

Lethal Injection Litigation in California

For almost five years, the State of California has engaged in a protracted legal battle over its method of execution: lethal injection. Three of these lawsuits are still pending. Executions should not resume in California until all of these legal challenges and uncertainties are settled. Below is a summary of the primary legal challenges.

Summary of Lawsuits

State Law Challenge Based on Administrative Procedures Act (2 cases), *Morales v. California Dept of Corrections and Rehabilitation (CDCR) and Sims v. CDCR*

Summary: In the *Morales* case, plaintiffs asserted that the CDCR violated state law by creating the current execution protocol in secret. The state court ruled in their favor, holding that the execution protocol must be adopted in the same manner as other regulations, allowing public comment and participation. The appellate court affirmed and the CDCR eventually submitted the lethal injection protocol for public comment. The regulations were approved by a state agency on July 30, 2010. On the following Monday, plaintiffs filed the *Sims* case, alleging that the CDCR violated state law both in the process of adopting the new regulations and the in the substance of the regulations. This new challenge and the questions raised have not yet been addressed.

Federal Law Challenge Based on Eighth Amendment

Morales v. Ayers

Summary: In this case, plaintiff Michael Morales challenged the lethal injection procedure as implemented in California as cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. Morales asserts that there is a substantial and unjustified risk he will suffer excruciating pain when executed due to the manner in which lethal injections have been administered

California Litigation Timeline

October 2005

Morales files federal challenge to lethal injection.

December 2005

Stanley Tookie Williams is executed. Prison staff spends 30 minutes searching for a vein and one IV appears to fail during the execution.

January 2006

Clarence Ray Allen is executed. The warden orders a second dose of the lethal drugs after the procedures fails to stop Allen's heart.

February 2006

Judge Fogel initially rules that the execution of Morales can proceed if the CDCR has a doctor present or uses only one drug during the execution. The CDCR is forced to stop the execution because they cannot comply.

Pacific News Service files First Amendment challenge to use of paralytic drug.

December 2006

Judge Fogel issues preliminary ruling finding constitutional violations. The Governor agrees to revise the procedures.

May 2007

The CDCR unveils new execution protocol.

Morales files APA challenge.

California Litigation Timeline *continued*

October 2007

State court rules that new protocol must be submitted for public comment under APA.

October 2008

State Court of Appeals affirms ruling in APA case.

May 2009

The CDCR releases the new protocol for public comment.

June 30, 2009

Hearing in Sacramento on new protocol attracts more than 100 witnesses.

January 2010

The CDCR releases revised protocol, beginning a second comment period.

June 2010

State agency rejects the protocol. The CDCR again issues a new version leading to a third comment period.

July 30, 2010

Despite nearly 30,000 objections, state agency approves protocol.

August 2, 2010

Sims files new APA challenge to regulations.

September 19, 2010

State Court of Appeals rules original APA injunction no longer in effect but plaintiffs may seek a new injunction.

in California in the past. After an extensive evidentiary hearing, Judge Fogel issued a preliminary ruling stating that if procedures were not revised, he would be forced to find California's current method of carrying out executions in violation of the Constitution. Governor Schwarzenegger responded by agreeing to overhaul the procedures in California. Judge Fogel is now considering what steps must be taken before he determines if the changes satisfy the requirements of the constitution.

Federal Law Challenge Based on First Amendment

Pacific News Service v. Ayers

Summary: This case challenges the use of one of the three drugs now involved in the lethal injection process. Plaintiff, a news service, asserts that the paralytic drug currently used during lethal injection violates the First Amendment rights of the press and the public to see what really happens during an execution. By preventing the person being executed from moving, the paralytic drug acts as a "chemical curtain," hiding the truth from the press. This case is also before Judge Fogel and has not been resolved.

"In California, for example, a federal judge in December 2006 said there was 'more than adequate' evidence that the state was violating the U.S. Constitution after hearing testimony that lethal injection procedures were performed in a dark, cramped room by men and women who knew little about the drugs they administered.

Medical experts in the case testified before U.S. District Judge Jeremy Fogel in San Jose that they could not rule out the possibility that one or more inmates had been conscious and experienced an excruciating sensation of drowning or strangulation before death."

January 7, 2008 article in Los Angeles Times by Henry Weinstein