NO. 11-35940

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL EZRA RHOADES,

Petitioner-Appellant,

vs.

BRENT REINKE, *et al*.,

Respondents-Appellees.

Appeal from the United States District Court
for the District of Idaho
The Honorable Ronald E. Bush

PETITIONER-APPELLANT'S REPLY BRIEF

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I. ARGUMENT

Rhoades reasserts the facts, issues and arguments contained in the Opening Brief.

A. *Baze* Safeguards

Defendants' Answer Brief completely ignores the fact that IDOC did not verify the credentials or experience of any member of the execution teams. *Baze* presumes that the execution team members actually have the credentials they purport to possess. Although the Court did not address the appropriate means of verifying credentials, some type of verification is implicated as unqualified team members would render the safeguards meaningless.

This Court dealt with the issue of verification in *Dickens*. During discovery, Dickens uncovered various incompetencies in Arizona's medical team members. One team member had a suspended nursing license and no other medical training. *Dickens v. Brewer*, 631 F.3d 1139, 1147 (9th Cir. 2010). At the time he was hired for the medical team, he owned an appliance business. *Id.* He suffered from post-traumatic stress disorder and had been arrested multiple times. *Id.*

Another medical team member was a doctor who had dyslexia and due to his "problems with numbers, knowingly 'improvised' the doses of lethal injection drugs, adhered to no set protocol, and kept no records of procedures." *Id.* at 1147.

By the time this Court considered Dickens' claims, Arizona had amended its protocol to require the screening of applicants. It was "undisputed that neither [of these members] would have been hired under [Arizona's] current Protocol." *Id.* The plaintiffs argued that these "past missteps in hiring and training raise[d] an issue as to whether Arizona would hire competent team members in the future." *Id.* at 1147.

This Court did not question Dickens' challenges to unqualified team members. *Id.* This Court also did not reject Dickens' claim that a Medical Team made up of individuals like these people could undermine the lethal injection protocol. *Id.* However, because Arizona had amended its protocol to require screening of all members of the medical team, this Court found that it did not create an issue of fact as to whether Arizona would not hire qualified people in the future. *Id.* at 1147-48.

Unlike Arizona's protocol, SOP 135 does not require the screening of candidates for the Medical and Injection Teams. The Idaho Department of Correction does not screen candidates or verify credentials. Deputy Chief of the Idaho Bureau of Prisons, Jeff Zmuda testified that IDOC did not inquire of any licensing body whether any of the individuals he approved had valid licenses or certifications. ER Vol. VI, p. 750. He did not verify any employment experience. ER Vol. VI, pp. 752, 759. Nor did he confirm degrees or diplomas with any

education institution. ER Vol. VI, p. 758. He accepted at face value whatever documentation was provided by the candidates. *Id*. And, he destroyed all documentation after he selected the team members. ER Vol. VI, p. 753. The only verification that he did consisted of running a criminal background check. ER Vol. VI. p. 764. The court found that Zmuda's efforts to appropriately verify applicants were sufficient. ER Vol. II, pp. 100-02.

The total lack of verification implicates the effectiveness of the subsequent "safeguards." The court ignored these flaws in IDOC's implementation of the *Baze* safeguards. This was an abuse of discretion.

In its Answer brief, IDOC states: "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, 797-98." Dkt. 7 at 13. This is a misrepresentation of Zmuda's testimony.

Zmuda's affidavit states that the Medical Team Leader does not have venous access currency, and thus is unqualified to initiate and maintain IVs. ER Vol. II, p. 131. At the evidentiary hearing he testified that two members of the medical team had current daily experience in inserted IVs but that the team leader did not. ER, Vol. II, p. 119-20.

The credentials of the Medical Team Leader are important, because as the court pointed out, Zmuda relied exclusively upon the Medical Team Leader to

assess the qualifications of the other team members. ER Vol. II, p. 102. The Medical Team Leader also oversees the training sessions. ER Vol. VI, p. 754, 762, l. 19-23. The Medical Team Leader's lack of current experience affects IDOC's ability to implement the *Baze* safeguards.

IDOC's compressed orientation and training schedule does not satisfy the requirements set forth in *Baze*. By the date of execution, based solely on the testimony of Zmuda, the execution team will have completed 10 training sessions. ER Vol. VI, p. 793. However, notwithstanding the term used by Zmuda, these "training sessions" include orientation and as of the fifth session, the only hands-on practice involved setting an IV with a maniquin arm. *Id*. at 756-57, 774. One week prior to execution, Zmuda was uncertain if any of the execution team members had yet "pushed" a drug. *Id*. at 774.

Even if the sessions were thorough and meaningful trainings or practices, the sessions are occurring so shortly before the execution as to prevent any necessary or advisable modification of procedure or correction of mistakes, lack of proficiency or other problems. The Court in *Baze* approved of a timeline of one-year over the course of which 10 training sessions were to occur. *Baze v. Rees*, 553 U.S. 35, 55 (2008). The protocol approved by the Court in *Baze* intended something more than for just 10 sessions to occur immediately before an

execution. The lengthier timeline contemplates time for officials to have meaningful sessions followed by corrective action, if necessary.

Contrary to IDOC's assertion (Dkt. 9, p 16), the hurried training schedule is not like the Kentucky protocols which requires 10 practice sessions "during the course" of one (1) calendar year." Even SOP 135 slows the pace to weekly sessions in the 4 weeks before an execution. In practical terms, IDOC is simply rushing though the 10 sessions. Four of the 10 sessions involve little or no practical skills work, ER Vol. VI, pp. 756-57, and five of the sessions are occurring in these last seven days prior to the scheduled execution. *Id*. at 830-31. This hurried pace of training does not allow for correction of problems or lack of proficiencies as the *Baze* Court and the Kentucky officials contemplated.

B. One-Drug Protocol

Rhoades raises three primary points to rebut IDOC's argument against a one-drug protocol. First, IDOC does not dispute that a one-drug protocol completely eliminates all risk of pain from the pain-causing second and third drugs in the current protocol. Second, while Kentucky's three-drug lethal injection protocol was "believed to be the most humane available" at the time *Baze* was written, 553 U.S. at 62, IDOC omits the critical context for that belief: the one-drug protocol was entirely untested, and "[n]o State uses or has ever used the alternative one-drug protocol." *Id*. at 53. Third, while objective evidence exists of

the consistent trend toward a one-drug protocol, its implementation in Ohio and Washington and its adoption in South Dakota, that implementation is more important for its establishment of scientific proof that pain-free executions can be carried out quickly and efficiently. The points to be taken from IDOC's response are that a one-drug protocol is established and available, and that such a protocol indisputably and entirely removes the risk of pain from the latter two drugs in Idaho's current three-drug cocktail.

The greatest and most telling omission in IDOC's response is any discussion of the scientific certainty of pain-free executions under a one-drug protocol. Given that certainty, together with Rhoades's acknowledgement that a one-drug execution is constitutional, the failure to choose a one-drug protocol necessarily includes a willingness on IDOC's part to tolerate the risk of torturous botched executions without any legitimate penological interest. This transforms the risk of a botched execution from an "innocent misadventure" to a purposeful and cruel act knowingly made but entirely avoidable. Under these circumstances, the risk of pain from the second and third drug in the protocol is substantial compared to the known alternative, which has zero risk and is feasible and readily implemented. Idaho's pursuit of three-drug executions, given that reality, is "objectively intolerable."

For these reasons, the lower court erred in finding Rhoades was not likely to succeed on the merits.

C. Balance of Equities

IDOC asserts Rhoades's expert, Dr. Mark Heath, had reviewed the 2006 Protocol at the request of Rhoades's attorneys in 2007. Dkt. 9, p. 3, n.1. From this, IDOC asserts Dr. Heath has been working on "Rhoades's case 'over the last several years' having reviewed" the 2006 Protocol in 2007. Dkt. 9, p. 22. This, according to IDOC, supports the lower court's finding that the balance of equities does not tip in either party's favor. *Id*. The logic supporting this assertion fails when Dr. Heath's testimony is given more than a cursory reading.

IDOC counsel, LaMont Anderson, initiated his cross-examination of Dr. Heath, not with his opinions in the case or his experience as an anesthesiologist. Instead, he began examination with Dr. Heath's involvement in this 1983 action. ER Vol. VI, p. 721, l.19-20. His first question asks when the "federal defenders" first contacted Heath "regarding this case." *Id*. Heath answered;

> I've had a number of contacts with the federal defender's office in Idaho about lethal injection litigation over the past several years. I don't know whether they referred specifically to this case or not. I was first, to my certain knowledge, contacted specifically about this case on approximately October 27 I would guess.

ER Vol. VI, pp. 721, l. 21-25; p. 722, l. 1. Those contacts came in 2011.

IDOC then asserted Dr. Heath had been working with "them" for a number of years. ER Vol. VI, p. 722, l. 4-5. Heath answered:

> It depends on what you mean by working with them. I've had a number of telephone conversations with different individuals in the Idaho federal defender's office. I've reviewed some documents and protocols. It's been very sporadic over what I would guess would be approximately something like six or seven years.

ER Vol. VI, p. 722, l. 6-11.

Counsel next inquired about when Heath reviewed the 2006 Protocol. ER Vol. VI, p. 722, l. 12-13. Heath answered:

> As I sit here now, I can't remember whether I've done that. You have to understand that I've reviewed numerous iterations of protocols for numerous states and I just can't answer that question for you either way. I would consider it likely due to the nature of the on again, off again back and forth discussions I've had with members of the Idaho federal defender's office. I would consider it quite plausible. Let's put it that way.

ER Vol. VI, p. 722, l. 14-20.

It is true that the Federal Defender Services of Idaho represented Mr. Rhoades in 2007. The defender services represented the wide majority of death-sentenced individuals in Idaho at that time. It is also true that the federal defender services had sporadic contact with Dr. Heath over the years since 2007. But, as Dr. Heath testified, he could not remember reviewing the 2006 Protocol prior to 2007. ER Vol. VI, p. 722, l. 12-14. And, while he may have had sporadic contacts with the federal defender's office over the last six to seven years, those contacts were

not connected with this case particularly or Mr. Rhoades specifically. IDOC simply contorts Dr. Heath's answer in an attempt to manufacture a "fact" to use in the argument in the Equities prong. Dkt. 9, p. 22. This assertion is not fact nor is it true on its face, nor in the context of IDOC's counsel's questions. It does not support the lower court's finding or the balance of equities.

The underlying complaint for which this "fact" became relevant was, of course, the charge that Rhoades delayed his challenge. Again, the facts before the lower court support Mr. Rhoades, and the finding to the contrary is an abuse of discretion. The 2006 Protocol indicated it was to be reviewed by March 23, 2008. ER Vol. V, p. 534. Shortly after the *Baze* decision in 2008, Rhoades sought administrative review of the execution protocol. ER Vol.IV, p. 395. His first attempt to obtain a protocol was a request on December 24, 2008. ER Vol. IV, p. 395. His next attempt came on February 24, 2009. *Id*. Neither request resulted in IDOC producing any protocol. Instead, IDOC admitted the protocol was under revision. *Id*.

In combination with the previously discussed attempts to obtain the valid protocol, *see* Dkt. 4, p. 6, these steps indicate Rhoades did not delay. He requested a copy within months of the next scheduled protocol review and approximately eight months after *Baze*. The request was reviewed approximately one year after *Baze*. A final request was denied in March of 2011. ER Vol. V, p. 592. Rather

than delaying, Rhoades diligently attempted to obtain whatever document IDOC was to produce *after* the March 23, 2008 published date for review. The balance of equities does tip, and strikingly so, in Rhoades's favor.

II. CONCLUSION

Mr. Rhoades meets his burden for a stay. He has established that SOP 135 creates a demonstrated risk of severe pain. That risk is substantial when compared to the known and available alternatives. The Court should issue a preliminary injunction or stay of execution pending the resolution of this lawsuit.

Dated this 16th day of November 2011.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

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/s/
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