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 REPLY BRIEF AND REPLY TO OPPOSITION TO MOTION FOR STAY OF EXECUTION

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

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I. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING MR. MORALES INJUNCTIVE RELIEF.

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Harris v. Board of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004); *G.C. and K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1107 (9th Cir. 2003). A district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Rucker. v. Davis*, 237 F.2d 1113, 1118 (9th Cir. 2001)(en banc), *rev'd on other grounds, Dep't of Hous. & Urban Dev. v Rucker*, 535 U.S. 125 (2002). A district court also errs if, in applying the appropriate legal standards, the court misapprehends the law with respect to the underlying issues in litigation. *Wilson v. Watt*, 703 F.2d 395, 398 (9th Cir. 1983); *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir.1982). If the district court has relied on an erroneous legal premise in deciding to deny a preliminary injunction, this Court must review the underlying issue of law on a *de novo* basis. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996). See also *United States v. Farrar*, 414 F.2d 936, 938 (5th Cir. 1969)(reverse denial of injunction because "we are concerned with the lower court's characterization of the evidence, and conclusions drawn from the evidence, which we find to be clearly erroneous.")

In the present case, the District Court recognized that no court around the country to date has found lethal injection to be unconstitutional, but observed that "[a]t the same time, 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 at 308. After considering this more comprehensive body of evidence, the Court conceded that eyewitness statements that many inmates continue to breathe long after breathing should have ceased "cannot simply be disregarded on its face," that notations in execution logs indicating that the breathing did not cease as expected in at least six out of thirteen executions "raises at least some doubt as to whether the protocol actually is functioning as intended," and that evidence of other "anomalies" in the record "raises additional concerns as to the manner in which the drugs used in the lethal-injection protocol are administered." ER at 311. On that basis, the District Court concluded "that Plaintiff has raised more substantial questions than his counterparts in *Cooper* and *Beardslee*." ER at 312.

Having recognized this growing body of evidence, particularly from California, that the lethal injection protocol creates a significant risk that inmates will be subjected to a painful execution in violation of the Eighth Amendment, the District Court refused to grant a preliminary injunction relying exclusively on the State's "strong interest in proceeding with its judgment," under *Gomez v. U.S. Dist.*

Ct. N. D. Cal., 503 US. 653, 654 (1992). Such reliance however is badly misplaced in the circumstances of this case. In *Gomez*, the Supreme Court noted that petitioner's claim for relief followed four prior federal habeas petitions, that the claim could have been brought more than a decade earlier, and that petitioner was guilty of abusive delay, "which has been compounded by last minute attempts to manipulate the judicial process." 503 U. S. at 654. Thus, central to the Supreme Court's holding was the "last minute nature of an application" and the "obvious attempt at manipulation." *Id*. The District Court here acknowledged that Mr. Morales' request for equitable relief bears no evidence of manipulation or delay.

The Court noted that in pursuing this action, Mr. Morales was even more diligent than plaintiff had been in *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005). The Court noted that Mr. Morales filed his challenge to the lethal-injection protocol shortly before the Ventura Superior Court scheduled his execution date, and 39 days before the execution date that the trial court ultimately set. The District Court concluded 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*, 541 U.S. at 650." ER at 306. The Court acknowledged the salutary effect of Mr. Morales' diligence, which "made it possible for this Court to proceed in a somewhat more orderly fashion than otherwise would have been possible," as a result of which "the record in the present action is substantially

more developed than the record" in *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004) or *Beardslee*. ER at 306.

Thus, the District Court misapplied the law with respect to the underlying issues in the litigation when it denied injunctive relief based upon the Supreme Court's presumption in *Gomez* and *Nelson v. Campbell*, 541 U.S. 637 (2004) against grant of a stay where an inmate has unnecessarily delayed in seeking relief. Accordingly, this Court should take a *de novo* look at this case and grant the requested relief.

II. MR. MORALES' EXECUTION SHOULD BE STAYED IN LIGHT OF THE COURT'S RECOGNITION THAT PROCEDURE NO. 770 IS FLAWED.

The Court summarized the motivation behind its refusal to grant the injunctive relief mandated by the evidentiary record and its insistence on trying to craft a quick-fix to Procedure No. 770 to allow the execution to go forward:

> Even if the Court were to hold an evidentiary hearing and Plaintiff were to prevail, Plaintiff would remain under a sentence of death. Neither the death penalty nor lethal injection as a means of execution would be abolished. At best, Plaintiff would be entitled to injunctive relief requiring the State to modify its lethal-injection protocol to correct the flaws Plaintiff has alleged. Presumably, at some point, Plaintiff would be executed.

ER at 312. This notion that the inevitability of Mr. Morales' execution permits the District Court to provide less protection to Mr. Morales' constitutional rights than might be provided to condemned inmates in the future if Defendants take up the Court's suggestion that after the Morales execution, they proactively "conduct a thorough review of the lethal-injection protocol," cannot be squared with

constitutional jurisprudence. A likely constitutional violation having been found by the District Court's review of the limited evidentiary record, injunctive relief should have been entered.

Appellee CDCR does not dispute either that non-medical personnel are administering the process, or that the delivery system does not meet any proper medical standard for administration of drugs. They merely say Mr. Morales can't prove it matters. But, now, it has been proven, at least as much as possible given that he must rely on prison logs, which, as this Court noted, have inherent difficulties. *California First Amendment Coalition v. Woodford*, 299 F.3d at 884 ("As Warden Calderon's memo demonstrates, a prison official's perception of the execution process may be vastly different--and markedly less critical--than that of the public."). This is not to mention the actual difficulties presented by apparent alterations in numerous entries, incomplete notations and a lack of attention to details. As discussed *infra* and in the briefing and exhibits, the evidence is compelling and requires discovery and a hearing.

What the District Court and Appellees have done instead is to devise a process that may or may not inform the debate at the next lethal injection challenge, sometime in the distant future. At that point, the monitors will be able to come forward with their records, undoubtedly kept under seal, and offer to the Court a description of what they observed. At that point, there may be a more complete evidentiary record of what is actually going on with the execution

process under the protocol, although that may depend on how much the monitors are required to reveal. And, even then, they may have employed procedures that do not meet accepted standards.

This may assist the courts who are facing challenges and having to confront disturbing evidence, but it does nothing for Michael Morales. It is Mr. Morales' rights that are at stake, not the ability of the District Court to develop a better record for future cases, or the State's ability to fend off future challenges. Mr. Morales has no quarrel with the District Court's ability to fashion a remedy, he merely wants a real one.

III. APPELLEES HAVE NOT SOLVED THE PROBLEMS WITH PROCEDURE NO. 770 WITH THE ADDITION OF A MONITOR.

In Appellees' Brief, they emphasize a point made by the District Court in its Final Order, namely that the modification of Procedure No. 770 that the Court has tried to engraft onto the protocol was an attempt to incorporate and be responsive to suggestions and observations made by Plaintiff's expert anesthesiologist, Dr. Heath. See ER at 339-40; Appellee Br. at 8, 11, 13,14, 15. However, Appellees, like the District Court, overreach in the extreme when they contend that Plaintiff's expert somehow had a hand in their stopgap approach to modifying the protocol or that Dr. Heath would endorse the modification as a solution to the myriad of problems that have been identified in the protocol. Dr. Heath did indeed suggest that, along with many other possible changes, adding an anesthesiologist in the

abstract would be an improvement to Procedure No. 770. However, at no time did Dr. Heath presume to prescribe how the State should implement and incorporate such an addition of skilled personnel to the overall procedure for conducting an execution by lethal injection. Presumably, outside of a correctional setting, a comparable change to a sophisticated medical procedure would be adopted only after careful and comprehensive study and research. Defendants offer no explanation why a far more casual approach is appropriate when devising the procedure to be used to end a man's life. In any event, the claim that Dr. Heath somehow bears responsibility for the still-defective procedure Appellees intend to use in the Morales execution is disingenuous.

Likewise, Mr. Morales never stated that having someone merely monitoring the execution would "ensure a humane execution", nor is that the assurance he seeks. Appellee Br., at 14, 16. Any review of the citiation offered (ER 280) would demonstrate this to be incorrect. The representation was that the District Court's inquiry was what San Quentin should be engaged in so as to develop a constitutional protocol. The assertion that Dr. Heath would be satisfied with mere monitoring, and nothing more, is simply incorrect. Even the District Court would not go that far. This, again, shows that CDCR believes only monitoring is needed. Finally, the Court should not be fooled by the statement that CDCR said the monitors would "assess" and monitor. Appellee Br., at 14. They said no such thing. ER 335. Nor should this Court assume that CDCR presented anything to

the District Court by way of "assurances" that the monitoring would include the ability to insure sedation. Appellee Br., at 15. No such offers were made there, and none are made here.

Moreover, the contention that there has been any appreciable change in the lethal injection protocol is difficult to support when the CDCR's Chief Counsel 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. Thus, while the District Court contends that meaningful changes have been made to the protocol, the State obviously feels otherwise and the mere presence of the monitor changes nothing in the process of how an inmate is put to death. 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. 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, all the monitor can do is watch, with no power to act on, or cause the injection team to act on, his awareness that Mr. Morales is in fact conscious and in pain.

Because the District Court failed to put any enforcement or oversight mechanism in its ruling, Appellees are going to merely station a monitor in the execution chamber, but provide that monitor with absolutely no authority or opportunity to intercede. The record on that is undisputed. ER 327, 335 (besides addition of monitor, Procedure 770 remains fully in effect).[1] And Appellees have not disputed that conclusion in Court, through their Chief Counsel or publicly.[2] Any conclusions or presumptions to the contrary are clearly erroneous. Unfortunately, the "fix" came so late in the day that Mr. Morales could not get a hearing on it to properly contest and vet it. The only means Mr. Morales now has available to test the approach is to have his execution go forward, with Mr. Morales as the test subject.

The District Court did not even make any findings of fact when his quick fix was challenged, instead, the Court merely "presumed" Appellees were going to do something (unspecified) that would somehow comport with indiscernible "medical evidence" presented by two conflicting experts, neither of whom testified and neither of whom was trying to design and implement a new protocol for carrying

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[1] The Sovin Declaration is rank hearsay, probably third-hand. It was offered at the last minute and, except for the admission that Procedure 770 will be used, the statements contained therein are so equivocal as to be meaningless. Noticeably, the Warden did not offer a declaration, nor did the doctors, as to what was going to be done.

[2] The District Court opinion states that this was "one CDCR official." ER 384. In fact, it was the official spokesperson for the entire department. *See* http://www.corr.ca.gov/AboutCDCR/offices.html.

out executions.. ER 340. Instead of subjecting Appellees' representations to the Court to exacting scrutiny, the Court merely "construed" their statement that they were going to monitor according to Procedure No. 770 as a statement that Appellees were going to insure unconsciousness, without recognizing the Procedure No. 770 that Appellees insist remains in place actually prevents anything except monitoring. ER 339 n. 3. The statement that the Sovin declaration does not contradict the District Court's order (ER 341) can only be true if that order is construed to mean solely monitoring, and nothing more. Otherwise, it is patently erroneous. And, the District Court did this without recognizing its previous orders did not in fact require that Appellees actually ensure unconsciousness.[3] To the extent that any of these are findings of fact (as opposed to mere observations), they are clearly erroneous.

Another supposition without any evidence to support it, and therefore clearly erroneous, is that the monitors themselves will ensure unconsciousness. ER 340. Not one shred of information has been provided to the any court, or to Mr. Morales, that this is true. Noticeably, the District Court follows this with the holding that the monitors are to abide by professional standards for "examination and documentation" (not administration of drugs), and that there is nothing in the Sovin Declaration to contradict this. ER 341. That is exactly correct. Sovin only states they will monitor, nothing more.

[3] Even then, the District Court never actually ordered it in its Final Order.

As for what equipment is going to be used, the District Court merely notes the monitors "may" use and "would be expected" to use whatever a certified anesthesiologist would. ER 339. As with its other statements, the court below never actually ordered that this occur. That equipment is extensive. ER 285. ("physicians should rely on "multiple modalities, including clinical techniques [e.g., checking for clinical signs such as purposeful or reflex movement] and conventional monitoring systems [e.g., electrocardiograms, blood pressure monitors, heart-rate monitors, end-tidal anesthetic analyzers and capnographs].")

IV. THE DISTRICT COURT HAS IMPROPERLY INJECTED ITSELF INTO THE ADMINISTRATIVE PROCESS.

The failure to truly incorporate the monitor into the lethal injection process to enable him to provide useful service was a natural outgrowth of District Court's attempt to change flawed State regulations on the fly without the benefit of a deliberative process solely to allow the State to proceed with this execution. Although the District Court correctly observed that "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," the Court ignored that principle in injecting itself into the process here. ER at 313. This Court has previously recognized that the courts should not attempt to micro-manage the work of government agencies.

> In general, federal courts take a "hands-off attitude towards problems of prison administration" because they "are complex and intractable

> and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).

California First Amendment Coalition v. Woodford, 299 F.3d 868, 877-78 (9th Cir. 2002). The wisdom of that approach is apparent by the problems created by the Court's protocol revisions here. Having recognized a serious problem with the protocol, the District Court should have granted the stay and left it to Defendants to devise an appropriate remedy. *See Stone v. City and County of San Francisco,* 968 F.2d 850, 861 (9th Cir. 1992). The Court's current approach is a last-minute quick-fix that is hastily drawn, undefined and untested in either the administrative or adversarial process. It is merely an ill-considered effort to go forward at all costs.

V. APPELLEES' BRIEF REFERS TO NUMEROUS FACTS NOT OF RECORD AND HAS NUMEROUS FACTUAL MISTATEMENTS

Appellees' Brief includes numerous incorrect and unsupported statements of fact that need to be corrected for this Court to fully understand the factual issues in this appeal.

In their Brief, Appellees contend that under California's lethal injection protocol, Procedure No. 770, the execution team has a backup *syringe* of sodium thiopental, but fail to cite to the protocol for support. Appl. Br. at 6. However, the protocol is clear that no such backup syringe is available to the execution team.

ER 66-67 (describing one 35-cc syringe of 5 grams of sodium Pentothal (thiopental), backups of only the second and third drugs).[4] It is that one syringe that is injected initially. ER 69. Procedure No. 770 specifies that from the initial inventory of drugs gathered prior to mixing, the sodium thiopental must be mixed with dilutent in order to be used. ER 85-86. Although the protocol identifies under "chemicals needed" (ER 55) a five gram vial of the powdered form of sodium thiopental, plus a back-up, unopened *vial,* that backup is never opened or even in the execution chamber or anteroom. Indeed, Procedure No. 770 makes clear that the "equipment and materials" needed for execution includes only the single mixture of five grams of sodium Pentothal. ER 56. CDCR counsel admitted as much in his proffer, with only four 1.25 grams of the drug being administered, and no mention of any backup syringe. ER 502-504.[5]

Appellees state that a saline solution must be injected between injection of the first and second, and second and third chemicals. Appl. Br. at 7. Indeed, Procedure 770 recognizes the critical importance of such a saline "flush" because of the potential for the sodium thiopental to mix with the pancuronium and clog the

[4] The second drug is designed to paralyze. The third is designed to kill the inmate by stopping the heart. Both will result in excruciating pain: the first by suffocation, the second by burning the veins.

[5] For some reason, CDCR's very detailed and fact-specific written proffer, containing many additional facts, most of which do not appear in the protocol and are contested by plaintiff, did not make its way into the District Court record even though it was offered. It only further demonstrated why a hearing was necessary. The fact that now 4 syringes are being used instead of one only increases the chances or failure.

passage for the second drug as they pass through the fifty plus feet of jury-rigged line. ER 70. If there is no flush, or if drugs adhere to one another, the result would likely be a partially-sedated inmate who then gets hit with a massive dose of pancuronium, or a partially sedated inmate who gets only a partial dose of pancuronium, then a dose of potassium chloride. Either scenario is extremely problematic and both may account for the previous botched executions that have occurred in California. Thus, while the saline flush is an important part of the protocol, the actual logs of the previous executions contain notations that sometimes but not always, indicate that such a saline flush took place. Had the District Court conducted the requested hearing, fact-finding into how and why the logs are so inconsistent on this critical point would have been conducted.

Appellees' Brief also exhibits some confusion about how the syringes are "marked." Appellees would have this Court believe the syringes are marked according to the type of chemical present. Appl. Br. at 6-7. In fact, the syringes are marked only by number. ER 66. This is one of the major flaws in the protocol, one that Dr. Dershwitz has recognized elsewhere. The requested hearing would have established these facts in detail, and explored any difficulties that have arisen from them.

Appellees make other factual assertions in their brief that are not supported by the record. For instance, they repeat their assertion, also made before the District Court, that Procedure No. 770 is "indistinguishable" from those of other

states. Plaintiffs contest that position, but have been denied a hearing to establish that fact. As the District Court noted, only in California is there a record of executions available that was presented as evidence to support a hearing and trial.[6]

Appellees' also assert that "there is no evidence that once an inmate is unconscious, the delivery of the second or third drugs will offset the effects" of the sedative. Appl. Br. at 8. Appellees cleverly place this sentence after noting that the five gram dose, "if properly delivered" would render Mr. Morales unconscious. However evidence exists that the second and third chemicals would cause Mr. Morales to re-awaken if he is partially sedated, a fact recognized by the District Court. ER 14. It is another issue that required a hearing because Mr. Morales has presented overwhelming evidence that proper sedation is not occurring in California.

Appellees are simply incorrect concerning Dr. Dershwitz's attempt to dismiss the undeniable evidence that many inmates are still breathing well after the supposed administration of the sedative. Appl. Br. at 8. As counsel for Mr. Morales pointed out below, Dr. Dershwitz was "working backwards" by assuming proper administration, then stating that it could not be breathing that was being

[6] That record is truncated as a result of limited discovery. The District Court limited it to the last three executions. The problem is that none of the previous cases obtained any discovery either. The Anderson and Rich logs, recently disclosed, are new evidence even though they predated the Bearsdlee execution. Full discovery and a hearing will determine what other evidence exists. For instance, the handwritten logs, so powerful for the Williams execution, have not been provided for a majority of the executions. Nor have the EKGs.

observed. ER 480. Mr. Morales strongly contested the Dershwitz opinion as completely unscientific and offered to present such testimony at a hearing. ER 473. The fact of the matter is, as the District Court noted, trained doctors observed respirations in many executions well after sedation. ER 309 Dr. Dershwitz's colorful "chest wall movements" theory, and the notion that such is not associated with breathing is untested. Likewise, his theory that this is not associated with consciousness is without any foundation and will, at a hearing, be shown to be completely incorrect.

The fact that Dr. Dershwitz was willing to offer such opinions reflects strongly and negatively on his credibility. His "magic number" of 99.99999% certainty of unconsciousness even if there is proper administration is now being examined in the field and may very well be incorrect. ER 236-38. Because there was no hearing or examination of Dershwitz, neither theory could be explored and his underlying data has never been turned over.

Ironically, Dr. Dershwitz relies on the "highly sensitive" monitoring equipment used in the operating room. ER 234, par. 10. These two devices are offered as ways in which a trained anesthesiologist can determine if breathing is occurring. *Id*. But, **there is no indication whatsoever that those monitors will be present for Mr. Morales' execution**. Indeed, CDCR complained that it could

not provide such equipment, most likely because of the logistics of the chamber (it is the gas chamber modified to contain a gurney and is extremely small). ER 274.[7]

VI. THE FACTUAL RECORD OF PROBLEMS WITH PROCEDURE NO. 770 IS OVERWHELMING.

Because Appellees casually dismiss the past problems with executions in California as "anomalies," some of the more salient features of the problematic executions need to be recalled:

Babbit: While Manny was on the execution table, his eyes closed and he took a couple of deep breaths. About 3 or 4 minutes later, he had a sudden and extreme convulsion. It lasted a few seconds. It seemed as if he was going to break all the restraints when this happened." ER 75

The Babbitt log notes these "spasmodic" movements were after the Pavulon and lasted less than 10 seconds. ER 109. He had "respirations" at least 3 minutes after administration of the sedative (it may be longer because the log is unclear). ER 109. His heart rate is inconsistent with adequate sedation. ER 100. And the logs and descriptions are consistent with him being conscious during the administration of Pavulon. *Id*.

[7] Admittedly, it is not clear from this response whether CDCR was complaining that the equipment was not "easily obtainable" and could not be used by staff, or whether it was saying that it was unable to obtain equipment that staff could use. The problem may be that the California Penal Code prevents anyone other than CDCR employees and selected guests to be present at an execution. Cal. Pen. Code section 3605(a).

Anderson: "A male technician came in to the room with a caddy full of syringes and needles. He tried for quite awhile to insert the needle into a vein in Mr. Anderson's left arm. He was not able to find a vein and Mr. Anderson's arm began to bleed. The technician became frustrated, removed his gloves, put them back on, and started over. During this time, Mr. Anderson looked over at his arm several times to see what was happening. Mr. Anderson attempted to help the technician find a vein by pumping his fist." ER 110-111.

"Within a minute his eyes closed and his head rolled over slightly. Thereafter, his cheeks began puffing as if air were coming out of his mouth. Within moments after that, Mr. Anderson's chest and stomach area began to heave upward. The convulsions continued with some irregular pauses in between. Altogether, Mr. Anderson's chest and stomach heaved more than 30 times." ER 111. Mr. Anderson was likely reacting to the suffocation induced by Pavulon; He was not properly sedated. ER 99.

The logs support this strong evidence of inadequate sedation. "The January 29, 2002 execution log of Stephen Wayne Anderson, recently produced by the defendants, reveals that Mr. Anderson continued breathing until 12:22, 5 minutes after the thiopental was administered. Again, this persistent respiratory activity is not consistent with the expected effect of 5 grams of thiopental, which would be to stop all visible respiratory activity within a minute of its delivery into the

circulation. I am unable to provide any explanation for the recorded events other than a failure to deliver the complete dose." ER 244-45.

Siripongs: Mr. Siripongs did not stop breathing for five minutes after the sedative started. The potassium chloride did not produce a flat line for eight full minutes, which should not occur with proper administration. ER107.

Bonin: "In the execution of William Bonin, it took the staff assigned anywhere between 18 and 27 minutes to fashion the IV lines (the records are unclear as to this point). This is an unusually long period of time for an experienced and properly trained professional." ER 95.

His heart rate increased with administration of the Pavulon. ER 106. As a second dose was administered, likely because no backup sedative is available SR 99-100. *Id*. The entry as to when respirations ceased is altered, as is a notation about his pulse. *Id*. There appears to have been problems with the heart monitor and no rate is noted for the time of administration of the potassium chloride. *Id.*

The administration of redundant and inappropriate doses of pancuronium raises enormous concerns about the discipline, logic, medical judgment, and rigor that was applied to the conduct of this execution." ER 99-100.

Beardslee: The execution log of Donald Beardslee's execution indicates that the second IV line was inserted with "difficulty," and the time entries indicate that it took 12 minutes to insert the second line. ER 95.

Mr. Beardslee's log is clearly altered. ER 105. Although heart rate was monitored (as shown by an EKG notation and an EKG was provided in discovery), no rates are noted in the log. *Id*. The box to indicate when respirations ceased is not filled in.

S. Williams: "[T]he injection team took 12 minutes to insert the IV lines. The first line was placed quickly but spurted blood, and the staff struggled for 11 minutes to insert the second line, having so much difficulty that Williams asked whether they were 'doing that right.' By 12:10 a.m., the medical tech's lips were tight and white and sweat was pooling on her forehead as she probed Williams' arm." ER 95

Mr. Williams was breathing for a full 12 minutes after the sedative was administered. ER 244. "Thus, the thiopental did not have the effect on Mr. Williams's brain and respiratory activity that would be expected with a high degree of certainty from the delivery into the circulation of the full 5-gram dose of thiopental." *Id.* He was inadequately sedated. *Id.*

The execution log has been proven to have been deliberately altered to make it appear as if he was not breathing at the time the Pavulon was given. ER 245-46. There are other alterations as well, including the time of death. ER 179. Boxes are blank. *Id*. The log indicates a failure in one of the IV lines. ER 179. His heart rate increased dramatically upon administration of the Pavulon. ER 179.

Allen: Mr. Allen required two doses of potassium chloride. ER 182. This was not noted in his log. ER 180. His heart rate increased as well. *Id*. These events would not occur with adequate sedation. ER 182-86.

Breathing did not cease for 9 minutes. *Id*. "Again, 5 grams of thiopental, if successfully delivered into the circulation, simply should not take 9 minutes to ablate cerebral electrical activity and respiratory activity." ER 244.

Darrel Rich: Mr. Rich was breathing for 3 minutes after the sedative. ER 245. His chest movements are, like Babbit's and Anderson's, consistent with fighting off the effects of Pavulon. ER 245. "These chest movements, beginning after Mr. Rich had ostensibly stopped breathing (and while he was still alive, as shown by his heart rate of 110 beats per minute), and 3 minutes after the administration of the thiopental, are again inconsistent with successful administration of the thiopental. The chest movements are consistent, however, with an attempt to fight against the accruing paralytic effect of the pancuronium. Had the 5-gram dose of thiopental reached Mr. Rich and had the expected effect, he would not have been able to fight against the pancuronium by attempting to breathe, nor would he even have been aware of the effect of the pancuronium." ER 145. He was inadequately sedated.

VII. A STAY OF EXECUTION IS REQUIRED

CDCR does not separately address the requested stay of execution. However, should the Court feel there is sufficient reason for concern, both about

the constitutional violation shown and the remedy provided, the matter requires a stay. *See Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997) (stay when argument warrants further review). The parties have attempted to give the Court a sense of what evidence was offered below in the two days since the Final Order. But, by necessity, this has been a much abbreviated proceeding. Given what has been shown, and what is at stake, the matter requires much more thought and consideration than has been allowed. *See Malone v. Calderon***,** 167 F.3d 1221 (9th Cir. 1999). This is particularly true because of the District Court's last-minute remedy and the substantial dispute over whether it does anything to rectify the problems Mr. Morales faces Monday night. *Id*.

Mr. Morales' allegations and evidence, limited as it is by a lack of discovery and the denial of a hearing, must be accepted as true. When such "substantial grounds upon which relief might be granted" are presented, as they are here, a stay of execution is appropriate. *Barefoot v. Estelle*, 463 U. S. 880, 885 (1983). As the District Court noted, Mr. Morales is going to be executed in any event. ER 312. Of course, that favors a stay as the state's judgment is not in jeopardy. In the balance of equities, it is an important factor. In fact, the length of time it took the District Court to act is a further indication of the substantive and real disputes that need to be resolved.

As was noted below, the District Court cannot fully adjudicate this case until adequate discovery, including questioning of the state's doctors (or whomever is in

charge of and observing the process); an examination of the Dershwitz figures; an explanation as to why California's executions appear not to be proceeding according to their own protocol; why they are not proceeding as they would if the sedative was being properly administered; why the inmates are manifesting behaviors inconsistent with that sedation; why second dosages of the paralytic agent and the potassium chloride are applied when, if properly administered, they are not necessary at all (leading to the strong inference that none of the chemicals are being administered properly); and, why the state has never medically vetted this procedure. Perhaps most compelling of all – whether the paralytic agent is a "chemical veil" merely masks what strong evidence now indicates is inadequate sedation.

As this Court has noted elsewhere, the review of such weighty matters often requires a hearing with live testimony and the opportunity to examine witnesses, particularly where facts are undisclosed and witnesses have offered only declarations. *See California First Amendment Coalition v. Woodford*, 299 F.3d 868, 879-80 (9th Cir. 2002) (noting the information obtained after remained for a hearing on 770's viewing restrictions). Mr. Morales never got this chance. We do not know if the admittedly incomplete logs reflect mere "anomalies" as the District Court and CDCR call them, or actual evidence of a system gone awry because non-medical personnel are administering it without sufficient training, and using a drug delivery system that Mr. Morales contests meets no medical standard

Another factor is that there has been no delay here attributable to Mr. Morales. He arrives in this Court as quickly as he could given the state statutes and regulations that prevent him from acting sooner. That is why it is so perplexing and erroneous for the District Court to have relied on *Gomez* to deny the stay. ER 312. *See Beardslee v. Woodford*, 395 F.3d 1064, 1070 (9th Cir. 2005) (error to rely on *Gomez*). CDCR does not even assert delay here, but it is worth describing just how such challenges are litigated under such time pressures.

The State of California has accomplished the same extremely shortened time frame that in effect prevents an adequate inquiry as was present in *Taylor v. Crawford*, No. 06-1397 (8th Cir.). An inmate's section 1983 challenge to execution method is not ripe until the inmate decides what the method of execution will be. *See Beardslee*, 395 F.3d at 1069 n. 16, *citing LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir. 1999); *Fierro. v. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998). California continues to have such a choice mechanism. Cal. Pen. Code sec. 3604. The state decides when the date-setting hearing will be and what execution date is requested. Cal. Pen. Code sec. 1193(a). This usually results in 10 days notice of the hearing, and a warrant mandating an execution date 30 days after that hearing. By regulation, however, the choice of method itself is not determined until the Warden reads the warrant to the inmate after the date-setting hearing and asks what method he chooses (gas or lethal injection). Title 15 Cal. Code Regs. Sec 3349(a) (when inmate silent for 10 days, method is lethal injection). At the most,

this leaves an inmate with about 28 days to file and litigate. At the least, it is 18 days.

This shortened time frame is compounded by the state's administrative review process. Although the state has never once represented that this process can afford any relief at all, whether it be a review of Procedure 770 or the actual suspension of it, the state still insists that inmates challenging lethal injection go through this process. As the Court noted in *Beardslee*, this creates enormous problems for the inmate because the administrative mechanism forbids a challenge to an "anticipated" violation. *See Beardslee v. Woodford*, 395 F.3d 1064, 1069 & n. 5 (9th Cir. 2005). Thus, an inmate cannot utilize this administrative process unless and until his execution is imminent, i.e. the state has actually notified him of the fact that a date will be set and what that date will be. This is exactly what happened to Mr. Beardslee as he attempted to exhaust before a date was set only to be told that he commenced the administrative process too early.[8]

This game of "legal gotcha" was played out in Mr. Morales' case, as outlined in the Declaration of David Senior. ER 215-17. Mr. Morales could not count on the dispute over execution date-setting hearings, and he filed his complaint on January 13, 2006 to prevent a possible delay argument by the state.

[8] There is substantial doubt whether this also means exhaustion is futile. Execution itself is not necessarily a condition of confinement, and is an "anticipated" violation up until the actual execution itself. And, the reviewing entity does not have any authority to alter or review Procedure 770.

He turned out to be correct, as the state then went back to the trial court and convinced it to reconsider its ruling, and re-set the date-setting hearing so that the February 21, 2006 date would remain.

The administrative review process was commenced the very day that the notice for a date-setting hearing was filed (January 9, 2006) and it became plain that an execution date was going to be set. At the time, the February 21, 2006 was still the proposed date, although its viability was questionable. Even then, it took too long, and the complaint was filed on January 13, 2006 so as to avoid delay arguments by the state. The "Catch-22" orchestrated by the state in effect prevented the very exhaustion they demanded. They have not properly asserted the defense below, *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), and have admitted here that the filing of a new complaint and consolidation obviates any problems. Opp., at 5-6, 3.

It is simply the state's own fault that Mr. Morales comes before this Court in the procedural posture he does, and requests a stay so as to litigate his Eighth and Fourteenth Amendment claim. This is exactly like the situation in *Taylor* and this Court is in exactly the same position, unable to achieve a reasoned inquiry based on a complete record. Considered appellate review is equally important. *See In re Public Service Co. of New Hampshire*, 963 F.2d 469, 471 (1st Cir. 1992) ("Jurisdictional concerns may arise from the constitutional limitations imposed on the exercise of Article III judicial power in circumstances where no effective

remedy can be provided, or from a loss of jurisdiction over the res or the parties, before or during the appeal, which renders the appellate court powerless to grant the requested relief.") Here, this Court can only look at the evidence and argument in a few days.

For these reasons, and those articulated in the substantive briefing, a stay of execution should issue so the matter may be considered and resolved with either a grant of relief or a remand to the District Court for a hearing on the new execution modifications and whether or not they will actually protect Mr. Morales' rights.

VIII. 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. Appellees do not and cannot deny those problems. The District Court acknowledged this evidence and recognized the risks, but nonetheless chose to deny the injunctive relief necessary to safeguard Mr. Morales' rights. This Court should do so.

MICHAEL ANGELO MORALES

By: _____
One of his attorneys

Dated: February 18, 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 reply 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 6,579 words (exclusive of the table of contents, table of authorities, proof of service and this certificate.)

Dated: February 18, 2006

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