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8

9 **IN THE COURT OF APPEALS**

10 **STATE OF ARIZONA**

11 **DIVISION ONE**

12
13
14 DANIEL WAYNE COOK,
BEAU JOHN GREENE,
15 ELDON SCHURZ,

16 Plaintiffs/Appellants,

17 vs.

18 STATE OF ARIZONA; ARIZONA
DEPARTMENT OF CORRECTIONS;
19 CHARLES RYAN, Director, Arizona
Department of Corrections, in his
official capacity,

20 Defendants/Appellees.
21
22

Court of Appeals
Division One
No. 1 CA-CV 11-0629

Maricopa County Superior
Court No. CV2011-011677

**MOTION FOR
RECONSIDERATION**

23 Pursuant to ARCAP 22, Appellants request reconsideration of the Court's opinion
24 in this case. This motion is limited to addressing factual issues underpinning the second
25 claim that the statute unconstitutionally allows the Arizona Department of Corrections
26 ("ADC") to evade judicial review of its actions in carrying out executions through lethal
27 injection. Ariz. R. Civ. App. P. 22 cmt. (noting that although motions for
28 reconsideration should not simply reargue issues that were already briefed by the parties,

1 “[s]uch motions can also be used to address an issue that was raised by the court in its
2 decision without the parties having fully briefed the issue previously”).

3 The parties did not fully brief the history of changes to ADC’s lethal-injection
4 protocol or the federal court litigation regarding the constitutionality of the protocol and
5 ADC’s actions pursuant to *Baze v. Rees*, 553 U.S. 35 (2008), because Appellants argued
6 that the protocol was not relevant to the state constitutional issues.¹ However, the oral
7 argument and opinion in this case clearly demonstrate that this Court believed
8 otherwise. See *Cook v. State*, No. CA-CV 110629, 2012 WL 3055981 (Ariz. Ct. App.
9 July 26, 2012); at *4-5. In fact, the Court based its decision that ADC’s implementation
10 of the protocol had not yet risen to the level of a constitutional violation on specific
11 provisions of the protocol itself, as amended in June 2012. *Id.*, at *5.

12 This Court did not have the benefit of information about the problems with the
13 protocol in addressing this issue pursuant to the separation-of-powers doctrine.
14 Accordingly, Appellants provide a detailed history of the facts underlying the changes
15 to the lethal-injection protocol and ADC’s actions in carrying out the last several lethal-
16 injection executions. Appellants ask the Court to take judicial notice of the facts below
17 regarding litigation in both state and federal courts on this issue. *State v. McGuire*, 124
18 Ariz. 64, 66, 601 P.2d 1348, 1349 (Ct. App. 1978).

19 **Argument**

20 Because the Court did not have before it the record of ADC’s history in evading
21 judicial review, the Court was left with the misimpression that “the Department has not
22 yet violated the Arizona Constitution’s separation of powers doctrine.” *Cook*, 2012 WL
23 3055981, at *4 ¶ 18.

24 Plaintiffs respectfully present the following facts related to ADC’s past actions,
25 which involve ADC making changes to its written lethal-injection protocol eight times
26

27 ¹At oral argument, counsel for Appellees agreed with this position, but then devoted a
28 considerable portion of his argument to discussing the protocol.

1 since October 2007, and making multiple ad hoc changes. These actions reflect a
2 pattern in which ADC repeatedly changes its protocol *in the midst of litigation* to avoid
3 subjecting the procedures to meaningful review. ADC’s written and unwritten changes
4 act together to deprive the judiciary of its ability to carefully engage in “one of the
5 gravest responsibilities that [the court is] asked to perform: approving the state’s plan
6 to take a human life.” *Id.* ¶ 13 (citations omitted).

7 **1. Initial lethal-injection litigation**

8 The history begins in 2007, when several prisoners filed suit alleging that ADC’s²
9 lethal-injection protocol was unconstitutional. *Dickens v. Brewer*, No.
10 CV07–1770–PHX–NVW, 2009 WL 1904294 (D. Ariz. July 1, 2009) (Compl. filed Sept.
11 14, 2007). ADC changed the protocol twice during the early stages of litigation in
12 *Dickens*, and then changed the protocol once more in a joint agreement in order to
13 obtain a favorable court ruling. Based on those changes, the district court granted
14 summary judgment in favor of ADC *Id.*, at *25. The court’s acceptance of the protocol
15 included “the protocol ‘as written,’ including the agreed-upon amendments set forth in
16 the parties’ joint report.” *West v. Brewer*, Case No. 2:11-cv-01409-NVW, 2011 WL
17 6724628, at *3 (D. Ariz. Dec. 21, 2011), *appeal docketed*, No. 12-15009 (9th Cir. Jan.
18 3, 2012), *and stay granted* (May 2, 2012).

19 On appeal, the plaintiffs argued in part “that evidence obtained during discovery
20 suggests that Arizona is incapable of—or not interested in—hiring competent
21 individuals to serve on the execution teams and adhering to the Protocol’s procedures
22 during an execution.” *Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir. 2011).³ The

23
24 ²In this and similar federal litigation, ADC and other state actors are referred to as
25 “Defendants.” For ease of reading in this matter, Plaintiffs will refer to those actors solely as
26 “ADC,” except in direct quotations from court documents, in which the state actors are referred
27 to as “Defendants” or “State.”

28 ³The plaintiffs in the case had uncovered evidence that ADC had hired patently
unqualified persons for the medical team, including Alan Doerhoff, M.D., and an unqualified
person designated “Medical Team #3.” As the Ninth Circuit explained, “Doerhoff is a
physician and licensed surgeon who lives in Missouri; he has assisted with executions in several

1 Ninth Circuit rejected this argument, explaining that “[t]he Protocol . . . sets forth the
2 standards under which Arizona must hire future MTMs. These standards are adequate
3 and the evidence does not suggest that Arizona will fail to adhere to them in future
4 hiring.” *Id.* at 1148 n.5.

5 The court rejected the prisoners’ other claims as well, noting that although the
6 prisoners “also challenge[] the Protocol’s failure to provide formal procedures for
7 amendment, [i]f Arizona amends the Protocol to modify the current safeguards, [the lead
8 plaintiff]—or another affected death row inmate—may be able to challenge the
9 constitutionality of the amended protocol. The notion that Arizona might adopt and use
10 a new, unconstitutional protocol can only be dismissed as rank speculation.” *Id.* at
11 1150.

12 **2. Post-*Dickens* changes to the lethal-injection protocol**

13 The Ninth Circuit’s expectations of ADC’s behavior have not been met. Since
14 2010, death-row prisoners have managed to claw out bits and pieces of evidence
15 showing that “Arizona *will* fail to adhere to [hiring standards] in future hiring[,]”
16 *Dickens*, 631 F.3d at 1148 n.5 (emphasis added), contrary to the court’s predictions.
17 Moreover, the evidence has shown that Arizona has, in fact, “adopt[ed] and use[d] a
18 new, unconstitutional protocol[,]” *id.* at 1150, or has come very close to it. *Lopez v.*
19 *Brewer*, 680 F.3d 1068, 1075 (9th Cir. 2012) (noting that the January 2012 Protocol
20 “come[s] perilously close to losing safe-harbor protection under *Baze*.”); *see also id.* at
21 1080 (noting that the “January, 2012 protocol is probably unconstitutional as written in
22 significant respects.”) (Berzon, J., concurring in part and dissenting in part).

23 states and for the federal government. At the time Arizona hired Doerhoff, he had testified in
24 a case challenging Missouri’s execution protocol that he is dyslexic, has problems with
25 numbers, knowingly ‘improvised’ the doses of lethal injection drugs, adhered to no set protocol,
26 and kept no records of procedures. Following Doerhoff’s testimony, Missouri publicly
27 announced that it would no longer use him in executions.” *Dickens*, 631 F.3d at 1147.

28 “Arizona hired MTM #3 in February 2008. During discovery, Dickens learned that MTM
#3 did not attend medical school, had his nursing license suspended, and did not have any other
medical licenses. . . . He has been treated for post-traumatic stress disorder from service in Iraq,
and has been arrested multiple times.” *Id.*

1 This “probably-unconstitutional” protocol is the latest in a string of protocols and
2 last-minute changes made over the course of the eight executions carried out since
3 October 2010—changes that demonstrate a recurring pattern of ad hoc changes that are
4 designed to evade review. Despite having been told that its protocol was constitutional
5 *as written*, and despite having gained the courts’ trust as far as ADC’s future expected
6 behavior, ADC embarked on a path involving both written changes that removed the
7 protections of the approved protocol, and unwritten deviations that further stripped the
8 protocol of its approved protections.

9 **A. Execution of Jeffrey Landrigan**

10 The first evidence that the prisoners obtained of ADC’s approach to executions
11 came in September 2010, when Jeffrey Landrigan, who was scheduled to be executed
12 on October 26, 2010, discovered that ADC was in the process of importing its supply
13 of lethal-injection drugs from an overseas source in a manner that likely violated
14 multiple federal laws. As soon as Landrigan learned of ADC’s actions, he sued ADC
15 in federal district court, and asked for a preliminary injunction halting his execution.
16 *Landrigan v. Brewer*, No. 2:10-cv-02246-ROS, 2010 WL 4269559 (D. Ariz. Oct. 25,
17 2010), *aff’d*, 625 F.3d 1144 (9th Cir. 2010), *denying rehr’g en banc*, 625 F.3d 1132 (9th
18 Cir. 2010), *and vacated*, 131 S. Ct. 445 (2010) (Mem.). The district court ordered ADC
19 to provide information about the drugs’ provenance, but “Defendants refused to disclose
20 to Plaintiff any information regarding the drug. Defendants maintained their refusal to
21 disclose *even after a direct Court order* requiring ‘immediate’ disclosure.” *Landrigan*,
22 2010 WL 4269559, at *8 (emphasis added). Accordingly, the district court granted
23 Landrigan relief. However, the Supreme Court vacated the order, observing—despite
24 Landrigan’s attempt to get information from the recalcitrant ADC—that “[t]here was no
25 showing that the drug was unlawfully obtained, nor was there an offer of proof to that
26 effect.” *Brewer v. Landrigan*, 131 S. Ct. at 445.

1 **B. Execution of Donald Beaty**

2 The next changes occurred while prisoner Donald Beaty was awaiting his
3 execution scheduled for May 25, 2011. First, ADC changed its protocol on May 12,
4 2011. *West*, 2011 WL 6724628, at *5 n.4. Then, *eighteen hours* before Beaty’s
5 scheduled execution, ADC gave notice that it would replace sodium thiopental, the first
6 drug in its written three-drug protocol, with pentobarbital, a drug not listed or otherwise
7 addressed in the protocol.⁴ This change was necessary because the federal Drug
8 Enforcement Administration informed ADC that ADC had obtained its supply of sodium
9 thiopental—used in Landrigan’s execution—in violation of the federal Controlled
10 Substances Act.

11 **C. Executions of Richard Bible and Thomas West**

12 On June 10, 2011, while Richard Bible and Thomas West were awaiting their
13 executions scheduled for June 30, 2011, and July 19, 2011, respectively, ADC amended
14 its protocol again. *West*, 2011 WL 6724628, at *5 n.4. In response to those changes,
15 several prisoners filed a lawsuit on July 16, 2011, challenging the constitutionality of
16 ADC’s execution practices. *West*, 2011 WL 6724628 (Compl. filed July 16, 2011).
17 After the district court denied injunctive relief, *West*, 2011 WL 2836754 (D. Ariz. July
18 18, 2011), *aff’d* 652 F.3d. 1060 (9th Cir. 2011), *and denying rehr’g en banc*, 652 F.3d
19 1084 (9th Cir. 2011), the Ninth Circuit held argument the day before West’s execution,
20 and permitted the execution to occur, based on avowals made during argument by
21 ADC’s counsel as to how the execution would proceed. *West v. Brewer*, 652 F.3d 1060,
22 1061 (9th Cir. 2012).

23 Meanwhile, after discovery, the plaintiffs in the *West* case presented evidence of
24 significant deviations from the previously approved written protocol. *West*, 2011 WL
25 6724628. (And while discovery was ongoing, ADC ignored provisions in its protocol
26

27 ⁴As this Court observed, “[t]he ‘last-minute decision’ to modify the protocol in Beaty’s
28 case was not an isolated occurrence.” *Cook*, 2012 WL 3055981, at *3, ¶ 12.

1 *again. Id.*, at *5 n.4.) For example, the court found that “ADC admittedly failed to
2 conduct license and criminal background checks on MTM–IV and MTL, failed to
3 document their qualifications to serve on the IV team, and failed to select Medical Team
4 members with current and relevant professional experience in their assigned duties on
5 the Medical Team.” *West*, 2011 WL 6724628, at *12.

6 Moreover, ADC failed to conduct the required vein checks of the condemned
7 prisoners, *id.*, at *7; failed to leave the IV site uncovered and visible, *id.*, at *8; and
8 failed to record the use and disposal of the lethal drugs, *id.*, at *7, all of which were
9 violations of the protocol. None of these deviations were known to Landrigan, Beaty,
10 Bible or West, and ADC’s execution procedures escaped judicial review.

11 The court found:

12 Defendants told this Court and the Court of Appeals that they would follow
13 the protocol ‘as written.’ And they did not. Nor did they amend the written
14 protocol to conform to what they actually were doing. Instead, they
15 [sought] shelter in Department Order 710’s statement: ‘These procedures
shall be followed as written unless deviation or adjustment is required, as
determined by the Director of the Arizona Department of Corrections.’

16 *Id.* at *11. Despite finding the existence of the multiple deliberate violations, however,
17 the district court denied relief to the plaintiffs. *Id.* at *21.

18 The prisoners appealed the matter.⁵ While the appeal was pending, the State
19 sought and obtained warrants for two more executions.

20 **D. Executions of Robert Moormann and Robert Towery**

21 Subsequently, on January 25, 2012, ADC—despite having prevailed in the district
22 court in *West*, and despite the fact that the matter was on appeal, and despite that two
23 executions were pending—*again* revised its lethal-injection protocol, this time removing
24 virtually all the protections that the district court had found constitutional in *West* (and
25 that the Ninth Circuit had approved in the facial challenge in *Dickens* in 2011).

26 Robert Moormann and Robert Towery challenged the January 2012 Protocol and

27 ⁵The matter is still on appeal.
28

1 asked for a preliminary injunction staying their executions, but the district court denied
2 relief. *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012). During this time, ADC
3 represented in writing to Moormann and Towery that they would be executed using a
4 three-drug protocol. *Id.* at 657. But on the morning of the appeal, ADC retracted this
5 representation because ADC had just discovered that one of the drugs necessary for the
6 three-drug protocol had expired six weeks earlier. *Id.* This news came as a surprise to
7 the Ninth Circuit, which said, “How such a discovery escaped the State for the past six
8 weeks is beyond us, and gives us pause as to the regularity and reliability of Arizona’s
9 protocols.” *Id.* at 653. During the appeal, ADC made multiple representations to the
10 Ninth Circuit; these related to IV Team qualifications and attorney-client visitation on
11 the morning of the execution. *Id.* at 658. Thus, the Ninth Circuit permitted the
12 executions to proceed—not on the basis of the written protocol, but on the basis of terms
13 fashioned and approved by the Ninth Circuit based on representations by ADC’s
14 attorney. *Id.* at 659. These representations included ADC’s commitments regarding the
15 training and qualifications of the IV team, and preparation of backup doses of the lethal
16 drugs (necessary to prevent unconstitutional levels of suffering if the first set of drugs
17 failed), and an agreement to permit counsel to meet with the client up until forty-five
18 minutes before the execution. *Id.* at 658.

19 **E. Execution of Samuel Lopez**

20 Subsequent to the executions of Moormann and Towery, Samuel Lopez was
21 scheduled to be executed on May 16, 2012. ADC informed him that he would only be
22 permitted to visit with his counsel until 7:00 a.m. the morning of the execution, despite
23 the Ninth Circuit’s order in *Towery* permitting attorney visitation until forty-five
24 minutes before the execution. Director Ryan informed Lopez that the *Towery* opinion
25 “incorrectly” relied on a version of the protocol that no longer existed. *Lopez*, 680 F.3d
26 at 1077.

27 Lopez then challenged the constitutionality of ADC’s actions through a motion
28

1 for preliminary injunction. During this time, ADC informed Lopez, on June 7, 2012,
2 that the nurse who had participated in Moormann’s and Towery’s executions would be
3 replaced.

4 The district court denied relief to Lopez, and he appealed. As this Court has
5 observed, *Cook*, 2012 WL 3055981, at *4 ¶ 13, the Ninth Circuit expressed significant
6 concern as to ADC’s practices. Thus, although that court permitted the execution to
7 proceed, the execution procedure the court approved was *again* not the written protocol,
8 but rather the procedure that the court developed through its directive that corrected the
9 Director’s assertion that the court had ruled “incorrectly,” and with commitments that
10 ADC’s counsel represented would be followed during Lopez’s execution. *Lopez*, 680
11 F.3d at 1078.

12 Yet, ADC was not finished changing the protocol in the midst of litigation. On
13 June 5, 2012, just one day before ADC filed its Motion to Dismiss in the matter
14 currently pending in the federal district court—and more than two months after the
15 plaintiffs in the matter sought leave to file their second amended complaint, *Towery v.*
16 *Brewer*, No. 2:12-cv-00245-NVW (Mot. Leave File Second Am. Compl. filed Apr. 2,
17 2012), and almost five weeks after ADC answered the second amended complaint, ADC
18 *again* changed its protocol, *id.* (Answer Second Am. Comp. filed May 5, 2012). The
19 next day, in ADC’s motion to dismiss, ADC asserted that the new protocol “foreclosed”
20 certain of the plaintiffs’ claims. *Id.* (Mot. Dismiss filed June 6, 2012, at 1 n.1).

21 ADC again relied on ad hoc changes made during litigation to prevent that
22 litigation from occurring, and is still attempting to avoid judicial scrutiny of its “rolling
23 protocol.” *Towery*, 672 F.3d at 653. That is, ADC has again told the courts that it has
24 voluntarily ceased its potentially unconstitutional activity, in order to convince those
25 courts to permit it to escape judicial review. ADC’s past history indicates that if its
26 gambit is successful, ADC will simply remove these amendments once the matter is no
27 longer before a court, as it has done repeatedly.

1 **3. A design to evade judicial review**

2 These actions, which are not isolated, and which “insulate [this matter] from
3 review[,] must be viewed with a critical eye.” *Knox v. Serv. Emp. Int’l Union, Local*
4 *1000*, 132 S. Ct. 2277, 2287 (2012). As the United States Supreme Court has observed,
5 such voluntary cessation does not generally render a case moot, because to dismiss an
6 action on those grounds would “leave the defendant[s] free to return to [their] old ways.”
7 *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc.*, 528 U.S. 167, 170 (2000).
8 Although courts ordinarily presume the government is “acting in good faith” and that
9 policy changes are not a “transitory litigation posture,” *Am. Cargo Transport, Inc. v.*
10 *United States*, 625 F.3d 1176, 1180 (9th Cir. 2010), ADC’s “moving target” approach
11 to execution procedures undermines this presumption and suggests that these
12 amendments are temporary. As the Ninth Circuit recently declared, “the State’s frequent
13 changes to its protocol during litigation are not sustainable.” *Towery*, 672 F.3d at 653.

14 These actions provide concrete evidence that this Court was correct when it stated
15 that “the Department’s practice of making last-minute changes to its lethal injection
16 protocol threatens adequate judicial review and therefore raises a legitimate, and
17 troubling, separation of powers concern.” *Cook*, 2012 WL 3055981, at *1 ¶ 2.
18 Moreover, the Court’s assertion that “the Department’s recent history of deviating from
19 or changing its protocol at the last minute raises constitutional concerns, as well as a
20 separation of powers concern under the Arizona Constitution,” *Id.* at *4 ¶ 14 (footnote
21 omitted), is borne out on both levels—constitutional concerns and separation-of-powers
22 concerns. From a constitutional standpoint, ADC has failed to create protections in its
23 protocol that address the concerns this Court has raised. *Id.* at *4 n.5.

24 And from a separation-of-powers standpoint, the evidence demonstrates that ADC
25 has repeatedly told the courts what the courts needed to hear (usually in the last few
26 hours before an execution) in order to be able to execute a particular prisoner, and then
27 has reversed course once the particular execution was over.

1 This factual history makes clear that this Court's initial concerns, which were
2 generated from the limited record before it, were well placed. The Court cannot rely on
3 ADC's representations in the amended protocol when deciding whether ADC's
4 implementation of A.R.S. § 13-757(A) rises to the level of a constitutional violation.
5 The record aptly demonstrates that the separation-of-powers clause has been violated.

6 **Conclusion**

7 Therefore for all of the reasons stated, Appellants request that their motion for
8 reconsideration of the opinion be granted.

9 RESPECTFULLY SUBMITTED this 2nd day of August, 2012.

10 Jon M. Sands
11 Federal Public Defender
12 Cary Sandman
13 Jennifer Y. Garcia

14 /s/ Jennifer Y. Garcia
15 Counsel for Plaintiffs/Appellants