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15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 Towery, et al.,
18 Plaintiffs,
19 v.
20 Brewer, et al.,
21 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**

22
23 In their Response to Plaintiff Samuel Lopez's Motion for Preliminary Injunction,
24 Defendants fail to address factual circumstances and legal arguments that this Court has not
25 yet considered. Instead, they ask this Court to deny the motion based on its previous findings
26 in *Towery v. Brewer*, No. 12-cv-245-PHX-NVW, 2012 WL 592749 (D. Ariz. Feb. 23, 2012).
27 This case presents new factual developments in light of the three most recent executions and
28 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.

1 **I. Introduction**

2 Defendants attempt to persuade the Court to deny Lopez’s motion by claiming that
3 the January 2012 Protocol is essentially the same protocol that this Court and the Ninth
4 Circuit reviewed in *Towery v. Brewer*. It is not. In *Towery*, the Ninth Circuit “amended” the
5 protocol based on Defendants’ representations that both IV team members had experience
6 placing IVs within the last twelve months—one was a licensed nurse with seventeen years
7 experience and the other was a medically-licensed physician. *Towery v. Brewer*, 672 F.3d
8 650, 658 (9th Cir. 2012). And it accepted, for purposes of Moormann’s and Towery’s
9 execution, that the IV team members “must have no less than the training that is traditionally
10 given for people to be licensed to place IVs.” *Id.* The conclusion made by the Ninth Circuit
11 in *Towery* is not based on the written language of the January 2012 Protocol. Rather it is
12 based on the representations that were made by counsel during argument. Those
13 representations are no longer being made by counsel. Thus, the issue regarding the
14 qualifications of IV team members remains unresolved.

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

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

1 277, n.4 (N.D. Ohio 1977) (noting that “district court has discretion to forego an evidentiary
2 hearing where undisputed facts, submitted affidavits, or other factors render such a hearing
3 unnecessary”).

4 **II. This Court Should Issue a Preliminary Injunction**

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

9 **First Claim: Eighth Amendment Violation**

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

23 Moreover, Defendants also claim that Lopez has not shown that the IV team was
24 unqualified. When Defendants’ expert Mark Dershwitz, M.D., was asked during the *Dickens*
25 *v. Napolitano* proceedings whether it was possible to puncture the femoral artery when
26

27 ¹Defendants state that Kemp’s execution occurred “without incident.” (ECF No. 64
28 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.

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

10 In attempting to rebut Lopez’s argument that the IV procedure during Towery’s
11 execution was unreasonable, Defendants “[a]ssum[e] the IV team leader . . . suggested
12 making a final effort to set a peripheral backup line, rather than proceeding straight to setting
13 the backup line in Towery’s hand” (ECF No. 64 at 8 (emphasis added).) Lopez
14 supported his facts with direct citation to the execution logs provided by Defendants. That
15 Defendants would have to “assume” something that it is reflected in their own logs calls into
16 question the reliability of their procedures.³ Defendants likewise have done nothing other
17 than to state that the actions of the IV team leader—which they suggest could be
18 hypothetical—were “not unreasonable.” (ECF No. 64 at 8.) This statement, however, does
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20 ²Robert Comer’s autopsy report revealed that Defendants administered the lethal drugs
21 through his femoral artery. (*See* Autopsy Report of Robert C. Comer, dated May 23, 2007,
22 attached as Ex. OO at 5.)

23 ³Equally, if not more, puzzling is Defendants’ Answer to Plaintiffs’ Second Amended
24 Complaint. Many paragraphs of the Second Amended Complaint included facts related to
25 the executions of Towery and Moormann, which involved timing of activities. (*See, i.e.*,
26 ECF No. 58, ¶¶113-16, 118-20, 123-29, 132-33, 135-38.) In their Answer, Defendants admit
27 each of the activities alleged by Plaintiffs, but claim they are “without information or belief
28 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.

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

5 **Second and Third Claims: Equal Protection Violation**

6 Defendants flippantly assert that Lopez has offered “nothing new, other than the
7 information regarding the executions of Moormann, Towery, and Kemp, to show that the
8 execution protocol violates Equal Protection.” (ECF No. 64 at 10.) But the past several
9 executions, and the circumstances surrounding them, are critical. Indeed, Defendants’ only
10 legal argument is that Lopez cannot show that the three most recently executed prisoners
11 were treated differently such that they were subjected to a “substantial risk of pain.” (ECF
12 No. 64 at 11.) Defendants position, however, ignores the recent Ninth Circuit opinion in
13 *Towery v. Brewer*, which indicated that there could be an equal-protection violation requiring
14 strict-scrutiny analysis where a prisoner shows that state action *burdens* fundamental rights.
15 672 F.3d at 660. The *Towery* court found that such burden could be shown through a
16 “pattern of treating prisoners differently in ways that [] affect[ed] the *risk* of pain to which
17 they would be subjected.” *Id.* at 660 (citation omitted). Defendants disregard that holding
18 and present no compelling state interest for the varying treatment of prisoners.

19 **Fourth Claim: Due Process Violation**

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

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

8 **Fifth and Sixth Claims: Access to Courts and Counsel**

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

15 Moreover, Defendants’ response to Lopez’s argument that he should have access to
16 counsel on the morning of his execution is factually inaccurate. Defendants claim that the
17 “requirement” that a condemned prisoner’s in-person visitation with his attorney cease after
18 9:00 p.m., the day before an execution was “in place during the Landrigan, King, Beaty,
19 Bible, and West executions.” (ECF No. 12.) This statement misrepresents the written
20 protocol in place during those five executions. The version of Department Order 710 that
21 was in effect for those prisoners’ executions states: “The inmate’s visitation privileges shall
22 be terminated at 2100 hours the day prior to the execution, *excluding* non-contact visits with
23 the inmate’s Attorney of Record and facility chaplain as approved by the Division Director
24 for Offender Operations.” (Dept. Order 710.09, § 1.5.2, *available at West v. Brewer*, No. 12-

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

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

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

14 Finally, Defendants represent to this Court that "ADC has communicated to Lopez's
15 attorney that contact visitation will be allowed the morning of the execution between 6 and
16

17 ⁵The Department Order cited became effective May 12, 2011, and governed the
18 executions of Beaty, Bible, and West. The Department Order in place for the executions of
19 Landrigan and King had the same language in Department Order 710, but it was in Section
20 710.09, §1.6.1. *See West*, Trial Ex. 85.

21 ⁶Moreover, Defendants disregard the written protocols from over the past twenty years
22 that allowed (*without* the Director's discretion) attorney-client visitation up until anywhere
23 between 30 minutes and 2 hours before an execution. *See, e.g.*, ADC Internal Management
24 Procedure 500.4 (Feb. 4, 1986) Section 4.4.5 ("Visits from the Attorney of Record and a
25 Chaplain of condemned inmate's choice shall be permitted up to ½ hour prior to the
26 scheduled time of the execution."); Internal Management Procedure 500 (Mar. 10, 1993)
27 Section 5.6.3.6 ("Non-Contact Visits from the Attorney of Record and a Chaplain of
28 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.").

1 7.” (ECF No. 64 at 13.) As of this filing, neither of Lopez’s attorneys have been provided
2 this information.

3 **Conclusion**

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

8 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
Legal Assistant
Capital Habeas Unit