NO.10-35771

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

CAL COBURN BROWN,

Plaintiff-Appellant,

v.

ELDON VAIL, et al.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. CV-09-5101-JCC
The Honorable John C. Coughenour
United States District Judge

# RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION

ROBERT M. MCKENNA
Attorney General

JOHN J. SAMSON
SARA J. DI VITTORIO
Assistant Attorneys General
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445 / (360) 586-1319 fax
johns@atg.wa.gov
sarao@atg.wa.gov

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases

Statutes

# I. INTRODUCTION

The Defendants-Appellees (the State), through their attorneys, Robert M. McKenna, Attorney General, and John J. Samson and Sara J. Di Vittorio, Assistant Attorneys General, respond to Brown's emergency motion for a stay of the execution scheduled for September 10, 2010.

# II. STATEMENT OF THE CASE

## A. Introduction

Nineteen years ago, Brown kidnapped Holly Washa. After repeatedly raping and torturing her over the course of two days, Brown killed Ms. Washa and left her body in the trunk of a car. There was no doubt as to his guilt, as Brown confessed in detail to the crime. Brown was sentenced to death for this horrific crime, and now, almost two decades later, he will be executed by the injection of one drug, sodium thiopental. Brown previously presented evidence that the injection of sodium thiopental does not cause pain, and he previously argued the injection of sodium thiopental is a painless method of execution. Despite his prior evidence and assertions, Brown now seeks to further delay his execution by arguing this one drug protocol is actually unconstitutional. The Court should deny a stay of execution.

**B. Summary Of Brown's Prior Judicial Proceedings**

Brown's conviction and sentence became final upon conclusion of direct review in 1998. *State v. Brown*, 132 Wash.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). This Court ultimately affirmed the denial of federal habeas relief in 2008. *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006), *reversed*, *Uttecht v. Brown*, 551 U.S. 1 (2007), *aff'd. on remand*, *Brown v. Uttecht*, 530 F.3d 1031 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1005 (2009). The stay terminated, and the date of execution reset to March 13, 2009. At that time, the State used a three drug protocol that required the injection of sodium thiopental, pancuronium bromide, and potassium chloride.

In February 2009, Brown filed a complaint challenging the three drug protocol. CR 1.[1] Brown alleged the three drug protocol violated the state and federal constitutional prohibitions on cruel punishment. Brown contended the State should adopt a one drug protocol that uses only sodium thiopental. Brown also alleged violations of the state and federal controlled substances acts. Brown filed the complaint in state court, but the State removed the complaint to federal court under 28 U.S.C. § 1441. CR 1 and 2.

[1] "CR" cites to documents as numbered in the district court docket. "Exhibit" refers to copies of documents from the district court's record on appeal that are attached to this response to Brown's motion.

Concluding that the state courts should first resolve Brown's state law claims, the district court abstained from considering the federal claims, stayed the federal action, and remanded the matter back to state court. CR 12. The court advised "the parties of their right to preserve any federal claims pursuant to *England v. La. Bd. of Med. Examiners*, 375 U.S. 411 (1964)." CR 12, at 8. Brown did not make an *England* reservation, and instead actively pursued his federal claims in state court.

On remand, the state court consolidated Brown's complaint with an identical action filed by Darold Stenson.[2] The state courts stayed Brown's execution. The state court summarily dismissed the claims based upon the state and federal controlled substances acts, and held trial on the claims challenging the three drug protocol as cruel punishment. Throughout trial, the plaintiffs contended the three drug protocol should be replaced with a one drug protocol that uses only sodium thiopental because the one drug protocol would not inflict pain and would eliminate any constitutional concerns. Exhibit 4, at 15:13 – 16:3 and 914:6-19. The plaintiffs introduced expert testimony that the one drug protocol did not pose any risk of pain. Exhibit 4, at 568:7 – 575:14.

[2] A separate district judge granted Stenson a stay of execution so that he could pursue his challenge to the three drug protocol, but the Supreme Court vacated that stay of execution. *Vail, et al. v. Stenson,* 129 S. Ct. 537 (2008).

The trial court rejected the challenges to the three drug protocol, finding the protocol was substantially similar to the one in *Baze v. Rees*, 553 U.S. 35 (2008). Exhibit 3, Finding of Fact (FOF) 14. The court found the protocol would not inflict unnecessary pain. Exhibit 3, FOF 63. The court found a risk of pain is not inherent in the protocol, any risk would arise only from an error in administrating the protocol, and "the risk of such an error is minimal." Exhibit 3, FOF 62.

Brown appealed to the Washington Supreme Court, again arguing the State should adopt the one drug protocol because it did not pose any risk of pain. Exhibit 5, at 25 & 37. While the appeal was pending, Ohio successfully used the one drug protocol. Washington then adopted the one drug protocol, *see* Exhibit 6, and the State moved to dismiss as moot Brown's appeal. The Washington Supreme Court issued its opinion on July 29, 2010. The court affirmed that the State had statutory authority to implement the protocol, affirmed the dismissal of the claims under the controlled substances acts as failing to present a justiciable controversy, and dismissed as moot the constitutional challenges to the three drug protocol. Exhibit 2, at 11-22. The Washington Supreme Court lifted the stay on July 29, 2010. Exhibit 2, at 23. The date of execution reset to September 10, 2010. RCW 10.95.160(2).

## C. Current Federal Court Proceedings

Brown returned to the district court in August 2010. The district court lifted the stay of the federal proceedings, and Brown filed an amended complaint challenging the one drug protocol. CR 24 and 26. Brown moved for a stay of execution, arguing that the State had not proven the lethal injection team was adequately qualified and trained.[3] CR 25 and 27.

In opposition, the State argued Brown had not shown a likelihood of success on the merits and equity barred a stay. CR 30-37, 39, 41-42, and 44. The State submitted the extensive evidence developed during the state court trial, as well as the state court's detailed findings of fact concerning Brown's factual allegations. CR 30-36. The State also submitted evidence showing the lethal injection team's qualifications and training exceeded the protocol's minimum requirements. CR 36 and 44 (submitted here as Exhibits 8 & 11).

The district court denied Brown's motion for a stay on August 31, 2010. Exhibit 1. The court concluded Brown failed to show a likelihood of success, and concluded that equity disfavors a stay. Exhibit 1. Brown now moves this Court for a stay of execution. The State opposes the motion.

[3] Brown also alleged a denial of the right of access to courts, and a violation of the federal drug laws, but Brown does not pursue these two allegations in the current motion before this Court.

## III. ARGUMENT

### A. Standard For A Stay Of Execution

The State suffers severe prejudice from any stay of execution. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 644 (2004); *In re Blodgett*, 502 U.S. 236 (1992). The State has a strong interest in proceeding with its judgment, and there is a strong presumption against a stay when a challenge is brought on the eve of an execution. *Nelson*, 541 U.S. at 649; *Gomez v. U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992). The Supreme Court has recognized that courts should not automatically grant a stay of execution solely for the reason that the party seeking the stay will be put to death. A stay of execution must reflect "the presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 894-95 (1983). A federal court may grant a stay only when the petitioner shows a significant possibility of success on the merits. *Id*. at 888. As the district court correctly recognized, the federal courts have historically held that injunctive relief is "to be used sparingly, and only in a clear and plain case." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *Sampson v. Murray*, 415 U.S. 61, 83 (1974). To obtain preliminary injunctive relief, a plaintiff must clearly carry the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

The district court's denial of the requested injunctive relief is subject to limited review. *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). The district court's order is reviewed for an abuse of discretion. *Id.*; *Beno v. Shalala*, 30 F.3d 1057, 1063 (9th Cir. 1994). The order should not be reversed merely because this Court would have reached a different result. *Big Country Foods v. Bd. of Ed. of Anchorage S.D.*, 868 F.2d 1085, 1087 (9th Cir. 1989). "The [reviewing] court is not empowered to substitute its judgment for that of the [district court]." *Id.* The Court will reverse only where "the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Herrington v. County of Sonoma*, 12 F.3d 901, 907-08 (9th Cir. 1993). Questions of law underlying a denial of an injunction are reviewed de novo. *Rent-A-Center, Inc. v. Canyon Television & Appliance*, 944 F.2d 597, 600 (9th Cir. 1991). However, reversible legal error occurs only if the court employed an incorrect legal standard or misapplies substantive rules governing the underlying issues. *Zepeda v. United States I.N.S.*, 753 F.2d 719, 724-25 (9th Cir. 1983). The district court properly exercised its discretion in denying a stay because Brown failed to show a likelihood of success and equity disfavors a stay. Exhibit 1. For the same reasons, this Court should deny a stay.

**B. Brown Cannot Show A Likelihood Of Success On The Merits Because He Did Not Exhaust His Administrative Remedies**

Brown cannot show a likelihood of success because he cannot proceed with his complaint, having failed to properly exhaust his administrative remedies. No action may be brought by a prisoner challenging the conditions of his sentence until administrative remedies are exhausted. Exhaustion is mandatory under the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e; *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006); *Booth v. Churner*, 532 U.S. 731, 740, 742 (2001); *Porter v. Nussle*, 543 U.S. 516, 524-32 (2002). Brown failed to fully exhaust his administrative remedies. The State has a grievance system that allows inmates to challenge prison policy, including the one drug protocol. Exhibit 7. Brown was required to file a Level I grievance, a Level II appeal to the Superintendent, and a Level III appeal to Headquarters. Exhibit 7, at 2. Although Brown filed a grievance, he has not fully exhausted the process through the Level III appeal. Exhibit 7, at 3. Brown has not properly exhausted his administrative remedies, and he cannot proceed with his complaint. 42 U.S.C. § 1997e; *Nelson*, 541 U.S. at 650. Due to his failure to exhaust, Brown is not entitled to a stay. *Nelson*, 541 U.S. at 650; *Cooey v. Strickland*, 484 F.3d 424 (6th Cir. 2007) (stay denied based in part on failure to exhaust as required by PLRA); *White v. Johnson*, 429 F.3d 572, 574 n.1 (5th Cir. 2005) (same).

### C. Brown Is Judicially Estopped From Challenging The Protocol

"'[W]here a party assumes a certain position in a legal proceeding, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). Estoppel protects the integrity of the judicial process "by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment…." *Id.* at 749-50 (citation omitted). There is no inflexible prerequisite or exhaustive formula to determine the applicability of judicial estoppel, but the Court has considered factors such as whether the party's position is "clearly inconsistent" with an earlier position, whether the party persuaded a court to accept the earlier position, and whether the party would gain an unfair advantage or impose an unfair detriment on an opponent. *Id*. at 750-51. Brown repeatedly argued the one drug protocol is simple, painless, and would eliminate any constitutional concerns. Exhibits 4 and 5. Brown is estopped from challenging the protocol.

### D. Brown Fails To Show The Protocol Inflicts Cruel Punishment

Brown has the burden to prove the protocol violates the Eighth Amendment. Brown failed to satisfy this burden.

The *Baze* Court held the three drug protocol is constitutional even though the second and third drugs posed a risk of severe pain. *Baze v. Rees*, 553 U.S. 35, 62 (2008). The determination that the three drug protocol is constitutional does not prohibit, but instead accommodates, the adoption of even more humane methods of execution. *Id*. The one drug protocol eliminates the two drugs the petitioners in *Baze* argued caused the pain, and in doing so adopts an even more humane method of execution. If the three drug protocol is constitutional, the one drug protocol necessarily must be. As the Sixth Circuit noted in rejecting a challenge to Ohio's protocol, a plaintiff "has little prospect of being the first inmate to show that an execution protocol is unconstitutional" in a challenge to the new protocol because "the risk of severe pain [is] no greater – and likely less – than the risk of pain inherent in any lethal injection procedure found constitutional by a federal court." *Cooey II (Brios) v. Strickland*, 589 F.3d 210, 221 (6th Cir. 2009).

Because capital punishment is constitutional, "[i]t necessarily follows that there must be a means of carrying it out." *Baze*, 553 U.S. at 47. "Some risk of pain is inherent in any method of execution," and "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Id*. The Constitution forbids only punishment possessing "deliberate infliction of

pain for the sake of pain – 'superadd[ing]' pain to the death sentence through torture and the like." *Baze*, 553 U.S. at 48. To violate the Eighth Amendment, the method must present a "substantial" or "very likely" risk of needless suffering. *Id*. at 50. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id*. A risk of error is insufficient to show a violation. *Id*. at 54-56.

The fact that additional safeguards could reduce a risk is not sufficient. Such a rule would transform the courts into boards of inquiry charged with determining "best practices" for executions, improperly embroiling the courts in ongoing scientific controversies. *Baze*, 553 U.S. at 51 & n.2. "[A]n inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures." *Id*. at 60-61. "[W]hat the [Eighth] Amendment prohibits is wanton exposure to 'objectively intolerable risk,' ... not simply the possibility of pain." *Id*. at 61-62 (citations omitted). "The risks of maladministration they have suggested – such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel – cannot remotely be characterized as 'objectively intolerable.'" *Id*. at 62.

Brown cannot show a likelihood of success where no circuit court has found a protocol unconstitutional.[4] This is especially true where the challenged protocol is the protocol the petitioners in *Baze* (and Brown in state court) argued should be adopted. *See Baze*, 553 U.S. at 51.

Brown never alleged sodium thiopental if properly administered causes pain. Instead, Brown alleges the State may err in administering the sodium thiopental. But the possibility of accident does not render the method unconstitutional. The risk of accident need not be eliminated. *Baze*, 553 U.S. at 47. As the Court noted, "'[a]ccidents happen for which no man is to blame,'" and "such 'an accident, with no suggestion of malevolence,' ... 'did not give rise to an Eighth Amendment violation.'" *Id*. at 50 (citation omitted). "Some risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure." *Id*. at 47. "It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Id*. The risk of maladministration simply does not present the "substantial risk" of pain prohibited by the Constitution. *Id*. at 62.

[4] *See, e.g., Beardslee v. Woodford*, 395 F.3d 1064, 1076 (9th Cir. 2005); *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004); *Poland v. Stewart*, 151 F.3d 1014 (9th Cir. 1998); *Jackson v. Danberg*, 594 F.3d 210, 224-28 (3rd Cir. 2010); *Harbison v. Little*, 571 F.3d 531, 535-39 (6th Cir. 2009).

Brown's primary argument is that the State has not proven the lethal injection team is adequately qualified and trained. But as the district court determined, Brown improperly shifts the burden of proof. Exhibit 1, at 17-18. Brown bears the burden of proof, and he utterly failed to meet this burden. As the district court concluded, Brown offered only conjecture that the team may be inexperienced. Exhibit 1, at 18. Such conjecture does not constitute the "clear showing" of likely success. *Id*.

As the district court determined, Brown's conjecture fails because the State presented evidence showing the team is adequately qualified and trained "even though they bear no burden whatsoever in this case." Exhibit 1, at 17. Brown attempts to minimize the State's evidence, noting "that one of the four team members was a certified Emergency Medical Technician and had been one for more than six years," and referring to the other three team members simply as "certified paramedics." Brown's Motion, at 12. But Brown omits the fact that the three team members actually responsible for inserting the IVs during the execution are a paramedic with more than six years experience, a paramedic with more than 11 years experience, and a paramedic with more than 12 years experience. Exhibit 11, at 1. The fourth team member referred to by Brown, the emergency medical technician, will not insert IVs. Exhibit 11, at 1.

Brown complains that he was denied discovery in state court about former team members, but the state trial court ultimately determined the requested discovery was not relevant. Brown's Exhibit K, at 16. The court also recognized that, if accepted, Brown's theory about the need for a fact specific, individualized inquiry into the particular qualifications of the team members would effectively require endless litigation:

> THE COURT: Well, Ms. Peterson, if I were to accept your theory here, it would mean that every single time there was an execution in the state, there would be need to litigate for the particular team that was assembled to administer the policy.

Brown's Exhibit K, at 18:24 – 19:3.

Moreover, although Brown complains about a lack of discovery in state court, the Washington Supreme Court determined Brown waived these issues by not properly briefing the issues on appeal. Exhibit Q, at 19 n.11.

Brown also complains the district court erroneously denied his request for expedited discovery, but the district court's discovery ruling is not subject to interlocutory review. *See Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2010). Even if the ruling was subject to immediate review, Brown fails to show an abuse of discretion. As the district court noted, Brown's complaint fails because the State has provided information concerning the qualifications and training of the team members:

> Responding to Plaintiff's still-pending motion for a stay of his execution date (Dkt. No. 25), Defendants submitted more than one thousand pages of exhibits. Among them is the three-page declaration of Stephen Sinclair, the superintendent of the Washington State Penitentiary. (Sinclair Decl. 1–3 (Dkt. No. 36 at 116–18)). Mr. Sinclair avers that he is "personally aware of the identities of all members of the lethal injection team and their qualifications, training, and professional experience." (*Id.* 2). He continues: "All members of the lethal injection team have more than one year of professional experience as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman." (*Id.*). Finally, Mr. Sinclair avers that each team member responsible for inserting intravenous lines during the execution "regularly inserts intravenous lines as a part of his or her professional duties."
>
> In his briefing on this issue, Plaintiff nowhere acknowledges having received a copy of Mr. Sinclair's declaration, preferring to argue against straw men. He argues, for example, that the state could "hire random people off the street to be members of the execution team, without fear of judicial scrutiny." (Pl. Reply 7 (Dkt. No. 52)).
>
> The law permits no such thing. This Court has scrutinized Mr. Sinclair's declaration, which he offered under penalty of perjury. (Sinclair Decl. 3 (Dkt. No. 36 at 118)). Mr. Sinclair reports that all team members have more than one year of experience in the medical profession, and Plaintiff has failed to offer any reason for this Court to doubt the veracity of his averments. The Court is therefore satisfied that Plaintiff has received adequate discovery with respect to his allegation, offered upon "information and belief," that the members of the execution team are "inadequately trained and qualified to administer the one-drug protocol." (Am. Compl. 7 (Dkt. No. 26)).

Exhibit 12, at 3.

Brown fails to show the district court abused it discretion.

As clearly expressed by Chief Justice Roberts, *Baze* does not require a specific factual inquiry into the members of the team. Rather, *Baze* resolves the challenge to any state protocol that is substantially similar to the one reviewed in *Baze*. *See Baze*, 553 U.S. at 61. When properly understood, *Baze* will not "lead to litigation that enables 'those seeking to abolish the death penalty ... to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.'" *Id.* at 63 (Alito, J., concurring). Only a misinterpretation of *Baze*, the one now advanced by Brown, "would create a grave danger of extended delay." *Id*. at 70.

The Fifth Circuit recently held the type of discovery demanded by Brown is not necessary or proper under *Baze*. *Raby v. Livingston*, 600 F.3d 552 (5th Cir. 2010). Raby had obtained only a limited amount of discovery that included a deposition of the prison warden. *Id*. at 555. The warden testified about the protocol, but did not know the particular qualifications of the team members. *Id*. at 559-60. Raby argued he was entitled to additional discovery concerning the execution team. *Id*. at 555. The Fifth Circuit rejected Raby's argument. *Id*. at 561-62. The Fifth Circuit determined the claimed need for fact-specific discovery was the view of Justice Stevens; the view rejected by the *Baze* plurality. *Id*. The court held,

> We read *Baze* to foreclose exactly the type of further litigation that Raby seeks to continue. The safe harbor established by *Baze* would hardly be safe if states following a substantially similar protocol nonetheless had to engage in prolonged litigation defending their method of lethal injection.

*Raby*, 600 F.3d at 562.

Moreover, the requested discovery is not proper because Brown is collaterally estopped from litigating his factual allegations. The state trial court previously found the protocol's qualification and training requirements are similar to those in *Baze*. Exhibit 3, FOF 2, 4, 14. The court reviewed the three drug protocol, but the minimum requirements in the one drug protocol are identical to those in the three drug protocol. Exhibit 6, at 7-8. The trial court also found rejected Brown's various allegations of risk. The state trial court found the preparation of sodium thiopental was not difficult and could be properly performed by a lay person. Exhibit 3, FOF 32, 33. The state court rejected the various factors Brown alleged could compromise delivery of the sodium thiopental, finding Brown failed to prove any of these difficulties was likely to occur. Exhibit 3, FOF 24. The state trial court found a risk of unnecessary pain is not inherent in the protocol, any risk would arise only from an error, and "the risk of such an error is minimal." Exhibit 3, FOF 62. Brown cannot relitigate these factual issues.

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral estoppel gives preclusive effect to the prior decisions of state courts. *Id*. at 95-96.

Although the state trial court reviewed the three drug protocol, the factual issues presented by Brown are identical under the one drug protocol. As the Sixth Circuit noted, "the risk of severe pain [is] no greater – and likely less – than the risk of pain inherent in any lethal injection procedure found constitutional by a federal court." *Cooey II*, 589 F.3d at 221. If the allegations did not show a risk of when under the three drug protocol, the allegations do not show a risk of pain under the one drug protocol.[5]

Finally, Brown presented expert testimony that the protocol poses no risk of pain. Exhibit 4, at 568:7 – 575:14. Although Brown has a new expert,

[5] Brown will contend he had a right to return to federal court under *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964). But Brown did not reserve his rights, and instead litigated the federal claims in state court. Where the plaintiff litigates the federal claims in state court, the state court's determination of issues has preclusive effect in subsequent federal litigation. *San Remo Hotel, L.P. v. City and County of San Francisco, Cal*., 545 U.S. 323, 338-45 (2005); *Lurie v. State of Cal.*, 633 F.2d 786, 787-89 (9th Cir. 1980). The factual findings have preclusive effect because the Washington Supreme Court did not vacate the trial court's judgment. *See United States v. Munsingwear*, 340 U.S. 36, 38-41 (1950).

he opines only there is a risk that the execution "may" cause pain.[6] A "possible" risk of pain is not the "substantial" risk needed to show an Eighth Amendment violation. *Baze*, 553 U.S. at 62; *Cooey II*, 589 F.3d at 226-28.

**E. Brown Is Not Entitled To A Stay On The Eve Of His Execution**

Brown has no automatic right to a stay, and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 583-84. "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson*, 541 U.S. at 650.

Almost two decades have passed since Brown tortured, raped, and killed Holly Washa. Brown was to be executed in March 2009, but he successfully avoided his execution by alleging the three drug protocol was unconstitutional. Brown litigated his challenge to the three drug protocol for a year and a half, repeatedly arguing that the State should abandon the three drug protocol and adopt the humane, risk free one drug protocol. Now that the State has adopted the one drug protocol, Brown again seeks to further postpone his execution by

[6] Brown's expert also speculates the team may use a cut-down for IV access. But this will not happen. *See* Exhibit 2, at 8-9. If the team cannot insert an IV, the execution simply will not proceed. Exhibit 3, FOF 34, 44.

changing his position and arguing the one drug protocol actually inflicts cruel and unusual punishment. Equity does not favor a stay based upon the inconsistent and ever changing arguments presented by Brown.

Brown is not entitled to further delay. Any delay, even a brief one, prejudices the compelling interests of the State and the family of Holly Washa. *Blodgett*, 502 U.S. at 239-40. "At some point in time, the State has a right to impose a sentence – not just because the 'State's interests in finality are compelling,' but also because there is a 'powerful and legitimate interest in punishing the guilty,' which attaches to 'the State and the victims of crime alike.'" *Workman v. Bredesen*, 486 F.3d 896, 913 (6th Cir. 2007). In light of the strong presumption against a stay, equity demands the denial of any stay.

## IV. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court deny a stay of execution.

RESPECTFULLY SUBMITTED this 2nd day of September, 2010.

ROBERT M. MCKENNA
Attorney General

s/John J. Samson
JOHN J. SAMSON, WSBA #22187
SARA J. DI VITTORIO, WSBA #33003
Assistant Attorneys General

No. 10-35771 *Cal Coburn Brown v. Eldon Vail, et al.*

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2010, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

GILBERT H. LEVY: courts@glevylawyer.com

SUZANNE LEE ELLIOTT: suzanne-elliott@msn.com

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 2nd day of September, 2010, at Olympia, WA.

s/ Kathy Jerenz
KATHY JERENZ