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

MICHAEL ANGELO MORALES, Plaintiff, v. JAMES TILTON, Secretary of the California Department of Corrections; ROBERT AYERS, Warden, San Quentin State Prison, San Quentin, CA; ARNOLD SCHWARZENGGER, Governor of the State of California; and DOES 1-50, Defendants.	Case No. C 06-0219 (JF) C 06-0926 (JF) **THIRD AMENDED COMPLAINT FOR EQUITABLE AND INJUNCTIVE RELIEF [42 U.S.C. § 1983]**

NATURE OF ACTION

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of the right of Plaintiff to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. Plaintiff seeks temporary, preliminary, and permanent injunctive relief to prevent the Defendants from executing Plaintiff by means of lethal injection, as that method of execution is currently used in California. Plaintiff contends that lethal injection, as performed in California, unnecessarily risks infliction of pain and suffering. Plaintiff further contends that the use of pancuronium bromide, a paralytic agent that acts as a chemical veil over the lethal injection process, disguises the pain and suffering to which he will be subjected. Plaintiff additionally contends that Defendants, as a result of their deliberate failure to use medically approved procedures and properly trained personnel, have inflicted pain and torture on several executed prisoners in the past, making Plaintiff certain he will suffer the same fate unless Defendants adopt a humane and safe execution protocol.

JURISDICTION AND VENUE

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

3. Venue is proper pursuant to 28 U.S.C. § 1391(b) in that Plaintiff is currently incarcerated at San Quentin State Prison ("San Quentin") in San Quentin, California, located in this District. All executions conducted by the State of California ("State") occur at San Quentin. The events giving rise to this complaint have occurred and will occur in this District.

THE PARTIES

4. Plaintiff Michael Angelo Morales is a United States citizen and a resident of the State. He is currently a death-sentenced prisoner under the supervision of the California Department of Corrections and Rehabilitation (CDCR). He is held at San Quentin State Prison, San Quentin, California, 94974.

5. Defendant James Tilton is the Secretary of the CDCR.

6. Defendant Robert Ayers is the Warden of San Quentin State Prison, where the Plaintiff is incarcerated and where the Plaintiff's execution will occur.

7. Defendant Arnold Schwarzenegger is the Governor of the State of California.

8. Plaintiff is ignorant of the true names of Does 1-50 but alleges that they have or will participate in Plaintiff's execution by virtue of their roles in designing, implementing, and/or carrying out the lethal injection process. When Plaintiff discovers the Doe Defendants' true identities, he will amend his complaint accordingly.

GENERAL ALLEGATIONS

9. On January 6, 2006, the clerk of the Superior Court of Ventura County issued a Notice of Public Session in the case of People v. Morales, No. CR 17960, scheduling a public session on January 18, 2006 for the purpose of the setting of the date of execution of judgment of death of February 21, 2006.

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

11. The CDCR has decided to execute Plaintiff by poisoning him with a lethal combination of three chemical substances: sodium pentothal, a short-acting barbiturate; pancuronium bromide, which paralyzes all voluntary muscles; and potassium chloride, an extremely painful chemical which activates the nerve fibers lining the prisoner's veins and interferes with the heart's contractions, causing cardiac arrest.

12. In performing Plaintiff's execution by lethal injection, the CDCR will follow the protocol established in San Quentin Operational Procedure No. 770, as well as certain practices not delineated in the protocol. The protocol and actual practice by which lethal injection executions are performed

under Procedure No. 770 violates constitutional and statutory provisions enacted to prevent cruelty, pain, and torture.

13. The remote administration of the chemical substances, the absence of standardized procedures for administration of the chemicals, the lack of adequate training, screening and qualifications of the personnel involved in the process, and the combination and amounts of the three particular chemicals used in Procedure No. 770 create a grave and substantial risk that Plaintiff will not be adequately unconscious during the execution process and, as a result, will experience an excruciatingly painful and protracted death. This risk has been realized in at least six of the previous seven executions and in nine executions total.

14. Procedure No. 770 lacks medically necessary safeguards, thus increasing the risk that Plaintiff will suffer unnecessary pain during the lethal injection process. For example, there is no standardized administration of each of the three chemicals. The protocol identifies no procedures for ensuring that the anesthetic agent is properly flowing into the prisoner, and it identifies no appropriate procedures or personnel for ensuring that the prisoner is properly sedated prior to the administration of the lethal chemicals as required by the Eighth Amendment and as would be required in any medical or veterinary procedure after administration of a sedative and before the administration of a neuromuscular blocking agent, such as pancuronium bromide, or the administration of a painful potassium chloride overdose.

15. The protocol established in Procedure No. 770 does not establish any minimum qualifications required of the personnel who perform all of the tasks in the lethal injection process, and none exist. Nor does it require the minimum expertise that would be necessary to ensure proper performance of the tasks in the lethal injection procedure. There are no guidelines or customary procedures upon which these personnel can rely if they are required to exercise their discretion during the process. There is no plan in place if the Plaintiff requires medical assistance during the execution. Nor is there any procedure, personnel or equipment available for obtaining access to Plaintiff's veins should the procedure described in Procedure No. 770 become difficult or impossible to accomplish, as has recently been the case in several executions.

16. Sodium pentothal is an ultra short-acting barbiturate that is usually administered only during the preliminary phase of anesthesia administration, and never administered remotely in the manner proposed. There is a reasonable likelihood that sodium pentothal will be ineffectively delivered, given the inadequacy of the administration procedures and the personnel involved, and as a result will not provide a sufficient sedative effect for the duration of the execution process. This has actually occurred in many California executions and in executions in other states. Without adequate sedation, Plaintiff will experience the conscious asphyxiation caused by pancuronium bromide and the excruciatingly painful internal burning sensation and cardiac arrest caused by a potassium chloride overdose.

17. The American Veterinary Medical Association (AVMA) states that when potassium chloride is used for euthanasia, it is extremely important for the personnel who perform euthanasia to be trained and knowledgeable in anesthetic techniques and competent in assessing the anesthetic depth appropriate for potassium chloride administration, a depth at which animals are in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli. California law requires non-veterinary personnel who perform animal euthanasia to undergo strict training by a veterinarian and/or a registered veterinary technician who specializes in anesthesia. California law does not permit non-veterinary personnel to perform euthanasia using potassium chloride or neuromuscular blockers; rather, such personnel are limited to using a lethal overdose of barbiturates such as pentobarbital. The Department of Correction's lethal injection protocol under Procedure No. 770 does not include comparable protections or require comparable training, and thus a procedure under that protocol would be illegal if performed on animals.

18. The AVMA also employs a longer-lasting and more stable barbiturate, sodium pentobarbital, for animal euthanasia. The CDCR's use of sodium pentothal knowingly exacerbates the risk of error created by its deficient protocol because sodium pentothal is extremely volatile, short-acting, and sensitive to human error, and because CDCR makes no determination of a suitable level for any

particular inmate, despite this being a required procedure for administration of a sedative to all humans and animals for any purpose

19. Pancuronium bromide, the second chemical administered in the lethal injection process, paralyzes voluntary muscles, including the diaphragm, but it does not affect consciousness or the perception of pain. A similar paralytic agent has been used by CDCR in the past to torture prisoners as part of its behavioral modification programs. Pancuronium bromide, administered by itself as a "lethal dose," would not result in a quick death; instead, it would cause someone to suffocate to death while still conscious. The use of pancuronium bromide as administered under the CDCR's lethal injection protocol in combination with the initial dose of sodium pentothal, increases the risk that Plaintiff will become paralyzed while still aware of pain and suffering death from the burning veins and heart failure caused by the administration of the potassium chloride. Pancuronium bromide unnecessarily increases the risk that a prisoner will be paralyzed during the injection of an extremely painful drug, aware of this pain, yet be entirely unable to inform the attendants of his condition. Without the use of pancuronium bromide, a prisoner would be able to indicate that he was still conscious or had regained consciousness or awareness prior to the administration of potassium chloride. Properly trained and qualified personnel would be able to assess unconsciousness, which CDCR personnel at present cannot and do not do and thus are unable to determine whether a prisoner is aware of or feeling pain at the time the pancuronium bromide is administered, or if the administration causes the prisoner to become able enough to sense the pain from pancuronium bromide and, then, potassium chloride.

20. Because the CDCR's protocol calls for the potassium chloride to be administered in a lethal dose, the use of pancuronium bromide will serve no purpose in the execution process. It is completely unnecessary in the lethal injection process and will only serve to mask any pain or suffering that the Plaintiff may experience.

21. Pancuronium bromide could not lawfully be used alone as the fatal agent because causing death by suffocation violates the Eighth Amendment's prohibition against cruel and unusual punishment.

THE DEVELOPMENT OF THE CURRENT VERSION OF PROCEDURE NO. 770

22. The version of Procedure No. 770, under which Defendants originally intended to execute Plaintiff, was adopted without any medical research or review to ensure that a prisoner would not suffer a painful death. No member of the medical community was involved in its adoption. The procedure was adopted by the former Warden of San Quentin, Daniel Vasquez, after observing two executions in Texas, without any further input from or consultation with medical personnel. The procedure was not subsequently subjected to any review by medical professionals or other qualified persons to assess if it was an appropriate procedure or if it was being administered in a manner that either caused or prevented unnecessary infliction of pain and suffering. In fact, evidence demonstrated that Procedure No. 770 as administered was not properly sedating executed inmates, as a result of which they were aware of and suffering from pain. Defendants knew this, yet undertook no appropriate review or revisions of their procedures.

23. On February 14, 2006, the District Court for the Northern District of California found that Plaintiff had raised "substantial questions" that the 2003 protocol "creates an undue risk that Plaintiff will suffer excessive pain when he is executed." Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction, at 13 (February 14, 2006). The District Court therefore suggested 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. . . . A proactive approach by Defendants would go a long way towards maintaining judicial and public confidence in the integrity and effectiveness of the protocol." *Id.* at 12-13.

24. In light of the substantial possibility that Plaintiff would suffer excruciating pain as he was executed, the District Court held that Defendants could proceed to execute Plaintiff only if they implemented one of two proposed modifications of the execution procedure. *Id.* at 13-14. Defendants could either certify that they would execute Plaintiff using only sodium pentothal or another barbiturate; or procure the assistance of "qualified individual or individuals" to provide

"independent verification" that Plaintiff was in fact unconscious prior to the administration of the pancuronium bromide and potassium chloride. *Id.* at 13-15.

25. Defendants determined that satisfactorily "qualified individuals" would in fact be medical doctors, and in particular board certified anesthesiologists, to allow Defendants to "ensure that [Plaintiff] [was] unconscious at all times following the administration of sodium thiopental." Notwithstanding, Defendants did not go forward with the scheduled 12:01 a.m. execution on February 21, 2006.

26. Later that day, Defendants returned to the District Court and advised that they then believed that the most suitable manner to execute Plaintiff was by administering only a single lethal dose of sodium thiopental or other barbiturate, and they sought permission to perform the execution at 7:30 p.m. on February 21, 2006 in this manner. The District Court issued an order allowing the execution to proceed so long as "sodium thiopental [was] injected in the execution chamber directly into the intravenous cannula by a person or persons licensed by the State of California to inject medications intravenously." Order on Defendants' Motion to Proceed with Execution, at 3 (February 21, 2006). Defendants declined to comply with the District Court's order, and the execution did not go forward.

27. Because Defendants did not comply with the District Court's Orders, by the terms of the February 14, 2006 Order, a stay of execution automatically was entered on February 21, 2006.

28. Following the events of February 21, 2006, Defendants modified the execution protocol, and these modifications were incorporated in a new version of Procedure No. 770, dated March 6, 2006. According to Defendants, the changes to the protocol were made after consultation with unidentified "court experts," and in part reflected deviations from the 2003 version of the protocol that had been sanctioned by the Defendants but had not previously been formally adopted as revisions to the protocol, or recorded in the contemporaneous records of executions. Defendants, however, rejected their own expert's recommendation to use a single barbiturate as the sole lethal agent. This rejection was grounded in two blatantly invalid considerations: no other state uses a barbiturate as the sole lethal agent; and discontinuance of the use of pancuronium would eliminate the cosmetic appearance of a serene execution that is achieved by paralyzing the inmate. The direction by Defendant

Schwarzenegger to CDCR merely was to "tweak" the previous versions of OP 770, and to provide for less sedative.

29. The March 6, 2006 version of Procedure No. 770, as well as Defendants' stated intention to follow the new version, was substantially similar to the 2003 version in all material respects relating to the manner in which the chemicals are administered. The March 6, 2006 version employed the same three chemicals, injected in the same sequence, and using the same remote administration, but Defendants – after purported consultation with "experts" – determined to use a lower initial dose of sodium pentothal, a lower dose of pancuronium bromide, and a higher dose of potassium chloride. The only material difference between the 2003 version of the protocol and the March 6, 2006 version is that, in addition to an initial bolus dose of 1.5 grams of sodium pentothal, the March 6 version provided that a continuous drip of five grams of sodium pentothal would be begun in a second IV line after the initial dose of sodium pentothal is administered. Shortly after the drip is begun, a saline flush was to be sent through the first IV line and the pancuronium and potassium were to be injected.

30. The March 6, 2006 version of Procedure No. 770 utterly failed to address the "substantial questions" raised by Plaintiff, and recognized by the District Court, regarding the significant risk that Plaintiff will suffer excruciating pain during the execution. Among other things, the March 6, 2006 version of Procedure No. 770, like the 2003 version, failed to provide any procedure for ensuring that the inmate is in an appropriate surgical plane of anesthesia prior to the administration of the pancuronium bromide; failed to provide for any training to be given to the injection personnel; failed to require any level of experience or other qualifications for such personnel; failed to ensure that an adequate dose of anesthesia is able to reach the prisoner; and failed to provide procedures for obtaining IV access should the inmate have unusable peripheral veins. Moreover, because the design of the execution chamber remained the same, and the March 6, 2006 version of the protocol made no material changes in the equipment used to administer the drugs, it did not alleviate the need to use multiple IV extensions or other conditions that have caused the drug administration problems that plagued the previous executions.

31. Indeed, the March 6, 2006 version of Procedure No. 770 was even more deficient than the old version. The additional deficiencies included, but were not limited to, the fact that Defendants' purported experts determined that much less sodium pentothal should be administered to the inmate, even assuming proper administration by the execution team resulting in the full dose of pentothal reaching the prisoner. This significantly decreased dose of sodium pentothal drastically lowered the margin of error in administering the anesthesia and increased the probability that the inmate would not be placed in an appropriate surgical plane of anesthesia.

32. Defendants, relying on the advice of their selected expert, deliberately chose to lower the dose of anesthetic in the belief that the previously used five-gram dose of sodium pentothal rendered inmates "too unconscious" for the potassium chloride to cause death as quickly as it would otherwise. Moreover, by their own admission, Defendants deliberately increased the risk of excessive suffering in order to ensure that executions are carried out as quickly as possible.

33. Defendants' failure to address the substantial questions as to the significant risk of excruciating pain created by the original version of Procedure No. 770, even after the experience of recent executions during which indicia of inadequate sedation were present, and even after the District Court recognized the seriousness and substantial nature of the risk, amounted to conscious disregard of Plaintiffs' constitutional right to be free from cruel and unusual punishment. Indeed, on March 6, 2006, after obtaining the advice of, inter alia, Robert Singler, M.D. and at the direction of Andrea Hoch, Legal Affairs Secretary of Governor Arnold Schwarzenegger, Defendants purposefully rendered the execution procedure more dangerous without any rational reason for doing so.

34. Defendants' creation of the March 6, 2006 version of Procedure No. 770 in the space of a mere thirteen days, without consultation with any members of the medical community or other experts – besides the unnamed "court experts" and/or Robert Singler, M.D. – further evidenced Defendants' deliberate disregard of Plaintiff's Eighth Amendment rights. Defendants flagrantly ignored the District Court's suggestion that they conduct a "thorough" review of the execution procedures. As a result, Defendants substituted a different version of Procedure No. 770 that simply

perpetuated the deficiencies in the previous version and exacerbated the already-significant risk of inadequate anesthesia.

35. After undertaking a review of the execution protocol, including the composition and training of the execution team, the equipment and apparatus used in executions, the pharmacology and pharmacokinetics of the drugs involved, and the available documentary and anecdotal evidence concerning executions in California, on December 15, 2006, the District Court found that Defendants' Procedure 770 as actually administered in practice violated the Eighth Amendment.

36. Defendants immediately vowed to implement yet another review, evaluation, and revision of Procedure 770. Defendant Schwarzenegger directed the revision be undertaken by his Legal Affairs Secretary, Andrea Hoch.

37. Before conducting another review, evaluation, and revision of Procedure 770, Defendants announced that this complete undertaking would be completed in less than 120 days, or by May 15, 2007. Defendants concluded that they would limit their review, evaluation, and revisions to only five issues that they contend are raised in the District Court's December 15, 2006 order, despite that order's express notation that it was not meant as an exhaustive recitation of the failings of Defendants' procedures.

38. Defendant CDCR appointed K. W. Prunty, Jr., Undersecretary Operations of the CDCR, and "the attorneys" to revise the procedure. Prunty reports to James Tilton, the CDCR Secretary. Tilton never has read the District Court's December 15, 2006 order, and he admittedly is not "an expert" on the Procedure.

39. After commencing its review, Defendant CDCR requested additional time to determine and make any necessary revisions. Defendant Schwarzenegger denied the CDCR's request and insisted that the self-imposed and blindly created May 15, 2007 deadline be adhered to. Defendants submitted a revised Procedure 770 to the District Court on May 15, 2007.

40. While on February 16, 2006, Defendants unilaterally determined that the most "qualified individuals" to "ensure that [Plaintiff] [was] unconscious at all times following the administration of sodium thiopental" would in fact be medical doctors, and in particular board certified

anesthesiologists, and in the space of two days did obtain two such medical professionals, Defendants now have concluded that this is not the case. Defendants' new Procedure makes no such provision for qualified medical doctors to perform this complex task, or to perform or monitor any other tasks associated with planning for or conducting executions. Nor have Defendants made provisions to have a doctor perform a central line catheterization if necessary, despite Defendants' knowledge that some inmates will require a central line to avoid unsuccessful drug administration, and that central line placement requires extensive medical training.

41. The May 15, 2007 version of Procedure No. 770 provides for an "assessment" of consciousness to be performed by an Intravenous Team Member. This assessment does not constitute effective monitoring of anesthetic depth, and will not be sufficient to ascertain whether the inmate is placed into, and remains in, a surgical plane of anesthesia.

42. On February 21, 2006, Defendants unilaterally determined that, because Procedure 770 prevents them from ensuring that Plaintiff will be unconscious at all times following the administration of sodium thiopental, a preferred method of execution would be to use only sodium thiopental or another barbiturate or combination of barbiturates during Plaintiff's execution.

43. Subsequent to February 21, 2006, Dr. Mark Dershwitz, one of the medical experts retained by Defendants to defend their protocol in this action and in previous lethal-injection challenges, has advised several states, including those with which Defendants have exchanged execution-related information, that using a single barbiturate as the sole lethal agent would be an easier, less complex, and less dangerous means of accomplishing executions. Despite their knowledge of this advice, and despite Defendants' conclusions on February 21, 2006, regarding the single-drug protocol, Defendants failed to give serious consideration to the use of a single-drug protocol, even though they still have no reliable method to ensure that Plaintiff will be unconscious at all times following the administration of sodium thiopental. Defendants' new Procedure intends to make use of a complicated three drug protocol involving the use of two excruciatingly painful drugs when improper sedation occurs.

44. Before reviewing, evaluating, and/or revising its March 6, 2006 execution Procedure, Defendants decided in January 2007 to build a new execution facility. The design and construction of the new facility derived from the provisions of the March 6, 2006 execution Procedure, the latest version of Procedure No. 770 then in existence, as the later announced May 15, 2007 version of the procedure had not yet been created, reviewed, evaluated, and/or revised.

45. Defendants fraudulently claimed that the execution chamber could be designed and constructed from discretionary budgeting, that a new execution chamber had been ordered to be built by the District Court, and that the District Court ordered that construction be completed by May 15, 2007. Defendants' tactics were an effort to avoid mandatory state legislative oversight and to obtain a permanent lethal injection facility so as to justify a multi-million dollar expansion of death row at San Quentin. Defendants thereafter designed and commenced construction of the chamber before they had begun or finished their review, evaluation, and/or revisions to Procedure 770. Defendant Tilton, the lead official in the CDCR later claimed he was not advised of this decision to build a new chamber, or of the commencement of the construction of this facility.

46. On April 13, 2007, when Defendants' fraudulent budgeting activities came to light, Defendants backdated a budgeting request to January, 2007, and submitted same for legislative consideration. On or about April 21, 2007, Defendant Schwarzenegger ordered that the construction be stopped.

47. The May 15, 2007 version of Procedure No. 770, as well as Defendants' stated intention to follow the new version, is substantially similar to the 2003 version in all material respects relating to the manner in which the chemicals are administered. The May 15, 2007 version employs the same three chemicals, injected in the same sequence, but Defendants determined to use a greater initial dose of sodium pentothal than the March 6, 2006 Procedure, but a smaller dose than was used in the 2003 version, a greater dose of pancuronium bromide , and a lower dose of potassium chloride.

48. The May 15, 2007 version of Procedure No. 770 utterly fails to even examine the many "substantial questions" raised by Plaintiff, and recognized by the District Court, regarding the significant risk that Plaintiff will suffer excruciating pain during the execution. Among other things,

the May 15, 2007 version of Procedure No. 770, like its predecessor March 6, 2006 and 2003 versions, fails to provide any adequate procedure and personnel for ensuring that the inmate is in an appropriate surgical plane of anesthesia prior to the administration of the pancuronium bromide and remains in a surgical plane of anesthesia for the duration of the execution; fails to provide for any training to be given to the personnel involved; fails to require any level of experience or other qualifications for such personnel; fails to provide for any mechanism to ensure that an adequate dose of anesthesia is able to reach the prisoner; fails to provide guidelines for detecting and remedying the foreseeable problems that could occur and that have recently caused botched executions in several other states, or to ensure that personnel are sufficiently trained and qualified to exercise their judgment in such situations; fails to ensure an appropriate delivery mechanism for any of the three chemicals, and fails to provide procedures for obtaining IV access should the inmate have unusable peripheral veins. The Procedure was prepared and submitted without an execution chamber to provide any reference or concept.

49. Indeed, the May 15, 2007 version of Procedure No. 770 is even more ill-conceived and deficient than the older versions. The additional deficiencies include, but are not limited to, the fact that Defendants determined that much less sodium pentothal should be administered to the inmate than that which was supposed to have been administered to inmates in all past executions, even assuming proper administration by the execution team resulting in the full dose of pentothal reaching the prisoner. This significantly decreased dose of sodium pentothal drastically lowers the margin for error in administering the anesthesia and increases the probability that the inmate will not be placed in an appropriate surgical plane of anesthesia.

50. Defendants – in conjunction with the advice of their selected experts – deliberately chose to lower the dose of anesthetic in the belief that the previously used five-gram dose of sodium pentothal rendered inmates "too unconscious" for the potassium chloride to cause death as quickly as it would otherwise. Defendants were aware that such a theory was ill-conceived, medically unsound and unsupported by the records in previous executions. Moreover, by their own admission, Defendants

deliberately increased the risk of excessive suffering in order to ensure that executions are carried out as quickly as possible.

51. Defendants' failure to address the substantial questions regarding the significant risk of excruciating pain created by the original version of Procedure No. 770, even after the experience of several recent executions during which indicia of inadequate sedation were present, and even after the District Court recognized the seriousness and substantial nature of the risk, amounts to conscious disregard of Plaintiffs' constitutional right to be free from cruel and unusual punishment. Defendants have flagrantly disregarded their January 16, 2007 representations to the District Court that they intended to conduct a careful review, revision, and implementation of their execution procedures. As a result, Defendants substituted a different version of Procedure No. 770 that simply perpetuated the deficiencies in the previous version and exacerbates the already-significant risk of inadequate anesthesia.

COUNT I

VIOLATION OF RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)

52. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 51.

53. Defendants James Tilton, Robert Ayers, and Arnold Schwarzenegger, and Doe Defendants are acting under color of California law in causing to be administered to Plaintiff chemicals that will cause unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C. § 1983.

54. The CDCR's Procedure No. 770, which specifies the State's lethal injection protocol, and the Defendants' actual practice of implementing the protocol violates Plaintiff's rights under the cruel and unusual punishment clause of the Eighth Amendment because (a) the protocol creates the unreasonable and unacceptable risk of unnecessary physical and psychological pain; (b) the protocol

does not comport with contemporary norms and standards of society; and (c) the protocol offends the dignity of the person and society.

55. The CDCR's lethal injection protocol requires utilization of three dangerous chemicals but does not ensure that the personnel entrusted with the lethal injection procedure possess the proper and necessary training, experience, or expertise to administer those drugs. Moreover, the protocol fails to provide specific guidelines for the administration of the three separate chemicals, which is an essential requirement for their proper administration.

56. Procedure No. 770 contains little or no description of the training, credentials, certifications, experience, or proficiency required of any personnel involved in the administration of the lethal injection procedure, notwithstanding the fact that it is a complex medical procedure requiring a great deal of expertise in order to be performed correctly. For example, Procedure No. 770 does not require at the execution the presence of any personnel who possess sufficient expertise to insert an intravenous line properly in all situations, determine if there is a blockage in the intravenous line, or evaluate whether a prisoner is properly sedated before proceeding with the painful parts of the execution process. Nor is it Defendants' actual practice to require the participation of such personnel.

57. The absence of such trained personnel greatly increases the risk that a prisoner would not receive the necessary amount of anesthetic prior to being paralyzed by the pancuronium bromide and then experience the painful internal burn of the potassium chloride. The execution logs of California prisoners, and the recent experiences in other states which utilize similar protocols, suggest that many executed prisoners did not receive enough sedative prior to the administration of pancuronium bromide. Moreover, toxicology reports from prisoners executed by other states suggest that some prisoners likely remained conscious during the administration of lethal drugs, which could have occurred because of improper insertion of the intravenous line, an unrecognized blockage in the line, or various other reasons. The factors contributing to the likelihood that prisoners in other states were executed while conscious are present in Procedure No. 770 and the actual practice of CDCR in implementing it.

58. Inducing and maintaining a sufficient level of unconsciousness by correctly administering sodium pentothal is indispensable to preventing the wanton infliction of unnecessary pain when the potassium chloride overdose is administered. Procedure No. 770, however, does nothing to ensure such a level of unconsciousness. Nor does the protocol provide guidelines for ensuring that an inmate is deeply anesthetized prior to injecting the second two drugs, or establish procedures for determining when an additional dose of sodium pentothal should be administered.

59. Defendants' decision to reject their own experts' opinion that a single sedative should be employed, and their decision to maintain the remote administration of the three drugs without anesthetic monitoring despite evidence that such administration was not effectively sedating inmates, and Defendants' blind adherence to a procedure that lacks necessary medical safeguards and personnel, despite evidence that such a process has resulted in a substantial and unnecessary risk of undue pain and suffering in past executions and in the executions undertaken by other jurisdictions, constitutes a deliberate decision to disregard the substantial and unnecessary risk of undue pain and suffering in the Procedure as outlined and as employed.

60. The CDCR's lethal injection protocol and practices fail to address any reasonably foreseeable complications with any appropriate medical response, such as difficulty obtaining access to a peripheral vein, or damage to such veins as a result of repeated failed attempts to insert the catheter. Moreover, the protocol and practices include no safeguards that would protect the prisoner in the event a stay of execution is entered or a reprieve granted immediately before or after the lethal injection process has begun. Thus, the protocol and actual practices fail to provide any protections to prevent a prisoner from being wrongly executed should a reprieve or stay be granted after the process has begun but before death has occurred.

61. At any time before the potassium chloride is administered, the prisoner could be readily resuscitated if trained personnel and routine resuscitation medication and equipment were present at the execution site. Even after the potassium chloride is administered, resuscitation would still be possible, although admittedly it would be more challenging. Any resuscitation, however, would require the close proximity of the necessary equipment, medication, and properly trained personnel.

The omission of such personnel and equipment under the protocol set forth in Procedure No. 770 further undermines the constitutionality of the procedure.

62. Although it is possible to conduct executions in a constitutionally compliant manner, the Department of Corrections has deliberately chosen not to do so. The CDCR could choose to use different chemicals that do not cause pain and therefore do not carry extraordinarily grave consequences to a condemned inmate if not properly administered, as all veterinary euthanasia does. Instead, the CDCR has knowingly and recklessly chosen to use chemicals that will subject the inmate to excruciating pain in the likely event of administration error. Moreover, it has not taken precautions to ensure that the personnel who are involved in the process, including the preparation and administration of the lethal injection chemicals, possess the training, experience, and expertise needed to administer those chemicals properly. Thus, while it is possible for the CDCR to choose different lethal injection chemicals and/or retain qualified personnel to administer its chosen chemicals in order to ensure the constitutionality of its lethal injection procedure, the CDCR purposefully has not done so.

63. These numerous deficiencies in the CDCR's lethal injection protocol are the direct result of Defendants' conscious disregard of the significant risk that the execution procedure will result in the wanton and unnecessary infliction of extreme pain.

COMPLAINT FOR EQUITABLE AND INJUNCTIVE RELIEF

64. The use of pancuronium bromide under the protocol established in Procedure No. 770 to paralyze Plaintiff greatly increases the risk that an inadequately sedated prisoner will be subjected to a painful and protracted death, and will in fact cause such an unnecessarily painful death. Moreover, it serves no legitimate penological purpose.

65. Pancuronium bromide does not play a legitimate role in killing the condemned person. The execution protocol provides that potassium chloride kills the condemned. The administration of pancuronium bromide cannot be justified on the grounds that the drug paralyzes the breathing muscles because death by asphyxiation is itself a form of cruel and unusual punishment under the Eighth Amendment.

66. Enjoining the administration of pancuronium bromide will have no appreciable impact on California correctional institution procedures. If anything, it will simplify the execution process by eliminating one step in the process.

67. The question of whether there exist readily available alternatives to pancuronium bromide is not an issue in this case because paralyzing a condemned inmate in the execution process is not a legitimate penological goal.

68. The Ninth Circuit and this Court have previously held that Defendants and their predecessors, in order to forestall discussion and criticism of California's lethal injection procedure, have implemented restrictions on the execution process in order to prevent witnesses from being aware of complications experienced during the procedure.

69. The CDCR's failure to require sufficient training, credentials, certification, experience, or proficiency of the personnel involved in the administration of the lethal injection procedure greatly increases the risk that a prisoner will experience excruciating pain as a result of the suffocation caused by the pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose. Employing untrained personnel to perform executions exacerbates the risks created by the deficiencies in the protocol and the methods and circumstances of drug administration, because untrained personnel will be unable to react to and remedy problems that arise during an execution. Allowing untrained personnel to develop deviations from the protocol that become customary practices also increases the risk of inhumane executions due to the lack of vetting by qualified experts and the danger that execution team turnover will lead to confusion as to how to perform the execution.

70. Allowing personnel who lack sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure does not play a legitimate role in killing the condemned person. Suffocation while inadequately sedated or otherwise aware, as caused by the administration of pancuronium bromide, violates the Eighth Amendment because death by asphyxiation is itself a form of cruel and unusual punishment. Similarly, internal burning and cardiac

arrest while insufficiently sedated or otherwise aware, as caused by a potassium chloride overdose, constitute unnecessary physical and psychological pain in violation of the Eighth Amendment.

71. If Plaintiff suffers unnecessary pain, he will have no alternative "reasonable and effective means of communication" to communicate the fact that he was not properly anesthetized because he will be unable to do so and the pancuronium bromide will paralyze him and he will be dead at the conclusion of the procedure.

72. Enjoining the administration of the lethal injection procedure by personnel who lack sufficient training, credentials, certification, experience, or proficiency will have no appreciable impact on the correctional institution.

73. The question of whether there exist readily available alternatives to requiring personnel who possess sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure is not an issue in this case because causing a prisoner who has not been properly anaesthetized as a result of administration error to experience excruciating pain from the conscious suffocation caused by pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose is not a legitimate penological goal.

74. CDCR's continued use of remote administration of the three-drug cocktail without sufficient means of ensuring adequate sedation throughout the procedure greatly increases the risk that a prisoner will experience excruciating pain as a result of the suffocation caused by the pancuronium bromide and the painful internal burn and cardiac arrest caused by a potassium chloride overdose. Enjoining the use of remote administration of the three-drug cocktail without sufficient safeguards will have no appreciable impact on the correctional institution. The question of whether there exist readily-available alternatives to employing emote administration of the three-drug cocktail without sufficient safeguards because needlessly exposing inmates to an unreasonable risk of excruciating pain is not a legitimate penological goal.

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EXHAUSTION ALLEGATIONS

75. On January 9, 2006, Plaintiff filed an inmate appeal on CDC Form 602 alleging that his execution under the lethal injection protocol of the CDCR would constitute cruel and unusual punishment. Plaintiff asked that his appeal be processed as an emergency appeal pursuant to 15 Cal. Code Regs. § 3084.7 on the ground that the State of California shortly intended to seek his execution date. On or about January 27, 2006, the Director's Level Appeal Decision was issued, which stated that "no further relief shall be afforded the appellate at the Director's Level of Review." The decision stated that "This decision exhausts the administrative remedy available to the appellant within CDCR."

76. Notwithstanding his filing of an appeal on CDC Form 602, Plaintiff is not required to exhaust administrative remedies before bringing this claim because resolution of the grievance seeking modification of Procedure No. 770 is not possible through the appeal process and exhaustion is futile.

77. On November 24, 2004, Donald J. Beardslee, San Quentin Inmate No. C-82702, raised a challenge similar to Plaintiff's claim here when he filed two inmate appeals on CDC Form 602 alleging that the Department of Correction's lethal injection procedure violated his rights under the First and Eighth Amendments to the United States Constitution. After being considered on an emergency basis, the appeals were first denied by the Warden and then denied by the Director of the Department of Corrections on Third Level Review. In denying Beardslee's appeal, the Director's Level Appeal Decision stated that Beardslee's "sentence and penalty were established by court in California; therefore relief at the Director's Level of Review cannot be afforded the appellant." Administrative review therefore cannot resolve any of the issues raised in Plaintiff's appeal.

78. Moreover, pursuit of administrative review is futile for additional reasons. In subsequent proceedings in Beardslee's case, the Court of Appeals for the Ninth Circuit observed that "by regulation the California Department of Corrections does not permit challenges to anticipated action[s]. 15 Cal. Code Regs. § 3084.3(c)(3)." *Beardslee v. Woodford*, 395 F.3d 1064, 1069 (9th Cir. 2005). Thus, no administrative challenge to the lethal injection protocol is possible here.

79. Plaintiff's challenge to the lethal injection protocol that the CDCR intends to use to execute him is ripe for adjudication now.

PRAYER FOR RELIEF

WHEREFORE, Michael Angelo Morales prays for:

1. Temporary, preliminary, and permanent injunctive relief to enjoin the Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiff by lethal injection using Procedure No. 770 and the practices associated with the protocol;

2. In the event that Procedure No. 770 is not enjoined in its entirety as violating the Eighth and Fourteenth Amendments, temporary, preliminary, and permanent injunctive relief to enjoin Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from administering pancuronium bromide and potassium chloride during the execution process;

3. In the event that Procedure No. 770 is not enjoined in its entirety as violating the Eighth and Fourteenth Amendments, temporary, preliminary, and permanent injunctive relief to enjoin Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from allowing personnel who lack sufficient training, credentials, certification, experience, or proficiency to conduct the lethal injection procedure;

4. Reasonable attorneys' fees pursuant to 42 U.S.C. § 1983 and the laws of the United States;

5. Costs of suit; and

6. Any such other relief as the Court deems just and proper.

MICHAEL ANGELO MORALES

Dated: July 2, 2007

By: /s/ Benjamin D. Weston .
One of his attorneys

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