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9 **UNITED STATES DISTRICT COURT**
 10 **DISTRICT OF ARIZONA**

11
 12 Towery, et al.,

13 Plaintiffs,

14 -vs-

15 Brewer, et. al.,

16 Defendants.

CV 2:12-CV-00245-NVW

Response to Motion for
 Preliminary Injunction

[Death Penalty Case-Execution
 Date May 16, 2012]

17
 18 Plaintiff Samuel Lopez seeks a preliminary injunction enjoining his
 19 execution on May 16, 2012. Specifically, Lopez contends that the Arizona
 20 Department of Corrections’ (“ADC’s”) lethal injection protocol revised effective
 21 January 25, 2012, violates his First, Fifth, Eighth, and Fourteenth Amendments
 22 rights. Because the revised protocol does not take away constitutional safeguards
 23 ensuring that an inmate is not at serious risk of pain during an execution, this Court
 24 should deny Lopez’s motion.

25 Prior to the executions of Robert Moormann and Robert Towery, this Court
 26 and the United States Court of Appeals for the Ninth Circuit denied similarly-
 27 sought injunctive relief, and those two executions were carried out without any
 28

1 evidence of significant pain or suffering.

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

14 I. BACKGROUND

15 In 2007, several plaintiffs filed a § 1983 action challenging numerous
16 aspects of Arizona's lethal injection protocol.¹ This Court denied relief,
17 concluding that Arizona's protocol was substantially similar to that approved by
18 the Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). See *Dickens v. Brewer*,
19 No. CV-07-1770-PHX-NVW, 2009 WL 1904294, at *1 & n. 2 (D. Ariz. July 1,
20 2009) (unpublished order). On February 9, 2011, the Ninth Circuit affirmed.
21 *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

22 The protocol reviewed in *Dickens* required the sequential administration of
23 the following: (1) sodium thiopental, an ultra-fast-acting barbiturate that induces
24 unconsciousness; (2) pancuronium bromide, a paralytic neuromuscular blocking
25 agent that prevents any voluntary muscle contraction; and, (3) potassium chloride,
26 which causes skeletal muscle paralysis and cardiac arrest. On June 10, 2011, ADC
27

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

1 amended its protocol to provide for the administration of sodium thiopental or
2 pentobarbital as the first of the three sequentially-administered drugs.
3

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

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

1
2 The amended protocol also provides for venous access to be determined by
3 the Director acting upon the recommendation of the IV Team Leader. (*Id.* at
4 § 1.2.5.4.) Venous access can be either through a peripheral vein or a central line
5 in the femoral vein. If a central line is used, the protocol requires that a medically
6 trained physician with relevant experience placing central lines perform this
7 procedure. (*Id.*) *See West*, 2011 WL 6724628 at *18 (finding no Eighth
8 Amendment requirement that ADC administer drugs through the peripheral vein
9 whenever feasible).

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

15 **II. STANDARD FOR INJUNCTIVE RELIEF.**

16 “[A] stay of execution is an equitable remedy.” *Hill v. McDonough*, 547
17 U.S. 573, 584 (2006). The standard for issuing a stay of execution is the same as
18 that for issuing a preliminary injunction. To be entitled to relief, a movant must
19 demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to
20 suffer irreparable harm, (3) that the balance of equities tips in his favor, and (4)
21 that an injunction is in the public interest. *Winter v. Natural Res. Def. Council,*
22 *Inc.*, 129 S. Ct. 365, 374, 376 (2008); *Hill*, 547 U.S. at 584 (2006); *Beardslee v.*
23 *Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion is on
24 the movant, who must make a “clear showing.” *Mazurek v. Armstrong*, 520 U.S.
25 968, 972 (1997) (per curiam).

26 These principles apply when a capital defendant asks a federal court to stay
27 his pending execution. *Hill*, 547 U.S. at 584. “[E]quity must be sensitive to the
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1 State's strong interest in enforcing its criminal judgments without undue
2 interference from the federal courts." *Id.* Thus, courts "must consider not only the
3 likelihood of success on the merits and the relative harm to the parties, but also the
4 extent to which the inmate has delayed unnecessarily in bringing the claim." *Id.*
5 (quoting *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)).

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

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

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

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

24 The backup catheter provision is set forth at D.O. 710, Attachment D § B.2 and
25 requires only that a set of backup chemicals and syringes be available. Lopez's
26 claim that ADC's failure to prepare backup chemicals in syringes during the Kemp
27 execution was "inconsistent with the Ninth Circuit's opinion in *Towery*" is
28

1 incorrect. In *Towery*, the Ninth Circuit noted that for the Towery and Moormann
2 executions, “the State represented that there will be one additional set of syringes,
3 along with the necessary chemicals and drugs, available for immediate
4 administration should circumstances so require.” 672 F.3d 650, 658 (9th Cir.
5 2012). This does not require ADC to maintain a set of backup chemicals *drawn*
6 *into syringes* for every execution. While ADC agreed to do so for the Towery and
7 Moormann executions, it has determined that drawing chemicals into backup
8 syringes unnecessarily wastes chemicals that are difficult to obtain and in short
9 supply. Moreover, the chemicals and syringes are immediately available if
10 necessary and can be placed in syringes and administered in less than 90 seconds.
11 (See attached Affidavit of Robert Patton.)

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

13 Lopez contends that ADC’s revised protocol violates his Eighth Amendment
14 right against cruel and unusual punishment because ADC abandoned previously
15 adopted safeguards. This Court has already determined that the revised protocol
16 does not violate the Eighth Amendment because it lacks necessary safeguards. *See*
17 *Towery*, 2012 WL 592749, at *5. The protocol has not changed since this Court
18 made that determination nor has Lopez provided any evidence that ADC has
19 deviated from the protocol.
20

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

1 in assessing consciousness and monitoring of the inmate. In addition, the warden
2 remains in the execution room to monitor the inmate and the IV lines to assure they
3 are functioning properly. (D.O. 710, Attachment D, § D.1–9.)
4

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

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

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

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

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

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

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

23 Lopez observes that, in executing Kemp, the IV team utilized a femoral
24 catheter as the primary line and a left peripheral catheter as the backup line. These
25 circumstances do not in any way demonstrate that the IV team members were
26

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

1 unqualified.

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

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

19 Lopez’s assertion that Kemp’s torso and right arm shook for approximately 6
20 seconds after he was given pentobarbital also does not demonstrate that Kemp
21 suffered harm or risk of pain. While Lopez’s medical expert believes that Kemp
22 may have suffered a partial seizure, he does not opine that it was a result of the
23 execution protocol and notes instead that it “could be related to medication
24 administration, previous head injury or stroke, or a history of seizures.” (Plaintiff’s
25 Exhibit AA.) Kemp was executed using a one drug protocol. He was not
26 administered a paralytic drug (as would have been required in the three drug
27 protocol) that would have rendered him incapable of expressing pain. Moreover,
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1 Lopez’s medical expert does not suggest that Kemp experienced serious harm or
2 severe pain. (*Id.*)

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

9 **C. *Disparate Treatment (Plaintiff’s Second and Third Claims for***
10 ***Relief).***

11 As this Court previously found, “ADC has a legal obligation to carry out
12 lawfully-imposed capital sentences and a legitimate interest in ensuring that
13 executions are carried out in a reliable, humane, and professional manner.”
14 *Towery*, at *14. Thus, it is appropriate that decisions about the execution method
15 “be made on a case-by-case basis, as they may well depend on individualized and
16 changing factors such as the availability of particular people to participate in the
17 execution, the supply of drugs available to the State at a given time, and the
18 condition of the prisoner’s veins.” *Towery*, 672 F.3d at 661. As Lopez himself
19 observes, it may be appropriate for the execution method to “take[] into account
20 [the inmate’s] particular health concerns.” (Motion for preliminary injunction, at
21 14).

22 Regardless, Lopez argues that the discretion vested in the director to make
23 decisions regarding each execution violates Equal Protection. This Court and the
24 Ninth Circuit previously rejected this same contention. Lopez offers nothing new,
25 other than information regarding the executions of Moormann, Towery, and Kemp,
26 to show that the execution protocol violates Equal Protection. The fact that there
27 were differences in how those executions were carried out does not support
28

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

7
8 **D. *Lack of Notice (Plaintiff's Fourth Claim for Relief).***

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

18 The protocol notifies inmates:

19 The IV Team will consist of any two or more of the following:
20 physician(s), physician assistant(s), nurse(s), emergency medical
21 technician(s), paramedic(2), military corpsman, phlebotomist(s) or
22 other appropriately trained personnel including those trained in the
23 United States Military. All team members shall have at least one year
of relevant experience in placing either peripheral or central femoral
intravenous lines.

24 [A] central femoral venous line may not be utilized unless placed by a
25 medically-licensed physician with relevant experience.

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

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

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

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

13 The current protocol provides that attorney contact visitation terminates at
14 9:00 p.m. the day before an execution, but permits attorney telephone contact
15 thereafter. (D.O. 710.11 § 1.5.2.) This requirement was in place during the
16 Landrigan, King, Beaty, Bible, and West executions. The Director, however,
17 allowed attorney contact visitation on the morning of those executions between 6
18 a.m. and 7 a.m. In *Towery*, the Ninth Circuit relied on a 2004 protocol that had
19 been superseded to request that ADC allow attorney contact visitation with Towery
20 and Moormann until 9:15 a.m. the day of their executions. *See Towery*, 672 F.3d at
21 658. ADC complied with that request.

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

26 Lopez contends that the protocol denies him access to counsel and the
27 courts. This Court previously rejected this claim, finding that ADC had a
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1 legitimate interest in terminating visitation after 9:00 p.m. the night before the
2 execution in order to maintain the confidentiality of the execution participants.
3 *Towery*, at *18. Limiting in-person visits during the 24 hours preceding an
4 execution does not implicate any constitutional right. Finally, ADC has
5 communicated to Lopez’s attorney that contact visitation will be allowed the
6 morning of the execution between 6 and 7.

7 **III. IRREPARABLE HARM.**

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

19 **IV. BALANCE OF EQUITIES.**

20 In *Hill*, the Supreme Court recognized the “important interest in the timely
21 enforcement of a sentence” and cautioned that federal courts “can and should
22 protect States from dilatory or speculative suits.” 547 U.S. at 584–85. Because
23 Lopez has not set forth any type of claim that would entitle him to relief, he has not
24 established an equitable basis for a stay of execution. Given the State’s strong
25 interest in enforcing its judgments without undue interference from the federal
26 courts, and because “the victims of crime have an important interest in the timely
27 enforcement of a sentence,” this Court should conclude that the balance of equities
28

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

3
4 **V. CONCLUSION.**

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

15 DATED this 4th day of May, 2012.

16 RESPECTFULLY SUBMITTED,
17 THOMAS C. HORNE
18 ATTORNEY GENERAL

19 /s/ _____
20 JEFFREY A. ZICK
21 SECTION CHIEF COUNSEL

22 ATTORNEYS FOR DEFENDANTS
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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

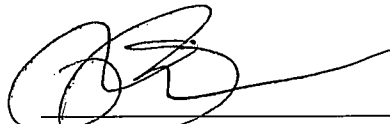
STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

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:

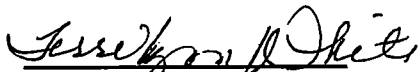
1. I am currently the Division Director of Offender Operations at the Arizona Department of Corrections (“ADC”).
2. I am familiar with ADC’s execution protocols—Department Order 710 and Attachment D, the preparation and administration of chemicals.
3. Attachment D provides that “one full set of syringes 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

