

10-72977

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW CATE, Secretary of the
California Department of Corrections and
Rehabilitation, et al.,

Petitioners,

v.

UNITED STATES DISRICT COURT
for the NORTHERN DISTRICT of
CALIFORNIA

Respondents,

MICHAEL MORALES and ALBERT
GREENWOOD BROWN,

Real Parties in Interest.

D.C. No. 5-6-cv-219-JF-HRL

DEATH PENALTY CASE

USDC No. 5:06-cv-00219-JF-HRL
Honorable Jeremy Fogel

**MOTION FOR VOLUNTARY DISMISSAL OF
PETITION FOR WRIT OF MANDAMUS**

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**MOTION FOR VOLUNTARY DISMISSAL OF PETITION FOR
WRIT OF MANDAMUS**

In light of the Order of the Supreme Court of California issued today in *California Department of Corrections and Rehabilitation, et al. v. Superior Court County of Marin*, CSC No. S186751 (copy attached), no execution of Albert Greenwood Brown can occur on September 30, 2010, as a matter of state law. Accordingly, the mandamus proceedings initiated in this Court to vacate the Order of the District Court in *Morales, et al. v. Cate, et al.*, N.D. Cal. No. 06-926 JF HRL, will, upon expiration of the warrant and associated reprieve, be moot. Under these circumstances, petitioners respectfully move this Court to dismiss the petition for writ of mandamus.

Dated: September 29, 2010

Respectfully Submitted,

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s/ Ronald S. Matthias
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MATTHEW CATE, Secretary of the
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v.

UNITED STATES DISRICT COURT
for the Northern District of California

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GREENWOOD BROWN,

Real Parties in Interest.

D.C. No. 5-6-cv-219-JF-HRL

DEATH PENALTY CASE

STATEMENT OF RELATED CASES

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

Dated: September 28, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
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**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 05-99014**

I certify that: (check (x) appropriate option(s))

1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

Monospaced, has 10.5 or fewer characters per inch and contains ___ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because

This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

Monospaced, has 10.5 or fewer characters per inch and contains ___ pages or ___ words or ___ lines of text.

3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

Proportionately spaced, has a typeface of 14 points or more and contains 119 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

Monospaced, has 10.5 or fewer characters per inch and contains ___ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

4. **Amicus Briefs.**

Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

9/29/10

Dated

s/ Ronald S. Matthias

Ronald S. Matthias

Senior Assistant Attorney General

CERTIFICATE OF SERVICE

Case Name: Morales and Sims v. CDC, et al. No. 10-72977

I hereby certify that on **September 29, 2010**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MOTION FOR VOLUNTARY DISMISSAL OF PETITION FOR WRIT OF MANDAMUS

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On **September 29, 2010**, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 29, 2010**, at San Francisco, California.

M.M. Argarin
Declarant

s/ M.M. Argarin
Signature

Attachment

SUPREME COURT
FILED

SEP 29 2010

S186751

Frederick K. Ohlrich Clerk

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,
Petitioners,

v.

SUPERIOR COURT COUNTY OF MARIN COUNTY, Respondent;

MICHAEL MORALES et al., Real Parties in Interest.

In March 2006, the California Department of Corrections and Rehabilitation (CDCR) adopted Operational Procedure 770 (OP 770), the protocol for execution by lethal injection in this state. In April 2006, condemned prisoners Michael Morales and Mitchell Sims sued CDCR and other state defendants (collectively the state) alleging that the adoption of OP 770 did not comply with the California Administrative Procedure Act (APA). (*Morales, et al. v. California Department of Corrections and Rehabilitation, et al.*, Marin County Super. Ct. No. CIV 06136.) In November 2007, the Marin County Superior Court permanently enjoined CDCR “from carrying out the lethal injection of any condemned inmates under OP 770 unless and until OP 770 is promulgated as a regulation in full compliance with the [APA]” (the 2007 injunction). That judgment was affirmed by the Court of Appeal (*Morales v. California Dep’t of Corr. & Rehab.* (2008) 168 Cal.App.4th 729 (*Morales I*)), and the state did not seek review in this court. Thereafter, a revised version of the protocol, approved by the California Office of Administrative Law, was promulgated (Cal. Code Regs., tit. 15, § 3349) and became effective by operation of law on August 29, 2010. (Gov. Code, § 11343.4.) The People thereupon notified condemned inmates, including Sims, that they would resume scheduling executions. On August 30, 2010, the Riverside County District Attorney obtained an execution date of September 29, 2010, for condemned inmate Albert Greenwood Brown.

Meanwhile, on August 10, 2010, Sims moved in Marin County Superior Court to enforce the 2007 injunction, urging that it continued to bar executions under the new and amended regulations unless and until the state demonstrated in court that these regulations complied with the APA. On August 31, 2010, the superior court granted the

motion to enforce. On September 2, 2010, the state filed an original petition for writ of mandate in the Court of Appeal seeking to overturn the superior court's order. On September 20, 2010, the Court of Appeal ordered the issuance of a peremptory writ of mandate directing the Marin County Superior Court to vacate its order enforcing the 2007 injunction and enter a new and different order denying the motion to enforce the injunction. The Court of Appeal specified that its judgment "shall be final as to this court immediately." (*California Department of Corrections and Rehabilitation v. Superior Court (Morales et al., RPIs)*, A129540 (*Morales II*)).

Under applicable court rules, Sims thus has 10 days after September 20, 2010, or to and including September 30, 2010, to petition this court for review in *Morales II*. (Cal. Rules of Court, rule 8.500(e)(1).) Such a filing would be timely under the rules if, at any time on September 30, 2010, a petition for review is mailed by priority or express mail, or is delivered to a common carrier promising overnight delivery. (*Id.*, rule 8.25(b)(3).) In any event, this court has a minimum of 30 days after September 20, 2010, or to and including October 20, 2010, to order review on its own motion (*id.*, rule 8.512(c)(1)). The rules further provide that the Court of Appeal's remittitur, transferring jurisdiction to the Superior Court to act in compliance with the Court of Appeal's judgment, cannot issue while time remains for this court to order review. (*Id.*, rules 8.272(b)(1)(A), 8.490(c).)

On September 27, 2010, the Governor issued a reprieve of Brown's execution, effective until 11:59 p.m. on September 29, 2010, apparently believing this would ensure that the execution would not proceed prior to the timely filing of a petition for review in *Morales II*. Brown's execution was thereupon rescheduled for 9:00 p.m. on September 30, 2010. (See Pen. Code, § 1227.5.)

Thereafter, on September 27, 2010, the state filed in this court the instant "Petition for Mandate or Other Appropriate Relief." We solicited, and on September 28, 2010, we received, an informal response and an informal reply to the state's petition.

In its pleading, the state requests that we deem the Court of Appeal's decision in *Morales II* "final" if Sims has not filed a petition for review in that matter by 5:00 p.m. on September 30, 2010. If no such petition for review is filed within that time, the state further requests that we (1) then immediately order the Court of Appeal to issue a writ of mandate, and a remittitur, in *Morales II* by 6:00 p.m. that evening, and (2) further direct the Marin County Superior Court to comply with the Court of Appeal's writ and remittitur, and thus to vacate its own order enforcing the 2007 injunction, by 7:00 p.m. the same evening. The state represents that unless, by these extraordinary means outside our normal rules, we remove the obstacle the 2007 injunction presents to Brown's scheduled execution at 9:00 p.m. on September 30, 2010, the state will likely be unable to

execute Brown, or any other condemned inmate, during this year. That is so, the state declares, because its limited, and temporarily irreplaceable, supply of one of the execution drugs, sodium thiopental, “expires” on October 1, 2010.

The state acknowledges that these proposals contravene the well-established rules governing the times for seeking, and ordering, review in this court, and for the issuance of remittiturs. It argues only that this court has the inherent power to suspend those rules in the interest of justice. But the state fails to demonstrate that this is a situation in which mandate properly lies “to compel the performance of an act which the law specially enjoins.” (Code Civ. Proc., § 1085.) No compelling reason appears why this court should, by extraordinary means, remove an obstacle to Brown’s execution by denying litigant Sims his full normal time to petition for review in this court, or by cutting short its own jurisdictional time to grant or order review in *Morales II*. By choosing an execution date for Brown of September 29, 2010, with presumptive knowledge that it faced the imminent loss of an essential ingredient to the execution on October 1, 2010, the state has itself contributed to circumstances incompatible with the orderly resolution, pursuant to normal procedures, of pending legal issues in connection with executions under the new regulations.

Accordingly, the state’s “Petition for Writ of Mandate or Other Appropriate Relief” is denied.

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Moreno
Associate Justice

Corrigan
Associate Justice