UNITED STATES COURT OF APPEALS IN AND FOR THE NINTH CIRCUIT

CAL COBURN BROWN, Petitioner, vs. STEVEN SINCLAIR, Respondent.	Circuit No. Dist. Ct. No. C10-1446-JCC EMERGENCY MOTION FOR ORDER STAYING EXECUTION SET FOR SEPTEMBER 10, 2010 AT 12:01 A.M. **THIS IS A CAPITAL CASE AND THE EXECUTION IS SCHEDULED TO TAKE PLACE IN LESS THAN 7 HOURS**

I. STATEMENT OF THE CASE

Plaintiff Cal Brown 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 September 3, 2010 he filed a motion in the King County Superior Court arguing that, but for his medication, he would be incompetent to be executed. The trial court denied that motion on September 8, 2010.

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That same day, Brown filed a Motion for Discretionary Review in the Washington State Supreme Court. The Washington State Supreme Court denied review and a stay at 1:48 P.M. today.

Brown immediately filed a habeas petition in the District Court for the Western District of Washington. Judge Coughenour considered that petition and a request for a stay. All grounds advanced in support of Brown's habeas petition and request for a stay were presented to that court.

II. ARGUMENT

The State will likely argue that this application is brought at the 11th hour. In many other jurisdictions, when a defendant's appeals are exhausted, the State is required to bring a motion to set an execution date. *See, e.g., United States v. Thompson*, 380 F.3d 423, 428-29 (6th Cir. 2009) (discussing Tennessee's procedure). At that time, the defendant can oppose the motion by challenging his competency in a more orderly and rationale way. But in Washington, the State takes the position that once any stay is lifted the date of execution is automatically reset pursuant to RCW 10.95.160(2). The State also takes the position that defendant can do nothing to alter the time schedule once set.

The combined effect of the State's position on the statute and the Washington State Supreme Court decisions in *In Re Personal Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998), which states that these type of claims are premature before an execution is set, and *State v. Harris*, 114 Wn.2d 419, 789 P.2d 60 (1990), which required Brown to initially bring his claim in the trial court, make it inevitable that competency issues will be raised very late in the proceedings. And, it is regrettable that, in some cases, this will result in disruption of preparations for the execution and more pain and inconvenience to the witnesses to the execution. But the constitutional mandate is clear – no incompetent person may be executed.

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In bringing this motion, Brown followed the procedures set forth by this Court in *State v. Harris*, supra.

According to *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) and *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), a defendant about to be executed must only make a threshold showing in order to be entitled to a stay (if necessary) and an evidentiary hearing. And in *Ford*, the Court held that the Eighth Amendment claim at issue [competency for execution] can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death

In *Panetti*, the Court ruled that the state court's procedures for determining competency violated the Eighth and Fourteenth Amendments. Since Panetti met the threshold showing of incompetency, under *Ford* he was entitled to an evidentiary hearing. 551 U.S. at 949-50. In applying Justice Powell's basic standard in *Ford*, the Court found that the state court failed to provide petitioner with a constitutionally adequate opportunity to be heard. *Id.*

In this case, as in *Ford* and *Panetti*, the state trial court finding that Brown against Brown was reached without affording him an evidentiary hearing to prove what he alleged. Clearly established Supreme Court precedent establishes that resolving an incompetency claim based on a paper record falls short of the minimal due process constitutionally required.

In *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2010) the Court held that Tennessee's refusal to hold formal evidentiary proceedings in Thompson's case on his competency claim constituted an unreasonable application of *Ford*. The same is true here. The state courts refused to hold a full evidentiary hearing on Brown's claims.

In the district court Brown asked for a stay pursuant to LCR 104(3) and argued that the application for stay should be granted in order for Brown to pursue the non-frivolous issues raised in the accompanying petition.

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III. CONCLUSION

This Court should grant a stay of execution and set a briefing schedule.

Respectfully submitted this 9th day of September, 2010:

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CERTIFICATE OF SERVICE

I, SUZANNE LEE ELLIOTT, hereby certify that on September 9, 2010, I filed the foregoing document with the Ninth Circuit's ECF/CM system. I hereby certify that I served one copy of the foregoing document by email on ASSISTANT ATTORNEY GENERAL JOHN SAMSON.

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No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAL COBURN BROWN,

Petitioner,

v.

STEVEN SINCLAIR,

Respondent.

ON APPEAL FROM THE U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
The Honorable John C. Coughenour

APPENDIX

SUZANNE LEE ELLIOTT

Attorney for Petitioner
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

CAL COBURN BROWN, Petitioner, vs. STEVEN SINCLAIR, Respondent.	Case No. PETITION UNDER 28 U.S.C. § 2254 FOR HABEAS CORPUS **THIS IS A CAPITAL CASE EXECUTION SET FOR SEPTEMBER 10, 2010 AT 12:01 A.M.**

Place of Confinement: Washington State Penitentiary, 1313 North 13th Street, Walla Walla WA, 99362, DOC # #998921.

Cal Coburn Brown, through his attorney, Suzanne Lee Elliott, petitions this court under 28 U.S.C. § 2254(d), for a writ of habeas corpus staying his execution, on the ground that his execution would violate the Eighth Amendment because, absent psychotropic medications, he would be incompetent to be executed.

In support of this request, petitioner shows the following:

I. BASIS OF CUSTODY

In 1993 Brown 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.*

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Uttecht, 530 F.3d 1031 (9th Cir. 2008), *cert. denied by Brown v. Sinclair*, 129 S.Ct. 1005, 173 L.Ed.2d 300 (2009).

II. EVIDENCE PRESENTED IN THE STATE COURT

The facts of Mr. Brown's crime have been established for many years and are undisputed.

On May 24, 1991, after two days of torture and rape, Mr. Brown murdered Holly Washa by stuffing her into a car trunk and slitting her throat. The Washington State Supreme Court described the condition in which authorities discovered her dead body—a condition that is horrifying but also vivid evidence of Mr. Brown's mental illness:

> In addition to the lethal injuries, [authorities] described other trauma to Ms. Washa's body. Her pubic hair had been shaved. Her face was severely bruised. Both the inside and outside of her vaginal area were bruised. There was also bruising around her anus. The vaginal and anal injuries indicated forcible penetration with a hard object . . . . Her nipples showed abrasions and a linear pattern of bruising consistent with being whipped by a belt or cord. Similar bruising was found on her inner thigh, which also indicated whipping. Her feet and ankles were covered with bruises consistent with having been restrained. Her chest and abdomen had multiple stab and slicing wounds. An irregular blemish-like area of red drying on her inner thigh indicated burning.

State v. Brown, 132 Wn.2d 529, 549, 940 P.2d 546 (1997). A jury convicted Mr. Brown of aggravated murder in the first degree on December 10, 1993, and sentenced him to death a few weeks later. The death sentence was based on a finding that there were no mitigating circumstances warranting leniency—a finding based on the prosecutor's testimony and argument debunking Mr. Brown's lack of mental illness or need for medication to control it, testimony that has proved to be untrue as the State of Washington has been medicating Mr. Brown for his mental illness since the week after his trial.

The procedural history since that time is long and complicated, as is true of virtually every capital case.

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Most recently, when the Washington Supreme Court lifted its stay of execution after rejecting Brown's arguments regarding this state's lethal injection protocols, the Department of Corrections announced it would execute Mr. Brown on September 10, 2010.

Just a week after being sentenced, Mr. Brown was seen by a psychiatrist employed by the Washington State Department of Corrections (DOC). On February 4, Mr. Brown was evaluated by Dr. Tim. L. McBath, M.D., a psychiatrist with the Washington State Penitentiary. Dr. McBath described Mr. Brown as cooperative and accessible, but possessing an "elevated energy level, being animated and demonstrative in speech" that was "quite rapid and moderately pressured." *See* Exhibit B to Motion for Discretionary Review (MDR); Dr. McBath February 3, 1994 Evaluation, pg. 3. Dr. McBath concluded that Mr. Brown suffered an Axis I disorder: "Probable Bipolar Disorder with history of at least hypomanic and possibly manic episodes. Currently exhibiting hypomanic symptoms." *Id*. at 4. As such, Mr. Brown was prescribed 300 milligrams of lithium three times a day.

A follow-up evaluation was done three weeks later. On February, 23, 1994, Mr. Brown was seen by Dr. Carl Baum, M.D., another psychiatrist with the Washington State Penitentiary. Dr. Baum described Mr. Brown's speech as being somewhat "pressured" and "hyperverbal", including laughing inappropriately continued prescription of psychotropic medication, concluding that "[C]ontinued mental health follow-up and maintenance with psychotropics would seem to be warranted." *See* Exhibit C to MDR; Dr. Ronald D. Page, PhD, May 4, 1995 Evaluation, pg. 3.

At the directive of the Washington State Department of Corrections, Mr. Brown has been prescribed psychotropic medication over the last sixteen years.

Dates	**Prescribed Psychotropic Medication and Dosage**
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September 19 – 30, 2003	Divalproex (aka Depakote) 500 mg.
October 2003	Lithium (300 mg) and Divalproex (500 mg)
November 2003 – April 2010	Divalproex (Depakote) 500 mg

The diagnosis and prescribed medication as remained unchanged since 1994. As recent as July 16, 2009, Mr. Brown was diagnosed by a DOC physician, Dr. Grubb, as suffering from "bipolar disorder, more or less stable" and requiring medication. *See* Exhibit D to MDR; Dr. David Grubb, M.D. July 16, 2009.

Pursuant to the procedures outlined in *State v. Harris*, 114 Wn.2d 419, 789 P.2d 60 (1990), Brown filed an emergency motion to preclude his execution on the grounds of incompetence in the King County Superior Court on September 3, 2010. He presented the unrebutted declaration of Dr. George Woods. Dr. George Woods recently conducted an evaluation of Mr. Brown, in part, to determine his current competence. His declarations, which are attached as Exhibit E to MDR, state that Mr. Brown's competence is achieved artificially—through the use of mood altering psychotropic medication. But for that medication, which is administered by the State, Mr. Brown there is a reasonable likelihood that Mr. Brown would not be competent. In fact, despite being medicated by the DOC continuously for years and years, Mr. Brown still shows significant signs of mania. As a result, his competence has been achieved only through the medication that the State has told him to take.

Dr. Woods rendered his opinion pro bono.

Judge Sharon Armstrong entered Findings of Fact and Conclusions of Law denying Brown's motion and refused to grant a stay. Although Brown asked for discovery and a hearing, she denied those requests.

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III. GROUND FOR RELIEF

The Eighth Amendment protects against "cruel and unusual punishments." Brown submits that forcible medication into competency violates these provisions. The facts in support of this claim are those set forth above and presented to the Washington State Supreme Court.

IV. EXHAUSTION

A federal court may not grant a writ of habeas corpus unless the petitioner has exhausted his state court remedies. *See* 28 U.S.C. § 2254(b)(1)(A). A petitioner satisfies the exhaustion requirement by providing the highest state court with an opportunity to rule on the merits of the claim. The State claim need not be identical to the federal claim. *Picard v. Connor*, 404 U.S. at 277-78.

V. BROWN'S CLAIM IS BASED UPON CLEARLY ESTABLISHED SUPREME COURT PRECEDENT WHICH THE WASHINGTON COURTS DID NOT REASONABLY APPLY TO HIS CLAIMS

A federal court may reverse a state court's decision on the merits only if it was contrary to or an unreasonable application of clearly established Supreme Court precedent, or if it was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority. *Williams v. Taylor*, 529 U.S. 362, 413-14 (2000). A decision involves an unreasonable application of federal law if the state court identifies the correct governing legal principle but applies that principle to the facts of the prisoner's case in a manner that is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63 (2003). A state court can be "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." (emphasis added). *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000). Circuit law is "persuasive authority" for purposes of determining what law has been clearly established by the Supreme Court. *Clark v. Murphy*, 331 F.3d 1062 (9th Cir.), *cert. denied*, 540 U.S. 968 (2003).

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Although the 2254(d) standard is deferential, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

The Washington State Supreme Court decision is an unreasonable application of *Ford* because the state courts refused to hold a full evidentiary hearing on Brown's claims. *See Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2010).

The Washington State Supreme Court's decision is "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." The Supreme Court has not squarely addressed whether the Eighth Amendment's prohibition on cruel and unusual punishment prohibits rendering a prisoner competent for execution through involuntary medication. But a logical reading of *Ford* and *Panetti* requires this Court to conclude that the legal principle – it is unconstitutional to execute the incompetent – would prohibit the execution of those made artificially or superficially competent via the use of the medications. And, the Supreme Court's repeated recent willingness to deem unconstitutional the execution of prisoners who the state previously had a legitimate right to execute – including those with mental or developmental deficiencies – supports the claim that Brown cannot be medicated into competency. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of mentally retarded defendants); *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (applying *Atkins* to prohibit execution of prisoners who were under eighteen years of age at the time of their capital crimes).

VI. OTHER REQUIRED ALLEGATIONS

1. All of the grounds for relief set forth in paragraphs 6-14, above, were previously presented to the Supreme Court of Washington. *See* paragraphs 2 and 3.
2. Petitioner has no other appeal or petition now pending in any court on this issue.
3. Petitioner has been represented by the following attorneys:

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3.1. Throughout trial court proceedings;

3.2. On direct appeal to the Washington Court of Appeals;

3.3. For the petition for review and petition for writ of certiorari from the direct appeal;

3.4. At various stages of the personal restraint proceedings.

4. Petitioner has a further sentence of life to be served in California if he is ever released in Washington. There are no challenges pending as to that conviction or sentence.

5. The petition is timely although it is filed more than one year after the judgment became final.

VII. PRAYER FOR RELIEF

WHEREFORE, Petitioner asks that this Court:

1. Require the State to file an answer to the petition in the form prescribed by Rule 5 of the Rules Governing § 2254 Cases in the United States District Court, identifying all state proceedings conducted in petitioner's case, including any which have not been recorded or transcribed, and specifically admitting or denying the factual allegations set forth above.
2. Permit petitioner to respond to the answer.
3. Require the Washington State Attorney General to bring forth and file with this Court accurate and complete copies of all documents and proceedings relating to petitioner's conviction and sentence.
4. Permit petitioner to utilize the procedures for discovery in FRCP 26-37, to the extent necessary to fully develop and identify the facts supporting his petition, and any defenses thereto raised by the State's answer.
5. Permit petitioner to amend this petition to include any additional claims or allegations not presently known to him or his counsel, which are identified or uncovered in the course of discovery, investigation, and litigation of this petition.
6. Conduct an evidentiary hearing to resolve any factual disputes raised by the respondent's answer to this petition, or by petitioner's response to the answer.

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7. Order the respondent to stay his imminent execution.

8. Grant such further relief as may be just.

DATED this 9th day of September, 2010.

Respectfully submitted:

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VERIFICATION

Suzanne Lee Elliott states as follows:

1. I am the attorney representing Cal Coburn Brown
2. To avoid unnecessary delay in filing the petition, I am verifying the petition on his behalf. *See* Local Rule W. D. Wash. CR 100(e).
3. Based on my review of the state court record, I know all of the facts described in the petition and verify them to be true.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this 9th day of September, 2010,

/s/Suzanne Lee Elliott

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No.

IN THE WASHINTON STATE SUPREME COURT

CAL COBURN BROWN,

Plaintiff

v.

ELDON VAIL, ET. AL.

THIS IS A CAPITAL CASE

MOTION FOR DISCRETIONARY REVIEW

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JEFFREY ELLIS
WSBA 17139

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A. IDENTITY OF PETITIONER

Cal Coburn Brown asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION

Brown asks this Court to review the decision of the King County Superior Court. This decision was issued on September 7, 2010. It is attached as Exhibit A to this motion. In *State v. Harris*, 114 Wash.2d 419,441, 789 P.2d 60 (1990), this Court stated that an inmate sentenced to die and the State both have an interest in guarding against erroneous determinations of the issue of petitioner's insanity. "Therefore, there should be a discretionary review mechanism whereby the Superior Court's conclusion may be reviewed for error, and it is appropriate that this court review such cases directly. RAP 4.2(a)(6); see, e.g., *State v. Campbell*, 112 Wash.2d 186, 770 P.2d 620 (1989)." Further, "[t]his court should expedite appellate review of *Ford/Harris* claims due to the urgency created by the pending execution date. RAP 18.8(a) allows the court to shorten the time within which the parties may file their briefs and present oral argument."

C. ISSUES PRESENTED FOR REVIEW

1. Under the procedures set forth by this Court in *State v. Harris*, 114 Wash.2d 419,441, 789 P.2d 60 (1990), and under the Eighth Amendment, where Brown has presented the *unrebutted* opinion of a licensed psychiatrist

that "there is a reasonable likelihood that if not medicated by state actors, Mr. Brown would again suffer from symptoms of mood disruption of psychotic proportions which may impair his capacity to rationally understand the reason for his execution," may the trial court disregard that unrebutted opinion and substitute her judgment for that of a medical professional, deny further factual discovery and permit the state to proceed with an execution?

D. STATEMENT OF THE CASE

The facts of Mr. Brown's crime have been established for many years and are undisputed.

On May 24, 1991, after two days of torture and rape, Mr. Brown murdered Holly Washa by stuffing her into a car trunk and slitting her throat. The Washington State Supreme Court described the condition in which authorities discovered her dead body—a condition that is horrifying but also vivid evidence of Mr. Brown's mental illness:

> In addition to the lethal injuries, [authorities] described other trauma to Ms. Washa's body. Her pubic hair had been shaved. Her face was severely bruised. Both the inside and outside of her vaginal area were bruised. There was also bruising around her anus. The vaginal and anal injuries indicated forcible penetration with a hard object . . . . Her nipples showed abrasions and a linear pattern of bruising consistent with being whipped by a belt or cord. Similar bruising was found on her inner thigh, which also indicated whipping. Her feet and ankles were covered with bruises consistent with having been restrained. Her chest and abdomen had multiple stab and slicing wounds. An irregular blemish-like area of red drying on her inner thigh indicated burning.

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sentenced him to death a few weeks later. The death sentence was based on a finding that there were no mitigating circumstances warranting leniency—a finding based on prosecutor's testimony and argument debunking Mr. Brown's lack of mental illness or need for medication to control it, testimony that has proved to be untrue as the State of Washington has been medicating Mr. Brown for mental illness since the week after his trial.

The procedural history since that time is long and complicated, as is true of virtually every capital case.

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At the directive of the Washington State Department of Corrections, Mr. Brown has been prescribed psychotropic medication over the last sixteen years.

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1. THIS REQUEST FOR REVIEW IS TIMELY AND NOT SUCCESSIVE.

In *In Re the Personal Restraint of Benn*, 134 Wash.2d 868, 924-925, 952 P.2d 116, (1998) this Court held that no constitutional violation can be shown unless the prisoner is currently insane; while he is sane, the issue is premature. This is simply not the kind of issue that can be waived by failure to raise it in the first petition for post-conviction relief. The claim would also be exempt from the statute of limitation under RCW 10.73.100(1). See also *Panetti v. Quarterman*, 551 U.S. 930 (2007).

In many other jurisdictions, when a defendant's appeals are exhausted, the State is required to bring a motion to set an execution date. See e.g. *United States v. Thompson*, 380 F. 3rd 423, 428-29 (6th Cir. 2009)(discussing Tennessee's procedure). At that time, the defendant can oppose the motion by challenging his competency in a more orderly and rationale way. But in Washington, the State takes the position that once any stay is lifted the date of execution is automatically reset pursuant to RCW 10.95.160(2). The State

also takes the position that defendant can do nothing to alter the time schedule once set.

The combined effect of the State's position on the statute and the decisions in *Benn* and *Harris* make it inevitable that competency issues will be raised very late in the proceedings. And, it is regrettable that, in some cases, this will result in disruption of preparations for the execution and more pain and inconvenience to the witnesses to the execution. But the constitutional mandate is clear – no incompetent person may be executed.

In bringing this motion, Brown followed the procedures set forth by this Court in *State v. Harris*, supra.

2. BROWN PRESENTED COMPETENT EVIDENCE SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING

In *Harris*, this Court held that "[a]n evidentiary hearing will be ordered if the pleadings raise a prima facie issue of constitutional error which cannot be resolved on the existing record." Citing RAP 16.11(b) and *In re Williams*, 111 Wash.2d 353, 365, 759 P.2d 436 (1988). Brown made a prima facie showing that but for his medications, he may be incompetent for purposes of execution. He submitted the unrebutted declaration of Dr. Woods. The State did not challenge Dr. Woods' credentials or expertise. The State did not submit any countervailing opinion.

Judge Armstrong considered Dr. Woods' declaration. Although this Court considered Dr. Woods' declaration, this Court did not view that

declaration in the light most favorable to Mr. Brown. Further, the trial judge did not permit Mr. Brown with an opportunity to supplement that declaration.

In addition, the trial judge did not conduct an evidentiary hearing in support of the motion.

Instead, the trial court rejected Mr. Brown's claim, in large part, because it found that bipolar disorder does not result in psychosis. This Court did not indicate the source of its knowledge on this point. But the prevalence of psychotic symptoms for someone afflicted with bipolar disorder is extremely well established and discussed in the literature. The DSM defines a subset of bipolar disorder to include psychosis during a manic episode. Diagnostic Code 296.04 Bipolar I Disorder, Single Manic Episode, Severe With Psychotic Features.

The following medical literature discusses the prevalence of psychosis in bipolar disordered individuals:

- Tsuang MT, Taylor L, Faraone SV; An overview of the genetics of psychotic mood disorders; J. Psychiatric Res. (2004) (a conceptual review of the genetic underpinnings of psychotic mood disorders, which notes that both unipolar and bipolar forms of mood disorder sometimes feature psychotic symptoms);
- Keck PE Jr, et al; Psychosis in bipolar disorder: phenomenology and impact on morbidity and course of illness; Compr Psychiatry (2003) (noting that psychosis is common in bipolar individuals);

- Goes, F.S., et al; Mood-incongruent psychotic features in bipolar disorder; Am J Psychiatry (2007) (Mood-incongruent psychotic features in bipolar disorder may signify a more severe form of the illness and might represent phenotypic manifestations of susceptibility genes shared with schizophrenia. This study attempts to characterize clinical correlates, familial aggregation, and genetic linkage in subjects with these features);
- Ketter TA, Wang PW, Becker OV, Nowakowska C, Yang Y, Psychotic bipolar disorders: dimensionally similar to or categorically different from schizophrenia?; J Psychiatr Res (2004) (discussing the similarities and differences between psychosis found in bipolar disorder and schizophrenia).

In addition, other courts have recognized Dr. Woods' expertise on the issue of "synthetic" competence. See *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009). The Thompson court specifically relied on Thompson's medical history, which demonstrated his "long history of bipolar disorder and psychic symptoms." Id. at 436.

Thompson further alleged that he was "involuntarily" taking antipsychotic medication, and that it was unconstitutional to execute him if he is rendered competent through the forced administration of medication (Thompson's "chemical competency claim"). The federal court reversed the state court and directed the lower federal court to conduct an evidentiary

hearing to determine Thompson's competency for execution. In doing so, the Sixth Circuit Court relied the Supreme Court's decision in Panetti which confirmed that when a petitioner has made the threshold showing under Ford he is therefore constitutionally entitled to an evidentiary hearing.

The trial court's approach—viewing the evidence in an unfavorable light to Mr. Brown and drawing inferences adverse to his position is the exact opposite of how this Court should have viewed the evidence. In determining whether evidence exists to support a prima facie claim (whether in a civil or criminal case), the trial court views the evidence, and the reasonable inferences therefrom, in the light most favorable to the moving party. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wash.App. 829, 835, 14 P.3d 837 (2000). "[T]he trial court need only determine whether the defendant is able to demonstrate any set of circumstances that would, if believed, entitle the defendant to relief." *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wash.App. 191, 203, 165 P.3d 1271 (2007). This Court did not follow that directive.

Moreover the trial court's recitation of the historical facts regarding Mr. Brown's mental health, Findings of Fact 11-24 is irrelevant. The question is whether Brown would presently be incompetent absent his medication.

The trial court faulted Dr. Woods for failing to give "any basis" for his opinion that, if not medicated, Woods would become delusional. The trial judge appeared to believe that there must be some evidence that Brown has

previously suffered from delusions in order to reach his diagnosis. Dr. Woods opinion was stated in terms of a "reasonable medical certainty." Thus, it cannot simply be dismissed by deeming it speculative. But the State did not present any countervailing expert opinion, medical literature or studies to demonstrate that such a history was required to support Dr. Woods' opinion. And, Brown asked for the opportunity to call Dr. Woods so that he could provide a more detailed basis for his opinions but the trial judge denied that request.

Regardless of whether Brown's incompetency petition should be granted, he has made a prima facie case and presented a genuine issue of fact regarding his competency absent medication.

3. THE FOURTH, EIGHTH AND FOURTEENTH AMENDMENTS AND CONST. ART. 1, §14 FORBID THE EXECUTION OF BROWN IF WITHOUT THAT MEDICATION HE WOULD NOT BE COMPETENT TO BE EXECUTED.

In *Ford v. Wainwright*, 477 U.S. 399, 106 Sup. Ct. 2595, 91 L.ed. 2nd 335 (1986), the Supreme Court held that the execution of an insane person violated the Eighth Amendment prohibition against cruel and unusual punishment. The controlling opinion in *Ford*, that of Justice Powell, held that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it. A majority agreed with this proposition:

> Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to

> protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

477 U.S. at 409-410, 106 S.Ct. 2602

The Eighth Amendment protects against "cruel and unusual punishments." Brown submits that forcible medication into competency violates these provisions, for, as the Louisiana Supreme Court stated in the leading case of *State v. Perry*, 610 So. 2d 746 (La. 1992) in construing analogous provisions of its state constitution:

> The specific issue we address here is whether death, combined with forcible administration of antipsychotic drugs, is punishment that subjects an insane capital offender to cruel, excessive or unusual punishment, that consequently, by virtue of Art. I, § 20 of the 1974 Louisiana Constitution, is beyond the power of the stare to inflict. We conclude that the death penalty as applied to an insane offender under these circumstances is unconstitutional. The punishment is cruel because it imposes significantly more indignity, pain and suffering than ordinarily is necessary for the mere extinguishment of life, excessive because it imposes as severe penalty without furthering any of the valid social goals if punishment, and unusual because it subjects to the death penalty a class of offenders that has been exempt therefrom for centuries and adds novel burdens to the punishment of the insane which will not be suffered by sane capital offenders.

610 S.W.2d at 761

This Court should adopt the humane treatment jurisprudence espoused by the Louisiana Supreme Court in *Perry* and should thus forbid the execution of any person who is being involuntarily medicated into competency.

5. THE STATE'S PROCEDURAL ARGUMENTS ARE MERITLESS.

Despite the decisions in *Benn* and *Harris*, the State suggested in the trial court that Brown's motion was untimely. This Court cannot execute an incompetent person simply because it may somehow "derail" a scheduled execution. In fact, in *Benn* this Court made it clear that the proper time to bring this sort of claim is "premature" at any time before an execution is pending. The fact that Brown was competent (or incompetent) at any other time is simply immaterial.

4. THE STATE'S COUNTERVAILING DECLARATIONS ARE NOT "OBJECTIVE" AND UTTERLY FAIL TO IMPEACH DR. WOOD'S DECLARATION.

The State attached the declarations of Steven Sinclair, Chris Bowman and Frank Leonetti. None of these gentlemen have any medical or psychological expertise or credentials. They are willing participants in Brown's execution and are hardly "objective." The fact that these men do not find Mr. Brown incompetent or even mentally ill (despite that fact that they have been medicating him for 16 years) is not compelling. The fact that they find nothing strange or concerning about the fact that Mr. Brown is "giddy" or "cocky" or "happy-go-lucky" in the face of an imminent execution clearly demonstrates their failure to appreciate Mr. Brown's obvious mental health issues.

Various persons who indicate that they are "psychology" associates at the prison sign the remaining "medical records". There is no evidence that these people have any medical training and the term "psychology associate"

appears to be a prison term, not any recognized professional medical designation. It is reasonably likely that they are NOT medical personnel since most licensed medical professionals are prohibited by their ethical associations from taking any part in an execution.

F. CONCLUSION

For the reasons stated above, this Court should grant review.

Respectfully submitted,

Jeffrey E. Ellis
WSBA 17139
Suzanne Lee Elliott
WSBA No. 12634
Suite 1300 Hoge Building
705 Second Ave.
Seattle, WA 98104

CERTIFICATE OF SERVICE BY MAIL

I declare under penalty of perjury that on September 8th, 2010 I served this document on:

Mr. Jim Whisman
King County Prosecuting Attorneys Office
516 Third Ave. Suite 554
Seattle WA 98104-2362

Suzanne Lee Elliott

Exhibit A

FILED
KING COUNTY, WASHINGTON
SEP 08 2010
SEA
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs CAL COBURN BROWN, Defendant	No 91-1-03233-1 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S COMPETENCY TO BE EXECUTED

THIS MATTER came before the court on September 7, 2010 on defendant's Emergency Motion to Preclude Defendant's Execution on Grounds of Incompetency and Motion for Stay of Execution Pending Evidentiary Hearing The State was represented by James Whisman, Senior Deputy Prosecuting Attorney and the defendant was represented by Suzanne Elliot and Jeffrey E Ellis The Court has reviewed the Emergency Motion, the Response and Reply, Defendant's Additional Objection and Motion to Reconsider and the State's Response, as well as the

ORIGINAL

appellate court decisions in this case, and portions of the trial court record The court has heard oral argument Being fully advised in the premises, now therefore, the Court finds as follows

FINDINGS OF FACT

Procedural History

1 Cal Colburn Brown murdered Holly Washa on May 24, 1991 Brown was charged with and found guilty in King County Superior Court of Premeditated Murder in the First Degree with Aggravating Circumstances

2 Trial proceedings on the charge of Premeditated Murder in the First Degree with Aggravating Circumstances extended over a number of years At no time during the trial court proceedings did Cal Colburn Brown allege that he was insane at the time of the murder or that he was incompetent to stand trial He never raised the issue of competency before or during trial

3 Cal Colburn Brown did allege during the penalty phase of his trial that he had an untreated mental illness (bi-poloar disorder) that contributed to Ms Washa's death and that this untreated mental illness was a mitigating circumstance that merited leniency He further claimed that lithium was required to treat this condition Brown did not, however, claim that the lack of lithium rendered him insane or delusional at the time of the murder

4 The jury found that there were not sufficient mitigating circumstances to merit leniency Brown, therefore, was sentenced to death on January 28, 1994

5 Shortly after sentence was imposed, Brown was placed in the custody of the Washington State Department of Corrections Since his incarceration at the Washington State Penitentiary, Brown has on multiple occasions been diagnosed with bipolar disorder and

has continuously received psychotropic medications for this mood disorder, as described more fully below

6 Brown filed an appeal from his conviction and his sentence Brown also mounted collateral attacks, in both federal and state courts, upon the conviction and sentence In these challenges, Brown claimed that his attorneys did not adequately present information regarding his untreated mental health disorder to the jury, that the jury did not give adequate weight to his untreated mental health disorder, that his death sentence was disproportionate due to his untreated mental health disorder, and that the Eighth Amendment prohibits the execution of someone who suffered from a mental health disorder at the time of the murder In none of these challenges did Brown claim that he was insane or delusional at the time of the crime In none of these challenges did Brown claim that he was incompetent at the time of trial, throughout appeal and post-mandate proceedings, or presently, to assist his counsel

7 Brown's federal habeas corpus matter concluded on January 28, 2009, when the federal court mandate issued and the federal court's stay of execution was dissolved An execution date of March 13, 2009, was set by operation of RCW 10 95 160

8 On March 12, 2009, when Brown was 11 hours from execution, Brown telephonically addressed the Clemency and Pardons Board Brown's statement demonstrates his awareness that the imminent execution was intended to punish him for killing Holly Washa He expressed remorse for the crime and suggested that God knows he wishes he could bring his victim back

9 On March 12, 2009, the Washington Supreme Court granted a stay of execution to allow Brown to litigate his claim that Washington Department of Corrections' lethal injection

protocol violated the Eighth Amendment This stay was lifted on July 29, 2010 By statute, a new execution date was set for September 10, 2010, 30 judicial days later Brown and his counsel were notified of this new date on July 29, 2010

10 On September 3, 2010, 26 days after the stay of execution was dissolved, Brown filed an emergency motion for a stay of execution and for a hearing to determine his competency to be executed

Brown's Mental Health History

11 Brown was born in 1958 As an infant and child he was reported to be very agitated and "out of bounds" While in primary grades he was referred to mental health counseling Teachers noted Brown's aggression at age 8 As he moved through the school system, Brown's behavioral patterns of anger, irritability, excitability, and mood disregulation continued At age 18 Brown stalked and assaulted two women and pled guilty to assault with a deadly weapon in 1979

12 In 1983 he attacked a woman and was convicted of assault in the second degree and attempted assault in the first degree He was sentenced to 7 ½ years in the Oregon State Prison for this crime in 1984 He complied with prison rules and received only one infraction during his incarceration In 1985, prison mental health professionals diagnosed Brown as suffering from a mood disorder and prescribed lithium Brown filed suit against the prison to receive the lithium, and he was medicated during the last six months of his incarceration He was released on March 25, 1991 with a 30-day supply of lithium He apparently discontinued his lithium, and was reported by family members shortly thereafter to have "wild" and pressured speech, and to be "way out "

13 On May 23, 1991 defendant abducted Holly Washa from her car and ultimately tortured, raped and murdered her

14 On May 26, 1991 defendant flew to California and committed a similar crime against Susan Schnell, but she fortunately survived Brown was apprehended and gave three interviews to police on May 27, 1991 at 11 20 a m , May 27, 1991 at 7 55 p m and on May 28, 1991 at noon Those interviews were recorded The transcripts indicate that Brown was rational, focused and detailed in his descriptions of his crimes, that his speech was organized and coherent, and that he manifested a sophisticated perception of his legal peril

15 During Brown's federal habeus corpus hearing, defense psychiatrist Dr Maryonda Scher opined that at the time of the murder Brown was not suffering from delusions or hallucinations and wasn't psychotic She further testified that Brown intended to do the actions he committed, knew what he was doing, and appreciated right from wrong

16 On remand to the Department of Corrections after sentencing in this case, Brown's mental health status was evaluated by mental health staff at the Washington State Penitentiary On February 3, 1994 psychiatrist Dr Tim McBath conducted an interview and evaluation of Brown Dr McBath considered Brown's self-reported mental health history, including his prior use of lithium, observed Brown's behavior, which included pressure and rapid speech and inappropriate affect Based on this information Dr McBath provided an assessment of "Axis I (1) Probably Bipolar Disorder with history of at least hypomanic and possible manic episodes Currently exhibiting hypomanic symptoms " Other diagnoses included Sexual Sadism, Antisocial Personality Disorder,

distant Polysubstance Abuse (alcohol and marijuana), and Hyperactivity Disorder as a child per patient history Dr McBath prescribed a therapeutic trial of lithium

17 The same year psychiatrist Dr Carl Baum conducted a second mental health evaluation and observed that Brown appeared hypomanic on lithium He wrote "Rule out Atypical Bi-Polar Affective Disorder"

18 On May 4, 1995 Clinical Psychologist Dr Page at the Washington State Penitentiary evaluated Brown a third time for placement in a special prison housing unit Dr Page diagnosed Brown with "AXIS I – Sexual Sadism, Axis II—Antisocial Personality Disorder" He characterized the defendant as a "nonpsychotic individual" During his interview/evaluation, Brown denied hallucinations and delusions, but described "a history of hypomania and rapid mood cycling, especially when off of psychotropics" Brown reported that on his current regimen of Lithium and Sinequan he "apparently maintains fair emotional stability and sleeps satisfactorily" Dr Page found that during Brown's incarceration he "has been accountable, tractable, and relatively low-key"

19 On September 11, 1996 Dr Page again evaluated the defendant Dr Page opined that "Mr Brown's prior diagnostic categorizations as enumerated in the medical folder probably may stand without correction He certainly seems to exhibit Bipolar features and continued hypomania even on his current dosage of psychotropics" He notes that Brown has responded favorably to the structure and routine of imprisonment, and apparently was not an unreasonable threat to the orderly operation of the Oregon prison when he was incarcerated there

20 On July 16, 2009, psychiatrist Dr Grubb of the Penitentiary diagnosed Brown's bipolar disorder as "more or less stable" and prescribed continuing the psychotropic medication Depakote

21 Psychological Associates for the Department of Corrections periodically conducted routine mental status examinations of Brown during 2009 and 2010 These records uniformly indicate the defendant is oriented to time, place, person, and situation, and demonstrates normal content of thought, well organized thought, and normal perception, affect and mood

22 Since 1994 Brown has been prescribed and taken either lithium or Divalproex for his bipolar disorder These medications are known as psychotropics (having an altering effect on the mind) but are not anti-psychotics Brown takes these medications without objection, although since he is incarcerated it cannot be known if his acquiescence is "voluntary " His lawsuit against the Oregon prison system to compel administration of lithium suggests that his medication compliance is voluntary Since 1994 Brown has exhibited manic symptoms of pressured speech, difficulty sleeping, and occasional grandiosity, despite taking lithium and Divalproex Brown has denied delusions and hallucinations By history his periods of depression are short and somewhat mild Defense counsel, who have regular contact with Brown, do not argue that he is currently incompetent to be executed

23 Bipolar disorder is a mental disease that can range from mild to severe In some instances the disorder includes psychotic symptoms, such as delusions and (typically auditory) hallucinations An individual suffering from the disorder with psychosis may be incompetent if the psychosis is so severe that it impacts his or her ability to understand

the charges, the nature of the proceedings or to assist counsel An individual suffering merely from the mood disorder, alone, is not incompetent

24 There is no evidence that Brown, during his long experience with bipolar disorder since at least his young adult years, whether on or off medication, has suffered from hallucinations, delusions, any form of psychosis or other dissociation from reality that would render him incompetent That is, his mood disorder does not and never has prevented him from appreciating his legal peril, understanding the relationship between his crime and his penalty, or assisting his attorneys in his defense To the contrary, Brown is a highly intelligent individual (in federal court testimony his I Q was indicated to be 144, within the top of percentile of intelligence scores) whose understanding of his situation is clear and has never been clouded by psychosis

Defendant's Presentation

25 Defendant relies primarily on the two declarations of psychiatrist George W Woods, Jr M D , both of which were signed on September 3, 2010 Dr Woods is board certified in psychiatry and neurology and maintains a private practice focusing on neuropsychiatry, psychopharmacology, workplace safety, and forensic consultation Dr Woods reviewed defendant's records and interviewed Brown by phone on September 3, 2010

26 Dr Woods advances the following opinions to a reasonable degree of medical certainty

a Mr Brown suffers from bi-polar disorder In many instances he has experienced mania On several occasions, he has experienced psychosis

b If not medicated, there is a reasonable likelihood Brown would suffer from symptoms of mood disruption, including both mania and/or depression Mr Scott [sic] has experienced both depression and mania of psychotic proportions

c These disruptions of Mr Brown's mood may impair his capacity to rationally understand the reasons for his execution due to his severe mental illness (emphasis supplied)

27 Dr Woods does not provide bases for these opinions He does not describe any instance in which Brown, even off medication, has experienced either depression or mania of psychotic proportions, nor can he cite to any documentation or evaluation by another health care professional of psychosis He does not cite literature or any other basis for the assertion that an individual with a bipolar disorder who has not previously suffered psychosis will now manifest psychosis if he discontinues his medication Absent psychosis or other thought disorder, Brown's mood disorder does not impair his perception of reality and does not affect his competency

28 Dr Woods' opinion that Brown's unmedicated bipolar disorder may impair his capacity to understand the reasons for his execution is speculative During the many years Brown suffered from his bipolar disorder and was not medicated, there is no evidence he experienced delusions or hallucinations, lost his rational thought processes, or lost touch with reality His mania may have intensified, his speech may have become more rapid and pressured, his sleep may have become more disturbed, and his irritability may have increased, but there is no evidence Brown suffered a thought disorder, delusions or hallucinations, or was ever insane

29 Dr Woods' opinions, without supporting bases, do not present substantial evidence or a prima facie claim that, without medication for his mood disorder, Brown would experience psychosis or other thought disorder that would impair his competency or his understanding of his crime and the reasons for his execution

Based on the foregoing Findings of Fact, the court enters its

CONCLUSIONS OF LAW

1 Brown's mental state is not distorted by a mental illness such that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole

2 Although competency to execute may be obtained through the voluntary or forced administration of medically necessary drugs, there is no evidence that Brown has been forced to take medications More importantly, there is also no evidence that the medication that Brown is currently taking is necessary for him to be rendered competent Even if he were to discontinue his psychotropic medications, there is no evidence that Brown would become insane, delusional, unaware of his crime or impending punishment, or unaware of the reasons for his punishment

3 Brown is competent to be executed because he is capable of properly appreciating his peril and of rationally assisting in his own defense

4 Brown has failed to make a substantial showing of incompetency Cal Colburn Brown has produced no evidence of current incompetency or probable incompetency if his medications were discontinued

Based upon the proceeding findings of fact and conclusions of law, the Court enters the following

ORDER

1 Cal Coburn Brown's motion for a stay of execution and for an evidentiary hearing into his competency is denied

1 2 Cal Coburn Brown's motion for reconsideration is denied

2 DONE IN OPEN COURT this 8th day of September, 2010

3 Sharon S Armstrong

JUDGE SHARON S ARMSTRONG

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Exhibit B

MAR 0 1 '31

PSYCHIATRIC EVALUATION

NAME: BROWN, Gal
NO: 998921
DATE: February 3, 1994

Washington State Penitentiary
Tim L. McBath, M.D.
Psychiatrist

IDENTIFICATION: 35-year-old single Caucasian male.

SOURCE OF INFORMATION: Central File, current MHU chart, patient interview and examination.

BACKGROUND INFORMATION: Patient has been sentenced to Death for a conviction of Aggravated Murder in the First Degree. This relates to the abduction of a young lady from a Seattle Airport Hotel parking lot and the ensuing torture, rape, and eventual murder of the same.

HISTORY: Inmate relates he's been diagnosed as "Manic Depressive". He states he's also been considered a bipolar manic in the past. He says he's been given diagnoses as having an Antisocial Personality Disorder and in childhood Attention Deficit Hyperactivity Disorder and Conduct Disorder.

Currently, he complains of feeling "manic". By this he is meaning to describe a condition characterized by "elevated mood", feeling "inappropriately" happy, talking a lot, laughing and smiling frequently, feeling energetic, excessively so, and having great difficulty sleeping. His mind feels very active and he's reading voraciously up to 500 or 600 pages a day if material is available. He feels irritable and particularly bothered by any sort of noise, conversation, or music--especially when he's trying to go to sleep.

He's felt "manic" now a couple of weeks and believes it might be related somewhat to his having been moved from King County Jail and having gotten the trial over with. He also feels confident that his sentence will be overturned upon appeal.

Additionally, he describes feeling anxious because of the sentence and uncertainty of his placement. He is especially concerned that he'll eventually reside somewhere where it's not too noisy and he won't be bothered by other inmates.

He denies any profoundly elevated or expansive opinions about himself, no ideas of special power or perception. He denies any history of such. His conversation is not significant for any themes at this time.

He has felt depressed in the past but his depressive episodes last three days at the most and are "mild." His worst episode of depression lasted maybe a few days or weeks and occurred directly

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NO: 998921
DATE: February 3, 1994
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after his most recent arrest about three years ago. During this time he was thinking about the need to kill himself and considering various methods. He had a piece of a plastic spoon which he was considering using. However, he never acted on this and eventually gave it up as "silly." He denies any history of suicide attempt. When he's depressed, he feels down, distressed, dysphoric, but doesn't describe any associated neuro-vegative signs, such as sleep, appetite, or disturbance of energy level lasting more than a day or so.

He denies any mood associated feelings or ideas of paranoia, persecution, or impending doom.

PSYCHIATRIC HISTORY: He describes frequent mental health and psychiatric evaluation and treatment periodically throughout his childhood, beginning as early as age seven or eight. He explains it's related mainly to disruptive behavior at school. He was violent at times and tended to be oppositional and uncooperative. He denies ever receiving any psychopharmacologic treatment throughout his childhood. He denies any particular benefit from the periodic counseling and therapy he would receive.

He was evaluated psychiatrically as a part of the violent offenders' evaluation in the Oregon penal system about six or seven years ago. He was treated with Lithium three or four years ago towards the end of his stay in the Oregon system. For a period of about six months, he was taking 1200 mg a day. He feels that this was at least mildly helpful in stabilizing some of his moods. However, Lithium didn't seem to help sleep too much and if anything it seemed to exacerbate his insomnia. He stopped taking it upon his release and was arrested for the instant offense within a couple of months. He believes he was manic at the time but denies any grandiose thoughts of a delusional nature.

He was treated with Sinequan, up to 250 mg at night for a period of about four months, ending four months ago, by Dr. Hefter at Shelton. This was for insomnia. It did help somewhat. He had mild complaint of dry mouth and constipation.

SUBSTANCE ABUSE HISTORY: During his adolescent and early adult years, he used alcohol heavily. He also used Marijuana heavily but denies much involvement with any other types of drugs and eventually cut back and discontinued use of alcohol and Marijuana. He did describe himself, if not incarcerated, as a "light social drinker." He has no history of a previous substance abuse treatment.

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SOCIAL HISTORY: He was born in San Jose, California. His natural father left when he was two. He's had intermittent contact with him since that time. He was raised by his natural mother, who remarried five or six times. Some of his step-fathers were physically abusive. He has large segments of time in his childhood for which he has no memories. He has no specific memory of being sexually abused. He has two siblings, both younger, a brother and a sister.

He had frequent difficulties in school and received mental health attention throughout childhood. He denies any juvenile convictions or offenses. He dropped out of school after his junior year in high school. His grades in high school were poor. He did get a GED, claiming to have completed it above the ninetieth percentile. He had several years of college while incarcerated in Oregon in general studies.

He claims he was doted upon and spoiled by his mother's adoptive mother throughout childhood.

Previous offense record includes several convictions of Assault for which he has spent a year and then seven years in prison. He's also had previous convictions for writing bad checks.

MEDICAL HISTORY:

1. History of Otitis Media as a child with corrective surgery.
2. He denies any other serious illness, accident, or injury or operation. No history of head injury.

MEDICATIONS: PRN Aspirin for headaches which he tends to experience in severe levels associated with environmental noise.

MEDICAL ALLERGIES: None.

MENTAL STATUS EXAM: Patient was seen at cell front. He was cooperative and accessible. He presented with an elevated energy level, being animated and demonstrative in speech. He bore a broad smile and grinned throughout most of the interview. He laughed quite frequently and easily. Speech was quite rapid and moderately pressured. He was difficult to interrupt and redirect at times. He tended to provide a wealth of information with minimal prompting. Hygiene was fair.

Thoughts were logical, coherent, and sequential. No tangentiality. No loose associations. No elements of formal thought disorder. He denied auditory or visual hallucinations and does not appear to

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attend to such. His speech was not significant for any bizarre, peculiar, or unusual ideas. No grandiose ideas or delusions. No persecutory paranoid ideas. His manner was ingratiating and overly familiar.

He denied any suicidal ideas, plans, or intent. He denied any violent or homicidal ideas. He did admit to a history of homicide which related to a manic episode. He expressed a modest degree of regret and remorse.

Intellect was grossly intact, including short and long-term memory. Sensorium was clear. He was alert and oriented. He focused and shifted fairly well for the purposes of our interview. Insight was fair to good with regard to psychiatric symptoms. Judgement fair with regard to limits of incarceration.

ASSESSMENT:

Axis I:
1) Probable Bipolar Disorder with history of at least hypomanic and possibly manic episodes. Currently exhibiting hypomanic symptoms.
2) History of Polysubstance Abuse, alcohol and Marijuana, distant.
3) History of a diagnosis of Attention Deficit Hyperactivity Disorder as a child per patient history.
4) History of diagnosis as Sexual Sadism per patient history.

Axis II: 1) Antisocial Personality Disorder
Axis III: No diagnosis
Axis IV: Severity of Psychosocial Stressors: Severe, 4
Axis V: Global Assessment of Functioning: 35 - 40
Estimated Highest in Last Year: 35 - 40

DISCUSSION: I don't feel he is a high risk for suicide or self-harm nor violent acting out at this point in time. He seems to believe he has a good chance on appeal and is well-acquainted with the rigors of incarceration. He is, however, irritable and stressed with environmental stimuli, particularly noise from other inmates. He may represent at least a moderate risk for acting out.

PLAN:

1. Lithium 300 mg po tid. We briefly discussed side effects and irrationale with a therapeutic trial.
2. CBC Chem Profile TSH now Lithium level in one week.
3. Doxepin 50 mg po qhs.

S-00010879

Exhibit C

MENTAL HEALTH EVALUATION

NAME: BROWN, Cal C.
NO: 888921
DATE: May 4, 1995

Washington State Penitentiary
Ronald D. Page, Ph.D.
Clinical Psychologist

INTERVIEW IMPRESSION: Mr. Cal Brown, a 37-year-old Caucasian, was evaluated today approximately one year subsequent to his conviction for Aggravated First Degree Murder. Mr. Brown was referred for consideration of his suitability for placement in the Special Housing Unit.

This man was evaluated in TMU and correspondingly dressed in prison-issue overall and cuffed. He stands 5' 9" and weighs a moderately obese 230 pounds. He also maintains a long scraggly beard and lengthy coiffeur. Mr. Brown maintained sound eye contact and related in a hypomanic, affectively positive, and verbose way. He unleashed a fusillade of descriptors and spontaneous remarks in response to most questions but generally was manageable within the interview context. He seemed friendly, frank, open, and freely admitted culpability. Mr. Brown denied hallucinations and no idea of reference or delusion was elicited. He freely described a history of hypomania and rapid mood cycling, especially when off of psychotropics. On his current regimen of Lithium and Sinequan he apparently maintains fair emotional stability and sleeps satisfactorily. He denies depression, nervousness, and other subjective distress. Basically, Mr. Brown's stance with me was fatuously friendly and rather disarming as contrasted with his history of egregious offenses.

BACKGROUND INFORMATION: Mr. Brown was born and raised in San Jose, eldest of three siblings. His parents were divorced when he was two years of age, and he primarily was raised by his mother thereafter. In keeping with his many years of criminal entanglement, Mr. Brown lost contact with family members many years ago. In his words, "I pretty well burned my bridges."

This man's developmental years were characterized by what he now labels as Attention Deficit Disorder, and he correspondingly received counseling for extended periods as a child and adolescent. He discontinued schooling after the eleventh grade in 1978 and entered the military. His enlistment lasted only about four months, and he was granted an honorable discharge because of pre-existing hearing impediment. He had not been in trouble with juvenile legal authorities but initiated a criminal career of fairly consistent larcenous activity soon after his military discharge. He was employed on an intermittent basis between jail terms as a cook. Mr. Brown primarily spent his time in jails but also was held briefly in Chino, California in around 1979 or early

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NO: 998921
DATE: May 4, 1995
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1980. In 1983 he was convicted of Attempted Assault and Second Degree Assault and spent eight years in the Oregon State prison system until his release in 1991. While imprisoned, he earned his GED as well as an AA. He had been in the community for less than two months when apprehended on the offenses which brought this incarceration. Indeed, as described within the file, the Aggravated First Degree Murder which he committed in Washington state included a sustained period of domination, torture, and sadism involving his female victim. The assault in California a few days later appears to have followed a similar pattern but ended prematurely when the woman escaped.

Mr. Brown has never married. He admits some heavy alcohol usage in his early adulthood but essentially denies difficulty with chemical dependency throughout most of his adulthood. Psychiatric care since adolescence primarily has involved psychotherapy and psychotropics since 1991. He has been maintained on his current psychotropic regimen for the past year or so.

Mr. Brown's adaptation to prison has been satisfactory in most respects. He committed one infraction in May of 1994, involving the stockpiling of his Sinequan prescription. Otherwise, he has been accountable, tractable, and relatively low-key. He now functions as a tier porter, a position which he acquired in November of 1994.

DIAGNOSTIC IMPRESSION: Mr. Brown may be categorized as follows:

Axis I - Sexual Sadism
Axis II - Antisocial Personality Disorder
Axis III - No significant current health concern
Axis IV - No significant stressor other than confinement
Axis V - GAF: 85

Mr. Brown is a nonpsychotic individual with a lengthy criminal history. He appears to have lacked frustration tolerance, impulse control, and motivation to delay gratification. His offenses reflect what he considers to have been a lifelong propensity for domination and control of women. It seems rather conservative to suggest that he may exhibit a rather prominent/profound anger problem relating to women, leading to the acts of sexual sadism as described in the central file. Certainly, his deliberate cruelty to the victims went far beyond necessity for larcenous gain or sexual satisfaction.

RECOMMENDATION: Despite this man's undeniably extreme danger at large from the standpoint of larcenous acting

NAME: BROWN, Cal C.
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out and/or sexually assaultive potential, he may not represent an unreasonable risk for placement in the Special Housing Unit. He seems to have programmed fairly well at TMU and does not conspicuously embody dynamics which would disrupt adaptation to the Special Housing Unit. While I do not have reference material from his lengthy stay in the Oregon State system, I surmise that he did not present a significant problem beyond the usual acting out associated with emotional immaturity and egocentrism. Continued mental health follow-up and maintenance with psychotropics would seem to be warranted.

Ronald D. Page, Ph.D.
Clinical Psychologist

RDP:bt

cc: Central Records
Classification Counselor Sutton - TMU
Health Records

S-00010672

PSYCHOLOGICAL REVIEW

BROWN, Cal - 998921
Date of Birth: 4/16/58
Age: 38

Evaluator: Ronald D. Page, Ph.D.
Clinical Psychologist
Evaluation Date: September 11, 1996

REASON FOR REFERRAL:

Mr. Cal Brown, a 38-year-old Caucasian, was evaluated today at the request of his counselor. I previously evaluated Mr. Brown under similar circumstances in May of 1995. During the interim, Mr. Brown has completed anger/stress management and now is participating in related counseling with Mr. Assink. The current referral requested my impression of any change in Mr. Brown's perspective as a result of mental health intervention of the past year.

BEHAVIORAL OBSERVATIONS:

Mr. Brown was interviewed at IMU in a visitation booth. He appeared much as I described him in my last report, "dressed in prison-issue orange overalls and cleanly groomed. He continues to maintain a long scraggly beard and a neatly appointed coiffeur. As before, he related with clipped speech in a hypomanic way. He was rational, coherent, and appropriately responsive to all questions. Mr. Brown denied recent depression and anxiety but emphasized his ardent interest in transfer to the Special Housing Unit. He spoke appreciatively of his participation in anger/stress management and related enthusiastically his benefits from the sessions with Mr. Assink. He further was able to explain a rational emotive framework for mitigating his accustomed angry response to provocation. He cited anecdotal situations which convincingly portrayed his understanding of the material. Mr. Brown denied sleep disturbance, except for that related to the noise in IMU. He spoke with resignation and relative self confidence about his self-perceived ability to adjust to prison life, if he is spared the death penalty. He also fully acknowledged culpability for his offenses, stating, "It's all my fault." When asked if he had a sexual problem, he expounded philosophically on his presumed underlying motivations, explaining a "power control-anger" motivational underpinning for his sadistic murder of the victim in 1994.

BACKGROUND INFORMATION:

Little space in this report will reiterate material included in my evaluation of May 4, 1995. Most germane to the present examination is this man's criminal history, which has been extensive during recent years. He initially spent lengthy jail terms in Oregon for Assault with a Deadly Weapon, Forgery, and Theft. He later was imprisoned from 1983 through 1991 in Oregon for Second Degree Assault and Attempted First Degree Assault. Following his release from Oregon, he was confined in California for Armed Robbery, False

BROWN, Cal - 998921
September 11, 1996
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Imprisonment, Attempted Murder, Extortion, and other convictions. The crime of 1994 in this state for which he now is incarcerated was a particularly brutal, sustained, and sadistic sexual assault/murder. This man continues to labor under detainers to both Oregon and California.

In addition to his criminal involvement, Mr. Brown's overall lifestyle appears to have been one of underlying estrangement from meaningful interpersonal relationships. He has never married, has been nomadic, and has been avoidant of sustained problem solving in any given situation or location. He appears to have carried a marked underlying loathing and embitterment, presumably for himself and for others in general.

Since this man's confinement in IMU, he has performed satisfactorily within the limitations of that setting. His last infraction was in 1994. As mentioned above, he most recently has completed anger/stress management and continues to work with mental health personnel on his temper and self-perception. He now is medicated with Doxepin and Lithium, which further mitigates his tendency to hypomania and short-fused reactivity to provocation. The Doxepin assists him with sleep as well.

CONCLUSIONS:

Mr. Brown's prior diagnostic categorizations as enumerated in the medical folder probably may stand without correction. He certainly seems to exhibit Bipolar features and continued hypomania even on his current dosage of psychotropics. While he has been an assaultive and larcenous risk in the community for many years, he apparently responds favorably to the structure and routinization of imprisonment. To my knowledge, he was not an unreasonable threat to the orderly operation of the Oregon State Penitentiary during his lengthy stay there. His self-stated plan for the future is to survive in prison and to create some semblance of a "normal life" in the Special Housing Unit if possible. During the past year, he appears to have understood if not assimilated a rational emotive philosophy for reducing his previously established meager angry reaction to thwarting or provocation. As such, I cite no psychological contraindication to his favorable consideration for transfer from IMU to the Special Housing Unit, assuming continued freedom from infractions and overall cooperation with correctional staff. Obviously, considering his extensive record of assaultiveness in various contexts, he realistically should be considered to be a potentially high risk of violence/escape in any situation affording the ready expression of these potentials.

BROWN, Cal - 998921
September 11, 1996
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Ronald D. Page, Ph.D.
Clinical Psychologist

RDP:bt

cc: Central Records
Classification - Headquarters
Health Records

S-00010669

Exhibit D

PSYCHIATRIC NOTE

NAME:	BROWN, Cal	IMU-N
NO:	998921	Washington State Penitentiary
DATE:	July 16, 2009	David G. Grubb, M.D.
DOB:	04/16/1958	

Page 1 of 1

S: "I've got legal assignment, I'm fine."

O: Last recent appeal about lethal injection procedures. Eager to leave. See recent mental health please. Seems stable.

A: Bipolar disorder more or less stable.

P: Continue Depakote 1000 b.i.d. Return in three months.

DGrubb-MD

DGG:rke
D: 07/16/09
R: 07/17/09
T: 08/03/09

David G. Grubb, M.D.
Psychiatrist

Exhibit E

DECLARATION OF GEORGE W. WOODS, JR., M.D.

I, George W. Woods, M.D., declare as follows:

1. I was asked to review records and conduct an evaluation at the request of counsel representing Cal Coburn Brown to determine:

a. Whether Mr. Brown currently suffers from a mental disease or defect; and, if he does,

b. Is that mental disease being treated and/or managed with the use of medication;

c. Whether Mr. Brown suffered from that same mental disease at the time of his crime and trial; and, if so,

d. Whether, at the time of Mr. Brown's crime, the use of appropriate medications would have helped treat his mental illness.

2. In response, I offer the following opinions, which I hold to a reasonable degree of medical certainty:

a. Mr. Brown suffers from a serious mood disorder, namely bi-polar disorder;

b. Mr. Brown suffered from this mental disorder at the time of his crime;

c. In fact, Mr. Brown suffered from this mental disorder long before his crime;

d. Mr. Brown's clinical history reflects that he has responded well to medication, including lithium and depakote (valproic acid);

e. Significantly, for over 15 years the Washington Department of Corrections has been treating Mr. Brown with medication in order to control his mood disorder. The medical personnel at the Department of Corrections would not have instituted and continued this course of treatment for so many years if it was not medically appropriate and effective. As recently as July 16, 2010, Mr. Brown was diagnosed by a DOC physician, Dr. Grubb, as suffering from "bipolar disorder, more or less stable" and requiring medication.

f. Any claim that mood stabilizing drugs like lithium or depakote do not have or would not have a positive and stabilizing effect on Mr. Brown is unfounded and contrary to a voluminous amount of evidence;

g. To the contrary, from the time that Mr. Brown was first started on lithium (while in the Oregon prison system) until the present he has responded well to medications.

3. In sum, it is reasonably medically certain—indeed, from the available evidence it is certain—that Mr. Brown suffers now and suffered at the time of his crime from a serious mood disorder—one that has been successfully managed through the use of psychotropic medication.

QUALIFICATIONS

4. I am a licensed physician specializing in psychiatry and neuropsychiatry. I currently maintain a private practice focusing on neuropsychiatry, psychopharmacology, workplace safety, and forensic consultations.

5. I am a Fellow of the American Psychiatric Association, and a member of the California Psychiatric Association and the Northern California Psychiatric Association. I am also a member of the American Neuropsychiatric Association, the American Psychological Association, the American Society of Addiction Medicine and the Black Psychiatrists of America.

6. I am Secretary General of the International Academy of Law and Mental Health, where I am a member of the Scientific and Executive Committees. I also serve on the Advisory Board of the Center for African Peace and Conflict Resolution, California State University, Sacramento, California; and the Global Advisory Board for Humiliation and Dignity Studies, Trondheim University, Norway, and Columbia University, New York, New York.

7. I received my bachelor's degree from Westminster College in Salt Lake City, Utah, in 1969; and was awarded my medical degree from the University of Utah in 1977. I then completed a rotating medical internship at Alameda County Medical Center (Highland Hospital), in Oakland, California, which included internal medicine, surgery, orthopedic surgery, Emergency Medicine, and Obstetrics/Gynecology. In 1981, I completed my psychiatric residency at the Pacific Medical Center in San Francisco, California, where I served as Chief Resident my senior year. During my psychiatric residency, I pursued specialized neurological electives at Kaiser Permanente Hospital, Oakland, California. These electives consisted of extended, three month clerkships, in which I was assigned to the Neurology department, conducting neurological examinations and diagnosing neurological disorders, including movement disorders, headache disorders and central nervous dysfunctions, among others.

8. In 1982, I then participated in a National Institute of Mental Health/American Psychiatric Association Fellowship, during which I developed the first medical/psychiatric unit at Pacific Presbyterian Hospital. This unit administered to patients with either medical illnesses that had psychiatric manifestations or psychiatric patients with severe medical illness that could not be treated effectively on regular medical units. The focus of my Fellowship was Geriatric Psychopharmacology, the study of medication use with elderly populations. Geriatric Psychopharmacology, however, is an extremely valuable approach to the study of psychopharmacology in general. The medical/psychiatric/neurological/pharmacological training and experience I gained during this period proved relevant to other patient populations, particularly forensic populations, who experience a higher incidence and greater interaction of

drug, mental and neurocognitive problems than the general population. Following the completion of my Fellowship, I become the Director of Outpatient Geriatric Services for the San Francisco Family Services Agency. In that capacity, I conducted home visits with elderly patients who manifested psychiatric symptoms. Medical examinations and neurological intervention were frequently required.

9. From 1983 through 1990, I provided neuropsychiatric care at Crestwood Manor, Vallejo, California, a long-term psychiatric facility, dedicated to treating severely ill patients. Many of these patients came from state hospitals with atypical presentations and the diagnosis of mental retardation. Atypical presentation of psychiatric symptoms is common among forensic populations as well, particularly in areas that may lack community mental health services and or widespread availability of intensive treatment. Many of these patients Many of Crestwood's clients also had multiple, co-occurring disorders that required an understanding of pharmacology, neurology, and psychiatry, as noted by the American Neuropsychiatric Association.

10. From 1989 to 1994, I served as Clinical Director of the New Beginnings Chemical Dependency Program, an inpatient substance abuse detoxification and rehabilitation center housed at Doctors Hospital in Pinole, California. In 1994, I was appointed as Senior Consulting Addictionologist by Doctors Hospital, and oversaw complex withdrawals and detoxifications, and developed research protocols for the use of new medications for opiate withdrawals and sedation in the intensive care units. During my tenure, New Beginnings evolved into program that treated patients with what are called co-occurring disorders, meaning persons who have multiple psychiatric disorders – which is the norm, rather than unusual. Many persons with neuropsychiatric disorders attempt to self-medicate their symptoms.

11. The clinical facilities at Doctors Hospital afforded access to a Single Photon Emission Computerized Tomography (SPECT), which was utilized to determine brain function. My neuroimaging experience also includes the study of Magnetic Resonance Imagining (MRI) and Cathode Scans (CT), focusing on the different uses of structural imaging and functional imaging, like the SPECT and the Positive Emission Tomography (PET). From 1990 through 1995, I also served as the Coordinator and Psychiatric Consultant to the Insomnia Division of the Doctors Hospital Sleep Disorders Center. The assessment of sleep disorders, the evaluation of disorders in the architecture of sleep, is a seminal component of diagnosing medical illness and psychiatric disorders, and formulating appropriate pharmacological interventions. Sleep disruption is frequently the first overt symptom of an underlying medical, neurological, or psychiatric disorder. Disruption of sleep can be found in almost all psychiatric disorders. Impairment of normal sleep patterns is also often a contributing cause of and exacerbated by substance abuse.

12. In 1991, I was retained by Neurocare Corporation, a treatment facility in Concord, California, specializing in head-injury and neurological disorders, to work with neurologically impaired individuals who had psychiatric manifestations of their cognitive impairments. The

facility was a multidisciplinary environment in which the treatment team consisted of neurologists, neuropsychiatrists, neuropsychologists, and social workers. Treating physicians required an intimate knowledge of brain/behavior relationships in order to avoid misdiagnosis of atypical symptom presentations.

13. In 1992, I received my board certification in psychiatry by the American Board of Psychiatry and Neurology. I joined the faculty of the University of California, Davis, Medical School, Department of Psychiatry, in 1996. For the next four years, I taught Forensic Psychiatry and Criminal Responsibility to psychiatrists in the Postgraduate Forensic Fellowship.

14. In 1998, at the request of Kenyan and Tanzanian Medical Societies, I assisted their nations in developing mental health delivery services after the Kenyan/Tanzanian Embassy bombings. The initial focus of the project centered on the acute trauma suffered by survivors and families of those killed and injured in the bombing. Appropriate diagnosis and treatment for trauma survivors required assessment of and treatment for pre-existing psychiatric and neurologic disorders and an appreciation of the consequences of chronic exposure to trauma that predated the bombings.

15. I am currently an Adjunct Professor on the faculty of Morehouse School of Medicine, Department of Psychiatry, in Atlanta, Georgia, where I teach courses in Clinical Aspects of Forensic Psychiatry to third and fourth year residents. I am also on the Faculty of the Department of Educational Leadership and Public Policy, California State University, Sacramento, California.

16. My clinical private practice is based in Oakland, California. I have been qualified and testified as an expert in numerous civil and criminal cases in state and federal courts.

CLINICAL IMPRESSIONS AND SUPPORTING INFORMATION

17. Mr. Brown suffers from an Axis I mood disorder. He presents with a lengthy history that is completely consistent with bi-polar disorder.

18. The fact that Mr. Brown suffers from a serious mood disorder is, in my opinion, a fact that I would not expect a psychiatrist who reviewed Mr. Brown's history to dispute.

19. Ample anecdotal and congruent documentary evidence confirm that Mr. Brown's mental disorders and defects pre-existed the date of his offense and his trial. Because time is short, this declaration sets forth only some of the salient facts. I can, of course, expand this declaration if given more time or testify in support, if permitted by the Court.

20. Cal Brown was born April 16, 1958 near San Jose, California. The delivery was complicated. Reports of his infancy and early childhood describe Mr. Brown as a "very agitated baby" and as "out of bounds." Brown was seeing mental health counselors by the first or second

grade. Evidence suggests family members rejected him and that teachers observed aggression by the age of eight.

21. While in prison in 1985, mental health professionals diagnosed Brown as suffering from a "mood disorder" and prescribed lithium. As I understand it, Mr. Brown filed a lawsuit in order to compel treatment by state officials. In any event, Mr. Brown took lithium for about 5 or 6 months before his release from the Oregon State Prison. After his release, Mr. Brown left Oregon, failed to take his medication, and went to California, where he visited his sister (Heidi Tetz). Ms. Tetz's description of Mr. Brown is entirely consistent with mania ("wild," pressured speech, and "way out.")

22. After Mr. Brown was sentenced to death, a psychiatric evaluation was performed by Dr. Tim McBath at the Washington State Penitentiary (WSP). Dr. McBath's evaluation drew from several sources. Dr. McBath concluded: "Probable Bipolar Disorder with history of at least hypomanic and possibly manic episodes. Currently exhibiting hypomanic symptoms...Antisocial Personality Disorder." Dr. McBath's treatment plan included: (1) Lithium 300 mg (2) CBC Chem Profile (3) Doxepin 50 mg.

23. A second psychiatric evaluation of Mr. Brown was performed in 1994 at WSP by Dr. Carl Baum. The evaluation noted that Brown had been taking lithium, but further noted that he nevertheless "appears hypomanic." Dr. Baum's diagnosis included the notation: "Rule out Atypical Bipolar Affective Disorder" Dr. Baum's treatment plan appropriately suggested increased doses of lithium and the monitoring of his blood levels.

24. A third evaluation was conducted in 1995, by Dr. Ronald Page, a clinical psychologist employed by the State of Washington Department of Corrections. Dr. Page's evaluation confirms Brown's continued use of lithium and sinequan and acknowledges that under the current regiment Brown maintains fair emotional stability and sleeps satisfactorily. Further, Page's evaluation acknowledges that Brown's adaption to prison has been satisfactory, committing one infraction of stockpiling sinequan. Dr. Page concluded that the continued use of psychotropic drugs was warranted.

25. Dr. Page conducted a follow up evaluation on September 11, 1996. That evaluation confirms Brown's continued use of doxepin, depakote, and lithium, "which further mitigates his tendency to hypomania and short-fused reactivity to provocation. The Doxepin assists him with sleep as well." Additionally, the evaluation concludes that Brown continues to exhibit bipolar features and continued hypomania even on the current dosage of medication. This is significant because Mr. Brown continues to exhibit symptoms of hypomania today, including sleep disruption, irritability, pressured speech and flight of ideas.

26. Department of Corrections records further reveal that Mr. Brown has continued on mood stabilizing, psychotropic medications.

MEDICOLEGAL FINDINGS

27. I hold the foregoing opinions to a reasonable degree of medical certainty, and if called as a witness, I would and could testify truthfully to the opinions set forth above.

DECLARATION OF GEORGE W. WOODS, JR., M.D.

I, George W. Woods, M.D., declare as follows:

1. I am a licensed physician specializing in psychiatry and neuropsychiatry. I currently maintain a private practice focusing on neuropsychiatry, psychopharmacology, workplace safety, and forensic consultations. My *vitae* is attached.

2. As a forensic neurpsychiatrist, I am familiar with the legal standards relating to "incompetency" or "insanity" at the time of execution, as discussed in the leading federal and state cases.

3. I was asked to conduct an evaluation at the request of counsel representing Cal Coburn Brown to determine Mr. Brown's current mental state as it relates to his "competence" in light of his imminent execution date. Because time is short, I have set forth the essence of my opinion. If given more time, I could expand on this opinion orally or in writing.

4. I offer the following opinions, which I hold to a reasonable degree of medical certainty:

a. Mr. Brown suffers from a serious and severe mental disease or disorder. He has a lengthy history of bi-polar disorder. There are many instances in his life where he experienced mania. On several occasions, he has experienced psychosis.

b. But for the psychotropic medications that have been administered to Mr. Brown by the State of Washington Department of Corrections during his entire period of imprisonment, there is a reasonable likelihood that, if not medicated by state actors, Mr. Brown would, again, suffer from symptoms of mood disruption, including both mania and/or depression. Mr. Scott has experienced both depression and mania of psychotic proportions. These disruption of Mr. Brown's mood may impair his capacity to rationally understand the reason for his execution due to his severe mental illness.

c. Mr. Brown continues to have symptoms of hypomania. In my telephone interview, Mr. Brown described difficulty sleeping that keeps him awake several times per week. His speech continues to be pressured, and he was grandiose. These symptoms exist even when he has been medicated for decades.

I declare under the penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and was executed on

__September 3rd, 2010.

_George W. Woods, Jr., M.D.

No. 85045-3

IN THE WASHINTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

CAL COBURN BROWN,

Petitioner.

THIS IS A CAPITAL CASE

REPLY PETITIONER'S MOTION FOR STAY OF EXECUTION AND DISCRETIONARY REVIEW OF ORDER DENYING EVIDENTARY HEARING RE: COMPETENCY TO BE EXECUTED

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A. REPLY ARGUMENTS

1. Introduction

Scott Panetti is alive today because the United States Supreme Court directed that he be provided an evidentiary hearing to determine his current competency. If the decision of the trial court in this case is permitted to stand, Cal Coburn Brown will be dead tomorrow because his competency was determined not only without a hearing, but also without any opportunity to rebut the adverse inferences drawn by the trial court.

The trial court did not view the facts submitted in support of Mr. Brown's petition in the light most favorable to Mr. Brown and then conclude that he fell short of the requisite threshold showing. Instead, as the *Findings* urged by the State and revised by the trial court show, the Court weighed the evidence, resolved conflicts, found a Dept. Of Corrections psychological "associate" credible and qualified to give an expert opinion, and rejected, at least in part, the opinion of the defense expert, Dr. George Woods, an expert whose forensic opinion on issues of incompetency has been accepted by state and federal courts around the Nation. Finally, the trial court refused Brown's request to present evidence (in any form) after the Court stated it intended to find Dr. Woods' opinion unsupportable and incredible.

The simple fact that the trial court found it necessary to make these *Findings* in order to dispose of Mr. Brown's motion amply demonstrates that the trial court erred.

2. The Threshold Showing Standard

According to *State v. Harris*, 114 Wn.2d 419, 789 P.2d 60 (1990), *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) and *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), a defendant about to be executed must only make a threshold showing in order to be entitled to a stay (if necessary) and an evidentiary hearing.

The trial court found that Brown failed to make a substantial showing of incompetency, but only after finding facts, resolving disputes in the evidence, and by drawing inferences unfavorable to Mr. Brown—inferences which the trial court refused to permit Brown to answer or rebut with evidence. As noted earlier, the trial court was instead legally obliged to view Brown's facts *as true* in measuring whether he met the threshold standard. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether Brown had met his burden, the court should have viewed the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion. *Id.* Instead, as urged by the State, the trial court weighed evidence from the written documents, including finding the unrebutted declaration of Dr. Woods unpersuasive.

The State's *Response* further proves Brown's point. The State's brief is largely comprised of facts which Brown has never been permitted to investigate, contest, or rebut—none of which were tested at an evidentiary hearing. The State, of course, has every right to prove these facts at a hearing.

However, without an evidentiary hearing they cannot be accorded any weight in terms of whether Brown has made the requisite, preliminary showing.

This Court should accept review because the trial court denied Mr. Brown the legal process that he was constitutionally due.

3. The Constitutional Right to an Evidentiary Hearing

In *Panetti*, the Court ruled that the state court's procedures for determining competency violated the Eighth and Fourteenth Amendments. Since Panetti met the threshold showing of incompetency, under *Ford* he was entitled to an evidentiary hearing. 551 U.S. at 949-50. In applying Justice Powell's basic standard in *Ford*, the Court found that the state court failed to provide petitioner with a constitutionally adequate opportunity to be heard. *Id.*

In this case, as in *Ford* and *Panetti*, the trial court finding that Brown against Brown was reached without affording him an evidentiary hearing to prove what he alleged. Caselaw firmly establishes that resolving an incompetency claim based on a paper record falls short of the minimal due process constitutionally required.

However, it is Justice Thomas' dissent that is especially illuminating for present purposes. Justice Thomas argued (unsuccessfully) that the State's procedures met the minimum due process as required by the Constitution. *Id.* at 970-71. Frankly, those procedures were far more expansive than what the trial court afford Brown in this case.

When Panetti asserted he was incompetent he filed two exhibits in state court which outlined his mental history from 1981 to 1997. *Id.* at 970. He did not offer the opinion of an expert, as Brown did. *Id.* at 969-70. Because these exhibits were merely "preliminary observations" and failed to address Panetti's competency at the time of his scheduled execution in 2004, Justice Thomas contended that Panetti's claim did not meet the preliminary threshold showing of insanity that is required by a *Ford* claim.

However, even if Panetti had made the required threshold showing, Justice Thomas maintained that the State met minimum due process requirements by having a judge consider Panetti's insanity claim and resolve it against him. *Id.* at 971-72. Texas law required only an unspecified type of hearing, not an evidentiary hearing. Hence, Thomas concluded that the state court operated within the procedural leeway granted by *Ford*.

Justice Thomas' opinion accurately states the facts. However, his legal conclusion is not the law of the land.

In this case, the state court's hearing was no different than the hearing that Justice Thomas would have found sufficient, but that the majority of the United States Supreme Court found was legally insufficient.

The trial court in this case was certainly correct that it needed to make *Findings* in order to resolve Mr. Brown's incompetency claim. However, the trial court was absolutely wrong when it did so without affording Brown a

hearing or even an opportunity to address or rebut the inferences drawn by the Court from the historical record.

Mr. Brown freely acknowledges that this motion was filed on the eve of his execution. Without access to funds with only 30 days to proceed, Brown was able to obtain *pro bono* expert assistance; conduct a psychiatric evaluation; and submit an opinion to the trial court. The fact that this claim comes at the "last minute" only identifies the nature of the claim. These claims are always filed at the last minute. However, that does not justify *dispensing* with due process. Instead, it *requires* due process.

B. CONCLUSION

Following remand, an evidentiary hearing was held in Scott Panetti's case. The trial court judge concluded, after seeing and hearing the witnesses, that Panetti was competent.

The State should certainly have an opportunity to convince the trial court that Brown is competent like Panetti. However, Brown should have an opportunity to present his own evidence supporting the opposite conclusion.

Sanctioning Mr. Brown's execution by finding that the threshold standard was not met after resolving factual disputes and making credibility determinations from a paper record—a record which Brown was not permitted to supplement and where the trial court took judicial notice of facts unfavorable to Brown falls far short of the Constitutional standard.

Even in his last moments, Mr. Brown should still be entitled to the protections of our Constitutions.

As the *Ford* court held, when the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the "high regard for truth that befits a decision affecting the life or death of a human being." "Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U. S. at 411-412.

Because the proceeding below fell short of that standard this Court should grant a stay and grant discretionary review.

Respectfully submitted,

/s/Jeffrey E. Ellis
Jeffrey E. Ellis
WSBA 17139
/s/Suzanne Lee Elliott
Suzanne Lee Elliott
WSBA No. 12634
Suite 1300 Hoge Building
705 Second Ave.
Seattle, WA 98104

CERTIFICATE OF SERVICE BY MAIL

I declare under penalty of perjury that on September 9, 2010 I served this document via email on:

Mr. Jim Whisman
King County Prosecuting Attorneys Office
516 Third Ave. Suite 554
Seattle WA 98104-2362
Email: Jim.Whisman@kingcounty.gov

/s/Suzanne Lee Elliott

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CAL COBURN BROWN, Petitioner, vs. STEVEN SINCLAIR, Respondent.	No. BROWN'S EMERGENCY MOTION FOR ORDER STAYING SEPTEMBER 10, 2010, 12:01 A.M. EXECUTION **THIS IS A CAPITAL CASE** NOTED FOR: SEPTEMBER 9, 2010 ORAL ARGUMENT REQUESTED

Petitioner Cal Coburn Brown, by and through his counsel, Suzanne Lee Elliott and Gilbert H. Levy, hereby moves this Court for an order staying his execution scheduled for September 10, 2010 at 12:01 a.m.

Respectfully submitted this 9th day of September, 2010.

/s/Suzanne Lee Elliott
Law Office of Suzanne Lee Elliott
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CERTIFICATE OF SERVICE

I, SUZANNE LEE ELLIOTT, hereby certify that on September 9, 2010, I filed the foregoing document with the United States District Court's Electronic Case Filing (CM/ECF) system. I hereby certify that I served one copy of the foregoing document by email on ASSISTANT ATTORNEY GENERAL JOHN SAMSON.

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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CAL COBURN BROWN, Petitioner, vs. STEVEN SINCLAIR, Respondent.	No. BRIEF IN SUPPORT OF BROWN'S EMERGENCY MOTION FOR ORDER STAYING SEPTEMBER 10, 2010 12:01 A.M. EXECUTION PURSUANT TO LR 104(3) **THIS IS A CAPITAL CASE** NOTED FOR SEPTEMBER 9, 2010 ORAL ARGUMENT REQUESTED

I. STATEMENT OF THE CASE

Petitioner Cal Brown 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).

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On September 3, 2010 he filed a motion in the King County Superior Court arguing that, but for his medication, he would be incompetent to be executed. The trial court denied that motion on September 8, 2010.

That same day, Brown filed a Motion for Discretionary Review in the Washington State Supreme Court. **AS OF THE FILING OF THIS MOTION, THAT MATTER IS STILL PENDING IN THE WASHINGTON STATE SUPREME COURT.**

II. ARGUMENT

According to *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007), a defendant about to be executed must only make a threshold showing in order to be entitled to a stay (if necessary) and an evidentiary hearing. And in *Ford*, the Court held that the Eighth Amendment claim at issue [competency for execution] can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death.

In *Panetti*, the Court ruled that the state court's procedures for determining competency violated the Eighth and Fourteenth Amendments. Since Panetti met the threshold showing of incompetency, under *Ford* he was entitled to an evidentiary hearing. 551 U.S. at 949-50. In applying Justice Powell's basic standard in *Ford*, the Court found that the state court failed to provide petitioner with a constitutionally adequate opportunity to be heard. *Id.*

In this case, as in *Ford* and *Panetti*, the trial court finding against Brown was reached without affording him an evidentiary hearing to prove the claims he alleged. Caselaw firmly establishes that resolving an incompetency claim based on a paper record falls short of the minimal due process constitutionally required.

In *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2010), the Court held that Tennessee's refusal to hold formal evidentiary proceedings in Thompson's case on his competency claim constituted an unreasonable application of *Ford*. The same is true here. The state courts refused to hold a full evidentiary hearing on Brown's claims.

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Pursuant to CR 104(3), this application for stay should be granted in order for Brown to pursue the non-frivolous issues raised in the accompanying petition.

III. CONCLUSION

This Court should grant the stay and set a status conference for the parties to discuss scheduling further discovery and factual development.

Respectfully submitted this 9th day of September, 2010:

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The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CAL COBURN BROWN, Petitioner, vs. STEPHEN C. SINCLAIR, Respondent.	No. C05-00319LRS THIS IS A CAPITAL CASE [PROPOSED] EMERGENCY ORDER STAYING SEPTEMBER 10, 2010, 12:01 A.M. EXECUTION OF CAL COBURN BROWN

This Court, having reviewed the Emergency Motion to Stay the Execution of Cal Coburn Brown and the response by Sinclair hereby ORDERS:

The Superintendent of the Washington State Penitentiary is ordered and commanded to refrain from executing Cal Coburn Brown until such time as this Court rules his pending petition. The Clerk of the Court shall immediately notify counsel for Respondent of this order. Counsel for Respondent is directed to promptly notify Mr. Sinclair that this Court has stayed Mr. Brown's execution.

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DATED this 9th day of September, 2010.

The Honorable John C. Coughenour
United States District Court Judge

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The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CAL COBURN BROWN, Petitioner, vs. STEPHEN C. SINCLAIR, Respondent.	No. CV10-1446-JCC **THIS IS A CAPITAL CASE** REPLY RE: PETITION FOR WRIT OF HABEAS CORPUS

The Washington State Supreme Court denied review just a few minutes ago. *See* Exhibit 1.

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court ruled that the state court's procedures for determining competency violated the Eighth and Fourteenth Amendments. Since *Panetti* met the threshold showing of incompetency, under *Ford* he was entitled to an evidentiary hearing. 551 U.S. at 949-50. In applying Justice Powell's basic standard in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court found that the state court failed

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to provide petitioner with a constitutionally adequate opportunity to be heard. *Id.*

In this case, as in *Ford* and *Panetti*, the trial court finding against Brown was reached without affording him an evidentiary hearing to prove what he alleged. Clearly established law firmly establishes that resolving an incompetency claim based on a paper record falls short of the minimal due process constitutionally required.

However, it is Justice Thomas's dissent that is especially illuminating for present purposes. Justice Thomas argued (unsuccessfully) that the State's procedures met the minimum due process as required by the Constitution. *Id.* at 970-71. Frankly, those procedures were far more expansive than what the trial court afforded Brown in this case.

When *Panetti* asserted he was incompetent he filed two exhibits in state court which outlined his mental history from 1981 to 1997. *Id.* at 970. He did not offer the opinion of an expert, as Brown did. *Id.* at 969-70. Because these exhibits were merely "preliminary observations" and failed to address Panetti's competency at the time of his scheduled execution in 2004, Justice Thomas contended that Panetti's claim did not meet the preliminary threshold showing of insanity that is required by a *Ford* claim.

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However, even if Panetti had made the required threshold showing, Justice Thomas maintained that the State met minimum due process requirements by having a judge consider Panetti's insanity claim and resolve it against him. *Id.* at 971-72. Texas law required only an unspecified type of hearing, not an evidentiary hearing. Hence, Thomas concluded that the state court operated within the procedural leeway granted by *Ford*.

Justice Thomas's opinion accurately states the facts. However, his legal conclusion is not the law of the land.

In this case, the state court's hearing was no different than the hearing that Justice Thomas would have found sufficient, but that the majority of the United States Supreme Court found was legally insufficient.

The trial court in this case was certainly correct that it needed to make Findings in order to resolve Mr. Brown's incompetency claim. However, the trial court was absolutely wrong when it did so without affording Brown a hearing or even an opportunity to address or rebut the inferences drawn by the Court from the historical record.

Mr. Brown freely acknowledges that this motion was filed on the eve of his execution. Without access to funds with only 30 days to proceed, Brown was able to obtain pro bono expert assistance, conduct a psychiatric evaluation, and submit an opinion to the trial court. The fact that this claim

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comes at the "last minute" only identifies the nature of the claim. These claims are always filed at the last minute. However, that does not justify dispensing with due process. Instead, it requires due process.

DATED this 9th day of September, 2010.

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CERTIFICATE OF SERVICE

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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. CAL COBURN BROWN, APPELLANT.	)	**ORDER** Supreme Court No. 85045-3 King County No. 91-1-03233-1 SEA

This matter came before the Court on its September 9, 2010, En Banc Case Conference, and the Court having unanimously determined that Appellant Brown has not made the showing required to justify relief sought:

FILED
SUPREME COURT
STATE OF WASHINGTON
2010 SEP 9 PM 1:48
BRONALD R. CARPENTER
CLERK

Now, therefore, it is hereby ordered that:

(1) the motion for discretionary review is denied and;

(2) the emergency motion to stay is also denied.

DATED at Olympia, Washington this 9th day of September, 2010.

For the Court,

Madsen, C.J.
CHIEF JUSTICE

593/185

EXHIBIT 1

Case: 10-35798 09/10/2010 Page: 86 of 91 ID: 7478084 DktEntry: 2-2

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAL COBURN BROWN, Petitioner, v. STEPHEN SINCLAIR, Respondent.	C10-1446-JCC **ORDER**

This matter comes before the Court upon a petition for writ of *habeas corpus.* (Dkt. No. 2). Petitioner Cal Coburn Brown asks this Court to stay his pending execution, currently scheduled for tomorrow, September 10, 2010, at 12:01 a.m. Respondent Stephen Sinclair, the prison warden charged with the responsibility of supervising the execution, opposes Petitioner's request. (Dkt. No. 3). Having reviewed the parties' briefing and the relevant exhibits and declarations, the Court hereby DENIES the petition for the reasons explained below.

I. BACKGROUND

Petitioner killed Holly Washa on May 24, 1991. A Washington State jury convicted him of aggravated murder in the first degree in December 1993, and sentenced him to death in January 1994. The conviction and sentence became final in January 2009, after a lengthy appeals process that included argument before the United States Supreme Court. *See Brown v. Uttrecht*, 530 F.3d 1031 (9th Cir. 2008) (describing procedural history).

Since his conviction and sentence became final, Petitioner has raised two claims before this Court, arguing first, that state execution protocols constitute cruel and unusual punishment in violation of the Eighth Amendment, and second, that the Constitution forbids Washington State from executing him because he would be mentally incompetent without the use of certain medications to treat his mental-health issues. This Court denied his petition for relief with respect to the first theory in an order issued on August 31, 2010. (*Brown v. Vail*, C09-5101, Dkt. No. 53). This Court also denies his petition for relief with respect to the second theory today. In so doing, the Court upholds the judgment of the King County Superior Court, which denied Petitioner's request for relief on the second theory on September 8, 2010. (Dkt. No. 1 at 29–39).[1]

II. RELEVANT FACTS

Petitioner has been prescribed different medications to treat underlying mental-health problems since he was incarcerated in 1994. These medications have included *lithium* and *depakote*, and the mental-health problems have included diagnoses of antisocial personality disorder and probable bipolar disorder. (McBath Report 4 (Dkt. No. 1 at 41)). Petitioner nowhere expressly alleges that he has taken these medications against his will, nor does he offer evidence to suggest as much.

Petitioner was recently examined by Dr. George Woods, a psychiatrist. Dr. Woods diagnosed Petitioner as suffering from bipolar disorder. He also concluded, within a reasonable degree of medical

[1]The Washington State Supreme Court unanimously affirmed the King County Superior Court in an order issued September 9, 2010. (Dkt. No. 5-1 at 2).

certainty, that a "reasonable likelihood" exists that Petitioner would suffer from "symptoms of mood disruption, including mania and depression," if he were to stop taking his medications. According to Dr. Woods, these possible mood disruptions "may impair his capacity to rationally understand the reason for his execution due to his severe mental illness." (Woods Report 9 (Dkt. No. 1 at 60)).

III. LEGAL STANDARD

This petition for writ of *habeas corpus* is governed by the Antiterrorism and Effective Death Penalty Act of 1996, *codified in relevant part at* 28 U.S.C. § 2254. Under the Act's provisions, this Court cannot grant *habeas* relief to any person in the custody of Washington State unless the proceedings in the Washington State judicial system "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

The decision of a state court can be contrary to clearly established federal law in one of two ways: It can arrive at a conclusion opposite to that reached by the Supreme Court on a question of law, or it can confront facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive at an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The phrase "clearly established federal law" refers to "the holdings, as opposed to the dicta" of the Supreme Court's decisions. *Id.* at 412. The determination of a state court may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled. *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000). A state-court decision is an unreasonable application of federal law if the evidence is "too powerful to conclude anything but the contrary" of the conclusion reached by the state court. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007). It does not suffice on *habeas* review that reasonable minds might disagree about the state court's decision. *Rice v. Collins*, 546 U.S. 333, 341–42 (2006).

IV. RELEVANT LAW

"[T]he Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410–11. For the purposes of the Eighth Amendment, a condemned prisoner is competent to be executed if he "perceives the connection between his crime and his punishment." *Id.* at 422 (Powell, J., concurring). The Eighth Amendment therefore forbids the execution of a prisoner "whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417 (Marshall, J., for a plurality).

If a prisoner makes a substantial showing of incompetency, he is entitled to a "fair hearing" that includes an "opportunity to be heard." *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007) (citing *Ford*, 477 U.S. at 424 (Powell, J., concurring)). Under this standard, "a constitutionally acceptable procedure may be far less formal than a trial." *Id.* at 950.

V. DISCUSSION

Petitioner's claims fail for several reasons. First, the United States Supreme Court has never held that the Eighth Amendment forbids a state from executing a prisoner whose competence depends upon his long-standing use of medications to treat mental-health problems. The Antiterrorism and Effective Death Penalty Act therefore precludes relief, because a federal court can grant a state prisoner a writ of *habeas corpus* only if the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established federal law, *as determined by the Supreme Court of the United States*[.]" 28 U.S.C. § 2254(d)(1) (emphasis added). Petitioner argues that a "logical reading" of Supreme Court precedent mandates the conclusion that the Eighth Amendment "prohibits the execution of those made artificially or superficially competent via the use of medications." (Petition 6 (Dkt. No. 1)). A logical reading mandates no such thing: Petitioner has medicated the effects of his mental-health problems ever since he was incarcerated, presumably to improve his own quality of life. He has lived for the past two decades under the effects of medication, and now argues that he would be incompetent

except for the effects of the medication. It is undisputed that Petitioner is competent to be executed today. The direct precedent of the United States Supreme Court requires no more.

Second, the state courts provided Petitioner with adequate process at which to litigate this issue. Petitioner filed a request for relief with the King County Superior Court on September 3, 2010. The trial court heard argument on the issue and considered the parties' proffered evidence. (Findings and Conclusions 2 (Dkt. No. 1 at 30)). The court considered the report of Dr. Woods, and gave his findings their due weight. The court concluded that Petitioner had failed to make a substantial showing of incompetency and therefore denied his motion for a stay of his execution. Because Petitioner was provided with a "fair hearing" that included an "opportunity to be heard," the state courts complied with the requirements of the Eighth Amendment. *See Panetti v. Quarterman*, 551 U.S. 930, 948 (2007) (citing *Ford*, 477 U.S. at 424 (Powell, J., concurring)).

Third, Petitioner has failed to demonstrate that the state court unreasonably applied Supreme Court precedent when it concluded that he had failed to make a substantial showing of incompetence. Petitioner relied on the report of Dr. Woods to substantiate his claim, but the report offers nothing more than conjecture, possibility, and hypothesis. Most importantly, Dr. Woods nowhere concludes that Petitioner is currently incompetent to be executed. He nowhere argues that Petitioner cannot understand the rational connection between the murder of Holly Washa and his execution. Dr. Woods only concludes that there exists "a reasonable likelihood" that Petitioner would suffer from "mood disruption" if he stopped taking his medications. Dr. Woods then argues that these possible mood disruptions "may impair [Petitioner's] capacity to rationally understand the reason for his execution due to his severe mental illness." (Woods Report 9 (Dkt. No. 1 at 60)). In other words, Petitioner *might* suffer mood disorders, and these mood disorders *might* impair his understanding, but these consequences follow *only if* Petitioner were to stop taking his medications. Given that the state court was offered only such speculation, this Court cannot conclude that it unreasonably applied federal law.

Such speculation cannot satisfy the requirement that a prisoner make a substantial showing of incompetence before being afforded a hearing. One thing is certain: Petitioner can today "perceive the connection between his crime and his punishment[.]" *Ford*, 477 U.S. at 422 (Powell, J., concurring). Because Petitioner offered only speculation, this Court cannot conclude that the decision of the King County Superior Court to deny him a further evidentiary hearing was "an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding." 28 U.S.C. § 2254(d)(2).

V. CONCLUSION

For the foregoing reasons, the Court hereby DENIES the petition for writ of *habeas corpus.*

SO ORDERED this 9th day of September, 2010.

JOHN C. COUGHENOUR
United States District Judge

No. 10-35798

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAL COBURN BROWN,

Petitioner,

v.

STEVEN SINCLAIR,

Respondent.

ON APPEAL FROM THE U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
The Honorable John C. Coughenour

SUPPLEMENTAL APPENDIX

SUZANNE LEE ELLIOTT

Attorney for Petitioner
1300 Hoge Building
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(206) 623-0291

DECLARATION OF GEORGE W. WOODS, JR., M.D.

I, George W. Woods, M.D., declare as follows:

1. I was asked to review records and conduct an evaluation at the request of counsel representing Cal Coburn Brown to determine:

a. Whether Mr. Brown currently suffers from a mental disease or defect; and, if he does,

b. Is that mental disease being treated and/or managed with the use of medication;

c. Whether Mr. Brown suffered from that same mental disease at the time of his crime and trial; and, if so,

d. Whether, at the time of Mr. Brown's crime, the use of appropriate medications would have helped treat his mental illness.

2. In response, I offer the following opinions, which I hold to a reasonable degree of medical certainty:

a. Mr. Brown suffers from a serious mood disorder, namely bi-polar disorder;

b. Mr. Brown suffered from this mental disorder at the time of his crime;

c. In fact, Mr. Brown suffered from this mental disorder long before his crime;

d. Mr. Brown's clinical history reflects that he has responded well to medication, including lithium and depakote (valproic acid);

e. Significantly, for over 15 years the Washington Department of Corrections has been treating Mr. Brown with medication in order to control his mood disorder. The medical personnel at the Department of Corrections would not have instituted and continued this course of treatment for so many years if it was not medically appropriate and effective. As recently as July 16, 2010, Mr. Brown was diagnosed by a DOC physician, Dr. Grubb, as suffering from "bipolar disorder, more or less stable" and requiring medication.

f. Any claim that mood stabilizing drugs like lithium or depakote do not have or would not have a positive and stabilizing effect on Mr. Brown is unfounded and contrary to a voluminous amount of evidence;

g. To the contrary, from the time that Mr. Brown was first started on lithium (while in the Oregon prison system) until the present he has responded well to medications.

3. In sum, it is reasonably medically certain—indeed, from the available evidence it is certain—that Mr. Brown suffers now and suffered at the time of his crime from a serious mood disorder—one that has been successfully managed through the use of psychotropic medication.

QUALIFICATIONS

4. I am a licensed physician specializing in psychiatry and neuropsychiatry. I currently maintain a private practice focusing on neuropsychiatry, psychopharmacology, workplace safety, and forensic consultations.

5. I am a Fellow of the American Psychiatric Association, and a member of the California Psychiatric Association and the Northern California Psychiatric Association. I am also a member of the American Neuropsychiatric Association, the American Psychological Association, the American Society of Addiction Medicine and the Black Psychiatrists of America.

6. I am Secretary General of the International Academy of Law and Mental Health, where I am a member of the Scientific and Executive Committees. I also serve on the Advisory Board of the Center for African Peace and Conflict Resolution, California State University, Sacramento, California; and the Global Advisory Board for Humiliation and Dignity Studies, Trondheim University, Norway, and Columbia University, New York, New York.

7. I received my bachelor's degree from Westminster College in Salt Lake City, Utah, in 1969; and was awarded my medical degree from the University of Utah in 1977. I then completed a rotating medical internship at Alameda County Medical Center (Highland Hospital), in Oakland, California, which included internal medicine, surgery, orthopedic surgery, Emergency Medicine, and Obstetrics/Gynecology. In 1981, I completed my psychiatric residency at the Pacific Medical Center in San Francisco, California, where I served as Chief Resident my senior year. During my psychiatric residency, I pursued specialized neurological electives at Kaiser Permanente Hospital, Oakland, California. These electives consisted of extended, three month clerkships, in which I was assigned to the Neurology department, conducting neurological examinations and diagnosing neurological disorders, including movement disorders, headache disorders and central nervous dysfunctions, among others.

8. In 1982, I then participated in a National Institute of Mental Health/American Psychiatric Association Fellowship, during which I developed the first medical/psychiatric unit at Pacific Presbyterian Hospital. This unit administered to patients with either medical illnesses that had psychiatric manifestations or psychiatric patients with severe medical illness that could not be treated effectively on regular medical units. The focus of my Fellowship was Geriatric Psychopharmacology, the study of medication use with elderly populations. Geriatric Psychopharmacology, however, is an extremely valuable approach to the study of psychopharmacology in general. The medical/psychiatric/neurological/pharmacological training and experience I gained during this period proved relevant to other patient populations, particularly forensic populations, who experience a higher incidence and greater interaction of

drug, mental and neurocognitive problems than the general population. Following the completion of my Fellowship, I become the Director of Outpatient Geriatric Services for the San Francisco Family Services Agency. In that capacity, I conducted home visits with elderly patients who manifested psychiatric symptoms. Medical examinations and neurological intervention were frequently required.

9. From 1983 through 1990, I provided neuropsychiatric care at Crestwood Manor, Vallejo, California, a long-term psychiatric facility, dedicated to treating severely ill patients. Many of these patients came from state hospitals with atypical presentations and the diagnosis of mental retardation. Atypical presentation of psychiatric symptoms is common among forensic populations as well, particularly in areas that may lack community mental health services and or widespread availability of intensive treatment. Many of these patients Many of Crestwood's clients also had multiple, co-occurring disorders that required an understanding of pharmacology, neurology, and psychiatry, as noted by the American Neuropsychiatric Association.

10. From 1989 to 1994, I served as Clinical Director of the New Beginnings Chemical Dependency Program, an inpatient substance abuse detoxification and rehabilitation center housed at Doctors Hospital in Pinole, California. In 1994, I was appointed as Senior Consulting Addictionologist by Doctors Hospital, and oversaw complex withdrawals and detoxifications, and developed research protocols for the use of new medications for opiate withdrawals and sedation in the intensive care units. During my tenure, New Beginnings evolved into program that treated patients with what are called co-occurring disorders, meaning persons who have multiple psychiatric disorders – which is the norm, rather than unusual. Many persons with neuropsychiatric disorders attempt to self-medicate their symptoms.

11. The clinical facilities at Doctors Hospital afforded access to a Single Photon Emission Computerized Tomography (SPECT), which was utilized to determine brain function. My neuroimaging experience also includes the study of Magnetic Resonance Imagining (MRI) and Cathode Scans (CT), focusing on the different uses of structural imaging and functional imaging, like the SPECT and the Positive Emission Tomography (PET). From 1990 through 1995, I also served as the Coordinator and Psychiatric Consultant to the Insomnia Division of the Doctors Hospital Sleep Disorders Center. The assessment of sleep disorders, the evaluation of disorders in the architecture of sleep, is a seminal component of diagnosing medical illness and psychiatric disorders, and formulating appropriate pharmacological interventions. Sleep disruption is frequently the first overt symptom of an underlying medical, neurological, or psychiatric disorder. Disruption of sleep can be found in almost all psychiatric disorders. Impairment of normal sleep patterns is also often a contributing cause of and exacerbated by substance abuse.

12. In 1991, I was retained by Neurocare Corporation, a treatment facility in Concord, California, specializing in head-injury and neurological disorders, to work with neurologically impaired individuals who had psychiatric manifestations of their cognitive impairments. The

facility was a multidisciplinary environment in which the treatment team consisted of neurologists, neuropsychiatrists, neuropsychologists, and social workers. Treating physicians required an intimate knowledge of brain/behavior relationships in order to avoid misdiagnosis of atypical symptom presentations.

13. In 1992, I received my board certification in psychiatry by the American Board of Psychiatry and Neurology. I joined the faculty of the University of California, Davis, Medical School, Department of Psychiatry, in 1996. For the next four years, I taught Forensic Psychiatry and Criminal Responsibility to psychiatrists in the Postgraduate Forensic Fellowship.

14. In 1998, at the request of Kenyan and Tanzanian Medical Societies, I assisted their nations in developing mental health delivery services after the Kenyan/Tanzanian Embassy bombings. The initial focus of the project centered on the acute trauma suffered by survivors and families of those killed and injured in the bombing. Appropriate diagnosis and treatment for trauma survivors required assessment of and treatment for pre-existing psychiatric and neurologic disorders and an appreciation of the consequences of chronic exposure to trauma that predated the bombings.

15. I am currently an Adjunct Professor on the faculty of Morehouse School of Medicine, Department of Psychiatry, in Atlanta, Georgia, where I teach courses in Clinical Aspects of Forensic Psychiatry to third and fourth year residents. I am also on the Faculty of the Department of Educational Leadership and Public Policy, California State University, Sacramento, California.

16. My clinical private practice is based in Oakland, California. I have been qualified and testified as an expert in numerous civil and criminal cases in state and federal courts.

CLINICAL IMPRESSIONS AND SUPPORTING INFORMATION

17. Mr. Brown suffers from an Axis I mood disorder. He presents with a lengthy history that is completely consistent with bi-polar disorder.

18. The fact that Mr. Brown suffers from a serious mood disorder is, in my opinion, a fact that I would not expect a psychiatrist who reviewed Mr. Brown's history to dispute.

19. Ample anecdotal and congruent documentary evidence confirm that Mr. Brown's mental disorders and defects pre-existed the date of his offense and his trial. Because time is short, this declaration sets forth only some of the salient facts. I can, of course, expand this declaration if given more time or testify in support, if permitted by the Court.

20. Cal Brown was born April 16, 1958 near San Jose, California. The delivery was complicated. Reports of his infancy and early childhood describe Mr. Brown as a "very agitated baby" and as "out of bounds." Brown was seeing mental health counselors by the first or second

grade. Evidence suggests family members rejected him and that teachers observed aggression by the age of eight.

21. While in prison in 1985, mental health professionals diagnosed Brown as suffering from a "mood disorder" and prescribed lithium. As I understand it, Mr. Brown filed a lawsuit in order to compel treatment by state officials. In any event, Mr. Brown took lithium for about 5 or 6 months before his release from the Oregon State Prison. After his release, Mr. Brown left Oregon, failed to take his medication, and went to California, where he visited his sister (Heidi Tetz). Ms. Tetz's description of Mr. Brown is entirely consistent with mania ("wild," pressured speech, and "way out.")

22. After Mr. Brown was sentenced to death, a psychiatric evaluation was performed by Dr. Tim McBath at the Washington State Penitentiary (WSP). Dr. McBath's evaluation drew from several sources. Dr. McBath concluded: "Probable Bipolar Disorder with history of at least hypomanic and possibly manic episodes. Currently exhibiting hypomanic symptoms...Antisocial Personality Disorder." Dr. McBath's treatment plan included: (1) Lithium 300 mg (2) CBC Chem Profile (3) Doxepin 50 mg.

23. A second psychiatric evaluation of Mr. Brown was performed in 1994 at WSP by Dr. Carl Baum. The evaluation noted that Brown had been taking lithium, but further noted that he nevertheless "appears hypomanic." Dr. Baum's diagnosis included the notation: "Rule out Atypical Bipolar Affective Disorder" Dr. Baum's treatment plan appropriately suggested increased doses of lithium and the monitoring of his blood levels.

24. A third evaluation was conducted in 1995, by Dr. Ronald Page, a clinical psychologist employed by the State of Washington Department of Corrections. Dr. Page's evaluation confirms Brown's continued use of lithium and sinequan and acknowledges that under the current regiment Brown maintains fair emotional stability and sleeps satisfactorily. Further, Page's evaluation acknowledges that Brown's adaption to prison has been satisfactory, committing one infraction of stockpiling sinequan. Dr. Page concluded that the continued use of psychotropic drugs was warranted.

25. Dr. Page conducted a follow up evaluation on September 11, 1996. That evaluation confirms Brown's continued use of doxepin, depakote, and lithium, "which further mitigates his tendency to hypomania and short-fused reactivity to provocation. The Doxepin assists him with sleep as well." Additionally, the evaluation concludes that Brown continues to exhibit bipolar features and continued hypomania even on the current dosage of medication. This is significant because Mr. Brown continues to exhibit symptoms of hypomania today, including sleep disruption, irritability, pressured speech and flight of ideas.

26. Department of Corrections records further reveal that Mr. Brown has continued on mood stabilizing, psychotropic medications.

MEDICOLEGAL FINDINGS

27. I hold the foregoing opinions to a reasonable degree of medical certainty, and if called as a witness, I would and could testify truthfully to the opinions set forth above.

28. The evidence is overwhelming that Mr. Brown suffers from a serious mood disorder.

29. In addition to the numerous times that Mr. Brown has exhibited the signs and symptoms of mania (which are amply described in Mr. Brown's history), the simple fact that he has been treated with mood stabilizing, psychotropic medications for nearly two decades can only lead to the conclusion expressed above.

30. Asserting that Mr. Brown does not now or did not at the time of his crime and trial suffer from a serious mood disorder which can be effectively controlled through the proper use of medication is contrary to the overwhelming weight of the evidence.

31. This is not only my opinion; it is the opinion of the psychologists and psychiatrists employed by the State of Washington who were charged with treating Mr. Brown while imprisoned since the early 1990's. It was also the opinion of the individual who treated Mr. Brown during his imprisonment in Oregon.

32. If anyone suggested at Mr. Brown's trial that he did not suffer from a serious mental disorder—one that could be effectively treated with psychotropic medications—history has clearly proven that suggestion to be completely incorrect, to a reasonable medical certainty.

33. Mr. Brown's medical disorder is such that, without medication during his entire period of imprisonment, there is a reasonable likelihood that, if not medicated by state actors, Mr. Brown would, again, suffer from symptoms of mood disruption of psychotic proportions which may impair his capacity to rationally understand the reason for his execution. I believe that a qualified physician familiar with Mr. Brown's diagnosis and history and involved in his treatment would confirm that likelihood. Indeed, I believe that the sole reason Mr. Brown is medicated is to control his mental disorder and prevent such decompensation. I have separately rendered opinions on that issue in another declaration signed this date.

I declare under the penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and was executed on

September 3rd, 2010.

George W. Woods, Jr., M.D.

DECLARATION OF GEORGE W. WOODS, JR., M.D.

I, George W. Woods, M.D., declare as follows:

1. I am a licensed physician specializing in psychiatry and neuropsychiatry. I currently maintain a private practice focusing on neuropsychiatry, psychopharmacology, workplace safety, and forensic consultations. My *vitae* is attached.

2. As a forensic neurpsychiatrist, I am familiar with the legal standards relating to "incompetency" or "insanity" at the time of execution, as discussed in the leading federal and state cases.

3. I was asked to conduct an evaluation at the request of counsel representing Cal Coburn Brown to determine Mr. Brown's current mental state as it relates to his "competence" in light of his imminent execution date. Because time is short, I have set forth the essence of my opinion. If given more time, I could expand on this opinion orally or in writing.

4. I offer the following opinions, which I hold to a reasonable degree of medical certainty:

a. Mr. Brown suffers from a serious and severe mental disease or disorder. He has a lengthy history of bi-polar disorder. There are many instances in his life where he experienced mania. On several occasions, he has experienced psychosis.

b. But for the psychotropic medications that have been administered to Mr. Brown by the State of Washington Department of Corrections during his entire period of imprisonment, there is a reasonable likelihood that, if not medicated by state actors, Mr. Brown would, again, suffer from symptoms of mood disruption, including both mania and/or depression. Mr. Scott has experienced both depression and mania of psychotic proportions. These disruption of Mr. Brown's mood may impair his capacity to rationally understand the reason for his execution due to his severe mental illness.

c. Mr. Brown continues to have symptoms of hypomania. In my telephone interview, Mr. Brown described difficulty sleeping that keeps him awake several times per week. His speech continues to be pressured, and he was grandiose. These symptoms exist even when he has been medicated for decades.

I declare under the penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and was executed on

__September 3rd, 2010.

_George W. Woods, Jr., M.D.