CV061436

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MORALES, and MITCHELL SIMS, Plaintiffs, **v.** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; and JEANNE S. WOODFORD, ACTING SECRETARY OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,** Defendants.	CA No. D.C. No. 5-6-cv-219-JF-HRL D.C. No. 5-6-cv-926-JF-HRL **DEATH PENALTY CASE** D.C. No. 5-6-cv-1793-JF-HRL

On Appeal from the United States District Court
for the District of California

No. C 06 219 JF HRL
Honorable Jeremy Fogel

DEFENDANTS' OPPOSITION TO MOTION FOR STAY OF EXECUTION AND APPELLEE'S BRIEF OR IN THE ALTERNATIVE OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

On October 28, 1980, a little over four and a half months after being paroled from prison for raping a fourteen-year- old girl, Brown snatched fifteen-year-old Susan Jordan as she walked to school, dragged her into an orange grove, raped her and then strangled her to death with her own shoe lace. That night, Brown tormented Susan's parents with phone calls about how they would never see their daughter again, where they could find her body and where they could find her belongings. *People v. Brown*, 40 Cal. 3d 512, 522-25, 726 P.2d 516, 230 Cal. Rptr. 834 (1985). There is no doubt about Brown's guilt. Eyewitnesses positively identified Brown and his car at the scene; Brown's voice, which had been recorded during one of his taunting phone calls, was positively identified; biological evidence tied Brown to the crime (Brown is among the 1.2 percent of Black males who could have deposited the semen found on Susan's body); shoe-print evidence tied Brown to the crime; Susan's body and belongings were found where Brown said they would be; and Susan's belonging were also found in Brown's home. *Brown*, 40 Cal. 3d at 523-25, 528.

Brown has aggressively litigated the validity of his conviction and sentence over the past two decades, through both state and federal court,

culminating with the denial of his second petition for writ of certiorari in 2008. *Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007), *cert. denied*, 129 S.Ct. 63, 172 L.Ed.2d 61 (2008).

More than three years ago, this Court informed Brown that he was free to challenge the state's three-drug lethal injection protocol "in a § 1983 action, as did the petitioner in *Morales,* and need not raise this issue in habeas proceedings for fear of waiver." *Brown v. Ornoski*, 503 F.3d at 1017 n.5; see *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D. Cal. 2006); *Morales v. Hickman*, 415 F.Supp.2d 1037 (N.D. Cal. 2006). Notwithstanding that Brown has been aware of the Morales lethal injection litigation and his need to pursue a 1983 action if he believed the protocol as applied was unconstitutional since 2007 (See, Brown, 503 F.3d at 1017 & n.5), Brown initiated no § 1983 action, but on September 15, 2010 – more than 2 weeks after his execution date was set, and only two weeks before that execution is scheduled to occur – Brown sought to intervene in the *Morales* suit still pending in the Northern District. Brown also asked the District Court to stay his September 29 execution. Doc. 387.

The District Court conducted two hearings in connection with Brown's motions, the first on September 21, and the second, telephonically,

on September 22. Docs. 398, 400. Also on September 22, the state, in response to queries posited by the Court during the September 21 hearing, (1) identified the changes to the state's lethal injection protocol that would be necessary to effect an execution by use of sodium thiopental alone, and (2) explained its preference for receiving three days' notice before implementing such changes in order that the state's execution team could conduct training in conformity therewith. Doc. 394. Brown was granted leave to file papers in response to the state's submission, in which Brown urged the Court *not* to extend to him the option of *avoiding* the three-drug protocol he hoped to challenge as intervenor in Morales's suit. Docs. 396, 397.[1]

On September 24, the District Court granted Brown leave to intervene, but denied the stay subject to specified conditions, including that the state, if Brown so elected by 6:00 p.m. on September 25, would perform Brown's scheduled execution by use of a single drug in accordance with the

[1] The complaint pending before the District Court in *Morales* actually challenges Operating Procedure 770, a protocol that is no longer operative. The existing protocol (which, unlike O.P. 770, has been adopted as a formal regulation), is set forth in Cal. Code Regs. tit. 15, §§ 3349, et seq. (approved July 30, 2010; effective August 29, 2010). The Court has granted Morales until October 6, 2010 to amend the complaint as he sees fit in light of the execution protocol now in effect.

state's September 22 submission. Brown immediately sought leave to challenge the District Court's order by motion for reconsideration. Doc. 402.) This request was denied. Doc. 403. Following a supplemental submission by Defendants, Doc. 40, Brown presented a second request for reconsideration on September 25. Doc. 405. This too was denied, but the District Court extended the time for Brown to notify the state of his preferred method of execution until 12:00 noon on September 26. Doc. 406. Brown never notified the state of his election, and thus, under the terms of the District Court's order, "Defendants may carry out the execution in accordance with Cal. Code Regs. tit. 15, §§ 3349, et seq."[2]

Brown contends that the district court was obligated to grant his request for an outright stay of his scheduled execution, and erred by making its denial of his request conditional on the state offering a one-drug alternative. He is wrong. Not only did the District Court's order not constitute an abuse of discretion (at least not in any regard that Brown can complain about), but the court surely would have abused its discretion if it had issued the outright stay Brown demanded. By declining execution by

[2] Notwithstanding Brown's failure to respond to the District Court's deadline, CDCR will still honor Brown's election should he choose to make one.

injection of sodium thiopental only, and continuing to press his attack on the District Court's order here, Brown only proves that his complaints about the three-drug protocol have nothing to do with its constitutionality at all, but are merely the pretext for seeking to avoid execution by *any* means.

ARGUMENT

I. BROWN'S FAILURE TO AMEND THE MORALES COMPLAINT TO ALLEGE ANY PROTOCOL-SPECIFIC CONSTITUTIONAL DEFICIENCIES FORECLOSES ANY FINDING THAT HE IS LIKELY TO PREVAIL ON THE MERITS

"'[B]efore granting a stay of execution, courts 'must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.'" *Morales v. Hickman*, 438 F.3d 926, 927 n.1 (9th Cir. 2006) (citing *Beardslee v. Woodford,* 395 F.3d 1064, 1068 (9th Cir. 2005) (quoting *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)). Putting aside the reasons for Brown's belated attempt to join the *Morales* litigation, we again note that Brown (like Morales) has still failed to amend the complaint to state constitutional objections specific to the protocol that would actually be used at his execution. This failure impaired—to the detriment of the *defendants*—the District Court's capacity to assess the parties' relative prospects of prevailing on the merits of a challenge to the state's three-drug

protocol. Indeed, in light of the state's "strong interest in proceeding with its judgment," *Gomez v. District Court*, 503 U.S. 653, 654 (1992); compare Motion for Stay at 12 (characterizing the harmful consequences of delaying valid capital judgments as "de minimis"),[3] Brown's complete failure to produce any protocol-specific allegations for the district court's consideration *should* have prompted the district court to summarily deny a stay of any sort.[4]

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[3] It is, of course, the state's strong interest in enforcing its criminal laws that impels it to seek execution dates. As the District Court observed, "there was no legal impediment to the setting of Brown's execution date." Doc. 401 at 8. There are, however, a number of practical constraints surrounding the scheduled date: The state's existing inventory of sodium thiopental consists of 5 grams, with an expiration date of October 1, 2010. Additional supplies are not expected to be available until the first quarter of 2011.

[4] Brown contends that Cal. Code Regs. tit. 15, §§ 3349, et seq. are "the exact same procedures" that "were once called OP 770." Motion for Stay at 8; see id. at 18 ("obvious . . . that in all substantial respects the procedures are the same"). This is simply incorrect, as the District Court noted. Doc. 401 at 8 ("Defendant reasonably point to their extensive efforts to address the Court's concerns in the new regulations and facilities"). Nor, of course, did Defendants submit a declaration reciting that "the procedures were the same under OP 770 and the new regulations." Motion for Stay at 10. Rather, the declaration simply noted, accurately, that "Many of the current regulations, including those concerning the movement of a condemned inmate before an execution, and the administration of the drugs during an execution, are similar to those that were proposed by CDCR *in mid-2009*. Doc. 391 at 2.

II. A STAY MAY NOT BE GRANTED BECAUSE CAL. CODE REGS. TIT. 15, SECTIONS 3349 ET SEQ. CONTAINS ***MORE*** SAFEGUARDS THAN WERE PROVIDED IN THE KENTUCKY PROTOCOL UNDER EXAMINATION IN *BAZE*.

"A stay of execution may not be granted on grounds [that the method of execution violated the Eighth Amendment] unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to [Kentucky's] would not create a risk that meets this standard." *Baze v. Rees*, 553 U.S. 35 (2008). California's lethal injection is *at least* "substantially similar" to the one used in Kentucky and upheld in *Baze*. Indeed, California's protocol contain safeguards not contained in Kentucky's protocol, which, had they been included, would have satisfied the *Baze* dissenters that the protocol is constitutional. *Baze*, 553 U.S. at 120-21 (Ginsburg, J., dissenting). Because the district court did not—and plainly could not—conclude that California's protocol has *fewer* safeguards than Kentucky's, *Baze* compelled the District Court to deny any stay. See *Raby v. Livingston,* 600 F.3d 552, 560-62 (5th Cir. 2010) (holding that *Baze* created a "safe harbor" for any protocol that is

consistent with what was approved by the Supreme Court[5]; *State of Tennessee v. Jordon*, 2010 WL 3368513 (September 22, 2010.)

III. CAL. CODE REGS. TIT. 15, SECTIONS 3349 ET SEQ. POSES NO "SUBSTANTIAL RISK OF SERIOUS HARM."

Brown bears a "heavy burden" of showing that Cal. Code Regs. tit. 15, §§ 3349, et seq. is "cruelly inhumane." *Baze*, 553 U.S. at 53. As we have explained, Brown cannot show that California's *current protocol* creates a "substantial risk of serious harm" within the meaning of *Baze*. *Id.* at 50 ("the risk must be '*sure or very likely* to cause serious illness and needless suffering' and give rise to 'sufficiently *imminent* dangers'" (emphasis in in original)), accord, Doc. at 8 ("absent a presently-existing demonstrated risk of constitutional violation, Defendants are entitled to proceed with the execution"). Brown argues otherwise, but in so doing refers almost entirely to events connected to California's use of O.P. 770, which is *not the protocol under which Brown's execution will be effected*.

[5] As noted in *Raby*, "[t]he safe harbor established by *Baze* would hardly be safe if states following a substantially similar protocol nonetheless had to engage in prolonged litigation defending their method of lethal injection. Absent some intentional malevolence on the part of the state in its administration of an otherwise acceptable protocol, it would be almost impossible for condemned inmates to meet the high burden of establishing "wanton exposure to objectively intolerable risk." 600 F.3d at 562.

(Motion for Stay at 17, citing Doc. 401 at 7-8 (referencing "problems with as many as seven of the eleven lethal-injection executions *carried out under O.P. 770"* (emphasis added)); see also Motion for Stay at 19-22.[6] The law is clear that evidence of prior missteps under a now-defunct protocol is not sufficient to demonstrate that a newly devised protocol is constitutionally defective. *Jackson v. Danberg*, 594 F.3d 210, 226-27 (3d Cir. 2010) ("Clearly, any blunder committed during Steckel's execution does not suffice to show a substantial risk of serious harm in future executions"; *Raby*, 600 F.3d at 559-60; see also *Nooner v. Norris*, 594 F.3d 592, 602 ("even if the ADC engaged in a 'series of abortive' execution attempts under previous protocols, the record does not establish a genuine issue of material fact about whether the Inmates will remain conscious during the injection of the pancuronium bromide and potassium chloride under the current protocol"). Importantly, the state has constructed entirely new execution facilities at San Quentin. See Doc. 401 at 3. Under these circumstances, the District Court

[6] Brown attempts to distinguish *Baze* on the ground that instant "matter has progressed to a remedial stage of review, far beyond the initial stage of needing to plead and prove risk of harm." Motion for Stay at 25. To the contrary, as it relates to Cal. Code Regs. tit. 15, §§ 3349, et seq.—the only procedure under which Brown is subject to execution—this matter has *not even progressed to the pleading stage*. See note 1, *ante*.

correctly concluded that Brown, like Morales in 2006, is "not entitled to an *outright* stay." Doc. at 9.[7]

IV. EVEN IF IT WERE ASSUMED FOR THE SAKE OF ARGUMENT THAT CAL. CODE REGS. TIT. 15, SECTIONS 3349 ET SEQ. POSES A "SUBSTANTIAL RISK OF SERIOUS HARM," A STAY MUST STILL BE DENIED BECAUSE BROWN HAS NOT DEMONSTRATED THE EXISTENCE OF AN ALTERNATIVE PROCEDURE THAT "EFFECTIVELY ADDRESSES" THAT RISK

As the Supreme Court did in *Baze,* "[w]e begin with the principle, settled by *Gregg*, that capital punishment is constitutional. . . . It necessarily follows that there must be a means of carrying it out." *Baze*, 553 U.S. at 47.

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[7] Brown argues that by imposing certain conditions on its order denying Brown's stay request, as it had done when denying Morales a stay in 2006, the district court "contradict[ed]" its finding that Brown had failed to show a constitutional violation under *Baze*. As Brown puts it, "[t]he district court could not require [a thiopental-only option] if, as it had held, Mr. Brown could not meet the *Baze* standard that Mr. Morales did." Motion for Stay at 8-9. But the district court did not "hold" that Morales had ever "met" the *Baze* standard. *Baze* had not been decided when the district court considered his claim, and the district court simply hypothesized that the finding and conclusion it reached in *Morales* "likely" would not have changed had the court applied *Baze* rather than lesser, now-superseded test set forth in *Cooper*. More importantly, any argument that rests on a perceived "contradiction" is foreclosed by *Morales v. Hickman*, 438 F.3d at 931("The district court did not abuse its discretion in fashioning a remedy that would alleviate the substantial concerns it found with the way Protocol No. 770 was being implemented"). Finally, even if there were a contradiction, it triggered an error in Brown's favor—granting him an option to which he is not entitled. Because Defendants have declined to seek review of this asserted "error," Brown's complaints about a "contradiction" need not detain this Court.

Thus, if Cal. Code Regs. tit. 15, §§ 3349, et seq. is constitutionally defective, it must mean that there is some alternative method *that is not*. Accordingly, *Baze* places the burden on Brown to identify an alternative that " effectively address[es] a 'substantial risk of serious harm.'" Further, "To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id*. at 37.

Brown has identified no such procedure, and the only one suggested by Baze himself—"a one-drug protocol . . . using a single dose of sodium thiopental or other barbiturate, " *Baze* 553 at 56—was one Brown *was free to elect*. Thus, Brown is not compelled to suffer execution by the three-drug protocol prescribed in Cal. Code Regs. tit. 15, §§ 3349, et seq., and his entitlement to a stay could not turn solely on the constitutionality of that procedure.[8] Rather, for Brown to qualify for a stay, the alternative he was

[8] By choosing to forgo the option of being executed with only sodium thiopental, Brown has waived any claim that the potential maladministration of sodium thiopental presents a substantial risk of serious harm from the effects of the follow-up administration of pancuronium bromide and potassium chloride. See *Stewart v. LeGrand* 526 U.S. 115, 119,119 S.Ct. 1018, 1021, 143 L.Ed.2d 196 (1999) (an inmate who chose to be executed by lethal gas instead of the default rule of execution by lethal injection waived his claim that the use of lethal gas is unconstitutional). Although Brown argues that any waiver could not be knowing and intelligent because he was not provided with certain requested information, the Supreme Court

(continued…)

offered must also create a substantial risk of serious harm, and even then, Brown would need to show that there exist yet some *other* alternative that "effective addresses" the risk posed under *both* Cal. Code Regs. tit. 15, §§ 3349, et seq. *and* the one-drug option described in the state's submission to the District Court on September 23. Because Brown has done neither, no stay can issue. See also *Nelson v. Campbell*, 541 US 648, 649-650 (citing *Gomez v*. District Court)

V. THE DISTRICT COURT DID NOT ERR BY FASHIONING AN ORDER THAT ENABLED BROWN TO AVOID EXECUTION UNDER A PROTOCOL THAT BROWN INSISTS IS UNCONSTITUTIONAL.

Brown is not at all relieved that the District Court allowed him to avoid execution by allegedly unconstitutional means. To the contrary, he is profoundly disappointed that the District Court had interfered with his opportunity to continue complaining about it. His grievance is unavailing.

Brown acknowledges—finally—that his demand for a stay is doomed if he confines his attack to Cal. Code Regs. tit. 15, §§ 3349, et seq. Accordingly, Brown turns his sights to the single-drug option as well,

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(…continued)
in *Stewart* did not hold that any certain amount of information must be provided to the inmate in order for the waiver to be valid.

characterizing it as "undefined," and noting that it too depends on "delivery of sodium thiopental." Motion for Stay at 27. No matter. The District Court concluded that the single-drug alternative will "eliminate any 'demonstrated risk' of a constitutional violation." Doc. 401 at 9. Indeed, "Brown will be exposed to no risk of severe pain from the injection of pancuronium bromide and potassium chloride, and the risk of his being placed in a chemically induced vegetative state as asserted in his instant request is so speculative as not to implicate the Eighth Amendment." Doc.406 at 2. Brown offers no refutation of these conclusions, and they are fully consistent with governing circuit precedent. *Morales v. Hickman*, 438 F.3d at 930 ("The district court's modification of Protocol No. 770, relying in large part on the testimony of Morales' own expert, attempted to accommodate Morales' objections and cure the perceived constitutional infirmities. The district court exercised its equitable powers to "preserve[ ] both the State's interest in proceeding with [Morales'] execution and [Morales'] constitutional right not to be subject to an undue risk of extreme pain").[9]

[9] Morales's own expert, Dr. Heath, has acknowledged that 5 grams of sodium thiopental, effectively delivered, is assuredly fatal.

To be sure, Brown, as did Morales, "continues . . . to express concern" about the option extended to him, Motion for Stay at 28, 32, but as the District Court observed, these are concerns are "primarily technical in nature," and certainly not of constitutional proportion. Doc. 406 at 2.

Brown next contends the district court improperly conditioned his election of the one-drug option on "consent," as this "may have jeopardized Mr. Brown's rights under the California Administrative Procedures Act." Motion for Stay at 29. Brown is again mistaken, as the "consent" clause is completely consistent with the result provided by state law on its own terms. Under state law, an accommodation made to a single inmate upon that inmate's request, accomplished by departing from the terms of a formal regulation, does not constitute promulgation of a new "regulation" subject to the APA. Cal. Gov. Code § 11340.9 (i). Thus, Brown's consent is consistent with state law and cannot be characterized as a violation of "due process."

CONCLUSION

For the foregoing reasons, Brown's motion for stay of execution must be denied.

Dated: September 27, 2010

Respectfully Submitted,

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FOR CV061436

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9/27/10
Dated

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