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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

THE ASSOCIATED PRESS, *et al.*,)
)
Plaintiffs,)
)
vs.)
)
C.L. (BUTCH) OTTER, *et al.*,)
)
Defendants.)

Case No. 1:12-cv-00255-EJL
**STATUTORY SUPPLEMENT TO
DEFENDANTS’ OPPOSITION TO
PLAINTIFFS’ EXPEDITED MOTION
FOR PRELIMINARY INJUNCTION,
DKT. NO. 2**

Defendants (1) Governor C.L. (Butch) Otter, (2) Idaho Board of Correction Members Robin Sandy, Howard G. “J.R.” Van Tassel, and Jay L. Nielsen, (3) Idaho Department of Correction (“IDOC”) Director Brent Reinke, and (4) Idaho Department of Correction Division Chief of Operations Kevin Kempf, collectively Defendants or IDOC, all of whom have been sued in their official capacities, file their Defendants’ Statutory Supplement to Opposition to Plaintiffs’ Expedited Motion for Preliminary Injunction, Dkt. No. 2.

This Statutory Supplement reviews the history of Idaho death penalty statutes with regard to whether they did or did not provide for witnesses to an execution. Defendants were not able to provide this information yesterday because libraries with the old statutes were not open over the holiday weekend and the materials upon which this Supplement is based could not be incorporated into the materials filed yesterday in time to meet the 5:00 p.m. filing deadline.

Idaho's Territorial Legislature provided for witnesses to executions in a manner similar to the California statutes reviewed in *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (2002) (*CFAC IV*). The Revised Statutes of the Idaho Territory (1887), § 8021, which regulated executions at a time when they were conducted by county officials and not by the State, provided:

SEC. 8021. The judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The sheriff of the county must be present at the execution, and must invite the presence of a physician, the District Attorney of the county, and ***at least twelve reputable citizens, to be selected by him***; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other person than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

Revised Statutes of the Idaho Territory (1887), page 837 (emphasis added).

In 1899 the Fifth Idaho State Legislature centralized felony punishments in a State prison and required all persons sentenced to death to be transported from the county jails to the State prison for execution of the sentence of death. See 1899 Idaho Session Laws, pp. 340-342, amending Revised Statutes §§ 8504, 8008, 8009, and 8019. Section 5 of the same Act amended Revised Statute § 8201 to repeal the requirement of twelve public witnesses and to require that executions take place out of public view:

SEC. 5. Section 8021 of the Revised Statues is hereby amended to read as follows:

Section 8021. The State Prison Board of the State, at the expense of the State of Idaho, shall provide a suitable room or

place, *closed from public view within the walls of the State Penitentiary*, and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty; and the punishment of death must, when pronounced by sentence in this State, in each and every case, be inflicted by the Warden, in the State Penitentiary, in the room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead.

1899 Idaho Session Laws, page 342 (emphasis added).

The 1901 Revised Code recodified this section as Penal Code § 5704 and added a catchline to the body of the section, but otherwise left the substance of the section unchanged:

Section 5704. State Prison Board shall Provide Suitable Place, etc.: The State Prison Board of the State, at the expense of the State of Idaho, shall provide a suitable room or place, *closed from public view within the walls of the State penitentiary*, and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty; and the punishment of death must, when pronounced by sentence in this State, in each and every case, be inflicted by the warden, in the State penitentiary, in the room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead.

Penal Code (1901), page 350 (emphasis added).

The 1919 Compiled Statutes of Idaho recodified the section to § 9064 and changed the section's catchline, but otherwise left the section as it was:

§ 9064. [8021] Same: Duties of the state prison board. The state prison board of the state, at the expense of the state of Idaho, shall provide a suitable room or place, *closed from public view within the walls of the state penitentiary*, and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty; and the punishment of death must, when pronounced by sentence in this state, in each and every case, be inflicted by the warden, in the state penitentiary, in the room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead.

Compiled Statutes, page 2504 (emphasis added).

The 1932 Idaho Code Annotated recodified the section to Idaho Code § 19-2617, again changed the catchline, and otherwise left the section substantively as it was before.

19-2617. Infliction of death penalty—Duties of the state prison board. The state prison board of the state, at the expense of the state of Idaho, shall provide a suitable room or place, *closed from public view within the walls of the state penitentiary*, and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty; and the punishment of death must, when pronounced by sentence in this state, in each and every case, be inflicted by the warden, in the state penitentiary, in the room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead.

Idaho Code Annotated (1932), Vol. 1, pages 1271-1272 (emphasis added).

In 1941, this section was amended to reflect a change in the names of the officers from members of a Board to Commissioners and to allow the Warden to appoint an executioner. Section 2 of Chapter 150 of the 1941 Idaho Session Laws provided as follows:

19-2617. INFLICTION OF DEATH PENALTY—DUTIES OF THE BOARD OF STATE PRISON * COMMISSIONERS.—The *Board of state prison * commissioners*, * * * * at the expense of the state of Idaho, shall provide a suitable room or place, *closed from public view within the walls of the state penitentiary*, and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty * *and shall appoint an executioner to inflict the death penalty*; and the punishment of death must, when pronounced by sentence in this state, in each and every case, be inflicted by the * *executioner*, in the state penitentiary, in the room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead.

1941 Idaho Session Laws, Chapter 150, section 2, page 304 (emphasis added).

According to the annotations of the current bound volume of the Idaho Code, Titles 19 and 20 (2004), other than being recodified as § 19-2717, this section remained unchanged until it was repealed by 1978 Idaho Session Law, Chapter 70, Section 2, the same Session Law that changed the method of executing the death penalty from hanging to lethal injection.

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DATED this 30th day of May, 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Michael S. Gilmore
MICHAEL S. GILMORE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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