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EXPEDITE
 No Hearing Set
 Hearing is Set:
Date: 10/31/2008
Time: 9:00 AM
The Honorable Chris Wickham

**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

DAROLD R.J. STENSON,

Plaintiff,

v.

ELDON VAIL, et al.

Defendants.

NO. 08-2-02080-8

REPLY TO RESPONSE TO
DEFENDANTS' MOTION TO
DISMISS OR TRANSFER CASE TO
THE SUPREME COURT

I. REPLY ARGUMENT

A. INTRODUCTION

Stenson challenges lethal injection and hanging as performed in Washington. Defendants moved to dismiss Stenson's complaint, asserting it is barred and fails to state a claim for relief. In response, Stenson argues the Defendants have misread Baze v. Rees, 128 S. Ct. 1520 (2008). Citing to Chief Justice Roberts' summary of the procedural history, and to the concluding paragraph of Justice Steven's concurrence, Stenson argues, "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." Response, at 2 (citing Baze, 128 S. Ct. at 1526 and 1552). Stenson is simply incorrect. Baze does not require "extensive hearings" or an individualized factually specific inquiry into the execution protocol of each and every State.

1 Declaring that additional fact finding is not needed to review the constitutionality of
2 lethal injection protocols in other States, Chief Justice Roberts rejected the suggestion that
3 the Court “leaves the disposition of other cases uncertain. . . .” Baze, 128 S. Ct. at 1537.
4 Stating that “the standard we set forth here resolves more challenges than [Justice Stevens]
5 acknowledges,” the Chief Justice expressly declared, “A State with a lethal injection
6 protocol substantially similar to the protocol we uphold today would not create a risk that
7 meets this standard.” Id. Justice Alito specially concurred on this point, clarifying that,
8 when properly understood, the Baze standard will not “lead to litigation that enables ‘those
9 seeking to abolish the death penalty . . . to embroil the States in never-ending litigation
10 concerning the adequacy of their execution procedures.’” Id. at 1538 (Alito, J.,
11 concurring). Justice Alito stressed that only a misinterpretation of the Baze standard, the
12 one advanced by Stenson, “would create a grave danger of extended delay.” Id. at 1542.

13 Contrary to Stenson’s contention, courts post-Baze have not engaged in detailed
14 inquiries into lethal injection protocols of other states. On the contrary, courts have
15 applied Baze to summarily reject challenges to various lethal injection protocols. See, e.g.,
16 Bennett v. State, 900 So.2d 155, 160-61 & n. 1 (Miss. 2008); Porter v. Commonwealth, 276
17 Va. 203, 237-38, 661 S. Ed. 2d 415, 431-32 (2008); Emmett v. Johnson, 532 F.3d 291 (4th
18 Cir. 2008); People v. Salcido, 44 Cal.4th 93, 169-70, 186 P.3d 437, 494 (2008); Sexton v.
19 State, ___ So.2d ___ (Fla. Sept. 18, 2008) (WESTLAW 2008 WL 4240155), at *12; Ex
20 Parte Chi, 256 S.W.3d 702, 704 (Tex. Crim. App. 2008); Cooey v. Strickland, ___ F. Supp.
21 ___ (S.D. Ohio Sept. 30, 2008) (WESTLAW 2008 WL 4449536); Cooey v. Strickland, ___
22 F.3d ___ (6th Cir. October 9, 2008) (WESTLAW 2008 WL 4516091); Ex Parte Belisle,
23 ___ So.2d ___ (Ala. October 3, 2008) (WESTLAW 2008 WL 4447593). Contrary to
24 Stenson’s assertions, Baze did not create a new standard requiring extensive hearings in
25 order to resolve challenges to a method of execution. Henyard v. State, ___ So.2d ___
26 (Fla. Sept. 10, 2008) (WESTLAW 2008 WL 4148992), at *7.

1 **B. STENSON'S LETHAL INJECTION CLAIM FAILS AS A MATTER OF LAW.**

2 Baze did not impose a new standard of review that overturns prior case law
3 upholding the constitutionality of lethal injection. See Henyard v. State, ___ So.2d ___
4 (Fla. Sept. 10, 2008) (WESTLAW 2008 WL 4148992). Baze did not overturn the
5 Washington Supreme Court's prior decisions upholding lethal injection in Washington.
6 See In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998). The Washington Supreme
7 Court's decision is still good law, and it is binding on this Court.

8 The Court is not required to hold extensive hearings when the policy is substantially
9 similar to the policy reviewed in Baze. Bennett, 990 So.2d at 160-61 (quoting Baze, 128 S.
10 Ct. at 1537). Under a correct application of the Baze standard, courts are not to become
11 "boards of inquiry charged with determining 'best practices' for executions" Baze,
12 128 S. Ct. at 1531; see also id. at 1532 n.2. Baze held it is not "objectively intolerable" for
13 a State to use the three drug protocol for lethal injection. Id. at 1532 & 1534. Baze held
14 the risk that the first drug, sodium thiopental, might be improperly prepared or
15 administered was not sufficient to establish a constitutional error. Id. at 1533. Speculation
16 that prison officials might be unqualified or err in the preparation and administration of the
17 first drug is not sufficient to render the method unconstitutional. Id. Baze also expressly
18 rejected the claim that a State must adopt an untried alternative method (i.e., the one drug
19 protocol), or adopt additional safeguards, in order to satisfy the Constitution. Id. at 1534-
20 37.

21 Moreover, Stenson's claim that lethal injection in Washington is unconstitutional
22 because the Department's policy is not substantially similar to the Kentucky protocol at
23 issue in Baze is now moot. Assuming, arguendo, that Stenson was correct about the policy
24 in existence at the time he filed his complaint, the Department has since amended its policy
25 to ensure it is substantially similar to Kentucky's protocol. See Amended DOC Policy
26

1 490.200 (<http://www.doc.wa.gov/policies>)¹. The amended policy expressly requires
2 minimum qualifications of members of the lethal injection team (at least one or more years
3 of experience in a profession that involves intravenous injections), sufficient practice
4 sessions (at least three of which will include the siting of intravenous lines), the
5 establishment of two intravenous lines with a normal flow of saline through each line, the
6 administration of 3 grams of sodium thiopental, the Superintendent to observe the inmate
7 for signs of consciousness after the administration of sodium thiopental and before the
8 administration of pancuronium bromide, and the administration of an additional dose of 3
9 grams of sodium thiopental before the pancuronium bromide if the Superintendent observes
10 the inmate is conscious after the administration of the first dose of sodium thiopental.
11 Amended DOC Policy 490.200. The amended policy is substantially similar to Kentucky's
12 protocol, and Stenson's allegations are now moot.

13 Moreover, Stenson's other allegations fail to demonstrate a constitutional violation.
14 The allegation that there is a safer method of lethal injection fails because States are not
15 required to adopt an untried method of execution. Baze, 128 S. Ct. at 1534-35. Similarly,
16 the allegation that the Department should not use pancuronium bromide fails because the
17 use of this drug does not violate the Constitution. Id. at 1535-36. The allegation that there
18 are not expert medical professionals to ensure the inmate is properly sedated fails since
19 such safeguards are not required. Id. at 1536. The allegations concerning the need for
20 additional safeguards, such as having the policy expressly state where substances will be
21 stored in the prison or precisely state under what circumstances a pre-execution physical
22 examination of the inmate may occur, necessarily fail because Baze specifically rejected
23 the argument that a method of execution is unconstitutional if additional safeguards could
24 be, but are not, utilized by the State to avoid risks of pain. Id. at 1537. The allegation that

25 _____
26 ¹ For the Court's convenience, attached is a copy of Amended DOC Policy 490.200.

1 the policy does not forbid the use of "cut downs" fails because Stenson does not show he
2 would be a subject to such a procedure, and the allegation that there is no process for
3 determining an inmate's psychiatric state fails because Stenson does not allege he has a
4 psychiatric state that would affect lethal injection, and because such an issue is irrelevant
5 to whether lethal injection violates the Constitution. Finally, Stenson's complaint that a
6 physician is not on site to revive the inmate once the lethal substances are administered
7 fails because no case law requires such a process. The allegations concerning the lack of
8 such minute details in the policy seek to have this Court become a "board of inquiry"
9 charged with determining the "best practices" for execution by lethal injection, but the
10 Constitution and the correct application of Baze do not require or allow such an inquiry.
11 Baze, 128 S. Ct. at 1531; see also id. at 1532 n.2. The allegations fail as a matter of law.

12 **C. THE COURT SHOULD DISMISS THE HANGING CLAIM.**

13 Stenson's response on hanging is limited to a footnote. The response fails to show
14 Stenson has standing to challenge hanging, and it fails to show hanging is unconstitutional.
15 In re Benn, 139 Wn.2d 868, 933, 952 P.2d 116 (1998); State v. Frampton, 95 Wn.2d 469,
16 512-14 & 527, 627 P.2d 922 (1981); State v. Campbell, 112 Wn.2d 186, 192, 770 P.2d 620
17 (1989); In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998); In re Lord, 123 Wn.2d 296,
18 325-26, 868 P.2d 835 (1994); Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994).

19 **D. THE ELECTION OF METHOD OF EXECUTION CLAIM IS MERITLESS.**

20 Stenson fails to provide more than a conclusory response to the motion to dismiss
21 Stenson's claim that he was denied due process because he is unable to make an informed
22 election of the method of execution. Response, at 24-25. Stenson's argument fails to show
23 this claim has any merit. The Court should dismiss this claim as a matter of law.

24 **E. THE ACTION CONSTITUTES A COLLATERAL ATTACK TO THE EXECUTION OF THE SENTENCE.**

25 Defendants showed why Stenson's declaratory judgment action falls within the
26

1 broad definition of a “collateral attack” under Washington law. Stenson responds to
2 Defendant’s position by arguing his action is actually a civil rights action presumably
3 brought under 42 U.S.C. § 1983. However, nowhere in his complaint does Stenson allege a
4 civil rights action under 42 U.S.C. § 1983. See Brutsche v. City of Kent, 78 Wn. App. 370,
5 898 P.2d 319, 375 (1995). Instead, Stenson explicitly states his complaint is an action for
6 declaratory judgment and injunctive relief brought under chapters 7.24 and 7.40 RCW.
7 Complaint, at 3, ¶ 10. Since this is an action brought under state law, it is governed by
8 state law, including the law defining “collateral attack” contained in RCW 10.73.090(2).

9 Stenson argues this action is not a “collateral attack” because he is not challenging
10 his sentence. However, the complaint does not merely seek to enjoin a single method of
11 execution; it seeks such broad relief as a ruling that hanging itself (and not just hanging as
12 performed under the Department’s policy) is unconstitutional. Complaint, at 3 ¶ 5 (alleging
13 hanging is unconstitutional); see also Complaint, at 21, prayer for relief D and E (requesting
14 judgment that hanging is unconstitutional). “[A] constitutional challenge seeking to
15 permanently enjoin the use of lethal injection may amount to a challenge to the fact of the
16 sentence itself.” Nelson v. Campbell, 541 U.S. 637, 644 (2004); see also Hill v.
17 McDonough, 547 U.S. 573, 582 (2006). Stenson seeks to effectively prevent the execution
18 of his sentence. See In re Lord, 123 Wn.2d 296, 325-26 n.11, 868 P.2d 835 (1994) (a
19 finding that both lethal injection and hanging are unconstitutional would be tantamount to
20 forbidding death penalty). Since Stenson seeks to prevent his execution, this action falls
21 within the broad state law definition of “collateral attack.”

22 Transfer may be especially appropriate for two reasons. First, Stenson has filed a
23 separate action in the Supreme Court, seeking a writ of prohibition or mandamus and a stay
24 of execution, based upon his challenge to the setting of the date of execution. Stenson v.
25 Vail, Supreme Court Cause No. 82197-6. Rather than allowing Stenson to pursue
26 contemporaneous litigation in two courts, and potentially obtaining conflicting decisions on

1 the appropriateness of a stay, judicial economy is better served by transferring this action
2 for consolidation with Stenson's newly filed action. Second, the Supreme Court already
3 has before it a challenge to lethal injection as performed in Washington in the case of In re
4 the Personal Restraint of Cross, Supreme Court Cause No. 79761-7.

5 **F. STENSON'S CLAIMS ARE BARRED UNDER THE STATUTE OF**
6 **LIMITATIONS, LACHES, AND RES JUDICATA.**

7 Stenson's Complaint alleges a cause of action that accrued in 1997, with the
8 conclusion of his direct review. Stenson has known since 1997 that he will be executed by
9 either lethal injection or hanging. Stenson claims this is a civil rights action.² Under 42
10 U.S.C. § 1983, the statute of limitations on the claim is three years. Stenson waited 11
11 years, until the eve of his execution to raise this challenge. His claim is now time-barred
12 and this Court should adopt the reasoning of the Fifth, Sixth and Eleventh Circuits in
13 concluding that the State's interest in exercising its sovereign power to finalize its
14 judgment should not be delayed. See, e.g., McNair v. Allen, 515 F.3d 1168 (11th Cir.
15 2008); Cooley v. Strickland, 479 F.3d 412 (6th Cir. 2007); Cooley v. Strickland, ___ F.3d
16 ___ (6th Cir. Oct. 9, 2008) (WESTLAW 2008 WL 4516091); Henyard v. Secretary, ___
17 F.3d ___ (11th Cir. Sept. 23, 2008) (WESTLAW 2008 WL 4328570).³

18 Similarly, Stenson's claim is barred under the doctrine of laches. Laches bars an
19 action when a plaintiff had reasonable opportunity to discover the basis of the cause of
20 action, unreasonably delayed commencing the cause of action, and the defendant has been
21 damaged by the delay. All of these factors are present in this case. Stenson knew of this
22 cause of action, at the latest, in 1997. Stenson unreasonably delayed commencing this
23 action until the eve of his execution. Defendants' interest in the exercise of the State's

24 ² As argued in Section E, Stenson has not properly pled a 42 U.S.C. § 1983 claim.

25 ³ Stenson argues the statute of limitations does not apply because Defendants are subjecting him to a
26 "continuing constitutional violation". The courts cited above and in the motion to dismiss applying the statute of
limitations have rejected such arguments, finding the cause of action accrues not when the inmate is to be
executed, but when the defendant's conviction becomes final or the method of execution is adopted.

1 sovereign power to enforce judgments is severely prejudiced by Stenson's challenge at this
2 late date. Finally, as argued above, the policy need not be subjected to detailed fact finding
3 as it is substantially similar to the protocol analyzed in Baze. Baze, 128 S. Ct. at 1537.

4 Finally, *res judicata* bars Stenson's untimely challenge to the constitutionality of
5 lethal injection and hanging. The doctrine of *res judicata* serves to bar a claim where there
6 is an identity of claims, a final judgment on the merits, and an identity or privity of parties.
7 Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The doctrine of
8 *res judicata* further bars "issues that were or could have been raised in the prior action."
9 Mellor v. Chamberlin, 100 Wn.2d 643, 645, 673 P.2d 610 (1983). Contrary to Stenson's
10 assertion, there is privity of parties in this case and Stenson's *habeas corpus* action as both
11 name the superintendent of the Washington State Penitentiary. Stenson could have
12 challenged the constitutionality of lethal injection and hanging in his personal restraint
13 petitions. Thus, the orders denying the personal restraint petitions and the federal *habeas*
14 *corpus* petition, bar Stenson's claims in this Court. If the Court does not dismiss the action
15 as barred by RCW 10.73.090, and does not transfer it to the Washington Supreme Court,
16 the Court should dismiss Stenson's challenges to lethal injection and hanging as barred
17 under the statute of limitations, laches, and the doctrine of *res judicata*.

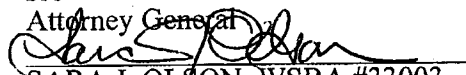
18 II. CONCLUSION

19 For the foregoing reasons, Defendants respectfully request that the Court dismiss
20 Stenson's complaint with prejudice, or in the alternative, transfer it to the Washington
21 Supreme Court for consideration as a personal restraint petition.

22 DATED this 24th day of October, 2008.

23 ROBERT M. MCKENNA

24 Attorney General


25 SARA J. OLSON, WSBA #33003
26 JOHN J. SAMSON, WSBA #22187
Assistant Attorneys General

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by: Vicky Woods

TO:

SHERILYN PETERSON
ELIZABETH D. GAUKROGER
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1201 THIRD AVE, SUITE 4800
SEATTLE, WA 98101-3099

EXECUTED this 24th day of October, 2008, at Olympia, Washington.


KATHY JERENZ
Legal Assistant

ATTACHMENT



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

APPLICABILITY
PRISON

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10/25/08

PAGE NUMBER
1 of 12

NUMBER
DOC 490.200

POLICY

TITLE

CAPITAL PUNISHMENT

REVIEW/REVISION HISTORY:

Effective: 9/3/93
Revised: 6/15/98
Revised: 8/10/01
Revised: 6/21/07
Revised: 10/25/08

SUMMARY OF REVISION/REVIEW:

Title and Team Name changes throughout
I.A.1., II.C. & VIII.A.1., & VIII.C.2. – Added clarifying language
III.B.3. – Added requirements for ISDP incoming mail
III.B.4.b. & 5.b. – Added clarifying language regarding attorney of record
Revised IV.A.1. to specify a single media event
Added IV.B.1. & DOC 21-575 Acknowledgment of Visitor Search Requirements for searches of media representatives
Revised V.F. regarding search requirement for witnesses
VI.C. – Revised housing requirements for female ISDP
VIII.A.2. – Added requirement for 3 practice sessions for lethal injections
VIII.B. – Removed medical file review; revised physical examination requirement
IX.A.1.d. – Added that Lethal Injection Team members must be trained; added qualifications
IX.A.2.a. – Changed Director of Health Services to Superintendent
IX.A.4.b. & d. – Revised requirements for lethal injection
IX.A.4.h. – Removed requirement that Lethal Injection Team remove apparatus and saline
X.A. – Calls to Headquarters will be made to the Department Emergency Operations Center
X.F. – Removed requirement that Death Certificate be signed before removal of body
Several changes to Attachment 1


APPROVED:

Signature on File

ELDON VAIL, Secretary
Department of Corrections

10/23/08

Date Signed

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REFERENCES:


DOC 100.100 is hereby incorporated into this policy; RCW 10.95.160-190; WAC 137-48-050; DOC 410.040 Incident Command System (ICS)

POLICY:

- I. The Department has established procedures governing capital punishment to meet the requirements of RCW 10.95.160-190. These procedures set forth:
 - A. Security requirements for an Inmate Subject to the Death Penalty (ISDP),
 - B. Protocol for conducting an execution,
 - C. The care provided the ISDP while a valid Death Warrant is in force, and
 - D. The method of execution by lethal injection or hanging.
- II. The Department Secretary designates the Assistant Secretary for Prisons to coordinate:
 - A. The responsibilities of the Washington State Penitentiary (WSP) Superintendent, and
 - B. A review of the procedures and all operational decisions in carrying out the execution, as well as the legal status of the Death Warrant.

DIRECTIVE:


- I. ISDP Housing
 - A. Upon receipt of an ISDP and prior to receipt of a Death Warrant:
 1. Male ISDPs shall be housed in a single person cell located in a segregated area of WSP.
 2. Female ISDPs shall be housed in a segregated area of the Washington Corrections Center for Women (WCCW). Prior to the execution date, the female ISDP will be transported to WSP for housing and execution.
- II. Pre-Execution Procedure
 - A. Consistent with RCW 10.95.190, a log shall be maintained with the Death Warrant in the Superintendent's Office.
 - B. Responsibilities are listed in the Execution Procedures and Assignments Checklist (Attachment 1).

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- C. Only staff assigned by the Superintendent will attend the execution. No facility staff will be required to participate in any part of the execution procedure.

III. Notification to ISDP


- A. After receiving confirmation of a valid Death Warrant, the Superintendent will designate an Associate Superintendent to personally interview the ISDP regarding procedures relating to the execution.
- B. The Associate Superintendent will provide the ISDP with a written summary of procedures, to include mail, visits, telephone usage, and available religious services. The ISDP will be informed of the following:
1. The date of the execution.
 2. The punishment of death shall be by lethal injection.
 - a. The ISDP may elect hanging as an alternate means of execution.
 - b. The procedure to be used will be determined 14 days prior to the execution and the method cannot be changed after that date. If the ISDP elects hanging, it must be stated in writing no later than 14 days prior to the execution date.
 3. Mail procedures for an ISDP with an active Death Warrant will be as follows:
 - a. The Mail Room Sergeant will be instructed, in writing, to forward all incoming mail, unopened, to the designated Associate Superintendent, who will screen and exclude any items which may threaten the order and security of the facility with regard to the ISDP.
 - 1) Mail intended to harass the ISDP will be considered a threat to the orderly operation of the facility and restricted per WAC 137-48-050.
 - 2) Legal mail will be screened, not read.
 - b. The Mail Room Sergeant will maintain a log of all incoming and outgoing mail, noting the date and time of receipt and delivery. A separate log will be maintained for all legal mail.
 4. All visits between the ISDP and authorized visitors will be no contact.

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- a. Visitation for an ISDP will be consistent with the visiting procedures of other offenders housed in the Intensive Management Unit (IMU).
 - b. Seven days prior to the execution, daily visits will be authorized in addition to visits with the attorney of record.
 - c. Twenty-four hours prior to the execution date, all visits and visitors require the approval/denial of the Superintendent.
 - d. After the ISDP is moved to the execution holding cell, visits will be restricted to approved clergy and the attorney of record.
5. The ISDP will have unlimited phone access during the daily yard period. Fourteen days prior to the execution date, an additional daily one hour yard will be provided.
- a. There will be no limit on the number or duration of calls to and from the attorney of record.
 - b. Only calls from the attorney of record will be authorized following transfer to the execution holding cell.

IV. Media Relations

- A. The Superintendent/designee will coordinate all requests for information concerning an execution.
 1. A single event to provide representatives of major and local media an opportunity to access the chamber will be authorized by the Superintendent and coordinated by designated staff.
- B. The Superintendent will establish procedures for selecting media witnesses as specified in the Witness Selection section of this policy.
 1. No audio/electronic/video equipment, cameras, telephones, or recording/communication devices will be permitted in the chamber. Media witnesses will be subject to an electronic and pat search. Written consent for search will be required using DOC 21-575 Acknowledgment of Visitor Search Requirements.
 2. The only items that are allowed in the chamber are pens, pencils, and writing tablets supplied by the facility.
- C. Requests from media representatives for access to the Information Center must be submitted in writing.

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1. Information Center access will not be permitted more than 3 hours prior to an execution.
- D. Media access to a designated area of the facility parking lot will be permitted at a designated time the day prior to the execution.
- E. Media will not be permitted to film or conduct interviews with facility staff without the prior authorization of the Superintendent/designee.
- F. All normal facility security procedures will apply. Failure to comply with these procedures, Department policies, operational memorandums, or directions from authorized personnel may be cause for removal from the facility and/or facility grounds. The Superintendent may establish emergency rules and procedures.
- V. Witness Selection
- A. Not less than 20 days prior to an execution, individuals who wish to attend and witness the execution must submit a letter of request (e.g., application) to the Superintendent. The letter must designate the relationship to the ISDP and reason(s) for wishing to attend. Eligible individuals include:
1. Judicial officers (i.e., the Judge who signed the Death Warrant for the ISDP, the current Prosecuting Attorney or a Deputy Prosecuting Attorney of the county from which the final Judgment and Sentence and Death Warrant were issued, and the most recent attorney of record representing the ISDP),
 2. Law enforcement representatives (i.e., officers responsible for investigating the crime for which the inmate was sentenced to death),
 3. Media representatives,
 4. Representatives of the families of the victims (i.e., immediate family or victim advocates of the immediate family), and
 5. Representatives from the ISDP's immediate family.
- B. Not less than 15 days prior to the execution, the Superintendent shall determine the total number of individuals, other than Department employees, who will be allowed to attend and witness the execution.
1. The Superintendent shall determine the number of witnesses allowed in each category of eligible individuals.

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- a. No less than 5 media representatives will be included, with consideration given to news organizations serving communities affected by the crimes or the execution.
- b. Up to 2 law enforcement representatives will be included. The chief law enforcement officer of the jurisdiction where the crime was committed shall designate the law enforcement representatives.
- 2. Once the list is composed, the Superintendent shall serve the list on all parties who have submitted a letter (e.g., application) to witness the execution.
- C. Not less than 10 days prior to the execution, the Superintendent shall file the witness list with the Superior Court from which the conviction and Death Warrant were issued. The witness list will be filed with a petition asking that the court enter an order certifying the list as a final order identifying the witnesses to attend the execution. The final order of the court certifying the witness list shall not be entered less than 5 days after the filing of the petition.
- D. Unless a show cause petition is filed with the Superior Court from which the conviction and Death Warrant were issued within 5 days of the filing of the Superintendent's petition, the Superintendent's list, by order of the Superior Court, will become final and no other party will have standing to challenge its appropriateness.
- E. In no case may the Superintendent or the Superior Court order or allow more than 17 witnesses to a planned execution, excluding required staff.
- F. All witnesses must adhere to the facility's search and security provisions in regards to witnessing an execution and may be subject to emergency rules and procedures. Written consent for search will be required using DOC 21-575 Acknowledgment of Visitor Search Requirements.
- VI. Execution Holding Cell
 - A. Prior to the execution, but no sooner than 24 hours before, the ISDP will be moved to the execution holding cell.
 - B. The holding cell will contain:
 - 1. Bedding that includes a mattress, 2 sheets, 3 blankets, a pillow, and a pillow case,
 - 2. Personal hygiene items that include 2 towels, a washcloth, and a bar of soap,



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3. Approved personal items and clothing that include underwear, facility clothing, legal materials, religious items, jewelry, or other personal items as requested by the ISDP and approved by the Superintendent, and
 4. Other personal items as requested by the ISDP and approved by the Superintendent to be retained by holding cell staff and issued as requested by the ISDP.
- C. A female ISDP may be housed in the WSP Intensive Management Unit (IMU) prior to being moved to the execution holding cell.
- D. Two correctional staff will be posted at the holding cell at all times and a complete log of activities will be maintained.
- VII. Final Meal
- A. At the meal period just prior to the time of execution, the ISDP will be allowed to provide his/her meal selection from a menu prepared and provided by the Food Service Manager. The Food Service Manager will ensure preparation and delivery of the meal to the ISDP.
- VIII. Execution Preparation
- A. The Superintendent will appoint individuals to support the execution process.
1. No staff will be required to participate in any part of the execution procedure.
 2. Briefings and rehearsals will be conducted as necessary to ensure adequate preparation for the execution. For an execution by lethal injection, there shall be a minimum of 3 practice sessions preceding an execution that shall include the siting of intravenous (IV) lines.
- B. Medical Review
1. A physical examination of the ISDP may be conducted to determine any special problems (e.g., collapsed veins, obesity, deterioration of bone or muscular structure) that may affect the execution process. The ISDP's height and weight will be measured during the examination.
 2. Based upon the physical examination, the Superintendent may consult with appropriate experts to determine whether deviation from the policy is advisable to ensure a swift and humane death.
- C. Crowd Control



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1. The Superintendent will notify law enforcement agencies of the date of execution, enabling them to prepare for any traffic and crowd control issues that may arise.
2. Prior to the execution, the Superintendent will hold briefings for local and state law enforcement agencies to determine the manner and extent to which WSP and Department resources will support law enforcement in managing crowd control and potential external threats.
3. An area(s) will be designated for the general public.
4. The WSP Emergency Response Team (ERT) will provide crowd control for the protection of the WSP grounds.
 - a. The ERT Commander(s) will be briefed by the Superintendent prior to the execution.
 - b. In the event that protesters and/or onlookers gather, law enforcement assistance will be requested to direct them to the designated area.

IX. Execution Procedure

A. Lethal Injection

1. **Lethal Injection Materials/Personnel**
 - a. All tubing, syringes, saline solution, and other apparatus will be on site and verified no later than 7 days prior to the execution.
 - b. The Superintendent will direct the acquisition of the appropriate quantities of lethal substances. These will be available and on site 7 days prior to the execution date.
 - c. The Superintendent will ensure the security and continued verification of all materials.
 - d. Lethal Injection Team members will have sufficient training or experience to carry out the lethal injection process without any unnecessary pain to the ISDP. Minimum qualifications include one or more years of professional experience as a certified Medical Assistant, Phlebotomist, Emergency Medical Technician, Paramedic, military corpsman, or similar occupation.
2. **Lethal Injection Table**

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- a. The Superintendent, in conjunction with the Plant Manager, will examine and verify that the lethal injection table is in working order with all restraints available.
3. Preparation of the Execution Area
 - a. The Lethal Injection Team will inspect the area designated for lethal injection and make any final recommendations to the Superintendent.
 - b. The Lethal Injection Team will assemble all necessary materials for transport to the chamber no less than one hour prior to the time of execution. The Lethal Injection Team Leader will secure the lethal substances and personally transport them to the chamber.
 - c. The solutions for injection will be prepared not more than 30 minutes prior to administration.
 4. Execution Process
 - a. The Superintendent will direct that the ISDP be brought to the chamber. The Escort Team will place the ISDP on the lethal injection table and appropriately secure the ISDP to the table. The Escort Team will then leave the room.
 - b. The Lethal Injection Team will establish 2 IV lines and start a normal flow of saline through each line. The Lethal Injection Team will ensure that a slow, normal saline flow is maintained through each line.
 - c. The Superintendent will ask the ISDP if s/he has any last words.
 - d. Upon notification from the Superintendent, the Lethal Injection Team will introduce the following lethal solutions using a bolus injection into the tubing in the order specified:
 - 1) 3 g thiopental sodium
 - 2) 50 cc normal saline
 - 3) 100 mg pancuronium bromide
 - 4) 50 cc normal saline
 - 5) 240 mEq potassium chloride (KCl)
 - e. Either line may be used for injection of solutions as required. The Superintendent shall observe the ISDP for signs of consciousness before the Lethal Injection Team administers the pancuronium



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bromide. If the Superintendent observes that the ISDP is conscious following the first dose of thiopental sodium, s/he shall direct the Lethal Injection Team to administer an additional 3 g dose of thiopental sodium.

- f. The Lethal Injection Team Leader will signal the Superintendent when all of the solutions have been administered.
- g. At a time deemed appropriate by the Superintendent, the curtains will be closed. The Superintendent will call for the physician to examine the body and make a pronouncement of death.
- h. After the pronouncement of death, the Lethal Injection Team will remain in the area until directed to leave.
- i. Post-execution procedures will be followed.

B. Hanging

- 1. The gallows area trap door(s) and release mechanisms will be inspected for proper operation.
- 2. A determination of the proper amount of drop of the ISDP through the trap door will be made. The following standard military execution drop chart will be used:

<u>WEIGHT (Pounds)</u>	<u>DROP DISTANCE</u>
120	8'1"
125	7'10"
130	7'7"
135	7'4"
140	7'1"
145	6'9"
150	6'7"
155	6'6"
160	6'4"
165	6'2"
170	6'0"
175	5'11"
180	5'9"
185	5'7"
190	5'6"
195	5'5"



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200	5'4"
205	5'2"
210	5'1"
220 and over	5'0"

3. Equipment

- a. Hood – The hood will be a neutral color with an outer surface made of rough material, split at the open end so that it will come down over the chest and back.
- b. Collapse Board – A board will be provided for use in case the ISDP collapses.
- c. Restraints – Restraints will be used to ensure that the hands and arms of the ISDP are securely held to his/her front and sides.
- d. Rope –The rope will be manila hemp, at least ¾ inch and not more than 1¼ inches in diameter and approximately 30 feet in length. The rope will be soaked and then stretched while drying to eliminate any spring, stiffness, or tendency to coil. The knot will be treated with wax, soap, or clear oils ensuring a smooth sliding action through the knot. The knot will be tied according to Army regulations.

4. Execution Process

- a. Restraints will be placed on the ISDP by assigned staff.
- b. The Escort Team will escort the ISDP to the gallows area. The ISDP will be placed, standing, in the spot designated by the Superintendent. The Superintendent will ask the ISDP if s/he has any last words.
- c. The hood will be placed on the ISDP and leg restraints applied. If a collapse board appears to be necessary, the Escort Team will put the board in place.
- d. The noose will be placed snugly around the ISDP's neck in such a manner that the knot is directly behind the left ear.
- e. The Superintendent will direct the trapdoor be released.
- f. The Escort Team will move to the lower floor location to assist with removal of the deceased ISDP. The curtains will be closed.

