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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Towery, et al., Plaintiffs, -vs- Brewer, et. al., Defendants.	CV 2:12-CV-00245-NVW Response to Motion for Preliminary Injunction [Death Penalty Case-Execution Date May 16, 2012]

Plaintiff Samuel Lopez seeks a preliminary injunction enjoining his execution on May 16, 2012. Specifically, Lopez contends that the Arizona Department of Corrections' ("ADC's") lethal injection protocol revised effective January 25, 2012, violates his First, Fifth, Eighth, and Fourteenth Amendments rights. Because the revised protocol does not take away constitutional safeguards ensuring that an inmate is not at serious risk of pain during an execution, this Court should deny Lopez's motion.

Prior to the executions of Robert Moormann and Robert Towery, this Court and the United States Court of Appeals for the Ninth Circuit denied similarly-sought injunctive relief, and those two executions were carried out without any

evidence of significant pain or suffering.

The Arizona Supreme Court subsequently issued execution warrants for Thomas Kemp and Lopez, after which ADC provided notice of its intent to make two minor changes to the procedures followed in carrying out the Moormann and Towery executions: (1) backup chemicals would be immediately available to be placed in syringes but would not be placed in the syringes (a process that takes less than 90 seconds) unless necessary, and (2) attorney visits would be permitted the morning of execution between 6:00 a.m. and 7:00 a.m., rather than from 7:15 a.m. until 9:15 a.m. The first change was made to avoid unnecessarily wasting execution chemicals, which are in short supply. The second change was made to avoid unnecessary delay and is a return to the policy followed without objection in the prior 6 executions. Kemp did not object to these changes, and his execution was carried out without incident on April 25, 2012.

I. BACKGROUND

In 2007, several plaintiffs filed a § 1983 action challenging numerous aspects of Arizona's lethal injection protocol.[1] This Court denied relief, concluding that Arizona's protocol was substantially similar to that approved by the Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). *See Dickens v. Brewer*, No. CV–07–1770–PHX–NVW, 2009 WL 1904294, at *1 & n. 2 (D. Ariz. July 1, 2009) (unpublished order). On February 9, 2011, the Ninth Circuit affirmed. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

The protocol reviewed in *Dickens* required the sequential administration of the following: (1) sodium thiopental, an ultra-fast-acting barbiturate that induces unconsciousness; (2) pancuronium bromide, a paralytic neuromuscular blocking agent that prevents any voluntary muscle contraction; and, (3) potassium chloride, which causes skeletal muscle paralysis and cardiac arrest. On June 10, 2011, ADC

[1] Plaintiff Lopez was not party to this initial protocol challenge.

amended its protocol to provide for the administration of sodium thiopental or pentobarbital as the first of the three sequentially-administered drugs.

On July 15, 2011, several plaintiffs brought another § 1983 challenge to ADC's protocol alleging that ADC's unwillingness to follow its written protocol and its substitution of pentobarbital created a substantial risk of unnecessary pain in violation of the Eighth and Fourteenth Amendments. Plaintiffs later amended their complaint to include an equal protection and due process claim. After a 3-day bench trial, this Court found that ADC's deviations from its written protocol did not violate any constitutional provision, noting that there was no evidence that any inmate suffered unnecessary pain during an execution. *West v. Brewer*, No. CV–11–1409–PHX–NVW, 2011 WL 6724628, at * 10–21 (D. Ariz. Dec. 21, 2011) (unpublished opinion), *appeal docketed*, No. 12–15009 (9th Cir. Jan. 3, 2012). This Court found that Arizona's protocol, as implemented, was constitutional, but noted, however, that ADC should amend its protocol to reflect its current practice. *Id*. at * 13.

Consistent with that ruling, on January 25, 2012, ADC amended its protocol to reflect current practice. ADC also provided for discretion in implementing either a one-drug or three-drug administration of chemicals. (*See* D.O. 710.) The amended protocol requires the IV team members to have 1 year of relevant experience, rather than the "aspirational" requirement in the prior protocol that the team members have medical licenses and 1 year of current and relevant experience. (D.O. 710.02 § 1.2.5.1) *See West*, 2011 WL 6724628, at * 13 ("The Court finds credible Director Ryan's testimony that obtaining qualified [team members] is very difficult due to fears of professional repercussions from participating in executions."). In addition, IV team members are no longer required to attend trainings when no execution warrant is pending. Instead, they must attend trainings on the day before an execution. (D.O. 710.02, §§ 1.1.2 & 1.2.5.5.)

The amended protocol also provides for venous access to be determined by the Director acting upon the recommendation of the IV Team Leader. (*Id*. at § 1.2.5.4.) Venous access can be either through a peripheral vein or a central line in the femoral vein. If a central line is used, the protocol requires that a medically trained physician with relevant experience placing central lines perform this procedure. (*Id*.) *See West*, 2011 WL 6724628 at *18 (finding no Eighth Amendment requirement that ADC administer drugs through the peripheral vein whenever feasible).

Lopez was sentenced to death for the 1986 murder of Estefana Holmes. On March 20, 2012, the Arizona Supreme Court issued a warrant for Lopez's execution. On April 20, 2012, the director notified Lopez that ADC would use a one-drug protocol using pentobarbital. (Plaintiff's Ex. II.) Lopez is scheduled to be executed on May 16, 2012.

II. STANDARD FOR INJUNCTIVE RELIEF.

"[A] stay of execution is an equitable remedy." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). The standard for issuing a stay of execution is the same as that for issuing a preliminary injunction. To be entitled to relief, a movant must demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*, 129 S. Ct. 365, 374, 376 (2008); *Hill*, 547 U.S. at 584 (2006); *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion is on the movant, who must make a "clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

These principles apply when a capital defendant asks a federal court to stay his pending execution. *Hill*, 547 U.S. at 584. "[E]quity must be sensitive to the

State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. Thus, courts "must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)).

A. *Plaintiffs Are Not Likely To Succeed On The Merits.*

ADC has not materially changed or deviated from the protocol implemented in carrying out the Towery and Moormann executions. *See Towery v. Brewer*, No. CV–12–245–PHX–NVW, 2012 WL 592749, *5 (D. Ariz. Feb. 23, 2012).

With regard to the Towery and Moormann executions, ADC made allowances based on agreements made at the Ninth Circuit oral argument regarding those executions. Those agreements related to attorney contact visitation and the use of backup syringes.

As discussed further below, the attorney contact visitation protocol is set forth at D.O. 710.11 § 1.5.2, and this Court previously found that ADC has a legitimate interest in enforcing the protocol's requirement that attorney contact visitation terminate at 9 p.m. the night before the execution. *See Towery*, at *18–19. The fact that ADC allowed Towery and Moormann to have attorney contact visitation until 9:15 a.m. on the morning of the execution does not mean that ADC is required to allow such visitation in every execution. ADC has agreed to permit attorney contact visit between 6:00 a.m. and 7:00 a.m. the day of the execution. This was the practice for the executions prior to the Towery and Moormann executions.

The backup catheter provision is set forth at D.O. 710, Attachment D § B.2 and requires only that a set of backup chemicals and syringes be available. Lopez's claim that ADC's failure to prepare backup chemicals in syringes during the Kemp execution was "inconsistent with the Ninth Circuit's opinion in *Towery*" is

incorrect. In *Towery*, the Ninth Circuit noted that for the Towery and Moormann executions, "the State represented that there will be one additional set of syringes, along with the necessary chemicals and drugs, available for immediate administration should circumstances so require." 672 F.3d 650, 658 (9th Cir. 2012). This does not require ADC to maintain a set of backup chemicals *drawn into syringes* for every execution. While ADC agreed to do so for the Towery and Moormann executions, it has determined that drawing chemicals into backup syringes unnecessarily wastes chemicals that are difficult to obtain and in short supply. Moreover, the chemicals and syringes are immediately available if necessary and can be placed in syringes and administered in less than 90 seconds. (See attached Affidavit of Robert Patton.)

B. *Lack of Necessary Safeguards (Plaintiff's First Claim for Relief).*

Lopez contends that ADC's revised protocol violates his Eighth Amendment right against cruel and unusual punishment because ADC abandoned previously adopted safeguards. This Court has already determined that the revised protocol does not violate the Eighth Amendment because it lacks necessary safeguards. *See Towery*, 2012 WL 592749, at *5. The protocol has not changed since this Court made that determination nor has Lopez provided any evidence that ADC has deviated from the protocol.

Preliminarily, Lopez contends that because the execution method considered in *Baze* was a three-drug rather than a one-drug method, this Court must consider whether the one-drug method that will be used to execute Lopez violates the Eighth Amendment. The safeguards in the revised protocol as related to the three-drug protocol are equally present with the one-drug protocol. In fact, the one-drug protocol is simpler than the three-drug protocol and only requires a subsequent verification that the inmate has died after the administration of either sodium thiopental or pentobarbital. The execution team also continues to utilize a camera

in assessing consciousness and monitoring of the inmate. In addition, the warden remains in the execution room to monitor the inmate and the IV lines to assure they are functioning properly. (D.O. 710, Attachment D, § D.1–9.)

Nonetheless, Lopez alleges that the circumstances of only the Towery and Kemp executions demonstrate that ADC officials "have created an objectively intolerable risk of harm for which they cannot be subjectively blameless." Lopez's arguments are without merit.

Lopez questions whether the IV team members in the Towery execution were qualified because they were unsuccessful in setting a peripheral line. Lopez cites Towery's private autopsy report, which states that *after Towery's elbow pit was incised*, Towery's "superficial veins were readily exposed and identified. The walls are thin, delicate and translucent without sclerosis or surrounding scar." (Doc. 54–1, Exhibit W.) Lopez therefore argues that Towery had "good veins," and the IV team members were unable to set a peripheral line because they were unqualified to do so. Lopez's argument is unpersuasive.

Towery's private medical examiner did not attempt to set a peripheral IV while Towery was alive, and his description of Towery's veins *after his arm was incised* does not show that a qualified IV team member would have been able to set a peripheral line. The protocol requires that an IV team member be a "physician, physician assistant, nurse, emergency medical technician, paramedic, military corpsman, phlebotomist or other appropriately trained personnel" and "have at least one year of relevant experience in placing either peripheral or central femoral intravenous lines." (D.O. 710.02 § 1.2.5.1.) Thus, despite Lopez's claim that Towery had "good veins," [2] the medical doctor and nurse tasked with placing IV

[2] *See Towery v. Schriro*, 641 F.3d 300, 313 (9th Cir. 2010) (addressing whether trial counsel should have presented evidence that Towery was a "skilled intravenous drug user").

catheters determined to the contrary and placed the primary line in the femoral vein.

Lopez also suggests that the IV team leader was unqualified because after unsuccessful attempts to set a peripheral line in either of Towery's arms, the IV team leader initially recommended using the left peripheral line as the backup line. Towery argues that because the IV team had already been unsuccessful setting a peripheral line, it was "unreasonable" for the IV team leader to suggest another attempt to set a peripheral line as a backup. (*See* Plaintiff's Exhibit AA.) At the same time, however, Lopez argues that Towery's hand was an inappropriate site for a backup line. Assuming the IV team leader, a medically-licensed physician,[3] suggested making a final effort to set a peripheral backup line, rather than proceeding straight to setting the backup line in Towery's hand, this reflects the IV team leader's efforts to keep Towery as free from any discomfort as possible. This was not unreasonable.

Ultimately, the IV team leader, after discussion with the Director, and after an additional attempt to secure a peripheral line as the backup line, used Towery's right hand as the location for the backup line. (Plaintiff's Exhibit DD, Attachment 1.) These circumstances do not reflect a lack of qualifications, but instead the IV team leader's efforts to follow the protocol's requirement to secure a backup line. *See Towery*, 672 F.3d at 658 ("The IV Team members shall insert a primary IV catheter and a backup IV catheter, as required by Attachment D, § E.1 of the 2012 Protocol.")

Lopez observes that, in executing Kemp, the IV team utilized a femoral catheter as the primary line and a left peripheral catheter as the backup line. These circumstances do not in any way demonstrate that the IV team members were

[3] The protocol requires that when a central femoral line is used—as it was in Towery's execution—it must be placed by a medically-licensed physician with relevant experience. D.O. 710.02 § 1.2.5.4.

unqualified.

This Court previously observed that "[a]t bottom, Plaintiff's claim rests on speculation that ADC will enlist unqualified personnel to serve on the IV Team . . . ." *Towery*, at *8. Lopez's suggestion that the IV team members in the Towery and Kemp executions were unqualified still rests on speculation. Lopez has provided this Court with no reason not to continue to "presume[] ADC's director will properly discharge his official duties when selecting IV team members." *Id*.

Moreover, Lopez provides no evidence that Towery or Kemp suffered "serious harm" or were exposed to an unconstitutional risk of severe pain. *See Baze*, 553 U.S. at 49–50. In the Towery execution, the IV team member's unsuccessful attempts to set peripheral IV lines and the use of the hand as a site for the backup line did not create the 'substantial risk of severe pain' the Supreme Court was concerned about in *Baze*. The "medical team leader" testified during the *West* litigation that if pentobarbital was administered in a smaller vein "down, away from the elbow," "it would most likely cause *discomfort*." (Plaintiff's Exhibit CC, at 33 (emphasis added).) Lopez fails to demonstrate that this "discomfort" rises to the level of the severe pain prohibited by the Eighth Amendment.

Lopez's assertion that Kemp's torso and right arm shook for approximately 6 seconds after he was given pentobarbital also does not demonstrate that Kemp suffered harm or risk of pain. While Lopez's medical expert believes that Kemp may have suffered a partial seizure, he does not opine that it was a result of the execution protocol and notes instead that it "could be related to medication administration, previous head injury or stroke, or a history of seizures." (Plaintiff's Exhibit AA.) Kemp was executed using a one drug protocol. He was not administered a paralytic drug (as would have been required in the three drug protocol) that would have rendered him incapable of expressing pain. Moreover,

Lopez's medical expert does not suggest that Kemp experienced serious harm or severe pain. (*Id.*)

"Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of objectively intolerable risk of harm that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50. This Court should reject Lopez's speculative claim that the revised protocol, as written and applied, lacks the necessary safeguards to ensure the inmate does not suffer unnecessary pain.

C. *Disparate Treatment (Plaintiff's Second and Third Claims for Relief).*

As this Court previously found, "ADC has a legal obligation to carry out lawfully-imposed capital sentences and a legitimate interest in ensuring that executions are carried out in a reliable, humane, and professional manner." *Towery*, at *14. Thus, it is appropriate that decisions about the execution method "be made on a case-by-case basis, as they may well depend on individualized and changing factors such as the availability of particular people to participate in the execution, the supply of drugs available to the State at a given time, and the condition of the prisoner's veins." *Towery*, 672 F.3d at 661. As Lopez himself observes, it may be appropriate for the execution method to "take[] into account [the inmate's] particular health concerns." (Motion for preliminary injunction, at 14).

Regardless, Lopez argues that the discretion vested in the director to make decisions regarding each execution violates Equal Protection. This Court and the Ninth Circuit previously rejected this same contention. Lopez offers nothing new, other than information regarding the executions of Moormann, Towery, and Kemp, to show that the execution protocol violates Equal Protection. The fact that there were differences in how those executions were carried out does not support

Lopez's argument that ADC engages in a pattern of treating prisoners differently in ways that subject them to a substantial risk of pain. Neither Moormann, Towery, nor Kemp was exposed to or experienced significant pain. Because Lopez has failed to demonstrate some way in which the director's discretion is being irrationally exercised so that Lopez is being treated less favorably than others, his argument necessarily fails. *See Towery*, 672 F.3d at 661.

D. *Lack of Notice (Plaintiff's Fourth Claim for Relief).*

Lopez complains that the revised protocol does not require that ADC provide inmates with notice regarding the venous access to be used or the qualifications of the individuals inserting the IV catheters. This Court previously determined that inmates have "no right to notice and an opportunity to be heard as to intended placement of IV lines before an execution." *Towery*, at *17; *see also Beaty v. Brewer*, 791 F. Supp. 2d 678, 685–86 (D. Ariz. 2011). This Court has also "expressly rejected the claim that use of a femoral central line causes constitutionally unacceptable pain and suffering." *Towery,* at *17 (citing *West*, 2011 WL 6724628, at *17–18).

The protocol notifies inmates:

> The IV Team will consist of any two or more of the following: physician(s), physician assistant(s), nurse(s), emergency medical technician(s), paramedic(2), military corpsman, phlebotomist(s) or other appropriately trained personnel including those trained in the United States Military. All team members shall have at least one year of relevant experience in placing either peripheral or central femoral intravenous lines.
>
> [A] central femoral venous line may not be utilized unless placed by a medically-licensed physician with relevant experience.

(D.O. 710.02 §§1.2.5.1; 1.2.5.4 & Attachment D, § E.1.)

Thus, ADC provided Lopez with notice of the qualifications of the individuals inserting the IV catheters: IV team members inserting peripheral lines

will be physicians, physician assistants, nurses, EMT's, paramedics, military corpsmen, phlebotomists, or other appropriately trained personnel with at least 1 year of relevant experience in placing either peripheral or central femoral intravenous line, *and* an IV team member inserting a central femoral line will be a medically licensed physician with relevant experience. As discussed above, Lopez has not demonstrated that ADC has deviated from the protocol. Lopez has no right to a more specific notice regarding the qualifications of the IV team members. *See Clemons v. Crawford*, 585 F.3d 1119, 1129, n. 9 (8th Cir. 2009) (noting lack of authority indicating due process right to probe into backgrounds of execution personnel).

E. *Access to Counsel and Courts (Plaintiff's Fifth and Sixth Claims for Relief).*

The current protocol provides that attorney contact visitation terminates at 9:00 p.m. the day before an execution, but permits attorney telephone contact thereafter. (D.O. 710.11 § 1.5.2.) This requirement was in place during the Landrigan, King, Beaty, Bible, and West executions. The Director, however, allowed attorney contact visitation on the morning of those executions between 6 a.m. and 7 a.m. In *Towery*, the Ninth Circuit relied on a 2004 protocol that had been superseded to request that ADC allow attorney contact visitation with Towery and Moormann until 9:15 a.m. the day of their executions. *See Towery*, 672 F.3d at 658. ADC complied with that request.

To the extent that Lopez contends that ADC's compliance with the Ninth Circuit's request in the Towery and Moormann executions acted as an amendment to the protocol, he is incorrect. ADC's compliance with the Ninth Circuit's request does not forever bind it to that procedure.

Lopez contends that the protocol denies him access to counsel and the courts. This Court previously rejected this claim, finding that ADC had a

legitimate interest in terminating visitation after 9:00 p.m. the night before the execution in order to maintain the confidentiality of the execution participants. *Towery*, at *18. Limiting in-person visits during the 24 hours preceding an execution does not implicate any constitutional right. Finally, ADC has communicated to Lopez's attorney that contact visitation will be allowed the morning of the execution between 6 and 7.

III. IRREPARABLE HARM.

Lopez, who was notified that ADC will use the one-drug method in his execution, has not shown that he is likely to suffer irreparable harm in the absence of a stay of execution. The 2012 protocol did not abandon the critical safeguards that ensure an inmate will not be at risk of significant pain. The protocol continues to require that IV team members who place peripheral lines be appropriately trained and have 1 year of relevant experience and that an IV team member who places a central femoral line be a medically-licensed physician. The protocol continues to require video monitoring of the inmate, and all execution team members are required to train and be familiar with the various provisions of the protocol. The protocol also provides for reasonable attorney contact visitation up to the night before the execution.

IV. BALANCE OF EQUITIES.

In *Hill*, the Supreme Court recognized the "important interest in the timely enforcement of a sentence" and cautioned that federal courts "can and should protect States from dilatory or speculative suits." 547 U.S. at 584–85. Because Lopez has not set forth any type of claim that would entitle him to relief, he has not established an equitable basis for a stay of execution. Given the State's strong interest in enforcing its judgments without undue interference from the federal courts, and because "the victims of crime have an important interest in the timely enforcement of a sentence," this Court should conclude that the balance of equities

favors Defendants and that a stay of execution to resolve Lopez's speculative allegations is not in the public interest. *Id*. at 584.

V. CONCLUSION.

Lopez has not established a reasoned basis for this Court or the Ninth Circuit to revisit its rulings denying injunctive relief prior to the Moormann and Towery executions. The only changes that have occurred since those rulings are: (1) backup drugs are not placed in a syringe unless necessary, which will at most result in a 90-second delay if the backup drugs are needed, and (2) ADC notified attorneys for inmates Kemp and Lopez that attorney contact visits will end at 7:00 a.m. rather than 9:15 a.m. Neither of these changes create a basis for relief under *Baze*. There is no evidence that the Moormann, Towery, or Kemp executions resulted in unnecessary pain or suffering. This Court should deny Lopez's request for injunctive relief.

DATED this 4th day of May, 2012.

RESPECTFULLY SUBMITTED,

THOMAS C. HORNE
ATTORNEY GENERAL

/S/_____
JEFFREY A. ZICK
SECTION CHIEF COUNSEL

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2012, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and that a copy of the foregoing was also electronically mailed with the transmittal of a Notice of Electronic Filing to the following ECF registrant:

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ATTACHMENT

AFFIDAVIT OF ROBERT PATTON

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

AFFIDAVIT OF ROBERT PATTON

I, Robert Patton, declare under penalty of perjury, the following to be true and accurate to the best of my belief:

1. I am currently the Division Director of Offender Operations at the Arizona Department of Corrections ("ADC").

2. I am familiar with ADC's execution protocols—Department Order 710 and Attachment D, the preparation and administration of chemicals.

3. Attachment D provides that "one full set of syringes is used in the implementation of the death sentence and one full set is to be available." I am also aware of the Ninth Circuit Court of Appeals opinion in *Towery v. Brewer*, 672 F.3d 650, 658 (9th Cir. 2012), noting that ADC's protocol provides that "one additional set of syringes, along with the necessary chemicals and drugs, [would be] available for immediate administration should circumstances so require."

4. Based on the Ninth Circuit's *Towery* opinion, the ADC agreed to have a back-up set of pentobarbital available in syringes for the executions of Robert Moorman and Robert Towery. The back-up pentobarbital was not used and was discarded following the execution.

5. Prior to the execution of Thomas Kemp, ADC notified Mr. Kemp's counsel that it intended to have pentobarbital immediately available to be loaded in syringes, but would not be loaded unless necessary. No objection was lodged to that procedure, and the execution was carried out with back-up pentobarbital immediately available but not loaded in syringes.

6. I personally observed the Special Operations and IV teams practice simulations of using the available back-up pentobarbital in the event of either a syringe or line failure. It took less than 90 seconds for the back-up chemicals to be placed in a syringe, attached to the manifold and the one-drug protocol to be administered.

Signed this 4th day of May, 2012

Robert Patton
Division Director of Offender Operations

SUBSCRIBED AND SWORN to before me this 4 day of MAY, 2012.

Notary Public

My Commission expires: 9/25/2012

OFFICIAL SEAL
TERRI LYNN WHITE
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires Sept. 25, 2012