IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW CATE, Secretary of the California Department of Corrections and Rehabilitation, et al., Petitioners, v. UNITED STATES DISRICT COURT for the NORTHERN DISTRICT of CALIFORNIA Respondents, MICHAEL MORALES and ALBERT GREENWOOD BROWN, Real Parties in Interest.	D.C. No. 5-6-cv-219-JF-HRL **DEATH PENALTY CASE**

USDC No. 5:06-cv-00219-JF-HRL
Honorable Jeremy Fogel

PETITION FOR WRIT OF MANDAMUS

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COMES NOW PETITIONERS ARNOLD SCHWARZENEGGER, GOVERNOR OF THE STATE OF CALIFORNIA, AND MATTHEW CATE, SECRETARY OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, and in support of this Emergency Petition for Writ of Mandamus alleges as follows:

1. There is pending in the Respondent UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ("District Court"), a civil rights action which challenged the administration of California's former lethal injection protocol under 28 United States Code § 1983, entitled *Morales, et al. v. Cate, et al.*, Case Nos. C 06-0219 (JF) and C 06-0926 (JF). The recent intervenor in that case, Albert Greenwood Brown, who is subject to California's current protocol, is the Real Party In Interest in this Petition for Writ of Mandate. Brown is currently scheduled to be executed at 9 p.m. on September 30, 2010.

2. This Court has jurisdiction to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law pursuant to 28 U.S.C. § 1651.

3. This case is governed by *Baze v. Rees*, 553 U.S. 35 (2008), in which the Supreme Court found that Kentucky's three-drug lethal injection protocol—a protocol that is at least "substantially similar" to California's

current protocol—comports with the Eighth Amendment's proscription against cruel and unusual punishment because it creates no demonstrated risk of severe pain.

4. *Baze* held that a federal court may not stay an execution "unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must also show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the [Kentucky] protocol we uphold today would not create a risk that meets this standard." *Baze* v. *Rees*, 553 U.S. at 61.

5. Over the course of the last four years, California has dutifully endeavored to ensure the quality of its lethal injection processes. Public hearings, approval of the protocol under the state Administrative Procedures Act, and construction of a new lethal injection facility have all resulted from that effort. There is no evidence demonstrating any risk to Brown or any condemned inmate under this current protocol.

6. Despite the Supreme Court's decision in *Baze*, the District Court stayed Brown's execution, finding "substantial questions of fact as to whether at least some of the deficiencies in O.P. 770 [not the protocol currently in effect in California] have been addresssed *in actual*

practice"[italics in original] (Order at 7, lines 4-5) and issued an order staying Brown's execution. The district court clearly erred in staying Brown's execution on this basis.

7. The District Court issued a stay in an action where the operative complaint—a third amended complaint filed by Michael Morales on July 2, 2007—challenges a long-defunct state protocol, first implemented in 2006. The contours of "Brown's claims" (Order at 8, line 8) against California's current protocol (effective August 29, 2010) cannot even be fully discerned.

8. Brown is not entitled to the equitable relief of a stay of execution because he inexcusably delayed in challenging the implementation of California's current lethal injection protocol by waiting until seven days and six hours before his scheduled execution to intervene in *Morales et al. v.Cate, et al.,* C06-0219 JF and C06-0926 JF, and to seek a stay of execution.

9. Petitioner seeks a writ of mandamus from this Court ordering Respondent District Court to vacate its order of September 28, 2010, staying the September 30, 2010 execution of Brown.

10. This Petition for Writ of Mandamus is based on the accompanying memorandum of points and authorities, excerpts of record, and files and records of this case.

STATEMENT OF RELIEF SOUGHT AND ISSUES PRESENTED

Albert Greenwood Brown is scheduled to be executed at 9:00 p.m. on September 30, 2010, for raping and murdering a fifteen-year-old girl almost thirty years ago. Initially, the respondent court denied Brown's request for a stay of execution, finding Brown's execution could constitutionally proceed under California's three-drug protocol but providing Brown the option of proceeding under a single drug protocol. The respondent court's order further provided that if the state did not proceed with the single drug protocol after Brown so elected, a stay would issue, but that if Brown did not make an election, the state could proceed with the three-drug protocol. Brown appealed and this Court remanded the matter to the district court to consider the new protocol and whether Brown was entitled to a stay under *Baze v. Rees*, 553 U.S. 35 (2008) and *Nelson* v. *Campbell*, 541 U.S. 637, 649-650 (2004). Without any evidence that California's current lethal injection protocol creates a risk of severe pain, the respondent court reversed itself and ordered a stay.

Issue Presented:

Whether respondent court clearly erred in granting Brown a stay even though Brown failed to present any evidence on remand that California's

current lethal injection regulations demonstrated a risk of severe pain and posed a substantial risk in comparison with available alternatives, especially since California's protocol provides greater safeguards against unnecessary pain than the protocol approved by the Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008).

Relief Sought:

Petitioner seeks a writ of mandamus directing the respondent court to vacate its order granting Brown's motion for stay of execution and entering a new order denying Brown's motion for stay of execution. Relief is imperative so that preparations may proceed to permit petitioners to carry out their lawful duties of executing the lawful judgment of the State of California in Brown's case.

STATEMENT OF THE CASE

The underlying action, *Morales* v. *Cate*, C06-0219 JF and C06-0926 JF, is a challenge to California's *2006* lethal injection protocol (O.P. 770). California's current lethal injection regulations became effective on August 29, 2010. Ca. Code Regs, tit. 15, § 3449 et seq. The following day, the Riverside County Superior Court lawfully scheduled the execution of real party in interest Brown for September 29, 2010. On September 15, 2010, Brown moved to intervene in *Morales* v. *Cate* and sought a stay of

execution. The district court granted Brown's motion to intervene, but conditionally denied Brown's motion to stay his execution pending review of California's new regulations. The district court found that Brown had not shown a demonstrated risk of severe pain under the new regulations.[1] Brown appealed, and on September 28, 2010, this Court remanded the matter to the district court to determine whether Brown was entitled to a stay under *Baze v. Rees*, 553 U.S. 35 (2008) and *Nelson* v. *Campbell*, 541 U.S. 637, 649-50 (2004). On September 29, 2010, the district court granted the stay, but clearly erred in doing so.

ARGUMENT

I. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS DIRECTING RESPONDENT TO VACATE ITS STAY OF EXECUTION.

Under the All Writs Act, 28 U.S.C. §1651(a), this Court has the power to issue a writ of mandamus. *Allied Chem. Corp*. v. *Daiflon, Inc*., 449 U.S. 33, 35 (1980) (per curiam). Issuance of a writ of mandamus is appropriate

[1] The court ordered Brown's execution could proceed under California's three-drug protocol but also provided Brown the option of proceeding under a single-drug protocol. The court's order further provided that if the state did not proceed with the single-drug protocol after Brown so elected, a stay would issue. If Brown did not make an election, the state could proceed with the three-drug protocol pursuant to the protocol.

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when there is "'usurpation of judicial power' or a clear abuse of discretion, [citation]," (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, (1964) (quoting *Bankers Life & Casualty Co*. v. *Holland*, 346 U.S. 379, 383 (1953)) and there is no other adequate remedy (*Allied Chem. Corp*. v. *Daiflon, Inc*., 449 U.S. at 35). Here, there is both. The District Court has improperly interfered with petitioner's legal duty to execute a legal judgment of the State of California – in this case, the execution of Brown after almost thirty years of litigation. California's *current* protocol is at least "substantially similar" to the Kentucky protocol examined in *Baze.* Brown presented no evidence of a demonstrated risk of severe pain under the new lethal injection regime. Manifestly, he also did not show a substantial risk compared to other alternatives. He utterly failed to demonstrate entitlement to a stay under *Baze*.

A. The district court clearly erred by issuing a stay of execution without a finding Brown met the standard in *Baze,* nor could the district court make such a finding.

"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, as the district court noted, California's protocol contains 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; *State of Tennessee* v. *Jordon*, 2010 WL 3368513 (September 22, 2010.)

Despite the fact that the district court found Brown failed to meet this burden "prior to his briefing on remand," the district court granted the stay anyway. (Doc. 424, p. 3) The district court did not grant the stay because Brown has now met that burden, but the decision to stay was made, assertedly, "pursuant to guidance provided by the Court of Appeals and new information that has come to light since its own order of September, 24,

2010, was entered." (p. 2) But there is no "new information" germane to the issue of the constitutionality of California's new protocol or whether Brown is entitled to a stay. Rather, the district court points to the fact that "Defendants knew, but did not disclose to the Court, that their existing supply of sodium thiopental will expire on October 1, 2010 and that additional quantities will not be available until first quarter of 2011." (p. 3.) The only execution set is Brown's; it was set for September 29 (before expiration of the sodium thiopental); and the expiration date has no bearing on the likelihood of Brown prevailing on the merits. Additionally, the information about the quantity of sodium thiopental *was* disclosed to the district court on September 25, 2010. *Thereafter* (but that same day -- Doc 406), the district court *denied* Brown's second motion for reconsideration, again subject to the same conditions as were set forth in his September 24, 2010 order.

The district court also suggested that this information demonstrated that no other executions but Brown's will be affected by a stay, so with "only one" execution in play, the court's theory goes, the state's interests are not so great. (Order at 3, lines 14-21.) Nothing in *Baze* suggests this sort of sliding scale. The number of executions is irrelevant to whether a method creates a risk of severe pain.

Nor did this Court's directive that the district court consider California's existing protocol and Brown's request under the strictures of *Baze* and *Nelson* provide a basis for the district court's aboutface in granting the stay. Rather, the remand order reflected the fact that Brown, as noted by the district court, had not adequately identified any feature of the new protocol that supposedly rendered it unconstitutional. In that regard, the district court correctly called for briefing on the existing protocol, including a comparison between that protocol and California's former protocol. But the district court's order does not point to anything in the comparison of the two protocols to support a stay.

The district court erred in relying upon evidence of events occurring in connection with the administration of prior protocols. Because Brown must show "a presently-existing 'demonstrated risk' of a constitutional violation" Doc. 401 at 8 (emphasis in original), he and the district court cannot content themselves with rehashing historical shortcomings. *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; *State v. Jordon*, 2010 WL 3368513 (September 22, 2010); *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"); see also *Nooner v. Norris*, 594 F.3d 592, 602 (8th Cir. 2010) ("[E]ven 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").

California's *current* lethal injection protocol comes within *Baze's* safe harbor.[2]

B. The District Court clearly erred in failing to recognize the significance of the post-2006 addition of a consciousness assessment to California's lethal injection protocol.

"[T]he proper administration of sodium thiopental is an indispensable link in the lethal injection chain for Eighth Amendment purposes, as it ensures that an inmate will not suffer under the effects of the second two drugs." *Jackson v. Danberg,* 594 F3d 210, 225. The District Court found both in 2006 and 2010 that California could properly administer sodium

[2] The District Court speculated that because of Defendants' limited supply of sodium thiopental, "it appears that there is an insufficient quantity of the drug available to permit the pre-execution training and mixing described in the regulations." Doc.424 at 6, n.5. But the protocol requires that there be training concerning drug-mixing, not that all training sessions necessarily consume prescribed quantities of actual drugs. Indeed, the mixing process is not complicated. *Baze,* 553 U.S. at 54; *Harbison v. Little,* 571 F.3d 531, 538.

thiopental in a single drug protocol. *Morales v. Tilton,* 465 F.Supp.2d 972, 977 (N.D. Cal. 2006); ER[3] 9-11. [4] California addressed the District Court's concern expressed in 2006 that a condemned inmate might not be unconscious before injection of pancuronium and potassium chloride by, among other things, adding a provision requiring a consciousness assessment. This safeguard alone—while plainly not *essential* to establish that a protocol is constitutional—is *more than sufficient to assure it.* Compare *Baze*, 553 U.S. at 60 with *id*. at 120-121 (Ginsburg, J., dissenting).

In *Baze*, Justice Ginsburg approvingly referred to an iteration of OP 770 that supplanted the version the district court examined in 2006, and observed—again with evident approval—that "[i]n California, a member of the IV team brushes the inmate's eyelashes, speaks to him, and shakes him at the halfway point and, again, at the completion of the sodium thiopental injection. See State of California, San Quentin Operational Procedure No. 0-770, Execution by Lethal Injection, § V(S)(4)(e) (2007), online at http://

[3] The Excerpt of Record filed with this Court on September 26, 2010, in case number 10-99019, is referenced herein as "ER."

[4] Cal. Code Regs. tit. 15, §§ 3349, et seq. compares favorably with Kentucky's protocol in virtually every respect. These similarities were summarized in a chart , appended to defendants' pleading filed in the district court. It demonstrates that the Regulations are *at least* "substantially similar" to the protocol upheld by the Supreme Court in *Baze*.

www. cdcr. ca. gov/ News/ docs/ Revised Protocol. pdf." *Baze* 553 U.S. at 120-21 (Ginsburg, J. dissenting.) That version of OP 770, in turn, has since been supplanted by Cal. Code Regs. tit. 15, §§ 3349, et seq., but, as noted, those formal regulations currently in force continue to incorporate the consciousness-check feature.

The District Court acknowledged that the current protocol includes a consciousness-check feature in its initial order denying a stay, yet utterly failed to address this point in its analysis. (Doc. 424 at 5.) This was clear error. As discussed, to establish an Eighth Amendment violation based on a risk of future harm, a condemned inmate must show "the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Baze,* 533 U.S. at 49-50 (citation omitted). Because Brown has not done so, his stay request should have been denied.

C. The District Court clearly erred in its assessment of the equities.

The Supreme Court has held that, "before granting a stay, a district court 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." *Nelson* , 541 U.S. at 649-50

(emphasis added). There is a strong presumption against a stay when a challenge is brought on the eve of an execution. *Id.* at 649. This Court specifically directed the respondent court to consider Brown's stay request in light of *Nelson*.

The respondent court found that Brown did not unreasonably delay in moving to intervene and moving for a stay[5] and that "the equitable presumption appears to cut strongly the other way." (Doc. 424 at 7.) In this regard, the District Court wrote that the sense of urgency of the present situation was created by "Defendants' decision to seek an execution date

[5] No evidence supports this finding. To the contrary, 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 1006, 1017 n.5 (9th Cir. 2007); *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 section 1983 action until September 15, 2010, only two weeks before his execution was then scheduled to occur, even though the new lethal injection protocol was approved by July 29, 2010, he received notice of his imminent execution in the Governor's August 3, 2010 letter, and had actual notice on August 13, 2010 that the State would be seeking a public session for an execution date. Doc. 387. Because Brown unreasonably delayed seeking to intervene, and to this day has failed to amend the complaint to identify any features of California's current protocol that allegedly causes it violate his rights under the Eighth Amendment, there exists a strong equitable presumption against granting him a stay.

only thirty days after the new regulations became final." (Doc. 424 at 7.) The District Court also quoted this Court's statement in the remand order that "'[t]he timing of Brown's execution date is apparently dictated in part by the fact that the state's existing inventory of sodium thiopental consists of 7.5 grams, with an expiration date of October 1, 2010.'" (Doc. 424 at 8.)

But the district court cited no authority for the proposition that the State's indisputably lawful selection of an execution date (Doc. 410 at 8:25-26 ("there was no legal impediment to setting Brown's execution date") should somehow shift this equitable presumption in Brown's favor. Moreover, while the district court twice referred to Defendants' failure to inform it earlier of the quantity and expiration date of its sodium thiopental (Doc. 424 at 3, 8)—something the Defendants had no obligation to do—this fact is plainly irrelevant to both whether a stay should have been granted under *Nelson* and to the constitutionality of California's lethal injection protocol. There is no dispute that California possesses sufficient sodium thiopental to constitutionally execute its judgment as scheduled under California law. Moreover, rather than "rushing" to execute Brown, Defendants have spent the past four years devoting substantial resources to ensuring the quality of its lethal injection processes. These efforts—and

their fruits—demonstrate California's commitment to *exceed* constitutional requirements.

The respondent district court also suggested that because only Brown's execution would be directly or indirectly impacted by a stay because of the present unavailability of additional quantities of sodium thiopental, the issuance of a stay would have only a minimal effect on Defendants' interests. (Doc. 424 at 7-8.) But the State suffers severe prejudice from any stay of execution. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. at 644; *In re Blodgett*, 502 U.S. 236 (1992). A state need not suffer *multiple* stays of execution before the impairment of its interests can be said to rise above "minimal" levels.

The injury inflicted on California by the grant of a stay here is profound. As the Supreme Court has observed in addressing the compelling state interest in finality:

> Only with an assurance of real finality can the State execute its moral
>
> judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. [Citation.] To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," [citation], an interest shared by the State and the victims of crime alike. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

It is for this reason that the "State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson* v. *Campbell*, 541 U.S. at 64. It is also for this reason as well as California's constitutional response to the respondent court's concerns about its method of execution of its lawful judgments, that the respondent court should have applied the appropriate standard under *Baze* and denied Brown's motion for stay.

Dated: September 28, 2010 Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: September 28, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 05-99014

I certify that: (check (x) appropriate option(s))

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9/29/10

Dated

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