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

13 **MICHAEL ANGELO MORALES,**

14 Plaintiff,

CAPITAL CASE

C 06-219 JF RS

15 v.

16 **JAMES E. TILTON, Acting Secretary; ROBERT L.**
 17 **AYERS, JR., Warden,**

18 Defendants.

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 20 **DEFENDANTS' RESPONSE TO MEMORANDUM OF INTENDED DECISION**
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**DEFENDANTS' RESPONSE
 TO MEMORANDUM OF
 INTENDED DECISION**

19
 20 In its Memorandum of Intended Decision filed on December 15, 2006 (Memorandum),
 21 the Court asked Defendants to "advise the Court and Plaintiff of their response to this memorandum,
 22 including specifically whether Defendants and the Governor's Office intend to review and revise
 23 OP 770 further and, if so, how much additional time, if any, they believe they will need to complete
 24 the task." Memorandum at 17. Defendants respectfully submit this response.

25 In its Memorandum, the Court was careful to explain that this case presents the narrow
 26 question of whether actual implementation of California's lethal injection protocol creates an undue
 27 and unnecessary risk that an inmate would experience extreme pain in violation of the Eighth
 28 Amendment's prohibition against cruel and unusual punishment. *Id.* at 2. In addressing that issue

1 the Court identified certain “correctable” deficiencies in the implementation of California’s lethal
2 injection protocol and indicated that “a thorough, effective response to the issues raised in this
3 memorandum likely will enable the Court to enter . . . a favorable judgment.” *Id.* at 14-15.

4 Although the Governor is not a party to this case, the Court expressed its belief that the
5 Governor’s Office is in the best position to direct the changes needed to correct deficiencies noted
6 in the memorandum and invited the Governor “to take this opportunity to address” the
7 implementation of OP 770. *Id.* at 15. The Governor’s Office is filing a separate response
8 confirming its commitment to this effort.

9 The Governor’s Office and Defendants are committed to reviewing, evaluating, and
10 revising the current lethal injection protocol with respect to the identified deficiencies and any others
11 that may emerge during the evaluation. However, such efforts, to be fully effective, must involve
12 a deliberative process that is not chilled by threats of depositions, subpoenas, or other premature
13 discovery efforts. Consultants, experts, and others may be reluctant to share information if there is
14 the threat of discovery. Accordingly, Defendants and the Governor’s Office have respectfully
15 submitted a separate motion for protective order designed to allow this important deliberative
16 process to proceed in an effective manner.

17 The Defendants and the Governor’s Office intend to review and revise OP 770 and to
18 correct deficiencies in the implementation of the protocol. Care must be taken, however, to ensure
19 that the efforts are comprehensive and effective. As the Court indicated in an earlier order, “a
20 thorough review of the lethal injection protocol, including *inter alia*, the manner in which the drugs
21 are injected, the means used to determine when the person being executed has lost consciousness,
22 and the quality of contemporaneous records of executions” may be necessary. *Morales v. Hickman*,
23 415 F.Supp.2d 1037, 1046 (N.D. Cal. 2006), quoted at Memorandum at 16. To allow a thorough
24 review and opportunity to take corrective action, Defendants will submit to the Court and Plaintiff
25 a report setting forth a revision of OP 770 and identifying corrective actions addressing deficiencies
26 in the implementation of lethal injection executions by May 15, 2007.

1 Dated: January 16, 2007

2 Respectfully submitted,

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