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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 PACIFIC NEWS SERVICE,
17 Plaintiff,

18 v.

19 JEANNE WOODFORD, Acting Secretary of
the California Department of Corrections and
20 Rehabilitation; STEVEN ORNOSKI, Warden,
California State Prison at San Quentin, San
21 Quentin, CA; and Does 1-50,

22 Defendants.
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Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**
[42 U.S.C. § 1983]

1 **NATURE OF ACTION**

2 1. This action is brought pursuant to 42 U.S.C. § 1983 to vindicate the right of the
3 press and the public to attend, meaningfully observe, and gather and report on important
4 information at executions administered by the California Department of Corrections and
5 Rehabilitation and the California State Prison at San Quentin. This right is guaranteed by the
6 First and Fourteenth Amendments of the United States Constitution and is primarily effectuated
7 by members of the press who are actually present at executions and who serve as surrogates for
8 the press and the public at large. Plaintiff, a media organization that reports on California
9 executions, seeks temporary, preliminary, and permanent injunctive relief to prevent the
10 defendants from executing any death row inmates in a manner that conceals important
11 information to which the public is constitutionally entitled. Defendants' use of pancuronium
12 bromide, a paralytic agent that acts as a chemical curtain over the lethal injection process, makes
13 it impossible for witnesses to determine whether death row inmates in California are being
14 subjected to substantial and unnecessary pain before dying. Pancuronium bromide also conceals
15 other aspects of the dying process about which the public is entitled to know. This lawsuit is not
16 a blanket challenge to the death penalty or to all lethal injection executions. Rather, plaintiff
17 contends that California may not execute death row inmates in a manner that violates the First
18 Amendment rights of the press and of the public. The public requires information in order to
19 decide via democratic processes whether and how executions should be conducted. The First
20 Amendment claim, therefore, vindicates the public's right to gather information related to that
21 decision-making process.

22 **JURISDICTION AND VENUE**

23 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question),
24 § 1343 (civil rights violations), § 2201 (declaratory relief), and § 2202 (further relief). This
25 action arises under the First and Fourteenth Amendments to the United States Constitution and
26 under 42 U.S.C. § 1983.

27 3. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the California State
28 Prison at San Quentin in San Quentin, California, is located in this District. All executions

1 conducted by the State of California ("State") occur at San Quentin. The events giving rise to
2 this complaint will occur in this District.

3 THE PARTIES

4 4. Plaintiff Pacific News Service ("PNS") is a non-profit media organization,
5 founded in 1969, that reports on, among other things, the application of the death penalty in
6 California. PNS syndicates daily stories through the Associated Press wire to subscribing
7 mainstream and community newspapers across the United States. PNS stories include feature-
8 length commentary, news analysis, and investigative reporting. PNS also sponsors magazine
9 articles, books, TV segments and films. Additionally, PNS owns and operates New America
10 Media, an association of hundreds of independent news organizations that cover, at least in part,
11 issues pertaining to ethnic or minority communities. New America Media publishes content
12 generated both internally and from its member organizations. Pacific News Service is interested
13 in disseminating information on what eyewitnesses to California executions observe during the
14 lethal injection process, including but not limited to whether executed inmates manifest indicia
15 of pain prior to death. PNS is a California non-profit corporation based in San Francisco,
16 California.

17 5. Defendant Jeanne S. Woodford is the Acting Secretary of the California
18 Department of Corrections and Rehabilitation ("the Department").

19 6. Defendant Steven Ornoski is the Warden of the California State Prison at San
20 Quentin, where the plaintiff is incarcerated and where the plaintiff's execution is scheduled to
21 occur.

22 7. Plaintiff does not know the true names of Does 1-50 but alleges that they have or
23 will participate in plaintiff's execution by virtue of their roles in designing, implementing, and/or
24 carrying out the lethal injection process. When plaintiff discovers the Doe Defendants' true
25 identities, it will amend its complaint accordingly.

1 CLAIM

2 **VIOLATION OF RIGHT TO BE PRESENT AT, MEANINGFULLY WITNESS,**
3 **GATHER INFORMATION AT, AND REPORT ON EXECUTIONS PURSUANT TO**
4 **THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES**
5 **CONSTITUTION**

6 (42 U.S.C. § 1983)

7 8. Under California law, death sentences shall be carried out by “administration of a
8 lethal gas or by an intravenous injection of a substance or substances in a lethal quantity
9 sufficient to cause death, by standards established under the direction of the Department of
10 Corrections.” Cal. Penal Code § 3604(a). The statute prescribes no specific drugs, dosages, drug
11 combinations, or the manner of intravenous line access to be used in the execution process; nor
12 does the statute prescribe any certification, training, or licensure required of those who
13 participate in the execution process. All of the details of the execution process are to be
14 determined by the Department of Corrections and Rehabilitation.

15 9. Since it first adopted a lethal injection protocol in the mid-1990’s, the Department
16 of Corrections and Rehabilitation has refused to disclose to the public a complete version of the
17 protocol. Additionally, the Department conducts substantial portions of lethal injection
18 executions outside of public view and without public disclosure. Thus, although plaintiff is
19 familiar with those significant aspects of the lethal injection protocol and the conduct of lethal
20 injection executions that have been disclosed, plaintiff lacks complete and precise knowledge of
21 (1) the protocol the Department has adopted; (2) changes to the protocol over time; and (3)
22 whether and to what extent the Department abides by its own protocol when conducting lethal
23 injection executions.

24 10. On information and belief, San Quentin Operational Procedure No. 770
25 (“Procedure 770”) is the lethal injection protocol adopted by the Department and has evolved
26 since it was first adopted in the mid-1990’s. Most recently, the Department revised Procedure
27 770 after its February 21, 2006 decision to indefinitely postpone the execution of Michael
28 Angelo Morales. The Department outlined the revision in skeleton form in a March 3, 2006

1 Case Management Conference Statement, filed in *Morales v. Woodford*, No. C 06 219 JF (N.D.
2 Cal. Jan. 18, 2006), a case currently pending in this Court.

3 11. On information and belief, Procedure 770, in policy and practice, has remained
4 unchanged since its inception in one critical respect: It provides for execution by injection with a
5 lethal combination of three chemical substances, in the following order: first, sodium pentothal, a
6 short-acting barbiturate; second, pancuronium bromide, which paralyzes all voluntary muscles;
7 and third, potassium chloride, which causes cardiac arrest.¹

8 12. The intended purpose of the first drug administered in Procedure 770, sodium
9 pentothal (also known as sodium thiopental), is to render the inmate unconscious and therefore
10 unable to experience pain. The intended purpose of the third drug, potassium chloride, is to
11 bring about the rapid death of the inmate by stopping his heart. The intended purpose of the
12 second drug, pancuronium bromide (also known as Pavulon), is in dispute and is discussed in
13 more detail below. On information and belief, plaintiff alleges that defendants have never
14 provided a legitimate reason for administering pancuronium bromide and that this drug functions
15 only to conceal important aspects of the execution process from the press and the public.

16 13. Defendants Jeanne Woodford and Steven Ornoski, and Doe Defendants are acting
17 under color of California law when promulgating or amending Procedure 770 and when carrying
18 out executions.

19 14. A limited number of members of the press and the public are permitted to witness
20 executions. These eyewitnesses serve as surrogates for those members of the press and the
21 public who are not able to attend executions personally. Thus, the First Amendment rights of the
22 public and the press to attend and meaningfully observe executions are effectuated by these
23 surrogates.

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26 ¹ On information and belief, one potential deviation from this series of drugs took place on
27 February 21, 2006, in connection with the execution of Michael Angelo Morales. On
28 information and belief, on that day, the Department contemplated executing Mr. Morales using
only sodium pentothal so as to comply with a condition, imposed in *Morales v. Woodford*, No. C
06 219 JF, for proceeding with the execution. On information and belief, this contemplated
revision was never implemented.

1 15. Death row inmates have challenged Procedure 770, arguing that this protocol
2 violates constitutional and statutory provisions enacted to prevent cruelty, pain, and torture. As a
3 result, the issue of whether Procedure 770 illegally subjects death row inmates to an undue risk
4 of a painful death has received substantial media attention and is of great interest to the public.

5 16. A major controversy surrounding Procedure 770 focuses on whether the inmate is
6 properly anaesthetized before dying. Specifically, a substantial question has been raised as to
7 whether Procedure 770 ensures adequate delivery of sodium pentothal to the inmate's veins. In
8 past challenges to the protocol, inmates have alleged shortcomings in Procedure 770 and have
9 presented evidence suggesting that prior California executions performed under Procedure 770
10 actually subjected inmates to excruciating pain. Defendants Woodford and Ornoski dispute the
11 allegation that Procedure 770 is flawed as well as the evidence that they or their predecessors
12 have improperly administered the protocol.

13 17. Members of the press and the public who witness executions at San Quentin are
14 unable to observe aspects of the execution process historically observed by eyewitnesses and
15 reported to the public at large, including, but not limited to, whether the three-drug cocktail
16 subjects inmates to unconstitutional levels of pain due to inadequate anesthesia. This is because
17 pancuronium bromide, the second drug in the lethal injection cocktail, paralyzes all voluntary
18 muscle movement in the inmate. Thus, whether or not the inmate is experiencing pain, his body
19 would remain still and would be incapable of manifesting any pain that is felt. These physical
20 manifestations of pain include both physical reactions of the body, such as voluntary or
21 involuntary coordinated muscle movement, and verbal indicia of pain. As a result, pancuronium
22 bromide acts as a chemical curtain that conceals indicia of pain from the members of the press
23 and the public that are observing the executions.

24 18. Importantly, pancuronium bromide conceals important information from members
25 of the press and the public whether pain is present *or absent*. If the inmate does experience pain,
26 execution witnesses will not be able to observe the inmate's physical indicia of pain because of
27 the inmate's paralysis. If the inmate is completely anaesthetized and does not experience pain,
28 execution witnesses will not be able to determine that either, because the lack of any physical

1 response will be attributed to pancuronium bromide, not unconsciousness. Thus, pancuronium
2 bromide masks important information about the presence *or absence* of pain.

3 19. Additionally, pancuronium bromide masks both disputed and undisputed indicia
4 of pain or consciousness. In the lawsuits brought by death row inmates challenging Procedure
5 770 and in the larger social debate, there are often disputes as to whether certain physical
6 responses during the lethal injection process by previously executed inmates actually indicate
7 that the inmate was conscious and experienced pain while dying. Pancuronium bromide
8 conceals from members of the public viewing executions both types of physical responses –
9 those that could and could not be reasonably disputed as indicia of pain. The press and the
10 public are entitled to witness, interpret, and report on both types of physical responses.

11 20. Finally, entirely aside from the issue of pain, pancuronium bromide conceals
12 aspects of the execution process that may be important to the public. For instance, while fighting
13 off the effects of the sedative, sodium pentothal, an inmate may attempt to express sentiments or
14 information unrelated to pain, such as repentance or anger. The First Amendment right of the
15 public and the press encompasses many types of information in which society may be interested,
16 not merely those associated with the issue of pain. Thus, the public and the press are entitled to
17 information unrelated to pain that is being concealed by pancuronium bromide.

18 21. On information and belief, pancuronium bromide serves no legitimate functional
19 or penological purpose in the lethal injection protocol. On information and belief, pancuronium
20 bromide does not affect consciousness, the perception of pain, or the hastening of death. Thus,
21 when administered as provided for in Procedure 770, pancuronium bromide appears to serve no
22 purpose other than concealing important information about the execution process from the public
23 and the press. On information and belief, defendants know that pancuronium bromide's only
24 function is to conceal information, but defendants continue to administer the drug despite this
25 knowledge.

26 22. On information and belief, defendants therefore intentionally administer
27 pancuronium bromide to conceal important information from the press and the public. This
28 would not be the first time that defendants and their predecessors incorporated into the lethal

1 injection process procedures intentionally aimed at concealing important information from those
2 viewing the execution. Specifically, in *California First Amendment Coalition v. Woodford*, 299
3 F.3d 868 (9th Cir. 2002), the plaintiff media organization challenged the San Quentin Prison and
4 Department policy of drawing a physical curtain in front of the lethal injection chamber while
5 prison guards strapped down the inmate and inserted intravenous lines into his arms. On the
6 basis of an internal Department of Corrections memo, the district court found and the Ninth
7 Circuit affirmed that “Procedure 770 was motivated, at least in part, by a concern that the
8 strapping of a condemned inmate, the injection of intravenous lines or other aspects of a lethal
9 injection execution would be perceived as brutal by the public and thus was, to that extent,
10 prompted by considerations other than legitimate concerns for prison personnel safety.”
11 *California First Amendment Coalition*, 299 F.3d at 880.

12 **ALLEGATIONS IN SUPPORT OF DECLARATORY AND INJUNCTIVE RELIEF**

13 23. The inclusion of pancuronium bromide in Procedure 770 necessarily impacts
14 plaintiff’s First and Fourteenth Amendment rights. Whether or not the lethal injection procedure
15 subjects the inmate to pain, pancuronium bromide prevents the press and the public from
16 obtaining this information. Pancuronium bromide also conceals from the press and the public
17 disputed indicia of pain and aspects of the execution process unrelated to pain. The press and the
18 public are entitled to each of these types of information, all of which are masked by pancuronium
19 bromide. Additionally, defendants administer pancuronium bromide with the intention of
20 concealing information from the press and the public. This conduct violates plaintiff’s First and
21 Fourteenth Amendment rights to meaningfully witness and obtain information at executions.

22 24. Procedure 770 results in irreparable injury to plaintiff PNS because the
23 information suppressed and concealed by the protocol can never be reacquired.

24 25. This complete and permanent loss of socially valuable information to the press
25 and to the public cannot be redressed by legal remedies.

26 26. Defendants’ prior intentional attempts to conceal information about the execution
27 process from the press and the public weigh in favor of injunctive relief.
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