No. 12-16084

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Samuel Lopez, Plaintiff-Appellant,
vs.
Janice K. Brewer, et al., Defendants-Appellees.

* * * CAPITAL CASE * * *
EXECUTION SET MAY 16, 2012, at 10AM MST

Appeal from United States District Court for the District of Arizona
Hon. Neil V. Wake, District Judge, Presiding
Dist. Ct. No. 2:12-cv-00245-NVW

EXCERPTS OF RECORD
VOLUME 2: ERs 089 through 243

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Excerpts of Record

Volume 1 (ERs 001-088):

ER 001: Notice of Preliminary Injunction Appeal, filed May 7, 2012 [USDC ECF No. 67]

ER 003: Order Denying Motion for Preliminary Injunction, filed May 7, 2012 [USDC ECF No. 66]

ER 023: Reply to Response to Motion for Preliminary Injunction (including Exhibits KK-OO), filed May 5, 2012 [USDC ECF No. 65]

- ER 032: Exhibit KK: Email from Eric D. Peters, M.D., to Robin Konrad, dated May 4, 2012
- ER 034: Exhibit LL: Summary Statement of Joseph I. Cohen, M.D., dated May 5, 2012
- ER 036: Exhibit MM: Nembutal Sodium, FDA Label
- ER 048: Exhibit NN: Excerpt Transcript Testimony of Mark Dershwitz, M.D., pp. 89-96, dated December 9, 2008
- ER 052: Exhibit OO: Autopsy Report of Robert C. Comer, dated May 23, 2007

ER 069: Answer to Second Amended Complaint, filed May 2, 2012 [USDC ECF No. 63]

Volume 2 (ERs 089-243):

ER 089: Motion by Plaintiff Samuel Lopez for Preliminary Injunction (including Exhibits X-JJ), filed May 2, 2012 [USDC ECF No. 62]

- ER 121: Exhibit X: Declaration of Timothy M. Gabrielsen, dated April 30, 2012
- ER 125: Exhibit Y: Declaration of Dale A. Baich, dated April 30, 2012
- ER 129: Exhibit Z: Private Autopsy Examination of Thomas Kemp, Declaration of Joseph I. Cohen, M.D., dated April 30, 2012
- ER 132: Exhibit AA: Declaration of Eric D. Katz, M.D., dated April 30, 2012
- ER 135: Exhibit BB: Excerpt Transcript Testimony of Eric Katz, M.D., pp. 19-25, 50-51, *West v. Brewer*, No. 2:11-cv-01409 (D. Ariz.), December 7, 2011

ER 147: Exhibit CC: Excerpt Transcript Testimony of Medical Team Leader, pp. 32-33, *West v. Brewer*, No. 2:11-cv-01409 (D. Ariz.), December 6, 2011

ER 152: Exhibit DD: Declaration of Angela Fairchild, dated April 30, 2012 (including Attachments 1-6)

ER 154: Attachment 1: ADC Correctional Service Log, Housing Unit 9 Section Leader, dated March 8, 2012

ER 163: Attachment 2: ADC Correctional Service Log, Housing Unit 9 Special Operations, dated March 8, 2012

ER 166: Attachment 3: Execution Log, Towery, ADC #051550

ER 169: Attachment 4: ADC Correctional Service Log, Housing Unit 9 Section Leader, dated February 29, 2012

ER 176: Attachment 5: ADC Correctional Service Log, Housing Unit 9 Special Operations, dated February 29, 2012

ER 180: Attachment 6: Execution Log, Moormann, ADC # 31293

ER 183: Exhibit EE: Letter from Charles Ryan to the Arizona Supreme Court, dated February 9, 2012, Re: Execution of Robert Moormann

ER 185: Exhibit FF: Letter from Charles Ryan to the Arizona Supreme Court, dated February 17, 2012, Re: Execution of Robert Towery

ER 187: Exhibit GG: Letter from Charles Ryan to the Arizona Supreme Court, dated March 28, 2012, Re: Execution of Thomas Kemp

ER 190: Exhibit HH: Letter from Charles Ryan to the Arizona Supreme Court, dated April 16, 2012, Re: Execution of Samuel Lopez

ER 192: Exhibit II: Letter from Charles Ryan to Samuel Villegas Lopez, dated April 20, 2012, Re: Choice of Protocol

ER 194: Exhibit JJ: Letter from Charles Ryan to Dale Baich, dated April 2, 2012, Re: Attorney Visitation

ER 196: Second Amended Complaint, filed April 19, 2012 [USDC ECF No. 58]

ER 227: Exhibits U and W to Reply to Response to Motion for Court-Ordered Settlement Conference Pursuant to Local Civil Rule 83.10, and Motion for Stay of Proceedings, filed April 2, 2012 [USDC ECF No. 54-1]

ER 227: Exhibit U: Letter from Charles Ryan to Dale Baich, March 22, 2012

ER 229: Exhibit W: Private Autopsy Examination of Robert Charles Towery, Performed by Joseph I. Cohen, M.D., dated April 2, 2012

ER 236: Motion for Leave to File Second Amended Complaint, filed April 2, 2012 [USDC ECF No. 53]

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Volume 3 (ERs 244-296):

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ER 280: Autopsy Photos from Execution of Thomas Kemp
ER 280: Photo No. C4U52904
ER 281: Photo No. C4U52906
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ER 283: Docket

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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 MOTION BY PLAINTIFF SAMUEL LOPEZ FOR PRELIMINARY INJUNCTION Expedited Oral Argument and Evidentiary Hearing Requested **DEATH-PENALTY CASE** **Execution Scheduled May 16, 2012 at 10 a.m.**

Plaintiff Samuel Lopez, having filed his Complaint in the above-captioned case, moves pursuant to Federal Rule of Civil Procedure 65(a) for a preliminary injunction barring Defendants from executing him on May 16, 2012, under the Arizona Department of Corrections ("ADC")'s execution protocol that went into effect on January 25, 2012 (the "January 2012 Protocol"). Lopez seeks injunctive relief barring Defendants and each of

them and/or their agents from acting jointly or severally to execute Lopez on his execution date in a manner that will deprive him of his rights in violation of his First, Fifth, Eighth, and Fourteenth Amendment rights under the United States Constitution and 42 U.S.C. § 1983.

In light of his impending execution date, a preliminary injunction is necessary to allow Lopez to litigate his claims. Lopez also requests expedited discovery, oral argument, and an evidentiary hearing on his motion. This motion is supported by the attached memorandum.

Respectfully submitted this 1st day of May, 2012.

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

"Because the death penalty is undeniably the most serious penalty available to a State, the procedures for such penalty must be implemented in a reasoned, deliberate, and constitutional manner." *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012). The State of Arizona has continually failed to implement their execution procedures consistent with this requirement.

Since 2007, this Court has heard claims related to the constitutionality of Arizona's execution procedures. When condemned prisoners have mounted a meritorious challenge to the State's procedures, the State has responded by changing its written protocol or simply by making avowals of change to the Court, thereby insulating its practices from judicial scrutiny. On January 25, 2012, for the seventh time since the litigation began, Arizona changed its written lethal-injection protocol. In doing so, it removed the previously adopted written safeguards and instead gave complete discretion to the ADC Director. To date, no federal court has undertaken a review of the constitutionality of the January 2012 Protocol as written or as applied.

The State of Arizona has executed three prisoners since it last changed its protocol and issued the January Protocol: Robert Moormann (February 29, 2012); Robert Towery (March 8, 2012); and Thomas Kemp (April 25, 2012). Moormann's and Towery's executions went forward not under the terms of the written protocol, but under the specific terms outlined and accepted by the Ninth Circuit. *See Towery*, 672 F.3d at 653 ("We find ourselves, once again, deciding not the merits of Arizona's written protocol, but the validity of the litigation-related, often case-specific, amendments to the protocol designed to ensure constitutionality."). Despite the representations made to this Court and the Ninth Circuit by the State, there were serious problems that occurred during Towery's execution. Although Towery was punctured at least eleven times, no catheters were placed in either of his arms. Towery was denied access to counsel during this hour-long ordeal, even though he asked, and even though the Director contacted the Attorney General's office. During the most recent execution, which

was carried out pursuant to the January 2012 Protocol (but without the alterations in place for Towery and Moormann), Kemp had a catheter placed in his femoral area and in his left arm. Witnesses also reported that Kemp shook violently for approximately six seconds before becoming unconscious.

In their Second Amended Complaint, Plaintiffs assert that the January 2012 Protocol violates their constitutional rights on six grounds: (1) safeguards that Defendants previously adopted to comply with the Eighth Amendment have been abandoned (*see* 2d Am. Compl. ¶¶ 130-144); (2) the discretionary nature of the January 2012 Protocol as written violates the Equal Protection Clause by treating similarly situated death-row prisoners differently and burdening their fundamental rights without providing adequate justification (*see id.* ¶¶ 171-87); (3) the discretionary nature of the January 2012 Protocol as applied violates the Equal Protection Clause by treating similarly situated death-row prisoners differently and burdening their fundamental rights without providing adequate justification (*see id.* ¶¶ 188-97); (4) the January 2012 Protocol provides inadequate notice as to the specific drug protocol and type of venous access to be used in an execution (*see id.* ¶¶ 198-209); (5) limitations on pre-execution attorney visits in the January 2012 Protocol violate Plaintiffs' rights to access counsel and the courts (*see id.* ¶¶ 210-20); and (6) limitations on access to counsel during an execution violate Plaintiffs' right to be free from cruel and unusual punishment (*see id.* ¶¶ 221-27).

In light of the impending execution date, a preliminary injunction is necessary to allow Lopez to litigate his claims.

I. Factual Background Before 2012

In 2007, a group of prisoners sentenced to death in Arizona brought an action for injunctive relief under 42 U.S.C. § 1983, alleging that Defendants' lethal-injection procedures violated the Eighth Amendment by allowing untrained and unqualified individuals to conduct executions, and requiring the use of a central femoral line to administer execution drugs. *Dickens v. Brewer*, No. 2:07-cv-1770 (D. Ariz.) (Compl., Sept. 14, 2007, Dkt. No. 1). In the course of that litigation, Defendants agreed to amend the

protocol to add crucial safeguards that decreased the risk of harm to condemned prisoners. In particular, Defendants agreed to set peripheral IV lines as the default access and to conduct proper vetting of individuals before retaining them to participate in executions. The court found that the protocol, once amended, did not violate the Eighth Amendment, and that there was no risk that ADC would intentionally deviate from its amended protocol. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

In fact, during the five executions carried out in 2010-2011, Defendants *did* deviate from the lethal-injection protocol in key ways, repeatedly failing to implement and adhere to the very safeguards they adopted in *Dickens* to comply with the Eighth Amendment. *See generally West. v. Brewer*, No. 2:11-cv-01409, 2011 WL 6724628 (D. Ariz. Dec. 21, 2011).[1] Defendants did not conduct background checks on medical team members before allowing those members to participate in executions, and one medical team member participated in all five executions despite his criminal background. *Id.* at *7. The medical team members did not have current experience in placing intravenous lines and one of the two members was not a licensed medical professional. *Id.* at *20-21. In all but one execution, Defendants deviated from the amended requirement that lethal drugs would "by default be administered through a peripheral intravenous line," and instead adopted a femoral central line as the default procedure. *Id.* at *14.

Defendants admitted that they had failed to follow their protocol, but took the position that these deviations were acceptable because ADC Director Charles Ryan had authorized them. *Id.* Asked to explain the many core deviations from the written protocol, Director Ryan testified that the written protocol provides him virtually unlimited discretion to deviate from its terms as he sees fit. *See West v. Brewer*, Doc. No. 104, Ex. 264 (Dep. Charles Ryan) at 150-153.

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[1] In 2011, the *Dickens* plaintiffs, along with Thomas West, brought an action for injunctive relief against Defendants, this time alleging that by repeatedly deviating from the lethal-injection protocol found facially constitutional in *Dickens*, Defendants were violating plaintiffs' constitutional rights. *See West v. Brewer*, No. 2:11-cv-01409 (D. Ariz, filed July 16, 2011).

II. Factual Background: 2012

On January 25, 2012, Defendants issued the January 2012 Protocol, which codified Defendants' position that ADC has unlimited discretion when carrying out executions by removing or altering nearly all of the safeguards added during the *Dickens* litigation, effectively giving the Director unfettered discretion to determine how each execution is performed. By eliminating clear standards for qualifications for execution team members (medical licensure and current, relevant experience are no longer required), the January 2012 Protocol significantly lowers the experience and qualification requirements for medical execution team members, allowing for the possibility that minimally qualified or even incompetent personnel will conduct executions.

The January 2012 Protocol also eliminates the use of a peripheral catheter as the default method for administering execution drugs. Instead, the ADC Director has complete discretion to decide whether to use peripheral or central femoral IV access, and the January 2012 Protocol does not inform prisoners when or how the Director will determine which type of IV access will be used. Unlike peripheral IV access, the placement of a central line is an invasive surgical procedure. (*See* Excerpted Testimony of Eric Katz, M.D., Trial Tr., Dec. 7, 2011, *West v. Brewer*, No. 2:11-cv-1409 (D. Ariz.), attached as Ex. BB at 19-25.) Placing a central femoral line requires the use of a larger needle than would be used for establishing a peripheral line, and the needle must be inserted into a femoral vein which, unlike a peripheral vein, is not visible from the skin. (*Id.* at 21.) Whereas placement of a peripheral IV requires the needle to go through only the skin to reach a vein, peripheral IV placement requires pushing the needle through the skin, the subcutaneous tissue, and the muscle before reaching the vein. (*Id.*) After the needle is inserted, a guide wire must be threaded through the needle into the vein. (*Id.*) Once the guide wire is in place, the skin is incised with a scalpel so that a plastic introducer piece approximately 4-5 millimeters long can bore a hole from the skin all the way to the vein and into the vein itself. (*Id.* at 21-22.) The catheter is then sutured to the skin using thread or staples. (*Id.* at 23-24.) Complications can arise from setting a femoral line—such as puncturing the femoral artery, tearing the femoral vein, or

puncturing the bladder—that would not arise in setting a peripheral IV. (*Id.* at 50-51.) Accordingly, only medical personnel with extensive training in this specific procedure should attempt to insert a femoral line. The January 2012 Protocol does not require that a person setting a femoral line have specific experience in performing this surgical procedure.

Finally, unlike prior ADC execution protocols,[2] the January 2012 Protocol denies condemned prisoners legal visits after 9:00 p.m. the day prior to a scheduled execution. Condemned prisoners are now allowed only telephonic contact with attorneys of record, which will take place in a holding cell in the presence of ADC officers with no opportunity for privileged communication.

This Court, and the Ninth Circuit, recently had a chance to review similar issues related to the constitutionality of the January 2012 Protocol. *See Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012); *Towery v. Brewer*, 2012 WL 592749 (D. Ariz. Feb. 23, 2012). While the Ninth Circuit denied the preliminary injunction motion for Robert Moormann and Robert Towery, it did so on different grounds than did the district court. *Towery*, 672 F.3d at 653. The Ninth Circuit permitted the executions of Moormann and Towery to proceed *not* based on the January 2012 Protocol, but *rather* based on the protocol "as amended by the State during oral argument." *Id.*

The Ninth Circuit relied on several critical representations made by Defendants' counsel in denying petitioners' request for a preliminary injunction.

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[2] *See* 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."); Department Order 710.09 (Sept. 15, 2009) Section 1.6.2 ("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."); Department Order 710.09 (May 12, 2011) Section 1.5.2 (same).

First, the Ninth Circuit relied on and adopted Defendants' representations regarding the qualifications of the IV Team. Defendants informed the Ninth Circuit that the IV team chosen for Moormann's and Towery's executions was "comprised of a licensed nurse with seventeen years of experience and a medically-licensed physician." *Id.* at 658. Moreover, Defendants informed the Court that "[b]oth of these individuals have had experience placing IVs within the last twelve months," outside of the execution context. *Id.*

Second, the Ninth Circuit relied on and adopted Defendants' representation regarding backup drugs. *Id.* In its opinion, the Court noted that Defendants represented that they would have an additional set of syringes of backup drugs during the executions of Towery and Moormann. *Id.* The Defendants also represented, and the Ninth Circuit relied upon and adopted, that there would be a primary catheter and a backup catheter. *Id.*

Finally, the Court found critical that Defendants represented that Towery and Moormann would be permitted in-person legal visits during the morning of the execution. *Id.* The Court indicated that its opinion was based on the "long-standing ADC practice, as reflected in Department Order 710–IO–F (Nov. 5, 2004), § 710.02, ¶ 1.3.3.5." *Id.*

A. Execution of Robert Moormann

Robert Moormann was scheduled to be executed on February 29, 2012, at 10:00 a.m. (Letter from Charles Ryan to the Arizona Supreme Court, dated February 9, 2012, Re: Execution of Robert Moormann, attached as Ex. EE.) Consistent with the Ninth Circuit's opinion, Moormann's attorneys visited with him until 9:15 a.m. on the morning of his execution. (Declaration of Angela Fairchild, dated April 30, 2012, attached as Ex. DD, Attach. 6 at 2.)

According to Defendants' records,[3] the restraint/escort team was ready at 9:39 a.m. (Ex. DD, Attach. 4 at 1.) By 9:50 a.m., Moormann was restrained and secured to the execution table. (Ex. DD, Attach. 4 at 2.) Defendants' log notes that at 9:55 a.m., the Director "shall determine the catheter(s) site(s)." (Ex. DD, Attach. 4 at 3.) By 10:05 a.m,

[3]Counsel for Defendants provided to Plaintiffs' counsel execution logs that ADC maintained during Towery's and Moormann's executions. (Ex. DD, ¶ 3.)

the IV procedure was completed (Ex. DD, Attach. 4 at 3), and it was noted that the left peripheral catheter was the primary IV line and the right peripheral catheter was the backup IV line (Ex. DD, Attach. 5 at 2).

At 10:19 a.m., all witnesses to Moormann's execution were in place (Ex. DD, Attach. 4 at 3), and the injection of the lethal drugs began at 10:23 a.m. (Ex. DD, Attach. 5 at 2). Moormann was pronounced dead at 10:33 a.m. (Ex. DD, Attach. 5 at 2.)

B. Execution of Robert Towery

Robert Towery was scheduled to be executed on March 8, 2012, at 10:00 a.m. (Letter from Charles Ryan to the Arizona Supreme Court, dated February 17, 2012, Re: Execution of Robert Towery, attached as Ex. FF.) Consistent with the Ninth Circuit's opinion, Towery's attorneys visited with him until 9:15 a.m. that morning. (Declaration of Dale A. Baich, dated April 30, 2012, attached as Ex. Y ¶ 3 ; Ex. DD, Attach. 3 at 2.)

According to Defendants' records, what happened in the half-hour after Towery's legal visit was very similar to what took place in preparing Moormann for his execution. The restraint/escort team was ready at 9:38 a.m. (Ex. DD, Attach. 1 at 2.) By 9:49 a.m., Towery was restrained and secured to the execution table. (Ex. DD, Attach. 1 at 3.) Defendants' log notes that at 9:52 a.m., the Director "shall determine the catheter(s) site(s)." (Ex. DD, Attach. 1 at 4.)

What happened next, however, is quite different. Defendants' records report that at 10:28 a.m., "[a]fter multiple attempts of the left and right peripheral [ ] (approximately 4 in right - 2 in left), IV Team Leader recommended right femoral [catheter] as [the] primary [IV line] and left peripheral [catheter] as back-up [IV line]." (Ex. DD, Attach. 1 at 4.) The recommendation of setting a left peripheral catheter as the backup line is particularly questionable given that there were multiple unsuccessful attempts in setting a line in that location. (Declaration of Eric M. Katz, M.D., dated April 30, 2012, attached as Ex. AA, ¶ 7.)

At 10:31 a.m., the Director called the Attorney General's office and provided "an update regarding the IV process." (Ex. DD, Attach. 1 at 4.) At 10:37 a.m., the Director spoke with Jeff Zick at the Attorney General's office. (Ex. DD, Attach. 1 at 4.) Defendants'

records provide no additional information regarding why the Attorney General's office was notified.

At some point during the attempts to set the IV lines, Towery asked to speak with his counsel, Dale Baich, but he was not permitted to do so. (Ex. Y, ¶¶ 12, 15, 16.) At approximately 10:45 a.m., Towery's execution had not yet started. Baich, who was waiting to witness the execution, asked an ADC employee if there was a problem and if there was anything to report regarding Mr. Towery or the execution procedure. (Ex. Y ¶ 6.) The ADC employee checked with the command center and informed Baich that command had nothing to report. (Ex. Y ¶ 6.)

At 10:50 a.m., the right femoral catheter was placed, but Defendants' records indicate that the left peripheral catheter was unsuccessful. (Ex. DD, Attach. 1 at 4.) The Director had a discussion with the IV Team Leader regarding the back-up IV line. (Ex. DD, Attach. 1 at 4.) At 10:59 a.m., a catheter was placed in Towery's right hand as a backup line to the femoral catheter. (Ex. DD, Attach. 1 at 4.) The logs indicate that the IV procedure was finally complete approximately one hour after it started. (Ex. DD, Attach. 1 at 5.)

At 11:13 a.m., all witnesses to Towery's execution were in place (Ex. DD, Attach. 1 at 5), and the injection of the lethal drugs began at 11:17 a.m. (Ex. DD, Attach. 2 at 2). Towery was pronounced dead at 11:26 a.m. (Ex. DD, Attach. 2 at 2.)

The IV team member(s) responsible for setting Towery's IV lines punctured Towery multiple times without ever successfully setting a peripheral line in the arm (Ex. DD, Attach. 1 at 4), but an autopsy of Towery revealed that the peripheral veins near his elbows were delicate without signs of sclerosis; that is, the veins were not hardened and had no scarring. (*See* Private Autopsy Examination of Robert Charles Towery, Performed by Joseph Cohen, M.D., dated April 2, 2012, available at ECF No. 54-1, Ex. W at 3). In other words, Towery had good veins. These critical difficulties are unsurprising, given that ADC removed the previous protocol's medically reasonable proviso that ADC staff assess the condition of the

prisoner's veins in the days before an execution.[4]

Defendants determined that the backup line should be in the hand, even though the doctor who ADC hired to conduct its executions in 2010-2011 testified that it would be painful to administer a large amount of barbiturate through a small peripheral vein in a lower extremity. (*See* Excerpted Testimony of Medical Team Leader, Trial Tr., Dec. 6, 2011, *West v. Brewer*, No. 2:11-cv-1409 (D. Ariz.), attached as Ex. CC at 32-33.)

C. Execution of Thomas Kemp

Thomas Kemp was scheduled to be executed at 10:00 a.m. on April 25, 2012. (Letter from Charles Ryan to the Arizona Supreme Court, dated March 28, 2012, Re: Execution of Thomas Kemp, attached as Ex. GG.)

Via letter dated March 22, 2012, Director Ryan informed counsel for Thomas Kemp that no more than two legal visitors would be permitted to see Kemp and that they would only be permitted a one-hour visit from 6:00 a.m. until 7:00 a.m. (Letter from Ryan to Baich, dated March 22, 2012 (ECF No. 54-1, attached as Ex. U).) This procedure was inconsistent with the Ninth Circuit's opinion in *Towery*. *See Towery*, 672 F.3d at 658 (noting that the

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[4]Moreover, although Director Ryan appears to blame any difficulties on the courts by noting that Towery's execution was "more challenging because of the mandated order regarding two catheter points" (Ex. DD, Attach. 1 at 7), it was not the court that "mandated" two catheter points. Rather, it was Defendants' counsel who stated in the brief to the Ninth Circuit, and again during oral argument, that "[t]he protocol also requires the use of a back-up IV catheter." (*Towery v. Brewer*, No. 12-15381, ECF No. 9 (9th Cir. Feb. 27, 2012)); see *alsoTowery v. Brewer*, No. 12-15381, Oral Argument of Assistant Attorney General Jeffrey Zick (Feb. 27, 2012),available at http://www.ca9.uscourts.gov/media/ , 38:45-38-50 ("There is a backup IV catheter being placed in the inmate"), 43:58-44:02 ("there is two IV catheters, one primary, and one backup"). For Defendants to say the execution was challenging because of the court's mandate is yet another example of ADC not following—or even knowing, its own procedures.

Furthermore, Director Ryan also attempts to cast blame on the delayed execution to the attorney visitation, which ended at 9:15 a.m. (Ex. DD, Attach. 1 at 7.) However, this alleged concern was not indicated in Moormann's execution log, and Moormann had the same time frame for his legal visitation with his attorney on the morning of his execution.

Finally, Director Ryan asserts that Towery's "bad veins" also contributed to the delay. (Ex. DD, Attach. 1 at 7.) As Lopez has demonstrated in this motion, Towery did not have "bad veins."

ADC's attempt to direct blame at others, rather than considering the fact that the procedures in place are not sufficient for ensuring a safe and humane execution is contrary to constitutional principles. *See Towery*, 672 F.3d 653 (noting that procedures must be "reasoned, deliberate, and constitutional").

in-person visits will be permitted "under the long-standing ADC practice").[5] Indeed, when Director Ryan was asked about the possibility of a visit consistent with the Ninth Ciruit's order in *Towery*, he challenged the Ninth Circuit's decision—saying the Court "incorrectly relied" on an older protocol, and noting that although ADC "agreed" to the court-ordered visitation, it "did not waive the right to exercise [his] discretion on the scheduling of future visits with death row inmates." (*See* Letter from Charles Ryan to Dale Baich, April 2, 2012, Ex. JJ.)

While Director Ryan informed Kemp that ADC intended to carry out his execution using a one-drug protocol with pentobarbital, he stated that back-up chemicals would not be prepared in syringes unless they are required. (ECF No. 54-1, attached as Ex. U.) The failure to prepare backup drugs was inconsistent with the Ninth Circuit's opinion in *Towery*. *See Towery*, 672 F.3d at 658 (noting that "one additional set of syringes , along with the necessary chemicals and drugs, [would be] available for immediate administration should circumstances so require").

Before Kemp's execution started, his attorney Tim Gabrielsen, along with other witnesses, was informed by an ADC employee that Kemp would be sedated and that after ADC personnel verified that he was sedated, the lethal drugs would be injected. (*See* Declaration of Timothy M. Gabrielsen, dated April 30, 2012, ¶ 5 attached as Ex. X.) Gabrielsen raised the concern with an ADC employee that Kemp was going to be injected with drugs after he was sedated, because a sedation check followed by injection of lethal drugs is required only with the three-drug protocol. (Ex. X, ¶¶ 6-7.) The ADC employee did not answer his question. (Ex. X, ¶ 7.) Eventually another ADC official told Gabrielsen that Kemp would be executed using a one-drug protocol. (Ex. X, ¶ 9.)

Kemp's execution began at approximately 10:00 a.m. (Ex. GG.)[6] Kemp appeared to

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[5]The Ninth Circuit cited a protocol that allowed attorney-client visits up until 45 minutes before the execution

[6]Counsel for Plaintiffs have not yet been provided any documentation on Kemp's execution from Defendants.

have a femoral catheter in his groin. (Ex. X, ¶ 10.) Kemp had no IV lines in his right arm. (Ex. X, ¶ 10.) Witnesses were not able to see his left arm.

During Kemp's final statement, his attorney heard him say "I regret nothing" and heard nothing else. (Ex. X, ¶ 11.) Kemp's lips appeared to continue moving despite the witnesses not being able to hear him say anything else. (Ex. X, ¶ 11.)

Shortly after the execution began, Kemp's right arm and his torso began violently shaking. (Ex. X, ¶ 12.) This occurred for approximately five or six seconds. (Ex. X, ¶ 12.) This could have been a partial seizure potentially caused by the administration of pentobarbital. (Ex. AA, ¶ 9.) Kemp was pronounced dead at 10:08 a.m. (Ex. X, ¶ 13.)

An autopsy was performed on Kemp revealed that at least one puncture was made in the femoral area. (Private Autopsy Examination of Thomas Kemp, Declaration of Joseph I. Cohen, M.D., dated April 30, 2012, attached as Ex. Z.)[7] The autopsy also revealed that there were at least two punctures in the left arm: one in the antecubital fossa and one in the outer forearm. (Ex. Z.) There were no puncture marks anywhere on his right arm. (Ex. Z.) Kemp had good veins that were quite prominent, without visible thickening, scarring, or sclerosis. (Ex. Z.) The autopsy revealed no visible signs of stroke, bleeding or other significant findings in the brain tissue. (Ex. Z.)

D. Scheduled Execution of Samuel Lopez

Samuel Lopez is scheduled to be executed at 10:00 a.m. on May 16, 2012. (Letter from Charles Ryan to the Arizona Supreme Court, dated April 16, 2012, Re: Execution of Samuel Lopez, attached as Ex. HH.) On April 20, 2012, Director Ryan informed Lopez that ADC will be using a one-drug protocol using pentobarbital to carry out his execution. (Letter from Charles Ryan to Samuel Villegas Lopez, Dated April 20, 2012, Re: Choice of Protocol, attached as Ex. II.) Lopez has no real assurance that ADC will in fact implement the January 2012 Protocol as it has indicated, as ADC clearly is comfortable changing the protocol just

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[7] A private autopsy was performed on April 28, 2012. The autopsy conducted by the Pima County Medical Examiner occurred on April 27, 2012. Counsel received photographs from the Medical Examiner's Office on May 1, 2012. Plaintiffs have not yet obtained the written autopsy report.

days before an execution. *See, e.g.*, *Towery*, 672 F.3d at 653 (noting that "after the appeal was filed and hours before the argument, Arizona yet again changed course as to its plans for the executions" and commenting that how the State failed to notice that its drugs were expired for "the past six weeks is beyond us, and gives us pause as to the regularity and reliability of Arizona's protocols").[8]

III. This Court Should Grant Lopez a Preliminary Injunction

Plaintiff Lopez seeks a preliminary injunction barring Defendants from executing him according to the January 2012 Protocol. *See* Fed. R. Civ. Proc. 65. The purpose of a preliminary injunction is to preserve the status quo until the rights of the parties can be fully and fairly litigated. *Los Angeles Mem. Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

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[8]Although ADC has not yet informed Lopez what drug protocol it intends to use in his execution, he has concerns about ADC's ability to follow federal law in obtaining the drugs, much less in ADC's ability to adhere to even its own stated drug choice.

First, ADC violated the federal Food, Drug, and Cosmetics Act when it imported three lethal-injection drugs into the country. *See Beaty v. FDA*, F.Supp.2d __, 2012 WL 1021048, at *8 (D.D.C., March 27, 2012) (explaining that the federal Food, Drug, and Cosmetic Act (FDCA) "mandates the universal exclusion of foreign drugs from unregistered establishments that appear misbranded, adulterated, or unauthorized . . . ." and finding that "the foreign manufactured thiopental . . . imported by the importing States (e.g., Arizona, California, South Carolina, Georgia, and Tennessee) is a misbranded drug and an unapproved new drug . . . . as such, this thiopental cannot lawfully be . . . imported into the United States . . . ."). Indeed, the court explained that "[t]he law does not create an exception for drugs purchased for use by a state DOC." *Id.* at*10 n.9. (Although the court was only asked to address the issue of imported sodium thiopental, the court's finding applies to all three drugs, because all three fall under the definition of "misbranded, adulterated, or unauthorized" drugs.)

Second, in addition to violating the FDCA, ADC violated the federal Controlled Substances Act by importing sodium thiopental without a license. Owing to the illegal importation, ADC has relinquished the thiopental to federal Drug Enforcement Administration agents.

With respect to ADC's inability to follow its own stated notice, *see, e.g.*, [State's] Notice of Substitution of Drug, *State v. Beaty*, Case No. CR-85-0211-AP/PC (Ariz. Sup. Ct.), filed May 24, 2011 (providing notice eighteen hours before Beaty's execution that the Department will "substitute pentobarbital for sodium thiopental in carrying out the Donald Beaty execution."); [State's] Notice of Intent to Administer the One-Drug Protocol, filed jointly on February 27, 2012 in *State v. Moormann*, CR-12-0093-PC (Ariz. Sup. Ct.) and *State v. Towery*, CR-2-0493-AP (providing notice—two days before Moormann's execution—of change in protocol because the Department "realized [today] that its foreign-supplied pancuronium bromide expired in January 2012."); *see also Towery v. Brewer*, 672 F.3d at 653 ("How such a discovery escaped the State for the past six weeks is beyond us, and gives us pause as to the regularity and reliability of Arizona's protocols.").

Accordingly, absent court intervention, Lopez can have no confidence in statements made by ADC about the lethal-injection drugs.

"[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.'" *Towery*, 672 F.3d at 657 (*quoting Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). The four elements to consider when issuing a preliminary injunction are: (1) the likelihood of success on the merits of a claim; 2) the likelihood of suffering irreparable harm without preliminary relief; 3) whether the balance of equities tips in the movant's favor; and 4) whether an injunction is in the public interest. *Id.* The Ninth Circuit has explained that "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Cottrell*, 632 F.3d at 1131. For the reasons outlined below, Lopez meets the standard for obtaining a preliminary injunction.

A. The Merits of Lopez's Claims

Lopez has raised serious questions going to the merits of his claims. Lopez need not meet the preliminary injunction standard for every claim; a preliminary injunction is appropriate where he can demonstrate a likelihood of success on at least one of his claims. *See Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 983 (D. Ariz. 2006) (noting that the court need not address each and every claim in determining plaintiff's likelihood of success on the merits where court has found at least one claim is likely to succeed). Lopez can meet the preliminary-injunction standard on the following claims:

Defendants' Failure to Provide Notice Violates Lopez's Due-Process Rights [Fourth Claim for Relief]

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The January 2012 Protocol fails to provide reasonable notice of critical aspects of

the mode and manner in which Defendants will carry out executions.[9]

The January 2012 Protocol provides no notice whatsoever to condemned prisoners about how ADC will gain intravenous access to administer the lethal drugs during an execution. The January 2012 Protocol eliminates the requirement that peripheral IV access be the default method, and gives the Director sole discretion to choose between peripheral or central femoral IV access. (Dept. Order 710, Attach. D, § E (1).) The January 2012 Protocol also dispenses with any requirement that Defendants perform a pre-execution assessment of the prisoner's veins to determine the best and safest access for each prisoner. Having a qualified and experienced medically trained professional assess a prisoner's veins is critical to minimize complications that could otherwise arise.

Placement of a central femoral line is an invasive, complicated surgical procedure that is difficult to perform without significant training and experience. Errors in the attempted placement of a femoral IV can result in severe pain, as well as serious complications. The January 2012 Protocol fails to give Lopez any notice (let alone reasonable notice) of the method of IV access that will be used in his execution. Moreover, Lopez is not provided any information regarding the qualifications of the individuals inserting the IV catheters. The January 2012 Protocol allows the Director to select individuals that he deems as "appropriately trained." (Dept. Order 710.02, § 1.2.5.) Without such notice, Lopez is prevented from challenging whether the method of IV placement to be used in his execution presents a significant risk of serious harm, including whether it takes into account his particular health concerns or whether a qualified medically trained individual is available—critical components of a constitutional execution process.

This is of critical concern based on the circumstances surrounding the execution of Robert Towery. ADC was unsuccessful at setting catheters in Towery's peripheral veins in

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[9] The January 2012 Protocol provides that the condemned prisoner shall be notified in writing seven days before his execution which drug or drugs will be used in the execution. *See* Dept. Order 710, Attach. D, § C, 1. While Lopez has been informed that Defendants intend to execute him using a one-drug pentobarbital protocol, there is no guarantee that the choice will not change before his execution. *See supra*, Section II.D.

his elbow area. Towery's veins, however, had no signs of scarring and were soft. (*See* ECF 54-1, Ex. W at 3.) The execution logs recorded by ADC indicate that the initial unsuccessful attempt to establish intravenous access took approximately 30 minutes and resulted in six punctures in either arm. (Ex. DD, Attach. 1 at 4.) And, despite at least two unsuccessful attempts to set a peripheral IV in Towery's left arm, the IV Team Leader directed that the left peripheral IV be used as a backup. (*Id.*) This calls into question the qualifications of the person making this decision. (Ex. AA, ¶ 7.) Compounding these problems, Towery was denied access to his attorney despite his request and his attorney's inquiries. (Ex. Y, ¶¶ 6, 12, 15, 16.)

During the execution of Thomas Kemp, ADC placed a femoral catheter in the right groin and a catheter in the left arm. (Ex Z; Ex. X, ¶ 10.) After saying three words during his last statement, Kemp appeared to be talking or moving his lips but witnesses could not hear anything. (Ex. X, ¶ 11.)

A prisoner's right to due process regarding the constitutionality of a given execution procedure must be a right of substance, rather than form. *Western Life Indemnity Co. of Ill. v. Rupp*, 235 U.S. 261, 273 (1914) (the Due Process clause "has regard not to matters of form, but to substance of right"). A state must disclose to a prisoner all relevant information relating to how it will carry out that prisoner's execution. By failing to provide notice of intended intravenous access for administering execution drugs and by preventing prisoners from accessing their counsel during this process, Defendants deprive Plaintiff Lopez of his right to notice and an opportunity to be heard, in violation of the Due Process Clause. *See Oken v. Sizer*, 321 F. Supp. 2d 658, 664 (D. Md. 2004) ("Fundamental fairness, if not due process, requires that the execution protocol that will regulate a prisoner's death be forwarded to him in prompt and timely fashion."), *stay vacated*, 542 U.S. 916 (2004).

The January 2012 Protocol Violates Lopez's Rights of Access to Counsel and the Courts [Fifth and Sixth Claims for Relief]

The right of access to the courts is protected by the Due Process and Equal Protection Clauses, *see Ex parte Hull*, 312 U.S. 546, 549 (1941); *Murray v. Giarratano*, 492 U.S. 1, 11

n. 6 (1989), and requires that prisoners be afforded "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts," *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *overruled in part on other grounds*, *Lewis v. Casey*, 518 U.S. 343, 354 (1996). The fundamental rights during the hours before an execution includes the right to be competent during an execution and the right to be free from cruel and unusual punishment. Ensuring that those fundamental rights are not violated will only be proper if a prisoner has meaningful access to the courts, which means that he must have the opportunity to "communicate privately with an attorney." *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990); *Cooey v. Strickland*, Slip Copy, 2011 WL 320166, at *7 (S.D. Ohio Jan. 28, 2011) ("[T]here is unquestionably a right to access the courts involved in the context of executions that inherently injects the issue of access to counsel.").

With the new January 2012 Protocol and the Director's actions under it, ADC has made it plain that it rejects the concept of a prisoner's fundamental right of access to the courts. Contrary to ADC's written policy for at least the past twenty-six years, *see supra* n.2, condemned prisoners are now prevented from meeting with their attorneys in the hours before an execution. *See* DO 710.11, §§ 1.5.1 and 1.5.2. Instead, only telephonic contact with attorneys will be permitted, which will take place in a holding cell in the presence of ADC officers with no opportunity for privileged communication.

Without the ability to have privileged communications in the immediacy of Lopez's execution, Lopez can have no "meaningful" access to counsel and the courts. If circumstances arise immediately prior to Lopez's execution that present constitutional concerns, due process demands that he have the means—through counsel—to petition the courts for appropriate relief. *Cooey v. Strickland*, 2011 WL 320166, at *10 (S.D. Ohio Jan. 28, 2011) ("If Plaintiffs cannot communicate with counsel [on the day of execution], then this Court can hardly conclude as a matter of law that Plaintiffs have adequate, effective, and meaningful access to the courts.").

In the modified protocol approved by the Ninth Circuit for Towery's and Moormann's executions, the prisoners were allowed to meet with their counsel from 7:15 a.m. until 9:15

a.m., which was consistent with prior protocols. *See Towery*, 672 F.3d at 658 (noting that Moormann and Towery shall be allowed to meet with counsel consistent with "long-standing ADC practice" under prior protocol, which allowed legal visit up until 45 minutes before scheduled execution). This is no longer the case with Lopez, as there is no court order requiring the ADC to comply with prior procedures.[10]

Moreover, it is imperative that Lopez also be permitted access to counsel, and in turn the courts, during the insertion of the IV catheters. During Towery's execution, Towery asked to meet with counsel during the extended period that the IV team was repeatedly puncturing Towery in an attempt to set peripheral IVs. (Ex. Y, ¶¶ 12, 15-17.) Although it seems likely that Towery wished to consult with counsel about the repeated failures, it is also possible that Towery had other concerns that he needed to address with counsel. Moreover, Towery's counsel attempted to obtain information about the execution delay, but was rebuffed. (Ex. Y, ¶ 6.) Defendants cannot be permitted to deny prisoners the right to litigate viable claims of constitutional violations by preventing them from accessing counsel and the courts, and then executing them.

In evaluating a claim of denial of meaningful access to the court, a court must "weigh[] the interests of the prison as an institution (in such matters as security and effective operation) with the constitutional rights retained by the inmates." *Cooey*, 2011 WL 320166, at *9 (internal citation and quotation omitted); *see also Ching*, 895 F.2d at 610 (holding that a prisoner must be permitted attorney visitation absent justification from prison). Policies that unnecessarily obstruct the availability of professional representation—like unreasonably restricting attorney visitation and communication—will be invalid. *See Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1207-08 (7th Cir. 1983) (prison's telephone policy unconstitutional); *Cooey*, 2011 WL 320166, at *9 (execution protocol that limited attorney contact on the morning of an execution unconstitutional).

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[10]Based on ADC's position with regard to Thomas Kemp, Lopez has no reason to believe that he will be permitted access to his attorneys consistent with the Ninth Circuit's opinion in *Towery*. *See* Ex. X; ECF No. 54-1, Ex. U; Ex. JJ.

Here, before implementing the January 2012 Protocol, Defendants permitted the last twenty-eight executed prisoners to have in-person visitation with their attorneys on the day of their execution. Defendants have no legitimate governmental interest in this sudden about-face. The January 2012 Protocol on its face obstructs Lopez's ability to communicate with counsel in what may be the final hours of his life, thus stripping away one of his most sacred rights under the Constitution. *See DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988) ("A prison inmate's right of access to the courts is the most fundamental right he or she holds. 'All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden.'" (*quoting Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973)). Moreover, the January 2012 Protocol, as applied, has resulted in the Director abusing his discretion by denying a prisoner access to his counsel when he asked for counsel. Defendants' actions cannot continue.

Execution by the January 2012 Protocol As Written and As Applied Would Violate Lopez's 14th Amendment Rights to Equal Protection Under the Laws [Second and Third Claim for Relief]

On its face and as applied, the January 2012 Protocol violates Lopez's right to equal protection under the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. The January 2012 Protocol, which removes the Eighth Amendment safeguards, burdens the fundamental rights of Lopez without a compelling state interest.

A. The January 2012 Protocol removes necessary safeguards without adequate justification

Defendants must justify removing several important safeguards from the execution protocol in order to obtain constitutional sanction of that protocol, as they did when they adopted safeguards to obtain a favorable ruling in the *Dickens* litigation. This they have not done. Instead, they have simply substantially reduced the safety of their execution protocol by removing many of the very safeguards they adopted to obtain this favorable ruling. *See Perry v. Brown*, 671 F.3d 1052, 1083-84 (9th Cir. 2012) ("[T]he Equal Protection Clause requires the state have legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first

place.") (emphasis omitted). As with any other state action, Defendants must establish a legitimate basis for retreating from increased protections once those protections have been adopted. *See e.g., Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 535 (1982) (state may repeal legislation adding rights that go beyond constitutional requirements for legitimate purposes); *Perry*, 371 F.3d at 1092("Laws may be repealed and new rights taken away if they have had unintended consequences or if there is some conceivable affirmative good that revocation would produce, but new rights may not be stripped away solely because they are new.") (internal citations omitted). This is all the more true when, as here, Defendants adopted these protections *specifically* to obtain a favorable ruling. The only interest that Defendants are furthering is their interest in eliminating time-consuming yet crucial safety measures by increasing the Director's discretion and thereby reducing the likelihood that they will deviate from a nearly standardless protocol. Defendants' inability to comply with their own execution standards is not a legitimate basis for removing those standards. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 103 (2000) ("A desire for speed is not a general excuse for ignoring equal protection guarantees."); *Rinaldi*, 384 U.S. at 310 (administrative convenience is insufficient justification for disparate treatment when alternatives are readily available). Here, alternatives are available: ADC itself incorporated them in the previous protocol. Not only is ADC aware of alternatives, but it authored them. Now, however, ADC has stripped these protections and asks this Court to sanction its standardless, risk-enhancing protocol.

B. The disparate treatment under the January 2012 Protocol as applied burdens Lopez's fundamental rights

The disparate treatment under the January 2012 Protocol violates the Fourteenth Amendment by burdening Lopez's fundamental rights, thereby triggering heightened strict-scrutiny analysis. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1310 (9th Cir. 1982). The Ninth Circuit recently rejected the district court's conclusion that if there is no Eighth Amendment violation then that necessarily means that there has been no interference with fundamental rights to trigger strict scrutiny. *See*

Towery, 672 F.3d at 659. Instead, the Ninth Circuit recognized that there could be an equal-protection violation where a prisoner demonstrates that state actions *burden* his fundamental rights. *Id.* at 660. Relying upon a federal court's analysis in Ohio, the court found that a burden on a fundamental right 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." *Towery*, 672 F.3d at 660 (*citing In re Ohio Execution Protocol Litig.*, __ F. Supp. 2d __, 2012 WL 84548, at *9 (S.D. Ohio Jan. 11, 2012)).[11]

Here, Lopez demonstrates that Defendants have burdened his fundamental right to be free from cruel and unusual punishment.[12] Defendants must therefore establish that a compelling state interest supports removing necessary safeguards from the execution protocol in favor of an arbitrary approach that allows execution styles ranging widely in risk and pain inflicted. *See Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010); *United States v. Alvarez*, 617 F.3d 1198, 1216 (2010); *see also Bush*, 531 U.S. at 103, 105-106 (finding voting procedures lacking sufficient standards to guard against non-arbitrary treatment violate the Equal Protection Clause). Defendants furthermore bear the burden of demonstrating that this unbridled discretion and these decreased safeguards are necessary to—or are the least restrictive means for—achieving a compelling state interest. *See Citizens United*, 130 S.Ct at 898. They cannot meet their burden.

Defendants have not only removed many of the safeguards from ADC's protocol that

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[11]The district court rebuked Ohio for its "dubious cycle of defending often indefensible conduct, subsequently reforming its protocol when called on that conduct, and then failing to follow through on its own reforms." *In re Ohio Execution Protocol Litig.*, ___ F. Supp. 2d ___, 2012 WL 84548, at *1 (S.D. Ohio Jan. 11, 2012). The court found that the plaintiff was likely to succeed on his claim that Ohio's execution protocol "is facially invalid because it codifies disparate treatment of similarly situated individuals without sufficient justification so as to be arbitrary, irrational, and capricious." *Id.* at *3. The Sixth Circuit affirmed, and the Supreme Court did not vacate the stay. *Kasich v. Lorraine*, 131 S. Ct. 1306 (2012) (Mem.) (refusing to vacate district court's grant of temporary restraining order for Charles Lorraine based on equal-protection claim where the state had repeatedly failed to adhere to execution protocols); *In re Ohio Execution Protocol Litig.*, 671 F.3d 601(6th Cir. 2012) (same). Like the unconstitutional protocol, the January 2012 Protocol also codifies disparate treatment absent sufficient justification.

[12]Lopez can also demonstrate that Defendants' disparate treatment will burden his right to access the courts.

were put into place *for the express purpose of complying with the Eighth Amendment*, but they have allowed the Director unfettered discretion in conducting an execution. Unlike the petitioners in *Towery*, Lopez can demonstrate a "pattern of treating prisoners differently in ways that [] affect[ed] the *risk* of pain to which they would be subjected." *Towery*, 672 F.3d at 660 (citation omitted). Specifically, each of the three prisoners that have been executed since the adoption of the January 2012 Protocol have been treated differently.

Moormann had one peripheral IV placed in each arm, and it took the IV team ten minutes to set the lines.

In contrast, it took the IV team over an hour to set the IV lines for Towery. There were at least six punctures made to Towery's arms over a half-hour period. Despite the team's inability to set a peripheral IV in either arm, the IV team leader recommended using a peripheral IV in the arm as the backup line for Towery while recommending a femoral IV as the primary line. It was not until another twenty minutes ostensibly of additional unsuccessful attempts that it was determined that the backup catheter should be placed in Towery's right hand. This decision was made even though the doctor who Director Ryan hired to conduct executions in 2010-2011 said that there would be pain and discomfort if drugs were administered through a vein in the hand.

Kemp had a femoral IV and an IV in his left arm at his elbow. There were no attempts to place a peripheral IV in Kemp's right arm, and there was at least one more puncture would in Kemp's left forearm.

Defendants have no compelling reason for treating prisoners differently. There was no pre-execution individualized assessment to determine which veins should be accessed. To the contrary, during Towery's execution, Defendants were unable to set peripheral IV lines. In light of Towery's good veins, there are serious questions regarding the qualifications of the person(s) attempting to set the lines. Moreover, even if numerous attempts to set peripheral lines were reasonable, once the IV team was unsuccessful, it was unreasonable to designate the left arm peripheral IV as a backup line. When the backup option failed—which was not unusual given that the IV team could not establish the line in

the first thirty minutes—Defendants blatantly disregarded the known potential of Towery's suffering. Ultimately, by designating Towery's right wrist as the backup catheter, the Director ignored the advice of the doctor who participated in the five executions in 2010-2011.[13]

Because Defendants can offer no compelling justification for disposing of these necessary safeguards and treating prisoners differently, the January 2012 Protocol as written and as applied is invalid. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011); *Cooey*, 801 F. Supp. 2d 623, 653 (S.D. Ohio 2011) (rejecting deviations in Ohio's execution procedures because defendants offered "no compelling reason for selectively introducing risk into some executions but not others").

The January 2012 Protocol, Both Written and Applied, Violates the Eighth Amendment [First Claim for Relief]

Lopez's Eighth Amendment challenge raises concerns outside of *Baze v. Rees*, 553 U.S. 35 (2008), which only considered the risk of pain under a three-drug protocol. Because Defendants intend to use a one-drug protocol in executing Lopez, this Court should consider whether he can demonstrate, based on Defendants' past actions, that the medical procedure of inserting the IV catheters violates his Eighth Amendment rights. In deciding this claim, the Court should apply the standard that there is "an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *See, e.g.*, *Baze*, 553 U.S. at 50 (*quoting Farmer v. Brennan*, 511 U.S. 825, 842, 846, n.9 (1994)). Here, Lopez can demonstrate that Defendants' actions have created an objectively intolerable risk of harm for which they cannot be subjectively blameless.

Of critical importance to Lopez's Eighth Amendment claim are Defendants' actions surrounding the medical procedure of inserting IV catheters in condemned prisoners.

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[13] While MTL testified during his 2011 deposition that he did not intend to participate in future executions (*West v. Brewer*, No. 2:11-cv-01409, Deposition of Medical Team Leader, October, 24, 2011, ECF No. 104, Ex. 265 at 293-94), Lopez does not know whether MTL has participated in the 2012 executions because Defendants refuse to provide that information.

Defendants have a history of retaining unqualified individuals to conduct this procedure. *See, e.g.*, *Dickens*, 631 F.3d at 1142; *West*, 2011 WL 6724628, at *6. Moreover, the facts surrounding the most recent executions demonstrate that Defendants are not subjectively blameless for the risk of harm they cause to prisoners. Instead, through their actions, Defendants have chosen to ignore the advice of their own retained physician regarding the harm. Rather than being blameless, Defendants are directly responsible for the harm.

During Towery's execution, ADC elected to first designate as the backup IV site a location for which the IV team unsuccessfully attempted to gain access for approximately one-half hour; then ADC elected to use a backup IV site in an area that ADC's own doctor who performed the 2010-2011 executions indicated would cause pain and discomfort. In Kemp's execution, ADC placed a femoral IV line without even attempting to set a catheter in Kemp's right arm. As discussed *supra*, the insertion of a femoral line by an unqualified individual increases the risk of pain and suffering. Because these actions demonstrate an Eighth Amendment violation, Lopez has shown a likelihood of success on the merits of this claim.

Defendants have fostered an execution environment which does not provide the basic safeguards that the Constitution demands. Instead of a rigorous protocol that attempts to meet the minimum protections the *Baze* safeguards guarantee, Defendants have designed a protocol that permits unfettered discretion at the very points where *Baze* sought to limit the potential for error through thorough safeguards. The result is a protocol that is a protocol in name only. It provides the illusion of regulated procedure while permitting unqualified and untrained individuals to perform demanding tasks at the whim of the Director. This is outside the constitutional framework constructed in *Baze*.

B. Lopez is Likely to Suffer Irreparable Harm

As a matter of law, Lopez will suffer irreparable harm if a preliminary injunction is not granted. *See Towery*, 672 F.3d at 661 (recognizing that irreparable harm is demonstrated by prisoners bringing § 1983 lawsuit involving upcoming execution). As described above, Lopez has raised colorable claim of threatened constitutional violations of his First, Fifth,

Eighth, and Fourteenth Amendment rights under the United States Constitution. The Ninth Circuit has made clear that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore Inc. v. Super. Ct. of Calif.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 1001-1002 (9th Cir. 2005) ("'When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary'") (*citing* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2948.1 (2d ed. 2011).

Lopez will also suffer irreparable harm as a matter of fact. He is scheduled to be executed on May 16. If executed under the January 2012 Protocol and at the whims of the Director, he will be denied Equal Protection and due process under the law, as demonstrated by the very face of the Protocol. And without many of the constitutional safeguards mandated by *Baze*, there is a substantial risk that Lopez will experience pain and suffering.

Finally, Lopez does not seek damages; no amount of monetary relief could adequately compensate him once he is executed in violation of the Constitution. *See Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (constitutional violations cannot be remedied through damages). There is nothing more final and irreversible than death. If Lopez is unconstitutionally executed, the harm is irreparable. Once this violation occurs, he will have no recourse for an execution that violates his constitutional rights.

C. The Balance of Equities Favors Lopez

The balance of equities tips sharply in Lopez's favor. This Court should keep in mind that Lopez is not seeking an injunction to forever prevent the State from carrying out his sentence. Rather, he seeks only to enjoin Defendants from executing him in an unconstitutional manner. While "the State has a significant interest in enforcing its criminal judgments, it is unclear how a short, temporary stay to resolve [Lopez's] claims will threaten that interest." *Landrigan v. Brewer*, No. CV-10-02246, 2010 WL 4269559, *11 (D. Ariz., Oct. 25, 2010) (internal citation omitted).

This Court should not permit executions to proceed before it has the opportunity to

review Lopez's claims regarding the newly-issued January 2012 Protocol. He is not merely speculating about the harm that might occur as a result of Defendants' new protocol: he is alleging that the January 2012 Protocol is *facially* unconstitutional. Lopez has raised serious questions going to the merits of his claims and the hardships to be suffered by Lopez outweighs the limited hardships of Defendants. The delay resulting from granting the relief sought here will have little adverse effect on the State's interest and will ensure that ADC does not perform an unconstitutional execution. *See Gomez v. U.S. Dist. Ct. For N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J. dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.").

D. Granting the Injunction Would Serve the Public Interest

Preliminary relief would serve the public interest because "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d, 815, 826 (9th Cir. 2005). The "public interest is served only by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights." *In re Ohio Execution Protocol Litigation*, 2012 WL 84548, *14 (citation omitted). Indeed, "the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights." *Id.* Surely, it is in the public interest to carry out executions in a safe manner. Under the constitution and *Baze*, safeguards must be in place to minimize the risk of pain that the prisoner may suffer. Here, the public interest is harmed as the ADC, by giving unfettered discretion to its Director, has demonstrated that it cannot comply with the tenets of the Constitution. The lack of transparency and the failure to follow a written set of reliable procedures erodes confidence in the public officials who are charged with carrying out executions in Arizona. The citizens of Arizona deserve more and the public interest tilts toward Lopez here. The public interest will also be served because Arizona will continue to conduct executions unconstitutionally unless forced by this Court to make

necessary changes. Moreover, there is no public interest that would be injured by the granting of preliminary relief. *Cottrell*, 632 F.3d at 1138 (considering "whether there exists some critical public interest that would be injured by the grant of preliminary relief").

IV. Plaintiffs Have Not Intentionally Delayed in Filing their Lawsuit and Could Not Have Raised their Claims Sooner

Before granting injunctive relief that would prevent an execution from occurring, courts must "consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). There has been no such delay here.

Lopez, along with the other Plaintiffs, filed a motion for leave to file a second amended complaint on April 2, 2012. (ECF No. 53.) This motion was filed as soon as practicable after Plaintiffs obtained additional facts necessary to amend the complaint. In particular, the factual basis for Plaintiffs' amended complaint did not come to light until after Plaintiffs received autopsy reports and execution logs for Moormann's execution (February 29, 2012), and Towery's execution (March 8, 2012). Defendants provided copies of execution logs on March 23, 2012. The private autopsy report for Towery was not provided to Plaintiffs until April 2, 2012. (ECF No. 54-1, Ex. W at 6.) On April 19, 2012, this Court granted the motion for leave to file a second amended complaint. (ECF No. 57.) Lopez could not assert the basis for his preliminary injunction motion until the second amended complaint was filed.

Moreover, Kemp's execution occurred on April 25, 2012. The facts surrounding the circumstances of his execution were only recently revealed with the private autopsy of Kemp, which occurred on April 28, 2012. (*See* Ex Z.) Joseph Cohen, M.D., who performed the autopsy of Kemp, provided a declaration outlining his preliminary findings at the end of day on April 30, 2012. (*See* Ex Z.) Lopez could not have discovered these facts sooner.

Because the imminent execution of Samuel Lopez under the newly-released and substantially revised January 2012 Protocol would violate his constitutional rights, he is

entitled to injunctive relief.

V. Conclusion

For the reasons outlined in this Memorandum, this Court should:

(1) grant Lopez a preliminary injunction preventing Defendants from carrying out his execution on the scheduled date;

(2) grant Lopez a preliminary injunction requiring Defendants to allow attorney visitation up to at least forty-five minutes before the time of his scheduled execution;

(3) grant Lopez a preliminary injunction requiring Defendants to allow Lopez's attorney to be present during the insertion of IV catheters;

(4) grant Lopez oral argument and an evidentiary hearing on his request for a preliminary injunction; and

(5) grant any other relief as this Court deems appropriate.

Respectfully submitted this 1st day of May, 2012.

Jon M. Sands
Federal Public Defender
Dale A. Baich
Robin C. Konrad
Cary Sandman

David J. Sepanik
Flora F. Vigo
Amanda R. Conley
O'Melveny & Myers LLP

By: s/Dale A. Baich
Counsel for Plaintiffs Rogovich, Stanley, Cook, and Stokley

Kelley J. Henry
Denise I. Young

By: s/Kelley J. Henry (with permission)
Counsel for Plaintiff Lopez

Certificate of Service

I hereby certify that on May 1, 2012, I electronically transmitted the foregoing Motion by Plaintiff Samuel Lopez 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

Towery v. Brewer
No. 2:12-cv-002454-NVW

Exhibits to Motion by Plaintiff Samuel Lopez for Preliminary Injunction

X. Declaration of Timothy M. Gabrielsen, dated April 30, 2012

Y. Declaration of Dale A. Baich, dated April 30, 2012

Z. Private Autopsy Examination of Thomas Kemp, Declaration of Joseph I. Cohen, M.D., dated April 30, 2012

AA. Declaration of Eric D. Katz, M.D., dated April 30, 2012

BB. Excerpt Transcript Testimony of Eric Katz, M.D., pp. 19-25, *West v. Brewer*, No. 2:11-cv-01409 (D. Ariz.), December 7, 2011

CC. Excerpt Transcript Testimony of Medical Team Leader, pp. 32-33, *West v. Brewer*, No. 2:11-cv-01409 (D. Ariz.), December 6, 2011

DD. Declaration of Angela Fairchild, dated April 30, 2012

1. ADC Correctional Service Log, Housing Unit 9 Section Leader, dated March 8, 2012

2 ADC Correctional Service Log, Housing Unit 9 Special Operations, dated March 8, 2012

3. Execution Log, Towery, ADC #051550

4. ADC Correctional Service Log, Housing Unit 9 Section Leader, dated February 29, 2012

5. ADC Correctional Service Log, Housing Unit 9 Special Operations, dated February 29, 2012

6. Execution Log, Moormann, ADC # 31293

EE. Letter from Charles Ryan to the Arizona Supreme Court, dated February 9, 2012, Re: Execution of Robert Moormann

FF. Letter from Charles Ryan to the Arizona Supreme Court, dated February 17, 2012, Re: Execution of Robert Towery

GG. Letter from Charles Ryan to the Arizona Supreme Court, dated March 28, 2012, Re: Execution of Thomas Kemp

HH. Letter from Charles Ryan to the Arizona Supreme Court, dated April 16, 2012, Re: Execution of Samuel Lopez

II. Letter from Charles Ryan to Samuel Villegas Lopez, dated April 20, 2012, Re: Choice of Protocol

JJ. Letter from Charles Ryan to Dale Baich, dated April 2, 2012, Re: Attorney Visitation

EXHIBIT X

EXHIBIT X

Declaration of Timothy M. Gabrielsen

I, Timothy M. Gabrielsen, declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am an Assistant Federal Public Defender with the Office of the Federal Public Defender in the Capital Habeas Unit. I represent indigent prisoners sentenced to death.

2. I was one of the attorneys who represented Thomas Kemp. I was also one of the individuals whom Mr. Kemp listed to be a witness to his execution on April 25, 2012.

3. On the morning of Mr.Kemp's execution, I met with Mr. Kemp from approximately 6:00 a.m. until 7:00 a.m. at the prison in Florence, Arizona. I then left the prison grounds.

4. I returned to the prison at 8 a.m., with another, to be admitted to witness Mr. Kemp's execution, which was set for 10 a.m. Arizona Department of Corrections personnel, two women, led us to two buildings prior to taking us to Housing Unit 9, which is where the execution was to occur. We remained at the first building for approximately one hour.

5. The two female ADOC staff then moved us to another nearby building. A different woman with the ADOC entered the room and said that she was going to read us a protocol for the execution. The ADOC official appeared to be reading from a piece of paper she was holding. As best I can recall, she reported that Mr. Kemp would be sedated and that after it was verified that he was sedated, the lethal drugs, or a similar description of the drugs, would be injected.

6. Her statement raised a concern because ADOC Director Charles Ryan had provided written notice to Mr. Kemp that ADOC would carry out his execution using a one-drug protocol. If that were true, I thought, there would be no need for the administration of additional drugs once Mr. Kemp was deemed sedated.

7. I interrupted the woman and said that the protocol sounded like the ADOC was going to execute Mr. Kemp with a three-drug protocol, which conflicted with the Director's notice. She paused briefly but failed to answer my concern. She resumed reading from the protocol. When she left the room in which I was seated, she returned to the hallway where it sounded like she told one or more ADOC personnel that a question had been raised during her reading of the protocol.

8. The original two escorts then took me and the other witness toward the execution chamber. I told one of those women that I needed clarification as to how the ADOC planned to kill Mr. Kemp, with a single drug or three drugs. She said that there was a man at the execution area who could answer that question.

9. At the door to the Housing Unit 9 there was a man in a suit or sport coat and tie. I stated that the protocol that was just read to me seemed to indicate that multiple drugs would be used for the execution but that the Director had informed Mr. Kemp in writing that one drug would be used. I asked him to clarify which method would be used. The man informed me that ADOC would be using one drug to execute Mr. Kemp.

10. I witnessed the execution of Mr. Kemp. From the witness room it appeared that Mr. Kemp had a femoral line in his groin. I saw a tray with sheet draped over his groin. I did not see a catheter in his outstretched right arm. I saw a light colored material around his right wrist and something resembling a cowhide strap over it that tethered his wrist to the gurney or table upon which the execution was taking place. I saw what appeared to be black straps across Mr. Kemp's chest against what appeared to be an orange shirt or jumpsuit. I do not recall seeing a sheet, blanket or other covering over his chest.

11. Mr. Kemp made a last statement. He said, "I regret nothing." It appeared that he tried to talk or at least move his lips after that, but I could not hear anything.

//

12. Soon after the lethal injection process started, Mr. Kemp's torso and right arm shook for approximately five or six seconds. I would characterize the shaking as violent due to the strain I saw being exerted on the cowhide strap on his right wrist and his right forearm moving repeatedly and quickly up and down off the gurney. It appeared as though he were convulsing or seizing. It is my recollection that his eyes were closed while he convulsed or shook and that his eyes did not open afterwards.

13. Mr. Kemp was pronounced dead at 10:08 a.m.

Signed this 30th day of April 2012, in Tucson, Arizona.

Tim Gabrielsen

EXHIBIT Y

EXHIBIT Y

Declaration of Dale A. Baich

I, Dale A. Baich, declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am an Assistant Federal Public Defender with the Office of the Federal Public Defender in the Capital Habeas Unit.

2. I was one of the attorneys who represented Robert Towery. I was also one of the individuals that Mr. Towery listed to be a witnesses to his execution on March 8, 2012. The execution was scheduled to begin at 10:00 a.m.

3. On the morning of Mr. Towery's execution, I, along with attorney Therese Day, met with Mr. Towery at about 8:15a.m. in Housing Unit 9 in the Central Unit at the Arizona State Prison in Florence. We were promptly escorted from Housing Unit 9 at 9:15 a.m.

4. I was then escorted by Arizona Department of Corrections (ADC) officers to a different building within Central Unit and taken to a conference room where I waited with other witnesses.

5. At approximately 9:40 a.m., I, along with the other witnesses, were moved from the conference room to another building at Central Unit and placed in an office.

6. At approximately 10:45 a.m., I was still waiting to be escorted into the witness area of Housing Unit 9. I thought this was unusual because on February 29, 2012, I witnessed the execution of Robert Moormann and the witnesses were escorted to Housing Unit 9 at approximately 10:10 a.m. I asked one of the ADC escort officials if there was a problem and if there was anything to report regarding Mr. Towery or the execution procedure. The escort officer indicated that she would check with the command center. After checking with the command center, the escort officer informed me that command had nothing to report.

7. I then asked to use the telephone. At approximately 10:50 a.m., I spoke with attorneys at the Office of the Federal Public Defender and informed them that

I was concerned that the execution had not started.

8. At approximately 11:03 a.m., I reported to the attorneys at my office that I, along with the other witnesses, were being moved to Housing Unit 9.

9. I arrived at Housing Unit 9 at approximately 11:08 a.m.

10. At approximately 11:17 a.m., Mr. Towery gave his last statement.

11. The evening prior to his execution, I had informed Mr. Towery what he could expect when ADC placed the intravenous (IV) catheters. Mr. Towery then made fists with both hands to show me the veins in each of his arms. He said "With veins like these, how can they miss."

12. I advised Mr. Towery that if there were any problems with the procedure or if he had concerns with what was occurring as the IV lines were being inserted, that he should advise the ADC officials who were present in the execution chamber that he wished to speak to his attorney. I further told Mr. Towery if the ADC officials would not allow him to speak with his attorney that he should say words to that effect as part of his last statement.

13. Mr. Towery was concerned about speaking openly about the procedures, as he had been informed by ADC that his last words would be cut off if he made any statements against ADC.

14. This concern is consistent with what Richard Bible told me during a morning meeting I had with him on the day of his execution. The date was June 30, 2011. Mr. Bible said that he was told by an ADC official to keep his last statement short, and that if he was critical of the ADC, critical of law enforcement or made disparaging comments about the victim, the microphone would be cut off during his statement. Mr. Bible was also told he would have to rehearse his last statement with an ADC official.

15. Mr. Towery said that rather than directly state that he asked to talk to his lawyer during the IV insertion procedure, he would say something to the effect of "Hey Dale I should have called you." He also said that if there were problems with the insertion of the IV lines or that if he was being hurt, he

would use the word "mistake" as part of his last statement.

16. During Mr. Towery's last words, he said "In the end, I should have called you Dale." Based on my discussions with Mr. Towery, this phrase meant that he asked to have speak to his lawyers while the catheters were being placed but was denied access.

17. During Mr. Towery's last words, he also said that he should have gone left and he went right. He went right when he should have gone left. He then went on to say he made "mistake, after mistake after mistake." Based on my discussions with Mr. Towery, this phrase meant that there were problems or he was hurt during the insertion of the catheters.

18. From the witness room, it appeared that Mr. Towery had a catheter in his right leg and a catheter in his right wrist.

Signed this 30th day of April 2012, in Phoenix, Arizona.

Dale A. Baich

Dale A. Baich

EXHIBIT Z

EXHIBIT Z

United Forensic Services, P.C.

Professional Forensic Autopsy & Consultation

Joseph I. Cohen, M.D., Forensic Pathologist | drcohen@forensiconline.com | www.forensiconline.com
448 Ignacio Blvd., Suite 325, Novato, California 94949 | 877.372.6436 Toll Free | 951.346.3245 Fax

Private Autopsy Examination of Thomas Kemp

(Declaration of Joseph I. Cohen, M.D.)

I, Joseph I. Cohen, M.D., Forensic Pathologist, performed a private autopsy examination, following the informed written consent of the Federal Public Defender, on the previously autopsied body of Thomas Kemp on April 28, 2012, at the University of Arizona Medical Center in Tucson, Arizona.

The following declaration serves as a preliminary summary of my autopsy findings, and is not intended to provide the detail that will be reported in my forthcoming, final autopsy protocol. I respectfully reserve the right to alter the following opinions in the event that additional pertinent information becomes available through future discovery or scientific studies.

Mr. Kemp was a well-developed, well-nourished man who, by history, was executed by lethal injection. An initial autopsy examination was performed by the local medical examiner.

Lethal injection was most likely performed via right femoral and/or left upper extremity venous (intravascular) access. Evidence of at least three or more antemortem punctures, including at least one puncture in the right femoral area and at least two punctures over the left upper extremity (left antecubital and lateral left forearm regions), were observed during the course of my autopsy examination.

The initial autopsy examination, performed by the medical examiner, included the performance of incisions and dissection over the right femoral and left antecubital areas. The incisions in these areas were extended by the undersigned during the course of this private autopsy examination. Additionally, an incision with examination of subcutaneous tissue was performed by the undersigned, over the externally visible antemortem left forearm puncture. The presence of hemorrhage on the skin surface and within the subcutaneous tissues corresponding to the left forearm puncture, confirms the antemortem nature of the left forearm puncture.

There were no readily visible antemortem skin punctures over the right upper extremity and the feet of Mr. Kemp.

The veins of Mr. Kemp's extremities were routinely noted to be thin, delicate and translucent, without apparent vessel wall thickening or sclerosis. The veins of the feet were especially prominent, of relatively large diameter.

The examination performed by the undersigned failed to reveal significant underlying natural disease, and failed to reveal evidence of underlying acute or remote cerebrovascular (brain) disease or injury. Natural disease did not cause or contribute to the death of Mr. Kemp.

Thomas Kemp

Physical injury did not cause or contribute to the death of Mr. Kemp.

Joseph I. Cohen, M.D.
Forensic Pathologist

04-30-12
Date

EXHIBIT AA

EXHIBIT AA

Declaration of Eric D. Katz, M.D.

I, Eric D. Katz, M.D., declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am employed by the Maricopa Medical Center. At Maricopa Medical Center, I serve in the Department of Emergency Medicine as the Program Director and Staff Physician; the Vice-Chairman for Education; and the Associate Director, Simulation and Education Fellowship. I serve in the Department of Internal Medicine as a staff physician. At the University of Arizona College Medicine, I hold an appointment as Associate Professor of Emergency Medicine.

2. On December 7, 2011, I testified during the *West v. Brewer* trial in my capacity as an emergency-medicine expert.

3. During my testimony, I testified as to my qualifications, and I was qualified as a medical expert.

4. I have reviewed the execution log from the execution of Robert Towery, dated March 8, 2012, titled "Correctional Service Log," by the Housing Unit 9 Section Leader.

5. That log indicates that when the execution team was attempting to set IV lines, the team made approximately four attempts to set a peripheral IV line in the right arm, and two in the left.

6. The log indicates that after the team made the multiple unsuccessful attempts to set peripheral IV lines, the IV Team Leader recommended that the team set a femoral line as the primary line, and a left peripheral as back-up.

7. In my medical opinion, it is 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.

8. In fact, as medical experience and logical analysis predict, the IV team was ultimately unsuccessful in setting the back-up line in the left peripheral site, as evidenced by the log.

9. I was also provided information regarding Thomas Kemp's execution. I was told that after the lethal injection began, Mr. Kemp's torso and right arm began to shake, and continued to do so for approximately six seconds. It is my understanding that Mr. Kemp was given 5 grams of pentobarbital during his execution. The description presented to me suggests a partial seizure which began shortly after medication administration. The cause of this activity could be related to medication administration, previous head injury or stroke, or a history of seizures.

Signed this 30th day of April, 2012.

Eric D. Katz, M.D.

EXHIBIT BB

EXHIBIT BB

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Thomas Paul West, et al.,	)	
	)	
Plaintiffs,	)	No. **CV 11-1409-PHX-NVW**
vs.	)	
	)	
Janice K. Brewer, et al.,	)	**Phoenix, Arizona**
	)	**December 7, 2011**
	)	**9:00 a.m.**
Defendants.	)	
	)	

BEFORE: **THE HONORABLE NEIL V. WAKE**
UNITED STATES DISTRICT JUDGE

(***Bench Trial - Day 3***)
(***Partial Transcript***)

Official Court Reporter:
Laurie A. Adams, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC 43
Phoenix, Arizona 85003-2151
(602) 322-7256

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

P R O C E E D I N G S

THE COURT: Please be seated.

And I guess the plaintiffs may call their next witness.

MR. BAICH: Good morning, Your Honor. Plaintiffs call Dr. Eric Katz.

THE COURTROOM DEPUTY: Doctor, come right up here. State your full name for the record and spell your last name.

THE WITNESS: Eric Daniel Katz, K-A-T-Z.

(The witness, Eric Katz, was sworn.)

THE COURT: Please proceed.

ERIC KATZ, M.D.

a witness herein, having been first duly sworn by the clerk to speak the truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KONRAD:

Q. Good morning, Doctor. How are you?

A. Good. Thank you.

Q. You have before you a stack of exhibits that we'll be referring to today, and there's also a monitor where exhibits will be shown.

If we could first -- I'd like you, for the Court, to go through your background. And your CV is attached to your report at Exhibit 258 in front of you in case you need it for

opinions that we haven't discussed?
A. At the time of the report, no, there were not.
Q. And does the report marked as Exhibit 258 briefly summarize your opinions?
A. It does.
MS. KONRAD: And I'd move to qualify him as a medical expert, Your Honor.
THE COURT: Well, he certainly is. It depends on what questions are asked.
BY MS. KONRAD:
Q. So let's talk about placing central lines. You indicated that you have been trained to place central lines, and for the past 15 years you have taught students and residents to place central lines?
A. That's correct.
Q. Will you please explain to the Court how a femoral central line is placed? And you have brought a catheter kit with you today, correct?
A. Yes.
Q. The placement of a central line goes through several distinct steps. Perhaps the most important one of those is actually the setup and the preparation of the patient and the equipment.
From there -- may I open it and demonstrate?
So once the patient has been positioned, once the skin

has been prepped, once the physician has ensured sterile technique, the first step in identifying a vein is actually to use both landmark identification of your target as well as ultrasound identification.

The landmark identification is usually found through a series of physical exam findings and a knowledge of anatomy. One of the perks of using ultrasound, though, is that when there are anatomical abnormalities, or things that are a little bit different from normal, the ultrasound shows you those changes before you take any steps.

My standard practice, and I think the standard practice with most physicians, is to use ultrasound to identify your target prior to even giving a local anesthetic, and that the local anesthetic is only given once you know where to give it.

And so from there, once the patient is anaesthetized, the needle that's used is actually a fairly large needle. And that's used to basically enter the skin and target the vein. Once that has entered into the vein, the trick with the central line is to at that point put down your ultrasound, hold your needle in place while taking off the syringe, and to take your guide wire and thread it through your needle and into the actual vein.

The wire is actually what holds the position of your procedure for you. Because before the wire is in the needle is

very prone to be moved or to being jostled or to being pushed deeper into the skin. Once the wire is threaded through, the needle is taken out.

Now, I have seen in testimony that there was a lot of mention of the needle being similar to the needle used for an intravenous catheter. And I think that looking at it shows that that's not really the case. It's a much bigger needle. It's a much longer needle. And it's going in a completely different anatomical location. Where the needle is being placed is basically through the skin, and a femoral line needle is going through the skin, through the subQ tissues, through the muscle, and into the vessel itself.

Now, once your line is in place, there are a couple of other steps that happen. The first is basically using a scalpel to nick the -- to go through the skin. And the normal way you do that, if you remember the wire is through the skin so everything beneath my fingers --

THE COURT: Excuse me, Doctor. Back up for a minute. Where does the use of the scalpel come in in relation to the insertion of the needle?

THE WITNESS: So the needle is placed through the skin and the wire is placed through the needle. At that point the needle is taken out of the patient and the scalpel is used to incise the skin right next to where the wire is going in.

THE COURT: Go ahead. Continue.

THE WITNESS: So the actual most painful part of the procedure is where you take the dilator. And this is a rigid plastic dilator much thicker than the needle itself.

BY MS. KONRAD:

Q. And just for the record, Doctor, can you describe by -- for the record how big these things are that you are talking about? I mean, she's transcribing so they are not going to be able to see the demonstration. The judge obviously has the benefit of doing that, but can you give a description?

A. So the description of the needle is -- I'm sorry. I'm not sure where I have put it right now. The description of the needle is it's approximately three and-a-half inches long. It is a 16 French needle, I believe, and it's on a clear hub with a 5cc syringe attached to it. The wire, I'm not sure of the size of it. It's a standard introducer wire.

The introducer piece itself is several millimeters across, probably four or five millimeters across. And so at the step that we're at now, the wire's through the skin, the skin has been cut with the scalpel. And at this point, this is the painful part because the introducer is what's going to bore a hole from the skin all the way through to the vein, bore a hole into the vein itself. So that's brought down from the skin in a twisting motion all the way down. And what that does is separates out the tissues so your softer catheter can then follow.

So at that point, you take this firm catheter out of the patient.

THE COURT: Now, Doctor, what have you accomplished with that firm catheter?

THE WITNESS: The path of the wire is much thinner than the path of the catheter here. So by using the dilator you have essentially cleared out a wider path for the catheter to come down through.

THE COURT: Is that clearing out within the vein or in the tissue outside the vein?

THE WITNESS: It's actually clearing out from the skin all the way through to and including the vein. So it's pushing subcutaneous fat. It's pushing muscle tissue. It's pushing skin.

THE COURT: All right.

THE WITNESS: And so at this point in the procedure, you are going to thread the catheter over the wire and the catheter itself is a little shorter -- is a little narrower than the width of the dilator itself but it's a little bit softer plastic. So you are going to thread the catheter through down into the vein and at that point you are going to pull out your wire and you now have a secured position of your secured femoral line within the vein.

At that point there are two side pieces to the hub of the catheter and those are then sutured to the skin with a

needle and usually a 3-0 suture.

And so this whole process I have seen described as painful as an IV needle and that doesn't make a lot of sense to me. When you have done these often enough, what you realize is that, first of all, you have a bigger, firmer, longer needle buried deeper into the skin. You have a firm rigid dilator which is twisted down through the skin. You have a catheter that's placed all the way down. Then there are two more needle sticks on the side of it just to sew it in place.

And so the entire process isn't as painless as an IV as has been suggested.

THE COURT: But, Doctor, what is the consequence of applying a local anesthetic before this procedure has begun?

THE WITNESS: That's an excellent question.

So most of the kits will come with a small vial of lidocaine. Each kit is a little bit different. This kit comes with a 5cc bottle of lidocaine. And actually when I do these procedures I actually take this and kind of toss it away and get a bigger bottle of lidocaine. The reason is lidocaine will only work in the vicinity in which it's placed into the patient. A small amount of lidocaine would only deaden the nerves that it touches.

So if inadequate lidocaine is used, then the areas outside of its perimeter are completely un-anaesthetized. Now, when you do use lidocaine, it usually numbs up the surface of

the skin and the area right underneath it. The key part of using lidocaine correctly, though, is to try and instill the lidocaine along the entire path that the needle and the catheter are going to go through. That's very tricky, because you may not know that path at the start. And that's why generous amounts of lidocaine are always used.

BY MS. KONRAD:

Q. Thank you for that description.

Now that you have explained how to set a central line, let's turn to your report and the opinions that you reached in reviewing the documents in this case.

If you could, please give the Court a brief overview of your opinion regarding the placement of the femoral central lines in the five prisoners. So what I'm doing is starting with number one on your report.

A. So one of the first set of documents that I was able to review were the pictures of the scene and also the pictures from the autopsy reports there. And there was a trend there that was clearly non-standard. And that trend was that the actual placement of the catheter was in an incorrect position and an incorrect orientation on four of the five inmates who had a central line placed.

Q. Okay. So you noticed that -- I think you have marked here that they are placed in an orientation where the catheter points laterally. What other things did you also notice?

position can make it difficult. The size of the vein can make it difficult. The presence of a clot in the vein can also make it difficult.

Q. So what does his opinion demonstrate to you, Doctor?

A. Again, I'm concerned that he's learned the wrong lessons in placing central lines and I'm concerned that he's not recognizing some of the things that we teach for people to look for before placing a central line.

His deposition, I think, from 2008 reported that when he missed it was always because of anatomy. I would like to be able to say that every time I have struggled with a central line it's because of anatomy, but there has to be an identification of the fact that maybe the anatomy is off because you don't know what to expect.

Q. And what complications could arise from placement of a -- or attempted placement of a femoral central line?

A. In the acute part, where -- in the time when you are actually placing the line, the major complication is hitting the femoral artery, which is both somewhat uncomfortable and also it can distort your landmarks and provide some interference before you place the central line in the femoral vein, in the femoral vein rather than in the artery.

So if you hit the artery, it can actually leak blood around the femoral vein. And since when you are going in you are aspirating, you may be actually aspirating the hematoma

1 rather than in the vein itself.
2 So that's usually the one that's most common. There
3 are a few others that are reported there. There are reports of
4 tearing the femoral vein and there are reports of even hitting
5 the bladder from an inappropriate femoral vein.
6 Q. And do you have similar complications when attempting to
7 set a peripheral IV?
8 A. No, you don't.
9 Q. So summing up your testimony regarding the Medical Team
10 Leader's practice, training, and understanding of placing a
11 central line, what is your ultimate opinion regarding that?
12 A. My ultimate opinion is that I don't see physicians
13 requiring assistance 50 percent of the time, and I don't see
14 this many central lines placed that need repeated needle sticks
15 to gain access.
16 So given his deposition, his description of his
17 training, his recognition of common complicating factors, I
18 don't think he's up to the standard when it comes to placing
19 these lines.
20 THE COURT: What do you mean, "up to the standard."
21 What standard?
22 THE WITNESS: I think his performance is demonstrated
23 to be below that of my residents in training.
24 THE COURT: Well, I'm trying to understand what that
25 means. Are you offering an opinion -- have you ever testified

EXHIBIT CC

EXHIBIT CC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Thomas Paul West, et al.,	)	
	)	
Plaintiffs,	)	No. **CV 11-1409-PHX-NVW**
vs.	)	
	)	
Janice K. Brewer, et al.,	)	**Phoenix, Arizona**
	)	**December 6, 2011**
	)	**9:00 a.m.**
Defendants.	)	
	)	

BEFORE: **THE HONORABLE NEIL V. WAKE**
UNITED STATES DISTRICT JUDGE

(***Bench Trial - Day 2***)
(*Redacted*)

Official Court Reporters:
Laurie A. Adams, RMR, CRR
Merilyn A. Sanchez, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC 43
Phoenix, Arizona 85003-2151
(602) 322-7256

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

MEDICAL TEAM LEADER,

a witness herein, having been first duly sworn by the clerk to speak the truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KONRAD:

Q. Good morning.

A. Good morning.

Q. And you are aware that the courtroom is sealed today, correct? 09:07:17

A. Yes.

THE COURT: And let me be clear. I will repeat what I previously said.

It is ordered that the testimony of this witness is sealed, the courtroom is sealed. And the transcript which will 09:07:24 be prepared will be redacted to protect the identity of the witness and will be reviewed by plaintiffs' counsel to assure that that is achieved -- and defendant's counsel -- before we file the transcript with the records of the Court.

All right. Please proceed. 09:07:44

MS. KONRAD: I would like to take a few minutes to go over your background, sir. If I could introduce Exhibit 207, which is a CV that you had provided.

And I move to have that admitted.

THE COURT: Exhibit 207 is admitted. 09:08:01

Q. Why is that your preference?
A. I believe that the central line is more reliable and less likely to cause pain, discomfort, to the inmate.
Q. And why do you say it's less likely to cause pain and discomfort to the prisoner? 09:49:07
A. Because the chemicals which are administered are known to cause pain if not administered appropriately.
Q. Which chemicals are known to cause pain?
A. Pentothal or pentobarbital and potassium chloride.
Q. And what type of pain is caused by pentothal being administered? 09:49:30
A. I'm not sure exactly what kind of pain. I think it would be described by most patients or inmates as like a burning pain.
Q. And pentothal burns if what? 09:49:48
A. Well, it's toxic to tissues, so mostly you would have pain if it was extravasating outside of the vein into the subcutaneous tissue. But if it's given in a high enough concentration in a smaller vein, then that will also cause pain. 09:50:17
Q. Okay. And is it your opinion that the concentration level of the sodium thiopental or pentothal that's administered in Arizona as part of the lethal injection protocol is a concentration that would in and of itself cause pain if administered? 09:50:42

A. I think that's my opinion, yes.
Q. And so to what degree of medical certainty would somebody -- take that back.
You say that somebody would feel pain from administering the pentothal in the concentration level that it is given in Arizona's protocol through a smaller vein, correct? 09:51:05
A. Correct.
Q. And would you agree that that would be a peripheral vein?
A. I think my opinion on that is that if the vein was distal, or down, away from the elbow, that it would most likely cause discomfort. 09:51:30
Q. So if it was administered at the elbow, it would not cause discomfort?
A. I don't think so. Well, I shouldn't say that. It may. Everybody -- every individual is different but much less likely to. 09:51:54
Q. So your preference is to administer the chemicals, the drugs, through the femoral line because if you administer it through a smaller vein it could cause pain, correct?
A. And the risk of extravasation. 09:52:26
Q. And what causes extravasation?
A. Whenever a peripheral IV is placed there's a pretty good chance that there will be a slight puncture through the vein. And if a chemical or a fluid is given at a high rate under pressure then that puncture could rupture out and then the 09:52:45

EXHIBIT DD

EXHIBIT DD

Declaration of Angela Fairchild

1. My name is Angela Fairchild, and I am employed as a Paralegal with the Office of the Federal Public Defender for the District of Arizona ("FPD").

2. I am the paralegal assigned to the case *Towery v. Brewer*, Case No. 2:12-CV-00245 (D. Ariz.).

3. On March 22, 2012, our office was provided a copy of documents related to the executions of Robert Moormann and Robert Towery by the Attorney General's Office.

4. Attached to my declaration are unaltered copies of several pages that were included in the documents we received.

5. Attachment 1 is a log from Robert Towery's execution labeled Correctional Service Log, Housing Unit 9 Section Leader, dated 3/8/12.

6. Attachment 2 is a log from Robert Towery's execution labeled Correctional Service Log, Housing Unit 9 Special Operations, dated 3/8/12.

7. Attachment 3 is a document labeled Execution Log, Towery, ADC #051550.

8. Attachment 4 is a log from Robert Moormann's execution labeled Correctional Service Log, Housing Unit 9 Section Leader, dated 2/29/12.

9. Attachment 5 is a log from Robert Moormann's execution labeled Correctional Service Log, Housing Unit 9 Special Operations, dated 2/29/12.

10. Attachment 6 is a document labeled Execution Log, Moormann, ADC # 31293.

I declare under penalty of perjury the following to be true to the best of my information and belief:

Signed this 30th day of April 2012, in Phoenix, Arizona.

Angela Fairchild

Attachment 1

Attachment 1

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Institution/Facility	Institutional Unit	Period Covered
ASPC-Florence	Central Unit	Hour 0900 Date 03/08/12
Housing Unit/Post/Duty Assignment: Housing Unit 9 Section Leader		Hour 1205 Date 03/08/12

Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
HU9 Section Leader	[redacted]	0600	1205				
HU9 Recorder	[redacted]	0830	1205				

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.	Staff Initials
0900	Execution table is prepared at least two hours prior to	[redacted]
	scheduled time of execution.	
0930	All items removed from inmate's cell(linen, property, etc.)	
0930	Housing Unit 9 Section Leader advises Director that inmate	
	is ready for search and restraint; request permission to	
	proceed.	
0930	Condemned inmate to be placed in upper restraints by	
	restraint/escort team after strip search.	
0935	Director's briefing:	
	Inmate Towery's attorney told him to ask the Director two	
	questions -	
	1) What is the protocol? 2)Where were the drugs obtained?	
	Inmate Towery stated it was not necessary but in order to	
	console the inmate the Director answered both questions.	
	The Director asked inmate Towery if he received the letter	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
	advising the protocol to be used. Inmate Towery acknowleged	
	the letter he received advising the one drug protocol would	
	be used. The Director advised inmate Towery the chemicals	
	were lawfully obtained in the United States. Deacon Sheffer	
	had avised the Director earlier that inmate Towery was in a	
	good place and he had asked inmate Towery to cooperate.	
0938	Restraint Team Leader notifies Housing Unit 9 Section Leader	
	that inmate is restrained and the team is ready.	
0939	The Director picks up the red phone and makes a check to	
	ascertain if the execution may proceed. If there is no delay	
	in the procedure, the Director informs Housing Unit 9 Section	
	Leader, "We may proceed with movement."	
0940	When signaled by Housing Unit 9 Section Leader, the Restraint	
	Escort team removes the inmate from cell; apply lower	
	restraints and proceed with movement.	
0940	Restraint Team Leader checks with Housing Unit 9 Section	
	Leader before proceeding with movement of inmate.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0940	Condemned inmate escorted to Execution Room; one staff in	
	front, two at the inmate's sides; Team Leader behind.	
	Support staff behind Team Leader.	
0948	Inmate secured by chest and ankle straps; Team Leader at head	
	of table, two at arms, two at feet.	
0948	Secure wrists with soft restraints.	
0948	Secure arms (maintain good circulation).	
0948	Secure upper torso.	
0948	Secure legs (maintain good circulation).	
0949	Restraint/Escort Team Leader checks all restraints. Team	
	moves back to holding area, Team Leader at door. Remove any	
	item not part of the event.	
0949	Housing Unit 9 Section Leader advises the Director inmate is	
	secure on table and requests approval to proceed with IV	
	procedure.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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8/6/09

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0952	The Director, acting upon the advice of the IV Team Leader,	[redacted]
	shall determine the catheter(s) site(s).	
1028	After multiple attempts of the left and right peripheral -	
	(approximately 4 in right - 2 in left), IV Team Leader recommended	
	right femoral as primary and left peripheral as back- up.	
1031	Director calls the Attorney General's Office and provides	
	an update regarding the IV process	
1037	The Director spoke with Jeff Zick at the Attorney General's	
	Office.	
1050	Right femoral was successful;left peripheral was unsuccessful	
	Discussion held with the Director and the IV Team Leader	
	regarding back-up catheter. Right hand peripheral was decided	
	as back-up and was successful at 1059.	
1059	Restraint/Escort Team Leader and Housing Unit 9 Section	[redacted]
	Leader positioned in Execution room. Special Ops Team Leader	
	inside of the chemical room. Inmate is secured to table with	
	IV flowing, EKG functioning.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1059	Housing Unit 9 Section Leader advises Director that IV	[redacted]
	procedure is complete.	
1103	Housing Unit 9 Section Leader advises Command to begin	
	movement of witnesses to Housing Unit 9.	
1104	Command directs movement of witnesses to Housing Unit 9 in	
	the following order: Inmate Witnesses, Media Witnesses,	
	Official Witnesses, Victim Witnesses. (no victim witnesses attended)	
1113	Command advises Housing Unit 9 Section Leader that all	
	witnesses are in place.	
1113	Housing Unit 9 Section Leader advises Director that witnesses	
	are in position and requests authorization to proceed.	
1114	The Director picks up the red phone and makes a final check	
	to ascertain if the execution may proceed. If there is no	
	delay in the procedure, the Director informs Housing Unit 9	
	Section Leader, "We may proceed."	
1115	With permission from Director and confirmation to proceed,	
	Housing Unit 9 Section Leader opens curtains.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1115	Housing Unit 9 Section Leader reads the Execution Order.	[redacted]
1116	Housing Unit 9 Section Leader asks inmate if he would like to	
	make a last statement.	
1117	Inmate makes his last statement.	
1122	Housing Unit 9 Section Leader advises witnesses the inmate	
	has been sedated.	
1126	Director informed of death by Special Ops Team Leader.	
1126	Director advises witnesses that the execution is concluded.	
1127	Housing Unit 9 Section Leader closes the curtains.	
1130	Housing Unit 9 Section Leader notifies Command to proceed	
	with removal of witnesses.	
1134	Housing Unit 9 Section Leader instructs IV Team to cut lines	
	to IV's.	
1137	CIU Investigator examines the body.	
1137	Coroner/Medical Examiner examines the body.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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8/6/09

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1144	Team enters and removes restraints from the inmate; the	[redacted]
	inmate is placed on a gurney.	
1144	Restraint/Escort Team assists Coroner in the removal of the	
	inmate's body.	
1147	Inmate's body is placed in Coroner's vehicle.	
1147	All teams perform clean-up chores.	
1154	The IV and Special Operations Teams will participate in an	
	informal debriefing with the Director and Division Director	
	immediately upon completion of the event.	
	Director: *The execution was more challenging because of the*	
	mandated order regarding two catheter points. I will be	
	speaking to the Attorney General regarding the attorney	
	visit the morning of the execution. In the past	
	this concluded at 7:00 A.M., not 9:15 A.M. The attorney	
	visit contributed to delay along with the inmates bad veins.	
	The Director thanked everyone for their patience, and advised	
	two more executions are coming up (no dates set yet).	
	Deputy Director [redacted] *The IV Team expressed their thanks and*	
	appreciation for the support received from everyone.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
	Division Director Patton: Movement last night went well. We	
	will look at getting radios and chargers for Housing Unit 9.	
	Special Operations Team Leader: The calmness of the Restraint	
	Team made the IV Team calm.	
1205	Housing Unit 9 Section Leader gives directive to secure the	[redacted]
	Execution Facility.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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Attachment 2

Attachment 2

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Institution/Facility	Institutional Unit	Period Covered
ASPC - Florence	Central Unit	Hour 0730 Date 03-08-12
Housing Unit/Post/Duty Assignment: Housing Unit 9, Special Operations		Hour 1141 Date 03-08-12

Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
SOT Leader [redacted]		—	—				
SOT Recorder [redacted]		—	—				

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.	Staff Initials
0730	Special Operations and IV Teams assembled for execution of inmate ROBERT	[redacted]
	TOWERY ADC # 051550	
0748	Audio, visual, and medical equipment inspected.	
0800	IV Team Leader checked and verified the flow of each gauge and confirmed there	
—	are no obstructions in the manifold or lines.	
0840	Commenced the preparation of chemicals and syringes.	
0856	Completed preparing, labeling, and affixing syringes to the manifold.	
0858	Special Operations Team Leader verified that all syringes are properly labeled	
—	and affixed in the correct location on the manifold.	
0947	EKG leads, Pulse/Oxygen monitor, and blood pressure cuff attached.	
—	Initial blood pressure: 141/69	
0952	IV procedure commenced.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff
1059	IV procedure complete. Primary IV catheter placed in inmate's Right	[redacted]
/	Femoral Backup IV catheter placed in inmate's Right Hand.	
1117	Director instructed Special Ops Team Leader to commence with drug protocol:	
1117	• **Syringe 1A, 60 mL Heparin/Saline**	
1118 10	• **Syringe 2A, 2.5 gm Pentobarbital**	
1118	• **Syringe 3A, 2.5 gm Pentobarbital**	
1119	• **Syringe 4A, 60 mL Heparin/Saline**	
1119	Drug protocol completed.	
1121 10	3 minute point: 1122 10. Confirmed 3 minutes have elapsed since	
/	commencing the administration of chemicals.	
1122	IV Team Leader assessed consciousness and confirmed the inmate is sedated	
1126	IV Team Leader pronounces death.	
	Additional entries: N/A.	
	A.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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Attachment 3

Attachment 3

EXECUTION LOG - Towery, ADC #051550	
1/10/12 @ 1607	Rcvd a call from Carl from the AZ Supreme Court advising a Warrant of Execution was issued for inmate Towery; execution set for March 8, 2012. Carl's contact number is: 602-452-3396 (Carl Johanson)
1/10/12	February 2, 2012 is the 35th day with date of execution of March 8, 2012
1/17/12	Received certified copy of Warrant; advised Eyman for pick-up
2/2/12	Legal call with Therese Day from 1535-1615
2/3/12	Received Inmate Interview Request Form – Inmate Towery declined
2/3/12	Legal call with Therese Day at 1500 hours
2/4/12	No legal activity
2/5/12	No legal activity
2/6/12	Received the following completed forms: Inmate Witness Information Method of Execution Disposition of Property, Notification of Accident, Illness, Death Last Meal Request
2/7/12	Received the following completed forms: Disposition of Remains
2/7/12	Legal call with Therese Day from 1530-1400
2/8/12	Legal call with Therese Day from 1015-1045
2/9/12	Legal call with Nancy Rangel from 1315-1345
2/10/12	Legal call with Nancy Rangel from 1015-1045
2/11/12	Legal call with Therese Day from 1015-1045
2/12/12	Legal call with Therese Day from 1015-1045
2/13/12	Legal call with Natasha Merle and Kimberly Taylor from 1015-1045
2/14/12	Legal call with Keith Helzendenger and Therese Day from 1343-1415
2/15/12	Legal call with Kelly Schneider from 1015-1045
2/16/12	Legal call with Kimberly Taylor from 1215-1245
2/17/12	Legal call with Kimberly Taylor from 1015-1240
2/18/12	Legal call with Therese Day from 1015-1045
2/19/12	Legal call with Dale Baich from 1015-1045
2/20/12	Legal call with Kimberly Taylor from 1015-1045
2/21/12	Legal call with Therese Day from 1025-1055
2/22/12	Legal call with Kimberly Taylor at 1015 Legal call with Nancy Rangel and Therese Day at 1500
2/23/12	Legal call with Dale Baich, Therese Day, Nancy Rangel, Kimberly Taylor, and Jasmine Teter from 1215-1245.
2/24/12	Legal call with Therese Day at 1015
2/25/12	Legal call with Therese Day at 1015
2/26/12	Legal call with Dale Baich at 1015
2/27/12	Legal call with Nancy Rangel from 1505-1535
2/28/12	Legal call with Keith Hilzendeger from 1535-1605
2/29/12	Legal call with Kelly Schneider from 10-15-1045
3/1/12	Legal call with Dale Baich and Nancy Rangel from 12/15-1240
3/1/12	Received Inmate Interview Request Form – Inmate Towery declined
3/2/12	Legal call from Nancy Rangel from 1230-1245
3/3/12	No legal activity
3/4/12	No legal activity
3/5/12	Legal call with Therese Day from 1015-1045
3/6/12	Legal call with Therese Day from 1015-1045
3/7/12	Legal call with Nancy Rangel from 1615-1646
3/7/12	Inmate consumed all food provided to him:

	2 20oz bottles of pepsi 1 tumbler ice 1 13oz porterhouse steak (deboned) 1 baked potato w/ butter and sour cream 1 cup sautéed mushrooms 1 serving asparagus with cheese sause 1 cup clam chowder 1 pint 2% milk 1 slice apple pie with 2 scoops vanilla ice cream Began meal at 1800, Finished meal at 1845.
3/8/12	Legal visit (0700-0800) with Kelly Schneider and Natasha Merle Legal visit (0815-0915) with Dale Baich and Therese Day
3/8/12	Time of Death 1126.

Attachment 4

Attachment 4

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Institution/Facility	Institutional Unit	Period Covered
ASPC-Florence	Central Unit	Hour 0900 Date 2/29/12
Housing Unit/Post/Duty Assignment: Housing Unit 9 Section Leader		Hour 1100 Date 2/29/12

Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
HU9 Section Leader	[redacted]	0600	1100				
HU9 Recorder	[redacted]	0830	1100				

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.	Staff Initials
0915	Execution table is prepared at least two hours prior to	[redacted]
	scheduled time of execution.	
0915	All items removed from inmate's cell (Linen, property, etc)	
0930	Housing Unit 9 Section Leader advises Director that inmate	
	is ready for search and restraint; request permission to	
	proceed.	
0939	Condemned inmate to be placed in upper restraints by	
	restraint/escort team after strip search.	
0939	Restraint Team Leader notifies Housing Unit 9 Section	
	Leader that inmate is restrained and the team is ready.	
0940	The Director picks up the red phone and makes a check to	
	ascertain if the execution may proceed. If there is no	
	delay in the procedure, the Director informs Housing Unit 9	
	Section Leader, "We may proceed with movement".	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0940	When signaled by Housing Unit 9 Section Leader, the Restraint/	[redacted]
	Escort team removes the inmate from cell. Apply lower	
	restraints and proceed with movement.	
0942	Restraint Team Leader checks with Housing Unit 9 Section Leade	
	before proceeding with movement of inmate.	
0942	Condemned inmate escorted to Execution Room; one staff	
	in front, two at the inmate's sides, Team Leader behind.	
	Support staff behind Team Leader.	
0950	Inmate secured by chest and ankle straps, Team Leader at head	
	of table, two at arms, two at feet.	
0950	Secure wrists with soft restraints.	
0950	Secure arms (maintain good circulation).	
0950	Secure upper torso.	
0950	Secure legs (maintain good circulation).	
0950	Restraint/Escort Team Leader checks all restraints. Team	
	moves back to holding area, Team Leader at door. Remove any	
	item not part of the event.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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8/6/09

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
0951	Housing Unit 9 Section Leader advises the Director inmate is	[redacted]
	secure on table and requests approval to proceed with IV	
	procedure.	
0955	The Director, acting upon the advise of the IV Team Leader,	
	shall determine the catheter(s) site(s).	
1005	Restraint/Escort Team Leader and Housing Unit 9 Section Leader	
	positioned in Execution room. Special Ops Team Leader inside	
	of the chemical room. Inmate is secured to table with IV	
	flowing, EKG functioning.	
1005	Housing Unit 9 Section Leader advises Director that IV	
	procedure is complete.	
1008	Housing Unit 9 Section Leader advises Command to begin	
	movement of witnesses to Housing Unit 9.	
1009	Command directs movement of witnesses to Housing Unit 9 in	[redacted]
	the following order: Inmate Witnesses, Media Witnesses,	
	Official Witnesses, Victim Witnesses.	
1019	Command advises Housing Unit 9 Section Leader that all	
	witnesses are in place.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

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ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1019	Housing Unit 9 Section Leader advises Director that witnesses	[redacted]
	are in position and requests authorization to proceed.	
1019	The Director picks up the red phone and makes a final check	
	to ascertain if the execution may proceed. If there is no	
	delay in the procedure, the Director informs Housing Unit 9	
	Section Leader, "We may proceed".	
1021	With permission from Director and confirmation to proceed,	
	Housing Unit 9 Section Leader opens curtains.	
1022	Housing Unit 9 Section Leader reads the Execution Order	
1022	Housing Unit 9 Section Leader asks inmate if he would like to	
	make a last statement.	
1023	Inmate makes his last statement.	
1028	Housing Unit 9 Section Leader advises witnesses the inmate	
	has been sedated.	
1033	Director informed of death by Special Ops Team Leader.	
1033	Director advises witnesses that the execution is concluded.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

105-6
8/6/09

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1033	Housing Unit 9 Section Leader closes the curtains.	[redacted]
1034	Housing Unit 9 Section Leader notifies command to proceed	
	with removal of witnesses.	
1040	Housing Unit 9 Secton Leader instructs IV Team to cut lines to IV's	
1041	CIU Investigator examines the body.	
1041	Coroner / Medical Examiner examines the body.	
1050	Team enters and removes restraints from the inmate.	
	The inmate is placed on a gurney.	
1051	Restraint / Escort Team assists Coroner in the removal of the	
	inmate's body.	
1052	Inmate's body is placed in Coroner's vehicle.	
1053	All teams perform clean-up chores.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

105-6
8/6/09

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1055	The IV and Special Operations Teams will participate in an	[redacted]
	informal debriefing with the Director and Division Director	
	immediately upon completion of the event.	
	1) Special Ops Team Leader - lines need to be only as long as	
	they need to be. When hooked up they will be shortened down so	
	we dont share excess.	
	2) Push back picking up the inmate at Browning by 15 minutes.	
	3) Director. Good job by everyone. Took care of States business and	
	did it professionally	
1100	Housing Unit 9 Section Leader gives directive to secure the	[redacted]
	Execution Facility.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

105-6
8/8/09

Attachment 5

Attachment 5

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Institution/Facility	Institutional Unit	Period Covered
ASPC - Florence	Central Unit	Hour 0640 Date 02-29-12
Housing Unit/Post/Duty Assignment		Hour 1050 Date 02-29-12
Housing Unit 9, Special Operations		

Staff Member (Last, First M.I. and Title)	Staff	Time Arrived	Time Departed	Staff Member (Last, First M.I. and Title)	Staff Initials	Time Arrived	Time Departed
SOT Leader	[redacted]	0640	1050				
SOT Recorder	[redacted]	0640	1050				

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action Taken, etc.	Staff Initials
0640	Special Operations and IV Teams assembled for execution of inmate	[redacted]
0852	Audio, visual, and medical equipment inspected.	[redacted]
0904	IV Team Leader checked and verified the flow of each gauge and confirmed there	[redacted]
	are no obstructions in the manifold or lines.	
0907	Commenced the preparation of chemicals and syringes.	[redacted]
0921	Completed preparing, labeling, and affixing syringes to the manifold.	
0921	Special Operations Team Leader verified that all syringes are properly labeled	
	and affixed in the correct location on the manifold.	
0949	EKG leads, Pulse/Oxygen monitor, and blood pressure cuff attached.	
	Initial blood pressure: 145 / 77	
0956	IV procedure commenced.	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
1000	IV procedure complete. Primary IV catheter placed in inmate's LEFT	[redacted]
—	Periphial Backup IV catheter placed in inmate's Right Periphial	
1023.	Director instructed Special Ops Team Leader to commence with drug protocol:	
1023.	• **Syringe 1A, 60 mL Heparin/Saline**	
1024 24	• **Syringe 2A, 2.5 gm Pentobarbital**	
1025.	• **Syringe 3A, 2.5 gm Pentobarbital**	
1026.	• **Syringe 4A, 60 mL Heparin/Saline**	
1026.	Drug protocol completed.	
1027 24	3 minute point: 1027 24. Confirmed 3 minutes have elapsed since	[redacted]
—	commencing the administration of chemicals.	
1028	IV Team Leader assessed consciousness and confirmed the inmate is sedated	
1033	IV Team Leader pronounces death.	
	Additional entries: NONE	
	A. N/A	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

105-6
8/6/09

ARIZONA DEPARTMENT OF CORRECTIONS

Correctional Service Log

Time of Day	Occurrence/Action Taken: Events, Activities, Disciplinary Violations, Maintenance Requirements, Safety/Health Hazards, Other Information Received and Action taken, etc.	Staff Initials
	[redacted]	

Shift Commander's Comments: *(Notes or comments concerning entries above; comments deemed appropriate)*

105-6
8/6/09

Attachment 6

Attachment 6

EXECUTION LOG - Moorman, ADC #31293	
1/10/12 @ 1607	Rcvd a call from Carl from the AZ Supreme Court advising a Warrant of Execution was issued for inmate Moorman; execution set for February 29, 2012. His contact number is: 602-452-3396 (Carl Johanson)
1/10/12	January 25, 2012 is the 35th day with date of execution of February 29, 2012.
1/17/12	Received certified copy of Warrant; advised Eyman for pick-up.
1/26/12	Legal visit w/ Denise Young (1000-1200)
1/27/12	Legal call w/ Attorney Julie Hall from 0930 – 0950.
1/27/12	Received the following completed forms: Disposition of Property Last Will and Testament
1/28/12	No legal activity
1/29/12	No legal activity
1/30/12	No legal activity
1/31/12	No legal activity
1/31/12	Received the following completed forms: Method of Execution
2/1/12	Legal call w/ Attorney Julie Hall. 0945 - 1000
2/2/12	No legal activity. Received the following completed forms: Disposition of Remains Inmate Witness Information Last Meal Request
2/3/12	Received Inmate Interview Request Form – Inmate Moormann declined.
2/3/12	Legal call with attorney Julie Hall from 0940-1010
2/3/12	Received letter from AZ Board of Executive Clemency. Reprieve/Commutation of Sentence hearing is scheduled for 2/24/12 at 0830 at Rynning Unit.
2/4/12	Legal call with Julie Hall at 0930.
2/5/12	Legal call with Julie Hall at 0930.
2/6/12	Legal call with Denise Young at 0930.
2/7/12	Legal call with Julie Hall from 0930-1000.
2/8/12	Legal call with Julie Hall from 0935-1005.
2/9/12	No legal activity
2/10/12	Legal call with Julie Hall from 0935-1005.
2/11/12	Legal call with Julie Hall from 0930-1000
2/12/12	Legal call with Denise Young from 0930-1000
2/13/12	Legal call with Denise Young from 0930-1000
2/14/12	No legal activity
2/15/12	Legal call with Denise Young from 0940-1010
2/16/12	No legal activity
2/17/12	No legal activity
2/18/12	Legal call with Julie Hall from 0930-1000
2/19/12	Legal call with Denise Young from 0930-1000
2/20/12	No legal activity
2/21/12	No legal activity
2/22/12	Legal call with Julie Hall from 1050-1120
2/22/12	Received letter from Director to Moormann regarding 3 drug protocol.

2/23/12	No legal activity
2/24/12	Attended Clemency Hearing (0800 - 1330)
2/25/12	Legal call with Denise Young at 0930
2/26/12	Legal call with Julie Hall at 0930
2/27/12	Legal call with Denise Young at 0930
2/27/12	Received letter from Director to Moormann regarding one-drug protocol
2/28/12	Received Inmate Interview Request Form – Inmate Moormann declined.
2/28/12	No legal calls
2/29/12	Legal visit with attorney's Julie Hall and Denise young from 0715-0915
2/29/12	Time of death 1033 hours.

EXHIBIT EE

EXHIBIT EE

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

RECEIVED
FEB - 9 2012
CLERK SUPREME COURT

FILED
FEB - 9 2012
RACHELLE M. RESNICK
CLERK SUPREME COURT
BY:

February 9, 2012

Rachelle M. Resnick
Clerk of the Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-85-0115-AP
Pinal County Superior Court No. CR-11043

Dear Ms. Resnick:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution set for Wednesday, February 29, 2012 is scheduled to occur on or after 10:00 a.m. on that date.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Wednesday, February 29, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Wednesday, February 29, 2012.

Sincerely,

Charles L. Ryan
Director

EXHIBIT FF

EXHIBIT FF

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

February 17, 2012

Rachelle M. Resnick
Clerk of the Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-92-0493-AP
Maricopa County Superior Court No. CR-91-92648

Dear Ms. Resnick:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution set for Thursday, March 8, 2012 is scheduled to occur on or after 10:00 a.m. on that date.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Thursday, March 8, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Thursday, March 8, 2012.

Sincerely,

Charles L. Ryan
Director

EXHIBIT GG

EXHIBIT GG

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

March 28, 2012

Janet Johnson
Acting Clerk of the Arizona Supreme Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-93-0332-AP
Pima County Superior Court No. CR-38826

Dear Ms. Johnson:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution of inmate Thomas Arnold Kemp is set for Wednesday, April 25, 2012 and is scheduled to occur on or after 10:00 a.m. on that date. The inmate has chosen lethal injection as the method of execution.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Wednesday, April 25, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Wednesday, April 25, 2012.

Sincerely,

Charles L. Ryan
Director

CLR/hp

cc: Thomas Arnold Kemp, ADC #099144, ASPC-Eyman
Kent E. Cattani, Unit Chief, Capital Appeals, Arizona Attorney General's Office
Barbara Lawall, County Attorney, Pima County Attorney's Office
Duane Belcher, Executive Director, Arizona Board of Executive Clemency
Honorable Roslyn O. Silver, Chief Judge, U.S. District Court for the District of Arizona
Honorable Frank R. Zapata, Judge, U.S. District Court for the District of Arizona
William K. Suter, Clerk, U.S. Supreme Court
Molly Dwyer, Clerk, U.S. Court of Appeals for Ninth Circuit
Brian Karth, Clerk, U.S. District Court for the District of Arizona
Kristine Fox, Capital Case Staff Attorney, U.S. District Court for the District of Arizona
Honorable Sandra R. Simmons, Presiding Judge, Pima County Superior Court
Honorable Richard D. Nichols, Presiding Family Court Judge, Pima County Superior Court
Patricia A. Noland, Clerk of the Court, Pima County Superior Court
Joseph Sciarrotta, General Counsel, Office of the Governor
Karyn E. Klausner, General Counsel, Arizona Department of Corrections
Dan Levey, Victim Services Division, Arizona Attorney General's Office
Heather Tanner, Victim Services Division, Arizona Attorney General's Office
Amy Bocks, Victim Services Division, Arizona Attorney General's Office
Amy Sara Armstrong, Arizona Capital Representation Project
Dale A. Baich, Federal Public Defender's Office
Diane Alessi, Capital Case Staff Attorney, Arizona Death Penalty Judicial Assistance Program
File

EXHIBIT HH

EXHIBIT HH

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

April 16, 2012

Janet Johnson
Acting Clerk of the Arizona Supreme Court
Supreme Court of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Arizona Supreme Court No. CR-90-0247-AP
Maricopa County Superior Court No. CR-163419

Dear Ms. Johnson:

Thank you for the certified copy of the Warrant of Execution in the above entitled matter, along with the enclosed copies of the Opinion and the Mandate.

The purpose of this communication is to both confirm receipt, as well as to notify you that the execution of inmate Samuel Villegas Lopez is set for Wednesday, May 16, 2012 and is scheduled to occur on or after 10:00 a.m. on that date.

As per the Order, the twenty-four (24) hours during which the Warrant of Execution is valid will begin on Wednesday, May 16, 2012 at 10:00 a.m. This communication meets the Order requirement of written notice to the Supreme Court and parties at least 20 days prior to Wednesday, May 16, 2012.

Sincerely,

Charles L. Ryan
Director

CLR/hp

EXHIBIT II

EXHIBIT II

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

April 20, 2012

Samuel Villegas Lopez, ADC #043833

RE: Choice of Protocol

Mr. Lopez:

The purpose of this correspondence is to notify you that the one-drug protocol using Pentobarbital will be used to carry out the execution. This one-drug protocol is outlined in Department Order 710 Attachment D, Chemical Chart D.

If you have any questions you may direct them to your attorney who is receiving a copy of this notification, as well.

Regards,

Charles L. Ryan
Director

cc: Kelley J. Henry, Supervisory Asst. Federal Public Defender, Attorney for Inmate Lopez
Denise Young, Co-Counsel for Inmate Lopez
Dawn Northup, General Counsel- ADC
Kent Cattani, Division Chief, Capital Appeals, Arizona Attorney General's Office
Jeff Zick, Section chief, Capital Appeals, Arizona Attorney General's Office
Robert Patton, Division Director, Offender Operations
Ron Credio, Warden, ASPC-Eyman
Lance Hetmer, Warden, ASPC-Florence

EXHIBIT JJ

EXHIBIT JJ

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

April 2, 2012

Dale Baich
Federal Public Defender's Office
Capital Habeas Division
850 W. Adams, Suite 201
Phoenix, AZ 85007

Re: Visitation with Inmate Kemp

Mr. Baich:

In response to your letter of March 28, 2012, please be advised that ADC's current policy regarding attorney-client visitation remains unchanged. Visitation will, however, be allowed from 6:00 a.m. to 7:00 a.m. on the morning of Mr. Kemp's scheduled execution. As you know, attorney-client visitation on the mornings prior to the executions of Mr. Landrigan through Mr. West was permitted each time you requested. Visits with each inmate occurred from 6:00 a.m. to 7:00 a.m. without any complaint from your office.

The recent Ninth Circuit panel decision in *Towery v. Brewer* incorrectly relied on a 2004 protocol referring to visitation. This protocol has long been superseded by Department Order 710. ADC agreed, however to allow the visitation schedule stated in the court's opinion for Mr. Moorman and Mr. Towery, but did not waive the right to exercise of my discretion on the scheduling of future visits with death row inmates.

It is my intention to permit attorney-client visitation, but not pursuant to the outdated 2004 protocol. The pending execution of Mr. Kemp is set for 10:00 a.m. In order for the process to go forward smoothly and without undue delay, visitation will be allowed, if requested, between the hours of 6:00 a.m. to 7:00 a.m.

Regards,

Charles L. Ryan
Director

cc: Kent Cattani, Arizona Attorney General's Office
Jeff Zick, Arizona Attorney General's Office
Karyn Klausner, General Counsel
Dawn Northup, General Counsel
Jeff Hood, Deputy Director
Robert Patton, Division Director, Offender Operations
Lance Hetmer, Warden ASPC Florence

Jon M. Sands
Federal Public Defender
Dale A. Baich, OH Bar No. 0025070
Robin C. Konrad, AL Bar No. 2194-N76K
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fvigo@omm.com

Counsel for Plaintiffs Pete Rogovich, Thomas Kemp, Milo Stanley, Daniel Cook, and Richard Stokley

Denise I. Young, AZ Bar No. 007146
2930 N. Santa Rosa Place
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Telephone: 520-322-5344
dyoung3@mindspring.com

Henry A. Martin
Federal Public Defender
Kelley J. Henry
Assistant Federal Public Defender
Missouri State Bar No. 38849
810 Broadway, Suite 200
Nashville, TN 37203-3805
(615) 736-5047 (t)
(615) 736-5265 (f)
kelley_henry@fd.org

Counsel for Plaintiff Samuel Lopez

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Towery, Robert Moormann, Pete Rovogich, Thomas Kemp, Samuel Lopez, Milo Stanley, Daniel Cook, and Richard Stokley, Plaintiffs, v. Janice K. Brewer, Governor of Arizona; Charles L. Ryan, Director, Arizona Department of Corrections; Ron Credio, Warden, Arizona Department of Corrections - Eyman; Lance Hetmer Warden, Arizona Department of Corrections - Florence; IV Team Leader; IV Team Members 1-5; Special Operations Team Leader; Special Operations Team Recorder; Special Operations Team Members 1-5; and Does 1-25, Defendants.	Case No. 2:12-cv-00245-NVW **DEATH PENALTY CASE** **SECOND AMENDED COMPLAINT FOR EQUITABLE, INJUNCTIVE, AND DECLARATORY RELIEF [42 U.S.C. § 1983]**

Plaintiffs, by undersigned counsel, allege as follows:

Nature of the Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations by the Arizona Department of Corrections ("ADC") of Plaintiffs' right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and for violations and threatened violations of Plaintiffs' rights to due process, to access to courts, and to equal protection under the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

2. This Complaint does not challenge Plaintiffs' underlying capital conviction or sentences of death, nor does it allege that lethal injection as a form of execution is *per se* unconstitutional. Rather, Plaintiffs challenge only the manner and means by which ADC intends to execute condemned inmates by lethal injection under its protocol dated January 25, 2012.

3. Plaintiffs seek equitable, injunctive, and declaratory relief.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violations), § 2201 (declaratory relief), and § 2202 (injunctive relief).

5. Venue is proper in this district under 28 U.S.C. § 1391(b) because all Plaintiffs are currently incarcerated in Arizona State Prison Complex-Eyman, located within this District. All executions performed by Defendants are carried out in Central Unit at Arizona State Prison Complex-Florence, also located within this District. The wrongful acts giving rise to this Complaint have occurred and/or will occur in this District.

The Parties

6. Plaintiffs are United States citizens and residents of the State of Arizona. They are currently death-sentenced prisoners under the supervision of ADC. They are incarcerated at ASPC-Eyman, Browning Unit, in Florence, Arizona.

7. Plaintiff Daniel Cook is a United States citizen and a resident of the State of Arizona. He is currently a death-row prisoner under the supervision of ADC. He is

incarcerated at ASPC-Eyman, Browning Unit, 4374 East Butte Avenue, Florence, Arizona, 85232. Mr. Cook was sentenced to death on August 8, 1988, and therefore may choose under Arizona Revised Statutes Section 13-757(B), whether to be executed by lethal injection or lethal gas. If he does not make a selection, Mr. Cook will be executed by lethal injection.

8. Plaintiff Richard Stokley is a United States citizen and a resident of the State of Arizona. He is currently a death-row prisoner under the supervision of ADC. He is incarcerated at ASPC-Eyman, Browning Unit, 4374 East Butte Avenue, Florence, Arizona, 85232. Mr. Stokley was sentenced to death on July14, 1992, and therefore may choose under Arizona Revised Statutes Section 13-757(B), whether to be executed by lethal injection or lethal gas. If he does not make a selection, Mr. Stokley will be executed by lethal injection.

9. Defendant Janice K. Brewer is the Governor of the State of Arizona and is being sued in her official capacity for equitable relief.

10. Defendant Charles Ryan is the Director of ADC and is being sued in his official capacity for equitable relief.

11. Defendant Ron Credio is the Warden of Arizona State Prison Complex-Eyman, where death-row prisoners are housed, and is being sued in his official capacity for equitable relief.

12. Defendant Lance Hetmer is the Warden of Arizona State Prison Complex-Florence, where ADC performs all Arizona executions, and is being sued in his official capacity for equitable relief.

13. Defendant IV Team Leader is the person assigned the role of IV Team Leader, as defined in Arizona Department of Corrections Order 710 and Attachment D, and is being sued in his or her official capacity for equitable relief.

14. Defendants IV Team Members 1-5 are the persons assigned the role of IV Team member, as defined in Arizona Department of Corrections Order 710 and Attachment D, and are each being sued individually in his or her official capacity for equitable relief.

15. Defendant Special Operations Team Leader is the person assigned the role of

Special Operations Team Leader, as defined in Arizona Department of Corrections Order 710 and Attachment D, and is being sued in his or her official capacity for equitable relief.

16. Defendant Special Operations Team Recorder is the person assigned the role of Special Operations Team Recorder, as defined in Arizona Department of Corrections Order 710 and Attachment D, and is being sued in his or her official capacity for equitable relief.

17. Defendants Special Operations Team Members 1-5 are the persons assigned the role of Special Operations Team members, as defined in Arizona Department of Corrections Order 710 and Attachment D, and are each being sued individually in his or her official capacity for equitable relief.

18. Defendants Does 1-25 are other unknown ADC officers, successors in office, agents, contractors, and employees, along with those acting in concert with them, who have or will participate in Plaintiffs' executions by virtue of their roles in designing, implementing, and/or carrying out the lethal injection process. These Defendants will participate in Plaintiffs' executions in various capacities, including in ordering, supplying, distributing, transporting, storing, or mixing lethal injection drugs; or preparing, implementing, or carrying out lethal injection itself. The identities of these Defendants either have not yet been disclosed or have not been determined, but if and when Plaintiffs discover their identities, Plaintiffs will amend this Complaint accordingly.

Exhaustion of Administrative Remedies

19. Exhaustion is not necessary under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, because this action does not challenge prison conditions, and because there are no available administrative remedies capable of addressing the challenged constitutional violations.

20. Attempting to exhaust available administrative remedies in an effort to resolve this issue would be futile because the internal grievance process does not allow for modification of the ADC lethal-injection protocol. Moreover, because the ADC Director has

unfettered discretion to change the protocol at anytime—even after providing notice as to certain aspects of the protocol—any attempt to grieve the protocol would be illusory.

Relevant Facts

21. Plaintiffs incorporate by reference each and every statement and allegation set forth throughout this Complaint as if fully stated herein.

22. Plaintiffs are death row prisoners awaiting execution in Arizona. Under Arizona law, a sentence of death shall be carried out by lethal injection under the supervision of ADC. Ariz. Rev. Stat. § 13-757(A). But "a defendant sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection." Ariz. Rev. Stat. § 13-757(B).

23. The statute does not specify the drugs, dosages, drug combinations, or manner of intravenous line access to be used in the execution process. Nor does the statute set forth requirements for the certification, training, or licensure required for those individuals who participate in the execution process.

24. All of the details and methods involved in the execution process are to be determined at the sole discretion of ADC. ADC promulgates a written protocol governing execution procedures in Arizona. ADC Department Order 710 ("DO 710") establishes procedures for planning and carrying out executions. Attachment D to DO 710 governs the preparation and administration of lethal drugs when carrying out an execution.

25. ADC has amended its written lethal-injection protocol seven times since October 2007.

26. ADC's current written lethal-injection protocol became effective on January 25, 2012 (hereinafter, the "January 2012 Protocol").

27. The January 2012 Protocol allows for a condemned prisoner to be executed using either a three-drug or a one-drug protocol.

28. If a three-drug protocol is used, executions will occur via administration of a sequence of three drugs—either sodium thiopental or pentobarbital, pancuronium bromide, and potassium chloride.

29. Sodium thiopental is an ultra-fast-acting barbiturate. If properly administered, the barbiturate anesthetizes the prisoner and permits the other drugs to be administered without causing pain. *See Dickens v. Brewer*, 631 F.3d 1139, 1142 (9th Cir. 2011).

30. Pentobarbital, like sodium thiopental, is a barbiturate. The FDA package insert classifies pentobarbital as a short-acting barbiturate, not an ultra-short acting barbiturate like sodium thiopental. Developed in 1928, pentobarbital has never been considered as an agent to induce anesthesia. Pentobarbital is also not clinically used to induce anesthesia.

31. The second drug, pancuronium bromide, is a paralytic. Administration of pancuronium bromide renders individuals completely paralyzed—unable to move, speak, or even breathe—yet the drug has no amnesic or analgesic properties. An individual who is improperly anesthetized will slowly suffocate as a result of the paralytic while being unable to communicate or otherwise indicate that he is awake, alert, and suffering. *See Dickens*, 631 F.3d at 1142.

32. The final drug, potassium chloride, causes cardiac arrest. *See Dickens*, 631 F.3d at 1142. If given to a conscious person, potassium chloride causes a severe burning sensation and would result in severe pain.

33. When using a three-drug protocol, the purpose of the barbiturate is not to kill the prisoner but to produce a deep and long-lasting anesthesia. The purpose of the pancuronium bromide is to paralyze the muscles. The purpose of the potassium chloride is to kill the prisoner by stopping the heart. *See Dickens*, 631 F.3d at 1142.

34. If a prisoner is not properly anesthetized before being given the second and third drugs, he will suffocate and experience excruciating pain. *See Baze v. Rees*, 553 U.S. 35, 53 (2008) ("It is uncontested that, failing a proper dose of sodium thiopental that would render the 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."); *see also Dickens*, 631 F.3d at 1142.

35. The use 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 anesthetized prisoner.

36. The January 2012 Protocol contains significant departures from the previous version, which the Ninth Circuit determined to be constitutional on its face. *See Dickens*, 631 F.3d at 1150.

37. The January 2012 Protocol provides the ADC Director with unfettered discretion in determining the manner in which a prisoner will be executed.

38. The ADC Director can select wholly different manners of execution for otherwise similarly situated inmates without offering any justification for the disparate treatment or adhering to any established standards for making such a determination. The determination is wholly arbitrary and lacks any guidelines, standards, or other rational bases for choosing between different procedures.

39. The January 2012 Protocol also removes several of the safeguards that the Supreme Court in *Baze* found necessary in assessing whether a lethal injection protocol comports with the Eighth Amendment.

40. The January 2012 Protocol eliminates the prisoners ability to have attorney visits after 9:00 p.m. on the day before a scheduled execution.

41. The January 2012 Protocol violates Plaintiffs' rights under the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

A. In 2009, ADC Added Safeguards to its Lethal-Injection Protocol in Response to Litigation

42. In September 2007, several prisoners sentenced to death in Arizona brought an action for injunctive relief under 42 U.S.C. § 1983 alleging that Arizona's lethal-injection procedures violated the Eighth Amendment to the United States Constitution. *Dickens v. Brewer*, Case No. 2:07-cv-1770-NVW (D. Ariz.) (Compl., Sept. 14, 2007, ECF No. 1).

43. During the *Dickens* litigation, the defendants amended the ADC lethal-injection protocol. *Dickens v. Brewer*, 2009 WL 1904294, at *1 (D. Ariz. July 1, 2009). After discussions with the plaintiffs, the *Dickens* defendants agreed to make substantial changes that were designed to add crucial safeguards to the process and with the goal of decreasing the risk of harm to condemned prisoners.

44. The defendants agreed that ADC would conduct medical license and criminal background checks on all medical team members prior to allowing them to participate in an execution, upon the issuance of a warrant of execution, and annually. (*Dickens*, Joint Report, ECF No. 131 ("Joint Report") at 3:8-12, Ex. A § B ¶ 2; *see also Dickens*, 2009 WL 1904294, at *16.

45. The defendants agreed that the members of the medical team would have "at least one year of current and relevant professional experience in their assigned duties on the Medical Team." Joint Report at Ex. A § B ¶ 4; *see also Dickens*, 2009 WL 1904294, at *16.

46. The use of a qualified and competent medical team increases the likelihood that medical aspects of the execution process will be performed correctly, including setting of IVs, preparation of drugs, monitoring consciousness, and administering the full dose of drugs into the prisoner's circulatory system, thus decreasing the risk of pain and suffering.

47. The *Dickens* defendants agreed that ADC would "by default" administer lethal drugs "through a peripheral intravenous line." Joint Report at Ex. A § F ¶ 1; *see also Dickens*, 2009 WL 1904294, at *16.

48. Based upon ADC's representations that it would add the above-described safeguards to its lethal-injection protocol, the district court granted summary judgment to Defendants, finding that, "[a]s written, the Arizona Protocol does not subject inmates to a substantial risk of serious harm and does not violate the Eighth Amendment." *Dickens*, 2009 WL 1904294, at *25.

49. The Ninth Circuit upheld the district court's judgment. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

B. The *West v. Brewer* Trial Revealed That ADC Has Not Followed the Safeguards That It Adopted To Obtain a Favorable Outcome in *Dickens*

50. After ADC conducted four executions under the version of the written protocol found constitutional in *Dickens*, the *Dickens* plaintiffs, along with Thomas West,[1] filed a lawsuit based on the premise that ADC's failure to follow its protocol violated plaintiffs constitutional rights. *See West v. Brewer*, Case No. 2:11-cv-01409-NVW (D. Ariz, filed July 16, 2011).

51. It is undisputed that Defendants did not conduct background and license checks on the two medical team members who participated in the executions of Jeffrey Landrigan, Eric King, Donald Beaty, Richard Bible, and Thomas West, and who were responsible for inserting IV lines, preparing and mixing drugs, and monitoring the prisoner throughout the execution.

52. It is undisputed that the two medical team members did not have one year of current experience in placing central femoral or peripheral IV lines.

53. It is undisputed that in the last five executions, a central femoral line was placed. In four executions, the central line was the primary line used to deliver the lethal drugs.

54. It is undisputed that one of the medical team members had not placed an IV line in fifteen years and that he had a criminal record.

55. It is undisputed that the medical team leader, who determined whether the prisoner was unconscious after the first drug was administered, would not be able to tell using his methods for determining consciousness whether the prisoner was unconscious or paralyzed.

56. Although the district court expressed reservations about deviations between the written protocol and its application, it ultimately found that none of the deviations viewed in isolation violated the Eighth Amendment. *West v. Brewer*, Case No. 2:11-cv-01409 (D.

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[1]Thomas West was executed on July 19, 2011.

Ariz. Dec. 21, 2011) (ECF No. 112).

57. The district court's decision is currently on appeal in the Ninth Circuit. *West v. Brewer*, Case No. 12-15009 (9th Cir.).

C. ADC Subsequently Adopted a Protocol that Eliminates Safeguards, Increases the Director's Discretion, and Codifies Arbitrary and Disparate Treatment

58. ADC issued a revised protocol on January 25, 2012.

59. The January 2012 Protocol eliminates most of the crucial safeguards that Defendants previously included in the execution protocol to obtain a favorable summary judgment ruling in *Dickens*.

60. The January 2012 Protocol instructs that a Special Operations Team and an IV Team will carry out an execution. There is no longer a Medical Team.

61. Members of the IV Team are not subject to the same training, selection, and preparation criteria required of the Medical Team under the previous protocol.

62. The IV Team consists of any two or more of the following: physician(s), physician assistant(s), nurse(s), emergency medical technician(s), paramedic(s), military corpsman, phlebotomist(s) or "other appropriately trained personnel," including those trained in the United States Military. (DO 710.02, § 1.2.5.1.) The January 2012 Protocol does not define "other appropriately trained personnel."

63. The addition of the term "other appropriately trained personnel" means that there are no objective criteria or formal certification required for participating in executions. The ADC Director, who has no medical training, is left to decide what qualifies as "appropriately trained."

64. ADC removed necessary safeguards designed to make the process safer by decreasing the required qualifications of the team members who will perform the medical aspects of the procedure.

65. The IV Team members—the qualifications of whom are less stringent than those previously required for the Medical Team members—are responsible for inserting

either peripheral IV catheters or a central femoral line and for ensuring that all lines are functioning properly throughout the procedure. The IV Team members are assigned to supervise the Special Operations Team in mixing and preparing drugs and monitoring the level of consciousness.[2]

66. The only requirement for IV Team members is that they have "at least one year of relevant experience in placing either peripheral or central femoral intravenous lines." (DO 710.02, § 1.2.5.1.)

67. There is no longer any requirement that the IV Team member have current experience.

68. Under the January 2012 Protocol, it is no longer required that the IV Team members undergo a personal interview before being selected to participate in an execution.

69. The decreased criteria requirements to be on the IV Team increase the risk of harm because the January 2012 Protocol allows minimally qualified or incompetent personnel to conduct executions.

70. ADC removed a requirement that execution team members participate in ongoing training activities. Under the January 2012 protocol, IV Team members no longer have to participate in at least ten training sessions per year. IV Team members are required only to participate in "at least one training session with multiple scenarios within one day prior to the scheduled execution." (DO 710.02, § 1.1.2; *see also* DO 710.02, § 1.2.5.5.)

71. The decrease in training requirements increases the chance that IV Team Members will be unprepared to properly carry out executions and unable to detect and correct problems that arise during the process, thus subjecting the prisoner to an increased risk of harm.

72. The January 2012 Protocol vests substantial authority in the IV Team Leader.

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[2]The Medical Team was responsible for mixing the drugs, preparing the syringes, and monitoring the prisoner under the previous protocol. Now the Special Operations team performs these tasks under the supervision of the IV Team. (DO 710.02, § 1.2.5.4.)

The IV Team Leader's responsibilities include (1) advising the ADC Director as to where to place the primary and backup IV lines for each prisoner; (2) supervising the Special Operations Team in mixing the chemicals;[3] (3) monitoring the prisoner's level of consciousness;[4] and (4) attaching the leads from the electrocardiograph and checking the electrocardiograph's function. (DO 710 Attach. D, §§ B, ¶ 1; D, ¶¶ 7, 9; and E, ¶ 1.)

73. The January 2012 Protocol gives the ADC Director discretion to select the IV Team Leader without mandating any qualifications beyond those listed in requirements for IV Team Members. (*See* DO 710.02, § 1.2.5.3)

74. The requirements for IV Team members do not include supervisory experience, experience or competence in consciousness monitoring, or qualifications to select the appropriate venous access.

75. The Special Operations Team, which consists of a minimum of five team members, including a Team Leader, a Recorder, and three additional team members, prepares the designated drug(s) and syringes for a total of one complete set of drugs. (DO 710 Attach. D, § B, ¶ 2.)

76. The January 2012 Protocol does not set forth any requirements for the individuals serving on the Special Operations Team.

77. The Division Director for Offender Operations selects the Special Operations Team members and team leader.

78. There is no requirement that the Special Operations Team members have any minimum qualifications, including experience mixing or preparing drugs. This increases the

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[3]This section of Attachment D is inconsistent with DO 710.02 § 1.2.5.4, which states that the IV Team, not the IV Team Leader, shall "supervise the Special Operations team in the mixing of the chemicals."

[4]This section of Attachment D is inconsistent with DO 710.02 § 1.2.5.4, which states that the IV Team shall "supervise the Special Operations team in . . . monitoring the inmate (including the level of consciousness and establishing the time of death)." Whether the IV Team Leader is responsible for personally monitoring the level of consciousness or supervising others, it still requires expertise that is not indicated in the protocol.

risk that the inmate will receive the wrong drug, will receive the drugs in the wrong order, or will receive improperly mixed drugs, any of which causes substantial pain and suffering, including awareness of death by suffocation.

79. Under the January 2012 Protocol, the ADC Director has sole discretion to determine "which [drug] protocol will be used for the scheduled execution." (DO 710 Attach. D, § C ¶1.)

80. There are four options from which the ADC Director can choose.

81. Option A is a three-drug protocol, which includes: four (4) syringes of 1.25 grams of sodium thiopental; two (2) syringes of 60 milligrams of pancuronium bromide; and two (2) syringes of 120 milliequivalents of potassium chloride.

82. Option B is a three-drug protocol, which includes: two (2) syringes of 2.5 grams of pentobarbital; two (2) syringes of 60 milligrams of pancuronium bromide; and two (2) syringes of 120 milliequivalents of potassium chloride.

83. Option C is a one-drug protocol, which includes: four (4) syringes of 1.25 grams of sodium thiopental.

84. Option D is a one-drug protocol, which includes: two (2) syringes of 2.5 grams of pentobarbital.

85. The January 2012 Protocol calls upon the ADC Director to inform the prisoner in writing, seven days prior to the scheduled execution date, which combination of drugs will be used in his or her execution.

86. The January 2012 Protocol does not provide any guidance or rationale for selecting one option over another, nor does it specify how the ADC Director will make the decision.

87. The January 2012 Protocol eliminates the peripheral catheter as the default method. Instead, the ADC Director determines whether to use peripheral or central femoral IV access.

88. Peripheral IV access is safer as a default method of IV access because it does

not involve the larger, deeper vein accessed in a central line placement. Peripheral IV access is not an invasive surgical procedure.

89. Placement of a central femoral line is an invasive, complicated surgical procedure that is difficult to perform without significant training and experience.

90. Placement of a central femoral line should only be used when medically indicated and by medical personnel with extensive training in this specific procedure.

91. Central femoral line placement can cause great pain, as it requires placing the IV in a vein which can be anywhere from half an inch to several inches below the skin, and it can cause painful and dangerous complications.

92. The January 2012 Protocol does not limit the time or attempts to place an IV catheter.

93. A time limitation in setting IV lines is a necessary safeguard. Multiple attempts to place an IV threatens the integrity of the prisoner's veins and increases the chance that even if a line is set, it will fail.

94. The January 2012 Protocol also removes the pre-execution assessment of the prisoner's veins that was in the prior version of the protocol. A venous assessment is a necessary safeguard to ensure, *inter alia*, proper placement of catheters.

95. The January 2012 Protocol eliminates the preparation of a backup set of drugs.

96. The January 2012 Protocol is unclear and contradictory on the question of whether a back-up catheter is required.

97. One section of the January 2012 Protocol indicates that the "IV Team shall insert a primary IV catheter and a backup IV catheter." (DO 710 Attach D, § E, ¶ 1.)

98. Another section of the protocol states that the ADC Director will determine the "catheter(s) site(s)" (DO 710 Attach D, § E, ¶ 1), suggesting that a single catheter site will be used.

99. The January 2012 Protocol instructs that "[t]he IV Team shall be responsible for inserting *either peripheral IV catheters or a central femoral line* as determined by the

Director acting upon the recommendation of the IV Team Leader." (DO 710.02, § 1.2.5.4) (emphasis added). The language here suggests that there would either be two peripheral catheters or one central line.

100. A backup IV line is a necessary safeguard in ensuring that a sufficient dose of the barbiturate is administered. If the primary line fails, then there is a functioning backup line to use immediately.

101. The January 2012 Protocol does not inform prisoners of how or when the ADC Director will make the determination of which IV line(s) will be established.

102. The ADC Director does not provide notice to the condemned prisoner whether femoral or peripheral IV access will be used.

D. Executions of Robert Moormann and Robert Towery

103. On January 10, 2012, the Arizona Supreme Court issued warrants of execution for Robert Moormann and Robert Towery. Robert Moormann's execution was scheduled for February 29, 2012. Robert Towery's execution was scheduled for March 8, 2012.

104. After the warrants were issued, Towery and Moormann, through counsel, asked Director Ryan to provide them with information regarding the process by which they would be executed, including qualifications of the team members, which drugs would be administered, and where the IV lines would be set.

105. On February 2, 2012, counsel for Towery and Moormann received letters from the Attorney General advising, as a courtesy, that Director Ryan had made the decision to use the three-drug protocol in each of the executions. The letter did not indicate whether the first drug used would be sodium thiopental or pentobarbital.

106. In that same letter dated February 2, 2012, the Attorney General also advised counsel for Towery and Moormann that Director Ryan also decided to use the pancuronium bromide imported from in Great Britain in 2011, in carrying out each of their executions.

107. The pancuronium bromide was imported from Dream Pharma, Ltd., a grey-market distributor.

108. On February 3, 2012, Towery and Moormann received letters from Director Ryan informing them that ADC will not release any information regarding the qualifications of the IV Team. Director Ryan again informed Towery and Moormann that ADC planned to use imported pancuronium bromide in the each of their executions.

109. On February 27, 2012, Director Ryan informed Moormann and Towery that ADC would use a one-drug protocol in carrying out their executions because it had just discovered that day that its entire supply of pancuronium bromide was expired.

110. Under the January 2012 Protocol, upon receipt of the execution warrant, the Housing Unit 9 team leader is to "[e]nsure that complete sets of chemicals are on site and immediately available for use." (DO 710 Attach. D, § A.) Defendants failed to do this.

111. Robert Moormann was executed on February 29, 2012. His execution was scheduled to begin at 10:00 a.m.

112. Moormann's attorneys visited with him until 9:15 a.m. on February 29, 2012.

113. At 9:30 a.m., Moormann had been strip searched and was placed in upper restraints.

114. At 9:50 a.m., Moormann was secured to the execution table.

115. At 9:55 a.m., the Director determined the catheter(s) site(s).

116. At 10:05 a.m., the Housing Unit 9 Section Leader advised the Director that the IV procedure was complete.

117. Moormann had two IV catheters placed in each of his arms near his elbows. The left peripheral catheter was designated as the primary IV line. The right peripheral catheter was designated as the back-up IV line.

118. At 10:23 a.m., Moormann made his last statement.

119. At 10:28 a.m., the Housing Unit 9 Section Leader advised the witnesses that Moormann had been sedated.

120. At 10:33 a.m., Moormann was pronounced dead.

121. Robert Towery was executed on March 8, 2012. His execution was scheduled

to begin at 10:00 a.m.

122. Towery's attorneys visited with him until 9:15 a.m. on March 8, 2012.

123. At 9:30 a.m., Towery had been strip searched and was placed in upper restraints.

124. At 9:35 a.m., Towery asked the Director what the protocol was and where the drugs had been obtained.

125. At 9:49 a.m., Towery was secured to the execution table.

126. At 9:52 a.m., the Director determined the catheter(s) site(s).

127. At 10:28 a.m., after multiple attempts of the left and right peripheral (approximately four in the right and two in the left), the IV Team Leader recommended the right femoral catheter as the primary IV line and left peripheral catheter as the back-up IV line.

128. At 10:31 a.m., the Director called the Attorney General's office and provided an update regarding the IV process.

129. At 10:37 a.m., the Director spoke with Jeff Zick at the Attorney General's office.

130. At some point during the attempts to set the IV lines, Towery asked to speak with his counsel Dale Baich, but he was not permitted to do so.

131. At approximately 10:45 a.m., Towery's execution had not yet started. Towery's counsel, Dale Baich, asked an ADC employee if there was anything that he needed to know regarding Towery or the execution procedure. The ADC employee checked with the command center and informed Baich that command had nothing to report.

132. At 10:50 a.m., the right femoral catheter was placed; the left peripheral catheter was unsuccessful. The Director had a discussion with the IV Team Leader regarding the back-up IV line.

133. At 10:59 a.m., a catheter was placed right in Towery's right hand.

134. The right femoral catheter was designated as the primary IV. The right hand

catheter was designated as the back-up IV.

135. At 10:59 a.m., the Housing Unit 9 Section Leader advised the Director that the IV procedure was complete.

136. At 11:17 a.m., Towery made his last statement.

137. At 11:22 a.m., the Housing Unit 9 Section Leader advised the witnesses that Towery had been sedated.

138. At 11:26 a.m., Towery was pronounced dead.

139. The doctor who ADC hired to conduct its executions in 2010-2011 informed ADC that it would be painful to administer a large amount of barbiturate through a small peripheral vein in lower extremity.

140. An autopsy of Towery revealed that his peripheral veins of the antecubital fossae were thin walled and pliable without signs of sclerosis.

E. Scheduled Executions of Thomas Kemp and Samuel Lopez

141. Plaintiff Thomas Kemp is scheduled to be executed on April 25, 2012.

142. Plaintiff Samuel Lopez is scheduled to be executed on May 13, 2012.

143. Via letter dated March 22, 2012, Director Ryan informed counsel for Thomas Kemp that no more than two legal visitors will be permitted to see Kemp and they will only be permitted a one-hour visit (from 6:00 a.m. until 7:00 a.m.) on the morning of his scheduled execution. Kemp is scheduled to be executed at 10:00 a.m.

144. In that same letter, Director Ryan indicated that ADC intends to carry out the execution using a one-drug protocol with pentobarbital.

145. In that same letter, Director Ryan indicated that back-up chemicals would not be prepared in syringes unless they are required.

F. Defendants Unlawfully Imported Lethal-Injection Drugs

146. In September 2010, ADC imported the three lethal-injection drugs (sodium thiopental, which is a controlled substances under the federal Controlled Substances Act (CSA); pancuronium bromide; and potassium chloride), from a small drug distributor, Dream

Pharma Ltd., which operates out of the back of a driving school in London, England.

147. None of these drugs comply with federal drug regulations under the Food, Drug, and Cosmetics Act (FDCA).

148. These drugs are unapproved by the FDA. It was illegal for the Food and Drug Administration (FDA) to "allow[] shipments of a misbranded and unapproved drug to enter the United States for use in state lethal injection protocols. . . ." *Beaty v. FDA*, No. 1:11-cv-00289-RJL, 2012 WL 1021048, at *1 (D.D.C. Mar. 27, 2012)

149. "[D]rugs from foreign countries do not have the same assurance of safety as drugs actually regulated by the FDA due to the risk that counterfeit or unapproved drugs will be sent to consumers and also because without regulation of repackaging, storage conditions, and many other factors, drugs delivered to the American public from foreign countries may be very different from FDA approved drugs with respect to formulation, potency, quality, and labeling." *In re Canadian Import Antitrust Litigation*, 470 F.3d 785, 789 (8th Cir. 2006) (internal citations omitted).

150. In October 2010, ADC imported a second shipment of sodium thiopental. Despite being repeatedly warned that these actions run afoul of federal laws (*i.e.*, the CSA and the FDCA), ADC persisted in its actions.

151. On May 24, 2011, the federal Drug Enforcement Administration informed the State of Arizona that the State had violated the Controlled Substances Act when it imported the sodium thiopental.

152. ADC's imported drugs are illegal. *See Beaty v. FDA*, 2012 WL 1021048 (D.D.C. Mar. 27, 2012); *see also Brewer v. Landrigan*, 131 U.S. 445 (2010).

153. ADC's imported drugs are also presumptively unsafe. *Beaty*, 2012 WL 1021048, at *9 (finding that the importation of FDA-unapproved drugs violates the federal FDCA, and that part of the FDA's evaluation under that statute involves the FDA's expressed "concern about 'the safety risks associated with the importation of prescription drugs from foreign countries,' [because] foreign drugs are more likely to be counterfeit or

contaminated than FDA-approved products . . . .") (internal quotation marks and citations omitted).

FIRST CLAIM FOR RELIEF

The January 2012 Protocol Lacks the Necessary Safeguards Required under *Baze v. Rees* (8th Amendment; 42 U.S.C. § 1983)

154. Plaintiffs incorporate by reference each and every statement and allegation set forth in this Complaint as if fully set forth herein.

155. In *Baze v. Rees*, the United States Supreme Court found Kentucky's lethal-injection protocol constitutional because it had necessary safeguards that reduced the substantial risk of a prisoner suffering during the implementation of the three-drug protocol. 553 U.S. 35 (2008).

156. The Ninth Circuit upheld the written protocol that ADC adopted to obtain a summary judgment ruling in the *Dickens* litigation, because it contained safeguards that were "substantially similar" to the Kentucky protocol that the Supreme Court upheld in *Baze*. *See Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir. 2009). The Ninth Circuit affirmed the district court's decision "[b]ecause the protocol's safeguards are adequate under the *Baze* standard and because there is no material issue of fact regarding compliance with the protocol." *Id.* at 1141.

157. The January 2012 Protocol eliminates many safeguards that ADC adopted in *Dickens*. The few remaining safeguards fall substantially short of maintaining the "important safeguards" that the Supreme Court found acceptable in *Baze* and that the Ninth Circuit relied on in upholding the *Dickens* protocol.

158. In *Baze*, the Supreme Court found that the most significant safeguard in the Kentucky protocol was the requirement that each member of the IV team had at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. *Baze*, 553 U.S. at 55. Of note, Kentucky uses a phlebotomist and an EMT who have daily experience setting IV catheters. *Id.*

159. The Supreme Court noted that IV team members, along with the rest of the

execution team, participated in at least ten practice sessions per year. *Id.* These training sessions involved a rehearsal of the execution process, including setting IV lines on volunteers. *Id.*

160. The Supreme Court found that the use of a primary and backup IV line ensures that if a prisoner did not receive a sufficient dose of the barbiturate through the primary line, he would be able to receive additional drugs through the backup line. *Id.* Consistent with using a backup line, the Court also noted that Kentucky requires that two sets of the lethal-injection drugs be prepared before the execution begins. *Id.*

161. The Supreme Court determined that Kentucky's one-hour time limit to establish an IV was not excessive. *Id.* at 55.

162. Unlike the protocol approved in *Baze* and in *Dickens*, the January 2012 Protocol does not require the IV Team to have current professional experience setting IV lines.

163. Unlike the protocol approved in *Baze* and in *Dickens*, the January 2012 Protocol does not require that the IV Team members be medically trained. The language now permits any individual to participate in executions who the ADC Director deems are "appropriately trained."

164. The January 2012 Protocol only requires that the IV Team attend one training session on the day prior to an execution. Unlike the protocol approved in *Baze*, the January 2012 Protocol provides no description of what shall be done at the sole training other than having "one training session with multiple scenarios." Unlike the protocol approved in *Baze*, there is no requirement that the IV Team practice siting IVs during the training.

165. Unlike the protocol approved in *Baze*, the January 2012 Protocol has no time limitation for the IV Team to find and set the IV catheters. "Punishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). Without a time restriction for setting an IV line, and without proper qualifications of the IV Team, the January 2012 Protocol increases the risk that Plaintiffs will suffer a lingering death.

166. During Towery's execution, at least six unsuccessful attempts were made to insert IV catheters in his arms. It took more than an hour to finally place an IV catheter in his right hand.

167. Unlike the protocol approved in *Baze* and in *Dickens*, the January 2012 Protocol does not require the use of a primary and backup line. A backup line is a necessary safeguard to help ensure that a complete dose of barbiturate is delivered to the prisoner.

168. Unlike the Protocol approved in *Baze* and in *Dickens*, the January 2012 Protocol does not require preparation of a backup set of drugs.

169. By eliminating these necessary safeguards, Defendants have stripped Arizona's lethal-injection process of the constitutional protections outlined in *Baze*.

170. The January 2012 Protocol no longer has constitutionally adequate protections to ensure that a prisoner will not suffer from the second and third drugs. There is an objectively intolerable risk that Plaintiffs' Eighth Amendment rights will be violated under the January 2012 Protocol.

SECOND CLAIM FOR RELIEF

Similarly Situated Prisoners Are Not Treated Alike Under the Written Protocol (8th & 14th Amendments; 42 U.S.C. § 1983)

171. Plaintiffs incorporate by reference each and every statement and allegation set forth throughout this Complaint as if fully set forth herein.

172. The Fourteenth Amendment to the United States Constitution requires that similarly situated Plaintiffs be treated alike. Plaintiffs, individually, are a "class of one," similarly situated relative to one another and to any other prisoner facing execution in Arizona because all such individuals face execution under the January 2012 Protocol.

173. Codifying disparate treatment across executions without a principled basis for determining when deviations are warranted violates the Equal Protection Clause and impairs Plaintiffs' fundamental rights, including the right to be free from cruel and unusual punishment.

174. Where disparate treatment burdens a fundamental right, strict scrutiny applies,

and the state action will be upheld only if the state can show that such action is narrowly drawn to serve a compelling state interest. *Cooey*, 2011 WL 2681193, at *29 (S.D. Ohio July 8, 2011); *In re Ohio Execution Protocol Litigation*, 2012 WL 118322 (6th Cir. Jan. 13, 2012) (affirming district court's grant of temporary restraining order for Charles Lorraine based on equal-protection claim where the state follows its written protocol except when it does not); *Green v. City of Tuscon*, 340 F.33d 891 (9th Cir. 2003); *see also Vacco v. Quill*, 521 U.S. 793, 799-800 (1997).

175. Absent the burden upon a fundamental right, the government violates the equal protection clause if individuals are "intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

176. On its face, the January 2012 Protocol violates the Equal Protection Clause.

177. By allowing the ADC Director to arbitrarily choose between a three-drug and one-drug protocol, the January 2012 Protocol codifies arbitrary treatment of Arizona prisoners sentenced to death.

178. By allowing the ADC Director to have discretion to select execution team members, the January 2012 Protocol codifies arbitrary treatment of Arizona prisoners sentenced to death.

179. By allowing the ADC Director to have the discretion to eliminate a backup catheter, the January 2012 Protocol codifies arbitrary treatment of Arizona prisoners sentenced to death.

180. By allowing the ADC Director to have the discretion to select either pentobarbital or unlawfully imported sodium thiopental, the January 2012 Protocol codifies arbitrary treatment of Arizona prisoners sentenced to death.

181. The ADC Director has discretion to select unlawfully imported drugs to be used in executions.

182. Before Moormann's and Towery's executions, ADC asserted its intention to

use imported pancuronium bromide in carrying out their executions. The imported pancuronium bromide, as well as the imported potassium chloride, are illegal substances under the Food, Drug and Cosmetics Act. *See Beaty*, 2012 WL 1021048, at *2.

183. In carrying out Towery's and Moormann's execution, the ADC Director had no compelling interest in, or rational basis for, first selecting a three-drug protocol. The ADC Director's decision to ultimately use a one-drug protocol was not a result of a reasoned decision making process. Rather, it was only made because ADC failed to comply with its protocol and determine whether the drugs were available for use before the Director made a selection.

184. Director Ryan has no compelling state interest in, or rational basis for, selecting an inherently risky three-drug protocol over the safer, readily available one-drug alternative. While both three- and one-drug protocols are intended to cause the same result, they are nevertheless substantially different.

185. Director Ryan has no compelling state interest in, or rational basis for, treating condemned prisoners differently when it comes to selecting the team members who will be carrying out execution, or determining whether to use a backup catheter. or whether to choose an anesthetic drug imported from a foreign source over a domestic drug not labeled for anesthetic purposes.

186. The January 2012 Protocol provides no guidelines or standards for determining when and under what circumstances such distinctions may be warranted. Clear standards must exist, and deviations from those standards result in equal protection violations. Defendants have adopted a policy that codifies unbridled discretion and arbitrary treatment. Deviation is the standard.

187. Plaintiffs' rights to equal protection under the Fourteenth Amendment are violated by the January 2012 Protocol.

THIRD CLAIM

Similarly Situated Prisoners Are Not Treated Alike Under the Protocol As Applied (8th & 14th Amendments; 42 U.S.C. § 1983)

188. Plaintiffs incorporate by reference each and every statement and allegation set forth throughout this Complaint as if fully set forth herein.

189. The procedures for carrying out a death sentence "must be implemented in a reasoned, deliberate, and constitutional manner." *Towery v. Brewer*, ___ F.3d ___, 2012 WL 627787, *1 (9th Cir. Feb. 28, 2012). As it has been applied and will continue to be applied, the January 2012 Protocol violates the Equal Protection Clause.

190. In carrying out Towery's execution, ADC treated Towery differently from other prisoners. This different treatment occurred because of the lack of standardized, written procedures.

191. It took ADC approximately ten minutes to set two peripheral IV catheters in Moormann.

192. In carrying out Towery's execution, ADC attempted for nearly an hour to set peripheral lines, making at least six punctures in Towery's arms during that time.

193. Kentucky's protocol approved in *Baze* set a time limit of one hour to attempt to set IV lines.

194. After several unsuccessful attempts to set a peripheral IV line in the right and left arm, the IV Team Leader recommended using the right femoral vein as the primary line and the left peripheral as the backup line.

195. At least thirty minutes after the decision to use the left peripheral as the backup line, ADC then decided to set a peripheral line in the right hand as the backup line.

196. By setting a catheter in Towery's hand despite being informed by its own contracted executioner that administering a barbiturate through a small peripheral vein would be painful, ADC increased the risk of pain endured by Towery and burdened Towery's fundamental right to be free from cruel and unusual punishment.

197. ADC had no rational basis, let alone a compelling governmental interest, to

select a backup line that it knew would be inherently more painful.

FOURTH CLAIM FOR RELIEF

Failure to Provide Adequate Notice of the Specific Drugs and of the Type of Venous Access That Will Be Used in Executions (14th Amendment; 42 U.S.C. § 1983)

198. Plaintiffs incorporate by reference each and every statement and allegation set forth throughout this Complaint as if fully set forth herein.

199. "The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending . . . ." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (internal citations omitted).

200. "Fundamental fairness, if not due process, requires that the execution protocol that will regulate a prisoner's death be forwarded to him in prompt and timely fashion." *Oken v. Sizer*, 321 F. Supp. 2d 658, 664 (D. Md. 2004), *stay vacated*, 542 U.S. 916 (2004).

201. The January 2012 Protocol does away with any timely notice of the manner in which the prisoner will be executed.

202. Under the January 2012 Protocol, ADC is required only to inform the prisoner seven days before his execution the drug or drugs by which he will be executed.

203. Approximately one month before Moormann's scheduled execution, ADC informed Moormann that it would be using a three-drug protocol in carrying out his execution. Just two days prior to Moormann's execution, ADC informed Moormann that it would instead be using a one-drug protocol in carrying out his execution. ADC violated its own written protocol by providing notice to Moormann only forty-eight hours before the execution.

204. Under the January 2012 Protocol, Plaintiffs are not provided any notice regarding where ADC intends to site the IV catheters that will be used to introduce the lethal drugs in their circulatory systems.

205. The January 2012 Protocol removed the venous access check and provides no

time limit for setting IV lines. Plaintiffs will not have any knowledge what veins are deemed accessible for the IV lines. Nor are Plaintiffs aware of how long ADC will have to attempt to set the lines.

206. Towery's veins were pliable, and were not hardened or otherwise compromised.

207. Robert Towery was punctured at least six times during the attempt to set a catheter in his arms. During ADC's attempt to unsuccessfully set IV catheters in his arms, Towery asked to speak with his attorney. Towery was denied access to his attorney. When Towery's attorney inquired about the execution process, in which there was a delay, his attorney was not provided any information.

208. Plaintiffs will be denied access to counsel while ADC is attempting to set IV lines.

209. By failing to provide adequate notice of either of these decisions and by preventing prisoners from having access to counsel during the insertion of IV lines, Defendants are depriving Plaintiffs of their right to notice and an opportunity to be heard, in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs have no meaningful opportunity challenge the method of execution if they do not learn of this method until seven days before their scheduled execution or if they are not informed at all, much less if they are prevented from speaking with counsel when complications arise.

FIFTH CLAIM FOR RELIEF

Access to Counsel and the Courts Under the Protocol As Written (1st, 5th 8th, and 14th Amendments; 42 U.S.C. § 1983; 18 U.S.C. § 3599)

210. Plaintiffs incorporate by reference each and every statement and allegation set forth in this Complaint as if fully set forth herein.

211. The January 2012 Protocol on its face violates Plaintiffs' federal constitutional rights to due process and to access to the courts and thereby implicates their right to be free from cruel and unusual punishment. U.S. Const. amends. I, V, VIII & XIV.

212. Sections 710.11, 1.5.1 and 1.5.2 of DO 710 deny Plaintiffs legal visits after

2100 hours the day prior to a scheduled execution. Instead, Plaintiffs will only be permitted telephone contact with the attorneys of record. The telephone calls will take place in a holding cell where ADC officers will be present. There is no opportunity for privileged communication.

213. Plaintiffs have a federal constitutional right to be free from cruel and unusual punishment and to be competent during their execution. *See* U.S. Const. amends. VIII & XIV; *Ford v. Wainwright*, 477 U.S. 399 (1986).

214. Plaintiffs are entitled to appointed counsel throughout the execution procedure. *See* 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180 (2009). Plaintiffs are entitled to have access to counsel in every proceeding subsequent to their appointment, including the day of an execution, in order to pursue legal claims that may arise.

215. Plaintiffs also have a due process and First Amendment right to access to the courts, which includes asserting a claim that their Eighth and/or Fourteenth Amendment rights have been violated, or will be violated, at any time during their proceedings. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) (affirming that "prisoners have a constitutional right of access to the courts"); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (noting that "right of access to the courts . . . is founded in the Due Process Clause").

216. Plaintiffs' right to access the courts inherently injects the issue the right of meaningful access to counsel. *See Cooey v. Strickland*, 2011 WL 320166, at *7 (S.D. Ohio Jan. 28, 2011).

217. Plaintiffs will have no means by which to meaningfully access the courts if they are denied privileged communication with attorneys in the twelve hours prior to an execution. Plaintiffs' ability to openly confer with counsel makes counsel's presence valuable to Plaintiffs and thus renders meaningful the ability to access the courts on Plaintiffs' behalf.

218. ADC has no legitimate governmental interests that outweigh Plaintiffs' constitutional right to access the courts. This is evident by the fact that in the past, ADC has permitted twenty-eight condemned prisoners to have in-person visitation with their attorneys

on the day of their execution.

219. If circumstances arise immediately prior to Plaintiffs' executions that present a constitutional injury under the Eighth or Fourteenth Amendments, certainly Plaintiffs have the right to litigate those claims.

220. The only way to protect Plaintiffs' rights would be to guarantee access to counsel, who could in turn petition the courts for appropriate relief. Because the January 2012 Protocol strips away this right, it is unconstitutional on its face.

SIXTH CLAIM FOR RELIEF

Access to Counsel and the Courts Under the Protocol As Applied (1st, 5th 8th, and 14th Amendments; 42 U.S.C. § 1983; 18 U.S.C. § 3599)

221. The January 2012 Protocol as applied violates Plaintiffs' federal constitutional rights to due process and to access to the courts and thereby implicates their right to be free from cruel and unusual punishment. U.S. Const. amends. I, V, VIII & XIV.

222. The January 2012 Protocol gives the Director overbroad discretion in carrying out an execution. The actions of Defendants have violated or will violate Plaintiffs' constitutional rights.

223. Plaintiffs have a federal constitutional right to be free from cruel and unusual punishment. *See* U.S. Const. amend. VIII. "Punishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890).

224. Plaintiffs are entitled to appointed counsel throughout the execution procedure. *See* 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180 (2009). Plaintiffs are entitled to have access to counsel in every proceeding subsequent to their appointment, including during an execution in order to pursue legal claims that may arise.

225. Robert Towery was punctured at least six times during the attempt to set a catheter in his arms. During ADC's attempt to unsuccessfully set IV catheters in his arms, Towery asked to speak with his attorney. Towery was denied access to his attorney. When Towery's attorney inquired about the execution process, in which there was a delay, his attorney was not provided any information. Towery was denied his right to access the courts

and present an Eighth Amendment challenge to Defendants' actions.

226. Circumstances arose during Towery's execution for which he should have been permitted to access his counsel and the courts. *See Broom v. Strickland*, Complaint, ECF No. 3, No. 09-cv-00823-GLF (S.D. Ohio Sept. 18, 2009) (alleging Eighth Amendment violations where numerous unsuccessful attempts were made to access prisoner's veins during execution); *see Broom*, Opinion and Order, ECF No. 48 at 4 (finding that "[t]here is no doubt that the Eighth Amendment applies to Plaintiff's situation").

227. If circumstances arise during Plaintiffs' execution similar to what occurred on with Robert Towery, they would have a legal claim that their right to be free from "torture or a lingering death" was being violated. The only way to protect their rights and to ensure that the violation immediately stopped would be through access to counsel, who could in turn seek redress in the courts. The January 2012 Protocol as applied prevents Plaintiffs from asserting this right and is therefore unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

(1) Injunctive relief to enjoin Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiffs until such time as Defendants can demonstrate that measures are in place to allow for Plaintiffs' execution in a manner that complies with the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution;

(2) Injunctive relief ordering Defendants, their officers, agents, servants, employees, and all persons acting in concert with them to allow Plaintiffs to have access to counsel on the morning of the execution up until one hour before the execution;

(3) Injunctive relief ordering Defendants, their officers, agents, servants, employees, and all persons acting in concert with them to allow Plaintiffs to

have access to counsel during the insertion of IV catheters;

(4) Injunctive relief preventing Defendants from using illegal (e.g., non-FDA approved) lethal-injection drugs currently in Defendants' possession, as well as any that Defendants may acquire in the future;

(5) Appropriate and necessary discovery and an evidentiary hearing to permit Plaintiffs to prove their constitutional claims;

(6) Costs and attorney fees; and

(7) Any such other relief as the Court deems just and proper.

Respectfully submitted this 19th day of April, 2012.

Jon M. Sands
Federal Public Defender
Dale A. Baich
Robin C. Konrad
Cary Sandman

David J. Sepanik
Flora F. Vigo
O'Melveny & Myers LLP

By: s/Dale A. Baich
Counsel for Plaintiffs Rogovich, Kemp, Stanley, Cook, and Stokley

Kelley J. Henry
Denise I. Young

By: s/Kelley J. Henry (with permission)
Counsel for Plaintiff Lopez

EXHIBIT U

EXHIBIT U

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

March 22, 2012

Dale Baich
Federal Public Defender's Office
Capital Habeas Unit
Sent via Email: Dale_Baich@fd.org

Re: Death Row Inmate Thomas Kemp #099144

Dear Mr. Baich:

The purpose of this correspondence is to inform you that visitation for the pending execution of Thomas Kemp will be permitted from 6:00 a.m. to 7:00 a.m. the morning of April 25, 2012. Though the current policy provides that inmate visitation is to end at 9:00 p.m. the evening before the execution, (See Department Order 710.11, §1.5.2), in exercising my discretion as Director I am permitting the attorney-of-record to visit as outlined above. Please be advised that no more than two persons who have been designated previously as the inmate's legal visitors will be permitted into the facility for this purpose.

Additionally, in the event the inmate selects lethal injection as the method of execution, or fails to select the method and it defaults to lethal injection, the Department intends to carry out the execution using the one-drug protocol with domestically-obtained pentobarbital. Pursuant to D.O. 710, Attachment D §B(2), the back-up chemicals will be immediately available, but not drawn into syringes until or unless they are required. In the unlikely event the back-up chemicals are needed they can be drawn into syringes and in use within 90 seconds.

Sincerely,

Charles L. Ryan
Director

CLR/kk/mf

CC: Kent Cattani, Unit Chief, Arizona Attorney General's Office, Capital Appeals
Jeff Zick, Section Chief, Arizona Attorney General's Office, Capital Appeals
Karyn Klausner, General Counsel, Arizona Department of Corrections
Jeff Hood, Deputy Director, Arizona Department of Corrections
Carson McWilliams, Southern Regional Operations Director, Arizona Department of Corrections
Robert Patton, Division Director of Operations, Arizona Department of Corrections
Lance Hetmer, Warden, ASPC Florence
Ron Credio, Warden, ASPC Eyman

EXHIBIT W

EXHIBIT W

United Forensic Services, P.C.

Professional Forensic Autopsy & Consultation

Joseph I. Cohen, M.D., Forensic Pathologist | drcohen@forensiconline.com | www.forensiconline.com
448 Ignacio Blvd., Suite 325, Novato, California 94949 | 877.372.6436 Toll Free | 951.346.3245 Fax

Private Autopsy Examination of Robert Charles Towery

Date of Examination: March 16, 2012
Place of Examination: Heritage Coolidge Funeral Home, Coolidge, Arizona
File Number: P12-031612 (United Forensic Services, P.C.)

Diagnoses:

I. Judicial execution by lethal injection, with:
   A. Recent punctures with subcutaneous hemorrhages, right femoral region.
   B. Vascular punctures with associated hemorrhages, right femoral vein and artery.
   C. Recent punctures with subcutaneous hemorrhages, right antecubital fossae, multiple.
   D. Recent punctures with subcutaneous hemorrhages, left antecubital fossae, multiple.
   E. Recent venipuncture with subcutaneous hemorrhage, right hand.
   F. Apparent venous access, right femoral and right hand.

II. Absence of significant antemortem traumatic injury.

III. Absence of significant natural disease.

CAUSE OF DEATH: JUDICIAL EXECUTION BY LETHAL INJECTION

MANNER OF DEATH: HOMICIDE

Written consent authorizing the performance of this autopsy examination was obtained from attorney Dale A. Baich.

"I hereby certify that I, Joseph I. Cohen, M.D., forensic pathologist, have performed a private autopsy examination on the previously autopsied body of Robert Charles Towery on the 16th day of March, 2012, commencing at 11:47 a.m. at Heritage Coolidge Funeral Home, 410 West Roosevelt Avenue, Coolidge, Arizona. This examination was completed at 3:00 p.m."

This autopsy examination was assisted by Levon Herston of Heritage Coolidge Funeral Home.

External Examination:

The decedent, covered by a white sheet, is of an unembalmed, well-developed, well nourished, previously autopsied, middle aged man.

Robert Charles Towery

The scalp hair is long, brown and wavy. There is a mustache. The irides are masked by corneal opacity. The conjunctivae are well visualized and free of petechiae, jaundice or hemorrhage, except for a small, irregular hemorrhage on the lateral aspect of the right bulbar conjunctiva (comment: consistent with previous postmortem needle puncture and vitreous removal). The oral cavity has natural teeth in fair repair. The buccal mucosa is free of injury. The eyes, ears, nose and mouth are normally developed. The nasal septum is intact. The neck is symmetrical, and free of injury. The abdomen is unremarkable. The posterior neck, back and buttocks are unremarkable. The external genitalia are of a normal, circumcised, adult man. There are no injuries to the perianal region.

There is a ¾ inch oblique scar on the ulnar aspect of the left wrist and an irregular scar is on the anterior right wrist. There are linear scars (2) on the dorsum of the left hand and on the dorsum of the right hand (1). A small 3/8 inch scar is on the dorsum of the distal right forearm. There are tattoos on both sides of the upper chest, on the lower abdomen, on both arms, on the dorsum of the left forearm, on the anterior right thigh, and on the medial aspects of the mid and distal left leg (2). There is a tentative 1/8 inch, circular tattoo on the dorsum of the left hand (comment: subsequent dissection reveals absence of subcutaneous hemorrhage). A similar mark is on the anterior left arm. The fingernails are short and unremarkable. There is no edema of the extremities. There are minute healing crusts (scabs) on the distal right leg (2) and mid left leg (1). There are no injuries of the hands or feet. There are no readily visible needle tracks.

There are identification bands encircling the ankles (a white identification encircling the right ankle bearing the decedent's name and the number "12-164" and a red identification encircling the left ankle bearing the decedent's name and identifier "ML-12-0556").

Postmortem Changes:

The decedent is received unembalmed and well preserved without signs of significant decomposition. Rigor mortis is slight in the extremities. Livor mortis is moderate and is both fixed and blanches on the posterior aspects of the body. The body is cold due to refrigeration.

There is a dry, ½ inch red abrasion on the superior aspect of the left side of the forehead, consistent with postmortem artifact. There is purple-blue discoloration of the tips of the fingers due to postmortem artifact.

There is evidence of a prior autopsy examination, consisting of a partially sutured intermastoid incision over the top and sides of the scalp, a sutured Y-incision on the front of the torso, and previously examined organs and tissues contained in a biohazard bag within the abdominopelvic cavity.

Clothing:

There is no clothing on the body at the time of the examination.

Robert Charles Towery

Therapeutic and Resuscitative Procedures:

There is no evidence of therapeutic or resuscitative intervention at the time of this examination.

Evidence of Judicial Execution Procedure:

Multiple recent needle punctures (numbering at least 11) on the upper extremities and on the right femoral region are described below. Incisions are made, by the undersigned, over the antecubital fossae, the dorsa of the hands, the femoral regions, and over the medial, lateral and dorsal aspects of the feet. The superficial veins are readily exposed and identified. The walls are thin, delicate and translucent without sclerosis or surrounding scar.

There are several recent punctures (numbering at least 3) on the right antecubital/proximal right forearm region, oriented along a 2 inch oblique line from superolateral to inferomedial. The punctures contain focal, minute and 1/16 to 1/8 inch ecchymoses. Subsequent examination of the subcutaneous tissues shows discreet hemorrhages associated with the skin surface punctures, the largest hemorrhage associated with the most superolateral puncture closest to the antecubital fossa.

There are several recent punctures (numbering at least 3) oriented along a mostly vertical, 2 5/8 inch line on the left antecubital region and proximal left forearm. The antecubital region contains 2 punctures within a 1¼ inch margin of marked ecchymosis. The proximal left forearm contains two smaller, though discreet ecchymoses (3/8 inch and 1/8 inch) with the most inferior one (1/8 inch) containing a puncture. Subsequent examination of the subcutaneous tissues shows marked hemorrhage associated with the skin surface punctures, and within the intervening subcutaneous tissues between the smaller discreet skin surface ecchymoses of the proximal forearm.

There is a recent puncture on the dorsum of the right hand. Subsequent dissection shows slight, focal subcutaneous hemorrhage and a distinct, oozing venipunture.

There are multiple punctures (numbering at least 4) on the right femoral region/proximal right thigh, associated with an irregular ecchymosis. Two of the punctures are situated more superior and medial, and are associated with the majority of the surface ecchymosis. Two minute punctures are in close proximity to one another and are situated more inferior and lateral; they are free of significant ecchymosis (comment: the latter two minute punctures are consistent with placement of suture to secure a vascular catheter). Subsequent examination of the subcutaneous tissues of the right femoral area reveals subcutaneous hemorrhage associated with the two superior/medial surface punctures. The femoral vein, femoral artery and branches are exposed and examined through an incision over the femoral area; there is a conspicuous puncture in the femoral vein with associated hemorrhage, and there is a minute puncture in the femoral artery with slight associated hemorrhage.

Robert Charles Towery

There are no apparent punctures on the skin of left femoral area. Subsequent incision to expose subcutaneous adipose tissue fails to reveal any subcutaneous hemorrhage in the left femoral region.

There are no visible punctures on surfaces of the feet. The superficial veins of the feet are examined; they are free of puncture or surrounding hemorrhage.

Photographs are obtained.

Injuries, External and Internal:

There are no evident traumatic injuries to the body, externally or internally. The aforementioned abrasion on the left side of the forehead appears to be postmortem artifact, though antemortem or perimortem body surface injury cannot be entirely excluded.

Internal Examination:

Body Cavities: The organs were previously examined (comment: during the course of the initial examination by the medical examiner). There is residual serosanguinous liquid within the body cavity. The surfaces are smooth and glistening. The tissues are moist.

Head: The scalp was previously incised and reflected during the course of the previous autopsy examination; it is unremarkable. The skull, including the skull cap, is free of injury or fracture. The visualized sections of the brain have normal gyri and sulci. The leptomeninges are smooth, delicate and transparent, and the leptomeningeal vessels are normal. The visualized arteries at the base of the brain are free of significant atherosclerosis. The visualized portions of the cranial nerves appear unremarkable. The surfaces of the brainstem and cerebellum are unremarkable.

The cortical gray matter, subcortical and deep white matter, and deep grey nuclei are normal. There are no apparent acute hemorrhages or lesions. The cerebrospinal fluid is not available for examination; however, the visualized surfaces of the ventricular lining are smooth and glistening with normal appearing choroid plexus. Sections of the brainstem and cerebellum are unremarkable.

Neck: The cervical vertebrae, hyoid, tracheal and laryngeal cartilages and paratracheal soft tissues are normal. The hyoid is free of hemorrhage or fracture. The upper airway is not obstructed. The tongue was not previously removed by earlier autopsy; however, it is unremarkable.

Cardiovascular System: The aorta and branches have minimal atherosclerosis with fatty streaks. The visualized portions of the vena cavae and pulmonary arteries have no apparent thrombus or embolus.

Robert Charles Towery

The heart appears of normal size and weight and has a normal distribution of coronary arteries. The visualized portions of the epicardial vessels are free of significant atherosclerosis. The myocardium is uniformly red-brown without hemorrhage or pallor. There is no apparent softening of the myocardium. The left ventricle wall thickness measures approximately 1.5 cm. The endocardial surfaces, heart valves, chordae tendineae and papillary muscles are unremarkable.

Respiratory System: The visceral pleural surfaces of the previously sectioned lungs are smooth and glistening. The parenchyma is soft and spongy, dark red, and moist to slightly wet without consolidation. The bronchi are not obstructed. The pulmonary arteries have no apparent thrombus or embolus.

Liver, Gallbladder, Pancreas: The liver has a smooth capsule. The previously sectioned parenchyma is red-brown and moist. The bile ducts are unremarkable. The gallbladder wall is thin and delicate. The previously sectioned pancreas is uniformly tan-gray and has a normal lobular appearance.

Hemic and Lymphatic Systems: The previously sectioned spleen has a smooth capsule. The parenchyma is plum colored, moist and softened with indistinct follicles. There are no lymph node enlargements. The thymus is atrophic. The bone marrow of the ribs and clavicles is unremarkable.

Genitourinary System: The cortical surfaces of the kidneys are slightly finely granular. The parenchyma is red-brown and moist with demarcated corticomedullary junctions. The calyces and pelves are empty. The visualized portions of the ureters have uniform caliber. The epithelial surface of the urinary bladder is pale tan and glistening.

The previously sectioned prostate has uniform, tan-grey cut surfaces. The testes are unremarkable; they were previously sectioned.

Endocrine System: The sella turcica is unremarkable. The thyroid is symmetrical with uniform, dark red, glandular-appearing cut surfaces. Portions of adrenal gland are visualized; they are unremarkable, containing maroon medullae are covered by thin, golden yellow cortices.

Digestive System: The esophagus is unremarkable. The gastric mucosa contains normal appearing rugal folds. The small and large intestines are unremarkable. The appendix is attached to the cecum, though it is unremarkable.

Musculoskeletal System: The musculature is well-developed and normally distributed. There are no fractures of the axial skeleton.

Photography:

Robert Charles Towery

Multiple external and internal examination photographs are obtained.

Summary:

Judicial execution by lethal injection was performed by means of venous access, with initial venous access proving successful only after repeated needle punctures and attempts to secure vascular access.

At least eleven (11) needle punctures are identified over the skin surfaces of the body, including on the right antecubital fossa (at least 3), the left antecubital fossa (at least 3), the right femoral region (at least 4), and the dorsum of the right hand (1). Subcutaneous hemorrhages, associated with the surface punctures, are noted within the tissues of the antecubital fossae, the right femoral area, and right hand. Two (2) of the eleven (11) punctures can potentially be explained by the use of suture to secure a right femoral venous catheter.

Physical injury did not cause or contribute to the death of Mr. Towery.

Natural disease did not cause or contribute to the death of Mr. Towery.

Comment: As of the date of this report, medical examiner photographs have been received and reviewed; however, the medical examiner's autopsy report, toxicology results and other records are pending receipt and review. Hence, I request the right to modify factual information and/or opinions contained within this report, as additional information becomes available.

Joseph I. Cohen, M.D.
Forensic Pathologist

04-02-12
Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Towery, et al., Plaintiffs, v. Janice Brewer, et al., Defendants.	Case No. 2:12-cv-00245-NVW Motion for Leave to File Second Amended Complaint

Plaintiffs hereby seek leave of this Court to file their Second Amended Complaint for Equitable, Injunctive, and Declaratory Relief [42 U.S.C. § 1983]. This Court should "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In the unique circumstances of this case, Plaintiffs could not have included the factual allegations and related legal claims when they filed their Amended Complaint. As such, this Court should allow them leave to amend.

Plaintiffs have recently learned additional information that supports their claims and that gives rise to new legal claims. Specifically, Plaintiffs have learned previously unavailable information from the executions of Robert Moormann (February 29, 2012), and Robert Towery (March 8, 2012). On March 22, 2012, Plaintiffs received photographs from the Pima County Medical Examiner related to the autopsies of Moormann and Towery.[1] On March 23, 2012, Defendants provided counsel for Plaintiffs with documentation related to the executions of Moormann and Towery. On April 2, 2012, Plaintiffs received a final report of Towery's private autopsy performed by Joseph Cohen, M.D.

Also, on March 27, 2012, the United States District Court for the District of Columbia issued a memorandum opinion and order in *Beaty v. FDA*, No. 1:11-cv-00289-RJL, 2012 WL 1021048 (D.D.C. Mar. 27, 2012). In that case, the plaintiffs, a group of death-sentenced prisoners in Arizona, California, and Tennessee, sued the defendants, which included the Food and Drug Administration (FDA), alleging that the defendants violated provisions of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301, et seq., "by improperly allowing shipments of a misbranded and unapproved new drug to enter the United States for use in state lethal injection protocols, which will be used during plaintiffs' executions." *Beaty*, 2012 WL 1021048 at *7. The court issued summary judgment for the plaintiffs, concluding that "defendants have acted arbitrarily and capriciously, and have abused their discretion both by departing from FDA's own regulations and longstanding policies and by undermining the purpose of the FDCA." *Id.* at *10. The court ordered the FDA to "immediately notify any and all state correctional departments which it has reason to believe are still in possession of any foreign manufactured thiopental that the use of such drug is prohibited by law and that, that thiopental must be returned immediately to the FDA." *Beaty v. FDA*, No. 1:11-cv-00289-RJL, Order, ECF No. 24 at 2.

These facts give rise to Plaintiffs' need to amend their complaint. Indeed, the initial

[1]As of this filing, Plaintiffs have not yet received the autopsy reports from Pima County.

complaint alleged constitutional violations based solely on the written protocol. Now, Defendants have completed two executions under this protocol. The circumstances surrounding those executions result in legal challenges to the protocol *as applied*. Moreover, the court's ruling in *Beaty v. FDA* further supports Plaintiffs' claims related to the illegal importation of lethal-injection drugs.

For these reasons, Plaintiffs respectfully seek leave of this Court to file an amended complaint.

Respectfully submitted this 2nd day of April, 2012.

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Robin C. Konrad
Cary Sandman

David J. Sepanik
Flora F. Vigo
Amanda R. Conley
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By: s/Dale A. Baich
Counsel for Plaintiffs Rogovich, Kemp, and Stanley

Kelly J. Henry
Denise I. Young

By: s/Kelly J. Henry (with permission)
Counsel for Plaintiff Lopez

EXHIBIT O

EXHIBIT O

Declaration of Michael L. Burke

I, Michael L. Burke, declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am an Assistant Federal Public Defender with the Office of the Federal Public Defender in the Capital Habeas Unit. I represent indigent prisoners sentenced to death.

2. I was assigned to represent Eric John King. Mr. King was executed on March 29, 2011. His execution began at 10:00 a.m.

3. On March 29, 2011, at approximately 6:00 a.m., I met with Mr. King at his cell in Housing Unit 9. The meeting occurred approximately 4 hours before Mr. King's scheduled execution. I was accompanied by co-counsel, Ashley J. McDonald.

4. The meeting occurred while Mr. King lay on his cot inside the holding cell. Ms. McDonald and I sat on chairs located in a small alcove immediately adjacent to his cell. It is my recollection that two Arizona Department of Corrections ("ADC") employees were in the death house, standing nearby but still allowing sufficient space for confidential communication between Mr. King and us. The only thing I recall about the ADC employees is that they were males; I do not recall what they looked like or any other identifying information.

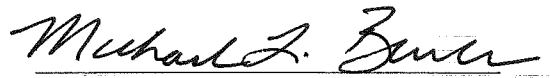
5. Although Mr. King was under the influence of some medication that sedated him, he was able to converse with Ms. McDonald and me for close to one hour.

6. During our conversation with Mr. King, one of the ADC employees approached the cell and asked Mr. King if he would like more medication. I do not recall Mr. King's response.

7. The meeting allowed my co-counsel and me to advise Mr. King about the status of his litigation pending before the Supreme Court of the United States. Despite his moderate sedation, Mr. King was able to converse with us about the litigation.

8. More importantly, the visit served the critical purpose of allowing my co-counsel and me to observe Mr. King's mental state in the hours immediately preceding his execution to determine whether concerns existed regarding his competency to be executed.

Signed this 18th day of February, 2012, in Phoenix, Arizona.



Michael L. Burke

EXHIBIT P

EXHIBIT P

Declaration of Ashley J. McDonald

I, Ashley J. McDonald, declare under penalty of perjury the following to be true to the best of my information and belief:

1. As an assistant federal public defender with the Office of the Federal Public Defender in the Capital Habeas Unit, I was assigned to represent Eric John King and Donald Edward Beaty.

2. Mr. King was executed on March 29, 2011. His execution began at approximately 10:00 a.m.

3. Mr. Beaty was executed on May 25, 2011. His execution was scheduled to begin at 10:00 a.m., but he received a temporary stay of execution. As result, Mr. Beaty's execution began at approximately 7:30 p.m.

4. On March 29, 2011, at approximately 6:00 a.m., I met with Mr. King at his cell in Housing Unit 9. The meeting occurred approximately 4 hours before Mr. King's scheduled execution. I was accompanied by co-counsel, Michael Burke.

5. Mr. King was inside the holding cell. Mr. Burke and I sat in a small alcove immediately adjacent to his cell. It is my recollection that one or two Arizona Department of Corrections ("ADC") employees were in the death house standing close enough to observe Mr. King, while affording Mr. Burke and me sufficient privacy for confidential communication with Mr. King. I have no memory of the ADC employees' faces or their names.

6. Although Mr. King was under the influence of some medication that sedated him, he was able to converse with Mr. Burke and me for close to one hour. The meeting allowed Mr. Burke and me to advise Mr. King about the status of his litigation pending before the Supreme Court of the United States. Despite his moderate sedation, Mr. King was able to converse with us about the litigation.

7. I was also able to observe Mr. King's mental state in the hours immediately preceding his execution to determine whether concerns existed regarding his competency to be executed.

8. Early in the morning on May 25, 2011, I met with my client, Donald Edward Beaty, at his cell in Housing Unit 9. I was accompanied by my co-counsel, Dale Baich. Mr. Beaty did not appear sedated.

9. The legal visit occurred at approximately 6:00 a.m. ADC had scheduled Mr. Beaty's execution to occur at 10:00 a.m., but the Arizona Supreme Court issued a temporary stay of his execution.

ajm

10. The meeting occurred while Mr. Beaty was inside the holding cell. Mr. Baich and I sat in a small alcove immediately adjacent to Mr. Beaty's cell. It is my recollection that one or two ADC employees were in the death house, standing nearby but still allowing sufficient space for confidential communication between Mr. Beaty, my co-counsel, and me. I have no memory of the ADC employees' faces or their names. I do not recall interacting with them during my visit with Mr. Beaty.

11. During the legal visit, my co-counsel and I were able to advise Mr. Beaty about the status of his litigation pending before the Arizona Supreme Court, the Supreme Court of the United States, and to answer Mr. Beaty's legal questions about the stay that was in place and the course of the litigation.

12. The visit also served the purpose of allowing me to observe Mr. Beaty's mental state in the hours immediately preceding his execution to determine whether concerns existed regarding his competency to be executed.

13. I requested to meet with Mr. Beaty again in the afternoon on May 25, 2011, to advise him of the status of the litigation. ADC permitted this meeting, which was several hours past the previously scheduled execution time. At the afternoon meeting, my co-counsel and I advised Mr. Beaty about his case, and we were able to observe Mr. Beaty's mental state.

14. The stay of execution was lifted mid-afternoon, and Mr. Beaty was executed in the early evening on May 25, 2011.

Signed this 18th day of February, 2012, in Lynchburg, Virginia.

Ashley J. McDonald

Ashley J. McDonald
Signature