No. 10-35771

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAL COBURN BROWN
Plaintiff – Appellant

v.

ELDON VAIL, Secretary of Washington Department of Corrections, STEPHEN SINCLAIR, Superintendent of the Washington State Penitentiary, CHERYL STRANGE, Office of Correctional Operations Deputy Secretary, WASHINGTON DEPARTMENT OF CORRECTIONS, and DOES 1-5

Respondents - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

THIS IS A CAPITAL CASE

EMERGENCY MOTION FOR STAY OF EXECUTION UNDER CIRCUIT RULE 27-3

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NINTH CIRCUIT RULE 27-3 CERTIFICATE

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The facts showing the existence of the claimed emergency are that Appellant is a State prisoner under sentence of death and is scheduled to be executed on September 10, 2010 unless an emergency stay is granted. No stay of execution is currently in place.

Counsel for Appellees were notified of this motion telephonically on August 31, 2010 and were served with a copy of this motion by E-mail on September 2, 2010.

The District Court denied Appellant's motion for a temporary stay of execution on August 31, 2010. All grounds advanced in support of this motion were submitted to the District Court.

I. RELIEF REQUESTED

Appellant is a State prisoner under sentence of death and is scheduled to be executed on September 10, 2010. He has filed a lawsuit pursuant to Title 42 United States Code § 1983 challenging on Eighth Amendment grounds the State of Washington's administration of its lethal injection policy. Specifically, he alleges that the policy itself fails to assure that the persons involved in administering death by lethal injection – the "execution team" - are properly trained and qualified, and that in fact the persons selected for the execution team by Defendant Sinclair are improperly trained and unqualified. In the District Court, Appellant sought expedited discovery to establish his claim and the request was denied. He also sought a stay of execution pending completion of discovery. That motion was also denied. Appellant is now asking this Court to stay his execution pending completion of discovery and a full and fair hearing in District Court.

II. BASIS OF THE MOTION

Appellant is a prisoner in the Intensive Management Unit at the Washington State Penitentiary. In 1993 he was convicted of aggravated first degree murder by a jury in King County Superior Court. He was sentenced to death in early 1994.

His death sentence was affirmed in *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *In Re Personal Restraint Petition of Brown,* 143 Wn.2d 431, 21 P.3d 687 (2001); and in *Brown v. Uttecht*, 530 F.3d 1031 (9th Cir. 2008), *cert. denied by Brown v. Sinclair*, 129 S.Ct. 1005, 173 L.Ed.2d 300 (2009).

On February 9, 2009, Brown filed a complaint in Thurston County Superior Court for injunctive and declaratory relief challenging Washington's three-drug lethal injection protocol as then set forth in DOC Policy 490.200. *Brown v. Vail*, No. 09-2-002373-1. Brown brought both state and federal claims that the Washington policy violated state and federal prohibitions against cruel and unusual punishment. On February 10, 2009, Respondent removed the action to the Eastern District of Washington. The Eastern District found that Respondent had removed the case to the wrong district and it was transferred to the Western District of Washington. *See* Dkt. 1.[1]

On March 2, 2009, the District Court entered an order abstaining from deciding federal issues and staying all proceedings in the federal action until such time as the state courts of Washington had fully determined Brown's challenges to the validity of Washington's lethal injection protocol under state law. Dkt. 12.

On March 13, 2009, Brown moved to lift the March 2, 2009 stay and sought an emergency injunction of his imminent execution in the District Court because, although the Thurston County Superior Court judge agreed to entertain Brown's claims in state court, he refused to grant him a stay of execution. Dkt. 17. Just hours before the execution was to take place, however, the Washington State Supreme Court granted a stay of execution and Brown's request became moot.

The matter proceeded to trial in Thurston County Superior Court. In addition to his state law based claims, Brown and his co-plaintiffs argued that Washington's three-drug protocol violated the Eighth Amendment because the protocol did not comply with the standards set forth in *Baze v. Rees*, 553 U.S. 35 (2008). The plaintiffs sought to demonstrate a number of deficiencies with the Washington protocol including the claim that Washington's "lethal injection team" – that is, the non-medical personnel who actually perform the executions – did not meet the minimum requirements approved of in *Baze*. Their efforts included discovery requests for information and documents held by the defendants that described the qualifications, selection, retention, training, duties and assignments of the lethal injection team members.

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[1] The notation "Dkt" refers to the documents filed in the Western District of Washington. Those documents have been transmitted to this Court in advance of this motion.

When defendants did not timely respond to the discovery request, plaintiffs moved to compel.[2] Exhibit A, Plaintiff's Motion to Compel Discovery Regarding the Lethal Injection Team, filed 1/20/09. The trial court heard argument on January 27, 2009. *See* Exhibit B, Transcript, Motion to Compel, 1/27/09. The trial court decided not to compel disclosure of information regarding the lethal injection team directly to the plaintiffs. The trial court did, however, order the defendants to turn the requested material over to him for *in camera* review. Exhibit C, Order entered 3/11/09.

The State sought reconsideration which was denied except to the extent that the trial court indicated that, upon completion of his review of the materials, they would be returned to the Attorney General's Office rather than being placed under seal in the court file. Exhibit D, Excerpt of Hearing, 3/27/09; Exhibit E, Order entered 3/27/09.

On March 31, 2009, the defendants filed a pleading stating that "the Lethal Injection Team members have all resigned from their positions on the Lethal Injection Team." Exhibit F, Defendant's Statement Regarding Lethal Injection

[2] Plaintiffs first served their interrogatory requests on September 26, 2008. Defendants twice asked for extensions of time to respond. When they responded, they refused to provide any information responsive to requests regarding lethal injection team members. *See* Exhibit H, excerpt of Defendant's Answers to Plaintiff's First Interrogatories signed 12/12/08; Exhibit I, excerpt of Defendant's

Team, 3/31/09. Superintendent Sinclair stated that the members resigned "upon receiving notification of the reconsidered protective order in this case." *Id.* Counsel for State advised the Court that a new team would not be selected until after the stay of execution was lifted and a new execution date was set. Exhibit K, Transcript of 4/30/09 Hearing at page 8.

Plaintiffs again moved to compel compliance with the trial court's discovery orders and for a continuance of the trial date. The trial judge denied both motions. Exhibit G, Order signed 4/30/09. He said:

> We currently, as I understand the representations from the defendant, we currently do not have a lethal injection team, and, therefore, further discovery as to who they are and how they were trained I also believe is no longer relevant to this proceeding.

Exhibit K, Transcript of Hearing, 4/30/09 at 16.

During trial, Brown's expert testified that without an execution team in place it was simply not possible to assess the sufficiency of the DOC's policy because the critical factor in the execution protocol is the competence and technical ability of the team involved.[3] Even the DOC's expert, Dr. Dershwitz,

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Answers to Plaintiffs First Request for Production, signed 12/24/08; and Exhibit J, Excerpt of Deposition of Sinclair, 3/25/09.

[3] In the State Court proceeding, the Plaintiffs' expert, Dr. Souter, testified as follows:

testified that he would demand that key members perform the procedures regularly and competently as part of their day jobs. RP 563-64.

Nonetheless, in this vacuum of information, the trial court found that because the DOC policy set forth minimum requirements for team members and because the Superintendent testified that he would "seek to use individuals with current IV experience", the State's administration of lethal injections complied with *Baze*. Exhibit L, Findings of Fact and Conclusions of Law, filed 7/10/09.

Brown and the other plaintiffs filed their appeal in the Washington State Supreme Court. In their opening brief, the plaintiffs argued that the trial court

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Q: Are you aware of the Department of Corrections position that it will not reconstitute the team until after the litigation is over:

A: I have been made aware of that, yes.

Q: With no team in place, is it possible to give an opinion regarding the sufficiency – let me ask this again. With no team in place, is it possible to give an opinion that would support the sufficiency of the DOC's policy?

A: I can't see how it would be on the basis that the critical factor is the competence and technical ability of the team involved and being able to deliver the drugs, and if you don't know their qualifications, if they don't exist in the present at the moment, then you really can't say anything about the policy being able to carry out its stated purpose.

Q: Do you have an opinion as to whether the Washington execution policy has sufficient safeguards to avoid the risk of unnecessary pain?

A: I think it does not.

erred in refusing to permit the plaintiffs to engage in discovery regarding the execution team, in refusing to apply adverse inference to the team's qualifications when the team resigned, and in finding the execution policy constitutional in the absence of any evidence that team members met the qualifications and competence levels set out in *Baze*. *See* Exhibit M, Excerpt of Petitioner's Opening Brief in the Washington Supreme Court, filed 12/24/09; Exhibit N Excerpt of Petitioner's Reply Brief in Washington State Supreme Court, filed 2/24/10.

Two weeks before oral argument in the Washington State Supreme Court, the DOC moved to dismiss all of the plaintiffs' claims on the grounds they were "moot." The DOC stated that on February 25, 2010, Defendant Vail had directed that policy 490.200 be amended to "adopt the one drug protocol for an execution by lethal injection." According to the DOC, this decision was made "in light of the opinions of experts who have advised the Department." Exhibit O, Respondent's Motion to Dismiss as Moot, filed March 10, 2010.

The Supreme Court denied the plaintiff's motions for supplemental briefing to address the DOC's 11th hour amendment. See Petitioner's Motion for Continuance of Oral Argument and Permission to re-Brief the Issues in this Case, Exhibit P, filed 3/4/10.

RP 363-365.

The Court heard oral argument on March 18, 2010.

On July 29, 2010, the Washington State Supreme Court entered its opinion. Exhibit Q, Slip Opinion, *Brown v. Vail*, filed 7/29/10. The Court found that the plaintiff's claims were not barred by any statute of limitations. Slip Opinion at 9-11. However, the Court decided Brown's claim that the Washington State Legislature had improperly delegated its authority to the DOC adversely to him. Slip Opinion at 11-15. The Court also declined to find that the DOC's violation of the state and federal controlled substances statutes was a basis for invalidating the death penalty protocol. Slip Opinion at 15-19. As to Brown's remaining constitutional claims, the Court concluded the appeal was moot because of the DOC's amendment to a "one-drug" protocol:

> In short, there has been no trial on the constitutionality of the new one-drug protocol, and we cannot hold such a trial on appeal.

Slip Opinion at 22.

Thus, the Supreme Court stated:

> We therefore grant the Department's motion to dismiss the Appellant's constitutional claims and related issues and ***do not reach their merits***.

Slip Opinion at 22.

On July 29, 2010, the Department reset Mr. Brown's execution for September 10, 2010.

On August 9, 2010, Brown filed a motion in the District Court for leave to file an amended complaint and a motion to lift the stay. The State agreed to these motions and they were granted. Brown then filed an amended complaint under the Civil Rights Act. Exhibit R. In the amended complaint, he alleged:

- He was never been afforded the opportunity to challenge the manner in which the State intends to administer the one drug protocol.
- He was never afforded the opportunity through discovery to ascertain the training and qualifications of the members of the execution team.
- DOC policy 490.200 is merely an advisory policy and fails to contain adequate safeguards to insure that members of the execution team are properly trained and qualified to administer the one drug protocol.
- In the absence of a properly trained and qualified execution team, there is a substantial likelihood that Brown would suffer extreme and unnecessary pain in the course of the execution.
- Upon information and belief, the currently convened execution team is inadequately trained and qualified to administer the one drug protocol.

Brown then filed a motion for a stay of execution. Exhibit S. In support of the motion, he relied on the exhibits referred to above and on the declaration of Dr. Mark Heath. Exhibit T. Dr. Heath is a medical doctor and an Assistant

Professor of Clinical Anesthesiology at Columbia University Medical Center. In his declaration he stated:

> Thiopental, when prepared for intravenous injection, is highly caustic. Infiltration of thiopental into the tissue surrounding the vein may (but will not necessarily) cause near immediate severe pain, and will in high likelihood cause severe pain if the prisoner survives the execution attempt. If death is not caused rapidly, (a likely event if thiopental is not injected into the circulation but instead infiltrates), infiltrated thiopental will cause tissue necrosis (tissue death) which is painful and disfiguring. Evidence from executions in other states includes shocking images of chemical burns resulting from the infiltration of large doses of thiopental.
>
> Infiltration of drugs (accidental injection of the drug into the tissue surrounding the vein) is a well-known complication of IV injection in clinical settings, and it is a well-known problem during execution by lethal injection. DOC 490.200 is fraught with risk that infiltration of thiopental will occur, and lacks safeguards that are clinically necessary and that are present in the protocols of other states.

Exhibit T, p. 5.

Regarding qualification of execution team members, Dr. Heath stated:

> DOC 490.200 states that the lethal injection team members will have a minimum qualification of one year of professional experience in a variety of medical professional fields ("certified Medical Assistant, Phlebotomist, Emergency Medical Technician, Paramedic, military corpsman or similar occupation"). This standard is inadequate to screen out personnel who lack the proficiency to effectively and humanely secure IV access, to properly inject thiopental, and to "detect and correct" intravenous infiltration if it is occurring. For example, under the state requirement, an individual could serve on or lead the Lethal Injection Team if their most recent experience was 20 or 30 years in the past. An individual could serve on or lead the Lethal Injection Team if their credentials had been revoked for professional misconduct.

Exhibit T, p.7-8.

Based upon his knowledge of lethal injection litigation in other jurisdictions, Dr. Heath also commented on the need for discovery in cases such is this one where information concerning the qualifications of team members is lacking. He stated:

> In states where there are no designated execution personnel at the time of litigation and discovery the state is typically asked to put forward execution team members for deposition and discovery. During this process it is often the case that all parties come to learn about attributes of the team members that render them unsuitable for participation in past and future executions. This then typically leads to a reconsideration by the Department of Corrections of the vetting process that is used to select execution personnel.

Exhibit T, p.8-9.

Brown filed a motion for expedited discovery. Exhibit U. In the motion Brown sought to take the depositions of execution team members on an expedited basis, subject to an appropriate protective order. *Id.* The motion for expedited discovery was denied. Exhibit V

In opposing the motion for a stay of execution, the State tendered the declaration of Defendant Sinclair. Exhibit W. In his declaration, Sinclair stated that one of the four team members was a certified Emergency Medical Technician and had been one for more than six years. He stated that the other three members were certified paramedics. *Id.* He stated that the team members responsible for

inserting intravenous lines regularly insert them as part of their professional duties. *Id.* In response, Brown pointed out that there was no showing that Sinclair's assertions in the declaration were based on personal knowledge and requested the opportunity to test these assertions through discovery. Exhibit W.

The District Court issued an order denying Brown's motion for a stay of execution. Exhibit X. In doing so, the District Court disregarded the numerous procedural defenses put forth by the State and addressed the Eighth Amendment claim on the merits. *Id.* The District Court held that Brown is not entitled to a stay of execution because he failed to demonstrate a likelihood of success on the merits. The District Court noted that *Baze v. Rees*, 553 U.S. 35 (2008), was a plurality opinion and that there was disagreement among the Justices as to the standard to be applied in determining whether a particular method of execution violates the Eighth Amendment. The District Court stated that regardless of the specific standard, the condemned person carries the burden of demonstrating a violation of the Eighth Amendment. Exhibit X at p. 13. To establish his claim, Brown was obligated to demonstrate that the state's execution team is unqualified and that their lack of qualifications is likely to cause him needless suffering. *Id.* at p.17. The District Court faulted Brown for failing to offer evidence to refute Sinclair's declaration to the effect that team members are qualified, stating:

> Moreover, it is Plaintiff who bears the burden of proving that the team members are unqualified and that they are so unqualified that they are likely to cause him to experience needless suffering. Rather than submitting evidence to meet that burden, Plaintiff offers conjecture, arguing "[i]t may well be that the new team has no execution experience." (Id.) This Court cannot offer relief on "maybe", however. Because Plaintiff has failed to make a "clear showing" of likely success on the merits, a preliminary injunction is inappropriate.

Exhibit X at p. 13.

III. ARGUMENT

A. Summary of Argument

According to Justice Roberts' plurality opinion in *Baze,* the Eighth Amendment affords a condemned person the right to challenge a particular method of execution on the grounds that it constitutes cruel and unusual punishment. While the bar for making a successful challenge is quite high, this is nevertheless a fact based determination. Implicit in the right to challenge the method of execution is the right to a full and fair hearing in which to make the challenge. This never occurred in State Court, where Brown was denied any information about the qualifications of members of the execution team. Nor did it occur in District Court. Brown was faulted for failing to present evidence to show that members of the execution team were unqualified and at the same time he was afforded no opportunity to gather that evidence. Brown is entitled to discovery in

the District Court as to the qualifications of the execution team members and he should be given a stay by this Court so that he does not get executed before discovery takes place.

B. Appealability of the Order

The District Court's order denying the motion for a stay of execution is an appealable order. The District Court treated Brown's motion for a stay as a motion for a preliminary injunction. Exhibit X at p. 14. Denial of a motion for a preliminary injunction is appealable as a matter of right. Title 28 United States Code § 1292(a)(1). Even if Brown's motion is characterized as a motion for a temporary restraining order, it is still an appealable order. The denial of a request for a temporary restraining order is appealable where the denial follows a full adversary hearing and in the absence of review, the appellant would be effectively foreclosed from pursuing further interlocutory relief. *Environmental Defense Fund, Inc. v. Andrus,* 625 F.2d 861 (9th Cir. 1980). The issue of whether the District Court should issue of a stay execution was fully briefed by the parties and there was an adversary hearing on the pleadings[4]. In the absence of review, Brown will be precluded from seeking further interlocutory relief because he will be executed on September 10, 2010. Therefore the District Court's order is

appealable even if it amounted only to denial of a motion for a temporary restraining order.

C. This Court Should Issue a Stay of Execution

The test for issuance of a stay in capital cases is set forth in *Beardslee v. Woodford,* 395 F.3d 1064, 1067-1068 (9th Cir. 2005). The moving party must demonstrate: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury, (3) a balance of the hardships favoring the plaintiff, and (4) advancement of the public interest. Alternatively, injunctive relief could be granted if the moving party demonstrates either a combination of the probability of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips in his favor. *Id*. These two alternatives are extremes of a single continuum. Thus the greater the hardship to the party seeking the injunction, the less probability of success must be established by the party. *Id*. In capital cases, equity must take into consideration the State's strong interest in proceeding with the judgment. *Id*. The Court must consider whether the inmate has delayed unnecessarily in bringing the claim. *Id*. The district court's denial of a preliminary injunction is reviewed for abuse of discretion. *Id*.

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[4] While Brown concedes there was an hearing, it was not a fair one, as argued

In *Beardslee,* the plaintiff challenged California's method of lethal injection using the so called three drug protocol. The Court of Appeals recognized that in proceedings below, the plaintiff had raised "extremely troubling questions about the protocol" but that he had nevertheless failed to make a sufficient showing of likelihood of success on the merits to justify issuance of a stay. 395 F.3d at 1075. However, it is important to point out that the case came up on appeal after a full hearing in district court in which the state's expert testified that there was a 99% chance that the inmate would be incapable of feeling pain following administration of 5 grams of sodium thiopental and the defense expert failed to rebut that claim. *Id*. Furthermore, there is no indication that the plaintiff in that case raised specific questions about the qualifications and competency of the execution team.

Morales v. Hickman, 438 F.3d 926 (9th Cir. 2006) involved a later challenge to California's lethal injection protocol. In an evidentiary hearing in district court, the plaintiff presented evidence as to a number of past executions in which there was cause to doubt whether the inmate was sufficiently sedated with sodium thiopental. The protocol employed was the same as the one at issue in *Beardslee.* The district ruled that it would issue a stay of execution unless the state agreed to modify its protocol. In response, the state agreed to have an anesthesiologist

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herein.

attend the execution. On the basis of this concession, the district court declined to issue a stay. The district court's decision was upheld on appeal.

The Supreme Court's decision in *Baze v. Rees,* 553 U.S. 35 (2008), followed a full evidentiary hearing in District Court. Chief Justice Roberts wrote a plurality decision concurred in by Justices Alito and Kennedy. He recognized that an inmate could challenge a particular method of execution on Eighth Amendment grounds but would have to demonstrate that the particular method of execution poses a "substantial risk of serious harm" and that there is a feasible, readily available alternative procedure. He stated:

> To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method of execution can be viewed as "cruel and unusual" under the Eighth Amendment.

553 U.S. at 52.

Justice Roberts then proceeded to hold that Plaintiff failed to prove the existence of "substantial risk of serious harm" and therefore failed in his effort to demonstrate a violation of the Eighth Amendment. In reaching this conclusion, he took note of the trial testimony establishing that the Kentucky execution team was well qualified. He stated:

> Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. (Record cite omitted). Moreover, these team members, along with the rest of the execution team, participate in at least ten practice sessions per year. (Record cite omitted). These sessions required by the written protocol, encompass a complete walk through of the execution procedures, including the citing of IV catheters into volunteers. *Ibid.* In addition, the protocol calls for the IV team to establish both primary and backup lines to prepare two sets of the lethal injection drugs before the execution commences. (Record cite omitted). These redundant measures insure that if an insufficient dose of sodium thiopental is administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected.

Id. at 55.

Although he intended the test to pose a high bar to establishing successful Eighth Amendment challenges, Chief Justice Roberts did not close the door on all such challenges and he assumed that these would be essentially fact based determinations. Thus he stated:

> Justice Stevens suggests that our opinion leaves the disposition of other cases uncertain, see *post*, at 542-543, but the standard we set forth here resolves more challenges than he acknowledges. 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 substantial risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a protocol substantially similar to the one we uphold today would not create a risk that would meet this standard.

Id. at 61.

Justice Ginsburg wrote a dissenting opinion in *Baze*, in which Justice Souter concurred. She opted for a more flexible, less rigorous standard for establishing and would have remanded for an additional evidentiary hearing. *Id*. at 114 - 122. It is apparent then that five of the nine justices view the issue as one requiring a fact based determination, although there is disagreement as to the appropriate standard.

Following *Baze*, the Sixth Circuit issued a stay of execution in a challenge to Ohio's lethal injection protocol. *Reynolds v. Strickland,* 583 F.3d 956 (6th Cir. 2009). After a botched effort by the State to administer sodium thiopental in another case, the Court of Appeals found that the plaintiff raised sufficiently serious questions concerning the competency of the team and the absence of a backup plan to justify issuance of a stay. The Court remanded for further fact finding.

Based upon the foregoing authority, Brown maintains that he is entitled to a stay of execution. First, the balance of the hardships tips decidedly in his favor since he will be executed unless a stay is granted. Second, he is presenting his claim in a timely manner. Brown attempted to challenge the competency and qualifications of the execution team in State Court but was denied access to discovery. Instead he was informed that the execution team had resigned and a new team would be assembled only after the State litigation was over. Thus he

would not have been in a position to challenge the competence and qualifications of the team until the Washington Supreme Court issued its decision and lifted the stay. He promptly moved to amend his complaint and for a stay of execution in District Court as soon as there was an opportunity to do so. Thus there can be no issue of undue delay.

In regard to the merits, what was present in all of the above decisions including *Baze* was a prior opportunity for a full and fair hearing prior to a decision on a stay. That opportunity is completely lacking in this case, after Brown raised serious questions about the Washington policy as it pertains to the competence and qualifications of the team. Brown was denied any access to information about the qualifications of the team in State court and was denied meaningful access in the District Court when it denied his request for expedited discovery. Instead, the District Court ruled on the basis of Defendant Sinclair's declaration without affording Brown a meaningful opportunity to challenge that declaration through discovery. The District Court's ruling on denial of the stay is a species of "Catch 22." In order to prevail on his Eighth Amendment claim, Brown is obligated to demonstrate execution team members are unqualified and yet at the same time he is denied access to information about their qualifications.

Based on the agreement of the experts as to the necessity of a competent team and the declaration of Dr. Heath in regard to the insufficiency of the policy

on that issue, there is reasonable cause to believe that the Washington policy is not substantially similar to the protocol approved in *Baze*. This requires further inquiry and a full and fair hearing, as was provided in all of the above cited cases. This Court therefore should issue a stay until Brown is afforded access to information about the qualifications of the execution team and a full and fair hearing on the issues raised in the pleadings.

IV. CONCLUSION

The Court should grant the relief requested herein.

DATED: September 2, 2010.

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CERTIFICATION UNDER CIRCUIT RULE 32-1

Undersigned counsel hereby certifies under penalty of perjury that this document, excluding tables and certificates, consists of 4,540 proportionately spaced words typed in 14 point Times New Roman.

DATED: September 2, 2010.

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CERTIFICATE OF SERVICE

I, GILBERT H. LEVY, hereby certify that on September 2, 2010, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Appellate CM/ECF system, which will serve one copy of this document on opposing counsel, ASSISTANT ATTORNEY GENERAL JOHN J. SAMSON, a registered CM/ECF user.

I further certify that because MR. CAL COBURN BROWN is not a registered CM/ECF user, I have sent one copy of the foregoing document in paper format by Federal Express delivery, all fees prepaid, to MR. BROWN at #998921, IMU, Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362.

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