IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW CATE, Secretary of the, Department of Corrections and Rehabilitation, et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent. MICHAEL ANGELO MORALES and ALBERT BROWN, Real Parties in Interest.	CA No. 10-72977 D.C. No. 5-6-cv-219-JF-HRL **DEATH PENALTY CASE** **EXECUTION SCHEDULED FOR 9:00 P.M ON THURSDAY, SEPTEMBER 30, 2010**

REAL PARTY ALBERT BROWN'S OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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

HONORABLE JEREMY FOGEL
United States District Judge

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I. STANDARD OF REVIEW

Under the All Writs Act, 28 U.S.C. section 1651(a), this Court has the power to issue a writ of mandamus, but such power should be exercised only in the most limited circumstances. *See Will v. United States*, 389 U.S. 90, 95 (1967). As this Court has recognized, the writ of mandamus is an "extraordinary" remedy limited to "extraordinary causes." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010).

A mandamus petitioner must "satisfy 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 403 (1976). In *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977), this Court established five guidelines to aid in the determination of whether mandamus is appropriate in a given case:

> (1) whether the petitioner has no other means, such as an appeal, to obtain the desired relief;
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> (2) whether petitioner will be damaged or prejudiced in any way not correctable on appeal;
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> (3) whether the district court's order is clearly erroneous as a matter of law;

> (4) whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules;
>
> (5) whether the district court's order raises new and important problems or issues of first impression.

Although not every factor must be present, "the absence of the third factor, clear error, is dispositive." *Perry*, 591 F.3d at 1156.

The clear error standard "is significantly deferential and is not met unless the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Cohen v. U.S. Dist. Ct. for N. Dist. of Cal.*, 586 F.3d 703, 708 (9th Cir. 2009). A district court's ruling will not be reviewed for clear error unless it is "totally at odds with the relevant facts." *Am. Fidelity Fire Ins. v. U.S. Dist. Ct. for N. Dist. of Cal.*, 538 F.2d 1371, 1375 (1976).

Courts observe "great deference on appeal" for a trial court's finding of fact. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (deference to fact finding is necessary because the trial judge's "major role is the determination of fact, and with experience in fulfilling that role comes expertise"); *United States v. Jordon*, 291 F.3d 1091, 100 (9th Cir. 2002) (citing "great deference" to district court fact finding). In particular, appellate courts must "accord considerable deference" to a district court's fact finding in circumstances such

as these, where the "trial court's familiarity with the underlying litigation," informs its fact finding. *McGrath v. Nevada*, 67 F.3d 248, 255 (1995) (applying increased deference to district court fact finding related to time records submitted by plaintiff's counsel); *see also Bose v. Consumers Union*, 466 U.S. 485, 500 (1984) (explaining that the "presumption of correctness that attaches to factual findings is stronger … when trial judges have lived with the controversy for weeks or months instead of just a few hours.").

Applying these guidelines to the facts of the present case, the Court should conclude that extraordinary relief is not warranted here.

II. THE DISTRICT COURT WAS NOT "CLEARY ERRONEOUS: BY EVALUATING THE NEW PROTOCOL IN LIGHT OF THE EXTENSIVE RECORD EVIDENCE OF THE STATE'S DEFICIENT ADMINISTRATION OF A SUBSTANTIALLY SIMILAR PROTOCOL.

The State takes the position that because it has now written a new protocol California prisoners cannot seek a stay of execution, presumably until another ten years have passed and prison officials have again operated at a 64% error rate and again engaged in the grotesque misconduct that has marked administration of the prior protocol. That is not and cannot be the law.

Predictably, defendants rely heavily on the stay standard in *Baze v. Rees*, 553 U.S. 35 (2008). As noted previously, however, *Baze* involved the

question of whether a protocol on its face was sufficient while the very different question here is whether a protocol propounded in response to an as-applied finding of an Eighth Amendment violation is sufficient. The difference between the two inquiries is significant. In *Baze* the Court had before it little more than a paper description of a protocol. Here the Court had the benefit of a five day evidentiary hearing, a tour of the execution chamber, substantial documentary evidence and hundreds of facts stipulated to by both parties, all of which persuasively convinced the Court to make a detailed and thorough finding that California was in violation of the Constitution. *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D.Cal., 2006); Order After Remand, at 4 ("This finding is based on the entire record.") For defendants to argue that the courts must ignore the overwhelming and well-documented proof of the violation and the facts supporting it is absurd.

As the district court noted, the matter is in a remedial posture. The status quo, established in 2006, is that the state's procedures are unconstitutional, and the only remaining question is whether the state has adequately remedied the violation. Thus, the question going forward isn't whether the district court abused his discretion in granting a stay under *Baze*. The question is whether it abused its discretion in granting a stay to protect its

remedial powers -- i.e., his power to review the remedy proposed by the State (the new protocol) to make sure it actually remedies the violation.

Significantly, the findings that California is in violation of the Eighth Amendment in the manner in which it executes inmates, is not disputed. The finding by the district court is that Brown here sits in the same position as the plaintiff there, Mr. Morales, in terms of his claims and the "demonstrated risk of severe pain" he faces because the protocols under review are the same. Order, at 5 ("in most respects the [protocols] are remarkably similar.") Again, that is for the most part undisputed. Mr. Brown and Mr. Morales are now awaiting a review of the new procedures to see if defendants have in any way fixed what is now an undisputed constitutional violation, a review Defendants do not contest with regard to Mr. Morales and do not dispute needs to be done. To treat such similarly-situated inmates differently violates Due Process.

Defendants complain that Brown has not established a constitutional violation under the new protocol based primarily on the claimed similarities between their new protocol and the Kentucky protocol at issue in Baze, but the more pertinent comparison is of the differences, if any, between their old and new protocols. Defendants claim compliance with the Constitution by essentially xeroxing Kentucky's protocol and invoking the Supreme Court's

holding that Kentucky's protocol appeared facially valid when there was no factual record or findings below of any difficulty under that protocol, simply because the protocol had only been used once. If such simplistice remedial action were sufficient, there would be no review for Mr. Morales either. But, defendants have agreed to that review of the new protocol and the district court's finding that it must complete that review remains uncontested. Also uncontested is the fact that the state agreed to suspend that review for three years and that the review could only begin after the protocol went into effect, which only took place on August 29, 2010.

Nor is there any error in evaluating Brown's complaint through the lens of the actual record here and determining if his claims are substantially similar to the already-established and undisputed constitutional violation. Defendants claim legal error not to examine prior difficulties, something all the cases it cites have done. *Raby v. Livingston*, 600 F.3d 552, 560-62 (5th Cir. 2010) (examining deposition testimony regarding procedures used previously); *Jackson v. Danberg*, 594 F.3d 210 (3d Cir. 2010)(examining record of administrations); *Nooner v.Norris*, 594 F.3d 592 (8th Cir. 2010) (same). As the district court noted several times, "it is fair to say that there is no case involving an Eighth Amendment challenge to a lethal-injection protocol in which the factual record is as developed as the record here."

(Order, at 2). After that examination, the district court found "substantial questions of fact as to whether at least some of the deficiencies in O.P. 770 have been addressed in actual practice." (Order at 7, lines 4-5). Defendants do not dispute this finding here, nor could they as the record now available is that within days of the district court's finding in Morales, the State determined they were simply going to continue with the same discredited practices and try to convince the court that it was wrong in its Memorandum of Intended Decision. (Doc. 418, at 13; Doc. 422)[1]. They instead now argue that it is constitutionally irrelevant.

The problem with Defendants argument about Brown's showing is that they wrongly ignore the Morales record and denigrate its significance to the evaluation of their protocol. The pertinent comparison is not between the pieces of paper; rather it is whether what is now on the paper fixes the extensive factual showing already made. And, given that the few facts known (i.e. "new information") are adverse to Defendants, it is now plain why they are insistent that *Baze* prevents any inquiry into actual practices. For example, Defendants argue that the court should ignore the fiasco surrounding

[1] On January 31, 2007, Denise Dull made contemporaneously prepared notes wherein she reported that the Governor, as early as a few weeks after the Court's December 15 order had instructed that the "1 drug protocol is now off the table, stick w 3 drugs." (Doc. 419-3, Prunty Depo., Ex. 213).

the drug expiration dates and the effect their conduct has on the litigation because that problem illustrates the failure of the current protocol to require anyone to check expiration dates. Indeed, it was only after Brown insisted that Defendants disclose the expiration date information that they were forced to disclose that they have so little drugs available they could not engage in a single-drug execution without deviating from the practices in other states and from their own backup procedures. In fact, they were seeking dates for executions, including for Mr. Morales, that they could only have completed using expired drugs. More significantly, the shortage and training records (Doc. 423) also establish that Defendants were not training as required under their own new protocol. This is a perfect example of how what is on paper does not translate into what Defendants are actually doing.

Defendants argue (Pet., at 11 n.2) that it is speculation that there has been no mixing of thiopental during the training, but it is not speculation – it was established by Defendants' own records. (Doc. 422-23). They contend that it is not that complicated to mix thiopental, but their own expert testified that someone with some experience needs to be doing it [2], and the record here

[2] Dr. Ekins (the State's expert) testified that one problem leading to unsuccessful drug delivery would be errors in preparing the drugs, and that "[h]opefully, a pharmacist oversees them to make sure it was done properly." Doc. 259 (evidentiary hearing proceedings Sept. 26, 2006), at 897.

is that the registered nurse and LVN tasked with this in previous executions demonstrated complete incompetence. *Morales v. Tilton*, 465 F.Supp.2d 972, 980 (N.D.Cal., 2006). And, Defendants themselves recognized this and instituted supposedly regular training on this aspect of the protocol because it is so important and because they have such an abysmal record.

Second, there is nothing in the new procedures that at all prevents the exact same problems that were exposed in the Morales litigation, a position taken below that Defendants do not contest here. For instance, in Morales it was established that the infusion process was done in the dark such that it was difficult to see what's in one's own hand. (ER 204). Nothing in the protocol addresses this.

Contrary to Defendant's position, there is quite a bit of information that the same problems remain. The selection system, (which they did not employ for Brown's execution, apparently) permits the same persons as were previously on the team to remain and isn't even followed. (*See* Doc. 418, at 14-17). "As long as the warden at San Quentin could get a team that meets that criteria, they're going to use San Quentin people," even if there were people "who were better and brighter and cleaner outside of San Quentin." Doc. 419-3, Larson Depo. at 40. An employee who has worked regular full shifts of overtime in the condemned unit can still be a lethal injection team

member, because overtime is "not an assignment." Doc. 419-5, Prunty Depo. at 70. Many of the same team members were selected again to be on the new execution team and hold critical positions, including Witness #9 as Team Leader, Witness #4 as an Infusion Team member, and Witness #3 as an Intravenous Team member. Ex. Redacted, Execution Team Members at 1, 2. They failed to review supervisory files, training files, and personnel files as required under both the old and new protocols. Doc. 419-5, Prunty Depo. at 62-63, 66. In reality, it is the same process as before: team members would be chosen by the Warden. Doc. 419-4, McAuliffe Depo. at 251. Thus, after Witness #9 was interviewed, he was included on the selection panel because "[i]t was the warden's intention to have Witness No. 9 be finally selected as the team leader." Doc. 419-5, Prunty Depo. at 119.

The training section permits the same absenteeism of medical staff that was so prevalent previously, only this time it may not be so well documented. Cal. Code Regs. tit 15, § 3349.1.4(d)(3) & (4) (exempting medical personnel); Cal. Code Regs. tit 15, § 3349.1.4(e)(3) (eliminating records). Apparently, from their logs (Doc. 422-23), they only engage in partial training, omitting certain key events such as mixing the drugs and putting them in the syringes.

There is nothing in the protocol about the rate of administration, so problematic in the previous executions.[3] The Warden, the one actually in charge of the process, has complained that he is removed from the best position of command during the process and will be in the dark as to how the injection is proceeding. (Doc. 419, exh. 1; Cal. Code Regs. tit 15, § 3349.4.5(f)(1) (Warden with inmate; infusion in other room).

The list goes on. The point is that one doesn't just look at the paper, one has to look to see if it changes anything. Judge Fogel has that record; he knows it and understands it. It was based on that record, which is certainly well supported, that he found the substantial questions about the new protocol

[3] The factual milieu that must be considered when evaluating the question of rate of administration includes extensive testimony about the properties of the drugs and why the administration mechanism is important and requires training and, hopefully, some level of experience if three drugs are being used. Thiopental's concerning characteristics include its effervescent nature, its varying half-lives and rapid re-distribution into and accumulation in tissues other than the brain. RT 264, 298, 323-24 ("[Thiopental] also has features that allow it to very rapidly wear off. It is not used to maintain anesthesia per se."); Concannon Trial Aff. ¶ 27 ("Thiopental has the potential to wear off if any delays occur during the euthanasia procedure or if the complete dosage is not properly administered."). Dr. Ekins stated in his deposition and confirmed at the hearing that although "[s]omeone non-medically could do it [inject the drugs]," it "would . . . certainly be ideal to at least have a nurse do that," because "[t]hey are trained. It's common. They are used to what it feels like to push an IV through a small tube. They are familiar with it." RT 898. Thus, if the paralytic is to be used, such questions need to be answered in the context of the new protocol.

sufficient to warrant a stay because the protocol cannot and did not rectify the finding of an Eighth Amendment violation.

It is entirely proper for a court to assess the effect of a stay of execution not only on the State's case against an inmate but on the State's processes in general. If the state had managed to obtain execution dates, including the one attempted for Mr. Morales (in contravention of a federal court stay), they would be asserting that courts are holding up the entire process. It is wise and prudent for the district court to consider the entire effect of its orders, and the relative lack of intrusion on the state's processes as a whole.

Defendant faults Brown for not amending the complaint, arguing that they cannot adequately respond. The district court found the complaint was sufficiently broad and Brown's position sufficiently similar. (ER 56-57 [broad enough to encompass many things]). More important, Defendants hyper-technical argument does not point to a single inability to argue their position. Certainly, some "technical amendments" need to be made, but the body remains as relevant as always. Morales' Third Amended Complaint begins with a claim as relevant today as at any time: "Plaintiff additionally contends that Defendants, as a result of their deliberate failure to use medically approved procedures and properly trained personnel, have inflicted pain and torture on several executed prisoners in the past, making Plaintiff

certain he will suffer the same fate unless Defendants adopt a humane and safe execution protocol." (Doc. 323, par. 1) The Complaint also alleges that "[t]here is a reasonable likelihood that sodium pentothal will be ineffectively delivered, given the inadequacy of the administration procedures and the personnel involved, and as a result will not provide a sufficient sedative effect for the duration of the execution process. This has actually occurred in many California executions and in executions in other states." (*Id.*, at par. 16) In challenging the administration of the sedative, Morales notes that "[t]he CDCR's use of sodium pentothal knowingly exacerbates the risk of error created by its deficient protocol because sodium pentothal is extremely volatile, short acting, and sensitive to human error, and because CDCR makes no determination of a suitable level for any particular inmate, despite this being a required procedure for administration of a sedative to all humans and animals for any purpose." With regards to the pancuronium bromide, Morales alleges that "[w]ithout the use of pancuronium bromide, a prisoner would be able to indicate that he was still conscious or had regained consciousness or awareness prior to the administration of potassium chloride. Properly trained and qualified personnel would be able to assess unconsciousness, which CDCR personnel at present cannot and do not do and thus are unable to determine whether a prisoner is aware of or feeling pain at the time the

pancuronium bromide is administered, or if the administration causes the prisoner to become able enough to sense the pain from pancuronium bromide and, then, potassium chloride." (*Id.*, at par. 19) The complaint over the lack of medical professional involvement remains (Complaint, par. 40), as does the Defendants' deliberate disregard of their own expert's advice to proceed with a single-drug protocol. (*Id.*, at par. 43, 59, 62).

Defendants further argue that Brown's showing was deficient initially. Even if that were true, which he argued was not in this Court, it is irrelevant now. Brown raised the following issues that needed to be considered by the district court based on the Morales record, all of which are even more germane now:

> 1. Is the infusion procedure still conducted in the dark?
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> 2. Does the antechamber offer sufficient viewing of the chamber such that those administering the drugs can see what is taking place in the chamber? Limited photographs of the new facility available via the internet show a small window with a counter in the antechamber that appears to prevent viewing as the site lines to the inmates' arms are obscured. An examination of the new facility will be necessary to clear this up.
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> 3. Should the State be permitted to proceed with executions despite eliminating the one recording mechanism that documented inadequate executions – a doctor chart measuring respirations?

4. Should the state be permitted to proceed with executions after eliminating the record of what personnel actually attend training?

5. Can the State proceed with executions under a procedure that calls for having LVNs inserting catheters, when this is prohibited by state law?

6. Who is responsible for viewing the IV lines and checking the inmate to guard against leaking and blown veins? This responsibility rested with witnesses #3 and #4, who exhibited a remarkably inept understanding of how to perform the requisite examination.

7. What is the backup plan if one of the IV lines fails? Is it the three-drugs protocol as contained in the new regulations? What is the procedure if both lines are inoperable? Is there a cut-down procedure or central line being set? Who is responsible for making this determination and who will perform that procedure?

8. Who is responsible for IV insertion? The LVNs who established IV access in past executions demonstrated ineptitude in several executions. (see Williams, Beardsley and Thompson)

9. Who is responsible for infusion and what type of training do they have? The previous record was replete with evidence execution personnel describing the process of infusion in a way that reflected no understanding of infusion or how to accomplish it and no appreciation for the fact that inadequate rates of infusion can cause serious difficulties with thiopental because it is an effervescent drug that quickly wears off. Moreover, team members did not understand that improper infusion can blow a vein, particularly with remote administration.

10. Who mixes the chemicals and how is it done? The stipulated findings show that it was not done properly in past

executions. First, execution personnel, including witnesses #3 and #4, did not know what properly mixed thiopental looked like. Second, because the dosages varied from the packaging applications, no one mixed the drugs properly.

11. Can the state proceed with an execution without someone checking the expiration date of the thiopental as displayed by the manufacturer? One of the "improvements" in the "new" procedure is the elimination of this requirement. At the very least, the Court should insist that the Defendants disclose how much thiopental they currently possess and its expiration date.

12. How have Defendants obtained their thiopental? The record demonstrates a consistent lack of a proper chain of custody, although the previous protocol as well as state and federal law require it. There appear to be no prescription requirements for the drugs.

13. What is the delivery mechanism? The record has exposed the previous mechanism as consisting of a spaghetti ball of twisting lines and devices that could not be explained by the state's own expert, let alone those entrusted with administering it.

14. What are the dangers of improper administration of thiopental? Would an improper administration result in the inmate being left in a vegetative state, alive but unconscious? Order, Feb. 21, 2006, at 2, Docket 73 ("An insufficient dose, however, has the potential to cause irreversible brain damage while not causing death.")

15. Can the state credibly argue that it requires only 3 days to train on a new procedure when their own new protocols require 8-hour trainings on a "monthly" basis. The McAuliffe declaration evidences the defendants' admission that any protocol requires months of training to ensure it is adhered to under conditions of an actual execution.

> 16. Do the records from Washington and Ohio need to be considered here? The anecdotal information is that the single drug procedure used to execute 9 people rendered the inmates deceased quickly and safely. To Mr. Brown, this is only confirms that what was taking place in California over the past many years was pure incompetence. How can anyone be assured without proper review that this institutional incompetence is not continuing without the state actually establishing that fact?

Finally, it is improper to ignore the fact that alternatives exist as in Ohio and Washington. Justice Roberts and the dissent were in agreement on this point. Baze *v. Rees*, 553 U.S. at 57 (ruling that the "comparative efficacy of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment"); *id*. at 61 (ruling that an Eighth Amendment violation exists where the "risk is substantial when compared to the known and available alternatives"). Since then, two states have used a single-drug protocol. Neither of them did so within three (3) days of promulgating the protocol; instead, having given it the administrative consideration and review it required, as well as time for judicial review. As counsel understands it, Washington announced the single drug protocol on March 8, 2010 while litigation was ongoing. It is not known what preparations were put into place before that announcement. Washington executed Cal Brown on September 10, 2010 using the new protocol. Ohio announced on November 13, 2009 that it would adopt a single drug process. Again, it is not known what preparations were put into place or reviews

undertaken before that announcement. The formal protocol was then released and went into effect on November 30, 2009 and was first used on December 8, 2009. By taking only three (3) days, California once again put itself in a position of an extreme outlier among the states.

Now, Defendants argue Brown's failure to choose the single-drug procedure waives consideration of the constitutional mechanism for review. So enamored of *Baze* previously, they desire it be jettisoned here. But, no court can do this nor should it. The procedure crafted by the district court was too imprecise and not well thought-out, and filled with procedural traps, a fact it has now realized (Order, at 8-9), and as to which this Court agreed (Amended Order on Remain, at 7). It turns out, they had insufficient drugs according to the Ohio and Washington protocols. The fact remains that the landscape has changed, not just for inmates with such claims, but for states as well. In weighing the calculation under *Baze*, it cannot be ignored that perhaps there is some alternative mechanism that makes the calculation different for a state with a record such as California.[4] If anything, this once again shows the State here was simply premature in its rush to execute.

[4] Defendants ignore counsel's obligations here that the district court recognizes and appreciates. (ER

In light of the finding of a violation, the district court's remedial powers and the facts established at the Morales hearing and thereafter, the court did not abuse its discretion in granting a stay of execution.

III. THE DISTRICT COURT WAS NOT "CLEARLY ERRONOUS" IN CONCLUDING THAT THE EIGHTH AMENDMENT IS NOT AUTOMATICALLY SATISFIED BY THE PROVISION OF A CONSCIOUSNESS ASSESSMENT IN DEFENDANTS' LETHAL INJECTION REGULATIONS

Defendants make a single comparison of their new execution regulations to their former execution protocol (the consciousness check provision), thereby acknowledging that in all other substantial respects, the procedures remain the same. Petition at 11-13. As to the consciousness evaluation, Defendants seek refuge in "Justice Ginsburg's approving reference in her dissent to the fact that '[i]n California, a member of the IV team brushes the inmate's eyelashes, speaks to him, and shakes him at the halfway point and, again, at the completion of the sodium thiopental injection.' [*Baze*, 553 U.S. at 120–21 (Ginsburg, J., dissenting). They argue that this 'consciousness check' alone is sufficient to render the current regulations constitutionally adequate." Order, Sept. 28, 2010, Doc. No. 424, at 5. Of course, Justice Ginsburg did not have the record here as to what California does and how it does it; the district court does, however. "'[I]t is fair to say that there is no case involving an Eighth Amendment challenge to a

lethal-injection protocol in which the factual record is as developed as the record here.'" *Id.* at 2 (quoting district court Order, Sept. 24, 2010, Doc. No. 420, at 6).

Defendants' reliance solely on the provisions in regulations—without any assessment of how the Defendants previously have implemented identical procedures—misses the point entirely. Defendants' regulations have always been in writing, and Mr. Morales demonstrated an Eighth Amendment violation under *Baze* based "on the entire record (citation omitted); on the largely undisputed evidence presented at the hearing; on Defendants' stipulation that injection of the second and third drugs in the three-drug protocol (pancuronium bromide and potassium chloride) without adequate anesthesia will cause an unconstitutional level of pain; on the fact that data in Defendants' execution logs indicate that sodium thiopental did not have its expected effect or function as expected in 64% of lethal-injection executions pursuant to the protocol; and in particular on the testimony of Defendants' own medical expert, Dr. Singler, that in at least one execution the inmate likely was awake when the second and third drugs were injected, and that the only reason that the anesthesiologist could not render a definitive opinion was the apparent unreliability of Defendants' records . . ." *Id.* at 4. Critically, Defendants will not and cannot talk about the record that the district court

used in concluding that there is a "demonstrated risk of severe pain" should the execution proceed. *Id.*

As this Court is undoubtedly aware, the district court and this Court already have been down this road, even prior to the development of the *Morales* record. Early on, the question was raised as to whether and how to assess consciousness. Defendants put forth two anesthesiologists to make an "independent verification, through direct observation and examination . . . that [the inmate] in fact is unconscious before either pancuronium bromide or potassium chloride is injected." *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1048 (N. D. Cal 2006). The anesthesiologists were fully prepared to undertake this obligation, with the use of monitoring devices (that are not present in the current regulations). Only because Defendants misrepresented their *other* obligations (i.e., to intervene if there is a botched execution, *see Morales v. Hickman*, 438 F.3d 926, 931 (9th Cir. 2006), those professionals felt they could not continue given the last-minute manipulation by Defendants.

Now, Defendants have employed a "consciousness check." What remains to be seen is if this is of any value. Given the fact that it does not even comply with the previous court orders in this regard, that will be difficult for them. They have not included a check on the inmate once

pancuronium is administered, which is the real issue – whether the inmate paralyzed and conscious to the extent he can feel excruciating pain.

But, more significantly, unconsciousness was a focal point at the *Morales* hearing, with extensive expert testimony from anesthesiologists, pharmacological and pharmokinetc experts. It is highly technical, particularly with regards to thiopental, a fast-acting drug that dissipates quickly unless properly administered. The testimony focused on what is the requisite anesthetic depth, how is that measured, and what qualifications and experience level is required. The State's own experts provided testimony that is helpful in this regard, particularly as to the proper monitoring devices and how to employ them. What the district court must now do is sift through that extensive record and evaluate whether someone with no experience or training brushing the inmate's eyelashes and poking him is sufficient to rectify the record of mishaps established here. That is all that Brown requests and what is required given the apparently undisputed finding that California's executions violate the Eighth Amendment.

Defendants' current execution protocol is a means to an end; it merely is a first step toward Constitutional *practices*. Thereafter, given the overwhelming evidence of Defendants' inability to follow its own protocol, Defendants must be able to comply with their regulations and the orders of

this Court by setting forth some indicia of reliability that they have the intent, means, and ability to follow these writings in practice. The record is fully devoid of these abilities, and in fact, is replete with evidence that defendants do not have such qualities. *See* Order, Feb 21, 2006, Doc. No. 78, at 3 (district court noting "the apparent disconnect between the expectations articulated in the orders of this Court and the Court of Appeals and the expectations of the anesthesiologists retained by Defendants.") The record here is not narrowly confined to Defendants' written regulations. It includes their practices and the record as it is before the district court. In this regard, defendants' sole reliance on their new consciousness check regulation is misplaced.

IV. THE DISTRICT COURT WAS NOT "CLEARY ERRONEOUS" IN BALANCING THE EQUITIES AND WAS MANIFESTLY CORRECT IN FINDING THAT MR. BROWN TIMELY RAISED HIS CLAIM AND REQUESTED A STAY.

Betraying no apparent sense of irony, petitioners allege for the *first time* that Mr. Brown was not timely in raising his claim under 42 U.S.C. section 1983, and that the district court clearly erred in its *sua sponte* finding, made in the absence of *any* dispute from petitioners, that Mr. Brown was diligent. Petition at 3, ¶ 8; 13-14 & n. 5. Petitioner's contention is foreclosed by petitioners' *repeated* failure to raise the objection to Mr. Brown's timely complaint in the district court or this Court. In light of petitioners' failure to

raise the issue before this Court, or to petition for rehearing from the Order remanding the matter to the district court, the determination that Mr. Brown was timely constitutes both law of the case, and an issue waived by petitioners' persistent neglect. *See Rotec Indus. v. Mitsubishi*, 348 F.3d 1116, 1120 (2003) (affirmative defenses other than those of jurisdiction may not be raised for the first time on appeal); *Art Attacks Ink v. MGA Entm't*, 581 F.3d 1138, 1141 (9th Cir. 2009) (objection that opposing party's Rule 50(b) motion was not timely filed waived by failure to raise it before the district court); *Hill v. Blind Indus. & Serv.*, 179 F.3d 754, 756 (9th Cir. 1999) (timely disclosure of defenses provides fair notice to opposing party, allows the parties to establish a full record for appellate review, and prevents waste of judicial resources); Fed. Rule Civ. Pro. 8(c) ("a party must affirmatively state any avoidance or affirmative defense"); *see also Williamsburg Wax Museum v. Historic Figures*, 810 F.2d 243, 250 (D.C. Cir. 1987) (under law of the case doctrine, a legal decision made at one stage of the litigation, not challenged in a subsequent appeal when the opportunity existed becomes law of the case for future stages of the same litigation).[5]

[5] In the district court, "[petitioners] themselves did not contend in their briefing that Brown has not been diligent in seeking federal relief." Order at 7 [ER-13]. Similarly, petitioners did not contend in their Opposition to Motion for Stay of Execution and Appellee's Brief or in the Alternative Opposition to Petition for Writ of Mandamus ("Opposition"), filed in this

Neither do petitioners give even passing acknowledgment to the controlling law of this Circuit, or other decisional authority, which demonstrates that far from being "clearly erroneous," the district court's finding was compelled by the history in this case. Although petitioners' attempt to give a self-serving gloss to the relevant facts, the Petition actually concedes the facts upon which the district court relied and this Court "appears to agree," supported a finding of timeliness. Order, Sept. 28, 2010, Doc. No. 424, at 7. Specifically, "[a]fter a four-year moratorium on executions in California," and state court proceedings regarding the administrative legality of the revised protocol, "a new lethal injection protocol became effective August 29, 2010." Order Remanding, at 2, 4. "On August 30, 2010, the State had already scheduled the first execution in four years – Albert Greenwood Brown – for September 29, 2010." *Id*. at 4. Mr. Brown's efforts to protect his constitutional rights, which proceeded simultaneously in both state and federal court, were therefore timely undertaken. *See Beardslee v. Woodford*, 395 F.3d 1064, 1069 (9th Cir. 2005) (petitioner "correctly point[ed] out that

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Court that Mr. Brown had been untimely. Indeed, petitioners explicitly "[p]ut[] aside the" discussion of any "reasons for Brown's" purportedly "belated attempt to join the *Morales* litigation." Opposition at 5. *See also United States v. Escabar-Urrego*, 110F.3d 1556 (11th Cir.1997) (district court's determination regarding quantity of drugs possessed became law of the case when appellant failed to seek review of decision).

the precise execution protocol is subject to alteration until the time of execution"); *see also Crowe v. Donald*, 528 F.3d 1290, 1292 (11th Cir. 2008) (method of execution claim accrues on later of date on which state review is complete or date on which capital litigant becomes subject to new or substantially changed execution protocol).

Petitioners assiduously avoid mentioning any significant facts or law in complaining that the district court clearly erred in considering the equities. Petition at 14. Petitioners incompletely characterize the district court's Order Following Remand as faulting the State only for scheduling an inconvenient execution date, and rushing to use petitioners' expiring supply of sodium thiopental. Petition at 15. Some amplification of the district court's reasons is in order.

1. The district court found – and petitioners do not dispute – that "much of the review the Court needs to undertake" to resolve Mr. Brown's Eighth Amendment claim "*would have completed* by now *but for [Petitioners'] own requests*" to postpone the 42 U.S.C ¶ 1983 proceedings. Order on Remand at 8 (emphasis added);
2. The district court found – and petitioners do not dispute – that the lower court was "surprised" by the petitioners' decision to seek an execution date for Mr. Brown even before the new regulations went into effect. Order Granting Motion for Leave to Intervene; and Denying Conditionally Intervenor's

Motion for a Stay of Execution at 6 & n. 4.

3. The district court found – and petitioners do not dispute – that petitioners reneged on the clear understanding, which both Mr. Brown's counsel and the district court reasonably had up to that time, that petitioners "would defer seeking any new execution dates until the *Morales* litigation could be concluded." *Id.* at 7.
4. The district court found – and petitioners do not dispute – that it previously schedule expedited review of the Eighth Amendment claim and substantial factual questions in this case, which can be completed before petitioners replenish their supply of sodium thiopental and can resume executions. *Id*. at 8.

In addition to failing to suggest why these facts do not support the district court's assessment of the equities, petitioners also overlook controlling Supreme Court authority, which fully supports the district court's conclusion. The Supreme Court's holdings in *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004), and *Gomez v. United States Dist. Court for Northern Dist. of Cal*, 503 U.S. 653, 654 (1992), require district courts to "take into consideration the State's strong interest in proceeding with its judgment *and* . . . *attempt[s] at manipulation*," in granting stays of execution. *Nelson*, 541 U.S. at 649-650 (emphasis added). Although the question of manipulation is generally raised by the State in resisting a stay, the consideration of this factor

is compelled by the equitable nature of the Court's injunctive jurisprudence. *Id.* Accordingly, there is no authority for ignoring the State's sharp practices, particularly where it is *only* the State's *own* doing that has brought about "the urgency of the present situation." Order, Sept. 28, 2010, Doc. No. 424, at 7.

Yet, even if the State's behavior were not manipulative and in bad faith (which it is), the other *Nelson* factors demonstrate the correctness of the district court's exercise of equitable discretion. Briefly summarized: (a) relying on an extensive factual record, including a four-day evidentiary hearing and the State's stipulated facts, the district court found establishes that State's former execution protocol *in fact* created a demonstrated "risk of severe pain," within the meaning of *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality op.); (b) Mr. Brown's current showing raises "substantial questions of fact" that State "did not come close" to correcting deficiencies that produced a 64% error rate in California executions, including medical findings that a paralytic drug was likely administered to fully conscious inmate, who was then made to suffer a chemically induced heart attack; (c) the expedited resolution of these issues will require only until the end of the year, but cannot be completed in time for Mr. Brown's currently scheduled execution; and (d) these time constraints are no fault of Mr. Brown's.

The thoughtful consideration of the entire record in this case therefore compels the conclusion that a stay is appropriate to allow the district court to complete the work it started, but interrupted at the State's behest. Similarly, the California Supreme Court noted today:

> By choosing an execution date for Brown of September 29, 2010, with the presumptive knowledge that it faced the imminent loss of an essential ingredient to the execution on October 1, 2010, the state itself has contributed to circumstances incompatible with the orderly resolution, pursuant to normal procedures, of pending legal issues in connection with executions under the new regulations.

Cal. Dept. of Corr. and Rehab., et al. v. Superior Court of Marin County (Morales), California Supreme Court Case No. S186751, En Banc, Order filed Sept. 29, 2910, at 3.

Against the detailed factual record supporting the district court's order, petitioners make a telling – and chilling – attempt to invoke "moral" authority for their position, with a citation to *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Petition at 16. The evidence before the district court, including eyewitness testimony, raises the likelihood that the inmate in *Thompson* was conscious at the time petitioners injected him with pancuronium bromide and potassium chloride. Whatever else is in dispute, there is no question "that injecting these two drugs into a conscious person would cause an unconstitutional degree of pain and suffering. Order Granting Motion for

Leave to Intervene; and Denying Conditionally Intervenor's Motion for a Stay of Execution at 2.

It is similarly undisputable, in light of the evidentiary record developed after Mr. Morales narrowly avoided execution that, despite petitioners soothing assurance to the contrary, Mr. Morales also was at a demonstrated risk of experiencing such barbaric treatment. The many and consistent "disconnects" that the evidentiary record demonstrates to separate petitioners' representations from their actions constitute just one reason why the district court should be permitted the opportunity to resolve this case in an orderly fashion.[6]

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[6] Rather than staying Mr. Morales's execution, the district court permitted the State to modify its lethal-injection procedures in one of two ways: the State had the option of (1) using only sodium 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 potassium chloride. *Morales*, 415 F. Supp. 2d at 1047. Petitioners assured the 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. In reviewing this sequence of events, the district court was willing to charitably excuse the results as

V. CONCLUSION

For these reasons, the Petition for Writ of Mandamus should be denied.

Dated: September 29, 2010

Respectfully submitted,

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indicating a "disconnect between the expectations articulated in the orders of this Court and the Court of Appeals and the expectations of the anesthesiologists." *Morales*, 465 F. Supp. 2d at 976.