No. 19- _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re KERMIT ALEXANDER, *et al.*,

Petitioners.

KERMIT ALEXANDER and BRADLEY WINCHELL,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

MICHAEL MORALES, TIEQUON COX, ALBERT BROWN, MITCHELL SIMS, DAVID RALEY, ROBERT FAIRBANK, KEVIN COOPER, SCOTT PINHOLSTER, WILLIAM PAYTON, ROYAL HAYES, RICHARD BOYER, RONALD DEERE, HARVEY HEISHMAN, ANTHONY SULLY, ALBERT CUNNINGHAM, DOUGLAS MICKEY, HECTOR AYALA, RICHARD SAMAYOA, RAYNARD CUMMINGS, CONRAD ZAPIEN, RONALDO AYALA, and JOHN VISCIOTTI,

Real Parties in Interest-Plaintiffs,

RALPH DIAZ, ACTING SECRETARY OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, RONALD DAVIS, WARDEN OF SAN QUENTIN PRISON, and GAVIN NEWSOM, GOVERNOR OF THE STATE OF CALIFORNIA,

Real Parties in Interest-Defendants.

PETITION FOR WRITS OF MANDAMUS OR PROHIBITION

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ISSUES PRESENTED

1. Under *Baze v. Rees* and *Glossip v. Gross*,[1] may a District Court maintain a stay of all executions in a State in a method-of-execution case after (a) the State abandons the method for which the *Baze* finding was made, (b) the State adopts the alternative method found by the court to be "sufficient to eliminate any 'demonstrated risk' of a constitutional violation," and (c) no new *Baze/Glossip* showing against the alternative method has been made?

2. Under the Prison Litigation Reform Act's (PLRA) requirement of narrow relief, 18 U.S.C. § 3626(a), may a District Court include in its stay order a prohibition on all preparations for executions without a finding and without any showing whatever that preparatory activity (such as training the execution team) violates any right of the plaintiffs?

3. Is a stay of execution in an action under 42 U.S.C. § 1983 (as distinguished from a habeas corpus petition) subject to the PLRA's limitations on preliminary injunctive relief, including the 90-day expiration?

INTRODUCTION

For nearly 13 years, justice has been obstructed in the worst California murder cases. Well-deserved sentences of death for horrible murders, justly imposed and thoroughly reviewed by both state and federal courts, have gone unexecuted since early 2006. The reasons have been a combination of federal

1. 553 U.S. 35 (2008) (plurality opinion) and 135 S.Ct. 2726 (2015).

litigation, state litigation, and the failure of the agency charged with carrying out death sentences to take the necessary steps.

In the 2016 general election, the people of California voted to expedite the execution of capital sentences. The basis for the state-court injunction on executions was abrogated, and the injunction has been lifted. However, the overbroad orders issued by the U.S. District Court in this matter still stand in the way.

Under United States Supreme Court precedent, a federal court in a civil rights action under 42 U.S.C. § 1983 can only enjoin a particular method of execution. A challenge that will prevent execution altogether must be brought in habeas corpus, not § 1983. Further, a method of execution can only be enjoined if the plaintiff meets the stiff requirements prescribed by *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion) and *Glossip v. Gross*, 135 S.Ct. 2726 (2015).

The state's refusal to adopt an alternative method that effectively addresses a substantial risk of serious harm is an essential element of an Eighth Amendment method of execution claim under *Baze*. In this case, the state *has* adopted the plaintiffs' proffered alternative, yet the District Court not only maintains in effect the previously granted stays but has also granted yet another stay to an inmate who intervened after adoption of the alternative method.

Defendants have failed to appeal the stay orders, even though the arguments they have filed in the District Court opposing these orders make clear that they are erroneous. Defendants simply ignored an express written request by counsel for the petitioners in this action to seek review by appeal.

The suit has become a semi-collusive one, with the defendants using stay orders they know are improper as a shield to avoid their duties under state law, blocking petitioners' statutory right under state law to compel performance of those duties.

Petitioners, family members of murder victims, are impacted by this injunction, but as non-parties to the action are unable to appeal. They therefore invoke this court's extraordinary writ jurisdiction. The factors established in *Bauman v. United States District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977) weigh heavily in favor of writ relief.

STATEMENT

A. The Parties.

1. *Petitioners*. Petitioner Kermit Alexander's mother, sister, and two nephews were murdered by Tiequon Cox, a plaintiff in the underlying action. *See People v. Cox*, 53 Cal. 3d 618, 641-643 (1991). Cox's case was reviewed through all the normal procedures (appeal, state habeas corpus, and federal habeas corpus) culminating in denial of certiorari by the Supreme Court in the federal habeas corpus case over seven years ago. *See Cox v. Ayers*, 613 F.3d 883, 886 (9th Cir. 2010), *cert. denied*, 565 U.S. 897 (2011).

Petitioner Bradley Winchell's sister was murdered by Michael Morales, a plaintiff in the underlying action. *See Morales v. Woodford*, 388 F.3d 1159, 1163-1166 (9th Cir. 2004). The normal end of reviews of this case was over 13 years ago. *See Morales v. Brown*, 546 U.S. 935 (2005).

2. *Real Parties in Interest-Plaintiffs*. The plaintiffs in the underlying case are 22 convicted murderers on California's death row, all of whom have had

full review of their cases through the procedures noted above. In addition to Michael Morales and Tiequon Cox, noted above, they are Albert Brown, Mitchell Sims, David Raley, Robert Fairbank, Kevin Cooper, Scott Pinholster, William Payton, Royal Hayes, Richard Boyer, Ronald Deere, Harvey Heishman, Anthony Sully, Albert Cunningham, Douglas Mickey, Hector Ayala, Richard Samayoa, Raynard Cummings, Conrad Zapien, Ronaldo Ayala, and John Visciotti. Former plaintiffs Stevie Fields and Fernando Belmontes are deceased.

3. *Real Parties in Interest-Defendants*. The defendants, all sued in their official capacities, are the Secretary of the California Department of Corrections and Rehabilitation, the Warden of San Quentin Prison, and the Governor of the State of California. The current holders of these offices, automatically substituted via Federal Rule of Civil Procedure 25, are Ralph Diaz (acting), Ronald Davis, and Gavin Newsom, respectively.

B. The Federal District Court Case.

Lethal injection was first used in California on February 23, 1996, for the execution of William Bonin. *See* California Department of Corrections and Rehabilitation, The History of Capital Punishment in California <http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html> (as of Dec. 27, 2017). Eleven executions were carried out from that date through the January 17, 2006, execution of Clarence Allen. *See* California Department of Corrections and Rehabilitation, Inmates Executed, 1978 to Present, <http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html> (as of Dec. 27, 2017).

On January 13, 2006, defendant Michael Morales, who was scheduled to be executed next, filed the underlying action under 42 U.S.C. § 1983, claiming that the California three-drug lethal injection protocol then in use violated the Eighth Amendment prohibition on cruel and unusual punishment. On February 14, 2006, the District Court conditionally denied a preliminary injunction on the condition that California Department of Corrections and Rehabilitation (CDCR) either (1) certify that it would use only a barbiturate or combination of barbiturates in Morales's execution, or (2) have the execution and the inmate's degree of sedation observed and verified by independent anesthesiologists. *See Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006). In the confused state of affairs caused by the last-minute nature of the litigation, CDCR was unable to fulfill the court's conditions, and the conditional denial became a stay of execution. *See Morales v. Tilton*, 465 F. Supp. 2d 972, 976-977 (N.D. Cal. 2006).)

The District Court subsequently issued a notice of intended decision, noting that

> "because the constitutional issues presented by this case stem solely from the effects of pancuronium bromide and potassium chloride on a person who has not been properly anesthetized, removal of these drugs from the lethal-injection protocol, with the execution accomplished solely by an anesthetic, such as sodium pentobarbital, *would eliminate any constitutional concerns*, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic."

Id. at 983 (italics added).

On May 15, 2007, CDCR issued a new protocol, OP 770, but stayed with the problematic three-drug protocol rather than the barbiturate-only method that the District Court had held "would eliminate any constitutional concerns." Following state court litigation regarding the Administrative Procedure Act (APA), described in section C below, CDCR issued another protocol under that act, which was eventually approved by the Office of Administrative Law and filed with the Secretary of State. *See* Cal. Reg. Notice Register 2010, Vol. 33-Z, p. 1274; Cal. Code Regs. tit. 15, §§ 3349-3349.4.6.

Following this approval, the Orange County Superior Court set an execution date for another murderer, Albert Greenwood Brown, who intervened in the federal case. The District Court attempted to give Brown a choice between the three-drug protocol in the new regulation or a single-drug protocol, but this court held that imposing on Brown a choice between the state's protocol and one never adopted by the state was improper. *Morales v. Cate*, 623 F.3d 828, 831 (9th Cir. 2010).

This court "remanded to the district court to determine whether, under *Baze*, Brown is entitled to a stay of his execution as it would be conducted under the three-drug protocol now in effect." 623 F.3d at 831. However, on remand the District Court found this was not possible within the very limited time remaining before Brown's scheduled execution, "other than in a very preliminary way." *See* Order Following Remand, Addendum 37 ("Add."). The court reiterated its prior findings that an execution via sodium thiopental alone would be "painless." Add. 39, n.7.

Brown's proposed order contained language that, in addition to a stay of execution, also stayed "other proceedings related to the execution of Albert Greenwood Brown's sentence of death, including preparation for execution and the setting of an execution date . . . ." Doc. 387-2[2] at 2. Not a word in Brown's motion provided any basis for prohibiting anything other than the execution or arguably the setting of a date. *See* Doc. 387. Defendants objected to the breadth of the prohibition. *See* Doc. 392 at 7. Nothing in Brown's reply defended this breadth. *See* Doc. 393. Even so, the District Court adopted this language without a word of explanation for imposing the broad restriction and rejecting the Defendants' objection. Add. 39. This pattern has been repeated for each subsequent stay. *See* Add. 41, 47, 51, 55-56, 60, 65, 70, 76.

A few months after the Brown stay, the District Court denied CDCR's motion to dismiss, holding that the plaintiffs had stated a cause of action assuming their allegations to be true. *Morales v. Cate*, 757 F. Supp. 2d 961, 963-964, 971 (N.D. Cal. 2010). The District Court held that the element of *Baze v. Rees* that "there exists a known and available alternative" was properly pleaded by the plaintiffs' assertion that "a single-drug protocol using only sodium thiopental is feasible and readily implemented" and had been used in two other states. *See id*. at 970-971.

On October 8, 2010, Morales and Brown filed a Fourth Amended Complaint. Add. 82. That complaint alleged that the three-drug procedure created a "demonstrated risk of severe pain" that is "substantial when

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2. "Doc." citations are to the document numbes in the PACER docket of the underlying action, No. 3:06-cv-00219-RS.

compared to the known and available alternatives" and identified the barbiturate-only, single-drug method adopted in Ohio and Washington as an alternative. Add. 84-85, ¶¶ 106-109; Add. 88, ¶ 117. This remains the operative pleading to this day, with no further amendments having been filed.

Litigation of the validity under the Eighth Amendment of the 2010 protocol did not proceed because of state-court litigation under the APA, discussed in section C, below. On July 16, 2012, the parties signed a joint scheduling statement asking the District Court to, in essence, put the case on hold until a protocol that was valid under state law had been promulgated. Doc. 532. The court adopted this proposal on August 10, 2012. Doc. 554.

Many additional plaintiffs later intervened in the federal case, in part in response to efforts by district attorneys and crime victims, discussed below, to force CDCR to establish a working protocol. Mitchell Sims and Stevie Field were granted intervention and a stay "on the same basis and to the same extent as in the case of Plaintiffs Morales and Brown" on January 19, 2011. Add. 41. David Raley, Tiequon Cox, and Robert Fairbank were allowed to intervene on November 21, 2012. Add. 47. Kevin Cooper was allowed to intervene on June 19, 2013. Add. 51. Scott Pinholster and William Payton were allowed to intervene on September 13, 2013. Add. 55. Fernando Belmontes, Royal Hayes, Richard Boyer, Ronald Deere, Harvey Heishman, Anthony Sully, Albert Cunningham, Douglas Mickey, Hector Ayala, Richard Samayoa, and Raynard Cummings were allowed to intervene on April 18, 2017. Add. 60. Conrad Zapien was allowed to intervene on September 21, 2017. Add. 65. Ronaldo Ayala was allowed to intervene on December 4, 2017. Add. 70.

In opposing Ronaldo Ayala's motion, CDCR argued

> "that the current proceedings are either moot or not ripe for review in light of the fact the lethal injection protocol that is the subject of this litigation is enjoined and efforts are underway to promulgate a one-drug lethal injection protocol."

Add. 68. However, the District Court held:

> "The operative protocol [i.e., the three-drug protocol then in Cal. Code Regs., tit. 15 §§ 3349 et seq.] was found to be deficient by a California state court and the method by which it was implemented was found to be deficient by this Court. Defendants *have not yet replaced that protocol* and, thus, have not shown that they have obviated the constitutional issues that have existed since the litigation began."

Add. 69 (emphasis added).

CDCR then did replace the protocol. On January 29, 2018, CDCR notified the District Court that it had sent to the California Office of Administrative Law regulations to establish procedures for lethal injection. *See* Doc. 634. On March 8, 2018, CDCR notified the District Court that the new protocol had been finalized. *See* Doc. 634. On May 14, 2018, the District Court granted intervention and a stay to John Visciotti, *see* Add. 76, despite the fact that the complaint Visciotti was joining attacked a protocol the state had abandoned and proffered as the alternative to the one that the state had adopted.

All of the intervention orders included stays on the same basis as the prior plaintiffs. None were appealed.

On June 26 and July 5 of last year, the District Attorneys of San Bernardino, Riverside, and San Mateo Counties sought to intervene in the

District Court action. The defendants opposed the motion claiming that there was no need for it because the defendants would "move for judgment on the pleadings once the Court adopts a schedule and lifts the stay on the proceedings." Doc. 670 at 2. The District Court denied intervention, saying that the intervenors' interests were represented by the current defendants. Doc. 676 at 8-9. That was six months ago, and no progress has been made toward terminating the action despite the fact that both the state-court injunction and the problematic three-drug protocol are in the past. The District Attorneys' appeal from denial of intervention is pending before this court in case number 18-16547, but even if they prevail a timely vacation of the stays of execution will not follow. The appeal concerns only the denial of intervention, and following reversal they will have to return to District Court, move again to vacate the stays, and then appeal the likely denial.

With the dubious stay orders providing an umbrella of a *de facto* moratorium on executions, the District Court is making no apparent effort to expedite this litigation. The court adopted a leisurely schedule for the next stage of the litigation, giving the plaintiffs until February 27, 2019, to file their complaint against the current execution protocol, *over a year* after CDCR had finished it, and almost a year after its adoption was formalized. *See* Order Setting Briefing Schedule (Oct. 30, 2018), Add. 77. Briefing on a motion to dismiss is not scheduled to be completed until July 5, 2019, and if that motion is denied there is no end in sight to the litigation. All of this delay is happening without any semblance of the showing against the current protocol required by *Baze* and *Glossip*.

Three more death-row inmates, Guy Rowland, Tracy D. Cain, and Ricky Lee Earp were denied certiorari by the Supreme Court, completing their usual reviews, early in the October 2018 term, and they moved for intervention and stay as the earlier inmates had. Docs. 689, 693, 702. Petitioners moved to file an amicus brief to present substantially the same arguments as are made in this petition. Doc. 695. The District Court denied petitioners' amicus motion and also denied the inmates' intervention and stay motions, without prejudice to renewal when a complaint against the current protocol is filed. Add. 78. Why these inmates were denied for the time being when the identically situated John Visciotti was granted immediate intervention and stay after adoption of the new protocol is not explained. The court noted that a new complaint against the new protocol was needed, Add. 81, but that was also true for Visciotti.

Petitioners presented the court with an opportunity to consider and rule on the merits of the arguments in this petition, the court declined to do so, the litigation drags on with no end in sight and no one pushing for expeditious completion, and petitioners have no effective vehicle for relief in the District Court.

C. Related State-Court Litigation.

The federal litigation is intertwined with several suits in California state courts. A brief description of that litigation is helpful in understanding the federal litigation and why victims of crime do not have an adequate remedy in waiting for CDCR to take the necessary steps to lift the stays entered in this case.

Before the present case commenced, CDCR had been executing judgments of death for many years, its procedures had never been promulgated pursuant to the APA, and that had never been considered necessary. In 2008, the California Court of Appeal for the First District affirmed an injunction issued by the Superior Court for Marin County, enjoining CDCR from carrying out executions until its "protocol is promulgated in compliance with the APA." *Morales v. California Dept. of Corrections & Rehabilitation*, 85 Cal. Rptr. 3d 724, 726 (Cal. App. 2008). This was an issue of great statewide importance, and the court of appeal decision expressly contradicted another court of appeal decision, *see id*. at 730, thus making it an ideal case for California Supreme Court review. *See* Cal. Ct. R. 8.500(b)(1). Even so, CDCR failed to petition for review, thereby creating a second barrier to the resumption of executions on top of the litigation in the Federal District Court.

In 2009, CDCR submitted regulations to adopt a new execution protocol, staying with the three-drug method despite the holding of the District Court that a barbiturate-only protocol would "would eliminate any constitutional concerns." California's Office of Administrative Law found that the first attempt did not meet the requirements of the APA, but a revised version did comply and was approved in 2010. *See Sims v. California Dept. of Corrections & Rehabilitation*, 157 Cal. Rptr. 3d 409, 413-414 (Cal. App. 2013). The state trial court found that the new regulation did not, in fact, comply with the APA, among other reasons because CDCR had provided no plausible explanation for its decision to stay with the three-drug method, *id*.

at 420-421, and the Court of Appeal affirmed in pertinent part. *See id*. at 428-429. CDCR again failed to seek Supreme Court review.

After another year of inaction, petitioners in this matter formally asked CDCR to establish a working execution protocol. CDCR flatly refused. The petitioners then petitioned for a writ of mandate in Sacramento Superior Court to compel adoption. CDCR opposed the petition claiming that (1) CDCR had unreviewable discretion to fail to adopt any protocol, and (2) victims of crime lacked standing to bring the petition. The superior court rejected both arguments. The court's decision is Exhibit A to the Declaration of Kent Scheidegger ("Scheidegger Decl."), in the form of the court's pre-hearing tentative ruling followed by the post-hearing amendment of that ruling. CDCR then settled and agreed to commence the APA process for a new regulation within 120 days of decision in the then-pending U.S. Supreme Court case of *Glossip v. Gross*. *See* Scheidegger Decl., Ex. B.

The new regulation was also challenged under the APA, but in the November 2016 election the people adopted Penal Code section 3604.1(a) in Proposition 66. This provision exempts execution protocols from the APA, "remov[ing] procedural impediments to execution protocols that are evident" in the *Morales* and *Sims* APA cases. *See Briggs v. Brown*, 3 Cal. 5th 808, 831 (2017). Proposition 66 was challenged, and its implementation was delayed a year by the challenge, but in the end the California Supreme Court rejected all of the attacks made on the initiative. *See id*. at 862.

CDCR then did nothing for four months to vacate the APA-based injunction in state court, so petitioner Alexander (the proponent of the initiative) moved in Marin County Superior Court on January 22, 2018, to lift

the injunction. CDCR belatedly joined the motion, and the court vacated the injunction on April 9, 2018. *See* Scheidegger Decl., Ex. C. This action left the federal injunction as the only legal barrier to resuming executions in California after a 12-year delay.

There are presently two suits pending in state courts seeking to enjoin executions on state-law grounds. In *Masters v. California Dept. of Corrections & Rehabilitation*, No. Civ. 1800580 (Marin Sup. Ct.), condemned murderer Jarvis Masters contends that despite Penal Code section 3604.1 the APA still applies to most of the execution protocol, notwithstanding the California Supreme Court's statement to the contrary. As of the date of this petition, no injunction has been issued in this case, and no motion for one is pending.

The other suit was filed by Mitchell Sims, a plaintiff in the District Court case, in Alameda County Superior Court, claiming that the statute specifying the method of execution as lethal injection and leaving the implementation to executive regulation violates the non-delegation doctrine. Not surprisingly, it was rejected by the Superior Court, and the Court of Appeal for the First District affirmed, *Sims v. Kernan*, 30 Cal. App. 5th 105 (2018), noting that its decision is in accord with those of almost all jurisdictions. Arkansas is the only state noted by the plaintiffs to have accepted the argument. *Id*. at 115. The time to seek California Supreme Court review has not yet elapsed as of the date of this petition.

In short, the state-law basis for delaying the action in the District Court case was abolished by the people of California two years ago, and the

pending state-court actions are desperate "Hail Mary passes" with little chance of success. They provide no basis for further delay in federal court.

The only current legal barrier to the resumption of long-overdue justice in California is the stay orders issued by the Federal District Court in the underlying case to provide time to litigate a dispute that is now moot.

ARGUMENT

I. Timely execution of capital sentences is an important interest, as recognized by the Supreme Court, Congress, and the people of California.

In the stay orders issued by the District Court in this matter since 2012, there seems to be a tone implying that halting all executions in the state for an indefinite period is, to use the vernacular, "no big deal." For example, on May 14, 2018, the District Court granted a stay of execution to John Visciotti (despite the fact that the state had adopted the plaintiffs' proffered alternative method and no complaint challenging that method is on file) by observing that because Visciotti is similarly situated to the others "his execution must be stayed until the present litigation is concluded." Add. 76. Nowhere in this order or the other orders issued in the last several years do we see any apparent awareness of the powerful interests of the state and the victims in carrying out these sentences without unreasonable delay. A few words about that importance are in order before turning to the specific issues.

The Supreme Court has noted many times the powerful interest in timely enforcing judgments and the prejudice from delay, both before and after the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In *In re Blodgett*, 502 U.S. 236, 239 (1992) (per curiam) the high court noted

"severe prejudice by the 2½-year stay of execution." The stay in the present case has extended nearly 13 years for Michael Morales.

The Supreme Court had taken some delay-reducing measures before 1996, but they were not enough. Congress decided stronger medicine was needed. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases . . . ." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003).[3] This landmark legislation, enacted after extended and heated debate, is a powerful statement that reducing delay is a major public concern and should be given great weight.[4]

Finally, the people of California, by direct vote, made a strong statement about delay when they approved Proposition 66. The proposition was based squarely on principle that "[f]amilies of murder victims should not have to wait decades for justice. These delays further victimize the families who are waiting for justice." *See* Proposition 66, § 2, ¶ 3 in Cal. Secretary of State, Voter Guide to 2018 General Election 213, http://vig.cdn.sos.ca.gov/2016/general/en/pdf/ complete-vig.pdf.

When the Supreme Court first allowed civil suits with stays of execution in method-of-execution cases, it was careful to emphasize that delay was a harm to " 'the State's strong interest in proceeding with its judgment . . . .' " and that must be taken into consideration. *See Nelson v.*

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3. Congress's purpose has been frustrated to date, in large part by the repeated failure of courts to follow its commands. *See*, *e.g.*, *White v. Wheeler*, 136 S.Ct. 456, 462 (2015).

4. Congress has also recognized that victims of crime have an interest in timeliness beyond the interest of the general public, a point we will address further in Part VA (standing).

Campbell, 541 U.S. 637, 649 (2004). *See also Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion) ("State's legitimate interest in carrying out a sentence of death in a timely manner").

Time is of the essence. The sentences put on hold by the District Court have already been delayed far too long, and every additional day is another miscarriage of justice.

II. A section 1983 plaintiff who has obtained a stay under *Baze/Glossip* with a showing of a better alternative is not entitled to a continued stay after the state adopts the alternative.

Baze v. Rees, 553 U.S. 35, 61 (2008) and *Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015)[5] establish the requirements for a court in a § 1983 method-of-execution case to halt an execution, whether its order be designated a stay or a preliminary injunction:

> " 'A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives.' [*Baze*], at 61. The preliminary injunction posture of the present case [*Glossip*] thus requires petitioners to establish a likelihood that they can establish both that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is *substantial when compared to the known and available alternatives*."

Glossip at 2737 (emphasis added).

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5. All citations to *Baze* are to the plurality opinion unless otherwise indicated. This is the "controlling opinion." *Glossip* at 2738 & n.2.

The "known and available alternatives" requirement serves the important function of ensuring "that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.' " *Glossip*, 135 S.Ct. at 2732-2733, *quoting Baze* (alterations by the *Glossip* Court). It also serves to keep method-of-execution suits brought under 42 U.S.C. § 1983 within the jurisdictional limits of that statute by insuring that an injunction will only prevent execution by a particular method, not prevent execution of the state judgment altogether, which would be a case for habeas corpus rather than § 1983. *See Nelson v. Campbell*, 541 U.S. 637, 645-647 (2004).

The state's refusal to adopt the alternative procedure when the two requirements quoted above are met is an essential element of the plaintiffs' Eighth Amendment claim. *See Baze*, 553 U.S. at 52. Obviously, then, a plaintiff no longer has his original cause of action and has no entitlement to a stay under it when the state has adopted the alternative. He might or might not be able to file a new action and get a new stay, but the pending action is moot. "Because the old procedure will not be utilized on [plaintiffs], no basis exists for continuing the stay previously in effect." *Cooey v. Strickland*, 588 F.3d 921, 923 (6th Cir. 2009), *cert. and stay denied sub nom. Biros v. Strickland*, 558 U.S. 1085 (2009)[6]; *see also Brown v. Vail*, 169 Wn.2d 318, 337, 237 P.3d 263, 272-273 (2010).

6. Biros's challenge to Ohio's barbiturate-only protocol was rejected on the merits. *See Cooey v. Strickland*, 589 F.3d 210, 233-234 (6th Cir. 2009), *cert. and stay denied sub nom. Biros v. Strickland*, 558 U.S. 1087 (2009).

These problems were brought to the attention of the District Court when additional plaintiffs sought to intervene and obtain stays of execution, but the court has brushed them aside with terse and cryptic statements that failed to address the issues involved. In 2012, Tiequon Cox and Robert Fairbank moved for intervention and stays in response to the efforts of the Los Angeles and San Mateo District Attorneys, respectively, to force CDCR to adopt a single-drug protocol for the execution of those two inmates.[7] In its order granting intervention and stays, the District Court described the history of this litigation, including the court's ruling on two separate occasions that California could proceed with execution if it used the single-drug protocol rather than the three-drug. *See* Order Resolving Motions to Intervene and to Stay Executions, Add. 43. The court rejected the argument against a stay with this stunning *non sequitur*:

> "The stated rationale for treating [Cox and Fairbank] differently [from the earlier plaintiffs] is that the district attorneys who sought or are seeking Cox's and Fairbank's executions intend that a single drug be used, yet the instant litigation purportedly involves only lethal injections of three drugs. However, as the above discussion indicates, one-drug executions have been at issue in this litigation since it commenced, and the Court found 'a number of critical deficiencies,' *Morales v. Tilton*, 465 F. Supp. 2d at 979, in Defendants' prior protocol that were not related to the number of drugs used. Defendants' argument ignores this record."

Add. 45-46.

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7. Those efforts were rejected by the state superior courts of the two counties on state-law grounds since abrogated by Proposition 66.

What "the above discussion indicates" and the record shows is that "one-drug executions have been at issue in this litigation" *only* as the plaintiffs' proffered alternative, which the court expressly held, in the very decision cited, "would eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic." *Morales v. Tilton*, 465 F. Supp. 2d at 983.

While the decision cited does indeed refer to "a number of critical deficiencies," the statement that the deficiencies are "not related to the number of drugs used" is seriously misleading. The deficiencies are strongly related to *which* drugs are used (not the number as such) because an error in the administration of a painless drug, *see* Add. 39, n.7, does not create the "demonstrated risk of severe pain" that is essential for a constitutional claim. That is why the District Court held in the same decision that "the constitutional issues presented by this case stem solely from the effects of pancuronium bromide and potassium chloride . . . ." 465 F. Supp. 2d at 983.

When requested by the District Court in response to Brown's stay request, CDCR submitted a brief statement of the changes that would be needed to its then recently promulgated protocol to change it to a single-drug, barbiturate only protocol. Add. 28. The District Court found, "the Court is satisfied that the procedure described in Defendants' submission is sufficient to eliminate any 'demonstrated risk' of a constitutional violation." *Id*. This finding has not been contradicted by any later order, nor has any claim been made that the protocol adopted this year is materially different from the procedure approved in 2010.

Even so, when inmate John Visciotti moved for intervention and stay after the formal adoption of the post-Proposition 66 single-drug protocol, the District Court brushed aside the fact that the state had adopted the plaintiffs' proffered alternative. The court quoted its illogical statement from six years earlier that " 'one-drug executions have been at issue in this litigation since it commenced.' " Add. 75.

The District Court stated, "Defendants have not met *their burden* in showing that the Court should reconsider its prior conclusions." *Id*. (emphasis added). But the only conclusion the District Court has reached regarding the propriety of a stay under *Baze* related solely to the abandoned three-drug protocol. At no time has the court made a finding that plaintiffs have met *their* burden under *Baze* and *Glossip* for an order preventing the state from using its new barbiturate-only protocol.

The assumption that seems to underlie the District Court's order is that as soon as a plaintiff makes a *Baze*/*Glossip* showing against a state's method of execution he and every other murderer who piles into the case is entitled to a moratorium on executions until the state makes an affirmative showing in regard to an entirely different protocol, even one substantially the same as the alternative previously approved by the court. No basis for giving such sweeping effect to the prior finding has been given by the District Court or the plaintiffs.

All the stays of execution entered in this case are based on the prior holdings regarding the abandoned three-drug protocol, and they should all be vacated, unless they have already expired automatically as discussed in the next section.

III. All stays granted in this case have expired under PLRA, but confirmation of that expiration is needed.

Nelson v. Campbell, 541 U.S. 637, 642-643 (2004) rejected the argument that method-of-execution claims had to be brought in habeas corpus, where they would be subject to the strict limit on successive petitions in 28 U.S.C. § 2244(b). Death row inmates could instead bring a civil rights action under 42 U.S.C. § 1983. However,

> "the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 [PLRA] imposes limits on the *scope and duration* of *preliminary* and permanent injunctive relief . . . ."

Nelson at 650 (emphasis added).

There can be no doubt that the stay orders issued in this case are "preliminary injunctive relief" within the meaning of the PLRA section imposing the limits that *Nelson* referred to, 18 U.S.C. § 3626. *Nelson* cites that section in a paragraph discussing only stays of execution. *See* 541 U.S. at 648. In *Glossip*, the Court treated stays and preliminary injunctions as equivalent. *See supra* p. 17 (quoted paragraph).

Unlike habeas corpus, Congress has not expressly granted federal district courts in § 1983 actions the power to stay state court proceedings. *Cf.* 28 U.S.C. § 2251 (stay in habeas). The Anti-Injunction Act by its terms implies that a stay of state court proceedings is an injunction. *See* 28 U.S.C. § 2283. In order for federal courts in § 1983 actions to halt state proceedings, it was necessary for the Supreme Court to find that § 1983 came within an

exception to the Anti-Injunction Act. *See Mitchum v. Foster*, 407 U.S. 225, 242-243 (1972).

There are two kinds of orders that grant preliminary injunctive relief: temporary restraining orders and preliminary injunctions. Section 3626(a)(2) governs both. Along with the same requirements that apply to all prospective relief under paragraph (a)(1), paragraph (a)(2) also contains a 90-day expiration rule.

The plain purpose of this rule is to prohibit exactly what has occurred in this case. An order that is supposed to be short term actually governs a state prison's operations for years while the litigation drags on. To prevent this, or at least inhibit it, Congress has provided in § 3626(a)(2) three conjunctive requirements for an order of preliminary relief to extend beyond 90 days. First, the court must make the findings required by paragraph (a)(1) for prospective relief. Second, the court must make the order final, not preliminary. Third, both of these requirements must be met "before the expiration of the 90-day period."

In the present case, all of the stay orders are more than 90 days old. At no time has the court made the findings of necessity, narrowness, and avoidance of ordering a violation of State law required by paragraph (a)(1). The orders remain preliminary, not final. Therefore, each stay order automatically expired on the 90th day after its issuance. *See Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001). Those expiration dates range from May 22, 2006, for Plaintiff Morales to August 12, 2018, for Plaintiff Visciotti. PLRA does not prevent the District Court from entering new stays, *see id*., but the burden is on the plaintiffs to prove they meet the requirements

for a new stay. *See id*. As applied to this case, that means the requirements of *Baze* and *Glossip* would have to be met as to the new protocol. The new stays would also expire in 90 days unless made final with the requisite findings within that time.

Although it seems indisputable that these stays have expired, Plaintiffs did dispute it in their opposition to the district attorney intervenors' motion. Doc. 669 at 20-21. While a dispute exists, it would not be realistic to expect CDCR to risk contempt by disregarding the orders until a court has confirmed that they are expired. The needed confirmation could take various forms, as discussed under mootness, *infra* p. 30, but some confirmation is needed.

IV. The *Bauman* factors point heavily toward granting this petition.

To implement the Supreme Court's guidance on the proper use of extraordinary writs, this court has adopted a five-part standard:

> "The guidelines are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression."

In re Cement Antitrust Litigation, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd*, *Arizona v. U.S. District Court*, 459 U.S. 1191 (1983).

> "Rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable.

> The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators."

Bauman v. U.S. District Court (Union Oil), 557 F.2d 650, 655 (9th Cir. 1977). "However, although all five factors need not be satisfied in order for mandamus to issue, 'it is clear that the third factor, the existence of clear error as a matter of law, is dispositive.' " *Calderon v. United States District Court*, 134 F.3d 981, 983-984 (9th Cir. 1998), *quoting Executive Software North America, Inc. v. United States District Court (Page)*, 24 F.3d 1545, 1551 (9th Cir. 1994).

The first factor is satisfied when the petitioner is not a party to the district court proceedings and cannot appeal. *See McClatchy Newspapers v. U.S. District Court*, 288 F.3d 369, 373 (9th Cir. 2002). Petitioners are not parties, and they could not become parties in a timely manner. The District Court's rejection of the District Attorneys' motion to intervene, holding that the current defendants represent the interest in enforcing the law despite their obvious lack of interest in timely disposition, presently before this court in case 18-16547, makes clear that an intervention motion by victims of crime would meet the same fate. Although that holding could be challenged on appeal, the resulting extended delays would defeat the very interest that petitioners seek to protect, timely execution of the judgments in the criminal cases.

The second factor is also satisfied. The petitioners' interest in timely enforcement, described further under the discussion of standing, *infra* at 27, is irreparably damaged by delay.

The third factor is the most important, *see McClatchy Newspapers*, 288 F.3d at 373, and it is powerfully met here. The District Court's injunction against mere preparation does not even pass "the straight-face test," PLRA limitations on the scope of relief apply to stays of execution in method-of-execution cases. *See supra* at 22. One of those requirements is that prospective relief "extend no further than necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A) & (a)(2). No showing or finding whatever has been made that preparatory activities such as designating and training an execution team or acquiring execution drugs, *see* Doc. 684 at 7, violates any federal right of the plaintiffs, and without such a finding this prohibition unquestionably violates the above provisions of the PLRA.

On the main issue, the state adopted a new protocol, and the petitioners have not even filed a complaint alleging that it violates the Eighth Amendment, much less made the showing that *Baze* and *Glossip* require for a stay. Quite the contrary, the District Court has already held that the method now adopted *does* meet constitutional requirements. Add. 28. "[A] definite and firm conviction that a mistake has been committed," *In re Henson*, 869 F.3d 1052, 1059 (9th Cir. 2017) (per curiam) is inescapable when the state's compelling interest in carrying out its judgments is blocked without the showing that the Supreme Court has held is required for this drastic measure. *See Beaty v. Brewer*, 649 F.3d 1071, 1075 (9th Cir. 2011).

The fifth factor is met here. Though the wording of the PLRA seems clear that the 90-day expiration rule applies to stays of execution in cases such as this, petitioners have found no precedent on point, making this a case

of first impression on an important point. Further, while it seems obvious that under *Baze* and *Glossip* the dispute is mooted when the state adopts the proffered alternative, and a stay ought not continue unless a new *Baze*/*Glossip* showing is made against the new method, the District Court held to the contrary and no on-point precedent of this court could be cited against the ruling, although other jurisdictions have so held. *See supra* at 18.

The fourth and fifth factors are to some extent mutually exclusive so that a petitioner can only and need only show one. "Where one of the two is present, the absence of the other is of little or no significance." *See Calderon*, 134 F.3d at 983, n.4, *quoting United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984). Petitioner therefore need not show that the error is often repeated in other cases, and indeed it is not. The error in this case is unique, although repeated within the same case. The second half of the fourth factor is "manifests persistent disregard of the federal rules." The District Court has manifested a persistent disregard of the constraints of the PLRA and the *Baze* and *Glossip* precedents, as described in the preceding parts of this petition, so in that sense the fourth factor is met and not inconsistent with the fifth.

The *Bauman* factors thus weigh heavily in favor of granting this petition.

V. Petitioners have standing, and the case is not moot.

A. Standing.

> "[T]he 'irreducible constitutional minimum' of standing consists of three elements. [Citation.] The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of

> the defendant, and (3) that is likely to be redressed by a favorable judicial decision."

Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1547 (2016). The injury must be "concrete and particularized," *see id*. at 1548, but not necessarily tangible. *See id*. at 1549. Injury to the interests in free speech and free exercise of religion are sufficient concrete, *see ibid*., as is merely observing a species of animal for purely esthetic reasons. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992). What is not sufficient is an interest "to vindicate . . . a generally applicable . . . law" in which the "petitioners ha[ve] no 'direct stake.' " *See Hollingsworth v. Perry*, 570 U.S. 693, 705-706 (2013).

Congress cannot grant standing where the minimum interest required for an Article III case or controversy is lacking, *Spokeo*, 136 S.Ct. at 1547-1548, but legislation is relevant to the standing analysis in two ways. First, both state and federal law must often be consulted to determine what interest the complaining party has. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 16-18 (2004) (state family law critical to standing of non-custodial parent); *White v. Square, Inc.*, 891 F.3d 1174, 1175 (9th Cir. 2018) (state discrimination law prerequisite to federal standing question). Second, the judgment of Congress as to whether an intangible harm "meet[s] minimum Article III requirements" is "instructive and important." *Spokeo*, 136 S.Ct. at 1549. An act of Congress may " 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.' " *Id*. (*quoting Lujan*, 504 U.S. at 578).

The status of victims of crime in criminal prosecutions has varied through the years, from actually prosecuting the case in early America to

being considered a stranger to the action and nothing more than a witness as of a few decades ago. *See* D. Beloof, P. Cassell, & R. Twist, Victims in Criminal Procedure 3-4 (2d ed. 2006). More recently, though, both Congress and the people of California, exercising their retained legislative authority via initiative, have recognized that victims of crime (including the family of murder victims) do indeed have a particularized interest in the prosecution and punishment of the perpetrator.

In the Crime Victims' Rights Act (CVRA), Congress has provided that victims of federal crimes, including family members of deceased victims, *see* 18 U.S.C. § 3771(e)(2)[8], have substantive rights in "any court proceeding involving an offense against a crime victim," § 3771(b), one of which is "proceedings free from unreasonable delay." § 3771(a)(7). Further, Congress conferred procedural rights to enforce the substantive rights, allowing victims to personally make motions in district court and petition for mandamus in the court of appeals even if the Government does not. *See* § 3771(d).

The CVRA does not directly apply to this case, but under *Spokeo* it is "instructive and important" nonetheless. Congress made a judgment that the victim's right to proceedings free from unreasonable delay was sufficiently concrete and particularized to give victims standing to enforce it on their own. Cases governed by the CVRA are not distinguishable from the present case on the question of whether the intangible harm of unreasonable delay

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8. All further section references are to 18 U.S.C., unless otherwise noted.

meets minimum Article III requirements. *Cf. Spokeo*, 136 S.Ct. at 1549. This congressional judgment is entitled to great weight under *Spokeo*.

Petitioners' legal interest in avoiding excessive delay comes from state law. The California Constitution, article I, section 28(b) protects many of the same rights as § 3771(a), and paragraph (9) confers a right to "a prompt and final conclusion of the case and any related post-judgment proceedings." California Penal Code § 190.6(d) eliminates any doubt by providing that this "includes the right to have judgments of death carried out within a reasonable time." Of course, this interest created by state law cannot override federal law, and petitioners do not claim that it does. In the present case, the petitioners' legally protected interest expressly recognized in state law is being impaired by an erroneous stay maintained by the District Court in *violation* of controlling federal law, *i.e.*, the PLRA and the *Glossip* and *Baze* precedents. The "concrete and particularized" state-law interest can and does give petitioners standing to complain of the federal-law error that injures that interest.

B. Mootness.

With one caveat, the case is not moot. Although the Prison Litigation Reform Act on its face renders the stays expired, the existence of a dispute on that point causes injury by preventing the petitioners from exercising their state-law rights regarding timely enforcement of the judgments. A state superior court judge is unlikely to order CDCR to conduct the necessary preparation, *see* Cal. Penal Code § 3604.1(a), or to set an execution date

while federal court orders prohibiting these actions have not yet been declared expired by either this court or the District Court.

Conceivably, this court could render the case moot by declaring it moot on the basis of the automatic expiration, thereby eliminating the doubt. That would, in effect, grant relief in the form of a declaratory judgment even while denying the requested writ. "This is one of those rare cases in which we must decide the merits to decide jurisdiction. We, of course, have jurisdiction to decide jurisdiction." *Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co*., 346 F.3d 1190, 1192 (9th Cir. 2003).

CONCLUSION

Petitioners request that this court issue writs of prohibition, mandamus, or both, as appropriate, ordering the District Court:

1. To vacate all stays of execution and associated prohibitions of preparatory actions issued to date;

2. To refrain from issuing any further stays or injunctions against executions unless and until the plaintiffs seeking them have made the showing required by *Baze* v. *Rees* and *Glossip* v. *Gross* as to California's current execution protocol;

3. To refrain from any prohibition of any preparatory activity without a showing that the activity violates a right of the party seeking it under federal law;

4. To include in any order granting a stay of execution, preliminary injunction, or other preliminary relief in this case a statement that the order is subject to automatic expiration under 18 U.S.C. § 3626(a)(2).

January 22, 2019

Respectfully submitted,

s/KENT S. SCHEIDEGGER
Attorney for Petitioners

STATEMENT OF RELATED CASES
Circuit Rule 28-2.6

Cooper v. Brown, No. 18-16547, pending in this court, arises out of the same district court case and involves related issues.

The issue presented in that appeal is whether the district court erred in denying the district attorneys' motion to intervene. The underlying reasons that the district attorneys seek to intervene are substantially the same as the issues presented in this writ petition, but the merits of those issues are not before this court in Case 18-16547.

January 22, 2019

Respectfully submitted,

s/KENT S. SCHEIDEGGER
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 21-2 and 32-3, I certify that the attached Brief Amicus Curiae for the Criminal Justice Legal Foundation is proportionally spaced, uses 15-point Times New Roman type and contains 8,366 words. This number divided by 280 does not exceed 30, and under Rule 32-3(2) is therefore deemed to comply with the 30-page limit of Rule 21-2(c).

January 22, 2019

s/Kent S. Scheidegger
KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I electronically filed the foregoing Petition for Writs of Mandamus or Prohibition, the Addendum to the Petition, and the Declaration of Kent Scheidegger with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to counsel on the attached Email Service List.

The district court has been provided with a copy of these documents.

s/Kent S. Scheidegger
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