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

HONORABLE CHRIS WICKHAM

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

DAROLD R. J. STENSON,

Plaintiff,

v.

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

Defendants.

No. 08-2-02080-8

PLAINTIFF'S SUR-REPLY TO DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

On the eve of this Court's hearing on their motion to dismiss and evidently in response to this litigation, Defendants have hurriedly modified their execution policy. Plaintiff submits this Sur-reply to respond to this extraordinary revelation. Defendants followed no apparent administrative process, standards, or guidelines in implementing this amended policy. They cite no statute that authorizes their spontaneous policy modification. They gave no notice of their proposed modification – not to Mr. Stenson, whose execution Defendants claim is scheduled for December 3, 2008, or to anyone else. Yet they claim that

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this new policy now renders Mr. Stenson's claims moot. Reply at 3. By their actions, Defendants apparently hope that their execution methods will continue to evade any scrutiny against a standard the methods do not meet.

Defendants' actions undermine the central tenet of *Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). As *Baze* holds, the Eighth Amendment protects an inmate's right to die free from the "risk of pain from maladministration" of lethal drugs. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1552 (Stevens, J., concurring). In *Baze*, this meant that a Kentucky trial court took discovery and heard evidence regarding the written protocol and any other policy, other guidelines or practices addressing Kentucky's method of execution. Only after that review was the court ultimately assured, based on all the evidence presented, that Kentucky had in place sufficient safeguards to meet the Eighth Amendment's requirements. The United States Supreme Court, too, was reassured by the safeguards Kentucky had in place, and held the Kentucky method constitutional based on a factual record establishing such safeguards.

By blithely assuming that their policy is constitutional simply because courts have previously upheld lethal injection as a constitutional method of execution, Defendants hope to short-cut the process of review that *Baze* requires. They assumed this before they modified their policy, and they continue to assume it today. But their amended policy, like the one it replaced, fails to address many of the fundamental concerns emphasized by the Supreme Court in *Baze*. *Baze* does not permit Defendants to avoid judicial review just by adopting in some watered-down form aspects of a few of the procedures that Kentucky used. While a showing of substantial similarity between Kentucky's protocol and the DOC's procedures cannot be made without discovery and fact-finding, even a cursory comparison

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shows the DOC's policy lacking many of the safeguards in the Kentucky policy. *See* summary chart attached as Exhibit 1 hereto.

More significantly, Defendants' last minute tinkering with its policy simply confirms that their goal is to avoid any scrutiny of their execution policy and to ensure that Washington's policy is simply unreviewable, by this Court, by Mr. Stenson, or by anyone else.

Defendants' modification is a tacit admission that Mr. Stenson's concerns, set forth in his Complaint, were well-founded. Unfortunately, Defendants' recent actions only amplify those concerns. If Defendants are correct that they have the authority to change their policy at any time, without any notice, any process or review, nothing will stop them from changing this policy again, perhaps before Mr. Stenson's execution. If Defendants decide they cannot or will not comply with their new policy, perhaps because it is not feasible, or is too costly or too difficult – a likely result given Mr. Stenson's proposed execution date of December 3 – they apparently believe they are free to simply change it again.

Defendants' brash position that they may establish and implement a lethal injection policy (1) without a legislative grant of authority, (2) without standards or guidelines from the Legislature to guide their actions and (3) that permits no review or oversight of their actions is stunning and is ***not*** the law. Washington protects against precisely the "unnecessary and uncontrolled discretionary power" by administrative agencies that DOC exercised here. *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979). In order for the legislature to permissibly delegate authority to a state administrative body, it must satisfy a two-part test:

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> First, the legislature must provide standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it.... Second, adequate procedural safeguards must be provided, in regard to the Procedure for promulgation of the rules ***and for testing the constitutionality of the rules after promulgation.*** Such safeguards can ensure that administratively promulgated rules and standards are as a Subject to public scrutiny and judicial review as are standards established and statues passed by the legislature.

Id. at 891 (citation omitted; emphasis added). In *Powell* the court held that a legislative delegation of authority to the State Board of Pharmacy to promulgate emergency regulations without public notice was an unlawful delegation of authority.

Defendants' policymaking here meets neither prong of the *Powell* test. First, there is no statute identifying DOC as "the administrative body" to establish and implement the procedures by which lethal injection will be administered. DOC's policy cites RCW §§ 10.95.160-190 as the sole authority for its power to establish and implement its policy. Policy at 2. But RCW § 10.95.180, which authorizes the two modes of execution permitted in this state, only provides that the superintendent will "supervise" the execution. Nor is there any statute providing "standards or guidelines" – even in "general terms" – about "what is to be done." *Powell*, 92 Wn. 2d at 891. RCW § 10.95.180 provides, in full:

> (1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

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(2) All execution, for both men and women, shall be carried out within the walls of the state penitentiary. [1]

There is no express delegation to DOC, or to any administrative body, to establish execution procedures. There are certainly no standards or guidelines to direct the establishment or implementation of a policy.

Nor does DOC meet the second part of the *Powell* test. RCW § 10.95.180 provides *no safeguards*, much less "adequate procedural safeguards," for how to establish and implement execution procedures. *Powell*, 92 Wn.2d at 891. Nor has the Legislature provided adequate procedural safeguards "for testing the constitutionality of the policy" after promulgation. *Id.* To the contrary, DOC contends that review of its policy is impermissible. Certainly, DOC's claim that Mr. Stenson's challenge is now moot because it has changed its policy is a blatant attempt to avoid any review of the policy. Where, as here, a state administrative body issues rules or policy (1) without an express delegation of authority, (2) without legislative guidance on standards and guidelines to be followed, and (3) with no mechanism for review, that policy cannot be enforced.

In light of Defendants' last-minute change to its policy, and DOC's lack of authority to promulgate this policy, Mr. Stenson is filing today an amended Complaint which (1) challenges the amended policy and (2) clarifies that Plaintiff's challenge includes a challenge to Defendants' authority to promulgate the policy, particularly their blatant attempt to shield their policy from any review. It is simply untenable that Defendants would so quickly rush to amend and modify a process that must meet state and federal

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[1] RCW § 10.95.160 sets out procedures for trial courts to issue death warrants. RCW § 10.95.170 directs where and when a death sentenced prisoner shall be incarcerated. RCW § 10.95.190 directs the persons permitted to attend executions and places specific limits on numbers of persons and timing for designating the same.

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constitutional standards ***without any review, oversight or process***. DOC apparently considers itself exempt from complying with the Administrative Procedures Act. If there is no APA review, there must be some other form of review of the DOC's actions to determine whether DOC's protocol is constitutional and otherwise lawful.[2]

DATED: October 29, 2008

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[2] Mr. Stenson questions, and hereby reserves his right to challenge, whether the narrow exclusion of DOC from compliance with Washington's Administrative Procedures Act "with respect to persons who are in [DOC's] custody or are subject to the jurisdiction of [DOC]," RCW § 34.05.030(1)(c), exempts DOC's establishment and implementation of a systemic execution policy.

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Exhibit 1

Comparison of Safeguards Approved in Baze to Establish Constitutionality of Kentucky's Protocol with Washington's DOC's Amended Protocol Dated 10/25/08

Kentucky Safeguard	Washington DOC Provision
Written protocol's requirement that the execution team members have at least one year of "professional experience" as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. Kentucky currently uses a phlebotomist and an EMT, "personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population." 128 S. Ct. at 1533-34. Ginsberg notes the phlebotomist has 8 years experience; the EMT has 20. 128 S. Ct. at 1569. Requires that IV team members "must remain certified in their profession and must fulfill any continuing education requirements in their profession." (Policy (Pl.'s Opp. Ex. 7) at p. 984.)	6/07 Policy had no experience or occupation qualifications. 10/25/08 Policy requires at least one year's experience in the occupations listed in the Kentucky statute but marginalizes that requirement by allowing "or similar occupation." (IX.A.1.d.) No requirement that the experience be current. Given the recency of even this requirement and DOC's anticipated execution date of December 3, 2008, there is no reasonable assurance that qualified persons with current experience and willing to participate in executions will be available.
IV team members and rest of execution team participate in at least 10 practice sessions per year. 128 S. Ct. at 1534.	10/25/08 Policy requires three practice sessions preceding an execution, to "include the siting" of IV lines. (VIII.A.2.) New requirement that may not be feasible to meet prior to scheduled December 3, 2008 execution date.
The written protocol requires that these practice sessions encompass a complete walk through of the execution procedures, including the siting of IV catheters into volunteers. 128 S. Ct. at 1534.	No equivalent requirements. 6/07 Policy provided for "[b]riefings and rehearsals" "as necessary" (VIII.A.2.); 10/25/08 Policy calls for "practice sessions" which "include the siting of intravenous (IV) lines." (VIII.A.2.) No complete walk through or volunteer requirements.
Presence of warden and deputy warden in execution chamber with the prisoner to (1) assure that prisoner is unconscious after 1st drug using visual inspection and (2) "watch for any problems with the IV catheters and tubing." 128 S. Ct. at 1528; 1534.	No specific requirement that anyone be in the execution chamber. 6/07 Policy had no requirement for observation of prisoner for signs of consciousness or difficulties with IV lines. 10/25/08 Policy provides that the superintendent shall observe for signs of consciousness before injection of pancuronium bromide. (IX.A.4.e.) No requirement that superintendent be in the execution chamber as opposed to the separate room where the drugs are located and administered; no requirement that anyone watch for problems with IV catheters and tubing. No requirement that two persons make observations.

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If physician and warden determine through visual inspection that the prisoner is not unconscious within 60 seconds of delivery of the Thiopental sodium to the primary IV site, a new 3 gram dose is administered to the secondary site before administering the other drugs. 128 S. Ct. at 1228; 1534.	6/07 policy had no such requirement. 10/25/08 Policy directs for an additional 3 grams of Thiopental sodium "if the superintendent observes" the prisoner to be conscious after the first dose, but with no time limitation. (IX.A.4.e.)
Invasive and painful cut-down procedure (requiring special surgical skills--see Souter Decl. ¶16) not allowed: Kentucky DOC agreed during trial court proceedings not to perform these, so the policy reviewed by the Supreme Court did not permit cut-downs. Baze v. Rees, Trial Court Slip op. (Pl.'s Opp. Ex. 3) at 3 n.7.	Allows cut-down procedure and state contends this cannot even ever be challenged unless prisoner "show[s] he would be a subject to such procedure." (Defs.' Reply at 5.) Of course, Plaintiff does not know whether DOC will attempt this procedure on him, so he cannot make such a prior showing, nor have other courts addressing lethal injection protocol required such an individualized showing in order to challenge particular aspects of the protocol.
Placement of IV in neck not allowed—this was held by Kentucky trial court to be unconstitutional (Trial Court Slip op. (Pl.'s Opp. Ex. 3) at 8, ¶ 7) and state agreed it would not perform these as part of the policy and did not challenge the court's finding. Aside from the neck placement issue, Kentucky's policy required placement in the following order of preference: "arms, hands, ankles, and/or feet." (Policy (Pl.'s Opp. Ex. 7) at p. 975.)	WA 8/10/01 Policy had required that IVs be placed in right and left arms only. (IX.A.4.b). Washington's 6/07 and 10/25/08 protocols have no limitations on placement and allow insertion in neck or anywhere.

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Monitoring of prisoner by medical personnel commencing 14 days prior to execution date, physical examination, physical and psychiatric evaluations, and notation of any changes in medical or psychiatric condition—all required by Kentucky Policy (Policy (Pl.'s Opp. Ex. 7) at pp. 971-74.)	• No requirements for physical or psychiatric evaluations or monitoring of medical or psychiatric condition. • A physical exam was required "if needed" by 6/20/07 policy (VIII B.2) – the 10/25/08 policy provides only that a physical exam "may be conducted," but is not required even though the policy notes that a physical exam could expose possible problems that "may affect the execution process," such as collapsed veins, obesity or deterioration of bone or muscular structure. (VIII B.2.) • State contends that failure of requirement for psychiatric evaluation is not reviewable because Stenson "does not allege he has a psychiatric state that would affect lethal injection." Defs' Reply at 5. Such allegation specific to a prisoner is not
Physician is present to assist in any effort to revive the prisoner in the event of a last-minute stay. 128 S. Ct. at 1528. Policy requires medical staff on site to attempt to revive prisoner in the event a stay is issued after execution commences and requires an ambulance and staff at the institution and a "medical crash cart and defibrillator" in the execution building. (Policy (Pl.'s Opp. Ex. 7) at p. 985.)	No comparable provisions. Rather, 10/25/08 policy provides that "[n]o staff will be required to participate in any part of the execution procedure.' (VIII.A.1) The 6/07 policy stated that no "individual' would be required to participate. (VIII.A.2) Requirement that Director of Health Services, a physician, assure that the lethal injection table is in working order under 6/20/07 policy (IX.A2.), was removed in the 10/25/08
: Protocol requires that the IV team establish both primary and backup lines and prepare two sets of drugs before execution commences. 128 S. Ct. at 1534.	No specific requirement for two sets of drugs. Both policies call for "the acquisition of the appropriate quantities of lethal substances." (IX.A.1.b.) 6/07 Policy did not specify how many lines would be established or whether one would be primary and another backup. (IX.A.4.) 10/25/08 policy has no requirement that DOC designate a primary and backup line. Rather, policy says the lethal injection team will establish two IV lines, start a normal saline flow "through each line," (IX.A.4.b.) and allows "[e]ither line" to be used--with no designation of either as primary or backup. (IX.A.4.e.)

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IV tubing is 5 feet. 128 S. Ct. at 1528. Ginsberg notes that length of tubing contributes to risk of inadequate dosage. 128 S. Ct. at 1572.	No specifications for length of tubing and no disclosure of what length is planned for use.
IV team has up to one hour to establish both the primary and back-up IVs. 128 S. Ct. at 1528, 1534.	No comparable, or any, limitations.
Dosages – 3g Thiopental, 50mg Pancuronium bromide, and 240 millequivalents Potassium Chloride. 128 S. Ct. at 1528.	6/07 Policy set Thiopental sodium at 2 grams; 10/25/08 Policy increases it to 3 grams. 6/20/07 policy provided that potassium chloride would be 1.50 – 2.70 mEq/icg based on body weight. New policy sets it at 240 without reference to body weight. (IX.A.4.d)
Electrocardiogram verifies death, 128 S. Ct. at 1528, cardiac monitor is attached to prisoner prior to injection of drugs, a team member uses a stopwatch once drug injections are complete and if there is no flat line after 10 minutes, a second set of lethal drugs is administered. (Policy (Pl.'s Opp. Ex. 7) at pp. 976, 979-80.)	No comparable requirements.
	• Medical file review was required in 6/20/07 policy (VIII B.1) – completely eliminated in 10/25/08 policy. • 10/25/08 and 6/07 policies provide that the superintendent "may consult" with experts to determine if a deviation from policy is advisable to ensure a swift and humane death (VIII.B.2 and VIII.B.3 respectively) but now that consultation is authorized only based on a physical exam (which is not even required). Former requirement allowing expert consultation based on medical file