

E-filed 2/14/06

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

Michael Angelo MORALES,

Plaintiff,

v.

Roderick Q. HICKMAN, Secretary of the California Department of Corrections and Rehabilitation; Steven W. Ornoski, Acting Warden of San Quentin State Prison; and Does 1-50,

Defendants.

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

DEATH-PENALTY CASE

ORDER DENYING
CONDITIONALLY PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION

[Docket No. 12]

Plaintiff Michael Angelo Morales is a condemned inmate at California's San Quentin State Prison. He is scheduled to be executed at 12:01 a.m. on February 21, 2006. The present action challenges the manner in which California's lethal-injection protocol is administered. In his amended complaint, Plaintiff contends that the way in which the protocol is carried out creates an undue risk of causing him excessive pain as he is being executed, thereby violating the Eighth Amendment's command that "cruel and unusual punishments [not be] inflicted." U.S. Const. amend. VIII.

Plaintiff seeks a preliminary injunction to stay his execution so that the Court may conduct a full evidentiary hearing to consider his claims. Defendants Roderick Q. Hickman, Secretary of the California Department of Corrections and Rehabilitation, and Steven W.

1 Ornoski, Acting Warden of San Quentin State Prison, oppose the motion. The Court has read the
2 moving and responding papers and has considered the oral arguments of counsel presented on
3 January 26 and February 9, 2006. The Court also has considered the parties' responses to its
4 request for supplemental briefing dated February 13, 2006. The Court has jurisdiction pursuant
5 to 42 U.S.C. § 1983 (2006). *Beardslee v. Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005).
6 For the reasons set forth below, Plaintiff's motion will be denied, subject to certain conditions
7 concerning the manner in which the execution is to be carried out.

8 I

9 The Eighth Amendment prohibits punishments that are "incompatible with the evolving
10 standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S.
11 97, 102 (1976) (internal quotation marks and citations omitted). Executions that "involve the
12 unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), or that
13 "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), are not
14 permitted. When analyzing a particular method of execution or the implementation thereof, it is
15 appropriate to focus "on the objective evidence of the pain involved." *Fierro v. Gomez*, 77 F.3d
16 301, 306 (9th Cir. 1996) (citing *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994)), *vacated on*
17 *other grounds*, 519 U.S. 918 (1996). In this case, the Court must determine whether Plaintiff "is
18 subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by
19 lethal injection under California's protocol must be restrained." *Cooper v. Rimmer*, 379 F.3d
20 1029, 1033 (9th Cir. 2004).

21 In California, unless a condemned inmate affirmatively selects to be executed by lethal
22 gas, executions are performed by lethal injection. Cal. Penal Code § 3604 (West 2006).
23 Defendants have developed California's lethal-injection protocol¹ to implement this statutory
24 directive. *See id.* at § 3604(a) (lethal injection to be administered "by standards established

25
26 ¹Defendants have developed two versions of the protocol: a confidential version labeled "San
27 Quentin Institution Procedure No. 770" and a redacted, publicly available version labeled "San Quentin
28 Operational Procedure No. 770." During the course of this litigation, the Court reviewed the confidential
version *in camera* and ordered Defendants to make it available to Plaintiff's counsel with certain
redactions related to prison security and subject to a protective order. There are potentially significant
differences between the two versions.

1 under the direction of the Department of Corrections”).² The protocol calls for the injection of a
 2 sequence of three drugs into the person being executed: five grams of sodium thiopental, a
 3 barbiturate sedative, to induce unconsciousness; 50 or 100 milligrams of pancuronium bromide, a
 4 neuromuscular blocking agent, to induce paralysis; and 50 or 100 milliequivalents of potassium
 5 chloride, to induce cardiac arrest.³ Significantly, each drug is given in a dosage that is lethal in
 6 and of itself.

7 In his amended complaint, Plaintiff contends that these drugs are administered in such a
 8 way that there is an undue risk that he will be conscious when the pancuronium bromide and the
 9 potassium chloride are injected. Defendants agree with Plaintiff that a person injected with either
 10 of these two drugs while conscious would experience excruciating pain; however, they assert that
 11 the dosage of sodium thiopental is more than sufficient to insure that Plaintiff will be
 12 unconscious prior to their administration.

13 A significant number of media reports have described this action as an attack on the
 14 constitutionality of lethal injection. *See, e.g., Lethal Injection of Murderer-Rapist Could Be*

15
 16 ²The Department of Corrections was reorganized into the Department of Corrections and
 Rehabilitation on July 1, 2005.

17
 18 ³The lethal-injection protocol is not entirely clear as to which dosages of pancuronium bromide
 and potassium chloride are used. The protocol provides for the preparation of two syringes of 50
 milligrams each of pancuronium bromide (which is also known as Pavulon). It then instructs:

19 The “NS” syringe shall be removed and one of the #2 syringes (Pavulon)
 20 shall be inserted. The entire contents shall be injected with slow, even
 pressure on the syringe plunger.

21 CAUTION: If all of the Sodium Pentothal has not been flushed from the
 22 line, there is a chance of flocculation forming when coming in contact
 with the Pavulon, which will block the flow of fluid through the
 Angiocath. If this should happen, shift over to the contingency line
 23 running to the right arm. When the contents of the first #2 syringe has
 [sic] been injected, repeat with the second #2 syringe.

24 San Quentin Operational Procedure No. 770 § VI.E.4.d.5)(g)(5) (publicly available version). Regarding
 25 syringes of 50 milliequivalents of potassium chloride, the protocol directs, “The first #3 syringe (KCl)
 shall be inserted and the entire contents shall be injected. The second #3 syringe shall be repeated or
 26 until death has been pronounced by the physician [sic].” *Id.* at § VI.E.4.d.5)(g)(7). Additionally, the
 protocol and Defendants’ submissions are inconsistent as to whether the volume used to administer
 27 sodium thiopental is 20 or 50 cubic centimeters, *see id.* at § VI.E.4.d.5)(c)(6)(d); this difference would
 28 affect how much sodium thiopental actually gets to an inmate being executed due to the volume of fluid
 containing sodium thiopental that is retained in the intravenous line after the flush of 20 cc of saline, as a
 percent of the total dose of sodium thiopental that is intended to be administered.

1 *Blocked*, San Diego Union-Trib., Feb. 10, 2006, at A4 (“A federal judge said yesterday that he
2 might block a murderer and rapist’s Feb. [sic] 21 execution to provide enough time to determine
3 whether lethal injection is cruel and unusual punishment.”). As is apparent from the foregoing
4 discussion, these reports are in error. Rather, the discrete issues in the present action are whether
5 or not there is a reasonable possibility that Plaintiff will be conscious when he is injected with
6 pancuronium bromide or potassium chloride, and, if so, how the risk of such an occurrence may
7 be avoided.

8 II

9 The United States Court of Appeals for the Ninth Circuit has explained that a condemned
10 inmate seeking a stay of execution is

11 required to demonstrate (1) a strong likelihood of success on the
12 merits, (2) the possibility of irreparable injury to the plaintiff if
13 preliminary relief is not granted, (3) a balance of hardships
14 favoring the plaintiff, and (4) advancement of the public interest
15 (in certain cases). Alternatively, injunctive relief could be granted
16 if he demonstrated either a combination of probable success on the
17 merits and the possibility of irreparable injury or that serious
18 questions are raised and the balance of hardships tips sharply in his
19 favor. These two alternatives represent extremes of a single
20 continuum, rather than two separate tests. Thus, the greater the
21 relative hardship to the party seeking the preliminary injunction,
22 the less probability of success must be established by the party. In
23 cases where the public interest is involved, the district court must
24 also examine whether the public interest favors the plaintiff. [¶] In
25 capital cases, the Supreme Court has instructed that equity must
26 take into consideration the State’s strong interest in proceeding
27 with its judgment.

28 *Beardslee*, 395 F.3d at 1067-68 (internal quotation marks, citations, brackets and emphasis
omitted). As the United States Supreme Court has adjured,

before granting a stay [of execution], a district court must consider
not only the likelihood of success on the merits and the relative
harm to the parties, but also the extent to which the inmate has
delayed unnecessarily in bringing the claim. Given the State’s
significant interest in enforcing its criminal judgments, there is a
strong equitable presumption against the grant of a stay where a
claim could have been brought at such a time as to allow
consideration of the merits without requiring entry of a stay.

Nelson v. Campbell, 541 U.S. 637, 649-50 (2004) (citations omitted).

III

1
2 Two years ago, condemned inmate Kevin Cooper faced imminent execution at San
3 Quentin. Eight days before he was scheduled to be executed, Cooper filed an action in which he
4 challenged California's lethal-injection protocol on Eighth Amendment grounds. This Court
5 declined to stay the execution, finding that Cooper had delayed unduly in asserting his claims and
6 that he had done no more than raise the possibility that he might suffer unnecessary pain if errors
7 were made in the course of his execution. *Cooper v. Rimmer*, No. C 04 436 JF, 2004 WL
8 231325 (N.D. Cal. Feb. 6, 2004). The Ninth Circuit affirmed for the same reasons. *Cooper*, 379
9 F.3d 1029.⁴

10 Just over one year ago, another inmate under sentence of death, Donald J. Beardslee, filed
11 an action in this Court challenging the lethal-injection protocol shortly after the San Mateo
12 Superior Court set his execution date. Beardslee contended that the protocol violated both his
13 First Amendment right to freedom of speech and his Eighth Amendment right not to be subjected
14 to cruel and unusual punishment. While this Court recognized that Beardslee had been more
15 diligent than Cooper in that he filed his action thirty days before his scheduled execution and had
16 exhausted his administrative remedies prior to filing, it nonetheless concluded that Beardslee also
17 had delayed unduly in asserting his claims. On the merits, the Court concluded, "Based upon the
18 present record, a finding that there is a reasonable possibility that . . . errors will occur [during
19 Beardslee's execution] would not be supported by the evidence. [Beardslee's] action thus is
20 materially indistinguishable from *Cooper*." *Beardslee v. Woodford*, No. C 04 5381 JF, 2005 WL
21 40073 (N.D. Cal. Jan. 7, 2005).

22 The Ninth Circuit disagreed with this Court's determination that Beardslee's action was
23 untimely. *Beardslee*, 395 F.3d at 1069-70. The appellate court noted that "the precise execution
24

25 ⁴In a separate habeas corpus proceeding originally brought before the Ninth Circuit, that court
26 granted Cooper a stay of execution to permit him to return to the United States District Court for the
27 Southern District of California to pursue his claim that he is innocent of the crimes of which he was
28 convicted and for which he was sentenced to death. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004)
(en banc). This Court subsequently dismissed without prejudice Cooper's challenge to the lethal-
injection protocol in light of Cooper's failure to exhaust his administrative remedies. *Cooper v.*
Woodford, No. C 04 436 JF (N.D. Cal. Oct. 12, 2004).

1 protocol is subject to alteration until the time of execution” and it found that “by regulation the
2 California Department of Corrections does not permit challenges to anticipated actions.”⁵ *Id.* at
3 1069. *Beardslee* thus suggests that in California, a condemned inmate’s challenge to the lethal-
4 injection protocol may not become ripe for judicial review until the inmate’s execution is
5 imminent. *See id.* at 1069 n.5; *but cf. id.* at 1069-70 n.6 (“we have not resolved the question of
6 when challenges to execution methods are ripe”). At the very least, unlike Cooper, “Beardslee
7 pursued his claims aggressively as soon as he viewed them as ripe.” *Id.* at 1069.

8 Although it concluded that Beardslee’s challenge was timely, the Ninth Circuit affirmed
9 this Court’s decision on the merits, holding that “we cannot say, given our deferential standard of
10 review, that the district court abused its discretion in denying [a] stay of execution.” *Id.* at 1070.
11 In doing so, however, it noted that

12 the California execution logs of William Bonin, Keith Williams,
13 Jaturun Siripongs, and Manuel Babbit[t] . . . contain indications
14 that there may have been problems associated with the
15 administration of the chemicals that may have resulted in the
16 prisoners being conscious during portions of the executions. This
17 evidence, coupled with the opinion tendered by Beardslee’s expert,
18 raises extremely troubling questions about the protocol.

19 *Id.* at 1075.

20 In the present action, Plaintiff has been even more diligent than Beardslee: he filed his
21 challenge to the lethal-injection protocol shortly before the Ventura Superior Court scheduled his
22 execution—thirty-nine days before the execution date that court ultimately set.⁶ Because in light
23 of *Beardslee*, Plaintiff is not guilty of undue delay in bringing his claim, there is no presumption
24 against the grant of a stay due to delay, much less the “strong equitable presumption” identified
25 by the Supreme Court in *Nelson*, 541 U.S. at 650.⁷

26 ⁵The regulation reads in relevant part, “An appeal may be rejected for any of the following
27 reasons: . . . (3) The appeal concerns an anticipated action or decision.” Cal. Code Regs. tit. 15, §
28 3084.3(c) (2006).

⁶It also appears from the face of his amended complaint that Plaintiff has exhausted his
administrative remedies.

⁷This conclusion is buttressed by the Supreme Court’s recent denial, by a vote of 6-3, of an
application to vacate a stay of execution in *Crawford v. Taylor*, 546 U.S. ___, No. 05A705 (Feb. 1,

IV

1
2 Plaintiff's diligence in filing the present action has made it possible for this Court to
3 proceed in a somewhat more orderly fashion than otherwise would have been possible. At the
4 initial hearing on January 26, 2006, the Court announced that it would construe Plaintiff's
5 application for a temporary restraining order as it would a motion for a preliminary injunction,
6 ordered supplemental briefing on Plaintiff's motion to expedite discovery as well as his motion
7 for a preliminary injunction, and scheduled oral argument on the motion for a preliminary
8 injunction. On February 1, 2006, the Court issued an order granting in part Plaintiff's motion for
9 expedited discovery; the discovery granted was completed the following day.⁸ The Court heard
10 argument on the motion for a preliminary injunction on February 9, 2006, and requested
11 additional supplemental briefing by an order dated February 13, 2006.⁹ As a result of this
12 procedural history, the record in the present action is substantially more developed than the
13 record in *Cooper* or *Beardslee*.

14 Through their involvement in the *Cooper* and *Beardslee* cases, both this Court and the
15

16 2006). Like Plaintiff, Taylor filed an action pursuant to § 1983 in which he challenged his state's lethal-
17 injection protocol when his execution was imminent but an execution date had not yet been set. During
18 the course of the litigation, the United States District Court for the Western District of Missouri
19 scheduled an evidentiary hearing for February 2006. The Missouri Supreme Court subsequently selected
20 February 1, 2006, for Taylor's execution date, and the district court issued a stay of execution. A panel
21 of the Eighth Circuit vacated the stay, 2-1, and remanded with instructions for the action to be reassigned
22 and for the new judge to hold an expedited evidentiary hearing. Following an abbreviated telephonic
23 hearing, the district court denied Taylor relief. The Eighth Circuit panel affirmed, again 2-1, but the en
24 banc court granted Taylor a stay by a vote of 9-1. As noted, the Supreme Court declined to vacate the
25 stay. For the same reasons that the present action is analogous to *Taylor*, it is distinguishable from other
26 recent cases in which the Supreme Court has allowed executions to go forward. *See, e.g., Neville v.*
27 *Livingston*, 546 U.S. ___, No. 05-9136 (Feb. 8, 2006); *Elizalde v. Livingston*, 546 U.S. ___, No. 05A696
28 (Jan. 31, 2006).

⁸The discovery granted was concerned primarily with the three executions that Defendants have
conducted since *Beardslee*—those of Beardslee himself on January 19, 2005; Stanley Tookie Williams
on December 13, 2005; and Clarence Ray Allen on January 17, 2006. In addition, as noted, much of the
confidential version of California's lethal-injection protocol was disclosed. Although not required to do
so by the discovery order, Defendants also voluntarily produced additional execution logs that previously
had not been made available.

⁹The additional briefing addresses whether it would be feasible for Plaintiff's execution to
proceed using only sodium thiopental or utilizing an independent means to insure that Plaintiff will be
unconscious before pancuronium bromide and potassium chloride are injected.

1 Ninth Circuit have acquired substantial familiarity with the legal and factual issues surrounding
2 lethal injection in California. In addition, many other courts have reviewed lethal-injection
3 protocols similar to California's. To date, no court has found either lethal injection in general or
4 a specific lethal-injection protocol in particular to be unconstitutional. *See, e.g., Bieghler v.*
5 *State*, 839 N.E. 691, 694-96 (Ind. Dec. 28, 2005); *Boyd v. Beck*, ___ F. Supp. 2d ___, No. 5:05-
6 CT-774-D, 2005 WL 3289333 (E.D.N.C. Nov. 29, 2005); *Abdur'Rahman v. Bredesen*, ___
7 S.W.3d ___, No. M2003-01767-SC-R11-CV, 2005 WL 2615801 (Tenn. Oct. 17, 2005); *Aldrich*
8 *v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (lethal injection in Texas); *Reid v. Johnson*, 333 F.
9 Supp. 2d 543 (E.D. Va. 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (lethal injection
10 in Texas); *People v. Snow*, 65 P.3d 749, 800-01 (Cal. 2003); *Sims v. State*, 754 So.2d 657 (Fla.
11 2000); *State v. Webb*, 750 A.2d 448, 453-57 (Conn. 2000); *LaGrand v. Stewart*, 133 F.3d 1253,
12 1265 (9th Cir. 1998) (lethal injection in Arizona); *but cf. Rutherford v. Crosby*, 546 U.S. ___,
13 No. 05-8795 (Jan. 31, 2006) (granting stay of execution pending disposition of cert. pet.); *Hill v.*
14 *Crosby*, 546 U.S. ___, No. 05-8794 (Jan. 25, 2006) (granting stay of execution & granting cert.);
15 *Anderson v. Evans*, No. CIV-05-0825-F, 2006 WL 83093, at *3-*4 (W.D. Okla. Jan. 11, 2006)
16 (denying mot. to dismiss 8th amend. challenge to lethal-injection protocol). At the same time, it
17 should be noted that the record now before this Court, which includes both additional expert
18 declarations and detailed logs from multiple executions in California, contains evidence of a kind
19 that was not presented in these earlier cases. *See, e.g., Reid*, 333 F. Supp. 2d at 548-49 (limiting
20 scope of review to "issues pertaining to the particular chemical combination . . . and their [sic]
21 probable affect [sic] on Reid" and excluding other evidence); *Webb*, 750 A.2d at 453-57
22 (resolving challenge in state where no lethal injections had been performed); *Bieghler*, 839
23 N.E.2d at 696; *Boyd*, 2005 WL 3289333, at *3.; *cf. Anderson*, 2006 WL 83093, at *3-*4
24 (discussing evidence proffered in complaint).

25 This Court and others have found persuasive the declarations of Defendants' medical
26 expert, Dr. Mark Dershwitz, to the effect that "over 99.999999999999% of the population would
27 be unconscious within sixty seconds from the start of the administration of [five grams of]
28 thiopental sodium" and that "this dose will cause virtually all persons to stop breathing within a

1 minute of drug administration. Therefore . . . virtually every person given five grams of
2 thiopental sodium will have stopped breathing prior to” the administration of the pancuronium
3 bromide. *Cooper*, 379 F.3d at 1032; *see also, e.g., Reid*, 333 F. Supp. 2d at 547 (discussing two
4 grams of sodium thiopental used in Virginia). In most if not all of the legal challenges to lethal
5 injection, condemned inmates have suggested various errors that could occur during the
6 administration of sodium thiopental, thereby rendering an inmate conscious when the
7 pancuronium bromide and potassium chloride are administered. However, “the risk of accident
8 cannot and need not be eliminated from the execution process in order to survive constitutional
9 review,” *Campbell*, 18 F.3d at 687, and the courts that have considered the issue to date have
10 found that “the likelihood of such an error occurring ‘is so remote as to be nonexistent,’”
11 *Beardslee*, 2005 WL 40073, at *3 (quoting *Reid*, 333 F. Supp.2d at 551).

12 Plaintiff does not dispute Dr. Dershwitz’s conclusions at the theoretical level, agreeing
13 that a person’s breathing and consciousness should cease within one minute of the beginning of
14 the administration of sodium thiopental. Instead, he contends that in actual practice in
15 California, for whatever reason, the sodium thiopental has not had its intended effect. He cites,
16 *inter alia*, the following evidence from the execution logs:

17 Jaturun Siripongs, executed February 9, 1999: The administration of sodium thiopental
18 began at 12:04 a.m. and the administration of pancuronium bromide began at 12:08 a.m.,
19 yet respirations¹⁰ did not cease until 12:09 a.m., four minutes after the administration of
20 sodium thiopental began and one minute after the administration of pancuronium bromide
21 began.

22 Manuel Babbitt, executed May 4, 1999: The administration of sodium thiopental began
23 at 12:28 a.m. and the administration of pancuronium bromide began at 12:31 a.m., yet
24 respirations did not cease until 12:33 a.m., five minutes after the administration of
25 sodium thiopental began and two minutes after the administration of pancuronium
26 bromide began. In addition, brief spasmodic movements were observed in the upper
27

28 ¹⁰“Respirations” is the term used by the employees of the Department of Corrections and
Rehabilitation who witnessed the executions and made entries in the execution logs.

1 chest at 12:32 a.m.¹¹

2 Darrell Keith Rich, executed March 15, 2000: The administration of sodium thiopental
3 began at 12:06 a.m. and the administration of pancuronium bromide began at 12:08 a.m.,
4 yet respirations did not cease until 12:08 a.m., when pancuronium bromide was injected,
5 two minutes after the administration of sodium thiopental began. Chest movements were
6 observed from 12:09 a.m. to 12:10 a.m.¹²

7 Stephen Wayne Anderson, executed January 29, 2002: The administration of sodium
8 thiopental began at 12:17 a.m. and the administration of pancuronium bromide began at
9 12:19 a.m., yet respirations did not cease until 12:22 a.m., five minutes after the
10 administration of sodium thiopental began and three minutes after the administration of
11 pancuronium bromide began.

12 Stanley Tookie Williams, executed December 13, 2005: The administration of sodium
13 thiopental began at 12:22 a.m., the administration of pancuronium bromide began at
14 12:28 a.m., and the administration of potassium chloride began at 12:32 a.m. or 12:34
15 a.m., yet respirations did not cease until either 12:28 a.m. or 12:34 a.m.—that is, either
16 six or twelve minutes after the administration of sodium thiopental began, either when or
17 six minutes after the administration of pancuronium bromide began, and either four
18 minutes before or when the administration of potassium chloride began.¹³

19
20 _____
21 ¹¹Plaintiff's medical expert, Dr. Mark Heath, notes that Babbitt maintained a steady heart rate of
22 95 or 96 beats per minute for seven minutes after he was injected with sodium thiopental. Dr. Heath
23 states that this fact raises concerns about whether Babbitt was properly sedated.

24 ¹²According to Dr. Heath, this evidence is consistent with a conscious attempt to fight the
25 paralytic effect of the pancuronium bromide rather than with unconsciousness due to the successful
26 administration of the sodium thiopental, particularly in light of Rich's apparently iatrogenic rapid heart
27 rate of 110 beats per minute as the chest movements were occurring. Rich's heart rate was 130 beats per
28 minute when the administration of potassium chloride began.

29 ¹³Defendants' records are inconsistent in this regard: the formal execution log suggests that
30 Williams stopped breathing at 12:28 a.m. and indicates that potassium chloride was injected at 12:32 a.m.
31 whereas the execution team's log states that Williams stopped breathing at 12:34 a.m. when the potassium
32 chloride was injected. It appears that the formal log has been altered without any indication as to who
33 made the alteration. Similarly to Rich, Williams apparently experienced an iatrogenic rapid heart rate of
34 115 beats per minute when he was injected with pancuronium bromide.

1 Clarence Ray Allen, executed January 17, 2006: The administration of sodium thiopental
2 began at 12:18 a.m., yet respirations did not cease until 12:27 a.m., when pancuronium
3 bromide was injected, nine minutes after the administration of sodium thiopental began.

4 In a new declaration filed in the present action on February 6, 2006, Dr. Dershwitz opines
5 that the “respirations” reported in the execution logs may be not be respirations at all,
6 hypothesizing that they are no more than “chest wall movements.” However, he proposes this
7 hypothesis with considerably less certainty than was evident in his discussion of the
8 pharmacokinetics and pharmacodynamics of sodium thiopental, which are his principal areas of
9 expertise. *Cf. Beardslee*, 395 F.3d at 1075. While Dr. Dershwitz’s explanation may be correct,
10 evidence from eyewitnesses tending to show that many inmates continue to breathe long after
11 they should have ceased to do so cannot simply be disregarded on its face. In rejecting the
12 plaintiffs’ claims on the merits in *Cooper* and *Beardslee*, this Court relied on Dr. Dershwitz’s
13 opinion that the amount of sodium thiopental used in California’s lethal-injection protocol should
14 both stop breathing and cause unconsciousness within a minute after administration begins.
15 While there is no direct evidence that any condemned inmate actually was conscious when
16 pancuronium bromide was injected, evidence from Defendants’ own execution logs that the
17 inmates’ breathing may not have ceased as expected in at least six out of thirteen executions by
18 lethal injection in California raises at least some doubt as to whether the protocol actually is
19 functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence
20 that an inmate was conscious at some point after that drug was injected would be imperceptible
21 to anyone other than a person with training and experience in anesthesia.¹⁴

22 Other evidence in the present record raises additional concerns as to the manner in which
23 the drugs used in the lethal-injection protocol are administered. For example, it is unclear why
24 some inmates— including Clarence Ray Allen, who had a long history of coronary artery disease
25 and suffered a heart attack less than five months before he was executed, *see Allen v. Hickman*,
26 ___ F. Supp. 2d ___, No. C 05 5051 JSW, 2005 WL 3610666 (N.D. Cal. Dec. 15, 2005)—have

27 _____
28 ¹⁴See Dr. Heath’s declaration in response to the February 13 request for supplemental briefing, at
p. 9.

1 required second doses of potassium chloride to stop promptly the beating of their hearts.¹⁵ The
2 Court need not list all such anomalies here. It is sufficient for purposes of resolving the present
3 motion to note that Plaintiff has raised more substantial questions than his counterparts in
4 *Cooper and Beardslee*.

V

6 The fact that Plaintiff has raised such questions does not mean that he must be granted a
7 stay of execution. The State's "strong interest in proceeding with its judgment," *Gomez v. U.S.*
8 *Dist. Ct. N.D. Cal.*, 503 U.S. 653, 654 (1992), is no less important here than it was in *Cooper and*
9 *Beardslee*. It has been nearly twenty-five years since Plaintiff committed the crimes for which he
10 now faces the death penalty. Even if the Court were to hold an evidentiary hearing and Plaintiff
11 were to prevail, Plaintiff would remain under a sentence of death. Neither the death penalty nor
12 lethal injection as a means of execution would be abolished. At best, Plaintiff would be entitled
13 to injunctive relief requiring the State to modify its lethal-injection protocol to correct the flaws
14 Plaintiff has alleged. Presumably, at some point, Plaintiff would be executed.

15 Having given the matter much thought, the Court concludes that it is within its equitable
16 powers to fashion a remedy—set forth below as the order of the Court—that preserves both the
17 State's interest in proceeding with Plaintiff's execution and Plaintiff's constitutional right not to
18 be subject to an undue risk of extreme pain. Should Defendants decline to implement this
19 remedy, the Court will stay the execution and hold an evidentiary hearing within ninety days in
20 order to resolve the questions raised by the execution logs.

21 Whether or not Defendants implement the remedy and thus proceed to execute Plaintiff as
22 scheduled, the Court respectfully suggests that Defendants conduct a thorough review of the
23 lethal-injection protocol, including, *inter alia*, the manner in which the drugs are injected, the
24 means used to determine when the person being executed has lost consciousness, and the quality

26 ¹⁵At a press conference immediately following Allen's execution, Warden Ornoski stated that a
27 second dose of potassium chloride was required because "this guy's heart has been beating for 76 years,
28 Chron., Jan. 17, 2006, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/17/MNG37GOHD715.DTL>.

1 of contemporaneous records of executions, such as execution logs and electrocardiograms.
2 Given the number of condemned inmates on California's Death Row, the issues presented by this
3 case are likely to recur with considerable frequency. Because California's next execution is
4 unlikely to occur until the latter part of this year, the State presently is in a particularly good
5 position to address these issues and put them to rest. It is hoped that the remedy ordered by this
6 Federal Court in this case will be a one-time event; under the doctrines of comity and separation
7 of powers, the particulars of California's lethal-injection protocol are and should remain the
8 province of the State's executive branch. A proactive approach by Defendants would go a long
9 way toward maintaining judicial and public confidence in the integrity and effectiveness of the
10 protocol.

11 VI

12 As noted at the outset, the present action concerns the narrow question of whether the
13 evidence before the Court demonstrates that Defendants' administration of California's lethal-
14 injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is
15 executed. While the Court finds that Plaintiff has raised substantial questions in this regard, it
16 also concludes that those questions may be addressed effectively by means other than a stay of
17 execution, and that these alternative means would place a substantially lesser burden on the
18 State's strong interest in proceeding with its judgment.

19 Accordingly, and good cause therefor appearing, Plaintiff's motion for a preliminary
20 injunction is conditionally DENIED. Defendants may proceed with the execution scheduled for
21 February 21, 2006, provided that they do one of the following:

22 1) Certify in writing, by the close of business on Thursday, February 16, 2006, that they
23 will use only sodium thiopental or another barbiturate or combination of barbiturates in
24 Plaintiff's execution.¹⁶

25
26 ¹⁶In their response to the February 13 request for supplemental briefing, Defendants assert that
27 while sodium thiopental alone would be effective to cause Plaintiff's death, its use without the other two
28 drugs would cause the execution to be unduly prolonged. Plaintiff correctly points out that there is no
evidence in the record to support Defendants' claim that the execution could last as long as forty-five
minutes. The execution logs show that several executions pursuant to the current protocol took

1 2) Agree to independent verification, through direct observation and examination by a
 2 qualified individual or individuals, in a manner comparable to that normally used in medical
 3 settings where a combination of sedative and paralytic medications is administered, that Plaintiff
 4 in fact is unconscious before either pancuronium bromide or potassium chloride is injected.
 5 Because Plaintiff has raised a substantial question as to whether a person rendered unconscious
 6 by sodium thiopental might regain consciousness during the administration of pancuronium
 7 bromide or potassium chloride,¹⁷ the presence of such person(s) shall be continuous until Plaintiff
 8 is pronounced dead. With respect to this alternative:

9 (a) A “qualified individual” shall be a person with formal training and experience
 10 in the field of general anesthesia. The nature and extent of such training and experience
 11 shall be set forth in a declaration submitted to the Court on or before the close of business
 12 on Wednesday, February 15, 2006. Plaintiff may file any comments he may have with
 13 respect to the qualifications of such person(s) not later than 12:00 noon on Thursday,
 14 February 16, 2006. The Court will advise the parties as to whether it finds the person(s)
 15 to be qualified by the close of business on Thursday, February 16, 2006.

16 (b) The person(s) may be employees of the Department of Corrections and
 17 Rehabilitation.¹⁸

18 (c) If Defendants wish to keep the identity of such person(s) confidential, they

19 _____
 20 considerably longer than anticipated. While the Court has no wish to burden the participants in and
 21 witnesses to Plaintiff’s execution with additional stress in what obviously is a very difficult situation, it
 22 concludes that the questions surrounding the protocol justify an exception to the standard procedure in
 23 this one instance, particularly in lieu of a stay of execution. The Court’s purpose in permitting
 24 Defendants to use other barbiturates or a combination of barbiturates is to give Defendants flexibility
 with respect to the length of the execution; such an approach appears to be fully consistent both with the
 law—“the precise execution protocol is subject to alteration until the time of execution,” *Beardslee*, 395
 F.3d at 1069—and with the opinions of Plaintiff’s medical expert, Dr. Heath.

25 ¹⁷*See, inter alia*, the excerpts from the execution logs summarized above and Dr. Heath’s
 26 declaration filed in response to the February 13 request for supplemental briefing, at p. 9.

27 ¹⁸Defendants have indicated through declarations and in their offer of proof regarding lethal-
 28 injection procedures that medical doctors, registered nurses, and licensed vocational nurses employed by
 the Department have rôles at executions. At this time, the Court has no information as to the specific
 training and experience of these individuals.

1 may submit their declaration setting forth the qualifications of such person(s) with
2 personal identifiers redacted, except that the redacted information shall be provided to the
3 Court for *in camera* review by e-mail to g_o_kolombatovich@cand.uscourts.gov.

4 (d) During the execution, the person(s) may wear appropriate clothing to protect
5 their anonymity.

6 If Defendants reject both of the alternatives described above, a stay of execution will
7 issue without the necessity of further proceedings. In that event, the Court will hold an
8 evidentiary hearing on the merits of Plaintiff's claims on Tuesday, May 2, 2006, and Wednesday,
9 May 3, 2006. The Court will issue a briefing schedule and orders with respect to discovery
10 should that become necessary.

11 The Court will retain jurisdiction with respect to Defendants' implementation of the
12 remedy provided for herein. This order otherwise is intended to be final for purposes of appellate
13 review.

14 IT IS SO ORDERED.

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16 DATED: February 14, 2006

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18 JEREMY FOGEL
19 United States District Judge
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