No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

DAROLD R. J. STENSON,

Petitioner-Plaintiff,

v.

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

Respondents-Defendants.

EMERGENCY MOTION FOR DISCRETIONARY REVIEW OF DENIAL OF PRELIMINARY INJUNCTION

Sherilyn Peterson, WSBA No. 11713
Elizabeth Dietrich Gaukroger, WSBA No. 38896
Diane M. Meyers, WSBA No. 40729
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Attorneys for Petitioner-Plaintiff Darold R. J. Stenson

TABLE OF CONTENTS

I. INTRODUCTION

Petitioner-Plaintiff Darold R. J. Stenson brings a constitutional challenge to Washington's manner of implementing lethal injection execution. Whether Washington's lethal injection procedures meet minimum constitutional requirements set forth in *Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), has never been fully litigated in Washington, nor tested against the Washington Constitution, which affords greater protections than its federal counterpart.

Baze made clear that the courts are the final arbiters of the federal constitutionality of states' execution protocols. Likewise, state law requires that "adequate procedural safeguards must be provided ... for **testing the constitutionality of the rules after promulgation**." *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979) (citations omitted; emphasis added). These safeguards protect against the "unnecessary and uncontrolled discretionary power" of administrative agencies. *Id.*

The trial court agreed that this declaratory action was a proper means to review the Department of Corrections' ("DOC") lethal injection executions procedures. (A0454-A0456) However, it denied Mr. Stenson's request for a preliminary injunction that would stay his December 3, 2008 execution date, thus rendering further proceedings futile.

Unless this Court intervenes, Mr. Stenson will be executed on December 3, 2008 using a policy that has never been reviewed or implemented. To avoid this injustice and properly consider the manner in which Washington executes its citizens, Mr. Stenson urges this Court to grant this motion, accept review, enter a stay of execution or direct the trial court to do so.

II. IDENTITY OF THE PETITIONER

The Petitioner is Darold R.J. Stenson, plaintiff in the underlying action. Mr. Stenson' execution is set for December 3, 2008.

III. DECISION BELOW

Mr. Stenson seeks review of the superior court's order denying his motion for preliminary injunction, a copy included in A0457-A0460.

IV. ISSUE PRESENTED FOR REVIEW

1. Did the superior court err when it denied a preliminary injunction that would have permitted Washington courts to undertake, for the first time, a thorough review of Washington's execution protocol in light of recent changes in federal Eighth Amendment jurisprudence, recent changes to DOC's execution policy, the more protective provision of the Washington Constitution and the evidence that, given Mr. Stenson's medical condition, use of this policy will likely cause him serious pain?

2. Whether, in light of Mr. Stenson's well grounded fear of

immediate invasion of his right and the undisputed finality of the actual injury that will result, the trial court appropriately balanced the factors "according to the circumstances of the particular case" as required in *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P.2d 397 (1936)?

3. Whether the absence of any statute identifying DOC as the administrative body authorized to establish and implement execution policies and the absence of any standards or guidelines to direct their establishment is an unconstitutional delegation of authority under *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979)?

V. STATEMENT OF THE CASE

Under Washington law, death sentences are carried out by "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead." RCW § 10.95.180(1). The statute prescribes no guidelines or standards for how this should be done.

In April 2008, the United States Supreme Court decided *Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), in which the Court recognized for the first time that an inmate can, under certain circumstances, prove that a state's lethal injection protocol violates the Eighth Amendment to the United States Constitution. *Baze* requires

courts to conduct a fact-based review of lethal-injection challenges. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1556 (Stevens, J., concurring).

Though the Supreme Court found that Kentucky's procedures for carrying out lethal injection survived constitutional scrutiny, the three-Justice plurality made clear that that determination was reached only after (1) requiring discovery of Kentucky's policy and how it actually carried out lethal injection executions; (2) examining Kentucky's procedure and hearing and expert testimony, and (3) finding that Kentucky employed specific safeguards that, taken together, minimized the risk of maladministration of the death-causing drugs.

Mr. Stenson's Complaint challenged the adequacy of DOC's policy in light of these standards. At the time his Complaint was filed, he did not have an execution date, his petition for writ of certiorari was pending before the United States Supreme Court and a federal court order prohibited Defendants from setting an execution date.

On October 24, 2008—less than a month ago—Respondents announced that they had adopted a new lethal injection policy by attaching it to their reply brief in support of their motion to dismiss. ("2008 Policy") (A0060-A0079) This was the second such revision in the past sixteen months. Respondents followed no apparent administrative process, standards, or guidelines in implementing this amended policy.

They cited no statute that authorizes this spontaneous policy modification, and gave no notice of it.

DOC's newest policy calls for the sequential administration of three drugs: sodium thiopental (a general anesthetic), followed by pancuronium bromide (a paralytic agent), followed by potassium chloride (a heart-attack-inducing agent). Other than identifying these drugs and the sequence in which they are administered, the 2008 Policy fails to establish requirements for critical components of the execution process.

Mr. Stenson submitted to the superior court declarations from an expert witness, Dr. Souter, who reviewed the new Washington policy and concluded that it was not substantially similar – even on its face – to the Kentucky policy upheld in *Baze*, and that further facts were needed about the policy and the DOC's actual practices to allow a reasoned evaluation. (A0126-A0135) Evidence was also submitted that Mr. Stenson is a type 2 diabetic and that his veins are very difficult to access. (A0443-A0444.) This makes it likely that DOC may use a "cut-down" procedure, a painful and invasive procedure requiring special surgical skills, (A0126-A0135), or requiring access to veins in parts of the body other than arms or legs.

The cut-down procedure was not part of the Kentucky protocol before the Supreme Court. (A0100-A0113) The Kentucky protocol also permits veinous access *only* in the arms. Access in the neck is painful and

requires surgical skills. (A0438-A0422) Washington's new policy – unlike Kentucky's – permits both the cut down procedure and has no limitation on veinous access. (A0060-A0072, A0079-A0083) Given Mr. Stenson's medical condition, DOC is likely to use one or both procedures in this execution.

Mr. Stenson sought an order to enjoin Respondents from carrying out his execution so that the important and complicated constitutional issues raised by this lawsuit can be adequately reviewed by Washington courts, and so that he is not executed pursuant to an unconstitutional policy subjecting him to a significant likelihood of severe pain.

With the exception of Mr. Stenson's challenge to hanging—a method of execution he has not elected—the superior court refused to dismiss Mr. Stenson's complaint. The superior court noted the value of submitting the policy to the pretrial and civil discovery process. It observed that the analysis of the lethal injection policy presented a complicated and significant issue:

> The question is whether the Washington policy is substantially similar to the Kentucky policy. It is apparent that there have been some changes and there are differences from the Kentucky policy. The question is whether these differences are significant such that the Plaintiff could prove a violation of the Eighth Amendment. The issues are complicated and present a significant challenge for the trial court to evaluate and make factual findings.

(A0454-A0456)

Despite recognizing the complexities and significance of the case, the superior court denied Mr. Stenson's motion for preliminary injunction. Further, though the superior court had before it evidence and argument that Mr. Stenson was particularly at risk given his physical condition, it completely ignored that evidence. This decision leaves Mr. Stenson is an untenable position: his claim is sufficient as a matter of law, discovery, expert testimony and fact finding and needed to unravel the complexities of the significant issues involved; but unless this can all occur before December 3, 2008, he will die at the hands of an unreviewed, untested, never-before implemented lethal injection policy which is likely to cause him, in particular, severe pain.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In its November 21 Order, the superior court made the certification set forth in RAP 2.3(b)(4): "this decision involves a controlling question of law as to which there is a substantial ground for difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." The superior court's certification provides clear grounds for immediate review of its Order. (A0457-A0460)

A. The Superior Court Erred in Denying a Preliminary Injunction, Effectively Terminating This Action

The purpose of a preliminary injunction is to preserve the status quo until the rights of the parties can be fully and fairly litigated. *McLean v. Smith*, 4 Wn. App. 394, 482 P.2d 798 (1971); RCW § 7.40.020. In determining whether a preliminary injunction should issue, the court balances three factors: (1) whether Mr. Stenson has a clear legal or equitable right; (2) whether he has a well grounded fear of immediate invasion of his right; and (3) whether Defendants' acts complained of will result in actual and substantial injury. *See, e.g., Nw. Gas Ass'n v. Wash. Utils. & Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007). These factors must be balanced on a continuum, and the required showing of each factor varies "according to the circumstances of the particular case." *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P.2d 397 (1936). Thus, if one or more factors are strongly implicated, the showing on another factor need not be so strong. *See Rabon v. City of Seattle*, 135 Wn. 2d 278, 284, 957 P.2d 621 (1998) ("[S]ince injunctions are within the equitable powers of the court, these criteria must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate."); *Marion Richards Hair Design, Inc. v. Journeymen Barbers, Hairdressers, Cosmetologists & Proprietors*

Intern. Union of Am. Local 195-A, 59 Wn. 2d 395, 396, 367 P.2d 806 (1962) (while "defendants would not sustain serious harm" if an injunction was ordered, "plaintiff is threatened with the disruption of its business" and an injunction would go "no further than the preservation of the *status quo*."); *see also Independent Living Ctr. of S. Calif., Inc. v. Shewry*, 543 F.3d 1047, 1049 (9th Cir. 2008) ("Injunctive relief is warranted when the party requesting such relief demonstrates some combination of probable success on the merits and the possibility of irreparable harm.")

The superior court found that Mr. Stenson had satisfied the showing of harm on both the fear of immediate invasion of right and actual and substantial injury factors. The Court found that "the harm that could result from the execution is great." (A0457-A0460) Thus, given that the invasion of rights and injury factors are *certain* to occur without a preliminary injunction, the showing required for the likelihood of success on the merits is consequentially less.

While likelihood of success on the merits is a required factor, the weight given to it should be minimal here given that Mr. Stenson completely fulfills the other two factors. Denial of an injunction completely and irrevocably precludes Mr. Stenson from proceeding with this case and subjects him to the risk that he will be executed under an unconstitutional policy that, with respect to Mr. Stenson, is quite likely to

cause him severe pain. The superior court erred in requiring too high a threshold showing for the likelihood of success factor and/or its balancing of the factors was an abuse of discretion.

Even if the likelihood of success factor did deserve significant weight, the court abused its discretion in finding that the likelihood of success was "slight" and ruling "though the harm that could result from the execution is great, it does not outweigh the remoteness of success on the merits of the claim." (A0457-A0459) The court based its conclusion on its opinion that the new Washington protocol was likely substantially similar to the Kentucky protocol upheld in *Baze*. The record before the court showed the opposite. The *only* medical expert to opine on whether the new policy was substantially similar was Dr. Souter:

> In my professional opinion, considering the medical aspects of the two policies, they are not the same or substantially similar. The Kentucky policy has requirements that exceed those in the Washington policy. In my professional opinion, under DOC's written policy, there is a serious risk that the inmate may not be adequately sedated after administration of the sodium thiopental.

(A0438-A0442) Dr. Souter gave two significant examples of differences to highlight this:

> The policy would permit the use of the painful cut-down procedure described in my initial declaration. It would also permit DOC to access the inmate's veins anywhere, including in the neck.

(A0438-A0442)

> Both of these procedures require specialized medical training beyond the skills of most physicians and involve significant pain and risk.

(A0438-A0442)

DOC concedes that its policy leaves it free to choose any method of IV access, including the highly invasive "cut down" procedure, i.e., surgically exposing the vein, inserting a catheter and closing the skin with suturing. (A0310-A0326); *Nelson v. Campbell*, 541 U.S. 637, 641-42, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004) (noted expert testimony that "the cut down is a dangerous and antiquated medical procedure to be performed only by a trained physician in a clinical environment with the patient under deep sedation"). The use of the "cut down" procedure was challenged in *Baze*. During discovery, Kentucky agreed to remove this procedure from its protocol. (A0100-A0113); *see also Nelson,* 541 U.S. at 646 (noting that the state agreed not to use the cut-down procedure unless actually necessary). In addition, DOC appears free to insert the IV lines into the neck by use of the carotid artery or the jugular vein, a procedure found to cause "substantial and unnecessary risks" by the trial court in *Baze*. (A0100-A0113)

Both procedures require specialized medical training beyond the skills of most physicians and involve significant pain and risk. (A0126-

A0135, A0438-A0442). Many other differences also exist between the policies which are substantial (A0079-A0083) and require the development of facts and expert testimony to assess.

Further, *Baze* and other courts that have reviewed execution procedures teach that the written policy alone is not the end of the inquiry. The trial court in *Baze* examined the procedures actually used in practice and took those into account in the evaluation. Courts that have examined what happens in practice have sometimes been horrified by the lack of safeguards and failure to follow policy. *See, e.g.*, *Harbison v. Little*, 511 F. Supp. 2d 872, 887 (M.D. Tenn. 2007) (noting testimony by paramedics who placed catheters that they were unaware of potential pitfalls identified by experts as significant risks and criticizing the type of training received what actually happens in training session, lack of screening and team members with drug and alcohol addiction and psychological disorder); *Morales v. Hickman*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (finding "California's lethal-injection protocol—as actually administered in practice" showed a broken system in need of fixing, team members included drug smuggler and PTSD sufferer, training was not meaningful, improper mixing of drugs and poorly lit execution chamber).

Baze and other courts recognize the propriety of granting a stay of execution to permit review. *Baze* began, like this case, as a state court

declaratory action challenging Kentucky's lethal injection protocols under state and federal constitutional provisions. In order to carefully consider the "substantial issue" of the "constitutionality of Kentucky's manner and means of effecting execution by lethal injection," the trial court granted a motion for temporary injunction barring the execution of the plaintiffs in that case. (A0271-A0275) The court observed "The public interest is best served when the [state] presents and explains its position on the manner and means. Thereafter, the citizens of Kentucky can be assured that their government's duty and responsibility of enforcing death sentence is being administered in a constitutionally proper manner." *Id.*; s*ee also Missouri v. Middleton*, No. SC80941 (Mo. Sept. 3, 2008) (A0277); *Arizona v. Landrigan*, No. CR-90-0323-AP (Ariz. Oct. 11, 2007) (A0278-A0279); *Nooner v. Norris*, No. 5:06CV00110 (8th Cir. Oct. 11, 2007) (A0281-A0284); *Cooey v. Taft*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (A0286-A0295); *Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (A0297-A0302); *Jackson v. Taylor*, No. 06-300-SLR (D. Del. May 9, 2006) (A0304-A0306); *Jackson v. Danberg*, No. 06-300-SLR (D. Del. June 27, 2008) (A0308-A0309)

B. The Unlawful Delegation of Authority to DOC Is Another Critical Issue That Should Be Reviewed.

Defendants' may not 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. *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979).

The determination of "crime[] and punishment is a legislative function." *State v. Emmert*, 94 Wn. 2d 839, 847, 621 P.2d 121 (1980). Although the legislature may delegate this authority, it must define what is to be done and the administrative body to do it. When delegating authority to DOC, the Legislature typically does so by specific enabling statute. *E.g.*, RCW 9.94.070(2) (directing DOC to promulgate rules designating "serious infraction" pursuant to RCW 72.09.130). There is no analogous grant of authority to DOC to enact execution policies.

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" which "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." *Powell*, 92 Wn.2d at 891 (citation omitted; emphasis added).

Defendants' policymaking here meets no prong of the *Powell* test. There is no express delegation to DOC to establish execution procedures,

nor are there safeguards, much less "adequate procedural safeguards" for how to establish and implement execution procedures, and "for testing the constitutionality of the policy" after promulgation. *Powell*, 92 wn.2d at 891. RCW §10.95.180 To the contrary, DOC contends that review of its policy is impermissible.

C. A Preliminary Injunction Would Preserve the Status Quo Without Undue Burden on the State

Granting a preliminary injunction merely preserves the *status quo* for only as long as necessary to litigate the merits of Mr. Stenson's substantial claims. The State is not precluded from carrying out his execution, but it must do so under a constitutional policy. It is, and has always been, in Defendants' control to enact and implement a constitutional policy. Their decision to issue a brand new policy on the eve of execution should not prejudice Mr. Stenson's rights.

DATED: November 21, 2008

Respectfully submitted,

Darold R. J. Stenson

By: _____

Sherilyn Peterson, WSBA No. 11713
Diane Meyers, WSBA No. 40729
Elizabeth D. Gaukroger, WSBA No. 38896
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Attorneys for Respondent-Plaintiff
Darold R.J. Stenson

CERTIFICATION OF SERVICE

This certifies that on November 21 2008, I caused a true and correct copy of the foregoing Darold R.J. Stenson's Motion For Discretionary Review to be served via electronic on the following counsel of record at the stated addresses:

Sara J. Olson
John J. Samson
Assistant Attorneys General
Attorney General of Washington
Corrections Division
PO Box 40116
Olympia, WA 98504-0116

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on November 21, 2008.