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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

Michael Angelo MORALES,
Plaintiff,

v.

James E. TILTON, Acting Secretary of the
California Department of Corrections and
Rehabilitation, and Robert L. Ayers Jr., Acting
Warden of San Quentin State Prison,
Defendants.

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

DEATH-PENALTY CASE

ORDER REGARDING OBJECTIONS
TO MAGISTRATE JUDGE’S ORDER
AND REQUESTS FOR STAYS;
ORDER ON OTHER PENDING
MOTIONS

[Docs. Nos. 220-21, 224, 234, 237, 2xx]

The present action involves a challenge to California’s lethal-injection protocol, which is known as San Quentin Operational Procedure No. 0-770, or OP 770. On September 12, 2006, the magistrate judge to whom this action has been referred for discovery disputes issued an order granting in part and denying in part Plaintiff’s second motion to compel discovery. (Doc. No. 209.) The order, inter alia, compelled Defendants and nonparty witness Office of Governor Arnold Schwarzenegger of California (“the Governor’s Office”) to produce certain documents by September 22, 2006, in light of the evidentiary hearing in this action that is scheduled to commence on September 26, 2006.

It is the Court’s understanding that most of the discovery ordered by the magistrate judge is proceeding. However, Plaintiff, Defendants, and the Governor’s Office object to discrete parts

1 of the magistrate judge's order. Their objections, along with related requests by Defendants and
2 the Governor's Office for partial stays of the magistrate judge's order, now are before the Court.
3 (Docs. Nos. 220, 221, & 224.) "The district judge to whom the case is assigned shall consider
4 such objections and shall modify or set aside any portion of the magistrate judge's order found to
5 be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A)
6 (2006).

7 The Court has reviewed the briefs submitted in support of and in response to the
8 objections and has considered the oral arguments of counsel presented during a telephonic
9 hearing on September 21, 2006. In addition, Defendants and the Governor's Office have lodged
10 with the Court under seal the documents that are the subject of their objections to permit the
11 Court to review the documents in camera.

12 I

13 Plaintiff objects to the magistrate judge's denial of some discovery regarding possible
14 medical misconduct by members of the execution team and in the units in which such members
15 work. While the magistrate judge did order—and Defendants do not object to—the disclosure of
16 documents regarding investigations of execution team members (including investigations of
17 alleged medical misconduct),¹ Plaintiff is concerned that there may have been relevant
18 allegations of misconduct that were not investigated due to a "culture of concealment" in
19 California's prison system that has been found in the ongoing litigation in *Plata v.*
20 *Schwarzenegger*, No. C 01 1351 TEH (N.D. Cal. filed April 5, 2001), whereby the provision of
21 medical care by Defendants has been placed in a federal receivership. (*See* Doc. No. 225-3.)

22 The magistrate judge appropriately decided not to expand the scope of discovery at this
23 late stage of the present litigation. Plaintiff's allegations of a lack of professionalism on San
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25 ¹Defendants have submitted to the Court under seal for review in camera one such set of
26 documents regarding an investigation of alleged medical misconduct by an execution team member; the
27 investigation concluded with a finding that the allegation of misconduct was not sustained. Defendants
28 do not object as such to the disclosure of these documents. Accordingly, Defendants must produce these
documents as well as any other such documents. Because the protective order previously issued in this
action necessarily governs such documents, Defendants' request for a further protective order is denied.

1 Quentin’s medical staff certainly are relevant to the constitutionality of a lethal-injection protocol
2 that relies on members of San Quentin’s medical staff for its implementation. However,
3 considering that Plaintiff has been permitted significant discovery into these matters already, that
4 Defendants may remove and replace individual execution team members at any time, and that the
5 Court may take judicial notice of relevant documents filed including factual findings made and
6 legal conclusions reached in *Plata*, the Court cannot say that the magistrate judge’s decision not
7 to expand the scope of discovery to the extent sought by Plaintiff was clearly erroneous or
8 contrary to law.

9 II

10 On February 28, 2006, following Defendants’ decision not to proceed with Plaintiff’s
11 execution, a meeting was held at the Governor’s Office to consider revisions to OP 770.
12 Participants at the meeting included Senior Assistant Attorney General Dane R. Gillette, lead
13 counsel for Defendants, and Bruce Slavin, Chief Counsel for the California Department of
14 Corrections and Rehabilitation. Messrs. Gillette and Slavin each took two pages of notes at the
15 meeting. These notes are the documents that Defendants object to producing.

16 Defendants contend that the documents at issue are protected from discovery as attorney
17 work product pursuant to Federal Rule of Civil Procedure 26(b)(3). Specifically, Defendants
18 assert that the magistrate judge’s September 12 order failed to analyze expressly the assertion of
19 the work-product doctrine by *Defendants*, as distinguished from a similar assertion made by the
20 Governor’s Office.

21 While Defendants’ assertion is correct as far as it goes, it omits the fact that the
22 documents at issue were the subject of a prior order issued on May 2, 2006 (Doc. No. 151), in
23 which the magistrate judge granted in part and denied in part Plaintiff’s first motion to compel
24 discovery² and to which Defendants did not object.³ It has been more than four months since the

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26 ²In particular, in the September 12 order, the magistrate judge correctly determined that requests
27 nos. 3 and 5 from Plaintiff’s third set of document requests—seeking “notes generated by any CDCR
28 employee [or] representative . . . at the meeting called by the Governor’s legal affairs secretary . . .” and
“notes generated by any CDCR employee [or] representative . . . that refer to the process concluded upon

1 magistrate judge issued the May 2 order.⁴ Though the Court may well have sustained a timely
2 and properly presented objection to the production pursuant to the May 2 order of the documents
3 at issue, it is now too late for Defendants to object to their production. *See* Fed. R. Civ. P. 72(a)
4 (“Within 10 days after being served with a copy of the magistrate judge’s order, a party may
5 serve and file objections to the order; a party may not thereafter assign as error a defect in the
6 magistrate judge’s order to which objection was not timely made.”). Accordingly, the magistrate
7 judge’s September 12 order compelling production of these documents was neither clearly
8 erroneous nor contrary to law.

9 Pursuant to the terms of the magistrate judge’s order, the discovery compelled from
10 Defendants is due on September 22, 2006, the date of the present order. Accordingly,
11 Defendants’ request for a partial stay of the magistrate judge’s order is moot by the present order.
12 Even if the request for a stay were not moot, the Court would deny it because of the overriding
13 importance of proceeding with the evidentiary hearing as scheduled.

14 III

15 In March 2006, Plaintiff sought discovery from Defendants regarding documents in the
16 possession of the Governor’s Office, including documents related to the February 28 meeting.
17 Defendants initially agreed to disclose such discoverable documents. However, on August 8,
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19 at the meeting called by the Governor’s legal affairs secretary”—were “specific iterations of earlier
20 document requests” that were governed by the May 2 order. (Doc. No. 209 at 3.)

21 ³Indeed, Defendants had not even identified the documents in a privilege log so as to preserve
22 any claim of protection under the work-product doctrine, although Defendants had raised the work-
23 product doctrine in an inadequate attempt to cover the documents at issue in a general way. *See*
24 *Burlington N. & Santa Fe Ry. Co. v. United States Dist. Ct.*, 408 F.3d 1142, 1149 (9th Cir. 2005); *see*
25 *also* Fed. R. Civ. P. 26(b)(5) (requiring that party claiming protection of attorney work product “shall
26 make the claim expressly and shall describe the nature of the documents . . . in a matter that . . . will
27 enable other parties to assess the applicability of the . . . protection”). Although Defendants chose not to
28 rely on the work-product doctrine (instead emphasizing the deliberative-process privilege) in their
briefing opposing Plaintiff’s first motion to compel and at oral argument before the magistrate judge on
that motion, the nature of the documents was readily apparent, and there is no reason why the work-
product doctrine could not have been asserted properly at that time.

⁴It has been more than six months since Plaintiff initially requested the documents at issue.

1 2006, Plaintiff was informed (on the basis of what counsel for the Governor's Office at oral
2 argument termed a "judgment call") that "the Office of the Governor of the State of California is
3 a separate and independent state agency and is not a party to this action," and that Plaintiff would
4 have to obtain any such documents by subpoena. Soon thereafter, Plaintiff issued a subpoena to
5 the Governor's Office. In response, the Governor's Office asserted that some of the requested
6 documents are subject to various privileges, including the attorney-client privilege, or protected
7 from disclosure by the work-product doctrine; the Governor's Office contends that the attorney-
8 client privilege and the work-product doctrine are applicable because it, like Defendants' lead
9 counsel and general counsel, in effect is counsel for Defendants because of the Governor's
10 supervisory rôle in overseeing litigation against the State.

11 The magistrate judge found the positions taken by the Governor's Office to be internally
12 inconsistent and without merit, and this Court has reached the tentative conclusion that the
13 magistrate judge's ruling is neither clearly erroneous nor contrary to law. Nonetheless, in the
14 interests of comity and respect for the separation of powers, the Court will defer ruling on the
15 objections asserted by the Governor's Office until after the impending evidentiary hearing.
16 Having reviewed the documents in camera and having found them to be largely cumulative and
17 not particularly probative with respect to the central issues to be addressed at the evidentiary
18 hearing (*cf.* Fed. R. Evid. 403), and in light of the Court's inherent power to permit and order any
19 necessary further development of the factual record following the conclusion of the hearing, the
20 Court finds that Plaintiff will not be prejudiced by not having access to the documents prior to
21 the hearing. Moreover, the Court will be in a better position after the hearing to resolve the
22 instant objections. Accordingly, the Court will grant a stay of the magistrate judge's order
23 insofar as it applies to the Governor's Office pending further order of the Court.

24 IV

25 For the reasons set forth herein, and good cause therefor appearing, Plaintiff's and
26 Defendants' objections to the magistrate judge's order granting in part and denying in part
27 Plaintiff's second motion to compel discovery are overruled; Defendants' request for a partial
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1 stay of such order is denied; the Court will defer ruling on the objections of nonparty witness
2 Office of Governor Arnold Schwarzenegger of California until after the impending evidentiary
3 hearing; the request for a stay of the magistrate judge's order insofar as it compels discovery
4 from the Governor's Office is granted subject to further order of the Court.

5 V

6 A number of other pending motions were discussed during the September 21 telephonic
7 hearing. For the reasons stated on the record at the hearing, and good cause therefor appearing,
8 Plaintiff's motion for a continuance of the evidentiary hearing and a corresponding motion to
9 shorten time are denied; Plaintiff's motion regarding redactions is granted pursuant to the terms
10 set forth at the hearing; and Defendants are required to make Witness No. 9 available for
11 deposition pursuant to the schedule agreed upon by counsel.

12 IT IS SO ORDERED.

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14 DATED: September 22, 2006

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16 JEREMY FOGEL
17 United States District Judge