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

OPENING BRIEF OF PLAINTIFF-APPELLANT

Jon M. Sands
Federal Public Defender
Dale A. Baich, OH Bar No. 0025070
Robin C. Konrad, AL Bar No. 2194-N76K
Cary Sandman, AZ Bar No. 004779
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
Telephone: 602-382-2816
Facsimile: 602-889-3960

David J. Sepanik, CA Bar No. 221527
Flora F. Vigo, CA Bar No. 239643
Amanda R. Conley, CA Bar No. 281270
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, California 94111
Telephone: 415-984-8963

Denise I. Young, AZ Bar No. 007146
2930 N. Santa Rosa Place
Tucson, Arizona 85712
Telephone: 520-322-5344

Henry A. Martin
Federal Public Defender
Kelley J. Henry, MO State Bar No. 38849
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203-3805
Telephone: 615-736-5047
Facsimile: 615-736-5265

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

Introduction. 1

Statement of Jurisdiction. 2

Issues Presented for Review. 2

Statement of the Case. 4

Facts. 5

The Written January 2012 Protocol. 6

Executions Under January 2012 Protocol. 8

Circumstances Surrounding Moormann's Execution. 9

Circumstances Surrounding Towery's Execution. 10

Circumstances Surrounding Kemp's Execution. 13

Standard of Review. 16

Summary of Argument. 17

Argument. 19

I. Lopez is entitled to a preliminary injunction under this Court's "serious questions" test, which the district court failed to apply. 19

II. Lopez has demonstrated serious questions going to his claims related to Defendants' denial of his right of access to counsel and the courts. 22

III. Lopez has presented serious questions going to the merits of his Eighth and Fourteenth Amendment claims. 28

1. Lopez has demonstrated serious questions regarding his Eighth Amendment claim. 28

2. Lopez has demonstrated serious questions going to his Equal Protection Claims. 32

IV. The district court had before it undisputed facts that support Lopez's claims in his motion for preliminary injunction. Lopez was entitled to relief based on the undisputed facts; alternatively, he was entitled to a hearing on the issues surrounding the factual bases of his claims. 35

Conclusion. 42

Certificate of Compliance. 43

Certificate of Service. 44

TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973). 27

Aguirre v. Chula Vista Sanitary Serv. and Santi-Tainer, Inc., 542 F.2d 779 (9th Cir. 1976).. . . . . 41, 42

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011). 2, 19, 20, 22

Arthur v. Thomas, 674 F.3d 1257 (11th Cir. 2012). 34

Baze v. Rees, 553 U.S. 35 (2008).. . . . . 28, 31

Cooey v. Kasich, 801 F. Supp. 2d 623 (S.D. Ohio 2011).. 35

DISH Network Corp. v. F.C.C., 653 F.3d 771 (9th Cir. 2011).. 17

DeMallory v. Cullen, 855 F.2d 442 (7th Cir. 1988). 27

Dickens v. Brewer, 631 F.3d 1139 (9th Cir.2011). 1

Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011). 16

Farmer v. Brennan, 511 U.S. 825 (1994).. . . . . 29, 31

International Paper Co. v. Inhabitants of the Town of Jay, 672 F. Supp. 29 (D. Me. 1987). 40

Kenneally v. Lungren, 967 F.2d 329 (9th Cir. 1992). 41

Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009).. 16

In re Ohio Execution Protocol Litigation, 671 F.3d 601 (6th Cir. 2012). 35

In re Ohio Execution Protocol Litig., No. 2:11-cv-1016, 2012 WL 1132607 (S.D. Ohio April 4, 2012). 26

Rangra v. Brown, 566 F.3d 515 (5th Cir. 2009). 35

Ross-Whitney Corp. v. Smith Kline & French Laboratories, 207 F.2d 190 (9th Cir. 1953). 40

Scott & Fetzer Co. v. McCarty, 450 F. Supp. 274 (N.D. Ohio 1977). 41

Towery v. Brewer, 672 F.3d 650 (9th Cir. 2012). . . . . passim

United States v. Oregon, 913 F.2d 576 (9th Cir. 1990). 41

West v. Brewer, Case No. CV-11-1409-PHX-NVW, 2011 WL 6724628 (D.Ariz. Dec. 21, 2011). 31, 33, 34, 43

FEDERAL STATUTES

42 U.S.C. § 1983. 4

28 U.S.C. § 1292(a)(1). 2

28 U.S.C. § 1331. 2

INTRODUCTION

Just over two months ago, this Court permitted the executions of Robert Moormann and Robert Towery to proceed under the protocol recently re- written by the Arizona Department of Corrections (ADC), despite Moormann's and Towery's allegations that the protocol is unconstitutional. *Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012). The Court did not sanction the protocol as written; rather, the Court allowed the executions to proceed, "contingent upon the State's representations and commitments made during the preliminary injunction hearing. With these representations, the protocol parallels the one reviewed under *Dickens* [*v. Brewer*, 631 F.3d 1139 (9th Cir.2011)], with respect to training and qualifications of the IV Team and the availability of backup drugs and catheters. It also mirrors the prior practice regarding access to counsel and resolves Towery and Moormann's claims on these issues." *Towery*, 672 F.3d at 658. In large measure, Towery's and Moormann's executions were carried out in accordance with Defendants' representations to this Court. However, these amendments have not been codified, instead Defendants have retreated from the representations they made to this Court concerning the manner in which they will conduct executions.[1] In fact, during the execution of Thomas Kemp,

[1]Indeed, as Samuel Lopez explains below, Defendants assert that they are not bound by the Court's holding because Director Ryan determined that the Court "incorrectly relied" on an older version of the protocol, and because Director Ryan only agreed to certain changes for Moormann's and Towery's executions.

Defendants departed from the execution procedure approved by this Court in *Towery*. Specifically, Defendants limited Kemp's in-person attorney meeting to one hour, from 6:00 a.m. to 7:00 a.m. on the morning of his execution. Defendants also did not prepare a backup set of syringes of lethal drugs. These are not the only issues raised below.

Defendants similarly plan to execute Samuel Lopez in a manner that departs from the procedure approved by this Court. Accordingly, in order to protect Lopez's constitutional rights, this Court should is grant Lopez a preliminary injunction pending resolution of these issues.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violations), § 2201 (declaratory relief), and § 2202 (injunctive relief). This appeal is from an order denying a motion for preliminary injunction, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

1. The district court failed to apply this Court's "serious questions" test as articulated in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), when it considered and denied the motion for preliminary injunction.

Additionally, Director Ryan appears to blame this Court for the "problems" that occurred during Towery's execution, despite the fact that the requirements that Ryan claims caused "problems" were part of ADC's own protocol.

2. During Thomas Kemp's execution, ADC departed from this Court's order in *Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012), and terminated his in-person access to counsel on the morning of his execution three hours prior to the execution. Moreover, there is undisputed evidence that Towery was denied access to counsel and the courts while ADC was attempting to insert IV lines. Not only did Defendants fail to present evidence rebutting Lopez's account of what occurred during Towery's execution, but they failed to even address the issue at all. The district court abused its discretion in denying Lopez a preliminary injunction by discounting undisputed facts in finding that Lopez could not succeed on the merits of his access to courts claims.

3. A State's execution procedures will violate the Eighth Amendment where they present an objectively intolerable risk of harm for which the State cannot be subjectively blameless. A State that burdens a prisoners' Eighth Amendment right to be free from cruel and unusual punishment by treating prisoners differently in a way that affects the risk of pain to which they are subjected will violate the Equal Protection Clause. Defendants' actions during the execution of Robert Towery rise to the level of Eighth and Fourteenth Amendment violations. After at least six unsuccessful attempts to set a peripheral IV in Towery, Defendants determined that a femoral IV would be used as the primary line and a left peripheral line would be used as a backup line. After further inability to set a left peripheral IV, it was decided that a backup line would be placed in the hand, despite the opinion of Defendants' doctor who said that would be painful. Moreover, the femoral artery was punctured, and if pentobarbital were administered through the artery, it would have been painful. The district court's finding that Lopez would not likely succeed on the merits of these claims was clearly erroneous.

4. Under the preliminary-injunction standard, a district court may grant relief in the absence of a hearing if affidavits, pleadings, or other factors provide undisputed facts, such that a hearing is unnecessary; alternatively, the court may hold a hearing on factual disputes. The district court had before it undisputed facts that support Lopez's claims. The court, however, neither granted relief, nor held a hearing. Instead, it substituted its own speculation for the undisputed facts. The district court erred by failing to grant relief on the basis of undisputed facts, or by failing to hold a hearing on issues related to those facts.

STATEMENT OF THE CASE

On February 6, 2012, Plaintiffs filed a Complaint for Equitable and Declaratory Relief pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of Arizona. *Towery v. Brewer*, Case No. 2:12-cv-00245, ECF No. 1 (D. Ariz.).[2] The complaint was amended on February 10, 2012, and Samuel Lopez was added as a Plaintiff to the lawsuit. (ECF No. 8.)

On February 14, 2012, Plaintiffs Moormann and Towery filed a motion for a preliminary injunction, asking the district court to enjoin the Arizona Department of Corrections (ADC) from carrying out their scheduled executions. (ECF No. 16.) On February 22, 2012, the district court heard argument on the motion, and the following day, denied the motion. (ECF No. 42.)

This Court affirmed the district court's denial of the motion, but only based on the representations made by the State during argument; those representations "alter[ed] the 2012 Protocol in various ways with respect to Towery and Moormann." *Towery v. Brewer*, 672 F.3d 650, 658 (9th Cir. 2012).

On March 6, 2012, Plaintiffs filed a motion requesting a court-ordered settlement conference (ECF No. 50), which Defendants opposed (ECF No. 51). The district court denied the motion. (ECF No. 55.)

---

[2]All citations to ECF numbers will refer to the district court docket in this case.

On April 2, 2012, Samuel Lopez, along with the other Plaintiffs, filed a motion for leave to file a second amended complaint. (ER 236-38.) On April 19, 2012, the district court granted the motion for leave to file a second amended complaint. (ECF No. 57.)

On May 1, 2012, Lopez lodged his motion for a preliminary injunction, along with four new declarations supporting the motion as well as execution records from Towery and Moormann. (ECF No. 59, 60.) The motion for preliminary injunction was filed on May 2. (ER 089-120.) That same day, Defendants filed their Answer to Plaintiffs' second amended complaint. (ER 069-088.) On May 4, 2012, Defendants filed a response to Lopez's motion for preliminary injunction (ECF No. 64), and on May 5, 2012, Lopez filed his reply (ER 023-031).

On May 7, 2012, the district court, without holding a hearing, denied Lopez's preliminary injunction motion. (ER 003-022.) On that same day, Lopez filed his notice of appeal. (ER 001-002.)

FACTS

Appellant Samuel Lopez is scheduled to be executed at 10:00 a.m. on May 16, 2012. (ER 191.) On April 20, 2012, Director Ryan informed Lopez that ADC will execute him by means of a one-drug protocol using pentobarbital. (ER 193.) Based on the declaration of Robert Patton, ADC's Division Director of Offender Operations, it appears that it is ADC's intent not to prepare backup syringes unless needed. (ECF

No. 64-1.) ADC has made no representations regarding the qualifications of the IV team that will place the catheter(s) in Lopez. ADC notified Lopez's counsel today that they would be permitted to meet with Lopez on the morning of his execution from 6:00 a.m. to 7:00 a.m.

The Written January 2012 Protocol

ADC's lethal-injection protocol revised on January 25, 2012 ("January 2012 Protocol"), which codifies 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 gives 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* ER 138-144.) 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.[3] (*Id.* at 21.) 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 through the skin all the way to the vein and then 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—including puncturing the femoral artery, tearing the femoral vein, or puncturing the bladder—that do 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,[4] the January 2012 Protocol

---

[3]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.*)

[4]*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

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.

Executions Under January 2012 Protocol[5]

This Court last considered the constitutionality of ADC's lethal-injection procedures on February 28, 2012. *See Towery*, 672 F.3d 640. Since then, Arizona has executed three prisoners, Robert Moormann (February 29, 2012), Robert Towery

---

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).

[5]Lopez does not repeat the detailed history regarding ADC's execution procedures but only outlines the new facts revealed from the three most recent executions. For a detailed factual history, Lopez refers this Court to his Motion for Preliminary Injunction (ER 092-93) and this Court's recent opinion in *Towery*, 672 F.3d at 654-55.

(March 8, 2012), and Thomas Kemp (April 25, 2012). The executions of Moormann and Towery were carried out under the January 2012 Protocol as amended by this Court. *See id.* at 658. The execution of Kemp was not carried out with those same amendments in place.

On March 23, 2012, Defendants provided counsel for Lopez copies of the execution logs kept by ADC during the executions of Moormann and Towery. (ER 153-182.) The ADC logs for Moormann and Towery are the only information Lopez has from the Defendants regarding the details of the three most recent executions. Lopez has obtained all other information from witness or expert statements or from pathologist reports.

Circumstances Surrounding Moormann's Execution

Robert Moormann was scheduled to be executed on February 29, 2012, at 10:00 a.m. (ER 184.) Consistent with this Court's opinion, Moormann's attorneys visited with him until 9:15 a.m. on the morning of his execution. (ER 182.) By 9:50 a.m., ADC had restrained and secured Moormann to the execution table. (ER 171.) The ADC log notes that at 9:55 a.m., the Director "shall determine the catheter(s) site(s)." (ER 172.) By 10:05 a.m, the IV procedure was completed (ER 172), and it was noted that the left peripheral catheter was the primary IV line and the right peripheral catheter was the backup IV line (ER 178).

The injection of the lethal drugs began at 10:23 a.m. (ER 178.) Moormann

was pronounced dead at 10:33 a.m. (ER 178.)

Circumstances Surrounding Towery's Execution

Robert Towery was scheduled to be executed on March 8, 2012, at 10:00 a.m. (Ex 186.) Consistent with the Ninth Circuit's opinion, Towery's attorneys visited with him until 9:15 a.m. that morning. (ER 126 ¶ 3; ER 168.)

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. By 9:49 a.m., Towery was restrained and secured to the execution table. (ER 157.) The ADC log notes that at 9:52 a.m., the Director "shall determine the catheter(s) site(s)." (ER 158.)

What happened next, however, differed substantially from the Moormann execution. The ADC log reports 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]." (ER 158.) The recommendation of setting a left peripheral catheter as the backup line is puzzling given that the log notes that there had already been multiple unsuccessful attempts in setting a line in that location. (ER 133 ¶ 7.)

At 10:31 a.m., the Director called the Attorney General's office and provided "an update regarding the IV process." (ER 158.) At 10:37 a.m., the Director spoke

with Jeff Zick at the Attorney General's office. (ER 158.) The ADC log provides no additional information regarding why counsel from the Attorney General's office was sought during the execution.

At some point during the numerous attempts to set the IV lines, Towery asked to speak with his counsel, Dale Baich, but was not permitted to do so. (ER 127-28 ¶¶ 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 Towery or the execution procedure. (ER 126 ¶ 6.) The ADC employee checked with the command center and informed Baich that command had nothing to report. (ER 126 ¶ 6.)

At 10:50 a.m., the right femoral catheter was placed, but Defendants' records indicate that the left peripheral catheter was unsuccessful. (ER 158.) The Director then had a discussion with the IV Team Leader regarding the back-up IV line. (ER 158.) At 10:59 a.m., a catheter was placed in Towery's right hand as a backup line to the femoral catheter. (ER 158.) Defendants set a backup line in the hand, even though the doctor who ADC hired to conduct its executions in 2010-2011 testified previously that it would be painful to administer a large amount of barbiturate through a small peripheral vein in a distal extremity. (ER 150.) The log indicates that the IV procedure was finally completed approximately one hour after it started. (ER 159.)

According to ADC's log, Director Ryan stated that Towery's execution was "more challenging because of the mandated order regarding two catheter points." (ER 161.) However, it was not the Court that mandated two catheter points. Rather, it was Defendants' counsel who stated in briefing to this Court, 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 also Towery v. Brewer*, No. 12-15381, Oral Argument of Assistant Attorney General Jeffrey Zick (Feb. 27, 2012), *available at* http://www.ca9.uscourts.gov/media/, at 38:45-38:50 ("There is a backup IV catheter being placed in the inmate"); *id.* at 43:58-44:02 ("there is two IV catheters, one primary, and one backup").

The injection of the lethal drugs began at 11:17 a.m. (ER 165.) Towery was pronounced dead at 11:26 a.m. (ER 165.)

The IV team member(s) responsible for setting Towery's IV lines punctured Towery's arms numerous times without ever successfully setting a peripheral line. (ER 158.) In ADC's log, Director Ryan asserted that Towery's "bad veins" contributed to the delay in the execution. (ER 161.) Towery did not have "bad veins." 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 (ER 232). In other words, Towery had good veins. The substantial difficulties in placing catheters may have been mitigated had ADC not removed the

previous protocol's medically reasonable provision that ADC staff assess the condition of the prisoner's veins in the days before an execution.

Furthermore, Towery's autopsies revealed that the both the femoral artery and the femoral vein were punctured. (ER 230; ER 033; ER 035.) If the IV line was placed in the artery and the pentobarbital was administered, then it was likely that Towery experienced pain. (ER 039; ER 051 at 93:15-17.)

The ADC log also reports that Director Ryan blamed delayed complettion of the execution on attorney visitation, which ended at 9:15 a.m. (ER 161.) However, Moormann's legal visitation with his attorney on the morning of his execution ended at the same time, and resulted in no delay.

Circumstances Surrounding Kemp's Execution

Thomas Kemp was scheduled to be executed at 10:00 a.m. on April 25, 2012. (ER 188.)

By letter dated March 22, 2012, Director Ryan informed counsel for Thomas Kemp that no more than two attorneys-of-record 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. (ER 228.) This approach was inconsistent with this Court's holding in *Towery*. *See* 672 F.3d at 658 (noting that the in-person visits will be permitted "under the long-

standing ADC practice").[6] Indeed, when Director Ryan was asked about the possibility of a visit consistent with this Court's order in *Towery*, he stated that the Court "incorrectly relied" on an older protocol, and noted that although ADC "agreed" to the court-ordered visitation for Towery and Moormann, it "did not waive the right to exercise [his] discretion on the scheduling of future visits with death row inmates." (ER 195.)

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 were required. (ER 228.) The failure to prepare back-up drugs is inconsistent with this Court's holding in *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. (ER 122 ¶ 5.) Gabrielsen asked an ADC employee why he was told that Kemp was going to be injected with drugs after he was sedated, because a sedation

[6]This Court cited a protocol that allowed attorney-client visits up until 45 minutes before the execution.

check followed by injection of lethal drugs is required only with the three-drug protocol. (ER 122-23 ¶¶ 6-7.) The ADC employee did not answer his question. (ER 123 ¶ 7.) Eventually a different ADC official told Gabrielsen that Kemp would be executed using a one-drug protocol. (ER 123 ¶ 9.)

Kemp's execution began at approximately 10:00 a.m. (ER 188)[7] Kemp had a femoral catheter in his groin. (ER 123 ¶ 10.) According to a witness, Kemp had no IV lines in his right arm and witnesses were not able to see his left arm. (ER 123 ¶ 10.) A private autopsy performed on Kemp revealed that at least one puncture was made in the femoral area. (ER 130-31.)[8] The autopsy also revealed that there were at least two punctures in the left arm: one in the antecubital fossa (the area at the fold of the front of the elbow) and one in the outer forearm. (ER 130.) There were no

---

[7]Counsel for Plaintiffs have not yet been provided ADC's logs concerning Kemp's execution.

[8]A private autopsy was performed on April 28, 2012. The autopsy conducted by the Pima County Medical Examiner occurred on April 27, 2012. Plaintiffs have not yet obtained the written autopsy report. Counsel for Plaintiffs have obtained photographs from the Medical Examiner. Although the photographs were not presented to the court below due in part to the district court's failure to set a hearing and in part to time constraints of this litigation, the photographs taken by the Medical Examiner during Kemp's autopsy demonstrate that there was an IV catheter placed in the antecubital fossa and an IV catheter placed in the femoral area. The photographs also demonstrate that the puncture in the lower forearm was not used as a site for an IV catheter. One photograph that shows that the IV line leading to the catheter in the left arm had a knot in it. These photographs were not submitted to the district court, but, given the last minute nature of this litigation, Lopez asks this Court to expand the record to allow them to be considered. [ER 280, 281, 282]

puncture marks anywhere on his right arm. (ER 130.) Kemp had good veins that were without visible thickening, scarring, or sclerosis. (ER 130-31.)

During Kemp's final statement, his attorney heard him say "I regret nothing" but heard nothing else. (ER 123 ¶) Kemp's lips appeared to continue moving despite the witnesses not being able to hear him say anything else. (ER123 ¶ 11.)

Shortly after the execution began, Kemp's right arm and his torso began violently shaking. (ER 124 ¶ 12.) This occurred for approximately five or six seconds. (ER 124 ¶ 12.) This could have been a partial seizure potentially caused by the administration of pentobarbital. (ER 134 ¶ 9.) Kemp was pronounced dead at 10:08 a.m. (ER 124 ¶ 13.)

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011). "The district court abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* When it is alleged that the district court relied on an "erroneous legal premise," this Court reviews the underlying issues of law *de novo*. *Klein v. City of San Clemente*, 584 F.3d 1196, 1200 (9th Cir. 2009). This Court must ultimately determine whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011)

(citation omitted).

SUMMARY OF ARGUMENT

The case currently before this Court involves both facial and as-applied challenges to the State of Arizona's execution procedures. Samuel Lopez presented undisputed, uncontested facts in the district court that put into sharp relief this Court's concerns—expressed just ten weeks ago—that "the State of Arizona . . . has insisted on amending its execution protocol on an ad hoc basis—through add-on practices, trial court representations and acknowledgments, and last minute written amendments—leaving the courts with a rolling protocol that forces [them] to engage with serious constitutional questions and complicated factual issues in the waning hours before executions." *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012). Moreover, the evidence demonstrates that "Arizona's ongoing conduct" indicates that it "cannot be trusted to fulfill its otherwise lawful duty to execute inmates sentenced to death." *Towery*, 672 F.3d at 653 (internal citations and quotation marks omitted). Despite the uncontested evidence, the district court denied Lopez his requested preliminary injunction, and did so without holding a hearing or even addressing the factual basis of Lopez's evidence. Instead, the court labeled much of Lopez's evidence as "speculative claims." In denying Lopez's request for preliminary injunction, the district court erred in four significant ways.

First, the district court misapplied this Court's legal standard when reviewing

the motion for a preliminary injunction. Rather than balance the factors and consider whether Lopez presented serious questions going to the merits of his claims, the court instead considered only the likelihood of success on the merits of the claims. As a result, its review of Lopez's claims was improper and should be reversed.

Second, the district court found that Lopez's right of access to the courts is served by telephonic contact, rather than by confidential in-person contact with his attorneys in the hours immediately preceding the execution. The court erroneously substituted its own finding—reached before this Court's decision in *Towery*—for this Court's holding as to the importance of Lopez's right to preserve the right of access to the courts. Additionally, the district court erred in finding that Lopez could not justify a need for access to counsel during the execution process, even in light of uncontroverted evidence of problematic execution procedures.

Third, the district court wrongly denied Lopez's claims that Defendants' actions rise to the level of an independent Eighth Amendment violation, as well as an equal protection violation because such actions burden a fundamental right. Lopez's claims are based in significant part on the actions of the Defendants in carrying out the most recent three executions. Those actions display clear undisputed failures by ADC to follow its own protocol, and its representations to this Court regarding procedures previously determined to be constitutional.

And fourth, in an error that infected all aspects of the court's decision, the court

failed to properly contend with the facts presented to it. That is, the court deemed undisputed facts as mere speculative claims, and then created reasons that masqueraded as facts to explain away Defendants' actions (including facts that Lopez took directly from Defendants' own execution logs). Not only did the court decline to consider Lopez's undisputed facts, and not only did the court create its own explanations, but it did so in the absence of a hearing, and so failed to require Defendants to put forth their own explanations of the facts that Lopez presented.

ARGUMENT

I. Lopez is entitled to a preliminary injunction under this Court's "serious questions" test, which the district court failed to apply.

Lopez presented factual allegations that raise serious questions as to Defendants' ability to execute him in a constitutional manner. In disregard of this Court's precedent, the district court failed to consider these "serious questions," when it denied Lopez's motion. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

Under *Wild Rockies*, the district court properly grants a preliminary injunction when "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor" and where "there is a likelihood of irreparable injury and that the injunction is in the public interest." *Wild Rockies*, 632 F.3d at 1135. But here, rather than asking whether there were serious questions going to the

merits of the case, and instead of balancing the four factors, the district court simply stated the four-pronged balancing test, and then concluded that a "stay of execution to resolve Lopez's speculative allegations is not in the public interest."[9] (ER 021.)

The court provided no analysis demonstrating that it had balanced "the elements of the preliminary injunction test . . . so that a stronger showing of one element may offset a weaker showing of another." *Wild Rockies*, 632 F.3d at 1131. The district court, in a conclusory manner that covered only three sentences, determined that the state has a strong interest in enforcing its judgments and the victims have an important interest in timely enforcement of a sentence. (ER 021.)

But the court ignored the reality that Lopez just obtained the facts—facts that are dependent on three executions that took place over the course of the last ten weeks, one of which occurred only two weeks ago. And the first of those executions (Robert Moormann) took place only five weeks after Defendants changed their execution protocol yet again—after the State of Arizona had already obtained warrants of execution for Moormann and Robert Towery. Thus, Moormann and Towery were forced into litigating at the last moment. Furthermore, as this Court

[9]Furthermore, as Lopez argues below, the court reached its conclusory statement about Lopez's "speculative" claims by ignoring the declarations and other factual evidence that Lopez produced, and by creating explanations without factual support for Defendants' conduct, rather than by requiring Defendants to explain their own conduct.

explained, "Because the new protocol was adopted on the eve of the two planned executions, this appeal comes to us at the eleventh hour." *Towery*, 672 F.3d at 652.

Here, Lopez seeks only to enjoin Defendants from executing him in an unconstitutional manner. Lopez asks that the Court consider his factual allegations and consider the effect of those factual allegations on the "serious questions" on the constitutionality of his impending execution.

As Lopez suggested, the district court should have considered the "serious questions" raised regarding the merits of his claim, and should have equally considered the fact that it was Defendants, not Lopez, who caused the need for last-minute litigation by changing the protocol "at the eleventh hour," such that it has not yet even been reviewed by a court.[10] It is Defendants' actions that resulted in the request for preliminary injunctive relief. Thus, "[b]ecause [the district court] did not apply the 'serious questions' test, the district court made an error of law in denying the preliminary injunction." *Wild Rockies*, 632 F.3d at 1135. This Court should grant relief. *Cf. Towery*, 672 F.3d at 661 (noting that in light of, *inter alia*, the protocol as

[10]Indeed, the Court only permitted the executions of Moormann and Towery to go forward under the "amended 2012 Protocol, as outlined . . . [in the Court's opinion], on the basis of representations and commitments made at the February 27 hearing, comports with the protocol approved in *Baze*." 672 F.3d at 659. And as discussed below, Defendants assert that they need not follow that protocol for Lopez's execution because that protocol was only in place for the executions of Moormann and Towery.

amended pursuant to Defendants' in-court representations, "Towery and Moormann do not raise serious questions going to the merits of their Eighth and Fourteenth Amendment claims with regard to their executions as they will actually be carried out[; therefore,] we conclude that Towery and Moormann do not meet the standards under *Winter* and *Alliance for the Wild Rockies* for issuance of a preliminary injunction.").

II. Lopez has demonstrated serious questions going to his claims related to Defendants' denial of his right of access to counsel and the courts

Lopez raised two claims related to his denial of the right of access to counsel and the courts. First, he claimed that the January 2012 Protocol as written and based on the Director's exercise of discretion violates this fundamental right. Second, he claimed that based on Defendants' actions during Towery's execution that Defendants will deny him access to counsel and the courts. The district court erroneously concluded that it was unlikely that Lopez would succeed on the merits of these claims.

In *Towery*, Moormann and Towery challenged the January 2012 protocol on the grounds that it denied them their right to access the courts by denying them in-person visits with their counsel on the morning of their executions. This Court resolved these claims based on "the State's representations and commitments made during the preliminary injunction hearing[]" relating to the ability of counsel to meet

with their clients on the morning of the execution. Thus, the Court held, "Counsel for Towery and Moormann will be permitted in-person visits with their clients, including during the morning of the execution, under the long-standing ADC practice, as reflected in Department Order 710-IO-F (Nov. 5, 2004), § 710.02, ¶ 1.3.3.5." *Towery*, 672 F.3d at 659. The Court explicitly stated that its "decision is contingent upon" Defendants' representations. *Towery*, 672 F.3d at 659.

Subsequent to Moormann's and Towery's executions, Director Ryan decided to reverse course and use his "discretion" to permit attorney visitations before Thomas Kemp's execution, but only until 7:00 a.m. He asserted that this Court "incorrectly" relied on an older protocol, and therefore, ADC would not follow the Court's "incorrect" holding. (ER 195.)

Lopez challenged this practice, but despite this Court's holding, the district court accepted Defendants' approach. The court stated, "This Court previously determined that Plaintiffs had not shown a likelihood of success on their access-to-courts claim based on the visitation policy change enacted by the January 2012 Protocol. The Court adopts its previous conclusion, which applies with stronger force the closer the time of execution approaches."[11] (ER 018-20.) The district court's

[11]If the district court means to suggest that in-person visits that end just before an execution impede ADC's ability to conduct an execution, this conclusion is inaccurate, as facts taken from Defendants' execution logs attest. Counsel for both Towery and Moormann, visited with their clients until 9:15 a.m. on the morning of

conclusion thus stands in direct conflict with this Court's prior holding in this litigation. It also fails to take into account ADC's actions with respect to prisoners' request for counsel.

First, the district court's finding that "Plaintiffs had not shown a likelihood of success on their access-to-courts claim" based on the policy change is belied by this Court's holding that "contingent upon" Defendants' representations that in-person, morning-of attorney-client visits would be permitted, the access-to-counsel claims were resolved. This Court did not hold that Towery and Moormann could not prevail on their claim; rather, the Court held that Defendants had mooted the claim by changing their position. *Towery*, 672 F.3d at 659.

Moreover, the district court's conclusion that "Lopez's fear that ADC will dishonor its commitment to allow such access is unpersuasive, especially in light of ADC's honoring its commitment to the Ninth Circuit concerning the Towery and Moormann executions[]" (ER 019) is belied by the fact that Director Ryan has already asserted his right and his intention to reject the Court's specific citation of

---

their executions, consistent with this Court's order. (ER 182; (ER 126 ¶ 3; ER 168.)

After Moormann's attorneys left, ADC took Moormann to the execution chamber. By 9:50 a.m., ADC had Moormann restrained and secured to the execution table. (ER 171.) After Towery's attorneys left, ADC took Towery to the execution chamber. Towery was restrained and secured to the execution table by 9:49 a.m. (ER157.) Thus, the effect of in-person visits upon the ADC's ability to conduct the two executions was negligible if not non-existent.

ADC protocol. (ER 195.)

Second, the district court's reliance on ADC's efforts to appropriately provide access to counsel—and to the courts—is misplaced, given the undisputed fact that Towery asked for counsel during the extended time that ADC was attempting to set multiple IV lines. (ER 127-28 ¶¶ 12, 15, 16.) However, ADC did not comply with Towery's request. Indeed, Towery's counsel questioned ADC after the execution was delayed for forty-five minutes and asked if there was anything he needed to know. He was told no. These facts evince a need for court-ordered protection of Lopez's right to access the courts.

But the district court dismissed Lopez's claim as to this fundamental right, stating that although Lopez presented evidence of Towery's request, Lopez did not "identify any contemplated litigation that will be inhibited by the lack of access to counsel during the IV-placement procedure, other than to speculate that some circumstance may arise immediately prior to his execution that presents a constitutional concern." (ER 020-21.) The court dismisses the claim entirely by stating that if ADC were to experience difficulty setting IV lines and therefore paused during the proceedings and then *restart*ed the procedure some hours later, or if ADC called off the proceedings entirely because of problems, *then* the prisoner presumably would have access to counsel, and concomitant access to the courts. But this argument fails to recognize that ADC's immediate actions could require access to the

courts. *See, e.g.*, *In re Ohio Execution Protocol Litig.*, No. 2:11–cv–1016, 2012 WL 1132607, at *15 (S.D. Ohio April 4, 2012) (describing the "failed execution of Rommell Broom when Defendants introduced a doctor into the execution proceedings who was not a member of the execution team (a direct violation of the protocol) and who promptly attempted to start an IV site only to hit the inmate's ankle bone in the process before the doctor fled from the room . . . ."). At this point, through no fault of his own, Lopez is unable to state with certainty, without discovery, the claim or claims that Towery could have brought to the courts. It is *because* of Defendants' actions that Towery was prevented from discussing matters with his counsel.

Finally, the court commented that Lopez's explication of the Towery events "especially fails" because "[e]ven with after-the-fact examination, there was nothing in the Towery execution that would have warranted judicial proceedings." (ER 021.) This statement is astonishing: an autopsy—a physical examination of a cadaver—cannot reveal what the prisoner was experiencing or thinking, or what ADC team members might have said, during the time that ADC was engaging in the ongoing, unsuccessful medical procedures designed to end his life. The district court further indicated its lack of understanding of the need for access to counsel—and to the courts—when it found that "[t]he difficulty of finding IV access sites required immediate further effort by the IV Team, not intervention by this Court." (ER 021.) It is simply not Lopez's claim that "the difficulty of finding IV access" would have

been the sole reason (or perhaps any part of a reason) for access to the courts. Towery was *at that moment* experiencing the physical sensations associated with these unsuccessful medical procedures, hearing various commentary by ADC staff, and experiencing whatever else surrounded ADC's actions. What Towery needed to address with his counsel when he asked for his attorney simply cannot be waved away by resort to a narrow imagining of one specific type of problem. To do so negates the "most fundamental right" a prisoner holds. *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)).

The district court erred in substituting its finding for this Court's holding, and it erred by deciding that prisoners did not need access *during* an execution, but would have appropriate access if the execution were *stopped*. Finally, the court erred by drawing unsupported factual conclusions as to why the court thought Towery wanted access to counsel. This Court should therefore reverse the district court's denial of a preliminary injunction and order, at minimum, that ADC provide Lopez with in-person access to counsel up to 45 minutes before his scheduled execution, and allow access to counsel during the insertion of IV catheters.

III. Lopez has presented serious questions going to the merits of his Eighth and Fourteenth Amendment claims

In support of his motion for a preliminary injunction, Lopez asserted that Defendants' actions rise to the level of an independent Eighth Amendment violation, as well as an equal protection violation because such actions burden his fundamental right. Lopez's claims are based on the actions of the Defendants in carrying out the three most recent executions. The district court denied relief on both the Eighth and Fourteenth Amendment claims. In doing so, the district court was wrong for several reasons. This Court should reverse the lower court's decision and grant Lopez a preliminary injunction.

1. Lopez has demonstrated serious questions regarding his Eighth Amendment claim

The district court cited the correct legal standard in reviewing Lopez's claim that the risk associated with ADC's execution procedures rise to an Eighth Amendment violation. "The risk must be an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." (ER 010.) (*quoting Baze*, 553 U.S. at 50, and *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (internal quotation marks omitted). The district court, however, failed to apply this standard. Particularly, it ignored the evidence presented by Lopez that ADC could not be "subjectively blameless." Moreover, the district court abused its discretion in making clearly erroneous factual

findings to support its denial of relief to Lopez. Based on evidence of Defendants' actions in particular during Towery's execution, Lopez has presented serious questions whether his right to be free from cruel and unusual punishment will be violated.

The district court quotes at length its findings in *West v. Brewer* to conclude that "Lopez has not cited any legal authority or alleged any facts" to disturb its previous finding that the "Eighth Amendment is not offended by administration of lethal chemicals through a femoral central line." (ER 011.) It also concludes that the setting of an IV line in Towery's hand does not present "an objectively intolerable risk of severe pain." (ER 011.) In reaching its conclusion, the district court ignores the second half of the legal standard—Defendants cannot claim they are subjectively blameless. There are several undisputed facts from Towery's execution that support Lopez's Eighth Amendment claim.

The IV team spent approximately thirty minutes, and made at least six punctures, attempting to place IV catheters in both of Towery's arms near his elbows. After such time, the team was unsuccessful at starting any lines. Despite the IV team's lack of success, the Director determined that a peripheral IV would be placed as a backup line in Towery's left arm. The decision to continue to puncture veins that obviously, for whatever reason, the IV team was unable to access was unreasonable. Moreover, once the IV team could not start a peripheral line in Towery's left arm near

his elbow, the Director then determined that a backup line should be placed in his right hand. This decision was made in total disregard of the opinion of ADC's former Medical Team Leader, a doctor, who said that administering a high concentration of pentobarbital or pentothal through a smaller vein would "cause pain." (ER 150.) The Medical Team Leader explained that the smaller vein was one down away from the elbow. (ER 151.)[12] By making a choice that Defendants knew would cause pain, they cannot be said to be "subjectively blameless." The district court's conclusion that there was no objectively intolerable risk of pain is wrong.

The district court also improperly discounted facts regarding the pain surrounding Towery's IV procedure. Quoting *Baze*, 553 U.S. at 50, the district court found that there was no objectively intolerable risk of pain "[s]imply because an execution method *may result in pain*, either by accident or as an inescapable consequence of death." (ER 012.) (alteration and emphasis in original). Here, Defendants' actions during the medical procedure before Towery's execution were not an "accident" nor were they the "inescapable consequence of death." To the

[12] Although Lopez's admits this evidence was not presented to the district court due to time constraints, *see supra* n.8, it is critical to note that a puncture was made but not used as a catheter site in Kemp's left forearm. Based on the fact that an IV catheter was placed at his left elbow and in his right groin, it seems clear that the puncture in the forearm was made *before* the catheter was set at the elbow. Thus, ADC once again disregarded the opinion of its doctor in attempting to place a catheter in a vein in the lower extremity of the arm.

contrary, as explained above, they were deliberate decisions made despite knowing the risks of pain. *Cf. Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (defining "deliberate indifference" as "requiring a showing that the official was subjectively aware of the risk"). In reaching this conclusion, the district court discounted the numerous attempts to set an IV line in Towery as not violating the Eighth Amendment because it found that the multiple attempts to set an IV line are "not uncommon in the execution context, as shown by the evidence in the *West* litigation." (ER 012.) This conclusion ignores a critical fact: the person ADC used to set the peripheral IV lines in the executions reviewed in *West* was unqualified under the terms of ADC's then-protocol, had not set IV lines in over fifteen years, and had no specific recollection of his training in which he apparently learned how to set an IV line while in the military. *West v. Brewer*, 2011 WL 6724628, at *6 (D. Ariz. Dec. 21, 2011).

The fact that ADC has a history of repeated punctures in attempting to place an IV line is only "not uncommon" because it fails to hire individuals qualified to start IV lines. Moreover, the district court found that repeated attempts to set IVs is not rare in therapeutic medicine. This is speculation for which neither side presented support. *See infra*, Section IV.

The district court likewise discounted the fact that Towery's artery was punctured, and discounted evidence of pain if Towery was provided lethal drugs

arterially rather than venously.[13] (ER 012.) The district court concludes that this was simply an "isolated mishap," which under *Baze*, does not rise to the level of an Eighth Amendment violation. (ER 012.) This conclusion could be made if the district court ignores, as it clearly did, the evidence that this happened at least once in the past. The autopsy report of Robert Comer, who was executed in 2007, revealed that Defendants administered the lethal drugs through his femoral artery. (ER 057.) The district court can only reach the conclusions it does by ignoring ADC's history with respect to executing prisoners. This Court should not do the same.

2. Lopez has demonstrated serious questions going to his Equal Protection Claims

The district court rejected as meritless Lopez's claims that the January 2012 Protocol, both on its face and as applied, violates the Equal Protection Clause. In rejecting these claims, the district court determination was clearly erroneous.

The district court found that there was no pattern of treating prisoners differently that "affected the risk of pain" and that using a femoral line is "no more likely to create a risk of cruel and unusual punishment than use of a peripheral catheter." (ER 015.) This conclusion ignores not only the district court's finding in

[13]If the IV line was placed in the artery and the pentobarbital was administered, then Towery experienced pain. (ER 039) (noting, under precautions, that "extreme care should be taken to avoid . . . intra-arterial injection" because "consequences of intra-arterial injection may vary from transient pain to gangrene of the limb"); (ER 051 at 93:15-17) (noting that thiopental "if injected into an artery" is painful)).

West, but also undisputed facts that the court had before it. First, the district court found in *West* that "a prisoner may experience some pain and discomfort during placement of a central line if the topical anesthetic is improperly administered before the skin is punctured." *West*, 2011 WL 6724628, at *18. Second, there were undisputed facts that during Towery's execution, his artery was punctured, and if lethal drugs were administered through the artery, then he was in pain. There were also undisputed facts that the Director decided to use a backup vein that he was informed would cause pain if used to administer pentobarbital. The district court's conclusion that Lopez failed to show that ADC treated prisoners differently in a way that affected risk of pain is contrary to the record.

Moreover, the district court, while *citing* the correct standard, appears to *apply* the standard that this Court declined to adopt in *Towery*. That is, if "there is no Eighth Amendment violation, . . . that necessarily means that there has been no interference with fundamental rights sufficient to trigger strict scrutiny under the Equal Protection Clause." *Towery*, 672 F.3d at 659. The district court concluded that the risk of using a femoral line is "no more likely to create a risk of cruel and unusual punishment than use of a peripheral catheter." (ER 015.)

After the *West* trial, the district court found "any pain attendant to placement of a central line, beyond that likely to accompany placement of a peripheral IV line, falls far short of the severity needed to trigger an Eighth Amendment violation."

West, 2011 WL 6724628, at *18. Therefore, the court has, in fact, found that there is a risk of pain in placing a central line beyond that of placing a peripheral IV, but it determined such pain did not result in an Eighth Amendment violation. In essence, the district court is once again determining that Lopez's claims fail on the merits based solely on its determination that there has been no Eighth Amendment violation. This is not the appropriate legal standard.

As this Court found, there could be an equal-protection violation requiring strict-scrutiny analysis where a prisoner shows that state action *burdens* fundamental rights. 672 F.3d at 660. Such burden could be shown through a "pattern of treating prisoners differently in ways that [] affect[ed] the *risk* of pain to which they would be subjected." *Id.* at 660 (citation omitted). This Court is not alone in its conclusion. *See, e.g.*, *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (reversing district court's dismissal of lethal-injection lawsuit and finding that prisoner stated a claim under the Equal Protection Clause, on the basis that, "'[i]f a law treats individuals differently on the basis of ... [a] suspect classification, or if the law impinges on a fundamental right, it is subject to strict scrutiny'") (citation omitted; alterations in original); *In re Ohio Execution Protocol Litigation*, 671 F.3d 601, 602 (6th Cir. 2012) (denying State's motion to vacate stay of execution and affirming based "upon the analysis of the district court's January 11, 2012 Opinion and Order granting a preliminary injunction and a stay of execution").

Because Lopez has put forth evidence that Defendants' actions burden his Eighth Amendment right, Defendants were required to show a compelling governmental interest for their differential treatment between prisoners. *Cf. Rangra v. Brown*, 566 F.3d 515, 520-21 (5th Cir. 2009) (noting that strict scrutiny "requires the government to prove that its action . . . pursues a compelling state interest, and demands that the government prove that its action or regulation is 'narrowly tailored' to further that compelling interest"). But like the State of Ohio, "Defendants offer no compelling reason for selectively introducing risk into some executions but not others." *Cooey v. Kasich*, 801 F. Supp. 2d 623, 653 (S.D. Ohio 2011). Because Lopez has demonstrated that Defendants subject condemned prisoners to risks that burden the prisoners' constitutional rights, and because Defendants have failed to show a compelling governmental interest. Accordingly, he has shown serious questions going to the merits of his claims and is entitled to a preliminary injunction.

IV. The district court had before it undisputed facts that support Lopez's claims in his motion for preliminary injunction. Lopez was entitled to relief based on the undisputed facts; alternatively, he was entitled to a hearing on the issues surrounding the factual bases of his claims.

Lopez presented declarations from execution witnesses detailing problems with the executions of Robert Towery and Thomas Kemp (ER 122-24; ER 126-28); documents detailing multiple venous punctures of the now-executed prisoners (ER 033; ER 035; ER 130-31; ER 133-34); documents detailing arterial puncture of

Towery's femoral artery (ER 232); and a witness declaration detailing Towery's attempt to speak with his counsel during the lengthy IV insertion attempts (PI Exibit Y). Despite these and other documents, the district court asserted that Lopez made only speculative claims that did not justify relief. Furthermore, in support of that finding, the court offered speculative reasons for Defendants' actions—reasons that, contrary to Lopez's proffered facts, find no factual support in the record.

For example, Lopez presented evidence that a catheter was placed in Towery's right hand as a backup line to the femoral catheter (ER 158), and that 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 distal to the elbow. (ER 150.) But without any factual support, the court offered speculation as to why this step—taken in contradiction to the advice of ADC's own doctor—was made.

First, the court mistakenly characterized Lopez's argument, stating that Lopez's "contention [is] that Towery was thus subjected to cruel and unusual punishment because it was necessary to place the backup IV in his hand . . . ." (ER 012.) The court compounded the error by concluding that this mischaracterized contention is meritless, "because it was necessary to place the backup IV in his hand." (ER 012.) There is simply nothing in the record to indicate that it was "necessary" to place the

IV in a location that ADC's physician advised against.

Moreover, the court continued its speculation, asserting, "The difficulty and delay in placing two working IV lines in Towery appears to be atypical and may very well have been a result of his having been a habitual intravenous drug user."[14] (ER 012.) Although it is apparently true that Towery was an intravenous drug user before he went to prison, more than twenty years have lapsed since that time. No evidence exists for the *current* difficulty that ADC apparently had in placing peripheral IV lines; on the contrary, Lopez presented undisputed evidence that Towery had good veins, which were not hardened, at the time of Towery's autopsy. (ER 232.) Thus, the district court substituted its unsupported conclusions for the factual evidence Lopez presented.

As a second example, Lopez presented evidence that ADC asserts that it is no longer bound by this Court's decision pertaining to attorney-client visits on the morning of the execution. Director Ryan stated that the Court "incorrectly relied" on an older protocol, and noted that although ADC "agreed" to the court-ordered visitation for Towery and Moormann, it "did not waive the right to exercise [his] discretion on the scheduling of future visits with death row inmates." (ER 195.)

---

[14]Furthermore, the speculation that the result was "atypical" contradicts the court's equally unsupported conclusion that repeated punctures in attempts to site IV lines are not "rare in therapeutic medicine." (ER 012.)

Director Ryan informed counsel for Thomas Kemp that he would be permitted a visit on the morning of the execution that would end at 7:00 a.m., rather than ending as it did for Moormann and Towery forty-five minutes before the execution. (ER 195.)

Despite Lopez's documentary evidence, the district court concluded that "Lopez's fear that ADC will dishonor its commitment to allow such access is unpersuasive, especially in light of ADC's honoring its commitment to the Ninth Circuit concerning the Towery and Moormann executions." (ER 019.) This conclusion defies the statements by Director Ryan himself that ADC would not honor the commitment made to the Ninth Circuit because Director Ryan had determined that the Ninth Circuit was incorrect in its citation of ADC's "long-standing practice" as reflected in a 2004 protocol. *Towery*, 672 F.3d at 658.[15]

As a final example, Lopez asserted that preventing him from meeting in person with counsel immediately before his execution, and requiring him instead to communicate via telephone, would compromise confidential attorney-client communications. He pointed to earlier undisputed evidence that counsel for other prisoners were able to maintain confidential in-person conversations with their clients

[15]It is possible that the district court intended to absolve ADC of its obligation to comply with the *specifics* of its commitment to the Court, while suggesting that ADC would surely comply with providing some sort of earlier visitation than what the Court addressed in its decision. If that is the case, then Lopez respectfully suggests that Director Ryan is not in a position to declare what parts of this Court's order was "correct" and what "incorrect," absent a ruling from this Court.

on the morning of an execution (ER 240; ER 242.) The court dismissed this undisputed evidence, however, and stated, "It is difficult to see how Lopez could speak in confidence with his lawyer in person, but not in confidence on the telephone, as he conclusorily asserts." (ER 020.) But it is not Lopez who made conclusory assertions. Rather, Lopez provided undisputed facts that the district court ignored.[16]

Defendants failed to address, much less challenge any of Lopez's facts. Inaccuracies and speculative conclusions such as the ones described pervade the order denying the motion.[17] Accordingly, this Court should grant Lopez relief on the

---

[16] In that same discussion, the court stated, "Moreover, after the exhaustive and repetitive litigations that Lopez's counsel have conducted in numerous prior executions, the chance of anything happening in the last minutes that could result in successful immediate litigation attenuates well below the threshold for injunctive relief." (ER 020.)

It is important to note that it was *not* Lopez's counsel *qua* Lopez's counsel who engaged in previous litigation. Rather, some of the counsel who represent Lopez have also represented other death-row prisoners. Accordingly, they have not engaged in "repetitive" litigation, but have litigated specific and appropriate claims for each of their clients.

Furthermore, whether counsel for those other clients felt that there were issues that needed to be litigated at the last minute is irrelevant to Lopez's claim relating to access to counsel. Finally, this Court believed that ADC's long-standing practice was sufficiently established to permit in-person attorney-client visits up until forty-five minutes before the execution.

[17] As a final example, but one that does not directly affect Lopez's claims at this time, the district court asserted that "at least one last-minute change [to the protocol]—the switch to pentobarbital on the eve of [Donald] Beaty's execution—was driven by inmate litigation, not caprice." (ER 018.) This statement is another unsupported conclusion. No Arizona prisoner was litigating issues related to the federal Drug Enforcement Administration (DEA). Rather, the Department of

evidence he has presented. *See Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953) (holding that "a preliminary injunction may be granted upon affidavits"); *International Paper Co. v. Inhabitants of the Town of Jay*, 672 F. Supp. 29, 33 (D. Me. 1987) ("court may rely on affidavits and pleadings alone where basic facts are not disputed"); *Scott & Fetzer Co. v. McCarty*, 450 F. Supp. 274, 277, n.4 (N.D. Ohio 1977) (noting that "district court has discretion to forego an evidentiary hearing where undisputed facts, submitted affidavits, or other factors render such a hearing unnecessary").

Alternatively, if the Court believes that evidentiary development is necessary, the Court should remand the matter to the district court for a hearing. While there is no presumption in favor of evidentiary hearings, this Court has consistently recognized that "if the facts are simple and little time would be taken, a court may be required to hold an evidentiary hearing on a motion for an injunction." *Kenneally v. Lungren*, 967 F.2d 329, 334 (9th Cir. 1992) (*quoting United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990)) (brackets omitted). That very rationale applies in this

---

Justice sent Defendants a letter informing them that their importation of thiopental violated the federal Controlled Substances Act. *See, e.g.*, ER 214 ¶ 151.

Although previous prisoners notified the DEA of potential violations of the law, they did so only after repeating informing ADC and the Arizona courts that ADC was likely violating federal controlled-substances law by its importation of a controlled substance. Only after ADC ignored the prisoners' warnings, and after ADC continued to assert that it had complied with all laws, did the prisoners notify law enforcement of potential illegal activity.

case. Indeed, the district court had no apparent reason to deny Lopez an opportunity to present his evidence, for, as this Court has stated:

> There is no apparent reason to deny petitioner an opportunity to present his witnesses where . . . there is a sharp factual conflict, resolution of that conflict will determine the outcome, the witnesses are immediately available, the facts are simple, little time would be required for an evidentiary hearing, and the court has concluded that relief must be denied if the motion is decided on the affidavits alone.

Aguirre v. Chula Vista Sanitary Serv. and Santi-Tainer, Inc., 542 F.2d 779, 781 (9th Cir. 1976).

Here, the proffered facts were simple *e.g.*, Towery's artery was punctured (ER 230); the IV team attempted to place a back-up IV in locations in which they had already been unable to set an IV (ER 158); puncturing the femoral artery is not expected during placement of a femoral catheter (ER 026); ADC's director disavowed the need to follow this Court's visitation schedule in future executions (ER 029); attorney-visitation on the morning of an execution was not the cause of Towery's delayed execution (ER 097); Thomas Kemp shook violently as the lethal drug was administered (ER 101). Furthermore, witnesses would have been "immediately available" for a preliminary-injunction hearing, *Aguirre*, 542 F.2d at 781, because the witnesses largely were ADC employees present at the executions. Moreover, the motion involves a "sharp factual conflict," the resolution of those facts turned on that

conflict, and the district court apparently decided that, on the affidavits alone, Lopez could not prevail on his motion. *Aguirre*, 542 F.2d at 781.

CONCLUSION

For all the above reasons, the district court's ruling should be reversed, and this Court should enjoin Defendants from executing Lopez until these issues are fully resolved. In the alternative, the Court should reverse the decision and remand the case to the district court.

Respectfully submitted this 9th day of May, 2012.

Jon M. Sands
Federal Public Defender
Dale A. Baich, OH Bar No. 0025070
Robin C. Konrad, AL Bar No. 2194-N76K
Cary Sandman, AZ Bar No. 004779
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
Telephone: 602-382-2816
Facsimile: 602-889-3960

David J. Sepanik, CA Bar No. 221527
Flora F. Vigo, CA Bar No. 239643
Amanda R. Conley, CA Bar No. 281270
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, California 94111
Telephone: 415-984-8963

Denise I. Young, AZ Bar No. 007146
2930 N. Santa Rosa Place
Tucson, Arizona 85712
Telephone: 520-322-5344

Henry A. Martin
Federal Public Defender
Kelley J. Henry, MO State Bar No. 38849
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203-3805
Telephone: 615-736-5047
Facsimile: 615-736-5265

s/Dale A. Baich
Counsel for Plaintiff-Appellant

Certificate of Compliance under Circuit Rule 32-4

In compliance with this Court's page limitation, this opening brief is proportionately spaced, has a typeface of 14 points, and contains 10,593 words.

Respectfully submitted this 9th day of May, 2012.

By: s/Dale A. Baich
Counsel for Plaintiff-Appellant

Certificate of Service

I hereby certify that on May 9, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that one copy of the excerpts of record, consisting of three (3) volumes were sent via electronic mail to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, and to the following:

Jeffrey Zick
Kent Cattani
Michael Gottfried
Counsel for Defendants-Appellees

s/Michelle Young
Legal Assistant
Capital Habeas Unit