

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

**SAMUEL LOPEZ EMERGENCY MOTION UNDER
CIRCUIT RULE 27-3 FOR STAY OF EXECUTION**

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

Circuit Rule 27-3 Certificate

1. The contact information for the parties' counsel is as follows:

Counsel for Appellants:

Dale A. Baich, dale_baich@fd.org, 602-382-2816
Robin C. Konrad, robin_konrad@fd.org, 602-382-2816
Cary Sandman, cary_sandman@fd.org, 602-382-2816
Office of the Federal Public Defender, 850 W. Adams St., Ste 201
Phoenix, Arizona 85007

Denise I. Young, dyoung3@mindspring.com, 520-322-5344
2930 N. Santa Rosa Place Tucson, Arizona 85712

Kelley Henry, kelley_henry@fd.org, 615-736-5047
810 Broadway, Suite 200
Nashville, TN 37203-3805

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

Counsel for Appellees:

Kent. E. Cattani, Kent.Cattani@azag.gov, 602-542-4686
Jeffrey A. Zick, Jeffrey.Zick@azag.gov, 602-542-4686
Michael E. Gottfried, Michael.Gottfried@azag.gov, 602-542-4686
Assistant Attorneys General
1275 W. Washington Street
Phoenix, Arizona 85007

2. Plaintiff-Appellant Samuel Lopez currently has pending before this Court his appeal from the district court's denial of his motion for preliminary injunction. His is scheduled to be executed at 10:00 a.m. on May 16, 2012. Absent emergency relief from this Court, he will likely be executed—and his appeal will become moot, *see McKenzie v. Day*, 57 F.3d 1495, 1495 (9th Cir. 1995)—before the Court is able to consider his appeal, thus making this request for emergency relief appropriate, *see* Ninth Cir. R. 27-3(a).
3. Counsel for Defendants-Appellees were electronically notified of the motion on May 12, 2012, and will be provided a copy via ECF and separate email.
4. All grounds advanced in support of this motion in this Court were submitted to the district court in Motion by Plaintiff Samuel Lopez for Preliminary Injunction (Dist. Ct. ECF No. 62, filed May 2, 2012), *Towery v. Brewer*, Case No. 2:12-cv-00245-NVW (D. Ariz.); *see also* Second Amended Compl. (Dist. Ct. ECF No. 58, filed April 19, 2012).

EMERGENCY MOTION AND SUPPORTING ARGUMENT

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-3, Plaintiff-Appellant Samuel Lopez asks this Court for an emergency order staying his execution scheduled for Wednesday, May 16, 2012, at 10:00 a.m. MST.

In considering a request for a stay of execution, a court considers “not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Thus, “[g]iven the State’s significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 650.

Here, these factors weigh in favor of a stay for Lopez. First, as discussed in the Opening Brief (Ninth Cir. ECF No. 7) and in his Reply Brief (Ninth Cir. ECF No.10-1), Lopez has demonstrated that the State will likely violate his right of access to counsel and the courts. (*See* Claim II, Opening Br.) Moreover, given the practice in the past three executions, the State’s actions will likely violate Lopez’s Eighth and Fourteenth Amendment. (*See* Claim III, Opening Br.)

Second, the district court made legal and factual errors in finding that Lopez could not show a likelihood on the success of the merits of his claims. (*See* Claims

I & IV, Opening Br.) Accordingly, given that Lopez has put forth uncontested evidence of First, Eighth, and Fourteenth Amendment violations, he can demonstrate “serious questions” going to the merits of the claims presented in his motion for preliminary injunction.

Moreover, if a stay is not granted, the relative harm to Lopez significantly outweighs the harm to the State if a stay were granted. This Court has recognized that death-row prisoners have a “strong interest in being executed in a constitutional manner” *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011). Conversely, although the State may “suffer[] an inconvenience” in the postponement of an execution, “the injury is more psychological and intangible than substantial. The state will get its man in the end.” *Gomez v. U.S. Dist. Court for N. Dist. of Calif.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting). Thus, if the Court stays the execution of Lopez during the pendency of the appeal, there will only be a temporary delay in his execution. And if the Court finds that the State’s actions are unconstitutional, the State will presumably be able to return to the previously approved protocol, or will draft a new protocol that comports with the constitutional requirements articulated in *Baze v. Rees*, 553 U.S. 35 (2008). Then, Arizona will be able to carry out the executions under a constitutional protocol. Such an approach also serves the public’s interest in seeing that the Constitution is upheld. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

Finally, Lopez did not delay in bringing his claim or his request for a stay. *See Nelson*, 541 U.S. at 649-50. Lopez, along with the other Plaintiffs, filed a motion for leave to file a second amended complaint on April 2, 2012. (Dist. Ct. ECF No. 53.) This motion was filed as soon as practicable after Plaintiffs obtained additional facts necessary to amend the complaint. In particular, the factual basis for Plaintiffs' amended complaint did not come to light until after Plaintiffs received autopsy reports and execution logs for Robert Moormann's execution (February 29, 2012), and Robert Towery's execution (March 8, 2012). Defendants provided copies of execution logs on March 23, 2012. The private autopsy report for Towery was not provided to Plaintiffs until April 2, 2012. (Dist. Ct. ECF No. 54-1, Ex. W at 6.) On April 19, 2012, the district court granted the motion for leave to file a second amended complaint. (Dist. Ct. ECF No. 57.) Lopez could not assert the basis for his preliminary injunction motion until the second amended complaint was filed.

Moreover, Kemp's execution occurred on April 25, 2012. The facts surrounding the circumstances of his execution were only recently revealed with the private autopsy of Kemp, which occurred on April 28, 2012. (*See* Dist. Ct. ECF No. 60-1, Ex Z.) Joseph Cohen, M.D., who performed the autopsy of Kemp, provided a declaration outlining his preliminary findings at the end of day on April 30, 2012. Lopez could not have discovered these facts sooner.

For the foregoing reasons, Lopez respectfully requests that this Court enter a

stay of execution to permit the Court to fully consider his appeal without risk that the appeal would be mooted by his execution. In the alternative, for the reasons outlined in the Opening Brief, Lopez respectfully requests that this Court issue a preliminary injunction prohibiting the State from carrying out Lopez's executions under the January 2012 Protocol.

Respectfully submitted this 12th 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 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
Capital Habeas Unit