

ANALYSIS OF JUNE 2010 CHANGES TO LETHAL INJECTION PROCEDURE

On June 11, 2010, the California Department of Corrections and Rehabilitation (CDCR) again proposed changes to the lethal injection procedures that had previously been released to the public for review twice, once in May 2009 and again in January 2010. The most recent changes came after the state agency that oversees the rulemaking process (the Office of Administrative Law) rejected the proposed regulations. Any member of the public may comment on the changes, whether or not that person commented on the proposed regulations before. *The CDCR must read and respond to all relevant comments.* This analysis is provided to assist interested members of the public in understanding how the proposed changes impact individuals and the state, and in drafting relevant public comments.

Written comments may be submitted by mail, fax, or email. They must be **received by June 25, 2010 at 5:00 pm PDT**. Send comments to:

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Comments should reference “Proposed Amendments to *Title 15, Article 7.5, Sections 3349.*” If you send your comment by mail, please also consider sending a copy by email to ensure it arrives by June 25 and you have a record. *Comments should mention one of the changes the CDCR made to the procedures—discussed below.* We encourage you to make as many additional points in your comment as you want, and include any relevant attachments.

Summary Analysis of Changes

I. The regulations now require that reporters who witness the execution be “reputable citizens,” without explaining the term—this is confusing and potentially unfair.

The CDCR changed the regulations to require any reporter who witnesses the execution be a “reputable citizen” but does not define this term. It is unclear if this means simply a “non-governmental employee,” as the word “citizen” is sometimes used in everyday speech, or if it means a “citizen” of the United States, or some other jurisdiction, as the word is sometimes used legally. If the CDCR intends to exclude reporters who are foreign nationals from witnessing executions, this is unnecessary and violates the First and Fourteenth Amendments.

II. The CDCR now cites the First Amendment as authority for the regulations, but in fact the regulations continue to conflict with the First Amendment.

For the first time, the CDCR cites the First Amendment as an authority for parts of the regulations. But the regulations are inconsistent with the First Amendment and place unnecessary and unfair restrictions on the ability of the media to witness and report on all relevant aspects of the execution. For example, the regulations keep media witnesses physically separated from other witnesses, prevent the reporters from hearing what happens in the

execution chamber, and prohibit the disclosure of critical public information such as the names of the official witnesses.

III. The regulations continue to treat state employed and non-state employed spiritual advisors differently, in violation of the First Amendment.

Thousands of people objected to the fact that the regulations treat state employed and non-state employed spiritual advisors differently, allowing state employed spiritual advisors to conduct religious ceremonies at cell front but limiting non-state employed spiritual advisors to conducting ceremonies in the public visiting room. The CDCR now claims this distinction is necessary because non-state employed spiritual advisors have not been through the same security screening process. But the CDCR failed to explain how long this process takes, why it cannot be done in the 45 days before an execution, and what happens if a non-state employed spiritual advisor already has such clearance. The distinction is unnecessary, unfair and unconstitutional.

IV. The CDCR has reduced the standards for who may be on the lethal injection team.

In the guise of clarifying the regulation, the CDCR has reduced the standards for membership on the lethal injection team, without any explanation or justification. Before, at least two satisfactory employee evaluations were required; now only one is sufficient, regardless of how many prior, unsatisfactory evaluations have been given. The CDCR should adopt an alternative that clearly states that two or more performance evaluations in recent years must meet or exceed expectations in order to serve on the lethal injection team.

V. CDCR failed to explain how it will respond to unforeseen occurrences during an execution or to clarify when the Warden must halt an execution.

The oversight agency noted in its decision that the CDCR failed to respond to numerous comments that objected to the fact that the regulations do not clearly state what the CDCR will do if something goes wrong during the execution. The CDCR failed to correct this problem. The regulations still do not explain when a Warden must halt an execution when something has gone wrong, such as when the person being executed shows signs of being awake.

Full Analysis of Changes

I. The regulations now require that reporters who witness the execution be “reputable citizens,” without explaining the term—this is confusing and potentially unfair.

Change Made:

The CDCR changed the part of the regulations that set the standards for members of the media who wish to witness the execution: the regulations now state that reporters must be “reputable citizens” to be approved to witness the execution. (Section 3349.2.3.)

CDCR Rationale for the Change:

The CDCR changed the standards because the state oversight agency noted in its decision that the previous version of the regulations were not consistent with state law which requires that witnesses to executions be “reputable citizens.”

The Problem:

The regulations do not make clear what a “reputable citizen” means. There is no definition or guideline anywhere in the regulations for the meaning of “reputable,” nor is it clear what “citizen” means in this context. Does “citizen” as used here simply mean “non-governmental employee,” as used most commonly in everyday speech? Or does it mean a legal citizen of the United States, a California citizen, or a citizen of some other jurisdiction, as the word is sometimes used in legal contexts?

Merriam Webster¹ provides these definitions of “citizen”:

- 1: an inhabitant of a city or town; *especially*: one entitled to the rights and privileges of a freeman;
- 2 a): a member of a state; b): a native or naturalized person who owes allegiance to a government and is entitled to protection from it; [or]
- 3: a civilian as distinguished from a specialized servant of the state.

Any of these definitions could apply to the term “citizen” as used in the regulations. The difference between these definitions is extremely significant for media access to executions. If the regulations now require that media witnesses be lawful US citizens or even California citizens, that needs to be explicitly stated in the regulations and a justification for this limitation provided.

If, on the other hand, media representatives who happen to be foreign nationals but meet one of the other definitions of “citizen” are eligible to witness an execution, the regulations must make this clear. Otherwise, these reporters may not know that they are eligible to view the execution and may mistakenly refrain from applying.

There is no legitimate reason for limiting the right of reporters who happen to be foreign nationals from witnessing executions and any such limitation would violate the First Amendment and the Fourteenth Amendment of the United States Constitution. The CDCR should not be allowed to discriminate against reporters who work for American media outlets but happen to be citizens of another country. Further, reporters representing international media often have a particular interest in covering executions. California has previously executed a person who was a citizen of another country and there are 56 foreign nationals currently on death row in the state. In addition, because the international community largely condemns the death penalty as a violation of human rights and international law, representatives of media outlets in other countries have a particular interest in covering executions in California and documenting on-going human rights violations in this country.

¹ Merriam-Webster Online Dictionary 2010, searched June 15, 2010, available at: <http://www.merriam-webster.com/dictionary/citizen>.

The CDCR must consider an alternative to the current regulations that explains the meaning of “reputable citizen” and that clearly explains that “citizen,” as used in this context, simply means a non-governmental employee.

II. The CDCR now cites the First Amendment as authority for the regulations, but in fact the regulations continue to conflict with the First Amendment.

Change Made:

The CDCR added the First Amendment of the United States Constitution to the list of legal authorities it relied on in drafting several sections of the regulations.

CDCR Rationale for the Change:

The oversight agency noted in its decision that the CDCR failed to accurately cite legal authority throughout the regulations. The CDCR included legal authority that is irrelevant and failed to include necessary legal authority like the Constitution.

The Problem:

The regulations themselves continue to violate the First Amendment rights of the media and the public by unduly restricting the media’s ability to report on executions. For example:

- The regulations physically separate the media witnesses from all other witnesses to the execution for the first time. For over 150 years in California, reporters have been in the same location as other witnesses to executions and have been able to report on these witnesses’ responses to the execution. The CDCR’s decision to separate the witnesses is not necessary and is inconsistent with the First Amendment.
- The regulations prevent the media witnesses from hearing what occurs in the execution chamber. The regulations require that the microphone in the execution chamber be turned off before the execution begins. This limitation on the ability of the media to perceive the execution is not necessary and is inconsistent with the First Amendment.
- The regulations prohibit the disclosure of the names of the witnesses, including the names of the official witnesses. The media should have access to the names of the witnesses and be allowed to interview those who are willing. This limitation on the ability of the media to report on relevant aspects of the execution is not necessary and is inconsistent with the First Amendment.

These are just some examples of the many ways the regulations continue to conflict with the First Amendment, despite the fact that the CDCR now cites the First Amendment as authority supporting parts of the regulations. The CDCR should consider alternatives to the current regulations that are consistent with the First Amendment, ensuring that reporters are able to perceive and report on all relevant aspects of the execution process.

III. The regulations continue to treat state employed and non-state employed spiritual advisors differently, in violation of the First Amendment.

Change Made:

The regulations allow state employed spiritual advisors to perform religious ceremonies at the cell front of the person to be executed, but require non-state employed religious advisors to perform these ceremonies in the visiting room. The CDCR added an explanation for this, stating that state employed spiritual advisors have been through a more rigorous security screening process and there is not sufficient time to do the same security clearance for non-state employed spiritual advisors.

CDCR Rationale for the Change:

The oversight agency noted that the CDCR failed to adequately respond to many comments that objected to the different treatment of state employed and non-state employed spiritual advisors.

The Problem:

The CDCR has failed to explain how long a “rigorous” security clearance takes or why there is insufficient time before the execution to do the clearance for a non-state employed spiritual advisor. The person to be executed may name his or her spiritual advisor as much as 45 days before the execution. Why is it not possible to complete the security clearance in this amount of time? Why is the CDCR unwilling to try? What if the spiritual advisor has already passed the security clearance, as in the case of a chaplain who recently stopped working for the prison and is not “state employed” but may have a long relationship with the person to be executed?

In its *Final Statement of Reasons, Summary of Comments and Responses to Renotice Period* (FSOR), the CDCR claimed that the person being executed has the “same opportunity to communicate with a spiritual advisor” regardless of whether he or she chooses a state-employed or non-state-employed advisor and that the “proposed regulation ensures that both state-employed and non-state employed Spiritual Advisors have the *same amount of time* with the inmate.” (pp. 61-62, emphasis added.) But the actual language of the regulations contradicts this, as the CDCR acknowledges elsewhere. For example, in the same FSOR, the CDCR states that non-state employed spiritual advisors are “subject to general visiting regulations” while state-employed spiritual advisors apparently are not. The language of the regulations specifically creates a distinction between state and non-state employed spiritual advisors with respect to cell-front visits, contradicting the CDCR’s statement that both are treated equally.

The distinction between state-employed and non-state employed spiritual advisors is unnecessary and inconsistent with the First Amendment religious rights of the individual to be executed. Because non-state employed spiritual advisors are more likely to be from minority religions, this distinction is particularly disturbing and violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. The CDCR must consider and adopt an alternative to the current regulations that makes every effort to accommodate and provide equal treatment to non-state employed spiritual advisors to ensure that the religious rights of the person to be executed are not violated.

IV. The CDCR has reduced the standards for who may be on the lethal injection team.

Change Made:

Before, the regulations stated that the requirements to be a member of the lethal injection team included that: "Annual permanent employee performance evaluations meet or exceed expected standards." The CDCR changed the requirements to: "[t]he most recent Annual permanent employee performance evaluation meets or exceeds expected standards." (3349.1.2.)

CDCR Rationale for the Change:

The oversight agency noted in its decision that the previous regulation was unclear as to how many performance evaluations must meet or exceed expected standards, noting only that it must be two or more.

The Problem:

In the guise of clarifying the regulation, the CDCR has reduced the standards for membership on the lethal injection team, without any explanation or justification. While before at least two satisfactory evaluations were required, now only one is sufficient. A 25 year employee with 24 performance evaluations that are below expectations could now be approved to be on the lethal injection team with just one satisfactory evaluation.

The CDCR should not lower the standards for members of the execution team. On the contrary, the CDCR should adopt an alternative that clearly states that two or more performance evaluations in recent years must meet or exceed expectations in order to serve on the lethal injection team.

V. CDCR failed to explain how it will respond to unforeseen occurrences during an execution or to clarify when the warden must halt an execution.

The oversight agency noted in its decision that the CDCR failed to respond to numerous comments that objected that the regulations do not clearly state what the CDCR will do if something goes wrong during the execution. Specifically, nowhere do the regulations explain when a Warden must halt an execution when something has gone wrong, such as when the person being executed shows signs of being awake.

The CDCR failed to correct this problem. The CDCR must consider alternatives to the current regulations that make clear when the execution will be stopped, including stating clearly that the Warden must stop the execution if the person shows signs of being awake or if a last minute reprieve is granted by the Governor or any court.