

THE HONORABLE LONNY R. SUKO

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UNITED STATES DISTRICT COURT  
EASTER DISTRICT OF WASHINGTON

DAROLD R. J. STENSON,

Plaintiff,

v.

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

Defendants.

NO. CV-08-5079-LRS

PLAINTIFF DAROLD STENSON'S  
MOTION FOR TEMPORARY  
RESTRAINING ORDER

NOTE ON MOTION CALENDAR:  
*November 24, 2008, 9:00 a.m.*

**I. INTRODUCTION**

Plaintiff Darold R.J. Stenson (“Stenson”) moves the Court, pursuant to Federal Rule of Civil Procedure 65, for an order temporarily restraining defendants Eldon Vail, Stephen Sinclair, Cheryl Strange, and the Washington Department of Corrections (“DOC”) (collectively “Defendants”) and their officers, directors, agents, servants, employees, attorneys, representatives and all persons in active concert or participation with them from engaging in the following conduct until the Court may consider plaintiff’s motion for preliminary injunction:

Carrying out the execution of Darold R. J. Stenson. The execution is currently scheduled for December 3, 2008 at 12:01 a.m.

1 This motion is based on the argument herein, the declarations of Dr. Michael  
2 Souter and Diane M. Meyers filed herewith, the motion for preliminary injunction  
3 and related briefing and order filed in *Stenson v. Vail et al.*, No. 08-2-02080-8  
4 (attached as exhibits D, E, F, and G), and the Complaint in this case. A proposed  
5 order is submitted separately.  
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## 10 II. STATEMENT OF FACTS

11 Mr. Stenson is incarcerated at the Washington State Penitentiary and has  
12 been sentenced to death. Mr. Stenson's execution was recently set for December  
13 3, 2008.  
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19 Under Washington law, death sentences are carried out by "intravenous  
20 injection of a substance or substances in a lethal quantity sufficient to cause death  
21 and until the defendant is dead." RCW § 10.95.180(1). The statute prescribes no  
22 specific drugs, dosages, drug combinations or the manner of intravenous line  
23 access to be used in the execution process. *Id.* In addition, the statute fails to  
24 prescribe any certification, training, or licensure required for those individuals who  
25 participate in the execution process. *Id.*  
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33 In April 2008, the United States Supreme Court decided *Baze v. Rees*, 128 S.  
34 Ct. 1520 (2008), in which the Court recognized for the first time that an inmate  
35 under a sentence of death can, under certain circumstances, prove that a state's  
36 lethal injection protocol violates the Eighth Amendment to the United States  
37 Constitution. *Baze* requires courts to conduct a fact-based review of lethal-  
38 injection challenges under the Eighth Amendment. *Id.* at 1526 (Roberts, C.J.,  
39 plurality); *id.* at 1556 (Stevens, J., concurring).  
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47 Mr. Stenson's Complaint challenges the adequacy of DOC's policy in light  
48 of these standards. On October 24, 2008—less than a month ago—Defendants  
49 announced that they had adopted a new lethal injection policy by attaching it to a  
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1 state court pleading. *See* DOC 490.200 (“2008 Policy”) (attached as an exhibit to  
 2 the Complaint.) They attached it to state court pleadings (their reply brief in  
 3 support of their motion to dismiss).<sup>1</sup> This was the second such revision in the past  
 4 sixteen months. Defendants followed no apparent administrative process,  
 5 standards, or guidelines in implementing this amended policy. They cited no  
 6 statute that authorizes their spontaneous policy modification. They gave no notice  
 7 of their proposed modification—not to Mr. Stenson or to anyone else.

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

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 27 Mr. Stenson submits herewith declarations from an expert witness, Dr.  
 28 Souter, who reviewed the new Washington policy and concluded that it was not  
 29 substantially similar – even on its face – to the Kentucky policy upheld in *Baze*,  
 30 and that further facts needed to be understood about the policy and the DOC’s  
 31 actual practices to allow a reasoned evaluation. *See* Exs. A & B.

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 37 Mr. Stenson has Type-2 diabetes, and his veins are very difficult to access.  
 38 *See* Ex. C. Defendants apparently ignored his medical condition in assuring the  
 39 Washington state courts that they were prepared for Mr. Stenson’s execution,  
 40 submitting a declaration signed by the Superintendent of the Washington State  
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<sup>1</sup> Mr. Stenson filed an analogous state court declaratory action on September 5, 2008. On November 20,  
 2008, the Thurston County Superior Court denied Defendant’s Motion to Dismiss Plaintiff’s lethal injection  
 challenge but also denied a preliminary injunction under Washington preliminary injunction standard.

1 Penitentiary stating that he “reviewed Mr. Stenson’s medical records” and knew  
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3 “that [Mr. Stenson’s] veins have been examined and are considered ‘normal’ in  
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5 that there are no signs of collapsed veins.” *See id.* More importantly, Mr.  
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7 Stenson’s condition makes more likely that DOC may use the painful “cut-down”  
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9 procedure, an invasive procedure requiring special surgical skills, or requiring  
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11 access to veins in parts of the body other than arms or legs. Ex. A; *see also* Ex. H  
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13 (comparing 2008 Policy with Kentucky policy reviewed in *Baze*); *Nelson v.*  
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15 *Campbell*, 541 U.S. 637, 641-42 (2004) (describing cut down procedure and noting  
16  
17 expert testimony that “the cut down is a dangerous and antiquated medical  
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19 procedure to be performed only by a trained physician in a clinical environment  
20  
21 with the patient under deep sedation”).

22  
23 The cut-down procedure was not part of the Kentucky protocol reviewed by  
24  
25 the Supreme Court, and other jurisdictions have agreed not to use the procedure.  
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27 *Baze v. Rees*, No. 04-CI-1094, at 4 (Franklin Circuit Court, Nov. 23, 2004)  
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29 (attached as Ex.1 to Plaintiff’s Motion for Preliminary Injunction, filed in Thurston  
30  
31 County Superior Court and attached hereto as Ex. D (“PI Motion”)); *e.g. Nelson*,  
32  
33 541 U.S. at 646 (noting that during oral argument the state agreed not to use the  
34  
35 cut-down procedure unless actually necessary). The Kentucky protocol limits  
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37 intravenous access to the arms. *See* Ex. H. Because access in the neck is painful  
38  
39 and requires surgical skills, it was held unconstitutional by the trial court in *Baze*  
40  
41 and not challenged by Kentucky Department of Corrections on appeal. *See Baze v.*  
42  
43 *Rees*, No. 04-CI-1094, at 8 (Franklin Cir. Ct., July 8, 2005) (attached as Ex. I); Ex.  
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45 B, ¶ 4. Washington’s new policy – unlike Kentucky’s – permits both, and one or  
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47 both are likely to occur in this case, as the record shows.

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49 Mr. Stenson sought an order in Washington state court (Thurston County) to  
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51 enjoin Defendants from carrying out his execution so that the important and

1 complicated constitutional issues raised by this lawsuit can be thoroughly and  
2 adequately reviewed by Washington courts, and so that he is not executed pursuant  
3 to an unconstitutional policy subjecting him to a significant likelihood of severe  
4 pain.  
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9 With the exception of Mr. Stenson's challenge to hanging—a method of  
10 execution he has not elected—the Washington state court agreed that Mr. Stenson  
11 had stated a claim against defendants and refused to dismiss his complaint. That  
12 court noted the value of submitting the policy to the pretrial and civil discovery  
13 process. It observed that the analysis of the lethal injection policy presented a  
14 complicated and significant issue. *See* Order Denying, in Part, Motion to Dismiss  
15 (Wash. Super. Ct. Nov. 21, 2008) (attached as Ex. J).  
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23 Despite recognizing the complexities and significance of the case, the  
24 Washington court denied Mr. Stenson's motion for preliminary injunction.  
25 Further, though the superior court had before it evidence and argument that Mr.  
26 Stenson was particularly at risk given his physical condition, it completely ignored  
27 that evidence. This decision leaves Mr. Stenson in an untenable position: his  
28 claim is sufficient as a matter of law, discovery and expert testimony is needed to  
29 unravel the complexities of the significant issues involved, but unless this can all  
30 occur before December 3, 2008, he will die at the hands of an unreviewed,  
31 untested, never-before implemented lethal injection policy which is likely to cause  
32 him severe pain.  
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### 43 III. ARGUMENT

#### 44 45 A. STANDARD FOR ISSUANCE OF TEMPORARY 46 RESTRAINING ORDER

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48 In considering a motion for a temporary restraining order, the Court utilizes  
49 the same test as that used for issuance of a preliminary injunction. *See Los Angeles*  
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1 *Unified Sch. Dist. v. United States Dist. Ct.*, 650 F.2d 1004, 1008 (9th Cir. 1981)  
 2  
 3 (Ferguson, J., dissenting). Under the Ninth Circuit's traditional formulation, the  
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 5 Court should consider:

- 6  
 7 (1) the likelihood of the moving party's success on the merits;  
 8 (2) the possibility of irreparable harm to the moving party if  
 9 relief is not granted; (3) the extent to which the balance of  
 10 hardships favors the respective parties; and (4) in certain cases,  
 11 whether the public interest will be advanced by granting the  
 12 preliminary relief.  
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 16 *Miller ex rel. NLRB v. Calif. Pacific Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994)  
 17 (en banc); *see also Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786  
 18 (9th Cir. 2001) (“The traditional equitable criteria . . . are: (1) a strong likelihood of  
 19 success on the merits; (2) the possibility of irreparable injury to the plaintiffs if  
 20 injunctive relief is not granted; (3) a balance of hardships favoring the plaintiffs;  
 21 and (4) advancement of the public interest.”). This test requires the moving party  
 22 to show *either* (1) probable success on the merits and possible injury *or* (2) the  
 23 existence of serious questions going to the merits, the balance of hardships tipping  
 24 sharply toward the party requesting the preliminary relief, and at least a fair chance  
 25 of success on the merits. *Miller*, 19 F.3d at 456.<sup>2</sup> These alternative formulations  
 26 are not separate tests but represent “two points on a sliding scale in which the  
 27 degree of irreparable harm increases as the probability of success decreases.” *Id.*  
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 47 <sup>2</sup> The Ninth Circuit characterizes, as serious, questions that are “substantial, difficult, and doubtful as to  
 48 make them a fair ground for litigation and thus more deliberative investigation.” *Senate of Calif. v. Mosbacher*, 968  
 49 F.2d 974, 977 (9th Cir. 1992) (citation and internal quotation marks omitted).  
 50  
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1 (quoting *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th  
2  
3 Cir. 1987)).<sup>3</sup>

4 An adequate showing under either of the alternative formulations is  
5  
6 satisfactory to obtain the requested preliminary relief. *Midgett v. Tri-County*  
7  
8 *Metro. Transp. Dist.*, 254 F.3d 846, 850-51 (9th Cir. 2001); *Diamontiney v. Borg*,  
9  
10 918 F.2d 793, 795 (9th Cir. 1990). Moreover, the moving party need not show  
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12 actual harm, only the threat of irreparable harm. *Id.*

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15 **B. PLAINTIFF HAS RAISED SERIOUS QUESTIONS GOING TO**  
16 **THE MERITS AND HAS AT LEAST A FAIR CHANCE OF**  
17 **SUCCESS ON THE MERITS**  
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19 For at least four reasons, Mr. Stenson is likely to prevail on his claim that  
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21 DOC's 2008 Policy is constitutionally inadequate under the Eighth Amendment  
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23 and that DOC violated his due process rights under the Fourteenth Amendment  
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25 when it unilaterally promulgated its policy without pre- or post-enactment review:  
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27 (1) contrary to the command of cases such as *Bush v. Gore*, 531 U.S. 98, 109  
28  
29 (2000) (recount procedure was "inconsistent with the minimum procedures  
30  
31 necessary to protect the fundamental right of each voter"); *Fuentes v. Shevin*, 407  
32  
33 U.S. 67 (1972) (hearing claims that the states of Florida and Pennsylvania violated  
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35 procedural due process by their prejudgment replevin statutes); *Bell v. R. H.*  
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37 *Burson*, 402 U.S. 535, 542 (1971) (in some instances, hearing necessary before  
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44 <sup>3</sup> The critical element in determining which of the alternative tests to apply is the relative hardships of the  
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46 parties. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). The necessary showing of likelihood of  
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48 success on the merits decreases as the balance of hardships increases in favor of the moving party. *Id.* Yet, even if  
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50 the balance of hardship tips decidedly toward the moving party, that party at a minimum still must have a fair chance  
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of success on the merits to obtain injunctive relief. *Stanley v. Univ. of S. Calif.*, 13 F.3d 1313, 1319 (9th Cir. 1993).

1 driver's license can be suspended), *Punikaia v. Clark*, 720 F.2d 564 (9th Cir. 1983)  
2  
3 (hearing claims that due process was violated by the state closing a leprosarium  
4 and by the state failing to provide residents a hearing prior to closing); *Ritter v.*  
5  
6 *Cecil County Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 330 (4th Cir. 1994)  
7  
8 (hearing a claim that removal from Section 8 housing by the state agency violated  
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10 due process because resident was removed without a hearing), *no* procedural  
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12 safeguards exist for promulgating or testing the constitutionality of DOC's hastily-  
13  
14 enacted execution policy;  
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17 (2) the 2008 Policy, as written, violates the Eighth Amendment to the United  
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19 States Constitution;  
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21 (3) the 2008 Policy, as carried out in practice, poses a significant and  
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23 constitutionally intolerable risk of violating the Eighth Amendment to the United  
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25 States Constitution; and  
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27 (4) the due process clause of the United States constitution requires that  
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29 Mr. Stenson receive notice of precisely how Washington intends to execute him to  
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31 ensure that the process does not run afoul of the Eighth Amendment to the United  
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33 States Constitution;  
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35 As the Washington state court recognized and as the declaration of Dr.  
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37 Souter makes clear, whether Washington's lethal injection policy comports with  
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39 constitutional prohibitions on cruel and unusual punishment presents a complicated  
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41 question. More must be known before we can be satisfied that the policy, as  
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43 written or as implemented, satisfies the Eighth Amendment.  
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1 **C. MR. STENSON WILL SUFFER IRREPARABLE HARM IF**  
 2 **DEFENDANT IS NOT RESTRAINED AND THEREFORE THE**  
 3 **BALANCE OF HARDSHIPS TIPS SHARPLY TOWARDS**  
 4 **PLAINTIFF**  
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7 Mr. Stenson seeks a temporary restraining order barring Defendants from  
 8 carrying out his execution while this litigation remains pending. Unless this Court  
 9 orders otherwise, his execution will occur before a final judgment is issued in this  
 10 case. In this case, issuance of a temporary restraining order is both necessary and  
 11 appropriate. If a restraining order is not granted, Mr. Stenson will be executed  
 12 before discovery and factfinding can occur on the merits of his case. Thus, given  
 13 that the invasion of rights and injury factors are certain to occur without a  
 14 preliminary injunction, the showing required for the likelihood of success on the  
 15 merits is consequentially less.  
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25 **D. OTHER COURTS HAVE TEMPORARILY BARRED**  
 26 **EXECUTIONS SO THAT CONSTITUTIONALITY OF**  
 27 **EXECUTION PROTOCOL MIGHT BE SCRUTINIZED**  
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30 *Baze* began as a state court declaratory action challenging Kentucky's lethal  
 31 injection protocols under state and federal constitutional provisions. In order to  
 32 carefully consider the "substantial issue" of the "constitutionality of Kentucky's  
 33 manner and means of effecting execution by lethal injection," the trial court  
 34 granted a motion for temporary injunction barring the execution of the plaintiffs in  
 35 that case. *Baze v. Rees*, No. 04-CI-1094, at 4 (Franklin Circuit Court, Nov. 23,  
 36 2004) (attached as Ex. 1 to PI Motion). Other courts have similarly issued  
 37 preliminary injunctions or stays of executions in order to consider the  
 38 constitutionality of execution protocol. *See Missouri v. Middleton*, No. SC80941  
 39 (Mo. Sept. 3, 2008) (attached as Ex. 3 to PI Motion); *Arizona v. Landrigan*,  
 40 No. CR-90-0323-AP (Ariz. Oct. 11, 2007) (attached as Ex. 4 to PI Motion);  
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1 *Nooner v. Norris*, No. 5:06CV00110 (8th Cir. Oct. 11, 2007) (attached as Ex. 5 to  
2 PI Motion); *Cooley v. Taft*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (attached  
3 as Ex. 6 to PI Motion) (granting Romell Broom's motion for preliminary  
4 injunction and staying his execution; *Cooley v. Strickland*, No. 2:04-cv-1156 (S.D.  
5 Ohio Aug. 26, 2008) (attached as Ex. 7 to PI Motion) (setting discovery deadlines  
6 and hearing for Kenneth Biros); *Jackson v. Taylor*, No. 06-300-SLR (D. Del.  
7 May 9, 2006) (attached as Ex. 8 to PI Motion) (granting Robert Jackson's motion  
8 for preliminary injunction); *Jackson v. Danberg*, No. 06-300-SLR (D. Del. June  
9 27, 2008) (attached as Ex. 9 to PI Motion) (setting discovery deadlines and a  
10 hearing date).

#### 11 **E. NO BOND IS REQUIRED**

12 A restraining order will do no harm to Defendants. If they prevail on the  
13 merits of the litigation, or if their execution policy is revised to comport with  
14 constitutional requirements, they will be able to execute Mr. Stenson. All  
15 Mr. Stenson seeks is a death in "accord with the dignity of man, which is the basic  
16 concept underlying the Eighth Amendment." *Gregg v. Georgia*, 428 U.S. 153, 173  
17 (1976).

#### 18 **IV. CONCLUSION**

19 This is an important issue that the state and federal courts of Washington  
20 have never considered. The factors that the Court considers in determining  
21 whether to issue a temporary restraining order weigh heavily in favor of granting a  
22 Temporary Restraining Order in this matter. In order to give careful scrutiny to the  
23 constitutional claims presented, Mr. Stenson respectfully requests that this Court  
24 grant a temporary restraining order barring Defendants from scheduling or carrying  
25 out his execution until the conclusion of this litigation.

1 DATED this 21st day of November, 2008.  
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4

5 s/Richard C. Coyle

6 By Richard C. Coyle, WSBA #6498  
7 Sherilyn Peterson, WSBA #11713  
8 Attorneys for Plaintiff Darold R. J. Stenson  
9

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**CERTIFICATE OF SERVICE**

On November 21, 2008, I caused to be served upon the following attorneys who have entered an appearance on behalf of defendants, at the address stated below, via the method of service indicated, a true and correct copy of the following documents:

- 1) Plaintiff’s Motion for Temporary Restraining Order
- 2) Exhibits to Plaintiff’s Motion for Temporary Restraining Order
- 3) Declaration of Diane M. Meyers Regarding Efforts to Provide Notice of Motion for Temporary Restraining Order

|   |   |   |                   |   |  |   |                        |   |               |          |                     |
|---|---|---|-------------------|---|--|---|------------------------|---|---------------|----------|---------------------|
| John J. Samson<br>Assistant Attorneys General<br>Attorney General of<br>Washington<br>Corrections Division<br>PO Box 40116<br>Olympia, WA 98504-0116<br>Facsimile:<br>Email: JohnS@atg.wa.gov | <table border="0"> <tr><td>—</td><td>Via hand delivery</td></tr> <tr><td>—</td><td>Via U.S. Mail, 1st Class,<br/>Postage Prepaid</td></tr> <tr><td>—</td><td>Via Overnight Delivery</td></tr> <tr><td>—</td><td>Via Facsimile</td></tr> <tr><td><u>X</u></td><td>Via Electronic Mail</td></tr> </table> | — | Via hand delivery | — | Via U.S. Mail, 1st Class,<br>Postage Prepaid | — | Via Overnight Delivery | — | Via Facsimile | <u>X</u> | Via Electronic Mail |
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| <u>X</u>  | Via Electronic Mail   |   |                   |   |  |   |                        |   |               |          |                     |

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