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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Introduction

Lopez files his Reply to the Answering Brief. He discusses first the substantive issues presented (Issues Two and Three), and then discusses the legal and factual errors in the district court's opinion (Issues One and Four). For the reasons stated in his Opening Brief, and in this Reply, Lopez is entitled to relief.

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

It should be the rule—rather than the exception—that a condemned prisoner is permitted to meet with his counsel on the morning of his execution. In responding to Claim Two, the State overlooks several critical points in Lopez's arguments. First, the January 2012 Protocol as written *does not permit* a prisoner to consult in person with his attorney on the morning of his execution. That Director Ryan (a) followed this Court's order in Moormann and Towery and allowed counsel to confer with their clients from 7:15 a.m. until 9:15 a.m., on the morning of their execution and (b) allowed Kemp to confer with his counsel from 6:00 a.m. until 7:00 a.m. on the morning of his execution is of no consequence to the written protocol. Second, the State makes no argument to refute that Lopez presented uncontested evidence that Towery was denied access to counsel, and in turn the courts, while the IV Team was attempting to insert IV lines.

The State claims that the ADC's policy that "attorney contact visitation

terminate[] at 9:00 p.m. the day before an execution" was the "requirement" before the executions of Landrigan, King, Beaty, Bible, and West—who were executed in 2010 and 2011. (Answering Br. at 14.) This statement misrepresents the written protocol in place during those five executions. The version of Department Order 710 that was in effect for those prisoners' executions states: "The inmate's visitation privileges shall be terminated at 2100 hours the day prior to the execution, *excluding* non-contact visits with the inmate's Attorney of Record and facility chaplain as approved by the Division Director for Offender Operations." *See* Dept. Order 710.09, § 1.5.2 (effective May 12, 2011), *available at West v. Brewer*, No. 2:11-1409-NVW, ECF No. 1-2, Ex. C) (emphasis added), attached as Addendum 1;[1] *see also West*, Trial Ex. 85, attached as Addendum 2.[2] Up until the January 2012 Protocol, attorneys were excluded from the blanket rule ending visitation at 9:00 p.m. on the evening before an execution. Thus, the State's representation to the contrary is wrong.[3]

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[1]For the Court's convenience, Lopez is attaching as addenda materials from the record below and in *West v. Brewer*, which currently has a motion for consolidation with this case pending.

[2]The Department Order in place for the executions of Landrigan and King had the same language in Department Order 710, effective May 12, 2011, but this provision was labeled as Section 710.09, §1.6.1 (Addendum 2).

[3]In support of the argument that Director has been exercising discretion for some time now by allowing attorney visitation on the morning of an execution, the State cites to the deposition of former ADC Director Dora Schriro. The reliance on an exhibit to Schriro's deposition, which is a protocol with an effective date of March 5, 2008, is irrelevant to the point the State attempts to make. First, the cited protocol

In defending its position that there is a legitimate purpose for terminating attorney-client visitation three hours before the scheduled execution the State makes two claims: "confidentiality concerns relating to the identity of the execution team members requires that movement to the execution chamber" and "placement of the IV's not take place until the attorney visit ends." (Answering Br. at 16.) These concerns were raised in briefing in *Towery v. Brewer*, Case No. 12-15381 (9th Cir. 2012) (ECF No. 5 at 41-50), and were mooted by this Court's order in that case permitting visitation up until 45 minutes before the scheduled execution. If confidentiality were really a legitimate concern, ADC could have sought a protective order, as it has in previous litigation, which would require the attorneys to protect the identity, if discovered, of any ADC employee serving an ancillary function in an execution, or could have required the attorneys to sign confidentiality forms as a condition of visiting their clients on the day of the execution.[4]

Moreover, there is nothing in the record to suggest that ADC cannot conduct

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states that telephone and visitation privileges will end at 2100 hours on the day prior to an execution, except for attorneys. (*See* Dept. Order 710.09, Section 1.6 (effective Mar. 5, 2008), attached for this Court's convenience as Addendum 3.) Second, neither Director Schriro nor this protocol was around in 2010-2011.

[4]In fact, during the last appeal from the denial of Towery's and Moormann's request for a preliminary injunction, plaintiffs offered evidence that attorneys who visited clients on the morning of the scheduled execution had no recollection of the correctional staff present. *See, e.g.*, *Towery v. Brewer*, No. 12-15381 (9th Cir. 2012) (Towery ER 122, 124-25.)

a timely execution unless attorney visitation is terminated *three* hours before the scheduled start time. In fact, evidence that was before the district court in *West v. Brewer* from the 2010-2011 executions, as well as evidence before this Court from the executions of Moormann and Towery, would suggest otherwise.[5] Finally, this Court should not give any credit to the State's accusation, without *any* evidence to support it, that attorneys—who are officers of the court—would violate the state confidentiality statute. *Cf. See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 881-83 (9th Cir. 2002) (prison's purported safety and confidentiality concerns in restricting viewing access to execution not reasonably related to legitimate penological interest where prison presented no evidence that staff would be retaliated against or that personnel might be unwilling to participate because of a perceived risk that they will be publicly identified); *State ex rel. McCamic v. McCoy*, 166 W.Va. 572, 579 (W. Va. 1981) ("[A]ttorneys occupy a professional standing as officers of the courts. This standing demands high moral and ethical conduct and the failure to comply with these standards can lead to disciplinary action including the suspension

[5]ADC logs from the five executions that occurred during 2010-2011 demonstrate no reason why ADC needs to terminate the attorney visit three hours before the execution. Indeed, the logs indicate in King and Bible (executions that were not stayed) that the prisoner was ready for restraint an hour before the scheduled execution. *See West*, No. 11-1409-NVW, Trial Exs. 30, 35, attached as Addenda 4, 5. If ADC plans to restrain the prisoner one hour before the scheduled execution, then there is no justification for the need to terminate a legal visit three hours before the execution.

or loss of a license. For this reason, we do not presume that they would engage in any conduct that would jeopardize the security or discipline at the prison.").

The State also attempts to discount Lopez's argument that ADC will violate his right of access to counsel and the courts during the execution procedure, after any discretionary legal visitation has been terminated. The State's contention that Lopez "fails to identify any contemplated litigation" that would occur during IV insertion ignores the uncontested evidence submitted by Lopez. (Answering Br. at 16.) Lopez submitted a declaration indicating that during Towery's last statement, Towery communicated that he was either hurt or that there were problems with the IV insertion, and that he asked to speak with his attorney but was denied. (ER 127-28.) Towery was denied access to his counsel when he asked, and he was unable to communicate openly about the problems because he feared that the microphone would be cut off. (ER 127, ¶ 13-14.)[6]

The claim that could have been raised if Towery had access to his counsel would have undoubtedly been an Eighth Amendment challenge to ADC's procedures. The State incorrectly says that Lopez cites to the failed execution of Rommell Broom in Ohio to "speculate" that "this could happen in Arizona." (Answering Br at 17.)

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[6]Lopez also submitted a declaration from Kemp's attorney that it appeared his mouth continued to move after saying one sentence, but the witnesses could not hear anything. (ER 123, ¶ 11.) Indeed, prisoners are told that the microphone will be cut off if they make any statements that are critical of ADC. (ER 127, ¶¶ 13-14.)

Lopez is not speculating. He has presented facts not only of the serious problems that occurred during the execution Robert Towery, but also that Towery was denied access to counsel while those problems were occurring. The State's argument rests on the assumption that "if the IV team is unable to place a functioning catheter," then the Director may either restart at a later period or abandon the effort entirely and a prisoner would then be able to present his claim to the courts. (Answering Br. at 16-17.) What this assumption overlooks, however, is exactly what occurred during Towery's execution. If the State is having difficulty placing a catheter and it rises to the level of an Eighth Amendment violation, then the prisoner is entitled to consult with counsel to vindicate his rights.

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

Once again, the State attempts to justify its procedures and practices during executions on a post hoc basis and without reasoning that comports with both the Eighth and Fourteenth Amendment. Indeed, the State wants this Court to find that its actions are insulated from the scrutiny of the Eighth and Fourteenth Amendments because it simply chooses between what it sees as two constitutional ways of executing prisoners—either through a peripheral IV line or through a femoral IV line. This practice is runs afoul of the constitution for several reasons.

First, the State is inconsistent in following its own alleged rationale. The State

has repeatedly represented that it believes that the femoral line is safer and less risky than a peripheral line.[7] From the most recent three executions, there appears to be no reasoning as when it elects to use peripheral or femoral or when it chooses to introduce risk of pain. Even though the State has said that it would like the option to place what, in its opinion is the safer, less risky central line, if it has a doctor available, it did not do that for Moormann's execution. Instead, it placed two peripheral lines—one in each elbow—in Moormann.

Moreover, the State has elected to either place (or attempt to place) a line in a location that its doctor said would cause pain. During Towery's execution, the State decided to place a backup line in his hand. During Kemp's execution, the State attempted to set a line in Kemp's left forearm, thereby increasing the risk that there would be pain from administration of the drugs. There was no evidence that the State attempted to set a line anywhere on Kemp's right arm.[8]

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[7] *See West v. Brewer*, No. 11-1409-NVW, Tr. 12/7/11 at 56 ("With respect to the discretion to use a peripheral or a central line, the director would like the option of both in case he does have a Medical Team Leader who—a doctor who can actually place the central line because he believes it's safer and less risk."); *see also West*, 2011 WL 6724628, at * 15 (finding that "Director Ryan determined, based on MTL's advice, that a femoral central line would be safer and more reliable"). *See also infra*, n.14.

[8] *Compare West*, 2011 WL 6724628, at * 15 ("It was not unreasonable for the Director to defer to MTL's training and expertise to ensure that the executions were carried out in the most humane manner possible, with the least amount of discomfort to the prisoners.").

Second, setting a femoral line is *not* safer and less risky if the person placing the line is not qualified. Being a doctor in and of itself does not make one qualified to set a central line. As Lopez has argued, there are complications and resultant pain that can occur while setting a femoral line. (*See* Opening Br. at 7; see ER 138-46.)[9] Moreover, there is evidence of problems that have occurred during several of the executions involving femoral lines. (ER 25-26) (noting that the femoral artery was punctured in Towery, and possibly was used to administer the lethal drugs; also noting that drugs were administered through the femoral artery during the 2007 execution of Robert Comer).[10] Therefore, it does not follow that using a femoral line,

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[9]Indeed, the issues related to the placement of femoral line and the findings by the district court in *West*, 2011 WL 6724628, at *15-16, are on appeal before this Court. *See West v. Brewer*, Case No. 12-15009 (9th Cir.). Therefore, it is not a foregone conclusion that there are no constitutional problems with femoral line placement.

[10]The undisputed facts from *West v. Brewer* also indicate that during Landrigan's execution, the doctor attempted at least twice to insert the femoral line and failed to inject additional lidocaine after his first unsuccessful attempt (No. 11-1409, ECF No. 86 at 14-15 ¶ 117); during King's execution, the doctor failed to inject additional lidocaine after his first unsuccessful attempt at setting the femoral line and he used a staple to suture the catheter to King's leg despite never using this before (*id.* at 16, ¶ 133-34); and during Beaty's execution, the doctor punctured the skin more than once while attempting to place the femoral line (*id.* at 17, ¶ 141). As the Plaintiffs' expert testified during trial in *West*, repeated attempts in setting the line and the failure to administer lidocaine, would be painful. As Eric Katz, M.D., testified, "[I]t's not just the surface of the skin you are trying to anaesthetize. That's a painful area and maybe the most painful of the areas. But underneath it is still muscle. And any time you are entering that muscle there are nerves there that are going to feel the sensation and the pain of the procedure you are doing." *West*, Trial

in and of itself, is safer and less risky than using peripheral lines. The discretion that the State continues to exercise related to the setting of IV lines violates both the Eighth and Fourteenth Amendments.

Moreover, the State's response to Lopez's arguments supporting both his Eighth and Fourteenth Amendment claims ignore uncontested evidence and argue new facts that were never presented below. Lopez responds to each claim individually below.

A. Cruel and Unusual Punishment

The State suggests that the uncontested evidence from a forensic pathologist that Towery's peripheral veins were not sclerotic—i.e., hardened—is irrelevant because the pathologist "did not attempt to set a peripheral IV while Towery was alive." (Answering Br. at 20.) Lopez agrees that the pathologist did not attempt to set an IV in Towery, but that point does not refute the evidence that Towery's veins *were not hardened*. Lopez presented evidence that Towery's veins were good, and now, on appeal, the State claims—without any evidentiary support—that "the medical doctor and nurse tasked with placing IV catheters determined to the contrary. . . ." (Answering Br. at 20.) There is nothing in the execution logs maintained by ADC

Tr. Dec. 7, 2011, 41:13-18, attached as Addendum 6. *See also* Answering Br. at 22-23 (recognizing that evidence "demonstrated that a prisoner may experience some pain and discomfort during the placement of a central line if the topical anesthetic was improperly administered").

that states that the medical doctor and the nurse made that determination. (ER 158.)[11] It is improper for the State to now argue to this Court this as fact. *Cf. N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997) (striking brief and dismissing case where brief was, *inter alia*, replete with assertions of fact without support in the record).

Moreover, in attempting to rebut Lopez's argument that the IV procedure during Towery's execution was unreasonable, the State asks this Court to "*[a]ssum[e]* the IV team leader . . . suggested making a final effort to set a peripheral backup line, rather than proceeding straight to setting the backup line in Towery's hand . . . ." (Answering Br. at 21) (emphasis added).[12] In the next paragraph,

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[11] Indeed, the log does not give much description at all regarding what happened for the hour that ADC attempted to set IV lines in Towery. The log notes that the Director provided an update to the Attorney General's office regarding the IV process, but there is no description accompanying that entry. (ER 158.) This is in contrast to the log maintained during the execution of Thomas West, where there was detailed information when an IV catheter was unsuccessful. *See West v. Brewer*, No. 11-1409-NVW, Trial Ex. 23 at pp. 1-2, attached as Addendum 7. The inconsistencies in record-keeping and procedures was an issue raised during *West v. Brewer*, (ECF No. 70, ¶¶120-134), which is currently on appeal before this Court. *See West v. Brewer*, Case No. 12-15009 (9th Cir.). Why the State chooses to record some information and not other information should be a concern to the Court.

[12] As Lopez noted in his Opening Brief, ADC's director appears to blame this Court for its "mandated" backup catheters, despite the fact that it was the State's counsel that averred to the Court that the lethal-injection protocol requires backup catheters. (Opening Br. at 12.) Counsel once again are now asserting that the protocol requires a backup catheter. (Answering Br. at 28 (explaining that "[t]he Arizona requires that a backup catheter be placed . . . .").)

however, the State asserts that "the IV team leader. . . after an additional attempt to secure a peripheral line as the backup line, used Towery's right had as the location for the backup line." (Answering Br. at 21) (*citing* ER 152, Attachment 1). There is nothing in evidence that indicates that there was "an additional attempt" to set a peripheral line before ADC determined to use the right hand as the backup line. This Court cannot make assumptions nor can it consider unsupported statements made by the State in its brief. Here, Lopez supported his facts with direct citation to the execution logs provided by the State.

While the entry for the log at 10:28 a.m. indicates that approximately four attempts were made to set a right peripheral and two attempts were made to set a left peripheral, there is no statement that one additional attempt was made to set a left peripheral. (ER 158.) The only related entry on the log is that the "left peripheral was unsuccessful." (*Id.*) Furthermore, the State presents no evidence to refute the declaration of Eric Katz, M.D., submitted by Lopez in support of his motion, who explains that it was "unreasonable to suggest setting a peripheral line (back-up or otherwise) in a vein in which IV personnel were demonstrably unable to set an IV after multiple attempts." (ER 133, ¶ 7.)[13]

[13]Indeed, the State could have submitted affidavits or additional reports to explain the rationale of the IV team leader and Director Ryan in proceeding in the manner in which it did during Towery's execution. But it did not. Lopez has submitted evidence to the best of his ability to support his claim. He cannot,

The State supports its choice to set a backup line in Towery's hand by ignoring part of its former doctor's opinion testimony. Instead of considering the Medical Team Leader (MTL)'s testimony in its entirety, the State quotes only a portion where he uses the phrase "discomfort." But that overlooks the bulk of his testimony:

> [MTL:] I believe that the central line is more reliable and less likely to cause pain, discomfort, to the inmate.
> [Counsel:] And why do you say it's less likely to cause pain and discomfort to the prisoner?
> [MTL:] Because the chemicals which are administered are known to cause pain if not administered appropriately.
> [Counsel:] Which chemicals are known to cause pain?
> [MTL:] Pentothal or pentobarbital and potassium chloride.
> [Counsel:] And what type of pain is caused by pentothal being administered?
> [MTL:] 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.
> [Counsel:] And pentothal burns if what?
> [MTL:] 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.
> [Counsel:] 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?

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obviously, produce statements from now-deceased Robert Towery regarding the pain he experienced. And he has been denied access to discovery to depose the individuals who may have related information. The State continues to hide behind a veil of secrecy rather than being transparent and making known the decisions it makes and why it makes them.

[MTL:] I think that's my opinion, yes.

(ER 150-51.) The State cannot ignore the fact that its own doctor, who it paid $18,000 in cash per execution for each of the five executions in 2010-2011,[14] testified that pain would occur if pentobarbital or pentothal were administered through a smaller vein.

The State also claims that during the past five executions, no prisoner verbally complained of any pain during the central line placement. (Answering Br. at 23.) This assertion ignores the uncontested evidence that not only did Towery request to speak with his counsel while the attempts to place IVs were being made but that there were problems and he could have been hurt during this process. (ER 128 ¶¶ 16-17.)[15]

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[14] *See, e.g.*, *West v. Brewer*, No. 11-1409-NVW (ECF No. 64-1, Ex. A at 32) (uncontested fact #103). It is odd that the State felt that this doctor's qualifications were deserving of this type of payment, but now the State attempts to discount his opinion to justify its actions in the most recent executions. Moreover, it is also odd that the State repeatedly used MTL's opinion as justification for setting a femoral line during the *West* litigation, but now the State is backing away from his opinion. *See, e.g.*, *West v. Brewer*, No. 11-1409-NVW (ECF No. 64-1, Ex. B at 5) (Defendant's asserted fact EE, which states: "The decision on placement of lines lies within the discretion of the ADC Director *relying on the medical opinion of the MTL*, who had the requisite experience to insert the femoral central line") (emphasis added); *id.* (ECF No. 64-1, Ex. B at 2) (Defendants' asserted fact D, which states: "MTL determined that the most reliable vehicle to administer the amounts of chemicals under the protocol was through a central line in the inmate's femoral vein. The Director relied on this medical advice.").

[15] There is also a witness statement that Kemp appeared to continue talking after ADC turned off the microphone during his last statement. (ER 123, ¶ 11.)

It also ignores the uncontested fact that Towery's counsel asked to know what was going on with Towery, because the execution had been delayed, but he was given no information. (ER 126 ¶ 6.)[16] Finally, the State's assertion that Towery could have expressed pain because he was "not given a paralytic agent" makes no sense. (Answering Br. at 27.) The State's assertion suggests that under a three-drug protocol, the prisoner is injected with a paralytic *before* the insertion of the IVs, and *before* the administration of the barbiturate. While this certainly could happen due to maladministration and improperly trained executioners, such logic is inconsistent with the written protocol.

B. Equal Protection Violations

The State relies on this Court's opinion in discussing whether the January 2012 Protocol on its face violated the equal protection clause under a rational basis test by providing the Director discretion. (Answering Br. at 25) (*quoting Towery v. Brewer*, 672 F.3d 650, 661 (9th Cir. 2012)). But the part of this Court's analysis in *Towery* upon which the State relies is not applicable to Lopez's claim. As discussed in his Opening Brief, Lopez has shown that the State's actions burden his fundamental right to be free from cruel and unusual punishment. As such, the State is obligated to

[16]Counsel for Plaintiffs continue to attempt to gain information that is solely in the possession of the State. *See, e.g.*, Letter to Charles Ryan from Dale Baich, dated May 11, 2012, attached as Addendum 8.

present a compelling governmental interest for burdening that right. It has not. Rather, Lopez has demonstrated that the State presents no rationale for acting in the manner in which it has during the most recent executions.

Of note, the State asserts that Moormann, Towery, and Kemp were neither "exposed to [n]or experienced significant pain." (Answering Br. at 26.) The State's argument, however, misunderstands the law. What should be considered is whether the State's actions "treat[ed] prisoners differently in ways that did affect the *risk* of pain to which they would be subjected." *Towery*, 672 F.3d at 660. Because Lopez has presented unrebutted evidence that this, in fact, occurred, he can show a likelihood of success on the merits of his claim.[17]

III. The district court relied on incorrect legal analysis and based its decision on speculation, rather than on the uncontested evidence that Lopez presented

In asking this Court to affirm the lower court's decision, the State argues that because the district court cited the standard, the court is entitled to a presumption that it followed the law. (Answering Br. at 13.) That presumption, however, does not

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[17]The State claims that the three executions carried out this year were "carried out without incident." (Answering Br. at 9.) This statement is contradicted by direct evidence that Lopez presented, and which the State has declined to rebut or even address, as described *supra*.

Of course, if by "without incident," the State means that the prisoners ended up dead, then the State is correct. But "ending up dead" is not the correct constitutional standard.

mean that a reviewing court may therefore never find that a lower court erred. Here, the district court's analysis is flawed because it relied on an erroneous treatment of undisputed facts on which to build its legal conclusion. Thus, it failed to apply the proper legal standard. The decision is also clearly erroneous because it is based on speculation rather than facts presented before it.

In its Answering Brief, the State has made no attempt to do other than what the district court did: ignore evidence, or speculate as to the reason the evidence exists, and then claim that **Lopez** is the one raising speculative claims that do not warrant relief.[18] Rather than consider serious questions going to the merits of the claims presented by Lopez—as it was required to do—the district court came to its speculative conclusions without holding a hearing or even requiring the State to address the documentary evidence. Without evidence from the State, the court had nothing from which to draw its conclusions. *M.R. v. Dreyfus*, 663 F.3d 1100, 1119 (9th Cir. 2011) ("The state must make a more particularized showing . . . in order to eliminate the serious questions on the merits . . ."); *see also id.* at 1122 (Rawlinson, J., dissenting) (noting that the state presented declarations refuting the plaintiffs' declarations, and concluding, "I am not persuaded that the district court clearly erred

[18]The State's allegations that Lopez has failed to show that Towery suffered pain or that the use of a catheter in a small vein was unnecessary (Answering Br. at 27) have been addressed *supra* in Issue Three.

in *crediting the State's view of the facts*.") (emphasis added). As a result, the court reached its decision that is contrary to uncontested facts, and it did so without having—much less addressing—counterfactual information. *Cf. Dreyfus*, 663 F.3d at 1121 (Rawlinson, J., dissenting) (explaining that "[t]he district court prefaced its decision by noting its 'careful review' of the 164+ documents filed by the parties and the 5+ hours of oral argument during two hearings.").

Given the uncontroverted facts in this matter, the court was not in a position to conclude that Lopez could not succeed on the merits. Indeed, this Court has recognized that death-row prisoners have "a strong interest in being executed in a constitutional manner," and will prevail in light of appropriate evidence. *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (en banc) (holding, "We acknowledge that Beaty has a strong interest in being executed in a constitutional manner, *but he has not shown that this interest is threatened in this case*.") (emphasis added).

Because an injunction is an equitable remedy, the court should have considered that the problem of the "eleventh hour" appeal here lies with the State, which relies on add-on practices and last-minute changes that force the courts "to engage with serious constitutional questions and complicated factual issues in the waning hours before an execution" *Towery*, 672 F.3d at 653. Here, Lopez was able to quickly obtain some evidence about Kemp's execution (which took place only seventeen days ago); however, he does not yet have execution logs or the Medical Examiner's

autopsy report. Both of these sets of documents are critical to presenting evidence, and both of these are within the control of the State. The evidence that Lopez has already presented raises serious questions;[19] he is entitled to a stay in order to develop the evidence that addresses these serious questions. The district court erred in deciding otherwise.

Finally, Lopez is not—as the State suggests—asking this Court to become a board of inquiry over executions. (Answering Br. at 28.) *But see Towery*, 672 F.3d at 653 ("Arizona's ongoing conduct may require us 'to monitor every execution on an ad hoc basis, because the State cannot be trusted to fulfill its otherwise lawful duty to execute inmates sentenced to death.'") (citation omitted). Here, Lopez is merely asking the Court to consider the uncontested facts rather than basing a decision on speculation, which is what the district court did.

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[19]Lopez has presented uncontested evidence that immediately after Kemp was injected with what ADC has represented was pentobarbital, he began shaking violently for five to six seconds. (ER 124.)

Respectfully submitted this 12th day of May, 2012.

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Certificate of Compliance under Circuit Rule 32-4

In compliance with this Court's page limitation, this reply brief is proportionately spaced, has a typeface of 14 points, and contains 5,035 words.

Respectfully submitted this 12th day of May, 2012.

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

Certificate of Service

I hereby certify that on May 12, 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.

s/Michelle Young
Legal Assistant
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