☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set:
Date: November 20, 2008
Time: 9:00 AM
The Honorable Chris Wickham

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

DAROLD R.J. STENSON, Plaintiff, v. ELDON VAIL, et al., Defendants.	NO. 08-2-02080-8 DEFENDANTS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

The Defendants, by and through their attorneys, ROBERT M. MCKENNA, Attorney General, and SARA J. OLSON and JOHN J. SAMSON, Assistant Attorneys General, responds to Stenson's motion for a preliminary injunction.

I. STATEMENT OF THE CASE

In 1994, Plaintiff Stenson was sentenced to death for the aggravated first degree murders of his wife and business partner. The Washington Supreme Court affirmed the convictions and sentence on direct review in 1997, and the United States Supreme Court denied certiorari in 1998. State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). The Supreme Court denied Stenson's first personal restraint petition on the merits in 2001, and denied as procedurally barred two subsequent personal restraint petition in 2003 and 2004. In re Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001); In re Stenson, 150 Wn.2d 207, 76 P.3d 241 (2003); In re Stenson, 153 Wn.2d 137, 102 P.3d 151 (2004).

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Stenson filed a habeas corpus petition in 2001 challenging his convictions and sentence in federal court. Stenson v. Lambert, US District Court Cause No. C01-252P. The district court denied the petition in 2005, the Ninth Circuit affirmed dismissal of the petition on in September 2007. Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007). The Supreme Court denied certiorari on October 6, 2008. Stenson v. Sinclair, ___ S. Ct. ___ (2008). The Ninth Circuit issued the mandate on October 17, 2008. The mandate terminated the stay of execution issued by the federal court. Pursuant to RCW 10.95.160(2), when the stay terminated, the date of execution automatically reset for 30 judicial days. In re Lord, 123 Wn.2d 737, 740-41, 870 P.2d 964 (1994). The date of execution is currently scheduled for December 3, 2008.

Stenson filed this action alleging that lethal injection and hanging are unconstitutional. With the execution less than 20 days away, Stenson now moves for a preliminary injunction, seeking to prevent the carrying out the lawful sentence imposed by the Clallam County Superior Court. However, Stenson has been under the sentence of death since 1994, and he has known since March 1996 that the sentence will be carried out by lethal injection, unless he selects the alternative method of hanging. RCW 10.95.180 (amended by 1996 Wash. Laws c. 251, §1). Despite having repeatedly challenged his convictions and sentence in both state and federal court since 1996, Stenson has now waited until the eve of his execution to file this action challenging the methods used to execute his sentence. Stenson's delay in bringing this action not only renders his request untimely, and therefore unreviewable under the applicable statutes of limitations, but it also renders his request inequitable since the balancing of interests weighs against the grant of a stay in this eleventh hour challenge to a lawful execution. Stenson cannot show a clear legal or equitable right, the invasion of such a right, or actual and substantial injury, and Stenson cannot show the balance of the interests weighs in favor of stay. For these reasons, the Court should deny Stenson's motion for a preliminary injunction.

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II. ARGUMENT

A. STENSON CANNOT SATISFY THE HIGH STANDARD FOR OBTAINING THE EXTRAORDINARY EQUITABLE REMEDY OF INJUNCTIVE RELIEF SINCE HIS REQUEST IS UNTIMELY, AND FAILS TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

1. Standard For Obtaining Preliminary Injunctive Relief

The requirements for obtaining a preliminary injunction are well settled. Kucera v. Dep't of Transportation, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). A person seeking preliminary injunctive relief must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) the acts complained of either have or will result in actual and substantial injury. Tyler Pipe Indus., Inc. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). All three of these criteria must be satisfied to obtain injunctive relief. If a party seeking an injunction fails to establish any one of the criteria, then injunctive relief must be denied. Kucera, 140 Wn.2d at 210; Wash. Fed'n of State Employees v. State, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983).

With respect to the heavy burden of establishing a clear legal or equitable right, the Court must examine the likelihood that the moving party will succeed on the merits. Kucera, 140 Wn.2d at 216; County of Spokane v. Local 1553, AFL-C10, 76 Wn. App. 765, 792, 888 P.2d 735 (1995). The party seeking an injunction must show a likelihood of successive on the merits, and must show that a right will be irreparably harmed if injunctive relief is denied. Wash. Fed'n of State Employees, 99 Wn.2d at 888; Tyler Pipe, 96 Wn.2d at 793. The Court should not issue a preliminary injunction in a doubtful case. Wash. Fed'n of State Employees, 99 Wn.2d at 888; Tyler Pipe, 96 Wn.2d at 793; Fed. Way Family Physicians, 106 Wn.2d 261, 265, 721 P.2d 946 (1986).

In addition, since injunctive relief is an equitable remedy, the criteria must be examined in light of equity, balancing of the relative interests of the parties and of the public. Tyler Pipe, 96 Wn.2d at 792. "An injunction is distinctly an equitable remedy and is 'frequently termed

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"the strong arm of equity," or a "transcendent or extraordinary remedy," and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." Kucera v. Dep't of Transportation, 140 Wn.2d at 209 (quoting 42 Am.Jur.2d Injunctions, § 2, at 728 (1969) (footnotes omitted)).

Stenson cannot show an entitlement to injunctive relief under these standards. Stenson's delay in bringing this action shows equity and the balancing of interests weigh against injunctive relief. Stenson also fails to show a clear legal or equitable right, the invasion of such right, or actual and substantial injury. Even if the action was not time barred, Stenson cannot show a likelihood of success on the merits.

2. Equity And The Balancing Of Interests Weigh Against The Grant Of Injunctive Relief In This Case.

The Washington Supreme Court has recognized that "death penalty litigation is fraught with the potential for false claims and deliberate delay." State v. Harris, 114 Wn.2d 419, 435, 789 P.2d 60 (1990). Death row inmates have an obvious incentive to make last minute claims and file eleventh hour petitions with the hope of delaying the execution of a lawful sentence. Id. Consequently, the Washington Supreme Court has stated that in death penalty cases, courts should deny a stay of execution unless the petitioner can make a substantial showing of success on the merits of the underlying claim. Id. For example, in Harris, the defendant sought a stay of execution, arguing that he lacked the sufficient mental capacity to be executed. The Washington Supreme Court said it would not grant a stay of execution unless the defendant made a "substantial threshold showing" of insanity. Harris, 114 Wn.2d. at 435. The Court noted this stringent standard for a stay of execution was necessary to avoid against undue delay:

> Without a substantial threshold requirement, the eleventh hour petitions asserting insanity would be encouraged because the death row petitioner would know that the mere filing of a conclusory petition would result in a stay of execution. Placing no initial burden on the petitioner is an invitation to specious insanity claims.

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Harris, 114 Wn.2d at 435.

The United States Supreme Court has also expressly recognized the "State retains a significant interest in meting out a sentence of death in a timely fashion." Nelson v. Campbell, 541 U.S. 637, 644, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004). The State has a compelling interest in the timely execution of a criminal judgment, and the State's interest is severely prejudiced by a stay of execution. In re Blodgett, 502 U.S. 236, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." Hill v. McDonough, 547 U.S. 573, 584, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (citing Calderon v. Thompson, 523 U.S. 538, 555, 118 S. Ct. 1489, 140 L. Ed.2d 728 (1998) (State has a compelling interest in the enforcement of a criminal judgment). The Supreme Court has therefore declared that, in considering whether a stay of execution should be granted when a person challenges a method of execution, "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." Nelson, 541 U.S. at 649 (quoting Gomez v. U.S. Dist. Court for N. Dist. of California, 503 U.S. 653, 654, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992) (vacating stay because challenge to lethal gas could have been brought ten years earlier).

A stay of execution is not available as a matter of right. Hill, 547 U.S. at 584. The filing of an action challenging a method of execution "does not entitle the complainant to an order staying an execution as a matter of course." Id. at 583-84. Instead, the Court must "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Gomez, 503 U.S. at 654. Before granting a stay of execution, the courts "must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." Nelson, 541 U.S. at 649-50. "Given the State's significant interest in enforcing its criminal judgment, . . . **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**

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merits without requiring entry of a stay." Id. at 650 (emphasis added); see also Hill, 547 U.S. at 584 (reaffirming strong presumption against a stay in cases where plaintiff delayed challenge to lethal injection); see also Hill v. McDonough, 464 F.3d 1256 (11th Cir. 2006) (affirming denial of stay of execution finding equities do not support stay in light of delay in bringing challenge to lethal injection); Hill v. McDonough, 548 U.S. 940, 127 S. Ct. 343, 165 L. Ed. 2d 1013 (2006) (denying application for stay of execution).

Equity bars the entry of a preliminary injunction to stay the execution. Stenson was sentenced to death in 1994, his sentence became final upon direct review in 1998. Stenson has known since 1996 that the method of execution would be lethal injection unless he elected hanging. The Washington Supreme Court has considered challenges to lethal injection since as early as 1998, and considered challenges to hanging even earlier. Despite having litigated numerous actions, Stenson delayed bringing this action challenging his method of execution until the eve of his execution.

The courts have overwhelmingly held that equity disfavors a stay in cases such as this where the plaintiff delayed bringing the action challenging the method of execution. The Supreme Court held that while an inmate may challenge lethal injection in a civil rights action, that the filing of an action does not entitle the inmate to a stay of execution as a matter of right. Hill, 547 U.S. at 584. In that case, the Supreme Court directed the lower courts on remand to consider whether Hill was entitled to the equitable remedy of a stay. Id. The Court stressed 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. On remand, the Eleventh Circuit determined "the equities do not support Hill's request" for a stay of execution. Hill v. McDonough, 464 F.3d at 1259. Among other things, Hill did not file his claim until the eve of his execution in 2006, even though the state court had rejected a similar challenge to lethal injection as early as 2000. Id. Since Washington has had

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challenges to lethal injection even earlier, see, e.g., In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998) (challenge to lethal injection), Stenson could have brought this action earlier.

The courts have overwhelmingly applied the strong presumption against stays of execution, and have denied stays where the defendant delayed challenging lethal injection. Crowe v. Donald, 528 F.3d 1290, 1292-94 (11th Cir. 2008); Lambert v. Buss, 498 F.3d 446, 453-54 (7th Cir. 2007); Woods v. Buss, 496 F.3d 620, 623 (7th Cir. 2007); Nooner v. Norris, 491 F.3d 804, 807-10 (8th Cir. 2007); Grayson v. Allen, 491 F.3d 1318, 1322-26 (11th Cir. 2007); Workman v. Bredesen, 486 F.3d 896, 911-13 (6th Cir. 2007); Jones v. Allen, 485 F.3d 635, 638-41 (11th Cir. 2007); Cooey v. Strickland, 484 F.3d 424, 425 (6th Cir. 2007); Hamilton v. Jones, 472 F.3d 814, 816 (10th Cir. 2007); Diaz v. McDonough, 472 F.3d 849, 850-51 (11th Cir. 2006); Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006); Brown v. Livingston, 457 F.3d 390, 391 (5th Cir. 2006); Smith v. Johnson, 440 F.3d 262, 263 (5th Cir. 2006); Neville v. Johnson, 440 F.3d 221, 222 (5th Cir. Cir. 2006). "[A] death-sentenced inmate may not wait until execution is imminent before filing an action to enjoin a State's method of carrying it out." Berry v. Epps, 506 F.3d 402, 404 (5th Cir. 2007). "At some point in time, the State has a right to impose a sentence – not just because the 'State's interests in finality are compelling,' but also because there is a 'powerful and legitimate interest in punishing the guilty,' which attaches to 'the State and the victims of crime alike.'" Workman v. Bredesen, 486 F.3d at 913 (quoting Calderon, 523 U.S. at 556).

Stenson may argue he could not bring this action until his execution was either set or imminent following the expiration of federal habeas corpus proceedings. The courts have overwhelmingly rejected this type argument. See, e.g., Gomez, 503 U.S. at 654 (challenge brought on eve of execution could have been brought ten years earlier); McNair v. Allen, 515 F.3d 1168, 1174 (11th Cir. 2008) (cause of action accrues when conviction final after state review, or when method of execution is new or substantially changed, not when execution is imminent); Crowe v. Donald, 528 F.3d at 1292-93 (same); Neville v. Johnson, 440 F.3d at 222

(defendant could have challenged method of execution once conviction became final on direct review); White v. Johnson, 429 F.3d 572, 574 (5th Cir. 2005) (same); Jones v. Allen, 485 F.3d at 639-40 (defendant could have challenged method four years earlier when Alabama adopted lethal injection); Cooey v. Strickland, 479 F.3d 412, 419-20 (6th Cir. 2007) (delaying case until completion of federal habeas corpus proceedings adds significant delay that prejudices the state). Once the sentence of death is final upon conclusion of direct review in the state courts, there is no impediment to filing an action challenging the method of execution. Nooner, 491 F.3d at 808. Stenson unreasonably delayed bringing this action by waiting until days before the Supreme Court was set to rule on his certiorari petition. As the Eleventh Circuit explained, "waiting until a petition for certiorari has been pending for over three months, is simply too late to avoid the inevitable need for a stay of execution." Jones, 485 F.3d at 639 n.2.

Stenson may also argue he could not bring this claim until the Supreme Court ruled in Baze v. Rees. However, the Eleventh Circuit has rejected similar arguments that the challenge could not be brought until the Supreme Court ruled in Hill v. McDonough. Williams v. Allen, 496 F.3d 1210 (11th Cir. 2007); Crowe v. Donald, 528 F.3d at 1293-94. Stenson's cause of action accrued and existed long before the Supreme Court issued its ruling in Baze. See also McNair v. Allen, 515 F.3d 1168, 1177 (11th Cir. 2008) (changes in execution policy did not justify delay in bringing challenge to method); Henyard v. Secretary, DOC, 543 F.3d 644, 649 (11th Cir. 2008) (same).

Stenson delayed bringing this action until the eleventh hour before his execution. Any stay of execution would cause severe prejudice to the compelling interests of both the State and the victims' families in seeing the sentence carried out. In light of the strong presumption against granting a stay of execution in such cases, and balancing the interests of the parties in this case, equity demands the denial of any stay of execution. The Court should deny Stenson's motion for a preliminary injunction.

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3. **Stenson Fails To Show A Likelihood Of Success On The Merits Since His Claims Are Untimely, Barred Under Res Judicata, And Without Merit.**

a. **Whether the action is viewed as a collateral challenge or a declaratory judgment action, it is time barred.**

As discussed in Defendant's motion to dismiss, Stenson's declaratory judgment action constitutes a collateral challenge to the execution of the sentence that is untimely and successive. Washington law broadly defines a "collateral attack" to mean "any form of postconviction relief other than a direct appeal." RCW 10.73.090(2). Under Washington law, a "'collateral attack' includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment." and is not limited to a challenge to the fact or duration of confinement. RCW 10.73.090(2); RAP 16.4(b); see also In re Meyer, 142 Wn.2d 608, 16 P.3d 563 (2001); In re Smith, 130 Wn. App. 897, 125 P.3d 233 (2005); In re Matteson, 142 Wn.2d 298, 12 P.3d 585 (2000). Under state law, a collateral attack includes not only challenges to the fact of a sentence, but also the conditions associated with the execution of the sentence. In re Metcalf, 92 Wn. App. 165, 172-73 & n. 5, 963 P.2d 911 (1998); In re Arseneau, 98 Wn. App. 368, 371-74, 989 P.2d 1197 (1999). In fact, the Washington Supreme Court has acknowledged that challenges to methods of execution constitute a collateral attack. In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998) (lethal injection); In re Lord, 123 Wn.2d at 325-26 (hanging). Since Stenson's action constitutes a "collateral attack," it is barred under RCW 10.73.090 and RCW 10.73.140.

But even if the action is not a collateral challenge, and is simply an ordinary declaratory judgment action, the action is barred under the statute of limitations. Washington law imposes a three year statute of limitations. RCW 4.16.080(2). Stenson's cause of action accrued at the latest when his convictions and sentence became final upon conclusion of direct review in the state courts. At that date, Stenson knew he was subject to a sentence of death that would be carried by out by lethal injection, unless he elected hanging. At that date, the statute of limitations started to run. See, e.g., McNair v. Allen, 515 F.3d 1168, 1174-75 (11th Cir. 2008);

Cooey v. Strickland, 479 F.3d 412, 419-22 (6th Cir. 2007); Neville v. Johnson, 440 F.3d 221, 222 (5th Cir. 2006); Crowe v. Donald, 528 F.3d 1290, 1292-93 (11th Cir. 2008); Henyard v. Secretary, DOC, 2008 WL 4328570, 2. Despite having filed numerous actions in state and federal court, Stenson delayed filing his current action until September 2008, long after his cause of action accrued and the statute of limitations expired. Stenson cannot show a likelihood of success on the merits because his action is time barred.

b. Stenson's claims are barred under the doctrine of *res judicata*.

The doctrine of *res judicata* serves to bar a claim where there is an identity of claims, a final judgment on the merits, and an identity or privity of parties. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). *Res judicata* further bars "issues that were or could have been raised in the prior action." Mellor v. Chamberlin, 100 Wn.2d 643, 645, 673 P.2d 610 (1983). This doctrine applies to Stenson's claims.

c. Even if the claims are not barred, Stenson fails to show a likelihood of success on the merits.

Even if Stenson's claims are not barred, he cannot show a likelihood of success on the merits because lethal injection and hanging are constitutional methods of execution. Considering this fact in light of the equities of the case, and the interests of the parties, Stenson has not satisfied the high burden for obtaining preliminary injunctive relief on the eve of his execution.

(1) Stenson's claims regarding lethal injection and hanging fail as a matter of law.

As legislatively chosen methods of execution, lethal injection and hanging are presumed constitutional. State v. Rupe, 101 Wn.2d 664, 698, 683 P.2d 571 (1984); State v. Frampton, 95 Wn.2d 469, 512-14 & 527, 627 P.2d 922 (1981); Gregg v. Georgia, 428 U.S. 153, 174-76, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994) (en banc). Stenson bears the burden of rebutting the presumption of constitutionality by presenting clear, objective evidence that the method of execution is actually cruel punishment. See e.g.

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Frampton, 95 Wn.2d at 512-14 & 527; Campbell, 18 F.3d at 682; In re Kemmler, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519 (1890). Speculation that DOC's policy for carrying out an execution might cause an unnecessary risk of pain is not sufficient to show a violation of either the state or federal Constitutions. Speculation that undue pain might occur does not render the method of execution unconstitutional. The possibility of an accident "cannot and need not be eliminated from the execution process in order to survive constitutional review." LeGrand v. Stewart, 133 F.3d 1253, 1265, (9th Cir. 1998) (quoting Campbell v. Wood, 18 F.3d at 668); see also Poland v. Stewart, 151 F. 3d 1014, 1023 (9th Cir. 1998) (rejecting claim that the Arizona method of lethal injection could cause severe pain).

The Washington Supreme Court has already held that hanging and lethal injection are both constitutional. See In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998) (holding hanging and lethal injection are constitutional methods of execution); In re Lord, 123 Wn.2d at 325-26 & n.11 (holding hanging is constitutional, and declaring lethal injection is "undoubtedly constitutional"); State v. Campbell, 112 Wn.2d 186, 192, 770 P.2d 620 (1989) (hanging is constitutional); see also Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994) (same). The United States Supreme Court has also rejected the very claim now presented by Stenson, holding that lethal injection using the three drug protocol employed by Kentucky is a constitutional method of execution, Baze v. Rees, 128 S. Ct. 1520, 1529, 170 L. Ed. 2d 420 (2008). The Court held that a lethal injection protocol substantially similar to Kentucky's protocol would not violate the Eighth Amendment. Id. at 1537.

Washington's lethal injection protocol is substantially similar to Kentucky's protocol. DOC Policy 490.200, as amended 10/25/08, expressly requires minimum qualifications of members of the lethal injection team (at least one or more years of experience in a profession that involves intravenous (IV) injections), sufficient practice sessions (at least three of which will include the siting of intravenous lines), the establishment of two intravenous lines with a normal flow of saline through each line, the administration of 3

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grams of sodium thiopental, the Superintendent to observe the inmate for signs of consciousness after the administration of sodium thiopental and before the administration of pancuronium bromide, and the administration of an additional dose of 3 grams of sodium thiopental before the pancuronium bromide if the Superintendent observes the inmate is conscious after the administration of the first dose of sodium thiopental. See Defendants' Motion for Summary Judgment, Exhibit 2, Declaration of Dell-Autumn Witten, Attachment A, DOC Policy 490.200, as amended 10/25/08.[1] The individual who will site the intravenous lines during Mr. Stenson's execution regularly inserts intravenous lines as a part of his/her professional duties. Id. at Exhibit 1, Declaration of Stephen Sinclair. It is, therefore, reasonable to assign the task of inserting the IV lines to this individual. Id. at Exhibit 4, Declaration of Fiona Jane Couper, Ph.D.; Id. at Exhibit 5, Declaration of Mark Dershwitz, M.D., Ph.D. Additionally, the three practice sessions with the siting of IV lines, as required by policy, have been completed. Id. at Exhibit 1, Declaration of Stephen Sinclair; Id. at Exhibit 3, Declaration of Dan J. Pacholke.

The amended policy is substantially similar to Kentucky's protocol and is being properly followed in anticipation of Stenson's December 3, 2008, execution. The proper application of the protocol, will result in a rapid, painless and humane death and the ISDP will not experience any unnecessary pain or suffering. Id. at Exhibit 4, Declaration of Fiona Jane Couper, Ph.D.; Id. at Exhibit 5, Declaration of Mark Dershwitz, M.D., Ph.D.

In addition to the Supreme Court and the Washington Supreme Court, the courts that have considered the constitutionality of lethal injection using a three drug protocol have overwhelmingly found it to be a constitutional method of execution. See, e.g., Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008) (applying Baze and rejecting claims identical to Stenson's); Workman v. Bredesen, 486 F.3d 896, 905-10 (6th Cir. 2007) (rejecting in challenge to

[1] Copies of all declarations cited, which were filed with Defendants' Motion for Summary Judgment, are attached to this response for the Court's reference.

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Tennessee's protocol, which is similar to Washington's protocol, the same arguments now raised by Stenson); Lambert v. Buss, 498 F.3d 446, 448-54 (7th Cir. 2007) (rejecting same type of claims in challenge to Indiana's protocol); Woods v. Buss, 496 F.3d 620, 622-23 (7th Cir. 2007) (same); Hamilton v. Jones, 472 F.3d 814, 816-17 (10th Cir. 2007) (rejecting similar challenge to Oklahoma's protocol); Cooper v. Rimmer, 379 F.3d 1029 (9th Cir. 2004) (rejecting challenge to California's similar protocol); Poland v. Stewart, 151 F.3d. 1014 (9th Cir. 1998) (rejecting challenge to Arizona's protocol); LaGrand v. Stewart, 133 F. 3d 1253 (9th Cir. 1998) (same); Woolls v. McCotter, 798 F.2d 695 (5th Cir. 1986); Hill v. Lockhart, 791 F. Supp. 1388 (E.D. Ark. 1992), affirmed on other grounds, 927 F.2d 340 (8th Cir. 1991); United States ex rel. Silagy v. Peters, 713 F. Supp. 1246 (C.D. Ill. 1989), affirmed on other grounds, 905 F.2d 986 (7th Cir. 1990); Ex Parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978); People v. Stewart, 121 Ill.2d 93, 520 N.E.2d 348 (1988); State v. Moen, 309 Or. 45, 786 P.2d 111 (1990); Hopkinson v. State, 798 P.2d 1186, 1187 (Wyo. 1990); People v. Silagy, 116 Ill.2d 357, 507 N.E.2d 830 (1987); State v. Deputy, 644 A.2d 411 (Del. Super. 1994); State v. Webb, 252 Conn. 128, 750 A. 2d 448 (2000); Sims v. State, 754 So. 2d 657 (Fla. 2000).

Lethal injection and hanging are constitutional methods of punishment, and Stenson's challenge to the particular procedures used in Washington fail as a matter of law.[2] State officials are presumed to conduct themselves properly. Although Stenson speculates that officials might be unqualified, or might make mistakes in carrying out the execution, his allegations do not show DOC will "wantonly" inflict unnecessary pain so as to cause cruel and unusual punishment.

(2) DOC's policy does not violate the rule against the unlawful delegation of legislative authority.

Stenson's original complaint alleged DOC's lethal injection policy was unconstitutional. Stenson alleged he was not trying to prevent his execution, that he was

[2] Also, as discussed in Defendants' motion to dismiss, Stenson lacks standing to challenge hanging since he has not elected hanging as the method of execution. In re Benn, 134 Wn.2d 868, 933, 952 P.2d 116 (1998).

ATTORNEY GENERAL OF WASHINGTON
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challenging only the particular procedure set forth in the existing policy, and that his complaint was not an attack on the sentence imposed by the superior court. Subsequent to the filing of the first complaint, DOC promulgated an amended policy that eliminated the concerns raised by Stenson's original complaint.[3] Stenson has now filed an amended complaint, adding a new claim that alleges DOC lacks authority to make any changes to its existing execution policy. In addition to being without merit, the new claim demonstrates Stenson's true intentions in filing this action: Stenson wishes to prevent his execution from ever occurring. Stenson's complaint is, therefore, a collateral attack to his sentence and is barred under RCW 10.73.090 and RCW 10.73.140.

Moreover, the claim is without merit. First, the "legislative delegation" rule cited by Stenson does not apply. The policy is a directive governing the internal operations of a prison. "Unlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law." Joyce v. Dept. of Corrections, 155 Wn.2d 306, 323, 199 P.3d 825 (2005) (citations omitted). The policies are not an enactment of legislative power, and "they do not have the force of law." Joyce, 155 Wn.2d at 323 (citing State v. Brown, 142 Wn.2d 57, 62, 11 P.3d 818 [2000]). Additionally, the APA does not apply to policies governing offenders and prison operations. RCW 34.05.030(1)(c); see also Dawson v. Hearing Committee, 92 Wn.2d 391, 597 P.2d 1353 (1979); Foss v. DOC, 82 Wn. App. 355, 358-59, 918 P.2d 521 (1996). The execution policy is not a "quasi-legislative" rule, and the "legislative delegation" rule cited by Stenson does not apply.

Second, even if the legislative delegation rule applied to this policy, DOC's amendment to the policy would not violate this rule. There are two requirements for lawful delegation of legislative power. State v. Simmons, 152 Wn.2d 450, 455, 98 P.3d 789 (2004). First, the

[3] Stenson alleges without any support that DOC amended its policy simply as a reaction to his original complaint. In fact, DOC began the process of amending the policy once the Supreme Court ruled in Baze v. Rees, long before Stenson filed his complaint.

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Legislature must have described in general terms what is to be done and by which agency. Id. Second, there must be adequate procedural safeguards to control arbitrary agency action and abuse of discretion. Id. However, the safeguards need not be set out in the delegating statutes, and the APA need not be followed; other statutory and common law safeguards are sufficient to satisfy the need for "adequate procedural safeguards." State v. Crown Zellerbach, 92 Wn.2d 894, 901, 602 P.2d 1172 (1979); Simmons, 152 Wn.2d at 457.

Contrary to Stenson's allegations, the Legislature has described in general terms what is to be done and by which agency. The Legislature directed DOC to carry out executions of death sentences, when and how executions are to be scheduled, and directed that the Superintendent execute the sentence and keep records of death warrants and their execution. RCW 10.95.180; RCW 10.95.160; RCW 10.95.190. The Legislature further provided DOC with statutory authority to promulgate internal policies to carry out its statutory functions. See RCW 72.01.090; RCW 72.02.040; RCW 72.09.050; RCW 72.02.045(4) & (6).

In addition, adequate procedural safeguards exist to prevent arbitrary agency action. "Adequate procedural safeguards" merely require the protection against arbitrary and capricious agency action. State v. Simmons, 152 Wn.2d at 457 (citations omitted). Such protections exist under existing Washington law. See, e.g., RAP 16.2; RCW 7.16.150; RCW 7.16.290; Foss, 82 Wn. App. at 359.

Since Stenson cannot show a likelihood of success on the merits, and equity and the balance of interests weigh against a grant of injunctive relief, the Court should deny the extraordinary remedy of a stay of execution.

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III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Stenson's motion for a preliminary injunction.

DATED this 19th day of November, 2008.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

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EXECUTED this 13th day of November, 2008, at Olympia, Washington.

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