C070851

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

BRADLEY S. WINCHELL,

Petitioner,

vs.

MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondents,

MICHAEL ANGELO MORALES,

Real Party in Interest.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF MANDATE

HON. PETE WILSON
State Bar No. 35742
355 S. Grand Ave., 45th Floor
Los Angeles, CA 90071
(213) 680-6777

HON. GEORGE DEUKMEJIAN
State Bar No. 26966
KENT S. SCHEIDEGGER*
State Bar No. 105178
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
(916) 446-0345
(916) 446-1194

Attorneys for Petitioner

*Counsel of Record

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SUMMARY OF ARGUMENT

The heart of this case is the violation of Petitioner's constitutional rights under Proposition 9 of 2008, known as Marsy's Law. Neither Respondents nor Real Party in Interest has denied the Petitioner has a constitutional right to a prompt and final conclusion, that this right has been violated, and that he is constitutionally entitled to a remedy.

The remedy Petitioner seeks, an individual execution protocol for this specific case, is not quasi-legislative. Precedents on the narrowness of judicial review of quasi-legislature decisions are therefore inapposite.

Given the constitutional violation in this case, relief by writ of mandate would be warranted under any standard. *Saleeby v. State Bar* is on point.

Real Party's suggestion that California's entire death penalty law was rendered subject to nullification by an administrative agency by amendment of the method-of-execution statute cannot be reconciled with the clear intent of the death penalty law as a whole.

The relief requested in this case is not contrary to the Marin injunction. The "doctrine of priority of jurisdiction" does not apply where the relief requested cannot be granted in the other case.

The named person exception, the single-prison exception, and the operational needs exception are all available to end the misuse of the Administrative Procedure Act to block enforcement of the underlying law. Given that section 11340.9, subdivision (i) of the Government Code expressly exempts *regulations* directed to a specifically named person, Real Party's argument that an individual protocol would still be a "regulation" is beside the point.

ARGUMENT

I. Neither Respondents nor Real Party in Interest denies that Petitioner's constitutional right has been violated or that he is constitutionally entitled to a remedy.

The most remarkable aspect of the opposition papers filed in this case is what they do not say. The heart of this case is the constitutional rights added to the California Constitution by the people in Proposition 9 of 2008, the Victims' Bill of Rights Act of 2008: Marsy's Law, which amended article I, section 28 of the California Constitution. The petition alleges that Petitioner is a victim of crime within the meaning of that section, that he has

the substantive constitutional right under subdivision(b)(9) to "a prompt and final conclusion of the case and any related post-judgment proceedings," that this right has been egregiously violated and continues to be violated by the unprecedented six-year delay in execution of the judgment after completion of all reviews, and that he has a procedural constitutional right to judicial enforcement under subdivision (c)(1). (See Petition for Writ of Mandate and Memorandum of Points and Authorities in Support of Petition at pp. 1, 10, 14 ("Pet.").)

What do the Respondents and Real Party in Interest have to say to this? Absolutely nothing. Neither opposing party so much as mentions the Victims' Bill of Rights Act.

Respondents Cate and California Department of Corrections and Rehabilitation (CDCR) attempt to downgrade the constitutional violation in this case to a mere "frustration." (See Respondents' Opposition to Petition for Writ of Mandate 7 ("Resp. Opp.").) This is the kind of dismissive attitude toward victims that made Marsy's Law necessary in the first place. (See Proposition 9 of 2008, § 2, ¶¶ 1-2, Ballot Pamp., Gen. Elec. (Nov. 4, 2008), p. 128.)

Respondents further assert that writ relief is unnecessary because Respondents are already developing an alternative lethal-injection process. (Resp. Opp. at pp. 8-9.) Conspicuously absent from this statement is any promise or even any indication this process will be completed without more protracted delays in this already unconstitutionally delayed matter. Given that both opposing parties have stated that the single-drug method is readily available (see Pet. at p. 9, ¶¶ 19-20, not denied in either opposition) and that statutory alternatives to the protracted notice-and-comment process are

available (see Part IV *infra* at pp. 11-16), the "prompt and final conclusion" the Constitution requires is weeks from now, not years.

Respondents misstate Petitioner's argument, claiming that Petitioner "correctly admits that CDCR's decision to fight the challenge to its protocol rather than switching the protocol was within its discretion." (Resp. Opp. at p. 7.) Petitioner definitely did not and does not admit that CDCR acted reasonably or within its discretion by engaging in years of litigation over the enjoined three-drug method *after* the one-drug method had been both approved by the federal court and demonstrated by other states. Petitioner said fighting for the validity of that method *would* have been reasonable if it could have been completed promptly, but it has not been. (Pet. at p. 20.)

Real Party's disregard of the Constitution is even extreme. Although well aware that the notice-and-comment process would take at least another year and therefore not be "prompt" by any definition, Real Party asserts that, "Petitioner gives no reason" for not using that process. (See Real Party in Interest's Opposition to Petition for Writ of Mandate 7 ("RPI Opp.").) The reason given is to end a violation of the Constitution, and to do so promptly, as the Constitution requires. Apparently upholding anyone's constitutional rights but his own is "no reason" to Real Party.

Given the uncontroverted constitutional violation and the clear constitutional mandate for judicial relief, a conclusion that the Petitioner has no remedy cannot be sustained. If other rules of law were in conflict with the constitutional requirement, they would have to yield to the extent of any inconsistency. They are not in violation, however.

II. The action Petitioner seeks is not quasi-legislative.

Real Party in Interest places great weight on authorities stressing the limited judicial role in directing an administrative agency regarding a quasi-legislative action, but he skips lightly over the question of whether the action requested is quasi-legislative. (See RPI Opp. at pp. 3-8.) "Rulemaking, or 'quasi-legislative' action, involves the formulation of rules to be applied to all future cases. [Citation.] Adjudicative, or 'quasi-judicial,' acts involve the actual application of such rules to a specific set of facts." (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1149.) The individual protocol requested here might be characterized as purely executive, because it involves neither the promulgation of a rule for future cases nor the adjudication of any dispute between two parties. Whether executive or quasi-judicial, though, it is certainly not quasi-legislative.

"A written statement of policy that an agency intends to apply generally, that is *unrelated to a specific case*, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-575, italics added.) Petitioner asks for exactly the opposite, that CDCR invoke Government Code section 11340.9, subdivision (i) to establish a protocol to enable it to perform its duty for *this specific case*. A decision on how to proceed in an individual case is not quasi-legislative. (See *Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1007.)

III. Given the constitutional violation, mandate would be appropriate under any standard.

A. Correcting the Constitutional Violation.

Regardless of how CDCR's action in establishing a protocol is characterized and regardless of which standard is employed, a writ of mandate would be appropriate in this case. As discussed in the Petition, the Supreme Court held that traditional mandate was the appropriate remedy in *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 561-562, a case where the action was quasi-legislative and reviewed under an abuse of discretion standard. In that case, as in this one, the choices made by the agency resulted in a violation of constitutional rights. The remedy in that case was to order new rules to be promulgated. (See *id*. at pp. 566, 575.)

Real Party attempts to distinguish *Saleeby* by noting that the Supreme Court "did not prescribe what the content of those new rules should be or order the Bar to promulgate any specific regulations." (RPI Opp. at p. 4-5.) Petitioner in this case does not ask for promulgation of specific regulations either. Petitioner does not ask this court to specify what drug will be used, what dosage will be used, or any of the other specifics of a protocol. The *Saleeby* court was as specific as it needed to be to insure that the constitutional violation was rectified. It specified that the client must be provided an opportunity "to respond to the bar's or the attorney's assertions" (*Saleeby v. State Bar*, *supra*, 39 Cal.3d at p. 566), not merely to state his case initially, but it left to the Bar whether the opportunity be written or oral and whether it be in conjunction with disciplinary proceedings or separate. (See *ibid*.)

Similarly, in this case Petitioner asks that the protocol be established by a means that will meet the constitutional requirement of promptness. Neither Real Party nor Respondents have objected that the relief requested is too

specific in the sense that it forecloses CDCR from fulfilling its duties in another way *that also meets the constitutional requirement of promptness*. Instead both assert, in effect, that CDCR should be permitted to continue on a path that will continue to violate this constitutional requirement for the indefinite future.

B. Penal Code Section 3604.

As noted in the petition, it is undisputed that Penal Code section § 3604, subdivision (a) vests CDCR with considerable discretion regarding *how* a death-sentenced murderer will be executed. The statutes on capital punishment do not, however, vest CDCR with any discretion whatever regarding *whether* or *when* the murderer will be executed. The "whether" decision is vested in the jury, the trial court, and the Supreme Court. (See Pen. Code, §§ 190.3, 190.4, subd. (e); Cal. Const., art. VI, § 11, subd. (a).) The "when" decision, once the appeals and habeas review have been completed, is vested in the trial court. (See Pen. Code, §§ 1193, subd. (a), 1227.) The Legislature has made very clear that "when" is important. In addition to the tight time constraints and prohibition of appeal in both of the above date-setting statutes, it has expressly made a finding "that the sentence in all capital cases should be imposed expeditiously." (Pen. Code, § 190.6, subd. (a).)

As a result of the lethal injection litigation, we now have the peculiar situation that the "how" and "when" decisions are intertwined. Long-delayed justice can be carried out soon by one method but will be delayed for at least one more year and possibly longer if CDCR persists with another method. When a decision that would otherwise be within the agency's discretion results in a violation of a person's constitutional right, that discretion must necessarily be limited.

Real Party now advances the creative argument that California's death penalty law is not self-executing. (See RPI Opp. at p. 12.) A law so important that the Constitution vests the appeals in the Supreme Court alone can, according to Real Party, be effectively repealed by a mere administrative agency, converting all death sentences to effective life without parole, merely by the passive inaction of not adopting regulations, and there is nothing the victims or the courts can do about it.

This facially absurd proposition is advanced by plucking a few words from section 3604 and examining them *in vitro* rather than *in vivo*, that is, separated in a test tube rather than together with the body of law of which they are a part. That is not the correct way to read statutes. (See *People v. Thomas* (1992) 4 Cal.4th 206, 212.) Considered as a part of the entire body of law of capital punishment, the Legislature cannot be presumed to have intended to vest such a power in CDCR,[1] and the language of section 3604 does not compel such an absurd conclusion. CDCR has discretion to prescribe the details of lethal injection within other constraints of the law. Those other constraints include, as Real Party has vigorously litigated, the Eighth Amendment to the United States Constitution. They also include the legislative mandate for expeditious imposing of the penalty noted above. Finally, they include the constitutional right of the victim to a prompt and final conclusion. While CDCR surely has discretion under section 3604, an exercise of that discretion that results in a violation of the statutory and

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1. If the court were to accept the thesis that an amendment to section 3604, enacted by the Legislature, suspended the operation of the death penalty law, enacted by initiative, it would have to confront the constitutional question of whether the Legislature has the power to do so. (See Cal. Const., art. II, § 10.) Such questions are better avoided. (See *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60.)

constitutional requirements for promptness is an abuse of discretion, for which mandate is an appropriate remedy. (Cf. *Saleeby v. State Bar*, *supra*, 39 Cal.3d at p. 562.)

C. The Marin Injunction.

The reasons why the injunction in the Marin County litigation do not preclude a grant of relief in this case were addressed in the original petition and again in the opposition to Real Party's motion to transfer. Only a brief further discussion here is needed.

Respondents invoke the "doctrine of priority of jurisdiction" (Resp. Opp. at p. 9), but the application of that doctrine to the present case is contradicted by the primary authority Respondents cite, *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781. That case notes that abatement of the second action "is not appropriate where the first action cannot afford the relief sought in the first." (*Id*. at p. 787.) As noted in Petitioner's opposition to the transfer motion, the issues before the First District are different from the issues in this case. Even if CDCR prevails in that appeal and its existing three-drug protocol is held to be in compliance with the Administrative Procedure Act, its use remains enjoined by the federal court. The relief Petitioner seeks of compelling CDCR to adopt a protocol satisfying the requirements of the federal court in its orders conditionally denying stays of execution cannot be ordered in the First District appeal. In addition, the validity of that new protocol cannot be determined in the suit over the old one. The First District has already so held in a case to which both Respondents and Real Party were parties. (See Opposition to Motion Requesting Transfer of Writ Proceedings at pp. 3-4.)

Real Party contends that Petitioner is asking for a modification of the Marin injunction, implying that the requirement that "regulations be

promulgated in accordance with the APA" means compliance with the public notice and comment procedure and not the APA's own exceptions to that procedure. (See RPI Opp. at p. 14.) However, a look at the injunction itself refutes that argument. Paragraphs 4 and 5 of the injunction, which refer to lethal gas and execution of women, neither pertinent here, specifically refer to the "public comment process." (See Petitioner's Exhibit H, pp. 85-86 of the Exhibits.) That language is conspicuously absent from paragraph 3, which requires only "compliance with the Administrative Procedure Act."

Section 11340.9 of the Government Code is as much a part of the Administrative Procedure Act as any other section. (See Gov. Code, § 11370.) It is self-evident that if that section says that a regulation is exempt from the remainder of the act then that regulation is in "compliance." It is certainly not in violation.

Finally, as noted in the original petition, the relief sought is promulgation of a protocol, not execution of the judgment of death, which can only be ordered by the original trial court, and only execution is enjoined. (Pet. at p. 30.) Respondents have no response to this point. Real Party resorts to name-calling, a reliable sign of a failing argument. He accuses Petitioner of being "mendacious" (RPI Opp. at p. 16, fn. 6) but fails to identify anything Petitioner has said that is not true. Of course Petitioner's goal is to see the judgment carried out, but the purpose of the Marin injunction is not to impose a moratorium on executions but rather to see that the Administrative Procedure Act is observed. A goal of carrying out executions in compliance with Government Code section 11340.9, a part of the Administrative Procedure Act, does not "undermine" that injunction. As for the federal litigation, establishing a protocol that meets the requirement for denial of a stay by the federal court is a necessary step to enforcing the law in this case.

Obviously, there will need to be a motion in the federal court to modify the stay once that protocol has been established,[2] but given that court's prior rulings on the single-drug method, there is little doubt such a motion would be granted.

IV. The named person exception, the single-prison exception, and the operational needs exception are all available to end the constitutional violation.

In the petition, Petitioner identified three statutory provisions that CDCR could use to end the delay resulting from the Administrative Procedure Act (APA) litigation and thereby end the constitutional violation at issue in this case. They are the specifically named person exception of Government Code section 11340.9, subdivision (i), the single-prison exception of Penal Code section 5058, subdivision (c)(1), and section 5058.3 of the Penal Code, which permits CDCR to use the "emergency" procedure of APA without showing an emergency, but only filing a written statement of operational needs.

A. The Named Person Exception.

Respondents do not address the named person exception at all, limiting their response to the single-prison exception, discussed below. Real Party responds with a discussion that simply ignores the words of the statute and would render it superfluous.

The exemption applies to "*[a] regulation* that is directed to a specifically named person or to a group of persons and does not apply generally

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2. The Los Angeles District Attorney has already moved to intervene in the federal litigation and to seek a clarification that single-drug executions are not enjoined in two cases from that county, Mitchell Sims and Tiequon Cox.

throughout the state." (Gov. Code, § 11340.9, subd. (i), italics added.) Real Party's entire argument is devoted to arguing that an individual execution protocol would still be a "regulation." (RPI Opp. at pp. 17-19.) Even if that were true, it would not preclude the operation of subdivision (i). By its terms, subdivision (i) exempts certain *regulations* from the APA. If the exemption only applied to agency actions which are not regulations (cf. RPI Opp. at p. 18), it would not exempt anything at all, because the APA in its entirety only applies to an agency action "which is a regulation as defined in Section 11342.600." (Gov. Code, §11340.5, subd. (a); *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 575.) The notion that subdivision (i) only exempts actions which are not regulations is contrary to the clear wording of the subdivision and would render the statute entirely superfluous. Such interpretations are to be avoided. (See *Grupe Dev. Co. v. Superior Court* (1993) 4 Cal.4th 911, 921.) Subdivision (i) must exempt some actions that would otherwise be included, *i.e.*, some regulations.

The intent of this subdivision appears to be to create a safe harbor for agency actions directed to a specifically named person where the status as a "regulation" might be subject to dispute. If the action is not a regulation, the APA does not apply by the terms of its general rule. If it is a regulation, the APA does not apply by operation of subdivision (i). Once an agency action is determined to apply only to "a specifically named person," the question of whether it is a "regulation" becomes moot.

Real Party Morales claims his own prior APA suit is "directly on point" (RPI Opp. at p. 17) when in fact it is completely off-point. *Morales v. California Department of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 729, 739 (*Morales*) held that the protocol then before the court was a "regulation" subject to the APA because it applied to a certain class of

inmates. The court did not address, nor should it have addressed, whether a different protocol directed to specifically named persons rather than a described class of persons qualified for an exception, as no such protocol was before the court and no party had made such an argument. "Cases are not authority for propositions not considered." (*People v. Johnson* (2012) 53 Cal.4th 519, 528, internal quotation marks omitted.)

Real Party protests that allowing the promulgation of a protocol on a case-by-case basis would "eviscerate the APA" because CDCR could issue the protocols one-by-one, with the protocol in this case serving as a precedent for other cases. (RPI Opp. at p. 18.) Far from eviscerating the APA, that is how many administrative matters are routinely handled. "Of course, interpretations that arise in the course of case-specific adjudications are not regulations, though they may be persuasive as precedents in similar subsequent cases. [Citations.] Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. (Gov. Code, §§ 11343, subd. (a)(3), 11346.1, subd. (a).)" (*Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal.4th at p. 571.) The first of the statutes cited by *Tidewater* is now section 11340.9, subdivision (i). An advice letter may do exactly what a regulation would do, such as specify how a particular type of transaction is classified under a general tax statute, but because it is directed to a single named person it is not subject to the APA, and this is true even if the agency relies on it as a precedent for future cases.[3]

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3. Real Party's argument that an individual protocol would violate the United States Constitution was anticipated and refuted in the original petition and requires little additional comment. The changes the director was authorized to make for individual cases as need arose in *Towery v. Brewer* (9th Cir. 2012) 672 F.3d 650, 660-661, included the

If the named person exception "eviscerates" anything, it is the *misuse* of the APA to block enforcement of the underlying law. That misuse is exactly what *Tidewater* forbids. (14 Cal. 4th at p. 577.)

Between the clear wording of the statute, the absence of any opposing argument from Respondent, and the beside-the-point argument from Real Party, there should be little doubt that the named person exception provides a vehicle to carry out CDCR's duty to execute judgments of death in a timely manner, even while it continues *in parallel* to go through the APA procedures to establish a permanent regulation. To the extent that CDCR is troubled by any lingering uncertainty, a published decision in this case will resolve the matter authoritatively.

B. The Single-Prison Exception.

Respondents assert that the single-prison exception is unavailable, stating, "The First District already rejected CDCR's arguments that the single-prison exception to APA applies." (Resp. Opp. at p. 8, citing *Morales*, *supra*, 168 Cal. App. 4th at p. 740.) That decision did not hold that the exception was categorically inapplicable to execution protocols, however, but only to the expanded protocol presented in that case. (168 Cal.App.4th at p. 740.) Respondents assert that CDCR is "compl[ying] with its legal obligations under *Sims*, *Morales*, and the APA" (Resp. Opp. at p. 8), but it is doing so only at the expense of violating Petitioner's rights under the Constitution. That is not a tradeoff CDCR is entitled to make if there is an alternative, and Petitioner has shown that there is.

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very change Petitioner asks in this case, the change from the three-drug protocol to a one-drug protocol. Whether such a change is made in an individual protocol or an *ad hoc* variation from a protocol is not material for the purpose of the Equal Protection Clause.

C. The Operational Needs Exception.

In the petition, Petitioner noted that CDCR has a special dispensation from the Legislature to invoke the APA's rapid issuance procedure, normally reserved for emergencies, merely upon a showing of "operational needs." (Pet. 28; Pen. Code, § 5058.3, subd. (a)(2); Gov. Code, § 11346.1.) There can be no doubt that executing judgments of death in a timely manner is an operational need. The petition further noted, "because this method involves expenditure of additional state resources and should be unnecessary, given the two exceptions noted above, Petitioner does not ask the court to order the invocation of this exception at this time. Use of this exception would be necessary, though, if for some reason both of the other exceptions are found to be unavailable or ineffective." (Pet. 28-29.) In the prayer for relief, Petitioner asked for a writ directing use of the other exceptions and "such other and further relief as may be appropriate and just."

Petitioner believes that he has refuted the objections to use of the other two exceptions and that use of the operational needs exception will not be necessary. However, if the court should deem it advisable to provide CDCR the maximum latitude consistent with curing the constitutional violation, the "other and further relief" could take the form of requiring CDCR to establish a single-drug execution protocol by any means that will make the protocol usable within a reasonable time (*e.g.*, 30 days) of the court's order. That would include using the operational needs exception and the "emergency" regulation procedure, the specifically named person exception, or a trimmed-down protocol qualifying for the single-prison exception, as CDCR may choose. There can be no doubt whatever that promulgation of a protocol in accordance with section 11346.1 of the Government Code (part of the APA) as authorized by section 5058.3 of the

Penal Code constitutes compliance with the APA, and this route would eliminate any possible lingering doubt regarding conflict with the Marin injunction.

V. The court should proceed to an expeditious resolution of this matter.

The oppositions filed in this matter have not denied that Petitioner's constitutional rights have been violated by the extreme delay or that he is constitutionally entitled to a judicial remedy. They have not denied that the single-drug method is presently available and meets the requirements imposed by the federal court. There has been only insubstantial argument against the proposition that the specifically named person exception is available as a vehicle to prevent the misuse of the APA to block enforcement of the underlying law, a misuse the *Tidewater* precedent forbids. Under *Saleeby v. State Bar*, *supra*, mandate is the appropriate remedy under any standard. (See *supra* at p. 6.)

Those are the issues to be decided in this case. Given that delay *is* the constitutional violation in this case, Petitioner asks the court to proceed to a final decision of the matter expeditiously.

CONCLUSION

The court should issue an alternative writ or order to show cause and proceed promptly to a final decision.

June 6, 2012

Respectfully Submitted,

HON. GEORGE DEUKMEJIAN
HON. PETE WILSON

KENT S. SCHEIDEGGER
Attorneys for Petitioner
Bradley S. Winchell

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULE OF COURT 8.204(c)(1)

Pursuant to rule 8.204(c)(1), I certify that the foregoing brief 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 Reply to Opposition to Petition for Writ of Mandate contains 4,497 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

Dated: June 6, 2012

Respectfully Submitted,

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:

Thomas S. Patterson
Supervising Deputy Attorney General
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
415-703-5272
Thomas.Patterson@doj.ca.gov
Attorney for Respondents

Hon. Pete Wilson
355 S. Grand Ave., 45th Floor
Los Angeles, CA 90071

David A. Senior
McBreen & Senior
1900 Avenue of the Stars, 11th Floor
Los Angeles, CA 90067
310-552-5300
dsenior@mcbreensenior.com
Attorney for Morales

Executed on June 6, 2012, at Sacramento, California.

Irma H. Abella