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

MICHAEL ANGELO MORALES, Petitioner-Appellant**,** 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, Respondents-Appellees.	D.C. Nos. C 06 0219 (JF), C 06 0926 (JF) **DEATH PENALTY CASE** **EXECUTION IMMINENT:** **Execution Date February 21, 2006**

APPELLANT'S OPENING BRIEF

APPEAL FROM DENIAL OF PRELIMINARY INJUNCTION BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CORPORATE DISCLOSURE STATEMENT

The appellant, Michael Angelo Morales, is an individual confined in San Quentin State Prison, San Quentin, California. He does not have any corporate affiliations.

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STATEMENT OF JURISDICTION

The District Court has jurisdiction over this action pursuant to 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. This Court of Appeals has jurisdiction over this action pursuant to 28 U.S.C. § 1292 (appeals from interlocutory orders of the district court refusing injunctions).

The District Court issued its Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction ("Order") on February 14, 2006. ER 301. The Order denied Mr. Morales' request for injunctive relief and a stay of execution, and permitted Defendants to proceed with the execution on February 21, 2006, if they either (1) certify in writing, by the close of business on February 16, 2006, that they will use only a barbiturate or combination of barbiturates in Mr. Morales' execution, or (2) agree to independent verification during the execution that Mr. Morales is unconscious before he is injected with pancuronium bromide or potassium chloride, through direct and continuous 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." ER 313-315. The Order required Defendants by the close of business on February 15, 2006 to set forth the proposed individual's formal

training and experience in the field of general anesthesia, permitted comments in response by Mr. Morales, and promised a ruling by the Court on the adequacy of the qualifications by the close of business on February 16, 2006. ER 314. The Court retained jurisdiction with respect to Defendants' implementation of the proposed changes to the protocol but stated that the "order otherwise is intended to be final for purposes of appellate review." ER 315.

On February 15, Defendants filed their Response to Court's Conditional Denial of Preliminary Injunction and stated that they had retained two anesthesiologists to monitor Mr. Morales throughout the execution. ER 316. On February 16, Plaintiff filed his Response to Modification of Lethal Injection Procedure. ER 325. Then, in response to a request made by the Court unbeknownst to Plaintiff, Defendants filed a Supplemental Response. ER 331. Well after the close of business on February 16, the District Court issued a Final Order Re Defendants' Compliance with Conditions ("Final Order"). ER 336.

By its Order and Final Order the District Court denied Mr. Morales the injunctive relief and stay of execution sought in his complaint, and effectively disposed of Mr. Morales' claims in their entirety. ER 315, 341. Accordingly, this Court may now hear this appeal. On February 17, 2006, Mr. Morales filed a Notice of Appeal in the District Court and an Application for Stay of Execution in this Court. ER 342.

STATEMENT OF RELATED CASE

No other cases pending in this Circuit Court are related to the present appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the District Court abused its discretion when it denied Mr. Morales' request for a stay and preliminary injunction, despite noting that execution logs from six out of the thirteen most recent executions under California's lethal injection protocol raised some doubt as to whether the protocol actually is functioning as intended, and finding that based on the evidence presented "substantial questions" exist as to whether the protocol creates an undue risk that Mr. Morales will suffer excessive pain when he is executed using it.

Whether the District Court abused its discretion when it denied Mr. Morales' request for a stay and preliminary injunction under these circumstances and allowed the execution of Mr. Morales to go forward using a last-minute modification to the lethal injection protocol that has never been subjected to any legal, medical or administrative review, which the Court unilaterally devised itself without the benefit of an evidentiary hearing.

STATEMENT OF THE CASE

On January 13, 2006, Mr. Morales brought an action in the District Court pursuant to 42 U.S.C. § 1983 seeking injunctive relief to prevent Defendants from executing him by means of lethal injection pending the resolution of his action. ER 351. Mr. Morales alleges that Defendants' administration of Procedure No.

770, the lethal injection protocol of California's Department of Correction and Rehabilitation ("CDCR"), constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment because it creates a substantial risk that Mr. Morales will be fully conscious and in agonizing pain for the duration of the execution process. ER 355-360.

Procedure No. 770 calls for the use of three drugs in succession: first, sodium thiopental, an ultrashort-acting barbiturate intended to cause the inmate to lose consciousness; pancuronium bromide, a neuromuscular blocking agent that paralyzes the muscles for the purpose of making the execution appear peaceful to witnesses; and finally, potassium chloride, which induces cardiac arrest. ER 66, 69-72. Procedure No. 770 also establishes the conditions under which these drugs are administered. ER 65-72. A growing body of evidence persuasively demonstrates that CDCR's lethal injection protocol creates a significant risk that inmates will fail to receive adequate anesthesia and will be conscious for the duration of their executions, causing them to experience first slow suffocation and then the "extraordinarily painful" activation of the sensory nerve fibers in the walls of the veins that is caused by potassium chloride. Mr. Morales' suit alleges that the significant risk of botched executions is an entirely foreseeable consequence of the conditions imposed by, and failings of, Procedure No. 770, and that it is

unconstitutional for the State to administer an execution protocol that creates a significant risk of inflicting excruciating pain. ER 256-267.

Mr. Morales filed a Motion for Temporary Restraining Order ("TRO") on January 17, 2006. ER 1. At an initial hearing on January 26, 2006, 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 oral argument. ER 220, 450-454. On February 1, 2006, the District Court permitted 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, the Court heard argument on the motion for a preliminary injunction, ER 457, and on February 13, 2006, requested additional 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 269-270.

The District Court issued its Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction on February 14, 2006. ER 301. The District Court

found that it had jurisdiction pursuant to 42 U.S.C. § 1983 (2006) and *Beardslee v. Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005). ER 302. The District Court noted that Mr. Morales was diligent in pursuing his claim by filing his action 39 days before the Ventura Superior Court scheduled his execution, and that from the face of the amended complaint filed by Mr. Morales on February 13, 2006, it appeared that he had exhausted his administrative remedies. ER 306. The District Court held that "[b]ecause in light of *Beardslee*, Plaintiff is not guilty of undue delay in bringing his claim, there is no presumption against the grant of a stay due to delay, much less the 'strong equitable presumption' identified by the Supreme Court" in *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). ER 306. The District Court analogized the case to *Crawford v. Taylor*, 546 U.S. ___ , No. 05A705 (Feb. 1, 2006), where the Supreme Court had recently denied, by a vote of 6-3, an application to vacate a stay of execution, and distinguished the case 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). ER 306.

In the Order, the District Court noted that execution logs from six out of the thirteen most recent executions performed using California's lethal injection protocol raised some doubt as to whether the protocol actually is functioning as intended. ER 311. Based on its review of the recent executions, the District Court

found that "substantial questions" exist as to whether the protocol creates an undue risk that Mr. Morales will suffer excessive pain when he is executed under the protocol. ER 313. The District Court concluded, however, that "[w]hile 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." ER 313. On that basis, the District Court conditionally denied Mr. Morales the requested relief, subject to Defendants' compliance with one of two alternative conditions concerning the manner in which the execution is to be carried out. ER 315.

Thereafter Defendants proposed two unnamed anesthesiologists whose credentials were redacted to serve as monitors at the execution to satisfy one of the Court's conditions. ER 316-324. In its Final Order, the District Court accepted the individuals as qualified, subject to an *in camera* review of their backgrounds and credentials to be undertaken at Plaintiff's suggestion. ER 3317-338. With the ruling, the Court's denial of Mr. Morales' claim became final. ER 341.

STATEMENT OF FACTS

In 1983, a jury in Ventura County, California, convicted Michael Morales of first degree murder, conspiracy and rape. The jury found that two special circumstances – killing by torture and intentional killing by lying in wait – applied

to the offense. Cal. Penal Code § 190.2(a)(15), (18). Following the penalty phase, the jury sentenced Mr. Morales to death, and the California Supreme Court affirmed the conviction and sentence. *See People v. Morales*, 770 P.2d 244, 249 (Cal. 1989). The United States Supreme Court denied certiorari.

Mr. Morales filed a petition for habeas corpus in federal court in 1996, raising several constitutional challenges to his conviction and sentence. The District Court denied the petition in full, and the United States Court of Appeals for the Ninth Circuit affirmed in July 2003. *Morales v. Woodford*, 388 F.3d 1159 (9th Cir. 2004). The Supreme Court denied certiorari on October 11, 2005, and the stay of execution was lifted shortly thereafter. On January 18, 2006, a public session was held in the Superior Court of Ventura County in the case of *People v. Morales*, No. CR 17960, where the court set February 21, 2006 as the date of execution of Mr. Morales' judgment of death. Mr. Morales did not elect a form of execution, and therefore will be executed by means of lethal injection. *See* Cal. Penal Code § 3604(b).

On January 9, 2006, plaintiff filed an emergency inmate appeal on CDC Form 602, pursuant to 15 Cal. Code Regs. § 3084.7, alleging that his upcoming execution under the California lethal injection protocol, Procedure No. 770, would constitute cruel and unusual punishment. On January 27, 2006, the Director's Level Appeal Decision was issued, which stated that "no further relief shall be

afforded the appellant at the Director's Level of Review." ER 227-228. The decision stated that "This decision exhausts the administrative remedy available to the appellant within CDCR." ER 228.

On January 13, 2006, Mr. Morales filed his complaint under 42 U.S.C. § 1983 in the United States District Court for the Northern District of California, Case No. C 06 219 JF. ER 351. On February 10, 2006, Mr. Morales filed an Amended Complaint in that action and filed a new action under 42 U.S.C.§ 1983 which included the same substantive claims and set forth the fact that Mr. Morales had exhausted his administrative remedies, Case No. C 06 926 JF RS. ER 256. By Order dated February 13, 2006, the two cases were consolidated. ER 271, 363. They are presented here for appeal.

SUMMARY OF ARGUMENT

Michael Morales brings this matter before this Court in a posture unlike any of the previous challenges to the California lethal injection protocol under Procedure No. 770. The District Court acknowledges that Mr. Morales presented compelling and undeniable proof of a substantial risk that he will suffer unnecessary and excruciating pain during the lethal injection process. *See* ER 310-315. It is uncontroverted that record evidence from four of the last six, and six of the last 13, California executions raises serious concerns that the inmates were not properly sedated during the process. ER 311. Yet in the face of this chilling and

persuasive evidence, Defendants offer no credible answer or explanation, continuing the silence observed by this Court in *Beardslee*.

Now that the constitutional inadequacy of the procedure has been acknowledged by the District Court, Defendants seek to rehabilitate it by grafting onto it a new procedure suggested by the District Court using non-CDCR personnel. ER 317-320. However, the quick fix suggested by the District Court is completely untested, has never been subjected to any comprehensive legal, medical or administrative review, and represents nothing more than a high stakes experiment, with Mr. Morales' constitutional rights hanging in the balance. Even as this appeal is taken, uncertainty surrounds the new protocol, as the roles and responsibilities of the monitors are unwritten, poorly defined and of uncertain effectiveness, and the credentials of the proposed monitors are still being evaluated by the District Court. The Court attempts to overcome its finding that the current protocol may not meet the requirements of the Constitution by redesigning the protocol on the fly, rather than through a careful deliberative process of fact-finding and analysis befitting the seriousness of the issue. The approach exalts expediency over the rights guaranteed under the Constitution for no good reason.

This Court should issue the stay that the District Court declined to grant. The failure of the District Court to promptly rule on Mr. Morales' timely request for relief, the Court's repeated and time-consuming requests for further briefing in

light of Defendants' inadequate responses, and the Court's ever-evolving creation of a last-minute revision of the protocol in a desperate attempt to make sure Mr. Morales is executed on Defendants' schedule, have effectively prevented any considered review by this Court, even though the District Court has itself made clear that a constitutional violation has been shown. Given that Mr. Morales demonstrated a substantial likelihood of success on the merits, with a sufficient showing that the lethal injection procedures are improper, the District Court erred as a matter of law in denying the stay. This Court should order that the status quo be preserved until Mr. Morales has received a hearing.

ARGUMENT

The last time the United States Court of Appeals for the Ninth Circuit considered a challenge to Procedure No. 770, the Court noted that evidence that recent executions involved problems in the administration of the chemicals used in the process and the expert opinions of Dr. Mark Heath raised "extremely troubling questions about the protocol." *See Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005). The Ninth Circuit expressed concern that the State "tendered only minimal evidence" in response to the claims raised, that the State "did not defend the protocol," and, most troubling, that, "[t]he State did not, even under repeated questioning at oral argument, provide a single justification for the use of pancuronium bromide, which is one of the key issues." *Id.* at 1075.

Notwithstanding these "troubling" questions about the administration of Procedure No. 770, however, the Court concluded that "ultimate resolution of the merits of this issue . . . will have to await another day." 395 F.3d at 1075-76.

In the present case, the District Court took another look at Procedure No. 770, found additional problems and reasons for concern occurring in the administration of the protocol and was met with similar indifference from the State. The District Court first referenced the *Beardslee* Court's observation that the execution logs of Messrs. Bonin, K. Williams, Siripongs and Babbitt "contain indications that there may have been problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions." ER 306, quoting *Beardslee*, 395 F.3d at 1075. The District Court then noted that evidence from the recent executions of Messrs. Rich, Anderson, S. Williams and Allen raised further doubt as to whether the protocol was functioning as intended. ER 310-311. The Court further noted that the evidence of still other anomalies, including the fact that some inmates needed second doses of potassium chloride, demonstrated that Mr. Morales has "raised more substantive questions than his counterparts in *Cooper* and *Beardslee*." ER 312.

Faced with this clear evidence that the lethal injection protocol was not functioning properly, the District Court still denied Mr. Morales injunctive relief

and the necessary stay. ER 315. While giving Defendants the option of either of two quick fixes, the District Court acknowledged that those remedies were not the solution to a problem of constitutional dimension, but only a one-time event. ER 313. The Court said

> 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.

ER 312-313. However, having recognized the fundamental and serious flaws in the protocol and acknowledged the need to rectify those problems through the exercise of the executive branch's administrative powers, the District Court then simply sacrifices the constitutional rights of Mr. Morales in the name of expediency. Defendants must design and implement a constitutionally compliant protocol now, not in the future, and Mr. Morales has the right to benefit from that

protocol. The District Court's insistence that the execution can proceed with a stop gap solution, after which the CDCR can implement a real solution, cannot pass constitutional muster.

I. The District Court Abused its Discretion in Denying Mr. Morales' Request for a Preliminary Injunction

While a district court's exercise of discretion to grant or deny injunctive relief generally will not be disturbed absent a clear abuse of that discretion, *G.C. and K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1107 (9th Cir. 2003), a district court abuses its discretion if the court "employs erroneous legal standards in issuing or denying the injunction." *Pac. West Cable Co. v. City of Sacramento*, 798 F.2d 353, 354 (9th Cir. 1986). A district court also abuses its discretion if it "bases its decision upon erroneous legal premises or clearly erroneous findings of fact." *Id.* (internal citation omitted).

As the District Court correctly observed, to obtain a preliminary injunction, a plaintiff must 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 that favors the plaintiff; and (4) in certain cases, advancement of the public interest. ER 304; *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). Alternatively, injunctive relief may be granted if a plaintiff demonstrates (1) a combination of likely success on the merits and the possibility of irreparable injury to the plaintiff if no preliminary relief is granted; or

(2) that serious questions are raised and the balance of hardships tips sharply in the plaintiff's favor, with these alternatives more properly characterized as "extremes of a single continuum, rather than two separate tests." ER 304 (internal quotations omitted). Stated differently, "the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party." ER 304.

In moving for injunctive relief against Defendants, Plaintiff seeks only to preserve the status quo while he litigates his Eighth Amendment claim. The irreparable harm he will face in the absence of temporary relief is obvious, as otherwise his execution under a protocol found to be constitutionally deficient will proceed, and he will be subjected to the harms attendant with that procedure. The finality of this irreparable harm is significant, as the Ninth Circuit has recognized that the necessary showing of likelihood of success diminishes in proportion to the "relative hardship to the party seeking the preliminary injunction." *Beardslee v. Woodford*, 395 F.3d at 1067-68. Where, as here, the balance of hardships tips sharply in favor of Plaintiff, he need only demonstrate the existence of serious questions going to the merits in order to gain entitlement to temporary relief. *See Id*. Moreover, a grant of temporary relief here will serve the public interest because it will allow the important question of the constitutionality of Procedure

No. 770 to be resolved on the merits, a question the District Court has now brought to the forefront with its pointed criticism of the procedure.

Significantly, Plaintiff's likelihood of success on the merits and the public interest in the constitutionality of Procedure No. 770 have increased based on the District Court's findings, which recognize that the experiences of California and other states with lethal injection have produced a growing body of evidence that the protocol creates a significant risk that inmates will be subjected to a painful execution that runs afoul of Eighth Amendment protections. The District Court expressly noted the substantial questions about the effectiveness of the lethal injection protocol raised by Mr. Morales, and how the body of evidence raising constitutional challenges to that protocol has grown since *Beardslee*. ER 305-313.

Federal courts have both the power and the duty to issue injunctions to prevent a deprivation of constitutional rights. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."); *United States v. Farrar*, 414 F.2d 936, 938 (5th Cir. 1969) ("federal courts are empowered to fashion such remedies,

including the issuance of injunctions, as are necessary to vindicate rights which have been secured under the Constitution and laws of the United States"). District Courts possess this judicial power, among many other instances, when confronted by unconstitutional administrative power such as that at issue here. *See Woods v. Wright*, 334 F.2d 369, 374-75 (5th Cir. 1964) (noting that "when there is a deprivation of a constitutionally guaranteed right," a federal court's duty to exercise its injunctive power to interfere with state officer conduct "cannot be avoided"); *Lester v. Parker*, 235 F.2d 787, 790 (9th Cir. 1956) (noting that courts have both the power and duty to protect individual rights from unlawful and unauthorized administrative power, particularly when those rights are constitutional). Indeed, it may be considered error for a court to observe that a deprivation of constitutional rights has somehow taken place yet still not issue injunctive relief to prevent that deprivation of constitutional rights. *See Soster v. Rockefeller*, 312 F. Supp. 863, 884 (S.D. N.Y. 1970), rev'd in part on other grounds, 442 F.2d 178 (2d Cir. 1971), ("This court has no discretion to deny injunctive relief to a person who clearly establishes, after a trial on the merits, that he is being denied his constitutional rights."); *U.S. v. Farrar*, 414 F.2d 936, 939 (5th Cir. 1969) (finding that it was error for the district court not to enjoin conduct which constituted a deprivation of constitutional rights and noting that the court

was "both empowered and obliged to exercise its authority by enjoining appellees from continuing such conduct").

The District Court noted that the "troubling" questions about Procedure No. 770 have increased in number and seriousness even in the past year, and that as a result changes in the protocol are necessary. ER 306-315. That the District Court chose the expedient route of trying to devise a quick fix at the eleventh hour rather than requiring the State to engage in a comprehensive deliberative process to arrive at a safe and constitutionally compliant protocol, should not be allowed to obscure the Court's significant and well-grounded conclusion about the problems with the protocol. Having recognized those problems, the District Court should have granted the stay and left it to the CDCR to devise an appropriate remedy. *See Stone v. City and County of San Francisco,* 968 F.2d 850, 861 (9th Cir. 1992) (in fashioning equitable remedies, Court should "exercise the least possible power adequate to the end proposed.") The decision denying the stay and requested injunctive relief should be reversed to allow an evidentiary hearing on Mr. Morales' claims.

II. Changes to Procedure No. 770 Imposed by the District Court Will Not Cure the Constitutional Defect in the Lethal Injection Protocol

After noting that "substantial questions" exist as to whether the lethal injection protocol creates an undue risk that Mr. Morales will suffer excessive pain when he is executed, and recognizing that Procedure No. 770 must be changed to

be constitutionally compliant, ER 312, the District Court invoked its equitable powers to try to micro-manage the CDCR's execution process. The Court allowed the execution to proceed based on Defendants' agreement that an anesthesiologist would be present during the execution to monitor that Mr. Morales was in fact unconscious before the pancuronium or potassium was injected. In its Final Order, the Court explained at length that it "intentionally fashioned its order so that the anesthesiologists would perform their duties precisely as contemplated by Dr. Heath," Plaintiff's expert. ER 340. The Court noted that in a declaration from a CDCR lawyer submitted in response to the Court's last minute ex parte request the CDCR committed to have one doctor in the execution chamber and that "Defendants themselves as well as the anesthesiologists are presumed to understand and comply" with the Court's order. ER 340. While the District Court takes great comfort by reading CDCR submissions for more than they are worth, this Court should not be fooled into thinking that these last minute machinations of the District Court and Defendants have somehow cured the protocol's fatal defects.

Although the issue of unconsciousness has been a critical inquiry since at least the *Cooper* case, and medical aspects of that inquiry have been explored since at least *Beardslee*, the State did nothing to address these concerns until five days before Mr. Morales' scheduled execution, and then only to appease the District Court to allow the execution to take place as scheduled. Even in purporting to

accept the conditions created by the District Court at the eleventh hour, however, Defendants parsed their words carefully and have made no commitment as to how the new procedure will work and what the anesthesiologist will do, other than to monitor Mr. Morales level of unconsciousness. The State should not be permitted to proceed with an execution using a new protocol that was created out of whole cloth and has not been subjected to medical, administrative or legal scrutiny, and indeed has not even been disclosed to Mr. Morales.

Defendants' commitment to leaving the lethal injection protocol unchanged was reaffirmed when the CDCR lawyer stated in his declaration to the Court that "[o]ther than the monitoring of Mr. Morales by the doctor who will be present in the execution chamber, the process by which San Quentin carries out an execution has not been changed from that set forth in Operations Procedure No. 770." ER 339. However, the District Court recognized the need to change the protocol, and the presence of a monitor alone fails to effectuate any meaningful change to safeguard Mr. Morales' constitutional rights. Defendants do not describe a single action or procedure available to the monitor that comports with "a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered," as required by the District Court. ER 314.

Because Procedure No. 770 remains in effect, the monitor will not be available to participate in or direct changes in the setting up of IV lines, the labeling of syringes or the pre-testing of the process. There is no indication of what the monitoring will entail, of what medical monitoring equipment, if any, will be available or used, or of how intraoperative consciousness will be assessed. There is no indication that the monitor will be made aware that the chemical flow has started from the other room. The monitor is not part of the process in determining what chemicals are administered, will have no ability to notify the execution team of problems in the drug administration, and will have no authority to stop a botched execution. Without these capabilities, the doctor monitoring unconsciousness will not be able meaningfully to ensure that the execution is performed humanely. The presence of the monitor will serve no purpose if the doctor is powerless to act on, or cause the injection team to act on, his awareness that Mr. Morales is in fact conscious and in pain. Thus, the District Court's effort to recast the protocol has done nothing to alleviate the "substantial questions" that have arisen from 4 of the past 6 and 6 of the past 13 executions. Moreover, the lack of clarity in how the procedure will work prevents any considered review and reduces Mr. Morales to little more than a test subject.

Such difficulties are to be expected when a District Court attempts to change flawed State regulations on the fly and without the benefit of a deliberative

process. Design and implementation of a lethal injection protocol falls within the State's domain, subject to compliance with constitutional imperatives. The CDCR is supposed to adopt such procedures following considered review and debate, and consultation with not only its security staff, but medical personnel and other experts in the field. Only after such careful consideration and compliance with the State's Administrative Procedure Act (Cal. Gov. Code § 11349 et seq.), as well as the Agency's own regulations (15 Cal. Code Regs. § 3380(c) & (d) (limiting written approval to Wardens, subject to approval by the Director); (Procedure 770 Section IV (requiring Warden and director approval)), can the CDCR then issue a procedure describing the various roles of the individuals involved, the equipment that is going to be used, and the timing of events. Such a reasoned process has not been followed here, nor could it have been, given the urgency which has motivated the District Court and Defendants.

Without a single piece of evidence describing the actual procedures that will be employed, the District Court presumes that the doctors will use their professional judgment to ensure unconsciousness before injection of pancuronium bromide and potassium chloride. However, the Court's first Order required only that they monitor and confirm unconsciousness before the drugs were administered, ER 314, and neither the CDCR nor the doctors have committed to do more. These problems and uncertainties exist because the District Court's decision

and subsequent modifications arrived so late in the day, and the modifications are themselves rife with the same difficulties that CDCR's original procedure itself presents. Most importantly, the Court's insistence on engrafting changes on to the procedure days before execution results in an inability to obtain meaningful judicial review, even in the face of an extensive history of lethal injection failures in California. The District Court's actions have failed to correct the problem while preventing considered review by this Court of substantial questions as to whether Mr. Morales' execution is constitutional.

III. Mr. Morales Has Demonstrated That He Is Entitled To Injunctive Relief Preventing Defendants From Executing Him According to Procedure No. 770

In invoking its power to grant equitable relief ordering the Defendants to modify their execution procedure, the District Court held that Mr. Morales has "raised substantial questions" as to whether "Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed." ER 312. In other words, Mr. Morales has demonstrated that the evidence currently available entitles him to injunctive relief preventing the Defendants from executing him in the manner prescribed by Procedure No. 770. The record evidence to support that finding is substantial.

A. Evidence Revealed in Discovery Demonstrates Severe Problems With Drug Administration Under Procedure No. 770

The District Court found, based on the execution records that have been produced for the first time as a result of the limited discovery ordered by the Court, that Procedure No. 770 creates a significant and unconstitutional risk that the sodium thiopental will not be successfully administered and the inmate will remain conscious. ER 311 ("in at least six out of thirteen executions" there is "some doubt as to whether the protocol actually is functioning as intended").

The execution records indicate that several inmates continued breathing for far longer than would be expected had they received the full dose of sodium thiopental. ER 106-109, 179-180. The records also reveal that at least two inmates made labored attempts to breathe upon the administration of the pancuronium, ER 100, 109, a phenomenon that would not occur if the inmates were deeply unconscious and anesthetized by the sodium thiopental by the time of the pancuronium injection. In addition to this compelling evidence that the CDCR is not properly administering the full dose of sodium thiopental, a review of the execution records kept by the CDCR reveals a number of unexplained deviations from Procedure No. 770, as well as inaccuracies in the records themselves. ER 242. In sum, even the limited amount of evidence obtained on an expedited basis here demonstrates that the risk of inadequate anesthesia under Procedure No. 770 as administered is real and most likely has been realized in a number of recent

executions. Based on this evidence, the District Court found that Mr. Morales has raised "substantial questions" about the constitutionality of the protocol, ER 312, a finding that entitles Mr. Morales to injunctive relief.

1. Evidence that Sodium Thiopental is Not Being Successfully Administered

Evidence recently obtained from the CDCR as a result of court-ordered discovery indicates that four of the last six inmates executed likely did not receive the full dose of sodium thiopental and were not placed into a surgical plane of anesthesia before the administration of the pancuronium and potassium. ER 105-109, 178-180. Thus, it is highly likely that these inmates remained conscious, or regained consciousness, during the procedure, and were subjected to excruciating pain. *See* ER 311.

It is undisputed that the five-gram dose of sodium thiopental is more than sufficient to stop an inmate's breathing within a minute of administration -- assuming that it is successfully injected in full. ER 308-309. Sodium thiopental causes unconsciousness by depressing the central nervous system and suppressing electrical activity in the brain. *See* ER 243. Respiratory activity, as well as other muscle activity, is controlled by the brain, so the administration of sodium thiopental will cause a person to stop breathing. Because five grams is a massive dose that is well over the amount necessary to completely arrest respiration in any person, ER 243-244, both the Defendants' expert, Dr. Mark Dershwitz, and Mr.

Morales's expert, Dr. Mark Heath, agree that an inmate's breathing should cease within a minute of administration. ER 234, 243.

The records of six out of thirteen (and four out of the last six) previous executions, however, indicate that the inmates have continued breathing for well over a minute following the administration of the sodium thiopental, in one case for twelve minutes. This evidence is extremely troubling because it demonstrates that the inmates could not have received the full dose of sodium thiopental. Moreover, a person who is breathing is not deeply anesthetized, and therefore may awaken in response to a painful stimuli such as a surgical incision or the administration of either pancuronium or potassium. ER 244.

Specifically, the handwritten records from Stanley "Tookie" Williams's December 13, 2005, execution indicate that Mr. Williams did not stop breathing until 12:34, upon the injection of the potassium chloride, twelve minutes after the thiopental was injected. ER 179, 310. Clarence Ray Allen, executed on January 17, 2006, continued breathing for 9 minutes after the delivery of the thiopental. ER 180, 311. Stephen Wayne Anderson, executed on January 29, 2002, continued breathing for five minutes after the thiopental was administered. ER 244, 310. The March 15, 2000 execution log of Darrell Keith Rich states that Mr. Rich's respirations ceased at 12:08, with the administration of the pancuronium, but that Mr. Rich had "chest movements" lasting from 12:09 to 12:10. ER 245, 310.

These chest movements did not begin until 3 minutes after the administration of the thiopental, after Mr. Rich had ostensibly stopped breathing (and while he was still alive, as shown by his heart rate of 110 beats per minute). ER 245, 310. Finally, both Jaturun Siripongs and Manuel Babbitt, executed in 1999, continued breathing for 5 minutes after the sodium thiopental was administered, and 1-2 minutes past the injection of the pancuronium. ER 107, 109, 309. No person given five grams of sodium thiopental should continue breathing for as long as did these inmates. ER 244-245.

The District Court again cited to the oft-repeated assertion in the declarations of Defendants' medical expert, Dr. Mark Dershwitz, to the effect that "over 99.999999999999% of the population would be unconscious within sixty seconds from the start of the administration of [five grams of] 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. ER 308-309. [1] *See 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). Faced with statements by a number of eyewitnesses who said that the

[1] Plaintiff disputed this calculation below based on an expert declaration and requested Dr. Dershwitz's underlying data and an opportunity to question him about it. This was denied.

breathing and consciousness of several inmates did not cease within one minute after administration of sodium thiopental but instead continued long after it should have ceased, however, the District Court concedes that such evidence cannot simply be disregarded on its face and raises at least some doubt as to whether the protocol actually is functioning as intended. ER 311. Moreover, evidence from Defendants' own execution logs suggests that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions, further raising doubt as to whether the protocol actually is functioning as intended.

Although Defendants attempted to dismiss this evidence of continued breathing by asserting that the inmates were experiencing "chest movements," rather than actual breathing, the District Court correctly dismissed this assertion as unfounded and unpersuasive. ER 311. Defendants' expert, Dr. Dershwitz, states that the injection team recording the execution log must have erroneously assumed that the inmates were breathing because of these "chest movements." ER 234. Dr. Dershwitz does not explain, however, why he is in a better position than the physicians who created the execution records to determine whether the inmates' "chest movements" constituted breathing, or whether the inmates' throats and noses were closed for some reason and so the chest movements were not actually breathing. Nor can he explain why the logs themselves differentiate between "respirations" and "chest movements," by noting when, during particular

executions, respirations ceased and chest movements began. *See* ER 310 (describing execution log of Darrell Rich, which indicated that respiration stopped at 12:08, and chest movements began at 12:09). The execution records themselves therefore indicate that the monitoring physicians were capable of distinguishing between breathing and chest movements. Thus, the District Court was right to note that Dr. Dershwitz's "hypothesis" reflected "considerably less certainty" than his assertions on issues as to which he is actually qualified to opine. ER 311. The Court correctly concluded that the substantial questions raised by Plaintiff's evidence "cannot simply be disregarded" on the strength of Dr. Dershwitz's speculation. ER 311.

In the absence of any other evidence as to the conduct of these executions, there is no plausible explanation for these inmates' continued breathing other than that the sodium thiopental was not successfully administered. In addition, as the District Court recognized, ER 311, the continued breathing indicates that these inmates were almost certainly not deeply anesthetized, and therefore were at risk for regaining consciousness in reaction to the pain inflicted by the pancuronium or potassium. Whether any of these inmates attempted to alert the execution staff of their consciousness or suffering cannot be known, because the pancuronium required by Procedure No. 770 would have masked any signs of awareness or suffering. The Defendants' own protocol therefore both creates a situation so

medically unsafe that drug administration may have failed in almost half of recent executions, and also effectively prevents the injection team and other observers from detecting these very failures. Plaintiff has demonstrated the existence of serious doubts as to the efficacy of the CDCR's administration of sodium thiopental and therefore the humaneness of the executions.

2. Evidence That Inmates Are Not Anesthetized When the Pancuronium Is Administered

Relatedly, two execution logs indicate that inmates made labored attempts to breathe shortly after the pancuronium was administered. ER 100, 109. This is another phenomenon that should not occur if the inmates have been properly anesthetized. Upon the administration of the five-gram dose of sodium thiopental, the inmates should stop breathing and lapse into unconsciousness within a minute. There is currently no plausible medical explanation for labored attempts to breathe that begin and end shortly after the pancuronium is administered other than that the inmates are attempting to fight against the paralyzing effect of the pancuronium. *See* ER 310 (acknowledging this evidence).

Darrell Rich's execution log indicates that the pancuronium was administered at 12:08 a.m. ER 245, 310. The log states that Mr. Rich experienced "chest movements @ 0009-0010" – ER 245, 310 – in other words, beginning one minute *after* the pancuronium was administered. Similarly, Manuel Babbit's execution log of May 4, 1999, indicates that Mr. Babbit experienced "brief

spasmodic movements of the upper chest" at 12:32, again one minute *after* the pancuronium was administered at 12:31. ER 109.

As Dr. Heath has stated, and the District Court recognized, these chest movements are consistent with an attempt to fight against the accruing paralytic effect of the pancuronium. ER 100, 245. Had the five-gram dose of sodium thiopental reached the inmates and provided the expected effect, however, they would not have been able to fight against the pancuronium by attempting to breathe, and indeed because five grams of thiopental would have arrested all cerebral activity, they would not even have been aware of the effect of the pancuronium. Thus, the inmates' labored attempts to breathe are another indication that the full dose of sodium thiopental may not have reached them. At this point, Defendants have not proffered any evidence suggesting an alternative explanation for these occurrences, aside from Dr. Dershwitz's conclusory and unsupported assertion that chest movements do not necessarily indicate an attempt to breathe. At a minimum, then, Mr. Morales has demonstrated that there is substantial evidence suggesting that inmates often are not properly anesthetized and may be subject to excruciating pain. Mr. Morales is entitled to further discovery – particularly taking the depositions of the people who perform these executions – and an evidentiary hearing in order to determine the circumstances and causes of these troubling occurrences.

3. The Existence of Additional Troubling Questions That Must Be Answered By Defendants

The execution records and press accounts of recent executions also have raised a number of troubling questions as to the CDCR's conduct of executions. An examination of CDCR's execution records and Warden Ornoski's comments to the press reveals that the injection team has deviated repeatedly from Procedure No. 770, each time without explanation. Moreover, some of these deviations – such as the administration of a second dose of potassium chloride during Clarence Allen's execution – have been omitted from the CDCR's execution records, and some execution logs have been altered without explanation. Once again, the defendants have provided no explanation for the injection team's repeated deviation from the protocol, or the inadequacy and inaccuracy of its recordkeeping. This evidence, as the District Court noted, "raises additional concerns as to the manner in which the drugs . . . are administered." ER 311.

Immediately following the execution of Clarence Ray Allen on Tuesday, January 17, 2006, defendant Steven Ornoski, Warden of San Quentin Prison, stated that the injection team administered a second dose of potassium chloride to Mr. Allen. ER 182. Warden Ornoski also stated that the injection team had been forced to administer a second dose of potassium in two previous executions. ER 182. The 100 milliequivalent-dose called for by the Procedure No. 770 should, if administered rapidly, be sufficient to cause cardiac arrest in any inmate. ER 182.

Perhaps for this reason, Procedure No. 770, makes no mention of a second dose of potassium chloride, and certainly does not provide any information on the situations in which a second dose would be considered appropriate or who would have the authority to order a second dose.[2] ER 182; *see* ER 311-312 (noting lack of explanation for the second dose).

A second dose of potassium was also administered to Stephen Anderson in 2002, according to the log of his execution. *See* ER 182, 343. There is no explanation in the record for the second dose. The third recipient of an extra potassium dose is presently unknown to Plaintiff-Appellant. This evidence demonstrates that the CDCR has repeatedly deviated from Procedure No. 770, apparently without ever attempting to determine why a situation arose in which a second dose of potassium was considered necessary; whether this situation was normal, or could be avoided; or whether the apparent ineffectiveness or failure rate of the potassium could suggest a drug administration problem affecting the other drugs as well. The CDCR's tolerance of repeated departures from the protocol suggests that the CDCR treats the execution process rather casually, allowing an atmosphere of ad hoc improvisation and reaction to problems that should have

[2] Although Procedure No. 770 states that three syringes, each containing 50 mEq of potassium, are prepared, the protocol provides that two of the syringes should be administered, for a total dose of 100 mEq. ER 66-67. There is no mention of employing the third syringe (which contains only a half dose of 50 mEq) as a backup dose. *See* ER 69-72.

been anticipated beforehand and addressed in the written protocol, but which are likely to be causing an unacceptable level of pain during the execution.

Another troubling question regarding the adequacy of the CDCR's procedures is raised by the inaccuracies, omissions, and alterations evident on the face of the CDCR's execution records. For instance, the administration of a second dose of potassium is not noted in the records of Mr. Allen's execution, nor is there any indication of why the second dose might have been given. *See* ER 180. In addition, the execution log of Stanley Williams appears to have been altered. *See* ER 179. As discussed above, the handwritten record of the execution indicates that Mr. Williams stopped breathing at 12:34, when the potassium was administered, but the "respirations" column of the execution log has been *altered* to record a "0" instead of the entry initially made at the time of the pancuronium administration. ER 179. Consequently, the execution log states that Williams' breathing stopped at 12:28, when the pancuronium was administered. ER 179. This inconsistency in the records, and the apparent alteration of the execution log, is extremely disturbing. The alteration suggests that the CDCR perceived Mr. Williams' continued respiration as potentially problematic, but that it chose to obscure the problem rather than addressing it in a considered manner.

These inaccuracies in the execution records and deviations from the protocol are not the evidence that one would expect to receive were the execution

procedures carried out in a professional manner by adequately trained personnel. *See* ER 310 (noting that Williams' log has been altered without explanation and "without any indication as to who made the alteration"). Rather, unexplained deviations and faulty record-keeping are hallmarks of an error-ridden procedure. These anomalies raise substantial questions about whether the CDCR tolerates or fosters practices that are inconsistent with the careful administration of lethal injection, and whether the injection team is capable of ensuring that executions are accomplished humanely. The modification to the protocol that CDCR proposes to employ for Mr. Morales' execution will do nothing to avoid such problems.

IV. The CDCR's Protocol Violates the Eighth Amendment Because It Creates a Significant Risk of An Excruciating Death

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishments as measured by "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal quotation marks and citations omitted); U.S. Const. amend. VIII. The prohibition includes the "infliction of unnecessary pain in the execution of the death sentence," *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), and executions that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890); *see also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain").

Whether pain is "unnecessary" must be determined by reference to "evolving standards of decency," and "contemporary values concerning the infliction of a challenged sanction." *Gregg*, 428 U.S. at 173. A method of execution that was considered more humane than available alternatives when it was first introduced therefore could later be held to offend contemporary values if, for example, experience with the method in question has demonstrated that it is not in fact as humane as first thought. *See Fierro v. Gomez*, 77 F.3d 301, 303 n.1 (9th Cir. 1996) (noting, in a challenge to the constitutionality of execution by lethal gas, that the California Supreme Court had last considered such a challenge in 1953, and that the court's consideration had been limited by then-existing scientific knowledge), vacated as moot in light of Cal. Penal Code § 3604, 519 U.S. 918.

In determining whether a particular method of execution offends contemporary standards of decency by inflicting unnecessary pain, this Court has held that the most important consideration is the "objective evidence of the pain involved in the challenged method." *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994). Such evidence can include the execution records of inmates executed using the same method; expert testimony regarding the effect of the method on both humans and animals; and scientific studies and other evidence analyzing the effects on humans and animals. *See Fierro*, 77 F.3d at 307 (listing the types of evidence considered by the district court in analyzing the effects of exposure to cyanide

gas); *Campbell*, 18 F.3d at 683-87 (discussing expert testimony, scientific literature, and experiments on death by hanging considered by the district court).

Because Mr. Morales challenges the specific method of accomplishing lethal injection as it is practiced in California, the fact that other states use lethal injection does not establish that the CDCR's protocol for lethal injection comports with contemporary standards of decency. *See Beardslee*, 395 F.3d at 1072-73 (noting that the fact that many other states use lethal injection does not shed light on the constitutionality of the method used in California); *cf. Campbell*, 18 F.3d at 682 ("The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice."). Moreover, because Mr. Morales does not allege that the three-drug combination used by CDCR is unconstitutional *in itself*, but instead asserts that the CDCR's protocol for administering those drugs is so defective that it creates a significant risk that the drugs will not be successfully administered, the fact that many other states use the same three-drug combination as the CDCR also does not shed light on the constitutionality of the CDCR's protocol. Instead, Procedure No. 770 must be analyzed on its own merits, in light of the evidence gleaned from the records of executions performed under the protocol, in order to determine whether it involves the infliction of unnecessary pain.

The District Court observed that many other courts have reviewed lethal-injection protocols similar to Procedure No. 770, and that to date, no court has found either lethal injection in general or a specific lethal-injection protocol in particular to be unconstitutional. ER 308, *citing Bieghler v. State*, 839 N.E. 691, 694-96 (Ind. Dec. 28, 2005); *Boyd v. Beck*, ___ F. Supp. 2d ___, No. 5:05-CT-774-D, 2005 WL 3289333 (E.D.N.C. Nov. 29, 2005); *Abdur'Rahman v. Bredesen*, ___ S.W.3d ___, No. M2003-01767-SC-R11-CV, 2005 WL 2615801 (Tenn. Oct. 17, 2005); *Aldrich v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (lethal injection in Texas); *Reid v. Johnson*, 333 F. Supp. 2d 543 (E.D. Va. 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (lethal injection in Texas); *People v. Snow*, 65 P.3d 749, 800-01 (Cal. 2003); *Sims v. State*, 754 So.2d 657 (Fla. 2000); *State v. Webb*, 750 A.2d 448, 453-57 (Conn. 2000); *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998) (lethal injection in Arizona); *but cf. Rutherford v. Crosby*, 546 U.S. ___, No. 05-8795 (Jan. 31, 2006) (granting stay of execution pending disposition of cert. pet.); *Hill v. Crosby*, 546 U.S. ___, No. 05-8794 (Jan. 25, 2006) (granting stay of execution & granting cert.); *Anderson v. Evans*, No. CIV-05-0825-F, 2006 WL 83093, at *3-*4 (W.D. Okla. Jan. 11, 2006) (denying mot. to dismiss 8th Amendment challenge to lethal-injection protocol).

Most significantly, however, the District Court conceded that "it should be noted that the record now before this Court, which includes both additional expert

declarations and detailed logs from multiple executions in California, contains evidence of a kind that was not presented in these earlier cases." ER 308, *citing Reid*, 333 F. Supp. 2d at 548-49 (limiting scope of review to "issues pertaining to the particular chemical combination . . . and their [sic] probable affect [sic] on Reid" and excluding other evidence); *Webb*, 750 A.2d at 453-57 (resolving challenge in state where no lethal injections had been performed); *Bieghler*, 839 N.E.2d at 696; *Boyd*, 2005 WL 3289333, at *3.; *cf. Anderson*, 2006 WL 83093, at *3-*4 (discussing evidence proffered in complaint). With this more comprehensive legal, medical and factual record, a more informed assessment by the District Court of the California lethal injection protocol, as administered, was possible. The District Court's findings of substantial problems under these circumstances is significant.

Because it is impossible to determine with certainty before the fact whether a particular inmate will suffer unnecessary pain during his execution, the question whether a method of execution will inflict unnecessary pain on an individual inmate is fundamentally an inquiry as to whether the inmate is "subject to an unnecessary *risk* of unconstitutional pain or suffering." *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004) (emphasis added); *Fierro*, 77 F.3d at 307 ("*Campbell* also made clear that the method of execution must be considered in terms of the *risk* of pain.") (emphasis in original). *Campbell*, 18 F.3d at 687. An

execution procedure can create an unconstitutional risk of pain in either of two ways: the method itself may inherently carry a risk of pain, as did the lethal gas method considered in *Fierro*, 77 F.3d at 309; or the execution procedures may be so defectively designed that there is an unconstitutional risk that errors in execution will result in the inmate's suffering excruciating pain, *see Campbell*, 18 F.3d at 687 n.17 (upholding Washington's hanging protocol because it "minimized [the risk] as much as possible"); *see also Rupe v. Wood*, 863 F. Supp. 1307, 1313-15 (W.D. Wash. 1994) (holding that a "significant" risk (less than 24% probability) of accidental decapitation rendered judicial hanging unconstitutional as applied to an obese inmate), vacated in part as moot in light of Wash. Rev. Code § 10.95.180 (eff. June 6, 1996), 93 F.3d 1434 (9th Cir. 1996).

Mr. Morales has demonstrated that the CDCR has designed a protocol that is rife with potential problems and opportunities for untrained personnel to commit grave errors, all of which can lead to an excruciating death. Procedure No. 770 creates a significant risk that the execution team will not successfully anesthetize him before they administer the pancuronium and potassium chloride, both of which cause extreme pain. Mr. Morales does not dispute that the five-gram dose of sodium thiopental provided in Procedure No. 770, *if successfully administered*, is sufficient to render any inmate deeply unconscious. If there are no errors in the administration of the sodium thiopental, therefore, Mr. Morales's execution will

not be painful. The deficiencies in Procedure No. 770, however, make it extremely unlikely that no errors will occur and the full dose of sodium thiopental will in fact be administered.

Although the Eighth Amendment does not require executioners to eliminate all possible risk of accident from their execution protocols, *see Campbell*, 18 F.3d at 687, it does require the elimination or minimization of "unnecessary risks," *Cooper*, 379 F.3d at 1033. A risk of error is unnecessary when it is foreseeable and therefore preventable. Mr. Morales has demonstrated that Procedure No. 770 utterly fails to account for a number of foreseeable problems, which are inherent in allowing medically untrained personnel to perform executions by remote control. Record evidence has established that executions performed according to Procedure No. 770 carry a significant and unconstitutional risk of unnecessary pain, a risk that has almost certainly been realized in four of the past six (and six of the last thirteen) executions performed in California. A procedure so rife with unnecessary risk creates a strong likelihood of unnecessary pain which cannot pass muster under the Eighth Amendment.

V. The Risk of Inadequate Anesthesia Is Created By the Deficiencies in Procedure No. 770

The risk that inmates will be insufficiently anesthetized and therefore conscious during their executions, substantiated by the execution records recently produced by Defendants, is a foreseeable result of Procedure No. 770's utter

failure to ensure a humane execution. The protocol uses potassium chloride, an extremely painful drug, to cause death, necessitating the administration of general anesthesia to ensure that the inmate is not subjected to the excruciating pain of the potassium. Yet Procedure No. 770 provides that untrained personnel administer general anesthesia remotely, from another room, using multiple IV line extensions with jerry-rigged devices, and inadequately labeled syringes. There is no provision for monitoring the inmate to ensure that he is in fact unconscious throughout the procedure, nor is there any indication of how the injection team should deal with contingencies -- such as the need for a second dose of potassium -- that the evidence demonstrates have in fact arisen. The design and administration of the protocol is inherently and fundamentally flawed. See ER 79-103. The changes proposed by the CDCR only for Mr. Morales' execution do not eliminate those flaws. *See* ER 83-103.

A. The Risk of Unsuccessful Drug Administration Is Substantial.

Administering the drugs in the manner dictated by Procedure No. 770 creates a substantial risk that the sodium thiopental will not be administered properly and the inmate will not be rendered fully unconscious by the time that the other two drugs are administered. Because Procedure No. 770 fails to ensure the proper administration of sodium thiopental, the risk of consciousness cannot be mitigated by the fact that the five-gram dose of sodium thiopental would be almost

certainly sufficient to induce unconsciousness if the full dose actually reached the inmate.

Most fundamentally, Procedure No. 770 does not require that injection personnel be trained in inducing general anesthesia or indeed have any particular medical qualifications. Because the pain caused by potassium is akin to that of a surgical incision, the established veterinary standard of care requires that when veterinarians use potassium to euthanize an animal, the animal must be anesthetized by someone who is trained in placing animals in a surgical plane of anesthesia. *See 2000 Report of the AVMA Panel on Euthanasia*, 218 J. Am. Veterinary Med. Ass'n 669, 681 (2001) (persons euthanizing animals must be "competent in assessing depth [of anesthesia] appropriate for administration of potassium chloride"). ER 120-121. Similarly, California requires extensive training in the use of anesthesia for all technicians authorized to euthanize animals. *See* 16 Cal. Admin. Code § 2039. Thus, the individual administering and monitoring the sodium thiopental should have training equivalent to that of an anesthesiologist or Certified Registered Nurse Anesthetist (CRNA). ER 89.

Not only does Procedure No. 770 contain no provisions for ensuring that personnel are adequately trained, however, but Defendants' responses to the District Court's inquiries indicate that Defendants themselves believe that their personnel are not capable of monitoring anesthetic depth. On February 13, 2006,

the District Court asked the parties to discuss whether a "qualified individual" could be present in the execution chamber with Mr. Morales in order to ensure that he is in fact unconscious. ER 269. Defendants first responded that they would not "approve the presence of non-departmental employees in the chamber area," but proposed that the Warden could attempt to monitor anesthetic depth by "touching" Mr. Morales. When Defendants finally proposed individuals to monitor consciousness, they offered individuals not employed by the CDCR. ER 274. Thus, Defendants have effectively conceded that no departmental employee is capable of monitoring anesthetic depth, and that an individual qualified to the Court's satisfaction must be brought in from outside the prison. Although they have now offered to put an anesthesiologist in the chamber, they have declined to say what he will do.

There are other indications that the execution personnel are completely unqualified. No physician participates in the execution procedure as currently written, other than to pronounce death by monitoring an EKG. On repeated occasions, the injection team has had considerable trouble inserting the IVs into the inmates' veins, in some cases trying for over 10 minutes. *See* ER 95. This is simply not consistent with the performance that would be expected if the personnel had adequate medical training, including in the placement of IV lines. In addition, the Warden himself -- who personally supervises each execution -- has made

public comments that indicate his lack of medical training and understanding of the process. *See* ER 184 (discussing how Warden Ornoski's explanation of the need for a second dose of potassium in the Allen execution indicated a lack of medical understanding).

Procedure No. 770 creates a significant risk that inmates will not be adequately anesthetized by having these untrained personnel administer the drugs remotely, from another room. *See* ER 67-72. The protocol thus prevents personnel from obtaining any sort of visual or other verification that the drugs are actually being administered to the inmate, or that the sodium thiopental anesthetic has taken effect. Proper monitoring of the flow of fluids into the vein requires a clear view of the IV site, and also tactile examination of the skin surrounding the IV site to verify skin firmness and temperature. ER 87, 90-91. In addition, because the drugs are administered from another room, IV line extensions must be used, *see* ER 56, 65, 86-87, which increases the risk that a flaw or kink in the IV line will disrupt the flow of drugs. ER 91. As the District Court noted, it also increases the risk of the sedative remaining in the line. A reasonable medical standard of care would not permit these unnecessary line extensions.

Procedure No. 770 also creates the risk that the drugs will be administered in the wrong order by requiring that the syringes be labeled by number, rather than by contents. This is a serious deviation from accepted medical standards, which

would never permit such ambiguous labeling. ER 86. In fact, Defendants' expert, Dr. Mark Dershwitz, testified in another ongoing lethal injection case, *Taylor v. Crawford*, that "[i]t's very important to label syringes to make sure the right drug is given in the right order. . . . Any person who draws up medication into a syringe is expected to label the syringe immediately afterward with the syringe's contents so that when it comes time to inject the syringe there is less chance for any sort of error to occur." Tr. of Hr'g on Jan. 30, 2006, *Taylor v. Crawford*, No. 05-4173-CV-S-FJG (W.D. Mis.). Procedure No. 770 thus flies directly in the face of the medical consensus that failing to label the syringes with their contents creates an unacceptable risk of error in administering the drugs. Should such an error occur -- if, for instance, the potassium or pancuronium is injected before the sodium thiopental -- the inmate could be subjected to excruciating pain and the execution personnel will have no means of detecting the problem. Moreover, as the District Court observed, the lethal-injection protocol is not entirely clear as to which dosages of pancuronium bromide and potassium chloride are used. ER 303.

Thus, Procedure No. 770 creates a significant risk that untrained execution personnel, administering the lethal drugs remotely, will commit errors that will expose the inmate to excruciating pain. Procedure No. 770 then fails to minimize the danger of these errors, omitting any mention of problems in drug administration that could occur and failing to provide any procedures for dealing

with unusual situations. For example, despite the fact that the injection team personnel are not doctors or nurses who are capable of exercising competent medical judgment based on the situation at hand, Protocol No. 770 contains no specific instructions for inserting the angiocath into the vein; what to do if there is trouble finding an adequate vein; or how to compensate if any equipment malfunctions. *See* ER 30-72. Nor is there any indication of how personnel should go about exercising their discretion should these types of issues arise, or who bears responsibility for making medical decisions on the scene. *See* ER 30-72. Indeed, the protocol does not specify whether the injection team is in any way prepared to handle the contingencies that might occur during the course of an execution, or provide that training should encompass foreseeable contingencies. *See* ER 67-72.

Despite Procedure No. 770's insistence on removing all personnel from the execution chamber before any drugs are administered, ER 68, the protocol does not anticipate and provide for the problems that could arise as a result of this policy. *See* ER 67-72. There is no procedure for testing or verifying the efficacy of the extended IV tubing, or even any instruction on precisely how to set up the tubing. *See* ER 67-72. Nor is there a procedure for entering the chamber during the execution should any of the equipment malfunction or the inmate somehow indicate that something has gone awry. *See* ER 67-72. Indeed, the protocol requires that the execution team lock the door of the chamber before the injections

begin, *see* ER 68, thus effectively ensuring that no staff member will be able to reach the inmate expeditiously should something go wrong. Although an anesthesiologist will be present in the chamber for Mr. Morales' execution, he will be authorized to do nothing other than monitor consciousness.

Finally, and most disturbingly, the protocol apparently does not require execution personnel to verify in *any* manner, even through the windows of the execution chamber, that the inmate has been rendered unconscious by the sodium thiopental. *See* ER 67-72. Apparently, that will be done in some unknown fashion at some unknown time by an unnamed anesthesiologist here, but even the revised protocol leaves him powerless to do anything besides monitor. The protocol most certainly does not allow the anesthesiologist to have a backup syringe of sodium thiopental to be readied in case something goes wrong. *See* ER 66; *cf.* ER 99-100 (noting use of a backup syringe of sodium thiopental in other states). Thus, despite the foreseeable risks created by the protocol and described above, Procedure No. 770 simply does not acknowledge, much less provide for, the possibility that the five-gram dose of sodium thiopental will fail to render the inmate unconscious.

B. The Use of Pancuronium Bromide Serves No Valid Purpose and Exacerbates the Risk of Inadequate Anesthesia.

The Defendants' use of pancuronium bromide exacerbates the risk created by the deficiencies in Procedure No. 770. As a neuromuscular blocking agent that paralyzes the inmate's muscles, including those of the chest and diaphragm,

pancuronium renders the inmate completely unable to move, breathe, or signal his consciousness to observers. ER 96-97. Although pancuronium has legitimate uses in surgical settings, where the patient is monitored at all times by a licensed anesthesiologist, it serves no useful function in the execution procedure, and simply exacerbates the risk that errors in drug administration will go undetected and the inmate will suffer excruciating pain. ER 98-99. Indeed, although the District Court ordered the Defendants to discuss their interest in employing pancuronium as part of the lethal injection cocktail, the Defendants could point to no valid justification for its use.

Accepted medical and veterinary standards of care forbid the use of pancuronium in end-of-life and euthanasia situations. Although pancuronium may promote observer comfort by providing the appearance that the patient is peaceful and not suffering, that very characteristic of pancuronium carries an unacceptable risk of masking actual suffering. The Ethics Committee of the American College of Critical Care Medicine therefore has recommended against using drugs like pancuronium:

> "NMBAs [neuromuscular blocking agents] possess no sedative or analgesic activity and can provide no comfort to the patient when they are administered at the time of withdrawal of life support. Clinicians cannot plausibly maintain that their intention in administering these agents in these circumstances is to benefit the patient. Indeed, unless the patient is also treated with adequate sedation and analgesia, the NMBAs may mask the signs of acute air hunger associated with ventilator withdrawal, leaving the patient to endure the agony of

> suffocation in silence and isolation. Although it is true that families may be distressed while observing a dying family member, the best way to relieve their suffering is by reassuring them of the patient's comfort through the use of adequate sedation and analgesia."

See R. Truog et al., *Recommendations for End-of-Life Care in the Intensive Care Unit*, 29 Crit. Care Med. 2332, 2345 (2001). ER 197, 210. For the same reasons, the American Veterinary Medical Association has stated that pancuronium is unacceptable for use in euthanizing animals. *See* ER 101, 120-121.

Pancuronium's ability to mask suffering is all the more dangerous in the execution setting, where there are no trained anesthesiologists or other personnel to monitor the depth of anesthesia. An individual trained in assessing anesthetic depth, situated elbow-to-elbow with an inmate, might be able to detect extremely subtle signs that an inmate is conscious and terrified, but paralyzed by the pancuronium. ER 247-248. These signs of fear and pain would include dilated pupils, tearing, and increased heart rate. The untrained members of the injection team, on the other hand, observing the inmate from a distance and through glass, would be utterly unable to detect these indicia of consciousness. ER 247-248. Thus, when pancuronium is used in the execution setting, as determined by Procedure No. 770, it *completely* prevents the execution staff from determining whether or not the inmate is conscious. If the risks associated with pancuronium in the clinical setting -- where a trained anesthesiologist can penetrate the masking effect of the pancuronium by discerning subtle signs of awareness -- outweigh its

benefits, then the interest in using pancuronium in the execution context would have to be strong indeed to outweigh the correspondingly greater danger.

In light of the difficulties created by pancuronium, it is therefore incumbent upon the CDCR to justify its use of the drug. Yet, when questioned by the District Court, the CDCR was unable to come up with any persuasive or plausible justification for its use of pancuronium. Although the CDCR's expert speculates that pancuronium masks the effects of seizure-like movements induced by potassium, Opp. to TRO Mot. at 11, there is no evidence that such seizures actually would occur. *See* ER 187. Moreover, masking the inmate's body movements in order to create the impression, for the benefit of witnesses to the execution, that the inmate is peaceful is simply not a sufficiently strong interest to overcome the risks posed by pancuronium. Notably, *Recommendations for End-of-Life Care in the Intensive Care Unit* rejects precisely this justification for pancuronium in advising against its use in end-of-life situations. ER 209-210. The CDCR also asserts that it uses pancuronium because other States also use it; this defense of pancuronium does nothing to justify its use in the execution and simply raises the question whether the CDCR engaged in any independent medical analysis when developing its protocol.

CONCLUSION

Mr. Morales has produced substantial record evidence establishing that there is a significant risk that the CDCR will not properly administer sodium thiopental, and that as a result, Mr. Morales will not be rendered deeply unconscious for the duration of the execution. The District Court expressly acknowledged this evidence and recognized the risks, but nonetheless chose to deny injunctive relief that would have allowed the parties to explore these issues at a hearing and instead attempted to over see the piecemeal modification of the protocol with the benefit of any legal, medical or administrative review. That desperate effort fails to give due regard to the constitutional issues that are here in play. Given the District Court's conclusion of substantial risk to Mr. Morales, the only constitutionally appropriate response is a stay preserving the status quo pending a hearing and resolution of the case on the merits. This Court should grant such relief.

Dated: February 17, 2006

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached opening 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 12,609 words (exclusive of the table of contents, table of authorities, proof of service and this certificate.)

Dated: February 17, 2006

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