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	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.

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).

1 Washington's lethal injection policy is conspicuously silent about how officials should
2
3 conduct themselves, their qualifications, or what procedures are to be followed—safeguards
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5 required by *Baze*. The policy provides no standards to guide the executioner's conduct or
6
7 assure minimum safeguards. Defendants' attorneys' glib assurance of "proper conduct"
8
9 cannot insulate Washington's lethal injection methods from constitutional scrutiny.

10
11 Defendants' motion is premised on a (1) fundamental misunderstanding the central
12
13 holding of *Baze* and (2) refusal to acknowledge the substantial differences between the
14
15 Kentucky protocol approved in *Baze* and Washington's never-reviewed meager protocol.
16
17 *Baze* announced new federal standards that Washington must follow when considering
18
19 whether its execution methods constitute cruel and unusual punishment.² Under *Baze*,
20
21 discovery of the state's methods is required, followed by "extensive hearings" and fact-
22
23 finding to determine whether the "risk of pain from maladministration" of lethal drugs
24
25 violates the Eighth Amendment. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1552 (Stevens,
26
27 J., concurring).³ The *Baze* Court's conclusion that Kentucky's protocol was constitutionally
28
29 sufficient *absolutely depended* on safeguards in the protocol deemed sufficient by the Court
30
31 to satisfy the Eighth Amendment. "In light of these safeguards, we cannot say that the risks
32
33 identified by petitioners are so substantial or imminent as to amount to an Eighth
34
35 Amendment violation." *Id.* at 1534 (Roberts, C.J. plurality).

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40 ² Further, Washington's ban on "cruel punishment" in art. I sec. 14 of the Washington Constitution
41 "affords greater protection than its federal counterpart." *State v. Morin*, 100 Wn. App. 25, 995 P.2d 113 (2000).
42 ³ Defendants incorrectly assume, without any analysis, that the three-Justice plurality announced the
43 Court's holding. Because *Baze* lacks a holding endorsed by a majority of Justices, the opinion of the Justices
44 concurring in the judgment on the "narrowest grounds" is regarded as the Court's holding. *Marks v. United*
45 *States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). But even were the three-Justice plurality
46 opinion controlling, it remains true that in the absence of discovery and "extensive hearings," a court cannot
47 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).

1 Washington's written protocol looks nothing like that in *Baze*. Accordingly, whether
2
3 Mr. Stenson's execution will satisfy constitutional standards cannot be determined by
4
5 simply ruling, as Defendants would have the Court do, that lethal injection execution is, in
6
7 effect, *per se* constitutional simply because that mode of execution has previously been
8
9 upheld by the courts. Defendants completely ignore that *Baze* now requires the state to
10
11 disclose its methods—both its policies and actual practices—so that the Court can determine
12
13 whether the state's protocols and methods are constitutionally sufficient.

14
15 The Complaint does *not* attack Mr. Stenson's conviction or sentence. Compl. ¶ 3.
16
17 Nor does it attack Washington's right to execute him using lethal injection. This case
18
19 presents the narrow question of whether Defendants' administration of Washington's
20
21 execution statute "unnecessarily risks the infliction of torturous pain and suffering." *Id.* ¶ 4.
22
23 Whether Washington employs specific safeguards sufficient to minimize the risk of
24
25 maladministration of the death-causing drugs is a factual question that cannot be disposed of
26
27 as a matter of law.

28
29 **II. DEFENDANTS' MOTION MAY NOT BE GRANTED BECAUSE THEY**
30 **CANNOT DEMONSTRATE, BEYOND DOUBT, THAT PLAINTIFF CANNOT**
31 **PROVE ANY SET OF FACTS TO JUSTIFY THE RELIEF REQUESTED**

32
33 Defendants fail to cite the authority under which they move to dismiss this case, but
34
35 presumably their motion is made under CR 12(b)(6). Under this rule, dismissal is only
36
37 appropriate if it is *beyond doubt* that Mr. Stenson cannot prove any set of facts which could
38
39 justify the relief requested. *See, e.g., Parmelee v. O'Neel*, 145 Wn. App. 223, 232, 186 P.3d
40
41 1094 (2008); *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.2d 1230 (2005). This Court
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43 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

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

1 fact-based review of lethal-injection challenges. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at
2 1552 (Stevens, J., concurring).
3

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

26 Because Washington's written Policy contains none of the specific safeguards that
27 satisfied the Supreme Court in *Baze*, undersigned counsel submitted public disclosure
28 requests to DOC on July 1, 2008. *See* Peterson Decl. Ex. 2. In those requests, counsel
29 sought documents that might confirm whether Washington, by policy or practice, utilizes
30 safeguards that prevent the risk of maladministration of lethal drugs. *See* Peterson Decl. ¶ 3
31
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36 No document provided by DOC to date discloses any intention by DOC to use any of
37 the safeguards that saved Kentucky's lethal injection protocol, or any similar safeguards. *Id.*
38 ¶ 4. For example, DOC has not identified: (1) minimum qualifications of the execution
39 team; (2) sites where IV line(s) can be inserted; (3) number of IV lines; (4) whether a
40 backup IV line is required; (5) how the drugs are stored, mixed, prepared and injected;
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47 (6) whether the correct dosage is determined based on an inmate's physical condition and

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

23
24
25 **IV. THIS CIVIL RIGHTS CASE BELONGS IN THIS COURT AND**
26 **MAY NOT BE DISMISSED OR TRANSFERRED**

27
28 **A. This Is a Civil Rights Action Challenging the Constitutionality of DOC Actions**

29 This is a civil rights case challenging the constitutionality of Washington's execution
30 methods. This Court has original jurisdiction over this action under RCW § 2.08.010
31 because Mr. Stenson seeks equitable declaratory and injunctive relief. Compl. ¶ 10.
32
33

34 Petitioners in *Baze* brought the same type of action. It is settled that constitutional
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41
42 ⁵ The use of the "cut down" procedure was challenged in *Baze*. During discovery, Kentucky
43 Department of Corrections agreed to remove this procedure from its protocol. *Baze v. Rees*, No. 04-CI-1094,
44 at n.7 (Franklin Circuit Court, July 8, 2005) (attached as Ex. 3); see also *Nelson v. Campbell*, 541 U.S. 637,
45 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004) (noting that the state agreed not to use the procedure unless actually
46 necessary). After complaints that state officials used this procedure in past botched executions, the Arkansas
47 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).

1 challenges to a *method* of execution are cognizable in civil rights actions, even if challenges
2
3 to the sentence are not.

4
5 While Defendants try to characterize Mr. Stenson's claim as a broad, general
6
7 challenge to lethal injection as a method of execution, it is clear from the Complaint that this
8
9 is not the case. Mr. Stenson does not challenge lethal injection as a method of execution.
10
11 Instead, he challenges the lack of adequate procedures and trained personnel that make the
12
13 risk of unnecessary pain and suffering constitutionally impermissible.

14
15 The Court should reject Defendants' attempt to immunize their execution methods
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17 from any oversight. Washington statutes do not describe how executions should be carried
18
19 out, but instead delegate the methods and manner to DOC. DOC, in turn, creates and
20
21 implements its execution policy with no guidance or oversight. *See* RCW § 34.05.030(1)(c)
22
23 (exempting DOC from Washington's Administrative Procedures Act). Mr. Stenson's
24
25 constitutional right to die free from cruel and unusual punishment clearly eclipses any
26
27 interest the state could have in shielding its execution process from review.

28
29 **B. The Complaint Alleges Civil Rights Violations, Not an Attack on Conviction Or**
30 **Sentence**

31
32 Mr. Stenson is not challenging his sentence, Compl. ¶ 3, nor attacking the
33
34 constitutionality of execution by lethal injection or imposition of the death penalty. He asks
35
36 only that Washington protect his constitutional right to be executed free from cruel and
37
38 unusual punishment by modifying its protocol to correct its many flaws. *Id.* ¶¶ 26-71. This
39
40 is quintessentially a civil rights case, and Mr. Stenson is not barred by his incarceration from
41
42 bringing this challenge. *See, e.g., Parmalee*, 145 Wn. App. at 246 (inmate had civil rights
43
44 claim against DOC for its method of punishment).

1 Because Defendants fundamentally misconstrue Mr. Stenson’s Complaint, they
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3 erroneously assert that he can *only* find relief in state and federal post conviction procedures.
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5 But the “requirement to resort to state [post conviction] litigation” before filing a civil suit
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7 “is not, however, implicated by a prisoner’s challenge that threatens no consequence for his
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9 conviction or the duration of his sentence.” *Muhammad v. Close*, 540 U.S. 749, 124 S. Ct.
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11 1303, 158 L. Ed. 2d 32 (2004); *cf. Parmalee*, 145 Wn. App. at 246. In *Muhammad*, a
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13 prisoner filed a civil rights suit against a prison official alleging that he had been charged
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15 with an infraction that subjected him to mandatory pre-hearing lockup in retaliation for prior
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17 lawsuits and grievance proceedings. 540 U.S. at 751. The Court held that “these
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19 administrative determinations do not as such raise any implication about the validity of the
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21 underlying conviction, and although they may affect the duration of time to be served . . .
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23 that is not necessarily so.” *Id.* at 754. Accordingly, the Court held that the civil suit was
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25 properly brought and the prisoner was not required to bring his challenge through habeas
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27 corpus proceedings.

28 Like *Muhammad*, Mr. Stenson’s suit for injunctive relief cannot be “construed as
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30 seeking a judgment at odds with his conviction [or sentence].” *Id.* at 754-55. He does not
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32 challenge his sentence or the constitutionality of lethal injection punishment *per se*. He
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34 seeks only to bar Defendants from executing him in an unconstitutional manner.
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36 The Supreme Court faced the same threshold issue in *Nelson*, when it considered
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38 whether the federal civil rights statute “is an appropriate vehicle for petitioner’s Eighth
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40 Amendment claim” that challenges the means for effectuating petitioner’s death sentence by
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42 lethal injection. 541 U.S. at 637. The district court had dismissed the complaint, ruling that
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44 the issues should have been raised in a habeas proceeding subject to the more stringent
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46 statutory requirements governing habeas actions. The Supreme Court rejected that
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1 argument—the same one Defendants in this case make—holding that “[a] suit seeking to
2 enjoin a particular means of effectuating a sentence of death does not directly call into
3 question the ‘fact’ or ‘validity’ of the sentence itself” because “by . . . altering its method of
4 execution, the State can go forward with the sentence.” *Id.* at 644.
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9 As in *Muhammad* and *Nelson*, Mr. Stenson’s suit must be allowed to proceed as an
10 independent civil action. He is not challenging his conviction or sentence. Executions can
11 go forward using lethal injection if Defendants modify their lethal injection practices to
12 comport with constitutional protections. It is within this Court’s equitable power to fashion
13 a remedy capable of preserving Defendants’ interest in proceeding with executions while at
14 the same time protecting inmates’ constitutional rights not to be subjected to executions that
15 present risk of serious harm. *See, e.g., Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046
16 (N.D. Cal. 2006); *cf. Ohio v. Rivera*, No. 04-CR-065940 (Lorain County Ct. of C.P.,
17 June 10, 2008) (modifying Ohio’s lethal injection protocol to conform with Ohio’s statutory
18 requirement that execution be “quick[] and painless[]”) (“*Rivera*”) (attached as Ex. 5.)
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29 **C. Mr. Stenson Is Not Limited to Protecting His Civil Rights Through Personal**
30 **Restraint Petitions**

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32 The personal restraint petition is Washington’s appellate habeas device for
33 subjecting restraints on liberty to judicial scrutiny. *Toliver v. Olsen*, 109 Wn.2d 607, 610-
34 11, 746 P.2d 809 (1987). Defendants rely on two cases, *In re Pirtle*, 136 Wn.2d 467, 965
35 P.2d 593 (1998), and *In re Lord*, 123 Wn.2d 296, 325, 868 P.2d 835, 854 (1994)—which
36 summarily concluded that lethal injection is constitutional—to support their unfounded
37 assertion that a lethal injection challenge can only be brought in a personal restraint petition.
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44 Defendants’ analysis is flawed in several respects. First, Mr. Stenson does not
45 challenge the constitutionality of lethal injection as a means of execution; he challenges the
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1 *method* of lethal injection, a claim recognized by *Baze* and a host of other federal and state
2 courts. *Pirtle* and *Lord*—both of which pre-date *Baze* and Washington’s current execution
3 policy and neither of which ever considered Washington’s actual lethal injection process—
4 are inapposite. See *Pirtle*, 136 Wn.2d at 497 (noting petitioner “fail[ed] to analogize”
5 Washington’s execution protocol to botched executions in other states) and *Lord*, 123
6 Wn.2d at 325 (commenting *in dicta* that lethal injection has been held constitutional).
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13 Second, Defendants cite no case that supports their sweeping proposition that civil
14 rights claims by incarcerated persons are not cognizable as civil rights actions—a position so
15 broad that it would effectively bar the courthouse door to constitutional claims asserted by
16 inmates.⁶ They fail to cite a single case in which a Washington court rejected a civil rights
17 case on the ground that it should have been brought as a personal restraint petition. The
18 cases cited by Defendants stand, at most, for the proposition that a challenge to lethal
19 injection *may* be brought in a personal restraint petition (ironically, a position that the State
20 has routinely opposed in other cases). See, e.g., *In re Arseneau*, 98 Wn. App. 368, 372, 989
21 P.2d 1197 (1999) (rejecting State’s argument that petitioner should be barred from filing a
22 personal restraint petition because he could file a civil rights action); *In re Metcalf*, 92 Wn.
23 App. 165, 173, 963 P.2d 911 (1998) (rejecting State’s argument that personal restraint
24 petition was improper way to challenge State’s automatic payroll deduction statute).
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37 *Parmalee* confirms that the superior courts of this state provide an appropriate forum
38 in which an incarcerated inmate can raise constitutional claims relating to punishment. In
39 *Parmalee*, the plaintiff brought a civil rights lawsuit in the Superior Court of Clallam
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45 ⁶ Such a rule would undoubtedly implicate state and federal equal protection guarantees. Wash.
46 Const. art. 1, § 4 (“The right to petition . . . shall never be abridged.”); § 12 (protecting privileges and
47 immunities); U.S. Const. amends. V, XIV.

1 County and successfully challenged a DOC punishment that the court found violated his
2 First Amendment rights. *Parmalee*, 145 Wn. App. at 246.
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5 Moreover, Washington courts recognize that personal restraint petitions are not a
6 forced substitute for cases over which the superior courts have original jurisdiction. In
7 *Toliver*, the Court of Appeals had held, *inter alia*, that a prisoner's failure to seek relief by a
8 personal restraint petition precluded the Superior Court's consideration of his habeas
9 petition. The Washington Supreme Court reversed, holding that the Superior Court, Court
10 of Appeals, and Washington Supreme Court had concurrent jurisdiction and the prisoner
11 was not required to bring his complaint as a personal restraint petition. Ruling otherwise
12 would unconstitutionally divest the Superior Court of its jurisdiction. 109 Wn.2d at 611.
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16 Finally and most fundamentally, Defendants again completely ignore *Baze*. Like the
17 present case, *Baze* was a state civil declaratory action challenging Kentucky's lethal
18 injection protocol under state and federal constitutional provisions. The Kentucky DOC
19 sought to dismiss the complaint, arguing, as Defendants do here, that a challenge to the
20 methods of lethal injection could not be brought as a civil rights complaint seeking
21 declaratory and injunctive relief. The trial court, citing *Nelson*, 541 U.S. 637, disagreed:
22 "[C]laims involving the manner and means of the Commonwealth of Kentucky's lethal
23 injection protocol are properly before the Court." *Baze v. Rees*, No. 04-CI-1094, at 4
24 (Franklin Circuit Court, Oct. 13, 2004) (attached as Ex. 6). Mr. Stenson seeks here what the
25 Supreme Court in *Baze* requires: a careful review of the manner and means of Washington's
26 execution protocol.
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1 **D. Baze Requires Disclosure and Factual Analysis of the DOC's Execution**
2 **Protocol**

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4 After *Baze*, the question for this Court is whether the lethal injection practices,
5 particularly the means to assure that the first anesthetic drug is properly administered,
6 include sufficient safeguards to satisfy constitutional requirements. This inquiry is
7 necessary because, as the Supreme Court recognized, “[i]t is uncontested that, *failing a*
8 *proper dose of sodium thiopental* that would render the prisoner unconscious, there is a
9 *substantial, constitutionally unacceptable risk of suffocation* from the administration of
10 pancuronium bromide *and pain* from the injection of potassium chloride.” *Baze*, 128 S. Ct.
11 at 1533 (emphasis added).
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19 As written, the similarities between the Kentucky policy upheld in *Baze* and
20 Washington begin and end with the type and sequence of drugs administered. *Compare*
21 Kentucky Policy (attached as Ex. 7) with Compl., Ex. 1. The quantities of drug are
22 different. Training standards for executioners are nonexistent in Washington. In *Baze*, the
23 Court identified no less than seven safeguards that, taken together, caused the Court to rule
24 that Kentucky’s protocol avoided the risk of persons suffering severe and unnecessary pain
25 while being executed. *Baze*, 128 S. Ct. at 1533-34 (describing safeguards); *see supra*
26 Part III.C. Washington’s Policy requires *none* of these safeguards.
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35 Defendants contend that the question of whether the lethal injection procedures they
36 use are constitutional is an easy one. It is not. As the Supreme Court understood, the
37 facts—how the procedure is done in practice—matter. Plaintiff submits herewith the
38 Declaration of Dr. Michael Souter which describes the medical aspects of the lethal injection
39 process, the risks, and gives examples of types of safeguards needed to assure that a proper
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1 dose of sodium thiopental is administered. Souter Decl. ¶¶ 9-19. As Dr. Souter describes,
2 and as *Baze* recognized, this is a fact specific and complicated inquiry. *Id.*, ¶¶ 22-23.
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4 Defendants completely misread *Baze*. *Baze* did not insulate lethal injection
5 challenges from attack. To the contrary, it recognized that minimum safeguards are
6 essential. Since *Baze*, courts have reviewed whether the state protocols before them are
7 substantially similar to Kentucky's and whether states have in place adequate protections to
8 avoid the "substantial, constitutionally unacceptable risk of suffocation." *Baze*, 128 S. Ct. at
9 1533. For example, after an evidentiary hearing, an Ohio court recently concluded that
10 Ohio's protocol "create[s] an unnecessarily risk of causing an agonizing or excruciatingly
11 painful death" and "deprives the condemned person of the substantive right to expect and to
12 suffer an execution without suffering an agonizing and excruciatingly painful death."
13

14 *Rivera*, No. 04-CR-065940, at 8. In *Harbison v. Little*, 511 F. Supp. 2d 872 (M.D. Tenn.
15 2007), the court enjoined the state from carrying out executions because the protocol did not
16 include sufficient safeguards. Likewise, a court concluded that California's lethal injection
17 protocol "is broken" after conducting "a thorough review of every aspect of the protocol,
18 including the composition and training of the execution team, the equipment and apparatus
19 used in executions, the pharmacology and pharmacokinetics of the drugs involved, and the
20 available documentary and anecdotal evidence concerning every execution in California."
21

22 *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006). A North Carolina court
23 scheduled arguments in a lethal injection case because "[condemned inmates] have a right to
24 be heard." Estes Thompson, *Judge Wants to Hear Arguments in NC Execution Case*, The
25 News & Observer Publishing Co., Oct. 16, 2008 (attached as Ex. 8). Courts and legislatures
26 have considered lethal injection challenges in the past year in Alabama, Arizona, Arkansas,
27 California, Delaware, Florida, Georgia, Kentucky, Maryland, Missouri, New Jersey,
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1 Nevada, North Carolina, Ohio, South Dakota, Tennessee, Texas, Virginia. *See* Lethal
2 Injection: Moratorium on Executions Ends After Supreme Court Decision,
3 <http://deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme->
4 [court-decision](http://deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-) (last visited Oct. 17, 2008).
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8 Washington's Policy is nothing like Kentucky's, and this Court cannot determine
9 without a thorough examination whether Washington's practices avoid the risk of
10 maladministration of lethal drugs.⁷
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15 **E. Mr. Stenson Has a Due Process Right to Discover If DOC's Practices Violate**
16 **the Washington and United States Constitutions**

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18 *Baze* requires a fact intensive inquiry, and Mr. Stenson must have an opportunity to
19 discover how Washington intends to administer its lethal injection Policy. *Cf. Stewart v.*
20 *LaGrand*, 526 U.S. 115, 119, 119 S. Ct. 1018, 143 L. Ed. 2d 196 (1999) (death row inmates
21 entitled to notice of post-conviction changes in mode of execution).
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25 The Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's
26 ban on cruel and unusual punishment protect from execution based on secret information.
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28 *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed 2d 133 (1994);
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30 *Gardner v. Florida*, 430 U.S. 349, 357, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Surely, if
31 an inmate cannot be sentenced to death based on secret information, he cannot be executed
32 under a secret procedure which he had no notice of or opportunity to challenge.
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37 Mr. Stenson is not in a position to know whether DOC has constitutional safeguards
38 required to prevent severe and unnecessary pain. The Supreme Court acknowledged that an
39 improper dose of sodium thiopental *will create* a "substantial, constitutionally unacceptable
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45 ⁷ Even if the written policy were similar, *Baze* would still require that the state disclose its actual
46 practices and that the Court review all of the facts. 128 S. Ct. at 1533-34 (describing supplements to
47 Kentucky's written policy that provide critical safeguards against maladministration).

1 risk of suffocation from the administration of pancuronium bromide and pain from the
2 injection of potassium chloride.” *Baze*, 128 S. Ct. at 1533. Nothing in the Policy or
3 documents disclosed by DOC safeguards against this risk. The most that can be discerned
4 from Washington’s policy is that it omits the very safeguards that salvaged Kentucky’s
5 protocol. Discovery is necessary to determine whether Washington has supplemented its
6 written policy with anything else that could arguably provide meaningful safeguards.
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13 **F. There Is No Authority to Transfer This Case to the Washington Supreme Court**

14 Defendants cite no authority for converting a civil rights declaratory action into a
15 personal restraint petition and transferring it to the state supreme court. None exists.
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18 In state and federal courts, venue statutes govern the circumstances under which a
19 case may be transferred between trial courts vested with original jurisdiction. *See* RCW
20 §§ 4.12.030, 4.12.060 (authorizing change of venue between counties); 28 U.S.C. § 1404
21 (authorizing change of venue between federal district courts). No state statute or rule
22 authorizes transfer of a case from a Washington state trial court to its highest appellate court.
23 Court rules carefully control access to the Washington Supreme Court. *See* RAP 13.1
24 (providing that the “only method of seeking review by the Supreme Court” is “discretionary
25 review”); RAP 13.4(b) (describing conditions governing acceptance of review).
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34 The Washington criminal rule cited by Defendants is inapposite. Washington
35 criminal rules, which apply only to “criminal proceedings,” CrR 1.1, provide for the transfer
36 of a *criminal* case to the Washington Court of Appeals (not the Supreme Court) and then
37 only when the defendant moves to vacate a judgment. *See* CrR 7.8. In other words, the
38 criminal transfer rule permits a Superior Court to transfer a challenge to a *conviction* to the
39 Court of Appeals which can hear a personal restraint petition. As discussed at length above,
40 Mr. Stenson is not challenging his conviction or seeking to vacate his judgment and this is
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1 not a criminal proceeding. But even if all these factors were present, CrR 7.8(c) authorizes
2 transfer only to the Court of Appeals, not the Washington Supreme Court. CrR 7.8 by its
3 terms does not permit the transfer Defendants seek.
4

5
6 Moreover, the Washington Supreme Court is a particularly unsuitable forum for the
7 discovery and fact-finding required by *Baze*. Defendants admit that *Baze*, at a minimum,
8 requires a showing of “substantial similar[ity]” between Washington and Kentucky’s
9 protocols, Defs.’ Br. at 13, though they do not attempt to make this showing. As courts
10 have observed, when the “applicable statutes and the record” do not reveal whether the
11 challenged protocol is “substantially similar” to the protocol in *Baze*, discovery is necessary.
12
13 *See Moeller v. Weber*, No. Civ. 04-4200, 2008 WL 1957842, at *3-9 (D.S.D. May 2, 2008).
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17 The Washington Supreme Court is the state’s highest appellate court, not a court that
18 is equipped to manage discovery and conduct fact-finding. *Cf.* RAP 16.26 (describing the
19 limited circumstances under which the Supreme Court may authorize discovery in a
20 personal restraint petition challenging conviction or sentence of death). This Court, by
21 contrast, is vested with authority to consider and decide the issues presented by
22 Mr. Stenson’s complaint. *See* RCW § 2.08.010 (“The superior court shall have original
23 jurisdiction in all cases in equity”) This Court, as a trial court, is the best equipped to
24 oversee discovery and fact-finding, and to conduct an evidentiary hearing.
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37 **G. Mr. Stenson’s Complaint Is Not Barred by Any Statute of Limitations**

38 Defendants have the burden to prove this defense, a burden they cannot meet.⁸

39 Dismissal under Rule 12(b)(6) requires that all facts necessary to the determination of the
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⁸ Notably, Defendants argue, on the one hand, that 42 U.S.C. § 1983 is not relevant because they dislike the well-settled law expressly authorizing civil actions challenging lethal injection methods. They then change tack completely and assert that the Court can somehow borrow statute of limitations rules from 42 U.S.C. § 1983 case law. Compounding Defendants’ argument—again—is their refusal to acknowledge the basis for this action and their misreading of the Complaint.

1 defense be pled in the Complaint. As evident from the discussion below, Defendants'
2 reliance on this defense depends on many facts which are not set out in the Complaint.
3

4 Defendants' claim fails on its face for three additional reasons as well: (1) statutes of
5 limitations do not apply to purely equitable claims, (2) no statute of limitations applies to
6 constitutional challenges to systemic policy nor do statutes of limitations begin to run on
7 continuing constitutional violations, and (3) even if Washington's three-year statute of
8 limitations did apply, Mr. Stenson's claim was filed within the statutory period.
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15 **1. Statutes of Limitations Do Not Apply to Cases Seeking Purely Equitable**
16 **Relief**

17 Mr. Stenson seeks purely equitable relief, namely a declaration that Defendants'
18 lethal injection practices are unconstitutional and an injunction from executing him "using
19 the practices and procedures *currently* employed by DOC in lethal injections." Compl., at
20 21-22 (emphasis added). Because "[s]tatutes of limitation go to matters of remedy, not
21 destruction of fundamental rights," *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.
22 Ct. 1137, 89 L. Ed. 1628 (1945), where, as here, a plaintiff seeks only equitable remedies,
23 "statutes of limitations are not controlling measures," *Holmberg v. Armbrecht*, 327 U.S. 392,
24 396, 66 S. Ct. 582, 90 L. Ed. 743 (1946). Instead, the equitable doctrine of laches applies.
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⁹ See also *Russell v. Todd*, 309 U.S. 280, 287, 60 S. Ct. 527, 84 L. Ed. 754 (1940) ("From the beginning, equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant."); *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003); *accord Freeman v. Cincinnati Gas & Elec. Co.*, No. 1:05CV179, 2005 WL 2837466, at *2 (S.D. Ohio Oct. 27, 2005) ("statutes of limitations historically do not control measures of equitable relief"); *United States v. Am. Elec. Power Serv. Corp.*, 137 F. Supp. 2d 1060, 1067-8 (S.D. Ohio 2001) (statutes of limitations do not bar injunctive relief because they "historically do not control measures of equitable relief"); *United States v. Am. Elec. Power Serv. Corp.*, 136 F. Supp. 2d 808, 811 (S.D. Ohio 2001) (quoting *Holmberg*, 327 U.S. at 396: "statutes of limitations are not controlling measures of equitable relief"); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 805 (8th Cir. 1979), citing *Holmberg*, 327 U.S. at 396; *Nicholson v. Bd. of Comm'rs of the Ala. State Bar Ass'n*, 338 F. Supp. 48, 53 (M.D. Ala.

1 relief under a federal statute was barred by a New York state statute of limitations. There,
2 the federal statute at issue, the Federal Farm Loan Act—like 42 U.S.C. § 1983—did not
3 contain a statute of limitations. The Supreme Court held that it was not appropriate to apply
4 a state statute of limitations because (1) plaintiffs were seeking purely equitable relief and
5 (2) a federal right was at stake. *Holmberg*, 327 U.S. at 395. Instead, the doctrine of laches,
6 rather than statute of limitations, governed the inquiry into whether the case was filed too
7 late.¹⁰

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15 Laches cannot bar an action unless the plaintiff (1) had a reasonable opportunity to
16 discover the basis for the cause of action, (2) unreasonably delayed in commencing the
17 action and (3) the defendant has been damaged by the delay. *In re Marriage of Leslie*, 112
18 Wn.2d 612, 619, 772 P.2d 1013 (1989); *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375, 680
19 P.2d 453 (1984). Defendants cannot establish any, much less all, of these elements.

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25 First, Defendants are not prejudiced. They are obliged not perform executions in
26 violation of the state and federal constitutions. They have, and always have had, the power
27 to adopt practices with sufficient safeguards. Defendants are not prejudiced by court review
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34 1972) (section 1983 First Amendment claims not barred by the statute of limitations since plaintiffs sought
35 only injunctive and declaratory relief).

36 Defendants surprisingly rely on *Neville v. Johnson*, 440 F.3d 221 (5th Cir. 2006), as a case that has
37 “squarely addressed the statute of limitations for constitutional challenges to the methods of execution” in
38 § 1983 cases. Defs.’ Br. at 10. But *Neville* did not even mention statutes of limitations. In fact, the Court
39 applied a laches analysis to determine whether the equitable relief sought was timely and ruled that it was not
40 because the lawsuit was filed two days prior to the execution.

41 The Fifth Circuit’s recent decision in *McNair v. Allen*, 515 F.3d 1168, 1172 (5th Cir. 2008), ignores
42 *Neville*, though it acknowledged that “[c]ourts assessing the timeliness of a § 1983 method of execution
43 challenge may do so in either of two ways,” applying the state’s statute of limitations or using an “equitable
44 inquiry,” *i.e.*, laches analysis. Inexplicably, the Court then held that all § 1983 claims are tort claims subject to
45 a statute of limitations, citing as sole authority *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 254
46 (1985), which adopted a generic rule for § 1983 claims by analogizing to state “tort action[s] for the recovery
47 of damages” *McNair* ignored that the claimant sought equitable relief, not damages, and ignored prior
Supreme Court precedent specific to equitable claims. The only other case defendants cite is *Cooley v.*
Strickland, 479 F.3d 412, 416 (11th Cir. 2007), which uses the same faulty analysis.

1 of their methods which is required by *Baze*, or by waiting to execute inmates until they have
2 a valid policy that satisfies constitutional standards.
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5 Second, Defendants cannot establish that Mr. Stenson had a reasonable opportunity
6 to discover the basis for his cause of action and delayed unreasonably in commencing it.
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8 This inquiry cannot be answered by examining the allegations in the Complaint as this Court
9 must do on this Motion to Dismiss. At a minimum, whether and when Mr. Stenson knew or
10 should have known about the means to challenge the DOC's lethal injection protocol present
11 factual questions that cannot be addressed on a Motion to Dismiss.
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17 The facts will show that Mr. Stenson has, in fact, been diligent in discovering, and
18 bringing, this challenge. *Baze* was not decided until April 2008. Counsel for Mr. Stenson
19 sought information regarding DOC's lethal injection policies and practices on July 1, 2008.
20 Peterson Decl. ¶ 3, Ex. 2. DOC has produced some documents pursuant to that request but
21 still has not completed its response and recently advised that it would provide further
22 documents on November 12, 2008. *Id.* ¶ 4, Ex. 4. Mr. Stenson commenced this lawsuit on
23 September 5, 2008 after it became apparent from DOC's responses to counsel's PDA
24 requests that it has no written guidelines apart from its Policy. Shortly after filing,
25 Mr. Stenson propounded Interrogatories, Requests for Production and a request for site
26 inspection. *Id.* ¶ 5, Ex. 5.
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37 Mr. Stenson's overarching complaint is that the actual execution practices, which
38 form the basis for his claim, are not known or knowable to him, even today. Mr. Stenson
39 still does not know how Defendants plan to execute him. He does not know, for example,
40 the minimum qualifications of the execution team, where Defendants will attempt to insert
41 an IV lines or the number of IV lines Defendants plan to insert, whether Defendants will
42 establish a backup IV line, the appropriateness of Defendants' plan to determine the
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1 appropriate dosages, handle, mix and administer the drugs, whether Defendants will monitor
2 Mr. Stenson to ensure that he is unconscious before administering pancuronium bromide and
3 potassium chloride, how the execution team will proceed if it cannot insert an IV line
4 peripherally, whether Defendants will use a cut-down procedure and whether Defendants
5 have an adequately trained person to do so, or whether Defendants have any contingency
6 plans, including any life-maintaining equipment and persons adequately trained to operate
7 the equipment, in the event of a last minute stay of execution or a failure of the execution.
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9 Because Mr. Stenson still does not have information necessary to assess the state's
10 procedures, his claim is not barred by laches. At a minimum, this is a factual inquiry that
11 precludes 12(b)(6) dismissal as a matter of law.
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21 **2. Statutes of Limitations Do Not Apply to Constitutional Challenges to**
22 **Systemic Policy Nor Do They Begin to Run on Continuing Constitutional**
23 **Violations**

24 Mr. Stenson challenges the DOC's systemic policy that applies to all inmates
25 presently on death row or who will be on death row in the future. He does not challenge
26 particular actions or inquiries directed at him alone. DOC's policy is, in essence, a
27 continuing violation of his, and others,' constitutional rights. Numerous courts have
28 recognized that constitutional challenges to systemic policies such as this (1) are not subject
29 to any statute of limitations and/or (2) constitute challenges to continuing violations for
30 which the statute of limitations has not yet began to run. In *Franklin v. Murphy*, 745 F.2d
31 1221 (9th Cir. 1984), for example, the court held that a prisoner's civil rights action was not
32 barred by the statute of limitations because the alleged violation of rights—the prison's
33 refusal to permit access to religious services—was continuing. The Ninth Circuit explained
34 that "[t]his action does not appear to be barred by the statute of limitations because Franklin
35 alleges that he gained access to religious services only two days before the complaint was
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1 filed.” *Id.* at 1230 (ultimately dismissing claim as moot because plaintiff was given access
2 to religious services).
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4 Likewise, in *Devey v. City of Los Angeles*, the Ninth Circuit recognized that
5 allegations of a “widespread or systemic unconstitutional policy” satisfy the continuing
6 violations exception to the statute of limitations. 129 Fed. Appx. 362, No. 03-55605, at *1
7 (9th Cir. Apr. 15, 2005) (dismissing plaintiff’s complaint because it failed to allege facts
8 sufficient to demonstrate either a widespread or systemic unconstitutional policy or practice
9 or a series of related acts against him). Unlike *Devey*, Mr. Stenson’s Complaint challenges
10 on constitutional grounds DOC’s systemic policy for how executions will be carried out.
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12 The federal district court in this district also recognizes the same principle that
13 “[w]here a continuing violation is alleged, the statute of limitations clock does not begin to
14 run until the violation ends.” *Brandt v. Lehman*, No. C07-942-RSL-JPD, 2007
15 WL 4358324, at *3 (W.D. Wash. Dec. 10, 2007) (Magistrate’s Report and
16 Recommendation), adopted by Judge Lasnik, No. C07-942RSL, 2008 WL 336736 (W.D.
17 Wash. Feb. 4, 2008) (rejecting plaintiff’s claim because the complaint did not allege that an
18 individual defendant had participated in the challenged policy).
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20 Other courts agree. In *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2001), the court
21 applied the continuing violation exception in a prisoner civil rights suit alleging that the
22 jail’s refusal to treat a medical condition violated the Eighth Amendment. The court
23 reversed the district court’s dismissal on statute of limitations grounds, holding that the
24 statute of limitations did not begin to run until he left the jail because “[t]his refusal
25 continued for as long as the defendants had the power to do something about his condition.”
26 *Id.* at 318; *see also Douglass v. City of Spokane*, 25 Wn. App. 823, 826, 609 P.2d 979
27 (1980) (action for violation of a use restriction not subject to statute of limitations because
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1 “[t]his type of violation is a continuing one for which no limitation of action is prescribed by
2 statute or ordinance”); *City of Pasco v. Dep’t of Ret. Sys.*, 110 Wn. App. 582, 596, 42 P.3d
3 992 (2002) (no statute of limitations for action to correct employee records); *Kent School*
4 *Dist. No. 415 v. Ladum*, 45 Wn. App. 854, 856, 728 P.2d 164 (1986) (action to quiet title has
5 “no statute of limitations”); *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App.
6 3d 585, 628, 255 Cal. Rptr. 184 (1989) (no statute of limitations for mandate to compel
7 Water Board to rescind licenses as Board’s conduct was continuing violation of its statutory
8 obligations).

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17 **3. Even If Washington’s Three-Year Statute of Limitations Applied, This**
18 **Claim Is Within the Statutory Period**

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20 Even if this Court could somehow borrow the statute of limitations period for 42
21 U.S.C. § 1983 claims, Mr. Stenson’s claims are timely because the factual and legal support
22 for his claim have changed substantially in the last three years. Statutes of limitations do not
23 begin to run until “after petitioners had discovered or had failed in reasonable diligence to
24 discover the . . . basis of” the claim. *Holmberg*, 327 U.S. at 397. Even assuming that
25 Mr. Stenson could somehow know, today, how DOC intends to execute him, the basis for
26 his claim could not have been discovered before June 2007—when DOC last revised its
27 protocol, making what it called “[m]ajor changes.” Compl. Ex. 1 at 1. Nor could he have
28 known that he had a constitutional right to discovery and full court review of the state’s
29 actual execution procedures until *Baze* was decided earlier this year.

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40 Moreover, *Baze* wrought a fundamental alteration of the legal landscape. As judges
41 of the Sixth Circuit have observed, before *Baze*, lethal injection rulings were a
42 “dysfunctional patchwork of stays and executions.” *Alley v. Little*, 447 F.3d 976, 977 (6th
43 Cir. 2006) (Martin, J., dissenting from denial of rehearing en banc); *cf.*, *Simpson v. Norris*,

1 490 F.3d 1029, 1035 (“Since *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] created a previously
2 unavailable claim based on the unconstitutionality of executing the mentally retarded, [the
3 habeas petitioner] can hardly be said to have lacked diligence in developing the factual basis
4 of that claim in state court.”) *reh’g denied*, 499 F.3d 874 (8th Cir. 2007), *cert. denied*, 128 S.
5 Ct. 1226 (2008). After *Baze*, it is clear that the Eighth Amendment demands, at a minimum,
6 that an execution policy contain protocols and safeguards adequate to prevent the
7 “substantial constitutionally unacceptable risk of suffocation.” *Baze*, 128 S. Ct. at 1553.
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15 **H. Mr. Stenson’s Complaint Is Not Barred by Res Judicata**

16 Like the statute of limitations defense, dismissal under Rule 12(b)(6) on res judicata
17 grounds requires that all facts necessary to the determination of this defense be pled in the
18 Complaint, which they are surely not. Defendants’ claim fails for other reasons as well.
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23 Defendants argue that this challenge could have been brought in prior habeas or
24 personal restraint petitions. To the contrary, res judicata “is designed to prevent relitigation
25 of already determined causes.” *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395, 429
26 P.2d 207 (1967). Res judicata applies only when all four elements are met: identity of
27 (1) subject matter, (2) parties, (3) cause of action and (4) quality of persons for/against
28 whom the claim is made. *Mellor v. Chamberlin*, 100 Wn.2d 643, 645, 673 P.2d 610 (1983).
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35 There is no “identity of subject matter.” The authorities Defendants cite show that
36 habeas and personal restraint proceedings are designed primarily to test the legality of the
37 state’s imposition of the judgment. RCW 10.73.090(2); RAP 16.4(b). Mr. Stenson does not
38 challenge his conviction or sentence; he challenges the method by which the sentence will
39 be carried out. Indeed, DOC has *previously* taken the position that challenges that could be
40 brought in a civil rights action, as this, may not be brought in a personal restraint petition.
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47 *See supra* at 10. Mr. Stenson’s prior proceedings did not involve the same subject matter.

1 Nor can Defendants meet the “identity of cause of action” requirement which looks
2 to whether the “same primary right” is involved or the same evidence would be offered.
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4 *Mellor*, 100 Wn.2d at 646. The primary right to an execution carried out in a manner that
5 satisfies constitutional requirements is fundamentally different from the right to assure that a
6 conviction was lawfully imposed. Similarly, the relevant evidence differs.
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10 Further, the instant claim was not even available to Mr. Stenson previously. The
11 contours and precise application of Washington’s execution protocol are unknown and
12 unknowable by Mr. Stenson even now. They were certainly not known in 1997, when his
13 direct review was finalized, or in 2004, when he filed his most recent personal restraint
14 petition. It was not possible to challenge then a policy not promulgated until June 2007 or to
15 assert a right that was not settled until *Baze* was decided in April 2008. Res judicata does
16 not prohibit litigants from raising in a separate action any claim “which, because of its
17 *subsequent creation, could not have been litigated.*” *Mellor*, 100 Wn.2d at 647 (quoting
18 *Harsin v. Oman*, 68 Wash. 281, 283, 123 P. 1 (1912)). Res judicata has not been held to bar
19 other lethal injection challenges by defendants who had already pursued federal and state
20 collateral review. *See Baze*, 128 S. Ct. 1520; *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct.
21 2096, 165 L. Ed. 2d 44 (2006); *Nelson*, 541 U.S. at 641-42. Finally res judicata is not, as
22 Defendants have asked “to be applied so rigidly as to defeat the ends of justice or to work an
23 injustice.” *Henderson v. Bardahl Int’l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967).
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39 **I. Mr. Stenson’s Due Process Claim Is Cognizable**

40 Animating Mr. Stenson’s complaint is his right to die with dignity. *See, e.g.*,
41 *Autry v. McKaskle*, 727 F.2d 358 (5th Cir. 1984). By statute, Mr. Stenson has two options—
42 lethal injection or hanging. RCW § 10.95.180(1). But as described above, those two
43 options have little, if any, meaning without a consideration of whether either—or both—
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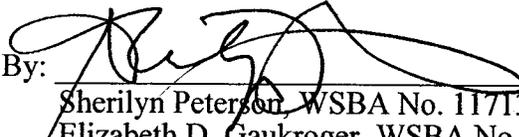
1 methods as practiced in Washington comport with prohibitions against cruel and unusual
2 punishment. Because DOC's policies are, in their present form, ill-defined, Mr. Stenson
3 does not have adequate or fair notice of how Washington intends to execute him. He has
4 been effectively rendered without the choice granted him by Washington law, and without
5 any attendant process, as required by article 1, section 3 of the Washington Constitution and
6 the Fourteenth Amendment to the U.S. Constitution.¹¹
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12 V. CONCLUSION

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14 Defendants' Motion to Dismiss cannot demonstrate beyond doubt that Mr. Stenson
15 cannot prove any set of facts which justify relief, and their motion should be denied.
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21 DATED: October 20, 2008

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39 ¹¹ While not the primary inquiry, Mr. Stenson's complaint that DOC's hanging protocol violates the
40 Constitution is also cognizable. The DOC argues that Mr. Stenson is too late to challenge lethal injection, but
41 disingenuously suggests that he is too early to challenge hanging because he has not elected it as his method of
42 execution. Defs.' Br. at 17. But he is not required to elect until 14 days prior to a scheduled execution. Policy
43 at III.B.2.b. Mr. Stenson does not allege that hanging is *per se* unconstitutional. Rather, he alleges that
44 hanging "*as practiced* in Washington" creates a substantial risk of conscious pain and suffering. Compl. ¶ 74
45 (emphasis added). Though *Baze* involved lethal injection, the constitutional considerations apply to any
46 method of execution, including hanging, and Defendants' hanging procedures must be examined. Cases cited
47 by the Defendants are inapposite because they were (1) decided before *Baze* mandated a fact-based inquiry into
how executions will be carried out, and (2) not cases where, as here, the plaintiff is requesting that the Court
conduct the kind of discovery and fact-finding required by *Baze*.