

- EXPEDITE
- No hearing set
- Hearing is set

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); STEPHEN SINCLAIR,
Superintendent of the Washington State
Penitentiary (in his official capacity);
MARC STERN, Director of Health
Services (in his official capacity);
CHERYL STRANGE, Office of
Correctional Operations Deputy Secretary
(in her official capacity); WASHINGTON
DEPARTMENT OF CORRECTIONS; and
DOES 1-50,

Defendants.

No. 08-2-02080-8

FIRST AMENDED AND SUPPLEMENTAL
COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

Darold R. J. Stenson, by and through his undersigned attorneys for his complaint
against the above-captioned Defendants, alleges as follows:

FIRST AMENDED AND SUPPLEMENTAL
COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF – 1

68695-0001/LEGAL14833831.1

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I. NATURE OF ACTION

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3 1. Plaintiff Darold R. J. Stenson brings this action for declaratory and injunctive
4 relief for violations and threatened violations of his right, under the Washington
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6 Constitution, art. I, §§ 14 and 3 of the Washington Constitution, and the Eighth and
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8 Fourteenth Amendments to the United States Constitution to be free from cruel and unusual
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10 punishment and arbitrary and capricious action caused by the State of Washington's
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12 Department of Corrections ("DOC") protocols, procedures and/or actions.

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14 2. Plaintiff is under a sentence of death imposed by the State of Washington.
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16 The State of Washington has elected to use lethal injection as the presumptive method of
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18 execution, and DOC has implemented a policy by which it plans to carry out lethal
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20 injections in the State. A death-sentenced inmate in the State of Washington may elect
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22 death by hanging.

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24 3. Plaintiff does not in this action challenge his underlying conviction or
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26 sentence. Rather, Plaintiff challenges the manner and means by which DOC intends to
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28 execute him under its former policy, DOC Policy Number 490.200 (dated June 21, 2007)
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30 (the "Policy"), attached to Plaintiff's Complaint as Exhibit A, or its amended policy, dated
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32 October 25, 2008, which was revised after Plaintiff initiated this action and is attached as
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34 Exhibit A hereto, and any other policy, protocol, or other guideline or practice addressing
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36 the method of execution in Washington. Methods of lethal injection that would comply with
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38 the United States and Washington constitutions exist and are available for Defendants' use.

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40 4. Lethal injection, as that method of execution is currently administered in
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42 Washington under the Policy, unnecessarily risks the infliction of torturous pain and
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44 suffering. The nature of the chemicals used by Defendants to effectuate execution by lethal
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46 injection, coupled with Defendants' failure to implement sound procedures and guarantee
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1 the use of properly-trained and qualified personnel, unnecessarily risks and creates a highly
2 foreseeable probability that Plaintiff will experience excruciating pain and suffering during
3 execution.
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7 5. The alternative elective method of execution, death by hanging, is also
8 unconstitutional under the constitutions of the State of Washington and United States
9 because it unnecessarily risks and creates a highly foreseeable probability that Plaintiff will
10 experience excruciating pain and suffering during execution.
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15 6. Furthermore, Defendants' failure to provide a complete set of the execution
16 procedures and an opportunity for Plaintiff to review and object to those procedures violates
17 due process and fundamental fairness guaranteed by the constitutions of the State of
18 Washington and United States.
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23 7. In implementing and modifying the Policy, Defendants have not acted
24 pursuant to any authority, and/or any proper authority, granted to them by the Washington
25 Legislature.
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29 8. Defendants have not been given by the Legislature, nor have they
30 promulgated, sufficient procedural standards, safeguards or guidelines for the
31 implementation or modification of the Policy or to test the constitutionality of these actions
32 after promulgating the Policy or other critical guidelines or practices for implementing the
33 death penalty.
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38 9. Plaintiff seeks declaratory and injunctive relief to prevent Defendants from
39 carrying out his execution by means of lethal injection, as that method of execution is
40 currently performed in the State of Washington.
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1 the Court held that the Eighth Amendment to the United States Constitution is violated when
2
3 the State subjects an individual to conditions presenting the risk of future harm that are
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5 likely to cause serious illness and needless suffering and give rise to sufficiently imminent
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7 dangers.

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9 25. The State of Washington's methods of execution create a substantial risk of
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11 serious harm and wantonly expose death-sentenced prisoners to objectively intolerable risks
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13 of harm for purposes of Article I, § 14 of the Washington Constitution, and the Eighth
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15 Amendment to the United States Constitution.

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17 26. Alternatives to the State's methods of execution exist that effectively address
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19 the substantial risk of serious harm posed by the State's current methods and that are
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21 feasible, readily implemented, and in fact significantly reduce a substantial risk of severe
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23 pain. The State lacks a legitimate penological justification for adhering to its current
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25 methods of execution. By refusing to adopt the available constitutionally sufficient
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27 procedures, the State is violating the prohibitions on cruel and unusual punishment set forth
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29 in Article I, § 14 of the Washington Constitution, and the Eighth Amendment to the United
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31 States Constitution.

32 33 V. GENERAL ALLEGATIONS

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35 27. All prior allegations set forth above are re-alleged as if set forth entirely
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37 herein.

38 39 A. Lethal Injection

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41 28. The State of Washington has elected to use lethal injection as the
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43 presumptive method of execution. *See* RCW § 10.95.180(1). Under state law, death
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45 sentences "shall be supervised by the superintendent of the penitentiary and shall be inflicted
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1 by intravenous injection of a substance or substances in a lethal quantity sufficient to cause
2 death and until the defendant is dead.” *Id.* A defendant may elect death by hanging. *Id.*

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4 29. The statute prescribes no specific drugs, dosages, drug combinations, or the
5
6 manner of intravenous line access to be used in the lethal injection execution process.
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9 30. The statute fails to prescribe any certification, training, or licensure required
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11 for those individuals who participate in the execution process.

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13 31. Though the statute does not delegate to DOC or any agency the authority to
14
15 establish or implement execution policies and fails to set forth any administrative or
16
17 procedural standards safeguards or guidelines to be followed when enacting policy or
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19 otherwise acting to implement the statute, all of the details and methods involved in the
20
21 execution process have been determined by DOC and at DOC’s sole discretion.

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23 32. The Policy sets forth the protocol by which the DOC has determined that
24
25 lethal injections are to be carried out in the State of Washington.

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27 33. On information and belief, DOC intends to execute Plaintiff by the lethal
28
29 injection procedure as set forth in the Policy. The Policy, and the manner and means by
30
31 which lethal injections are currently performed, violate state and federal constitutional
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33 provisions that prohibit cruelty, pain, and torture.

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35 34. On information and belief, the lethal injection protocol set forth in the Policy
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37 was adopted without sufficient medical research or review to determine that an inmate
38
39 would not suffer a painful death.

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41 35. The execution protocol set forth in the Policy was adopted without complying
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43 with any administrative or procedural standards, safeguards or guidelines.
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1 **B. The Chemicals Chosen by DOC for Lethal Injection Create an Excessive Risk**
2 **That Plaintiff Will Suffer Excruciating Pain During Execution**

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4 36. The Policy creates a substantial risk that Plaintiff will consciously experience
5 pain and suffering during execution. Pursuant to the Policy, an “injection team” whose
6 members, titles and qualifications are undefined by the Policy, will administer intravenously
7 a three-drug combination to Plaintiff in the following order: (1) thiopental sodium;
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10 (2) pancuronium bromide; and (3) potassium chloride.
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13 **1. Thiopental Sodium**

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15 37. Thiopental sodium, the first drug to be administered, is an ultra-short acting
16 anesthetic intended to cause temporary unconsciousness, the effects of which wear off
17 quickly. If a sufficient dose of thiopental sodium is not administered properly, the sedative
18 effect will wear off during the execution process, creating a substantial constitutionally
19 unacceptable risk of suffocation from the administration of the subsequently-administered
20 pancuronium bromide and pain from injection of the subsequently-administered potassium
21 chloride.
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29 38. Failure to administer properly the entire dose of thiopental sodium necessary
30 to prevent unconstitutional suffering is a foreseeable consequence of the inadequacy of
31 DOC’s procedures and training as outlined in the Policy. Proper administration of
32 thiopental sodium sufficient to render an adequate depth of unconsciousness is crucial to
33 render the execution humane because the subsequently-administered drugs cause
34 excruciating pain and suffering if injected into a conscious or inadequately sedated person.
35 If not fully anaesthetized when injected with the pancuronium bromide and the potassium
36 chloride, Plaintiff will experience both conscious paralysis and asphyxiation and an
37 excruciating burning feeling throughout his veins before dying from cardiac arrest.
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1 39. The Policy provides that a solution of thiopental sodium will be used in the
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3 lethal injection procedure and states that solutions for injection will be prepared no more
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5 than thirty minutes prior to administering them in the execution. The Policy does not outline
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7 how the drug will be prepared, or by whom, nor does it reasonably assure that the personnel
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9 who will prepare and deliver the thiopental sodium have adequate training and experience to
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11 perform these tasks properly and to do so within the thirty-minute time constraint. On
12
13 information and belief, other states use licensed pharmacists or physicians to mix the drugs,
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15 including thiopental sodium, for lethal injections.

16 40. DOC has chosen to create a substantial and foreseeable risk that Plaintiff will
17
18 be conscious during the administration of the pancuronium bromide and potassium chloride
19
20 by electing to use thiopental sodium. Anesthesiologists typically administer thiopental for
21
22 purposes of temporarily anaesthetizing patients in order to introduce a breathing tube. Once
23
24 the breathing tube has been inserted, other longer-lasting barbiturates are administered to
25
26 maintain the patient at a surgical plane of anesthesia throughout the procedure.

27 41. The American Veterinary Medical Association (AVMA) recommends the use
28
29 of a long-acting barbiturate such as sodium pentobarbital in euthanasia, rather than the
30
31 thiopental sodium used in Washington executions of death-sentenced prisoners. *See*
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33 American Veterinary Medical Association, *AVMA Guidelines on Euthanasia (Formerly*
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35 *Report of the AVMA on Euthanasia)* (June 2007) at 11, available at
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37 <http://www.avma.org/issues/animal_welfare/euthanasia.pdf>, last visited August 18, 2008.
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41 **2. Pancuronium Bromide**

42 42. After the thiopental sodium, Defendants intend to administer 100 milligrams
43
44 of pancuronium bromide. Pancuronium bromide is a neuromuscular blocking agent that
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46 paralyzes all voluntary muscles, including the respiratory muscles, thereby causing
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1 asphyxiation. Pancuronium bromide does not diminish cognition, consciousness, or the
2 ability to feel pain or suffocation. As a result, if an individual is not fully unconscious when
3 pancuronium bromide is administered, that person will experience the physical and
4 psychological agony of conscious suffocation, but because of the paralysis, the person will
5 be unable to communicate that suffering and the pain will not be visible to an observer.
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11 43. Pancuronium bromide substantially increases the risk that Plaintiff will be
12 conscious during the injection of potassium chloride, an extremely painful drug. Once
13 paralyzed by pancuronium bromide, an inadequately anesthetized person will appear to be
14 serene and unconscious throughout the execution procedure and will be unable to speak or
15 move or otherwise inform the execution personnel that he is conscious and experiencing
16 torturous pain. Indeed, administered by itself to a conscious person, pancuronium bromide
17 would cause the person to suffocate to death slowly while remaining fully conscious.
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25 44. Pancuronium bromide serves no medical purpose or legitimate function in an
26 execution. The chemical is used to prevent the executioners and witnesses from knowing
27 whether the condemned inmate is adequately anesthetized. In cases in which the thiopental
28 sodium is not successfully delivered to the inmate's circulation and/or the condemned
29 inmate is not adequately anesthetized, pancuronium bromide will create the appearance of a
30 serene death while masking the fact that the person is experiencing conscious paralysis,
31 suffocation, and the agony of cardiac arrest from the administration of potassium chloride.
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44 45. On information and belief, pancuronium bromide is banned in most states for
45 use in animal euthanasia because it inhibits the ability to determine if the patient is
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1 experiencing pain during the procedure. Washington's statutory and administrative
2 provisions express a strong preference for pentobarbital-based drugs. See RCW §§
3 16.52.011; 69.50.310; WAC §§ 246-886-020 & 246-886-030.
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7 46. Pancuronium bromide substantially and foreseeably increases the risk that
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9 Plaintiff will be conscious during the injection of the potassium chloride that follows. Once
10 paralyzed, he will be unable to indicate to the execution personnel that he is conscious and
11 experiencing torturous pain. When pancuronium bromide is administered after an initial
12 dose of thiopental sodium, as the Policy calls for, it creates the real, gratuitous, and
13 unacceptable risk that Plaintiff will be paralyzed by the pancuronium bromide but conscious
14 and able to feel the severe pain caused by the potassium chloride. Administering the
15 combination of thiopental sodium and pancuronium bromide thus creates the
16
17 unconscionable possibility that Plaintiff will consciously experience the agony of
18 suffocation by the pancuronium bromide and the intense burning as the potassium chloride
19 moves through his veins, followed by cardiac arrest, without being able to indicate that he
20 was still conscious or had regained consciousness.
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31 **3. Potassium Chloride**

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33 47. The third and final chemical Defendants intent to administer is potassium
34 chloride, an extremely painful chemical which causes death by disrupting the heart's
35 contractions, leading to cardiac arrest and death. As potassium chloride travels through the
36 bloodstream from the site of injection towards the heart, the chemical activates sensory
37 nerve fibers inside the veins, causing a prolonged and intense burning sensation. In the
38 foreseeable event that a person is not adequately anesthetized throughout the execution
39 procedure, the potassium chloride will cause the person to consciously experience the
40 agonizing pain of this excruciatingly painful chemical coursing through his veins and of
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1 cardiac arrest, while being incapable of expressing his suffering due to the paralytic effects
2 of the pancuronium bromide.
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4 48. The AVMA condemns the use of potassium chloride as the sole agent for
5 animal euthanasia. *See* AVMA Guidelines, *supra*, at 12. If potassium chloride is to be used
6 at all, the AVMA requires the practitioner administering the potassium chloride to have
7 proper training and knowledge to ensure that the euthanized animal has reached a surgical
8 plane, which is characterized by the loss of consciousness, loss of reflex muscle and loss of
9 response to noxious stimuli. The Policy lacks even these basic protections.
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11 49. The Policy creates a substantial risk that Plaintiff will not be fully
12 anaesthetized when the potassium chloride is administered and therefore will be conscious
13 and experience torturous pain as a result.
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23 **C. Deficiencies in the DOC's Lethal Injection Protocol Create a Substantial and**
24 **Excessive Risk That Plaintiff Will Suffer Excruciating Pain During Execution**

25 50. On information and belief, the State of Washington does not use a lethal
26 injection procedure and/or employ safeguards substantially similar to those used by the State
27 of Kentucky. *See Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520, 170 L.Ed. 2d 420 (2008).
28

29 51. The Policy fails for many reasons including, but not limited to, those stated
30 below.
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32 52. The Policy fails to set forth a back-up plan in the event of failed intravenous
33 insertion or other errors in administration of the chemicals.
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35 53. On information and belief, the State does not select or assemble the lethal
36 injection team until 60 to 90 days prior to the execution date, thereby creating the substantial
37 risk that the members of the injection team will not have adequate training to perform
38 executions in a constitutionally compliant manner.
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1 54. The Policy fails to set forth the procedures for establishing properly the
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3 intravenous lines through which the lethal solutions will flow. This failure creates a
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5 substantial, intolerable risk of serious harm that the drugs will not be properly administered,
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7 specifically, that an adequate dose of thiopental sodium will not reach Plaintiff and render
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9 him unconscious on a surgical plane of anesthesia, and that therefore Plaintiff will suffer
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11 suffocation from the administration of the pancuronium bromide and the excruciating pain
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13 akin to fire running through his veins from injection of the potassium chloride.

14 55. The Policy does not identify who will set the intravenous lines, where and the
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16 manner in which the intravenous lines will be set, or sufficient credentials, qualifications,
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18 training, or experience of such person or persons.

19 56. The Policy does not provide a time frame during which the intravenous lines
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21 must be established or a backup plan for vein access in the event that the initial attempt to
22
23 establish the intravenous lines is unsuccessful. The protocol set forth in the Policy fails to
24
25 identify whether the intravenous access will be attempted first through peripheral sites, such
26
27 as arms, hands, or legs, before more invasive measures are attempted.

28 57. The Policy does not prohibit the use of "cut downs" to access veins for the
29
30 intravenous lines. A cut down is a painful procedure that involves surgically exposing a
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32 vein, inserting a catheter, and closing the skin with suturing, and would be performed prior
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34 to the administration of the thiopental sodium.

35 58. The Policy does not provide for persons who possess sufficient expertise to
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37 insert an intravenous line properly to be present in the chamber with the inmate to watch for
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39 signs of intravenous line problems, such as blockage and infiltration, and what necessary
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41 measures to take in the event of such instances.
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1 59. The Policy does not provide for a standard time for the lethal solutions to be
2 administered or how much time should elapse between administration of the solutions.
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4 60. The Policy fails to specify where the injection team and injection team leader
5 are to be located during the administration of the intravenous lethal solutions or how the
6 execution facilities are set up, thereby creating the substantial risk that there will be not be
7 adequate monitoring for purposes of assessing unconsciousness and whether intravenous
8 tubes are and remain properly inserted into veins.
9

10 61. The Policy fails to provide sufficient methods to ensure and monitor that the
11 proper level of unconsciousness is maintained following administering of the sodium
12 thiopental to ensure that an inmate will not experience suffocation or the excruciating
13 burning pain caused by the second and third drugs, *i.e.*, whether the inmate is on the surgical
14 plane of anesthesia prior to administration of pancuronium bromide and potassium chloride.
15 In light of the known risk that a person not completely and deeply unconscious will
16 experience torturous pain and suffering as a result of the last two drugs to be administered,
17 the lack of safeguards creates a substantial intolerable risk of serious harm and wantonly
18 exposes death-sentenced prisoners to that risk.
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20 62. The Policy does not provide how the syringes containing the lethal solutions
21 will be labeled to ensure that the injection team administers the drugs in the correct order
22 and dosage.
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24 63. The Policy does not provide where or how the lethal solutions will be stored
25 upon arrival to the Washington State Penitentiary to guarantee that the integrity of the
26 chemicals is not compromised prior to the execution.
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28 64. The Policy's inadequate procedures and lack of safeguards for establishing
29 and maintaining the IVs, administering the lethal solutions and maintaining the
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1 unconsciousness of the condemned creates a substantial intolerable risk of serious harm to
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3 Plaintiff.

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5 65. The Policy delegates the assignment of all staff to be involved in the
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7 execution, including the administration of the medical procedures, as well as the
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9 determination whether expert advice should be sought as to whether to deviate from the
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11 Policy's procedures for inmate-specific physical or medical reasons, to the Superintendent
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13 of the Washington State Penitentiary (Superintendent), a position that, on information and
14
15 belief, does not require any medical certification, training, experience, or knowledge.

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17 66. The Policy lacks any guidelines for injection team members or other
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19 personnel to rely upon if they are required to exercise their discretion during the lethal
20
21 injection process.

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23 67. The Policy provides that briefing and rehearsals are to be conducted only "as
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25 necessary," but fails to provide what will be rehearsed, and whether and what type of
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27 follow-up will take place in the event that the rehearsal reveals deficiencies, difficulties, or
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29 flaws with the personnel or procedures.

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31 68. A physical examination of the person, may, but need not, be performed. The
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33 Policy does not state who is to review the medical file the requirements for that person's
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35 credentials or qualifications. There is no guidance as to who will conduct the physical
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37 examination, when a physical examination will be performed or the scope of the
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39 examination. The Policy provides that, based upon the physical examination, the
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41 Superintendent "may" but need not consult with "appropriate experts" to determine whether,
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43 based on the medical file, any deviation from the policy is advisable. There is no guidance
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45 as to what the credentials and qualifications of these "appropriate experts" must be, or
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47 whether they must have any experience administering lethal injections.

1 alternative chemicals and retain qualified medical personnel to administer its chosen
2 chemicals to ensure the constitutionality of its lethal injection procedure, Defendants have
3 acted with deliberate indifference and failed to do so. Defendants' current procedures
4 violate evolving standards of decency.
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9 **COUNT II:**
10 **Violation of the Right to be Free from Cruel and Unusual Punishment**
11 **Pursuant to Eighth Amendment**
12 **to the United States Constitution (Lethal Injection)**
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14 77. All prior allegations set forth above are re-alleged as if set forth entirely
15 herein.
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18 78. Defendants, acting under color of Washington law, intend to execute Plaintiff
19 in a manner and by methods that will cause unnecessary pain, that do not comport with
20 evolving standards of decency, thereby depriving Plaintiff of his rights under the Eighth
21 Amendment to the United States Constitution, as made applicable to the State of
22 Washington by the Fourteenth Amendment to the United States Constitution, to be free from
23 cruel and unusual punishment.
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30 79. Although it is possible to conduct executions in a constitutionally compliant
31 manner, Defendants have chosen not to do so. While Defendants could select additional or
32 alternative chemicals and retain qualified medical personnel to administer its chosen
33 chemicals to ensure the constitutionality of its lethal injection procedure, Defendants have
34 acted with deliberate indifference and failed to do so. Defendants' current procedures
35 violate evolving standards of decency.
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COUNT III:
Violation of the Right to be Free from Cruel Punishment and Arbitrary and
Capricious Procedures Pursuant to Article I, Sections 3 and 14,
of the Washington Constitution (Hanging)

80. All prior allegations set forth above are re-alleged as if set forth entirely herein.

81. Defendants, acting under color of Washington law, intend to execute Plaintiff in a manner and by methods that will cause unnecessary pain, that do not comport with evolving standards of decency, thereby depriving Plaintiff of his rights under Article I, §§ 3 and 14 to the Washington Constitution to be free from cruel punishment.

82. Although it is possible to conduct executions in a constitutionally compliant manner, Defendants have chosen not to do so. While Defendants could select additional or alternative methods of execution to ensure the constitutionality of its procedure, Defendants have acted with deliberate indifference and failed to do so. Defendants' current procedures violate evolving standards of decency.

COUNT IV:
Violation of the Right to be Free from Cruel and Unusual Punishment
Pursuant to Eighth Amendment
to the United States Constitution (Hanging)

83. All prior allegations set forth above are re-alleged as if set forth entirely herein.

84. Defendants, acting under color of Washington law, intend to execute Plaintiff in a manner and by methods that will cause unnecessary pain, that do not comport with evolving standards of decency, thereby depriving Plaintiff of his rights under the Eighth Amendment to the United States Constitution, as made applicable to the State of

1 Washington by the Fourteenth Amendment to the United States Constitution, to be free from
2 cruel and unusual punishment.
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5 85. Although it is possible to conduct executions in a constitutionally compliant
6 manner, Defendants have chosen not to do so. While Defendants could select additional or
7 alternative methods of execution to ensure the constitutionality of its procedure, Defendants
8 have acted with deliberate indifference and failed to do so. Defendants' current procedures
9 violate evolving standards of decency.
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15 **COUNT V:**

16 **Violation of the Right to Due Process Pursuant to**
17 **Article I, Section 3, of the Washington Constitution**
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19 86. All prior allegations set forth above are re-alleged as if set forth entirely
20 herein.
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23 87. Defendants, acting under color of Washington law, fail to set forth, in detail
24 sufficient for Plaintiff to evaluate, the manner and methods of the execution employed by
25 the State of Washington as required by Article I, Section 3 of the Washington Constitution.
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29 88. As a direct cause of Defendants' failure to adequately describe the manner
30 and methods of execution employed by the State of Washington, Plaintiff is unable to make
31 a knowing, voluntary and informed election of his method of execution.
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35 **COUNT VI:**

36 **Violation of the Right to Due Process Pursuant to the**
37 **Fourteenth Amendment to the United States Constitution**
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39 89. All prior allegations set forth above are re-alleged as if set forth entirely
40 herein.
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43 90. Defendants, acting under color of Washington law, fail to set forth, in detail
44 sufficient for Plaintiff to evaluate, the manner and methods of the execution employed by
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