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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF MARIN

17 JARVIS JAY MASTERS and WITNESS
18 TO INNOCENCE,

19 Plaintiffs,

20 vs.

21 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
22 REHABILITATION; SCOTT KERNAN,
SECRETARY OF THE CALIFORNIA
23 DEPARTMENT OF CORRECTIONS
AND REHABILITATION; and RONALD
24 DAVIS, WARDEN OF SAN QUENTIN
STATE PRISON,

25 Defendants.
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FILED

MAY 16 2018

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: T. Jones, Deputy

CASE NO. CIV 1800580

OPPOSITION TO MOTION TO STRIKE

Hearing Date: May 30, 2018
Hearing Time: 1:30 p.m.
Dept: B
Judge: The Honorable Roy O. Chernus
Trial Date: None Set
Action Filed: February 16, 2018

INTRODUCTION

Section 3604.1 of the Penal Code exempts from the Administrative Procedure Act (“APA”) only standards issued pursuant to Penal Code section 3604 that govern the method of execution. Nevertheless, Defendants chose to issue a single Execution Protocol that includes both some regulations that would, by themselves, be exempt from the APA with many others that are not. Defendants could have chosen to promulgate two separate protocols—one (governing the execution method) without notice and comment, and another (governing Defendants’ other duties in administering the death penalty) in compliance with the APA. Indeed, Defendants did not even express any intent that the Execution Protocol could be broken apart for APA purposes, having failed to include a severability clause in their unitary Execution Protocol. Plaintiffs’ prayer for relief seeking invalidation of the Execution Protocol and an injunction requiring that all future regulations be promulgated in compliance with the APA is therefore proper. (See *Engelmann v. State Bd. of Educ.* (1991) 2 Cal.App.4th 47, 50, 62-63 [affirming trial court judgment holding “procedures and criteria” for selecting textbooks “void” and prohibiting Board from “using those procedures and criteria until they had been promulgated as prescribed by the APA,” despite agency’s argument that some procedures and criteria were “obviously” exempt from APA].) Defendants’ motion to strike should be denied.

BACKGROUND

The California Department of Corrections and Rehabilitation (“CDCR”) has extensive duties with respect to administration of the death penalty. They are set forth principally in Title 3 of Part 3 of the Penal Code. (Pen. Code, §§ 3600-3706.)

Some duties pertain to the method of execution. Section 3604, part of Title 3, makes lethal injection the default method of execution but authorizes an execution by lethal gas if the inmate so elects. (*Id.*, § 3604.) Section 3604 delegates to CDCR the duty to develop “standards” governing the method of execution, i.e., standards for administering lethal gas or intravenously administering a lethal substance or substances in a “quantity sufficient to cause death.” (*Id.*, § 3604, subd. (a).)

1 But, in addition to giving CDCR responsibility for developing standards governing the
2 method of execution pursuant to Section 3604, Title 3 imposes numerous other duties on the
3 agency in administering the death penalty. Title 3 specifies where CDCR is to house male and
4 female defendants under a judgment of death. (*Id.*, §§ 3600, 3601.) It requires CDCR to conduct
5 executions at San Quentin State Prison. (*Id.*, § 3603.) Title 3 further requires CDCR, upon
6 issuance of an execution warrant, to investigate the sanity of the defendant. (*Id.*, § 3700.5.) If the
7 Warden of San Quentin has “good reason to believe” that the defendant “has become insane,”
8 certain procedures to determine the defendant’s sanity must follow. (*Id.*, §§ 3701-03.) The
9 Warden must suspend the execution if the defendant is “insane” but proceed if he is not. (*Id.*,
10 § 3704.) Title 3 requires CDCR, no earlier than three days before a scheduled execution, to
11 transfer a female defendant to San Quentin. (*Id.*, § 3601.) Title 3 requires the Warden to be
12 present at the execution and to invite members of the public and others to witness the execution.
13 (*Id.*, § 3605.) Finally, Title 3 requires the Warden to make a return upon the death warrant to the
14 issuing court. (*Id.*, § 3607.) Although not specific to CDCR’s duties in administering the death
15 penalty, Penal Code section 5061 addresses the agency’s duties with respect to the remains of an
16 inmate who dies while confined. (*Id.*, § 5061.)

17 Defendants recently adopted an Execution Protocol without providing for public notice
18 and comment. (Complaint, Exh. A, Notice of Filing of Regulations.) The Execution Protocol
19 intermingles provisions related to CDCR’s duties under Section 3604 with provisions related to
20 CDCR’s numerous other duties in administering the death penalty.

21 Some portions of the Execution Protocol set forth procedures related to the method of
22 execution. (Compare Pen. Code, § 3604, with Execution Protocol, § 3349.7 [“Administration of
23 the Lethal Injection Chemical”].) Other portions of the Execution Protocol set forth procedures
24 related to administration of a death judgment other than the method of execution, for example:

- 25 • the “sanity review” of the inmate (compare Pen. Code, §§ 3700.5-3704, with, e.g.,
26 Execution Protocol, § 3349.5(e)(5)-(6), 3349.5(h), 3349.6(a), 3349.6(b)(2)-(4));
- 27 • the transport and housing of female inmates to San Quentin (compare Pen. Code, §§ 3601-
28 3602, with Execution Protocol, § 3349.6(d));

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- the inmate's request for a last meal and its maximum cost (Execution Protocol, §§ 3349.6(b)(7), 3349.6(f)(1)(E), CDCR Form 1801-D);
- who may witness the execution and what they may witness (compare Pen. Code, § 3605, with Execution Protocol, § 3349.5(e)(C), 3349.6(h)(1), 3349.7(d), CDCR Form 1801-C);
- the inmate's access to in-person visits and telephone calls with spiritual advisors, attorneys, and others (Execution Protocol, §§ 3349.5(g)(2)(E), 3349.5(g)(3), 3349.6(b)(5)-(6), 3349.6(f)(2), 3349.6(g)(1));
- the disposition of the inmate's remains (compare Pen. Code, § 5061, with Execution Protocol, § 3349.5(g)(2)(D), 3349.8(c), CDCR Form 1801-F); and
- the Warden's duty to return the execution warrant (compare Pen. Code, § 3607, with Execution Protocol, § 3349.8(m), CDCR Form 2178).

Penal Code section 3604.1(a) exempts from the APA "standards, procedures, or regulations promulgated pursuant to Section 3604." The prayer for relief accounts for this exemption. In addition to seeking invalidation of the Execution Protocol (which contains non-Section 3604 regulations) in Paragraph 1, Paragraphs 2 and 3 seek declaratory and injunctive relief tailored to address the APA exemption for Section 3604 standards:

2. For a declaratory judgment that neither the Execution Protocol nor any other regulations governing executions in the State of California *other than those promulgated solely pursuant to Section 3604* may be issued, utilized, or enforced unless and until Defendants have complied in all respects with the Administrative Procedure Act, Government Code section 11340 *et seq.*

3. For preliminary and permanent injunctions prohibiting Defendants from carrying out any execution in the State of California unless and until Defendants have adopted regulations governing *the aspects of executions not covered by Section 3604* that comply in all respects with the Administrative Procedure Act, Government Code section 11340 *et seq.*

(Complaint at 13 [emphasis added]).

ARGUMENT

Defendants contend that the relief sought in Paragraph 1 is improper because Section 3604 standards are exempt from the APA and that Paragraphs 1 and 3 are improper because the APA contains other statutory exemptions. Neither argument has merit.

First, the entire Execution Protocol is invalid because CDCR chose to intermingle exempt and non-exempt provisions.

The remedy in a case challenging an underground regulation is a declaration of invalidity. (See, e.g., *Bollay v. California Office of Administrative Law* (2011) 193 Cal.App.4th 103, 113;

1 Gov. Code, § 11340.5, subd. (a) ["No state agency shall issue, utilize, enforce, or attempt to
2 enforce any...rule, which is a regulation, unless [it] has been adopted as regulation and filed with
3 the Secretary of State pursuant to this chapter."].) In *Engelmann*, the State Board of Education
4 issued procedures and criteria for textbook selection without complying with the APA. The trial
5 court held them "void since they had not been promulgated in accordance with the APA" and
6 further "issued a writ of mandate commanding the Board to refrain from using those procedures
7 and criteria until they had been promulgated as prescribed by the APA." (*Engelmann*, 2
8 Cal.App.4th at p. 50.) The Court of Appeal affirmed the trial court's judgment, even though it
9 agreed with the agency that "certain policies and procedures contained in the 1988 publication,"
10 to the extent they simply reiterated the statutory scheme, were "obviously" exempt from the APA.
11 (*Id.* at p. 62; see also *ibid.* [agency argued that "it should not have to submit the entirety of its
12 procedures and criteria for textbook selection" through the APA process].)

13 Similarly here, the APA exemption for Section 3604 standards means that CDCR will
14 "not have to submit the entirety of its" death penalty administration procedures through the APA
15 process in the future; instead it may issue separate protocols. (*Ibid.*)¹ But because CDCR chose
16 to intermingle exempt and non-exempt provisions and to issue the entirety without notice and
17 comment, the entire Execution Protocol—like the textbook selection procedures in *Engelmann*—
18 is "void since [it was] not promulgated in accordance with the APA." (*Id.* at 50, 62.)

19 Defendants themselves apparently did not believe that the Execution Protocol should be
20 broken apart for APA purposes: they did not take even the simple step of including a severability
21 clause. (Cf. *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 92 [finding
22 regulations severable where, *inter alia*, agency included a severability clause]; *Aguiar v. Superior*
23 *Court* (2009) 170 Cal. App. 4th 313, 329 [finding regulations not severable where they did not
24 include severability clause].) They did not argue in their motion to strike that invalidation of the

25
26 ¹ There is no requirement CDCR issue one protocol that comprehensively addresses all its duties
27 in administering the death penalty. Indeed, the current Execution Protocol addresses only lethal
28 injection, even though lethal gas is another authorized method of execution. (Penal Code, § 3604,
subd. a.) In the past, CDCR has also issued an execution protocol that addressed only male, not
female, inmates. (*Sims v. Dep't of Corr. & Rehab.* (2013) 216 Cal.App.4th 1059, 1082.)

1 entire Execution Protocol is improper because any invalid parts should be severed. Nor can they
2 make this argument on reply, as it has been waived. (See *Telish v. California State Personnel Bd.*
3 (2015) 234 Cal.App.4th 1479, 1487 n.4 [points raised for first time on reply are waived].)

4 *Second*, Defendants contend that Paragraphs 1 and 3 of the prayer for relief are improper
5 because some, but not all, of the non-execution-method parts of the Execution Protocol are
6 exempt under APA exemptions other than that set forth in Penal Code Section 3604.1, such as the
7 exemption for regulations that embody the only legally tenable interpretation of law. (Mot. to
8 Strike at 3-4 [citing Gov. Code, § 11340.9, subd. (f)].) This argument also fails.

9 Paragraph 1 seeking invalidation of the Execution Protocol is appropriate because, as set
10 forth above, Defendants chose to intermingle exempt and non-exempt provisions. Defendants do
11 not contend that all provisions of the Execution Protocol are exempt under any APA exemption.
12 Whether the exempt provisions are exempt pursuant to Section 3604.1, subdivision (a) or some
13 other APA exemption does not, given the presence of non-exempt provisions, alter the analysis.

14 Paragraph 3 is also appropriate because it seeks an injunction prohibiting Defendants from
15 conducting executions “until Defendants have adopted regulations governing the aspects of
16 executions not covered by Section 3604 that comply in all respects with the Administrative
17 Procedure Act, Government Code section 11340 *et seq.*” (Complaint at 13 [emphasis added].)
18 Paragraph 3, like Paragraph 2—which Defendants have sensibly not moved to strike—thus
19 expressly tailors the requested injunction to the exemption in Section 3604.1 for standards issued
20 pursuant to Section 3604, and then seeks to require Defendants to “comply in all respects with the
21 [APA].” (*Ibid.*) If there are provisions Defendants wish to include in a future protocol that are
22 indeed exempt under other provisions of the APA, they can adopt those without notice and
23 comment; doing so would comply with the APA because of the other APA exemptions.

24 Plaintiffs have not sought an injunction commanding Defendants to subject all regulations
25 governing the aspects of executions not covered by Section 3604 to public notice and comment.
26 Instead, the injunction sought here—seeking compliance with the APA—is similar to the
27 injunction previously affirmed by the Court of Appeal in a prior case against Defendants for
28 issuing an execution protocol in violation of the APA. The APA at the time contained numerous

1 statutory exemptions, including the exemption under Government Code section 11340.9,
2 subdivision (f), cited by Defendants, yet the Court affirmed a permanent injunction against
3 “CDCR from carrying out the execution of any condemned inmate by lethal injection unless and
4 until new regulations governing lethal injection execution are promulgated in compliance with the
5 APA.” (*Sims v. Dept. of Corr. & Rehab.* (2013) 216 Cal.App.4th 1059, 1083-84; see also
6 *Engelmann*, 2 Cal.App.4th at p. 62 [affirming writ of mandate ordering agency “to adopt, in
7 compliance with the procedural requirements of the [APA]..., any and all rules of general
8 application...used by the [B]oard to carry out its responsibility to adopt textbooks and
9 instructional materials” even though agency had “no duty” to comply with the APA for exempt
10 provisions] [alternation and omission in original].)

11 Paragraphs 1 and 3 of the prayer seek relief that is entirely proper.²

12 CONCLUSION

13 For the foregoing reasons, the motion to strike should be denied.

14 DATED: May 16, 2018

Respectfully submitted,

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27 ² To the extent the Court finds any merit to Defendants’ motion to strike, Plaintiffs seek leave to
28 amend.