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.,	)	**EXECUTION SCHEDULED FOR 12:01 A.M ON WEDNESDAY, SEPTEMBER 29, 2010**
	)	
Defendants-Appellees.	)	

APPELLANT ALBERT BROWN'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR STAY OF EXECUTION AND APPELLANT'S REPLY BRIEF OR IN THE ALTERNATIVE REPLY TO OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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

INTRODUCTION

Defendants' Opposition to Motion for Stay of Execution and Appellee's Brief or in the Alternative Opposition to Petition for Writ of Mandamus ("Opposition") ignores the record before this Court:

(1) Mr. Brown *timely* intervened in this case – a fact not even disputed by Defendants in the court below;

(2) This case has perhaps the most developed evidentiary record of any "case involving an Eighth Amendment challenge to a lethal-injection protocol." ER13. That evidence demonstrates that during the time California's execution procedures eluded judicial review, they had over a 60% rate of error, and it was *more likely than not* that Defendants would fail to give a condemned inmate sufficient doses of sodium thiopental to avoid excruciating and tortuous pain when Defendants then administered a paralytic agent, pancuronium bromide and potassium chloride;

(3) That Brown's complaint is the same as Morales's- the "new" regulations are the same as the old ones and have done nothing to change the procedure, which was fundamentally flawed and certain to result in pain and suffering;

(4) In light of the unconstitutional disparity between Defendants' past assurance that their execution protocols were adequate and the horrific results

they produced when they were "implemented in practice" [ER 14], Mr. Brown is entitled to test Defendants' current representations that such "prior missteps" (opposition at 9) are a thing of the past, rather than have his execution go forward on only the strength of Defendants' word.

This the second time in this litigation the Court has been asked to review the district court's conditional denial of a stay. In 2006, as here, the district court accepted Defendants' untested arguments that Michael Morales's criticism of their procedures did not have sufficient "probative value," to stay his execution. The district court nevertheless offered a compromise procedure designed to eliminate any risk. In response, Defendants assured the district court and this Court that they would provide two licensed anesthesiologists to ensure that Mr. Morales was and remained unconscious before the injection of either pancuronium bromide or potassium chloride.

But defendants never advised the anesthesiologists of these responsibilities until two hours prior to the scheduled execution. Then, the California Attorney General attempted to chide and cajole the anesthesiologist to continue, stating that this Court's decision in the case was merely an "opinion", not a court "order." The anesthesiologist rightfully refused to proceed, and defendants reneged on the promise to the district court.

Ultimately, because the state could not effectuate a last-minute single-drug procedure (although they said they could), the district court's "contingent" stay of execution" went into effect. *See Morales*, 415 F. Supp. 2d at 1048.

After Mr. Morales's execution was thus fortuitously stayed, the district court permitted him to conduct discovery, which "produced *even stronger* evidence of problems" with Defendants' protocol. ER 14 (emphasis added). That evidence demonstrated systemic deficiencies in Defendants' protocol that continue to the present, irrespective of its relabeling. Defendants do not dispute that information about their limited supply of sodium thiopental, disclosed in their most recent attempts to dissuade the district court from carefully examining purported improvements to their protocols, means that they *could not* have been training execution members in conformity with their new regulations (i.e. that no one has been trained on actually mixing thiopental) *See* Appellant's Brief at 14.

This belated disclosure again demonstrates the disparity between apparent facial regularity of *any* iteration of Defendants' procedures and the demonstrated risk of severe pain resulting from their inept implementation in practice. Defendants' suggestion that Mr. Brown has "waived" his right to orderly litigation of his timely claims because he did not yield to the district

court's suggestion that he be executed with an improvised procedure is absurd.

It seems that respondents have successfully induced a hysteria about this case in order to avoid review and to "execute at all costs." This Court has already been down this road with Defendants and, luckily, it did not result in an execution. The result was that Defendants' conduct was finally fully exposed, and, by any standard, an Eighth Amendment violation was proven. We should not travel this path again – Mr. Brown should be given the orderly and thorough review he is entitled to given this record.

ARGUMENT

I. MR. BROWN'S ACTION IS TIMELY.

Defendants' timeliness argument, while foreclosed by both the failure even to raise it below, and the district court's *sua sponte* finding that Mr. Brown was timely, does underscore the internal inconsistency of Defendants' position. First, Defendants' belated attempt to fault Mr. Brown for not having challenged the state's current regulations for the past three years (Opposition at 2) is wholly at odds with defendants' later assurances that the regulations that were officially adopted less than a month ago constitute a substantial departure of their earlier procedures. There is in fact no significant difference between the new regulations and the deficient protocol Defendants'

previously attempted to shield from judicial scrutiny. Yet Defendants know that in light of the stipulated stay in this case, an injunction in state court and Defendants' assurances they were administratively "revising" the regulations, a lawsuit by Mr. Brown would have been challenged on the grounds of failing to present a case or controversy. *See Calderon v. Ashmus*, 523 U.S. 740, 745 (1998).

Second, the district found, and Defendants do not provide any reason to dispute, that as soon as the regulations went into effect, it was *Defendants* who deliberately created the time pressures that now threaten the availability of orderly judicial review. ER 12. Defendants' arguments are an attempt to distract the Court from the dearth of equities in the state's favor.

Third, Defendants' attempt to smuggle a timeliness argument into belated objections to the lack of an amended complaint are similarly unavailing. Defendants hinge their argument on some sort of alteration from OP 770 to Title 15 CCR 3349, et seq. and a vague statement by the district court that Morales' challenge was to OP 770. But, neither defendants nor the district court identified a single different provision, much less one that matters. This is because they cannot. As the district court noted, Morales will have to make "technical" amendments to the complaint (i.e. change "OP 770" to Title 15 CCR 3349 et seq), but that the complaint was sufficiently

broad. ER 56-57. The district court specifically found that the current state of the pleadings was sufficient to alert Defendants that ongoing regulation-specific deficiencies in their *current* execution procedures, including "selection and training of the execution team" were in issue. ER 13.

II. BROWN IS ENTITLED TO A STAY OF EXECUTION BASED ON THE SHOWING IN THE *MORALES* RECORD

Respondent notes the *Baze* standard for obtaining a stay of execution, adopted by three justices, but nowhere discusses Brown's showing in this regard, which is the *Morales* record. If Defendants are correct, which they are not, a state with a long history of problematic executions and frightening disregard for minimal professionalism, *as found by the district court*, can fix it by putting a new cover on the same procedure, calling it something else and propounding it as a "regulation." *Baze* contains no safe harbor for such conduct.

Respondents and the district court point to the review process that took almost three years. Of course, that ignores the fact that for over two years that review process consisted of a failed attempt to *avoid* administrative review. Only after the state courts forced them did they undertake any such review. Even then, it was a reluctant, half-hearted attempt that, not surprisingly, ended up with the same procedure. As the complaint being

litigated in Marin Superior Court demonstrates, there are significant problems with that review, such as the failure to address expert opinions (including their own experts) that they should be adopting a single drug protocol and that the consciousness check is inadequate and being performed by persons without any qualifications to do so. ER 257-299.[1]

Respondent points to Justice Ginsburg's dissent that discusses California's protocol. Not mentioned is that hers is a discussion of OP 770, not the regulation. *Baze*, 553 U.S. at 120-21 (Ginsburg, J., dissenting). This is again proof that the two procedures are one and the same. More fundamentally, the California record was not before the Supreme Court; Kentucky's was. Thus, speaking abstractly, California had more procedures in place than Kentucky under OP 770. But, those procedures do not fix the problems demonstrated at the hearing in *Morales*, nor could they.

By focusing on the different name and not the actual procedure, respondent hopes to avoid a discussion of the elephant in the room – the showing made by Morales, a showing unparalleled in the lethal injection cases. But, no court can or should ignore that record. And, respondent has not contested that, given that record, Mr. Morales is entitled to review of the

[1] Brown intervened in that action, but was denied a temporary restraining order.

new procedures. The District court noted that discovery would occur, to which there was no objection. Respondent has not filed to dismiss the complaint or for summary judgment. The question remains – why can they execute Brown?

The difficulty the district court and this Court have is that this review, which all recognize needs to be done, cannot be done for Mr. Brown because the state went out and got and execution date. The record in *Morales* is voluminous and complicated. Many of the facts are stipulated.[2] But, courts need to act to preserve rights such as this. It is truly unfortunate that the state appears to have found a way around the *Morales* case and to execute a simple man for crimes he committed when he was 21 years old. It is even more unfortunate that they have been able to force everyone into crises mode about it. But, it is the obligation of the district court to ensure that review occurs in such a situation, not to be concerned that such review might tread on the

[2] Defendants did not dispute the representation that they currently have the same problematic persons leading and acting as medical personnel on the execution team as were engaged in the process during the *Morales* hearing. ER 61, 92-94. This is likely a deliberate indifference that would satisfy any Eighth Amendment standard.

state's interest when that interest has been artificially manufactured in a manner that was designed to pressure courts.[3]

If Brown arrived in this Court with only the regulations in hand and argued he was entitled to a stay, there could be a debate whether or not he satisfies *Baze*. But, that is far from what is going on here. He has demonstrated a "substantial risk of serious harm" within the meaning of *Baze* that is "*sure or very likely* to cause serious illness and needless suffering" and give rise to "sufficiently *imminent* dangers'", *Baze*, 553 U.S. at 50, because of this record. At the very least, he is entitled to prove it given the record in *Morales*.

It is for this reason that the decisions of the other circuits respondent cites are not applicable. RB 8-9. As noted by the District Court (ER 91), they do not have the record that California has. Thankfully, no one does.[4] *See*

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[3] The Attorney General, counsel for defendants here, appeared and argued for Brown's September 29, 2010 execution date. ER 152-153. She deceived the court there as to the need for such a short date, arguing it was a scheduling concern. It was really because the drugs they have expire on October 1, 2010. ER 310-311.

[4] Respondent cites to language in *Raby*, 600 F.3d 552, that seems to adopt the requirement of a showing of "intentional malevolence on the part of the state in its administration of an otherwise acceptable protocol", "to meet the high burden of establishing 'wanton exposure to objectively intolerable risk.' " 600 F.3d at 562. But, this was a discussion of the *Farmer* case in *Baze* and what would certainly establish an Eighth Amendment violation, not what is required to show one. Further, and interestingly, a facially valid protocol

Raby v. Livingston, 600 F.3d 552, 560 (5th Cir. 2010) (discovery showed procedures were safe); *Jackson v. Danberg*, 594 F.3d 210, 225 (3d Cir. 2010) (no evidence inmate conscious during past executions); *Nooner v. Norris*, 594 F.3d 592, 602 (8th Cir. 2010) (same).[5]

The one thing that respondent points to as different is the new chamber, which is untested and was built without the Warden reading Judge Fogel's decision. It was also built by fraud, and was the result of a state investigation. It remains to be seen whether a hurried construction done to avoid public scrutiny without knowledge of past problems has altered those problems in any manner. It appears not as the sight lines from the single small window for the infusion team on the internet photos seem problematic. But, the point is that after what we learned in *Morales*, any court would want to look at this chamber to see if it is sufficient, as Judge Fogel says he must. (ER 48-50`) For Mr. Brown, that will come too late.[6]

III. A VIABLE SINGLE-DRUG PROCEDURE EXISTS SUCH THAT THE COURT COULD PROPERLY CONSIDER IT IF PROPOUNDED WITH THE THOUGHT AND DELIBERATION,

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(which this is not) is not immunized from misconduct by such a standard. This is Brown's point exactly.

[5] The evidence in *Morale*s was different. Over one half were breathing when they should have been dead. *Morales v. Tilton*, 465 F. Supp. 2d at 980.

[6] CDCR conducted a media tour, but did not invite counsel.

AND THE CONSTTUTIONALLY-REQUIRED DELIVERY SYSTEM IT REQUIRES

Because *Baze* recognized the calculation would differ if others successfully administered a single drug, respondent's argue that Brown cannot now argue that such a procedure is available such that a stay in required. The crux of this argument is that because Brown was offered a last-minute, cobbled-together procedure that violated state law[7], he should have taken that chance and has now waived the argument.

The problem with the argument is that the procedure offered Mr. Brown was too last-minute and contrary to the procedures in other states, and also made no accommodation for the problems known to exist in California. As noted in the Motion for a Stay, Mr. Morales, with less proof, obtained an order requiring direct administration, so as to avoid many of the problems that were then known. After the *Morales* hearing, still more problems came to light. Further, as suspected, the state does not have sufficient back up drug to undertake an execution according to the two states that do use this method, and in accordance with the existing regulation (and OP 770) which calls for 3 grams ready to go in case of a problem and for full re-administration. Should

[7] Defendants cite to a government code section that permits a procedure to be employed for a n individual. It does not permit an agency to deviate from an existing procedure for an individual as that would lead to wholesale deviations from state regulations.

there be a problem, which it seems there always is, he is out of luck, in a vegetative state and strapped on a gurney. Respondent points to *Stewart v. LeGrand*, 526 U.S. 115 (1999). But, that case is one of the reasons Brown could not accept the district court's unprecedented invitation to chose a procedure for which there was no protocol. In *Stewart*, the defendant waived because he *chose* a method. Mr. Brown made no choice. If respondent's argument is adopted, then no inmate could ever challenge an execution procedure because they all have default provisions. The clear directive in *Stewart* is that one cannot elect if one needs to challenge the procedure.

IV. THE DISTRICT COURT'S PROCEDURE FOR A SINGLE-DRUG EXECUTION WAS HASTILY IMPOSED AND INADEQUATE TO CURE THE KNOWN DEFICIENCIES IN THE LETHAL INJECTION PROCESS

The district court's finding that Mr. Brown "will be exposed to no risk of severe pain from the injection of pancuronium bromide and potassium chloride" (Doc. 406 at 2), only applies to a scenario when none is infused. The State's regulations call for infusion of these chemicals. Defendants' record in this regard fails to comport with the standards set forth in *Baze v. Kentucky*, 553 U.S. 35 (2008). Docket 401, at 8 ("Although the Court framed its factual findings and legal conclusions under the legal standard then applicable in the Ninth Circuit, cf., *Cooper*, 379 F.2d at 1033, it likely would

have made the same findings and reached the same conclusions under the "demonstrated risk" standard announced in *Baze*.")

Regarding the district court's recent assessment that "the risk of his being placed in a chemically induced vegetative state [if infused only with thiopental sodium] . . . is so speculative as not to implicate the Eighth Amendment" (Doc. 406 at 2), this finding, if it is such, is clearly erroneous when viewed in the context of the complete record. This finding was made after "Defendants [sought] an execution date that effectively preclude[d] an orderly review of the new regulations in either state or federal courts." Order, Sept. 24, 2010, Doc. 401 at 6. It was made when "there is no way that the [district court could] engage in a thorough analysis of the relevant factual and legal issues in the days remaining before Brown's execution date." *Id.* at 8. And, it was made against the following backdrop of evidence when the district court did have time to make a thorough analysis with orderly review:

(1) "An insufficient dose [of thiopental sodium] has the potential to cause irreversible brain damage while not causing death." Order, Feb. 21, 2006, Doc. 78 at 2;

(2) "evidence from Defendants' own execution logs that the inmates' breathing may not have ceased as expected [if thiopental was properly infused] in at least six out of thirteen executions by lethal injection in

California raises at least some doubt as to whether the protocol actually is functioning as intended . . ." *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1045 (N.D. Cal. 2006); and

(3) "In contrast, the record in this case, much of which was stipulated to by Defendants, shows that there may have been problems with as many as seven of the eleven lethal-injection executions carried out under O.P. 770. Defendants' own medical expert expressed concern that at least one inmate well may have been awake when he was injected with the second and third drugs in the lethal-injection cocktail. Order, Sept. 24, 2010, Doc. 401 at 7-8 (citing *Morales v. Tilton*, 465 F. Supp. 2d at 980).

These findings were made after an orderly review of the record and the evidence and are fully contrary to the district court's admittedly now rushed and newly created "clean slate" assessment. The stipulated record is that defendants do not know how to handle thiopental, mix thiopental, infuse thiopental, or even what color it is supposed to be. *See* Stipulated Facts: ER 192 ("The execution team does not practice mixing thiopental"); ER 195-96 ("thiopental is not actually mixed into solution" during execution practice sessions); ER 196 ("During the last eight California executions, there were no practice sessions where people practiced mixing Pentothal"); ER 197 ("The first time witness #4 mixed Pentothal was on the evening of a scheduled

execution. Prior to mixing Pentothal for an execution, Witness #4 had never received any training in doing that"); ER 197 (Witness #4 observed that mixed Pentothal was "yellowish, brownish tan color;" packaging material for Pentothal provides "use reconstituted solution only if it is clear, free from precipitate and is not discolored").

Defendants now seek refuge for their incompetence in the district court's conclusion that their failure to mix, train, infuse, and deliver thiopental sodium are concerns "primarily technical in nature," and that Brown offers no alternatives. This is incorrect. The stipulated record in this case is that defendants have alternative methods which *they believe are better*. A more complete and orderly review of the record would provide a multitude of examples of readily available execution procedures available to defendants – all without the incompetence that defendants have demonstrated for many years in California.

CONCLUSION

For the foregoing reasons, Brown requests that the Court reverse the district court and enter a stay of execution pending the final resolution of Brown"s § 1983 action, including any and all appeals.

Dated: September 27, 2010

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