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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, Petitioner, **v.** **KEVIN CHAPPELL, Warden of California State Prison at San Quentin,** Respondent.	**CAPITAL CASE** Case No. CV 09-2158-CJC **OPENING BRIEF ON CLAIM 27 THAT LENGTHY CONFINEMENT OF PETITIONER UNDER SENTENCE OF DEATH VIOLATES EIGHTH AMENDMENT** Hon. Cormac J. Carney U.S. District Judge

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Pursuant to this Court's Order of April 10, 2014, Respondent Kevin Chappell, the Warden of the California State Prison at San Quentin, hereby files the instant Opening Brief concerning recently amended Claim 27 of the Petition alleging that Petitioner's lengthy confinement while under a sentence of death constitutes cruel and unusual punishment in violation of the Eighth Amendment. As discussed below, habeas corpus relief is unavailable on this claim.

Dated: June 6, 2014

Respectfully submitted,

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/s/ Herbert S. Tetef

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In 1995, a Los Angeles County Superior Court jury convicted Petitioner of capital murder and sentenced him to death. On March 17, 2003, the California Supreme Court affirmed the judgment of conviction and death sentence on direct appeal. *People v. Jones*, 29 Cal. 4th 1229, 131 Cal. Rptr. 2d 468 (2003). On October 14, 2003, the United States Supreme Court denied a petition for writ of certiorari. *Jones v. California*, 540 U.S. 952, 124 S. Ct. 395, 157 L. Ed. 2d 286 (2003).

On October 21, 2002, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. The petition contained twenty-seven claims for relief, was 429 pages long, and had over 3,000 pages of exhibits. On October 16, 2007, Petitioner filed another petition for writ of habeas corpus in the California Supreme Court. On March 11, 2009, the California Supreme Court denied both petitions.

On March 10, 2010, Petitioner filed the Petition for Writ of Habeas Corpus in the instant proceedings. On April 6, 2010, Respondent filed an Answer. On February 17, 2011, Petitioner filed a Motion for Evidentiary Hearing. The Supreme Court thereafter issued its decision in *Cullen v. Pinholster*, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). On April 6, 2011, this Court ordered the parties to submit briefs on the effect of *Pinholster* on Petitioner's entitlement to an evidentiary hearing. After the *Pinholster* briefing was filed, the Court denied Petitioner's Motion for Evidentiary Hearing without prejudice and ordered the parties to submit briefs addressing the application of 28 U.S.C. § 2254(d) to Petitioner's claims. On December 10, 2012, Petitioner filed his opening § 2254(d) brief. On June 14, 2013, Respondent filed an Opposition. On January 27, 2014, Petitioner filed a Reply.

On April 10, 2014, this Court issued an Order requiring the parties to address Claim 27 of the Petition alleging that Petitioner's death sentence constitutes cruel

and unusual punishment in violation of the Eighth Amendment. The Order indicates the Court's belief that the claim may have merit in light of the long delay in the execution of death sentences in California, caused by the protracted post-conviction litigation of constitutional claims in state and federal court and the current stay of executions while the courts resolve the constitutionality of California's lethal injection protocol.

On April 14, 2014, this Court issued an Order directing Petitioner to file an amendment to the Petition alleging a claim that the long delay in execution of sentence in the case, coupled with the grave uncertainty of not knowing whether Petitioner's execution will ever be carried out, renders his death sentence unconstitutional. On April 28, 2014, Petitioner filed a First Amended Petition, which supplements Claim 27 with these brand new allegations, never before raised in any court.

ARGUMENT

I. THE CLAIM THAT PETITIONER'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE OF DELAY BASED ON THE LACK OF AN EXECUTION PROTOCOL IS UNEXHAUSTED

In Claim 27 of the First Amended Petition ("FAP"), Petitioner now contends that the long delay in execution of sentence in this case, coupled with the grave uncertainty of not knowing whether Petitioner's execution will ever be carried out, renders his death sentence unconstitutional. (FAP at 414-27.) A portion of recently amended Claim 27 now alleges an Eighth Amendment violation based on delay caused by the current lack of an execution protocol in California. (FAP at 421-22.) To the extent these new allegations place the claim in a fundamentally different light, the claim is unexhausted.[1]

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[1] Petitioner's original version of Claim 27 alleged unconstitutionality solely on the basis of delay in execution caused by a slow litigation process. As argued in prior briefing, and as discussed below, relief on that claim is barred under 28 U.S.C. § 2254(d) because there is no "clearly established" United States Supreme (continued…)

Exhaustion of state remedies is a prerequisite to a federal court's consideration of claims sought to be presented by a state prisoner in federal habeas corpus. 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008). To satisfy the state exhaustion requirement, the petitioner must fairly present his federal claims to the state's highest court. *Rose v. Lundy*, 455 U.S. 509, 515, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). A claim has not been fairly presented unless the prisoner has described in the state court proceedings both the operative facts and the federal legal theory on which his contention is based. *See Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996); *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999).

During his direct appeal in the California Supreme Court, Petitioner presented a *Lackey* claim, arguing that his death sentence violated the Eighth Amendment because of the long delay between sentencing and execution.[2] (NOL B1 at 229-43.) However, Petitioner never argued in the California Supreme Court, either in his direct appeal or in any habeas corpus petition, that his death sentence violated the

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(…continued)
Court case endorsing such a right. The new allegations do not change that calculus at all, and the claim is still meritless from a "clearly established law" standpoint. However, if this Court determines that the claim as now presently alleged warrants habeas corpus relief, the new allegations of an absent-lethal-injection protocol place the claim in a fundamentally different light, thus rendering the claim unexhausted. *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014).

[2] This claim is termed a "*Lackey*" claim, but neither *Lackey* nor any other case holds that such an Eighth Amendment claim is viable. In a memorandum opinion respecting the *denial of certiorari* in *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995), Justice Stevens questioned whether executing a prisoner who has spent many years on death row constitutes cruel and unusual punishment prohibited by the Eighth Amendment. The Supreme Court, however, has *never* addressed the issue in any manner on the merits, let alone held that such a constitutional right exists.

Eighth Amendment because of delay based on the lack of an execution protocol in California. Therefore, to the extent these new allegations place this claim in a fundamentally different light, Claim 27 is unexhausted and relief may not be granted. *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014). However, as demonstrated in Section III below, it is perfectly clear that this ground raises no colorable claim for habeas corpus relief, and therefore should be denied on its merits, even though it is unexhausted. *See* 28 U.S.C. § 2254(b)(2); *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

II. ANY CLAIM THAT PETITIONER'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE OF DELAY BASED ON THE LACK OF AN EXECUTION PROTOCOL IS NOT RIPE FOR REVIEW

Article III of the Constitution limits the jurisdiction of federal courts to deciding actual "Cases" or "Controversies." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661, 186 L. Ed. 2d 768 (2013). The "ripeness" doctrine is drawn from Article III's limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003). The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997). "An issue is not ripe for review 'where the existence of the dispute itself hangs on future contingencies that may or may not occur.'" *Poland v. Stewart*, 117 F.3d at 1004.

Here, to the extent Petitioner directly claims that *his* death sentence violates the Eighth Amendment because California currently lacks an execution protocol, that claim is not ripe for review. Any delay in the execution of *Petitioner's* death sentence has *not* been attributable to the lack of an execution protocol. The execution of Petitioner's death sentence has been stayed pending final disposition of the Petition for Writ of Habeas Corpus, and all of the claims have been briefed

under 28 U.S.C. § 2254(d), and are awaiting final disposition by this Court, as well as further appellate review. At the current time, Petitioner's constitutional claims are still being litigated and there has been no final disposition. In other words, Petitioner cannot say that but for the absence of a valid lethal injection protocol, his execution would be imminent. Until execution is imminent, the existence of a valid protocol is wholly irrelevant to this petitioner, thus making any harm attributable to the lacking protocol speculative and hypothetical, which are the hallmarks of an unripe claim. *Hillblom v. United States*, 896 F.2d 426, 430 (9th Cir. 1990). The claim is therefore properly treated in the same manner as a claim under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). The claim does "not become ripe until after the denial of [petitioner's] first habeas petition." *Magwood v. Patterson*, 561 U.S. 320, ___, 130 S. Ct. 2788, 2805, 177 L. Ed. 2d 592 (2010). Therefore, a claim that the lack of an execution protocol violates Petitioner's Eighth Amendment rights is not justiciable.

III. THE CLAIM THAT PETITIONER'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE OF HIS LENGTHY CONFINEMENT UNDER A SENTENCE OF DEATH IS BARRED BY 28 U.S.C. § 2254(D)

Even assuming an exhausted and justiciable claim, or one based exclusively on delay supposedly attributable to state and federal litigation, Petitioner's claim that his death sentence violates the Eighth Amendment because he has been confined under a sentence of death since 1995 is barred by 28 U.S.C. § 2254(d). The claim is barred because there is no clearly established law from the United States Supreme Court endorsing a claim of cruel and unusual punishment for a lengthy delay between conviction and execution of a capital sentence. Accordingly, this Court is forbidden from granting relief on these grounds.

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d) constitutes a "threshold restriction," *Renico v. Lett*, 559 U.S. 766, 773 n.1, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010), on federal habeas corpus relief that "bars relitigation of any claim 'adjudicated on the merits'

in state court" subject to two narrow exceptions. *Harrington v. Richter*, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011). These exceptions require a petitioner to show that the state court's previous adjudication of the claim either (1) was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" or (2) was "'based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding.'" *Id*. at 783-84 (quoting 28 U.S.C. § 2254(d)). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id*. at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Accordingly, to overcome the bar of § 2254(d), a petitioner is required to show at the threshold that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*.; *see also Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1094, 185 L. Ed. 2d 105 (2013) (standard of § 2254(d) is "difficult to meet" and "sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was 'adjudicated on the merits in State court proceedings'").

Here, relitigation of Petitioner's Eighth Amendment claim is barred by § 2254(d). Because the Supreme Court has never held that execution following a long period of confinement under a sentence of death—for any reason whatsoever—constitutes cruel and unusual punishment, the California Supreme Court's rejection of Petitioner's Eighth Amendment claim was neither contrary to nor an unreasonable application of any "clearly established" Supreme Court precedent. *See Wright v. Van Patten*, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [petitioner's] favor, 'it cannot be said that the state court

"unreasonabl[y] appli[ed] clearly established Federal law""); *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006) (denial of habeas relief proper because Supreme Court has never held that execution after long tenure on death row constitutes cruel and unusual punishment); *see also Blair v. Martel*, 645 F.3d 1151, 1157 (9th Cir. 2011) (denial of habeas relief proper because Supreme Court has never held that delay in direct appeal violates due process). A federal court may not grant relief under § 2254(d) even if it believes that it would be unreasonable for a state court to refuse to extend a governing legal principle to a context where it should control. *White v. Woodall*, 572 U.S. ___, ___, 2014 WL 1612424 *7-*8 (2014). Section 2254(d)(1) "does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error." *Id*. at *8 (emphasis in original). Thus, federal habeas relief is barred.[3]

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[3] In our view, the statistical data referenced in the two articles the Court cited in its Order of April 10, 2014, shed no light on either the merits or cognizability of a "*Lackey*" claim. Likewise, because none of the delay Petitioner has experienced toward his execution is in any sense attributable to the absence of a finalized protocol, we submit that any "public records addressing the delay associated with the administration of California's death penalty" are not likely illuminating, though we include here for the Court's consideration three pleadings that speak to the point of the Court's inquiry. *See* Attachment 1 (Special appearance by the California Department of Corrections and Rehabilitation filed in *People v. Mitchell Carlton Sims*); Attachment 2 (Declaration of Thomas S. Patterson filed in *People v. Mitchell Carlton Sims*); Attachment 3 (Opposition to Petition for Writ of Mandate filed in *Bradley Winchell v. Matthew Cate, et al*.).

CONCLUSION

For the foregoing reasons, granting habeas relief on Claim 27 of the First Amended Petition would be impermissible.

Dated: June 6, 2014

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **v.** **MITCHELL CARLTON SIMS,** Defendant.	Case Nos. A591707 **SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE** Date: July 13, 2012 Time: 10:00 a.m. Dept: 106 Judge: Judge Larry Fidler Action Filed: May 2, 2012

BY FAX

INTRODUCTION

The Los Angeles District Attorney has asked this Court to order the California Department of Corrections and Rehabilitation to execute condemned inmates Tiequon Cox and Mitchell Sims by a one-drug method that is not contained in California's regulations. CDCR is not a party to these criminal actions, and is specially appearing here in an effort to provide helpful information to the Court. Because CDCR is not a party, the Court has no jurisdiction over it to order the relief the District Attorney seeks. Moreover, the Marin County Superior Court has permanently enjoined CDCR from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal-injection executions are promulgated in compliance with the Administrative Procedure Act. (Decl. Patterson, ex. 1) If the Court were to order CDCR to carry out the requested executions, the Court's order would necessarily conflict with the permanent injunction. Any such order would place CDCR in an untenable position because it would not be able to simultaneously comply with one order directing it to carry out executions and another order barring it from doing so.

ARGUMENT

I. CDCR IS NOT A PARTY TO THESE CRIMINAL PROCEEDINGS, AND THE COURT LACKS JURISDICTION TO ORDER CDCR TO CARRY OUT THE REQUESTED EXECUTIONS.

The Court lacks jurisdiction over CDCR to order it to carry out the executions of Sims and Cox using a one-drug method because CDCR is not a party to these criminal proceedings. The proceedings here are between the People and the two condemned inmates. No statute or court rule permits this Court to exercise authority over CDCR in a criminal case to inquire about certain lethal-injection methods, and to potentially dictate a particular method. Although Penal Code section 1193 allows a superior court to serve a death warrant on the Warden of San Quentin, this statute does not subject CDCR to this Court's authority in the manner that the District Attorney requests. (See Pen. Code, §§ 1193 and 3604; Cal. Rules of Court, rule 4.315.)

Further, the District Attorney's motion mistakenly contends that this Court can be the first to dictate an execution method, by relying on a miscellaneous provision from the Code of Civil

Procedure, section 187. That provision grants a trial court the means necessary to carry out its jurisdiction—primarily regarding procedural matters—only if the court has jurisdiction over whomever it would exercise power (*Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 116-117) and if no statute has previously allocated whatever power the court would exercise (*Phillips, Spallas & Angstadt LLP v. Fotouhi* (2011) 197 Cal.App.4th 1132, 1142). Here, because there is no jurisdiction over CDCR in this criminal proceeding, and because the Legislature already granted to CDCR the authority to establish lethal-injection standards (Pen. Code, § 3604, subd. (a)), the Court cannot grant the District Attorney's motion.

II. CDCR Is Permanently Enjoined From Carrying Out the Execution of Any Condemned Inmate by Lethal Injection.

In February, the Marin County Superior Court permanently enjoined CDCR from carrying out the execution of any condemned inmate by lethal injection unless and until new lethal-injection regulations are promulgated in compliance with the Administrative Procedure Act. (Decl. Patterson, ex. 1.) This injunction bars CDCR from executing any condemned inmate by lethal injection, regardless of whether a one-drug or three-drug method is used, until new regulations have been promulgated under the APA. If this Court were to issue an order directing CDCR to carry out the executions of inmates Sims and Cox, the order would conflict with the injunction. And it would put CDCR in the impossible position of having to somehow comply with contradictory orders from two different superior courts. In addition, a federal district court has granted Sims a stay against "all proceedings related to the execution of [the condemned inmate's] sentence of death, including but not limited to preparations for an execution and the setting of an execution date . . . ." (Decl. Patterson, ex. 3.) The relief requested by the District Attorney regarding Sims would also conflict with this federal stay.

III. CDCR Is Currently Working to Develop a One-Drug Protocol in Compliance with Its Legal Obligations.

CDCR is committed to faithfully carrying out its obligations under the law. And to this end, CDCR is defending the State's current lethal-injection regulations against legal attack (Cal. Code

Regs., tit. 15 §§ 3349, et seq.), while it is simultaneously considering alternatives to the current lethal-injection method. Specifically, CDCR is appealing both the Marin County Superior Court's invalidation of the state's three-drug protocol and that court's injunction against CDCR performing any lethal-injection executions until CDCR promulgates new regulations under the Administrative Procedures Act. (Decl. Patterson, exs. 1, 2.) In addition, under the Governor's direction, CDCR has begun the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty. (*Id.*, at ex. 2.)

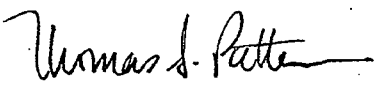
CONCLUSION

As a threshold issue, there is no jurisdiction over nonparty CDCR in these criminal cases. Moreover, CDCR has been enjoined from carrying out any executions by lethal injection until new regulations have been promulgated. Accordingly, even if this Court had jurisdiction to order CDCR to carry out the requested executions, any such order would necessarily conflict with the permanent injunction barring CDCR from carrying out executions by lethal injection.

Dated: June 28, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People of the State of California v. Mitchell Carlton Sims and Tiequon Aundray Cox**
No.: **A591707 A758447**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **June 28, 2012**, I served the attached **SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE; DECLARATION OF THOMAS S. PATTERSON SUPPORTING THE SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE; EXHIBITS 1 TO 3** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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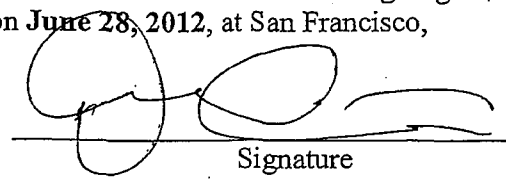
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 28, 2012**, at San Francisco, California.

D. Criswell
Declarant



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ATTACHMENT 2

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **v.** **MITCHELL CARLTON SIMS,** Defendant.	Case Nos. A591707 **DECLARATION OF THOMAS S. PATTERSON SUPPORTING THE SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE** Date: July 13, 2012 Time: 10:00 a.m. Dept: 106 Judge: Judge Larry Fidler Action Filed: May 2, 2012

BY FAX

I, Thomas S. Patterson, declare:

1. I am a Supervising Deputy Attorney General in the California Attorney General's Office, and am assigned to represent and specially appear for the California Department of Corrections and Rehabilitation in this matter. I am competent to testify to the matters set forth in this declaration, and if called to do so, I would and could so testify. I submit this declaration in support of CDCR's response to the two orders to show cause issued in the above-captioned cases, which order CDCR to appear before this Court and show cause why an execution using a single-drug method sought by the Los Angeles District Attorney cannot be performed on two condemned inmates, Defendants Cox and Sims.

2. The Marin County Superior Court, in the case of *Sims v. CDCR*, Case No CIV1004019, issued a permanent injunction on February 21, 2012, which prohibits the CDCR from "carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injections are promulgated in compliance with the Administrative Procedure Act." A copy of this judgment and injunction is attached as exhibit 1.

3. CDCR is already considering the relief that the Los Angeles District Attorney seeks, namely, the development of a single-drug protocol, although CDCR's protocol would apply to all condemned inmates, not just Sims and Cox. The notice of appeal in the *Sims* action, which was filed on April 26, 2012, states that the Governor has directed CDCR to "begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty." A copy of the notice of appeal filed in the *Sims* action is attached as exhibit 2.

4. The United States District Court for the Northern District of California in *Morales v. Cate*, Case Nos. 5-6-cv-219 and 5-6-cv-926, issued an order granting Defendant Sims's motion to intervene and for a stay of execution on January 19, 2011. A true and correct copy of this order is attached as exhibit 3. The order granted Sims a stay to the same extent as the court had previously granted some of the other plaintiffs in that matter against "all proceedings related to the execution of [the condemned inmate's] sentence of death, including but not limited to preparations for an execution and the setting of an execution date . . . ."

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, on June 28, 2012.

Thomas S. Patterson
SupervisingDeputy Attorney General

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EXHIBIT 1

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

UNLIMITED JURISDICTION

MITCHELL SIMS,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,

Defendants.

ALBERT GREENWOOD BROWN, JR. and KEVIN COOPER,

Plaintiffs-in-Intervention.

No. CIV1004019

Action Filed: August 2, 2010

~~[PROPOSED]~~ FINAL JUDGMENT AS TO PLAINTIFF MITCHELL SIMS

Dep't: E
Judge: Hon. Faye D'Opal

Plaintiffs' motion for summary judgment came on for hearing by this Court on December 16, 2011, at 8:30 a.m. Sara Eisenberg and Jaime Huling Delaye appeared on behalf of Plaintiff Mitchell Sims. Sara Cohbra specially appeared on behalf of Plaintiff-in-intervention Albert Greenwood Brown. Cameron Desmond appeared on behalf of Plaintiff-in-intervention Kevin Cooper. Deputy Attorneys General Jay M. Goldman, Michael Quinn and Marisa Kirchenbauer appeared on behalf of Defendants California Department of Corrections and Rehabilitation and Matthew Cate.

After considering the moving, opposing and reply papers, the file in this matter, and the arguments presented at the December 16, 2011 hearing, and good cause appearing therefor, the Court GRANTED summary adjudication on Plaintiffs' second cause of action for declaratory relief to invalidate Defendant California Department of Corrections and Rehabilitation's lethal injection protocol (Cal. Code Regs., tit. 15, §§3349-3349.4.6, "Administration of the Death Penalty"), and DENIED summary adjudication on Plaintiffs' first cause of action. Subsequently, Plaintiff Mitchell Sims filed a request for dismissal of his first cause of action, and the dismissal of Sims' first cause of action was entered by the Court on January 26, 2012.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that final judgment is entered in favor of Plaintiff Mitchell Sims and against Defendants California Department of Corrections and Rehabilitation and Matthew Cate as follows:

1. Defendants substantially failed to comply with the requirements of California's Administrative Procedure Act ("APA") when the lethal injection protocol (Cal. Code Regs., tit. 15, §§ 3349-3349.4.6, "Administration of the Death Penalty") was enacted, in violation of Government Code Section 11350(a), as is more fully set forth in the Court's December 19, 2011 Final Ruling, attached hereto as Exhibit A and incorporated into this judgment as if set forth in full.

DECLARATORY RELIEF

2. The lethal injection protocol (Cal. Code Regs., tit. 15, §§ 3349-3349.4.6, "Administration of the Death Penalty") is invalid for substantial failure to comply with the requirements of the APA.

INJUNCTION

3. Defendant California Department of Corrections and Rehabilitation is permanently

enjoined from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injection executions are promulgated in compliance with the Administrative Procedure Act.

4. Defendant California Department of Corrections and Rehabilitation is permanently enjoined from carrying out the execution of any condemned inmate by lethal gas unless and until regulations governing execution by lethal gas are drafted and approved following successful completion of the APA review and public comment process, as set forth at page 14, line 26 through page 15, line 3 of the Court's Final Ruling, attached hereto as Exhibit A.

5. Defendant California Department of Corrections and Rehabilitation is permanently enjoined from carrying out the execution of any female inmate unless and until regulations governing the execution of female inmates are drafted and approved following successful completion of the APA review and public comment process, as set forth at page 14, line 26 through page 15, line 3 of the Court's Final Ruling, attached hereto as Exhibit A.

DATED: 2-21, 2012.

HONORABLE FAYE D'OPAL
JUDGE OF THE SUPERIOR COURT

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

MITCHELL SIMS,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,

Defendants.

ALBERT GREENWOOD BROWN, JR. and KEVIN COOPER,

Plaintiffs-in-Intervention.

CIV 1004019

FINAL RULING RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

After issuance of the court's tentative ruling regarding Plaintiffs' motion for summary judgment, argument requested by defendants was heard on December 16, 2011. Attorneys Sara J. Eisenberg and Jaime Huling-Delaye appearing on behalf of Plaintiff Mitchell Sims, attorney Sara Cohbra on behalf of Intervenor Albert Brown, and attorney Cameron Desmond on

behalf of Intervenor Kevin Cooper. Attorneys Jay Goldman, Michael Quinn and Marisa Kirchenbauer appeared on behalf of Defendant California Department of Corrections and Rehabilitation, et al. Following respective arguments by attorney Goldman and attorney Eisenberg, the Court finds no new evidence or other grounds on which to base a change in its tentative ruling, the core of which establishes that Plaintiffs met their burden to prove that the identified defects within the entire regulatory scheme, collectively, if not singly, constitute a substantial failure by the Department to comply with the procedures mandated by the Administrative Procedures Act, resulting in invalidation of the lethal injection administration and protocol. The court adopts its tentative ruling, as briefly modified, as the Final Ruling.

RULING

Plaintiffs' motion for summary judgment (Code Civ. Proc. § 437c(p)(1)), on their Declaratory Relief action to invalidate Defendant California Department of Corrections and Rehabilitation's three-drug lethal injection protocol (Cal. Code Regs., tit. 15, §§ 3349-3349.4.6, "Administration of the Death Penalty" (hereafter Regs., § _____), is granted as follows:

A. For the reasons discussed below, the court finds the undisputed evidence supports Plaintiffs' second cause of action alleging Defendant substantially failed to comply with the mandatory procedural requirements of the Administration Procedures Act (APA) when it adopted these regulations, in violation of Govt. Code § 11350(a).

1.

The Initial Statement of Reasons (ISOR) and the Final Statement of Reasons (FSOR) each *substantially failed to comply* with the APA requirements by not considering and describing alternative methods to the three-drug protocol; by failing to provide a sufficient rationale for rejecting these alternatives; and by failing to explain, with supporting documentation, why a

one-drug alternative would not be as effective or better than the adopted three-drug procedure, in violation of § 11346.2(b)(3)(A) and § 11346.9(a)(4). "If an agency adopts a regulation without complying with the APA requirements it is deemed an 'underground regulation' (Cal. Code Regs., tit. 1, § 250) and is invalid. [Citation.]." (*Naturist Action Committee v. California State Dept. of Parks & Recreation* (2009) 175 Cal.App.4th 1244, 1250.)

In the ISOR, which statement was repeated verbatim in the FSOR, the Department described the purpose and rationale of the three-drug procedure and its decision to reject alternatives to the three-chemical protocol it was proposing, in its effort to comply with Govt. Code § 11346.2(b)(1):

> In light of the Memorandum of Intended Decision, and as directed by the Governor, the CDCR reviewed all aspects of the lethal injection process and its implementation. As an integral part of the review, the CDCR considered alternatives to the existing three-chemical process, including a one-chemical process. Additionally, in developing this proposed regulation, the CDCR was guided by the United States Supreme Court's decision in *Baze v. Rees* (2008) 553 U.S. 35, which held that the State of Kentucky's lethal injection process, and the administration of the three-chemicals, did not constitute cruel and unusual punishment under the Eighth Amendment. CDCR also reviewed all available lethal injection processes from other states and the Federal Bureau of Prisons, and reviewed the transcripts and exhibits in the *Morales v. Tilton* case. Based on the information considered, the CDCR revised the lethal injection process as set forth in this proposed regulation. (Ex. 6, p. 2; Ex. 7, p. 2 emphasis added.)

The rationale for adoption of the three-drug procedure, as underlined, is false. Defendant concedes that the decision to adopt the three-drug protocol was decided in May 2007, before the decision in the U.S. Supreme Court case of *Baze v. Rees* (2008) 553 U.S. 35,

upholding Kentucky's similar three-drug lethal injection protocol from an Eighth Am. challenge. (Undisputed Fact No. 8-10)

In its opposition, the Department admits:

> The ISOR and FSOR inaccurately stated that CDCR's decision to adopt the three-drug lethal-injection method found in the regulations and to reject the one-drug alternative preferred by Plaintiffs, was primarily based on the United States Supreme Court's decision in *Baze v. Rees* (2008) 553 U.S. 35. (Oppo. p. 20, n. 6 ¶ 4.)

The CDCR also concedes:

> The decision to use the three-drug procedure was made in May 2007 by Governor Schwarzenegger. (Undisputed Fact No. 9) Thereafter, in 2008, the Supreme Court upheld the constitutionality of a three-drug method, and refused to determine the constitutionality of a one-drug method, in *Baze v. Rees*. Subsequently, the decision to use the three-drug procedure was not revisited by Governor Schwarzenegger in the course of drafting the lethal injection regulations. (Undisputed Fact No. 10, Ex. 9, p. 4)

Additionally, the Undisputed Evidence shows the ISOR did not provide any description of the "one-chemical process". (Undisputed Fact No. 2) The ISOR did not identify or describe any alternatives to the "one-chemical process." (Undisputed Fact No. 3); nor did Defendant provide any reasons for rejecting any alternative to the three-chemical process that were purportedly considered. (Undisputed Fact No. 4)

The FSOR states, in conclusory language, the same reason for selecting the three-drug procedure as described in the ISOR, *ante*. It is also undisputed the FSOR states, without elaboration: "The Department has determined that no alternative considered would be more

effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons." (Undisputed Fact No. 5, Ex. 7 p. 9).

Also, nowhere in the FSOR is there any *description* of the alternative(s) the CDCR considered, or any discussion "*with supporting information*" explaining why the one-drug method would not be: 1 – more effective in carrying out the purpose of the regulation than the three-drug procedure; or 2 – would be as effective and less burdensome to the condemned inmate, all in violation of § 11346.9(a) (4).

The failure to discuss the one-drug method is a particularly significant omission, since use of a barbiturate-only protocol was raised by at least one commenter (Ex. 13, p. 48, no. 13); several commenters make the identical assertion that use of pancuronium bromide is unnecessary, dangerous, and creates a risk of excruciating pain. (Ex. 13, p. 48, no. 12; p. 50, no. 18, 19; p. 51, no. 20); the CDCR stated in its responses to the court's inquiry in the federal action *Morales v. Cate, et al.*, a single-drug formula consisting of five grams of sodium thiopental is sufficient to bring about the death of a condemned inmate. (Undisputed Fact No. 12); and CDCR's own expert John McAuliffe testified that after conducting substantial research for his review of OP 770, he recommended to top CDCR officials to adopt the single-drug formula. (Undisputed Fact No. 13.)

The Department's attempt to fix any omission through its brief statement in the Addendum to the FSOR, that it selected the three-drug method in reliance on the decision in *Baze v. Rees* (2008) 553 U.S. 35, is unavailing. As conceded by the Department, *Baze v. Rees* was not the reason it chose the three chemical method, nor was it the reason for rejecting the one drug method, since Governor Schwarzenegger chose the three chemical method in 2007 before the

Supreme Court decision was issued and there was never any discussion of an alternative method by the Governor at that time.

Also, the Addendum fails to describe any alternative, and does not describe Defendant's reasons for rejecting an alternative "with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation." (Govt. Code §11346.9(a) (4).)

Importantly, inclusion of this information only in the Addendum to the FSOR, even if adequate, does not promote "meaningful public participation" (*Pulaski v. Occupational Safety & Health Stds. Board.* (1999) 75 Cal.App.4th 1315, 1327-1328), as the public had no opportunity to comment before the corrections were submitted to OAL.

These defects infect the entire regulatory scheme, and the lethal injection administration and protocol, as a whole, is declared to be invalid.

2.

The ISOR fails to describe the purpose and/or the rationale for the agency's determination why certain regulations to be implemented five days prior to the execution, were reasonably necessary. (Govt. Code § 11346.2; Regs., tit. 1, § 10 (b).) The ISOR does not explain why it is necessary for unit staff to monitor the inmate and to complete documentation *every fifteen minutes* starting five days before execution (§ 3349.3.4(a)(2)); why *all* personal property must be removed from the inmate's cell (§ 3349.3.4(b)(3)); or why inmates must be bound with waist restraints during visits. (§ 3349.3.4(c) (3).) The ISOR merely summarizes the different

procedures required five days prior to the execution, without explaining why the specific provisions are necessary and/or how a specific provision fills that need. (Undisputed Fact No. 20) (ISOR Ex. 6, p. 16)

Likewise, Regs., tit. 15, §3349.4.5, which discusses the chemicals to be used in the lethal injection and the administration of these chemicals, summarizes the procedure but does not contain information explaining the rationale for the agency's determination that the three-drug protocol is "reasonably necessary to carry out the purpose for which it is proposed." (Govt. Code § 11346.2(b).) This regulation itself refers to the *Baze v. Rees* decision, but as noted above, this decision was not the basis upon which the Department decided to adopt the three-drug protocol.

Defendant's attempt to cure this deficiency in its Addendum to the FSOR comes too late in the rulemaking process. Accordingly, these individual regulations are deemed invalid.

Additional regulations Plaintiffs have cited in Appx. B to the memorandum of points and authorities (p. 12, n. 4), are not properly before the court as that document exceeds the page limit approved by the court.

3.

The undisputed evidence establishes the FSOR did not summarize and/or respond to two dozen or so public comments, in violation of Govt. Code § 11346.9(a) (3). (Undisputed Fact No. 22-30) It is also undisputed that in all, the Department received over 29,400 comments in writing and from the public hearings. (Defendant's Undisputed Fact No. 2)

"Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute. Where there is compliance as to all matters of substance, technical deviations are not to be given the stature of noncompliance. Substance prevails over form." (*Pulaksi, supra*, 75 Cal.App.4th at p. 1328.) Despite the large number of public comments properly addressed by the Department, the failure to summarize or respond to these comments is not a "technical defect." Defendant does not assert that the crux of any of these comments was addressed in other responses. The purpose of the APA – "to advance meaningful public participation in the adoption of administrative regulations by state agencies", is met by giving "interested parties an opportunity to present statements and arguments at the time and place specified in the notice and calls upon the agency to consider all relevant matter presented to it." (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 908-909.)

By not summarizing and responding to these comments, the Department did not give substance to the central APA requirement that all interested persons be afforded a meaningful chance to have their objections heard and to inform the rulemaker's decision; i.e., to allow agencies "to learn from the suggestions of outsiders and [] benefit from that advice." (*San Diego Nursery Co. v. Agricultural Labor Relations Board* (1979) 100 Cal.App.3d 128, 142-143.) Additionally, the undisputed evidence establishes that some of the Department's responses to comments are incomplete, incorrect, or inadequate. (Undisputed Fact No. 31-36)

For example, about 15 commenters submitted comments objecting to the use of the second drug, pancuronium bromide (the paralytic), on *various medical and humanitarian* grounds. (Undisputed Fact No. 31) Despite the different grounds, the Department answered with the

identical response to each comment summary: "The United States Supreme Court in *Baze v. Rees* (2008) 553 U.S. 35 upheld the use of the three chemicals, including pancuronium bromide, identified in these regulations. Accommodation: None." (Undisputed Fact No. 32) This broad, conclusory response is not a sufficient answer to explain why the Department initially selected, and continues to endorse the use of the second drug—pancuronium bromide, in light of the specific medical and humanitarian concerns raised in these comments. The inadequacy of the response is especially troubling when considering the Department's admission that the three-drug protocol was originally adopted without regard to the decision in *Baze v. Rees* (2008) 553 U.S. 35, and with no consideration of an alternative, one-drug protocol at that time; nor since that time has the Department described any alternative or explained why any alternatives would not be equally or more effective than the method with pancuronium bromide.

On this record, the court finds the FSOR substantially failed to comply with this requirement, invalidating the adoption of these regulations.

4.

It is undisputed that Defendant did not mail a Notice of the Proposed Action to three civil rights groups prior to the close of the initial public comment period (January 20, 2009), and seven condemned inmates, all of whom had requested notice, in violation of Govt. Code § 11346.4 (a)(1). (Undisputed Fact No. 38-41) It is also undisputed that the three organizations and these inmates submitted comments during the initial comment period, ending January 20, 2009. (Undisputed Fact No. 38-41).

As to the population of inmates generally, Defendant presented evidence it posted the Notice of Proposed Regulations throughout the departments and cell blocks in San Quentin, and at other penal institutions in the State. (Undisputed Fact No. 41) Plaintiffs have presented evidence that this may have been inadequate, as only the top sheet of these regulations was visible through the glass cases. (Reply p. 10, Delaye decl. Ex. A) However, Govt. Code § 11346.4(f) provides: "The failure to mail notice to any person as provided in this section shall not invalidate any action taken by a state agency pursuant to this article." In light of the statute, and the fact the comments of these organizations and persons were prepared and submitted to the Department, a triable issue exists whether Defendant's violation of the APA is sufficient to invalidate the regulations. Summary judgment is not granted on this ground.

5.

The undisputed evidence establishes Defendant did not make the complete rulemaking file available for public review as of the date the Notice of the Proposed Action was published, in violation of Govt. Code § 11347.3(a).

The Department did not make the rulemaking file available for public inspection until June 11, 2009, six weeks after the publication of the notice of proposed action on May 1st, and less than three weeks before the end of the public comment period on June 30, 2009. (Undisputed Fact No. 45)

This violation is a substantial failure to comply with the APA, which defect undermined meaningful public participation in the rulemaking process.

Contrary to Mr. Goldman's argument, this court finds no support in the legislative purpose behind the APA to require Plaintiffs to show prejudice from Defendant's significant delay in making the rulemaking record available for public review.

6.

The rulemaking file itself was incomplete, in violation Govt. Code § 11347.3(b). It is undisputed the rulemaking file did not contain several documents upon which the Department stated it relied in drafting these regulations: the San Quentin Operational Procedure, OP 770, on which much of the proposed regulations were based; the transcripts, Judge Fogel's Statement of Intended Decision, and the experts reports or declarations admitted as exhibits in the *Morales v. Tilton* case; the lethal-injection process for the Federal Bureau of Prisons; responses by 15 states to the survey sent out by the CDCR and upon which it considered in drafting the revision to OP 770. (Oppo. p. 12, Undisputed Fact No. 50-63)

In light of this defect, the court finds the Department substantially failed to comply with this requirement of the APA.

7.

Some of the regulations do not comply with the "Clarity" standard under the APA, which is defined as "written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." (Govt. Code § 11349(c); Regs., tit. 1, § 16.)

Regs. § 3349.3.2.(a)(1), which discusses the Warden's review of information bearing on the inmate's sanity, conflicts with the agency's description of the effect of this regulation in the Addendum to the FSOR. (See Ex. 8, p. 11)

The explanation that information about the inmate's sanity can be received at any time prior to the execution, conflicts with the language of the regulation which limits information from the inmate's attorney to 7 days prior to the execution, at the latest. This creates an ambiguity in violation of the APA and this individual regulation is invalid. (Regs., tit. 1, § 16(a)(2).)

Conversely, the court finds no conflict between the regulation distinguishing the places a state-employed chaplain and an non-state employed "Spiritual Advisor" may communicate with the inmate (Regs. § 3349.3.4(e)), and the Department's explanation of the effect of this regulation in its responses to comments. (Ex. 50, pp. 61-63)

The use of the term "reputable citizen" in Regs. § 3349.2.3, which provision restricts the number of witnesses in the viewing area, may have more than one meaning and is ambiguous in violation of Cal. Code Regs., tit. 1, § 16 (a)(1). It is undisputed that this term is no where defined in the regulations or in Pen. Code § 3605(a). It is also undisputed the term "citizen" can mean the citizen of the United States or the citizen of a foreign country, or any non-governmental employee. (Undisputed Fact No. 67) This term is archaic and ambiguous, and is invalid. The Department should include a definition of this term along with the other definitions currently found in Regs. § 3349.1.1.

Plaintiffs have attached Appendix C, which contains other putative examples of ambiguous terms. These additional arguments are not properly before the court as they exceed the expanded 35-page limit approved by the court.

8.

Plaintiffs' claim that certain regulations fail to meet the "Consistency" standard of the APA

defined as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Govt. Code § 11349(d)), is rejected.

Plaintiffs have no standing to argue that the treatment of female condemned inmates under Regs. § 3349.3.6(e) violates the Equal Protection Clauses of the state and federal constitutions, claiming the operation of that provision denies female inmates, who have to be transferred 150 miles from the Central California Women's Facility to San Quentin, some the same rights as male condemned inmates housed at San Quentin, e.g., 24-hour telephone access to their counsel (§ 3349.3.4(d),(4)(C); access to spiritual advisors (§§ 3349.3.4(e); 3349.4.2(b)(1)); and priority visiting privileges. (§ 3349.3(i)(1).)

The all-male plaintiffs do not have standing to raise the Equal Protection challenges on behalf of condemned female inmates, because they do not claim to suffer the disparate treatment they hypothesize. (See *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 255.) "One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation. [Citations.]" (*People v. Superior Court* (2002) 104 Cal.App.4th 915, 932, internal quotations and citations omitted; 7 Witkin, Summ. Cal. Law (10th ed. 2005) Const. Law, §76, pp. 168-169.)

Also, there is no merit to Plaintiffs' claim that Regs. § 3349.1.2(a)(4)(B), "Recruitment and Selection Process", conflicts with the order by the Federal District Court in the 2005 decision of *Plata v. Schwarzenegger*, where the Judge appointed a Receiver to take control over positions "related to the delivery of medical health care" at CDCR: "The Receiver shall have the duty to control, oversee, supervise, and direct all administrative, personnel, financial, accounting,

contractual, legal, and other operational functions of the medical delivery component of the CDCR." (Request to Take Judicial Notice, Ex. D, p. 4, Undisputed Fact No. 72) Plaintiffs present no evidence that the District Court's order was at all concerned with the execution protocols at San Quentin. Also, execution is not tantamount to the delivery of medical services. (See *Morales v Tilton* (N.D. Cal. 2006) 465 F.Supp. 2d 972, 983 ["Because an execution is not a medical procedure, and its purpose is not to keep the inmate alive but rather to end the inmate's life, . . ."].)

9.

There is no merit to Plaintiffs' next contention that the regulations substantially fail to comply with the APA because the regulation incorporates documents by reference, without subjecting those documents to the APA review process, in violation of Cal. Code Regs., tit. 1, § 20. In responses to comments about the procedures for execution by lethal gas and the execution of condemned female inmates, the Department indicated these areas would be the subjects of separate documents and/or regulations. (Undisputed Fact No. 75-76).

At the time of approval of the subject regulations, neither referenced document existed, nor are these documents referred to in the language of the regulations. On this record, there is insufficient evidence to show the regulations under review attempted to incorporate by reference these proposed documents within the meaning of the law, and therefore the regulations do not violate this requirement of the APA.

That said, unless and until these prospective, separate documents/regulations have been drafted and approved following successful completion of the APA review and public comment

process, the Department has no authority under Regs., tit. 15, §§ 3349-3349.4.6, to carry out the execution of condemned inmates by lethal gas, or to execute any condemned female inmate.

10.

The Department has failed to include a fiscal impact assessment of the administration of execution by lethal injection as proposed by these regulations, in violation of Govt. Code § 11346.5(a). There is uncontradicted evidence that there will likely be increased costs from hiring and/or training of additional members for the lethal injection sub-teams; plus overtime compensation for the supporting staff; as well as the additional costs of the three drug method vs. the one-drug method; and also the reimbursement by the CDCR for extra state and local law enforcement personnel to handle security matters, crowd control, and traffic closures prior to and on the night of the execution. (Undisputed Fact No. 78-80) Former San Quentin Warden Jeanne Woodford stated in a public comment, that past executions by lethal injection have cost between $70,000.00 and $200,000.00 each. (Undisputed Fact No. 79) It is no excuse, as Defendant argues, that either fiscal estimates or supporting documents were not required because "the costs and fiscal impacts of lethal-injection executions are caused by the fact that the Penal Code, not a regulation, mandates this type of execution." (Oppo. p. 13:20-21)

The APA gives the public a right to know and to comment on the fiscal impact of implementing a regulation adopted pursuant to a state statute, if for no other reason than to recommend more efficient or less costly methods of accomplishing the statutory purpose. The Department

was required to prepare the fiscal estimate as prescribed by the Department of Finance. Its failure to do so was substantial noncompliance with the procedural requirements of the APA.

B. Separately, the court denies Plaintiffs' motion for summary judgment on their first cause of action, which alleges there is no substantial evidence in the rulemaking file to show the use of the second drug – pancuronium bromide and/or the third drug – potassium chloride are "reasonably necessary" to effectuate the purpose for which the regulations are proposed, as required by Govt. Code §§ 11342.2, and 11350(b) (1). (Complaint ¶s 30-41)

Since this is Plaintiffs' motion for summary judgment, Plaintiffs have the burden to show there is no substantial evidence in the rulemaking file, *when considered in its entirety*, to support the agency's determination the three-drug injection protocol is reasonably necessary to effectuate the purpose of the statute. (Govt. Code §§ 11349(a) [defining "Necessity"], 11350(b) (1); *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336-337.)

For our purposes, "substantial evidence" is defined as whether, based on the entire record, there is evidence which is reasonable in nature, credible, and of solid value, contradicted or uncontradicted, which will support the agency's determination. (*Desmond, supra*, 21 Cal.App.4th at p. 336.)

It is undisputed the rulemaking file contains documents favorable to Defendant; e.g., that caution against acceptance of using thiopental alone to guarantee a lethal effect. (Undisputed Fact No. 85, Ex. 55); or confirms the experience in other states that proper application of the same three-drug method will result in a rapid death of the inmate without undue pain or suffering. (Undisputed Fact No. 86, Ex. 56, p. 931)

In fact, one of the articles relied upon by Plaintiffs (Undisputed Fact No. 90) indicates that it might not be possible to administer enough thiopental by itself, to guarantee a lethal effect. (Undisputed Fact No. 90, Ex. 58, pp. 2, 12)

On this record, the court finds that a triable issue of fact exists over whether the rulemaking file contains substantial evidence to support Defendant's determination that the three-drug protocol is reasonably necessary to implement the statutory mandate to provide for a lethal injection alternative. The motion for summary judgment on this ground is denied.

Plaintiffs also argue in a footnote that the rulemaking file does not contain substantial evidence to support the CDCR's determination of necessity of several other regulations. (MPA p. 34, n. 20.) It is improper to briefly raise these issues in a footnote and expect the court to conduct a substantial evidence review. Plaintiffs have provided no citation to the law; to the record, or any analysis of the law to the facts. By attempting to raise these additional issues in a footnote, Plaintiffs are violating the intent and spirit of the court's order allowing them to file an oversized brief. These issues are not properly before the court, and the court refuses to address these issues at this time.

Plaintiffs' Request to Take Judicial Notice of documents filed in separate federal actions, is granted. (Ev. Code § 452(d).) Defendant's objections to these requests are Overruled. Defendant's evidentiary objections Nos. 1-3 are all Overruled.

Plaintiffs' shall submit a Judgment in this matter.

Dated: December 19, 2011

Judge Faye D'Opal

STATE OF CALIFORNIA)
COUNTY OF MARIN)

MITCHELL SIMS VS. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
ACTION NO.: *CIV 1004019*
(PROOF OF SERVICE BY MAIL – 1013A, 2015.5 C.C.P.)

I AM AN EMPLOYEE OF THE SUPERIOR COURT OF MARIN; I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE-ENTITLED ACTION; MY BUSINESS ADDRESS IS CIVIC CENTER, HALL OF JUSTICE, SAN RAFAEL, CA 94903. ON December 19, 2011 I SERVED THE WITHIN
FINAL RULING RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN SAID ACTION TO ALL INTERESTED PARTIES, BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT SAN RAFAEL, CA ADDRESSED AS FOLLOWS:

SARA EISENBERG *HOWARD RICE NEMEROVSKI CANADY FALK &RABKIN, A PROFESSIONAL CORPORATION* *THREE EMBARCADERO CENTER, 7TH FLOOR* *SAN FRANCISCO, CA 94111*	*JAY GOLDMAN* *DEPUTY ATTORNEY GENERAL* *455 GOLDEN GATE AVENUE, STE. 11000* *SAN FRANCISCO, CA 94102*
JAN NORMAN *1000 WILSHIRE BLVD. #600* *LOS ANGELES, CA 90017*	*NORMAN HILE* *400 CAPITOL MALL* *SUITE 300* *SACRAMENTO, CA 95814*

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: 12-19-11

EXHIBIT 2

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(Exempt from filing fees—
Gov. Code, § 6103.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

MITCHELL SIMS, Plaintiff, v. **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,** Defendants.	Case No. CIV1004019 **NOTICE OF APPEAL**

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that defendants the California Department of Corrections and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims.

The state has expended significant time and resources developing a three-drug lethal-injection protocol for carrying out the death penalty, and this protocol conforms with a procedure that has been upheld by the United States Supreme Court. This notice of appeal is filed because the state's three-drug protocol is the law of California and should not be abandoned without

appellate review, and because the superior court made fundamental errors in issuing its decision. At the same time, appellants recognize that the availability of the three drugs comprising the current protocol is uncertain. If it becomes certain in the future that the drugs needed to implement the protocol have, in fact, become unavailable, appellants will reevaluate whether this appeal, or any portions of it, should continue to be prosecuted. In the meantime, under the Governor's direction, the California Department of Corrections and Rehabilitation will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty.

Dated: April 26, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

Thomas S. Patterson

THOMAS S. PATTERSON
Supervising Deputy Attorney General
Attorneys for Defendants
California Department of Corrections and Rehabilitation and Matthew Cate

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **M. Sims v. CDCR, et al.**
No.: **CIV1004019**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 26, 2012, I served the attached

NOTICE OF APPEAL

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2012, at San Francisco, California.

T. Oakes
Declarant

Signature

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EXHIBIT 3

E-Filed 1/19/2011

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Michael Angelo MORALES et al., Plaintiffs, v. Matthew CATE, Secretary of the California Department of Corrections and Rehabilitation, et al., Defendants.	Case Number 5-6-cv-219-JF-HRL Case Number 5-6-cv-926-JF-HRL DEATH-PENALTY CASE ORDER GRANTING MOTION TO INTERVENE [Doc. No. 467]

Plaintiff Michael Angelo Morales, a condemned inmate at San Quentin State Prison, initiated this challenge to the constitutionality of Defendants' protocol for executions by lethal injection. Plaintiff Albert Greenwood Brown, also a condemned prisoner, subsequently moved to intervene. The Court granted the motion, noting that "Brown's federal claims are virtually identical to those asserted by . . . Morales." *Morales v. Cate*, No. 5-6-cv-219-JF-HRL, 2010 WL 3751757, at *1 (N.D. Cal. Sept. 24, 2010). Pursuant to guidance from the Court of Appeals, this Court also stayed Brown's execution. *Morales v. Cate*, No. 5-6-cv-219-JF-HRL, 2010 WL 3835655 (N.D. Cal. Sept. 28, 2010).

Now before the Court is the motion of Mitchell Carlton Sims and Stevie Lamar Fields to intervene as Plaintiffs in this litigation. Both Sims and Fields are similarly situated to Morales

and Brown in that they are condemned prisoners whose executions are not otherwise stayed and whose claims in their complaint in intervention are virtually identical to those asserted by Morales and Brown. Accordingly, Sims and Fields are entitled to intervene and, like Morales and Brown, to have their executions stayed until the present litigation is concluded.

Defendants do not oppose the motion on the merits, (Doc. No. 472 at 2), but they urge the Court to defer ruling on the motion until the California Supreme Court has determined whether the proposed intervenors' attorneys, Michael Laurence and Sara Cohbra, who are affiliated with the Habeas Corpus Resource Center (HCRC), are authorized to participate in actions such as this one. However, Laurence and Cohbra are members of the bar of this Court, and as such, they "may practice in this Court." Civil L.R. 11-1(a). The question of the scope of the HCRC's authority under state law is not a federal question and has no bearing on the merits of the present motion. If the California Supreme Court ultimately determines that Laurence and Cohbra must withdraw as counsel in this case, this Court will permit an appropriate substitution of counsel at that time.

Accordingly, and good cause appearing therefor, the motion of Mitchell Carlton Sims and Stevie Lamar Fields to intervene as Plaintiffs in this litigation is granted; the motion hearing presently calendared for February 4, 2011, is hereby vacated. All proceedings related to the execution of the intervenors' sentences of death, including but not limited to preparations for an execution and the setting of an execution date, are hereby stayed on the same basis and to the same extent as in the case of Plaintiffs Morales and Brown.

IT IS SO ORDERED.

DATED: January 19, 2011

JEREMY FOGEL
United States District Judge

ATTACHMENT 3

ATTORNEY GENERAL'S
OFFICE COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

FILED

MAY 2 2 2014

COURT OF APPEAL - THIRD DISTRICT
DEENA C. DAVIS CLERK

BY _____ Deputy

BRADLEY S. MITCHELL,

Petitioner,

Case No. C070551

v.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, et al.,

Respondents.

MICHAEL ANGELO MORALES,

Real Party in Interest.

OPPOSITION TO PETITION FOR WRIT OF MANDATE

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Court of Appeal
Third Appellate District

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INTRODUCTION

Petitioner Bradley Winchell asks this Court to issue a writ of mandate requiring the California Department of Corrections and Rehabilitation to develop a new state lethal-injection process in the manner he believes makes the most sense. The petition does not seek to compel the performance of a ministerial duty, which is the primary purpose of mandamus relief. Rather, it mistakenly asserts that CDCR has abused its discretion—not because CDCR's choices have been arbitrary or unreasonable—but because litigation challenging the lethal-injection protocol has delayed implementation of the death penalty. These allegations cannot support mandamus relief.

The Legislature vested CDCR with discretion in developing the state's lethal-injection process. And CDCR has exercised its discretion appropriately. CDCR's current lethal-injection protocol is similar to a protocol deemed constitutional by the United States Supreme Court in *Baze v. Rees* (2008) 553 U.S. 35. Although condemned inmates' legal challenges have unfortunately delayed the protocol's implementation, CDCR has appropriately defended the protocol against these challenges. And to reduce further delay from the current litigation challenging the protocol, CDCR has begun considering alternative protocols for the purpose of developing new regulations for an alternative lethal-injection process. Although Petitioner disagrees with how CDCR is proceeding, he concedes that CDCR's actions have been reasonable.

The petition should be denied because mandamus is unavailable to substitute Petitioner's judgment for CDCR's. The petition should also be denied because the relief sought—namely, the development of an alternative lethal-injection protocol—is already underway. Finally, even if the petition could frame a facially viable request for writ relief (which it cannot), it should be denied because the requested relief should be sought

in the First District Court of Appeal, which is currently reviewing CDCR's regulatory obligations related to its lethal-injection protocol.

STATEMENT OF FACTS

The Legislature has vested CDCR with discretion to develop procedures for the execution of condemned inmates by lethal injection. (Pen. Code, § 3604 subd. (a).) In May 2007, CDCR issued Operational Procedure 770 (O.P. 770), which set forth a detailed protocol that addressed the entire process of housing and executing condemned inmates at San Quentin. (*Morales v. Cal. Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 729, 733-35.)

Condemned inmates Michael Morales and Mitchell Sims filed a complaint in Marin County Superior Court for declaratory and injunctive relief against CDCR, seeking to bar any executions until the state's execution protocol was promulgated as regulations under the Administrative Procedure Act (APA). (Ex. 1, pp. 1-8.) In October 2007, the court granted their summary-judgment motion and enjoined O.P. 770's enforcement until and unless it was promulgated under the APA. (Ex. 2, pp. 40-43.)

CDCR appealed that ruling, and on November 21, 2008, the Court of Appeal for the First Appellate District upheld the superior court's decision. (*Morales v. Cal. Dept. of Corrections and Rehabilitation*, *supra*, 168 Cal.App.4th at p. 732.) The opinion affirmed in full the superior court's summary-judgment ruling. (*Ibid.*) The court concluded that O.P. 770 was a rule of general application because it declared how a certain class of inmates will be treated, and that it was not subject to the single-facility exception because "it directs the performance of numerous functions beyond San Quentin's walls." (*Id.* at pp. 739-740.)

In compliance with *Morales*, CDCR promulgated regulations for a three-drug-lethal-injection protocol. In August 2010, Sims again filed a

lawsuit in Marin County Superior Court seeking to invalidate the regulations for failing to substantially comply with the APA. (Ex. 3.) In December 2011, the superior court granted plaintiff summary judgment in favor of plaintiffs, ruling that CDCR did not substantially comply with the APA's procedural requirements. (Ex. 4, p. 88.) On February 21, 2012, the court issued judgment, invalidating CDCR's lethal-injection protocol, and permanently enjoining CDCR from executing any condemned inmate by lethal injection until new regulations were promulgated in compliance with the APA. (Ex. 5, p. 106:18-107:13.)

On April 26, 2012, CDCR filed a notice of appeal from the Marin County Superior Court's judgment. (Ex. 6.) In the notice of appeal, the Department explained that it was pursuing an appeal because, among other reasons, the regulations conformed to the procedure the United States Supreme Court upheld in *Baze v. Rees*. (*Id.* at p. 127:25-128:8) It further stated that "under the Governor's direction, the California Department of Corrections and Rehabilitation [would] . . . begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty." (*Id.* at p. 128:5-8.)

ARGUMENT

I. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT WRIT RELIEF BECAUSE THE PETITION DOES NOT SEEK ENFORCEMENT OF A MINISTERIAL DUTY BUT SIMPLY TRIES TO DICTATE HOW CDCR SHOULD EXERCISE ITS DISCRETION.

The primary purpose of a writ of mandate is to compel the performance of a ministerial legal duty. (See Code Civ. Proc., § 1085, subd. (a); *Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1002.) Even when addressing ministerial duties, courts have a great amount of discretion in determining whether to exercise original jurisdiction to issue a writ, and in the vast majority of

cases, they decline to do so. (1 *Cal. Civil Writ Practice* (Cont.Ed.Bar 4th ed. 2011) § 15.4, p. 352.) Mandamus generally "may be used only to compel the performance of a duty that is purely ministerial in character," and it "may not be invoked to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular way." (*Ibid.*) "[T]he writ will not lie to control discretion conferred upon a public officer or agency." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.)

In unusual circumstances where a ministerial duty is not at issue, mandamus may be appropriate to compel the exercise of discretion by a governmental agency where, under the facts, discretion can only be exercised in one way. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 904.) But a court generally cannot issue a writ of mandate to dictate how an agency must exercise the discretion with which it has been vested. (*Lindell Co. v. Bd. of Permit Appeals for the City and County of S.F.* (1943) 23 Cal.2d 303, 315.)

If a ministerial duty is not at issue, a writ of mandate is only appropriate where petitioners have shown that the agency abused its discretion. (*Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 673.) Determining whether an agency abused its discretion turns not on whether the agency's findings were supported by substantial evidence, but whether the agency's actions were arbitrary or capricious, or entirely without evidentiary support. (*Ibid.*) A party seeking mandamus must show that the public official or agency invested with discretion acted arbitrarily, capriciously, fraudulently, or without due regard for his rights, and that the action prejudiced the party. (*Gordon v. Horsley* (2001) 86 Cal.App.4th 336, 351.) Additionally, in determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree about the wisdom of the agency's

action, its determination must be upheld. (*American Federation of State, County and Municipal Employees v. Metropolitan Water Dist. of Southern California* (2005) 126 Cal.App.4th 247, 261.)

The Court should not grant the relief requested here because the petition does not seek to compel a ministerial duty. Rather, it simply takes issue with how CDCR has exercised its discretion in developing the state's lethal-injection protocol. But as explained below, writ relief is unavailable because CDCR has properly exercised its discretion.

II. WRIT RELIEF MUST BE DENIED BECAUSE CDCR HAS NOT ABUSED ITS DISCRETION IN IMPLEMENTING A LETHAL-INJECTION PROTOCOL. IN FACT, CDCR HAS RESPONDED APPROPRIATELY TO EVERY COURT-IMPOSED OBLIGATION.

The Legislature has vested CDCR with discretion to develop procedures for the execution of condemned inmates by lethal-injection. (Pen. Code, § 3604, subd. (a).) The petition concedes that section 3604 "implies considerable discretion" to CDCR in establishing the state's lethal-injection standards. (Pet. at p. 18.) In the course of developing these standards, CDCR has repeatedly been confronted with legal challenges and court rulings defining its legal obligations. At every juncture over the course of these legal proceedings, CDCR has appropriately exercised its discretion to establish lethal-injection standards. Because CDCR has not acted arbitrarily, capriciously, fraudulently, or in a manner prejudicial to Petitioner's rights, writ relief must be denied. (See *Gordon v. Horsley*, *supra*, 86 Cal.App.4th at p. 351.)

In 2007, CDCR issued Operational Procedure No. 770 (O.P. 770), establishing a three-drug-lethal-injection protocol. (*Morales v. Cal. Dept. of Corrections and Rehabilitation*, *supra*, 168 Cal.App.4th at p. 732.) Condemned inmates challenged the validity of O.P. 770 in Marin County Superior Court on the ground that it was adopted without compliance with the Administrative Procedure Act. (*Ibid.*) The superior court agreed and

struck down the protocol. (*Ibid.*) CDCR appealed, and argued that compliance with the APA was not required under the single-prison exception because all executions are conducted at San Quentin. (*Ibid.*)

The First District Court of Appeal rejected this argument, and held that CDCR was obligated to promulgate regulations for its lethal-injection process in compliance with the APA. (*Morales v. Cal. Dept. of Corrections and Rehabilitation*, *supra*, 168 Cal.App.4th at p. 732.) The court found that O.P. 770 was a rule of general application because it declared how a certain class of inmates—condemned inmates—would be treated. (*Id.* at p. 739.) It further noted that the protocol was not subject to the single-facility exception because "it directs the performance of numerous functions beyond San Quentin's walls." (*Id.* at p. 740.) For example, to ensure that the execution team is comprised of qualified members, the protocol authorized CDCR to recruit qualified staff from other institutions if a sufficient number could not be fielded from San Quentin. (*Ibid.*)

In compliance with *Morales*, CDCR promulgated regulations providing for a three-drug-lethal-injection process, similar to the process upheld as constitutional by the United States Supreme Court. (See *Baze v Rees*, *supra*, 553 U.S. at pp. 62-63.) As soon as those regulations were promulgated, condemned inmates again sued in Marin County Superior Court, asserting that CDCR did not substantially comply with the APA when it promulgated the regulations. The superior court agreed, granted summary judgment against CDCR, and, on February 21, 2012, permanently enjoined CDCR from executing any condemned inmate by lethal injection until new regulations have been promulgated in compliance with the APA. (Pet. Ex. H.)

CDCR is currently appealing that ruling in the First District. (Ex. 6.) CDCR's decision to defend the three-drug protocol on appeal certainly cannot be deemed an abuse of discretion, given the time and resources the

state invested to develop it, the *Baze* decision, and the fact that numerous other states and the federal government still use the three-drug method. (Death Penalty Information Center, *State by State Lethal Injection* <http://www.deathpenaltyinfo.org/state-lethal-injection> [as of May 22, 2012] [identifying the 35 states that have lethal injection as at least a potential for capital punishment, and noting that most use a three-drug method, while only six have changed to a single-drug method].) In fact, the petition admits that CDCR's three-drug protocol is similar to or better than the protocol upheld in *Baze,* and admits that it was within CDCR's discretion to attempt to establish and defend the three-drug protocol. (Pet. at p. 20.) It also correctly admits that CDCR's decision to fight the challenge to its protocol rather than switching the protocol was within the CDCR's discretion. (*Id.*)

The petition simply argues that although those decisions were within CDCR's discretion, CDCR is now abusing its discretion because the litigation has not been quickly resolved. (*Id.*) The apparent frustration with the delays caused by the litigation brought by condemned inmates is understandable. But the subjective argument that the litigation has now taken too long is not a sufficient basis to engage mandamus relief.

Moreover, the state is already taking action to reduce further delays by considering alternative protocols for the purpose of developing new lethal-injection regulations. (See Ex. 6 and Section III, below.) CDCR's development of new regulations cannot reasonably be deemed an abuse of discretion given the *Morales* appellate decision and the *Sims* injunction. Against this backdrop, the petition's legally dubious suggestion that CDCR should develop an alternative protocol *without* promulgating new regulations amounts to nothing more than second-guessing. Mandamus is not available to second-guess CDCR's considered judgments. (See *American Federation of State, County and Municipal Employees v.*

Metropolitan Water Dist. of Southern California, supra, 126 Cal.App.4th at p. 261.)

III. THE PETITION SHOULD BE DENIED BECAUSE CDCR IS ALREADY DEVELOPING AN ALTERNATIVE LETHAL-INJECTION PROCESS.

The petition essentially seeks an order compelling CDCR to develop an alternative lethal-injection process. But, at the Governor's direction, CDCR has already begun the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty. (See Ex. 6.)

The petition suggests that CDCR should simply draft a single-drug, single-prison, lethal-injection protocol *without* promulgating new regulations. But doing so would put CDCR in apparent violation of *Morales* and the permanent injunction in *Sims*. Rather than expediting the development of a protocol free of legal impediments, the petition's proposed course of action would inevitably subject CDCR to new litigation, and a possible injunction (if not sanctions) from the Marin County Superior Court or the First District Court of Appeal, causing further delay. The First District already rejected CDCR's arguments that the single-prison exception to the APA applies. (*Morales v. Cal. Dept. of Corrections and Rehabilitation, supra,* 168 Cal.App.4th at p. 740.) And mandamus is not available to second-guess CDCR's determination that an effective lethal-injection protocol requires involvement by individuals at CDCR headquarters and elsewhere.

Rather than proceed in the ill-advised manner the petition proposes, CDCR has begun the process of considering alternative lethal-injection protocols to develop new regulations so that it complies with its legal obligations under *Sims*, *Morales*, and the APA. In sum, the petition is

unnecessary and should be denied because CDCR already is considering alternative lethal-injection protocols.

IV. THE PRIORITY-OF-JURISDICTION DOCTRINE MILITATES AGAINST GRANTING WRIT RELIEF BECAUSE LITIGATION IS PENDING IN THE FIRST DISTRICT COURT OF APPEAL CONCERNING CDCR'S OBLIGATIONS UNDER THE APA RELATED TO ITS LETHAL-INJECTION PROTOCOL.

Under the doctrine of priority of jurisdiction (sometimes called the rule of exclusive concurrent jurisdiction), the first superior court to assume and exercise jurisdiction in the case acquires exclusive jurisdiction until the matter is disposed of. (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 786-787.) The doctrine avoids conflict of jurisdiction, multiplicity of suits, confusion, and contradictory decisions. (*Ibid*; see also *Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1135.) If the court exercising original jurisdiction has the power to bring before it all the necessary parties, even though the parties in the second action are not identical, that will not preclude the application of the rule. (*Plant Insulation Co.*, at p. 788.) Some courts have viewed the doctrine as implicating the subsequent court's jurisdiction, while other courts have viewed the doctrine as implicating considerations of comity and judicial discretion. (Compare *Plant Insulation Co*, *supra*, 224 Cal.App.3d at pp. 786-787 and *Levine v. Smith*, 145 Cal.App.4th 1131, with *Childs v. Eltinge* (1973) 29 Cal.App.3d 843; *In re Marriage of Gray* (1988) 204 Cal.App.3d 1239; see also 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 427, p. 1077.)

The writ petition clearly presents APA issues that are intertwined with those in CDCR's appeal in *Sims*, which is currently pending in the First District Court of Appeal. That case involves, among other things, the procedures CDCR must follow before conducting any executions by lethal injection. The judgment CDCR is challenging on appeal permanently

enjoins it from "carrying out the execution of any condemned inmate by lethal injection *unless and until new regulations governing lethal injection executions are promulgated in compliance with the Administrative Procedure Act.*" (Ex. 5, pp. 106:28-107:3, emphasis added.) The petition's view that CDCR should develop a new protocol *without* promulgating new regulations would seem to place CDCR in direct violation of a plain reading of the permanent injunction.

Regardless of whether the priority-of-jurisdiction doctrine is deemed mandatory or discretionary, the policy reasons behind it, such as avoiding multiplicity of suits, jurisdictional conflicts, contradictory decisions, and confusion, militate against this Court exercising its discretion to grant relief here. The relief that the petition seeks would be more appropriately sought in the First District Court of Appeal, where the *Sims* appeal is currently pending.

CONCLUSION

The Court should not exercise its discretion to issue a writ of mandate because the manner in which CDCR has chosen to implement the lethal-injection protocol is reasonable and appropriate. CDCR's actions have not been arbitrary, capricious, or entirely without evidentiary support. And the Court cannot compel CDCR to exercise its discretion in a particular manner. Moreover, the Governor has directed CDCR to begin the process of considering alternative regulations, so the relief Petitioner essentially seeks is already underway. Finally, the relief sought (assuming for argument that it is substantively viable) should be sought in the First District Court of

Appeal, which has already considered CDCR's APA obligations once and is now considering those obligations again in the *Sims* appeal. For all of these reasons, the petition should be denied.

Dated: May 22, 2012

Respectfully submitted,

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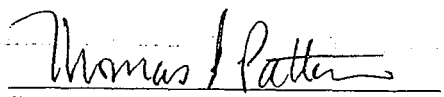

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