C078488

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

JEFFREY A. BEARD, SECRETARY,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO,
Respondent,

BRADLEY WINCHELL AND KERMIT ALEXANDER,
Real Parties in Interest.

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI, OR OTHER APPROPRIATE RELIEF

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INTRODUCTION

Real Parties in Interest Bradley Winchell and Kermit Alexander ("Real Parties") submit this preliminary opposition to the Petition for Writ of Mandate, Prohibition, Certiorari, or Other Appropriate Relief filed by Jeffrey Beard, Secretary of the California Department of Corrections and Rehabilitation ("the Secretary").[1] This "[p]reliminary opposition is not meant to be a

1. Because the Petitioner in this proceeding is the Respondent in the Superior Court, we refer to him by title for clarity.

full briefing on the merits." (2 Cal. Civil Writ Practice (Cont.Ed.Bar 4th ed. 2008) § 21.8, p. 585 (cited below as "CEB Civil Writ Practice").) Its purpose is to quickly apprise this court of reasons why this petition is one of the many that should be weeded out at the threshold with a summary denial, not one of the few that should go forward to full briefing. (See *id*. § 21.3, p. 583.) In the event that the court issues a *Palma* notice or an alternative writ, Real Parties will submit a full brief on the merits in response.

The Secretary states the issue in this case as follows (emphasis added):

> "The Legislature afforded CDCR discretion to determine when and how it will promulgate lethal-injection regulations. CDCR has worked to develop new regulations after previous ones were stricken through litigation. *But it has not yet promulgated them because of well-known, judicially noticed external forces.* Can the Superior Court entertain a writ proceeding that alleges that CDCR abused its discretion and seeks to require CDCR to promulgate regulations with any particular time frame?" (Petition, pp. 2-3.)

This statement of the issue simply assumes the central fact in dispute. Real Parties do not deny that there are substantial external forces complicating the task of establishing a valid and usable lethal injection protocol. However, Real Parties do vigorously dispute that these forces are the reason for the extreme delay that has occurred in California. It is beyond dispute that other states subject to those same forces have established and successfully used the type of lethal injection protocol that the Secretary's predecessor assured this court almost *three years ago* that CDCR was developing, and they have taken far less than three years to do it.

SUPPLEMENTAL STATEMENT OF FACTS AND CASE

The facts and case are stated in the Petition. Real Parties will offer here just a few corrections, supplements, and updates.

The issue before the United States Supreme Court in *Glossip v. Gross* is discussed in Part II, *infra*. (Cf. Petition 1.)

The petition incorrectly equates Real Parties' petition in the Superior Court in this matter with Mr. Winchell's prior original petition in this court, saying that Real Parties "*again* sought a writ of mandate directing to CDCR to promulgate *regulations*" (Petition 3, italics added), and that the present petition asks for "nearly identical" relief. (Petition 14.) In fact, CDCR opposed the prior petition on the ground, among others, that Mr. Winchell was asking "that CDCR should simply draft a single-drug, single-prison, lethal-injection protocol *without* promulgating new regulations. But doing so would put CDCR in apparent violation of *Morales* and the permanent injunction in *Sims*." (App. C0203, italics in original.) The relief sought in the present case, in contrast, would be fully consistent with the *Morales* and *Sims* decisions.

The tentative ruling was issued on Thursday, January 29, 2015, and the hearing was on Friday, January 30, 2015. (Cf. Petition 5.)

The Superior Court did not make any order in favor of would-be intervenor Mitchell Sims. (Cf. Petition 6.) The court denied his motions without prejudice. (App. H0264, H0268.)

The Petition claims that Real Parties "cited no authority finding an abuse of discretion in circumstances similar to this case, where events outside an agency's control have affected the regulatory process." (Petition 14-15.) Real Parties cited authority finding an abuse of discretion in what they believe to be and have alleged to be the circumstances of this case, an unreasonable and unjustified delay in implementing a statutory mandate. (See App. D0226.) The Secretary's "no authority" claim is based on his

version of disputed facts, but the Real Parties' version is controlling for the purpose of this demurrer.

The original petition incorrectly alleged that Real Parties had reserved a hearing date in the Superior Court of June 5, 2015. (Petition 26.) Counsel for Real Parties brought this to the attention of counsel for the Secretary, and he filed a notice of errata on February 20. Real Parties have not reserved any dates or noticed any motions so far.

On February 19, 2015, the day after the filing of the Petition, this court denied the request for immediate stay.

On February 24, 2015, the Secretary filed an answer to the petition. In paragraph 10 of the answer, the Secretary admitted that CDCR has developed "a barbiturate-only lethal-injection protocol" although characterizing it as "preliminary drafts" and denying it was "completed." To the best of Real Parties' knowledge, this is the first public statement by CDCR that it has developed the protocol it said it would three years ago.

In Part II, *infra*, Real Parties note some additional factual material in response to the Secretary's requests to take judicial notice. Because this preliminary opposition is intended to be quick and relatively informal, Real Parties simply cite publicly available sources rather than burden the court with an additional request for judicial notice. We can make that request if and when this matter proceeds to full briefing, which we submit it should not.

ARGUMENT

I. There are no extraordinary circumstances warranting a departure from the normal course of appellate review.

The normal course of appellate review is "that there be only one appeal at the end of a case following entry of final judgment." (CEB Civil Writ Practice § 14.1, p. 343.) The final judgment rule is "a fundamental principle of appellate practice in the United States." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 96, p. 158.) Other than final judgments, orders are not appealable unless made so by statute (*id*., § 85, pp. 145-146), and an order overruling a demurrer is not. (See *id*., § 154, p. 230.)

The use of a writ petition to review an order overruling a demurrer is thus an end-run around the Legislature's choice to make such orders nonappealable. Petitions of this type are rarely granted and usually warrant no more than a summary denial. (See CEB Civil Writ Practice § 14.1, pp. 343-344; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1271-1274.)

The Supreme Court addressed the specific question of use of a writ petition to review an order overruling a demurrer in *Babb v. Superior Court* (1971) 3 Cal.3d 841. Although the court decided that extraordinary circumstances warranted such review in that case, it added an important caveat.

> "We wish to emphasize, however, that our action in this matter should not be understood to indicate our willingness to employ the prerogative writs to review rulings on pleadings. Indeed, we perform such a function of intermediate review with extreme reluctance. 'In most . . . cases, as is true of most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment.' [Citation.] However, upon occasion our attention is drawn to instances of such grave nature or of such significant legal impact that we feel

compelled to intervene through the issuance of an extraordinary writ." (*Id*. at p. 851.)

The question typically comes down to one of whether the petitioner has shown "extraordinary circumstances" or some similar expression. (See, *e.g.*, *Franchise Tax Bd. v. Superior Court* (2013) 221 Cal.App.4th 647, 656.) Published opinions on this point are nearly all cases where extraordinary circumstances are found because the petitions without such circumstances are summarily denied. The rule is more published in the breach than the observance, but observance remains the norm. The California Courts of Appeal disposed of 94% of original proceedings without an opinion in Fiscal Year 2013. (See Judicial Council of California, 2014 Court Statistics Report, Courts of Appeal, Table 6, p. 33.)

Boy Scouts of America National Foundation v. Superior Court (2012) 206 Cal.App.4th 428, relied on by the Secretary at page 16, says, " 'Appeal is presumed to be an adequate remedy and writ review is rarely granted unless a significant issue of law is raised, *or* resolution of the issue would result in a final disposition as to the petitioner.' " (*Id*. at p. 438, italics added.) The disjunctive "or" makes no sense here. Every demurrer to an entire complaint, if sustained, would result in a final disposition as to the defendant, and if that factor alone were sufficient, *every* defendant whose demurrer is overruled could obtain review by writ, effectively abrogating the Legislature's decision to make such orders nonappealable, contrary to *Babb* and many other cases. That cannot be the law, and following the citation chain from *Boy Scouts* back through *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182 to *Curry v. Superior Court* (1993) 20 Cal.App.4th 180, 183, we find that, sure enough, *Casterson* changed *Curry*'s "and" to an "or." *Regents of University of California v. Superior Court* (2013) 220

Cal.App.4th 549, 558, also cited by the Secretary, makes only the "significant issue" point, and *Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 134, says nothing at all on the standard to be applied.

The underlying issue in this case, whether long-obstructed justice in the State's very worst murder cases will finally be carried out, is of course of great public interest. That is why Real Party Winchell sought the exercise of this court's original jurisdiction three years ago. The importance of the underlying issue has not changed since then, however, and if it was not sufficient to avoid summary denial then, it is not now.

The issue actually presented in the demurrer and in this petition is more prosaic.[2] A statute commands an agency to issue a regulation and does not specify a time. Is the time completely beyond the reach of judicial review, so that the agency can stall indefinitely if it chooses? This may be "an important question of administrative law" (Petition 16), but it is one that this court answered a quarter century ago in *Cal. Trout v. Superior Court* (1990) 218 Cal.App.3d 187, 203. "An administrative agency has no discretion to engage in unjustified, unreasonable delay in the implementation of statutory commands." The timing is subject to review for abuse of discretion. Whether the Secretary has abused his discretion and whether the delay is justifiable are, of course, disputed, and a demurrer is not the procedure for resolving those disputes. Resolution requires more facts than are presently before this court or the Superior Court. See *infra*, Part II.

The Secretary claims inadequacy of the remedy at law because of the expense of completing the litigation in the trial court. (Petition 17.) Again,

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2. In the Superior Court, the Secretary also claimed that victims of crime have no standing (see Petition 14), but he has wisely chosen not to raise that claim in this court.

this claim fails to distinguish the present case from any other demurrer. By its nature, a demurrer is an attempt to nip a suit in the bud, and its overruling allows the bud to bloom. The "inadequacy" of the remedy of proceeding to a final decision and appealing from there is simply the natural consequence of the Legislature's decision to make the type of order involved here nonappealable.

There is more than a little irony in the Secretary's decision to initiate a new, original proceeding, dump a two-and-a-half-inch thick stack of documents on this court and opposing counsel, demand immediate response from the court in the form of a request for an immediate stay, and then claim it is all to protect "the public coffers." (See Petition 26.) The total cost to the State of this proceeding may well exceed the cost of going forward in the Superior Court. Real Parties have chosen an expeditious form of action which "is usually disposed of by a hearing on the merits which is limited to oral argument on written briefs and documentary evidence . . . ." (Sacramento Superior Court, Guide to the Procedures for Prosecuting Petitions for Prerogative Writs 6 (2014), App. A0032.)

The Secretary raises the specter of expensive discovery (see Petition 26), but discovery need not be expensive if CDCR will simply come clean as to why it has not done in three years what states such as Texas and Washington got done in a few months. The only discovery to date has been a simple demand by Real Parties for copies of the draft protocols CDCR has already prepared, and instead of simply and inexpensively making the copies, the Secretary chose to object, which in due course will require a motion to compel.

In short, there is nothing extraordinary about this demurrer or the order overruling it that warrants a departure from the normal course of

appellate review. The court can and should follow the standard procedure and allow this case to take its normal course, coming to this court (if at all) by appeal from a final decision by the trial court with a more complete factual basis.

II. The Superior Court correctly deemed the allegations of the petition regarding abuse of discretion to be admitted for the purpose of the demurrer, and judicially noticeable facts do not conclusively negate that allegation.

In the Superior Court, the Secretary claimed that the petition did not allege an abuse of discretion. (App. E0237, lines 3-4.) The court noted that the petition does indeed allege an abuse of discretion in paragraph 16. (App. G0260; App. H0269.) It is black-letter law that for the purpose of a demurrer the allegations of the complaint are deemed admitted and liberally construed. This rule extends to allegations of abuse of discretion by an administrative agency in a writ of mandate case:

> "A demurrer tests only the strength of the pleading and will lie only where the defects appear on the face of the pleading. (Code Civ. Proc., § 430.30.) For purposes of considering the demurrer all material, issuable facts properly pleaded in the complaint are deemed admitted, however improbable they may be. [Citation.] The complaint and petition, liberally construed in favor of the plaintiffs, alleges that the board has acted arbitrarily and unreasonably in fulfilling its mandatory duty to consider the prevailing rates of compensation for comparable duties in other public and private employment. However difficult it may be for plaintiffs to succeed with this action, they have alleged facts sufficient to establish an abuse of discretion on the part of the board and have thus stated a cause of action." (*California State Police Assn. v. State of California* (1981) 120 Cal.App.3d 674, 680.)

Although the "face of the pleading" rule makes it unnecessary to support the allegation of abuse of discretion with evidence at this point in the case, it is worth noting here that Real Parties had substantial grounds to

believe the CDCR was simply stalling in an abuse of its discretion. Nearly three *years* ago, CDCR assured this court among others that it was unnecessary to order it to develop a protocol because the project was already under way. (App. C0203-0204.) The State of Texas adopted the sedative-only protocol two *months* later, used it without difficulty (see PBS Newshour, Death Penalty: States Transition to One-Drug Executions (July 19, 2012)[3]), and has used it 38 times since. (Texas Dept. of Criminal Justice, Executed Offenders (Feb. 5, 2015).[4]) On September 12, 2012, two and a half years ago, a deputy district attorney alleged in open court that CDCR already had a protocol and was actively practicing it. (App. C0087-0088.) In a discussion with the court about how long it would take, counsel for CDCR talked in terms of months, not years. (App. C0081-0083.) Finally, CDCR's denial of Real Parties' administrative petitions without giving any reason whatever for not promulgating a regulation (App. A0015-0016, A0023-0024) raises a strong suspicion that the reasons are illegitimate.

The Secretary seeks to avoid the "face of the pleading" rule by claiming that matters judicially noticeable conclusively negate any possibility that the Secretary has abused his discretion (Petition 22), and he seeks to bolster that argument by asking this court to take judicial notice of several newspaper articles on top of what he submitted to the Superior Court. While the existence of a newspaper article may be judicially noticeable if relevant, the truth of its contents is not. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064.)

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3. http://www.pbs.org/newshour/rundown/death-penalty-states-transition-to-one-drug- executions/

4. http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html

Even if the various materials were judicially noticeable for their contents, though, they would not amount to the kind of conclusive evidence that would allow a court to conclude that the Secretary could not have abused his discretion as a matter of law. The controlling rule from *Cal. Trout v. Superior Court*, 218 Cal.App.3d at p. 203 is that "[a]n administrative agency has no discretion to engage in unjustified, unreasonable delay in the implementation of statutory commands." Evidence that there are difficulties with lethal injection does not establish as a matter of law that a delay of three years is justified and reasonable, particularly in light of the undeniable fact that states such as Texas adopted new protocols promptly years ago and have used them successfully.

The Secretary attempts to use Oklahoma's difficulties and its pending case in the United States Supreme Court as excuses for a failure to act that was already long overdue before this case arose. The Oklahoma case is irrelevant, and the Secretary's description of the issue before the high court is misleading.

The Supreme Court case is 14-7955.[5] The case was originally titled *Warner v. Gross*, but the title became *Glossip v. Gross* when the court, 5-4, denied a stay to lead petitioner Warner and he was executed. (See *Warner v. Gross* (2015) 135 S.Ct. 824, 190 L.Ed.2d 903.)[6] The Oklahoma protocol at issue is "a three-drug protocol consisting of midazolam, vecuronium bromide, and potassium chloride. In theory, at least, midazolam should render a condemned inmate unconscious, vecuronium bromide should

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5. The case number given by the Secretary (Petition 2, 24) is incorrect. That was the Tenth Circuit's number.

6. See http://www.supremecourt.gov/opinions/14pdf/14a761_d18f.pdf for the opinion.

paralyze him, and potassium chloride should stop his heart." (*Id*. at 824 (dis. opn. of Sotomayor, J.). In other words, it is similar to the three-drug protocol that California has now abandoned. It substitutes a different and controversial drug as the first, sedative drug, but it continues to use the type of paralytic that was the primary bone of contention in *Sims v. Cal. Dept. of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1066.

The Secretary's statement that *Glossip* will examine a two-drug protocol (Petition 24) is incorrect. The Question Presented unambiguously refers to a three-drug protocol. (See Question Presented in *Glossip v. Gross*, U.S. Supreme Court No. 14-7955, p. 2.[7]) Far from calling into question the single-drug, sedative-only methods of the type which are in use in Texas, Missouri, and other states and which CDCR represented to this court in *Winchell v. Cate* that it was developing three years ago, the *Glossip* case involves only a variation on the obsolete method that Real Parties wish to see replaced. In *Ladd v. Livingston* (5th Cir. 2015) 2015 U.S. App. LEXIS 1573, cert. den. No. 14-8168 (Jan. 29, 2015), the Fifth Circuit discussed the large differences in the methods and refused to stay a Texas execution in light of the grant of certiorari in *Glossip*. The court noted that pentobarbital from compounding pharmacies "appears to have been used without significant incident for the last fourteen executions carried out by the State [of Texas]." (*Id*. at *8.)

The method at issue in *Glossip* is used only in Oklahoma and Florida. In states using the pentobarbital-only method, the high court has allowed executions to go forward with no recorded dissents. (See Denniston, Court

7. http://www.supremecourt.gov/qp/14-07955qp.pdf

allows Texas execution (UPDATED), SCOTUSblog (Jan. 29, 2015)[8] (discussing *Ladd*).) There is no point in waiting for a decision in *Glossip*, and even if there were, that case will be decided before Real Parties will move for issuance of a writ in the Superior Court in the present case.

The facts that the Secretary seeks to have judicially noticed are, at best, some evidence supporting an argument that he has operated within the bounds of his lawful discretion. They do not establish that ultimate fact beyond any possibility of being refuted. The undeniable fact that another large state quickly adopted the type of protocol at issue here and has used it "without significant incident" in more executions than California's modern-era total is sufficient by itself to raise a genuine issue as to whether CDCR's years-long delay is unjustified and unreasonable with the meaning of *Cal. Trout*. This case should go forward to a resolution on a developed factual record, not cut short at the pleading stage.

III. There is no basis for the Secretary's assumption that the relief granted in this case would not allow sufficient time for a sound, practical, defensible protocol.

The petition in this case is riddled with statements that say or imply that the Superior Court would force CDCR to establish a protocol more quickly than is prudent. (See Petition 16-17, 19-20, 27.) There is no basis for attributing such a lack of discretion to the trial court.

The Superior Court correctly noted that the prayer for relief is not subject to a demurrer. (App. H0268, fn. 5; 5 Witkin, Cal. Procedure, *supra*, Pleading, § 957(2).) The petition asked that the process begin within 30 days because Real Parties are informed and believe that CDCR has had a protocol

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8. http://www.scotusblog.com/2015/01/court-allows-texas-execution/

ready for years and is simply sitting on it, and in that case 30 days would be entirely reasonable.

Real Parties have no wish to force the adoption of a protocol that is not constitutionally and legally defensible and also usable as a practical matter. (See App. G0258.) Once CDCR drops the veil of secrecy and provides the reasons regarding why it has not acted to date when so many other states have, what remains to be done, and how long is needed, Real Parties will be in a position to know what to ask for, and the Superior Court will be in a position to know what to order. Such judgments cannot be made in the dark, though, and the dark is what we have at present solely as a result of CDCR's intransigence.

Indeed, now that it is established that victims have standing and that CDCR's discretion does not extend to unreasonable and unjustifiable delay, there is no reason this case cannot be settled. The Secretary works for the Governor, who has a constitutional duty to "see that the law is faithfully executed." (Cal. Const., art. V, § 1.) He is represented by the Attorney General, who is "the chief law officer of the State." (Cal. Const., art. V, § 13.) Yet the law is not being executed, and these two officers are fighting tooth and nail against victims of horrible crimes who seek nothing more than the justice they were promised decades ago. The simple solution is to agree to a reasonable plan to get this protocol implemented and these judgments carried out.

Yet if the Secretary continues to stall, then the judiciary must act. At this preliminary stage, this court should assume that the Superior Court will act properly and prudently in shaping relief. If it does not, that is what appeals are for.

CONCLUSION

The petition should be summarily denied.

March 2, 2015

Respectfully Submitted,

KENT S. SCHEIDEGGER
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Bradley S. Winchell and Kermit Alexander

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document is one-and-a-half spaced and is printed in 13-point Times New Roman font. In reliance upon the word count feature of WordPerfect, I certify that the attached Preliminary Opposition to Petition for Writ of Mandate, Prohibition, Certiorari, or Other Appropriate Relief contains 4007 words.

Dated: March 2, 2015

KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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Executed on March 2, 2015, at Sacramento, California.

_____
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