UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 10–99021

JEFFREY TIMOTHY LANDRIGAN, Plaintiff - Appellee, v. JANICE K. BREWER, et al., Defendants - Appellants.	Appeal from the United States District Court for the District of Arizona CV–10–02246–ROS (Capital Case)

REPLY TO RESPONSE IN OPPOSITION TO APELLANTS' MOTION TO LIFT STAY

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The issue before this Court is whether, in light of the information that the State has disclosed regarding the drugs to be used in Landrigan's execution, there is a "substantial risk of serious harm, an objectively intolerable risk of harm" in administering sodium thiopental such that Landrigan is "*sure or very likely*" to endure serious illness and needless suffering giving rise to an *imminent* danger. *Baze v. Rees*, 553, U.S. 35, 50 (2008) (emphasis in original).

Landrigan's Response again highlights the unnecessary focus that has been placed on having "FDA-approved sodium thiopental" to carry out the execution. (Response, at 4, 8–10.) Landrigan asserts, for example, that his expert, Dr. Palmer has opined "that it is so critical that a drug be approved by FDA 'that a reasonable and prudent medical practitioner would not use thiopental that has not received FDA approval.'" (Response, at 10.) However, the drugs the Arizona Department of Corrections has acquired are not for use by a prudent medical practitioner who would presumably be treating a patient with an illness. Instead, the drugs are to be used to carry out an execution, which is hardly analogous.

Landrigan further posits that the district court correctly determined that "the issue is whether there is a sufficient level of confidence that the sodium thiopental Defendants plan on using to sedate Plaintiff does not create a substantial risk of harm" and that "FDA-approval is relevant in that drugs manufactured under FDA-guidelines are likely to perform as expected; drugs manufactured by non-FDA

approved sources might not benefit from such a presumption." He also quotes the district court's statement that "[w]ithout the assurance of FDA-approval, the Court is left to speculate whether the non-FDA approved drug will perform in the exact same manner as an FDA-approved drug and whether the non-FDA approved drug will cause pain and suffering." (Response, at 8.) This quotation again highlights a misplaced focus on FDA-approval, and suggests that the district court is engaging in precisely the type of board-of-inquiry analysis prohibited by *Baze*.

This is not a situation where the State chose to acquire drugs from a substandard United States manufacturer who is unable to comply with FDA standards. The drugs were purchased from a foreign manufacturer, and the State has provided assurances that that the process of shipping and receiving the chemicals was cleared and approved by United States Customs and FDA officials.

The State's disclosure of information to the district court was more than adequate for the court to assess whether Landrigan has established a colorable claim under *Baze*. The district court abused its discretion by concluding that more information and analysis – including an assessment of the significance of FDA approval – is required to assess the merits of Landrigan's claim.

. . .

DATED this 25th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25th, 2010, I electronically filed this reply with the U.S. Court of Appeals for the Ninth Circuit, by using the Court's Case Management/Electronic Case Files (CM/ECF) system.

Copies of this Reply were deposited for mailing this date to:

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