NO. 11-35940

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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PAUL EZRA RHOADES,

Plaintiff-Appellant,

v.

BRENT REINKE, et al,

Defendants-Appellees.

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Appeal From the United States District Court
In the District of Idaho,
The Honorable Ronald E. Bush, Presiding

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# ANSWERING BRIEF OF DEFENDANTS-APPELLEES

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## STATEMENT OF JURISDICTION

Appellees agree with Appellant's Statement of Jurisdiction.

## ISSUES PRESENTED FOR REVIEW

Appellant raises two issues on appeal. *Appellant's Brief*, p. 3. The relevant issues can be restated as follows:

> Has Rhoades failed to establish the district court abused its discretion by denying his Emergency Motion for Preliminary Injunction or Stay of Execution where Idaho's execution protocol is not only "substantially similar" to Kentucky's protocol which was upheld in *Baze v. Rees*, but actually exceeds the safeguards from Kentucky to ensure his execution does not violate the Constitution?

## STATEMENT OF THE CASE

Rhoades appeals from the federal magistrate's Memorandum Decision and Order Re: Plaintiff's Emergency Motion for Preliminary Injunction or Stay of Execution wherein the district court denied his request for a preliminary injunction or stay of his execution, which is scheduled for November 18, 2011, at 8:00 a.m.

## STATEMENT OF RELEVANT FACTS AND COURSE OF PROCEEDINGS

Appellees agree with the chronology of events and the course of proceedings before the district court as described in Appellant's Statement of the Case. *Appellant's Brief*, pp. 4-5.

The following facts are relevant to the issue presented on appeal. As summarized by the district court:

> On March 24, 1988, Paul Ezra Rhoades ("Rhoades") was sentenced to death in Idaho's Seventh Judicial District state court for the kidnapping and murder of Susan Michelbacher. On May 13, 1988, in the same state judicial district but in a separate criminal case, Rhoades again was sentenced twice to death, for the kidnapping and murder of Stacy Baldwin.
>
> In the over 23 years that have followed, Rhoades pursued appeals and petitions for postconviction relief in state court. He has also pursued habeas claims in federal court. All such appeals and other collateral proceedings have run their course, with their denouement coming when the United States Supreme Court denied certiorari review of Rhoades's federal habeas claims in the Bonneville County case on October 11, 2011, and in the Bingham County case on
>
> October 13, 2011.
>
> Following the denials of certiorari, the cases returned to Idaho state court. On October 19, 2011, a new death warrant was issued by the state court in both the Bonneville County and Bingham County cases. The death warrants, directed at Brent Reinke, the Director of the Idaho Department of Correction, and Randy Blades, the Warden of the Idaho Maximum Security Institution, ordered that Reinke and Blades "cause the execution of said sentence of death to take
> place" on November 18, 2011, unless said sentence were to be stayed by law.

ER, Vol. II, p.73. (footnotes omitted).

The Idaho Department of Correction ("IDOC") has two documents that govern executions: a policy which states the general intent of the Board of Correction, and a Standard Operating Procedure or "SOP" describing specific procedures to be followed. The IDOC currently has in effect Policy 135 Execution Procedures which was adopted January 1994 and revised and adopted on October 13, 2011. On October 14, 2011, the IDOC approved and adopted a revised IDOC

SOP Execution Procedures 135.02.01.001 ("SOP 135") outlining the current execution protocol in great detail. Prior to the adoption of the current version of SOP 135, IDOC had in effect a former version since 2006, which also relied on a three drug protocol.[1]

In drafting SOP 135, the IDOC reviewed execution policies of other states before modeling it after the execution policies of Arizona and Kentucky. IDOC's process also included a site visit to Arizona to discuss its execution protocol with Arizona correctional officials.

> Under SOP 135, executions are carried out through the sequential administration of three chemicals: a barbiturate (sodium thiopental, also known as sodium pentothal) [or pentobarbital[2]], pancuronium bromide, and potassium chloride. [footnote omitted]. The barbiturate drug anesthetizes the inmate by inducing unconsciousness, permitting the other two chemicals to be administered without causing pain. Pancuronium bromide is a paralytic neuromuscular blocking agent that causes complete paralysis and accompanying suffocation. Finally, potassium chloride induces cardiac arrest.

ER, Vol. II, pp.74-75.

## SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Rhoades' Motion to Stay. The district court properly concluded that IDOC's SOP 135 is substantially

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[1] Rhoades was aware of the 2006 SOP as late as 2008, as he exhausted the IDOC's administrative grievance process with respect to that SOP at that time. ER, Vol. II, pp.110. Additonally, Dr. Heath testified that he reviewed the 2006 SOP at the request of Rhoades' attorneys in 2007. ER, pp.721-22.

[2] ER, Vol. II, p.87.

similar to the lethal injection protocol approved by the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). Therefore, the district court found that Rhoades is not likely to succeed on the merits of his claims. The district court also carefully considered the additional factors applicable to a request for a preliminary injunction and determined that Rhoades is not entitled to injunctive relief. Accordingly, the district court properly denied Rhoades' Motion to Stay.

## STANDARD OF REVIEW

A district court's decision regarding preliminary injunctive relief is subject to limited review. *Harris v. Board of Supervisors, L.A. County, 366 F.3d 754, 760 (9th Cir. 2004)* ("limited and deferential"). Accordingly, a district court may be reversed only if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *FTC v. Enforma Natural Products*, 362 F.3d 1204, 1211-12 (9th Cir. 2004). An abuse of discretion is "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997). The appellate court cannot simply substitute its judgment for that of the lower court. *United States v. Henderson*, 241 F. 3d 638, 646 (9th Cir. 2000). Under the abuse of discretion standard, an appellate court must uphold a district court decision that falls within a broad range of

permissible conclusions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).

## ARGUMENT

A. Applicable Standard For Preliminary Injunction Or Stay Of Execution

Filing a § 1983 action does not entitle the complainant to an order staying an execution as a matter of course. *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). The state and the victims of a crime have an interest in the timely enforcement of a sentence. *Id*. A stay of execution is an equitable remedy and not available as a matter of right. *Id.* "Equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*.; *see Nelson v. Campbell*, 541 U.S. 637, 649-650 (2004). In seeking to challenge the manner of execution, the inmate must satisfy all the requirements of a stay, including a showing of a significant possibility of success on the merits. *Id*. A court that is considering granting a stay "must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time to allow consideration of the merits without requiring entry of a stay.'" *Id*.

"To be entitled to injunctive relief, a movant must demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and

(4) that an injunction is in the public interest." *Beaty v. Brewer*, 2011 WL 2050124 *2 (D. Ariz. 2011); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 374 (2008). The movant has the burden of making "a clear showing." *Id*. at 376. In capital cases, these principles apply when a condemned prisoner asks a federal court to enjoin his impending execution because "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill*, 547 U.S. at 583-84.

B. Applicable Standards Governing Lethal Injection

*1*. *Baze v. Rees*

*Baze v. Rees*, 553 U.S. 35 (2008), is the controlling case on the constitutionality of lethal injection protocols. "It is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated." *Id.*, at 53. Thirty-six states have adopted lethal injection as the exclusive or primary method of execution, including the Federal Government. *Id*. "This broad consensus goes not just to the method of execution, but also to the specific three-drug combination used by Kentucky." *Id*. The U.S. Supreme Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Id.* at 48.

To prevail on an Eighth Amendment claim in challenging the administration of lethal injection, "'there must be a substantial risk of serious harm,' an

'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id*. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n.9 (1994)). "[A] condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative. *Baze*, 553 U.S. at 51 (citations omitted). Nor can an inmate cannot "succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures." *Id*. at 60. "This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner." *Id*. at 60. To the extent an inmate's Eighth Amendment method of execution claim relies on a suggested alternative "'must effectively address a 'substantial risk of serious harm.'" *Id*. at 52 (citation omitted). Moreover, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id*. at 52, 128 S.Ct. at 1532.

Addressing staying an execution, in *Baze* the Supreme Court explained:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A state with a lethal injection

> protocol substantially similar to the protocol we uphold today would not create a risk that meets the standard.

*Id*. at 62 (emphasis added).

*2. Dickens v. Brewer*

In *Dickens v. Brewer*, 631 F.3d 1139, 1141 (9th Cir. 2011), this Court held that Arizona's protocol and the safeguards contained therein "falls within th[e] safe harbor" created by the Supreme Court in *Baze*. Dickens, however, asked the Court to "look beyond the protocol's facial constitutionality to consider whether there is a substantial risk that it [would] be implemented in an unconstitutional manner." *Id*. at 1145. Stated another way, Dickens asked this Court to decide whether, despite Arizona's safeguards, "Arizona's protocol creates an unconstitutional risk that an inmate will be properly anesthetized and thus experience extreme pain and suffering while dying." Id. at 1141. In addressing this question, the Court found that "absent any evidence that Arizona failed to adhere to execution procedures in the past, it would be pure speculation to conclude that Arizona might fail to follow the Protocol in the future." *Id*. at 1149. The Court also rejected Dickens' argument that Arizona should be required to add additional safeguards to the Protocol, concluding "the Protocol contains more safeguards than the Kentucky protocol and there is no evidence that Arizona will fail to follow it in future executions." *Id*. at 1149. Relying on *Baze*, the Court stated:

> An inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. *Baze*, 553 U.S. at 60-61, 128 S.Ct. 1520. Where an execution protocol contains sufficient safeguards, the risk of not adopting an additional safeguard is too 'remote and attenuated' to give rise to a substantial risk of serious harm. Id. at 58-59, 128 S.Ct. 1520.

*Id.* at 1149.

Because the "risk that Dickens [would] be improperly anesthetized if Arizona fails to adopt the additional safeguards [was] too remote and attenuated to raise questions of fact as to the Protocol's constitutionality," the Court rejected Dickens' constitutional claim. *Id*. at 1150.

### C. Rhoades Is Not Likely To Succeed On The Merits

As stated above, the first factor a court must consider in ruling on a request for preliminary injunctive relief is whether the movant will likely succeed on the merits. The district court did not abuse its discretion in finding that Rhoades is not likely to succeed on the merits on his claim that IDOC SOP 135 violates his Eighth and Fourteenth Amendment rights. The district court properly relied on *Baze v. Rees*, 553 U.S. 35 (2008) in finding SOP 135 is substantially similar to the Kentucky protocol and contains the necessary safeguards outlined in *Baze*.

Addressing Rhoades' contentions that SOP 135 is not substantially similar to *Baze*, the district court explained:

> Rhoades argues that SOP 135 "contains none of the *Baze* safeguards." *See* Mem. In Supp. of Mot. for Prelim Inj. or Stay of

Execution, p.11 (Docket No. 18). Specifically, Rhoades maintains that SOP 135 (1) "does not contain the 'most significant' safeguard, a required medical credential 'combined with at least one year of professional experience'"; (2) "does not contain the second *Baze* requirement, daily experience"; (3) "does not contain the third *Baze* safeguard, in-house training"; (4) "does not contain the fourth *Baze* Safeguard, meaningful redundancy"; (5) "does not contain the final *Baze* safeguard, a meaningful consciousness check." *See id*. at pp. 11-23. This Court concludes, however, that SOP 135 is a substantially similar protocol to that approved in *Baze*.

First, Rhoades overstates the holding of *Baze* to the extent he equates the identified "safeguards" as mandatory requirements that must each be in place in order for a State's three-drug lethal injection protocol to pass constitutional muster. *See* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, pp. 10-11, 14 (Docket No. 18). The Kentucky Safeguards emphasized in *Baze* are among the means that Kentucky has chosen to protect against the risk of a failed administration of the first drug – the anesthetic – of the three-drug protocol. In other words, *Baze* neither operates as a doctrinal blueprint, instructing States on the exact type or quantum of safeguards needed to insulate a three-drug lethal injection protocol from challenge, nor does it foreclose the possibility that different, more, or even fewer safeguards could offer the same assurances against the understood risks presented in similar cases. *Baze* stands for the proposition that Kentucky's lethal injection protocol, as well as substantially similar lethal injection protocols, are constitutional. *See Baze*, 553 U.S. 35, 61 ("[a] State with a lethal injection protocol substantially similar to [Kentucky's lethal injection protocol] would not create a [demonstrated risk of severe pain]."). If Chief Justice Roberts intended that only Kentucky's precise protocol could meet Eighth Amendment scrutiny, he did not say so.

Second, even if the safeguards identified in *Baze* are understood to be more-or-less safety requirements as Rhoades contends, this Court is persuaded that the record developed thus far reveals that the safeguards in SOP 135 – as further elaborated upon by Jeff Zmuda in his affidavit and his testimony during the evidentiary hearing – satisfies these requirements in any event. Indeed, on its face, SOP 135 contains even more safeguards than those referenced and relied upon in *Baze*.

ER, Vol. II, pp.81-83 (footnotes omitted).

SOP 135 contains the safeguard set forth in *Baze* that members of the medical and injection teams have at least one year of professional experience. *See Baze*, 553 U.S. at 55. SOP 135 states the Medical Team can be comprised of any combination of the following disciplines: emergency medical technician; licensed practical nurse (LPN) or registered nurse (RN); military corpsman; paramedic; phlebotomist; physician assistant; or other medically trained personnel including those trained in the United States Military. ER, Vol. IV, p.406. Although SOP 135 does not contain the specific language "at least one year of professional experience" the particular experience of the Medical Team and Injection Team members' were detailed in the Affidavit of Jeff Zmuda, ER, Vol. II, pp.124-25, and again addressed during the evidentiary hearing, ER, Vol. VI, pp.759, 778, 797-98. The evidence before the district court clearly supports the conclusion that the team members' professional experience exceeds the minimal amount necessary to satisfy this particular safeguard. As recognized by the district court:

> SOP 135 requires verification of the Medical Team and Injection Team candidates' professional licensure or certification before approval. *See* SOP 135, p.9 (Docket No. 7, Att. 4). Selection of the Team members includes a review of each member's professional qualifications, training, experience, professional license(s) and certification(s), criminal history, with a personal interview. *See id*. at pp.9-10. According to Zmuda, all members of the current Medical Team and Injection Team are qualified medical providers and "have professional qualifications and experience exceeding one year of professional training and experience." *See*

Zmuda Aff. at ¶13 (Docket No. 50). Going further, Zmuda says that "[t]he team member with the least amount of experience has 15 years experience in his/her professional field." *See id.*

Speaking to Plaintiff's additional argument that "SOP 135 does not state that [either Medical Team members or Injection Team members] be currently licensed or have any actual experience in initiating IV catheters (See Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, pp. 14-17 (Docket No. 18)), Zmuda goes on to state:

> all members of the Medical Team and Injection Team are certified in CPR, have venous access currency, which means they have current professional practice in insertion of IVs on a regular basis. Additionally, all team members have experience in Pharmco Dynamic Currency, which means the team members understand medical orders, can read and understand medical labels, draw medications and deliver medications through either an injection or IV.
>
> ***
>
> SOP 135 does not state that the Medical Team members have at least one year of professional training and practical experience, however, all Medical Team members selected for the preparation of chemicals have at least one year of professional training and practical experience necessary to prepare the chemicals.

*See* Zmuda Aff. at ¶¶ 18, 24 (Docket No. 50). With Zmuda's testimony in mind, this Court cannot agree with Plaintiff that SOP 135's Medical and Injection Team members do not (or, in the case of replacements, will not) have the requisite medical credentials and experience over time. [Citation omitted.] To the contrary, consistent with Baze, SOP 135 ensures that members of the Medical and Injection Teams have at least one year of professional, medical experience.

ER, Vol. II, pp.84-85 (footnotes omitted)(emphasis added).

A comparison of the Kentucky Protocol approved in Baze, which can be found at pages 327-342, E.R., Vol. III, with SOP 135 reveals that any claim by Rhoades that Idaho's protocol is inadequate with respect to the qualifications of team members lacks merit.

Rhoades is also incorrect in his assertion that the district court erred in finding that the Medical and Injection Team are qualified to establish and maintain IVs. SOP 135 states that "the Medical Team shall be responsible for inserting the IV catheters, ensuring the line is functioning properly throughout the procedure, mixing the chemicals, preparation of the syringes, monitoring the offender (including the level of consciousness), and supervising the administration of the chemicals. ER, Vol. IV, p. 406. SOP 135 requires Injection Team members to "have at least one year of medical experience as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military medical corpsman. *Id*. All the Injection Team members meet the criteria in SOP 135 in having more than one year of medical experience. *Id*. As explained in Zmuda's affidavit, each member of the Medical Team has daily experience necessary in establishing IV catheters. ER, Vol. II, p.125. This was reaffirmed at the evidentiary hearing. ER, Vol. VI, pp.797-98.

Based upon the evidence presented, the district court correctly reasoned:

> Chief Justice Roberts noted that the actual experience of the Kentucky IV team members exceeded the minimum experience requirement. Nothing more. *Cf. Nooner v. Norris*, 594 F.3d 592, 605 n.7 (8th Cir. 2010)("The Inmates assert that the *Baze* plurality found that the daily experience of the IV team members was equally significant. This argument mischaracterizes *Baze*.")
>
> Zmuda testified that all Medical and Injection Team members "have current professional practice in insertion of IVs on a regular basis" and "can draw medications and deliver medications through either an injection or IV." *See* Zmuda Aff. at ¶ 18 (Docket No. 50). Hence, even if ongoing experience is part of the *Baze* list of safeguards, SOP 135 is much like the Kentucky protocol in terms of the qualifications of medical personnel employed. Therefore, SOP 135 does contain assurances that there will be Medical and Injection Team members with regular experience establishing IV catheters.

ER, Vol. II, p. 86.

While Rhoades may prefer otherwise, there is no specific requirement in *Baze* that the IV team have daily experience in IV catheter insertion; [3] in fact the Kentucky protocol approved in *Baze* only states that "Members of the IV team must remain certified in their profession and must fulfill any education requirements in their profession." ER, Vol. III, 341.*Id*. Rhoades has failed to establish the district court did not abuse its discretion when it held the Medical Team and Injection Team members have regular experience in establishing IV catheters. The records establishes the Medical Team and Injection Team have the

[3] *Baze* merely states, "Kentucky uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population." *Id.*

required experience for IV catheter insertion and the district court correctly found that SOP 135 is "much like the Kentucky protocol in terms of the qualifications of medical personnel employed." *See id*.

Contrary to Rhoades' claims on appeal, the district court also correctly concluded SOP 135 meets the in-house training safeguards set forth in *Baze*. SOP 135 details the prescribed training up until the day before the execution. *See* ER, (SOP pp. 10, 21, 24, 26, 27, 30.) Jeff Zmuda detailed in is Affidavit the training schedule to occur prior to the execution.

> Between October 20, 2011 and the scheduled execution, there will be a total of 10 training sessions, which includes two full rehearsals as provided for in SOP 135 for the Escort Team, Injection Team and Medical Team. *See Dkt. No*. 7-4, p.10. All members of the Specialty teams are familiar with SOP 135, the execution process and skill sets needed to complete the execution. All team members were placed into their respective roles for the execution procedure based on their professional experience, training and practice. All team members will have participated in a minimum of four training sessions prior to the actual execution. Medical Team members will have practiced IV insertion on volunteers. The training schedule outlined in SOP 135 is consistent with the *Baze* safeguards. Additionally, all team members exceed the one year of training and experience in their respective professions.

ER, Vol. II, pp.125-126. Zmuda's testimony during the evidentiary included additional details about the training which had already occurred and the upcoming scheduled trainings, which included five training sessions including placing IV lines in live volunteers. ER, Vol. VI, pp. 756-58, 768-78, 792-93, 828-30.

The district court stated "SOP 135, the training done to date, and the training planned to occur are substantially similar to the training called for by the Kentucky protocol at issue in *Baze*." ER, Vol. II, p.89. The district court went on to state:

> If the record before the Court showed only the fact of a training structure and schedule, with no evidence of actual training intended to gain, gauge, and rehearse proficiency in the steps and skills necessary to conduct the execution, the Court might be persuaded that safeguards to avoid the substantial risk of serious harm are not sufficiently present. But here, the training is underway, the prison official (Zmuda) in charge of the training and the success of the training, even though not medically-trained himself, is a credible witness who has described a plan to accomplish a full course of training, with qualified and experienced execution team members.

*Id*.

A review of the Kentucky protocol reveals that it does not require any more training than what is set forth in SOP 135. The Kentucky protocol states:

> 2. Prior to participating in an actual execution, the member of the IV team must have participated in at least two (2) practices.
>
> ***
>
> 4. The execution team shall practice at least ten (10) times during the course of one (1) calendar year.
>
> 5. Each practice shall include a complete walk through of an execution including the siting of two (2) IVs into a volunteer.
>
> 6. Execution team members, excluding IV team members, must have participated in a minimum of two (2) practices prior to participating in an actual execution.

ER, Vol. III, p.341.

The district court did not abuse its discretion in finding "SOP 135 contains sufficient training practices and actual implementation of such practices, consistent

with *Baze*." ER, 90. There can be no abuse of discretion when the training is substantially similar to the Kentucky protocol

SOP 135 contains a meaningful redundancy safeguard similar to the *Baze* safeguard. The district court stated:

> SOP 135 requires that the Medical Team prepare three complete sets of chemicals; "one full set of syringes is used in the implementation of the death sentence and two full sets are to be available and ready for use as backup." *See* SOP 135, Appx. A at p.1 (Docket No. 7, Att. 4); *see* also Zmuda Aff., at ¶ 24. The Medical Team also "determine[s] the best sites on the offender to insert a primary IV catheter and a backup IV catheter in two separate locations in the peripheral veins using appropriate medical procedures." *See* SOP 135, App. A. at p. 5(Docket No. 7, Att. 4). Finally, according to SOP 135, "[t]he primary IV catheter will be used to administer the chemicals and the backup catheter will be reserved in the event of the failure of the first line." *Id*.
>
> Rhoades agrees that SOP 135 contains the redundancy safeguards discussed in Baze. See Mem. in Supp. of Mot. for Prelim, Inj. or Stay of Execution, p. 21 (Docket No. 18) ("SOP 135 likewise requires a backup IV, and backup chemical preparation, and readiness as well.") But Rhoades questions the meaningfulness of these redundancy safeguards, arguing that SOP 135 "does not require that the individuals training, maintaining, or delivering chemicals through the IV have any relevant training and experience in doing so." *Id*.

ER, Vol. II, pp. 90-91.

The district court again recognized the Medical Team and Injection Team members responsible for IV lines, mixing, preparing syringes and injecting chemicals have the relevant training and experience. *Id*. at 91.

Also contrary to Rhoades' claims on appeal, SOP 135 contains the same meaningful consciousness check as *Baze*. ER,Vol. II, p. 92. Indeed, SOP 135 contains additional safeguards relative to the consciousness check. SOP 135 requires the use of a microphone, there is a person present throughout the execution to communicate with the offender, an EKG is used, a Medical Team member monitors the EKG, the offender is continually monitored by the Medical Team members throughout the procedure for consciousness and EKG readings, and the Medical Team leader physically confirms unconsciousness after the administration of the sodium pentothal or pentobarbital through medically appropriate methods. ER, Vol. II, pp. 92-93. In his affidavit, Zmuda outlines how the Medical Team leader will physically assess unconsciousness. *Id*. at p. 93. The plurality opinion in *Baze* rejected "rough-and ready tests" suggested by the dissent which involved checking consciousness with even more basic methods than required by SOP 135, including "calling the inmate's name, brushing his eyelashes, or presenting him with strong, noxious odors." *Baze*, 553 at 60. Based upon the plurality's rejection of such "rough-and-ready tests," the district court did not abuse its discretion in holding that SOP 135 includes a meaningful consciousness check, particularly since Kentucky's protocol merely requires visual observation of consciousness by the warden. ER, Vol., III, pp.335-36. Moreover, *Baze* only speaks to having the warden and deputy warden in the execution

chamber watch for signs of IV problems including infiltration. *Baze*, 553 U.S. 56. SOP 135 goes well beyond this specific safeguard and implements numerous additional safeguards in addition to the Medical Team leader conducting a physical assessment to determine whether the offender is unconscious. The district court did not abuse its discretion when it held that SOP 135 is substantially similar to the Kentucky protocol.

In addition to being substantially similar to the *Baze* safeguards, the district court found that SOP 135 incorporates more safeguards than those found in *Baze*. ER, Vol. II, pp.95-98. Rhoades' arguments, at their core, are complaints about a lack of specificity in the protocol itself, and he dismisses the additional information provided by Zmuda at the evidentiary hearing as though it is of no relevance to this Court's inquiry. These types of complaints have previously been rejected by this Court. Most notably, in *Beardslee v. Woodford*, 395 F.3d 1064, 1071-1072, 1075 (9th Cir. 2005), in opinion prescient of what the Supreme Court would write more than a decade later in *Baze*, this Court considered a death sentenced inmate's complaints regarding the "lack of specificity" in California's execution procedure, the "ambiguity of the procedure," and the "risks attendant to the improper administration of the drug." This Court rejected these arguments as sufficient to stay Beardslee's execution. The Court stated: "Obviously, there are risks involved in virtually every method of execution. However, the Supreme Court has rejected

Eighth Amendment challenges based on an unforeseeable accident, **and has presumed that state officials have acted in a careful and humane manner.**" *Id.* at 1075 (citations and quotations omitted). Although the Court shared some concerns regarding California's protocol, the Court noted the question before it was not the ultimate resolution of the merits of those issues. *Id.* at 1076. Rather, "[t]he critical question" was not whether Beardslee "ha[d] raised serious questions about the protocol itself, but whether, in [his] specific challenge, he ha[d] shown enough of a likelihood that he will be conscious during the administration of pancuronium bromide and potassium chloride to experience pain." *Id.* Beardslee did not meet his burden because, as in this case, the undisputed evidence was that "an administration of five grams of sodium pentothal will produce unconsciousness, and perhaps even death, if properly administered" and Beardslee had not "shown a sufficient likelihood that the administration will be improper in his case, or that there are specific risks unique to him that require modification of the protocol." *Id.* at 1076. Rhoades' claims suffer from the same fatal flaws.

Rhoades is not likely to succeed on the merits of his claim since SOP 135 not only is substantially similar to the Kentucky protocol, but in some instances sets forth safeguards that go beyond the safeguards in *Baze*. Therefore the district court did not abuse its discretion when the test is whether Rhoades is likely to succeed on the merits of his claim.

### D. Rhoades Is Not Likely To Suffer Irreparable Harm In The Absence Of Preliminary Relief

In considering this factor, the district court acknowledged the precise nature of the alleged harm is open to varying interpretations by other courts. As discussed by the district court, some courts have concluded death is the irreparable harm to be analyzed while other courts have focused their "irreparable harm" inquiry on whether there is a likelihood that the prisoner would be improperly anesthetized, and therefore experience pain during the administration of the remaining drugs. ER, Vol. II, p.109. In addressing this issue, the district court determined the harm likely to be suffered by Rhoades is death and the inability to continue litigating his claims. ER, Vol. II, p.110. The district court then determined that this factor weighed in Rhoades' favor, however, it was insufficient to justify a stay because the other factors—substantial likelihood of success on the merits and the balance of equities—were not in Rhoades' favor. The district court did not abuse its discretion in reaching this decision.

As stated, the district court actually resolved this factor in favor of Rhoades. However, the district court properly refused to issue a stay based on this sole factor because "inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonough,* 547 U.S. 573, 584 (2006) (emphasis added). Because Rhoades failed to establish a

substantial likelihood of success on the merits, the district court did not abuse its discretion in refusing to grant a stay, despite finding Rhoades would suffer irreparable harm as a result of his death.

### E. The Balance Of Equities Do Not Tip In Rhoades' Favor

Rhoades completely ignores the district court's finding that the equities do not tip in either parties favor. The district court properly recognized that Rhoades too is accountable for the equities not titling in his favor because he failed to initiate a lawsuit challenging the IDOC lethal injection protocol's in 2009 when he exhausted his administrative remedies. ER, Vol. II, p. 110. Moreover, Dr. Heath was working on Rhoades case "over the last several years," having reviewed Idaho's 2006 Protocol prior to 2007 ER, Vol. VI, pp.721-22 The district court also noted Rhoades did not file a lawsuit challenging the SOP until the end of his habeas appeals when it was foreseeable that an execution date would be set. *Id*. Rather Rhoades argues that it is entirely the States fault because the most recent SOP was not adopted until October 14, 2011. (*Appellant's Brief*, p. )The district court stated "the equities do not sharply favor either side, but the public interest in proceeding is compelling." ER, Vol. II, p.110. The district court did not abuse its discretion in recognizing that the equities do not tip in favor of either party.

### F. An Injunction Is Not In The Public Interest

An injunction is not in the public's interest. The public has waited nearly twenty-five years to see the sentence imposed for the crimes committed by Rhoades are carried out. Rhoades has challenged all of his convictions in federal and state court. ER, Vol. II, p. 111. The State has a statutory obligation in carrying out a sentence imposed by its courts. The State also has an obligation to ensure that the families of the victims see the judgments are enforced. There was no abuse of discretion in determining that an injunction is not in the public interest. The district court held SOP 135 is substantially similar to the Kentucky protocol and does not have a substantial risk of serious harm to the offender. ER, Vol. II, p.81 Rhoades' Eighth Amendment rights will not be violated as a result of SOP 135.

### G. One Drug Protocol

The current constitutional lethal injection protocol approved by the United State Supreme Court is a three-drug protocol. *Baze*, 553 U.S. 35. There has been no ruling by the Supreme Court holding that a one-drug protocol is a safer alternative than a three-drug lethal injection protocol or that a one-drug lethal injection protocol creates a lesser risk of severe pain.

"An inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently

adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner." *Id*. at 60, 128 S.Ct. at 1537. The suggested alternative "'must effectively address a 'substantial risk of serious harm.' To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id*. at 52, 128 S.Ct. at 1532.

In *Baze* the Court held

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A state with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets the standard.

*Id*. at 62, (emphasis added.)

The Kentucky Protocol is believed to be the most humane available, one shared with 35 other states. *Id*. Kentucky's decision to adhere to its protocol, and adoption of safeguards to protect against the asserted risks, "cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment." *Id*. The Court held that Kentucky's procedure is consistent with the Eighth Amendment. *Id*. at 63.

Likewise, in *Dickens v. Brewer*, 631 F.3d 1139, 1150 (9th Cir. 2011), this Court confirmed, "Under *Baze*, the failure to adopt an alternative protocol

established an Eighth Amendment violation only if the current protocol creates a substantial risk of serious harm that the alternative protocol would reduce." Moreover, this Court recognized that since *Baze* every circuit addressing that has addressed a state's protocol "has upheld the challenged protocol, despite evidence of past problems carrying out executions." *Id.* at 1147 (citing cases). Clearly, since only three states use a one drug protocol, those circuits have concluded that three drug protocols remain constitutional. Moreover, Rhoades' reliance upon "evolving standards of decency" fails because he has not presented sufficient evidence to demonstrate "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper v. Simmons*, 543 U.S. 551 563 (2005); *see also Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (discussing the standards for determining "evolving standards of decency"). Finally, Idaho was and is permitted to rely upon the statement in *Baze* that a "state with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Id.* 553 at 61. Idaho should not be required to abandon its three drug protocol merely because three other states have adopted a one drug protocol.

The district court held Rhoades failed to establish SOP 135 creates a substantial risk of serious harm in the three-drug protocol. ER, Vol. II, p.108. SOP 135 is substantially similar to the Kentucky protocol and on its face it

contains even more safeguards than *Baze*. ER, Vol. II, pp.82-83. Therefore there is no substantial risk of serious harm in implementing SOP 135 and it meets the constitutional standard of lethal injection and does not violate the Eighth Amendment of the Constitution. The district court did not abuse its discretion in holding that a one-drug protocol is a safer alternative and would reduce the substantial risk of serious harm to the offender.

## CONCLUSION

The Defendants respectfully request that the district court's Memorandum Decision and Order Re: Plaintiff's Emergency Motion for Preliminary Injunction or Stay of Execution be affirmed and that Rhoades' request for a preliminary injunction or stay of execution be denied.

Respectfully submitted this 16th day of November, 2011.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ Krista L. Howard
KRISTA L. HOWARD
Deputy Attorney General,
Counsel for Appellees

## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees are unaware of any related cases pending before the Court.

Dated: November 16, 2011
S/ Krista L. Howard
KRISTA L. HOWARD

## CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) and Circuit Rule 32-1

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached Appellees Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,714 words (such numbering being determined by the word count of the word-processing system used to prepare the brief).

Dated: November 16, 2010

S/ Krista L. Howard
KRISTA L. HOWARD

**CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on the 16th day of November, 2011, I electronically filed the foregoing Appellees' Brief with the Clerk of the Court for the United States Court of Appeals for Ninth Circuit by using the appellate CM/ECF system.

I further 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/ Krista L. Howard
KRISTA L. HOWARD