

File Name: 09a0248p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN FAUTENBERRY,

Petitioner-Appellant,

v.

BETTY MITCHELL, Warden,

Defendant-Appellee.

No. 09-3847

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 00-00332—James L. Graham, District Judge.

Submitted: July 13, 2009

Decided and Filed: July 13, 2009

Before: BATCHELDER, MOORE, and GILMAN, Circuit Judges.

COUNSEL

ON BRIEF: Dennis Lyle Sipe, BUELL & SIPE, Marietta, Ohio, Tyson L. Fleming, Randall L. Porter, OHIO PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellant. Matthew A. Kanai, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Batchelder, J., delivered the opinion of the court, in which GILMAN, J., joined. MOORE, J. (p. 3), delivered a separate concurring opinion in the judgment.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Petitioner appeals the district court's orders denying his Renewed Request for Funding for a neuro-psychologist and for a stay of execution. We **affirm**.

In an order dated July 10, 2009, we affirmed the district court's order denying Petitioner's initial Request for Funding and held that there was no basis upon which we could stay the scheduled execution. We note that, although we were unaware of it at the time, on July 9, 2009, the Governor of Ohio had denied Petitioner's request for clemency.

On July 11, Petitioner filed in the district court his Renewed Request for Funding and for a stay of execution. The district court noted that in support of his Renewed Request, Petitioner reiterated the arguments he had raised in his initial request, raised a new "staleness" argument, and submitted only two new exhibits: an article concerning the psychological impact of incarceration, and the Ohio Adult Parole Board's completed clemency report. The district court, apparently unaware that the Governor had already denied clemency, noted that Petitioner intended to file a "supplemented application for clemency directly to the Governor." The district court denied the Renewed Request because it concluded that Petitioner had failed to make a showing that the services of the neuropsychologist were reasonably necessary for Petitioner to pursue state clemency further. The district court found no basis upon which it could grant Petitioner's motion for stay of execution and denied the motion.

We have reviewed the district court's orders, the briefs of Petitioner and the Warden, and the materials furnished to the district court by Petitioner in support of his Renewed Request and his motion for stay of execution. For the reasons stated in our order of July 10, 2009, as well as for the reasons given by the district court for denying the Renewed Request, we **affirm** both the denial of the Renewed Request and the denial of the request for stay of execution.

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring in the judgment. I concur in this court's judgment affirming the judgment of the district court.