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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES, et al.,

Plaintiffs,

v.

RALPH DIAZ, Acting Secretary of the
California Department of Corrections and
Rehabilitation, et. al.,

Defendants.

Case No. 06-cv-0219 RS

06-cv-0926 RS

DEATH PENALTY CASE

**ORDER DENYING MOTION TO FILE
AMICUS BRIEF AND DENYING
WITHOUT PREJUDICE MOTIONS TO
INTERVENE**

Re: Doc. No. 689, 693, 695, 702

INTRODUCTION

Guy Rowland, Tracy D. Cain, and Ricky Lee Earp are condemned inmates at San Quentin State Prison whose direct and collateral attacks on their convictions and sentences have concluded. All move to intervene in the instant actions, which involve challenges to the constitutionality of California’s protocol for executions by lethal injection, and to have their executions stayed pending the conclusion of this litigation. (Doc. Nos. 689, 693, 702.) Kermit Alexander and Bradley Winchell, family members of victims of two death row prisoners already plaintiffs in the suit, filed an administrative motion to file an amici curiae brief opposing would-be intervenor Rowland’s motion to intervene. (Doc. No. 695). For the foregoing reasons, the motion to file an amici curiae brief is denied and the motions to intervene and stay would-be intervenors’ executions are denied without prejudice to renewal.

MOTION TO FILE AN AMICI CURIAE BRIEF

Kermit Alexander and Bradley Winchell are family members of victims of plaintiffs Tiequon Cox and Michael Morales, respectively. Administrative Motion for Leave to File Amici Curiae Brief at 3. They seek to file a brief as amici curiae opposing only Guy Rowland’s motion

1 to intervene. Proposed amici’s brief makes three major arguments: (1) that all stays of execution
2 entered in this case have expired under the Prison Litigation Reform Act, (2) prior orders granting
3 stays exceeded the Court’s authority by requiring defendants to refrain from making execution
4 preparations for the prisoner granted intervention, and (3) Rowland failed to meet the pleading
5 requirements set out by the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35, 61 (2008)
6 and *Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015). Proposed Amici Brief at 2, 4, 7. Plaintiffs
7 oppose the filing of an amici brief arguing both that the form of the motion is procedurally
8 improper and that the scope of the proposed amici brief exceeds Rowland’s motion to intervene.
9 Opp. at 2-3.

10 The Court has broad discretion in deciding whether to allow a non-party to participate as
11 an amicus curiae. See *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982), *abrogated on other*
12 *grounds by Sandin v. Conner*, 515 U.S. 472; *In re Roxford Foods Litig.*, 790 F.Supp. 987, 997
13 (E.D. Cal.1991). “An amicus brief may be unhelpful for many reasons, including because it is
14 untimely or does not provide information relevant to a pending decision.” *Jamul Action Comm. v.*
15 *Chaudhuri*, 2015 WL 1802813 *2 (E.D. Cal. April 17, 2015), citing *Cnty. Ass’n for Restoration*
16 *of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F.Supp.2d 974, 975 (E.D.Wash. 1999).

17 Two of proposed amici’s arguments pertain to prior orders issued in this case. The third
18 argument, again, seeks an order declaring expired all stays of execution in this case on the ground
19 that they issued prior to the defendants’ inception of the new one-drug lethal injection protocol.
20 Proposed Amici Brief at 10. An amicus may not assume the functions of a party, nor may it
21 initiate, create, extend, or enlarge the issues. *United States v. Alkaabi*, 223 F.Supp.2d 583, 593
22 (D.N.J. 2002).

23 Most of the information contained within proposed amici’s brief is not germane to the
24 pending determination of whether Rowland should be allowed to intervene and whether a stay of
25 execution specific to Rowland should issue. The limited information that is relevant has been
26 covered amply by defendants. Accordingly, the brief is not useful and, in many instances, exceeds
27 the scope of a proper amici brief. The administrative motion to file it is denied.

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1 **MOTIONS TO INTERVENE**

2 Guy Rowland, Tracy D. Cain, and Ricky Lee Earp seek intervention and stays of execution
 3 based on the fourth amended complaint. *See* Doc. Nos. 689, Ex. A; 693, Ex. B; 702, Ex. B.
 4 Intervention exists as a matter of right when a federal statute confers the right to intervene or the
 5 applicant has a legally protected interest that may be impaired by disposition of the pending action
 6 and existing parties do not adequately represent that interest. Fed. R. Civ. P. 24(a). A court must
 7 permit an applicant to intervene as a matter of right when: “(1) it has a significant protectable
 8 interest relating to the property or transaction that is the subject of the action; (2) the disposition of
 9 the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest;
 10 (3) the application is timely; and (4) the existing parties may not adequately represent the
 11 applicant’s interest.” *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (citation and
 12 internal quotation omitted). “Each of these four requirements must be satisfied to support a right
 13 to intervene.” *Id.* (internal citation, quotation, and alterations omitted). Failure to satisfy any one
 14 of the requirements is fatal to the application. *Perry v. Proposition 8 Official Proponents*, 587
 15 F.3d 947, 950 (9th Cir. 2009).

16 “Timeliness is ‘the threshold requirement’ for intervention as of right.” *League of United*
 17 *Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.1997) (quoting *United States v.*
 18 *Oregon*, 913 F.2d 576, 588 (9th Cir.1990)). Courts consider three factors when evaluating the
 19 timeliness of a motion to intervene: “(1) the stage of the proceeding at which an applicant seeks to
 20 intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.” *United*
 21 *States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir.1992)
 22 (quotations omitted).

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1 As noted, all three intervenors seek intervention based on the fourth amended complaint.
2 However, plaintiffs have been ordered to file a fifth amended complaint due to changed
3 circumstances. *See* Doc. No. 688. In light of the case's procedural posture and the need for an
4 amended operative complaint, the motions to intervene based on the prior complaint are not
5 timely. Thus, they are denied without prejudice to renewal upon filing of the fifth amended
6 complaint. The concurrent motions to stay executions also are denied without prejudice.

7 **CONCLUSION**

8 For the foregoing reasons, the administrative motion to file an amici curiae brief is denied.
9 The motions to intervene and to stay the executions of Guy Rowland, Tracy D. Cain, and Ricky
10 Lee Earp are denied without prejudice. The hearings currently scheduled for December 6, 2018
11 and December 13, 2018 will be taken off calendar.

12 **IT IS SO ORDERED.**

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14 Dated: November 30, 2018

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17 RICHARD SEEBORG
18 United States District Judge
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United States District Court
Northern District of California