

FILED
SUPREME COURT
STATE OF WASHINGTON
2009 MAR 17 P 1:30
BY RONALD R. GATEWATER
CS

No. 82832-6

J.M. JOHNSON, J. (dissenting)—Eighteen years have passed since Cal Coburn Brown kidnapped, tortured, raped, and stabbed this victim to death. Fifteen years have passed since 12 jurors unanimously decided the death penalty was appropriate for Brown. And although less than one week had passed since this court denied two other challenges to his execution, a bare majority of this court grants another stay. Because this stay contradicts the rule of law and our constitutional system, disregarding entirely the rights of victims (and their families) under article I, section 35, I dissent.

Brown has already been given every opportunity for judicial review. Three years after his jury trial(s), we denied a challenge and affirmed Brown's conviction and sentence. *State v. Brown*, 132 Wn.2d 529, 539, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). In 2001, this court denied Brown's Personal Restraint Petition. *In re PRP of Brown*, 143 Wn.2d 431, 435, 21 P.3d 687 (2001). In 2002, Brown sought habeas relief in the federal courts and Brown's claims were heard and denied. *Brown v. Lambert*, 2004 WL 5331923 (W.D. Wash. 2004). When one Ninth Circuit panel ruled in his favor, *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006), the United States Supreme Court

reversed (affirming the conviction). *Uttecht v. Brown*, 551 U.S. 1, 127 S. Ct. 2218, 2231, 167 L. Ed. 2d 1014 (2007). On remand, the Ninth Circuit considered additional numerous claims and affirmed denial of habeas relief. *Brown v. Uttecht*, 530 F.3d 1031 (9th Cir. 2008). Brown's appeal of that final decision was also denied by the Supreme Court, *cert. denied*, ___ U.S. ___, 129 S. Ct. 1005, ___ L. Ed. 2d ___ (2009).

A short time later we denied *two* additional separate challenges by Brown. Orders in Cause No. 82711-7 and Order in Cause No. 82742-7. These challenges were denied only three days before the court granted this stay.

In this case Brown had also challenged his execution in Thurston County Superior Court. *See Brown, et al. v. Vail, et al.*, Thurston County Cause No. 09-2-00273-5. The case was removed to the Western District of Washington, *Brown, et al. v. Vail, et al.*, USDC Cause No. C09-5101-JCC, which denied stay and returned the case to state courts.

On March 11, 2009, the Thurston County Superior Court considered the materials Brown's counsel filed (they were voluminous). After issuing findings disposing of the latest claims, that court denied Brown's request for stay. Brown then filed here an emergency motion for discretionary review and stay based on the

same materials ruled insufficient in the lower court. The majority of this court obliges by granting this stay only hours before the scheduled execution.

In order for a stay to be even arguably appropriate, Brown must establish a likelihood of success on the merits. *See Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). The numerous previous rulings in the *Brown* cases—both in state and federal court—show *no* likelihood of success. Additionally, the United States Supreme Court already held the same method of execution (lethal injection) constitutional in *Baze v. Rees*, 553 U.S. ___, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), even explicitly referencing Washington's law. *Id.* at 1545, n.4.

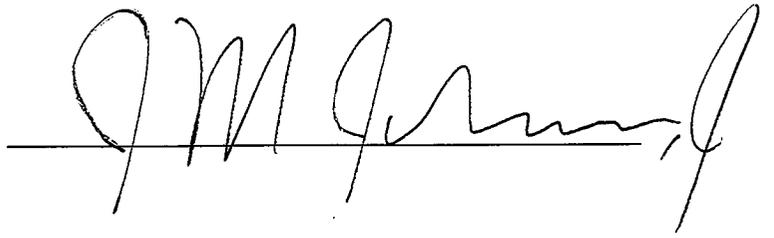
Despite the many factors weighing against a stay, the majority inexplicably grants stay, while declining to hear arguments on the merits or even grant review, and *not* overturning the Thurston County court's findings.

When the United States Supreme Court ruled against Brown's claims, it noted that "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." *Uttecht v. Brown*, 551 U.S. 1, 127 S. Ct. 2218, 2224, 167 L. Ed. 2d 1014 (2007). The same must be said of all judges. A jury, the bedrock of our system, determined guilt and that all facts required capital punishment as provided under our laws. Judges are also

bound by a constitutional oath to enforce the law. The people of Washington and the family and friends of Holly Washa are also entitled to this protection.

There is no proper ground to stay this execution. Brown does not even allege his innocence. He confessed, in excruciating detail, to torturing and murdering Holly. She was not his only victim. Despite these facts, Brown is constitutionally entitled to an execution that is neither cruel nor unusual. The Washington Constitution prohibits “cruel,” and the United States Constitution prohibits “cruel and unusual,” the tests are the same here. All Brown’s claims regarding the constitutionality of Washington’s lethal injection are meritless.

Finally, the majority order fails to recognize one clear difference between the United States and Washington’s constitution. Our article I, section 35 requires consideration of the rights of victims (and their families) “to accord them due dignity and respect” Because the majority fails to implement our constitution, I dissent.

A handwritten signature in black ink, appearing to be "J. M. J.", is written over a solid horizontal line. The signature is cursive and somewhat stylized.