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15 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

16 Thomas Paul West, et al.,
17 Plaintiffs,
18 v.
19 Janice K. Brewer, et al.,
20 Defendants.

No. 2:11-cv-01409-NVW

Proposed Findings of Fact and
Conclusions of Law

21
22 **PROPOSED FINDINGS OF FACT**

23 1. In 2009, this Court reviewed the constitutionality of the Arizona Department
24 of Corrections (“ADC”) written lethal-injection protocol and found that “the record
25 does not demonstrate a substantial risk that Defendants will violate the Arizona
26 Protocol in the future in a manner that is sure or very likely to cause needless
27 suffering.” *Dickens v. Brewer*, 2009 WL 1904294, at *25 (D. Ariz. July 1, 2009).

28 2. Since this Court’s last review of ADC’s Protocol, the record has drastically
changed.

1 3. The Arizona Department of Corrections (“ADC”) has executed five prisoners
2 by lethal injection in the past thirteen months. Preparations were made for the
3 execution of a sixth prisoner, who obtained a stay. (See ECF No. 64.1, Exhibit A
4 (hereinafter “Fact Chart”) at #2.)¹

- 5 a. The execution of Jeffrey Landrigan took place on October 26, 2010.
- 6 b. The execution of Eric King took place on March 29, 2011.
- 7 c. The execution of Donald Beaty took place on May 25, 2011.
- 8 d. The execution of Richard Bible took place on June 30, 2011.
- 9 e. The execution of Thomas West took place on July 19, 2011.
- 10 f. The execution of Daniel Cook was scheduled to take place on April 5,
11 2011, but was stayed by the United States Supreme Court on April 4,
12 2011.

13 4. Plaintiffs are convicted Arizona prisoners sentenced to death who have brought
14 an action for injunctive relief under 42 U.S.C. § 1983 alleging that, based on ADC’s
15 actions in the past five executions, their executions by lethal-injection in Arizona will
16 violate their rights as guaranteed under the Eighth Amendment, as well as the Due
17 Process and Equal Protection Clauses of the Fourteenth Amendment. (Am. Compl.,
18 ECF No. 29.) (Fact Chart #1.)

19 5. In each of the past five executions, Defendants failed to follow the written
20 protocol. Moreover, Defendants willingly violated federal law and overlooked
21 constitutional safeguards in order to ensure that an execution took place as scheduled.
22 These deviations from the written protocol, coupled with Defendants unnecessary
23 haste to obtain execution drugs at any cost, rise to the level of a violation of
24 Plaintiffs’ Eighth and Fourteenth Amendment rights.

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26
27 ¹The Fact Chart is the list of Plaintiffs’ facts and Defendants’ response to those
28 facts. When cited in this document, it will refer to uncontested facts and the citation
will be to the number assigned to the fact.

Arizona's Three-Drug Lethal-Injection Protocol

6. ADC Department Order 710 establishes procedures for planning and carrying out the execution of a person sentenced to death in Arizona. (Exs. 85, 86, 216.)² (Fact Chart #21.)

7. Attachment F to Department Order 710 governs the preparation and administration of chemicals when carrying out an execution. Attachment F also describes the composition and duties of the Medical Team. (Exs. 85, 86, 216; Fact Chart #22.)

8. Department Order 710 states that it shall be followed as written unless deviation or adjustment is required, as determined by the Director of the Arizona Department of Corrections. (Ex. 86 at 2; Fact Chart #27.)

9. The current version of Attachment F³ instructs that ADC shall administer a sequence of three drugs to carry out an execution of a prisoner by lethal injection, with heparin/saline flushes between each injection: (1) 5 grams of either sodium thiopental or pentobarbital, (2) 120 milligrams of pancuronium bromide, and (3) 240 milliequivalents of potassium chloride. (Ex. 216 at 4; Fact Chart #28.)

10. Sodium thiopental is an ultra-short acting barbiturate sedative intended to quickly render the prisoner unconscious. (Fact Chart #29.)

11. Pentobarbital is a short-acting barbiturate, not an ultra-short acting barbiturate like sodium thiopental. (Fact Chart #30.)

12. Pentobarbital is labeled for use as a sedative; a hypnotic; a preanesthetic; and

²All exhibits cited in this document refer to Plaintiffs' exhibits designated for trial unless otherwise noted.

³On September 15, 2009, a revised version of Department Order 710, including Attachment F, took effect. (Ex. 85.) On May 12, 2011, a revised version of Department Order 710 took effect. Attachment F was not revised at that time. (Exs. 85, 86.) On June 10, 2011, a revised version of Attachment F took effect. (Ex. 86.) On September 12, 2011, a revised version of Attachment F took effect. (Ex. 216.)

1 an anticonvulsant. It is not labeled for the induction of anaesthesia. (Ex. 255.)

2 13. The purpose for administering 5 grams of sodium thiopental or pentobarbital
3 is to anesthetize the prisoner, rendering the prisoner unconscious, before
4 administering the pancuronium bromide and potassium chloride. (Deposition of
5 Medical Team Leader, Oct. 24, 2011, 99:21-25; 243:1-6; Fact Chart #32.)

6 14. Pancuronium bromide is a paralytic agent that inhibits all muscular-skeletal
7 movements. Pancuronium bromide will paralyze the diaphragm and stop respiration.
8 (Fact Chart #33.)

9 15. Pancuronium bromide does not affect consciousness, sensation, cognition, or
10 the ability to feel pain and suffocation. Thus, if pancuronium bromide is given to a
11 conscious person, the result is severe agony because the person will be aware that he
12 is unable to breathe for several minutes before losing consciousness. (Fact Chart
13 #34.)

14 16. The amount of potassium chloride administered will induce cardiac arrest,
15 therefore causing the heart to stop. (Fact Chart #35.)

16 17. If given to a conscious person, potassium chloride causes a severe burning
17 sensation and will result in severe pain. (Fact Chart #36.)

18 18. Proper administration of a sufficient amount of sodium thiopental or
19 pentobarbital eliminates any meaningful risk that a prisoner will experience pain from
20 the subsequent injections of pancuronium bromide and potassium chloride. (Fact
21 Chart #37.)

22 19. Conversely, failing a proper dose of sodium thiopental or pentobarbital
23 sufficient to render a prisoner unconscious, there is a substantial constitutionally
24 unacceptable risk of suffocation from the administration of pancuronium bromide and
25 severe pain from the injection of potassium chloride. (Fact Chart #38.)

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1 Previous Lethal-Injection Litigation in Arizona

2 20. In September 2007, Plaintiffs⁴ brought an action for injunctive relief under 42
3 U.S.C. § 1983 alleging that Arizona's lethal-injection procedures violated the Eighth
4 Amendment. *Dickens v. Brewer*, No. 07-1770-NVW (D. Ariz.) (Compl., ECF No. 1.)

5 21. In *Dickens*, the Plaintiffs offered proof that:

- 6 a. There were clear defects in ADC's method for selecting members of its
7 lethal-injection medical team, resulting in the selection of medical team
8 members who were demonstrably unqualified to participate in an
9 execution; and what is more, the evidence showed that ADC selected
10 these unqualified medical team members without conducting any
11 screening, medical licensing checks, or criminal background checks.
12 (*Dickens*, Pls' Resp. to Defs' Statement of Facts in Support Mot. Summ.
13 J. and Pls' Statement of Uncontroverted Facts, filed Feb. 12, 2009, ECF
14 No. 99 at 36-41.)
- 15 b. There were no training requirements for the medical team. (*Id.* at 36;
16 Fact Chart #8b.)
- 17 c. Arizona's mandated use of a central femoral line to administer the
18 execution drugs resulted in a substantial risk of causing the prisoner
19 severe pain. (ECF No. 99 at 30-33.)

20 22. In light of the evidence offered by Plaintiffs, ADC offered to amend its
21 execution protocol. *Dickens v. Brewer*, 2009 WL 1904294, at *1 (D. Ariz. July 1,
22 2009).

23 23. Following discussions with Plaintiffs, Defendants made the following promises
24 and representations to the Court:

25 _____
26 ⁴The Plaintiffs in the instant lawsuit are the named Plaintiffs in *Dickens*, with
27 two exceptions. Michael Correll is no longer a party to the lawsuit because his death
28 sentence was overturned. *See Correll v. Schriro*, No. 87-cv-01471-SMM (D. Ariz.)
(ECF No. 478). Donald Beaty is no longer a party because he was executed.

- 1 a. The IV lines used to administer the lethal injection drugs would only be
2 administered by “medically licensed individuals with at least one year
3 current and regular practice placing such lines” (Ex. 173 at 3:4-6) and
4 that medical team personnel would be currently employed professionals
5 who practice what they do during an execution (Ex. 214 at 7:5-8). *See*
6 *also Dickens*, 2009 WL 1904294, at *16.
- 7 b. ADC would conduct medical license and criminal background checks
8 on its medical team members prior to allowing them to participate in an
9 execution, upon the issuance of a warrant of execution, and annually.
10 (Ex. 173 at 3, 8-12.) *See also Dickens*, 2009 WL 1904294, at *16.
11 (Fact Chart #9b.)
- 12 c. Lethal drugs would “by default be administered through a peripheral
13 intravenous line.” (Ex. 173 at 3:1-3.) *See also Dickens*, 2009 WL
14 1904294, at *16.
- 15 d. ADC would “ensure that a qualified medical team is in place before any
16 scheduled execution.” (Ex. 173 at 8:11-12.) *See also Dickens*, 2009
17 WL 1904294, at *16. (Fact Chart #9d.)
- 18 e. ADC would retain all documents establishing the qualifications and
19 training of the medical team members. (Ex. 173, Ex. A § B ¶ 7.) *See*
20 *also Dickens*, 2009 WL 1904294, at *23. (Fact Chart #9e.)
- 21 f. ADC would ensure that the IV lines used to administer the execution
22 drugs would not be covered and would remain visible throughout an
23 execution. (Ex. 173, Ex. A at § F, ¶ 5.) *See also Dickens*, 2009 WL
24 1904294, at *8. (Fact Chart #9f.)
- 25 24. Based upon ADC’s representations described above, this Court granted
26 summary judgment to Defendants, finding that, “[a]s written, the Arizona Protocol
27 does not subject inmates to a substantial risk of serious harm and does not violate the
28 Eighth Amendment.” *Dickens*, 2009 WL 1904294, at *25.

1 25. In reaching that conclusion, this Court also refrained from presuming that ADC
2 would intentionally not follow its amended protocol, *id.*, and expressly acknowledged
3 and accepted ADC's promise that an execution would not go forward if a qualified
4 medical team was not in place in conformance with the amended protocol, *id.* at *23.

5 26. On appeal to the Ninth Circuit, the central issue was whether "evidence
6 gathered during discovery raises issues of fact as to whether Arizona will follow the
7 protocol and ensure that the existing safeguards are properly implemented." *Dickens*
8 *v. Brewer*, 631 F.3d 1139, 1141 (9th Cir. 2011).

9 27. In defense of this Court's order granting summary judgment, Defendants
10 informed the appellate court that "ADC has written its present protocol to comply
11 with the Eighth Amendment and has no incentive to deviate from the current
12 protocol." *Dickens v. Brewer*, Case No. 09-16539 (9th Cir.) (Defs' Answering Br.
13 at 12, April 8, 2010; Fact Chart #284.)

14 28. Defendants also stated that ADC's protocol provides the necessary criteria to
15 ensure that only qualified and trained individuals are placed on the Medical Team.
16 Specifically, Defendants represented that "[t]he ADC's selection of Doerhoff and
17 Medical Team Member #3 when licensing and background checks were not required
18 does not demonstrate that the ADC is likely to select future Medical Team members
19 without licensing and background checks when licensing and background checks are
20 required by a written protocol held constitutional." (*Id.* at 27-28; Fact Chart #285.)

21 29. Defendants further explained that because ADC has placed its protocol on its
22 website, it has ensured that any changes or amendments are transparent. (Defs'
23 Answering Br. at 43; (Fact Chart #286.)

24 30. The Ninth Circuit upheld this Court's judgment and reiterated that "there is no
25 evidence that Arizona will fail to follow [the written lethal-injection protocol] in
26 future executions." *Dickens*, 631 F.3d at 1149.

27 31. In the past year, the State reiterated to the Arizona Supreme Court that its
28 lethal-injection protocol is constitutional and that it would be followed in Donald

1 Beaty's execution. *State v. Beaty*, No. CR 85-0211-AP/PC (Ariz.) (Response Re:
2 Supplement in Opposition to Second Motion For Warrant of Execution, April 13,
3 2011, at 1; Fact Chart #282.)

4 32. Plaintiffs—including Thomas West, the most recent prisoner to be executed by
5 the State of Arizona—filed the Complaint in this lawsuit, along with West's Motion
6 for Temporary Restraining Order (TRO). (ECF Nos. 1, 3.)

7 33. West alleged, *inter alia*, that ADC was not following its written protocol and
8 that the execution team was not trained using the execution drugs. (ECF No. 1, ¶¶
9 38-39, 45-46.)

10 34. In response, Defendants represented to this Court in a motion to dismiss that
11 “[t]here is no evidence ADC does not follow its written protocol.” (ECF No. 11 at
12 11.) In fact, Defendants maintained that “ADC has complied and will continue to
13 comply with its written execution protocol.” (ECF No. 11 at 14; Fact Chart #13.)

14 35. Defendants also told this Court that “[t]he protocol requires that the drugs be
15 mixed by someone with experience in doing so. That requirement has been and will
16 continue to be met.” (ECF No. 11 at 11.)

17 ADC Director's Representations Regarding Arizona's Execution Protocol

18 36. Charles Ryan has been the Director of the Department of Corrections during
19 the last five executions. (Dep. of Charles Ryan, Oct. 14, 2011, at 24:8-25:2.)

20 37. Director Ryan came into his position during the *Dickens* litigation and, in
21 support of his interest in obtaining a favorable ruling from this Court, he approved
22 all of the amendments to the protocol which ADC promised to perform in all future
23 executions. (Ryan Dep. 61:1-12; 61:20-21, 74:9-75:1.)

24 38. Director Ryan has admitted that the medical team renders a core function under
25 the protocol and that no execution should be carried out unless the medical team is
26 comprised of personnel who satisfy the requirements in ADC's written execution
27 protocol. (Ryan Dep. 57:20-58:8, 58:15-59:6.)

28 39. But Ryan has admitted that he conducted the last five executions with full

1 knowledge that at least one of the medical team members did not hold a medical
2 license or otherwise satisfy the qualifications outlined in the written protocol. (Ryan
3 Dep. 115:8-12; 116:7-9, 116:11-21.)

4 40. Although he possessed knowledge that ADC would not comply with its
5 execution protocol as written, Ryan submitted sworn affidavits to the courts prior to
6 Landrigan's execution and prior to Cook's planned execution that ADC would follow
7 the protocol as written. (Ex. 123 at 8, Ex. 134 at A.)

8 41. When asked to explain ADC's many core deviations from its written protocol
9 during the past five executions, Ryan claimed that the written protocol granted him
10 virtually unlimited discretion to deviate from the written requirements of the protocol
11 and that therefore when he submits sworn testimony to follow the protocol as written,
12 he means that the executions may proceed as he decides. (Ryan Dep. 117:7-13,
13 117:19-118:2, 118:9-16.)

14 42. ADC's written execution procedures are not subject to assessment for
15 compliance with constitutional requirements, as the written execution procedures
16 embrace an unlimited capacity for deviation as directed by ADC Director. (Ryan
17 Dep. 117-18.)

18 The Past Five Executions In Arizona

19 43. During the past five executions, at the direction of those responsible for
20 administering those executions ADC intentionally failed to follow the core
21 components of its execution protocol, which it had promised it would adhere to in
22 *Dickens*, including:

- 23 a. It failed to follow and deviated from the requirement that IV lines used
24 to administer the lethal injection drugs would only be administered by
25 "medically licensed individuals with at least one year current and regular
26 practice placing such lines."
27 b. It failed to follow and deviated from the requirement that medical team
28 personnel would need to be currently employed in a position practicing

- 1 what they do in an execution.
- 2 c. It failed to follow and deviated from the requirement that it conduct
- 3 medical license and criminal background checks on its medical team
- 4 members prior to allowing them to participate in an execution, and
- 5 thereafter annually and upon the issuance of a warrant of execution.
- 6 Criminal background checks were never done and there is no
- 7 documentation that medical license checks were ever conducted.
- 8 d. In all but one execution, it failed to follow and deviated from the
- 9 requirement that lethal drugs would “by default be administered through
- 10 a peripheral intravenous line,” and instead ADC adopted a femoral
- 11 central line as the default procedure.
- 12 e. It failed to follow and deviated from the requirement that it would
- 13 “ensure that a qualified medical team is in place before any scheduled
- 14 execution”; instead the evidence shows that a qualified medical team
- 15 was not in place for any of the last five executions.
- 16 f. It failed to follow and deviated from the requirement that it would retain
- 17 all documents establishing the qualifications and training of the medical
- 18 team members; and instead the evidence shows that ADC did not retain
- 19 any documents evidencing the qualifications of the medical team
- 20 members or the training of the medical team leader.
- 21 g. It failed to follow and deviated from the requirement that it would
- 22 ensure that the IV lines used to administer the execution drugs would
- 23 remain uncovered and visible during an execution; instead during four
- 24 of the last five executions, the main line did not remain uncovered and
- 25 was not visible.

26 Execution Team Members and Their Qualifications

27 44. Under Attachment F, any Medical Team member must be a physician,

28 physician’s assistant, nurse, emergency medical technician, paramedic, military

1 corpsman, phlebotomist, or other medically trained personnel including those trained
2 in the United States Military. All Medical Team members also must have at least one
3 year of current and relevant professional experience in their assigned duties on the
4 Medical Team. Two Medical Team members (“IV team”) will be assigned the
5 responsibility of inserting the IV catheters. (Fact Chart #91.)

6 45. Under Department Order 710, Section 710.04, Subsection 1.9.5.1, the Medical
7 Team shall consist of volunteers whose primary duties include administering IV as
8 part of their employment. (Fact Chart #92.)

9 46. Under Department Order 710, Section 710.02, Subsection 1.1, the Division
10 Director of Offender Operations (“Division Director”) is responsible for the planning
11 and overall direction of all pre-execution, execution and post-execution activities.
12 (Deposition of Robert Patton, Oct. 5, 2011, at 23; Fact Chart #89.)

13 47. The Division Director was responsible for selecting the Medical Team
14 members with the approval of Director Ryan. (Ex. 85, Attachment F at B, 2; Ex. 86,
15 Attachment F at B, 2.)

16 48. Robert Patton was ADC’s Division Director during the past five executions.
17 (Patton Dep. 23.)

18 49. There were two Medical Team members who participated in the executions of
19 Jeffrey Landrigan, Eric King, Donald Beaty, Richard Bible, and Thomas West:
20 Medical Team Member IV (“MTMIV”) and Medical Team Leader (“MTL”).

21 50. MTMIV was a medical team member and was an IV team member.
22 (Deposition of MTMIV, Sept. 29, 2011, at 27:4-7.)

23 51. MTMIV is currently employed with ADC since 1996. (MTMIV Dep. 75:3-11.)

24 52. MTMIV was a corpsman from 1988 until 1996. (MTMIV Dep. 71:12-19,
25 74:21-23.) MTMIV has no idea the length of time of his corpsman training; he does
26 not know whether it was weeks, months, or years. (MTMIV Dep. 72:13-24.)
27 MTMIV cannot describe the training he received as a corpsman other than saying it
28 was medical training. (MTMIV Dep. 71:25-72:7.)

1 53. While a corpsman, MTMIV was also an EMT. (MTMIV Dep. 73:10-13; Fact
2 Chart #96.)

3 54. MTMIV could not describe the training he received to be an EMT other than
4 saying he was taught to treat illnesses and injuries. (MTMIV Dep. 73:16-74:11; Fact
5 Chart #96.)

6 55. MTMIV is currently employed with ADC and does not have any medical
7 responsibilities, including setting IV lines, as part of his employment. (MTMIV Dep.
8 75:14-16; Fact Chart #97.)

9 56. MTMIV's primary duties do not include administering IV as part of his
10 employment. (Fact Chart #98.)

11 57. MTMIV does not have at least one year of current and relevant medical
12 experience. (Patton Dep. 104:25-105:4.)

13 58. Under Department Order 710 and Attachment F, MTMIV is not qualified to
14 participate in executions.

15 59. MTMIV's participation in executions violates ADC's protocol and is contrary
16 to the representations made by ADC to the Court in *Dickens*.

17 60. In the past five executions, MTL was the Medical Team Leader and was an IV
18 team member. (MTL Dep. 40:24-41:16, 120:2-3, 157:13-20, 185:17-19, 205:13-17.)
19 MTL was also scheduled to participate as the Medical Team Leader in the execution
20 of Daniel Cook. (MTL Dep. 153:5-7.)

21 61. MTL also participated as an observer in the execution of Robert Comer in May
22 2007. (MTL Dep. 34:5-8.)

23 62. MTL has been compensated at a rate of \$18,000 in cash per completed
24 execution. (MTL Dep. 15:9-16:14, 114:5-115:7, 155:11-22, 183:3-15, 203:14-
25 204:8.) MTL received \$12,000 in cash for the scheduled execution of Daniel Cook.
26 (MTL Dep. 153:5-155:10.) To date, MTL has made at least \$102,000 for his
27 participation in executions since September 2010.

28 63. Since January 2010, MTL has been a physician at a clinic where he sees adult

1 patients with medical problems such as diabetes, heart disease, or high blood
2 pressure. (MTL Dep. 270:13-20.)

3 64. MTL does not place femoral central or peripheral IV lines in his employment
4 as a clinic physician. (MTL Dep. 278:14-21.)

5 65. MTL does not know the last time he placed a femoral central line outside of
6 executions. (MTL Dep. 279:8-11.)

7 66. MTL does not have training on setting an IV line in someone's feet or legs.
8 (MTL 215:21-23; Fact Chart #106.)

9 67. MTL's primary duties do not include administering IVs as part of his
10 employment. (Fact Chart #107.)

11 68. MTL does not have at least one year of regular and current professional
12 experience conducting femoral central line placement.

13 69. Under Department Order 710 and Attachment F, MTL is not qualified to
14 participate in executions.

15 70. MTL's participation in executions violates ADC's protocol and is contrary to
16 the representations made by ADC to the Court in *Dickens*.

17 71. MTL does not intend to participate in future executions in Arizona. (MTL Dep.
18 293:24-294:4.)

19 Medical Team Licensing and Background Review

20 72. Under Attachment F and consistent with ADC's representation to the Court in
21 *Dickens*, selection of the Medical Team members must include a review of the
22 proposed team member's professional qualifications, training, experience,
23 professional licenses and certifications, criminal history, and personal interview.
24 Licensing and criminal history reviews must be conducted prior to contracting,
25 annually, and upon the issuance of a Warrant of Execution. (Fact Chart #112.)

26 73. Under Attachment F and consistent with ADC's representation to the Court in
27 *Dickens*, any documentation establishing qualifications shall be maintained by the
28 Department Director or designee. (Fact Chart #113.)

1 74. No licensing or criminal history review of the MTL or MTMIV was conducted
2 upon before selecting either person for the Medical Team. (Fact Chart #114.)

3 75. No licensing or criminal history review of the MTL or MTMIV was conducted
4 upon issuance of the Warrant of Execution in Landrigan, King, Beaty, Bible, or West.
5 (Fact Chart #115.)

6 76. Before Landrigan's execution, MTMIV received a telephone call from his
7 warden and ADC Director Charles Ryan asking whether he knew how to start an IV
8 and whether he would have a problem doing it for an execution. (MTMIV Dep.
9 8:20-25, 9:3, 90:16-25.) MTMIV was not asked any other questions. (MTMIV Dep.
10 90:16-25; Fact Chart #116.)

11 77. MTMIV was not interviewed by anyone in person regarding his participation
12 in executions. (MTMIV Dep. 10:17-21.)

13 78. On October 14, 2010, less than two weeks before Landrigan's execution,
14 MTMIV signed a form entitled Notice of Execution Involvement. (MTMIV Dep.
15 12:12-25; Ex. 58.)

16 79. ADC did not conduct a professional license check of MTMIV before each
17 execution. (Patton Dep. 111:14-25, 112:1.) This is a violation of ADC's protocol and
18 is contrary to the representations made by ADC to the Court in *Dickens*. (Fact Chart
19 #119.)

20 80. ADC has no documentation demonstrating that MTMIV holds any professional
21 license. (Patton Dep. 112:2-6; Fact Chart #120.) This is a violation of ADC's
22 protocol and is contrary to the representations made by ADC to the Court in *Dickens*.

23 81. In 2008, MTMIV was charged with DUI. His blood-alcohol content was over
24 0.08. (Exs. 61A, 61B.) He paid a fine for reckless driving. (MTMIV Dep. 82:19,
25 83:6-7.)

26 82. In 2000, MTMIV was arrested for consuming liquor in public. (Ex. 62.) He
27 paid a fine.

28 83. In 1984 or 1985, MTMIV was arrested for writing a bad check. (MTMIV Dep.

1 82:5-9.)

2 84. A criminal history check was not completed for MTMIV. (Patton Dep.
3 109:8-17, 111:5-10.) This is a violation of ADC's protocol and is contrary to the
4 representations made by ADC to the Court in *Dickens*. (Fact Chart #124.)

5 85. Patton does not know whether MTMIV has a criminal record. (Patton Dep.
6 112:7-11; Fact Chart #125.)

7 86. Approximately four to six weeks before Landrigan's scheduled execution on
8 October 26, 2010, MTL received a telephone call from Director Ryan asking if he
9 would participate in Landrigan's execution. (MTL Dep. 20:14-23; Fact Chart #126.)

10 87. During that call, Director Ryan asked MTL no other questions. (MTL Dep.
11 19:3-10, 22:4-8; Fact Chart #126.)

12 88. That call was the first contact MTL had with ADC since he reviewed his
13 previous deposition a few weeks after he gave it in October 2008. (MTL Dep.
14 20:24-25, 21:1-14; Fact Chart #126.)

15 89. MTL spoke with Director Ryan on the telephone one more time before
16 Landrigan's execution for the sole purpose to make transportation arrangements for
17 the execution. (MTL Dep. 19:12-15, 23:5-24; Fact Chart #127.)

18 90. MTL met Director Ryan in person on October 24, 2010, two days prior to
19 Landrigan's execution. (MTL Dep. 24:7-12; Fact Chart #128.)

20 91. Director Ryan transported MTL to the prison to practice for Landrigan's
21 execution. (MTL Dep. 24:21-24, 25:22-25, 26:4-12; Fact Chart #128.)

22 92. MTL was not interviewed in person regarding his participation in the execution
23 of Landrigan. This is a violation of ADC's protocol and is contrary to the
24 representations made by ADC to the Court in *Dickens*.

25 93. Patton was not involved in the selection of MTL. (Patton Dep. 98:11-15; Fact
26 Chart #130.)

27 94. A criminal history check was not completed for MTL. (Patton Dep. 109:8-17,
28 111:5-10.) This is a violation of ADC's protocol and is contrary to the

1 representations made by ADC to the Court in *Dickens*. (Fact Chart #131.)

2 95. Patton did not conduct a professional license check of MTL before each
3 execution. (Patton Dep. 111:14-25, 112:1.) This is a violation of ADC's protocol
4 and is contrary to the representations made by ADC to the Court in *Dickens*. (Fact
5 Chart #132.)

6 Documentation of Qualifications and Training of Execution Team

7 96. As Division Director, Patton had the responsibility to ensure that ADC staff
8 understands Department Order 710. (Patton Dep. 24:22-25:16; Fact Chart #133.)

9 97. As Division Director, Patton was expected to know and understand the terms
10 of Department Order 710 better than anyone else. (Patton Dep. 27:15-19.)

11 98. Under Attachment F and consistent with ADC's representation to the Court in
12 *Dickens*, any documentation establishing qualifications, including training of all the
13 medical team members, shall be maintained by the Department Director or designee.
14 (Fact Chart #136.)

15 99. Patton does not document his activities in recommending members of the
16 Special Operations Team or Medical Team. (Patton Dep. 31:4-8; 89:17-90:3.)

17 100. Patton has no documentation that MTMIV satisfies the minimum qualifications
18 under the protocol. (Patton Dep. 35:25-36:8.)

19 101. Patton has no documentation regarding any interview of MTMIV or MTMIV's
20 qualifications. (Patton Dep. 99:9-23, 108:6-109:7.)

21 102. Under Attachment F and consistent with ADC's representation to the Court in
22 *Dickens*, IV Team members and non-medically licensed team members must
23 participate in a minimum of ten (10) execution rehearsals per year with the Special
24 Operations Team. All team members must have participated in at least two (2)
25 execution rehearsals prior to participating in an actual execution. (Fact Chart #135.)

26 103. The training records do not indicate that MTMIV attended at least two (2)
27 execution rehearsals prior to participating in Landrigan's execution. (Ex. 59.) This
28 is a violation of ADC's protocol and is contrary to the representations made by ADC

1 to the Court in *Dickens*.

2 104. ADC has no documentation of MTL attending training sessions. This is a
3 violation of ADC's protocol and is contrary to the representations made by ADC to
4 the Court in *Dickens*.

5 105. MTL received \$6,000 per day in cash for being at the prison the two days prior
6 to each scheduled execution. (MTL 15:9-25, 16:2, 114:15-25, 115:1-7, 155:20-23,
7 183:9-13, 188:8-11, 204:2-8.) MTL attended two days of training sessions before the
8 executions of Landrigan, King, Beaty, and West, and in anticipation for participating
9 in Daniel Cook's scheduled execution. (MTL 154:21-25, 155:1-8; Fact Chart #141.)

10 106. MTL was unable to attend the training sessions the two days immediately prior
11 to Bible's execution. (MTL 187:16-25.) He was, nevertheless, compensated at
12 \$6,000 per day for attending meetings at the prison two days immediately prior to
13 Bible's execution after the training had been completed.

14 Preparation and Recording of Lethal Drugs

15 107. In this lawsuit, in opposition to West's motion for a temporary restraining
16 order, Defendants represented to this Court that ADC's lethal-injection protocol
17 requires medical team members to have "at least one year of current and relevant
18 professional experience," which ensures that they have "current experience working
19 with those chemicals." (*West v. Brewer*, Mot. To Dismiss Complaint and Resp. for
20 Equitable, Injunctive, and Declaratory Relief (ECF No. 11 at 6-7).)

21 108. Defendants also represented that such requirement "has been and will continue
22 to be met." (*Id.* at 11.)

23 109. Lethal-injection drugs are not prepared during training session. (Dep. of Carson
24 McWilliams, Oct. 6, 2011, 40:6-9; Dep. of SOTM1, Oct. 4, 2011, 31:1-8; Dep. of
25 SOTM3, Sept. 19, 2011, 21:11-15; Fact Chart #143.)

26 110. MTL, along with MTMIV, prepared the drugs for each execution. (MTL Dep.
27 124:8-14; Fact Chart #145.)

28 111. MTL does not have any experience in his regular employment preparing

1 sodium thiopental and he does not use that drug outside of executions. (MTL Dep.
2 57:15-21.) MTL's participation in executions is contrary to the representations made
3 by ADC to the Court in this lawsuit.

4 112. MTMIV has no current medical experience and has been employed as a
5 correctional officer with ADC for the past fifteen years. (Fact Chart #147.)

6 113. MTMIV does not prepare drugs as part of his regular employment. MTMIV's
7 participation in executions is contrary to the representations made by ADC to the
8 Court in this lawsuit.

9 114. Under Attachment F, an assigned Medical Team member shall be responsible
10 for preparing and labeling the assigned sterile syringes, affixing two labels to each
11 syringe. (Fact Chart #149.)

12 115. In the executions of Landrigan, King, Beaty, Bible, and West, a Medical Team
13 member did not label the syringes and there was only one label affixed to each
14 syringe. (MTL Dep. 56:15-25; SOTM1 Dep. 43:6-13, 86:24-25.) This is a violation
15 of ADC's protocol.

16 116. Under Attachment F, once the drugs are prepared and the syringes labeled,
17 MTL is required to attach two complete sets of the syringes to the 3-Gang, 3-Way
18 manifold. (Fact Chart #151.)

19 117. The drugs are drawn into a syringe and then labeled by a special operations
20 team member. (MTMIV Dep. 34:24-35:9.)

21 118. Defendants' failure to ensure that drugs are drawn into pre-labeled syringes falls
22 below the generally accepted standard of care. (Ex. 258 at 3 ¶ 3.e.)

23 119. In the executions of Landrigan, King, Beaty, Bible, and West, MTL did not
24 attach the syringes to the manifold. (MTL Dep. 63:19-22, 125:5-10.) This is a
25 violation of ADC's protocol. (Fact Chart #152.)

26 120. Under Attachment F, a member of the Special Operations Team shall be
27 designated as the Recorder for each execution. (§ E, ¶ 14.) The Recorder is
28 responsible for completing Form 710-9, Sequence of Chemicals. (§ E, ¶ 14.) The

1 Recorder shall document on the form the amount of each chemical administered and
2 confirm that it was administered in the order set forth in the Chemical Chart. (§ E,
3 ¶ 14.) Any deviation from the written procedure shall be noted and explained on the
4 form. (§ E, ¶ 14.) Moreover, the full dose contained in each syringe shall be
5 administered to the inmate and subsequently documented by the designated Recorder.
6 (§ H, ¶ 15; Fact Chart #153.)

7 121. The Recorder for the execution of Jeffrey Landrigan did not complete a
8 Sequence of Chemicals Form, (SOTM8 Dep. 34:1-4.) did not specifically record that
9 a full dose of each syringe was administered (Dep. of SOTM8, Sept. 19, 2011,
10 33:11-18; Ex. 41.), and did not record an explanation for deviation from the written
11 procedure. This is a violation of ADC's protocol.

12 122. The Recorder for the execution of Eric King did not complete a Sequence of
13 Chemicals Form, (SOTM3 Dep. 53:12-14) did not specifically record that a full dose
14 of each syringe was administered (SOTM3 Dep. 52:12-20; Ex. 29), and did not record
15 an explanation for deviation from the written procedure. (SOTM3 Dep. 51:21-52:11.)
16 This is a violation of ADC's protocol.

17 123. The Recorder for the execution of Donald Beaty did not complete a Sequence
18 of Chemicals Form, (SOTM2 Dep. 36:21-25) did not specifically record that a full
19 dose of each syringe was administered (Dep. of SOTM2, Sept. 19, 2011, 35:21-24;
20 Ex. 18), and did not record an explanation for deviation from the written procedure.
21 (SOTM2 35:16-20.) This is a violation of ADC's protocol.

22 124. The Recorder for the execution of Richard Bible did not complete a Sequence
23 of Chemicals Form, (SOTM3 Dep. 53:12-14) did not specifically record that a full
24 dose of each syringe was administered (SOTM3 Dep. 68:11-15; Ex. 34), and did not
25 record an explanation for deviation from the written procedure. (SOTM3 68:16-19.)
26 This is a violation of ADC's protocol.

27 125. The Recorder for the execution of Thomas West did not complete a Sequence
28 of Chemicals Form, (SOTM2 Dep. 48:21-24) did not specifically record that a full

1 dose of each syringe was administered (SOTM2 Dep. 47:11-14; Ex. 23), and did not
2 record an explanation for deviation from the written procedure. (SOTM2 47:7-10.)
3 This is a violation of ADC's protocol.

4 126. Under Attachment F, the Recorder shall also observe the disposal of all
5 chemicals that were not administered and document in the Sequence of Chemicals
6 form the chemical name, syringe number, amount disposed, date disposed and the
7 time. (§ J, ¶ 3.)

8 127. The Recorder for the execution of Jeffrey Landrigan did not observe the
9 disposal of the drugs not used during the execution and did not record the disposal
10 of such drugs. (SOTM8 Dep. 33:19-25.) This is a violation of ADC's protocol.

11 128. The Recorder for the execution of Eric King did not observe the disposal of the
12 drugs not used during the execution and did not record the disposal of such drugs.
13 (SOTM3 Dep. 53:2-7.) This is a violation of ADC's protocol.

14 129. The Recorder for the execution of Donald Beaty did not record the disposal of
15 drugs not used during the execution. (SOTM2 Dep. 35:25-36:3.) This is a violation
16 of ADC's protocol.

17 130. The Recorder for the execution of Richard Bible did not record the disposal of
18 drugs not used during the execution. (SOTM3 Dep. 68:20-23.) This is a violation
19 of ADC's protocol.

20 131. The Recorder for the execution of Thomas West did not record the disposal of
21 drugs not used during the execution. (SOTM2 Dep. 47:15:18.) This is a violation of
22 ADC's protocol.

23 132. For the executions of Landrigan, King, Beaty, Bible, and West, there is no
24 Sequence of Chemical form. This is a violation of ADC's protocol.

25 133. For the executions of Landrigan, King, Beaty, Bible, and West, there is no
26 documentation that explains any deviation from the written procedure regarding the
27 drugs administered. This is a violation of ADC's protocol.

28 134. For the executions of Landrigan, King, Beaty, Bible, and West, there is no

1 documentation that records that the full dose of each drug was administered. This is
2 a violation of ADC's protocol.

3 IV Placement and Administration of Drugs

4 135. Under Attachment F in effect for the executions of Landrigan, King, and Beaty,
5 Division Director Patton was required, upon receipt of a Warrant of Execution, to
6 ensure that IV Team member(s) physically inspect the inmate to predetermine
7 appropriate venous access locations. (Fact Chart #169.)

8 136. No IV Team member physically inspected Landrigan, King, or Beaty upon
9 issuance of the warrant. (MTMIV Dep. 64:23-25, 65:1-2; MTL Dep. 39:9-11,
10 218:7-10) This is a violation of ADC's protocol. (Fact Chart #170.)

11 137. Under Attachment F in effect for the executions Bible and West, Patton was
12 required, upon receipt of a Warrant of Execution, to ensure that ADC's medical staff
13 or IV Team member(s) physically inspect the inmate to predetermine appropriate
14 venous access locations. (Fact Chart #171.)

15 138. No IV Team member physically inspected Bible or West upon issuance of the
16 warrant. (MTMIV Dep. 64:23-25, 65:1-2.) This is a violation of ADC's protocol.

17 139. Patton maintains no documentation that ADC's medical staff physically
18 inspected Bible or West to predetermine appropriate venous access locations nor does
19 Patton know the results of any inspections. (Patton Dep. 113:6-13, 114:17-25,
20 115:1-3.) This is a violation of ADC's protocol.

21 140. Under Attachment F and consistent with ADC's representation to the Court in
22 *Dickens*, IV Team members are to site and insert a primary IV catheter and a backup
23 IV catheter in two separate locations in the peripheral veins utilizing appropriate
24 medical procedures. (§ G, ¶ 1.) The insertion sites in order of preference shall be:
25 arms, hands, ankles and feet, as determined medically appropriate by the Medical
26 Team Leader. (§ G, ¶ 1.) Both primary and backup IV lines are to be placed unless
27 in the opinion of the Medical Team Leader it is not possible to reliably place two
28 peripheral lines. (§ G, ¶ 1.) Should the use of the backup IV catheter be determined

1 necessary, a complete set of backup chemicals is to be administered in the backup IV
2 as set forth in the chemical chart of Attachment F. (§ G, ¶ 7.) (Fact Chart #174.)

3 141. Under Attachment F and consistent with ADC's representation to the Court in
4 *Dickens*, if it becomes necessary to use an alternate means of establishing an IV line
5 because, in the opinion of the Medical Team Leader, *it is not possible* to reliably
6 place a peripheral line in the inmate, a Medical Team member may utilize a
7 percutaneous central line in the inmate's femoral vein in the thigh if, in the opinion
8 of a qualified Medical Team member, such a line may be reasonably placed. (§ G, ¶
9 8.) (Fact Chart #175.)

10 142. In the executions of Jeffrey Landrigan, Eric King, Donald Beaty, Richard
11 Bible, and Thomas West, a central line was placed in the femoral area. (MTMIV
12 Dep. 39:2-5, 64:1-7, 64:12-13; MTL Dep. 39:23-25, 40:1.) In King, Bible, and West,
13 a peripheral line was also placed. (Fact Chart #176.)

14 143. In the executions of Landrigan, King, Beaty, and Bible, the drugs were
15 administered through the femoral central line. (Ryan Dep. 126:21-23, 127:9-16, MTL
16 Dep. 131:20-24, 177:16-21, 205:21-23; Fact Chart #177.)

17 144. West was the only execution since 2010 in which the lethal drugs were
18 administered through a peripheral line. (Fact Chart #177.)

19 145. In Landrigan, no attempt was made to set a peripheral IV line. This is a
20 violation of ADC's protocol. (MTL Dep. 36:5-22.)

21 146. In King, Beaty, and Bible, the femoral central line was placed before an attempt
22 was made to set a peripheral line. (MTMIV Dep. 39:2-5; MTL Dep. 167:21-23.)
23 This is a violation of ADC's protocol.

24 147. In King and Bible, peripheral lines were set after a femoral central line was
25 placed. (MTL Dep. 125:16-126:23, 190:17-191:1; MTMIV Dep. 63:15-22.) This is
26 a violation of ADC's protocol.

27 148. After Landrigan's execution, Defendants decided that they would set a
28 peripheral line as the back up to the femoral central line. (MTL Dep. 120:18-121:4,

1 122:19-123:13.)

2 149. Defendants' rationale for placement of a central line is in contrast to
3 recommendations for medical care and is contrary to the generally accepted standard
4 of care. Placing a peripheral line after a central line is illogical, internally
5 inconsistent, and contrary to the generally accepted standard of care. (Ex. 258 at 2 ¶
6 2.)

7 150. MTL did not survey the veins of Landrigan, King, Beaty, or Bible before
8 placing the femoral central line. (MTL Dep. 218:7-10.)

9 151. Neither MTL nor MTMIV attempted to set an IV in the hands, feet, or ankles
10 during any of the five executions. (MTL Dep. 215:5-9; MTMIV Dep. 63:23-25, 64:3-
11 5, 64:7-13, 64:23-65:2; 94:16-17, 94:25-96:6.) This is a violation of ADC's protocol.

12 152. MTL preferred to administer the lethal drugs through the femoral vein. (Ryan
13 Dep. 139:21-25, 140:1-2; MTL Dep. 206:23-25.)

14 153. In none of the executions were two (a primary and backup) peripheral IV lines
15 placed. (Fact Chart #183.)

16 154. Under Attachment F in effect for the executions of Landrigan, King, and Beaty,
17 the IV catheter in use was not to be covered and was to remain visible throughout the
18 procedure. Also under Attachment F, the prisoner was required to be positioned such
19 that the Medical Team members and Special Operations Team Leader can directly
20 observe the prisoner's arms (or other designated IV location). (Fact Chart #184.)

21 155. In the executions of Landrigan, King, Beaty, and Bible, the femoral central line
22 was not visible to the Medical Team members or the Special Operations Team
23 Leader. This is a violation of ADC's protocol. (Fact Chart #185.)

24 156. In the executions of Landrigan, King, Beaty, and Bible, Warden Carson
25 McWilliams was the only person watching the femoral line. (McWilliams Dep.
26 84:3-6; MTL Dep. 199:17-22.)

27 157. McWilliams was not trained regarding potential problems or complications
28 with the femoral line. (McWilliams Dep. 87:23-24, 84:19-25.) MTL did not tell

1 McWilliams what he should be watching for. (MTL Dep. 200:3-5.)

2 Execution of Jeffrey Landrigan

3 158. The Medical Team members who participated in the execution of Jeffrey
4 Landrigan were not qualified under Attachment F and ADC's representation to the
5 Court in *Dickens*.

6 159. Before Landrigan's execution, ADC did not conduct licensing and background
7 checks of the Medical Team members as required under Attachment F and consistent
8 with ADC's representation to the Court in *Dickens*. (Fact Chart #189.)

9 160. A femoral central line was used to administer the lethal injection drugs that
10 killed Jeffrey Landrigan. No other IV line was placed. (Fact Chart #190.)

11 161. MTL placed the femoral central line. At the time of Landrigan's execution,
12 MTL did not have one year of "regular and current professional experience
13 conducting that procedure."

14 162. The main line and the backup line were both in the central line. (McWilliams
15 Dep. 108:18-23.)

16 163. MTL made the decision to use a central line for the execution of Landrigan at
17 least one day prior to the scheduled execution without examining Landrigan's veins.
18 (McWilliams Dep. 34:8-18, 38:8-16; Ryan Dep. 123:8-25, 128:11-14.)

19 164. MTL punctured the skin at least twice before setting the line. (MTL Dep.
20 75:21-22.)

21 165. "The medical team leader repeatedly needs multiple attempts to successfully
22 perform cannulation of the femoral vein despite reporting using ultrasound guidance,
23 which would be below expectations." (Ex. 258 at 2, ¶ 1.d.)

24 166. "The repeated attempts to secure the femoral vein contradict the physician's
25 stated purpose of using a central line, which is to reduce discomfort to the inmate."
26 (Ex. 258 at 2, ¶ 1.d.)

27 167. MTL used between 1 to 3 cc's of lidocaine during the procedure. (MTL Dep.
28 76:3-8.)

1 168. MTL did not administer additional lidocaine after his first attempt at setting the
2 line was unsuccessful. (MTL Dep. 78:2-5.)

3 169. The amount of Xylocaine, which is the brand name for lidocaine, recorded as
4 being used on the Chemical Disposition Form is incorrect. (SOTM1 Dep. 65:6.)

5 170. MTL believes that lidocaine only reduces the pain from the femoral central line
6 procedure 50% of the time. (MTL Dep. 152:19-22.)

7 171. MTL's opinion that 50% of patients do not benefit from lidocaine during
8 femoral central line placement is incorrect and is contrary to generally accepted
9 reasonable medical standards. (Ex. 258 at 2, ¶ 1.e.)

10 172. MTL used an ultrasound while placing the central line, but MTMIV is the one
11 holding it during the procedure. (MTL Dep. 78:9-19.)

12 173. MTL's practice, training, understanding and implementation falls below
13 reasonable standards of competence with respect to placement of femoral central
14 lines, use of ultrasound, and recognition of possible complications. (Ex. 258 at 1, ¶
15 1.)

16 174. The Medical Team made no attempt to insert an IV, either backup or primary,
17 in Mr. Landrigan's peripheral veins. (MTL Dep. 36:17-25.)

18 175. MTL does not know whether it was possible to reliably place a peripheral line.
19 (MTL Dep. 85:21-24.)

20 176. Autopsy findings reveal that Landrigan's veins were intact and not sclerotic.
21 (Ex. 259 at 5.)

22 177. There are three separate documents that were prepared by ADC related to
23 Landrigan's execution: Special Operations Checklist (Ex. 42); Correctional Service
24 Log (Ex. 41); and Chemical Disposition Form. (Ex. 43.) (Fact Chart #197.)

25 178. The Special Operations Checklist was completed by Warden McWilliams'
26 Assistant. (McWilliams Dep. 93:1-11.)

27 179. The Correctional Service Log was completed by SOTM8, who indicated that
28 it was an accurate account of the information that he recorded during Landrigan's

1 execution. (SOTM8 Dep. 31:25-32:3; Fact Chart #199.)

2 180. The Chemical Disposition Form was completed by the Special Operations
3 Team Leader (SOTM1) who indicated that the Form was correct except for the
4 amount of Xylocaine given. (SOTM1 Dep. 65:6-13, 66:14-17; Fact Chart #200.)

5 181. Contrary to the requirements in Attachment F, no Sequence of Chemicals Form
6 was completed for Landrigan's execution. (SOTM8 Dep. 34:1-4.) Also contrary to
7 Attachment F, there is no specific recording that a full dose of each syringe was
8 administered to Landrigan (SOTM8 Dep. 33:11-18), and there is no explanation for
9 the deviation from the written procedure.

10 182. Contrary to the requirements in Attachment F, the Recorder did not document
11 drugs that were disposed of after the execution nor did the Recorder observe the
12 disposal of the unused drugs. (SOTM8 Dep. 33:19-25.)

13 183. The Special Operations Checklist indicates that 8 syringes filled with 1.25
14 grams each of sodium thiopental were administered to Landrigan at 22:15 on October
15 26, 2011. (Fact Chart #203.)

16 184. The Correctional Service Log, maintained by the Recorder, does not indicate
17 the amounts of any drug administered to Landrigan. The Correctional Service Log
18 indicates that Bank 2, which is the back-up set of drugs, was administered in part
19 after Landrigan was pronounced dead. (Ex. 41; Fact Chart #204.)

20 185. The Chemical Disposition Form indicates that 5,000 mg of Thiopental was
21 administered to Landrigan. SOTM1 made the mistake of recording 5,000 mg and he
22 made this mistake because he recorded the amount in the vial that was used to cause
23 death; an additional 5,000 mg was administered after death. (SOTM1 Dep.
24 58:4-59:21; Fact Chart #205.)

25 186. Landrigan was pronounced dead approximately three minutes after the
26 potassium chloride was administered. (Ex. 41; Fact Chart #206.)

27 187. Contrary to Attachment F, ADC Director Ryan instructed that all remaining
28 drugs should be administered to Landrigan even after he was deceased. (SOTM1

1 Dep. 58:22-24, 62:21-23; MTL Dep. 106:19-109:13.)

2 188. An additional 5 grams of sodium thiopental was administered to Landrigan
3 after he was pronounced deceased. MTL instructed that the remaining drugs not be
4 administered into Landrigan's deceased body because he was concerned that a vein
5 may rupture causing drugs to go inside the abdominal cavity. (MTL Dep.
6 107:23-108:16; Fact Chart #208.)

7 189. If Attachment F were followed, Landrigan should have received 120 mg of
8 pancuronium bromide. The Chemical Disposition Form indicates that he received
9 1,100 mg of pancuroium bromide. SOTM1 indicated that this was correct. (SOTM1
10 Dep. 66:14-17.)

11 190. If Attachment F were followed, Landrigan should have received 240 mEq of
12 potassium chloride. The Chemical Disposition Form indicates that he received 360
13 mEq of potassium chloride. SOTM1 indicated that this was correct. (SOTM1 Dep.
14 66:14-17.)

15 191. Under Attachment F, the prisoner will be positioned to enable the Medical
16 Team and Special Operations Team Leader to directly observe the inmate and the
17 inmate's arms (or other designated IV location); the IV catheter in use shall not be
18 covered and shall remain visible throughout the procedure. In Landrigan, the central
19 line was used to administer the lethal drugs and it remained covered throughout the
20 execution. The Medical Team and the Special Operations Team Leader did not
21 observe the central line. (MTMIV Dep. 101:1-102:2; MTL Dep. 94:22-95:3; SOTM1
22 Dep. 51:22-25.)

23 192. The Special Operations Team Leader believed it was not his responsibility to
24 observe the central line under the protocol. (SOTM1 Dep. 51:22-25; Fact Chart
25 #212.)

26 193. When MTL went into the execution chamber, he does not know if he lifted up
27 the sheet covering the central line to view the catheter. (MTL Dep. 101:12-14.)

28 194. MTL conducted a consciousness check that included checking corneal reflex

1 with a sterile swab, checking the gag reflex in the back of the throat, and squeezing
2 a finger as hard as possible. (MTL Dep. 96:23-97:13; Fact Chart #214.)

3 195. MTL would not know from conducting his check if the prisoner was paralyzed
4 instead of sedated. (MTL Dep. 97:25-98:5.)

5 196. MTL's understanding of assessing and monitoring sedated individuals is
6 incorrect and falls below the generally accepted standard of care. (Ex. 258 at 3, ¶ 3.a.)

7 Execution of Eric King

8 197. The Medical Team members who participated in the execution of Eric King
9 were not qualified under Attachment F and ADC's representation to the Court in
10 *Dickens*.

11 198. Before King's execution, ADC did not conduct licensing and background
12 checks of the Medical Team members as required under Attachment F and consistent
13 with ADC's representation to the Court in *Dickens*. (Fact Chart #217.)

14 199. A femoral central line was used to administer the lethal injection drugs that
15 killed Eric King. A peripheral IV line was also placed in King's left arm. (MTL Dep.
16 126:6-8, 139:5-8; Fact Chart #218.)

17 200. MTL placed the femoral central line. (MTL Dep. 125:16-21.) At the time of
18 King's execution, MTL did not have one year of "regular and current professional
19 experience conducting that procedure."

20 201. A day or two before King's execution, Ryan and Warden McWilliams informed
21 MTL that they wanted an attempt to be made set a peripheral IV line. (MTL Dep.
22 120:18-121:25.) The plan would be that MTL would set a central line and once that
23 line was inserted, then MTMIV would set a peripheral line. (MTL Dep. 123:7-13;
24 Fact Chart #220.)

25 202. MTL made decision to use central line as the main line in King. (MTL Dep.
26 139:5-8; Fact Chart #221.)

27 203. The main line used for administering the lethal drugs was the central line; the
28 line designated as a backup line was also the central line. (MTL Dep. 131:20-24;

1 Fact Chart #222.)

2 204. There was no backup line set to the peripheral IV in King's arm. (MTL Dep.
3 132:12-17; Fact Chart #223.)

4 205. MTL placed the femoral central line. MTL punctured the skin at least twice
5 before setting the line. (MTL Dep. 126:9-15.) MTL did not administer additional
6 lidocaine after his first attempt at setting the line was unsuccessful. (MTL Dep.
7 126:20-23.)

8 206. MTL used a staple rather than a stitch to attach the central line catheter to
9 King's leg. MTL was not trained to use staples in this procedure (MTL Dep.
10 128:16-18) and he has not used staples when he placed femoral lines in the past
11 (MTL Dep. 130:3-5; Fact Chart #225.)

12 207. MTL is not familiar with using a staple and he had not ever used them before
13 King. (MTL Dep. 128:20-22; Fact Chart #225.)

14 208. MTMIV made at least two attempts before setting a peripheral IV line in
15 King's left arm. (MTL Dep. 131:8-10; Fact Chart #226.)

16 209. While MTMIV was attempting to set the peripheral line, MTL was putting the
17 suture and staples in King and flushing the central line. (MTL Dep. 130:11-16; Fact
18 Chart #226.)

19 210. After MTMIV set the peripheral line, MTL did not check the line to ensure it
20 was in proper working order. (MTMIV Dep. 131:13-19; Fact Chart #226.)

21 211. Contrary to Attachment F, the Medical Team and the Special Operations Team
22 Leader did not observe the central line. (MTMIV Dep. 101:18-102:1; MTL Dep.
23 181:8-11, 199:17-22; SOTM1 Dep. 70:1-22.)

24 212. MTL, along with MTMIV, prepared the drugs for King's execution. (MTL
25 Dep. 124:8-14; Fact Chart #228.)

26 213. When MTL started to prepare the potassium chloride, one of the Special
27 Operations Team Members told him the wrong amount of the drug. MTL prepared
28 a diluted amount. (MTL Dep. 135:3-15.) He recalled that he did not dilute potassium

1 chloride in the previous execution so he discarded the drug. (MTL Dep.
2 137:16-138:6.) (Fact Chart #229.)

3 214. There are three separate documents that were prepared by ADC related to
4 King's execution: Special Operations Checklist (Ex. 30); Continuous Correctional
5 Log (Ex. 29); and Chemical Disposition Form. (Ex. 31; Fact Chart #230.)

6 215. The Special Operations Checklist was completed by Warden McWilliams'
7 Assistant. (McWilliams Dep. 93:1-11.)

8 216. The Continuous Correctional Log was completed by SOTM3, who indicated
9 that it was an accurate account of the information that he recorded during King's
10 execution. (SOTM3 Dep. 50:17-20; Fact Chart #232.)

11 217. The Chemical Disposition Form was completed by the Special Operations
12 Team Leader or SOTM1, who indicated that the Form was correct. (SOTM1 Dep.
13 79:02-08; Fact Chart #233.)

14 218. Contrary to the requirements in Attachment F, no Sequence of Chemicals Form
15 was completed for King's execution. (SOTM3 Dep. 53:12-14.) Also contrary to
16 Attachment F, there is no specific recording that a full dose of each syringe was
17 administered to King despite (SOTM3 Dep. 52:12-20), and there is no explanation
18 for the deviation from the written procedure. (SOTM3 Dep. 51:25-52:11.)

19 219. Before he was pronounced dead, King was given an additional dose of
20 potassium chloride. Contrary to Attachment F, before he was pronounced dead and
21 after the additional dose of potassium chloride was given, King was given additional
22 dose of sodium thiopental. (MTL Dep. 240:20-22, 241:11-13.)

23 220. MTL does not remember exactly why additional sodium thiopental was given
24 to King. (MTL Dep. 242:10-12.) In hindsight, MTL does not know whether that was
25 the "greatest idea or the greatest decision." (MTL Dep. 243:17-22.)

26 221. MTL testified that additional sodium thiopental would have "just deepened the
27 sedation that [King] was already in." (MTL Dep. 247:7-8.)

28 222. When asked whether the sodium thiopental could have circulated through his

1 system if his heart was not beating, MTL responded, “That’s a good question.
2 Probably not.” (MTL Dep. 247:11-16; Fact Chart #236.)

3 223. MTL’s “demonstrated application of pharmacology (i.e. use of medications)
4 is below reasonable expectations.” (Ex. 258 at 3 ¶ 3.)

5 224. After King’s execution, MTL starting “thinking that it would be better to have
6 a peripheral as a backup.” (MTL Dep. 197:5-8; Fact Chart #237.)

7 225. King was declared dead approximately eight minutes after the complete set of
8 lethal-injection drugs were administered. (Fact Chart #238.)

9 226. MTL learned about King’s crime before the execution. (MTL Dep.
10 115:21-116:8.)

11 Execution of Donald Beaty

12 227. The Medical Team members who participated in the execution of Donald Beaty
13 were not qualified under Attachment F and ADC’s representation to the Court in
14 *Dickens*.

15 228. Before Beaty’s execution, ADC did not conduct licensing and background
16 checks of the Medical Team members as required under Attachment F and consistent
17 with ADC’s representation to the Court in *Dickens*. (Fact Chart #241.)

18 229. A femoral central line was used to administer the lethal injection drugs that
19 killed Donald Beaty. MTL determined it would not be possible to place a peripheral
20 IV line. (MTL Dep. 197:13-15; Fact Chart #242.)

21 230. MTL placed the femoral central line. At the time of Beaty’s execution, MTL
22 did not have one year of “regular and current professional experience conducting that
23 procedure.”

24 231. MTL punctured the skin at least twice before setting the femoral central line.
25 (MTL Dep. 168:5-10.)

26 232. Beaty was nervous and twitching during the setting of the IV lines. (MTL Dep.
27 169:1-17.) MTL did not ask that Beaty be given a sedative to calm him because it
28 would have taken thirty minutes to take effect. (MTL Dep. 70:1-7.)

1 233. MTMIV attempted to set a peripheral line but he could not do it. (MTL Dep.
2 173:14-20.) MTL does not remember seeing MTMIV attempt to set the peripheral
3 line. (MTL Dep. 173:15-16.) MTL did not attempt to set a peripheral line himself.
4 (MTL Dep. 173:21-22.)

5 234. MTL advised that the peripheral line not be set and indicated that the central
6 line was “100 percent sure.” (MTL Dep. 172:21-25; Fact Chart #247.)

7 235. The main line used for administering the lethal drugs was the central line; the
8 line designated as a backup line was also the central line. (MTL Dep. 177:16-21.)

9 236. Contrary to Attachment F, the Medical Team and the Special Operations Team
10 Leader did not observe the central line. (MTMIV Dep. 101:18-102:1; MTL Dep.
11 181:8-11; Fact Chart #248.)

12 237. Inconsistent with Attachment F, ADC used Pentobarbital to execute Beaty.

13 238. The afternoon before Beaty’s execution, Director Ryan asked MTL about
14 switching to pentobarbital. (MTL Dep. 158:21-23.)

15 239. MTL indicated that sodium thiopental and pentobarbital were “essentially
16 equivalent” and “should work exactly the same.” (MTL Dep. 159:8-11.) He
17 determined this from looking at the package inserts and looking up general
18 information on the internet. (MTL Dep. 159:13-15.)

19 240. MTL diluted the pentobarbital in half because the protocol called for four
20 syringes. (MTL Dep. 163:11-18, 164:23-165:1; Fact Chart #252.)

21 241. Beaty was declared dead approximately four minutes after the complete set of
22 lethal-injection drugs were administered.

23 242. MTL learned about Beaty’s crime before the execution. (MTL Dep.
24 156:21-23.) MTL was curious about knowing before he performed an execution.
25 (MTL Dep. 157:3-7.)

26 Execution of Richard Bible

27 243. The Medical Team members who participated in the execution of Richard
28 Bible were not qualified under Attachment F and ADC’s representation to the Court

1 in *Dickens*.

2 244. Before Bible's execution, ADC did not conduct licensing and background
3 checks of the Medical Team members as required under Attachment F and consistent
4 with ADC's representation to the Court in *Dickens*. (Fact Chart #256.)

5 245. A femoral central line was used to administer the lethal injection drugs that
6 killed Richard Bible. A peripheral IV line was also placed in Bible's left arm. (Fact
7 Chart #257.)

8 246. MTL placed the femoral central line. At the time of Bible's execution, MTL
9 did not have one year of "regular and current professional experience conducting that
10 procedure."

11 247. After the line was set, MTMIV set a peripheral IV line in Bible's left arm.
12 (MTL Dep. 193:16-194:2.) MTL did not observe MTMIV setting peripheral line and
13 is not sure how many attempts it took MTMIV to set the line. (MTL Dep. 194:18-24;
14 Fact Chart #259.)

15 248. The femoral central line was the main line and the peripheral IV line was set
16 as the backup line. (MTL Dep. 195:17-23; Fact Chart #260.)

17 249. MTL and MTMIV could not see the central line during the execution. (MTL
18 Dep. 199:17-22; MTMIV Dep. 101:18-102:1; Fact Chart #261.)

19 250. Bible was declared dead approximately two minutes after the complete set of
20 lethal-injection drugs were administered. (Fact Chart #262.)

21 251. Bible's heart stopped at the end of the administration of the complete set of
22 lethal-injection drugs. A backup dose of potassium chloride was administered after
23 MTL indicated on the EKG printout that Bible's heart had stopped.

24 Execution of Thomas West

25 252. The Medical Team members who participated in the execution of Thomas West
26 were not qualified under Attachment F and ADC's representation to the Court in
27 *Dickens*.

28 253. Before West's execution, ADC did not conduct licensing and background

1 checks of the Medical Team members as required under Attachment F and consistent
2 with ADC's representation to the Court in *Dickens*. (Fact Chart #265.)

3 254. A peripheral IV line was used to administer the lethal injection drugs that killed
4 Thomas West. (MTL Dep. 205:21-23.) A femoral central line was also placed in
5 West's groin. (Fact Chart #266.)

6 255. Director Ryan approached MTL the morning of West's execution and indicated
7 that court was scrutinizing the protocol. Ryan asked MTL to use a peripheral line as
8 the primary line. MTL said he would make that attempt. (MTL Dep. 205:21-206:16,
9 207:8-16; Fact Chart #267.)

10 256. MTL did not want to administer the drugs through the peripheral line in West.
11 (MTL Dep. 206:13-18; Fact Chart #268.)

12 257. That MTL takes orders from non-medical personnel when performing a
13 procedure and giving medications is contrary to generally accepted medical standards.
14 (Ex. 258 at 3, ¶ 4.)

15 258. MTL informed Director Ryan that pentobarbital or thiopental should only be
16 administered through a large peripheral vein and that it would cause some discomfort.
17 (MTL Dep. 208:1-8; Fact Chart #269.)

18 259. After Bible's execution, MTL discussed with Director Ryan concerns about
19 what happened in other states who execute prisoners using a peripheral vein. (MTL
20 Dep. 208:9-209:5; Fact Chart #270.)

21 260. MTL attempted to place an IV in West's right arm while at the same time
22 MTMIV attempted to place an IV in West's left arm. (MTL Dep. 211:4-10,
23 212:11-14; Fact Chart #271.)

24 261. MTL unsuccessfully attempted twice to set the IV and then found a vein.
25 (MTL Dep. 211:11-15, 212:15-18.) MTL's primary duties do not include
26 administering IVs as part of his employment.

27 262. MTMIV was unsuccessful at setting an IV in the left arm. (MTL Dep.
28 211:16-20; MTMIV 61:6-13.) MTL did not examine the left arm after MTMIV was

1 unsuccessful. (MTL Dep. 215:1-4; Fact Chart #273.)

2 263. Contrary to Attachment F, MTL did not attempt to set an IV line anywhere else
3 on West's body besides his arms. (MTL Dep. 215:5-9.)

4 264. MTL determined that a backup line could not be placed in the left arm or in the
5 right arm. (MTL Dep. 211:25-212:8; Fact Chart #275.)

6 265. Contrary to Attachment F, MTL placed a femoral central line as a backup line.
7 (MTL Dep. 211:25-212:8.)

8 266. At the time of West's execution, MTL did not have one year of "regular and
9 current professional experience conducting that procedure."

10 267. Contrary to Attachment F, MTL did not personally watch the peripheral IV
11 where the drugs were being administered to West. (MTL Dep. 220:1-13.)

12 268. West was declared dead approximately two minutes after the complete set of
13 lethal-injection drugs were administered. (Fact Chart #278.)

14 269. MTL learned about West's crime before the execution. (MTL Dep. 204:12-
15 24.)

16 Acquisition of Lethal Drugs

17 270. The drugs that were administered to Landrigan and King during their
18 executions were obtained in violation of the requirements of federal law. (Ex. 144.)

19 271. Some of the prisoners whose executions have been scheduled since 2010, filed
20 lawsuits challenging ADC's acquisition of the lethal-injection drugs.

21 272. In various litigation, the State of Arizona has represented that Ryan avowed
22 that drugs to be used in Jeffrey Landrigan's execution were obtained legally.

23 *Landrigan v. Brewer*, Case No. 2:10-cv-02246-ROS (D. Ariz.) (ECF No. 7) Resp. to
24 Compl. at 2:2-3, and Attachment A, ¶ 3, Oct. 22, 2010.⁵ (Fact Chart #280.)

25

26

27 ⁵In *Brewer v. Landrigan*, Case No. 10A416 (U.S.), the State also informed the
28 United States Supreme Court that the drugs to be used in Landrigan's execution were
obtained legally. See Anticipatory Motion to Lift Stay, Oct. 25, 2010, at 2

1 273. Before Daniel Cook’s scheduled execution, the State further informed the
2 United States Supreme Court that ADC had DEA approval to import the drugs from
3 a foreign country.⁶ (Fact Chart #283.)

4 274. ADC typically purchases pharmaceutical drugs through a multi-state contract
5 known as the Minnesota Multistate Contracting Alliance for Pharmacy (“MMCAP”).
6 (FlanaganDep. 41:1-9.)

7 a. Pharmacist 2, who is ADC’s pharmacy program manager, and is ADC’s
8 most senior pharmacist, is also the pharmaceutical representative for the
9 State of Arizona for the MMCAP contract. (Dep. of Pharmacist 2, Oct.
10 19, 2011, 12:11-13, 17:18-20.)

11 b. Pharmacist 2 works with MMCAP’s Dr. Sara Turnbow, who is
12 MMCAP’s senior pharmacist. (Ex. 161; Pharmacist 2 Dep. 19:14-25.)

13 c. Pharmacist 2 knows Dr. Turnbow personally and trusts Dr. Turnbow’s
14 opinion. (Pharmacist 2 Dep. 20:8-15.)

15
16
17 (“However, the State provided information regarding the expiration date of the drugs
18 and avowed that the drugs were lawfully obtained with the approval of U.S. Customs
19 and Food and Drug Administration (“FDA”) officials.”); *id.* at 5 (“However, the State
20 provided information regarding the expiration date of the drugs and avowed that the
21 drugs were lawfully obtained with the approval of U.S. Customs and Food and Drug
22 Administration (“FDA”) officials.”); *id.* at 6 (“However, the State has in fact made
23 repeated avowals that the drugs were obtained legally, and that the process of
24 shipping and receiving the chemicals was cleared and approved by U.S. Customs and
25 FDA officials. The Arizona Supreme Court accepted the State’s avowals.”).

26
27
28 ⁶*See Cook v. Brewer*, Case No. 10-9824 (U.S.) (State’s Brief in Opposition at
3, Apr. 4, 2011) (“However, the FDA, United States Customs, and the United States
Drug Enforcement Administration specifically authorized the importation of the drugs
at issue. Cook’s assertion that it is illegal to import execution drugs from a foreign
source is simply incorrect.”); *id.* at 6 (“That fact does not establish any sort of claim
regarding Arizona’s supply of execution drugs, particularly given that ADC obtained
approval from the FDA, DEA, and U.S. Customs to import the drugs at issue.”).

1 d. Pharmacist 2 testified that Dr. Turnbow is knowledgeable about
2 pharmaceutical procurement. (Pharmacist 2 Dep. 20:4-7.)

3 275. In August and September 2010, MMCAP tried to obtain sodium thiopental,
4 pancuronium bromide, and potassium chloride from a variety of its usual providers,
5 including Cardinal Health. (Ex. 217; Flanagan Dep. 41:1-9.)

6 276. However, because of a domestic shortage, MMCAP could not obtain sodium
7 thiopental in September 2010, and struggled to find pancuronium bromide and
8 potassium chloride. (Ex. 156; Ex. 149; Ex. 161; Ex. 217; Flanagan Dep. 41:1-9.)

9 277. As a result of the shortage, Charles Ryan, Carson McWilliams, Robert Patton,
10 and Charles Flanagan made multiple attempts to locate the lethal-injection drugs;
11 those efforts included contacting departments of corrections in other states.
12 (Flanagan Dep. 42:20:43:17.)

13 278. On approximately September 22, 2010, Ryan obtained information from
14 Wendy Kelley, the Deputy Director for the Arkansas Department of Corrections, that
15 a particular foreign distributor located in the United Kingdom might be able to
16 provide ADC with sodium thiopental. (Ryan Dep. 164-165; Ex. 100.)

17 279. Kelley told Ryan that she had ordered from the distributor, but that her
18 shipment was “currently being held for FDA approval.” (Ex. 100.)

19 280. On September 22, 2010, almost immediately after learning of the distributor
20 from Ryan, Flanagan contacted the distributor and told him, “I cannot stress enough
21 to you how critical it is that these drugs in our order with you be sent as soon as
22 possible and be expedited to us. Anything and everything you can do to expedite the
23 shipment is both necessary and appreciated.” (Ex. 111.)

24 281. Flanagan further communicated with the distributor during the last two weeks
25 of September, 2010, by e-mail and by phone. (Ex. 149; Ex. 155; Ex. 160; Ex. 161;
26 Ex. 168.)

27 282. On September 23, 2010, the day after Flanagan contacted the foreign
28 distributor, Flanagan discussed with Dr. Turnbow the possibility of ordering drugs

1 from the foreign distributor through MMCAP. (Ex. 156; Ex. 161.)

2 283. At that time, Flanagan learned that MMCAP could not order the drugs from the
3 foreign distributor. (Ex. 156.)

4 284. Moreover, Dr. Turnbow informed Flanagan that the foreign distributor order
5 might have an issue with FDA approval. (Ex. 159.)

6 285. In addition to her concerns about FDA approval, Dr. Turnbow had other
7 significant concerns about the distributor. She advised Flanagan that the foreign
8 distributor's website "leaves something to be desired; it is nothing like the
9 pharmaceutical wholesale distribution websites we use here in the United States. It
10 makes me wonder whether [the foreign distributor] is reputable and where exactly
11 the medication would be coming from." She further warned Flanagan that there is
12 a "'gray' market in the pharmaceutical industry and in this particular instance, you
13 need to be sure that the product is actually Thiopental and that it is going to work."
14 (Ex. 161.)

15 a. On September 27, 2010, Dr. Turnbow reiterated her concerns about the
16 gray market, telling Flanagan that Cardinal Health "has a policy in place
17 to only buy from manufacturers (eliminating the 'gray' pharmaceutical
18 market)" (Ex. 217.)

19 b. Pharmacist 2 was aware of concerns about gray markets, in part because
20 Pharmacist 2 obtained information MMCAP meetings. (Pharmacist 2
21 Dep. 15:9-11.)

22 c. Pharmacist 2 knows about "adulterations of medications, and they're
23 sold in the gray market." (Pharmacist 2 Dep. 50:3-6.)

24 d. Pharmacist 2 stated, "[w]e all know that there have been instances where
25 drugs have been adulterated." (Pharmacist 2 Dep. 50:13-15.)

26 e. Pharmacist 2 stated that if Dr. Turnbow expressed concern about a
27 website, Pharmacist would be concerned as well. (Pharmacist 2 Dep.
28 51:24-25; 52:1-3.)

1 f. Pharmacist 2 stated that “the information that’s been presented in
2 accurate format [in Turnbow’s email] and to our division director, the
3 people that have been documented here, I think that’s a good expression
4 [of Dr. Turnbow’s concerns].” (Pharmacist 2 Dep. 52:7-12.)

5 g. In light of Dr. Turnbow’s email, Pharmacist 2 would not need to do any
6 further research to determine the foreign distributor’s credibility,
7 because Dr. Turnbow’s concerns are valid and adequate. (Pharmacist 2
8 Dep. 52, 53)

9 h. Pharmacist 2 would have agreed with Dr. Turnbow’s email if Pharmacist
10 2 had seen it. (Pharmacist 2 Dep. 52:7-12)

11 286. When shown a version of the email that had Dr. Turnbow’s identifying
12 information redacted, Flanagan initially testified that he email was “from somebody
13 from MMCAP. [The portion expressing concern about the foreign distributor] was—I
14 don’t honestly know what it was. It was the opinion of somebody from MMCAP,
15 somebody who was concerned about who we were purchasing drugs from.” (Flanagan
16 Dep. 70:4-10)

17 287. Flanagan testified that he was unconcerned because “we had already verified
18 that [foreign distributor] was a distributor and that the drugs were being manufactured
19 by a legitimate British drug manufacturer” (Flanagan Dep. 70:13-20.)

20 288. In spite of these concerns, Flanagan, who has no training in pharmacology and
21 no medical training (Flanagan Dep. 33:8-14), testified that he never researched the
22 gray market drug issue (Flanagan Dep. 75:8-16).

23 289. In fact, Flanagan later testified that the email was from “one of the subordinate
24 employees at MMCAP who expressed some unsolicited concerns.” (Flanagan Dep.
25 227.)

26 290. Flanagan offered that testimony in spite of the fact that emails he had sent to
27 Charles Ryan, Dr. Michael Adu-Tutu (Director of ADC’s Health Services Division),
28 and others, noting that he had been called “by one of Sara’s staff” about ordering

1 drugs domestically. (Ex. 156.)

2 291. Indeed, instead of investigating the matter, Flanagan responded to Dr.
3 Turnbow's concerns by instructing Karen Ingram, an ADC procurement officer, and
4 others on September 23, 2010, that "we need to do everything possible to process this
5 and all of the other orders." (Ex. 159.)

6 292. Furthermore, Flanagan does not appear to have informed Director Ryan of
7 these concerns. Ryan testified that he does not recall Flanagan sharing with him either
8 Dr. Turnbow's email or the concerns that she expressed in her email. (Ryan Dep.
9 194:15-23.)

10 a. However, Ryan would have liked to "have a conversation with Charles
11 Flanagan" about Turnbow's email if Ryan had seen Dr. Turnbow's
12 email. (Ryan Dep. 195-196.)

13 b. In fact, Ryan does not know if Flanagan did due diligence on the foreign
14 distributor (Ryan Dep. 194:2-9), nor does he know if anyone at ADC did
15 due diligence on (Ryan Dep. 194:13-16). Nor did Ryan himself do due
16 diligence on Foreign distributor. (Ryan Dep. 194:10-12.)

17 293. According to Pharmacist 2, FDA-approved drugs means that the FDA "has
18 provided that [a drug] would be safe and effective in any way for treatment, for its
19 desired use." (Pharmacist 2 Dep. 48:14-20.) Accordingly, Pharmacist 2 would want
20 to know that execution drugs had been approved by the FDA in some way to be used
21 for executions because the FDA is the regulatory agency for pharmaceuticals; and
22 because the FDA provide their approval through a process that this is a viable
23 medication and will do what it says it will do. (Pharmacist 2 Dep. 49:1-19.)

24 294. Pharmacist 2 testified that one would know that a drug is FDA-approved
25 because it would have an NDC number and would be available from, for example,
26 MMCAP. (Pharmacist 2 Dep. 48.) However, the drugs shipped from the foreign
27 distributor do not have NDC numbers. (Pharmacist 2 Dep. 97.) Moreover, the drugs
28 that ADC imported from The foreign distributor are not FDA-approved. (Thomas

1 Dep. 43, 44, 47; Ex. 260 at V(i).)

2 295. Pharmacist 2 testified that a chain of custody is preferred when dispensing or
3 handling controlled substances to track possession of the drugs and that they remain
4 stable during shipment. That chain of custody usually begins with the manufacturer.
5 (Pharmacist 2 Dep. 89:9-23.) There was no chain of custody for the September 2010
6 or October 2010 shipments prior to ADC taking possession of the drugs.

7 296. Charles Ryan agreed, with Pharmacist 2 about the importance of FDA
8 approval, asserting that FDA approval would make a difference to ADC, because
9 “[i]f it was not FDA approved, then we may not have acquired that.” (Ryan Dep.
10 208:15-21.)

11 297. In spite of the fact that Flanagan was on notice about gray-market issues,
12 Flanagan is still unaware of the purported manufacturers of the drugs. He testified
13 that the sodium thiopental was manufactured by Archimedes. (Flanagan Dep. 52-53.)

14 i. Flanagan testified that by September 23, 2010, when Dr. Turnbow
15 expressed her concerns about the foreign distributor, ADC “had
16 already verified that [the foreign distribuor] was a distributor and
17 that the drugs were being manufactured by a legitimate British
18 drug manufacturer And we were satisfied that the drugs
19 would be shipped from England from those manufacturers. And
20 we verified that when we received them.” (Flanagan Dep. 70:16-
21 25; *see also* 227:1-7.)

22 ii. Flanagan’s detailed “Chemical Acquisition Timeline” does not
23 reflect any contact with any “manufacturers” or distributors other
24 than the foreign distributor. (Ex. 149.)

25 iii. The foreign distributor’s paperwork indicates that the product it
26 sold ADC as sodium thiopental was allegedly manufactured by
27 Sandoz GmbH in Austria. (Ex. 149; Ex. 253.)

28 298. The foreign distributor was cited by the United Kingdom’s regulatory body,

1 the Medicines and Healthcare products Regulatory Agency (MHRA) for “trading
2 falsified medicinal product” in 2006. (Ex. 260.)

3 299. On September 23, 2010, ADC purchased sodium thiopental, potassium
4 chloride, and pancuronium bromide from the foreign distributor. (Ex. 149.)

5 300. On September 23, 2010, the foreign distributor told Karen Ingram that the
6 responsibility with getting the drugs through Customs lay with ADC. Ingram
7 responded to the foreign distributor and Flanagan that she understood “that it is the
8 Department’s responsibility to get the products out of customs.” (Ex. 223.)

9 301. Charles Flanagan sought assistance from the FDA in Phoenix and from a
10 customs broker in facilitating and expediting the importation process. On September
11 23, 2010, Charles Flanagan contacted Phoenix FDA investigator David Thomas to
12 enlist his assistance in importing the lethal-injection drugs from The foreign
13 distributor. (Ex. 232.)

14 a. Thomas recognized that the drugs were manufactured by a facility that
15 lacked a valid FDA registration, and that the drugs were unapproved
16 new drugs. (Dep. of David Thomas, Sept. 20, 2100, 43, 44, 47; Ex. 260
17 at V(i).)

18 b. In spite of the fact that the importation was a “noncompliant” shipment
19 of drugs, Thomas continued to assist ADC in facilitating the importation
20 of the illegal
21 drugs.(Ex. 260 at V(j).)

22 c. Thomas provided “extraordinary” and “professional” assistance to ADC.
23 (Ex. 65; Ex. 70; Ex. 75.)

24 302. On September 24, 2010, Flanagan hired Arizona Customs Brokers. (Ex. 149.)

25 a. Flanagan and Thomas worked with Robert Hornyman, president of
26 Arizona Customs Brokers and Robert McDonald, an import supervisor
27 at Arizona Customs Brokers. (Dep. of Robert Hornyman, Sept. 15, 2011,
28 15:17-24; Dep. of Robert McDonald, Sept. 15, 2011, 9:17:21, 11:2-8;

1 Ex. 65.)

2 b. Although ADC hired Arizona Customs Brokers (“ACB”), ACB did not
3 have a contract with ADC (Hornyan Dep. 32:25, 33:1-5), nor did ACB
4 have an agency agreement with ADC (Hornyan Dep. 33:6-25, 34:1-25).
5 Furthermore, although ACB filled out the U.S. Customs and FDA
6 documentation for ADC’s shipments (Hornyan Dep. 29:10-21), ACB
7 was not the importer of the drugs; ADC was (Hornyan Dep. 35:1-17).
8 Moreover, ACB did not sign the necessary documents on behalf of
9 ADC; ADC signed the documents for both the September and October
10 2010 shipments. (Hornyan Dep.33:7-18, 34:12-15, 35:1-7, 37:1-9;
11 118:22-25, 119:1-11.)

12 303. On September 24, 2010, Flanagan “provide[d] precise shipping instructions to
13 The foreign distributor; legal and shipping instructions to broker.” (Ex. 149.)

14 a. On September 24, 2010, Flanagan provided certain “essential
15 directions” to the foreign distributor: Fed Ex was not to use its own
16 customs broker; the Port of Entry “shall be Phoenix, Arizona without
17 fail”; if Fed Ex shipped to the drugs through Memphis on their way to
18 Phoenix, Memphis “shall only be the Port of Unladen, not the Port of
19 Entry.” (Ex. 168; Ryan Dep. 201:8-13.)

20 b. Flanagan mandated that Phoenix be the Port of Entry “to make sure that
21 the people we spoke to here in Phoenix were the people who cleared
22 because they’re the ones who had all of the communications from us.”
23 (Flanagan Dep. 150:11-24.)

24 c. On September 24, 2010, Thomas told Flanagan, “I am pleased to see that
25 you have negotiated an expedient pathway to importing the product from
26 [the foreign distributor], London, England.” (Ex. 65.)

27 304. Robert McDonald is an import supervisor at Arizona Customs Brokers, with
28 the responsibility for clearing freight through U.S. Customs and handling

1 documentation. (McDonald Dep. 9:21-25.) He is responsible for, *inter alia*, entering
2 FDA documentation, which includes an FDA “product code” to identify the product
3 being imported. (McDonald Dep. 21:17-22:3) McDonald uses the FDA product-code
4 builder a few times a week. (McDonald Dep. 38:1-7.)

5 a. McDonald’s role in ADC’s September drug shipment was “inputt[ing]
6 the information in our system, which transmitted it to customs”
7 (McDonald Dep.11:2-8), including the required FDA product codes for
8 the drugs for ADC’s September 2010 drug shipment. (McDonald Dep.
9 23:8-21; Hornyman Dep. 44:1-5; 50:1-3.) He was conscientious about
10 filling out ADC’s FDA form. (McDonald Dep. 34:22-25, 35:1-3.)

11 b. Despite his conscientious actions, McDonald testified that he made a
12 “clerical error”—three different times, for three different drugs—in
13 inputting the FDA product codes, such that he marked the drugs as
14 products intended for use on non-human animals. (McDonald Dep.
15 32:9-21, 34:3-21.) McDonald testified that he had never before made
16 a mistake like this one for drug entries. (McDonald Dep. 38:11-13.)

17 c. Counsel for Plaintiffs discovered the “error” in March 2011, as a result
18 of information they obtained from U.S. Customs on “Form 701
19 Inquiries.” (Ex. 13.) Subsequently, Hornyman apparently informed
20 Flanagan that the FDA could correct the error (Ex. 171 at 2); however,
21 corrections were apparently unable to be made (Ex. 15).

22 305. On September 24, 2010, Dave Thomas informed Flanagan and others that the
23 FDA would conduct no inspection of ADC’s import shipment. (Ex. 64.) Despite this
24 statement, however, Dave Thomas subsequently inspected the September 2010
25 shipment. (Ex. 149; Ex. 138.) Thomas explained that the purpose of the inspection
26 “was to ensure that the product was actually—actually what it was purported to be.
27 In other words, I didn’t want a nonhuman drug coming in for human use, so I was
28 looking specifically for not for human use or for animal use only. I was looking for

1 some—some signs that this was not what it was purported to be. I was trying to find
2 out.” (Thomas Dep. 101:16-23.)

3 306. ADC ordered a second shipment of sodium thiopental from the foreign
4 distributor in October 2010. (Exs. 235;4; 11.)

5 307. Flanagan considered the September shipment to have been a “complicated
6 order” and wanted to modify the process in October to avoid those complications.

7 308. Flanagan received advice about modifying the process of the October 2010
8 shipment from “someone who helped [ADC] negotiate the entry of the first, more
9 complicated order.” (Ex. 234.)

10 309. On September 30, 2010, Thomas recommended to Flanagan that Flanagan
11 should ask Hornyan about “informal entry.” (Ex. 244.)

12 310. “Informal entries” reduce governmental scrutiny of imported goods by
13 allowing importers to take advantage of less rigorous local port procedures. (Ex. 260
14 at “Summary of Findings.”)

15 311. On October 12, 2011, Flanagan and Thomas had lunch together; during that
16 lunch, Flanagan “ask[ed] how to best bring in imported drugs.” (Ex. 76.)

17 312. On October 13, 2010, Flanagan directed Ingram to place a new order of sodium
18 thiopental with the foreign distributor. Flanagan told Ingram that the order must be
19 split into three separate shipments, each totaling not more than \$1500.00. (Exs. 234-
20 235.)

21 313. Ingram informed the foreign distributor that ADC wished to place “a second
22 order” with the foreign distributor in accordance with Flanagan’s directions to split
23 the shipment. (Ex. 236.)

24 314. In response to Ingram’s instructions, the foreign distributor told her that he
25 could create “a proforma [invoice] for any cost you want me to do. You just have to
26 pay the actual invoice. Would this help you[?]. I can also do a separate invoice for the
27 shipping cost, if the invoice value exceeds \$1200USD. Whichever works best for
28 you.” (Ex. 235.)

1 315. Ingram told Flanagan about the foreign distributor's offer to "put whatever on
2 the proforma" and indicated that she did not "recommend fudg[ing] this." (Ex. 237.)

3 316. On October 14, 2010, Flanagan directed the foreign distributor to prominently
4 mark the shipments as "Informal Entry." (Ex. 238.)

5 317. On October 14, 2010, Ingram placed the first of what were to be three orders
6 for sodium thiopental. She noted that "shipping is key" and that the shipment was to
7 shipped direct from London to Phoenix: "Port of entry must be Phoenix. Port of
8 unladen must be Phoenix." (Ex. 235.)

9 318. The breaking of the one transaction into three shipments was done for the
10 express purpose of avoiding scrutiny by FDA officials who were detaining other
11 states' shipments of these drugs. (Ex. 260 at II(d).)

12 319. In June 2010, Georgia ordered sodium thiopental from the foreign distributor.
13 The FDA detained Georgia's shipment for approximately six weeks.

14 320. In September 2010, the FDA held Arkansas's shipment for approximately one
15 week.

16 321. As Robert Hornyman and ACB had done in September 2010, ACB served as
17 ADC's customs broker for the October 2010 shipment. (Hornyman Dep. 36:19-37:9;
18 Ex. 4; Ex. 137.)

19 322. On October 25, 2010, Robert Hornyman filled out Customs Form 3461, and
20 described the sodium thiopental as "medical equipment so it wouldn't appear that it
21 was drugs." (Ex. 79; Hornyman Dep. 121:5-6.)

22 323. ADC imported its sodium thiopental from the foreign distributor in violation
23 of the Controlled Substances Act ("CSA"). (Ex. 144.)

24 324. Sodium thiopental is a drug subject to the Controlled Substances Act. (Ex. 112
25 at Ex. 3; Ex. 144.)

26 325. ADC is not an importer authorized by the DEA to import controlled substances.

27 326. ADC did not use a licensed importer sanctioned by the DEA to import sodium
28 thiopental. (Exs. 144; 146; Ryan Dep. 213.)

1 327. ADC could have applied for an importer license. (Ex. 144.)

2 328. At the time of the two importations of sodium thiopental, ADC held DEA two
3 registration certificates. One permitted ADC to handle the following scheduled drugs:
4 Schedule 3; Schedule 3N; Schedule 4; Schedule 5. The second permitted ADC to
5 handle the following scheduled drugs: Schedule 2; Schedule 2N; Schedule 3;
6 Schedule 3N; Schedule 4; Schedule 5. Both registration certificates listed ADC's
7 business activity as "Hospital/clinic." A "hospital/clinic" registrant "does not permit
8 the importation of any controlled substances as a primary or coincident activity."
9 (Ex. 69A.)

10 329. Charles Ryan testified that he thinks that a responsible dealer in controlled
11 substances would know whether they have the appropriate licenses to import those
12 substances into the United States. (Ryan Dep. 241:18-25.)

13 330. Charles Flanagan testified that he understood the role of the DEA to be
14 issuing certifications which, in ADC's case, he and "all of us believed gave us
15 authorization to procure the drugs as needed from whatever source was necessary."
16 (Flanagan Dep. 59:7-61:18.)

17 331. Flanagan did not ask the foreign distributor whether it was licensed by the
18 DEA. (Flanagan Dep. 218:24-219:2.)

19 332. Flanagan was not concerned that the foreign distributor was not licensed by the
20 DEA to export drugs to the U.S. (Flanagan Dep. 228:10-14.)

21 333. Flanagan testified that "Our contact with [the foreign distributor] was: Is this
22 something you can do? Yes. What do you need from us to do it? We — we provided
23 that subsequently." (Flanagan Dep. 228:14-17.)

24 334. In order to import a Schedule 3 controlled substance, such as sodium
25 thiopental, a DEA-authorized importer must submit a Form DEA-236, "Controlled
26 Substances Import/Export Declaration." *See* [http://www.deadiversion.usdoj.gov/
27 imp_exp/index.html](http://www.deadiversion.usdoj.gov/imp_exp/index.html). *See also* ECF No. 59 at Ex. 5.

28 335. Form DEA-236 must contain the name and address of the "importer," which

1 is defined as the “authorized DEA registrant who receives the controlled substance.”

2 *See* ECF No. 59 at Ex. 5.

3 336. ADC was not registered as a DEA-authorized importer. (Ex. 69A.)

4 337. In order to be imported, a drug must have an NDC number, which must be
5 listed on Form DEA-236. *See* ECF No. 59 at Ex. 5.

6 338. The sodium thiopental that ADC imported does not have an NDC number.
7 (Pharmacist 2 Dep. 97:4-16.)

8 339. If ADC had submitted a Form DEA-236 as it was required to do, the September
9 shipment would not have been processed in time to meet the October 1, 2010 deadline
10 ordered by the Arizona Supreme Court.

11 a. A copy of Form DEA-236 must be forwarded to the DEA “at least 15
12 days prior to importation.”

13 b. ADC first contacted the foreign distributor on September 22, 2010, and
14 placed its order on September 23, 2010. (Exs. 111; 149.)

15 c. ADC received the sodium thiopental on September 29, 2010—5 days
16 after ordering the controlled substance. (Ex. 149.)

17 d. If ADC had completed a Form DEA-236, the sodium thiopental would
18 have arrived no earlier than October 8, 2010—one full week after the
19 reporting deadline ordered by the Arizona Supreme Court.

20 e. Charles Ryan testified that he does not know whether, if the proper form
21 had been submitted to the DEA in a timely fashion, the DEA would have
22 permitted the importation of drugs from the foreign distributor. (Ryan
23 Dep. 203:7-17.)

24 f. Pharmacist 2 testified that it would have been Flanagan’s responsibility
25 to know what DEA licenses were necessary to purchase the drugs.
26 (Pharmacist 2 Dep. 82:18-83:19.)

27 g. Flanagan testified that “at some point” he became aware of Form
28 DEA-236 and the statutes relating to the importation of controlled

1 substances. He made no effort to look at these statutes before the
2 shipments were made. (Flanagan Dep. 111:8-20.)

3 340. ADC used the Sodium Thiopental obtained in violation of the Controlled
4 Substances Act in the execution of Jeffrey Landrigan (October 26, 2010) and in the
5 execution of (Eric King, March 29, 2011). (Ryan Dep. 197-198.)

6 341. On or about September 30, 2010, ADC gave 12 grams of the sodium thiopental
7 to the California Department of Corrections. (Flanagan Dep. 140-142.)

8 a. ADC did not seek approval from the DEA before providing California
9 with the sodium thiopental it imported from The foreign distributor in
10 violation of the CSA. (Ryan Dep. 204.)

11 342. On May 24, 2011, the U.S. Department of Justice told ADC that its supply of
12 sodium thiopental had been acquired in violation of the Controlled Substance Act.
13 (Ex. 143; Ex. 144.)

14 343. Although the DEA asked ADC to turn over to the DEA the sodium thiopental
15 ADC obtained from the foreign distributor, ADC refused to do so. ADC instead
16 informed the DEA that it would not use the drug.

17 344. Although the DEA asked ADC to turn over to the DEA the Sodium Thiopental
18 ADC obtained from The foreign distributor, ADC refused to do so. ADC instead
19 informed the DEA that it would not use the drug. (Ryan Dep. 199-200.)

20 345. On May 24, 2011, eighteen hours before the scheduled execution of Donald
21 Beaty, the State of Arizona filed a Notice of Substitution of Drug in the Arizona
22 Supreme Court, which indicated that ADC would use pentobarbital in Beaty's
23 execution. (Fact Chart #86.)

24 346. ADC still possesses the illegally obtained sodium thiopental. (Ryan Dep.
25 199:15-200:3.)

26 347. ADC's protocol still permits the use of sodium thiopental in executions. (Ex.
27 310.)

28

1 **CONCLUSIONS OF LAW**

2 1. To prevail on a § 1983 claim, a plaintiff must show that, while acting under
3 color of state law, the Defendants deprived or will deprive him of a right secured by
4 the Federal Constitution or laws of the United States. *See Nelson v. Campbell*, 541
5 U.S. 637, 643 (2004).

6 2. Plaintiffs have sustained their burden to show that, while acting under color
7 of state law, Defendants operate a lethal injection system that, unless enjoined, will
8 deprive Plaintiffs of their rights secured by the Federal Constitution.

9 3. For the reasons explained below, Arizona’s method of administering its
10 execution system is unconstitutional. Plaintiffs are protected from these practices
11 under 42 U.S.C. § 1983. *Nelson v. Campbell*, at 541 U.S. 644-45

12 **Arizona’s Administration of Its Lethal-injection Protocol Violates**
13 **the Eighth Amendment to the United States Constitution**

14 4. Defendants’ failure to follow the written lethal-injection protocol and to follow
15 to the law in obtaining lethal-injection drugs violates Plaintiffs’ Eighth Amendment
16 right to be free from cruel and unusual punishment.

17 5. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel
18 and unusual punishments inflicted.” U.S. Const., amend. VIII.

19 6. The Eighth Amendment to the U.S. Constitution “prohibits punishments that
20 involve the unnecessary and wanton inflictions of pain, or that are inconsistent with
21 evolving standards of decency that mark the progress of a maturing society.” *Cooper*
22 *v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004); *see also Beaty v. Brewer*, 2011 WL
23 2050124, at *3 (D. Ariz. May 25, 2011).

24 7. When challenges are made to a state’s execution protocol, an Eighth
25 Amendment violation will be established by demonstrating that there is a “substantial
26 risk of serious harm” that is sure or very likely to cause needless suffering. *Dickens*
27 *v. Brewer*, 631 F.3d 1139, 1144-46 (9th Cir. 2011) (adopting plurality in *Baze v.*
28

1 *Rees*, 553 U.S. 35 (2008)); *see also Dickens v. Brewer*, 2009 WL 1904294, at *18 (D.
2 Ariz. July 1, 2009) (“To the extent issues raised by Plaintiffs were not addressed in
3 *Baze*, the Arizona Protocol violates the Eighth Amendment if it subjects inmates to
4 a substantial risk of serious harm or a risk of harm that is ‘sure or very likely to cause
5 . . . needless suffering.’”) (citation omitted); *Beaty*, 2011 WL 2050124, at *3.

6 8. The risk must be an “‘objectively intolerable risk of harm’ that prevents prison
7 officials from pleading that they were ‘subjectively blameless for purposes of the
8 Eighth Amendment.’” *Baze*, 553 U.S. at 50 (citing *Farmer v. Brennan*, 511 U.S. 825,
9 842 (1994)).

10 9. Subjecting individuals to a risk of future harm—not simply actually inflicting
11 pain—can qualify as cruel and unusual punishment. *Baze*, 553 U.S. at 49-50.

12 10. It is uncontested that “failing a proper dose of sodium thiopental that would
13 render the prisoner unconscious, there is a substantial, constitutionally unacceptable
14 risk of suffocation from the administration of pancuronium bromide and pain from
15 the injection of potassium chloride.” *Baze*, 553 U.S. at 53.

16 11. Where there are sufficient safeguards in place, including using qualified
17 personnel who have daily experience placing IV catheters, the risk of an Eighth
18 Amendment violation is minimized. *Baze*, 553 U.S. at 55.

19 12. When reviewing the constitutionality of a state’s written lethal-injection
20 protocol, this Court must look beyond the facial constitutionality of the protocol when
21 presented with evidence of improper administration. *Dickens*, 631 F.3d at 1146.

22 13. If the State refuses to adopt a proffered feasible, readily implemented
23 alternative that significantly reduces a substantial risk of severe pain, without a
24 legitimate penological justification, such refusal can be viewed as “cruel and unusual”
25 under the Eighth Amendment. *Baze*, 553 U.S. at 52

26 14. This Court in *Dickens* noted that the errors in the “labeling of syringes” or
27 “selecting the correct syringe” could be problematic to the proper administration of
28 sodium thiopental. 2009 WL 1904294, at *12.

1 15. This Court in *Dickens* also noted that “it does not establish a substantial risk
2 of serious harm from failure to screen for psychological and medical problems *if*
3 *Medical Team members are required to have at least one year of current and relevant*
4 *professional experience in their assigned duties on the Medical Team and licensing*
5 *and criminal history reviews are conducted before contracting, annually, and upon*
6 *the issuance of a warrant of execution.”* 2009 WL 1904294, at *22 (emphasis
7 added).

8 16. Defendants’ actions rise to the level of an Eighth Amendment violation in three
9 critical ways:

10 a. By disregarding the important safeguards in the written protocol
11 approved by this Court, Defendants have created a substantial risk that
12 the prisoner will suffer severe pain from the administration of
13 pancuronium bromide and potassium chloride;

14 b. By using a femoral central line—placed by an unqualified individual
15 who fails to recognize the pain involved in conducting the
16 procedure—despite the readily available peripheral line, Defendants
17 have created an objectively intolerable risk of harm where they cannot
18 claim that they were subjectively blameless;

19 c. By disregarding the advice of pharmacists regarding the risks of
20 purchasing unapproved foreign drugs from a gray-market distributor,
21 and by acquiring lethal drugs in violation of federal laws, Defendants
22 have created an objectively intolerable risk of harm where they cannot
23 claim that they were subjectively blameless.

24 17. The evidence demonstrates that, in violation of the written protocol and
25 avowals to this Court, Defendants failed to conduct background and license checks
26 before assembling a medical team; failed to ensure that both medical team members
27 had at least one year of current and relevant professional experience in their assigned
28 duties on the team, that their primary duties include administering IV as part of their

1 employment, and that they were medically licensed; failed to ensure that the syringes
2 were labeled according to the protocol; and failed to properly record the
3 administration of the drugs including any deviations from the protocol. What records
4 that ADC did maintain are inconsistent regarding the amounts of drugs administered
5 to the prisoners.

6 18. The evidence further demonstrates that based on the consciousness check he
7 performed, MTL he had no way of knowing whether the prisoner was paralyzed
8 instead of sedated. MTL's understanding of assessing and monitoring sedated
9 individuals is incorrect and falls below the generally accepted standard of care. *See*
10 *Dickens*, 2009 WL 1904294, at *12 (finding that “[h]aving a properly trained and
11 credentialed individual examine the inmate after the administration of the sodium
12 thiopental (but before administration of pancuronium bromide) to verify that the
13 inmate is completely unconscious mitigates the risk that the inmate will suffer
14 excruciating pain during his execution”).

15 19. The safeguards—established by ADC and approved by this Court—are
16 necessary to ensure that a prisoner receives the correct amount of an anesthetic
17 thereby reducing the risk of pain and suffering from the pancuronium bromide and
18 potassium chloride. Defendants cannot demonstrate that the prisoner is, in fact,
19 sedated instead of paralyzed during the consciousness check. Moreover, Defendants
20 records cannot be relied upon to ensure that the prisoner actually received drugs in
21 accordance with the protocol. Defendants' blatant failure to adhere to the written
22 safeguards in the lethal-injection protocol creates a substantial risk that Plaintiffs will
23 suffer severe pain. *Cf. Baze*, 553 U.S. at 55-56 (noting that the “qualifications of the
24 IV team also substantially reduce the risk” of IV complications).

25 20. The evidence demonstrates that, in violation of the written protocol,
26 Defendants permitted a femoral central line to be placed in all five of the prisoners
27 executed since October 2010. The femoral central line was placed by an individual
28 who did not have “at least one year of regular and current professional experience

1 conducting that procedure.” MTL, who conducted the invasive surgical procedure,
2 required several attempts in placing the catheter on at least three prisoners. MTL did
3 not adequately anesthetize each of the areas in which he attempted to place the
4 catheter.

5 21. Defendants also instructed that a peripheral line be placed, in addition to the
6 femoral central line. In three of the five prisoners who were executed a peripheral
7 line was able to be placed. In one of the prisoners there was no attempt to place a
8 peripheral line.

9 22. Defendants had no legitimate reason to conduct the invasive surgical procedure
10 of setting a femoral central line. Because using a peripheral line to administer the
11 drugs was a feasible, readily available alternative—and, in this case, was the *required*
12 method of administering the drugs under the lethal-injection protocol—ADC’s failure
13 to do otherwise violates the Eighth Amendment. *See Baze*, 553 U.S. at 52 (noting
14 that State’s failure to adopt readily available alternative without legitimate
15 penological justification violates Eighth Amendment).

16 23. The evidence demonstrates that ADC’s deputy director, who has no medical
17 or pharmacological training, was tasked with acquiring lethal-injection drugs. The
18 deputy ignored direct advice from one of ADC’s pharmaceutical advisor—an advisor
19 who holds a Doctor of Pharmacy degree—that raised significant concerns about the
20 safety and legality of the drugs and the drug seller that the deputy director had
21 selected. The senior pharmacist advised the deputy director that she was concerned
22 that the drug seller might be a gray market distributor; that any drugs that ADC
23 acquired from the seller might be counterfeit or have related problems; and that the
24 drugs the seller was offering were probably not approved by the FDA. But instead
25 of acting on these concerns—or even inquiring further—the deputy director directed
26 ADC staff and others to do everything possible to get the drugs as quickly as
27 possible. Those directions resulted in ADC violating the federal Controlled
28 Substance Act, and ADC and its hired customs broker taking action to circumvent

1 federal scrutiny of illegal drugs. These actions not only demonstrate a wilful
2 disregard of Plaintiffs' safety, but also run directly afoul of Supreme Court
3 jurisprudence. *See, e.g., Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (Mem.)
4 (suggesting that relief may also be granted where prisoner shows "that the [execution]
5 drug was unlawfully obtained").

6 24. In each of the past five executions, Defendants failed to follow the written
7 Protocol. Moreover, Defendants willingly violated federal law and overlooked
8 constitutional safeguards in order to ensure that an execution took place as scheduled.
9 These deviations from the written Protocol, coupled with Defendants unnecessary
10 haste to obtain execution drugs at any cost, rise to the level of an Eighth Amendment
11 violation.

12 **Arizona's Administration of Its Lethal Injection System Violates the Due**
13 **Process and Equal Protection Clauses of the Fourteenth Amendment**

14 25. The Fourteenth Amendment provides in relevant part that "[n]o state shall ...
15 deprive any person of life, liberty or property without due process of law," and that
16 no state "shall deny to any person within its jurisdiction the equal protection of the
17 laws." U.S. Const., Amendment. 14.

18 Due Process

19 26. "The touchstone of due process is protection of the individual from arbitrary
20 action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

21 27. The procedural due process guaranty guards against the exercise of government
22 power without any reasonable justification in the service of a legitimate governmental
23 objective. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citations
24 omitted).

25 28. The substantive due process guaranty "protects against government power
26 arbitrarily and oppressively exercised." *County of Sacramento*, 523 U.S. 846 (*citing*
27 *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It is recognized, however, in cases
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1 dealing with abusive executive action that “only the most egregious official conduct
2 can be said to be arbitrary in the constitutional sense.” *Id.* (citing *Collins v. Harker*
3 *Heights*, 503 U.S. 115, 129 (1992)). Further, violations of the substantive due process
4 guaranty are limited to cases that “shock[] the conscience,” or interfere with the rights
5 implicit in the concept of ordered liberty. *County of Sacramento*, 523 U.S. at 847
6 (citing cases).

7 29. For the following reasons, this Court concludes that Defendants’ exercise of
8 their executive powers were among the most egregious and their conduct which
9 included the submission of repeated misrepresentations and half-truths to this Court
10 and other courts, would shock the conscience of any reasonable judicial officer,
11 including this Court.

12 30. In *Dickens v. Brewer*, this Court found that Arizona’s lethal-injection protocol
13 “did not violate the Eighth Amendment if it is implemented as written.” No.
14 CV07-1770-PHX-NVW, 2009 WL 1904294, at *24 (D. Ariz. July 1, 2009), *aff’d*, 631
15 F.3d 1135 (9th Cir. 2011).

16 31. Defendants in *Dickens* defeated Plaintiffs’ constitutional claims by representing
17 to Plaintiffs and the Court that Defendants had amended their lethal injection protocol
18 to insure:

- 19 a. The IV lines used to administer the lethal injection drugs would only be
20 administered by “medically licensed individuals with at least one year
21 current and regular practice placing such lines” (Ex. 173 at 3:4-6) and
22 that medical team personnel would be currently employed professionals
23 who practice what they do during an execution (Ex. 214 at 7:5-8).
- 24 b. ADC would conduct medical license and criminal background checks
25 on its medical team members prior to allowing them to participate in an
26 execution, upon the issuance of a warrant of execution, and annually.
27 (Ex. 173 at 3, 8-12.)
- 28 c. Lethal drugs would “by default be administered through a peripheral

- 1 intravenous line.” (Ex. 173 at 3:1-3.)
- 2 d. ADC would “ensure that a qualified medical team is in place before any
- 3 scheduled execution.” (Ex. 173 at 8:11-12.)
- 4 e. ADC would retain all documents establishing the qualifications and
- 5 training of the medical team members. (Ex. 173, Ex. A § B ¶ 7.)
- 6 f. ADC would ensure that the IV lines used to administer the execution
- 7 drugs would not be covered and would remain visible throughout an
- 8 execution. (Ex. 173, Ex. A at § F, ¶ 5.)
- 9 g. During the *Dickens* appeal, the Defendants argued that “ADC has
- 10 written its present protocol to comply with the Eighth Amendment, that
- 11 it had no incentive to deviate from the current protocol, and that to
- 12 insure transparency any changes to its protocol would be posted on its
- 13 website (Defs’ Answering Br. at 12, 43).

14 32. All of the changes that ADC promised to make to its execution procedure in

15 *Dickens* are neatly incorporated into its written protocol, but during the five

16 executions that have taken place since *Dickens*, ADC has failed to actually implement

17 any of the above identified changes in its execution procedures, and it simply

18 disregarded its pledge to insure transparency, as it never posted any deviations or

19 amendments to the execution protocol on its website.

20 33. Perhaps in isolation these facts alone, while disturbing and evidencing *bad*

21 *faith*, may not rise to a level of constitutional significance; but that is not all that

22 happened here.

23 34. After failing to administer or give effect to changes that ADC incorporated into

24 its written protocol Defendants went further. They repeatedly misrepresented that

25 they were following their lethal injection protocol - which included the amendments

26 they promised to implement in *Dickens* - as written. In truth, they never did.

27 35. Over and over during the course of litigation concerning the lethal injection

28 processes in place in last five executions, Defendants contended and even swore

1 under oath that they were following, and in the future would follow, their lethal
2 injection protocol as written. In truth, they never did.

3 36. Defendants even moved to dismiss Plaintiffs' complaint in these proceedings,
4 in part on the grounds that ADC follows its written protocol and "[t]here is no
5 evidence [that] ADC does not follow its written protocol." (ECF No. 11 at 11.)
6 These statements, made solely in the interests of seeing that Mr. West's execution
7 was achieved no matter what the cost, were clearly untrue: none of the above
8 identified *Dickens* amendments contained in the written protocol, and other written
9 protocol requirements were being followed.

10 37. Defendants' answer is essentially that mere deviations from the written
11 protocol are constitutionally insignificant and that prisoners do not have a due process
12 right to be executed in accordance with a state's written execution protocol. There is
13 legal authority supporting Defendants' argument, but on these facts their argument
14 is, for practical purposes, irrelevant. There remains a Fourteenth Amendment issue
15 that targets whether state officials are living up to their constitutional obligations in
16 how it ends the life of its citizens.

17 38. It is one thing to say that state authorities may deviate from their written
18 protocol without notice to the prisoner; it is quite another thing to say that state
19 officials can *materially* misrepresent the substance of their execution procedures by
20 repeatedly promising various courts that they will follow their protocol as written,
21 when in fact they do not.

22 39. What is more, ADC's pattern and practice of falsely maintaining that it would
23 follow its written procedures is compounded by evidence that ADC obtained
24 execution drugs by any means necessary. Specifically, ADC illegally procured
25 execution drugs from a less-than-reputable unlicensed foreign supplier in a manner
26 designed to avoid oversight by federal regulatory agencies.

27 40. ADC again demonstrated its willingness to misrepresent the substance of its
28 activities by informing courts that it had DEA approval for the drug importations,

1 when in fact it knew that it had not consulted with or obtained any approval from the
2 DEA.

3 41. The Constitution may generally permit Arizona to execute inmates condemned
4 to death, but it does not permit state officials to disguise and materially misrepresent
5 their execution procedures or otherwise engage in illegal conduct simply to carry out
6 an execution at any cost. To say otherwise would ordain an ends justifies the means
7 system offensive to our system of constitutional justice. *Ex parte Milligan*, 71 U.S.
8 2, 76 (1866) (an ends justifies the means “rule of conduct [is] denounced by all law,
9 human and divine, as being pernicious in policy and false in morals”).

10 42. Defendants’ active concealment and misrepresentation of their execution
11 procedures and their willingness to violate established federal criminal laws in pursuit
12 of achieving executions is unsupported by “any reasonable justification in the service
13 of a legitimate governmental objective. *County of Sacramento*, 523 U.S. at 845-46.

14 43. Defendants’ active concealment and misrepresentation of their execution
15 procedures during the very litigation commenced to determine whether those
16 procedures are constitutional, and their willingness to violate established federal
17 criminal laws in pursuit of achieving executions, are the exemplar of the “extremely
18 egregious” official conduct that is constitutionally arbitrary and “shocks the
19 conscience.” *Id.*

20 44. What is more Plaintiffs would be deprived of their Fourteenth Amendment
21 procedural guaranty of meaningful access to the courts if Defendants’ practice of
22 concealment and misrepresentation of its execution procedures were permitted to
23 continue. *Christopher v. Harbury*, 536 U.S. 403, 413-14 (2002) (recognizing that
24 state officials’ cover-up of facts relevant to litigation of constitutional claim can result
25 in denial of meaningful access to the courts).

26 45. Plaintiffs will be denied both procedural and substantive due process if
27 Defendants are not enjoined from continuing their custom and practice of active
28 misrepresentation of the material aspects of their execution procedures.

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Equal Protection

46. The Equal Protection Clause of the Fourteenth Amendment commands that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

47. The Equal Protection Clause “embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.” *Vacco v. Quill* 521 U.S. 793, 799, 117 S.Ct. 2293, 2297 (1997).

48. “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Warren v. City of Athens, Ohio*, 411 F.3d 697, 710 -711 (6th Cir. 2005) (*quoting Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445(1923) (internal quotation marks and citation omitted)).

49. When state action burdens a fundamental right, that action receives heightened scrutiny under the Fourteenth Amendment’s Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Here Plaintiffs point to their fundamental right to be free from cruel and unusual punishment under the Eighth Amendment.

50. State action burdening a fundamental right is subjected to strict scrutiny and will be sustained only if it is suitably tailored to serve a compelling state interest. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

51. Equal protection claims can be brought by a “class of one,” where the plaintiff alleges that the state treated the plaintiff differently from others similarly situated and that there is no rational basis for such difference in treatment. *Id.*; *Cooley v. Kasich*, 2011 WL 2681193, *29 (S.D. Ohio July 8, 2011).

52. The “rational basis” test means that courts will not overturn government action “unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only

1 conclude that the [government's] actions were irrational.” *Kimel v. Fla. Bd. of*
2 *Regents*, 528 U.S. 62, 84 (2000) (internal quotation marks and citation omitted).

3 53. In this case ADC has essentially two classes of lethal injection procedures.
4 Under the first class ADC has its written execution protocol which is designed to
5 demonstrate the constitutionality of its execution procedures and which it said it
6 would follow as written during the last five executions. In reality it operates under
7 a wholly different set of execution procedures under which its written protocol
8 embraces an unlimited capacity for deviation as directed by the ADC Director.

9 54. Defendants’ pattern of deviation from the written lethal-injection protocol,
10 combined with their willingness to violate federal law in order to carry out
11 executions, intentionally, irrationally, and arbitrarily infringes on Plaintiffs’
12 fundamental right to be free from cruel and unusual punishment by introducing an
13 unacceptable risk of violating that right, and Defendants actions are not justified by
14 any compelling state interest.

15 55. The question for the purposes of Plaintiffs’ equal protection claim is not
16 whether Defendants’ conduct creates a substantial risk of harm but whether such
17 conduct results in unequal treatment infringing upon Plaintiffs’ fundamental right to
18 be free from cruel and unusual punishment. “For present purposes, it does not matter
19 whether there is a qualifying risk of severe pain . . . but only the creation of unequal
20 treatment impacting the fundamental protection involved.” *Cooey*, 2011 WL
21 2681193, at *29.

22 56. When a plaintiff proceeds on a “class-of-one” theory, “allegations of irrational
23 and wholly arbitrary treatment, even without allegations of improper subjective
24 motive, [are] sufficient to state a claim for relief under equal protection analysis.”
25 *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 993 (9th Cir. 2007) (citing
26 *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000)).

27 57. The only rationale for Defendants’ repeated, core deviations from a written
28 execution protocol that eliminates safeguards and introduces greater uncertainty into

1 the execution process is to complete the executions at all or nearly all costs. This is
2 not a constitutionally sufficient rationale. *See Cooley*, 2011 WL 2681193, at *30.

3 **Defendants Are Barred by Judicial Estoppel from Arguing That**
4 **ADC’s Actual Method of Administration of Its Lethal Injection**
5 **Protocol During the Last Five Executions Complied with Applicable**
6 **Eighth and Fourteenth Amendment Requirements**

7 58. The Court finds in favor of Plaintiffs on the additional ground that Defendants
8 are judicially estopped from arguing that their numerous deviations from ADC’s
9 lethal-injection protocol lack constitutional significance.

10 59. Where “a party assumes a certain position in a legal proceeding, and succeeds
11 in maintaining that position, he may not thereafter, simply because his interests have
12 changed, assume a contrary position, especially if it be to the prejudice of the party
13 who has acquiesced in the position formerly taken by him.” *Davis v. Wakelee*, 156
14 U.S. 680, 689 (1895).

15 60. This rule, known as judicial estoppel, “generally prevents a party from
16 prevailing in one phase of a case on an argument and then relying on a contradictory
17 argument to prevail in another phase.” *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8
18 (2000); *see also* 18 Moore’s Federal Practice § 134.30 at 134-62 (3d ed. 2000) (“The
19 doctrine of judicial estoppel prevents a party from asserting a claim in a legal
20 proceeding that is inconsistent with a claim taken by that party in a previous
21 proceeding”); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure
22 § 4477 at 782 (1981) (“... absent any good explanation, a party should not be allowed
23 to gain an advantage by litigation on one theory, and then seek an inconsistent
24 advantage by pursuing an incompatible theory”); *New Hampshire v. Maine*, 532 U.S.
25 742, 749-51 (2001).

26 61. The Court should generally consider three factors in determining whether to
27 apply the doctrine of judicial estoppel: (1) whether a party’s later position is “clearly
28 inconsistent” with its early position; (2) whether the party has succeeded in
persuading a court to accept that party’s earlier position, so that judicial acceptance

1 of an inconsistent position in a later proceeding would create “the perception that
2 either the first or the second court was misled,” thereby threatening judicial integrity;
3 and (3) whether the party seeking to assert an inconsistent position would derive an
4 unfair advantage or impose an unfair detriment on the opposing party if not
5 estopped. *New Hampshire*, 532 U.S. at 749; *United Nat. Ins. Co. v. Spectrum*
6 *Worldwide, Inc.*, 555 F.3d 772, 778 (9th Cir. 2009).

7 62. Application of this equitable doctrine is within the Court’s sound discretion
8 and is appropriate here. *See New Hampshire*, 532 U.S. at 750.

9 63. Plaintiffs’ undisputed evidence demonstrates that in *Dickens v. Brewer*, No.
10 07-1770-NVW (D. Ariz.), Defendants changed their written protocol to avoid an
11 adverse ruling, and made express representations that they would follow specific
12 procedures in the amended protocol in all future executions.

13 64. Specifically, Defendants represented that (1) the IV lines used to inject lethal
14 drugs would only be administered by medically licensed individuals with at least one
15 year current and regular practice placing such lines, and that medical team personnel
16 would be currently employed professionals who practice what they do during an
17 execution; (2) ADC would conduct medical license and criminal background checks
18 on its medical team members prior to allowing them to participate in an execution,
19 upon issuance of a warrant of execution, and annually; (3) lethal drugs would by
20 default be administered through a peripheral intravenous line; (4) ADC would ensure
21 that a qualified medical team is in place before any scheduled execution; (5) ADC
22 would retain all documents establishing the qualifications and training of the medical
23 team members; and (6) ADC would ensure that the IV lines used to administer the
24 execution drugs would not be covered and would remain visible throughout an
25 execution.

26 65. Based on these representations, this Court found that there was no risk that
27 Defendants would intentionally deviate from the amended protocol, and the Court
28 expressly acknowledged and accepted ADC’s promise that no execution would go

1 forward without a qualified medical team in place in conformance with the amended
2 protocol.

3 66. Since *Dickens*, ADC Director Charles Ryan, personally and through counsel,
4 repeatedly represented to this Court and the public that ADC had been following and
5 would continue to follow the written protocol that this Court deemed constitutional.

6 67. For example, Director Ryan submitted sworn affidavits to the courts prior to
7 Landrigan's execution and Cook's scheduled execution that ADC would follow the
8 amended protocol as written.

9 68. Director Ryan made similar representations in opposition to Plaintiffs'
10 preliminary injunction motion in this case.

11 69. Plaintiffs' evidence now shows that Director Ryan's representations were false,
12 and that ADC has intentionally deviated from the same core components of the
13 execution protocol it promised it would adhere to in *Dickens* in order to obtain an
14 advantage in that litigation.

15 70. The Court finds that during the last five executions, at the direction of Director
16 Ryan and others responsible for administering executions, ADC has acted in a manner
17 wholly inconsistent with the promises it made *Dickens*.

18 71. Indeed, it is now clear to the Court that, contrary to their representations in
19 *Dickens* and other litigation, (1) neither of ADC's two medical team members who
20 participated in the last five executions were qualified to do so under the protocol; (2)
21 ADC *never* conducted medical license or criminal background checks on its medical
22 team members prior to allowing them to participate in an execution, either upon
23 issuance of a warrant of execution, or annually; (3) in all but *one* of the past five
24 executions, ADC adopted a femoral central line as the default IV line for chemical
25 administration; (4) ADC *never* ensured that a qualified medical team was in place
26 before *any* of the past five executions; (5) ADC did not retain *any* documentation
27 evidencing the qualifications of the medical team members or the training of the
28 medical team leader; and (6) the central IV line, which was used administer the lethal

1 injection chemicals in four of the five past executions, was *not* uncovered and visible
2 throughout the execution.

3 72. In other words, Defendants have gone back on each of the six core
4 constitutional safeguards it promised to implement.

5 73. Defendants obtained a favorable ruling from this Court in *Dickens* by insisting
6 that the purported changes to ADC's lethal-injection protocol sufficed to meet the
7 constitutional standard set forth by the Supreme Court in *Baze*.

8 74. Now in another effort to sway this Court, Defendants inconsistently argue that
9 their deviations from the protocol and breached promises lack constitutional
10 significance.

11 75. Stated differently, Defendants won *Dickens* by arguing ADC would perform
12 certain execution procedures, yet now argue that they should prevail here because
13 their failure to perform these same execution procedures does not violate the
14 Constitution.

15 76. Defendants' current position is clearly inconsistent with its earlier position in
16 *Dickens*, which Defendants persuaded the Court and Plaintiffs to accept to their
17 detriment. *New Hampshire*, 532 U.S. at 750.

18 77. Defendants cannot play "fast and loose" with this Court any longer—
19 Defendants are judicially estopped from arguing that their deviations from ADC's
20 lethal-injection protocol lack constitutional significance. *See id.* (citations and
21 quotations omitted).

22 **An Injunction Is Necessary to Remedy Defendants' Constitutional**
23 **Violations**

24 78. In *Dickens*, and during the lethal-injection litigation during the past year, ADC
25 has insisted that prisoners' constitutional claims should be measured against the
26 Protocol as adopted in *Dickens*, which ADC said it had followed and would continue
27 to follow as written.

28 79. The evidence shows that ADC's representations were simply false.

1 80. What is more, ADC was willing to engage in criminal conduct and other law
2 violations in order to complete the last five executions.

3 81. In fashioning a remedy for Defendants' repeated violations of Plaintiffs'
4 constitutional rights, this Court can only reach one conclusion: Plaintiffs' are entitled
5 to permanent injunctive relief. *See, e.g., Nelson v. Campbell*, 541 U.S. 637, 639-40
6 (2004) (finding that 1983 lawsuit challenging lethal-injection process is appropriate
7 vehicle for permanent injunctive relief).

8 82. Here, Plaintiffs satisfy the requirements for obtaining a permanent injunction
9 because: (1) they will suffer an irreparable injury; (2) the remedies available at law,
10 such as monetary damages, are inadequate to compensate for that injury; (3)
11 considering the balance of the hardships between the parties, a remedy in equity is
12 warranted; and (4) the public interest would not be disserved by a permanent
13 injunction. *eBay Inc. v. MerchExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

14 83. Plaintiffs will suffer and are suffering irreparable injury in the form of a
15 substantial risk of serious harm from severe, unnecessary pain incident to their
16 executions as well as from disparate treatment under the law.

17 84. No remedy short of injunctive relief can compensate for those injuries.

18 85. A remedy in equity is warranted because ADC will not be substantially
19 burdened by the injunction, which requires that it act within the confines of its own
20 protocol, abide by federal law, and provide adequate procedural protections to
21 prevent ADC actions that threaten prisoners' Constitutional rights such as those that
22 have occurred repeatedly in the past.

23 86. ADC will continue to be able to perform executions that comport with
24 Constitutional requirements.

25 87. The public interest is served by enforcing Constitutional rights. *Preminger v.*
26 *Principi*, 422 F.3d, 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are
27 implicated when a constitutional right has been violated, because all citizens have a
28 stake in upholding the Constitution.").

1 88. The public, however, has no interest in seeing its citizens tortured or suffer a
2 lingering death. *See In re Kemmler*, 136 U.S. 436, 447 (1980).

3 89. The evidence shows that ADC operates “an end justifies the means” execution
4 system, which is highly offensive to the notion of constitutional justice.

5 90. Injunctive relief and judicial supervision are required to secure the Plaintiffs’
6 constitutional rights.

7 91. The Court, therefore, enters an injunction:

- 8 a. directing ADC to conform its lethal-injection procedures to Department
9 Order 710 and Attachment F “as written”;
- 10 b. directing ADC to provide, prior to carrying out an execution, this Court
11 and the condemned prisoner and his counsel documentation sufficient
12 to demonstrate that any planned execution will be carried in
13 conformance with Department Order 710 and Attachment F “as written”
14 and if not, that any deviations therefrom be disclosed so that ADC’s
15 execution procedures can be measured against applicable constitutional
16 requirements;
- 17 c. directing a judicial monitor to be appointed to insure ADC’s adequate
18 compliance with the injunction;
- 19 d. directing ADC not to use drugs in executions that were acquired in
20 violation of federal law; and
- 21 e. directing ADC not to use drugs in executions that were purchased from
22 foreign sources that are not otherwise licensed or permitted by the FDA
23 and DEA to offer into the United States drugs for human use, including,
24 but not limited to, all drugs obtained from which it in September and
25 October 2010 from a foreign distributor.

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Certificate of Service

I hereby certify that on this 10th day of November, 2011, I electronically transmitted the foregoing Proposed Findings of Fact and Conclusions of Law 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.

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