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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Towery, et al., Plaintiffs, v. Brewer, et al., Defendants.	Case No. 2:12-cv-00245-NVW **DEATH PENALTY CASE** Execution Scheduled May 16, 2012 at 10:00 a.m. **Reply to Response to Motion for Preliminary Injunction**

In their Response to Plaintiff Samuel Lopez's Motion for Preliminary Injunction, Defendants fail to address factual circumstances and legal arguments that this Court has not yet considered. Instead, they ask this Court to deny the motion based on its previous findings in *Towery v. Brewer*, No. 12-cv-245-PHX-NVW, 2012 WL 592749 (D. Ariz. Feb. 23, 2012). This case presents new factual developments in light of the three most recent executions and presents new legal arguments related, in part, to an as-applied challenge to the January 2012 Protocol. Therefore, this Court should grant the preliminary injunction, stay Lopez's execution, and allow him to proceed to trial on the merits of his claims.

I. Introduction

Defendants attempt to persuade the Court to deny Lopez's motion by claiming that the January 2012 Protocol is essentially the same protocol that this Court and the Ninth Circuit reviewed in *Towery v. Brewer*. It is not. In *Towery*, the Ninth Circuit "amended" the protocol based on Defendants' representations that both IV team members had experience placing IVs within the last twelve months—one was a licensed nurse with seventeen years experience and the other was a medically-licensed physician. *Towery v. Brewer*, 672 F.3d 650, 658 (9th Cir. 2012). And it accepted, for purposes of Moormann's and Towery's execution, that the IV team members "must have no less than the training that is traditionally given for people to be licensed to place IVs." *Id.* The conclusion made by the Ninth Circuit in *Towery* is not based on the written language of the January 2012 Protocol. Rather it is based on the representations that were made by counsel during argument. Those representations are no longer being made by counsel. Thus, the issue regarding the qualifications of IV team members remains unresolved.

In addition to ignoring the qualifications of those retained by ADC to perform executions, Defendants also remain silent regarding Towery's denial of counsel immediately before his execution. The Ninth Circuit also "amended" the protocol to assure that access to counsel would be permitted the morning of an execution under "long-standing ADC practice." *Id.* Lopez presented the undisputed declaration of Dale A. Baich as factual support that Towery was denied access to counsel, and in turn, the courts shortly before he was executed. Defendants have done nothing to rebut those facts.

This Court should refrain from following Defendants' conclusory logic and instead should rely upon the undisputed declarations submitted in support of Lopez's request for preliminary injunction and grant Lopez relief. *See Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953) (holding that "a preliminary injunction may be granted upon affidavits"); *International Paper Co. v. Inhabitants of the Town of Jay*, 672 F. Supp. 29, 33 (D. Me. 1987) ("court may rely on affidavits and pleadings alone where basic facts are not disputed"); *Scott & Fetzer Co. v. McCarty*, 450 F. Supp. 274,

277, n.4 (N.D. Ohio 1977) (noting that "district court has discretion to forego an evidentiary hearing where undisputed facts, submitted affidavits, or other factors render such a hearing unnecessary").

II. This Court Should Issue a Preliminary Injunction

In a cursory manner, Defendants simply state that Lopez is not entitled to an injunction because ADC has not deviated from the protocol used in carrying out Towery's and Moormann's executions. (ECF No. 64 at 5.) By doing so, they fail to rebut the merits of Lopez's claims.

First Claim: Eighth Amendment Violation

Defendants assert that Lopez cannot show an Eighth Amendment violation where there was no evidence that Towery or Kemp experienced pain or suffering. (ECF No. 64 at 9.)[1] Towery's autopsies, however, revealed that the both the femoral artery and the femoral vein were punctured. (ECF No. 54-1, attached as Ex. W, at 1; *see also* Email from Eric D. Peters, M.D., to Robin Konrad, dated May 4, 2012, attached as Ex. KK (indicating that medical examiner did not puncture the artery); Summary Statement of Joseph I Cohen, M.D., dated May 5, 2012, attached as Ex. LL.) If the IV line was placed in the artery and the pentobarbital was administered, then it was likely that Towery experienced pain. (*See* Nembutal Sodium, FDA Label, attached as Ex. MM, at 3 (noting, under precautions, that "extreme care should be taken to avoid . . . intra-arterial injection" because "consequences of intra-arterial injection may vary from transient pain to gangrene of the limb"); *see also* Testimony of Mark Dershwitz, M.D., dated Dec. 9, 2008, attached as Ex. NN, at 93:15-17 (noting that thiopental "if injected into an artery" is painful)).

Moreover, Defendants also claim that Lopez has not shown that the IV team was unqualified. When Defendants' expert Mark Dershwitz, M.D., was asked during the *Dickens v. Napolitano* proceedings whether it was possible to puncture the femoral artery when

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[1]Defendants state that Kemp's execution occurred "without incident." (ECF No. 64 at 2.) This, however, is not true. Kemp possibly suffered a seizure, as he convulsed for at least five seconds. Kemp also had two punctures in his left arm and a femoral catheter.

attempting to place a femoral line, he responded: "I will acknowledge that virtually anything is possible. However, because one typically palpates the artery with the fingers of one hand while inserting the needle with the fingers of the other, that's a relatively uncommon adverse effect in my experience." Ex. NN at 92:9-14. Even Defendants' own expert argues that puncturing the femoral artery is uncommon. Yet it happened in one of the three most recent executions under the January 2012 Protocol. And this is not an isolated incident: Defendants executed a prisoner in 2007 by injecting the lethal drugs through the femoral artery instead of the vein.[2] Defendants have a history of retaining unqualified individuals to participate in executions.

In attempting to rebut Lopez's argument that the IV procedure during Towery's execution was unreasonable, Defendants "*[a]ssum[e]* the IV team leader . . . suggested making a final effort to set a peripheral backup line, rather than proceeding straight to setting the backup line in Towery's hand . . . ." (ECF No. 64 at 8 (emphasis added).) Lopez supported his facts with direct citation to the execution logs provided by Defendants. That Defendants would have to "assume" something that it is reflected in their own logs calls into question the reliability of their procedures.[3] Defendants likewise have done nothing other than to state that the actions of the IV team leader—which they suggest could be hypothetical—were "not unreasonable." (ECF No. 64 at 8.) This statement, however, does

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[2]Robert Comer's autopsy report revealed that Defendants administered the lethal drugs through his femoral artery. (*See* Autopsy Report of Robert C. Comer, dated May 23, 2007, attached as Ex. OO at 5.)

[3]Equally, if not more, puzzling is Defendants' Answer to Plaintiffs' Second Amended Complaint. Many paragraphs of the Second Amended Complaint included facts related to the executions of Towery and Moormann, which involved timing of activities. (*See, i.e.*, ECF No. 58, ¶¶113-16, 118-20, 123-29, 132-33, 135-38.) In their Answer, Defendants admit each of the activities alleged by Plaintiffs, but claim they are "without information or belief as to the exact time alleged." (ECF No. 63, ¶¶113-16, 118-20, 123-29, 132-33, 135-38.) Defendants, however, are the ones who provided the execution logs upon which Plaintiffs have based the times in their complaint. Defendants' statement that they are "without information" lends further support for Lopez's request that counsel be present to observe the IV procedure.

not refute the declaration of Eric Katz, M.D., submitted by Lopez in support of his motion. Dr. Katz explains that it was "unreasonable to suggest setting a peripheral line (back-up or otherwise) in a vein in which IV personnel were demonstrably unable to set an IV after multiple attempts." (Ex. AA, ¶ 7.)

Second and Third Claims: Equal Protection Violation

Defendants flippantly assert that Lopez has offered "nothing new, other than the information regarding the executions of Moormann, Towery, and Kemp, to show that the execution protocol violates Equal Protection." (ECF No. 64 at 10.) But the past several executions, and the circumstances surrounding them, are critical. Indeed, Defendants' only legal argument is that Lopez cannot show that the three most recently executed prisoners were treated differently such that they were subjected to a "substantial risk of pain." (ECF No. 64 at 11.) Defendants position, however, ignores the recent Ninth Circuit opinion in *Towery v. Brewer*, which indicated that there could be an equal-protection violation requiring strict-scrutiny analysis where a prisoner shows that state action *burdens* fundamental rights. 672 F.3d at 660. The *Towery* court found that such burden could be shown through a "pattern of treating prisoners differently in ways that [] affect[ed] the *risk* of pain to which they would be subjected." *Id.* at 660 (citation omitted). Defendants disregard that holding and present no compelling state interest for the varying treatment of prisoners.

Fourth Claim: Due Process Violation

Defendants argue that Lopez is not entitled to notice regarding where the IV catheter(s) will be placed, and they argue the January 2012 Protocol provides sufficient notice regarding the qualifications of the IV team members. (ECF No. 64 at 11.) Defendants cannot prevent a prisoner from knowing in advance information regarding his execution and when something goes awry during the process, prevent him access to counsel and the courts. Furthermore, Defendants cite to the written terms of the January 2012 Protocol to satisfy this Court that prisoners are provided notice of the qualifications of the persons performing the surgical incision or setting peripheral IVs—which he will find out only minutes before his death. The Ninth Circuit was concerned about the vague terms related to the training and

qualifications of individuals, and it therefore explained the "amended" terms of the protocol. *Towery*, 672 F.3d at 658. The detailed information provided by the Ninth Circuit is not written in the protocol, and Defendants have not represented that they intend to follow that aspect of the *Towery* opinion. To the contrary, they all but ignore the IV team qualifications as modified by *Towery*.[4] Without further information, this Court should not allow an execution to go forward where Lopez is denied access to information in violation of due process.

Fifth and Sixth Claims: Access to Courts and Counsel

Defendants' silence regarding Lopez's access to counsel during the IV procedure is telling. They say nothing to refute the now uncontested facts surrounding the circumstances of Towery's execution and Defendants' blatant disregard for his request for counsel and, in turn, his fundamental right to access the courts. The facts, as presented by Lopez and supported with declarations from Plaintiffs and documents from Defendants, demonstrate that ADC violated Towery's right to counsel and right to access the courts.

Moreover, Defendants' response to Lopez's argument that he should have access to counsel on the morning of his execution is factually inaccurate. Defendants claim that the "requirement" that a condemned prisoner's in-person visitation with his attorney cease after 9:00 p.m., the day before an execution was "in place during the Landrigan, King, Beaty, Bible, and West executions." (ECF No. 12.) This statement misrepresents the written protocol in place during those five executions. The version of Department Order 710 that was in effect for those prisoners' executions states: "The inmate's visitation privileges shall be terminated at 2100 hours the day prior to the execution, *excluding* non-contact visits with the inmate's Attorney of Record and facility chaplain as approved by the Division Director for Offender Operations." (Dept. Order 710.09, § 1.5.2, *available at West v. Brewer*, No. 12-

[4]Indeed, ADC will make any representations necessary to allow an execution to go forward, but then it backs away from those representations after the urgency of the situation has passed. *See, e.g.*, Ex. JJ.

245-NVW, ECF No. 1-2, Ex. C) (emphasis added).[5] Up until the January 2012 Protocol, attorneys were excluded from the blanket rule ending visitation at 9:00 p.m. on the evening before an execution. Thus, Defendants representation to the contrary is wrong.[6]

Perhaps in attempt to suggest Lopez has waived this argument, Defendants assert that Kemp made no objection to the change in visitation hours on the morning of his execution. (ECF No. 64 at 2.) First, Kemp's actions, or inactions, are irrelevant to this Court's determination of Lopez's motion. Second, Defendants, once again, are mistaken. Their statement ignores a letter that Kemp's attorney wrote to Director Ryan after the Director informed him that his legal visit would only be from 6:00 a.m. until 7:00 a.m. the morning of his execution. (Letter from Baich to Ryan, dated March 28, 2012 (ECF No. 54-1, attached as Ex. V).) In the letter, Kemp's attorney requested explanation from the Director on his change in requiring in-person legal visits to end three hours prior to the scheduled execution, rather than 45-minutes as required by the *Towery* court. (*Id.*)

Finally, Defendants represent to this Court that "ADC has communicated to Lopez's attorney that contact visitation will be allowed the morning of the execution between 6 and

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[5]The Department Order cited became effective May 12, 2011, and governed the executions of Beaty, Bible, and West. The Department Order in place for the executions of Landrigan and King had the same language in Department Order 710, but it was in Section 710.09, §1.6.1. *See West*, Trial Ex. 85.

[6]Moreover, Defendants disregard the written protocols from over the past twenty years that allowed (*without* the Director's discretion) attorney-client visitation up until anywhere between 30 minutes and 2 hours before an execution. *See, e.g.*, ADC Internal Management Procedure 500.4 (Feb. 4, 1986) Section 4.4.5 ("Visits from the Attorney of Record and a Chaplain of condemned inmate's choice shall be permitted up to ½ hour prior to the scheduled time of the execution."); Internal Management Procedure 500 (Mar. 10, 1993) Section 5.6.3.6 ("Non-Contact Visits from the Attorney of Record and a Chaplain of condemned inmate's choice shall be permitted up to two hours prior to the scheduled execution."); Internal Management Procedure 500.4 (Dec. 24, 1994) Section 5.2.1.2.4 ("Visits from the Attorney of Record and a Chaplain of condemned inmate's choice shall be permitted up to one-half hour before the scheduled execution time."); Department Order 710-IO-F (Nov. 5, 2004) Section 1.3.3.5 ("Visits from the Attorney of Record and a Department Chaplain of condemned inmate's choice are permitted up to forty-five (45) minutes prior to the scheduled execution.").

7." (ECF No. 64 at 13.) As of this filing, neither of Lopez's attorneys have been provided this information.

Conclusion

For the reasons in this Reply and in his Motion, Lopez respectfully requests that this Court grant him relief on based on the undisputed evidence presented to this Court. In the alternative, Lopez requests that the Court grant him discovery, a hearing, and ultimately a preliminary injunction.

Respectfully submitted this 5th day of May, 2012.

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Certificate of Service

I hereby certify that on May 5, 2012, I electronically transmitted the foregoing Reply to Response to Motion for Preliminary Injunction to the Clerk's office using the CM/ECF System for filing.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Michelle Young
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