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13 Attorneys For Plaintiff MICHAEL ANGELO MORALES

14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN JOSE DIVISION**

16 MICHAEL ANGELO MORALES,) Case No. C 06-0219 (JF) (RS)
17)
18 Plaintiff,)
19) **SECOND AMENDED COMPLAINT**
20) **FOR EQUITABLE AND INJUNCTIVE**
21) **RELIEF [42 U.S.C. § 1983]**
22 v.)
23)
24 JEANNE WOODFORD, Acting Secretary of)
the California Department of Corrections;)
21 EDDIE YLST, Acting Warden, San Quentin)
22 State Prison, San Quentin, CA; and DOES 1-50,)
23)
24 Defendants.)

1 **NATURE OF ACTION**

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

14 **JURISDICTION AND VENUE**

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

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

22
23 **THE PARTIES**

24 4. Plaintiff Michael Angelo Morales is a United States citizen and a resident of the State. He is
25 currently a death-sentenced prisoner under the supervision of the California Department of
26
27

1 Corrections and Rehabilitation (CDCR). He is held at San Quentin State Prison, San Quentin,
2 California, 94974.

3 5. Defendant Jeanne Woodford is the Acting Secretary of the CDCR.

4 6. Defendant Eddie Ylst is the Acting Warden of San Quentin State Prison, where the plaintiff is
5 incarcerated and where the plaintiff's execution is scheduled to occur.

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

10 **GENERAL ALLEGATIONS**

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

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

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

1 11. In performing plaintiff's execution by lethal injection, the CDCR will follow the protocol
2 established in San Quentin Operational Procedure No. 770, as well as certain practices not delineated
3 in the protocol. The protocol and actual practice by which lethal injection executions are performed
4 under Procedure No. 770 violates constitutional and statutory provisions enacted to prevent cruelty,
5 pain, and torture.

6 12. The absence of standardized procedures for administration of the chemicals, the lack of
7 qualifications of the personnel involved in the process, and the combination of the three particular
8 chemicals used in Procedure No. 770 create a grave and substantial risk that plaintiff will not be
9 adequately unconscious during the execution process and, as a result, will experience an
10 excruciatingly painful and protracted death. This risk has been realized in at least six of the previous
11 seven executions and in nine executions total.

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

20 14. The protocol established in Procedure No. 770 does not establish any minimum qualifications
21 or expertise required of the personnel who perform all of the tasks in the lethal injection process, and
22 none exist. There are no guidelines or customary procedures upon which these personnel can rely if
23 they are required to exercise their discretion during the process. There is no plan in place if the
24 plaintiff requires medical assistance during the execution.

25 15. Sodium pentothal, in an ordinary clinical dose, is a very short-acting barbiturate that is
26 usually administered only during the preliminary phase of anesthesia administration. There is a
27

1 reasonable likelihood that sodium pentothal will be ineffectively delivered, given the inadequacy of
2 the administration procedures, the personnel involved , and will not provide a sedative effect for the
3 duration of the execution process. This has actually occurred in many California executions.

4 Without adequate sedation, plaintiff will experience excruciating pain as a result of the conscious
5 asphyxiation caused by pancuronium bromide and the painful internal burn and cardiac arrest caused
6 by a potassium chloride overdose.

7 16. The American Veterinary Medical Association (AVMA) states that when potassium chloride
8 is used for euthanasia, it is extremely important for the personnel who perform euthanasia to be
9 trained and knowledgeable in anesthetic techniques and competent in assessing the anesthetic depth
10 appropriate for potassium chloride administration, a depth at which animals are in a surgical plane of
11 anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of
12 response to noxious stimuli. California law requires non-veterinary personnel who perform animal
13 euthanasia to undergo strict training by a veterinarian and/or a registered veterinary technician who
14 specializes in anesthesia. The Department of Correction's lethal injection protocol under Procedure
15 No. 770 includes no comparable requirement No such training in fact occurs.

16 17. The AVMA also employs a longer-lasting barbiturate, sodium phenobarbital, for animal
17 euthanasia. The CDCR's use of sodium pentothal exacerbates the risk of error created by its
18 deficient protocol because sodium pentothal is extremely volatile, short-acting, and sensitive to
19 human error.

20 18. Pancuronium bromide, the second chemical administered in the lethal injection process,
21 paralyzes voluntary muscles, including the diaphragm, but it does not affect consciousness or the
22 perception of pain. A similar paralytic agent has been used by CDCR in the past to torture prisoners
23 as part of its behavioral modification programs. Pancuronium bromide, administered by itself as a
24 "lethal dose," would not result in a quick death; instead, it would cause someone to suffocate to death
25 while still conscious. The use of pancuronium bromide as administered under the CDCR's lethal
26 injection protocol increases the risk that the use of this chemical, in combination with the initial dose
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1 of sodium pentothal, will result in plaintiff being paralyzed but aware of pain and suffering death
2 from the burning veins and heart failure caused by the administration of the potassium chloride.
3 Pancuronium bromide unnecessarily increases the risk that a prisoner will be paralyzed during the
4 injection of an extremely painful drug, aware of this pain, yet be entirely unable to inform the
5 attendants of his condition. Without the use of pancuronium bromide, a prisoner would be able to
6 indicate that he was still conscious or had regained consciousness or awareness prior to the
7 administration of potassium chloride. Properly trained personnel would be able to assess
8 unconsciousness, which they at present cannot and do not do. This is particularly crucial because the
9 CDCR's protocol indicates that the prisoner will be alone in a room when he is executed, making it
10 impossible to determine whether a prisoner is aware of or feeling pain at the time the pancuronium
11 bromide is administered, or if the administration causes the prisoner to become able enough to sense
12 the pain from pancuronium bromide and, then, potassium chloride.

13 19. The AVMA states that a combination of a barbiturate and a neuromuscular blocking agent
14 such as pancuronium bromide, a combination similar to that called for by Procedure No. 770, is not
15 an acceptable euthanasia method for animals when used alone.

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

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

23
24 **THE DEVELOPMENT OF THE CURRENT VERSION OF PROCEDURE NO. 770**

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

10 23. On February 14, 2006, the District Court for the Northern District of California found that
11 plaintiff had raised “substantial questions” that the 2003 protocol “creates an undue risk that plaintiff
12 will suffer excessive pain when he is executed.” Order Denying Conditionally Plaintiff’s Motion for
13 Preliminary Injunction, at 13 (February 14, 2006). The Court therefore suggested that defendants
14 “conduct a thorough review of the lethal injection protocol, including, *inter alia*, the manner in which
15 the drugs are injected, the means used to determine when the person being executed has lost
16 consciousness, and the quality of contemporaneous records of executions, such as execution logs and
17 electrocardiograms. . . . A proactive approach by Defendants would go a long way towards
18 maintaining judicial and public confidence in the integrity and effectiveness of the protocol.” *Id.* at
19 12-13.

20 24. In light of the substantial possibility that Plaintiff would suffer excruciating pain as he was
21 executed, the Court held that Defendants could proceed to execute Plaintiff only if they implemented
22 one of two proposed modifications of the execution procedure. *Id.* at 13-14. Defendants could either
23 certify that they would execute Plaintiff using only sodium pentothal or another barbiturate; or
24 procure the assistance of anesthesiologists to provide “independent verification” that Plaintiff was in
25 fact unconscious prior to the administration of the pancuronium bromide and potassium chloride. *Id.*
26 at 13-15.

1 25. Defendants first opted to employ anesthesiologists to “ensure that [Plaintiff] [was]
2 unconscious at all times following the administration of sodium thiopental.” Final Order Re
3 Defendants’ Compliance with Conditions, at 4 (February 16, 2006). Those anesthesiologists
4 withdrew from the execution, however, upon learning that, in accordance with the District Court’s
5 orders, they would “have the authority,” and would in fact be required to, “take all medically
6 appropriate steps – either alone or in conjunction with the injection team – to immediately place or
7 return Morales into an unconscious state or otherwise alleviate the painful effects of either or both the
8 pancuronium bromide or potassium chloride.” Opinion of February 19, 2006, at 13 (9th Cir.).
9 Defendants failed to advise the anesthesiologists of this and, in fact, misrepresented the Court’s
10 orders to the anesthesiologists, who became aware of the orders only at the last minute. Because the
11 anesthesiologists then refused to participate, Defendants did not go forward with the scheduled 12:01
12 a.m. execution on February 21, 2006.

13 26. Later that day, Defendants returned to the District Court and sought permission to perform
14 the execution at 7:30 p.m. on February 21, 2006, using the other alternative offered by the District
15 Court, administration of a lethal dose of sodium thiopental or other barbiturate. The Court issued an
16 order allowing the execution to proceed so long as “sodium thiopental [was] injected in the execution
17 chamber directly into the intravenous cannula by a person or persons licensed by the State of
18 California to inject medications intravenously.” Order on Defendants’ Motion to Proceed with
19 Execution, at 3 (February 21, 2006). Defendants declined to comply with the Court’s order, and the
20 execution did not go forward.

21 27. Because Defendants did not comply with either of the two conditions set forth in the Court’s
22 Orders, by the terms of the February 14, 2006 Order, a stay of execution automatically was entered
23 on February 21, 2006.

24 28. Following the events of February 21, 2006, Defendants modified the execution protocol, and
25 these modifications were incorporated in a new version of Procedure No. 770, dated March 6, 2006.
26 According to Defendants, the changes to the protocol were made after consultation with unidentified
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1 “court experts,” and in part reflected deviations from the 2003 version of the protocol that had been
2 sanctioned by the Defendants but had not previously been formally adopted as revisions to the
3 protocol, or recorded in the contemporaneous records of executions.

4 29. The new version of Procedure No. 770, as well as Defendants’ actual practice in following the
5 new version, is substantially similar to the 2003 version in all material respects relating to the manner
6 in which the chemicals are administered. The new version employs the same three chemicals,
7 injected in the same sequence, but uses a lower initial dose of sodium pentothal, a lower dose of
8 pancuronium bromide, and a higher dose of potassium chloride. The only material difference
9 between the 2003 version of the protocol and the 2006 version is that, in addition to an initial bolus
10 dose of 1.5 grams of sodium pentothal, the new version provides that a continuous drip of five grams
11 of sodium pentothal shall be begun in a second IV line after the initial dose of sodium pentothal is
12 administered. Shortly after the drip is begun, a saline flush is sent through the first IV line and the
13 pancuronium and potassium are injected.

14 30. The new version of Procedure No. 770 utterly fails to address the “substantial questions”
15 raised by Plaintiff, and recognized by the District Court, regarding the significant risk that Plaintiff
16 will suffer excruciating pain during the execution. Among other things, the new version of Procedure
17 No. 770, like the 2003 version, fails to provide any procedure for ensuring that the inmate is in an
18 appropriate surgical plane of anesthesia prior to the administration of the pancuronium bromide; fails
19 to provide for any training to be given to the injection personnel; fails to require any level of
20 experience or other qualifications for such personnel; fails to ensure that an adequate dose of
21 anesthesia is able to reach the prisoner; and fails to provide procedures for obtaining IV access
22 should the inmate have unusable peripheral veins. Moreover, because the design of the execution
23 chamber remains the same, and the new version of the protocol makes no material changes in the
24 equipment used to administer the drugs, the new version does not alleviate the need to use multiple
25 IV extensions or other conditions that have caused the drug administration problems that plagued the
26 previous executions.

1 31. Indeed, the new version of Procedure No. 770 is even more deficient than the old version.
2 The additional deficiencies include, but are not limited to, the fact that the new version provides that,
3 much less sodium pentothal will be administered to the inmate, even assuming proper administration
4 by the execution team resulting in the full dose of pentothal reaching the prisoner. This significantly
5 decreased dose of sodium pentothal drastically lowers the margin of error in administering the
6 anesthesia and increases the probability that the inmate will not be placed in an appropriate surgical
7 plane of anesthesia.

8 32. Defendants have deliberately chosen to lower the dose of anesthetic in the belief that the
9 previously used five-gram dose of sodium pentothal rendered inmates “too unconscious” for the
10 potassium chloride to cause death as quickly as it would otherwise. Moreover, by their own
11 admission, Defendants are deliberately increasing the risk of excessive suffering in order to ensure
12 that executions are carried out as quickly as possible.

13 33. Defendants’ failure to address the substantial questions as to the significant risk of
14 excruciating pain created by the original version of Procedure No. 770, even after the experience of
15 several recent executions during which indicia of inadequate sedation were present, and even after
16 the District Court recognized the seriousness and substantial nature of the risk, amounts to conscious
17 disregard of Plaintiffs’ constitutional right to be free from cruel and unusual punishment. Indeed,
18 Defendants have purposefully rendered the execution procedure more dangerous without any rational
19 reason for doing so.

20 34. Defendants’ creation of the new version of Procedure No. 770 in the space of a mere thirteen
21 days, without consultation with any members of the medical community or other experts – besides
22 the unnamed “court experts” – further evidences Defendants’ deliberate disregard of Plaintiff’s
23 Eighth Amendment rights. Defendants flagrantly ignored the District Court’s suggestion that they
24 conduct a “thorough” review of the execution procedures; no such review could have been conducted
25 in such a short time and none was. As a result, Defendants have substituted a new version of
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1 Procedure No. 770 that simply perpetuates the deficiencies in the previous version and exacerbates
2 the already-significant risk of inadequate anesthesia.

3
4 **COUNT I**

5 **VIOLATION OF RIGHT TO BE FREE FROM CRUEL AND UNUSUAL**
6 **PUNISHMENT PURSUANT TO THE EIGHTH AND FOURTEENTH**
7 **AMENDMENTS TO THE UNITED STATES CONSTITUTION**

8 **(42 U.S.C. § 1983)**

9 35. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1
10 through 34.

11 36. Defendants Jeanne Woodford, Eddie Ylst, and Doe Defendants are acting under color of
12 California law in causing to be administered to plaintiff chemicals that will cause unnecessary pain in
13 the execution of a sentence of death, thereby depriving plaintiff of his rights under the Eighth and
14 Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C.
15 § 1983.

16 37. The CDCR's Procedure No. 770, which specifies the State's lethal injection protocol, and the
17 Defendants' actual practice of implementing the protocol violates plaintiff's rights under the cruel
18 and unusual punishment clause of the Eighth Amendment because (a) the protocol creates the
19 unreasonable and unacceptable risk of unnecessary physical and psychological pain; (b) the protocol
20 does not comport with contemporary norms and standards of society; and (c) the protocol offends the
21 dignity of the person and society.

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

27 39. Procedure No. 770 contains no description of the training, credentials, certifications,
28 experience, or proficiency required of any personnel involved in the administration of the lethal

1 injection procedure, notwithstanding the fact that it is a complex medical procedure requiring a great
2 deal of expertise in order to be performed correctly. For example, Procedure No. 770 does not
3 require at the execution the presence of any personnel who possess sufficient expertise to insert an
4 intravenous line properly in all situations, determine if there is a blockage in the intravenous line, or
5 evaluate whether a prisoner is properly sedated before proceeding with the painful parts of the
6 execution process. Nor is it Defendants' actual practice to require the participation of such
7 personnel.

8 40. The absence of such trained personnel greatly increases the risk that a prisoner would not
9 receive the necessary amount of anesthetic prior to being paralyzed by the pancuronium bromide and
10 then experience the painful internal burn of the potassium chloride. The execution logs of California
11 prisoners suggests that many executed prisoners did not receive enough sedative prior to the
12 administration of pancuronium bromide. Moreover, toxicology reports from prisoners executed by
13 other states suggest that some prisoners likely remained conscious during the administration of lethal
14 drugs, which could have occurred because of improper insertion of the intravenous line, an
15 unrecognized blockage in the line, or various other reasons. The factors contributing to the
16 likelihood that prisoners in other states were executed while conscious are present in Procedure 770
17 and the actual practice of CDCR in implementing it.

18 41. Inducing and maintaining a sufficient level of unconsciousness by correctly administering
19 sodium pentothal is indispensable to preventing the wanton infliction of unnecessary pain when the
20 potassium chloride overdose is administered. Procedure No. 770, however, does nothing to ensure
21 such a level of unconsciousness and does not require the preparation of backup syringes of sodium
22 pentothal. Nor does the protocol provide guidelines for ensuring that an inmate is deeply
23 anesthetized prior to injecting the second two drugs, or establish procedures for determining when an
24 additional dose of sodium pentothal should be administered.

25 42. The CDCR's lethal injection protocol and practices fail to address any reasonably foreseeable
26 complications with any appropriate medical response. Moreover, the protocol and practices include
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1 no safeguards that would protect the prisoner in the event a stay of execution is entered or a reprieve
2 granted immediately before or after the lethal injection process has begun. Thus, the protocol and
3 actual practices fail to provide any protections to prevent a prisoner from being wrongly executed
4 should a reprieve or stay be granted after the process has begun but before death has occurred.

5 43. At any time before the potassium chloride is administered, the prisoner could be readily
6 resuscitated if trained personnel and routine resuscitation medication and equipment were present at
7 the execution site. Even after the potassium chloride is administered, resuscitation would still be
8 possible, although admittedly it would be more challenging. Any resuscitation, however, would
9 require the close proximity of the necessary equipment, medication, and properly trained personnel.
10 The omission of such personnel and equipment under the protocol set forth in Procedure No. 770
11 further undermines the constitutionality of the procedure.

12 44. Although it is possible to conduct executions in a constitutionally compliant manner, the
13 Department of Corrections has deliberately chosen not to do so. As demonstrated by the events of
14 February 21, 2006, the CDCR could choose to use different chemicals that do not cause pain and
15 therefore do not carry extraordinarily grave consequences to a condemned inmate if not properly
16 administered. Instead, the CDCR has knowingly and recklessly chosen to use chemicals that will
17 subject the inmate to excruciating pain in the likely event of administration error. Moreover, it has
18 not taken precautions to ensure that the personnel who administer the lethal injection chemicals
19 possess the training, experience, and expertise needed to administer those chemicals properly. Thus,
20 while it is possible for the CDCR to choose different lethal injection chemicals and/or retain qualified
21 personnel to administer its chosen chemicals in order to ensure the constitutionality of its lethal
22 injection procedure, the CDCR purposefully has not done so.

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

COMPLAINT FOR EQUITABLE AND INJUNCTIVE RELIEF

1
2 46. The use of pancuronium bromide under the protocol established in Procedure No. 770 to
3 paralyze plaintiff greatly increases the risk that an inadequately sedated prisoner will be subjected to
4 a painful and protracted death, and will in fact cause such an unnecessarily painful death. Moreover,
5 it serves no legitimate penological purpose.

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

11 48. If pancuronium bromide is administered, paralyzing plaintiff during the execution procedure,
12 he will have no alternative “reasonable and effective means of communication” to communicate that
13 he was not properly anesthetized because he will be dead at the conclusion of the procedure.

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

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

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

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

9 53. Allowing personnel who lack sufficient training, credentials, certification, experience, or
10 proficiency to conduct the lethal injection procedure does not play a legitimate role in killing the
11 condemned person. Suffocation while inadequately sedated or otherwise aware, as caused by the
12 administration of pancuronium bromide, violates the Eighth Amendment because death by
13 asphyxiation is itself a form of cruel and unusual punishment. Similarly, internal burning and cardiac
14 arrest while insufficiently sedated or otherwise aware, as caused by a potassium chloride overdose,
15 constitute unnecessary physical and psychological pain in violation of the Eighth Amendment.

16 54. If plaintiff suffers unnecessary pain, he will have no alternative “reasonable and effective
17 means of communication” to communicate the fact that he was not properly anesthetized because he
18 will be unable to do so and the pancuronium bromide will paralyze him and he will be dead at the
19 conclusion of the procedure.

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

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

3 **EXHAUSTION ALLEGATIONS**

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

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

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

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

3 61. Plaintiff’s challenge to the lethal injection protocol that the Department of Corrections intends
4 to use to execute him is ripe for adjudication now.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Michael Angelo Morales prays for:

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

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

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

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

22 5. Costs of suit; and

23 6. Any such other relief as the Court deems just and proper.
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MICHAEL ANGELO MORALES



By: _____
John R Grele

Dated: April 6, 2006

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