

1 Jon M. Sands  
2 Federal Public Defender  
3 Dale A. Baich, OH Bar No. 0025070  
4 Robin C. Konrad, AL Bar No. 2194-N76K  
5 Cary Sandman, AZ Bar No. 004779  
6 850 West Adams Street, Suite 201  
7 Phoenix, Arizona 85007  
8 Telephone: 602-382-2816  
9 dale\_baich@fd.org  
10 robin\_konrad@fd.org  
11 cary\_sandman@fd.org

12 David J. Sepanik, CA Bar No. 221527  
13 Flora F. Vigo, CA Bar No. 239643  
14 Amanda R. Conley, CA Bar No. 281270  
15 O'Melveny & Myers LLP  
16 Two Embarcadero Center, 28th Floor  
17 San Francisco, California 94111  
18 Telephone: 415-984-8963  
19 dsepanik@omm.com  
20 fvigo@omm.com  
21 aconley@omm.com

22 Counsel for Plaintiffs Pete Rogovich,  
23 Milo Stanley, Daniel Cook, and  
24 Richard Stokley

25 **IN THE UNITED STATES DISTRICT COURT**  
26 **FOR THE DISTRICT OF ARIZONA**

27 Towery, et al.,

28 Plaintiffs,

29 v.

30 Brewer, et al.,

31 Defendants.

Case No. 2:12-cv-00245-ROS

**DEATH PENALTY CASE**

**Execution Scheduled**  
**May 16, 2012 10:00 a.m.**

**EMERGENCY MOTION FOR**  
**DISCOVERY AND PRESERVATION**  
**OF EVIDENCE ON MAY 16, 2012**

32 Plaintiffs<sup>1</sup> respectfully ask this Court to order Defendants to allow Plaintiffs' attorneys  
33 to witness the intravenous procedure when Samuel Lopez's execution is carried out. This  
34 motion is urgent as Lopez's execution is scheduled for **10:00 a.m., Wednesday, May 16,**  
35 **2012.** The reasons for this request are stated herein.

36 On May 11, 2012, counsel for Plaintiffs sent Defendant Arizona Department of

---

<sup>1</sup>This motion is on behalf of all Plaintiffs except for Samuel Lopez.

1 Corrections (ADC) Director Charles Ryan a letter requesting that two attorneys representing  
2 Plaintiffs in this lawsuit be able to witness the insertion of the IV lines during Mr. Lopez’s  
3 execution. (See Letter to Ryan from Baich, dated May 11, 2012, attached as Ex. PP.)  
4 Defendant Ryan responded via letter dated May 14, 2012, which counsel received via email  
5 at 7:26 a.m. on May 15, 2012. (See Letter to Baich from Ryan, dated May 14, 2012, attached  
6 as Ex. QQ; Email to Baich from Perez, dated May 15, 2012, attached as Ex. RR.) In that  
7 letter, Ryan declined the request for attorneys to be present. (Ex. QQ at 1.) Because  
8 Defendants are unwilling to accommodate Plaintiffs’ reasonable request, an order of this  
9 Court is required.

10 Defendant Ryan denied Plaintiffs’ request to access this evidence for two reasons.  
11 Neither of the reasons are legitimate penological interests that override Plaintiffs’ need for  
12 discovery in this case. See Fed. R. Civ. P. 26 (b)(1) (noting that court may order discovery  
13 for “any matter relevant to the subject matter involved in the action”); see also *Application*  
14 *of Deiuemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 478 (4th Cir.  
15 1999) (upholding district court’s grant of motion filed under Rule 27 of the Federal Rules  
16 of Civil Procedure to “perpetuate testimony . . . [because] ‘extraordinary circumstances’  
17 warranted Rule 27 discovery because crucial evidence—the ship’s engine—was scheduled  
18 for substantial repair, and that, as a result, “[t]he circumstances and conditions extant today  
19 can never be recreated.”) (citations omitted; second brackets in original).

20 First, Defendant Ryan indicated that nothing “suggests that Mr. Lopez cannot  
21 communicate with the IV or Special Operations Teams if he is experiencing pain.” (Ex. QQ  
22 at 1.) Defendant Ryan misses the point. Plaintiffs have alleged in their Second Amended  
23 Complaint that there were serious concerns regarding the execution of Robert Towery. (See  
24 ECF No. 58 ¶¶ 127-32.) One of those concerns involved Towery being denied access to his  
25 counsel, and his counsel made a concerned inquiry when the execution was 45-minutes  
26 delayed, and was told by ADC personnel that there was nothing to report. (See ECF No. 60-  
27 1, Ex. Y ¶¶ 6, 16-17.) The Towery execution logs maintained by ADC have no indication  
28 that Towery asked for counsel, and provide no detail regarding what took place during the

1 one-hour-and-five-minute attempts to set his IV lines. (See ECF No. 60-1, Ex. DD,  
2 Attachment 1 at 4.)<sup>2</sup>

3 By observing this part of Lopez’s execution, Plaintiffs’ counsel could potentially  
4 discover evidence or information that would help litigate their claims. Defendants have  
5 complete control and access to this critical evidence that is necessary in proving Plaintiffs’  
6 claims. While ADC asserts that it “faithfully adheres to all constitutional mandates” (Ex. QQ  
7 at 1), that too is not the point. Defendants are being sued and have different interests than  
8 Plaintiffs in this lawsuit. Indeed, the IV Team is hired by ADC—the previous doctor has  
9 been paid \$18,000 in cash per execution—to ensure that the execution is carried out.  
10 Plaintiffs cannot rely upon the individuals with different interests to ensure that their  
11 constitutional rights are protected.

12 Second, Defendant Ryan claims that ADC has a “compelling interest in maintaining  
13 the anonymity of all personnel who participate, or perform ancillary functions, in the  
14 execution. . . .” (Ex. QQ at 1.) Counsel for Plaintiffs recognize that there is a statute  
15 governing confidentiality and indicated such in the letter to Director Ryan. (Ex. QQ at 1.)  
16 As this Court knows, there is already a protective order in place, see *West v. Brewer*, No.  
17 2:11-cv-01409-NVW, ECF No. 36 (Aug. 10, 2011) in which counsel for Plaintiffs are  
18 obligated to maintain as confidential any information they receive related to participants in  
19 executions. Moreover, as the Ninth Circuit has held, anonymity of execution staff is not a  
20 legitimate concern where there is no evidence that the staff had been or would be likely to  
21 be publicly identified or attacked. See *California First Amendment Coalition v. Woodford*,  
22 299 F.3d 868, 880 (9th Cir. 2002). Here, the Defendants have never presented evidence that  
23 the individuals participating in executions have been publicly exposed. To the contrary,  
24 counsel for Plaintiffs have taken great care to ensure that the identities of the individuals  
25 involved have been kept confidential.

---

26  
27 <sup>2</sup>Towery’s logs are very limited compared to the ADC logs from the West execution,  
28 which had detailed explanations of the procedure, including statements allegedly made by  
West. See *West v. Brewer*, No. 2:11-cv-01409-NVW, Trial Exhibit 23, attached as Ex. SS.

1 Plaintiffs are attempting to get access to information that will be unavailable after  
2 Lopez is executed. As one of the Ninth Circuit judges indicated during oral argument on  
3 Lopez’s appeal from this Court’s denial of preliminary injunction, “what disturb[ed her] most  
4 here is that we never find out what happens.” *Towery v. Brewer*, No. 12-16084, Audio  
5 Recording of Oral Argument May 14, 2012, at 19:28-31, available at  
6 [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000009184](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000009184) (last visited May  
7 15, 2012). Part of the reason that occurs is, as Judge Berzon pointed out, that “we don’t  
8 know what happened because no one is telling [Plaintiffs] or [the court] what happened.”  
9 *Id.* at 17:42-48. This concern was expressed by Judge Rawlinson as well: “The difficulty is,  
10 how do you get the evidence to rebut the presumption [that the director carries out his duties  
11 lawfully] if the attorney is not allowed access to the process and if the inmate asks for the  
12 ability to consult with his attorney and that’s denied, how do we get that information that  
13 would rebut the presumption?” *Id.* at 33:53-34:13; *see also id.* 30:41-31:17 (taking exception  
14 to attorney general’s statement that there is no showing of unconstitutional pain, and stating,  
15 “But what’s very disturbing is, how would there be? Because the lawyers– unlike in  
16 California and Ohio and other places, there are no witnesses to the actual execution. The  
17 lawyers are not present. And the State’s – diaries, notes, are extremely opaque and they don’t  
18 say anything. For all we know, Towery was . . . screaming bloody murder about being in  
19 pain and nobody would know”).

20 Plaintiffs have demonstrated an urgent need to preserve evidence and view the  
21 intravenous procedure during Lopez’s execution. Defendants will not suffer harm by the  
22 presence of Plaintiffs’ counsel during this procedure nor will Defendants be unduly  
23 burdened.<sup>3</sup> *See, e.g., Tracfone Wireless Inc., v. King Trading Inc.*, No. 3-08-CV-0398-B,

---

25 <sup>3</sup>If counsel’s presence in the execution chamber is the real concern, it would not be  
26 burdensome for Defendants to allow counsel to view this procedure from the adjoining  
27 chemical room through the glass window, using the audio and video equipment that is  
28 already in place. *See Ex. QQ* at 1 (noting that there is a camera in the execution chamber  
with a microphone); *see also Dickens v. Brewer*, No. 07-1770-NVW, ECF No. 136 at 7 (D.  
Ariz. June 24, 2009) (Defendants’ attorney noting that there is a high-resolution camera in

1 2008 WL 918243, at \*1 (N.D. Texas March 13, 2008) (granting plaintiffs’ emergency motion  
2 to preserve evidence and emergency motion for expedited discovery because “(1) there is a  
3 legitimate concern for the continuing existence and maintenance of the evidence in question  
4 absent an order preserving the evidence; (2) such concerns outweigh any harm to the  
5 defendants that may result from a preservation order; and (3) defendants will not be unduly  
6 burdened by such an order”).

7 Plaintiffs, therefore, request that this Court issue an order allowing two of Plaintiffs’  
8 counsel to be present during the insertion of the IV lines during Lopez’s execution.

9 Respectfully submitted this 15th day of May, 2012.

10 Jon M. Sands  
11 Federal Public Defender  
12 Dale A. Baich  
13 Robin C. Konrad  
14 Cary Sandman

15 David J. Sepanik  
16 Flora F. Vigo  
17 Amanda R. Conley  
18 O’Melveny & Myers LLP

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

22  
23  
24  
25  
26  
27  
28 \_\_\_\_\_  
the execution room that is placed above prisoner).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Certificate of Service**

I hereby certify that on May 15, 2012, I electronically transmitted the foregoing to the Clerk's office using the CM/ECF System for filing.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Michelle Young  
Legal Assistant  
Capital Habeas Unit