THE HONORABLE LONNY R. SUKO

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.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

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

II. STATEMENT OF FACTS

Mr. Stenson is incarcerated at the Washington State Penitentiary and has been sentenced to death. Mr. Stenson's execution was recently set for December 3, 2008.

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 specific drugs, dosages, drug combinations or the manner of intravenous line access to be used in the execution process. *Id.* In addition, the statute fails to prescribe any certification, training, or licensure required for those individuals who participate in the execution process. *Id.*

In April 2008, the United States Supreme Court decided *Baze v. Rees*, 128 S. Ct. 1520 (2008), in which the Court recognized for the first time that an inmate under a sentence of death 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 under the Eighth Amendment. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1556 (Stevens, J., concurring).

Mr. Stenson's Complaint challenges the adequacy of DOC's policy in light of these standards. On October 24, 2008—less than a month ago—Defendants announced that they had adopted a new lethal injection policy by attaching it to a

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

state court pleading. *See* DOC 490.200 ("2008 Policy") (attached as an exhibit to the Complaint.) They attached it to state court pleadings (their reply brief in support of their motion to dismiss).[1] This was the second such revision in the past sixteen months. Defendants followed no apparent administrative process, standards, or guidelines in implementing this amended policy. They cited no statute that authorizes their spontaneous policy modification. They gave no notice of their proposed modification—not to Mr. Stenson or to anyone else.

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 how the execution process is to be carried out.

Mr. Stenson submits herewith 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 needed to be understood about the policy and the DOC's actual practices to allow a reasoned evaluation. *See* Exs. A & B.

Mr. Stenson has Type-2 diabetes, and his veins are very difficult to access. *See* Ex. C. Defendants apparently ignored his medical condition in assuring the Washington state courts that they were prepared for Mr. Stenson's execution, submitting a declaration signed by the Superintendent of the Washington State

---

[1] Mr. Stenson filed an analogous state dourt 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.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Penitentiary stating that he "reviewed Mr. Stenson's medical records" and knew "that [Mr. Stenson's] veins have been examined and are considered 'normal' in that there are no signs of collapsed veins." *See id.* More importantly, Mr. Stenson's condition makes more likely that DOC may use the painful "cut-down" procedure, an invasive procedure requiring special surgical skills, or requiring access to veins in parts of the body other than arms or legs. Ex. A; *see also* Ex. H (comparing 2008 Policy with Kentucky policy reviewed in *Baze*); *Nelson v. Campbell*, 541 U.S. 637, 641-42 (2004) (describing cut down procedure and noting 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 cut-down procedure was not part of the Kentucky protocol reviewed by the Supreme Court, and other jurisdictions have agreed not to use the procedure. *Baze v. Rees, No. 04-CI-1094*, at 4 (Franklin Circuit Court, Nov. 23, 2004) (attached as Ex.1 to Plaintiff's Motion for Preliminary Injunction, filed in Thurston County Superior Court and attached hereto as Ex. D ("PI Motion")); *e.g. Nelson*, 541 U.S. at 646 (noting that during oral argument the state agreed not to use the cut-down procedure unless actually necessary). The Kentucky protocol limits intravenous access to the arms. *See* Ex. H. Because access in the neck is painful and requires surgical skills, it was held unconstitutional by the trial court in *Baze* and not challenged by Kentucky Department of Corrections on appeal. *See Baze v. Rees*, No. 04-CI-1094, at 8 (Franklin Cir. Ct., July 8, 2005) (attached as Ex. I); Ex. B, ¶ 4. Washington's new policy – unlike Kentucky's – permits both, and one or both are likely to occur in this case, as the record shows.

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

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

complicated constitutional issues raised by this lawsuit can be thoroughly and 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 Washington state court agreed that Mr. Stenson had stated a claim against defendants and refused to dismiss his complaint. That 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. *See* Order Denying, in Part, Motion to Dismiss (Wash. Super. Ct. Nov. 21, 2008) (attached as Ex. J).

Despite recognizing the complexities and significance of the case, the Washington 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 in an untenable position: his claim is sufficient as a matter of law, discovery and expert testimony is 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 severe pain.

III. ARGUMENT

A. STANDARD FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER

In considering a motion for a temporary restraining order, the Court utilizes the same test as that used for issuance of a preliminary injunction. *See Los Angeles*

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Unified Sch. Dist. v. United States Dist. Ct., 650 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J., dissenting). Under the Ninth Circuit's traditional formulation, the Court should consider:

> (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable harm to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Miller ex rel. NLRB v. Calif. Pacific Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994) (en banc); *see also Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001) ("The traditional equitable criteria . . . are: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the plaintiffs if injunctive relief is not granted; (3) a balance of hardships favoring the plaintiffs; and (4) advancement of the public interest."). This test requires the moving party to show ***either*** (1) probable success on the merits and possible injury **or** (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply toward the party requesting the preliminary relief, and at least a fair chance of success on the merits. *Miller*, 19 F.3d at 456.[2] These alternative formulations are not separate tests but represent "'two points on a sliding scale in which the degree of irreparable harm increases as the probability of success decreases.'" *Id.*

[2] The Ninth Circuit characterizes, as serious, questions that are "substantial, difficult, and doubtful as to make them a fair ground for litigation and thus more deliberative investigation." *Senate of Calif. v. Mosbacher*, 968 F.2d 974, 977 (9th Cir. 1992) (citation and internal quotation marks omitted).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

(quoting *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987)).[3]

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

B. PLAINTIFF HAS RAISED SERIOUS QUESTIONS GOING TO THE MERITS AND HAS AT LEAST A FAIR CHANCE OF SUCCESS ON THE MERITS

For at least four reasons, Mr. Stenson is likely to prevail on his claim that DOC's 2008 Policy is constitutionally inadequate under the Eighth Amendment and that DOC violated his due process rights under the Fourteenth Amendment when it unilaterally promulgated its policy without pre- or post-enactment review:

(1) contrary to the command of cases such as *Bush v. Gore*, 531 U.S. 98, 109 (2000) (recount procedure was "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter"); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (hearing claims that the states of Florida and Pennsylvania violated procedural due process by their prejudgment replevin statutes); *Bell v. R. H. Burson*, 402 U.S. 535, 542 (1971) (in some instances, hearing necessary before

---

[3] The critical element in determining which of the alternative tests to apply is the relative hardships of the parties. *Walczak v. EPL Prolong, Inc.,* 198 F.3d 725, 731 (9th Cir. 1999). The necessary showing of likelihood of success on the merits decreases as the balance of hardships increases in favor of the moving party. *Id.* Yet, even if the balance of hardship tips decidedly toward the moving party, that party at a minimum still must have a fair chance of success on the merits to obtain injunctive relief. *Stanley v. Univ. of S. Calif.*, 13 F.3d 1313, 1319 (9th Cir. 1993).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

driver's license can be suspended), *Punikaia v. Clark*, 720 F.2d 564 (9th Cir. 1983) (hearing claims that due process was violated by the state closing a leprosarium and by the state failing to provide residents a hearing prior to closing);; *Ritter v. Cecil County Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 330 (4th Cir. 1994) (hearing a claim that removal from Section 8 housing by the state agency violated due process because resident was removed without a hearing), ***no*** procedural safeguards exist for promulgating or testing the constitutionality of DOC's hastily-enacted execution policy;

(2) the 2008 Policy, as written, violates the Eighth Amendment to the United States Constitution;

(3) the 2008 Policy, as carried out in practice, poses a significant and constitutionally intolerable risk of violating the Eighth Amendment to the United States Constitution; and

(4) the due process clause of the United States constitution requires that Mr. Stenson receive notice of precisely how Washington intends to execute him to ensure that the process does not run afoul of the Eighth Amendment to the United States Constitution;

As the Washington state court recognized and as the declaration of Dr. Souter makes clear, whether Washington's lethal injection policy comports with constitutional prohibitions on cruel and unusual punishment presents a complicated question. More must be known before we can be satisfied that the policy, as written or as implemented, satisfies the Eighth Amendment.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

C. MR. STENSON WILL SUFFER IRREPARABLE HARM IF DEFENDANT IS NOT RESTRAINED AND THEREFORE THE BALANCE OF HARDSHIPS TIPS SHARPLY TOWARDS PLAINTIFF

Mr. Stenson seeks a temporary restraining order barring Defendants from carrying out his execution while this litigation remains pending. Unless this Court orders otherwise, his execution will occur before a final judgment is issued in this case. In this case, issuance of a temporary restraining order is both necessary and appropriate. If a restraining order is not granted, Mr. Stenson will be executed before discovery and factfinding can occur on the merits of his case. 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.

D. OTHER COURTS HAVE TEMPORARILY BARRED EXECUTIONS SO THAT CONSTITUTIONALITY OF EXECUTION PROTOCOL MIGHT BE SCRUTINIZED

Baze began 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. *Baze v. Rees*, No. 04-CI-1094, at 4 (Franklin Circuit Court, Nov. 23, 2004) (attached as Ex. 1 to PI Motion). Other courts have similarly issued preliminary injunctions or stays of executions in order to consider the constitutionality of execution protocol. *See Missouri v. Middleton*, No. SC80941 (Mo. Sept. 3, 2008) (attached as Ex. 3 to PI Motion); *Arizona v. Landrigan*, No. CR-90-0323-AP (Ariz. Oct. 11, 2007) (attached as Ex. 4 to PI Motion);

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Nooner v. Norris, No. 5:06CV00110 (8th Cir. Oct. 11, 2007) (attached as Ex. 5 to PI Motion); *Cooey v. Taft*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (attached as Ex. 6 to PI Motion) (granting Romell Broom's motion for preliminary injunction and staying his execution; *Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (attached as Ex. 7 to PI Motion) (setting discovery deadlines and hearing for Kenneth Biros); *Jackson v. Taylor*, No. 06-300-SLR (D. Del. May 9, 2006) (attached as Ex. 8 to PI Motion) (granting Robert Jackson's motion for preliminary injunction); *Jackson v. Danberg*, No. 06-300-SLR (D. Del. June 27, 2008) (attached as Ex. 9 to PI Motion) (setting discovery deadlines and a hearing date).

E. NO BOND IS REQUIRED

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

IV. CONCLUSION

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

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

DATED this 21st day of November, 2008.

s/Richard C. Coyle
By Richard C. Coyle, WSBA #6498
Sherilyn Peterson, WSBA #11713
Attorneys for Plaintiff Darold R. J. Stenson
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101
Telephone: (206) 359-8000
Fax: (206) 359-9000
Email: RCoyle@perkinscoie.com
Email: SPeterson@perkinscoie.com

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
Assistant Attorneys General
Attorney General of
Washington
Corrections Division
PO Box 40116
Olympia, WA 98504-0116
Facsimile:
Email: JohnS@atg.wa.gov

___ Via hand delivery
___ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
__X__ Via Electronic Mail

s/Richard C. Coyle
By Richard C. Coyle, WSBA #6498
Attorneys for Plaintiff Darold R. J. Stenson
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101
Telephone: (206) 359-8000
Fax: (206) 359-9000
Email: RCoyle@perkinscoie.com