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REFILED DOC. NO. 164
REVISED PURSUANT TO
ORDER OF THE COURT,
DOC. NO. 211, SEPT. 14, 2006

24 **IN THE UNITED STATES DISTRICT COURT**
25 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
26 **SAN JOSE DIVISION**

27 MICHAEL ANGELO MORALES,) CASE NO. C 06 0219 (JF) (RS)
28) C 06-926 (JF) (RS)
29 Plaintiff,)
30 vs.) JOINT PRE-HEARING CONFERENCE
31) STATEMENT
32)
33 JEANNE WOODFORD, Secretary of the) [REDACTED]
34 California Department of Corrections;)
35 EDDIE YLST, Warden, San Quentin State) HEARING DATE: Sept. 26, 2006
36 Prison, San Quentin, CA; and DOES 1-50,) TIME: 9:00 a.m.
37) COURTROOM: 3
38 Defendants.)

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1 (2) Disputed Factual Issues (All Facts are Disputed by Defendant, Unless Marked
2 “Disputed by Plaintiff”) Defendants’ objections are primarily to the form of the
3 statements rather than the contents unless otherwise noted.
4

5 1. The team always includes 2-3 medical personnel consisting of a
6 combination of RNs and Medical Technical Assistants (MTA), who must be a Licensed
7 Vocational Nurse (LVN) with a state credential authorizing insertion of IVs. **Disputed by**
8 **Plaintiff.**
9

10 2. Former execution team leader, Witness #10, was removed from the
11 execution team for misconduct.
12

13 3. The misconduct by Witness #10 leading to his several month suspension
14 from work was unrelated to his participation in an execution.
15

16 4. The team leader administers the fatal dosages of drugs to the inmate during
17 the execution. **Defendants have never revealed the identity of the team member**
18 **responsible for delivering the drugs.**
19

20 5. The execution teammates’ responsibilities are “awesome” and very stressful.
21 The teammates become very apprehensive during an execution. It is a very intense
22 process; it is the most stressful thing that a person in the Department of Corrections is
23 asked to do. Team members, including the RNs and LVNs are as tense as they ever are.
24 It is a surrealistic experience. It does not seem real when it’s happening. It seems
25 dreamlike. It is stressful because there is no other place in the world that an LVN is asked
26 to start an IV for that purpose. Warden Steven Ornoski was practically beside himself
27
28

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1 during the Stanley Williams execution. Wardens have refrained from viewing any part of
2 the condemned inmate save his feet during the last three California executions.

3
4 6. It is a rule that you cannot be working in the condemned area of the prison
5 and be on the execution team. There are no exceptions to the rule.

6
7 7. Warden Woodford had no inhibitions about assigning a member to the
8 execution team who was known by the inmate who was being executed.

9 8. The LVNs claim to prepare the Pentothal by following the instructions.

10
11 9. The new Operational Procedure 770, March 6, 2006, each one gram of
12 Pentothal is to be dissolved in 50 mL of a solution of sodium chloride of unknown
13 concentration, rather than in 40 mL of sterile water.

14
15 10. During an execution, "it's a bit more crowded" in the antechamber than
16 16 or 17 people.

17
18 11. During Stanley Williams's execution, Witness #4 was tasked with
19 selecting the lethal drugs from the cart to be administered to Stanley Williams, and
20 the large man "was standing in Witness #4's way.

21
22 12. Twenty-six people or so were on the approved list to be present in the
23 anteroom for the scheduled execution of Michael Morales.

24
25 13. To execute an inmate, officers bring the inmate from a holding cell
26 across the hall from the execution chamber, through the anteroom of the execution
27 chamber, and into the chamber. Witness #1 believes that five peace officers walk the
28 inmate into the chamber, while Witness #4 thinks it's four.

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14. Catheters are regularly set in the inmates' arms by RNs during executions.

15. The setting of these catheters is performed in the execution chamber, not in a health care facility.

16. During Stanley Williams's execution, an RN was responsible to set one catheter. The vein blew when she started the IV. She attempted again to start the IV and the vein blew again.

17. The nurse was frustrated and became upset; she was visibly upset to other execution team members.

18. Unbeknownst to the RN and Witness #3, the RN then failed to properly set the catheter a third time. The RN subsequently taped the catheter to Williams's arm, and began to exit the chamber.

19. While Witness #3 and RN were exiting the chamber, it was said that "it wasn't flowing, the drip wasn't flowing." The RN couldn't believe that it wasn't running again. After the RN exited the chamber – while the chamber door still was open – it was said a second time that "the left wasn't running."

20. Warden Ornoski was standing in the center of the anteroom, looking at the door. The team leader was present at the chamber door.

21. Witness #4 was under the impression that the team leader was responsible to monitor the IV drip as a result of all the training he went through for Williams, as well as other executions.

1 22. The Warden then said, "Proceed," "after the comments were made that
2 the left IV had failed. The execution proceeded without the IV line in the left arm
3 properly set or operating.
4

5 23. After the RNs or LVNs leave the execution chamber, the lights are
6 turned down in the anteroom before the execution begins. The lights are turned very
7 low. Under the anteroom's subdued lighting, the syringes containing the lethal drugs
8 are present, taped to a cart.
9

10 24. The syringes containing the lethal drugs to be used in the execution are
11 taped to a cart in the order they are to be used and on a grid which identifies each drug
12 by name. The syringes are numbered in the order they are to be used.
13

14 **Disputed by plaintiff.**
15

16 25. During an execution, the doctors filling out the execution record cannot
17 see where their entries are supposed to be without the aid of a small flashlight.
18

19 26. The RN or MTA/LVN who attaches the syringe to the stopcock then
20 stands in the window of the chamber to observe the inmate's right arm. **Disputed by**
21 **plaintiff.**
22

23 27. Witness #1 believes that after a syringe has been emptied, the same
24 MTA removes the syringe, places it back on the cart and retrieves the next syringe.
25

26 28. Witness #4 cannot conduct an inspection to see if the catheter is set
27 properly without entering the execution chamber.
28

 29. The identity of the execution team leader is known to personnel at San
Quentin from all aspects of the institution: maintenance, medical, and custody. For

1 Witnesses #1 and #5, their existence on the execution team and as execution team
2 leader was not a secret at the institution. It becomes a known fact.

3 30. If the thiopental sodium drip stops during an execution, there is no
4 procedure for what is to take place next.
5

6 31. Operational Procedure 770 prohibits team members from asking
7 anything that would require an oral response during an execution.
8

9 (3) Agreed Statement

10 The action may not be presented upon an agreed statement.

11 (4) Stipulations Requested or Proposed.

12 Unless objected to below, all exhibits are stipulated by the parties to be
13 admitted, except Exhibit Nos. 32-50, 79, 97, 98, 99 and 100 which at this time, are
14 only being marked for identification by plaintiff.
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17

18 DISPUTED LEGAL ISSUES

19 Points of Law

20
21 1. California's lethal injection protocol, set forth in Operational Procedure
22 770, as revised March 6, 2006 ("new Procedure 770"), is a regulation or regulations
23 subject to California's Administrative Procedure Act ("APA"), Cal. Gov. Code §§
24 11340 et seq. The APA defines a "regulation" to mean "every rule, regulation, order
25 or standard of general application or the amendment, supplement, or revision of any
26 rule, regulation, order or standard adopted by any state agency to implement, interpret,
27 or make specific the law enforced or administered by it, or to govern its procedure."
28
Cal. Gov. Code § 11342.600. To be a rule, regulation, order or standard of "general

1 application,” a rule need only apply to all the members of a class of persons; it need
2 not apply to all citizens of the state. See Armistead v. State Personnel Bd., 583 P.2d
3 744, 746 (Cal. 1978); Faunce v. Denton, 167 Cal. App. 3d 191, 213 Cal. Rptr. 122
4 (1985).

5
6 2. New Procedure 770 unilaterally was adopted by defendants in violation of
7 the APA. A state agency may not issue, utilize, enforce or attempt to enforce any
8 regulation unless the requirements of the APA have been satisfied. Cal. Gov. Code §
9 11340.5. The agency must give the public notice of its proposed regulatory action
10 11340.5. The agency must give the public notice of its proposed regulatory action
11 (Cal. Gov. Code §§ 11346.4, 11346.5); issue a complete text of the proposed
12 regulation with a statement of the reasons for it (Cal. Gov. Code § 11346.2(a), (b));
13 give interested parties an opportunity to comment on the proposed regulation and to
14 request a public hearing (Cal. Gov. Code § 11346.8(a)); respond in writing to public
15 comments (Cal. Gov. Code § 11346.9); and forward a file of all materials on which
16 the agency relied in the regulatory process to the Office of Administrative Law (Cal.
17 Gov. Code § 11347.3(b)), which reviews the regulations for consistency with the law,
18 clarity, and necessity (Cal. Gov. Code §§ 11349.1, 11349.3). Defendants have done
19 none of these things in adopting New Procedure 770.
20
21
22

23 3. New Procedure 770 is not a binding or properly approved execution
24 protocol that can be utilized by the State of California in light of the state’s failure to
25 comply with the APA. Cal. Gov. Code § 11340.5.
26

27 4. The APA provides that “[a]ny interested person may obtain a judicial
28 declaration as to the validity of any regulation or order or repeal by bringing an action
for declaratory relief in the superior court in accordance with the Code of Civil

1 Procedure.” Cal. Gov. Code § 11350(a). In such an action, the regulation or order
2 may be declared to be invalid for a substantial failure to comply with the APA. Id.
3 Plaintiff is entitled to such relief as a matter of law and is seeking such relief in the
4 Superior Court of the State of California, County of Marin, Case No. CV 061436.
5 The Superior Court has ordered that the matter be decided by summary judgment, and
6 has calendared same for hearing on December 6, 2006.
7

8
9 5. California’s lethal injection protocol, set forth in Procedure 770, violates
10 the Eighth Amendment’s prohibition on the “infliction of unnecessary pain in the
11 execution of the death sentence.” Louisiana ex rel. Francis v. Resweber, 329 U.S.
12 459, 463 (1947); see also Gregg v. Georgia, 428 U.S. 153, 173 (1976) (the
13 punishment may be not “excessive”).
14

15
16 6. The lethal injection protocol impermissibly subjects the inmate “to an
17 unnecessary risk of unconstitutional pain or suffering.” Cooper v. Rimmer, 379 F.3d
18 1029, 1033 (9th Cir. 2004); see also Cooney v. Taft, 430 F. Supp. 2d 702, 708 (S.D.
19 Ohio 2006) (in view of emerging evidence calling into question the conclusions of Dr.
20 Mark Dershwitz, “Court is persuaded that there is an unacceptable and unnecessary
21 risk . . . that [plaintiff] could suffer unnecessary and excruciating pain while being
22 executed . . .”).
23

24
25 7. The unnecessary risk of substantial pain imposed by the lethal injection
26 protocol renders the method of execution contained therein unconstitutional. Fierro v.
27 Gomez, 77 F.3d 301, 307 (9th Cir.), vacated as moot sub nom. Gomez v. Fierro, 519
28 U.S. 918 (1996) (moot in light of Cal. Penal Code § 3604).

1 8. The protocol involves a “substantial risk” of an extended period of “intense
2 physical pain.” Fierro, 77 F.3d at 308; see also Rupe v. Wood, 863 F. Supp. 1307,
3 1313-15 (W.D. Wash. 1994), vacated in part as moot, 93 F.3d 1434 (9th Cir. 1996)
4 (holding that a “significant” risk (less than 24% probability) of decapitation rendered
5 judicial hanging unconstitutional as applied to an obese inmate).

7 9. The records from previous executions demonstrate the inherent, substantial
8 risk the inmate will experience agonizing and prolonged pain, in violation of
9 “evolving standards of decency,” and “contemporary values concerning the infliction
10 of a challenged sanction.” Gregg, 428 U.S. at 173; Beardslee v. Woodford, 395 F.3d
11 1064, 1075 (9th Cir. 2005) (California’s execution logs “contain indications that there
12 were problems associated with the administration of the chemicals that may have
13 resulted in prisoners being conscious during portions of the executions.”); Fierro, 77
14 F.3d at 307 (“the key question to be answered in a challenge to a method of execution
15 is how much pain the inmate suffers.”).

19 10. The protocol’s failure to provide for any meaningful monitoring of
20 anesthetic depth by appropriate medical personnel exposes plaintiff to a substantial
21 risk of extreme pain. See Order Denying Conditionally Plaintiff’s Motion for
22 Preliminary Injunction, February 14, 2006, at 14 (in view of “substantial question” as
23 to whether inmate might regain consciousness after administration of sodium
24 thiopental, Court allows State to implement alternative procedure of continuous
25 presence of “qualified individual” to independently verify that inmate is unconscious
26 before either pancuronium bromide or potassium chloride is injected).

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1 11. The risk of inadequate anesthesia is compounded by the fact that
2 Procedure 770 requires that *no* personnel be present in the execution chamber when
3 *any* of the drugs are administered thus preventing personnel from visual and tactile
4 verification that the drugs are actually being administered to the inmate, or that the
5 sodium pentothal anesthetic has taken effect. Cooper v. Rimmer, 379 F.3d 1029,
6 1033 (9th Cir. 2004) (state prohibited from subjecting inmate “to an unnecessary risk
7 of unconstitutional pain or suffering.”).

8
9
10 12. The protocol’s failure to anticipate foreseeable events, and to provide
11 contingency plans for such events subjects plaintiff to an unnecessary risk of
12 unconstitutional pain. See id.

13
14 13. The execution protocol involves acts by prison personnel which are
15 prohibited by law. Cal. Bus. & Prof. Code §§ 2051; 2052; 2860; 2860.5; Magit v. Bd.
16 of Med. Exam’rs, 57 Cal. 2d 74, 366 P.2d 816, 17 Cal. Rptr. 488 (1961).

17
18 14. The protocol is performed by prison personnel with criminal records of
19 misconduct, and who lack skill, competence, professionalism, patience, stability,
20 training, qualifications, mental health, and the necessary character to perform
21 executions and the tasks associated with executions. Ford v. Wainwright, 477 U.S.
22 399, 410 (1986) (plurality opinion) (the Eighth Amendment “protect[s] the dignity of
23 society itself from the barbarity of exacting mindless vengeance.”); Taylor v.
24 Crawford, 2006 U.S. Dist. LEXIS 42949, at *20 (W.D. Mo. June 26, 2006) (court is
25 “gravely concerned” about condition of physician who mixes the lethal drugs); id. at
26 *21-22 (court concludes it would be “almost impossible” for the physician to monitor
27 the inmate’s anesthetic depth in the manner physician described in his deposition).
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1 15. The protocol is implemented under unacceptable conditions that
2 unnecessarily increase the risk of unconstitutional pain, including overcrowding;
3 obstructed views; inadequate lighting; sound suppression; remote administration of
4 the drugs; insufficient supervision; unqualified management; and the absence of
5 meaningful participation by properly licensed medical personnel. Taylor v. Crawford,
6 2006 U.S. Dist. LEXIS 42949, at *21-22 (W.D. Mo. June 26, 2006) (darkness and
7 obstructed view result in inadequate monitoring of anesthetic depth); (Anderson v.
8 Evans, 2005 U.S. Dist. LEXIS 39407, at *14 (W.D. Okla. Dec. 20, 2005), aff'd, 2006
9 U.S. Dist. LEXIS 1632 (W.D. Okla., Jan. 11, 2006) (court refuses to dismiss Eighth
10 Amendment challenge where inmate alleges, inter alia, that execution personnel are
11 untrained in the use of IV catheters; improper placement and monitoring of catheters
12 can lead to inadequate anesthesia; medical personnel do not oversee the placement of
13 catheters).

14 16. The use of sodium pentothal, an ultrashort-acting barbiturate anesthetic
15 which is extremely sensitive to errors in preparation, to be administered through a
16 high risk failure scenario more than likely will result in “the inmate not [being]
17 properly sedated by the first drug, . . . [and] experienc[ing] torturous pain.”
18 Beardslee, 395 F.3d at 1071; Taylor v. Crawford, 2006 U.S. Dist. LEXIS 42949, at
19 *21 (W.D. Mo. June 26, 2006) (“the process of mixing the three different drugs and
20 knowing the correct amount of the drugs to dissolve in the correct amount of solution
21 involves precise measurements”).

22 17. Pancuronium bromide “paralyzes all skeletal or voluntary muscles, but []
23 has no effect whatsoever on awareness, cognition, or sensation.” Beardslee, 395 F. 3d
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1 at 1071. The state has failed to provide any legitimate justification for the use of
2 pancuronium bromide, and apparently uses it merely to prevent witnesses from
3 observing movement “that could be interpreted as . . . pain or discomfort.” Beardslee,
4 395 F.3d at 1076 n.13.
5

6 18. Administered on their own, pancuronium bromide and potassium chloride
7 would violate the Eighth Amendment. Morales v. Hickman, 438 F.3d 926, 928 (9th
8 Cir. 2006) (“[t]here is no dispute that in the absence of a properly administered
9 anesthetic, Morales would experience the sensation of suffocation as a result of the
10 pancuronium bromide and excruciating pain from the potassium chloride activating
11 nerve endings in Morales’ veins.”).
12

13 19. The enactment of laws by at least nineteen states that mandate the
14 exclusive use of a sedative or expressly prohibit the use of a neuromuscular blocking
15 agent in the euthanasia of animals provides objective evidence that society’s
16 “contemporary values” (Gregg v. Georgia, 428 U.S. at 173) render California’s lethal
17 injection procedure unacceptable. Beardslee, 395 F.3d at 1073.
18

19 20. Thiopental sodium is a Schedule III controlled substance under the
20 Controlled Substance Act. Federal law requires the state to keep accurate logs as to
21 the amount of this drug that it has used, dispensed, or disposed of. 21 U.S.C. § 827;
22 21 C.F.R. §§ 1304.03, 1304.04, 1304.11, 1304.21. The violations of specified
23 procedures and federal laws for obtaining, storing, preparing, using, dispensing,
24 disposing, and appropriately labeling the drugs, all affect their efficacy and subject the
25 inmate “to an unnecessary risk of unconstitutional pain or suffering.” Cooper v.
26 Rimmer, 379 F.3d 1029, 1033 (9th Cir. 2004).
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1 20. Procedure 770 does not require medically trained personnel to supervise
2 or assist in the medical tasks necessary to prepare for the execution. These tasks
3 include mixing the sodium pentothal solution, setting up the IV line and associated
4 equipment, including the “Y” injection site, in order to ensure that fluids do not leak
5 and are not misdirected, finding a usable vein, properly inserting the IV line in the
6 proper direction, and verifying that the drugs are flowing into the inmate’s vein rather
7 than into surrounding tissue. These tasks require a high degree of specialized training.
8 The absence of these tasks subject the inmate “to an unnecessary risk of
9 unconstitutional pain or suffering.” Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir.
10 2004).

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14 21. Procedure 770 creates the unnecessary and unacceptable risk that the
15 drugs will be administered in the wrong order as a result of the improper management
16 of the team and the labeling of the syringes. If an error in loading or labeling the
17 syringes occurs, the personnel administering the drugs will have no means of
18 detecting it. In addition, because the drugs are administered from another room, IV
19 line extensions must be used, which increases the risk that a flaw or kink in the IV line
20 will disrupt the flow of drugs. Thus, the State cannot establish that “the risk has been
21 minimized as much as possible” Campbell v. Wood, 18 F.3d 662, 687 n.17 (9th
22 Cir. 1994).

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26 Defendants agree that the above are disputed legal issues without agreeing that
27 all are relevant to or necessarily need to be decided by the Court in this action.
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Plaintiff’s Conclusions of Law

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1. The implementation of Operational Procedure 770 contains a substantial risk of unnecessary pain in the execution of the sentence of death, thereby depriving plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C. § 1983.

Defendants' Conclusions of Law

1. Conducting a lethal injection execution pursuant to OP 770 does not result in cruel and unusual punishment or deprive Plaintiff of any right under the Eighth or Fourteenth Amendments. Defendants refer the Court to the pleadings filed in opposition to Plaintiff's motion for a Temporary Restraining Order and Injunction.

WITNESSES TO BE CALLED AND TIME ESTIMATE

The following witnesses will be called at the hearing by plaintiff, other than solely for impeachment or rebuttal.

1. Witness #1 - execution team leader for scheduled execution of plaintiff. This witness will testify regarding team members' qualifications and training, and the execution protocol and practices;

Plaintiff's time estimate - 4 hours	Defendant's time estimate -
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2. Witness #3 - Licensed Vocational Nurse, execution team member. This witness will testify regarding team members' qualifications and training, and the execution protocol and practices;

Plaintiff's time estimate - 4 hours	Defendant's time estimate -
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3. Witness #4 - Licensed Vocational Nurse, execution team member. This witness will testify regarding team members' qualifications and training, and the execution protocol and practices;

Plaintiff's time estimate - 1.5 hours	Defendant's time estimate -
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4. Witness #5 - execution team leader for last 8 California executions. This witness will testify regarding team members' qualifications and training, and the execution protocol and practices;

Plaintiff's time estimate - 4 hours	Defendant's time estimate -
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5. Warden Ornoski - warden for last two lethal injection executions and scheduled execution of plaintiff. This witness will testify regarding defendant's management and oversight of execution team members' qualifications, and the execution protocol and practices;

Plaintiff's time estimate - 2 hours	Defendant's time estimate -
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6. Warden Woodford - warden for four lethal injection executions. This witness will testify regarding defendant's management and oversight of execution team members' qualifications, and the execution protocol and practices;

Plaintiff's time estimate - 30 minutes	Defendant's time estimate -
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1 7. Warden Calderon - warden for four lethal injection executions. This witness will
2 testify regarding defendant's management and oversight of execution team members'
3 qualifications, and the execution protocol and practices;

4	Plaintiff's time estimate - 30 minutes	Defendant's time estimate -
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7 8. Anesthesiologist #2 - this witness will testify regarding execution training and
8 compliance with this Court's February 14, 2006 order;

9	Plaintiff's time estimate - 1 hour	Defendant's time estimate -
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12 9. Robert Singler, M.D. - this witness will testify regarding execution training and
13 compliance with this Court's February 14, 2006 order;

14	Plaintiff's time estimate - 1 hour	Defendant's time estimate -
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17 10. Donald Calvo, M.D. - CDCR doctor who has attended executions;

18	Plaintiff's time estimate - 30 minutes	Defendant's time estimate -
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21 11. Jack St. Clair, M.D. - CDCR doctor who has attended executions;

22	Plaintiff's time estimate - 30 minutes	Defendant's time estimate -
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25 12. Thomas Rosko, M.D. - CDCR doctor who modified execution protocol;

26	Plaintiff's time estimate - 30 minutes	Defendant's time estimate -
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28 13. Darc Keller - CDCR Secretary in charge of plaintiff's scheduled execution;

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Plaintiff's time estimate - 1.5 hours	Defendant's time estimate -
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14. Lt. Eric Messick - Administrative Assistant of the Warden and spokesperson for San Quentin State Prison;

Plaintiff's time estimate - 30 minutes	Defendant's time estimate -
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15. San Quentin Pharmacist - practices and procedures regarding refrigerated storage of drugs;

Plaintiff's time estimate - 20 minutes	Defendant's time estimate -
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16. Denise Dull - Legal Affairs Coordinator for San Quentin State Prison and person with knowledge of record retention and preparation;

Plaintiff's time estimate - 1.5 hours	Defendant's time estimate -
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17. Cindy Adcock - execution witness of North Carolina execution that used 1.5 grams of Thiopental;

Plaintiff's time estimate - 30 minutes	Defendant's time estimate - 15 minutes
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18. Heather Jarvis - execution witness of North Carolina execution that used 1.5 grams of Thiopental;

Plaintiff's time estimate - 30 minutes	Defendant's time estimate - 15 minutes
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19. Kim Stevens - execution witness of North Carolina execution that used 1.5 grams of Thiopental;

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Plaintiff's time estimate - 30 minutes	Defendant's time estimate - 15 minutes
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20. Chuck Patterson - California execution witness;

Plaintiff's time estimate - 30 minutes	Defendant's time estimate - 15 minutes
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21. Margo Ricconi - California execution witness;

Plaintiff's time estimate - 30 minutes	Defendant's time estimate - 15 minutes
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21. William Ebling, Ph.D. - pharmacologist who will present evidence that the administration of thiopental as described in Operational Procedure 770 and the prior executions creates a substantial and unreasonable risk that an inmate will be inadequately sedated during an execution;

Plaintiff's time estimate - 2.5 hours	Defendant's time estimate - 1.5 hours
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22. Dr. Kevin Concannon - doctor of veterinary medicine and a diplomat of the American College of Veterinary Anesthesiologists who will present evidence that California's lethal injection protocol is not an acceptable method of euthanasia for animals.

Plaintiff's time estimate - 1 hour	Defendant's time estimate - 1 hour
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23. Mark Heath, M.D. - anesthesiologist who will present evidence that California's lethal injection protocol is more likely than not to cause extreme and excruciating pain to the inmate.

1	Plaintiff's time estimate - 4 hours	Defendant's time estimate - 3 hours
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3 The following witnesses will be called at the hearing **by defendant**, other than solely
4 for impeachment or rebuttal.

5
6 1. Robert Singler, M.D. - anesthesiologist who will testify on the properties and use
7 of the drugs used in a lethal injection execution in light of the procedure set forth in
8 O.P. 770.

10	Plaintiff's time estimate - 4 hours	Defendant's time estimate - 3.5 hours
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12 2. Dr. Brent Ekins - will present evidence on the pharmacological properties of the
13 drugs used in lethal injection execution.

15	Plaintiff's time estimate - 1.5 hours	Defendant's time estimate - 2 hours
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17 The witness list and/or time estimates from plaintiff will be substantially
18 reduced based upon the stipulated facts set forth above. The final best estimates will
19 be modified upon further review of the stipulated facts, disputed facts, and the
20 witnesses deposition testimony, and will be submitted to the Court. Defendants will
21 be better able to make time estimates when the parties have agreed upon a final
22 witness list.

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24
25 Should Plaintiff continue to include any current or former members of
26 the execution team on their witness list Defendants request that such testimony be
27 taken at San Quentin State Prison under the same terms and conditions as applied to
28 the March 30, 2006 hearing with Witness # 1.

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1 Defendants intend to move to exclude the testimony of some witnesses
 2 as irrelevant.
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5 JOINT EXHIBIT LIST

6 The following documents and items will be offered as exhibits at the
 7 evidentiary hearing, other than solely for impeachment or rebuttal. The parties have
 8 conferred with respect to the objections.
 9

Exh. No.	Description	Sponsoring witness	Objections
1	Photo of syringe attachment site		
2	Pentothal mixing instructions		
3	Photo of door in antechamber		
4	Photo of saline bags and light		
5	Photo of chamber door, window to mixing room, and drug cart		
5A	Xerox Photo of chamber door, window to mixing room, and drug cart		
6	Photo depicting location for delivery of drugs		
7	Handwritten log from Thompson execution		
8	Printed and handwritten log from Siripongs execution		
8A	Printed log from Siripongs execution		
9	Printed and handwritten log from Babbitt execution		
9A	Printed log from Babbitt execution		
10	Printed and handwritten log from Rich execution		

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10A	Printed log from Rich execution		
11	Printed and handwritten log from Massie execution		
11A	Printed log from Massie execution		
12A	Printed and handwritten log from Anderson execution by Calvo		
12B	Printed log from Anderson execution by second doctor		
13	Printed and handwritten log from Beardslee execution		
13A	Printed log from Beardslee execution		
14	Printed and handwritten log from S. Williams execution		
14A	Printed log from S. Williams execution		
15	Printed and handwritten log from Allen execution		
15A	Printed log from Allen execution		
16	Redacted LVN license for Witness #3		
17	OP 770 dated March 6, 2006		
18	Photo of chamber EKG machine		
19	Memo re S. Williams veins		
20	Memo re Allen veins		
21	Photo of execution chamber from witness side		
22	Photo of door to execution chamber from antechamber		
23	Photo of execution chamber depicting right side of window, IV bags, and light		
24	Photo of gurney depicting left arm rest		
25	Printed log from K. Williams execution		
26	Photo of closeup on IV bags and light in chamber		

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27	Photo of syringes on cart		
28	Photo of panel for attachment of syringes		
29	Printed log from Bonin execution		
30	Redacted LVN license for Witness #4		
31	Pages 43-44 from OP 770		
32	Subpoena for Witness #5		
33	Dr. Ekins' Report		
34	List of Dr. Ekins' source material		
35	Table re pentothal from Dr. Ekin's materials		
36	Dr. Singler's report		
37	Dr. Singer's CV		
38	Dr. Dershwitz's declaration from Cooper v. Rimmer		
39	Dr. Dershwitz's declaration from Perkins v. Beck		
40	Dr. Concannon's CV		
41	Dr. Concannon's report		
42	AVMA Euthanasia Guidelines		
43	AVMA brochure re: animal euthanasia		
44	Dr. Concannon's declaration in <i>Brown v. Beck</i>		
45	AC brief of Dr. Concannon et al. from <i>Hill v. McDonough</i>		
46	Dr. Concannon's declaration in <i>Page v. Beck</i>		
47	Limits on use of AVMA Guidelines		
48	Article from DVM Magazine		
49	Dr. Ebling's report		
50	Dr. Ebling's CV		

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51-74	OPEN FOR NEW EXHIBITS		
75	Controlled substance inventory log 2004		
76	Controlled substance inventory log dated 1/4/05		
77	Controlled substance inventory log dated 4/10/06		
78	OP 770, issued 10/1/92, revised 6/13/03		
79	Robert Singler, M.D. copies of legal opinions and document		
80	3-30-06 Crittendon photo of IV bags		
81	3-30-06 Crittendon photo of panel for syringes		
82	3-30-06 Crittendon photo of panel for syringes - from left side		
83	3-30-06 Crittendon photo of EKG monitor		
84	3-30-06 Crittendon photo of door to death cell		
85	3-30-06 Crittendon photo of antechamber ceiling vent		
86	3-30-06 Crittendon photo of radiator		
87	3-30-06 Crittendon photo of radiator		
88	3-30-06 Crittendon photo of execution chamber from witness side - antechamber door open		
89	3-30-06 Crittendon photo of execution chamber from witness side - antechamber door closed		
90	3-30-06 Crittendon photo of window into execution chamber; stopcocks		
91	3-30-06 Crittendon partial photo of syringes on cart		

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92	3-30-06 Crittendon photo of gurney - from foot		
93	3-30-06 Crittendon photo of gurney - from right side		
94	3-30-06 Crittendon photo of gurney depicting right arm rest		
95	3-30-06 Crittendon photo of gurney depicting left arm rest		
96	3-30-06 Crittendon photo of gurney depicting both arm rests		
97	March 20, 1978 Court of Appeal Opinion in Civil Case No. 40716		
98	Handwritten execution Log Michael Morales		
99	Letter of Jeanne Woodford, March 13, 2006, to Senator Thomas McClintock		
100	Governor's Office Privilege Log		
101	Execution Team Training Logs (78 pages)		

USE OF DISCOVERY

The parties have not yet agreed on the use of discovery responses and depositions to be used at the hearing, other than solely for impeachment or rebuttal.

MISCELLANEOUS

During the course of discovery, including through the depositions of Anesthesiologist #2, Warden Ornoski, and Witness #1, plaintiff learned of additional claims against defendants. The facts underlying these claims continue to be investigated. Prior to the September 13, 2006 pre-hearing conference, plaintiff will

1 file a motion for leave to file an amended pleading pursuant to Federal Rule of Civil
2 Procedure 15(a), setting forth additional claims against defendants. The amended
3 pleading will allege that defendants' actions taken vis a vis plaintiff, his counsel, and
4 the Court between February 14 and February 21, 2006, deprived plaintiff of the
5 Eighth Amendment's protection against deliberate government indifference to the risk
6 of pointless suffering, in violation of 28 U.S.C. § 1983. See, e.g., Estelle v. Gamble,
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8 429 U.S. 97, 104 (1976).
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10 The briefing for the basis of this motion has been presented to
11 defendant. Defendant intends to oppose the motion.
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DATED: September 1, 2006

MCBREEN & SENIOR

By: /s/ David A. Senior

DAVID A. SENIOR
Attorneys for Plaintiff
MICHAEL ANGELO MORALES

DATED: September 1, 2006

OFFICE OF THE ATTORNEY GENERAL

By: /s/ Dane R. Gillette

DANE R. GILLETTE
Attorneys for Defendants