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

APPELLANT'S REPLY TO RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION

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I. REPLY TO ARGUMENT THAT BROWN FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

Brown filed a grievance contesting the qualifications of the execution team after the State Court stay was lifted. That grievance is pending at the present time. Until the stay was lifted, there was no team in existence and nothing to grieve. Darold Stenson, a similarly situated death row inmate, filed a grievance against the previously applicable three drug protocol. His grievance took approximately ninety days to resolve. See, Docket No. 41, Defendants' Sur-Reply to Plaintiff's Motion for a Stay of Execution. Ultimately, his grievance was denied on the merits. Id.

Failure to exhaust administrative remedies is an affirmative defense and Brown was not obligated to plead exhaustion in his complaint. *Jones v. Bock,* 549 U.S. 199, 216 (2007). Defendants must demonstrate the absence of exhaustion and must prove that pertinent relief remains available. *Brown v. Valoff,* 422 F. 3d 926, 936 (9th Cir. 2005). Brown maintains that pertinent relief is unavailable because of the adverse decision in Stenson. Furthermore, Brown need not exhaust his administrative remedies because exhaustion would be futile. *Blackmon ex rel. Blackmon v. Springfield School Dist.*, 198 F. 3d 648, 656 (8th Cir. 1999). Given the likelihood of delay, Brown will be long dead before the administrative process has run its course. Furthermore, there is no reason to believe that the decision in

his case will be any different than it was in the case of Stenson. The Department's position is based on a court decision. Its own regulation provides that court decisions are not subject to the grievance procedure. See, Docket No. 52, Plaintiff Brown's Reply to Defendant's Response to Motion for Expedited Discovery, Exhibit 1.

II. REPLY TO ARGUMENT THAT BROWN IS JUDICIALLY AND COLLATERALLY ESTOPPED

In the prior state litigation, Brown had multiple claims. One claim was that the State should adopt the one drug protocol. Another was that execution by lethal injection required the presence of a qualified and competent execution team and that misadventure would inevitably follow in the absence of a competent team. Brown maintained that the State's policy as written was inadequate to insure a competent team. Brown never conceded that the policy was adequate to insure the competence of the team. Brown never conceded the competence of the execution team. These are claims that Brown is now seeking to raise because he was never afforded a fair opportunity to pursue them in the prior State litigation. The need to switch to a one drug protocol was only one of his claims.

Defendants obfuscate the arguments that Brown makes in his Amended Complaint. Brown has consistently argued that the risk of maladminstration of any drug or any number of drugs continues to exist in Washington because the

2010 lethal injection protocol does nothing to insure that there will be a properly experienced and qualified lethal injection team in place at the time of his execution. Defendants have not cited to a single reference in the record that Brown made such a concession.

In fact, in the District Court, the defendants' arguments were littered with the qualifier "if properly administered" or "if followed" that the protocol is humane. Even the Finding of Fact entered by the Thurston County Superior Court Judge stated that Brown had failed to prove that his execution would be humane only "if the Washington protocol is followed."

As set forth in Brown's emergency motion, in the state court the defendants manipulated the process so that Brown was not able to determine whether the protocols regarding the training and experience of the lethal injection team (as constituted at that time) were, in fact, being followed. Because the previous lethal injection team resigned en masse during the state court litigation, the best the state's witnesses could do was state that in the future they would try to get the "best qualified people" to administer the policy.

Brown has never "waived" this argument either. The defendants cite to a footnote to the Washington State Supreme Court's opinion in support of this argument. But they do not seriously contend there was a waiver here. This is likely because the record clearly demonstrates that Brown fully challenged the

defendants' failure to provide discovery and briefed his claims that the trial court erred in failing to enforce its own discovery orders. The defendants recognized this fact when they specifically asked the Washington State Supreme Court to dismiss Brown's ancillary assignment of error regarding discovery claims as moot. And the Washington Supreme Court's comment is dicta. Because the Court dismissed all challenges to the 2008 three-drug protocol, any finding of waiver was superfluous to the decision.

Even if there is some argument that Brown waived his discovery requests as to the previous team, he certainly did not waive any request as to future teams deployed by the defendants. Because it appears that the DOC has a new team, Brown filed a motion to expedite discovery regarding these new participants in the district court. Again, seeking to avoid transparency at any cost, the defendants objected to expedited discovery in the hopes that Brown would be executed before they were required to comply with any discovery requests.

The doctrine of collateral estoppel is inapplicable here. In Thurston County Superior Court, the parties litigated the prior version of DOC lethal injection policy adopted in 2008. Brown is now seeking to litigate, by his amended complaint, the March 2010 lethal injection policy.

Furthermore, the § 1983 challenge in this case is based upon a new set of facts. A critical issue in this case is whether the present execution team members

possess the necessary training, qualifications and experience. The previous team resigned in the course of the state litigation and taking the Defendants at their word, the new team was not constituted until the state court stay was lifted. The doctrine of collateral estoppel is inapplicable, where, as here, there has been a significant change in the legally controlling facts. *Carter v. United States*, 973 F.2d 1479, 1482-83 (9th Cir. 1992).

The application of the doctrine of collateral estoppel in this case would also be grossly unfair and work an extreme injustice. The defendants in this case participated in two years of litigation, at great expense to the taxpayers. During that litigation they took steps to avoid proper discovery orders.

On the eve of argument in the appeal, the DOC unilaterally amended Policy 400.200 in an attempt to further avoid any state court action that might require them to reveal how and by whom executions are actually accomplished in Washington. They argued that a portion the trial court's decision was moot.

On the day that the Washington State Supreme Court agreed that the constitutional issues were moot, the DOC announced that it would execute Brown on September 10, 2010. This confirmed what Brown had always suspected: the resignation of the Lethal Injection Team during the trial court litigation was a shameless ploy to avoid inquiry and that the previous team would withdraw their

resignations or a new team would be recruited as soon as any perceived threat of inquiry was removed.

The defendants cite to the "integrity of the judicial process" but fail to acknowledge their own manipulation of the orderly administration of justice. Brown has been reduced to litigating this matter on the eve of his execution because the defendants have done everything in their power to avoid transparency in the administration of Washington's lethal injection protocols.

III. REPLY TO ARGUMENT THAT BROWN'S MOTION IS FORECLOSED BY *BAZE*

As argued in the stay motion, the Supreme Court in *Baze* recognized the importance of a competent and qualified execution team. This is consistent with the testimony of the experts. If the team is incompetent and the injection process goes awry, the condemned person will experience severe pain whether it's the three drug protocol or the one drug protocol. The defendants' position seems to be that so long as it adopts a written policy somewhat similar to the one approved in *Baze* and so long as it files a self serving declaration like the one submitted by Defendant Sinclair, that puts an end to further inquiry by any court. Team members may have no current experience in IV insertion. Team members may have been subjected to professional discipline and license revocation. Team

members may have a history of drug and alcohol abuse. If defendants' position is correct, no one will ever know.

Plaintiff is not suggesting that there should be new litigation about team member qualifications every time an execution is about to take place. Plaintiff is claiming, however, that there should be at least one full hearing to determine whether the policy is adequate to insure the presence of a competent team. Such a hearing never took place in State Court in this case and it never took place in the District Court below. Throughout the history of this litigation, the State has been quite successful in hiding information about the competence and qualifications of team members although such information has been made readily available to litigants raising similar challenges in other courts. See, Docket No. 52, Exhibits 2, 3, and 4.

Plaintiff is asking for a short stay so that he is not executed before he has an opportunity to prove his claim. The issue can be resolved expeditiously. If discovery reveals that team members possess the necessary experience and qualifications, as defendants now claim, then inquiry essentially ends once and for all. On the other hand, if the process is allowed to remain impervious to public scrutiny, as defendants would wish it to be, one can look forward to the probability of needless suffering and a botched execution, whether it occurs in this case or at some point down the road.

IV. CONCLUSION

The Court should grant Brown's request for a stay.

DATED: September 3, 2010.

/s/ Gilbert H. Levy
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Attorney for Appellant Cal Brown

CERTIFICATE OF SERVICE

I, GILBERT H. LEVY, hereby certify that on September 3, 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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