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

MORALES,) CV-06-00219-JF
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.)
) APRIL 29, 2011
CATE, ET AL,)
)
DEFENDANT.) PAGES 1-16
)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

FOR THE PLAINTIFF: MCBREEN & SENIOR
BY: DAVID SENIOR
2029 CENTURY PARK EAST, 3RD FL
LOS ANGELES, CA 90067

FOR THE DEFENDANT: ATTY GENERAL'S OFFICE
BY: MICHAEL QUINN
JAY GOLDMAN
455 GOLDEN GATE AV, STE11000
SAN FRANCISCO, CA 94102

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

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FOR THE PLAINTIFF: LAW OFFICE OF JOHN R. GRELE
BY: JOHN GRELE
149 NATOMA STREET, 3RD FL
SAN FRANCISCO, CA 94105

FOR THE PLAINTIFF: JENNER & BLOCK
BY: RICHARD STEINKEN
ONE IBM PLAZA
CHICAGO, IL 60611

FOR THE INTERVENOR: HABEAS CORPUS RESOURCE CENTER
BY: SARA COHBRA
303 SECOND ST, STE 400 SOUTH
SAN FRANCISCO, CA 94102

1 SAN JOSE, CALIFORNIA APRIL 29, 2011

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENEED AND THE
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: THIS IS THE MATTER OF MORALES
6 VERSUS CATE.

7 AND IF I COULD GET COUNSEL'S APPEARANCES,
8 PLEASE.

9 MR. SENIOR: GOOD AFTERNOON, YOUR HONOR.

10 DAVID SENIOR ON BEHALF OF MICHAEL MORALES
11 AND ALBERT BROWN.

12 MS. COHBRA: GOOD AFTERNOON, YOUR HONOR.

13 SARA COHBRA HERE ON BEHALF OF MITCHELL
14 SIMS AND STEVIE FIELDS.

15 MR. STREETER: GOOD AFTERNOON,
16 YOUR HONOR.

17 JOHN STREETER ON BEHALF OF PACIFIC NEWS
18 SERVICE.

19 THE COURT: AND I BELIEVE WE HAVE
20 MR. GRELE ON THE PHONE?

21 ARE YOU THERE, MR. GRELE?

22 OPERATOR: YOUR HONOR, PARDON THE
23 INTERRUPTION. THIS IS THE COURT CALL OPERATOR.

24 I BELIEVE MR. GRELE IS TRYING TO DIAL
25 BACK IN. HE GOT DISCONNECTED.

1 THE COURT: OKAY.

2 DO WE HAVE MR. STEINKEN.

3 MR. STEINKEN: YES, YOUR HONOR.

4 THE COURT: LET ME GET APPEARANCES FROM
5 THE DEFENDANTS.

6 MR. QUINN: GOOD AFTERNOON.

7 MICHAEL QUINN FOR DEFENDANTS.

8 MR. GOLDMAN: GOOD AFTERNOON.

9 JAY GOLDMAN FOR DEFENDANTS.

10 THE COURT: WHY DON'T YOU HAVE A SEAT.

11 DO WE HAVE MR. GRELE NOW?

12 MR. GRELE: YES. I'M HERE, YOUR HONOR.

13 THE COURT: THANK YOU.

14 WELL, THANK YOU ALL FOR COMING IN. THIS
15 PARTICULAR CONFERENCE WAS CONVENED BY THE COURT.
16 AND I JUST WANTED TO PUT A COUPLE THINGS ON THE
17 RECORD AS FRAMEWORK SO THAT THE COURT'S CONCERNS
18 MAKE A LITTLE MORE SENSE.

19 THE COURT ISSUED AS MEMORANDUM INTENT OF
20 DECISION WHICH WAS ITS ANALYSIS OF THE PRIOR
21 EXECUTION PROTOCOL IN DECEMBER OF 2006, WHICH WAS
22 OBVIOUSLY MORE THAN FOUR YEARS AGO.

23 THE STATE FILED ITS RESPONSE TO THAT
24 MEMORANDUM IN APRIL OF 2007.

25 AT THAT TIME IT WAS THE COURT'S INTENTION

1 TO HAVE AN EVIDENTIARY HEARING TO ASSESS WHETHER
2 THE STATE'S RESPONSE IN ITS APRIL 2007 SUBMISSION
3 ADDRESSED THE DEFICIENCIES THAT WERE IDENTIFIED IN
4 THE MEMORANDUM THAT WAS ISSUED IN DECEMBER 2006.

5 AND THE COURT'S ANTICIPATION AT THAT
6 POINT WAS THAT THAT HEARING WOULD OCCUR SOME TIME
7 IN THE SUMMER OR EARLY FALL OF 2007. SO WE ARE
8 STILL A LITTLE BIT LESS THAN FOUR YEARS AGO.

9 THAT WAS, I THINK, THE ASSUMPTION THAT
10 EVERYONE WAS PROCEEDING ON UNTIL THE MARIN SUPERIOR
11 COURT ISSUED ITS ORDER IN THE RELATED STATE
12 LITIGATION WHICH DETERMINED THAT THE STATE NEEDED
13 TO COMPLY WITH THE ADMINISTRATIVE PROCEDURES ACT IN
14 ORDER TO AMEND THE PROTOCOL.

15 THAT, ESSENTIALLY, PUT A ROADBLOCK IN THE
16 COURT'S DOING ANYTHING IN THE FEDERAL CASE UNTIL
17 THAT CASE WAS RESOLVED. AND AT THE REQUEST OF BOTH
18 OF THE PARTIES, NOT AT THE REQUEST OF THE COURT BUT
19 AT THE REQUEST OF THE PLAINTIFFS AND THE DEFENDANTS
20 IN THIS CASE, THE PROCEEDINGS IN THIS CASE
21 ESSENTIALLY WERE SUSPENDED WHILE THE STATE CASE WAS
22 LITIGATED.

23 THE STATE APPEALED THE DECISION OF THE
24 MARIN SUPERIOR COURT TO THE DISTRICT COURT OF
25 APPEAL.

1 THAT APPEAL TOOK A LITTLE MORE THAN A
2 YEAR, AND BY THE TIME THAT CASE WAS RESOLVED, THE
3 INJUNCTION THAT HAD BEEN ISSUED BY THE MARIN
4 SUPERIOR COURT WAS UPHOLD AND THE CALIFORNIA
5 SUPREME COURT DENIED REVIEW, THEN IT BECAME CLEAR
6 THAT THE STATE WAS GOING TO HAVE TO REDO THE
7 EXECUTION PROTOCOL PURSUANT TO THE ADMINISTRATIVE
8 PROCEDURES ACT.

9 THE STATE DID NOT MAKE ANY ATTEMPT TO
10 COMPLY WITH THE APA NOR WAS IT REQUIRED TO DURING
11 THE TIME THAT THE MATTER WAS ON APPEAL.

12 AND THEN THE APA PROCESS ITSELF TOOK WELL
13 OVER A YEAR BECAUSE IT REQUIRED PUBLIC HEARINGS AND
14 COMMENT PERIODS AND PROMULGATION PERIODS AND SO
15 FORTH.

16 SO THE ACTUAL REVISED EXECUTION PROTOCOL
17 THAT EMANATED FROM THIS COURT IN DECEMBER 2006 DID
18 NOT ISSUE UNTIL AUGUST OF 2010.

19 SO THERE WAS A PERIOD OF THREE AND A HALF
20 YEARS WHERE THIS COURT WAS ESSENTIALLY WITHOUT
21 POWER TO ACT.

22 THEN THE PROCEEDINGS FROM MR. BROWN WHICH
23 OCCURRED IN SEPTEMBER OF LAST YEAR, THE COURT
24 INDICATED ITS DESIRE TO PROCEED EXPEDITIOUSLY TO
25 RESOLVE THIS FEDERAL CASE, AND WE'VE HAD SEVERAL

1 ROUNDS OF MOTIONS THAT WERE FILED BY THE STATE
2 ATTACKING THE MATERIALS FILED BY PLAINTIFFS. WE
3 HAD DISCOVERY MOTIONS THAT NEEDED TO BE RESOLVED.

4 AND WHEN WE WERE LAST TOGETHER IN
5 FEBRUARY OR MARCH THE COURT INDICATED AGAIN, AT
6 LEAST FOR THE FOURTH OR FIFTH TIME, ITS DESIRE TO
7 RESOLVE THIS CASE EXPEDITIOUSLY SO THAT EITHER
8 CALIFORNIA CAN RESUME EXECUTIONS OR NOT, AND THAT
9 IF THE PARTIES WHO WAS UNHAPPY WITH THE COURT'S
10 DECISION COULD TAKE THE CASE TO THE NINTH CIRCUIT
11 FOR APPELLATE REVIEW.

12 AT THE CLOSE OF THE LAST HEARING THE
13 STATE'S ATTORNEYS INDICATED THAT BECAUSE THERE WAS
14 A NEW WARDEN AT SAN QUINTON, THAT WARDEN WISHED TO
15 RECONSTITUTE THE NEW EXECUTION TEAM. THAT THERE
16 WOULD BE A NECESSARY DELAY IN THE READINESS OF THE
17 STATE TO IMPLEMENT THE NEW EXECUTION PROTOCOL AND
18 THE STATE'S READINESS TO HAVE AN EVIDENTIARY
19 HEARING ON THE ISSUES THAT HAD BEEN RAISED IN THE
20 FEDERAL LITIGATION.

21 AND APPROXIMATELY THREE WEEKS AGO THE
22 COURT RECEIVED THE PROPOSED STIPULATION FROM THE
23 PARTIES THAT, AMONG OTHER THINGS, SETS THE
24 EVIDENTIARY HEARING FOR NO EARLIER THAN DECEMBER OF
25 2011, EXACTLY FIVE YEARS AFTER THE COURT FIRST

1 FOUND THE OLD OP770 TO BE DEFICIENT.

2 WITHOUT COMMENTING ON WHETHER I'M GOING
3 TO SIGN THAT STIPULATION OR NOT, I WANTED TO GIVE
4 COUNSEL A CHANCE TO PROVIDE FURTHER JUSTIFICATION
5 FOR WHY, GIVEN THE FACT THAT THE COURT HAS
6 REPEATEDLY EXPRESSED A DESIRE TO RESOLVE THIS CASE
7 AT THE TRIAL LEVEL SOONER RATHER THAN LATER, AND
8 THE FACT THAT THE NEW PROTOCOL HAS BEEN IN PLACE
9 SINCE AUGUST OF LAST YEAR, IT IS THE PARTIES' JOINT
10 CONCLUSION THAT THIS COURT CANNOT AGAIN REVISIT THE
11 ISSUES IN THIS CASE UNTIL DECEMBER OF 2011.

12 IT MAY WELL BE THAT THAT'S THE CASE, BUT
13 I WANTED TO BE CLEAR ON THE RECORD WHY THAT'S THE
14 CASE. I WANT IT TO BE CLEAR ON THE RECORD THAT
15 BOTH THE PLAINTIFFS AND THE STATE BELIEVE THAT
16 THAT'S THE CASE, AND SO THAT'S WHY I ASKED YOU TO
17 COME AND ANSWER MY QUESTIONS.

18 SO LET ME HEAR FIRST FROM COUNSEL FOR THE
19 STATE.

20 MR. QUINN: YOUR HONOR, AS YOU REFERRED
21 TO DURING THE LAST HEARING, WE REFERENCE THAT THE
22 WARDEN WAS GOING TO BE SELECTING A NEW TEAM.

23 THAT PROCESS IS STILL ONGOING AND WE'VE
24 ACTUALLY GOTTEN SOME NEWS JUST THIS WEEK THAT
25 ALTHOUGH WE STATED IN THE STIPULATION THAT IT WOULD

1 BE COMPLETED, THAT PROCESS, BY THE END OF JUNE,
2 CDCR IS NOW TELLING US THEY NEED UNTIL AUGUST --

3 THE COURT: OKAY.

4 MR. QUINN: -- TO DO THAT.

5 SO THAT FURTHER, IN OUR MIND, SOLIDIFIES
6 OR JUSTIFIES THE SCHEDULE THAT THE PLAINTIFFS AND
7 THE DEFENDANTS HAVE PUT TOGETHER.

8 ALSO THERE'S THE EFFORT TO GATHER
9 DOCUMENTS AND PROVIDE IT TO THE PLAINTIFFS. THAT'S
10 ONGOING, AND WE ANTICIPATE IN MAY WE WILL START
11 PRODUCING DOCUMENTS.

12 AND I THINK THE STIPULATION SETS OUT KIND
13 OF A SENSIBLE, I THINK IN BOTH SIDES, FROM BOTH
14 SIDES' PERSPECTIVE, OF DOCUMENTS TO BE PRODUCED AND
15 THEN DEPOSITIONS CAN GO FORWARD ONCE THE PLAINTIFFS
16 HAVE A CHANCE TO LOOK AT THE DOCUMENTS AND THE NEW
17 TEAM HAS BEEN ASSEMBLED.

18 AND JUST AS THAT -- THAT SIMPLY CAN'T
19 OCCUR, THAT PORTION OF DISCOVERY CAN'T OCCUR UNTIL
20 SOMETIME IN SEPTEMBER.

21 MR. GOLDMAN: AND ALSO, ONCE THE NEW TEAM
22 IS ASSEMBLED AND WE KNOW WHO IS ON THE TEAM, WE
23 WOULD, OF COURSE, BE PRODUCING THE APPROPRIATE
24 DOCUMENTS REGARDING THOSE PEOPLE WHICH THE OTHER
25 SIDE WOULD LIKE TO SEE.

1 THE COURT: OF COURSE.

2 SO WHAT I'M HEARING FROM BOTH OF YOU IS
3 IN ORDER FOR THE COURT TO CONDUCT A MEANINGFUL
4 REVIEW OF THE AS-APPLIED CHALLENGE TO THE NEW
5 REGULATIONS, THE EXECUTION TEAM HAS TO BE IN PLACE
6 AND THERE HAS TO BE AN OPPORTUNITY TO DO DISCOVERY
7 WITH RESPECT TO THE MAKEUP AND TRAINING OF THAT
8 EXECUTION TEAM, AMONG OTHER ISSUES, BUT THOSE
9 ISSUES AT LEAST, AND THAT CANNOT HAPPEN UNTIL THIS
10 FALL.

11 IS THAT THE STATE'S POSITION?

12 MR. QUINN: ESSENTIALLY, YES.

13 THE COURT: AND I TAKE IT THERE ARE
14 ADDITIONAL ISSUES HAVING TO DO WITH OTHER ASPECTS
15 OF THE REGULATIONS, BUT THE ONE THAT IS CAUSING THE
16 DELAY IS THE RECONSTITUTION OF THE EXECUTION TEAM,
17 FROM THE STATE'S PERSPECTIVE?

18 MR. QUINN: THAT'S SORT OF A HIGHLIGHTED
19 ISSUE, YEAH.

20 THE COURT: I KNOW THERE'S BEEN A LOT OF
21 BACK AND FORTH ABOUT THE DRUGS AND OTHER SUCH
22 THINGS, BUT OTHER THAN FOLLOWING NEWS REPORTS ABOUT
23 THAT, I HAVE NOT SEEN THAT SURFACE IN THIS CASE AS
24 BEING AN ISSUE.

25 BUT THE PROBLEM WITH CONSTITUTION OF THE

1 TEAM GOES DIRECTLY TO THE AS-APPLIED CHALLENGE.

2 MR. QUINN: CORRECT.

3 THE COURT: OKAY. THANK YOU.

4 ANYTHING PLAINTIFF'S COUNSEL WANT TO ADD
5 TO THIS?

6 MR. SENIOR: I'M HAPPY TO ANSWER ANY
7 QUESTIONS THE COURT HAS.

8 BUT JUST -- I GUESS I WOULD JUST SAY THAT
9 UP UNTIL THIS WEEK, IF WE WERE TO ASSUME THAT A
10 TEAM WOULD HAVE BEEN AROUND -- AVAILABLE THE
11 BEGINNING OF JULY, NOW IT LOOKS LIKE MAYBE THE
12 BEGINNING OF SEPTEMBER, THE DATES REALLY -- IT'S
13 JULY, AUGUST, SEPTEMBER, OCTOBER WHICH INVOLVES ALL
14 THE DISCOVERY, REVIEWING IT, COORDINATING IT, THEN
15 WITH OUR EXPERTS AND GETTING EXPERT REPORTS AND
16 EXPERT EVALUATIONS. THE 120 DAY SCHEDULE IS -- WE
17 ARE TRYING TO BE DILIGENT IN MOVING THINGS ALONG.

18 THE COURT: I DON'T EXPECT COUNSEL TO
19 PERFORM MIRACLES, BUT I EXPECT COUNSEL TO MOVE
20 ALONG QUICKLY, BUT I DON'T EXPECT YOU TO PERFORM
21 MIRACLES.

22 BUT I WANT TO MAKE SURE THAT THE
23 ASSUMPTIONS THAT UNDERLIE THE SCHEDULE ARE
24 TRANSPARENT. BECAUSE FRANKLY WHEN THE PUBLIC LOOKS
25 AT THIS AND THEY SAY, WELL, WHY AREN'T THERE ANY

1 EXECUTIONS? ALL THEY KNOW IS THAT IT'S TAKING FIVE
2 YEARS TO GET TO CLOSURE IN THIS CASE AND IT'S NOT
3 EASY TO EXPLAIN WELL, THREE AND A HALF YEARS OF
4 THAT IS THE ADMINISTRATIVE APPEAL AND SO FORTH.

5 IF WHAT YOU'RE SAYING IS THE STATE IS
6 SIMPLY NOT READY TO PROCEED UNTIL IT HAS AN
7 EXECUTION TEAM AND WE CAN'T DETERMINE WHETHER THE
8 NEW REGS PASS MUSTER UNTIL THE TEAM IS IN PLACE AND
9 WE SEE HOW THEY ARE GOING TO BE APPLIED, THEN SO BE
10 IT, AT LEAST EVERYBODY IS CLEAR ABOUT THAT,
11 EVERYBODY AGREES ABOUT THAT, THERE ISN'T ANY
12 CONFUSION ABOUT THAT.

13 ANYTHING ON BEHALF OF PNS?

14 MR. STREETER: YOUR HONOR, THANK YOU.

15 I WOULD LIKE TO MAKE CLEAR THAT WE WERE
16 INVOLVED IN THE PREPARATION OF THE STIPULATION, TO
17 THE DEGREE THERE'S ANY UNCERTAINTY ABOUT THAT, WE
18 HAVE BEEN PART OF THAT PROCESS AND HAVE SIGNED OFF
19 ON IT.

20 TO THE EXTENT THE COURT IS SATISFIED WITH
21 IT, THEN WE ARE OKAY --

22 THE COURT: RIGHT.

23 I HAVE NO REASON TO BELIEVE THAT ANYBODY
24 WAS DRAGGING THEIR FEET OR BEING ANYTHING LESS THAN
25 DILIGENT, I SIMPLY WANTED THE FACTUAL BASIS OF THE

1 STIPULATION TO BE ON THE RECORD, AND IT WAS NOT
2 CLEAR TO ME FROM THE MATERIALS YOU SUBMITTED.

3 ANYTHING, MR. STEINKEN?

4 MR. SENIOR: I ALSO JUST WANTED TO ADD AS
5 TO PNS IS THEY WERE VERY INVOLVED IN THE
6 PREPARATION OF THE STIPULATION ALL THE WAY ALONG.
7 AND THEN AS IT CONTINUED TO GET EDITED AND REVISED,
8 SOME VERY SPECIFIC ISSUES WITH RESPECT TO PNS
9 BECAME UNNECESSARY TO BE IN THERE.

10 ALSO, THEY DISAPPEARED BY NAME IN THERE
11 BUT THEY WERE VERY MUCH INVOLVED AND PARTICIPATED
12 IN THE STIPULATIONS.

13 THE COURT: THANK YOU.

14 I THINK YOU'VE ADDRESSED THE QUESTION
15 THAT I HAD AND THAT WAS THE MAIN REASON I CONVENE
16 THIS HEARING.

17 THE OTHER THING I DID WANT TO ASK YOU
18 ABOUT SINCE YOU WERE ALL HERE IS WHETHER ANY OF THE
19 PARTIES EXPECT THAT THE ISSUE CONCERNING THE PURITY
20 OR LEGALITY OF THE THIOPENTAL IS LIKELY TO ARISE IN
21 THIS CASE.

22 I THINK THAT'S AN ISSUE OF STATE LAW BUT
23 I DON'T KNOW WHETHER THAT'S SOMETHING THE COURT
24 OUGHT TO ANTICIPATE OR WHETHER IT'S FACTORED INTO
25 THE SCHEDULING AT ALL.

1 MR. GRELE: YOUR HONOR, THIS IS
2 JOHN GRELE ON BEHALF OF MR. MORALES AND MR. BROWN.

3 I THINK WHAT WE ARE GOING TO DO IS SEE
4 WHAT WE CAN FIND OUT ABOUT THAT. IT OBVIOUSLY
5 AROSE AFTER WE FILED OUR LATEST AMENDED COMPLAINT.

6 I KNOW THE STATE HAS RELEASED SOME
7 INFORMATION ABOUT THE DRUGS AND WE ARE GOING TO
8 HOPEFULLY FIND OUT MORE ABOUT THEM IN THE PROCESS
9 TO SEE IF IT DOES AFFECT OUR LITIGATION AT ALL.

10 THE COURT: OKAY.

11 BUT AT THIS POINT THERE'S NOTHING BEFORE
12 THE COURT AND YOU WILL THE LET ME KNOW IF THERE'S
13 GOING TO BE.

14 MR. STREETER: YOUR HONOR, FROM THE PNS
15 PERSPECTIVE, THE WHOLE QUESTION OF THE EFFECT OF
16 THE DRUGS IS SOMETHING THAT EXPERTS ARE GOING TO
17 HAVE TO ADDRESS AND WE HAVEN'T GOTTEN TO THAT STAGE
18 IN THE DISCOVERY YET.

19 THE COURT: RIGHT.

20 I SUSPECT THAT WILL BE ONE OF THE ISSUES
21 THAT WILL BE ACCEPTED FROM THE CROSS MOTION, BUT WE
22 WILL FIND OUT.

23 OKAY. GOOD. THANK YOU.

24 SORRY TO MAKE YOU ALL COME DOWN ON A
25 FRIDAY AFTERNOON, BUT I FEEL BETTER ABOUT IT NOW.

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MR. SENIOR: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS
MATTER WERE CONCLUDED.)