

\*\*E-filed 2/21/06\*\*

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8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**  
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12 Michael Angelo MORALES,  
13 **Plaintiff,**

14 v.

15 Roderick Q. HICKMAN, Secretary of the  
16 California Department of Corrections and  
17 Rehabilitation; Steven W. Ornoski, Acting Warden  
18 of San Quentin State Prison; and Does 1-50,  
19 **Defendants.**

Case Number C 06 219 JF  
Case Number C 06 926 JF RS

DEATH-PENALTY CASE

ORDER ON DEFENDANT'S  
MOTION TO PROCEED WITH  
EXECUTION UNDER  
ALTERNATIVE CONDITION TO  
ORDER DENYING PRELIMINARY  
INJUNCTION

[Docket No. 73]

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22 In its order of February 14, 2006, denying conditionally Plaintiff's motion for a  
23 preliminary injunction, the Court allowed Plaintiff's execution to proceed subject to Defendants'  
24 agreement to one of two conditions. The first alternative permitted Defendants to execute  
25 Plaintiff using only sodium thiopental or another barbiturate or combination of barbiturates. The  
26 second alternative required Defendants to ensure, through verification by persons with  
27 experience and training in general anesthesia, that Plaintiff would be and would remain  
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1 unconscious at all times following the administration of sodium thiopental. Defendants agreed to  
2 the second alternative. Earlier today, as the execution was about to commence, the two  
3 anesthesiologists designated by Defendants pursuant to this Court's remedial order of February  
4 16, 2006, declined to participate in Plaintiff's execution because of ethical concerns arising from  
5 their understanding of certain language in the opinion of the United States Court of Appeals for  
6 the Ninth Circuit that affirmed this Court's orders of February 14 and February 16, 2006. As a  
7 result of this action by the anesthesiologists, Plaintiff's execution did not go forward as  
8 scheduled. Defendants have rescheduled the execution for 7:30 p.m. this evening and now seek  
9 approval from the Court to proceed with the first alternative.

10 Plaintiff opposes Defendants' motion, arguing among other things that executing him  
11 using only sodium thiopental without at the same time addressing issues arising from the manner  
12 in which that drug is administered by Defendants still would subject him to an undue risk of an  
13 Eighth Amendment violation. This morning, the Court heard approximately one hour of  
14 telephonic argument; it also has considered Plaintiff's written response to Defendants' motion  
15 and the fifth declaration of Plaintiff's medical expert, Dr. Mark Heath. For the reasons set forth  
16 below, the motion will be granted, subject to Defendants' strict compliance with the conditions  
17 set forth herein.

18 It is undisputed that five grams of sodium thiopental, properly administered, is a fatal  
19 dose. It also is undisputed that sodium thiopental does not cause pain; in fact, as a barbiturate, it  
20 anesthetizes the person into whom it is injected. An insufficient dose, however, has the potential  
21 to cause irreversible brain damage while not causing death. The only relevant factual dispute  
22 with respect to the present motion is whether there is a realistic possibility that the sodium  
23 thiopental injected into Plaintiff will not be properly administered.

24 Plaintiff points out that recurring problems with the manner in which sodium thiopental is  
25 administered pursuant to Protocol No. 770 are suggested by the execution logs cited by the Court  
26 in its order of February 14, 2006. While he does not concede that there is any basis upon which  
27 the Court should allow his execution to proceed today, he is emphatic in his insistence that it  
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1 must not proceed using the same procedures that the Court itself has found to be problematic. He  
2 urges the Court to postpone the execution so that an appropriate protocol for executing him using  
3 only sodium thiopental can be developed and thoroughly vetted.

4 Both parties' medical experts agree that there is no doubt that direct intravenous injection  
5 of five grams of sodium thiopental by a trained individual, such as a nurse or other medical  
6 professional licensed by the State of California, will be fatal virtually one hundred percent of the  
7 time. While Plaintiff objects categorically to any further deviations from Protocol No. 770  
8 without discovery and an evidentiary hearing, he acknowledges that there is no medical reason to  
9 believe that direct injection poses any risk to him, of Eighth Amendment significance or  
10 otherwise, as long as the person performing the injection has proper medical training.

11 Defendants object to direct injection, both because they believe that the current protocol is  
12 adequate and because having a person in the execution chamber is contrary to departmental  
13 policy. The Court notes, however, that Defendants agreed to have one of the anesthesiologists in  
14 the execution chamber.

15 Despite the many twists and turns that have brought it to this point, including the apparent  
16 disconnect between the expectations articulated in the orders of this Court and the Court of  
17 Appeals and the expectations of the anesthesiologists retained by Defendants, the Court  
18 nonetheless recognizes and respects the importance to the State of proceeding with the execution.  
19 However, due process requires that to permit it to do so under these circumstances, Defendants'  
20 obligations be set forth in a way that leaves no room for reasonable doubt. Accordingly, while  
21 Defendants may proceed with the execution this evening using only sodium thiopental, they may  
22 do so only if the sodium thiopental is injected in the execution chamber directly into the  
23 intravenous cannula by a person or persons licensed by the State of California to inject  
24 medications intravenously. The dosage used shall be at least five grams of sodium thiopental to  
25 be followed by a 20 cc saline flush as provided in Protocol No. 770. The persons may wear  
26 appropriate clothing to protect their anonymity. Based upon the evidence in the record, the Court  
27 has no question that such a method is safe, effective and fully consistent with the its order of  
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1 February 14, 2006.

2 IT IS SO ORDERED.

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4 DATED: February 21, 2006



JEREMY FOGEL  
United States District Judge

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