

LAWRENCE G. WASDEN
ATTORNEY GENERAL OF IDAHO

MARK A. KUBINSKI, ISB #5275
Lead Deputy Attorney General
Idaho Department of Correction

KRISTA L. HOWARD #5987
Deputy Attorney General
Idaho Department of Correction
1299 North Orchard St., Suite 110
Boise, Idaho 83706
Telephone (208) 658-2097
Facsimile (208) 327-7485
E-mail: khoward@idoc.idaho.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS CREECH et. al.,)	CASE NO. 12-00173-S-EJL
)	
Plaintiffs,)	DEFENDANTS’ REPLY IN SUPPORT
)	OF DEFENDANTS 12(b) MOTION TO
vs.)	DISMISS [DOCKET NO. 10]
)	
BRENT REINKE, et. al.,)	
)	
Defendants.)	
_____)	

COME NOW the Defendants Brent Reinke, Kevin Kempf, Jeff Zmuda, Josh Tewalt and Randy Blades (hereinafter “Defendants”), by and through undersigned counsel and pursuant to D. Id. L. Rule 7.1, hereby file this Reply in Support of Defendants’ 12(b) Motion to Dismiss [Dkt. No. 10]. Based on the reasons previously stated, together with those stated below, Defendants request that the Court grant their Motion to Dismiss.

Defendants filed their motion to dismiss on the grounds that all Plaintiffs failed to exhaust their administrative remedies and failed to state a claim for relief with respect to claims 3, 4, 5, 6 and 7 of the Complaint. Defendants then filed an IDOC Notice of Intent to Use One-Drug Protocol in the Execution of Richard Leavitt scheduled for June 12, 2012. Dkt. No. 18. Plaintiffs filed their Opposition to Motion to Dismiss. Plaintiff Leavitt claims “it appears that his Claims 1 (notice of protocol), 4 (use of pentobarbital in a three-drug protocol), 5 (Idaho should use one-drug protocol), and 6 (fundamental right against cruel and unusual punishment) are moot.” Dkt. No. 19, pp.2-3. All Plaintiffs contend that their claims are not subject to the administrative remedies exhaustion requirement because they attack the “particular procedures employed to end a prisoner’s life, not a particular or general incidents of prison life.” Dkt. No. 19, p.3. Plaintiff Leavitt contends that he does state a claim with respect to claims 3 and 7 of the Complaint.

I. THE PLAINTIFFS HAVE FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

The crux of Plaintiffs’ argument is that they do not have to exhaust the PLRA administrative remedies requirement because their claims are not a “conditions of confinement” challenge. The Plaintiffs are wrong, their claims are a “conditions of confinement” challenge and are subject to the PLRA requirement that they must exhaust their administrative remedies prior to filing a lawsuit.

Pursuant to the Prison Litigation Reform Act (“PLRA”), “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). In *Porter v. Nussle*, 534 U.S. 516 (2002), the United States Supreme Court expressly stated that “the PLRA’s exhaustion

requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Id.* at 532.

In *Hill v. McDonough*, 126 S.Ct. 2096 (2006), Hill challenged the constitutionality of a three-drug sequence the state of Florida would use to execute him. 126 S.Ct. 2099. Hill filed his action in the United States District Court for the Northern District of Florida as a §1983 action. *Id.* The Supreme Court in *Hill* was presented with the question whether Hill’s claim must be brought by an action for a writ of habeas corpus or whether it may proceed as a § 1983 action. *Id.* The Supreme Court determined it was comparable in its essentials to the action the Court allowed to proceed under §1983 in *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117 (2004). *Id.* at 2100. The Supreme Court concluded that Hill’s § 1983 action was controlled by *Nelson*. If “Hill’s action is successful it would not necessarily prevent the State from executing him by lethal injection. The complaint does not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin respondents ‘from executing [Hill] in the manner they currently intend’.” *Id.* at 2102. Hill conceded “other methods of lethal injection the Department could choose to use would be constitutional.” *Id.* Hill’s claim was cognizable via § 1983.

In *Nelson* the Supreme Court states “the ability to bring a § 1983 claim rather than a habeas application, does not entirely free inmates from substantive or procedural limitations.” 541 U.S. 637, 650, 124 S.Ct. 2117, 2126. The PLRA requires that inmates exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of their confinement. *Id.*

The Plaintiffs in this action filed a §1983 action challenging the execution procedures employed by the IDOC, specifically Standard Operating Procedure 135.02.01.001 (version 3.6).

See Dkt. No. 1. Because the Plaintiffs filed a § 1983 action challenging the conditions of confinement, the execution procedures set forth in 2012 SOP 135, they are subject to the exhaustion requirement of the PLRA. IDOC SOP 316 Grievance Procedures states “the purpose of this standard operating procedure (SOP) is to increase the safety and security of the Idaho Department of Correction (IDOC) correctional facilities by providing offenders a process to voice complaints about policies, division directives, SOPs, field memorandums, conditions of confinement, employee actions, actions of other offenders, healthcare, and other incidents within the jurisdiction of the IDOC unless otherwise noted in this SOP.” Dkt. Nos. 10-5, p.38; 10-6, p.2. Non-grievable issues are categorized as length of sentence, pardon and parole decisions, previously grieved issues and outside problems. Dkt. Nos. 10-5, p.41; 10-6, p.5. The Plaintiffs’ complaints do not fall within one of the non-grievable categories.

In *Bowling v. Hass*, 2007 WL 403875 (E.D. Ky. 2007), the issues raised were a direct challenge of the Kentucky department of correction’s “policies and procedures” or “institutional policies and procedures” falling within one of the stated examples of grievable issues. 2007 WL 403875, *2. The issues raised in the complaint were not identified as non-grievable issues. *Id.* Thus the issues raised are grievable. *Id.* The district court went on to hold that Kentucky’s refusal to process a grievance challenging the lethal injection protocol on Eighth Amendment grounds, did not excuse the plaintiffs from exhausting their administrative remedies because Kentucky’s prior refusal would make such efforts futile. *Id.* The district court stated “while KDOC may have firmly expressed its opinion that Eighth Amendment challenges to the lethal injection procedure are non-grievable, such an indication does not constitute a clear expression by KDOC that any challenge to lethal injections . . . are excluded from the grievance process.” *Id.* at *3.

In *Walton v. Johnson*, 2006 WL 2076717 (E.D. Va. 2006), the plaintiff's case was dismissed for failing to exhaust his administrative remedies pursuant to the PLRA. Walton filed a § 1983 action claiming the execution procedures will violate his constitutional right to be free from cruel and unusual punishment. 2006 WL 2076717. Walton claimed the protocol lacked sufficient safeguards to ensure he would be properly anaesthetized. *Id.* The district court held that Walton could not avoid the PLRA exhaustion requirement and the court was without discretion to dispense with it. *Id.* at *6.

Just like the foregoing cases, the Plaintiffs in this action are required to exhaust their administrative remedies pursuant to the PLRA. The Plaintiffs filed a § 1983 action challenging the constitutionality of the IDOC 2012 SOP 135 execution procedures. The Plaintiffs claims are a conditions of confinement challenge because they are not a challenge to their death sentence, but instead challenge the manner and method in which the execution will be carried out. The 2012 SOP 135 is an IDOC standard operating procedure subject to the grievance process and is not one of the listed categories of non-grievable issues outlined in the IDOC grievance policy. The Plaintiffs have failed to exhaust their administrative remedies pursuant to the PLRA and their claims should be dismissed.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF WITH RESPECT TO CLAIMS 3 AND 7

Plaintiffs Claim 3 and 7 fails to state a claim for relief and Claim 3 is moot with respect to Plaintiff Leavitt. In the Complaint Plaintiffs contend the Defendants will be using Thiopental. The IDOC has provided notice of its intent to use pentobarbital for the execution of Plaintiff Leavitt on June 12, 2012. Dkt. No. 18. Plaintiffs rely on information that is outside the pleadings in support of their claims and rely on the Court drawing inferences to support their contention that they state a claim for relief.

The Plaintiffs contend because Defendant Blades was engaged in email correspondence with Harris Pharma in May 2011, about drugs for a different execution, this creates an inference that the State of Idaho is involved in illegal activity. Plaintiffs Complaint does not make any specific factual allegations with respect to the inference Plaintiffs claims exist based on the email correspondence between Defendant Blades and Harris Pharma. Plaintiffs also rely on documents filed in a closed case to support their claims. It is not up to the Court to search attachments and review closed cases to draw inferences to support the Plaintiffs' claims. Plaintiffs are attempting to rely on evidence outside the pleadings and provide information in support of their Complaint which was not contained in the Complaint.

Plaintiffs also claim that Defense counsel would not provide specific information in response to their inquiries. These inquiries were made in an effort to settle this case¹. Counsel did not provide information to inquiries that were not relevant to the pending motion for injunction or claims asserted in the Complaint. Even assuming the Court was to consider Plaintiffs' arguments, the Plaintiffs still fail to state a claim for relief.

DATED this 30th day of May, 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ Krista L. Howard
KRISTA L. HOWARD
Deputy Attorney General

¹ Plaintiffs' counsel's reference to conversations between the parties were conversations made in an attempt to settle this case and reference to these conversations appear to be a violation of Federal Rule of Evidence 408 and are inadmissible.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of May, 2012, I caused to be served a true and correct copy of the foregoing DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' 12(b) MOTION TO DISMISS [DOCKET NO. 10] 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

/s/ Krista L. Howard
KRISTA L. HOWARD