

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MATTHEW CATE,

MATTHEW CATE et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SAN JOSE,

Respondent,

MICHAEL ANGELO MORALES and
ALBERT GREENWOOD BROWN,

Real Parties in Interest.

No. 10-72977

D.C. No. 5-6-cv-219-JF-HRL
(Northern California, San Jose)

DEATH-PENALTY CASE

RESPONDENT'S RESPONSE
TO PETITION FOR WRIT OF
MANDAMUS

This response is submitted for the sole purpose of clarifying a statement in Respondent's Order Following Remand filed September 28, 2010. (D.C. Doc. No. 424.) That order states that Petitioners did not disclose to Respondent the fact that their remaining supply of sodium thiopental would expire on October 1, 2010. (*Id.* at 3.) Petitioners are correct that the expiration date was disclosed in their statement filed September 25, 2010, amplifying their response to Respondent's questions concerning the feasibility of an execution using only sodium thiopental.

(D.C. Doc. No. 404 at 4.) The date was noted in a parenthetical in connection with Petitioners' representation that their current inventory of sodium thiopental is 7.5 grams. Petitioners did not disclose that they have an insufficient amount of sodium thiopental to provide members of the execution team with experience and training in the actual mixing of the drug, (*see* D.C. Doc. No. 424 at 6 n.5.), or that they will be unable to obtain additional sodium thiopental until at least the first quarter of 2011, (*see id.* at 3.)

Petitioners did not make any representations or disclosures with respect to the availability of sodium thiopental in either their papers or their oral argument in opposition to Real-Party-in-Interest Brown's motion for a stay of execution. (*See* D.C. Doc. Nos. 391, 392, 394, 395, & 410.) As of September 25, 2010, the motion for a stay already had been denied. (*See* D.C. Doc. No. 401.) Respondent thus did not consider, and Brown did not have an opportunity to address, the implications of the shortage of usable sodium thiopental in connection with whether Brown was entitled to a stay. Brown's second motion for leave to file a motion for reconsideration, (D.C. Doc. No. 405), which was denied, (D.C. Doc. No. 406), after the expiration date was disclosed, (*see* D.C. Doc. No. 404 at 4), was addressed solely to the propriety of the single-drug option; the expiration date of the drug was not addressed by Brown, was not relevant to the matters being

litigated, and was not focused upon by Respondent. Respondent denied the second motion for leave to file a motion for reconsideration because it believed (incorrectly) that it was within its equitable powers to offer the single-drug option to Brown.

Dated: September 29, 2010



JEREMY FOGEL
United States District Judge
Respondent