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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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10 Thomas Paul West, Gregory Dickens,
11 Charles M. Hedlund, Robert Wayne
Murray, Theodore Washington, and
Todd Smith,

) No. CV-11-1409-PHX-NVW

) **DEATH PENALTY CASE**

12 Plaintiffs,

13 vs.

) **ORDER DENYING EMERGENCY
MOTION FOR TEMPORARY
RESTRAINING ORDER OR
PRELIMINARY INJUNCTION**

15 Janice K. Brewer, Governor of Arizona;
16 Charles L. Ryan, Director, Arizona
Department of Corrections; Ernest
Trujillo, Warden, Arizona Department
17 of Corrections - Eyman; Carson
McWilliams, Warden, Arizona
18 Department of Corrections - Florence;
Does 1-50,

19 Defendants.

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22 This matter is before the Court for consideration of Plaintiff Thomas Paul West's
23 emergency motion for a temporary restraining order or a preliminary injunction. (Doc. 3.)

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25 Plaintiff West, an Arizona inmate under sentence of death, is scheduled to be executed on
26 Tuesday, July 19, 2011, at 11:00 a.m. On July 16, 2011, he filed the instant motion as well
27 as a complaint pursuant to 42 U.S.C. § 1983 and an application to proceed *in forma pauperis*.

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(Docs. 1-3.) The complaint alleges that the manner and means by which the Arizona
Department of Corrections (ADC) intends to execute him will violate his Eighth Amendment

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1 right to be free from cruel and unusual punishment. The Court has considered the complaint
2 and its exhibits, the emergency motion, and all responsive pleadings. For the reasons that
3 follow, the Court denies Plaintiff West’s motion for a temporary stay of execution.

4 **BACKGROUND**

5 The facts underlying Plaintiff West’s conviction and death sentence for the 1997
6 murder of Donald Bortle in his Tucson home are detailed in the Arizona Supreme Court’s
7 decision on direct appeal and will not be repeated here. *See State v. West*, 176 Ariz. 432,
8 436-37, 862 P.2d 192 196-97 (1993). Because Plaintiff West committed his crime after
9 November 23, 1992, under Arizona law he will be executed by lethal injection. *See A.R.S.*
10 *§ 13-757(B)*.

11 In 2007, Plaintiffs filed a § 1983 complaint challenging numerous aspects of
12 Arizona’s then-in-effect lethal injection protocol.¹ That protocol was based on Department
13 Order 710, dated November 1, 2007, and as modified by an exhibit submitted by the parties
14 as part of a joint report to the Court. *See Dickens v. Brewer*, No. CV-07-1770-PHX-NVW,
15 2009 WL 1904294, at *1 & n.2 (D. Ariz. Jul. 1, 2009) (unpublished order). On July 1, 2009,
16 this Court granted summary judgment in favor of Defendants, concluding that Arizona’s
17 protocol was “substantially similar” to that approved by the Supreme Court in *Baze v. Rees*,
18 553 U.S. 35 (2008), and thus did not subject inmates to a substantial risk of serious harm in
19 violation of the Eighth Amendment. *Id.* On February 9, 2011, the Ninth Circuit Court of
20 Appeals affirmed. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011). The appellate court’s
21 mandate issued on April 18, 2011.

22 The version of the protocol at issue in *Dickens* required sequential administration of:
23 (1) sodium thiopental, an ultra fast-acting barbiturate that induces unconsciousness; (2)
24 pancuronium bromide, a paralytic neuromuscular blocking agent that prevents any voluntary
25 muscle contraction; and (3) potassium chloride, which causes skeletal muscle paralysis and
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27 ¹ Plaintiff West was not a party to this initial protocol challenge.

1 cardiac arrest. “It is uncontested that, failing a proper dose of sodium thiopental that would
2 render [a] prisoner unconscious, there is a substantial, constitutionally unacceptable risk of
3 suffocation from the administration of pancuronium bromide and pain from the injection of
4 potassium chloride.” *Baze*, 553 U.S. at 53.

5 In October 2010, Arizona prisoner Jeffrey Landrigan filed a § 1983 complaint on the
6 eve of his execution describing a nationwide shortage of sodium thiopental and alleging that
7 ADC had imported the drug from a non-FDA-approved foreign manufacturer. The district
8 court granted a temporary restraining order to permit further discovery regarding efficacy of
9 the drug. *Landrigan v. Brewer*, No. CV-10-2246-PHX-ROS, 2010 WL 4269559 (D. Ariz.
10 Oct. 25, 2010) (unpublished order). The Supreme Court reversed, noting that there was “no
11 evidence in the record to suggest that the drug obtained from a foreign source is unsafe.”
12 *Brewer v. Landrigan*, 131 S. Ct. 445 (2010).

13 Subsequently, Arizona prisoner Daniel Cook filed a complaint similar to that of
14 Landrigan, alleging an unconstitutional risk of serious pain from use of non-FDA approved
15 sodium thiopental. The district court dismissed the complaint, finding that it failed to
16 sufficiently state a claim for relief. *Cook v. Brewer*, No. CV-10-2454-PHX-RCB, 2011 WL
17 251470 (D. Ariz. Jan. 26, 2011) (unpublished order). The Ninth Circuit affirmed and noted
18 that Arizona’s protocol contains safeguards that would prevent the administration of the
19 second and third drugs if the prisoner were not sufficiently anesthetized. *Cook v. Brewer*,
20 637 F.3d 1002, 1007-08 (9th Cir. 2011) (*Cook I*). Based on newly-discovered evidence
21 surrounding the foreign-manufactured sodium thiopental and ADC’s acquisition thereof,
22 Cook refiled a complaint on the eve of his execution. The district court summarily dismissed
23 the complaint, and the Ninth Circuit affirmed. *Cook v. Brewer*, --- F.3d ----, No. 11-15743,
24 2011 WL 1213095 (9th Cir. Apr. 1, 2011) (*Cook II*), *cert. denied*, 131 S. Ct. 2465 (2011);
25 *Cook v. Brewer*, No. CV-11-557-PHX-RCB, 2011 WL 1119641 (D. Ariz. Mar. 28, 2011)
26 (unpublished order).

1 On May 24, 2011, the night before the scheduled execution of Arizona prisoner
2 Donald Beaty, ADC notified Beaty and the Arizona Supreme Court that it intended to
3 substitute pentobarbital for sodium thiopental in carrying out Beaty's execution but that
4 Arizona's lethal injection protocol would otherwise remain the same as used in prior
5 executions. (Doc. 1, Ex. J at 1.) ADC noted that Arizona's protocol authorized ADC's
6 Director to make such a change and that the drug was obtained domestically. (*Id.*) ADC also
7 indicated that on this same day (May 24) a United States Associate Deputy Attorney General
8 contacted the Arizona Attorney General's Office requesting that the sodium thiopental ADC
9 imported from a foreign source not be used in Beaty's execution because the Drug
10 Enforcement Administration believed ADC failed to fill out one of the forms necessary for
11 importation of the drug. (*Id.* at 2.)

12 Beaty filed a § 1983 complaint. He asserted a due process violation from insufficient
13 notice and argued that the last-minute drug substitution would make it impossible for ADC
14 to comply with the protocol's training requirement, thus subjecting him to a substantial risk
15 of pain and suffering. This Court denied injunctive relief, concluding *inter alia* that the lack
16 of practice with pentobarbital was insufficient to demonstrate a risk of serious harm in light
17 of the protocol's safeguards ensuring the prisoner's anesthetization prior to administration
18 of pancuronium bromide and potassium chloride. *Beaty v. Brewer*, --- F.Supp.2d ----, No.
19 CV-11-1037-PHX-NVW, 2011 WL 2050124, at *5 (May 24, 2011). The Ninth Circuit
20 affirmed, and the Supreme Court denied certiorari. *Beaty v. Brewer*, --- F.3d ----, No. 11-
21 99007, 2011 WL 2040916, at *6 (9th Cir.), *cert. denied*, 131 S. Ct. 2929 (May 25, 2011).

22 On June 10, 2011, ADC formally amended Department Order 710 to provide for the
23 administration of sodium pentothal (thiopental) *or* pentobarbital as the first of the three
24 sequentially-administered drugs. (Doc. 1, Ex. C at Attach. F.)

25 At 5:30 p.m. on July 14, 2011, Plaintiffs, through the Office of the Federal Public
26 Defender, received documents from ADC disclosed in response to a complaint filed by the
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1 Federal Public Defender in the Maricopa County Superior Court seeking enforcement of a
2 request for public records made on February 3, 2011. (Doc. 1, Ex. A-B.) According to
3 Plaintiffs, these documents “reveal Defendants’ awareness of problems with the British
4 distributor that provided them with Sodium Thiopental” and suggest that ADC may have
5 “deviated from mandatory practice requirements.” (Doc. 1 at 4.)

6 DISCUSSION

7 In their § 1983 complaint, Plaintiffs allege that ADC’s unwillingness to follow its
8 written lethal injection protocol and its use of pentobarbital in place of sodium thiopental
9 create a substantial risk that they will suffer unnecessary pain during execution, in violation
10 of the Eighth Amendment. (Doc. 1 at 14-18.) Plaintiff West has moved for a temporary
11 restraining order or a preliminary injunction to enjoin his execution and to allow for litigation
12 of these claims. (Doc. 3.)

13 The standard for issuing a temporary restraining order is essentially the same as that
14 for issuing a preliminary injunction. To be entitled to injunctive relief, a movant must
15 demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable
16 harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4)
17 an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct.
18 365, 374, 376 (2008); *National Meat Ass’n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010);
19 *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of
20 persuasion is on the movant, who must make “a clear showing.” *Mazurek v. Armstrong*, 520
21 U.S. 968, 972 (1997) (per curiam).

22 In the context of a capital case, the Supreme Court has emphasized that these
23 principles apply when a condemned prisoner asks a federal court to enjoin his impending
24 execution because “[f]iling an action that can proceed under § 1983 does not entitle the
25 complainant to an order staying an execution as a matter of course.” *Hill v. McDonough*, 547
26 U.S. 573, 583-84 (2006). Rather, “a stay of execution is an equitable remedy” and “equity
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1 must be sensitive to the State’s strong interest in enforcing its criminal judgments without
2 undue interference from the federal courts.” *Id.* at 584. In addition, “[a] court may consider
3 the last-minute nature of an application to stay execution in deciding whether to grant
4 equitable relief.” *Beardslee*, 395 F.3d at 1068 (quoting *Gomez v. United States District*
5 *Court*, 503 U.S. 653, 654 (1991)). Thus, courts “must consider not only the likelihood of
6 success on the merits and the relative harms to the parties, but also the extent to which the
7 inmate has delayed unnecessarily in bringing the claim.” *Id.* (quoting *Nelson v. Campbell*,
8 541 U.S. 637, 649-50 (2004)).

9 **I. Likelihood of Success**

10 **A. Relevant Legal Standard**

11 The Eighth Amendment “prohibits punishments that involve the unnecessary and
12 wanton inflictions of pain, or that are inconsistent with evolving standards of decency that
13 mark the progress of a maturing society.” *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir.
14 2004). That prohibition necessarily applies to the punishment of death, precluding
15 executions that “involve torture or a lingering death, or do not accord with the dignity of
16 man.” *Beardslee*, 395 F.3d at 1070. A violation of the Eighth Amendment can be
17 established by demonstrating there is a risk of harm that is “*sure or very likely* to cause
18 serious illness and needless suffering.” *Helling v. McKinney*, 509 U.S. 25, 33, 34 (1993).
19 In other words, there must be a “substantial risk of serious harm.” *Farmer v. Brennan*, 511
20 U.S. 825, 842 (1994).

21 In *Baze v. Rees*, the Supreme Court held that Kentucky’s method of execution by
22 lethal injection was consistent with the Eighth Amendment. The decision encompassed
23 seven separate opinions involving three blocks of Justices. In *Ventura v. State*, 2 So.3d 194,
24 200 (Fla. 2009), the Florida Supreme Court observed that the *Baze* plurality:

25 adopted a version of the substantial-risk standard, while Justice Breyer,
26 concurring in the judgment, and Justices Ginsburg and Souter, dissenting,
27 adopted a version of the unnecessary-risk standard. In contrast, Justices
Thomas and Scalia renounced any risk-based standard in favor of a rule of law

1 that would uphold any method of execution which does not involve the
2 *purposeful* infliction of “pain and suffering beyond that necessary to cause
3 death.” Justice Stevens did not provide a separate standard but, instead,
4 expressed general disagreement with (1) the death penalty based upon his long
5 experience with these cases and the purported erosion of the penalty’s
6 theoretical underpinnings (deterrence, incapacitation, and retribution), and (2)
7 the allegedly unnecessary use of the paralytic drug pancuronium bromide.

8 *Id.* at 199-200 (citations and footnotes omitted). In response to Justice Stevens’s suggestion
9 that the plurality opinion leaves the disposition of other cases uncertain, Chief Justice
10 Roberts wrote:

11 [T]he standard we set forth here resolves more challenges than [Justice
12 Stevens] acknowledges. *A stay of execution may not be granted on grounds
13 such as those asserted here unless the condemned prisoner establishes that the
14 State’s lethal injection protocol creates a demonstrated risk of severe pain.*
15 He must show that the risk is substantial when compared to the known and
16 available alternatives. A State with a lethal injection protocol similar to the
17 protocol we uphold today would not create a risk that meets this standard.

18 *Baze*, 553 U.S. at 61 (emphasis added).

19 **B. Claim One—Protocol Deviations**

20 Plaintiffs allege that ADC has substantially deviated from its lethal injection protocol
21 and thus there is a substantial risk that the anesthetic drug will not be properly administered,
22 causing serious harm. (Doc. 1 at 15.) Plaintiffs cite to five deviations: (1) failure to
23 adequately train the execution team using pentobarbital; (2) failure to legally obtain drugs
24 from a safe and reputable source; (3) use of the femoral vein as the default access site; (4)
25 failure to leave IV insertion sites uncovered during executions; and (5) the substitution of
26 pentobarbital for sodium thiopental. (*Id.* at 7-9, 13.) The Court concludes that none are so
27 consequential that Plaintiff West has established a likelihood of success on his claim that he
will not be properly anesthetized prior to administration of pancuronium bromide and
potassium chloride.

Plaintiffs assert that ADC was unable to carry out its minimum training
requirements—ten practices using pentobarbital—prior to executing Donald Beaty on May
25, 2011. According to an ADC training log, fifteen practice sessions took place between

1 January 1 and May 24, 2011. (Doc. 1, Ex. L.) However, the log does not indicate which
2 anesthetic drug, if any, was used during these practices. Even assuming pentobarbital was
3 not utilized, this would not appear to be a deviation from the protocol as the protocol does
4 not specifically require that execution rehearsals include mixing or using the drugs.² (See
5 Doc. 1, Ex. C, Attach. F at § B.5.) And even if the protocol contained such a requirement,
6 in light of the exigent circumstances caused by the Department of Justice’s last-minute
7 request not to use sodium thiopental, any failure to practice with pentobarbital does not
8 demonstrate, as urged by Plaintiffs, a “willful disregard” of the protocol. (Doc. 1 at 13.)
9 Lastly, as discussed below with regard to Claim Two, any risk of harm from failing to
10 practice mixing the chemicals is ameliorated by the protocol’s consciousness checks.

11 For the same reasons, the Court is unpersuaded by Plaintiffs’ allegation that ADC did
12 not follow its training requirements with respect to the use of pancuronium bromide during
13 rehearsals. Plaintiffs cite a September 2010 email to ADC’s Deputy Director from an
14 unknown sender as evidence ADC likely substituted saline during practices due to a shortage
15 of pancuronium bromide. (Doc. 1, Ex. I.) The email “recommend[s]” substituting saline or
16 another product given ADC’s short supply of pancuronium bromide. (*Id.*) However, within
17 days of this email, ADC ordered and received a shipment of pancuronium from Los Angeles.
18 (See Doc. 1, Ex. J, Attach. B.) Plaintiffs’ speculative assertion that saline may have been
19 substituted in practices is insufficient to establish a likelihood of success on the merits,
20 especially give the protocol’s silence on the use of actual drugs during execution rehearsals.

21 Petitioner next complains that ADC illegally obtained sodium thiopental and the other
22 two drugs from a foreign supplier about which ADC had concerns. (Doc. 1 at 7-8.) In

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24 ² Any suggestion to the contrary in this Court’s *Beaty* decision, 2011 WL
25 2050124, at *4, was based on a broad reading of a protocol provision that does not actually
26 support that specificity. The protocol provision states: “The Division Director for Offender
27 Operations and the Medical Team leader shall ensure that all team members thoroughly
understand all provisions contained herein as written and by practice.” (Doc. 1, Ex. C,
Attach. F at § B.6.)

1 support, they proffer an email to the Deputy Director cautioning that the foreign supplier's
2 "website leaves something to be desired" and wondering whether the supplier was "reputable
3 and where exactly the medication would be coming from." (Doc. 1, Ex. K.) First, the
4 acquisition of sodium thiopental is irrelevant in light of ADC's intent to anesthetize Plaintiff
5 West with pentobarbital. Second, ADC obtained pancuronium bromide and potassium
6 chloride from a domestic supplier as well as a foreign one and indicated in the *Beaty* case
7 that it intended to carry out executions using drugs obtained domestically. (*See* Doc. 1, Ex.
8 J at 1 & Attach. B-C.) Third, Plaintiff has not explained how the legality of importing drugs
9 affects the constitutionality of their use. *See Cook II*, 2011 WL 1213095, at *3; *Cook I*, 637
10 F.3d at 1007 n.3.

11 Plaintiffs argue that ADC has failed to follow protocol by using the femoral vein as
12 the access site for the intravenous line in several recent executions. However, the protocol
13 expressly states femoral access is permissible if the Medical Team Leader determines that
14 it is not possible to place a reliable peripheral line. (Doc. 1, Ex. C, Attach. F at § G.8.)
15 Similarly, Plaintiff alleges that ADC violated its protocol by failing to insert a backup IV
16 catheter in two executions (Doc. 13 at 3 n.1), but the protocol provides that a backup is
17 unnecessary if the Medical Team Leader determines it is not possible to place two lines.
18 (Doc. 1, Ex. C, Attach. F at § G.1.)

19 Plaintiffs further allege that ADC covered the intravenous insertion sites during recent
20 executions, in contravention of the protocol. (Doc. 1 at 9; *see* Doc. 1, Ex. C, Attach. F at §
21 G.5.) Even if true, the Court concludes that this minor deviation is insufficient to establish
22 a likelihood of success on Plaintiffs' Eighth Amendment claim. In upholding this Court's
23 ruling in *Dickens*, the Ninth Circuit observed that the plaintiffs faced an uphill battle in trying
24 to demonstrate a substantial risk of improper anesthetization from a failure to follow
25 protocol. *Dickens*, 631 F.3d at 1146. "[T]he evidence must show more than single accident
26 or mistake or failure to follow the Protocol." *Id.* at 1147. Here, even assuming ADC has
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1 failed in the past several executions to follow protocol with respect to leaving visible the
2 intravenous insertion site, Plaintiffs do not explain how such deviation creates a significant
3 risk of unnecessary pain or suffering. Moreover, if the intravenous site during these
4 executions was accessed through a femoral vein in the prisoner's groin area, it might not
5 have been logistically possible to leave the site completely uncovered.

6 Finally, Petitioner points to ADC's last-minute substitution of pentobarbital in the
7 Beaty case as evidence that ADC is unable to follow its protocol as written. (Doc. 1 at 13.)
8 As already explained, however, exigent circumstances led to this change. As such, it was not
9 an arbitrary protocol deviation but a practical one ultimately made necessary by the
10 increasing difficulty of obtaining the chemicals needed to carry out lawfully-imposed
11 sentences of death. Although Plaintiffs focus on ADC's deviation from the protocol's literal
12 requirements, the relevant issue is whether such deviation creates a substantial risk of serious
13 harm. The Court concludes that Plaintiff West has failed to make a "clear showing" that it
14 does. *See Baze*, 553 U.S. at 50 ("[A]n isolated mishap alone does not give rise to an Eighth
15 Amendment violation, precisely because such an event, while regrettable, does not suggest
16 cruelty, or that the procedure at issue gives rise to a substantial risk of serious harm.").

17 **C. Claim Two—Use of Pentobarbital**

18 Plaintiffs allege that although pentobarbital is a barbiturate like sodium thiopental,
19 unlike sodium thiopental it is untested for use as an anesthetic and lacks a standard
20 recognized dosage for inducing anesthetic coma. (Doc. 1 at 5, 10-11.) Plaintiffs also assert
21 that the manufacturer of pentobarbital has warned that the drug is not intended as an
22 anesthetic. (*Id.* at 10, 15-16.) Therefore, according to Plaintiffs, there is a substantial risk
23 that pentobarbital, even if successfully injected, may not prevent needless pain and suffering.
24 (*Id.* at 11, 15.) Plaintiffs further allege, based on problems reported during executions in
25 Alabama and Georgia as well as the affidavit of Dr. David Waisel, that the consciousness
26 checks in Arizona's protocol are insufficient to ensure unconsciousness prior to
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1 administration of pancuronium bromide and potassium chloride. (*Id.* at 12-13, 16-17.)

2 To show a likelihood of success on the merits of his Eighth Amendment claim,
3 Plaintiff must demonstrate that the use of pentobarbital as an anesthetic creates a
4 “demonstrated risk of severe pain.” *Baze*, 553 U.S. at 61. Both the Tenth and Eleventh
5 Circuits have expressly addressed this issue and found that use of pentobarbital does not
6 create a substantial risk of serious harm. *See Powell v. Thomas*, No. 11-12238, 2011 WL
7 1899564, at *2(11th Cir. May 19, 2011) (unpublished order), *cert. denied*, 131 S. Ct. 2487
8 (2011); *Pavatt v. Jones*, 627 F.3d 1336, 1340 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 974
9 (2011). Notably, the plaintiff in *Pavatt* conducted discovery, submitted an expert report,
10 and participated in an evidentiary hearing. In addition, pentobarbital has been used either
11 singularly or as a substitute for sodium thiopental in executions in several other states.

12 Dr. Waisel opines that because pentobarbital has rarely been used in an operating
13 room to anesthetize patients, “significant unknowns” about its use as an anesthesia “puts the
14 inmate at risk of needless pain and suffering.” (Doc. 1, Ex. D at 5.) This is nothing more
15 than speculation and was rejected by the court in *Pavatt*, who found “no clear error in finding
16 that the amount of pentobarbital selected for use by the [Oklahoma Department of
17 Corrections] as part of its protocol was sufficient to induce unconsciousness in an inmate.”
18 627 F.3d at 1340. Similarly, Dr. Waisel asserts that pentobarbital failed to properly
19 anesthetize two of the 16 inmates executed using pentobarbital, but again this is pure
20 speculation as Plaintiffs have produced no evidence demonstrating that any problems in those
21 cases were caused by the drug itself rather than misadministration.

22 Moreover, Arizona’s protocol has significant safeguards in place to ensure that a
23 prisoner is fully anesthetized prior to administration of pancuronium bromide and potassium
24 chloride. As noted by this Court in *Dickens*, although electronic monitors may be used to
25 measure brain activity, physical examination such as stroking a patient’s eyelashes to look
26 for reflex and monitoring his breathing pattern is as good or better for assessing the depth of
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1 anesthesia. 2009 WL 1904294, at *12. To this end, the Arizona protocol:

2 requires that a microphone “be affixed to the inmate’s shirt to enable the
3 Medical Team and Special Operations Team Leader to verbally communicate
4 directly with the inmate and hear any utterances or noises made by the inmate
5 throughout the procedure.” It requires that the inmate “be positioned to enable
6 the Medical Team and Special Operations Team Leader to directly observe the
7 inmate and to monitor the inmate’s face with the aid of a high resolution color
8 NTSC CCD camera with 10x Optical zoom lens with pan tilt capability and a
9 19-inch resolution color monitor.” It requires the Medical Team to
10 “continually monitor the inmate’s level of consciousness and
11 electrocardiograph readings, maintaining constant observation of the inmate
12 utilizing direct observation, audio equipment, camera and monitor as well as
13 any other medically approved method(s) deemed necessary by the Medical
14 Team.” It requires the warden to “physically remain in the room with the
15 inmate throughout the administration of the chemicals in a position sufficient
16 to clearly observe the inmate and the primary and backup IV sites for any
17 potential problems.” Further, after administration of the sodium thiopental and
18 heparin/saline flush, the Medical Team must “confirm the inmate is
19 unconscious by sight and sound, utilizing the audio equipment, camera and
20 monitor,” and a Medical Team member must “enter into the room where the
21 inmate is located to physically confirm the inmate is unconscious, and that the
22 catheter and lines are affixed and functioning properly, using methods deemed
23 medically necessary.” Although the Arizona Protocol does not define
24 “methods deemed medically necessary,” it is likely that Medical Team
25 members, who must be medically trained, would be able to assess
26 consciousness by telling the patient to respond and, upon receiving no
27 response, be able to look for a simple reflex response to a tactile stimulus.

Id., at *21. If it appears that a prisoner is not fully anesthetized, the protocol prohibits the
administration of any further drugs.

Dr. Waisel opines that Arizona’s consciousness checks are insufficient because the
protocol does not specify the training, skills, and certification of the Medical Team Leader
conducting the check. (Doc. 1, Ex. D at 7.) However, the Ninth Circuit has specifically
determined that the consciousness checks required by the protocol are adequate to ensure that
a prisoner is anesthetized prior to administration of the second and third drugs. *See Cook I*,
637 F.3d at 1007-08. Dr. Waisel’s affidavit does not undermine the Circuit’s ruling or
suggest that anesthetization using pentobarbital instead of sodium thiopental requires a
different level of skill in assessing consciousness.

Finally, the Court does not find the manufacturer’s “warning” against pentobarbital
use in executions to be persuasive. Although the company relayed to the Georgia

1 Department of Corrections it could not “assure the associated safety and efficacy” of using
2 pentobarbital for off-label use, it also made clear that it was “adamantly opposed” to the use
3 of pentobarbital “or any product for that matter, for the purpose of capital punishment”
4 because such use “contradicts everything we are in business to do—provide therapies that
5 improve people’s lives.” (Doc. 1, Ex. N.) This is insufficient evidence to establish a
6 substantial risk of harm.

7 For all of these reasons, the Court concludes that Plaintiff West has failed to show a
8 likelihood of success on the merits of his Eighth Amendment claim.

9 **II. Irreparable Harm**

10 The Court also concludes that Plaintiff West has not shown that he is likely to suffer
11 irreparable harm in the absence of a stay. Plaintiff West asserts that he is at risk of suffering
12 pain if the pentobarbital does not adequately anesthetize him. However, any risks from using
13 pentobarbital in lieu of sodium thiopental is substantially mitigated by the safeguards
14 outlined above that will ensure Plaintiff West is fully anesthetized before the second and
15 third drugs are administered.

16 **III. Balance of Equities & Public Interest**

17 Plaintiff West murdered Donald Bortle fourteen years ago. In *Hill v. McDonough*, the
18 Supreme Court recognized the “important interest in the timely enforcement of a sentence”
19 and cautioned that federal courts “can and should protect States from dilatory or speculative
20 suits.” 547 U.S. at 584-85. Given the State’s “strong interest in enforcing its criminal
21 judgments without undue interference from the federal courts,” and because “the victims of
22 crime have an important interest in the timely enforcement of a sentence,” the Court
23 concludes that the balance of equities favors Defendants and that a stay of execution to
24 resolve Plaintiff West’s speculative allegations is not in the public interest. *Id.* at 584.

25 The Court also observes that although there was some delay by Defendants in fully
26 complying with the Federal Public Defender’s public records request, the two newly-released
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1 emails referenced by Plaintiffs in their complaint provide only tangential support for their
2 claims. The main thrust of the complaint—inefficacy of pentobarbital for use as an
3 anesthetic and ADC protocol deviations—could have been asserted at least by the end of
4 May when Beaty was executed using pentobarbital or shortly after the allegedly problematic
5 execution in Georgia on June 23. The Court finds that Plaintiff West unnecessarily delayed
6 filing suit until July 16, just three days before his scheduled execution. Therefore, equity
7 also favors denial of his request for a stay. *See Nelson v. Campbell*, 541 U.S. at 649-50.

8 **CONCLUSION**

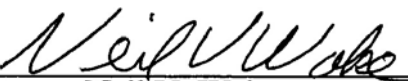
9 Plaintiff West has not demonstrated entitlement to injunctive relief.

10 Accordingly,

11 **IT IS HEREBY ORDERED** that Plaintiff West’s Emergency Motion for Temporary
12 Restraining Order or Preliminary Injunction (Doc. 3) is **DENIED**.

13 **IT IS FURTHER ORDERED** that Plaintiff West’s Application to Proceed *In Forma*
14 *Pauperis* (Doc. 2) is **GRANTED**.

15 Dated: July 17, 2011.

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18 _____
19 Neil V. Wake
20 United States District Judge
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