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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 WILLIE LEWIS,

11 Plaintiff,

12 v.

13 A. ENDELL, E.K. McDANIELS, JOE
14 BRACKBILL, TONY JONES, ROBERT
15 CHAMBLISS, and JOHN DOE,

16 Defendants.

CASE NO.: 2:08-cv-00157-RLH-LRL

DEFENDANTS' EMERGENCY MOTION
TO STAY PROCEEDINGS PENDING
APPEAL

17 DEFENDANTS ADAM ENDEL and ROBERT CHAMBLISS (hereinafter "Defendants"),
18 by and through counsel, CATHERINE CORTEZ MASTO, Attorney General, and LEEANN
19 PHOUTHAVONGSAY, Deputy Attorney General, hereby submit their Motion to Stay
20 Proceedings Pending Appeal. This Motion is made and based upon the attached points and
21 authorities, as well as all other papers, pleadings, and documents on file herein.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. Introduction**

24 This Court's Order (CD #49), filed on October 28, 2009, did not analyze or rule on
25 qualified immunity. Defendants filed a Motion for Reconsideration (CD #66) on May 20, 2010,
26 as said Order appeared to resolve the only claim for trial by ruling that Plaintiff did not meet
27 the objective component of the two-part test required for an Eighth Amendment violation (CD
28 #49, p. 6, ll. 10-17) and based on the fact that said Order did not analyze or rule on qualified

1 immunity. On June 2, 2010, this Court ruled that Defendants are not entitled to qualified
2 immunity.

3 Because this Court recently denied Defendants' claim of qualified immunity on June 2,
4 2010, Defendants have filed a Notice of Appeal to the Ninth Circuit Court of Appeals. Federal
5 district court orders rejecting qualified immunity from suit are immediately appealable. 28
6 U.S.C. § 1291; *Will v. Hallock*, 546 U.S. 345, 346 (2006).

7 A bench trial in this matter is currently scheduled for June 9, 2010. In the event the
8 Ninth Circuit rules in favor of Defendants, a trial will not be necessary. Thus, Defendants'
9 instant request is made in order to conserve judicial resources and to avoid the expenses to
10 the parties of a potentially unnecessary trial. Defendants respectfully request that the
11 upcoming trial be stayed or vacated pending a ruling from the Ninth Circuit as to Defendants'
12 interlocutory appeal.

13 **II. Argument**

14 This Court is automatically divested of jurisdiction to proceed with trial in this case
15 unless it certifies in writing that Defendants' interlocutory appeal as to qualified immunity is
16 frivolous or has been waived. *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992).

17 First, Defendants' appeal as to qualified immunity is not frivolous. This Court's Order
18 (CD #49), filed on October 28, 2009, provides:

19 **"To establish an Eighth Amendment violation, a prisoner must**
20 **satisfy both the objective and subjective components of a**
21 **two-part test."** *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991).
22 "First, there must be a demonstration that the prison official
23 deprived the prisoner of the 'minimal civilized measure of life's
24 necessities.' Second, a prisoner must demonstrate that the prison
25 official 'acted with deliberate indifference in doing so.'" *Toguchi v.*
Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Hallett v.*
Morgan, 296 F.3d 732, 744 (9th Cir. 2002)). As the Ninth Circuit
has stated, "[this] is not an easy test for plaintiffs to satisfy."
Hallett, 296 F.3d at 745 (emphasis added).

26 (CD #49, p. 5, II. 20-26). This Court then ruled:

27 Defendants claim that giving Plaintiff an upper bunk served a
28 penological purpose because there were no lower bunk beds
available at the time Defendants gave him an upper bunk and they
needed to give him a bed to sleep (Dkt. #41, Mot. 12). The Court
agrees with Defendants on this point. Defendants were still bound
to provide Plaintiff with a bed, even if it was not located in a lower

1 bunk. **Thus, under the objective component of the test, Defendants did not deprive plaintiff of a minimal civilized**
2 **measure of life's necessities.** However, the Court must still
3 analyze the risk associated with placing him on the upper bunk
under the subjective "deliberate indifference" standard (emphasis
added).

4 (CD #49, p. 6, ll. 10-17).

5 Said Order specifically provides that Defendants did not deprive Plaintiff of a minimal
6 civilized measure of life's necessities. (CD #49, p. 6, ll. 14-15). In order to establish an Eighth
7 Amendment violation, a prisoner must satisfy both the objective and subjective components.
8 Because this Court ruled that Plaintiff did not meet the objective component of the two-part
9 test required for an Eighth Amendment violation, the analysis must end there. Said ruling is
10 fatal to Plaintiff's claim of an Eighth Amendment violation, and therefore, Defendants are
11 entitled to qualified immunity. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

12 However, this Court did not analyze and rule on Defendants' claim of qualified immunity
13 in said Order. The doctrine of qualified immunity is an immunity from suit rather than a mere
14 defense to liability and is effectively lost if a case is erroneously permitted to go to trial.
15 *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The utility and shield of qualified immunity is
16 lost if government officials are subjected to the burdens and expenses of trial preparation and
17 distracted from their duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 816-818 (1982).

18 Defendants requested an analysis and ruling on qualified immunity through a Motion for
19 Reconsideration (CD #66), filed on May 20, 2010, and this Court ruled on June 2, 2010 that
20 Defendants are not entitled to qualified immunity. F.R.A.P. (a)(4)(B)(ii) provides, "[a] party
21 intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a
22 judgment altered or amended upon such a motion, must file a notice of appeal, or an
23 amended notice of appeal – in compliance with Rule 3(c) – within the time prescribed by this
24 Rule measured from the entry of the order disposing of the last such remaining motion."
25 Defendants' appeal of this Court's June 2, 2010 Order denying qualified immunity is not
26 frivolous.

27 Second, Defendants claim of qualified immunity has not been waived. Defendants
28 have claimed qualified immunity since the inception of this case as set forth in their Motion to

1 Dismiss (CD #15), Motion for Summary Judgment (CD #41), and Motion for Reconsideration
2 (CD #66). Defendants are not raising qualified immunity for the first time on appeal either.
3 Thus, there has been no waiver on the part of Defendants.

4 **III. Conclusion**

5 Based upon the foregoing, Defendants request that the trial in this case be stayed or
6 vacated pending a ruling from the Ninth Circuit as to Defendants' interlocutory appeal.

7 DATED this 4th day of June, 2010.

8 Respectfully submitted,

9 CATHERINE CORTEZ MASTO
10 Attorney General

11 By: /s/
12 LeeAnn Phouthavongsay
13 Deputy Attorney General
14 Public Safety Division
15 555 E. Washington Ave., Ste. 3900
16 Las Vegas, NV 89101
17 Attorneys for Defendants

18 **IS IS SO ORDERED.**

19 
20 **CHIEF UNITED STATES DISTRICT JUDGE**

21 **DATED: June 10, 2010**

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on the 4th day of June, 2010, I served the foregoing **DEFENDANTS' EMERGENCY MOTION TO STAY PROCEEDINGS PENDING APPEAL** by causing a true and correct copy thereof to be filed with the Clerk of the Court using the CM/ECF system and by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof addressed to:

WILLIE LEWIS #91716
High Desert State Prison
PO Box 650
Indian Springs, NV 89070

/s/ Gina Long
An employee of the Office of the Attorney General