UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

THE ASSOCIATED PRESS, a New York corporation; IDAHO STATESMAN PUBLISHING, LLC, a Delaware limited liability company d/b/a The Idaho Statesman; LEE ENTERPRISES, INCORPORATED, a Delaware corporation d/b/a The Times-News; THE IDAHO PRESS CLUB, INC., an Idaho corporation; PIONEER NEWSPAPERS, INC., a Nevada corporation d/b/a Idaho Press-Tribune, Idaho State Journal, Standard Journal, Teton Valley News, The New-Examiner, The Preston Citizen, and Messenger Index; TPC HOLDINGS, INC., an Idaho corporation, d/b/a Lewiston Tribune and Moscow-Pullman Daily News; BAR BAR INC., an Idaho corporation d/b/a Boise Weekly; COWLES PUBLISHING COMPANY, a Washington corporation, d/b/a The Spokesman Review; and IDAHOANS FOR OPENNESS IN GOVERNMENT, INC., an Idaho non-profit corporation,

Plaintiffs,

vs.

CL. (BUTCH) OTTER, in his official capacity as the Governor of the State of Idaho; ROBIN SANDY, HOWARD G. "J.R." VAN TASSEL, and JAY L. NIELSEN in their official capacity as the Idaho Board of Correction; BRENT D. REINKE, in his official capacity as the Director of the Idaho Department of Correction; and KEVIN KEMPF in his official capacity as Division Chief of Operations of the Idaho

Civil No. 1:12-cv-00255-EJL

ORDER

Department of Correction, Defendants.	

Pending before the Court in the above-entitled matter is Plaintiffs' Expeditied Motion for Preliminary Injunction (Dkt. 2). The Complaint and motion were filed on May 22, 2012. The Court granted the request for expedited briefing and also ordered the parties to participate in mediation with Chief United States Magistrate Judge Candy W. Dale. The mediation was unsuccessful. The Defendants filed their response to the motion on May 29, 2012 and a supplement on May 30, 2012. Plaintiffs filed their reply brief on June 4, 2012.

Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument at this stage of the litigation, this matter shall be decided on the record before this Court without oral argument.

FACTUAL BACKGROUND

The Plaintiffs are comprised of a number of newspaper publishing companies located throughout the State of Idaho, the Associated Press, and Idahoans for Openness in Government, Inc., an Idaho non-profit corporation. The Defendants are the Governor of the State of Idaho, C. L. "Butch' Otter; the individual members of the Idaho Board of

Corrections, Robin Sandy, Howard G. "J.R." Van Tassel and Jay L. Nielsen; the Director of the Idaho Department of Corrections ("IDOC"), Brent Reinke; and the Division Chief of Operations of the IDOC, Kevin Kempf. The Defendants are sued in their official capacities. Plaintiffs filed their Complaint pursuant to 42 U.S.C. § 1983 seeking a preliminary injunction, a permanent injunction and declaratory relief in response to alleged First Amendment violations by the IDOC via the procedures or protocol used by IDOC for death penalty executions. Plaintiffs specifically seek a preliminary injunction regarding the procedures used for the execution of Mr. Richard Leavitt currently scheduled for June 12, 2012.

Plaintiffs are requesting that IDOC allow the witnesses to any execution view the execution from the time the inmate enters the execution chamber. While the protocol is very specific for executions carried out by the IDOC, in general, the current IDOC procedures allow for witnesses to view the execution process only after the inmate has entered the execution chamber, has been restrained, intravenous ("IV") catheters have been placed and medical personnel have left the viewable area of the execution chamber. Defendants maintain IDOC's execution procedures allow for the privacy of the condemned inmate and dignity in the implementation of a death sentence. Defendants argue the current protocol does not violate the First Amendment and any limits of First Amendment rights are proper based on rationally related penological reasons for such limits. Defendants also argue an injunction request is not timely filed based on the date

of the scheduled execution of Mr. Leavitt within a week and the need to practice the exact protocol being used prior to the scheduled execution.

STANDARD OF REVIEW FOR PRELIMINARY INJUNCTION

Preliminary injunctions are designed to preserve the status quo pending the ultimate outcome of litigation. They are governed by Federal Rule of Civil Procedure 65(b) which requires the moving party to show "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition. . . ." Under Rule 65(b) and Ninth Circuit case law, a plaintiff may obtain a preliminary injunction only where he or she can "*demonstrate* immediate threatened injury." *See, e.g., Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original). Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. *Goldie's Bookstore Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984).

Fed. R. Civ. P. 65(b) discusses the procedure to be followed on an application for a preliminary injunction. A preliminary injunction may issue even though a plaintiff's right to permanent injunctive relief is not certain. The grant or denial of a preliminary injunction is a matter of the court's discretion exercised in conjunction with the principles of equity. *See: Inland Steel v. United States,* 306 U.S. 153 (1939); *Deckert v.*

Independence Shares Corp., 311 U.S. 282, 61 S. Ct. 229, 85 L.Ed. 189 (1940); and *Stanley v. Univ. of Southern California,* 13 F.3d 1313 (9th Cir. 1994).

While courts are given considerable discretion in deciding whether injunctive relief should be issued, injunctive relief is not obtained as a matter of right and it is considered to be an extraordinary remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. *See: Sampson v. Murray,* 415 U.S. 61 (1974)*; Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co.,* 363 U.S. 528 (1960); and *Stanley v. Univ. of Southern California,* 13 F.3d 1313 (9th Cir. 1994).

In each case, the district court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987). In *Winter v. Natural Resource Defense Council, Inc.*, 555 U.S. 7 (2008), the United States Supreme Court held that, in order to be entitled to a preliminary injunction, the moving party must demonstrate (1) likelihood of success on the merits; (2) that he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. 555 U.S. at 20; *see also, Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

Prior to the Supreme Court's ruling in *Winter*, the Ninth Circuit applied alternative tests in determining whether a preliminary injunction should be granted: "[a] preliminary

injunction is appropriate when a plaintiff demonstrates either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). The Ninth Circuit reasoned that "[t]hese two options represent extremes on a single continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Id*. In *Winter*, the Supreme Court expressly disapproved the "possibility of harm standard," stating that "the Ninth Circuit's 'possibility' standard is too lenient . . . [and the proper] standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." 555 U.S. at 22 (emphasis in original). This left open the question, however, of whether the remaining aspects of the Ninth Circuit's sliding scale test for preliminary injunctions remained good law.

The Ninth Circuit clarified the issue in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). In that case, the Court of Appeals held that although *Winter* had raised the bar on what must be shown on the irreparable harm prong to justify a preliminary injunction, it did not alter the district court's authority to balance the elements of the preliminary injunction test, so long as a certain threshold showing is made on each factor. 632 F.3d at 1134-35. The court in *Wild Rockies* stated that "the 'serious questions' approach survives *Winter* when applied as part of the four-element *Winter*

test." *Id*. at 1135. In other words, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id*.

ANALYSIS

1. Timeliness

The Court begins by addressing Defendants' contention that the motion for preliminary injunction is not timely filed. Defendants indicate in their briefing that they were served with the Complaint and motion for preliminary injunction on May 24, 2012, less than nineteen days before the scheduled execution even though the media had raised its First Amendment concerns with IDOC after the execution of Mr. Paul Rhoades in the fall of 2011 and IDOC published its amended execution protocol in January 2012. Plaintiffs do not give any explanation as to why they waited until the end of May 2012 to file a First Amendment claim that would exist whether or not an execution was scheduled. Moreover, Plaintiffs state they are not seeking to postpone the scheduled execution of Mr. Leavitt by the filing of their motion for preliminary injunction. The Court notes Plaintiffs' reply briefing was due June 4, 2011, approximately one week before the scheduled execution.

The Court finds the motion for an expedited preliminary injunction is not timely filed by Plaintiffs. The primary authority Plaintiffs rely upon to support their request for

relief is *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) ("*CFAC IV*"). The opinion in *CFAC IV* was issued in August 2002 and Plaintiffs have waited until less than three weeks before an execution in 2012 and long after the Rhoades execution in the fall of 2011, to bring their § 1983 challenge that clearly existed since the IDOC updated its protocol before the Rhoades execution in the fall of 2011. As discussed below, the Court is not in position based on the record before it to evaluate whether or not substantial evidence exists establishing the IDOC's acknowledged limits on the public's access to the viewing of an execution are reasonably related to legitimate penologocial concerns. The Court is very concerned that to the extent Plaintiffs could establish the IDOC's protocol *does* need to be changed to protect First Amendment rights of the public, there is insufficient time for the IDOC to amend the policies and practice changes in the protocol without a delay in the scheduled execution. The IDOC's Standard Operating Protocol 135 ("Protocol 135") is 51 pages in length and sets forth in detail the procedures to be used once a death warrant is issued for an inmate. *See* Declaration of Jeff Zmuda, Exhibit 1, Dkt. 8-2. Additionally, any changes to Protocol 135 need to follow the due process requirements for amending any IDOC protocol.

In the procedural history of the decision relied upon by Plaintiffs, *CFAC IV*, the legal issues were originally presented in the form of a motion for preliminary injunction which was granted by the district court and then reversed on appeal. *California First Amendment Coalition v. Calderon*, 150 F.3d 976 (9th Cir. 1998) ("*CFAC III*"). In *CFAC*

III, the Ninth Circuit remanded the matter back to the district court to determine if plaintiff had presented "substantial evidence" that the procedure being challenged represented an exaggerated response to warden's security and safety concerns. *Id.* at 983. The final decision in *CFAC IV* was issued only after a number of executions were completed, discovery was completed by the parties and the district court held a full evidentiary hearing. In filing this preliminary injunction in late May (less than a month before a scheduled execution), Plaintiffs are attempting to force the Court to rule without a complete record. The Court declines to take this approach to such a serious constitutional question. Moreover, the Supreme Court has continuously upheld there is a strong presumption against eleventh hour motions for injunctive relief related to scheduled executions:

> A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and ... attempt[s] at manipulation." *Ibid*. Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, *see Blodgett*, 502 U.S. at 239; *McCleskey*, 499 U.S., at 491, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

Nelson v. Campbell, 541 U.S. 637, 649-50 (2004).

Since Plaintiffs aver it is not their intent or request to delay the scheduled execution, the Court finds a more prudent course of consideration of the legal issues presented and which are also subject to being raised again in the future, would be to allow

discovery and a full evidentiary hearing to determine whether IDOC's execution protocol does or does not satisfy the First Amendment of the Constitution. This would be consistent with the procedure utilized by the Ninth Circuit in the *CFAC* cases. The legal issues presented are significant, but the Court should not be forced by the late filing of pleadings of having to make decisions of this significance without a full evidentiary hearing. Simply put, the current scheduled execution does not allow adequate time for discovery, an evidentiary hearing, a ruling by this Court and a potential appeal by the non-successful litigant to the Ninth Circuit before the scheduled execution date.

2. Preliminary Injunction Factors

Even if Plaintiffs had timely filed this action, the Court finds at this stage in the litigation, Plaintiffs have not carried their burden to support the issuance of a preliminary injunction. The Court will review the four *Winter* factors.

A. Likelihood of Success on the Merits

Plaintiffs correctly cite *CFAC IV* for the proposition that "the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those 'initial procedures' that are inextricably intertwined with the process of putting the condemned inmate to death." *CFAC IV* at 877. The Court acknowledges that like the State of California in *CFAC IV*, the State of Idaho has a historical tradition of allowing the public to witness the process of putting a condemned

inmate to death. It is true that prior to 1901 the applicable state statute provided for a limited number of witnesses to be present at executions. Since 1901, the applicable Idaho statute has been revised to state that executions will be "closed from public view within the walls of the state penitentiary." *See* Statutory Supplement to Def. Opposition to Pls.' Expedited Motion for Preliminary Injunction, Dkt. 11. However, the undisputed reality as supported by the newspaper accounts of past executions and the specific language in IDOC's Protocol 135 (which provides for numerous witnesses including the media), is that some portion of the public has historically viewed the execution process in Idaho. Further, this Court agrees with Plaintiffs that society has a critical interest in having at least some members of the public view the government's implementation of a death warrant.

Specifically, the media's access to the execution process is limited to four seats as defined in Protocol 135. Plaintiffs do not contest the limited number of witness seats assigned to the media under the existing protocol. Rather, the Plaintiffs argue the process of the execution should be visible to all allowed witnesses when the inmate first enters the execution chambers instead of the current policy of allowing witnesses to view the execution after the inmate has been prepped for execution by being strapped to a gurney and two intravenous catheters placed by medical personnel.

The Plaintiffs' right to view an execution is no greater than the right of any other member of the public to view an execution. *Pell v. Procunier,* 417 U.S. 817, 834 (1974).

Having acknowledged there is a First Amendment right to view an execution from the time an inmate enters the execution chamber, the Court must determine if the limits placed by IDOC to restrict the public's view of the execution until the preliminary procedures of restraint and placement of IVs is concluded by medical personnel are reasonably related to legitimate penological objections or whether the limits represent an exaggerated response to prison officials' concerns. *Turner v. Safley*, 482 U.S. 78, 87 (1987). The *Turner* test requires the Court to evaluate four factors:

> (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources, generally" and (4) whether there exist "ready alternatives . . . that fully accommodate [] the prisoner's rights at *de minimis* cost to valid penological interests."

CFAC IV at 878 (citing *Turner, 482 U.S.* at 89-91).

In the record before the Court, Defendants have submitted the declarations of Jeff Zmuda, the IDOC Deputy Chief of the Bureau of Prisons (Dkt. 8-1) and Randy Blades, the Warden of the Idaho Maximum Security Institution which carries out the execution of death warrants (Dkt. 8-3). Defendants argue there are four legitimate penological objectives that allow IDOC to limit the public's right to witness the execution from the time the inmate enters the executions chamber: (1) to preserve an inmate's right to privacy during as much as possible of his final conscious moments; (2) to consider how an extended witness period may affect other death row inmates; (3) to shield the family

and friends of the condemned inmate from the public suffering that the inmate might incur during extended witness periods or delays in the execution process; and (4) to shield the members of the medical team from public exposure as they insert the IV catheters and in their general participation in the execution process.

The only evidence submitted by Plaintiffs related to the penological objectives of IDOC is the Affidavit of Betsy Russell, Dkt. 15, which sets forth the public's historical participation in viewing executions and the scope of witnesses' accounts of prior executions. The Plaintiffs challenge, by way of argument, not evidence, that Defendants' concerns are not legitimate penological concerns.

It is the Plaintiffs' burden to present the Court with "substantial evidence" that Protocol 135 represents an exaggerated response to IDOC's concerns for security and safety. *CFAC III* at 983. Plaintiffs argue the concerns of Defendants are unsubstantiated but they do not provide any rebuttal affidavits to the declarations of experienced prison officials. While the Court agrees that Defendants must substantiate their concerns with actual evidence of retaliation against medical personnel, inability to get medical personnel to participate on the medical team for an execution, the impact of extending the viewing by witnesses on other inmates or prison safety in general, Plaintiffs have not provided any evidence to counter declarations of IDOC personnel.

The Deputy Chief of the Bureau of Prisons, Jeff Zmuda states in paragraph 9 of his declaration, Dkt. 8-1, that if official witnesses are allowed to see the inmate from the

point he enters the execution chamber, "it will greatly impair IDOC's ability to recruit and retain Medical Team members and will have a chilling effect on the Medical Team members' willingness to serve on the Medical Team." Mr. Zmuda also states in paragraph 8 that "confidentiality and anonymity is of paramount concern to the Medical Team members." While it is true the Ninth Circuit in *CFAC IV* downplayed the concern of execution team members based on the history in California, it is unclear based on the record before the Court if the IDOC concerns raised are speculative or contradicted by the limited history regarding executions in Idaho. *See CFAC IV* at 882. Moreover, there has been no development in the record of alternative means available for IDOC to address the public's interest and security and safety concerns. Finally, this Court is required to give deference to prison officials' opinions regarding security and safety concerns. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The Supreme Court has cautioned the federal courts not to interfere with the day-to-day operations of the prisons, especially those things related to security, a task which is best left to prison officials who have particular experience in dealing with prisons and prisoners. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (First Amendment claims).

In reviewing the record to date, the Court has significant concerns regarding the penological objectives submitted by the Defendants and whether such concerns outweigh the First Amendment rights of the public, whether the concerns raised by the Defendants are substantiated by actual evidence, whether sufficient alternatives exist that could be

implemented such as requiring the medical personnel involved to wear surgical garb including gowns, masks and eye protection to help shield their identity, whether there is a First Amendment interest in allowing the public to witness the preliminary execution procedures to ensure the execution is being performed in a humane manner, whether there is any evidence of an impact on other inmates that rises to the level of a safety or security issue for IDOC, whether the concerns submitted by IDOC are valid "security and safety" concerns, and whether the consideration of emotional well being of the condemned inmate and his family should enter into the balance.

Society has a strong interest in having the most serious of criminal penalties implemented in a professional, humane manner with the rights of privacy of all involved considered and respected. Prison officials have a legitimate interest in conducting an execution such that it does not impact the safety and security of prison officials and other inmates. IDOC's current protocol to effectuate a death warrant is lethal injection. Plaintiffs have presented strong arguments based on binding Ninth Circuit case law that IDOC's objectives may not justify restricting the viewing of the execution process until after the inmate has been restrained and IVs are placed. However, the Court cannot find based on the current record, that Plaintiffs have provided "substantial evidence" that IDOC's Protocol 135 is an "exaggerated response" to the security concerns presented.

The Court agrees that Plaintiffs may ultimately prevail on their challenges that the Defendants penological objectives do not satisfy the requirements of *Turner* or that

alternative practices cannot be included in the protocol to satisfy the public's interest and penological security and safety concerns. But the record needs to be more fully developed and in all fairness IDOC should be provided the opportunity to provide detailed evidence to support the conclusions of experienced IDOC personnel set forth in the declarations that extending the portion of the execution that is viewed by witnesses will have a detrimental effect on the safety and security of the inmates and prison officials.

Even assuming that without an evidentiary hearing or any evidence from Plaintiffs, the Court could find the Plaintiffs have presented a likelihood of success on the merits of their legal claim, the Court would still deny the request for a preliminary injunction based on the other *Winter* factors.

B. Irreparable Harm

It is Plaintiffs' burden to establish that irreparable harm is likely, not just possible, if the injunction is not granted. The Court finds irreparable harm is not likely if the preliminary injunction is not granted. Plaintiffs specifically allege they do not want the scheduled execution delayed due to their lawsuit. The witnesses still will be allowed to see the execution process from the time after the inmate is restrained and IVs are placed. Under the current protocol, witnesses will be allowed to view the condemned inmate as he receives the lethal drug. Additionally, there will most likely be other executions in the

future and if Plaintiffs are successful after a full evidentiary hearing, the protocol can be changed without any harm to Plaintiffs, the public or Defendants.

C. Balance of Equities

The Court must determine if the balance of equities tips in Plaintiffs' favor. This is a close call for the Court as the Court finds Plaintiffs' legal arguments are strong. However, in balancing the equities, the Court finds it is simply too late to hold an evidentiary hearing prior to the scheduled execution date.[1] Also, it is too late to incorporate any necessary changes that may be required in the protocol if Plaintiffs are successful on their claims. Declaration of Jeff Zmuda, paragraph 6, Dkt. 8-1: "Any deviation of SOP 135 with respect to witnesses being present earlier in the execution

[1]Plaintiffs ignore how heavily courts have emphasized the need for challenges related to executions to be brought in a timely manner, so as not to delay the scheduled execution. Here, there is a high likelihood that opening the entire execution to the public will delay the execution. In these cases, the condemned had a great interest in the action (preserving his own life or preventing serious pain during execution), and yet, the courts concluded a stay was inappropriate where they were dilatory in bringing the action because of the strong public interest in finalizing criminal judgments. *See Nooner v. Norris*, 491 F.3d 804 (8th Cir. 2007) ("Once a state inmate's sentence of death has become final on direct review in the state's courts, there is no impediment to filing a § 1983 action challenging the constitutionality of a state's lethal injection protocol as long as lethal injection is the established method of execution [and] the protocol is known.") *Id*. at 808; *Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006) ("[The condemned] is not entitled to equitable relief due to his dilatory filing, noting that the there was no excuse for the delay"). By analogy, the Court finds there was not excuse for Plaintiffs waiting to file this lawsuit until the end of May and such dilatory tactics do not justify expedited injunctive relief.

process would not only require a modification of SOP 125, but would also require a change in the already established training schedule and format." Further any changes to the protocol may delay the execution and open the door to further challenges by the condemned that the protocol has been changed.

Finally, it is uncertain if medical team personnel would decide not to participate on the execution team if the protocol is changed as requested by Plaintiffs. Therefore, the Court finds the balance of equities tips in favor of the Defendants and proceeding with the scheduled execution.

D. Public Interest

Plaintiffs must establish that an injunction is in the public's interest. The public has an interest in witnessing the implementation of a death warrant. As a society, we cannot have the death penalty carried out behind closed doors with only prison officials as witnesses. In this case, Protocol 135 provides for numerous witnesses including four media witnesses to the view process wherein the lethal drug is administered. Plaintiff's interest in allowing the public to more fully view the execution process does not outweigh the public's interest in proceeding with a scheduled execution. In this case, the condemned inmate, Mr. Leavitt, was originally sentenced to death in 1985. The public has a significant interest in enforcing its criminal judgments. *Nelson v. Campbell*, 541 U.S. 637, 649050 (2004). The Court finds the limited First Amendment rights relating to

the portion of the execution that is viewed by witnesses and which has not been fully litigated does not trump the competing interest of the public to enforce a valid death warrant scheduled within a week.

3. Conclusion

Based on the untimeliness of the motion for a preliminary injunction and Plaintiffs' failure to carry their burden for injunctive relief at this stage of the litigation, the Court finds the motion for a preliminary injunction must be denied. The Court acknowledges Plaintiffs have presented a strong claim on the merits but the other equitable factors in the preliminary injunction test weigh against granting the relief in this context. The claim was brought very late and if granted, it would undoubtedly change the execution protocol and could disrupt the scheduled execution. The public has an interest in viewing the whole execution process, but it also has an interest in seeing the judgment enforced without disruption. The harm from delaying this matter to allow both sides to present their evidence so the credibility of the evidence and testimony can be weighed by the Court is not necessarily irreparable because there most likely be other executions to view in the future so the requested relief may still apply. Finally, the public and the media are allowed under the current protocol to view the execution process when the lethal drug is administered to the condemned inmate and until the matter can be fully litigated, the protocol should remain unchanged.

ORDER

IT IS ORDERED:

1. Plaintiffs' Expedited Motion for Preliminary Injunction (Dkt. 2) is DENIED.

2. Plaintiffs' Motion to Take Judicial Review (Dkt. 16) is irrelevant to the determination on the motion for preliminary injunctive relief. The motion and Defendants' objection to said motion will be taken up in the normal course of this litigation.

3. The parties shall submit a joint litigation plan for the Court's consideration to allow for discovery and a full evidentiary hearing on the request for permanent injunctive relief.

DATED: **June 5, 2012**

Honorable Edward J. Lodge
U. S. District Judge