

No. 14-16310

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Joseph Rudolph Wood III, Plaintiff-Appellant,
vs.
Charles L. Ryan, et al., Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:14-cv-01447-NVW-JFM

EMERGENCY MOTION FOR STAY OF EXECUTION

EXECUTION SCHEDULED: JULY 23, 2014 at 10:00AM MST (10:00 AM PDT)

JON M. SANDS
Federal Public Defender
District of Arizona
Dale A. Baich
Robin C. Konrad
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
dale_baich@fd.org
robin_konrad@fd.org

Attorneys for Plaintiff-Appellant Joseph R. Wood

CIRCUIT RULE 27-3 CERTIFICATE

1. The contact information for the parties' counsel is as follows:

Counsel for Appellants

Dale A. Baich, dale_baich@fd.org, 602-382-2816
Robin C. Konrad, robin_konrad@fd.org, 602-382-2816
Office of the Federal Public Defender
850 W. Adams St., Ste 201
Phoenix, Arizona 85007

Counsel for Appellees

Jeffrey A. Zick
Jeffrey Sparks
Lacey Stover Gard
John Pressley Todd
Matthew H. Binford
Assistant Attorneys General
1275 W. Washington Street
Phoenix, Arizona 85007
602-542-4686

2. Plaintiff-Appellant Joseph Rudolph Wood III currently has pending before this Court his appeal from the district court's denial of his motion for preliminary injunction. His is scheduled to be executed at 10:00 a.m. on July 23, 2014. Absent emergency relief from this Court, he will likely be executed—and his appeal will become moot, *see McKenzie v. Day*, 57 F.3d 1495, 1495 (9th Cir. 1995)—before the Court is able to consider his appeal, thus making this request for emergency relief appropriate, *see Ninth Cir. R. 27-3(a)*.

3. Counsel for Defendants-Appellees were electronically notified of the motion on July 14, 2014, and will be provided a copy via ECF and separate email.

4. All grounds advanced in support of this motion in this Court were submitted to the district court in Plaintiff Joseph Rudolph Wood III's Motion for Preliminary Injunction or Temporary Restraining Order (Dist. Ct. ECF No. 11, filed July 2, 2014), Case No. 2:14-cv-01447-NVW (D. Ariz.); *see also* Compl. (Dist. Ct. ECF No. 1, filed June 26, 2014).

EMERGENCY MOTION AND SUPPORTING ARGUMENT

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-3, Plaintiff-Appellant Joseph Rudolph Wood III asks this Court for an emergency order staying his execution scheduled for Wednesday, July 23, 2014, at 10:00 a.m. MST (10:00 a.m. PDT).

In considering a request for a stay of execution, a court considers “the likelihood of success on the merits and the relative harms to the parties,” and also any delay on the part of the prisoner. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Here, these factors weigh in favor of a stay for Mr. Wood.

First, as discussed in the Opening Brief (Ninth Cir. ECF No. 10 at 10-50), Mr. Wood can demonstrate a likelihood of success on the merits of his claim and the district court was wrong to conclude otherwise. Defendants-Appellees have violated Mr. Wood’s First Amendment right of access to documents that are part of the “historically open” execution proceedings. *See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002) (recognizing that the public has a “right to be informed about how the State and its justice system implement the most serious punishment a state can exact from a criminal defendant—the penalty of death”).

The public has an affirmative, enforceable right of access to certain government proceedings in the criminal system and records associated with those

proceedings. *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8-14 (1986) (*Press-Enterprise II*) (plurality); *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510–11 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603–11 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980). Right of access attaches specifically where (a) proceedings or records are historically open to the public and (b) public access to the specific proceedings or records plays a significant positive role in the functioning of government. *Press-Enterprise II*, 478 U.S. at 8 (citing *Globe Newspaper*, 457 U.S. at 604). This Court has determined that a right of access attaches to executions because both of these “complementary considerations” are satisfied. *Cal. First Amendment Coal.*, 299 F.3d at 875.

Historically, executions have been open to the public, and the manner of execution has likewise been disclosed to the public. *Cal. First Amendment Coal.*, 299 F.3d 868 at 877; *see also Associated Press v. Otter*, 682 F.3d 821, 822-23 (9th Cir. 2012) (reaffirming that *California First Amendment Coalition* is “settled law” and “binding precedent”). Public access to information about executions ensures the proper functioning of the process and promotes public confidence in the criminal justice system. “Independent public scrutiny—made possible by the public and media witnesses to an execution—plays a significant role in the proper

functioning of capital punishment.” *Id.* at 876. Thus, there is a First Amendment right of access to executions.

Further, the First Amendment right to access extends to the records and documents associated with historically open proceedings. *Cal. First Amendment Coal.*, 299 F.3d at 874 (quoting *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir.1985)) (stating that “the public and the press have a right of access to criminal proceedings and documents filed therein”); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014). Because executions are historically open governmental proceedings, the First Amendment right of access identified by *California First Amendment Coalition* extends to information about the manner and method in which executions will be carried out. *See Cal. First Amendment Coal.*, 299 F.3d at 877; *cf. Seattle Times Co. v. U.S. Dist. Court for W. Dist. of Wash.*, 845 F.2d 1513, 1517 (9th Cir. 1988) (citation omitted) (documents related to pretrial proceedings “are often important to a fully understanding of the way in which the judicial process and the government as a whole are functioning”).

In this case, Defendants-Appellees have consistently refused to provide Mr. Wood with records related to the drugs that will be used in his scheduled execution, the legal and professional qualifications of the executioners, and the process by which Arizona developed its current drug protocol. In failing to provide Mr. Wood access to these records, which directly relate to the execution

proceeding—a governmental proceeding to which this Court has found a First Amendment right of access attaches—Defendants-Appellees are violating Mr. Wood’s constitutional rights. A stay of execution is necessary so that Mr. Wood may litigate the instant appeal and obtain the information to which he is entitled under the First Amendment.

Moreover, if a stay is not granted, the relative harm to Mr. Wood significantly outweighs the harm to Defendants if a stay were granted. This Court has recognized that death-row prisoners have a “strong interest in being executed in a constitutional manner” *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011). In fact, “[a]n alleged constitutional infringement will often alone constitute irreparable harm.” *Goldie’s Bookstore Inc. v. Super. Ct. of Calif.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 1001-1002 (9th Cir. 2005) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”) (citation omitted).

Conversely, although Defendants-Appellees may “suffer[] an inconvenience” in the postponement of an execution, “the injury is more psychological and intangible than substantial. The state will get its man in the end.” *Gomez v. U.S. Dist. Court for N. Dist. of Calif.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting). Thus, if the Court stays the execution of Mr. Wood

during the pendency of the appeal, there will only be a temporary delay in his execution. And if the Court finds that Defendants-Appellees' actions are unconstitutional, Defendants-Appellees will presumably be able to quickly provide the information to Mr. Wood, thus simultaneously removing the need for a stay, and affording him his ability to "effectively participate in and contribute to our republican system of self-government[.]" *Cal. First Amendment Coal.*, 299 F.3d at 847 (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982)) (internal quotation marks omitted). A brief stay to allow Defendants to comply with the First Amendment also serves the public's interest in seeing that the Constitution is upheld. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Specifically, the public interest is enhanced by a brief stay that allows Defendants-Appellees to comply with the First Amendment, because such compliance would ensure that the "constitutionally protected discussion of governmental affairs is an informed one" *Cal. First Amendment Coal.*, 299 F.3d at 847 (quoting *Globe Newspaper*, 457 U.S.at 606) (internal quotation marks omitted).

Finally, Mr. Wood did not delay in bringing his claim or his request for a stay. *See Nelson*, 541 U.S. at 649-50. Beginning on April 30, 2014, Mr. Wood began seeking from ADC the information that is at issue in this matter. (*See, e.g.*, Opening Br. at 4-7; Mot. for Prelim. Inj. at 3-6.) Defendants-Appellees did not

provide concrete notice of the drug protocol until Saturday, June 28, 2014. (Opening Br. at 5-6; Reply to Resp. in Opp'n to Pl. Wood's Mot. for Prelim. Inj. or TRO at 9-10 (Dist. Ct. ECF No. 16); *see also* Hr'g Tr., July 9, 2014, at 23:13-21.) Mr. Wood could not have asserted a "case and controversy," U.S. Const. art. III, until Defendants-Appellees provided that notice. (*See also* Hr'g Tr. at 25:10 (suggesting that Plaintiffs could not have raised this issue before Defendants provided notice on June 28, 2014).) Mr. Wood filed his motion for preliminary injunction just three business days after Defendants-Appellees provided the definitive notice.

There is ongoing debate about the death penalty in the United States and in Arizona. To further that debate, Plaintiff-Appellant has asked for records related to the drugs that will be used, the legal and professional qualifications of the executioners, and the process by which Arizona developed its current drug protocol. The information requested is crucial to the functioning of lethal injection—like the rope or the gas chamber—and it ensures the proper functioning of the execution process, as well as promotes public confidence in the criminal justice system.

CONCLUSION

For the foregoing reasons, Mr. Wood respectfully requests that this Court enter a stay of execution to permit the Court to fully consider his appeal without risk that the appeal would be mooted by his execution. In the alternative, for the reasons outlined in the Opening Brief, Mr. Wood respectfully requests that this Court issue a preliminary injunction prohibiting Defendants from carrying out Mr. Wood's executions until Defendants comply with the First Amendment and provide Mr. Wood with the information relating to execution proceedings.

Respectfully submitted this 14th day of July, 2014.

Jon M. Sands
Federal Public Defender
District of Arizona

Dale A. Baich
Robin C. Konrad

By s/Dale A. Baich
Counsel for Plaintiff-Appellant

Certificate of Service

I hereby certify that on July 14, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Chelsea Hanson
Legal Assistant
Capital Habeas Unit