



FILED
ALAMEDA COUNTY

MAY - 9 2017

By *[Signature]*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

MITCHELL SIMS, et al,

Plaintiffs,

v.

SCOTT KERNAN, AS SECRETARY OF THE
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, et
al,

Defendants.

No. RG16-838951

ORDER SUSTAINING DEMURRER TO
PETITION WITHOUT LEAVE TO AMEND.

Date: 5/4/17
Time: 9:00 a.m.
Dept.: 511

The demurrer of the California Department of Corrections and Rehabilitation ("CDCR") was scheduled to come on for hearing on May 4, 2017, in Department 511 of this Court, with the Honorable Kimberly Colwell presiding. Counsel appeared on behalf of Petitioners and on behalf of Respondents. After consideration of the points and authorities, as well as the oral argument of counsel, IT IS ORDERED: Demurrer of California Department of Corrections and Rehabilitation to Petition and Complaint is SUSTAINED WITHOUT LEAVE TO AMEND.

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1 PROCEDURE

2 The court issued an order on 3/30/17 that set forth the court's initial analysis and
3 requested supplemental briefing to address issues raised by the court. (*Bacon v. Southern Cal.*
4 *Edison Co.* (1997) 53 Cal.App.4th 854, 860; *Monarch Healthcare v. Superior Court* (2000) 78
5 Cal.App.4th 1282, 1286.) The court has considered the supplemental briefing.
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8 CLAIM PRECLUSION

9 To court is not persuaded that the CDCR's demurrer has merit to the extent it is based on
10 claim preclusion.

11 At all times since 1996, Penal Code 3604(a) has read: "The punishment of death shall be
12 inflicted by the administration of a lethal gas or by an intravenous injection of a substance or
13 substances in a lethal quantity sufficient to cause death, by standards established under the
14 direction of the Department of Corrections [and Rehabilitation]."

15
16 Before 2006, the CDCR's standards for conducting lethal injections were set forth in a
17 procedural manual known as Operational Procedure No. 0-770 (OP 770). In December of 2006,
18 a federal court ruled that the protocol prescribed by OP 770 violated the Eighth Amendment's
19 prohibition against cruel and unusual punishment. (*Morales v. Tilton* (N.D.Cal.2006) 465
20 F.Supp.2d 972.) In order to cure this deficiency, the CDCR substantially revised OP 770 on May
21 15, 2007.

22
23 In 2007, Sims and Morales filed a complaint contending that any procedure employed to
24 carry out the death penalty must be adopted through the regulatory approval process prescribed
25 by the California Administrative Procedure Act (APA), rather than as an agency operational
26

1 procedure. Sims and Morales prevailed. (*Morales v. California Dept. of Corrections &*
2 *Rehabilitation* (2008) 168 Cal.App.4th 729.)

3 The CDCR then undertook to promulgate a lethal injection protocol through the APA
4 rulemaking process. The regulations took effect on August 29, 2010.

5 On August 2, 2010, Sims filed a complaint asserting that the CDCR's regulations
6 regarding the manner in which the death penalty is carried out failed to substantially comply with
7 the APA. Sims and Morales prevailed in part. (*Sims v. Department of Corrections and*
8 *Rehabilitation* (2013) 216 Cal.App.4th 1059.)

9 The CDCR argues that the claims in this case are barred by claim preclusion because they
10 could have been raised in the 2006 litigation. The elements of claim preclusion are: (1) the
11 second lawsuit must involve the same cause of action as the first lawsuit; (2) there must have
12 been a final judgment on the merits in the prior litigation; and (3) the parties in the second
13 lawsuit must be the same (or in privity with) the parties to the first lawsuit. (*City of Oakland v.*
14 *Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.) A fourth
15 element is (4) if injustice would result or if the public interest requires that relitigation not be
16 foreclosed. (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 592.)
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19
20 FINAL JUDGMENT

21 The court finds that the First District's published decision in *Morales v. California Dept.*
22 *of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729, constitutes a final judgment on the
23 merits.
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1 IDENTITY OR COMMUNITY OF INTEREST.

2 The court finds that Sims and Morales were both parties to the 2007 lawsuit, so they have
3 an identity of interest and claim preclusion can apply against them.

4 The court finds that although the ACLU was not a party to the 2007 lawsuit, it has a
5 community of interest with Sims and Morales regarding their claims in the 2007 lawsuit. The
6 ACLU is a membership entity “dedicated to defending and promoting individual rights and
7 liberties.” (Ptn, para 13.) The concept of privity can be challenging when applied in the context
8 of an organization that seeks to advance public interests.
9

10 In *Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1511, the court states “This
11 requirement of identity of parties or privity is a requirement of due process of law. ... Due process
12 requires that the nonparty have had an identity or community of interest with, and adequate
13 representation by, the ... party in the first action.” Applying this standard, *Roberson* held that to
14 the extent that Roberson was challenging project approvals under CEQA based on the defective
15 notice, he, “a natural person who resides in the City of Rialto,” was in privity with Rialto
16 Citizens which is “a nonprofit mutual benefit corporation “formed for the purpose of promoting
17 social welfare through advocacy for and education regarding responsible and equitable
18 environmental development.”
19

20 In *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180
21 Cal.App.4th 210, the court held that although two public interest entities had a “common
22 interest” in the enforcement of CEQA for purposes of a privity determination, they were not in
23 privity because the for purposes of claim preclusion because one did not adequately represent the
24 common interest. In *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168
25 Cal.App.4th 675, 689-690, the court held that two organizations that alleged distinct causes of
26

1 action in the public interest under same anti-pollution statute and against same defendant were in
2 privity for purposes of claim preclusion.

3 The court finds that the ACLU has a shared community of interest with Sims and
4 Morales. In both the 2007 action and this action, the ACLU, Sims, and Morales are united in
5 their interest to ensure that the state complies with California law in developing the procedures
6 for imposing the death penalty.
7

8 The court finds that the ACLU was adequately represented by Sims and Morales in the
9 first action. Sims and Morales were represented at the trial and appellate levels by the law firm
10 of Munger, Tolles & Olson. (CDCR's RJN, Exh A.)) The court takes judicial notice that
11 Munger, Tolles & Olson is a large law firm that has regularly represented corporate and public
12 clients at the California Supreme Court and the California Court of Appeal. (E.g., *Kilby v. CVS*
13 *Pharmacy, Inc.* (2016) 63 Cal.4th 1; *De Vries v. Regents of the University of California* (2016) 6
14 Cal.App.5th 574.) By reputation, Munger, Tolles & Olson is similar in quality to Covington &
15 Burling, which currently represents Sims and Morales. In the 2007 case, Sims and Morales
16 pursued the case through judgment.
17

18
19 CAUSE OF ACTION.

20 The court finds that the cause of action in this case is the same as the cause of action in
21 the 2007 case. *Oakland*, 224 Cal.App.4th at 228-229, states the law as follows:

22 Whether two lawsuits are based on the same cause of action is determined in
23 California by reference to the primary right theory. ... Under this theory, a "cause
24 of action" is comprised of a primary right possessed by the plaintiff, a
25 corresponding duty imposed upon the defendant, and a wrong done by the
26 defendant which is a breach of such primary right and duty. ... The primary right
is the plaintiff's right to be free of the particular injury, regardless of the legal
theory on which liability is premised or the remedy which is sought. ... Thus, it is

1 the *harm suffered* that is the significant factor in defining the primary right at
2 issue. ...

3 Of course, we do not mean to imply that the City is forever bound by the
4 mandate of [a prior decision], regardless of current circumstances. That is clearly
5 not the law. Rather, as the First District has summarized: "The theory of estoppel
6 by judgment or *res judicata* ... *extends only to the facts in issue as they existed at*
7 *the time the judgment was rendered* and does not prevent a reexamination of the
8 same questions between the same parties where in the interim the facts have
9 changed or new facts have occurred which may alter the legal rights of the
10 parties. *When other facts* or conditions *intervene* before a second suit, furnishing
11 a new basis for the claims and defenses of the respective parties, *the issues are*
12 *no longer the same and the former judgment cannot be pleaded in bar of the*
13 *second action.*"

14 In both the 2007 complaint and the complaint in this case the petitioners assert that the state
15 failed to follow the required procedures in developing the procedures for imposing the death
16 penalty.

17 Although the cases are filed ten years apart, there has been no change in the relevant facts
18 or the relevant law. The 2007 complaint at para 16 recites the text of Penal Code 3604 and the
19 text is unchanged since 2007. The primary case cited by both sides, *Kugler v. Yocum* (1968) 69
20 Cal.A2d 371, is unchanged. Although the 2007 case did not raise the separation of powers
21 argument, Sims and Morales could have raised that issues in the earlier case, and therefore can be
22 precluded from raising it in this case. (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170,
23 1175.) The court has not been able to identify any reason why Sims and Morales could not have
24 raised the issue in the 2007 case.

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1 THE PUBLIC INTEREST

2 The court finds that the public interest requires that relitigation not be foreclosed. The
3 court's finding in this regard is not based on the seriousness of the death penalty and rests instead
4 on more generally applicable principles.

5 First, the separation of powers is a fundamental issue of state governance that affects the
6 people of the state, so the court is cautious about denying a judicial forum for the resolution of
7 the issue. "[C]ollateral estoppel will not be applied "to foreclose the relitigation of an issue of
8 law covering a public agency's ongoing obligation to administer a statute enacted for the public
9 benefit and affecting members of the public not before the court.'" (*Sacramento County*
10 *Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 452.) (See also
11 *People v. Union Pacific R. Co.* (2006) 141 Cal.App.4th 1228, 1245 ["This is a matter of
12 tremendous public significance, and the public interest demands that collateral estoppel be
13 rejected in these circumstances"].)

14 Second, this issue affects all persons who have been sentenced to death, so any other such
15 persons could assert the claim. (*Sacramento County Employees' Retirement System v. Superior*
16 *Court* (2011) 195 Cal.App.4th 440, 452 ["applying collateral estoppel ultimately would be futile,
17 because if we concluded the *Bee* were estopped, any newspaper or even any private citizen could
18 request the same information tomorrow and litigate SCERS's refusal to disclose it".])

19 Third, the prudential rule of judicial restraint counsels courts against rendering a decision
20 on constitutional grounds if a statutory basis for resolution exists. (*Elkins v. Superior Court*
21 (2007) 41 Cal.4th 1337, 1357.) (See also *Arden Carmichael, Inc. v. County of Sacramento*
22 (2000) 79 Cal.App.4th 1070, 1077, fn 4.) Therefore, even if Sims and Morales had raised the
23 constitutional separation of powers issue in the 2007 case, it is unlikely that the courts would
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1 have reached and resolved the constitutional issue given that they decided that case on the
2 statutory ground that the execution protocol did not comply with the APA.

3
4 AVAILABILITY OF WRIT RELIEF

5 To court is not persuaded that the CDCR's demurrer has merit to the extent it is based on
6 the inapplicability of CCP 1085.

7
8 The CDCR argues that the court cannot grant relief under CCP 1085 because CCP 1085
9 permits the court to order that a public agency perform a ministerial duty and in this case the
10 ACLU's claim is that CDCR is performing its statutory duty by developing a protocol.

11 Petitioners can seek a prohibitory writ under CCP 1085. "Prohibitory mandate is
12 typically invoked in two situations: where the official's conduct is in violation of a statutory
13 ministerial duty, and where the performance of a statutory ministerial duty would violate the
14 Constitution. The writ has issued to restrain an official from conducting an election in violation
15 of statute. ... Prohibitory mandate has also been used to restrain state officials from enforcing
16 ministerial statutory provisions found to be unconstitutional." (*Planned Parenthood Affiliates v.*
17 *Van de Kamp* (1986) 181 Cal.App.3d 245, 263.) The claim in this case is a proper request for
18 prohibitory mandate.
19

20
21 SEPARATION OF POWERS

22 The CDCR's demurrer based on whether petitioner states a claim based on separation of
23 powers has merit. This is an issue that can be resolved based on the statute and matters that are
24 subject to judicial notice. The demurer to the complaint is SUSTAINED WITHOUT LEAVE
25 TO AMEND.
26

1 Petitioners assert that Penal Code 3604(a) is an unconstitutional delegation of authority
2 because the legislature has (1) left the resolution of fundamental policy issues to others or (2)
3 failed to provide adequate direction for the implementation of the policy. (*Kasler v. Lockyer*
4 (2000) 23 Cal.4th 472, 491-492; *Samples v. Brown* (2007) 146 Cal.App.4th 787, 805.)
5 *People v. Wright* (1982) 30 Cal.3d 705, 712-713, states:

6
7 This doctrine rests upon the premise that the legislative body must itself
8 effectively resolve the truly fundamental issues. It cannot escape responsibility by
9 explicitly delegating that function to others or by failing to establish an effective
10 mechanism to assure the proper implementation of its policy decisions. ... The
11 doctrine prohibiting delegations of legislative power does not invalidate
12 reasonable grants of power to an administrative agency, when suitable safeguards
13 are established to guide the power's use and to protect against misuse. ... The
14 Legislature must make the fundamental policy determinations, but after declaring
15 the legislative goals and establishing a yardstick guiding the administrator, it may
16 authorize the administrator to adopt rules and regulations to promote the purposes
17 of the legislation and to carry it into effect. ... Moreover, standards for
18 administrative application of a statute need not be expressly set forth; they may be
19 implied by the statutory purpose.

20 The complaint must state a claim to a high level of certainty. "Before a court may declare an act
21 of the Legislature invalid because of due process or other constitutional conflict, 'such conflict
22 must be clear, positive, and unquestionable.'" (*Wilkinson v. Madera Community Hospital* (1983)
23 144 Cal.App.3d 436, 441, 442.) "[A]ll presumptions favor [a statute's] validity." (*Hess*
24 *Collection Winery v. Cal. Agr. Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1595-1596.)

25 Petitioners assert that Penal Code 3604 both left the resolution of fundamental policy issues to
26 the CDCR and failed to provide adequate direction to the CDCR.

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1 FUNDAMENTAL POLICY QUESTIONS

2 Petitioners assert that the legislature had an obligation to address what they describe as
3 the “fundamental policy questions” of pain, speed, reliability, and transparency.

4 Case law suggests that fundamental policy questions must be the foundational and that
5 the legislature can decide those questions at a fairly high level of abstraction. In *People v. Wright*
6 (1982) 30 Cal.3d 705, a criminal defendant argued that when the legislature adopted determinate
7 sentencing it unconstitutionally delegated to the Judicial Council the definition of aggravating
8 and mitigating circumstances. The Court held that the legislature had decided the fundamental
9 issues, stating, “Changing from the system of indeterminate sentences to determinate sentences
10 and fixing the alternative terms, the Legislature made the fundamental policy decision that terms
11 were to be fixed by choosing one of the alternatives on the basis of circumstances relating to the
12 crime and to the defendant.” Similarly, in *Wilkinson v. Madera Community Hospital* (1983) 144
13 Cal.App.3d 436, 442-443, the court held that the Legislature resolved a “fundamental issue” by
14 determining that a hospital could require every member of the medical staff to have professional
15 liability insurance as a condition of being on the medical staff and could bar noninsured doctors
16 from practicing in a hospital.
17

18
19 At the oral argument on 5/4/17, Petitioners argued that *Clean Air Constituency v.*
20 *California State Air Resources Bd.* (1974) 11 Cal.3d 801, provides useful guidance on what is a
21 “fundamental issue.” *Clean Air* concerned the NOx act, in which the Legislature stated that
22 because oxides of nitrogen are “dangerous substances” and declared its desire that “such devices
23 [be] installed on most of such passenger vehicles within the shortest time possible.” (11 Cal.3d
24 at 808.) The legislature delegated to the Air Resources Board (“ARB”) the responsibility for
25 establishing by regulation a schedule of installation. The NOx legislation also authorized the
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1 ARB to delay the latter requirement “for extraordinary and compelling reasons only.” (11 Cal.3d
2 at 806.) The ARB then used that authority to delay a NOx pollution control program for the
3 stated reason of conserving gasoline during the energy crisis.

4 The Supreme Court in *Clean Air* held that the ARB could not delay implementation of
5 the regulations due to economic concerns. The court held that the legislature had made the
6 “fundamental” policy decision that “that urgent action against automobile pollution was essential
7 for the health of California's residents” and “made clean air a higher priority than the concern for
8 fuel consumption, the problem of rising costs in transportation, or the economics of the
9 automobile industry.” (11 Cal.3d at 817.) The court reasoned that the ARB had the discretion to
10 delay the NOx program for reasons relating to the setting up of and enforcing an effective and
11 speedy program for the eradication of NOx emissions. The court stated. “With the primary goals
12 of the NOx legislation as its guide, the ARB could perhaps delay the program under Vehicle
13 Code section 4602 when, for example, devices cannot be installed because of a shortage of
14 materials or mechanics, when significant problems arise in the administration and enforcement of
15 the registration, certificate, and vehicle check requirements, or when the devices fail to control
16 emissions effectively.” (11 Cal.3d at 818.)

17
18 Turning to the issues in this case, Penal Code 3604(a) states:

19
20 The punishment of death shall be inflicted by the administration of a lethal gas or
21 by an intravenous injection of a substance or substances in a lethal quantity
22 sufficient to cause death, by standards established under the direction of the
23 Department of Corrections and Rehabilitation.

24 The court finds that in Penal Code 3600 et seq the legislature has resolved the
25 fundamental policy issues related to the death penalty. The legislature has decided:

- 26 1. Whether to have a death penalty. (Penal Code 15(1).)

- 1 2. The identity of the offenses where the death penalty may be applied. (E.g. Penal Code
2 37 [treason], Penal Code 190.1 [murder in first degree with special circumstances];
3 Penal Code 4500 [assault by life prisoner with deadly weapon].)
- 4 3. That a defendant subject to the death penalty is entitled to extra procedural
5 protections. (E.g., Penal Code 190.1, 190.4, 859, 987(d), 1254.)
- 6 4. That the death penalty will be inflicted by the administration of a lethal gas or by an
7 intravenous injection. (Penal Code 3604)

8
9
10 In the November 1972 election the voters affirmed the fundamental policy decision to
11 have a death penalty when they passed Proposition 17, which added California Constitution
12 Article I, section 27. This section affirmed the then existing statutes regarding the death penalty
13 and states that the death penalty is not a cruel or unusual punishment within the meaning of
14 California Constitution Article 1, Section 6.

15
16 In the November 2016 election the voters again affirmed the fundamental policy decision
17 to have a death penalty when they rejected Proposition 62, which would have replaced the death
18 penalty with a sentence of life without the possibility of parole, and passed Proposition 66, which
19 is designed to streamline post-conviction relief in death penalty cases. (Petition, para 25.)

20 The court is not persuaded that the pain, speed, and reliability of an execution are
21 “fundamental policy issues.” The legislature has decided that when a jury has found both that a
22 person has committed certain offenses and in a separate penalty phase that the death penalty is
23 appropriate for that person, then there is no reasonable possibility of rehabilitation and the state’s
24 objectives of deterrence and retribution support imposition of the death penalty. The legislature
25 has determined that the death penalty will be inflicted by the administration of a lethal gas or by
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1 an intravenous injection. These are the fundamental decisions of whether, for what offenses,
2 and how. The pain, speed, and reliability of the resulting execution do not rise to the level of
3 fundamental decisions.

4 This case is similar to *Clean Air*, where the legislature made the fundamental policy
5 decision to make clean air “a higher priority than the concern for fuel consumption, the problem
6 of rising costs in transportation, or the economics of the automobile industry.” (11 Cal.3d at
7 817.) That is similar to the fundamental policy decision that the state’s objectives of deterrence
8 and retribution have a higher priority than concerns such as potential rehabilitation, potentially
9 inconsistent application of the death penalty, and the possibility that the death penalty might be
10 imposed on innocent persons. In *Clean Air*, the court held that the legislature could delegate to
11 the ARB the responsibility to set up and enforce an effective and speedy program, and to delay
12 the implementation of the program for practical, non-policy, reasons. Similarly, the legislature
13 has delegated to the CDCR the responsibility to develop and implement an execution protocol.

14
15
16 The court is not persuaded that the transparency of an execution is a “fundamental policy
17 issue” that must be addressed by the CDCR under Penal Code 3604. Transparency concerns the
18 public’s ability to monitor the actions of public entities and the public’s access to public records
19 but transparency does not relate directly to the implementation of the death penalty. The Public
20 Records Act and related Constitutional provisions address the issue of transparency. (See
21 *American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55.)
22 Furthermore, to the extent that the transparency of an execution is a “fundamental policy issue,”
23 the legislature addressed that issue in Penal Code 3605 which expressly states that the warden of
24 the state prison where the execution is to take place (1) shall be present at the execution, (2) shall
25 invite the Attorney General, the members of the immediate family of the victim or victims of the
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1 defendant, and at least 12 reputable citizens, (3) shall permit the defendant to have two ministers
2 of the Gospel present, (4) shall permit the defendant to have up to five persons, relatives or
3 friends present, and (5) may have such peace officers or any other Department of Corrections
4 employee as the warden may think expedient present.

5
6
7 ADEQUATE DIRECTION

8 The court finds that in Penal Code 3600 et seq and in the Penal Code generally the
9 legislature has provided adequate direction for the implementation of the policy. Petitioners are
10 correct that the legislature gave little express direction to the CDCR on what factors to consider
11 and how to weigh those factors. That omission does not, however, support a claim that Penal
12 Code 3604 is unconstitutional.

13 First, the “standards for administrative application of a statute need not be expressly set
14 forth; they may be implied by the statutory purpose.” (*People v. Wright* (1982) 30 Cal.3d 705,
15 712–713.) Similarly, *Samples v. Brown* (2007) 146 Cal.App.4th 787, 805-806, states: “The
16 requisite legislative guidance need not take the form of express standards.” (See also *Birkenfeld*
17 *v. City of Berkeley* (1976) 17 Cal.3d 129, 168.) *Wilkinson v. Madera Community Hospital*
18 (1983) 144 Cal.App.3d 436, 441, notes that legislative history can reveal the purpose of a statute
19 in a separation of powers analysis.

20
21 The legislative history of Penal Code 3604 demonstrates that the standard for the
22 execution of the death penalty is compliance with the Eighth Amendment’s prohibition against
23 cruel and unusual punishment. In 1996, the legislature amended Penal Code 3604 to state that
24 the default method of execution is lethal injection. The purpose of the legislation was to ensure
25 that California law was not in violation of the Eighth Amendment’s prohibition against cruel and
26

1 unusual punishment. The Court takes judicial notice of the Bill Analysis for the Assembly Third
2 Reading of AB 2082 (Conroy) dated 3/15/96,¹ which states:

3 The Ninth Circuit Court of Appeals recently held that execution by lethal gas
4 constitutes cruel and unusual punishment and, thus, is violative of the Eighth
5 Amendment. The court based its decision on evidence concerning the severity of
6 pain experience by an inmate executed by lethal gas. In addition, the court found
7 that there is a substantial risk that inmates will suffer extreme pain for several
8 minutes. For these reasons, the court determined that execution by lethal gas is
9 unconstitutional. [See Fierro et al. v. Gomez, No. 94-16775 (9th Circuit, filed
10 February 21, 1996).]

11 ARGUMENTS IN SUPPORT: This bill to the current statute would bring the
12 state into conformity with the Gomez decision, supra, thus providing resolution in
13 this area of the law, regardless of the federal appellate destiny of the Gomez case.

14 ARGUMENTS IN OPPOSITION: None.

15 The Court also takes judicial notice of the Floor analysis of the Senate Rules Committee dated
16 1/18/96, which states:

17 ARGUMENTS IN SUPPORT: According to the author, current law states that
18 when an individual is sentenced to death for murder, the default method of
19 execution is the gas chamber. Recent court rulings have held that to be
20 unconstitutional so this bill will make lethal injection the default method of
21 execution.

22 The legislature history demonstrates that the legislature intended the CDCR to devise an
23 execution protocol that met the constitutional minimum standard and that the legislature did not
24 intend for the CDCR's execution protocol to meet any higher standard.

25 The adoption of Proposition 66 in 2016 also suggests that standard for the CDCR's
26 execution protocol was the constitutional minimum standard. Proposition 66 enacted Penal Code

¹ http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2051-2100/ab_2082_cfa_960315_174900_asm_floor.html

1 3406.1(c), which states: “The court which rendered the judgment of death has exclusive
2 jurisdiction to hear any claim by the condemned inmate that the method of execution is
3 *unconstitutional* or otherwise invalid.” (Emphasis added.) The reference to the constitutional
4 standard is express. The reference to the “or otherwise invalid” standard suggests that the
5 Proposition both did not recognize any specific non-constitutional standard while also not
6 foreclosing any non-constitutional challenge.
7

8 Penal Code 3406.1(c) also states: “If the use of a method of execution is enjoined by a
9 federal court, the Department of Corrections and Rehabilitation shall adopt, within 90 days, a
10 method that conforms to *federal requirements* as found by that court.” (Emphasis added.) The
11 reference to “federal requirements” suggests that the “method of execution” is subject to the
12 minimum federal constitutional standard.
13

14 The court presumes that when the legislature most recently amended Penal Code 3406 in
15 1996 it was aware of the case law that set out the then existing existing constitutional standard.
16 (*In Re Pedro T.* (1994) 8 Cal.4th 1041, 1046; *Busse v. United PanAm Financial Corp.* (2014) 222
17 Cal.App.4th 1028, 1038.)

18 *Estelle v. Gamble* (1976) 429 U.S. 97, set out the existing law in 1996. In *Estelle*, the
19 Supreme Court considered whether prison doctors and prison guards had acted with indifference
20 to a prisoner’s serious medical needs. The Court reviewed the history of the constitutional
21 prohibition against cruel and unusual punishment and found that the more recent cases held that
22 the Eighth Amendment proscribes more than physically barbarous punishments. The Court
23 stated: “The Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards,
24 humanity, and decency . . .,’ (citation), against which we must evaluate penal measures. Thus, we
25 have held repugnant to the Eighth Amendment punishments which are incompatible with ‘the
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1 evolving standards of decency that mark the progress of a maturing society,' (citations), or which
2 'involve the unnecessary and wanton infliction of pain,'." (*Estelle*, 429 U.S. at 102-103.) (See
3 also *In re Coca* (1978) 85 Cal.App.3d 493, 501-502.) The *Estelle* standard required the CDCR
4 to develop an execution protocol that was consistent with "concepts of dignity, civilized
5 standards, humanity, and decency." In addition, the *Estelle* standard implicitly required the
6 CDCR to periodically review its execution protocol in light of both "the evolving standards of
7 decency that mark the progress of a maturing society," and developments in execution
8 technology, which is relevant to whether any technology involves "the unnecessary ... infliction
9 of pain."

11 Petitioners note correctly that the Constitution merely places an outer limit on the risk and
12 degree of pain. (*Glossip v. Gross* (2015) 135 S.Ct. 2726, 2737.) Petitioners also note correctly
13 that well before that limit is reached there are a wide range of judgment calls that a legislature
14 can make about the pain, speed, reliability, and transparency of executions. (*Baze v. Rees* (2008)
15 553 U.S. 35, 51.) Petitioners have not, however, cited to any authority for the proposition that a
16 legislature that has made the fundamental decision to have a death penalty cannot set the standard
17 as the constitutional minimum and delegate to prison officials the task of developing a
18 constitutional execution protocol.

20 At the hearing on 5/4/17, Petitioners stressed that the development of an execution
21 protocol necessarily required decisions about whether the imposition of the death penalty would
22 involve no pain, mild pain, moderate pain, or just shy of severe pain. Petitioners observed that
23 the answer to that policy question will reflect fundamental policy decisions about the purpose of
24 punishment generally and the death penalty specifically. In *People v. Landry* (2106) 2 Cal.5th
25 523, 108, the California Supreme Court referenced *Kennedy v. Louisiana* (2008) 554 U.S. 407,
26

1 420, for the proposition that “punishment is justified under one or more of three principal
2 rationales: rehabilitation, deterrence, and retribution.” In *In re A.G.* (2011) 93 Cal.App.4th 791,
3 804, stated “While one objective of criminal punishment is the rehabilitation of the offender, the
4 “‘traditional aims’” of imprisonment are deterrence and retribution, as well as the isolation of
5 the offender from society.” As noted by Petitioners on 5/4/17, if the dominant purpose were
6 retribution, then a CDCR execution protocol could permit, or might be required to impose, an
7 elevated level of pain before death.
8

9 The legislature has, however, resolved the issue of whether the implementation of the
10 death penalty can permit, or is required to impose, an elevated level of pain before death. Penal
11 Code 15 states that punishments under the Penal Code are: “(1) Death; (2) Imprisonment; (3)
12 Fine; (4) Removal from office; or, (5) Disqualification to hold and enjoy any office of honor,
13 trust, or profit in this State.” Physical pain is not on the list. Penal Code 681 states “No person
14 can be punished for a public offense, except upon a legal conviction in a Court having
15 jurisdiction thereof.” The punishment of a death sentence therefore cannot exceed the legal
16 conviction imposing the death sentence. Penal Code 15 and Penal Code 681 reflect a legislative
17 determination that the punishment of “death” is death alone and is not death with an additional
18 punishment of unnecessary infliction of pain before death and is certainly death with an
19 intentionally elevated level of pain before death.
20

21 Petitioners reasonably argue that it is meaningless to find that the legislature intended that
22 the CDCR’s execution protocol was required only to meet the constitutional minimum because
23 the court always presumes that the legislature intended to enact constitutional legislation and the
24 court always endeavors to construe legislation so that it is constitutional. (*Professional*
25 *Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 575 [“the courts ...always
26

1 presume that the Legislature acts with integrity and with an honest purpose to keep within
2 constitutional restrictions and limitations”]; (*People v. Morera-Munoz* (2016) 5 Cal.App.5th 838,
3 846 [“[statutes] are to be so construed, if their language permits, as to render them valid and
4 constitutional rather than invalid and unconstitutional”].) This case law is, however, consistent
5 with a legislative direction that the CDCR prepare an execution protocol that meets a standard set
6 as the constitutional minimum.

7
8 Second, the required specificity of statutory direction is minimal. In *People v. Wright*
9 (1982) 30 Cal.3d 705, 712–713, the court found that the legislature provided sufficient direction
10 to the Judicial Council on what the legislature meant by aggravating an mitigating circumstances
11 in Penal Code 1170(b), which states only that the court may consider “statements in aggravation
12 or mitigation submitted by the prosecution, the defendant, or the victim.” *Wright* goes on to
13 state, “Similar broad delegations to public agencies enjoying the expertise to implement the
14 legislative policy have been upheld. ([*In re Marks* (1969) 71 Cal.2d 31, 52-53 [determination of
15 outpatient status for narcotic addicts]; *Southern Pac. Transportation Co. v. Public Utilities Com.*,
16 *supra*, 18 Cal.3d 308, 313 [public convenience and necessity].)”

17
18 The minimal requirement is exemplified by *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495,
19 507-511, where a city passed an ordinance that delegated to the Director of Development the
20 responsibility for determining whether signs should be approved. The court held that the City
21 made the fundamental policy decision to “require[] compatibility with surroundings before a sign
22 permit could be approved in order to promote and protect the public health, safety and welfare.”
23 (1 Cal.App.4th at 507.) The court then held that the City ordinance provided sufficient
24 direction, stating:
25
26

1 That the ordinance does not articulate a formula for determining compatibility
2 does not make it unconstitutional. Standards sufficient for administrative
3 application of a statute can be implied by the statutory purpose. ...

4 As we noted above, the council directed the promotion of the "public ... welfare"
5 by sign regulation using compatibility, among other considerations. This, in itself,
6 can be construed as a guideline (to the promotion of public welfare).

7 We cannot conclude that merely because there are no expressed "metes and
8 bounds" delineating what is or what is not compatible, the ordinance is rendered
9 infirm. While the legislative body cannot delegate its power to make a law, it can
10 delegate a power to determine some fact or state of things which the law is
11 designed to address.

12 Furthermore, it would be difficult at best to articulate standards for such an
13 abstract concept as aesthetics. By its nature, aesthetics is a vague term and any
14 interpretation would be somewhat subjective. ... Finally, it has been held by
15 several courts that a general welfare standard is a sufficient guideline to enable an
16 agency to act constitutionally. ...

17 California courts permit vague standards because they are sensitive to the need of
18 government in large urban areas to delegate broad discretionary power to
19 administrative bodies if the community's zoning business is to be done without
20 paralyzing the legislative process.

21 (1 Cal.App.4th at 509-510.) (See also *CEED v. California Coastal Zone Conservation Com.*

22 (1974) 43 Cal.App.3d 306, 325-327 [legislative direction was adequate when it stated that before
23 a permit may issue, the regional commission must find that the development will not have a
24 substantial adverse environmental or ecological effect and will be consistent with the policy and
25 objectives of the Act].) The statutory direction to develop a protocol that complies with the
26 Eighth Amendment is not very specific, but it is no less specific than legislative direction to
consider "public convenience and necessity" or "compatibility with the surroundings."

Third, the specificity of statutory direction is situational. In *Birkenfeld v. City of Berkeley*
(1976) 17 Cal.3d 129, 168, the court stated, "The rule that the statute must provide a yardstick to
define the powers of the executive or administrative officer is easy to state but rather hard to

1 apply. Probably the best that can be done is to state that the yardstick must be as definite as the
2 exigencies of the particular problem permit.” In *Wilkinson*, 144 Cal.App.3d at 444, the court
3 noted that “insurance premiums are constantly subject to change” and that as in *Birkenfeld v. City*
4 *of Berkeley* (1976) 17 Cal.3d 129, 168, the “‘exigencies’ of the particular situation prohibit the
5 Legislature from setting any particular [requirements].”

6
7 After the legislature has indicated that the CDCR was to develop an execution protocol to
8 comply with the United States Constitution, then the legislature could add little more. This is
9 not the usual situation where the legislature enacts a statute and the court’s function is to interpret
10 the intent of the legislature. This is the unusual situation where the legislature has adopted the
11 constitutional minimum standard, the legislature has directed the CDCR to establish a protocol
12 that meets that standard, and the United States Supreme Court defines the factors that go into that
13 standard. Given that the United States Supreme Court determines the constitutional standard, the
14 California legislature would be engaging in a useless act if it set out its predictions for the
15 constitutional standard.
16

17 Fourth, the legislature can rely on safeguards to take the place of standards. *Samples v.*
18 *Brown* (2007) 146 Cal.App.4th 787, 805-806, states: “our Supreme Court has advised that “
19 ‘[t]he need is usually not for standards but for safeguards.... [The] most perceptive courts are
20 motivated much more by the degree of protection against arbitrariness than by the doctrine about
21 standards” The legislative history to the 1996 amendment makes clear that the legislature
22 was relying on Eighth Amendment jurisprudence to provide the relevant safeguards.
23

24 Fifth, the legislature can give an executive branch department a general mandate to use its
25 expertise and power of regulation as it sees fit within broad parameters. In *Association of*
26 *California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, the court upheld the validity of a

1 regulation, stating, “That the Legislature entrusted to the Commissioner the application of these
2 and other statutory provisions to specific problems—problems the Legislature did not, and in
3 some cases could not, anticipate—is precisely why enactment of section 790.10 makes sense in
4 the broader statutory scheme. [Para] To conclude that these statutory schemes require the
5 Legislature to define in advance every problem it expects an agency to address is to suggest that
6 the Legislature had little need for agencies in the first place.” Similarly, in *Ralphs Grocery Co.*
7 *v. Reimel* (1968) 69 Cal.2d 172, 182-183, the Court distinguished between “specific statutory
8 mandates and general grants of power.” Regarding the former, the Court stated, “To the extent
9 that the Legislature considers a given problem and determines the best method of dealing with it,
10 it may specifically include its resolution of the matter in statutory law.” Regarding the latter, the
11 Court stated, “the Legislature gave the department a general mandate: to use its expertise and
12 power of continuous regulation as it sees fit to ‘promote orderly marketing and distribution.’”
13 The court found the latter form of regulation to be appropriate. Although neither *Association of*
14 *California Insurance Companies* nor *Ralphs* mentioned separation of powers, the analysis of the
15 limits of administrative rulemaking authority is the obverse of the separation of powers analysis.

16
17
18 Sixth, *Kasler v. Lockyer* (2000) 23 Cal.4th 472, draws on United States Supreme Court
19 jurisprudence and states that the separation of powers doctrine is concerned about “encroachment
20 and aggrandizement.” (*Kasler*, 23 Cal.4th at 493.) In this case, the legislature is not encroaching
21 on executive branch turf but rather is delegating to the executive branch.

22
23 Seventh, *Kasler* states that the separation of powers doctrine “not only guards against the
24 concentration of power in a single branch of government; it also protects one branch against the
25 overreaching of the others.” (*Kasler*, 23 Cal.4th at 498.) In this case, the legislature is imposing
26 responsibilities on the CDCR. There is, however, no indication that the responsibilities are

1 inappropriate or unduly burdensome. *Kasler* extensively discussed *Mistretta v. United States*
2 (1989) 488 US 361, where “the high court reviewed the constitutionality of the Sentencing
3 Reform Act, under which Congress delegated authority to the Sentencing Commission to
4 promulgate sentencing guidelines for federal criminal offenses, placed the commission within the
5 judicial branch, and required federal judges to serve on it along with nonjudges.” *Kasler* noted
6 that “sentencing is a field in which the Judicial Branch long has exercised substantive or political
7 judgment,” and that Congress placed the Commission in the Judicial Branch precisely because of
8 the Judiciary's special knowledge and expertise. (See also *People v. Wright* (1982) 30 Cal.3d
9 705, 714 [“broad delegations to public agencies enjoying the expertise to implement the
10 legislative policy have been upheld”].)

12 On the facts of this case, the legislature is not unreasonably imposing responsibility on
13 the CDCR. The CDCR is responsible for incarceration for the purpose of public safety and
14 punishment for crime. (Penal Code 1170(a) and 5000.) As such, the CDCR is responsible for
15 implementing the death penalty and is likely the public entity with the most expertise in that
16 area.¹ The CDCR is arguably the best institution to be tasked with monitoring the development
17 of new injections and monitoring the pain, speed, and reliability of executions as they are carried
18 out in other states.
19
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22

23 ¹ The phrase “most expertise” is relative. Most state agencies are tasked with preserving
24 life and improving the quality of life. An exception would be the California National Guard,
25 which is military in nature and are therefore tasked with being able to kill persons when directed
26 to do so. (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 309-310 [describing
state National Guard as “a part-time, nonprofessional fighting force” and “armed citizens trained
to military duty”].)

1 Petitioner’s supplemental brief argues that the courts have repeatedly struck down the
2 CDCR’s execution protocols, suggesting that the CDCR lacks expertise. (Petition, paras 58-70.)
3 The repeated judicial decisions that the CDCR’s execution protocols were unlawful does not,
4 however, compel the conclusion that the legislature improperly delegated authority for
5 developing the execution protocol to the CDCR. When reviewing legislation to determine
6 whether it is constitutional, it is not the function of the court to inquire into the wisdom of the
7 Legislature's policy choices. (*People v. Christman* (2014) 229 Cal.App.4th 810, 816; *Service*
8 *Employees Intern. Union, Local 1000 v. Brown* (2011) 197 Cal.App.4th 252, 273.)

9
10 Eighth, *Kasler* states, “some commentators perceive in legislative bodies a tendency to
11 duck controversial issues, and upholding a delegation of this sort will only encourage that
12 tendency.” (*Kasler*, 23 Cal.4th at 498.) *Kasler* distinguishes between (1) broad delegation for
13 reasons of internal political maneuver or as an escape from having to stand up and be counted,”
14 and (2) legitimate responses to the fact that a legislative body, “in an increasingly complex and
15 changing world, is called upon to deal with subject matter that is novel and imprecise, and for
16 which it is frequently ill-equipped to do more than to paint with a broad brush, leaving the details
17 to be filled in by less unwieldy and more expert administrative authority.” The facts of this case
18 suggest that the legislature and the voters have made the fundamental decision that California
19 will have the death penalty, and that the legislature has legitimately delegated to the CDCR the
20 responsibility for developing a constitutional execution protocol and updating it as appropriate as
21 both execution technology and Eighth Amendment jurisprudence develop.
22
23

24 ///

1 TAXPAYER CLAIM

2 The court is not persuaded that the CDCR's demurrer has merit to the extent it is based
3 on the unavailability of relief under the taxpayer claim (CCP 526).

4 The CDCR argues that the court cannot grant relief under CCP 526 because CCP 526 is a
5 simply a standing provision and authorizes taxpayer suits only if the government body has a duty
6 to act and has refused to do so. (*Daily Journal Corp. v. County of Los Angeles* (2009) 172
7 Cal.App.4th 1550, 1557.) CCP 526 authorizes actions by a resident taxpayer against officers of a
8 county, town, city, or city and county to obtain an injunction restraining and preventing the
9 illegal expenditure of public funds. "A taxpayer may sue to enjoin wasteful expenditures by state
10 agencies as well as local governmental bodies." (*Cates v. California Gambling Control Com.*
11 (2007) 154 Cal.App.4th 1302, 1308.) A taxpayer can bring an action under CCP 526a to restrain
12 enforcement of an unconstitutional statute. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 268.)
13

14 As discussed above, petitioners do not state a claim that Penal Code 3604 is an
15 unconstitutional delegation of legislative responsibility.
16

17
18 CONCLUSION

19 The Demurrer of the CDCR to the Petition and Complaint is SUSTAINED WITHOUT
20 LEAVE TO AMEND. The statute is not unconstitutional under the "clear, positive, and
21 unquestionable" standard.

22 Regarding the Constitutional issues surrounding the implementation of the death penalty,
23 this order is limited to the issue of whether Penal Code 3604 is void because it is an
24 unconstitutional delegation of the legislative responsibility to make fundamental policy
25 decisions. This order does not address whether the CDCR's current execution protocol is
26

1 consistent with the Eighth Amendment's prohibition against cruel and unusual punishment and
2 cannot address whether any yet to be developed execution protocol might be consistent with the
3 evolving Eighth Amendment jurisprudence.
4

5 Dated: May 9, 2017
6



7 Kimberly Colwell
8 Judge of the Superior Court
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG16838951

Case Name: Sims vs. Kernan

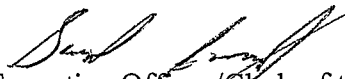
1) Order Sustaining Demurrer to Petition Without Leave to Amend


DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing Order Sustaining Demurrer to Petition Without Leave to Amend was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

May 10, 2017


Executive Officer/Clerk of the Superior Court
By M. Scott Sanchez, Deputy Clerk

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