☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: 11/20/2008
Time: 9:00 a.m.
Judge/Calendar: Hon. 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 MOTION FOR PRELIMINARY INJUNCTION

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I. RELIEF REQUESTED

Plaintiff Darold R. J. Stenson moves the Court under Washington Rule of Civil Procedure 65 for a preliminary injunction barring Defendants from carrying out his execution while this litigation remains pending.

II. STATEMENT OF FACTS AND EVIDENCE TO BE INTRODUCED

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). An inmate may elect death by hanging. *Id.* The statute prescribes no specific drugs, dosages, drug combinations or the manner of intravenous line access to be used in the execution process. In addition, the statute fails to prescribe any certification, training, or licensure required for those individuals who participate in the execution process.

In April 2008, the United States Supreme Court decided *Baze v. Rees*, 553 U.S. __, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (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).[1]

[1] The Supreme Court recognized that the determination of whether a state's lethal injection protocol withstands constitutional scrutiny requires the trial court to conduct "extensive hearings" and fact-finding to determine the sufficiency of the evidence. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1556 (Stevens, J., concurring). Chief Justice Roberts, writing the plurality opinion, phrased the

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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 procedure, both as to its policy and how, in practice, Kentucky actually carried out lethal injection executions; (2) examining Kentucky's procedure and hearing factual and expert testimony, and (3) finding that Kentucky employed specific safeguards that minimized the risk of maladministration of the death-causing drugs. These safeguards included, for example, a minimum level of professional experience for individuals who insert intravenous ("IV") catheters, a requirement that the lethal injection team regularly practice, a requirement of backup IV lines and other redundancies, and the warden's presence in the execution chamber to watch for signs of consciousness and IV problems, and to redirect, as necessary, the flow of chemicals to the backup IV site if the inmate does not lose consciousness. *Id.* at 1533-34. Whether Washington's lethal injection statute, policy and procedures meet minimum constitutional requirements set forth in *Baze* has never been fully litigated in Washington, nor has the sufficiency of the same been tested against the Washington Constitution, which affords greater protections than its federal counterpart.[2]

Less than three weeks ago, on the eve of this Court's first scheduled hearing in this action and evidently in response to this litigation, Defendants hurriedly modified their execution policy (the twice such revision in the past sixteen months). DOC 490.200 ("2008 Policy"), filed as Attachment 1 to Reply to Resp. to Defs. Mot. to Dismiss ("Defs. Reply").

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inquiry as a determination of whether the "risk of pain from maladministration" of a lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment. *Id.* at 1526.

[2] Washington's prohibition on "cruel punishment" found in Article I, § 14 of the Washington Constitution, provides greater protection than the Eighth Amendment to the United States Constitution. *E.g.*, *State v. Morin*, 100 Wn. App. 25, 995 P.2d 113 (2000), *review denied*, 142 Wn. 2d 1010, 16 P.3d 1264.

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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 seeks an order enjoining Defendants from carrying out his execution so that the important and complicated constitutional issues raised by this lawsuit can be thoroughly and adequately reviewed by Washington courts.

III. STATEMENT OF THE ISSUE

The following issue is presented for resolution by the Court: whether the Court should grant Plaintiff's Motion for a Preliminary Injunction in order to undertake, for the first time, a thorough review of Washington's execution protocol in light of recent changes in federal Eighth Amendment jurisprudence and recent changes to DOC's execution policy and so that the constitutionality of the statute, policy and procedure can be tested under the Washington constitution as well.

IV. LEGAL AUTHORITY

Mr. Stenson seeks a preliminary injunction 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.

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A. The Preliminary Injunction Standard

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. To grant Mr. Stenson an injunction, this Court must balance three factors: (1) whether he 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); *see also Independent Living Ctr. of S. Calif., Inc. v. Shewry*, 543 F.3d 1047, 1049 (9th Cir. 2008) (noting that "[i]njunctive relief is warranted when the party requesting such relief demonstrates some combination of probable success on the merits and the possibility of irreparable harm"); *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.")

Mr. Stenson meets completely the second and third factors. If an injunction is not granted, he will be executed. Thus, the invasion of his right is as complete as it could be in any case. For the same reason, the third factor, "actual and substantial injury," is also certain. Thus, the only remaining factor to be considered is the likelihood of success on the merits. 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.

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B. *Baze* and Other Cases Have Recognized the Necessity of Granting Preliminary Injunctions to Review State Lethal Injection Policy and Procedures

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 Exhibit 1). 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 Exhibit 2); *Arizona v. Landrigan*, No. CR-90-0323-AP (Ariz. Oct. 11, 2007) (attached as Exhibit 3) (granting Jack Harold Jones's motion to stay execution); *Nooner v. Norris*, No. 5:06CV00110 (8th Cir. Oct. 11, 2007) (attached as Exhibit 4); *Cooey v. Taft*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (attached as Exhibit 5) (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 Exhibit 6) (setting discovery deadlines and hearing for Kenneth Biros); *Jackson v. Taylor*, No. 06-300-SLR (D. Del. May 9, 2006) (attached as Exhibit 7) (granting Robert Jackson's motion for preliminary injunction); *Jackson v. Danberg*, No. 06-300-SLR (D. Del. June 27, 2008) (attached as Exhibit 8) (setting discovery deadlines and a hearing date).

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C. Consideration of the Three Preliminary Injunction Factors Establishes the Need for an Injunction in This Case

1. Mr. Stenson Is Likely to Succeed on the Merits

As part of deciding whether a party has a "clear legal or equitable right," this Court must examine the "likelihood that the moving party will prevail on the merits." *Rabon v. City of Seattle*, 135 Wn. 2d 278, 285, 957 P.2d 612, 623 (1998).

For at least five reasons, Mr. Stenson is likely to prevail on his claim that DOC's 2008 Policy is constitutionally inadequate under both the Washington and United States constitutions and that the DOC exceeded its authority under Washington law when it unilaterally promulgated its policy without pre- or post-enactment review: (1) contrary to the command of *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979), ***no*** procedural safeguards exist for promulgating or testing the constitutionality of this hastily-enacted policy; (2) the 2008 Policy, as written, violates Article I, § 14 of the Washington Constitution and 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 Article I, § 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution; (4) the due process clauses of the Washington and United States constitutions require that Mr. Stenson receive notice of precisely how Washington intends to execute him to ensure that the process does not run afoul of Article I, § 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution; and (5) no statute delegates to DOC the authority to establish and implement Washington's execution policy.

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a. The 2008 Policy, as written, violates the Washington and United States constitutions

Even a cursory comparison of Washington's 2008 Policy with the Kentucky's protocol examined in *Baze* confirms that the Policy contains few of the safeguards the Supreme Court relied on to uphold the Kentucky protocols. *See Baze*, 128 S. Ct. at 1537; *compare* 2008 Policy at 8-9 *with* 2004 Kentucky Execution Protocol and Revisions, attached as Exhibit 9.

Like Kentucky, Washington administers three drugs sequentially: sodium thiopental (a general anesthetic), followed by pancuronium bromide (a paralytic agent), followed by potassium chloride (a heart-attack-inducing agent). *Baze* acknowledged that maladministration of the first drug would cause constitutionally unacceptable risk of suffocation and pain: "*It is uncontested that failing a proper dose of sodium thiopental* that could render a person unconscious, *there is a substantial constitutionally unacceptable risk* of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze*, 128 S. Ct. at 1533. The question then, is whether the state protocol contains sufficient safeguards such that there is not a substantial risk of maladministration. *Id.*

Unlike Kentucky, Washington lacks any substantial safeguards to prevent maladministration of the drugs and has no contingency plan for dealing with the known, foreseeable and serious complications that can arise during a lethal injection execution. For instance, the 2008 Policy does not require that a properly-trained individual monitor Mr. Stenson to ensure that he is properly sedated prior to the administration of the lethal chemicals pancuronium bromide and potassium chloride. Instead it generally provides that Superintendent, a person not required to possess any medical training, will "observe"

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Mr. Stenson "for signs of consciousness." 2008 Policy at 9. Moreover, the 2008 Policy does not account for the dangers of IV problems, including infiltration, nor provide for certain other protective redundancies that will ensure an adequate dose of sodium pentothal is delivered. If an insufficient dosage of sodium pentothal is delivered—a foreseeable occurrence given the inadequacy of the Policy—Mr. Stenson could regain consciousness and experience both conscious suffocation induced by pancuronium bromide and the excruciatingly painful burning sensation induced by potassium chloride. As the Supreme Court has explained, the risk of this occurring is constitutionally impermissible. *See Baze*, 128 S. Ct. at 1523.

Moreover, the Policy does not describe the manner and means by which DOC intends to access Mr. Stenson's veins. 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. *See Nelson v. Campbell*, 541 U.S. 637, 641-42, 124 S. Ct. 2117, 158 L.Ed.2d 924 (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 use of the "cut down" procedure was challenged in *Baze*. During discovery, Kentucky agreed to remove this procedure from its protocol. *Baze v. Rees*, No. 04-CI-1094, at n.7 (Franklin Circuit Court, July 8, 2005); *see also 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 DOC implicitly conceded in its briefing on Defendants' Motion to Dismiss that the Policy does not bar this method of IV access or stipulate that, if used, a member of the execution team be medically qualified and capable of performing this painful surgical procedure. *See* Defs. Reply at 5.

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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*.[3] *Baze v. Rees*, No. 04-CI-1094, at 8 (Franklin Cir. Ct., July 8, 2005).

The Policy gives no details on the flow of drugs through the lines, including whether and how long the injection team will wait before administering each subsequent chemical, or what happens if a malfunction occurs. It fails to describe how Washington will save Mr. Stenson's life if a last-minute stay is granted and does not require the presence of appropriate equipment or properly-trained personnel who can revive Mr. Stenson between administration of each drug should such a stay be granted.

Washington's Policy is plainly inadequate when compared to the protocols approved in *Baze*. As described below, these obvious deficiencies unnecessarily increase the risk that lethal injection, as administered, will cause Mr. Stenson to suffer unnecessary and severe pain.

b. The significant risk of maladministration of DOC's execution protocol violates the Washington and United States constitutions

Even if Washington's Policy was similar to the protocol examined by the United States Supreme Court in *Baze*—and it is not—there is an unacceptable likelihood that the Policy will be administered improperly and cause Mr. Stenson to suffer excruciating and constitutionally impermissible pain.

Baze requires courts to conduct a fact-based review of lethal-injection challenges under the Eighth Amendment. *Baze*, 128 S. Ct. at 1556. The numerous opinions making up the majority agree that "evidence adduced by [a] petitioner" will in certain circumstances render a state's protocol unconstitutional. *Id.* Similarly, the plurality observes that in the

[3] Kentucky did not challenge this finding of fact.

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absence of "extensive hearings," it will be difficult to determine whether the "risk of pain from maladministration" of lethal-injection protocols is sufficient to trigger Eighth Amendment protections. *Id.* at 1526 (Roberts, C.J., plurality).

The Court identified no less than seven safeguards that, taken together, caused the Court to rule that Kentucky's protocol avoided the risk that persons will suffer severe and unnecessary pain while being executed, including requiring experienced team members, regular practice, primary and backup IV lines, two sets of lethal injection drugs, precise timeframes for establishing IV lines, personal monitoring of the inmate's condition, and explicit alternative instructions in the event of the failure of the chemicals.

Because of the woeful lack of guidance provided in the written protocol and apparent absence of any other instructions, procedures or requirements to provide guidance and establish minimum standards, it is likely that DOC's application of the Policy, as applied, will create a substantial risk of severe and unnecessary pain. This is especially true where, as here, the protocol was just recently and hastily assembled and the DOC has had no time to assure that it can meet the few new requirements it has now included in the protocol. Further, as other courts have found when they actually required discovery and examined what was happening in practice, the actual practice did not mirror the written procedures. *See, e.g., Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N. D. Cal. 2006).

c. DOC exceeded its jurisdiction when it established and modified the execution policy without any review or oversight of their actions

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). Washington law protects against precisely the

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"unnecessary and uncontrolled discretionary power" by administrative agencies that DOC exercised here. *Id.* In order for the legislature to permissibly delegate authority to a state administrative body, it must satisfy a two-part test:

> 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 no 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. 2008 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 only that "[t]he punishment of death shall be supervised by the superintendent of the penitentiary . . ." and that the punishment "shall be carried out within the walls of the state penitentiary.[4] There is no express delegation to DOC, or to any administrative body, to

[4] 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

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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 prong 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. 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. It is simply untenable that Defendants would so quickly rush to amend and modify a process that must meet state and federal constitutional standards ***without any review, oversight or process***.

d. Stenson has a due process right to discover if DOC's of execution protocols violates the Washington and United States constitutions

Because *Baze* requires a fact intensive inquiry, Mr. Stenson must have an opportunity to discover precisely how Washington intends to administer its execution Policy. *See, e.g., Stewart v. LaGrand*, 526 U.S. 115, 119, 119 S. Ct. 1018, 143 L.Ed.2d 196 (1999) (holding that inmates facing the death penalty are entitled to notice when there has been a post-conviction change in mode of execution).

The Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's prohibition on cruel and unusual punishment protect an inmate from being executed based on secret information. *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Simmons v. South*

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§ 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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Carolina, 512 U.S. 154 (1994). Surely, if an inmate cannot be sentenced to death based on secret information, then likewise, he cannot be executed under a secret procedure that the condemned inmate had no notice of or opportunity to challenge.

Mr. Stenson is not in a position to confirm that DOC has the safeguards required under the Eighth Amendment or the Washington Constitution to prevent severe and unnecessary pain. For instance, the Supreme Court acknowledged that an improper dose of sodium thiopental would create a "substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze*, 128 S. Ct. at 1523. Nothing in the Policy or the documents received by plaintiff's counsel from DOC pursuant to a public disclosure request prevents this risk.

The most that can be discerned from reviewing Washington's protocols is that it omits many of the safeguards that salvaged Kentucky's protocols. Discovery will be necessary to determine whether Washington has supplemented its written policy with any informal or oral instruction or training that could provide the meaningful safeguards to reduce the risk of excruciating pain during the administration of lethal injection drugs.

2. Mr. Stenson Has a Well Grounded-Fear That Defendants Will Schedule and Carry Out His Execution

Mr. Stenson's execution has been set for December 3, 2008. He has a well-grounded fear that Defendants will carry out his execution if this Court does not enjoin them from doing so in order to consider the merits of this action.

3. If Defendants Schedule or Effect Stenson's Execution, He Will Suffer an Actual and Substantial Injury

Mr. Stenson will be executed if an injunction is not granted—quite possibly enduring excruciating agony. Any final judgment that DOC's Policy is constitutionally deficient

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would be rendered completely meaningless should Mr. Stenson be executed before judgment. Mr. Stenson will suffer the ultimate "actual and substantial" injury.

In order to preserve the parties' and the Court's ability to reach the merits of this claim without a pending execution lurking in the background, and to ensure that any final judgment is not rendered ineffectual by the irreparable injury of Mr. Stenson's execution, this Court should grant Mr. Stenson a preliminary injunction barring Defendants from carrying out Mr. Stenson's execution. *See Wainwright v. Booker*, 473 U.S. 935 n.1 (1985) (Powell, J., concurring) (recognizing that a prisoner facing execution will suffer irreparable injury if the stay is not granted). The hardship to the defendants if an injunction is granted is minimal.

D. The Public Interest In and Importance Of Evaluating the Constitutionality of the Policy Surpass Any Interest in Quickly Scheduling and Carrying Out Mr. Stenson's Execution

Granting Mr. Stenson a preliminary injunction barring Washington from carrying out his execution during the pendency of this litigation merely preserves the status quo for only as long as necessary to litigate the merits of Mr. Stenson's substantial claims.

Moreover, an injunction will do no harm to Defendants because if they prevail on the merits of the litigation, they will be able to execute Mr. Stenson as soon as they wish. 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, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

This is the first challenge focusing exclusively on lethal injection to be considered by Washington state courts since *Baze* was decided seven months ago. States confronted with challenges to the constitutionality of their execution protocols postponed executions to ensure that death sentences were not carried out in an unconstitutional manner. *See supra*, at

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4-5 (identifying cases in which courts stayed executions in order to consider the merits of similar lethal injection challenges). As the court observed in *Baze* when granting a preliminary injunction so the plaintiffs could pursue their lethal injection challenge: "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 a death sentence is being administered in a constitutionally proper manner." *Baze v. Rees*, No. 04-CI-1094, at n.7 (Franklin Circuit Court, Nov. 23, 2004).

This is an important issue that the courts of this state should address. If a preliminary injunction is not granted, Mr. Stenson will effectively be precluded from bringing this challenge, the DOC will continue to employ a constitutionally inadequate lethal injection policy, and Washington executions will continue to skirt the Eighth and Fourteenth Amendments, as well as the Washington Constitution. The Court should require that Defendants address the concerns raised by Mr. Stenson.

V. CONCLUSION

The factors that the Court considers in determining whether to issue a preliminary injunction weigh heavily in favor of granting an injunction in this matter. In order to give careful scrutiny to the constitutional claims presented, Mr. Stenson respectfully requests that this Court grant a preliminary injunction barring Defendants from scheduling or carrying out his execution until the conclusion of this litigation.

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DATED: November 13th, 2008

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CERTIFICATE OF SERVICE

On this the 13th day of November, 2008, I hereby caused a true and correct copy of the above foregoing document PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, NOTE FOR MOTION, and PROPOSED ORDER to be served by hand-delivery on the following counsel of record:

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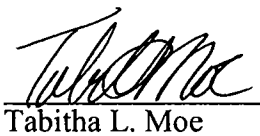

Tabitha L. Moe

Exhibit 1

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 04-CI-1094

RALPH BAZE
and
THOMAS C. BOWLING **PLAINTIFFS**

v.

JOHN D. REES, Commissioner
Kentucky Department of Corrections
and
GLEN HAEBERLIN, Warden
Kentucky State Penitentiary
and
HON. ERNIE FLETCHER, Governor
Commonwealth of Kentucky **DEFENDANTS**

ORDER AND OPINION

This matter is before the Court on Plaintiff's, Thomas Bowling, motion for a temporary injunction. The Plaintiff and Co-Plaintiff, Ralph Baze, have each been convicted of murder and have been sentenced to death under the laws of the Commonwealth. Plaintiff Bowling's execution by lethal injection is scheduled for November 30, 2004, under a warrant requested by the Attorney General on October 12, 2004, and signed by the Governor on November 8, 2004.

Bowling asks this Court for a temporary injunction barring his execution until his remaining claim in this pending case (filed August 9, 2004) is adjudicated. Plaintiffs'

remaining claim does not ask that their convictions or death sentences be set aside.[1] Rather, the claim challenges the Commonwealth's protocol for executions by lethal injection, saying it is inadequate, lacks appropriate safeguards and execution under the current protocol will subject them to cruel or unusual punishment, prohibited by the Kentucky and United States Constitutions.

The Defendants, the Commissioner of Corrections, the Kentucky State Penitentiary Warden, and the Governor of the Commonwealth, respond with a Motion for Summary Judgment saying there is no genuine issue of material fact which exists, CR 56.02, and the complaint fails to state a claim on which relief can be granted, CR 12.02(f). In sum, the Defendants are asking this Court to decide this case on its merits or lack of merit as found in the pleadings and proof already taken.

DISCUSSION

I. The Plaintiff's Motion for a Temporary Injunction

A temporary injunction is "an extraordinary remedy," tempered by the "equities of the situation," determined within the "sound discretion of the court," and by using the elements of CR 65.04. *Maupin v. Stansbury*, Ky. App., 575 S.W.2d 695 (1978). The Court of Appeals, in *Maupin*, said the application for temporary injunctive relief is viewed on three levels (a "three-part test," as restated by the Supreme Court in *Sturgeon Mining Company, Inc. v. Whymore Coal Company, Inc.*, Ky., 892 S.W.2d 591, 592 (1995)). The first level or predicate, also found in CR 65.04, is the showing of

[1] As of the date of this Order, Governor Fletcher has not signed a warrant of execution on the Plaintiff Ralph Baze.

irreparable harm.[2] The second predicate is weighing the equities involved. The last level requires that a "substantial question is at issue." *Maupin*, 575 S.W.2d at 699. The Court must find all three predicates before a temporary injunction will be issued.

The "clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur" before the determination of the matter in issue. *Id.* at 698. In this case the irreparable injury is death. Obviously a possible remedial final judgment, entered after the execution, is meaningless to the Plaintiff.

The second predicate involves equity. The Plaintiffs argue there is no detriment to the public interest; no harm to the Defendants and the injunction would merely maintain the status quo, not change the conviction or sentence. A brief delay, during which the status quo is maintained and necessitated by the need for this Court to consider this pending constitutional challenge, is not harm to the Commonwealth.

The United States Supreme Court, in the recently decided case of *Nelson v. Campbell*, 124 S.Ct. 2117 (2004), recognized a challenge to a particular aspect of a state's lethal injection protocol under 42 U.S.C. §1983, but said "the mere fact that an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right." *Nelson*, 124 S.Ct. at 2125-26. More particularly the Supreme Court said, "[g]iven the State's significant interest in enforcing its criminal judgments there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 2126. This Court does not find that the Plaintiffs filed this action in order to delay

[2] CR 65.04 provides that a temporary injunction is authorized "if it is clearly shown...that the movant's rights are violated or will be violated...and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action."

the execution. Before the suit was filed both the Plaintiffs had requested the protocol through Open Records. When this suit was filed there was no signed death warrant and the Plaintiff's Petition for Writ of Certiorari to the United States Supreme Court was pending.[3] Prior to this action, the Commonwealth had never disclosed its manner or means for lethal injections even though this method of execution had been previously used.[4] Only during the recent discovery process has the protocol been disclosed and future discovery will reveal if the protocol has been in flux even after this action was filed.

As stated before, the ultimate issue is not if or when the execution will be administered or the method, but how. The public interest is best served when the Commonwealth 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 a death sentence is being administered in a constitutionally proper manner. Equity favors the Plaintiffs.

While this Court will not presently render a decision on the merits of Plaintiffs' challenge to the protocol, the Court concludes that the last predicate of the *Maupin* test has been met. The substantial issue is the constitutionality of Kentucky's manner and means of effecting execution by lethal injection.

II. The Defendants' Motion for a Summary Judgment

Defendants' motion for summary Judgment requests this Court decide the matter on the pleadings and record as presented. Even on an expedited basis the requested

[3] The Petition for a Writ of Certiorari was denied October 4, 2004.
[4] Interestingly, a number of states' protocols are on the Internet or otherwise publicly available.

decision may possibly still be under consideration after the date scheduled for the Plaintiff's execution. Therefore, in addition to the reasons articulated above, the Defendants' motion for a summary judgment requires additional time past November 30.

CONCLUSION

Accordingly, Plaintiff Bowling's motion for a temporary injunction is GRANTED. The Defendant, Warden Glen Haeberlin, is enjoined from enforcing the Governor's order of execution of Plaintiff Thomas Bowling until the issue raised in the Plaintiffs' pleadings has been decided on its merits.

SO ORDERED, this 23 day of November 2004

Roger L. Crittenden, Judge
Franklin Circuit Court

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Exhibit 2