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

REPLY TO DEFENDANTS' RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION

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

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REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF EXECUTION

It is uncontroverted that the public, including Mr. Wood, have 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." *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002). Under his First Amendment right of access, Mr. Wood has sought, and the Arizona Department of Corrections (ADC) has refused to provide, information about records related to the drugs that will be used, the legal and professional qualifications of the executioners, and records related to the development of ADC's current drug protocol to be used in Mr. Wood's execution. Beginning on April 30, 2014, Mr. Wood sought information from ADC about the information at issue. ADC did not provide concrete notice of the drug protocol to Mr. Wood's attorney until Saturday, June 28, 2014. Mr. Wood filed his motion for a preliminary injunction just three days later.

In order to obtain a stay, this Court must consider "the likelihood of success on the merits and the relative harms to the parties [and] the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). As explained in both his Opening Brief and Reply Brief, Mr. Wood has demonstrated a likelihood of success on the merits.

In *California First Amendment Coalition*, this Court recognized that the public has the right to be informed about the implementation of the death penalty. This principle is broader than simply a right to view executions. While ADC cites two Georgia cases, *Owens v. Hill*, 2014 WL 2025129 (Ga. 2014), and *Wellons v. Commissioner, Georgia Dept. of Corrections*, 204 WL 2748316 (11th Cir. 2014), it fails to mention that, in Georgia, until 2013, when the lethal-injection secrecy act was passed, the Georgia Department of Corrections would, in response to Open Records Act requests, routinely provide prisoners and members of the press and public with detailed information about the drugs used in lethal injections. ADC is, therefore, flatly incorrect when asserting that the type of information Mr. Wood seeks has historically never been made available. A number of other cases on which ADC relies are not First Amendment cases. Obviously, they do not decide the issue before this Court.

Because Mr. Wood can show a likelihood of success on the merits, he defeats ADC's arguments against injunctive relief. The bulk of ADC's arguments in opposition to a stay boil down repeatedly to their view of the merits. For example, under irreparable harm, ADC asserts that "[t]here has been no showing that Wood has a First Amendment right to the information he seeks." (Resp. at 4, Ninth Cir. ECF No. 16.) ADC asserts that Mr. Wood's reliance on *Goldie's Bookstore, Inc. v. Superior Court of State of California*, 739 F.2d 466, 472 (9th

Cir. 1984), is misplaced because there the Court did not find that the balance tipped sharply in the plaintiff's favor. (Resp. at 5.) Mr. Wood, however, cited that case, as well as *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005), for the proposition that an alleged First Amendment violation is sufficient to show irreparable harm. In fact, as *Warsoldier* stated: "[u]nder the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." 418 F.3d at 1001 (alteration in original; citation omitted). Because Mr. Wood has shown that he has a colorable First Amendment claim, he has shown irreparable harm.

ADC also repeats the argument that because Mr. Wood has "has not set forth any type of claim that would entitle him to relief from his conviction and sentence," the balance of the equities weighs against him. (Resp. at 6.) By the tenor of its arguments, ADC all but concedes that if Mr. Wood shows a likelihood of success on the merits, he is entitled to a stay. Mr. Wood has, in fact, stated a colorable claim and he is likely to succeed on the merits. For that reason, he is entitled to a stay.

Moreover, there has been no undue delay. Contrary to ADC's, *Hill v. McDonough*, 547 U.S. 573 (2006), supports Mr. Wood's position on this point. In *Hill*, the petitioner's death warrant was issued on November 29, 2005, and his

execution date was set for January 24, 2006. *Id.* at 577. Like Mr. Wood, the petitioner in that case requested information about the lethal-injection protocol, but the department of corrections provided none. *Id.* He attempted to resolve this first in state court, but that claim was dismissed. *Id.* at 577-78. Then, three days after he was denied relief in state court, the petitioner brought an action in federal court— only four days before his scheduled execution. *Id.* at 578. The Supreme Court granted a stay. *Id.*

In this case, Mr. Wood brought his request for preliminary injunction nearly one month before his scheduled execution and only three business days after he received concrete notice of the drug protocol to be used in his execution. As the district court noted below, Mr. Wood may not have had a justiciable case or controversy if he brought his case sooner. (Hr'g Tr. at 25:21-26:2, ER 042-43.) Indeed, counsel for Mr. Wood explained to the district court that it takes time to ensure that a meritorious claim is presented. (Hr'g Tr. at 16:24-17:6, ER 033-34.) As the Supreme Court recognized, "piecemeal litigation" raises similar concerns to delay. *Hill*, 547 U.S. at 584-85.

Here, Mr. Wood has not delayed. ADC's main response about Mr. Wood's delay is that Mr. Wood "spent over a month writing letters to ADC seeking information that ADC considered confidential while the execution date approached." (Resp. at 7.) What ADC is suggesting is that Mr. Wood, or any

other prisoner, should file a complaint and request for injunctive relief without first trying to obtain information from Defendants. Mr. Wood had good-faith basis to presume that ADC would provide similar (and some identical) information to him where the district court recently found a First Amendment right to such information. *See Schad v. Brewer*, No. 2:13-cv-13-02001-PHX-ROS, 2013 WL 5551668, at *4-5 (D. Ariz. Oct. 7, 2013) (finding that prisoners have a First Amendment right of access to government information related to their executions because executions have historically been open to the public, and because public access to information plays a significant positive role in the functioning of capital punishment). This is especially true given that ADC did not appeal the district court's order in *Schad*, but instead complied with it.

This was in contrast to a previous case in which the district court ordered ADC to reveal information regarding the source of its lethal-injection drugs. *See Landrigan v. Brewer*, No. 10-cv-2246-PHX-ROS, 2010 WL 4269557 (D. Ariz. Oct. 23, 2010). In that case, which was three years prior to *Schad*, the court first "invited Defendants [ADC] to 'voluntarily provide detailed information concerning the sodium thiopental it intends to use in Plaintiff's execution, including the manufacturer and expiration date.'" *Id.* at *1. ADC chose not to provide the information, and the court directed ADC "to immediately and publically disclose information concerning the sodium thiopental ADOC intends to

use in Plaintiff's execution." *Id.* ADC did not comply with the court's order, but instead appealed the decision. The Supreme Court vacated the order under the Eighth Amendment on grounds that "[t]here is no evidence in the record to suggest that the drug obtained from a foreign source is unsafe" and "[t]here was no showing the drug was unlawfully obtained." *Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (mem.). As Mr. Wood has explained, it later came to light that ADC did, in fact, unlawfully obtain the lethal-injection drugs. (*See* Opening Br. at 31-33.)

Therefore, given the circumstances surrounding ADC's prior actions, Mr. Wood cannot be blamed for attempting to first seek information from ADC, and then waiting until he received notice under ADC's own procedures of the drug protocol that ADC planned to use in his execution. Mr. Wood has not delayed in bringing his lawsuit and his request for injunctive relief.

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CONCLUSION

For the reasons stated in Mr. Wood's motion and this reply, as well as the reasons stated in his Opening Brief and Reply Brief, Mr. Wood is entitled to a stay of his execution.

Respectfully submitted this 16th day of July, 2014.

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Certificate of Service

I hereby certify that on July 16, 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/Stephanie Bame
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