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But Can it Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions

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BUT CAN IT BE FIXED? A LOOK AT CONSTITUTIONAL CHALLENGES TO LETHAL INJECTION EXECUTIONS

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I. INTRODUCTION

> The curtains to the execution chamber were opened at 6:00 p.m. From my seat in the front row of the observation room[,] I was located approximately six (6) to seven (7) feet from Mr. Diaz. Initially, I observed Mr. Diaz laying on a gurney covered by a white sheet. He was strapped to the gurney, and his right arm was held in place by a leather strap. Additionally, Mr. Diaz had some type of tape or gauze holding his right hand in place, and an intravenous needle had been placed in his right arm where his elbow would bend. . . .
>
> Mr. Diaz was asked if he had any last words, and he was permitted to give a short speech in Spanish. Having met Mr. Diaz before, it appeared to me that he was sedated in some manner, as his speech was slower and somewhat slurred.
>
> Within a few minutes, Mr. Diaz became agitated, and it appeared to me that he was speaking to members of the Department of Corrections staff. They did not appear to respond to him . . . . During the time Mr. Diaz appeared to be speaking . . . [h]is face was contorted, and he grimaced on several occasions. His Adam's Apple bobbed up and down continually, and his jaw was clenched.
>
> . . . [H]is left eye remained opened. . . . Mr. Diaz appeared to be gasping for air for at least 10-12 minutes. It was apparent that the complete drug cycle had been given to Mr. Diaz, however, . . . I

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> observed movement from Mr. Diaz, and he continued to gasp . . . for air.
>
> . . . .
>
> After a total of 25-30 minutes, Mr. Diaz's breathing appeared to get shallower. His face became slack, and his skin had a grayish pallor. During the last 5-6 minutes, both of his eyes opened and his Adams apple slowly stopped bobbing.
>
> . . . The time from when Mr. Diaz finished speaking, until the time he was pronounced dead was a span of 34 minutes.

– Affidavit of Neal Dupree after observing the execution of Angel Diaz on December 13, 2006.[1]

For five days in September 2006, in Judge Jeremy Fogel's courtroom in the U.S. District Court in San Jose, witnesses testified and offered insight into executions by lethal injections, currently the most humane way to kill another human being.[2] The judge inquired about, and a witness distinguished between, a feeling of agony (a sensation of suffocation or drowning) and one of excruciating pain (more of a burning sensation), in order to better understand how an inmate feels when certain drugs are administered.[3] Experts testified about clinical

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1. Emergency Petition Seeking to Invoke this Court's All Writs Jurisdiction, Attachment E, Dupree Affidavit, Lightbourne v. Crist, No. 06-2391 (Fla. Sup. Ct. Dec. 14, 2006), *available at* http://www.floridasupremecourt.org/pub%5Finfo/summaries/briefs/06/06%2D2391/Filed_12-14-2006_AttachmentE.pdf. Following this "botched" execution, Florida governor Jeb Bush declared a moratorium on executions until a newly appointed commission on the administration of lethal injection reviews the methods by which lethal injection are administered in the state and reports back to the governor to ensure they are consistent with the Eighth Amendment to the Constitution. Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, N.Y. TIMES, Dec. 16, 2006, at A11.

2. *See* Transcript of Proceedings, Morales v. Tilton, No. C-06-0219-JF (N.D. Cal. Sept. 27, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/Evidentiary%20Hearing/2006.09.27%20Morales%20Evidentiary%20Hearing.txt.

3. *Id.* The following is the testimony of Dr. Mark Heath:

> THE WITNESS: . . . I think that it's worth talking about whether it's pain or not. I don't believe that it would fall under a definition of pain.
>
> THE COURT: It [sic] not pain in the sense that potassium causes pain?
>
> THE WITNESS: Exactly.
>
> THE COURT: It doesn't cause the burning sensation that potassium causes, but it causes an experience of suffocation?
>
> THE WITNESS: It causes agony, but it's not an agony from pain. It's the agony of—that would be with drowning or strangulation or some kind of suffocation like that.

trials that studied the effect of barbiturates on primates, and how those results inform our ability to kill what was referred to in the courtroom as a "large 150 pound primate."[4] Doctors testified to their ethical obligations and how these affected their decision whether to participate in a state execution.[5] The hearings represented the culmination of hours of depositions taken from numerous witnesses, all of whom were involved in California's lethal injection executions.

This evidence was presented to Judge Fogel to evaluate whether California's current lethal injection procedures, administered in accordance with the San Quentin Operating Procedure 770 (Procedure 770), involves the unnecessary and wanton infliction of pain contrary to contemporary standards of decency in violation of the Eighth Amendment to the United States Constitution. Judge Fogel answered this question in the affirmative. He stated that California's implementation of lethal injection is broken, adding, "[B]ut it can be fixed."[6]

With lethal injection, unnecessary infliction of pain arises principally from two sources. First, the state procedures themselves may unnecessarily increase risk of unnecessary infliction of pain.[7] The most controversial aspect of the existing Procedure 770 is the use of a paralytic agent that masks the effect of the barbiturate sedative expended to render the inmate unconscious. Because this drug renders an inmate unable to speak or gesture, the inmate could be conscious and in excruciating pain without anyone else knowing of his suffering. The paralytic drug is unnecessary to the execution. Indeed, the American Veterinary Medical Association (AVMA) has condemned the use of paralytic drugs to euthanize animals, saying it was inhumane.[8]

Second, even if the lethal injection could be administered

Id. at 553 (testimony of Dr. Mark Heath).

4. *Id.* at 608-09.

5. Transcript of Proceedings at 978-89, Morales v. Tilton, No. C-06-0219-JF (N.D. Cal. Sept. 28, 2006), (testimony of Dr. Robert Singler), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/Evidentiary%20Hearing/2006.09.28%20Morales%20Evidentiary%20Hearing.txt.

6. Memorandum of Intended Decision; Request for Response from Defendants at 3, Morales v. Tilton, C-06-0219, (N.D. Cal. Dec. 15, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/200612.15%20memorandum%20of%20intended%20decision.pdf.

7. *See infra* Parts V.A.1-6.

8. Panel on Euthanasia, Am. Veterinary Med. Ass'n, *2000 Report of the AVMA Panel on Euthanasia*, 218 J. AM. VETERINARY MED. 669 (2001).

humanely, it requires some medical training or participation to ensure that the inmate is properly anesthetized so as to eliminate unnecessary infliction of pain.[9] The American Medical Association (AMA) forbids doctors from participating in executions as a violation of their professional ethics.[10] As a result, execution teams rarely include medical professionals and the team's competence, therefore, depends on state training and supervision. This state training, even if done conscientiously, is unlikely to ever rise to the level of professional training. Medical professionals receive training for a lifelong career. Members of an execution team, on the other hand, are only given training for a single procedure. This state training is most likely to be effective if the same team conducts repeated executions, but staying on an execution team could increase the traumatic effect on prison guards required to carry out the executions.[11]

Morales v. Tilton[12] challenges the constitutionality of California's lethal injection procedure. Michael Morales was sentenced to death for the 1981 rape and murder of Terri Winchell in Lodi, California. Morales' challenge is not a debate over the usefulness or the morality of the death penalty, but rather questions the constitutionality of the specific manner in which California has implemented executions by lethal injection. Judge Fogel made clear that the case presents one question: "[Whether] California's lethal-injection protocol—as actually administered in practice—create[s] an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth

9. Memorandum of Intended Decision, *supra* note 6, at 16. Judge Fogel noted that:

> [B]ecause of the paralytic effect of pancuronium bromide, a determination of an inmate's anesthetic depth after being injected with that drug is extremely difficult for anyone without substantial training and experience in anesthesia, the protocol must ensure that a sufficient dose of sodium thiopental or other anesthetic actually reaches the condemned inmate and that there are reliable means of monitoring and recording the inmate's vital signs throughout the execution process.

Id.

A Missouri Federal Court recently issued an order requiring that: (1) a board certified anesthesiologist shall be responsible for the mixing of all drugs which are used in the lethal injection process. If the anesthesiologist does not actually administer the drugs through the IV, he or she shall directly observe those individuals who do so; (2) Pancuronium Bromide and Potassium Chloride will not be administered until the anesthesiologist certifies that the inmate has achieved sufficient anesthetic depth so that the inmate will not feel any undue pain when the Potassium Chloride is injected; (3) the State will put in place procedures which will allow the anesthesiologist to adequately monitor the anesthetic depth of the inmate. Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *8-9 (W.D. Mo. June 26, 2006).

10. CODE OF MED. ETHICS § E-206 (Am. Med. Ass'n 2000), *available at* http://www.ama-assn.org/ama/pub/category/8419.html.

11. Transcript of Proceedings, *supra* note 2, at 577-78,(testimony of Dr. Mark Heath).

12. Morales v. Tilton, No. C-06-0219-JF (N.D. Cal. 2006).

Amendment?"[13]

This article argues that California's Procedure 770 as currently implemented is unconstitutional. Judge Fogel, after an exhaustive review of evidence from all parties, agrees. Although Judge Fogel believes that the lethal injection system, while broken "can be fixed," we argue that lethal injection, as a method of execution, is always unconstitutional because the procedures employed in its administration can never ensure against unnecessary risk of pain to the inmate. We also argue that the California legislature must step in to publicly review lethal injection executions and to investigate the conduct of the California Department of Corrections and Rehabilitation (CDCR) in the manner in which prior executions have been carried out at San Quentin. This article examines the issues and lessons illuminated by the constitutional challenge to Procedure 770 raised by Michael Morales. Part II reviews the history of the lethal injection procedure in California. Part III provides analysis of the ways by which challenges to lethal injection executions may be raised and the process of securing a stay of execution while litigation is pending. Part IV examines the Eighth Amendment jurisprudence and its applicability to lethal injection executions. Part V, using the *Morales* case as a backdrop, looks at how courts evaluate whether California's lethal injection procedures create an "unnecessary risk of pain." Part VI then reviews the court's ruling in *Morales*. Part VII presents the conflict between the constitutional standard and medical ethics. Finally, Part VIII presents an assessment of the Morales case and makes recommendations for what the court and legislatures should do.

II. HISTORY OF THE USE OF LETHAL INJECTION IN EXECUTIONS

While lethal injection has been used as a method of execution for less than thirty years, the idea of using a chemical injection to execute an inmate has been around for over a century.[14] An examination of states' adoption of lethal injection as a method of execution reveals three motivations for the growing acceptance of this form of execution.[15]

13. Memorandum of Intended Decision, *supra* note 6, at 2.

14. Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551 (1994) (providing a more exhaustive history of lethal injection as well as other methods of execution used in the United States).

15. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 91 (2002).

The first motivation is that lethal injection satisfies a desire for something "simpler and more humane"—a better way to carry out a death sentence.[16] Like the calm of euthanizing a favorite pet, lethal injection may help the public feel satisfied that the state has employed modern medicine and technology to impose death in an efficient and considerate manner.[17]

Second, legal challenges to the previous methods of execution prompted a search for a less controversial alternative.[18] In California, it was litigation surrounding the constitutionality of the gas chamber that motivated passage of a lethal injection execution bill.[19]

Finally, there are cost incentives favoring the lethal injection process.[20] The construction costs of building gas chambers or electric chairs far exceed the minimal costs of obtaining drugs for a lethal injection.[21]

These three advantages triumphed over continuing objections and concerns about the complicity of the medical establishment in executions; the inherent conflict between the medical ethics and the medical oversight necessary for a responsible, "civilized," and constitutional execution procedure.

A. Early Consideration of Lethal Injection

As early as 1888, a panel commissioned by the state of New York considered lethal injection as a possible means of execution.[22] Ultimately, the commission decided that electrocution presented a preferable option.[23] The panel rejected lethal injection primarily because the medical profession was concerned that the public would begin to associate the practice of medicine with death.[24]

In the mid-1900s, before the United Kingdom abolished the death penalty, the British government contemplated using lethal injection as a means of execution.[25] The Royal Commission on Capital

16. LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 35 (2004).

17. Denno, *supra* note 15, at 91-92.

18. *Id.* at 86-87.

19. Letter from Tom McClintock, Cal. Assemb, to All Members of Leg. (Apr. 21, 1992) (on file with author).

20. Denno, *supra* note 14, at 655.

21. Denno, *supra* note 15, at 95 & n.206.

22. Denno, *supra* note 14, at 572-73.

23. *Id.* at 573.

24. Denno, *supra* note 15, at 90-91.

25. REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, CMD. 8932, at 257 (H.M. Stationary Office 1953).

Punishment's report pointed to three specific reasons why lethal injection was not a preferred option.[26] First, the Commission thought that certain physical abnormalities of the condemned might make the procedure impossible.[27] Second, the Commission was concerned that inmates would not cooperate.[28] Third, the commission's report recognized that to effectively implement the procedure, medical skills were required and the medical profession was unwilling to participate.[29]

Over the years, U.S. politicians continued to express an interest in a lethal injection procedure for execution. The apparent simplicity of the lethal injection procedure was attractive to state governments.[30] In 1973, then California Governor Ronald Reagan acknowledged the appeal of the lethal injection process:

> Being a former farmer and horse-raiser, I know what it's like [how difficult it is] to try to eliminate an injured horse by shooting him. Now you call the veterinarian and the vet gives it a shot and the horse goes to sleep-that's it. I myself have wondered if maybe this isn't part of our problem [with capital punishment], if maybe we should review and see if there aren't even more humane methods now [to execute prisoners]—the simple shot or tranquilizer.[31]

At the time Governor Reagan made these observations, the U.S. was experiencing a moratorium on executions.[32] In *Furman v. Georgia*,[33] the U.S. Supreme Court had just struck down Georgia's death penalty statute, effectively invalidating the death penalty statutes of 40 states.[34] Because *Furman* did not abolish capital punishment per se, the state legislatures responded to the decision by developing new death penalty statutes that would pass constitutional muster. In 1976, the Court upheld the constitutionality of one such statute, thereby bringing back death penalty to the country.[35] States then began to review their methods of execution.

B. Oklahoma's Adoption of Lethal Injection

Like many states, California borrowed its lethal injection protocol

26. *Id.*
27. *Id.*
28. *Id.* at 258.
29. *Id.* at 258-59.
30. Denno, *supra* note 15, at 92.
31. Henry Schwarzschild, *Homicide by Injection*, N.Y. TIMES, Dec. 23, 1982, at A15.
32. CARTER & KREITZBERG, *supra* note 16, at 23.
33. Furman v. Georgia, 408 U.S. 238 (1972).
34. *Id.*
35. Gregg v. Georgia, 428 U.S. 153 (1976).

from a process that originated in Oklahoma and was later modified in Texas.[36] When the death penalty was reinstated in Oklahoma, the Oklahoma legislature faced a difficult dilemma before the state could resume executions.[37] The state's electric chair had been unused for some time and required $62,000 to be repaired.[38] An even less attractive alternative was construction of a new gas chamber at a cost of roughly $300,000.[39] Oklahoma wanted a less expensive method of execution. With the assistance of Dr. Stanley Deutsch, head of the Department of Anesthesiology at The University of Oklahoma Health Sciences Center, a proposal was made to Oklahoma's legislature to perform executions using a lethal injection of an ultra short-acting barbiturate combined with a neuromuscular blocking drug.[40] A lethal injection bill was introduced and quickly passed.[41] No committee hearings, research, or expert testimony was presented prior to final passage of the bill.[42]

The Oklahoma lethal injection statute specifically provides that the state must use "a lethal quantity of an ultra short-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice."[43] The Oklahoma legislature did not identify specific drugs, nor did it provide any details about appropriate dosage. To determine these details, the state turned to its Chief Medical Examiner, Dr. Jay Chapman.[44] Dr. Chapman recommended using a three-drug "cocktail"[45]: sodium thiopental as the barbiturate sedative, to induce unconsciousness; pancuronium bromide as a neuromuscular blocking agent, to induce paralysis; and potassium chloride, to induce cardiac arrest.[46] In a recent interview Dr. Chapman was asked about his drug

36. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 2006).

37. Denno, *supra* note 15, at 95.

38. *Id.*

39. *Id.*

40. Letter from Stanley Deutsch, Ph.D., M.D., Professor of Anesthesiology, Univ. of Okla. Health Sci. Ctr., to the Honorable Bill Dawson, Okla. State Senator (Feb. 28, 1977), *quoted in* Denno, *supra* note 15, at 95 n.207.

41. OKLA. STAT. ANN. tit. 22, § 1014(A) (West 2003).

42. *Id.*

43. *Id.*

44. HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 14-15 (2006), *available at* http://hrw.org/reports/2006/us0406/us0406webwcover.pdf (presenting telephone interview with Dr. Jay Chapman, former Oklahoma chief medical examiner, in Santa Rosa, California, on March 23, 2006).

45. Cocktail may be a misnomer as the three drugs used in a lethal injection execution are administered sequentially and not mixed together in a traditional cocktail form.

46. HUMAN RIGHTS WATCH, *supra* note 44, at 15.

selection and acknowledged:

> I didn't do any research. I just knew from having been placed under anesthesia myself, what we needed. I wanted to have at least two drugs in doses that would each kill the prisoner, to make sure if one didn't kill him, the other would. . . . You just wanted to make sure the prisoner was dead at the end, so why not just add a third lethal drug? . . . I didn't do any research . . . . Doctors know potassium chloride is lethal. Why does it matter why I chose it?[47]

Oklahoma's lethal injection statute became law on May 10, 1977. Texas passed a similar bill the next day.[48]

C. California's Move to Lethal Injections

1. Legislative Efforts

California reinstated its death penalty statute in 1977.[49] At that time, the state's sole method of execution was the gas chamber. Between 1977 and 1992, there were two unsuccessful legislative efforts to change the method of execution to lethal injection.[50] The first was in February of 1984 when State Senator Oliver Speraw introduced Senate Bill 1968 (SB 1968) which proposed that California establish an alternative method of execution to the gas chamber.[51] The bill called for "lethal penathol injections."[52] Questions and problems with the bill included issues about staff training, and potential litigation challenging the procedure.[53] The motivation behind this bill was to allow inmates

47. *Id.* Recently, both Chapman and Bill Wiseman, a legislator who helped write the original lethal injection bill, have expressed regret with the protocols they help to design. Denise Grady, *Doctors See Way to Cut Suffering in Executions*, N.Y. TIMES, June 23, 2006; Opinion, *Bill Wiseman: "Happy Hour," A Confession*, DALLAS MORNING NEWS, Oct. 9, 2005. "I'm sorry for what I did . . . . I hope someday to offset it by helping us realize that capital punishment is wrong and self-destructive." Vince Beiser, *A Guilty Man*, MOTHER JONES, Sept./Oct. 2005 (quoting Bill Wiseman).

48. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 2006). For history, see *Ex parte Granviel*, 561 S.W.2d 503, 507 (Tex. Crim. App. 1978).

49. *See* S.B. 155, 106, 1977-78 Reg. Sess. (Cal. 1977) (Senate Final History). One year later, in 1978, California voters passed Proposition 7 (better known as "the Briggs Initiative," after sponsor Senator John Briggs), which greatly expanded the scope of the state's death penalty statute. Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides*, 46 SANTA CLARA L. REV. 1, 3 (2005).

50. *See* Assemb. B. 1716, 1987-88 Reg. Sess. (Cal. Mar. 5, 1987); S.B. 1968, 1983-84 Reg. Sess. (Cal. 1984).

51. *See* S.B. 1968 (Senate Comm. on Judiciary Background Info.).

52. *Id.*

53. *Id.* One legislative analysis of the bill observed that laws in other states, like Texas, specifically prohibited the use of body organs of executed persons. Patrick Kennedy, Bill

to donate their organs under the Uniform Anatomical Gift Act.[54] After nine months in committee without a vote or a hearing, SB 1968 died.[55]

A few years later, in March 1987, State Assembly member Tom McClintock introduced Assembly Bill 1716 (AB 1716) which proposed changing the method of execution to lethal injection.[56] This bill was defeated in January of 1988.[57] Proponents hailed the bill as a more cost efficient alternative to the gas chamber as well as a "painless" and "more humane" method of execution.[58] McClintock argued that for capital inmates, "[n]o matter how hideous their crimes, it is incumbent upon society to insure that their deaths occur in the most humane and painless fashion."[59] Other proponents of the bill dismissed the need for physicians in administering the injection and argued that, "a licensed medical technician is qualified for such a procedure."[60]

Many organizations including Amnesty International, The Friends Committee on Legislation, the California Medical Association, the American Civil Liberties Union, and UCSF Chief of Medical Ethics opposed AB 1716.[61] Opponents of the bill rejected the idea that executions by lethal injection were more humane and argued that the procedure "perverts the role of doctors and health professionals."[62] This bill also never had hearings and was unable to get out of committee.[63]

In 1992, California faced its first execution following the reinstatement of the death penalty. Robert Harris was scheduled to die on April 21, 1992.[64] On April 17, Harris and two other death row

Analysis of Senate Bill 1968 (Mar. 26, 1984) (on file with author).

54. *See* S.B. 1968 (Senate Comm. on Judiciary Background Info.) (on file with author). Dr. Jack Kevorkian, a then-unknown pathologist, provided the primary support for this bill, *see id.*, because he believed that execution by lethal gas would leave the organs unsuitable for donation. Dr. Kevorkian was later a proponent and advocate of assisted suicide. *See* Wikipedia.com, Jack Kevorkian, http://en.wikipedia.org/wiki/Jack_Kevorkian (last visited May 9, 2007).

55. *See* S.B. 1968, at 1196 (Senate Final History).

56. Assemb. B. 1716, 1987-88 Reg. Sess. (Cal. Mar. 5, 1987) (introduced by Tom McClintock) (on file with author). This bill also proposed changing the location of death row. *See id*

57. Assemb. B. 1716, at 1148 (Assembly Final History). According to the bill history, the bill was filed with the Chief Clerk and died pursuant to article IV, section 10(a) of the California Constitution. *Id.*

58. Assemb. B. 1716 (Bill Analysis Worksheet) (on file with author).

59. Press Release, Cal. State Assembly, Assembly Republican Caucus (Jan. 6, 1988) (on file with author).

60. Assemb. B. 1716, at 56 (Bill Analysis Worksheet).

61. Melissa K. Nappan, Bill Analysis of AB 1716 for Hearing of May 11, 1987.

62. *Id.*

63. Assemb. B. 1716, at 1148 (Assembly Final History).

64. Cal. Dep't of Corrections & Rehabilitation, Inmates Executed, 1978 to Present,

inmates filed a constitutional challenge to the use of the gas chamber as a means of execution. The courts initially granted Harris a stay of his execution in order to litigate his challenge.[65] Nevertheless, the U.S. Supreme Court lifted the stay.[66] Robert Harris was executed as scheduled in California's gas chamber.[67]

While California was carrying out executions in its gas chamber, United States District Court Judge Marilyn Hall Patel scheduled a hearing to evaluate the procedure's constitutionality.[68] With this backdrop, Assembly Member Tom McClintock once again introduced a bill to change the method of execution to lethal injection.[69] This time there was a real possibility that California would be unable to carry out executions unless the state adopted a procedure other than the gas chamber. As a result, McClintock's bill, AB 2405, passed through the state legislature with bi-partisan support and minimal discussion.[70] The legislative process was swift. There were no hearings in either the state Assembly or the Senate.[71] There was no testimony by experts about how the procedure would be implemented. The bill did not propose any specific protocol for lethal injection executions.[72] It took only approximately six months from the introduction of the bill to the day when Governor Pete Wilson signed it into law.[73] With Wilson's signature, California joined twenty-four other states[74] that now had

http://www.cdcr.ca.gov/ReportsResearch/InmatesExecuted.html (last visited May 10, 2007).

65. Fierro v. Gomez, 790 F. Supp. 966 (N.D. Cal. 1992).

66. Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653 (1992).

67. On August 24, 1993, David Mason was the only other inmate to be executed by lethal gas in California before a federal court ruled on October 4, 1994, that the gas chamber was a "cruel and unusual" way to execute inmates. Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994). Mason had voluntarily waived his appeals and did not seek a stay of execution based on this issue. The Court challenged California's use of a gas chamber under all circumstances, claiming that the length of time it took to die and the pain involved in any execution by gas was a violation of Eighth Amendment rights. Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996) ("[W]e conclude that execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments.").

68. *Fierro*, 790 F. Supp. at 971. The hearing on the challenge to the gas chamber was held primarily in October and November of 1993. Eight days of testimony followed. Experts testified about the effect of gas on the lungs, eyewitnesses testified about their observations from prior executions, and a law professor discussed criminal justice policy. *See Fierro*, 865 F. Supp. 1387.

69. Letter from Tom McClintock, Cal. Assemb., to All Members of Legislature (Apr. 21, 1992) (on file with author).

70. Assemb. B. 2405, 1991-92 Reg. Sess. at 1645 (Vol. 2) (Cal. 1992) (Assembly Final History).

71. *Id.*

72. Assemb. B. 2405,(Bill History) (on file with author).

73. Assemb. B. 2405.

74. Deborah W. Denno, *Getting To Death: Are Executions Constitutional?*, 82 IOWA L.

lethal injection as a possible form of execution.[75]

2. California's Adoption of Procedure 770

Procedure 770 sets forth the procedure for implementing a lethal injection execution in California.[76] It describes the selection and training of the execution team and also provides a detailed step-by-step account of all activity of the execution team in the weeks and hours leading up to an execution. It also specifies what each member of the execution team should be doing during the execution.[77]

The procedure also specifies the three drugs that should be injected during an execution.[78] First, the procedure requires the injection of one syringe of Sodium Pentothal to anesthetize an inmate and render him unconscious.[79] Next, the procedure requires the injection of three syringes of Pancuronium Bromide (Pavulon) to stop all muscular activity for the duration of the execution. Finally, the procedure requires the injection of three separate syringes of Potassium Chloride, which stops the inmate's heart.

REV. 319, 408 (1997).

75. Assembly Bill 2405 read as follows:

> Existing law requires the punishment of death to be inflicted by the administration of a lethal gas.
>
> This bill, instead, would provide that the punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.
>
> The bill would provide that persons sentenced to death prior to or after the operative date of this bill shall have the opportunity, as specified, to elect to have the punishment imposed by lethal gas or lethal injection.

Assemb. B. 2405, at 1645 (Assembly Final History). Section 3604(a) of the California Penal Code provides only that "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death." CAL. PENAL CODE § 3604(a) (West 2000).

76. San Quentin Institution Procedure 770, Exhibit A to Plaintiff's Motion for Temporary Restraining Order; Memorandum of Points and Authorities in Support Thereof, Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006) (No. C-06-926-JF), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct.Cp/Ex%20A%20to%20TRO%20motion%20(Procedure%20No.%20770).pdf.

77. *Id.*

78. *Id.*

79. Procedure 770 currently calls for five grams of sodium pentothal dissolved in twenty to twenty-five grams of dilutent. *Id.* For prior executions, two grams of sodium pentothal were used. *See* Joint Filing of Statement of Undisputed Facts, Part II at 58, ¶ 254, Morales v. Woodford, No. C-06-0219-JF (N.D. Cal. Nov. 27, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/November%20filing/Filed%20Stip%20Facts%202.pdf (citing the "initial draft" of the excution procedure as calling for "only one syringe of Pentothal solution, containing 2.0 grams of sodium Pentothal").

According to former San Quentin Warden Daniel Vasquez, this procedure was adopted from the one used in Texas. Vasquez testified in an earlier hearing that he traveled to Texas to observe their method of executions and to bring back a recommendation for California to adopt.[80] He recalled watching one lethal injection execution in Texas where a suitable vein could not be located for 45 minutes until finally an IV line was inserted in the inmate's scrotum.[81] Despite this experience, Vasquez recommended adoption of the Texas procedure by California.

Interestingly, however, the procedures used in California differ from the procedures used in Texas in several significant respects. According to Vasquez, Texas uses three to four feet of IV line whereas California uses approximately twenty feet of line.[82] Texas uses medical staff to inject the drugs, but California uses untrained prison guards.[83] Texas procedure calls for five grams of the anesthesia, sodium pentothal, but California procedure, prior to March 2006, called for two grams of sodium pentothal.[84] Vasquez does not recall consulting with any doctors independently about the procedure and could not provide any explanation for this deviation from the Texas protocol.[85]

Apart from the information Vasquez brought back from Texas on their implementation of a lethal injection execution, there has been no independent assessment, evaluation, or examination of the protocol implemented as Procedure 770. Over the years there has never been any critical re-evaluation of the procedure to assess whether modern medical or scientific knowledge could improve the existing protocol.

E. Lethal Injection Nationally

As of November, 2006, thirty-seven states provide for lethal injection as a means of execution[86]; eighteen of these states allow an inmate to choose between lethal injection and either electrocution, the

80. *Id.* at 57, ¶ 248.

81. *Id.* at 60-61, ¶ 265b

82. Plaintiff's Brief Submitted After Conclusion of Evidentiary Hearing at 13, Morales v. Tilton, No. C-06-0219-JF (N.D. Cal. Nov. 28, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/November%20filing/Filed%20Post-Trial%20Brief.pdf.

83. Joint Filing of Statement of Undisputed Facts, *supra* note 79, at 56, ¶¶ 241, 259, 261.

84. *Id.* at 57-58, ¶¶ 248-57.

85. *Id.*

86. Death Penalty Info. Ctr., Methods of Execution, http://www.deathpenaltyinfo.org/article.php?scid=8&did=245 (last visited May 6, 2007).

gas chamber, hanging, or a firing squad.[87] Of all the states that have the death penalty, only Nebraska does not provide lethal injection as an execution method and instead executes only by means of electrocution.[88] Since 1977 an estimated 901 people have been executed in the United States by lethal injection.[89]

Morales' challenge to California's lethal injection procedure was not isolated; inmates in other states filed similar challenges to their state's lethal injection procedure.[90] The fundamental question in all cases is the same. A court is asked to decide whether the a state's lethal injection procedure is constitutional; whether it involves the unnecessary and wanton infliction of pain contrary to the contemporary standards of decency in violation of the Eighth Amendment.

III. CONSTITUTIONAL CHALLENGES TO METHODS OF EXECUTIONS

The Eighth Amendment of the Constitution prohibits the imposition of cruel and unusual punishment,[91] and a violation of this prohibition can be challenged in different ways. There are both legal and strategic reasons behind a decision as to which legal procedure to use to make a challenge. Any lethal injection challenge is complicated because an inmate must also request a court to halt the impending execution while the challenge is being litigated. There are two principal legal avenues for filing a challenge; by a petition for writ of habeas corpus[92] or by a civil rights lawsuit under 42 U.S.C. § 1983[93] (§

87. *Id.*

88. *Id.*

89. *Id.* Texas was the first state to use lethal injection in an execution; Charlie Brooks Jr. was executed by lethal injection on December 7, 1982. Death Penalty Info. Ctr., Executions in the U.S. from 1976-1986, http://www.deathpenaltyinfo.org/article.php?scid=8&did=465 (last visited May 10, 2007).

90. Hearings have been held in several states, including Missouri, Taylor v. Crawford, 457 F.3d 902 (8th Cir. 2006), Kentucky, Baze v. Rees, 217 S.W.3d 207 (Ky. 2006), Oklahoma, Patton v. Jones, 193 Fed. Appx. 785 (10th Cir. 2006), and Maryland, Evans v. Saar, 412 F. Supp. 2d 519 (D. Md. 2006).

91. U.S. CONST. amend. VIII.

92. Habeas Corpus is a civil petition where an inmate challenges the constitutionality of a conviction or a sentence. 28 U.S.C. § 2254 states: "Justice . . . shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on grounds that he is in custody in violation of the Constitution or laws or treaties of the United States."

93. Section 1983 provides statutory authorization for federal court suits against local governments or state and local government officials to redress violations of a federal civil right. To bring this action a plaintiff must allege: (1) a violation of a constitutional right; and (2) that this right was violated by someone acting under color of state law. 42 U.S.C. § 1983 (2006).

Typical actions brought under § 1983 include challenges to prison conditions, challenges to ex post facto laws, and other denials of procedural due process. *See* DAVID R.

1983).

A. Lethal Injection Challenges by a Petition for a Writ of Habeas Corpus

With the passage of the Anti-terrorism and Effective Death Penalty Act (AEDPA) in 1996,[94] Congress imposed numerous limitations on and restrictions to the filing of a habeas corpus petition.[95] AEDPA also severely limit an inmate's ability to file a second or successive petition in federal court.[96] These restrictions make it difficult for an inmate to challenge his method of execution by filing a writ of habeas corpus.

An inmate usually files a habeas corpus petition in federal court raising all constitutional claims relating to the capital trial. These claims take years to make their way through the court system.[97] At the point when a habeas corpus petition is first filed, it is usually too early in the process to challenge a method of execution because no execution date is set while these claims are being litigated.[98] Moreover, during the time it takes to litigate a sentence of death,[99] a state may modify the

DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW 146-78 (2005).These challenges are civil proceedings in which an inmate brings a cause of action against the state. The warden of a penal institution is named as the respondent. These actions argue that the methods the state uses in carrying out a lethal injection execution violate the inmate's rights under the Eighth Amendment. *See id.*

94. Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

95. *See* 28 U.S.C. § 2244. Some of the limitations that are still in effect include: strict filing deadlines, *see id.* § 2244(d); a requirement that claims be exhausted in state court, *see, e.g., In re* Turner, 101 F.3d 1323 (9th Cir. 1996) (holding that § 224 does not apply to subsequent habeas petitions "where the first petition was dismissed by the district court without prejudice for failure to exhaust state remedies); and strict adherence to state procedural rules, *see* Rouse v. Iowa, 110 F. Supp. 2d 1117 (N.D. Iowa 2000) (holding that the tolling provisions of § 2244(d)(2) require compliance with the full range of state procedural rules).

96. 28 U.S.C. § 2244(b) addresses follow-up or "successor" petitions. It prohibits claims that were raised in a prior federal habeas corpus petition and puts strict limitations on the ability to raise claims that were not raised in a prior habeas corpus petition. 28 U.S.C. § 2244(b). A successor petition is limited to previously unraised claims in situations where: (1) the Supreme Court has changed an applicable law that applies retroactively in collateral review; or (2) on claims of actual innocence where evidence that was not discoverable before would have made it impossible for a reasonable fact finder to find the person guilty. *Id.* § 2244(b)(2). Because lethal injection challenges contain neither of these characteristics, they are dismissed if they are filed or characterized as successor habeas corpus challenges.

97. According to the California Department of Corrections and Rehabilitation, since 1992, the average inmate had served 17.5 years on death row at the time of their execution. Cal. Dep't of Corrections & Rehabilitation, *supra* note 64. No one executed in California since 2000 had served fewer than 20 years. *Id.*

98. Interview with John Philipsborm (May 24, 2007).

99. *See* Cal. Dep't of Corrections & Rehabilitation, *supra* note 64 (reporting an average

details of its lethal injection procedure. If a different process is in place at the time of an inmate's execution, any challenge to a previously existing procedure would no longer apply.[100] When an execution date is finally set, a challenge in a new writ of habeas corpus could be viewed as a "second" or "successive" petition and may not be permitted by courts already concerned about manipulation of the system by "unnecessary delays."[101]

This presents an inmate with a difficult choice. A claim challenging the execution method may be filed early in the process to preserve the issue and prevent a later court from ruling that the claim cannot be raised.[102] Nevertheless, if filed too soon, a court may dismiss the claim as premature.[103] This dilemma, along with the complex restrictions under AEDPA, result in many inmates avoiding habeas corpus petitions as the means to litigate their lethal injection challenges.[104]

B. Lethal Injection Challenges Under § 1983

Challenges to the lethal injection procedures are more frequently filed under 42 U.S.C. § 1983.[105] Under this "civil rights claim" the

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time served on death row since 1978 as 17.5 years).

100. Beardslee v. Woodford, 395 F.3d 1064, 1069, n.6 (9th Cir. 2005).

101. Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 741-43 (2002).

102. Petiton for Writ of Habeas Corpus, *In re* Haley, No. S103000 (Cal. Dec. 18, 2001); Petition for Writ of Habeas Corpus, *In re* Hillhouse, No. S102296 (Cal. Nov. 26, 2001); Petition for Writ of Habeas Corpus, Barnett v. Woodford, No. Civ. S-99-2416 (E.D. Cal. Apr. 9, 2001). These claims are typically not the primary focus of these petitions, and are primarily raised in order to avoid procedural default if they are litigated later with greater emphasis.

103. Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). In *Stewart*, the Court determined that a challenge regarding an inmate's competency to be executed could not be litigated because his execution was not imminent. *Id.*

104. The first challenge to the lethal injection procedure was filed in Texas with a writ of habeas corpus. The court granted a short hearing. *Ex parte* Granviel, 561 S.W.2d 503, 508 (Tex. App. 1978). A single witness, Dr. Gary Harold Wimbish, was brought in to testify, having been called jointly by the state and by the petitioner. *See id.* The court noted that:

> Dr. Wimbish noted a wide variety of poisons that could potentially cause death if injected into a human's bloodstream, but he indicated that sodium thiopental was a drug unique in its effect and onset of action, and if he had been consulted by Director Estelle he would not have advised against its use in executions but would have given it high priority in consideration. There was no other proof offered at the habeas corpus hearing.

Id. The court held that execution by the intravenous injection of a lethal substance does not constitute cruel and unusual punishment in violation of either the Federal or State Constitutions. *See id.* at 514.

105. Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal*

plaintiff must prove that constitutional rights are violated by someone acting on behalf of the state.[106] In a lethal injection challenge, an inmate argues that the execution procedure as administered by the prison on behalf of the state violates the Eighth Amendment prohibition against cruel and unusual punishment. In most cases arising under § 1983, a plaintiff must prove a case by a "preponderance of the evidence."[107] This is not a demanding standard and requires only that the facts proposed by a plaintiff are more likely to be true than untrue.[108]

A challenge to a lethal injection procedure is complicated, as there are frequently multiple proceedings going forward at the same time. For example, usually an inmate waits until an execution date is set before filing a challenge to the lethal injection procedure. At this point, an inmate also must file a request for a stay of execution (or a temporary injunction) with the court. This motion asks the court to prevent the state from proceeding with the execution while the challenge is being litigated in court.

1. The Granting of a Stay of Execution in § 1983 Litigation

A stay of execution filed with a § 1983 claim is litigated in the same manner as a request for a temporary injunction.[109] In order to get a stay, an inmate must convince a court that the balance of various

Injections, 120 HARV. L. REV. 1301, 1301 (2007) (discussing the "explosion of Eighth Amendment challenges to lethal injection protocols" that have hit federal courts since *Hill v. McDonough*, 126 S. Ct. 2096 (2006), which "empowered prisoners to bring challenges . . . under 42 U.S.C. § 1983").

106. Under § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2006).

107. "In an action brought under 42 U.S.C. § 1983, the plaintiff has the burden of proving the case by a preponderance of the evidence, and ordinarily retains the burden of proof throughout trial." 15 AM. JUR. 2D, *Civil Rights* § 162 (2006). "The preponderance of the evidence standard is also the standard to be employed by this Court in entering its findings of fact on a section 1983 claim." Douglas N. Higgins, Inc. v. Florida Keys Aqueduct Auth., 565 F. Supp. 126, 130 (S.D. Fla. 1983).

108. BLACK'S LAW DICTIONARY 1220 (8th ed. 2004) (defining preponderance of the evidence).

109. FED. R. CIV. P. 65.

interests justify the granting of a stay.[110] Thus a decision to grant a stay requires a court to consider an entirely different set of issues and to apply a more demanding burden of proof than a pure examination of the § 1983 claim.

The court must consider the possibility of irreparable harm to the plaintiff and the likelihood of success on the merits of the claim in deciding whether to grant a stay of execution. A court must balance these interests against each other; the greater the possibility of irreparable harm, the lower a showing of success on the merits of the claim is required.[111] In lethal injection challenges, a plaintiff argues that "irreparable harm" is the loss of life if the execution takes place. Balanced against a loss of life, it may seem that the courts would require only a minimal showing of success on the merits. An examination of case histories suggests this is not the case.[112]

Courts are reluctant to grant a stay once an execution date has been set. In fact, courts have frequently applied a "strong equitable presumption" against the granting of the stay.[113] The most important

110. Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995). The traditional common law criteria for granting preliminary injunctive relief are: (1) "a strong likelihood of success on the merits"; (2) "the possibility of irreparable injury to plaintiff if the preliminary relief is not granted"; (3) "a balance of hardships favoring the plaintiff"; and (4) "advancement of the public interest (in certain cases)." *Id.* (citing Dollar Rent A Car of Wash., Inc. v. Travelers Indem. Co., 774 F.2d 1371, 1374 (9th Cir. 1985)).

111. Roe v. Anderson, 134 F.3d 1400, 1401-02 (9th Cir. 1998).

> We have repeatedly instructed that to obtain a preliminary injunction, the moving party must show either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

Id. (citing United States v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir. 1992)).

112. *See, e.g.*, Harris v. Johnson, 376 F.3d 414, 417 (5th Cir. 2004); *In re* Sapp, 118 F.3d 460, 463 (6th Cir. 1997); Cooper v. Rimmer, No. C04-436-JF, 2004 WL 231325 (N.D. Cal. Feb. 6, 2004).

113. The "strong equitable presumption" against granting a stay was first noted in *Gomez v. United States District Court for Northern District of California*, 503 U.S. 653 (1992). That case was a challenge to the constitutionality of the gas chamber in California. After a stay was granted by the Ninth Circuit, the state asked the Supreme Court to lift the stay. The Supreme Court lifted the stay and held: "Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation." *Id.* at 654. Harris was executed in the gas chamber while the challenge was still pending. *See* Fierro v. Gomez, 865 F. Supp. 1387, 1390 (N.D. Cal. 1994) (stating that Harris was executed in San Quentin's gas chamber after 6:00 a.m. on April 21, 1992). Judge Patel held hearings on the challenge because other inmates were named as plaintiffs. *See id.* at 1389 (naming the other two plaintiffs, David Fierro and Alejandro Gilbert Ruiz). Ultimately, Judge Patel held the gas chamber was unconstitutional. *See id.* at 1415. Until recently, courts have used this language from *Gomez*, and have routinely considered the timing of the filing of the challenge when

factor to a court in its decision whether to grant a stay is whether a claim could have been brought earlier to allow the case to be heard without the need for a stay.[114] Because most lethal injection challenges are filed only after an execution date has been set,[115] courts frequently hold that the claim could have been brought at an earlier time and apply the "strong equitable presumption" against granting a stay.[116] The execution goes forward despite the pending litigation.[117] Therefore, even though a § 1983 claim requires a plaintiff only to prove the constitutional challenge by a preponderance of the evidence, if an inmate does not make a greater showing, the execution stay will not be granted. The execution takes place before a hearing can be held on the constitutional issue.

In the summer of 2006, execution prior to a hearing was the outcome in *Hill v. McDonough*.[118] In *Hill*, the U.S. Supreme Court considered whether Mr. Hill's challenge to Florida's lethal injection procedure was cognizable via 42 U.S.C. § 1983 or whether it was actually a successor habeas corpus petition. This distinction was critical since as a successor petition, it was procedurally barred and would have been dismissed.[119] The Court unanimously held that Hill's challenge to the lethal injection procedure was an action under § 1983.[120] In its ruling, however, the Court announced that, "[f]iling an action that can proceed under § 1983 does not entitle . . . [Hill] to an order staying . . . [his] execution as a matter of course."[121] The Supreme Court remanded Hill's case back to the federal court to examine his challenge to the lethal injection procedure.[122] On remand, the federal court lifted the previously existing stay of execution.[123] Hill then requested a hearing from the federal court to present evidence on his lethal injection challenge.[124] He also requested a stay of execution

reviewing motions for a stay of execution connected to a challenge of a method of execution.

114. *Gomez*, 503 U.S. 653. This case arose out of the challenge to execution by lethal gas brought by Robert Harris. *See id.*

115. Interview with John Philipsborm (May 24, 2007).

116. *See Harris*, 376 F.3d 414; *Sapp*, 118 F.3d 460; *Cooper*, 2004 WL 231325.

117. *See Harris*, 376 F.3d 414; *Sapp*, 118 F.3d 460; *Cooper*, 2004 WL 231325.

118. Hill v. McDonough, 126 S. Ct. 2096 (2006).

119. 28 U.S.C. § 2244(b)(2) (2006).

120. *Hill*, 126 S. Ct. at 2102.

121. *Id.* at 2104 (citing Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653 (1992)).

122. *Id.*

123. Hill v. McDonough, No. 4:06-CV-032-SPM, 2006 WL 2556938 (N.D. Fla. Sept. 1, 2006).

124. *Id.*

while he litigated his case. The federal court denied a stay.[125] Clarence Hill was executed on September 20, 2006, without having his hearing to present evidence challenging the lethal injection procedure.[126]

The Ninth Circuit takes a more limited approach towards applying the "strong equitable presumption" against the granting of a stay.[127] In *Beardslee v. Woodford*,[128] the Ninth Circuit explained that a key consideration was whether the timing of the filing was an effort to manipulate the system.[129] When this occurs, the court acknowledged that the presumption should apply against a plaintiff.[130]

Beardslee filed his lethal injection challenge thirty-one days before his execution date. The district court denied a stay, finding, in part, that the motion was filed too close to his execution date.[131] On appeal, the Ninth Circuit found that Beardslee "pursued his claims aggressively as soon as he viewed them as ripe."[132] The court declined to apply the "strong equitable presumption" against granting a stay in his case.[133]

The question of when a § 1983 challenge to lethal injection procedures is "ripe"[134] remains unresolved. The Ninth Circuit has not answered this question directly.[135] Nevertheless, as *Beardslee* shows, once an execution date is set, an inmate waits to file a challenge at significant peril.

125. *Id.*

126. Abby Goodnough, *Court Refuses Second Delay; Inmate Dies*, N.Y. TIMES, Sept. 21, 2006, at A27.

127. Beardslee v. Woodford, 395 F.3d 1064, 1069 (9th Cir. 2005).

128. *Id.*

129. *Id.*

130. *Id.*

131. Beardslee v. Woodford, No. C04-5381-JF, 2005 WL 40073, at *2 (N.D. Cal. Jan. 7, 2005). "Plaintiff waited until the State scheduled his execution date before filing suit. Thus, although Plaintiff has been somewhat more diligent than Cooper, he still must make a showing of serious questions going to the merits that is sufficient to overcome that strong presumption."

132. Beardslee v. Woodford, 395 F.3d 1064, 1069 (9th Cir. 2005).

133. The court did however refuse to reverse on the denial of a stay of execution. In their conclusion they noted that Beardslee had not shown "enough of a likelihood that he will be conscious during the administration of pancuronium bromide and potassium chloride to experience pain." *Id.* at 1076.

134. For a claim to be ripe there must be a real controversy. A controversy may not exist if it cannot be shown that the plaintiff is going to be subjected to the challenged method. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

135. *Beardslee*, 395 F.3d at 1069 n.6.

C. Lethal Injection Challenges Nationally

In 2006, several challenges to lethal injections procedures were filed under § 1983 in federal courts across the country. Very few of these claims were granted hearings.[136] Although many states' procedures are almost identical and the challenges cited comparable evidence, declarations, and exhibits, courts reached different conclusions in disposing these cases.[137] For example, a district court in Ohio granted a hearing after finding that, "at the very least, Plaintiff has demonstrated a stronger likelihood of success on the merits than the plaintiffs who preceded him, given the growing body of evidence calling Ohio's lethal injection protocol increasingly into question."[138]

The Tenth Circuit reviewed a case that presented similar evidence to that presented in Ohio, but came to the opposite conclusion and denied a hearing stating that:

> [I]n light of (a) the unlikelihood of success on the merits of the underlying action, both as to the use of § 1983 to raise a constitutional challenge to the lethal injection procedure and as to the constitutional challenge itself, (b) the State's interest in the timely effectuation of its final criminal judgments, (c) the public's interest in the orderly administration of its criminal justice system free from belated efforts to derail it, and (d) [the inmates] unnecessary delay in bringing this challenge, we conclude that a stay of his execution is clearly inappropriate.[139]

In June 2006, a federal court in Missouri held a hearing on the constitutionality of that state's lethal injection procedure.[140] After reviewing extensive evidence, District Court Judge Fernando Gaitan held that "Missouri's lethal injection procedure subjects condemned inmates to an unnecessary risk that they will be subject to unconstitutional pain and suffering when the lethal injection drugs are administered."[141] Judge Gaitan ordered changes to Missouri's lethal

136. Some courts granted hearings. *See, e.g.*, Taylor v. Crawford, 457 F.3d 902 (8th Cir. 2006); Cooey v. Taft, 430 F. Supp. 2d 702 (S.D. Ohio 2006); Order, Nooner v. Norris, No. 5:06-CV-00110-SWW (E.D. Ark. June 26, 2006).

137. One federal judge noted this disparity stating thatrecently in Ohio and other states, some inmates challenging the lethal injection process in federal courts have been given stays of executions, while others, similarly situated, have been denied stays and have been executed. This inconsistent application of federal law in capital cases has raised concerns among a number of federal judges.Cooey v. Taft, No. 2:04-CV-1156, 2006 WL 3526424, at *1-2 (S.D. Ohio Dec. 6, 2006).

138. *Cooey*, 430 F. Supp. 2d at 707.

139. Boltz v. Jones, 182 Fed. Appx. 824, 825 (10th Cir. 2006).

140. Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 26, 2006).

141. *Id.* The most compelling evidence may have come from "John Doe 1," a doctor

injection procedure. The most important change ordered was that a board certified anesthesiologist be involved in the lethal injection process.[142] Since the ruling in June 2006, as of February 2007, there have been no executions in Missouri as the state has been unable to obtain an anesthesiologist willing to perform this role.

As challenges to lethal injection executions continue to be filed around the country, more and more evidence is made public about how lethal injection executions are carried out. In some cases a stay may be granted and in others an execution is allowed to proceed. The result is what one judge referred to as a "dysfunctional patchwork of stays and executions" around the country.[143]

D. Lethal Injection Challenges in California Federal Courts

The first hearing on California's lethal injection procedures was held in September 2006, before Judge Jeremy Fogel. Prior to this hearing, Judge Fogel had denied hearings to two California inmates who had filed similar challenges within the previous eighteen months.[144] Judge Fogel's opinions in these earlier cases were brief and he dismissed each challenge to the lethal injection procedure without serious discussion.[145]

Kevin Cooper filed the first of these recent challenges under § 1983 on February 2, 2004, just eight days prior to his execution date. Cooper requested a stay of execution and filed the most developed

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who was the primary executioner in Missouri. John Doe 1, who admitted to being dyslexic, was the doctor who mixed the drugs, monitored the anesthetic depth and acknowledged that:

> [I]t's not unusual for me to make mistakes. . . . But I am dyslexic and that is the reason why there are inconsistencies in my testimony. That's why there are inconsistencies in what I call drugs. I can make these mistakes, but it's not medically crucial in the type of work I do as a surgeon.

Id. at *5.

142. Gaitan ruled that an anesthesiologist should be responsible for the mixing of all drugs, or if the anesthesiologist does not actually administer the drugs through the IV, he or she shall directly observe those individuals who do so. *Id.* at *8. Other changes were ordered including a requirement that the staff be provided a well-lit room and the ability to adequately monitor an inmate. *See id.* at *9.

143. Alley v. Little, 447 F.3d 976, 977 (6th Cir. 2006) (Martin, J., dissenting).

144. Beardslee v. Woodford, No. C04-5381-JF, 2005 WL 40073 (N.D. Cal. Jan. 7, 2005); Cooper v. Rimmer, No. C04-436-JF, 2004 WL 231325 (N.D. Cal. Feb. 6, 2004). Beardslee was executed, but Cooper was not.

145. *Cooper*, 2004 WL 231325, at *4. "Plaintiff has done no more than raise the possibility that California's lethal-injection protocol unnecessarily risks an unconstitutional level of pain and suffering. As he has neither demonstrated the likelihood of success on the merits nor serious questions going to the merits, he is not entitled to injunctive relief." *Beardslee*, 2005 WL 40073, at *3. "Based upon the present record, a finding that there is a reasonable possibility that such errors will occur would not be supported by the evidence." *Id.*

challenge yet formulated to California's lethal injection procedure.[146] He submitted affidavits from two medical professionals, eyewitness accounts of several prior executions, as well as the American Veterinary Medical Association (AVMA) standards as a basis to argue that Procedure 770 was unethical even under the AVMA euthanizing standards.[147]

The California Attorney General's Office opposed Cooper's challenge and his request for a stay of execution.[148] Judge Fogel denied the stay,[149] and on appeal, the Ninth Circuit affirmed the denial.[150] While doing so, Ninth Circuit Judge Browning, concurring in the opinion, recognized that more lethal injection challenges would be coming—and possibly with additional evidence to support them. He cautioned that "[n]either the district court nor the parties should read today's decision as more than a preliminary assessment of the merits."[151]

Donald Beardslee raised the next challenge to California's lethal injection procedure on December 20, 2004, almost one month prior to his execution date.[152] Beardslee requested that the California

146. *See* Complaint for Equitable and Injunctive Relief, Copper v. Rimmer, No. C-04-0436-JF (N.D. Cal. Feb. 1, 2004); Plaintiffs Motion for Temporary Restraining Order, Preliminary Injunction and Order to Show Cause, and Memorandum of Points and Authorities in Support Thereof, Copper v. Rimmer, No. C-04-0436-JF (N.D. Cal. Feb. 1, 2004).

147. *2000 Report of the AVMA Panel on Euthanasia*, *supra* note 8.

148. *See* Defendants' Opposition to Motion for Temporary Restraining Order, Preliminary Injunction, and Order to Show Cause, Cooper v. Rimmer, No. C-04-0436-JF (N.D. Cal. Feb. 3, 2004), *available at* http://lang.dailybulletin.com/projects/cooperwatch/library/cooper_tro_opp.pdf.

149. *Cooper*, 2004 WL 231325.

150. Cooper v. Rimmer, 379 F.3d 1029 (9th Cir. 2004).

151. *Id.* at 1034 (Browning, J., concurring). Ultimately, the Ninth Circuit granted Cooper a stay of execution so that more testing could be done to look into his claims of actual innocence. His complaint under § 1983 was dismissed without prejudice, partly due to the fact that he had not exhausted all internal administrative remedies. The Ninth Circuit has since called into question whether internal administrative challenges must be exhausted in this particular type of claim because "by regulation the California Department of Corrections does not permit challenges to 'anticipated action[s].'" Beardslee v. Woodford, 395 F.3d 1064, 1069 (9th Cir. 2005).

152. *See* Plaintiff's Motion for Temporary Restraining Order, Preliminary Injunction, and Order to Show Cause, Memorandum of Points and Authorities in Support Thereof, Beardslee v. Woodford, No. C04-5381-JF, (N.D. Cal. Dec. 20, 2004).

> If for any reason other than the pendency of an appeal pursuant to subdivision (b) of Section 1239 of this code a judgment of death has not been executed, and it remains in force, the court in which the conviction was had shall, on application of the district attorney, or may upon its own motion, make and cause to be entered an order appointing a day upon which the judgment shall be executed, which must not be less than 30 days nor more than 60 days from the time of making such

Department of Corrections release specific details of the lethal injection procedure in California.[153] Beardslee raised many of the same concerns as Cooper, but was able to offer additional detailed evidence about California's lethal injection executions.[154]

Despite the more detailed showing, Beardslee's claim was also denied by Judge Fogel.[155] The judge ruled that Beardslee's claim was filed too late and that the delay created a "strong equitable presumption" against relief.[156] The Ninth Circuit found the presumption should not apply.[157] Nevertheless, when the Ninth Circuit reviewed Beardslee's § 1983 claim, it ultimately decided that he "has not shown a sufficient likelihood that the administration will be improper in his case, or that there are specific risks unique to him that require modification of the protocol."[158] Although the court expressed its concern about the existing lethal injection protocol, it did not grant Beardslee a stay of execution.[159] The court remained unconvinced that Beardslee's additional evidence revealed that the lethal injection procedure created an unnecessary risk of pain.[160] On January 19, 2005, Donald Beardslee was executed, without the opportunity to present his evidence challenging the lethal injection procedure in court.[161]

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order . . . .

CAL. PENAL CODE § 1227 (West 2004).

153. *See* Plaintiff's Motion for Expedited Discovery and to Compel Production of Documents at 5-8, Beardslee v. Woodford, No. C04-5381-JF, (N.D. Cal. Dec. 20, 2004)

154. Beardslee submitted much of the same evidence as Cooper in support of his claim. Cooper's claim only contained records from three California executions, William Bonin, Jaturun Siripongs and Stephen Anderson. Beardslee's claim included these records as well as those from the execution of Keith Williams and Manuel Babbitt. Beardslee also submitted the results of a toxicology study done on inmates executed in North Carolina, South Carolina, and Arizona that used a manner of execution similar to the one in California. L. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412 (2005). Note that this study has since been criticized as unsound, even by Dr. Mark Heath who assisted on behalf of Beardslee, Morales, and other inmates with similar challenges. Morales decided not to use this study as a part of his challenge.

155. Beardslee v. Woodford, No. C04-5381-JF, 2005 WL 40073, at *2 (N.D. Cal. Jan. 7, 2005).

156. *Id.* at *3.

157. Beardslee v. Woodford, 395 F.3d 1064, 1070 (9th Cir. 2005).

158. *Id.* at 1076.

159. *Id.* at 1075-76.

160. *See id.* at 1076; *infra* Part V.

161. Dean E. Murphy, *Late Efforts to Halt Execution in California Fail*, N.Y. TIMES, Jan. 19, 2005, at A17.

IV. CAPITAL PUNISHMENT AND EIGHTH AMENDMENT CHALLENGES

A. Overview

The Eighth Amendment of the U.S. Constitution prohibits states from inflicting cruel and unusual punishment on its citizens.[162] As a result, it provides the basis for numerous challenges to capital punishment in the United States. These challenges address different aspects of the death penalty. The broadest challenge asks whether capital punishment is ever constitutional.[163] Still other challenges examine whether the death penalty serves any legitimate penological purpose (usually retribution or deterrence), especially as applied to a particular crime or a specific class of offender.[164] More specific challenges look at the structure of death penalty statutes to see whether they impose the death penalty in a fair and rational manner.[165] Finally, challenges are also made to the process of execution—in *Morales* the challenge is to the lethal injection procedure.[166]

Challenges have been made under the Eighth Amendment to executions by the use of a firing squad,[167] hanging,[168] the electric chair,[169] the gas chamber,[170] and now, lethal injection.[171] Some of

162. U.S. CONST. amend. VIII.

163. Furman v. Georgia, 408 U.S. 238 (1972).

164. When the death penalty does not further a penological purpose, then the punishment is "nothing more than the purposeless and needless imposition of pain and suffering." Atkins v. Virginia, 536 U.S. 304, 319 (2002); *see also* Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

165. McClesky v. Kemp, 481 U.S. 279 (1987).

166. Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006).

167. Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984) (upholding the firing squad as a method of execution).

168. Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1994) ("We do not consider hanging to be cruel and unusual simply because it causes death, or because there may be some pain associated with death.").

169. Dawson v. State, 274 Ga. 327, 335 (2001) ("[W]e hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment . . . .").

170. Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996), *vacated*, 519 U.S. 918 ("The district court's findings of extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual."); Hunt v. Nuth, 57 F.3d 1327, 1337-38 (4th Cir. 1995), *cert denied*, 521 U.S. 1131 (1997) ("Lethal gas currently may not be the most humane method of execution—assuming that there could be a humane method of execution—but the existence and adoption of more humane methods does not automatically render a contested method cruel and unusual.").

171. *Morales*, 415 F. Supp. 2d 1037; Cooey v. Taft, 430 F. Supp. 2d 702 (S.D. Ohio 2006); Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. 2006).

these challenges argue that the method of execution is "per se "unconstitutional, that it was in all cases and under all circumstances a violation of the Eighth Amendment.[172]

To understand the current Eighth Amendment jurisprudence, it is necessary to review how the modern death penalty statutes emerged. In the 1960's and early 1970's societal support declined for the death penalty, with fewer death sentences and a de facto moratorium.[173] The paucity of death sentences and executions led opponents of capital punishment to challenge the death penalty as per se unconstitutional under the Eighth Amendment. This type of challenge took place in *Furman v. Georgia*.[174]

1. Furman*: The Early Challenges*

In *Furman*, defense lawyers argued that the death penalty was per se unconstitutional.[175] They also argued that existing death penalty statutes were unconstitutional because the statutes applied the death penalty in an arbitrary and capricious manner.[176] The U.S. Supreme Court's decision in the case was far less sweeping than opponents of the death penalty had hoped.[177] Although it struck down the Georgia statute by a vote of 4-4, there was no majority opinion for the reasoning of the Court.[178] In fact, nine separate opinions were issued with each Justice providing his own rationale for striking down the challenged statute.

Only two of the Justices in *Furman* held that the death penalty was unconstitutional in all circumstances.[179] The other three Justices

172. *Fierro*, 77 F.3d 301.

173. The last execution before the death penalty was reinstated was in 1967, when the state of Colorado executed Luis Monge. *See* Death Penalty Info. Ctr., Executions in the U.S. 1608-1987: The Espy File, Executions by Date, http://www.deathpenaltyinfo.org/ESPYdate.pdf (last visited May 10, 2007).

174. Furman v. Georgia, 408 U.S. 238 (1972).

175. CARTER & KREITZBERG, *supra* note 16, at 23.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Furman*, 408 U.S. 238.

> In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

Id. at 304 (Brennan, J., concurring). "There is but one conclusion that can be drawn from all of this—i.e., the death penalty is an excessive and unnecessary punishment that violates the

who comprised the majority looked primarily at the existing practices of imposing death sentences in Georgia and found them to be unconstitutional.[180] These three justices found that the procedures involved in existing death penalty statutes created a substantial risk that the death penalty would be imposed in an arbitrary and capricious manner.[181]

The *Furman* decision effectively struck down all existing death penalty statutes and vacated more than 600 death sentences in effect at the time.[182] States aggressively responded to the decision by promptly passing new death penalty statutes.[183] By 1976, the new statutes resulted in more than 420 new capital convictions.[184] The Supreme Court began its review of these new legislations that same year.

Five death penalty cases went to the Supreme Court in 1976.[185] In two of the cases, the Court struck down statutes that imposed a mandatory death sentence on defendants convicted of capital murder.[186] In the three remaining cases, the Court upheld the statutes because they adequately addressed the constitutional defects discussed in *Furman*.[187]

Eighth Amendment." *Id.* at 359 (Marshall, J., concurring).

180. "I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 240 (Douglas, J., concurring). "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310 (Stewart, J., concurring). "In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment." *Id.* at 310-11 (White, J., concurring). "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

181. The dominant theme of the dissenters in *Furman* (Justices Blackmun, Powell, and Rehnquist) was that there should be deference to the state legislatures to determine the appropriate punishments in their states. They also found that the death penalty served the goals of retribution and deterrence. CARTER & KREITZBERG, *supra* note 16, at 24.

182. Robert Sherill, *Death Trip: The American Way of Execution, Part 2*, NATION, Jan. 8, 2001, *available at* http://www.deathpenaltyinfo.org/article.php?scid=17&did=453.

183. CARTER & KREITZBERG, *supra* note 16, at 25.

184. *See* Death Penalty Info. Ctr., Size of Death Row by Year – (1968 - present), http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#year (last visited May 6, 2007).

185. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

186. *Roberts*, 428 U.S. 325; *Woodson*, 428 U.S. 280.

187. *Gregg*, 428 U.S. 153; *Jurek*, 428 U.S. 262; *Profitt*, 428 U.S. 242.

*2. Post-*Furman *Challenges*

Since *Furman*, most of the challenges to the death penalty have focused on the structure of death penalty statutes.[188] As a result of those challenges, the Supreme Court has elaborated that to satisfy the Eighth Amendment, a death penalty statute must adequately narrow the class of persons eligible for a sentence of death, must guide the discretion of the jury in making its decision, and must allow for individualized consideration of a defendant's character and background before imposing a sentence of death.[189]

Other Eighth Amendment challenges to the death penalty argue that the death penalty is disproportionate and serves no legitimate purpose of punishment when applied to a particular crime or to a particular class of defendants.[190] Recently, these challenges resulted in the Supreme Court holding that the death penalty is unconstitutional when applied to the crime of rape of an adult woman,[191] to minor participants in a crime,[192] to those who are mentally retarded,[193] and to those who are under eighteen at the time of the commission of the offense.[194]

The Supreme Court has not yet reviewed a challenge to a method of execution under the Eighth Amendment. Although an 1890 decision upheld the use of electrocution as a method of execution, the Court decided this case under the Privilege and Immunities Clause of the Fourteenth Amendment, and not under the Eighth Amendment.[195]

3. Eighth Amendment Test for Execution Procedures

According to the Supreme Court, "the Eighth Amendment has a

188. CARTER & KREITZBERG, *supra* note 16, at 27.
189. *Id.*
190. McClesky v. Kemp, 481 U.S. 279, 306 (1987).
191. *See* Coker v. Georgia, 433 U.S. 584 (1977).
192. *See* Tison v. Arizona, 459 U.S. 882 (1982).
193. *See* Atkins v. Virginia, 536 U.S. 304 (2002).
194. *See* Roper v. Simmons, 543 U.S. 551 (2005).
195. *See In re* Kemmler, 136 U.S. 436 (1890). The Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. In *In re Kemmler*, the U.S. Supreme Court upheld the New York statute providing for electrocution as a form of execution. *In re* Kemmler, 136 U.S. 436 (1890). This case was decided under the Fourteenth Amendment's Privileges and Immunities Clause, because at that time, the Eighth Amendment had not been applied to the states. *See id.* at 446. The only other times the Supreme Court has reviewed a similar issue include *Wilkerson v. Utah*, 99 U.S. 130, 135-147 (1878), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (upholding second attempt at electrocution after first attempt failed to cause death). *But see* Glass v. Louisiana, 471 U.S. 1080 (1985) (Brennan, J., dissenting).

further component based on a concept of preserving human dignity regardless of the punishment imposed."[196] It is not cruel or unusual simply because the punishment results in death or in the pain associated with death. However, if the death penalty punishment results in unnecessary pain or a long, uncomfortable death, then, human dignity is not being preserved. In making this determination, lower courts have focused on two considerations: the length of time to die and the pain involved in an execution.[197]

In the only two cases in which the Ninth Circuit considered a challenge to the method of execution, the court drew a distinction between an execution protocol that was constitutional because it recognized and prevented a foreseeable risk of pain and a procedure that was unconstitutional because it inherently involved a substantial risk of pain.[198] The Ninth Circuit held that courts should examine "objective evidence of the pain involved in the challenged method."[199] And focus on whether a specific execution method imposes an unnecessary *risk* of pain or suffering.[200]

When the State of Washington argued that hanging was a constitutional form of execution, the state acknowledged the risk of asphyxiation or decapitation that was present in the procedure.[201] Nonetheless, the Ninth Circuit upheld hanging as a form of execution because, in its view, Washington had created a sufficiently detailed protocol that "minimized [the risk of pain from asphyxiation or decapitation] as much as possible."[202] In contrast, the Ninth Circuit later struck down California's use of the gas chamber when evidence was presented to show that "executions in the gas chamber subjected an inmate to a '"substantial risk'" of several minutes of intense

196. *See* Gregg v. Georgia**,** 428 U.S. 153, 173 (1976)

197. Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994). In *Campbell*, the Ninth Circuit cited Justice Brennan's dissent in *Glass v. Louisiana*, 471 U.S. at 1084 (Brennan, J., dissenting), asserting that "first and foremost among objective factors by which courts should evaluate the constitutionality of a challenged method of punishment is whether the method involves the unnecessary and wanton infliction of pain." *Campbell*, 18 F.3d at 682.

198. During the 1990s, the United States Court of Appeals for the Ninth Circuit reviewed two different forms of execution: death by hanging in *Campbell*, 18 F.3d at 683, and death by the gas chamber in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996). In both cases, the court was asked whether the specific method of execution offended contemporary standards of decency. The Ninth Circuit in *Campbell* found that hanging was a constitutional form of execution, but in *Fierro* that the gas chamber was not.

199. *Campbell*, 18 F.3d at 682.

200. *See Fierro*, 77 F.3d at 307; *Campbell*, 18 F.3d at 687.

201. *Campbell*, 18 F.3d at 686.

202. *Id.* at 684-85, 687 n.17.

pain."[203]

Since individuals react differently to drugs and medicines, it is impossible for a court to determine in advance whether a particular inmate will suffer unnecessary pain during his execution by lethal injection. The state is also unable to test any proposed lethal injection procedures on human subjects to learn its effects with any certainty. Courts, therefore, look at whether the process inflicts an unnecessary *risk* of unconstitutional pain and suffering.[204]

An execution need not be free of pain in order to be constitutional. The risk of pain becomes unnecessary, and therefore unconstitutional, when the procedure fails to minimize foreseeable risks of prolonged pain.[205] A court may find a particular method unconstitutional when an examination of the methodology involved and past experiences expose foreseeable problems that have not been taken into account in designing the execution protocol.

There are several objective criteria that provide insight into the pain or risk of pain of a particular execution method.[206] One criterion is the period of time it takes for unconsciousness to occur.[207] Once an inmate is unconscious, there is presumably no sensation and therefore no pain.[208] Consciousness may be determined by measuring the time it takes for breathing to stop.[209] An inmate is not fully anesthetized until

203. *Fierro*, 77 F.3d at 308. In *Fierro v. Gomez*, the district court held that the gas chamber was unconstitutional because:

> The evidence presented concerning California's method of execution by administration of lethal gas strongly suggests that the pain experienced by those executed is unconstitutionally cruel and unusual. This evidence, when coupled with the overwhelming evidence of societal rejection of this method of execution, is sufficient to render California's method of execution by lethal gas unconstitutional under the eighth amendment.

Fierro v. Gomez, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994).

204. *Fierro*, 77 F.3d at 308.

205. *Campbell*, 18 F.3d at 711 ("[I]f a state chooses to execute defendants, it must adopt a method of execution that minimizes the risk that any person who is put to death will suffer unnecessary pain.").

206. *See* Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir 2004); *Fierro*, 77 F.3d at 307; *Campbell*, 18 F.3d at 687.

207. *See Cooper*, 379 F.3d at 1032-33; *Fierro*, 77 F.3d at 306-07.

208. *See Cooper*, 379 F.3d at 1032-33; *Fierro*, 77 F.3d at 307.

209. Lethal Injection - Execution Record, Exhibit 2 to Declaration of Dr. Mark Heath, Exhibit C to Plaintiff's Motion for Temporary Restraining Order; Memorandum of Points and Authorities in Support Thereof, Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006) (No. C-06-926-JF), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct.Cp/Ex%202%20to%20Heath%20Decl%20(California%20Execution%20Logs).pdf.

breathing has stopped.[210] Once this occurs, there is presumably no sensation and therefore no pain.[211] Consciousness may also be evaluated by evidence of an inmate's voluntary or involuntary movements or expressions.[212]

4. Morales *Eighth Amendment Challenge*

Morales v. Tilton[213] raised a narrow issue. In his case, Morales argued that California's lethal injection protocol, as described in Procedure 770 and implemented by the California Department of Corrections, is unconstitutional in violation of the Eighth Amendment.[214] Specifically, Morales argued that this procedure "creates a substantial risk that he will be fully conscious and in agonizing pain during the execution process."[215] The court must determine whether the risk of pain is "unnecessary," and therefore unconstitutional under the Eight Amendment.[216] This examination

210. At the hearings, Dr. Heath expressed serious concerns that "[a] person who's breathing is not in a deep plane of anesthesia." Transcript of Proceedings, *supra* note 2, at 532 (providing the direct examination of Dr. Mark Heath).

211. Memorandum of Intended Decision, *supra* note 6, at 12. Judge Fogel noted that there were "anomalies in six execution logs [that] raise substantial questions as to whether certain inmates may have been conscious when pancuronium bromide or potassium chloride was injected." *Id.*

This may mean that the cessation of chest movement of the inmate may have been due to the muscle blocker as opposed to the inmate being properly anesthetized. *See* Lethal Injection - Execution Record, *supra* note 209 (providing execution records for Jaturun Siripongs and Manuel Babbitt).

212. *See* Lethal Injection - Execution Record, *supra* note 209 (providing execution record of Manuel Babbitt from May 4, 1999). This record describes "[b]rief spasmodic movements of upper abdomen/chest @ 0032 lasting <10 seconds." *Id.*

213. Morales v. Tilton, 465 F. Supp. 2d 972 (N.D. Cal. 2006).

214. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*" (emphasis added)).

215. Plaintiff's Motion for Temporary Restraining Order; Memorandum of Points and Authorities in Support Thereof at 2, Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006) (No. C-06-926-JF), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct.Cp/Morales%20Motion%20for%20TRO%20-%20final.pdf; *see also* Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1994) (holding that hanging is constitutional as it does *not* involve the unnecessary and wanton infliction of pain). In reaching this test the Court examined several Supreme Court precedents that spoke to this question. *See, e.g.*, *In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . something in human and barbarous, something more than the mere extinguishment of life"); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.").

216. Fierro v. Gomez, 77 F.3d 301, 307 (9th Cir. 1996) ("[T]he key question to be answered in a challenge to a method of execution is how much pain the inmate suffers. . . . .

requires the court to evaluate the lethal injection process according to "evolving standards of decency" and "contemporary values."[217] An execution procedure, touted as humane when first introduced, could, over time, come to offend contemporary values.[218]

There are two different components to Morales' Eighth Amendment challenge: whether death by California's lethal injection procedure was acceptable at the time the Bill of Rights was adopted; and whether such a death is consistent with our evolving standards of decency.[219]

Lethal injection neither existed nor was contemplated at the end of the Eighteenth century when the Bill of Rights was adopted. To our founding fathers, the proscription of "cruel and unusual punishment" was seen as outlawing "torture and other cruel punishments."[220] The Court in *Furman* observed that the Eighth Amendment forbids punishments such as "disembowelment, beheading, quartering, burning at the stake and breaking at the wheel," practices that were employed previously and viewed as acceptable forms of punishment under English law."[221]

The second component to Morales' Eighth Amendment challenge questioned whether the California death penalty conforms to underlying values consistent with human dignity.[222] Because the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[223] as the concepts of dignity and civility evolve, what is considered cruel

Death where unconsciousness is likely to be immediate or within a matter of seconds is apparently within constitutional limits. . . . [T]he method of execution must be considered in terms of the *risk* of pain.").

217. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

218. *Fierro*, 77 F.3d at 303 n.1 (holding that the California Supreme Court held execution by gas chamber to be constitutional in 1953, but its examination was limited by scientific knowledge at the time), *vacating as moot* 519 U.S. 918 (in light of amendments to California Penal Code Section 3604); Dawson v. State, 274 Ga. 327, 335 (2001) ("Based on this evidence of the electrocution process and comparing that process with lethal injection, a method of execution the Legislature has now made available in this State, we conclude that death by electrocution involves more than the "mere extinguishment of life.").

219. *Gregg*, 428 U.S. at 176-179; *see also* CARTER & KREITZBERG, *supra* note 16, at 25.

220. Furman v. Georgia, 408 U.S. 238, 319 (1972) (Marshall, J., concurring).

221. *See id.* at 264-65 (Brennan, J., concurring) (quoting Wilkerson v. Utah, 99 U.S. 130, 136 (1878)).

222. Complaint for Equitable and Injunctive Relief at 5, Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006) (No. C-06-926-JF), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct.Cp/Morales%20--%20complaint%20final.pdf.

223. Trop v. Dulles 356 U.S. 86, 101 (1958) (denationalizing the plaintiff as a punishment for deserting the U.S. Army during wartime is barred by the Eighth Amendment).

and unusual must also evolve.[224] Even when a punishment is acceptable to contemporary society, the punishment is unconstitutional if it is inconsistent with "human dignity."[225]

a. Evidence Presented by Morales

In evaluating the presumption of dignity in *Morales*, the federal district court assessed how painful the procedure is, how long until death occurs, and the *risk* that pain may occur.[226]

The court heard eyewitness accounts of prior executions in North Carolina and California.[227] Witnesses testified to, and evidence was presented of observations of, an inmate's breathing patterns and movements in the moments leading to death.[228] Expert testimony was presented on the effect of lethal injection drugs on humans and animals as well as scientific studies analyzing the effects of those drugs.[229]

Attorneys for Morales called several experts to support his claim that California's lethal injection procedure is unconstitutional.[230] These included: an expert in veterinary anesthesiology, who opined he would not follow California's Procedure 770 because he needed to be in direct contact with a patient and he did not feel comfortable with the drug combination;[231] an expert in the field of pharmacokinetics and pharmacodynamics, who offered his opinion the California procedure

224. In *Fierro*, which involved a challenge to lethal gas, neither party argued that execution by lethal gas was a form of punishment considered unacceptable at the time of the adoption of the Bill of Rights. *See* Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996). Thus, the Ninth Circuit proceeded directly to the second prong of the analysis to determine whether it violated our evolving standards of decency. When upholding hanging as a form of punishment, the Ninth Circuit focused primarily on the second prong of the analysis finding that even a form that was acceptable at the time of the Bill of Rights could still offend modern standards. Ultimately they determined that hanging did not. Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994).

225. Glass v. Louisiana, 471 U.S. 1080, 1080 (1985); CARTER & KREITZBERG, *supra* note 16, at 26.

226. *See* Morales v. Tilton, 465 F. Supp. 2d 972 (N.D. Cal. 2006); Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994); *see also* Memorandum of Intended Decision, *supra* note 6, at 13-14.

227. *See* Transcript of Proceedings at 199-213, Morales v. Tilson, No. C-06-0219-JF (N.D. Cal. Jan. 26, 2006) (testimony of Heather Wells Jarvis); *id.* at 214-37 (testimony of Cindy Adcock); *id.* at 238-49 (testimony of Margo Rocconi).

228. *See id.*

229. *Campbell*, 18 F.3d at 684 (examining the specific methodology used by Washington state to conduct a state hanging identifying those factors that contribute to rapid unconsciousness and death).

230. *See* Transcript of Proceedings, *supra* note 227, at 250-89 (testimony of Dr. Kevin Concannon); *id.* at 289-430 (testimony of Dr. William F. Ebling); *id.* at 431-842 (testimony of Dr. Mark Heath).

231. *See id.* at 250-89 (testimony of Dr. Kevin Concannon).

does not adequately eliminate the risk of pain;[232] and an anesthesiologist, who reviewed numerous problems with the protocol including the facilities, the selection and training of the execution team and the inadequate monitoring of the anesthetic depth of the inmate.[233]

Some of the experts called by the California Department of Corrections supported Morales' claims that Procedure 770 created an unnecessary risk of pain. For example, Dr. Brent Ekins, a clinical pharmacologist, agreed that the second drug, pancuronium bromide may block respiration and may account for the cessation of chest movements rather than the anesthesia.[234] In addition, Dr. Mark Singler, an expert in clinical anesthesia, testified that it would be "terrifying" to be awake and injected with the contemplated dosage of pancuronium bromide and that it would be "unconscionable" to inject a conscious person with the contemplated amount of potassium chloride.[235]

Interestingly, most of the specifics as to how the lethal injection procedure was carried out by the Department of Corrections were not in dispute.[236] The state argued that the lethal injection procedure as

232. *See id.* at 289-430 (testimony of Dr. William F. Ebling). Tendered as an expert in the field of pharmacokinetics and pharmacodynamics, Dr. Ebling said, "My opinion is that procedure 770 will not allow one to eliminate the risk of having a—a painful—a painful execution given the information that I have from—from all these different sources. *Id.* at 318-19.

> Part of this has to do with the—with having an understanding of the unique properties of thiopental itself, and placing the pharmacokinetic characteristics of thiopental within the context of—of that protocol leaves lots of room for doubt that—that there is possibilities that patients or I should say inmates could emerge and experience a painful execution.

Id. Most of Dr. Ebling's testimony had to do with the way that the human body processes sodium thiopental. *See generally id.* at 289-430. He discussed several elements of the California protocol that decreased the likelihood that the state could ensure that the thiopental was effective at the time that the potassium chloride was injected. *See generally id.*

233. *See id.* at 431-842 (testimony of Dr. Mark Heath who, after reviewing numerous records and logs of procedures and past executions, offered his opinion of the inadequacies of the protocol and the problems with the implementation of the executions including the inadequate facilities, the arbitrary selection and training of the execution team and the inadequate monitoring of the anesthetic depth of the inmate).

234. *See id.* at 844-972 (testimony of Dr. Brent Elkins, tendered as an expert in toxicology and pharmacology).

235. Memorandum of Intended Decision, *supra* note 6, at 9; Transcript of Proceedings, *supra* note 5, at 972-1208 (testimony of Dr. Robert Singler).

236. Following the hearing in *Morales*, a Joint Filing of Undisputed Facts, Parts I and II (redacted Nov. 27, 2006) were filed with Judge Fogel. *See* Joint Pre-hearing Conference Statement, Morales v. Woodford, 2006 U.S. Dist. Lexis 42153 (N.D. Cal. 2006) (No. C-06-926-JF-RS), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California

implemented, was constitutional while Morales maintained that the procedure could not satisfy the Eighth Amendment.

V. THE CONSTITUTIONAL TEST: THE *RISK* OF UNNECESSARY PAIN AND ITS IMPLICATION FOR *MORALES*

A. California's Procedure 770 and the Risk of Unnecessary Pain

Morales argued that the California lethal injection procedure, as administered under Procedure 770,[237] is unconstitutional because it creates a significant and substantial risk of unnecessary pain.[238] "[A]lthough executions following Procedure 770, if performed properly under ideal circumstances, may not inherently involve unnecessary pain and suffering, Procedure 770 creates a procedure that is rife with potential problems and opportunities for untrained personnel to commit grave errors, all of which can lead to an excruciating death."[239]

Procedure 770 covers numerous aspects of the execution process. Three main areas of constitutional concern are: (1) the selection and training of the execution team; (2) inadequate facilities and oversight for the injection procedure; and (3) the selection and dose of drugs.[240] Morales presented evidence to address what he viewed as the failings of Procedure 770 in each of these areas.[241]

1. The Selection and Training of the Execution Team

The execution team is responsible for carrying out the death sentence. Each member of the team is assigned a specific area of responsibility from tasks as straightforward as walking the inmate to

/Morales/Morales%20Dist%20Ct/2006.09.15%20refiled%20joint%20prehearing%20stmt.pdf. These included stipulations to many of the procedures for lethal injection executions as well as many of the errors that occurred in previous executions. *See id.*

237. Pursuant to court order, the Office of the Attorney General released a redacted version of Procedure 770 on January 6, 2006. *See* San Quentin Institution Procedure 770, *supra* note 76, at 8 n.1; *see also* Cal. State Prison, San Quentin Operation Procedure No. 770 (redacted version on file with author). A full version has never been made public and it is not clear what portions have been redacted. *Id.* Previously, the procedure was kept confidential. The Procedure 770 states that its purpose "is to establish the procedure for the care and treatment of inmates from the time an execution date is set through execution by lethal injection." San Quentin Institution Procedure 770, *supra* note 76, at 1. "In addition, this plan identifies staff responsibilities pursuant to preparation for executions and operation of the Lethal Injection Chamber." *Id.*

238. Plaintiff's Motion for Temporary Restraining Order, *supra* note 215, at 8.

239. *Id.*

240. *Id.*

241. *Id.*

the execution chamber to complex responsibilities like inserting an IV line. Simply put, the team members are responsible for bringing about the death of another person and the pressure they feel is extraordinary.[242] Members of the execution team describe their work as "awesome and very stressful—the most stressful thing that a person in the Department of Corrections is asked to do."[243] To ensure a smooth execution, the execution team should be selected thoughtfully and trained extensively.

Morales argued that California's ad hoc process of selecting execution team members creates an execution team that is not well suited to the unique task of implementing a complex, emotional, and stress-ridden procedure.[244] Team members are apt to make a procedural mistake creating a substantial risk of unnecessary pain.[245] For such a demanding task as executing another human being, one could reasonably expect a rigorous standardized training routine and strict performance criteria. Evidence given in Morales' hearings suggested that this is not the case in California.[246]

San Quentin Operational Procedure 770 provides for the selection of the execution team.[247] The protocol does not provide specific qualification requirements for a team member nor does it provide a process for reviewing or re-evaluating whether a team member should continue to participate in executions.[248] There are no minimum

242. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995) (discussing military techniques used to overcome an individual's powerful reluctance to kill, how killing affects a soldier, and the implications this has for society).

243. Joint Pre-hearing Conference Statement, *supra* note 236. Dr. Heath offered his opinion that it is very important that the execution team members handle stress well "because clearly this is a very stressful thing for the folks who participate. So you would not want to have somebody doing this who had problems with handling stress greater than the normal problems of handling stress that we all have." Transcript of Proceedings, *supra* note 2, at 577-78. He also suggested it would be "almost cruel" to put an employee who was suffering from post- traumatic stress related to his job on the execution team. *Id.* at 578.

244. According to Dr. Heath: "They are trying to figure it out for themselves, and they are sort of adrift. I think they are doing the best they can within a very dysfunctional system." Transcript of Proceedings, *supra* note 2, at 510.

245. *See id.*

246. *See id*.

247. According to the Joint Filing of Statement of Undisputed Facts, assembly of the execution team has occurred in a number of ways. *See* Joint Pre-hearing Conference Statement, *supra* note 236. Wardens Calderon selected members of the team himself. *See id.* at 3, ¶ 8. Warden Woodford "assured herself" of the competence and the professionalism of each team member. *Id.* Warden Ornoski, on the other hand, claimed there were no guidelines and left the selection of the executions teams up to the team leader. *Id.* at 4, ¶ 11.

248. *See generally* San Quentin Institution Procedure 770, *supra* note 76.

qualifications or expertise required to be on the team.[249] Morales presented evidence to show that the selection process varied somewhat depending on the warden. Some wardens indicated they selected the team themselves; others allowed the team leader to make the selection.[250] The state also disclosed troubling background information of the execution team members. For example, some team members were involved in criminal activity,[251] another member received institutional disciplinary reports,[252] and a prison guard led the execution team despite having suffered from psychological disorders and receiving treatment with anti-depressant medication.[253] This evidence raised questions about whether the team members were well suited to participate in state executions.[254]

In choosing lethal injection as its primary method of execution, the state has chosen a procedure that requires special training in

249. *See* Joint Pre-hearing Conference Statement, *supra* note 236, at 3.

250. Warden Arthur Calderon presided over four lethal injection executions and claimed that he personally selected all the teammates that participated. *Id.* at 3, ¶ 8. Jeanne Woodford became warden in 1999 and presided over four lethal injection executions and claims that she "personally assured herself that each member of the execution team had a high degree of skill, competence, professionalism, patience, and stability." *Id.* Warden Ornoski presided over the executions of Stanley Williams and Clarence Ray Allen (the two executions that immediately preceded this challenge) and claims that he left it to the team leader (Witness #5) to select the teammates. *Id.* at 3-4, ¶¶ 7, 8, 11.

251. *See id.* at 4, ¶¶ 10-12.

252. *See id.* at 4.

253. *See id.*

254. The identity of the execution team is confidential. During the hearing and in filings, members of the execution team were referred to by a witness number. *Id.* These included Witness #5, a licensed peace officer, and guard who was a member of the team. *Id. 4*, ¶¶ 10-12. He was terminated from CDCR then reinstated with a five month suspension without pay for bringing illegal narcotics into San Quentin Prison. *Id.* After this incident, he was approved by Wardens Calderon and Woodford as a member of the team and selected as team leader by Warden Calderon. *Id.* He has participated in ten California executions. *Id.* Warden Ornoski had Witness #5 select his teammates. *Id.* at 4, ¶ 11. This was done without Witness #5 reviewing any personnel files before or during the time they were team members. *Id.* at 4, ¶ 12.

Witness #1 was also a member of the execution team. In 1995, Witness #1 was diagnosed with psychiatric disorders including clinical depression and post traumatic stress disorder as a result of working in the prison system. *Id.* at 4, ¶ 13. He was treated for these disorders from 1995-1998. *Id.* In 1998, Witness #1 was arrested and convicted for driving while intoxicated. *Id.* at 4, ¶ 14. From 1999-2006, Witness #1 participated in the executions of eight inmates. *Id.* at 4, ¶ 15. In January 2006, Witness #1 was diagnosed for clinical depression and prescribed 300 mg of daily anti-depressant medication. *Id.* at 5, ¶ 16. At this time, Witness #1 was elevated to be co-leader of the execution team. *Id.* at 5, ¶ 17. Among other things, he was responsible for observing and directing the actions of all members of the execution team, including the mixing of the execution drugs. *Id.* In February 2006, Witness #1 was sole team leader for the scheduled execution of Morales. *Id.* at 5, ¶ 19. At that time he was still receiving treatment for clinical depression and taking 300 mg of anti-depressant medication. *Id.*

medical procedures including the injection of drugs and the necessity to monitor an inmate's anesthetic depth.[255] Yet medical personnel do not participate in the implementation of the procedure.[256] Members of the execution team, for the most part, have no prior medical or pharmacological education, experience, or training. Team training is extremely important, therefore, to ensure that the procedure runs smoothly and efficiently.[257] Evidence did show a significant amount of time dedicated to training team members in the weeks prior to the execution.[258] One week before the date, in fact, the team trains several hours a day going "over and over and over" the procedure several times per hour.[259] Unfortunately, testimony also showed that members of the execution team had never read Procedure 770, were often unfamiliar with the names of the drugs, and others who actually administered the drugs could not report the dosage of the drugs they administered.[260]

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255. *See* Transcript of Proceedings *supra* note 2, at 480-81 (testimony of Dr. Mark Heath).

> Q: What does monitoring anesthetic depth entail?
>
> A: It's an integration of multiple streams of information that's performed usually by one person or sometimes a couple of people if you have two anesthesiologists working together. But usually it's one person who's at the bedside. It's a bedside procedure, as it were, and who is observing monitors and able to physically examine the patient to integrate all of that information and make a determination about what the anesthetic depth is.
>
> It also involves observing the stimulus that's being done. The surgical stimulation varies in intensity through a procedure. Some parts hurt a lot more than others. And so the anesthesiologist needs to be aware of what the surgeons are doing, how much that would hurt and what the anticipated physiological response would be for a given depth of anesthesia.
>
> And so we're constantly reviewing those things to come up with our best determination of what the depth is.

Id.

256. There is no requirement that a registered nurse be on the team. At the time of Morales execution, there were no RNs on the team. There have been RNs and LVNs on the execution team in the past. Joint Pre-hearing Conference Statement, *supra* note 236, at 3, ¶ 6.

257. *See* Transcript of Proceedings, *supra* note 2, at 560-76. Dr. Heath discusses the inadequate training that the team receives. *Id.* In addressing two particular team members who showed a lack of understanding of the drugs that were used he stated, "Both of these folks need specific training to help to get them up to a level where they should be participating in a lethal injection procedure." *Id.* at 567.

258. *See* Joint Pre-hearing Conference Statement, *supra* note 236, at 7.

259. *Id.* at 7, ¶ 29. Execution practice sessions consists of meetings and dry runs through the procedure exactly as it is expected to proceed in an execution, except that the thiopental is not actually mixed into solution, the catheters are not inserted into anyone's veins; water is used in syringes and IV bags; the IV lines empty the fluid into a bucket. *Id.* at 7, ¶ 30. No one takes down any notes while the training is going on. *Id.* at 7, ¶ 31.

260. *See id.* at 7-9. During the last eight California executions, there were no practice sessions where people practiced mixing Pentothal. *Id.* at 8, ¶ 33. Witness #1 has not been trained in mixing drugs. *Id.* Despite this, Witness #1 was responsible to ensure that the

This suggests that the state's procedural training is inadequate.[261]

2. Unreliable Record Keeping and Oversight of Drugs

Morales argued that the execution procedure at San Quentin was critically deficient in its failure to require maintenance of reliable records for the various aspects of the execution procedure.[262] Records were inadequate to verify whether the proper amount of anesthesia for any execution was used. Testimony presented during Morales' trial suggested that in some of the executions it was not.[263]

Serious questions were also raised about the oversight, control, and possible diversion of controlled drugs at San Quentin.[264] Sodium Thiopental, the anesthetic used in the lethal injection procedure, is classified by the federal government as a controlled substance.[265] Its use is closely monitored with an accounting of every amount used or wasted.[266] The *Morales* hearings showed that San Quentin failed to meet accepted standards for the dispensing, control or monitoring of this drug.[267] For example, evidence was presented that on multiple occasions execution team members checked out significant amounts of sodium thiopental sometimes for an execution, other times for practice.[268] Sodium thiopental was never used during any practice. However, records did not reflect that the drug was returned to the pharmacy. Additionally, large amounts of sodium thiopental were reported unused after executions, although the San Quentin records do not reflect that the drugs were returned.[269] No explanation was offered.

San Quentin failed to demonstrate any serious concern for the

drugs were mixed correctly. *Id.* The first time Witness #4 mixed Pentothal was on the evening of a scheduled execution. *Id.* at 8, ¶ 34. Prior to mixing Pentothal for an execution, Witness #4 had never received any training in doing that. *Id.* Witness #4 may have read ten to twelve pages of Procedure 770, but only once after Beardslee's execution. *Id.* at 11, ¶ 53. Witness #3 never has read Procedure 770. *Id.* Dr. Calco who was present for the executions of Keith Williams, Babbitt, Siripongs, Anderson, Rich, Massey, and Stanley Williams, and perhaps others has not read procedure 770. *Id.*

261. Transcript of Proceedings, *supra* note 2, at 529.

262. Memorandum of Intended Decision, *supra* note 6, at 10-11. From procedures as diverse as the operation of the electrocardiogram to the recording of the controlled drugs used for the execution, the Court found that the lethal injection procedure was replete with inaccuracies and failures. *See id.* at 15-17.

263. *Id.* at 10-11.

264. *See* Joint Pre-hearing Conference Statement, *supra* note 236, at 9-12, 15.

265. *See id.* at 8, ¶ 25h. The public cannot obtain this drug except through a licensed pharmacist. *Id.*

266. Transcript of Proceedings, *supra* note 2, at 511-13.

267. *Id.* at 513-15.

268. *See* Joint Pre-hearing Conference Statement, *supra* note 236, at 9-11.

269. *See id.* at 6-11.

serious problem of possible drug diversion. The problem is heightened because at least one execution team member responsible for handling the drugs had been disciplined for a drug offense,[270] while another had been treated for significant psychological disorders.[271] The possibility of drug diversion also raises questions whether the amounts intended for use as an anesthesia were actually used for that purpose or whether any diversion resulted in inadequate anesthesia during an execution.[272] No answers to these concerns were provided.

3. Inadequate Facilities and Oversight

Morales argued that the physical conditions under which the execution team members operate raise concerns about the ability of the team to monitor whether an inmate is properly anesthetized before otherwise pain inflicting drugs are administered to cause death.[273] For example, Procedure 770 does not allow any execution team member to be present in the execution chamber once the execution begins.[274] An inmate is strapped to a gurney, the IV line is inserted and the inmate is left alone.[275] The execution chamber is then sealed shut so that no member of the team can hear anything the condemned inmate might say during the execution.[276]

Team members gather in the anteroom and all lights are extinguished except for one small red bulb.[277] Despite the fact that the team is behind one-way glass, this added procedure is thought necessary to preserve anonymity.[278] The anteroom is small and

270. *Id.* at 3, ¶ 9.
271. *Id*. at 4, ¶¶ 13-16.
272. Transcript of Proceedings, *supra* note 2, at 514-16.
273. Motion for Temporary Restraining Order, *supra* note 215.
274. *See id.*
275. *See* Joint Pre-hearing Conference Statement, *supra* note 236, at 11, ¶ 48.
276. *See* Transcript of Proceedings *supra* note 2, at 589-90. Dr. Heath noted:

> [T]o determine if someone is suffering you need to be able to visualize them well, but you also need to hear if -- what they are doing because one of the ways we have evidence that somebody is suffering is the sounds they make. And by doing that it made the chamber almost soundproof. When we were in there there were some attorneys in the room at one point and the door was sealed and we couldn't get their attention. We had to start banging on the windows, as I recall, to get their attention in there. So certainly if somebody were moaning or whatever, that would not be evident to the personnel in the anteroom.

Id.

277. Joint Pre-hearing Conference Statement, *supra* note 236, at 9, ¶ 41. A lamp fixture consisting of an incandescent light bulb with red glass and a silver, cylindrical reflective metal sheath. On the night of a scheduled execution, this lamp is turned on at approximately 11:40 p.m. *Id.*
278. *See id.* at 9.

comfortably accommodates no more than sixteen or seventeen people, but during an execution many more people may be present.[279] One team member described handing a syringe of lethal drugs to a hand that emerged from the crowd in the anteroom, without ever being able to see to whom it was being given.[280]

Procedure 770 specifically prohibits any execution team member from asking questions that require a verbal response.[281] Presumably this code of silence, like an executioner's hood, maintains the anonymity of the execution team. Thus, there is no ability to ask or confirm verbally to whom the syringe is given. This call for silence would seem inappropriate under these circumstances. There is no mechanism to communicate a failure or to adjust a procedure once the execution process begins. As a result of this compelled silence, the execution of Stanley "Tookie" Williams in 2005 proceeded even though the required back up IV line was never inserted into his arm.[282] Neither the warden nor the team leader knew of the failure until the execution was complete.[283]

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279. *Id.* at 9, ¶ 43. Dr. Calvo testified that there are "so many people in the room that you didn't even know who they were and [why] they were there." *Id.* Warden Ornoski reports that he would "shuffle from side to side a foot or two . . . it's fairly crowded back there. *Id.* Dr. St. Clair noted that "some big fellow from Sacramento was in [his] way . . . he'd block the light that comes from that little room that helped to allow me to see what I'm doing." *Id.* at 10, ¶ 44. During Stanley William's execution, a "rather large" CDCR official, that did not take any part or role in the execution of Mr. Williams, was standing in front of the anteroom window to the execution chamber. *Id.* at 10, ¶ 45. Witness #4 was attaching the syringe of lethal drugs from the cart to be administered from Stanley Williams . . . and the large man "was standing in Witness #4's way"; witness #4 had to nudge him a couple of times. *Id.*

280. Transcript of Proceedings, *supra* note 2, at 587. Dr. Heath read from the testimony a Witness #7, a member of the execution team, who reported that:

> When I took [the syringe] off of the cart I handed it to the officers, whoever it was going to be, and it usually was kind of around a person or corner or something because there were so many people in [the anteroom]. And so I never paid any attention. I just handed it to whoever and after that, you know, I don't know.

Id. And when asked his opinion of this conduct, Heath replied. "It's the opposite of the way things should be. They should have a clear working space so that they can accomplish this task properly." *Id.*

281. *See* San Quentin Institution Procedure 770, *supra* note 76, at 39.

282. Joint Pre-hearing Conference Statement, *supra* note 236, at 16, ¶ 85.

283. *See* Transcript of Proceedings, *supra* note 2, at 523-25; Joint Pre-hearing Conference Statement, *supra* note 236, at 16, ¶ 85. During Stanley Williams' execution, an RN was responsible to set one catheter. The vein blew when she set the IV. She again attempted to start the IV and the vein blew again. She was visibly upset to other execution team members. The RN then failed to properly set the catheter a third time, taped the catheter to William's leg and began to exit the chamber. The Warden then said to "proceed" and the execution proceeded without the IV line in the left arm properly set or operating. Transcript of Proceedings, *supra* note 2, at 523-25. "The folks [at the execution] didn't know . . . [there was no back up IV working] [Witness #5, the team leader] didn't find out

The injection of drugs for the execution does not conform to medical practices for anesthesia or the administration of drugs through IV lines.[284] During an execution, drugs are administered remotely along IV lines that may be as long as seventy-two inches, increasing the risk that the drug flow may be interrupted or blocked.[285] The procedure followed and the dosage of the drugs remain the same regardless of the inmate's size, weight, medical condition, other drugs taken, or the condition of an inmate's veins.[286] The failure to individualize the procedure to a specific inmate increases the likelihood of unnecessary pain or suffering.

4. The Choice of Drugs

Morales argued that the three-drug cocktail combination is not designed to eliminate the risk of unnecessary pain.[287] There is universal recognition that the last drug, potassium chloride, when given in doses sufficient to cause death by cardiac arrest, is excruciatingly painful.[288] This drug activates the nerves in the inmate's veins before it causes the heart to stop.[289] The choice of potassium chloride makes it imperative that an inmate be completely anesthetized prior to the administration of this drug to avoid unnecessary pain.[290]

The first drug, sodium thiopental, is a sedative designed to anesthetize.[291] Medically, this drug is used in small doses as an "ultra-short" acting drug in procedures such as tracheotomies.[292] It is designed to cause patients to become unconscious for a short period of

[the back up IV wasn't working] until they—until after it was all over." *Id.* at 525.

284. Transcript of Proceedings, *supra* note 2, at 596.

285. *See* Joint Pre-hearing Conference Statement, *supra* note 236, at 17, ¶ 86. The length of the IV line increases the risk of unnecessary pain because it alters the timing of the drug delivery. Plaintiff's Brief Submitted After Conclusion of Evidentiary Hearing, Morales v. Tilton, 465 F. Supp. 2d 972 (N.D. Cal. 2006) (No. C-06-926-JF), at 74.

286. Plaintiff's Motion for Temporary Restraining Order, *supra* note 215, at 12.

287. Plaintiff's Motion for Temporary Restraining Order, *supra* note 215, at 1-2.

288. Memorandum of Intended Decision, *supra* note 6, at 8-9 ("[T]he parties agree that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride in the amounts contemplated by OP 770.").

289. Plaintiff's Motion for Temporary Restraining Order, *supra* note 215, at 9.

290. Transcript of Proceedings, *supra* note 5, at 826.

291. San Quentin Institution Procedure 770, *supra* note 76 (stating that Sodium thiopental is the generic name of Sodium Pentothal; the two names are frequently used interchangeably in litigation and news reporting on this issue).

292. Declaration of Dr. Mark Heath at 9, ¶ 18, Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006) (No. C-06-926-JF), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct.Cp/Ex%20C%20to%20TRO%20Motion%20(Heath%20Decl).pdf.

time with the expectation they will awaken to begin breathing again on their own.[293] Morales argued that this "ultra-short-acting" property creates a risk that the anesthetic effects will wear off before the execution is complete.[294]

Although five grams of sodium thiopental should produce unconsciousness for a sufficient period, Morales argued that there is no way to ensure the drug is properly delivered to the inmate.[295] Morales presented evidence of witnesses' testimony to prior executions, and prison logs documenting inmate activity during executions that suggest inmates were breathing and not sufficiently anesthetized before the second and third drugs were administered.[296] There was also uncertainty about the drug dosage used. Poor record keeping by the state preclude accurate accounting of the exact amount of sodium thiopental used for both practices and actual executions.[297]

The second drug administered is pancuronium bromide. This drug is the most controversial in the execution "cocktail."[298] It is a paralytic and completely paralyzes both the involuntary muscles and the diaphragm of the inmate.[299] An inmate who is not properly anaesthetized by the sedative remains conscious, but the paralysis caused by the pancuronium bromide prohibits any verbal or physical communication while the inmate slowly suffocates to death. One expert opined that the drug's paralytic effect is so complete that it would interfere with an anesthesiologist's ability to assess consciousness.[300]

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293. *Id.*

294. Plaintiff's Motion for Temporary Restraining Order, *supra* note 215, at 14.

295. *Id.* at 9. Morales argued that there was essentially too much room for error in the procedure. Proper administration of the sodium pentothal requires properly mixing the solution, setting up the IV lines and associated equipment including the "Y" injection site, fluids must not be leaked or misdirected, finding a usable vein, properly inserting the IV line in the proper direction and verifying that the drugs are properly flowing into the veins. *Id.* at 10.

296. *See id.* at 9-10. The log for the Jaturun Siripongs execution showed that there was still a respiratory effort at the time the pancuronium bromide was injected. *See* Lethal Injection - Execution Record, *supra* note 209 (providing execution record for Jaturun Siripongs). The Manuel Babbitt log shows that respirations occurred for a short while, even after the pancuronium bromide was administered. *See id.* (providing execution record for Manuel Babbitt).

297. *See* Transcript of Proceedings, *supra* note 2, at 517-18. Dr. Heath describes how vials were checked out of the pharmacy for "practice," even though execution team members state that they practice without using the actual drug. *See id.*

298. Pac. News Serv. v. Tilton, No. C-06-1793-JF-RS (N.D. Cal. 2006) (challenging the states use of pancuronium bromide in a lethal injection executions).

299. A patient given pancuronium bromide alone would suffocate to death. *See* Transcript of Proceedings, *supra* note 2, at 552.

300. *See id.* at 485-88. Morales argues that despite repeated questions to the state, they

Morales argued that pancuronium bromide serves no legitimate purpose in the execution process while greatly increasing the risk that an inmate will suffer unnecessary pain.[301] This risk is compounded by concern that the paralytic drug prevents observers from detecting any suffering.[302] Morales presented evidence that the American Veterinary Medical Association, stating that this drug cocktail is inhumane, has promulgated guidelines that prohibit this combination of drugs for use when euthanizing animals.[303]

Judge Fogel expressed his concern as to whether the state is able to accurately monitor an inmate's consciousness before the pancuronium bromide is administered.[304] Although denying Morales' request for a stay of execution in February 2006, Judge Fogel ordered that Morales' execution could proceed as scheduled only if the state: (1) performed the execution using only sodium thiopental or another barbiturate; or (2) the state procured the assistance of anesthesiologists to provide "independent verification" that Morales was in fact unconscious prior to the administration of the pancuronium bromide and potassium chloride.[305] When the state was unable to comply with these requirements, the execution was not permitted to proceed and the hearings into the constitutionality of the lethal injection procedure were set.

The Ninth Circuit has held that accounts of previous executions inform the courts' determination as to whether there is a risk of

have offered no justification for the use of this particular drug. In earlier proceedings, a state expert stated that the use of pancuronium is primarily to prevent witnesses from observing movement that "could be interpreted as pain or discomfort." Plaintiff's Motion For Temporary Restraining Order, *supra* note 215, at 16; *see also* Beardslee v. Woodford, 395 F.3d 1064, 1076 n.13 (2005) (noting that the record the record does not contain any other explanation).

301. Plaintiff's Motion for Temporary Restraining Order, *supra* note 215, at 14-16.

302. *Id.* at 15.

> [I]f there's a problem with the IV that's delivering the thiopental, infiltrated or leaking or mixing problem or whatever, any of the things that we've talked about, then the thiopental wouldn't be effectively delivered into the circulation at a level to provide anesthesia. But if the other IV is working, the one that's giving the pancuronium and potassium, then the prisoner will be paralyzed. Nobody will realize that he's not asleep. He will be suffocating and then he will get the potassium and experience that excruciating pain and then he will die.

Transcript of Proceedings, *supra* note 2, at 604.

303. Transcript of Proceedings, *supra* note 2, at 718-24. The state argues that the AVMA own guidelines recommend that their standards not be applied to non animal subjects. *Id.*

304. *See* Memorandum of Intended Decision, *supra* note 6, at 12.

305. *See* Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction at 13, Morales v. Hickman, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (No. C-06-926-JF-RS).

unnecessary pain in a method of execution.[306] Accordingly, Morales introduced observations by witnesses to earlier executions to document how long the dying inmate continued to breathe.[307] This evidence of

306. Fierro v. Gomez, 865 F. Supp. 1386, 1401 (N.D. Cal. 1994).

307. *See* Transcript of Proceedings, *supra* note 2. Morales called three eyewitnesses to testify: Heather Wells Jarvis, *see* Transcript of Proceedings, *supra* note 227, at 199-213; Cindy Adcock, *see id.* at 214-37; and Margo Rocconi, *see id.* at 238-49. Ms. Jarvis discussed the North Carolina execution of her former client Edward Ernest Hartman. *Id.* at 205-96. She described a violent scene that occurred when the execution was botched:

> I don't think that a person can move their body in that way, and so his throat was shaking and pulsing. And then very soon as well his chest began to heave and it was a rather rapid and violent heaving of his chest. In fact, I—he was lifting really up off the gurney in his torso and I remember thinking that he was going to fall off. I felt like he was going to crash onto the floor because his chest was heaving so violently.
>
> Q: And how long did the violent heaving of his chest last?
>
> A: It was—it was at least five minutes. I think it was over five minutes.

Id. at 205-06.

Ms. Adcock discussed the North Carolina executions of Zane Hill, Willie Fischer, and Timothy Keel. She described problems with all, though Mr. Hill's was execution was problematic in that he was overly drugged before the execution. *Id.* at 219.

For Mr. Fischer, Ms. Adcock described the following:

> [H]is [Mr. Fischer's] chest started heaving really heavily up against the blanket and his neck went back and his mouth opened and it was like he was trying to gasp for breath. You can't hear anything. It's a soundproof room. But he had his mouth open gasping for breath. And I was focusing mostly on his chest and his throat and it was like throbbing and heaving.
>
> Q: Okay. And how long did that last?
>
> A: About ten minutes.

Id. at 223.

Complications arose with Mr. Keel's execution as well:

> . . . Timmy was continuing to mouth to us and he wanted to make sure—there was four witnesses for him there and he wanted to make sure he spoke to each of us. So he was continuing to try to communicate. He was increasingly very frustrated. He wasn't sure we were understanding him.
>
> So he started gasping for breath, but he was still able to talk or at least mouth. Again, we can't hear. So he would take a deep breath and then, you know, mouth to us, you know, and then take another -- you know, mouth to us. And we were just—or at least I was just trying to keep smiling at him and assuring him it was okay.
>
> And so then he suddenly stopped mid-sentence. He just kind of froze and his eyes just stared and his mouth gaped open. And he started shaking and heaving as well and it just seemed to go on forever. Because, again, I just wanted it to end. I remember Willie. I was just hoping it wouldn't go on so long.
>
> Q: And I was going to ask you that. The shaking, how long did that go on?
>
> A: It was about the same amount of time, right at ten minutes the last time.

Id. at 227-28.

Ms. Rocconi discussed the California execution of her former client, Stephen Anderson. She also witnessed complications with the process:

> . . . Mr. Anderson had raised his head a few times and he put his head down, and I saw what I thought he was sort of holding his breath or something. And then within I would say a few moments, a few minutes, there were—he started—his

inmates respirations, movements, and other visual evidence of breathing provided the court with insight as to how long an inmate remained conscious after receiving the drugs.[308]

The government acknowledged that Procedure 770 could be improved, but argued that it is not unconstitutional.[309] The government maintained that there is nothing about the current procedure that presents any unnecessary risk of pain. In response, Morales argued that, in part, this denial of any risks associated with the procedure is what makes California's lethal injection procedure unconstitutional.[310]

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chest and his stomach area started to heave upwards sort of up against the restraints.

Q: Okay. Now, can you give an estimate as to how many times his chest heaved?

A: I would say it was over 30 times. I sort of lost count after about 30, somewhere in that neighborhood, but I think it was more than 30.

Id. at 245-47.

308. Transcript of Proceedings, *supra* note 2, at 534.

Q: On reviewing these (prison execution) logs, what did you notice?

A: Well, several things, but one thing of concern is that breathing continues for quite a long period, several executions after the time of pentothal, and it doesn't stop until after the pancuronium is administered.

Q: And does that raise doubts about the level of anesthesia?

A: Yes. It's very concerning. I don't know whether the breathing stops because of pentothal or because of pancuronium, but when somebody is breathing like that they are not in a deep plane of anesthesia. They may not even be unconscious.

Id.

Judge Fogel cited Dr. Singler's testimony about the execution of Robert Massie on March 27, 2001, when Dr. Singler opined that "based upon the heart rates reflected in the execution log, Massie well may have been awake when he was injected with potassium chloride." Memorandum of Intended Decision, *supra* note 6, at 12.

309. *See* Defendant's Post-Hearing Brief and Response to Court's Questions, Morales v. Tilton, 465 F. Supp. 2d 972 (N.D. Cal. 2006) (No. C-06-926-JF-RS).

Although free of any constitutional deficiency, California's lethal injection procedure, like any matter of human design, can always undergo continual improvement. The state, as a matter of civic responsibility, is, and shall always remain, committed to that effort. But Plaintiff, having failed to carry his burden of showing a violation of the Eighth Amendment, is not entitled to relief in this proceeding.

Id. at 2-3.

310. Washington's protocol for hanging carefully acknowledged the risks of asphyxiation (which is slow and painful) or decapitation (which mutilates the body). Once identifying the risks, the protocol provided detailed procedures specifically designed to minimize these risks. The discussion identified factors including the diameter of the rope, the method of tying the knot, treating the rope with wax and boiling it to reduce elasticity, and, most importantly, the length of the drop in relation to body weight and the manner in which the length should be calculated. *See* Campbell v. Wood, 18 F.3d 662, 683-85 (9th Cir. 1994). With these precautions, the Court concluded that the "risk of a prolonged and agonizing death by asphyxiation or decapitation was negligible." Fierro v. Gomez, 77 F.3d 301, 307 (9th Cir. 1996).

VI. JUDGE FOGEL'S RULING IN *MORALES*

On December 15, 2006, Judge Fogel issued a Memorandum of Intended Decision and stated that California's lethal injection procedure, as currently administered and practiced, is unconstitutional.[311] Nevertheless, he hastened to add that "it can be fixed."[312] In a strongly worded opinion,[313] Judge Fogel based his conclusions primarily on the uncontested evidence of the testimony of the government's expert, Dr. Singler, and Judge Fogel's own observations of the physical facilities at San Quentin.[314] Judge Fogel stopped short of requiring that a medical professional be present at any execution,[315] but stated that "the need for a person with medical training would appear to be inversely related to the reliability and transparency of the means for ensuring that the inmate in properly anesthetized"[316]

Judge Fogel noted that both parties agreed that it would be "unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride."[317] Although Procedure 770 contemplates that the first drug would render an inmate unconscious, evidence from various execution logs, as well as observations of persons who were witnesses to California executions, raise serious questions whether unconsciousness, in fact, is obtained in all cases. Even more critically, Judge Fogel found that the state was deficient in its implementation of the protocol in numerous significant respects.[318]

Judge Fogel took the Attorney General and the Governor's office to task for not being more proactive to fix a system with such glaring deficiencies.[319] Judge Fogel seemed concerned that neither San

311. Memorandum of Intended Decision, *supra* note 6. Judge Fogel noted that he was "prepared to issue formal findings of fact and conclusions of law with respect to the deficiencies of California's current lethal injection protocol." *Id.* at 14.

312. *Id.* at 3.

313. *Id.* at 13. Fogel ruled that the implementation of the procedure "lacks both reliability and transparency." *Id.* at 15. He rejected the Governor's earlier effort to solve this process by a "single brief meeting." *Id.*

314. *Id.* at 8.

315. A stark contrast to what was required by a Federal Judge in *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. 2006).

316. Memorandum of Intended Decision, *supra* note 6, at 16.

317. *Id.* at 8-9.

318. Fogel detailed the numerous ways in which he found the protocol to be deficient including: (1) inconsistent and unreliable screening of execution team members; (2) a lack of meaningful training, supervision, and oversight of the execution team; (3)inconsistent and unreliable record keeping; (4)improper mixing, preparation, and administration of sodium thiopental by the execution team; and (5) inadequate lighting, overcrowded conditions and poorly designed facilities in which the execution team must work. *Id.* at 11-12.

319. *Id.* at 14 (noting that the defendants have still not fulfilled their discovery

Quentin prison, the state, nor the Governor's office seemed to act commensurate with the responsibility each held in the lethal injection procedure.[320]

Although Judge Fogel expressed optimism that lethal injection could be administered in a constitutional manner, he left it to the state to propose a procedure that does not violate the Eighth Amendment. Finally, Fogel called upon the Governor's office to demonstrate "executive leadership" in devising an appropriate and constitutional lethal injection procedure.[321] The state responded in January, 2007, and asked for time to conduct a thorough review of the protocol.[322] In this same pleading, the state asked for a protective order on this deliberative process and to insulate those who consult with the state in preparing a new procedure.[323] The Court denied the protective order.

VII. THE ROLE OF PHYSICIANS IN EXECUTIONS

Courts have determined that the constitutional implementation of the death penalty requires executions to be carried out without the risk of "unnecessary pain."[324] The American Medical Association (AMA)

obligations); *Id.* at 15-16 (encouraging a "thorough review of the lethal injection protocol" and, in a rejection of the state's earlier efforts noting that it "seems unlikely that a single, brief meeting primarily of lawyers, the result of which is to "tweak" Operating Procedure 770, will be sufficient to address the problems identified in this case).

320. *Id.* at 7. Fogel referred to the February execution that was postponed at the last minute when it became clear that there was a "'disconnect between the expectations articulated in the orders of [his] Court and . . . the expectations of the anesthesiologists' regarding how they would participate in [Morales'] execution." *Id.* at 5-6. Fogel also recounted a meeting that took place at the governors office that lasted less than two hours that concluded with a "tweak" of the chemical aspects of the protocol. *Id.* at 7. Fogel observed that at this meeting there was no discussion of the selection and training of the execution team, the administration of the drugs, the monitoring of the executions, or the quality of the execution logs—all components of the execution process that he found to be deficient and thereby unconstitutional. *Id.*

321. *Id.* at 14.

322. Defendants' Response to Memorandum of Intended Decision at 2, Morales v. Tilton, No. C-06-219-JF-RS (N.D. Cal. Jan. 16, 2007), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/2006.01.16%20filings/AG%27s%20response.pdf.

323. *See id.*

> [S]uch efforts, to be fully effective, must involve a deliberative process that is not chilled by threats of depositions, subpoenas, or other premature discovery efforts. Consultants, experts, and others may be reluctant to share information if there is the threat of discovery. Accordingly, Defendants and the Governor's Office have respectfully submitted a separate motion for protective order designed to allow this important deliberative process to proceed in an effective manner.

Id.

324. Fierro v. Gomez, 77 F.3d 301, 307 (9th Cir. 1996).

ethical guidelines prohibit a doctor from participating in an execution.[325] If a judge determines that it is necessary for medical doctors to be involved in carrying out execution by lethal injection, a clash arises between legal principles and medical ethics. The *Morales* case highlights this issue.

A. Historical Background

In the wake of the Nuremburg revelations about medical experimentation in Nazi Germany, there was general condemnation of medical involvement in these practices.[326] The World Medical Association[327] sought to upgrade the Hippocratic Oath[328] to prevent anti-humanitarian acts taken at the behest of the governments. There was a general unifying sense that the privilege of medical knowledge and treatment must not be used "contrary to the laws of humanity."[329]

The controversy over the use of doctors in execution procedures has been a contentious subject between medical associations and governments for years.[330] In the context of lethal injection procedures, a debate began even before the first lethal injection execution took place.[331] As early as 1980, in anticipation of the first lethal injection execution, the AMA passed a resolution against physician participation in executions.[332] A decade later, Illinois commissioned three physicians to administer the lethal drugs to Charles Walker in the first lethal injection procedure in the state.[333] This generated an outcry in

325. CODE OF MED. ETHICS § E-206 (Am. Med. Ass'n 2000), *available at* http://www.ama-assn.org/ama/pub/category/8419.html.

326. *See* AM. COLL. OF PHYSICIANS ET AL., BREACH OF TRUST, PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 29 (1994), *available at* http://www.hrw.org/reports/1994/usdp/index.htm [hereinafter BREACH OF TRUST].

327. *Id.* at 29.

328. *Id.* at 41.

329. *Id.* at 29.

330. *See id.* at 30-31.

331. *See* Suzanne Daley, *4 States Allow Lethal Injection For Executions*, N.Y. TIMES, Aug. 7, 1982, at 30.

332. BREACH OF TRUST, *supra* note 326, at 10.

333. Don Colburn, *Lethal Injection; Why Doctors Are Uneasy About The Newest Method Of Capital Punishment*, WASH. POST, Dec. 11, 1990, at Z12.

> An Illinois prison warden touched off a furor last September when he enlisted three unidentified physicians to insert an IV line into the arm of condemned killer Charles Walker in preparation for the state's first lethal injection. Medical organizations protested to no avail, and several lawsuits challenged the state's regulations, which call for a "licensed physician, RN [registered nurse] or physician extender" [technician qualified in medical procedures] to insert the catheter.

Id.

the broader medical community.[334] Despite this furor, two years later in Arkansas, physicians still participated in lethal injection executions.[335]

Medical ethics and the law continued to clash as states enacted a variety of laws related to lethal injections. Some statutes require that a physician "shall" or "must" attend the execution, other require that a physician "pronounce" or "determine" death, and other statutes merely list physicians as witnesses that may attend.[336] Many bills defer to prison authorities to create specific protocols governing the role of the physician in lethal injection executions.[337]

The only mention of doctors in Procedure 770 is in reference to the role of the Chief Medical Officer.[338] The reference is brief and only requires that the Officer closely monitor any medication that the inmate takes in the time leading up to the execution.[339]

Medical associations have issued strong statements against a member's participation in executions. As recently as August 2005, the AMA updated its Code of Ethics stating that "[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."[340]

As one would expect, anesthesiologists, those physicians specializing in the use of anesthetics, are most directly impacted by the controversy surrounding the lethal injection executions. Recently the President of the American Society of Anesthesiologists, Orrin F.

334. BREACH OF TRUST, *supra* note 326, at 1.

335. Ricky Rector was scheduled to be executed in Arkansas. *See* Alexander Cockburn, *Brown's Moral Anchor Is His Political Edge; The Establishment Cranks Up Its Rage For Clinton, A Man Devoid Of Political Principle*, L.A. TIMES, Mar. 30, 1992, at B5. When the execution team was unable to locate a vein in which to place an IV, a medical team was poised to surgically insert an intravenous tube. *See id.* This execution achieved a great deal of notoriety when Bill Clinton, then campaigning for president, returned to Arkansas to preside over the execution. *See id.* Rector was, at that time some 300 pounds. *See id.* He had blown away over half of his own brain after the shooting of a police officer and was unaware of the fact that he was about to be executed. *See id.*

336. Stacey A. Ragon, *A Doctor's Dilemma: Resolving The Conflict Between Physician Participation In Executions And The AMA's Code Of Medical Ethics*, 20 U. DAYTON L. REV. 975, 980-82 (1995).

337. *See* CAL. PENAL CODE § 3604(a) (2006) ("The punishment of death shall be inflicted by . . . standards established under the direction of the Department of Corrections."). California's bill provides that the Department of Corrections shall establish the necessary procedures to implement a lethal injection execution. The Department of Corrections designed a procedure that is written in San Quentin Operating Procedure 770.

338. San Quentin Institution Procedure 770, *supra* note 76, at 8.

339. *Id.*

340. CODE OF MED. ETHICS § E-206 (Am. Med. Ass'n 2000).

Guidry, M.D., released a strongly worded statement to its members that they not be involved in executions.[341] Dr. Guidry said,

> "Lethal injection was not anesthesiology's idea. American society decided to have capital punishment as part of our legal system and to carry it out with lethal injection. The fact that problems are surfacing is not our dilemma. The legal system has painted itself into this corner and it is not our obligation to get it out."[342]

Additional professional medical associations including the American Nurses Association,[343] the American Public Health Association,[344] and the National Association of Emergency Medical Technicians,[345] have all released statements prohibiting their members from participating in executions.

The medical profession appears to have established a very broad definition of what it means to participate in an execution. The AMA Code of Ethics lists several specific examples of conduct that are included in their definition of "participation" in execution.[346] These include "prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution."[347] Performing acts specific to execution by lethal injection are also prohibited. These include:

> ["P]rescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution; selecting injection sites; starting intravenous lines as a port for a

341. Orrin F. Guidry, M.D., Am. Soc'y of Anesthesiologists, *Message From the President, Observations Regarding Lethal Injection*, June 30, 2006, *at* http://www.asahq.org/news/asanews063006.htm.

342. *See id.*

343. Press Release, Am. Nurses Ass'n, Professional Societies Oppose Health Care Professionals Participation in Capital Punishment (Sept. 13, 1996), *available at* http://nursingworld.org/pressrel/1996/execut1.htm.

344. *LB-00-9: Participation of Health Professionals in Capital Punishment*, 91 AM. J. PUB. HEALTH 520 (2001), *available at* http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1446552&blobtype=pdf.

345. Nat'l Ass'n of Emergency Med. Technicians [NAEMT], *NAEMT Position Statement on EMT and Paramedic Participation in Capital Punishment*, http://www.naemt.org/aboutNAEMT/capitalpunishment.htm (last visited May 10, 2007).

346. CODE OF MED. ETHICS § E-206 (Am. Med. Ass'n 2000).

347. *Id.*

> lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel."[348]

The AMA Code of Ethics allows some involvement by doctors in an execution that is not considered a violation of the Code.[349] For example, a doctor may testify at a capital trial in a professional capacity, may certify the death of the inmate once the inmate has been declared dead by someone else, may witness an execution in a totally nonprofessional capacity, and may perform any act to relieve the suffering of a condemned person while awaiting execution.[350]

Interestingly, many medical professionals are unaware of the AMA guidelines. Recent surveys confirm that many doctors are unaware that any guidelines exist proscribing participation in a lethal injection procedure.[351]

There are physicians who are aware of these restrictions, but are still willing to participate in executions.[352] Some believe they have a responsibility to comfort an inmate who is about to be executed.[353] Others are simply not morally offended by the execution itself.[354]

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348. *Id.*

349. *Id.*

350. *Id.*

351. One survey in 2001 showed that only three percent of the physicians who responded even knew that there were guidelines on the issue. NJ Farber et al., *Physicians' Willingness to Participate in the Process of Lethal Injection for Capital Punishment*, 135 ANN. INTERN. MED. 884-88 (2001).

352. *See id.* The survey of 1000 physicians showed that forty-one percent of responding doctors would perform one of the actions specifically prohibited by the AMA while twenty-five percent would perform at least five. Surprisingly, twenty percent were even willing to inject the lethal drugs themselves. *Id.* at 885.

353. One doctor believed his participation was appropriate in the same way that it was appropriate to treat any patient with a terminal disease. He stated:

> [T]his is an end-of-life issue . . . It just happens that it involves a legal process instead of a medical process. When we have a patient who can no longer survive his illness, we as physicians must ensure he has comfort. [A death-penalty] patient is no different from a patient dying of cancer—except his cancer is a court order… "the cure for this cancer"—abolition of the death penalty—but "if the people and the government won't let you provide it, and a patient then dies, are you not going to comfort him?

Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 N. ENGL. J. MED. 1221, 1228 (2006).

Another doctor interviewed expressed the view that "until the law changes, I believe we owe it to the condemned to ensure that they die quickly and painlessly; doing so serves the interests of both the prisoner and society." Lawrence I. Bonchek, Letter to the Editor, *Why Physicians Participate in Executions*, 355 N. ENGL. J. MED. 99, 99 (2006).

354. Gawande, *supra* note 353, at 1221-29.

B. Morales' Case and Medical Ethics

Morales highlights several conflicts between a lethal injection procedure and the standards for medical ethics. California's lethal injection procedure calls for procedures that include starting IV lines, administering three drugs sequentially, and monitoring anesthetic depth. Properly done, these tasks must be performed by individuals who are well trained by professionals in the field.

Judge Fogel initially ordered that Morales' February 2006 execution could proceed if two professional medical personnel were present during the execution.[355] The state represented to the court that two anesthesiologists agreed.[356] One of the anesthesiologists, Dr. Singler, stated that he was willing to "stand in the chamber as [Morales] . . . died."[357]

Nevertheless, just hours before the execution was to begin, when Dr. Singler and his associate were finally given a one page opinion from the Ninth Circuit detailing their responsibilities, both physicians declined to participate. [358] Dr. Singler felt that the court order that he

355. Memorandum of Intended Decision, *supra* note 6, at 16. Fogel made clear that this order was "intended as a one time solution to permit [Morales'] execution to proceed as scheduled. It was not meant to suggest or to hold that the participation of medical professionals in lethal-injection executions generally is required by the Constitution." *Id.* at 16 n.15.

356. *See* Morales v. Hickman, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (No. C-06-926-JF). Judge Fogel ordered that the execution could proceed if the state retained the services of a qualified expert to ensure that Morales was unconscious when exposed to painful drugs. *Id.*; *see also* Transcript of Proceedings, *supra* note 5, at 971-1208 (testimony of Dr. Robert Singler, physician and anesthesiologist).

Dr. Singler testified as an expert in clinical anesthesia. *See id.* The identity of his associate remains anonymous. *See id.* at 979. Even during the hearing, the choice of words became an issue. When asked by the attorney general whether he (Dr. Singler) was "prepared to participate in the execution," Dr. Singler replied that he viewed it as "being present" as not as participation. *Id.* at 979, 988-89.

357. *Id.* at 987.

358. *See id.* There was some discussion on cross examination about the timing of when Singler learned about the Ninth Circuit order. Singler's copy of the order was placed into evidence. Singler had written on the order "delivered to us 2/20/06 9:00 PM in the warden's office." *Id.* at 1061. At the bottom of the order, also in Singler's handwriting it said "Attorney General Office has this for 2 days with stars following that writing. *Id.* It also said "didn't see a problem," which Singler testified referred to the Attorney Generals view on the courts requirements for the doctor. *Id.* at 1062. Singler testified that the attorney general's failure to recognize the ethical conflict the order created simply demonstrated the "gulf in understanding between the physicians and their issues with regard to medical ethics and the legal approach to this process." *Id.*; *see also* Memorandum of Intended Decision, *supra* note 6, at 6. The Court made findings as follows:

> [The state] represented to the Court that the anesthesiologists would ensure that [Morales] would remain unconscious after he was injected with sodium thiopental. This disconnect became apparent on the evening of February 20, 2006,

"take all medically appropriate steps" meant that he had an affirmative duty to act and that he was responsible to ensure Morales remained unconscious throughout the procedure.[359] While Dr. Singler hastened to add that he didn't believe anything could or would go wrong with the execution given the drugs they were planning to administer, he declined to be involved.[360] His concern was that he "didn't feel like getting painted as an executioner rescuing a botched execution. It was just- beyond my limit."[361] Dr. Singler acknowledged that even agreeing to monitor Morales placed him "in the unenviable opinion [sic] of being slightly at variance with the AMA's stance on capital punishment or involvement in a process of lethal injection."[362]

Judge Fogel's order did stop short of ordering that a medical professional be present during the lethal injection procedure.[363] Nevertheless, drawing a very fine line, Judge Fogel recognized the need for a member of the execution team to have "substantial training and experience in anesthesia."[364] He also noted that the protocol must "include a means of providing additional anesthetic to the inmate should the need arise."[365] To satisfy the court's concern that an inmate remain unconscious, someone must be present in the execution chamber to properly monitor the anesthetic depth of an inmate. The state must now determine who, outside of a medical professional, is capable of properly performing that task.

VIII. CONCLUSION AND RECOMMENDATIONS

The hearings on the constitutionality of lethal injection procedure in California were only one of many such challenges to lethal injection procedures heard around the country. In Missouri, all executions were put on hold until the Department of Corrections adjusts its execution

> approximately three to four hours before [Morales'] scheduled execution when [the state] provided copies of the Ninth Circuit's opinion to the anesthesiologist. Almost immediately, the anesthesiologists stated that they could not proceed for reasons of medical ethics.

Memorandum of Intended Decision, *supra* note 6, at 6.

359. Transcript of Proceedings, *supra* note 5, at 987.

360. *Id.* at 988.

361. *Id.* at 989.

362. *Id.* at 987.

363. Memorandum of Intended Decision, *supra* note 6, at 16. "[A]n execution is not a medical procedure, and it's purpose is not to keep the inmate alive but rather to end the inmate's life . . . the Constitution does not necessarily require the attendance and participation of a medical professional." *Id.*

364. *Id.*

365. *Id.*

procedures.[366] In North Carolina, first a federal court judge ordered the monitoring of the lethal injection process by medically trained personnel and then a state court judge ordered a temporary halt to lethal injection executions until a procedure is devised that does not require the use of a physician.[367] In Ohio, a federal judge ordered a stay of an execution to examine the state's lethal injection process. In Florida, Governor Jeb Bush declared a moratorium on lethal injection executions following a thirty-four minute prolonged and painful execution of one inmate.[368]

The Supreme Court has said that it is constitutional to put someone to death. In California, the voters have decided that the death penalty should be available as one possible punishment. For this death work we ask ordinary citizens to undertake an extraordinary responsibility—guards and staff are responsible for walking an inmate to the execution chamber, strapping him to a gurney, inserting an IV line, and preparing lethal drugs. It is a guard or staff person who injects the drugs and monitors an inmate until death is pronounced. In order for an execution to be constitutional, this work must be carried out in a professional, skilled, and properly regulated manner that ensures no unnecessary risk of pain. In California, that has clearly not been the case.

Lethal injection appeared to be a fast, simple, and relatively humane way for the state to put prisoners to death, especially compared to earlier techniques such as hanging or the electric chair. But during the *Morales* hearings, the public has, for the first time, seen the reality of how lethal injections are carried out by the state. Execution by lethal injection is far from simple. It requires careful and accurate mixing of several drug solutions, insertion of IV lines or catheters into inmates under stressful and difficult scenarios, and constant monitoring of the inmate to assess his anesthetic depth until death is pronounced. The "humanity" that has been associated with lethal injection is a result

366. Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *8-9 (W.D. Mo. June 26, 2006).

367. Henry Weinstein, *N.C. Judge May Block 3 Executions Over Doctor Participation*, L.A. TIMES, Jan. 25, 2007, at A12. "In the latest challenge to the use of lethal injection in North Carolina, a judge said Wednesday that he would block three executions scheduled over the next three weeks unless state officials come up with a new protocol that does not require physicians to participate." *Id.* Stephens acted a day after thirty North Carolina legislators asked Governor Michael F. Easley to halt executions until a study is complete on the constitutionality of the state's method of execution. *Id.*

368. *Id.* Florida Governor Jeb Bush had imposed a moratorium on executions following "a botched execution during which the condemned inmate clearly suffered a protracted, painful death." *Id.*

of the fact that an inmate is paralyzed and unable to react to or communicate any pain.

The state kept the details about the selection, training, and supervision of the execution team a closely held secret only made public by order of the court in the *Morales* case.[369] Despite the care and solemnity that should have attended an execution, Judge Fogel found a pervasive lack of professionalism[370] and a system that suffered from a number of "critical deficiencies."[371] Judge Fogel found Procedure 770 unconstitutional. It was simply too uncertain, too prolonged, and created an unnecessary risk of pain.

Following Judge Fogel's announcement of his intent to strike down Procedure 770, the Governor's office and the CDCR asked the court for several months to engage in a "thorough, effective, response to the issues raised."[372] But despite the lack of transparency in the state's procedure contributed to its many deficiencies, the state has asked that they be allowed to conduct this review in a shroud of secrecy and pursuant to a protective order.[373] They argue that secrecy is essential so that their "deliberative process [is] not chilled by threats of depositions, subpoenas or other discovery."[374] The court should refuse this request and keep the doors open. Public review of these procedures may be the only means to keep the Governor, the state, and the California Department of Corrections accountable. The Governor's office and the CDCR have continually failed to demonstrate any commitment to seriously review or evaluate the lethal injection process. In fact, the contrary has been the case. On February 14, 2006, Judge Fogel issued an order in Morales where he "respectfully suggest[ed] that [the state] conduct a thorough review of the lethal injection protocol . . . . "[375] The Court also suggested that "a proactive approach by [the state] would go a long way toward maintaining

369. Order Regarding Objections to Magistrate Judge's Order and Request for Stays; Order on Other Pending Motions, Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal 2006) (No. C-06-219-JF-RS), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/2006.09.22%20order%20on%20pending%20motions.pdf.

370. Memorandum of Intended Decision, *supra* note 6, at 12.

371. *Id.* at 10.

372. Response by the Governor's Office to the Court's Memorandum of Intended Decision at 1, Morales v. Tilton, No. C 06-926-JF-RS (N.D. Cal. Jan. 16, 2007), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/2006.01.16%20filings/Gov%27s%20response.pdf.

373. *Id.* at 2.

374. *Id.*

375. Morales v. Hickman, 415 F. Supp. 2d 1037, 1046-47 (N.D. Cal 2006) (No. C-06-926-JF-RS).

judicial and public confidence in the integrity and effectiveness of the protocol."[376] The only response by the Governor's office was to hold a meeting lasting about an hour and a half. The only change to come out of that meeting was what has been described as a "tweak" of the chemical aspects of the protocol.[377] Judge Fogel observed there was "no indication from the record that the participants in the meeting addressed or considered issues related to the selection and training of the execution team, the administration of the drugs, the monitoring of the executions, or the quality of the logs and other pertinent records."[378] In short, no serious consideration or review of the procedure took place at all.

The California Prison system has been fraught with management issues generally giving rise to previous litigation.[379] Judge Fogel observed that part of the problem may be that the warden sees his or her legal obligation in the implementation of the lethal injection execution too narrowly.[380] During depositions, Warden Ornoski testified that his definition of a successful execution is where "the inmate ends up dead at the end of the process."[381] Since the Governor, the CDCR, and the Attorney General have all abdicated their responsibility over the years, there is no reason to believe they will all suddenly respond in a responsible manner at this time. The legislature should now step in and fix this problem. Having never performed a full investigation, examination, or vetting of any lethal injection procedure even when it was first adopted, the legislature should engage in a full examination of all aspects of an execution before adopting any specific procedure.

Several specific issues must be addressed. A comprehensive system for the selection, training, and oversight of the execution team members that is both reviewable and accountable must be implemented. Professional and reliable record keeping must occur for tracking the controlled drugs used for any lethal injection execution. A system of data collection and accurate execution logs that provide accounts of exactly what occurs during an execution must be employed. A new facility must be built to properly accommodate any new lethal injection procedure. Finally, a full investigation must be

376. *Id.*

377. Memorandum of Intended Decision, *supra* note 6, at 7.

378. *Id.*

379. *Id.* at 15 (citing Plata v. Schwarzenegger, No. C-01-1351, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005)).

380. *See id.* at 15 n.14.

381. *Id.*

conducted into many questions raised about the possible diversion of controlled drugs during several lethal injection procedures to determine exactly what happened.

There is much work to do. Society has shown that when a constitutional challenge emerges, technology and ingenuity allows us to "build a better mousetrap" and continue with executions. But perhaps the flaws brought out in these hearings provide us with sufficient pause to step back and examine the enormity of what we are trying to accomplish. What we are asking of the guards and staff is almost beyond comprehension. We relegate the "death work" to a small, untrained group of prison guards and administrators who are ill equipped to deal with all that is involved. They are not medical technicians, yet we expect them to administer drugs, monitor anesthetic depth, and supervise IV lines. They are not psychologists, yet we require them to accompany a person in his last minutes of life. They are not religious leaders, and yet we place them in a position of great moral ambiguity. As we struggle to find a more efficient and more humane method of execution, we seem to resist any conclusion that perhaps we are just not up to the task.[382]

382. Postscript: On May 15, 2007, in response to Judge Fogel's Memorandum of Intended Decision, the state filed a Lethal Injecton Protocol Review that proposed revisions to California's lethal injection procedure. Their proposal was intended to address the deficiencies noted by the Court in its order. The state proposed retaining the three-drug protocol, while altering the quantity of drug administered. The state proposal also does not call for participation by a trained medical professional, but provides for "reliable but relatively uncomplicated" assessment of consciousness. Judge Fogel held a hearing on June 1, 2007 on the state's proposal and declined to rule at that time. Judge Fogel set further hearings for October, 2007 and indicated he would not make a decision until he had all necessary information.