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

13
 14 **MICHAEL ANGELO MORALES,**

15 Plaintiff,

16 v.

17 **JAMES E. TILTON, et al.,**

18 Defendants.

Case Number C 06 219 JF RS
 Case Number C 06 926 JF RS

DEATH PENALTY CASE

**RESPONSE BY THE GOVERNOR'S
 OFFICE TO THE COURT'S
 MEMORANDUM OF INTENDED
 DECISION DATED DECEMBER 15,
 2006**

1 **RESPONSE BY THE GOVERNOR'S OFFICE TO**
2 **THE COURT'S MEMORANDUM OF INTENDED DECISION.**

3 Although the Governor is not a party to this case, he appreciates the Court's invitation to
4 address the deficiencies in implementation of the lethal injection protocol identified in the
5 Memorandum of Intended Decision filed on December 15, 2006 (Memorandum) and the
6 opportunity to review, evaluate and revise the current lethal injection protocol. The Governor's
7 Office files this response to confirm that the Governor and his administration are committed to
8 fixing the identified deficiencies and intend to review, evaluate and revise the lethal injection
9 protocol.

10 In the Memorandum, the Court was careful to explain that this case is not about whether
11 lethal injections are constitutional in the abstract, or whether executions must be painless.
12 (Memorandum at p. 2.) Instead, this case presents the narrow question whether the actual
13 implementation of California's lethal injection protocol creates an undue and unnecessary risk
14 that an inmate would experience pain so extreme that it would offend the Eighth Amendment's
15 prohibition against cruel and unusual punishment. (*Ibid.*)

16 In addressing the narrow issue presented, this Court identified certain "correctable"
17 deficiencies in the implementation of California's lethal injection protocol. (Memorandum at pp.
18 14-15.) The Court indicated that "a thorough, effective response to the issues raised" in the
19 Court's Memorandum likely would enable the Court to enter a favorable judgment in this matter.
20 (*Id.* at 15.)

21 The Court expressed its belief that the Governor's Office is in the best position to direct
22 the changes needed to correct the deficiencies noted in the Court's Memorandum.
23 (Memorandum at p. 15.) Accordingly, the Court respectfully invited the Governor's Office to
24 take this opportunity to address the implementation of the lethal injection protocol and to advise
25 the court if the Governor's Office and defendants intend to review and revise the current lethal
26 injection protocol. (Memorandum at pp. 15, 17.)

27 In response to the Court's December 15th Memorandum, the Governor's Office took
28 immediate action. The next business day, the Governor directed his administration to correct the

1 deficiencies identified by the Court. (See Press Release dated December 18, 2006 attached as
2 Exhibit A.) As an initial matter, the Governor directed his administration to (1) establish a
3 screening process for selection of execution team members and a periodic review process for
4 team members; (2) establish a comprehensive training program for all execution team members;
5 (3) develop standardized record-keeping to ensure there are complete and reliable records of
6 each execution; (4) recommend how to improve the death penalty facility at San Quentin Prison
7 to ensure that there is adequate equipment, lighting and space for the execution team; and (5)
8 identify the best experts to provide advice on the lethal injection protocol and its
9 implementation. (*Ibid.*)

10 The Governor's review of the lethal injection protocol is significant and important. But
11 if the review is going to be thorough and comprehensive, then it must involve a certain amount
12 of deliberative process. That deliberative process should not be chilled by threats of depositions,
13 subpoenas or other discovery. Experts, consultants, professionals and other public officials
14 should feel comfortable discussing alternatives, options and possibilities without fear that they
15 will be subpoenaed or deposed simply due to their participation in pre-decisional policy
16 discussions. The administration is already working to identify appropriate experts and to consult
17 with other jurisdictions. However, some of these sources of information may be reluctant to
18 cooperate without a protective order from the Court. Accordingly, the Governor's Office and
19 defendants will be filing a separate request for a protective order so that this important
20 deliberative process can proceed in an effective manner.

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1 The Governor's Office appreciates this opportunity to respond to the Court's
2 Memorandum. The Governor's Office will review and revise the lethal injection protocol to
3 make certain that the protocol and its implementation are constitutional.

4 DATED: January 16, 2007

5 Respectfully Submitted,

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10 /s/ Steven M. Gevercer

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