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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Robert Towery, et al., Plaintiffs, vs. Janice K. Brewer, et al., Defendants.	No. CV-12-245-PHX-NVW DEATH PENALTY CASE **ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION**

Before the Court is a motion for preliminary injunction filed by Plaintiff Samuel Lopez, who is an Arizona prisoner under sentence of death. (Doc. 62.) Lopez is scheduled to be executed by lethal injection on Wednesday, May 16, 2012. The motion will be denied for the reasons that follow.

BACKGROUND

In 2007, a group of Arizona death row prisoners filed a § 1983 complaint challenging numerous aspects of Arizona's then-in-effect lethal injection protocol.[1] That protocol was based on Department Order 710, dated November 1, 2007, and as modified by an exhibit submitted by the parties as part of a joint report to the Court. *See Dickens v. Brewer*, No. CV-07-1770-PHX-NVW, 2009 WL 1904294, at *1 & n.2 (D. Ariz. Jul. 1, 2009) (unpublished order). This Court granted summary judgment in favor of Defendants, concluding that Arizona's protocol was "substantially similar" to that approved by the Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008), and thus did not subject inmates to a

[1] None of the Plaintiffs in this matter were parties to that litigation.

substantial risk of serious harm in violation of the Eighth Amendment. The Court of Appeals for the Ninth Circuit affirmed. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

The version of the protocol at issue in *Dickens* required sequential administration of: (1) sodium thiopental (pentothal), 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. "It is uncontested that, failing a proper dose of sodium thiopental that would render [a] prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze*, 553 U.S. at 53.

In October 2010, on the eve of his execution, Arizona prisoner Jeffrey Landrigan filed a § 1983 complaint describing a nationwide shortage of sodium thiopental and alleging that the Arizona Department of Corrections ("ADC") had imported the drug from a non-FDA-approved foreign manufacturer. The district court granted a temporary restraining order to permit further discovery regarding efficacy of the drug. *Landrigan v. Brewer*, No. CV-10-2246-PHX-ROS, 2010 WL 4269559 (D. Ariz. Oct. 25, 2010) (unpublished order). The Supreme Court reversed, noting that there was "no evidence in the record to suggest that the drug obtained from a foreign source is unsafe" and "no showing that the drug was unlawfully obtained." *Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (Mem.).

Subsequently, Arizona prisoner Daniel Cook filed a complaint similar to that of Landrigan, alleging an unconstitutional risk of serious pain from use of non-FDA approved sodium thiopental. The district court dismissed the complaint, finding that it failed to sufficiently state a claim for relief. *Cook v. Brewer*, No. CV-10-2454-PHX-RCB, 2011 WL 251470 (D. Ariz. Jan. 26, 2011) (unpublished order). The Ninth Circuit affirmed and noted that Arizona's protocol contains safeguards that would prevent the administration of the second and third drugs if the prisoner were not sufficiently anesthetized. *Cook v. Brewer*, 637 F.3d 1002, 1007-08 (9th Cir. 2011) (*Cook I*). Based on newly-discovered evidence surrounding the foreign-manufactured sodium thiopental and ADC's acquisition thereof,

Cook refiled a complaint on the eve of his execution. The district court summarily dismissed the complaint, and the Ninth Circuit affirmed. *Cook v. Brewer*, No. CV-11-557-PHX-RCB, 2011 WL 1119641 (D. Ariz. Mar. 28, 2011) (unpublished order), *aff'd*, 649 F.3d 915 (9th Cir.) (*Cook II*), *cert. denied*, 131 S. Ct. 2465 (2011).

On May 24, 2011, the night before the scheduled execution of Arizona prisoner Donald Beaty, ADC notified Beaty and the Arizona Supreme Court that it intended to substitute pentobarbital for sodium thiopental in carrying out Beaty's execution but that the remaining aspects of the lethal injection protocol would be followed. In this notice, ADC also stated that the change was necessitated by information it had received that day from the United States Department of Justice, indicating that ADC's supply of sodium thiopental was imported without compliance with the Controlled Substances Act and could not be used.

Beaty filed a § 1983 complaint, asserting a due process violation from insufficient notice and arguing that a last-minute drug substitution would make it impossible for ADC to comply with the protocol's training requirement, thus subjecting him to a substantial risk of pain and suffering. This Court denied injunctive relief, concluding that the lack of practice with pentobarbital was insufficient to demonstrate a risk of serious harm in light of the protocol's safeguards ensuring the prisoner's anesthetization prior to administration of pancuronium bromide and potassium chloride. *Beaty v. Brewer*, 791 F.Supp.2d 678, 684 (D. Ariz. 2011). The Ninth Circuit affirmed. *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir.), *cert. denied*, 131 S. Ct. 2929 (2011).

On June 10, 2011, ADC amended Department Order 710 to provide for the administration of sodium thiopental or pentobarbital as the first of the three sequentially-administered drugs in its lethal injection protocol.

On July 15, 2011, Thomas West, along with the plaintiffs in *Dickens*, filed a § 1983 complaint challenging ADC's implementation of its lethal injection protocol. Specifically, the plaintiffs alleged that ADC's failure to follow its written protocol and the addition of pentobarbital created a substantial risk of unnecessary pain and violated their rights to due process and equal protection. West also sought emergency injunctive relief to enjoin his

impending execution, which was denied. *See West v. Brewer*, CV-11-1409-PHX-NVW, 2011 WL 2836754 (D. Ariz. Jul. 18, 2011) (unpublished order), *aff'd*, 652 F.3d 1060 (9th Cir.), *cert. denied*, 131 S. Ct. 3092 (2011). Thereafter, this Court denied a motion for summary dismissal and ordered expedited discovery.

Following a bench trial in December 2011, the Court entered judgment against the *West* plaintiffs, finding no constitutional infirmities from ADC's implementation of its lethal injection protocol. *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628 (D. Ariz. Dec. 21, 2011) (unpublished order), *appeal docketed*, No. 12-15009 (9th Cir. Jan. 3, 2012). In particular, the Court determined that none of the complained-of deviations—default use of a femoral central intravenous ("IV") line; failure to conduct required background checks of the IV team members, document their qualifications, and ensure IV-setting as part of their current professional duties; and failure to affix multiple labels on syringes and accurately document disposal of unused drugs—created a substantial risk the plaintiffs would be improperly anesthetized or otherwise suffer needless suffering and severe pain. The Court noted that ADC Director Charles L. Ryan has "discretion to deviate from the written protocol when safety, security, or medical issues in individual circumstances require temporary deviation from the written protocol." *Id.* at *11. However, the Court further observed that the written protocol should reflect actual practice and should be amended if "ADC no longer intends to follow the protocol as currently written." *Id.*

On January 25, 2012, ADC again amended Department Order 710 ("the January 2012 Protocol"). The revised protocol permits execution using either a three-drug or one-drug protocol and requires ADC's director to choose between these two protocols at least seven days prior to a scheduled execution. Ariz. Dep't Corr., Dep't Order 710, § 710.01, ¶ 1.1.2.4 & Attach. D, § C.1 (Jan. 25, 2012) (hereinafter "DO 710 (Jan. 2012)"). The protocol further directs that the director, upon consultation with the IV team leader, shall determine the catheter sites and that a central femoral venous line may not be utilized unless placed by a medically-licensed physician with relevant experience. DO 710 (Jan. 2012), § 710.02, ¶ 1.2.5.4 & Attach. D, § E.1.

The January 2012 Protocol also changed the composition and experience requirements for the IV (Medical) team:

> 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.

DO 710 (Jan. 2012), § 710.02, ¶ 1.2.5.1 (emphasis added). The previous version used the phrase "or other medically trained personnel" instead of "other appropriately trained personnel" and required one year of "*current* and relevant *professional* experience in their assigned duties on the Medical Team" rather than just one year of "relevant experience." Ariz. Dep't Corr., Dep't Order 710, Attach. D, § B.1 (Sept. 12, 2011) (hereinafter "DO 710 (Sept. 2011)"). In addition, the revised protocol requires IV team members to participate in "at least one training session with multiple scenarios within one day prior to a scheduled execution" rather than ten execution "rehearsals" annually as previously required. DO 710 (Jan. 2012), §§ 710.02, ¶ 1.1.2, 710.02, ¶ 1.2.5.5; DO 710 (Sept. 2011), Attach. D, § B.5. Finally, the revised protocol permits only telephonic contact between an inmate and his attorney after 9:00 p.m. the night before a scheduled execution, whereas previously counsel were permitted unlimited non-contact visitation. DO 710 (Jan. 2012), § 710.11, ¶ 1.5; DO 710 (Sept. 2011), § 710.09, ¶ 1.5.

On February 6, 2012, Plaintiffs filed a complaint pursuant to 42 U.S.C. § 1983, challenging the manner and means by which ADC intends to execute condemned inmates by lethal injection. (Doc. 1.) Specifically, Plaintiffs alleged that on its face ADC's revised protocol impermissibly eliminates safeguards, increases the ADC director's discretion, and codifies arbitrary and disparate treatment of capital prisoners, in violation of the Eighth and Fourteenth Amendments. Plaintiffs further alleged constitutional violations from ADC's intent to execute them using the three-drug protocol, including use of pancuronium bromide imported from a foreign source, instead of the one-drug option. Finally, Plaintiffs alleged that the January 2012 Protocol violates their due process right to notice concerning the

specific drugs and venous access to be used during execution and their right of access to counsel and the courts.

On February 14, 2012, Plaintiffs Moormann and Towery, who had been notified pursuant to the January 2012 Protocol that ADC intended to execute them using the three-drug protocol, moved for a preliminary injunction to enjoin their impending executions. Following a hearing, at which neither party presented witnesses, the Court denied injunctive relief. (Doc. 42.) On February 27, less than 48 hours before the first scheduled execution and immediately preceding oral argument before the Ninth Circuit, ADC discovered belatedly that its foreign-supplied pancuronium bromide had expired the previous month and filed notice of intent to administer the one-drug protocol using domestically-obtained pentobarbital. *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). During argument to the Ninth Circuit, counsel for ADC made representations regarding the qualifications of the IV Team in place for the impending executions, preparation of backup syringes, and attorney-client visitation the morning of the executions. *Id.* at 658. The appellate court ultimately determined that Plaintiffs had failed to establish a likelihood of success on the merits of their Eighth Amendment and equal protection challenges. *Id.* at 659-61.

Between February 29 and April 25, 2012, ADC carried out the executions of Plaintiffs Moormann, Towery, and Kemp using the one-drug protocol. Each had either a peripheral catheter, femoral catheter, or both inserted as the primary and backup IV lines during the execution process. With regard to Towery, the IV Team made numerous unsuccessful attempts to set a primary peripheral catheter, ultimately inserting a femoral central line for the primary IV and a peripheral catheter in the prisoner's hand as the backup line.

On April 19, 2012, Plaintiffs filed a second amended complaint, alleging new claims based on application of the January 2012 Protocol and withdrawing the claim concerning foreign-imported pancuronium bromide. Specifically, the amended complaint alleged that ADC treated Towery differently from other prisoners by spending nearly an hour to set the IV catheters and that this differential treatment burdened Towery's fundamental right to be free from cruel and unusual punishment. Plaintiffs also alleged that Towery was denied

access to counsel during ADC's attempts to set the IV catheters and thus, as applied, the January 2012 Protocol prevents Plaintiffs from asserting legal claims based on their right to be free from torture or a lingering death.

Plaintiff Lopez filed the instant motion for preliminary injunctive relief on May 1, 2012. Defendants filed a response, and Lopez filed a reply. (Docs. 64, 65.)

DISCUSSION

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). An injunction may be granted only where the movant shows that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). Under the "serious questions" version of the sliding-scale test, a preliminary injunction is appropriate when a plaintiff demonstrates that "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted). This approach requires that the elements of the preliminary injunction test be balanced, so that a stronger showing of one element may offset a weaker showing of another. "'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.*

In the context of a capital case, the Supreme Court has emphasized that these principles apply when a condemned prisoner asks a federal court to enjoin his impending execution because "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). Rather, "a stay of execution is an equitable remedy" and "equity

must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584.

I. Merits of Claims

Lopez asserts that he can meet the preliminary injunction standard on each of the claims raised in his second amended complaint. His motion is based in large measure on ADC's implementation of the January 2012 Protocol in the Moormann, Towery, and Kemp executions.

A. Eighth Amendment

The Eighth Amendment "prohibits punishments that involve the unnecessary and wanton inflictions of pain, or that are inconsistent with evolving standards of decency that mark the progress of a maturing society." *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004). That prohibition necessarily applies to the punishment of death, precluding executions that "involve torture or a lingering death, or do not accord with the dignity of man." *Beardslee v. Woodford*, 395 F.3d at 1070 (internal citations omitted). A violation of the Eighth Amendment can be established by demonstrating there is a "substantial risk of serious harm" that is sure or very likely to cause pain and needless suffering. *Dickens v. Brewer*, 631 F.3d at 1144-46 (adopting *Baze* plurality); *see also Brewer v. Landrigan*, 131 S. Ct. at 445. The risk must be an "'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Baze*, 553 U.S. at 50 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

Lopez argues that ADC's actions surrounding the insertion of IV catheters in condemned prisoners demonstrates an objectively intolerable risk of harm. (Doc. 62 at 24-25.) Specifically, Lopez asserts that Towery was subjected to a risk of "pain and discomfort" from the placement of a backup IV line in one of his hands after the IV Team was unable to place a line in either of his arms, and that Kemp was subjected to an increased risk of pain and suffering from placement of a femoral central line. (*Id.* at 25.) This Court previously rejected the argument that use of a femoral central line creates a risk of constitutionally unacceptable pain and suffering:

> In *Baze*, the Court stated, "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." 553 U.S. at 50. In addition, "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Id.* at 51. "To qualify, the alternative procedure must be feasible, readily implemented, and in fact *significantly* reduce a *substantial* risk of *severe* pain." *Id.* at 52 (emphasis added).
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> At trial Plaintiffs' expert described the process involved in placing a femoral central line. Unlike a peripheral IV, for which the needle and catheter are one unit and are placed just below the surface of the skin into a visible vein, a central line requires use of a larger needle to go through skin, subcutaneous tissue, and muscle to reach the larger femoral vein. An ultrasound is used to locate the vein and a local anesthetic (lidocaine) is applied. Once the needle reaches the vein, a guide wire is threaded into the vein, the needle is removed, the skin next to the wire is incised with a scalpel to enlarge the opening, a dilator slightly larger than the catheter is used to clear a wider path, and then the catheter is placed and secured with two sutures or staples. Unlike a peripheral IV, the placement of a central line requires an advanced level of training and is ordinarily undertaken only by a physician.
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> At most, the evidence at trial showed that a prisoner may experience some pain and discomfort during placement of a central line if the topical anesthetic is improperly administered before the skin is punctured. However, this pain, as Plaintiffs' own expert conceded, is difficult to quantify. The evidence at trial also demonstrated that none of the prisoners during the past five executions verbally complained of, or appeared to experience, any pain while [the Medical Team Leader] placed the central line.
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> Therefore, the Court finds that any pain attendant to placement of a central line, beyond that likely to accompany placement of a peripheral IV line, falls far short of the severity needed to trigger an Eighth Amendment violation. *Cf. Baze*, 553 U.S. at 53 (describing the "constitutionally unacceptable" pain from suffocation and cardiac arrest a prisoner would experience if not fully anesthetized prior to administration of pancuronium bromide and potassium chloride). Accordingly, the Eighth Amendment does not require that ADC administer the drugs through a peripheral vein whenever feasible. To find otherwise would in effect turn this Court into a "board[] of inquiry charged with determining 'best practices' for executions." *Id.* at 51.

West, 2011 WL 6724628, at *17-18.

Lopez has not cited any legal authority or alleged any facts that bring into question the prior conclusion in *West* that the Eighth Amendment is not offended by administration of lethal chemicals through a femoral central line. Nor is there any persuasive or even colorable reason to think that placement of a peripheral IV line in a prisoner's hand, while possibly more uncomfortable than other peripheral sites, poses an objectively intolerable risk of severe pain that qualifies as cruel and unusual. Indeed, the IV line was placed in Towery's

hand only after placement at all preferable peripheral sites had failed. The contention that Towery was thus subjected to cruel and unusual punishment because it was necessary to place the backup IV in his hand is meritless.

Therefore, Lopez's assertion that the IV-placement process in the Towery execution gives rise to an objectively intolerable risk of serious harm in future executions is also meritless. Again, an objectively intolerable risk of pain for purposes of the Eighth Amendment is not established "[s]imply because an execution method *may result in pain*, either by accident or as an inescapable consequence of death." *Baze*, 553 U.S. at 50 (emphasis added). Repeated punctures in IV-placement attempts are not uncommon in the execution context, as shown by the evidence in the *West* litigation, and do not result in the type of pain prohibited by the Eighth Amendment. Nor is it rare in therapeutic medicine. Lopez asserts that both the femoral artery and the femoral vein were punctured and that Towery likely experienced pain as a result. (Doc. 65 at 3.) He further asserts that ADC administered lethal chemicals to Robert Comer through his femoral artery. (*Id.*) Accepting these allegations as true, they fall far short of showing that arterial administration results in a constitutionally unacceptable level of pain. Moreover, the Supreme Court has emphasized that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a substantial risk of serious harm." *Baze*, 553 U.S. at 50 (internal citation omitted). The difficulty and delay in placing two working IV lines in Towery appears to be atypical and may very well have been a result of his having been a habitual intravenous drug user. *See Towery v. Ryan*, 641 F.3d 300, 313 (9th Cir. 2010). While undoubtedly disquieting to a condemned inmate awaiting execution, repeated efforts to set IV lines do not, in and of themselves, suggest malevolence from Defendants, extreme pain, or even unnecessary pain. For these reasons Lopez has failed to show either "serious questions" or a likelihood of success on the merits of an Eighth Amendment claim based on placement of IV lines in past executions.

Lopez also asserts that Defendants "have designed a protocol that permits unfettered

discretion at the very points where *Baze* sought to limit the potential for error through safeguards" and thus Arizona's lethal injection protocol is "outside the constitutional framework constructed in *Baze*." (Doc. 62 at 25.) However, Lopez acknowledges that *Baze* considered the risk of pain only in the context of administering a three-drug protocol. (*Id.* at 24.) In *Baze*, the safeguards against maladministration of the first anesthetic drug were found important because there is no dispute that administration of pancuronium bromide and potassium chloride to a conscious individual will cause excruciating pain and suffering. *Baze*, 553 U.S. at 53-56. Here, ADC has notified Lopez that it intends to administer the one-drug protocol, the same method of execution advocated by both the plaintiff in *Baze* and the plaintiffs in *Dickens* and *West*. Under Arizona's one-drug protocol, ADC will administer only a lethal dose of anesthetic; it will not administer either pancuronium bromide or potassium chloride. Thus, Lopez's concern that Arizona's one-drug protocol is "outside the constitutional framework" of *Baze* does not survive scrutiny.

A one-drug protocol using a lethal dose of barbiturate is not immune from attack under the Eighth Amendment. However, in the context of the complaint in this case, Plaintiffs have not asserted that maladministration of the lethal chemical used in Arizona's one-drug regimen will cause substantial pain.[2] Rather, the Eighth Amendment claim presented in the complaint is that a condemned inmate may not be sufficiently unconscious when receiving a dose of pancuronium bromide and potassium chloride. (*See* Doc. 58 at 22 ("The January 2012 Protocol no longer has constitutionally adequate protections to ensure that a prisoner will not suffer *from the second and third drugs*."); *see also* Doc. 8 at 8 ("[U]se of a barbiturate-only protocol would eliminate the risk of substantial pain that would occur if pancuronium bromide and potassium chloride were administered to an improperly

[2]Although he does not directly assert that Kemp experienced substantial pain as a result of being injected with pentobarbital, Lopez references a witness's statement that Kemp shook "violently" for five or six seconds, possibly as a result of a partial seizure. (Doc. 62 at 13.) If in fact Lopez is asserting that execution using only a lethal dose of pentobarbital results in constitutionally unacceptable pain, there is insufficient evidence in the record to establish a likelihood of success on such a claim.

anesthetized prisoner.").) Lopez has not demonstrated any objectively intolerable risk of pain from administration of the one-drug protocol.

B. Disparate Treatment

Lopez argues that, on its face and as applied, the January 2012 Protocol violates his right to equal protection. (Doc. 62 at 20.) The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A state practice that discriminates against a suspect class of individuals or interferes with a fundamental right is subject to strict scrutiny. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Lopez asserts that Defendants' disparate treatment of different condemned inmates burdens his right to be free from cruel and unusual punishment.[3]

In *Towery*, the Ninth Circuit observed that a prisoner's right to be free from cruel and unusual punishment "is not affected simply because that prisoner is treated less favorably than another, where one means of execution is no more likely to create a risk of cruel and unusual punishment than the other, and both are constitutionally available." *Towery*, 672 F.3d at 660. However, a risk of being subjected to cruel and unusual punishment may be implicated if plaintiffs show an actual pattern of treating prisoners differently in ways that "affect the *risk* of pain to which they would be subjected." *Id.* Lopez argues that each of the prisoners that have been executed since adoption of the January 2012 Protocol have been treated differently with respect to placement of the IV catheters and that these variances affected the risk of pain to which each was subjected. (Doc. 62 at 23.) That is mistaken.

First, the Ninth Circuit has recognized that the task of selecting which IV site to use may appropriately be made on a case-by-case basis, based on "individualized and changing factors" such as the condition of a prisoner's veins. *Towery*, 672 F.3d at 661. Second, in *Towery*, the Ninth Circuit found that Plaintiffs had failed to show a pattern of treating

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[3]Lopez does not urge the class-of-one equal protection theory advanced by Moormann and Towery in their motion for preliminary injunction. It is difficult to see how any such claim could survive after *Towery*. 672 F.3d at 660-61 (rejecting class-of-one argument).

prisoners differently in ways that affected the risk of pain, either generally or with respect to the planned application of the January 2012 Protocol to Moormann and Towery, including the fact that ADC's Director had the discretion to decide whether to use peripheral or central femoral IV access after consultation with the IV Team Leader. *Id.* at 659-60. There is no dispute that at the time of the *Towery* decision, ADC had utilized either peripheral or femoral (or both) IV lines in carrying out each of the previous 26 executions by lethal injection. Third, as already addressed above, use of a femoral catheter is no more likely to create a risk of cruel and unusual punishment than use of a peripheral catheter. For these reasons, Lopez has not raised serious questions or shown a likelihood of success on the merits of his equal protection claim.

C. Lack of Notice

Lopez argues that the January 2012 Protocol fails to provide reasonable notice of "critical aspects" of the mode and manner in which Defendants will carry out executions, including the method of IV access and the qualifications of the individuals placing the IV catheters. (Doc. 62 at 16.) He asserts that failing to provide this information and preventing access to counsel during the insertion of IV lines deprives him of his right to notice and an opportunity to be heard under the Due Process Clause of the Fourteenth Amendment.[4] Plaintiffs Moormann and Towery raised a similar claim in their motion for preliminary injunction, which the Court found wanting.[5] (Doc. 42 at 24-26.) Lopez has provided no new authority that was not previously considered by the Court.

To establish a procedural due process violation, Plaintiffs must show that (1) they had a property or liberty interest with which Defendants interfered, and (2) Defendants failed to use constitutionally sufficient procedures in depriving Plaintiffs of that right. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). "[A]n individual claiming a

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[4]The access-to-counsel issue is discussed next in Section I.D.

[5]Plaintiffs did not appeal this aspect of the Court's ruling. *See Towery*, 672 F.3d at 656 n.3.

protected interest must have a legitimate claim of entitlement to it. Protected liberty interests 'may arise from two sources—the Due Process Clause itself and the laws of the States.'" *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)).

Lopez does not allege that Arizona law creates an enforceable liberty interest. Indeed, as explained in the Court's prior order, Arizona's lethal injection protocol is not statutory—it is issued by ADC and sets out technical procedures for carrying out lethal injection. (Doc. 42 at 18.) Rather, Lopez relies on a district court ruling in *Oken v. Sizer*, 321 F.Supp. 2d 658, 664 (D. Md.), *stay vacated*, 542 U.S. 916 (2004) (Mem.), in which the court stated: "Fundamental fairness, if not due process, requires that the execution protocol that will regulate an inmate's death be forwarded to him in prompt and timely fashion." However, there is no dispute that Lopez has access to ADC's protocol. The issue is whether he has a due process right to advance notice of the intended method of IV access and the qualifications of the IV Team who will be placing the IV catheters. He does not.

First, Lopez has pointed to no authority suggesting he has a right, prior to an execution, to challenge the qualifications of the IV Team or the method of intravenous access. *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). Second, Lopez has not shown that lack of such notice will impair consideration of a colorable Eighth Amendment claim. To require the requested notice would in effect permit constitutional challenges based on speculative injuries and the possibility of negligent administration. The Sixth Circuit has recognized that such actions are

> not only unsupported by Supreme Court precedent but [are] also beyond the scope of our judicial authority. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 174-75 (1976) ("[W]hile we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators."). While the Eighth Amendment does provide a necessary and not insubstantial check on states' authority to devise execution protocols, its purpose is not to substitute the court's judgment of best practices for each detailed step in the procedure for that of corrections officials. *See Baze*, 128 S. Ct. at 1537 ("[A]n inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner.").

Cooey v. Strickland, 589 F.3d 210, 225 (6th Cir. 2009).

Lopez has not shown any credible prospect that information concerning venous access and the IV Team will lead to presentation of a viable Eighth Amendment claim. Specifically, Lopez has not alleged any facts to support the inference that the risk of pain and suffering during a lethal injection execution changes substantially based on the siting of the intravenous access, and the Court has rejected the argument that use of a femoral central line creates a risk of constitutionally unacceptable pain and suffering. *See West*, 2011 WL 6724628, at *17-18. Therefore, due process does not require advance notice of intended venous access sites.

Similarly, any pre-execution challenge based on qualifications of the IV Team would likely fail to establish a substantial risk of serious harm. Before both this Court and the Ninth Circuit, Defendants asserted that the "relevant experience" necessary for selection to the IV Team under the revised protocol "means that IV Team members must have no less than the training that is traditionally given for people to be licensed to place IVs." *Towery*, 672 F.3d at 658. This representation is "binding" as to the meaning of "appropriately trained" and "relevant experience" in the context of the January 2012 Protocol. *Id.* Moreover, the protocol requires that a central femoral line be placed only by a medically-licensed physician with at least one year of relevant experience placing such lines. DO 710 (Jan. 2012), § 710.02, ¶ 1.2.5.1, ¶ 1.2.5.4 & Attach. D, § E.1. Given these requirements, any pre-execution challenge to the qualifications of individual IV Team members would necessarily be based on speculation as to their ability to set IV catheters. Consequently, due process does not demand more notice than is already set forth in the protocol concerning the qualifications of the IV Team.

The lack of correlation between the due process right alleged in this case and the ability to pursue a claim of cruel and unusual punishment is even more pronounced here because Lopez will be executed using a one-drug protocol, and he has not alleged or identified the harm that would result from faulty IV siting or deficient IV Team

qualifications. Again, implementation of a one-drug protocol is not immune from attack under the Eighth Amendment. However, Lopez simply has not articulated any specific harm from the risk of maladministration of a barbiturate in the absence of pancuronium bromide and potassium chloride also being administered as part of the execution protocol.

In substance, the relief Plaintiffs seek under the guise of due process is a right to judicial pre-clearance in every execution regarding whether ADC will comply with its protocol and how it will deal with contingencies. This is simply not a proper role for the judiciary in the absence of a demonstrated likely deprivation of constitutional rights. Admittedly, ADC does not have a perfect track record in the way it has administered and changed its protocol since resumption of executions in October 2010. *See Towery*, 672 F.3d at 653. Most recently, ADC's failure to discover until the last minute the expiration of its supply of pancuronium bromide, forcing an unexpected, eve-of-execution switch to the one-drug protocol, is inexplicable. On the other hand, at least one last-minute change—the switch to pentobarbital on the eve of Beaty's execution—was driven by inmate litigation, not caprice.

In *West*, testimony was heard concerning the importation of sodium thiopental and the Department of Justice's eve-of-execution request that the imported drug not be used in Beaty's execution. The evidence showed that it was reasonable for ADC to believe the FDA had "approved" the drug's importation, that ADC was unaware of certain DEA requirements for importing sodium thiopental, and that ADC did not intentionally or knowingly import drugs unlawfully. *West*, 2011 WL 6724628, at *19. Although ADC had deviated from its protocol either inadvertently or by design, such deviations were not undertaken in bad faith and none subjected condemned inmates to an objectively intolerable risk of harm. *Id.* at *17. Consequently, the plaintiffs' contentions that ADC could not be trusted to adhere to its protocol and that judicial oversight was necessary to ensure protocol compliance were unpersuasive. Similarly, nothing in the instant motion carries the burden of persuasion.

D. Access to Counsel and Courts

The January 2012 Protocol precludes in-person legal visitation after 9:00 p.m. the day

before a scheduled execution, instead permitting only telephonic contact with attorneys of record. Lopez alleges such calls will take place in a holding cell where ADC officers will be present and thus there will be "no opportunity for privileged communication." (Doc. 62 at 18.) This restriction, Lopez asserts, violates his rights to meaningful access to counsel and the courts under the First, Fifth, Eighth, and Fourteenth Amendments.

In its prior order denying injunctive relief for Moormann and Towery, the Court addressed this claim and determined that Plaintiffs had failed to establish a likelihood of success on the merits. (Doc. 42 at 26-28.) During oral argument before the Ninth Circuit, counsel for Defendants agreed to the panel's request to permit counsel for Towery and Moormann to meet in person with their clients the morning of each execution, thus mooting appeal of the issue for Towery and Moormann. *Towery*, 672 F.3d at 658. The court referenced ADC's "long-standing" practice of permitting such visitation. *Id.*

Although Lopez asserts he has no reason to believe ADC will permit similar access, Defendants state in their response that counsel for Lopez will be permitted in-person visitation the morning of the execution up to 7:00 a.m. (Doc. 64 at 13.) Defendants assert that morning-of visitation was permitted from 6:00 to 7:00 a.m. for the Landrigan, King, Beaty, Bible, and West executions, and that, notwithstanding the terms of the current protocol, ADC intends to offer the same visitation terms to counsel for Lopez. Lopez asserts that he should be permitted visitation at least until 45 minutes before the start of the 10:00 a.m. execution, as directed by the Ninth Circuit for the executions of Moormann and Towery. *See Towery*, 672 F.3d at 658 (referencing 2004 version of Department Order 710). The issue of meeting in person with counsel up to 7:00 a.m. may not be technically moot, but Lopez's fear that ADC will dishonor its commitment to allow such access is unpersuasive, especially in light of ADC's honoring its commitment made to the Ninth Circuit concerning the Towery and Moormann executions.

The dispute remains concerning in-person meeting with counsel from 7:00 a.m. up to and during the execution. This Court previously determined that Plaintiffs had not shown a likelihood of success on their access-to-courts claim based on the visitation policy change

enacted by the January 2012 Protocol. The Court adopts its previous conclusion, which applies with stronger force the closer the time of execution approaches. Communication with counsel by telephone is still permitted past 7:00 a.m. It is difficult to see how Lopez could speak in confidence with his lawyer in person, but not in confidence on the telephone, as he conclusorily asserts. Like Towery and Moorman before him, Lopez makes no attempt to show that confidential telephone communication cannot be effective in the three hours before execution. The legitimate purpose of access to courts is served by telephonic contact. Moreover, after the exhaustive and repetitive litigations that Lopez's counsel have conducted in numerous prior executions, the chance of anything happening in the last minutes that could result in successful immediate litigation attenuates well below the threshold for injunctive relief.

Lopez also argues that he is entitled to have counsel observe the IV-placement procedure. (Doc. 62 at 19; Doc. 65 at 4 n.3.) He alleges that ADC refused Towery's request to meet with counsel during the hour it took to set functioning IV lines and that without such access he will be denied meaningful access to the courts.

Prisoners have a constitutional right of access to the courts that is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). However, this right "guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis v. Casey*, 518 U.S. 343, 354 (1996). Consequently, an inmate who brings a § 1983 claim based on his right of access to the courts must be able to show that the infringing act somehow defeated his ability to pursue a legal claim. That is, a prisoner must show he suffered an "actual injury" as a result of the defendant's actions. *Id*. at 348-49. An "actual injury" is "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." *Id.* at 348. The right of access does not create "an abstract, freestanding right," but exists to vindicate other rights. *Id.* at 351.

Lopez does not identify any contemplated litigation that will be inhibited by the lack

of access to counsel during the IV-placement procedure, other than to speculate that some circumstance may arise immediately prior to his execution that presents a constitutional concern. This is insufficient to demonstrate actual injury under *Lewis v. Casey*. Moreover, as discussed above, repeated attempts to place an IV line do not raise a *per se* claim of cruel and unusual punishment. If the IV Team is unable to place a functioning IV line, Arizona's protocol provides that the Director may restart the procedure at a later time within the warrant's 24-hour period or abandon the effort altogether. DO 710 (Jan. 2012), Attach. D, § I.3. In such event, nothing in Arizona's protocol precludes the prisoner from access to counsel and, consequently, pursuit of any appropriate judicial remedies.

Lopez's argument from the circumstances of the Towery execution especially fails. Even with after-the-fact examination, there was nothing in the Towery execution that would have warranted judicial proceedings. The difficulty of finding IV access sites required immediate further effort by the IV Team, not intervention by this Court.

II. Irreparable Harm, Balance of Equities, and Public Interest

Although there is a likelihood of irreparable harm in every § 1983 action challenging a proposed method of execution, that factor alone is insufficient to warrant injunctive relief where there is no significant possibility of success on the merits. In *Hill v. McDonough*, the 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. Given the State's "strong interest in enforcing its criminal 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," the Court concludes 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.

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IT IS THEREFORE ORDERED that the Motion by Plaintiff Lopez for Preliminary Injunction (Doc. 62) is **DENIED**.

DATED this 7th day of May, 2012.

Neil V. Wake
United States District Judge