

NO. 10-35798

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

CAL COBURN BROWN,

Petitioner-Appellant,

v.

STEPHEN SINCLAIR,

Respondent-Appellees.

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

No. CV-10-1446-JCC
The Honorable John C. Coughenour
United States District Judge

RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION

ROBERT M. MCKENNA
Attorney General

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

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I. INTRODUCTION

The Respondent-Appellee (the State), through his attorneys, Robert M. McKenna, Attorney General, and John J. Samson Assistant Attorney General, responds to Brown's emergency motion for a stay of the execution scheduled for September 10, 2010.

II. STATEMENT OF THE CASE

A. Introduction

Nineteen years ago, Brown kidnapped Holly Washa. After repeatedly raping and torturing Ms. Washa, Brown slit her throat and left her body in the trunk of a car. Brown was sentenced to death for this horrific crime, and he is now to be executed on September 10, 2010. Brown has aggressively litigated the validity of his conviction and sentence over the past two decades, challenging among other things the composition of the jury, the admissibility of his confessions, the adequacy of his trial counsel, and the constitutionality of his sentence and method of execution. Brown's litigation has proceeded through both the state and federal courts, all the way to the Supreme Court. Never before has Brown alleged insanity or a lack of competency. Now, on the very eve of his execution, Brown contends the Court stay his execution because he "might" become incompetent. The Court should deny a stay.

B. Summary Of Brown's Prior Judicial Proceedings

Brown was convicted and sentenced to death following a jury trial. Exhibit 1, at 2 ¶¶ 1 & 4. Brown's competency or sanity was not an issue at trial. Exhibit 1, at 2 ¶ 2. Brown was evaluated for to try to develop a defense at trial, but neither the experts, nor Brown's counsel ever contended that Brown was incompetent to stand trial or that Brown was insane. Exhibit 1, at 2 ¶¶ 2-3. Also, neither the judge, nor the prosecutor expressed any concern about Brown's competency.

Brown appealed from his convictions and sentence to the Washington Supreme Court. Brown raised numerous claims challenging his conviction and sentence, but he never argued insanity or incompetency. Exhibit 1, at 3 ¶ 6. The state court affirmed Brown's conviction and sentence in 1997, and the Supreme Court denied certiorari on March 9, 1998. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Brown then filed a personal restraint petition in the Washington Supreme Court. Brown raised numerous claims, including claims that counsel failed to present mitigating evidence of his mental illnesses to the jury, but he never raised any issue of insanity or incompetency. Exhibit 1, at 3 ¶ 6. The state court denied the petition in 2001. *In re Brown*, 143 Wn.2d 431, 21 P.3d 687 (2001).

Brown then filed a federal habeas corpus petition. *Brown v. Lambert*, Cause No. C01-715-JCC. Among his claims, Brown alleged counsel was ineffective for not properly presenting mitigation evidence concerning Brown's mental illnesses, but he never alleged or argued insanity or incompetency. In fact, Brown's own psychiatrist, Dr. Scher admitted Brown was intelligent, goal oriented, knew right from wrong, knew what he was doing when he killed Holly Washa, intended to do the actions he committed, and was not hallucinating or delusional. Exhibit 1, at 5 ¶ 15; Exhibit 2. Dr. Scher never opined that Brown was insane or incompetent. Exhibit 1, at 5 ¶ 15; *see also* Exhibit 2. The federal courts ultimately denied relief. *Brown v. Lambert*, 2004 WL 5331923 (W.D. Wash. Sep. 15, 2004), *rev'd in part*, *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006), *rev'd*, *Uttecht v. Brown*, 551 U.S. 1 (2007), *aff'd*, *Brown v. Uttecht*, 530 F.3d 1031 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1005 (2009). The date of execution reset to March 13, 2009. Exhibit 1, at 3 ¶ 7.

Prior to that execution date, Brown filed a second personal restraint petition and a mandamus petition in the Washington Supreme Court. *In re Brown*, Cause No. 82711-7; *Brown v. Vail, et al.*, Cause No. 82742-7. In these proceedings, Brown never alleged he was insane or incompetent. The Washington Supreme Court denied both petitions.

On March 12, 2009, just hours before his scheduled execution, Brown spoke to the state clemency board. Exhibit 1, at 3 ¶ 8; Exhibit 3 at 15-16. Brown admitted he was responsible for killing Holly Washa, and that his mental illness did not excuse his crime. Exhibit 3, at 15-16. Brown never indicated any lack of competency. Rather, “Brown’s statements demonstrated his awareness that the imminent execution was intended to punish him for killing Holly Washa.” Exhibit 1, at 3 ¶ 8.

Prior to the 2009 execution date, Brown filed a complaint challenging the State’s lethal injection protocol. *Brown v. Vail, et al.*, Thurston County Cause No. 09-00273-5; *Brown v. Vail, et al.*, Cause No. C09-5101-JCC. Brown came within a few hours of his execution before the Washington Supreme Court granted a stay on the evening of March 12, 2009. Despite being within mere hours of execution, Brown never contended he was insane or incompetent to be executed. On the contrary, Brown’s words and actions indicated he was well aware of his pending execution, and when notified that the court had granted a stay, Brown demonstrated he knew the stay meant he would not be executed. Exhibit 4.

After the Washington Supreme Court stayed the execution, Brown litigated his challenge to the State’s lethal injection protocol in both the state

trial court and in the Washington Supreme Court. Over the course of the one and one-half years of litigation, Brown never contended he was insane or incompetent. The Washington Supreme Court ultimately denied relief and lifted the stay of execution on July 29, 2010. *See Brown, et al. v. Vail, et al.*, ___ Wash.2d ___, ___ P.3d ___ (July 29, 2010) (2010 WL 2948856).

The date of execution again reset to September 10, 2010. Brown then filed an amended complaint in the district court, challenging the State's new one drug protocol for lethal injection. *See Brown v. Vail, et al.*, Cause No. C09-5101-JCC. Brown never argued that he was insane or incompetent to be executed. The district court, this Court and the Supreme Court denied a stay.

C. Recent State Court Proceedings Concerning Competency

Since July 29, 2010, Brown has clearly demonstrated he is well aware of his upcoming execution, and he rationally knows why he will be executed. Exhibits 5 and 6. Brown is aware that he faces execution, and that his attorneys were filing actions trying to stop his execution. Exhibits 5 and 6. For example, Brown indicated he would not elect an alternative method of execution "on the advice of counsel." Exhibit 5, at 2 ¶ 4. In doing so, Brown demonstrated he understood his counsel's advice because an election of an alternative method would moot his pending challenge to the one drug protocol

and would waive any challenge to the elected method. *See Stewart v. LaGrand*, 526 U.S. 115 (1999) (petitioner who elected lethal gas waived challenge to lethal gas). Similarly, Brown demonstrated his awareness of the imminent execution by discussing the disposition of his remains, the disposition of his property, and his last meal. Exhibit 5, at 2 ¶ 5. Brown requested a special meal, and when informed he could not obtain a special meal, he requested larger portions for his final meal. Exhibit 5, at 2 ¶ 5. Brown's words and actions clearly demonstrate that Brown is fully aware that he is to be executed, is fully and rationally aware of the reason for his execution, and is fully competent. As Associate Superintendent Bowman testified in state court:

6. Also during our meeting on September 2, 2010, Mr. Brown told me that the ruling from Judge Coughenour was not the end of the line for him. Mr. Brown told me he and his lawyers were prepared for that ruling from Judge Coughenour and that there's nothing he could do about being executed. Mr. Brown also told me that he was not worried about being executed and his lawyers had new challenges and new surprises they would be filing in the next week to stop the execution.¹

¹ After Brown's statement to Mr. Bowman, Brown's attorneys actually filed the third personal restraint petition and the state court action based upon his alleged incompetency. Brown was clearly aware of his attorneys' intent to file these actions seeking to stop the execution. Brown was rationally aware of the fact of and reason for his imminent execution.

7. During our meetings on September 2nd and 3rd, Mr. Brown and I had a conversation about his last words that will be spoken prior to the execution. After our conversations in preparation for the last execution, I had concerns that Mr. Brown's final words would be disrespectful toward Holly Washa's family. I expressed my concerns to Mr. Brown and told him that being disrespectful to the victim's family would not be appropriate. Mr. Brown told me, "I already apologized to them" and said his intent was not to disrespect them.

8. During our meetings on September 2nd and 3rd, I asked Mr. Brown how he was feeling. He told me that he realizes that there is nothing he can do about it, that he can't control his destiny, and that he understood that he may be executed and that he couldn't control it, and he was still going to file appeals to try and stop the execution.

Exhibit 5, at 2-3, ¶¶ 6-8.

On September 3, 2010, facing his imminent execution, Brown for the first time ever filed a motion in state court alleging an issue of incompetency. Exhibit 7. Brown did not allege he was incompetent. Exhibit 7; *see also* Exhibit 1, at 7 ¶ 22. Instead, Brown merely contended that he had raised a "colorable issue" concerning competency, that he is competent only as a result of medication, and that but for the medication there is a reasonable likelihood he would not be competent. Exhibit 7. Similarly, Brown's new expert, Dr. Woods, never opined that Brown is currently incompetent to be executed. Exhibit 7, Attachment E. Instead, Dr. Woods at most opined that if Brown were not medicated, he "may" become incompetent. Exhibit 7, Attachment E.

The state trial court denied Brown's motion. Exhibit 1, at 10-11. In doing so, the court reviewed the numerous submissions from Brown and the prosecutor, including the declarations of Dr. Woods and the records concerning Brown's criminal and mental health history. Exhibit 1, at 1-9. The court found Brown had never raised an issue of insanity or incompetency prior to filing the current motion. *See, e.g.*, Exhibit 1, at 2-4.

The court found his confessions to the crime showed "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." Exhibit 1, at 5 ¶ 14. "[D]efense 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." Exhibit 1, at 5 ¶ 15.

After reviewing records from 2009 and 2010, the court found "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." Exhibit 1, at 7 ¶ 21. The court found Brown had been prescribed and taken either lithium or Divalproex for

bipolar disorder, but the court also found the medications, while psychotropic, are not anti-psychotic medications. Exhibit 1, at 7 ¶ 22. The court found Brown's use of the medication is apparently voluntary. Exhibit 1, at 7 ¶ 22. The state trial court also found "There is no evidence that Brown . . . whether on or off medication, has suffered from hallucinations, delusions, any form of psychosis or other dissociation from reality that would render him incompetent." Exhibit 1, at 8 ¶ 24. The court found Brown denies having delusions or hallucinations, and "Defense counsel, who have regular contact with Brown, do not argue that he is currently incompetent to be executed." Exhibit 1, at 7 ¶ 22. The court found Brown's mental illness and medications did not render him incapable of understating his current predicament:

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 never been clouded by psychosis.

Exhibit 1, at 8 ¶ 24.

The court considered Dr. Woods' opinion as to Brown, but found that Dr. Woods provided no bases for these opinions. Exhibit 1, at 8-9 ¶¶ 25-27. The court found Dr. Woods does not describe any instance of Brown actually

experiencing an episode of psychotic proportions, and he does not cite any documentation or evaluation by another health professional of Brown experiencing psychosis. Exhibit 1, at 9 ¶ 27. The court found there was no professional literature or other basis for Dr. Woods' assertion that Brown will now manifest psychosis if he discontinues his medication. Exhibit 1, at 9 ¶ 27. The court found Dr. Woods' opinion "is speculative." Exhibit 1, at 9 ¶ 28.

The state trial court found that while Brown's mania may have intensified without medication in the past, "there is no evidence Brown suffered a thought disorder, delusions or hallucinations, or was ever insane." Exhibit 1, at 9 ¶ 28. The court found Dr. Woods' opinions did not present substantial evidence or even a prima facie claim that Brown would become incompetent without medication. Exhibit 1, at 9 ¶ 29.

The state trial court found Brown did not make a substantial showing of incompetency, and in fact the court found Brown is currently competent. Exhibit 1, at 10 ¶¶ 3 and 4. The court concluded there is no evidence Brown has been forced to take medication, and 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 if he were to discontinue his medication. Exhibit 1, at 10 ¶ 2. The court found Brown is competent, and

found “Cal Coburn Brown has produced no evidence of current incompetency or probable incompetency if his medications were discontinued.” Exhibit 1, at 10 ¶ 4. The court denied an evidentiary hearing, and denied a stay of execution. Exhibit 1, at 10. The Washington Supreme Court denied review and denied a stay of execution. Exhibit 9.

D. Brown’s Current Federal Habeas Proceedings

Mere hours before his execution, Brown his current habeas corpus petition in the district court, and he moved for a stay based solely upon an “issue” of possible incompetence. The State responded to the petition and motion for a stay. The district court denied a stay of execution.

Brown now moves for a stay of execution from this Court. Brown argues he has made a threshold showing concerning his competency, but the simple fact is that Brown has never alleged or argued, even before this Court, that he is actually currently incompetent. At most, Brown merely alleges that he may become incompetent if he stops taking his medication (a prerequisite condition that has not occurred – Brown is still taking his medication). Brown’s claim fails to show any basis for relief. The motion is not a legitimate request for relief, but is a thinly veiled last ditch effort to avoid the execution by any means. The State respectfully requests that the Court deny a stay.

III. ARGUMENT

Federal habeas is not a vehicle for indefinite delays of executions. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). A stay of execution “should reflect the presence of substantial grounds upon which relief might be granted.” *Id.* at 895. The Court should deny a stay if the petitioner is not entitled to relief. *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996). It is proper for the Court to deny a stay following a “summary proceeding” in which the appellant's claims are determined to be without merit. *Id.*; *Barefoot*, 463 U.S. at 888-91.

The State suffers severe prejudice from any delay in the execution of a valid sentence. *In re Blodgett*, 502 U.S. 236, 239-40 (1992); *Hill v. McDonough*, 547 U.S. 573, 584 (2006). There is a strong presumption against a stay when the challenge is brought on the eve of an execution. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Consequently, the Court should not automatically grant a stay of execution. Rather, a stay of execution must reflect “the presence of substantial grounds upon which relief might be granted.” *Barefoot*, 463 U.S. at 894-95. A federal court may grant a stay only when the petitioner shows a significant possibility of success on the merits. *Id.* at 888; *Hill*, 547 U.S. at 584; *Gomez v. U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992).

A. To Show A Likelihood Of Success, Brown Must Overcome The Deferential Standards Imposed By 28 U.S.C. § 2254

To obtain a stay, Brown must show a likelihood of success on the merits. To show a likelihood of success in this proceeding, Brown must show that he can obtain relief under the deferential standards imposed by the Antiterrorism and Effective Death Penalty Act. *Schriro v. Landrigan*, 550 U.S. 465 (2007) (petitioner's entitlement to an evidentiary hearing rests upon a review of the claim in light of the standards imposed by 28 U.S.C. § 2254). Brown must prove the state court adjudication was an unreasonable application of clearly established federal law as determined by the Supreme Court, or prove the state court adjudication was based upon an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d). It is not enough to show the state court erred. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Instead, Brown must show the state court decision was unreasonable. *Id.* The fact that reasonable minds reviewing the same record might disagree about the correct resolution of an issue is not sufficient. *Rice v. Collins*, 126 S. Ct. 969, 976 (2006). "Only if the evidence is 'too powerful to conclude anything but' the contrary" of the conclusion reached by the state court should the federal court grant relief. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005)).

Moreover, Brown's claim necessarily rests upon the factual issue of competency. The state court determination of competency is presumed correct. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983); *Langford v. Day*, 110 F.3d 1380, 1390-91 (9th Cir. 1996); *Moran v. Godinez*, 57 F.3d 690, 696 (9th Cir. 1994). The presumption applies to findings made by the state's appellate courts and trial courts. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981). Brown must overcome the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Brown Failed To Make The Substantial Showing Of Incompetency

Brown argues he made the required threshold showing. But in *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007), the Court determined Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986) constitutes the "clearly established" law for purposes of 28 U.S.C. § 2254(d). "Justice Powell's opinion states the relevant standard as follows. Once a petitioner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 426). "Petitioner was entitled to these protections once he had made a 'substantial threshold showing of insanity.'" *Id.* at 950.

Panetti made a substantial showing of insanity. An evaluation at trial showed Panetti “suffered from a fragmented personality, delusions, and hallucinations.” *Panetti*, 551 U.S. at 936. In a prior psychotic episode, Panetti was “convinced the devil had possessed their home and that, in an effort to cleanse their surroundings, petitioner had buried a number of valuables next to the house and engaged in other rituals.” *Id.* During trial, Panetti engaged in “‘bizarre,’ ‘scary,’ and ‘trance-like.’” Behavior. *Id.* The trial attorney believed Panetti’s was mentally incompetent. *Id.* Panetti also stopped taking his anti-psychotic medicine, and after trial the state court determined Panetti lacked the competency to waive the appointment of state habeas counsel. *Id.* at 936-37. Panetti raised the issue of competency to stand trial in his state court proceedings, and in his first federal habeas proceedings. *Id.* at 937. When subsequently challenging his competency to be executed, Panetti presented a declaration from a psychologist and a law professor that demonstrated Panetti did not understand the reasons he was about to be executed. *Id.* at 938. Moreover, experts testified that Panetti had a “schizo-affective disorder . . . resulting in a ‘genuine delusion’ involving his understanding of the reason for his execution.” *Id.* at 954. Panetti believed that “his execution was part of a spiritual warfare between the demons and the forces of the darkness and God

and the angels and the forces of light.” *Panetti*, 551 U.S. at 954. Panetti believed the State’s claim that it was executing Panetti for murder was “a ‘sham’ and the State in truth wants to execute him ‘to stop him from preaching.’” *Id.* at 954-55. Panetti made the “substantial threshold showing.”

Similarly, Ford was plainly psychotic and delusional such that he did not have any real grasp on reality. Although not insane or incompetent at trial, Ford’s mental state deteriorated after sentencing. *Ford*, 477 U.S. at 402. After reading a news story about the Ku Klux Klan, Ford developed an obsession with the Klan, he brooded about his “Klan work,” and he suffered “an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide.” *Id.* Ford “believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds.” *Id.* Ford later began to believe that his female relatives were tortured and sexually abused in the prison, and that the people at the prison had taken members of his family hostage. *Id.* “The hostage delusion took firm hold and expanded, until Ford was reporting that 135 of his friends and family were being held hostage in the prison, and that only he could help them.” *Id.* “By ‘day 287’ of the ‘hostage crisis,’ the list of hostages

had expanded to include ‘senators, Senator Kennedy, and many other leaders.’” *Ford*, 477 U.S. at 402. Ford later wrote a letter to the Florida Attorney General, claiming to have ended the “hostage crisis” by firing a number of prison officials. *Id.* Ford “began to refer to himself as ‘Pope John Paul, III,’ and reported having appointed nine new justices to the Florida Supreme Court.” *Id.*

Ford told a psychiatrist “that ‘I know there is some sort of death penalty, but I’m free to go whenever I want because it would be illegal and the executioner would be executed.’” *Ford*, 477 U.S. at 403. Ford told the psychiatrist, “‘I can’t be executed because of the landmark case. I won. *Ford v. State* will prevent executions all over.’” *Id.* Ford made these statements amidst long streams of seemingly unrelated thoughts in rapid succession. *Id.* The psychiatrist “concluded that Ford had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves.” *Id.* Ford further regressed into nearly complete incomprehensibility, speaking only in a code Ford created using the word “one.” *Id.*

Ford and Panetti were clearly delusional and insane, and they made a “substantial showing” of insanity. But as the state court found, Brown did not. While Brown contends he has raised a “colorable issue” as to competency that is not the proper standard. A “colorable issue” is one that is simply plausible. A substantial showing requires the presentation of evidence that actually satisfies the appropriate legal standard. Without a “substantial” showing, a defendant is simply not entitled to the procedures set forth in *Ford* and *Panetti*. Brown failed, in state court and in federal court, to present evidence necessary to make the substantial threshold showing that he is incompetent to be executed. At most, Brown provided evidence that he “might” become incompetent if he stops his medication. Reviewing Brown’s proffered evidence, the state court determined that Brown had not made a substantial showing of incompetency, and the state court determined Brown was actually competent. Brown did not rebut the state court determination of the facts, and he did not show the state court adjudication was unreasonable.

The *Panetti* Court recognized there was no retributive value in “executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life . . . [or] who has no capacity to come to grips with his own conscience or deity....” *Panetti*, 551 U.S. at 957.

The Court also recognized it is not proper to execute “. . . the prisoner whose mental state is so distorted by a mental illness 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.” *Panetti*, 551 U.S. at 957. Yet, the *Panetti* Court also recognized that serious mental illnesses short of insanity would not bar execution. *Id.* at 959-60. Brown failed to make a substantial showing that he is incompetent under the standards in *Panetti* and *Ford*. The state court correctly denied his claim.

C. Brown Did Not Rebut The State Court Competency Determination

Brown has not made a “substantial threshold showing of insanity” that would justify further inquiry into whether he is sane to be executed. *Panetti*, 551 U.S. at 949. Brown does not allege that he is delusional. Brown does not allege that he fails to understand the sentence or the reasons it was imposed, or that he is presently incapable of understanding that the sentence is going to be carried out. Brown’s most recently hired expert asserts only that he *might* not be able to understand his fate *if* he was not medicated. As the state court reasonably determined, this speculative opinion is not supported by any evidence that Brown was ever delusional, and it is insufficient to demonstrate that Brown would become delusional if he stopped his medications. Exhibit 1.

Brown complains that the state court incorrectly disregarded the opinion of Dr. Woods, but Dr. Woods never opines that Brown is currently incompetent. Dr. Woods opines, at most, that Brown has a long-time mood disorder that, *if not medicated, may* affect his ability to understand that he is going to be executed. Moreover, Dr. Woods relies on evaluation reports that do not support his opinion. For example, a report dated May 4, 1995 shows “Brown denied hallucinations and no idea of reference or delusion was elicited.” Exhibit 7, Attachment B, at 1. The report refers to Brown as “a nonpsychotic individual.” Exhibit 7, Attachment B, at 2. Similarly, a report from September 1996 notes Brown “was rational, coherent, and appropriately responsive to all questions.” Exhibit 7, Attachment C, at 1. Similarly, a report completed in 2009 indicates Brown was aware of the developing results of his challenge to lethal injection, and was “stable.” Exhibit 7, Attachment D.

In his second declaration, Dr. Woods states:

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 [sic] has experienced both depression and mania of psychotic proportions. These disruption [sic] 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.

Exhibit 7, Attachment E (second declaration).²

Dr. Woods' entire opinion is couched in probabilistic, subjunctive and conditional terms that never claim Brown is currently incompetent. This fact reveals that Dr. Woods knows Brown is *actually*, at present, capable of understanding his situation, his peril, and the legal consequences of his crime, and that Brown "may" be insane only if certain conditional events were to occur. These conclusions simply say that if Brown were not medicated he might suffer more pronounced mania. This showing is a far cry from the showing required under *Ford* and *Panetti*. Moreover, the fact Dr. Woods states his conclusions in such terms is an implicit concession that Brown is presently aware of his situation and not insane. In short, Brown fails to show he is currently incompetent.

² It appears that Dr. Woods has either confused Brown's symptoms with those of another patient, "Mr. Scott," or he simply cut-and-pasted Brown's "evaluation" from an evaluation he previously prepared for a "Mr. Scott." Exhibit 7, Attachment E, at ¶ 4 b. Either possibility seriously undermines the credibility of his evaluation. How much of the evaluation is tailored to Brown and how much is actually relevant to someone else.

Although Dr. Woods asserts that he is aware of the appropriate legal standard, he fails to apply that standard. The only present evidence of mental illness that Dr. Woods identifies is pressured speech and grandiosity, but this does not indicate that Brown is out of touch with reality. Dr. Woods does not opine that Brown is insane or that Brown is delusional. He does not even opine that Brown *would* be delusional if he stopped taking medication; he simply says that “his capacity to rationally understand the reason for his execution” “may” be "impaired" if he stopped taking medication.

Brown captured, tortured, and raped his victim, then killed her when she was no longer of use to him and left her in the trunk of her car in an airport parking lot. Throughout these events Brown was cool, calculating, and at times charming, to the people he encountered. According to Brown, he was not taking lithium, yet there is not a shred of evidence that he was delusional or insane at the time of his crime. Even Brown’s prior expert, Dr. Scher, agreed that without medication Brown still knew what he was doing when he raped, tortured, and murdered Holly Washa, that he was not delusional or psychotic, that he was not hallucinating, that he knew right from wrong, and that he is highly intelligent. Exhibit 2.

Another key failing in Brown's contention is the assumption that persons with bi-polar disorder are necessarily psychotic and unable to understand what is happening to them. Thousands of people suffer from bi-polar disorder to varying degrees. Many are high-performing professionals. They are aware of their surroundings, capable of rational thought and decision-making, and the vast majority do not kill anyone. *See* Exhibit 2, at 107-08.

D. The Evidence Supports The State Court Competency Determination

For the reasons set forth above, Brown has not met the legal standard that would justify a stay. The objective evidence show that Brown knows exactly what is going on with his legal proceedings.

Throughout eighteen years of trial and appellate litigation in state and federal courts, Brown's attorneys have never alleged that he is incompetent. Brown has rationally assisted his counsel throughout these lengthy proceedings, and no claim to the contrary is made even now. Brown has consistently been described as a person of extremely high intelligence who acted with cunning and deliberation in committing his crimes. There is no indication that his behavior or medical routine has recently changed. In other words, there is no old or new evidence of disturbed thought processes that inhibit Brown's perception of reality.

There is recent evidence, however, that Brown is quite unlike Ford and Panetti. Three declarations by corrections officials who have spoken directly to Brown about his impending execution dates, both this year and last year, are attached. *See* Exhibits 4-6. Brown was perfectly aware of his pending execution in March 2009, taunting officials as he was being led to the execution chamber, saying that they would simply have to bring him back once a stay was granted. Exhibit 4. After a stay was granted, Brown was “giddy and cocky. Mr. Brown was laughing, gloating, and making jokes directed at correctional staff. Mr. Brown stated to correctional staff, ‘I want to stay long enough that I get my pizza and root beer.’” Exhibit 4. Brown’s conduct was wholly rational and shows a keen awareness of his legal victory in 2009.

More recently, the prison superintendent twice met with Brown observed his demeanor and mental processes in relation to the scheduled execution. At first, Brown was “happy go lucky and cocky,” saying that “he had appeals pending that would stop his execution.” Exhibit 6, at 1. Brown refused to choose a method of execution on the advice of counsel, and he asked the superintendent to name the members of the execution team. These responses indicate that Brown is following the advice of counsel about his pending execution, and that he is well-versed in the details of the litigation, to the point

he made sarcastic comments about one of his legal issues, i.e., disclosing the names of the execution team members. Brown's demeanor became more subdued after a stay was denied in the lethal injection challenge, indicating that he was aware that he had suffered a legal setback. Exhibit 6, at 2. Brown also made choices about his last meal, sarcastically deriding the limited choices, and the Superintendent confirmed that Brown had been taking all his prescribed medications. Exhibit 6, at 2.

The associate superintendent met with Brown in the last few weeks. Brown was "cocky and ... of the belief that he was not going to be executed because he had appeals pending." Exhibit 5, at 1. After a stay was denied, his demeanor was "markedly different" and "stoic." Exhibit 5. This change reflects a clear understanding of his legal peril. On September 2, 2010, Mr. Bowman met with Brown and discussed disposition of his remains and his property, and the arrangements for the execution day, including his last meal. Brown reviewed and commented on paperwork covering these matters. His demeanor was again "cocky" and he said that "Judge Coughenour's ruling was not the end of the line for him." He said he was not worried about being executed because "his lawyers had new challenges and new surprises they would be filing in the next week to stop the execution." Brown assured

Bowman that he would not make offensive comments to the victim's family during the execution. He said that he realized he cannot control his destiny and that he understood that he may be executed. He chose to give his personal belongings to his lawyer. All these actions and statements evince a clear understanding of the situation he faces.

Moreover, several Mental Status Examinations (MSE) were repeatedly performed on Brown over the last year and a half. Exhibit 8. The most recent available report was prepared approximately six weeks ago on July 20, 2010. Exhibit 8, at 1. That report shows that Brown was oriented as to time, place, person and situation. Exhibit 8, at 1. Brown was neatly groomed, had good eye contact, was cooperative, and spoke at a normal rate. Exhibit 8, at 1. His psychological processes were normal, his thoughts were well-organized, and his perception, affect and mood were all normal. Exhibit 8, at 1. His sleep, appetite and weight were normal. Exhibit 8, at 1. These findings are consistent with the findings made in all the status reports. Exhibit 8, at 1-6.

In January 2009, the mental health professional found there was "no indication of emotional or cognitive distress." Exhibit 8, at 2. On February 5, 2009, Brown expressed frustration with the system, but the health professional found Brown "presented without indication of emotional or cognitive distress."

Exhibit 8, at 3. The report from February 2009 shows that even just before the previous execution date of March 13, 2009, Brown had normal cognitive processes. Exhibit 8, at 4. In fact, the report shows Brown was rationally aware of his predicament:

Offender Brown talked resignedly about his frustration with DOC and the clock winding down toward his execution. He felt that many of the little rules governing life in the IMU were unnecessary and did not make sense. He presented with no indication of acute emotional or cognitive distress.

Exhibit 8, at 4.

In June 2009, after his execution had been stayed, Brown still showed no signs of emotional or cognitive distress. Exhibit 8, at 5. Brown was still properly oriented as to time, place, person and situation, and his thoughts, perception, affect and mood were all normal. Exhibit 8, at 5. In October 2009, Brown interacted appropriately, discussed his case, and showed no signs of distress. Exhibit 8, at 6.

Brown himself has provided concrete evidence of his competency by speaking to the clemency board telephonically last year. Exhibit 3. Brown clearly articulated his guilt for the crime, said that his crimes were horrible and that his victim's memory haunts him. Exhibit 3, at 15-16. Brown even said "God knows I wish I could [bring Holly Washa back]." Exhibit 3, at 16. This

statement indicates either that Brown “has . . . [the] capacity to come to grips with his own conscience or deity. . . .”, see *Panetti*, 551 U.S.at 957, or that Brown can feign a conscience to the board considering his fate. Brown’s speech is clear, his thoughts are directed, and there is no hint of irrational thought or delusions. Brown’s lawyer, Ms. Elliott, never suggested that Brown’s mental state was compromised in any respect.

Finally, even the comments of someone sympathetic to Brown shows he is not insane or delusional. As detailed in a recent news article, Brown is keenly aware of the ongoing efforts to stall imposition of sentence, and he hopes his lawyer’s gambits are successful. In a recent report, Judith Kay, an ethics professor at the University of Puget Sound, said she has been in contact with Brown and other death row inmates for nearly 10 years. Kay said she met with Brown at the Washington State Penitentiary, in Walla Walla, last week and said that he remains hopeful an appeals court would grant a stay.

“He said it's not going to be over until it's really, really over,” said Kay, who is opposed to the death penalty. “He's anxious and nervous but handling it well.”

http://seattletimes.nwsourc.com/html/theblotter/2012793891_browns_lawyers_ask_federal_cir.html (accessed 9/4/10).

Brown fails to rebut the state court determination by clear and convincing evidence, and he fails to show the state court adjudication was objectively unreasonable. On the contrary, the evidence supports the state court determination, and it shows the state court's decision was not only reasonable, but the correct determination. Brown fails to show a likelihood of success under the deferential standards imposed by 28 U.S.C. § 2254.

E. Equity Bars A Stay Of Execution

The Court “must take into consideration the State’s strong interest in proceeding with its judgment. . . .” *Nelson*, 541 U.S. at 649. “Given the State’s significant interest in enforcing its criminal judgment, . . . there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 650 (citations omitted). Any delay, even a brief one, prejudices the compelling interests of the State and the family of Holly Washa. *Blodgett*, 502 U.S. at 239-40. “At some point in time, the State has a right to impose a sentence – not just because the ‘State’s interests in finality are compelling,’ but also because there is a ‘powerful and legitimate interest in punishing the guilty,’ which attaches to ‘the State and the victims of crime alike.’” *Workman v. Bredesen*, 486 F.3d 896, 913 (6th Cir. 2007).

Brown's claim was brought mere hours before his execution for the sole purpose of delaying the execution. Despite their assertions that mental health experts need to be appointed, evaluations performed, and evidentiary hearings held, Brown's lawyers have never, in the almost two decades since Brown's crime, asserted that he is insane and incompetent. Brown did not make that claim 18 months ago when he faced execution on March 13, 2009, and there is no allegation that Brown's mental state has changed *recently*, such that the motion could not have been brought until the eve of his execution. This motion is brought at the eleventh hour for tactical reasons. *See* Exhibit 5, at 2 ("Mr. Brown also told me that he was not worried about being executed and his lawyers had new challenges and new surprises they would be filing in the next week to stop the execution"). This Court should deny Brown's motion.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 9th day of September, 2010.

ROBERT M. MCKENNA
Attorney General

s/John J. Samson
JOHN J. SAMSON, WSBA #22187
Assistant Attorney General

No. 10-35798

Cal Coburn Brown v. Stephen Sinclair

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2010, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

SUZANNE LEE ELLIOTT: suzanne-elliott@msn.com

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

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

s/ Kathy Jerenz
KATHY JERENZ

EXHIBIT 1

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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

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
DEFENDANT'S COMPETENCY TO BE EXECUTED - 1

ORIGINAL

EXHIBIT 1

1 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

2 FINDINGS OF FACT

3 Procedural History

- 4 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
- 5 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
6 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
- 7 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
8 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,
9 claim that the lack of lithium rendered him insane or delusional at the time of the murder
- 10 4 The jury found that there were not sufficient mitigating circumstances to merit leniency
Brown, therefore, was sentenced to death on January 28, 1994
- 11 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
12 Penitentiary, Brown has on multiple occasions been diagnosed with bipolar disorder and

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

2 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
3 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
4 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
5 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
6 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
7 proceedings, or presently, to assist his counsel.

7 Brown's federal habeas corpus matter concluded on January 28, 2009, when the federal
8 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.

9 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
10 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
11 could bring his victim back.

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

1 protocol violated the Eighth Amendment. This stay was lifted on July 29, 2010. By
2 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.

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

6 **Brown's Mental Health History**

7 11 Brown was born in 1958. As an infant and child he was reported to be very agitated and
8 "out of bounds." While in primary grades he was referred to mental health counseling.
9 Teachers noted Brown's aggression at age 8. As he moved through the school system,
10 Brown's behavioral patterns of anger, irritability, excitability, and mood dysregulation
11 continued. At age 18 Brown stalked and assaulted two women and pled guilty to assault
12 with a deadly weapon in 1979.

13 12 In 1983 he attacked a woman and was convicted of assault in the second degree and
14 attempted assault in the first degree. He was sentenced to 7 ½ years in the Oregon State
15 Prison for this crime in 1984. He complied with prison rules and received only one
16 infraction during his incarceration. In 1985, prison mental health professionals diagnosed
17 Brown as suffering from a mood disorder and prescribed lithium. Brown filed suit
18 against the prison to receive the lithium, and he was medicated during the last six months
19 of his incarceration. He was released on March 25, 1991 with a 30-day supply of lithium.
20 He apparently discontinued his lithium, and was reported by family members shortly
21 thereafter to have "wild" and pressured speech, and to be "way out."

1 13 On May 23, 1991 defendant abducted Holly Washa from her car and ultimately tortured,
raped and murdered her

2 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
3 interviews to police on May 27, 1991 at 11 20 a m , May 27, 1991 at 7 55 p m and on
4 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
5 peril

6 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
7 actions he committed, knew what he was doing, and appreciated right from wrong

8 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
9 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
10 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
11 at least hypomanic and possible manic episodes Currently exhibiting hypomanic
symptoms " Other diagnoses included Sexual Sadism, Antisocial Personality Disorder,

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

2 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
3 Bi-Polar Affective Disorder "

4 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
5 Disorder " He characterized the defendant as a "nonpsychotic individual" During his
interview/evaluation, Brown denied hallucinations and delusions, but described "a history
6 of hypomania and rapid mood cycling, especially when off of psychotropics " Brown
reported that on his current regimen of Lithium and Simequan he "apparently maintains
7 fair emotional stability and sleeps satisfactorily " Dr Page found that during Brown's
incarceration he "has been accountable, tractable, and relatively low-key "

8 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
9 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
10 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
11 when he was incarcerated there

1 20 On July 16, 2009, psychiatrist Dr. Grubb of the Penitentiary diagnosed Brown's bipolar
2 disorder as "more or less stable" and prescribed continuing the psychotropic medication
Depakote

3 21 Psychological Associates for the Department of Corrections periodically conducted
4 routine mental status examinations of Brown during 2009 and 2010. These records
5 uniformly indicate the defendant is oriented to time, place, person, and situation, and
6 demonstrates normal content of thought, well organized thought, and normal perception,
7 affect and mood

8 22 Since 1994 Brown has been prescribed and taken either lithium or Divalproex for his
9 bipolar disorder. These medications are known as psychotropics (having an altering
10 effect on the mind) but are not anti-psychotics. Brown takes these medications without
11 objection, although since he is incarcerated it cannot be known if his acquiescence is
12 "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

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

2 24 There is no evidence that Brown, during his long experience with bipolar disorder since
3 at least his young adult years, whether on or off medication, has suffered from
4 hallucinations, delusions, any form of psychosis or other dissociation from reality that
5 would render him incompetent. That is, his mood disorder does not and never has
6 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

7 25 Defendant relies primarily on the two declarations of psychiatrist George W. Woods, Jr.
8 M.D., both of which were signed on September 3, 2010. Dr. Woods is board certified in
9 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.

10 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.

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

3 27 Dr Woods does not provide bases for these opinions He does not describe any instance
4 in which Brown, even off medication, has experienced either depression or mania of
5 psychotic proportions, nor can he cite to any documentation or evaluation by another
6 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
7 psychosis will now manifest psychosis if he discontinues his medication Absent
8 psychosis or other thought disorder, Brown's mood disorder does not impair his
9 perception of reality and does not affect his competency

10 28 Dr Woods' opinion that Brown's unmedicated bipolar disorder may impair his capacity
11 to understand the reasons for his execution is speculative During the many years Brown
12 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

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

2 CONCLUSIONS OF LAW

- 3 1 Brown's mental state is not distorted by a mental illness such that his awareness of the
4 crime and punishment has little or no relation to the understanding of those concepts
5 shared by the community as a whole
- 6 2 Although competency to execute may be obtained through the voluntary or forced
7 administration of medically necessary drugs, there is no evidence that Brown has been
8 forced to take medications. More importantly, there is also no evidence that the
9 medication that Brown is currently taking is necessary for him to be rendered competent.
10 Even if he were to discontinue his psychotropic medications, there is no evidence that
11 Brown would become insane, delusional, unaware of his crime or impending punishment,
12 or unaware of the reasons for his punishment
- 13 3 Brown is competent to be executed because he is capable of properly appreciating his
14 peril and of rationally assisting in his own defense
- 15 4 Brown has failed to make a substantial showing of incompetency. Cal Colburn Brown
16 has produced no evidence of current incompetency or probable incompetency if his
17 medications were discontinued

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

20 ORDER

- 21 1 Cal Coburn Brown's motion for a stay of execution and for an evidentiary
22 hearing into his competency is denied

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2 Cal Coburn Brown's motion for reconsideration is denied

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



JUDGE SHARON S ARMSTRONG

EXHIBIT 2

Scher Cross

99

1 THE COURT: All right.

2 CROSS-EXAMINATION

3 BY MR. SAMSON:

4 Q Good afternoon, Doctor.

5 A Good afternoon, Mr. Samson.

6 Q Doctor, the -- you mentioned a prior treating psychiatrist
7 who had put down in the records "rule out manic depressive."
8 Do you remember that doctor's name?

9 A Dr. Engel.

10 Q Dr. Engel did not prescribe lithium. Is that correct?

11 A He wrote -- as far as I can tell, no, he did not, although
12 Mr. Brown said he did. But Dr. Engel in a later -- at a later
13 time was interviewed and said in his records he did not see
14 that he had done that.

15 Q And rule out is a term used to essentially do that, rule
16 out a possible --

17 A It says you're thinking about the particular disorder in
18 regard to the individual that you're talking to.

19 Q But it's not that you're a hundred percent certain they
20 have it.

21 A That's right.

22 Q And, Doctor, you mentioned you relied on some medical or
23 mental health records that were created by psychiatrists and
24 psychologists at the state penitentiary?

25 A Yes.

WITHOUT REPORTER'S ORIGINAL SIGNATURE
THIS TRANSCRIPT IS NOT CERTIFIED

EXHIBIT 2

Scher Cross

100

1 Q Those were all created after Mr. Brown's trial in state
2 court in this case.

3 A That's correct.

4 Q So if you had given an opinion in 1993 at Mr. Brown's
5 trial, you would not have had those documents --

6 A That's correct.

7 Q You do not disagree with Dr. Maiuro's diagnosis of sexual
8 sadism.

9 A No. I don't disagree with that.

10 Q And that is a mental disorder?

11 A It's in the DSM.

12 Q Doctor, you mentioned that Mr. Brown tortured and raped
13 Holly Washa.

14 A Yes.

15 Q You've read his confessions?

16 A I heard parts of them.

17 Q You've actually listened to the tape?

18 A A bit of it. Not a lot of it. It was very hard to
19 understand.

20 Q He took pleasure out of those acts, did he not?

21 A I don't know.

22 Q As a sexual sadist he would receive sexual excitement from
23 acts such as torture and rape, would he not?

24 A Yes.

25 Q And he would receive pleasure from such acts?

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THIS TRANSCRIPT IS NOT CERTIFIED

Scher Cross

101

1 A I don't know that that's in the diagnosis of sexual sadism
2 but he certainly would be stimulated by it.

3 MR. SAMSON: Your Honor, if I may approach, please.

4 THE COURT: All right.

5 Q BY MR. SAMSON: Doctor, I've handed up a copy of your
6 deposition. You recall the deposition that I took of you --

7 A Yes.

8 Q -- a few months past?

9 A Uh-huh.

10 Q And you were under oath.

11 A Yes, I was.

12 Q And I asked you to give the best answer you could possibly
13 give to the questions I asked you?

14 A Yes.

15 Q And I allowed you to clarify any answers that you had
16 given, if you later needed to correct those?

17 A Yes.

18 Q If you could turn to page 22 of your deposition.

19 A I said I assume he was getting some pleasure out of
20 torturing these people and that certainly had painful
21 consequences.

22 Q So you assumed he was getting pleasure out of --

23 A Yes, I guess so.

24 Q And you're aware that Mr. Brown used a electrical cord
25 with the ends cut off to shock Holly?



01-CV-00715-TN pg 101-150

Scher Cross

102

- 1 A Yes. With electricity, yes.
- 2 Q So he would have gotten pleasure out of that?
- 3 A I assume so.
- 4 Q And he raped her with an after shave bottle?
- 5 A Yes.
- 6 Q He would have gotten --
- 7 A Both vaginally and anally.
- 8 Q And he would have gotten pleasure out of that.
- 9 A I assume so.
- 10 Mr. Brown did many terrible things to that woman.
- 11 Q And as a sexual sadist -- does a person with sexual
- 12 sadism, do they get pleasure or sexual excitement from their
- 13 fantasies of this type of behavior?
- 14 A Yes.
- 15 Q So as Mr. Brown sits in his cell and thinks back on what
- 16 he did, he still receives some sexual excitement from that?
- 17 MR. LEVY: Objection, Your Honor.
- 18 THE WITNESS: Well, I don't know.
- 19 THE COURT: Sustained. Let's move on, counsel.
- 20 MR. SAMSON: Very good, Your Honor.
- 21 Q The antisocial personality disorder is an axis II
- 22 disorder.
- 23 A That's right.
- 24 Q That's his personality.
- 25 A That's right.

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Scher Cross

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- 1 Q The same with sexual sadism?
- 2 A I don't know where that fits. It's actually a disorder
3 that I haven't had much to do with, and I just don't know.
- 4 Q You're not a forensic psychiatrist?
- 5 A No.
- 6 Q Your specialty is in multiple personality disorder?
- 7 A No. I don't have a specialty in psychiatry. I have dealt
8 with a lot of multiple -- nobody has a specialty in a certain
9 type of disorder.
- 10 Q You've not published any literature on bipolar disorder?
- 11 A No, I have not.
- 12 Q You've not published any literature on lithium treatments?
- 13 A No.
- 14 Q You've not published anything on antisocial personalities?
- 15 A No.
- 16 Q And you have not reviewed any published literature
17 specifically in preparing your opinion in this case.
- 18 A No.
- 19 Q Did you interview Mr. Brown's family members?
- 20 A No, I did not.
- 21 Q It took you several months to prepare your opinion in this
22 case?
- 23 A Yes.
- 24 Q You started in February 2002?
- 25 A Yes.

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Scher Cross

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1 Q And you did not provide a written report until
2 October 2002?

3 A That's right. That's when I was asked to first provide
4 the report that I read from.

5 Q And at the time you were preparing your opinion you were
6 semiretired?

7 A Yes.

8 Q You were only working two days a week?

9 A That's right.

10 Q In 1993 you worked 85 percent?

11 A In 1993?

12 Q 1993.

13 A '93, yes.

14 Q You worked at Harborview --

15 A Yes, I was at Harborview at the time.

16 Q And you saw patients at that time in '93?

17 A Uh-huh. Yes.

18 Q You taught classes in '93?

19 A Yes.

20 Q You had a full workload in 1993?

21 A Right.

22 Q A diagnosis of unipolar is different from your diagnosis
23 of bipolar one. Is that correct?

24 A Bipolar disorder. Well, yes, but -- well, I already
25 explained what I thought happened there.

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1 Q But it is different.

2 A It's -- yes. The words are different. But unipolar would
3 be the manic phase of the bipolar disorder.

4 Q Psychiatrists disagree. Would you agree psychiatrists can
5 look at the same patient and two psychiatrists could come up
6 with a different diagnosis?

7 A Obviously.

8 Q That's happened in this case?

9 A Well, you must be hiring somebody to rebut what I say.

10 Q And you agree that a majority of the professionals who
11 evaluated Mr. Brown in the 1980s, they diagnosed him as having
12 antisocial personality disorder. Correct?

13 A Which ones are you referring to?

14 Q You've reviewed his reports from the 1980s?

15 A Yes.

16 Q Those reports, the majority of the psychiatrists and
17 psychologists in the 1980s determined that Mr. Brown had
18 antisocial personality disorder.

19 A You're talking about the psychologists who tested him
20 repeatedly and then the two social workers that saw him at the
21 Oregon state penitentiary?

22 Q I'm talking about the medical records you reviewed from
23 the 1980s. Would you agree that the majority of those
24 professionals determined he had antisocial personality?

25 A Yes.

- 1 Q That's the most consistent diagnosis.
- 2 A Yes. But the psychologist didn't give him the tests that
3 would show whether he was bipolar or not.
- 4 Q But they did not reach bipolar diagnosis. You agree with
5 that?
- 6 A They weren't giving him the tests that would show it. The
7 social workers did and the psychiatrist that gave him the
8 medication did. They all did.
- 9 Q But they were the only ones. Right?
- 10 A In the eighties. I'm trying to think when Dr. Engel saw
11 him. I think he was in the eighties, too, and he mentioned
12 that as a rule-out.
- 13 Q But he did not prescribe lithium.
- 14 A He says he didn't. Mr. Brown says he did.
- 15 Q Now, one of your opinions in this case is that if
16 Mr. Brown was on lithium and properly treated he'd be less
17 likely to have committed the crime he committed?
- 18 A That's my opinion, yes.
- 19 Q But you can't say how less likely?
- 20 A There's no way to say that.
- 21 Q You can't say five percent --
- 22 A No way.
- 23 Q You have not subjected your opinion in this case to peer
24 review?
- 25 A How would I do that?

1 Q Publish it.
2 A Oh, no. We don't publish single cases hardly at all.
3 Q So you have not done that.
4 A Right.
5 Q And there's no published criteria that you're aware of
6 supporting your opinion that Brown would have been less likely
7 to commit sexually violent crimes if treated with lithium.
8 Isn't that correct?
9 A I don't know of any literature about that.
10 Q And you did not run any tests to determine how less likely
11 Brown would have been to commit a sexually violent crime if
12 treated with lithium.
13 A There aren't any tests that you can do.
14 Q You didn't conduct any studies regarding that either.
15 Correct?
16 A I wouldn't even know how to do that.
17 Q And as a psychiatrist you cannot accurately predict the
18 likelihood of someone committing a crime.
19 A Psychiatrists or anybody else can't predict if they're
20 going to commit a crime.
21 Q You can't?
22 A You can say they're more likely to.
23 Q But you can't say how much more.
24 A No.
25 Q And there's no proof of a direct causal connection between

Scher Cross

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1 bipolar disorder and killing. Would you agree?

2 A No. There's no proof of that.

3 Q The vast majority of people with bipolar disorder do not
4 kill?

5 A They certainly do not.

6 Q And the vast majority of people with bipolar disorder do
7 not commit rapes?

8 A That's right.

9 Q And the vast majority of people with bipolar disorder do
10 not torture?

11 A That's right.

12 And the vast majority of people with bipolar disorder
13 do not have an antisocial personality as well.

14 Q So it was the antisocial personality disorder that caused
15 him to do this?

16 A It's a combination of the two.

17 Q Now, you do know Dr. Brinkley?

18 A Yes, I do.

19 Q In 1993 his office was down the hall from yours?

20 A Yes.

21 Q And in the past you have talked to Dr. Brinkley about new
22 medications?

23 A Yes, I have.

24 Q He has -- he is one who reads up on new medications?

25 A Well, he sees himself as a psychopharmacologist, you know,

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Scher Cross

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1 which is -- as being -- that's what he does, and so he is very
2 involved in reading about medications, right.

3 Q And you have in the past talked to him about those new
4 medications.

5 A Yeah. When new medications -- once or twice I wasn't
6 aware of, you know, the way to use them and so forth, and I
7 walked down the hall and talked to him about them.

8 Q Like to ask you about the diagnostic criteria for bipolar
9 disorder that you discussed on your direct.

10 A Yes.

11 Q There are -- I don't know -- there are seven or eight that
12 you listed?

13 A There are seven for the manic phase and there are nine for
14 the depressed phase.

15 Q And it's your opinion he was manic at the time he
16 committed this crime --

17 A I think so, yes.

18 Q So seven for the manic. You've only found four of those
19 seven in existence. Is that correct?

20 A At the time of committing the crime? Well, I didn't know
21 how he was talking and I didn't know how he was sleeping and I
22 didn't know if he was grandiose. I didn't hear him say that.
23 And I didn't know if he was having trouble with rapid thoughts.
24 You know, there were three that I did know about, and so I
25 mentioned them.

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Scher Cross

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- 1 Q Okay. Three?
- 2 A Uh-huh.
- 3 Q Goal-oriented activity?
- 4 A Marked increase in goal-oriented activity.
- 5 Q Distractibility?
- 6 A Distractibility.
- 7 Q Excessive involvement in pleasurable activities?
- 8 A With potential painful consequences.
- 9 Q Like to ask you about those, but let me first ask you is
10 it possible that those three diagnostic symptoms could also
11 result from the antisocial personality and sexual sadism?
- 12 A No. Typically your antisocial personality is not somebody
13 who has a marked increase in activities and distractibility.
- 14 Q Let's take the last one first, the excessive involvement
15 in pleasurable activities with potential painful consequences.
16 By that you're referring to the torture and the rape.
- 17 A And the murder.
- 18 Q And the murder.
- 19 The torture and the rape could be caused by the
20 sexual sadism?
- 21 A Yes.
- 22 Q Now, the goal-orientated activity was Mr. Brown traveling
23 from state to state, meeting various people, making -- picking
24 up information about those people, and then planning to meet
25 those people and actually following through and meeting those

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Scher Cross

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1 people.

2 A Uh-huh. Yes.

3 Q And the same -- the distractibility is the same?

4 A Yes.

5 Q It's possible that was just Mr. Brown implementing his
6 scheme to find victims.

7 A Well, I don't know if he was trying to find victims during
8 this until it came to the end there, Miss Washa.

9 Q If you could turn to your deposition at page 21, please.

10 A What page?

11 Q Page 21.

12 A 21.

13 Q Starting at line 17 and through line 21, I asked you
14 whether it's possible that all this activity and this
15 distractibility was simply part of the scheme to find victims?

16 Your answer was that's a possibility.

17 A But I don't know if he meant to victimize them.

18 Q So it's possible this was all part of the scheme to find
19 victims.

20 A Yea. I suppose it is.

21 Q Goal-orientated activity, I'm goal-oriented right now.

22 A Are you showing a marked increase in goal-oriented
23 activity?

24 Q And most successful people, physicians such as yourself,
25 have been goal-orientated at times?

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Scher Cross

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- 1 A I think the emphasis has to be on marked increase.
- 2 Q Now, when you interviewed Mr. Brown you only talked to him
- 3 for two hours?
- 4 A Little over two hours.
- 5 Q And you had no cause at that time to believe that he was
- 6 malingering?
- 7 A I didn't get that impression.
- 8 Q You didn't run any test to determine malingering?
- 9 A There aren't any tests to determine malingering.
- 10 Q Does the MMPI have any test?
- 11 A Ah, well the MMPI can -- yes, I'm sorry. I take that
- 12 back.
- 13 Q Now, Mr. Brown is under a sentence of death.
- 14 A Yes.
- 15 Q And if he does not prevail in these proceedings there's a
- 16 likelihood he will be executed.
- 17 A Yes.
- 18 Q And he does have an antisocial personality disorder.
- 19 A That's one of the diagnoses that I give him and other
- 20 people give him.
- 21 Q And one of the elements of that is deceitfulness?
- 22 A Yes.
- 23 Q And he has a history of deceitfulness.
- 24 A Yes.
- 25 Q And when you interviewed Mr. Brown you did not spend much

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Scher Cross

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1 time talking to him about the facts of this crime and this
2 case, did you?

3 A A little. Not much.

4 Q Mr. Brown did not say why he engaged in the torture and
5 rape?

6 A No.

7 Q He did not say why he killed Holly?

8 A No.

9 Q Do you -- are you aware of any evidence that he was
10 suffering delusions at the time of the crime?

11 A No. There's no evidence that he was.

12 Q No evidence of hallucinations?

13 A He wasn't psychotic, evidently.

14 Q And he intended to do the actions he committed?

15 A I believe so.

16 Q And he knew what he was doing when he committed the
17 crimes?

18 A I believe so.

19 Q And he knew right from wrong.

20 A I believe so.

21 Q Mr. Brown is an intelligent person.

22 A Yes. But he didn't have the control.

23 Q He has scored very high in I.Q. tests?

24 A Yes. He's scored very high. He's been in the top 1
25 percent, 2 percent, 10 percent, depending on who gave it to

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Scher Cross

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1 him.

2 THE COURT: In what range? 120 to 130?

3 THE WITNESS: He was 144 in one test. That's the
4 only one I can remember the score on.

5 THE COURT: Smarter than me.

6 THE WITNESS: Well, on testing.

7 MR. SAMSON: I reserve comment on that, Your Honor.

8 Q You agree that Mr. Brown was able to comply with prison
9 rules in Oregon without proceeding (inaudible)?

10 A There was one time when he was out of where he should be.
11 He broke a rule. That's in the thing.

12 Q Now, I'd like to ask about sexual sadism for a few minutes
13 before I wrap up here.

14 It involves real acts. Is that correct?

15 A I told you I don't know much about sexual sadism, I don't
16 know whether it can be all in your mind and you're still a
17 sadist or not, is what I'm saying. I think you have to have
18 acts, but I'm not sure.

19 Q Would it assist you to look at the DSM-IV to recall the
20 diagnostic --

21 THE COURT: She's not being tendered as an expert on
22 that subject, so let's move on.

23 MR. SAMSON: Very well, Your Honor.

24 Q When you interviewed Mr. Brown in 2002 he was properly
25 treated with lithium?

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Scher Redirect

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1 A In 2000 -- yes. Yes. And he had good blood levels.

2 Q And during the interview you did talk a little bit about
3 the actual crime in this case.

4 A Yes, very little.

5 Q And he used the term "hanky-spanky games"?

6 A Yes, he did.

7 Q What was he referring to?

8 A I think he was referring to the torture.

9 Q So even though he was on lithium properly treated he still
10 referred to what he did to Holly as a game.

11 A Yes, he did.

12 MR. SAMSON: Thank you, Your Honor.

13 THE COURT: Redirect?

14 MR. LEVY: May I have just a minute, please, Your
15 Honor?

16 **REDIRECT EXAMINATION**

17 BY MR. LEVY:

18 Q Would you say at the time of the crime that Mr. Brown's
19 ability to control his behavior was impaired?

20 A Yes.

21 Q Would -- if he had been on lithium at the time, would that
22 have improved his ability to control his behavior?

23 A I believe so.

24 Q Thank you.

25 Nothing further.

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EXHIBIT 3

Verbatim Report of Proceedings
Clemency & Pardons Board Meeting

Page 1

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CLEMENCY AND PARDONS BOARD MEETING

Special Meeting

Re: Cal Coburn Brown

VERBATIM REPORT OF PROCEEDINGS

March 12, 2009

Olympia, Washington

Reported By:

Kristin DeLyn Manley, RPR, CCR
Registered Professional Reporter
Capitol Pacific Reporting, Inc.
2401 Bristol Court S.W.
Olympia, WA 98502
(360) 352-2054
scheduling@capitolpacificreporting.com
www.capitolpacificreporting.com

March 12, 2009
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EXHIBIT 3

Verbatim Report of Proceedings
Clemency & Pardons Board Meeting

Page 13

1 please put your cell phones on vibrate or turn them off.
2 It will just make this go a lot more smoothly if we
3 don't have this sort of interruption. And, Ms. Elliott,
4 please proceed.

5 MS. ELLIOTT: At this point, I believe it would
6 be appropriate - Mr. Brown wishes to make a statement to
7 the Board and I would have him do that before I proceed
8 into my presentation. And I believe your assistant has
9 the proper phone number.

10 CHAIRPERSON SMITH: She is pretty good at that,
11 making these calls and we will be able to hear from
12 Mr. Brown on the overhead speakers.

13 MS. ELLIOTT: Thank you. He may not know exactly
14 where we are in the proceedings, so if you could update
15 him.

16 CHAIRPERSON SMITH: I will take a moment to do
17 that, and you can have any communications you wish to
18 have with him before he begins.

19

20

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(Phone call being made to
get Mr. Brown on the phone
line.)

24

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Verbatim Report of Proceedings
Clemency & Pardons Board Meeting

Page 14

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MS. GOTTBURG: Is this Mr. Brown? Mr. Brown, I'm going to put you on the overhead speakers and so the Clemency and Pardons Board can talk to you and you can talk to them. Hold on.

8

CHAIRPERSON SMITH: Mr. Brown? Hello, Mr. Brown? Mr. Brown?

9

10

MR. BROWN: Yes.

11

CHAIRPERSON SMITH: Okay. We can hear you now.

12

MR. BROWN: Okay.

13

CHAIRPERSON SMITH: Mr. Brown, the Clemency and Pardons Board has convened here in Olympia, Washington, in the senate hearing room at this time for considering

15

16

the petition filed on your behalf, asking the Governor

17

to commute your sentence or to grant a reprieve to allow a lethal injection trial to proceed in May.

18

19

Your attorney, Ms. Suzanne Elliott, has addressed the Board and indicated to us that you wish to make a statement to the Board. The - there are four board members here. A fifth member of our board could not be here today. This board is meeting in a special hearing to consider your petition, which was filed just this morning.

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Verbatim Report of Proceedings
Clemency & Pardons Board Meeting

Page 15

1 MR. BROWN: I very much appreciate your time.

2 CHAIRPERSON SMITH: And I will turn it over to
3 your attorney to see if she has any remarks she wishes
4 to make to you before you begin addressing us.

5 MS. ELLIOTT: Cal, this is Suzanne. It is my
6 understanding that you wanted to make a statement of
7 remorse to the Board.

8 MR. BROWN: Yes.

9 MS. ELLIOTT: You may proceed. And I think the
10 Board will give you as much time as you like or as a
11 little time as you like.

12 MR. BROWN: Well, first I cannot begin to tell
13 you how sorry and ashamed I am for what I have done.
14 Back in 1991, I was in a very dark place. I met Holly
15 Washa just before the Memorial Day weekend, I think it
16 was. And she was a young woman. She was full of life.
17 And I and I alone am responsible for ending her life.

18 If there was any way that I could go back, any way
19 that I could turn back the clock knowing what I now
20 know, what my mental situation was, having a chance to
21 get her back to the world, I would do so.

22 I mean, I can't use my lack of treatment for - for a
23 disease I didn't fully understand as any kind of excuse.
24 Not - none whatsoever. I mean, you cannot excuse what I
25 did. Killing Holly Washa did not just deprive her -

Verbatim Report of Proceedings
Clemency & Pardons Board Meeting

Page 16

1 didn't just deprive her of her own life, as horrible as
2 this was, but it took her away from her friends and her
3 family far, far too soon.

4 My acts are so horrible and appalling to myself that
5 when I had a chance once I was arrested before - before
6 everything else, I voluntarily turned myself in. And I
7 was - you know, I confessed. I gave a full accounting
8 of my actions. And while I know that that can't give a
9 whole lot of comfort to Holly's family or her friends or
10 anybody else, I hope that the fact that she haunts me -
11 and she does, she haunts me to this day, every day -
12 that might help. I don't know.

13 There has not been one time since that time that I
14 haven't felt horrible about what I did. And if there
15 was any way I could tell her family that, I would do so.

16 If there was any way I could bring her back, I would do
17 so. I can't. God knows I wish I could, but I can't.

18 MS. ELLIOTT: Thank you, Cal.

19 MR. BROWN: That's all I can say.

20 MS. ELLIOTT: Thank you, Cal. I'm not sure we
21 can leave you on the phone to hear the rest of the
22 proceedings.

23 CHAIRPERSON SMITH: Excuse me for a moment. Are
24 there any questions from any board members for
25 Mr. Brown?

EXHIBIT 4

SEP/03/2010/FRI 07:03 PM

FAX No.

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The Honorable Sharon S. Armstrong
Hearing Date:
Hearing Time:
Hearing Location:

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY**

STATE OF WASHINGTON,

NO. 91-1-03233-1 SEA

Plaintiff,

DECLARATION OF FRANK
LEONETTI

v.

CAL COBURN BROWN,

Defendant.

I, FRANK LEONETTI, make the following declaration:

1. I have worked for the Department of Corrections (the Department) at the Washington State Penitentiary (WSP) for 26 years. I am currently employed as a Correctional Captain and have been so employed for over six years.

2. I have been assigned the responsibility of Chamber Team Leader for the execution of Cal Coburn Brown scheduled for September 10, 2010. I performed this same responsibility when Mr. Brown was previously scheduled for execution on March 13, 2009.

3. On March 12, 2009, I greeted Mr. Brown at the door of the building which houses the execution chamber at WSP when he was transported there by correctional staff. As we escorted Mr. Brown up the stairs to the holding cell he repeatedly stated to us "You guys are just going to be bringing me back down in a half hour." I would characterize his demeanor as cocky and self-assured during the entirety of my interactions with him on that date.

SEP/03/2010/FRI 07:03 PM

FAX No.

P. 002

1 4. I was responsible for informing Mr. Brown of his conditions of confinement in
2 the holding cell on March 12, 2010. During my conversations with him, he again repeatedly
3 stated, "You are going to be bringing me back to my cell in a half hour".

4 5. I was present when Mr. Brown was notified that a stay had been granted, hours
5 before his scheduled execution on March 12, 2010. I would characterize Mr. Brown's
6 demeanor after the issuance of the stay as giddy and cocky. Mr. Brown was laughing,
7 gloating, and making jokes directed at correctional staff. Mr. Brown stated to correctional
8 staff, "I want to stay long enough that I get my pizza and root beer."

9 I declare under the penalty of perjury that the foregoing is true and correct to the best of
10 my knowledge.

11 SIGNED this 3 day of September, 2010, at Walla Walla, Washington.

12
13 
14 FRANK LEONETTI
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EXHIBIT 5

The Honorable Sharon S. Armstrong
Hearing Date:
Hearing Time:
Hearing Location:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

CAL COBURN BROWN,

Defendant.

NO. 91-1-03233-1 SEA

DECLARATION OF
CHRISTOPHER BOWMAN

I, CHRISTOPHER BOWMAN, make the following declaration:

1. I have worked for the Department of Corrections (the Department) at Washington State Penitentiary (WSP) for 29 years. I am currently employed as an Associate Superintendent of Programs. My job duties include oversight of the Intensive Management Unit/Segregation units, Administrative Segregation, Capital Projects Engineers/Plant Maintenance, Environmental, Sustainability, Food Service Departments and Safety. I have been employed as an Associate Superintendent for three years.

2. As the designee of the Superintendent, I have frequent contact with Cal Coburn Brown with regard to preparation for his execution on September 10, 2010.

3. I met with Mr. Brown approximately one month ago, once his execution date had been set. During that meeting, Mr. Brown was cocky and was of the belief that he was not going to be executed because he had appeals pending. On that day, I provided him with a document informing him of his right to designate an immediate family member to witness his

DECLARATION OF CHRISTOPHER
BOWMAN

1 execution. Mr. Brown wrote on that form, "No family member available [sic] for this
2 evolution." Attached to this declaration as Attachment A is a true and accurate copy of the
3 document completed by Mr. Brown on August 10, 2010.

4 4. Last week, I met with Mr. Brown again. During this meeting, Mr. Brown's
5 demeanor was markedly different. I would characterize his demeanor as stoic and not quite as
6 cocky as he had been at our previous meeting. At that meeting, on August 27, 2010, Mr.
7 Brown was given the opportunity to elect an alternative method of execution. Mr. Brown
8 declined to elect an alternative method and stated that he was refusing to elect "on the advice
9 of counsel."

10 5. I met with Mr. Brown again yesterday, September 2, 2010. During our meeting
11 yesterday, we discussed the issues we would be meeting about in the next week, including
12 disposition of his remains, disposition of his property, and when he will be taken to the holding
13 cell. We also discussed the visit from his aunt and uncle which is scheduled for Monday,
14 September 9th. We also discussed his last meal. Mr. Brown requested that he be given pizza
15 and root beer, which was arranged for him when his execution was scheduled in March of
16 2009. I informed him he would be given the opportunity to select his last meal from the
17 Washington State Penitentiary menu. Mr. Brown requested that he receive larger portions. I
18 asked him to write down what he wanted. I would characterize Mr. Brown's demeanor at this
19 meeting as cocky.

20 6. Also during our meeting on September 2, 2010, Mr. Brown told me that the
21 ruling from Judge Coughenour was not the end of the line for him. Mr. Brown told me he and
22 his lawyers were prepared for that ruling from Judge Coughenour and that there's nothing he
23 could do about being executed. Mr. Brown also told me that he was not worried about being
24 executed and his lawyers had new challenges and new surprises they would be filing in the
25 next week to stop the execution.

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PAA NO.

P. 001/001

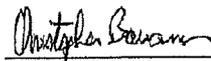
1 7. During our meetings on September 2nd and 3rd, Mr. Brown and I had a
 2 conversation about his last words that will be spoken prior to the execution. After our
 3 conversations in preparation for the last execution, I had concerns that Mr. Brown's final
 4 words would be disrespectful toward Holly Washa's family. I expressed my concerns to Mr.
 5 Brown and told him that being disrespectful to the victim's family would not be appropriate.
 6 Mr. Brown told me, "I already apologized to them" and said his intent was not to disrespect
 7 them.

8 8. During our meetings on September 2nd and 3rd, I asked Mr. Brown how he was
 9 feeling. He told me that he realizes that there is nothing he can do about it, that he can't
 10 control his destiny, and that he understood that he may be executed and that he couldn't control
 11 it, and he was still going to file appeals to try and stop the execution.

12 9. I met with Mr. Brown again today, September 3, 2010. During the meeting
 13 today, Mr. Brown was again cocky. He provided me a written document articulating the food
 14 he wants for his last meal. The document also indicates that he wants all of his property and
 15 remains to go to Gilbert Levy. Mr. Brown handed this document to me personally. Attached
 16 to this declaration as Attachment B is a true and accurate copy of the document handed to me
 17 by Mr. Brown earlier today.

18 I declare under the penalty of perjury that the foregoing is true and correct to the best of
 19 my knowledge.

20 SIGNED this 3rd day of September, 2010, at Walla Walla, Washington.

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 23 _____
 24 CHRISTOPHER BOWMAN
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ATTACHMENT A

SEP/03/2010/FRI 06:58 PM

FAX NO.

P. 002/003



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
OFFICE OF CORRECTIONAL OPERATIONS
WASHINGTON STATE PENITENTIARY
1313 N. 13th Avenue • Walla Walla, Washington 99362-1065 • (509) 626-3610

August 10, 2010

Cal Brown, #998921
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

RE: Witness Selection

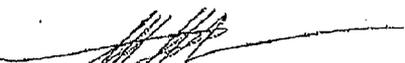
Mr. Brown:

In accord with RCW 10.95.185 you are authorized to designate one immediate family member to serve as a witness to your execution, currently scheduled for September 10, 2010.

If you wish to exercise this privilege, I must know the name, address, telephone number, birth date, and social security number (if known) of the family member. This information must be provided to me no later than August 20, 2010.

Associate Superintendent Bowman will contact you on August 26, 2010, if we have not heard from you previously.

Sincerely,


Stephen Sinclair
Superintendent

I acknowledge receipt of this letter. *CB*

Cal Brown, #998921

Date

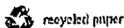
7-10-10

08/10

*NO FAMILY MEMBER
AVAILABLE FOR THIS
EVOLUTION*

cc: John Samson, AAG
Suzanne Elliott, Defense Attorney
Gilbert Levy, Defense Attorney
file

"Working Together for SAFE Communities"



ATTACHMENT A

ATTACHMENT B

SEP/03/2010/FRI 00:00 PM

FAA NO.

P. 003/003

45



**WASHINGTON STATE PENITENTIARY
FOOD SERVICE DEPARTMENT**

September 3, 2010

September 9th Dinner

- Fresh Fruit
- Tossed Salad
- Tri-Taters
- Sloppy Joe Sandwich
- Bun
- Peas
- Catsup/ Italian Dressing
- Fruit Drink

The above meal is the normal meal being prepared for the general population. Food Service has alternate items you may choose from to replace any of the entrees, vegetables, salads, and desserts listed below if you want an alternate meal. Please check one item in each category and submit to Food Services.

Entrée Meats:		Vegetables:		Salads:	
Sliced Turkey Breast		Broccoli		Tossed Green Salad	
Fried Chicken		Mixed Vegetables		Coleslaw	
Cheeseburger		Peas		Carrot Sticks	
Combination Pizza	✓	Carrots		Potato Salad	
Scrambled Eggs & Ham		Corn		Pasta Salad	
Burritos		Garden Vegetables		Macaroni Salad	
Meatballs					
Hot Dogs or Polish Dog					
Desserts:		Additional Items:			
Ice Cream		Baked Potato			
Fresh Fruit		Hash Browns			
Brownie		Dinner Roll			
Cookies (Chocolate)		Mashed Potatoes			
Chip/Oatmeal/Sugar		Macaroni & Cheese			
Cake		Fried Rice			
Apple Pie	✓	Steamed Rice			
		Mexi Rice			
		Potato Chips			

Comments: ICE WATER - COFFEE - MILK

Kerrl Robinson 9-3-10
Kerrl Robinson DATE
Food Manager 5

Stephen D. Sinclair 9/2/10
Stephen D. Sinclair DATE
Superintendent

-3-2010
820 Chris Bowman
Chris Bowman

I met with ^{Mr} Brown, #99892, on 9-3-2010, and he handed me a piece of paper that identified his request for his "last meal" (attached).

ATTACHMENT B

09/09/2010 PM 00:00:18

PAA NO.

P. 001/003

Last Meal

Pizza -

Thin Crust (it's usually too thick)

2/3 Sheet Pan Size (full w x 1/3 Long)

Lite on Sauce (about 1/2 of what you usually use 500 onions or pepper
Xtra cheese (lots))

Meat (Hamburger/Pepperoni/Sausage) (Lots)

mushrooms + olives

NO Peppers of Any kind

NO Onions of Any kind

NO Black Pepper

NO Other Veggies - Carrots, Squash, Tomatoes, celery ect.

Dessert -

Beverage -

2 Litre Root Beer or

Ice water + coffee + milk (lots)

Inmate Brown handed me
this piece of paper today,
9-3-2010, identifying his
request for his "Last Meal"

Chris Bowman

Chris Bowman

9-3-2010

0820

Remarks & Property -

Gilbert Levy

2003 Western Ave Suite 350

Seattle WA 98121

888-777-0670 or 206-443-4670

EXHIBIT 6

SEP/03/2010/FRI 07:28 PM

FAX No.

P. 001

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The Honorable Sharon S. Armstrong
Hearing Date:
Hearing Time:
Hearing Location:

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY**

STATE OF WASHINGTON,

NO. 91-1-03233-1 SEA

Plaintiff,

DECLARATION OF STEPHEN
SINCLAIR

v.

CAL COBURN BROWN,

Defendant.

I, STEPHEN SINCLAIR, make the following declaration:

1. I am currently employed as the Superintendent of the Washington State Penitentiary (WSP). I have been employed in this position since August of 2008. Prior to assuming the position of Superintendent, I was employed as an Associate Superintendent at WSP for 3 years. I have worked for the Department of Corrections (DOC) for 21 years.

2. As the Superintendent for WSP, I am responsible for supervising the execution of Cal Coburn Brown on September 10, 2010.

3. In accordance with my duties, I have met with Mr. Brown twice in anticipation of the scheduled execution. On my first visit, Mr. Brown was happy-go-lucky and cocky telling me that he had appeals pending that would stop his execution. On that first visit, I told Mr. Brown that I was there to provide him with information about the execution process and that my purpose in meeting with him was to make myself available to him to answer questions. At that meeting, I gave Mr. Brown the opportunity to select an alternative method of execution.

DECLARATION OF STEPHEN
SINCLAIR

SEP/03/2010/FRI 07:28 PM

FAX No.

P. 002

1 Mr. Brown told me he would not be signing anything "on the advice of counsel". Also at that
2 meeting, when I offered to answer questions about the process, Mr. Brown said, "the only
3 thing you can tell me is the identity of your team members".

4 4. I met with Mr. Brown, along with Christopher Bowman, again on August 27,
5 2010. On that date, I observed that his demeanor had changed as he was not so happy-go-
6 lucky and cocky. Mr. Brown asked me if he could get "pizza and root beer again" as had been
7 arranged for him prior to the last scheduled execution. I informed him that he would not be
8 receiving pizza and root beer. He responded, "really, I'm not going to get real food?"

9 5. I have confirmed with medical staff that Mr. Brown is "med compliant"
10 meaning he is currently taking his medications. I have also confirmed with medical staff that
11 he is being provided his medications personally, at cell front, daily.

12 6. I have confirmed with correctional staff that Mr. Brown has had no visitors,
13 other than his attorneys, since 2002. I have also confirmed with correctional staff that the only
14 telephone calls made by Mr. Brown in the last month have been calls to his attorneys.

15 I declare under the penalty of perjury that the foregoing is true and correct to the best of
16 my knowledge.

17 SIGNED this 3 day of September, 2010, at Walla Walla, Washington.

18 
19 _____
20 STEPHEN SINCLAIR

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EXHIBIT 7

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**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
KING COUNTY**

STATE OF WASHINGTON,
Plaintiff,
vs.
CAL COBURN BROWN,
Defendant.

NO. 91-1-03233-1 SEA
EMERGENCY
MOTION TO PRECLUDE
DEFENDANT'S EXECUTION ON
GROUNDS OF INCOMPETENCY AND
MOTION FOR STAY OF EXECUTION
PENDING EVIDENTIARY HEARING
* THIS IS A CAPITAL CASE

MOTION

Cal Coburn Brown, who is scheduled to be executed at 12:01 am on September 10, 2010, moves this Court for an order precluding the State from executing him due to incompetence (sometimes called insanity).

Because Mr. Brown raises a colorable issue, this Court should immediately issue a stay of execution. This Court should then set a briefing schedule and entertain discovery motions from either party. Finally, this Court should set an evidentiary hearing where expert testimony can be taken on this issue.

Undersigned counsel is cognizant that this claim is raised "very late in the day." However, given the nature of the claim, that is precisely when it must be raised; in fact, the Supreme Court of the United States has held that is the *only* time

1 it can be raised. Any arguments by the State that this Court should deny Mr.
2 Brown's requests because of when they are being made fails to understand the very
3 nature of this claim and invites this Court to dispense with the Constitution. This
4 Court cannot do so.
5

6
7 **FACTS**

8
9 The facts of Mr. Brown's crime have been established for many years and
10 are undisputed.

11
12 On May 24, 1991, after two days of torture and rape, Mr. Brown murdered
13 Holly Washa by stuffing her into a car trunk and slitting her throat. The
14 Washington State Supreme Court described the condition in which authorities
15 discovered her dead body—a condition that is horrifying but also vivid evidence of
16 Mr. Brown's mental illness: :
17

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

30
State v. Brown, 940 P.2d 546, 549 (Wash. 1997). A jury convicted Mr. Brown of

1 aggravated murder in the first degree on December 10, 1993, and sentenced him to
2 death a few weeks later. The death sentence was based on a finding that there were
3 no mitigating circumstances warranting leniency—a finding based on prosecutor’s
4 testimony and argument debunking Mr. Brown’s lack of mental illness or need for
5 medication to control it, testimony that has proved to be untrue as the State of
6 Washington has been medicating Mr. Brown for mental illness since the week after
7 his trial.
8
9

10
11 The procedural history since that time is long and complicated, as is true of
12 virtually every capital case.
13

14
15 Most recently, when the Washington Supreme Court lifted its stay of
16 execution after rejecting Brown’s arguments regarding this state’s lethal injection
17 protocols, the Department of Corrections announced it would execute Mr. Brown
18 on September 10, 2010.¹
19

20
21 Just a week after being sentenced, Mr. Brown was seen by a psychiatrist
22 employed by the Washington State Department of Corrections (DOC). On
23 February 4, Mr. Brown was evaluated by Dr. Tim. L. McBath, M.D., a psychiatrist
24 with the Washington State Penitentiary. Dr. McBath described Mr. Brown as
25 cooperative and accessible, but possessing an “elevated energy level, being
26 animated and demonstrative in speech” that was “quite rapid and moderately
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¹ This date was not set by any Court, but by the Department and Attorney General, based on their interpretation of RCW 10.95.

1 pressured.” (See Exhibit A; Dr. McBath February 3, 1994 Evaluation, pg. 3). Dr.
2 McBath concluded that Mr. Brown suffered an Axis I disorder: “Probable Bipolar
3 Disorder with history of at least hypomanic and possibly manic episodes.
4 Currently exhibiting hypomanic symptoms.” *Id.* at 4. As such, Mr. Brown was
5 prescribed 300 milligrams of lithium three times a day.
6
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9 A follow-up evaluation was done three weeks later. On February, 23, 1994,
10 Mr. Brown was seen by Dr. Carl Baum, M.D., another psychiatrist with the
11 Washington State Penitentiary. Dr. Baum described Mr. Brown’s speech as being
12 somewhat “pressured” and “hypervocal”, including laughing inappropriately
13 during the interview. (See Exhibit B; Dr. Baum, February 23, 1994 Evaluation, pg.
14 2). Dr. Baum concluded:
15
16

17
18 Patient is on lithium 300, mg. three times daily. Will get a level on
19 this dose and consider increased dose adjustment next month. Patient
20 is not sleeping on 50 mg. of Sinequan and will increase the dose
21 gradually to 150 mg. of Sinequan. Will see patient back in follow-up
22 in one month.

23
24 Dr. Ronald D. Page, Ph.D., a clinical psychologist with the Washington
25 State Correctional Facility, concurred with the continued prescription of
26 psychotropic medication, concluding that “[C]ontinued mental health follow-up
27 and maintenance with psychotropics would seem to be warranted.” (See Exhibit C;
28 Dr. Ronald D. Page, PhD, May 4, 1995 Evaluation, pg. 3).
29
30

1 At the directive of the Washington State Department of Corrections, Mr.
 2 Brown has been prescribed psychotropic medication over the last sixteen years.
 3

Dates	Prescribed Psychotropic Medication and Dosage
Feb.3, 1994 – September, 2003	Lithium (300 mg) one tablet three times a day)
September 1- 18, 2003	Lithium 300mg (one tablet three times a day)
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

17 The diagnosis and prescribed medication as remained unchanged since 1994.
 18
 19 As recent as July 16, 2010, Mr. Brown was diagnosed by a DOC physician, Dr.
 20 Grubb, as suffering from “bipolar disorder, more or less stable” and requiring
 21 medication. (See Exhibit D; Dr. David Grubb, M.D. July 16, 2009).
 22

23 Dr. George Woods recently conducted an evaluation of Mr. Brown, in part,
 24 to determine his current competence. His declaration, which is attached, states that
 25 Mr. Brown’s competence is achieved artificially—through the use of mood altering
 26 psychotropic medication. But for that medication, which is administered by the
 27 State, Mr. Brown there is a reasonable likelihood that Mr. Brown would not be
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1 competent. In fact, despite being medicated by the Washington Department of
2 Corrections continuously for years and years and years, Mr. Brown still shows
3 significant signs of mania. As a result, his competence has been achieved only
4 through the medication that the State has told him to take.
5
6

7 ARGUMENT

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9 “[T]he Eighth Amendment prohibits a State from carrying out a sentence of
10 death upon a prisoner who is insane.” *Ford v. Wainwright*, 477 U.S. 399, 409-410,
11 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The prohibition applies despite a prisoner's
12 earlier competency to be held responsible for committing a crime and to be tried
13 for it. Prior findings of competency do not foreclose a prisoner from proving he is
14 incompetent to be executed because of his mental condition.
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17
18 The Washington State Constitution's prohibition against “cruel” punishment
19 almost certainly prohibits the execution of a prisoner who is “insane,” although it
20 appears that the scope of the Washington State Constitution's protection have
21 never been specified. Nevertheless, the Washington Supreme Court has held state
22 courts possess inherent authority to grant a stay of execution upon a showing of
23 intervening “insanity.” *State v. Davis*, 6 Wash.2d 696, 717, 108 P.2d 641 (1940).
24
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26
27 However, given that it is well established that Wash. Const. art. 1, § 14 is
28 broader than its federal counter-part (*State v. Fain*, 94 Wash.2d 387, 390, 617 P.2d
29 720 (1980)), this Court should issue a stay so that the parties can address whether
30

1 the Washington Constitution's prohibition against executing a person who is
2 incompetent is broader than the federal standard.
3

4 The State will certainly complain that this pleading comes too late.
5
6 However, a capital defendant who asserts that he cannot be presently executed can
7 only properly raise that claim just before the time of his execution. In addition, the
8 failure of both the Washington statutes and the King County Prosecutor to bring
9 Mr. Brown to court to set an execution date precludes Mr. Brown from raising this
10 issue at the time the issue of a new execution warrant. As a result, the State
11 contributed to the issue that it will soon complain about,
12
13

14 The federal constitutional standard prohibiting the execution of a prisoner
15 who is incompetent is a complicated one.
16

17 The prohibition against execution of the mentally ill is based on ancient
18 traditions of English common law. When *Ford v. Wainwright*, 477 U.S. 399, 106
19 S.Ct. 2595, 91 L.Ed.2d 335 (1986), was decided, no state permitted the execution
20 of the insane. *Id.* at 408 n. 2. Prior to *Ford*, however, the United States
21 Constitution only provided procedural due process protection for the exemption
22 from execution that was provided by state law. *See, e.g., Phyle v. Duffy*, 334 U.S.
23 431, 68 S.Ct. 1131, 92 L.Ed. 1494 (1948).
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26 *Ford* recognized that the Eighth Amendment also provides a restriction on a
27 state's substantive power to execute the mentally incompetent.
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1 Alvin Ford was convicted of murder and sentenced to death in the State of
2 Florida. Well after his trial and sentencing, Ford began to exhibit bizarre behavior,
3 based on his apparent belief in a wide-ranging conspiracy against him, which
4 included the delusion that his family and friends had been taken hostage. His
5 attorney ultimately invoked the procedures of Fla. Stat. § 922.07 (1985) to have
6 Ford declared incompetent to be executed. In accordance with that statute, which
7 prohibited execution of a prisoner unless he had “the mental capacity to understand
8 the nature of the death penalty and the reasons why it was imposed upon him,” the
9 Governor of Florida appointed three psychiatrists to examine Ford. Each of the
10 psychiatrists concluded that Ford had a severe mental disorder, but all of them
11 concluded that he was competent to be executed under Florida law. Based on those
12 opinions, the Governor signed a death warrant for Ford's execution, without further
13 explanation. *Ford*, 477 U.S. at 402-04.

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21 Two issues were before the Court in *Ford*: whether the Eighth Amendment
22 prohibited the execution of the insane and whether the procedure employed by the
23 Florida court to determine competency was constitutionally adequate. The Court's
24 ultimate determination in Ford's favor on both issues was a plurality decision.
25 Seven justices agreed that the Florida procedure was constitutionally inadequate;
26 however, only four believed that a full evidentiary hearing was required. Justice
27 Powell wrote separately to disapprove of Florida's procedure, but he would have
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1 held that any procedure that provided an impartial officer and an opportunity for
2 the prisoner to be heard was adequate. On the substantive issue, five justices
3 agreed with the general principle that the execution of the insane, as proscribed in
4 the common law and statutorily prohibited in all states, violated the Eighth
5 Amendment; however, Justice Powell wrote separately on the issue of the
6 definition of insanity.
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10 In his discussion of the historical context of the prohibition against executing
11 the insane, Justice Marshall, writing for himself and three others, recognized
12 several historical bases for the rule. He first cited Blackstone for the principle that
13 a man who becomes insane after judgment, but before execution, should have his
14 execution stayed, “[F]or peradventure, says the humanity of the English law, had
15 the prisoner been of sound memory, he might have alleged something in stay of
16 judgment or execution.” *Id.* at 406 (quoting 4 W. Blackstone, “Commentaries,”
17 24-25). Other reasons were also offered in support of the common-law
18 prohibition. The first was, “[T]he execution of an insane person simply offends
19 humanity.” 477 U.S. at 407. Second, Marshall noted, “[I]t provides no example to
20 others and thus contributes nothing to whatever deterrence value is intended to be
21 served by capital punishment.” *Id.* The third reason advanced was, “[I]t is
22 uncharitable to dispatch an offender ‘into another world, when he is not of a
23 capacity to fit himself for it.’ ” *Id.* (quoting Hawles, “Remarks on the Trial of Mr.
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1 Charles Bateman,” 11 How. St. Tr. 474, 477 (1685)). He identified as a fourth
2 rationale, that “execution serves no purpose in these cases because madness is its
3 own punishment....” 477 U.S. at 407. Finally, Marshall recognized, “[T]he
4 community's quest for ‘retribution’-the need to offset a criminal act by a
5 punishment of equivalent ‘moral quality’-is not served by execution of an insane
6 person, which has a ‘lesser value’ than that of the crime for which he is to be
7 punished.” *Id.* at 408.

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12 Justice Marshall found all of these reasons to have continued “logical, moral,
13 and practical force....” *Id.* at 409. While not expressly adopting any of these
14 rationales over another, Justice Marshall stated, “It is no less abhorrent today than
15 it has been for centuries to exact in penance the life of one whose mental illness
16 prevents him from comprehending the reasons for the penalty or its implications.”
17
18 *Id.* at 417. He concluded, “Whether its aim be to protect the condemned from fear
19 and pain without comfort of understanding, or to protect the dignity of society
20 itself from the barbarity of exacting mindless vengeance, the restriction finds
21 enforcement in the Eighth Amendment.” *Id.* at 410.

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25 As Justice Powell noted in his concurrence, the determination of a prisoner's
26 sanity is not an issue that can be resolved by reference to historical facts. 477 U.S.
27 at 426.
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1 Instead, it is a “basically subjective judgment ... [that] depends substantially
2 on expert analysis in a discipline fraught with ‘subtleties and nuances.’ ” *Id.*
3 (quoting *Addington v. Texas*, 441 U.S. 418, 430, 99 S.Ct. 1804, 60 L.Ed.2d 323
4 (1979)). There is no “bright line”-no calculation or discrete measurement-for
5 determining who is ineligible for execution. For this reason, the analysis is
6 markedly different from that conducted in *Roper v. Simmons*, 543 U.S. 551, 125
7 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (prohibiting execution of individuals who were
8 under eighteen when they committed the crime), or *Atkins v. Virginia*, 536 U.S.
9 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (prohibiting execution of mentally
10 retarded individuals).

11 Believing that Justice Marshall's opinion had not set forth the meaning of
12 insanity in this context, and that the historical arguments “do not provide a
13 common answer when it comes to defining the mental awareness required by the
14 Eighth Amendment as a prerequisite to a defendant's execution,” Justice Powell
15 wrote separately to address that issue. *Id.* at 418-19.

16 Justice Powell specifically discounted one historical theory for the
17 prohibition against execution of the insane-that an insane prisoner could not
18 adequately assist counsel in making arguments against his execution. In Justice
19 Powell's view, that justification has no force in modern practice, which provides
20 far more extensive review of convictions and sentences-particularly death
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1 sentences-than did the common law, including not only direct appeal but ordinarily
2 both state and federal collateral review, throughout all of which the defendant has
3 access to counsel, and indeed, the right to effective assistance of counsel at trial
4 and on appeal. *Id.* at 420.
5

6
7 Justice Powell thus considered it “unlikely indeed that a defendant today
8 could go to his death with knowledge of undiscovered trial error that might set him
9 free.” *Id.*
10

11
12 Justice Powell agreed, however, that other rationales identified by Justice
13 Marshall remained valid:
14

15 The more general concern of the common law-that executions of the insane
16 are simply cruel-retains its vitality. It is as true today as when Coke lived
17 that most men and women value the opportunity to prepare, mentally and
18 spiritually, for their death. Moreover, today as at common law, one of the
19 death penalty's critical justifications, its retributive force, depends on the
20 defendant's awareness of the penalty's existence and purpose. Thus, it
21 remains true that executions of the insane both impose a uniquely cruel
22 penalty and are inconsistent with one of the chief purposes of executions
23 generally. For precisely these reasons, Florida requires the Governor to stay
24 executions of those who “d[o] not have the mental capacity to understand
25 the nature of the death penalty and why it was imposed” on them. Fla.Stat. §
26 922.07 (1985 and Supp. 1986).
27

28 *Id.* at 422. Justice Powell observed that, in fact, while some states had more
29 rigorous standards, prohibiting the execution of a defendant who is unable to assist
30 in his own defense, “none disputes the need to require that those who are executed

1 know the fact of their impending execution and the reason for it.” *Id.* And in his
2 view, this was all the Eighth Amendment required:
3

4 Such a standard appropriately defines the kind of mental deficiency that
5 should trigger the Eighth Amendment prohibition. If the defendant perceives
6 the connection between his crime and his punishment, the retributive goal of
7 the criminal law is satisfied. And only if the defendant is aware that his
8 death is approaching can he prepare himself for his passing. Accordingly, I
9 would hold that the Eighth Amendment forbids the execution only of those
10 who are unaware of the punishment they are about to suffer and why they
11 are to suffer it.

11 *Id.*

12
13 Subsequent opinions from lower courts assumed that Justice Powell's
14 definition of competence was controlling without much reference to the other
15 language in *Ford*. See, e.g., *Scott v. Mitchell*, 250 F.3d 1011, 1014 (6th Cir.2001);
16 *Massie v. Woodford*, 244 F.3d 1192, 1195 n. 1 (9th Cir.2001); *Coe v. Bell*, 209
17 F.3d 815, 825-26 (6th Cir.2000); *Fearance v. Scott*, 56 F.3d 633, 640 (5th
18 Cir.1995); *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir.), *cert. denied*, *Rector v.*
19 *Bryant*, 501 U.S. 1239, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991).
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22
23 In one case, *Walton v. Johnson*, 440 F.3d 160, 170 (4th Cir.2006), the court
24 analyzed the effect of the plurality opinion by reference to the principle announced
25 in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). In
26 *Marks*, the Court held, “When a fragmented Court decides a case and no single
27 rationale explaining the result enjoys the assent of five Justices, ‘the holding of the
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1 Court may be viewed as that position taken by those Members who concurred in
2 the judgments on the narrowest grounds....' ” 430 U.S. at 194 (quoting *Gregg v.*
3 *Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

4
5 The *Walton* court noted that the issue was not quite clear, since Justice
6 Powell had specifically stated that the “Court's opinion does not address ... the
7 meaning of insanity.” 440 F.3d at 170 n. 10 (quoting *Ford*, 477 U.S. at 418).
8
9 Additionally, the *Walton* opinion recognized that Justice Marshall, in a dissent
10 from the denial of certiorari in another case, *Rector v. Bryant*, 501 U.S. 1239,
11 1241-42, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991) (Marshall, J., dissenting),
12 argued forcefully that *Ford* left unsettled the parameters of mental disturbance that
13 would prohibit execution. On the other hand, considering “the actual discussion of
14 rationales and the overlapping agreement on one of the rationales in both the *Ford*
15 plurality opinion and Justice Powell's concurrence” and in light of the Supreme
16 Court's “acknowledgment of Justice Powell's proffered test (albeit in *dicta*) as the
17 appropriate standard” in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106
18 L.Ed.2d 256 (1989) (holding that the Eighth Amendment did not prohibit the
19 execution of a mentally retarded inmate), overruled on other grounds by *Atkins v.*
20 *Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the *Walton* court
21 concluded that the *Ford* court effectively adopted Justice Powell's proffered two-
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1 part test as the constitutionally minimum standard for determining mental
2 competence to be executed. 440 F.3d at 170.
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4 Given this uncertainty, it should hardly be surprising that the United States
5 Supreme Court recently decided another case addressing the issue of defendant's
6 competency at the time of his scheduled execution. This was the state of the law
7 when Scott Panetti's case was decided.
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10 Panetti, who suffered from a fragmented personality, delusions and
11 hallucinations, killed his estranged wife's parents in front of his wife and their
12 daughter. His habeas attorneys produced evidence that, while Panetti claimed to
13 understand that the state wanted to execute him for the murders he committed, his
14 mental illness had resulted in a delusion that the stated reason for his execution
15 was a sham, and that the state actually intended to kill him to stop his preaching.
16 *Panetti v. Dretke*, 401 F.Supp.2d 702, 708 n. 3 (W.D.Tex.2004). This claim had
17 been presented in state court, resulting in the appointment of two experts to
18 examine him. *Id.* at 704. Those experts concluded that Panetti was competent, and
19 the state court ruled against Panetti without giving him an opportunity to rebut
20 those opinions. *Id.* The district court that considered his claim held, first, that the
21 state court opinion was not entitled to deference under AEDPA, as the proceedings
22 in state court were constitutionally inadequate. 401 F.Supp.2d at 705-06.
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1 The court then struggled with the question of whether Panetti was
2 incompetent under the rationale of *Ford*. According to the district court, Justice
3 Powell's opinion defined competence as perceiving the connection between the
4 crime and the punishment, thereby satisfying the retributive goal of the death
5 penalty. *Id.* at 709. In order to satisfy that goal, however, the prisoner's perception
6 must include not just factual knowledge of the reason for execution, but also his
7 understanding, or, as Justice Powell stated, "[T]he Eighth Amendment forbids the
8 execution only of those who are unaware of the punishment they are about to
9 suffer and why they are to suffer it." *Id.* at 709-10, quoting *Ford*, 477 U.S. at 422,
10 106 S.Ct. 2595 (emphasis added). The district court reviewed Fifth Circuit
11 precedent on this issue, however, and concluded that the appellate court had not
12 adopted Justice Powell's reasoning in its entirety, but only adopted his standard in a
13 limited sense. "[T]he Fifth Circuit has, without any discussion of the potential
14 broader import of the statement, apparently interpreted Justice Powell's use of the
15 concept of 'awareness why' to require no more than knowledge of the required
16 factual predicate for an execution." *Id.* at 710 (citing *Fearance v. Scott*, 56 F.3d
17 633, 640 (5th Cir.1995); *Barnard v. Collins*, 13 F.3d 871, 876 n. 2 (5th Cir.1994);
18 *Garrett v. Collins*, 951 F.2d 57, 59 (5th Cir.1992); *Lowenfield v. Butler*, 843 F.2d
19 183, 187 (5th Cir.1988)).
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1 Panetti had argued that he would be held incompetent using Justice Powell's
2 reasoning, but the district court's dissection of the Ford opinions compelled a
3 conclusion that Justice Powell's concurrence was not controlling, in that the
4 opinion of the other four justices in the majority "specifically declined to reach a
5 holding on the question of what standard should be used to determine
6 incompetency for the purposes of the Eighth Amendment." 401 F.Supp.2d at 710.
7 For this reason, the district court held, "[T]he Powell concurrence does not operate
8 as binding Supreme Court precedent on what standard governs competency to be
9 executed." *Id.*

10 Examining Fifth Circuit precedent, the district court concluded that the
11 "retributive goal" requirement of Justice Powell's concurrence had not been
12 adopted. "Ultimately, the Fifth Circuit test for competency to be executed requires
13 the petitioner know no more than the fact of his impending execution and the
14 factual predicate for the execution." *Id.* at 711. Panetti was aware that he was
15 convicted for the murders of his in-laws and that he was to be executed. Although
16 there was evidence demonstrating that Panetti did not appreciate the connection
17 between the murders and his execution, under controlling Fifth Circuit precedent,
18 his lack of understanding did not exempt him from the death penalty. *Id.* at 709-
19 12.

1 On appeal, the Fifth Circuit declined to rule on the issue of whether the
2 state's procedure for reviewing Panetti's claim was adequate and entitled to
3 deference. *Panetti v. Dretke*, 448 F.3d 815, 817 (5th Cir.2006). However, on the
4 issue of competence, the court reviewed its earlier decisions and concluded that the
5 standard for competence to be executed in the Fifth Circuit required only that an
6 inmate to be aware of his punishment and why he is to suffer it. *Id.* at 819-21.
7 Holding that "awareness" was not synonymous with "rational understanding," the
8 court found Panetti competent to be executed. *Id.*

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10 The Supreme Court reversed. *Panetti v. Quarterman*, 551 U.S. 930, 127
11 S.Ct. 2842, 168 L.Ed.2d 662 (2007). Addressing a jurisdictional issue, the Court
12 held that Panetti's petition was not "second or successive," within the meaning of
13 28 U.S.C. § 2244, as it held that the statute did not apply to bar *Ford* claims "filed
14 when the application is first ripe." *Id.* at 947.

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16 Turning to the issue of whether Florida's procedure to determine competence
17 was entitled to deference, the Court discussed the split of opinions in *Ford* as to
18 what was constitutionally required in a state competency proceeding. Applying
19 *Marks*, 430 U.S. at 193, 97 S.Ct. 990, the Court held that Justice Powell's opinion
20 on that issue, which "offered a more limited holding," constituted clearly
21 established law and set the minimum standard for such a proceeding. 551 U.S. at
22 949.

1 Even under Justice Powell's standard, however, the Texas procedure was
2 constitutionally inadequate. *Id.* at 950-52.
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4 The process having been inadequate under *Ford*, and Justice Powell's
5 opinion constituting clearly established law, the state court's opinion was not
6 entitled to deference under AEDPA. *Id.* at 953-54.
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8 Then the Court considered whether Panetti's delusions made him
9 incompetent to be executed under *Ford*. Although it recognized that the application
10 of the Eighth Amendment to the issue of executing the insane resulted from a
11 plurality opinion, the Court neither referenced *Marks* nor deferred to Justice
12 Powell's concurrence. *Id.* at 957-59. Instead, the Court acknowledged that *Ford*
13 did not provide a precise standard for competency. "The four-Justice plurality
14 discussed the substantive standard at a high level of generality; and Justice Powell
15 wrote only for himself when he articulated more specific criteria." *Id.* at 957.
16 Characterizing Justice Marshall's opinion as "the opinion of the Court," the *Panetti*
17 Court recited these reasons from *Ford* as the foundation for the constitutional
18 prohibition against executing mentally incompetent prisoners:
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26 [T]oday, no less than before, we may seriously question the retributive value
27 of executing a person who has no comprehension of why he has been singled
28 out and stripped of his fundamental right to life.... Similarly, the natural
29 abhorrence civilized societies feel at killing one who has no capacity to
30 come to grips with his own conscience or deity is still vivid today. And the
intuition that such an execution simply offends humanity is evidently shared

1 across this Nation. Faced with such widespread evidence of a restriction
2 upon sovereign power, this Court is compelled to conclude that the Eighth
3 Amendment prohibits a State from carrying out a sentence of death upon a
4 prisoner who is insane.

5 *Panetti*, 551 U.S. at 957.

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7 According to the Court, the prohibition rested upon reasons recognized at
8 common law and recited in “the controlling portion” of Justice Marshall's opinion
9 in *Ford*. 551 U.S. at 958. One of those reasons was the failure of such an execution
10 to serve any retributive purpose. In most cases, imposition of the death penalty
11 “has the potential to make the offender recognize at last the gravity of his crime
12 and to allow the community as a whole ... to affirm its own judgment that the
13 culpability of the prisoner is so serious that the ultimate penalty must be sought
14 and imposed.” *Id.* This effect is questionable, however, “if the prisoner's mental
15 state is so distorted by a mental illness that his awareness of the crime and
16 punishment has little or no relation to the understanding of those concepts shared
17 by the community as a whole.” *Id.* at 958-59.
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25 Retribution was not the only rationale to be considered, however, as the
26 Court went on to state, “[T]he other rationales set forth by *Ford* fail to align with
27 the distinctions drawn by the Court of Appeals.” *Id.* at 959. Later in the opinion,
28 the Court repeated that the “principles set forth in *Ford* are put at risk” by the Fifth
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1 Circuit's interpretation of the competence standard. *Id.* Likewise, the Court held,
2 the Fifth Circuit's interpretation "find[s] no support elsewhere in *Ford*, including in
3 its discussions of the common law and the state standards...." *Id.* (emphasis added).
4 Thus, it held, it was "error to derive from *Ford*, and the substantive standard for
5 incompetency its opinions broadly identify, a strict test for competency that treats
6 delusional beliefs as irrelevant once the prisoner is aware the State has identified
7 the link between his crime and the punishment to be inflicted." *Id.*
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11 This language indicates that the Court in *Panetti* intended to do more than to
12 simply include a delusional state as a factor that could fit an accused within the
13 narrow test enunciated by Justice Powell. Although *Panetti* held that a delusional
14 state could prevent an inmate from having a rational understanding of his fate, the
15 Court refused to adopt Justice Powell's definition or to enunciate "a rule governing
16 all competency determinations." *Id.* at 960-61. Instead, the opinion appears to open
17 the analysis of competence to consideration of the other common law factors
18 recognized by Justice Marshall as relevant to this issue.
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24 A determination of mental illness is necessarily subjective, and the legal
25 definition of competence is not precise. It is not surprising, therefore, that lower
26 courts were left by the *Panetti* opinion without a specific measure of incompetence
27 to be executed. This continued uncertainty provides yet another powerful reason
28 for this Court to stay Mr. Brown's execution and conduct a full and fair hearing—
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1 one which permits both parties to present their facts and argue the relevant, if not
2 always clear law.
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4 *Panetti* gives this Court guidance on how a competency analysis should be
5 undertaken:
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7 The underpinnings of petitioner's claims should be explained and evaluated
8 in further detail on remand. The conclusions of physicians, psychiatrists, and
9 other experts in the field will bear upon the proper analysis. Expert evidence
10 may clarify the extent to which severe delusions may render a subject's
11 perception of reality so distorted that he should be deemed incompetent. Cf.
12 *Brief for American Psychological Association, et al., as Amici Curiae* 17-
13 19 (discussing the ways in which mental health experts can inform
14 competency determinations). And there is precedent to guide a court
15 conducting Eighth Amendment analysis. See, e.g., *Roper v. Simmons*, 543
16 U.S. 551, 560-564, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Atkins v. Virginia*,
17 536 U.S. 304, 311-314, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Ford*, 477
18 U.S., at 406-410, 106 S.Ct. 2595.

19 *Id.* at 962.

20 Although the Court in *Panetti* declined to set forth a specific definition of
21 incompetence applicable in all cases, as the district court observed on remand in
22 *Panetti*, the Supreme Court made clear in its opinion in *Panetti* that, "in the Eighth
23 Amendment context, 'insanity' does have a baseline definition: the test for
24 competence to be executed involves not only a prisoner's factual awareness of the
25 crime, the impending execution, and the state's reason for executing the prisoner,
26 but also some degree of 'rational understanding' of the connection between the
27 crime and the punishment." *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008
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1 WL 2338498, *31 (W.D.Tex. March 26, 2008) (quoting *Panetti*, 127 S.Ct. at
2 2861).

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4 However, the Court's citations to *Roper*, *Atkins* and *Ford* additionally
5 suggest that Eighth Amendment analysis of a defendant's competence to be
6 executed must include consideration of society's current perception of capital
7 punishment and the effect of that perception on the determination of what
8 constitutes cruel and unusual punishment in the context of competence to be
9 executed. As the Court recognized in *Atkins*, "A claim that punishment is
10 excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys
11 presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but
12 rather by those that currently prevail." 536 U.S. at 311. More recently, the Court
13 reasoned that the Eighth Amendment's scope must continue to evolve, "because
14 '[t]he standard of extreme cruelty is not merely descriptive, but necessarily
15 embodies a moral judgment. The standard itself remains the same, but its
16 applicability must change as the basic mores of society change.'" *Kennedy v.*
17 *Louisiana*, --- U.S. ---, 128 S.Ct. 2641, 2649, 171 L.Ed.2d 525 (2008) (quoting
18 *Furman v. Georgia*, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)
19 (Burger, C.J., dissenting)).

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28 In *Ford*, the Court summarized the "ancestral legacy" against execution of
29 the insane and concluded that it had "not outlived its time. Today, no State in the
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1 Union permits the execution of the insane.” 477 U.S. at 408. In *Atkins*, the Court
2 reviewed recent legislation by the states to determine whether “evolving standards
3 of decency” indicated a trend toward exempting mentally retarded offenders from
4 execution. 536 U.S. at 312-13. Similarly, in *Roper*, the Court looked at the
5 evolution of the law prohibiting the execution of juveniles since the time that it
6 earlier held such executions constitutional. 543 U.S. at 562-65. In each of these
7 cases, the Court decided that there was “objective indicia of consensus” sufficient
8 to hold that the Eighth Amendment should be extended to exempt certain classes of
9 offenders from punishment by death. On the whole, then, it can surely be said that
10 there is a trend toward narrowing the class of inmates against whom the death
11 penalty may be imposed consistent with the Eighth Amendment’s prohibition
12 against cruel and unusual punishment. As to whether this existence of this trend
13 supports a conclusion that “evolving standards of decency” suggest a broader
14 definition of incompetence than the baseline definition recognized in *Panetti* is
15 another matter. However, it is a matter that must be explored before Mr. Brown
16 can be executed.

17
18 Mr. Brown urges this Court to adopt the standard announced in *State v.*
19 *Perry*, 610 So.2d 746 (La. 1992). In *Perry*, the Supreme Court of Louisiana held
20 that the state cannot voluntarily medicate an otherwise-incompetent death row
21 prisoner with antipsychotic drugs in order to carry out his death sentence.

1 Michael Owen Perry was convicted and sentenced to death for murdering his
2 mother, father, nephew, and two cousins. Perry was age twenty-eight at the time of
3 his offenses but had long lived with his parents due to his history of mental illness.
4 At the age of sixteen, he was diagnosed as a schizophrenic, and had been
5 committed by his parents to several mental institutions.
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9 The Louisiana Supreme Court observed that for centuries no jurisdiction has
10 approved the execution of the insane. Accordingly, the court ruled that the state's
11 attempt to forcibly medicate an insane prisoner with antipsychotic drugs violated
12 his rights under the state constitution. The *Perry* court opined that such an action
13 violated the inmate's right to privacy as it required an unjustified invasion of bodily
14 integrity with potentially dangerous and painful drugs. The court reasoned that
15 when under the influence of psychotropic drugs, the inmate loses the ability to
16 make medical decisions. The court further observed that executing an insane
17 prisoner did not serve the social goals of capital punishment. The court concluded
18 that the state could re-apply for a modification of the stay of execution of the death
19 sentence if *Perry* regained his sanity independently, and without the influence of
20 antipsychotic drugs.
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27 In outlining the parameters of the state constitutional right to privacy, the
28 court stated "that the state's plan to medicate and execute Perry would violate his
29 bodily integrity, chemically alter his mind and will, and usurp his fundamental
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1 right to make decisions regarding his health or medical treatment. Each of these
2 interests is protected from unwarranted governmental intrusion by [state
3 constitutional] right of privacy or personhood. Moreover, these invasions are
4 particularly intrusive because the forcible administration of antipsychotic drugs
5 creates a substantial risk of permanent injury and premature death." *Id.*, 758. The
6 court also stated that the issue was whether forcible medication "is necessary to
7 promote a compelling state interest, and is narrowly drawn to further only that
8 interest." *Id.*, at 760. The court concluded, "even if prison safety and Perry's
9 medical welfare were the state's true objectives, ... the state action proposed in the
10 present case is not narrowly confined to the interests of prison safety and the
11 inmate's medical interests...." *Id.*, 761. That is, the state did not simply seek to
12 medicate the defendant to protect him and others and to take care of his medical
13 needs, but the state also planned to execute him. In other words, "a physician's
14 prescription and administration of antipsychotic drugs to a prisoner against his
15 will, pursuant to the order of a state court or other government official, for the
16 purpose of carrying out the death penalty, does not constitute medical treatment
17 but forms part of the capital punishment sought to be executed by the state." *Id.*,
18 753.

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29 The court concluded its analysis by declaring: "the compound of forcible
30 medication and death that the state seeks to impose on Perry is a severe

1 punishment unacceptable to contemporary society. *After taking into account*
2 *objective evidence of contemporary values*, it is evident that the punishment would
3 offend civilized standards of decency." *Id.*, 768 (emphasis added). The court
4 pointed out that "[t]he ethical standards of the medical profession reinforce this
5 view and constitute further objective evidence of this standard of decency. Both the
6 American Medical Association and the American Psychiatric Association have
7 strongly urged physicians not to participate in legalized state executions.... Like the
8 use of lethal injections, forcible medication in an attempt to restore competency
9 constitutes a part of capital punishment that inherently conflicts with medical
10 ethics." *Id.*, 769.

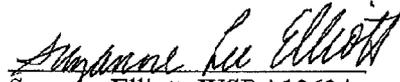
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These cases demonstrate the multiple complex issues that are involved in a
competency determination when the State seeks to take a human life. The cases
also make it exceedingly clear that competency can only be determined based on a
careful examination of the present facts.

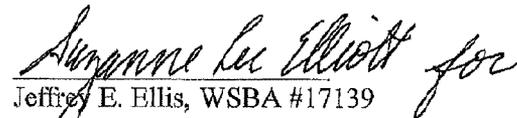
CONCLUSION

Based on the above, this Court should: (1) immediately issue a stay of
execution or hold a hearing on that request; (2) set a briefing and discovery
schedule; and (3) set a time for an evidentiary hearing.

DATED this 3rd day of September, 2010.

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Suzanne Elliott, WSBA12634
Suite 1300 Hoge Building
703 Second Ave.
Seattle WA 98104
206-623-0291


Jeffrey E. Ellis, WSBA #17139
621 SW Morrison St., Ste 1025
Portland, OR 97205
(206) 218-7076
JeffreyErwinEllis@gmail.com
Attorneys for Mr. Brown

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on September 3, 2010, I delivered by hand a copy of this document to:

Mr. Daniel Satterberg
King County Prosecuting Attorney
King County Courthouse
516 Third Ave.
Seattle, WA 98104

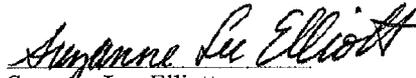

Suzanne Lee Elliott
Attorney for Cal Coburn

Exhibit A

MAR 01 2011

PSYCHIATRIC EVALUATION

NAME: BROWN, Cal
NO: 998921
DATE: February 8, 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

8-00010678

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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-vegetative 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.

S-00010677

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Page 3

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 call 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

NAME: BROWN, Cal
 NO: 988921
 DATE: February 3, 1994
 Page 4

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 rationale with a therapeutic trial.
2. CBC Chem Profile TSH now Lithium level in one week.
3. Doxepin 50 mg po qhs.

CSX
 8-00010879

Exhibit B

MENTAL HEALTH EVALUATION

NAME: BROWN, Cal C.
NO: 998821
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

S-00010670

NAME: BROWN, Cal G.
 NO: 998821
 DATE: May 4, 1996
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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 - GAP: 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

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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

Exhibit C

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

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BROWN, Cal - 998921
September 11, 1996
Page 3 of 3

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.

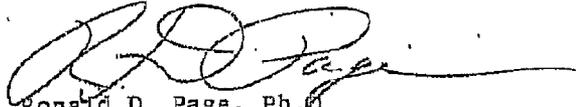
In addition to his criminal involvement, Mr. Brown's overall lifestyle appears to have been one of underlying estrangement from meaningful interpersonal relationships. He has never married, has been nomadic, and has been avoidant of sustained problem solving in any given situation or location. He appears 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
Page 3 of 3



Ronald D. Page, Ph.D.
Clinical Psychologist

RDF:bt

cc: Central Records
Classification - Headquarters
Health Records

S-00010668

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.



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

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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 Imaging (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

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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.

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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 neuropsychiatrist, 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.

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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.

A handwritten signature in black ink, appearing to read "George W. Woods, Jr.", written over a horizontal line.

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

EXHIBIT 8



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

OFFENDER I.D. DATA: BROWN, CAL
(Name, DOC#, DOB) 998921 04/16/1958

MENTAL STATUS EXAMINATION

FACILITY: WSP DATE: 07/20/2010

AD SEG IMU _____
PULHES Changed? No Yes Current S Code: 4

1. Primary Observations:

- A) Appearance: Neatly groomed Acceptable Disheveled Poor hygiene
- B) Oriented: Time Place Person Situation
- C) Eye Contact: Good Fair Poor
- D) Cooperation: Cooperative Acceptable Manipulative Suspicious Uncooperative
- E) Speech (rate): Normal Accelerated Retarded Pressured Poverty
- F) Attention: Normal Distractible Inaudible Dysarthric Incoherent
- Unfinished tasks Poor concentration

2. Symptoms—Psychological Processes:

- A) Content of thought: Delusions (check type below): Being controlled Nihilistic Somatic
- Normal Thought broadcasting Markedly illogical Persecutory Reference
- Thought withdrawal
- B) Form of thought: Loosening of associations Flight of ideas Racing thoughts Neologisms
- Well organized Poverty of content of speech Perseverations Blocking Clanging
- C) Perception: Hallucinations (check type): Auditory Visual Tactile
- Normal Gustatory Olfactory Somatic Hypersensitivity
- D) Affect: Inappropriate Constricted Blunted Flat
- Normal Labile Pressured Driven
- E) Mood: Anxious Irritable Angry Hostile
- Normal Sad Depressed Withdrawn
- Elated Euphoric Expansive

3. Current Medication and Compliance:

P is compliant with his medications prescribed at this time.

4. Behaviors:

- Current suicidal ideation Current suicide attempt Current assaultive ideation
 - Current suicide plan Current suicide command hallucinations Current assault command hallucinations
 - History of suicidal ideation History of suicide attempt History of assaultive ideation
 - Sleep: Normal Hypersomnia Insomnia Disturbance: _____
 - Appetite: Normal Increased Decreased
 - Weight: Normal Weight gain Weight loss
- Comments: P seems to be programming well in IMU.

5. Diagnostic Impression:

Axis I: _____ Axis IV: _____
 Axis II: _____ Axis V (GAF): _____
 Axis III: _____ Maximum GAF within past year: _____
 Comments: None at this time.

6. Referral: None at this time.

7. During interview, displayed SMI symptoms? No Yes

Interviewer (Print or Stamp): Amy Evensen, Psych Associate

Signature:

State law (RCW 70.02; RCW 70.24.105; RCW 71.05.390) and/or federal regulations (42 CFR Part 2; 45 CFR Part 164) prohibit disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law.



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

OFFENDER I.D. DATA: BROWN, CAL
(Name, DOC#, DOB) 998921 04/16/1958

MENTAL STATUS EXAMINATION

FACILITY: WSP DATE: 01/08/2009

AD SEG IMU _____

PULHES Changed? No Yes Current S Code: 3

1. Primary Observations:

- A) Appearance: Neatly groomed Acceptable Disheveled Poor hygiene
- B) Oriented: Time Place Person Situation
- C) Eye Contact: Good Fair Poor
- D) Cooperation: Cooperative Acceptable Manipulative Suspicious Uncooperative
- E) Speech (rate): Normal Accelerated Retarded Pressured Poverty
- Audible Inaudible Dysarthric Incoherent
- F) Attention: Normal Distractible Unfinished tasks Poor concentration

2. Symptoms—Psychological Processes:

- A) Content of thought: Normal Delusions (check type below): Thought broadcasting Thought withdrawal Being controlled Nihilistic Somatic Markedly illogical Persecutory Reference
- B) Form of thought: Well organized Loosening of associations Flight of ideas Racing thoughts Neologisms Poverty of content of speech Perseverations Blocking Clanging
- C) Perception: Normal Hallucinations (check type): Auditory Visual Tactile Gustatory Olfactory Somatic Hypersensitivity
- D) Affect: Normal Inappropriate Constricted Blunted Flat Labile Pressured Driven
- E) Mood: Normal Anxious Irritable Angry Hostile Sad Depressed Withdrawn Elated Euphoric Expansive

3. Current Medication and Compliance:

No issues

4. Behaviors:

- Current suicidal ideation Current suicide attempt Current assaultive ideation
- Current suicide plan Current suicide command hallucinations Current assault command hallucinations
- History of suicidal ideation History of suicide attempt History of assaultive ideation

Sleep: Normal Hypersomnia Insomnia Disturbance: _____

Appetite: Normal Increased Decreased

Weight: Normal Weight gain Weight loss

Comments:

5. Diagnostic Impression:

Axis I: _____ Axis IV: _____

Axis II: _____ Axis V (GAF): _____

Axis III: _____ Maximum GAF within past year: _____

Comments: Offender Brown presented as well groomed and interacted appropriately with staff. He protested the fact that all death row offenders were moved to IMU--but he made his protest appropriately and explained his points clearly. No indication of emotional or cognitive distress.

6. Referral:

7. During interview, displayed SMI symptoms? No Yes

Interviewer (Print or Stamp): Peter Beck, Psychology Associate

Signature:

State law (RCW 70.02; RCW 70.24.105; RCW 71.05.390) and/or federal regulations (42 CFR Part 2; 45 CFR Part 164) prohibit disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law.



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

OFFENDER I.D. DATA: BROWN, CAL
(Name, DOC#, DOB) 998921 04/16/1958

MENTAL STATUS EXAMINATION

FACILITY: WSP DATE: 02/05/2009

AD SEG IMU

PULHES Changed? No Yes Current S Code: 3

1. Primary Observations:

- A) Appearance: Neatly groomed Acceptable Disheveled Poor hygiene
- B) Oriented: Time Place Person Situation
- C) Eye Contact: Good Fair Poor
- D) Cooperation: Cooperative Acceptable Manipulative Suspicious Uncooperative
- E) Speech (rate): Normal Accelerated Retarded Pressured Poverty
- F) Attention: Normal Distractible Inaudible Dysarthric Incoherent
- Unfinished tasks Poor concentration

2. Symptoms—Psychological Processes:

- A) Content of thought: Delusions (check type below): Being controlled Nihilistic Somatic
- Normal Thought broadcasting Markedly illogical Persecutory Reference
- Thought withdrawal
- B) Form of thought: Loosening of associations Flight of ideas Racing thoughts Neologisms
- Well organized Poverty of content of speech Perseverations Blocking Clanging
- C) Perception: Hallucinations (check type): Auditory Visual Tactile
- Normal Gustatory Olfactory Somatic Hypersensitivity
- D) Affect: Inappropriate Constricted Blunted Flat
- Normal Labile Pressured Driven
- E) Mood: Anxious Irritable Angry Hostile
- Normal Sad Depressed Withdrawn
- Elated Euphoric Expansive

3. Current Medication and Compliance:

No issues

4. Behaviors:

- Current suicidal ideation Current suicide attempt Current assaultive ideation
- Current suicide plan Current suicide command hallucinations Current assault command hallucinations
- History of suicidal ideation History of suicide attempt History of assaultive ideation
- Sleep: Normal Hypersomnia Insomnia Disturbance: _____
- Appetite: Normal Increased Decreased
- Weight: Normal Weight gain Weight loss

Comments:

5. Diagnostic Impression:

Axis I: _____ Axis IV: _____
 Axis II: _____ Axis V (GAF): _____
 Axis III: _____ Maximum GAF within past year: _____

Comments: Offender Brown presented without indication of emotional or cognitive distress. He discussed his frustration with the system and then wished the committee a non-confrontational day.

6. Referral:

7. During interview, displayed SMI symptoms? No Yes

Interviewer (Print or Stamp): Peter Beck, Psychology Associate

Signature:

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STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

OFFENDER ID DATA: BROWN, CAL
(Name, DOC#, DOB) 998921 04/16/1958

MENTAL STATUS EXAMINATION

FACILITY: WSP DATE: 02/27/2009

AD SEG IMU

PULHES Changed? No Yes Current S Code: 3

1. Primary Observations:

- A) Appearance: Neatly groomed Acceptable Disheveled Poor hygiene
- B) Oriented: Time Place Person Situation
- C) Eye Contact: Good Fair Poor
- D) Cooperation: Cooperative Acceptable Manipulative Suspicious Uncooperative
- E) Speech (rate): Normal Accelerated Retarded Pressured Poverty
- F) Attention: Normal Distractible Inaudible Dysarthric Incoherent
- Unfinished tasks Poor concentration

2. Symptoms—Psychological Processes:

- A) Content of thought: Delusions (check type below): Being controlled Nihilistic Somatic
- Normal Thought broadcasting Markedly illogical Persecutory Reference
- Thought withdrawal
- B) Form of thought: Loosening of associations Flight of ideas Racing thoughts Neologisms
- Well organized Poverty of content of speech Perseverations Blocking Clanging
- C) Perception: Hallucinations (check type): Auditory Visual Tactile
- Normal Gustatory Olfactory Somatic Hypersensitivity
- D) Affect: Inappropriate Constricted Blunted Flat
- Normal Labile Pressured Driven
- E) Mood: Anxious Irritable Angry Hostile
- Normal Sad Depressed Withdrawn
- Elated Euphoric Expansive

3. Current Medication and Compliance:

No issues

4. Behaviors:

- Current suicidal ideation Current suicide attempt Current assaultive ideation
- Current suicide plan Current suicide command hallucinations Current assault command hallucinations
- History of suicidal ideation History of suicide attempt History of assaultive ideation
- Sleep: Normal Hypersomnia Insomnia Disturbance:

Appetite: Normal Increased Decreased
Weight: Normal Weight gain Weight loss

Comments:

5. Diagnostic Impression:

Axis I: _____ Axis IV: _____
Axis II: _____ Axis V (GAF): _____
Axis III: _____ Maximum GAF within past year: _____

Comments: Offender Brown talked resignedly about his frustration with DOC and the clock winding down toward his execution. He felt that many of the little rules governing life in IMU were unnecessary and did not make sense. He presented with no indication of acute emotional or cognitive distress.

6. Referral:

7. During interview, displayed SMI symptoms? No Yes

Interviewer (Print or Stamp): Peter Beck, Psychology Associate

Signature:

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STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

OFFENDER ID: DATA: BROWN, CAL
(Name, DOC#, DOB) 998921 04/16/1958

MENTAL STATUS EXAMINATION

FACILITY: WSP DATE: 06/02/2009

AD SEG IMU .

PULHES Changed? No Yes Current S Code: 3

1. Primary Observations:

- A) Appearance: Neatly groomed Acceptable Disheveled Poor hygiene
- B) Oriented: Time Place Person Situation
- C) Eye Contact: Good Fair Poor
- D) Cooperation: Cooperative Acceptable Manipulative Suspicious Uncooperative
- E) Speech (rate): Normal Accelerated Retarded Pressured Poverty
- F) Attention: Normal Audible Inaudible Dysarthric Incoherent
- Distractible Unfinished tasks Poor concentration

2. Symptoms—Psychological Processes:

- A) Content of thought: Normal Delusions (check type below): Thought broadcasting Thought withdrawal Being controlled Markedly illogical Nihilistic Persecutory Somatic Reference
- B) Form of thought: Well organized Loosening of associations Poverty of content of speech Flight of ideas Perseverations Racing thoughts Blocking Neologisms Clanging
- C) Perception: Normal Hallucinations (check type): Gustatory Auditory Olfactory Visual Somatic Tactile Hypersensitivity
- D) Affect: Normal Inappropriate Labile Constricted Pressured Blunted Driven Flat
- E) Mood: Normal Anxious Sad Elated Irritable Depressed Euphoric Angry Withdrawn Expansive Hostile

3. Current Medication and Compliance:

No issues

4. Behaviors:

- Current suicidal ideation Current suicide attempt Current assaultive ideation
- Current suicide plan Current suicide command hallucinations Current assault command hallucinations
- History of suicidal ideation History of suicide attempt History of assaultive ideation

Sleep: Normal Hypersomnia Insomnia Disturbance:

Appetite: Normal Increased Decreased

Weight: Normal Weight gain Weight loss

Comments:

5. Diagnostic Impression:

Axis I: _____ Axis IV: _____

Axis II: _____ Axis V (GAF): _____

Axis III: _____ Maximum GAF within past year: _____

Comments: Offender asked about pillow cases for the pillows that the death row prisoners recently received. He also asked about re-doing the store list. He presented with no indication of acute emotional or cognitive distress.

6. Referral:

7. During interview, displayed SMI symptoms? No Yes

Interviewer (Print or Stamp): Peter Beck, Psychology Associate

Signature:

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STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

OFFENDER I.D. DATA: BROWN, CAL
(Name, DOB, DOB) 998921 01/01/2001

MENTAL STATUS EXAMINATION

FACILITY: WSP DATE: 10/22/2009

AD SEG IMU _____

PULHES Changed? No Yes Current S Code: 3

1. Primary Observations:

- | | | | | |
|-------------------|--|---|--|---|
| A) Appearance: | <input checked="" type="checkbox"/> Neatly groomed | <input type="checkbox"/> Acceptable | <input type="checkbox"/> Disheveled | <input type="checkbox"/> Poor hygiene |
| B) Oriented: | <input checked="" type="checkbox"/> Time | <input checked="" type="checkbox"/> Place | <input checked="" type="checkbox"/> Person | <input checked="" type="checkbox"/> Situation |
| C) Eye Contact: | <input checked="" type="checkbox"/> Good | <input type="checkbox"/> Fair | <input type="checkbox"/> Poor | |
| D) Cooperation: | <input checked="" type="checkbox"/> Cooperative | <input type="checkbox"/> Acceptable | <input type="checkbox"/> Manipulative | <input type="checkbox"/> Suspicious |
| E) Speech (rate): | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Accelerated | <input type="checkbox"/> Retarded | <input type="checkbox"/> Pressured |
| | | <input type="checkbox"/> Audible | <input type="checkbox"/> Inaudible | <input type="checkbox"/> Dysarthric |
| F) Attention: | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Distractible | <input type="checkbox"/> Unfinished tasks | <input type="checkbox"/> Poor concentration |
| | | | | <input type="checkbox"/> Uncooperative |
| | | | | <input type="checkbox"/> Poverty |
| | | | | <input type="checkbox"/> Incoherent |

2. Symptoms—Psychological Processes:

- | | | | | |
|------------------------|--|---|---|-------------------------------------|
| A) Content of thought: | <input type="checkbox"/> Delusions (check type below): | <input type="checkbox"/> Being controlled | <input type="checkbox"/> Nihilistic | <input type="checkbox"/> Somatic |
| | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Thought broadcasting | <input type="checkbox"/> Persecutory | <input type="checkbox"/> Reference |
| | | <input type="checkbox"/> Thought withdrawal | <input type="checkbox"/> Markedly illogical | |
| B) Form of thought: | <input type="checkbox"/> Loosening of associations | <input type="checkbox"/> Flight of ideas | <input type="checkbox"/> Racing thoughts | <input type="checkbox"/> Neologisms |
| | <input checked="" type="checkbox"/> Well organized | <input type="checkbox"/> Poverty of content of speech | <input type="checkbox"/> Blocking | <input type="checkbox"/> Clanging |
| C) Perception: | <input type="checkbox"/> Hallucinations (check type): | <input type="checkbox"/> Auditory | <input type="checkbox"/> Visual | <input type="checkbox"/> Tactile |
| | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Gustatory | <input type="checkbox"/> Olfactory | <input type="checkbox"/> Somatic |
| | | <input type="checkbox"/> Inappropriate | <input type="checkbox"/> Constricted | <input type="checkbox"/> Blunted |
| D) Affect: | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Labile | <input type="checkbox"/> Pressured | <input type="checkbox"/> Driven |
| | | | <input type="checkbox"/> Irritable | <input type="checkbox"/> Flat |
| E) Mood: | <input type="checkbox"/> Anxious | <input type="checkbox"/> Depressed | <input type="checkbox"/> Euphoric | <input type="checkbox"/> Angry |
| | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Sad | | <input type="checkbox"/> Withdrawn |
| | | <input type="checkbox"/> Elated | | <input type="checkbox"/> Hostile |
| | | | | <input type="checkbox"/> Expansive |

3. Current Medication and Compliance:

No issues

4. Behaviors:

- | | | |
|---|---|---|
| <input type="checkbox"/> Current suicidal ideation | <input type="checkbox"/> Current suicide attempt | <input type="checkbox"/> Current assaultive ideation |
| <input type="checkbox"/> Current suicide plan | <input type="checkbox"/> Current suicide command hallucinations | <input type="checkbox"/> Current assault command hallucinations |
| <input type="checkbox"/> History of suicidal ideation | <input type="checkbox"/> History of suicide attempt | <input type="checkbox"/> History of assaultive ideation |
| Sleep: <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Hypersomnia | <input type="checkbox"/> Insomnia |
| Appetite: <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Increased | <input type="checkbox"/> Decreased |
| Weight: <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Weight gain | <input type="checkbox"/> Weight loss |

Comments:

5. Diagnostic impression:

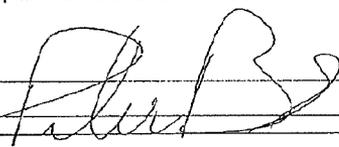
Axis I: _____ Axis IV: _____
 Axis II: _____ Axis V (GAF): _____
 Axis III: _____ Maximum GAF within past year: _____

Comments: P interacted appropriately. He discussed his court case, his wish to be back in Unit 5 and his medications. No indication of emotional or cognitive distress.

6. Referral:

7. During interview, displayed SMI symptoms? No Yes

Interviewer (Print or Stamp): Peter Beck, Psychology Associate

Signature: 

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EXHIBIT 9

THE SUPREME COURT OF WASHINGTON

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

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:

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

CLERK
 D. R. C. CENTER
 SEP 9 PM 1:18
 SUPREME COURT
 WASHINGTON
 FILED

593/185