For hearing dates scheduled after 1/1/08

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

Darold R.J. Stenson
Plaintiff/Petitioner,

vs.

Eldon Vail, et al.
Defendant/Respondent.

NO. 08-2-02080-8

CIVIL NOTICE OF ISSUE (NTIS)
Clerk's Action Required

TO: THURSTON COUNTY CLERK and to all other parties listed herein:

PLEASE TAKE NOTICE that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.

Calendar Date: October 24, 2008 **Day of Week:** Friday

IMPORTANT WARNING: If this Notice of Issue is not timely filed, contains a wrong day or date, or is scheduled for a wrong calendar date, your hearing will not be scheduled. You will not be notified.

Bench/Judge Copies:	Deliver to Superior Court, Building 2, Rm. 150
Filing Deadlines:	By 12:00 noon, 5 court days preceding the scheduled hearing date [LCR 5(b)(2)]
Confirmation:	Confirm at **www.co.thurston.wa.us/clerk** by clicking on Hearing Confirmation, by faxing to (360) 753-4033, or by calling (360) 786-5423 by 12:00 noon three court days prior to the hearing date [LCR 16(f)(2)].
Court Address:	2000 Lakeridge Drive SW, Building 2, Olympia WA 98502.

☒ **CIVIL MOTIONS** (Friday – 9:00 am)
CONFIRMATION REQUIRED

ASSIGNED JUDGE:

- ☐ Judge Richard D. Hicks
- ☐ Judge Christine Pomeroy
- ☒ Judge Gary R. Tabor
- ☐ Judge Chris Wickham

☐ **UNLAWFUL DETAINERS** (Friday – 10:00 am)
CONFIRMATION REQUIRED

☐ **DOL REVOCATIONS** (Friday–9:00 am)
CONFIRMATION REQUIRED

☐ **RALJ APPEALS** (Tuesday – 9:00 am)
No Confirmation Necessary

Type of Motion:

- ☐ Default
- ☐ Discovery
- ☒ Summary Judgment/Dismissal
- ☐ Change Venue
- ☐ Continue Trial
- ☐ Show Cause
- ☐ Present Order
- ☐ TRO/Preliminary Injunction
- ☐ Other: _____

Certificate of Service

I certify that on 9/24, 2008, I ☒ deposited in the United States mail. ☐ delivered through a legal messenger service. ☐ personally delivered, a copy of this document to the attorney(s) of record for ☒ Plaintiff/ Petitioner ☐ Defendant/Respondent ☐ All Other Parties of Record.

Attorney for ☐ Plaintiff/Petitioner
☒ Defendant/Respondent
☐ Other: _____

PRESENTING PARTY:

Sign: _____
Print/Type Name: Sara Olson
WSBA # 33003 (if attorney)
Address: P.O. Box 40116
City/State/Zip: Olympia, WA 98504-0116
Attorney for: Defendants
Telephone: 360-586-1445
Date: 9/24/08

LIST NAMES, ADDRESSES & TELEPHONE NUMBERS OF ALL PARTIES REQUIRING NOTICE

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☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set:
Date: 10/24/2008
Time: 9:00 AM
The Honorable Gary R. Tabor

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

DAROLD R.J. STENSON, Plaintiff, v. ELDON VAIL; STEPHEN SINCLAIR; MARC STERN; CHERYL STRANGE; WASHINGTON STATE DEPARTMENT OF CORRECTIONS, and DOES 1-50 Defendants.	NO. 08-2-02080-8 DEFENDANTS' MOTION TO DISMISS OR TRANSFER CASE TO THE SUPREME COURT AND MEMORANDUM IN SUPPORT THEREOF

MOTION

The Defendants, by and through their attorneys, ROBERT M. MCKENNA, Attorney General, and SARA J. OLSON and JOHN J. SAMSON, Assistant Attorneys General, move to dismiss Plaintiff Darold Stenson's complaint, or in the alternative, to transfer it to the Washington Supreme Court for consideration as a personal restraint petition. Stenson was convicted and sentenced to death in 1994. In 14 years of direct and collateral challenges to his conviction and sentence he has not challenged the method of execution; now he asks this Court to enjoin the State from executing his lawful sentence, in direct contravention to Washington Supreme Court precedent. Defendants now move for dismissal for the following reasons: (1) Stenson's action is a time barred collateral challenge; (2) the statute of limitations bars this action; (3) the doctrine of *res judicata* bars

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this action; (4) Stenson's challenges to the methods of execution and his election of a method fail to state a claim. If the Court does not dismiss, Defendants move for transfer of this action to the Washington Supreme Court as Stenson asks this Court to rule contrary to Washington Supreme Court precedent.

MEMORANDUM

I. STATEMENT OF THE CASE

In 1994, a Clallam County jury sentenced Darold Stenson to death for the aggravated first degree murders of his wife Denise Stenson, and business partner, Frank Hoerner. See State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). The Washington Supreme Court affirmed the convictions and sentence on direct review on July 24, 1997. Id. The United States Supreme Court denied certiorari on March 9, 1998. Stenson v. Washington, 523 U.S. 1008 (1998).

Following Stenson's unsuccessful direct appeal, he challenged his conviction and sentence by way of multiple personal restraint petitions. The Washington Supreme Court denied Stenson's first personal restraint petition on January 4, 2001. In re Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001). The Court denied Stenson's second personal restraint petition as time barred on September 11, 2003, and denied Stenson's third personal restraint petition as an "abuse of the writ" on November 24, 2004. In re Stenson, 150 Wn.2d 207, 76 P.3d 241 (2003); In re Stenson, 153 Wn.2d 137, 102 P.3d 151 (2004).

Stenson filed a habeas corpus petition in 2001, challenging his convictions and sentence in federal court. Stenson v. Lambert, US District Court Cause No. C01-252P. The district court denied the petition on July 26, 2005, the Ninth Circuit affirmed dismissal of the petition on September 24, 2007, and the Ninth Circuit denied rehearing *en banc* on March 19, 2008. Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007). Stenson's petition for a writ of certiorari currently is pending before the United States Supreme Court, and is scheduled for conference on September 29, 2008. Stenson v. Sinclair, U.S. Supreme Court

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Cause No. 08-5328. The Court is expected to rule on the petition by Monday October 6, 2008. If the Court denies the petition, the mandate will issue shortly thereafter, and the stay of execution issued by the federal court will terminate. The date of execution will automatically reset for 30 judicial days upon termination of the stay. RCW 10.95.160(2).

Stenson has been under the sentence of death since 1994, and he has known since March 1996 that the sentence will be carried out by lethal injection unless he selects the alternative method of hanging. See RCW 10.95.180 (amended by 1996 Wash. Laws c. 251, §1). Despite having repeatedly challenged his convictions and sentence in both state and federal court since 1996, Stenson has now waited until the eleventh hour to file this action challenging the methods used to execute his sentence. For the reasons set forth below, the Defendants respectfully request that the Court dismiss the action, or in the alternative, transfer the action to the Washington Supreme Court for consideration as a personal restraint petition.

II. ARGUMENT

A. THE ACTION IS A COLLATERAL CHALLENGE TO THE EXECUTION OF THE SENTENCE, AND THE COURT SHOULD EITHER DISMISS THE ACTION, OR TRANSFER IT TO THE SUPREME COURT FOR CONSIDERATION AS A PERSONAL RESTRAINT PETITION.

1. This Action Is A Collateral Challenge To The Execution Of The Sentence, And Should Be Dismissed As Barred.

Although Stenson labels this a declaratory judgment action, this action is a collateral challenge to the execution of the sentence. Stenson filed this action to prevent the Department of Corrections from carrying out the lawful sentence imposed by the Clallam County Superior Court. Stenson challenges the two statutory methods of execution, and argues the Department may not use either method to carry out his sentence. Stenson's complaint is a collateral challenge to the execution of his sentence. Since Stenson is now barred from filing any collateral attack, the action should be dismissed.

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Washington law broadly defines a "collateral attack" to mean "any form of postconviction relief other than a direct appeal." RCW 10.73.090(2). Under Washington law, a "'collateral attack' includes, *but is not limited to*, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment." RCW 10.73.090(2) (emphasis added). Under Washington law, a collateral challenge is not limited to a challenge to the fact or duration of confinement, but also includes any challenge to "some other disability resulting from a judgment or sentence in a criminal case." RAP 16.4(b) (defining restraint).

Unlike the federal statute, 28 U.S.C. § 2254, which limits collateral challenges to a person "in custody" who is challenging the fact or duration of such "custody," Washington law allows prisoners to bring a broad variety of challenges to "restraint" in a collateral challenge. As the Supreme Court noted, unlike the federal habeas corpus statute, "[n]either chapter 7.36 RCW nor the Rules of Appellate Procedure relating to personal restraint petitions contain 'in custody' language." Born v. Thompson, 154 Wn.2d 749, 765, 117 P.3d 1098 (2005). The personal restraint petition rule is broad, and expressly refers to various types of restraint other than confinement. Id. (citing RAP 16.4(b); In re Meyer, 142 Wn.2d 608, 16 P.3d 563 (2001) (noting federal statute differs from state rules governing personal restraint petitions)). In contrast to federal law, state court challenges to conditions of confinement, even if the challenges do not contest the fact or duration of confinement, properly fall within the scope of a collateral challenge. In re Smith, 130 Wn. App. 897, 125 P.3d 233 (2005) (challenge to deduction of funds brought in personal restraint petition); In re Matteson, 142 Wn.2d 298, 12 P.3d 585 (2000) (challenge to transfer to out-of-state prison); In re Garcia, 106 Wn. App. 625, 24 P.3d 1091 (2001) (challenge to condition requiring participation in AA treatment).

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The personal restraint petition is the appropriate vehicle to challenge not only the fact of a sentence, but also the conditions associated with the carrying out of the sentence. In re Metcalf, 92 Wn. App. 165, 172-73 & n.5, 963 P.2d 911 (1998) (rejecting argument that claim should have been brought as declaratory judgment action in superior court); In re Arseneau, 98 Wn. App. 368, 371-74, 989 P.2d 1197 (1999) (challenge to condition of no contact properly brought in personal restraint petition). In fact, the Washington Supreme Court has acknowledged that challenges to the execution of a sentence constitute a collateral attack because the Court has reviewed and rejected challenges to the methods of execution in other personal restraint petitions. In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998) (challenge to lethal injection); In re Lord, 123 Wn.2d 296, 325-26, 868 P.2d 835 (1994) (challenge to hanging).

Regardless of the label given by Stenson to his current action, the action falls squarely within the broad category of a "collateral attack." Washington law bars untimely and abusive collateral challenges to a sentence under RCW 10.73.090 and RCW 10.73.140. Since Stenson's challenge is both untimely and abusive, the Court should dismiss this action.

Stenson will likely argue that his challenge is not a collateral attack of the sentence, because the Supreme Court held a challenge to a method of execution does not fall within the federal habeas corpus statute. Hill v. McDonough, 547 U.S. 573 (2006) (challenge to lethal injection may be brought under 42 U.S.C. § 1983); Nelson v. Campbell, 541 U.S. 637 (2004) (same). However, any such argument fails for two reasons.

First, the claims presented in Hill and Nelson would not have prevented the State from carrying out the executions. Hill, 547 U.S. at 580-81. As the Supreme Court noted, Hill's challenge did not leave the State without any other practicable method of executing Hill, but left the State free to use an alternative method to carry out execution. Id. Similarly, Nelson's challenge did not even prevent the use of lethal injection, but simply

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went to a "cut-down" procedure that might not even occur. Id. Stenson's action, however, seeks to utterly prevent the Department from carrying out the sentence using any method. Stenson's action challenges both methods of execution allowed by statute, alleges that the Department has failed to adopt any method to carry out the sentence in a constitutional manner, and seeks an injunction to prevent the Department from using either lethal injection or hanging to carry out the judgment and sentence.

Moreover, Stenson's complaint goes so far as to seek a declaration that hanging is unconstitutional and cannot be used. See Complaint, at 21 (prayer for relief D and E – seeking declaration that execution by hanging violates Washington and United States Constitutions). Stenson seeks to effectively prevent the Department from carrying out the sentence imposed by the Clallam County Superior Court. See In re Lord, 123 Wn.2d 296, 325-26 n.11, 868 P.2d 835 (1994) (recognizing that a finding that both lethal injection and hanging are unconstitutional would be tantamount to forbidding the death penalty altogether). Since Stenson seeks to prevent his execution by the only two methods allowed in Washington, Stenson's action is a collateral challenge to the execution of his sentence.

Second, and more importantly, Hill and Nelson concerned the proper avenue for raising a challenge under the federal statutes. In other words, the Court ruled on whether the challenge should be brought under the federal civil rights statute, 42 U.S.C. § 1983, or the federal habeas corpus statute, 28 U.S.C. § 2254. The cases did not, and could not, resolve the proper avenue for a challenge under Washington law since that is a matter of state law.

As discussed above, the complaint constitutes a collateral challenge under Washington law. Stenson seeks to prevent the Department from carrying out the sentence using the methods provided by the Legislature. This action is no different than cases by other prisoners seeking to challenge the Department's actions in carrying out a sentence, cases all recognized to fall within the broad parameters of a habeas corpus or personal

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restraint petition proceeding. Under Washington law, a challenge to the method of executing a sentence, whether that sentence be capital or non-capital, falls within the broad definition of a collateral challenge. Consequently, this action is subject to the provisions of chapter 10.73 RCW. Since it is more than one year since Stenson's judgment and sentence became final, the action is time barred under RCW 10.73.090. Also, since Stenson has already filed three personal restraint petitions, his action is an abuse of the writ, barred under RCW 10.73.140. The action should be dismissed.

2. In The Alternative, The Court Should Transfer The Case To The Supreme Court For Consideration As A Personal Restraint Petition.

In the alternative, the Defendants respectfully request that this Court transfer the case to the Supreme Court for consideration as a personal restraint petition. While the personal restraint petition procedure does not affect the jurisdiction of the superior courts,[1] the interests of judicial comity, judicial economy, and the ends of justice may require a court to transfer a case to the jurisdiction of the Supreme Court. Tolliver v. Olsen, 109 Wn.2d 607, 610-13, 746 P.2d 809 (1987). The ends of justice may often require a superior court to forego its jurisdiction in favor of the personal restraint petition jurisdiction of the appellate courts. Id. at 612-13; see also CrR 7.8.

If the Court does not dismiss the action, the Defendants respectfully request that the Court transfer the petition to the Supreme Court. First, the Supreme Court has exclusive original jurisdiction to consider personal restraint petitions and appeals involving defendants sentenced to death. RAP 16.3(c) (exclusive jurisdiction in personal restraint petitions involving death penalty); RCW 2.06.030(b) (exclusive jurisdiction in appeals

[1] A superior court has jurisdiction to issue writs for petitions filed by persons in custody within the county of that particular superior court. Conway v. Cranor, 37 Wn.2d 303, 233 P.2d 452 (1950). Since Stenson is not confined in Thurston County, this Court lacks jurisdiction to consider a habeas corpus petition filed by Stenson.

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from death penalty cases); RCW 10.95.100 (mandatory sentence review by Supreme Court); State v. Harris, 114 Wn.2d 419, 441, 789 P.2d 60 (1990) (direct review of competency hearing regarding capital defendant); State v. Campbell, 112 Wn.2d 186, 770 P.2d 620 (1989) (direct review of order setting date of execution).

Second, the Washington Supreme Court is already well aware of the facts and history of Stenson's sentence and appellate proceedings, having reviewed his judgment on four occasions. Third, as discussed in more detail below, the Washington Supreme Court has already held that hanging and lethal injection are both constitutional. See In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998) (holding hanging and lethal injection are constitutional methods of execution); In re Lord, 123 Wn.2d 296, 325-26 & n.11, 868 P.2d 835 (1994) (holding hanging is constitutional, and declaring lethal injection is "undoubtedly constitutional"). This Court is bound by the holdings of the Washington Supreme Court. By asking this Court to rule to the contrary, and find both methods unconstitutional, Stenson seeks to have this Court issue a ruling directly contrary to the holdings of the Washington Supreme Court. The interests of judicial comity and judicial economy are both served by avoiding this attempt to create a conflict. This Court should transfer the action to the Supreme Court for consideration as a personal restraint petition.

B. ASSUMING THE ACTION IS NOT DISMISSED AS BARRED UNDER RCW 10.73.090, OR TRANSFERRED TO THE SUPREME COURT, STENSON'S CLAIMS SHOULD BE DISMISSED AS TIME BARRED BY THE STATUTE OF LIMITATIONS, AS BARRED BY *RES JUDICATA*, OR FOR FAILURE TO STATE A CLAIM AS A MATTER OF LAW.

1. The Statute Of Limitations Bars Stenson's Claims.

Stenson's cause of action for declaratory judgment and injunctive relief accrued, at the latest in 1997, with the completion of direct appellate review. Stenson filed this action on September 5, 2008, more than three years after his cause of action accrued. Therefore, his claim is barred by the statute of limitations.

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Stenson's complaint alleges federal constitutional civil rights claims and state constitutional claims. 42 U.S.C. § 1983 does not contain a statute of limitations, so the applicable Washington statute of limitations must be applied. Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981); Bagley v. CMC Real Estate Corp., 923 F.2d 758 (9th Cir. 1991). Washington imposes a three year statute of limitation for "injury to the person or rights of another not hereinafter enumerated." RCW 4.16.080(2). This includes 42 U.S.C. § 1983 actions, see Rose and Bagley, as well as state constitutional actions. The statute of limitations for federal and state claims begins to run when the plaintiff "knows or has reason to know of the injury which is the basis of the action." Trotter v. International Longshoremen's & Warehousemen's Union, 704 F.2d 1141, 1143 (9th Cir. 1986); see also Gevaart v. Metco Constr., Inc., 111 Wn.2d 499, 501-02, 760 P.2d 348 (1988).

Stenson was sentenced to death in 1994. See Complaint at 5. This sentence became final, upon completion of direct appellate review, in 1997. See State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). RCW 10.95.180 was amended in 1996, mandating that execution be by lethal injection or, in the alternative, hanging. See RCW 10.95.180 (amended by 1996 Wash. Laws c. 251, §1). As an individual sentenced to the death penalty, Stenson knew or had reason to know of the methods of execution in Washington as of the statutory amendment in 1996 or, at the latest, at the conclusion of direct review of his case in 1997. As such, the statute of limitations for challenging the method of execution began to run, at the latest, in 1997 and expired in 2000. Stenson filed his Complaint on September 5, 2008, well over three years after the cause of action accrued. Therefore, Stenson's claim for declaratory judgment and injunctive relief is time barred.

Stenson will likely argue that the statute of limitations did not begin to run until the completion of his federal collateral remedies, in 2007, or until his execution becomes imminent when the federal stay is lifted, presumably in 2008. Although this issue has not been resolved in Washington's courts or the Ninth Circuit, three federal circuit courts of

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appeal have squarely addressed the statute of limitations for constitutional challenges to the methods of execution. See McNair v. Allen, 515 F.3d 1168 (11th Cir. 2008); Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007); Neville v. Johnson, 440 F.3d 221 (5th Cir. 2006). These courts concluded that the statute of limitations begins to run on either the date state direct review is completed, Neville, 440 F.3d at 222, or the date the individual becomes subject to a "new or substantially changed" execution protocol, whichever is later. McNair, 515 F.3d at 1174; Cooey, 479 F.3d at 422. In reaching this conclusion, the Eleventh Circuit, in McNair, rejected the argument that the statute of limitations begins to run with imminent execution stating, "we disagree with its application to cases such as this one, where the ultimate injury is reasonably likely and wholly foreseeable." McNair, 515 F.3d at 1174.

The Eleventh Circuit similarly rejected the argument that the statute of limitations begins to run upon exhaustion of federal remedies, stating "doing so would prolong unnecessarily the time during which a litigant should reasonably anticipate the need to file suit and would fail to show proper respect for principles of federalism." Id. at 1175. The Sixth Circuit reached the same conclusion, using similar reasoning, stating:

> More fundamentally, setting an accrual date at the point of imminency plus exhaustion of federal collateral remedies adds a significant period of delay to a state's ability to exercise its sovereign power and to finalize its judgments, which disrupts the vital yet delicate balance between state and federal relations.

Cooey, 479 F.3d at 419.

The reasoning of the Fifth, Sixth and Eleventh Circuits should be adopted in this case. Stenson knew definitively he was subject to lethal injection or hanging in 1996. Stenson knew his death sentence had been upheld in 1997 when his sentence was affirmed on direct review. Therefore, using the later of the two dates, the statute of limitations on his challenge to the constitutionality of the methods of execution expired in 2000. Therefore, his claims are time barred. If the Court does not dismiss the action as barred by

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RCW 10.73.090, and does not transfer it to the Washington Supreme Court, the Court should dismiss Stenson's challenges to lethal injection and hanging as time barred.

2. Stenson's Claims Are Barred Under The Doctrine Of *Res Judicata.*

The doctrine of *res judicata* serves to bar a claim where there is an identity of claims, a final judgment on the merits, and an identity or privity of parties. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The doctrine of *res judicata* further bars "issues that were or could have been raised in the prior action." Mellor v. Chamberlin, 100 Wn.2d 643, 645, 673 P.2d 610 (1983). This doctrine applies to Stenson's claims regarding the constitutionality of Washington's procedures and methods of execution.

Res judicata applies in this Court, as the grounds for relief raised now could have been raised in his previous actions. Stenson was sentenced to the death penalty in 1994. See Complaint at 5; State v. Stenson, 132 Wn.2d. 668, 940 P.2d 1239 (1997). His conviction has been affirmed. Id. As argued above in Section A(1), Stenson has filed three personal restraint petitions and one federal *habeas corpus* petition since his conviction in 1994. See In re PRP of Darold Stenson, 142 Wn.2d 710, 6 P.3d 1 (2001); In re PRP of Darold Stenson, 150 Wn.2d 207, 76 P.3d 241 (2003); In re PRP of Darold Stenson, 153 Wn.2d 137, 102 P.3d 151 (2004); Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007). Stenson could have raised his claims challenging the constitutionality of the procedures and method of execution in his personal restraint petitions. RCW 10.73.090(2); RAP 16.4(b). The orders denying the personal restraint petitions and the federal *habeas corpus* petition, therefore, bar Stenson's claims in this Court. If the Court does not dismiss the action as barred by RCW 10.73.090, and does not transfer it to the Washington Supreme Court, the Court should dismiss Stenson's challenges to lethal injection and hanging as barred under the doctrine of *res judicata*.

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3. **Stenson's Challenges To Lethal Injection Fail As A Matter of Law.**

Stenson alleges lethal injection as performed under the Department of Corrections' existing policies violates both the Washington State Constitution and the United States Constitution. Stenson's claim fails as a matter of law.

The Legislature selected lethal injection as the primary method of execution for Washington. RCW 10.95.180(1). As a legislatively chosen method of execution, lethal injection is presumed constitutional. State v. Rupe, 101 Wn.2d 664, 698, 683 P.2d 571 (1984); State v. Frampton, 95 Wn.2d 469, 512-14 & 527, 627 P.2d 922 (1981); Gregg v. Georgia, 428 U.S. 153, 174-76 (1976); Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994) (en banc). Stenson bears the burden of rebutting the presumption of constitutionality by presenting clear, objective evidence that lethal injection is cruel punishment. See e.g. Frampton, 95 Wn.2d at 512-14 & 527; Campbell, 18 F.3d at 682; In re Kemmler, 136 U.S. 436, 447 (1890).

Stenson's speculation that the Department's policy for implementing the method of lethal injection might cause an unnecessary risk of pain because the policy allegedly does not set forth sufficient safeguards, does not require sufficient qualifications, and does not ensure officials will not commit errors when administering the lethal substances, does not demonstrate a violation of either the Eighth Amendment to the United States Constitution or Article I, Section 14 of the Washington Constitution. Contrary to Stenson's claims, speculation of a possibility of risk of pain does not render the method of execution unconstitutional. The possibility of an accident "cannot and need not be eliminated from the execution process in order to survive constitutional review." LeGrand v. Stewart, 133 F.3d 1253, 1265, (9th Cir. 1998) (quoting Campbell v. Wood, 18 F. at 668); see also Poland v. Stewart, 151 F. 3d 1014, 1023 (9th Cir. 1998) (rejecting claim that the Arizona method of lethal injection could cause severe pain).

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As noted above, the Washington Supreme already has rejected the claim that lethal injection is unconstitutional. Pirtle, 136 Wn.2d at 496; Lord, 123 Wn.2d at 325-26 & n.11. In addition, the United States Supreme Court this past year rejected the very claim now presented by Stenson. Baze v. Rees, 128 S. Ct. 1520 (2008). Therefore, Stenson's claim fails as a matter of law.

The Baze Court began its analysis by noting that the Federal Government and 36 States, including Washington, have adopted lethal injection as the exclusive or primary means of execution. Baze, 128 S. Ct. at 1526-27 & n.1. The Court then noted that at least 30 States (which includes Washington) use the same combination of the three drugs in their lethal injection protocol – first the administration of sodium thiopental, then pancuronium bromide, and then potassium chloride. Id. at 1527. The Court noted that the proper administration of the first drug, sodium thiopental, "ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs." Id. Reviewing the protocol used in Kentucky, the Court noted that Kentucky also uses this three drug protocol. Id. at 1528. The Court granted certiorari to determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment. Id. at 1529. After considering Baze's claims (which Stenson's claims mirror), the Court held the protocol was constitutional. Id. The Court further held that a lethal injection protocol substantially similar to Kentucky's protocol would not violate the Eighth Amendment. Id. at 1537. Since Stenson's claims are the same as the claims rejected by the Court in Baze, the Court's ruling disposes of Stenson's claim as a matter of law.[2] Stenson's complaint should be dismissed.

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[2] Stenson may argue that because Baze was a plurality opinion, it does not dispose of his claim. However, since the fourth and fifth Justices joining the Court's judgment (Justices Thomas and Scalia) would apply a rule even more deferential to the State, and would find no violation unless the State deliberately inflicted unnecessary pain, Stenson's claims clearly fail under the reasoning of a majority of the Justices of the Court.

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In reviewing Kentucky's protocol, the Supreme Court began with the principle that capital punishment is constitutional, and "[i]t necessarily follows that there must be a means of carrying it out." Baze, 128 S. Ct. at 1529. From this principle, the Court recognized,

> Some risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure. It is clear then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

Baze, 128 S. Ct. at 1529.

The Supreme Court noted it has never held a method of execution to be unconstitutional, and has upheld firing squads and electrocution as methods of execution. Baze, 128 S. Ct. at 1530 (citing Wilkerson v. Utah, 99 U.S. 130 (1879); In re Kemmler, 136 U.S. 436 (1890)). These methods were adopted to provide a more humane execution than previous methods and the Court noted that what the types of punishment forbidden by the Constitution "had in common was the deliberate infliction of pain for the sake of pain – 'superadd[ing]' pain to the death sentence through torture and the like." Baze, 128 S. Ct. at 1530. Addressing the contention that lethal injection presents a risk of pain, the Court rejected Baze's "unnecessary risk" standard, and ruled that to establish an Eighth Amendment violation, the conditions presenting risk must be "sure or likely" to cause needless suffering. Id. at 1530-32. The Court stressed "there must be a 'substantial risk of serious harm,'" and that "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual punishment." Id. at 1531. Because the Supreme Court rejected the unnecessary risk standard, Stenson's claim that lethal injection under the Department's policy is unconstitutional because it creates an unnecessary risk of pain fails as a matter of law.

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Like Stenson, Baze had also alleged the three drug protocol created an unnecessary risk of the infliction of pain because an alternative method (the one drug protocol) would eliminate a significant risk of harm.[3] Baze, 128 S. Ct. at 1531. Rejecting this argument, the Court ruled a prisoner cannot successfully challenge a State's method of execution by simply showing the existence of a safer alternative. Id. Such a "safer alternative" rule would improperly transform the courts into boards of inquiry charged with determining "best practices" for executions, would improperly embroil the courts in ongoing scientific controversies, and would improperly intrude upon the role of state legislatures to select a method of execution. Id.

Baze also raised the other allegations now advanced by Stenson's complaint. The Supreme Court rejected each claim. First, the Supreme Court found it is not "objectively intolerable" for a State to use the three drug protocol for lethal injection that is employed by thirty states. Baze, 128 S. Ct. at 1532 and 1534. Second, the Court found the risk that the first drug, sodium thiopental, might be improperly prepared or administered was not sufficient to establish a constitutional error. Id. at 1533. Thus, contrary to Stenson's claim, speculation that prison officials might make an error in the preparation and administration of the first drug is not sufficient to render the method unconstitutional. Id. Third, the Court rejected the claim that states should omit the second drug, pancuronium bromide. The Court ruled the use of the drug does not offend the Eighth Amendment. Id. at 1535. The Court noted that the drug serves two legitimate state interests – it preserves the dignity of the procedure, and it hastens death by stopping breathing. Id. The Court rejected the argument that pancuronium bromide is barred for the use by veterinarians because the argument "overlooks the States' legitimate interest in providing for a quick,

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[3] Stenson repeatedly alleges an alternative method, but he fails to specifically identify the details of this alternative method. Defendants assume the alternative method is the untried one drug method that the Baze Court held States need not adopt. Baze, 128 S. Ct. at 1534-35.

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