

NO. 11-35940

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**PAUL EZRA RHOADES,
Petitioner-Appellant,**

vs.

**BRENT REINKE, *et al.*,
Respondent-Appellees.**

**Appeal from the United States District Court
for the District of Idaho
The Honorable Ronald E. Bush**

PETITIONER-APPELLANT'S EXCERPTS OF RECORD

VOLUME II OF VI

CAPITAL HABEAS UNIT

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**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

PAUL EZRA RHOADES,

Plaintiff,

vs.

BRENT REINKE, RANDY BLADES, DOES 1-50,
and/or UNKNOWN EXECUTIONERS,

Defendants.

Case No.: 1:11-cv-00445-REB

**MEMORANDUM DECISION AND
ORDER RE: PLAINTIFF'S
EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR
STAY OF EXECUTION**

(Docket No. 17)

Currently pending before the Court is Plaintiff's Emergency Motion for Preliminary Injunction or Stay of Execution (Docket No. 17). Having carefully reviewed the record, participated in oral argument, and otherwise being fully advised, the Court enters this Memorandum Decision and Order.

SUMMARY OF DECISION

Plaintiff Paul Ezra Rhoades contends that there is a substantial risk that the State of Idaho will carry out his planned execution by lethal injection on November 18, 2011 in a manner that will result in serious harm by causing him excruciating pain and suffering. Rhoades contends that the execution protocol adopted by the Idaho Department of Correction does not contain adequate written and actual protection in its implementation against the possibility that he might be insufficiently anesthetized at the beginning of the execution process. The Court agrees with the parties that if Rhoades is not rendered sufficiently unconscious from the first drug used in the three-drug lethal injection protocol, then he will certainly suffer excruciating suffocation and

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pain from the remaining two drugs. The Court also finds, as agreed by the parties, that if properly anesthetized, there will be no risk of pain for Rhoades.

Rhoades asks the Court to rule that such a risk violates his rights under the Eighth Amendment of the U.S. Constitution to be protected from cruel and unusual punishment. He asks the Court to issue a stay upon the scheduled execution, so that his claim can be more fully heard and considered.

In order for Rhoades to be entitled to a stay of his execution, he must prove that he is likely to succeed on the merits of his claim that Idaho's method of execution violates the Eighth Amendment, that he is likely to suffer irreparable harm if a stay is not entered, that the balance of equities tips in his favor, and that a stay is in the public interest.

For the reasons described in this decision, the Court denies Rhoades's request for a stay of his execution. The Court finds that the Idaho Department of Correction, in setting out its formal protocol for the manner in which the execution will be conducted and in choosing and training the persons who will be involved in the execution, has provided appropriate safeguards to protect against a substantial risk that Rhoades will not be adequately anesthetized at the beginning of the execution process. The Court finds that although Rhoades has raised questions that present the possibility of error or mistake in the execution process, the safeguards of the Idaho protocol are substantially similar to those contained in execution protocols approved by the United States Supreme Court and by the Ninth Circuit Court of Appeals in similar cases. The Court also finds that the State of Idaho is not required to implement a different, one-drug, protocol in its executions without a more certain showing by Rhoades that Idaho's existing

protocol raises a substantial risk of serious harm and that the alternative protocol significantly reduces such a risk, is feasible, and readily implemented.

The Court also finds, and acknowledges with a full understanding of the practical meaning of this decision, that if Rhoades's request for a stay is not granted, then the very nature of an execution means that he will suffer irreparable harm.

In regard to the equities of the case, the Court concludes that the equities in this case do not tip toward Rhoades any more than toward the Defendants. Rhoades did not bring this lawsuit, nor his request for a stay, until his execution date was on the near horizon. However, the Idaho Department of Correction did not even release its planned execution protocol until October 14, 2011, less than a week before new death warrants were issued in Rhoades's state criminal cases.

The Court finds that the public interest favors denial of the request for a stay of the execution. Rhoades has previously appealed the convictions and the sentences that brought him to this fast-approaching execution date, and has sought relief from the federal courts under federal habeas claims. Those appeals and collateral proceedings have run their course, and those issues are not before this Court. It has been over 23 years since Rhoades was first sentenced to death. The State of Idaho allows imposition of the death penalty for crimes such as committed by Rhoades. Rhoades was sentenced to death in two separate criminal cases, involving kidnapping and murder. The State of Idaho has an interest in seeing that its laws are enforced, and further delay will not meet that interest. Similarly, the uncertainties and expense that come from the delay that often follows death-penalty cases, as well as the impact of such delay upon the families of victims and their communities, will only be compounded by a stay of the

execution. The public has an interest, independent of the difficult debate over the death penalty as a form of punishment at all, to have such proceedings reach a conclusion. Therefore, the Court finds that the public interest would not be served by a stay of the execution.

In summary, Rhoades has failed to show a right to have injunctive relief entered in this case, in the form of a stay of his execution. His motion for such relief is denied.

I. INTRODUCTION

The Eighth Amendment of the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This is a case which asks how the Eighth Amendment should be applied to an execution scheduled for November 18, 2011. The condemned man, who is the Plaintiff in this case and who stands convicted of four capital punishment crimes, contends that the protection of the Eighth Amendment against cruel and unusual punishment should stop his execution. His claim is *not* that the death penalty is unconstitutional. Rather, he argues, through his counsel, that the manner in which the State of Idaho intends to go about his execution – through the use of lethal injection – will subject him to a substantial risk of serious harm in the form of severe pain, and is therefore unconstitutional as a form of cruel and unusual punishment. *See* Pl.’s Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, p. 3 (Docket No. 18). Alternatively, Plaintiff maintains that a stay should be granted “because the IDOC execution facility is incomplete, precluding the IDOC from complying with SOP 135.” *See id.*

On March 24, 1988, Paul Ezra Rhoades (“Rhoades”) was sentenced to death in Idaho’s Seventh Judicial District state court for the kidnapping and murder of Susan Michelbacher.¹ On May 13, 1988, in the same state judicial district but in a separate criminal case, Rhoades again was sentenced twice to death, for the kidnapping and murder of Stacy Baldwin.²

In the over 23 years that have followed, Rhoades pursued appeals and petitions for post-conviction relief in state court. He has also pursued habeas claims in federal court. All such appeals and other collateral proceedings have run their course, with their denouement coming when the United States Supreme Court denied certiorari review of Rhoades’s federal habeas claims in the Bonneville County case on October 11, 2011, and in the Bingham County case on October 13, 2011.

Following the denials of certiorari, the cases returned to Idaho state court. On October 19, 2011, a new death warrant was issued by the state court in both the Bonneville County and Bingham County cases. The death warrants, directed at Brent Reinke, the Director of the Idaho Department of Correction, and Randy Blades, the Warden of the Idaho Maximum Security Institution, ordered that Reinke and Blades “cause the execution of said sentence of death to take place” on November 18, 2011, unless said sentence were to be stayed by law.

On September 22, 2011, Rhoades filed this lawsuit against Reinke and Blades, seeking an order permanently enjoining the State of Idaho from executing him (Docket No. 1). The death warrants issued on October 19, 2011, heightened the urgency of Rhoades’s lawsuit, and, on

¹ *State v. Rhoades*, Case No. C-87-04-547, Seventh Judicial District of the State of Idaho, in and for the County of Bonneville.

² *State v. Rhoades*, Case No. 4283, Seventh Judicial District of the State of Idaho, in and for the County of Bingham.

October 28, 2011, he filed an Emergency Motion for Preliminary Injunction or Stay of Execution (Docket No. 17). Since that date, the Court has considered the written arguments and evidence of the parties, and heard testimony and additional argument during a lengthy hearing on November 10, 2011. This written decision resolves the issues of constitutional law concerning cruel and unusual punishment raised by Rhoades's motion asking to stay the execution. This decision does not revisit the challenges made by Rhoades against his conviction and his sentence. Those have been decided. This decision does not consider whether the death penalty, as a form of punishment, is constitutional for the crimes committed by Rhoades at issue here. The Supreme Court has said that it is. *Gregg v. Georgia*, 428 U.S. 153 (1976). Each State is free to decide on its own whether to provide for the death penalty. Idaho, through its elected legislature, has chosen to do so, and has further decided to inflict the death penalty through lethal injection.³

Idaho, with the large majority of states that impose the death penalty, employs a three-drug lethal injection protocol. That protocol is identified as Idaho Department of Correction ("IDOC") Standard Operating Procedure 135.02.01.001 ("SOP 135"). Under SOP 135, executions are carried out through the sequential administration of three chemicals: a barbiturate (sodium thiopental, also known as sodium pentothal), pancuronium bromide, and potassium

³ "The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of a substance or substances approved by the director of the Idaho department of correction until death is pronounced by a coroner or a deputy coroner. The director of the Idaho department of correction shall determine the procedures to be used in any execution. This act shall apply to all executions carried out on and after the effective date of this enactment, irrespective of the date sentence was imposed." Idaho Code § 19-2716.

chloride.⁴ The barbiturate drug anesthetizes the inmate by inducing unconsciousness, permitting the other two chemicals to be administered without causing pain. Pancuronium bromide is a paralytic neuromuscular blocking agent that causes complete paralysis and accompanying suffocation. Finally, potassium chloride induces cardiac arrest. Both Rhoades and the IDOC agree that if an inmate is not properly anesthetized by the sodium pentothal at the start of the execution, he will experience significant pain and suffering from the subsequent administration of the pancuronium bromide and potassium chloride. However, if the sodium pentothal is administered properly, it is equally uncontested that there is no risk of pain during the execution. This understanding of the three-drug protocol is discussed in both of the most significant cases for this Court, dealing with challenges such as the one brought by Rhoades in this case. *See Baze v. Rees*, 553 U.S. 35, 49, 53 (2008); *Dickens v. Brewer*, 631 F.3d 1139, 1142 (9th Cir. 2011).

II. STANDARD OF LAW

The pending motion seeks injunctive relief in the form of an order staying the execution. Therefore, the Court considers the argument and the evidence under the so-called “*Winter*” standards, namely that Rhoades “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). A preliminary injunction “is an ‘extraordinary and drastic

⁴ SOP 135 also calls for a heparin/saline solution “flush” to be injected after the administration of the barbiturate and before the administration of the pancuronium bromide, and then again after the administration of the pancuronium bromide and before the administration of the potassium chloride. *See* SOP 135, Appx. A at pp. 6-7 (Docket No. 7, Att. 4).

remedy’ . . . never awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008) (internal citations omitted). Significantly, although the threat of irreparable harm is inescapable, the condemned prisoner is not entitled to “an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.”⁵ *Hill v. McDonough*, 547 U.S. 573, 583-584 (2006), citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). “[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay” *Hill*, 547 U.S. 573, 584.

When assessing these factors, the court must bear in mind that “a stay of execution is an equitable remedy” and “equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill*, 547 U.S. at 584.

III. DISCUSSION

A. Rhoades is Not Likely to Succeed on the Merits

1. The Analysis Required by *Baze v. Rees*

The Eighth Amendment prohibits “punishments that involve the unnecessary and wanton infliction of pain, or that are inconsistent with evolving standards of decency that mark the progress of a maturing society.” *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004). For a prisoner to establish an Eighth Amendment violation based on his future exposure to pain during

⁵ It has been over 23 years since Rhoades was sentenced to death for these crimes, an extraordinary length of time even in the world of death-penalty cases. The paradox of extended periods of incarceration upon death row, which average nearly 15 years, has been discussed in cases which raise Eighth Amendment challenge to execution after such lengthy incarceration under a pending, but not yet implemented, sentence of death. *See, e.g., Valle v. Florida*, 564 U.S. ____ (2011) (Breyer, J., dissenting) (expressing support for certiorari in case seeking to prevent execution after condemned man had been on death row for 33 years.).

an execution, he must demonstrate that “the conditions presenting the risk must be ‘*sure or very likely* to cause serious illness and needless suffering,’ and give rise to ‘sufficiently *imminent* dangers.’” *Baze v. Rees*, 553 U.S. 35, 50 (2008) (Roberts, C.J., plurality opinion) (emphasis in original and quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)). Put another way, “there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’” *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 & n.9 (1994)).

In *Baze*, the Supreme Court held that Kentucky’s method of execution by lethal injection – using the same three drugs – did not violate the Eighth Amendment. *See Baze*, 553 U.S. at 63. The decision was comprised of seven separate opinions, which fell into three groups of Justices. In *Ventura v. State*, 2 So. 3d 194, 200 (Fla. 2009), the Florida Supreme Court observed that the *Baze* plurality:

adopted a version of the substantial-risk standard, while Justice Breyer, concurring in the judgment, and Justices Ginsburg and Souter, adopted a version of the unnecessary-risk standard. In contrast, Justices Thomas and Scalia renounced any risk-based standard in favor of a rule of law that would uphold any method of execution which does not involve the *purposeful* infliction of “pain and suffering beyond that necessary to cause death.” Justice Stevens did not provide a separate standard but, instead, expressed general disagreement with (1) the death penalty based upon his long experience with these cases and the purported erosion of the penalty’s theoretical underpinnings (deterrence, incapacitation, and retribution), and (2) the allegedly unnecessary use of the paralytic drug pancuronium bromide.

Id. at 199-200 (emphasis in original; citations and footnotes omitted). Justice Stevens also said he believed that the plurality opinion concerning lethal injection procedures “would generate debate” in future cases, a concern Chief Justice Roberts answered thusly:

[T]he standard we set forth here resolves more challenges than [Justice Stevens] acknowledges. *A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State’s lethal*

injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Baze, 553 U.S. at 61, 71 (emphasis added).⁶ “Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” *Id.*

Thus, *Baze* creates a constitutional “safe harbor” for those lethal injection protocols that are substantially similar to Kentucky’s lethal injection protocol. *See Dickens*, 631 F.3d at 1146. Seeking a stay of his execution, Rhoades argues that SOP 135⁷ is not substantially similar to Kentucky’s lethal injection protocol (on its face and/or as applied), such that it necessarily violates the Eighth Amendment. *See* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, p. 3 (Docket No. 18) (“Idaho’s execution procedures create a demonstrated risk of severe pain, do[] not provide safeguards relied upon in *Baze*, and [are] not substantially similar

⁶ The Ninth Circuit has agreed with every other circuit to consider the issue and has held that Chief Justice Roberts’s opinion for a three-Justice plurality sets out the controlling standard. *See Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir. 2011) (“Every circuit that has considered a challenge to a lethal injection protocol following *Baze* has analyzed the protocol under the plurality’s substantial risk standard.”). Indeed, the Supreme Court has since applied the plurality’s standard when vacating a temporary restraining order barring an execution in Arizona because the sodium thiopental to be used had been obtained from a foreign source. *See Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (holding execution could proceed because there was no evidence that drug was “‘sure or very likely to cause serious illness and needless suffering’” (citing *Baze*, 553 U.S. at 50)). “We are, therefore, in good company in holding that the *Baze* plurality’s substantial risk standard is the controlling standard for assessing the constitutionality of an execution protocol.” *Dickens*, 631 F.3d at 1145-46.

⁷ SOP 135 was originally attached as an exhibit to Defendants’ October 14, 2011 Motion to Dismiss. *See* SOP 135, attached as Ex. 4 to Defs’ 12(b)(6) Mot. to Dismiss (Docket No. 7, Att. 4). Although Defendants have since withdrawn their Motion to Dismiss in light of Plaintiff’s Amended Complaint, the parties acknowledge that SOP 135 remains a part of the Court’s record.

to the Kentucky protocol upheld in *Baze*.”). Additionally, Rhoades argues that the availability and effectiveness of a one-drug lethal injection protocol alternative – adopted in Ohio, Washington, and South Dakota after the *Baze* decision was issued – further establishes that SOP 135 violates the Eighth Amendment. *See* Reply to Resp. to Mot. for Stay, pp. 3-9. IDOC disputes each of these arguments in defending SOP 135's constitutionality.

2. SOP 135 is Substantially Similar to Kentucky's Lethal Injection Protocol as Discussed and Upheld in *Baze*

The parties agree that, if an inmate is not properly anesthetized by the sodium pentothal at the start of the execution, he will experience significant pain and suffering from the subsequent administration of the pancuronium bromide and potassium chloride. If the sodium pentothal is administered properly, there is no risk of pain during the execution. *See Dickens*, 631 F.3d at 1142. Therefore, the manner in which the sodium pentothal is administered is of critical importance when weighing a State's three-drug lethal injection protocol against the Eighth Amendment.

The *Baze* Court acknowledged the concern raised by the petitioner that IV⁸ catheters could malfunction, and the sodium pentothal could infiltrate into surrounding tissue rather than just into the vein, possibly causing an inadequate dose of sodium pentothal to be delivered to the circulation system and, ultimately, the brain. *See Baze*, 553 U.S. at 53-54. However, *Baze* held that such potential problems “do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment” where Kentucky had put safeguards into place “to

⁸ The abbreviation “IV” means “an apparatus used to administer a fluid (as of medication, blood, or nutrients) intravenously.” MERRIAM-WEBSTER DICTIONARY, *available at* <http://www.merriam-webster.com/dictionary/iv> (site last visited Nov. 14, 2011).

ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner.” *Id.*, at 55. These standards were described as follows:

- “The most significant of these is the written protocol’s requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman.” *Id.*⁹
- “Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.” *Id.*
- “In addition, the protocol calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences. These redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected.” *Id.*
- “The IV team has one hour to establish both the primary and backup IVs, a length of time the trial court found to be ‘not excessive but rather necessary’” *Id.*
- “The qualifications of the IV team also substantially reduce the risk of IV infiltration.” *Id.* at 56.
- “In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration.” *Id.*
- “Kentucky’s protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds.” *Id.*

⁹ Chief Justice Roberts noted that the actual experience of the execution team IV members was even more extensive than called for by the standard: “Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky’s prison population.” *Baze*, 553 U.S. at 55.

Id. “In light of these safeguards, [the Supreme Court could not] say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.” *Id.*; *see also id.* at 60 (“Again, the risk [of administering the second and third drugs before the sodium thiopental has taken effect] is already attenuated, given the steps Kentucky has taken to ensure the proper administration of the first drug.”); *id.* at 62 (“Kentucky’s decision to adhere to its protocol despite these asserted risks [of “maladministration”], while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment.”).

Rhoades argues that SOP 135 “contains none of the *Baze* safeguards.” *See* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, p. 11 (Docket No. 18). Specifically, Rhoades maintains that SOP 135 (1) “does not contain the ‘most significant’ safeguard, a required medical credential ‘combined with at least one year of professional experience’”; (2) “does not contain the second *Baze* requirement, daily experience”; (3) “does not contain the third *Baze* safeguard, in-house training”; (4) “does not contain the fourth *Baze* safeguard, meaningful redundancy”; and (5) “does not contain the final *Baze* safeguard, a meaningful consciousness check.” *See id.* at pp. 11-23. This Court concludes, however, that SOP 135 is a substantially similar protocol to that approved in *Baze*.

First, Rhoades overstates the holding of *Baze* to the extent he equates the identified “safeguards” as mandatory requirements that must each be in place in order for a State’s three-drug lethal injection protocol to pass constitutional muster. *See* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, pp. 10-11, 14 (Docket No. 18). The Kentucky safeguards emphasized in *Baze* are among the means that Kentucky has chosen to protect against the risk of

a failed administration of the first drug – the anesthetic – of the three-drug protocol. In other words, *Baze* neither operates as a doctrinal blueprint, instructing States on the exact type or quantum of safeguards needed to insulate a three-drug lethal injection protocol from challenge, nor does it foreclose the possibility that different, more, or even fewer safeguards could offer the same assurances against the understood risks presented in similar cases. *Baze* stands for the proposition that Kentucky’s lethal injection protocol, as well as substantially similar lethal injection protocols, are constitutional. *See Baze*, 553 U.S. 35, 61 (“[a] State with a lethal injection protocol substantially similar to [Kentucky’s lethal injection protocol] would not create a [demonstrated risk of severe pain].”). If Chief Justice Roberts intended that only Kentucky’s precise protocol could meet Eighth Amendment scrutiny, he did not say so.

Second, even if the safeguards identified in *Baze* are understood to be more-or-less safety requirements as Rhoades contends, this Court is persuaded that the record developed thus far reveals that the safeguards contained in SOP 135 – as further elaborated upon by Jeff Zmuda¹⁰ in his affidavit and his testimony during the evidentiary hearing – satisfies these requirements in

¹⁰ Zmuda has been an employee of IDOC for approximately 24 years and is currently the Deputy Chief of the Bureau of Prisons. *See Zmuda Aff.* at ¶ 2 (Docket No. 50). In his position as the Deputy Chief of the Bureau of Prisons, Zmuda works in conjunction with the Idaho Maximum Security Institution to plan, prepare, and implement IDOC execution procedures. *See id.* at ¶ 3. Zmuda was closely and directly involved in SOP 135’s development. *See id.* at ¶ 6.

any event.¹¹ Indeed, on its face, SOP 135 contains even more safeguards than those referenced and relied upon in *Baze*.

a. SOP 135 Ensures that Members of the Medical and Injection Teams Have at Least One Year of Professional, Medical Experience

Under Kentucky's lethal injection protocol, members of its IV team – those individuals responsible for establishing the IV lines – must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. *See Baze*, 553 U.S. at 55. SOP 135's "Medical Team" is similarly responsible for inserting the IV catheters¹² and can be comprised of any combination of the following disciplines: (1) emergency medical technician; (2) licensed practical nurse or registered nurse; (3) military corpsman; (4) paramedic; (5) phlebotomist; (6) physician assistant; (7) physician; or (8) other medically trained personnel including those trained in the United States Military. *See* SOP 135, p. 9 (Docket No. 7, Att. 4). As Rhoades points out, however, SOP 135 does not require Medical Team members to "have at least one year of professional experience" as was the case in *Baze*. *See* Mem. in

¹¹ The Court considers Zmuda's affidavit and evidentiary hearing testimony as supplementing SOP 135, like similar cases in other courts. *See, e.g., Dickens*, 631 F.3d at 1142 ("During the course of this litigation, Arizona agreed to amend the November 1, 2007 protocol to address some concerns raised by Dickens. . . . The amendments are set forth in a Joint Report submitted to the district court on April 9, 2009. The district court considered the constitutionality of the November 1, 2007 protocol, as amended by the Joint Report (the "Protocol"), and our analysis on appeal is similarly constrained.").

¹² Pursuant to SOP 135, the Medical Team is also responsible for:

ensuring the line is functioning properly throughout the procedure, mixing the chemicals, preparation of the syringes, monitoring the offender (including the level of consciousness), and supervising the administration of the chemicals.

See SOP 135, p. 9 (Docket No. 7, Att. 4).

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Supp. of Mot. for Prelim. Inj. or Stay of Execution, p. 14 (Docket No. 18). Still, Zmuda's affidavit addresses this concern.

SOP 135 requires verification of the Medical Team and Injection Team¹³ candidates' professional licensure or certification before approval. *See* SOP 135, p. 9 (Docket No. 7, Att. 4). Selection of the Team members includes a review of each member's professional qualifications, training, experience, professional license(s) and certification(s), criminal history, with a personal interview. *See id.* at pp. 9-10. According to Zmuda, all the members of the current Medical Team and Injection Team are qualified medical providers¹⁴ and "have professional qualifications and experience exceeding one year of professional training and experience." *See* Zmuda Aff. at ¶ 13 (Docket No. 50). Going further, Zmuda says that "[t]he team member with the least amount of experience has 15 years experience in his/her professional field." *See id.*

Speaking to Plaintiff's additional argument that "SOP 135 does not state that [either Medical Team members or Injection Team members] be currently licensed or have any actual experience in initiating IV catheters (*see* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, pp. 14-17 (Docket No. 18)),¹⁵ Zmuda goes on to state:

¹³ Pursuant to SOP 135, "Injection Team" members "shall be responsible for administering the chemicals as described in Appendix A, *Execution Chemicals Preparation and Administration*" and [m]ust have at least one year of medical experience as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military medical corpsman." *See* SOP 135, p. 9 (Docket No. 7, Att. 4).

¹⁴ To maintain the Medical and Injection Team members' anonymity, with the exception of the Medical Team leader (a registered nurse), the undersigned redacted their respective employment titles from Zmuda's affidavit, generically listing them as "medical provider[s]." *See* Zmuda Aff. (Docket No. 50).

¹⁵ Aside from what may have *actually* existed by way of the Kentucky's IV team members' make-up (*see Baze*, 553 U.S. at 55), it cannot be said that *Baze* identified either (1) medical license currency, or (2) experience using IVs as "safeguards." Regardless, Zmuda

all members of the Medical Team and Injection Team are certified in CPR, have venous access currency, which means they have current professional practice in insertion of IVs on a regular basis. Additionally, all members have experience in Pharmco Dynamic Currency, which means the team members understand medical orders, can read and understand medical labels, draw medications, and deliver medications through either an injection or IV.

SOP 135 does not state that the Medical Team members have at least one year of professional training and practical experience, however, all Medical Team members selected for the preparation of chemicals have at least one year of professional training and practical experience necessary to prepare the chemicals.

See Zmuda Aff. at ¶¶ 18, 24 (Docket No. 50). With Zmuda's testimony in mind, this Court cannot agree with Plaintiff that SOP 135's Medical and Injection Team members do not (or, in the case of replacements, will not) have the requisite medical credentials and experience over time. *See Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution*, p. 14 (Docket No. 18). To the contrary, consistent with *Baze*, SOP 135 ensures that members of the Medical and Injection Teams have at least one year of professional, medical experience.

b. SOP 135 Ensures that Medical and Injection Team Members Have Regular Experience Establishing IV Catheters

In *Baze*, Chief Justice Roberts stated that "Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population." *Baze*, 553 U.S. at 55. Rhoades contends that this language means that a State's lethal injection protocol must require "daily" professional experience on the part of the team members in the various procedures of the protocol. *See Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution*, p. 17 (Docket No. 18). This Court is not so persuaded. Rather, after

addresses these subjects in his affidavit.

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speaking to the “most significant” safeguard within Kentucky’s lethal injection protocol (“at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman”), Chief Justice Roberts noted that the actual experience of the Kentucky IV team members exceeded the minimum experience requirement. Nothing more. *Cf. Noonan v. Norris*, 594 F.3d 592, 605 n.7 (8th Cir. 2010) (“The Inmates assert that the *Baze* plurality found that the daily experience of the IV team members was equally significant. This argument mischaracterizes *Baze*.”).

Zmuda testified that all Medical and Injection Team members “have current professional practice in insertion of IVs on a regular basis” and “can draw medications and deliver medications through either an injection or IV.” *See* Zmuda Aff. at ¶ 18 (Docket No. 50).¹⁶ Hence, even if ongoing experience is part of the *Baze* list of safeguards, SOP 135 is much like the Kentucky protocol in terms of the qualifications of medical personnel employed. Therefore, SOP 135 does contain assurances that there will be Medical and Injection Team members with regular experience establishing IV catheters.

c. SOP 135 Provides for In-House Training

Plaintiff takes issue with SOP 135's outlined training procedures, arguing that the protocol neither requires that the in-house training cover all aspects of the execution procedure, nor involves anyone other than Medical Team members. *See* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, p. 20 (Docket No. 18). A review of SOP 135 indicates otherwise.

¹⁶ If it is not possible to reliably place a peripheral line in the offender, the utilization of a central line catheter into the femoral vein in the offender’s thigh may be necessary. *See* SOP 135, Appx. A at p. 6 (Docket No. 7, Att. 4). “The Medical Team member responsible for placing a central line catheter in the offender’s femoral vein shall have at least one year of regular and current professional experience conducting that procedure.” *Id.*

Pursuant to SOP 135, the Idaho Maximum Security Institution (“IMSI”) Warden ensures an annual training schedule is established, identifying dates for periodic on-site practice by the various teams. *See* SOP 135, p. 10 (Docket No. 7, Att. 4). The prescribed training is to include the following:

- The schedule shall include a minimum of 10 training sessions for the Execution Escort Team, Injection Team, and Medical Team annually;
- After receiving a death warrant, the teams will train weekly before the scheduled execution date;
- Team members must participate in a minimum of four (4) training sessions prior to participating in an actual execution; and
- Prior to any scheduled execution, the Execution Escort Team, Medical Team, and Injection Team shall conduct a minimum of two (2) rehearsal sessions during the 48 hours before the scheduled execution.

Id. Thirty to 21 days before the scheduled execution, the Deputy Chief of the Bureau of Prisons ensures that staff members participating in the execution have received adequate training, written instruction and practice, and that all training has been documented (*id.* at 21); and the IMSI Warden ensures that the assigned Medical Team members physically evaluate the offender to predetermine appropriate venous access locations (*id.* at 24). Twenty-one to seven days before the scheduled execution, the IMSI Warden ensures that the Specialty Teams¹⁷ “are conducting training and exercises in preparation.” *Id.* at 26. Seven to two days before the scheduled execution, the Medical Team leader ensures the serviceability of all necessary medical equipment, that heart monitor lines are sufficient in length, and that a mild sedative is available to the offender (*id.* at 27); and the IMSI Warden ensures that the teams “have completed

¹⁷ Pursuant to SOP 135, the “Specialty Teams” are the Execution Escort Team, the Medical Team, and the Injection Team. *See* SOP 135, p. 8 (Docket No. 7, Att. 4).

adequate training and practice” (*id.*). Twenty-four to 12 hours before the scheduled execution, the IMSI Warden ensures that the Medical Team leader checks the electrocardiograph instruments to confirm they are functioning properly. *Id.* at 30.

With these procedures as a backdrop, Zmuda details what has already occurred, and what will occur, by way of training before the scheduled execution:

The Escort, Medical, and Injection Teams have been engaged in training sessions since October 20, 2011, using the execution unit. Between October 20, 2011 and the scheduled execution, there will be a total of 10 training sessions, which includes two full rehearsals as provided for in SOP 135 for the Escort Team, Injection Team, and Medical Team. All members of the Specialty Teams are familiar with SOP 135, the execution process, and skill sets needed to complete the execution. All team members were placed into their respective roles for the execution procedure based on their professional experience, training, and practice. All team members will have participated in a minimum of four training sessions prior to the actual execution. Medical Team members will have practiced IV insertion on volunteers. The training schedule outlined in SOP 135 is consistent with the *Baze* safeguards. Additionally, all team members exceed the one year of training and experience in their respective professions.

See Zmuda Aff. at ¶ 19 (Docket No. 50). Additional details were provided during Zmuda’s courtroom testimony, in which he more fully described the training that had occurred through the date of the hearing, and the training, including full rehearsal training, that was scheduled for the following seven days. During the argument portion of the hearing, after the Court expressed its concern over the seemingly compressed nature of the training in light of the relatively recent adoption of SOP 135, the Court allowed the Defendants to recall Zmuda to the witness stand, over Rhoades’s objection. At that time, Zmuda said that there will be five trainings, to include several full rehearsals, before the execution date which will include placing IV lines in volunteer subjects, who will be Zmuda and two other wardens.

SOP 135, the training done to date, and the training planned to occur are substantially similar to the training called for by the Kentucky protocol at issue in *Baze*. The Court is troubled, as was described during the evidentiary hearing, about the short period of time in which the IDOC is trying to meet the requirements of its own execution protocol. The day of an execution is, as the Court stated in the hearing, a day unlike any other day, and it seems inescapable that the enormity of the act that is to take place will make adequate and effective training of utmost importance to the IDOC. If the record before the Court showed only the fact of a training structure and schedule, with no evidence of actual training intended to gain, gauge, and rehearse proficiency in the steps and skills necessary to conduct the execution, the Court might be persuaded that safeguards to avoid the substantial risk of serious harm are not sufficiently present. But here, the training is underway, the prison official (Zmuda) in charge of the training and the success of the training, even though not medically-trained himself, is a credible witness who has described a plan to accomplish a full course of training, with qualified and experienced execution team members.

Additionally, the IDOC has no control on when the “first” time that an execution under a new protocol, and new and different safeguards than might have been used in the past, will take place. Idaho has not had an execution since 1994, conducted by lethal injection. The last execution prior to that occurred in 1957, by hanging. There is no certain predictability to when the collateral proceedings that stay a prior death warrant will run their course, nor, for that matter, whether those proceedings will undo the conviction or the sentence. Then, as here, when the collateral proceedings have been completed, Idaho law requires that the case return immediately to the sentencing court, and that a new death warrant be issued in short order.

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Finally, Idaho law requires that an execution date be set within 30 days of the issuance of the death warrant. *See* Idaho Code § 19-2715(2).

These circumstances combine to persuade the Court that SOP 135 contains sufficient training practices and actual implementation of such practices, consistent with *Baze*.

d. SOP 135 Outlines Meaningful Redundancy Safeguards

In *Baze*, the establishment of both a primary and backup line, as well as the preparation of two sets of the lethal injection drugs before the execution begins, ensures that, if necessary, additional doses of sodium pentothal can be administered before the remaining two drugs – pancuronium bromide and potassium chloride – are injected. *See Baze*, 553 U.S. at 55. Similar redundant measures exist with respect to SOP 135.

SOP 135 requires that the Medical Team prepare three complete sets of chemicals; “one full set of syringes is used in the implementation of the death sentence and two full sets are to be available and ready for use as backup.” *See* SOP 135, Appx. A at p. 1 (Docket No. 7, Att. 4); *see also* Zmuda Aff. at ¶ 24. The Medical Team also “determine[s] the best sites on the offender to insert a primary IV catheter and a backup IV catheter in two separate locations in the peripheral veins using appropriate medical procedures.” *See* SOP 135, Appx. A at p. 5 (Docket No. 7, Att. 4).¹⁸ Finally, according to SOP 135, “[t]he primary IV catheter will be used to administer the

¹⁸ Pursuant to SOP 135, “[b]oth primary and backup IV lines will be placed unless in the opinion of the Medical Team leader, it is not possible to reliably place two peripheral lines. *See* SOP 135, Appx. A at p. 5 (Docket No. 7, Att. 4). As discussed during the evidentiary hearing, the Court notes that the Medical Team leader’s discretion in establishing *both* the primary and backup IV lines was not mentioned in *Baze*. *See Baze*, 553 U.S. at 55. Even so, this is not material enough to conclude that SOP 135 is not substantially similar to Kentucky’s lethal injection protocol, especially when considering that, in the event a peripheral line is not possible, the Medical Team may utilize a central line catheter in the offender’s femoral vein in the thigh, using an ultrasound to assist in properly inserting the catheter and related anesthetic. *See* SOP

chemicals and the backup catheter will be reserved in the event of the failure of the first line.”

Id.

Rhoades agrees that SOP 135 contains the redundancy safeguards discussed in *Baze*. *See* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, p. 21 (Docket No. 18) (“SOP 135 likewise requires a backup IV, and backup chemical preparation, and readiness as well.”). But Rhoades questions the meaningfulness of these redundancy safeguards, arguing that SOP 135 “does not require that the individuals initiating, maintaining, or delivering chemicals through the IV have any relevant training and experience in doing so.” *Id.*

As already discussed, SOP 135 ensures that the Medical and Injection Team members – those responsible for establishing the IV lines, mixing the chemicals, preparing the syringes, and injecting the chemicals – have the relevant training and experience in accomplishing these respective tasks. Therefore, like *Baze*, SOP 135 outlines meaningful redundancy safeguards.

e. SOP 135 Includes Meaningful Consciousness Checks

In *Baze*, another safeguard was found in Kentucky’s requirement that the warden redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. *Baze*, 553 U.S. at 56. Although the plurality decision in *Baze* does not specifically speak to “how” Kentucky’s warden is to determine a prisoner’s consciousness, Rhoades argues that this portion of *Baze* requires that SOP 135 incorporate meaningful consciousness checks. *See* Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, p. 22-23 (Docket No. 18). Said

135, Appx. A at p. 6 (Docket No. 7, Att. 4); *see also* Zmuda Aff. at ¶ 26. This procedure does not require an incision, or “cut down” and is to be performed by personnel with regular experience inserting central lines in their professional practice. *See* Zmuda Aff. at ¶ 26 (Docket No. 50).

another way, even though *Baze* does not address the manner in which consciousness checks are to be performed, Rhoades still maintains that “SOP 135 does not contain the final *Baze* safeguard, a meaningful consciousness check.” *Id.* at 22. This Court disagrees.

Like *Baze*, SOP 135 contemplates what is to occur in the event the offender remains conscious. First, “the Medical Team shall assess the situation to determine why the offender is conscious”; then, “[t]he Medical Team leader shall communicate this information to the IMSI Warden, along with all Medical Team input.” *See* SOP, Appx. A at p. 6 (Docket No. 7, Att. 4). At that point, the IMSI Warden “will determine how to proceed or, if necessary, to start the procedure over at a later time or stand down.” *Id.* If deemed appropriate, the IMSI Warden “may instruct the Injection Team to administer an additional 5 grams of sodium pentothal or pentobarbital,¹⁹ followed by the heparin/saline flush from Backup Set 2.” *Id.* at pp. 6-7. Thus, whether characterized as a “consciousness check” or, simply, a contingency plan in the event an offender remains conscious, SOP 135 incorporates the same safeguards as *Baze*.

But, unlike *Baze*, SOP 135 is not silent on the nature of consciousness checks to be used following the administration of the sodium pentothal. According to SOP 135:

- A microphone will be positioned to enable the Medical Team [and] Injection Team Leader . . . to hear any utterances or noises made by the offender throughout the procedure. The Medical Team leader will confirm the microphone is functioning properly, and that the offender can clearly hear from their affixed position, and be heard in the chemical room.
- The IMSI Warden shall ensure there is a person present throughout the execution who is able to communicate with the offender in the offender’s

¹⁹ Pursuant to SOP 135, pentobarbital is to be used “[i]n the event of an unavailability of a sufficient quantity of sodium pentothal from available resources” *See* SOP 135, Appx. A at p. 3 (Docket No. 7, Att. 4).

primary language. This person will be positioned to clearly see, hear, and speak to the offender throughout the execution.

- Once the offender is secured, the medical Team leader will attach the leads from the electrocardiograph to the offender's chest and confirm that the electrocardiograph is functioning properly and that the proper graph paper is used. A backup electrocardiograph shall be on site and readily available if necessary.
- A Medical Team member shall be assigned to monitor the EKG, and mark the EKG graph paper at the commencement and completion of the administration of each chemical. The assigned identifier of the Medical Team member monitoring the electrocardiograph shall be noted at each juncture.
- Throughout the procedure, the Medical Team members shall continually monitor the offender's level of consciousness and electrocardiograph readings, maintaining constant observation of the offender using one or more of the following methods: direct observation, audio equipment, camera, and television monitor, as well as any other medically approved method(s) deemed necessary by the Medical Team leader. The Medical Team leader shall be responsible for monitoring the offender's level of consciousness.
- After the sodium pentothal or pentobarbital and heparin/saline have been administered and before the Injection Team members begin administering the pancuronium bromide, the Medical Team leader shall confirm the offender is unconscious by direct examination of the offender.
- The Medical Team leader, dressed in a manner to preserve his anonymity, will enter into the room where the IMSI Warden and offender are located to physically confirm the offender is unconscious by using all necessary medically appropriate methods. The Medical Team leader will also confirm that the IV line remains affixed and functioning properly.

See SOP 135, Appx. A at pp. 4-6 (Docket No. 7, Att. 4).²⁰ Zmuda further confirms and elaborates on these consciousness checks, stating:

The execution procedure contains provisions for the consciousness checks of the offender once the drugs have been administered. Once the sodium pentothal or pentobarbital has been administered, the Medical Team leader will enter the execution chamber and confirm the offender is unconscious by direct examination. The [Medical Team]²¹ leader will physically assess the offender for signs of consciousness through verbal stimulus, solicit an auditory response, touch the offender's eyelashes, pinch the offender, and conduct a sternal rub. The Medical Team leader is competent in conducting levels of consciousness checks. These consciousness checks are consistent with the safeguards set forth in *Baze*.

See Zmuda Aff. at ¶ 21 (Docket No. 50). Together, these checks offer meaningful ways in which to monitor an offender's consciousness prior to administering the pancuronium bromide, followed by the potassium chloride.²² *Baze* is therefore satisfied in this respect.^{23 24}

²⁰ Pursuant to SOP 135, if a backup set of drugs is used:

the Medical Team shall confirm the offender is unconscious by sight and sound, utilizing the audio equipment, camera, and monitor. The Medical Team leader will again physically confirm the offender is unconscious using proper medical procedures and verbally advise the IMSI Warden of the same. Throughout the entire procedure, the Medical Team members, the Injection Team members and the IMSI Warden shall continually monitor the offender using all available means to ensure that the offender remains unconscious and that there are no complications.

See SOP 135, Appx. A at p. 7 (Docket No. 7, Att. 4).

²¹ Zmuda's affidavit references "Execution Team leader." See Zmuda Aff. at ¶ 21 (Docket No. 50). During his testimony, however, Zmuda confirmed that this individual is, indeed, the Medical Team leader.

²² Interestingly, in dissenting from Justice Roberts's opinion in *Baze*, Justice Ginsburg, joined by Justice Souter, stated that Kentucky's protocol does not include "any of the most basic tests to determine whether the sodium thiopental has worked. No one calls the inmate's name, shakes him, brushes his eyelashes to test for a reflex, or applies a noxious stimulus to gauge his response." *Baze*, 553 U.S. at 118 (dissent). Justice Ginsburg further indicated that Kentucky does not "monitor the effectiveness of the sodium thiopental using readily available equipment, even though the inmate is already connected to an electrocardiogram (EKG)." *Id.* Though apparently not present in Kentucky's lethal injection protocol upheld in *Baze*, these "safeguards"

f. SOP 135 Incorporates Even More “Safeguards” than Baze

Notwithstanding the above-referenced protections existing in substantial compliance with the *Baze* safeguards, SOP 135 includes *additional* safeguards against the inadequate administration of the three lethal injection protocol drugs used in Idaho:

Medical Services On-Site:

- A licensed physician will be on-site, staged near the Execution Unit. The physician will have access to an on-site medical crash cart, including applicable medications, and defibrillator. *See* SOP 135, p. 10 (Docket No. 7, Att. 4).
- The physician must be a medical doctor licensed by the Idaho Board of Medicine. *See id.*

are, by-and-large, outlined in SOP 135.

²³ During the evidentiary hearing, Rhoades’s medical expert, Mark Heath, M.D., warned of the risks associated with injecting pancuronium bromide and potassium chloride to a conscious individual, and expressed his opinion about the difficulty of assessing the level of unconsciousness without the sort of monitoring equipment ordinarily found in an operating room. Dr. Heath’s opinion implies a safeguard that would call for the presence of medical professionals whose code of ethics preclude them from participating in an execution. *Baze* is clear that such a step is not required for Eighth Amendment purposes, and the practical implications of such a requirement if judicially imposed in Idaho could easily replicate the quandary that has brought capital punishment to a *de facto* standstill in California. *See Morales v. Cate*, 757 F. Supp. 2d 961 (N.D. Cal. 2010). This Court will not cast its line into this debate but will, as it must, follow the direction from the Supreme Court in *Baze*.

²⁴ Dr. Heath was also the medical expert for the petitioner in *Baze*, and Justice Ginsberg made particular note of his testimony from another lethal injection case in which the issue of consciousness had been raised. In reference to that case, arising in Florida, Justice Ginsberg pointed out that Dr. Heath had testified that “the eyelash test is ‘probably the most common first assessment that we use in the operating room to determine...when a patient might have crossed the line from being conscious to unconscious’”...and that “[a] conscious person, if you touch their eyelashes very lightly, will blink; an unconscious person typically will not.” *Baze*, 553 U.S. at 120, n.6. Justice Ginsberg also made mention that Dr. Heath further testified that the “shaking and name-calling tests...are similar to those taught in basic life support courses.” *Id.* Justice Ginsberg drew upon such testimony to support her view that something more than Florida’s protocol was called for on the question of assessing the inmate’s level of consciousness. Idaho has essentially incorporated those safeguards into SOP 135.

- The physician will not be a part of the execution team or specialty teams and will not participate in the execution in any way. *See id.*
- The physician will provide the following services: (1) first aid: providing emergency care if needed to any person in the immediate area; and (2) resuscitation: assisting in any necessary resuscitation effort of the offender should a problem occur with the execution process. *See id.*
- Emergency medical technicians and ambulance service will be staged near the Execution Unit to provide emergency medical assistance and transport to anyone requiring such care during the process. *See id.*
- Trained medical personnel and emergency transportation, neither or which is involved in the execution process, shall be available in proximity to respond to the offender should any medical emergency arise at any time before the order to proceed with the execution is issued by the director of the IDOC. *See id.* at Appx. A at p. 8 (Docket No. 7, Att. 4).

Monitoring Potential IV Problems:

- The offender will be positioned to enable the Medical Team and Injection Team leader to view the offender, the offender's arms (or other designated IV location) and face with the aid of a color camera and a color monitor. *See id.* at Appx. A at p. 1.
- Prior to attaching the syringes to the 3-Gang, 3-Way Manifold, the flow of each gauge on the manifold shall be checked by the Medical Team leader running heparin/saline solution through the line to confirm there is no obstruction. *See id.*
- To ensure proper insertion in the vein, the assigned medical Team members should watch for the dark red flashback of blood at the catheter hub in compliance with medical procedures. *See id.* at Appx. A at p. 5.
- The assigned Medical Team members shall ensure the catheter is properly secured with the use of tape or adhesive material, properly connected to the IV line and out of reach of the offender's hands. A flow of heparin/saline shall be started in each line and administered at a slow rate to keep the line open. *See id.*
- Any failure of a venous access line shall be immediately reported to the IMSI Warden. *See id.*

- The IV catheter in use shall not be covered and shall remain visible throughout the procedure. *See id.*
- The IMSI Warden shall physically remain in the execution chamber with the offender throughout the administration of the chemicals in a position sufficient to clearly observe the offender and the primary and backup IV sites for any potential problems and shall immediately notify the medical Team leader and director should any issue occur. Upon receipt of such notification, the director of the IDOC will stop the proceedings and take all steps necessary in consultation with the Medical Team leader prior to proceeding further with the execution. *See id.*
- The Medical Team will take measures to ensure that there is no leakage in the tubing of the IV. *See Zmuda Aff. at ¶ 25 (Docket No. 50).*

Timing Between Administration of Chemicals:

- No further chemicals shall be administered until the Medical Team leader has confirmed the offender is unconscious, has verbally advised the IMSI Warden and three minutes have elapsed since commencing the administration of the sodium pentothal/or pentobarbital. *See SOP 135, Appx. A at p. 6 (Docket No. 7, Att. 4); see also Zmuda Aff. at ¶ 22 (Docket No. 50).*²⁵

Equipment Condition and Drug Chain of Custody:

- Ensure that execution chemicals and other medical supplies have been purchased and/or that sources have been established. *See SOP 135, p. 24 (Docket No. 7, Att. 4).*
- When chemicals are received, the IMSI Warden shall immediately start a chain of custody document and secure the chemicals in a safe. Access to the safe must be limited and controlled. The IMSI Warden will establish in a field memorandum the individuals who have access to the safe. The chain of custody form must be updated each time the safe is opened. *See id.*
- If chemicals are on site, the IMSI Warden will check the expiration dates on each item to ensure they will not expire before the execution date. If any

²⁵ In dissenting from Chief Justice Roberts's opinion in *Baze*, Justice Ginsburg, joined by Justice Souter, stated that "Kentucky's protocol does not include an automatic pause in the 'rapid flow' of the drugs" *Baze* 553 U.S. at 118 (dissent). SOP 135's three-minute break (also applied in the event backup lines are used) addresses this issue. *See SOP 135, Appx. A at pp. 6-7 (Docket No. 7, Att. 4)*

item will expire before the execution date, the IMSI Warden will immediately contact the deputy chief of prisons. *See id.*

- The IMSI Warden will consult with Medical Team members regarding the equipment for the procedure and ensure all equipment necessary to properly conduct the procedure is on site, immediately available for use, and functioning properly. *See id.*
- The IMSI Warden will ensure that all backup medical equipment, including a backup electrocardiograph, crash cart, defibrillator, and two complete sets of backup chemicals, are on site, immediately available for use, and functioning properly. *See id.*
- With technical assistance, the IMSI Warden will review lethal substances, amounts, methods, and the offender's physical and historical characteristics to evaluate compliance with SOP 135 and the appropriate facility field memorandum. *See id.* at pp. 27-28.
- The IMSI Warden shall confirm preventive maintenance of the execution chamber is current. *See id.* at p. 28.
- The IMSI Warden will confirm that the inventory of equipment, necessary supplies, and backup materials are on-site. *See id.*
- Within 24 to 12 hours prior to the execution, the IMSI Warden shall ensure that the Medical Team leader checks the electrocardiograph instruments to confirm they are functioning properly. *See id.* at p. 30.
- Within 24 to 12 hours prior to the execution, the IMSI Warden shall ensure that the crash cart and defibrillator are in place and functioning properly. *See id.*
- Within 24 to 12 hours prior to the execution, the IMSI Warden shall check the medical supply and chemical inventory. *See id.*
- The IMSI Warden will re-check the medical supplies and chemicals to ensure that each item is ready, expiration dates have not been exceeded, items are properly packaged, and, if applicable, sterilized. *See id.*

As an alternative to a stay of execution, Rhoades requests that *Baze*'s safeguards extend to SOP 135. *See* Pl.'s Reply to Resp. to Mot. For Stay of Execution, p. 18 ("Alternatively, [Rhoades] requests that the safeguards integral to the *Baze* protocol be implemented by the

Director and incorporated into SOP 135.”). In light of *Baze*, this Court has conducted a review of SOP 135 and concludes that it is substantially similar to Kentucky’s lethal injection protocol.

3. Rhoades Has Not Shown a Substantial Risk that SOP 135 Will be Implemented in an Unconstitutional Manner

Rhoades contends that even if Idaho’s lethal injection protocol contains adequate safeguards to minimize the risk of pain, there is still a substantial risk that IDOC officials will commit mistakes in implementing the protocol, exposing him to severe pain. To support his argument, he relies on selected reports of problems that have occurred during executions in other States that use a three-drug protocol. He also contends that the current members of Idaho’s execution teams were not fully vetted because no IDOC official confirmed employment history, training, or relevant medical experience, as called for by SOP 135. Additionally, Rhoades argues that Idaho’s adoption of the final version of SOP 135 five weeks before his scheduled execution has resulted in an unnecessarily rushed atmosphere with little time to practice, and, moreover, that the training sessions that have occurred and will occur before the scheduled execution are inadequate to ensure his safety.

In *Dickens*, the Ninth Circuit acknowledged that *Baze* did not foreclose prisoners from bringing claims that go beyond a written protocol and rely on errors in implementation, but it noted that a prisoner making such a claim “faces an uphill battle.” 631 F.3d at 1146. This is so because the prisoner must “raise issues of fact as to whether there is a substantial risk that he will be improperly anesthetized *despite* the Protocol’s safeguards, including those added through amendment.” *Id.* (citing *Baze*, 553 U.S. at 56). This is “not an impossible task, but it is a difficult one.” *Id.* at 1147.

As an initial matter, the Court has considered Rhoades's argument regarding problems during executions in other jurisdictions. In his briefing, he provides a list of 31 "botched executions" between 1982 and 2001, and he cites a few more recent examples from media accounts since *Baze*. See Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. or Stay of Execution, pp. 5-6 (Docket No. 18). At oral argument, Rhoades's counsel argued that 12% of executions under three-drug protocols since the *Baze* decision had been "botched," resulting in serious pain to the prisoner.

The Court is unsure precisely how counsel reached this statistic, but he appears to have relied on a much smaller sample size than the hundreds of executions that have occurred since States moved to lethal injection in the early 1980s. He also has not specified the conditions under which these executions were carried out, and the protocols may have differed significantly from Idaho's current protocol. And while problems have occurred, this does not mean that, in each such case, the prisoner experienced serious pain and an unconstitutional punishment, as Rhoades assumes. See, e.g., *DeYoung v. Owens*, 646 F.3d 1319, 1325-27 (11th Cir. 2011) (discussing different witness accounts of Roy Blankenship's movements during his execution and concluding that, whatever caused them, "it is clear that Blankenship's execution did not proceed to the second drug until after he was fully unconscious."). Although of obvious concern, mishaps of varying degree in other states with different personnel under varying protocols are not necessarily probative of how Idaho will implement its own protocol.

Rhoades next contends that Zmuda failed to verify the employment history and relevant medical experience of the current execution team members. He asserts that there is no way of

knowing whether the team members have the experience that they claim they have and, consequently, some of the members may not be qualified to complete the tasks assigned to them.

At the evidentiary hearing, Zmuda testified that criminal background checks of the prospective team members were conducted, and that the candidates provided him with their qualifications and certificates, but to maintain confidentiality he did not contact prior employers or institutions to corroborate the information that was given to him. Zmuda and two other Wardens interviewed each candidate personally. Once the Medical Team leader was selected, the Medical Team leader also participated in interviews and asked relevant questions. Zmuda said that he later “verified” that the team members had the necessary skills and experience from direct observation during subsequent training sessions.

The Court finds Zmuda to be a credible witness who has been acting in good faith to minimize the potential risk of error, and it is satisfied with his explanations on this point. Additionally, there is an enormity to Zmuda’s responsibilities that he appears to understand. He is responsible for the organization and implementation of an execution. If there were to be problems with that process, it would carry personal and professional consequences. He appears to the Court to be carrying out his responsibilities with a full understanding of the gravity of his duties. He was candid in his courtroom testimony about where his knowledge started and where it stopped, particularly on medical issues. His testimony reflected an appropriate emphasis on hiring team members with the input of others, to include a highly trained medical professional hired as the Medical Team leader (here, a registered nurse with many years of experience), and his emphasis upon confirming, with the assistance of the Medical Team leader, the actual, hands-on, competencies of the team members. Although Rhoades asserts that Zmuda is not a medical

professional and would be unable to assess a team member's proficiency in such tasks, he overlooks that the Medical Team leader, at least, has significant experience in these matters, is qualified to make such assessments, and Zmuda has that person's assistance.

Rhoades also argues, with understandable concern, that he is in a difficult position due to the combination of the relative anonymity of the execution team members and the expedited nature of these proceedings, which he contends impede the investigation he wants to make on his own into their credentials and qualifications. But it is Rhoades who is seeking injunctive relief, and he has the burden to demonstrate that such relief is warranted. *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). This issue – the request to seek discovery or the time for investigation about unknowns that might raise Eighth Amendment concerns – was recently before the Ninth Circuit, and then the U.S. Supreme Court. In *Landrigan v. Brewer*, 625 F.3d 1132 (9th Cir. 2011), the court upheld a district court's temporary restraining order putting on hold a scheduled execution. In *Landrigan*, the petitioner was scheduled to be executed on October 26, 2010. On October 21, 2010, he sought a stay, based upon the State of Arizona's refusal to provide information "about the provenance and efficacy of the foreign-source drug [sodium thiopental]" to be used in the execution. *Landrigan*, 625 F.3d at 1133. In approving the stay, both the district court and the circuit panel emphasized that the petitioner ought to be permitted to conduct discovery to obtain information about the particular drug to be used in the execution. The circuit panel further stated: "[o]ur courts operate on an adversarial basis A party and his lawyers may, through research, additional evidence, and advocacy, succeed in proving that information that appears benign to a judge is not." *Landrigan*, 625 F.3d 1135.

Additionally, in *Landrigan*, the petitioner was able to state a seemingly colorable concern – *i.e.*, that drugs manufactured abroad are more likely to contain harmful contaminants, which would have implications about the efficacy of the foreign manufactured drug in the execution procedure. *Landrigan v. Brewer*, 2010 WL 4269559, *10 (D. Ariz. Oct. 25, 2010). The Supreme Court, however, vacated the temporary restraining order, making clear in doing so that – on facts immediately analogous to this case – the prisoner’s speculation or even scientifically-based suspicions about potential errors or problems in the manner in which an execution will be conducted, even without an opportunity to investigate such possibilities, will not justify a stay. *Brewer v. Landrigan*, 131 S.Ct. 445 (2010) (“speculation cannot substitute for evidence that the use of the drug is “*sure or very likely* to cause serious illness and needless suffering.””) (citing *Baze*, 553 U.S. at 50, and *Helling*, 509 U.S. at 33).

This Court is drawn to the intuitive, equitable tilt of the district court and circuit decisions in *Landrigan* toward allowing discovery on some subject that *might* raise questions about whether a planned execution should proceed. No judge considers questions such as raised in this case in a vacuum. There is no way to make this judicial proceeding, and the starkness of the decision before the Court, appear as if it is either mundanely routine or somehow freighted with great wisdom because the decision is made by someone who wears a judicial robe. Similarly, the heartwood of logic and adherence to the Rule of Law that the Court seeks to bring to the question cannot hide the ultimate end of a decision adverse to Rhoades. In that particular space, the mind instinctively is concerned about the possibility of error. But, when the Supreme Court acted in the posthaste manner it did in *Landrigan*, the message is unmistakable. *Baze* and the decisions upon which it drew, particularly in the context of injunctive relief, *are* to be

followed. Speculation cannot substitute for evidence that some component of the protocol, or the actual implementation of the protocol, is “*sure or very likely* to cause serious illness and needless suffering.” *Id.* The possibility that some team member might have misstated or exaggerated his or her credentials is not “sure or very likely” evidence of a substantial risk of serious illness and needless suffering, particularly when actual performance of duties in the training and rehearsals corroborate the team members’ stated credentials.

Rhoades also asks the Court to consider the timing of IDOC’s issuance of SOP 135. The Court is troubled by IDOC’s adoption of a final version of SOP 135 on October 14, 2011, a day after the last of the two denials of certiorari in Rhoades’s federal habeas cases. As the Court noted at the evidentiary hearing, having implemented a new protocol just as newly-issued death warrants in the Rhoades criminal cases were nearly certain to be headed its way, IDOC now appears to be “playing catch-up” so that it will be sufficiently prepared for the execution. Ideally, IDOC would have devised a final protocol more quickly after *Baze* set the parameters of a constitutional lethal injection procedure. Yet state officials waited more than three years after *Baze* was decided – even while knowing that prisoners such as Rhoades potentially were nearing the end of their appeals – before finalizing SOP 135.

Despite this concern, the Court finds no evidence in the record that IDOC intentionally delayed adopting SOP 135 to gain a tactical advantage in litigation. The record shows that state officials were slowly but steadily progressing toward a goal of a final SOP and that they did not hurriedly put together a slapdash plan. Zmuda testified that IDOC has been re-evaluating and revising the protocol over the last few years. To that end, he contacted officials in other states to inquire about their protocols, focusing primarily on Arizona. In 2010, Zmuda and other IDOC

officials conducted an on-site visit to Arizona's execution facilities, where they discussed Arizona's procedures with officials there. To be sure, IDOC did itself no favors by not completing the process until October 2011, but Zmuda and others were attempting to devise and implement a protocol that will comport with the Eighth Amendment, as construed by *Baze* in the time leading up to that date.

IDOC has also since made up for much of the lost time, and the Court is reassured by the steps that it has taken since SOP 135 was adopted. Between late October and November 10, the execution teams have practiced a total of five times, and they intend to practice five more times with live volunteers, including two complete rehearsals of the execution process, before November 18. These last five training sessions will include the insertion of IV catheters into live volunteers, the use of a saline solution to simulate the lethal injection, and a rehearsal of the consciousness checks by the Medical Team on volunteers.

At the evidentiary hearing, Zmuda testified that the initial practice sessions involved inserting IV catheters into a mannequin. The Court expanded the record to include a new affidavit from Dr. Heath, in which he states that practicing on a mannequin arm "does not make a person competent to establish and maintain an IV on a human being." *See* Heath Aff. at ¶ 11 (Docket No. 51, Att. 1). The Court's conclusion is not altered by Dr. Heath's opinion, both because Zmuda testified that the Medical Team members already have experience in IV insertion and because the Medical Team will be practicing IV insertion five more times on live volunteers before the execution.²⁶

²⁶ Rhoades has also alleged that the execution facility is incomplete. Zmuda testified that the "execution chamber" has been completed but that the first training sessions may have occurred without a "monitoring system" fully installed in the chamber, though he could not

Rhoades has put forward understandable concerns, particularly with respect to IDOC's slow development of its protocol, and there is always a *possibility* that an error could occur during implementation. Nonetheless, "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Baze*, 553 U.S. at 50. Based on the evidence before it, this Court concludes that Rhoades has not shown a substantial likelihood that he will be able to prove a *substantial risk* that the protocol will be implemented in a manner that will cause serious pain.

4. Idaho is Not Required to Use an Alternative One-Drug Protocol

Rhoades also contends that the Court must take into consideration the availability of a one-drug protocol – the injection of a single barbiturate – which he asserts would significantly minimize the risk of serious pain because the pain-causing chemicals would be omitted entirely. A similar argument was rejected in *Baze*. There, the controlling opinion formulated the test for stating an Eighth Amendment claim based on available alternative methods of execution:

Given what our cases have said about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative.

* * *

Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." To qualify, the alternative procedure must be feasible, readily

recall specifically. *See* Zmuda Aff. at ¶ 19 (Docket No. 50); Tr. of Evid. Hearing, p. 96. The Court is satisfied that, to whatever extent a few items of equipment may have not been in place for the initial training sessions, the training has occurred and will occur under conditions that replicate the execution in all material respects and there is no substantial risk of serious harm to Rhoades.

implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as “cruel and unusual” under the Eighth Amendment

553 U.S. at 49-51 (internal citation omitted).

Rhoades argues that he has satisfied this test in light of developments since *Baze*, including evidence that three States have adopted a one-drug protocol. He contends, through the testimony of his medical expert, Dr. Heath, that 14 executions have occurred under a one-drug protocol without incident, suggesting that this demonstrates a constitutionally dispositive reduction in the risk when weighed against his proffered error rate for executions under a three-drug protocol. The Court is not so persuaded.

For the Court to consider the question of whether there is a feasible and significantly safer alternative, Rhoades must first show a substantial risk of harm from the protocol that Idaho has chosen. *See Baze*, 553 U.S. at 50 (“[t]o qualify, the alternative procedure must be feasible, readily implemented, *and in fact significantly reduce a substantial risk of severe pain.*”) (emphasis added). This requirement is consistent with Chief Justice Roberts’s admonition in *Baze* that federal courts are not “boards of inquiry charged with determining ‘best practices’ for executions, with each ruling supplanted by another round of litigation touting a new an improved method of execution.” *Id.* at 51. The Ninth Circuit has confirmed that “under *Baze*, the failure to adopt an alternative protocol establishes an Eighth Amendment violation only if the current protocol creates a substantial risk of serious harm that the alternative protocol would reduce.” *Dickens*, 631 F.3d at 1150. For the reasons already given, Rhoades has not shown that, given

more time, he is likely to prove that a substantial risk of serious pain exists in Idaho's three-drug protocol.

Of the 36 death-penalty States when *Baze* was decided, no State had yet used a one-drug protocol, and Chief Justice Roberts wrote that "[t]his consensus [upon a three-drug protocol] is probative but not conclusive with respect to that aspect of the alternatives proposed by petitioners." 553 U.S. at 53. The converse is applicable in this case. Even though the decision of three States to employ a single drug protocol may be probative, it is not conclusive. The Court is not persuaded that this change in three States proves either a trend or is the type of groundswell of support that shows a national consensus regarding a particular method of execution, particularly in the absence of any of the sort of scientific consensus found lacking by the Supreme Court in its consideration of the same question in *Baze*. 553 U.S. at 57. It may well be that these three States simply decided to follow Justice Steven's suggestion that "States wishing to decrease the risk that future litigation will delay executions or invalidate their protocol would do well to reconsider their continued use of pancuronium bromide." 553 U.S. at 38.

B. Rhoades is Likely to be Irreparably Harmed Absent a Stay

If the execution is not stayed, Rhoades will be executed on November 18. That event is irrevocable. Absent a stay, he will also lose an opportunity to litigate his claims to completion. But Defendants argue that Rhoades "will not likely suffer irreparable harm in the absence of preliminary relief, because the safeguards in place are there to reduce the risk of severe pain during the execution procedure." (Docket No. 22, p. 19.) Defendants' argument assumes that

the focus of this element is on the likelihood of a legal injury to Rhoades that cannot be redressed rather than some other type of harm.

Some courts addressing this issue have conceded that, absent a stay, a prisoner will be “harmed” in all lethal injection challenges in which the prisoner seeks to litigate his claims on the merits before he is executed. *See Jones v. Hobbs*, 604 F.3d 580, 581 (8th Cir. 2010) (finding that irreparable harm “is present in every § 1983 action challenging a proposed method of execution”); *see also, Workman v. Bredesen*, 486 F.3d 896, 928 (6th Cir. 2007) (Coyle, J., dissenting) (“[n]obody contests that Workman will suffer irreparable harm if his execution is not stayed.”).

Other courts have found that “the alleged irreparable injury is not the fact alone that [the prisoner] will die by execution. That alone is not a cognizable constitutional injury.” *Powell v. Thomas*, 784 F. Supp.2d 1270, 1283 (M.D. Ala. 2011); *see also Jackson v. Danberg*, 2011 WL 3205453 at *3 (D. Del. 2011) (“[i]rreparable harm, in the context of the death penalty, cannot mean the fact of death, as such an interpretation would make analysis of this factor meaningless.”). Under this view, “the alleged irreparable injury lies in [the prisoner’s] assertion that, under present protocols, he may be conscious after being injected with [sodium thiopental or] pentobarbital and able to feel pain during the administration of the final two chemicals.” *Powell*, 784 F. Supp.2d at 1283; *see also Lambert v. Buss*, 498 F.3d 446, 452 (7th Cir. 2007) (concluding that the plaintiff had “not shown the existence of irreparable harm through the mere possibility that some unforeseen complication will result in a lingering death”); *West v. Brewer*, 2011 WL 2836754 at *8 (D. Ariz. 2011) (finding no irreparable harm because safeguards

ensured that “Plaintiff West is fully anesthetized before the second and third drugs are administered.”).

Notwithstanding a lack of binding authority on the precise issue, this Court finds that the harm in this instance is Rhoades’s death and his inability to continue with the litigation, and that this harm is irreparable if a stay is not granted. Even so, a finding in Rhoades’s favor on this factor alone does not warrant a stay, in light of his inability to show a substantial likelihood of success on the merits or that the equities tip sharply in his favor and that it is otherwise in the public interest to delay the matter (discussed below). *See, e.g., Jones*, 604 F.3d at 581-81 (noting that the “likelihood of irreparable harm (which is present in every § 1983 action challenging a proposed method of execution) is not enough.”).

C. The Equities do not Sharply Favor Either Side, but the Public Interest in Proceeding is Compelling

The Court is mindful that in cases where a prisoner has delayed bringing his claim seeking to stay an execution, the equities cut sharply against him. *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). Idaho, however, has not conducted an execution in over 15 years. *Baze* was decided in 2008, yet Idaho did not adopt a revised lethal injection protocol until five weeks before Rhoades is scheduled to be executed. On the other hand, Rhoades apparently exhausted IDOC’s internal grievance procedure with a claim made over two years ago challenging the State’s then-existing method of execution. But, he did not file a lawsuit in federal court challenging any method of execution until September 22, 2011, very near the end of his habeas appeals when it was arguably foreseeable that an execution date would be set. On such facts, the Court finds that equities do not tilt sharply to either side in this litigation.

However, the citizens of the State of Idaho and the families of the individual victims in this case have a compelling interest in seeing that Idaho's lawful judgments for the kidnappings and murders of Susan Michelbacher and Stacy Baldwin are enforced. Those judgments have been pending now for well over two decades while Rhoades challenged his convictions and sentences in state and federal court. There is much that has been said and written about the uncertainties and expense of death-penalty cases, and the impact that the length of time such cases place upon the families and communities of the victims, as well as the impact of such delay upon the *ratio decidendi* underpinning the death penalty in our society. Continued delay compounds those uncertainties, expenses, and impacts, and therefore is not in the public interest.

IV. CONCLUSION

For the foregoing reasons, Rhoades has not demonstrated entitlement to injunctive relief. Therefore, IT IS HEREBY ORDERED THAT Plaintiff's Emergency Motion for Preliminary Injunction or Stay of Execution (Docket No. 17) is DENIED.



DATED: **November 14, 2011**

A handwritten signature in black ink, appearing to read "Ronald E. Bush".

Honorable Ronald E. Bush
U. S. Magistrate Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

PAUL EZRA RHOADES,

Plaintiff,

vs.

BRENT REINKE, RANDY BLADES, DOES 1-50,
and/or UNKNOWN EXECUTIONERS,

Defendants.

Case No.: 1:11-cv-00445-REB

ORDER RE:

**PLAINTIFF'S MOTION TO EXPAND
RECORD**

(Docket No. 51)

**PLAINTIFF'S RENEWED MOTION
FOR DISCOVERY AND
EMERGENCY MOTION FOR STAY
OF EXECUTION FOR
REASONABLE TIME TO CONDUCT
NECESSARY BACKGROUND
CHECK**

(Docket No. 52)

Currently pending before the Court are Plaintiff's (1) Motion to Expand Record (Docket No. 51), and (2) Renewed Motion for Discovery and Emergency Motion for Stay of Execution for Reasonable Time to Conduct Necessary Background Check (Docket No. 52). Having carefully reviewed the record and otherwise being fully advised, the Court enters the following Order:

DISCUSSION

**A. Motion to Expand
(Docket No. 51)**

Plaintiff requests that the Court expand the record "with the attached two-page affidavit from Mark J.S. Heath, M.D." In his four-page affidavit, Dr. Heath discusses potential shortcomings associated with establishing IV catheters to mannequin arms rather than live

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volunteers. During the November 9, 2011 evidentiary hearing, Jeff Zmuda testified that a portion of the Idaho Department of Corrections's training thus far involved the use of mannequin arms for this purpose. Zmuda also stated that actual volunteers will be made available for future training sessions.

Defendants object to the inclusion of Dr. Heath's at-issue affidavit, arguing that Plaintiff's counsel did not reserve their right to recall Dr. Heath, knowing that Mr. Zmuda had not yet testified. According to Defendants, allowing Dr. Heath's affidavit, without the ability to correspondingly cross-exam him, requires that Plaintiff's Motion to Expand be denied.

Through his affidavit, Dr. Heath responded to Mr. Zmuda's testimony that, up until that point, was not contained in Mr. Zmuda's affidavit. The Court allowed Defendants to expand the record by recalling Mr. Zmuda. In fairness, Plaintiff shall be allowed to respond to that additional testimony. Plaintiff's Motion to Expand (Docket No. 51) is granted.

B. Renewed Motion for Discovery and Emergency Motion for Stay of Execution for Reasonable Time to Conduct Necessary Background Check (Docket No. 52).

Plaintiff's Renewed Motion for Discovery and Emergency Motion for Stay of Execution for Reasonable Time to Conduct Necessary Background Check focuses on the testimony given from Mr. Zmuda at the November 9, 2011 evidentiary hearing. Specifically, Plaintiff argues that, at that hearing, Mr. Zmuda did not actually perform any verification of Specialty Team members' licensure, professional certification, education diploma, training, or employment. According to Plaintiff, these alleged failures do not ensure that those individuals involved in the upcoming November 18, 2011 execution are properly qualified, pursuant to SOP 135.

Defendants oppose Plaintiff's renewed request for discovery and, likewise, any stay of execution, arguing, again, that the identify of Specialty Team members must be preserved and that Mr. Zmuda's testimony regarding the Specialty Teams' selection process was already subject to Plaintiff's counsel's cross-examination and, at this point, now relates to this Court's consideration of the already-pending Motion to Stay (Docket No. 17).

Mr. Zmuda reviewed the professional qualifications – including training, experiences, licenses, and certifications – of the applicants for the Specialty Teams; he also verified these skills when observing these individuals participate in the training sessions. The fact that Mr. Zmuda may not have independently performed credential cross-check verification upon each applicant does not undo the actual precautions taken when selecting Specialty Team members and, therefore, does not rise to a level warranting the discovery that Plaintiff again seeks in the current procedural context.

It is true that, questions theoretically exist as to the confirmed credentials of the Specialty Team members involved in the planned execution. However, these questions do not prove that any member is unqualified, or that they are so unqualified that their participation raises an objectively unreasonable and substantial risk of harm. Plaintiff's argument amounts to mere speculation, particularly when contrasted against Mr. Zmuda's affidavit and testimony, discussing the Specialty Team members qualifications. Simply put, the Court cannot offer relief based on possibilities. *See Brown v. Vail*, No. C09-5101-JCC (WD. Wa. Aug. 31, 2010) *aff'd*, No. 10-35771 (9th Cir. Sept. 6, 2010).

Plaintiff's Renewed Motion for Discovery and Emergency Motion for Stay of Execution for Reasonable Time to Conduct Necessary Background Check (Docket No. 52) is therefore denied.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that:

- (1) Plaintiff's Motion to Expand Record (Docket No. 51) is GRANTED; and
- (2) Plaintiff's Renewed Motion for Discovery and Emergency Motion for Stay of Execution for Reasonable Time to Conduct Necessary Background Check (Docket No. 52) is DENIED.



DATED: **November 14, 2011**

A handwritten signature in black ink, appearing to read "Ronald E. Bush".

Honorable Ronald E. Bush
U. S. Magistrate Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL EZRA RHOADES,

Plaintiff,

v.

BRENT REINKE, in his official capacity as
Director,
Idaho Department Of Correction;

RANDY BLADES, in his official capacity as
Warden,
Idaho Maximum Security Institution;

DOES 1-50, UNKNOWN EXECUTIONERS,
in their official capacities as Employees and/or
Agents of the Idaho Department of Correction,

Defendants.

CASE NO. 11-445-REB

**EMERGENCY RENEWED
MOTION FOR DISCOVERY
AND EMERGENCY MOTION
FOR STAY OF EXECUTION
FOR REASONABLE TIME
TO CONDUCT NECESSARY
BACKGROUND CHECK**

EMERGENCY RENEWED MOTION
FOR DISCOVERY AND EMERGENCY
MOTION FOR STAY OF EXECUTION - 1

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Plaintiff, Paul Ezra Rhoades, by and through his attorneys of record at the Capital Habeas Unit of the Federal Defender Services of Idaho, Inc., pursuant to Fed. R. Civ. P. 26(c)(1)(B), 65(a) and (b), and 28 U.S.C. §1651, renews his motion for discovery and moves for a preliminary injunction or stay of execution barring the State of Idaho from executing him on November 18, 2011. In support of his requests, Plaintiff states as follows:

1. At the limited evidentiary hearing conducted on November 10, 2011, Deputy Chief Zmuda testified that he had verified no Specialty Team member's stated licensure, professional certification, education diploma, training, or employment. Tr. at 72, 80-82.
2. Earlier in the week, in arguing that there was no good cause to grant Plaintiff's discovery motion seeking the names of the Specialty Team members, counsel for Defendants represented that Defendants had conducted a thorough background check of each Specialty Team member.
3. It is now apparent that no one has conducted a thorough background check of any Specialty Team member, including those individuals responsible for establishing peripheral intravenous catheters ("IVs") or, if necessary, a central line femoral vein IV and for assessing depth of unconsciousness.
4. When asked how he verified the Specialty Team members' competencies, including the competencies of those who would be responsible for establishing intravenous catheters ("IVs") and for assessing depth of unconsciousness, Deputy

Chief Zmuda testified that he assessed their competencies by observing the Specialty Team members at the first three training sessions. Tr. at 76-80, 102.

Deputy Chief Zmuda testified that there was no verification of any Specialty Team member's stated licensure, professional certification, education diploma, training, or employment. Tr. at 72, 80-81. He testified that Idaho Maximum Security Institution Warden Blades will be in charge of the execution, that Warden Cluney is the backup warden for Warden Blades, and that neither warden has any training or experience in determining whether an IV is being initiated properly or in determining whether an IV has infiltrated. Tr. 75, 156-58. Deputy Chief Zmuda himself is similarly unqualified. Tr. at 156, 158.

5. It is, therefore, now apparent that no reliable assessment has been made whether those tasked with establishing and maintaining IVs and assessing depth of unconsciousness while executing Mr. Rhoades are competent to discharge their duties.
6. Further, Deputy Chief Zmuda testified that while Specialty Team members did provide him with documents reflecting their purported licensure, professional certification, education, training, and employment, those documents have been destroyed. Tr. at 84-85. Nor is there any file memo, written report or electronic file describing those documents. Tr. at 86.
7. For these reasons, Plaintiff renews his motion for discovery, seeking the names of those Specialty Team members tasked with initiating and maintaining IVs and

with assessing depth of unconsciousness so that background checks may be conducted.

8. Plaintiff remains willing to enter into a protective order limiting disclosure of Specialty Team members' identity to the office of Plaintiff's counsel and precluding the sharing of that information with Plaintiff Rhoades.
9. Absent an adequate background check into whether those Specialty Team members tasked with initiating and maintaining IVs and with assessing depth of unconsciousness are competent to discharge their duties, there can be no confidence that Mr. Rhoades will not suffer severe pain during his execution. For this reason, Plaintiff asks that the Court enter an order staying his execution pending a reasonable time for his counsel's office to conduct the necessary background check.

Dated this 13th day of November, 2011.

Respectfully submitted,

/s/

Oliver W. Loewy
Teresa A. Hampton
Capital Habeas Unit
Federal Defenders Services of Idaho, Inc.

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

Krista Howard
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_____/s/
Oliver W. Loewy

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL EZRA RHOADES,

Plaintiff;

vs.

BRENT REINKE, in his official capacity
as Director, Idaho Department of Correction;

RANDY BLADES, in his official capacity
as Warden, Idaho Maximum Security
Institution;

DOES 1-50, UNKNOWN
EXECUTIONERS, in their official
Capacities as Employees and/or Agents of
Idaho Department of Correction.

Defendants.

CASE NO. 11-445-REB

Redacted
AFFIDAVIT OF JEFF ZMUDA
IN SUPPORT OF
DEFENDANTS' RESPONSE
AND OBJECTION TO
PLAINTIFF'S EMERGENCY
MOTION FOR PRELIMINARY
INJUNCTION OR STAY OF
EXECUTION [DKT. NO. 17]

AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17]-1

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

COMES NOW Jeff Zmuda, being duly sworn upon his oath, deposes and says:

1. I am over the age of eighteen (18) years and competent to testify on the matters herein. I make this affidavit based upon my own personal knowledge.
2. I am an employee of the Idaho Department of Correction ("IDOC"). I am the Deputy Chief of the Bureau of Prisons. I have been employed with the IDOC for approximately 24 years.
3. In my position as the Deputy Chief of the Bureau of Prisons, I work in conjunction with the Idaho Maximum Security Institution (IMSI) to plan, prepare and implement the IDOC execution procedures.
4. I have reviewed the Complaint and Amended Complaint (Dkt. Nos. 1 & 19) filed by offender Paul Rhoades in Case No. 11-445-REB.
5. In my position as the Deputy Chief of the Bureau of Prisons I was tasked with overseeing the execution process and developing and implementing the IDOC Standard Operating Procedures (SOP) regarding execution procedures. I am also tasked with all the duties related to my position as outlined in the Execution Procedures Standard Operating Procedure.
6. As the Deputy Chief of the Bureau of Prisons for the IDOC I was intricately involved in the development of IDOC SOP Execution Procedures 135.02.01.001 (hereinafter "SOP 135") that was approved on October 14, 2011. In developing SOP 135, the IDOC looked to other states' policies as a guide in the development of SOP 135. Countless hours were spent in the development of SOP 135 to

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17]--2**

ensure that it complies with the Eighth Amendment and the procedural safeguards established in *Baze v. Rees* and *Dickens v. Brewer*.

7. That after reviewing Arizona's Execution Protocol it was determined that the IDOC would model its Execution Procedures SOP after Arizona's Execution Protocol. In developing Appendix A of SOP 135, the IDOC modeled it after the Arizona Execution Protocol in this section of the IDOC SOP 135.

8. That it is absolutely paramount that the identity of the Specialty Team members remains confidential for their own safety and security, as well as the IDOC's ability to carry out its statutory obligations.

9. It is my responsibility in conjunction with the IMSI warden to identify qualified team members for the specialty teams for an execution. I am responsible for designating the Medical Team leader and an alternate Medical Team leader. The Medical Team leader reports to and takes direction from the IMSI warden.

10. In selecting persons for the Medical Team, even though SOP 135 does not specifically identify professional qualifications, I used the same criteria set forth in SOP 135 for selecting Injection Team members to identify Medical Team members. Specifically, candidates were required to have at least one year of medical experience as an emergency medical technician, licensed practical nurse or registered nurse, military corpsman, paramedic, phlebotomist, physician assistant, physician or other medically trained personnel including those trained in the United States Military. This is consistent with the safeguards set forth in *Baze*.

11. For selection of the Medical Team candidates I reviewed professional qualifications, training, experience, professional licenses and certifications, criminal

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17]--3**

history and conducted a personal interview with each of the candidates in selecting the Medical Team.

12. In selecting persons for the Injection Team, the criteria set forth in SOP 135 is that the team member must have at least one year of medical experience as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military medical corpsman. I also reviewed the Injection Team members' professional qualifications, training, experience, professional license(s) and certification(s), criminal history and conducted a personal interview. In addition, I verified that the Injection Team members had professional licensure or certification, *See SOP 135, Dkt. No: 7-4, p.9*. These qualifications are consistent with the safeguards set forth in *Baze*.

13. That all the members of the Medical Team and Injection Teams have professional qualifications and experience exceeding one year of professional training and experience. The team member with the least amount of experience has 15 years experience in his/her professional field. Attached as Exhibit A is a true and correct copy of a spreadsheet I constructed to illustrate each position of the Medical and Injection team and the training, professional licenses and certifications; and profession of each team member. In addition, each team member's years of experience is set forth below.

14. The Medical Team leader, Personnel 1a of Exhibit A, is a registered nurse with approximately [REDACTED] years experience as a registered nurse. The Medical Team leader Personnel 1a, has experience working in an emergency room and an intensive care unit. This individual has certification in CPR and has been an Advanced Cardiac Life Support (ACLS) [REDACTED] provider. The Medical Team leader, Personnel 1a has more administrative and clinical experience than any other team member.

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
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15. The Injection Team leader, Personnel 1b has approximately [REDACTED] plus years as a [REDACTED] *medical provider* and is currently an [REDACTED]. This individual is an ACLS certified provider.

16. The Injection Team members, Personnel 1c and 2c, with IV access are *medical providers* [REDACTED]. Personnel 1c has approximately [REDACTED] plus years experience as an *medical provider* [REDACTED] and is [REDACTED] ACLS certified. Personnel 2c has [REDACTED] plus years experience as an *medical provider* [REDACTED] and is ACLS certified. Personnel 2c is the backup Medical Team leader and also has a position on the Medical Team as IV Access. Personnel 1c will be responsible for inserting a central line in the femoral vein if this alternate site is necessary.

17. The Injector, Personnel 1d, is a *medical provider* [REDACTED] with experience as a [REDACTED] and is currently working in a clinic. This individual has over [REDACTED] years of medical and clinical experience. The Injector is tasked with pushing the IV drugs through the IV tubing.

18. That all members of the Medical Team and Injection Team are certified in CPR, have venous access currency, which means they have current professional practice in insertion of IVs on a regular basis. Additionally, all team members have experience in Pharmco Dynamic Currency, which means the team members understand medical orders, can read and understand medical labels, draw medications and deliver medications through either an injection or IV.

19. The execution chamber at IMSI is complete. The Escort, Medical and Injection Teams have been engaged in training sessions since October 20, 2011, using the

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17]--5**

execution unit. Between October 20, 2011 and the scheduled execution, there will be a total of 10 training sessions, which includes two full rehearsals as provided for in SOP 135 for the Escort Team, Injection Team and Medical Team. *See Dkt. No. 7-4*, p.10. All members of the Specialty teams are familiar with SOP 135, the execution process and skill sets needed to complete the execution. All team members were placed into their respective roles for the execution procedure based on their professional experience, training and practice. All team members will have participated in a minimum of four training sessions prior to the actual execution. Medical Team members will have practiced IV insertion on volunteers. The training schedule outlined in SOP 135 is consistent with the *Baze* safeguards. Additionally, all team members exceed the one year of training and experience in their respective professions.

20. At all times during the execution, the offender's level of consciousness will be continually monitored by the Medical Team through a closed-circuit video feed. *Dkt. No. 7-4*, pp. 9, 39-41. Additionally, another team member will continually monitor the EKG machine during the execution. *Dkt. No. 7-4*, pp. 9, 39.

21. The execution procedure contains provisions for the consciousness checks of the offender once the drugs have been administered. Once the sodium pentothal or pentobarbital has been administered the Medical Team leader will enter the execution chamber and confirm the offender is unconscious by direct examination. *Dkt. No. 7-4*, p.40. The Execution Team leader will physically assess the offender for signs of consciousness through verbal stimulus, solicit an auditory response, touch the offender's eyelashes, pinch the offender and conduct a sternal rub. The Medical Team leader will confirm the IV line remains affixed and is functioning properly. *Id.* The Medical Team

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
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leader is competent in conducting levels of consciousness checks. These consciousness checks are consistent with the safeguards set forth in *Baze*.

22. No further chemical shall be administered until the Medical Team leader has assessed and confirmed the offender is unconscious and has advised the warden and three minutes have elapsed since commencing the administration of sodium pentothal or pentobarbital. *Dkt. No. 7-4*, p.40.

23. If the offender is conscious after the administration of sodium pentothal or pentobarbital, the Medical Team shall assess the situation to determine why the offender is conscious. *Id.* This information will be relayed to the warden and the warden will determine how to proceed or, if necessary, to start the procedure over at a later time or stand down. *Id.* If deemed appropriate the warden may instruct the Injection Team to administer an additional 5 grams of sodium pentothal or pentobarbital followed by a heparin/saline flush from the Backup Sets. *Id.* at. 41. Only after three minutes have elapsed since commencing the chemicals from the Backup set, and only after the Medical Team leader has again physically confirmed the offender is unconscious, will the warden instruct the Injection Team leader to proceed. *Id.*

24. SOP 135 contains the redundancy safeguard set forth in *Baze*. SOP 135 requires that three (3) complete sets of chemicals be prepared prior to the execution. *Dkt. No. 7-4*, p.35. The preparation of chemicals will be done by the Medical Team. SOP 135 does not state that the Medical Team members have at least one year of professional training and practical experience, however, all Medical Team members selected for the preparation of chemicals have at least one year of professional training and practical experience necessary to prepare the chemicals.

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
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25. The Medical Team will take measures to ensure that there is no leakage in the tubing of the IV.

26. SOP 135 does not provide for a "cut down" procedure requiring an incision. A central line may be inserted in the femoral vein through the use of an ultrasound and sticking a needle into the vein. *See Dkt. No. 7-4, p.40.* The Medical Team member must have one year of regular and current professional experience conducting this procedure. *Id.* Personnel 1c will be the team member responsible for inserting the central line, if necessary. [REDACTED]
[REDACTED]

27. SOP 135 contains a contingency procedure in the event that the offender is conscious or any part of the execution procedure is not going according to SOP 135. *See Dkt. No. 7-4, p.42.* If any Medical or Injection Team members determine that any part of the execution process is not going according to procedure, they shall notify the Medical Team leader who shall immediately notify the warden. *Id.* The warden and director may consult with persons deemed appropriate and determine to go forward, start the procedure over at a later time or stand down. *Id.*

28. There is no substantial risk of pain to offender Rhoades during the execution procedure. The Medical Team and the Injection Team are made up of members with professional qualifications, training and practice of inserting and maintaining IVs with more than one year of professional experience.

29. Further your affiant sayeth naught.

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17]--8**

DATED this 3rd day of November, 2011.

Jeff Zmuda
JEFF ZMUDA

SUBSCRIBED AND SWORN To before me this 3rd day of November, 2011.



Mark A. Kubinski
Notary Public for Idaho
Residing at Boise
Commission Expires: 10/30/2015

AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17]--9

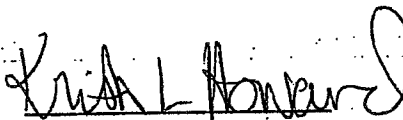
000129

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of November, 2011, I caused to be served a true and correct copy of the foregoing AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17] with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Oliver W. Loewy, oliver_loewy@fd.org

Teresa Hampton, Teresa_Hampton@fd.org


KRISTA L. HOWARD

**AFFIDAVIT OF JEFF ZMUDA IN SUPPORT OF DEFENDANTS' RESPONSE
AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR STAY OF EXECUTION [DKT. NO. 17]-10**

Personnel	Medical Team Position	License/Certification	IV Therapy/Venipuncture Trained	Venous Access Currency	CPR	Pharmco Dynamic Currency	Comments
1a	Team Leader	RN	Yes	Dated	Yes	Yes	Med Adm experienced
2c	IV Access	medical provider	Yes	Yes	Yes, ACLS	Yes	medical provider
1b	Injection Team Leader: injector	medical provider	Yes	Yes	Yes, ACLS	Yes	Works in Medical Clinic
1c	IV Access	medical provider	Yes, Central Line	Yes	Yes, ACLS	Yes	medical provider
2c	IV Access	medical provider	Yes	Yes	Yes, ACLS	Yes	medical provider
1d	Injector	medical provider	Yes	Yes	Yes	Yes	medical provider

EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

PAUL EZRA RHOADES,

Plaintiff,

vs.

BRENT REINKE, RANDY BLADES, DOES 1-50,
and/or UNKNOWN EXECUTIONERS,

Defendants.

Case No.: 1:11-cv-00445-REB

**ORDER RE: PLAINTIFF'S MOTION
TO EXPEDITE DISCOVERY**
(Docket No. 35)

and

**NOTICE RE: SCOPE OF
EXAMINATION DURING
EVIDENTIARY HEARING**

Currently pending before the Court is Plaintiff's November 9, 2011 Motion to Expedite Discovery (Docket No. 35). Having carefully reviewed the record, participated in oral argument, and otherwise being fully advised, the Court enters the following Order:¹

DISCUSSION

On November 9, 2011, Plaintiff served Defendants with Plaintiff's (1) First Request for Production of Documents, and (2) First Set of Interrogatories. *See* Exs. 1 & 2 to Pl.'s Mot. to Expedite Disc. (Docket No. 35). The requested materials at issue seek similar information –

¹ In the light of the scheduled November 18, 2011 execution date, on November 8, 2011, the Court informed the parties of its intent to conduct an evidentiary hearing on November 10, 2011 as to Plaintiff's Emergency Motion for Preliminary Injunction or Stay of Execution. Also on November 8, 2011, Plaintiff's counsel informed the Court and opposing counsel of its intent to pursue expedited discovery. Thereafter, Plaintiff's counsel met and conferred with Defendants' counsel concerning the scope of Plaintiff's requested discovery – apparently reaching agreement as to some, but not all, of the outstanding issues. Those unresolved matters are now before the Court via Plaintiff's November 9, 2011 Motion to Expedite Discovery. With the now-scheduled November 10, 2011 evidentiary hearing in mind, the undersigned recognizes the need for a prompt resolution of the matter.

namely, the identities and qualifications of those members of the various “teams” identified within SOP 135’s lethal injection protocol. The seven document requests are:

- Any and all Documents relied upon by Deputy Chief Zmuda in identifying or selecting, as described in SOP 135, Specialty Team members relating to the Specialty Team member’s professional qualifications, training, experience, professional licenses and certifications, criminal history, and any notes regarding the personal interview or personnel file reviews.
- Any and all Documents relating to the certification credentials in consciousness checking and training in consciousness checking for any member of the Specialty Teams, the IMSI Warden or the IDOC Director and any other person involved or assisting or advising in the Training Sessions or Rehearsal Sessions and/or Execution itself.
- Please produce those sections or parts of the Warden’s comprehensive chronological history execution log described as being “kept in the IMSI’s Warden’s office” as referenced at pages 16 and 23 of SOP 135 that relate to the Specialty Team training.
- Any and all Documents relating to the professional qualifications, professional licenses or certifications, credentials and experience of any person who is charged with or involved in the training of Specialty Team members.
- Any and all Documents relating to and including the “Appropriate Facility Field Memorandum” referenced at page 28 of SOP 135 or any other field memorandums relevant to implementation of SOP 135.
- Any and all Documents related to the consideration, evaluation, and consultation with experts or others regarding a one-drug protocol.
- Any and all documents related to any medical or legal certification, training or licenses currently held or obtained in the past by Jeff Zmuda, Deputy Chief of the Bureau of Prison, the IDOC Chief of Operations Division and the IDOC Director.

See Pl.’s First Request for Prod. of Docs. (Docket No. 35, Att. 1). Relatedly, the seven interrogatories are:

- Please identify the Persons on the Specialty Teams, including the Medical Team, the Execution Escort Team and the Injection team.

- Please provide the identity of each member of each Specialty Team, and each Training Session or Rehearsal Session in which each member participated. Identify each session by chronological number and date.
- Please provide a detailed description of each Specialty Team member's role during each execution Training Session and/or Rehearsal Session in which the Specialty Team member participated.
- Please identify any Person who is participating in Training Sessions, Rehearsal Sessions or the execution itself in an advisory capacity or providing technical assistance to a Specialty Team.
- Please identify the Lethal Injection Protocols used in the Training Sessions or Rehearsal Sessions or any other training done to comply with any execution protocol from November 18, 2010, until present. Please identify the session by chronological number and date.
- Please identify the anesthetic to be used in the Execution, including the date of manufacture and the acquisition date.

See Pl.'s First Set of Interrogs. (Docket No. 25, Att. 2).²

Although acknowledging that much of the requested information is addressed within Jeff Zmuda's Affidavit in Support of Defendants' Response and Objection to Plaintiff's Emergency Motion for Preliminary Injunction or Stay of Execution (Docket No. 28), Plaintiff generally argues that such information is nonetheless needed in order to conduct an *independent* investigation into the backgrounds of the team members' qualifications so as to (1) develop a more complete record, (2) foster a more thorough adversarial process, and (3) potentially reveal circumstances currently unaware to Defendants. Plaintiff also has submitted a proposed protective order to govern the handling and use of the requested information.

² It appears that potential disputes over certain requests for production and interrogatories may have been resolved by the parties based upon representations made in the briefing and during oral argument. Hence, at this time, the Court is considering only discovery issues that relate squarely to the identity of the members of the Specialty Teams.

In response, Defendants raise security concerns with respect to revealing the identities (or, even, certain identifying characteristics) of the various team members. According to Defendants, these concerns are reflected within the Administrative Rules of the Board of Correction where it is stated that:

The Department will not disclose (under any circumstance) the identity of staff, contractors, consultants, or volunteers serving on escort or injection teams, nor will the Department disclose any other information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution.

See IDAPA 06.01.01.06. Moreover, Defendants highlight the fact that, through his affidavit, Mr. Zmuda has already testified under oath about the qualifications and experience of the team members, consistent with the safeguards identified in both *Baze v. Rees* and *Dickens v. Brewer*.

Legitimate arguments exist in support of both positions, and the Court must balance the interests at play here. However, in the exercise of its discretion, the Court concludes that the anonymity of the team members is of paramount concern. Simply put, SOP 135 outlines the protocol for selecting team members. Mr. Zmuda, in turn, discussed the process he undertook for selecting these members in accordance with SOP 135 in his affidavit and, also in his affidavit, listed these individuals' qualifications and experience relevant to their roles on particular teams. It is not enough that Plaintiff would seek to "confirm" whether the team members are sufficiently qualified, particularly when the result of inquiry into the particular identities of such team members could greatly increase the potential that some persons may discern from such inquiry the names of such team members, or that others with such information will reveal it to others, and the persons on such teams will be subject to unwanted attention and may choose to withdraw from participating in this particular planned execution, or future executions. The Board of Correction Rule obviously seeks to protect against such a danger

which, if realized, could lead directly to a *de facto* ban on capital punishment in Idaho, analogous to that warned against by Justice Alito in *Baze v. Rees*. See *Baze v. Rees*, 553 U.S. 35, 71 (2008) (“The Court should not produce a *de facto* ban on capital punishment by adopting method-of-execution rules that lead to litigation gridlock.”).

Hence, mere possibilities, buttressed by speculation and conjecture, cannot operate to overcome the State’s interest in preserving team members’ anonymity – particularly when the present record illustrates that SOP 135’s member selection process was followed, as Mr. Zmuda states has occurred. See *Dickens v. Brewer*, 2009 WL 1904294, *23 (D. Ariz. 2009) (responding to claim that “it is unclear who comprises the current Medical Team and whether there will be a qualified Medical Team in place for any future executions” by holding that, “[a]s long as Defendants comply with the Arizona Protocol in selecting and training a Medical Team – or refrain from conducting any executions until they do comply with the Arizona Protocol – the Eighth Amendment does not require Defendants to select and disclose the identities of the Medical Team members to Plaintiffs.”); see also *Clemons v. Crawford*, 585 F.3d 1119, 1129 fn.9 (8th Cir. 2009) (in response to prisoner’s arguments concerning secrecy of execution team members, stating: “[w]e have located no authority indicating the prisoners have such a due process right to probe into the backgrounds of execution personnel.”).

The Court has also considered Plaintiff’s argument that the Defendant’s concerns can be adequately addressed through the use of a protective order, and the Court is aware that protective orders have been utilized in other constitutional challenges to execution protocols, as Plaintiff has pointed out to the Court. Even if the sorts of concerns raised by the Defendants could be adequately met through the use of a protective order, the Court is still left to balance the

Plaintiff's proffered need for and investigative use of such information (*i.e.*, that the names of the individuals will allow particularized investigation into education, experience and credentials) with the fast-approaching execution date, and the interest of the State of Idaho in seeing that judgments in its criminal justice system are enforced. This case is not a case with only the *possibility* of an execution upon a distant horizon. This case involves Plaintiff's request to issue injunctive relief staying implementation of two death warrants, issued pursuant to Idaho law and with no remaining appeal or habeas corpus challenges to be resolved, calling for an execution to take place on November 18, 2011.

The Court is mindful that this balancing of the interests gives implicit credence to the representations made by Mr. Zmuda, and that not requiring disclosure of the identity of the team members will constrain, to some degree, the ability of Plaintiff's counsel to search and ferret out as much information as possible concerning the team members, with the hope of learning something that will call into question the constitutional integrity of the Idaho execution protocol. However, the Court is allowing Plaintiff to cross-examine Mr. Zmuda upon his affidavit, where the particulars of his representations and the nuances of what has been planned, and what has been done to date, can be explored. Such an opportunity will allow inquiry into much the same realm as any independent investigation might seek. Such an opportunity will allow Plaintiff to reasonably test the integrity of Defendants' representations about the execution protocol and those people who will implement it. If evidence is adduced in the course of the hearing and presented to the Court in a manner persuasive to the Court that such credence is not deserved, then the Court may reconsider its ruling as to whether the identity of the team members must be disclosed to Plaintiff's counsel, and in what time frame.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiff's November 9, 2011 Motion to Expedite Discovery (Docket No. 35) as to the identity of the execution team members is DENIED.

NOTICE

The Court has already indicated that, as to the November 10, 2011 evidentiary hearing, only the affiants – Mark Heath, M.D., and Mr. Zmuda – will be permitted to testify. Therefore, in anticipation of the evidentiary hearing, the Court sees the benefit of informing counsel of its preliminary position concerning the scope of any direct and cross examinations – particularly as to Mr. Zmuda.

Counsel is permitted to question the affiants/witnesses as to the information submitted in their respective affidavits. However, the parties are on notice that, if such questions might logically elicit a response that requires the disclosure of specific identities (or closely identifying characteristics or information) of particular Specialty Team members, the witnesses are instructed to provide only generic information so as to minimize the risk of identifying the person who may be the subject of the given testimony. The Court notes that Mr. Zmuda dealt with that issue in his affidavit by identifying various team members using designated numbers and letters in both his affidavit and Exhibit A to his affidavit.

Presently, the Court sees no need for more particular information; moreover, the Court intends for such a procedure to preclude the need to consider closing the hearing in its entirety, or the need to close certain portions of the hearing in piecemeal fashion. This approach may not (and likely will not) represent a one-size-fits-all approach to the upcoming evidentiary hearing

and the testimony given. As a result, the Court will set aside time before the hearing begins to address the parties' concerns over this approach; additionally, the Court expects that certain situations may require side bar discussions before the orderly progression of testimony can proceed.



DATED: **November 10, 2011**

A handwritten signature in black ink, appearing to read "Ronald E. Bush".

Honorable Ronald E. Bush
U. S. Magistrate Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

PAUL EZRA RHOADES,

Plaintiff,

vs.

BRENT REINKE, RANDY BLADES, DOES 1-50,
and/or UNKNOWN EXECUTIONERS,

Defendants.

Case No.: 1:11-cv-00445-REB

ORDER RE:

**DEFENDANTS' 12(b)(6) MOTION TO
DISMISS**

(Docket No. 7)

**PLAINTIFF'S MOTION TO FILE
OVERSIZE REPLY TO RESPONSE
TO MOTION TO STAY**

(Docket No. 30)

Currently pending before the Court are (1) Defendants' 12(b)(6) Motion to Dismiss (Docket No. 7) and (2) Plaintiff's Motion to File Oversize Reply to Response to Motion to Stay (Docket No. 30). Having carefully reviewed the record and otherwise being fully advised, the Court **HEREBY ORDERS THE FOLLOWING:**

1. On October 14, 2011, Defendants filed their 12(b)(6) Motion to Dismiss. *See* Mot. to Dismiss (Docket No. 7). On November 4, 2011, Defendants withdrew their Motion to Dismiss in light of Plaintiff's November 1, 2011 Amended Complaint. *See* Not. to Withdraw, p. 2 (Docket No. 25). Therefore, Defendants' 12(b)(6) Motion to Dismiss (Docket No. 7) is **WITHDRAWN AS MOOT.**

2. Plaintiff's Reply to Response to Motion to Stay is 19 pages – nine pages above the ten pages allowed by Local Rule 7.1(a)(2). According to Plaintiff's counsel, "[t]he filing of Plaintiff's Reply in excess of the usual page limit is necessary due to the complexity of the

issues” and “[t]he issues raised are ones of first impression in Idaho.” *See* Decl. in Supp. of Mot. to Stay, p. 2 (Docket No. 30, Att. 1). Therefore, good cause appearing, the Court hereby **GRANTS** Plaintiff’s Motion to File Oversize Reply to Response to Motion to Stay (Docket No. 30).

IT IS SO ORDERED.



DATED: November 9, 2011

A handwritten signature in black ink, appearing to read "Ronald E. Bush".

Honorable Ronald E. Bush
U. S. Magistrate Judge

CAPITAL HABEAS UNIT
Oliver W. Loewy, IL #6197093
Teresa A. Hampton, ID #4364
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Teresa_Hampton@fd.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL EZRA RHOADES,)	
)	
Plaintiff,)	
)	Civil Action No. 11-445
v.)	
)	
BRENT REINKE, in his official capacity as)	MOTION TO EXPEDITE DISCOVERY
Director, Idaho Department of Correction;)	
)	
RANDY BLADES, in his official capacity as)	
Warden, Idaho Maximum Security)	
Institution;)	
)	
DOES 1-50, UNKNOWN)	
EXECUTIONERS, in their official)	
Capacities as Employees and/or Agents of)	
Idaho Department of Correction.)	
)	
Defendants.)	
)	

Plaintiff, Paul Ezra Rhoades, by and through his attorneys of record at the Capital Habeas Unit of the Federal Defender Services of Idaho, Inc., pursuant to Fed. R. Civ. P. 26(c)(1)(B), hereby requests that this Court expedite his discovery requests.

1. Following the status conference at 4 p.m. on Tuesday November 8, 2011, Plaintiff's counsel emailed Defendants' counsel proposed interrogatories and a request for production of documents.

2. Counsel for the parties conferred by telephone and discussed the proposed discovery that evening. Counsel for Defendants was unable to contact Defendants' representative that evening to discuss the particular objections, but raised general concerns.
3. Plaintiff refined the discovery in light of objections raised by Defendants in that telephone call and re-submitted the discovery via email later that evening.
4. Counsel for the parties conferred again regarding Plaintiff's proposed discovery requests this morning, November 9, 2011.
5. Defendants agreed to produce some documents, noted it did not have some documents, and indicated it had objections to some of the proposed discovery.
6. In light of one of the objections, Plaintiff further narrowed the request, and emailed the additionally revised discovery to Defendants earlier this morning.
7. Copies of those documents, Plaintiff's First Request for Production of Documents and Plaintiff's First Set of Interrogatories, are attached as Exhibits 1 and 2. These are the final versions of Plaintiff's discovery requests and the subject of Plaintiff's motion for expedited discovery.
8. Plaintiff understands Defendants' most steadfast objection to be to providing anything that discloses the identity of any member of the execution "specialty" teams, i.e., the Medical Team, the Injection Team, and the Execution Escort Team (collectively, "Specialty Teams"). *See* Exhibit 1, p. 11, Requests no. 1 and 2; Exhibit 2, p. 7, Interrogatories no. 1 and 2.
9. However, after indicating that Defendants would object to these requests, their counsel indicated that Defendants had no documents responsive to Plaintiff's first two document requests. *See* Exhibit 1, p. 11, Requests no. 1 and 2.

10. Defendants indicated an unwillingness to enter into a protective order that limited disclosure of Specialty Team members' identity to the office of Plaintiff's counsel and precluded sharing of that information with Plaintiff Rhoades.
11. Defendants also indicated that the Warden's execution log for the last 30 days contained information about the various training sessions along with many other details and objected to producing it. Plaintiff indicated a willingness to more narrowly tailor the request to direct it to the information documenting the training and rehearsal sessions. The attached final discovery request is so limited. *See* Exhibit 1, p. 11, request no. 3.
12. Defendants indicated that the Field Memorandum requested in Plaintiff's request number 5 did not exist, and that the only similar document that did exist was a "Post Order" for the Execution "Escort Team."
13. Defendants indicated they would produce documents responsive to request number 7, related to Mr. Zmuda's medical or legal certification, training or licenses. *See* Exhibit 1, p. 12, request no. 7.
14. Plaintiff does not mean to speak for Defendants with respect to their particular objections, but wishes to inform the Court of the scope of the parties' discussions. Plaintiff understood from this morning's informal discovery resolution discussion that Defendants were drafting objections to the discovery for submission to the court. Plaintiff anticipates that those objections will be filed forthwith.
15. Plaintiff is willing to stipulate to a protective order, to protect the identity of Specialty Team members, and to refer to them by a generic identification number. Plaintiff would agree to a protective order precluding the provision of the names of the Specialty Team members to the plaintiff and any expert. This would preclude the necessity of sealing

numerous documents in this case. A copy of a proposed Protective Order is attached as Exhibit 3.

16. Such protective orders have routinely been entered in other lethal injection litigation.

See, e.g. West v. Brewer, No. CV-11-01409-PHX-NVW, Dkt. 36, Protective Order (D. Az. Aug. 10, 2011). A copy of this protective order is attached as Exhibit 4.

17. Accordingly, having tailored Plaintiff's discovery requests as narrowly as possible, to be useful to the parties and Court at the evidentiary hearing, Plaintiff moves the Court for an order granting the requested discovery on an expedited basis.

Respectfully submitted this 9th day of November, 2011.

/s/
Oliver W. Loewy

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

Krista Howard
khoward@idoc.idaho.gov

/s/
Oliver W. Loewy

EXHIBIT 1

EXHIBIT 1

CAPITAL HABEAS UNIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL EZRA RHOADES,

Plaintiff,

v.

BRENT REINKE, et al.,

Defendants.

) Civil Action No. 11-445

)

) PLAINTIFF'S FIRST REQUEST

) FOR PRODUCTION OF

) DOCUMENTS

)

)

)

)

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To Defendants Brent Reinke and Randy Blades and their attorneys of record:

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiff hereby requests that Defendants respond to this First Request for Production of Documents (The "Document Requests" or "Requests") and produce for inspection and copying the documents specified below. Such productions shall be in accordance with the following Instructions and Definitions and shall take place at the office of the Federal Defender Services of Idaho, 702 W. Idaho Street, Suite 900, Boise, Idaho, 83702, Attention: Oliver W. Loewy/Teresa A. Hampton or otherwise made available at a time, place and in a form agreeable to all parties. Plaintiff also requests that Defendants permit

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS - 1

000147

Plaintiff's counsel to enter the Execution Unit at Idaho Maximum Security Institution for the purpose of inspection under Rule 34(a)(2).

Definitions

- A. "Action" means the present case, styled *Paul Ezra Rhoades v. Brent Reinke, et al.*, Case No. 11-445.
- B. "Agent" means any contract employee, law firm, accounting firm, customs broker, entity or individual hired by Defendants (as defined below) to perform services associated with drugs or facility construction beginning January 1, 2008, until present.
- C. "Any and all" or similar phrases are meant to be inclusive, not exclusive, to encompass the broadest interpretation of Documents responsive to a given request.
- D. "Communication" means any oral, written, or electronic utterance, notation, or statement of any nature whatsoever, draft or final, potential or actual, by and to whomever made or attempted to be made, including, but not limited to, correspondence, memoranda, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between two or more persons.
- E. "Complaint" refers to the Amended Complaint for Equitable, Injunctive, and Declaratory Relief [42 U.S.C. § 1983], filed in the above styled Action on November 1, 2011.
- F. "Concerning" is used in the broadest sense possible and means, in whole or in part, relating to, referring to, received from, addressed to, sent to, alluding to,

responding to, announcing, identifying, explaining, evaluating, discussing, showing, describing, studying, reflecting, analyzing, or consulting.

G. “Condemned prisoner” means a person under a death sentence whose death Defendants (acting individually, separately, or through agents) intend to cause by executing him.

H. “Defendant” or “Defendants” refers individually to the Defendant answering these Requests for Production of Documents and refers collectively to Defendants Reinke, Randy Blades, Unknown Executioners, to their attorneys, agents, representatives, advisors, predecessors, successors and assignees and Does 1-50.

I. “Document” has the broadest possible meaning accorded to it under Federal Rule of Civil Procedure 34 and means any medium upon or from which intelligence or information can be recorded or retrieved, including without limitation any electronically stored information on any computer, network, or electronic media, wherever found, including, but not limited to, active files, deleted files, or fragmentary files, and also includes, without limitation, the original and each copy regardless of origin and location, or any book, pamphlet, periodical, letter, memorandum, diary, calendar, telex, electronic mail message, telegram, cable report, facsimile, record, contract, agreement, study, handwritten note, draft, working paper, chart, paper, print, record drawing, sketch, graph, index, list, tape, stenographic recording, tape recording, computer diskette and/or data, photograph, microfilm, invoice, bill, order form, receipt, financial statement, accounting entry sheet or data processing card, or any other written, recorded, transcribed, punched taped, filmed, or

graphic matter, however produced, reproduced, or stored, which is in Your possession, custody, or control or which was, but is no longer in Your possession, custody, or control. The term “Document” encompasses any and all electronically stored information, wherever found. The term “Document” also means an authentic copy where the original is not in Your possession or control and every copy of a document that is not an identical copy of the original.

J. “Each” means “each and every.”

K. “Employment” or “employ” means any job, occupation, trade, work, or services, including both actual and potential employment, work while self-employed, and work as or for an independent contractor.

L. “Execution” means the imposition of the sentence of death by lethal injection by You.

M. “Execution Escort Team” means the Persons involved in, preparing for and carrying out Executions as described by SOP 135, section 5.

N. “F-Block” means the Execution Unit including the execution chamber, the chemical room, the room in which the physician will be positioned and both witness viewing areas.

O. “Injection Team” means the Persons involved in, preparing for and carrying out Executions as described by SOP 135, section 5.

P. “Lethal Injection Procedures” means the Defendants’ or the State of Idaho’s or the IDOC’s rules, policies, regulations, instructions, lists, descriptions of steps to be undertaken, guidelines, recommendations, suggestions, or procedures

relating to the preparation for, rehearsal for, conduct of, practice for, or execution of
Condemned Prisoners by lethal injection, including, but not limited to, SOP 135.

Q. “Medical Team” means the Persons involved in, preparing for and carrying
out Executions as described by SOP 135, section 5.

R. “Person” or “Persons” means any natural person acting in any capacity,
including attorneys, and/or any entity or organization, union, including divisions,
departments, other units therein, including independent contractors and employees
thereof and shall include, but not be limited to, a public or private corporation,
partnership, association, joint venture, committee, proprietorship, trust, estate, any
government and/or governmental body, including, but not limited to, any commission,
board, bureau and/or agency.

S. “Plaintiff” means the Plaintiff in this action and his agents.

T. “Produced” with respect to any document shall include authored, dictated,
edited, reviewed and/or approved in whole or in part.

U. “Refer” or “related to” or “referring” or “relating” means all documents that
comprise, reflect, record, memorialize, embody, discuss, evaluate, consider, review or
report on the subject matter of the request or that were reviewed in conjunction with,
or were created, generated, or maintained as a result of the subject matter of the
request.

V. “Rehearsal Session” means the tasks described in SOP 135, section 5.

W. “SOP 135” means the IDOC Standard Operating Procedure 135.02.01.001,
ver. 2.9 dated October 14, 2011.

X. “Specialty Team” means the Persons involved in, preparing for and carrying out Executions as described by the Lethal Injection Protocol in effect at the time of each Execution, including the Execution Escort Team, the Medical Team and the Injection Team, as referenced in section 5 of SOP 135.

Y. “Training Session” means the tasks described in SOP 135, section 5.

Z. “YOU” or “YOUR” means, collectively, the Idaho Department of Corrections (“IDOC”), as well as any of its present or former officials, employees, other agents, and any persons or entities whom Defendants understand or believe to be acting for or on behalf of the IDOC.

Instructions

A. These Requests cover all Documents in each Defendant’s actual or constructive possession, control or custody.

B. The use of a verb in any tense shall be construed as the use of the verb in all other tenses, whenever necessary to bring into the scope of the specification all responses that might otherwise be construed to be outside that scope.

C. The use of any singular word includes both the singular and the plural of that word, and vice versa. The use of any masculine or feminine pronoun includes both the masculine and feminine.

D. These discovery Requests are not intended to be duplicative. All Requests should be responded to fully and to the extent not covered by other Requests. If there are documents that are responsive to more than one Request, then so note and produce each

such document first in response to the Request that is more specifically directed to the subject matter of the particular document.

E. If any Document was, but no longer is, in Your possession, custody, or control, or is known to You but is no longer in existence or not within Your custody, state whether it is: (a) missing or lost; or (b) disposed of in some other manner. In each instance, explain in detail the circumstances surrounding the disposition of the Document, who authorized the action taken, who carried it out, and the date of the action taken. Additionally, please identify each such Document including: (a) the type of character of the Document (e.g., letter, memorandum, signed statement, notes, etc.); (b) title, if any, of the Document; (c) the name and address of the author of the Document; (d) the name and address of the recipient of the Document, if any; (e) the names and addresses of all recipients of copies of the Document, if any; (f) all information contained in each such Document; (g) the date and circumstances under which each such Document ceased to exist or to be in Your possession, custody, or control; (h) the time period during which each such Document was maintained; (i) the location of each such Document; and (j) the Person or Persons from whom each such Document may be obtained.

F. Unless otherwise indicated, these Requests pertain to documents created, dated, prepared, sent, received, altered, written upon or relating to the period beginning January 1, 2008 until present.

G. All Documents that respond in whole or in part to any portion of any Request shall be produced in their entirety, including all attachments and enclosures. All

pages of any Document(s) now stapled or fastened together should be produced stapled and fastened together.

H. To the extent that You object to production or identification of any Document or portion of any Document on the ground of a privilege or rule of law, You shall furnish a list identifying each Document for which the privilege is claimed, together with the following information:

1. Its title and subject matter;
2. Its date;
3. Its author(s) or addressor(s);
4. The addressee(s) and recipient(s) of all copies; and
5. The basis for the claim of privilege

I. Notwithstanding any provision of these Instructions to the contrary, if a portion of an otherwise responsive Document contains information subject to a claim of privilege, those portions of the Document subject to the claim of privilege may be redacted, subject to Instruction H above, and the rest of the Document shall be produced.

J. If You object to any of the definitions or instructions, state Your objection(s) in Your response and indicate whether You are complying with the direction or instruction in spite of Your objection. If Your objection goes to only part of a request, produce all Documents which do not fall within the scope of Your objection.

K. Without in any way limiting the definition of “Document” contained in the Federal Rules of Civil Procedure, You are specifically instructed to search all Document management systems, computer archives, and/or backup tapes or disks for Documents

responsive to the following Requests, and production of such Documents should be made regardless of whether such Documents exist in tangible or “hard” copy form. Production is also sought regardless of whether the user purported to “delete” the Document, if such Document is capable of being retrieved from archives and/or backup tapes or disks.

L. General Instructions for Technical Specifications of Document Production:

1. Please provide a cover letter with each production which includes the Bates range (or other identifying tracking system) and a general description of the documents and/or the custodian(s). The cover letter should also summarize the number of records, images, e-mails and attachments in the production.

2. Produce Documents in the same format in which they were created or maintained. Documents created or stored electronically should not be produced in hard copy.

3. Organize all productions by custodian.

4. Deliver data on CD, DVD, or hard drive. The smallest number of media is requested. If the collection is so large it should be delivered on a hard drive, one can be provided, if needed.

5. Provide all productions free of computer viruses.

6. Provide all passwords for documents, files or compressed archives provided in the production.

7. Label all media submitted. Include on the label at least the following information: producing party, production date, Bates or Document ID range(s) and disk number, if applicable.

8. Bates numbers should not contain embedded spaces (“ ”), slashes (“/”), backslashes (“\”), or underscores (“_”).

9. If there are any questions or issues that arise with respect to these specifications, contact Eric Macy for clarification.

M. Paper Documents. Special attention should be paid to ensure that hard-copy documents are produced as they are kept, reflecting attachment relationships between documents and information about the file folders within which the document is found. Production should include attachment information:

1. Preferred formats for production of paper documents:

- i. Each page uniquely Bates numbered.
- ii. Bates numbers should be defined and endorsed in the following

alpha-numeric style:

1. ABCD0000001 (ABCD = alpha identifier for custodian or producing entity; 0000001 = document page number).

N. Scanned paper should be converted/processed to Adobe PDF files.

O. After the initial production, any subsequent or supplemental productions should use the same protocol, with document pages numbered beginning after the last number of the immediately previous production.

P. Defendants remain under a duty to supplement pursuant to Rule 26 of the Federal Rules of Civil Procedure with respect to each Document Request. These Document Requests shall be deemed continuing so as to require further and supplemental

production by You in the event that You obtain or discover additional information or Documents covered by these Requests at the time of Your initial response.

Document Requests

1. Any and all Documents relied upon by Deputy Chief Zmuda in Identifying or selecting, as described in SOP 135, Specialty Team members relating to the Specialty Team member's professional qualifications, training, experience, professional licenses and certifications, criminal history, and any notes regarding the personal interview or personnel file reviews.

2. Any and all Documents relating to the certification credentials in consciousness checking and training in consciousness checking for any member of the Specialty Teams, the IMSI Warden or the IDOC Director and any other person involved or assisting or advising in the Training Sessions or Rehearsal Sessions and/or Execution itself.

3. Please produce those sections or parts of the Warden's comprehensive chronological history execution log described as being "kept in the IMSI's Warden's office" as referenced at pages 16 and 23 of SOP 135 that relate to the Specialty Team training.

4. Any and all Documents relating to the professional qualifications, professional licenses or certifications, credentials and experience of any person who is charged with or involved in the training of Specialty Teams members.

5. Any and all Documents relating to and including the “Appropriate Facility Field Memorandum” referenced at page 28 of SOP 135 or any other field memorandums relevant to implementation of SOP 135.

6. Any and all Documents related to the consideration, evaluation, and consultation with experts or others regarding a one-drug protocol.

7. Any and all documents related to any medical or legal certification, training or licenses currently held or obtained in the past by Jeff Zmuda, Deputy Chief of the Bureau of Prison, the IDOC Chief of Operations Division and the IDOC Director.

DATED this 9th day of November, 2011.

/s/
Oliver W. Loewy

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

Krista Howard
khoward@idoc.idaho.gov

___ U.S. Mail
___ Hand Delivery
___ Facsimile
___ Overnight Mail
 X Electronic Mail

/s/
Oliver W. Loewy

EXHIBIT 2

EXHIBIT 2

CAPITAL HABEAS UNIT

Oliver W. Loewy, IL #6197093

Teresa A. Hampton, ID #4364

Federal Defender Services of Idaho

702 W. Idaho, Suite 900

Boise, Idaho 83702

Telephone: (208) 331-5530

Facsimile: (208) 331-5559

ECF: Oliver_Loewy@fd.org

Teresa_Hampton@fd.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL EZRA RHOADES,

Plaintiff,

v.

BRENT REINKE, et al.,

Defendants.

) Civil Action No. 11-445

)

) PLAINTIFF'S FIRST SET OF
) INTERROGATORIES

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To Defendants Brent Reinke and Randy Blades and their attorneys of record:

Pursuant to Rules 33 of the Federal Rules of Civil Procedure, Plaintiff, Paul Ezra Rhoades, by and through his attorneys of record, hereby requests that Defendants answer each of the following Interrogatories individually, separately, and fully in writing, under oath, in accordance with the definitions and instructions set forth herein.

Definitions

A. "Action" means the present case, styled *Paul Ezra Rhoades v. Brent Reinke, et al.*, Case No. 11-445.

B. “Agent” means any contract employee, law firm, accounting firm, customs broker, entity or individual hired by Defendants (as defined below) to perform services associated with drugs or facility construction beginning January 1, 2008, until present.

C. “Any and all” or similar phrases are meant to be inclusive, not exclusive, to encompass the broadest interpretation of Documents responsive to a given request.

D. “Condemned prisoner” means a person under a death sentence whose death Defendants (acting individually, separately, or through agents) did cause or intend to cause by executing him. This term is limited to the following prisoners: Paul Ezra Rhoades and any person executed in the future.

E. “Defendant” or “Defendants” refers individually to the Defendant answering these Interrogatories and refers collectively to Defendants Brent Reinke, Randy Blades, and Does 1-50, Unknown Executioners, and to their attorneys, agents, representatives, advisors, predecessors, successors and assigns.

F. “Document” has the broadest possible meaning accorded to it under Federal Rule of Civil Procedure 34 and means any medium upon or from which intelligence or information can be recorded or retrieved, including without limitation any electronically stored information on any computer, network, or electronic media, wherever found, including, but not limited to, active files, deleted files, or fragmentary files, and also includes, without limitation, the original and each copy regardless of origin and location, or any book, pamphlet, periodical, letter, memorandum, diary, calendar, telex, electronic mail message, telegram, cable report, facsimile, record, contract, agreement, study, handwritten note, draft, working paper, chart, paper, print, record, drawing, sketch, graph,

index, list, tape, stenographic recording, tape recording, computer diskette and/or data, photograph, microfilm, invoice, bill, order form, receipt, financial statement, accounting entry sheet or data processing card, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced, reproduced, or stored, which is in Your possession, custody, or control or which was, but is no longer in Your possession, custody, or control. The term “Document” encompasses any and all electronically stored information, wherever found. The term “Document” also means an authentic copy where the original is not in Your possession or control and every copy of a document that is not an identical copy of the original.

G. “Each” means “each and every.”

H. “Execution” means the imposition of the sentence of death by lethal injection by IDOC.

I. “Execution Escort Team” means the Persons involved in, preparing for and carrying out Executions as described by SOP 135, section 5.

J. The words “Identify” or “Identity” when used herein in connection with a person means your answer should include the person’s full name, last known business and home addresses, last known business and home telephone numbers, business position and title, if any, and description of his or her duties and responsibilities connect with this position.

K. The word “Identify” when used herein in connection with a document means your answer should include, but not be limited to, the following:

a. The Identity of the present custodian of the document;

b. The date of making of the document and the Identity of each person whose testimony could be used to authenticate such document and lay the foundation for its introduction into evidence.

L. “Injection Team” means the Persons involved in, preparing for and carrying out Executions as described by SOP 135, section 5.

M. “Lethal Injection Procedures” means the Defendants’ or the State of Idaho’s or the IDOC’s rules, policies, regulations, instructions, lists, descriptions of steps to be undertaken, guidelines, recommendations, suggestions, or procedures relating to the preparation for, rehearsal for, conduct of, practice for, or execution of Condemned Prisoners by lethal injection, including, but not limited to, SOP 135.

N. “Medical Team” means the Persons involved in, preparing for and carrying out Executions as described by SOP 135, section 5.

O. “Person” means any natural person acting in any capacity, including attorneys, and/or any entity or organization, union, including divisions, departments, and other units therein, and shall include, but not be limited to, a public or private corporation, partnership, association, joint venture, committee, proprietorship, trust, estate, any government and/or governmental body, including, but not limited to, any commission, board, bureau and/or agency.

P. “Plaintiff” or “Plaintiffs” mean the Plaintiffs in this action and their agents.

Q. “SOP 135” means the IDOC Standard Operating Procedure 135.02.01.001, dated October 14, 2011.

R. “Specialty Team” means the Persons involved in preparing for and carrying out Executions as described by the Lethal Injection Protocol in effect at the time of each Execution, including the Execution Escort Team, the Medical Team and the Injection Team, as described by SOP 135, section 5.

S. “Specialty Team Leader” means the Person selected by IDOC to serve in such capacity as described by the Lethal Injection Protocol in effect at the time of each Execution.

T. “Recorder” means the Special Team member selected by IDOC to serve in such capacity as described by the Lethal Injection Protocol in effect at the time of each Execution.

U. “Refer” or “related to” or “referring” or “relating” means all documents that comprise, reflect, record, memorialize, embody, discuss, evaluate, consider, review or report on the subject matter of the request or that were reviewed in conjunction with, or were created, generated, or maintained as a result of the subject matter of the request.

V. “YOU” or “YOUR” means, collectively, the Idaho Department of Corrections (“IDOC”), as well as any of its present or former officials, employees, other agents, and any persons or entities whom Defendants understand or believe to be acting for or on behalf of the IDOC.

INSTRUCTIONS

A. Each Interrogatory shall be construed independently, and no Interrogatory shall be viewed as limiting the scope of any other Interrogatory.

B. In answering these Interrogatories, furnish all the information that is known to You. If the answer to all or any part of an Interrogatory is not presently known or available, You shall include a statement to that effect, furnish all information known or available, and respond to the entire Interrogatory by supplemental answer in writing and under oath as soon as practicable from the time the entire answer becomes known or available. If an estimate can be reasonably made in place of unknown information, You shall set forth Your best estimate, clearly designated as such, in place of unknown information and describe the basis on which the estimate is made.

C. Whenever an Interrogatory may be answered by referring to a Document, the Document shall be attached as an exhibit to the response and referred to in the response. If the Document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

D. The use of a verb in any tense shall be construed as the use of the verb in all other tenses, wherever necessary to bring within the scope of the Interrogatory, response, instruction, or definition that which might otherwise be construed to be outside the scope of same.

E. The use of the singular form of any word includes the plural and vice versa.

F. The connectives “and” and “or” shall be construed conjunctively and disjunctively as necessary to bring within the scope of an Interrogatory all information that might otherwise be construed to be outside of its scope.

G. These Interrogatories shall be deemed to be continuing so as to require prompt, further, and supplemental answers if You obtain further information at any time prior to the conclusion of this Action.

INTERROGATORIES

INTERROGATORY NO. 1:

Please Identify the Persons on the Specialty Teams, including the Medical Team, the Execution Escort Team and the Injection team.

INTERROGATORY NO. 2:

Please provide the Identity of each member of each Specialty Team, and each Training Session or Rehearsal Session in which each member participated. Identify each session by chronological number and date.

INTERROGATORY NO. 3:

Please provide a detailed description of each Specialty Team member's role during each execution Training Session and/or Rehearsal Session in which the Specialty Team member participated.

INTERROGATORY NO. 4:

Please Identify any Person who is participating in Training Sessions, Rehearsal Sessions or the execution itself in an advisory capacity or providing technical assistance to a Specialty Team.

INTERROGATORY NO. 5:

Please identify the Lethal Injection Protocols used in the Training Sessions or Rehearsal Sessions or any other training done to comply with any execution protocol from

November 18, 2010, until present. Please identify the session by chronological number and date.

INTERROGATORY NO. 7:

Please identify the anesthetic to be used in the Execution, including the date of manufacture and the acquisition date.

DATED this 9th day of November, 2011.

/s/
Oliver W. Loewy

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

Krista Howard
khoward@idoc.idaho.gov

___ U.S. Mail
___ Hand Delivery
___ Facsimile
___ Overnight Mail
 X Electronic Mail

/s/
Oliver W. Loewy

EXHIBIT 3

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL EZRA RHOADES,

Plaintiff,

v.

BRENT REINKE, RANDY
BLADES, DOES 1-50, and/or UNKNOWN
EXECUTIONERS,

Defendants.

Case No.: 1:11-cv-00445-REB

PROTECTIVE ORDER

IT IS HEREBY ORDERED that any discovery relating to the specialty team members will take place pursuant to the following Protective Order:

1. “Confidential Information”

1.1 As used throughout this Protective Order, the phrase “Confidential Information” shall mean information sufficient to determine “the identity of executioners and other persons who participate or perform ancillary functions in an execution.”

1.2 Counsel for Defendants shall be responsible for designating as Confidential any such information contained in any discovery disclosure.

1.3 Confidential Information will be designated by counsel for Defendants by submitting to counsel for Plaintiff, simultaneously with any discovery response in which such information was disclosed, a proposed redacted copy of any pages containing such information. Notwithstanding this requirement, the failure to designate Confidential Information shall not be deemed a waiver of the protections of the Protective Order. However, those individuals authorized to review the Discovery Responses under this Protective Order (as described below,

in paragraph 1.4) shall not be liable for inadvertent disclosure of Confidential Information of such information has not been properly designated.

1.4 If, after counsel for Plaintiff receive information designated pursuant to the provisions of paragraph 1.3 of this Protective Order, it appears to counsel for Plaintiff that any proposed redacted information is not, in fact, Confidential Information, Plaintiff's counsel shall first notify counsel of record for Defendants in writing. If the parties are unable to reach an agreement as to whether the information should be treated as Confidential under the terms of this Protective Order, Plaintiff's counsel may then or thereafter submit the matter for decision by the Court. Counsel for Defendants shall bear the burden of proving that the designated information constitutes Confidential Information. Plaintiff, however, shall not be obligated to challenge the propriety of any designation by Defendants, and a failure to do so shall not constitute a waiver or in any way preclude a subsequent challenge of the propriety of such designations.

2. Names of Specialty Team Members

The names of the Specialty team members shall not be revealed in connection with the litigation of this lawsuit to anyone other than counsel for Defendants, counsel for Plaintiff, and any staff member employed by the Federal Defender Services of Idaho. Counsel for Defendants and counsel for Plaintiff will agree upon a generic identifier to be used when referring to or addressing the Specialty Team Members. Such identifier will include only the person's title, such as "medical team leader" or "IV team member #1."

3. Filing of Documents Containing Confidential Information with the Court

Counsel for either Plaintiff or Defendants may file with the Court documents containing Confidential Information.

3.1 Any document filed with the Court that contains Confidential Information shall be filed under seal. Such documents may be filed using the ECF system without filing a separate motion to file under seal, so long as the inclusion of the Confidential Information is the only reason for filing the document under seal. If the filing party seeks to seal the document on other grounds, a separate motion to seal must be filed.

3.2 All documents containing Confidential Information that are filed with the Court pursuant to paragraph 3.1 may also be filed with the Court in redacted form without the need to file a separate motion to file under seal. Such redacted versions of filings shall include the word “[Redacted]” in the titled of the filed document, and will be filed publicly.

DATED this ___ day of November, 2011.

Ronald E. Bush
United States District Judge

EXHIBIT 4

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Thomas Paul West, et al.,)	No. CV-11-01409-PHX-NVW
Plaintiffs,)	PROTECTIVE ORDER
vs.)	
Janice K. Brewer, et al.,)	
Defendants.)	

IT IS HEREBY ORDERED that any depositions of medical team members or special operations team members will take place pursuant to the following Protective Order:

1. “Confidential Information”

1.1 As used throughout this Protective Order, the phrase “Confidential Information” shall mean information sufficient to determine “the identity of executioners and other persons who participate or perform ancillary functions in an execution,” as that information is defined and protected under A.R.S. 13-704(c).

1.2 Counsel for defendants shall be responsible for designating as Confidential any such information contained in the Deposition transcripts.

1.3 Confidential Information will be designated by counsel for defendants by submitting to counsel plaintiffs, within ten (10) days following the Deposition in which

1 such information was disclosed, a proposed redacted copy of any pages of the Deposition
2 transcript containing such information. Notwithstanding this requirement, the failure to
3 designate Confidential Information shall not be deemed a waiver of the protections of the
4 Protective Order. However, those individuals authorized to review the Deposition
5 transcripts under this Protective Order (as described below, in paragraph 4) shall not be
6 liable for inadvertent disclosure of Confidential Information if such information has not
7 been properly designated.

8 1.4 If, after counsel for plaintiffs receive information designated pursuant to the
9 provisions of paragraph 1.3 of this Protective Order, it appears to counsel for plaintiffs
10 that any proposed redacted information is not, in fact, Confidential Information,
11 plaintiffs' counsel shall first notify counsel of record for defendants in writing. If the
12 parties are unable to reach an agreement as to whether the information should be treated
13 as Confidential under the terms of this Protective Order, plaintiffs' counsel may then or
14 thereafter submit the matter for decision by the Court. Counsel for defendants shall bear
15 the burden of proving that the designated information constitutes Confidential
16 Information. Plaintiffs, however, shall not be obligated to challenge the propriety of any
17 designation by Defendants, and a failure to do so shall not constitute a waiver or in any
18 way preclude a subsequent challenge of the propriety of such designations.

19 2. Names of Deponents

20 The names of the medical team members and special operations members
21 shall not be revealed in connection with the litigation of this lawsuit to anyone other than
22 counsel for defendants, counsel for plaintiffs, one (1) staff investigator and one (1)
23 paralegal employed by the Federal Public Defender's office. Counsel for defendants and
24 counsel for plaintiffs will agree upon a generic identifier to be used when referring to or
25 addressing the aforementioned individuals. Such identifier will include only the person's
26 title, such as "medical team leader" or "IV team member #1."

1 3. Videotapes of Depositions

2 The Depositions may be videotaped. No videotape may be disseminated
3 in any form, although the videotapes may be used by counsel at trial.

4 3.1 Initially, the videotapes of the depositions will be given only to counsel for
5 defendants, who shall maintain custody of the video tapes until such time as the parties
6 enter into a separate agreement or pre-trial order governing the use of the videotapes by
7 counsel for plaintiffs in pre-trial preparations and during trial.

8 3.2 Upon conclusion of the litigation of this case, including any appeals, any
9 videotapes will be returned to counsel for defendants or destroyed.

10 4. Transcripts of the Depositions

11 Transcripts of the Depositions will not be made available to plaintiffs
12 Gregory Dickens, Charles M. Hedlund, Robert Wayne Murray, Theodore Washington, and
13 Todd Smith. Nor will plaintiffs' counsel disclose to plaintiffs Confidential Information.
14 Confidential Information obtained in the Depositions will not be disclosed to anyone other
15 than counsel for the parties and counsel's employees, only insofar as is necessary for
16 purposes of this litigation. Confidential Information will only be shared with outside
17 consultants and experts retained by the parties to assist counsel specifically for the
18 purposed of this litigation, to the extent necessary for such experts to prepare a written
19 opinion, prepare to testify, or to assist counsel.

20 5. Filing of Documents Containing Confidential Information with the Court

21 Counsel for either plaintiffs or defendants may file with the Court documents
22 containing Confidential Information.

23 5.1 Any document filed with the Court that contains Confidential
24 Information shall be filed under seal. Such documents may be filed using the ECF system
25 without filing a separate motion to file under seal, so long as the inclusion of Confidential
26 Information is the only reason for filing the document under seal. If the filing party seeks
27 to seal the document on other grounds, a separate motion to seal must be filed.
28

DATED this 10th day of August, 2011.

Neil V. Wake

United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL EZRA RHOADES,

Plaintiff,

v.

BRENT REINKE, in his official capacity as
Director,
Idaho Department Of Correction;

RANDY BLADES, in his official capacity as
Warden,
Idaho Maximum Security Institution;

DOES 1-50, UNKNOWN EXECUTIONERS,
in their official capacities as Employees and/or
Agents of the Idaho Department of Correction,

Defendants.

CASE NO. 11-445-REB

AMENDED COMPLAINT

NATURE OF ACTION

1. Paul Rhoades seeks injunctive and declaratory relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201 for violations and threatened violations of his right to due process of law and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and the Supreme Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008). Rhoades also seeks injunctive relief mandating the presence of his counsel at his execution, pursuant to the Due Process Clause and the Eighth Amendment.
2. Pursuant to Fed. R. Civ. P. 15(a), Mr. Rhoades files this amended complaint as a matter of course within 21 days of the State's service on October 14, 2011, of its motion to dismiss. Dkt. 7.

JURISDICTION AND VENUE

3. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 2201 (declaratory relief), and 2202 (injunctive relief).
4. The Court has personal jurisdiction over each Defendant in this matter. The planning and carrying out of the proposed execution of Mr. Rhoades, the events giving rise to this Amended Complaint, have already occurred or will occur in this District in or near Boise, Idaho.
5. Venue is proper under 28 U.S.C. §1391(b). Mr. Rhoades is located at Idaho Maximum Security Institution on Pleasant Valley Road near Boise, Idaho, located in this District. Mr. Rhoades's execution is scheduled to occur there.

PARTIES

6. Mr. Rhoades is a United States citizen residing at the Idaho Maximum Security Institution in Boise, Idaho.
7. Mr. Rhoades is under the control and supervision of the Idaho Department of Correction (“IDOC”).
8. Defendant Brent Reinke is the Director of the IDOC.
9. On information and belief, Reinke is a citizen of the United States and a resident of the State of Idaho.
10. Defendant Reinke is being sued in his official capacity as Director of the IDOC.
11. Defendant Randy Blades is the Warden of the IDOC’s Idaho Maximum Security Institution (“IMSI”), where any execution will occur.
12. On information and belief, Warden Blades is a citizen of the United States and a resident of the State of Idaho.
13. Defendant Blades is being sued in his official capacity as Warden of IMSI.
14. Defendants Unknown Employees and/or Agents of the IDOC are working in concert with Defendants Reinke and Blades in the implementation of the IDOC execution procedures, including procedures governing the acquisition, preparation and administration of chemicals designed to execute people, including Mr. Rhoades.
15. Mr. Rhoades is not yet able to further identify the Unknown Employees.
16. Defendants Reinke and Blades have the ability and resources to identify the unnamed defendants.

17. Each such unnamed defendant has been selected by Reinke and Blades or their designee, the Deputy Chief of the Bureau of Prisons, for participation in the planning, training and/or carrying out of an execution.
18. The unnamed defendants have or will participate in Mr. Rhoades's execution, by virtue of their roles in ordering, acquiring, supplying, distributing, transporting, storing or mixing lethal injection drugs; or preparing, implementing, or carrying out the lethal injection itself.
19. The unnamed defendants include all members or trainers of the Execution Team and any of its accompanying "specialty" teams, the Execution Escort Team, the Medical Team including the Medical Team Leader, and the Injection Team and Injection Team Leader.
20. Upon information and belief, all unnamed Defendants are United States citizens and residents of the State of Idaho.
21. Each unnamed defendant is sued in his or her official capacity.

PROCEDURAL BACKGROUND

22. Mr. Rhoades filed his initial Complaint on September 22, 2011, at which time his execution was not scheduled.
23. On October 14, 2011, the State filed a motion to dismiss the complaint. Dkt. 7.
24. In its motion, the State apprised Mr. Rhoades of the protocol that would be used for his execution, Standard Operating Procedure 135, ("SOP 135"), adopted that same day. Dkt. 7-4.
25. On October 19, the State scheduled Mr. Rhoades's execution for November 18, 2011.

THE LETHAL INJECTION PROCESS

26. As Director, Defendant Reinke is responsible for the daily supervision of operations of the Idaho Department of Correction.
27. Idaho Code §19-2716 provides that the “substance or substances” to be used in an execution must be “approved by the [IDOC] director[.]”
28. Idaho Code §19-2716 provides that the IDOC director must “determine the procedures to be used in any execution.”
29. Defendant Reinke has a duty to ensure that executions are carried out in compliance with the Eighth and Fourteenth Amendments to the United States Constitution, Idaho law, and departmental procedure.
30. As Warden, Defendant Blades is responsible for the day-to-day operations of IMSI.
31. Warden Blades also has a duty to ensure that executions are carried out in compliance with the Eighth and Fourteenth Amendments to the United States Constitution, Idaho law, and departmental procedure.
32. Idaho’s execution protocol, SOP 135, sets out lethal injection procedures which call for administering three chemicals through an intravenous catheter (“IV”).
33. The three chemicals and their order of administration are: sodium pentothal (“thiopental”), an anesthetic; pancuronium bromide, a paralytic; and potassium chloride, a cardiac-arrest inducing chemical.
34. SOP 135 provides that, if the IDOC is unable to secure a sufficient amount of thiopental, then pentobarbital should be substituted as the anesthetic.

35. Thiopental and pentobarbital are both barbiturates intended to render the condemned inmate unconscious.
36. Pancuronium bromide causes progressive paralysis and results in suffocation.
37. Pancuronium bromide does not affect consciousness and does not prevent the perception of pain.
38. Pancuronium bromide precludes an accurate assessment of consciousness by visual and auditory observations.
39. Pancuronium bromide paralyzes all muscles that would otherwise move when an individual is in excruciating pain. Dkt. 1-5, Exhibit 17 at paras. 5, 17 (Sworn declaration of David Lubarsky, M.D., *Arthur v. Thomas, et al.*, No. 11-CV-438-MEF-TFM).¹
40. A fully conscious or lightly unconscious individual who receives a therapeutic or greater dose of pancuronium bromide would experience suffocation and be unable to move or otherwise respond. Dkt. 18-4, Exhibit 4 at para. 10.
41. Potassium chloride is intended to induce cardiac arrest. Dkt. 7-4 at 36-37.
42. Potassium chloride does not affect consciousness and does not prevent the perception of pain.
43. As it travels in the bloodstream from the site of the injection throughout the body, potassium chloride activates all of the nerve fibers inside the blood vessels. This

¹ The exhibits filed with the Complaint, Dkt. 1, are incorporated by reference into this Amended Complaint and are referred to by the original designation.

activation causes an extraordinarily painful burning sensation absent adequate anesthesia.

44. The three drugs contemplated by Idaho (assuming the use of thiopental), are the same as used in Kentucky and discussed by the Supreme Court in *Baze*. *Baze*, 553 U.S. at 36-37.
45. In *Baze*, the Supreme Court held that a state's execution protocol violates the Eighth Amendment if it creates a substantial risk of severe pain, as compared to the risk created by known and available alternatives. *Id.* at 61.
46. The Supreme Court noted that "proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs." *Id.* at 44.
47. Unless the condemned inmate has first reached a sufficiently deep unconscious state from a "proper dose" of thiopental, the anesthetic, "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 53.

SUMMARY OF CLAIMS

48. SOP 135 creates a demonstrated "risk of severe pain" that "is substantial when compared to the known and available alternatives." *Id.* at 61.
49. The continued use of a three-drug protocol -- known to fail and induce severe pain, notwithstanding the alleged safeguards relied upon by the Supreme Court in upholding a three-drug protocol in *Baze* -- is unconstitutional and violates the Eighth

Amendment in light of the known alternative, a one-drug protocol that does not present any risk of severe pain.

50. If the Court rejects Mr. Rhoades's one-drug protocol claim, in the alternative, SOP 135 violates the Eighth and Fourteenth Amendments because it does not include any of the five *Baze* safeguards relating to one year of professional health care experience, daily experience establishing IVs, appropriate practice sessions, meaningful redundancy and a thorough consciousness check.
51. SOP 135 violates the Eighth Amendment as interpreted in *Baze* by allowing for a "cut down" to establish a central IV line. Allowing for a "cut down" creates a substantial "risk of severe pain ... when compared to the known and available alternative" of allowing venous access using ultrasound but not employing a cut down. *Baze*, 553 U.S. at 61.
52. Mr. Rhoades claims that as applied in his case, SOP 135 violates the Eighth Amendment. The IDOC execution facility is sufficiently incomplete and has thus precluded the completion of the mandated training by SOP 135.
53. Excluding Mr. Rhoades's counsel as a witness violates his Eighth and Fourteenth Amendments against cruel and unusual punishment and the Due Process Clause.
54. Finally, Mr. Rhoades seeks declaratory judgments pursuant to 28 U.S.C. §2201, clarifying that the Controlled Substances Act ("CSA") (21 U.S.C. §801 *et seq.*) and the Food, Drug and Cosmetic Act ("FDCA") (21 U.S.C. §301 *et seq.*) apply to his lethal injection in Idaho; that Defendants are now violating or, if they act in compliance with IDOC policy, will violate these statutes.

55. All statements of fact in this Complaint are based upon sworn testimony, declarations or affidavits, or upon well-founded information or belief.
56. All statements of fact and allegations made anywhere in this Complaint are incorporated by reference into each legal claim as if fully rewritten therein.

CLAIMS

A. Claims Pursuant To 42 U.S.C. §1983

57. As articulated in each of the following specific 42 U.S.C. §1983 claims, Defendants are acting under color of Idaho law and with deliberate indifference to the wanton and unnecessary infliction of prolonged, intense pain their conduct will cause Mr. Rhoades during his execution. *Baze*, 553 U.S. at 54.

CLAIM 1: Idaho Should Use A One-Drug Protocol of Thiopental or Pentobarbital.

58. There is scientific consensus that rapid IV delivery of a large dose of thiopental or pentobarbital will cause death in a short amount of time.
59. A one-drug protocol using pentobarbital (or thiopental) is a “known alternative” that has been used in 14 executions since 2008 in Ohio and Washington.
60. Of those 14 one-drug executions, 11 used thiopental and 3 used pentobarbital.
61. A one-drug protocol has also been adopted in South Dakota.
62. A one-drug protocol completely eliminates the substantial risk of severe pain that arises in three-drug executions, like those contemplated in Idaho, which allow for the injection of pancuronium bromide and potassium chloride, chemicals that may potentially cause excruciating pain.

63. The one-drug protocol does not employ either of the chemicals—pancuronium bromide and potassium chloride--which create severe pain absent proper administration of the anesthetic.
64. There are no reports of one-drug protocol executions apparently creating severe pain for the offender.
65. Painful, botched executions continue to occur post-*Baze*, using three-drug protocols that include pancuronium bromide and potassium chloride.
66. If an inadequate amount of anesthetic reaches the condemned inmate for any reason; whether from accidental or reckless acts, degraded or ineffective anesthetic, or incompetent or insufficient consciousness checks, the injection of the latter two chemicals in a three-drug protocol will produce severe, unconstitutional pain.
67. SOP 135 creates a demonstrated “risk of severe pain” that “is substantial when compared to the known and available alternatives.” *Baze*, 553 U.S. at 61.
68. The continued use of a three-drug protocol -- known to fail and induce severe pain, notwithstanding alleged safeguards that should preclude such executions and which were relied upon when the Supreme Court upheld a three-drug protocol in *Baze* -- is unconstitutional and violates the Eighth Amendment in light of the known alternative, a one-drug protocol that does not present substantial risk of severe pain.

**CLAIM 2: SOP 135 Violates Eighth and Fourteenth Amendment
Against Cruel and Unusual Punishment Because it Lacks
the Safeguards Required by *Baze*.**

69. SOP 135 does not include the safeguards used in Kentucky and relied upon in *Baze* when the Supreme Court upheld the Kentucky method of execution.

70. The *Baze* required safeguards included:

- that the personnel establishing and monitoring an IV possess, in addition to a healthcare credential, “at least one year of professional experience.” *Baze*, 553 U.S. at 55.
- that those personnel have “daily experience in establishing IV catheters.” *Id.*
- that those personnel together with the remaining personnel directly involved in an execution complete “at least ten practice sessions per year” which “encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.” *Baze*, 553 U.S. at 55, 56.
- that meaningful redundancy through backup chemical preparation by adequately trained and experienced personnel or through establishing a backup IV line by adequately trained and experienced personnel. *Id.* at 56.
- provide for a meaningful consciousness check after the anesthetic is administered.

71. SOP 135 mandates the creation of three “specialty teams” necessary to the execution process: “an Execution Escort Team, a Medical Team, and an Injection Team.” Dkt. 7-4 at 8.

72. Each of these teams is integral to the execution procedures.

Lack of Relevant Medical Credentials for All Teams

73. SOP 135 states in general terms the Medical Team's responsibilities as:

inserting the IV catheters, ensuring the line is functioning properly throughout the procedure, mixing the chemicals, preparation of the syringes, monitoring the offender (including the level of consciousness), and supervising the administration of the chemicals.

Dkt. 7-4 at 9.

74. SOP 135 also provides for a Medical Team Leader.

75. SOP 135 sets out minimum Medical Team, including the Medical Team leader, membership credential requirements:

- Emergency medical technician ["EMT"];
- Licensed practical nurse (LPN) or registered nurse (RN);
- Military corpsman;
- Paramedic;
- Phlebotomist;
- Physician assistant;
- Physician; or
- Other medically trained personnel including those trained in the United States Military.

Dkt. 7-4 at 9.

76. SOP 135 does not require Medical Team members to have a medical credential combined with at least one year of professional experience.

77. SOP 135 does not require Medical Team members to have a medical credential which required experience in establishing or monitoring IVs.

78. SOP 135 does not require Medical Team members to have any experience or training in thoroughly checking varying levels of consciousness.

79. SOP 135 does not require daily experience on the part of any Medical Team member in the areas of his assigned responsibilities under the execution protocol.
80. SOP 135 does not require that Medical Team members have ongoing daily experience in establishing IVs.
81. SOP 135 does not require that Medical Team members have ongoing daily experience in monitoring IV lines for failure.
82. The Injection Team is charged with the responsibility of administering the chemicals to the condemned through the IV system. Dkt. 7-4 at 9.
83. SOP 135 provides that the minimum medical credential requirements for Injection Team membership are at least one year of medical experience as a:
 - Certified medical assistant;
 - Phlebotomist;
 - Emergency Medical Technician;
 - Paramedic; or
 - Military Medical Corpsman.

Dkt. 7-4 at 9.

84. SOP 135 does not require Injection Team members to have a medical credential combined with at least one year of professional experience.
85. SOP 135 does not require that Injection Team members have a medical credential which required their acquiring skills related to injection of fluids through IV lines.
86. SOP 135 does not require that Injection Team members have any experience in injecting chemicals into IV lines.
87. SOP 135 does not require daily experience on the part of any Injection Team members in the area of his assigned responsibilities under the execution protocol.

88. SOP 135 does not require that any qualifying medical credential be current and valid, whether for the Medical Team or Injection Team.
89. The medical credential prerequisites required under SOP 135 do not ensure appropriate medical training for Medical Team members.
90. The State of Idaho does not license, certify, or regulate the training or scope of practice of Phlebotomists. *See* Dkt. 1-4, Exhibit 22 (Nicole Walton, Pbt, Phlebotomy Instructor, College of Western Idaho, 8/25/11).
91. Phlebotomists do not initiate, maintain, or administer any substance via IVs in the ordinary scope of practice in Idaho. *Id.*
92. Phlebotomists are not trained to initiate, maintain, or administer any substance via IVs. *Id.*
93. The State of Idaho licenses and regulates the training and scope of practice of Emergency Medical Technicians (“EMTs”) and Paramedics.
94. The Idaho legislature has invested the Idaho Emergency Medical Services Physician Commission [“EMS Physician Commission”] with the authority and obligation to “adopt appropriate rules defining the allowable scope of practice and acts and duties which can be performed by persons licensed by the EMS bureau[.]” I.C. § 56-1023(1).
95. The EMS Physician Commission Standards Manual (“Standards Manual”) fulfills this legislative mandate. Dkt. 1-5, Exhibit 23 (EMS Physician Commission Standards Manual).

96. The Standards Manual distinguishes between EMTs and Advanced EMTs (“AEMTs”) for training and scope of practice purposes. *Id.* at 16-18, 2
97. The Standards Manual allows only Advanced EMTs and Paramedics to initiate an IV and administer non-medicinal substances via IV infusion. *Id.* at 22-23.
98. The Standards Manual allows only Paramedics to administer medicinal substances via IV infusion or to administer any substance via IV push. *Id.* at 23.
99. There are different kinds of military corpsmen. Not all kinds have training and/or experience in initiating, maintaining or administering substances through an IV.
100. IV medication administration is outside the scope of Certified Medical Assistant practice and certification. *See* Dkt. 1-5 at Ex. 21.
101. It would be inappropriate for a Medical Assistant to start or manage IV fluids, or administer intravenous medication. Dkt. 1-5 at Ex. 21.

Lack of Appropriate On-Site Training

102. SOP 135 provides for “periodic on-site practice by command and the specialty teams.”
103. SOP 135 does not require the warden to participate in scheduled sessions.
104. SOP 135 does not require that the Execution Teams participate in “10 practice sessions per year . . . encompass[ing] a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.” *Baze*, 553 U.S. at 55.
105. SOP 135 does not require a “rehearsal session” encompassing siting IV catheters into a live volunteer.

- 106. SOP 135 does not require that Medical Team members engage in on-site training in monitoring IVs.
- 107. Reconstitution is required for preparing either thiopental or pentobarbital.
- 108. The procedure for reconstituting pentobarbital requires many more steps than is required for reconstituting thiopental.
- 109. The increased number of steps necessary to reconstitute pentobarbital as compared to thiopental increases the risk of error in the reconstitution process.
- 110. SOP 135 does not address how to reconstitute pentobarbital.

Redundant Measures Lacking

- 111. SOP 135 does not require adequate redundancy. *See Baze*, 553 U.S. at 55. Although SOP 135 requires the setting of primary and backup lines and the preparation of two sets of chemicals, these redundancies are rendered meaningless because the execution team members lack sufficient credentials and training.

Lack of Adequate Method and Training in Consciousness Checks

- 112. SOP 135 does not delineate the type or method of consciousness check used to determine if the prisoner is sufficiently anesthetized before administering the paralytic and cardiac-arrest chemicals.
- 113. SOP 135 does not require that Medical Team members engage in sufficient on-site training in conducting consciousness checks.
- 114. SOP 135 does not require that all persons charged with conducting consciousness checks in the execution process participate in on-site training in checking consciousness.

115. SOP 135 does not require that Injection Team members engage in sufficient on-site training in injecting chemicals into IVs.
116. SOP 135 does not require that any person directly involved in an execution and charged with consciousness checking have training in consciousness checking.
117. Certified medical assistants, phlebotomists, EMTs, paramedic, or military corpsmen, healthcare professionals which SOP 135 permits to be on an execution team, are not required for credentialing purposes to have any training and/or experience in conducting consciousness checks of individuals who have had anesthesia administered to them.
118. SOP 135 does not require that team members, or anyone else who participates in mandated training or rehearsals, perform with any minimal competency at any assigned task.

Failure to Incorporate *Baze* Safeguards Results in an Unconstitutional Execution Protocol

119. Absent proper training and practice in initiating and maintaining IVs, there is a substantial risk that an IV will not serve as a reliable mechanism for delivering chemicals into the bloodstream. Dkt. 18-4, Exhibit 4 at 5, 6, 20, *passim*.
120. There is a substantial risk that an insufficient amount of anesthetic will reach the prisoner.
121. Where a three-drug protocol is employed, if an insufficient amount of anesthetic reaches the offender, he will experience the pain and suffering caused by a paralytic

chemical and a cardiac-arrest inducing chemical which do reach him. *Baze*, 553 U.S. at 53.

122. During or after initiation of an IV, the needle can perforate the walls of the vein, delivering the chemicals into the surrounding tissue rather than the blood vessel. Dkt. 18-4, Exhibit 4 at 6.
123. Regardless the particular mechanism, inadvertent delivery of fluid into the tissues is referred to as infiltration. *Id.*
124. Assessing infiltration requires a trained and experienced individual to inspect the site, visually and tactilely “for swelling, discoloration, and temperature changes, as well as monitoring of the IV equipment.” Dkt. 18-4, Exhibit 4 at para. 11.
125. “The signs of an infiltrated IV are often very subtle, and can easily be missed by an inexperienced practitioner.” *Id.* at para. 12.
126. In addition to problems with infiltration, leakage of chemicals may occur at any point of connection. *Id.* at para. 8.
127. Importantly, “[i]nfiltration and leakage are not necessarily ‘all-or-nothing’ events.” *Id.* at para. 10. This can create a partial dose of the drugs administered to the prisoner and results in severe pain.
128. Infiltration and leakage are not “mutually exclusive causes of IV failure.” *Id.* at para. 10.
129. Allowing individuals without proper training and experience to establish, monitor, and inject chemicals through an IV creates a high, substantial risk that the offender will experience severe pain.

IDOC is not Subjectively Blameless for Risk of Harm

130. IDOC officials have known since 2008 that they needed to establish execution procedures in compliance with *Baze*.
131. IDOC officials have known for several years that one or more death sentenced inmates' cases were drawing to a conclusion.
132. News media report that the IDOC execution facility is not complete. Dkt. 18-6.
133. IDOC officials chose to remodel the execution facility on a timetable precluding the SOP 135 required training of execution teams in time for a November 18, 2011, execution in accord with SOP 135.
134. IDOC officials are not subjectively blameless for the substantial risk of serious harm because of the failure to include the *Baze* safeguards in SOP 135. *Baze*, 553 U.S. at 50; Dkt. 7-1 at 15.

CLAIM 3: Use of Adulterated or Illegally Obtained Drugs Creates a Substantial Risk of Harm.

135. The Attorney General for the State of Idaho, Lawrence Wasden, was one of several signatories to a January 25, 2011, letter to United States Attorney General Eric Holder seeking his "assistance in either identifying an appropriate source for sodium thiopental or making supplies held by the Federal Government available to the States." Dkt. 1-5, Exhibit 24 (letter to U.S. Attorney General Holder).
136. As Idaho Attorney General Wasden explained:

The protocol used by most of the jurisdictions employing lethal injection includes the drug sodium thiopental, an ultra-short-acting barbiturate. Sodium thiopental is in very short supply worldwide and, for various reasons, essentially unavailable on the open market.

For those jurisdictions that have the drug available, their supplies are very small—measured in a handful of doses. The result is that many jurisdictions shortly will be unable to perform executions in cases where appeals have been exhausted and Governors have signed death warrants.

Id. at 1.

137. United States Attorney General Eric Holder responded that:

At the present time, the Federal Government does not have any reserves of sodium thiopental for lethal injections and is therefore facing the same dilemma as many States. . . . I appreciate and share your concerns about this matter, but I am optimistic that workable alternatives are available that will allow us to carry out our duties.

Dkt. 1-5, Exhibit 25.

138. Upon information and belief, any thiopental which Defendants may use in executing Mr. Rhoades was illegally obtained. Cf. Dkt. 1-5, Exhibit 16 (Sidley Austin LLP and Equal Justice Initiative letters to United States Attorney General Holder outlining illegal importation and DEA seizure of thiopental in several states) and Exhibit 26 (Public Records Response regarding IDOC's attempts to obtain pentobarbital and thiopental).
139. Upon information and belief, any thiopental which Defendants may use in executing Mr. Rhoades was manufactured without adequate safeguards to ensure its identity and quality as thiopental.
140. Upon information and belief, any thiopental which Defendants may use in executing Mr. Rhoades has expired and deteriorated to an extent that it cannot be reliably used to induce anesthesia, due to improper storage or age.

141. Given these conditions, the use of thiopental under SOP 135 violates *Baze* and the Eighth Amendment.

CLAIM 4: Use of Pentobarbital in a Three-Drug Protocol Violates the Eighth Amendment, Though its Use as a One-Drug Protocol Would Not.

142. Pentobarbital takes 15 to 60 minutes to take full effect, according to the FDA-approved package insert for pentobarbital. Dkt. 1-5, Exhibit 17, 18, 19.
143. The FDA-approved package insert classifies pentobarbital as a short-acting barbiturate rather than an ultra short-acting one, like thiopental. Dkt. 1-5, Exhibit 19.
144. There is no scientific literature establishing what dose of pentobarbital will induce anesthesia. Dkt. 1-5, Exhibit 17 at para. 7, Exhibit 19.
145. Because pentobarbital is slower-acting than thiopental, Mr. Rhoades may be only partially anesthetized. He may be sufficiently anesthetized to appear unconscious to the untrained or inexperienced observer but still able to experience the pain from the second and third chemical injections.
146. Offenders experiencing severe pain while being executed by lethal injection continues even after *Baze*.
147. Such executions have occurred using a three-drug protocol with pentobarbital as the anesthetic.
148. In 16 reported executions utilizing pentobarbital in a three-drug protocol, two botched executions occurred.
149. Very recently, on June 23, 2011, the State of Georgia executed Roy Blankenship by lethal injection.

150. In executing Mr. Blankenship, the State of Georgia used pentobarbital as the first chemical in its three-chemical protocol.

151. An Associated Press reporter who witnessed Mr. Blankenship's execution wrote:

He was laughing and chatting with a prison chaplain in the moments before his execution, at one point trying to converse with the observers sitting behind a glass window.

As the injection began, he jerked his head toward his left arm and made a startled face while blinking rapidly. He soon lurched to his right arm, lunging with his mouth agape twice. He then held his head up, and his chin smacked as he mouthed words that were inaudible to observers.

Dkt. 1-4, Exhibit 6, p. 4 (Affidavit and attached newspaper article of Associated Press reporter Greg Bluestein, *DeYoung v. Owens*, No. 11-cv-2324-SCJ (N.D. Ga.)).

152. Using pentobarbital in a three-drug protocol presents a substantial risk of severe pain in light of the known alternative, using pentobarbital in a one-drug protocol.

CLAIM 5: The Exercise of Discretion Allows for Significant Changes in the Execution Protocol Without a Reasonable Opportunity to Review and Assert Due Process Violations.

153. With regard to several execution procedures, SOP 135 does not identify the steps necessary to comply with the mandated procedures.

- If “any potential problems . . . occur[,]” the IDOC director shall stop the proceeding “and take all steps necessary in consultation with the Medical Team leader prior to proceeding further with the execution.”

Dkt. 7-4, Appendix A at 5.

- SOP 135 further provides that “[i]n the unlikely event that the offender is conscious, . . . the IMSI warden will determine how to proceed[.] . . . If deemed appropriate, the IMSI warden may instruct the Injection Team to administer an additional 5 grams of sodium pentothal/or pentobartibal followed by the heparin/saline flush from Backup Set 2.”

Id. at 6-7.

- SOP 135 fails to limit the amount of time or the number of attempts that must be made in order to establish the IV lines.

154. In each of these areas, the discretion could be exercised in a manner which results in the offender experiencing severe pain.
155. These areas of discretion allow the protocol to be substantially changed with no advance notice to an offender and with no opportunity for the offender to be heard in court on any constitutionally-based objections to it.

**CLAIM 6: Executing Mr. Rhoades in Accordance with SOP 135
Would Infringe Mr. Rhoades’s Fundamental Right
Against Cruel and Unusual Punishment.**

156. Fourteenth Amendment fundamental due process jurisprudence governs this claim.
157. The *Baze* standard, derived from Eighth Amendment jurisprudence, is inapplicable to a due process analysis.
158. “[T]he Fourteenth Amendment ‘forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

159. The prohibition against the unnecessary infliction of cruelty is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.
160. There is no compelling state interest served by executing Mr. Rhoades using a protocol more likely, as compared to available alternatives, to result in his experiencing severe pain.

CLAIM 7: Excluding Mr. Rhoades's Counsel as a Witness Violates His Eighth and Fourteenth Amendment Rights of Due Process and Against Cruel and Unusual Punishment, As Well as His Lawyer's Due Process to Witness His Execution.

161. SOP 135 does not require that the offender's attorney be allowed to witness the offender's execution.
162. The individuals whom SOP 135 provides may witness an execution are:
- The director of IDOC;
 - A representative from the Idaho Board of Correction (one total);
 - The chief of the Operations Division;
 - The prosecuting attorney from the county of conviction (one total);
 - The sheriff from the county of conviction (one total);
 - The sentencing judge (one total);
 - A representative from the Idaho governor's office (one total);
 - The Idaho attorney general (or his representative) (one total);
 - Members of the victim's family (two [2] total);
 - A spiritual advisor of the offender's choosing (one total);

- Friends (approved visitors and/or attorney of record) or members of the offender's family (two [2] total); and
- Members of the news media (up to four [4] total).

Dkt. 7-4 at 15.

163. Mr. Rhoades is entitled to the Defendants acting in substantial compliance with the IDOC protocol in place at the time of his execution.
164. Bound to a gurney, Mr. Rhoades will have no recourse should the Defendants fail in this regard.
165. Should this occur, Mr. Rhoades is entitled to have counsel seek to stop the proceeding through appeals to court or by taking other appropriate action.

B. Request for Declaratory Judgment Under 28 U.S.C. § 1331

CLAIM 8: The Controlled Substances Act and The Food, Drug And Cosmetic Act.

166. The Controlled Substances Act ("CSA"), 21 U.S.C. §§801 *et. seq.*, creates five schedules of controlled substances. *Id.* at §812.
167. Because sodium thiopental contains a derivative or salt of barbituric acid, it is a Schedule III controlled substance. 21 C.F.R. §1308 (c)(3) (including in Schedule III "any substance which contains any quantity of a derivative of barbituric acid or any salt thereof").
168. Pentobarbital is a Schedule II controlled substance. 21 C.F.R. §1308.12 (e)(3).

169. 21 U.S.C. §829 provides that, unless dispensed directly by a practitioner other than a pharmacist, Schedule II and III controlled substances may be dispensed only upon prescription by a practitioner licensed by law to administer such a substance.
170. This provision means that either a doctor or other person licensed to administer pentobarbital or thiopental must administer the sodium thiopental to Mr. Rhoades, obtain the thiopental, or issue a prescription for the use of thiopental. Cf. 21 U.S.C. §802 (2, 8, 10, 21) (defining ‘administer,’ ‘deliver,’ ‘dispense,’ and ‘practitioner’).
171. Rules governing the issuing, filling and filing of prescriptions under the CSA are set out at 21 C.F.R. 1306.01, *et seq.*
172. “A prescription for a controlled substance [such as pentobarbital or sodium thiopental] must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” 21 C.F.R. 1306.04.
173. The Federal Food, Drug & Cosmetic Act provides that only a licensed medical practitioner may obtain and use prescription substances. 21 U.S.C. §353 (b).
174. Pancuronium bromide and potassium chloride are regulated substances requiring a prescription. 21 U.S.C. §353(b) (defining prescription drug); 21 U.S.C. §321(g)(1) (defining ‘drug’ as including any article included in the official United States Pharmacopoeia (“USP”)); http://www.pharmacopeia.cn/v29240/usp29nf24s0_alpha-18-1190.html (official USP listing pancuronium bromide) (last visited 9/19/2011); http://www.pharmacopeia.cn/v29240/usp29nf24s0_m67340.html (official USP listing potassium chloride) (last visited 9/19/2011).

175. SOP 135 and Idaho Code § 19-2716 conflict with the CSA and FDCA because, upon information and belief, a physician is not dispensing or administering the drugs.
176. In violation of the FDCA, no appropriately licensed medical practitioner has or will obtain and/or administer the sodium thiopental, pentobarbital, pancuronium bromide and/or potassium chloride which Defendants would use in executing Mr. Rhoades.
177. The Supremacy Clause of the United States Constitution requires that the Defendants obey the CSA and FDCA.
178. Courts entertain federal preemption claims seeking declaratory and injunctive relief even where the statutes at issue do not grant a private right of action. *See Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 331-34 (5th Cir. 2005). A statutory grant of a cause of action is unnecessary. *Id.*
179. Courts may entertain preemption claims even where the statute does not expressly confer jurisdiction. *Pharm. Research & Mfrs. Of America v. Walsh*, 538 U.S. 644, 661-69 (2003) (indicating that a Supremacy Clause preemption claim exists by considering a claim that alleged a conflict between a state statute and the Medicaid Spending clause statute; the lower court had observed that the defendant was not asserting an action to enforce the Medicaid statute, but was asserting a preemption-based challenge under the Supremacy Clause); *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) (finding that the lack of a federally created “right” required for a §1983 claim was inconsequential to analysis of a Supremacy Clause preemption challenge to a Missouri statute which allegedly conflicted with the Medicaid statute; “Preemption concerns the federal structure of the Nation rather than the securing of

rights, privileges and immunities to individuals.”) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 117 (1989)); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) (“A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law.”).

180. Mr. Rhoades seeks equitable relief in the form of a declaratory judgment clarifying that the safeguards contained in the CSA and FDCA apply to his execution by lethal injection.
181. Mr. Rhoades seeks a declaratory judgment that if Defendants act in compliance with SOP 135 and Idaho Code § 19-2716, they will violate the CSA and FDCA because the means the protocol prescribes for Defendants to obtain and administer the lethal injection chemicals violate those statutes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

1. Injunctive relief to enjoin Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiff until such time as Defendants can demonstrate that properly trained staff and medical personnel can implement Idaho’s lethal injection procedures using safe and legal means as well as safe, tested and legal lethal injection drugs;
2. Injunctive relief to enjoin Defendants, their officers, agents, servants, employees, and all persons acting in concert with them from executing Plaintiff until such time as

Defendants can demonstrate that measures are in place to allow for Plaintiff's execution in a manner that complies with the Eighth Amendment to the United States Constitution;

3. A declaratory judgment that IDOC's failure to follow its protocol regarding training violates Plaintiff's rights under the Eighth Amendment to the United States Constitution;
4. Permanently enjoin Defendants from executing Mr. Rhoades unless he has access to his counsel before and throughout any execution process, such that counsel can immediately access the courts or otherwise seek necessary relief, in exercise of Mr. Rhoades's rights under the Eighth and Fourteenth Amendments;
5. Enter a declaratory judgment that the CSA and FDCA apply to his lethal injection and that Defendants' executing Mr. Rhoades in accordance with the SOP 135 and Idaho Code § 19-2716 violates the CSA and FDCA;
6. Appropriate and necessary discovery and an evidentiary hearing to permit Plaintiff to prove his constitutional claims;
7. Costs of the suit; and
8. Any such other relief as the Court deems just and proper.

Dated this 1st day of November, 2011.

Respectfully submitted,

/s/ _____
By: Oliver W. Loewy
Teresa A. Hampton
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which is designed to send a Notice of Electronic Filing to the following persons:

Krista L. Howard
khoward@idoc.idaho.gov

/s/ _____
Molly Brown

EXHIBIT 26

EXHIBIT 26



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

October 7, 2011

Jennifer M. Moreno
Berkeley Law University of California
392 Simon Hall
Berkeley, Ca. 94720

Via email

Re: Public Records Request

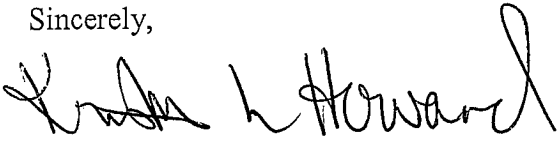
Dear Ms. Moreno:

I have reviewed your public record request received by the Idaho Department of Correction on September 26, 2011, requesting the following information:

1. Any and all drugs intended or considered for use in executions.
2. The expiration date of any and all drugs intended or considered for use in executions currently in the possession of the IDOC.
3. The lot numbers of any and all drugs intended or considered for use in executions currently in the possession of the IDOC.
4. Any and all drug or inventory logs from May 1, 2011 to the present.
5. Any and all activity by IDOC from May 1, 2011 to the present to purchase or acquire any drugs for use in executions, including purchase orders.
6. The manufactures and/or distributors of any and all drugs intended or considered for use in executions.
7. Any correspondence between IDOC and any party from May 1, 2011 to the present regarding drugs intended or considered for use in executions.
8. Any correspondence between IDOC and any party from May 1, 2011 to the present regarding execution protocols, regulations, guidelines, checklists, or other documents that instruct or direct the carrying out of an execution.

Based upon my review of your request and the IDOC records enclosed is an email from Warden Randy Blades with Chris Harris of Harris Pharma LLP. There are no other documents responsive to your public records request.

Sincerely,

A handwritten signature in black ink, appearing to read "Krista L. Howard". The signature is fluid and cursive, with the first name "Krista" written in a more stylized, looped manner, followed by "L. Howard".

Krista L. Howard
Deputy Attorney General
Idaho Department of Correction

From: "Chris Harris (Harris Pharma LLP)" <chrisharris@harrispharmallp.com>
To: "Randy Blades" <RBLADES@idoc.idaho.gov>
Date: 5/24/2011 1:47 PM
Subject: Re: Pentobarbital

Hi Randy,

Sodium Thiopental is the drug used by most of the sates like Nebraska, South Dakota, Delaware, Arazona etc.

Regards,
Chris Harris
CEO
Harris Pharma LLP.
171B/1F Picnic Garden Road,
Kolkata 700039
West Bengal,
India
Phone (Direct): +(91)-33-40614353
Cell: +(91)-9836827779
US: +1-239 494 5670
Fax: +(1)-800-6526916
www.harrispharmallp.com

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----- Original Message -----

From: "Randy Blades" <RBLADES@idoc.idaho.gov>
To: "Chris Harris (Harris Pharma LLP)" <chrisharris@harrispharmallp.com>
Sent: Wednesday, May 25, 2011 1:07 AM
Subject: Re: Pentobarbital

Chris

Elliot referred to another drug called Sodium thiopental. We have to research that one.

000212

Randy Blades
Warden
Idaho Maximum Security Institution
208-338-1635
rblades@idoc.idaho.gov

>>> "Chris Harris (.Harris Pharma LLP)" <chrisharris@harrispharmallp.com>
>>> 05/19/2011 12:15 >>>
Hi Randy,

The company information is mentioned below. Do tell him Chris Harris has given you his information so he knows.

Caligor Rx Inc
Name: Elliot Safdie
212-988-0590
212-988-1729

Regards,
Chris Harris
CEO
Harris Pharma LLP.
171B/1F Picnic Garden Road,
Kolkata 700039
West Bengal,
India
Phone (Direct): +(91)-33-40614353
Cell: +(91)-9836827779
US: +1-239 494 5670
Fax: +(1)-800-6526916
www.harrispharmallp.com

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----- Original Message -----

000213

From: "Randy Blades" <RBLADES@idoc.idaho.gov>
To: "Chris Harris (Harris Pharma LLP)" <chrisharris@harrispharmallp.com>
Sent: Wednesday, May 18, 2011 10:35 PM
Subject: Re: Pentobarbital

Chris

Yes, we would appreciate the working together through the US company. Please provide the information.

Thanks

Randy Blades
Warden
Idaho Maximum Security Institution
208-338-1635
rblades@idoc.idaho.gov

>>> "Chris Harris (Harris Pharma LLP)" <chrisharris@harrispharmallp.com>
>>> 05/18/2011 09:11 >>>
Hi Randy,

Just wanted to know if there is any update regarding your order. I can understand your concern for importing. However this problem is being solved. There is a company in the USA who can import these products legally and supply to you. Other states are doing the same. I am selling to the company in US and you would be buying directly from them. They have all the DEA licenses to import these kinds of products and distribute it in the US. If you are interested I can pass the info on to you and we can work together through this company.

Regards,
Chris Harris
CEO
Harris Pharma LLP.
171B/1F Picnic Garden Road
Kolkata - 700039
West Bengal,
India
Phone (Direct): +(91)-33-40614353
Cell: +(91)-9836827779
US: +1-239 494 5670
Fax: +(1)-800-6526916
www.harrispharmallp.com

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000214

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----- Original Message -----

From: "Randy Blades" <RBLADES@idoc.idaho.gov>
To: "Chris Harris" <chrisharris@kayempharma.org>
Sent: Wednesday, April 06, 2011 2:11 AM
Subject: Re: Pentobarbital

We are still developing the SOP. It will be a month or so I am afraid.

Randy Blades
Warden
Idaho Maximum Security Institution
208-338-1635
rblades@idoc.idaho.gov

>>> "Chris Harris" <chrisharris@kayempharma.org> 04/05/2011 13:09 >>>
Hi Randy,

Any updates regarding the order?

Regards,
Chris

----- Original Message -----

From: "Randy Blades" <RBLADES@idoc.idaho.gov>
To: "Chris Harris" <chrisharris@kayempharma.org>
Sent: Friday, March 25, 2011 12:55 AM
Subject: Re: Pentobarbital

Yes, things are moving along at the speed of government :-) We do have a meeting on it tomorrow however.

Randy Blades
Warden
Idaho Maximum Security Institution
208-338-1635
rblades@idoc.idaho.gov

>>> "Chris Harris" <chrisharris@kayempharma.org> 03/24/2011 13:18 >>>

Hi Randy,

Any updates?

Regards,
Chris Harris
Director Sales & Marketing
KAYEM Pharmaceuticals Pvt. Ltd.
2, Green Field CHS. Ltd., Laxman Mhatre Road,
Marian Colony, Borivali (W),
Mumbai - 400 103,
Maharashtra,
India
Phone (Direct): +(91)-33-40614353
Cell: +(91)-9836827779
www.kayempharma.org

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----- Original Message -----

From: "Randy Blades" <RBLADES@idoc.idaho.gov>
To: "Chris Harris" <chrisharris@kayempharma.com>
Sent: Monday, March 21, 2011 9:23 PM
Subject: Re: Pentobarbital

Chris

We are having some discussion with our central office folk on which method to use.

Randy Blades
Warden
Idaho Maximum Security Institution
208-338-1635
rblades@idoc.idaho.gov

000216

>>> "Chris Harris" <chrisharris@kayempharma.com> 03/21/2011 08:59 >>>
Hi Randy,

Just wanted to know if there is any update regarding your order.

Regards,
Chris Harris
Director Sales & Marketing
KAYEM Pharmaceuticals Pvt. Ltd.
2, Green Field CHS. Ltd., Laxman Mhatre Road,
Marian Colony, Borivali (W),
Mumbai - 400 103,
Maharashtra,
India
Phone (Direct): +(91)-33-40614353
Cell: +(91)-9836827779
Fax: +(91)-22-28907454
www.kayempharma.com

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----- Original Message -----

From: "Randy Blades" <RBLADES@idoc.idaho.gov>
To: <chrisharris@kayempharma.com>
Sent: Wednesday, March 16, 2011 6:20 PM
Subject: Re: Pentobarbital

>
> Thank you Chris. I will get back to you. Do you take state purchase
> orders?
> Also what quantity of Pentobarbital are we talking about to manufactor?
> Randy Blades
>
> Sent from my Verizon Wireless Phone
>
> ----- Reply message -----
> From: "Chris Harris" <chrisharris@kayempharma.com>

> Date: Wed, Mar 16, 2011 5:46 am
> Subject: Pentobarbital
> To: "Randy Blades" <RBLADES@idoc.idaho.gov>
>
>
> Hi Randy,
>
> It was nice talking to you on the phone yesterday and as discussed I am
> mentioning all details below.
>
> The Pentobarbital we are not able to supply as we do not have that in
> stock.
> We can manufacture it but the quantity will need to be large for the order
> and I am sure you would not require such a large quantity.
>
> However we can supply you with Sodium Thiopental 1gm Vials at \$15 per Vial
> with the minimum order quantity being 500 Vials. We have supplied this to
> Nebraska and have also just shipped to South Dakota. Other states are also
> placing their orders with us.
>
> Do let me know how you wish to proceed.
>
> Regards,
> Chris Harris
> Director Sales & Marketing
> KAYEM Pharmaceuticals Pvt. Ltd.
> 2, Green Field CHS. Ltd., Laxman Mhatre Road,
> Marian Colony, Borivali (W),
> Mumbai - 400 103,
> Maharashtra,
> India
> Phone (Direct): +(91)-33-40614353
> Cell: +(91)-9836827779
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> viruses, interceptions or interference.

>

>

> ----- Original Message -----

> From: "Randy Blades" <RBLADES@idoc.idaho.gov>

> To: <chrisharris@kayempharma.com>

> Sent: Tuesday, March 15, 2011 9:46 PM

> Subject: Pentobarbital

>

>

> Mr. Harris

>

> I am contacting you inquiring about the availability of Pentobarbital.

>

> Thank you

>

>

> Randy Blades

> Warden

> Idaho Maximum Security Institution

> 208-338-1635

> rblades@idoc.idaho.gov

>

>

>

>