No. 14-16310

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, et al.,

Plaintiffs,

–vs–

CHARLES L. RYAN, et al.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–14-1447

EXECUTION SCHEDULED FOR JULY 23, 2014 10:00 A.M. M.S.T.

DEFENDANTS' RESPONSE TO EMERGENCY STAY OF EXECUTION UNDER CIRCUIT RULE 27-3

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In his Emergency Motion for Stay Wood seeks to block Arizona from executing him on July 23, 2014, less than two weeks away. As grounds, Wood alleges that his First Amendment right of public access to governmental proceedings is violated by Defendants' refusal to disclose documentary information about lethal injection drugs, the development of lethal injection protocols, or the qualifications of the execution team. He makes this claim based largely on the misapplication of *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 873–74 (9th Cir. 2002). Because that case did not address a right of access to documentary information about lethal injection drugs, and the First Amendment does not mandate a right of access to government information or sources, Wood's motion should be denied.

To be entitled to relief, a movant must demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*, 129 S. Ct. 365, 374, 376 (2008); *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion is on the movant, who must make a "clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997 (per curiam).

These principles apply when a capital defendant asks a federal court to

stay his pending execution. *Hill*, 547 U.S. at 584. A stay of execution is an equitable remedy and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. A court can consider "the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Beardslee*, 395 F.3d at 1068 (quoting *Gomez v. United States District Court*, 503 U.S. 653, 654 (1991)). Thus, courts "must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)).

I. LIKELIHOOD OF SUCCESS ON THE MERITS.

This factor weighs strongly against granting a stay. As argued in Defendants-Appellees's answering brief, neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources. *Houchins v. KQED*, 438 U.S. 1, 15 (1978) (plurality opinion). Wood's reliance on *California First Amendment Coalition* is misplaced because that case only addressed the public's right of access to view the execution proceeding—not documentary information about the lethal injection drugs. Moreover, other courts have rejected the same claim Wood makes here. *See Owens v. Hill*, __ S.E.2d __, 2014 WL 2025129 (Ga. 2014) (rejecting inmate's claim of a First

Amendment right of access to information concerning the identity of the drug manufacturer); *Wellons v. Commissioner, Georgia Dept. of Corrections*, __ F.3d __, 2014 WL 2748316, at *6 (11th Cir. 2014) (rejecting claim that State's failure to provide information about execution drugs violated First Amendment right of access to government proceedings).

Even assuming Wood's extravagant view that information about the lethal injection drugs is a government process, his claim would fail under the test enunciated in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–14 (1986). The type of information Wood seeks has never historically been open to the public. *See Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir 2014) ("the assertion of a necessity for disclosure does not substitute for the identification of a cognizable liberty interest"); *In re Lombardi*, 741 F.3d 888, 895–96 (8th Cir. 2014) (en banc) (Eighth Amendment did not entitle death row inmate to information about the physician, pharmacy, and laboratory involved in the execution process absent plausible allegations of a feasible and more humane alternate method of execution or purposeful design by the State to inflict unnecessary pain); *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013) (rejecting Fourteenth Amendment, Supremacy Clause, and access-to-the-courts claims challenging state's failure to disclose information regarding method of execution in a timely manner absent a plausible Eighth Amendment claim);

Sepulvado v. Jindal, 729 F.3d 413, 420 (5th Cir. 2013) ("There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol."); *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011) (statute denying inmate certain information regarding execution did not constitute denial of due process right of access to the courts). Nor has Wood demonstrated how disclosure would have a positive role in the function of the execution process.

II. IRREPARABLE HARM.

Wood has not demonstrated he is likely to suffer irreparable harm in the absence of a stay. There has been no showing that Wood has a First Amendment right to the information he seeks. Wood fails to state a claim that demonstrates a constitutional violation. *See Lambert v. Buss*, 498 F.3d 446, 452 (7th Cir. 2007) (finding no irreparable harm from "mere possibilities"). There is no question that Wood has "a strong interest in being executed in a constitutional manner." *See West v. Brewer*, 652 F.3d 1060, 1060 (9th Cir. 2011) (Order); *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011). But Wood has not even alleged that he will be executed in a unconstitutional manner. Because Wood, who is under a warrant of execution, fails to raise serious questions concerning the constitutionality of his execution, he does not meet a standard for preliminary injunction. *See Towery v. Brewer*, 672 F.3d

650, 661 (9th Cir. 2012).

Wood's reliance on *Goldie's Bookstore, Inc,. v. Superior Court of State of Cal.*, 739 F.2d 466 (9th Cir. 1984) is misplaced. There, this Court found that the civil plaintiff-appellee had not presented a serious question or that the balance of hardship tipped sharply in her favor. *Id*. at 470. Nor does *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), advance Wood's argument, a case which concerned prison grooming policy. Because Wood has not demonstrated likelihood of success on his First Amendment claim, there is no need to reach the issue of irreparable injury. *See id* at 1001 (where plaintiff had established meritorious claim). Moreover, in light of the Supreme Court precedent and precedent from this Circuit, a temporary stay of execution days before it is scheduled to occur is hardly a mere "inconvenience."

III. BALANCE OF EQUITIES

A stay of execution is an equitable remedy that must be sensitive to the State's "strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 384 (citing *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)). Both Wood's state and federal collateral proceedings have run their course in the more than 20 years that have elapsed since Wood was sentenced to death for the two murders he committed. "[F]urther delay from a stay would cause hardship and prejudice to the State and

victims, given that the appellate process in this case has already spanned more than two decades." *Bible v. Schriro*, 651 F.3d 1060, 1066 (9th Cir. 2011) (*per curiam*). The State has a strong interest in carrying out the executions as scheduled without further delay. *See Hill*, 547 U.S. at 584. The Supreme Court also recognized the victims of crime have an "important interest in the timely enforcement of a sentence." *Id.*; *see also* Ariz. Const. art. 2, §2.1(a)(10) (Arizona crime victims have a constitutional right to "prompt and final" conclusion of the case); 18 U.S.C. § 3771(b)(2) (recognizing state victims right in federal habeas); *Towery*, 672 F.3d at 661 (recognizing the victims of crime have an "important interest" in the timely enforcement of a sentence). Because Wood has not set forth any type of claim that would entitle him to relief from his conviction and sentence, he has not established an equitable basis for a stay. Given the State's strong interest in enforcing its criminal judgments without undue influence from the federal courts, and the victims' interest in the timely enforcement of the state sentence, this Court should conclude the balance of equities favors the State and a stay of execution is not in the public interest.

Moreover, since the State sought a Warrant of Execution well over two months ago, Wood has been aware of the public protocol that identifies the qualifications of the IV team, of the types of drugs that could be used, and the presumption that Midazolam and Hydromorphone would be used, and in what

amounts, unless pentobarbital could be located. Nothing prevented him from initiating a lawsuit then and seeking a stay. Instead, he waited until the last minute. Wood's argument that he showed diligence by, on April 30, 2014, seeking information from the Arizona Department of Corrections before bringing this suit is only credible if this Court disregards prior litigation between ADC and the Federal Public Defenders since 2010. ADC has never voluntarily made public the identity of the source of execution drugs. Despite this fact, rather than seek a court order, Wood spent over a month writing letters to ADC seeking information that ADC considered confidential while the execution date approached. Equity does not condone such delay.

IV. AN INJUNCTION IS NOT IN THE PUBLIC INTERST

Because Wood fails to present any plausible questions of constitutional magnitude, there has been no showing that he will suffer an unconstitutional execution, and the equities tip in favor of Appellees, an injunction is not in the public interest.

CONCLUSION

Wood's emergency motion for a stay of his scheduled execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 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 on July 15, 2014.

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.

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