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Contrary to the District Court's assumption, the debate is not over whether sodium pentothal in a 5 gram dose will cause unconsciousness. Order, at 5. Instead, the issue is whether Procedure 770 sufficiently assures that this will occur and that the drug will have its intended effect. To that issue, the Defendants have offered no proof and have not contested Cooper's assertions, supported by witness and medical testimony, that Procedure 770 is woefully deficient to the point where there is at least a fifty percent chance Mr. Cooper will suffer excruciating pain. As explained in the Declaration of Dr. Heath, the problem is not with the amount of sodium pentothal used, but with the fact that the California procedures are such that they do not ensure that the dose will actually reach the inmate. When combined with the pancuronium's masking effect, and the absence of any monitoring mechanism sufficient to determine anesthetic levels, the risk is highly elevated and has in fact

resulted in botched executions.

Adding to the risk of inadequate anesthesia is the fact that sodium pentothal is very unstable. (EOR at 151,161.) It is an unusual drug in that it comes from the manufacturer in powder form and must be mixed by the anesthesiologist into a solution (a fluid form) before use. (*Id.*) Sodium pentothal in solution has an extremely short shelf life and will begin to lose its potency within the initial 24 hour period after it is mixed. (*Id.*) Moreover, if the solution of sodium pentothal comes into contact with another chemical, such as pancuronium bromide, the mixture of the two will cause the sodium pentothal immediately to precipitate out of solution. (EOR at 42-58; ¶ 20.) Consequently, it is important to maintain the purity of the drug during administration. This explains the need for an injection of saline solution between the sodium pentothal and the pancuronium bromide. These factors are significant in the risk of the inmate not being properly anesthetized, especially since no one checks that the inmate is unconscious before the second drug is administered. (*Id.*)

The ultimate risk with sodium pentothal is that an inadequate dose will leave the inmate conscious while experiencing suffocation from the pancuronium bromide and cardiac arrest from the potassium. Defects

in the administration of sodium pentothal includes:

(1) failure to account for each inmate's physiological composition such as body weight, tolerance to anesthetics, allergic reactions, past exposure to alcohol and addictive drugs, stress and fear of the inmate resulting in the release of adrenaline, all of which creates a high probability that the inmate will be conscious when the other chemicals are administered causing the inmate to suffer an excruciatingly painful death.

(2) ingestion of Valium prior to the administration of sodium pentothal substantially increases the risk of unnecessary pain. Valium, which is known to alter the sensitivity of the brain to sedative drugs such as and including sodium pentothal, will significantly amplify the risk of inhumane pain and suffering should anything go wrong with the administration of the sodium pentothal. (EOR at 42-58, ¶ 22.)

(3) Procedure 770 calls for a five (5) gram dose of sodium pentothal administered in a single injection from a single syringe. By contrast, the original design of the lethal injection protocol called for the **continuous** intravenous administration of an ultrashort-acting barbiturate so as to alleviate the risks associated with a single dose. (*Id.*, ¶ 23.)

(4) Procedure 770 contains no provisions for how sodium pentothal or any of the drugs are to be handled, mixed, administered, stored, or accounted for. (EOR at 42-58, ¶ 27; 28-41, ¶¶ 3-7.)

(5) There is no monitoring of the patient once the injection begins to ensure that the inmate is under a surgical plane of anesthesia. (EOR at 152-53; 162.)

For all of the above reasons, a single dosage of sodium pentothal is not a proper anesthetic for use in lethal injection as described in the California procedure.

**C. The Lack of Sufficient Guidance in Procedure 770 Creates a Substantial Risk of Unnecessary Pain**

In addition to the lack of defined procedures with respect to the administration of chemicals, these Procedures 770 protocols fail to include safeguards regarding the manner in which the execution is to be carried out, fail to establish the minimum qualifications and expertise required of the personnel performing the crucial tasks in the lethal injection procedure, and fail to establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures.

Without guidance from medical professionals or providing

sufficient guidance for carrying out lethal injection executions, Procedure 770 creates the unconstitutional risk of painful executions and botched procedures. (EOR 42-63, ¶ 24-25.) This is not a speculative risk – it is demonstrated in the difficulties seen in 1996 during the Bonin execution and in 2002 during the Anderson execution.

Although the District Court characterized this argument as one attacking the vagueness of Procedure 770 (EOR at 12), that is not Cooper's complaint. Rather, the argument here is that the process is simply too flawed to render any medical confidence that the inmate will be unconscious as the otherwise excruciatingly painful chemicals are administered. Again, as with Mr. Cooper's other arguments, this is not mere speculation – it is happening in California's executions.<sup>2</sup>

Perhaps the most glaring failure of Procedure 770 is the failure to ensure adequate procedures regarding the administration of the drugs. There is no guidance or protocol that determines the timing of administration of these chemicals. (EOR at 42-63, ¶ 26.)

If Mr. Cooper is given sodium pentothal followed by

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<sup>2</sup> Perhaps no where is an assurance of proper procedures more important than in lethal injection. The risk of error has profound implications. Even more disturbing, given the impassioned public debate over capital punishment, and particularly this case, with its strong undercurrent of racial divisiveness, the risk that someone will alter the procedure in a disguised manner because it is vague and allows too much room for discretion by unqualified personnel, is truly frightening.

pancuronium bromide and regains consciousness before the potassium chloride takes effect, he will be unable to move or communicate in any way while experiencing excruciating pain. As the potassium chloride is administered, he will experience an excruciating burning sensation in his vein, like the sensation of a hot poker being inserted into the arm and traveling up the arm and spreading across the chest until it reaches the heart, where it will cause the heart to stop. (EOR at 28-41, ¶ 6(c).)

If the sodium pentothal, pancuronium bromide and potassium chloride are administered in the sequence described and Mr. Cooper's heart fibrillates but does not stop, he will wake up but be unable to breathe. The initial dose of sodium pentothal could sensitize Mr. Cooper's pharynx, causing him to choke, gag, and vomit. He would be at risk of aspirating his vomitus or swallowing his tongue and suffocating. (EOR at 28-41, ¶ 6(a).)

Furthermore, the procedures provide for a saline injection between the pancuronium bromide and the potassium chloride. Although a saline flush is necessary between the first two drugs – the sodium pentothal and the pancuronium bromide – to avoid precipitation or crystallization of the pentothal, there is no need for a saline flush between the second and third drugs. This creates unnecessary complexity that

increases the chance for error. (EOR at 165.)

The California CDC procedures provide for virtually no monitoring of the flow of the fluids into the prisoner's vein. (EOR at 28-41, ¶ 9.) Proper monitoring requires a clear view of the IV site and often will require "palpation" or touch of the site to check for skin temperature and firmness of the surrounding tissue. (EOR at 166.) Infiltration or some kind of diversion of the fluid away from the vein could occur without being detectable by the trained naked eye just through observation. (*Id.*, 166.) There is no indication that the executioner or the Warden, the persons present during the actual injection of the drugs, is trained in these areas; nor is there any indication that they perform any kind of monitoring other than crude visual observation.

Further, there is no consideration of the need for modified procedures in 770 in the case of an emergency or difficulty. (EOR at 42-63, ¶ 32.) Thus, if there is a "cut-down" surgical procedure to open up Mr. Cooper in the event it cannot find a vein sufficient to administer these chemicals. The protocols don't even require medical training or experience in this gruesome procedure that is even more difficult and likely to result in error. (EOR at 42-63, ¶ 33.) Notably, the Warden has only offered that he does not now "contemplate" that such a procedure will

be used on Mr. Cooper. The Warden has not provided the medical evaluation of Mr. Cooper's veins to counsel, and her equivocal language is erringly vague about this grotesque and antiquated procedure.

Regardless of the manner in which "execution protocols" are drafted, the process of the lethal injection process, from start to finish, is complex and is fraught with the possibility of error, as all three recent wardens administering the protocol in California have admitted. (EOR at 252-67.) The administration of a complex series of drugs by non-medical personnel has created numerous, and horrific, mistakes and errors in California and other states. (EOR at 42-63; ¶ 31; 332-45.)

On February 23, 1996, William Bonin became the first person executed by means of lethal injection in California. It took the execution staff 27 minutes to insert the IV tube and begin administration of the lethal chemicals. (EOR at 131-34.) The Bonin log notes heat sensitivity of the EKG monitor indicating a possible equipment problem. (EOR at 28-41 ¶ 8.) In addition, Bonin's records indicate irregularities in his heart and breathing monitoring. The records appear altered without appropriate verification, so they are difficult to interpret. Mr. Bonin may have been on medications for which the procedure did not account. (EOR at 28-41 ¶ 25; 322-45.)

On February 9, 1999, Jaturun Siripongs, executed by lethal injection in California, was pronounced dead 15 minutes after being injected. After the injection of 50 cc of pancuronium bromide, "Siripongs' head tilted back and he opened his mouth widely, gasping for air and, to all appearances, yawning. His diaphragm continued to heave intermittently until near the end." (EOR at 346-47.) "Witnesses said his body twitched several times as the poisons worked through his body. At one point, his chest heaved and he seemed to gasp for air. His few more breaths were increasingly shallow until they stopped and he lay still." (*Id.*) A similar and graphic example of this was present for the Bonin execution. (EOR at 42-63; ¶ 31.)

On January 29, 2002, execution of Stephen Wayne Anderson took almost a half an hour to complete, directly contrary to Defendant's expert's evaluations of what should transpire. During that time, Mr. Anderson's chest heaved over 30 times in a fashion inconsistent with mere reflex and with the effects of either sodium penthonal or pancuronium. (EOR at 128-30.)

## CONCLUSION

The District Court abused its discretion by assuming the process is not flawed, and credited the Defendant's assertion that such a procedure is humane. We know this to be untrue, though, and we know that the executions in California are fraught with medically altered in incorrect procedures that have led to serious complications. Should Mr. Cooper be given his day in court, there is a reasonable likelihood that he will prevail on the merits given his presentation here. The evidence supporting a grant of a temporary restraining order weighs heavily in terms of merit and the irreparable injury that will be suffered by Mr. Cooper. The expert opinions present a factual dispute rightfully determined in the context of an evidentiary hearing.

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**RELIEF REQUESTED**

For the foregoing reasons, Mr. Cooper respectfully requests that the Court vacate the District Court's February 6, 2004 ruling and issue a temporary restraining order preventing the Defendants from executing Mr. Cooper by means of lethal injection, as that procedure is currently carried out in the State of California.

February 5, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David T. Alexander" with a flourish at the end.

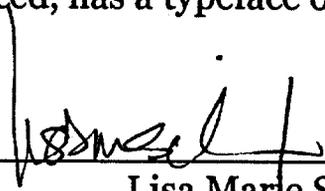
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**CERTIFICATE OF COMPLIANCE TO FED. R. APP. R. 32(A)(7)**  
**AND CIRCUIT RULE 32-1**

I, Lisa Marie Schull, certify that:

Pursuant to Ninth Circuit Rule 40-1(a), the attached Opening Brief on Appeal is proportionately spaced, has a typeface of 14 points or more and contains 8,566 words.

Dated: February 6, 2004

  
\_\_\_\_\_  
Lisa Marie Schull  
Attorney for Plaintiff-Appellant Kevin  
Cooper

**STATEMENT OF RELATED CASE**

Appellant, Kevin Cooper, filed on February 6, 2004 in this Court an Application for Leave to File a Petition for Writ of Habeas Corpus, Case No. 04-70578.

**DECLARATION OF SERVICE**

I am over the age of eighteen years old and not a party to the above-entitled action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, Old Federal Reserve Bank Building, 400 Sansome Street, San Francisco, California 94111.

On February 7, 2004, I served a copy of the Appellant's Opening Brief by placing a true copy thereof enclosed in a sealed envelope designated by Federal Express with delivery fees provided for and delivering it to a Federal Express office in San Francisco, California authorized to receive documents, addressed to the following at their respective office addresses last given, as follows:

**BILL LOCKYER, ESQ.**  
Attorney General of the State of California  
**HOLLY D. WILKENS, ESQ.**  
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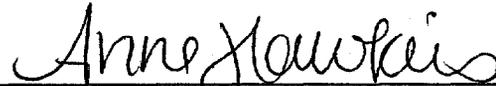
**MR. FREDERICK K. OHLRICH**  
Court Administrator and  
Clerk of the Supreme Court  
Supreme Court of California  
Earl Warren Building  
350 McAllister Street  
San Francisco, California 94102

and causing it to be personally delivered to:

**KEVIN COOPER**  
C-65304-3-EB-82  
San Quentin Prison  
San Quentin, California 94974  
**CONFIDENTIAL LEGAL MAIL**

I declare under penalty of perjury under the laws of the

State of California that the foregoing is true and correct and that this document was executed on February 7, 2004 at San Francisco, California.

  
\_\_\_\_\_  
Anne Hawkins