

No. 04-99003

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

JUL 15 2004

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

TERRY JESS DENNIS, )  
)  
Petitioner-Appellant, )  
)  
vs. )  
)  
MICHAEL BUDGE, et al. )  
)  
Respondents-Appellees. )  
)  
)  
)  
\_\_\_\_\_ )

D.C. No. CV-S-04-0798-PMP

**OPPOSITION TO MOTION TO STAY EXECUTION**

Respondents, by and through counsel, Brian Sandoval, oppose Butko's motion to stay the execution of Terry Dennis. This opposition is made and based on the attached points and authorities as well as the record on appeal in the above-entitled matter.

**ARGUMENT**

Karla Butko has filed a motion to stay the execution of Terry Dennis in the above-entitled matter. Unless and until this Court determines that Butko has standing under Article III of the United States Constitution, no consideration should be given to the motion.

Respondents deny each and every factual assertion made in the motion save and except for those facts expressly found to exist by a Nevada court of competent jurisdiction or by the federal district court in its order filed July 7, 2004.

The factual findings of the Nevada courts are presumptively correct. 28 U.S.C. § 2254(e)(1). Those facts are found, without limitation, predominantly in EOR 655-660; 662-717; 1135-1137; 1146-1147; 1149-1151; 1512-1513; 1655-1661; 1698-1706; and 1714-1721. Respondents adopt the factual findings and recitations therein and incorporate them herein as if set out in full.

Dennis is capable of assisting in his own defense and understanding the nature of legal proceedings he may pursue to avoid or delay imposition of the death penalty. EOR 1658, ll. 21-23.

Dennis has sufficient present ability to consult with his attorney with a reasonable degree of understanding, and he has a rational and factual understanding of the legal proceedings.<sup>1</sup> EOR 1660, ll. 8-10.

Dennis does not suffer from any disease or mental defect that prevents him from making a rational choice among his various legal options – including whether to pursue any further litigation that may save his life. EOR 1658, ll. 8-21.

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<sup>1</sup> Indeed, as the federal district court correctly noted, Butko conceded below that Dennis meets the standard of competency with respect to the second *Rumbaugh* inquiry. See Transcript of July 1 hearing (Docket # 15, pp. 32-33. Butko takes issue only with Dennis' volitional capacity, the third *Rumbaugh* inquiry. *Id.*

The Nevada Supreme Court found the district court's factual findings to be supported by substantial evidence and affirmed the findings. EOR 1698-1706. Those findings and any other findings made by the Nevada state courts are presumptively correct. 28 U.S.C. § 2254(e)(1). Butko had the burden of rebutting that presumption by clear and convincing evidence. *Id.* Butko failed to do so. EOR 1889-1903.

The federal district court found that Dennis displayed understanding, rationality and overall competence at the extensive canvass conducted by the federal district court at the July 1, 2004, hearing. EOR 1902. Dennis understands his legal position and the options available to him, and he is able to make rational choices. EOR 1902-1903. The federal district court's factual determinations may not be set aside unless they are clearly erroneous. Fed. R. Civ. P. 52(a); *Lawyer v. Department of Justice*, 521 U.S. 567, 580 (1997); *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000); *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1149 (9th Cir. 2000). "Review under the clearly erroneous standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993); *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992); *Alder v. Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000).

Butko presented no evidence whatsoever indicating that there has been any change in Dennis's condition since the state court determination regarding his competence. *See Demosthenes v. Baal*, 495 U.S. 731, 736 (1990). Indeed, as the federal district court found, the understanding, rationality and overall competence of Dennis displayed at the extensive canvass conducted by the federal district court at the July 1 hearing, is quite congruent with the factual findings made by the state court which establish Dennis's competence within the meaning of *Rees* and *Rumbaugh*. EOR 1796-1875.

Federal habeas review is not a vehicle for the indefinite delays of executions. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The granting of a stay of execution must reflect "something more than the absence of frivolity, [, it] should reflect the presence of substantial grounds upon which relief might be granted." *Id.* at 894-895. The federal court should grant a stay on a first petition if the court cannot dismiss the petition on the merits before the scheduled execution. *Lonchar v. Thomas*, 571 U.S. 314, 320 (1996). On the other hand, the federal court should deny a stay of execution and dismiss the petition summarily if it plainly appears the petitioner is not entitled to relief. *Id.* (citing Rule 4; 28 U.S.C. § 2254). It is therefore proper for a federal court to deny a stay following a "summary proceeding" in which the appellant's claims are determined to be without merit. *Id.*; *Barefoot*, 463 U.S. at 888-891.

The federal courts must therefore ensure that an adequate basis exists for staying an execution. *Demosthenes v. Baal*, 495 U.S. 731 (1990). “The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted.” *Barefoot*, 463 U.S. at 888. Courts should not automatically grant stays of execution. Rather, a court should grant a stay only when the petitioner shows a significant possibility of success on the merits. *Barefoot v. Estelle*, 463 U.S. at 888; *Delo v. Stokes*, 495 U.S. 320 (1990); *Maggio v. Williams*, 464 U.S. 46 (1983); *Woodard v. Hutchins*, 464 U.S. 377 (1984).

A third party does not have standing to challenge or stay the execution of a mentally competent defendant. *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Whitmore v. Arkansas*, 495 U.S. 149, 157 (1990); *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990). Purported “next friend” petitioners may not stay the execution of a competent defendant who chooses not to challenge the execution. *Wells by and through Kehne v. Arave*, 18 F.3d 656, 658 (9th Cir. 1994).

A stay of execution should not be entered unless there are substantial grounds upon which relief might be granted. *Delo v. Blair*, 113 S.Ct. 2922, 2923 (1993). Even where a court issues a certificate of probable cause to appeal, that step does not entitle the petitioner to a stay of execution. A stay is proper only if the petitioner has a significant chance of prevailing on the merits. *Burris v. Parke*, 72 F.3d 47 (7th Cir. 1995), citing *Netherland v. Tuggle*, 116 S.Ct. 4 (1995).

To the extent that Butko presented any claim(s) on behalf of Dennis in the “next friend” petition, they are stated, “Petitioner incorporates the claims and factual allegations raised in the state habeas petition and briefing on appeal from denial of the state habeas petition, Exs. 26, 27 43, as if fully set forth herein.” EOR 7.

The claims that Dennis presented to the Nevada Supreme Court in his appeal were:

1) The three-judge panel system utilized to sentence Dennis to death is unconstitutional; and

2) The district court committed error when it dismissed appellant’s (Dennis’s) petition for writ of habeas corpus (post-conviction).

EOR 1525-1528.

The basis of Dennis’ complaint with respect to the second point was that “Judge Berry’s order denying the habeas petition is not in compliance with applicable statutory protocol.” Dennis relied on NRS 34.830(1), which provides, “Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court.” EOR 1552.

The claims that Butko seeks to present were presented in Dennis’s appeal from the denial of his state petition for writ of habeas corpus (post-conviction). However, Dennis competently dismissed that appeal. EOR 1698-1706. Therefore,

the claims are unexhausted. 28 U.S.C. § 2254(b). Although an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State, the federal courts cannot grant federal habeas relief on an unexhausted claim. 28 U.S.C. § 2254(b)(1); 28 U.S.C. § 2254(b)(2). The federal courts cannot grant Dennis federal habeas relief on either claim.

Butko, whose direct appeal was concluded on February 8, 2001,<sup>2</sup> cannot prevail on the claim that the three-judge panel system utilized to sentence Dennis to death is unconstitutional. Assuming without conceding that the claim is governed by *Ring v. Arizona*, 536 U.S. 584 (2002), *Ring* was decided on June 24, 2002. Recently, the Supreme Court determined that *Ring* was not retroactive. *Schriro v. Summerlin*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2519 (2004); (2004 WL 1402732 U.S. 2004 (Docket No. 03-526, decided June 24, 2004)). Therefore, Butko cannot prevail on that claim.

Butko cannot prevail on his claim that the state district court committed error when it dismissed appellant's (Dennis's) petition for writ of habeas corpus (post-conviction). As noted above, the basis of Dennis's complaint with respect to the second point was that "Judge Berry's order denying the habeas petition is not in compliance with applicable statutory protocol." Dennis relied on NRS 34.830(1),

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<sup>2</sup> A copy of the remittitur is attached hereto.

which provides, "Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court." EOR 1552. Dennis alleged no federal constitutional violation. Indeed, the issue is one of state law and is not cognizable in a federal habeas action. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, (1991); *Engle v. Isaac*, 456 U.S. 107 (1982); *O'Bremski v. Maass*, 915 F.2d 418, 423 (9th Cir. 1990). Federal habeas is unavailable to retry state issues. *Milton v. Wainwright*, 407 U.S. 371, 377 (1972). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1989). Alleged errors in state post conviction actions are not cognizable in federal habeas actions. *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998).

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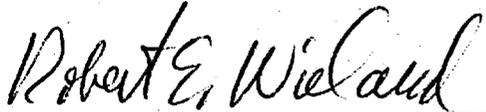
## CONCLUSION

Butko does not have standing to seek a stay. Even if this court were to determine that Butko does have standing, the claims in Butko's petition are unexhausted. Moreover, the claims in Butko's petition are entirely without merit. Respondents respectfully submit that no stay should be entered.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of July 2004.

BRIAN SANDOVAL  
Attorney General

By:



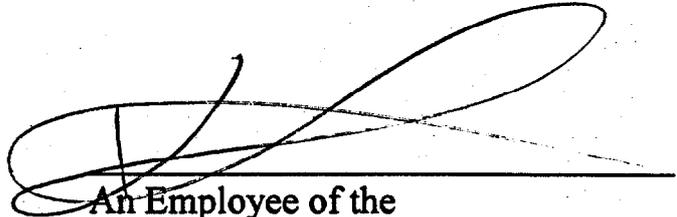
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 14<sup>th</sup> day of July 2004, I served a copy of the foregoing **OPPOSITION TO MOTION TO STAY EXECUTION**, by placing said document in the U.S. Mail, postage prepaid, addressed to:

**FRANNY A. FORSMAN  
Federal Public Defender  
MICHAEL PESSETTA  
330 South Third Street, Suite 700  
Las Vegas, Nevada 89101**



**An Employee of the  
Office of the Attorney General**

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY JESS DENNIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 34632

District Court Case No. CR990611

REMITTITUR

TO: Amy Harvey, Washoe County Clerk

Pursuant to the rules of this court, enclosed are the following:

- Certified copy of Judgment and Opinion/Order.
- Receipt for Remittitur.
- Record on Appeal, Vols. 1 through 4.
- Exhibits: Exhibit 17-Unredacted Videotape.

**FILED**

FEB 20 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

DATE: February 8, 2001

Janette M. Bloom, Clerk of Court

By: *J. Richards*  
Chief Deputy Clerk

cc: Hon. Janet J. Berry, District Judge  
Attorney General  
Washoe County District Attorney  
Washoe County Public Defender

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on Feb 9, 2001

*Amy Harvey*  
County Clerk

**RECEIVED**  
FEB 13 2001  
JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK