

Samuel Richard Rubin, ISB No. 5126
Federal Public Defender
Oliver W. Loewy, IL #6197093
Teresa A. Hampton, ID #4364
Capital Habeas Unit
702 West Idaho, Suite 900
Boise, Idaho 83702
Telephone: (208) 331-5530
Facsimile: (208) 331-5559
ECF: Oliver.Loewy@fd.org
Teresa.Hampton@fd.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

**THOMAS E. CREECH, JAMES H.
HAIRSTON, RICHARD A. LEAVITT,
GENE F. STUART,**

Plaintiffs,

v.

BRENT REINKE, in his official capacity as)
Director, Idaho Department of Corrections;)
KEVIN KEMPF, in his official capacity as)
Chief, Operations Division, Idaho)
Department of Corrections;)
JEFF ZMUDA, in his official capacity as)
Deputy Chief, Bureau of Prisons, Idaho)
Department of Corrections; and)
RANDY BLADES, in his official capacity as)
Warden, Idaho Maximum Security)
Institution, Idaho Department of Corrections)

Defendants.)

Case No. 12-00173-S-EJL

CAPITAL CASE

Civil Action

**EXPERT AFFIDAVIT IN SUPPORT
OF PLAINTIFF LEAVITT'S
EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION OR
STAY OF EXECUTION**

Expedited Oral Argument and
Evidentiary Hearing Requested

Execution Scheduled June 12, 2012

Plaintiff Richard A. Leavitt, by and through his attorneys at the Capital Habeas Unit of

the Federal Defender Services of Idaho, hereby files an affidavit in support of his Emergency
Expert Affidavit In Support Of
Plaintiff Leavitt's Emergency Motion for
Preliminary Injunction or Stay of Execution – Page 1

Motion For Preliminary Injunction Or Stay Of Execution and his reply to Defendant's response. Dkts. 16, 26, 22. The affidavit is from David B. Waisel, M.D., a board certified and practicing anesthesiologist at Boston Children's Hospital and an Associate Professor of Anesthesia, Harvard Medical School. Exhibit at 1. Dr. Waisel has been a practicing clinical anesthesiologist for approximately 19 years. *Id.* It is Dr. Waisel's opinion, held to a reasonable degree of medical certainty, that: If, after being injected into an IV or central line, pentobarbital reaches the extravascular space or tissues instead of the vein, the prisoner will experience excruciating and unrelenting pain. *Id.* at 2.

Respectfully submitted this 3rd day of June, 2012.

Samuel Richard Rubin

_____/s/
Oliver W. Loewy
Teresa A. Hampton
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Krista Howard
khoward@idoc.idaho.gov

_____/s/
Oliver Loewy

EXHIBIT

EXHIBIT

COUNTY OF SUFFOLK

STATE OF MASSACHUSETTS

AFFIDAVIT OF DAVID B. WAISEL, M.D.

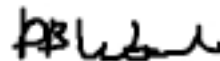
I, David B. Waisel, swear under penalty of perjury that the following is true:

1. My name is David B. Waisel, MD. I am over the age of 18 and competent to testify to the truth of the matters contained herein.
2. I am a practicing anesthesiologist at Boston Children's Hospital and an Associate Professor of Anesthesia, Harvard Medical School. I have been practicing clinical anesthesiology for approximately 19 years. I am a board certified anesthesiologist.
3. I have been asked by attorney Oliver Loewy to provide an expert medical opinion about the pain caused by pentobarbital extravasation (i.e., leakage or injection of a drug into the extravascular space or tissues instead of into the vein).
4. Pentobarbital and thiopental are alkaline drugs. The pH of pentobarbital commercially available in the United States is approximately 9.5. The pH of thiopental ranges from 10 -11, based on the formulation.
5. Compared to thiopental, pentobarbital is practically never used to induce anesthesia. Therefore, we have more knowledge about the consequences of extravasation of thiopental than of pentobarbital. Because of the similar alkalinity, thiopental is a valid surrogate when assessing complications (e.g., pain) from extravasation. The slight difference in pH between pentobarbital and thiopental is insignificant in regard to causing pain.
6. Extravasation of alkaline drugs causes pain, necrosis and tissue sloughing. Extravasation of thiopental causes the pain, necrosis and tissue sloughing one

would expect from a drug with a pH above 8. Pain can range from very irritating to excruciating, depending partly on the quantity of thiopental that reaches the soft tissue. The extent of pain and injury increases with the volume of drug injected. In my limited experience of this rare event, the injection and subsequent extravasation of a comparatively small volume of thiopental (10 -20 cc) has caused excruciating and unrelenting pain requiring treatment.

7. The extent of pain and injury increases with the volume of drug injected. My understanding is that the Idaho Department of Corrections lethal injection one-drug pentobarbital protocol calls for the injection through an IV or central line of 5 g of pentobarbital. A single cc of commercially available pentobarbital contains 50 mg of pentobarbital in a liquid solution. So, to administer 5 g pentobarbital, one would have to inject 100 cc. Because thiopental is a valid surrogate when assessing complications from extravasation, it is my opinion held to a reasonable degree of medical certainty that extravasation of 5 g pentobarbital would cause excruciating and unrelenting pain requiring treatment.
8. Pentobarbital extravasation will cause this pain whether the extravasation is associated with a peripheral IV or a central line.

Dated this 3rd day of June, 2012.



David B. Waisel, M.D.