☐ EXPEDITE
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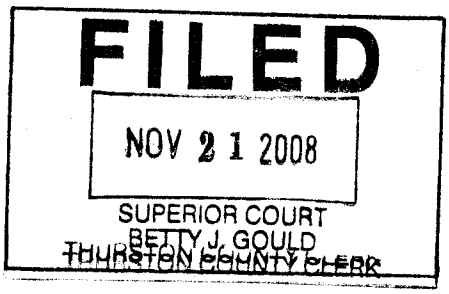
The Honorable Chris Wickham



STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

DAROLD R.J. STENSON, Plaintiff, v. ELDON VAIL; STEPHEN SINCLAIR; MARC STERN; CHERYL STRANGE; WASHINGTON STATE DEPARTMENT OF CORRECTIONS, and DOES 1-50 Defendants.	NO. 08-2-02080-8 ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (PROPOSED)

THIS MATTER having come on pursuant to the Plaintiff's Motion for Preliminary Injunction; the State being represented by ROBERT M. MCKENNA, Attorney General and SARA J. OLSON and JOHN J. SAMSON, Assistant Attorneys General, and the Plaintiff being represented by SHERILYN PETERSON and ELIZABETH D. GAUKROGER, Perkins Coie, LLP; and the Court having reviewed the Motion, the Responses and replies thereto, and the files and records and being fully advised in the premises, now therefore, IT IS HEREBY ORDERED:

1. There are three criteria for preliminary injunctive relief as established in Tyler Pipe Indus., Inc. v. Dep't of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982).

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2. The Plaintiff has satisfied two elements—well grounded fear of invasion of a right and whether the opposing party's acts complained of will result in actual and substantial injury.

3. But Plaintiff must also show a likelihood of success on the merits. Plaintiff has not demonstrated a likelihood of success on the merits.

4. The Supreme Court recently reviewed a constitutional challenge to Kentucky's procedures for lethal injection as a method of execution. Baze v. Rees, ___ U.S. ___, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). The Supreme Court held that Kentucky's protocol for lethal injection was constitutional, and the Supreme Court also held that a state protocol that was substantially similar to the Kentucky protocol would not violate the Constitution.

5. This Court finds the Washington policy governing lethal injection, despite some differences from the Kentucky protocol, appears to be substantially similar to the Kentucky protocol. The Court further finds that in areas where the two state policies diverge, it is because the Washington policy is not as specific as the Kentucky policy, although the Washington policy may be, in implementation, quite similar to the Kentucky policy.

6. The Court further finds that, even to the extent the Washington policy and the Kentucky policy are not similar as written or actually implemented, it is not clear that the Supreme Court instructed all states to have lethal injection policies identical to Kentucky's protocol in order to satisfy the Constitution. The Supreme Court held that the prisoners cannot challenge a policy merely by showing the existence of slightly safer alternatives, since such a rule would turn the courts into boards of inquiry determining best practices for an execution. To establish a constitutional violation, the safer alternatives must be feasible, readily available, and substantially reduce the risk of unnecessary pain. Plaintiff has made no such showing.

7. Although the Court cannot find as a matter of law that Plaintiff has failed to state a claim for relief, the Court does find that a likelihood of success on such a claim is slight, and that

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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.

8. The Court further notes the judgment and sentence was entered in 1994, and the judgment and sentence became final in 1997. The strong policy in favor of closure and in carrying out sentences, and the fact that Plaintiff has received judicial review of his sentence in multiple cases all weigh against the grant of a preliminary injunction.

9. For these reasons, Plaintiff's Motion for Preliminary Injunction is DENIED.

10. The Court recognizes that the Plaintiff may want to seek immediate review of this decision and I want to facilitate review, and therefore direct counsel to propose findings and conclusions for me to enter on November 21, 2008 on the 9:00 AM motion calendar.

11. I hereby certify, pursuant to RAP 2.3(b)(4), that 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.

12. Pursuant to RAP 2.3(d)(2), this decision involves a significant question of law under the Constitutions of the State of Washington and the United States.

13. Pursuant to RAP 2.3(d)(2), this decision involves an issue of the public interest which should be determined by an appellate court.

14. The Clerk shall send uncertified copies of this Order to counsel for the Plaintiff and counsel for the Defendants.

DATED this 21 day of November, 2008.

CHRIS WICKHAM
Judge, Thurston County Superior Court

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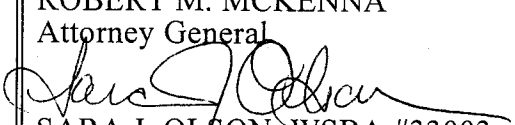
Presented by:

ROBERT M. MCKENNA
Attorney General



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