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June 28, 2009

Mr. Timothy Lockwood  
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DELIVERED VIA EMAIL AND FEDERAL EXPRESS

Re: Comment on Proposed Lethal Injection Regulations, Number 09-09  
Section 3349 and Subchapter 4, Article 7.5 of the California Code of  
Regulations – To be included in the rulemaking file

Dear Mr. Lockwood:

We are writing to comment on the CDCR's proposed lethal injection regulations. Undersigned Elisabeth Semel is the Director of the Death Penalty Clinic at the University of California, Berkeley, School of Law, and a Clinical Professor of Law. Undersigned Ty Alper is the Associate Director of the Death Penalty Clinic. Undersigned Jennifer Moreno and Kate Weisburd are the Clinic's two fellows and staff attorneys. Collectively, we have dozens of years of experience representing death-sentenced individuals at the trial level, on direct appeal, and in state and federal post-conviction proceedings. Under the auspices of the Clinic, we currently represent death row inmates in California, Alabama, Texas, and North Carolina. The Clinic also created and administers the website, [www.lethalinjection.org](http://www.lethalinjection.org), and has been involved in lethal injection litigation nationwide.

We are submitting the following comments. These comments do not purport to address all of the deficiencies in the proposed regulations. We note at the outset that our ability to submit a completely informed comment is restricted by the CDCR's failure to make the entire rulemaking file available to the public. Accordingly, we do not have all of the information necessary to fully comment on the proposed regulations.

Failure to allow access to rulemaking file

The CDCR has violated the APA in a number of respects. One example is the agency's failure to make the entire rulemaking file available to the public. Government Code § 11347.3 outlines the requirements related to the rulemaking file. Specifically, the statute states that the file must be made available to the public "for inspection and copying during regular business hours." § 11347.3(a). The statute then lists the contents that the file "shall" include. § 11347.3(b).

Among other things, the file must include *all* of the information the agency relied upon in developing the proposed regulations, as well as all of the written comments received by the agency to date. § 11347.3(b)(6), (7). These are two particularly important requirements, because interested members of the public cannot make fully informed comments about the proposed regulations unless they know a) what the agency relied upon in drafting the regulations and b) what other members of the public have said in their own public comments. For example, the CDCR states in its Initial Statement of Reasons (ISOR) that it "determined that no alternative to the proposed action would be more effective in carrying out the purpose of the action." ISOR at 2. It is impossible to submit a fully informed comment with respect to alternatives that the agency says it considered without knowing what those alternatives were, and what information the agency relied upon in order to reject those possible alternatives. Similarly, members of the public cannot respond to comments made by other members of the public if they are not permitted to view those comments.

We note that, when the failure to make the rulemaking file available was brought to their attention, CDCR officials did not deny it, but they refused to extend the comment period. This behavior suggests that the CDCR is more interested in a quick process than it is in complying with the APA or meaningfully considering public comments.

A. Rulemaking file not available ***at all, to anyone***, until June 11

CDCR did not make the rulemaking file available to the public in any fashion until most of the public comment period had elapsed. As late as June 10, CDCR officials were telling members of the public that they were "trying to coordinate a time when everyone could come in and review" the file and that it was still not publicly available. We understand that, on June 11, an attorney at the Habeas Corpus Resource Center was the first member of the public to be permitted access to the file. Even then, it was by special appointment and other members of the public were not able to see the file until after that date. To reiterate, from May 1 until at least June 11, any member of the public who requested to see the rulemaking file (and there were many who did so) was denied access to the file.

For example, on June 10, 2009, undersigned counsel Jennifer Moreno contacted John McClure of the Regulation and Policy Management Branch (RPMB) of the CDCR by telephone. She requested to see the rulemaking file at the RPMB office on Friday, June 12, 2009, when she already planned to be in Sacramento. She was informed that the file would not be available for inspection on that day because the office would be closed due to furlough. She told Mr. McClure that because she lives and works in the Bay Area, she could not easily travel to Sacramento. This, of course, is why California law requires that the file be made available "during regular business hours." Mr. McClure apologized, but told Ms. Moreno that she would have to email his office to set up an appointment to inspect the file.

Mr. McClure informed Ms. Moreno there are a large number of requests to see the file and that the RPMB office is not set up for public access. Therefore, the RPMB has to arrange for file inspections to take place in a different location and only upon scheduled appointments. Despite acknowledging that the rulemaking file is required to be available during regular business hours, Mr. McClure said that his office had to limit access to the file for these reasons. Finally, Mr. McClure told Ms. Moreno that she could view the file online at the CDCR website if she could not travel to the RPMB office.

Mr. McClure's response to Ms. Moreno was consistent with the response other members of the public received to their requests to see the file. As a result, until mid-June, when most of the public comment period had elapsed, a member of the public wishing to view the rulemaking file was limited to viewing the information that CDCR had posted on its website. The CDCR claimed, in emails to some members of the public, and as Mr. McClure had represented to Ms. Moreno, that "the file of the rulemaking proceedings is contained in the CDCR website." (One such email was sent from the CDCR to a member of the public named Greg Wolfe on the afternoon of June 8.) However, that statement was false. As of mid-June, the CDCR had posted on its website only the "Notice of Change to Regulations," "Notice of Proposed Regulations," "Initial Statement of Reasons," "Text of Proposed Regulations," and 17 forms for review.

The ISOR was wholly inadequate as a substitute for making publicly accessible the information relied upon by the agency in drafting the proposed regulations. The long list of documents contained in the ISOR *at best* served as a kind of index or table of contents to what should have been the actual rulemaking file. As noted above, such a list was insufficient to comply with the APA, which requires the agency make available the full text of any information or studies relied upon.

Moreover, even as an index, the ISOR was inadequate and not sufficient to allow even a sophisticated observer access to the actual documents and information relied upon by the agency. In the ISOR, the CDCR listed purported citations to 94

documents that were relied upon in developing the proposed amendments. Many of these citations, however, were URL links that were broken and directed members of the public to webpages that did not exist.<sup>1</sup> Other citations were to working websites, but not to specific documents within those websites, leaving an interested member of the public unable to determine what the agency actually claimed to be relying on.<sup>2</sup>

Finally, none of the comments submitted by other members of the public were made available to *anyone*, in any fashion, until mid-June. None of the comments submitted by members of the public were posted on the CDCR website at any time.

The effect of the erroneous and vague information was to deny us, and other members of the public, access to the contents of the rulemaking file. Again, we want to emphasize that our ability, as well as that of other members of the public, to make a meaningfully informed comment on the proposed regulations is severely restricted by the CDCR's failure to comply with the APA. The APA was enacted to ensure that members of the public have a meaningful opportunity to participate in the adoption of state regulations. If the CDCR does not, on its own, rectify and account for these violations, the Office of Administrative Law (OAL) should do so.

B. Partial rulemaking file available, in person only, to some members of the public in mid-June

With less than two weeks left in the comment period, the CDCR finally decided to allow a limited number of members of the public to view some of the rulemaking file. However, the CDCR did not provide any public information as to how members of the public could view the file; it failed to respond when many members of the public requested to view the file; and it failed to allow copying of

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<sup>1</sup> For example, the following were some of the URL citations in the ISOR that led to broken links: Emergency Nursing World!; I.V. Starts... --improving your odds!; Trimble, Tom RN CEN ; [www.enw.org/IVStarts](http://www.enw.org/IVStarts), as of February 23, 2009; Infusion Nurses Society – INCC Certification. [www.ins.org](http://www.ins.org), as of December 28, 2007; Central Venous Line Placement; Subclavian Venipuncture Infraclavicular Approach; [www.apps.med.buffalo.edu](http://www.apps.med.buffalo.edu), as of February 23, 2009; Fordham University School of Law; May 2007; 76 (1): 49-128; The Lethal Injection Quandary; How Medicine has Dismantled the Death Penalty; Denno, Deborah W.; [www.ssrn.com/abstract=983741](http://www.ssrn.com/abstract=983741); Idaho Department of correction, Standard Operating Procedures 135.02.01.001-Execution Procedures [www.doc.idaho.gov/policy/int1350201001.pdf](http://www.doc.idaho.gov/policy/int1350201001.pdf).

<sup>2</sup> For example, the following were some of the URL citations in the ISOR that led to website home pages, and not specific documents: [Directcardiac.com](http://Directcardiac.com), [www.apsf.org](http://www.apsf.org), [www.nationalanesthesia.com](http://www.nationalanesthesia.com), and [www.kpsan.org](http://www.kpsan.org).

most of the relevant documents. Therefore, even when the file was nominally made available, it was not done so in a manner that complied with the APA. As a result, members of the public have still, to this day, been unable to make meaningfully informed comments.

Undersigned counsel Moreno emailed the RPMB office on June 12, 2009, requesting to see the file. She did not receive a response from the RPMB office with details on how to view the file until June 18, 2009. However, Ms. Moreno was able to travel to Sacramento on June 17, 2009, with another member of the public who had successfully made an appointment with RPMB. At that time, she was allowed to view the file, but only in the presence of CDCR employees. Many of the public comments that had been submitted were not included in the rulemaking file that she was shown. Moreover, in violation of the APA, she was denied the right to copy the most relevant material – the information CDCR says it relied on in drafting the regulations – because the CDCR claimed that the material was copyrighted.<sup>3</sup>

As a result of the CDCR's claim that literally hundreds of pages of material cannot be copied due to federal copyright law, the vast majority of members of the public will not have access to this material. To be clear, this material is crucial to the public's ability to submit a meaningfully informed comment on the substance of the proposed regulations. For example, the CDCR will not allow anyone to copy the lethal injection protocols from other states that it claims to have relied upon in drafting the lethal injection regulations. The only way anybody can view these documents is by physically traveling to Sacramento and viewing them in the presence of CDCR employees. The documents are contained in five large binders and consist of complex medical and scientific studies, which require extensive time to read and analyze. The APA provides that agencies must make such material available for copying precisely to allow for wide dissemination of information. The CDCR has purposefully and knowingly thwarted this central requirement of the APA. If the CDCR does not rectify this violation, the OAL should.

Nothing in the APA allows an agency to hide behind copyright law as an excuse for not complying with its obligations to make the rulemaking file available for public inspection and copying during regular business hours. Moreover, the CDCR's copyright claim does not withstand any legal scrutiny. It is quite clear that the agency's reproduction (or allowance of reproduction) of the materials in

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<sup>3</sup> When the proposed regulations were first published, the CDCR designated some 51 documents "copyrighted" and claimed that it would not make them available to the public. However, when the CDCR finally decided to allow some members of the public to view some of the file in person, it decided to designate 26 additional documents as "copyrighted." The CDCR provided no explanation for why it now believes that those 26 documents are protected by federal copyright law.

question would be considered “fair use” by any court. The Office of the California Attorney General concluded as much in a published opinion. *See* 72 Ops. Cal. Atty. Gen. 72, 1989 WL 429203. We are aware that our colleague, Professor Jason Schultz, has submitted a comment that more fully exposes the weaknesses of the CDCR’s alleged copyright concerns. We will not repeat those points here, but we incorporate them by reference.

Suffice to say, however, the CDCR has in no way indicated what steps it has taken to determine the copyright status of the materials listed in the ISOR. It has not contacted any of the authors of the articles or studies to request permission, many of whom would gladly have provided permission. And, as Professor Shultz points out in his comment, many of the allegedly copyrighted materials are, on their face, plainly legal to copy and distribute.

It is of serious concern that the CDCR appears to have used copyright law to evade public review of its proposed regulations. We ask, respectfully, that the CDCR reconsider its position and allow public inspection *and copying* of the copyrighted material, and re-open the comment period for a full 45 days once all interested members of the public have had an opportunity to review this vital material. If the CDCR does not do so, the OAL should disapprove these regulations.

C. Partial rulemaking file available on the internet in mid-June

At some point in mid-June, the CDCR added five new links to its website and labeled these links “Supplemental documents/reports utilized and/or relied upon.” Nothing on the website, or in any other CDCR document of which we are aware, states when this material was added to the website. We happened to notice these new links when reviewing the other materials on the website. It is typical of the CDCR’s behavior throughout this process that the agency posts some 525 pages of “supplemental” material on the website without providing any notice. *See* Government Code § 11347.1.

The “supplemental material” contains the full text of some of the documents that the agency relied upon. However, many of the documents included in the supplemental material consist simply of a piece of paper that says “COPYRIGHT” and a link or citation to the document that the CDCR claims it cannot make publicly available (except through limited in-person viewing). On many of these coversheets, the URL links are incorrect and do not lead to the online version of the file.<sup>4</sup> Many of

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<sup>4</sup> The following are just a few examples of URL citations that are broken or otherwise incorrect: Anesthesiology; The Journal of the American Society of Anesthesiologists, Inc. Electroencephalographic Derivatives as a Tool for Predicting the Depth of Sedation and Anesthesia Induced by Sevoflurane. Clinical Investigations; March 1998, 88 (3); 642-650; Katoh, Takasumi; Suzuki, Akira; Ikeda,

the incorrect URL links were for journal articles, medical studies, and lethal injection protocols from other jurisdictions – material that is necessary for any member of the public who wishes to develop a relevant comment on the substance of the proposed regulations.

Additionally, we know from undersigned counsel Moreno's review of the file in Sacramento that, to date, hundreds of people have submitted comments to the agency. None of these comments are available on the internet.

Failure to include required material in the rulemaking file

Above we detail the numerous ways in which the CDCR has failed to make the rulemaking file available, as the APA requires. But it is also the case that, even if the CDCR had made the file available on May 1 (as mandated by the APA), and even if the CDCR allowed inspection and copying of the entire file (as also mandated by the APA), the rulemaking file would still be incomplete in several respects.

A. Inclusion of additional material at the end of the comment period without notice

When undersigned counsel Moreno examined the rulemaking file on June 17, 2009, she became aware for the first time that the file contained additional documents that were not disclosed in the ISOR. For example, the following study was added to the rulemaking file: Lethal Reflection-Chapman; OALMed; Intraosseous Infusion; Emergency Vascular Access in Children [www.palmedpage.com](http://www.palmedpage.com) Author: N/ John Bosomworth. These and other documents do not appear on the list contained in the ISOR, but are in the hard-copy rulemaking file that Ms. Moreno reviewed. References to them also appear in the "supplemental" materials that were added to the CDCR sometime in mid-June. However, on the CDCR website, the materials are allegedly "copyrighted," and the text of the documents is not included.

These additional documents have never been identified as new and were mixed in with documents that were identified in the ISOR. Only through a close comparison of the ISOR and the contents of the file was their inclusion discovered. In short, the CDCR has, without notice, slipped into the rulemaking file studies that it apparently claims to have relied upon in drafting the regulations. Such behavior violates the APA and is directly contrary to the APA's central purpose.

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Kazuyuki ([www.anesthesiology.org](http://www.anesthesiology.org)); DeBoer, Scott RN, MSN, CEN, CCRN, CFRN, ([www.emsresponder.com](http://www.emsresponder.com)); Intraosseous Infusion: Not Just for Kids Anymore; DeBoer, Scott RN, MSN, CEN, CCRN, CFRN, ([www.emsresponder.com](http://www.emsresponder.com)); Department of Corrections Public Affairs Capital Punishment in Oregon, ([www.oregon.gov/DOC/PUBAFF/cap\\_punishment/capital](http://www.oregon.gov/DOC/PUBAFF/cap_punishment/capital)).

Pursuant to the APA, the CDCR must mail notice of these new materials to persons who testified and submitted written comments at the public hearing, persons who submitted comments during the public comment period, and persons who requested notice of changes. Government Code § 11347.1. The CDCR must also make these new documents available for public inspection for fifteen days. § 11347.1. In its Final Statement of Reasons, the CDCR must identify material “not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period.” § 11346.9. To date, these additional documents have not been identified by the CDCR. Instead of complying with the law, the CDCR has buried these documents in the middle of hundreds of pages of other material.

The OAL should strictly enforce the requirement that the CDCR mail notice of the new information to all required parties, including all members of the public who have submitted public comments and who make comments at the public hearing. California law requires the OAL to insist that CDCR do this before the proposed regulations can be adopted.

B. Failure to include all public comments in the record

We are concerned that the CDCR is not including all public comments in the rulemaking record, as the APA requires. Section 11347.3(b)(6) requires that the rulemaking file contain “[a]ll data and other factual information, any studies or reports, and *written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.*” The agency must include *all* written comments it receives, regardless of whether it believes the comments to be relevant. It may choose not to respond to irrelevant comments, but it must include all comments in the rulemaking record.

In particular, the agency can make no distinction between comments related to the substance of the proposed regulations and comments related to the procedures by which the agency attempted to adopt those regulations. There is no mechanism other than the public comment period for members of the public to object to the agency’s violations of the APA’s procedural requirements. Comments such as this one, objecting to the CDCR’s violation of the APA, must be included in the rulemaking file.

The APA does allow agencies to “summarily dismiss irrelevant comments.” § 11346.9(a)(3). However, comments objecting to the agency’s violation of the APA are, by definition, not irrelevant. The APA defines as “irrelevant” comments that are “not specifically directed at the agency’s proposed action *or to the procedures followed by the agency in proposing or adopting the action.*” § 11346.9(a)(3). And, even those comments that *are* “irrelevant” still must be included in the rulemaking



file. The APA simply allows the agency to dismiss those comments summarily in its Final Statement of Reasons. In short, it is not for the agency to decide which comments to include in the rulemaking file; it must include them all.

It is against this backdrop of governing law that we alert the CDCR and the OAL to the CDCR's disturbing statement in an email to some members of the public. We are aware of several individuals who were denied access to the rulemaking file. We acknowledge that their written requests to see the rulemaking file are not "comments" pursuant to the APA, and do not need to be included in the rulemaking file. However, when these same individuals subsequently submitted written comments complaining that they were denied access to the rulemaking file, those written comments were not included in the rulemaking file that was made available to a limited number of viewers in the CDCR's Sacramento office. When they complained to the CDCR that their comments were not included in the file, they received an unsigned email from CDCR stating, "Please be advised that the comments that are included in the rulemaking file are those that pertain to the actual proposed regulation."

The CDCR must include *all* written comments in the file, whether they "pertain to the actual proposed regulation" or they relate to the procedures followed by the agency in proposing the regulation. The CDCR's failure to do so is another clear violation not only of the letter of the APA, but also one of its central purposes.

C. Failure to include all information relied upon

The CDCR has also failed to disclose all of the documents and materials it relied upon in developing the proposed regulations. Section 11346.2(b)(2) requires the agency to identify in the ISOR "each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies." Section 11347.3(b)(6) and (7) requires the agency to include the text of this information in the rulemaking file. The CDCR included a lengthy list of documents in the ISOR that it claimed to rely upon in drafting the proposed regulations. But the list appears to be missing critical documents, the precise nature of which we are unaware. These documents are also missing from the rulemaking record. Without an exhaustive list of the materials that were relied upon, and without seeing the actual documents, interested members of the public cannot make fully informed comments about the proposed regulations. In particular, we, and other members of the public, cannot make informed comment on possible alternatives that the CDCR claims to have considered.

1. Failure to include documents referenced in ISOR

In the text of the ISOR, the CDCR made the following statement:

[I]n developing this proposed regulation, the CDCR was guided by the United States Supreme Court's decision in *Baze v. Rees* (2008) \_U.S.\_, 128 S.Ct. 1520, which held that the State of Kentucky's lethal injection process, and the administration of the three-chemicals, did not constitute cruel and unusual punishment under the Eighth Amendment. CDCR also reviewed all available lethal injection processes from other states and the Federal Bureau of Prisons, and reviewed the transcripts and exhibits in the *Morales v. Tilton* case. Based upon the information considered, the CDCR revised the lethal injection process as set forth in this proposed regulation.

ISOR at 2. The CDCR failed to include most of the documents or materials mentioned in the above-quoted paragraph in the rulemaking file. To be specific, none of the following materials were included in the list of materials that begins on page 3 of the ISOR:<sup>5</sup> The lethal injection process for the Federal Bureau of Prisons; the transcripts in the *Morales v. Tilton* case; the exhibits from the *Morales v. Tilton* case; and the United States Supreme Court decision in *Baze v. Rees*.<sup>6</sup>

The CDCR does not deny relying on this information in developing the regulations. Indeed, the agency affirmatively admits that it did so. But it has violated the APA with respect to this information in at least two respects. First, it has violated the provision of the APA cited above that requires the agency to "identify" the documents it relies on in the ISOR. A vague reference to "transcripts and exhibits" in the *Morales* litigation is plainly insufficient, given that the record in that case is comprised of thousands of pages of documents. We cannot comment on the CDCR's consideration of the *Morales* record, because we have been given no information as to which aspects of the *Morales* record CDCR claims to have reviewed.

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<sup>5</sup> The CDCR also stated that it "reviewed all available lethal injection processes from other states." In the ISOR, the CDCR listed several lethal injection processes from other states. However, based on the failure of the CDCR to include the above-mentioned documents in the ISOR, we are not confident that all the lethal injection processes from other states were included on the list. The OAL should require that the CDCR state with particularity which states' protocols it reviewed.

<sup>6</sup> Obviously, undersigned counsel was able to access the *Baze* decision on their own. However, it is an example of a document relied upon by the CDCR that was not included in the rulemaking file. As discussed in this comment, most of the other material withheld from the rulemaking file is neither as identifiable nor as accessible as a Supreme Court opinion.

Second, the CDCR has violated the provision of the APA cited above that requires the agency to include all of the material it relied upon in the rulemaking record so the public can inspect and copy it. None of the material listed above is in the rulemaking file.<sup>7</sup>

2. Failure to include information reviewed in the drafting of OP-770

The CDCR has also failed to identify (in the ISOR), and disclose (in the rulemaking file) all of the materials and information relied upon between December 2006 and May 2007, when it revised Operational Procedure (OP) 770. "OP 770" refers to the lethal injection procedures that CDCR promulgated in violation of the APA and without public comment. With respect to the procedures for actually conducting lethal injection executions, the proposed regulations are virtually identical to OP 770. As a result, the materials and expert opinion that CDCR relied upon to draft OP 770 must be disclosed under the APA as information that the agency relied upon in promulgating the regulations currently at issue.

In the ISOR, the CDCR describes the history of OP 770 and the revisions made to the procedure following the December 2006 Memorandum of Intended Decision in *Morales v. Tilton*. In response to the intended decision, the CDCR conducted a review of "all aspects of the lethal injection process and its implementation," which culminated in the May 2007 version of OP 770. ISOR at 2. The subsequent invalidation of OP 770 prompted the CDCR to devise the proposed regulations, the latest version in the continuum of the lethal injection procedures put forth by the CDCR. What the CDCR makes clear by including this background information in the ISOR is that, with minor revisions, OP 770 became the proposed regulations. In fact, the text of proposed regulations posted online at the CDCR website is titled "Text OP770 4-16-09 Final rev.pdf," indicating that the CDCR considers OP 770 and the proposed regulations to be one and the same document.

Indeed, a side-by-side comparison of OP 770 and the proposed regulations reveals that the two documents are almost identical, with minimal organizational and few substantive changes. The proposed regulations are organized slightly differently than OP 770 with regards to sections that describe the Selection, Recruitment and Annual Review of Team Members (§ 3349.1.2), Lethal Injection Team Duties (§ 3349.2.3) and the addition of a Definitions section (§ 3349.1.1).

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<sup>7</sup> We note that the CDCR states in the ISOR that it has relied upon the documents listed in the ISOR, as well as "similar documents." ISOR at 2. The APA does not allow this level of generality. As cited above, the ISOR must state with specificity *all* information relied upon. The agency cannot reveal only what it claims to be a representative sample of the documents it relied upon.

However, beginning with the section that addresses Selection of Witnesses (§ 33491.4) until the end of the document, the proposed regulations consist of an almost verbatim reproduction of OP 770.

The substantive differences between the two documents are even less apparent than the organizational changes. The primary substantive differences between the two documents consist of a few discrete changes to the sections on “Selection, Recruitment and Annual Review of Lethal Injection Team Members” (§ 33491.2), including changes to the institutions from which team members will be selected; specifying the duties of medical personnel; and adding certification and licensure criteria for certain Sub-Team membership. What has not changed at all from OP 770 are the sections describing the events leading up to the execution and the administration of the lethal injection chemicals, including details on IV access, monitoring for consciousness, the drugs used and their administration. These important aspects of the process are, in all relevant respects, identical to OP 770.<sup>8</sup>

It is clear from the CDCR’s own description in the ISOR that the review process that resulted in the drafting of OP 770 was integral to the ultimate promulgation of the proposed regulations. It is therefore not surprising that OP 770 and the proposed regulations are virtually identical. In light of these facts, however, the APA mandates that the CDCR identify all the material relied upon in the development of the May 2007 version of OP 770 and make that material available for public inspection.

For example, the ISOR references a review of OP 770 that was directed by the Governor of California in response to the Memorandum of Intended Decision in *Morales* in December 2006. ISOR at 2. Following this review, the CDCR published a revised version of OP 770 and an extensive report on May 17, 2007, detailing the process of review and revision. In the report, entitled “State of California Lethal Injection Protocol Review” and attached to this comment as Attachment A, the CDCR describes its “review methodology.” Lethal Injection Protocol Review at 10. That methodology included document review, site visits, trainings in other states, a survey, and expert consultation. *Id.* at 10-11.

More specifically, the CDCR reviewed “volumes of information,” including testimony of expert witnesses, and reports prepared by executive commissions in Florida and Tennessee. Lethal Injection Protocol Review at 10-11. The CDCR conducted a survey and received responses from 15 jurisdictions that utilize lethal injection as a method of execution. *Id.* at 11. The CDCR also made multiple site visits to San Quentin Prison, as well as visits to the Virginia Department of Corrections, the Oklahoma State Penitentiary, Indiana State Prison and the Federal Correctional Complex at Terre Haute, Indiana. *Id.* at 11. Some CDCR staff “attended

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<sup>8</sup> We have attached OP 770 to this comment as Attachment B.

related training in another jurisdiction.” *Id.* at 10. Finally, the CDCR consulted with experts, including “volumes of additional information” and consultation with a “nationally renowned anesthesiolog[ist]”. *Id.* at 12. Through this extensive review, the CDCR “reviewed schematics, prepared working documents, reviewed and drafted OP 770 and lesson plans, and drafted and reviewed final reports.” *Id.* at 10.

This entire process culminated in the attempted promulgation of OP 770. Yet the CDCR failed to identify any of this information or these materials in the ISOR or make them available for review in the rulemaking file. To be sure, some of the material listed in the ISOR and contained in the rulemaking file appears to be the kind of information that the CDCR likely reviewed when drafting OP 770. However, many of the sources, particularly those the CDCR found on the internet, were reviewed by CDCR *after* OP 770 was released in May of 2007.<sup>9</sup> Additionally, several of the documents had not even been published in May of 2007.<sup>10</sup> Given that the proposed regulations are, in relevant part, identical to OP 770, we are skeptical that these sources were truly considered by the agency in the proposed regulations. In any event, however, it is quite clear that most of the information and material relied upon during the review process that led to the release of OP 770 was not included in the ISOR or the rulemaking file.

By way of example, none of the responses to the CDCR’s “Lethal Injection Survey” were included in the ISOR or the rulemaking file. Nor were any of the working documents and drafts of OP 770 that CDCR reviewed in drafting the final version of OP 770. Significantly, there is no mention of the identity or substance of the expert opinion that the agency consulted in drafting OP 770, despite the fact that the CDCR acknowledged in the May 2007 report that it “obtained the services” of a “renowned” anesthesiologist. Lethal Injection Protocol Review at 12.<sup>11</sup>

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<sup>9</sup> For example, *see* Peripheral Intravenous Access; [www.intermed.cmed.ottawa.ca](http://www.intermed.cmed.ottawa.ca), as of February 23, 2009.; California Nurse Anesthetists at a Glance; [www.canainc.org](http://www.canainc.org), as of February 23, 2009; and Pentothal; Clinical Pharmacology; [www.rxlist.com](http://www.rxlist.com), as of February 23, 2009.

<sup>10</sup> For example, *see* The Pharmacokinetics and Pharmacodynamics of Thiopental as used in Lethal Injection; Mark Dershwitz, MD, PhD & Thomas K. Henthorn, MD Fordham URB. L.J. Volume XXXV, July 3, 2008; Thiopental in Lethal Injection; by Susi Vassallo, MD Fordham URB. L.J. Volume XXXV, Jun 18, 2008; and PLoS Medicine; Ethical Implications of Modifying Lethal Injection Protocols; Koniaris, Leonidas G.; Goodman, Kenneth W.; Sugarman, J.Keremy; OZomaro, Uzoezi; Sheldon, Jonathan; Zimmers, Teresa A.; June 10, 2008; [www.plosmedicine.org](http://www.plosmedicine.org)

<sup>11</sup> The APA requires that the rulemaking record include “supporting facts, studies, expert opinion, or other information” that led to the policies the agency has adopted. 1 Cal. Code of Regs. § 10(b)(2). The regulation further defines “expert” as “a person

By not identifying the materials and expert opinion that were relied upon in developing and revising OP 770, which was in turn published as the proposed regulations, the CDCR has thwarted the central purpose of the Administrative Procedures Act. That purpose, according to the OAL, is to “provide the public with a meaningful opportunity to participate in the adoption of state regulations and to ensure that regulations are clear, necessary and legally valid.” *See* [http://www.oal.ca.gov/APA\\_link\\_to\\_leg\\_counsel.htm](http://www.oal.ca.gov/APA_link_to_leg_counsel.htm). The CDCR cannot escape the requirements of the APA by republishing an underground regulation and refusing to make public the information it relied upon in drafting the underground regulation. To allow an agency to do so would be to allow any agency to avoid public review of the materials it relied on; the agency could review materials in secret, promulgate an underground regulation, and then publish the underground regulation through the APA process but without revealing the reviewed materials. Clearly, California law does not sanction such behavior, and the OAL should not allow it.

In short, the CDCR has violated the APA by failing to identify *all* materials relied upon in the development of the proposed regulations, including those consulted in drafting the May 2007 version of OP 770, and has failed to make them available for public inspection and copying. We request that the CDCR comply with the APA and then re-open the comment period for a full 45 days to give all interested members of the public an opportunity to review this vital material. If the CDCR does not do so, the OAL should disapprove these regulations.

#### Failure to include information on alternatives considered

In the ISOR, the CDCR violated the APA by failing to provide the required information on the alternatives that it considered in developing the proposed regulations or the reasons for rejecting those alternatives. The CDCR stated that it considered “alternatives to the existing three-chemical process, including a one-chemical process” and that “no alternative to the proposed action would be as effective and less burdensome to affected private persons.” *Id.*

Section 11346.2(b)(3)(A) requires that the agency include in the ISOR “[a] description of reasonable alternatives to the regulations and the agency’s reason for rejecting those alternatives.” The CDCR stated that a one-chemical alternative was considered, but the CDCR did not provide a description, such as the drugs, doses, or method of administration. The CDCR stated that it considered “alternatives,” indicating that more than one alternative was considered. However it failed to provide a description or even identify any other alternatives, besides the “one-

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who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.”

chemical” alternative. Finally, the CDCR did not provide any reasons for rejecting the alternatives that were considered.

Without providing the statutorily required information on the other alternatives that were considered and the reasons for rejecting them, the CDCR cannot support the assertion that no alternative would be as “effective and less burdensome to affected private persons” than the proposed regulations, as California law requires. § 11346.5(a)(13). Additionally, this information is necessary to individuals who are reviewing the proposed regulations in order to submit relevant comments on the alternative chosen by the CDCR. The CDCR must identify and provide descriptions for all the alternatives it considered and provide the reasons for rejecting those alternatives. Once it does so, it must re-open the comment period for a full 45 days to allow informed public comment.

Violation of “clarity” requirement with respect to procedures for lethal gas

As a result of the CDCR’s refusal to make the rulemaking file fully available, we are hampered in our ability to make informed substantive comments on the proposed regulations. However, there are a few deficiencies in the regulations that we would like to point out. In particular, the proposed regulations violate the requirement of “clarity.” Cal. Govt. Code § 11349.1. Pursuant to Title 1, Section 16(b) of the California Code of Regulations, a regulation fails the “clarity” requirement if, on its face, it can “be reasonably and logically interpreted to have more than one meaning” or if “the regulation uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute.” The regulation also fails if it presents information “in a format that is not readily understandable” by directly affected persons. Finally, California law defines “directly affected” persons as, *inter alia*, those individuals who “incur from the enforcement of the regulation a detriment that is not common to the public in general.” Clearly, that would include inmates on California’s death row whom the State seeks to execute by means of these regulations.

The proposed regulations violate the above-cited law because, although they contemplate that an inmate may choose to die by way of the gas chamber, the regulations are wholly devoid of any mention of the procedures by which an inmate is to be put to death by lethal gas. Although the CDCR has referred to these proposed regulations as protocols governing lethal injection, they contain many provisions that have nothing whatsoever to do with lethal injection. For example, the proposed regulations provide information on the selection of witnesses, access to spiritual advisors leading up to the execution, and the inmate’s last meal. In fact, the regulations purport to govern all aspects of executions generally in California. As such, the fact that procedures for lethal gas are missing is a glaring omission that the CDCR does not explain.

The CDCR is submitting these proposed regulations because the California Court of Appeal held that the previous lethal-injection protocol – OP 770 -- was an illegal underground regulation that violated the APA. *See Morales v. California Dept. of Corrections and Rehabilitation*, 168 Cal.App.4th 729 (2008). The proposed regulations explicitly address the condemned inmate's choice between lethal injection and lethal gas, *see* § 3349, but then do not address in any way the procedures to be employed if the inmate chooses lethal gas. The CDCR even includes several forms, *see* Form 1801, 1801-A, 1801-B, that are to be used by the inmate to make the choice between lethal gas and lethal injection. Thus, an inmate who is directly affected by the proposed regulations has to make a decision as to whether he will be executed by lethal injection or by lethal gas, a decision that he can only make if he understands how execution by gas is implemented. But the new regulations fail to address how the CDCR will carry out execution by gas; lethal gas is never again mentioned in the rest of the lengthy regulations. They thus violate the "clarity" requirement.<sup>12</sup> That these procedures for lethal gas may be described in another internal memo does not remedy this problem. Any such memo is itself an illegal underground regulation for the same reasons that OP 770 was. The proposed regulation thus incorporates an unlawful underground regulation, in violation of 1 C.C.R. § 20.

In short, there is no difference between "lethal gas" and "lethal injection" as far as the APA is concerned, except that the courts of this State have already rejected the CDCR's lethal injection protocol as an underground regulation. But now that the CDCR has purported to promulgate regulations governing the "Administration of the Death Penalty" generally, it cannot simply omit all mention of one of the two methods of execution allowed by California law.

California should not paralyze people before executing them

We wish to register our objection to a specific substantive element of the proposed regulations, which is the CDCR's decision to paralyze condemned inmates with pancuronium bromide prior to executing them with potassium chloride. The

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<sup>12</sup> More specifically, the failure to account for lethal gas violates several provisions of the APA's "clarity" requirement. First, it leaves the regulations open to more than one interpretation or meaning. In that regard, "lethal gas" could refer to any number of actual methods of execution. Second, the definition of the term "lethal gas" is no more "generally familiar" to affected persons (such as death row inmates) than is the term "lethal injection." Third, the term "lethal gas" is in no way "readily understandable" by directly affected persons.



use of pancuronium bromide is unnecessary, dangerous, and creates a substantial risk that executions in this State will be excruciatingly painful and torturous.<sup>13</sup>

A. The problem with pancuronium in the lethal injection protocol

The proposed regulations call for the serial administration of three drugs. The drugs are, in the following order, thiopental, pancuronium bromide, and potassium chloride. The first drug is intended to anesthetize the inmate so he does not experience the effects of the second and third drugs. The second drug paralyzes him, and the third drug stops his heart, killing him. The use of pancuronium, the second drug, presents a serious problem. Because pancuronium paralyzes the inmate during the execution process, the inmate may experience excruciating pain and suffering but be unable to cry out or even blink an eyelid to let anyone know if the anesthesia has failed. Because pancuronium masks the ability of a lay observer to discern whether the anesthetic drug has been properly delivered, it is very difficult or impossible, in most cases, to know whether the lethal injection execution has been “botched.” Pancuronium virtually ensures that the execution looks “peaceful” when it may have been anything but.

Moreover, the pain and suffering that an inmate will experience if not properly anesthetized is extreme. Because pancuronium is a paralytic that restricts the ability of the respiratory muscles to contract, it causes asphyxiation. The third drug, potassium chloride, causes excruciating pain that has been likened to the feeling of having one’s veins set on fire. Experts who have testified in lethal injection cases have unanimously agreed that it would be unconscionable to inject either drug into a person who was not adequately anesthetized.

Litigation on behalf of death row inmates has exposed problems at every step of the process, including the mixing of the drugs; the setting of the IV lines; the administration of the drugs; and the monitoring of their effectiveness. At each step, discovery has revealed untrained and unreliable personnel working with inadequate equipment under poorly designed conditions. In California, for example, a federal judge found a “pervasive lack of professionalism” in the entire execution process, most notably in the improper mixing and preparation of the anesthetic; unreliable screening of execution team members; lack of training and supervision of execution team members; inadequate and poorly designed physical facilities; and inconsistent and unreliable recordkeeping. The CDCR has acknowledged the judge’s findings in its ISOR.

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<sup>13</sup> Citations to the assertions made in this section of the comment can be found in Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 Ford. Urb. L.J. 817 (2008), which is attached to this comment as Attachment C. This section of our comment is adapted from this article.

## B. Background and history on paralytic drugs

To fully comprehend the dangers of pancuronium, and the reasons why it is widely condemned in the practice of animal euthanasia, it is instructive first to consider briefly its origins and history, which we briefly describe here, and ask that the CDCR take into account.

Pancuronium belongs to a class of drugs called neuromuscular blocking agents. Many of these drugs are derived from, or are synthetic versions of, curare, a highly poisonous extract from certain woody vines that grow in South America. They are often referred to as “curariform” drugs, because they have a curare-like effect. Neuromuscular blocking agents interfere with the transmission of nerve impulses at the receptor sites of all skeletal muscle. In lay terms, these drugs paralyze all voluntary muscles in the body, including the diaphragm, which is necessary to breathe. Unless a person under the influence of a neuromuscular blocking agent is assisted by an artificial breathing mechanism (such as a ventilator), he or she will suffocate to death.

For centuries, indigenous tribes in South America used curare (which is also known as ourara, woorari, wourali, and urali) to make poison-tipped hunting arrows. They combined bark scrapings from certain vines with viscous substances such as snake or ant venom, boiled the mixture for days, and let it cool into a dark, heavy paste, into which they dipped their arrows. Animals struck with these arrows were paralyzed, and eventually suffocated from respiratory paralysis. Curare was particularly effective when hunting monkeys and other animals that lived high in the trees; once shot with a curare-tipped arrow, the animals lost their grip and fell to the ground. Indigenous hunters assessed the strength of their curare based upon how many trees a monkey could jump to after being poisoned. A monkey shot with “one-tree curare” could only leap to one tree before falling; poisoned by a weaker, “three-tree curare,” a monkey could leap to as many as three trees in an effort to escape before collapsing to the ground.

Although used in hunting for centuries, curare came to the attention of physiologists in the mid-nineteenth century, particularly among those who practiced vivisection, the dissection of a living animal for medical experimentation. The use of curare in vivisection was pioneered by the influential French physiologist Claude Bernard, who needed a way to keep the animals still and cooperative—but alive—while experimenting on them. After discovering its paralyzing properties, Bernard routinely used the drug during vivisection to immobilize his subjects.

It was through the use of curare in vivisection that people began to consider the implications of what curare did *not* do, namely serve any anesthetic function. While curare inhibits all voluntary movement, it does nothing at all to affect

consciousness, cognition, or the ability to feel pain. In 1864, Bernard described an animal under the influence of curare as corpse-like, but quite alive:

In this motionless body, behind that glazing eye, and with all the appearance of death, sensitiveness and intelligence persist in their entirety. The corpse before us hears and distinguishes all that is done around it. It suffers when pinched or irritated, in a word, it has still consciousness and volition, but it has lost the instruments which serve to manifest them.

In 1868, the Swedish physiologist A. F. Holmgren condemned curare as “the most cruel of all poisons.” Its use, he wrote,

changes [one] instantly into a living corpse, which hears and sees and knows everything, but is unable to move a single muscle, and under its influence no creature can give the faintest indication of its hopeless condition. The heart alone continues to beat.

Not surprisingly, the use of curare during animal experimentation was controversial; indeed, its use led to the passage of anti-vivisection laws in Great Britain at the end of the nineteenth century. Testifying before the Royal Commission of 1875, an investigative body created to examine the morality of vivisection, one witness described the experience of a dog subjected to vivisection while paralyzed by curare. Curare, he testified, was used to

render [the] dog helpless and incapable of any movement, even of breathing, which function was performed by a machine blowing through its windpipe. All this time, however, its intelligence, its sensitiveness, and its will, remained intact . . . . In this condition the side of the face, the interior of the belly, and the hip, were dissected out . . . continuously for ten consecutive hours . . . .

In the 1940s, surgeons began to utilize curare in surgery as a way of relaxing the muscles and aiding in certain delicate procedures. Anesthesiologists hailed the advent of curariform drugs in surgery, because their paralytic properties obviated the need for massive, and potentially dangerous, doses of anesthesia to control unwanted movement. Instead of using deep anesthesia to restrict muscle movement, curare-induced paralysis accomplished the same goal without the accompanying danger of general anesthesia. The drug quickly became a staple in operating rooms, allowing surgeons to work with improved surgical field and without fear of involuntary muscle contraction.

But while paralytic agents have their place in modern surgery, their inherent danger remains. Dr. Harold Griffith, a Canadian doctor who was the first to use curare on human beings to assist with surgery, published his findings in 1942. While extolling the virtues of curare in the surgical setting, he also warned that it is

a “dangerous poison, and should only be used by experienced anesthetists in well-equipped operating rooms.” Any time paralytic drugs are used in surgery, the necessity of adequately maintained anesthesia is that much more important, as the drugs restrict the patient’s ability to verbally communicate sensation, or physically respond to assessments of anesthetic depth. If the anesthesia wears off during surgery, and the patient is paralyzed, the consequences can be horrific. This phenomenon, referred to as anesthesia awareness, is well-known in the annals of surgery and is a major concern of the anesthesiology profession.

C. Rejection of paralytics by veterinary and animal welfare communities

Decades of review and study have led to a consensus in the veterinary and animal welfare communities with respect to the safest and most humane method of animal euthanasia. That method is an anesthetic-only procedure involving an overdose of the barbiturate sodium pentobarbital. Tens of thousands of animals are euthanized every day by means of this procedure, which has been used in the United States for more than sixty years. According to the AVMA’s guidelines, an overdose of pentobarbital is the “preferred method” of euthanizing dogs, cats, and large animals such as horses. In addition to the AVMA, every major American animal rights organization strongly recommends—or requires—the use of pentobarbital in animal euthanasia.

The ease with which the anesthetic-only procedure can be administered is an important consideration. The vast majority of animal euthanasia takes place not in the offices of veterinarians but in animal shelters, where millions of dogs and cats are euthanized each year. Euthanasia in shelters is performed by shelter workers who are not formally trained in veterinary medicine. By developing a procedure with no risk of pain, and a wide margin for error, the veterinary community has accounted for the difficulty posed by relatively untrained personnel administering the lethal procedure. For example, the Euthanasia Training Manual of the Humane Society of the United States is purposefully written in lay terms in recognition of the need for a “more instructive and less technical guide for shelter euthanasia technicians” than the AVMA guidelines, which are written by and for veterinarians. With that purpose in mind, the Humane Society Manual states that pentobarbital is the “best possible method of euthanasia currently available.”

Not only does the Humane Society agree with the AVMA that the anesthetic-only procedure is the preferred method for animal euthanasia, but it expressly condemns the use of curariform drugs like the one used in human lethal injections. The foreword to the Euthanasia Training Manual states that “[i]t is our moral and ethical duty to ensure that we work to end these practices: drowning, poisoning, shooting, gassing, or injecting animals with curare-based or paralytic substances.” The Manual later deems “inhumane” the use of “any combination of sodium

pentobarbital with a neuromuscular blocking agent.” The Humane Society also condemns the use of T-61, a euthanasia solution that combines an anesthetic with a neuromuscular blocking agent, because it “can cause animals intense pain after administration and a curare-like paralysis of respiration (suffocation) before the animal loses consciousness.”

Curariform drugs are mentioned only briefly in the AVMA guidelines, and almost always with disapproval. For example, the use of neuromuscular blocking agents alone to achieve death is “unacceptable” and “absolutely condemned.” The history of this provision in the guidelines suggests that veterinary experts were concerned with curare’s long association with conscious paralysis and suffocation. In short, no AVMA-approved method of euthanasia includes a paralytic, and nowhere in the AVMA guidelines is a three-drug formula like the one used in human lethal injection even contemplated, let alone approved.

#### D. State animal euthanasia laws and legislative history

There are only eight states whose animal euthanasia laws would even arguably allow the use of a procedure like the one used in human lethal injection executions. These states are essentially silent on the method to be used. Typical is Indiana, which mandates simply that the method shall be “reasonably humane.” While eight states are silent on the issue, forty-two states (including California) have enacted statutes and/or regulations that either implicitly or explicitly ban the use of neuromuscular blocking agents, such as pancuronium, in animal euthanasia.

The legislative history of the statutes banning the use of curariform drugs in animal euthanasia is striking, both for what it reveals, and for what it does not reveal. In some states, these laws were the product of intense lobbying by animal rights groups, who argued for the ban in terms quite similar to the arguments of death row inmates challenging the use of neuromuscular blocking agents in lethal injection procedures. In other states, pentobarbital was mandated because it was widely recognized to be the safest and most humane method of euthanasia. In still other states, the legislative or regulatory move either to ban neuromuscular blocking agents or mandate pentobarbital was utterly uncontroversial, as it reflected the virtually unanimous consensus of the veterinary and animal welfare communities.

In 1979, Delegate Elizabeth S. Smith introduced House Bill 599 in the Maryland Legislature. The bill, which eventually became law, explicitly banned the use of “curariform drugs” in the euthanasia of dogs and cats. Delegate Smith’s testimony before the House Environmental Matters Committee explained why such drugs should play no role in the euthanasia of animals: “These drugs cause a reduced pressure of oxygen to the blood and paralysis of respiratory muscles. Unconsciousness develops slowly, preceded by anxiety and fear. The animal can

experience pain even though no body movements occur.” The comments of the Humane Society in support of the bill echoed Smith’s concerns, in even stronger terms: “Let me stress here that as I have stated above, the ONLY acceptable use of neuromuscular blocking agents is for surgical assistance.” The bill passed, and has been on the books ever since.

In 1987, both houses of the New York Legislature overwhelmingly passed a bill to ban the use of “T-61, curare, any curariform drug, any neuromuscular blocking agent or any other paralyzing drug” in animal euthanasia, and allow animal shelters access to sodium pentobarbital. Once the bill was passed, then-Governor Mario Cuomo received an outpouring of letters and memoranda from doctors and animal rights activists, urging him to sign the bill into law, which he eventually did. Much of the debate focused on the use of the drug T-61, which is a combination of anesthetic and paralytic. T-61 is no longer available in the United States and is strongly condemned by the Humane Society of the United States because, “if improperly administered, T-61 can cause animals intense pain after administration and a curare-like paralysis of respiration (suffocation) before the animal loses consciousness.” At the time, however, shelters had to use T-61 because they were not able to procure sodium pentobarbital which, like thiopental used in human lethal injections, is a controlled substance. New York’s law, like similar laws of other states, gave shelters access to sodium pentobarbital. In any event, the concerns about T-61 and other curariform drugs, reflected in New York’s legislative history, are echoed in the concerns with pancuronium today.

For example, a group of doctors, including anesthesiologists, wrote to Governor Cuomo to describe what could happen if an animal euthanized using a combination of an anesthetic and a paralytic did not receive an adequate dose of the anesthetic:

In the case of a paralyzed, awake animal who did not volunteer and does not know what is happening, the experience is undoubtedly terrifying, even in the absence of pain. If pain is present, it can be even more terrifying and more painful than would ordinarily be assumed, since pain and fear can be synergistic.

Others wrote to the governor, noting that the New York State Department of Health banned the use of curariform drugs or agents with curariform activity in the destruction of animals in laboratory settings. Dozens of local animal welfare organizations weighed in as well, one noting that “we favor this law since it would also prohibit the use of . . . drugs containing paralytic agents, which can cause acute suffering before an animal dies.” Another letter pleaded that “[a]nimal organizations have put their hearts and souls into securing a bill which would mean that animal shelters could obtain sodium pentobarbital to be used only to humanely euthanize dogs and cats.”

The legislative testimony in support of the bill by Representative Arthur Kremer is particularly on point:

MR. KREMER: The objections that have been raised to the use of this drug [T-61] are based upon adequate scientific research that has shown the use of this particular drug causes animals to die in what is considered a torturous manner, and sodium pentobarbital is a more humane manner in which the animal could be euthanized. . . .

MR. DAVIDSEN: You mentioned the word “torturous”?

MR. KREMER: When an animal is paralyzed prior to dying, I think you put that animal, if you will, through a much more difficult death than you would with sodium pentobarbital.

The legislative history of the Connecticut statute also reflects concerns that the use of curariform drugs in animal euthanasia increases the potential for a torturous death. In that state, the original version of a proposed bill would only permit a licensed veterinarian to administer euthanasia by a “lethal injection.” Although the legislative history reflects an overwhelming support for the bill, several animal welfare advocates urged the legislators to include a list of drugs to be used in lethal injections, for fear that some individuals might use curariform drugs instead of sodium pentobarbital. One of the advocates, the president of the Northeastern Connecticut Animal Rescue, Inc., warned that pet shops may be tempted to use succinylcholine chloride, a neuromuscular blocking agent, and that animals would be paralyzed and “die[] of suffocation while fully conscious.” She continued: “Please do not assume that the phrase ‘lethal injection’ is adequate to prevent the animal’s suffering. Drugs other than sodium pentobarbital are NOT humane alternatives.” The legislature concurred and amended the bill, so that the language signed into law permits euthanasia only “by lethal injection of sodium pentobarbital.”

#### E. California animal euthanasia law

In California, employees of animal control shelters and/or humane societies are prohibited from using curariform drugs – such as pancuronium bromide – for euthanasia purposes. The statutory scheme that defines and controls the state’s veterinary practice is the Veterinary Medicine Practice Act [“the Act”]. Cal. Bus. & Prof. Code §§ 4800-4917. Pursuant to the Act, an employee of an animal control center or humane society may administer sodium pentobarbital as a method of euthanasia provided they have received proper training. *See* Opinion of Bill Lockyer, Attorney General of California, No. 01-103 (Jan. 2, 2002), at 3. But such persons are

prohibited from administering other drugs, including curariform drugs, to animals. See Cal. Bus. & Prof. Code § 4826.

California law thus prohibits all persons who are not veterinarians, veterinary technicians, or their assistants, including animal control shelter and humane society employees, from administering curariform drugs for any purpose. Any person who violates this law is guilty of a misdemeanor and is punishable by a fine of not less than five hundred dollars, nor more than two thousand dollars, or by imprisonment in a county jail for not less than 30 days, or more than one year. Cal. Bus. & Prof. Code § 4831.

When it revised the law in 1998 to outlaw another dangerous euthanasia method – carbon monoxide - the California Senate Judiciary Committee wrote that “there is a general consensus that a lethal injection of sodium pentobarbital is the most humane way to euthanize unwanted dogs and cats.”

- F. The CDCR should reconsider the use of a drug that has been long rejected by the veterinary and animal welfare communities

If an animal shelter employee used the CDCR’s proposed lethal injection protocols to euthanize a dog in this state, he or she would be guilty of a crime and could be sentenced to up to a year in jail. Yet the CDCR insists on using this procedure to execute human beings.

There is no reason for the CDCR to paralyze inmates before executing them. It is a barbaric practice that needlessly risks a horrifying and painful death. The CDCR should review and consider the considered expertise of the veterinary and animal welfare communities and conclude that pancuronium has no place in a humane lethal injection process.

#### Fiscal impact

We also wanted to make a short comment about the CDCR’s claim that adoption of the proposed regulations will have absolutely no fiscal impact on the state, any state agency, or any local agency. Nothing encapsulates the CDCR’s attitude towards this process more than that claim, which is absurd on its face.

The fiscal impact of the death penalty, and of the State’s decision to conduct lethal injection executions at San Quentin State Prison, are well-documented in the media and will no doubt be the subject of numerous other public comments. We will not repeat here all of the ways in which these proposed regulations fiscally impact the state. We have attached as Attachment D, however, for inclusion in the rulemaking record and for consideration by the CDCR and the OAL, an op-ed



Mr. Timothy Lockwood

June 28, 2009

Page 25 of 25

published on May 17, 2009. The piece, entitled, "Can Californians afford to keep the death penalty?" was published in the *Sacramento Bee* and is available at <http://www.sacbee.com/californiaforum/story/1866190.html>.

The CDCR's one word answer to the question of fiscal impact – "None" – demonstrates that the CDCR does not appear to have taken the APA process seriously. If the agency does not, on its own, decide to begin complying with the APA, the OAL should ensure that it does so.

### Conclusion

Thank you for your consideration of these comments. Should the CDCR decide to comply with the APA's provisions regarding open access to the rulemaking file and the material relied upon in drafting the proposed regulations, we look forward to an opportunity to submit further comment.

Sincerely



Elisabeth Semel



Ty Alper



Jennifer Moreno



Kate Weisburd

Enc.

**ATTACHMENT A**

State of California Lethal Injection Protocol Review  
May 15, 2007

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**STATE OF CALIFORNIA  
LETHAL INJECTION PROTOCOL REVIEW**

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**May 15, 2007**



**Arnold Schwarzenegger, Governor  
State of California**

**James E. Tilton, Secretary  
Department of Corrections and Rehabilitation**

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# STATE OF CALIFORNIA LETHAL INJECTION PROTOCOL REVIEW

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## Table of Contents

<b>Executive Summary .....</b>	<b>1</b>
<b>Introduction .....</b>	<b>3</b>
<b>Background .....</b>	<b>3</b>
Evolution of Capital Punishment.....	3
History of Capital Punishment in California.....	3
<b>Current Death Penalty Challenge.....</b>	<b>5</b>
<b>Memorandum of Intended Decision; Request for Response from Defendants .....</b>	<b>5</b>
Operational Procedure No. 770 .....	5
<b>Identified Deficiencies .....</b>	<b>7</b>
Lethal Injection Protocol Review.....	7
<b>Governor's Office Response to Memorandum of Intended Decision .....</b>	<b>9</b>
<b>Defendants' Response to Memorandum of Intended Decision.....</b>	<b>10</b>
<b>Review Methodology.....</b>	<b>10</b>
Scope .....	10
Participation.....	10
Document Review.....	10
Lethal Injection Survey .....	11
Site Visits.....	11
Expert Consultation .....	11
Barriers .....	12
<b>Improvements.....</b>	<b>12</b>
1. Screening of Execution Team Members.....	12
2. Meaningful Training, Supervision, and Oversight of the Execution Team .....	13
3. Consistent, Reliable Record Keeping .....	16
4. Proper Use of Sodium Thiopental by the Execution Team .....	17
5. Lethal Injection Facility .....	17
6. The Lethal Injection Protocol .....	19
<b>Attachment A:</b>	<b>San Quentin State Prison Execution Chamber</b>
<b>Attachment B:</b>	<b>San Quentin State Prison Proposed Lethal Injection Site</b>
<b>Attachment C:</b>	<b>Revised Three-Chemical Protocol</b>

## Executive Summary

Since 1993, California law has authorized capital punishment by lethal injection. San Quentin State Prison Operational Procedure No. 0-770 (OP 770) is California's protocol governing executions by lethal injection. This protocol, like those used by the federal government and most other states, provides for lethal injection by way of three chemicals intravenously injected into the condemned inmate scheduled for execution. The three-chemical protocol includes using:

**Sodium Thiopental**—a barbiturate sedative, to induce unconsciousness;

**Pancuronium Bromide**—a neuromuscular blocking agent, to induce paralysis, and cause breathing to cease; and,

**Potassium Chloride**—to induce cardiac arrest.

On February 21, 2006, Michael Angelo Morales, the Plaintiff in *Morales v. Tilton*, was scheduled to be the twelfth inmate executed by lethal injection in California. Morales' execution was stayed because of his challenge to California's administration of its lethal injection protocol. Morales challenged the constitutionality of his execution, contending that San Quentin State Prison's OP 770, the current protocol for lethal injection, and the manner in which the California Department of Corrections and Rehabilitation (CDCR) implements it, would subject him to an unnecessary risk of excessive pain, thus violating the Eighth Amendment's command that cruel and unusual punishments not be inflicted.

After lengthy review and an evidentiary hearing, on December 15, 2006, Judge Fogel, United States District Court, Northern District of California, issued a Memorandum of Intended Decision; Request for Response from the Defendants, *Morales v. Tilton, et al.*, in which the court identified five deficiencies in California's lethal injection protocol. The specific deficiencies identified were:

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.

The Court also stated, "Defendants' implementation of lethal injection is broken, but it can be fixed." The Court also expressed its belief "that the Governor's Office is in the

best position to direct the changes needed to correct the deficiencies noted in the Court's Memorandum."

In response to the Memorandum of Intended Decision, and as directed by the Governor, the CDCR initiated a review of all aspects of the lethal injection protocol and its implementation. Following the review, the CDCR initiated action to address all of the identified deficiencies noted by the Court in its Memorandum of Intended Decision.

Finally, as an integral element of the review, the CDCR considered alternatives to the existing three-chemical protocol including a one-chemical protocol. Based upon the information considered, the CDCR has elected to substantially revise the three-chemical protocol used as California's method of execution.

The actions taken by the CDCR to address the specific deficiencies noted by the Court, coupled with other modifications to the procedure, will assure the condemned inmate is rendered unconscious by the sodium thiopental and remains unconscious during the injection of the pancuronium bromide and the potassium chloride. The revisions to California's Lethal Injection Protocol will result in the dignified end of life for the condemned inmate.

## Introduction

Capital punishment has been an authorized punishment in California from the time of statehood. Over the years the laws governing capital punishment and the methods for its implementation have faced numerous legal challenges. Repeatedly, the voters of the State of California and the State Legislature have expressed their support for capital punishment.

Here, the method of execution is being challenged, and specific deficiencies in the Lethal Injection Protocol have been identified. The CDCR has been directed to take the actions necessary to address the deficiencies.

This report outlines the steps taken to address any deficiencies and ensure that the Lethal Injection Protocol meets constitutional standards.

## Background

### ***Evolution of Capital Punishment***

"The Framers of our Constitution were not far removed from a society in which condemned prisoners were put to death by being beheaded, drawn, and quartered. The Eighth Amendment was adopted in part as a response to such brutality, and it since has been construed by our Supreme Court to require that punishment for crimes comport with 'the evolving standards of decency that mark the progress of a maturing society'." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) quoting *Trop v Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

"The use of lethal injection in executions represents an evolution from earlier methods such as hanging, electrocution, and lethal gas that now are viewed by most jurisdictions as unduly harsh." *Morales v. Tilton* (Memorandum of Intended Decision—P.13, 16-19).

### ***History of Capital Punishment in California***

The Criminal Practices Act of 1851 authorized legal executions to be carried out by the sheriff of each county in California. On February 14, 1872, capital punishment was incorporated into the California Penal Code, stating in part:

*A judgment of death must be executed within the walls or yard of a jail or some convenient private place in the county. The Sheriff of the county must be present at the execution ...*



Capital punishment continued on a county level until 1891 when the California State Legislature enacted an amendment to the Penal Code that provided:

*A judgment of death must be executed within the walls of one of the State prisons designated by the court by which judgment is rendered.*

As a result of the 1891 statute, the warden of the prison replaced the sheriff as the person, who must be present at the execution, and an invitation to the attorney general, rather than to the district attorney, was required.

Executions by hanging were conducted at both San Quentin State Prison and Folsom State Prison. In August 1937, the California State Legislature replaced hanging as the method of capital punishment with the use of lethal gas. The gas chamber was installed at San Quentin State Prison in 1938, and on December 2, 1938, the first executions by lethal gas occurred at San Quentin State Prison.

Beginning in 1967, as a result of various State and United States Supreme Court decisions, there were no executions in California for a 25-year period. In 1972, the California Supreme Court found that the death penalty constituted cruel and unusual punishment under the California State Constitution and 107 condemned inmates were re-sentenced to terms of life with the possibility of parole, and removed from California's death row.

In 1972, the California electorate amended the State Constitution, and in 1973 enacted legislation making the death penalty mandatory in specified criminal cases. In 1976, the California Supreme Court held that the California death penalty statute was unconstitutional under the Federal Constitution because it did not allow mitigating circumstances to be admitted as evidence. In 1977, the California Legislature re-enacted the death penalty allowing for evidence in mitigation, and in 1978, California voters approved Proposition 7 reaffirming the death penalty in California. Although the death penalty was reinstated in California in 1978, executions did not resume in California until April 1992.

In 1993, California law changed to allow condemned inmates to choose either lethal gas or lethal injection as a method of execution. San Quentin State Prison developed lethal injection protocols based upon protocols from other jurisdictions.

In October 1995, a United States District Court ruled that the use of cyanide gas was considered cruel and unusual punishment. In February 1996, this ruling was upheld by the United States Ninth Circuit Court of Appeals, thus barring California from using the existing lethal gas protocol as a method of execution unless selected by the inmate.

The first execution by lethal injection in California occurred in February 1996. Since that date, eleven condemned inmates have been executed in California by lethal injection with the last execution occurring on January 17, 2006.

On February 21, 2006, Michael Angelo Morales, the Plaintiff in *Morales v. Tilton*, was scheduled to be the twelfth condemned inmate executed by lethal injection in California. Morales' execution was stayed as a result of his challenge to the administration of the lethal injection protocol.

## **Current Death Penalty Challenge**

Morales challenged the constitutionality of his execution contending that San Quentin State Prison's OP 770, the protocol for lethal injection, then in effect, and the manner in which the CDCR implements it would subject him to an unnecessary risk of excessive pain, thus violating the Eighth Amendment's command that cruel and unusual punishments not be inflicted.

## **Memorandum of Intended Decision; Request for Response from Defendants**

On December 15, 2006, Judge Fogel, United States District Court, Northern District of California, issued a Memorandum of Intended Decision; Request for Response from the Defendants (Memorandum). Judge Fogel framed the question presented in this case very narrowly:

"does California's lethal-injection protocol—as actually administered in practice—create an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment?" *Morales v. Tilton* (Memorandum of Intended Decision—P.2, 24-26).

The Court concluded that absent effective remedial action by CDCR, it would be compelled to answer the question presented in the affirmative, stating:

"Defendants' implementation of lethal injection is broken, but it can be fixed." *Morales v. Tilton* (Memorandum of Intended Decision—P.3, 9-12).

## **Operational Procedure No. 770**

San Quentin State Prison Operational Procedure No. 0-770 (OP 770) is California's protocol governing executions by lethal injection. This protocol, like those used by the federal government and most other states, provides for lethal injection by way of three chemicals injected into the inmate being executed:

**Sodium Thiopental**—a barbiturate sedative, to induce unconsciousness;

**Pancuronium Bromide**—a neuromuscular blocking agent, to induce paralysis, cause breathing to cease; and,

**Potassium Chloride**—to induce cardiac arrest.

On January 13, 2006, Morales filed the present action contending that OP 770, and the manner in which it was implemented, would subject him to an unnecessary risk of excessive pain, thus violating the Eighth Amendment.

The Court reviewed, in detail, evidence from previous execution logs, and finding anomalies in six logs, stated that:

“... inmates’ breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California.” *Morales v. Tilton* (Memorandum of Intended Decision–P.4, 16-18).

This and other evidence raised concerns that condemned inmates may not have been unconscious when they were injected with pancuronium bromide and potassium chloride, chemicals that would cause an unconstitutional level of pain if injected into a conscious person.

The Court found:

“...the amount of sodium thiopental to be given to the condemned person pursuant to OP 770 is sufficient to cause virtually all persons to become unconscious or even to cease breathing within one minute.” *Morales v. Tilton* (Memorandum of Intended Decision–P.9, 12-14).

“Accordingly, assuming that the sodium thiopental is delivered properly, there should be virtually no risk that an inmate will suffer an unconstitutional level of pain.” *Morales v. Tilton* (Memorandum of Intended Decision–P.9, 16-18).

Therefore, the Court noted:

“As it has from its inception, the resolution of this case turns on a single factual question: whether OP 770, as implemented, provides constitutionally adequate assurance that condemned inmates will be unconscious when they are injected with pancuronium bromide and potassium chloride.” *Morales v. Tilton* (Memorandum of Intended Decision–P.9, 6-9).

“...the record in this case ... is replete with evidence that in actual practice OP 770 does not function as intended.” *Morales v. Tilton* (Memorandum of Intended Decision–P.9, 19-21).

“There can be no real doubt that Defendant’s implementation of OP 770 has major flaws ...” *Morales v. Tilton* (Memorandum of Intended Decision –P.13, 4-5).

## Identified Deficiencies

In the Memorandum the Court noted:

"The evidence shows that the protocol and Defendants' implementation of it suffer from a number of critical deficiencies, 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.
5. Inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work." *Morales v. Tilton (Memorandum of Intended Decision—P. 9-11)*"

"In light of the substantial questions raised by the records of previous executions, Defendant's actions and failures to act have resulted in an undue and unnecessary risk of an Eighth Amendment violation." *Morales v. Tilton (Memorandum of Intended Decision—P.13-14, 21-22; 1).*

"Because the Court is prepared to find that the sequence of the three drugs described in OP 770, when properly administered will provide for a constitutionally adequate level of anesthesia, and given that the deficiencies in the implementation of the protocol appear to be correctable, a thorough, effective response to the issues raised in this memorandum likely will enable the Court to enter such a favorable judgment." *Morales v. Tilton (Memorandum of Intended Decision—P. 14-15, 23-25; 1-2).*

## Lethal Injection Protocol Review

As contemplated by the Court, a review of the lethal-injection protocol must include:

"...the manner in which the drugs are injected, the means used to determine when the person being executed has lost consciousness, and the quality of contemporaneous records of executions, such as execution logs and electrocardiograms." *Morales v. Tilton (Memorandum of Intended Decision—P.16, 2-5).*

To be meaningful, the Court said:

“...such a review may require consultation with independent experts and with other jurisdictions, and it must be undertaken with an openness to the idea of making significant improvements in the ‘infrastructure’ of executions.” *Morales v. Tilton (Memorandum of Intended Decision—P.16, 5-8)*.

Additionally, the Court stated:

“...because of the paralytic effect of the pancuronium bromide, a determination of the 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.” *Morales v. Tilton (Memorandum of Intended Decision—P.16, 9-14)*.

“An adequate protocol also must include a means of providing additional anesthetic to the inmate should the need arise.” *Morales v. Tilton (Memorandum of Intended Decision—P.16, 14-15)*.

Finally, the Court noted:

“Because an execution is not a medical procedure, and its purpose is not to keep the inmate alive but rather to end the inmate’s life, the Court agrees with the Defendants that the Constitution does not necessarily require the attendance and participation of a medical professional. However, 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 is properly anesthetized: the better the delivery system, the less the need for medical participation.” *Morales v. Tilton (Memorandum of Intended Decision—P.16, 15-21)*.

“...because the constitutional issues presented by this case stem solely from the effects of pancuronium bromide and potassium chloride on a person who has not been properly anesthetized, removal of these drugs from the lethal-injection protocol, with the execution accomplished solely by an anesthetic, such as sodium pentobarbital, would eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic.” *Morales v. Tilton (Memorandum of Intended Decision—P.16-17, 22-25; 1-2)*.

The Court directed:

“Accordingly, and good cause therefore appearing, within thirty days Defendants shall advise the Court and Plaintiffs of their response to this

memorandum, including specifically, whether Defendants and the Governor's Office intend to review and revise OP 770 further and, if so, how much additional time, if any, they believe they will need to complete the task." *Morales v. Tilton (Memorandum of Intended Decision–P.17, 6-9).*

## **Governor's Office Response to Memorandum of Intended Decision**

On January 16, 2007, the Governor's Office submitted a response to the Court's December 15, 2006, Memorandum of Intended Decision stating, in part:

"Although the Governor is not a party to this case, he appreciates the Court's invitation to address the deficiencies in implementation of the lethal injection protocol identified in the Memorandum of Intended Decision filed December 15, 2006, (Memorandum) and the opportunity to review, evaluate, and revise the current lethal injection protocol." *Governor's Office Response to Memorandum of Intended Decision–P.1, 3-6.*

"The Court expressed its belief that the Governor's Office is in the best position to direct the changes needed to correct the deficiencies noted in the Court's Memorandum." *Governor's Office Response to Memorandum of Intended Decision–P.1, 21-22.*

"In response to the Court's December 15, 2006 Memorandum, the Governor's Office took immediate action. The next business day, the Governor directed his administration to correct the deficiencies identified by the Court." *Governor's Office Response to Memorandum of Intended Decision–P.1-2, 27-28; 1.*

"...the Governor directed his administration to:

1. establish a screening process for selection of execution team members and a periodic review process for team members;
2. establish a comprehensive training program for all execution team members;
3. develop standardized record keeping to ensure there are complete and reliable records of each execution;
4. recommend how to improve the death penalty facility at San Quentin Prison to ensure there is adequate equipment, lighting and space for the execution team; and
5. identify the best experts to provide advice on the lethal injection protocol and its implementation." *Governor's Office Response to Memorandum of Intended Decision–P.2, 2-9.*

## **Defendants' Response to Memorandum of Intended Decision**

On January 16, 2007, the CDCR submitted a response to the Court's December 15, 2006, Memorandum of Intended Decision stating, in part:

"The Defendants and the Governor's Office intend to review and revise OP 770 and to correct deficiencies in the implementation of the protocol."  
*Defendants' Response to Memorandum of Intended Decision—P.2, 17-18.*

"To allow a thorough review and opportunity to take corrective action, Defendants will submit to the Court and Plaintiff a report setting forth a revision of OP 770 and identifying corrective actions addressing deficiencies in the implementation of lethal injection executions by May 15, 2007." *Defendants' Response to Memorandum of Intended Decision—P.2, 23-26.*

## **Review Methodology**

### **Scope**

The scope of the CDCR's review included, but was not limited by, the Memorandum. In addition to a review and revision of OP 770, with focused evaluation and effective responses addressing each of the five specified deficiencies, the CDCR sought to identify other improvements to the lethal injection protocol. The review included consultation with individual experts and site visits to other jurisdictions with the goal of improving all aspects of the lethal injection process.

### **Participation**

The CDCR assembled a team to conduct the review. The team members were selected on the basis of their background, experience, and expertise. The staff selected had a variety of experience in line, supervisory, management, and administrative positions.

Some team members made site visits. Selected staff attended related training in another jurisdiction. The team members and selected staff reviewed schematics, prepared working documents, reviewed and drafted OP 770 and lesson plans, and drafted and reviewed final reports.

### **Document Review**

The review began with the identification, collection and examination of relevant information. Volumes of information were reviewed including testimony of expert

witnesses related to the instant case as well as others. Information reviewed also included the Final Report with Findings and Recommendations completed on March 1, 2007, by *The Governor's Commission on Administration of Lethal Injection*, subsequent to the execution of Angel Diaz in the State of Florida on December 13, 2006 and the Tennessee Department of Correction, *Report on Administration of Death Sentences in Tennessee*, issued in April 2007.

## ***Lethal Injection Survey***

The CDCR prepared a lethal injection survey to gather relevant lethal injection protocol information. The survey included questions specific to the five deficiencies noted in the Memorandum. The survey was distributed to the 37 states and the federal government that utilize lethal injection as a method of execution. The CDCR received responses from 15 jurisdictions. The responses were reviewed, analyzed, and recorded. An assessment of the responses confirmed that all jurisdictions were using a similar combination of chemicals as those set forth in California's lethal injection protocol at the time of the *Morales v. Tilton* legal challenge. However, there was some notable degree of variance in the quantities used and methods of administration.

## ***Site Visits***

As an integral element of the review, physical site visits were made to other jurisdictions to examine both the implementation of the existing lethal injection protocols and the facilities in which executions were conducted.

Sites were selected after considering the content of the Memorandum, the results of the survey, recommendations from legal staff, and the willingness of the jurisdictions to participate. In all, site visits were made to four other jurisdictions, as well as multiple visits to San Quentin State Prison. The four site visits were: Virginia Department of Corrections, Greensville Correctional Facility; Oklahoma State Penitentiary, McAlester, Oklahoma; Indiana State Prison, Michigan City, Indiana; and The Federal Correctional Complex at Terre Haute, Indiana. All jurisdictions were helpful in discussing their protocols and allowing tours of their execution facilities. Each of the jurisdictions used the same three-chemical protocol, as is currently the protocol for California; however, each differed slightly in the quantity of chemicals and method of administration. Each jurisdiction also had a dedicated facility in which executions were conducted, and while each differed slightly from the others, there were basic similarities among them.

## ***Expert Consultation***

Considerable discussion surrounded the selection and consultation with experts in the subject of execution by lethal injection. In the instant case, the Court considered volumes of testimony and documentary evidence from experts on the subject. Much of



that information, including testimony and reports of Dr. Mark Heath, was made available and reviewed by team members and selected CDCR staff involved in this effort. Volumes of additional information, including testimony of experts on this subject in other cases nationwide was also obtained and reviewed.

The CDCR also obtained the services of a nationally renowned anesthesiology. The consultant reviewed several proposed revisions to the Lethal Injection Protocol and provided comments to the CDCR.

## **Barriers**

In its Memorandum, the Court noted, that to be meaningful, the CDCR's review may require consultation with independent experts and with other jurisdictions. During the review, the absence of a protective order was found to limit access to one jurisdiction with considerable experience in execution by lethal injection. Other jurisdictions were reluctant to share written procedures. Nevertheless, the cooperation, information, and advice obtained from the jurisdictions responsive to the survey, and those who consented to site visits, was invaluable, not only to this review, but also in allowing California to make the improvements to its lethal injection protocols.

## **Improvements**

The CDCR has taken the following steps to address the deficiencies noted by the Court in its Memorandum and to otherwise improve the lethal injection process.

### **1. Screening of Execution Team Members**

The Court stated the CDCR's lethal injection process included inconsistent and unreliable screening of execution team members. To correct this deficiency, the CDCR has developed a formal process for selection of execution team members.

With the assistance of the Director, Division of Adult Institutions (DAI), the Warden will coordinate the recruitment and selection of Lethal Injection Team Members. The Lethal Injection Team will consist of a minimum of 20 members to be determined by the Warden. If necessary, the CDCR may contract with specialists to perform specific duties during the lethal injection process.

A panel of staff will be designated to review the qualifications of potential Lethal Injection Team Members. The Warden will chair an interview panel of at least three members, including the Associate Director, Reception Centers, to interview the candidates and make the selection of Lethal Injection Team Members based on the following established criteria. Each team member must:

- Volunteer.
- Have consistently demonstrated professional job performance and demeanor.
- Have a good attendance record.
- Have no prior stress claims.
- Have no history of Corrective Action within the preceding three years and no sustained disciplinary action during State employment.
- Have received annual performance evaluations that meet or exceed performance expectations during State employment.
- Not be on probation in his or her current position. (This criteria does not apply to promotions made subsequent to initial placement on the Lethal Injection Team).
- Not have been assigned to any condemned housing unit during the preceding twelve months.

The Warden will personally review the performance of Lethal Injection Team Members annually to ensure they continue to meet the initial screening criteria. Any Lethal Injection Team Member who no longer meets the screening criteria will be immediately removed from the Team.

## ***2. Meaningful Training, Supervision, and Oversight of the Execution Team***

The Court stated the CDCR's lethal injection process lacked meaningful training, supervision, and execution team oversight. To address the Court's noted deficiencies, the CDCR developed formalized training plans for all Lethal Injection Team Members and specialized team functions. The CDCR has also developed and will implement procedures for the execution team to be closely supervised and monitored.

Specifically, an Associate Warden will provide direct management oversight for the training of the Lethal Injection Team Members, including the Lethal Injection Team Leader. The Lethal Injection Team will train at least once per month for at least 8 hours, and will attend additional training as directed by the Lethal Injection Team Leader and approved by the Associate Warden. All Team Members must attend a minimum of six training sessions within the six-month period immediately preceding a scheduled execution. Any specialists contracted to perform specific duties during the lethal injection process will train, at least annually, with the Lethal Injection Team, and during each of the three days immediately prior to a scheduled execution. All Lethal Injection Team Members will attend all scheduled training unless on approved vacation or sick leave.

All training (with the exception of any specifically appropriate certification training and updating) will take place at the dedicated Lethal Injection Facility. Training is designed to provide each Lethal Injection Team Member with specific knowledge of all aspects of OP 770, duties of their specific assignments, recent executions in other jurisdictions,

current litigation, and potential problems with recommendations for avoidance or resolution.

To improve the content and quality of training to be provided to the Lethal Injection Team Members, during the week of April 16, 2007, the CDCR sent seven employees to attend training provided by the Federal Bureau of Prisons at Terre Haute, Indiana. During the training, the CDCR staff actively participated in exercises identical to the actual protocol for execution by lethal injection used by the Federal Bureau of Prisons. Following training, the CDCR staff, in consultation with staff from CDCR's Office of Training and Professional Development, constructed initial lesson plans for the Lethal Injection Team and for each of its specialized teams:

### ***Lethal Injection Team***

- Lethal Injection Security Team
- Lethal Injection Intravenous Team
- Lethal Injection Infusion Team
- Lethal Injection Record Keeping Team.

The training for all Lethal Injection Team Members will include, but not be limited to:

- Custody and care of the condemned inmate;
- Overview—Intravenous catheter application and vein access;
- Identification of chemicals used in the process, including:
  - Characteristics and effects of each chemical used;
  - Proper preparation and mixing of the chemicals;
- Infusion process;
- Security of the Lethal Injection Facility;
- Proper report writing and record keeping; and,
- Potential problems and recommendations for avoidance or resolution.

Additionally, all Lethal Injection Team Members assigned to specific functional areas will receive additional training relative to those functions.

### ***Lethal Injection Security Team Members***

Training will include, but not be limited to:

- Application of restraint equipment;
- Escort and transportation of condemned inmates;
- Inmate and staff relations;
- Effective communication;
- Departmental Use of Force Policy and use of force options; and,
- Potential problems and recommendations for avoidance or resolution.

### ***Lethal Injection Intravenous Team Members***

Training will include, but not be limited to:

- Training necessary to maintain a current certification and licensure for initiation and monitoring of intravenous catheters in peripheral veins;
- Training necessary to maintain current certification and licensure for placement of ECG leads and monitoring of ECG during the lethal injection process; and,
- Potential problems and recommendations for avoidance or resolution.

### ***Lethal Injection Infusion Team Members***

Training will include, but not be limited to:

- Proper mixing of chemical(s) used in the lethal injection process;
- Sequence and rate of infusion of the lethal injection chemicals;
- Proper handling and accountability of lethal injection chemicals; and,
- Potential problems and recommendations for avoidance or resolution.

### ***Lethal Injection Record Keeping Team***

Training will include, but not be limited to:

- Report writing;
- Accurate record keeping; and,
- Specific documentation required for the Lethal Injection Protocol.

In addition to the regularly scheduled monthly training for Lethal Injection Team Members, the Lethal Injection Team will be activated three days immediately prior to a scheduled execution. Daily training and preparedness exercises will be conducted throughout this period.

The training and certification of Lethal Injection Team Members will be documented by the Lethal Injection Team Leader under the direction of the assigned Associate Warden. Identity of Team Members will be confidential. Records will be maintained and properly secured, by the Associate Warden and reviewed by the Warden at least quarterly.

### ***Additional Execution Team Oversight***

Following an execution, the Warden and the Associate Warden will conduct a debriefing with all of the Lethal Injection Team Members. All documents and records concerning the execution will be collected by the Associate Warden and secured for follow-up review.

An Execution Report will be prepared immediately following each execution. The Lethal Injection Team Leader will complete a San Quentin State Prison Execution Report,

Part A, Summary. Each Team Member will complete an Execution Report, Part B, Supplemental Report. Identity of Team Members will be confidential.

The completed Execution Report will include all appropriate supplemental reports. Following review by the Associate Warden, the Execution Report will be routed through the Chief Deputy Warden for the Warden's review and signature. A copy of the Execution Report will be delivered through the Associate Director, Reception Centers to the Director, DAI, for review and follow-up as determined necessary. The original Execution Report will be maintained in the Execution File.

### ***After Action Critique***

Within 72 hours following an execution, the Warden will conduct an "After Action Critique" to evaluate the execution from all operational perspectives for compliance with OP 770. The critique will be documented for inclusion in the Master Execution File with other records of the execution.

### ***3. Consistent, Reliable Record Keeping***

The Court stated the CDCR's lethal injection process was flawed by inconsistent and unreliable record keeping. To address this deficiency, the CDCR developed a formal process, including the assignment of Lethal Injection Team Members specifically to the record keeping function.

The CDCR has developed specific forms, processes, and formats to ensure that complete and accurate record keeping is achieved. Specialized training will be provided to all Lethal Injection Team Members on the subject of report writing and proper record keeping. Selected Lethal Injection Team Members will be assigned to the Record Keeping Team to ensure proper documentation is achieved at each stage of the execution process. These selected Lethal Injection Team Members will receive focused training on the specific formats and records to be maintained for documenting an execution. During regularly assigned training, as the Lethal Injection Team rehearses for an actual execution, the Record Keeping Team will practice documenting the events with the established forms and report formats.

The forms and reports prepared by the Record Keeping Team during rehearsals will be reviewed and critiqued by the Lethal Injection Team Leader and the Associate Warden for accuracy and completeness. Additionally, each Lethal Injection Team Member will prepare an Execution Report, Part B Supplemental Report documenting his or her assignment and duties during the execution.

#### **4. Proper Use of Sodium Thiopental by the Execution Team**

The Court stated the CDCR's lethal injection process included improper mixing, preparation, and administration of sodium thiopental by the execution team. To address this deficiency, the CDCR developed training processes for proper mixing, preparation, and administration of sodium thiopental.

Of the three chemicals, only sodium thiopental requires mixing. The chemical is a powder that must be mixed with a liquid before it is administered. The chemical is available, pre-packaged, in a variety of quantities, containing the powder and the appropriate quantity of liquid to be mixed together to obtain optimal solution. From the review of literature, site visits, discussions with personnel from other jurisdictions and the consultant, the CDCR has determined that proper mixing of sodium thiopental can only be achieved by adhering strictly to the manufacturer's instructions.

Lethal Injection Team Members assigned to the Infusion Team will practice mixing sodium thiopental on an on-going basis during regularly scheduled training and rehearsal. The rehearsal will emulate the Lethal Injection Protocol actually used during an execution, and will include preparation of the syringes and administration of the lethal chemical(s) through intravenous lines in the manner used in the execution to the highest degree possible. The training and practice of the preparation, mixing, and administration of the chemical(s) will be conducted under the supervision of the Lethal Injection Team Leader with direct oversight by the Associate Warden. All training and practice will be fully documented in training files. Strict accountability of the issuance, use, and disposal of the chemicals will be maintained during all training and practice just as during an execution, by direct supervision of the Lethal Injection Team Leader, oversight by the Associate Warden, and use of the Chain of Custody form.

#### **5. Lethal Injection Facility**

The Court stated the CDCR's lethal injection chamber provided inadequate lighting, overcrowded conditions and poorly designed facilities in which the execution team must work.

To address these deficiencies, designated CDCR staff reviewed the Memorandum and visited the existing Execution Chamber at San Quentin State Prison. The existing Execution Chamber was originally constructed in 1938 to accommodate a change in the law authorizing capital punishment by lethal gas. The "Gas Chamber" was specifically designed for execution by lethal gas.

Following another change in the law in 1993, authorizing capital punishment by lethal injection, modifications were made to the gas chamber to allow executions by lethal injection to occur. Since the change in the law and the modification of the gas chamber, a total of eleven condemned inmates have been executed by lethal injection using the chamber.

Designated CDCR staff conducted an on-site evaluation of the existing execution chamber to determine whether additional modifications could be made to address the deficiencies identified by the Court. Because California law permits a prisoner to choose lethal gas as the means of execution, it was important that the structural integrity of the gas chamber not be irreversibly compromised. The assessment concluded that it was not practical to make additional modifications to address the noted deficiencies.

Current law requires that all executions be conducted within the walls of San Quentin State Prison. Therefore, assigned staff completed a tour of the grounds of San Quentin State Prison in an attempt to identify alternative sites that, with modification, could be converted to a dedicated Lethal Injection Facility. The tour identified an existing secure building. The building had enough floor space that, with modification, could be developed into a dedicated Lethal Injection Facility.

An additional review of the building by staff from the CDCR Office of Facilities Management was conducted. Following this review, it was concluded that modification to the building could be made to convert the building into a dedicated Lethal Injection Facility that would address the deficiencies identified by the Court.

The CDCR staff that conducted site visits and reviewed lethal injection protocols at other jurisdictions were also able to tour several dedicated lethal injection facilities at those sites. There were basic similarities, including a lethal injection room where the condemned inmate is executed in view of witnesses, and separate viewing rooms for official witnesses, members of the victim's families, and other witnesses. There were separations, either a curtain or a wall, between the condemned inmate and the infusion team. In addition, there were cells for the confinement of the condemned inmate immediately before an execution.

In years past, relocating the condemned population or at least a portion of it from San Quentin State Prison to other institutions within the CDCR had been considered. In addition, the need for a Lethal Injection Facility at the new locations was also considered. The Office of Facilities Management had previously prepared schematics for such a Lethal Injection Facility. In considering the feasibility of modifying the newly identified secure building at San Quentin State Prison these schematics were reviewed. (A schematic for the existing Execution Chamber and the new Lethal Injection Facility are attached to this report. In addition, digital virtual tours of the two facilities are available on the CDCR website at [www.cdcr.ca.gov](http://www.cdcr.ca.gov)).

Based upon the assessments, the physical modifications of the building moved forward. However, after the physical modifications had begun, it became apparent the modifications would exceed authorized funding limits. Therefore, the modification of the facility was suspended pending authorization for additional funding. Funding for completion of the Lethal Injection Facility is included in the Governor's Budget for Fiscal Year 2007/08. (See May Revise released on May 14, 2007).

Upon completion, the new Lethal Injection Facility will address the structural deficiencies identified by the Court. The facility will be specifically designed for its intended purpose. Lighting will be more than adequate and sufficient space will be available to accommodate the needs of the Lethal Injection Team as well as the witnesses.

Additionally, the CDCR will prohibit observers in the area designated for the Lethal Injection Team to prevent overcrowding during an execution and maintain the dignity of the process.

## **6. The Lethal Injection Protocol**

Review of OP 770 included consideration of the chemical(s) used and the method of administration.

A one-chemical protocol was considered. Five grams of sodium thiopental would be expected to cause death. The use of only one chemical, sodium thiopental, has the advantages of being simpler to administer and virtually eliminates the potential for pain. However, the use of only one chemical also has disadvantages. Since no other jurisdiction currently uses only one chemical, the protocol remains untested. The use of only a barbiturate would likely result in involuntary muscle movement, with unpredictable consequences. Finally, the execution may take an extended period of time.

The three-chemical protocol was also re-examined. The advantages to retaining a three-chemical protocol are:

- All jurisdictions that use lethal injection for executions use the same three-chemical combination in varying amounts, in the same sequence of administration, and have in most cases done so in the course of many executions conducted over many years.
- The lethality of the three-chemical combination is unquestioned, and when properly administered, the protocol will result in a pain free, dignified end of life for the condemned inmate.

The disadvantage is that unless the condemned inmate is rendered unconscious by the sodium thiopental prior to the administration of the pancuronium bromide and the potassium chloride, the inmate would suffer unnecessary pain.

There is no doubt that the amount of sodium thiopental given to the condemned inmates, as reflected in the last previous versions of OP 770, was sufficient to cause virtually all persons to become unconscious within less than one minute. The Court commented:



"...the Court is satisfied that even one and one half grams of sodium thiopental, *if properly administered*, are sufficient to eliminate any unconstitutional risk that an inmate will be conscious when the pancuronium bromide and the potassium chloride are injected." *Morales v. Tilton (Memorandum of Intended Decision-P.9, footnote 6)*.

However, the earlier versions of OP 770 made no provisions for any objective assessment of consciousness of the condemned inmate following administration of the sodium thiopental, and prior to the administration of the other chemicals. As noted by the Court:

"...the Lethal Injection Team Members are too far away to permit effective observation of any unusual or unexpected movements by the condemned inmate, much less to determine whether the inmate is conscious..."  
*Morales v. Tilton (Memorandum of Intended Decision-P.11, 18-20)*.

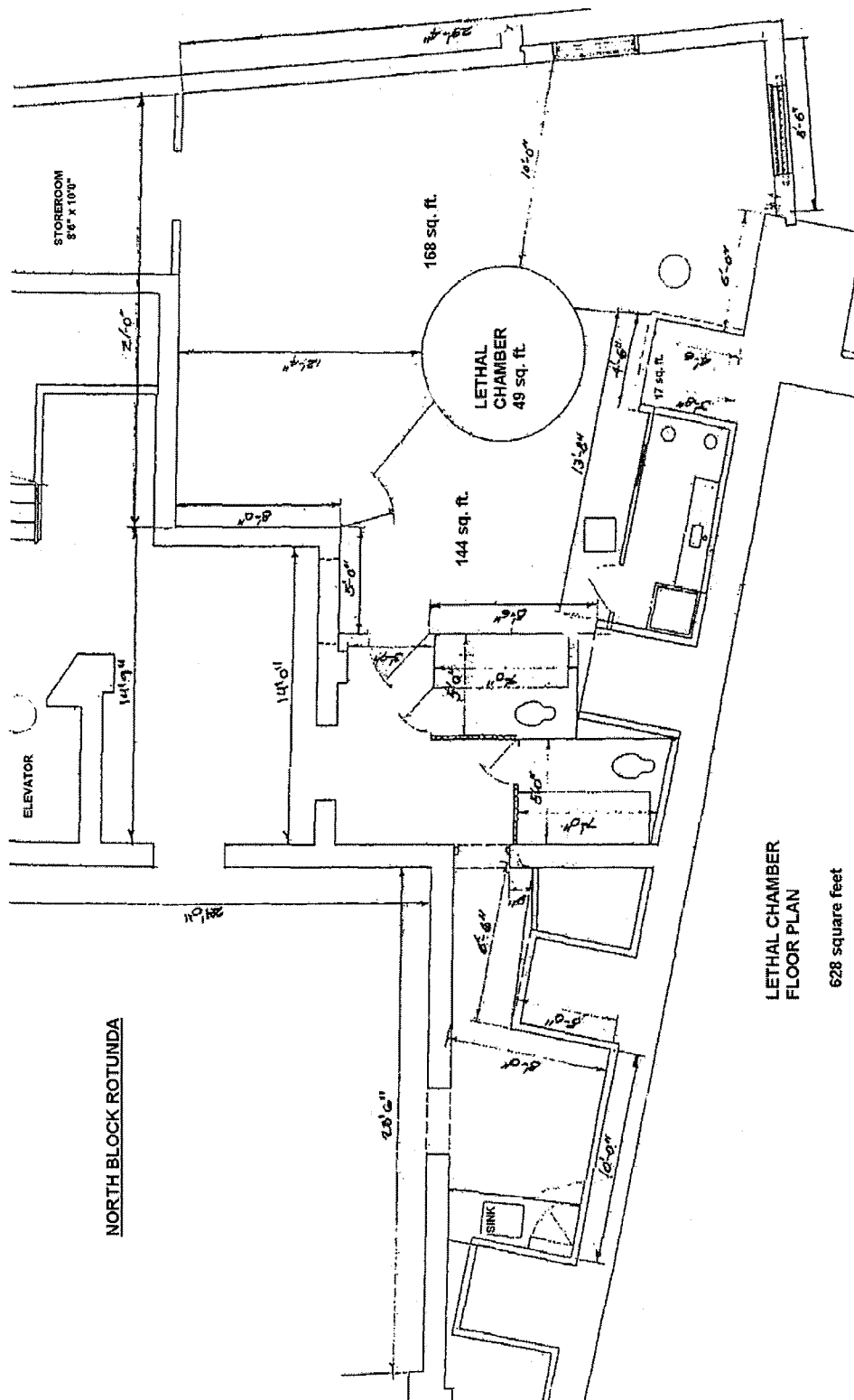
There are reliable, but relatively uncomplicated methods for effectively assessing consciousness that have been incorporated into the Lethal Injection Protocol. Among them are talking to and gently shaking the inmate, as well as lightly brushing the eyelash.

Changes were made to the protocol to place staff in close proximity to the condemned inmate throughout the execution to assess and confirm the condemned inmate is unconscious prior to and during the administration of the pancuronium bromide and the potassium chloride.

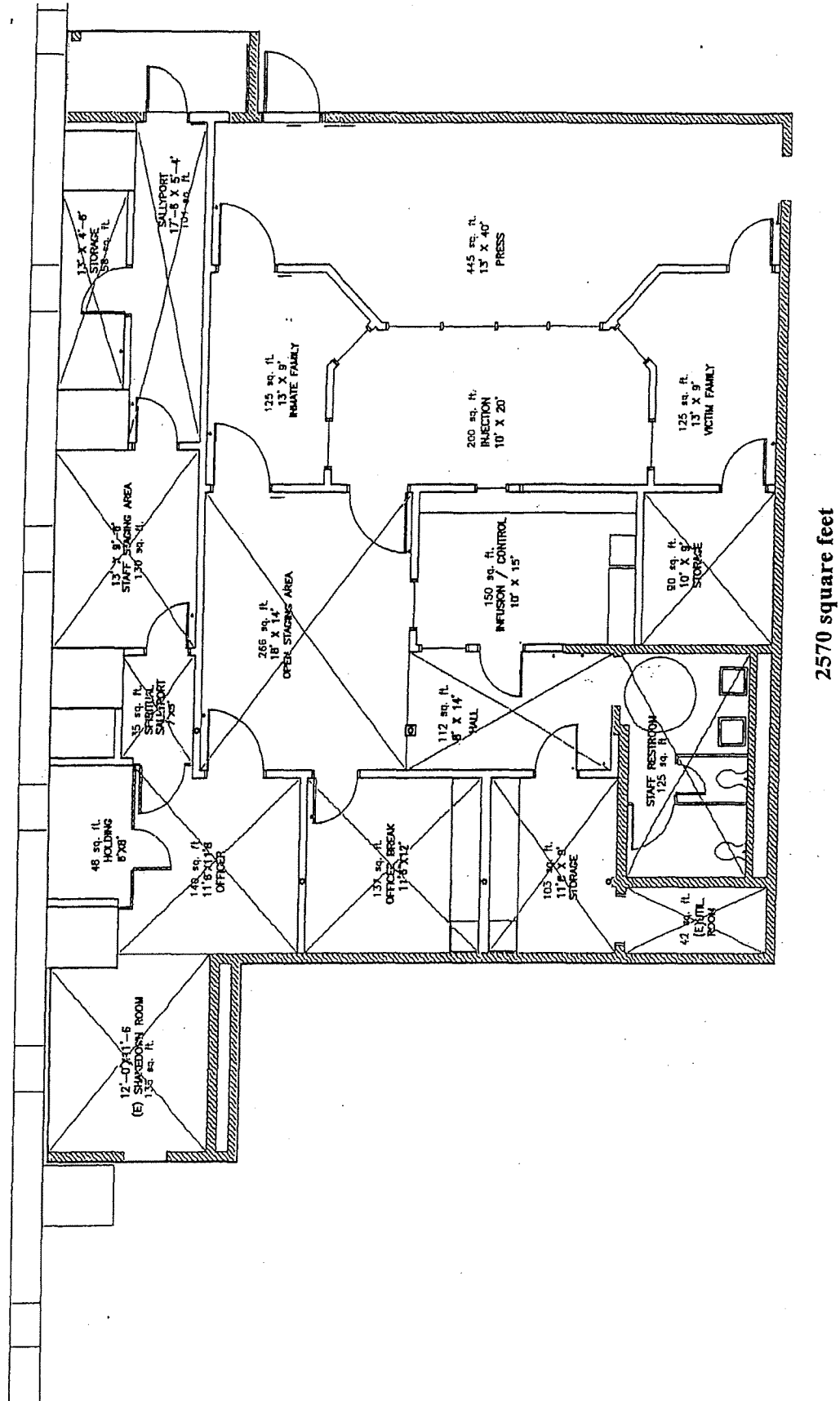
Considering this and other information from literature reviewed, as well as information from other jurisdictions and consultation with an expert, the CDCR elected to retain the three-chemical protocol as the method of execution by lethal injection in California. An overview of the revised protocol is included as an attachment to this report.

These improvements and others will ensure the Lethal Injection Protocol is followed and any unnecessary risk of excessive pain is eliminated. These changes will also instill an appropriate degree of care and professionalism in carrying out "the solemn task of executions in the State of California."

California Department of Corrections and Rehabilitation  
San Quentin State Prison Execution Chamber



California Department of Corrections and Rehabilitation  
San Quentin State Prison Proposed Lethal Injection Site



## California Department of Corrections and Rehabilitation Revised Three-Chemical Lethal Injection Protocol

- Bilateral intravenous catheters will be initiated and maintained with saline drips.
  - One catheter is designated as primary to administer the lethal chemicals.
  - One catheter is designated as back up if the primary fails.
- The Warden will remain in the execution room to observe the condemned inmate throughout the execution.
- A member of the Intravenous Team will remain in the execution room in close proximity to the condemned inmate to observe the condemned inmate throughout the execution. The Intravenous Team Member will continuously monitor the patency of the intravenous catheters and assess the consciousness of the condemned inmate.
- The lethal chemicals will be administered as follows:
  - Two identical trays of lethal injection chemicals will be prepared:
    - Tray "A" color-coded red
    - Tray "B" color-coded blue
- Syringes will be colored-coded and labeled by content and sequence of administration:
  - Beginning with Tray "A"
    - **#1—60cc syringe: 1.5 grams sodium thiopental** will be administered, followed by an assessment of the condemned inmate; the Intravenous Team Member will brush the back of his/her hand over the condemned inmate's eyelashes, and speak to and gently shake the condemned inmate. Observations will be documented. If the condemned inmate is unresponsive, it will demonstrate that he is unconscious. Regardless, the Protocol will continue as follows:
    - **#2—60cc syringe: 1.5 grams sodium thiopental** will be administered.
    - **#3—60cc syringe: 50cc saline flush** will be administered, followed by another assessment of consciousness as outlined above. Observations will be documented. At this point if the condemned inmate is determined to be unconscious, the Warden will authorize the protocol to proceed in the following sequence:
    - **#4—60cc syringe: 50 mg pancuronium bromide**
    - **#5—60cc syringe: 50cc saline flush**
    - **#6—60cc syringe: 100 ml/Eq potassium chloride**
    - **#7—60cc syringe: 100 ml/Eq potassium chloride**
    - **#8—60cc syringe: 50cc saline flush**
- If, following the administration of syringe #2 and syringe #3, the assessment indicates the condemned inmate is not unconscious, the Warden will direct that the injection through the primary intravenous catheter, be discontinued and the entire sequence be re-initiated using chemicals on Tray B via the designated back-up intravenous catheter.
- Complete records will be made and retained of the exact sequence and quantities of the chemicals administered.
- Vital signs will be monitored via ECG.
- Death will be pronounced by a doctor.

**ATTACHMENT B**

San Quentin Operational Procedure, Number 0-770  
May 15, 2007

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**STATE OF CALIFORNIA  
SAN QUENTIN OPERATIONAL PROCEDURE  
NUMBER 0-770  
EXECUTION BY LETHAL INJECTION**

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**May 15, 2007**



**Arnold Schwarzenegger, Governor  
State of California**

**James E. Tilton, Secretary  
Department of Corrections and Rehabilitation**

**Robert L. Ayers, Jr., Warden  
San Quentin State Prison**

<b>SAN QUENTIN STATE PRISON OPERATIONAL PROCEDURE</b>	<b>OP NO:</b>	<b>0-770</b>
	<b>TITLE:</b>	<b>EXECUTION BY LETHAL INJECTION</b>
	<b>REVISED:</b>	<b>May 15, 2007</b>

## **I. PURPOSES AND OBJECTIVES**

- A. The purpose of this procedure is to establish appropriate guidelines for the execution of condemned inmates in compliance with the laws of the State of California and the United States.
- B. The objectives of this procedure are:
  - 1. To establish the care, treatment and management of condemned inmates from the time an execution date is set through the completion of the execution.
  - 2. To establish criteria for the selection, training, and oversight of the Lethal Injection Team.
  - 3. To delineate specific duties and responsibilities of personnel in preparation for and completion of the execution by lethal injection of condemned inmates.
  - 4. To ensure direct supervision and managerial oversight of the Lethal Injection process.

## **II. REFERENCES**

- A. United States Constitution, Amendment VIII
- B. California Penal Code Sections: 1193, 1217, 1227, 3600, 3601, 3602, 3603, 3604, 3605, 3700, 3700.5, 3701, 3702, 3703, 3704, 3704.5, 3705, 3706.
- C. California Code of Regulations, Title 15, Chapter 1, Article 1, 3000, Subchapter 2, Article 7, 3173, c, 1-6, Subchapter 4, Article 1, 3261.5, a-g, Subchapter 4, Article 7.5, 3349, a-d.
- D. California Department of Corrections and Rehabilitation (CDCR) Operations Manual: (DOM), Article 13, 13010.5, Article 17, 13050.1-13050.18, Article 42, 54020.1-54020.22.

## **III. REVIEW AND APPROVAL**

- A. This procedure will be reviewed and/or revised annually in the month of June or at additional times as needed.
- B. The procedure is subject to the approval of the Warden and the Office of the Secretary, CDCR.

#### **IV. RESPONSIBILITY**

- A. The Warden is responsible for the recruitment, selection, retention, and training of all staff involved in the Lethal Injection process. The Warden is also responsible for managerial oversight and overall implementation of this procedure.
- B. The Chief Deputy Warden is responsible for the security of the institution during a scheduled execution.
- C. The Associate Warden, Specialized Housing Division, is the Lethal Injection Team Administrator and is responsible to provide direct managerial oversight and supervision of the Lethal Injection Team's training, preparation, and performance during an execution.
- D. The Lethal Injection Team Leader is responsible for providing direct supervision of the Lethal Injection Team during training, preparation, and the implementation of this procedure.

#### **V. METHODS**

- A. Method of Execution:
  - 1. The judgment of death shall be executed within the walls of the California State Prison at San Quentin.
    - a. The punishment of death shall be inflicted by the administration of a lethal gas or by an 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. (California Penal Code Section: 3604 (a)).
    - b. This procedure provides the direction and process for execution by lethal injection.
    - c. If the inmate elects to have lethal gas as the method of execution, refer to San Quentin Operational Procedure No. 769 for appropriate procedures.
- B. Execution Dates:
  - 1. All execution dates are set in accordance with the provisions of Penal Code Sections 1193 and 1227.
  - 2. The first execution date is set under the provisions of Penal Code Section 1193. The execution date must be scheduled no sooner than 60 days, but no later than 90 days from the 1193 PC hearing.
  - 3. All subsequent execution dates are set under the provision of Penal Code Section 1227. Execution dates set under this provision of the penal code must be scheduled no sooner than 30 days, but no later than 60 days from the 1227 PC hearing.



C. Execution Site:

1. The State of California has established a dedicated Lethal Injection Facility within the walls of the California State Prison at San Quentin for execution by lethal injection.
  - a. The Lethal Injection Facility consists of three (3) witness viewing rooms, one holding cell, an infusion/control room with mixing area, Security Team areas, restrooms, and execution room.
  - b. The witness areas are accessible by a door located at the junction of the South and East Blocks. This area is separate but adjacent to the execution room. Visibility of the execution is through clear security glazing. Maximum capacity of the witness area is fifty (50) individuals.
  - c. The holding cell contains a sink, toilet and sufficient room for a bed and mattress.
  - d. Secure space is provided adjacent to the holding cell for visitation by a spiritual advisor.
  - e. Security Team areas consist of an observation post near the holding cell, a search area, preparation area and a staff restroom.
  - f. The Infusion Control Room has sufficient space to accommodate the Infusion Team and designated members of the Intravenous Team and the Security Team. There is a mixing area located on one wall of the Infusion Room.
  - g. The Lethal Injection Facility safe and refrigerator shall be permanently mounted within the Infusion Control Room.
    - 1) Combination numbers to the Infusion Control Room safe are maintained only by the Warden, Associate Warden, Specialized Housing Division, and the Team Leader.
    - 2) The combination to the Infusion Control Room safe will be changed after each execution to maintain quality control, accountability, and security of lethal injection chemicals.
    - 3) The refrigerator shall be secured within a lockable, heavy gauge, steel enclosure to prevent unauthorized access. Access to the keys for the enclosure shall be limited to the Warden, Associate Warden, Specialized Housing Division, and the Team Leader.
    - 4) The temperature of the refrigerator will be monitored and documented to ensure that the proper storage temperature of the pancuronium bromide is maintained.

- 5) The refrigerator shall be connected to a power supply which is connected to the institution's back-up generator to ensure the integrity of the chemicals in the event of a power outage.

D. Execution Site Operation:

1. Security:

- a. Access to the Lethal Injection Facility will be restricted to staff authorized by the Warden, except in an emergency.
- b. All staff entering the Lethal Injection Facility must have prior approval of the Warden, or acting Warden, in the Warden's absence.

2. Key Procedure:

- a. The keys for the Lethal Injection Facility are located in the Institution's Main Control, in a locked box secured under glass. All access must be approved by the Warden.
- b. Keys allowing access to the Lethal Injection Facility locked box will only be issued to the Warden, Chief Deputy Warden, Associate Warden, Specialized Housing Division, or the Lethal Injection Team Leader.
- c. Each person authorized to draw these keys will be required to sign the key control log noting the time, reason for entry into the Lethal Injection Facility, and time of return.
- d. Each person authorized to draw the keys to the Lethal Injection Facility must personally return the keys to the Control Room to ensure that the keys are properly secured in the locked box under glass. Under no circumstances will the keys be returned by someone other than the person authorized to draw the keys.
- e. Any emergency access to the Lethal Injection Facility will be documented in a written report to the Warden as an unusual occurrence at the institution. The Warden (or Administrative Officer of the Day during weekends, holidays, and 1<sup>st</sup> and 3<sup>rd</sup> watches) will be immediately notified of the reasons access to the Lethal Injection Facility was required.

E. Maintenance:

1. The Associate Warden, Specialized Housing Division, Chief of Plant Operations, and the Lethal Injection Team Leader will conduct documented inspections of the Lethal Injection Facility on a monthly basis. (Attachment 1)
  - a. The Associate Warden, Specialized Housing Division, will work with the Team Leader to complete documented security inspections of the Lethal Injection Facility.
  - b. The Team Leader will inspect all keys, locking devices, security systems, sanitation, electrical, and mechanical systems in the Lethal

Injection Facility to ensure that the Lethal Injection Facility is fully operational at all times.

- c. The Team Leader will immediately report any deficiencies to the Associate Warden, Specialized Housing Division.
  - d. The Team Leader will coordinate with Plant Operations for the immediate repair of any noted deficiencies and for scheduled maintenance as needed.
  - e. The Team Leader will submit a written report to the Associate Warden, Specialized Housing Division, after each monthly inspection attesting to the readiness of the Lethal Injection Facility Security.
  - f. The Chief of Plant Operations will note any deficiencies and schedule immediate repairs as necessary.
  - g. The Chief of Plant Operations will report directly to the Warden the status of any repairs.
2. Thirty days prior to a scheduled execution, the Associate Warden, Specialized Housing Division, shall schedule weekly inspections of the Lethal Injection Facility.
- a. The Associate Warden, Specialized Housing Division, will coordinate with the Team Leader to conduct weekly security inspections of the Lethal Injection Facility.
  - b. The Team Leader will follow the procedures identified in Section V E. 1. b. through g., above, when conducting these weekly inspections.
3. Five days prior to a scheduled execution, the Associate Warden, Specialized Housing Division, shall schedule daily inspections of the Lethal Injection Facility.
- a. The Associate Warden, Specialized Housing Division, will personally conduct the daily inspections of the Lethal Injection Facility with the Team Leader.
  - b. The Associate Warden, Specialized Housing Division, will confirm that all items (clothing, personal hygiene items, television, radio, etc.) needed to re-house the inmate in the Lethal Injection Facility Secured Holding Area are present prior to re-housing the inmate in the Lethal Injection Facility.
4. On the morning before a scheduled execution, the Associate Warden, Specialized Housing Division, Chief of Plant Operations, and the Team Leader will make a final inspection of the Lethal Injection Facility. All deficiencies will be reported directly to the Warden.

F. Selection, Recruitment and Annual Review of Lethal Injection Team Members:

1. The purpose of this section is to establish a process and criteria for the recruitment, screening, and selection of members of a team to carry out the judgment of death in compliance with the laws of the state of California and the United States.
2. Recruitment and Screening Process:
  - a. With the assistance of the Director, Division of Adult Institutions (DAI), the Warden will coordinate the recruitment and selection of Lethal Injection Team Members. The Lethal Injection Team will consist of a minimum of 20 members. The total number of Lethal Injection Team Members will be determined by the Warden.
  - b. In the event the Warden is unable to field a sufficient number of qualified Lethal Injection Team Members, the Warden will contact the Director, DAI, to coordinate the identification of additional potential candidates for team membership. Prospective team members will be selected from departmental locations as determined appropriate by the Director, DAI.
  - c. The hiring authorities from designated locations will select prospective team members from personnel assigned to their respective areas of responsibility consistent with selection criteria listed below. The hiring authorities will forward the names and classifications of prospective team members to the Director, DAI.
    - 1) The Warden will select a panel of individuals to review qualifications, interview prospective candidates, and select Lethal Injection Team Members. The Associate Director, Reception Centers and the Lethal Injection Team Leader will participate as panel members.
    - 2) The Warden will chair the panel and be responsible for the selection of team members consistent with the criteria outlined in this section.
    - 3) If necessary, specialists may be contracted to perform specific duties during the Lethal Injection Process.
  - d. Screening of Candidates
    - 1) The panel will screen all candidates to ensure that each candidate meets the criteria established for membership on the four designated teams.

The selection panel screening process will include:

- a) Review of all the available candidate's performance evaluations.
  - b) Review of the candidate's Personnel, Supervisory, and Training files.
  - c) Review of the candidates current CI&I Report from the California Department of Justice.
- 2) The selection panel will interview each candidate to determine the following:
  - a) Personal History and Background
  - b) Professional Experience
    - i. Identify professional experiences, e.g., custody, administrative, that would aid them in performing this duty.
    - ii. Identify the professional characteristics which made this individual a candidate for membership on the team.
  - c) The selection panel will establish a pool of employees that have been approved for membership on the team. The Director, DAI, will ensure that a sufficient number of employees, in all four categories, will be maintained. It is the responsibility of the San Quentin Warden to notify the Director, DAI, of the necessity to fill vacancies.
- 3. Duties performed by the team members may include:
  - a. Security
  - b. Intravenous Access
  - c. Infusion of Lethal Chemicals
  - d. Record Keeping
- 4. Criteria for Lethal Injection Team membership:
  - a. Each team member will be selected based on their qualifications and expertise to effectively carry out the duties in one of these specialized functions.

The following criteria will be utilized in the selection of all personnel assigned to the team:

- 1) Volunteer.
  - 2) Demonstrated professional job performance and demeanor.
  - 3) Good attendance record.
  - 4) No prior stress claims.
  - 5) No corrective action in the past three years.
  - 6) No sustained Adverse Action as reflected in CDCR and State Personnel Board records and as substantiated by the candidate.
  - 7) Annual permanent employee performance evaluations that meet or exceed expected standards.
  - 8) Must not be on probation in the candidate's current classification. This criteria does not apply to promotions made subsequent to initial placement on the Lethal Injection Team.
  - 9) Must not have been assigned to any condemned housing unit either full- or part-time in the past 12 months.
- b. In addition to the general selection criteria, each specific team category will have the following criteria:
- 1) Team Leader Assignment Selection Criteria – Lieutenant or Captain:
    - a) Five years of supervisory experience.
    - b) Proven ability to make sound decisions and effectively direct the actions of others.
    - c) Demonstrated proficiency in the transportation of inmates and the application of restraints.
    - d) Good physical condition.
  - 2) Security Team Assignment Selection Criteria – Assistant Team Leader – Sergeant or Lieutenant:
    - a) Three years of supervisory experience.
    - b) Proven ability to make sound decisions and effectively direct the actions of others.

- c) Demonstrated proficiency in the transportation of inmates and the application of restraints.
  - d) Good physical condition.
- 3) Security Team Assignment Selection Criteria – Correctional Officer or Sergeant:
  - a) Three years of line experience.
  - b) Proven ability to make sound decisions.
  - c) Demonstrated proficiency in the transportation of inmates and the application of restraints.
  - d) Good physical condition.
- 4) Intravenous Team Assignment Selection Criteria:
  - a) Demonstrated ability to insert an intravenous catheter or catheters into an appropriate vein or veins of an inmate.
  - b) Demonstrated ability to set up intravenous lines and intravenous drip.
  - c) Qualified in the appropriate placement of the ECG leads utilized during this process.
- 5) Infusion Team Assignment Selection Criteria:
  - a) Able to follow the directions provided by the manufacturer in mixing the chemicals.
  - b) Possess the organizational skills necessary to appropriately label and color code the chemical used during the lethal injection protocol.
- 6) Record Keeping Team Assignment Selection Criteria:
  - a) Understanding of the critical need to keep accurate records during the Lethal Injection process.
  - b) Demonstrated expertise in report writing and record keeping.

5. Annual Review:

In order to ensure that the selection criteria for membership on the Lethal Injection Team is maintained, an annual compliance review will be conducted by the Warden of San Quentin. This will be conducted annually in the month of June.

This review will include, but not be limited to, the following:

- a. Review of the Personnel, Supervisory, and Training files.
- b. Review of most recent performance evaluation.
- c. Review of the CI&I Report from the California Department of Justice.

G. Training:

1. The purpose of this section is to establish a training regimen for Lethal Injection Team Members. This training will ensure that the Lethal Injection Team Members have the necessary skills and experience to carry out their specific tasks during a lethal injection execution. Training is a necessary aspect of this procedure. The serious nature of this procedure requires all members of the Lethal Injection Team to be thoroughly trained in their respective roles, and to have a general knowledge and familiarization in the entire lethal injection process.
2. The Associate Warden, Specialized Housing Division, has direct responsibility to ensure that relevant quality training is provided to each member of the Lethal Injection Team.
3. Each Lethal Injection Team Member will undergo specific training relevant to their assigned duties during an execution. The following categories of teams have been identified:
  - a. The Security Team
  - b. The Intravenous Team
  - c. The Infusion Team
  - d. The Record Keeping Team
4. Training for all Lethal Injection Team Members:
  - a. Monthly training will include, but not be limited to:
    - 1) A simulation of an execution by lethal injection.



- 2) Training on potential problems and recommendations for avoidance or resolution.
- b. The Team Leader and Security Team training will include but not be limited to:
- 1) Application of restraints.
  - 2) Escort and transportation of inmates.
  - 3) Inmate/staff relations.
  - 4) Effective communication.
  - 5) Appropriate methods of securing the condemned inmate so restraints do not interfere with the intravenous lines.
  - 6) Departmental Use of Force Policy and use of force techniques.
  - 7) Potential problems and recommendations for avoidance or resolution.
- c. Intravenous Team training will include but not be limited to:
- 1) Maintaining current certification and license to insert intravenous catheters into peripheral veins.
  - 2) Maintaining a current certification and license for placement of the ECG leads used during the lethal injection process.
  - 3) Set up intravenous lines and intravenous drip.
  - 4) Understanding the different sizes of intravenous catheters and determination of the proper size of the catheter(s) to be used, dependent on the size of the vein.
  - 5) Potential problems and recommendations for avoidance or resolution.
- d. Infusion Team training will include but not be limited to:
- 1) Appropriate mixing of the chemicals used in the lethal injection process.
  - 2) Proper level and rate of infusion of the chemicals into the intravenous lines established by the Intravenous Team.

- 3) Proper sequence of infusion of the three chemicals used in the lethal injection process and the physical effects that each chemical can have on the inmate as they are administered.
  - 4) Numbering and color-coding of the syringes used in the lethal injection process to ensure each chemical is administered in appropriate order.
  - 5) Proper handling and accountability of controlled substances.
  - 6) Potential problems and recommendations for avoidance or resolution.
- e. Record Keeping Team training will include but not be limited to:
- 1) Accurate record keeping.
  - 2) Report writing.
  - 3) Specific records used to document an execution.

## 5. Training Schedule

- a. Training shall be conducted monthly for all Lethal Injection Team Members. Specific training dates will be arranged by the Team Leader and approved by the Associate Warden, Specialized Housing Division.
- b. When a Death Warrant has been served on an inmate, the Lethal Injection Team Leader will schedule training in the 30 days immediately preceding the scheduled execution date.
- c. Three days prior to a scheduled execution, the Associate Warden, Specialized Housing Division, will activate all members of the Lethal Injection Team. Daily training and preparedness exercises will be conducted during each of the three days immediately preceding the scheduled execution.
- d. The Lethal Injection Team will train at least once per month for a minimum of eight (8) hours. The Lethal Injection Team will also attend additional training as directed by the Lethal Injection Team Leader. Any specialists contracted to perform specific duties during the Lethal Injection process will train at least annually with the Lethal Injection Team.
  - 1) All Lethal Injection Team Members must attend all training unless on approved vacation/sick leave.
  - 2) The training will include but will not be limited to, security of the Lethal Injection Facility, custody of the inmate, intravenous line applications, the proper documentation of

events, properties of the chemicals used as well as mixing, preparation, and the infusion of the lethal injection chemicals.

- 3) All Lethal Injection Team Members must attend at least six (6) training sessions prior to being assigned duties during an execution. This includes a minimum of three (3) training sessions in the six months immediately preceding a scheduled execution and participation in each of the three daily training sessions immediately preceding the scheduled execution.
- 4) All contracted specialists must attend at least one (1) training session in the year immediately preceding a scheduled execution and participate in each of the three daily training sessions immediately preceding the scheduled execution.

#### 6. Training Methods

- a. All simulation training sessions will include a complete walk-through of a simulated execution by lethal injection in the Lethal Injection Facility.
- b. All training will be conducted using San Quentin Operational Procedures No. 0-770 and approved lesson plans. No unauthorized lesson plans shall be utilized.
- c. Lethal Injection Team Members will be trained to ensure a general understanding and familiarization of each teammate's duties.
- d. Except for necessary out-service classes to maintain certifications and/or licenses, all training will be conducted in the Lethal Injection Facility.
- e. Potential problems and recommendations for avoidance or resolution.

#### 7. Training Documentation and Records

- a. The Associate Warden, Specialized Housing Division, will maintain a lethal injection protocol training file. This training file will contain a record of all lethal injection protocol training sessions.
- b. A lethal injection protocol checklist will be completed by the Lethal Injection Team Leader or designee during each training session to document that appropriate training was conducted and a complete walk-through of the lethal injection protocol was conducted.
- c. In-Service Training sign-in sheets will not be completed during training sessions and the names of the Lethal Injection Team Members will not be included in the training file.

H. Lethal Injection Record Keeping and Documentation:

1. The Litigation Coordinator is responsible for the security of all documents generated prior to, during, and after the Lethal Injection process. Each Associate Warden is responsible to ensure that all documents generated by staff are accurate, completed in a timely manner, and forwarded to the Litigation Coordinator. The Associate Warden, Specialized Housing Division, is responsible to ensure that all documents generated by the Lethal Injection Team are accurate, completed in a timely manner, and forwarded to the Litigation Coordinator. The Litigation Coordinator will maintain the Master Execution File in the Warden's Office Complex. The Master Execution File will serve as a permanent record of all documents related to the execution.
2. Each element of the Lethal Injection Protocol will be documented by a member of the Record Keeping Team assigned to maintain records of the Lethal Injection process.
  - a. The Condemned Unit Correctional Counselor II will collect and log all documents from the inmate on the Correctional Counselor's Pre-Execution Log. All documents received from the inmate as well as the Correctional Counselor's Pre-Execution Log will be forwarded to the Litigation Coordinator for inclusion in the Master Execution File. (Attachment 11)
  - b. The Litigation Coordinator will maintain a copy of and log all documents and notices between San Quentin State Prison and Headquarters, CDCR, or any other agency or organization.
  - c. The Team Leader will ensure documentation of the following:
    - 1) All training of the Execution Team.
    - 2) All inspections of the Lethal Injection Facility.
    - 3) All activities regarding the lethal injection process and all inmate activities after the inmate is re-housed in the Lethal Injection Facility Holding Area.
  - d. The Team Leader will assign a member of the Record Keeping Team to the Lethal Injection Team Administrator, Team Leader, the Security Team, the Intravenous Team, and to the Infusion Team to ensure that these teams' duties are documented without distracting the team members from the task at hand.
  - e. Immediately following the execution, the Lethal Injection Team Leader will complete the Execution Report-Part A. (Attachment 22)

- 1) Each team member will complete an Execution Report-Part B, documenting their actions and observations during the execution. (Attachment 23)
  - 2) Team members will use identifiers assigned to their specific position (duties), rather than their names and classifications, when completing the Execution Report.
  - 3) The Lethal Injection Team Leader will assemble the complete Execution Report for review by the Associate Warden, Specialized Housing Division. The Execution Report will include all appropriate supplemental reports.
- f. All records of the execution will be processed by the Associate Warden, Specialized Housing Division. The Associate Warden will personally meet with the Record Keeping Team following the execution to evaluate and critique all records submitted for inclusion in the Master Execution File.
- g. The Public Information Officer will ensure the Litigation Coordinator is provided a copy of press releases regarding the Lethal Injection Protocol.
3. Documents to be maintained.
- a) Each sub-file within the Master Execution File shall contain the following documentation.
    - 1) Notifications to inmate and involved agencies
      - i. Application for Setting of Execution Date
      - ii. Death Warrant
      - iii. CDCR 1801, Notification of Execution date and Choice of Execution Method
      - iv. CDC 1801-B, Execution Order Notice of Service
      - v. Notice to Director, Division of Adult Institutions
      - vi. Notice to Governor's Legal Affairs Secretary
      - vii. Memo to Director Identifying Alienist Panel
      - viii. CDC 1801-A, Choice of Execution Method
      - ix. Thirty Day Notice Signed by Inmate
      - x. Media Notification of Scheduled Execution
    - 2) Medical Review Documentation
      - i. 20-day Execution Report (PC 3700.5)
      - ii. Medical Status Report
      - iii. 7-day Report
      - iv. PC 3700 Sanity Notice to District Attorney

- 3) Inmate Visiting Records
  - i. Inmate Visiting File
  - ii. Inmate Visiting History
  - iii. Request for Approval of Visitors from the Thirty-Day Notice
- 4) Inmate's completed attachments from the Thirty-Day Notice
  - i. Request for Approval of Witnesses
  - ii. Disposition of Property
  - iii. Next of Kin Notification
  - iv. Last Meal Request
  - v. Release of Remains and Burial Arrangements
- 5) Pre-Execution Logs and Checklists
  - i. CDCR 128B Shift Summary Chronos
  - ii. Lethal Injection Facility Activity Log
  - iii. Condemned Unit 15-minute check logs
  - iv. Correctional Counselor's Pre-Execution Log
- 6) Equipment and Controlled Substance Accountability Reports
  - i. Pre- and Post Lethal Injection Supply Inventories
  - ii. Pre- and Post Lethal Injection Controlled Substance Inventories
  - iii. Controlled Substance Chain of Custody Reports
  - iv. Security Equipment Inventories
- 7) Execution Records
  - i. Security Team Log
  - ii. Intravenous Team Log
  - iii. Infusion Team Log
  - iv. Lethal Injection Administrator/Team Leader Log
  - v. ECG graph paper
  - vi. Lethal Injection Facility Announcements
  - vii. Emergency Operations Center Log
- 8) Post Execution Logs and Records
  - i. Death Certificate
  - ii. Return of Death Warrant
- 9) Legal Documents
  - i. Execution Related Pleadings
  - ii. Ancillary Lawsuits

- iii. Clemency Petition
- iv. Clemency Decision

10) Correspondence

- b) If additional documentation is generated as a result of the Lethal Injection Protocol, those documents will be added to the appropriate sub-file category.

4. Review of the Master Execution File.

- a) After an execution has been concluded the Associate Warden, Specialized Housing Division, will review the Master Execution File to ensure that all documents are accounted for and appropriately categorized.
- b) If force was utilized at any point during the Lethal Injection Protocol, the Execution Report will be available to the Executive Use of Force Review Committee. When the committee has completed its review of the use of force, the Executive Use of Force Review Committee findings and all associated documentation will be added to the Master Execution File.

I. Lethal Injection Team Duties:

- 1. The Associate Warden, Specialized Housing Division, is the Lethal Injection Team Administrator, and will ensure that the Lethal Injection Team is appropriately trained and prepared to carry out their specific duties.
- 2. The Lethal Injection Team Leader will be a custody supervisor at the rank of Correctional Lieutenant or Captain.
- 3. The Lethal Injection Team Members will be assigned by the Team Leader to one (1) of the following duties:
  - a. Security Team. The Security Team will perform the following tasks:
    - 1) Ensure that the Lethal Injection Facility is prepared.
    - 2) Provide direct constant supervision of the inmate in the final six hours prior to the execution.
    - 3) Place the inmate in appropriate restraints and escort the inmate into the execution room prior to the scheduled execution.
    - 4) Provide security of the Lethal Injection Facility during an execution.
    - 5) Provide post-execution security.

- b. Intravenous Team. The Intravenous Team will perform the following tasks:
  - 1) Assist in preparing the inmate by placing the ECG pads on the inmate's chest prior to the execution.
  - 2) Insert the intravenous catheters into appropriate veins in the inmate.
  - 3) Monitor the intravenous lines to ensure patency of the lines.
  - 4) Crimp and uncouple the intravenous lines after the inmate has expired.
- c. Infusion Team. The Infusion Team will perform the following tasks:
  - 1) Receive the Lethal Injection Chemicals from the Associate Warden, Specialized Housing Division, after removal from the Lethal Injection Facility safe or refrigerator prior to the scheduled execution.
  - 2) Mix the Lethal Injection Chemicals in accordance with the manufacturer's instructions and draw the needed chemicals into the appropriate syringes.
  - 3) Label and color-code the syringes.
  - 4) Infuse the Lethal Injection Chemicals in accordance with this procedure.
- d. The Record Keeping Team will perform the following tasks:
  - 1) One member of the Record Keeping Team will be assigned to each of the following teams: Security Team; Intravenous Team; Infusion Team. One member of the Record Keeping Team will be assigned to the Lethal Injection Team Administrator and Team Leader.
    - a) The Record Keeping Team Member assigned to the Infusion Team will complete the Infusion Team Execution Log. (Attachment 16)
    - b) The Record Keeping Team Member assigned to the Intravenous Team will complete the Intravenous Team Execution Log. (Attachment 19)
    - c) The Record Keeping Team Member assigned to the Security Team will complete the Security Team Execution Log. (Attachment 20)



- d) The Record Keeping Team Member assigned to the Lethal Injection Administrator Team and the Lethal Injection Team Leader will complete the Lethal Injection Administrator/Team Leader execution Log. (Attachment 21)
- 2) The Record Keeping Team will document each element of the lethal injection process.
- 3) Upon completion of the execution, the Record Keeping Team will assemble all documents pertaining to the lethal injection process for inclusion in the Master Execution File.
- e. A physician will be assigned to monitor the ECG for signs that the inmate has expired.

J. Selection of Witnesses:

- 1. The Warden shall invite the Attorney General, members of the immediate family of the victim or victims, and at least 12 reputable citizens, to be selected by the Warden. (See Penal Code Section 3605)
- 2. The Warden shall at the request of the condemned inmate, permit those spiritual advisors, not exceeding two, as the condemned inmate may name, and any persons, relatives or friends, not to exceed five, to be present at the execution.
- 3. The Warden shall authorize those peace officers or other CDCR employees as he or she may as deemed necessary to witness the execution.
- 4. Number of persons permitted in the witness viewing rooms:

- a. A maximum of 50 persons will be approved within the following designations.

Official Witnesses:	12
(Includes victim(s) families)	
Attorney General:	1
San Quentin security staff:	8
News media witnesses:	17
Witnesses requested by inmate: (7)	
Spiritual advisor:	2
Family/friends:	5
Governor's Office/CDCR/Victim(s) Families:	5
Total:	50

- b. The Office of the Inspector General will be permitted one (1) observer in the Infusion/Control Room of the Lethal Injection Facility during an execution. No other observers will be permitted in the Lethal Injection Facility.

K. News Media Witnesses:

- 1. Media is defined in Title 15, CCR Section 3000 and DOM subsection 13010.5.

- a. When an execution is scheduled, the CDCR, Assistant Secretary, Office of Public and Employee Communications, will notify the media and establish a 10-day filing period in which media may request to witness the execution. (Attachment 2)
  - b. Requests will be accepted only during the designated 10-day filing period.
  - c. All media requests to witness an execution shall be directed to the CDCR, Assistant Secretary, Office of Public and Employee Communications, 1515 S Street, Sacramento, California, 94283-0001.
  - d. Requests will be considered only for the scheduled execution and will not be kept "on file."
2. The Assistant Secretary, Office of Public and Employee Communications, and the San Quentin Public Information Officer will consult with the Warden to select the members of the news media to witness an execution. All media witnesses must agree to the use of a "pool" method and all media witnesses must agree to release information simultaneously to all other news agencies at a press conference held after the execution.

L. Confidentiality of Witnesses:

1. The names of the witnesses will not be released.

M. Processing of Witnesses:

1. All witnesses must arrive at the institution's West Gate at the time designated by the Warden.
2. Parking will be in the designated parking area.
3. All witnesses will be screened per existing procedures.
  - a. All witnesses must have a valid ID as outlined in California Code of Regulations, Title 15, Section; 3173, c, 1-6.
  - b. No blue jeans, no jeans-style blue, black, or grey pants or Levi's.
  - c. No cameras, cell phones, blackberries, tape recorders, electronic devices, or drawing implements, etc., will be permitted in the witness area.

N. Witnesses Accommodation Prior to Execution:

1. There will be three designated witness staging areas; one for Official/Victim Witnesses, one for Media Witnesses, and one for the Inmate's Witnesses.
2. After screening, each group will be escorted to their respective staging area.
3. All witnesses will view an execution orientation video in their respective staging area.

4. At a time directed by the Warden, the witnesses will be escorted to their respective designated witness rooms within the Lethal Injection Facility.

O. Witness Accommodation after Execution:

1. After the announcement of death, the official witnesses and victim's witnesses will be escorted back to their designated staging area. The inmate's witnesses will be transported to the West Gate and processed out of the institution.
2. The Media Witnesses will be transported to the media area to await the Warden's press conference which will be conducted approximately one (1) hour after the execution.

P. Selection and accommodations of media not selected to witness the execution:

1. The San Quentin Public Information Officer, under the direction of the Warden, in conjunction with the Assistant Secretary, Office of Public and Employee Communications, is responsible for selection, accommodation, and coordination of news media personnel not selected to witness the execution.
2. Members of legitimate media, as defined in Title 15, CCR Section 3000 and DOM subsection 13010.5, will be allowed on San Quentin grounds on the day and time specified by the Warden.
  - a. Requests must be made to the Assistant Secretary, Office of Public and Employee Communications via the process outlined in the media advisory.
  - b. A maximum of 125 non-witness news media personnel will be permitted to remain in the media area during and after the execution.
    - 1) Parking will be in the designated parking area. Media broadcast vans will be admitted to the institution grounds on a space-available basis with prior written approval. Requests for such accommodations should be made when requesting to cover the event. All media members must have a valid State of California photo I.D. (as outlined in CCR, Title 15; Section; 3173; c; 1-6)
    - 2) The non-witness media members will be processed at the West Gate and escorted to the media area.
    - 3) After the execution, the media witnesses will join the non-witness media as soon as possible at the media area for the media press conference, where they will relate what they witnessed to the non-witness media.
    - 4) No more than thirty minutes after the conclusion of the Warden's press conference, the escorting of all media personnel to the West Gate will begin.
3. Interviews with Condemned Inmates.
  - a. All interviews will be consistent with departmental policy. (CCR, Title 15, Section 3261.5, paragraph a-g)

4. Information Releases.

- a. The names of the 12 official witnesses will not be released.
- b. The names of Lethal Injection Team Members will not be released, nor will the members be available for interviews or photographs.
- c. The San Quentin Public Information Officer and Assistant Secretary, Office of Public and Employee Communications will be responsible for all CDCR press releases prior to, during and after an execution and for the developing of all information releases.
- d. The Warden, with the assistance of the Assistant Secretary and Public Information Officer, will hold a press conference approximately one hour after an execution. No other interview(s) will be given by the Warden after the news conference is completed.

Q. Communication:

1. To facilitate access to the Warden by the courts, the Governor's Office, and the Attorney General during business hours and at critical stages prior to an execution, dedicated telephone lines to the State Supreme Court, the Governor's Office, and the State Attorney General's Office will be opened and staffed beginning at least fifteen minutes prior to the execution.

R. Chronology of Events Prior to Execution:

1. Upon receipt of the execution order:
  - a. The Warden will:
    - 1) Notify the Director, DAI, and all other appropriate officials identified in this procedure.
    - 2) Together with the Correctional Counselor II, Litigation Coordinator, and the Associate Warden, Specialized Housing Division, interview the inmate to be executed, serve the warrant of execution, and document the interview on CDC-1801B, Service of Execution Warrant, Warden's Initial Interview. (Attachment 3)
      - a) Inform the inmate of the choices of execution method, either lethal injection or lethal gas and document this on the CDC-1801, Notification of Execution Date and Choice of Execution Method. (Attachment 4)
      - b) Instruct the inmate to indicate his choice within 10 days on CDC-1801-A, Choice of Execution Method, with the explanation that if no choice is made, lethal injection will be the method of execution. (Attachment 5)

- c) Provide the inmate a copy of the Thirty-Day Notification informational package regarding visiting, phone calls, witness list, burial arrangements, and the general rules and procedures that will be utilized during the days leading up to the date of execution. (Attachment 6)
  - 3) Notify the Governor's Legal Affairs Secretary by overnight mail of the scheduled execution with a copy of the execution order enclosed.
  - 4) Submit to the Director, DAI, the names of the three (3) psychiatrists who will serve as the required panel of alienists. The alienists will be employees of CDCR who have previously received the approval of the Director, DAI.
  - 5) Meet with all staff involved in the lethal injection process to ensure that all staff understands their roles in the scheduled execution.
- b. The Chief Deputy Warden will:
- 1) Review this Operational Procedure and the Emergency Operations Plan to ensure they are current.
- c. The Associate Warden, Specialized Housing Division, will:
- 1) Together with the Correctional Counselor II, Litigation Coordinator and the Warden, interview the inmate to be executed, serve the warrant of execution, and document the interview on CDC-1801B, Service of Execution Warrant, Warden's Initial Interview.
  - 2) Direct the Execution Team Leader to ensure the Lethal Injection Facility is maintained and is operational.
  - 3) Refer the inmate for a vein assessment to determine the size, location, and resilience of the veins in the inmate's antecubital areas. If a suitable vein is not available, alternate insertion sites will be considered, including but not limited to:
    - a) Forearm
    - b) Wrist
    - c) Back of hand
    - d) Top of foot

- e) Ankle, lower leg, or other appropriate location.
- 4) Report the results of the vein assessment to the Warden.
- d. The Lethal Injection Team Leader will notify Lethal Injection Team Members of the Execution Order.
- e. The Condemned Unit Correctional Counselor II will:
  - 1) Together with the Associate Warden, Specialized Housing Division, Litigation Coordinator and the Warden, interview the inmate to be executed, serve the Warrant of Execution, and document the interview on CDC-1801B, Service of Execution Warrant, Warden's Initial Interview.
  - 2) Maintain close daily contact with the inmate upon service of the execution warrant.
  - 3) If the condemned inmate cannot communicate effectively, the Correctional Counselor II will obtain the services of an interpreter.
- f. The Litigation Coordinator will:
  - 1) Advise the Warden of any pending litigation regarding the condemned inmate or the scheduled execution.
  - 2) Together with the Warden, Associate Warden, Specialized Housing Division, and Condemned Unit Correctional Counselor II, interview the inmate to be executed, serve the warrant of execution, and document the interview on CDC-1801B, Service of Execution Warrant Warden's Initial Interview.
  - 3) Obtain from the Visiting Lieutenant a copy of the list of approved visitors and a printout of visits weekly.
  - 4) Instruct the Office Assistant who schedules legal visiting to give priority accommodations to the attorney for the inmate. If a scheduling problem occurs, the Litigation Coordinator must immediately be notified.
  - 5) Construct a Master Execution File for the inmate that shall contain all pertinent documents; i.e., execution order, photocopy of the visiting printout, Service of Execution, Warrant Notification of Execution Date and Choice of Execution Method, pre-execution activity log, CDC-128B's, and any other pertinent information.

- a) This Master Execution File shall be kept in the Litigation Coordinator's office.
  - b) In the event the execution is stayed, the Master Execution File will be closed and filed in the Litigation Coordinator's office.
- 6) Update the list of scheduled executions and distribute it to the Administrative Officer of the Day book, and also to the Chief Deputy Warden, Associate Warden, Specialized Housing Division, Visiting Lieutenant, Mailroom Sergeant, Chief Psychiatrist and Chaplains.
- g. The Warden's Administrative Assistant will:
  - 1) Act as liaison between the inmate's family and the Warden.
  - 2) Direct the mailroom Sergeant to deliver all non-legal incoming mail for the inmate to the Administrative Assistant to be inspected, logged, and forwarded to the inmate via the oncoming Third Watch Condemned Row Sergeant.
    - a) Mail that is sent to the inmate by anonymous senders, containing offensive messages, will be hand carried to the inmate by the Condemned Row Correctional Counselor II. The Correctional Counselor II will give the inmate the option to accept or reject the offensive correspondence.
  - 3) Instruct the First Watch Condemned Row Sergeant to inspect and log all non-legal outgoing mail from the inmate.
    - a) The Condemned Row Sergeant will forward any unusual mail immediately to the Administrative Assistant for the Warden's attention.
    - b) This process must be handled expeditiously to avoid unnecessary delay of outgoing or incoming mail.
- h. The Public Information Officer will:
  - 1) Advise the Assistant Secretary, Office of Public and Employee Communications, by telephone, of the execution date and coordinate the development of a press release for news media agencies.
- i. The Visiting Lieutenant will:
  - 1) Flag the computer file, in the memo field, with the following instruction:

- a) Priority Visiting Privileges. Do not turn away visitors without approval of Warden or Administrative Officer of the Day. Notify the Warden's office (Public Information Officer) seven days prior to a scheduled execution, of each visit that this inmate has on the day that it occurs.
    - b) Ensure compliance with these instructions.
  - 2) Make photocopies of the inmate's visiting file along with a computer printout of all approved visitors and deliver them to the Litigation Coordinator.
  - 3) Ensure the attorney for the inmate is afforded assistance in expeditiously having access to their client. In the final weeks prior to the execution, this may include facilitating attorney visits during weekends and holidays if necessary.
  - 4) Arrange for visiting:
    - a) Grade A inmate visiting will take place in the Plexiglas booth of the Main Visiting Room during normal visiting hours. A Correctional Officer will be assigned to provide constant and direct supervision of the visit.
    - b) Grade B inmates will continue to receive non-contact visits in the Main Visiting.
2. Approximately 45 days prior to an execution:
- a. The Warden will:
    - 1) Work with the Attorney General's Office of Victims' Services to confirm the availability of victim(s) family members and the selection of 12 official witnesses and 2 or more alternates.
    - 2) Initiate the process for completion of the 20-day pre-execution report, Penal Code 3700.5, for submission to the Director, Division of Adult Institutions. The report shall include the following:
      - a) A current psychiatric report, written by each of the three alienists.
      - b) Comments of the chaplain attending to the inmate.



- c) A summary of the inmate's conduct and behavior, submitted by the Condemned Row Correctional Counselor II.
  - d) A cover letter from the Warden.
- b. The Associate Warden, Specialized Housing Division, will:
  - 1) Move the inmate to a designated area.
    - a) Inmates housed in East Block will be moved to the first tier upon receipt of the Death Warrant.
    - b) Inmates in North Segregation will remain in their assigned cells.
    - c) Inmates in the Adjustment Center will remain in their assigned cells.
  - 2) Implement hourly checks and logs prepared by condemned unit staff.
  - 3) Direct the condemned unit staff to commence documentation of the inmate's behavior on CDC 128B on each shift.
    - a) The 128B's will be forwarded daily to the Litigation Coordinator via the Associate Warden, Specialized Housing Division.
    - b) Any documentation regarding unusual behavior will be brought to the attention of the Warden.
  - 4) Visit the unit daily to ensure procedural follow through. Sign in on unit log book with each visit.
- c. The Public Information Officer will:
  - 1) Coordinate with the Assistant Secretary, Office of Public and Employee Communications, to make distribution of an announcement to the media via recognized wire services that the execution is scheduled.
    - a) The Advisory must provide instructions to media representatives wishing to witness or otherwise cover the event.
    - b) The Public Information Officer and Assistant Secretary, Office of Public and Employee Communications will announce a 10-day filing period in which the news media may submit their written requests to witness the execution.

- c) Media witness requests must be for the scheduled execution and will not be kept on file.
  - d) No request will be considered that is received after close of business on the tenth and final day.
- 2) Work with the Assistant Secretary to select up to 17 media witnesses to the execution. Consideration will be given to the broadest cross-section of media format and greatest circulation or viewers.
- d. The Psychiatrists (Alienists) will:
  - 1) Interview and examine the inmate within sufficient time to evaluate the findings and give written reports to the Warden within the Warden's 20-day report deadline. (Attachment 7)
  - 2) The written reports shall include an interpretation of the examinations, interviews, and history and shall be stated in lay wording.
  - 3) Information available to one psychiatrist pertinent to the inmate's sanity shall be made available to the other two psychiatrists for evaluation and inclusion in the appropriate psychiatric reports.
- e. The Chaplain will:
  - 1) Interview the inmate to assess the inmate's spiritual and emotional well-being.
  - 2) Determine the inmate's religious preferences and needs, next of kin, funeral or other requests, attitudes or thoughts on death and dying, and note any observations regarding the inmate's emotional stability such as acceptance of the sentence of death, etc.
  - 3) Formulate these observations into a written report and submit it to the Warden within sufficient time to meet the Warden's 20-day report deadline.
- f. The Condemned Row Correctional Counselor II will:
  - 1) Assess the observations of the inmate's counselor and custody staff, and research the case history to determine the inmate's past and present conduct and behavior.
  - 2) Submit this information in writing to the Warden within sufficient time to meet the Warden's 20-day report deadline.

- 3) Continue close daily contact with the inmate. Collect the completed pages of the Thirty-Day Notice that was provided to the inmate by the Warden.
3. Approximately 30 days prior to an execution:
  - a. Sanity Review Request:
    - 1) Attorneys may submit in writing for the Warden's review, any current psychiatric information that they believe may have a bearing on evaluating the sanity of a condemned inmate with a scheduled execution date.
    - 2) This information will be accepted within 30 days and up to 7 days prior to the scheduled execution.
      - a) Information submitted more than 30 days will be accepted for consideration by the panel of alienists.
      - b) The panel of alienists will consider this information in preparation of the 20-day pre-execution sanity report.
    - 3) The Warden will have available for review all psychiatric information pertaining to the condemned inmate known to San Quentin's psychiatric staff.
      - a) This information will be reviewed along with all material submitted by the inmate's attorney.
      - b) This information will be used to determine if substantial showing of insanity exists.
    - 4) The Warden will notify the condemned inmate's attorney in writing of the results of the requested sanity review. Should the Warden, with the assistance of the independent CDCR psychiatrist, find a substantial showing of insanity, the Warden will notify the District Attorney of Marin County in accordance with Penal Code Section 3701. (Attachment 8)
    - 5) Beginning the week prior to the execution the Warden will be provided with current daily information regarding the inmate's behavior and psychiatric condition.
    - 6) The inmate's behavior is continuously monitored by unit staff for the final 5 days with documentation completed every 15 minutes. (Attachment 9)

- a) Should the inmate display unusual or inappropriate behavior, the Warden will be notified immediately by institutional staff.
  - b) The Warden will take necessary steps to evaluate any reported changes including utilizing the provisions of PC Section 3701. Results will be reported to the Secretary, CDCR in writing via the Director, DAI.
- 7) The Secretary, CDCR will notify the Governor's Legal Affairs Secretary in writing, of all referrals to the Marin County District Attorney's office under the provisions of PC Section 3701.
- b. The Warden will:
  - 1) Deliver to the Director, DAI the 20-day report.
- c. The Associate Warden, Specialized Housing Division, will:
  - 1) Coordinate with the Team Leader to conduct weekly security inspections of the Lethal Injection Facility.
    - a) The Team Leader will follow the procedures identified in Section V E. 1. b. through g., above for these weekly inspections.
  - 2) Meet with and prepare the members of the Lethal Injection Team.
    - a) Schedule and conduct training for the Lethal Injection Team as needed.
  - 3) Ensure the Lethal Injection Facility is ready and fully stocked with supplies.
- 4. Approximately 10 days prior to an execution:
  - a. The Warden will:
    - 1) Compile and send a final 7-day report (original documents) to the Director, DAI.
      - a) This report will indicate whether or not there has been any change in the inmate's mental condition since the 20-day report.
      - b) The 7-day report will be delivered in sufficient time for forwarding to the Secretary, CDCR whose office

will then forward it to the Governor's Legal Affairs Secretary.

- c) This report shall be a memorandum updating the formal 20-day report based upon current observations.
  - d) Intermediate reports may be submitted by the Warden any time there is a change which may have an effect under PC Section 3700.5.
- 2) Review the inmate's requested witnesses and spiritual advisor(s) as provided by the Associate Warden, Specialized Housing Division, to ensure they meet existing witness and visitor criteria.
  - 3) Secure from the Case Records Manager the Central File of the inmate, which will be maintained in the Warden's office until the date of execution.

b. The Chief Deputy Warden will:

- 1) Direct the Crisis Response Team Commander to notify appropriate area managers of intent to re-assign any employee from their normal assignments associated with the execution at least five (5) days prior to proposed assignment change.

c. The Associate Warden, Specialized Housing Division, will:

- 1) Ascertain if the condemned inmate wishes to invite up to 5 witnesses and 2 spiritual advisors, and provide the Warden with the names.
- 2) Ensure Lethal Injection Team Members are prepared.
- 3) Ensure the Lethal Injection Facility is operational.
- 4) Ensure the Lethal Injection Facility has necessary supplies, including but not limited to, supplies for household and personal needs.
- 5) Ensure the required clothing is available. (Attachment 14)
- 6) Ensure a supply of documentation logs, graph paper, and record keeping materials are in place.
- 7) Ensure that the necessary chemicals are available and properly controlled.

- 8) Notify the Personnel Assignment Office of the names of personnel that are to be relieved of their regularly assigned duties and temporarily assigned to the execution detail three days prior to the scheduled execution.
- d. The Public Information Officer will:
  - 1) Notify all media representatives selected to be witnesses
  - 2) Notify all non-witness media representatives selected to cover the execution event.
- e. The Psychiatrists (Alienists) will:
  - 1) Interview and evaluate the inmate and submit their findings to the Warden in writing.
    - a) They shall compare their current evaluations with their previous findings to determine any change in the inmate's mental condition.
    - b) Their observations must be current and pertain to the inmate's mental state.
    - c) Submit a 7-day report to the Warden. (Attachment 10)
- f. The Chaplain will:
  - 1) Report to the Warden, in writing, the emotional state of mind of the inmate, being especially sensitive to any change. These observations shall pertain to contacts made within 3 days preceding preparation of the report.
- g. The Condemned Row Correctional Counselor II will:

Report any change in conduct or behavior in writing to the Warden.
5. Five days prior to an execution:
  - a. The Warden will:
    - 1) Order the inmate to be moved to the designated security housing area of Condemned Row where he will be under observation 24 hours a day by an officer assigned for that purpose. (The Warden may authorize the move at any time following receipt of the death warrant or when, in the opinion of the Warden, it is necessary to maintain the safety and security of the public, the institution and/or the inmate.)

- 2) The inmate's behavior is continuously monitored by unit staff for the final 5 days with documentation completed every 15 minutes. (Attachment 9)
  - a) Should the inmate display unusual or inappropriate behavior, the Warden will be notified immediately by institutional staff.
  - b) The Warden will take necessary steps to evaluate any reported changes including utilizing the provisions of PC Section 3701. Results will be reported to the Secretary, CDCR in writing via the Director, Division of Adult Institutions.

b. The Associate Warden, Specialized Housing Division, will:

- 1) Ensure the inmate is moved to the designated security housing area of Condemned Row and place the inmate under 24-hour a day observation by an officer assigned for that purpose.
- 2) Personally conduct the daily inspections of the Lethal Injection Facility with the Team Leader.
- 3) Direct that all personal property, with the exception of legal material, belonging to the inmate be removed from the inmate's cell and placed under the security of the officer stationed outside the security cell. The inmate will be given the use of items by the officer as he needs them, and then return them to the officer's care.
- 4) In the event of a stay of execution, the Associate Warden, Specialized Housing Division, will return the inmate's property and initiate return of the inmate to the inmate's former housing status.
- 5) Along with the Food Manager, interview the inmate to ascertain what request, if any, the inmate may have for a last meal.
  - a) Determine if Food Service will be able to fulfill the request or make arrangements to obtain the requested menu items.
  - b) Accommodations will be made up to fifty dollars (\$50.00).

c. The Visiting Lieutenant will ensure:

- 1) Grade B inmates will continue to receive non-contact visits during designated visiting hours.

- 2) The visitor(s) and attorney(s) will be required to successfully clear the walk-through metal detector and a clothed body search. Refusal to comply with the above search procedure will be grounds for denial of a visit.
  - 3) The inmate will visit in waist restraints.
  - 4) The inmate and the visitor(s) may briefly embrace or shake hands at the beginning and end of the visit. No other physical contact will be allowed.
  - 5) In the event there is a scheduled attorney visit, the following procedures will apply:
    - a) Attorneys and approved visitors of the inmate will not be permitted to visit with the inmate simultaneously.
    - b) For an attorney/client confidential visit, the attorney will be allowed to bring the following items:
      - i. One pen or pencil.
      - ii. One notepad.
      - iii. Necessary legal materials.
    - c) For attorney/client confidential visits, the inmate will be removed from the conference room and proceed with the attorney to visit in the Plexiglas visiting area under constant visual observation by the special visiting team.
  - 6) Visitors are informed via posted notice, Warden's Bulletin, that visiting will be closed the day preceding the execution as well as the day of the execution.
  - 7) The family visiting quarters will be vacant the day before and the day of the execution.
  - 8) All visiting will cease once the inmate is placed in the secured holding cell in the Lethal Injection Facility. Attorneys may have access to their client by phone as requested.
- d. The Condemned Row Correctional Counselor II will:
- 1) Interview the inmate to discern any special requests as to the disposition of his property.



- a) The inmate will package and label any property to be sent out of the institution.
- 2) Maintain a signed inventory receipt of all packaged property for mailing the first weekday following the execution.
- 3) In the event of an indefinite stay, return the property to the inmate with a signed receipt.
- 4) Arrange for the monitoring of all telephone calls made by the inmate via an institutional telephone.
  - a) Legal calls will not be monitored but will be facilitated by staff.
  - b) All calls will be logged on the pre-execution activity log. (Attachment 11)
  - c) The inmate shall have 24-hour access to a telephone for attorney contact.
- 5) Obtain clothing sizes from the inmate and ensure that appropriate clothing is available.
- 6) Begin daily briefings for the Warden, Chief Deputy Warden, Associate Warden, Specialized Housing Division, and Facility Captain as to the inmate's needs, requests, and behavior.
- e. Religious accommodations:
  - 1) State employed spiritual advisors selected by the inmate will be allowed to perform their spiritual functions at the inmate's cell front on either second or third watch.
  - 2) Non- state employed spiritual advisors may visit the inmate utilizing the visitor process outlined in this procedure. (See Section V. Methods; Sub-section Q. Chronology of Events Prior to Execution, paragraph 5, letter c.)
  - 3) Once the inmate is moved to the Lethal Injection Facility Holding Area, approved spiritual advisors may visit the inmate in the holding area of the Lethal Injection Facility.

6. Four days prior to an execution:

a. The Warden will:

- 1) Issue a letter to San Quentin Village residents, Marin Rod and Gun Club and the Post Office advising them of any likelihood of a gathering or demonstration at the East Gate.
- 2) Ensure that a notice is passed out during staff briefings and displayed on the Count Gate television monitor, to inform staff of the East Gate closure on the evening prior to the day of the execution. Staff will be instructed to use the West Gate.

b. The Associate Warden, Specialized Housing Division, will:

- 1) Direct the Lethal Injection Team Leader to conduct a final equipment check of all materials necessary to perform the execution. This shall be conducted not less than 24 hours, and not more than 96 hours, before the scheduled execution.

c. The Business Manager II will:

- 1) Notify all contractors and vendors that San Quentin will not be accepting any goods or services beginning at 1800 hours, 2 days prior to the execution and continuing through the execution day.

7. Three days prior to an execution:

a. The Associate Warden, Specialized Housing Division, will:

- 1) Assume direct oversight of all Lethal Injection Team responsibilities.
- 2) Activate all members of the Lethal Injection Team and schedule daily training and preparedness exercises on each of the three days prior to the execution.
- 3) Coordinate and discuss with the Lethal Injection Team Leader the selection of the Lethal Injection Team Members for specific team assignments.
  - a) Ensure Lethal Injection Team Members are available.
  - b) Ensure Lethal Injection Team Members are properly trained and capable of carrying out specific assignments.
  - c) Ensure other Lethal Injection Team Members are properly assigned as back-ups and that each back-up

is properly trained and capable to performing the assigned functions.

- 4) Begin conducting daily inspections of the Lethal Injection Facility.
  - a) Ensure the facility remains fully operational and stocked with appropriate supplies. (Attachment 12)
- 5) Assign the Lethal Injection Team Leader responsibilities to ensure:
  - a) All items that will come into contact with the condemned inmate are properly searched.
  - b) Continuous security is provided at the Lethal Injection Facility.
  - c) Lethal Injection Team Members assigned to specific functions begin daily training on their specific assignments, and all team members assigned as back-ups are also involved in training for their specific back-up function.

b. The Correctional Captain, Central Services Division, will:

- 1) Establish an internal support team to assist as needed to maintain the smooth operation of the institution. The team members will be located in an area designated by the Central Services Captain.
- 2) Ensure witness and media staging areas are clean and sanitized.

c. The Public Information Officer (PIO) will:

- 1) Activate the media center at the appropriate time commensurate with the day and hour of the scheduled execution, and staff it with one Correctional Sergeant and six Correctional Officers assigned by the Watch Sergeants for that purpose.
  - a) The PIO will address the needs of media representatives that may be operating out of the media center. The assigned staff will release no information or offer any commentary unless specifically authorized by the PIO.

- b) The PIO will give regular updates to any media gathered, and will notify the Assistant Secretary of this action.
  - 2) Work with the Assistant Secretary to prepare a biographical and general information sheet on the inmate for briefing notes for the media, including CDCR I.D. photo. A copy of this biographical and general information sheet will be sent to the Assistant Secretary.
  - 3) The Warden, through the PIO, will designate a cut-off time for the media to arrive as outlined in the Execution Security Plan.
8. Two days prior to an execution:
- a. The Chief Deputy Warden will:
    - 1) Prepare to activate the Emergency Operations Center. Consult with the Warden on specific areas of concern.
9. Twenty-four hours prior to an execution:
- a. The Warden will:
    - 1) Ensure that all Lethal Injection Team Members are fully prepared and ready to perform their assigned duties.
  - b. The Chief Deputy Warden will:
    - 1) Activate the Emergency Operations Center.
  - c. The Associate Warden, Specialized Housing Division, will:
    - 1) Accompany the Lethal Injection Team Leader to obtain the lethal injection chemicals from a licensed pharmaceutical facility or distributor.
    - 2) Verify the chemicals and quantity. Secure the chemicals in the safe or refrigerator in the Lethal Injection Facility and complete the chain of custody form (Attachment 13). The original copy of the chain of custody form will remain with the chemicals. A copy of the form will be distributed to;
      - a) Warden.
      - b) Chief Deputy Warden.
      - c) Associate Warden, Specialized Housing Division.
      - d) Lethal Injection Team Leader.

- 3) Assume direct supervision of the Lethal Injection Team Members.
  - 4) Make a final inspection of the Lethal Injection Facility to ensure operational readiness.
  - 5) In conjunction with the Lethal Injection Team Leader:
    - a) Brief the Security Team on their specific duties during the scheduled execution.
    - b) Assess each Lethal Injection Team Member to ensure readiness for their role in the execution.
    - c) If necessary, excuse any staff member they believe may be unable to complete their assigned duties.
10. Six (6) hours prior to an execution (approximately 1800 hours):
- a. The Lethal Injection Team Leader will:
    - 1) Meet with and brief the condemned inmate on procedures and the responsibilities of the Security Watch Staff.
    - 2) Supervise the movement of the condemned inmate to the Lethal Injection Facility holding cell.
    - 3) Assign at least one Correctional Sergeant and two Correctional Officers from the Lethal Injection Team to establish a security watch, (constant and direct supervision of the inmate) in the Lethal Injection Facility Holding Area.
    - 4) Ensure a security watch log is maintained with entrees made every 15 minutes. The log will reflect all activities involving the condemned inmate, including the following:
      - a) Telephone calls.
      - b) Correspondence.
      - c) Visits by staff and approved visitors.
      - d) Last meal.
    - 5) Address requests made by the condemned inmate:
      - a) Visits:
        - i. The inmate can be visited by spiritual advisors and the Warden.

- ii. Spiritual advisors must be approved by the Warden.
- iii. Spiritual advisors wishing to bring religious items must have received advanced written permission from the Warden. All items are subject to search by staff prior to entry into the Lethal Injection Facility.
- iv. No food, drinks, or vending machine items are permitted in the Lethal Injection Facility visiting areas. Coffee and juice will be provided.
- v. No other visits will be permitted in the Lethal Injection Facility Holding Cell area without the approval of the Warden.

b) Last meal will:

- i. Be as requested by the inmate in so far as reasonable within the established \$50.00 limit.
- ii. Be delivered to the Lethal Injection Facility by the Correctional Food Manager or designee.
- iii. Be inspected for contraband.
- iv. Be served in the Lethal Injection Facility Holding Area.

c) Coffee and/or juice will be made available.

d) Additional requests may include:

- i. Food items and soft drinks.
- ii. Television and radio.
- iii. Phone calls.
- iv. Mailing of letters.

b. The Lethal Injection Security Team will:

- 1) Initiate the security watch log.

- a) Make entries at least every 15 minutes.
    - b) Document all activities involving the condemned inmate.
  - 2) Take custody of and search the condemned inmate.
    - a) Conduct an unclothed body search.
    - b) Scan with a metal detector.
  - 3) Search the condemned inmate's approved property.
  - 4) Secure the condemned inmate in the Lethal Injection Holding cell.
  - 5) Issue the condemned inmate new state clothing:
    - a) Appropriate undergarments.
    - b) One pair of socks.
    - c) One pair of pants.
    - d) One shirt.
    - e) One pair of slippers.
11. Approximately three (3) hours prior to an execution:
- a. The Associate Warden, Specialized Housing Division, in the company of the Lethal Injection Team Leader will:
    - 1) Remove the lethal injection chemicals from the Lethal Injection Facility safe or refrigerator.
    - 2) Transfer custody of the lethal injection chemicals to two members of the Lethal Injection Infusion Team.
    - 3) Ensure accountability of the lethal injection chemicals.
      - a) A minimum of two staff members will verify all chemicals at the time of transfer and sign the chain of custody document. (Attachment 13)
      - b) The original form will be signed by the Lethal Injection Team Leader and re-secured in the safe or refrigerator.
  - b. The Infusion Team will prepare the lethal chemicals as described below:
    - 1) Two identical trays will be prepared:

- a) Tray A will be color-coded red and be the primary tray used for the Lethal Injection.
  - b) Tray B will be color-coded blue will be the backup tray.
- 2) Each tray will have eight (8) color-coded syringes to match the tray and be labeled by content and sequence of administration as follows:
- #1 60cc syringe 1.5 grams Sodium Thiopental
  - #2 60cc syringe 1.5 grams Sodium Thiopental
  - #3 60cc syringe 50cc saline flush
  - #4 60cc syringe 50 milligrams Pancuronium Bromide
  - #5 60cc syringe 50cc saline flush
  - #6 60cc syringe 100 milliequivalents Potassium Chloride
  - #7 60cc syringe 100 milliequivalents Potassium Chloride
  - #8 60cc syringe 50cc saline flush
- 3) One Infusion Team Member prepares the syringes for Tray A.
- a) Another Infusion Team Member observes to verify proper preparation.
- Note: Sodium Thiopental must be mixed according to the manufacturer's instructions.
- b) A Record Keeping Team Member will also observe and document the preparation on the Infusion Team Execution Log.
- 4) Tray B will be prepared by a different Infusion Team Member.
- a) Another Infusion Team Member observes to verify proper preparation.
  - b) A Record Keeping Team Member will also observe and document the preparation on the Infusion Team Execution Log.

12. During the Day of the Execution:

- a. The Warden will confirm the following activities:
  - 1) Approximately 2 hours prior to the execution, ensure all witnesses are appropriately accommodated.



- 2) Accompanied by the Associate Warden, Specialized Housing Division, meet with the condemned inmate in the Lethal Injection Facility Holding Area.
    - a) Advise the inmate that a written last statement can be prepared to be read after the execution.
    - b) Inform the inmate that a sedative is available. Upon request, a sedative will be administered under the direction and approval of a clinician.
  - 3) The official witnesses are ushered to their designated area and given final instructions as needed.
  - 4) Approximately 45 minutes before the execution, the Warden will instruct the Lethal Injection Team to prepare the inmate.
  - 5) Ensure open dedicated phone contact with the Governor's Office, the Office of the Attorney General and the California State Supreme Court is established.
  - 6) Approximately 25 minutes before the execution, instruct staff to admit the witnesses to their designated areas.
  - 7) Approximately 15 minutes before the execution, order the inmate brought into the execution room, and secured to the gurney.
- b. The Chief Deputy Warden will:
- 1) Place the institution on lockdown at the appropriate time commensurate with the day and hour of the scheduled execution.
  - 2) Assume command of the Emergency Operations Center.
- c. The Associate Warden, Specialized Housing Division, will:
- 1) Approximately 2 hours prior to the execution, accompany the Warden into the Lethal Injection Facility to meet with the inmate.
  - 2) During the execution, take a position in the Infusion/Control Room and provide direct supervision of the Lethal Injection Infusion Team during administration of the lethal chemicals.
- d. The Litigation Coordinator will:
- 1) Take a position at the Lethal Injection Facility telephones 15 minutes prior to the scheduled execution to ensure

constant communication with the Governor's Office, the State Attorney General and the State Supreme Court.

- 2) Relay all calls to the Warden and the Associate Warden, Specialized Housing Division.

e. The Warden's Administrative Assistant will:

- 1) At the time designated by the Warden, escort all witnesses, except those invited by the inmate to their respective areas.
- 2) Assign a Correctional Officer to escort witnesses invited by the inmate to their designated witness area. The Correctional Officer will remain with these witnesses.
- 3) During the execution, remain in the Lethal Injection Facility witness area to assist the Public Information Officer.

f. The Public Information Officer will:

- 1) At the time designated by the Warden, identify the media witnesses and escort them from the media center to their designated witness viewing room.
- 2) Instruct the media witnesses regarding items that are not permitted in the Lethal Injection Facility. These items will be deposited at the media center for later retrieval. No equipment will be allowed in the witness gallery. Pencils and notepads will be provided.
- 3) Utilize the metal detector at the Visitor Processing Center or any other search method deemed necessary and reasonable.
- 4) Immediately upon the Warden's announcement of death, usher the media witnesses directly to the media center where they will give pool commentary to the other assembled media. Give no commentary until after the official statement by the Warden.

S. The Lethal Injection Protocol:

1. Inmate preparation:

a. Upon direction of the Warden to prepare the inmate, the Lethal Injection Team Leader will:

- 1) Direct the Security Team to conduct an unclothed body search.

- 2) Place the inmate in restraints and remove the inmate from the Lethal Injection Facility Holding Area.
- 3) Observe the Intravenous Team place the ECG sensors on the chest of the inmate.

b. Resistive inmates:

- 1) In the event that an inmate refuses to comply with staff orders to be placed in restraints or to exit his assigned cell or the Lethal Injection Facility Holding Area, or any other area that the inmate may be held, the Lethal Injection Team Leader will advise the Associate Warden, Specialized Housing Division.
- 2) The Associate Warden, Specialized Housing Division, will speak to the inmate in an attempt to gain the inmate's cooperation.
- 3) If the inmate continues to refuse to comply with orders, an emergency cell extraction will be authorized.
- 4) Staff will follow the universal precautions when performing an extraction including, but not limited to, the following:
  - a) Disposable gowns
  - b) Face/head protection
  - c) Rubber gloves
  - d) Padded gloves
  - e) Leg protection
- 5) Any use of force will be noted in the Lethal Injection Facility Activity Log as well as in the Execution Report – Part A and Part B. (Attachments 22 and 23)

c. The Security Team will:

- 1) Escort the inmate from the Lethal Injection Facility Holding Area to the Execution Room.
- 2) Secure the inmate to the gurney with restraints.
- 3) Secure the inmates hands to the arm rests on the gurney with white medical tape.
  - a) Ensure that the inmate's hands are secured palm up to allow the Intravenous Team access to the necessary veins.

- b) Secure the inmate's fingers to the gurney in the extended position.
- d. The Lethal Injection Team Leader will:
  - 1) Ensure the inmate is properly secured.
  - 2) Ensure the restraints do not inhibit the inmate's circulation.
  - 3) Excuse the Security Team to wait on standby in an adjacent room.
  - 4) Remain in the room to supervise the insertion of the catheters by the Intravenous Team.
- e. The Intravenous Team will:
  - 1) Enter the Execution Room immediately after the Security Team exits.
  - 2) Inspect the restraints to ensure that they do not restrict the inmate's circulation or interfere with the insertion of the catheters.
  - 3) Insert two catheters into pre-designated veins.
  - 4) As each catheter is inserted inform an Intravenous Team Member in the Infusion Room to initiate the intravenous drip.
  - 5) Designate primary and back-up intravenous lines.
  - 6) Inform the Warden when the intravenous lines have been successfully established.
  - 7) One Intravenous Team Member will then exit the execution room and report to the Infusion Room to continuously monitor the saline drips.
  - 8) One Intravenous Team Member will remain in the execution room to continuously monitor the intravenous lines and assess the consciousness of the condemned inmate throughout the execution.
- 2. The Lethal Injection Team Leader will exit the Execution Room and report to the Infusion Room to monitor the Execution.
- 3. The Warden will:

- a) Take a position in the Execution Room in close proximity to the condemned inmate.
  - b) Inquire of both the State Supreme Court and the Attorney General's Office if there is any matter pending before any court to preclude the execution from proceeding.
  - c) Inquire of the Governor's Office if there is any reason not to proceed with the execution.
  - d) If there responses are negative, read a prepared statement detailing the court order mandating the execution. (Attachment 15)
  - e) Provide an opportunity for the condemned inmate to make a brief final statement via the public address system. After the statement is made, the public address system will be turned off.
  - f) Direct the Infusion Team to administer the lethal injection chemicals.
4. Infusion.
- a) The Infusion of Lethal Injection chemicals will begin with Tray A using the intravenous catheter designated as primary.
  - b) The saline drip in the intravenous catheter that was designated primary infusion will be stopped prior to the injection of the fist syringe, and restarted after the last syringe has been administered. The saline drip in the back-up intravenous line will be continually maintained.
  - c) If at any time during the infusion of the lethal chemicals, the primary intravenous catheter fails, the Warden will be notified and direct that the Lethal Injection Protocol using the primary intravenous catheter and the chemicals on Tray A be discontinued and the entire sequence began again using the back-up intravenous catheter and the chemicals on Tray B in the same sequence as noted below.
  - d) A Record Keeping Team Member in the infusion room will initiate a 10 minute count down at the start of the infusion of syringe #1 (sodium thiopental).
  - e) Beginning with Tray A and using the primary intravenous catheter, the chemicals will be administered as follows:
    - **#1—60cc syringe: 1.5 grams sodium thiopental** will be administered, followed by an assessment of the condemned inmate; the Intravenous Team Member will brush the back of his/her hand over the condemned inmate's eyelashes, and speak to and gently

shake the condemned inmate. Observations will be documented. If the condemned inmate is unresponsive, it will demonstrate that he is unconscious. Regardless, the Protocol will continue as follows:

- **#2—60cc syringe: 1.5 grams sodium thiopental** will be administered.
  - **#3—60cc syringe: 50 cc saline flush** will be administered, followed by another assessment of consciousness as outlined above. Observations will be documented. At this point if the condemned inmate is determined to be unconscious, the Warden will authorize the protocol to proceed in the following sequence:
    - **#4—60cc syringe: 50 mg pancuronium bromide**
    - **#5—60cc syringe: 50cc saline flush**
    - **#6—60cc syringe: 100 ml/Eq potassium chloride**
    - **#7—60cc syringe: 100 ml/Eq potassium chloride**
    - **#8—60cc syringe: 50cc saline flush**
  - If, following the administration of syringe #2 and syringe #3, the assessment indicates the condemned inmate is not unconscious, the Warden will direct that the injection through the primary intravenous catheter, be discontinued and the entire sequence re-initiated using chemicals on Tray B via the designated back-up intravenous catheter.
- f) An ECG will monitor the inmate's heart activity.
- g) Death will be determined by a doctor.
- h) If, in the event all eight syringes from Tray A have been administered, ten minutes has elapsed and death has not been determined, the Record Keeping Team Member will advise the Associate Warden, Specialized Housing Division, who will advise the Warden.
- i) The Warden will direct the Lethal Injection Protocol to be repeated using the back-up intravenous catheter and the chemicals from Tray B in exactly the same sequence as noted above.

T. Post-Execution Procedure:

1. Immediately following the determination of death of the condemned inmate, the Warden will read an official statement notifying the witnesses the execution is complete. (Attachment 17)
2. The Warden will:
  - a) Have the curtains on the viewing windows closed, and direct the witnesses be escorted from the Lethal Injection Facility.
  - b) Approximately one hour after the execution, the Warden will issue a statement to the media advising the sentence has been carried out and announcing the time of death, and immediately exit the media center.

3. The Administrative Assistant will:
  - a) Immediately following the official statement by the Warden at the press conference, accompany the Warden out of the media center.
4. The Public Information Officer will:
  - a) Immediately upon the Warden's announcement of death, usher the media witnesses directly to the media center where they will give pool commentary to the other assembled media
  - b) Accompany the Warden to the post-execution press conference and, after the Warden leaves, respond to questions that follow the Warden's Official Statement.
  - c) Read the inmate's last statement to the press or announce that the inmate did not have a last statement.
  - d) As soon as possible, but no longer than 30 minutes after commencement, conclude the press conference and usher all media off the prison grounds. Secure the media center and go to the Warden's office to field telephone inquiries.
5. The Litigation Coordinator will:
  - a) Assemble all appropriate reports and maintain the Master Execution File of records regarding the execution in the Litigation Coordinator's office.
6. After all the witnesses have been escorted out of the Lethal Injection Facility:
  - a) The Intravenous Team will crimp closed and disconnect all intravenous lines, but will not remove the lines from the inmate. Intravenous lines will remain in place to allow review by the Marin County Coroner as necessary.
  - b) Under the supervision of the Lethal Injection Team Leader, the inmate's body shall be removed with care and dignity and placed in a post-mortem bag pending removal as pre-arranged with the contract mortuary.
7. The Lethal Injection Facility will be cleaned thoroughly after the inmate's body has been removed.
8. The Security Team will conduct a security inspection of the Lethal Injection Facility to ensure that all doors are secured and that no items were left behind.
9. All unused chemicals will be documented on the Chain of Custody form and noted as to why they were not used. The Infusion Team will transfer the unused chemicals to the Associate Warden, Specialized Housing Division, who will place them in the Lethal Injection Facility safe or refrigerator to await proper disposal and note their transfer on the Chain of Custody form. (Attachment 13)

10. The Intravenous Team will complete a post-execution inventory of all supplies and equipment that were used by the Intravenous Team during the execution. The Intravenous Team will give the inventory to the Associate Warden, Specialized Housing Division, who will arrange for replacement and replenishment of supplies.
11. The Lethal Injection Team Leader will secure the Lethal Injection Facility and return the keys to Main Control.
12. The Lethal Injection Team Leader will report directly to the Warden that the Lethal Injection Facility has been secured.

U. Debriefing:

1. The Warden and Associate Warden, Specialized Housing Division, will hold a debriefing and critique with all Lethal Injection Team Members. All documents and records concerning the execution will be collected by the Associate Warden, Specialized Housing Division, for review.
2. The Associate Warden, Specialized Housing Division, will assess the Lethal Injection Team Members for the need for employee post trauma care.
3. As soon as possible but no later than 24 hours after the execution, the Warden will arrange for a confidential individual debriefing, by appropriate staff, with each Lethal Injection Team Member. The purpose of the debriefing is to provide a confidential forum for the team member to candidly discuss the impact of the execution on him or her and provide access to counseling services as requested. A Team Member may be accompanied by a person of his or her choosing at the individual debriefing.

V. Documentation- Managerial Oversight:

1. Immediately following the execution, the Lethal Injection Team Leader will complete a Execution Report - Part A. (Attachment 22)
2. Each team member will complete Execution Report – Part B, documenting their actions and observations during the execution. (Attachment 23)
3. Team members will use identifiers assigned to their specific position (duties), rather than their names and/or classifications, when they submit their reports.
4. The Lethal Injection Team Leader will assemble the complete Execution Report for review by the Associate Warden, Specialized Housing Division. The Execution Report will include all appropriate supplemental reports.
  - a) Following review by the Associate Warden, the Execution Report will be routed through the Chief Deputy Warden for the Warden's review and signature.
  - b) Any use of force will be specifically documented and reviewed according to existing Departmental policy.
5. A copy of the Execution Report will be delivered to the Director, DAI for review and follow up as needed.



6. The original Execution Report will be retained at San Quentin as part of the Master Execution File.
7. The Record Keeping Team will meet with the Associate Warden, Specialized Housing Division, and ensure all documentation has been completed. The documentation will be reviewed and approved by the Associate Warden, Specialized Housing Division, and shall be hand delivered to the Warden for inclusion in the Master Execution File.

**W. Critique:**

1. Within 72 hours, the Warden shall conduct an after-action critique of the execution.
  - a) The purpose of the critique is to evaluate the execution from all operational perspectives, including compliance with this Operational Procedure.
  - b) The critique shall be documented for inclusion in the Master Execution File with other records of the execution.
  - c) Any recommendations for changes in procedures or training must be approved by the Warden and the Office of the Secretary, CDCR.

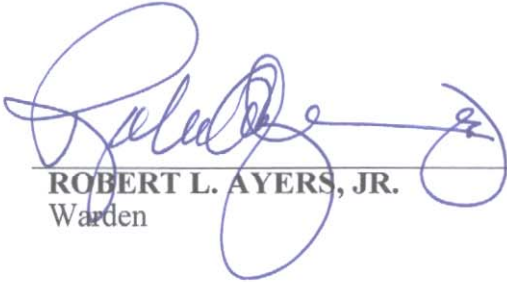
**X. Return on Warrant of Death:**

1. After receipt of the Certificate of Death, the Warden shall complete the Return on Warrant of Death, and forward the Return to the county from which the inmate was under sentence of death along with a copy of the Certificate of Death. (Attachment 18)


## **VI. RESOURCE SUPPLEMENTS**

Attachment 1:	Lethal Injection Facility Inspection Report
Attachment 2:	Media Notification of Scheduled Execution
Attachment 3:	CDCR 1801-B, Service of Execution Warrant – Warden’s Initial Interview
Attachment 4:	CDCR 1801, Notification of Execution Date, Choice of Execution Method
Attachment 5:	CDCR 1801-A, Choice of Execution Method
Attachment 6:	Thirty Day Notice
Attachment 7:	Sample of Alienist 20-Day Report
Attachment 8:	PC 3700 Notification
Attachment 9:	15-Minute Check Log
Attachment 10:	Sample of Alienist 7-Day Report
Attachment 11:	Pre-Execution Log
Attachment 12:	Lethal Injection Supply Inventory
Attachment 13:	Chain of Custody
Attachment 14:	Inmate Needs
Attachment 15:	Pre-Execution Notice to Witnesses
Attachment 16:	Lethal Injection Infusion Team Execution Log
Attachment 17:	Post-Execution Notice to Witnesses
Attachment 18:	Return on Warrant of Death
Attachment 19:	Lethal Injection Intravenous Team Execution Log

Attachment 20: Lethal Injection Security Team Execution Log  
Attachment 21: Lethal Injection Administrator/Team Leader Execution Log  
Attachment 22: Execution Report – Part A  
Attachment 23: Execution Report – Part B

  
**ROBERT L. AYERS, JR.**  
Warden

5-14-07  
Date Signed

  
**JAMES E. TILTON**  
Secretary  
California Department of Corrections and Rehabilitation

5-14-07  
Date Signed

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**STATE OF CALIFORNIA  
SAN QUENTIN OPERATIONAL PROCEDURE  
NUMBER 0-770  
EXECUTION BY LETHAL INJECTION**

**PROTOCOL ATTACHMENTS**

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## Lethal Injection Facility Sanitation Inspection Checklist

Date

Search Area	Comments
Sallyport Corridor	
Sallyport Storage Room	
Staging Area	
Secure Holding Cell Area	
Officer Security Area	
Prep Room	
Break Room	
Rest Rooms	
Prep Storage Room	
Infusion/Control Room	
Execution Room	
Electrical Room	
Storage Room	
Victim Family Viewing Room	
Press Viewing Room	
Inmate Family Viewing Room	
All Doors & Gates Functioning	

Lethal Injection Facility Safe Secure	
Light and Appliances Functioning	
Tool Inventory	
Refrigerator Temperature Indicate Temperature	Temperature_____
Equipment Inventory Attach to Form	

\_\_\_\_\_  
Security Team Members

\_\_\_\_\_  
Date

\_\_\_\_\_  
Execution Team Leader

\_\_\_\_\_  
Date

# NEWS



## MEDIA ACCESS FOR SCHEDULED EXECUTION

**For Immediate Release****Date of Press Release****Contact: (916) 445-4950**

The execution of (inmate's name), convicted of (synopsis of crime) in (Name of County), is set by court order for (scheduled date of execution), at San Quentin State Prison.

**Access Inquiries:**

Direct all requests and inquiries regarding access to San Quentin State Prison to the California Department of Corrections and Rehabilitation Assistant Secretary, Office of Public and Employee Communications in Sacramento, which is responsible for all media credentials. Requests are due by (final filing date). (See "Credentials.")

**Reporters:**

Up to 125 news media representatives may be admitted to the Media Center Building at San Quentin to attend news briefings and a news conference after the execution. To accommodate as many media firms as possible, each news media organization applying will be limited to one representative. Firms selected to send a news reporter to witness the execution will be allowed a separate representative at the media center.

**Audio/Visual/Still Photographs:**

In anticipation that interest may exceed space, pool arrangements may be necessary for audio/visual feeds and still photographs from inside the media center. The pool will be limited to two (2) television camera operators, two (2) still photographers, and one (1) audio engineer. The Northern California Radio Television News Directors Association (NCRTNDA) and the Radio Television News Association (RTNA) in southern California arrange the pool.

**Live Broadcast:**

On-grounds parking is limited. Television and radio stations are limited to one (1) satellite or microwave vehicle.

**Media Access for Scheduled Execution**  
**Page 2**

**Television Technicians:**

Television technicians or microwave broadcast vehicles will be permitted three (3) support personnel: engineer, camera operator, and producer.

**Radio Technicians:**

Radio broadcast vehicles will be allowed two (2) support personnel: engineer and producer.

**Credentials:**

For media credentials, send a written request signed by the news department manager on company letterhead with the name(s) of the proposed representatives, their dates of birth, driver's license number and expiration date, social security number, and size of vehicle for live broadcast purposes to:

**Assistant Secretary  
Office of Public and Employee Communications  
1515 S Street, Room 113 South  
P.O. Box 942883  
Sacramento, CA 94283-0001**

All written requests must be received no later than (Final Filing Date). Media witnesses will be selected from requests received by that time. Telephone requests will NOT be accepted.

Security clearances are required for each individual applying for access to San Quentin. The clearance process will begin after the application deadline. No assurances can be provided that security clearances for the requests, including personnel substitutions, received after the filing period closes (Final filing date), will be completed in time for access to the prison (Day before execution).

**Facilities:**

The media center has a 60-amp electrical service with a limited number of outlets. There are several pay telephones. Media orders for private telephone hookups must be arranged with SBC. SBC will coordinate the actual installation with San Quentin. There is one soft drink vending machine at the media center. Media personnel should bring their own food. Only broadcast microwave and satellite vans and their support personnel providing "live feeds" will be permitted in a parking lot adjacent to media center.

[illegible]





DISTRIBUTION  
WARDEN (ORIGINAL)  
CENTRAL FILE  
INMATE

was served Warrant of Execution number \_\_\_\_\_ issued by the  
 \_\_\_\_\_ County Superior Court on \_\_\_\_\_ .  
NAME OF COUNTY MONTH, DATE, YEAR

and that I may choose either lethal gas or lethal injection as the method of execution.

I understand that I had ten days from the date the warrant was served, or until \_\_\_\_\_ to make this choice in writing to the  
MONTH, DATE, YEAR

Warden.

I also understand that if I do not make a choice, lethal injection will be the method of execution.

This is to notify the Warden that my choice is \_\_\_\_\_  
LETHAL GAS OR LETHAL INJECTION  
(either lethal gas or lethal injection).

INMATE'S SIGNATURE	CDC NUMBER	DATE SIGNED
SIGNATURE OF WITNESS		DATE SIGNED
COMMENTS OF WITNESS		

**SERVICE OF EXECUTION WARRANT –  
WARDEN'S INITIAL INTERVIEW**

CDCR 1801-B (Rev. 4/98)

I, \_\_\_\_\_, have a received a copy of the Warrant of Execution  
PRINT OR TYPE FILL NAME  
 number \_\_\_\_\_ issued by \_\_\_\_\_ County Superior Court on \_\_\_\_\_.  
NAME OF COUNTY MONTH, DAY, YEAR

I have had an opportunity to discuss its ramifications and other related issues with a prison administrator on \_\_\_\_\_. I understand that I am entitled to elect either lethal gas or lethal injection as the  
MONTH, DAY, YEAR  
 method of execution. I further understand I must make my choice in writing to the Warden. If I do not choose either lethal gas or lethal injection within ten days after the service of this execution warrant, I understand the method of execution will be lethal injection. I further understand if I receive a stay of execution, I will again have the opportunity to choose the method of execution when I am served with another execution date. I understand I have an execution date of \_\_\_\_\_.  
MONTH, DAY, YEAR

**X** \_\_\_\_\_  
INMATE'S SIGNATURE

( ) Inmate has received a copy of the Warrant of Execution but refuses to sign for it.

**X** \_\_\_\_\_  
INMATE'S SIGNATURE

( ) Inmate understands he may choose either lethal gas or lethal injection as the method of execution.

( ) Inmate understands he must make his choice in writing to the Warden within ten days after services of this execution warrant. This ten day period expires on \_\_\_\_\_.  
MONTH, DAY, YEAR

( ) Inmate understands he will be recontacted on the above date if the Warden has not received his written notice of choice.

( ) Inmate understands if he makes no choice, execution will be imposed by lethal injection.

( ) Inmate understands the nature of the document and the possible ramifications.

( ) Inmate has been in contact with legal counsel regarding this matter.

( ) Inmate understands he will be interviewed by psychiatric staff and a report of their findings will be filed.

( ) Inmate claims to be of the \_\_\_\_\_ faith.

( ) Inmate understands he will be interviewed by a chaplain and a nonspecific report will be filed.

( ) Inmate has had an explanation of the course of events set in motion by the Warrant of Execution.

INTERVIEWER'S OBSERVATION AND COMMENTS

WARDEN/DESIGNEE'S PRINTED NAME	WARDEN/DESIGNEE'S SIGNATURE	DATE SIGNED
WITNESS' PRINTED NAME	WITNESS' SIGNATURE	DATE SIGNED

**THIRTY DAY NOTIFICATION  
SAN QUENTIN STATE PRISON**

\_\_\_\_\_  
Inmate Name

\_\_\_\_\_  
CDCR Number

I am Robert L. Ayers Jr., Warden of the California State Prison at San Quentin. You have been condemned for the crime of \_\_\_\_\_  
at \_\_\_\_\_ on \_\_\_\_\_.

The purpose of this Committee is to inform you of the rules and procedures that will be followed during the next 30 days, and to discuss certain privileges you may be afforded.

When this Committee concludes you will be re-housed in the designated area. (Adjustment Center and North Segregation inmates will remain in their assigned cells. East Block inmates will be re-housed on the first tier.) You will remain in that cell until 5 days prior to the date of execution. Five days prior to the date of execution, you will be moved to North Segregation. (Adjustment Center inmates may be moved to North Segregation or remain in their assigned cell at the discretion of the Warden.) During the 5 days proceeding the scheduled time of execution, you will be under direct surveillance by assigned Correctional Officers who will note your status and activities on an hourly check log.

On the afternoon prior to the execution, you will be moved to the Lethal Injection Facility Security Cell adjacent to the Execution Room. While in the Lethal Injection Facility Security Cell, and until the time of execution, you will be under constant surveillance by the assigned Correctional Officers.

**SUMMARY OF RULES AND PROCEDURES**

1. Mental Health staff will be conducting regular observations of you during this period. Mental Health clinicians are available to you 24-hours a day. If you need to speak to a Mental Health professional, notify any available staff member.
2. Religious advisors are available daily. If you wish to speak to a religious advisor, notify the tier officer or the officer assigned to the area.
3. If you have to leave your cell or the Lethal Injection Facility Security Cell for any reason, you will be subject to an unclothed body search. All escorts will be in handcuffs.
4. When you are re-housed in North Segregation, all of your stored legal material will be brought to the cell anteroom. (Inmate who remains in the Adjustment Center will be given all of his/her stored legal material in their assigned cell.)
5. Once the 5 days surveillance period has begun, if you experience an injury or illness, you will be treated by medical staff in your assigned cell whenever possible.
6. Beginning 5 days prior to a scheduled execution, you will be afforded additional visiting privileges. Visiting will be conducted as follows.
  - a. You will be afforded priority visiting privileges during normal visiting hours only.

- b. You may request visitors who are not currently listed on your approved visitor list by completing Page 4, Request for Approval of Visitors, and give to the Condemned Unit Correctional Counselor II within 5 days from the receipt of this notice. Only immediate family members will be considered, and all visitors must meet normal visiting guidelines.
  - c. Grade A inmates will receive contact visiting in the Plexiglas booths in the main visiting room.
  - d. Grade B inmates will receive non-contact visiting.
  - e. Vending machines purchases will not be permitted.
  - f. All inmates will remain in waist restraints for the duration of the visit.
  - g. Inmates and visitors may use the restroom; however, any use of the restroom will be under escort and/or direct supervision.
  - h. Attorneys and approved visitors will not be permitted to visit simultaneously.
  - i. All visiting will cease when you are re-housed in the Lethal Injection Facility Security Cell.
7. Once you have been re-housed in the Lethal Injection Facility Security Cell, the lights in the cell will be left on at all times.
8. A television and radio are provided in the Lethal Injection Facility Security Cell. You will not be permitted to bring any personal electronic appliances with you when you are re-housed in the Lethal Injection Facility Security Cell.
9. The only items of personal property permitted in the Lethal Injection Facility Security Cell will be:
- a. One bible or religious publication;
  - b. One cubic foot of legal material;
  - c. Personal photographs of family and friends.

No other personal items will be permitted. All necessary personal hygiene and clothing items will be provided.

10. You may have up to 5 witnesses and 2 spiritual advisors to witness the execution, and all witnesses must meet normal visiting guidelines. You must complete Page 5, Request for Approval of Witnesses and give to the Condemned Unit Correctional Counselor II, 14 days prior to the scheduled execution.
11. You are required to update you next of kin notification by completing Page 6, Next of Kin Notification, and give to the Condemned Unit Correctional Counselor II within 5 days from receipt of this notice.
12. You may request any food for your last meal. You must complete Page 7, Last Meal Request, and give to the Condemned Unit Correctional Counselor II within 5 days from receipt of this notice. The Associate Warden and the Food Manager will review your request to determine if the request can be accommodated.
13. You may designate the disposition of your personal property. You must complete Page 8, Disposition of Personal Property, and give it to the Condemned Unit Correctional Counselor II, 14 days prior to the scheduled execution. Failure to designate a disposition of your personal property may result in the property being donated or disposed of.

## **Attachment 6**

14. You may select a funeral home and make burial arrangements. You must complete Page 9, Release of Remains and Burial Arrangements, and give it to the Condemned Unit Correctional Counselor II, 14 days prior to the scheduled execution. Failure to designate burial arrangements may result in the State designating a disposition of your remains.

---

ROBERT L. AYERS JR.  
Warden  
California State Prison at San Quentin

---

Inmate Signature and CDCR Number

**REQUEST FOR APPROVAL OF VISITORS**

I am requesting that the following loved one be approved for visiting privileges. I understand that all requested visitors must meet all normal visiting guidelines. All persons not meeting these guidelines will not be approved. These approvals will only remain in effect while the execution is imminent. If a stay is issued, any approval given will be rescinded and all potential visitors must apply for visiting privileges under the normal visiting procedures.

NAME	ADDRESS	TELEPHONE#	RELATIONSHIP

---

 Inmate Name

---

 CDCR #

- ☐ Relationship verified by Condemned Unit Correctional Counselor II
- ☐ Visitors contacted to obtain information needed to perform CLETS check
- ☐ CLETS check completed by Administrative Assistant (Attach reports)

APPROVED/DISAPPROVED

---

 ROBERT L. AYERS JR.  
 Warden  
 California State Prison at San Quentin

---

 Date

**REQUEST FOR APPROVAL OF WITNESSES**

I am requesting that the following person(s) be permitted to witness the execution. I understand that all requested witnesses must meet all guidelines applied to normal visiting. All persons not meeting these guidelines will not be approved. No witnesses under the age of 18 will be permitted.

<b>FAMILY AND LOVED ONES</b>			
<b>NAME &amp; AGE</b>	<b>ADDRESS</b>	<b>TELEPHONE#</b>	<b>RELATIONSHIP</b>

<b>SPIRITUAL ADVISORS</b>		
<b>NAME</b>	<b>ADDRESS</b>	<b>TELEPHONE#</b>

\_\_\_\_\_  
Inmate Name

\_\_\_\_\_  
CDCR #

- ☐ Witnesses contacted to obtain information needed to perform CLETS check
- ☐ CLETS check completed by Administrative Assistant (Attach reports)

APPROVED/DISAPPROVED

\_\_\_\_\_  
ROBERT L. AYERS JR.  
Warden  
California State Prison at San Quentin

\_\_\_\_\_  
Date

**Thirty-Day Notice**

**NEXT OF KIN NOTIFICATION**

I am requesting that the following next of kin be notified of my death.

NAME	ADDRESS	TELEPHONE#	RELATIONSHIP

\_\_\_\_\_  
Inmate Name

\_\_\_\_\_  
CDCR #

APPROVED/DISAPPROVED

\_\_\_\_\_  
ROBERT L. AYERS JR.  
Warden  
California State Prison at San Quentin

\_\_\_\_\_  
Date



**LAST MEAL REQUEST**

I am requesting that the following food be provided for my last meal. I understand that all requests must be approved by the Food Manager and the Warden. Unreasonable and locally unavailable items will not be accommodated.

Meal Items Requested

---

Inmate Name

---

CDCR #

APPROVED/DISAPPROVED

---

Food Manager

---

Date

APPROVED/DISAPPROVED

---

ROBERT L. AYERS JR.

Warden

California State Prison at San Quentin

---

Date

**DISPOSITION OF PERSONAL PROPERTY**

I am requesting that any and all of my personal property and effects, as well as any funds remaining in the trust account maintained by the Department of Corrections and Rehabilitation in my name be distributed to the person(s) listed below. I understand that I am responsible for the cost of shipping my property to the person(s) listed below. If funds are not available, my property will be held for 15 days in order to allow the designated recipients to complete alternate shipping arrangements.

**PERSONAL PROPERTY**

NAME	ADDRESS	TELEPHONE#

**FUNDS IN TRUST ACCOUNT**

NAME	ADDRESS	TELEPHONE#

**LEGAL MATERIAL**

NAME	ADDRESS	TELEPHONE#

\_\_\_\_\_  
Inmate Name

\_\_\_\_\_  
CDCR #

APPROVED/DISAPPROVED

\_\_\_\_\_  
ROBERT L. AYERS JR.  
Warden  
California State Prison at San Quentin

\_\_\_\_\_  
Date

**Thirty-Day Notice**

**RELEASE OF REMAINS AND BURIAL ARRANGEMENTS**

I am requesting that my remains be released to the person or organization identified herein. I understand that the state of California does not accept financial responsibility for the disposition of my remains. I have designated the person who will accept that responsibility. If I do not designate these arrangements, the State will process my remains in accordance to current state policy and contracts.

Funeral Home \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_  
Telephone \_\_\_\_\_  
Contact Person \_\_\_\_\_

Person financially responsible for the disposition of remains:

Name \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_  
Telephone \_\_\_\_\_  
Relationship \_\_\_\_\_

APPROVED/DISAPPROVED

\_\_\_\_\_  
ROBERT L. AYERS JR.  
Warden  
California State Prison at San Quentin

\_\_\_\_\_  
Date

State of California

Department of Corrections and Rehabilitation

**M e m o r a n d u m**

Date :  
To : WARDEN  
From : San Quentin State Prison, San Quentin, CA 94964  
Subject : **20-DAY PRE-EXECUTION REPORT (NAME AND NUMBER OF INMATE)**

This report of a competency evaluation is prepared pursuant to San Quentin Institutional Procedure No. 770 and Section 3700.5 of the California Penal Code. Inmate (name) is scheduled for execution of his death sentence on (date).

Inmate (name) was advised that I was a psychiatrist and the purpose of the interview was to evaluate his legal competency to undergo execution. I advised that I was not his treating physician and that the results of the interview were not confidential but would be shared with others. He said he understood all this.

Mr. (name) was well groomed and neatly dressed in prison clothing. He noted "today is shower day" and was looking forward to getting a shower soon. He was calm and cooperative with no evidence of psychic or motoric agitation. His speech was normal and his form of thought was fully linear and coherent. His mood was "I'm OK, I'm doing OK, not out of control or anything like that." There were no psychotic symptoms. He denied any idea or plan to hurt or kill himself or anyone else.

In response to my questions, it was clear that Mr. (name) understood his circumstances and that he understood the nature of the death penalty and why it was imposed.

It is my opinion that Mr. (name) is legally competent to undergo execution.

(Name of alienist)  
Staff Psychiatrist

**NOTIFICATION BY WARDEN TO MARIN COUNTY  
DISTRICT ATTORNEY CONCERNING SANITY OF  
CONDEMNED INMATE (PC §3700)**

To: Edward S. Berberian Jr., District Attorney, County of Marin

From: Robert L. Ayers Jr., Warden, San Quentin State Prison

Re: Condemned Inmate \_\_\_\_\_, CDCR# \_\_\_\_\_

Pursuant to Penal Code § 3701, I have good reason to believe that the above named inmate/defendant, who is under sentence of death, has become insane.

I base this on the following: \_\_\_\_\_

**A. Information concerning the inmate:**

1. County from which the inmate is under sentence of death: \_\_\_\_\_
2. Charges convicted of: \_\_\_\_\_
3. Date set for execution: \_\_\_\_\_

**B. Enclosed with this memorandum are the following:**

- \_\_\_\_\_ 1. Copies of the reports of the three alienists who examined the Inmate/defendant per PC § 3700.5
- \_\_\_\_\_ 2. A copy of the inmate's psychiatric file
- \_\_\_\_\_ 3. Other \_\_\_\_\_

Robert L. Ayers Jr.  
Warden  
San Quentin State Prison

By: \_\_\_\_\_

Date: \_\_\_\_\_

## Condemned Unit 15-Minute Activity Log

## First Watch

All Officers will be responsible to record all events in clear, legible print. Each Officer's name must be clearly printed in the designated place at the top of the form and a signature is required for each entry.

Date: \_\_\_\_\_

Inmate Name: \_\_\_\_\_

Correctional Officers: \_\_\_\_\_

Number: \_\_\_\_\_

Cell: \_\_\_\_\_

2200:_____	Officer's Signature_____
2215:_____	Officer's Signature_____
2230:_____	Officer's Signature_____
2245:_____	Officer's Signature_____
2300:_____	Officer's Signature_____
2315:_____	Officer's Signature_____
2330:_____	Officer's Signature_____
2345:_____	Officer's Signature_____
2400:_____	Officer's Signature_____
0015:_____	Officer's Signature_____
0030:_____	Officer's Signature_____
0045:_____	Officer's Signature_____
0100:_____	Officer's Signature_____
0115:_____	Officer's Signature_____
0130:_____	Officer's Signature_____
0145:_____	Officer's Signature_____
0200:_____	Officer's Signature_____
0215:_____	Officer's Signature_____
0230:_____	Officer's Signature_____
0245:_____	Officer's Signature_____
0300:_____	Officer's Signature_____
0315:_____	Officer's Signature_____
0330:_____	Officer's Signature_____
0345:_____	Officer's Signature_____
0400:_____	Officer's Signature_____
0415:_____	Officer's Signature_____
0430:_____	Officer's Signature_____
0445:_____	Officer's Signature_____
0500:_____	Officer's Signature_____
0515:_____	Officer's Signature_____
0530:_____	Officer's Signature_____
0545:_____	Officer's Signature_____
0600:_____	Officer's Signature_____

Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Supervisor's Verification: \_\_\_\_\_

Position: \_\_\_\_\_

Captain's Review: \_\_\_\_\_

## Condemned Unit 15-Minute Activity Log

## Second Watch

All Officers will be responsible to record all events in clear, legible print. Each Officer's name must be clearly printed in the designated place at the top of the form and a signature is required for each entry.

Date: \_\_\_\_\_

Inmate Name: \_\_\_\_\_

Correctional Officers: \_\_\_\_\_

Number: \_\_\_\_\_

Cell: \_\_\_\_\_

0600:_____	Officer's Signature_____
0615:_____	Officer's Signature_____
0630:_____	Officer's Signature_____
0645:_____	Officer's Signature_____
0700:_____	Officer's Signature_____
0715:_____	Officer's Signature_____
0730:_____	Officer's Signature_____
0745:_____	Officer's Signature_____
0800:_____	Officer's Signature_____
0815:_____	Officer's Signature_____
0830:_____	Officer's Signature_____
0845:_____	Officer's Signature_____
0900:_____	Officer's Signature_____
0915:_____	Officer's Signature_____
0930:_____	Officer's Signature_____
0945:_____	Officer's Signature_____
1000:_____	Officer's Signature_____
1015:_____	Officer's Signature_____
1030:_____	Officer's Signature_____
1045:_____	Officer's Signature_____
1100:_____	Officer's Signature_____
1115:_____	Officer's Signature_____
1130:_____	Officer's Signature_____
1145:_____	Officer's Signature_____
1200:_____	Officer's Signature_____
1215:_____	Officer's Signature_____
1230:_____	Officer's Signature_____
1245:_____	Officer's Signature_____
1300:_____	Officer's Signature_____
1315:_____	Officer's Signature_____
1330:_____	Officer's Signature_____
1345:_____	Officer's Signature_____
1400:_____	Officer's Signature_____

Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Supervisor's Verification: \_\_\_\_\_

Position: \_\_\_\_\_

Captain's Review: \_\_\_\_\_

## Condemned Unit 15-Minute Activity Log

## Third Watch

All Officers will be responsible to record all events in clear, legible print. Each Officer's name must be clearly printed in the designated place at the top of the form and a signature is required for each entry.

Date: \_\_\_\_\_

Inmate Name: \_\_\_\_\_

Correctional Officers: \_\_\_\_\_

Number: \_\_\_\_\_

Cell: \_\_\_\_\_

1400:_____	Officer's Signature_____
1415:_____	Officer's Signature_____
1430:_____	Officer's Signature_____
1445:_____	Officer's Signature_____
1500:_____	Officer's Signature_____
1515:_____	Officer's Signature_____
1530:_____	Officer's Signature_____
1545:_____	Officer's Signature_____
1600:_____	Officer's Signature_____
1615:_____	Officer's Signature_____
1630:_____	Officer's Signature_____
1645:_____	Officer's Signature_____
1700:_____	Officer's Signature_____
1715:_____	Officer's Signature_____
1730:_____	Officer's Signature_____
1745:_____	Officer's Signature_____
1800:_____	Officer's Signature_____
1815:_____	Officer's Signature_____
1830:_____	Officer's Signature_____
1845:_____	Officer's Signature_____
1900:_____	Officer's Signature_____
1915:_____	Officer's Signature_____
1930:_____	Officer's Signature_____
1945:_____	Officer's Signature_____
2000:_____	Officer's Signature_____
2015:_____	Officer's Signature_____
2030:_____	Officer's Signature_____
2045:_____	Officer's Signature_____
2100:_____	Officer's Signature_____
2115:_____	Officer's Signature_____
2130:_____	Officer's Signature_____
2145:_____	Officer's Signature_____
2200:_____	Officer's Signature_____

Comments: \_\_\_\_\_

Supervisor's Verification: \_\_\_\_\_

Position: \_\_\_\_\_

Captain's Review: \_\_\_\_\_



State of California

Department of Corrections and Rehabilitation

**M e m o r a n d u m**

Date :  
To : WARDEN  
From : San Quentin State Prison, San Quentin, CA 94964  
Subject : **7-DAY PRE-EXECUTION REPORT (NAME AND NUMBER OF INMATE)**

This report of a competency evaluation is prepared pursuant to San Quentin Institutional Procedure No. 770. Inmate (Name) is scheduled for execution of his death sentence on (date).

Inmate (name) was evaluated by Drs. (name or names of alienists) on (Date of Exam) Their reports will be provided separately. The inmate is housed in the East Block.

Inmate (name) declined to leave his cell for interview, so was seen at his cell front. He was appropriately garbed. He responded in a lively and appropriate manner to introductions and an explanation of the purpose of the interview. His speech was coherent and goal-directed. He stated that he saw no need for further psychiatric contact as "I'm doing okay." He was polite and otherwise cooperative. He was fully oriented and indicated awareness of his upcoming date of execution and the efforts of his legal counsel on his behalf. Formal memory testing was not done, but inmate (name) spoke in a detailed manner about recent events. There was no evidence of impaired reality testing such as hallucinatory experiences or delusional beliefs.

**In conclusion, inmate (name) is considered mentally competent and meets the criteria for execution of his death sentence as scheduled.**

(Name of alienist)  
Staff Psychiatrist

\*\*\*CORRECTIONAL COUNSELOR'S PRE EXECUTION LOG\*\*\*

The condemned unit Correctional Counselor II will record all activities involving the condemned inmate on this log. These activities include, but are not limited to, delivery of mail, scheduling of telephone calls and visits, collection of attachments to the Thirty Day Notice, and any interviews by staff.

[illegible]

**Name**\_\_\_\_\_ **Signature**\_\_\_\_\_

**LETHAL INJECTION SUPPLY INVENTORY  
SAN QUENTIN STATE PRISON**

<b>SECURITY TEAM /RESTRAINT CABINET</b>			
<b>START</b>	<b>END</b>	<b>QUANTITY</b>	<b>ITEM</b>
		2	Leather Wrist Restraints
		1	Hand Restraints (Hand Cuffs)
		2	Leather Ankle Restraints (Large)
		2	Belly Chain with Handcuffs (Martin Chain)
		1	Pair Leg Irons
		1	1" Medical Tape -Box
		1	Latex Gloves – Box (Large)
		1	Latex Gloves – Box (Medium)
		1	Protective Surgical Masks – Box
		10	Disposable Gowns (X-Large,XX-Large)
		5	Protective (Riot) Helmet
		2	Multi-Channel Wireless Microphone (Lavalier)
		1	Multi-Channel Wireless Microphone (Hand-Held)
		2	Flashlight
		1	Bleach/Cleaner
		5	Protective Goggles
		5	Spit mask
		5 sets	Protective knee pads
		5 sets	Leather Elbow length gloves
		1	Stokes Liter
		5 sets	Shin Guards
		1	Extraction (Riot) Shield
		1	Rolling Medical Gurney
		1	Computer
		1	Computer Monitor
		1	Computer Printer
		1	Baton (Straight Handle)
<b>SEC. TEAM/ON FRONT COUNTER BY PHONES</b>			
		2	Bandage Scissors (Pair)
		1	MPA-31 20 Watt Amplifier
		1	Multi-Channel Wireless Microphone Receiver
		1	Speaker Control Center (Public Announce System)

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 Signature of Security Team Member

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 Date

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 Signature of Team Leader

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 Date

IV TEAM-SECURED STORAGE				
START	END	QUANTITY	AREA	ITEM
		5	Top	Box of Alcohol Preps
		2	Top	Non sterile gauze 2x2
		2	Top	Disposable Razor
		2	Drawer 1	Electrode Package
		100	Drawer 1	Needle – 18 ga – 1 ½
		100	Drawer 2	Angiocath – 14 ga – 2”
		100	Drawer 2	Angiocath, – 16 ga – 1”
		100	Drawer 2	Angiocath – 18 ga – 1”
		100	Drawer 2	Angiocath – 20 ga – 1”
		100	Drawer 2	Angiocath-22 ga-1”
		6	Drawer 2	Surgical Mask
		4	Drawer 2	Face Shield
		2	Drawer 2	Stethoscope
		4	Drawer 3	Tourniquet
		6	Drawer 3	IV start kits
		25	Drawer 3	Exten Set 32” long – Travenol Code #2C0066 sub w/ McGraw V5403 31”
		10	Drawer 4	Safeport Injector (Anesthesia Triple Valve)
		4	Drawer 5	Bandage Scissors (Pair)
		5	Drawer 5	Adhesive Tape - 1” clear
		6	Drawer 5	Adhesive Tape - 2” clear
		8	Drawer 5	Normal Saline – 1000cc 0.9% (Bag)
		2	Cabinet	Gloves non powder large
		2	Cabinet	Gloves non powder med
		2	Cabinet	Sharp’s Container
		10	Cabinet	Blood Spill Kit
		20	Cabinet	IV set 15 drops
		10	Cabinet	0.9 ns 1000ml bags
		2	Cabinet	Gloves non powder x-large
		6	Cabinet	Laboratory Gowns
		2		I.V. Hanger
		2		ECG Heart Monitor
		10		ECG graph paper roll
INFUSION TEAM-COUNTER				
		2	Drawer 2	Black Indelible Marker
		4	Drawer 3	Syringe – 5cc Luer Lock
		4	Drawer 3	Syringe – 10cc Luer Lock
		20	Drawer 4	Syringe – 60cc Luer Lock
		4	Cabinet	Red markers
		4	Cabinet	Yellow markers
		4	Cabinet	Green markers
		4	Cabinet	Black markers
		4	Cabinet	Blue markers

Signature of IV/Infusion Team Member

Date

Signature of Team Leader

Date

<b>CHEMICAL STORAGE</b>				
<b>PRE-EXECUTION</b>	<b>RECOMMENDED QUANTITY</b>	<b>EXPIRATION DATE</b>	<b>ITEM</b>	<b>POST-EXECUTION</b>
	18		Sodium Thiopental – 500 mg	
	25		Pancuronium – 10 mg Ampules	
	30		Potassium Chloride – 20 mil equiv Ampules	
	5		Valium Tabs – 10 mg (Diazepam)	

<b>BACK UP</b>			
<b>PRE-EXECUTION</b>	<b>EXPIRATION DATE</b>	<b>ITEM</b>	<b>POST-EXECUTION</b>
		Sodium Thiopental – 500 mg	
		Pancuronium – 10 mg Ampules	
		Potassium Chloride – 20 mil equiv Ampules	

<b>OUT-OF-DATE</b>			
<b>PRE-EXECUTION</b>	<b>EXPIRATION DATE</b>	<b>ITEM</b>	<b>POST-EXECUTION</b>
		Sodium Thiopental – 500 mg	
		Pancuronium – 10 mg Ampules	
		Potassium Chloride – 20 mil equiv Ampules	

<b>PRE-EXECUTION</b>	<b>TRAINING INVENTORY</b>	<b>POST-EXECUTION</b>
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\_\_\_\_\_  
Signature of Team Leader      Date

\_\_\_\_\_  
Signature of Team Leader      Date

\_\_\_\_\_  
Signature of Team Leader      Date

\_\_\_\_\_  
Signature of Associate Warden      Date

\_\_\_\_\_  
Signature of Associate Warden      Date

\_\_\_\_\_  
Signature of Associate Warden      Date

Inmate name	CDC #	Time	Date
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[illegible]

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	/	.
	/	.
	/	.
<b>lot #</b>	<b>received by</b>	<b>verified by</b>

[illegible]

**Evidence stored at \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_**

Evidence Received by \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Evidence stored at \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Evidence Received by \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Evidence stored at \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Evidence Received by \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Evidence stored at \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Returned Sodium Thiopental \_\_\_\_\_

	Amount/ lot#	Reason
Pancuronium Bromide	_____	_____
	_____	_____

	Amount/ lot#	Reason
Potassium Chloride	_____	_____
	_____	_____

	Amount/ lot#	Reason
	_____	_____
	_____	_____

Infusion began at \_\_\_\_\_  
TimeInfusion stopped at \_\_\_\_\_  
Time\_\_\_\_\_  
Name\_\_\_\_\_  
Signature\_\_\_\_\_  
Date

**LETHAL INJECTION INMATE NEEDS  
SAN QUENTIN STATE PRISON**

**INMATE NEEDS:**

- Bed Mattress
- Blanket
- Pillow
- AM/FM Radio
- Television
- Inmate Clothing (3 Sets)
  - State Issue Pants
  - State Issue Under garments
  - State Issue Socks
  - State Issue Shirt
  - State Issued Slippers



**Pre-Execution Notice to Witnesses  
San Quentin State Prison**

May I have your attention please,

The Honorable (enter judge's name), Judge of the Superior Court of the County of (enter name of county), ordered that on (enter date), (enter inmate's name), suffer the death penalty within the walls of San Quentin State Prison for the crime of murder in the first degree with special circumstances.

The execution shall now proceed.

**San Quentin State Prison  
Execution Log  
Lethal Injection Infusion Team**

Inmate Name	CDCR#	Date of Execution

**Record Keeping Team Member Identification #:**

05/2007

	Task	Time	Comments
1.	Infusion Team Members arrive at the Lethal Injection Facility.		
2.	Transfer of chemicals to Infusion Team; (chain of custody)		
	<b>Tray A</b>		
3.	Mix 1 <sup>st</sup> 3 kits of Sodium Thiopental for syringe #1 for <b>Tray A</b> .		
4.	Draw 1.5 g of Sodium Thiopental into 60cc syringe and label this syringe in red; <b>A-1 Sodium Thiopental</b> .		
5..	Mix 2 <sup>nd</sup> 3 kits of Sodium Thiopental for syringe #2.		
6..	Draw 1.5 g of Sodium Thiopental into 60cc syringe and label this syringe in red; <b>A-2 Sodium Thiopental</b> .		
7.	Draw 50cc of normal saline into a 60cc syringe and label in red; <b>A-3 Saline</b> .		
8.	Draw 50 mg of Pancuronium Bromide into one 60cc syringe and label in red; <b>A-4 Pancuronium Bromide</b> .		
9.	Draw 50cc of normal saline into a 60cc syringe and label in red; <b>A-5 Saline</b> .		
10.	Draw 100 mEq of Potassium Chloride into 60cc syringe and label in red; <b>A-6 Potassium Chloride</b> .		
11.	Draw 100 mEq of Potassium Chloride into 60cc syringe and label in red; <b>A-7 Potassium Chloride</b> .		
12.	Draw 50cc of normal saline into a 60cc syringe and label in red: <b>A-8 Saline</b> .		
	<b>Tray B</b>		
13.	Mix 1 <sup>st</sup> 3 kits of Sodium Thiopental for syringe #1 for <b>Tray B</b> .		
14.	Draw 1.5 g of Sodium Thiopental into 60cc syringe and label this syringe in blue; <b>B-1 Sodium Thiopental</b> .		
15.	Mix 2 <sup>nd</sup> 3 kits of Sodium Thiopental for syringe #2.		
16.	Draw 1.5 g of Sodium Thiopental into 60cc syringe and label this syringe in blue; <b>B-2 Sodium Thiopental</b> .		
17.	Draw 50cc of normal saline into a 60cc syringe and label in blue; <b>B-3 Saline</b> .		
18.	Draw 50 mg of Pancuronium Bromide into one 60cc syringe and label in blue; <b>B-4 Pancuronium Bromide</b> .		
19.	Draw 50cc of normal saline into a 60cc syringe and label in blue; <b>B-5 Saline</b> .		

20.	Draw 100 mEq of Potassium Chloride into 60cc syringe and label in blue; <b>B-6 Potassium Chloride.</b>		
	<b>Task</b>	<b>Time</b>	<b>Comments</b>
21.	Draw 100 mEq of Potassium Chloride into 60cc syringe and label in blue; <b>B-7 Potassium Chloride.</b>		
22.	Draw 50cc of normal saline into a 60cc syringe and labeled in blue: <b>B-8 Saline.</b>		
23.	Infusion Team Members cross check Tray A and Tray B.		
24.	Intravenous lines checked		
	<b>Infusion</b>		
25.	Inject syringe # <b>A-1 Sodium Thiopental.</b>		
	<b>Begin 10 minute count:</b>		
26.	Inject syringe # <b>A-2 Sodium Thiopental</b>		
27.	Inject syringe # <b>A-3 the Saline Flush.</b>		
	<b>Inmate conscious discontinue Tray A and start Tray B in back-up intravenous catheter. Inmate unconscious continue with Tray A.</b>		
28.	Inject syringe # <b>A-4 Pancuronium Bromide.</b>		
29.	Inject syringe # <b>A-5 the Saline Flush.</b>		
30.	Inject syringe # <b>A-6 Potassium Chloride.</b>		
31.	Inject syringe # <b>A-7 Potassium Chloride</b>		
32.	Inject syringe # <b>A-8 Saline Flush.</b>		
33.	<b>Cardiac monitor (ECG) “flat line.”</b>		
34.	<b>Physician pronounces cessation of life.</b>		
	<b>If all 8 syringes from Tray A have been infused, 10 minutes has elapsed and death has not been determined, notify Associate Warden and Team Leader. Warden may authorize repeat of protocol with Tray B, backup catheter.</b>		
35.	Inject syringe # <b>B-1 Sodium Thiopental.</b>		
36.	Inject syringe # <b>B-2 Sodium Thiopental.</b>		
37.	Inject syringe # <b>B-3 Saline flush.</b>		
38.	Inject syringe # <b>B-4 Pancuronium Bromide.</b>		
39.	Inject syringe # <b>B-5 Saline flush.</b>		
40.	Inject syringe # <b>B-6 Potassium Chloride.</b>		
41.	Inject syringe # <b>B-7 Potassium Chloride.</b>		
42.	Inject syringe # <b>B-8 Saline Flush.</b>		
43.	<b>Cardiac monitor (ECG) “flat line.”</b>		
44.	<b>Physician pronounces cessation of life.</b>		
45.	Prepare final report of execution.		

**Post-Execution Notice to Witnesses  
San Quentin State Prison**

May I have your attention please,

I, Warden (enter Warden's name) declares that condemned inmate (enter inmate's name), having been pronounced dead at ( time) hours by an attending physician was executed on this day, (enter date), as prescribed by the laws of the State of California.

The witness room must now be cleared. Please follow the instructions given to you by staff.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF XXXXXXXX**

THE PEOPLE OF THE STATE OF CALIFORNIA )  
 )  
 vs. ) **Case No. XXXXXXXX**  
 )  
 ) **RETURN ON WARRANT**  
 ) **OF DEATH**  
(Inmate's Name) )  
 )

To the Honorable XXXXXXXX, Judge of the Superior Court of the State of California, County of XXXXXXXX:

I, XXXXXXXX, Warden of the California State Prison at San Quentin, in compliance with Section 3607 of the Penal Code of the State of California, do hereby certify:

The Warrant of Execution entitled Judgment of Death and Commitment issued in this case on (date) by the Honorable XXXXXXXX, Judge of the Superior Court for the County of XXXXXXXX, was received at this institution on (date), as required by Penal Code Section 1227;

The body of (inmate's name and number), the subject of the above Warrant of Execution, was delivered to this institution by the Sheriff of XXXXX County on (date).

On the (date), shortly after 12:01 a.m., the above warrant was executed within the walls of San Quentin Prison, as designated by the court in which this judgment was rendered, by administering a lethal injection to XXXXXX, until he was dead. A true copy of the Certificate of Death is attached to this Return.

In accordance with the provisions of Penal Code Section 3605, I was present at this execution, and I invited the presence of the Attorney General of the State of California, at least twelve reputable citizens, such peace officers as I deemed expedient, and such friends or family of the defendant and a spiritual advisor(s) as designated by him to be present and witness the execution.

DATED: XXXXXXXX

XXXXXXXX, Warden  
California State Prison at San Quentin

**San Quentin State Prison  
Execution Log  
Lethal Injection Intravenous Team**

05/2007

Inmate Name	CDCR #	Date of Execution

**Record Team Member Identification #:**

Task	Time	Comments
1. IV tubing and needles given final check.		
2. ECG pads are placed on inmate's chest.		
3. ECG leads attached to monitor.		
4. Insert intravenous catheter - Left		
5. Left catheter patency confirmed.		
6. Insert intravenous catheter - Right		
7. Right catheter patency confirmed.		
8. One Intravenous Team Member exits Execution Room and goes to Infusion Room to record infusion of chemicals on ECG graph paper.		
9. One Intravenous Team Member takes position next to inmate to monitor consciousness and Intravenous lines.		
10. Team advised which Intravenous catheter is to be used for execution. (left or right)		
11. Saline drip in primary arm is stopped.		
12. Syringe #A-1 administered; mark ECG graph paper with #A-1. Team Member in Execution Room checks inmate for consciousness.		
13. Syringe #A-2 administered; mark ECG graph paper with #A-2.		
14. Syringe #A-3 administered; mark ECG graph paper with #A-3. Team Member in Execution Room checks inmate for consciousness.		
15. Syringe #A-4 administered; mark ECG graph paper with #A-4.		
16. Syringe #A-5 administered; mark ECG graph paper with #A-5.		
17. Syringe #A-6 administered; mark ECG graph paper with #A-6.		
18. Syringe #A-7, administered; mark ECG graph paper with #A-7.		
19. Syringe #A-8 administered; mark ECG graph paper with #A-8.		

	Task	Time	Comments
	<b>If chemicals on Tray B are used for repeat of Protocol - backup catheter will be used. Syringes will be injected in same sequence with all 8 syringes on Tray B being administered.</b>		
20.	Syringe <b>#B-1</b> , mark ECG graph paper with <b>#B-1</b> .		
21.	Syringe <b>#B-2</b> , mark ECG graph paper with <b>#B-2</b> .		
22.	Syringe <b>#B-3</b> , mark ECG graph paper with <b>#B-3</b> .		
23.	Syringe <b>#B-4</b> , mark ECG graph paper with <b>#B-4</b> .		
24.	Syringe <b>#B-5</b> , mark ECG graph paper with <b>#B-5</b> .		
25.	Syringe <b>#B-6</b> , mark ECG graph paper with <b>#B-6</b> .		
26.	Syringe <b>#B-7</b> , mark ECG graph paper with <b>#B-7</b> .		
27.	Syringe <b>#B-8</b> , mark ECG graph paper with <b>#B-8</b> .		
28.	Mark ECG graph paper when death is pronounced.		
29.	Prepare final report.		

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 Lethal Injection Team Administrator

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 Date

**San Quentin State Prison  
Execution Log  
Lethal Injection Security Team**

05/2007

Inmate Name	CDCR#	Date of Execution

Record Team Member Identification #:

TASKS	Time	Comments
Inmate searched placed in restraints (handcuffs, Martin chain, and leg irons) and removed from the holding cell.		
<b>Preparation/Execution Room</b>		
Inmate staged in Preparation Room to allow Intravenous Team to attach ECG leads.		
Escorted inmate to Execution Room.		
Inmate secured to gurney.		
Security Team exits Execution Room.		
Team Leader takes position in Infusion/Control Room.		
<b>Post Execution</b>		
Security Team re-entered Execution Room after the Lethal Injection process has been completed and all witnesses have been escorted out of the Lethal Injection Facility.		
Post mortem identification and photographs completed.		
Inmate's remains prepared for release to Coroner/Mortuary.		
Released inmate's remains to the Coroner/Mortuary.		
Completed all reports relative to Lethal Injection process.		
Clean Lethal Injection Facility.		

Notes:

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Lethal Injection Team Administrator

Date



**San Quentin State Prison  
Execution Log  
Lethal Injection Team Administrator/Team Leader**

05/2007

Inmate Name	CDCR #	Date of Execution

**Record Team Member Identification #:**

Task	Start	Comments
1. <b>3 hours prior:</b> Assemble Team and make assignments.		
<b>Record Keeping Team activated; Execution Logs begin.</b>		
2. The Lethal Injection Team Leader accompanied by the Associate Warden Specialized Housing Division will remove the lethal injection chemicals from the Lethal Injection Facility safe/refrigerator.		
3. The Lethal Injection Team Leader will transfer custody of the lethal injection chemicals to two members of the Lethal Injection Infusion Team and complete the Chain of Custody form.		
4. Meet with the condemned inmate in the Lethal Injection Facility holding cell area. <ul style="list-style-type: none"> <li>Ask if the inmate wishes to write a last statement to be read after the execution.</li> <li>Inform the inmate that a sedative is available. Valium or its equivalent will be administered under the direction and approval of a clinician.</li> </ul>		
5. The Lethal Injection Team Administrator will take position in the Infusion/Control room.		
6. Team Leader takes position in Infusion Room.		
7. Infusion of lethal chemicals is initiated.		
8. Flat line noted on ECG.		
9. Death pronounced.		
<b>If chemicals on Tray B are used for repeat of Protocol – backup catheter will be used. All 8 syringes will be administered in the same sequence.</b>		
10. Repeat Protocol.		
11. Flat line noted on ECG.		
12. Death pronounced.		
13. Witnesses notified that inmate has expired.		
14. Curtains drawn on viewing windows.		
15. Inmate's body prepared for Coroner/Mortuary.		

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Lethal Injection Team Administrator

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Date

**CDC#**

# San Quentin State Prison Execution Report

## PART B: EXECUTIVE SUMMARY

**PAGE** \_\_ **OF** \_\_

### TEAM ASSIGNMENT:

DATE: \_\_\_\_\_

**NARRATIVE:**

INMATE NAME: LAST:

**FIRST:**

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**MIDDLE:**

**CDC#**

## **ATTACHMENT C**

Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia  
35 Ford. Urb. L.J. 817 (2008)

## ANESTHETIZING THE PUBLIC CONSCIENCE: LETHAL INJECTION AND ANIMAL EUTHANASIA

*Ty Alper\**

### INTRODUCTION

In the late 1970s, when Texas was considering whether to adopt Oklahoma's three-drug lethal injection formula for the execution of prisoners, Dr. Ralph Gray, the doctor in charge of medical care in Texas prisons, consulted with a Texas veterinarian named Dr. Gerry Etheredge.<sup>1</sup> Dr. Etheredge told Dr. Gray that veterinarians used an overdose of one drug, an anesthetic called sodium pentobarbital, to euthanize animals and that it was a "very safe, very effective, and very cheap" method of euthanasia.<sup>2</sup> Dr. Etheredge remembers that Dr. Gray had only one objection to using a similar method to execute human beings. "He said it was a great idea," Dr. Etheredge recalled, "except that people would think we are treating people the same way that we're treating animals. He was afraid of a hue and cry."<sup>3</sup> Texas rejected Dr. Etheredge's one-drug, anesthetic-only recommendation and, in 1982, became the first state to actually use lethal injection—via the three-drug formula—as a method of execution.<sup>4</sup>

This history is almost hard to believe in light of the fact that three decades later, death row inmates in Texas, as well as in nearly

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\* Associate Director, Death Penalty Clinic, University of California, Berkeley, School of Law. I could not have written this Article without the creative and persistent research assistance of Joy Haviland and Ryan Davis. I am very grateful to them both, as well as to the editors of the *Fordham Urban Law Journal*, and my colleagues and friends who read and commented on earlier drafts.

1. Adam Liptak, *States Hesitate to Lead Change on Executions*, N.Y. TIMES, Jan. 3, 2008, at A1. The conversations between Dr. Gray and Dr. Etheredge are also reported in Robbie Byrd, *Informal Talks Opened Door to Lethal Injection*, THE HUNTSVILLE ITEM, Oct. 4, 2007, available at [http://www.itemonline.com/local/local\\_story\\_277004148.html](http://www.itemonline.com/local/local_story_277004148.html).

2. Liptak, *supra* note 1.

3. *Id.*

4. See Bob Ray Sanders, *The First to Die by Injection*, FORT WORTH STAR-TELEGRAM, Dec. 2, 2007, available at [http://www.star-telegram.com/news/columnists/bob\\_ray\\_sanders/story/335292.html](http://www.star-telegram.com/news/columnists/bob_ray_sanders/story/335292.html) (describing the execution of Charles Brooks, Jr., the first of over 400 Texas inmates put to death by lethal injection). Oklahoma did not execute anyone by lethal injection until 1990. See also Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (last visited Apr. 3, 2008).

every other death penalty state, are challenging the three-drug formula on the grounds that the method is *less* reliable, and therefore *less* humane, than the method used to euthanize animals.<sup>5</sup> Rather than objecting to their clients being treated no better than animals, lawyers for the petitioners in *Baze v. Rees*, the lethal injection case pending before the Supreme Court, have essentially asked the Court to require the state of Kentucky to treat them *at least as well* as the state requires shelter workers to treat animals during the euthanasia process.<sup>6</sup> Veterinarians have testified on behalf of death row inmates in several states,<sup>7</sup> and groups of veterinary experts have filed amicus briefs on behalf of petitioners in the two most recent Supreme Court lethal injection cases, *Baze*<sup>8</sup> and *Hill v. McDonough*.<sup>9</sup>

The three-drug formula that states use to execute people is often misleadingly referred to as a “cocktail.”<sup>10</sup> The three drugs are not mixed together like a cocktail; instead, they are administered serially, usually with a saline flush in between each drug, to clear the intravenous (“IV”) line.<sup>11</sup> The drugs are, in the following order, thiopental, pancuronium bromide, and potassium chloride.<sup>12</sup> The first drug is intended to anesthetize the inmate so he does not ex-

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5. See, e.g., Maura Dolan & Henry Weinstein, *The Nation; Concerns About Pain Put Lethal Injection on Trial*, L.A. TIMES, Apr. 24, 2006, at A1 (noting that challenges to the use of lethal injection have been filed in California, Florida, Maryland, Missouri, Kentucky, Louisiana, Texas, Tennessee, North Carolina, Indiana, Ohio, and Oklahoma).

6. See Reply Brief for Petitioners at 19, *Baze v. Rees*, No. 07-5439, 2007 WL 4618321 (U.S. petition for cert. filed Dec. 28, 2007) [hereinafter *Baze* Petitioners’ Reply Brief] (“Veterinarians routinely perform euthanasia by barbiturate and have concluded that it is the method ‘preferred’ over all others because it is reliably humane and causes ‘cardiac arrest within a matter of minutes.’”).

7. See, e.g., Testimony of Dr. Kevin Concannon at 250-51, *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. Sept. 26, 2006) (No. C06-0219-JF) [hereinafter Testimony of Dr. Kevin Concannon]; Testimony of Dr. Glenn Pettifer at 83-139, *Evans v. Saar*, 412 F. Supp. 2d 519 (D. Md. 2006) (No. 06-149).

8. See generally Brief of Dr. Kevin Concannon et al. as Amici Curiae in Support of Petitioners, *Baze v. Rees*, No. 07-5439, 2007 WL 3440946 (U.S. petition for cert. filed Nov. 12, 2007) [hereinafter *Baze* Veterinarian Brief].

9. See generally Brief of Dr. Kevin Concannon et al. as Amici Curiae in Support of Petitioner, *Hill v. McDonough*, 547 U.S. 573 (2006) (No. 05-8794) [hereinafter *Hill* Veterinarian Brief].

10. See, e.g., Ty Alper, *Lethal Incompetence: Lethal Injection Litigation is Exposing More than Torturous Executions*, THE CHAMPION, Sept.-Oct. 2006, at 41-42.

11. See 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, 98 (2002) [hereinafter Denno, *Legislatures Delegate Death*].

12. See *id.* at 97-98.

2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 819

perience the effects of the second and third drugs.<sup>13</sup> The second drug paralyzes him, and the third drug stops his heart, killing him.<sup>14</sup>

The use of pancuronium, the second drug, presents a problem that is fundamental to the controversy over the lethal injection procedure. Because pancuronium paralyzes the inmate during the execution process, the inmate may experience excruciating pain and suffering but be unable to cry out or even blink an eyelid to let anyone know if the anesthesia has failed.<sup>15</sup> Because pancuronium masks the ability of a lay observer to discern whether the anesthetic drug has been properly delivered, it is very difficult or impossible, in most cases, to know whether the lethal injection execution has been “botched.”<sup>16</sup> Pancuronium virtually ensures that the execution looks “peaceful”<sup>17</sup> when it may have been anything but.

The pain and suffering that an inmate would experience if not properly anesthetized is extreme. Because pancuronium is a paralytic that restricts the ability of the respiratory muscles to contract, it causes asphyxiation.<sup>18</sup> The third drug, potassium chloride, causes excruciating pain that has been likened to the feeling of having one’s veins set on fire.<sup>19</sup> Experts who have testified in lethal injection cases have unanimously agreed that it would be unconsciona-

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13. *See id.*

14. *See id.* at 98.

15. *See, e.g.,* David Waisel, *Physician Participation in Capital Punishment*, 82 MAYO CLINIC PROC. 1073, 1074 (2007) (“If the inmate was not anesthetized before the administration of pancuronium bromide and potassium chloride, the inmate may have the sensation of paralysis without anesthesia (known as awareness) and may feel the burning of the highly concentrated potassium chloride.”).

16. *See id.* at 1075.

17. Witnesses to lethal injection executions routinely describe them as “peaceful.” *See, e.g.,* Alan Johnson, *Murderer Dies Amid Lethal-Injection Debate*, THE COLUMBUS DISPATCH, Apr. 25, 2007, at B4 (describing the execution as a “seemingly peaceful death”); Carri Geer Thevenot, *The Execution of Timothy McVeigh*, LAS VEGAS REV.-J., June 12, 2001, at A1 (quoting one execution witness as saying, “I saw him swallow once, and that was it . . . I thought: what a peaceful way for a mass murderer to die”); Gwen Floria, *Convicted Murderer Asks Again To Be Allowed to Die*, GREAT FALLS TRIB. (Mont.), July 19, 2006, at M1 (quoting a witness as saying that the execution “appeared peaceful”). During oral argument in *Baze v. Rees*, counsel for Kentucky also conceded that pancuronium has no therapeutic benefit: “The purpose it serves is the purpose of dignifying the process for the benefit of the inmate and for the benefit of the witnesses.” Transcript of Oral Argument, *Baze v. Rees*, No. 07-5439, 2008 WL 63222, at \*43 (U.S. Jan. 7, 2008) [hereinafter *Baze* Oral Argument].

18. *See, e.g.,* Elizabeth Weil, *The Needle and the Damage Done*, N.Y. TIMES, Feb. 11, 2007, (Magazine), at 46.

19. *See id.*

ble to inject either drug into a person who was not anesthetized.<sup>20</sup> At issue in recent challenges to the administration of this procedure is whether, and to what extent, the public can be sure that prison officials are properly administering the first drug, the anesthetic, and monitoring its continued effect, such that the inmate does not experience the suffocation the second drug causes or the excruciating pain that the third drug inflicts.<sup>21</sup> A state's lethal injection procedures violate the Eighth Amendment if they subject the inmate to an intolerable risk of excruciating pain.<sup>22</sup>

Litigation on behalf of death row inmates has exposed problems at every step of the process, including the mixing of the drugs; the setting of the IV lines; the administration of the drugs; and the monitoring of their effectiveness. At each step, discovery has revealed untrained and unreliable personnel working with inadequate equipment under poorly designed conditions. In California, for example, a federal judge found a "pervasive lack of professionalism"<sup>23</sup> in the entire execution process, most notably in the improper mixing and preparation of the anesthetic; unreliable screening of execution team members; a lack of training and supervision of execution team members; inadequate and poorly designed physical facilities; and inconsistent and unreliable recordkeeping.<sup>24</sup> In Missouri, litigation revealed that the doctor who had presided over the past fifty-four executions in that state and who was responsible for mixing the drugs in their precise amounts, was dyslexic, admitted transposing numbers, and had been adjusting the dosages of the anesthetic drug on a whim, without telling anyone.<sup>25</sup>

20. See, e.g., *Harbison v. Little*, 511 F. Supp. 2d 872, 883-84 (M.D. Tenn. 2007) (referring to testimony of Dr. Michael S. Higgins, an impartial expert appointed by the court, who "testified that administering pancuronium bromide to an individual with consciousness 'would be nothing short of terror, as I think most of us can easily imagine with suffocation' and also that '[t]he administration of potassium [chloride] in that large a dose, large concentration through a peripheral IV would be painful,'" and also discussing the uncontradicted testimony of Dr. Bruce Levy, the medical examiner for the State of Tennessee and a defense witness, who testified that, "without sufficient anesthesia, pancuronium bromide would cause pain because 'a conscious person who is paralyzed would be unable to breathe. And suffocating to death would be a most violent form of death'").

21. See, e.g., Weil, *supra* note 18, at 46.

22. Pending before the Supreme Court in *Baze* is the issue of what exactly the Eighth Amendment standard should be in these types of challenges. *Baze* Petitioners' Reply Brief, *supra* note 6, at 29.

23. *Morales v. Tilton*, 465 F. Supp. 2d 972, 980 (N.D. Cal. 2006).

24. *Id.* at 979-80.

25. See *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*4-6 (W.D. Mo. June 26, 2006). Investigation by the media in Missouri further revealed that this doctor had been sued for malpractice more than twenty times and had been

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 821

Other examples abound.<sup>26</sup> In short, there is now ample reason to believe that the systems in place for the administration of the three-drug formula in many states are inadequate to ensure proper and consistent delivery of the anesthetic drug.

Much of the testimony on the part of veterinary experts in lethal injection cases has to do with their concerns about the use of pancuronium, the paralyzing drug. Advocates for death row inmates have routinely cited state animal euthanasia laws and regulations in support of two complimentary arguments: first, that the veterinary community bans the use of paralytics in animal euthanasia for good reason, and second, that the veterinary community has, for many years, been using a safer, readily-available procedure that states have refused to adopt for human lethal injections.<sup>27</sup> For the most part, however, the state animal euthanasia laws themselves have been cited only summarily, and without a discussion of what led to their passage.

This Article takes an in depth look at animal euthanasia. Part I examines the paralyzing drugs that veterinarians and animal welfare experts refuse to allow in animal euthanasia. Part II discusses the standards of professional conduct for veterinary and animal shelter professionals. Part III looks at the state laws and regulations governing animal euthanasia. Finally, Part IV analyzes the legislative history that led to the enactment of the various states' animal euthanasia laws and regulations. As this Article reveals, many more states than have previously been recognized either explicitly or implicitly ban the use of pancuronium or similar drugs in animal euthanasia. In fact, virtually all lethal injections in this country have taken place in states that either explicitly or implicitly ban the use of paralyzing drugs in animal euthanasia. Moreover, the concerns about those drugs, which informed and gave rise to

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disciplined by the state medical board for concealing those suits from the hospitals in which he practiced. Jeremy Kohler, *Behind the Mask of the Execution Doctor*, Sr. LOUIS POST-DISPATCH, July 30, 2006, at A1. In November 2007, the *Los Angeles Times* revealed that the federal government had hired this same doctor to develop execution procedures, place and monitor intravenous lines, monitor levels of consciousness, and make determinations of death. See Henry Weinstein, *Doctor Barred By State Helps in U.S. Executions*, L.A. TIMES, Nov. 15, 2007, at A17.

26. See generally Brief for Michael Morales et al. as Amici Curiae in Support of Petitioners, *Baze v. Rees*, No. 07-5439, 2007 WL 3407042 (U.S. Nov. 13, 2007) (compiling evidence of incompetent administration of lethal injection in several states).

27. See, e.g., Petition for Writ of Certiorari at 13, *Abdur'Rahman v. Bredesen*, No. 05-1036, (U.S. Feb. 15, 2006); Brief for Petitioners, *Baze v. Rees*, No. 07-5439, 2007 WL 3307732, at \*12, \*25, \*56 (U.S. Nov. 5, 2007) [hereinafter *Baze* Petitioners' Brief]; *Beardslee v. Woodford*, 395 F.3d 1064, 1073 nn.8-9 (9th Cir. 2005).

the strict animal euthanasia laws and regulations, are identical in many ways to the concerns that lawyers for death row inmates are currently raising about the executions of human beings.

In the end, the fears of Ralph Gray, the Texas doctor, have proven unfounded. Dr. Gray was concerned that people would balk at treating humans, even if they are death row inmates, “the same way we’re treating animals.”<sup>28</sup> Not so. For thirty years now, states have been treating them worse, and killing them using methods that have long since been abandoned by the veterinary and animal welfare communities.

### I. THE PROBLEM WITH CURARE

“The drug [curare] is never used as an anesthetic except when it is necessary to anesthetize the public conscience.”

— British physician Edward Berdoo, 1903<sup>29</sup>

States use pancuronium in the execution process because it paralyzes the inmate before death, thus sparing witnesses to the execution the experience of seeing the twitching and gasping that sometimes accompanies even painless deaths.<sup>30</sup> To fully compre-

28. Liptak, *supra* note 1, at A1.

29. EDWARD BERDOO, A CATECHISM OF VIVISECTION: THE WHOLE CONTROVERSY ARGUED IN ALL ITS DETAILS 70 (1903).

30. See Brief for Respondents, *Baze v. Rees*, No. 07-5439, 2007 WL 4244686, at \*51 (U.S. Dec. 3, 2007) [hereinafter *Baze* Respondents’ Brief] (“The likelihood of involuntary muscle contractions establishes that pancuronium performs a legitimate function in reducing the risk of disruption during an execution, thus leading to a humane death. . . . [P]etitioners’ argument ignores the impact on family members and other witnesses who view the involuntary contractions.”). At times, states have suggested other explanations for the use of pancuronium, such as the need to restrain the inmate so that the catheter does not come dislodged in the event of some kind of a struggle. See *id.* Given that inmates are always fully restrained while lying on the execution gurney, this argument carries little weight. States have also at times suggested that pancuronium serves the purpose of helping kill the inmate. See *id.* at \*50 (“The secondary function of pancuronium is to cause cessation of breathing or respiration.”). Again, this argument carries little weight, given that the third drug, potassium chloride, if administered properly, will always cause death. When push comes to shove, the states have admitted that the use of pancuronium is essentially cosmetic. Dr. Mark Dershwitz, an anesthesiologist who regularly testifies for, and consults with, states in their defense of lethal injection practices, testified as follows during litigation in Delaware:

Q. Is there anything beneficial that pancuronium does for the inmate? A. Not the inmate directly. Q. And indirectly? A. It may decrease the misperception of these involuntary movements as consistent with suffering on the part of the witnesses, including the inmate’s family. Q. But for the inmate himself? A. I said no.

Deposition of Dr. Mark Dershwitz, vol. I, at 119-120, *Jackson v. Danberg*, No. 06-CV-300 (D. Del. Sept. 10, 2007).

2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 823

hend the dangers of pancuronium, and the reasons why it is shunned in the practice of animal euthanasia, it is instructive first to consider briefly its origins and history.

Pancuronium belongs to a class of drugs called neuromuscular blocking agents.<sup>31</sup> Many of these drugs are derived from, or are synthetic versions of, curare, a highly poisonous extract from certain woody vines that grow in South America.<sup>32</sup> For that reason, they are often referred to as “curariform” drugs, because they have a curare-like effect.<sup>33</sup> Neuromuscular blocking agents interfere with the transmission of nerve impulses at the receptor sites of all skeletal muscle.<sup>34</sup> In lay terms, these drugs paralyze all voluntary muscles in the body, including the diaphragm, which is necessary to breathe. Unless a person under the influence of a neuromuscular blocking agent is assisted by an artificial breathing mechanism (such as a ventilator), he or she will suffocate to death.<sup>35</sup>

For centuries, indigenous tribes in South America used curare (which is also known as ourara, woorari, wourali, and urali)<sup>36</sup> to make poison-tipped hunting arrows.<sup>37</sup> They would combine bark scrapings from certain vines with viscous substances such as snake or ant venom, boil the mixture for days, and let it cool into a dark, heavy paste, into which they would dip their arrows.<sup>38</sup> Animals struck with these arrows would be paralyzed, and would eventually suffocate from respiratory paralysis.<sup>39</sup> Curare was particularly effective when hunting monkeys and other animals that lived high in the trees; once shot with a curare-tipped arrow, the animals would lose their grip and fall to the ground.<sup>40</sup> Indigenous hunters would assess the strength of their curare based upon how many trees a

31. W.C. Bowman, *Neuromuscular Block*, 147 *BRITISH J. PHARMACOLOGY* S277, S282 (2006).

32. See Albert M. Betcher, *The Civilizing of Curare: A History of Its Development and Introduction into Anesthesiology*, 56(2) *ANESTHESIA & ANALGESIA* 305, 310 (1977).

33. See *STEDMAN'S MEDICAL DICTIONARY* 436 (27th ed. 2000) (defining “curariform” as “[d]enoting a drug having an action like curare”). In this Article, I use the terms “curariform drugs” and “neuromuscular blocking agents” interchangeably.

34. See Testimony of Dr. Mark Heath at 66, *Taylor v. Crawford*, No. 05-4173 (W.D. Mo. June 12, 2006).

35. Betcher, *supra* note 32, at 310.

36. See Thandla Raghavendra, *Neuromuscular Blocking Drugs: Discovery and Development*, 95 *J. ROYAL SOC'Y MED.* 363, 363 (2002).

37. See Bowman, *supra* note 31, at S277.

38. Betcher, *supra* note 32, at 307, 311.

39. See Bowman, *supra* note 31, at S277.

40. See *id.*

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monkey could jump to after being poisoned.<sup>41</sup> A monkey shot with “one-tree curare” could only leap to one tree before falling; poisoned by a weaker, “three-tree curare,” a monkey could leap to as many as three trees in an effort to escape before collapsing to the ground.<sup>42</sup>

Although used in hunting for centuries, curare came to the attention of physiologists in the mid-nineteenth century, particularly among those who practiced vivisection, the dissection of a living animal for medical experimentation.<sup>43</sup> The use of curare in vivisection was pioneered by the influential French physiologist Claude Bernard, who needed a way to keep the animals still and cooperative—but alive—while experimenting on them.<sup>44</sup> After discovering its paralyzing properties, Bernard routinely used the drug during vivisection to immobilize his subjects.<sup>45</sup>

It was through the use of curare in vivisection that people began to consider the implications of what curare did *not* do, namely serve any anesthetic function. While curare inhibits all voluntary movement, it does nothing at all to affect consciousness, cognition, or the ability to feel pain.<sup>46</sup> Although some researchers initially believed that curare had anesthetic properties (and some believed that animals had no awareness of pain generally),<sup>47</sup> such beliefs may simply have been the product of wishful thinking on the part of vivisectionists who, as a matter of course, routinely cut open and dissected fully conscious animals.<sup>48</sup> In 1864, Bernard described an animal under the influence of curare as corpse-like, but quite alive:

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41. *See id.*

42. *See id.*

43. *See* Betcher, *supra* note 32, at 310.

44. *See id.*

45. Because the curare would suffocate the animals, researchers using the drug to experiment with animals had to use artificial ventilation to keep them alive during the experiments. *See* Raghavendra, *supra* note 36, at 363.

46. *See* Bowman, *supra* note 31, at S282 (“Neuromuscular blocking drugs, by themselves, have no effect at all on consciousness or pain sensation.”).

47. *See* STEPHEN WEBSTER, THINKING ABOUT BIOLOGY 119 (2003) (describing the French philosopher Rene Descartes’ view that animals have no awareness of pain).

48. The psychological effect on the surgeons who conducted vivisection experiments was one argument against the practice. A 1908 article in the *New York Times* discusses a meeting to lobby for the passage of anti-vivisection laws in New York, to ban, among other things, “curare, which only paralyzed the muscles and did not deaden the nerves.” *Curb on Vivisection Urged in Meeting*, N.Y. TIMES, Feb. 15, 1908, at 14. With respect to the effect on the vivisectionists themselves, one doctor was quoted as arguing: “I sympathize with this agitation . . . not merely for the sake of the brutes whom it seeks to protect, but more for the sake of a profession I hold in honor, and

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 825

In this motionless body, behind that glazing eye, and with all the appearance of death, sensitiveness and intelligence persist in their entirety. The corpse before us hears and distinguishes all that is done around it. It suffers when pinched or irritated, in a word, it has still consciousness and volition, but it has lost the instruments which serve to manifest them.<sup>49</sup>

Not surprisingly, the use of curare during animal experimentation was controversial; indeed, its use led to the passage of anti-vivisection laws in Great Britain at the end of the nineteenth century.<sup>50</sup> Testifying before the Royal Commission of 1875, an investigative body created to examine the morality of vivisection, one witness, Dr. Hoggan, described the experience of a dog subjected to vivisection while paralyzed by curare.<sup>51</sup> Curare, he testified, was used to

render [the] dog helpless and incapable of any movement, even of breathing, which function was performed by a machine blowing through its windpipe. All this time, however, its intelligence, its sensitiveness, and its will, remained intact . . . . In this condition the side of the face, the interior of the belly, and the hip, were dissected out . . . continuously for ten consecutive hours . . . .<sup>52</sup>

In 1868, the Swedish physiologist A. F. Holmgren condemned curare as “the most cruel of all poisons.”<sup>53</sup> Its use, he wrote,

changes [one] instantly into a living corpse, which hears and sees and knows everything, but is unable to move a single muscle, and under its influence no creature can give the faintest indication of its hopeless condition. The heart alone continues to beat.<sup>54</sup>

Even Bernard eventually became troubled by the suffering his experiments caused, and urged the Royal Commission to impose tougher restrictions on the use of vivisection.<sup>55</sup>

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most of all for myself and my fellow-humans, whom brutalized men are unfit to treat.” *Id.*

49. BERDOE, *supra* note 29, at 63 (quoting Bernard).

50. WEBSTER, *supra* note 47, at 118-21.

51. *See id.* at 120.

52. *Id.*

53. BERDOE, *supra* note 29, at 63 (quoting Holmgren). Lord Tennyson, using one of the alternative names for the drug, referred to it as “the hellish wourali.” MONA CAIRD, *BEYOND THE PALE: AN APPEAL ON BEHALF OF VICTIMS OF VIVISECTION* 8 (1897).

54. BERDOE, *supra* note 29, at 63 (quoting Holmgren).

55. WEBSTER, *supra* note 47, at 120.

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In the 1940s, surgeons began to utilize curare in surgery as a way of relaxing the muscles and aiding in certain delicate procedures.<sup>56</sup> Anesthesiologists hailed the advent of curariform drugs in surgery, because their paralytic properties obviated the need for massive, and potentially dangerous, doses of anesthesia to control unwanted movement.<sup>57</sup> Instead of using deep anesthesia to restrict muscle movement, curare-induced paralysis accomplished the same goal without the accompanying danger of general anesthesia.<sup>58</sup> The drug quickly became a staple in operating rooms, allowing surgeons to work with improved surgical field and without fear of involuntary muscle contraction.<sup>59</sup>

But while paralytic agents have their place in modern surgery, their inherent danger remains. Dr. Harold Griffith, a Canadian doctor who was the first to use curare on human beings to assist with surgery, published his findings in 1942.<sup>60</sup> While extolling the virtues of curare in the surgical setting, he also warned that it is a “dangerous poison, and should only be used by experienced anesthesiologists in well-equipped operating rooms.”<sup>61</sup> Any time paralytic drugs are used in surgery, the necessity of adequately maintained anesthesia is that much more important, as the drugs restrict the patient’s ability to verbally communicate sensation, or physically respond to assessments of anesthetic depth.<sup>62</sup> If the anesthesia wears off during surgery, and the patient is paralyzed, the conse-

56. Betcher, *supra* note 32, at 317.

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57. See Scientists Group for the Reform of Animal Experimentation, Statement on the Use of Muscle Relaxants in Experimental Animals 1 (Feb. 1985) [hereinafter Scientists Group] (“Unfortunately, deep anesthesia usually also results in circulatory depression and other deleterious effects which are a serious limitation to its use. These unwanted effects can be avoided by using a muscle relaxant whose action is essentially that of temporary, complete muscle paralysis.”); see also Bowman, *supra* note 31, at S281 (“In the early years of anesthesia, a sufficiently high and potentially dangerous dose of anesthetic agent . . . was required in order to paralyze reflex muscle movements.”); Paul M. Wood, L.H. Wright & H. Sidney Newcomer, *Curare in Anesthesia*, 3 N.Y. MED. 17, 17 (1947) (“Before the purified curare preparation . . . became available, a satisfactory state of muscular relaxation could be achieved only by depressing the activity of the central nervous system by a suitable anesthetic agent, and, in the case of a general anesthetic, often by pushing it beyond desirable limits.”).

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58. Betcher, *supra* note 32, at 313-16.

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59. *Id.* at 317; see also Raghavendra, *supra* note 36, at 366 (“Neuromuscular blocking agents revolutionized the practice of anesthesia.”).

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60. Harold R. Griffith & Enid G. Johnson, *The Use of Curare in General Anesthesia*, 3 ANESTHESIOLOGY 418, 418-20 (1942).

61. *Id.* at 420.

62. Brief of American Society of Anesthesiologists as Amici Curiae Supporting Neither Party, *Baze v. Rees*, No. 07-5439, 2007 WL 4102239, at \*6-7 (U.S. Nov. 13, 2007) [hereinafter *Baze* ASA Brief].

2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 827

quences can be horrific.<sup>63</sup> This phenomenon, referred to as anesthesia awareness, is well-known in the annals of surgery and is a major concern of the anesthesiology profession.<sup>64</sup>

For example, in 2004, the Joint Commission,<sup>65</sup> the accrediting agency for hospitals and health care organizations in the United States, issued an “Alert” about the problem of anesthesia awareness.<sup>66</sup> According to the Joint Commission, there are 20,000 to 40,000 cases of anesthesia awareness each year in the United States, many of which result in mental distress and post-traumatic stress disorder.<sup>67</sup> The alert concludes that “[a]nesthesia awareness is under-recognized and under-treated in health care organizations” and notes that it is important to “[a]void muscle paralysis unless absolutely necessary” for fear that the patient will be “unable to communicate with the surgical team” if the anesthesia fails.<sup>68</sup> The problem of anesthesia awareness has also been one of the pre-eminent and longstanding concerns of the American Society of Anesthesiologists (“ASA”).<sup>69</sup> In 2006, the ASA commissioned a task force on the subject, and eventually issued a lengthy practice advisory intended to “reduce the frequency of unintended intraoperative awareness.”<sup>70</sup> Among other things, the report warned that the “use of neuromuscular blocking drugs [such as pancuronium] may mask purposeful or reflex movements and adds additional importance to the use of monitoring methods that assure the adequate delivery of anesthesia.”<sup>71</sup>

63. See, e.g., *id.* at \*6 (“[I]t is possible that the patient could consciously experience the process of becoming paralyzed and losing the ability to breathe.”).

64. See Brief of Anesthesia Awareness Campaign as Amicus Curiae in Support of Neither Party, *Baze v. Rees*, No. 07-5439, 2007 WL 3407044 (U.S. Nov. 13, 2007) [hereinafter *Baze* Brief of AAC]. The phenomenon is referred to variably as “conscious paralysis,” “intraoperative awareness,” or “anesthesia awareness.” *Id.*

65. See generally The Joint Commission Web Site, <http://www.jointcommission.org> (last visited Apr. 4, 2008).

66. The Joint Commission, *Preventing, and Managing the Impact of, Anesthesia Awareness*, SENTINEL EVENT ALERT, Oct. 6, 2004, [http://www.jointcommission.org/SentinelEvents/SentinelEventAlert/sea\\_32.htm](http://www.jointcommission.org/SentinelEvents/SentinelEventAlert/sea_32.htm).

67. *Id.*

68. *Id.*

69. See *Baze* Brief of AAC, *supra* note 64, at \*9.

70. Am. Soc’y of Anesthesiologists Task Force on Intraoperative Awareness, *Practice Advisory for Intraoperative Awareness and Brain Function Monitoring*, 104 ANESTHESIOLOGY 847, 848 (2006), available at <http://www.asahq.org/publicationsAndServices/AwareAdvisoryFinalOct05.pdf>.

71. *Id.* at 854. The American Association of Nurse Anesthetists has also issued a practice advisory for the prevention and management of anesthesia awareness. See Am. Ass’n of Nurse Anesthetists, *Position Statement 2.12: Unintended Awareness Under General Anesthesia*, <http://www.aana.com> (follow “Practice Documents”

As reports of anesthesia awareness increased, patient advocacy groups were formed to expose the issue, tell the stories of people who experienced conscious paralysis, and encourage professional organizations, such as the ASA, to take the problem seriously.<sup>72</sup> One such organization, called Anesthesia Awareness, Inc., filed an amicus brief in the *Baze* case.<sup>73</sup> The brief, filed on behalf of neither party, describes the experiences of people like Kelly Haapala, whose anesthesia wore off during her hip replacement surgery.<sup>74</sup> She was awake during the surgery, but unable to cry out to let the surgeons know that the anesthesia had failed.<sup>75</sup> She has described the experience as “the worst terror that I’ve ever experienced.”<sup>76</sup> The brief also quoted Kathleen LaBrie, who was fully awake, but paralyzed, during an operation to open her sinus cavities and to repair a deviated septum.<sup>77</sup> LaBrie recalled:

I’ll never forget what happened. I realized something was very, very wrong when I awoke to the grinding and pushing in my nose. I also could hear conversations. I was awake and unable to let anyone know. . . . If anyone wants to know what HELL is like this is it, what happened to me.<sup>78</sup>

The experience of patients such as these is relevant to the lethal injection debate, because, as in the surgical context, the use of a paralytic agent renders the inmate unable to indicate if the anesthetic drug has not taken effect. As long as enough pancuronium is delivered intravenously, every lethal injection execution will look peaceful.<sup>79</sup> The reality may be quite different, if, as discussed above, the prison officials tasked with delivering and monitoring the anesthetic do not do their jobs with precision. As a judge in North Carolina recently explained, if the anesthetic drug

is not properly administered, an inmate could be conscious and suffer a very painful death from the other two lethal drugs. If not unconscious but paralysed, an inmate would not be able to

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hyperlink under “Resources”; then follow “Unintended Awareness Under General Anesthesia” hyperlink) (last visited Apr. 4, 2008).

72. See, e.g., *Baze* Brief of AAC, *supra* note 64, at \*1 (“The Anesthesia Awareness Campaign, Inc. (“AAC”) is a non-profit organization founded in 1998 that is dedicated to helping victims, providing education, and working to prevent anesthesia awareness.”).

73. *Id.*

74. *Id.* at \*5.

75. *Id.*

76. *Id.*

77. See *id.* at \*4.

78. *Id.*

79. See *supra* note 17.

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 829

move or scream while painfully suffocating or when the deadly, burning potassium chloride is injected into the veins causing more excruciating pain while stopping the heart.<sup>80</sup>

Again reaching back to the nineteenth century, in 1864 Claude Bernard offered another description of such a deceptively peaceful death:

A gentle sleep seems to occupy the transition from life to death. But it is nothing of the sort; the external appearances are deceitful. . . . [I]n fact . . . we discover that this death, which appears to steal on in so gentle a manner and so exempt from pain is, on the contrary, accompanied by the most atrocious sufferings that the imagination of man can conceive.<sup>81</sup>

No inmate has ever survived a botched lethal injection, so we do not know what it feels like to lie paralyzed on a gurney, unable even to blink an eye, consciously suffocating, while potassium burns through the veins on its way to the heart, until it finally causes cardiac arrest. But aided by the accounts of people who have suffered conscious paralysis on the operating table, one can begin to imagine.

In the cases of anesthesia awareness in the hospital setting, the paralyzing agent had surgical purposes, such as the prevention of muscle movements that would interfere with surgery. Advocates for patients say that the answer to the problem of anesthesia awareness is to require hospitals to use more sophisticated monitoring of consciousness during the surgery, including the use of machines such as one called a “BIS [bispectral index] monitor.”<sup>82</sup> They claim that, too often, hospitals cut corners, failing to utilize simple measures that would ensure that patients have reached what anesthesiologists call a “surgical plane” of anesthetic depth prior to incision.<sup>83</sup>

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80. *Conner v. N.C. Council of State*, Nos. 07-GOV-0238, 07-GOV-0264, at 5 (N.C.O.A.H. Aug., 9, 2007), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/orders/North%20Carolina/2007.08.09%20administrative%20ruling.pdf>.

81. FRANCES POWER COBBE, *ILLUSTRATIONS OF VIVISECTION: EXPERIMENTS ON LIVING ANIMALS FROM THE WORKS OF PHYSIOLOGISTS* 19-20 (1908) (quoting Bernard).

82. See Anesthesia Awareness, Inc., What Is Anesthesia Awareness, <http://www.anesthesiaawareness.com/what-is-AA.html> (last visited Apr. 3, 2008).

83. A surgical plane of anesthetic depth refers to the level of unconsciousness necessary to conduct surgery. See Declaration of Dr. Mark Heath at 2, 3, 5, *Taylor v. Crawford*, No. 05-4173-CV-W-FJG (W.D. Mo. July 24, 2006) [hereinafter Declaration of Dr. Mark Heath].

Advocates for death row inmates have pointed to an even more egregious lack of monitoring in the lethal injection context.<sup>84</sup> Currently, many state lethal injection protocols provide for no monitoring of anesthetic depth once the administration of drugs has begun.<sup>85</sup> Other states have begun to amend their protocols to include an assessment of consciousness by someone, usually a prison guard, or the warden, who has no formal training or experience in the assessment of anesthetic depth.<sup>86</sup> Usually these informal attempts to assess consciousness involve the prison official poking the inmate, or brushing his eyelashes, before giving the signal for the execution to proceed.<sup>87</sup> Such checks ignore the differences between determining mere consciousness (i.e., whether a person is “awake” or not) and determining whether a surgical plane of anesthetic depth has been achieved (i.e., whether a person is sufficiently anesthetized that he will not feel the excruciating effects of the pancuronium and the potassium chloride). They also ignore the fact that, once the pancuronium has taken effect, the inmate could not respond to shaking, poking, yelling, or a slap in the face, even if he were wide awake. Assessing the anesthetic depth of a person who is completely paralyzed requires the kind of skill and training (and physical proximity) that most of the people doing the job during executions do not possess.<sup>88</sup> As a result, lawyers for death row

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84. See, e.g., *Baze* Petitioners’ Brief, *supra* note 27, at 45-49.

85. Tennessee is one example. See *Harbison v. Little*, 511 F. Supp. 2d 872, 884 (M.D. Tenn. 2007) (“Perhaps the most glaring omission in the new protocol is the failure to check for consciousness before the pancuronium bromide is administered.”).

86. For example, during Indiana lethal injection litigation, Warden Ed Buss testified that his untrained assessment of consciousness includes the following: “I walk around the offender. I look for any signs of consciousness. I say his name. I touch him. . . . Maybe a gentle shake to see if we can detect any consciousness.” Official Reporter’s Transcript of Preliminary Injunction Hearing at 199, *Timberlake v. Buss*, Slip Copy, No. 1:06CV1859RLY-WTL, 2007 WL 1280664, slip op. (S.D. Ind. Apr. 26, 2007).

87. In Alabama, for example, a recent addition to the state’s lethal injection protocol calls for a prison guard to check that the inmate is unconscious by calling the inmate by name, brushing his eyelashes with a finger, and pinching his arm. See Stan Diel, *State’s New Execution Procedure Detailed*, BIRMINGHAM NEWS, Oct. 26, 2007, at 1A. During oral argument in *Baze v. Rees*, Justice Scalia commented that Kentucky asserts “all it takes is a slap in the face” to know whether the person is unconscious. *Baze* Oral Argument, *supra* note 17, at 16.

88. See Declaration of Dr. Mark Heath, *supra* note 83, at 3 (noting that Missouri’s proposed lethal injection protocol does not “require that the [person] who participates in executions have any training or background in the induction of general anesthesia. . . . Thus, the personnel asked to perform the monitoring may have absolutely no understanding of what they are supposed to do or what observations they need to make.”).

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 831

inmates have argued for real monitoring of anesthetic depth throughout the execution process by trained personnel.<sup>89</sup>

But lawyers for death row inmates have also suggested an even simpler solution: remove pancuronium from the procedure altogether.<sup>90</sup> Not only would removing pancuronium eliminate the risk that the inmate experiences conscious suffocation, it would remove the primary barrier to discerning whether the anesthetic drug has achieved its desired effect. Stop paralyzing inmates before they are killed, lawyers have suggested, and the necessary monitoring will be simplified, thereby greatly expanding the pool of people who are qualified to do it. The model for this suggested method of execution, of course, is animal euthanasia, which typically involves an overdose of one drug, an anesthetic much like the first drug used in human lethal injections.<sup>91</sup>

Some people have accused lawyers for death row inmates of disingenuously proposing a “better” method of execution, when their goal is to eliminate executions altogether.<sup>92</sup> The suggestion is that these lawyers know that any change to the protocol will simply engender years more litigation about the new procedure. It is diffi-

89. For example, lawyers in Missouri have argued that “[a]ssessing anesthetic depth is imperative, because the substandard practices of catheterization and drug administration used for executions create a significant and unnecessary likelihood that the intended dose of anesthetic will not in fact reach the inmate’s circulatory system.” Plaintiff’s Opposition to Defendant’s Proposed Protocol at 2, *Taylor v. Crawford*, No. 05-4173-CV-W-FJG (W.D. Mo. July 24, 2006).

90. See, e.g., *id.* at \*51 (“By omitting pancuronium and potassium and relying instead on a lethal dose of an anesthetic, the [Department of Corrections] would virtually eliminate the risk of pain.”); *Baze* Petitioners’ Reply Brief, *supra* note 6, at \*17-18 (Dec. 28, 2007) (arguing that “alternative procedures,” such as a barbiturate-only protocol, “would be less dangerous than Kentucky’s current procedures”).

91. See *infra* Part II. Importantly, lawyers for death row inmates have also decried the use of potassium chloride, an excruciatingly painful drug that ultimately causes cardiac arrest. Use of potassium chloride would be unnecessary in the anesthetic-only procedure described below, and the danger of pancuronium—that it masks the ability of lay observers to detect pain if the anesthesia fails—would be somewhat (though not completely) eliminated if the most painful of the three drugs were removed from the procedure.

92. For example, Tennessee Governor Phil Bredesen, who supports the death penalty, was recently quoted as saying,

Just remember that among the strongest proponents of the one-drug protocol are people who are adamantly opposed to the death penalty . . . . The answer is obvious, that when you change protocols to something new you’re going to have 10 years of litigation . . . . We’re not going to execute anybody for 10 years in this country while all this new uncharted territory of what a one-drug protocol is and what problems it may or may not have get adjudicated.

Greg Giuffrida, *Bredesen; 1-Drug Injection is No Quick Fix, Would Delay Executions*, ASSOCIATED PRESS, Jan. 21, 2008.

cult to see the merit in this argument, however, since a protocol that employs only an overdose of anesthesia does not involve the possibility of any pain, which is the crux of the Eighth Amendment challenge. Given that an anesthetic-only protocol could not result in any pain, even if inadequately delivered, one wonders whether states looking to avoid litigation actually might do well to consider such a procedure.<sup>93</sup> In any event, it is not only lawyers for death row inmates who have suggested the one-drug procedure. An executive commission in Tennessee recommended it,<sup>94</sup> as have federal judges in several states.<sup>95</sup> Nonetheless, no state has sought to change the procedure.<sup>96</sup>

The purported justifications for the use of pancuronium are thin at best. During oral argument in *Baze*, Justice Stevens pressed counsel for the State of Kentucky on the justification for using the paralytic agent.<sup>97</sup> Counsel's response was that the paralyzing agent

93. Some have also suggested that the one-drug procedure might take too long. See, e.g., *Baze* Respondents' Brief, *supra* note 30, at \*23 ("[T]he proposed one-drug protocol raises new problems because it will generally take much longer for the condemned to die under the one-drug protocol"). Experts, though, have noted that animal euthanasia rarely takes longer than a few minutes, and there is no reason to think it would be any different with humans. See Testimony of Dr. Kevin Concannon, *supra* note 7, at 287 ("When I do the euthanasia procedure, it's usually a matter of a couple of minutes."); see also AMERICAN VETERINARY MEDICAL ASSOCIATION GUIDELINES ON EUTHANASIA 11 (2007), available at [http://www.avma.org/issues/animal\\_welfare/euthanasia.pdf](http://www.avma.org/issues/animal_welfare/euthanasia.pdf) [hereinafter AVMA GUIDELINES] ("A primary advantage of barbiturates is speed of action."). Even if an execution did take a long time, however, it is difficult to see where the Eighth Amendment challenge would lie. I am not aware of any successful Eighth Amendment challenge to a lengthy, but painless, execution procedure.

94. See *Harbison v. Little*, 511 F. Supp. 2d 872, 875-79 (M.D. Tenn. 2007). After consultation with medical experts, an executive commission appointed by Governor Bredesen recommended that the state use a one-drug method similar to that used in animal euthanasia, in order to reduce the risk of conscious suffering during lethal injections. The Commissioner of the Department of Corrections ultimately rejected the recommendation because he did not want "Tennessee to be at the forefront of making the change from the three-drug protocol to the one-drug protocol" and that he thought adoption of a one-drug protocol could lead to "political ramifications." *Id.*

95. See, e.g., *Morales v. Tilton*, 465 F. Supp. 2d 972, 983 (N.D. Cal. 2006) ("[R]emoval of [pancuronium and potassium chloride] from the lethal-injection protocol, with the execution accomplished solely by an anesthetic, such as sodium pentobarbital, would eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic."); *Harbison*, 511 F. Supp. 2d at 895 ("[I]f the Department of Corrections had adopted the Committee's recommendation [to adopt a one-drug protocol], it would have greatly mitigated the plaintiff's risk of pain.").

96. See Liptak, *supra* note 1, at A1 (wondering about "the more practical question of why all 36 states that use lethal injections to execute condemned inmates are wedded to a cumbersome combination of three chemicals").

97. *Baze* Oral Argument, *supra* note 17, at 33-34.

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 833

“does bring about a more dignified death, dignified for the inmate, dignified for the witnesses.”<sup>98</sup> In other words, by eliminating the unpleasant twitching and gasping that might accompany even the most painless of deaths, witnesses are spared such a spectacle and the dying inmate is spared whatever indignity such a spectacle might engender.

The explicit insistence on the “dignity” of the execution—even at the expense of knowing whether the execution is actually humane—is quite a concession from the State, as it confirms the suspicion that the use of pancuronium is designed to maintain appearances at all costs. As such, it brings to mind the words of the British physician Edward Berdoe, a vocal opponent of vivisection at the turn of the century, who argued that curare anesthetizes only “the public conscience.”<sup>99</sup>

Certainly the animal welfare community is aware of the dangers of curare and curariform drugs; concerns about those drugs are reflected in both the professional standards of those who perform animal euthanasia, and in the laws and regulations governing animal euthanasia. This Article now turns to a study of the manner in which animals are euthanized in this country.

## II. THE ANESTHETIC-ONLY PROCEDURE FOR ANIMAL EUTHANASIA

Your pet is handled gently and with respect. The injection itself is an anesthetic drug called pentobarbital. It is injected into a vein on the front leg. Because it is an anesthetic agent, your pet will painlessly lose consciousness first, similar to being anesthetized for a surgical procedure. Then, while your pet is peacefully unaware, the drug goes on to cause cardiac and respiratory arrest. The whole process takes only a few seconds.

— “When It’s Time to Say Goodbye,” a publication of the Fairmont Animal Hospital, Syracuse, New York<sup>100</sup>

One response to the States’ “dignity” justification for the use of pancuronium is incredulity at the notion that any person would rather suffer an excruciatingly painful and torturous—but peaceful-looking—death than a painless one that might be accompanied by involuntary twitching and sighing. Another response, however, is that the premise of the argument is simply false, namely that a

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98. *Id.*

99. BERDOE, *supra* note 29, at 70.

100. Fairmont Animal Hospital, When It’s Time to Say Goodbye, <http://www.fairmountanimal.com/WHEN%20IT.htm> (last visited Apr. 4, 2008).

death without pancuronium cannot be dignified. In fact, what animal euthanasia practices reveal is that a dignified—and much safer—death can be achieved without a paralyzing agent.

It is well-established that lethal injection execution procedures are not the product of any kind of scientific or medical review.<sup>101</sup> Neither is there any ongoing review or testing to ensure that the process works as it should.<sup>102</sup> As a result, lawyers and judges have looked to the veterinary field, where methods of euthanasia are subjected to constant re-evaluation in order to ensure that the procedures are humane.<sup>103</sup> As the American Veterinary Medical Association (“AVMA”) points out in its published guidelines on euthanasia, the term “is derived from the Greek terms *eu* meaning good and *thanatos* meaning death. A ‘good death’ would be one that occurs with minimal pain and distress.”<sup>104</sup> The AVMA updates its guidelines at least once every ten years by “review[ing] all literature that scientifically evaluates methods and potential methods” of euthanasia and revising those guidelines accordingly, based on a “thorough evaluation of the available science.”<sup>105</sup>

Decades of review and study have led to a consensus in the veterinary and animal welfare communities with respect to the safest and most humane method of animal euthanasia. That method is an anesthetic-only procedure involving an overdose of the barbiturate

101. See, e.g., Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 70 (2007) [hereinafter Denno, *Lethal Injection Quandary*] (“[A]t no point was the [lethal injection] procedure medically or scientifically studied on human beings.”); Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 459 (2007) (“Over the years there has never been any critical re-evaluation of the [lethal injection] procedure to assess whether modern medical or scientific knowledge could improve the existing protocol.”).

102. See Denno, *Lethal Injection Quandary*, supra note 101, at 70.

103. See, e.g., *Ex parte Hopkins*, 160 S.W.3d 9, 10 n.6 (Tex. Crim. App. 2004) (Price, J., dissenting from denial of stay of execution) (“Especially poignant is our own legislature’s action in banning [pancuronium]. Clearly, the State of Texas has acted to eliminate the cruel and inhumane euthanasia of animals by limiting the procedures and chemicals that can be used to euthanize.”); *Abdur’Rahman v. Bredeesen*, No. M2003-01767-COA-R3-CV, 2004 WL 2246227, at \*6 (Tenn. Ct. App. Oct. 6, 2004) (death row inmate alleging that the inclusion of paralyzing agent in the Tennessee lethal injection protocol violates the Tennessee Nonlivestock Animal Humane Death Act); *Beardslee v. Woodford*, 395 F.3d 1064, 1073 n.9 (9th Cir. 2005) (stating that “it is somewhat significant” that “states have enacted laws that either mandate the exclusive use of a sedative or expressly prohibit the use of a neuromuscular blocking agent in the euthanasia of animals”); *Baze Oral Argument*, supra note 17, at 34-36 (Justices Stevens and Souter asking counsel questions about veterinary standards).

104. AVMA GUIDELINES, supra note 93, at 1.

105. *Id.*

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 835

sodium pentobarbital. Tens of thousands of animals are euthanized every day by means of this procedure,<sup>106</sup> which has been used in the United States for more than sixty years.<sup>107</sup> According to the AVMA's guidelines, an overdose of pentobarbital is the "preferred method" of euthanizing dogs, cats, and large animals such as horses.<sup>108</sup> In addition to the AVMA, every major American animal rights organization strongly recommends—or requires—the use of pentobarbital in animal euthanasia.<sup>109</sup>

Anyone who has witnessed a family pet being euthanized knows that euthanasia by pentobarbital is a quick, effective, and dignified process. Pentobarbital is injected into a vein, usually in the fore-

106. According to the American Humane Society, 9.6 million animals are euthanized annually in the United States. See American Humane Society, Animal Shelter Euthanasia, [http://www.americanhumane.org/site/PageServer?pagename=nr\\_fact\\_sheets\\_animal\\_euthanasia](http://www.americanhumane.org/site/PageServer?pagename=nr_fact_sheets_animal_euthanasia) (last visited Apr. 4, 2008) [hereinafter American Humane Society].

107. See, e.g., HUMANE SOC'Y OF THE U.S., WHY THE HSUS IS OPPOSED TO THE USE OF THE HIGH ALTITUDE DECOMPRESSION CHAMBER FOR ANIMAL EUTHANASIA (1978) [hereinafter 1978 HUMANE SOC'Y STATEMENT]. "The method of animal euthanasia which we have used exclusively for more than 30 years is the injection of sodium pentobarbital or its derivatives." *Id.* at 7 (quoting testimony of Walter E. Kilroy, Vice President, Massachusetts Society for the Prevention of Cruelty to Animals, before the City Council of Fort Wayne, Indiana, on May 12, 1977).

108. AVMA GUIDELINES, *supra* note 93, at 11; see also Declaration of Dr. Michael Loomis at 5, *Morales v. Tilton*, No. 06-219 (N.D. Cal. Nov. 9, 2006) (describing the use of sodium pentobarbital in the euthanasia of large primates, specifically gorillas).

109. See The Humane Society of the United States, General Statement Regarding Euthanasia Methods for Dogs and Cats, [http://files.hsus.org/web-files/HSI/E\\_Library\\_PDFs/eng\\_euth\\_statement.pdf](http://files.hsus.org/web-files/HSI/E_Library_PDFs/eng_euth_statement.pdf) (last visited Apr. 4, 2008) (stating that euthanasia by injection of sodium pentobarbital "has been found to be the most humane, safest, least stressful, and most professional" method); National Animal Control Association, National Animal Control Association Policy Statement: Dispositions of Animals—Euthanasia, <http://www.nacanet.org/poleuth.html> (last visited Apr. 4, 2008) ("NACA considers lethal injection of sodium pentobarbital, administered by competent, trained personnel, to be the method of choice utilized for humane euthanasia of animal shelter dogs and cats."); American Society for the Prevention of Cruelty to Animals, Position Statement on Euthanasia, [http://www.aspc.org/site/PageServer?pagename=pp\\_euthanasia](http://www.aspc.org/site/PageServer?pagename=pp_euthanasia) (last visited Apr. 4, 2008) ("The ASPCA recommends the injection of sodium pentobarbital as the preferred agent for euthanasia of shelter animals."); American Humane Society, Animal Welfare Position Statements: Euthanasia, at 10 (2006), [http://www.americanhumane.org/site/DocServer/animal\\_statement\\_2006.pdf?docID=3741](http://www.americanhumane.org/site/DocServer/animal_statement_2006.pdf?docID=3741) ("American Humane considers euthanasia by injection (EBI) of sodium pentobarbital to be the only acceptable method of euthanizing cats and dogs in animal shelters."); People for the Ethical Treatment of Animals, Euthanasia: The Compassionate Option, [http://www.peta.org/MC/factsheet\\_display.asp?ID=39](http://www.peta.org/MC/factsheet_display.asp?ID=39) (last visited Apr. 4, 2008) ("[A]n intravenous injection of sodium pentobarbital administered by a trained professional is the kindest, most compassionate method of euthanizing animals.").

leg.<sup>110</sup> When injected into a vein, pentobarbital affects the cerebral cortex of the brain first, rendering the animal immediately unconscious and unable to feel pain.<sup>111</sup> The drug then depresses the rest of the central nervous system, including the respiratory center, which causes all breathing to stop, usually “within an average of five to ten seconds” after the drug is injected.<sup>112</sup> Cardiac arrest soon follows, and the animal dies, usually within a minute.<sup>113</sup> Occasionally, the animal sighs and the nerves twitch briefly.<sup>114</sup>

The first drug in the three-drug lethal injection procedure, thiopental, is a barbiturate, like pentobarbital.<sup>115</sup> Experts on both sides of the lethal injection controversy agree that a barbiturate, given in the dosage used in most states’ lethal injection protocols, would reliably cause death—just as it does in animal euthanasia.<sup>116</sup> The crucial difference between the three-drug procedure used in lethal injections in humans and the anesthetic-only procedure used in animal euthanasia is the absence of the second and third drugs in the latter procedure. These are the two drugs that cause the pain and suffering if the first drug does not take. On the contrary, if the injection of the anesthetic fails to achieve its desired effect during an animal euthanasia, the animal feels no pain; the solution is to simply administer a second dose of the anesthetic.<sup>117</sup>

The ease with which the anesthetic-only procedure can be administered is an important consideration. The vast majority of

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110. REBECCA H. RHOADES, *THE HUMANE SOCIETY OF THE UNITED STATES, EUTHANASIA TRAINING MANUAL* 43 (2002).

111. *See id.* at 12.

112. *See id.*

113. *See id.* at 13.

114. H. ELLEN WHITELY, *UNDERSTANDING AND TRAINING YOUR DOG OR PUPPY* 255 (2006) (“Occasionally, a dying animal will gasp, vocalize, eliminate, or twitch. This is the body’s natural response; it does not mean that the animal is experiencing pain.”).

115. *See* Denno, *Legislatures Delegate Death*, *supra* note 11, at 97-98.

116. Although a longer-acting barbiturate such as the one used in animal euthanasia would be more appropriate for use in lethal injection than thiopental, which is an ultra-short acting barbiturate, testimony in *Baze* confirmed that even thiopental in the dosage given in Kentucky would be sufficient to cause death. Dr. Mark Heath, expert for petitioner, testified that thiopental will be lethal by itself at three grams, the amount called for in Kentucky’s protocol. *See* Joint Appendix at 541, vol. II, *Baze v. Rees*, No. 07-5439 (U.S. Nov. 5, 2007). It would also be lethal in virtually every case at two grams. *See id.* at 493-94. Dr. Dershwitz, the state’s expert, also testified that the amount of thiopental used in Kentucky’s procedures would be sufficient to cause death. *See id.* at 547.

117. *See* RHOADES, *supra* note 110, at 107; *see also* *Harbison v. Little*, 511 F. Supp. 2d 872, 895 (M.D. Tenn. 2007) (“Even if the sodium thiopental were improperly administered, the only result would be that that the plaintiff would be given more thiopental.”).

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 837

animal euthanasia takes place not in the offices of veterinarians but in animal shelters, where millions of dogs and cats are euthanized each year.<sup>118</sup> Euthanasia in shelters is performed by shelter workers who are not formally trained in veterinary medicine.<sup>119</sup> By developing a procedure with no risk of pain, and a wide margin for error, the veterinary community has accounted for the difficulty posed by relatively untrained personnel administering the lethal procedure.<sup>120</sup> For example, the Euthanasia Training Manual of the Humane Society of the United States is purposefully written in lay terms in recognition of the need for a “more instructive and less technical guide for shelter euthanasia technicians” than the AVMA guidelines, which are written by and for veterinarians.<sup>121</sup> With that purpose in mind, the Humane Society Manual states that pentobarbital is the “best possible method of euthanasia currently available.”<sup>122</sup>

Not only does the Humane Society agree with the AVMA that the anesthetic-only procedure is the preferred method for animal euthanasia, but it expressly condemns the use of curariform drugs like the one used in human lethal injections. The foreword to the Euthanasia Training Manual states that “[i]t is our moral and ethical duty to ensure that we work to end these practices: drowning, poisoning, shooting, gassing, or injecting animals with curare-based or paralytic substances.”<sup>123</sup> The Manual later deems “inhumane” the use of “any combination of sodium pentobarbital with a neuromuscular blocking agent.”<sup>124</sup> The Humane Society also condemns the use of T-61, a euthanasia solution that combines an anesthetic with a neuromuscular blocking agent, because it “can cause animals intense pain after administration and a curare-like paralysis of respiration (suffocation) before the animal loses consciousness.”<sup>125</sup>

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118. See American Humane Society, *supra* note 106.

119. See Charlie L. Reeve et al., *The Caring-Killing Paradox: Euthanasia Related Strain Among Animal-Shelter Workers*, 35 J. APPLIED SOC. PSYCHOL. 119, 120 (2005) (“Most typically, the job of performing euthanasia on unwanted animals falls in the hands of animal-shelter workers.”).

120. See, e.g., 1978 HUMANE SOC’Y STATEMENT, *supra* note 107, at 11-12 (quoting California veterinarian Dr. John W. Oliver: “I have trained numerous people (for sodium pentobarbital injection). The people I trained were not specially hired to participate in the program, but were the regular kennel people on the premises. The program was very simple . . . . We know that lay people can handle the job . . . .”).

121. RHOADES, *supra* note 110, at xiv.

122. *Id.* at 1.

123. *Id.* at xiv.

124. *Id.* at 133.

125. *Id.*

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Curariform drugs are mentioned only briefly in the AVMA guidelines, and almost always with disapproval. For example, the use of neuromuscular blocking agents alone to achieve death is “unacceptable” and “absolutely condemned.”<sup>126</sup> The history of this provision in the guidelines suggests that veterinary experts were concerned with curare’s long association with conscious paralysis and suffocation.<sup>127</sup> In short, no AVMA-approved method of euthanasia includes a paralytic, and nowhere in the AVMA guidelines is a three-drug formula like the one used in human lethal injection even contemplated, let alone approved.<sup>128</sup>

The testimony of veterinarians shows that the actual day-to-day euthanasia practices conform to the guidelines established by the Humane Society and the AVMA, and that neuromuscular blocking agents have no place in animal euthanasia.<sup>129</sup> A review of lethal injection litigation throughout the country did not yield a single instance of a veterinarian testifying that the use of such a drug is an accepted component of any animal euthanasia procedure. In fact, the group of veterinarians who filed an amicus brief in the *Baze* case stated that they are “unaware of any veterinarian or veteri-

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126. AVMA GUIDELINES, *supra* note 93, at 12.

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127. For example, the initial guidelines, published by the AVMA in 1963, noted that “[h]uman beings given these drugs have described periods of full consciousness accompanied by complete muscular immobility and intense anxiety.” AVMA Council on Research, *Report of the AVMA Panel on Euthanasia*, J.A.V.M.A., Jan. 15, 1963, at 166.

128. The AVMA allows paralytic agents to be used only when needed to restrain “extremely fractious large animal[s]” or reptiles in “zoos and clinical settings.” See AVMA Guidelines, *supra* note 93, at 19, 20. The cover page to the current AVMA Guidelines explicitly refers to the lethal injection controversy, stating that “[t]he application of a barbiturate, paralyzing agent, and potassium chloride delivered in separate syringes or stages (the common method used for human lethal injection) is not cited in the report.” *Id.* The current AVMA guidelines do state that “[a] combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent.” *Id.* at 11. However, the AVMA has since attempted to clarify this statement, and now maintains that the reference is to the mixing of the two drugs in the same syringe. See Jennifer Fiala, *AVMA Clarifies Report’s Context on Lethal Injection*, DVM NEWSMAG., Mar. 1, 2006, available at <http://www.dvmnews.com/dvm/News/AVMA-clarifies-reports-context-on-lethal-injection/ArticleStandard/Article/detail/310072>. Essentially, the AVMA has said that the lethal injection debate is a fight in which it has no dog, and in which it therefore does not want to be involved. See R. Scott Nolen, *Lethal Injection Opponents Use AVMA Euthanasia Guidelines to Make Their Case*, JAVMA NEWS, Dec. 15, 2007, <http://www.avma.org/onlnews/javma/dec07/071215a.asp> (describing the AVMA’s efforts to distance itself and its guidelines from the lethal injection debate).

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129. See, e.g., Testimony of Dr. Kevin Concannon, *supra* note 7, at 263 (“[N]euromuscular blockers . . . don’t play a role in euthanasia procedures.”).

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 839

nary group that advocates the use of neuromuscular blocking agents during the euthanasia procedure.”<sup>130</sup>

Even more striking than the fact that veterinary professionals condemn the use of curariform drugs in the euthanasia process is that, as discussed in Part III, the use of such drugs in animal euthanasia is actually *illegal* in many states that nevertheless continue to use them in human lethal injections. This Article now turns to those laws, and the concerns about the effects of curare that have led so many states to ban curariform drugs in the practice of animal euthanasia.

### III. STATE EUTHANASIA LAWS: A CONSENSUS AGAINST CURARE

The executioner will remove from the stand on the worktop the syringe labeled number four (4), which contains fifty milligrams (50mg) of pancuronium bromide, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port . . . .

— Excerpt from Florida’s recently-revised execution protocol<sup>131</sup>

[C]urare, curariform mixtures, [or] any substance which acts as a neuromuscular blocking agent . . . may not be used on a dog or cat for any purpose.

— Florida law governing animal euthanasia<sup>132</sup>

The relevance of state euthanasia laws on the lethal injection debate has not been lost on judges or lawyers. Justice Stevens specifically asked about euthanasia practices during the *Hill* oral argument,<sup>133</sup> and Chief Justice Roberts and Justices Souter and Stevens asked about it during the *Baze* argument.<sup>134</sup> A Texas state judge noted in his dissent from a denial of a stay of execution in *Ex Parte Hopkins* that “a national trend that recognizes that pancuronium bromide is inhumane for use in animals can also be said to be a national trend that recognizes that pancuronium bro-

130. *Baze* Veterinarian Brief, *supra* note 8, at 7.

131. FLA. DEP’T OF CORRECTIONS, EXECUTION BY LETHAL INJECTION PROCEDURES 11 (2007) (on file with author).

132. FLA. STAT. ANN. § 828.058(3) (2007).

133. See Transcript of Oral Argument at 36-37, *Hill v. McDonough*, 547 U.S. 573 (2006) (No. 05-8794), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-8794.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-8794.pdf).

134. See *Baze* Oral Argument, *supra* note 17, at \*34-35.

mide is inhumane for use in human beings.”<sup>135</sup> In *Beardslee*, the Ninth Circuit noted that “it is somewhat significant” that numerous states had banned the use of curariform drugs during animal euthanasia,<sup>136</sup> and lawyers have counted, and listed, state statutes in various pleadings on behalf of death row inmates.<sup>137</sup>

As it turns out, there is some discrepancy in the various counts of states that ban the use of curariform drugs,<sup>138</sup> a discrepancy that most likely reflects the nuances of the various laws rather than any real disagreement about their substance. Nevertheless, a thorough study of the laws and regulations governing animal euthanasia in several states suggests that the number of states either explicitly or implicitly banning neuromuscular blocking agents has been significantly under-counted, even by advocates for death row inmates. There has also been little analysis or discussion as to why states have adopted their animal euthanasia laws, why so many of them expressly ban the use of drugs like the ones used in human lethal injections, and why the overwhelming majority of states mandate the use of pentobarbital. Parts III and IV of the Article seek to provide that analysis.

In an attempt to clarify the status of state law on the issue, a review of the animal euthanasia laws and regulations in all fifty states was undertaken, first to determine whether any state explicitly allows the use of neuromuscular blocking agents such as pancuronium in animal euthanasia (short answer: no); second, to determine how many states explicitly or implicitly banned the use of neuromuscular blocking agents (short answer: the vast majority); and finally, to determine whether the states that do ban neuromuscular blocking agents do so for reasons that are relevant to the lethal injection controversy (short answer: yes). While some state statutes are less than crystal clear, the inescapable conclusion from this study is that the field of animal euthanasia has reached a unanimous consensus that neuromuscular blocking agents like pancuronium have no legitimate place in the execution process.<sup>139</sup>

135. *Ex Parte Hopkins*, 160 S.W.3d 9, 10 (Tex. Crim. App. 2004) (Price, J., dissenting).

136. *Beardslee v. Woodford*, 395 F. 3d 1064, 1073 (9th Cir. 2005).

137. See, e.g., *Hill Veterinarian Brief*, *supra* note 9, at 15 n.3; *Baze Veterinarian Brief*, *supra* note 8, at 18 n.5.

138. See, e.g., *Hill Veterinarian Brief*, *supra* note 9, at 15 n.3; *Baze Veterinarian Brief*, *supra* note 8, at 18 n.5; *Beardslee*, 395 F. 3d at 1073 nn.8-9.

139. Some of the statutes have nuances that would be distracting to detail in this Article. For example, many statutes refer to euthanasia methods for “dogs and cats” without specifying methods to be used on other animals; other statutes govern only certain euthanasia contexts, such as in pet shops. The concern of this Article is with

2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 841

Every state has some law or regulation governing some aspect of animal euthanasia,<sup>140</sup> but not a single one explicitly sanctions the use of a paralyzing agent in the administration of animal euthanasia.<sup>141</sup>

Nine states explicitly ban the use of neuromuscular blocking agents in animal euthanasia, regardless of whether they are used in conjunction with anesthesia.<sup>142</sup> Several of these states regularly execute inmates using neuromuscular blocking agents. One example is Florida, whose statute is quoted above. Georgia's law is almost identical to Florida's, and mandates that "curare, curariform mixtures, or any substance which acts as a neuromuscular blocking agent may not be used on a dog or cat" for euthanasia purposes.<sup>143</sup> Another example is Oklahoma, where the relevant statute expresses a preference for pentobarbital as the method of euthanizing cats and dogs, but allows other methods approved by the state's Department of Agriculture "with the exception of curariform derivative drugs."<sup>144</sup> In other words, this law, which was originally passed in 1981, allows any method of euthanasia that the relevant state agency approves, but singles out one class of drug as unacceptable under any circumstances: the precise kind of drug mandated for use by the state of Oklahoma in human lethal injections.<sup>145</sup>

Tennessee is another example of a state that explicitly bans the use of curare, curariform mixtures, "or any substance that acts as a neuromuscular blocking agent" for the purpose of animal euthanasia.<sup>146</sup> Tennessee added this provision to its law just seven years ago,<sup>147</sup> which is notable given that the Governor of that state has

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an expression by a state legislature or administrative agency about the danger of curariform drugs or the preference for sodium pentobarbital. As such, the relevance of these nuances in the state statutes is minimal.

140. See *infra* Appendix II.

141. The closest any state comes to sanctioning the use of a curariform drug in any manner is Arizona's allowance of T-61 as an acceptable euthanasia method. See ARIZ. REV. STAT. ANN. § 11-1021 (2007). However, the inclusion of T-61 appears to be a relic of the past. The Humane Society expressly condemns its use. RHOADES, *supra* note 110, at 133. The AVMA notes that it is not even available for purchase in the United States. See AVMA GUIDELINES, *supra* note 93, at 12. As a practical matter, therefore, it cannot be used, even in Arizona.

142. See *infra* Appendix I.

143. GA. CODE ANN. §. 4-11-5.1(b)(2) (2007).

144. OKLA. STAT. tit. 4, § 501(A)(3)(c) (2007).

145. See OKLA. STAT. tit. 22, § 1014 (2007).

146. TENN. CODE ANN. § 44-17-303(c) (2007).

147. In a challenge to Tennessee's lethal injection protocol, the Tennessee Court of Appeals noted that "the Act was amended in 2001 for two reasons—to respond to the

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recently proclaimed that he will not follow the recommendation of his own executive commission, which recommended removing pancuronium from the procedure for human lethal injections.<sup>148</sup>

In addition to the nine states that explicitly ban neuromuscular blocking agents, another twenty-eight states ban the use of such drugs by implication.<sup>149</sup> For the most part, these states mandate the use of a particular method of euthanasia, usually sodium pentobarbital. Texas, which requires the use of either pentobarbital or “commercially compressed carbon monoxide” in animal euthanasia, is one example.<sup>150</sup> Other examples are California<sup>151</sup> and Kentucky,<sup>152</sup> both of which require the use of pentobarbital.<sup>153</sup> Of these twenty-eight states, fourteen refer to the AVMA, allowing any euthanasia method that the AVMA allows.<sup>154</sup> Typical of these states is Missouri, which defines a “humane killing” as one that is accomplished “by a method approved by the American Veterinary Medical Association’s Panel on Euthanasia.”<sup>155</sup> Because, as discussed above, pentobarbital is the AVMA’s “preferred” method of euthanasia for the animals that most closely resemble humans in physiology and size, and because neuromuscular blocking agents are not on the AVMA’s list of acceptable euthanasia methods, these states are counted as among those that also implicitly ban the use of a procedure like the one used in human lethal injections.

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death of a Chattanooga animal shelter worker who died in a gas chamber accident and to revise and modernize the former statute in light of the acceptance of sodium pentobarbital to euthanize animals.” *Abdur’Rahman v. Bredesen*, No. M2003-01767-COA-R3-CV, 2004 WL 2246227, at \*8 (Tenn. Ct. App. Oct. 6, 2004).

148. See Giuffrida, *supra* note 92.

149. See *infra* Appendix I.

150. TEX. HEALTH & SAFETY CODE ANN. § 821.052(a) (Vernon 2007).

151. CAL. BUS & PROF. CODE § 4827 (West 2007).

152. 201 KY. ADMIN. REGS. 16:090, § 5(1) (2007).

153. Some states in this category implicitly ban neuromuscular blocking agents by limiting the drugs that animal control agencies can use in euthanasia. For example, Wyoming defines “euthanizing drugs” as “any pentobarbital-based drug labeled by the manufacturer for the purpose of euthanizing animals.” WYO. STAT. ANN. § 33-30-216(a)(v) (2007). Arkansas is included in this category, because it defines “euthanasia” as “the humane killing of an animal accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death.” A.C.A. § 4-97-103 (2007). Neuromuscular blocking agents, of course, do not cause a “painless loss of consciousness,” and statutes such as Arkansas’ use of the singular term “agent” appear to contemplate a single, painless euthanasia agent. Given that pentobarbital does meet that definition, it is a reasonable assumption that that is the method contemplated by the legislature. In any event, it is clear that the use of a curare derivative or a neuromuscular blocking agent would violate the statute.

154. See *infra* Appendix I.

155. MO. REV. STAT. § 578.005(7) (2007).

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 843

Some states have not traditionally been counted as implicitly banning curariform drugs because their statutes or published regulations do not provide a list of specifically approved drugs. Nevertheless, further study of these states reveals that several of them do specify acceptable euthanasia drugs through regulations that are not readily accessible to the public. Virginia is an example. Virginia's administrative code states simply that "[e]uthanasia shall be performed in compliance with methods approved or prescribed by the State Veterinarian."<sup>156</sup> The state has never appeared on a list of states that implicitly bans curariform drugs in animal euthanasia.<sup>157</sup> The Virginia State Veterinarian, however, has issued regulations listing the only acceptable euthanasia methods in the state: pentobarbital, carbon monoxide, and any method approved by the AVMA.<sup>158</sup> Thus, curariform drugs are banned in Virginia, just as they are in the states mentioned above that list approved euthanasia agents in a statute or published regulation. Idaho is another state in which the law does not reference specific drugs but the governing administrative body prescribes certain acceptable euthanasia agents, none of which are curariform drugs.<sup>159</sup>

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156. See 2 VA. ADMIN. CODE § 5-110-80 (2007).

157. See, e.g., *Hill Veterinarian Brief*, *supra* note 9, at 15 n.3; *Baze Veterinarian Brief*, *supra* note 8, at 18 n.5; *Beardslee v. Woodford*, 395 F. 3d 1064, 1073 nn.8-9 (9th Cir. 2005).

158. See VA. OFFICE OF VETERINARY SERVS., METHODS PRESCRIBED OR APPROVED FOR ANIMAL EUTHANASIA 1-2 (2004) (on file with author).

159. See IDAHO ADMIN CODE 46.01.01.201(a) (2007) ("A list of approved euthanasia drugs is on file at the board office."); Approved Euthanasia and Restraint Drugs, Idaho State Board of Pharmacy (Mar. 14, 2000) (listing approved drugs for euthanasia) (on file with author). Another example is New Hampshire, whose statute states only that animals should be put to death "humanely," using a method approved by the relevant state agency. N.H. REV. STAT. ANN. § 437:22 (2007). The State Veterinarian, however, has, since 1994, mandated that such animals be euthanized only by means of a federally licensed euthanasia solution or a gas chamber. See Clifford W. McGinnis, New Hampshire State Veterinarian, Euthanasia under RSA 437:22 II (Aug. 25, 1994) (on file with author). Alaska, Oregon, and Ohio also have statutes that refer to administrative agencies that, in theory, could have approved the use of paralytic agents in animal euthanasia. In fact, none of these agencies have done so. See Telephone Interview by Ryan Davis, Research Assistant, U.C. Berkeley School of Law, with Brenda Donohue, Licensing Examiner, Alaska Board of Veterinary Examiners (April 11, 2008) (confirming that Alaska does not allow any drugs other than sodium pentobarbital or sodium pentobarbital with lidocaine to be used in animal euthanasia); E-mail from Theresa Stir, Executive Director, Ohio Veterinary Medical Licensing Board, to Ryan Davis, Research Assistant, U.C. Berkeley School of Law (April 7, 2008) (on file with author) (confirming that the Board has not approved the use of any euthanasia agents in Ohio other than those specified in the governing statute); Telephone Interview by Ryan Davis, Research Assistant, U.C. Berkeley School of Law, with Gayle Shriver, Licensing Specialist, Oregon State Veterinary Medical

The statutes of another five states either express a strong preference for the use of sodium pentobarbital, or do not contemplate any method other than sodium pentobarbital.<sup>160</sup> These states do not explicitly mandate the use of pentobarbital, but a reasonable reading of the statute leads to the conclusion that no other method of euthanasia is tolerated. To be conservative, this Article does not include these states with the twenty-eight that implicitly prohibit the use of a paralytic by mandating the use of pentobarbital.

In sum, there are only eight states whose euthanasia laws would even arguably allow the use of a procedure like the one used in human lethal injections.<sup>161</sup> These states are essentially silent on the method to be used. Typical is Indiana, which mandates simply that the method shall be “reasonably humane.”<sup>162</sup> Thus, while eight states are silent on the issue, forty-two states have enacted statutes and/or regulations that either implicitly or explicitly ban the use of neuromuscular blocking agents, such as pancuronium, in animal euthanasia. Stated another way, virtually all (97.6 %) lethal injections in this country have taken place in states that have either implicitly or explicitly banned, for use in animal euthanasia, the same drugs that are used in those states during human executions.<sup>163</sup>

Part IV examines the legislative history of these animal euthanasia laws, revealing decades-old arguments against the use of paralyzing drugs that echo the arguments made in lethal injection challenges today.

#### IV. LEGISLATIVE HISTORY: FAMILIAR ARGUMENTS

Normally, in both animals and man, an instinctual panic reaction is triggered when the respiratory system fails to operate (as in drowning or suffocation). This panic reaction cannot be seen when a curare-like drug is given because the skeletal muscles

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Examining Board (April 8, 2008) (confirming that only sodium pentobarbital is approved for use in animal euthanasia in Oregon).

160. *See infra* Appendix I.

161. Those states are Hawaii, Indiana, Minnesota, New Mexico, North Dakota, South Dakota, Utah, and Vermont. *See infra* Appendix I. Four of these states—Hawaii, Minnesota, North Dakota, and Vermont—do not have the death penalty. Death Penalty Information Center, Facts About the Death Penalty (Apr. 1, 2008), <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

162. 345 IND. ADMIN. CODE 1-7-10(a) (2007).

163. Of the 929 executions by lethal injection that have taken place since executions resumed in 1977, only twenty-two of those occurred in states that do not explicitly or implicitly ban a paralyzing agent in animal euthanasia. Those states are Indiana, New Mexico, South Dakota, and Utah. *See* Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (last visited Apr. 4, 2008).



2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 845

are paralyzed. Thus to an observer, the absence of this overt panic reaction would make it seem that the animal succumbs peacefully to the administration of the [curare-like drug]. Since, however, the pharmacological effects on the body are identical for man and animal, one may subjectively identify with the animal since it will have some of the same emotional experiences and physiological reactions as a human being: panic, helplessness, acute fear, asphyxiation and even more gradual unconsciousness.

—Comments submitted by the Humane Society of the United States in Support of House Bill 559 Banning the Use of Curariform Drugs in Maryland, 1979.<sup>164</sup>

The legislative history of the statutes banning the use of curariform drugs in animal euthanasia is striking, both for what it reveals, and for what it does not reveal. In some states, these laws were the product of intense lobbying by animal rights groups, who argued for the ban in terms quite similar to the arguments of death row inmates challenging the use of neuromuscular blocking agents in lethal injection procedures. In other states, pentobarbital was mandated because it was widely recognized to be the safest and most humane method of euthanasia. In still other states, the legislative or regulatory move either to ban neuromuscular blocking agents or mandate pentobarbital was utterly uncontroversial, as it reflected the virtually unanimous consensus of the veterinary and animal welfare communities.

In 1979, Delegate Elizabeth S. Smith introduced House Bill 599 in the Maryland Legislature. The bill, which eventually became law, explicitly banned the use of “curariform drugs” in the euthanasia of dogs and cats.<sup>165</sup> Delegate Smith’s testimony before the House Environmental Matters Committee explained why such drugs should play no role in the euthanasia of animals: “These drugs cause a reduced pressure of oxygen to the blood and paralysis of respiratory muscles. Unconsciousness develops slowly, preceded by anxiety and fear. The animal can experience pain even though no body movements occur.”<sup>166</sup> The comments of the Humane Society in support of the bill echoed Smith’s concerns, in even stronger terms: “Let me stress here that as I have stated

164. Michael W. Fox, Inst. for the Study of Animal Problems, Humane Soc’y of the U.S., Succinylcholine Chloride (SUCOSTRIN, U-Tha-Sol) Not For Euthanasia 2 (undated) (on file with author).

165. MD. CODE ANN., CRIM. LAW § 10-611(a)(3) (West 2007).

166. Testimony of Delegate Elizabeth S. Smith before the House Environmental Matters Committee (Feb. 1, 1979) (on file with author).

above, the ONLY acceptable use of neuromuscular blocking agents is for surgical assistance.”<sup>167</sup> The bill passed, and has been on the books ever since.

In 1987, both houses of the New York Legislature overwhelmingly passed a bill to ban the use of “T-61, curare, any curariform drug, any neuromuscular blocking agent or any other paralyzing drug” in animal euthanasia, and allow animal shelters access to sodium pentobarbital.<sup>168</sup> Once the bill was passed, then-Governor Mario Cuomo received an outpouring of letters and memoranda from doctors and animal rights activists, urging him to sign the bill into law, which he eventually did.<sup>169</sup> Much of the debate focused on the use of the drug T-61, which is a combination of anesthetic and paralytic.<sup>170</sup> T-61 is no longer available in the United States and is strongly condemned by the Humane Society of the United States because, “if improperly administered, T-61 can cause animals intense pain after administration and a curare-like paralysis of respiration (suffocation) before the animal loses consciousness.”<sup>171</sup> At the time, however, shelters had to use T-61 because they were not able to procure sodium pentobarbital which, like thiopental used in human lethal injections, is a controlled substance.<sup>172</sup> New York’s law, like similar laws of other states, gave shelters access to sodium pentobarbital.<sup>173</sup> In any event, the concerns about T-61 and other curariform drugs, reflected in New York’s legislative history, are echoed in the concerns with pancuronium today.<sup>174</sup>

167. Fox, *supra* note 164, at 2.

168. Assembly Bill 5067-A, Senate Bill 3410-A. The bill passed 55 to 1 in the Senate and 129 to 16 in the Assembly. See Letter from State Senator Joseph L. Bruno to Evan A. Davis, Counsel to the Governor (July 21, 1987) (on file with author).

169. N.Y. AGRIC. & MKTS. LAW § 374 (2-b) (McKinney 2007).

170. See Andrew N. Rowan, *T-61 Use in the Euthanasia of Domestic Animals: A Survey*, ADVANCES IN ANIMAL WELFARE SCI., at 79 (1985).

171. See RHOADES, *supra* note 110, at 133.

172. See Memorandum by Senator Joseph Bruno in Support of SB 3410-A and AB 5067-A (N.Y. 1987) (on file with author) (“[S]ince [sodium pentobarbital] is not readily available to them, shelters have been destroying dogs and cats with T-61, a curariform paralyzing drug which causes fear, pain and suffering during slow asphyxiation.”).

173. See *id.*

174. As discussed below, it was concerns very similar to the concerns about pancuronium in lethal injections that led to T-61 falling out of favor with the animal welfare community. See Rowan, *supra* note 170, at 79 (“[T]he presence of a paralytic agent in the T-61 mixture, continuing anecdotal reports of bad reactions when using T-61, and the relatively complicated protocol recommended for its administration have resulted in repeated questions being raised about the appropriateness of T-61 as a euthanasia agent.”). Nevertheless, at the time the New York law was being debated, T-61 had its defenders, among them veterinarians who did not believe that shelter

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2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 847

For example, a group of doctors, including anesthesiologists, wrote to Governor Cuomo to describe what could happen if an animal euthanized using a combination of an anesthetic and a paralytic did not receive an adequate dose of the anesthetic:

In the case of a paralyzed, awake animal who did not volunteer and does not know what is happening, the experience is undoubtedly terrifying, even in the absence of pain. If pain is present, it can be even more terrifying and more painful than would ordinarily be assumed, since pain and fear can be synergistic.<sup>175</sup>

Others wrote to the governor, noting that the New York State Department of Health banned the use of curariform drugs or agents with curariform activity in the destruction of animals in laboratory settings.<sup>176</sup> Dozens of local animal welfare organizations weighed in as well, one noting that “we favor this law since it would also prohibit the use of . . . drugs containing paralytic agents, which can cause acute suffering before an animal dies.”<sup>177</sup> Another letter pleaded that “[a]nimal organizations have put their hearts and souls into securing a bill which would mean that animal shelters could obtain sodium pentobarbital to be used only to humanely euthanize dogs and cats.”<sup>178</sup>

The legislative testimony in support of the bill by Representative Arthur Kremer is particularly on point:

MR. KREMER: The objections that have been raised to the use of this drug [T-61] are based upon adequate scientific research that has shown the use of this particular drug causes animals to die in what is considered a torturous manner, and sodium pentobarbital is a more humane manner in which the animal could be euthanized. . . .

MR. DAVIDSEN: You mentioned the word “torturous”?

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workers should have access to pentobarbital, a controlled substance, and who also believed that veterinarians were able to administer T-61 without causing pain or suffering. *See, e.g.*, Memorandum of Opposition to SB 3410-A and AB 5067-A (N.Y. 1987) on Behalf of the New York State Veterinary Medical Society (on file with author) (noting that the veterinary society would only support the bill if its provisions were clearly limited to shelter workers, and did not bind veterinarians).

175. Scientists Group, *supra* note 57, at 2.

176. Letter from Arthur J. Kremer, Assembly Member, 20th District, to Evan A. Davis, Counselor to the Governor (July 27, 1987) (on file with author).

177. Letter from Grace Grantner, Legislative Chairperson, League for Animal Protection, to Governor Mario Cuomo (July 16, 1987) (on file with author).

178. Letter from Muriel Resh, Legislative Chairman, Animal Welfare League of Westchester County, Inc., to Governor Mario Cuomo (July 14, 1987) (on file with author).

MR. KREMER: When an animal is paralyzed prior to dying, I think you put that animal, if you will, through a much more difficult death than you would with sodium pentobarbital.<sup>179</sup>

The legislative history of the Connecticut statute also reflects concerns that the use of curariform drugs in animal euthanasia increases the potential for a torturous death. In that state, the original version of a proposed bill would only permit a licensed veterinarian to administer euthanasia by a “lethal injection.”<sup>180</sup> Although the legislative history reflects an overwhelming support for the bill, several animal welfare advocates urged the legislators to include a list of drugs to be used in lethal injections, for fear that some individuals might use curariform drugs instead of sodium pentobarbital.<sup>181</sup> One of the advocates, the president of the Northeastern Connecticut Animal Rescue, Inc., warned that pet shops may be tempted to use succinylcholine chloride, a neuromuscular blocking agent, and that animals would be paralyzed and “die[ ] of suffocation while fully conscious.”<sup>182</sup> She continued: “Please do not assume that the phrase ‘lethal injection’ is adequate to prevent the animal’s suffering. Drugs other than sodium pentobarbital are NOT humane alternatives.”<sup>183</sup> The legislature concurred and amended the bill, so that the language signed into law permits euthanasia only “by lethal injection of sodium pentobarbital.”<sup>184</sup>

The legislative history in other states similarly reflects the strong preference for pentobarbital among veterinarians and animal rights experts. For example, in a 1978 letter to the California senator sponsoring legislation to mandate the use of pentobarbital, the Executive Director of the Nevada Humane Society wrote that “you should know that the track record of sodium pentobarbital use[d] by Humane Societies throughout the U.S. is excellent and stands as

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179. ASSEMBLY DEBATE TRANSCRIPTS, ch. 619, at 40-41 (N.Y. Legislative Service, Inc. 1987).

180. Proposed Bill No. 6059, Connecticut General Assembly (1987) (on file with author).

181. See, e.g., Mildred G. Lucas, President, The Foundation for Animal Protection, Inc., Talking Points for the Testimony Before the Connecticut General Assembly Environment Committee on March 6, 1987 (“[I]nstead of the words ‘lethal injection,’ ‘sodium pentobarbital’ should be substituted, before some pet shop used Succinylcholine Chloride, which paralyzes and thus suffocates conscious animals and should itself be outlawed from use in Connecticut!”) (on file with author).

182. Letter from Linda E. Wenner, President, Northeastern Connecticut Animal Rescue, Inc., to Members of the Connecticut Assembly Environment Committee (Mar. 16, 1987) (on file with author).

183. *Id.*

184. CONN. GEN. STAT. § 22-344a(a) (2007).

2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 849

unquestionable evidence that its use is most humane and safe. There is no excuse for any animal shelter to be forced to use anything less.”<sup>185</sup> When California decided to outlaw the use of carbon monoxide as a method of euthanasia in 1998, the Senate Judiciary Committee prepared a Bill Analysis stating that “there is a general consensus that a lethal injection of sodium pentobarbital is the most humane way to euthanize unwanted dogs and cats.”<sup>186</sup>

In many states, a review of the legislative and administrative history reveals that state legislators simply deferred to veterinary experts, who long ago banned paralyzing agents in their euthanasia procedures and settled on an anesthetic-only procedure.

Kentucky is a prime example of a state whose creation of euthanasia standards mandating the exclusive use of pentobarbital proved uncontroversial. Kentucky’s statute does not mandate a particular method of euthanasia, so long as veterinarians are performing the task.<sup>187</sup> But with respect to “certified animal euthanasia specialists,” who work in animal shelters and do not have the same level of training and expertise as veterinarians, Kentucky regulations mandate the anesthetic-only euthanasia procedure, which is both safer and easier to administer.<sup>188</sup> A review of the regulatory history reveals that nobody requested a public hearing on these regulations, and the scheduled hearing was cancelled as a result.<sup>189</sup> In other states, such as Tennessee, a review of the legislative history reveals debate over certain aspects of the euthanasia laws, such as whether they apply to hunters, but no debate with respect to the strict requirements on drugs that could be used.<sup>190</sup>

185. Letter from Thomas A. Little, Executive Director, Nev. Humane Soc’y, Inc., to Cal. State Senator Alfred H. Song (Aug. 15, 1978) (on file with author).

186. JOHN L. BARTON, S. JUDICIARY COMM., SB 1659 SENATE BILL ANALYSIS, 1997-98 Reg. Sess. (Cal. 1998) (on file with author).

187. KY. REV. STAT. ANN. § 321.207 (West 2008).

188. See 201 KY. ADMIN. REGS. 16:090, § 5(1) (2007). Similarly, in Alaska, legislation was passed in 2002 that allowed for shelter workers to have access to sodium pentobarbital, so that they did not have to rely on veterinarians (who had access to the controlled substance). ALASKA STAT. § 08.02.050 (2007). During debate on the bill, several animal control agency directors testified about the need for shelter workers to have access to the “most humane method” of euthanizing animals. Testimony of Marianne Clark, Soldotna Animal Shelter, Apr. 2, 2002 (on file with author); see also Testimony of Laura Hood, Manager, Fairbanks North Star Borough, Division of Animal Control, Apr. 2, 2002 (“This bill allows animal shelter workers to legally purchase, maintain, and use the drug which is accepted as the best euthanasia method that we have available to us.”) (on file with author).

189. See Letter from James J. Grawe, Assistant Attorney General, to Susan C. Wunderlich, Regulations Compiler (Apr. 15, 1999) (on file with author).

190. Legislative history in Tennessee, as with many other states, is not transcribed. However, audio tapes are available from the Tennessee State Library and Archives.

In short, the heated controversy over proper procedures for use in human lethal injections is contrasted by a relative lack of such controversy in statehouses across the country when the issue is animal euthanasia. Legislatures appear to have deferred to the long-standing and carefully reviewed practices of the veterinary and animal welfare communities. When those experts have requested that states ban paralyzing agents in the destruction of animals, legislatures have been happy to oblige.

### CONCLUSION

One remarkable aspect of the recent challenges to lethal injection is that lawyers for death row inmates have consistently argued that there are humane ways to execute prisoners. In fact, they have routinely presented expert testimony in support of this proposition. For example, in a 2006 lethal injection challenge in Maryland, lawyers for death row inmate Vernon Evans presented the testimony of expert anesthesiologist Mark Heath, and asked him point blank whether, in his opinion, “lethal injection can be performed humanely.”<sup>191</sup> Dr. Heath responded, “I’m very confident of that, yes. I believe it’s performed on household pets, on dogs and cats, thousands of times a day in the United States or more, and it’s done in a reliable and humane fashion.”<sup>192</sup> President Ronald Reagan made the same analogy more than thirty years ago, defending the advent of lethal injection when he was Governor of California. Referring to the euthanasia of an injured horse, he said:

[Y]ou 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], and maybe we should review and see if there aren’t even more hu-

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See Audio tape: 102nd General Assembly, H. Agric. Comm. (Mar. 20, 2001) (on file with author); Audio tape: 102nd General Assembly, H. Calendar and Rules Comm. (Mar. 29, 2001) (on file with author); Audio tape: 102nd General Assembly, H. Sess. (Apr. 2, 2001) (on file with author); Audio tape: 102nd General Assembly, S. Judiciary Comm. (Feb. 13, 2001) (on file with author); Audio tape: 102nd General Assembly, S. Judiciary Comm. (Feb. 27, 2001) (on file with author); Audio tape: 102nd General Assembly, S. Sess. (Mar. 5, 2001) (on file with author); Audio tape: 102nd General Assembly, S. Sess. (Apr. 5, 2001) (on file with author).

191. Testimony of Dr. Mark Heath at 12, *Evans v. Saar*, 412 F. Supp. 2d 519 (D. Md. Sept. 19, 2006) (No. 06-149).

192. *Id.*

2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 851

mane methods [of execution] now—the simple shot or the tranquilizer.<sup>193</sup>

The comparison is, in theory, an apt one, as the relevant drugs (barbiturates, paralytics, and potassium) all have the same effects on animals such as cats, dogs, and horses as they do on humans.<sup>194</sup> And, of course, as a scientific matter, we extrapolate from animals all the time; such extrapolation is the foundational underpinning of the use of animals in any medical experimentation.<sup>195</sup>

But while President Reagan's comparison may be apt in theory, it breaks down in practice. After all, the fact remains: people are not executed the same way that animals are euthanized. People are never executed using the anesthetic-only procedure that veterinarians and shelter workers use on animals. And animals are never euthanized by the three-drug formula prison officials use on human beings. As detailed in this Article, the veterinary and animal welfare communities widely condemn the use of neuromuscular blocking agents such as pancuronium.<sup>196</sup> Particularly given the popular assumption that execution of humans by lethal injection is no different than "putting an animal to sleep," the condemnation of the use of curariform drugs in the euthanasia context should give courts pause when assessing the risks of the three-drug formula under the Eighth Amendment.

Interestingly, the Humane Society of the United States finds itself in the middle of a controversy every bit as heated as the debate over the death penalty, namely whether animal shelters should euthanize stray cats and dogs.<sup>197</sup> The Humane Society, taking the position that the euthanasia of millions of animals a year is an absolute necessity, has noted that the public's confidence in a program that involves the euthanasia of animals depends on the credibility of the program's administration:

In order for an animal control or humane society program to be successful, it must be accepted and supported by the people it

193. Colman McCarthy, Op-Ed, *Killing With Kindness*, WASH. POST, June 11, 1983, at A23.

194. See Expert Report of Dr. Kevin Concannon at 4, 6, *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. Aug. 15, 2006) (No. C06-0219).

195. See Deposition of Dr. Kevin Concannon at 33, *Morales*, 465 F. Supp. 2d at 972 (noting that some medical studies extrapolate information from animals to people).

196. See *supra* Part II.

197. See, e.g., Jesse Katz, *What's a Dog Worth? Los Angeles Kills More Animals in its Shelters Than Any Other Metropolitan Area in the United States. For that to Change, We Will Have to Figure out What to Do with the Pets None of Us Wants*, L.A. MAG., May 1, 2006, at 116; Kathleen Fifield, *Idealism: The Fight to Save Fluffy*, PHILA. MAG., Feb. 2006.

serves. When a shelter has a professional euthanasia program that meets or exceeds national standards, some of the worst fears and misconceptions of the public are alleviated. The implementation of euthanasia by injection of sodium pentobarbital and compassionate animal handling is an essential step for any shelter in gaining the public's trust.<sup>198</sup>

In other words, the Humane Society has decided that the best way to establish the credibility and sustainability of a program that involves the destruction of living beings is to use the most humane, compassionate methods possible.

The comparison between this approach and that of the states in their aggressive defense of the death penalty, is striking. The Humane Society mandates a method of euthanasia the primary benefit of which is that it is *actually* humane. At a time when the public's trust in the administration of capital punishment in this country appears to be eroding,<sup>199</sup> the states, on the other hand, have clung to a method whose primary benefit is that it *looks* humane—but that in reality risks the unnecessary infliction of excruciating pain and suffering.

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198. RHOADES, *supra* note 110, at 2.

199. See RICHARD C. DIETER, DEATH PENALTY INFORMATION CTR., A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY 1 (2007), available at <http://www.deathpenaltyinfo.org/CoC.pdf> (stating that, based on a national public opinion poll conducted in 2007, "[p]eople are deeply concerned about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purposes").



2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 853

**APPENDIX I: STATE ANIMAL EUTHANASIA LAWS AND  
REGULATIONS LISTED BY CATEGORY**

**A. States that Explicitly Ban Paralyzing Agents**

Florida	Georgia	Maine
Maryland	Massachusetts	New Jersey
New York	Oklahoma	Tennessee

**B. States that Implicitly Ban Paralyzing Agents**

Alabama*	Alaska	Arizona	Arkansas
California	Colorado*	Connecticut	Delaware
Idaho	Illinois*	Iowa*	Kansas*
Kentucky*	Louisiana*	Mississippi*	Missouri*
Montana	New Hampshire	North Carolina*	Ohio
Oregon	Rhode Island*	South Carolina	Texas
Virginia*	West Virginia*	Wisconsin*	Wyoming

\*The statutes and/or regulations of these states define euthanasia with a reference to a version of the AVMA guidelines.

**C. States that Express a Strong Preference for  
Pentobarbital-based Drugs**

Michigan	Nebraska	Nevada
Pennsylvania	Washington	

**D. States with Laws that Are Silent With Respect  
to Approved Animal Euthanasia Methods**

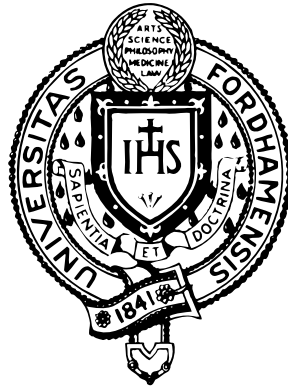
Hawaii	Indiana	Minnesota	New Mexico
North Dakota	South Dakota	Utah	Vermont

**APPENDIX II: CITATIONS TO STATE ANIMAL EUTHANASIA  
LAWS AND REGULATIONS**

<b>State</b>	<b>Statutes and Regulations</b>
Alabama	ALA. CODE § 34-29-131 (2007) ALA. ADMIN. CODE r. 930-x-1-.35 ALA. ADMIN. CODE r. 930-x-1-.36
Alaska	ALASKA STAT. § 08.02.050 (2007)
Arizona	ARIZ. REV. STAT. ANN. § 11-1021 (2007)
Arkansas	ARK. CODE ANN. § 4-97-103 (2007)
California	CAL. BUS. & PROF. CODE § 4827 (West 2007)
Colorado	COLO. REV. STAT. § 18-9-201 (2007) COLO. REV. STAT. § 35-80-102 (2007)
Connecticut	CONN. GEN. STAT. § 22-344a (2007)
Delaware	DEL. CODE ANN. tit. 3, § 8001 (2007)
Florida	FLA. STAT. § 828.058 (2007) FLA. STAT. § 828.065 (2007)
Georgia	GA. CODE ANN. § 4-11-5.1 (2007) GA. COMP. R. & REGS. r. 40-13-13-.08 (2007)
Hawaii	HAWAII REV. STAT. § 143-13 (2007)
Idaho	IDAHO ADMIN. CODE r. 46.01.01.201 (2007)
Illinois	510 ILL. COMP. STAT. 70/2.09 (2007)
Indiana	345 IND. ADMIN. CODE 1-7-10 (2007)
Iowa	IOWA CODE § 162.2 (2007) IOWA ADMIN. CODE r. 21-67.9 (2007)
Kansas	KAN. STAT. ANN. § 47-1718 (2007) KAN. ADMIN. REGS. § 9-26-1 (2007)
Kentucky	KY. REV. STAT. ANN. § 321.207 (2007) KY. REV. STAT. ANN. § 258.095 (2007) 201 KY. ADMIN. REGS. 16:090 (2007)
Louisiana	LA. REV. STAT. ANN. § 3:2465 (2007)
Maine	ME. REV. STAT. ANN. tit. 17, § 1044 (2007) ME. REV. STAT. ANN. tit. 17, § 1042 (2007)
Maryland	MD. CODE ANN., CRIM. LAW § 10-611 (2007)
Massachusetts	MASS. GEN. LAWS ch. 140, § 151A (2007)
Michigan	MICH. COMP. LAWS § 333.7333 (2007) MICH. ADMIN. CODE r. 285.151.1 (2007)
Minnesota	MINN. STAT. § 343.235 MINN. STAT. § 343.37 MINN. R. § 1720.1542 (2007)

2008] *LETHAL INJECTION & ANIMAL EUTHANASIA* 855

Mississippi	127 Miss. Gov'T REG. 50-026-001 (Weil Feb. 2008)
Missouri	MO. REV. STAT. § 578.005 (2007) MO. CODE REGS. ANN. tit. 2, § 30-9.020 (2007)
Montana	MONT. ADMIN. R. 8.64.901 (2007) MONT. ADMIN. R. 8.64.908 (2007)
Nebraska	NEB. REV. STAT. § 54-2503 (2007)
Nevada	NEV. REV. STAT. § 638.005 (2007)
New Hampshire	N.H. REV. STAT. § 437:22 N.H. CODE ADMIN. R. ANN. Pari. 809.05 (2007)
New Jersey	N.J. STAT. ANN. § 4:22-19.3 (2007) N.J. ADMIN. CODE § 8:23A-1.11 (2007)
New Mexico	N.M. STAT. § 77-1B-2 (2007)
New York	N.Y. AGRIC. & MKTS. LAW § 374 (2007) N.Y. COMP. CODES R. & REGS. tit. 10, § 80.134 (2007)
North Carolina	N.C. GEN. STAT. § 19A-23 (2007) N.C. GEN. STAT. § 19A-24 (2007)
North Dakota	N.D. CENT. CODE § 36-05-10.1 (2007)
Ohio	OHIO REV. CODE ANN. § 4729.532 (West 2007)
Oklahoma	OKLA. STAT. tit. 4, § 501 (2007)
Oregon	OR. REV. STAT. § 609.405 (2007)
Pennsylvania	3 PA. STAT. § 328.6 (2007)
Rhode Island	R.I. GEN LAWS § 4-19-2 (2007) R.I. GEN LAWS § 4-1-34 (2007)
South Carolina	S.C. CODE ANN. § 47-3-420 (2007)
South Dakota	S.D. ADMIN. R. 12:68:20:03 (2007)
Tennessee	TENN. CODE ANN. § 44-17-303 (2007)
Texas	TEX. HEALTH & SAFETY § 821.052 (Vernon 2007)
Utah	UTAH CODE ANN. § 58-17b-102 (2007)
Vermont	VT. STAT. ANN. tit. 20, § 3901 (2007)
Virginia	VA. CODE ANN. § 3.1-796.66 (2007)
Washington	WASH. REV. CODE § 16.52.011 (2007) WASH. REV. CODE § 69.50.310 (2007) WASH. ADMIN. CODE § 246-886-020 (2007)
West Virginia	W. VA. CODE § 7-10-4 (2007) W. VA. CODE § 30-10A-8 (2007)
Wisconsin	WIS. ADMIN. CODE NR 19.71 (2007)
Wyoming	WYO. STAT. ANN. § 33-30-216 (2007)



**ATTACHMENT D**

“Can Californians afford to keep the death penalty?”

*Sacramento Bee*

May 17, 2009

**THE SACRAMENTO BEE** [sacbee.com](http://www.sacbee.com)

This story is taken from Sacbee / Opinion

# Can Californians afford to keep the death penalty?

| Special To The Bee

**Published Sunday, May. 17, 2009**

It took more than three years of litigation, which the state lost repeatedly, before the attorney general's office conceded that the execution protocol must be open to public scrutiny.

Indeed, throughout the legal challenges to California's method of lethal injection, the governor, the attorney general and the Corrections Department unswervingly opposed any disclosures. Even as the process of public notice and comment on the state's lethal-injection protocol begins, a complicated tangle of legal proceedings remains before the state can resume executions.

The state's lethal-injection protocol still faces a primary challenge in federal court. The central claim is that the manner and means by which lethal-injection executions are carried out in California creates a substantial risk that the inmate will experience an excruciatingly painful death, violating the Eighth Amendment prohibition against "cruel and unusual punishment."

U.S. District Judge Jeremy Fogel, who is presiding over the lethal-injection challenge in the case of Michael Morales, has twice suggested that the state reconsider its procedures in light of the "substantial questions" raised by records of past executions, as well as other evidence. Fogel declared the state's procedures unconstitutional in December 2006 and gave the state 30 days to advise the court whether it intended to change its procedures. The state responded by embarking upon the construction of a new execution chamber – in secret and without the necessary legislative approval. At last count, the cost to taxpayers was about \$850,000.

All of the legal hurdles must be resolved before the state can resume lethal injections. In the meantime, the financial costs of capital punishment continue to pile up.

A recent editorial in the Daily Astorian, an Oregon newspaper, asked, "Can Oregon afford the death penalty?" The editorial declared that "incarceration – not education – is Oregonians' only entitlement." It urged that while "investment in education is about the future, and it is about hope," investment in the death penalty "is about final reckoning, an admission of gross failure."

Californians are all too familiar with the fact that while we rank 47th in the nation in per-pupil public school spending on a cost-adjusted basis, we are first in what we pay for

prisons and on the administration of the death penalty. California is housing so many people on death row that it plans to build a new facility. The price of construction is \$400 million and, over 20 years, taxpayers will pay \$1 billion in operating costs.

My opposition to the death penalty is not based on an economic calculation. I would prefer that capital punishment end because we come to our collective senses about what Justice Harry Blackmun called a penalty that "remains fraught with arbitrariness, discrimination, caprice, and mistake." However, I am not an elected public official who has the responsibility of spending the taxpayers' dollars wisely.

The question posed by the Daily Astorian's editors does not appear to have occurred to our governor or more than a handful of state legislators. Nor have the majority of the state's prosecutors tuned in to what Orange County, N.J., Police Chief James Abbott, a member of the state commission that recommended abolition, wrote about the quarter of a billion dollars New Jersey spent on administering the death penalty over the past 30 years: "I find this use of state resources offensive. ... Give a law enforcement professional like me that \$250 million, and I'll show you how to reduce crime. The death penalty isn't anywhere on my list."

Asked if he considers expense in deciding whether to seek the death penalty, San Bernardino District Attorney Michael Ramos replied, "When you are deciding for a victim's family who has lost a loved one, it is hard to think about money." Prosecutors know this is the answer that shuts down debate. One of the unique features of the death penalty is the level of fear that opposing it instills in many politicians. Local district attorneys neither speak for nor represent victim family members. They represent, are elected by and are paid by the people of California, who should demand that these elected officials act with transparency and accountability, disclosing exactly how much they are spending on the death penalty, and, in the words of 6th U.S. Circuit Court of Appeals Judge Boyce F. Martin, just how little "the public is getting for its money."

Using what it described as "conservative" numbers, the California Commission on the Fair Administration of Justice pegged the current annual cost of the state's death penalty system at \$137 million. The commission identified a series of reforms intended to reduce the length of time – 20 to 25 years – that it takes to bring capital cases to finality while ensuring "fairness, accuracy and nondiscrimination." Then it calculated the price tag for implementing these reforms: more than \$232 million a year. In the year since the commission released its report, Sacramento's response to the recommendations has been simply to ignore them.

In contrast, Kansas state Sen. Carolyn McGinn, a Republican, proposed eliminating the death penalty as one of the "policy decisions that would reduce government spending" in the face of the severe deficit.

She agreed that the state legislature cannot bring down the cost of the capital punishment system, which is the "result of investigation, lengthier trials and the higher cost and frequency of appeals. The appeals process is mandated by the U.S. Supreme Court and the Constitution."

In calling on the Supreme Court and legislatures to undertake "a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces," Supreme Court Justice John Paul Stevens pointed out that the expense of judicial review is largely due to the "state's failure to apply constitutionally sufficient procedures" at the time of the capital trial.

The fiscal crisis in California worsens by the day. The latest reports indicate that our state faces a \$10 billion budget deficit, even if the Tuesday ballot measures pass. Senate President Pro Tem Darrell Steinberg announced that failure to adopt the ballot propositions will result in even deeper reductions in spending for education, health and other vital

services. District attorneys in several counties have warned that budget cuts will diminish their ability to prosecute crimes and may threaten public safety. Furloughs, layoffs and hiring freezes are the norm in state and county government agencies.

Facing a deficit in the billions, is the prospect of saving a couple of hundred million dollars a year too small for politicians to bother with? School districts, state and county hospitals, the state college and university systems, day care and senior centers, public defender offices, police and fire departments, and even some district attorneys might disagree.

For decades, Democratic and Republican candidates for governor in California have stepped over each other to prove their capital punishment credentials. But public support for the death penalty has dropped dramatically in this state. When money is in short supply here, we would be well served if courage and leadership were not.

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