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ALAMEDA COUNTY

MAR 30 2017

CLERK OF THE SUPERIOR COURT
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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 (1) ORDER REQUESTING BRIEFING AND (2) [TENTATIVE] ORDER ON MERITS OF DEMURRER. Date: 4/24/17 Time: 9:00 a.m. Dept.: 511

The demurrer of the of California Department of Corrections and Rehabilitation ('CDCR") is scheduled to come on for hearing on April 24, 2017, in Department 511 of this Court, with the Honorable Kimberly Colwell presiding.

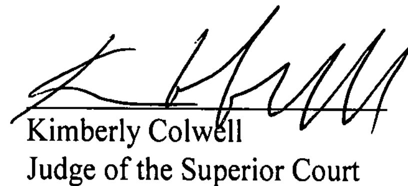
The court's independent research suggests that in Penal Code 3604 the legislature directed the CDCR to develop an execution protocol that complied with the Eighth Amendment's prohibition against cruel and unusual punishment and that this standard is sufficiently specific to meet the Legislature's duty to provide direction to the CDCR. The parties did not address this framing of the issue in their briefs. The court has also considered the new case of *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376. The court therefore permits and

requests supplemental briefing. (*Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 860; *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.)

The parties may file supplemental opening briefs of up to 8 pages, supported by new requests for judicial notice if appropriate, by 4/7/17. The parties may file supplemental reply briefs of up to 5 pages, with no new requests for judicial notice, by 4/14/17.

The court provides its current tentative decision below.

Dated: March 20 2017



Kimberly Colwell
Judge of the Superior Court

TENTATIVE DECISION

Demurrer of California Department of Corrections and Rehabilitation to Petition and Complaint is SUSTAINED WITHOUT LEAVE TO AMEND.

CLAIM PRECLUSION

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

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

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

In 2007, Sims and Morales filed a complaint contending that any procedure employed to carry out the death penalty must be adopted through the regulatory approval process prescribed by the California Administrative Procedure Act (APA), rather than as an agency operational procedure. Sims and Morales prevailed. (*Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729.)

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

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

The CDCR argues that the claims in this case are barred by claim preclusion because they could have been raised in the 2006 litigation. The elements of claim preclusion are: (1) the second lawsuit must involve the same cause of action as the first lawsuit; (2) there must have been a final judgment on the merits in the prior litigation, and (3) the parties in the second lawsuit must be the same (or in privity with) the parties to the first lawsuit. (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.) A fourth

element is (4) if injustice would result or if the public interest requires that relitigation not be foreclosed. (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 592.)

FINAL JUDGMENT

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

IDENTITY OR COMMUNITY OF INTEREST.

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

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

In *Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1511, the court states "This requirement of identity of parties or privity is a requirement of due process of law. ... Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the ... party in the first action." Applying this standard, *Roberson* held that to the extent that Roberson was challenging project approvals under CEQA based on the defective notice, he, "a natural person who resides in the City of Rialto," was in privity with Rialto Citizens which is "a nonprofit mutual benefit corporation "formed for the purpose of promoting

social welfare through advocacy for and education regarding responsible and equitable environmental development."

In *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, the court held that although two public interest entities had a "common interest" in the enforcement of CEQA for purposes of a privity determination, they were not in privity because the for purposes of claim preclusion because one did not adequately represent the common interest. In *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 689-690, the court held that two organizations that alleged distinct causes of action in the public interest under same anti-pollution statute and against same defendant were in privity for purposes of claim preclusion.

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

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

CAUSE OF ACTION.

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

> Whether two lawsuits are based on the same cause of action is determined in California by reference to the primary right theory. ... Under this theory, a "cause of action" is comprised of a primary right possessed by the plaintiff, a corresponding duty imposed upon the defendant, and a wrong done by the 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 the *harm suffered* that is the significant factor in defining the primary right at issue. ...
>
> Of course, we do not mean to imply that the City is forever bound by the mandate of [a prior decision], regardless of current circumstances. That is clearly not the law. Rather, as the First District has summarized: "The theory of estoppel by judgment or res judicata ... *extends only to the facts in issue as they existed at the time the judgment was rendered* and does not prevent a reexamination of the same questions between the same parties where in the interim the facts have changed or new facts have occurred which may alter the legal rights of the parties. *When other facts* or conditions *intervene* before a second suit, furnishing a new basis for the claims and defenses of the respective parties, *the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action.*"

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

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

1175.) The court has not been able to identify any reason why Sims and Morales could not have raised the issue in the 2007 case.

THE PUBLIC INTEREST

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

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

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

Third, the prudential rule of judicial restraint counsels courts against rendering a decision on constitutional grounds if a statutory basis for resolution exists. (*Elkins v. Superior Court*

(2007) 41 Cal.4th 1337, 1357.) (See also *Arden Carmichael, Inc. v. County of Sacramento* (2000) 79 Cal.App.4th 1070, 1077, fn 4.) Therefore, even if Sims and Morales had raised the constitutional separation of powers issue in the 2007 case, it is unlikely that the courts would have reached and resolved the constitutional issue given that they decided that case on the statutory ground that the execution protocol did not comply with the APA.

AVAILABILITY OF WRIT RELIEF

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

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

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

SEPARATION OF POWERS

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

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

People v. Wright (1982) 30 Cal.3d 705, 712–713, states:

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

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

Petitioners assert that Penal Code 3604 both left the resolution of fundamental policy issues to the CDCR and failed to provide adequate direction to the CDCR. Petitioners assert that the legislature had an obligation to address what they describe as the "fundamental policy questions" of pain, speed, reliability, and transparency.

Penal Code 3604(a) states:

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

The court finds that in Penal Code 3600 et seq the legislature has resolved the fundamental policy issues related to the death penalty. The legislature has decided whether to have a death penalty and the identity of the offenses where it may be applied. (Penal Code 15(1)[death is a penalty]; Penal Code 37 [treason], Penal Code 190.1 [murder in first degree with special circumstances]; Penal Code 4500 [assault by life prisoner with deadly weapon]).

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

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

1 The court is not persuaded that the pain, speed, and reliability of an execution are
2 "fundamental policy issues." The pain, speed, and reliability of executions relate to the
3 implementation of the fundamental policy decisions but they are not themselves fundamental
4 policy decisions. This is consistent with *Wilkinson v. Madera Community Hospital* (1983) 144
5 Cal.App.3d 436, 442, where the court held that the Legislature resolved a "fundamental issue" by
6 determining that a hospital could require every member of the medical staff to have professional
7 liability insurance as a condition of being on the medical staff, but that the legislature could defer
8 to individual hospitals the issues of whether to require insurance from a "recognized insurance
9 company" and the minimum amount of insurance that the hospital requires. (*Wilkinson*, 144
10 Cal.App.3d at 444 and fn 5.)
11
12 The court is not persuaded that the transparency of an execution is a "fundamental policy
13 issue" that must be addressed by the CDCR under Penal Code 3604. Transparency concerns the
14 public's ability to monitor the actions of public entities and the public's access to public records
15 but transparency does not relate directly to the implementation of the death penalty. The Public
16 Records Act and related Constitutional provisions address that issue. (See *American Civil*
17 *Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55.)
18
19 The court also finds that in Penal Code 3600 et seq the legislature has provided adequate
20 direction for the implementation of the policy. Petitioners are correct that the legislature gave
21 little express direction to the CDCR on what factors to consider and how to weigh those factors.
22 That omission does not, however, support a claim that Penal Code 3604 is unconstitutional.
23
24 First, the "standards for administrative application of a statute need not be expressly set
25 forth; they may be implied by the statutory purpose." (*People v. Wright* (1982) 30 Cal.3d 705,
26 712–713.) Similarly, *Samples v. Brown* (2007) 146 Cal.App.4th 787, 805-806, states: "The

requisite legislative guidance need not take the form of express standards." (See also *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 168.) *Wilkinson v. Madera Community Hospital* (1983) 144 Cal.App.3d 436, 441, notes that legislative history can reveal the purpose of a statute in a separation of powers analysis.

The legislative history of Penal Code 3604 demonstrates that the standard for the execution of the death penalty is compliance with the Eighth Amendment's prohibition against cruel and unusual punishment. In 1996, the legislature amended Penal Code 3604 to state that the default method of execution is lethal injection. The purpose of the legislation was to ensure that California law was not in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The Court takes judicial notice of the Bill Analysis for the Assembly Third Reading of AB 2082 (Conroy) dated 3/15/96, which states:

> The Ninth Circuit Court of Appeals recently held that execution by lethal gas constitutes cruel and unusual punishment and, thus, is violative of the Eighth Amendment. The court based its decision on evidence concerning the severity of pain experience by an inmate executed by lethal gas. In addition, the court found that there is a substantial risk that inmates will suffer extreme pain for several minutes. For these reasons, the court determined that execution by lethal gas is unconstitutional. [See Fierro et al. v. Gomez, No. 94-16775 (9th Circuit, filed February 21, 1996).]
>
> ARGUMENTS IN SUPPORT: This bill to the current statute would bring the state into conformity with the Gomez decision, supra, thus providing resolution in this area of the law, regardless of the federal appellate destiny of the Gomez case.
>
> ARGUMENTS IN OPPOSITION: None.

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

> ARGUMENTS IN SUPPORT: According to the author, current law states that when an individual is sentenced to death for murder, the default method of execution is the gas chamber. Recent court rulings have held that to be

> unconstitutional so this bill will make lethal injection the default method of execution.

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

The adoption of Proposition 66 in 2016 also suggests that standard for the CDCR's execution protocol was the constitutional minimum standard. Proposition 66 enacted Penal Code 3406.1(c), which states: "The court which rendered the judgment of death has exclusive jurisdiction to hear any claim by the condemned inmate that the method of execution is *unconstitutional* or otherwise invalid." (Emphasis added.) The reference to the constitutional standard is express. The reference to the "or otherwise invalid" standard suggests that the Proposition both did not recognize any specific non-constitutional while also not foreclosing any non-constitutional challenge.

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

Petitioners note correctly that the Constitution merely places an outer limit on the risk and degree of pain. (*Glossip v. Gross* (2015) 135 S.Ct. 2726, 2737.) Petitioners also note correctly that well before that limit is reached there are a wide range of judgment calls that a legislature can make about the pain, speed, reliability, and transparency of executions. (*Baze v. Rees* (2008) 553 U.S. 35, 51.) Petitioners have not, however, cited to any authority for the proposition that a

legislature that has made the fundamental decision to have a death penalty cannot set the standard as the constitutional minimum and delegate to prison officials the task of developing a constitutional execution protocol.

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

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

Third, the legislature can rely on safeguards to take the place of standards. *Samples v. Brown* (2007) 146 Cal.App.4th 787, 805-806, states: "our Supreme Court has advised that " '[t]he need is usually not for standards but for safeguards.... [The] most perceptive courts are

motivated much more by the degree of protection against arbitrariness than by the doctrine about standards ....'" The legislative history to the 1996 amendment makes clear that the legislature was relying on the courts to provide the relevant safeguards.

Fourth, the legislature can give an executive branch department a general mandate to use its expertise and power of regulation as it sees fit within broad parameters. In *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, the court upheld the validity of a regulation, stating, "That the Legislature entrusted to the Commissioner the application of these and other statutory provisions to specific problems—problems the Legislature did not, and in some cases could not, anticipate—is precisely why enactment of section 790.10 makes sense in the broader statutory scheme. [Para] To conclude that these statutory schemes require the Legislature to define in advance every problem it expects an agency to address is to suggest that the Legislature had little need for agencies in the first place." Similarly, in *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 182-183, the Court distinguished between "specific statutory mandates and general grants of power." Regarding the former, the Court stated, "To the extent that the Legislature considers a given problem and determines the best method of dealing with it, it may specifically include its resolution of the matter in statutory law." Regarding the latter, the Court stated, "the Legislature gave the department a general mandate: to use its expertise and power of continuous regulation as it sees fit to 'promote orderly marketing and distribution.'" The court found the latter form of regulation to be appropriate. Although neither *Association of California Insurance Companies* nor *Ralphs* mentioned separation of powers, the analysis of the limits of administrative rulemaking authority is the obverse of the separation of powers analysis.

Fifth, *Kasler v. Lockyer* (2000) 23 Cal.4th 472, draws on United States Supreme Court jurisprudence and states that the separation of powers doctrine is concerned about "encroachment

and aggrandizement." (*Kasler*, 23 Cal.4th at 493.) In this case, the legislature is not encroaching on executive branch turf but rather is delegating to the executive branch.

Sixth, *Kasler* states that the separation of powers doctrine "not only guards against the concentration of power in a single branch of government; it also protects one branch against the overreaching of the others." (*Kasler*, 23 Cal.4th at 498.) In this case, the legislature is imposing responsibilities on the CDCR. There is, however, no indication that the responsibilities are inappropriate or unduly burdensome. *Kasler* extensively discussed *Mistretta v. United States* (1989) 488 US 361, where "the high court reviewed the constitutionality of the Sentencing Reform Act, under which Congress delegated authority to the Sentencing Commission to promulgate sentencing guidelines for federal criminal offenses, placed the commission within the judicial branch, and required federal judges to serve on it along with nonjudges." *Kasler* noted that "sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment," and that Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise. (See also *People v. Wright* (1982) 30 Cal.3d 705, 714 ["broad delegations to public agencies enjoying the expertise to implement the legislative policy have been upheld"].)

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

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

TAXPAYER CLAIM

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

The CDCR argues that the court cannot grant relief under CCP 526 because CCP 526 is a simply a standing provision and authorizes taxpayer suits only if the government body has a duty to act and has refused to do so. (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557.)

CCP 526 authorizes actions by a resident taxpayer against officers of a county, town, city, or city and county to obtain an injunction restraining and preventing the illegal expenditure of public funds. "A taxpayer may sue to enjoin wasteful expenditures by state agencies as well as

local governmental bodies." (*Cates v. California Gambling Control Com.* (2007) 154 Cal.App.4th 1302, 1308.) A taxpayer can bring an action under CCP 526a to restrain enforcement of an unconstitutional statute. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 268.)