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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL ANGELO MORALES, Plaintiff, vs. JAMES E. TILTON, Acting Secretary of the California Department of Corrections; ROBERT L. AYERS, Acting Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50, Defendants.	CASE NO. C 06 0219 (JF) (RS) C 06-926 (JF) (RS) **RESPONSE TO DEFENDANTS' AND GOVERNOR'S POST MEMORANDUM BRIEFING**

The Court, in its Memorandum of Intended Decision ("Memorandum"), found that Defendant's lethal injection protocol, as then constituted, violated Plaintiff's rights under the Eighth and Fourteenth Amendments. *See* Memorandum, at 13-14. The Court inquired whether Defendants intended to change that lethal injection procedure, and if so, by when. Defendants and the Office of the Governor have responded that they will, yet again, change the protocol and will announce those changes by May 15, 2007.

This is Defendants' third bite at the apple. They are now saying they are going to do that which they should have done in response to the Court's Order of February 14, 2006; and, what they had the chance to do on March 3, 2006. Plaintiff is highly skeptical Defendants are either able or willing to take the time and make the fundamental changes necessary to bring the protocol in compliance with the Eighth Amendment, as the record demonstrates Defendants' profound lack of dedication to that effort and a willingness to settle for window dressing instead of real change.

The ad hoc, secretive manner in which Defendants are proceeding also does not bode well for the bona fides of the revision effort. The sole evidence of what Defendants plan to do is found in a press release issued by the Governor's Office, but that press release is not binding on the government, and does not provide any meaningful procedures or guidelines for the process. In stark contrast, when Governor Jeb Bush of Florida decided to reexamine the state's lethal-injection procedures following the botched execution of Angel Diaz, Governor Bush issued an Executive Order that established the goals, purpose, and procedures of an official Commission on the Administration of Lethal Injections. Exhibit A, Exec. Order No. 06-260, at 3 (Florida, Dec. 15, 2006) (establishing commission composed of medical, scientific, and corrections experts; establishing selection process for members; providing that the commission's meetings will be open to the public; setting timeframe for issuance of findings and conclusions).[1] Thus,

[1] Unless otherwise indicated, all exhibits are appended to the Declaration of John R

Florida has created a regularized, open process, which, at least at this juncture, bespeaks its willingness to give thoughtful consideration to the dangers of lethal injection and the possibility of meaningful alterations in the protocol. California's proposed revision "process," if one can call it that, is amorphous, shrouded in secrecy, and apparently to date has been given little or no thought. Because process necessarily affects outcome, at least at this point, Defendants have given little reason to hope that the State's final product will reflect careful, informed, and thorough consideration of this Court's concerns and the evidence of the CDCR's systemic and fundamental failures.

Asking the Court to give pre-approval to a request that the process be done in secret, and appointing to head that process the very same Legal Affairs Secretary who truncated the review in February of 2006, and whose position engendered tangled privilege litigation, only adds to the sense of foreboding. As discussed in the accompanying Opposition to Motion for Protective Order, there exists no basis in fact or law for keeping the process secret, and very many good reasons not to shield it from public and judicial scrutiny.

Defendants' request for secrecy is particularly outrageous given the current status of this litigation. The Court has already noted that it "is prepared to issue formal findings of fact and conclusions of law with respect to the deficiencies in the administration of California's current lethal-injection protocol that have been brought to light in this case." *Morales v. Tilton*, 2006 U.S. Dist. LEXIS 92243, *29 (N.D. Cal. Dec. 15, 2006). It has not done so to date, "in part because Defendants still have not fulfilled their discovery obligations. n. 11" *Id.* "Relatedly, the Court has deferred ruling on the objections of the Governor's Office to certain discovery orders issued by the assigned magistrate judge. *See Morales v. Tilton,* No. C 06 219 JF RS, 2006 U.S. Dist. LEXIS 73136, 2006 WL 2724152, at *3 (N.D. Cal. Sept. 22, 2006)." *Id.* at *29 n. 11.

It thus seems redundant for Plaintiff to ask the Court to order Defendants to comply with

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Grele in Support of Plaintiff's Opposition to Motion for Protective Order.

this Court's earlier discovery orders, which Defendants continue to ignore. Moreover, conspicuously absence from the briefs recently filed by Defendants is any mention or even acknowledgment of their ongoing failure to comply with their discovery obligations. Defendants failure not only to comply with the discovery orders, but to even acknowledge their failings merits the most severe discovery sanctions available and should compel the Court to draw the greatest adverse factual inferences possible in its formal findings of fact and conclusions of law. Plaintiff cannot chase Defendants to obtain the requested discovery when Defendants are completely unwilling to pretend they will make any efforts to comply.

Should the Court decline to issue its findings at this juncture, Plaintiff intends to pursue the discovery deficiencies noted by the Court. Memorandum, at 14. While Defendants plainly desire to maintain secrecy over the current review, that request cannot excuse their continuing arrogant flouting of the Court's orders. If Defendants fundamentally alter the protocol, the applicability of this discovery will be determined then; however, other items are plainly relevant regardless of the State's actions, including who determined the 1.5 gram bolus dose and why; discovery over Dr. Singler's contract and billing materials[2]; why the photographs of injection sites are missing; and, discovery from CDCR officials, particularly those in Sacramento.

Another area of inquiry is presented by the Defendant's use of the order in *Walker v. Johnson*, after review of Virginia's lethal injection protocol. *See also* Memorandum, at 15 n. 12. As Plaintiff explained, the *Walker* litigation is shrouded in secrecy, which has made it very difficult to determine whether the plaintiff there was even given access to critical witnesses and records, or if any records exist. It may be that no problems were noted because no one was looking at or documenting inmate responses to the drugs, or because the district court there limited the inquiry substantially (it was decided without any hearing). As the evidence here shows and the Court acknowledged, the use of pancuronium masks deficiencies in the process.

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[2] Relevant to privilege assertions by the Governor's office and to the basis for the circulatory collapse theory.

Memorandum, at 16. Simply because Virginia has not recorded difficulties does not mean its processes are an adequate constitutional floor.

Because the litigation over lethal injection is evolving, and the level of examination of other states' procedures varies greatly depending upon the amount of court inquiry that is permitted and what records exist, Plaintiff has no doubt evidence will surface as a result of additional inquiries that may better inform whatever final order is issued in this case.[3] Plaintiff will submit those materials as they become available.

Finally, the Court should also be mindful of the discovery violations when reviewing the State's new found Eighth Amendment religion, and review the State's future conduct very carefully. While the Court's order has thrown the State a third rescue line and the State now claims to have grabbed hold, lest we forget that there are few atheists in fox holes. The State's new found Eighth Amendment conversion can only be viewed over time to ensure its authenticity and righteous conviction. *See Id.* at *30 (the State's "*thorough, effective response* to the issues raised in this memorandum likely will enable the Court to enter such a favorable judgment." (emphasis added)).

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[3] For instance, shortly before this Court issued its December 15 Memorandum, the Florida execution of Angel Diaz was badly botched due to infiltrated IVs, leaving Mr. Diaz writhing in pain for 34 minutes, and resulting in 12-inch chemical burns on each arm. *See* Exhibit F (Tampbay.com article re. Diaz execution). It has now come to light that the execution team began injecting thiopental and then pancuronium into the primary IV; was unable to complete the injection of pancuronium; and then switched to the other IV without administering any more thiopental. See Exhibit G (Gainesville Sun article re. deviations from protocol in Diaz execution). This is precisely the scenario that Dr. Heath testified was highly foreseeable: Team members who do not understand the drugs may not recognize the need to inject more thiopental even when it appears that infiltration has prevented the successful delivery of the thiopental and the inmate is clearly conscious. Hrg. Tr. 525-26. The Diaz execution also definitively disproves Dr. Singler's argument that infiltration could never cause an inhumane execution. One would hope that the CDCR would take this confirmation of the dangers of the execution process extremely seriously, and would consider how to avoid such a calamity in California.

Dated: January 31, 2007

Respectfully submitted,

By: _____/s/_____
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