☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: 10/31/2008
Time: 9:00 a.m.
Judge: Wickham

HONORABLE CHRIS WICKHAM

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

DAROLD R. J. STENSON,

Plaintiff,

v.

ELDON VAIL, Secretary of Washington Department of Corrections (in his official capacity); *et al.*,

Defendants.

No. 08-2-02080-8

PLAINTIFF'S RESPONDING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR TRANSFER

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I. INTRODUCTION

Washington has never used its current lethal injection protocol to execute an inmate. Its last lethal injection execution took place more than seven years ago pursuant to a policy it no longer uses. And Washington has never used lethal injection to execute someone who did not "volunteer" to be executed.[1] There has never been a critical look at, nor has any Washington court sanctioned, the Department of Corrections' methods of execution.

The lethal injection landscape has changed dramatically since Washington's last lethal injection in 2001. The Department of Corrections ("DOC") has revised its execution protocol at least once since it was last used—including as recently as last year. In addition, the United States Supreme Court recently recognized that *how* a state executes people can and should be scrutinized under the Eighth Amendment to the United States Constitution. *See Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). *Baze* set forth new Eighth Amendment standards against which states' methods of execution must be judged.

Defendants ask this Court to avoid the review mandated by *Baze* and rubberstamp Washington's execution practices without even looking at them. They ask this Court to insulate them from *any* scrutiny despite (1) their apparent deficiency, and (2) Mr. Stenson's constitutional right to an execution free of cruel and unusual punishment.

Defendants would have Washington's lethal injection practices forever evade review based on their assurance that state officials "are presumed to conduct themselves properly." Defs.' Br. at 17. Perhaps unintentionally, Defendants identify the precise problem.

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[1] Washington has executed two people by lethal injection: James Elledge on August 28, 2001, and Jeremy Sagastegui on October 13, 1998. Neither man appealed his death sentence or challenged Washington's lethal injection methods. *See* Florangela Davila & David Postman, *Sagastegui Put to Death—State's First Execution by Lethal Injection*, Seattle Times, Oct. 13, 1998 (attached as Ex. 1); Rebekah Denn, *Some Killers More than Ready to Die*, Seattle Post-Intelligencer, Aug. 7, 2001 (attached as Ex. 2).

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Washington's lethal injection policy is conspicuously silent about how officials should conduct themselves, their qualifications, or what procedures are to be followed—safeguards required by *Baze*. The policy provides no standards to guide the executioner's conduct or assure minimum safeguards. Defendants' attorneys' glib assurance of "proper conduct" cannot insulate Washington's lethal injection methods from constitutional scrutiny.

Defendants' motion is premised on a (1) fundamental misunderstanding the central holding of *Baze* and (2) refusal to acknowledge the substantial differences between the Kentucky protocol approved in *Baze* and Washington's never-reviewed meager protocol. *Baze* announced new federal standards that Washington must follow when considering whether its execution methods constitute cruel and unusual punishment.[2] Under *Baze*, discovery of the state's methods is required, followed by "extensive hearings" and fact-finding to determine whether the "risk of pain from maladministration" of lethal drugs violates the Eighth Amendment. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1552 (Stevens, J., concurring).[3] The *Baze* Court's conclusion that Kentucky's protocol was constitutionally sufficient *absolutely depended* on safeguards in the protocol deemed sufficient by the Court to satisfy the Eighth Amendment. "In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation." *Id.* at 1534 (Roberts, C.J. plurality).

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[2] Further, Washington's ban on "cruel punishment" in art. I sec. 14 of the Washington Constitution "affords greater protection than its federal counterpart." *State v. Morin*, 100 Wn. App. 25, 995 P.2d 113 (2000).

[3] Defendants incorrectly assume, without any analysis, that the three-Justice plurality announced the Court's holding. Because *Baze* lacks a holding endorsed by a majority of Justices, the opinion of the Justices concurring in the judgment on the "narrowest grounds" is regarded as the Court's holding. *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). But even were the three-Justice plurality opinion controlling, it remains true that in the absence of discovery and "extensive hearings," a court cannot determine, as it must, whether the "risk of pain from maladministration" of the particular lethal-injection protocol used by a state satisfies Eighth Amendment standards. *Id.* at 1526 (Roberts, C.J., plurality).

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Washington's written protocol looks nothing like that in *Baze*. Accordingly, whether Mr. Stenson's execution will satisfy constitutional standards cannot be determined by simply ruling, as Defendants would have the Court do, that lethal injection execution is, in effect, *per se* constitutional simply because that mode of execution has previously been upheld by the courts. Defendants completely ignore that *Baze* now requires the state to disclose its methods—both its policies and actual practices—so that the Court can determine whether the state's protocols and methods are constitutionally sufficient.

The Complaint does *not* attack Mr. Stenson's conviction or sentence. Compl. ¶ 3. Nor does it attack Washington's right to execute him using lethal injection. This case presents the narrow question of whether Defendants' administration of Washington's execution statute "unnecessarily risks the infliction of torturous pain and suffering." *Id.* ¶ 4. Whether Washington employs specific safeguards sufficient to minimize the risk of maladministration of the death-causing drugs is a factual question that cannot be disposed of as a matter of law.

II. DEFENDANTS' MOTION MAY NOT BE GRANTED BECAUSE THEY CANNOT DEMONSTRATE, BEYOND DOUBT, THAT PLAINTIFF CANNOT PROVE ANY SET OF FACTS TO JUSTIFY THE RELIEF REQUESTED

Defendants fail to cite the authority under which they move to dismiss this case, but presumably their motion is made under CR 12(b)(6). Under this rule, dismissal is only appropriate if it is ***beyond doubt*** that Mr. Stenson cannot prove any set of facts which could justify the relief requested. *See, e.g., Parmelee v. O'Neel*, 145 Wn. App. 223, 232, 186 P.3d 1094 (2008); *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.2d 1230 (2005). This Court must accept all allegations of the complaint as true in making this determination. *Id.*

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III. FACTUAL BACKGROUND

A. Washington's Lethal Injection Statute

Washington's statute authorizing lethal injection execution provides no guidance for how death sentences shall be carried out. It simply calls for the "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead." RCW § 10.95.180(1). An inmate may elect death by hanging. *Id.*

The statute prescribes no specific drugs, dosages or manner of intravenous access. It also fails to prescribe any minimum qualifications for persons participating in the execution process. All details are delegated to DOC which can alter its protocol at any time.[4]

B. DOC Changes Its Lethal Injection Policy

Last year, DOC made what it called "[m]ajor changes" to its execution protocol, DOC 490.200 ("Policy"). Compl., Ex. 1 at 1. The Policy, effective June 21, 2007, calls for the sequential administration of three drugs: sodium thiopental (a general anesthetic), followed by pancuronium bromide (a paralytic agent), followed by potassium chloride (a heart-attack-inducing agent). Other than identifying the drugs and their sequence, the Policy fails to provide any guidance. *See* Policy 8-9. In fact, the portion of the Policy setting out lethal injection execution procedures is only two pages long.

C. United States Supreme Court Decides *Baze v. Rees*

Less than a year after Washington revised its execution policy, the United States Supreme Court decided *Baze* which recognized, for the first time, that an inmate under a death sentence can, under certain circumstances, prove that a state's lethal injection protocol violates the Eighth Amendment. *Baze*, 128 S. Ct. 1520. *Baze* requires courts to conduct a

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[4] DOC modified its policy 18 days before executing James Elledge. *See* Compl., Ex. 1.

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fact-based review of lethal-injection challenges. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1552 (Stevens, J., concurring).

Though the Supreme Court ruled that Kentucky's procedures for carrying out lethal injection survived constitutional scrutiny, that determination was based on a (1) factual record and hearing, including fact and expert testimony, reviewing Kentucky's procedures and (2) finding that Kentucky employed specific safeguards that minimized the risk of maladministration of the death-causing drugs. These safeguards included, for example, a minimum level of professional experience for individuals who insert intravenous ("IV") catheters, a requirement that the team regularly practice, a requirement of backup IV lines and other redundancies, and the warden's presence in execution chamber to watch for signs of consciousness and IV problems, and to redirect, as necessary, the flow of chemicals to the backup IV site if the inmate does not lose consciousness. *Id.* at 1533-34.

D. Public Disclosure Act Requests

Because Washington's written Policy contains none of the specific safeguards that satisfied the Supreme Court in *Baze*, undersigned counsel submitted public disclosure requests to DOC on July 1, 2008. *See* Peterson Decl. Ex. 2. In those requests, counsel sought documents that might confirm whether Washington, by policy or practice, utilizes safeguards that prevent the risk of maladministration of lethal drugs. *See* Peterson Decl. ¶ 3

No document provided by DOC to date discloses any intention by DOC to use any of the safeguards that saved Kentucky's lethal injection protocol, or any similar safeguards. *Id.* ¶ 4. For example, DOC has not identified: (1) minimum qualifications of the execution team; (2) sites where IV line(s) can be inserted; (3) number of IV lines; (4) whether a backup IV line is required; (5) how the drugs are stored, mixed, prepared and injected; (6) whether the correct dosage is determined based on an inmate's physical condition and

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medical history; (7) any monitoring for consciousness by anyone; (8) how the execution team proceeds if it cannot insert an IV line peripherally; (9) whether a cut-down or percutaneous procedure could be used and if so, whether DOC has an adequately trained person;[5] (10) whether DOC has any life-maintaining equipment and persons adequately trained to operate it; and (11) what contingency plans are in place for last minute complications and/or a last minute stay of execution. At a minimum, these facts must be known to determine whether Washington's execution protocol meets the minimum standards set by *Baze*. *See* Decl. of Michael J. Souter, M.D., submitted herewith. Further, it appears that DOC may not even be able to follow, in practice, what little it has in the way of procedure. The Policy requires the Director of Health Services to verify that the lethal injection table is in working order (Policy at 8), but the current Director has publicly stated his objection to carrying out that role. *See* Compl. ¶ 70 and Ex. B thereto.

IV. THIS CIVIL RIGHTS CASE BELONGS IN THIS COURT AND MAY NOT BE DISMISSED OR TRANSFERRED

A. This Is a Civil Rights Action Challenging the Constitutionality of DOC Actions

This is a civil rights case challenging the constitutionality of Washington's execution methods. This Court has original jurisdiction over this action under RCW § 2.08.010 because Mr. Stenson seeks equitable declaratory and injunctive relief. Compl. ¶ 10. Petitioners in *Baze* brought the same type of action. It is settled that constitutional

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[5] The use of the "cut down" procedure was challenged in *Baze*. During discovery, Kentucky Department of Corrections agreed to remove this procedure from its protocol. *Baze v. Rees*, No. 04-CI-1094, at n.7 (Franklin Circuit Court, July 8, 2005) (attached as Ex. 3); *see also Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004) (noting that the state agreed not to use the procedure unless actually necessary). After complaints that state officials used this procedure in past botched executions, the Arkansas Department of Corrections agreed not to use it. *See* Jon Gambrell, *Official: Ark. Won't Use "Cut-Downs" in Executions*, Associated Press, Aug. 1, 2008, *available at* Westlaw, APALERTAR 09:02:13 (attached as Ex. 4).

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challenges to a *method* of execution are cognizable in civil rights actions, even if challenges to the sentence are not.

While Defendants try to characterize Mr. Stenson's claim as a broad, general challenge to lethal injection as a method of execution, it is clear from the Complaint that this is not the case. Mr. Stenson does not challenge lethal injection as a method of execution. Instead, he challenges the lack of adequate procedures and trained personnel that make the risk of unnecessary pain and suffering constitutionally impermissible.

The Court should reject Defendants' attempt to immunize their execution methods from any oversight. Washington statutes do not describe how executions should be carried out, but instead delegate the methods and manner to DOC. DOC, in turn, creates and implements its execution policy with no guidance or oversight. *See* RCW § 34.05.030(1)(c) (exempting DOC from Washington's Administrative Procedures Act). Mr. Stenson's constitutional right to die free from cruel and unusual punishment clearly eclipses any interest the state could have in shielding its execution process from review.

B. The Complaint Alleges Civil Rights Violations, Not an Attack on Conviction Or Sentence

Mr. Stenson is not challenging his sentence, Compl. ¶ 3, nor attacking the constitutionality of execution by lethal injection or imposition of the death penalty. He asks only that Washington protect his constitutional right to be executed free from cruel and unusual punishment by modifying its protocol to correct its many flaws. *Id.* ¶¶ 26-71. This is quintessentially a civil rights case, and Mr. Stenson is not barred by his incarceration from bringing this challenge. *See, e.g.*, *Parmalee*, 145 Wn. App. at 246 (inmate had civil rights claim against DOC for its method of punishment).

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Because Defendants fundamentally misconstrue Mr. Stenson's Complaint, they erroneously assert that he can *only* find relief in state and federal post conviction procedures. But the "requirement to resort to state [post conviction] litigation" before filing a civil suit "is not, however, implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence." *Muhammad v. Close*, 540 U.S. 749, 124 S. Ct. 1303, 158 L. Ed. 2d 32 (2004); *cf. Parmalee*, 145 Wn. App. at 246. In *Muhammad*, a prisoner filed a civil rights suit against a prison official alleging that he had been charged with an infraction that subjected him to mandatory pre-hearing lockup in retaliation for prior lawsuits and grievance proceedings. 540 U.S. at 751. The Court held that "these administrative determinations do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of time to be served . . . that is not necessarily so." *Id.* at 754. Accordingly, the Court held that the civil suit was properly brought and the prisoner was not required to bring his challenge through habeas corpus proceedings.

Like *Muhammad*, Mr. Stenson's suit for injunctive relief cannot be "construed as seeking a judgment at odds with his conviction [or sentence]." *Id.* at 754-55. He does not challenge his sentence or the constitutionality of lethal injection punishment *per se*. He seeks only to bar Defendants from executing him in an unconstitutional manner.

The Supreme Court faced the same threshold issue in *Nelson*, when it considered whether the federal civil rights statute "is an appropriate vehicle for petitioner's Eighth Amendment claim" that challenges the means for effectuating petitioner's death sentence by lethal injection. 541 U.S. at 637. The district court had dismissed the complaint, ruling that the issues should have been raised in a habeas proceeding subject to the more stringent statutory requirements governing habeas actions. The Supreme Court rejected that

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argument—the same one Defendants in this case make—holding that "[a] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself" because "by . . . altering its method of execution, the State can go forward with the sentence." *Id.* at 644.

As in *Muhammad* and *Nelson*, Mr. Stenson's suit must be allowed to proceed as an independent civil action. He is not challenging his conviction or sentence. Executions can go forward using lethal injection if Defendants modify their lethal injection practices to comport with constitutional protections. It is within this Court's equitable power to fashion a remedy capable of preserving Defendants' interest in proceeding with executions while at the same time protecting inmates' constitutional rights not to be subjected to executions that present risk of serious harm. *See, e.g.*, *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046 (N.D. Cal. 2006); *cf. Ohio v. Rivera*, No. 04-CR-065940 (Lorain County Ct. of C.P., June 10, 2008) (modifying Ohio's lethal injection protocol to conform with Ohio's statutory requirement that execution be "quick[] and painless[]") ("*Rivera*") (attached as Ex. 5.)

C. Mr. Stenson Is Not Limited to Protecting His Civil Rights Through Personal Restraint Petitions

The personal restraint petition is Washington's appellate habeas device for subjecting restraints on liberty to judicial scrutiny. *Toliver v. Olsen*, 109 Wn.2d 607, 610-11, 746 P.2d 809 (1987). Defendants rely on two cases, *In re Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998), and *In re Lord*, 123 Wn.2d 296, 325, 868 P.2d 835, 854 (1994)—which summarily concluded that lethal injection is constitutional—to support their unfounded assertion that a lethal injection challenge can only be brought in a personal restraint petition.

Defendants' analysis is flawed in several respects. First, Mr. Stenson does not challenge the constitutionality of lethal injection as a means of execution; he challenges the

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method of lethal injection, a claim recognized by *Baze* and a host of other federal and state courts. *Pirtle* and *Lord*—both of which pre-date *Baze* and Washington's current execution policy and neither of which ever considered Washington's actual lethal injection process—are inapposite. *See Pirtle*, 136 Wn.2d at 497 (noting petitioner "fail[ed] to analogize" Washington's execution protocol to botched executions in other states) and *Lord*, 123 Wn.2d at 325 (commenting *in dicta* that lethal injection has been held constitutional).

Second, Defendants cite no case that supports their sweeping proposition that civil rights claims by incarcerated persons are not cognizable as civil rights actions—a position so broad that it would effectively bar the courthouse door to constitutional claims asserted by inmates.[6] They fail to cite a single case in which a Washington court rejected a civil rights case on the ground that it should have been brought as a personal restraint petition. The cases cited by Defendants stand, at most, for the proposition that a challenge to lethal injection *may* be brought in a personal restraint petition (ironically, a position that the State has routinely opposed in other cases). *See, e.g.*, *In re Arseneau*, 98 Wn. App. 368, 372, 989 P.2d 1197 (1999) (rejecting State's argument that petitioner should be barred from filing a personal restraint petition because he could file a civil rights action); *In re Metcalf*, 92 Wn. App. 165, 173, 963 P.2d 911 (1998) (rejecting State's argument that personal restraint petition was improper way to challenge State's automatic payroll deduction statute).

Parmalee confirms that the superior courts of this state provide an appropriate forum in which an incarcerated inmate can raise constitutional claims relating to punishment. In *Parmalee*, the plaintiff brought a civil rights lawsuit in the Superior Court of Clallam

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[6] Such a rule would undoubtedly implicate state and federal equal protection guarantees. Wash. Const. art. 1, § 4 ("The right to petition . . . shall never be abridged."); § 12 (protecting privileges and immunities); U.S. Const. amends. V, XIV.

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County and successfully challenged a DOC punishment that the court found violated his First Amendment rights. *Parmalee*, 145 Wn. App. at 246.

Moreover, Washington courts recognize that personal restraint petitions are not a forced substitute for cases over which the superior courts have original jurisdiction. In *Toliver*, the Court of Appeals had held, *inter alia*, that a prisoner's failure to seek relief by a personal restraint petition precluded the Superior Court's consideration of his habeas petition. The Washington Supreme Court reversed, holding that the Superior Court, Court of Appeals, and Washington Supreme Court had concurrent jurisdiction and the prisoner was not required to bring his complaint as a personal restraint petition. Ruling otherwise would unconstitutionally divest the Superior Court of its jurisdiction. 109 Wn.2d at 611.

Finally and most fundamentally, Defendants again completely ignore *Baze*. Like the present case, *Baze* was a state civil declaratory action challenging Kentucky's lethal injection protocol under state and federal constitutional provisions. The Kentucky DOC sought to dismiss the complaint, arguing, as Defendants do here, that a challenge to the methods of lethal injection could not be brought as a civil rights complaint seeking declaratory and injunctive relief. The trial court, citing *Nelson*, 541 U.S. 637, disagreed: "[C]laims involving the manner and means of the Commonwealth of Kentucky's lethal injection protocol are properly before the Court." *Baze v. Rees*, No. 04-CI-1094, at 4 (Franklin Circuit Court, Oct. 13, 2004) (attached as Ex. 6). Mr. Stenson seeks here what the Supreme Court in *Baze* requires: a careful review of the manner and means of Washington's execution protocol.

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