

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 1.06.

Until further notice, **NO IN-PERSON APPEARANCES WILL BE PERMITTED**. All court users are required to appear via Zoom [which includes telephonic and video options]. **NO COURTCALL APPEARANCES WILL BE ACCEPTED**. The Department 53 Zoom link is <http://saccourt.zoom.us/my/dept53.54a> . The Department 53 Zoom ID is: 841 204 6267. To appear on Zoom telephonically, call (888) 475-4499 or (877) 853-5257 (toll-free) and enter the Zoom ID referenced above.

Consistent with Local Rule 1.06(B), any party requesting oral argument on any matter on this calendar must comply with the following procedure.

To request oral argument, on any matter on this calendar, you must call the Department 53 clerk at (916) 874-7858 by 4:00 p.m. the court day before the hearing and advise opposing counsel. At the time of requesting oral argument, the requesting party shall leave a voice mail message to advise the clerk that it has notified the opposing party of the following: a) its intention to appear and b) that opposing party may appear via Zoom using the Zoom ID indicated above. If no request for oral argument is made, the tentative ruling becomes the final order of the Court. Local Rule 1.06.

The hearings will also be live-streamed on the Court's YouTube page for the benefit of the public. Although the hearings will be live-streamed on the Court's YouTube page, the broadcast will not be saved/preserved. Thus, if any party wishes to preserve the hearing for future use, a court reporter will be required.

During the COVID-19 emergency, the Court will supply a court reporter upon request. Any party desiring a court reporter shall so advise the clerk upon request for oral argument. Unless a fee waiver has been granted, the reporter's fee must be paid to the Court prior to the hearing. Local Rule 1.12 and Government Code § 68086.

Department 53
Superior Court of California
813 Sixth Street, 2nd Floor
Shama H. Mesiwala, Judge
P. Lopez, Clerk
T. Elder, Bailiff

Tuesday, August 31, 2021, 1:30 PM

Nature of Proceeding: Motion for Summary Judgment and/or Adjudication

Filed By: Williamson, Brett J.

The Cross-Motion for Summary Judgment/Summary Adjudication of Defendants Gavin Newsom, Governor of California, and Kathleen Allison, Secretary of California Department of Corrections and Rehabilitation (CDCR), is granted.

The parties entered a stipulation signed by the Court allowing the briefing of their cross motions for summary judgment in an expedited fashion. (See ROA 12)

The Request for Judicial Notice by Plaintiff James V. Lacy is denied. Plaintiff asks the Court to take judicial notice of information about an ongoing murder trial as well as a news article and television news clip related to the trial. A news article and a television news clip cannot be used to establish the truth of the matters asserted. Courts should not take judicial notice where the subject matter is not relevant to the case. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544 [denying judicial notice where the requesting party failed to demonstrate the relevance of the material].) This is especially true where the underlying material cannot be noticed for its truth. (*L.A. Unified Sch. Dist. v. Superior Court* (2021) 64 Cal.App.5th 549, 279, review filed (June 30, 2021).)

Plaintiff's Evidentiary Objections to Exhibits attached to the declaration of Mr. Trac are overruled. The documents are either not hearsay because not offered for the truth of the matter stated, or come within the Public Records exception to the hearsay rule, Evidence Code 1280, for the reasons more fully stated in the Defendants' Response to Evidentiary Objections.

Plaintiff seeks a declaratory judgment that Governor Gavin Newsom's March 13, 2019 executive order, number N-09-19, is unconstitutional. Plaintiff contends that the order, a moratorium on the death penalty, exceeded the Governor's death penalty-related powers and unconstitutionally attempted to change legislative policy by executive fiat. Plaintiff contends that the Governor subverted the legislative mandate for CDCR to maintain its ability to execute a judgment of death at all times. As to Defendant Allison, Plaintiff seeks orders that will reverse the effects of Governor Newsom's Executive Order if the Court finds that the executive order is unconstitutional.

Plaintiff's Complaint alleges the following causes of action:

(1) First Cause of Action Declaratory relief: Governor Gavin Newsom's March 13, 2019 executive order, number N-09-19, is unconstitutional because it infringes on separation of powers and attempts to exercise powers in excess of those conferred upon him;

(2) Second Cause of Action Injunctive Relief: CDCR, through Secretary Allison, should be ordered to establish standards for the infliction of punishment of death by lethal injection, because subdivisions (a) and (e) of the Penal Code require these standards, which have not existed since their repeal on May 18, 2019; and

(3) Third Cause of Action Injunctive Relief: CDCR, through Secretary Allison, should be ordered to restore its ability to inflict the punishment of death by lethal injection because subdivision (e) of Penal Code section 3604 requires that it maintain its ability to do so at all times, and CDCR has been unable to do so since it closed San

Quentin's execution chambers on March 13, 2019.

Defendants seek summary judgment on the following grounds:

- (1) Plaintiff lacks standing to bring this lawsuit because he cannot demonstrate personal standing or public interest standing to challenge Executive Order N-09-19 or the discretionary actions of the CDCR;
- (2) Executive Order N-09-19 is a valid exercise of executive authority under the California Governor's broad authority to grant reprieves;
- (3) The CDCR properly exercised its discretion in repealing its lethal injection protocols; and
- (4) The CDCR properly exercised its discretion in closing the lethal injection chamber and gas chamber.

Legal Standard

In evaluating a motion for summary judgment or summary adjudication the Court engages in a three step process. The Court first identifies the issues framed by the pleadings. The pleadings define the scope of the issues on a motion for summary judgment or summary adjudication. (*FPI Dev. Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382). Because a motion for summary judgment or summary adjudication is limited to the issues raised by the pleadings (*Lewis v. Chevron* (2004) 119 Cal. App. 4th 690, 694), all evidence submitted in support of or in opposition to the motion must be addressed to the claims and defenses raised in the pleadings. An issue that is "within the general area of issues framed by the pleadings" is properly before the court on a summary judgment or summary adjudication motion. (*Lennar Northeast Partners v. Buice* (1996) 49 Cal.App.4th 1576, 1582-1583.) The Court cannot consider an unpleaded issue in ruling on motion for summary judgment or adjudication. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.) The papers filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.)

Second, the Court is required to determine whether the moving party has met its burden. A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal 4th 826, 850, quoting Code of Civ. Proc. § 437c, subd. (p)(2)). A defendant is not required to conclusively negate one or more elements of the plaintiffs cause of action; (*Saelzer v Advance, Group 400* (2001) 25 Cal.4th 763, 780-781). Rather, to meet its burden, the defendant is required only to show that the plaintiff cannot prove an element of its cause of action, i.e., that the plaintiff does not possess and cannot reasonably obtain evidence necessary to show this element. (*Aguilar v Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 853-855).

Finally, once the moving party has met its burden, the burden shifts to the opposing party to show that a material factual issue exists as to the cause of action alleged or a defense to it. (Code of Civ. Proc. § 437c, subd. (p); *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 326-327.) "There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying

fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25Cal.4th at p. 845). In ruling on the motion, the court must consider the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party opposing the motion. (*Id.* at p. 843.)

Facts

On March 13, 2019, Governor Newsom issued Executive Order N-09-19, which implemented an "executive moratorium on the death penalty . . . in the form of a reprieve for all people sentenced to death in California." (UMF 4; Ex. 7, Executive Order N-09-19.) The Governor outlined in the order numerous reasons why he issued the reprieves, including that the death penalty has been "unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation" and that "innocent people have been sentenced to death in California." (*Id.*) Additionally, the Governor cited the \$5 billion spent on the death penalty system since 1978 to execute 13 people, and that no person has been executed in California since 2006 because California's execution protocols were adjudicated to be unlawful. (UMF 8, 9) In his Executive Order, the Governor additionally ordered the repeal of California's lethal injection protocol and the closure of the "Death Chamber at San Quentin." (UMF 10)

On March 14, 2019, CDCR submitted to the Office of Administrative Law a request to repeal the lethal injection protocol. (UMF 11) On March 18, 2019, the Office of Administrative Law issued a notice of repeal of the lethal injection protocol. (UMF 6, 12.) Additionally, on or about March 13, 2019, CDCR took the following steps in response to the Governor's order to close the Death Chamber: "Removed the chairs intended for use by execution witnesses from the gas chamber facility, removed the chairs intended for use by execution witnesses and the medical gurney from the lethal injection facility, inventoried all items removed from the facilities, and moved all items to a storage facility on the grounds of San Quentin State Prison (SQSP)." Additionally, CDCR placed signage at the entrance to both facilities that indicated each was closed. (UMF 15, 16, 17) The lethal injection facility and gas chamber facility have not been accessed since March 13, 2019. (*Id.*)

In 2020, the Governor issued an Executive Report on Pardons, Commutations of Sentence, and Reprieves for the prior year. Ex. C, Office of the Governor, Executive Report on Pardons, Commutations of Sentence, and Reprieves (2019)." The report, issued pursuant to Penal Code section 4807, identifies all of the people who received a reprieve based on Executive Order N-09-19. *Id.* at 319-54. (UMF 7)

Plaintiff did not petition the CDCR for restoration of the repealed lethal injection protocol. (UMF 3)

Plaintiff does not dispute any of the above facts, although he contends some are not material.

Argument

Article V, Section 8, Subdivision (a) of the California State Constitution provides: "Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after

sentence, except in case of impeachment." Defendant contends that the Governor's discretion to issue reprieves is "virtually unlimited," *In re Ramirez* (2001) 94 Cal.App.4th 549, 560, and his issuance of Executive Order N-09-19, 8 granting a reprieve to each person sentenced to death, is wholly within his authority. Plaintiff, on the other hand, contends that the order, a moratorium on the death penalty, exceeded the Governor's death penalty-related powers and unconstitutionally attempted to change legislative policy by executive fiat.

Standing

The Complaint alleges that Plaintiff has repeatedly voted for initiative measures that would continue capital punishment in the state and against measures that would reduce or eliminate it. He is interested in seeing the state's death penalty statutes enforced for himself, his family, his community, and the state as a whole. (Complaint, UMF 1) This language relates to alleged personal standing to bring this lawsuit.

Standing is a threshold issue concerning Plaintiff's specific "interest in the outcome of a lawsuit." (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 495 [*Becerra*].) While California's "Constitution has no case or controversy requirement," its "standing jurisprudence nonetheless reflects a sensitivity to broader prudential and separation of powers considerations elucidating how and when parties should be entitled to seek relief under particular statutes." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-48.) Plaintiff bears the burden of showing "that he or she is sufficiently interested as a prerequisite to deciding . . . whether [his] challenge to legislative or executive action independently has merit." (*Id.*)

As for the constitutional challenge, Defendants contend Plaintiff cannot show he has a concrete beneficial interest in the controversy, namely, that he has "some special interest to be served or some particular right to be preserved and protected over and above the interest held in common with the public at large." (*Becerra, supra*, 29 Cal.App.5th at 496 [five physicians who were opposed to assisted suicide had no standing to challenge constitutionality of legislation authorizing such] ; *Zetterberg v. State Dep of Pub. Health* (1974) 43 Cal.App.3d 657, 662 [dismissing complaint where plaintiffs did not show that they "have any greater or different interest in the subject than any other member of the body politic"].)

Defendants contend Plaintiff cannot meet the concrete beneficial interest test because his Complaint merely alleges standing based on Plaintiff's personal advocacy for the death penalty. (Compl. ¶ 5.) Defendants contend Plaintiff's support for the death penalty and personal dissatisfaction with the Governor's actions are insufficient to justify standing. "Difference[s] of opinion . . . between a citizen and a governmental agency do[] not give rise to a justiciable controversy." (*Zetterberg, supra*, 43 Cal.App.3d at 660, 662-663.)

In addition, California's standing jurisprudence accounts for the "separation of powers considerations elucidating how and when parties should be entitled to seek relief." (*Weatherford, supra*, 2 Cal.5th at 1247-48. The role of the judiciary is to interpret and apply the law "in cases properly brought before the courts." (*Zetterberg, supra*, 43 Cal.App.3d at 663 [quoting *Commonwealth of Massachusetts v. Mellon* (1923) 262 U.S. 447, 488].) But the judiciary is not empowered "per se to review and annul acts" of co-equal branches of government "on the ground that they are unconstitutional." (*Ibid.*) Rather, Plaintiff must show not only that the challenged act "is invalid but that he

has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement" to properly bring the matter before the courts. (*Ibid.*)

Plaintiff, in his reply/cross-opposition brief, does not dispute that he that he lacks personal standing to assert his claims. Rather, he relies on a theory of public interest standing to bring his constitutional challenge to the Governor's Executive Order.

The public interest exception to California's standing doctrine is not a free-standing right for members of the public to file suit whenever they believe an alleged constitutional violation has occurred. (*Becerra, supra*, 29 Cal.App.5th at 503; *Spotlight on Coastal Corruption v. Kinsey* (2020) 57 Cal.App.5th 874, 883.) "There is no general 'public interest' exception to the requirement of standing." Instead, it is only available to compel the execution of ministerial duties. (*Becerra, supra*, 29 Cal.App.5th at 503.) "A ministerial duty is one that is required to be performed in a prescribed manner . . . without the exercise of discretion or judgment." (*Ibid.*)

Plaintiff has not met his burden to show that the Governor has a "clear, present, and ministerial duty to act in a particular way." (*Cty. of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593. The Governor exercised his discretion in issuing an Executive Order declaring a death penalty reprieve. Likewise, Plaintiff has not shown that Secretary Allison through the CDCR has failed to perform any "ministerial" duties sufficient to justify Plaintiff having public interest standing.

Although Plaintiff alleges that CDCR has not adequately "maintain[ed] at all times the ability to execute" judgments of death under Penal Code section 3604, subdivision (e), the breadth and discretion built into Penal Code section 3604, including subdivision (e), does not present a "clear, present, and ministerial duty" for the CDCR to act in a particular manner without the exercise of discretion. (See *Zetterberg, supra*, 43 Cal.App.3d at 660, 662-63 [dismissing complaint seeking to demand that the Department of Health "resume their public health enforcement activities"].)

The Court rejects Plaintiff's argument that *Becerra* is distinguishable because it concerned a legislative and not an executive act that was challenged. There is no language in *Becerra* that allows citizen challenges to executive acts despite prohibiting such challenges to legislative acts. Rather, the Court stated that California's standing doctrine applies "whether a party's challenge [is] to legislative or executive action." (*Id.* at 495.) Moreover, the Court in *Becerra* refused to reach the constitutional challenge due to a lack of standing. (*Id.* at p. 499 [explaining that "we do not reach constitutional questions unless absolutely necessary."]) Thus, Plaintiff has not persuaded the Court that the standing requirement does not apply because this action challenges an executive act rather than a legislative act.

Defendants contend Plaintiff also fails to allege or to establish that he has public interest standing with regard to the second and third causes of action. Plaintiff asserts that he has "public interest" standing to challenge CDCR's actions under the second and third cause of action because his request for injunctive relief can be recast as a request for a writ of mandate. (Lacy MSJ at 21-23; Compl. ¶45 (Count II), ¶¶54-55 (Count III).) Plaintiff contends his injunctive/declaratory relief claims are interchangeable with mandate claims and that if mandate rules apply to his injunctive relief claims, then he should have standing because he states a claim for writ of mandate. Therefore, even if the public interest exception applies only in mandate, the exception applies here because his claims are subject to rules that apply in

mandamus. However, this action was not written as a claim in mandamus and the Complaint does not state a cause of action for a writ of mandate based on failure to comply with a ministerial or mandatory duty.

While public interest standing is an exception to the "usual requirement of a beneficial interest" and does not require Plaintiff to show "that he has any legal or special interest in the result" (*Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166, 170 n.5), this exception "is available only in a mandate proceeding, not in an ordinary civil action." (*Becerra, supra*, 29 Cal.App.5th at 503; *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873 [public interest standing "has been judicially recognized only in certain mandamus proceedings"].)

A demand for mandamus must "show there is no other plain, speedy, and adequate remedy" and that "respondent has a clear, present, and ministerial duty to act in a particular way." (*City of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593.) A ministerial duty is one that must "be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment." (*Becerra, supra*, 29 Cal.App.5th at 503.) Plaintiff has not shown that CDCR violated any ministerial duties that are subject to mandamus, and thus his assertion of public interest standing fails. CDCR's promulgation of a particular lethal injection protocol is not a ministerial duty. Public interest standing is available only to enforce a ministerial duty -- one that must "be performed in a prescribed manner ... without the exercise of discretion or judgment." (*Ibid.*) Penal Code section 3604, subdivision (a) provides: "[t]he punishment of death shall be inflicted . . . by standards established under the direction of [CDCR]." That subdivision gives CDCR the authority to develop those standards and discretion over what those standards will be. Penal Code section 3604, subdivision (e) provides: "[CDCR], or any successor agency with the duty to execute judgments of death, shall maintain at all times the ability to execute such judgments." That subdivision does not state a "clear, present, and ministerial duty" for CDCR to act in a particular manner that can be vindicated through an action for mandamus. CDCR has discretion to determine the particular infrastructure to maintain to execute judgments of death.

With regard to CDCR's maintenance of the ability to carry out a sentence of death, Plaintiff contends that CDCR has moved chairs for witnesses and the medical gurney from the execution chamber to a storage facility on the grounds of San Quentin State Prison. Plaintiff further contends there is potential need for repairs before the execution chamber can be used again. Plaintiff contends that these steps prevent CDCR from maintaining its ability to carry out judgments of death pursuant to Penal Code section 3604, subdivision (e). However, all of Plaintiff's contentions target acts that are within CDCR's discretion to manage the operation of its facilities. Plaintiff has not shown how transferring furniture to a storage facility on the grounds of the prison hinders CDCR's ability to carry out its statutory duties. None of these steps alleged by Plaintiff represent ministerial duties that CDCR must perform. CDCR's discretion in how it maintains the execution chamber when not in immediate use is not subject to mandamus.

Plaintiff is correct that the death penalty is an important public issue in California. But "there is no general exception to the requirement of standing for cases that a court finds to be in the 'public interest.'" (*Spotlight on Coastal Corruption v. Kinsey* (2000) Cal.App.5th 874, 886 (2020).) It would be reversible error to grant "public interest" standing just because it is "necessary to provide an 'effective remedy for violation of an

important public interest statute." (*Id.* at 887.)

The Court finds that since Plaintiff has not established either personal standing or public interest standing, Defendants' Motion for Summary Judgment is granted, and the Plaintiff's Motion for Summary Judgment is denied.

As the Court has determined that Plaintiff lacks standing, it declines to rule on the underlying constitutional argument that would be addressed if plaintiff had standing. (*Becerra, supra*, 29 Cal.App.5th at 499 ["we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us"].)

Defendants are directed to prepare a formal order complying with C.C.P. §437c(g) and C.R.C. Rule 3.1312.

Item 16 2021-00293349-CU-MC

James V. Lacy vs. Gavin Newsom

Nature of Proceeding: Motion for Summary Judgment and/or Adjudication

Filed By: Morgan, Chad D.

Plaintiff James V. Lacy's Motion for Summary Judgment on his Complaint for Declaratory and Injunctive Relief is denied.

The parties entered a stipulation signed by the Court allowing the briefing of their cross motions for summary judgment in an expedited fashion. (See ROA 12)

Plaintiff's Complaint for Injunctive and Declaratory Relief alleges that Defendant Governor Gavin Newsom is an ardent opponent of the death penalty. Shortly after he assumed office in January of 2019, he issued an Executive Order that Plaintiff contends effectively repealed California's death penalty, in violation of the state Constitution's separation of powers doctrine and in violation of the Governor's constitutional mandate to faithfully execute the law. Plaintiff contends the order had the effect of repealing the death penalty because it granted reprieves in excess of the Governor's constitutional power and ignored statutory mandates to (A) provide standards for administration of lethal injections, and (B) maintain at all times the ability to execute a judgment of death. Plaintiff seeks a declaratory judgment that the Governor's executive order is unconstitutional and the injunctive relief necessary to restore California's death penalty as the Legislature provided. (Complaint ¶¶ 2-4)

Plaintiff's Notice of Motion alternatively moves for summary adjudication of the three causes of action:

(1) First Cause of Action: Governor Gavin Newsom's March 13, 2019 Executive Order N-09-19 is unconstitutional because it infringes on separation of powers and attempts to exercise powers in excess of those conferred upon him. Plaintiff requests a declaratory judgment that Executive Order N-09-19 is void in whole or in part.

(2) Second Cause of Action: Defendant The California Department of Corrections and Rehabilitation (CDCR), through its Secretary, Defendant Kathleen Allison, should be

ordered to establish standards for the infliction of punishment of death by lethal injection because subdivisions (a) and (e) of the Penal Code require these standards, which have not existed since their repeal on May 18, 2019. Plaintiff seeks a mandatory injunction directing Defendant CDCR to restore or enact regulations setting forth its lethal injection standards; and

(3) Third Cause of Action: CDCR, through Secretary Allison, should be ordered to restore its ability to inflict of punishment of death by lethal injection because subdivision (e) of Penal Code section 3604 requires that it maintain its ability to do so at all times, and CDCR has been unable to do so since it closed San Quentin's execution chambers on March 13, 2019. Plaintiff seeks (1) a prohibitory injunction to prevent further dismantling of the San Quentin execution chamber, and (2) a mandatory inunction to restore the San Quentin execution chamber to an operable condition.

Governor Newsom is sued in his official capacity. CDCR Secretary Kathleen Allison is also sued in her official capacity. Governor Newsom appointed her to this position on October 1, 2020. Defendant Allison is the executive branch official charged with oversight and management of CDCR and is responsible for its day-to-day operations and maintaining its compliance with state law.

Statement of Undisputed Facts

Plaintiff's separate statement parallels those in the Defendants' Motion. (See Ruling on Motion for Summary Judgment filed by defendants on calendar this date.) The facts are essentially undisputed, as shown by Defendants' Opposition. The only dispute is as to Plaintiff's UMF 18, which sets forth facts concerning what needs to be done to restore the execution chambers to an operable condition. Defendants do not dispute that this fact is untrue, only that it is not the exclusive means to restore the execution chambers to an operable condition. This is not a material issue of fact for purposes of the legal issues that are to be resolved by this motion.

On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19. (UMFs Nos. 1, 2.) Through this order, he directed that:

1. An executive moratorium on the death penalty shall be instituted in form of a reprieve for all people sentenced to death in California. This moratorium does not provide for the release of any person from prison or otherwise alter any current conviction or sentence. (UMF 3)
2. California's lethal injection protocol shall be repealed. (UMF 4)
3. The Death Chamber at San Quentin shall be immediately closed in light of the foregoing. (UMF 12)

In response to this order, CDCR submitted to the Office of Administrative Law the repeal of regulations comprising the state's lethal injection protocol, and the OAL issued a notice of repeal. (UMFs 6-8.) CDCR also closed San Quentin's lethal injection chamber, which no one has entered since March 13, 2019. (UMF Nos. 14-16.)

Legal Standard

In evaluating a motion for summary judgment or summary adjudication, the Court engages in a three step process. The Court first identifies the issues framed by the

pleadings. The pleadings define the scope of the issues on a motion for summary judgment or summary adjudication. (*FPI Dev. Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382). Because a motion for summary judgment or summary adjudication is limited to the issues raised by the pleadings (*Lewis v. Chevron* (2004) 119 Cal.App.4th 690, 694), all evidence submitted in support of or in opposition to the motion must be addressed to the claims and defenses raised in the pleadings. An issue that is "within the general area of issues framed by the pleadings" is properly before the court on a summary judgment or summary adjudication motion. (*Lennar Northeast Partners v. Buice* (1996) 49 Cal.App.4th 1576, 1582-1583.) The Court cannot consider an unpleaded issue in ruling on motion for summary judgment or adjudication. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.) The papers filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.)

Second, the Court is required to determine whether the moving party has met its burden. A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, quoting Code of Civ. Proc., section 437c, subd. (p)(2).) A defendant is not required to conclusively negate one or more elements of the plaintiffs cause of action. (*Saelzer v Advance, Group 400* (2001) 25 Cal.4th 763, 780-781.) Rather, to meet its burden, the defendant is required only to show that the plaintiff cannot prove an element of its cause of action, i.e., that the plaintiff does not possess and cannot reasonably obtain evidence necessary to show this element. (*Aguilar v Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 853-855.)

Finally, once the moving party has met its burden, the burden shifts to the opposing party to show that a material factual issue exists as to the cause of action alleged or a defense to it. (Code Civ. Proc., sec. 437c, subd. (p); *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 326-327). "There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25Cal.4th 826, 845). In ruling on the motion, the court must consider the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party opposing the motion. (*Id.* at p. 843.)

Argument and Analysis

Plaintiff contends that the Order violates separation of powers because it subverts clearly established legislative policy, improperly seizing it for the executive, in three ways: "(1) the death penalty moratorium relieves procedures mandated by statute and the California Constitution; (2) The Governor did not have the power to repeal the state's lethal injection protocol because CDCR has a statutory obligation to establish those standards; and (3) CDCR has a statutory obligation to maintain its ability to execute a judgment of death at all times, and, because of actions taken in response to the Governor's order, CDCR is no longer able to execute a judgment of death." He further contends the Governor's order also infringes on judicial powers by preventing validly entered judgments from having their full force and effect.

Plaintiff contends that if the moratorium is found to be unconstitutional, he is entitled to

the relief sought in the second and third causes of action that requires CDCR to implement the lethal injection protocol.

Defendants have concurrently opposed Plaintiff's motion and filed their own Cross-motion for Summary Judgment.

The Court finds and rules that the issues presented by each motion are same issues of law and do not involve issues of fact. As such, the parties are referred to the Court's ruling on the Defendants' motion for summary judgment. In that ruling, the Court has found that Plaintiff has no standing to pursue his claims in this lawsuit.
