IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES and ALBERT BROWN,	)	CA No.
	)	
	)	D.C. No. 5-6-cv-219-JF-HRL
Plaintiffs-Appellants,	)	D.C. No. 5-6-cv-926-JF-HRL
	)	
v.	)	**DEATH PENALTY CASE**
	)	
MATTHEW CATE, Secretary of the, Department of Corrections and Rehabilitation, et al.,	)	**Emergency Motion Under Circuit Rule 27-3**
	)	
	)	**EXECUTION SCHEDULED FOR 12:01 A.M ON WEDNESDAY, SEPTEMBER 29, 2010**
Defendants-Appellees.	)	
	)	

APPELLANT ALBERT BROWN'S MOTION FOR STAY OF EXECUTION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE JEREMY FOGEL
United States District Judge

JOHN R. GRELE
Law Offices of John R. Grele
149 Natoma St., Third Floor
San Francisco, CA 94105
Tel: 415-348-9300
Fax: 415-348-0364

DAVID A. SENIOR
McBreen & Senior
2029 Century Park East, Third Floor
Los Angeles, CA 90067
Tel: 310-552-5300
Fax: 310-552-1205

ATTORNEYS FOR APPELLANT-PETITIONER ALBERT BROWN

I. INTRODUCTION

Appellant Albert Brown is scheduled to be executed by lethal injection shortly after midnight on September 29, 2010. He applies to this Court for a Stay of Execution because the record in this case demonstrates the likelihood that California's lethal injection procedures continue to pose a risk of inflicting severe pain, and Mr. Brown can thereby show a likelihood of success on the merits of his Eighth Amendment challenge.

On September 24, 2010, the district court determined that Mr. Brown had proceeded in a timely fashion to intervene in this matter under 42 U.S.C. section 1983.[1] The district court also determined that Mr. Brown shared virtually identical claims with Co-Plaintiff Michael Morales in maintaining that California's adoption of new execution procedures failed to correct many of the deficiencies in the implementation of a similar protocol, which earlier led the court to stay the execution of Mr. Morales. (ER at 7, 13-14.)[2] Evidence documenting the severity of those deficiencies included Defendants' own records, which revealed that nearly two-thirds of the lethal-injection executions did not go as intended; and medical evidence that

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[1] The district court noted that "[s]ignificantly, . . . Defendants themselves did not contend in their briefing that Brown has not been diligent in seeking federal relief." (ER 12-13.)

[2] *See Morales v. Tilton*, 465 F.Supp.2d 972 (N.D. Cal. 2006) and *Morales v. Hickman*, 415 F.Supp.2d 1037 (N.D. Cal. 2006).

malfeasance in the administration of sodium thiopental failed to render the prisoner unconscious before an excruciatingly painful paralytic agent was injected. (ER 13-14.)

The district court observed that when it permitted Co-Plaintiff Morales to make a factual inquiry beyond the facial regularity of Defendants' execution protocol, the evidence demonstrated that the procedures "as implemented in practice 'lack[ed] both reliability and transparency.'" (ER 14.) In its Order of September 24, 2010, the lower court concluded that Defendants' procedures likely would have been found to violate the Eighth Amendment even under heightened standards of review, including the plurality opinion in *Baze v. Rees*, 535 U.S. 35 (2008), requiring a plaintiff to show a "demonstrated risk of severe pain." (ER 14.)

The district court also concluded that the claims Mr. Brown shares with Mr. Morales can be appropriately reviewed through "full on expedited proceedings," and resolved within the next three months. (ER 52.) The district court, however, denied Mr. Brown's motion to stay his execution long enough for him to see the litigation to its impending conclusion. The lower court based the denial of a stay on two grounds, which were equally contrary to law and equity.

First, the district court noted that the former, official protocol, O.P. 770 "no longer is operative," and that the Defendants had made "extensive efforts to address the Court's concerns," by promulgating new regulations and constructing new "facilities." (ER 14.) Whether the former protocol, or the deficiencies that rendered it constitutionally suspect *in practice* are still operative is, of course, the ultimate issue to be decided on the merits. In the meantime, as the district court has implicitly noted, Defendants are unreliable arbiters of their own compliance with Eighth Amendment requirements. In opposing Mr. Morales's stay of execution, the Defendants also assured the district court that there were no significant deficiencies in the protocol they intended to use. The district court acknowledges, however, that "the development of the record *after* Morales's execution was stayed produced *even stronger* evidence of problems" than those that led the court to stay the execution. (ER 14 (emphasis added).) In turn, the district court's broader writings demonstrate that Defendants' construction of a new "facility" was not guided by "the Court's concerns."[3]

[3] "When asked by a legislative oversight committee why the construction had commenced without its knowledge, a corrections official responded on behalf of San Quentin's warden that the Court had ordered that a new chamber be built. When it was pointed out that the Memorandum contained no such requirement, the warden (a named party in Morales) admitted that he had not read the Memorandum." Fogel, Jeremy, *In The Eye Of The Storm: A Judge's*

The district court's second reason for denying the stay of execution was that the state's action in aggressively moving to set Mr. Brown's execution date, even before it officially adopted the new procedures, "effectively preclude[d] an orderly review of the new regulations." (ER 12.) Although the district court "would have preferred strongly to address any constitutional issues with respect to the regulations in a more orderly fashion," the state's orchestration of timing meant "there was no way the Court can engage in a thorough analysis of the relevant factual and legal issues in the days remaining before Brown's execution date." (ER 14.)

Thus, the court would allow the state's own creation of these time constraints to enable Defendants' to avoid orderly review of Mr. Brown's colorable claims that the execution procedures are unconstitutional. Meanwhile, the same issues will be fully litigated in the case of Co-Plaintiff Morales. Contrary to the district court's reasoning, principles of equity dictate that the adverse party's actions in setting the execution date, and the irreparable harm Mr. Brown will suffer if it is not stayed are reasons for granting, not denying, the stay. *See Wilson v. United States Dist. Ct. for the N. Dist. of Cal.* 161 F.3d 1185, 1187 (9th Cir. 1998) (denying State's

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Experience In Lethal-Injection Litigation, 35 Fordham Urb. L.J. 735, 747 (2008).

mandamus petition to review temporary restraining order because where complaint alleged colorable due process violation for denial of fairness in clemency proceedings, and "damage to state defendants is questionable . . . because the only harm complained of is the inability to execute the petitioner within 5 hours of the district court's order," and hearing on preliminary injunction could be scheduled within three weeks); *Koninklijke Philips Electronics N.V. v. KXD Technology*, 539 F.3d 1039, 1045 (9th Cir. 2008) (rejecting defendants' claim of irreparable harm as "entirely of their own making").

Yet, instead of granting the stay, the district court conditionally denied it. As it did with Mr. Morales, the district court suggested, on the one hand, that Mr. Brown had not demonstrated that the procedures constituted a sufficient *facial* threat of harm so as to justify a stay. On the other hand, the court was sufficiently concerned that the procedures *in practice* would result in severe pain that the court felt compelled to offer Mr. Brown the opportunity to "opt out" of Defendants' official protocol. If Mr. Brown agreed to be executed by a single-drug protocol, using only sodium thiopental, the court was prepare to order the Defendants to so, or suffer the automatic issuance of a stay of the execution. (ER 16-17.)

The offer of *ad hoc*, improvised execution procedures as a self-help remedy to avoid the demonstrated risk of severe pain that will be inflicted through an official protocol is neither a legal nor rational response to Mr. Brown's straightforward showing entitling him to a stay of his execution. As set forth in Appellant's Brief and previewed below, the clear illegality of the district court's proposal, as well as its profound failure to meaningfully or humanely address Mr. Brown's predicament, and the chaotic disarray into which it has thrown these proceedings, justifies this Court's intervention to return order and the rule of law to this case.

II. PROCEDURAL AND FACTUAL HISTORY

After the events in the *Morales* case, which clearly demonstrated a number of constitutional deficiencies, the state then promulgated a new protocol, its fourth version in as many years, although it was still entitled OP 770. The only significant difference was to reduce the dosage of the first drug, the anesthetic sodium thiopental, from the five grams used in previous executions, to three grams.

The district court then set the matter for hearing to determine if the state had cured the deficiencies the court had identified (and, presumably, whatever further or continuing deficiencies Plaintiff Morales could prove). As discovery was being undertaken, the state courts enjoined OP 770 because

it was an "underground regulation" in violation of California Administrative Procedure Act. S*ee Morales v. California Dept. of Corrections & Rehabilitation,* 168 Cal.App.4th 729 (2008). Defendants *agreed to stay* discovery and review in the district court pending the state court's resolution of the California Administrative Procedure Act litigation. They then propounded exactly the same procedure again in the state administrative review process, with minor deviations of little or no import. *Compare* OP 770 (May 15, 2007, Doc. 318; *with* Title 15 CCR 3349 et seq. During administrative review, they did not consider many of the materials that were part of the lethal injection case in the district court,[4] and made no significant changes in response to any public comments.

Defendant's counsel did not go before either the state or federal court for review of its "new" procedures. Instead, the state secured an execution date for Mr. Brown, who was not a party to either suit, on August 30, 2010, the day after the "new" regulation was operable. Mr. Brown and all other condemned inmates had their executions stayed by the Marin Superior Court on August 31, 2010. This was lifted by the California Court of Appeal on

[4] These included materials such as the Warden's objection to being removed from the infusion room and the state's own analysts' recommendation for a single drug protocol.

September 20, 2010. Mr. Brown then appeared in the district court on his applications to intervene and for a stay of execution.

In its Order, the district court held that Mr. Brown had proceeded in a timely fashion and that any time constraints limiting the court's ability to conduct an orderly review of the issues was the fault of the state. (ER 12-13.) But the district court denied any inquiry into the "new" procedures, although a hearing and discovery had been ordered on the exact same procedures when they were called OP 770. And, the district court pointed to the purported fact that the state had undertaken exhaustive review, without considering the record of that review (which in fact displays a cynical manipulation of the administrative process), or the results of that review (which ended up with same lethal injection process as OP 770). Based on this analysis, the district court held Mr. Brown could not establish a likelihood of success because, although Mr. Morales had satisfied the *Baze* standard of substantial harm, Mr. Brown could not. (ER 12-13.)

In direct contradiction of this holding, the district court also held that Mr. Brown could elect to deviate from the three-drug protocol (which has been in every version), and opt-in for a single-drug, thiopental-only version if he consented to deviate from the new regulations. (ER 16-17.) The district court could not require such an option if, as it had held, Mr. Brown could not

meet the *Baze* standard that Mr. Morales did. Thus, there is an implicit finding that the new regulation poises the same danger as already has been found for Mr. Morales and requires some remedial action or alternative. Ironically, the district court was nonetheless content to have Mr. Brown executed under that very same problematic three-drug protocol should he not choose the single drug version.

The district court based this single-drug option on anecdotal reports from Washington and Ohio, who have adopted single drug protocols. According to the lower court, with no evidence before it, executions have gone well under those protocols. (ER 15.) Indeed, this appears to be the nature of the press reports, although no one has actually examined the logs to see if this is true, an easy enough task if this was at all important. As Mr. Brown pointed out, though, each of those states actually undertook review and training under these procedures for several months before resuming executions. (ER 28-29.) In Mr. Brown's case, it would have been less than four days.

For its part, anxious to execute before October 1, 2010,[5] the state first presented a declaration by Mr. McAuliffe a retired corrections counselor. He

[5] Lest there be any doubt about this, when asked if any further executions were on the horizon, counsel represented that it was not seeking any further executions prior to mid-November. (ER 42.) Why such a date would be

posits that training has been undertaken for the past year even though no regulations were in effect, and that this was satisfactory because the procedures were the same under OP 770 and the new regulations. (ER 130-31.) Thus, the Defendants propounded a declaration contrary to the district court's order that states the procedures are significantly different. Once the district court indicated a potential single-drug solution, the state quickly did an about-face from its adamant position of the past ten years and offered a single-drug procedure. This would be done by returning to the five gram thiopental dose of the past executions that was so problematic.

Mr. Brown then presented the district court with a series of unanswered questions based upon the Morales record that remained unanswered as to the single-drug protocol. (ER 24-27.) Most of these also applied to the three-drug protocol. They included whether the procedure was still done in the dark; whether sufficient sight lines existed; the lack of any back up plan; and, whether any of the supposedly "trained" persons were qualified and competent. The district court did not address any of these issues and neither did Defendants. Nonetheless, the district court issued its order offering Mr. Brown the choice of a single-drug procedure. (ER 7-17.) When Mr. Brown

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selected for this representation is no mystery, as the CDCR's inventory of sodium thiopental expires on October 1, 2010.

sought leave to reconsider, pointing out that much of what was contained in the district court's order was not the subject of any briefing or fact development, and the election mechanism was unfair (ER 352-55), that application was denied. (ER 5-6.)

As was disclosed after the district court's order, and only because Mr. Brown kept insisting on disclosure (and not because of any court order to disclose), the state has no backup procedure for the single drug process except to continue to use the drug with whatever amount is left, unlike Washington and Ohio, because it does not have sufficient thiopental. (ER 308-51). Mr. Brown again moved for reconsideration to permit adequate inquiry into this second version of the proposed procedure. (ER 300-07.) That request was denied. (ER 4A-4B.)

For his part, Mr. Brown is unable to choose given the short time frame allotted him and the many unanswered questions about the proposed procedure. (ER 306-07.) The district court permitted counsel an additional visit with Mr. Brown and extended its deadline for election to noon today. ER 4A-4B.) By then, counsel was following the district court's conflicting directive contained in two orders to get this matter before this Court as quickly as possible.

III. ARGUMENT

Mr. Brown requests a stay of execution to permit resolution of whether Defendants' untested and unreviewed procedures cured the deficiencies that required a stay of execution of Mr. Morales in 2006 and that were found in the district court's Memorandum of Intended Decision. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D Cal. 2006). The "limited legal question" before the district court was whether a timely intervener should be allowed to live long enough to participate in the "accelerated case management schedule" to resolve this case for his identically-situated co-plaintiff. (ER 14; 15.) Indeed, the district court has announced its intention to resolve the colorable and serious questions surrounding California's procedures within the next three months.

Defendants seek to moot Mr. Brown's interests by executing him in the interim. This proposed course of action threatens fairly irreparable harm to Mr. Brown. If, instead, Defendants are not permitted to execute Mr. Brown, any harm to Defendants will be approximately *de minimis*. *See Wilson*, 161 F.3d at 1187 (denying state's mandamus petition to review temporary restraining order because where complaint alleged colorable due process violation for denial of fairness in clemency proceedings, and "damage to state defendants is questionable . . . because the only harm complained of is the

inability to execute the petitioner within 5 hours of the district court's order," and hearing on preliminary injunction could be scheduled within three weeks).

The only purported support that the Defendants have cured the multiple deficiencies in its lethal injection procedures is their representation that they have made "extensive efforts" to address the district court's concerns, including by promulgating "the new regulations," and constructing new facilities for carrying out executions. (ER 13.) These, of course, are the same Defendants who assured the courts that "former" O.P. 770 complied with the Eighth Amendment in 2006. These also are the same Defendants who assured the courts they would comply with the modifications ordered as necessary to permit Mr. Morales's execution to go forward in 2006, and then reneged.[6] These are the same Defendants who later stipulated to facts

[6] The evidence presented at the Morales hearing demonstrated that CDCR and, more importantly, its counsel, had not promptly informed the anesthesiologists of Judge Fogel's order and the subsequent Ninth Circuit opinion that required they take measures to correct a botched execution if one resulted, until a few hours before the execution. (ER 214-16) (Defendants' attempt to convince anesthesiologists that Ninth Circuit's opinion was not a court order, and *ex parte* attempts to obtain "clarification" from the district court.) In addition, the evidence established that the execution team interpreted the anesthesiologist's directions to mean that only 1 gram of thiopental was needed, and would have proceeded accordingly. (Doc. 260, Transcript of Proceedings, Sept. 29, 2006, Vol. 5, RT 1105-09.) This would have resulted in the only execution in history with that low dose of sodium thiopental. The District Court charitably suggested there must have been some inexplicable

demonstrating "even stronger evidence of problems with O.P. 770," than the showing that led the district court to conditionally stay Plaintiff Morales's execution in 2006. (ER 14.)

It is indisputable that if the courts had accepted CDCR's solemn assurances regarding the adequacy of O.P. 770 in 2006, Mr. Morales would have been subjected to an execution with a medically confirmed likelihood to result in excruciating pain when pancuronium bromide and potassium chloride were injected in his veins. Yet, the district court was prepared to accept the unexamined assurances of the same Defendants that they will get it right this time with Mr. Brown, simply because Defendants have not afforded the district court enough time for "orderly review." (ER 12.)[7] Even if standards of human dignity that mark the advance of a maturing society did

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"disconnect" between the Courts' explicit instructions and the message communicated to the persons tasked to execute Mr. Morales (*see* ER 171-72) and has since attributed this to "cultural differences" between court orders and those entrusted with effectuating them. Fogel, Jeremy, *In The Eye Of The Storm: A Judge's Experience In Lethal-Injection Litigation*, 35 Fordham Urb. L.J. 735 (2008). Plaintiff's characterization is far from one so charitable and forgiving, given the numerous counsel advising CDCR.

[7] The district court in fact had ample opportunity to conduct a hearing for Mr. Brown between September 21 and September 29, if it was so inclined. This would have allowed cross-examination of relevant witnesses, including the state actors entrusted with performing the execution, i.e., the "greatest legal engine ever invented for the discovery of truth" (*California v. Green*, 399 U.S. 149, 158 (1970)), and provided the district court with, if not an exhaustive review, a far better review than undertaking no review at all.

not entitle Mr. Brown to better treatment, basic notions of civil practice entitled him to a stay under these circumstances.

A. Standard of Review

Under *Barefoot v. Estelle*, 463 U. S. 880, 885 (1983), Mr. Brown is entitled to a stay of execution if he demonstrates "substantial grounds upon which relief might be granted." This standard is satisfied when the movant demonstrates that his "argument warrants further review," which cannot be fully and fairly accomplished in the time remaining before the execution. *See Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997).

A plaintiff seeking a preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, __ U.S. __, 129 S. Ct. 365, 375 (2008). This Court recently explained that its "serious questions" or "sliding scale" approach to preliminary injunctions – where "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another" – survives *Winter*. *Alliance for Wild Rockies v. Cottrell*, __ F.3d __, 2010 WL 3665149, *5 (Sept. 22, 2010) (noting also that "plaintiffs must establish that irreparable harm is likely, not

just possible") (emphasis in original). Under this Court's test then, "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test also are met." *Id.*

This Court reviews a district court's denial of an injunction for abuse of discretion. *Alliance for Wild Rockies*, 2010 WL 3665149, *4 (Sept. 22, 2010). Although the grant or denial of a motion for a preliminary injunction is discretionary, an appellate court will reverse the district court when it has abused its discretion:

> A district judge may abuse his discretion in any of three ways: (1) he may apply incorrect substantive law or an incorrect preliminary injunction standard; (2) he may rest his decision to grant or deny a preliminary injunction on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or (3) he may apply an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.
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> A district court's order is reversible for legal error if the court did not employ the appropriate legal standards which govern the issuance of a preliminary injunction, ... or if, in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in litigation...
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> Abuse of discretion may occur when the district court rests its decision to grant or deny a preliminary injunction on a clearly erroneous finding of fact.... A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Zepeda v. United States Immigration & Naturalization Serv., 753 F.2d 719, 724-25 (9th Cir.1985) (citations omitted).

B. A Stay Of Execution Is Required Because The Record Establishes That There Is A Demonstrated Risk That Mr. Brown's Execution Will Cause An Unconstitutional Degree Of Pain And Suffering.

The district court correctly concluded that Mr. Morales presented substantial evidence that Defendants consistently have employed flawed procedures in performing lethal injection executions. (*See, e.g.*, ER 13-14 (noting that problems have occurred in "as many as seven of the eleven lethal injection executions).) The district court further has concluded that, based upon the record before it, Mr. Morales is entitled to final resolution of his lawsuit prior to his execution. (ER 14 (adopting an accelerated case management schedule to review the new regulations).) Given these conclusions, the district court's denial of a stay of Mr. Brown's execution is indefensible and constitutes an abuse of discretion.[8] The district court's justifications for its differential treatment of Mr. Morales and Mr. Brown was its conclusion that California had undertaken "extensive efforts to address the Court's concerns," the different standard of review for Eighth Amendment

[8] The district court also plainly violated Mr. Brown's right to Equal Protection by finding the state in violation for Mr. Morales and requiring further proceedings, but permitting the state to execute Mr. Brown.

claims articulated in *Baze v. Rees*, 553 U.S. 35 (2008), and the lack of time for the district court to analyze "the relevant factual and legal issues in the days remaining before Brown's execution date." (ER 14.). None of these justifications are legal sufficient to deprive Mr. Brown of his constitutional rights to be free from Cruel and Unusual Punishment.

1. The District Court's Conclusions about Defendants' Changes in the Lethal Injection Protocol Are Unsupportable.

Notably, the district court could point to no single change except the construction of a new lethal injection chamber, one that neither it nor counsel has been permitted to view and one that counsel maintains is inadequate. (ER 24.) It pointed to the state administrative process without reviewing a single document about that process and despite knowing that a separate state lawsuit was filed alleging that the CDCR committed numerous violations of California's Administrative Procedures Act. (ER 257-99; 68-69.) Most critically, the district court noted that the previous findings in *Morales* concerned OP 770 without acknowledging the obvious – that in all substantial respects the procedures are the same. (*Compare* OP 770 (May 15, 2007; Doc. 318 with Title 15 CCR 3349 et seq.)

Because OP 770, the new regulation, and the proposed single-drug procedure all involve the administration of thiopental, it is worth examining

the record in this regard, something the district court never did. No state has had such a record of misadventure as California. Over one-half the inmates were breathing when, according to the state's own expert, they should have been dead. This was the direct result of the inability to correctly administer the first drug, sodium thiopental (thiopental). The inmates were supposedly injected with five grams of thiopental, which would have rendered anyone dead and respirations would have ceased within a minute. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1043-44 (N.D. Cal. 2006).[9]

To add to this record of misadventure, it was stipulated that at least four inmates, and likely five (because San Quentin "lost" the Thompson execution log), had to be given second dosages of potassium chloride, the heart-stopping agent, because they had not flat lined within the required time. (*See* ER 222 (Stipulated Fact 125 (Inmates Allen, Anderson, Massie and Siripongs required second dosages of potassium chloride)); ER 223 (Stipulated Fact 125a ("The doctor's log which lists, among other things, the number of doses of potassium chloride given to the inmate, is missing for the Thompson execution, and defendants cannot explain why.")))

[9] This conclusion has now been reflected in *some* of the single drug executions conducted to date to which the District Court refers.

What the above means is that the record is clear – California has proved itself incapable of administering five grams of thiopental correctly. If it had been done correctly, the inmates would not have been breathing as long as was noted and they would have been deceased and not required second doses of potassium chloride. Defendants have not provided any information that would cause anyone to blindly accept their current assurances that they can now do it correctly.

The record of thiopental administration is even worse when one examines the entire record. One uncontroverted fact is that no one on the execution team knows how to properly mix the drug. The state's expert, Dr. Ekins, stated the mixed chemical should appear to be clear. (Doc. 259, Transcript of Proceedings, Sept. 28, 2006, Vol. 4, RT 888-91.) The team members responsible for mixing could not adequately describe it. As the district court found, one of the deficiencies was the improper mixing of thiopental. (ER 176-77.)

Lest anyone think that the new procedures are different because they now require "qualified" personnel, it must be remembered that those during previous executions who were not mixing the drugs properly and were unable to adequately insert and monitor intravenous (IV) lines were Licensed Vocational Nurses (LVNs) and Registered Nurses (RNs) with certificates that

they could insert IVs and supposedly a job that required they do so.[10] Apparently, this has simply continued under the "new" procedures.[11]

The District Court declined to review the "new" procedures—by which it intends to execute Mr. Brown--commenting that they had not been submitted yet. Then, without any factual support, the court concluded that they were sufficient to overcome Mr. Brown's showing based on the record before it. The district court ignored Mr. Brown's argument that what has changed is that CDCR has removed the doctor's logs that demonstrated

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[10] Actually, LVNs are not authorized under state law to insert IVs without a doctor present and the record was that, despite CDCR's assurances, those participating in the insertion of IVs did not do so on a regular basis because they were not permitted to. In the carefully worded section on qualifications of IV team members, such individuals are permitted to remain on the team. See Title 15 CCR 3349.1.2(e)(4). The regulations also permit it to be those persons solely who undertake such tasks.

[11] Because of this record, Mr. Brown twice insisted Defendants disclose their backup plan for a single-drug procedure. Although the district court ignored this plea, Defendants eventually provided it: to identify when the drug is not being properly administered, and then take the syringe and put it in another vein. Basically, the plan is to administer whatever remains of the five grams of thiopental. This assumes that they will be able to identify mishaps early and to take appropriate actions, and to infuse correctly, something they obviously have never been able to do.

One critical feature of the *Morales* record, however, is that CDCR does not know how to recognize an infiltration wherein the IV is not working properly. The circumstances of the Williams execution are pertinent here. There, the IV team who had inserted the IV thought it was working properly. It was not. The evidence at the hearing was that this was not the only mishap; although it was the only one they acknowledged: Beardslee and Thompson (and likely Siripongs) were also subjected to improper IV insertions.

problems with executions, removed the training sign in sheets that were used to show no one actually attended training, and that they have the same people doing the same thing. (ER 24-25; 92-93.) In fact, all the assurances that are provided now are exactly the same as those provided when the hearing process began in Morales – training, selection, mixing of chemicals, qualified personnel, and adequate facilities. All of them proved to be false.

The "consciousness check" instituted in OP 770 and the "new" regulations, is often viewed as some sort of panacea. The record before the district court, however, has conclusively established that such a check is insufficient to determine anesthetic depth, the relevant question when administering pancuronium and potassium chloride, when it is performed by someone without the proper knowledge and training. What became known during the *Morales* litigation as the "Warden's poke" has transmogrified into this procedure, but is exactly the same thing – shaking Mr. Brown, talking to him, and brushing his eyes. The problem is that he could easily be in a stage that prevents responses, but that contains awareness of pain. Another problem is that the qualifications for this person contain no requirement of familiarity with anesthetic depth or how to measure it. Still another is that it is the very same people doing this who have managed to misapply the procedures to date.

The record that thus far has been developed in the *Morales* litigation unquestionably demonstrates that Mr. Brown has "substantial grounds upon which relief might be granted," *Barefoot*, 463 U. S. at 885 (1983). The district court's failure to permit a factual inquiry of the state's "new" procedures, while relying upon them to deny a stay of execution, was an abuse of discretion. Where factual matters are disputed, "the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) (internal quotation omitted) (remanding for evidentiary hearing). In circumstances where factual matters are disputed, a district court's findings of fact also must be "sufficiently comprehensive and pertinent to the issues" and a court may not unilaterally modify an injunction without fair notice to the parties. *Fed. Trade Comm'n v. Enforma Natural Products*, 362 F.3d 1204, 1218 (2004) (remanding to correct insufficient findings of fact after notice to parties).

Moreover, this Court has remanded a district court's denial of a motion for preliminary injunction when "apparent inconsistencies in the findings and conclusions" and the brevity of the court's order suggested that the lower court's determination on irreparable injury may have suffered a fatal defect.

Privitera v. California Bd. of Med. Quality Assurance, 926 F.2d 890, 897 (9th Cir. 1991). In *Privitera*, this Court ruled that the lower court primary relied on the timing of an upcoming hearing that was not germane to the preliminary injunction factors and failed to explain why it summarily concluded that Privitera had not demonstrated any likelihood of success on the merits nor that a balance of hardships tipped sharply in his favor. *Id*. at 898. Noting that the lower court's conclusions seemed inconsistent with other findings in the case, and holding that it was error to rely primarily on an irrelevant fact, the Court reversed and remanded. *Id*.; *see also Arcamuzi v. Continental Air Lines*, 819 F.2d 935, 936 (9th Cir. 1987) (remanding to district court for failure to consider a potential harm raised by plaintiff).

2. Mr. Brown Is Entitled To A Stay Of Execution Pursuant To *Baze v. Rees*, 553 U.S. 35 (2008).

In the district court, Defendants relied on *Baze v. Rees*, 535 U.S. 35 (2008), and the requirements therein to justify abbreviated consideration of the new protocol and proceeding to execution. In fact, the only arguable effect on this litigation is that *Baze* articulated the requirement that a plaintiff establish a substantial risk of serious harm.[12] Given the record here, however,

[12] This standard garnered only three votes. Arguably, three justices endorsed the "untoward readily avoidable risk of inflicting severe and unnecessary pain" standard. 535 U.S. at 107-108, 123. Justice Stevens was silent on the standard he would adopt, merely adopting the plurality's for sake

that standard was plainly satisfied. In nearly one-half the executions in California, the protocol did not appear to work as intended; the record shows why: the state was completely and utterly incompetent in the administration of the process, from the mixing of chemicals to the setting of IV's, to infusion through to monitoring inmate vital signs. Brown's ability to establish a likelihood of success on the merits is clear with this record.

Defendants' bald assertion that a new procedure is in place is insufficient to overcome the current showing. Instead, the state must affirmatively address the issues raised by the Court's Memorandum and the Plaintiff's closing brief. This case stands in a different posture from *Baze* or the subsequent circuit cases. The matter has progressed to a remedial stage of review, far beyond the initial stage of needing to plead or prove risk of harm. Risk of harm already has been established, and established sufficiently under any standard. The question is whether the state has fixed it. This requires the consideration of the process that Mr. Brown requested and was denied, and that Mr. Morales and all other inmates will receive.

The district court's opinion finds that Mr. Morales has met the *Baze* standard when attacking OP 770 in practice, but that Mr. Brown has not

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of argument in dissent. *Id.* at 87. It matters not for this case as the record before the Court is sufficient under any standard for a stay and further review.

because of the higher threshold for obtaining a stay of execution announced in *Baze*. (ER 14) ("the higher threshold for obtaining stays of execution established by the Supreme Court in *Baze*"). However, this is an error of law. The three-judge plurality in *Baze* did not set a higher standard for stays than the substantive standard for relief it announced. Instead, as would be expected, they are one and the same. *Baze*, 553 U.S. at 61. Further, *Baze* did not consider a challenge to lethal injection in practice as it had nothing before it concerning Kentucky's record of executions other than a single execution without incident. The district court fails to articulate how California could be in violation of the Eighth Amendment in its procedures as applied, but that somehow changes when they publish a new regulation that permits the exact same application errors previously found in the Morales litigation.

3. The District Court Improperly Weighed Concerns About The Limited Time To Resolve The Constitutional Issues About Defendants' Changes In The Lethal Injection Protocol Are Unsupportable.

Although the district court expressed its concern that final resolution of the litigation before it, it improperly used this consideration to deny a stay of execution. The state—not Mr. Brown—created the unprecedented time pressures under which this litigation is proceedings. *See, e.g.*, *Koninklijke Philips Electronics N.V.*, 539 F.3d at 1045 (rejecting defendants' claim of irreparable harm as "entirely of their own making").

C. A Stay of Execution is Required Because the District Court Improperly Avoided Resolving the Constitutionality of California Lethal Injection Protocol by Offering Mr. Brown a "Choice" of a Single Drug Execution.

Rather than address the constitutional question before it—whether California's procedures violate the Eighth Amendment—the district court imposed upon Mr. Brown the "choice" of execution by an undefined single-drug protocol or constitutionally infirm three-drug protocol that has proved to be flawed in seven out of the eleven executions. As was argued above, however, California has a demonstrated risk of harm in the delivery of sodium thiopental, the drug by which either execution will be performed.[13] Moreover, the district court crafted a solution that places the entire weight of that choice on Mr. Brown—who has no information about how the state would carry out such an execution--and requires the state to shoulder no burden whatsoever.

Although the district court held that the election of a single-drug protocol would not waive Mr. Brown's rights to appeal its Order, the district court was wrong as a matter of law. Should Mr. Brown have selected the single-drug procedure, the state undoubtedly would have argued the he had

[13] The district court pointed to the two states that use a single-drug, without any evidence as to the record therein, and with contrary presentation by Mr. Brown that what California is doing does not resemble what occurs there both in terms of the initial review and implementation, and in the procedures themselves.

waived his objections thereto. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). Thus, by placing the burden on Mr. Brown and creating a "consent" provision, the district court precluded any appeal of the many critical issues inherent in Defendants conducting a one-drug execution. As noted, there are significant questions about the process that require appellate review, as acknowledged by the district court in its complaint that it has had insufficient time to review the new procedures. This appears to have been a fundamental misunderstanding by the district court as to the law, which constitutes an abuse of discretion.[14]

In instituting a choice mechanism, the district court cited to various state laws that permit choices by inmates. Order at 10 n.5. However, these are inapposite and only compound the legal error. Foremost, all of them

[14] The consent issue was raised as a talking point by the District Court during oral argument and was briefed by neither side. When CDCR responded to the court's inquiry regarding a single-drug procedure, no requirement of consent by Mr. Brown was raised by CDCR. It was, therefore, not addressed in Mr. Brown's response. Once it was contained in the Order, Mr. Brown sought leave to reconsider to brief the issue, raising his Due Process right to be heard on the issue. *See, e.g., Gonzales v. Texaco Inc*, 334 Fed. Appx. 304 (2009) (finding that the district court abused its discretion in sua sponte imposing sanctions without argument from the affected party); *Halicki Films, LLC v. Sanderson Sales and Marketing*, 547 F.3d 1213 (2008) (finding that the district court erred in denying motion for reconsideration where it failed to consider extrinsic evidence necessary to contract interpretation). The District Court denied leave to file the motion to reconsider.

permit an inmate *not* to choose and impose an arguably constitutional default. That is not the case here – the default is a three-drug protocol that has been found to be significantly deficient such that a stay is in effect in the *Morales* case. In fact, it has been found to be deficient here such that it is impermissible if the inmate chooses otherwise. Second, all of them are statutory creations enacted with extensive debate and well in place at the time an inmate approaches execution. They are not judicial ad hoc procedures sprung on an inmate in the days before his execution when his limited capacities are stretched and his counsel's resources limited. This process created by the district court is in and of itself inhumane, and has no parallel in state law. *See, e.g.*, *Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001) ("[T]he [U.S. Supreme] Court has suggested that we should treat with skepticism waivers that are obtained swiftly.") (citing *Whea v United States*, 486 U.S. 153, 163 (1988)).

Whether by design or happenstance, the district court's requirement that Mr. Brown consent to deviate from the new regulations interfered with litigation in state court. This is because consent by Mr. Brown to deviate from the regulations may have jeopardized Mr. Brown's state rights under California's Administrative Procedures Act (APA).

Eighth Amendment protections against cruel and unusual punishment may not be conditioned on Mr. Brown's forfeiture of state rights to fair, transparent, and well-developed procedures and protocols for execution as governed by the California Administrative Procedure Act. *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (recognizing that "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."). Requiring Mr. Brown to forgo state rights and procedural regularity in exchange for enforcement of his Eighth Amendment rights also creates an "untenable tension" between his Eighth Amendment rights and other constitutional entitlements. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (stating that it is "intolerable that one constitutional right should have to be surrendered in order to assert another."). Forcing Mr. Brown to abandon state rights and procedures violates Equal Protection, as there is no legitimate state interest in requiring Mr. Brown, but not other death-sentenced individuals, to relinquish these state rights. *See Romer v. Evans*, 517 U.S. 620 (1996) (state violates equal protection by treating one group differently from others without legitimate state interest). Similarly, forcing Mr. Brown to relinquish state rights and protections unlawfully impinges on his right to due process in the implementation of procedures and protocols governing his execution. *See, e.g.*, *Cooper v. Dupnik*, 924 F.2d

1520, 1539 (1991) ("Due process requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice").

Contrary to its representation, the district court did not adopt the same procedures for Mr. Brown that it did for Mr. Morales in 2006. Significantly, it did not require direct administration of thiopental as it did for Mr. Morales so as to alleviate the concerns about the drug delivery system that has been so compromised in the past. (Order on Defendant's Motion to Proceed With Execution Under Alternative Condition to Order Denying Preliminary Injunction, Feb. 21, 2006, Doc. 78, at 3.) Thus, even though after the *Morales* order, Morales was able to prove things were much worse than was known on that night, Mr. Brown gets *less* protections than Mr. Morales. For instance, the remote administration has not changed; the hearing testimony was that it is a spaghetti ball of twisting lines no one can make sense of; and, CDCR has not come into court and shown that this has in any manner fixed. Certainly, it is not addressed in the regulations.

Finally, regardless of whether the district court was empowered to employ a choice mechanism for avoiding its review of the constitutional question, the circumstances under which this court did so violated Mr. Brown's rights to due process. As the Supreme Court recognized in

LaGrand, affording an inmate the choice of methods implicates important concerns and requires sufficient process to guarantee that such decisions are made knowingly, intelligently, and voluntarily. *Stewart v. LaGrand*, 526 U.S. at 119 (1999) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). As detailed above, the record in the Morales case established why the single-drug option is not yet a viable one in California. Counsel pointed out sixteen areas, arrived at in less only a day's contemplation of the state's proposal: None of these issues were addressed by the state, and counsel was unable to provide sufficient information upon which Mr. Brown could have made a knowing selection.

IV. CONCLUSION

For these reasons and those contained in Appellant's Opening Brief, a stay of execution is warranted.

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Respectfully submitted,

By: /s/ John R. Grele

David A. Senior
McBREEN &SENIOR

Richard P. Steinken
JENNER & BLOCK

John R. Grele
LAW OFFICE OF JOHN R. GRELE

Attorneys for Plaintiff
ALBERT GREENWOOD BROWN