IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES and ALBERT BROWN, Plaintiffs-Appellants, v. MATTHEW CATE, Secretary of the Department of Corrections and Rehabilitation, et al., Defendants-Appellees.	CA No. D.C. No. 5-6-cv-219-JF-HRL D.C. No. 5-6-cv-926-JF-HRL **DEATH PENALTY CASE** D.C. No. 5-6-cv-1793-JF-HRL

BRIEF OF APPELLANT; IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE JEREMY FOGEL
United States District Judge

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STATEMENT OF JURISDICTION

This is an appeal from the district court's collateral order of September 24, 2010 "denying conditionally [Albert Brown's] motion for a stay of execution," and related rulings. Appellant's Excerpts of Record filed concurrently herewith ("ER"). ER 7-17. This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violations), § 2201 (declaratory relief), and § 2202 (further relief). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. *See Sell v. United States*, 539 U.S. 166, 176 (2003) (describing orders before final judgment that are appealable "collateral orders" under 28 U.S.C. § 1291). In the alternative, the Court should treat this filing as a Petition for a Writ of Mandamus. The order denying a stay was entered on September 24, 2010. ER 7-17. Brown timely filed a notice of appeal on September 26, 2010. ER 1-4; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Where this Court expressly found plaintiff was free to intervene in an ongoing § 1983 lawsuit challenging California's lethal-injection procedures (*Brown v. Ornoski*, 503 F.3d 1006, 1017 & n.7 (9th Cir. 2007)), and plaintiff

intervened in a timely fashion, did the district court abuse its discretion by denying a stay of execution on the ground that the execution date set by Defendants "effectively precludes an orderly review" of purportedly "new" regulations, which are substantially similar to the protocol that had been found likely to create a 'demonstrated risk'"[1] of a constitutional violation. [2]

2. Whether a federal court may force a condemned inmate to choose between his Eighth Amendment right to be free from cruel and unusual punishment and his Due Process/state law right to have state execution protocols developed in full compliance with state regulatory procedures.

3. Whether, consistent with the statutory right to counsel and the due process right to make knowing, informed and voluntary decisions affecting constitutional rights, a federal court may force a condemned inmate to "elect" to be executed by either an untested and improvised one-drug lethal injection protocol or a likely unconstitutional three-drug protocol under circumstances in which neither the federal court, nor the inmate and his attorney, has access to critical information necessary to evaluate the State's ability to humanely employ either procedure.

4. Did the district court violate plaintiff's right to equal protection of the law by denying a stay of execution preventing Brown from litigating the same

[1]ER 14 (emphasis in original).

claims on the same record as the identically-situated plaintiff Morales?

STATEMENT OF THE CASE

Mr. Brown is a California death row inmate. *Brown*, 503 F.3d at 1008. On September 19, 2007, this Court affirmed the denial of Mr. Brown's federal habeas corpus petition. In denying Mr. Brown's claim that "lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment," the Court did "not view Brown's habeas petition as stating an 'as applied' challenge to California's lethal injection protocol," but rather a "general challenge" that lethal injection is always unconstitutional "in and of itself." *Id*. at 1017 & n.5. The Court noted that *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006), and *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), held that "the protocol as currently implemented in California may violate the Eighth Amendment," and explained that "Brown is free . . . to challenge the particular protocol used by the State of California in a [42 U.S.C.] § 1983 action, as did the petitioner in *Morales* . . . ." 503 F.3d at 1017 & n.5. The United States Supreme Court denied Brown's petition for a writ of certiorari on October 6, 2008. *Brown v. Ayers*, 129 S. Ct. 63 (2008) (mem.).

At the time Mr. Brown completed his federal habeas proceedings, the State's

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[2]ER 8.

"particular protocol" for lethal injection, Operational Procedure 770 ("OP 770"), was suspended pending state-court-ordered revision in compliance with California's Administrative Procedures Act ("APA"). *Morales v. Cal. Dept. of Corr. and Rehab.*, 168 Cal. App. 4th 729, 85 Cal. Rptr. 3d 724 (2008).

Beginning before Mr. Brown's completion of federal habeas proceedings, and continuing through the present, OP 770 was also subject to the stay issued by the United States District Court for the Northern District of California on behalf of Plaintiff Michael Morales in this case. Counsel for Plaintiff Morales explicitly was advised by the California Senior Assistant Attorney General responsible for all California death penalty cases that during the pendency of this action, the State would not seek to execute any condemned inmates in California. ER 12. The District Court had a similar impression of the *status quo*. *Id.*

On July 30, 2010, California's Office of Administrative Law (OAL) approved purportedly "new" lethal injection regulations proposed by Defendant California Department of Corrections and Rehabilitation ("CDCR"). ER 110. The regulations became effective 30 days later, on August 29, 2010. ER 9.

On August 2, 2010, Mitchell Sims, another California condemned inmate filed a complaint for declaratory and injunctive relief in the Marin County Superior Court. *Sims v. Cal. Dept. of Corr. and Rehab.*, Case No. CIV1004019. ER 257-

99. Sims alleged, *inter alia*, that Defendants' new regulations were "virtually identical" to OP 770, and adopted in violation of the state APA. *Id*.

On August 30, 2010, one day after the regulations went into effect, the California Attorney General appeared with the District Attorney in the Riverside County Superior Court and had the court set Plaintiff Brown's execution for September 29, 2010. ER 9.

On August 31, 2010, the day after Mr. Brown's execution setting, the Marin County Superior Court in *Morales v. Cal. Dept. of Corr. and Rehab.*, Case No. CIV061436, ordered enforcement of its previously issued permanent injunction. The injunction prohibited Defendants from executing condemned inmates by lethal injection pending a determination whether any new procedures had been adopted in full compliance with the state APA. ER 110.

On September 9, the Marin County Superior Court permitted Mr. Brown to intervene in the *Sims v. Cal. Dept. of Corr. and Rehab.* litigation. The superior court denied Mr. Brown's request for a temporary restraining order ("TRO") to enjoin the State from preparing to execute him because the injunction issued in the state court *Morales* litigation already barred Defendants from carrying out lethal-injection executions. ER 39-40.

On September 15, 2010, Mr. Brown timely filed his motion to intervene and

for a stay of execution in the district court in this 42 U.S.C. § 1983 action, which alleges that the State's lethal injection procedures violate the Eighth Amendment. *See Morales v. Tilton*, 465 F. Supp. 2d 972; ER 132-66; docket no. 1 (C 06-2019),

On September 20, 2010, the California Court of Appeal granted the State's writ of mandate, holding that the state was not required to take further action to dissolve the permanent injunction in the *Morales* APA action. ER 109-16.

On September 21, the district court heard argument on Mr. Brown's motion to intervene in this case, and for a stay of execution. ER 34-98.

On September 24, 2010, the district court issued an order granting Mr. Brown's timely motion to intervene, but conditionally denying his motion for a stay of execution. ER 7-17. Brown discusses the order and the events in the district court immediately before and after the order was issued in the Statement of Facts section below. *See* Fed. R. App. P. 28(a) ("The Appellant's Brief must contain . . . a statement of facts relevant to the issues submitted for review with appropriate references to the record.").

STATEMENT OF THE FACTS

In January 2006, Plaintiff Michael Morales challenged the constitutionality of California's lethal injection procedures. *See Morales v. Hickman*, 415 F. Supp. 2d 1037 (2006). Based on its review of the evidence, including an *in camera*

inspection of CDCR's documents, the district court determined that CDCR maintained two versions of its purported execution protocol: one a redacted, publicly available version, entitled "Operational Procedure No. 770," and a confidential version labeled "San Quentin Institution Procedure 770." *Id.* at 1039, n.1. Comparison of the two documents revealed "potentially significant differences between the two." *Id.*

The district court also found that neither protocol was "entirely clear as to which dosages of" two lethal drugs were actually administered during executions. *Id.*, n.3. In turn, a review of previously undisclosed institutional execution logs revealed evidence that "in at least six of thirteen executions," administration of a third drug, sodium thiopental, did not cause the inmate to stop breathing and lose consciousness as expected before the injection of the excruciatingly painful paralytic agent, pancuronium bromide. *Id.* at 1044. This and other evidence raised "at least some doubt as to whether the protocol actually [was] functioning as intended." *Id.*

Rather than staying Mr. Morales's execution, the district court attempted a workaround – similar to what it has done in this case – that required the State to modify its lethal-injection procedures in one of two ways.[3] Defendants assured the

[3] The federal court gave the State the option of (1) using only sodium

district court and this Court that it would provide two licensed anesthesiologists to ensure that Mr. Morales was and remained unconscious before the injection of either pancuronium bromide or potassium chloride, but defendants never advised the anesthesiologists of these responsibilities until two hours prior to the scheduled execution. Then, the California Attorney General chided and cajoled the anesthesiologist to continue, stating that the Court's decision in the case was merely an "opinion", not a court "order." The anesthesiologist refused to proceed, and defendants reneged on the promise to the district court. Ultimately, the State refused to employ either modification, and the district court's contingent stay of execution went into effect. *See Morales*, 415 F. Supp. 2d at 1048.

The district court then permitted Morales to conduct further discovery, present "four days of testimony and hundreds of pages of documentary evidence," and submit detailed stipulated facts. ER 14; ER 184-256 (the stipulated facts). As a result of this more thorough review of the issues, the district found "*even stronger evidence of problems* with O.P. 770," than the showing that led the court to conditionally stay Morales's execution in 2006. ER 14(emphasis added). That record pointed to a 63% error rate in executions carried out under California's

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thiopental or other barbiturate or combination of barbiturates; or (2) agreeing to independent verification, by a qualified individual or individuals, that Mr. Morales was in fact unconscious before the injection of either pancuronium bromide or

lethal-injection protocol before the district court's conditional stay became operational. ER 13-14. The evidence also included testimony from "Defendants' own medical expert" to the effect "that at least one inmate may well have been awake when he was injected with the second and third drugs in the lethal-injection cocktail." ER 14.

In sum, if the district court had reviewed this evidence under the guidance of the subsequently-rendered opinion in *Baze v. Rees*, 553 U.S. 35 (2008), it is likely it would have concluded that *in practice*, the "serious deficiencies" in Defendants' lethal-injection protocol amounted to a "demonstrated risk" of wantonly inflicting severe pain. *Id.* The demonstrated deficiencies included improper mixing, preparation and administration of sodium thiopental by the execution team; inconsistent and unreliable screening of execution team members; the lack of meaningful training, supervision and oversight of the execution team; inconsistent and unreliable record-keeping; and inadequate lighting, overcrowded conditions and poorly designed facilities in which the execution team worked. *Id.* at 3, n. 2.

Despite such pervasive, systemic and well-documented deficiencies, Defendants from the outset had attempted to persuade the district court that there

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potassium chloride. *Morales*, 415 F. Supp. 2d at 1047.

was no "probative" evidence to question the constitutionality of the State's lethal-injection protocol. Order at 2.

Once the deficiencies in the State's protocol had been uncovered through the process of careful judicial review, Defendants CDCR and the CDCR Secretary purported to issue a revised lethal-injection protocol on May 15, 2007 by way of an illegal, "underground" regulation. *See Morales*, 168 Cal. App. 4th at 732. Defendants' unlawful actions were enjoined by the state courts. *Id.* at 742.

Defendants then promulgated an iteration of the lethal injection procedures that was virtually identical to OP 770, the former protocol, in purported compliance with the state's Administrative Procedures Act ("APA") (Cal. Gov. Code § 11340, *et seq*.). As with the procedures found inadequate by the district court in this case, the "new" regulations are allegedly based substantially on the contents of extensive and significant undisclosed documents. ER 257-99. The new regulations also integrated by reference into the lethal injection protocol a wholly different method of execution – lethal gas – without providing an APA-compliant protocol. *Id.*

Based on Defendants' continuing use of procedures containing the virtually identical deficiencies in OP 770, Plaintiff Brown timely moved to intervene in the state court litigation in *Sims*, and in this matter; and for a stay of execution. ER

132-47.

At the September 21, 2010 hearing on Mr. Brown's motions in the district court, the court asked Defendants to provide information regarding the availability of a one-drug protocol using only sodium thiopental, the first of the three drugs provided for in the State's proffered protocol. ER 81-96.

On September 22, the State filed a response to the court's questions. ER 30-33. Without conceding that such a procedure would be legal under state law, Defendants explained the manner in which they would modify the execution protocol to use only sodium thiopental. These modifications included administering a total of five grams of sodium thiopental, with the use of five syringes, rather than using two syringes, which each contain 1.5 grams of sodium thiopental. *Id*. Defendants also informed the district court that they would only need three days' lead time to train the execution team members for this new procedure.

On September 24, 2010, the district court issued an order granting Brown's motion for leave to intervene but "denying conditionally" the motion for a stay of execution. ER 7-17. The court found that "Brown's federal claims are virtually identical to those asserted by Plaintiff Michael Angelo Morales." ER 7. The district court also acknowledged that, based on a factual record that exceeds any

other to be developed in a "case involving an Eighth Amendment challenge to a lethal-injection protocol," the deficiencies it found in the California protocol likely established a "demonstrated risk" of an Eighth Amendment violation. ER 13-14. The district court concluded, however, that the "strong[] evidence of problems" with the state's protocol concerned "O.P. 770," and "O.P. 770 no longer is operative." ER 14.

The only identified basis for the district court's conclusion that OP 770 is inoperative – as opposed to being simply relabeled as the state's current "regulations" – are Defendants' representations that they have made "extensive *efforts* to address the Court's concerns," and have constructed new "facilities." ER 14 (emphasis added).[4] Although the court "preferred" to examine "in a more orderly fashion" the question whether Defendants' purported "efforts" resulted in constitutionally adequate execution procedures, it found that the time constraints created by the expedited execution date "precludes" such review. ER 12, 14. The district court, therefore, concluded that in light of Defendants' untested claim that

[4] "When asked by a legislative oversight committee why the construction [of the new facility] had commenced without its knowledge, a corrections official responded on behalf of San Quentin's warden that the Court had ordered that a new chamber be built. When it was pointed out that the Memorandum contained no such requirement, the warden (a named party in *Morales*) admitted that he had not read the Memorandum." Fogel, Jeremy, *In The Eye Of The Storm: A Judge's Experience In Lethal-Injection Litigation*, 35 Fordham Urb. L.J. 735, 747 (2008).

they had corrected the deficiencies that they earlier denied existed in OP 770, they were "entitled to proceed with the execution." ER 14.

The district court nevertheless conditioned its denial of a stay on Defendants' willingness to accommodate Mr. Brown's "choice" to be executed by means of the single-drug protocol as outlined in Defendants' submission of September 22, 2010. ER 16. If Brown "elects" to be executed with the single-drug protocol, Defendants will be permitted by the court's order to proceed as described in their submission. If Defendants decline to follow the single-drug protocol, a stay will issue without further order. If Mr. Brown "elects" to be executed with the three-drug protocol, or if he declines to elect, Defendants may use the procedures in the renamed OP 770. ER 16-17. Mr. Brown was required to make his election at 6:00 p.m. Saturday, September 25, 2010. If he "chose" the single-drug protocol, Defendants were given until noon on Monday, September 27, 2010, to state whether they would agree to modify their regulations. ER 17.

In proposing the one-drug option, the district court (without citation or a record) pointed to the apparent lack of "difficulty" using similar procedures in Ohio and Washington. ER 15.

On September 24, 2010, Mr. Brown requested leave to file a motion for reconsideration to permit an opportunity to brief issues implicated by the court's

order of the same date. ER 352-55. These issues included an opportunity to address whether Defendants have sufficient quantity of thiopental (i.e., at least 10 grams) that has not passed its expiration date, as required by the Ohio and Washington protocols.[5]

On September 25, 2010, the district court denied the motion for leave to file a motion to reconsider. ER 5-6. At 2:21 p.m. on the same day, Defendants submitted an "Amplification" of their earlier response to the court's question regarding their proposed improvisation of a single-drug protocol. ER 308-11. Defendants revealed that they do not possess 10 grams of sodium thiopental as would be required under the Ohio and Washington protocols. ER 310-11.

Defendants' belated disclosure that they have a critical shortage of sodium thiopental clearly demonstrated that Defendant CDCR could not have been training by mixing the drug. The purported regulations, however, require the execution

[5] The Ohio protocol provides that the execution should be carried out by the administration of five grams of sodium thiopental and further provides that an additional five grams of sodium thiopental will be "available in the area of the execution chamber" for use should "the primary dose of five grams prove[] to be insufficient for the procedure." ER 347-48. Similarly, the Washington protocol provides that "[i]f the Doctor is unable to pronounce death, Superintendent shall re-open the curtain and signal the IV team to proceed with the second dose of thiopental sodium followed by the normal saline flush to be administered in the back up IV location." ER 335 (Washington State Penitentiary Superintendent's Checklist – One Drug Protocol). Like the Ohio procedures, this second dose consists of five grams of sodium thiopental. *Id*. (item 19).

team to train by simulating an execution by lethal injection. This includes "[a]ppropriate mixing of the chemicals." Cal. Code Regs. tit. 15 § 3349.1.4(c)(4)(A). Defendants' disclosure thus undermines the credibility of a declaration they submitted to the district court as further evidence of their "efforts" to address the court's concerns. *See* ER 131 (claiming that team is training pursuant to new regulations).

Mr. Brown again requested leave to seek reconsideration, and a hearing and opportunity for argument on the evolving nature of Defendants' disclosure regarding their protocols, which substantially affected counsel's ability to provide Brown with any informed guidance or to formulate a request for review by this Court. ER 300-07. The district court again denied the request, but extended the time for Brown to "elect" the method of his execution until noon today. ER 4-A, 4-B.

SUMMARY OF ARGUMENT

1. The very limited legal question before the district court was whether the timely intervenor, Brown, should be allowed to live long enough to participate in the "accelerated case management schedule" the district court has scheduled to resolve this case for the identically-situated co-plaintiff, Morales, by December of this year. ER 14; ER 52 ("full on expedited proceedings"). That decision is

governed by the well-settled law of this Circuit. Plaintiff Brown shares "virtually identical claims" with Plaintiff Morales. ER 7. These colorable and serious questions will require the district court's and the parties' attention during the next three months.

Defendants seek to moot Mr. Brown's interests by killing him in the interim. This proposed course of action threatens demonstrable irreparable harm to Mr. Brown. By contrast, if Mr. Brown's execution is deferred, any harm to Defendants will be *de minimis*. *See Wilson v. United States Dist. Ct. for the N. Dist. of Cal*, 161 F.3d 1185, 1187 (9th Cir. 1998) (denying State's mandamus petition to review TRO because where complaint alleged colorable due process violation for denial of fairness in clemency proceedings, and "damage to state defendants is questionable . . . because the only harm complained of is the inability to execute the petitioner within 5 hours of the district court's order," and hearing on preliminary injunction could be scheduled within three weeks).

Rather than decide this, or any, legal question in the case before it, the district court has required Mr. Brown to make an imponderable decision about the method of his execution, without access to critical information regarding the proposed procedures or even the State's commitment and ability to abide by his decision; and Brown must make his decisions under crushing time constraints of

the State's deliberate creation. At the root of the district court's unprecedented and clearly erroneous order is the implicit but serious doubt that Defendants' purportedly improved regulations, in practice, can and will satisfy constitutional standards for a humane execution. This doubt, supported by the consistent record evidence of defendants' conduct to date, pointed to Brown's likely success on the merits and should have moved the district court to grant an unconditional stay. *See Wilson*, 161 F. 3d at 1187 ("serious questions" timely presented in § 1983 complaint warranted stay of execution). *See also McNeal v. McAninch*, 513 U.S. 432 (1995) (where district court has grave doubt about harmlessness of error it should grant habeas relief).

2. Defendants' 2010 protocol is substantially the same as the prior protocol found deficient by the district court, with the exception of a few additional defects. The record developed below on the substantially similar prior protocol, including key facts stipulated to by the State, show that this Court can have no confidence that the 2010 protocol passes constitutional muster. Indeed, the district court "found that Morales was entitled to relief" on his challenge to the prior protocol. ER 8. The record shows that Mr. Brown is likely to succeed on the merits of his Eighth Amendment claim.

The district court record on the prior protocol shows that Brown is entitled

to relief on his challenge to the different-in-name-only "new" protocol. At the very least, he should be given the opportunity to develop a record on the new procedures, as the district court contemplates, particularly given that the regulations have been in effect less than 30 days, and became effective just one day before Brown's execution date was set. *See Reynolds v. Strickland*, 598 F.3d 300, 302 (6th Cir. 2010) (stating that Ohio death row inmate "should have received an opportunity to litigate his challenge to Ohio's new [one drug] lethal injection protocol to final adjudication but, instead, our Court engaged in a 'classic rush to judgment'").

3. The district court's conditional disposition of Brown's stay request constitutes an abuse of discretion because it foists a series of "options" on Brown that require him to waive his constitutional rights no matter how he chooses. The order grants a stay only if Brown agrees, and Defendants refuse, to proceed with an ad hoc, untried and unregulated single-drug procedure using only sodium thiopental that Defendants have refused to affirm is legal under the state Administrative Procedures Act (Defendants explicitly reserved the question of legality). Conversely, if Brown declines the one-drug procedure, the court's order allows Defendants to proceed with the three-drug procedure that, implicitly, the court has found to constitute a sufficient risk of severe pain to warrant a stay.

Significantly, the deficiencies in Defendant's allegedly "former" protocol include those when the procedures for administering sodium thiopental were implemented in practice. Brown cannot be forced to choose between his Eighth Amendment right to be free from execution under protocols that carry a demonstrated risk of inflicting severe pain and his Due Process, state-created liberty interest in lawful promulgation of execution procedures.

4. Even if the forced choice between constitutional rights were otherwise permissible, the district court committed a clear error of judgment by forcing Brown to choose, in just over 24 hours, on the eve of execution, whether to elect the single-drug option proffered by the court. A condemned inmate in this situation cannot possibly make an informed, intelligent and voluntary waiver of rights, particularly in the current information vacuum where there is no assurance that as implemented in practice, Defendants' improvised procedures will produce any better results than the numerous botched executions detailed in the district court record. The district court crafted this "choice" for Brown because it concluded that it could not adjudicate his Eighth Amendment claim in the week before Brown's execution. Yet the order requires Brown to decide whether to die with an ad hoc, unregulated one-drug protocol in just a little over 24 hours. The court abused its discretion in engaging in such burden-shifting rather than issuing a

stay to maintain the status quo and allow Brown to litigate his claim under the court's expedited case management plan.

5. The error of the order is highlighted by the fact that Mr. Brown and co-plaintiff Morales are similarly situated -- both are condemned inmates with "virtually identical" claims -- but Morales will receive a "thorough" if "accelerated" review of "the factual and legal issues" of his claims, while Brown must suffer execution by means of varying degrees of constitutional deficiency before his same claims are adjudicated. The district court does not even suggest a principled reason for this disparate treatment, and such treatment violates Equal Protection. Significantly, the district court concluded that Brown did not delay in seeking a stay or intervention and that it was Defendants who were responsible for creating the instant time-pressures.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING A STAY

A. Standard of Review

The denial of a request for a stay of execution is reviewed for an abuse of discretion. *Morales v. Hickman*, 438 F.3d 926, 930 (9th Cir. 2006) (per curiam).

B. Applicable Law

A condemned inmate bringing a timely action under 42 U.S.C. § 1983 is

entitled to a stay of execution where he raises "serious questions" regarding the constitutionality of the State's impending action and the only harm to the State is the temporary postponement of the execution. *See Wilson*, 161 F.3d at 1187. *See also Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004) (in the absence of any delay by the inmate, district court must consider likelihood of success on the merits and relative harm to the parties). As shown below, Brown met all three elements of the stay test, and the district court abused its discretion in denying a stay.

C. Brown Is Likely to Succeed on the Merits

Brown has joined Morales's claims that California's lethal injection protocol violates the rights guaranteed under the Eighth and Fourteenth Amendments to the Constitution and 42 U.S.C. § 1983. The 2010 protocol is very similar to the prior protocol the district court found defective after taking a considerable amount of evidence. The record in this case on the prior protocol thus establishes that Brown is likely to succeed on the merits of his challenge to the 2010 regulations. Any additional lack of proof of the 2010 protocol is the result of the State's conduct in setting Brown's execution date just one day after the protocol took effect, effectively precluding the district court from according him orderly review of his claims in the time remaining before Brown's scheduled September 29 execution date.

"[T]he record in this case, much of which was stipulated to by Defendants," ER 13, shows the deficiencies of the former protocol and of the different-in-name-only 2010 protocol. On December 15, 2006, the district court found that "the record in this case . . . is replete with evidence that in actual practice, OP 770 [the lethal injection protocol in place at the time,] does not function as intended." ER 175. In its order, the district court cited "critical deficiencies" in the following areas: (1) inconsistent and unreliable screening of execution team members; (2) 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. ER 176-77. As a result, the execution of individuals under OP 770 presented "an undue and unnecessary risk of an Eighth Amendment violation." ER 179-80.[6]

The purportedly "new" regulations in Cal. Code Regs. tit. 15 § 3349 do not address the "critical deficiencies" found in OP 770, nor can the new regulations "function as intended" given the circumstances of Brown's imminent execution.

[6]Although the court framed its factual findings and legal conclusions under the legal standard then applicable in the Ninth Circuit, *cf., Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004), it likely would have made the same findings and reached the same conclusions under the "a demonstrated risk" standard announced in *Baze*. ER 14.

The option to proceed by a single injection of sodium thiopental does not provide an adequate remedy because many of the factors likely to produce a substantial risk of pain – including improper training of execution team members and improper mixing of thiopental – remain unaddressed. Execution under either method presents a "demonstrated risk of severe pain" within the meaning of *Baze v. Rees,* 553 U.S. 35 (2008).

The undisputed evidence shows that no matter which protocol Brown is forced to choose, he will face execution by a team that cannot properly mix, prepare or administer sodium thiopental. The district court record demonstrated that CDCR officials who were involved in prior executions did not practice mixing thiopental prior to executions and did not know what properly mixed thiopental looked like. ER 192 ("The execution team does not practice mixing thiopental"); ER 195-96 ("thiopental is not actually mixed into solution" during execution practice sessions); ER 196 ("During the last eight California executions, there were no practice sessions where people practiced mixing Pentothal"); ER 197 ("The first time witness #4 mixed Pentothal was on the evening of a scheduled execution. Prior to mixing Pentothal for an execution, Witness #4 had never received any training in doing that"); ER 197 (Witness #4 observed that mixed Pentothal was "yellowish, brownish tan color;" packaging material for Pentothal provides "use

reconstituted solution only if it is clear, free from precipitate and is not discolored"). The mere existence of the new protocol does not ensure that the members of Mr. Brown's execution team have actually received enough training and practice to remedy this serious deficiency. It is a stipulated fact (as the district court is aware), that "[m]aking a execution seem humane and dignified is up to the people that carry it out. You can't legislate it or write it down. You have to practice it." ER 263 (testimony of Warden Vasquez).

Rather, as noted above, Defendants' disclosure yesterday reveals that the execution team could not have been training in compliance with the regulations, which require the execution team to train by practicing "[a]ppropriate mixing of the chemicals." Cal. Code Regs. tit. 15 § 3349.1.4(c)(4)(A). Given the importance of mixing thiopental correctly, and the documented past problems, this is an important part of the training process that appears to have been skipped.[7]

The CDCR has not corrected the previously existing deficiencies in their selection of execution team members. The record below showed one execution team leader had been disciplined for smuggling drugs into San Quentin and

[7] Since Brown's counsel have discovered this most recent "disconnect" between Defendants' representations and reality, they have reviewed documents obtained through the Public Records Act and discovered that the training logs do not reflect that execution team members have been mixing during training sessions.

another had been allowed to serve despite the fact that he was disabled by post-traumatic stress disorder. ER 176. Although the new regulations outline a process for the recruitment and selection of execution team members, Cal. Code Regs. tit. 15 § 3349.1.2, there is evidence that the CDCR does not intend to apply them to Brown's execution team. Brown was served with a Death Warrant just two days after the new regulations went into effect. On the same day, his veins were examined, despite the fact that the new protocol requires him to be examined by someone qualified to be on the Intraveneous Sub-Team. Cal. Code Regs. tit. 15, § 3349.3(c)(3). Thus, the CDCR either selected the Lethal Injection Team members at some unknown time prior to the regulations becoming effective, or the team was hastily assembled in 48 hours. Neither is acceptable. Without sufficient time to meaningfully implement the Lethal Injection Team selection procedure, there is a substantial risk that the same unqualified CDCR employees who participated in past executions will be called upon to perform Brown's execution.

Brown faces an execution by a team that lacks meaningful training, supervision and oversight. The district court record demonstrates that the LVNs responsible for establishing IV access during past executions were incompetent. ER 201 (Witness #4, a LVN, blew a vein during Donald Beardslee's execution); *Id.* (During Stanley Williams's execution, Witness #6, a LVN, blew a vein twice;

she "failed to properly set the catheter a third time" and the execution proceeded without the left arm IV operating).

This is not surprising given that members of the execution team had little or no training in performing lethal injection. ER 225-26 (Witness #9 recalled "[t]there isn't really much training into it" and it is "more a self-taught event."); ER 227 (Witness #9 is not familiar with how anesthesia works, would not know how to make a determination that a person is regaining consciousness after being administered sodium Pentothal, does not know what infiltration is and has received no formal medical training.); ER 239 ("No member of the execution team has training in anesthesiology").[8]

The new regulations call for training in the use of an electronic monitor for vital signs; setting up intravenous lines and intravenous drip; sizing intravenous catheters; performing simulated lethal injection executions; performing consciousness checks; monitoring intravenous lines to ensure patency; appropriately mixing chemicals used in the lethal injection process; monitoring proper level and rate of infusion of the chemicals into the intravenous lines; and monitoring the physical effects each chemical can have on the inmate as they are administered. Cal. Code Regs. tit. 15, § 3349.1.4. However, the new regulations

[8] Witness #9 was identified by defendants as the new execution team leader

provide that such training shall occur on a *monthly* basis. *Id.* With only 30 days between the approval of the regulations and Brown's scheduled execution, the CDCR has not had time to develop or provide such training. As a result, it is highly likely that the same incompetent LVNs who have botched past executions will be involved in Brown's execution.

With regard to record-keeping, the new regulations do not address the deficiencies noted by the district court. In fact, the new regulations state that sign-in sheets for lethal injection training *shall not* be completed and the names of the team members who participated shall not be including in the training file. Cal. Code Regs. tit. 15 § 3349.1.4(e)(3). As a result, there is no way to verify that the newly selected Lethal Injection team members have actually attended the training that the new regulations require.

In its December 15, 2006 Order, the district court also faulted the CDCR for conducting executions with poor lighting and insufficient visibility. Witnesses of prior executions have confirmed that after the catheter is set, the lights in the execution area are turned "very low." ER 204. Nothing in the new regulations addresses the issue of proper lighting during an execution or forbids CDCR officials from resuming their practice of performing executions in the dark.

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for the State of California after the district court's December 15, 2006 findings.

Furthermore, limited photographs of the new lethal injection facility (available on the internet) show that the deficiencies in the viewing area have not been corrected. There is a small window with a counter in the antechamber that appears to prevent viewing, as the site lines to the inmates' arms are obscured. If so, the new facility fails to remedy the visibility issues that plagued prior executions. ER 207-09 (LVNs responsible for setting and monitoring catheters cannot see inmate during execution due to crowding and low lighting in the anteroom of the old facility).

On top of the continuing deficiencies noted in the district court's 2006 order, Brown faces the additional risks associated with the completely untested, unexamined single-drug option hastily proposed by the district court and Defendants. Defendants assert that they would "make several changes" to the three-drug protocol currently in place, including using a five gram dose of thiopental, administered from five separate syringes, followed by a saline flush. ER 31.

However, while Defendants purported to verify the CDCR actually possess enough thiopental for such a large initial dose, they also confirmed that there is not enough of the drug for a requisite set of backup syringes; while they continued to withhold confirmation about whether the current inventory of soon-to-expire drugs

has been properly stored. The proposal does not detail the concentration of thiopental in each syringe, nor does it address the timing of the five doses to ensure that the drug does not wear off in between each one. ER 220 (Thiopental has a "relatively short duration of action" and is used to induce but not maintain unconsciousness). The lack of institutional knowledge regarding the proper handling and mixing of thiopental, noted *supra*, belies the CDCR's claim that it would only need three days' notice in order to implement a single-drug execution. ER 32.

In support of its one-drug proposal, the district court stated that "[t]he fact that nine single-drug executions have been carried out in Ohio and Washington without any apparent difficulty is undisputed and significant." ER 15. But here a one-drug procedure is being slapped together on the fly days before its first use in an execution, without going through California's administration procedures and with Defendants even declining to state that the protocol complies with state law.

Because Brown has shown that the Defendants' proposed protocols for execution present a "demonstrated risk of severe pain," *Baze v. Rees*, 553 U.S. 35 (2008), there is a strong likelihood he will succeed on the merits of his complaint. This Court should grant a stay of execution. *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005).

To the extent that this Court might question whether the present record shows a likelihood of success on the merits, that is solely attributable to Defendants' conduct in depriving Brown of presenting additional evidence by setting his execution within a month of the time the regulations becoming effective, and because the district court's order essentially accedes to Defendants' tactic. It is hard to imagine a more coercive and unfair litigation tactic to prevent an opposing party from presenting evidence to support his claim, much less a condemned inmate claiming that his execution under a protocol substantially similar to one already found deficient constitutes cruel and unusual punishment. When considering the equities, the Court should not reward Defendants for placing Brown in this situation.

Further, the district court clearly erred by failing to address the merits of Brown's claims, but instead fashioning a series of "choices," none of which allow Brown to live long enough to see the litigation through unless he "elects" a one-drug procedure and Defendants decline to provide it.

D. The Relative Harms to the Parties of Not Granting a Stay Weigh Greatly in Brown's Favor

The district court did not expressly address the relative harm to the parties, although it did note that "California has a 'strong interest in proceeding with its judgment.'" ER 14. It is beyond dispute that the relative harms weigh in Brown's

favor.

If a stay is not granted, Brown will suffer irreparable harm. In *Baze*, 553 U.S. at 49-50, the United States Supreme Court specifically left open the possibility that the actual implementation of lethal injection procedures could violate the Eighth Amendment. "[T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Baze*, 553 U.S. at 49-50 (citation omitted).

The district court held earlier in this case that "[i]n light of the substantial questions raised by the records of previous executions, Defendants' actions and failures to act have resulted in an undue and unnecessary risk of an Eighth Amendment violation." *Morales*, 465 F. Supp. 2d at 981. Defendants have not addressed the court's concerns about the implementation of the lethal injection protocol, and they are not currently following their own protocol.

The risk of harm in improper implementation of the new lethal injection protocol is substantial and intolerable: "the parties agree that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride in the amounts contemplated by OP 770." *Morales*, 465 F. Supp. 2d at 978.

In contrast to the harm Brown would suffer by losing his life and being executed in violation of the Eighth Amendment, the only harm to Defendants from granting a stay would be a slight delay in enforcing the judgment. The district court contemplates a case management schedule that would have the case submitted to the court within approximately three months, allowing for some further discovery. ER 62-65. As the district court noted in its order, the State's "new regulations have been more than three years in the making," ER 14, yet the State seeks to execute Brown within a month of the regulations taking effect, thwarting federal and state judicial review of the regulations in cases to which Brown is a party. Given the delay in developing the 2010 protocol, and the State's own interest, not reflected by Defendants' position in this litigation, in assuring that the new regulations comply with federal and state law, the harm to the State in granting a stay is *de minimus* at best. *See Wilson*, 161 F.3d at 1187.

E. As the District Court Correctly Found, Brown Did Not Delay in Seeking a Stay, but Rather, Defendants' Conduct Has Precluded an Orderly Review of the New Regulations and Brown's Claim

Defendants did not even dispute that Brown was timely in moving to intervene and for a stay of his execution. Similarly, the lower court found, *sua sponte*, that Brown did not delay in seeking a stay. To the contrary, the district court found that "it is Defendants who seek an execution date that effectively

precludes an orderly review of the new regulations in either state or federal courts . . . ." ER 12. As a result, "there is no way that the Court can engage in a thorough analysis of the relevant factual and legal issues in the days remaining before Brown's execution date." ER 14. The court added that "[t]he regulations have been more than three years in the making, and the Court would have preferred strongly to address any constitutional issues with respect to the regulations in a more orderly fashion." ER 14. The district court's factual findings that Brown did not delay in seeking a stay and that Defendants' conduct has effectively precluded an orderly review of the 2010 regulations are not clearly erroneous.

II. A FEDERAL COURT MAY NOT CONDITION THE PROTECTION OF A CONDEMNED INMATE'S EIGHTH AMENDMENT RIGHT TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT ON HIS RELINQUISHMENT OF HIS STATE LAW RIGHT TO HAVE EXECUTION PROTOCOLS DEVELOPED IN COMPLIANCE WITH STATE REGULATORY PROCEDURES

The district court's conditional disposition of Brown's stay request is riddled with internal inconsistency and erroneous premises. First, the court purports to stay the execution "without further order," if Mr. Brown agrees, and Defendants refuse, to proceed with a single-drug protocol using only sodium thiopental. ER 17. Yet, as the district court acknowledges, its authority to order such a stay rests on a finding that the three-drug procedure Defendants intend to use carries a "demonstrated risk" that it will result in extreme pain. If that risk exists (which the

record shows to be the case) then the district court should simply have issued a stay and permit "orderly review" of Defendants' proposed regulations. The district court cites no authority, nor has counsel found any, which permitted the district court to force plaintiff to resort to self-help or do-it-yourself methods for avoiding the demonstrated risk.

Second, conversely, if Mr. Brown does not agree to the one-drug protocol, Defendants are free to proceed with the three-drug procedure that, implicitly, the court has found to constitute a sufficient risk of severe pain to warrant a stay. Again, there is no authority permitting the district court to penalize Mr. Brown by exposing him to such risk merely because he refuses to "consent" to an untried and unregulated procedure. In this regard, it is significant that the demonstrated deficiencies in Defendants' allegedly "old" protocol included those when the procedures for administering sodium thiopental were "implemented in practice." ER 14. If purported procedures that looked good to Defendants on paper turned out to have a 63% fail rate (7 out of 11), the district court cannot reasonably expect Mr. Brown to rely on Defendants' ability to ad lib procedures in his execution.

Third, the Order provides that if Mr. Brown does elect the single-drug procedure, "Defendants shall carry out the execution in accordance with Cal. Code Regs. Tit. 15, §§ 3349, *et seq.*, except that they shall do so using sodium thiopental

only and in the quantity and in the manner described in their submission dated September 23, 2010." ER 17. The exception swallows the ordered compliance with State regulations. There is virtually nothing in the "manner described" in Defendants' submission that would be "in accordance" with the State regulations; i.e., the same regulations that purportedly give the district court some modicum of confidence that they need not be subject to orderly review before they are used to kill a human being. Indeed, the illegality of proceeding in the "manner described" was clearly signaled by Defendants' submission, which refused to answer the Court's question of whether they can employ such ad hoc procedures, and which explicitly reserved the question of legality. *See also* Cal. Gov. Code § 11346(a).

Fourth, even if Defendants could agree to violate the State APA in departing from their purportedly "new" execution procedures (which they cannot), there is no authority for forcing Mr. Brown to choose between vindication of his Eighth Amendment right to protection from execution protocols that carry a demonstrated risk of inflicting severe pain and his Due Process, state-created liberty interest in lawful promulgation of execution procedures. Indeed, the two are complementary. Whatever limitations on federal authority to supervise state compliance with the Eighth Amendment may exist out of concern for federalism and comity, they exist precisely because states are expected to fully comply with their own statutory and

regulatory procedures in carrying out executions. *See Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 333 (2006) ("The procedural requirements of the APA 'shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.'" Cal. Gov. Code, § 11346(a). Although Mr. Brown's counsel have not had the time or opportunity to review the impressive list of state statutes cataloged in ER 16, n.5, it is safe to assume that the requirements for inmates to elect between methods for their executions were mandated by state legislatures or other appropriate, deliberative state authorities.[9]

III. BROWN CANNOT MAKE AN INFORMED, KNOWING AND VOLUNTARY DECISION TO ELECT EXECUTION BY A ONE-DRUG PROTOCOL WHEN HE HAS TO MAKE THAT DECISION IN JUST OVER 24 HOURS, WITH EXECUTION IMMINENT, AND WITHOUT CRITICAL INFORMATION ABOUT THE PROTOCOL

Even if the forced choice between constitutional rights were otherwise permissible, the district court itself acknowledges that current time constraints prevent Mr. Brown from being able to make an informed and intelligent decision. *See, e.g., Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001) ("[T]he [U.S. Supreme] Court has suggested that we should treat with skepticism waivers that

[9]Curiously, the Court's survey notes that California still offers inmates the choice of execution by lethal gas. The last time this method was subjected to "orderly review" in federal court it was found to in fact constitute cruel and

are obtained swiftly.") (citing *Wheat v United States*, 486 U.S. 153, 163 (1988)). In this case, the devil we do know may be much worse than the devil we do not know. Recent experience with single-drug execution in other states, which presumably adopted their protocols pursuant to a considered and orderly administrative process, indicates that such protocols can be effective in eliminating the risk inherent in the procedures currently favored by Defendants, if properly complied with. But, there is no assurance that as "implemented in practice," Defendants' improvised procedures will produce any better results than the numerous botched executions with which this Court is familiar. In the absence of significantly more information regarding the Defendants' proposed modification of their protocol, the record in this case shows that Mr. Brown is being asked to choose between the risk of extreme pain and a chemically induced vegetative state. Forcing someone to make such a choice is medieval.

IV. THE ORDER VIOLATES MR. BROWN'S STATUTORY RIGHT TO EQUAL PROTECTION AND THE ASSISTANCE OF COUNSEL

Pursuant to the Court's conditional disposition, there is only one scenario by which Mr. Brown will live to vindicate his Eighth Amendment right to constitutionally adequate execution procedures. If Mr. Brown waives such rights and the State declines to violate state regulatory law, the lower court's stay will

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unusual punishment. *See Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

automatically issue. ER 17. Otherwise, Mr. Brown must suffer execution by methods of varying degrees of unconstitutional deficiency. By contrast, on the same record, Mr. Morales will receive a "thorough" if "accelerated" review of "the factual and legal issues." ER 14. The district court "has not even suggested a principled reason for this disparate treatment," and it violates Mr. Brown's right to equal protection of the law. *Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir. 1990) (California Supreme Court's refusal to extend retroactive application of ruling to one of three similarly situated appellants violated equal protection clause). *See also Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006) (Fifth Amendment imposes duty on courts to avoid application of law that would impose disparate treatment or arbitrary discrimination).

Although the district court suggests there is no "*presently-existing* 'demonstrated risk' of a constitutional violation," (ER 14, original emphasis) that does not provide justification for the disparate treatment. Besides the absence of any *evidence* to dispel the demonstrated risk previously established by the current record (and discussed above), the fact remains that it is *likely* Mr. Brown will be able to demonstrate such risk if he is afforded an opportunity to conduct discovery, including examine the voluminous documents Defendants have refused to disclose during the purportedly "public" regulatory process. As the Declaration of John W.

McAuliffe makes clear, the "new" regulations reflect merely cosmetic changes to OP 770, under which the execution team members have *continued* to train since 2007. ER 130-31.

Similarly, the Court's eleventh-hour forced election arbitrarily deprives Mr. Brown of his right to the assistance of counsel. Although there is no constitutional right to the assistance of counsel in habeas corpus proceedings, Congress has conferred a statutory right to such assistance. *Brown v. Vasquez*, 952 F.2d 1164, 1168-69 (9th Cir. 1991), *cert. denied*, *Vasquez v. Brown*, 112 S. Ct. 1778 (1992). In turn, the statutory right to counsel in "post-conviction proceedings," confers the right to counsel who is given an opportunity "meaningfully to research and present" a prisoner's claim. *McFarland v. Scott*, 512 U.S. 849, 858 (1994). Most recently, in *Harbison v. Bell*, 129 S. Ct. 1481 (2009), the Supreme Court concluded that the statutory right to federally-funded counsel extends to representation in "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." *Id.* at 1486 (quoting 18 U.S.C. § 3599 (emphasis added)). The Court noted that the language in § 3599 "hardly suggests a limitation on the scope of representation." *Id.* at 1487-88.

The district court's requirement that Brown communicate his forced election "through counsel" (ER 16) at least acknowledges "'that Congress did not want

condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine'" legal "'process from their jail cells.'" *Id.* at 1491 (citation omitted). In this instance, however, the district court did not give federally-appointed counsel any notice or opportunity to "research and present" authority in response to the district court's intended "disposition," nor has the district court afforded any counsel who are assisting Mr. Brown the time or opportunity to gather the information necessary to meaningfully provide Mr. Brown with informed guidance. *McFarland*, 512 U.S. at 858. Accordingly, the Court should stay the execution to allow counsel adequately to represent Mr. Brown. *Id*.

CONCLUSION

For the foregoing reasons, Brown requests that the Court reverse the district court and enter a stay of execution pending the final resolution of Brown's § 1983 action, including any and all appeals.

Respectfully submitted,

Dated: September 26, 2010

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STATEMENT OF RELATED CASES

To the best of my knowledge, there are no related, pending cases.

Dated: September 26, 2010

/S/ John R. Grele
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C) and Circuit Rule 32-1, I certify that Brief Of Appellant; In The Alternative, Petition For Writ Of Mandamus has been prepared in a proportionately spaced typeface using WordPerfect X3, 14 point, Times New Roman and contains 9,139 words.

Dated: September 26, 2010

/S/ John R. Grele
JOHN R. GRELE

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ALBERT G. BROWN

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/S/ John R. Grele
JOHN R. GRELE

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ADDENDUM

Amendment VIII to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, § 1 to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State of wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

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