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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

**RESPONSE TO DEFENDANTS’  
MOTION TO STRIKE EXPERT  
AFFIDAVIT IN SUPPORT OF  
PLAINTIFF LEAVITT’S MOTION  
FOR PRELIMINARY INJUNCTION  
OR STAY OF EXECUTION**

Expedited Oral Argument and  
Evidentiary Hearing Requested

**Execution Scheduled June 12, 2012**

Plaintiff Leavitt (“Leavitt”) served his Complaint on Defendants on April 24, 2012.

Defendants Reinke and Blades to “cause” the execution of Leavitt on June 12, 2012. Dkt. 16-2, Exh. 1. On May 23, 2012, Leavitt filed his Emergency Motion For Preliminary Injunction Or Stay of Execution (“Emergency Motion”). Dkt. 16. Later, on May 25, 2012, Defendants filed their IDOC Notice To Use One-Drug Protocol In The Execution Of Richard Leavitt (“Notice”). Dkt. 18. On May 30, 2012, Defendants filed their response to Leavitt’s Emergency Motion. Dkt. 22. On June 1, 2012, Leavitt filed his reply. Dkt. 26. Two days later, on June 3, 2012, Leavitt filed his expert affidavit (“Expert Affidavit”), the subject of Defendants’ motion to strike. Dkts. 30, 30-1.

Defendants move to strike the Expert Affidavit on the ground that it is untimely. Dkt. 32-1 at 3. They contend that the Expert Affidavit should have been filed with the motion. Leavitt does not dispute that Federal Rule of Civil Procedure 6(c)(2)<sup>1</sup> provides that an affidavit supporting a motion should be filed with the motion. Nor does he dispute that Local Rule 7.1(b)(2) requires that movants file “affidavits . . . on which the moving party intends to rely.” However, on the facts of this case, these rules do not allow striking the Expert Affidavit.

Federal Rule 6(c)(2) and Local Rule 7.1(b)(2) cannot be employed to strike a movant’s affidavit whose subject the respondents put into issue only *after* the motion was filed. This Court is aware that the 2012 Protocol expressly allows Idaho Department of Corrections (“IDOC”) personnel (specifically, Defendants Reinke and Kempf) to revise the protocol at any time, for any reason and at their sole discretion. Dkt. 1-7, Exh. 1 at 1. While Defendant’s Notice represents that the IDOC will not invoke their authority to revise and that the IDOC “will be proceeding with implementing the one-drug pentobarbital protocol (method 4) outlined in SOP

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<sup>1</sup> Contrary to Defendants’ assertion, Federal Rule of Civil Procedure 6(d) addresses time calculations consequent to certain types of service, not the filing of affidavits.

135 for the execution of Richard Leavitt on June 12, 2012,” that Notice was filed *after* Leavitt filed his Emergency Motion. Dkt. 18 at 2. At the time Leavitt filed his Emergency Motion the 2012 Protocol was subject to change in any way at the IDOC’s unfettered discretion. With that discretion the IDOC could have changed the lethal drug. For example, as Leavitt pointed out in his Emergency Motion, the Missouri Department of Corrections had very recently announced its plan to use propofol. Dkt. 16-1 at 6, Exh 3. At the time of filing his Emergency Motion, Leavitt did not know what lethal drug the IDOC would employ in his execution. On Defendants’ argument, Leavitt should have raised claims and supported them with affidavits addressing the use of each possible lethal drug. This reading is grossly unreasonable and contrary to Federal Rule of Civil Procedure 1’s admonition that the Rule of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Even if the Federal Rules of Civil Procedure and Local Rules did allow striking in these circumstances, otherwise strictly construed rules should be relaxed to accommodate expedited proceedings. This is especially the case where the party seeking to strike caused the proceedings to take on an expedited nature, as here where these expedited proceedings are required solely because the State chose to seek an execution date after being served with the Complaint challenging the 2012 Protocol. F.R.Civ.Pr. at 1 (rules should be construed to do justice). Regularly paced litigation allows for a thorough examination of issues which expedited scheduling precludes.

Finally, denying Defendants’ motion to strike the Expert Affidavit in no way prejudices Defendants. The Expert Affidavit does not prevent Defendants from litigating the Emergency

Motion, nor does it put them at an unfair procedural disadvantage. Leavitt will not oppose their filing an affidavit contradicting his Expert Affidavit.

As to Defendants' contention that Dr. Waisel's affidavit lacks foundation, Dr. Waisel is a board certified anesthesiologist and has been practicing clinical anesthesiology for approximately 19 years. Further, he is an Associate Professor of Anesthesiology at one of the Nation's premier medical schools, Harvard Medical School. Defendants' contention that his opinion regarding pain caused by improperly administered anesthetics is frivolous.

For all these reasons, the Court should deny Defendants' Motion to Strike the Expert Affidavit.

Respectfully submitted this 4th 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 4th 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](mailto:khoward@idoc.idaho.gov)

\_\_\_\_\_/s/\_\_\_\_\_  
Oliver Loewy

