C.A. NO. 06-99002
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES,	D.C. Nos. C 06 0219 (JF), C 06 0926 (JF)
Petitioner-Appellant,	**DEATH PENALTY CASE**
v.	
RODERICK Q. HICKMAN, Secretary of the California Department of Corrections; STEVEN ORNOSKI, Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50,	**EXECUTION IMMINENT: Execution Date February 21, 2006**
Respondents-Appellees.	

APPLICATION OF STAY OF EXECUTION

Emergency Motion Under Circuit Rule 27-3

David A. Senior
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

Richard P. Steinken
Janice H. Lam
Stephanie L. Reinhart
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

John R. Grele
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Ginger D. Anders
Jenner & Block LLP
601 Thirteenth Street, NW
Suite 1200 South
Washington DC 20005-3823
Phone: (202) 639-6000
Fax: (202) 639-6066
ganders@jenner.com

Attorneys For Petitioner-Appellant
Michael Angelo Morales

CIRCUIT RULE 27-3 CERTIFICATE

I hereby certify that the following are counsel of record for Plaintiff:

David A. Senior
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

Richard P. Steinken
Janice H. Lam
Stephanie L. Reinhart
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

John R. Grele
Law Offices of John R. Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Ginger D. Anders
Jenner & Block LLP
601 Thirteenth Street, NW
Suite 1200 South
Washington DC 20005-3823
Phone: (202) 639-6000
Fax: (202) 639-6066
ganders@jenner.com

Counsel of record for Defendants is:

Dane Gillette (#65925)
Senior Assistant Attorney General
450 Golden Gate Avenue, suite 1100
San Francisco, CA 94102
Tel: (415) 703-5866
Fax: (415) 703-1234

Appellant/Plaintiff Michael Morales challenged his execution under California's Procedure 770, the method of lethal injection, in the District Court.

His complaint was filed on February 13, 2006 and a Motion for a Temporary Restraining Order was filed on February 20, 2006. The nature of the need for emergency review is that the District Court issued its final order after the close of business yesterday, February 16, 2005, approving a last-minute modification of the procedure for execution. Mr. Morales' execution is set for February 21, 2006 at 12:01 am. Unless a stay of execution is issued, he will not have an opportunity for review of the procedure by which he is to be executed, despite a sufficient showing that the new procedure does nothing to alleviate the substantial likelihood he will suffer unnecessary and excruciating pain.

Counsel for the Defendant/Appellee was notified of this application by electronic mail today, February 17, 2006. He was advised we would file our appeal shortly after the final order was issued. He has been served with this Motion today electronically pursuant to the agreement of the parties.

All grounds for relief sought in this Court were advanced in the District Court.

Dated: February 17, 2006

JOHN R GRELE

One of the Attorneys for Petitioner-Appellant Michael Angelo Morales

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

Appellant Michael Morales is scheduled to be executed by lethal injection at midnight on the night of February 20, 2006 (12:01 am on February 21, 2006). He applies to this Court for a Stay of Execution because he has established that California's lethal injection procedures are sufficiently questionable to constitute a likelihood of success on the merits of his Eighth Amendment challenge, yet the District Court denied a stay and has prevented adequate review both below and in this Court. *See Malone v. Calderon*, 167 F.3d 1221 (9th Cir. 1999); *Taylor v. Crawford,* No. 06-1397 (8th Cir.).

Mr. Morales brought an action under 42 U.S.C. section 1983 and requested a Temporary Restraining Order. ER 1-29. The District Court ordered a series of at least four briefings, requesting further submissions each time Appellee, the California Department of Corrections and Rehabilitation (CDCR), submitted an inadequate response. ER 346-49 (docket). Finally, after having considered the request for over a month, and on the eve of execution, the District Court allowed the execution to go forward so long as the lethal injection procedure was modified, a finding that the procedure was so defective as to require judicial intervention. *See* ER 301-15 ("Conditional Order").

Now, at the last minute, a new procedure has been crafted. Two anesthesiologists will be present, one in the chamber. ER 336-37. But, in response

Morales alleged that CDCR's administration of Procedure No. 770, the lethal injection protocol, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it created a substantial risk that Mr. Morales will be fully conscious and in agonizing pain for the duration of the execution process. ER 256-67 (Amended Complaint).

Mr. Morales filed a Motion for Temporary Restraining Order on January 20, 2006. ER 1-29. Briefing by both parties ensued. ER 346 (pacer #17, 21). At an initial hearing on January 26, 2006 (ER 391-456), the District Court announced that it would construe the TRO motion as a motion for a preliminary injunction, ordered supplemental briefing on the motion for preliminary injunction, and scheduled further oral argument. ER 451-52. On February 1, 2006, the District Court denied all but the most limited expedited discovery, ordering production of a previously confidential version of California's lethal-injection protocol and information about the three most recent executions that Defendants have conducted -- those of Donald Beardslee on January 19, 2005; Stanley "Tookie" Williams on December 13, 2005; and Clarence Ray Allen on January 17, 2006. ER 229-231. On February 9, 2006, after further briefing, the District Court heard argument on the motion for a preliminary injunction where both sides offered what was to be presented at a hearing to be held in 60 to 90 days. ER 457-533. Still further supplemental briefing was requested by the Court. Then, on February 13, 2006,

the District Court requested a fourth round of supplemental briefing to address whether it would be feasible for Plaintiff's execution to proceed either using only sodium thiopental or utilizing an independent means to insure that Plaintiff will be unconscious before pancuronium bromide and potassium chloride are injected. ER 348. After the briefing on that issue, in which CDCR proposed to have the Warden poke Mr. Morales to see if he moved (ER 274), the District Court issued its Conditional Order on February 14, 2006. ER 301-15. That Conditional Order required yet further submissions: by the State of California as to what procedure it was going to employ, and by Mr. Morales as to the adequacy of that procedure. Those submissions were completed on February 16, 2006 and the Final Order was issued upholding the State's modified procedure later that evening.

A Notice of Appeal followed. ER 386. This Court has jurisdiction pursuant to 28 U.S.C. § 1292 , 28 U.S.C. § 1331 (federal question jurisdiction) and § 1343 (civil rights violation). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

III. STATEMENT OF FACTS

Procedure No. 770 calls for the use of three drugs in succession: first, sodium pentothal, an ultrashort-acting barbiturate intended to cause the inmate to lose consciousness, but that can wear off quickly; pancuronium bromide, a neuromuscular blocking agent that paralyzes the muscles, making the execution

appear peaceful to witnesses; and finally, potassium chloride, which induces cardiac arrest. ER 30-73. Procedure No. 770 allows for the remote administration of the drugs, from another room, by untrained personnel, using 50 feet of IV tubing and a modified junction for the injection. The process does not comport with accepted medical standards and is entirely error-prone. ER 79-103.

There is no dispute that if the inmate is not properly sedated by the sodium pentothal, the administration of the second and third drugs will result in an excruciatingly painful execution. And, there is no dispute that the inmate, because he will be paralyzed, will not be able to alert witnesses and personnel that he is conscious, and that it is nearly impossible for the untrained to detect this.

After only a fraction of the discovery requested (ER 221-27), the following was recognized as new and critically different information by the District Court:

- in 6 of the past 13 executions, and in 4 of the past 6, inmates have been breathing much longer than would occur if they were properly sedated. ER 309-10. One inmate was breathing up until the third chemical was administered, although the execution log was altered to obscure this. ER 243-47. The state's expert says breathing would stop in a minute. ER 115;
- in at least three of the past executions (Anderson, Babbit and Rich), inmates have manifested clear indications they were not properly sedated before the administration of the pancuronium, *see* ER 110-12; ER 309-10;

- in 3 of the previous executions, a second dose of the heart-stopping agent, potassium chloride, was administered. *See id.* at 11. There is no plausible explanation for this other than improper administration of all three drugs;
- in one previous execution (Bonin), a second dose of the paralyzing agent was required. ER 106. There is no plausible reason why this should be required other than improper administration of the drugs;
- The Procedure 770 that was in effect until less than a day ago had no provisions for monitoring consciousness. The modified provisions are undisclosed. All that is known is that two doctors will be present and will conduct observation and examination;
- Procedure No. 770 is rife with error, not the least of which are contradictory indications of how much of each chemicals is to be used, an array of alternative procedures without any indication of what is to be done under what circumstances, a jury-rigged 50-foot mechanism to deliver the drugs that does not comport with standard medical procedure, and admission that the sedative may adhere to the line and not reach the inmate. Further deficiencies include the lack of provisions for training of staff, a failure to require medically appropriate training, and the absence of provisions for verifying that the inmate is unconscious. ER 79-103. There is a frightening

inconsistency in the amount of sedative to be administered, increasing the likelihood it will not reach Mr. Morales. ER 303 n. 3;

- the execution logs produced by CDCR in discovery have been altered with respect to several inmates, and one is altered to give the appearance he was not breathing when he was (as disclosed in the hand-written notes). These logs are woefully deficient and highly suspect, with indications that sometimes the essential saline flush is noted, while other times it is not (the flush is required not so the sedative adhering to the line will reach the inmate, but so that the paralyzing agent will not be blocked). The logs indicate line failures during executions. ER 95; ER 105-109; ER 178-80;
- the logs themselves indicate *increased* heart rates even after the lethal dose of sedative has supposedly taken effect and the heart rate should be diminishing. These rates are inconsistent with proper drug administration. ER 100 (Babbit); ER 106 (Bonin); ER 179 (S. Williams); ER 180 (Allen) ;
- the ethical standard for critical care decisions concerning end of life situations in hospitals strongly discourages the use of the paralytic agent because of its likelihood for error and painful termination of life, *see* ER 188, 197-204;
- veterinarians throughout the country are prohibited from employing this procedure by veterinary standards, and by state law, for the same reasons,

see Beardslee v. Woodford, 395 F.3d 1064, 1073 & n.9 (9th Cir. 2005); ER 100-102; ER 120-121;

- Dr. Dershwitz's statement that 99.999999% of inmates should be fully sedated by the sodium pentothal has been credibly questioned in other cases. ER 236-39. Mr. Morales requested to review his underlying data and examine his opinions. ER 472. It was never permitted.

In light of the above, the District Court found that Mr. Morales "raised substantial questions" as to whether California's lethal-injection protocol creates an undue risk that [Appellant] will suffer excessive pain" and went on to note:

> [T]he 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. … 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.

Id. at 312-13.

Although the District Court held that the deficiencies in the protocol necessitated corrective action, it declined to issue a stay and hold a hearing. Instead, it attempted to craft its own lethal injection procedure by giving the State of California two options – either eliminating the second and third chemicals (the humane approach), or having a medically-trained individual monitor whether the inmate was unconscious (the monitor approach). The second option allowed

CDCR to "agree to independent verification, through direct observation and examination by a qualified individual...in a manner comparable to that normally used in medical settings where a combination of (unknown) sedative and (unknown) paralytic medications is administered, that Plaintiff is in fact unconscious before either pancuronium bromide or potassium chloride is injected…[T]he presence of such person(s) shall be continuous until Plaintiff is pronounced dead." ER 313-15.

The next day, February 15, 2006, CDCR's counsel said the prison would have two anesthesiologists "present" for "monitoring" of the process, and would verify this to the court. There was no proposed change in the protocol. ER 316-24. Mr. Morales then pointed out the difficulties with that non-description of the process, including that it did not even require the doctor's presence in the chamber and did not describe anything other than a vague monitoring process, without any examination, when in the execution process monitoring would occur or what equipment would be used. Nor was there any requirement that the doctor could stop the execution or administer additional sedative. Mr. Morales requested that the procedures be disclosed, as well as the identities of the doctors (under a protective order) so that he could research their credibility or bias. ER 325-30. He also requested a stay of execution and a hearing so as to permit orderly review. ER 329.

Yesterday, CDCR submitted its lawyer's hearsay declaration that he had talked to the anesthesiologists and the Warden, one of whom stated one doctor would be present in the chamber to "monitor consciousness...using whatever equipment or other techniques he deems medically appropriate." ER 335. The remainder of Procedure 770 would remain in effect. ER 335.

Then, after the close of business on February 16, 2006, the District Court issued its Final Order. ER 336-41. It charitably construed CDCR's response to mean that the State would also *ensure* unconsciousness, even though CDCR deliberately refused to say so. ER 339 n. 3. The District Court below then further *presumed* the procedure would comply with its previous order "in the context of the medical evidence provided by Dr. Heath and Defendants' medical expert, Dr. Dershwitz." ER 340. The District Court refused to order disclosure of the procedures that were going to be employed in executing Mr. Morales. [1]

---

[1] Mr. Morales's request for a Temporary Restraining Order was denied as moot when the court ordered a hearing on the preliminary injunction. ER 220. The court then held it would not take evidence, but requested proffers and oral argument. ER 451-52. Then, the District Court conditionally denied the preliminary injunction, with events to take place in days or a stay issued. ER 313-15. In response, Mr. Morales requested a stay of execution. ER 329. His request was deemed a request for reconsideration and denied in an order that is a final, appealable order. ER 341. Time did not permit another stay application in the court below.

IV. ARGUMENT

Under *Barefoot v. Estelle*, 463 U. S. 880, 885 (1983), Mr. Morales must demonstrate "substantial grounds upon which relief might be granted" to obtain a stay of execution. This standard is satisfied when the movant demonstrates that his "argument warrants further review," which cannot be fully and fairly accomplished in the time remaining before the execution. *See Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997).

Given the District Court's orders, and the record, Mr. Morales has met this standard. The Conditional Order identifies some of the glaring deficiencies in Procedure No. 770, and the real and substantial risk of an excruciatingly painful execution for Mr. Morales, one which he will not be able to express because he is paralyzed. *See* ER 309-11. The fact that the District Court recognized that Mr. Morales had raised "substantial questions" as to the constitutionality of California's lethal injection protocol (ER 313), and invoked the Court's equitable power to order CDCR to alter the procedure, indicates that the District Court essentially held that Mr. Morales had established his entitlement to injunctive relief against the use of Procedure No. 770. The District Court simply abused its discretion in denying the injunction and a stay.

Instead, at the very last minute, the District Court attempted to fashion a remedy by forcing CDCR to revise its regulations. But, it comes too late to

accomplish any adequate review of this procedure in either that court or this one. The new procedures are completely unknown, designed merely to monitor whether Mr. Morales is unconscious and are being interpreted that way by CDCR. For some reason, in the face of a hearsay declaration that states exactly that, and only that, the District Court construed CDCR's representations to mean that it would *ensure* unconsciousness. But, CDCR has refused to so state, despite two opportunities to do so. The evidence is to the contrary.

The new procedures are not designed to effectuate any remedy should Mr. Morales not be sufficiently sedated. What will happen if the anesthesiologist's "monitoring" reveals that Mr. Morales is not unconscious is completely undetermined. Without a procedure in place by which the doctor can administer or facilitate an additional dose of sodium, the monitoring will be useless. In addition, the injection team -- untrained personnel who must have a protocol to follow because they lack the background necessary to exercise their own discretion in a medical situation -- must have a procedure in place to respond. Without these safeguards, Mr. Morales is just as much at risk of suffering an excruciating execution as he was before the District Court modified the procedures.

The doctors have no authority to halt the execution, or to order the administration of additional sedatives. In fact, no additional sedatives are even

available. ER 56, 66 (one syringe). The Defendants plainly stated that all of Procedure 770 remains in effect except for this "monitoring." ER 335.

The new procedures have the following additional difficulties:

- CDCR has stated that: "I can't tell you what they [the doctors] will do; that is something the anesthesiologists will have to work out with the prison. Basically, the doctors will be brought in as experts to observe and then report back to the court." ER 327.
- There is no indication the doctors will employ any procedures whatsoever. There is no indication what their "examination" will entail. In fact, given the substantial doubt as to whether participating in an execution is consonant with medical ethics, or state law, it is doubtful they will do anything other than observe;
- There is no indication that the doctor in the chamber will be made aware when the chemicals are being administered, which is done from afar in another room. Without this knowledge, any monitoring by the anesthesiologist is useless;
- There is no indication that the doctors will use the medical monitoring equipment necessary to effectively monitor unconsciousness despite the paralyzing effect of the pancuronium, or that such equipment will even be present or available;

- There is no indication the doctors will be able to direct any alteration in the procedure such as setting up a medically appropriate IV line; properly labeling the syringes with the chemical names; pre-testing the process; notifying the execution team when something is awry; or taking any action whatsoever.
- Discerning adequate sedation requires checking for movement, response to commands, opened eyes, eyelash reflex, pupillary responses or diameters, perspiration and tearing. ER 132-33. Clinical techniques (e.g., checking for purposeful or reflex movement) and conventional monitoring systems (e.g, ECG, BP, HR, end-tidal anesthetic analyzer, capnography) should be used. ER 133-34. There is no indication any of the techniques or equipment will be employed.

All of these difficulties arise when a District Court attempts to change the state's regulations without holding a hearing as to what is appropriate and why. At least the CDCR could maintain that it had vetted its procedures by observing what was done in other states. Here, there is no such review. As the court below itself noted, in response to Mr. Morales' complaints about the lack of monitoring:

> [I]t's really not the role of the Court to micromanage what the state does. I mean the Court's role is to protect the Constitutional rights of the Plaintiff …
>
> So I think we could go too far down the road of saying, well, the state should d[o] this, and the state should do this, and have what an ideal

> execution protocol would be, and that's not the Court's function. That's not why the Court is here.

ER 479. It appears the District Court forgot its own, wise caution.

The Conditional Order raises another difficulty. It fails to specify the "observation and examination" that is "normally used in medical settings", and whether there are any differences between the sedatives and paralytic agents here that would require alterations from that standard medical practice. For instance, there is a debate in the medical field as to the utility of using a brain wave monitor, with the majority believing it inadequate. ER 143; ER 285-86. If this is what is envisioned, it would be inadequate.

CDCR seized upon the Conditional Order's "verification" language as something it must provide to the District Court after the execution. At no time did they verify it would use medically accepted techniques (only what it thought was medically appropriate). CDCR has not verified any particular method at all. Likewise, the Conditional Order is unclear as to exactly when any examination is to occur, before the administration of the paralytic agent, or before the potassium chloride. Reading it literally, it would allow a doctor to sit by and observe, but not actually monitor or examine Mr. Morales, after the paralytic agent is administered.

In fact, this highlights a major deficiency in the District Court's last-minute crafting of a state prison regulation. As long as the paralytic agent is being administered, monitoring anesthetic depth will remain incredibly difficult, and

stopping the execution and reversing the paralysis before the inmate begins to suffer excruciating pain will be impossible. Mr. Morales therefore remains at great risk of suffering an excruciatingly painful death that he, and the doctor who is present, must endure in total silence. This may make the execution appear more pleasant for the attending crowd, but it is not constitutional.

When presented with these difficulties (ER 325-29), the District Court issued its Final Order. But, neither order states that the doctor can do anything other than watch. The Final Order merely "construes" CDCR's "monitoring" hearsay declaration to mean it would "ensure" unconsciousness. ER 339 n. 4. Notably, despite Mr. Morales' explicit request to this effect (ER 327-28) that court never ordered that the doctor has the right or ability to intercede in the execution if an inadequate level of unconsciousness is present. No procedure or protocol has been issued to that effect. In fact, CDCR says Procedure 770 still governs.[2]

While the District Court quotes from Dr. Heath in its interpretation of its Conditional Order, it omits a very relevant passage from his declaration – the opinion that any monitoring requires "real-time and continuous integration of multiple lines of evidence and information." *Compare* ER340 with ER 286.

---

[2] It should be noted that at least four different doctors observed breathing by inmates during executions well beyond the time expected with adequate sedation, and two observed clear signs of inadequate sedation, yet none intervened. They are not permitted to under Procedure 770.

CDCR has not even attempted to describe anything close to this process, and neither court order requires it. Further, the District Court ignores Dr. Heath's statement that any such doctor would have to "view vital sign monitors", which are specific in functioning and purpose as described in the ASA requirements. Finally, and most fundamentally, Dr. Heath's statement that proper monitoring by an anesthesiologist is a "positive step" will be rendered completely meaningless if the monitoring physician has no ability to stop the execution, or request administration of more drugs, should Mr. Morales be conscious.

Ultimately, the District Court rests it Final Order on the notion that it is "presumed" that the doctors will "understand and comply" with the Conditional Order "in the context of the medical evidence provided by Dr. Heath and …Dr. Dershwitz." ER 340. But, the Conditional Order is silent as to the process to be used. Dr. Heath and Dr. Dershwitz are opposing experts, with Dr. Dershwitz believing that application of the sedative is sufficient as currently administered and the process fine. And, it is unclear what "medical evidence" is being referred to or what "context" means. As has been shown here, and in some of the most tragic events in human history, simply calling something "medical" does not end the inquiry.

Finally, the District Court, without any evidence of what procedures will be employed, stated that it is satisfied that the doctors will use their professional

judgment to *ensure* unconsciousness before injection of pancuronium bromide *and* potassium chloride. ER 340-41. But, that is not what the Conditional Order required. It only stated the doctors will monitor and it only stated that at some point they must examine before *either* one drug *or* the other. And, it is not what CDCR stated it will allow.

What CDCR and the District Court assume is that there will be no need for anything other than some degree of undefined observation and examination. But, that is not a comfortable assumption in light of the record here. In fact, the opposite is true. While it may be something that will assist the inquiry regarding Procedure 770 in the next case, it does nothing to protect Mr. Morales' rights.

As for delay, the court below noted that Mr. Morales was much more diligent than either Mr. Cooper or Mr. Beardslee. ER 306; *see also* ER 214-19. [3] But, unlike Beardslee and Cooper, Mr. Morales has not been afford considered review by this Court. While Mr. Morales appreciates the District Court's belief that it needed five rounds of briefing, and these are difficult and weighty issues, the decision arrived much too late, and improperly permitted last-minute modifications that prevent full briefing in this Court and full litigation in the District Court.

---

[3] The District Court also noted that exhaustion was satisfied. Mr. Morales' amended complaint indicates he exhausted, and another action was brought after exhaustion and consolidated. ER 350-89. CDCR has not answered either complaint with any defenses, and has not moved in the district court to dismiss for failure to exhaust.

This case is thus on all fours with *Taylor v. Crawford,* No. 06-1397 (8th Cir.). In that case, the plaintiff filed well before an execution date was set (because the state procedures allowed it). *See* Order of Jan. 31, 2006, *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mis.), at 1. After an execution date was set, the district court issued a stay so as to be able to fully litigate the matter. The appellate panel vacated and remanded, and allowed only a limited proceeding below. *Id.* at 2. After that proceeding, the *en banc* panel issued a stay, which was upheld in the Supreme Court.

The failure to allow full litigation in light of such substantial questions about the lethal injection process is exactly why Mr. Taylor obtained his stay. The State of Missouri, much like California, adopted a process that truncated review. In fact, Mr. Taylor was able to present some testimony, including the examination of Dr. Dershwitz. That was not even permitted in Mr. Morales' case. Here, instead, CDCR was permitted to craft a last-minute process in violation of state law and its own regulations and protocols. *See* Cal. Gov. Code § 11349 et seq. (Administrative Procedure Act); 15 Cal. Code Regs. § 3380(c) & (d) (limiting written approval to Wardens, subject to approval by the Director); Procedure No. 770 section IV (requiring Warden and Director approval). This was approved at the last minute despite the fact that the issue of unconsciousness has been a critical inquiry since the *Cooper* case, and medical aspects of that inquiry have been

explored since at least *Beardslee*. Now, that inquiry can only occur with a stay of execution.

V. CONCLUSION

For the foregoing reasons, a stay of execution should be issued so as to allow full briefing and consideration of Mr. Morales' action to allow a full hearing and consideration of the new procedures, adopted only a day or so, that will be used to execute him.

Dated: February 17, 2006

MICHAEL ANGELO MORALES

By:
John R Grele

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 32-1, I hereby certify that the foregoing brief is produced in a proportional font (Times New Roman) of 14 point type and utilizes double line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 4536 words (exclusive of the table of contents, table of authorities, proof of service and this certificate).

Dated: February 17, 2006

JOHN R GRELE

One of the Attorneys for Petitioner-Appellant Michael Angelo Morales