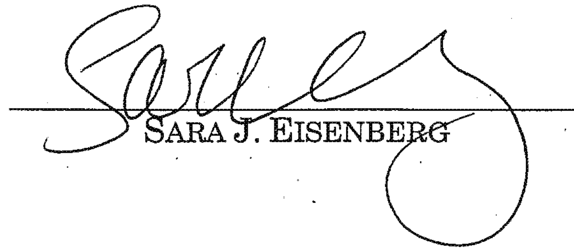
5. Neither Exhibit A nor Exhibit B was presented to a trial court.

6. Exhibit A was presented to the Court of Appeal, and judicial notice of the document was taken by that court.

7. Exhibit B, which was not presented to the Court of Appeal, was filed in the Los Angeles County Superior Court after the Court of Appeal summarily denied the Petition for Writ of Mandate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of July, 2012, in San Francisco, California.



SARA J. EISENBERG

31919627vF

EXHIBIT A

KAMALA D. HARRIS
Attorney General of California
THOMAS S. PATTERSON
Supervising Deputy Attorney General
State Bar No. 202890
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5727
Fax: (415) 703-5843
E-mail: Thomas.Patterson@doj.ca.gov
*Attorneys for Defendants
California Department of Corrections and
Rehabilitation and Matthew Cate*

(Exempt from filing fees—
Gov. Code, § 6103.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

MITCHELL SIMS, Plaintiff, **v.** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,** Defendants.	Case No. CIV1004019 **NOTICE OF APPEAL**

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that defendants the California Department of Corrections and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims.

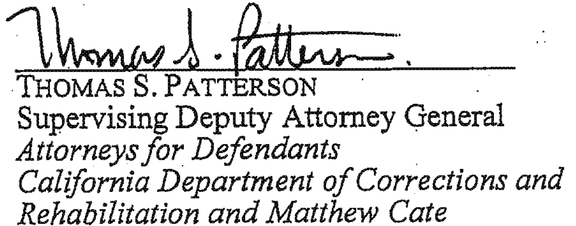
The state has expended significant time and resources developing a three-drug lethal-injection protocol for carrying out the death penalty, and this protocol conforms with a procedure that has been upheld by the United States Supreme Court. This notice of appeal is filed because the state's three-drug protocol is the law of California and should not be abandoned without

appellate review, and because the superior court made fundamental errors in issuing its decision. At the same time, appellants recognize that the availability of the three drugs comprising the current protocol is uncertain. If it becomes certain in the future that the drugs needed to implement the protocol have, in fact, become unavailable, appellants will reevaluate whether this appeal, or any portions of it, should continue to be prosecuted. In the meantime, under the Governor's direction, the California Department of Corrections and Rehabilitation will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty.

Dated: April 26, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California



THOMAS S. PATTERSON
Supervising Deputy Attorney General
Attorneys for Defendants
California Department of Corrections and Rehabilitation and Matthew Cate

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20596991.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **M. Sims v. CDCR, et al.**
No.: **CIV1004019**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 26, 2012, I served the attached

NOTICE OF APPEAL

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Sara J. Eisenberg, Esq.
Howard Rice Nemerovski Canady
Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4024
Attorney for Plaintiff
Mitchell Sims

Norman C. Hile
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 94814-4497

Jan B. Norman
Attorney at Law
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2012, at San Francisco, California.

T. Oakes
Declarant

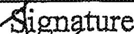
Signature

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EXHIBIT B

KAMALA D. HARRIS
Attorney General of California
THOMAS S. PATTERSON, State Bar No. 202890
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
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JAY M. GOLDMAN, State Bar No. 168141
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E-mail: Jay.Goldman@doj.ca.gov
Telephone: (415) 703-5846
Fax: (415) 703-5843
Attorneys Specially Appearing for the California Department of Corrections and Rehabilitation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. **MITCHELL CARLTON SIMS,** Defendant.	Case Nos. A591707 **DECLARATION OF THOMAS S. PATTERSON SUPPORTING THE SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE** Date: July 13, 2012 Time: 10:00 a.m. Dept: 106 Judge: Judge Larry Fidler Action Filed: May 2, 2012

I, Thomas S. Patterson, declare:

1. I am a Supervising Deputy Attorney General in the California Attorney General's Office, and am assigned to represent and specially appear for the California Department of Corrections and Rehabilitation in this matter. I am competent to testify to the matters set forth in this declaration, and if called to do so, I would and could so testify. I submit this declaration in support of CDCR's response to the two orders to show cause issued in the above-captioned cases, which order CDCR to appear before this Court and show cause why an execution using a single-drug method sought by the Los Angeles District Attorney cannot be performed on two condemned inmates, Defendants Cox and Sims.

2. The Marin County Superior Court, in the case of *Sims v. CDCR*, Case No CIV1004019, issued a permanent injunction on February 21, 2012, which prohibits the CDCR from "carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injections are promulgated in compliance with the Administrative Procedure Act." A copy of this judgment and injunction is attached as exhibit 1.

3. CDCR is already considering the relief that the Los Angeles District Attorney seeks, namely, the development of a single-drug protocol, although CDCR's protocol would apply to all condemned inmates, not just Sims and Cox. The notice of appeal in the *Sims* action, which was filed on April 26, 2012, states that the Governor has directed CDCR to "begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty." A copy of the notice of appeal filed in the *Sims* action is attached as exhibit 2.

4. The United States District Court for the Northern District of California in *Morales v. Cate*, Case Nos. 5-6-cv-219 and 5-6-cv-926, issued an order granting Defendant Sims's motion to intervene and for a stay of execution on January 19, 2011. A true and correct copy of this order is attached as exhibit 3. The order granted Sims a stay to the same extent as the court had previously granted some of the other plaintiffs in that matter against "all proceedings related to the execution of [the condemned inmate's] sentence of death, including but not limited to preparations for an execution and the setting of an execution date . . . ."

1 I declare under penalty of perjury that the foregoing is true and correct. Executed at San
2 Francisco, California, on June 28, 2012.
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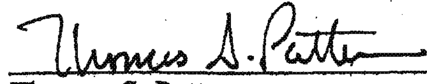
4 Thomas S. Patterson
5 SupervisingDeputy Attorney General

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PROOF OF SERVICE

I, Phyllis M. Montoya, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024. On July 16, 2012, I served the following document described as

MOTION FOR JUDICIAL NOTICE AND SUPPORTING DECLARATION OF SARA J. EISENBERG

by placing it 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 on the next business day, July 17, 2012, on the interested parties in this action addressed as follows:

Hon. Pete Wilson
355 S. Grand Avenue, 45th Floor
Los Angeles, CA 90071

Attorney for Petitioner Bradley S. Winchell

Hon. George Deukmejian
Kent S. Scheidegger, Esq.
Criminal Justice Legal Foundation
2131 L Street
Sacramento, CA 95816

Attorneys for Petitioner Bradley S. Winchell

Thomas S. Patterson
Supervising Deputy Attorney General
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Attorneys for Respondents Matthew Cate, Secretary of California Department of Corrections and Rehabilitation; and California Department of Corrections and Rehabilitation

Clerk of Court
California Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on July 16, 2012

Phyllis M. Montoya

31922997 92166/001

No. C070851

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,
Petitioner,

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitations, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondents,

MICHAEL ANGELO MORALES,
Real Party in Interest.

MOTION REQUESTING TRANSFER OF WRIT PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES

MCBREEN & SENIOR
DAVID A. SENIOR
dsenior@mcbreensenior.com
1900 Avenue of the Stars, 11th Floor
Los Angeles, California 90067
Telephone: 310.552.5300
Facsimile: 310.552.1205

Attorneys for Real Party in Interest Michael Angelo Morales

Real Party in Interest Michael Angelo Morales hereby requests that this Court ask the Supreme Court to transfer the original Petition for Writ of Mandate to the First Appellate District under California Rule of Court 10.1000(c) because an appeal on a related issue is pending in that District. The grounds for this request are stated in the accompanying Memorandum of Points and Authorities.

DATED: May 14, 2012.

Respectfully,

MCBREEN & SENIOR
DAVID A. SENIOR

By David A. Senior /SJE
DAVID A. SENIOR

Attorneys for Real Party in Interest
Michael Angelo Morales

MEMORANDUM OF POINTS AND AUTHORITIES

California Rule of Court 10.1000(c) provides that the "Supreme Court of California may transfer a cause" "[b]etween Courts of appeal." A transfer from this Court to the First Appellate District is warranted here.

The Petition for Writ of Mandate ("Petition") asks the Court to issue a writ of mandate directing the California Department of Corrections and Rehabilitation ("CDCR") to prepare a one-drug lethal injection protocol for the execution of Michael Angelo Morales. As such, the Petition implicates questions concerning the scope of California's Administrative Procedure Act ("APA") and the procedures the CDCR must follow, in light of the APA, to adopt a lethal injection protocol for the execution of condemned inmates. As acknowledged by the Petitioner, the First Appellate District has dealt with this issue before in deciding *Morales v. California Department of Corrections & Rehabilitation*, 168 Cal. App. 4th 729 (2008), and another case implicating the same issues was recently decided by the Marin County Superior Court. *See, e.g.*, Petition ¶¶11, 15, 23; Memorandum of Points and Authorities in Support of Petition 29-30. The latter case is now on appeal in the First Appellate District. Motion for Judicial Notice ("MJN") Ex. B. Accordingly, this Court should ask the Supreme Court to transfer the Petition to the First Appellate District.

A. Background On The *Sims v. CDCR* Litigation.

Penal Code Section 3604(a) provides that "[t]he punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, *by standards established under the direction of the Department of Corrections*." (Emphasis added.) The APA establishes the

rules that state agencies must follow when adopting regulations.

Until 2006, OP 770 was the protocol used by the CDCR to conduct lethal injections in the State of California. In December 2006, a federal court found constitutional defects in OP 770. *See Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006). In response, the CDCR issued a revised version of OP 770 on May 15, 2007. That fall, however, the Marin County Superior Court held that the revised version of OP 770 was an underground regulation enacted in violation of the APA and enjoined the CDCR "from carrying out the lethal injection of any condemned inmates under OP 770 unless and until that protocol is promulgated in compliance with the APA." *Morales*, 168 Cal. App. 4th at 732. The California Court of Appeal for the First District upheld the decision in November 2008, holding that "the procedural requirements designated by the APA for administrative regulations are applicable to OP 770," and that neither the single prison exception nor the internal management exception applied to the lethal injection protocol. *Id.* at 741.

On May 1, 2009, the CDCR proposed the adoption of twenty-two new sections of Title 15 of the California Code of Regulations concerning the execution process. The Office of Administrative Law approved the Regulations on July 30, 2010, and filed them with the Secretary of State. On August 2, 2010, Mitchell Sims, a death-eligible inmate on California's death row, filed an action in Marin County Superior Court—*Sims v. CDCR*, No. CIV 1004019—seeking a declaration that the regulations were invalid because the CDCR had substantially failed to comply with the APA in adopting them.

On December 19, 2011, the Marin County Superior Court issued its final ruling on Plaintiff Sims' Motion for Summary Judgment. The Marin County Superior Court found "the

undisputed evidence supports Plaintiffs' second cause of action alleging Defendant substantially failed to comply with the *mandatory procedural requirements* of the Administrat[ive] Procedures Act (APA) when it adopted these regulations, in violation of Govt. Code § 11350(a)." *See* MJN Ex. A at Ex. A p.2 (emphasis added). The Marin County Superior Court entered its Final Judgment in favor of Plaintiff Sims on February 21, 2012, permanently enjoining Defendant CDCR from "carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injection executions are promulgated in compliance with the Administrative Procedure Act." *See id.* Ex. A at 2. On April 26, 2012, Defendants CDCR and Matthew Cate filed a Notice of Appeal to the Court of Appeals for the First District from the February 21, 2012 final judgment (*id.* Ex. B), giving that District exclusive appellate jurisdiction over the case.

B. Transfer To the First District Is Warranted Because The Appeal Pending In The First District In *Sims v. CDCR* Is Similar To The Petition For Writ Of Mandate.

The instant Petition and the appeal in *Sims v. CDCR* both implicate fundamental questions about the APA, including what procedures the CDCR is required to follow before conducting executions by lethal injection. Moreover, the First Appellate District previously ruled on these issues in *Morales v. California Department of Corrections & Rehabilitation*, 168 Cal. App. 4th 729 (2008). And the Petition explicitly asks this Court to interpret the final judgment and permanent injunction entered by the Marin County Superior Court in *Sims v. CDCR*, which is currently within the exclusive appellate jurisdiction of the First Appellate District. MPA in Support of Petition 29-30. In the interests of judicial efficiency, to protect against the possibility of conflicting rulings on a common question of law, and to preserve the

exclusive appellate jurisdiction of the First District over the pending appeal in *Sims v. CDCR*, Real Party in Interest Michael Angelo Morales requests that the Court ask the California Supreme Court to transfer the Petition for Writ of Mandate to the First District under California Rule of Court 10.1000(c).

DATED: May 14, 2012.

Respectfully,

MCBREEN & SENIOR
DAVID A. SENIOR

By David A. Senior /SJE
DAVID A. SENIOR

Attorneys for Real Party in Interest
Michael Angelo Morales

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 action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024. On May 14, 2012, I served the following document described as MOTION REQUESTING TRANSFER OF WRIT PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES by placing it in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery on the next business day, May 15, 2012, on the interested parties in this action addressed as follows:

Hon. Pete Wilson
355 S. Grand Avenue, 45th Floor
Los Angeles, California 90071

Kent S. Scheidegger
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816

Petitioner

Jay M. Goldman
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004

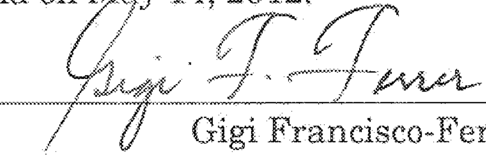
Respondent

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Clerk of the Court
1st District Court of Appeal
350 McAllister Street
San Francisco, California 94102

Courtesy Copies

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 14, 2012.



Gigi Francisco-Ferrer

31610265/F

No. C070851

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,

Petitioner,

vs.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondents,

MICHAEL ANGELO MORALES,

Real Party in Interest.

OPPOSITION TO
MOTION REQUESTING TRANSFER OF WRIT PROCEEDINGS

HON. PETE WILSON
State Bar No. 35742
355 S. Grand Ave., 45th Floor
Los Angeles, CA 90071
(213) 680-6777

HON. GEORGE DEUKMEJIAN
State Bar No. 26966
KENT S. SCHEIDEGGER*
State Bar No. 105178
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
(916) 446-0345
(916) 446-1194

Attorneys for Petitioner

*Counsel of Record

The present case is a petition for writ of mandate by a resident of San Joaquin County, directed to a government official in Sacramento County and a government agency headquartered in Sacramento County. The case arises from a crime committed in San Joaquin County by Real Party in Interest Michael Angelo Morales.

Among the California Courts of Appeal, the Third Appellate District, which includes both San Joaquin and Sacramento Counties (see Gov. Code § 69100(c)), is the obvious venue for this action.[1]

Real Party now asks this court to ask the Supreme Court to transfer this case to the First Appellate District simply "because an appeal on a related issue is pending in that District." (Motion Requesting Transfer of Writ Proceedings 1.) Yet his Memorandum of Points and Authorities is devoid of authority for the point that the mere pendency of a related case is a sufficient reason for transfer. Although authority on the considerations that go into a decision to transfer is sparse, some does exist.

We know that the Supreme Court's authority to make a transfer is entirely discretionary. (See *Haase v. Gibson* (1960) 179 Cal.App.2d 256, 258.) However, little has been written about the criteria for exercising that discretion. The closest case to the present appears to be *Most v. State Bar of California* (1967) 67 Cal.2d 589. Attorney Most's misappropriation of his client's funds produced two proceedings, a civil suit appealed to the Court of Appeal and a bar discipline action reviewed by the Supreme Court. Both cases involved the same underlying facts. Even so, the Supreme Court tersely rejected the suggestion that the Court of Appeal case be transferred.

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1. By requesting a transfer to another Court of Appeal, Real Party evidently agrees that the Court of Appeal is the correct level for consideration of this case.

> "Petitioner urges this court to review not only the State Bar disciplinary proceeding but also the appeal now pending before the Court of Appeal in the action filed by Merl [the client]. The record in the civil case is not the same as that involved in the instant disciplinary proceeding; the purpose of the two actions is different; and disciplinary action against petitioner, if justified by the present record, would be appropriate even if the Court of Appeal reverses the judgment in favor of Merl in the civil case. Thus, there is no justification for transferring the appeal to this court." (*Id.* at p. 595, fn. 5.)

The judicial efficiency that would have resulted from one court, instead of two, reviewing two proceedings arising from the same facts was "no justification" for a transfer. Similarly, the present case involves some overlap in the background, but the questions of law to be decided are distinct.

Real Party asserts in this case "the interests of judicial efficiency, to protect against the possibility of conflicting rulings on a common question of law, and to preserve the exclusive appellate jurisdiction of the First District over the pending appeal in *Sims v. CDCR*" support a transfer. (See Memorandum of Points and Authorities in Support of Motion Requesting Transfer 4-5.) The judicial efficiency interest here is minimal and insufficient to support a transfer. A transfer would itself produce inefficiencies. It would require involving the Supreme Court, having that court decide the transfer question, and then making the transfer if a transfer is found appropriate. From the discussion of writ procedures in this court's Practices & Procedures web page (http://www.courts.ca.gov/8453.htm [as of May 15, 2012]) and the notice of May 7 requesting opposition, it appears that the merits of this petition have already received preliminary consideration by the court's writ panel. That effort would be wasted by a transfer to the First District, which is considering different issues in the case before it.

as they were both parties to that case. (See Cal. Rules of Court, rule 8.1115(b)(1); *Alvarez v. May Department Stores Co.* (2006) 143 Cal.App.4th 1223, 1240.) A decision by this court that CDCR can and must issue a new single-drug protocol specifically for Morales, exempt from the APA under section 11340.9, subdivision (i) of the Government Code, will not conflict with either of the First District's prior decisions or with any decision to be issued on any question properly before that court at this time.

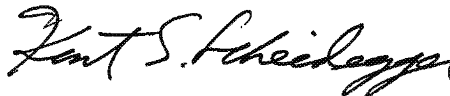
The present case and *Sims v. CDCR* both deal with the general topic of the application of the APA to execution protocols, but Real Party has cited no authority, and Petitioner has found none, holding that such a general relation is sufficient reason to gather all the cases on the topic before one intermediate appellate court. On the contrary, courts of last resort with discretionary jurisdiction sometimes intentionally wait on an issue until they have the benefit of the opinions of multiple lower courts. (See, *e.g.*, *McCray v. New York* (1983) 461 U.S. 961, 961-962 (conc. opn. of Stevens, J.).) This court's opinion on how the "specifically named person" exception to APA and the principle of *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577 relate to execution protocols (see Petitioner's Memo 21-25) can be a valuable addition to the caselaw.

Real Party's motion should be denied.

May 17, 2012

Respectfully Submitted,

HON. GEORGE DEUKMEJIAN
HON. PETE WILSON



KENT S. SCHEIDEGGER
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

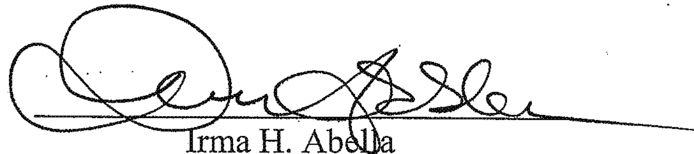
Thomas S. Patterson
Supervising Deputy Attorney General
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
415-703-5272
Thomas.Patterson@doj.ca.gov
Attorney for Respondents

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

David A. Senior
McBreen & Senior
1900 Avenue of the Stars, 11th Floor
Los Angeles, CA 90067
310-552-5300
dsenior@mcbreensenior.com
Attorney for Morales

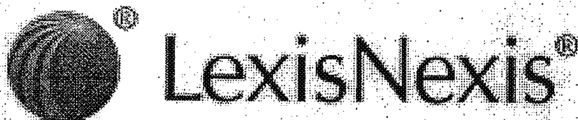
Clerk of the Court
First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

Executed on May 17, 2012, at Sacramento, California.



Irma H. Abella

EXHIBIT A



CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION et al., Petitioners, v. THE SUPERIOR COURT OF MARIN COUNTY, Respondent; MICHAEL MORALES et al., Real Parties in Interest.

A129540

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

2010 Cal. App. Unpub. LEXIS 7417

September 20, 2010, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]
Marin County Super. Ct. No. CV061436.

JUDGES: Before Simons, Acting P.J., Needham, J. and Bruiniers, J.

OPINION

THE COURT: *

* Before Simons, Acting P.J., Needham, J. and Bruiniers, J.

Petitioners California Department of Corrections and Rehabilitation (CDCR) and Matthew Cate, the CDCR Secretary (collectively referred to herein as petitioners) seek writ relief from an order restraining them from carrying out lethal injections of condemned inmates until respondent superior court dissolves a previously issued injunction. We grant the writ petition for the reasons expressed below.

BACKGROUND

In the action giving rise to this writ proceeding, two inmates condemned to death, real parties in interest Michael Morales and Mitchell Sims (real parties), challenged a protocol issued by petitioners governing the execution of condemned inmates by lethal injection, known as San Quentin Operational Procedure 0-770 (hereafter OP 770). Real parties argued OP 770 had been adopted without compliance with the Administrative Procedures Act (APA, Gov. Code, § 11340 et seq.). The superior court's November 2007 judgment granting real parties' summary judgment motion

agreed, and issued an injunction providing that the CDCR "is permanently [*2] enjoined from carrying out the lethal injection of any condemned inmates under OP 770 unless and until OP 770 is promulgated as a regulation in full compliance with the [APA]." On petitioners' appeal, we affirmed the superior court's judgment. *(Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729.)

Thereafter, in an effort to comply with the injunction, petitioners promulgated regulations pursuant to the APA governing the procedures for execution of death sentences by lethal injection at San Quentin State Prison. (Cal. Code Regs., tit. 15, § 3349 et seq.) The State of California Office of Administrative Law (OAL) issued a "Notice of Approval of Regulatory Action" pertaining to those regulations on July 30, 2010, indicating that the regulations would become effective on August 29, 2010. A certified copy of the regulations was filed with the Secretary of State on July 30, 2010.

On August 2, 2010, real party Sims (Sims) filed, in a separate action, a complaint for declaratory and injunctive relief in the Marin County Superior Court (case No. CIV1004019), seeking a determination that the new lethal injection regulations were not promulgated in compliance [*3] with the APA.

On August 4, 2010, Sims received notice that pursuant to the People's request, the Los Angeles County Superior Court would soon schedule a date for his execution. Shortly thereafter, Sims filed a motion in respondent Marin County Superior Court to enforce that court's November 2007 injunction (hereafter referred to as the injunction). Sims argued that the injunction prohibited the CDCR from carrying out lethal injections of condemned inmates until OP 770 was promulgated as a regulation in full compliance with the APA. Sims further maintained that no executions could occur until the court resolves Sims's recently filed action challenging the validity of the newly promulgated regulations. Sims also posited that proper procedure required the CDCR to bring a motion to dissolve the injunction, even though it could not prevail on such a motion.

Petitioners opposed Sims's motion, arguing that the injunction did not require the CDCR to return to court for a determination that the new lethal injection regulations were promulgated in compliance with the APA. Petitioners also argued that the regulations are presumed to be valid, and the burden of proof falls upon one challenging the [*4] regulations, not upon the agency. Petitioners further maintained that they were not required to dissolve the injunction before attempting to carry out executions by lethal injection.

Following a hearing on August 31, 2010, the superior court granted Sims's motion. Its August 31, 2010 written order states: "Plaintiff's motion to enforce injunction is GRANTED. Defendant [CDCR] shall refrain from carrying out the lethal injection of any condemned inmates unless and until this court dissolves the permanent injunction issued by this court in its final judgment . . .. [P] The presumption of regularity for administrative action does not allow the CDCR to bypass statutory procedures for modifying and dissolving injunctions *(see* Civil Code § 3424, and Code Civ. Procedure § 904.1, subd. (a)(6)), or to deprive plaintiff of any opportunity to show that the action was not in 'full compliance.' *(See* Eisenberg Decl., Exh. A, p. 2:1, and, e.g., *Union Interchange, Inc. v. Savage* (1959) 52 [C]al.2d 601, 604 (modification or dissolution of injunctions falls within court's inherent powers).) .... " [1]

1 During the hearing on Sims's motion, the superior court elaborated on its reasoning as follows: "On the matter [*5] that's before the Court this morning the CDCR argues that the Court must presume compliance with the APA. And I agree with the defense that ordinarily administrative agency action comes to the Court with a presumption of regularity. This regulation comes to the Court with a lot of history. The Code of Civil Procedure contains specific provisions for motions to dissolve injunctions. The argument that APA regulations were properly promulgated, and if the plaintiff here is aggrieved the plaintiff should seek an injunction, completely ignores the fact that there already is an injunction and it's not self-dissolving and it's not dissolved--it doesn't dissolve on the say-so of one party to contested litigation. [P] The party seeking relief from an injunction has to come to the Court and pursue that. The defense has not done that in this case and for that reason I am adopting my tentative ruling."

The following day, petitioners filed their writ petition in this court, seeking reversal of the superior court's

determination that they must refrain from carrying out lethal injections until the injunction is dissolved. The petition requested immediate relief, due to the September 29, 2010 scheduled **[*6]** execution date of condemned inmate Albert Greenwood Brown (Brown). [2] We promptly requested briefing pursuant to an expedited schedule, and advised the parties that we might proceed by issuing a peremptory writ in the first instance *(Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180).

2 We granted Brown's application for leave to file an amicus curiae brief in this proceeding, and have considered the views expressed therein.

DISCUSSION

1. Writ Review of the Challenged Order is Appropriate

We agree with petitioners that writ review is appropriate under the circumstances of this case. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274.)

Sims concedes that the challenged order is not appealable yet suggests no other avenue of review of the challenged order. In our view, prompt judicial review of the issues raised by the petition is desirable because those issues impact the administration of the death penalty in California. Furthermore, the scheduled September 29, 2010 execution date of amicus Brown renders this petition unusually urgent.

We reject Sims's contention that writ review should be denied since petitioners possess an adequate remedy **[*7]** at law through a motion to dissolve the injunction and subsequent appeal. As we explain *infra,* petitioners are not required to bring such a motion. Irrespective of whether such a motion is required, Sims's enforcement motion below argued that petitioners could not prevail on a motion to dissolve the injunction unless they first prevailed in Sims's recently filed action, demonstrating the inadequacy of that remedy.

Brown asserts that the equitable principles of unclean hands and judicial estoppel warrant the denial of writ relief. This argument is based on statements made by a Deputy District Attorney to the Riverside County Superior Court during an August 30, 2010 hearing concerning the scheduling of Brown's execution. (See Pen. Code, § 1227.) At that hearing, the Deputy District Attorney requested an execution date of September 29, 2010, and indicated that Sims's motion to enforce the injunction would be litigated the next day in the Marin County Superior Court, but that those "proceedings really have nothing to do with this matter moving forward in this court at this time or, for that matter, a scheduled execution date of September 29th." The Deputy District Attorney also stated that **[*8]** "[t]he actual status of the lethal injection litigation is really irrelevant to this Court's duty to set an execution date upon the request of the district attorney."

Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal.App.4th 970, 978 held that the unclean hands "doctrine demands that a [petitioner] act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." Brown has not shown that this doctrine applies to petitioners based on statements made at the Riverside County hearing. Nor has Brown demonstrated that petitioners have taken two totally inconsistent positions before the courts in Riverside and Marin Counties, as well as this court, so as to warrant application of the judicial estoppel doctrine. (See *People v. Castillo* (2010) 49 Cal.4th 145, 155 [outlining judicial estoppel doctrine].) Consequently, these considerations do not bar our consideration of the petition.

2. Petitioners are Entitled to Relief from the Challenged Order

The parties dispute the standard by which we review the superior court's order, with Sims urging application of the abuse **[*9]** of discretion standard and petitioners arguing in favor of de novo review. We find it unnecessary to resolve this issue, as under either standard of review, the superior court's August 31, 2010 order granting Sims's motion to enforce the injunction is erroneous and must be vacated.

The superior court's determination that petitioners are required to seek a dissolution of the injunction before they may proceed to carry out lethal injections under the newly promulgated regulations is flawed for a variety of interrelated reasons.

It is important to understand at the threshold the subject matter of the injunction. The injunction enjoined petitioners from carrying out any lethal injections of condemned inmates *under OP 770*. No party to this proceeding claims that petitioners are seeking to resume lethal injection executions under OP 770, the protocol invalidated by both the superior court and this court. Instead, it appears undisputed that petitioners are proceeding with lethal injection executions in reliance on the newly promulgated regulations (Cal. Code Regs., tit. 15, § 3349 et seq.).

The injunction restrained petitioners from carrying out lethal injections of condemned inmates under OP **[*10]** 770 until the promulgation of APA-compliant regulations. Neither Civil Code section 3424, subdivision (a), [3] nor the other authorities cited by the superior court in its order (e.g., Code Civ. Proc., § 904.1, subd. (a)(6) [4] and *Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 604) purport to impose a *requirement* on petitioners to seek dissolution of the injunction before they take steps in conformity with the new lethal injection regulations.

3 To dissolve an injunction, Civil Code section 3424, subdivision (a), requires "a showing that there has been a material change in the facts upon which the injunction was granted, that the law upon which the injunction was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction."

4 This section permits an appeal "[f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction."

Sims argues, "if a party believes an injunction is invalid or is no longer enforceable, 'the proper remedy is a noticed motion' arguing the 'injunction [is] improper under current circumstances'..." [Citation.] However, it bears emphasizing that at this stage of the litigation, **[*11]** petitioners do not challenge the injunction or its continued enforcement. Indeed, petitioners promulgated regulations governing executions by lethal injection to *comply* with the injunction. The filing of a certified copy of the lethal injection regulations with the Secretary of State, as was done here, creates a rebuttable presumption that the regulations were duly adopted in compliance with the APA. [5] (Gov. Code, § 11343.6, subds. (a), (c).) The Legislature has specified procedures for challenging regulations. (See Gov. Code, § 11350.) Sims made no attempt to rebut this presumption in his motion to enforce the injunction. Sims has, in his separate superior court case, initiated a challenge to the new lethal injection regulations and their compliance with the APA, and will have the burden of demonstrating their invalidity. *(Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657.)

5 This is so regardless of whether, as the superior court stated, there is a "history" preceding the promulgation of the regulations.

It is true that the injunction contains language enjoining enforcement of OP 770 "unless and until OP 770 is promulgated as a regulation *in* **[*12]** *full compliance with the [APA]"* [emphasis added]. Also correct is the notion that the superior court retains authority to modify or dissolve its injunction. *(Union Interchange, Inc., supra,* 52 Cal.2d at p. 604.) But the determination of whether the new lethal injection regulations were, in fact, promulgated in full compliance with the APA must proceed under the framework outlined above. The superior court's ruling, whether characterized as an interpretation or modification of its injunction, turns those principles on their head, by essentially making the validity of the new lethal injection regulations contingent upon petitioners returning to court and affirmatively showing that they fully complied with the APA *before* the regulations will be considered valid. However, as the foregoing principles make clear, compliance with the APA is presumed, and regulations will not be considered invalid until a challenger successfully rebuts the presumption of validity. [6] Whether the regulations were properly promulgated under the APA will be resolved in Sims's separate action challenging the new regulations (case No. CIV1004019).

6 Recognizing this process does not, as the superior court concluded, **[*13]** mean that petitioners are bypassing procedures for modifying and dissolving injunctions, or deprive Sims from showing in his separate action that

the regulations were not promulgated in full compliance with the APA. Nor are petitioners' arguments relating to APA procedures fairly construed as maintaining that the injunction was satisfied merely because petitioners declared that to be so.

CONCLUSION AND DISPOSITION

In accordance with our notification to the parties that we might do so, we will direct issuance of a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d at pp. 177-180.) Petitioners' right to relief is obvious, a temporal urgency exists warranting acceleration of the normal process, and no useful purpose would be served by issuance of an alternative writ, further briefing and oral argument. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241; see also *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1240-1244.)

Let a peremptory writ of mandate issue directing respondent superior court to vacate its August 31, 2010 order granting **[*14]** real party Sims's motion to enforce the injunction and ordering the CDCR to refrain from carrying out any lethal injections unless and until the court dissolves its permanent injunction, and to issue a new and different order denying real party Sims's motion to enforce the injunction and related requests. [7]

7 The granting of writ relief in this proceeding shall in no way preclude Sims from pursuing a motion for preliminary injunction in his separate action (case No. CIV1004019) challenging the validity of the newly promulgated lethal injection regulations.

This decision shall be final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(3).) The parties shall bear their own costs. (Cal. Rules of Court, rule 8.493(a)(1)(B), (2).)

No. C070851

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,

Petitioner,

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation; and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondents.

MICHAEL ANGELO MORALES,

Real Party in Interest.

REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF MANDATE

MCBREEN & SENIOR
DAVID A. SENIOR
dsenior@mcbreensenior.com
1900 Avenue of the Stars, 11th Floor
Los Angeles, California 90067
Telephone: 310.552.5300
Facsimile: 310.552.1205

Attorneys for Real Party in Interest Michael Angelo Morales

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Real Party in Interest Michael Angelo Morales ("Morales") hereby submits this Opposition pursuant to the Court's order dated May 7, 2012, and requests that Petitioner's Petition for Writ of Mandate ("Petition" or "Pet.") be denied.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner seeks an order compelling the California Department of Corrections and Rehabilitation ("CDCR") to promulgate a particular (single-drug, single-facility, Michael Morales-specific) execution protocol. This request must be denied for a simple and fundamental reason: mandamus *will not lie* to compel an agency to adopt rules or standards with the specific content a petitioner (or a court) prefers. *See* Part I, *infra*; *see also Sklar v. Franchise Tax Bd.*, 185 Cal. App. 3d 616, 626 (1986) ("However worthy and commendable their goal, what plaintiffs fail to appreciate is that the trial court lacked the authority to order implementation of the means sought by plaintiffs. The trial court correctly sustained the Board's demurrer to their amended [writ] petition"). The Court's analysis—and denial—of the Petition can and should begin and end based on this well-settled principle.

But even if this Court could order the CDCR to adopt a specific protocol, it could not—as Petitioner asks—order the CDCR to do so without complying with the California Administrative Procedure Act ("APA"). *See* Part II, *infra*.

First, pursuant to a permanent injunction entered by the Marin County Superior Court, the CDCR is prohibited from carrying out the execution of any condemned inmate "unless and until lethal injection regulations are enacted *in compliance with the APA*." Pet. Ex. H at 1-2 (emphasis added). The CDCR has appealed from that final judgment and permanent injunction, but the prohibitory injunction remains in effect pending appeal. *See* 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* §276, at 331 (5th ed. 2008)

(prohibitory injunction is not stayed by an appeal). Petitioner cannot avoid the reach of that injunction by bringing a separate action in a different court. *See* Part II(A), *infra*. This, too, mandates denial of the Petition.

Moreover, even if there were no injunction, the CDCR could not be ordered to circumvent the APA by crafting a single-facility, single-individual protocol that allegedly falls within exceptions to the mandatory requirements of that Act. Not only would such an order violate the fundamental principle, discussed above, that courts cannot compel an agency to exercise its rulemaking discretion in a particular manner—but, in addition, the execution protocol Petitioner seeks would not fall within the exceptions to the APA that he cites. *See* Part II(B), *infra*.

The Legislature gave the CDCR discretion to promulgate lethal injection regulations for a reason, and the manner in which it exercises that discretion cannot (and should not) be dictated by Petitioner or by the courts absent statutory authority. Moreover, the APA's requirements serve an important purpose—they "provide the public with a meaningful opportunity to participate in the adoption of state regulations and . . . ensure that [the resulting] regulations are clear, necessary and legally valid." *See* OFFICE OF ADMINISTRATIVE LAW, *Administrative Procedure Act and APA Regulation*, http:///www.oal.ca.gov/Administrative_Procedure_Act.htm (last visited May 20, 2012). Petitioner's preference that a single-drug protocol immediately be put into place to execute Morales cannot be allowed to trump the law which, for all the reasons described herein, prohibits the relief he seeks.

ARGUMENT

I.

MANDAMUS WILL NOT LIE TO COMPEL AN AGENCY TO EXERCISE ITS QUASI-LEGISLATIVE POWER IN THE MANNER PREFERRED BY PETITIONER.

Where, as here, an agency is granted authority to adopt regulations implementing a statute, a writ of mandate will not lie to compel the agency to promulgate specific rules or regulations. Since that is precisely the relief Petitioner seeks, the Petition must be denied.

Penal Code Section 3604(a) provides that "[t]he punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, *by standards established under the direction of the Department of Corrections.*" (Emphasis added.) As the italicized language makes clear, the Legislature has empowered the CDCR to adopt regulations implementing the statute. In such situations, "the agency acts in a 'quasi-legislative' capacity, having been delegated the Legislature's lawmaking power." *Lazarin v. Superior Court*, 188 Cal. App. 4th 1560, 1569 (2011).[1]

It is beyond dispute that "'[mandamus] will not lie to compel a legislative body to perform legislative acts in a particular manner.'" *Sklar*, 185 Cal. App. 3d at 624 (quoting

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[1] *See also Aguiar v. Superior Court*, 170 Cal. App. 4th 313, 323 (2009) ("When a statute empowers an administrative agency to adopt regulations implementing the legislation, the agency acts in a 'quasi-legislative' capacity, having been delegated the Legislature's lawmaking power"); *Carrancho v. California Air Res. Bd.*, 111 Cal. App. 4th 1255, 1266 (2003) ("To be sure, the formulation and adoption of rules is the clearest example of a quasi-legislative function performed by an agency, a form of substantive lawmaking delegated by the Legislature").

Bd. of Supervisors v. California Highway Comm'n, 57 Cal. App. 3d 952, 961 (1976), and citing cases). "Were it otherwise, courts would be involved in an attempt to exercise legislative functions, which . . . is expressly forbidden . . . . It is elementary that the courts have no such power." *Id.* (internal quotation marks and citations omitted; ellipses in original).

Pursuant to this well-established rule, courts will not issue writs of mandamus ordering agencies to promulgate specific rules or regulations. In *Sklar*, for example, the Court of Appeal refused to order the Franchise Tax Board to adopt regulations with the specific content plaintiff desired. *Sklar*, 185 Cal. App. 3d at 622-26. Similarly, in *AIDS Healthcare Foundation v. Los Angeles County Dep't of Public Health*, 197 Cal. App. 4th 693, 704 (2011), the Court of Appeal refused to order the Department of Public Health to issue regulations mandating condom use for performers in the adult film industry. *See also id.* ("A writ of mandate will not lie to impose the [petitioner's] discretion upon the Department's health officer. . . . Even if the [petitioner] believes the Department's efforts are not effective, the [petitioner] cannot obtain mandamus relief for this alleged violation"). Here, too, it would be inappropriate violation of the separation of powers doctrine for the Court to order the CDCR to promulgate the specific regulations Petitioner seeks.

Petitioner has not cited—because he cannot cite—*a single case* in which a court ordered an agency to exercise its quasi-legislative rulemaking authority in a particular manner. Petitioner cites *Saleeby v. State Bar*, 39 Cal. 3d 547 (1985), and *Ridgecrest Charter Schools v. Sierra Stands Unified School District*, 130 Cal. App. 4th 986 (2005), in support of his position (Pet. 18-19), but these cases are inapposite. In *Saleeby*, the Court held that the rules promulgated by the State Bar violated Due Process standards and ordered the

Bar to reformulate its rules to meet those standards—but it did *not* prescribe what the content of those new rules should be or order the Bar to promulgate any specific regulations. *Ridgecrest Charter Schools*, meanwhile, did not involve an agency's rulemaking authority at all. There, the petitioner sought an order requiring the respondent school district to provide facilities for a charter school as required by the Charter Schools Act of 1992. The Court of Appeal expressly noted that a "school district, in responding to a charter school's request for facilities, *is not acting in a quasi-legislative capacity.*" 130 Cal. App. 4th at 1007 (emphasis added).

These cases stand, at most, for the uncontroversial principle that mandamus may issue to invalidate an abuse of discretionary authority (like the hypothetical potassium chloride only protocol posited by Petitioner on pages 19-20 of the Petition). Similarly mandamus may be appropriate to compel a public body "to exercise its discretion in the first instance when it has refused to act at all," if the agency is required by law to do so. *Bldg. Indus. Ass'n v. Marin Mun. Water Dist.*, 235 Cal. App. 3d 1641, 1646 (1991); *see also Newland v. Kizer*, 209 Cal. App. 3d 647, 655 (1989) (ordering the agency to adopt regulations "in accord with its mandatory statutory duty," but distinguishing *Sklar*, on the ground that "[u]nlike the situation in *Sklar*, plaintiffs here are not seeking regulations with specific content they desire," and noting that a "[c]ourt mandate simply to issue regulations does not prescribe the substance and content of such regulations or otherwise compel the Department to exercise its administrative discretion in any particular manner").[2]

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[2] Such is not the case here. Far from "refus[ing] to act at all," the CDCR has asserted that it "expended significant time and resources developing a three-drug lethal-injections protocol for carrying out the death penalty" (Motion for

(continued . . .)

But neither of the two cases cited by Petitioner supports the proposition that mandamus may issue to compel an agency to "exercise . . . that discretion in a particular manner or to reach a particular result." *Bldg. Indus. Ass'n*, 235 Cal. App. 3d at 1646. Indeed, legions of cases confirm that the exact opposite is true. *See, e.g., Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 442 (1989) ("Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner"); *State v. Superior Court,* 12 Cal. 3d 237, 247 (1974) (mandamus "may be employed to compel the performance of a duty which is purely ministerial in character; it cannot be applied to control discretion as to a matter lawfully entrusted to the Commission"); *Carrancho v. California Air Res. Bd.*, 111 Cal. App. 4th 1255, 1269 (2003) ("mandamus may be used to compel an agency to exercise its discretion but not to control it, i.e., to force the exercise of discretion in a particular manner"); *Bldg. Indus. Ass'n*, 235 Cal. App. 3d at 1646 ("When the duty of a public body is broadly defined, the manner in which it carries out that responsibility ordinarily requires the exercise of discretion; under such circumstances, mandate is not available to order that public body to proceed in a particular manner").

(. . . continued)
Judicial Notice in Support of Real Party In Interest's Opposition to Petition for Writ of Mandate ("MJN") Ex. A at 1), and defended those regulations against a challenge brought in the Marin County Superior Court, *Sims v. California Department of Corrections and Rehabilitation*, No. CIV1004019. Although the CDCR did not prevail in that case, it has filed a notice of appeal to challenge the invalidation of those regulations in the First District Court of Appeal. MJN Ex. A. Moreover, the CDCR indicated in its notice of appeal that, "under the Governor's direction, [it] will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty." *Id.* at 2.

There is one limited exception to this general prohibition: "in unusual circumstances the writ will lie where, under the facts, [the agency's] discretion can be exercised in only one way." *Hurtado v. Superior Court*, 11 Cal. 3d 574, 579 (1974) (citation and internal quotation marks omitted). But these "unusual" circumstances are not present here. *See San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 771 (1983) ("It is unusual that a court is bound to exercise its discretion in one 'right' way"). Certainly, the single-drug, single-facility, Michael Morales-specific protocol that Petitioner seeks is not the only choice available.

As the Petition acknowledges (Pet. 20), some three-drug protocols have been approved by the Supreme Court of the United States (*Baze v. Rees*, 553 U.S. 35 (2008)) and upheld by the Ninth Circuit Court of Appeals (*Dickens v. Brewer*, 631 F.3d 1139, 1141 (9th Cir. 2011)). Indeed, 52 of the 61 executions carried out in the United States (85%) between January 1, 2011, and May 1, 2012, were performed with a three-drug protocol. *See Death Penalty Information Center: Execution List 2011*, *available at* http://www.deathpenaltyinfo.org/execution-list-2011, and *Execution List 2012*, *available at* http://www.deathpenaltyinfo.org/execution-list-2012). Accordingly, although Petitioner may believe a single-drug protocol is the *preferable* choice, it is certainly not the *only* choice.

Similarly, although Petitioner may *prefer* that the CDCR adopt a protocol that "is specifically for the execution of Michael Angelo Morales" and "is limited to those operations performed within San Quentin" (in an attempt to avoid the requirements of the APA), such a limited protocol is certainly not the *only* choice the CDCR could make. Pet. 10. Petitioner gives no reason—other than attempting to circumvent the APA (Pet. 25-28)—that the CDCR should not or could not choose to promulgate regulations covering all condemned

inmates and/or including such inter-facility provisions as recruitment of qualified team members from other facilities if necessary to ensure a fully qualified and competent team. The fact that these choices implicate the APA's requirements does not make them unreasonable. The APA is not a meaningless "roadblock." *See* Pet. 21. To the contrary, it reflects the Legislature's considered view that through the rulemaking process, "[a]gencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice." *San Diego Nursery Co. v. Agric. Labor Relations Bd.*, 100 Cal. App. 3d 128, 142-43 (1979) (citation and internal quotation marks omitted).

Because this is not one of the rare and "unusual circumstances" in which only one choice can be made by the agency, the limited exception does not apply. Accordingly, pursuant to the well-settled rule that mandamus will not lie to control an agency's quasi-legislative discretion, the Petition must be denied. *See AIDS Healthcare Found.*, 197 Cal. App. 4th at 704 ("[a] writ of mandate will not lie to impose the [Petitioner's] discretion upon the [CDCR]"); *id.* at 696 ("A court, by way of mandamus, cannot substitute its discretion for that of legislative or executive bodies in matters committed to the discretion of those branches").

II.

THE CDCR CANNOT PROMULGATE AN EXECUTION PROTOCOL WITHOUT COMPLYING WITH THE MANDATORY REQUIREMENTS OF THE APA.

A. The Petition Is An Improper Collateral Attack On A Preexisting Permanent Injunction That Prohibits The CDCR From Carrying Out Executions Unless And Until Regulations Are Enacted In Compliance With The APA.

The Petition asks this Court to order the CDCR to promulgate the lethal injection protocol Petitioner prefers *without complying with the public notice and comment requirements of the APA.* But, pursuant to a permanent injunction issued by the Marin County Superior Court (the "Marin Injunction") the CDCR cannot carry out any executions "unless and until lethal injection regulations are enacted *in compliance with the APA.*" Pet. Ex. H at 1-2 (emphasis added). For this reason, too, the Petition must be denied.

Citing *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996), Petitioner argues that the injunction cannot mean what it says because, if it did, it would "stop implementation of the statute" (Pet. 23), thereby "violati[ng] . . . controlling California Supreme Court precedent" (*id.* at 29). Petitioner contends that the injunction should therefore be "interpreted" to mean something else—*i.e.*, that the CDCR cannot carryout executions unless and until a new lethal injection protocol is enacted that *either* complies with the APA's requirements *or* falls into an exception to the APA. But Petitioner's reliance on *Tidewater* is badly misplaced and, as a result, the premise of his argument fails.

The premise of Petitioner's argument is that an "invalid regulation cannot thwart the enforcement of the underlying statute." Pet. 23. But this is not supported by the cases

petitioner cites and, in fact, is an incorrect statement of the law. To understand why Petitioner's sophistry fails, it is necessary to distinguish between the two types of statutes that delegate authority to state agencies: self-executing statutes and non-self-executing statutes.

- Self-executing statutes: Many statutes are self-executing, meaning that they are capable of enforcement without the adoption of regulations. *See Pac. Bell Wireless v. Pub. Utils. Comm'n*, 140 Cal. App. 4th 718, 739-44 (2006) (wireless phone company can be fined for misleading consumers about its quality of service even though PUC adopted no clarifying regulations of vague statute, given that earlier PUC decisions gave company adequate notice that this could occur); *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 502-04 (2002) (unless statute is too vague or indefinite to be enforced on its own, it can be enforced even though agency has failed to adopt regulations).

Although self-executing statutes may be enforced on a case-by-case basis in the absence of regulations, an agency may choose to adopt regulations to aid in efficient enforcement. "An example is a statute that provides: 'There shall be adequate space between hospital beds.'" OFFICE OF ADMINISTRATIVE LAW, *What Must Be Adopted Pursuant to the APA?* at 1 (Apr. 6, 2006), *available at* www.oal.ca.gov/res/docs/pdf/what_is_a_regulation.pdf. ("*What Must Be Adopted*"). As the Office of Administrative Law ("OAL") has explained,[3] such a statute could be enforced on a case-by-case

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[3] In 1979, the California Legislature created the OAL to ensure state agency regulations are authorized by statute, consistent with other law, and written in a comprehensive manner, as provided in the rulemaking part of California's APA. In addition to its regulatory review program, OAL responds to requests for determination of whether a California state agency rule meets the statutory definition of a "regulation," and if so, whether the rule should have been,

(continued . . .)

basis (without violating the APA) but, because the statute is susceptible to interpretation, regulations may assist the responsible agency with its enforcement efforts. *Id.*

- Non-self-executing statutes: In contrast to self-executing statutes, a non-self-executing statute (also known as a wholly-enabling statute) "is one that has no legal effect without the enactment of a regulation." *Id.* Such statutes cannot function until an agency adopts regulations to implement them. *See Alfaro*, 98 Cal. App. 4th at 502 ("Some statutory schemes, by their nature, cannot be implemented without administrative regulations"). For example, if a statute provides for protection of endangered species, but leaves to an agency the designation of which species are endangered, the statute is not self-executing. Regulations must be adopted before it has any legal effect. *See California Forestry Ass'n v. California Fish & Game Comm'n*, 156 Cal. App. 4th 1535, 1552-56 (2007). Another example, provided by the OAL, is a statute that states: "The department may set an annual licensing fee up to $500." *What Must Be Adopted* at 1. "This type of statute cannot be legally enforced without a regulation setting the fee." *Id.*

Tidewater involved self-executing wage orders, which applied to employees in, *inter alia*, the transportation industry, and barred work in excess of eight hours in any 24 hour period unless the employer paid overtime. *Tidewater*, 14 Cal. 4th at 561-62. The Department of Labor Standards Enforcement ("DLSE") was empowered to enforce these wage orders. *Id.* For several years, the DLSE determined on a case-by-case basis whether the wage orders applied to individual maritime industry employees who filed claims with the Department, "considering such factors as the type of

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(. . . continued)
but was not, adopted pursuant to the requirements of the Administrative Procedure Act.

vessel, the nature of its activities, how far it traveled from the California Coast, how long it was at sea, and whether it left from and returned to the same port." *Id.* at 562. Eventually, however, the DLSE prepared a formal "Operations and Procedures Manual" setting forth standards for determining the applicability of the wage orders to maritime employees. *Id.* The Court determined that the Manual was a regulation within the meaning of the APA and that it was invalid because the DLSE had not complied with the APA's requirements. *Id.* at 576. However, because the wage orders at issue were self-executing and capable of enforcement on a case-by-case basis even in the absence of regulations (as they had been for years), the Court did not preclude application of the underlying wage orders. *Id.* at 577. Rather, the Court decided for itself whether those wage orders applied to the plaintiffs' activities. *Id.* at 577-79.

There can be no dispute that Penal Code Section 3604(a), which provides that "[t]he punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, *by standards established under the direction of the Department of Corrections*" is not self-executing. (Emphasis added.) It is patently "too vague and indefinite to be implemented without administrative regulations" (*Alfaro*, 98 Cal. App. 4th at 501)—providing no guidance on the identity of quantity of the substance or substances to be used. And, even more critically, it expressly delegates to the CDCR the task of establishing the standards necessary to carry out the punishment of death by lethal injection, thereby evidencing a "legislative intention, by express provision . . . , that the Act cannot be implemented in the absence of administrative regulations." *Id.* Indeed, even Petitioner concedes that "Section 3604, subdivision (a) of the Penal Code directs Respondent CDCR to establish standards

for lethal injection." Pet. 18. Accordingly, *Tidewater* has no relevance here.[4]

Where, as here, the relevant statute is not self-executing, there is no underlying statutory scheme to enforce in the absence of regulations, so invalidation of the regulation will necessarily "stop the implementation of the statute." Pet. 23. This result is not "in clear violation" of controlling law (Pet. 29)—it is entirely consistent with it.

In re Ronje, 179 Cal. App. 4th 509 (2009), for example, involved Welfare and Institutions Code Sections 6600, *et seq.*, which provide for the civil commitment of sexually violent predators ("SVP"). Like Penal Code Section 3604, the Welfare and Institutions Code Section at issue in *Ronje* is not self-executing: it calls for two mental health professionals to evaluate the person "in accordance with a standardized assessment protocol developed by the [Department of Mental Health]." *Id.* at 515. Pursuant to this delegation of authority, the Department of Mental Health ("DMH") created and published a Clinical Evaluation Handbook and Standardized Assessment Protocol ("SAP") for its SVP evaluators. *Id.* An

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[4] Petitioner also cites *Morning Star Co. v. State Board of Equalization*, 38 Cal. 4th 324 (2006), in which the Court determined that the Department of Toxic Substances Control had adopted an invalid underground regulation when it determined that *all* corporations conduct activities related to hazardous materials (and were therefore required to pay a fee). *Id.* at 327-28. The Petition notes that "the court permitted collection of the fees to continue, due to the critical importance of the program, until the department complied with the APA." Pet. 23. But the Petition omits the critical fact that this order was an exercise of the Court's "inherent power to issue orders *preserving the status quo.*" *Morning Star*, 38 Cal. 4th at 341 (emphasis added). Here, Petitioner is not asking the Court to preserve the status quo. Far from it. Petitioner is asking this Court to *alter* the status quo by ordering the CDCR to adopt a specific protocol that is not now, and has never been, in existence. *Morning Star* provides no support for this request.

inmate, whose SVP evaluation was conducted under this SAP filed a petition for writ of habeas corpus, arguing that the SAP was invalid because it was not adopted in compliance with the procedural requirements of the APA. The court agreed, holding that the SAP met the statutory definition of a regulation and should have been adopted pursuant to the APA. *Id.* at 516-17. Because it was not, it was an invalid "underground" regulation. *Id.* at 517. Accordingly, the court remanded to the trial court with directions to "order new evaluations of Ronje using a valid assessment protocol." *Id.* at 519. In other words, the civil commitment proceedings could not proceed until a valid SAP was adopted in compliance with the APA. *See also, e.g., Alfaro*, 98 Cal. App. 4th at 503 (explaining that where the statute cannot be implemented without administrative regulations—*i.e.*, where the statute is not self-executing—"a court may enjoin implementation of a statutory scheme for want of administrative regulations").

Accordingly, Petitioner's argument that the Marin Injunction must be "interpreted" as he urges to avoid a conflict with California case law fails in its premise. The Marin Injunction means what it says—it precludes the relief Petitioner seeks by prohibiting the CDCR from carrying out executions "unless and until lethal injection regulations are enacted in compliance with the APA." Pet. Ex. H at 1-2.

So Petitioner is really asking this Court to *modify* the injunction to add a term that is not included therein ("unless and until a new lethal injection protocol is enacted that *either* complies with the APA's requirements *or* falls into an exception to the APA"). But this is not the proper forum or manner in which to make such a request.[5]

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[5] Notably, even if the Petition merely required interpretation, rather than modification, this would not be the

(continued . . .)

An injunction may be modified upon a showing that "the ends of justice would be served by the modification." CODE CIV. PROC. §533. But any attempt to modify an injunction must be brought in the court that originally issued the order. *See Luckett v. Panos*, 161 Cal. App. 4th 77, 96 (2008) ("If, for example, in *A v. B*, A obtains an injunction against B, B cannot seek to lift that injunction based on changed circumstances in an unrelated 'action,' say, *M v. X.* Obviously the 'action' referred to in section 533 is the very action which generated the injunction in the first place"). Here, the Marin Injunction was entered by the Marin County Superior Court on February 21, 2012, and the Notice of Appeal (which transferred exclusive appellate jurisdiction to the First District Court of Appeal) was not filed until April 26, 2012 (MJN Ex. A)—a week *after* this Petition was filed. Accordingly, at any time prior to the filing of this Petition, Petitioner could have (and, if it believed a modification was required, should have) moved to intervene in the Marin County action and sought a modification of the permanent injunction. Because the relief Petitioner seeks is prohibited by the Marin Injunction and because only the Court that

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(. . . continued)

proper forum or avenue to relief. The issuing trial court, not this Court, is in the best position to interpret and apply its own order. Indeed, courts have followed this well-settled principle for over 100 years. In 1904, a prominent treatise summarized the case law as follows: "The court granting the injunction is necessarily invested with large discretion in enforcing obedience to its mandate, and . . . courts of appellate powers are exceedingly averse to interfering with the exercise of such judgment and discretion." 2 J. HIGH, LAW OF INJUNCTIONS §1458, at 1467-68 (4th ed. 1905); *see also Hill v. Superior Court*, 21 Cal. App. 424, 426 (1913) ("*Upon its own interpretation of the order*, the court might conclude that the acts which petitioners are alleged to have committed did not constitute contempt, in which case they would not be aggrieved") (emphasis added).

issued the injunction is empowered to modify it (*see Luckett*, 161 Cal. App. 4th at 96), the Petition must be denied.[6]

B. The CDCR Cannot Be Ordered To Circumvent The Requirements Of The APA By Crafting Regulations That Allegedly Fall Within An Exception To The APA's Requirements.

By asking this Court to order the CDCR to adopt a lethal-injection protocol specifically designed to fit within certain exceptions to the APA, Petitioner has conceded that unless the CDCR's previously promulgated regulations are substantially modified to exploit these loopholes, the agency must comply with the APA. Of course, were the Court to order the CDCR to tailor its lethal injection protocols in the manner Petitioner prescribes, it would be "'compel[ling] a

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[6] Petitioner's half-hearted claim that the relief he seeks is not prohibited by the injunction because he is not asking the CDCR to carry out an execution, but merely to promulgate a protocol (Pet. 30), is a mendacious attempt to subvert the Marin Injunction. Indeed, this position is contrary to the theme of the entire Petition, which is that Michael Morales's death sentence should be imposed without further delays. *See, e.g., id.* at 1, 14, 32. The Court need "not leave its common sense at the door" and accept the contrived position that the adoption of a lethal injection protocol does not have the aim of executing Morales, especially when the Petition asks that the lethal injection protocol be adopted to execute *only* Michael Morales. *Gov't Emps. Ins. Co. v. Superior Court*, 79 Cal. App. 4th 95, 102 (2000).

For this reason, the relief Petitioner seeks is also prohibited by the stay of execution, entered by the U.S. District Court for the Northern District of California in *Morales v. Cate*, Nos. 5-6-cv-219 and 5-6-cv-926, that stays all proceedings related to the execution of Mr. Morales' death sentence. MJN Ex. B at 15; *see also id.* Ex. C at 2 ("All proceedings related to the execution of the intervenors' sentences of death, including but not limited to preparations for an execution and the setting of an execution date, are hereby stayed *on the same basis and to the same extent as in the case of Plaintiffs Morales and Brown*").

legislative body to perform legislative acts in a particular manner,'" which as discussed above, is prohibited. *Sklar,* 185 Cal. App. 3d at 624 (quoting *Bd. of Supervisors v. California Highway Comm'n*, 57 Cal. App. 3d at 961 and citing cases); *see also* Part I, *supra*. Even if such relief were available, the execution protocol Petitioner seeks would not fall within the exceptions to the APA that he cites.

1. The Named Individual Exception Does Not Allow The Creation Of Regulations That Apply To Only One Person.

Under the APA, "'[r]egulation' means every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." GOV'T CODE §11342.600. In *Morales v. California Department of Corrections and Rehabilitation*, 168 Cal. App. 4th 729, 737 (2008), the CDCR argued that its lethal injection protocols did not constitute "regulations" subject to the APA because they "applie[d] only to certain condemned inmates at San Quentin and execution team members." The Court of Appeal rejected Petitioner's argument that a lethal injection protocol is not subject to the APA because it is "directed to a specifically named person or to a group of persons and does not apply generally throughout the state." GOV'T CODE §11340.9(i). The *Morales* decision is directly on point, holding that a lethal injection protocol is a "Rule of General Application" that is "subject to the APA, even if it does not apply to all inmates, or even to all inmates sentenced to death." 168 Cal. App. 4th at 737, 739. Reducing the "group of persons" to whom a lethal injection protocol applies from a subset of condemned inmates to only one condemned inmate does not change this reasoning, nor does it change the result that the CDCR must comply with the APA's procedures.

"[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." *State Water Res. Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th 697, 702 (1993). A lethal injection protocol directed only at Michael Morales would not look any different than one applicable to all condemned inmates. If the CDCR were able to avoid the APA process by adopting a lethal injection protocol just for him, it would eviscerate the APA, because the agency could similarly execute *every* condemned inmate one at a time using a protocol directed specifically at that individual.[7]

The exception created by Government Code Section 11340.9(i) does not undermine the APA. Rather, consistent with the APA's general statutory scheme, the named individual exception means simply that not every agency determination qualifies as a regulation. For example, in *Re: Public Works Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*, No. PW 2007-08, 2010 WL 7210353 (Cal. Dep't Lab. May 3, 2010), the Department of Industrial Relations determined that Russ Will Mechanical, Inc. was a subcontractor within the meaning of the labor code. Russ Will Mechanical appealed the determination, arguing that it was an underground regulation, having not been adopted through the procedures of the APA. That contention was rejected because the determination was "directed to a specifically named person" and therefore exempted from the APA under Section 11340.9(i). The appeals board explained

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[7] Indeed, this is unquestionably what Petitioner envisions. The Petition itself states that the CDCR should be directed to "choose the presently available method, at least as to those cases that have completed the review process and are ready for execution" (Pet. 21), thereby acknowledging that it in fact seeks application of the protocol it seeks to all inmates who have exhausted their appeals.

the Section 11340.9(i) exception applies where the agency action "lack[s] the fundamental identifying characteristic of a regulation subject to the APA in that it [i]s not intended to apply generally, but rather only to a specific case." *Id.* at 6. Likewise, the fundamental identifying characteristic of the CDCR's lethal injection protocols is that they are rules of general application. Limiting their scope to the execution of one inmate at a time does not change that.

2. A Lethal Injection Protocol Directed Only To One Person Would Violate The United States And California Constitutions.

Moreover, if the CDCR were to enact a lethal injection protocol for the execution of only one inmate, the protocol would constitute unconstitutional "special legislation."

> "[A law] . . . is general . . . when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. . . . [It is a special law] . . . if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the Law." (*White v. Church*, 185 Cal. App. 3d 627, 632 (1986) (quoting *Serve Yourself Gas Etc. Ass'n. v. Brock*, 39 Cal. 2d 813, 820 (1952)) (brackets and ellipses in original))

California Constitution Article IV, Section 16(b) expressly bars special legislation: "A local or special statute is invalid in any case if a general statute can be made applicable." This constitutional prohibition on special legislation extends to agency actions. *See People v. Lockheed Shipbuilding & Constr. Co.*, 35 Cal. App. 3d 776, 784-85 (1973) (an attempt "to authorize an administrative agency . . . to make law in individual cases . . . . attempts to authorize arbitrary, special legislation and that . . . is unconstitutional"). (footnote omitted).

Petitioner asks the Court to order the creation of a law that would apply explicitly *by name* to only Mr. Morales. But even a law that does not identify the sole entity at which it is directed, but instead is directed at a class that by definition only includes a single entity, constitutes unconstitutional special legislation where the limitation of the class "is arbitrary and without any reasonable basis." *Hollman v. Warren*, 32 Cal. 2d 351, 359 (1948) (striking down a law limiting the number of notaries in unified cities and counties, of which San Francisco was the only one); *see also Stout v. Democratic County Cent. Comm.*, 40 Cal. 2d 91 (1952).

Furthermore, "a law which confers particular privileges or imposes peculiar disabilities upon an arbitrarily selected class of persons who stand in precisely the same relation to the subject matter of the law as does the larger group from which they are segregated constitutes a special law which is tantamount to a denial of [the] equal protection," promised by Article 1, Section 7 of the California Constitution. *California Fed'n of Teachers, AFL-CIO v. Oxnard Elementary Schs.*, 272 Cal. App. 2d 514, 527 (1969). As the CDCR would have absolutely no rational basis for adopting a law that singles out Mr. Morales from the class of condemned and death-eligible inmates on California's death row for execution, such a protocol would be the very definition of unconstitutional special legislation. Mr. Morales would literally be "denied equal protection of the" APA.

In addition, the protocol sought by Petitioner would violate the United States Constitution. A Federal District Court recently granted a stay of execution to condemned Ohio inmates, holding that they were likely to prevail on their claim that the state denied them equal protection of the laws in adopting lethal injection protocols that "treat each condemned inmate differently." *Cooey v. Kasich*, 801 F. Supp. 2d 623, 642, 654 (S.D. Ohio 2011), *motion to vacate stay*

denied by In re Ohio Execution Protocol Litig., 671 F.3d 601 (6th Cir. 2012), *and Kasich v. Lorraine*, 132 S. Ct. 1306 (2012). Nothing in *Towery v. Brewer*, 672 F.3d 650 (9th Cir.), *cert. denied sub nom. Moormann v. Brewer*, 132 S. Ct. 1656 (2012), is to the contrary. *Towery* holds merely that lethal injection protocols that apply to all condemned inmates are not likely to violate the Equal Protection Clause when they reserve certain decisions to the discretion of the Director of the Department of Corrections. *Id.* at 659-61.

In *Cooey*, the court held that because the protocol treated Plaintiff differently from other condemned inmates during his execution, his "class of one" claim was likely to succeed on the merits. There was no rational basis for this disparate treatment under the law because "[m]ere pursuit of administrative convenience that risks flawed executions . . . [is not] a legitimate state interest" that would justify disparate treatment of inmates during their executions. 801 F. Supp. 2d at 653. In contrast, "[c]ompleting executions in a constitutional manner is a legitimate state interest." *Id.* In order to ensure this state interest is achieved, the Petition must be denied.

3. The Single Prison Exception Does Not Apply.

The Petition admits that in order for the single prison exception set forth by Penal Code Section 5058(c)(1) to apply, the CDCR would need to enact regulations substantively different than those it has previously found in its legislative discretion to be necessary. Pet. 27. The earlier regulations required functions for the selection of an execution team to extend beyond San Quentin. *Id.* The selection of the execution team is no small matter—the inadequacy of the execution team was one of the primary Eighth Amendment concerns identified by the Federal District Court in 2006 (MJN Ex. D at 10-11) and again in 2010 (*id.* Ex. E at 5-7).

The Petition further concedes that the "execution protocol proper" would have to be separated out from this "additional matter" in order for the former to conceivably fall within the single prison exception and the former within the internal management exception (for which Petitioner does not even argue). Pet. 27-28. It bears repeating that any order from the Court dictating that the CDCR exercise its legislative functions in this particular manner is absolutely disallowed. *See supra*, Part I.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

DATED: May 22, 2012.

Respectfully,

MCBREEN & SENIOR
DAVID A. SENIOR

By David Senior / SJE
DAVID A. SENIOR

Attorneys for Real Party in Interest
Michael Angelo Morales

VERIFICATION

I, David A. Senior declare:

I am the attorney of record for Real Party in Interest Michael Angelo Morales. I have read the foregoing Opposition to Petition for Writ of Mandate. I am informed and believe that the matters stated therein are true, and on that ground, I allege that the matters stated therein are true. I further declare that Real Party is absent from the county in which I have my office.

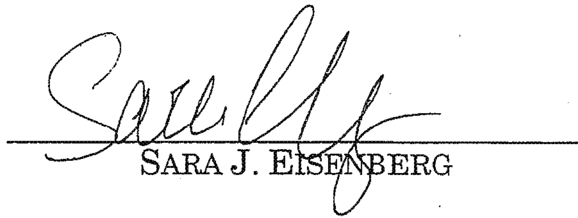
I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 22nd day of May, 2012, in Los Angeles, California.

DAVID A. SENIOR

CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.520(c)(1))

Pursuant to California Rule of Court 8.520(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached **OPPOSITION TO PETITION FOR WRIT OF MANDATE** contains 6,516 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: May 22, 2012.



SARA J. EISENBERG

31609918F

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 action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024. On May 22, 2012, I served the following document described as REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF MANDATE by placing it in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery on the next business day, May 23, 2012, on the interested parties in this action addressed as follows:

Hon. Pete Wilson
355 S. Grand Avenue, 45th Floor
Los Angeles, California 90071

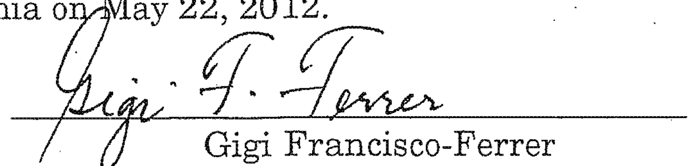
Kent S. Scheidegger
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816

Attorneys for Petitioner Bradley S. Winchell

Jay M. Goldman
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004

Attorneys for Respondents Matthew Cate
and California Department of Corrections and Rehabilitation

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 22, 2012.



Gigi Francisco-Ferrer

No. C070851

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,

Petitioner,

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitations, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondents,

MICHAEL ANGELO MORALES,

Real Party in Interest.

MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF MANDATE; SUPPORTING DECLARATION OF SARA J. EISENBERG; PROPOSED ORDER

MCBREEN & SENIOR
DAVID A. SENIOR
dsenior@mcbreensenior.com
1900 Avenue of the Stars, 11th Floor
Los Angeles, California 90067
Telephone: 310.552.5300
Facsimile: 310.552.1205

Attorneys for Real Party in Interest Michael Angelo Morales

No. C070851

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,
Petitioner,

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitations, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondents,

MICHAEL ANGELO MORALES,
Real Party in Interest.

MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF MANDATE

Pursuant to Evidence Code Sections 452(d) and 459, and Rule 8.252(a) of the California Rules of Court, Real Party in Interest Michael Angelo Morales respectfully requests the Court to take judicial notice of the documents attached hereto as Exhibits A, B, C, D and E.

Exhibit A is a document filed in the case of *Sims v. California Department of Corrections and Rehabilitation*, No. Civ 1004019. Exhibits B, C, D and E are copies of documents

from the Federal District Court case originally titled *Morales v. Hickman* and now titled *Morales v. Cate*, No. C 06-219, downloaded from the federal court PACER system.

Evidence Code Section 452(d) authorizes the Court to take judicial notice of "[r]ecords of . . . any court of this state." Accordingly, and because they contain information relevant to the resolution of the Petition for Writ of Mandate, Real Party in Interest respectfully requests the Court to take judicial notice of the attached documents.

DATED: May 22, 2012.

Respectfully,

McBREEN & SENIOR
DAVID A. SENIOR

By David Senior /SJE
DAVID A. SENIOR

Attorneys for Real Party in Interest
Michael Angelo Morales

DECLARATION OF SARA J. EISENBERG

I, Sara J. Eisenberg, declare:

1. I am an attorney admitted to practice before the Bar of the State of California. I am an associate with the law firm of Arnold & Porter LLP, attorneys for Mitchell Sims in *Sims v. California Department of Corrections and Rehabilitation*, Marin County Superior Court case number CIV1004019. I make this Declaration upon personal knowledge and, if called upon to testify, could and would testify competently hereto.

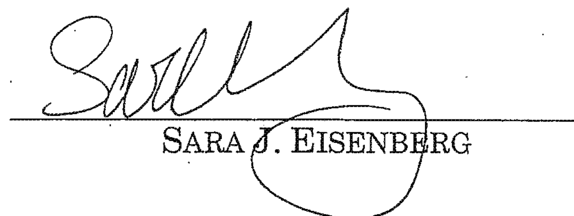
2. As counsel of record for Mr. Sims in *Sims v. California Department of Corrections and Rehabilitation*, I was served by the CDCR with a copy of the document attached hereto as Exhibit A, which is also in the Marin County Superior Court's file.

3. I downloaded the documents attached at Exhibits B, C, D and E—all of which are from the Federal District Court case originally titled *Morales v. Hickman* and now titled *Morales v. Cate*, No. C 06-219—from the Federal Court PACER system.

4. The documents attached as Exhibits A through E are true and correct copies of the documents I obtained.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 21st day of May, 2012, in San Francisco, California.



SARA J. EISENBERG

No. C070851

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,
Petitioner,

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitations, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondents,

MICHAEL ANGELO MORALES,
Real Party in Interest.

[PROPOSED] ORDER

GOOD CAUSE APPEARING THEREFOR, the Motion for Judicial Notice filed by Real Party in Interest Michael Angelo Morales is granted. The Court will take judicial notice of the documents attached as Exhibits A, B, C, D and E to the Motion.

____
PRESIDING JUSTICE

EXHIBIT A

KAMALA D. HARRIS
Attorney General of California
THOMAS S. PATTERSON
Supervising Deputy Attorney General
State Bar No. 202890
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5727
Fax: (415) 703-5843
E-mail: Thomas.Patterson@doj.ca.gov
Attorneys for Defendants
California Department of Corrections and Rehabilitation and Matthew Cate

(Exempt from filing fees—
Gov. Code, § 6103.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

MITCHELL SIMS, Plaintiff, **v.** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,** Defendants.	Case No. CIV1004019 **NOTICE OF APPEAL**

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that defendants the California Department of Corrections and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims.

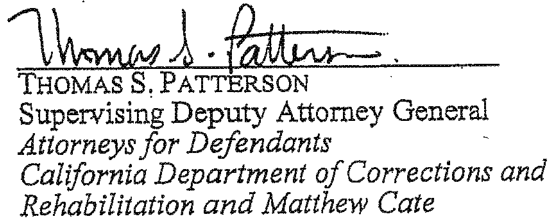
The state has expended significant time and resources developing a three-drug lethal-injection protocol for carrying out the death penalty, and this protocol conforms with a procedure that has been upheld by the United States Supreme Court. This notice of appeal is filed because the state's three-drug protocol is the law of California and should not be abandoned without

appellate review, and because the superior court made fundamental errors in issuing its decision. At the same time, appellants recognize that the availability of the three drugs comprising the current protocol is uncertain. If it becomes certain in the future that the drugs needed to implement the protocol have, in fact, become unavailable, appellants will reevaluate whether this appeal, or any portions of it, should continue to be prosecuted. In the meantime, under the Governor's direction, the California Department of Corrections and Rehabilitation will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty.

Dated: April 26, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California



THOMAS S. PATTERSON
Supervising Deputy Attorney General
Attorneys for Defendants
California Department of Corrections and Rehabilitation and Matthew Cate

SF2010201806
20596991.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **M. Sims v. CDCR, et al.**
No.: **CIV1004019**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 26, 2012, I served the attached

NOTICE OF APPEAL

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

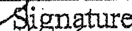
Sara J. Eisenberg, Esq.
Howard Rice Nemerovski Canady
Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4024
Attorney for Plaintiff
Mitchell Sims

Norman C. Hile
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 94814-4497

Jan B. Norman
Attorney at Law
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2012, at San Francisco, California.

T. Oakes
Declarant


Signature

SF2010201806
20597697.doc

EXHIBIT B

E-filed 2/14/06

DESIGNATED FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES, Plaintiff, v. Roderick Q. HICKMAN, Secretary of the California Department of Corrections and Rehabilitation; Steven W. Ornoski, Acting Warden of San Quentin State Prison; and Does 1-50, Defendants.	Case Number C 06 219 JF Case Number C 06 926 JF RS DEATH-PENALTY CASE ORDER DENYING CONDITIONALLY PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [Docket No. 12]

Plaintiff Michael Angelo Morales is a condemned inmate at California's San Quentin State Prison. He is scheduled to be executed at 12:01 a.m. on February 21, 2006. The present action challenges the manner in which California's lethal-injection protocol is administered. In his amended complaint, Plaintiff contends that the way in which the protocol is carried out creates an undue risk of causing him excessive pain as he is being executed, thereby violating the Eighth Amendment's command that "cruel and unusual punishments [not be] inflicted." U.S. Const. amend. VIII.

Plaintiff seeks a preliminary injunction to stay his execution so that the Court may conduct a full evidentiary hearing to consider his claims. Defendants Roderick Q. Hickman, Secretary of the California Department of Corrections and Rehabilitation, and Steven W.

1 Ornoski, Acting Warden of San Quentin State Prison, oppose the motion. The Court has read the
2 moving and responding papers and has considered the oral arguments of counsel presented on
3 January 26 and February 9, 2006. The Court also has considered the parties' responses to its
4 request for supplemental briefing dated February 13, 2006. The Court has jurisdiction pursuant
5 to 42 U.S.C. § 1983 (2006). *Beardslee v. Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005).
6 For the reasons set forth below, Plaintiff's motion will be denied, subject to certain conditions
7 concerning the manner in which the execution is to be carried out.

8 I

9 The Eighth Amendment prohibits punishments that are "incompatible with the evolving
10 standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S.
11 97, 102 (1976) (internal quotation marks and citations omitted). Executions that "involve the
12 unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), or that
13 "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), are not
14 permitted. When analyzing a particular method of execution or the implementation thereof, it is
15 appropriate to focus "on the objective evidence of the pain involved." *Fierro v. Gomez*, 77 F.3d
16 301, 306 (9th Cir. 1996) (citing *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994)), *vacated on*
17 *other grounds*, 519 U.S. 918 (1996). In this case, the Court must determine whether Plaintiff "is
18 subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by
19 lethal injection under California's protocol must be restrained." *Cooper v. Rimmer*, 379 F.3d
20 1029, 1033 (9th Cir. 2004).

21 In California, unless a condemned inmate affirmatively selects to be executed by lethal
22 gas, executions are performed by lethal injection. Cal. Penal Code § 3604 (West 2006).
23 Defendants have developed California's lethal-injection protocol[1] to implement this statutory
24 directive. *See id.* at § 3604(a) (lethal injection to be administered "by standards established

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26 [1]Defendants have developed two versions of the protocol: a confidential version labeled "San Quentin Institution Procedure No. 770" and a redacted, publicly available version labeled "San Quentin
27 Operational Procedure No. 770." During the course of this litigation, the Court reviewed the confidential version *in camera* and ordered Defendants to make it available to Plaintiff's counsel with certain
28 redactions related to prison security and subject to a protective order. There are potentially significant differences between the two versions.

under the direction of the Department of Corrections").[2] The protocol calls for the injection of a sequence of three drugs into the person being executed: five grams of sodium thiopental, a barbiturate sedative, to induce unconsciousness; 50 or 100 milligrams of pancuronium bromide, a neuromuscular blocking agent, to induce paralysis; and 50 or 100 milliequivalents of potassium chloride, to induce cardiac arrest.[3] Significantly, each drug is given in a dosage that is lethal in and of itself.

In his amended complaint, Plaintiff contends that these drugs are administered in such a way that there is an undue risk that he will be conscious when the pancuronium bromide and the potassium chloride are injected. Defendants agree with Plaintiff that a person injected with either of these two drugs while conscious would experience excruciating pain; however, they assert that the dosage of sodium thiopental is more than sufficient to insure that Plaintiff will be unconscious prior to their administration.

A significant number of media reports have described this action as an attack on the constitutionality of lethal injection. *See, e.g., Lethal Injection of Murderer-Rapist Could Be*

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[2]The Department of Corrections was reorganized into the Department of Corrections and Rehabilitation on July 1, 2005.

[3]The lethal-injection protocol is not entirely clear as to which dosages of pancuronium bromide and potassium chloride are used. The protocol provides for the preparation of two syringes of 50 milligrams each of pancuronium bromide (which is also known as Pavulon). It then instructs:

> The "NS" syringe shall be removed and one of the #2 syringes (Pavulon) shall be inserted. The entire contents shall be injected with slow, even pressure on the syringe plunger.
> CAUTION: If all of the Sodium Pentothal has not been flushed from the line, there is a chance of flocculation forming when coming in contact with the Pavulon, which will block the flow of fluid through the Angiocath. If this should happen, shift over to the contingency line running to the right arm. When the contents of the first #2 syringe has [sic] been injected, repeat with the second #2 syringe.

San Quentin Operational Procedure No. 770 § VI.E.4.d.5)(g)(5) (publicly available version). Regarding syringes of 50 milliequivalents of potassium chloride, the protocol directs, "The first #3 syringe (KCl) shall be inserted and the entire contents shall be injected. The second #3 syringe shall be repeated or until death has been pronounced by the physician [sic]." *Id.* at § VI.E.4.d.5)(g)(7). Additionally, the protocol and Defendants' submissions are inconsistent as to whether the volume used to administer sodium thiopental is 20 or 50 cubic centimeters, *see id.* at § VI.E.4.d.5)(c)(6)(d); this difference would affect how much sodium thiopental actually gets to an inmate being executed due to the volume of fluid containing sodium thiopental that is retained in the intravenous line after the flush of 20 cc of saline, as a percent of the total dose of sodium thiopental that is intended to be administered.

Blocked, San Diego Union-Trib., Feb. 10, 2006, at A4 ("A federal judge said yesterday that he might block a murderer and rapist's Feb. [sic] 21 execution to provide enough time to determine whether lethal injection is cruel and unusual punishment."). As is apparent from the foregoing discussion, these reports are in error. Rather, the discrete issues in the present action are whether or not there is a reasonable possibility that Plaintiff will be conscious when he is injected with pancuronium bromide or potassium chloride, and, if so, how the risk of such an occurrence may be avoided.

II

The United States Court of Appeals for the Ninth Circuit has explained that a condemned inmate seeking a stay of execution is

> required to demonstrate (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, injunctive relief could be granted if he demonstrated either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. These two alternatives represent extremes of a single continuum, rather than two separate tests. Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party. In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff. [¶] In capital cases, the Supreme Court has instructed that equity must take into consideration the State's strong interest in proceeding with its judgment.

Beardslee, 395 F.3d at 1067-68 (internal quotation marks, citations, brackets and emphasis omitted). As the United States Supreme Court has adjured,

> before granting a stay [of execution], a district court must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

Nelson v. Campbell, 541 U.S. 637, 649-50 (2004) (citations omitted).

1 III

2 Two years ago, condemned inmate Kevin Cooper faced imminent execution at San
3 Quentin. Eight days before he was scheduled to be executed, Cooper filed an action in which he
4 challenged California's lethal-injection protocol on Eighth Amendment grounds. This Court
5 declined to stay the execution, finding that Cooper had delayed unduly in asserting his claims and
6 that he had done no more than raise the possibility that he might suffer unnecessary pain if errors
7 were made in the course of his execution. *Cooper v. Rimmer*, No. C 04 436 JF, 2004 WL
8 231325 (N.D. Cal. Feb. 6, 2004). The Ninth Circuit affirmed for the same reasons. *Cooper*, 379
9 F.3d 1029.[4]

10 Just over one year ago, another inmate under sentence of death, Donald J. Beardslee, filed
11 an action in this Court challenging the lethal-injection protocol shortly after the San Mateo
12 Superior Court set his execution date. Beardslee contended that the protocol violated both his
13 First Amendment right to freedom of speech and his Eighth Amendment right not to be subjected
14 to cruel and unusual punishment. While this Court recognized that Beardslee had been more
15 diligent than Cooper in that he filed his action thirty days before his scheduled execution and had
16 exhausted his administrative remedies prior to filing, it nonetheless concluded that Beardslee also
17 had delayed unduly in asserting his claims. On the merits, the Court concluded, "Based upon the
18 present record, a finding that there is a reasonable possibility that . . . errors will occur [during
19 Beardslee's execution] would not be supported by the evidence. [Beardslee's] action thus is
20 materially indistinguishable from *Cooper*." *Beardslee v. Woodford*, No. C 04 5381 JF, 2005 WL
21 40073 (N.D. Cal. Jan. 7, 2005).

22 The Ninth Circuit disagreed with this Court's determination that Beardslee's action was
23 untimely. *Beardslee*, 395 F.3d at 1069-70. The appellate court noted that "the precise execution
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25 [4]In a separate habeas corpus proceeding originally brought before the Ninth Circuit, that court
26 granted Cooper a stay of execution to permit him to return to the United States District Court for the Southern District of California to pursue his claim that he is innocent of the crimes of which he was
27 convicted and for which he was sentenced to death. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc). This Court subsequently dismissed without prejudice Cooper's challenge to the lethal-
28 injection protocol in light of Cooper's failure to exhaust his administrative remedies. *Cooper v. Woodford*, No. C 04 436 JF (N.D. Cal. Oct. 12, 2004).

1 protocol is subject to alteration until the time of execution" and it found that "by regulation the
2 California Department of Corrections does not permit challenges to anticipated actions."[5] *Id.* at
3 1069. *Beardslee* thus suggests that in California, a condemned inmate's challenge to the lethal-
4 injection protocol may not become ripe for judicial review until the inmate's execution is
5 imminent. *See id.* at 1069 n.5; *but cf. id.* at 1069-70 n.6 ("we have not resolved the question of
6 when challenges to execution methods are ripe"). At the very least, unlike Cooper, "Beardslee
7 pursued his claims aggressively as soon as he viewed them as ripe." *Id.* at 1069.

8 Although it concluded that Beardslee's challenge was timely, the Ninth Circuit affirmed
9 this Court's decision on the merits, holding that "we cannot say, given our deferential standard of
10 review, that the district court abused its discretion in denying [a] stay of execution." *Id.* at 1070.
11 In doing so, however, it noted that

12 the California execution logs of William Bonin, Keith Williams,
13 Jaturun Siripongs, and Manuel Babbit[t] . . . contain indications that there may have been problems associated with the administration of the chemicals that may have resulted in the
14 prisoners being conscious during portions of the executions. This evidence, coupled with the opinion tendered by Beardslee's expert,
15 raises extremely troubling questions about the protocol.

16 *Id.* at 1075.

17 In the present action, Plaintiff has been even more diligent than Beardslee: he filed his
18 challenge to the lethal-injection protocol shortly before the Ventura Superior Court scheduled his
19 execution—thirty-nine days before the execution date that court ultimately set.[6] Because in light
20 of *Beardslee*, Plaintiff is not guilty of undue delay in bringing his claim, there is no presumption
21 against the grant of a stay due to delay, much less the "strong equitable presumption" identified
22 by the Supreme Court in *Nelson*, 541 U.S. at 650.[7]

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24 [5]The regulation reads in relevant part, "An appeal may be rejected for any of the following
25 reasons: . . . (3) The appeal concerns an anticipated action or decision." Cal. Code Regs. tit. 15, § 3084.3(c) (2006).

26 [6]It also appears from the face of his amended complaint that Plaintiff has exhausted his
27 administrative remedies.

28 [7]This conclusion is buttressed by the Supreme Court's recent denial, by a vote of 6-3, of an application to vacate a stay of execution in *Crawford v. Taylor*, 546 U.S. ___, No. 05A705 (Feb. 1,

IV

Plaintiff's diligence in filing the present action has made it possible for this Court to proceed in a somewhat more orderly fashion than otherwise would have been possible. At the initial hearing on January 26, 2006, the Court announced that it would construe Plaintiff's application for a temporary restraining order as it would a motion for a preliminary injunction, ordered supplemental briefing on Plaintiff's motion to expedite discovery as well as his motion for a preliminary injunction, and scheduled oral argument on the motion for a preliminary injunction. On February 1, 2006, the Court issued an order granting in part Plaintiff's motion for expedited discovery; the discovery granted was completed the following day.[8] The Court heard argument on the motion for a preliminary injunction on February 9, 2006, and requested additional supplemental briefing by an order dated February 13, 2006.[9] As a result of this procedural history, the record in the present action is substantially more developed than the record in *Cooper* or *Beardslee*.

Through their involvement in the *Cooper* and *Beardslee* cases, both this Court and the

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2006). Like Plaintiff, Taylor filed an action pursuant to § 1983 in which he challenged his state's lethal-injection protocol when his execution was imminent but an execution date had not yet been set. During the course of the litigation, the United States District Court for the Western District of Missouri scheduled an evidentiary hearing for February 2006. The Missouri Supreme Court subsequently selected February 1, 2006, for Taylor's execution date, and the district court issued a stay of execution. A panel of the Eighth Circuit vacated the stay, 2-1, and remanded with instructions for the action to be reassigned and for the new judge to hold an expedited evidentiary hearing. Following an abbreviated telephonic hearing, the district court denied Taylor relief. The Eighth Circuit panel affirmed, again 2-1, but the en banc court granted Taylor a stay by a vote of 9-1. As noted, the Supreme Court declined to vacate the stay. For the same reasons that the present action is analogous to *Taylor*, it is distinguishable from other recent cases in which the Supreme Court has allowed executions to go forward. *See, e.g., Neville v. Livingston*, 546 U.S. ___ , No. 05-9136 (Feb. 8, 2006); *Elizalde v. Livingston*, 546 U.S. ___, No. 05A696 (Jan. 31, 2006).

[8]The discovery granted was concerned primarily with the three executions that Defendants have conducted since *Beardslee*—those of Beardslee himself on January 19, 2005; Stanley Tookie Williams on December 13, 2005; and Clarence Ray Allen on January 17, 2006. In addition, as noted, much of the confidential version of California's lethal-injection protocol was disclosed. Although not required to do so by the discovery order, Defendants also voluntarily produced additional execution logs that previously had not been made available.

[9]The additional briefing addresses whether it would be feasible for Plaintiff's execution to proceed using only sodium thiopental or utilizing an independent means to insure that Plaintiff will be unconscious before pancuronium bromide and potassium chloride are injected.

1 Ninth Circuit have acquired substantial familiarity with the legal and factual issues surrounding
2 lethal injection in California. In addition, many other courts have reviewed lethal-injection
3 protocols similar to California's. To date, no court has found either lethal injection in general or
4 a specific lethal-injection protocol in particular to be unconstitutional. *See, e.g.*, *Bieghler v.*
5 *State*, 839 N.E. 691, 694-96 (Ind. Dec. 28, 2005); *Boyd v. Beck*, ___ F. Supp. 2d ___, No. 5:05-
6 CT-774-D, 2005 WL 3289333 (E.D.N.C. Nov. 29, 2005); *Abdur'Rahman v. Bredesen*, ___
7 S.W.3d ___, No. M2003-01767-SC-R11-CV, 2005 WL 2615801 (Tenn. Oct. 17, 2005); *Aldrich*
8 *v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (lethal injection in Texas); *Reid v. Johnson*, 333 F.
9 Supp. 2d 543 (E.D. Va. 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (lethal injection
10 in Texas); *People v. Snow*, 65 P.3d 749, 800-01 (Cal. 2003); *Sims v. State*, 754 So.2d 657 (Fla.
11 2000); *State v. Webb*, 750 A.2d 448, 453-57 (Conn. 2000); *LaGrand v. Stewart*, 133 F.3d 1253,
12 1265 (9th Cir. 1998) (lethal injection in Arizona); *but cf. Rutherford v. Crosby*, 546 U.S. ___,
13 No. 05-8795 (Jan. 31, 2006) (granting stay of execution pending disposition of cert. pet.); *Hill v.*
14 *Crosby*, 546 U.S. ___, No. 05-8794 (Jan. 25, 2006) (granting stay of execution & granting cert.);
15 *Anderson v. Evans*, No. CIV-05-0825-F, 2006 WL 83093, at *3-*4 (W.D. Okla. Jan. 11, 2006)
16 (denying mot. to dismiss 8th amend. challenge to lethal-injection protocol). At the same time, it
17 should be noted that the record now before this Court, which includes both additional expert
18 declarations and detailed logs from multiple executions in California, contains evidence of a kind
19 that was not presented in these earlier cases. *See, e.g.*, *Reid*, 333 F. Supp. 2d at 548-49 (limiting
20 scope of review to "issues pertaining to the particular chemical combination . . . and their [sic]
21 probable affect [sic] on Reid" and excluding other evidence); *Webb*, 750 A.2d at 453-57
22 (resolving challenge in state where no lethal injections had been performed); *Bieghler*, 839
23 N.E.2d at 696; *Boyd*, 2005 WL 3289333, at *3.; *cf. Anderson*, 2006 WL 83093, at *3-*4
24 (discussing evidence proffered in complaint).

25 This Court and others have found persuasive the declarations of Defendants' medical
26 expert, Dr. Mark Dershwitz, to the effect that "over 99.999999999999% of the population would
27 be unconscious within sixty seconds from the start of the administration of [five grams of]
28 thiopental sodium" and that "this dose will cause virtually all persons to stop breathing within a

minute of drug administration. Therefore . . . virtually every person given five grams of thiopental sodium will have stopped breathing prior to" the administration of the pancuronium bromide. *Cooper*, 379 F.3d at 1032; *see also, e.g., Reid*, 333 F. Supp. 2d at 547 (discussing two grams of sodium thiopental used in Virginia). In most if not all of the legal challenges to lethal injection, condemned inmates have suggested various errors that could occur during the administration of sodium thiopental, thereby rendering an inmate conscious when the pancuronium bromide and potassium chloride are administered. However, "the risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review," *Campbell*, 18 F.3d at 687, and the courts that have considered the issue to date have found that "the likelihood of such an error occurring 'is so remote as to be nonexistent,'" *Beardslee*, 2005 WL 40073, at *3 (quoting *Reid*, 333 F. Supp.2d at 551).

Plaintiff does not dispute Dr. Dershwitz's conclusions at the theoretical level, agreeing that a person's breathing and consciousness should cease within one minute of the beginning of the administration of sodium thiopental. Instead, he contends that in actual practice in California, for whatever reason, the sodium thiopental has not had its intended effect. He cites, *inter alia*, the following evidence from the execution logs:

> Jaturun Siripongs, executed February 9, 1999: The administration of sodium thiopental began at 12:04 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations[10] did not cease until 12:09 a.m., four minutes after the administration of sodium thiopental began and one minute after the administration of pancuronium bromide began.
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> Manuel Babbitt, executed May 4, 1999: The administration of sodium thiopental began at 12:28 a.m. and the administration of pancuronium bromide began at 12:31 a.m., yet respirations did not cease until 12:33 a.m., five minutes after the administration of sodium thiopental began and two minutes after the administration of pancuronium bromide began. In addition, brief spasmodic movements were observed in the upper

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[10]"Respirations" is the term used by the employees of the Department of Corrections and Rehabilitation who witnessed the executions and made entries in the execution logs.

chest at 12:32 a.m.[11]

Darrell Keith Rich, executed March 15, 2000: The administration of sodium thiopental began at 12:06 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations did not cease until 12:08 a.m., when pancuronium bromide was injected, two minutes after the administration of sodium thiopental began. Chest movements were observed from 12:09 a.m. to 12:10 a.m.[12]

Stephen Wayne Anderson, executed January 29, 2002: The administration of sodium thiopental began at 12:17 a.m. and the administration of pancuronium bromide began at 12:19 a.m., yet respirations did not cease until 12:22 a.m., five minutes after the administration of sodium thiopental began and three minutes after the administration of pancuronium bromide began.

Stanley Tookie Williams, executed December 13, 2005: The administration of sodium thiopental began at 12:22 a.m., the administration of pancuronium bromide began at 12:28 a.m., and the administration of potassium chloride began at 12:32 a.m. or 12:34 a.m., yet respirations did not cease until either 12:28 a.m. or 12:34 a.m.—that is, either six or twelve minutes after the administration of sodium thiopental began, either when or six minutes after the administration of pancuronium bromide began, and either four minutes before or when the administration of potassium chloride began.[13]

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[11]Plaintiff's medical expert, Dr. Mark Heath, notes that Babbitt maintained a steady heart rate of 95 or 96 beats per minute for seven minutes after he was injected with sodium thiopental. Dr. Heath states that this fact raises concerns about whether Babbitt was properly sedated.

[12]According to Dr. Heath, this evidence is consistent with a conscious attempt to fight the paralytic effect of the pancuronium bromide rather than with unconsciousness due to the successful administration of the sodium thiopental, particularly in light of Rich's apparently iatrogenic rapid heart rate of 110 beats per minute as the chest movements were occurring. Rich's heart rate was 130 beats per minute when the administration of potassium chloride began.

[13]Defendants' records are inconsistent in this regard: the formal execution log suggests that Williams stopped breathing at 12:28 a.m. and indicates that potassium chloride was injected at 12:32 a.m. whereas the execution team's log states that Williams stopped breathing at 12:34 a.m when the potassium chloride was injected. It appears that the formal log has been altered without any indication as to who made the alteration. Similarly to Rich, Williams apparently experienced an iatrogenic rapid heart rate of 115 beats per minute when he was injected with pancuronium bromide.

Clarence Ray Allen, executed January 17, 2006: The administration of sodium thiopental began at 12:18 a.m., yet respirations did not cease until 12:27 a.m., when pancuronium bromide was injected, nine minutes after the administration of sodium thiopental began.

In a new declaration filed in the present action on February 6, 2006, Dr. Dershwitz opines that the "respirations" reported in the execution logs may be not be respirations at all, hypothesizing that they are no more than "chest wall movements." However, he proposes this hypothesis with considerably less certainty than was evident in his discussion of the pharmacokinetics and pharmacodynamics of sodium thiopental, which are his principal areas of expertise. *Cf. Beardslee*, 395 F.3d at 1075. While Dr. Dershwitz's explanation may be correct, evidence from eyewitnesses tending to show that many inmates continue to breathe long after they should have ceased to do so cannot simply be disregarded on its face. In rejecting the plaintiffs' claims on the merits in *Cooper* and *Beardslee*, this Court relied on Dr. Dershwitz's opinion that the amount of sodium thiopental used in California's lethal-injection protocol should both stop breathing and cause unconsciousness within a minute after administration begins. While there is no direct evidence that any condemned inmate actually was conscious when pancuronium bromide was injected, evidence from Defendants' own execution logs that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California raises at least some doubt as to whether the protocol actually is functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia.[14]

Other evidence in the present record raises additional concerns as to the manner in which the drugs used in the lethal-injection protocol are administered. For example, it is unclear why some inmates— including Clarence Ray Allen, who had a long history of coronary artery disease and suffered a heart attack less than five months before he was executed, *see Allen v. Hickman*, ___ F. Supp. 2d ___, No. C 05 5051 JSW, 2005 WL 3610666 (N.D. Cal. Dec. 15, 2005)—have

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[14]*See* Dr. Heath's declaration in response to the February 13 request for supplemental briefing, at p. 9.

required second doses of potassium chloride to stop promptly the beating of their hearts.[15] The Court need not list all such anomalies here. It is sufficient for purposes of resolving the present motion to note that Plaintiff has raised more substantial questions than his counterparts in *Cooper* and *Beardslee.*

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The fact that Plaintiff has raised such questions does not mean that he must be granted a stay of execution. The State's "strong interest in proceeding with its judgment," *Gomez v. U.S. Dist. Ct. N.D. Cal.*, 503 U.S. 653, 654 (1992), is no less important here than it was in *Cooper* and *Beardslee*. It has been nearly twenty-five years since Plaintiff committed the crimes for which he now faces the death penalty. Even if the Court were to hold an evidentiary hearing and Plaintiff were to prevail, Plaintiff would remain under a sentence of death. Neither the death penalty nor lethal injection as a means of execution would be abolished. At best, Plaintiff would be entitled to injunctive relief requiring the State to modify its lethal-injection protocol to correct the flaws Plaintiff has alleged. Presumably, at some point, Plaintiff would be executed.

Having given the matter much thought, the Court concludes that it is within its equitable powers to fashion a remedy—set forth below as the order of the Court—that preserves both the State's interest in proceeding with Plaintiff's execution and Plaintiff's constitutional right not to be subject to an undue risk of extreme pain. Should Defendants decline to implement this remedy, the Court will stay the execution and hold an evidentiary hearing within ninety days in order to resolve the questions raised by the execution logs.

Whether or not Defendants implement the remedy and thus proceed to execute Plaintiff as scheduled, the Court respectfully suggests that Defendants conduct a thorough review of the lethal-injection protocol, including, *inter alia*, the manner in which the drugs are injected, the means used to determine when the person being executed has lost consciousness, and the quality

[15]At a press conference immediately following Allen's execution, Warden Ornoski stated that a second dose of potassium chloride was required because "this guy's heart has been beating for 76 years, and it took awhile for it to stop." Kevin Fagan, *Reporter's Eyewitness Account of Allen's Execution*, S.F. Chron., Jan. 17, 2006, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/17/MNG37GOHD715.DTL.

of contemporaneous records of executions, such as execution logs and electrocardiograms. Given the number of condemned inmates on California's Death Row, the issues presented by this case are likely to recur with considerable frequency. Because California's next execution is unlikely to occur until the latter part of this year, the State presently is in a particularly good position to address these issues and put them to rest. It is hoped that the remedy ordered by this Federal Court in this case will be a one-time event; under the doctrines of comity and separation of powers, the particulars of California's lethal-injection protocol are and should remain the province of the State's executive branch. A proactive approach by Defendants would go a long way toward maintaining judicial and public confidence in the integrity and effectiveness of the protocol.

VI

As noted at the outset, the present action concerns the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed. While the Court finds that Plaintiff has raised substantial questions in this regard, it also concludes that those questions may be addressed effectively by means other than a stay of execution, and that these alternative means would place a substantially lesser burden on the State's strong interest in proceeding with its judgment.

Accordingly, and good cause therefor appearing, Plaintiff's motion for a preliminary injunction is conditionally DENIED. Defendants may proceed with the execution scheduled for February 21, 2006, provided that they do one of the following:

1) Certify in writing, by the close of business on Thursday, February 16, 2006, that they will use only sodium thiopental or another barbiturate or combination of barbiturates in Plaintiff's execution.[16]

[16]In their response to the February 13 request for supplemental briefing, Defendants assert that while sodium thiopental alone would be effective to cause Plaintiff's death, its use without the other two drugs would cause the execution to be unduly prolonged. Plaintiff correctly points out that there is no evidence in the record to support Defendants' claim that the execution could last as long as forty-five minutes. The execution logs show that several executions pursuant to the current protocol took

2) Agree to independent verification, through direct observation and examination by a qualified individual or individuals, in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that Plaintiff in fact is unconscious before either pancuronium bromide or potassium chloride is injected. Because Plaintiff has raised a substantial question as to whether a person rendered unconscious by sodium thiopental might regain consciousness during the administration of pancuronium bromide or potassium chloride,[17] the presence of such person(s) shall be continuous until Plaintiff is pronounced dead. With respect to this alternative:

(a) A "qualified individual" shall be a person with formal training and experience in the field of general anesthesia. The nature and extent of such training and experience shall be set forth in a declaration submitted to the Court on or before the close of business on Wednesday, February 15, 2006. Plaintiff may file any comments he may have with respect to the qualifications of such person(s) not later than 12:00 noon on Thursday, February 16, 2006. The Court will advise the parties as to whether it finds the person(s) to be qualified by the close of business on Thursday, February 16, 2006.

(b) The person(s) may be employees of the Department of Corrections and Rehabilitation.[18]

(c) If Defendants wish to keep the identity of such person(s) confidential, they

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considerably longer than anticipated. While the Court has no wish to burden the participants in and witnesses to Plaintiff's execution with additional stress in what obviously is a very difficult situation, it concludes that the questions surrounding the protocol justify an exception to the standard procedure in this one instance, particularly in lieu of a stay of execution. The Court's purpose in permitting Defendants to use other barbiturates or a combination of barbiturates is to give Defendants flexibility with respect to the length of the execution; such an approach appears to be fully consistent both with the law—"the precise execution protocol is subject to alteration until the time of execution," *Beardslee*, 395 F.3d at 1069—and with the opinions of Plaintiff's medical expert, Dr. Heath.

[17]*See*, *inter alia*, the excerpts from the execution logs summarized above and Dr. Heath's declaration filed in response to the February 13 request for supplemental briefing, at p. 9.

[18]Defendants have indicated through declarations and in their offer of proof regarding lethal-injection procedures that medical doctors, registered nurses, and licensed vocational nurses employed by the Department have rôles at executions. At this time, the Court has no information as to the specific training and experience of these individuals.

1 may submit their declaration setting forth the qualifications of such person(s) with
2 personal identifiers redacted, except that the redacted information shall be provided to the
3 Court for *in camera* review by e-mail to g_o_kolombatovich@cand.uscourts.gov.
4 (d) During the execution, the person(s) may wear appropriate clothing to protect
5 their anonymity.
6 If Defendants reject both of the alternatives described above, a stay of execution will
7 issue without the necessity of further proceedings. In that event, the Court will hold an
8 evidentiary hearing on the merits of Plaintiff's claims on Tuesday, May 2, 2006, and Wednesday,
9 May 3, 2006. The Court will issue a briefing schedule and orders with respect to discovery
10 should that become necessary.
11 The Court will retain jurisdiction with respect to Defendants' implementation of the
12 remedy provided for herein. This order otherwise is intended to be final for purposes of appellate
13 review.
14 IT IS SO ORDERED.
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16 DATED: February 14, 2006

17 JEREMY FOGEL
United States District Judge
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EXHIBIT C

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2 **E-Filed 1/19/2011**
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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**
11

12 Michael Angelo MORALES et al., 13 Plaintiffs, 14 v. 15 Matthew CATE, Secretary of the California Department of Corrections and Rehabilitation, 16 et al., 17 Defendants.	Case Number 5-6-cv-219-JF-HRL Case Number 5-6-cv-926-JF-HRL DEATH-PENALTY CASE ORDER GRANTING MOTION TO INTERVENE [Doc. No. 467]

18
19 Plaintiff Michael Angelo Morales, a condemned inmate at San Quentin State Prison,
20 initiated this challenge to the constitutionality of Defendants' protocol for executions by lethal
21 injection. Plaintiff Albert Greenwood Brown, also a condemned prisoner, subsequently moved
22 to intervene. The Court granted the motion, noting that "Brown's federal claims are virtually
23 identical to those asserted by . . . Morales." *Morales v. Cate*, No. 5-6-cv-219-JF-HRL, 2010 WL
24 3751757, at *1 (N.D. Cal. Sept. 24, 2010). Pursuant to guidance from the Court of Appeals, this
25 Court also stayed Brown's execution. *Morales v. Cate*, No. 5-6-cv-219-JF-HRL, 2010 WL
26 3835655 (N.D. Cal. Sept. 28, 2010).
27 Now before the Court is the motion of Mitchell Carlton Sims and Stevie Lamar Fields to
28 intervene as Plaintiffs in this litigation. Both Sims and Fields are similarly situated to Morales

1 and Brown in that they are condemned prisoners whose executions are not otherwise stayed and
2 whose claims in their complaint in intervention are virtually identical to those asserted by
3 Morales and Brown. Accordingly, Sims and Fields are entitled to intervene and, like Morales
4 and Brown, to have their executions stayed until the present litigation is concluded.
5 Defendants do not oppose the motion on the merits, (Doc. No. 472 at 2), but they urge the
6 Court to defer ruling on the motion until the California Supreme Court has determined whether
7 the proposed intervenors' attorneys, Michael Laurence and Sara Cohbra, who are affiliated with
8 the Habeas Corpus Resource Center (HCRC), are authorized to participate in actions such as this
9 one. However, Laurence and Cohbra are members of the bar of this Court, and as such, they
10 "may practice in this Court." Civil L.R. 11-1(a). The question of the scope of the HCRC's
11 authority under state law is not a federal question and has no bearing on the merits of the present
12 motion. If the California Supreme Court ultimately determines that Laurence and Cohbra must
13 withdraw as counsel in this case, this Court will permit an appropriate substitution of counsel at
14 that time.
15 Accordingly, and good cause appearing therefor, the motion of Mitchell Carlton Sims and
16 Stevie Lamar Fields to intervene as Plaintiffs in this litigation is granted; the motion hearing
17 presently calendared for February 4, 2011, is hereby vacated. All proceedings related to the
18 execution of the intervenors' sentences of death, including but not limited to preparations for an
19 execution and the setting of an execution date, are hereby stayed on the same basis and to the
20 same extent as in the case of Plaintiffs Morales and Brown.
21 IT IS SO ORDERED.
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23 DATED: January 19, 2011

24 JEREMY FOGEL
United States District Judge
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PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111.

On May 21, 2012, I served the following document(s):

SUBSTITUTION OF ATTORNEY - CIVIL (WITHOUT COURT ORDER)

I served the document(s) on the following person(s):

Andrew L. Packard
Erik M. Roper
Emily J. Brand
Laurie A. Mikkelsen
Law Offices of Andrew L. Packard
100 Petaluma Blvd N., Suite 301
Petaluma, CA 94952
Email: Andrew@packardlawoffices.com
Erik@packardlawoffices.com
Emily@packardlawoffices.com
Laurie.Mikkelsen@gmail.com

The documents were served by the following means:

By personal service. I personally hand-delivered the above document to Andrew L. Packard.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 21, 2012

Signature: ______________________

Type or Print Name: Rhonda S. Goldstein

EXHIBIT D

E-filed 12/15/06

DESIGNATED FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES, Plaintiff, v. James E. TILTON, Secretary of the California Department of Corrections and Rehabilitation, and Robert L. Ayers Jr., Acting Warden of San Quentin State Prison, Defendants.	Case Number C 06 219 JF RS Case Number C 06 926 JF RS DEATH-PENALTY CASE MEMORANDUM OF INTENDED DECISION; REQUEST FOR RESPONSE FROM DEFENDANTS []

I

Few issues in American society have generated as much impassioned debate as the death penalty. At one end of the spectrum, abolitionists condemn the intentional taking of human life by the State as barbaric and profoundly immoral. At the other, proponents see death, even a painful death, as the only just punishment for crimes that inflict unimaginable suffering on victims and their surviving loved ones. Even among those with less absolute positions, there are vigorous arguments about the social, penological, and economic costs and benefits of capital punishment.

Any legal proceeding arising in this context thus acts as a powerful magnet, an opportunity for people who care about this divisive issue to express their opinions and vent their

1 frustrations. However, because courts (and particularly trial courts) exist not to resolve broad
2 questions of social policy but to decide specific legal and factual disputes, it is important at the
3 outset for this Court to make very clear what this case is not about.

4 This case is not about whether the death penalty makes sense morally or as a matter of
5 policy: the former inquiry is a matter not of law but of conscience; the latter is a question not for
6 the judiciary but for the legislature and the voters. Nor is it about whether California's primary
7 method of execution—lethal injection—is constitutional in the abstract: the arguments and
8 evidence presented by the parties address the specific manner in which California has
9 implemented that method and proposes to do so in the future. Nor is it about whether the
10 Constitution requires that executions be painless: binding precedent holds that the Eighth
11 Amendment prohibits only "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*,
12 428 U.S. 153, 173 (1976) (plurality opinion), and procedures that create an "unnecessary risk"
13 that such pain will be inflicted, *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004).

14 Nor, finally, does it somehow involve a comparison of the pain that Plaintiff, a
15 condemned inmate at California's San Quentin State Prison, might suffer when he is executed
16 with the horrific suffering of the young woman he raped and murdered. The Court has
17 considered seriously the constitutional issues raised by this case not because of some imagined
18 personal sympathy for Plaintiff but because it is its fundamental duty to do so. As a practical
19 matter, there is no way for a court to address Eighth Amendment issues in the capital context
20 other than in a case raised by a death-row inmate; by definition, the acts of which such an inmate
21 stands convicted are viewed by the law and a majority of the community as so abhorrent as to
22 warrant the ultimate penalty. Lest there be any doubt, this Court has the most profound sympathy
23 for the family and loved ones of Plaintiff's victim.

24 In fact, this case presents a very narrow question: does California's lethal-injection
25 protocol—as actually administered in practice—create an undue and unnecessary risk that an
26 inmate will suffer pain so extreme that it offends the Eighth Amendment? Because this question
27 has arisen in the context of previous executions, *see Beardslee v. Woodford*, 395 F.3d 1064 (9th
28 Cir. 2005); *Cooper*, 379 F.3d 1029, and is likely to recur with frequency in the future, the Court

has undertaken a thorough review of every aspect of the protocol, including the composition and training of the execution team, the equipment and apparatus used in executions, the pharmacology and pharmacokinetics of the drugs involved, and the available documentary and anecdotal evidence concerning every execution in California since lethal injection was adopted as the State's preferred means of execution in 1992, *see* 1992 Cal. Stat. 558. The Court has reviewed a mountain of documents, including hundreds of pages of legal briefs, expert declarations, and deposition testimony, and it has conducted five days of formal hearings, including a day at San Quentin State Prison that involved a detailed examination of the execution chamber and related facilities. The Court concludes that absent effective remedial action by Defendants—the nature of which is discussed in Part IV of this memorandum—this exhaustive review will compel it to answer the question presented in the affirmative. Defendants' implementation of lethal injection is broken, but it can be fixed.

II

Plaintiff Michael Angelo Morales raped and murdered Terri Winchell. A jury convicted Plaintiff of murder, found special circumstances, and sentenced him to death. *See generally Morales v. Woodford*, 388 F.3d 1159, 1163-67 (9th Cir. 2004).

In California, "[i]f a person under sentence of death does not choose either lethal gas or lethal injection within 10 days after the warden's service upon the inmate of an execution warrant [then] the penalty of death shall be imposed by lethal injection." Cal. Penal Code § 3604(b) (West 2006). More specifically, "[t]he punishment of death shall be inflicted . . . by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections."[1] *Id.* § 3604(a). Defendants[2] have adopted San Quentin Operational Procedure No. 0-770 ("OP 770") as

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[1]The Department of Corrections was reorganized into the Department of Corrections and Rehabilitation on July 1, 2005.

[2]At the commencement of the present litigation, the Defendants were Roderick Q. Hickman, who was the Secretary of the California Department of Corrections and Rehabilitation, and Steven W. Ornoski, then the Acting Warden of San Quentin State Prison; they were sued in their official capacities. Both of these positions have experienced multiple changes in personnel since this action was filed; each

California's protocol governing executions by lethal injection. This protocol, like those used by the federal government and most other states, provides for the injection of three drugs into a person being executed: sodium thiopental, a barbiturate sedative, to induce unconsciousness; pancuronium bromide, a neuromuscular blocking agent, to induce paralysis; and potassium chloride, to induce cardiac arrest.

Plaintiff filed the present action on January 13, 2006, contending that OP 770 and the manner in which Defendants implement it would subject him to an unnecessary risk of excessive pain, thus violating the Eighth Amendment's command that "cruel and unusual punishments [not be] inflicted." U.S. Const. amend. VIII. Five days later, the Superior Court of California for the County of Ventura issued a death warrant, setting Plaintiff's execution for February 21, 2006. This Court then ordered briefing and limited discovery and held two hearings on Plaintiff's application for a preliminary injunction to stay his execution so that the Court could conduct a full evidentiary hearing to consider his claims.

On February 14, 2006, the Court issued an order conditionally denying Plaintiff's request for a stay of execution. *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006). The Court reviewed in detail evidence from execution logs, which indicated that "inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California."[3] *Id.* at 1045. This and other evidence raised concerns that inmates may have been conscious when they were injected with pancuronium bromide and potassium chloride, drugs that the parties agreed would cause an unconstitutional level of pain if injected into a conscious person. Given this evidence, the Court fashioned a remedy that was intended to permit Defendants to proceed with Plaintiff's execution as scheduled by executing him with only barbiturates or by retaining the services of a qualified expert to ensure that Plaintiff would be unconscious when exposed to the painful drugs. *Id.* at 1047. In so holding, the Court stated,

time, the proper Defendants automatically were substituted pursuant to Federal Rule of Civil Procedure 25(d)(1). The current Defendants are Secretary James E. Tilton and Acting Warden Robert L. Ayers Jr.

[3]In fact, there have been only eleven executions by lethal injection in California; the first two executions following the reinstatement of the death penalty were by lethal gas.

> Whether or not Defendants implement the remedy and thus proceed to execute Plaintiff as scheduled, the Court respectfully suggests that Defendants conduct a thorough review of the lethal-injection protocol, including, *inter alia*, the manner in which the drugs are injected, the means used to determine when the person being executed has lost consciousness, and the quality of contemporaneous records of executions, such as execution logs and electrocardiograms. Given the number of condemned inmates on California's Death Row, the issues presented by this case are likely to recur with considerable frequency. Because California's next execution is unlikely to occur until the latter part of this year, the State presently is in a particularly good position to address these issues and put them to rest. It is hoped that the remedy ordered by this Federal Court in this case will be a one-time event; under the doctrines of comity and separation of powers, the particulars of California's lethal-injection protocol are and should remain the province of the State's executive branch. A proactive approach by Defendants would go a long way toward maintaining judicial and public confidence in the integrity and effectiveness of the protocol.

Id. at 1046-47.

The day after the Court issued its order, Defendants responded that they had retained the services of two anesthesiologists who would attend Plaintiff's execution pursuant to the terms of the order. Based upon Defendants' written submissions, and over Plaintiff's strenuous objections, the Court stated that it was satisfied that the anesthesiologists would "take all medically appropriate steps to ensure that Plaintiff is and remains unconscious" when injected with pancuronium bromide and potassium chloride. (Final Order Re Defendants' Compliance with Conditions, Doc. No. 67 at 4 n.3.; *id.* at 5 (finding that "the anesthesiologists designated by Defendants are qualified professionals who will use their professional judgment not merely to observe the execution but to *ensure* that Plaintiff is and remains unconscious").)

On February 19, 2006, the United States Court of Appeals for the Ninth Circuit affirmed. 438 F.3d 926 (9th Cir. 2006). The Ninth Circuit construed this Court's order as

> clearly contemplating that [the anesthesiologists] have the authority to take "all medically appropriate steps"—either alone or in conjunction with the injection team—to immediately place or return Morales into an unconscious state or to otherwise alleviate the painful effects of either or both the pancuronium bromide or potassium chloride.

Id. at 931.

However, for reasons that remain somewhat unclear, there was a "disconnect between the

expectations articulated in the orders of this Court and the Court of Appeals and the expectations of the anesthesiologists" regarding how they would participate in Plaintiff's execution. (Order on Defendants' Motion to Proceed with Execution, Doc. No. 78 at 3.) Defendants apparently had told the anesthesiologists that the anesthesiologists merely would have to observe the execution, while Defendants' counsel represented to the Court that the anesthesiologists would ensure that Plaintiff would remain unconscious after he was injected with sodium thiopental. This disconnect became apparent on the evening of February 20, 2006, approximately three or four hours before Plaintiff's scheduled execution (which Defendants had set for 12:01 a.m. on February 21), when Defendants provided copies of the Ninth Circuit's opinion to the anesthesiologists. Almost immediately, the anesthesiologists stated that they could not proceed for reasons of medical ethics. Several hours of tense discussions (including what Warden Ornoski described as "training" of the anesthesiologists) and telephonic hearings followed, during which Defendants postponed the execution. At approximately 2:45 a.m. on February 21, Defendants stated that they would seek approval from the Court to execute Plaintiff using only sodium thiopental (and without the participation of the anesthesiologists); the execution was rescheduled for 7:30 p.m.

The parties submitted briefing on Defendants' request, and the Court heard approximately one hour of telephonic argument during the morning of February 21. Because Defendants had indicated their desire to proceed using only sodium thiopental only hours earlier, the record contained virtually no evidence as to the details of how such an execution would be carried out, and Plaintiff had no meaningful opportunity for appellate review.[4] Accordingly, shortly before 3:00 p.m., the Court issued an order in which it held that, in light of the unique circumstances then presented,

> due process requires that . . . Defendants' obligations be set forth in a way that leaves no room for reasonable doubt. Accordingly, while Defendants may proceed with the execution this evening using only sodium thiopental, they may do so only if the sodium thiopental is injected in the execution chamber directly into the

[4]Obviously, this situation would not have arisen had Defendants elected this option initially pursuant to the Court's order of February 14.

> intravenous cannula by a person or persons licensed by the State of California to inject medications intravenously.

(*Id.*) Defendants were unwilling or unable to execute Plaintiff in accordance with these requirements, and a stay of execution to permit an evidentiary hearing issued automatically pursuant to the Court's order of February 14. 415 F. Supp. 2d at 1048.

The Court then set an expedited schedule for an evidentiary hearing to be held in May 2006. Thereafter, at the joint request of the parties, the evidentiary hearing was deferred until September 2006 to enable the parties to complete discovery.

On February 28, 2006, the Governor's Office hosted a meeting lasting approximately an hour and a half at which potential changes to OP 770 were discussed. Although more significant modifications were proposed by some of the participants, the Governor's Legal Affairs Secretary concluded that the only change that would be undertaken at that time was what was described as a "tweak" of the chemical aspects of the protocol. It was decided that the dosages of the three drugs would be adjusted and that a continuous infusion of sodium thiopental during the administration of pancuronium bromide and potassium chloride would be added. There is no indication from the record that the participants in the meeting addressed or considered issues related to the selection and training of the execution team, the administration of the drugs, the monitoring of executions, or the quality of execution logs and other pertinent records. Defendants issued the revised version of OP 770 on March 6, 2006; this version remains current and is the version that Defendants intend to follow in executing Plaintiff.

The Pacific News Service ("PNS") thereafter filed a related lawsuit, *Pacific News Service v. Tilton*, No. C 06 1793 JF RS (N.D. Cal. filed Mar. 8, 2006), challenging Defendants' use of pancuronium bromide during executions. PNS moved to consolidate its action with this one. The Court noted that "despite the fact that not consolidating the actions may leave an unresolved First Amendment challenge to California's lethal-injection protocol pending even after the conclusion of the proceedings in *Morales*, Defendants urge the Court to take a deliberate approach to managing these cases, with *PNS* being addressed after *Morales*." The Court declined to consolidate the cases, stating, "While the Court is committed to resolving all aspects of the

present litigation expeditiously, it will defer to the State's expressed concerns." (Order Denying Motion to Consolidate without Prejudice, Doc. No. 110 at 2.) In reaching this conclusion, the Court observed,

> At the hearing, counsel for Morales expressed the concern that an appeal of the Court's judgment in *Morales* might be pending while the *PNS* action was still unresolved. Because of the closely related nature of these actions, as well as the Court's inherent authority to determine the timing of its decisions, the Court considers this scenario unlikely.

(*Id.* at 3 n.1.)

On March 30, 2006, the Court convened at San Quentin State Prison for what the parties agreed would be a preliminary session of the evidentiary hearing. At San Quentin, the Court examined the equipment and facilities used during executions, and it heard partial testimony from the then-leader of Defendants' execution team.

In preparation for the remainder of the evidentiary hearing, the parties filed a joint pre-hearing conference statement containing detailed factual stipulations and also submitted voluminous testimony, including the testimony of experts and present and former execution team members, by means of deposition excerpts. The evidentiary hearing recommenced on September 26 and concluded on September 29, 2006. Following the evidentiary hearing, the parties submitted closing briefs.

III

From the evidence in the record and the parties' extensive briefing, the Court has learned a great deal about executions by lethal injection in general and their implementation in California in particular. The opportunity to make first-hand observations at San Quentin was quite useful, and the oral testimony and written declarations of well-qualified experts on both sides have been very helpful. Yet in many respects, the Court finds itself in virtually the same position today that it was in when it considered Plaintiff's motion for a preliminary injunction in February 2006.

As they did in February, the parties agree that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride in the amounts

contemplated by OP 770. Defendants' principal medical expert, Dr. Robert C. Singler,[5] testified that it would be "terrifying" to be awake and injected with the contemplated dosage of pancuronium bromide and that it would be "unconscionable" to inject a conscious person with the contemplated amount of potassium chloride. The parties also agree, as they did in February, that assuming effective anesthesia, the use in executions of pancuronium bromide or potassium chloride as such does not violate the Eighth Amendment. As it has from its inception, the resolution of this case thus turns on a single factual question: whether OP 770, as implemented, provides constitutionally adequate assurance that condemned inmates will be unconscious when they are injected with pancuronium bromide and potassium chloride.

On the surface, this would appear to be a relatively straightforward inquiry. As Defendants have pointed out repeatedly and as this Court itself has found in three separate capital cases, including this one, the amount of sodium thiopental to be given to the condemned person pursuant to OP 770 is sufficient to cause virtually all persons to become unconscious or even to cease breathing within one minute. *Morales*, 415 F. Supp. 2d at 1043-44; *Beardslee v. Woodford*, No. C 04 5381 JF, 2005 WL 40073, at *2 (N.D. Cal. Jan. 7, 2005); *Cooper v. Rimmer*, No. C 04 436 JF, 2004 WL 231325, at *3 (N.D. Cal. Feb. 6, 2004). Accordingly, assuming that the sodium thiopental is delivered properly, there should be virtually no risk that an inmate will suffer an unconstitutional level of pain.[6]

However, the record in this case, particularly as it has been developed through discovery and the evidentiary hearing, is replete with evidence that in actual practice OP 770 does not function as intended. The evidence shows that the protocol and Defendants' implementation of it

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[5]Dr. Singler also was one of the anesthesiologists retained by Defendants to participate in Plaintiff's scheduled execution, and he attended the meeting at the Governor's Office on February 28, 2006.

[6]Although Plaintiff's expert witnesses raised questions at the evidentiary hearing with respect to the effectiveness of the one-and-one-half-gram bolus dose of sodium thiopental in the current version of the protocol (compared to the five-gram dose in all prior versions), the Court did not find that testimony persuasive. Having reviewed all of the expert testimony, the Court is satisfied that even one and one-half grams of sodium thiopental, *if properly administered*, are sufficient to eliminate any unconstitutional risk that an inmate will be conscious when the pancuronium bromide and potassium chloride are injected.

suffer from a number of critical deficiencies, including:

1. <u>Inconsistent and unreliable screening of execution team members</u>: For example, one former execution team leader, who was responsible for the custody of sodium thiopental (which in smaller doses is a pleasurable and addictive controlled substance), was disciplined for smuggling illegal drugs into San Quentin; another prison guard led the execution team despite the fact that he was diagnosed with and disabled by post-traumatic stress disorder as a result of his experiences in the prison system and he found working on the execution team to be the most stressful responsibility a prison employee ever could have.

2. <u>A lack of meaningful training, supervision, and oversight of the execution team</u>: Although members of the execution team testified that they perform numerous "walk-throughs" of some aspects of the execution procedure before each scheduled execution,[7] the team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure. One member of the execution team, a registered nurse who was responsible for mixing and preparing the sodium thiopental at many executions, testified that "[w]e don't have training, really." While the team members who set the intravenous catheters are licensed to do so, they are not adequately prepared to deal with any complications that may arise, and in fact the team failed to set an intravenous line during the execution of Stanley "Tookie" Williams on December 13, 2005. Although Defendants' counsel assured the Court at the evidentiary hearing that "Williams was a lesson well learned, one that will never occur again," the record shows that Defendants did not take steps sufficient to ensure that a similar or worse problem would not occur during the execution of Clarence Ray Allen on January 17, 2006, or Plaintiff's scheduled execution the following month.[8]

3. <u>Inconsistent and unreliable record-keeping</u>: For example, there are no contemporaneous records showing that all of the sodium thiopental in the syringes used for

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[7]The execution team neither has received any training in nor has it practiced mixing sodium thiopental since at least as far back as 1998.

[8]Indeed, the execution team members' reaction to the problem at the Williams execution was described by one member as nothing more than "shit does happen, so."

injections actually was injected, and, in fact, testimony revealed that in at least several executions it was not. A number of the execution logs are incomplete or contain illegible or overwritten entries with respect to critical data such as the inmate's heart rate and the time at which observations were made. Inexplicably, Defendants use blank paper for their electrocardiogram (EKG) tracings instead of the graph paper that typically is used, and provide neither standardization markings nor paper-speed documentation, thereby precluding accurate interpretation of the tracings, even as to heart rate.[9]

4. Improper mixing, preparation, and administration of sodium thiopental by the execution team: Among other things, team members' admitted failure to follow the simple directions provided by the manufacturer of sodium thiopental further complicates the inquiry as to whether inmates being executed have been sufficiently anesthetized.

5. Inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work: The execution chamber was not designed for lethal-injection executions; San Quentin officials simply made slight modifications to the existing gas chamber, such as drilling holes in the chamber wall for intravenous lines and installing a metal hook at the top of the chamber from which the bags containing the lethal drugs are suspended. The bags are too high to permit the execution team to verify whether the equipment is working properly. The lighting is too dim, and execution team members are too far away, to permit effective observation of any unusual or unexpected movements by the condemned inmate, much less to determine whether the inmate is conscious; this is exacerbated by the fact that the chamber door is sealed shut during executions as if lethal gas were being disseminated, rendering it virtually impossible to hear any sound from the chamber. For some executions, the small anteroom from which the execution team injects the lethal drugs has been so crowded with prison officials and other dignitaries that even simple movement has been difficult.

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[9]There is also an extremely troubling absence of reliable documentation as to the disposition of sodium thiopental taken from the prison pharmacy by execution team members purportedly for training purposes; team members testified that the actual drugs are not used in training, yet it appears that substantial quantities of sodium thiopental—again, an addictive controlled substance—were not returned to the pharmacy. These circumstances may warrant investigation by an appropriate law-enforcement agency.

Defendants observe correctly that Plaintiff's burden of proof at the present stage of the instant proceeding is greater than it was at the preliminary-injunction stage and that there still is no definitive evidence that any inmate has been conscious during his execution. Nonetheless, the evidence is more than adequate to establish a constitutional violation. Given that the State is taking a human life, the pervasive lack of professionalism in the implementation of OP 770 at the very least is deeply disturbing. Coupled with the fact that the use of pancuronium bromide masks any outward signs of consciousness, the systemic flaws in the implementation of the protocol make it impossible to determine with any degree of certainty whether one or more inmates may have been conscious during previous executions or whether there is any reasonable assurance going forward that a given inmate will be adequately anesthetized. The responsibility for this uncertainty falls squarely upon Defendants, and the circumstances clearly implicate the Eighth Amendment.

As this Court noted in its order of February 14, 2006, anomalies in six execution logs raise substantial questions as to whether certain inmates may have been conscious when pancuronium bromide or potassium chloride was injected. 415 F. Supp. 2d at 1044-46. These substantial questions remain unanswered despite the depth and breadth of the evidentiary record and the parties' briefing. If anything, the questions have become even more substantial. One of the executions not discussed by the Court in its order of February 14 was that of Robert Lee Massie, who was executed on March 27, 2001. Massie's execution was explored in detail at the evidentiary hearing. Testifying on behalf of Defendants, Dr. Singler opined that based upon the heart rates reflected in the execution log, Massie well may have been awake when he was injected with potassium chloride. Significantly, Dr. Singler testified that he was unable to give a definitive opinion principally because of the poor quality of the log itself, and in particular an unclear entry in the log as to Massie's heart rate.

Dr. Singler's testimony regarding Massie's execution is merely the most dramatic evidence concerning the risks posed by Defendants' acts and omissions.[10] Dr. Singler also

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[10] *Cf., e.g., California: Official Admits Execution Was Bungled*, N.Y. Times, Sept. 27, 2006, at A21 ("A state official admitted that prison guards had bungled the execution of the gang leader Stanley

1 testified to a number of additional concerns, most notably the fact that overcrowding, obstructed
2 sight lines, and poor lighting in the execution chamber and adjoining anteroom make accurate
3 observations of the inmate during an execution extremely problematic. Whatever the merits of
4 the protocol in the abstract, there can be no real doubt that Defendants' implementation of OP
5 770 has major flaws, many of which are apparent from the *undisputed* facts to which Defendants
6 stipulated in the amended joint pre-hearing conference statement.

7 The Framers of our Constitution were not far removed from a society in which
8 condemned prisoners were put to death by being beheaded, drawn, and quartered. The Eighth
9 Amendment was adopted in part as a response to such brutality, and it since has been construed
10 by our Supreme Court to require that punishment for crimes comport with "the evolving
11 standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S.
12 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). While
13 opponents of the death penalty believe that any means of execution necessarily violates such
14 standards, the Supreme Court repeatedly has held otherwise, *see*, *e.g.*, *Gregg*, 428 U.S. 153, in
15 large part because the Constitution itself makes explicit reference to capital punishment, U.S.
16 Const. amends. V & XIV § 1. The use of lethal injection in executions represents an evolution
17 from earlier methods such as hanging, electrocution, and lethal gas that now are viewed by most
18 jurisdictions as unduly harsh. Needless to say, when properly administered, lethal injection
19 results in a death that is far kinder than that suffered by the victims of capital crimes.

20 At the present time, however, Defendants' implementation of California's lethal-injection
21 protocol lacks both reliability and transparency. In light of the substantial questions raised by the
22 records of previous executions, Defendants' actions and failures to act have resulted in an undue
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24

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25 Tookie Williams last December . . . at a federal court hearing in San Jose on lethal injection."); Maura Dolan & Henry Weinstein, *The Chaos Behind California Executions: Trial Testimony Paints Lethal*
26 *Injection Methods as Haphazard, with Little Medical Oversight*, L.A. Times, Oct. 2, 2006, at A1. Even Kent Scheidegger, the legal director of the Criminal Justice Legal Foundation and one of the strongest
27 advocates of the death penalty in California, has recognized that California "is legitimately criticized for not doing enough homework on the protocol." *Quoted in* Henry Weinstein, *State Will Help Shape Fate*
28 *of Lethal Injection: The* Morales *Case Gives California a Key Role in a National Debate Over the Method's Humaneness*, L.A. Times, Feb. 23, 2006, at A1.

and unnecessary risk of an Eighth Amendment violation. This is intolerable under the Constitution. *See Beardslee*, 395 F.3d at 1070-71; *Cooper*, 379 F.3d at 1033; *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 26, 2006) (holding that Missouri's lethal-injection protocol violates Eighth Amendment).

IV

As this Court previously has noted, "under the doctrines of comity and separation of powers, the particulars of California's lethal-injection protocol are and should remain the province of the State's executive branch." 415 F. Supp. 2d at 1046. Moreover, despite its critical assessment of Defendants' performance to date, this Court has no intention of interfering with or delaying California's implementation of a constitutional execution protocol. California's voters and legislature repeatedly have expressed their support for capital punishment. This case thus presents an important opportunity for executive leadership.

The Court is prepared to issue formal findings of fact and conclusions of law with respect to the deficiencies in the administration of California's current lethal-injection protocol that have been brought to light in this case. However, it will require additional time to do so, in part because Defendants still have not fulfilled their discovery obligations.[11] In addition, while the Court has deferred consideration of the issues raised in the *PNS* matter until after it issues a formal decision in this case, it still must resolve *PNS* in order to facilitate speedy and complete appellate review of all of the current challenges to OP 770. (*See* Doc. No. 110 at 2-3.) Finally, while it is a virtual certainty that any judgment in this case will be appealed by one party or the other, it seems fair to suggest that a judgment adverse to Defendants grounded in the extensive factual record present here is far more likely to delay the resumption of executions in California than is one favorable to Defendants. Because the Court is prepared to find that the sequence of three drugs described in OP 770 when properly administered will provide for a constitutionally adequate level of anesthesia, and given that the deficiencies in the implementation of the protocol

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[11]Relatedly, the Court has deferred ruling on the objections of the Governor's Office to certain discovery orders issued by the assigned magistrate judge. *See Morales v. Tilton*, No. C 06 219 JF RS, 2006 WL 2724152, at *3 (N.D. Cal. Sept. 22, 2006).

appear to be correctable,[12] a thorough, effective response to the issues raised in this memorandum likely will enable the Court to enter such a favorable judgment.[13]

Accordingly, and respectfully, the Court urges the Governor's Office to take this opportunity to address seriously now, rather than later, the significant problems with OP 770 and its implementation. In light of the well-documented management issues in California's prison system generally, *see, e.g., Plata v. Schwarzenegger*, No. C 01 1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005), the Court believes that the Governor's Office is in the best position to insist on an appropriate degree of care and professionalism in carrying out what Defendants properly characterize as the "solemn" task of executions.[14]

Toward that end, acknowledging its own limited role and with deference to the role of the State's executive branch, and informed by what it has learned in the course of the present litigation, the Court offers the following observations:

First, given past experience, it seems unlikely that a single, brief meeting primarily of lawyers, the result of which is to "tweak" OP 770, will be sufficient to address the problems

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[12]While there have been numerous legal challenges to lethal-injection protocols across the country, it is by no means clear that every jurisdiction has problems similar in either nature or extent to California's. For example, Virginia has executed sixty-six inmates pursuant to its lethal-injection protocol, which appears to provide for training, physical facilities, and oversight far superior to that provided by California's. *See Walker v. Johnson*, 448 F. Supp. 2d 719 (E.D. Va. 2006).

[13]Following the conclusion of the evidentiary hearing, the Court propounded a series of written questions that provided the parties with an opportunity to discuss potential remedies for the deficiencies in the administration of OP 770. (Request for Briefing, Doc. No. 256.) For different reasons, the parties largely declined to do so. Plaintiff argued that since Defendants are obligated by statute to design and implement an execution protocol, he should not be asked to do Defendants' work. Defendants contended that while the evidence indeed suggests a need for improvement in the implementation of the protocol, the situation does not rise to the level of a constitutional violation. Plaintiff's position is somewhat understandable, since Plaintiff's primary interest in the present litigation is not improving California's lethal-injection protocol but rather delaying or avoiding his own execution. However, if Defendants' goal is to resume executions as soon as possible, the Court respectfully suggests that their unwillingness to see the situation for what it is and to be proactive is self-defeating.

[14]Part of the problem may be that the prison officials responsible for implementation of the protocol see their legal obligations too narrowly. Warden Ornoski testified that he believes that a "successful execution" is simply one where "the inmate ends up dead at the end of the process." When asked whether he considered a successful execution to mean anything else, he responded, "I'm thinking not."

1 identified in this case. Rather, as contemplated by the Court in its order of February 14, 2006, "a
2 thorough review of the lethal-injection protocol, including, *inter alia*, the manner in which the
3 drugs are injected, the means used to determine when the person being executed has lost
4 consciousness, and the quality of contemporaneous records of executions, such as execution logs
5 and electrocardiograms," 415 F. Supp. 2d at 1046, likely will be necessary. To be meaningful,
6 such a review may require consultation with independent experts and with other jurisdictions,
7 and it must be undertaken with an openness to the idea of making significant improvements in
8 the "infrastructure" of executions.

9 Second, given that because of the paralytic effect of pancuronium bromide, a
10 determination of an inmate's anesthetic depth after being injected with that drug is extremely
11 difficult for anyone without substantial training and experience in anesthesia, the protocol must
12 ensure that a sufficient dose of sodium thiopental or other anesthetic actually reaches the
13 condemned inmate and that there are reliable means of monitoring and recording the inmate's
14 vital signs throughout the execution process. An adequate protocol also must include a means of
15 providing additional anesthetic to the inmate should the need arise. Because an execution is not
16 a medical procedure, and its purpose is not to keep the inmate alive but rather to end the inmate's
17 life, the Court agrees with Defendants that the Constitution does not necessarily require the
18 attendance and participation of a medical professional.[15] However, the need for a person with
19 medical training would appear to be inversely related to the reliability and transparency of the
20 means for ensuring that the inmate is properly anesthetized: the better the delivery system, the
21 less need there is for medical participation.

22 Third, because the constitutional issues presented by this case stem solely from the effects
23 of pancuronium bromide and potassium chloride on a person who has not been properly
24 anesthetized, removal of these drugs from the lethal-injection protocol, with the execution
25 accomplished solely by an anesthetic, such as sodium pentobarbital, would eliminate any
26

27 [15]As noted earlier, this Court's order of February 14 giving Defendants the option of having an anesthesiologist ensure Plaintiff's unconsciousness was intended as a one-time solution to permit
28 Plaintiff's execution to proceed as scheduled. It was not meant to suggest or to hold that the participation of medical professionals in lethal-injection executions generally is required by the Constitution.

constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic.[16] Should Defendants wish to retain a three-drug protocol, which it most certainly is their right to do, they must address in a serious way the broader structural problems in implementation outlined in this memorandum.

V

Accordingly, and good cause therefor appearing, within thirty days Defendants shall advise the Court and Plaintiff of their response to this memorandum, including specifically whether Defendants and the Governor's Office intend to review and revise OP 770 further and, if so, how much additional time, if any, they believe they will need to complete that task.[17] Plaintiff may file a response to Defendants' submission within fifteen days after the submission has been served upon his counsel of record. The Court will not construe any pleading filed in response to this memorandum as a waiver of any arguments with respect to the constitutionality of the current version of OP 770, its implementation, or any other legal issue or procedural question presented by the instant case.

IT IS SO ORDERED.

DATED: December 15, 2006

JEREMY FOGEL
United States District Judge

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[16] Along the same lines,

> it is somewhat significant that at least nineteen states have enacted laws that either mandate the exclusive use of a sedative or expressly prohibit the use of a neuromuscular blocking agent in the euthanasia of animals. It is also of some significance that the leading professional association of veterinarians promulgated guidelines that prohibit the use of a sedative with a muscle-paralyzing drug for purposes of euthanasia. . . .

Beardslee, 395 F.3d at 1073 (footnote omitted). As noted previously, the use of pancuronium bromide also is at issue in the *PNS* litigation.

[17] The Court notes that any proposed time line may need to be altered depending on the outcome of *Morales v. California Department of Corrections and Rehabilitation*, No. CV 061436 (Cal. Super. Ct. County of Marin filed Apr. 5, 2006), which addresses whether Defendants must follow California's Administrative Procedures Act in promulgating a lethal-injection protocol, and which is scheduled to be decided on cross-motions for summary judgment on January 31, 2007. *Cf. Bowling v. Ky. Dep't of Corr.*, No. 06-CI-00574 (Ky. Franklin Cir. Ct. Nov. 30, 2006) (holding that Kentucky's lethal-injection protocol violates Commonwealth Administrative Procedures Act).

EXHIBIT E

E-Filed 9/28/2010

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES and Albert Greenwood Brown, Plaintiffs, v. Matthew CATE, Secretary of the California Department of Corrections and Rehabilitation, et al., Defendants.	Case Number 5-6-cv-219-JF-HRL Case Number 5-6-cv-926-JF-HRL <u>DEATH-PENALTY CASE</u> ORDER FOLLOWING REMAND

I. INTRODUCTION

This case now is before the Court pursuant to an order of remand filed by the Ninth Circuit Court of Appeals on the evening on September 27, 2010. (Doc. No. 411, *amended by* Doc. No. 420.) The order directs this Court to determine whether, in light of the decision of the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008), Plaintiff Albert Greenwood Brown is entitled to a stay of his execution as it would be conducted under California Code of Regulations title 15, sections 3349 et seq. (2010), the lethal-injection execution protocol now in effect in California. In particular, this Court has been asked to address the similarity between the current protocol and San Quentin Operational Procedure 0-770, or O.P. 770, the earlier lethal-injection protocol found constitutionally deficient by the Court following an evidentiary hearing

in 2006, applying the "demonstrated risk" standard articulated in *Baze*, 553 U.S. at 61 (plurality op.), and the standards for stays of execution generally that were announced by the Supreme Court in *Nelson v. Campbell*, 541 U.S. 637 (2004). (Doc. No. 420 at 8.)

The Court has received briefing on these issues from the parties and also has conducted its own review of the record in the limited time available to it given Brown's pending execution date of September 30, 2010.[1] As explained below, pursuant to the guidance provided by the Court of Appeals in its order of remand and new information that has come to light since its own order of September 24, 2010, was entered, the Court concludes that its previous order must be reconsidered and that Brown is entitled to a stay of execution.

II. DISCUSSION

The extensive history of this litigation is summarized in the Court's order of September 24, 2010, (Doc. No. 401), and will not be repeated here. However, as relevant to the following discussion, three points do bear repeating. *First*, "it is fair to say that there is no case involving an Eighth Amendment challenge to a lethal-injection protocol in which the factual record is as developed as the record here." (*Id.* at 7, *quoted in* Doc. No. 420 at 6.) *Second*, because the instant proceedings with respect to Brown were commenced less than two weeks ago, "there is no way that the Court can engage in a thorough analysis of the relevant factual and legal issues in the days remaining before Brown's execution date." (Doc. No. 401 at 8.) *Third*, notwithstanding this severely constricted time frame, the Court must do its best to apply the tests articulated by the Supreme Court in *Baze* and *Nelson*.

Two other observations are relevant. *First*, the side-by-side comparison of O.P. 770 and the new lethal-injection regulations directed by the Court of Appeals, while obviously highly relevant, was not proffered either by Brown in his original motion for a stay or execution or by Defendants in opposition to that motion. It was Brown's burden as the moving party to show

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[1] At the time of the Court's earlier order denying conditionally Brown's motion for a stay of execution, the execution was set for September 29, 2010, at 12:01 a.m. On September 27, 2010, apparently because the time within which Brown may seek further appellate review of certain orders in related state-court litigation has yet to run, the Governor granted a reprieve postponing the execution until September 30, 2010, at 9:00 p.m.

that he is likely to succeed on his claim that the new regulations fail to remedy the defects found in O.P. 770 and that as such the regulations subject him to a "demonstrated risk" of an Eighth Amendment violation, *Baze*, 553 U.S. at 61 (plurality op.). Instead, Brown offered only conclusory statements that the two protocols are essentially similar. Brown's failure to meet this burden prior to his briefing on remand was a principal basis of the Court's conclusion that Brown was not entitled to an outright stay of execution. (*See* Doc. No. 401 at 8 ("absent a *presently-existing* 'demonstrated risk' of a constitutional violation, Defendants are entitled to proceed with the execution").)

Second, in considering, as it was required to do, California's "strong interest in proceeding with its judgment," *Gomez v. U.S. Dist. Ct. N.D. Cal.*, 503 U.S. 653, 654 (1992), the Court was mindful of the fact that there has been a *de facto* moratorium on executions in the state since its decision in *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal 2006), and it understood that Defendants wished to set other execution dates in the near future. It now appears that Defendants knew, but did not disclose to the Court, that their existing supply of sodium thiopental[2] will expire on October 1, 2010, and that additional quantities of the drug will not be available at least until the first quarter of 2011. (*See* Doc. No. 411 at 2.) At a status conference on September 21, 2010, this Court set an accelerated schedule for resolution of the *Morales* litigation under which a full review of the new regulations will be completed by the end of this year. Under these circumstances, the only execution that would be impacted either directly or indirectly by a stay is Brown's, which as a result of a brief reprieve granted by the Governor is now scheduled only three hours before the expiration date of the sodium thiopental.

A. Application of *Baze* to the New Regulations

As discussed in the Court's earlier order, *Baze* created a significantly higher threshold for obtaining a stay of execution in a case challenging lethal-injection protocols substantially similar to the Kentucky protocol upheld there. As noted by Defendants, it appears that the Kentucky

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[2] Because it is the first drug used in the three-drug lethal injection "cocktail" and is used to induce unconsciousness, sodium thiopental is indispensable to a lawful execution by lethal injection.

protocol may have contained fewer safeguards than O.P. 770. *Cf. Baze*, 553 U.S. at 120–21 (Ginsburg, J., dissenting). At the same time, Kentucky had carried out, "with no reported problems," *id.* at 46 (plurality op.), only one execution under its lethal-injection protocol, and the factual record before the Supreme Court was virtually nonexistent.

In its order of September 24, 2010, this Court commented that although it "framed its factual findings and legal conclusions [in the 2006 *Morales* litigation] under the legal standard then applicable in the Ninth Circuit, it likely would have made the same findings and reached the same conclusions under the 'demonstrated risk' standard announced in *Baze*." (Doc. No. 401 at 8 (internal citation omitted).) Although the ultimate disposition in that order did not require an express finding in that regard, such a finding appears to be necessary on remand to inform the Court's comparison of O.P. 770 and the new regulations. Accordingly, the Court hereby finds that O.P. 770 as implemented in practice through and including the date of the evidentiary hearing in the 2006 *Morales* litigation created a "demonstrated risk of severe pain." This finding is based on the entire record, *see Morales*, 465 F. Supp 2d 972; on the largely undisputed evidence presented at the hearing; on Defendants' stipulation that injection of the second and third drugs in the three-drug protocol (pancuronium bromide and potassium chloride) without adequate anesthesia will cause an unconstitutional level of pain; on the fact that data in Defendants' execution logs indicate that sodium thiopental did not have its expected effect or function as expected in 64% of lethal-injection executions pursuant to the protocol; and in particular on the testimony of Defendants' own medical expert, Dr. Singler, that in at least one execution the inmate likely was awake when the second and third drugs were injected, and that the only reason that the anesthesiologist could not render a definitive opinion was the apparent unreliability of Defendants' records, *id.* at 980.

Defendants contend that the deficiencies in O.P. 770 have been remedied by the new regulations and the construction of new execution facilities,[3] and that the Court may determine

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[3] Though it did cite deficiencies in the facilities used under O.P. 770, the Court did not order that new facilities be constructed. The person then serving as the warden at San Quentin, who later admitted that he had not read the Court's memorandum in *Morales v. Tilton*, apparently believed that such an

without discovery, additional briefing or fact-finding that Brown cannot show a "demonstrated risk of severe pain." For his part, Brown claims that the new regulations largely are O.P. 770 by another name, particularly with respect to the selection and training of the execution team and important aspects of the method for delivery of the three drugs involved. Based on the Court's very limited comparison of the two protocols in light of the order of remand and the additional briefing provided by the parties earlier today, it appears that Brown would have difficulty proving that Defendants have not made substantial improvements with respect to the physical conditions in which executions are to take place. However, there is a significant dispute with respect to the remaining issues.

Defendants' position is straightforward. They do not claim that the new regulations are radically different from previous lethal injection protocols; indeed, in most respects the documents are remarkably similar. Instead, they begin with the plurality's observation in *Baze* that "a State with a lethal injection protocol substantially similar to [Kentucky's] would not create a risk that meets [the 'demonstrated risk'] standard." 553 U.S. at 61 (plurality op.). They then cite Justice Ginsburg's approving reference in her dissent to the fact that "[i]n California, a member of the IV team brushes the inmate's eyelashes, speaks to him, and shakes him at the halfway point and, again, at the completion of the sodium thiopental injection." *Id.*, at 120–21 (Ginsburg, J., dissenting).[4] They argue that this "consciousness check" alone is sufficient to render the current regulations constitutionally adequate. They present a side-by-side comparison of key provisions of the regulations and the Kentucky protocol found constitutional in *Baze*, pointing out a number of ways in which the regulations provide greater protection to the inmate than the procedures used in Kentucky. Finally, they assert that subsequent to *Baze*, several courts

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order had been made. *Findings of S. Public Safety Comm. Informational Hr'g on San Quentin Death Chamber*, 2007–08 Sess. (Cal. 2007).

[4] Justice Ginsburg's comment concerned a revised version of O.P.770 not reviewed in the 2006 *Morales* litigation. O.P. 770 § V(S)(4)(e) (2007). The same procedure is incorporated in the regulations. Cal. Code Regs. tit. 15, § 3349.4.5(g)(5) (2010). The only other significant difference between the version of O.P. 770 considered in the 2006 proceedings and the new regulations is a reduction in the amount of sodium thiopental used in executions from five grams to three grams.

have concluded that evidence of problems under preëxisting, superseded execution protocols is insufficient to show a presently existing "demonstrated risk" of a constitutional violation, citing *Raby v. Livingston,* 600 F.3d 552, 560–62 (5th Cir. 2010); *State v. Jordan*, No. W2007-01272-SC-DDT-DD, 2010 WL 3668513 (Tenn. Sept. 22, 2010); *Jackson v. Danberg*, 594 F. 3d 210, 226–27 (3d Cir. 2010). (*But see, e.g.*, Doc. No. 401 at 7 (distinguishing *Jackson*).)

Although he does not concede that the new regulations are facially adequate under *Baze*, Brown argues principally that the "pervasive lack of professionalism," *Morales*, 465 F. Supp. 2d at 980, and "lack of reliability and transparency," *id.*, at 981, that the Court found in Defendants' actual application of O.P. 770 also has characterized Defendants' subsequent efforts to revise the lethal-injection protocol. He contends that on the present record, unlike other courts that have had to assess the constitutionality of post-*Baze* protocols, this Court cannot simply presume that Defendants' actual application of the new regulations will meet constitutional standards. Citing excerpts from the limited discovery that occurred in the instant case following the 2006 evidentiary hearing (as well as a large volume of exhibits), he argues that Defendants did not come close to conducting the "meaningful review" of the "infrastructure" of executions that the Court concluded was necessary, *id.*, at 983, and that notwithstanding what the regulations say on their face, the deficiencies found by the Court in the selection and training of the execution team, the mixing and delivery of the drugs used in executions, and the adequacy and accuracy of execution records under O.P. 770 in fact have not been addressed and are present under the regulations as well.[5]

In order to obtain a stay of execution under *Baze*, Brown must show that California's lethal-injection protocol "creates a demonstrated risk of severe pain." 553 U.S. at 61 (plurality op.). However, in light of the voluminous record in this case and the fact that the Court has been precluded from proceeding with the *Morales* litigation for more than three years by the pendency of a state-court injunction and the parties' repeated mutual requests that the state-court litigation

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[5] Defendants' very recent acknowledgment that they have only a very limited supply of sodium thiopental on hand is particularly relevant, as it appears that there is an insufficient quantity of the drug available to permit the pre-execution training and mixing described in the regulations.

be resolved first, it is virtually impossible for the Court to assess other than in a very preliminary way prior to Brown's scheduled execution date whether Brown can or will be able to make such a showing. Based solely on that very preliminary assessment, it appears that Brown has raised substantial questions of fact as to whether at least some of the deficiencies of O.P. 770 have been addressed *in actual practice*. Given what is at stake, this Court greatly appreciates the direction of the Court of Appeals that "[t]iming is everything and the district court should take the time necessary to address the State's newly revised protocol in accord with Supreme Court authority." (Doc. No. 420 at 2.) Given an execution date of September 30, 2010, the Court simply cannot comply fully with that directive in time to render a reasoned decision and permit adequate appellate review.

B. *Nelson v. Campbell*

In *Nelson*, the Supreme Court held that "[g]iven the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." 541 U.S. at 650 (internal citations omitted). In this case, as discussed in the Court's order of September 24, 2010, there is no indication, and Defendants did not contend in their opposition to the motions, that Brown's motions were untimely. To the contrary, as this Court found and as the Court of Appeals appears to agree, the equitable presumption appears to cut strongly the other way.

Regardless of whether Defendants' counsel ever expressly represented that they would defer seeking new execution dates until the *Morales* litigation could be concluded, that was Brown's—as well as the Court's—understanding, and it is clear that the urgency of the present situation was created not by Brown but by Defendants' decision to seek an execution date only thirty days after the new regulations became final. Moreover, because the injunction issued by the Marin Superior Court was not vacated until September 20, 2010, it was not apparent that there was anything for this Court to consider until that date.[6] The hearing on Brown's motions to

[6] Apparently, the state-court injunction technically will not be vacated until at least September

1 intervene and to stay his execution heard by this Court on September 21, 2010, actually were
2 appended to a status conference that the Court scheduled *sua sponte* because it was concerned
3 that the developments in the state courts might put it in exactly the position in which it finds
4 itself now. As the Court of Appeals observed, the fact that "[t]he timing of Brown's execution
5 date is apparently dictated in part by the fact that the state's existing inventory of sodium
6 thiopental consists of 7.5 grams, with an expiration date of October 1, 2010," (Doc. No. 420 at 2
7 (internal quotation marks omitted))—a fact that Defendants did not disclose to this
8 Court—hardly is a reason to forego a proper examination of the merits of Brown's claims.
9 As noted above, the Court indicated more than three years ago that it wished to proceed
10 expeditiously with such an examination; it has yet to do so only because the parties asked it to
11 wait because of state-court litigation over which it had no control. In other words, much of the
12 review the Court needs to undertake would have been completed by now but for Defendants'
13 own requests. The Court fully intends to undertake that review now, and to do so as quickly as is
14 reasonably possible. The fact that Defendants do not intend to schedule any future executions
15 until at least the first quarter of 2011 (and indeed they cannot because of the unavailability of
16 sodium thiopental) means that such a time line will have minimal effect on Defendants' long-
17 term interests.
18 **C. Additional Observations**
19 Like the Court of Appeals, this Court will emphasize once again that this case does not
20 involve Brown's guilt, the truly heinous acts Brown committed that resulted in his death
21 sentence, or the wisdom of the death penalty. Particularly in light of the guidance provided by
22 the remand order, the only issue at present is whether *Baze* requires that Brown's execution
23 proceed or whether it permits the Court to complete the review of California's lethal-injection
24 procedures that it began (but because of intervening events was not permitted to complete) more
25 than four years ago.
26 In offering Brown the option to request that only sodium thiopental be used in his
27

28 30, 2010, a fact that has prompted the Governor to grant Brown a reprieve until that date.

execution, the Court was seeking a way to reconcile California's "significant interest in enforcing its criminal judgments," *Nelson*, 541 U.S. at 650, with Brown's constitutional right to an execution method that does not expose him to a "demonstrated risk of severe pain."[7] *Baze*, 553 U.S. at 61 (plurality op.). While some understandably find offensive the notion that a condemned inmate may elect a method of execution, such elections are expressly permitted by law in at least thirteen states, including California. However, because the particular election at issue here should not have been presented to Brown unilaterally, the Court recognizes that its effort in this instance was ill-advised and that it should have granted Brown's motion for reconsideration on that basis.

III. DISPOSITION

Pursuant to the direction of the Court of Appeals, in accordance with the foregoing discussion, and good cause therefor appearing, Brown's motion for a stay of execution is granted. Accordingly, all proceedings related to the execution of Petitioner's sentence of death, including but not limited to preparations for an execution and the setting of an execution date, are hereby stayed. This stay will remain in effect unless and until it is dissolved by this Court, the United States Court of Appeals for the Ninth Circuit, or the Supreme Court of the United States.

IT IS SO ORDERED.

DATED: September 28, 2010

JEREMY FOGEL
United States District Judge

[7] As detailed in many of the Court's prior orders, sodium thiopental is painless and, in the amounts at issue here, virtually always fatal. One of Brown's principal criticisms of the new regulations in the state-court litigation is that Defendants did not give adequate consideration to the use of a single-drug alternative. *Sims v. Cal. Dep't of Corr. & Rehab.*, No CIV 1004019 (Cal. Super. Ct. Marin Cnty. compl. filed Aug. 2, 2010).

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 action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024. On May 22, 2012, I served the following document described as MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF MANDATE; SUPPORTING DECLARATION OF SARA J. EISENBERG; PROPOSED ORDER by placing it in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery on the next business day, May 23, 2012, on the interested parties in this action addressed as follows:

Hon. Pete Wilson
355 S. Grand Avenue, 45th Floor
Los Angeles, California 90071

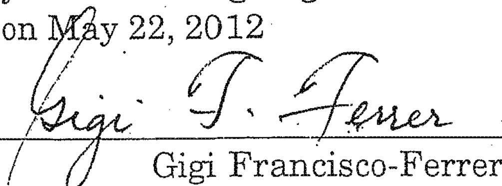
Kent S. Scheidegger
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816

Attorneys for Petitioner Bradley S. Winchell

Jay M. Goldman
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004

Atrorneys for Respondents Matthew Cate and
California Department of Corrections and Rehabiltation

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 22, 2012



Gigi Francisco-Ferrer

31614630 92166/001

No. ________________

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,

Petitioner,

vs.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondents,

MICHAEL ANGELO MORALES,

Real Party in Interest.

PETITION FOR WRIT OF MANDATE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

HON. PETE WILSON
State Bar No. 35742
355 S. Grand Ave., 45th Floor
Los Angeles, CA 90071
(213) 680-6777

HON. GEORGE DEUKMEJIAN
State Bar No. 26966
KENT S. SCHEIDEGGER*
State Bar No. 105178
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
(916) 446-0345
(916) 446-1194

Attorneys for Petitioner

*Counsel of Record

State of California
Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption:
Bradley S. Winchell
v.
Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, and California Department of Corrections and Rehabilitation

Court of Appeal Case Number: C0 ____________

Please check here if applicable:

☐ There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1. Michael Angelo Morales	Defendant in related criminal case
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information, if necessary.

Kent S. Scheidegger
Signature of Attorney or ~~Un~~represented Party

Date: April 19, 2012

Printed Name: Kent S. Scheidegger
State Bar No: 105178
Firm Name & Address: Criminal Justice Legal Foundation
2131 L Street, Sacramento, CA 95816

Party Represented: Bradley S. Winchell

ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

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INTRODUCTION

This original proceeding presents an issue of great importance to the people of California, warranting this court's prompt intervention to correct an obstruction of justice. The enforcement of the death penalty for the worst murderers, a penalty authorized directly by the people multiple times, has been obstructed for six years now.

There are now 14 murderers whose sentences have been fully reviewed and who are ready for execution, more than have been executed in California since the restoration of capital punishment in the state. Yet the execution of these judgments has been blocked by litigation over lethal injection. While other states have moved forward and resumed enforcement of their capital punishment laws, California remains mired in litigation.

This delay and denial of justice is entirely unnecessary. As shown in the attached Memorandum of Points and Authorities, the California Department of Corrections and Rehabilitation has ample authority to resume executions promptly. The failure of that Department and its Secretary, the Respondents in this action, is an abuse of discretion, an obstruction of the law, and a violation of the constitutional rights of the victims' families.

This case is appropriate for original proceedings because it presents a question of pure law with no disputable issues of fact. Proceedings in the Superior Court followed by an appeal to this court would be redundant and a waste of scarce judicial resources. Such a redundant proceeding would cause further delay, and delay is the very harm sought to be remedied.

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF

PARTIES

1. Petitioner Bradley S. Winchell is the brother of Terri Winchell, who was murdered on January 8, 1981, near Lodi in San Joaquin County. As a sibling of a deceased crime victim, he is a victim of this crime within the meaning of article I, section 28, subdivision (e) of the California Constitution.

2. Respondent Matthew Cate is the Secretary of Respondent California Department of Corrections and Rehabilitation (CDCR). CDCR has the duty to execute sentences of death.

3. Real Party in Interest Michael Angelo Morales was convicted of the murder in the first degree of Terri Winchell with special circumstances of torture and lying in wait. He was also convicted of forcible rape and conspiracy to commit murder. He was sentenced to death on June 14, 1983.

AUTHENTICITY OF DOCUMENTS

4. All of the exhibits in the Appendix are true and correct copies. Exhibits A, B, D, E, and F are copies of documents filed in the Federal District Court case originally titled *Morales v. Hickman* and now titled *Morales v. Cate*, No. C 06-219, downloaded from the federal court PACER system. Exhibit C is excerpts from Operational Procedure 770 (2007) ("OP 770") downloaded from Respondent CDCR's internet site. Exhibit G is a letter from counsel for Petitioners to Respondent Cate. Exhibit H is the judgment of the Superior Court for Marin County in the case of *Sims v. Department of Corrections and Rehabilitation*, No. Civ. 1004019.

FACTUAL ALLEGATIONS

5. Direct and collateral review of the judgment delayed the execution of Morales for 23 years. Direct appeal took six years. (See *People v. Morales* (1989) 48 Cal.3d 527, cert. den. *sub nom. Morales v. California* (1989) 493 U.S. 984.) State habeas review took another four years. The first federal habeas petition was not concluded for another twelve years. (See *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, cert. den. *sub. nom. Morales v. Brown* (2005) 546 U.S. 935.) Morales applied for executive clemency, which Governor Schwarzenegger denied. The trial court set an execution date of February 21, 2006, and state and federal courts denied successive petitions. (See *In re Morales* (Cal. Feb. 15, 2006, S141074); *Morales v. Ornoski* (9th Cir. 2006) 439 F.3d 529, cert. den. *sub. nom. Morales v. Hickman* (2006) 546 U.S. 1163; *In re Morales* (2006) 546 U.S. 1163.)[1]

6. After direct and collateral review of the judgment was completed, Morales began the lethal injection litigation. It is necessary to describe this litigation in some detail. Morales filed suit in the United States District Court for the Northern District of California, Nos. C 06-219 and C 06-926, against Respondent Cate's predecessor and the Warden of San Quentin, claiming that the injection protocol then in use was unconstitutional due to an undue risk of excessive pain. (Documents in this litigation, other than published opinions, are cited below by their document number in the C 06-219 docket as *Morales* USDC [Date] Doc. [__].) He moved for a

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1. A case chronology through January 2006 is available in Attorney General Office of Victim Services, *People v. Michael Angelo Morales*, Background Information (Feb. 2006) pp. 30-32 <http://ag.ca.gov/ victimservices/pdf/ aamorales_presspack.pdf> [as of Apr. 12, 2012].

preliminary injunction. On February 14, 2006, the court conditionally denied the injunction on condition that the defendants either (1) change to a single-drug, barbiturate-only method in lieu of the three-drug method used in prior executions or (2) have persons qualified in anesthesia confirm unconsciousness before administration of the second and third drugs. A true copy of the court's order is attached as Exhibit A. The Ninth Circuit affirmed. (See *Morales v. Hickman* (2006) 438 F.3d 926.)

7. Petitioner and other members of the family traveled to San Quentin for the scheduled execution on February 21, 2006. In an order that day, the Federal District Court found, "as the execution was about to commence, the two anesthesiologists designated by Defendants pursuant to this Court's remedial order of February 16, 2006, declined to participate in Plaintiff's execution because of ethical concerns arising from their understanding of certain language in the opinion of the United States Court of Appeals for the Ninth Circuit that affirmed this Court's orders . . . ." (Order on Defendant's Motion to Proceed with Execution under Alternative Condition to Order Denying Preliminary Injunction, *Morales* USDC (Feb. 21, 2006) Doc. 78, at p. 2.) A true copy of this order is attached as Exhibit B. The court held, "Defendants may proceed with the execution this evening using only sodium thiopental, they may do so only if the sodium 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," (*id.* at p. 3) as distinguished from having the injection done remotely by someone outside the chamber. (See *ibid.*) In a later opinion, the district court noted, "Defendants were unwilling or unable to execute Plaintiff in accordance with these requirements, and a stay of execution to permit an evidentiary hearing issued automatically pursuant to the Court's

order of February 14." (*Morales v. Tilton* (N.D.Cal. 2006) 465 F.Supp.2d 972, 977.)

8. On April 5, 2006, Morales and Mitchell Sims, another murderer sentenced to death, filed suit against Respondent CDCR and its Acting Secretary in Marin County Superior Court, claiming that CDCR's protocol violates the Administrative Procedure Act (APA). (Docket, *Morales v. CDCR*, Marin Sup. Ct. No. Civ. 061436; *Morales v. CDCR* (2008) 168 Cal.App.4th 729, 732.)

9. On December 15, 2006, the federal court issued a memorandum of intended decision, holding, "Defendants' implementation of lethal injection is broken, but it can be fixed." (*Morales v. Tilton*, *supra*, 465 F.Supp.2d at p. 974.) The court further held that "the constitutional issues presented by this case stem solely from the effects of pancuronium bromide and potassium chloride," the second and third drugs of the three-drug protocol, and that "execution accomplished solely by an anesthetic, such as sodium pentobarbital, would eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic." (*Id.* at p. 983, fn. omitted.)

10. On May 15, 2007, in response to this order, CDCR amended the protocol, OP 770. (See *Morales v. CDCR*, *supra*, 168 Cal.App.4th at p. 732 & fn. 2.) A true copy of the pertinent pages of this protocol is attached as Exhibit C.[2] Despite the federal court's indication that a single-drug method would "eliminate any constitutional concerns," CDCR adhered to the three-drug method. Among the changes adopted to address the federal court's

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2. The full 94-page document is available at <www.cjlf.org/files/OP770 rev070515.pdf>.

concerns with implementation of the three-drug method, the revised protocol included a section on selection of team members, which might include bringing in personnel from other prisons. (See Exhibit C at p. 6.)

11. In the Marin APA litigation, "[t]he trial court agreed [with the plaintiff inmates], granted [their] summary judgment motion and enjoined appellants from carrying out the lethal injection of any condemned inmates under OP 770 unless and until that protocol is promulgated in compliance with the APA." (*Morales v. CDCR*, *supra*, 168 Cal.App.4th at p. 732.) The Court of Appeal affirmed on November 21, 2008. It found that OP 770 was a rule of general application, subject to the APA unless qualifying for an exception, expressly disagreeing with a Fourth District Court of Appeal decision, *In re Garcia* (1998) 67 Cal.App.4th 841. (*Morales v. CDCR*, *supra*, at pp. 737-738.) The court further held that OP 770 did not qualify for CDCR's special APA exception for regulations affecting a single prison because of the provisions added in the May 15, 2007 revision regarding drawing execution team members from other prisons. (*Id.* at pp. 739-740.) The opinion says nothing about the propriety of the injunctive relief granted by the Superior Court. It shows no awareness of the mandate of *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577 that invalidity of the regulation under APA must not be allowed to block enforcement of the underlying statute, even though that case is cited for other points.

12. CDCR began the process of promulgating the execution protocol as a regulation through APA. It did not undertake *any* of the several available alternatives, any of which might have been taken in parallel with the regulatory action, to restart executions while that process was going on. Specifically, CDCR did not take any of the following actions:

a. Seek Supreme Court review of the Court of Appeal decision in light of its express disagreement with *In re Garcia* and its cramped interpretation of the single-prison exception, Penal Code section 5058, subdivision (c)(1).

b. Ask for relief from the injunction to continue enforcing the underlying law as mandated by *Tidewater*, *supra*.

c. Promulgate protocols for specific, named inmates, exempt from the APA under Government Code section 11340.9, subdivision (i).

d. Separate the protocol into one devoted entirely to activities conducted within the walls of San Quentin, exempt under the single-prison exception, and one devoted entirely to internal management matters, including selection of the team, exempt under Government Code section 11340.9, subdivision (d).

e. Invoke the "operational needs" exception of Penal Code section 5058.3, subdivision (a)(2) to promulgate the execution protocol on a temporary basis.

13. The administrative portion of the APA regulation process took over a year, beginning with a notice published by CDCR on April 16, 2009, and culminating in final approval by the Office of Administrative Law on July 30, 2010, OAL File No. 2010-0706-02 SR. The protocol is codified in Cal. Code Regs., tit. 15, §§ 3349-3349.4.6. The regulation continues the three-drug method. (*Id.*, § 3349.4.3.)

14. While California's administrative proceedings were pending, the States of Ohio and Washington adopted the one-drug method, resulting in challenges to their prior three-drug methods being dismissed as moot. (See *Cooey v. Strickland* (6th Cir. 2009) 588 F.3d 921, 923; *Brown v. Vail* (2010) 169 Wn.2d 318, ¶¶ 2-3, 237 P.3d 263.) Ohio subsequently completed 14 executions in less than 2 years, from December 8, 2009, to November 15,

2011. (Ohio Department of Rehabilitation and Correction, Ohio Executions—1999 to Present, <http://www.drc.ohio.gov/web/Executed/executed25.htm>, updated Nov. 15, 2011 [as of Feb. 16, 2012].) Arizona recently revised its procedure to allow either the three-drug or one-drug method, and it used the one-drug method in its most recent execution. (See *Towery v. Brewer* (9th Cir. Feb. 28, 2012, No. 12-15381) at pp. 7, 13-14, cert. den. *sub nom. Moormann v. Brewer* (2012) 182 L.Ed.2d 250.)[3]

15. Mitchell Sims filed a new APA action in Marin County challenging the new regulation. In addition, the Marin County Superior Court issued an order that its prior injunction was still in effect. The Superior Court for Riverside County set an execution date of September 29, 2010, for Albert Greenwood Brown. The Court of Appeal for the First District issued a writ directing the Marin Superior Court to vacate its order on the ground that the validity of the new regulations must be resolved in the new action challenging them, not the prior action challenging the old protocol no longer in effect. (*CDCR v. Superior Court* (*Morales*) (Sept. 20, 2010, A129540).)

16. Brown sought to intervene in the federal case. Judge Fogel once again attempted to move CDCR to use a single-drug method and asked CDCR what changes would be needed and how much time would be needed. CDCR filed a written response, a true copy of which is attached as Exhibit D. The changes are minor, involving an increase in dosage in sodium thiopental and elimination of the second and third drugs. The only time requirement noted is three days for the pre-execution training.

17. As with the previous Morales execution, the federal court issued a conditional denial of stay, permitting the execution to go forward only if

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3. Available at <http://www.ca9.uscourts.gov/datastore/opinions/2012/02/28/12- 15381_Towery_op.pdf>.

performed "by the injection of sodium thiopental only." A true copy of this order is attached as Exhibit E. To get around the problem of requiring a deviation from the promulgated regulation, the court shaped this order in the form of requiring Brown to make an election for this method. (See Exhibit E at pp. 9-10.) The Court of Appeals for the Ninth Circuit held that this forced election was improper and remanded. (*Morales v. Cate* (9th Cir. 2010) 623 F.3d 828, 831.) The district court stayed Brown's execution. (Order Following Remand, *Morales* USDC (Sept. 28, 2010) Doc. 424.)

18. On October 8, 2010, Morales filed in the federal action a Fourth Amended Complaint, Document 428, alleging on page 48 that "proffered alternatives," including the one-drug method, "are feasible, readily implemented and they significantly reduce the substantial risk of severe pain."

19. On February 14, 2011, Respondents filed in the federal court a Notice of Motion and Motion for a Protective Order regarding discovery matters. A true copy of this motion is attached as Exhibit F. On page 1 in footnote 1, "Defendants
[Respondents in the present action] *admit that a one-drug method is feasible, and readily available if regulations allowing for this method are adopted pursuant to California law*." (Italics added.)

20. In February or March 2011, the new warden of San Quentin decided to reconstitute the execution team. (Transcript of Proceedings, *Morales* USDC (Apr. 29, 2011) Doc. 520, at p. 7.)

21. In May 2011, counsel for Petitioner wrote to Respondent Cate, informing him that CDCR's delay in this matter was a violation of Petitioner's constitutional rights and requesting that CDCR (1) adopt the one-drug method and (2) invoke an exception to the APA so that executions

might resume once the new execution team was assembled. A true copy of this letter is attached as Exhibit G. Respondents have not taken either of these actions.

22. On November 2, 2011, the parties in the federal litigation filed a Joint Proposed Schedule for Completing Discovery, Document 530. That document noted that the execution team had been selected (*id.* at p. 2) and scheduled discovery extending until August 15, 2012. (*Id.* at p. 5.)

23. On February 21, 2011, the Marin Superior Court issued a final judgment granting in part the plaintiffs' motion for summary judgment, holding that the execution protocol regulations had not been issued in accordance with the APA and enjoining executions by lethal injection until new regulations are promulgated in compliance with the APA. A true copy of this judgment is attached as Exhibit H.

24. Petitioner's right to "a prompt and final conclusion" under article I, section 28, subdivision (b)(9) of the California Constitution has been violated and continues to be violated by litigation delays that Respondents have the ability to bring to an immediate end.

RELIEF REQUESTED

For the reasons stated above and in the attached memorandum, Petitioner asks this court to:

1. Issue an alternative writ of mandate directing Respondents to either (1) prepare, file with the Court, and serve on Petitioner and Real Party in Interest an execution protocol that (i) is specifically for the execution of Michael Angelo Morales, (ii) specifies a one-drug method using a barbiturate only and not pancuronium bromide or potassium chloride, and (iii) is limited to those operations performed within San Quentin Prison, or (2) show cause

before this Court, at a specified time and place, why it has not done so and why a peremptory writ should not issue,

2. Award Petitioner his costs, including reasonable attorney's fees, and

3. Grant Petitioner such other and further relief as may be appropriate and just.

VERIFICATION

I am the Petitioner in this action. All facts alleged in the above document, except those which are matters of record, are true of my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 19, 2012 at Sacramento, California.

BRADLEY S. WINCHELL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case of long-overdue justice for a crime of exceptional treachery and brutality. Terri Winchell was just 17 years old on January 8, 1981, when she rode in the front passenger seat of a car with people she thought were friends. Unknown to her, the person in the rear seat, Michael Angelo Morales, was planning to strangle her from behind with a belt. The motive was jealousy. Unknown to Terri, Morales's cousin Rick Ortega, the driver of the car, had a relationship with a boy Terri was dating and was extremely jealous of her. (See Attorney General Office of Victim Services, *People v. Michael Angelo Morales*, Background Information (Feb. 2006) p. 5 <http://ag.ca.gov/victimservices/pdf/aamorales_presspack.pdf> [as of April 12, 2012].)

> "The day of the murder, Ortega tricked Terri into accompanying him and Morales in Ortega's car to a remote area near Lodi, California. There, Morales attacked Terri from behind and attempted to strangle her with his belt. Terri struggled and the belt broke in two. Morales then took out a hammer and began hitting Terri in the head with it. She screamed for Ortega to help and attempted to fight off the attack, ripping her own hair out of her scalp in the struggle. Morales beat Terri into unconsciousness, crushing her skull and leaving 23 identifiable wounds in her skull.
>
> "Morales took Terri from the car and instructed Ortega to leave and come back later. Ortega left and Morales then dragged Terri face-down across the road and into a vineyard. Morales then raped her while she lay unconscious. Morales then started to leave, but went back and stabbed Terri four times in the chest to make sure she died. Morales then left Terri, calling her 'a fucking bitch,' as he walked away. Terri died from both the head and chest wounds. Her body was left in the vineyard naked from the waist down, with her sweater and bra pulled up over her breasts." (*Ibid.*)

The importance of this case goes well beyond this horrific crime, however. Justice in the worst criminal cases is obstructed in California. Justice is not obstructed by any necessity, but only by litigation which has dragged on for years in California while executions have resumed in other states following the United States Supreme Court's decision in *Baze v. Rees* (2008) 553 U.S. 35. The exceptional importance of the case warrants the exercise of this court's original jurisdiction. Beginning this case in the superior court would serve no purpose, as there are no material issues of fact subject to dispute.

Petitioner's standing to bring this action is unequivocally conferred by article I, section 28, subdivision (c)(1) of the California Constitution.

Mandamus is a proper remedy when an administrative agency has abused its discretion. The governing statute prescribes lethal injection and directs the California Department of Corrections and Rehabilitation (CDCR) to adopt standards, so the specifics would normally be within the agency's discretion. However, a federal district court has enjoined CDCR from using the three-drug method while giving the go-ahead for executions with the alternative one-drug method. Where one choice enables an agency to enforce the law and the other leads to obstruction of the law in violation of people's rights, it is an abuse of discretion to choose the latter.

Litigation under the Administrative Procedure Act (APA) has blocked enforcement of the law only because CDCR has allowed it to do so. This blockage is contrary to California Supreme Court precedent, which holds that APA litigation must not block enforcement of the underlying statute in individual cases. CDCR has at least three exceptions to the APA available which would enable it to adopt the single-drug method and proceed with the execution of Morales: the named individual exception, the single-prison

exception, and the operational needs exception. CDCR's failure to use these available exceptions is an abuse of discretion.

As a sibling of a homicide victim, Petitioner has a constitutional right to "a prompt and final conclusion of the case and any related post-judgment proceedings," including execution of the judgment. That right is being violated for no valid reason. Under the same section, Petitioner has a right to a judicial remedy.

ARGUMENT

I. This case presents an issue of great public importance with no disputed issues of material fact, appropriate for original proceedings.

Original jurisdiction in mandamus proceedings is vested in the Supreme Court, the Courts of Appeal, and the Superior Courts. (Cal. Const., art. VI, § 10.)

> "Because such a petition can also be filed in the superior court, however, a party who chose to seek relief from this court in the first instance would have to 'explain why the reviewing court should issue the writ as an original matter.' (Cal. Rules of Court, rule 8.486(a)(1).) 'In form, this is a rule of pleading; in effect, however, it expresses the policy of the Supreme Court and Courts of Appeal to refuse to exercise their original jurisdiction in the first instance, unless the circumstances are exceptional.' (8 Witkin, Cal. Procedure [5th ed. 2008] Extraordinary Writs, § 144, p. 1040.)" (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 845.)

This policy may not be applicable in the present case. Article I, section 28, subdivision (c)(1) of the California Constitution provides for enforcement of victims' rights "in any trial or appellate court *as a matter of right*." (Italics added.) However, it would not be necessary to decide in the present case whether this provision overrides the usual rule on mandamus

relief if the court issues an alternative writ on the ground that the standard criteria for original jurisdiction are met, and they are.

The principal reason for the policy of generally requiring parties to go to the Superior Court first is that "[t]he superior courts . . . are in a much better position to determine questions of fact than are the appellate tribunals." (*Roma Macaroni Factory v. Giambastiani* (1933) 219 Cal. 435, 437.) For example, in *Mexican-American Political Assn. v. Brown* (1973) 8 Cal.3d 733, 734, the Supreme Court discharged an alternative writ, indicating the parties should proceed in superior court, for a determination of the factual question of whether being listed first on the ballot was a substantial advantage for a candidate. The court determined, over a dissent, that this was a question of fact reasonably subject to dispute and not properly the subject of judicial notice.

The present case, in contrast, involves no facts subject to dispute. The relative merits of the three-drug versus one-drug methods of execution by lethal injection are not at issue. The first material fact for this case is that the federal district court has enjoined the Respondents from proceeding with executions using the three-drug method while also ruling that the Respondents can proceed using the one-drug method. This fact is not subject to dispute and is a proper subject of judicial notice. The second material fact is that the one-drug method is feasible and available. Both Respondents and Real Party in Interest have said so in their pleadings in the federal district court, so this fact is undisputed. The third material fact is that the execution of Morales has been delayed by the lethal injection litigation for six years after completion of the direct and collateral reviews of the judgment and continues to be delayed by that litigation. This fact is a matter of record, a proper subject for judicial notice, and not disputable.

All of the disputable issues in this case, discussed in the subsequent parts of this memorandum, are questions of law. These issues, including the critical issue of whether the Respondents have abused their discretion, would be reviewed de novo in this court on appeal from a decision of the superior court. "The trial court's determination of abuse or nonabuse of discretion by the administrative agency is of no concern to the appellate court. The appellate court gives no deference to the trial court's determination. It makes its own determination, de novo." (See *Cummings v. Civil Service Com.* (1995) 40 Cal.App.4th 1643, 1652; see also *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 586.) With no facts to be found and no deference to be given to any ruling on the dispositive legal issues, nothing but delay would be achieved by going to the superior court first. The principal reason *against* accepting original jurisdiction does not apply to this case.

The principal reason *for* accepting original jurisdiction, public interest, applies in spades. "It is uniformly agreed that the issues are of great public importance and should be resolved promptly. Accordingly, under well settled principles, it is appropriate that we exercise our original jurisdiction. [Citations.]" (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241; accord *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340.) Few issues are of greater public importance than the enforcement of the laws against violent crime and the rights of the victims of those crimes, which were the subjects of *Brosnahan* and *Raven*. The California Constitution expressly provides that the rights invoked in this case "are a subject of grave statewide concern" and "a matter of high public importance." (Cal. Const., art. I, § 28, subds. (a)(1) & (2).) Within the field of criminal law, the enforcement of the death penalty has a unique importance. This penalty is reserved for the very worst crimes.

Capital cases are so important that the Constitution expressly authorizes the punishment and provides for appeals to be taken directly to the Supreme Court. (Cal. Const., art. I, § 27; Cal. Const., art. VI, § 11, subd. (a).)

Yet despite the strong public interest, the large resources devoted to enforcement of capital punishment, and the repeated endorsement by the people, execution of judgment remains blocked by wasteful and unnecessary litigation which Respondents could bring to an immediate end. The public interest therefore warrants the exercise of this court's original jurisdiction in this matter.

II. The requirements of standing and jurisdiction are satisfied.

A. Standing.

The general rule of standing in a case such as this one is stated in *Newland v. Kizer* (1989) 209 Cal.App.3d 647, 653. "Where, as here, the question in a mandate proceeding is one of public right and the object is to procure enforcement of a public duty, a plaintiff need not show any legal or special interest in the result. Instead, it is sufficient the plaintiff is interested as a citizen in having the laws executed and the public duty enforced." This general principle would be sufficient, as Petitioner has an interest, shared with all Californians, of seeing the law against murder enforced.

Aside from that general interest, however, Petitioner has standing as an immediate family member of a murder victim. In November 2008, the people of California eliminated any doubt on this point by amendment to the California Constitution. "A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court

shall act promptly on such a request." (Cal. Const., art. I, § 28, subd. (c)(1).) A "victim" for the purpose of section 28, includes, among others, siblings of the person harmed. (Cal. Const., art. I, § 28, subd. (e).)

B. Jurisdiction.

This Court has jurisdiction in mandate proceedings, concurrently with the Supreme Court and the Superior Court. (Cal. Const., art. VI, § 10; Code Civ. Proc., § 1085, subd. (a).)

III. Respondents' decision to continue litigating the enjoined three-drug method for years rather than use the immediately available, federal-court-approved, one-drug method is an abuse of discretion and a violation of victims' rights.

"Traditional mandamus will, of course, not lie to compel a particular method of exercising discretion . . . . However, mandamus will lie to correct an abuse of discretion or the actions of an administrative agency which exceed the agency's legal powers." (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 561-562.) Section 3604, subdivision (a) of the Penal Code directs Respondent CDCR to establish standards for lethal injection, and Petitioner does not dispute that this statute implies considerable discretion in that regard. However, when the choice made in the exercise of discretion runs contrary to law and results in violations of people's rights, the choice is an abuse of discretion and mandamus relief is appropriate.

In *Saleeby*, *supra*, the State Bar had adopted rules for disbursement from the Client Security Fund that denied an applicant his right to due process of law. (See *Saleeby*, *supra*, 39 Cal.3d at p. 565-566.) The Court held that mandamus was appropriate to order the Bar to reformulate its rules to meet due process standards. (See *id*. at p. 575.) In *Ridgecrest Charter Schools v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986,

1000-1001, mandamus relief was appropriate because the school district had exercised its discretion in a manner contrary to the purpose of the controlling statute "to equalize the treatment of charter and district-run schools with respect to the allocation of space between them."

California law provides in several places for the expeditious execution of sentences of death. The most explicit is subdivision (a) of section 190.6 of the Penal Code: "The Legislature finds that the sentence in all capital cases should be imposed expeditiously." The procedures for setting and resetting execution dates also indicate a legislative intent of promptness. Section 1227 of the Penal Code permits only a narrow window of 30 to 60 days from the order setting a date. It expressly forbids appeal from the order. Section 3700 of the Penal Code sharply limits authority to suspend executions.

Proposition 9 of 2008, the Victims' Bill of Rights Act of 2008: Marsy's Law, establishes promptness as a right of the victims of crime, or in the case of homicide victims as a right of the family. Section 2, paragraph 1 lists rights of crime victims, including "above all, the right to an expeditious and just punishment of the criminal wrongdoer." (See Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 10.) Section 4.1 amends section 28 of article I of the California Constitution, providing among the enumerated rights in subdivision (b)(9) a right to "a prompt and final conclusion of the case and any related post-judgment proceedings." (See *id*. at p. 129.) The setting of the date and the execution are related post-judgment proceedings.

While an administrative agency has discretion, it does not have discretion to defeat the purpose of the law. Obviously, CDCR could not establish a protocol of injection of potassium chloride with no anesthetic, a method that would be clearly unconstitutional (see *Baze v. Rees* (2008) 553

U.S. 35, 53 (plur. opn. of Roberts, C.J.)) and would be promptly and permanently enjoined. Establishing such a protocol and refusing to change it would effectively create a permanent moratorium on enforcement of the death penalty.

CDCR's three-drug protocol is similar to or better than the Kentucky protocol upheld in *Baze*. (See *Baze v. Rees*, *supra*, 553 U.S. at pp. 119-121 (dis. opn. of Ginsburg, J.) (favorably comparing California's protocol, among others, with Kentucky's); see also *Dickens v. Brewer* (9th Cir. 2011) 631 F.3d 1139, 1141 (upholding Arizona's three-drug protocol).) A decision to fight rather than switch would have been within the agency's discretion if the fight could have been resolved within a reasonable time, but it has not, and CDCR has now stipulated in federal court to yet more extended delays. (See Factual Allegations ¶ 22.)

In practice, CDCR's stubborn adherence to the three-drug protocol has resulted in a six-year moratorium on executions, when combined with its mishandling of the APA issues discussed in the next part, and that moratorium could stretch into eight years if decisive action is not taken. From the time of the federal court's first ruling six years ago, it has been clear that CDCR could execute the judgment in Morales's case by adopting the single-drug method. That court has three times conditionally denied stays of execution, with the single-drug method being the condition. (See Factual Allegations ¶¶ 6, 7 & 17; Exhibit B at p. 3; Exhibit E at pp. 10-11.) Although from 2006 to 2008 there was an issue that the single-drug method was untested, in the sense of not having been used by any jurisdiction for executions (see *Baze v. Rees*, *supra*, 553 U.S. at p. 53), that objection was eliminated when Ohio adopted and used the single-drug method in 2009.

(See *Cooey v. Strickland* (6th Cir. 2009) 588 F.3d 921, 922-924; Factual Allegations ¶ 14.)

Prompt execution of the death penalty is a requirement of California law. Where one path leads to enforcement of the law and the other leads to a roadblock in violation of people's rights under the law, an agency's choice of the latter is an abuse of discretion. A writ of mandate should issue directing CDCR to choose the presently available method, at least as to those cases that have completed the review process and are ready for execution.

IV. Allowing Administrative Procedure Act litigation to block enforcement of the underlying law is contrary to California law and an abuse of discretion.

A. The APA and Enforcement of the Law.

The central purpose of the Administrative Procedure Act (Gov. Code, §§ 11340 et seq.) ("APA") is "to reduce the unnecessary regulatory burden on private individuals and entities . . . ." (§ 11340.1, subd. (a).) It is definitely not the purpose of the APA to block the enforcement of laws enacted by the Legislature or by the people, and such obstruction is not a permissible use of the APA. The Supreme Court made this very clear in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 ("*Tidewater*").

Tidewater involved wage orders issued by the Industrial Welfare Commission pursuant to certain provisions of the Labor Code and the interpretation and enforcement of those orders by the Division of Labor Standards Enforcement (DLSE). (See *Tidewater*, *supra*, 14 Cal.4th at p. 561.) After resolving a federal preemption issue, the Supreme Court asked whether DLSE's enforcement policy was void for failure to follow the APA. (See *id.* at p. 568.) The Court noted but rejected an argument submitted by

an amicus curiae that interpretive regulations, as distinguished from quasi-legislative regulations, were not subject to the full APA process. (See *id.* at pp. 574-575.) The court "conclude[d] that DLSE's policy for determining whether to apply IWC wage orders to maritime employees constitutes a regulation and is void for failure to comply with the APA." (*Id.* at p. 576.)

However, the court emphatically rejected the proposition that this meant the wage orders did not apply.

> "If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA, then *we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.* Here, for example, if Tidewater and Zapata violate applicable IWC wage orders, they should not be immune from suit simply because the DLSE adopted an invalid policy. The DLSE's policy may be void, but the underlying wage orders are *not* void. Courts must enforce those wage orders just as they would if the DLSE had never adopted its policy." (*Tidewater*, *supra*, 14 Cal.4th at p. 577, italics added in part.)

APA litigation must not be allowed to frustrate the controlling law as set forth in the statutes (or, in *Tidewater*, in orders validly issued under statutes). Nowhere in the findings and purposes of the APA is there any indication that such a result was intended or should be allowed. (See Gov. Code §§ 11340 (findings), 11340.1 (intent); *Tidewater*, *supra*, 14 Cal.4th at p. 568-569.) The APA is about reducing regulatory burden, giving people notice of what they must do, and allowing people to have input into regulations that affect them. It is not about relieving anyone of obligations he otherwise has under the law or denying anyone rights he otherwise has under the law. The *Tidewater* court went on to hold that the agency

interpretation was correct, so the result of the individual case was the same as if the regulation had been valid. (See *id.* at pp. 577-579.)

The Supreme Court's most recent APA case applied the same principle. In *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324 ("*Morning Star*"), the Department of Toxic Substance Control had an extremely broad rule for deciding what companies are involved with hazardous materials and thus subject to a statutory fee. The Court held this was an underground regulation, invalid under the APA. (See *id.* at pp. 332-340.) That did not mean Morning Star automatically got its money back. The Court further decided it was not in a position to decide the "hazardous materials" question itself. "Instead, we direct the Board [of Equalization] to conduct further administrative proceedings on Morning Star's refund request, without reliance upon the Department's invalid regulation." (*Id.* at p. 341.) As in *Tidewater*, the individual case goes forward without a regulation, decided on its merits under the statute.

As to the request for injunctive relief, the court permitted collection of the fees to continue, due to the critical importance of the program, until the department complied with the APA. The length of this authorization was left to the superior court on remand. (See *Morning Star*, *supra*, 38 Cal.4th at p. 342.) *Morning Star* thus indicates that an important government function should not be held up while an agency treads the very long road to full APA compliance.

These two cases unmistakably indicate that an invalid regulation cannot thwart the enforcement of the underlying statute. An administrative agency cannot impose a new burden not authorized by the statute through an invalid regulation, but it also cannot stop the implementation of the statute and the enforcement of rights under it. In an individual case, a court or an

adjudicating board can order the same action that would have been taken under an APA-invalid regulation, if that is the correct action to enforce the statute.

B. The Named Individual or Group Exception.

In the first round of APA litigation, the Court of Appeal, First District held that OP 770 was a rule of general application.

> "Thus, the protocol ' "declares how a certain class" ' of inmates, those whose execution dates have been set, will be treated. (*Morning Star*, *supra*, 38 Cal.4th at pp. 333-334, quoting *Tidewater*, *supra*, 14 Cal.4th at p. 571.) Therefore, the protocol is subject to the APA, even if it does not apply to all inmates, or even to all inmates sentenced to death." (*Morales v. CDCR*, *supra*, 168 Cal.App.4th at p. 739.)

Note that the word "inmates" is outside the inner quote. This passage of *Morning Star* quoting *Tidewater actually* says "a rule applies generally so long as it declares how a certain class of *cases* will be decided." (Italics added.) Cases, not people. Government Code section 11340.9, subdivision (i) expressly *excludes* from the APA "[a] regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." This subdivision is not mentioned at all in the *Morales v. CDCR* opinion.

The definition of "regulation" in the APA is extremely broad. (See Gov. Code, § 11342.600.) The Legislature has recognized that agencies might issue documents directed to specifically named persons that could be construed to be regulations within this definition and took care to exclude them from the APA. After all, the elaborate requirements of notifying the public and receiving comments from the public are unnecessary when the

regulation only affects a few specifically named people who can be notified directly.

Given the existence of this exception, the APA does not preclude CDCR from issuing an execution protocol for the "specifically named person" Michael Angelo Morales.

A permanent regulation applicable to all cases for an indefinite period would be desirable, but until that can be achieved justice needs to be carried out in the cases where it is overdue. Delaying justice by refusing to invoke this available exception is an abuse of discretion.

C. Equal Protection.

Conceivably, there might be an objection to a protocol drafted for a specifically named individual on the ground that it violates the requirement of equal protection of the law. The recent decision of the Ninth Circuit in the Arizona case of *Towery v. Brewer* (Feb. 28, 2012, No. 12-15381)[4] explains why such an objection would be meritless.

Arizona's protocol authorizes its Director to make variations for individual executions, including "to choose either a three- or one-drug protocol, using either sodium pentothal or pentobarbital . . . ." (*Towery*, *supra*, at p. 19.) These variations do not call for strict scrutiny. "A prisoner's right to be free of cruel and unusual punishment, in contrast, is not affected simply because that prisoner is treated less favorably than another, where one means of execution is no more likely to create a risk of cruel and unusual punishment than the other, and both are constitutionally available." (*Id*. at p. 21.) The variation Petitioner requests in the present case is even

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4. Available at <http://www.ca9.uscourts.gov/datastore/opinions/2012/02/28/ 12-15381_Towery_op.pdf>.

further removed because it amounts to treating the prisoner *more* favorably than CDCR's standard protocol. Petitioner asks that Real Party in Interest Morales be given the alternative that he has proffered himself as better than the standard. (See Factual Allegations ¶ 18.)

The *Towery* court goes on to reject the "class of one" argument, which is based on a theory that an individual is treated "differently from others similarly situated with no rational basis for doing so." (See *Towery* v. *Brewer* (9th Cir., Feb. 28, 2012, No. 12-15381) at p. 22.) "Absent any pattern of generally exercising the discretion in a particular manner while treating one individual differently *and* detrimentally, there is no basis for Equal Protection scrutiny under the class-of-one theory." (*Id.* at p. 23, italics in original.) Again, Petitioner is asking for a change that treats Morales more favorably than the standard, not detrimentally. Further, *Towery* goes on to hold that the practical necessities of an execution, such as the available supply of drugs, is sufficient to provide a rational basis for variations in procedure. (See *id.* at pp. 23-24.) The existence of an injunction against executing Morales with the three-drug method similarly qualifies as a rational basis.

Towery does warn against changing execution protocols frequently and at the last minute. (See *Towery v. Brewer* (9th Cir., Feb. 28, 2012, No. 12-15381) at pp. 3-5; see also *In re Ohio Execution Protocol Litigation* (6th Cir. 2012) 671 F.3d 601.) Nothing of that sort is proposed here. Petitioner asks for a change made "in a reasoned, deliberate, and constitutional manner" (cf. *Towery*, *supra*, at p. 3), well in advance of any execution.

There is no equal protection impediment to preparing a protocol for Morales individually.

D. The Single Prison Exception.

The Legislature has provided, "Rules issued by the director applying solely to a particular prison" are not "regulations" for the purpose of the APA. (Pen. Code, § 5058, subd. (c)(1).) The Court of Appeal for the First District held that this exception did not apply to the execution protocol before it, Exhibit C.

> "[T]he protocol substantially governs behavior outside San Quentin. For example, OP 770 regulates the selection of lethal injection team members and specifies that, if the Warden is unable to field a sufficient number of qualified lethal injection team members, the DAI Director will coordinate the identification of additional potential candidates for team membership from other CDCR prisons and correctional facilities. And the hiring authorities from those other prisons and correctional facilities (usually, but not always, the warden) will select prospective team members consistent with selection criteria enumerated in OP 770. In addition, the protocol assigns tasks to the CDCR Secretary, the CDCR Assistant Secretary, Office of Public and Employee Communications, and the DAI Director, none of whom serves under the Warden or works at San Quentin. Thus, OP 770 directs the performance of numerous functions beyond San Quentin's walls." (*Morales v. CDCR*, *supra*, 168 Cal.App.4th at p. 740, fn. relating to female inmates omitted.)

None of these matters need to be in the execution protocol. None of them were in the 2003 version in effect when Morales was first scheduled for execution. (See *Morales* USDC (Jan. 20, 2006) Doc. 13.) In its Initial Statement of Reasons for adoption of the regulation following the First District ruling, CDCR said, "Although much of the proposed regulation may fall into the internal management exception of the APA, that information is included in the proposed regulation in order to provide a comprehensive lethal injection process." In other words, the execution protocol proper would fall within the single-prison exception, the additional matter would fall within the internal management exception (see Gov. Code, § 11340.9,

subd.(d))[5], but CDCR combined them in a single document qualifying for neither exception simply to have a "comprehensive" document, resulting in years of additional delay.

The organization of documents would normally be a matter within an agency's discretion. As with the other choices discussed above, however, where one choice means the agency can carry out its duties to enforce the law, and the other choice means enforcement of the law is obstructed, it is an abuse of discretion to choose the obstructed path.

E. The Operational Needs Exception.

Unlike other agencies, CDCR has a special authorization from the Legislature to adopt regulations under the "emergency" procedure without a showing of an emergency, but only on a showing of "operational needs." (See Pen. Code, § 5058.3, subd. (a)(2).) The ability to carry out CDCR's duty to execute judgments is indisputably an operational need. The 160-day period allowed would be sufficient to carry out the execution of Morales. Counsel for Petitioner previously asked Respondent Cate to invoke this exception. (See Exhibit G.) However, because this method involves expenditure of additional state resources and should be unnecessary, given the two exceptions noted above, Petitioner does not ask the court to order the invocation of this exception at this time. Use of this exception would be

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5. The entire protocol *should* fall within the internal management exception, because it "does not require the individuals . . . affected [outside the agency itself] to do anything they are already required to do . . . ." (*Californians for Pesticide Reform v. Department of Pesticide Regulation* (2010) 184 Cal.App.4th 887, 909.) Unfortunately, CDCR defaulted that argument. (See *Morales v. CDCR*, *supra*, 168 Cal.App.4th at pp. 740-741.)

necessary, though, if for some reason both of the other exceptions are found to be unavailable or ineffective.

F. The Marin Injunction.

Respondent CDCR is subject to the injunction issued in the Marin County case unless and until that injunction is lifted or modified. Obviously, a party ought not be subjected to conflicting injunctions from different courts. Properly interpreted, there is no conflict.

The Marin judgment provides, "Defendant California Department of Corrections and Rehabilitation is permanently enjoined from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injection executions are promulgated in compliance with the Administrative Procedure Act." (Exhibit H, at pp. 1-2.) If this injunction were really a complete bar to enforcement of the death penalty law, it would be in clear violation of controlling California Supreme Court precedent on the APA. (See *Tidewater*, *supra*, 14 Cal.4th at p. 577, discussed in Part IV A, *supra*.) Therefore, it ought not be so interpreted. Just as a court should interpret a statute to have a constitutional meaning rather than an unconstitutional or even dubious one when both are plausible (see *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 507), so a court should interpret an order of another court to be in compliance with binding precedent rather than in defiance of it. Similarly, interpreting the injunction to negate exceptions that the Legislature has enacted would be contrary to those laws, and the injunction should not be interpreted in a way that makes it contrary to law if that can be avoided.

The phrase "compliance with the Administrative Procedure Act" does not necessarily mean the full public notice, comment, and Office of Administrative Law review procedure. A regulation is in compliance with

the APA if it qualifies for an exception in the law making these procedures unnecessary, whether that exception be in the Government Code or the Penal Code. Under the law, CDCR can promulgate "[a] regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." (Gov. Code, § 11340.9, subd. (i).) It can make "[r]ules issued by the director applying solely to a particular prison . . . ." (Pen. Code, § 5058, subd. (c)(1).) These statutes provide that CDCR can do either without going through the full APA procedure, and therefore doing so *is* "in compliance with the Administrative Procedure Act." The Marin injunction is therefore not an impediment to the relief Petitioner seeks in the present case.

In any event, Petitioner only asks this court to order promulgation of the execution protocol. Jurisdiction to order execution of the judgment lies exclusively with the trial court. (See Pen. Code, §§ 1227, 1265, subd. (a).) Promulgating the protocol alone cannot violate the injunction.

V. The FDA thiopental litigation does not preclude relief in this case.

One more lawsuit requires mention in the interest of completeness. In *Beaty v. Food and Drug Administration* (D.D.C. Mar. 27, 2012, No. Civ. 11-289) 2012 U.S. Dist. Lexis 41397, a group of death-sentenced murderers from California, Arizona, and Tennessee sued the FDA, claiming that the FDA had acted unlawfully in allowing the states to import sodium thiopental. The court agreed in an opinion that is in considerable tension with the controlling Supreme Court precedent in *Heckler v. Cheney* (1985) 470 U.S. 821. The accompanying order (at the end of the Lexis version of the opinion) provides, among other matters, "that the FDA: 1. immediately notify any and all state correctional departments which it has reason to

believe are still in possession of any foreign manufactured thiopental that the use of such drug is prohibited by law and that, that thiopental must be returned immediately to the FDA." (*Sic.*)

This order is remarkable for a couple of reasons. First is the complete absence of any legal authority in the opinion to support it. Assuming that the opinion is correct that the FDA failed in its duties regarding importation, not a single word in the opinion supports the conclusion that such a failure renders illegal the continued possession and noncommercial use of drugs already imported. The only reference in the opinion to the legality of continued possession is in footnote 3, where the court says that drugs imported in violation of an entirely different chapter of title 21 of the United States Code, administered by a different agency, makes drugs subject to seizure. But there has been no adjudication in this case that any such violation has occurred.

Second, the order seriously impacts the rights of persons and entities not before the court. Such action by a federal court is contrary to Federal Rule of Civil Procedure 19(a)(1)(B)(i) as well as more basic requirements of due process of law.

As of the date of this petition, it is unknown whether the FDA will comply with the order or seek a stay and appellate review. If the FDA does issue the notice to CDCR as ordered, CDCR will not be disabled from carrying out its responsibilities to conduct executions. CDCR could challenge the district court's order and the FDA's compelled notice, or it could switch to another drug, as other states have already done. (See *Beaty v. Food and Drug Administration*, *supra*, 2012 U.S. Dist. Lexis 41397 at *32.)

CDCR can, and should, deal with the problems of drug availability by establishing a protocol with alternative drugs and authorizing an appropriate official to make the choice based on availability close to the execution date. Arizona has already done this. (See *Towery v. Brewer* (9th Cir. Feb. 28, 2012, No. 12-15381) at pp. 7, 19, 23-24, cert. den. *sub nom. Moormann v. Brewer* (2012) 182 L.Ed.2d 250.)[6] Thus the *Beaty* litigation does not preclude CDCR from complying with the relief requested in this petition, to establish a protocol that can be used to carry out the execution of Michael Morales.

VI. Respondents' abuse of discretion, failure of duty, and violation of Petitioner's rights call for a judicial remedy.

"Protecting against an abusive delay *is* an interest of justice." (*Martel v. Clair* (Mar. 5, 2012, No. 10-1265) 565 U.S. __ (slip opn. at p. 12) (unanimous opn. by Kagan, J.) (italics in original).)[7]

Few delays in the history of justice have been as abusive as the delay in the execution of Michael Morales. He was convicted and sentenced to death almost three decades ago. The judgment was reviewed in multiple courts over the course of 23 years, ending 6 years ago. The justice of the penalty is fully decided, and there is no genuine question that this thoroughly deserved penalty can be executed with no significant risk of an Eighth Amendment violation. Yet justice remains delayed and denied for no good reason.

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6. Available at <http://www.ca9.uscourts.gov/datastore/opinions/2012/02/28/12- 15381_Towery_op.pdf>.

7. Available at <http://www.supremecourt.gov/opinions/11pdf/10-1265.pdf>.

Delay because of the federal litigation is unnecessary because the federal court has ruled that executions can go forward in California with the single-drug method, and all parties agree that the single-drug method is feasible and available. (See Part III, *supra*.) Blocking enforcement of the death penalty law with Administrative Procedure Act litigation is contrary to controlling California Supreme Court precedent on that Act, and it is unnecessary given the multiple exceptions the Legislature has provided. (See Part IV, *supra*.)

This delay is contrary to California law and the interests of the people of the state generally. (See Pen. Code, § 190.6, subd. (a).) "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." (*Hill v. McDonough* (2006) 547 U.S. 573, 584.) It is also a violation of the constitutional right of the victim's family to "a prompt and final conclusion of the case and any related post-judgment proceedings." (See Cal. Const., art. I, § 28, subd. (b)(9).)

After affirmance, jurisdiction returns to the trial court for "the making of orders necessary to carry the judgment into effect." (*People v. Ainsworth* (1990) 217 Cal.App.3d 247, 255; see also Pen. Code, §§ 1193, 1227 & 1265, subd. (a).) Section 1227 of the Penal Code, in particular, provides for the setting of a new execution date when the execution "has not been carried out for any reason other than the pendency of an appeal pursuant to subdivision (b) of Section 1239," *i.e.*, the automatic direct appeal. This "related post-judgment proceeding" and the "final conclusion," execution of the judgment, have been delayed for six years. That is not "prompt" by any stretch of the imagination.

Petitioner has no adequate remedy at law. Although Proposition 9 created a right and directed the courts to provide a remedy, in the next paragraph it

ruled out an action for damages. (See Cal. Const., art. I, § 28, subds. (c)(1) & (c)(2).) Damages could not compensate for the injustice of this delay in any event. Mandamus is the appropriate remedy for excessive delay in the execution of a capital sentence. (See *In re Blodgett* (1992) 502 U.S. 236, 240-241 (denying mandamus without prejudice because state failed to comply with a prerequisite, but noting state could return with a new application if delays continued).) While the Department of Corrections and Rehabilitation does have substantial discretion in the execution of the death penalty, it does not have discretion to block enforcement of the law or violate the rights of victims or their families. The importance of this matter to the state at large and the magnitude of the violation of the Petitioner's constitutional rights call for this court's intervention.

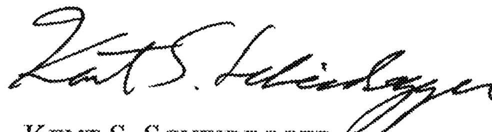
CONCLUSION

An alternative writ should issue as requested in the petition.

April 19, 2012

Respectfully Submitted,

HON. GEORGE DEUKMEJIAN
HON. PETE WILSON



KENT S. SCHEIDEGGER
Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT 8.204(c) AND 8.486(a)(6)

Pursuant to rule 8.204(c) and 8.486(a)(6), I certify that the foregoing brief is one-and-a-half spaced and is printed in 13-point Times New Roman font. In reliance upon the word count feature of WordPerfect, I certify that the attached Petition for Writ of Mandate and Memorandum of Points and Authorities in Support of Petition contains 9,629 words, exclusive of those materials not required to be counted under Rules 8.204(c) and 8.468(a)(6).

Dated: April 19, 2012

Respectfully Submitted,

KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document and the accompanying Petitioner's Appendix of Exhibits by depositing true copies of them enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

Mr. Matthew Cate, Secretary
Department of Corrections
and Rehabilitation
1515 S Street
Sacramento, CA 94283-0001

Attorney General of California
Attn: Jay M. Goldman, Deputy
Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
415-703-5846
Jay.Goldman@doj.ca.gov

David A. Senior
McBreen & Senior
2029 Century Park East, 3rd Floor
Los Angeles, CA 90067
310-552-5300
dsenior@mcbreensenior.com
Attorney for Morales

Michael Angelo Morales, C68801
San Quentin State Prison
San Quentin, CA 94974

Executed on April 19, 2012, at Sacramento, California.

____
Irma H. Abella

No. __________________

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,

Petitioner,

vs.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondents,

MICHAEL ANGELO MORALES,

Real Party in Interest.

PETITIONER'S APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

HON. PETE WILSON
State Bar No. 35742
355 S. Grand Ave., 45th Floor
Los Angeles, CA 90071
(213) 680-6777

HON. GEORGE DEUKMEJIAN
State Bar No. 26966
KENT S. SCHEIDEGGER*
State Bar No. 105178
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
(916) 446-0345
(916) 446-1194

Attorneys for Petitioner

*Counsel of Record

EXHIBITS

Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction, *Morales v. Hickman*, U.S. District Court, ND Cal., No. C 06 219, Feb. 14, 2006 . . . . A

Order on Defendant's Motion to Proceed with Execution under Alternative Condition to Order Denying Preliminary Injunction, *Morales v. Hickman*, U.S. District Court, ND Cal., No. C 06 219, Feb. 21, 2006 . . . . B

Excerpts from San Quentin State Prison, Operational Procedure 770, Execution by Lethal Injection, rev. May 15, 2007 C

Defendants' Responses to Court's Inquiries, *Morales v. Cate*, U.S. District Court, ND Cal., No. C 06 219, Sept. 22, 2010 . . . . D

Order Granting Motion for Leave to Intervene; and Denying Conditionally Intervenor's Motion for a Stay of Execution, *Morales v. Cate*, U.S. District Court, ND Cal., No. C 06 219, Sept. 24, 2010 . . . . E

Notice of Motion and Motion for Protective Order, *Morales v. Cate*, U.S. District Court, ND Cal., No. C 06 219, Jan. 31, 2011 . . . . F

Letter from Kent Scheidegger to Matthew Cate, May 27, 2011 . . . . G

Marin County Superior Court Final Judgment, *Sims v. CDCR*, No. CIV1004019, Feb. 21, 2012 . . . . H

EXHIBIT A

1
2
3 **E-filed 2/14/06**
4
5
6
7 DESIGNATED FOR PUBLICATION
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**
11

Michael Angelo MORALES, Plaintiff, v. Roderick Q. HICKMAN, Secretary of the California Department of Corrections and Rehabilitation; Steven W. Ornoski, Acting Warden of San Quentin State Prison; and Does 1-50, Defendants.	Case Number C 06 219 JF Case Number C 06 926 JF RS DEATH-PENALTY CASE ORDER DENYING CONDITIONALLY PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [Docket No. 12]

12–18

19 Plaintiff Michael Angelo Morales is a condemned inmate at California's San Quentin
20 State Prison. He is scheduled to be executed at 12:01 a.m. on February 21, 2006. The present
21 action challenges the manner in which California's lethal-injection protocol is administered. In
22 his amended complaint, Plaintiff contends that the way in which the protocol is carried out
23 creates an undue risk of causing him excessive pain as he is being executed, thereby violating the
24 Eighth Amendment's command that "cruel and unusual punishments [not be] inflicted." U.S.
25 Const. amend. VIII.
26 Plaintiff seeks a preliminary injunction to stay his execution so that the Court may
27 conduct a full evidentiary hearing to consider his claims. Defendants Roderick Q. Hickman,
28 Secretary of the California Department of Corrections and Rehabilitation, and Steven W.

1 Ornoski, Acting Warden of San Quentin State Prison, oppose the motion. The Court has read the
2 moving and responding papers and has considered the oral arguments of counsel presented on
3 January 26 and February 9, 2006. The Court also has considered the parties' responses to its
4 request for supplemental briefing dated February 13, 2006. The Court has jurisdiction pursuant
5 to 42 U.S.C. § 1983 (2006). *Beardslee v. Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005).
6 For the reasons set forth below, Plaintiff's motion will be denied, subject to certain conditions
7 concerning the manner in which the execution is to be carried out.

8 I

9 The Eighth Amendment prohibits punishments that are "incompatible with the evolving
10 standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S.
11 97, 102 (1976) (internal quotation marks and citations omitted). Executions that "involve the
12 unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), or that
13 "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), are not
14 permitted. When analyzing a particular method of execution or the implementation thereof, it is
15 appropriate to focus "on the objective evidence of the pain involved." *Fierro v. Gomez*, 77 F.3d
16 301, 306 (9th Cir. 1996) (citing *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994)), *vacated on*
17 *other grounds*, 519 U.S. 918 (1996). In this case, the Court must determine whether Plaintiff "is
18 subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by
19 lethal injection under California's protocol must be restrained." *Cooper v. Rimmer*, 379 F.3d
20 1029, 1033 (9th Cir. 2004).

21 In California, unless a condemned inmate affirmatively selects to be executed by lethal
22 gas, executions are performed by lethal injection. Cal. Penal Code § 3604 (West 2006).
23 Defendants have developed California's lethal-injection protocol[1] to implement this statutory
24 directive. *See id.* at § 3604(a) (lethal injection to be administered "by standards established

25 ---

26 [1]Defendants have developed two versions of the protocol: a confidential version labeled "San
Quentin Institution Procedure No. 770" and a redacted, publicly available version labeled "San Quentin
27 Operational Procedure No. 770." During the course of this litigation, the Court reviewed the confidential
version *in camera* and ordered Defendants to make it available to Plaintiff's counsel with certain
28 redactions related to prison security and subject to a protective order. There are potentially significant
differences between the two versions.

1 under the direction of the Department of Corrections").[2] The protocol calls for the injection of a
2 sequence of three drugs into the person being executed: five grams of sodium thiopental, a
3 barbiturate sedative, to induce unconsciousness; 50 or 100 milligrams of pancuronium bromide, a
4 neuromuscular blocking agent, to induce paralysis; and 50 or 100 milliequivalents of potassium
5 chloride, to induce cardiac arrest.[3] Significantly, each drug is given in a dosage that is lethal in
6 and of itself.

7 In his amended complaint, Plaintiff contends that these drugs are administered in such a
8 way that there is an undue risk that he will be conscious when the pancuronium bromide and the
9 potassium chloride are injected. Defendants agree with Plaintiff that a person injected with either
10 of these two drugs while conscious would experience excruciating pain; however, they assert that
11 the dosage of sodium thiopental is more than sufficient to insure that Plaintiff will be
12 unconscious prior to their administration.

13 A significant number of media reports have described this action as an attack on the
14 constitutionality of lethal injection. *See, e.g.*, *Lethal Injection of Murderer-Rapist Could Be*

15

16 [2]The Department of Corrections was reorganized into the Department of Corrections and Rehabilitation on July 1, 2005.

17

18 [3]The lethal-injection protocol is not entirely clear as to which dosages of pancuronium bromide and potassium chloride are used. The protocol provides for the preparation of two syringes of 50 milligrams each of pancuronium bromide (which is also known as Pavulon). It then instructs:

19

20

> The "NS" syringe shall be removed and one of the #2 syringes (Pavulon) shall be inserted. The entire contents shall be injected with slow, even pressure on the syringe plunger.
>
> CAUTION: If all of the Sodium Pentothal has not been flushed from the line, there is a chance of flocculation forming when coming in contact with the Pavulon, which will block the flow of fluid through the Angiocath. If this should happen, shift over to the contingency line running to the right arm. When the contents of the first #2 syringe has [sic] been injected, repeat with the second #2 syringe.

21

22

23

24 San Quentin Operational Procedure No. 770 § VI.E.4.d.5)(g)(5) (publicly available version). Regarding syringes of 50 milliequivalents of potassium chloride, the protocol directs, "The first #3 syringe (KCl) shall be inserted and the entire contents shall be injected. The second #3 syringe shall be repeated or until death has been pronounced by the physician [sic]." *Id.* at § VI.E.4.d.5)(g)(7). Additionally, the protocol and Defendants' submissions are inconsistent as to whether the volume used to administer sodium thiopental is 20 or 50 cubic centimeters, *see id.* at § VI.E.4.d.5)(c)(6)(d); this difference would affect how much sodium thiopental actually gets to an inmate being executed due to the volume of fluid containing sodium thiopental that is retained in the intravenous line after the flush of 20 cc of saline, as a percent of the total dose of sodium thiopental that is intended to be administered.

25

26

27

28

1 *Blocked*, San Diego Union-Trib., Feb. 10, 2006, at A4 ("A federal judge said yesterday that he
2 might block a murderer and rapist's Feb. [sic] 21 execution to provide enough time to determine
3 whether lethal injection is cruel and unusual punishment."). As is apparent from the foregoing
4 discussion, these reports are in error. Rather, the discrete issues in the present action are whether
5 or not there is a reasonable possibility that Plaintiff will be conscious when he is injected with
6 pancuronium bromide or potassium chloride, and, if so, how the risk of such an occurrence may
7 be avoided.

8 II

9 The United States Court of Appeals for the Ninth Circuit has explained that a condemned
10 inmate seeking a stay of execution is

11 required to demonstrate (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if
12 preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest
13 (in certain cases). Alternatively, injunctive relief could be granted if he demonstrated either a combination of probable success on the
14 merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his
15 favor. These two alternatives represent extremes of a single continuum, rather than two separate tests. Thus, the greater the
16 relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party. In
17 cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff. [¶] In
18 capital cases, the Supreme Court has instructed that equity must take into consideration the State's strong interest in proceeding
19 with its judgment.

20 *Beardslee*, 395 F.3d at 1067-68 (internal quotation marks, citations, brackets and emphasis
21 omitted). As the United States Supreme Court has adjured,

22 before granting a stay [of execution], a district court must consider not only the likelihood of success on the merits and the relative
23 harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's
24 significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a
25 claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

26
Nelson v. Campbell, 541 U.S. 637, 649-50 (2004) (citations omitted).
27
28

III

Two years ago, condemned inmate Kevin Cooper faced imminent execution at San Quentin. Eight days before he was scheduled to be executed, Cooper filed an action in which he challenged California's lethal-injection protocol on Eighth Amendment grounds. This Court declined to stay the execution, finding that Cooper had delayed unduly in asserting his claims and that he had done no more than raise the possibility that he might suffer unnecessary pain if errors were made in the course of his execution. *Cooper v. Rimmer*, No. C 04 436 JF, 2004 WL 231325 (N.D. Cal. Feb. 6, 2004). The Ninth Circuit affirmed for the same reasons. *Cooper*, 379 F.3d 1029.[4]

Just over one year ago, another inmate under sentence of death, Donald J. Beardslee, filed an action in this Court challenging the lethal-injection protocol shortly after the San Mateo Superior Court set his execution date. Beardslee contended that the protocol violated both his First Amendment right to freedom of speech and his Eighth Amendment right not to be subjected to cruel and unusual punishment. While this Court recognized that Beardslee had been more diligent than Cooper in that he filed his action thirty days before his scheduled execution and had exhausted his administrative remedies prior to filing, it nonetheless concluded that Beardslee also had delayed unduly in asserting his claims. On the merits, the Court concluded, "Based upon the present record, a finding that there is a reasonable possibility that . . . errors will occur [during Beardslee's execution] would not be supported by the evidence. [Beardslee's] action thus is materially indistinguishable from *Cooper*." *Beardslee v. Woodford*, No. C 04 5381 JF, 2005 WL 40073 (N.D. Cal. Jan. 7, 2005).

The Ninth Circuit disagreed with this Court's determination that Beardslee's action was untimely. *Beardslee*, 395 F.3d at 1069-70. The appellate court noted that "the precise execution

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[4]In a separate habeas corpus proceeding originally brought before the Ninth Circuit, that court granted Cooper a stay of execution to permit him to return to the United States District Court for the Southern District of California to pursue his claim that he is innocent of the crimes of which he was convicted and for which he was sentenced to death. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc). This Court subsequently dismissed without prejudice Cooper's challenge to the lethal-injection protocol in light of Cooper's failure to exhaust his administrative remedies. *Cooper v. Woodford*, No. C 04 436 JF (N.D. Cal. Oct. 12, 2004).

1 protocol is subject to alteration until the time of execution" and it found that "by regulation the
2 California Department of Corrections does not permit challenges to anticipated actions."[5] *Id.* at
3 1069. *Beardslee* thus suggests that in California, a condemned inmate's challenge to the lethal-
4 injection protocol may not become ripe for judicial review until the inmate's execution is
5 imminent. *See id.* at 1069 n.5; *but cf. id.* at 1069-70 n.6 ("we have not resolved the question of
6 when challenges to execution methods are ripe"). At the very least, unlike Cooper, "Beardslee
7 pursued his claims aggressively as soon as he viewed them as ripe." *Id.* at 1069.

8 Although it concluded that Beardslee's challenge was timely, the Ninth Circuit affirmed
9 this Court's decision on the merits, holding that "we cannot say, given our deferential standard of
10 review, that the district court abused its discretion in denying [a] stay of execution." *Id.* at 1070.
11 In doing so, however, it noted that

12 > the California execution logs of William Bonin, Keith Williams,
> Jaturun Siripongs, and Manuel Babbit[t] . . . contain indications
13 > that there may have been problems associated with the
> administration of the chemicals that may have resulted in the
14 > prisoners being conscious during portions of the executions. This
> evidence, coupled with the opinion tendered by Beardslee's expert,
15 > raises extremely troubling questions about the protocol.

16 *Id.* at 1075.

17 In the present action, Plaintiff has been even more diligent than Beardslee: he filed his
18 challenge to the lethal-injection protocol shortly before the Ventura Superior Court scheduled his
19 execution—thirty-nine days before the execution date that court ultimately set.[6] Because in light
20 of *Beardslee*, Plaintiff is not guilty of undue delay in bringing his claim, there is no presumption
21 against the grant of a stay due to delay, much less the "strong equitable presumption" identified
22 by the Supreme Court in *Nelson*, 541 U.S. at 650.[7]

23

24 [5]The regulation reads in relevant part, "An appeal may be rejected for any of the following
25 reasons: . . . (3) The appeal concerns an anticipated action or decision." Cal. Code Regs. tit. 15, §
3084.3(c) (2006).

26 [6]It also appears from the face of his amended complaint that Plaintiff has exhausted his
27 administrative remedies.

28 [7]This conclusion is buttressed by the Supreme Court's recent denial, by a vote of 6-3, of an
application to vacate a stay of execution in *Crawford v. Taylor*, 546 U.S. ___ , No. 05A705 (Feb. 1,

IV

Plaintiff's diligence in filing the present action has made it possible for this Court to proceed in a somewhat more orderly fashion than otherwise would have been possible. At the initial hearing on January 26, 2006, the Court announced that it would construe Plaintiff's application for a temporary restraining order as it would a motion for a preliminary injunction, ordered supplemental briefing on Plaintiff's motion to expedite discovery as well as his motion for a preliminary injunction, and scheduled oral argument on the motion for a preliminary injunction. On February 1, 2006, the Court issued an order granting in part Plaintiff's motion for expedited discovery; the discovery granted was completed the following day.[8] The Court heard argument on the motion for a preliminary injunction on February 9, 2006, and requested additional supplemental briefing by an order dated February 13, 2006.[9] As a result of this procedural history, the record in the present action is substantially more developed than the record in *Cooper* or *Beardslee*.

Through their involvement in the *Cooper* and *Beardslee* cases, both this Court and the

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2006). Like Plaintiff, Taylor filed an action pursuant to § 1983 in which he challenged his state's lethal-injection protocol when his execution was imminent but an execution date had not yet been set. During the course of the litigation, the United States District Court for the Western District of Missouri scheduled an evidentiary hearing for February 2006. The Missouri Supreme Court subsequently selected February 1, 2006, for Taylor's execution date, and the district court issued a stay of execution. A panel of the Eighth Circuit vacated the stay, 2-1, and remanded with instructions for the action to be reassigned and for the new judge to hold an expedited evidentiary hearing. Following an abbreviated telephonic hearing, the district court denied Taylor relief. The Eighth Circuit panel affirmed, again 2-1, but the en banc court granted Taylor a stay by a vote of 9-1. As noted, the Supreme Court declined to vacate the stay. For the same reasons that the present action is analogous to *Taylor*, it is distinguishable from other recent cases in which the Supreme Court has allowed executions to go forward. *See, e.g.*, *Neville v. Livingston*, 546 U.S. ___ , No. 05-9136 (Feb. 8, 2006); *Elizalde v. Livingston*, 546 U.S. ___, No. 05A696 (Jan. 31, 2006).

[8]The discovery granted was concerned primarily with the three executions that Defendants have conducted since *Beardslee*—those of Beardslee himself on January 19, 2005; Stanley Tookie Williams on December 13, 2005; and Clarence Ray Allen on January 17, 2006. In addition, as noted, much of the confidential version of California's lethal-injection protocol was disclosed. Although not required to do so by the discovery order, Defendants also voluntarily produced additional execution logs that previously had not been made available.

[9]The additional briefing addresses whether it would be feasible for Plaintiff's execution to proceed using only sodium thiopental or utilizing an independent means to insure that Plaintiff will be unconscious before pancuronium bromide and potassium chloride are injected.

1 Ninth Circuit have acquired substantial familiarity with the legal and factual issues surrounding
2 lethal injection in California. In addition, many other courts have reviewed lethal-injection
3 protocols similar to California's. To date, no court has found either lethal injection in general or
4 a specific lethal-injection protocol in particular to be unconstitutional. *See, e.g.*, *Bieghler v.*
5 *State*, 839 N.E. 691, 694-96 (Ind. Dec. 28, 2005); *Boyd v. Beck*, ___ F. Supp. 2d ___, No. 5:05-
6 CT-774-D, 2005 WL 3289333 (E.D.N.C. Nov. 29, 2005); *Abdur'Rahman v. Bredesen*, ___
7 S.W.3d ___, No. M2003-01767-SC-R11-CV, 2005 WL 2615801 (Tenn. Oct. 17, 2005); *Aldrich*
8 *v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (lethal injection in Texas); *Reid v. Johnson*, 333 F.
9 Supp. 2d 543 (E.D. Va. 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (lethal injection
10 in Texas); *People v. Snow*, 65 P.3d 749, 800-01 (Cal. 2003); *Sims v. State*, 754 So.2d 657 (Fla.
11 2000); *State v. Webb*, 750 A.2d 448, 453-57 (Conn. 2000); *LaGrand v. Stewart*, 133 F.3d 1253,
12 1265 (9th Cir. 1998) (lethal injection in Arizona); *but cf. Rutherford v. Crosby*, 546 U.S. ___,
13 No. 05-8795 (Jan. 31, 2006) (granting stay of execution pending disposition of cert. pet.); *Hill v.*
14 *Crosby*, 546 U.S. ___, No. 05-8794 (Jan. 25, 2006) (granting stay of execution & granting cert.);
15 *Anderson v. Evans*, No. CIV-05-0825-F, 2006 WL 83093, at *3-*4 (W.D. Okla. Jan. 11, 2006)
16 (denying mot. to dismiss 8th amend. challenge to lethal-injection protocol). At the same time, it
17 should be noted that the record now before this Court, which includes both additional expert
18 declarations and detailed logs from multiple executions in California, contains evidence of a kind
19 that was not presented in these earlier cases. *See, e.g.*, *Reid*, 333 F. Supp. 2d at 548-49 (limiting
20 scope of review to "issues pertaining to the particular chemical combination . . . and their [sic]
21 probable affect [sic] on Reid" and excluding other evidence); *Webb*, 750 A.2d at 453-57
22 (resolving challenge in state where no lethal injections had been performed); *Bieghler*, 839
23 N.E.2d at 696; *Boyd*, 2005 WL 3289333, at *3.; *cf. Anderson*, 2006 WL 83093, at *3-*4
24 (discussing evidence proffered in complaint).

25 This Court and others have found persuasive the declarations of Defendants' medical
26 expert, Dr. Mark Dershwitz, to the effect that "over 99.999999999999% of the population would
27 be unconscious within sixty seconds from the start of the administration of [five grams of]
28 thiopental sodium" and that "this dose will cause virtually all persons to stop breathing within a

minute of drug administration. Therefore . . . virtually every person given five grams of thiopental sodium will have stopped breathing prior to" the administration of the pancuronium bromide. *Cooper*, 379 F.3d at 1032; *see also, e.g.*, *Reid*, 333 F. Supp. 2d at 547 (discussing two grams of sodium thiopental used in Virginia). In most if not all of the legal challenges to lethal injection, condemned inmates have suggested various errors that could occur during the administration of sodium thiopental, thereby rendering an inmate conscious when the pancuronium bromide and potassium chloride are administered. However, "the risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review," *Campbell*, 18 F.3d at 687, and the courts that have considered the issue to date have found that "the likelihood of such an error occurring 'is so remote as to be nonexistent,'" *Beardslee*, 2005 WL 40073, at *3 (quoting *Reid*, 333 F. Supp.2d at 551).

Plaintiff does not dispute Dr. Dershwitz's conclusions at the theoretical level, agreeing that a person's breathing and consciousness should cease within one minute of the beginning of the administration of sodium thiopental. Instead, he contends that in actual practice in California, for whatever reason, the sodium thiopental has not had its intended effect. He cites, *inter alia*, the following evidence from the execution logs:

> Jaturun Siripongs, executed February 9, 1999: The administration of sodium thiopental began at 12:04 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations[10] did not cease until 12:09 a.m., four minutes after the administration of sodium thiopental began and one minute after the administration of pancuronium bromide began.
>
> Manuel Babbitt, executed May 4, 1999: The administration of sodium thiopental began at 12:28 a.m. and the administration of pancuronium bromide began at 12:31 a.m., yet respirations did not cease until 12:33 a.m., five minutes after the administration of sodium thiopental began and two minutes after the administration of pancuronium bromide began. In addition, brief spasmodic movements were observed in the upper

---

[10] "Respirations" is the term used by the employees of the Department of Corrections and Rehabilitation who witnessed the executions and made entries in the execution logs.

chest at 12:32 a.m.[11]

Darrell Keith Rich, executed March 15, 2000: The administration of sodium thiopental began at 12:06 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations did not cease until 12:08 a.m., when pancuronium bromide was injected, two minutes after the administration of sodium thiopental began. Chest movements were observed from 12:09 a.m. to 12:10 a.m.[12]

Stephen Wayne Anderson, executed January 29, 2002: The administration of sodium thiopental began at 12:17 a.m. and the administration of pancuronium bromide began at 12:19 a.m., yet respirations did not cease until 12:22 a.m., five minutes after the administration of sodium thiopental began and three minutes after the administration of pancuronium bromide began.

Stanley Tookie Williams, executed December 13, 2005: The administration of sodium thiopental began at 12:22 a.m., the administration of pancuronium bromide began at 12:28 a.m., and the administration of potassium chloride began at 12:32 a.m. or 12:34 a.m., yet respirations did not cease until either 12:28 a.m. or 12:34 a.m.—that is, either six or twelve minutes after the administration of sodium thiopental began, either when or six minutes after the administration of pancuronium bromide began, and either four minutes before or when the administration of potassium chloride began.[13]

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[11]Plaintiff's medical expert, Dr. Mark Heath, notes that Babbitt maintained a steady heart rate of 95 or 96 beats per minute for seven minutes after he was injected with sodium thiopental. Dr. Heath states that this fact raises concerns about whether Babbitt was properly sedated.

[12]According to Dr. Heath, this evidence is consistent with a conscious attempt to fight the paralytic effect of the pancuronium bromide rather than with unconsciousness due to the successful administration of the sodium thiopental, particularly in light of Rich's apparently iatrogenic rapid heart rate of 110 beats per minute as the chest movements were occurring. Rich's heart rate was 130 beats per minute when the administration of potassium chloride began.

[13]Defendants' records are inconsistent in this regard: the formal execution log suggests that Williams stopped breathing at 12:28 a.m. and indicates that potassium chloride was injected at 12:32 a.m. whereas the execution team's log states that Williams stopped breathing at 12:34 a.m when the potassium chloride was injected. It appears that the formal log has been altered without any indication as to who made the alteration. Similarly to Rich, Williams apparently experienced an iatrogenic rapid heart rate of 115 beats per minute when he was injected with pancuronium bromide.

1 Clarence Ray Allen, executed January 17, 2006: The administration of sodium thiopental
2 began at 12:18 a.m., yet respirations did not cease until 12:27 a.m., when pancuronium
3 bromide was injected, nine minutes after the administration of sodium thiopental began.
4 In a new declaration filed in the present action on February 6, 2006, Dr. Dershwitz opines
5 that the "respirations" reported in the execution logs may be not be respirations at all,
6 hypothesizing that they are no more than "chest wall movements." However, he proposes this
7 hypothesis with considerably less certainty than was evident in his discussion of the
8 pharmacokinetics and pharmacodynamics of sodium thiopental, which are his principal areas of
9 expertise. *Cf. Beardslee*, 395 F.3d at 1075. While Dr. Dershwitz's explanation may be correct,
10 evidence from eyewitnesses tending to show that many inmates continue to breathe long after
11 they should have ceased to do so cannot simply be disregarded on its face. In rejecting the
12 plaintiffs' claims on the merits in *Cooper* and *Beardslee*, this Court relied on Dr. Dershwitz's
13 opinion that the amount of sodium thiopental used in California's lethal-injection protocol should
14 both stop breathing and cause unconsciousness within a minute after administration begins.
15 While there is no direct evidence that any condemned inmate actually was conscious when
16 pancuronium bromide was injected, evidence from Defendants' own execution logs that the
17 inmates' breathing may not have ceased as expected in at least six out of thirteen executions by
18 lethal injection in California raises at least some doubt as to whether the protocol actually is
19 functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence
20 that an inmate was conscious at some point after that drug was injected would be imperceptible
21 to anyone other than a person with training and experience in anesthesia.[14]
22 Other evidence in the present record raises additional concerns as to the manner in which
23 the drugs used in the lethal-injection protocol are administered. For example, it is unclear why
24 some inmates— including Clarence Ray Allen, who had a long history of coronary artery disease
25 and suffered a heart attack less than five months before he was executed, *see Allen v. Hickman*,
26 ___ F. Supp. 2d ___, No. C 05 5051 JSW, 2005 WL 3610666 (N.D. Cal. Dec. 15, 2005)—have
27
28 [14]*See* Dr. Heath's declaration in response to the February 13 request for supplemental briefing, at p. 9.

required second doses of potassium chloride to stop promptly the beating of their hearts.[15] The Court need not list all such anomalies here. It is sufficient for purposes of resolving the present motion to note that Plaintiff has raised more substantial questions than his counterparts in *Cooper* and *Beardslee.*

V

The fact that Plaintiff has raised such questions does not mean that he must be granted a stay of execution. The State's "strong interest in proceeding with its judgment," *Gomez v. U.S. Dist. Ct. N.D. Cal.*, 503 U.S. 653, 654 (1992), is no less important here than it was in *Cooper* and *Beardslee*. It has been nearly twenty-five years since Plaintiff committed the crimes for which he now faces the death penalty. Even if the Court were to hold an evidentiary hearing and Plaintiff were to prevail, Plaintiff would remain under a sentence of death. Neither the death penalty nor lethal injection as a means of execution would be abolished. At best, Plaintiff would be entitled to injunctive relief requiring the State to modify its lethal-injection protocol to correct the flaws Plaintiff has alleged. Presumably, at some point, Plaintiff would be executed.

Having given the matter much thought, the Court concludes that it is within its equitable powers to fashion a remedy—set forth below as the order of the Court—that preserves both the State's interest in proceeding with Plaintiff's execution and Plaintiff's constitutional right not to be subject to an undue risk of extreme pain. Should Defendants decline to implement this remedy, the Court will stay the execution and hold an evidentiary hearing within ninety days in order to resolve the questions raised by the execution logs.

Whether or not Defendants implement the remedy and thus proceed to execute Plaintiff as scheduled, the Court respectfully suggests that Defendants conduct a thorough review of the lethal-injection protocol, including, *inter alia*, the manner in which the drugs are injected, the means used to determine when the person being executed has lost consciousness, and the quality

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[15] At a press conference immediately following Allen's execution, Warden Ornoski stated that a second dose of potassium chloride was required because "this guy's heart has been beating for 76 years, and it took awhile for it to stop." Kevin Fagan, *Reporter's Eyewitness Account of Allen's Execution,* S.F. Chron., Jan. 17, 2006, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/17/MNG37GOHD715.DTL.

of contemporaneous records of executions, such as execution logs and electrocardiograms. Given the number of condemned inmates on California's Death Row, the issues presented by this case are likely to recur with considerable frequency. Because California's next execution is unlikely to occur until the latter part of this year, the State presently is in a particularly good position to address these issues and put them to rest. It is hoped that the remedy ordered by this Federal Court in this case will be a one-time event; under the doctrines of comity and separation of powers, the particulars of California's lethal-injection protocol are and should remain the province of the State's executive branch. A proactive approach by Defendants would go a long way toward maintaining judicial and public confidence in the integrity and effectiveness of the protocol.

VI

As noted at the outset, the present action concerns the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed. While the Court finds that Plaintiff has raised substantial questions in this regard, it also concludes that those questions may be addressed effectively by means other than a stay of execution, and that these alternative means would place a substantially lesser burden on the State's strong interest in proceeding with its judgment.

Accordingly, and good cause therefor appearing, Plaintiff's motion for a preliminary injunction is conditionally DENIED. Defendants may proceed with the execution scheduled for February 21, 2006, provided that they do one of the following:

1) Certify in writing, by the close of business on Thursday, February 16, 2006, that they will use only sodium thiopental or another barbiturate or combination of barbiturates in Plaintiff's execution.[16]

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[16]In their response to the February 13 request for supplemental briefing, Defendants assert that while sodium thiopental alone would be effective to cause Plaintiff's death, its use without the other two drugs would cause the execution to be unduly prolonged. Plaintiff correctly points out that there is no evidence in the record to support Defendants' claim that the execution could last as long as forty-five minutes. The execution logs show that several executions pursuant to the current protocol took

2) Agree to independent verification, through direct observation and examination by a qualified individual or individuals, in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that Plaintiff in fact is unconscious before either pancuronium bromide or potassium chloride is injected. Because Plaintiff has raised a substantial question as to whether a person rendered unconscious by sodium thiopental might regain consciousness during the administration of pancuronium bromide or potassium chloride,[17] the presence of such person(s) shall be continuous until Plaintiff is pronounced dead. With respect to this alternative:

(a) A "qualified individual" shall be a person with formal training and experience in the field of general anesthesia. The nature and extent of such training and experience shall be set forth in a declaration submitted to the Court on or before the close of business on Wednesday, February 15, 2006. Plaintiff may file any comments he may have with respect to the qualifications of such person(s) not later than 12:00 noon on Thursday, February 16, 2006. The Court will advise the parties as to whether it finds the person(s) to be qualified by the close of business on Thursday, February 16, 2006.

(b) The person(s) may be employees of the Department of Corrections and Rehabilitation.[18]

(c) If Defendants wish to keep the identity of such person(s) confidential, they

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considerably longer than anticipated. While the Court has no wish to burden the participants in and witnesses to Plaintiff's execution with additional stress in what obviously is a very difficult situation, it concludes that the questions surrounding the protocol justify an exception to the standard procedure in this one instance, particularly in lieu of a stay of execution. The Court's purpose in permitting Defendants to use other barbiturates or a combination of barbiturates is to give Defendants flexibility with respect to the length of the execution; such an approach appears to be fully consistent both with the law—"the precise execution protocol is subject to alteration until the time of execution," *Beardslee*, 395 F.3d at 1069—and with the opinions of Plaintiff's medical expert, Dr. Heath.

[17] *See, inter alia*, the excerpts from the execution logs summarized above and Dr. Heath's declaration filed in response to the February 13 request for supplemental briefing, at p. 9.

[18] Defendants have indicated through declarations and in their offer of proof regarding lethal-injection procedures that medical doctors, registered nurses, and licensed vocational nurses employed by the Department have rôles at executions. At this time, the Court has no information as to the specific training and experience of these individuals.

1 may submit their declaration setting forth the qualifications of such person(s) with
2 personal identifiers redacted, except that the redacted information shall be provided to the
3 Court for *in camera* review by e-mail to g_o_kolombatovich@cand.uscourts.gov.
4 (d) During the execution, the person(s) may wear appropriate clothing to protect
5 their anonymity.
6 If Defendants reject both of the alternatives described above, a stay of execution will
7 issue without the necessity of further proceedings. In that event, the Court will hold an
8 evidentiary hearing on the merits of Plaintiff's claims on Tuesday, May 2, 2006, and Wednesday,
9 May 3, 2006. The Court will issue a briefing schedule and orders with respect to discovery
10 should that become necessary.
11 The Court will retain jurisdiction with respect to Defendants' implementation of the
12 remedy provided for herein. This order otherwise is intended to be final for purposes of appellate
13 review.
14 IT IS SO ORDERED.
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16 DATED: February 14, 2006

JEREMY FOGEL
17 United States District Judge
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EXHIBIT B

E-filed 2/21/06

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES, Plaintiff, v. Roderick Q. HICKMAN, Secretary of the California Department of Corrections and Rehabilitation; Steven W. Ornoski, Acting Warden of San Quentin State Prison; and Does 1-50, Defendants.	Case Number C 06 219 JF Case Number C 06 926 JF RS <u>DEATH-PENALTY CASE</u> ORDER ON DEFENDANT'S MOTION TO PROCEED WITH EXECUTION UNDER ALTERNATIVE CONDITION TO ORDER DENYING PRELIMINARY INJUNCTION [Docket No. 73]

In its order of February 14, 2006, denying conditionally Plaintiff's motion for a preliminary injunction, the Court allowed Plaintiff's execution to proceed subject to Defendants' agreement to one of two conditions. The first alternative permitted Defendants to execute Plaintiff using only sodium thiopental or another barbiturate or combination of barbiturates. The second alternative required Defendants to ensure, through verification by persons with experience and training in general anesthesia, that Plaintiff would be and would remain

1 unconscious at all times following the administration of sodium thiopental. Defendants agreed to
2 the second alternative. Earlier today, as the execution was about to commence, the two
3 anesthesiologists designated by Defendants pursuant to this Court's remedial order of February
4 16, 2006, declined to participate in Plaintiff's execution because of ethical concerns arising from
5 their understanding of certain language in the opinion of the United States Court of Appeals for
6 the Ninth Circuit that affirmed this Court's orders of February 14 and February 16, 2006. As a
7 result of this action by the anesthesiologists, Plaintiff's execution did not go forward as
8 scheduled. Defendants have rescheduled the execution for 7:30 p.m. this evening and now seek
9 approval from the Court to proceed with the first alternative.

10 Plaintiff opposes Defendants' motion, arguing among other things that executing him
11 using only sodium thiopental without at the same time addressing issues arising from the manner
12 in which that drug is administered by Defendants still would subject him to an undue risk of an
13 Eighth Amendment violation. This morning, the Court heard approximately one hour of
14 telephonic argument; it also has considered Plaintiff's written response to Defendants' motion
15 and the fifth declaration of Plaintiff's medical expert, Dr. Mark Heath. For the reasons set forth
16 below, the motion will be granted, subject to Defendants' strict compliance with the conditions
17 set forth herein.

18 It is undisputed that five grams of sodium thiopental, properly administered, is a fatal
19 dose. It also is undisputed that sodium thiopental does not cause pain; in fact, as a barbiturate, it
20 anesthetizes the person into whom it is injected. An insufficient dose, however, has the potential
21 to cause irreversible brain damage while not causing death. The only relevant factual dispute
22 with respect to the present motion is whether there is a realistic possibility that the sodium
23 thiopental injected into Plaintiff will not be properly administered.

24 Plaintiff points out that recurring problems with the manner in which sodium thiopental is
25 administered pursuant to Protocol No. 770 are suggested by the execution logs cited by the Court
26 in its order of February 14, 2006. While he does not concede that there is any basis upon which
27 the Court should allow his execution to proceed today, he is emphatic in his insistence that it
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1 must not proceed using the same procedures that the Court itself has found to be problematic. He
2 urges the Court to postpone the execution so that an appropriate protocol for executing him using
3 only sodium thiopental can be developed and thoroughly vetted.
4 Both parties' medical experts agree that there is no doubt that direct intravenous injection
5 of five grams of sodium thiopental by a trained individual, such as a nurse or other medical
6 professional licensed by the State of California, will be fatal virtually one hundred percent of the
7 time. While Plaintiff objects categorically to any further deviations from Protocol No. 770
8 without discovery and an evidentiary hearing, he acknowledges that there is no medical reason to
9 believe that direct injection poses any risk to him, of Eighth Amendment significance or
10 otherwise, as long as the person performing the injection has proper medical training.
11 Defendants object to direct injection, both because they believe that the current protocol is
12 adequate and because having a person in the execution chamber is contrary to departmental
13 policy. The Court notes, however, that Defendants agreed to have one of the anesthesiologists in
14 the execution chamber.
15 Despite the many twists and turns that have brought it to this point, including the apparent
16 disconnect between the expectations articulated in the orders of this Court and the Court of
17 Appeals and the expectations of the anesthesiologists retained by Defendants, the Court
18 nonetheless recognizes and respects the importance to the State of proceeding with the execution.
19 However, due process requires that to permit it to do so under these circumstances, Defendants'
20 obligations be set forth in a way that leaves no room for reasonable doubt. Accordingly, while
21 Defendants may proceed with the execution this evening using only sodium thiopental, they may
22 do so only if the sodium thiopental is injected in the execution chamber directly into the
23 intravenous cannula by a person or persons licensed by the State of California to inject
24 medications intravenously. The dosage used shall be at least five grams of sodium thiopental to
25 be followed by a 20 cc saline flush as provided in Protocol No. 770. The persons may wear
26 appropriate clothing to protect their anonymity. Based upon the evidence in the record, the Court
27 has no question that such a method is safe, effective and fully consistent with the its order of
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February 14, 2006.

IT IS SO ORDERED.

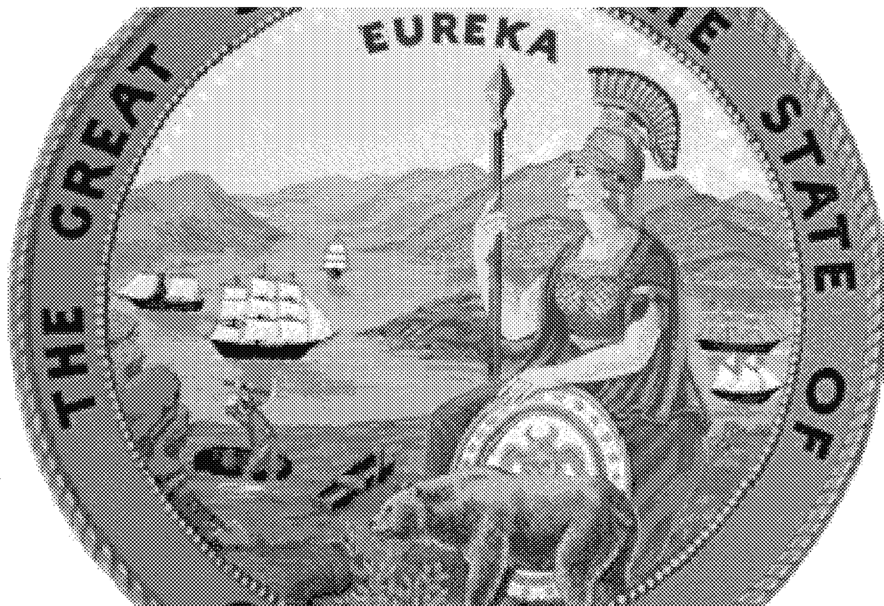
DATED: February 21, 2006

JEREMY FOGEL
United States District Judge

EXHIBIT C

STATE OF CALIFORNIA
SAN QUENTIN OPERATIONAL PROCEDURE
NUMBER 0-770
EXECUTION BY LETHAL INJECTION

May 15, 2007



Arnold Schwarzenegger, Governor
State of California

James E. Tilton, Secretary
Department of Corrections and Rehabilitation

Robert L. Ayers, Jr., Warden
San Quentin State Prison

Excerpt -- pages cover to 7 and 38 to 51

SAN QUENTIN STATE PRISON OPERATIONAL PROCEDURE	OP NO:	0-770
	TITLE:	EXECUTION BY LETHAL INJECTION
	REVISED:	May 15, 2007

I. PURPOSES AND OBJECTIVES

A. The purpose of this procedure is to establish appropriate guidelines for the execution of condemned inmates in compliance with the laws of the State of California and the United States.

B. The objectives of this procedure are:

1. To establish the care, treatment and management of condemned inmates from the time an execution date is set through the completion of the execution.

2. To establish criteria for the selection, training, and oversight of the Lethal Injection Team.

3. To delineate specific duties and responsibilities of personnel in preparation for and completion of the execution by lethal injection of condemned inmates.

4. To ensure direct supervision and managerial oversight of the Lethal Injection process.

II. REFERENCES

A. United States Constitution, Amendment VIII

B. California Penal Code Sections: 1193, 1217, 1227, 3600, 3601, 3602, 3603, 3604, 3605, 3700, 3700.5, 3701, 3702, 3703, 3704, 3704.5, 3705, 3706.

C. California Code of Regulations, Title 15, Chapter 1, Article 1, 3000, Subchapter 2, Article 7, 3173, c, 1-6, Subchapter 4, Article 1, 3261.5, a-g, Subchapter 4, Article 7.5, 3349, a-d.

D. California Department of Corrections and Rehabilitation (CDCR) Operations Manual: (DOM), Article 13, 13010.5, Article 17, 13050.1-13050.18, Article 42, 54020.1-54020.22.

III. REVIEW AND APPROVAL

A. This procedure will be reviewed and/or revised annually in the month of June or at additional times as needed.

B. The procedure is subject to the approval of the Warden and the Office of the Secretary, CDCR.

IV. RESPONSIBILITY

A. The Warden is responsible for the recruitment, selection, retention, and training of all staff involved in the Lethal Injection process. The Warden is also responsible for managerial oversight and overall implementation of this procedure.

B. The Chief Deputy Warden is responsible for the security of the institution during a scheduled execution.

C. The Associate Warden, Specialized Housing Division, is the Lethal Injection Team Administrator and is responsible to provide direct managerial oversight and supervision of the Lethal Injection Team's training, preparation, and performance during an execution.

D. The Lethal Injection Team Leader is responsible for providing direct supervision of the Lethal Injection Team during training, preparation, and the implementation of this procedure.

V. METHODS

A. Method of Execution:

1. The judgment of death shall be executed within the walls of the California State Prison at San Quentin.

    a. The punishment of death shall be inflicted by the administration of a lethal gas or by an injection of a substance or substances in a lethal quantity sufficient to cause death by standards established under the direction of the Department of Corrections.(California Penal Code Section: 3604 (a).

    b. This procedure provides the direction and process for execution by lethal injection.

    c. If the inmate elects to have lethal gas as the method of execution, refer to San Quentin Operational Procedure No. 769 for appropriate procedures.

B. Execution Dates:

1. All execution dates are set in accordance with the provisions of Penal Code Sections 1193 and 1227.

2. The first execution date is set under the provisions of Penal Code Section 1193. The execution date must be scheduled no sooner than 60 days, but no later than 90 days from the 1193 PC hearing.

3. All subsequent execution dates are set under the provision of Penal Code Section 1227. Execution dates set under this provision of the penal code must be scheduled no sooner than 30 days, but no later than 60 days from the 1227 PC hearing.

C. Execution Site:

1. The State of California has established a dedicated Lethal Injection Facility within the walls of the California State Prison at San Quentin for execution by lethal injection.

   a. The Lethal Injection Facility consists of three (3) witness viewing rooms, one holding cell, an infusion/control room with mixing area, Security Team areas, restrooms, and execution room.

   b. The witness areas are accessible by a door located at the junction of the South and East Blocks. This area is separate but adjacent to the execution room. Visibility of the execution is through clear security glazing. Maximum capacity of the witness area is fifty (50) individuals.

   c. The holding cell contains a sink, toilet and sufficient room for a bed and mattress.

   d. Secure space is provided adjacent to the holding cell for visitation by a spiritual advisor.

   e. Security Team areas consist of an observation post near the holding cell, a search area, preparation area and a staff restroom.

   f. The Infusion Control Room has sufficient space to accommodate the Infusion Team and designated members of the Intravenous Team and the Security Team. There is a mixing area located on one wall of the Infusion Room.

   g. The Lethal Injection Facility safe and refrigerator shall be permanently mounted within the Infusion Control Room.

      1) Combination numbers to the Infusion Control Room safe are maintained only by the Warden, Associate Warden, Specialized Housing Division, and the Team Leader.

      2) The combination to the Infusion Control Room safe will be changed after each execution to maintain quality control, accountability, and security of lethal injection chemicals.

      3) The refrigerator shall be secured within a lockable, heavy gauge, steel enclosure to prevent unauthorized access. Access to the keys for the enclosure shall be limited to the Warden, Associate Warden, Specialized Housing Division, and the Team Leader.

      4) The temperature of the refrigerator will be monitored and documented to ensure that the proper storage temperature of the pancuronium bromide is maintained.

5) The refrigerator shall be connected to a power supply which is connected to the institution's back-up generator to ensure the integrity of the chemicals in the event of a power outage.

D. Execution Site Operation:

1. Security:

a. Access to the Lethal Injection Facility will be restricted to staff authorized by the Warden, except in an emergency.

b. All staff entering the Lethal Injection Facility must have prior approval of the Warden, or acting Warden, in the Warden's absence.

2. Key Procedure:

a. The keys for the Lethal Injection Facility are located in the Institution's Main Control, in a locked box secured under glass. All access must be approved by the Warden.

b. Keys allowing access to the Lethal Injection Facility locked box will only be issued to the Warden, Chief Deputy Warden, Associate Warden, Specialized Housing Division, or the Lethal Injection Team Leader.

c. Each person authorized to draw these keys will be required to sign the key control log noting the time, reason for entry into the Lethal Injection Facility, and time of return.

d. Each person authorized to draw the keys to the Lethal Injection Facility must personally return the keys to the Control Room to ensure that the keys are properly secured in the locked box under glass. Under no circumstances will the keys be returned by someone other than the person authorized to draw the keys.

e. Any emergency access to the Lethal Injection Facility will be documented in a written report to the Warden as an unusual occurrence at the institution. The Warden (or Administrative Officer of the Day during weekends, holidays, and 1st and 3rd watches) will be immediately notified of the reasons access to the Lethal Injection Facility was required.

E. Maintenance:

1. The Associate Warden, Specialized Housing Division, Chief of Plant Operations, and the Lethal Injection Team Leader will conduct documented inspections of the Lethal Injection Facility on a monthly basis. (Attachment 1)

a. The Associate Warden, Specialized Housing Division, will work with the Team Leader to complete documented security inspections of the Lethal Injection Facility.

b. The Team Leader will inspect all keys, locking devices, security systems, sanitation, electrical, and mechanical systems in the Lethal

Injection Facility to ensure that the Lethal Injection Facility is fully operational at all times.

c. The Team Leader will immediately report any deficiencies to the Associate Warden, Specialized Housing Division.

d. The Team Leader will coordinate with Plant Operations for the immediate repair of any noted deficiencies and for scheduled maintenance as needed.

e. The Team Leader will submit a written report to the Associate Warden, Specialized Housing Division, after each monthly inspection attesting to the readiness of the Lethal Injection Facility Security.

f. The Chief of Plant Operations will note any deficiencies and schedule immediate repairs as necessary.

g. The Chief of Plant Operations will report directly to the Warden the status of any repairs.

2. Thirty days prior to a scheduled execution, the Associate Warden, Specialized Housing Division, shall schedule weekly inspections of the Lethal Injection Facility.

   a. The Associate Warden, Specialized Housing Division, will coordinate with the Team Leader to conduct weekly security inspections of the Lethal Injection Facility.

   b. The Team Leader will follow the procedures identified in Section V E. 1. b. through g., above, when conducting these weekly inspections.

3. Five days prior to a scheduled execution, the Associate Warden, Specialized Housing Division, shall schedule daily inspections of the Lethal Injection Facility.

   a. The Associate Warden, Specialized Housing Division, will personally conduct the daily inspections of the Lethal Injection Facility with the Team Leader.

   b. The Associate Warden, Specialized Housing Division, will confirm that all items (clothing, personal hygiene items, television, radio, etc.) needed to re-house the inmate in the Lethal Injection Facility Secured Holding Area are present prior to re-housing the inmate in the Lethal Injection Facility.

4. On the morning before a scheduled execution, the Associate Warden, Specialized Housing Division, Chief of Plant Operations, and the Team Leader will make a final inspection of the Lethal Injection Facility. All deficiencies will be reported directly to the Warden.

F. Selection, Recruitment and Annual Review of Lethal Injection Team Members:

1. The purpose of this section is to establish a process and criteria for the recruitment, screening, and selection of members of a team to carry out the judgment of death in compliance with the laws of the state of California and the United States.

2. Recruitment and Screening Process:

   a. With the assistance of the Director, Division of Adult Institutions (DAI), the Warden will coordinate the recruitment and selection of Lethal Injection Team Members. The Lethal Injection Team will consist of a minimum of 20 members. The total number of Lethal Injection Team Members will be determined by the Warden.

   b. In the event the Warden is unable to field a sufficient number of qualified Lethal Injection Team Members, the Warden will contact the Director, DAI, to coordinate the identification of additional potential candidates for team membership. Prospective team members will be selected from departmental locations as determined appropriate by the Director, DAI.

   c. The hiring authorities from designated locations will select prospective team members from personnel assigned to their respective areas of responsibility consistent with selection criteria listed below. The hiring authorities will forward the names and classifications of prospective team members to the Director, DAI.

      1) The Warden will select a panel of individuals to review qualifications, interview prospective candidates, and select Lethal Injection Team Members. The Associate Director, Reception Centers and the Lethal Injection Team Leader will participate as panel members.

      2) The Warden will chair the panel and be responsible for the selection of team members consistent with the criteria outlined in this section.

      3) If necessary, specialists may be contracted to perform specific duties during the Lethal Injection Process.

   d. Screening of Candidates

      1) The panel will screen all candidates to ensure that each candidate meets the criteria established for membership on the four designated teams.

         The selection panel screening process will include:

a) Review of all the available candidate's performance evaluations.

b) Review of the candidate's Personnel, Supervisory, and Training files.

c) Review of the candidates current CI&I Report from the California Department of Justice.

2) The selection panel will interview each candidate to determine the following:

a) Personal History and Background

b) Professional Experience

i. Identify professional experiences, e.g., custody, administrative, that would aid them in performing this duty.

ii. Identify the professional characteristics which made this individual a candidate for membership on the team.

c) The selection panel will establish a pool of employees that have been approved for membership on the team. The Director, DAI, will ensure that a sufficient number of employees, in all four categories, will be maintained. It is the responsibility of the San Quentin Warden to notify the Director, DAI, of the necessity to fill vacancies.

3. Duties performed by the team members may include:

a. Security

b. Intravenous Access

c. Infusion of Lethal Chemicals

d. Record Keeping

4. Criteria for Lethal Injection Team membership:

a. Each team member will be selected based on their qualifications and expertise to effectively carry out the duties in one of these specialized functions.

The following criteria will be utilized in the selection of all personnel assigned to the team:

b) The PIO will give regular updates to any media gathered, and will notify the Assistant Secretary of this action.

2) Work with the Assistant Secretary to prepare a biographical and general information sheet on the inmate for briefing notes for the media, including CDCR I.D. photo. A copy of this biographical and general information sheet will be sent to the Assistant Secretary.

3) The Warden, through the PIO, will designate a cut-off time for the media to arrive as outlined in the Execution Security Plan.

8. Two days prior to an execution:

a. The Chief Deputy Warden will:

1) Prepare to activate the Emergency Operations Center. Consult with the Warden on specific areas of concern.

9. Twenty-four hours prior to an execution:

a. The Warden will:

1) Ensure that all Lethal Injection Team Members are fully prepared and ready to perform their assigned duties.

b. The Chief Deputy Warden will:

1) Activate the Emergency Operations Center.

c. The Associate Warden, Specialized Housing Division, will:

1) Accompany the Lethal Injection Team Leader to obtain the lethal injection chemicals from a licensed pharmaceutical facility or distributor.

2) Verify the chemicals and quantity. Secure the chemicals in the safe or refrigerator in the Lethal Injection Facility and complete the chain of custody form (Attachment 13). The original copy of the chain of custody form will remain with the chemicals. A copy of the form will be distributed to;

a) Warden.

b) Chief Deputy Warden.

c) Associate Warden, Specialized Housing Division.

d) Lethal Injection Team Leader.

3) Assume direct supervision of the Lethal Injection Team Members.

4) Make a final inspection of the Lethal Injection Facility to ensure operational readiness.

5) In conjunction with the Lethal Injection Team Leader:

a) Brief the Security Team on their specific duties during the scheduled execution.

b) Assess each Lethal Injection Team Member to ensure readiness for their role in the execution.

c) If necessary, excuse any staff member they believe may be unable to complete their assigned duties.

10. Six (6) hours prior to an execution (approximately 1800 hours):

a. The Lethal Injection Team Leader will:

1) Meet with and brief the condemned inmate on procedures and the responsibilities of the Security Watch Staff.

2) Supervise the movement of the condemned inmate to the Lethal Injection Facility holding cell.

3) Assign at least one Correctional Sergeant and two Correctional Officers from the Lethal Injection Team to establish a security watch, (constant and direct supervision of the inmate) in the Lethal Injection Facility Holding Area.

4) Ensure a security watch log is maintained with entrees made every 15 minutes. The log will reflect all activities involving the condemned inmate, including the following:

a) Telephone calls.

b) Correspondence.

c) Visits by staff and approved visitors.

d) Last meal.

5) Address requests made by the condemned inmate:

a) Visits:

i. The inmate can be visited by spiritual advisors and the Warden.

ii. Spiritual advisors must be approved by the Warden.

iii. Spiritual advisors wishing to bring religious items must have received advanced written permission from the Warden. All items are subject to search by staff prior to entry into the Lethal Injection Facility.

iv. No food, drinks, or vending machine items are permitted in the Lethal Injection Facility visiting areas. Coffee and juice will be provided.

v. No other visits will be permitted in the Lethal Injection Facility Holding Cell area without the approval of the Warden.

b) Last meal will:

i. Be as requested by the inmate in so far as reasonable within the established $50.00 limit.

ii. Be delivered to the Lethal Injection Facility by the Correctional Food Manager or designee.

iii. Be inspected for contraband.

iv. Be served in the Lethal Injection Facility Holding Area.

c) Coffee and/or juice will be made available.

d) Additional requests may include:

i. Food items and soft drinks.

ii. Television and radio.

iii. Phone calls.

iv. Mailing of letters.

b. The Lethal Injection Security Team will:

1) Initiate the security watch log.

a) Make entries at least every 15 minutes.

b) Document all activities involving the condemned inmate.

2) Take custody of and search the condemned inmate.

a) Conduct an unclothed body search.

b) Scan with a metal detector.

3) Search the condemned inmate's approved property.

4) Secure the condemned inmate in the Lethal Injection Holding cell.

5) Issue the condemned inmate new state clothing:

a) Appropriate undergarments.

b) One pair of socks.

c) One pair of pants.

d) One shirt.

e) One pair of slippers.

11. Approximately three (3) hours prior to an execution:

a. The Associate Warden, Specialized Housing Division, in the company of the Lethal Injection Team Leader will:

1) Remove the lethal injection chemicals from the Lethal Injection Facility safe or refrigerator.

2) Transfer custody of the lethal injection chemicals to two members of the Lethal Injection Infusion Team.

3) Ensure accountability of the lethal injection chemicals.

a) A minimum of two staff members will verify all chemicals at the time of transfer and sign the chain of custody document. (Attachment 13)

b) The original form will be signed by the Lethal Injection Team Leader and re-secured in the safe or refrigerator.

b. The Infusion Team will prepare the lethal chemicals as described below:

1) Two identical trays will be prepared:

a) Tray A will be color-coded red and be the primary tray used for the Lethal Injection.

b) Tray B will be color-coded blue will be the backup tray.

2) Each tray will have eight (8) color-coded syringes to match the tray and be labeled by content and sequence of administration as follows:

#1	60cc syringe 1.5 grams Sodium Thiopental
#2	60cc syringe 1.5 grams Sodium Thiopental
#3	60cc syringe 50cc saline flush
#4	60cc syringe 50 milligrams Pancuronium Bromide
#5	60cc syringe 50cc saline flush
#6	60cc syringe 100 milliequivalents Potassium Chloride
#7	60cc syringe 100 milliequivalents Potassium Chloride
#8	60cc syringe 50cc saline flush

3) One Infusion Team Member prepares the syringes for Tray A.

a) Another Infusion Team Member observes to verify proper preparation.

Note: Sodium Thiopental must be mixed according to the manufacturer's instructions.

b) A Record Keeping Team Member will also observe and document the preparation on the Infusion Team Execution Log.

4) Tray B will be prepared by a different Infusion Team Member.

a) Another Infusion Team Member observes to verify proper preparation.

b) A Record Keeping Team Member will also observe and document the preparation on the Infusion Team Execution Log.

12. During the Day of the Execution:

a. The Warden will confirm the following activities:

1) Approximately 2 hours prior to the execution, ensure all witnesses are appropriately accommodated.

2) Accompanied by the Associate Warden, Specialized Housing Division, meet with the condemned inmate in the Lethal Injection Facility Holding Area.

   a) Advise the inmate that a written last statement can be prepared to be read after the execution.

   b) Inform the inmate that a sedative is available. Upon request, a sedative will be administered under the direction and approval of a clinician.

3) The official witnesses are ushered to their designated area and given final instructions as needed.

4) Approximately 45 minutes before the execution, the Warden will instruct the Lethal Injection Team to prepare the inmate.

5) Ensure open dedicated phone contact with the Governor's Office, the Office of the Attorney General and the California State Supreme Court is established.

6) Approximately 25 minutes before the execution, instruct staff to admit the witnesses to their designated areas.

7) Approximately 15 minutes before the execution, order the inmate brought into the execution room, and secured to the gurney.

b. The Chief Deputy Warden will:

1) Place the institution on lockdown at the appropriate time commensurate with the day and hour of the scheduled execution.

2) Assume command of the Emergency Operations Center.

c. The Associate Warden, Specialized Housing Division, will:

1) Approximately 2 hours prior to the execution, accompany the Warden into the Lethal Injection Facility to meet with the inmate.

2) During the execution, take a position in the Infusion/Control Room and provide direct supervision of the Lethal Injection Infusion Team during administration of the lethal chemicals.

d. The Litigation Coordinator will:

1) Take a position at the Lethal Injection Facility telephones 15 minutes prior to the scheduled execution to ensure

constant communication with the Governor's Office, the State Attorney General and the State Supreme Court.

2) Relay all calls to the Warden and the Associate Warden, Specialized Housing Division.

e. The Warden's Administrative Assistant will:

1) At the time designated by the Warden, escort all witnesses, except those invited by the inmate to their respective areas.

2) Assign a Correctional Officer to escort witnesses invited by the inmate to their designated witness area. The Correctional Officer will remain with these witnesses.

3) During the execution, remain in the Lethal Injection Facility witness area to assist the Public Information Officer.

f. The Public Information Officer will:

1) At the time designated by the Warden, identify the media witnesses and escort them from the media center to their designated witness viewing room.

2) Instruct the media witnesses regarding items that are not permitted in the Lethal Injection Facility. These items will be deposited at the media center for later retrieval. No equipment will be allowed in the witness gallery. Pencils and notepads will be provided.

3) Utilize the metal detector at the Visitor Processing Center or any other search method deemed necessary and reasonable.

4) Immediately upon the Warden's announcement of death, usher the media witnesses directly to the media center where they will give pool commentary to the other assembled media. Give no commentary until after the official statement by the Warden.

S. The Lethal Injection Protocol:

1. Inmate preparation:

a. Upon direction of the Warden to prepare the inmate, the Lethal Injection Team Leader will:

1) Direct the Security Team to conduct an unclothed body search.

2) Place the inmate in restraints and remove the inmate from the Lethal Injection Facility Holding Area.

3) Observe the Intravenous Team place the ECG sensors on the chest of the inmate.

b. Resistive inmates:

1) In the event that an inmate refuses to comply with staff orders to be placed in restraints or to exit his assigned cell or the Lethal Injection Facility Holding Area, or any other area that the inmate may be held, the Lethal Injection Team Leader will advise the Associate Warden, Specialized Housing Division.

2) The Associate Warden, Specialized Housing Division, will speak to the inmate in an attempt to gain the inmate's cooperation.

3) If the inmate continues to refuse to comply with orders, an emergency cell extraction will be authorized.

4) Staff will follow the universal precautions when performing an extraction including, but not limited to, the following:

a) Disposable gowns
b) Face/head protection
c) Rubber gloves
d) Padded gloves
e) Leg protection

5) Any use of force will be noted in the Lethal Injection Facility Activity Log as well as in the Execution Report – Part A and Part B. (Attachments 22 and 23)

c. The Security Team will:

1) Escort the inmate from the Lethal Injection Facility Holding Area to the Execution Room.

2) Secure the inmate to the gurney with restraints.

3) Secure the inmates hands to the arm rests on the gurney with white medical tape.

a) Ensure that the inmate's hands are secured palm up to allow the Intravenous Team access to the necessary veins.

b) Secure the inmate's fingers to the gurney in the extended position.

d. The Lethal Injection Team Leader will:

1) Ensure the inmate is properly secured.

2) Ensure the restraints do not inhibit the inmate's circulation.

3) Excuse the Security Team to wait on standby in an adjacent room.

4) Remain in the room to supervise the insertion of the catheters by the Intravenous Team.

e. The Intravenous Team will:

1) Enter the Execution Room immediately after the Security Team exits.

2) Inspect the restraints to ensure that they do not restrict the inmate's circulation or interfere with the insertion of the catheters.

3) Insert two catheters into pre-designated veins.

4) As each catheter is inserted inform an Intravenous Team Member in the Infusion Room to initiate the intravenous drip.

5) Designate primary and back-up intravenous lines.

6) Inform the Warden when the intravenous lines have been successfully established.

7) One Intravenous Team Member will then exit the execution room and report to the Infusion Room to continuously monitor the saline drips.

8) One Intravenous Team Member will remain in the execution room to continuously monitor the intravenous lines and assess the consciousness of the condemned inmate throughout the execution.

2. The Lethal Injection Team Leader will exit the Execution Room and report to the Infusion Room to monitor the Execution.

3. The Warden will:

a) Take a position in the Execution Room in close proximity to the condemned inmate.

b) Inquire of both the State Supreme Court and the Attorney General's Office if there is any matter pending before any court to preclude the execution from proceeding.

c) Inquire of the Governor's Office if there is any reason not to proceed with the execution.

d) If there responses are negative, read a prepared statement detailing the court order mandating the execution. (Attachment 15)

e) Provide an opportunity for the condemned inmate to make a brief final statement via the public address system. After the statement is made, the public address system will be turned off.

f) Direct the Infusion Team to administer the lethal injection chemicals.

4. Infusion.

a) The Infusion of Lethal Injection chemicals will begin with Tray A using the intravenous catheter designated as primary.

b) The saline drip in the intravenous catheter that was designated primary infusion will be stopped prior to the injection of the fist syringe, and restarted after the last syringe has been administered. The saline drip in the back-up intravenous line will be continually maintained.

c) If at any time during the infusion of the lethal chemicals, the primary intravenous catheter fails, the Warden will be notified and direct that the Lethal Injection Protocol using the primary intravenous catheter and the chemicals on Tray A be discontinued and the entire sequence began again using the back-up intravenous catheter and the chemicals on Tray B in the same sequence as noted below.

d) A Record Keeping Team Member in the infusion room will initiate a 10 minute count down at the start of the infusion of syringe #1 (sodium thiopental).

e) Beginning with Tray A and using the primary intravenous catheter, the chemicals will be administered as follows:

- **#1—60cc syringe: 1.5 grams sodium thiopental** will be administered, followed by an assessment of the condemned inmate; the Intravenous Team Member will brush the back of his/her hand over the condemned inmate's eyelashes, and speak to and gently

shake the condemned inmate. Observations will be documented. If the condemned inmate is unresponsive, it will demonstrate that he is unconscious. Regardless, the Protocol will continue as follows:

- **#2—60cc syringe: 1.5 grams sodium thiopental** will be administered.
- **#3—60cc syringe: 50 cc saline flush** will be administered, followed by another assessment of consciousness as outlined above. Observations will be documented. At this point if the condemned inmate is determined to be unconscious, the Warden will authorize the protocol to proceed in the following sequence:
- **#4—60cc syringe: 50 mg pancuronium bromide**
- **#5—60cc syringe: 50cc saline flush**
- **#6—60cc syringe: 100 ml/Eq potassium chloride**
- **#7—60cc syringe: 100 ml/Eq potassium chloride**
- **#8—60cc syringe: 50cc saline flush**
- If, following the administration of syringe #2 and syringe #3, the assessment indicates the condemned inmate is not unconscious, the Warden will direct that the injection through the primary intravenous catheter, be discontinued and the entire sequence re-initiated using chemicals on Tray B via the designated back-up intravenous catheter.

f) An ECG will monitor the inmate's heart activity.

g) Death will be determined by a doctor.

h) If, in the event all eight syringes from Tray A have been administered, ten minutes has elapsed and death has not been determined, the Record Keeping Team Member will advise the Associate Warden, Specialized Housing Division, who will advise the Warden.

i) The Warden will direct the Lethal Injection Protocol to be repeated using the back-up intravenous catheter and the chemicals from Tray B in exactly the same sequence as noted above.

T. Post-Execution Procedure:

1. Immediately following the determination of death of the condemned inmate, the Warden will read an official statement notifying the witnesses the execution is complete. (Attachment 17)

2. The Warden will:

a) Have the curtains on the viewing windows closed, and direct the witnesses be escorted from the Lethal Injection Facility.

b) Approximately one hour after the execution, the Warden will issue a statement to the media advising the sentence has been carried out and announcing the time of death, and immediately exit the media center.

3. The Administrative Assistant will:

   a) Immediately following the official statement by the Warden at the press conference, accompany the Warden out of the media center.

4. The Public Information Officer will:

   a) Immediately upon the Warden's announcement of death, usher the media witnesses directly to the media center where they will give pool commentary to the other assembled media

   b) Accompany the Warden to the post-execution press conference and, after the Warden leaves, respond to questions that follow the Warden's Official Statement.

   c) Read the inmate's last statement to the press or announce that the inmate did not have a last statement.

   d) As soon as possible, but no longer than 30 minutes after commencement, conclude the press conference and usher all media off the prison grounds. Secure the media center and go to the Warden's office to field telephone inquires.

5. The Litigation Coordinator will:

   a) Assemble all appropriate reports and maintain the Master Execution File of records regarding the execution in the Litigation Coordinator's office.

6. After all the witnesses have been escorted out of the Lethal Injection Facility:

   a) The Intravenous Team will crimp closed and disconnect all intravenous lines, but will not remove the lines from the inmate. Intravenous lines will remain in place to allow review by the Marin County Coroner as necessary.

   b) Under the supervision of the Lethal Injection Team Leader, the inmate's body shall be removed with care and dignity and placed in a post-mortem bag pending removal as pre-arranged with the contract mortuary.

7. The Lethal Injection Facility will be cleaned thoroughly after the inmate's body has been removed.

8. The Security Team will conduct a security inspection of the Lethal Injection Facility to ensure that all doors are secured and that no items were left behind.

9. All unused chemicals will be documented on the Chain of Custody form and noted as to why they were not used. The Infusion Team will transfer the unused chemicals to the Associate Warden, Specialized Housing Division, who will place them in the Lethal Injection Facility safe or refrigerator to await proper disposal and note their transfer on the Chain of Custody form. (Attachment 13)

10. The Intravenous Team will complete a post-execution inventory of all supplies and equipment that were used by the Intravenous Team during the execution. The Intravenous Team will give the inventory to the Associate Warden, Specialized Housing Division, who will arrange for replacement and replenishment of supplies.

11. The Lethal Injection Team Leader will secure the Lethal Injection Facility and return the keys to Main Control.

12. The Lethal Injection Team Leader will report directly to the Warden that the Lethal Injection Facility has been secured.

U. Debriefing:

1. The Warden and Associate Warden, Specialized Housing Division, will hold a debriefing and critique with all Lethal Injection Team Members. All documents and records concerning the execution will be collected by the Associate Warden, Specialized Housing Division, for review.

2. The Associate Warden, Specialized Housing Division, will assess the Lethal Injection Team Members for the need for employee post trauma care.

3. As soon as possible but no later than 24 hours after the execution, the Warden will arrange for a confidential individual debriefing, by appropriate staff, with each Lethal Injection Team Member. The purpose of the debriefing is to provide a confidential forum for the team member to candidly discuss the impact of the execution on him or her and provide access to counseling services as requested. A Team Member may be accompanied by a person of his or her choosing at the individual debriefing.

V. Documentation- Managerial Oversight:

1. Immediately following the execution, the Lethal Injection Team Leader will complete a Execution Report - Part A. (Attachment 22)

2. Each team member will complete Execution Report – Part B, documenting their actions and observations during the execution. (Attachment 23)

3. Team members will use identifiers assigned to their specific position (duties), rather than their names and/or classifications, when they submit their reports.

4. The Lethal Injection Team Leader will assemble the complete Execution Report for review by the Associate Warden, Specialized Housing Division. The Execution Report will include all appropriate supplemental reports.

   a) Following review by the Associate Warden, the Execution Report will be routed through the Chief Deputy Warden for the Warden's review and signature.

   b) Any use of force will be specifically documented and reviewed according to existing Departmental policy.

5. A copy of the Execution Report will be delivered to the Director, DAI for review and follow up as needed.

6. The original Execution Report will be retained at San Quentin as part of the Master Execution File.

7. The Record Keeping Team will meet with the Associate Warden, Specialized Housing Division, and ensure all documentation has been completed. The documentation will be reviewed and approved by the Associate Warden, Specialized Housing Division, and shall be hand delivered to the Warden for inclusion in the Master Execution File.

W. Critique:

1. Within 72 hours, the Warden shall conduct an after-action critique of the execution.

   a) The purpose of the critique is to evaluate the execution from all operational perspectives, including compliance with this Operational Procedure.

   b) The critique shall be documented for inclusion in the Master Execution File with other records of the execution.

   c) Any recommendations for changes in procedures or training must be approved by the Warden and the Office of the Secretary, CDCR.

X. Return on Warrant of Death:

1. After receipt of the Certificate of Death, the Warden shall complete the Return on Warrant of Death, and forward the Return to the county from which the inmate was under sentence of death along with a copy of the Certificate of Death. (Attachment 18)

VI. RESOURCE SUPPLEMENTS

Attachment 1: Lethal Injection Facility Inspection Report
Attachment 2: Media Notification of Scheduled Execution
Attachment 3: CDCR 1801-B, Service of Execution Warrant – Warden's Initial Interview
Attachment 4: CDCR 1801, Notification of Execution Date, Choice of Execution Method
Attachment 5: CDCR 1801-A, Choice of Execution Method
Attachment 6: Thirty Day Notice
Attachment 7: Sample of Alienist 20-Day Report
Attachment 8: PC 3700 Notification
Attachment 9: 15-Minute Check Log
Attachment 10: Sample of Alienist 7-Day Report
Attachment 11: Pre-Execution Log
Attachment 12: Lethal Injection Supply Inventory
Attachment 13: Chain of Custody
Attachment 14: Inmate Needs
Attachment 15: Pre-Execution Notice to Witnesses
Attachment 16: Lethal Injection Infusion Team Execution Log
Attachment 17: Post-Execution Notice to Witnesses
Attachment 18: Return on Warrant of Death
Attachment 19: Lethal Injection Intravenous Team Execution Log

EXHIBIT D

EDMUND G. BROWN JR.
Attorney General of California
ROCHELLE C. EAST
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy Attorney General
MICHAEL J. QUINN
Deputy Attorney General
State Bar No. 209542
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5726
Fax: (415) 703-5843
E-mail: Michael.Quinn@doj.ca.gov
Attorneys for Defendants Schwarzenegger, Cate and Cullen

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, **v.** **MATTHEW CATE, et al.,** Defendants.	C 06-0219 JF **DEFENDANTS' RESPONSES TO COURT'S INQUIRIES**

During the September 21, 2010 joint status conference, this Court requested information from Defendants regarding the following issues: (1) the departures from the current regulations that would be necessary to enable Defendants to perform a lethal-injection execution with a single drug, namely, sodium thiopental; and (2) the amount of notice that the execution team would need to make such changes and conduct a lethal-injection execution with a single drug. Without conceding that the Court has jurisdiction to order a single-drug execution or that such an execution would comply with State law, the following addresses the Court's two questions.

I. THE CHANGES THAT WOULD BE NECESSARY TO PERFORM AN EXECUTION WITH A SINGLE DRUG.

The current lethal-injection regulations, which went into effect on August 29, 2010, specify that 1.5 grams of sodium thiopental must be administered by the execution team, followed by a consciousness assessment of the inmate. Cal. Code Regs. tit. 15, § 3349.4.5(g)(5)(A) (2010). After that assessment, a second syringe with 1.5 grams of sodium thiopental is administered by the team. *Id.* at § 3349.4.5(g)(5)(B). If, following the administration of a saline flush and another consciousness assessment, the inmate is determined to be unconscious, the remaining lethal injection chemicals are dispensed. *Id.* at § 3349.4.5(g)(5)(C-H).

To perform a lethal-injection execution with a single drug, Defendants would make several changes to the manner in which the lethal injection chemicals are currently administered. Instead of using a total of three grams of sodium thiopental, as specified in the existing regulations, Defendants would use a total of five grams of sodium thiopental. The sodium thiopental would be administered through five syringes, each containing one gram of the chemical. After all five syringes have been administered, a 50cc saline flush would be dispensed.

As in a three-drug execution, a doctor would monitor an electronic device showing the inmate's vital signs throughout a single-drug execution and determine when the inmate has expired.

In addition, during a single-drug execution, pancuronium bromide and potassium chloride would not be administered. The portions of the current regulations concerning the administration of those chemicals would not be adhered to during such an execution.

II. THE AMOUNT OF NOTICE THAT WOULD BE NECESSARY TO PERFORM AN EXECUTION WITH A SINGLE DRUG.

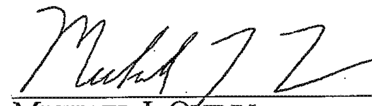
The current regulations provide that three days before a scheduled execution, the execution team leader must "activate all members of the Lethal Injection Team and schedule daily training and preparedness exercises on each of the three days prior to the scheduled execution." Cal. Code Regs. tit. 15, § 3349.3.6(b)(1) (2010).

If the State were to perform an execution with a single drug, Defendants would prefer that the execution team have three days' notice. That amount of notice would enable the team to conduct daily training and preparedness exercises during the three days before the execution as the current regulations envision.

Dated: September 22, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
ROCHELLE C. EAST
Senior Assistant Attorney General
THOMAS S. PATTERSON
Supervising Deputy Attorney General



MICHAEL J. QUINN
Deputy Attorney General
Attorneys for Defendants Schwarzenegger, Cate and Cullen

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CERTIFICATE OF SERVICE

Case Name: **Michael Angelo Morales v. James Tilton, et al.** No. **C 06-0219 JF**

I hereby certify that on **September 22, 2010**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' RESPONSES TO COURT'S INQUIRIES

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On **September 22, 2010**, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

Michael G. Millman
California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105

Stephanie L. Reinhart
Jenner & Block
One IBM Plaza
Chicago, IL 60611

Janice H. Lam
Jenner & Block
One IBM Plaza
Chicago, IL 60611

Office of the Inspector General
P.O. Box 348780
Sacramento, CA 95834

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 22, 2010**, at San Francisco, California.

M. M. Argarin
Declarant

Signature

40464745.doc

EXHIBIT E

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2 **E-Filed 9/24/2010**
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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**
11

Michael Angelo MORALES, Plaintiff, v. Matthew CATE, Secretary of the California Department of Corrections and Rehabilitation, et al., Defendants.	Case Number C 06 219 JF HRL Case Number C 06 926 JF HRL DEATH-PENALTY CASE ORDER GRANTING MOTION FOR LEAVE TO INTERVENE; AND DENYING CONDITIONALLY INTERVENOR'S MOTION FOR A STAY OF EXECUTION

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Albert Greenwood Brown, a condemned inmate at San Quentin State Prison, seeks leave to intervene in the above-entitled actions. He also seeks a stay of his execution, which currently is scheduled for September 29, 2010 at 12:00am. Because Brown's federal claims are virtually identical to those asserted by Plaintiff Michael Angelo Morales, the motion for leave to intervene will be granted. The motion for a stay of execution will be denied, subject to the conditions set forth below.

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I. BACKGROUND

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Morales filed the first of these consolidated actions in January 2006, claiming that the lethal-injection execution protocol then used by Defendants, known as O.P. 770, was so seriously

flawed that it violated the Eighth Amendment's prohibition against "cruel and unusual punishments." Morales produced evidence indicating that a number of inmates who had been executed pursuant to O.P. 770 may not have been unconscious when they were injected with the second and third drugs used in the protocol.[1] While disputing the probative value of Morales's showing, Defendants stipulated that injecting these two drugs into a conscious person would cause an unconstitutional degree of pain and suffering.

After receiving briefing and holding an evidentiary hearing, the Court found that Morales was entitled to relief under the legal standard then applicable in the Ninth Circuit, which prohibited methods of execution that exposed the condemned person to "an unnecessary risk of unconstitutional pain." *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004). However, rather than granting Morales an outright stay of execution, the Court entered an order permitting Defendants to proceed with the execution under certain alternative conditions, one of which was to execute Morales using only a barbiturate. *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006).

For reasons that for the most part are not directly relevant to the instant motions, Defendants did not carry out the execution, and a stay issued pursuant to the Court's conditional order. The parties then engaged in several months of discovery, including a judicial visit to the execution facilities at San Quentin. The Court subsequently held a four-day evidentiary hearing and received voluminous briefing and documentary evidence. As a result of this process, the Court "learned a great deal about executions by lethal injection in general and their implementation in California in particular." *Morales v. Tilton*, 465 F. Supp. 2d 972, 978 (N.D. Cal. 2006). It found and concluded that as implemented in actual practice, O.P. 770 contained

[1]The first drug in the three-drug execution protocol is sodium thiopental, which is painless and is intended to induce unconsciousness. The second drug, pancuronium bromide, induces paralysis. The third drug, potassium chloride, stops the heart. It is undisputed that in the quantities specified in the protocol, any of the three drugs will cause death.

1 several serious deficiencies[2], and it asked Defendants to engage in a through review and revision
2 of the protocol.
3 Defendants accepted the Court's invitation to revise California's lethal injection
4 procedures, and they presented a new version of O.P. 770 on April 15, 2007. Defendants also
5 began construction of new execution facilities at San Quentin. It was the Court's intention at that
6 time to review Defendants' revisions expeditiously so that the instant lawsuit could be resolved.
7 However, as a result of separate litigation in the Marin Superior Court, Defendants were enjoined
8 from implementing the new protocol unless and until they complied with California's
9 Administrative Procedures Act ("APA"), Cal. Govt. Code §§ 11340, et seq., and the superior
10 court's order was upheld on appeal. *Morales v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th
11 749 (Cal. Ct. App. 2008). Although several status conferences were scheduled thereafter, both
12 Morales and Defendants requested that this Court not proceed further until the state-court appeal
13 and the subsequent administrative process were completed. While the instant case was brought
14 by Morales in his individual capacity and not on behalf of other condemned inmates similarly
15 situated, the Court always has understood, apparently incorrectly, that executions would not
16 resume until it had an opportunity to review the new lethal-injection protocol in the context of
17 the evidentiary record developed during the 2006 proceedings.
18 The new lethal-injection protocol, which now is a formal regulation, Cal. Code Regs. tit.
19 15, §§ 3349, et seq., became effective on August 29, 2010. On August 30, 2010, at the request of
20 that county's district attorney, the Riverside Superior Court scheduled Brown's execution for
21 September 29, 2010. On August 31, 2010, the Marin Superior Court granted a motion to enforce
22 its earlier injunction, thereby staying any execution, including Brown's, "unless and until this
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26 [2]The deficiencies included inconsistent and unreliable screening of execution team
members; a lack of meaningful training, supervision and oversight of the execution team;
27 inconsistent and unreliable record-keeping; improper mixing, preparation and administration of
sodium thiopental by the execution team; and inadequate lighting, overcrowded conditions, and
28 poorly designed facilities in which the execution team must work. *Morales v. Tilton*, 465 F.
Supp. 2d at 979-80.

1 court dissolves the permanent injunction issued by this court in its final judgment." Defendants
2 sought appellate review, and on September 20, 2010, the California Court of Appeal issued a
3 peremptory writ of mandate directing the lower court to dissolve the injunction. *Cal. Dep't of*
4 *Corr. & Rehab. v. Super. Ct.*, No. A129540 (Cal. Ct. App., Sept. 20, 2010). Brown filed the
5 instant motions on September 15, 2010, while Defendants' writ petition was pending, and this
6 Court heard oral argument on September 21, 2010.

7 During the lengthy hiatus in these federal proceedings, the United States Supreme Court
8 decided *Baze v. Rees*, 553 U.S. 35 (2008), holding that Kentucky's lethal-injection protocol,
9 which uses the same three drugs as California's, did not violate the Eighth Amendment. The
10 plurality opinion by Chief Justice Roberts stated that in a case involving an Eighth Amendment
11 challenge to a lethal-injection protocol, a federal court may not stay an execution "unless the
12 condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated
13 risk of severe pain." *Id.* at 61 (plurality op.). Finding that "[t]here were no reported problems"
14 during the one lethal-injection execution actually carried out in Kentucky, *id.,* at 46 (plurality
15 op.), the plurality concluded that the petitioners had "not carried their burden of showing that the
16 risk of pain... constituted cruel and unusual punishment," *id.* at 41 (plurality op.).

17 The requirement that an inmate seeking stay of execution show "a demonstrated risk of
18 severe pain" superseded the lesser showing ("an unnecessary risk of unconstitutional pain") that
19 had been articulated by the Ninth Circuit in *Cooper*, 379 F. 3d at 1033, and that was binding on
20 this Court at the time that Morales filed the instant action in 2006 and until *Baze* was decided.
21 At the same time, while it rejected the petitioners' argument that Kentucky was constitutionally
22 required to adopt a single-drug method of execution, which at that point had not been tested in
23 any state, the *Baze* plurality did note the relevance of "known and available alternatives" to a
24 lethal-injection protocol in a case in which a substantial risk of a constitutional violation has been
25 shown. In the words of the Chief Justice,

26 To qualify, the alternative procedure must be feasible, readily implemented,
and in fact significantly reduce a substantial risk of severe pain. If a State
27 refuses to adopt such an alternative in the face of these documented advantages,
without a legitimate penological justification for adhering to its current method
28 of execution, then a State's refusal to change its method can be viewed as "cruel

1 and unusual" under the Eighth Amendment.

2

3 553 U.S. at 52 (plurality op.) Since *Baze* was decided, two states–Ohio and Washington–have
4 carried out a total of nine successful and problem-free executions using only sodium thiopental.

II. DISCUSSION

A. Abstention

Federal courts ordinarily should abstain from the exercise of jurisdiction "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 813-14 (1976) (internal quotation marks and citations omitted). In the instant case, Brown is one of several condemned inmates who have challenged California's new lethal-injection regulations in the Marin Superior Court on the basis that the regulations were not adopted properly under California's Administrative Procedures Act. At oral argument, counsel for Brown represented that they intended to seek injunctive relief that would permit the state court to consider the merits of this challenge prior to any executions taking place. Such relief would render moot Brown's motion for a stay of execution by this Court.

Apparently, the state court will not consider Brown's request until Monday, September 27, 2010.[3] Because Brown's execution is set for midnight on Wednesday, September 29, 2010, a decision by this Court to defer its ruling until after the state court has acted likely would frustrate the parties' ability to obtain meaningful appellate review of this Court's ruling. Accordingly, the Court concludes that abstention is not warranted. In deference to the state court, this Court has not considered and does not address Brown's state-law claims.

B. Timeliness

The Supreme Court has held that in determining the appropriateness of issuing a stay of execution,

> a district court must consider not only the likelihood of success on the merits and

[3]Brown made a previous, unsuccessful request for injunctive relief in the state court, but at that time the now-vacated injunction in the earlier APA litigation was still in place, and it does not appear that the state court addressed the merits of Brown's claims.

> relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

Nelson v. Campbell, 541 U.S. 637, 649050 (2004). Brown filed the instant motions on September 15, 2010, only two weeks before his execution date. Because of the need for at least minimal briefing, oral argument did not occur until September 21, 2010, only eight days before the scheduled execution. Under ordinary circumstances, Brown's motions clearly would be untimely. *See,* e.g., *Cooper*, 379 F.3d at 1031.

However, the circumstances in this case are anything but ordinary. Until September 20, 2010 an injunction was in place that prohibited, pending state-court review, any executions under California's new lethal-injection regulations. While that injunction since has been vacated, no authority cited by Defendants holds that Brown was required to predict how the state appellate court would rule or to seek "back-up" relief from this Court or in other state-court litigation. Brown's counsel also claim that they relied on assurances by Defendants' counsel that Defendants would not seek to resume executions while the instant federal case was pending.[4] Although arguably Brown could have filed his motions as a protective measure some weeks earlier (that is, on or shortly after August 30, 2010, when his execution date was set), it is Defendants who seek an execution date that effectively precludes an orderly review of the new regulations in either state or federal courts, and Defendants thus bear at least some responsibility for the fact that the Court now must address constitutional issues in a severely limited time frame. Significantly, while the Court must address the timeliness of Brown's motions *sua sponte*

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[4]Defendants' counsel dispute this claim. They acknowledge stating to this Court in 2006 that no executions would be scheduled during the period immediately preceding and following the evidentiary hearing because there were no condemned inmates whose cases had progressed to the point where that was a legal possibility, but they deny making any subsequent representations to counsel that executions would not be scheduled until after this Court has considered the new lethal-injection regulations. After hearing from all counsel at a telephonic hearing earlier today, the Court is not persuaded that Defendants' counsel made any representation that would affect the analysis or disposition of the instant motions. Although the Court itself was surprised by Defendants' decision to seek an execution date for Brown when they did, that decision is not inconsistent with anything communicated to the Court by Defendants' legal representatives.

1 in determining the appropriateness of equitable relief, Defendants themselves did not contend in
2 their briefing that Brown has not been diligent in seeking federal relief.

3 **C. Merits**

4 Brown contends that because California's new lethal-injection regulations are a direct
5 response to this Court's earlier factual findings, no executions should take place unless and until
6 the Court has had the opportunity to conduct a full review of the regulations. Brown also claims
7 that the regulations have failed to address many of the deficiencies identified by the Court,
8 particularly with regard to selection and training of the execution team.

9 Defendants argue that Brown has not made the showing required by *Baze*, that is, that the
10 new regulations create "a demonstrated risk of severe pain." *Id.*, at p. 61 (plurality op.) They
11 point out that the regulations were subjected to months of public and administrative scrutiny, and
12 that they have built a new execution facility that remedies specifically a number of the
13 deficiencies in the old facility that were identified by the Court. They also observe that the
14 Kentucky lethal-injection protocol that passed constitutional muster in *Baze* in some respects had
15 fewer safeguards even than O.P. 770, *Cf. Baze*, 553 U.S. at 120-21 (Ginsburg, J., dissenting),
16 which they contend has been improved significantly under the new regulations.

17 In considering these arguments, this Court hardly is writing on a clean slate. Indeed, it is
18 fair to say that there is no case involving an Eighth Amendment challenge to a lethal-injection
19 protocol in which the factual record is as developed as is the record here. As noted earlier, there
20 had been only one execution under the Kentucky protocol considered by the Supreme Court in
21 *Baze*, and the plurality opinion noted specifically that there had been "no reported problems"
22 with that execution. *Id.*, at p.46 (plurality op.) Similarly, in a post-*Baze* decision affirming the
23 denial of relief by the district court in Delaware, the Third Circuit found that the plaintiffs "ha[d]
24 submitted no evidence" and thus "on this record" concluded that they had "failed to show that
25 Delaware's lethal injection protocol violates the Eighth Amendment under *Baze*." *Jackson v.*
26 *Danberg*, 594 F.3d 210, 229 (3rd Cir. 2010).

27 In contrast, the record in this case, much of which was stipulated to by Defendants, shows
28 that there may have been problems with as many as seven of the eleven lethal-injection

1 executions carried out under O.P. 770. Defendants' own medical expert expressed concern that
2 at least one inmate well may have been awake when he was injected with the second and third
3 drugs in the lethal-injection cocktail. *Morales v. Tilton*, 465 F. Supp. 2d at 980. After
4 considering four days of testimony and hundreds of pages of documentary evidence, the Court
5 found that O.P. 770 as implemented in practice "lack[ed] both reliability and transparency."
6 *Id.*, at p. 981. Although the Court framed its factual findings and legal conclusions under the
7 legal standard then applicable in the Ninth Circuit, *cf., Cooper*, 379 F.2d at 1033, it likely would
8 have made the same findings and reached the same conclusions under the "demonstrated risk"
9 standard announced in *Baze*.

10 The question remains whether Brown is entitled to a stay of execution. As discussed
11 above, Morales's own request for a stay of execution, which involved the lesser showing then
12 required under *Cooper*, was conditionally denied, and Morales was not executed only because
13 the conditions were not met. As the Court recognized in its order concerning Morales, California
14 has a "strong interest in proceeding with its judgment," *Gomez v. U.S. Dist. Ct. N.D. Cal.*, 503
15 U.S. 653, 654 (1992). While Brown is correct that the development of the record after Morales's
16 execution was stayed produced even stronger evidence of problems with O.P. 770, O.P. 770 no
17 longer is operative, and Defendants reasonably point both to their extensive efforts to address the
18 Court's concerns in the new regulations and facilities and the higher threshold for obtaining stays
19 of execution established by the Supreme Court in *Baze*.

20 Although it has adopted an accelerated case management schedule for resolution of
21 Morales's claims in light of the new regulations, there is no way that the Court can engage in a
22 thorough analysis of the relevant factual and legal issues in the days remaining before Brown's
23 execution date. The regulations have been more than three years in the making, and the Court
24 would have preferred strongly to address any constitutional issues with respect to the regulations
25 in a more orderly fashion. Nonetheless, the Court recognizes that there was no legal impediment
26 to the setting of Brown's execution date, and that absent a *presently-existing* "demonstrated risk"
27 of a constitutional violation, Defendants are entitled to proceed with the execution.
28

Based on the foregoing discussion, the Court concludes that Brown has no greater entitlement to equitable relief than Morales did in February 2006. As relevant here, the Court concluded that Morales was not entitled to an outright stay of execution, but that it was appropriate that certain conditions be imposed that insured that Morales would not endure an unconstitutional degree of pain and suffering. *Morales v. Hickman*, 415 F. Supp. 2d at 1047. One of the alternatives offered to Defendants was to execute Morales using only sodium thiopental. For reasons not relevant here, Defendants did not seek to proceed with that alternative until hours before Morales's death warrant was to expire, and at that point no clear procedure had been articulated for carrying out a single-drug execution.

In an effort to avoid repeating that situation, the Court asked Defendants at oral argument on the instant motions to indicate what variation from the current regulations, if any, would be necessary to carry out Brown's execution using only sodium thiopental, and how much advance notice Defendants would require to implement such a variation. Defendants responded to the Court's questions on September 22, 2010, and Brown filed a response on September 23, 2010. Drawing upon its familiarity with and understanding of the record, the Court is satisfied that the procedure described in Defendants' submission is sufficient to eliminate any "demonstrated risk" of a constitutional violation. The fact that nine single-drug executions have been carried out in Ohio and Washington without any apparent difficulty is undisputed and significant.

Defendants reasonably are concerned that having been required by the state courts to promulgate the current lethal-injection protocol as formal regulations, any variation from the regulations would be problematic. The Court is satisfied that it can address this concern by allowing Brown himself to choose whether the second and third drugs in the protocol will be withheld. Allowing a condemned inmate to make such a choice is consistent with Ninth Circuit authority in cases arising both in California and elsewhere. *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), *vacated on other grounds sub nom. Gomez v. Fierro*, 519 U.S. 918 (election between

lethal injection and lethal gas in California); *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (election between lethal injection and hanging in Washington).[5]

The Court is constrained to point out once again that the instant litigation is not about the wisdom or morality of the death penalty or the tragic suffering of the families and loved ones of those who commit capital crimes. The passions that surround these issues are deep and entirely understandable, but they have little to do with the limited legal question presented here, which is whether under the United States Constitution as interpreted by the United States Supreme Court, Albert Greenwood Brown is entitled to a stay of execution. The Court is painfully aware that however it decides a case of this nature, there will be many who disagree profoundly with its decision. The moral and political debate about capital punishment will continue, as it should.

III. DISPOSITION

Good cause therefor appearing,

1. The motion for leave to intervene is granted;
2. The motion for a stay of execution is denied, subject to the following conditions:
    a. Not later than 6:00pm on Saturday, September 25, 2010, Brown shall advise Defendants through counsel whether he elects to be executed by the injection of all of the drugs specified in Cal. Code Regs. tit. 15, §§ 3349, et seq., or by the

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[5] *See also* Ala. Code 1975 § 15-18-82 (Alabama)(lethal injection but prisoner may elect electrocution) A.C.A. § 5-4-617 (Arkansas)(lethal injection; if offense committed before certain date, lethal injection but prisoner may elect electrocution); F.S.A. § 922.10 (West) (Florida)(lethal injection but prisoner may elect electrocution); KRS § 431.220 (Kentucky)(lethal injection; if offense committed before certain date, lethal injection but prisoner may elect electrocution); Code 1976 § 24-3-530 (South Carolina)(lethal injection but prisoner may elect electrocution;T. C. A. § 40-23-114 (Tennessee)(lethal injection but prisoner may elect electrocution); Va. Code Ann. § 53.1-234 (Virginia)(lethal injection but prisoner may elect electrocution); Ariz. Const. art. XXII § 22 (Arizona) (lethal injection; if offense committed before certain date, lethal injection but prisoner may elect lethal gas);
Cal. Penal Code § 3604 (California)(lethal injection but prisoner may elect gas); V.A.M.S. 546.720 (Missouri)(unclear who makes election); N.H. Rev. Stat. § 630:5 (New Hampshire)(lethal injection but state may elect hanging); RCWA 10.95.180 (West) (Washington)(lethal injection or hanging); U.C.A. 1953 § 77-18-5.5 (Utah)(lethal injection; if offense committed before certain date, lethal injection but prisoner may elect firing squad).

1 injection of sodium thiopental only. Such election shall not be deemed to be a
2 waiver of Brown's right to appeal from this order or any part of it, but it shall
3 be deemed consent for Defendants to vary from the regulations as described in
4 Defendants' submission dated September 23, 2010, in the event that this order is
5 not vacated or modified on appeal;
6 b. If Brown timely elects to be executed by the injection of sodium thiopental
7 only, Defendants shall carry out the execution in accordance with Cal. Code Regs.
8 tit. 15, §§ 3349, et seq, except that they shall do so using sodium thiopental only
9 and in the quantity and in the manner described in their submission dated
10 September 23, 2010;
11 c. If Brown timely elects to be executed by the injection of sodium thiopental
12 only, and if for any reason Defendants decline to proceed in accordance with that
13 election, a stay of execution shall issue without further order. To permit orderly
14 appellate review, Defendants shall advise Brown's counsel and the Court of any
15 such declination not later than 12:00pm on Monday, September 27, 2010;
16 d. If Brown does not timely elect to be executed by the injection of sodium
17 thiopental only, Defendants may carry out the execution in accordance with Cal.
18 Code Regs. tit. 15, §§ 3349, et seq.
19
20 IT IS SO ORDERED.
21
22 DATED: September 24, 2010

23 JEREMY FOGEL
United States District Judge
24
25
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EXHIBIT F

KAMALA D. HARRIS
Attorney General of California
THOMAS S. PATTERSON
Supervising Deputy Attorney General
JAY M. GOLDMAN
Deputy Attorney General
State Bar No. 168141
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5846
Fax: (415) 703-5843
E-mail: Jay.Goldman@doj.ca.gov
Attorneys for Defendants
Brown, Cate, and Cullen

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES, ALBERT G. BROWN, MITCHELL CARLETON SIMS, AND STEVIE LAMAR FIELDS, Plaintiff, **v.** **MATTHEW CATE, et al.,** Defendants.	C 06-0219 JF **NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER** Date: February 14, 2011 Time: 1:30 p.m. Dept: Ct. Rm. 3, 5th Floor Judge The Honorable Jeremy Fogel Trial Date None Action Filed: 1/5/2006

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TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 14, 2011, at 1:30 p.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 280 South First Street, San Jose, CA 95113, Defendants Governor Edmund G. Brown, Jr., Secretary Matthew Cate, and Warden Vincent Cullen will move this Court for a protective order prohibiting Plaintiffs Morales and Brown from propounding written discovery, or questions at deposition, that are outside the scope of permissible discovery. Specifically, Defendants seek an order clarifying that the correct scope of discovery by Plaintiffs is limited to information that is either relevant to, or will lead to the discovery of relevant evidence, pertaining to whether California's current lethal-injection regulations will operate in a manner that will create a substantial risk of severe pain to an inmate during an execution. If a plaintiff proffers an alternative to the regulations, inquires into an alternative's feasibility and availability are also proper.

The discovery that Defendants object to, however, seeks to obtain, for a three year period, every document anyone in the Governor's office or CDCR ever read that had anything to do with any aspect of lethal-injection, why each aspect of the regulations was selected, and every communication or note by anyone that has ever touched on any aspect of any lethal-injection procedure.[1]

Plaintiffs have stated that they require this expansive scope of discovery, from 2007 to the present, to determine how and why the August 2010 lethal-injection regulation procedures were decided upon. (Decl. Jay M. Goldman Ex. E.) But now that the Supreme Court has rejected the "unnecessary risk" standard and barred courts from simply adjudicating "best practices," the issue of how and why a procedure was adopted has no bearing in this case. *Baze v. Rees*, 553 U.S. 35, 51 (2008).

As Plaintiffs admitted elsewhere, since the Supreme Court established the acontextual "substantial risk of serious harm" standard in *Baze v. Rees*, 553 U.S. 35 (2008), courts thereafter

[1] None of the discovery requests that are specified by Defendants in this motion ask for discovery about the feasibility or availability of a specific proposed modification to California's lethal-injection regulations. Further, Defendants admit that a one-drug method is feasible, and readily available if regulations allowing for this method are adopted pursuant to California law.

1 have "examined the record of how the protocols work in practice and who is responsible for
2 what." (Docket No. 440, Pls.' Opp'n. Motion Dismiss 4:21-23.)
3 Therefore the Court should reject the exceedingly broad scope of discovery sought by
4 Plaintiffs and should hold that the following specific interrogatories and document demands
5 propounded thus far by Plaintiff Brown are outside of the scope of discovery provided for in Rule
6 26 of the Federal Rules of Civil Procedure:
7 1. Plaintiff Brown's October 15, 2010 Request for Production of Documents and
8 Electronically Stored Information, Nos. 1, 3-31, 35, 36, 37, 39, 57, 63 in their entirety, and Nos.
9 2, 32-34, 38, 40-56, 58-62, to the degree they require production of documents that are unrelated
10 to how the current lethal-injection regulations have been applied;
11 2. Plaintiff Brown's November 3, 2010 Request for Production of Documents and
12 Electronically Stored Information, Nos. 3 and 10 in their entirety, and Nos. 1-2, 4-9 to the degree
13 they call for documents that are unrelated to how the current lethal-injection regulations have
14 been applied; and
15 3. Plaintiff Brown's October 15, 2010 Interrogatories to Defendants Nos. 3 (except
16 regarding the contents, expiration date, and mixing instructions of the stock of unexpired sodium
17 pentothal as of the date of Defendants' response to this interrogatory), and Nos. 4-6, and 14 in
18 their entirety.
19 Defendants attempted to meet and confer with counsel for Plaintiffs Morales and Brown
20 about the subject of this motion. However, Plaintiffs refused to withdraw, limit, or modify any of
21 their discovery requests, and failed to provide a legitimate basis for their position.
22 This motion is based on this notice of motion, the memorandum of points and authorities
23 filed in support, the declaration of Jay M. Goldman, and the Court's file in this action.
24 **INTRODUCTION**
25 Counsel for Plaintiffs Morales and Brown have served 21 interrogatories containing more
26 than 30 subparts, and 73 document demands, since this litigation resumed in late 2010. They
27 have also noticed the deposition of Governor Schwarzenegger, his Secretary of Legal Affairs, and
28

1 numerous other individuals. Although those depositions have yet to go forward, Plaintiffs'
2 counsel has made it clear that they intend for depositions to ensue.

3 Plaintiffs' counsel have also been clear that, despite Defendants' extensive efforts to meet
4 and confer about the correct scope of discovery, Plaintiffs will seek document production and
5 responses to written discovery, and will ask questions at depositions, that have nothing to do with
6 whether the operation of California's existing lethal-injection regulations, as written and as
7 applied, will create a substantial risk that an inmate will experience severe pain during an
8 execution. And none of Plaintiffs' discovery requests ask for documents or information regarding
9 whether an alternative proffered by Plaintiffs to any aspect of California's regulations is feasible
10 or readily available.

11 Instead, Plaintiffs seek three years of documents, going back to 2007, about every
12 discussion, meeting, communication, evaluation, and decision, and everything ever reviewed, by
13 the Governor's Office or CDCR, about the inclusion of each particular provision and subpart of
14 regulations pertaining to the lethal-injection regulations that California recently adopted and
15 which became effective on August 29, 2010. But none of this discovery has anything to do with
16 whether California's regulations will operate in a manner that will create a substantial risk of
17 serious harm in violation of the Eighth Amendment. And Plaintiffs also seek additional
18 documents about long-defunct execution protocols, communications about setting execution
19 dates, and other topics, that have nothing to do with how California's current lethal-injection
20 regulations will work in practice.

21 As Plaintiffs admitted elsewhere, since the Supreme Court established the acontextual
22 "substantial risk of serious harm" standard in *Baze v. Rees*, 553 U.S. 35 (2008), courts thereafter
23 have "examined the record of how the protocols work in practice and who is responsible for
24 what." (Docket No. 440, Pls.' Opp'n. Motion Dismiss 4:21-23.)[2] Defendants agree that
25 information that will lead to the discovery of relevant evidence about how the regulations work in

26 [2] In its order allowing Plaintiff Brown to intervene in this case, this Court noted that
27 Brown apparently raised substantial questions of fact about whether some aspects of California's former lethal-injection protocol "have been addressed in actual practice." *Morales v. Cate*, 2010 WL 3835655 (N.D. Cal. 2010) (emphasis in original).
28

1 practice, and the qualifications and training of the persons who will perform the tasks assigned to
2 them in California's regulations, is within the scope of discovery. And Defendants have
3 answered interrogatories, and produced documents, responsive to such inquiries.[3]
4 By contrast, the discovery Plaintiffs seek that is the subject of this motion does not have
5 any bearing on how the regulations will work in practice, and cannot lead to the discovery of
6 relevant evidence. The Supreme Court threw out the "unnecessary risk" standard in 2008, and
7 therefore it is improper for Plaintiffs to seek discovery aimed at a comparative analysis of the
8 risks and advantages of differing practices that Defendants did or did not review, discuss or
9 consider during the prior three years. Such discovery, as well as other inquiries by Plaintiffs that
10 are well outside the scope of what is permitted by Rule 26, and the inevitable discovery disputes
11 and motions that will ensue, can only delay the resolution of this matter. However, Plaintiffs
12 have refused to modify or limit any of their discovery, and have justified this position with a
13 vague reference to a desire for "transparency" rather than an explanation of how Rule 26 may
14 allow for the discovery at issue.
15 Absent a protective order, Plaintiffs' improper discovery efforts will cause this Court and
16 Defendants to needlessly divert time and resources from the legitimate and very serious
17 constitutional issues in this case: How the regulations will work in practice, and whether their
18 operation will create a substantial risk of severe pain during an inmate's execution. Defendants
19 have responded to discovery requests on these topics, and have produced thousands of pages of
20 documents. But the discovery at issue in this motion has nothing to do with the qualifications of
21 the current Lethal Injection Team, their training, or how California's current lethal-injection
22 regulations will function during an execution. Nor does this discovery inquire into whether a
23 particular modification of an aspect of California's execution procedure is feasible and readily
24 available.
25
26
27 [3] Defendants have also produced a copy of the administrative rulemaking file for
28 California's lethal-injection regulations, which is a public document.

ARGUMENT

A. This Court Has the Authority to Clarify the Correct Scope of Discovery.

This Court has stated that it "will exercise its supervisory powers to limit the scope of the instant proceedings—and particularly the scope of discovery-so that the merits of Plaintiffs' claims may be resolved as expeditiously as possible." *Morales v. Cate*, ___ F.Supp.2d ___, 2010 WL 51385762, * 1 (N.D. Cal. 2010).

Federal Rule of Civil Procedure 26 provides for discovery of information relevant to claims and defenses, and only with the Court's permission will it allow a party to pursue requests for information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26 (b)(1). In 2000, the Federal Rules of Civil Procedure were amended "'to involve the court more actively in regulating the breadth of sweeping or contentious discovery.'" *Elvig. v. Calvin Presbyterian Church*, 375 F.3d 951, 967-68 (9th Cir. 2004) (quoting Fed. R. Civ. 26 advisory committee's notes). In particular, the new rules limit the breadth of discovery that can occur absent court approval. "Under Rule 26(b)(1), for example, discovery must now relate more directly to a 'claim or defense' than it did previously, and 'if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved.' Id. at 968.

Therefore, discovery that has no bearing on the claims or defenses in a case, and is not likely to lead to the discovery of evidence bearing on claims or defenses in a case, is not germane and is outside the scope of permissible discovery. Whether a matter is "relevant" for the purposes of discovery is necessarily a fact-specific inquiry, so that a district court enjoys broad discretion to determine relevance. *See, e.g., Surfvivor Media, Inc. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005).

B. The Supreme Court Set New Standards In *Baze*.

Given Plaintiffs' refusal to limit their discovery whatsoever, they may attempt to gloss over the fact that there has been a major shift in what is, and is not, germane to this case and therefore within the scope of discovery as defined by Rule 26. They will likely argue that, because the

scope of discovery in this matter in 2006 and 2007 was broader than what Defendants now seek in a protective order, this Court should deny Defendants' motion.

However, this Court is obligated to apply the holdings in *Baze*. *Baze* significantly altered the standard for evaluating a state's lethal-injection regulations for compliance with the Eighth Amendment. Therefore, *Baze* limited what information is relevant, or may lead to the discovery of relevant information, in an Eighth Amendment lethal-injection case.

Previously, this Court evaluated matters in this case, including discovery disputes, in the context of the "unnecessary risk" standard. As was stated in the Brief for Petitioners in the *Baze* case, "the unnecessary risk test looks at both the quantum of risk and the quantum of pain involved, as well as the availability of alternative methods to avoid the risk. The higher the quantum of pain, and the more feasible the alternatives, the lower the degree of risk that can be tolerated." Brief for Petitioners in *Baze v. Rees*, 2007 WL 3307732 (U.S.) at *42-3. Under this test, even a degree of risk that cannot be quantified as "substantial" could be an unnecessary risk. Id. at 43. As Plaintiff Morales has previously explained, the inquiry under the unnecessary risk standard was "whether the risk is unnecessary by balancing the degree of risk with the need for a particular protocol." (Docket No. 132, Pl.'s Mot. Compel Disc. 8:12-14.)

But in 2008 the Supreme Court rejected this "unnecessary risk" test. Therefore, "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Baze*, 553 U.S. at 51. And federal courts are not "boards of inquiry charged with determining 'best practices' for executions." Id. at 51.

The Supreme Court adopted a new, acontextual "substantial risk" standard. "[T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Id. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 & 846 n.9 (1994).

As for alternatives to a state's lethal-injection procedure, the Supreme Court held that a plaintiff must allege "proffered alternatives." *Baze*, 553 U.S. at 52. If an alternative is proffered, it "must effectively address a substantial risk of harm. . . . and in fact significantly reduce a

substantial risk of severe pain." It must also be feasible and possible of being readily implemented Id. at 51-52.

Defendants simply seek a protective order that will require Plaintiffs to confine their discovery efforts to what is germane to a post-*Baze* Eighth Amendment analysis of a lethal-injection execution procedure.

C. Plaintiffs' Discovery Requests That Do Not Bear on How the Current Regulations Work in Practice Are Outside the Scope of Permissible Discovery.

Plaintiffs have not limited their discovery to the discovery that they acknowledge was conducted in *Baze* itself and nearly every case after it. To the contrary, Plaintiffs have insisted that they must, for example, depose the Governor and his Secretary for Legal Affairs to determine who decided to use a three-drug execution method in the defunct May 2007, version of OP 770, and why they did so. (Docket No. 442, Pls.' Nonopp'n. and Opp'n. to Mot. for Protective Order 9:4-18.) And Plaintiffs seek every document of any type from 2007 to present that has anything to do with the formation of California's lethal-injection regulations, including anything reviewed, discussed, or "considered," information about persons who are not on the current Lethal Injection Team, documents about old and long-defunct protocols, documents and information about the setting of execution dates, and many other requests that have nothing to do with how the current regulations work. In a post-*Baze* world, none of this discovery seeks information that is relevant or may lead to the discovery of relevant information.

During the meet-and-confer process, Plaintiffs attempted to justify their discovery requests by vaguely stating that Defendants were required to allow Plaintiffs to determine whether their proffered execution alternative, consisting of a one-drug method, is feasible and readily available. But none of the discovery requests at issue ask for information or documents regarding the feasibility or availability of any alternative to California's regulations. And the feasibility and availability of using a high dose of only sodium thiopental for an execution is not in dispute in this case.

Below are examples of the many interrogatories and document demands served by Plaintiffs that are outside the scope of discovery:

1 INTERROGATORY NO. 14:

2 Describe by date, author and title all documents reviewed by CDCR during the process of
3 revising the protocol since October 1, 2007.

4 REQUEST FOR PRODUCTION NO. 3:

5 All documents pertaining to lethal injection and/or executions obtained by or sent to those
6 persons who participated in the process of drafting Cal. Code Regs., tit. 15 §3349. For this
7 request, if an item was contained in the rulemaking file and that item was made available to the
8 public for copying, it need only be identified by author/source, title and date.

9 REQUEST FOR PRODUCTION NO. 4:

10 Each document and all electronically stored information concerning or constituting
11 communications between the CDCR and the Governor's Office regarding the revisions to the
12 execution procedures, including OP 770, as well as any other alterations in CDCR's execution
13 procedures considered, discussed, evaluated, analyzed or undertaken.

14 REQUEST FOR PRODUCTION NO. 5:

15 Each document and all electronically stored information concerning any meetings held
16 between the Governor's Office and the CDCR, in furtherance of the revision of the CDCR's
17 execution procedures, including but not limited to any notes or other memorializations or
18 summaries of such meetings, created by or on behalf of any participant or attendee at such
19 meetings.

20 REQUEST FOR PRODUCTION NO. 6:

21 Each document and all electronically stored information concerning any decision since
22 November 1, 2007 with respect to any individual provision of the execution procedures or any
23 aspect of the execution procedures.

24 REQUEST FOR PRODUCTION NO. 12:

25 Each document and all electronically stored information concerning the consideration,
26 discussion, evaluation, analysis or decision to divide the administration of Potassium Chloride
27 into two courses of 100 milliequivalents each.

28

REQUEST FOR PRODUCTION NO. 15:

Each document and all electronically stored information concerning the consideration, discussion, evaluation, and ultimate decision not to remove thiopental from the execution protocol.

REQUEST FOR PRODUCTION NO. 18:

Each document and all electronically stored information concerning the selection of staff to participate in the review of the execution procedures.

REQUEST FOR PRODUCTION NO. 19:

Each document and all electronically stored information concerning the identity of CDCR staff members and Governor's Office staff members who participated in any capacity in the review of the execution procedures.

REQUEST FOR PRODUCTION NO. 24:

Each document and all electronically stored information concerning any solicitation of assistance in revising the execution procedures, directed to any individual, entity, or governmental body.

REQUEST FOR PRODUCTION NO. 25:

Each document and all electronically stored information relating to any execution procedures, including but not limited to the past or present procedures of California or any other state, the federal government, or the military, that were reviewed by team members or CDCR in the process of, for the purpose of, or in preparation for, revising the execution procedures.

REQUEST FOR PRODUCTION NO. 27:

Each document and all electronically stored information concerning any communications between the CDCR and/or the Governor's Office, on the one hand, and any other individual, agency, governmental body, corporation, entity, or other third party, in furtherance of the revision of the execution protocol.

REQUEST FOR PRODUCTION NO. 36:

Each document and all electronically stored information concerning the consideration, evaluation, discussions or ultimate decision to construct a new execution chamber.

REQUEST FOR PRODUCTION NO. 37:

Each document and all electronically stored information concerning the design and/or construction of the new execution chamber, including but not limited to any plans, specifications, budgetary projections, requests for disbursements or authorization, descriptions, emails, and/or notes.

REQUEST FOR PRODUCTION NO. 57:

Each document and all electronically stored information concerning the consideration, discussion, evaluation, analysis and ultimate decision to use peripheral IVs as the means of achieving IV access.

REQUEST FOR PRODUCTION NO. 63:

Each document and all electronically stored information concerning each permit sought or obtained from any municipality, entity, agency, or other issuing authority for the design and/or construction of the new execution chamber.

SUPPLEMENTAL REQUEST FOR PRODUCTION NO. 3:

Each document and all electronically stored information concerning the execution of Albert Brown, including but not limited to all communications concerning the attempted execution, training undertaken for that execution and all preparations for that execution.

SUPPLEMENTAL REQUEST FOR PRODUCTION NO. 10:

Each document and all electronically stored information concerning the setting of execution dates.

As the above examples demonstrate, the interrogatories and document demands that are at issue in this motion seek an extremely broad range of documents and information that have no bearing on whether California's lethal-injection regulations will work in a manner that creates a substantial risk of severe pain during an execution. Nor do these discovery requests seek information or documents regarding whether a proffered alternative is feasible or readily available.

1 At this point, there is a limited range of factual matters that remain to be explored in this
2 case. There is no dispute that the second and third drugs will cause severe pain during an
3 execution if the first drug, sodium thiopental, is not administered correctly. Also, there is no
4 dispute that a one-drug execution method is feasible and readily available. Therefore, the crux of
5 this matter pertains to whether the requirements in the regulations for the administration of the
6 first drug, and the qualifications and training of the personnel who will set intravenous catheters,
7 mix sodium thiopental, and assess consciousness are, as Plaintiffs claim, "insufficient."[4] Also
8 relevant is whether Plaintiffs will proffer any alternatives in this regard. The discovery at issue in
9 this motion will not have any bearing on these issues.

10 **D. Good Cause Exists for The Protective Order Sought by Defendants.**

11 Ample good cause exists for the protective order sought by Defendants. Plaintiffs'
12 discovery at issue has nothing to do with how the current regulations will work in practice. It
13 does not seek information that is either relevant, or likely to lead to the discovery of information
14 that is relevant, to the evaluation this Court must make under *Baze*.

15 Although Plaintiffs allege in their Fourth Amended Complaint that Defendants failed to
16 adopt "best practices" (Docket No. 428, Pls.' 4th Am. Compl. For Equitable And Injunctive
17 Relief 47:14-15), such an argument is precluded by law under *Baze*. Under *Baze*, it does not
18 matter what was said, considered, reviewed, or considered by the composers of a lethal-injection
19 protocol, or who undertook such actions and made decisions about a protocol. What matters is
20 how a protocol that is in effect functions, and whether it creates a substantial risk of serious harm.

21 Defendants should not be placed in an unfair and needlessly burdensome and expensive
22 situation in which they must invest significant time and effort to collect, review, produce

23

24 [4] Also relevant, of course, is how the regulations allegedly ought to be modified, and whether that modification will eliminate a substantial risk of serious harm. But none of Plaintiffs'
25 discovery requests pose such questions or seek documents about feasibility and availability of alternative means of screening and training the execution team, or a change in the required
26 expertise and qualifications of the team. This is likely because Plaintiffs have not proffered any modifications to the regulations except that the three-drug method be replaced with some
27 undefined one-drug method. (Ex. G to Goldman Decl.) Instead, they have simply alleged that other aspects of the lethal-injection regulations are "inadequate," "improper," or "insufficient."
28 They do not allege what should be adopted to replace such alleged deficiencies.

documents, and catalogue privilege objections, regarding wide-ranging discovery demands that are well outside the scope of permissible discovery. Information on former execution-team members who will not participate in the executions of Plaintiffs, and communications and documents that may have taken place or were read for a three-year period, cannot have any bearing on whether California's current lethal-injection regulations will work in practice during an execution.

The protective order Defendants seek will avoid unfair and unnecessary burdens on Defendants, will not prejudice Plaintiffs, and will allow this Court to avoid diverting resources to determine what will likely be multiple motions to compel pertaining to written discovery and deposition questions. Defendants request that this Court exercise its discretion to bar discovery by Plaintiffs that is outside the scope of discovery permitted by Rule 26, and will only serve to lengthen the time it will take to resolve this case.

E. Plaintiffs Rebuffed All of Defendants' Efforts to Meet and Confer.

Defendants have meet and conferred with Plaintiffs by way of letters detailing why specific discovery demands propounded by Plaintiffs were outside the scope of discovery permitted by Rule 26, and in a lengthy teleconference. (Decl. Jay M. Goldman ¶6 & Exs. D and F.)

Throughout this meet-and-confer effort, Plaintiffs refused to acknowledge that even one of their 95 written discovery requests is outside the scope of discovery. Nor have they coherently explained why they seek such a broad range of discovery, covering a three-year period, when these requests have nothing to do with how the lethal-injection regulations and execution team members will function during an execution.

Defendants have repeatedly requested that Plaintiffs reasonably stipulate about the scope of discovery, but Plaintiffs have refused to do so. As a result of Plaintiffs' refusal, Defendants had no choice but to move this Court for an appropriate protective order.

CONCLUSION

Since 2008 this Court and the parties have been subject to the new holdings and benchmarks set by the Supreme Court in *Baze*. *Baze* set an objective standard for evaluating execution protocols, consisting of an examination of whether a current protocol as written or as

1 applied will work in a manner that will subject an inmate to a substantial risk of severe pain
2 during an execution.
3 Nevertheless, Plaintiffs seek large amounts of discovery that cannot lead to the discovery of
4 evidence relevant to the inquiry required by *Baze*, and therefore can only serve to harass and
5 burden Defendants, delay this case's resolution, and burden this Court with the adjudication of
6 multiple discovery motions regarding written discovery as well as questions posed during
7 upcoming depositions.
8 Therefore, the Court should issue a protective order to expressly define the correct scope of
9 discovery. Discovery that cannot lead to any information that bears on how the lethal-injection
10 regulations will function during an execution or whether they will cause an inmate pain is well
11 outside the scope of discovery, and should not be permitted by this Court.
12 Dated: January 31, 2011 Respectfully Submitted,
13 KAMALA D. HARRIS
14 Attorney General of California
THOMAS S. PATTERSON
15 Supervising Deputy Attorney General
16
17 *s/ Jay M. Goldman*
18 JAY M. GOLDMAN
Deputy Attorney General
19 *Attorneys for Defendants*
Brown, Cate, and Cullen
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CERTIFICATE OF SERVICE

Case Name: **Michael Angelo Morales v. James Tilton, et al.** No. **C 06-0219 JF**

I hereby certify that on **January 31, 2011**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. **NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER**
2. **DECLARATION OF JAY M. GOLDMAN IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER, EXHIBITS A-G**
3. **PROPOSED ORDER FOR PROTECTIVE ORDER**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On **January 31, 2011**, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Michael Laurence
Sara Cohbra
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

Office of the Inspector General - Northern
P.O. Box 348780
Sacramento, CA 95834-8780

Michael Millman
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 31, 2011**, at San Francisco, California.

D. Criswell	*s/ D. Criswell*
Declarant	Signature

40481531.doc

EXHIBIT G

Criminal Justice Legal Foundation

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May 27, 2011

Mr. Matthew Cate, Secretary
Department of Corrections and Rehabilitation
P.O. Box 942883
Sacramento, CA 94283-0001

Re: Execution of Capital Judgments

Dear Secretary Cate:

The Criminal Justice Legal Foundation has been contacted by the family of a murder victim in a case where all appeals and habeas proceedings have been completed but the Department of Corrections and Rehabilitation has been unable to execute the judgment. There can be little doubt that this situation constitutes a grievous violation of their constitutional right to "a prompt and final conclusion" under Article I, Section 28 (b)(9) of the California Constitution.

Subdivision (c)(1) of that section provides for judicial enforcement of that right. However, we believe that such enforcement should only be sought as a last resort. For this reason, I am writing to ask you to take steps to bring the obstruction of justice in capital cases to the earliest possible conclusion.

Naturally, the announcement in April that many more months of delay would be needed to assemble a new injection team was greeted with great dismay. Given how much attention this issue had already received, it is astonishing that the team previously assembled was not of the first quality. However, if this delay is genuinely necessary, then the time interval should be used to concurrently take other steps that will fortify the process against other attacks.

First and most obviously, there is no good reason at present not to adopt a single-drug protocol. It has been four and a half years since Judge Fogel said this step "would eliminate any constitutional concerns . . . ." See *Morales* v. *Tilton*, F. Supp. 2d 972, 984 (ND Cal. 2006). One objection at the

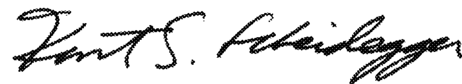
time was that the one-drug method had not previously been used, but its successful adoption in Ohio and Washington has eliminated that concern. Last year, the Washington Department of Corrections adopted the one-drug protocol in March, the litigation was dismissed in July, and the long overdue execution of Cal Coburn Brown was carried out in September.

Second, California should take the step that many other states have taken and switch from sodium thiopental to pentobarbital to eliminate the issues regarding importation of the thiopental.

Third, on June 16, 2010, I wrote to you asking that you invoke Penal Code Section 5058.3(a)(2) to put the necessary regulation into immediate effect. A copy is enclosed. Your response of August 5, 2010, a copy of which is also enclosed, said the goal "is better served by finalizing the protocol through the normal regulatory process." That is not really an answer because the two processes are not mutually exclusive. Section 5058.3 can be invoked to adopt the new protocol for an initial 160-day period, and an extension if necessary, to execute the judgments that are ready for execution, and the regular process can proceed concurrently to complete a final regulation.

Washington wrapped up its lethal injection issues and carried out justice in six months, and so can California. Failure to do so is a travesty, an injustice, and a violation of a constitutional right. I urge you to take immediate action to correct this situation.

Sincerely,



Kent S. Scheidegger

KSS:iha

Enclosures

EXHIBIT H

ARNOLD & PORTER LLP
KENNETH G. HAUSMAN (No. 57252)
kenneth.hausman@aporter.com
SARA J. EISENBERG (No. 269303)
sara.eisenberg@aporter.com
ELIZABETH WANG (No. 261145)
elizabeth.wang@aporter.com
JAIME M. HULING DELAYE (No. 270784)
jaime.hulingdelaye@aporter.com
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: +1 415.434.1600
Facsimile: +1 415.677.6262

Attorneys for Plaintiff
MITCHELL SIMS

FILED
FEB 21 2012
KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: E. Turner, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

UNLIMITED JURISDICTION

MITCHELL SIMS,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,

Defendants.

ALBERT GREENWOOD BROWN, JR. and KEVIN COOPER,

Plaintiffs-in-Intervention.

No. CIV1004019

Action Filed: August 2, 2010

~~[PROPOSED]~~ FINAL JUDGMENT AS TO PLAINTIFF MITCHELL SIMS

Dep't: E
Judge: Hon. Faye D'Opal

1 Plaintiffs' motion for summary judgment came on for hearing by this Court on December 16,
2 2011, at 8:30 a.m. Sara Eisenberg and Jaime Huling Delaye appeared on behalf of Plaintiff Mitchell
3 Sims. Sara Cohbra specially appeared on behalf of Plaintiff-in-intervention Albert Greenwood
4 Brown. Cameron Desmond appeared on behalf of Plaintiff-in-intervention Kevin Cooper. Deputy
5 Attorneys General Jay M. Goldman, Michael Quinn and Marisa Kirchenbauer appeared on behalf of
6 Defendants California Department of Corrections and Rehabilitation and Matthew Cate.
7 After considering the moving, opposing and reply papers, the file in this matter, and the
8 arguments presented at the December 16, 2011 hearing, and good cause appearing therefor, the
9 Court GRANTED summary adjudication on Plaintiffs' second cause of action for declaratory relief
10 to invalidate Defendant California Department of Corrections and Rehabilitation's lethal injection
11 protocol (Cal. Code Regs., tit. 15, §§3349-3349.4.6, "Administration of the Death Penalty"), and
12 DENIED summary adjudication on Plaintiffs' first cause of action. Subsequently, Plaintiff Mitchell
13 Sims filed a request for dismissal of his first cause of action, and the dismissal of Sims' first cause
14 of action was entered by the Court on January 26, 2012.
15 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that final judgment is entered
16 in favor of Plaintiff Mitchell Sims and against Defendants California Department of Corrections and
17 Rehabilitation and Matthew Cate as follows:
18 1. Defendants substantially failed to comply with the requirements of California's
19 Administrative Procedure Act ("APA") when the lethal injection protocol (Cal. Code Regs., tit. 15,
20 §§ 3349-3349.4.6, "Administration of the Death Penalty") was enacted, in violation of Government
21 Code Section 11350(a), as is more fully set forth in the Court's December 19, 2011 Final Ruling,
22 attached hereto as Exhibit A and incorporated into this judgment as if set forth in full.
23 DECLARATORY RELIEF
24 2. The lethal injection protocol (Cal. Code Regs., tit. 15, §§ 3349-3349.4.6,
25 "Administration of the Death Penalty") is invalid for substantial failure to comply with the
26 requirements of the APA.
27 INJUNCTION
28 3. Defendant California Department of Corrections and Rehabilitation is permanently

1 enjoined from carrying out the execution of any condemned inmate by lethal injection unless and
2 until new regulations governing lethal injection executions are promulgated in compliance with the
3 Administrative Procedure Act.

4 4. Defendant California Department of Corrections and Rehabilitation is permanently
5 enjoined from carrying out the execution of any condemned inmate by lethal gas unless and until
6 regulations governing execution by lethal gas are drafted and approved following successful
7 completion of the APA review and public comment process, as set forth at page 14, line 26 through
8 page 15, line 3 of the Court's Final Ruling, attached hereto as Exhibit A.

9 5. Defendant California Department of Corrections and Rehabilitation is permanently
10 enjoined from carrying out the execution of any female inmate unless and until regulations
11 governing the execution of female inmates are drafted and approved following successful
12 completion of the APA review and public comment process, as set forth at page 14, line 26 through
13 page 15, line 3 of the Court's Final Ruling, attached hereto as Exhibit A.

14

15 DATED: 2-21, 2012.

16 HONORABLE FAYE D'OPAL
JUDGE OF THE SUPERIOR COURT

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EXHIBIT A

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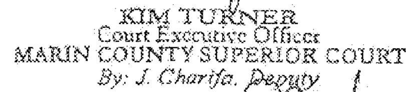


DEC 1 9 2011

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Charifa, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11

12 MITCHELL SIMS, 13 Plaintiffs, 14 vs. 15 CALIFORNIA DEPARTMENT OF 16 CORRECTIONS AND REHABILITATION, 17 et.al., Defendants. 18 19 ALBERT GREENWOOD BROWN, JR. and 20 KEVIN COOPER, 21 Plaintiffs-in-Intervention. 22	CIV 1004019 **FINAL RULING RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

23

24 After Issuance of the court's tentative ruling regarding Plaintiffs' motion for summary

25 judgment, argument requested by defendants was heard on December 16, 2011. Attorneys

26 Sara J. Eisenberg and Jaime Huling-Delaye appearing on behalf of Plaintiff Mitchell Sims,

27 attorney Sara Cohbra on behalf of Intervenor Albert Brown, and attorney Cameron Desmond on

28

behalf of Intervenor Kevin Cooper. Attorneys Jay Goldman, Michael Quinn and Marisa Kirchenbauer appeared on behalf of Defendant California Department of Corrections and Rehabilitation, et al. Following respective arguments by attorney Goldman and attorney Eisenberg, the Court finds no new evidence or other grounds on which to base a change in its tentative ruling, the core of which establishes that Plaintiffs met their burden to prove that the identified defects within the entire regulatory scheme, collectively, if not singly, constitute a substantial failure by the Department to comply with the procedures mandated by the Administrative Procedures Act, resulting in invalidation of the lethal injection administration and protocol. The court adopts its tentative ruling, as briefly modified, as the Final Ruling.

RULING

Plaintiffs' motion for summary judgment (Code Civ. Proc. § 437c(p)(1)), on their Declaratory Relief action to invalidate Defendant California Department of Corrections and Rehabilitation's three-drug lethal injection protocol (Cal. Code Regs., tit. 15, §§ 3349-3349.4.6, "Administration of the Death Penalty" (hereafter Regs., § _______), is granted as follows:

A. For the reasons discussed below, the court finds the undisputed evidence supports Plaintiffs' second cause of action alleging Defendant substantially failed to comply with the mandatory procedural requirements of the Administration Procedures Act (APA) when it adopted these regulations, in violation of Govt. Code § 11350(a).

1.

The Initial Statement of Reasons (ISOR) and the Final Statement of Reasons (FSOR) each *substantially failed to comply* with the APA requirements by not considering and describing alternative methods to the three-drug protocol; by failing to provide a sufficient rationale for rejecting these alternatives; and by failing to explain, with supporting documentation, why a

2

one-drug alternative would not be as effective or better than the adopted three-drug procedure, in violation of § 11346.2(b)(3)(A) and § 11346.9(a)(4). "If an agency adopts a regulation without complying with the APA requirements it is deemed an 'underground regulation' (Cal. Code Regs., tit. 1, § 250) and is invalid. [Citation.]." (*Naturist Action Committee v. California State Dept. of Parks & Recreation* (2009) 175 Cal.App.4th 1244, 1250.)

In the ISOR, which statement was repeated verbatim in the FSOR, the Department described the purpose and rationale of the three-drug procedure and its decision to reject alternatives to the three-chemical protocol it was proposing, in its effort to comply with Govt. Code § 11346.2(b)(1):

> In light of the Memorandum of Intended Decision, and as directed by the Governor, the CDCR reviewed all aspects of the lethal injection process and its implementation. As an integral part of the review, the CDCR considered alternatives to the existing three-chemical process, including a one-chemical process. Additionally, in developing this proposed regulation, the CDCR was guided by the United States Supreme Court's decision in *Baze v. Rees* (2008) 553 U.S. 35, which held that the State of Kentucky's lethal injection process, and the administration of the three-chemicals, did not constitute cruel and unusual punishment under the Eighth Amendment. CDCR also reviewed all available lethal injection processes from other states and the Federal Bureau of Prisons, and reviewed the transcripts and exhibits in the *Morales v. Tilton* case. Based on the information considered, the CDCR revised the lethal injection process as set forth in this proposed regulation. (Ex. 6, p. 2; Ex. 7, p. 2 emphasis added.)

The rationale for adoption of the three-drug procedure, as underlined, is false.

Defendant concedes that the decision to adopt the three-drug protocol was decided in May 2007, before the decision in the U.S. Supreme Court case of *Baze v. Rees* (2008) 553 U.S. 35,

upholding Kentucky's similar three-drug lethal injection protocol from an Eighth Am. challenge. (Undisputed Fact No. 8-10)

In its opposition, the Department admits:

> The ISOR and FSOR **inaccurately stated** that CDCR's decision to adopt the three-drug lethal-injection method found in the regulations and to reject the one-drug alternative preferred by Plaintiffs, was primarily based on the United States Supreme Court's decision in *Baze v. Rees* (2008) 553 U.S. 35. (Oppo. p. 20, n. 6 ¶ 4.)

The CDCR also concedes:

> The decision to use the three-drug procedure was made in May 2007 by Governor Schwarzenegger. (Undisputed Fact No. 9) Thereafter, in 2008, the Supreme Court upheld the constitutionality of a three-drug method, and refused to determine the constitutionality of a one-drug method, in *Baze v. Rees*. Subsequently, the decision to use the three-drug procedure was not revisited by Governor Schwarzenegger in the course of drafting the lethal injection regulations. (Undisputed Fact No. 10, Ex. 9, p. 4)

Additionally, the Undisputed Evidence shows the ISOR did not provide any description of the "one-chemical process". (Undisputed Fact No. 2) The ISOR did not identify or describe any alternatives to the "one-chemical process." (Undisputed Fact No. 3); nor did Defendant provide any reasons for rejecting any alternative to the three-chemical process that were purportedly considered. (Undisputed Fact No. 4)

The FSOR states, in conclusory language, the same reason for selecting the three-drug procedure as described in the ISOR, *ante*. It is also undisputed the FSOR states, without elaboration: "The Department has determined that no alternative considered would be more

1 effective in carrying out the purpose of this action or would be as effective and less
2 burdensome to affected persons." (Undisputed Fact No. 5, Ex. 7 p. 9).
3 Also, nowhere in the FSOR is there any *description* of the alternative(s) the CDCR considered; or
4 any discussion "*with supporting information*" explaining why the one-drug method would not
5
6 be: 1 – more effective in carrying out the purpose of the regulation than the three-drug
7 procedure; or 2 – would be as effective and less burdensome to the condemned inmate, all in
8 violation of § 11346.9(a) (4).
9
10 The failure to discuss the one-drug method is a particularly significant omission, since use of a
11 barbiturate-only protocol was raised by at least one commenter (Ex. 13, p. 48, no. 13); several
12
13 commenters make the identical assertion that use of pancuronium bromide is unnecessary,
14 dangerous, and creates a risk of excruciating pain. (Ex. 13, p. 48, no. 12; p. 50, no. 18, 19; p. 51,
15 no. 20); the CDCR stated in its responses to the court's inquiry in the federal action *Morales v.*
16
17 *Cate, et al.*, a single-drug formula consisting of five grams of sodium thiopental is sufficient to
18 bring about the death of a condemned inmate. (Undisputed Fact No. 12); and CDCR's own
19 expert John McAuliffe testified that after conducting substantial research for his review of OP
20
21 770, he recommended to top CDCR officials to adopt the single-drug formula. (Undisputed Fact
22 No. 13.)
23 The Department's attempt to fix any omission through its brief statement in the Addendum to
24 the FSOR, that it selected the three-drug method in reliance on the decision in *Baze v. Rees*
25
26 (2008) 553 U.S. 35, is unavailing. As conceded by the Department, *Baze v. Rees* was not the
27 reason it chose the three chemical method, nor was it the reason for rejecting the one drug
28 method, since Governor Schwarzenegger chose the three chemical method in 2007 before the

Supreme Court decision was issued and there was never any discussion of an alternative method by the Governor at that time.

Also, the Addendum fails to describe any alternative, and does not describe Defendant's reasons for rejecting an alternative "with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation." (Govt. Code §11346.9(a) (4).)

Importantly, inclusion of this information only in the Addendum to the FSOR, even if adequate, does not promote "meaningful public participation" (*Pulaski v. Occupational Safety & Health Stds. Board.* (1999) 75 Cal.App.4th 1315, 1327-1328), as the public had no opportunity to comment before the corrections were submitted to OAL.

These defects infect the entire regulatory scheme, and the lethal injection administration and protocol, as a whole, is declared to be invalid.

2.

The ISOR fails to describe the purpose and/or the rationale for the agency's determination why certain regulations to be implemented five days prior to the execution, were reasonably necessary. (Govt. Code § 11346.2; Regs., tit. 1, § 10 (b).) The ISOR does not explain why it is necessary for unit staff to monitor the inmate and to complete documentation *every fifteen minutes* starting five days before execution (§ 3349.3.4(a)(2)); why *all* personal property must be removed from the inmate's cell (§ 3349.3.4(b)(3)); or why inmates must be bound with waist restraints during visits. (§ 3349.3.4(c) (3).) The ISOR merely summarizes the different

procedures required five days prior to the execution, without explaining why the specific provisions are necessary and/or how a specific provision fills that need. (Undisputed Fact No. 20) (ISOR Ex. 6, p. 16)

Likewise, Regs., tit. 15, § 3349.4.5, which discusses the chemicals to be used in the lethal injection and the administration of these chemicals, summarizes the procedure but does not contain information explaining the rationale for the agency's determination that the three-drug protocol is "reasonably necessary to carry out the purpose for which it is proposed." (Govt. Code § 11346.2(b).) This regulation itself refers to the *Baze v. Rees* decision, but as noted above, this decision was not the basis upon which the Department decided to adopt the three-drug protocol.

Defendant's attempt to cure this deficiency in its Addendum to the FSOR comes too late in the rulemaking process. Accordingly, these individual regulations are deemed invalid.

Additional regulations Plaintiffs have cited in Appx. B to the memorandum of points and authorities (p. 12, n. 4), are not properly before the court as that document exceeds the page limit approved by the court.

3.

The undisputed evidence establishes the FSOR did not summarize and/or respond to two dozen or so public comments, in violation of Govt. Code § 11346.9(a) (3). (Undisputed Fact No. 22-30) It is also undisputed that in all, the Department received over 29,400 comments in writing and from the public hearings. (Defendant's Undisputed Fact No. 2)

"Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute. Where there is compliance as to all matters of substance, technical deviations are not to be given the stature of noncompliance. Substance prevails over form." (*Pulaksi, supra*, 75 Cal.App.4th at p. 1328.) Despite the large number of public comments properly addressed by the Department, the failure to summarize or respond to these comments is not a "technical defect." Defendant does not assert that the crux of any of these comments was addressed in other responses. The purpose of the APA – "to advance meaningful public participation in the adoption of administrative regulations by state agencies", is met by giving "interested parties an opportunity to present statements and arguments at the time and place specified in the notice and calls upon the agency to consider all relevant matter presented to it." (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 908-909.)

By not summarizing and responding to these comments, the Department did not give substance to the central APA requirement that all interested persons be afforded a meaningful chance to have their objections heard and to inform the rulemaker's decision; i.e., to allow agencies "to learn from the suggestions of outsiders and [] benefit from that advice." (*San Diego Nursery Co. v. Agricultural Labor Relations Board* (1979) 100 Cal.App.3d 128, 142-143.) Additionally, the undisputed evidence establishes that some of the Department's responses to comments are incomplete, incorrect, or inadequate. (Undisputed Fact No. 31-36)

For example, about 15 commenters submitted comments objecting to the use of the second drug, pancuronium bromide (the paralytic), on *various medical and humanitarian* grounds. (Undisputed Fact No. 31) Despite the different grounds, the Department answered with the

identical response to each comment summary: "The United States Supreme Court in *Baze v. Rees* (2008) 553 U.S. 35 upheld the use of the three chemicals, including pancuronium bromide, identified in these regulations. Accommodation: None." (Undisputed Fact No. 32) This broad, conclusory response is not a sufficient answer to explain why the Department initially selected, and continues to endorse the use of the second drug – pancuronium bromide, in light of the specific medical and humanitarian concerns raised in these comments. The inadequacy of the response is especially troubling when considering the Department's admission that the three-drug protocol was originally adopted without regard to the decision in *Baze v. Rees* (2008) 553 U.S. 35, and with no consideration of an alternative, one-drug protocol at that time; nor since that time has the Department described any alternative or explained why any alternatives would not be equally or more effective than the method with pancuronium bromide.

On this record, the court finds the FSOR substantially failed to comply with this requirement, invalidating the adoption of these regulations.

4.

It is undisputed that Defendant did not mail a Notice of the Proposed Action to three civil rights groups prior to the close of the initial public comment period (January 20, 2009), and seven condemned inmates, all of whom had requested notice, in violation of Govt. Code § 11346.4 (a)(1). (Undisputed Fact No. 38-41) It is also undisputed that the three organizations and these inmates submitted comments during the initial comment period, ending January 20, 2009. (Undisputed Fact No. 38-41).

As to the population of inmates generally, Defendant presented evidence it posted the Notice of Proposed Regulations throughout the departments and cell blocks in San Quentin, and at other penal institutions in the State. (Undisputed Fact No. 41) Plaintiffs have presented evidence that this may have been inadequate, as only the top sheet of these regulations was visible through the glass cases. (Reply p. 10, Delaye decl. Ex. A) However, Govt. Code § 11346.4(f) provides: "The failure to mail notice to any person as provided in this section shall not invalidate any action taken by a state agency pursuant to this article." In light of the statute, and the fact the comments of these organizations and persons were prepared and submitted to the Department, a triable issue exists whether Defendant's violation of the APA is sufficient to invalidate the regulations. Summary judgment is not granted on this ground.

5.

The undisputed evidence establishes Defendant did not make the complete rulemaking file available for public review as of the date the Notice of the Proposed Action was published, in violation of Govt. Code § 11347.3(a).

The Department did not make the rulemaking file available for public inspection until June 11, 2009, six weeks after the publication of the notice of proposed action on May 1st, and less than three weeks before the end of the public comment period on June 30, 2009. (Undisputed Fact No. 45)

This violation is a substantial failure to comply with the APA, which defect undermined meaningful public participation in the rulemaking process.

Contrary to Mr. Goldman's argument, this court finds no support in the legislative purpose behind the APA to require Plaintiffs to show prejudice from Defendant's significant delay in making the rulemaking record available for public review.

6.

The rulemaking file itself was incomplete, in violation Govt. Code § 11347.3(b). It is undisputed the rulemaking file did not contain several documents upon which the Department stated it relied in drafting these regulations: the San Quentin Operational Procedure, OP 770, on which much of the proposed regulations were based; the transcripts, Judge Fogel's Statement of Intended Decision, and the experts reports or declarations admitted as exhibits in the *Morales v. Tilton* case; the lethal-injection process for the Federal Bureau of Prisons; responses by 15 states to the survey sent out by the CDCR and upon which it considered in drafting the revision to OP 770. (Oppo. p. 12, Undisputed Fact No. 50-63)

In light of this defect, the court finds the Department substantially failed to comply with this requirement of the APA.

7.

Some of the regulations do not comply with the "Clarity" standard under the APA, which is defined as "written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." (Govt. Code § 11349(c); Regs., tit. 1, § 16.)

Regs. § 3349.3.2.(a)(1), which discusses the Warden's review of information bearing on the inmate's sanity, conflicts with the agency's description of the effect of this regulation in the Addendum to the FSOR. (See Ex. 8, p. 11)

The explanation that information about the inmate's sanity can be received at any time prior to the execution, conflicts with the language of the regulation which limits information from the inmate's attorney to 7 days prior to the execution, at the latest. This creates an ambiguity in violation of the APA and this individual regulation is invalid. (Regs., tit. 1, § 16(a)(2).)

Conversely, the court finds no conflict between the regulation distinguishing the places a state-employed chaplain and an non-state employed "Spiritual Advisor" may communicate with the inmate (Regs. § 3349.3.4(e)), and the Department's explanation of the effect of this regulation in its responses to comments. (Ex. 50, pp. 61-63)

The use of the term "reputable citizen" in Regs. § 3349.2.3, which provision restricts the number of witnesses in the viewing area, may have more than one meaning and is ambiguous in violation of Cal. Code Regs., tit. 1, § 16 (a)(1). It is undisputed that this term is no where defined in the regulations or in Pen. Code § 3605(a). It is also undisputed the term "citizen" can mean the citizen of the United States or the citizen of a foreign country, or any non-governmental employee. (Undisputed Fact No. 67) This term is archaic and ambiguous, and is invalid. The Department should include a definition of this term along with the other definitions currently found in Regs. § 3349.1.1.

Plaintiffs have attached Appendix C, which contains other putative examples of ambiguous terms. These additional arguments are not properly before the court as they exceed the expanded 35-page limit approved by the court.

8.

Plaintiffs' claim that certain regulations fail to meet the "Consistency" standard of the APA

defined as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Govt. Code § 11349(d)), is rejected.

Plaintiffs have no standing to argue that the treatment of female condemned inmates under Regs. § 3349.3.6(e) violates the Equal Protection Clauses of the state and federal constitutions, claiming the operation of that provision denies female inmates, who have to be transferred 150 miles from the Central California Women's Facility to San Quentin, some the same rights as male condemned inmates housed at San Quentin, e.g., 24-hour telephone access to their counsel (§ 3349.3.4(d),(4)(C); access to spiritual advisors (§§ 3349.3.4(e); 3349.4.2(b)(1)); and priority visiting privileges. (§ 3349.3(i)(1).)

The all-male plaintiffs do not have standing to raise the Equal Protection challenges on behalf of condemned female inmates, because they do not claim to suffer the disparate treatment they hypothesize. (See *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 255.) "One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation. [Citations.]" (*People v. Superior Court* (2002) 104 Cal.App.4th 915, 932, internal quotations and citations omitted; 7 Witkin, Summ. Cal. Law (10th ed. 2005) Const. Law, §76, pp. 168-169.)

Also, there is no merit to Plaintiffs' claim that Regs. § 3349.1.2(a)(4)(B), "Recruitment and Selection Process", conflicts with the order by the Federal District Court in the 2005 decision of *Plata v. Schwarzenegger*, where the Judge appointed a Receiver to take control over positions "related to the delivery of medical health care" at CDCR: "The Receiver shall have the duty to control, oversee, supervise, and direct all administrative, personnel, financial, accounting,

contractual, legal, and other operational functions of the medical delivery component of the CDCR." (Request to Take Judicial Notice, Ex. D, p. 4, Undisputed Fact No. 72) Plaintiffs present no evidence that the District Court's order was at all concerned with the execution protocols at San Quentin. Also, execution is not tantamount to the delivery of medical services. (See *Morales v Tilton* (N.D. Cal. 2006) 465 F.Supp. 2d 972, 983 ["Because an execution is not a medical procedure, and its purpose is not to keep the inmate alive but rather to end the inmate's life, . . ."].)

9.

There is no merit to Plaintiffs' next contention that the regulations substantially fail to comply with the APA because the regulation incorporates documents by reference, without subjecting those documents to the APA review process, in violation of Cal. Code Regs., tit. 1, § 20. In responses to comments about the procedures for execution by lethal gas and the execution of condemned female inmates, the Department indicated these areas would be the subjects of separate documents and/or regulations. (Undisputed Fact No. 75-76)

At the time of approval of the subject regulations, neither referenced document existed, nor are these documents referred to in the language of the regulations. On this record, there is insufficient evidence to show the regulations under review attempted to incorporate by reference these proposed documents within the meaning of the law, and therefore the regulations do not violate this requirement of the APA.

That said, unless and until these prospective, separate documents/regulations have been drafted and approved following successful completion of the APA review and public comment

process, the Department has no authority under Regs., tit. 15, §§ 3349-3349.4.6, to carry out the execution of condemned inmates by lethal gas, or to execute any condemned female inmate.

10.

The Department has failed to include a fiscal impact assessment of the administration of execution by lethal injection as proposed by these regulations, in violation of Govt. Code § 11346.5(a). There is uncontradicted evidence that there will likely be increased costs from hiring and/or training of additional members for the lethal injection sub-teams; plus overtime compensation for the supporting staff; as well as the additional costs of the three drug method vs. the one-drug method; and also the reimbursement by the CDCR for extra state and local law enforcement personnel to handle security matters, crowd control, and traffic closures prior to and on the night of the execution. (Undisputed Fact No. 78-80) Former San Quentin Warden Jeanne Woodford stated in a public comment, that past executions by lethal injection have cost between $70,000.00 and $200,000.00 each. (Undisputed Fact No. 79) It is no excuse, as Defendant argues, that either fiscal estimates or supporting documents were not required because "the costs and fiscal impacts of lethal-injection executions are caused by the fact that the Penal Code, not a regulation, mandates this type of execution." (Oppo. p. 13:20-21)

The APA gives the public a right to know and to comment on the fiscal impact of implementing a regulation adopted pursuant to a state statute, if for no other reason than to recommend more efficient or less costly methods of accomplishing the statutory purpose. The Department

was required to prepare the fiscal estimate as prescribed by the Department of Finance. Its failure to do so was substantial noncompliance with the procedural requirements of the APA.

B. Separately, the court denies Plaintiffs' motion for summary judgment on their first cause of action, which alleges there is no substantial evidence in the rulemaking file to show the use of the second drug – pancuronium bromide and/or the third drug – potassium chloride are "reasonably necessary" to effectuate the purpose for which the regulations are proposed, as required by Govt. Code §§ 11342.2, and 11350(b) (1). (Complaint ¶s 30-41)

Since this is Plaintiffs' motion for summary judgment, Plaintiffs have the burden to show there is no substantial evidence in the rulemaking file, *when considered in its entirety*, to support the agency's determination the three-drug injection protocol is reasonably necessary to effectuate the purpose of the statute. (Govt. Code §§ 11349(a) [defining "Necessity"], 11350(b) (1); *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336-337.)

For our purposes, "substantial evidence" is defined as whether, based on the entire record, there is evidence which is reasonable in nature, credible, and of solid value, contradicted or uncontradicted, which will support the agency's determination. (*Desmond, supra*, 21 Cal.App.4th at p. 336.)

It is undisputed the rulemaking file contains documents favorable to Defendant; e.g., that caution against acceptance of using thiopental alone to guarantee a lethal effect. (Undisputed Fact No. 85, Ex. 55); or confirms the experience in other states that proper application of the same three-drug method will result in a rapid death of the inmate without undue pain or suffering. (Undisputed Fact No. 86, Ex. 56, p. 931)

In fact, one of the articles relied upon by Plaintiffs (Undisputed Fact No. 90) indicates that it might not be possible to administer enough thiopental by itself, to guarantee a lethal effect. (Undisputed Fact No. 90, Ex. 58, pp. 2, 12)

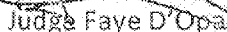
On this record, the court finds that a triable issue of fact exists over whether the rulemaking file contains substantial evidence to support Defendant's determination that the three-drug protocol is reasonably necessary to implement the statutory mandate to provide for a lethal injection alternative. The motion for summary judgment on this ground is denied.

Plaintiffs also argue <u>in a footnote</u> that the rulemaking file does not contain substantial evidence to support the CDCR's determination of necessity of several other regulations. (MPA p. 34, n. 20.) It is improper to briefly raise these issues in a footnote and expect the court to conduct a substantial evidence review. Plaintiffs have provided no citation to the law, to the record, or any analysis of the law to the facts. By attempting to raise these additional issues in a footnote, Plaintiffs are violating the intent and spirit of the court's order allowing them to file an oversized brief. These issues are not properly before the court, and the court refuses to address these issues at this time.

Plaintiffs' Request to Take Judicial Notice of documents filed in separate federal actions, is granted. (Ev. Code § 452(d).) Defendant's objections to these requests are Overruled. Defendant's evidentiary objections Nos. 1-3 are all Overruled.

Plaintiffs' shall submit a Judgment in this matter.

Dated: December 19, 2011



Judge Faye D'Opal

STATE OF CALIFORNIA)
COUNTY OF MARIN)

MITCHELL SIMS VS. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
ACTION NO.: *CIV 1004019*
(PROOF OF SERVICE BY MAIL – 1013A, 2015.5 C.C.P.)

I AM AN EMPLOYEE OF THE SUPERIOR COURT OF MARIN; I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE-ENTITLED ACTION; MY BUSINESS ADDRESS IS CIVIC CENTER, HALL OF JUSTICE, SAN RAFAEL, CA 94903. ON **December 19, 2011** I SERVED THE WITHIN
FINAL RULING RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN SAID ACTION TO ALL INTERESTED PARTIES, BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT SAN RAFAEL, CA ADDRESSED AS FOLLOWS:

SARA EISENBERG HOWARD RICE NEMEROVSKI CANADY FALK &RABKIN, A PROFESSIONAL CORPORATION THREE EMBARCADERO CENTER, 7TH FLOOR SAN FRANCISCO, CA 94111	*JAY GOLDMAN DEPUTY ATTORNEY GENERAL 455 GOLDEN GATE AVENUE, STE. 11000 SAN FRANCISCO, CA 94102*
JAN NORMAN 1000 WILSHIRE BLVD. #600 LOS ANGELES, CA 90017	*NORMAN HILE 400 CAPITOL MALL SUITE 300 SACRAMENTO, CA 95814*

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: 12-19-11