☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: December 12, 2008
Time: 9:00 a.m.
The Honorable Chris Wickham

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

DAROLD R.J. STENSON, Plaintiff, v. ELDON VAIL; STEPHEN SINCLAIR; MARC STERN; CHERYL STRANGE; WASHINGTON STATE DEPARTMENT OF CORRECTIONS, and DOES 1-50 Defendants.	NO. 08-2-02080-8 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

MOTION

Defendants, by and through their attorneys of record, ROBERT M. MCKENNA, Attorney General, and SARA J. OLSON and JOHN J. SAMSON, Assistant Attorneys General, move for summary judgment in this matter. This motion is based upon the argument set forth below, the attached exhibits, and Civil Rule 56. As this Court is aware, a motion to dismiss, pursuant to CR 12(b)(6) is currently pending and set for argument on November 20, 2008. Defendants present this motion for summary judgment in the event that the Court denies the motion to dismiss. If the motion to dismiss is denied, Defendants may move to have this motion for summary judgment considered in an expedited fashion. Defendants do not concede that a stay is necessary to consider this motion for summary judgment.

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MEMORANDUM

I. STATEMENT OF THE CASE

In 1994, a Clallam County jury sentenced Darold Stenson to death for the aggravated first degree murders of his wife Denise Stenson, and business partner, Frank Hoerner. See State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). The Washington Supreme Court affirmed the convictions and sentence on direct review on July 24, 1997. Id. The United States Supreme Court denied certiorari on March 9, 1998. Stenson v. Washington, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).

Following Stenson's unsuccessful direct appeal, he challenged his conviction and sentence by way of multiple personal restraint petitions. The Washington Supreme Court denied Stenson's first personal restraint petition on January 4, 2001. In re Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001). The Court denied Stenson's second personal restraint petition as time barred on September 11, 2003, and denied Stenson's third personal restraint petition as an "abuse of the writ" on November 24, 2004. In re Stenson, 150 Wn.2d 207, 76 P.3d 241 (2003); In re Stenson, 153 Wn.2d 137, 102 P.3d 151 (2004).

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 on July 26, 2005, the Ninth Circuit affirmed dismissal of the petition on September 24, 2007, and the Ninth Circuit denied rehearing *en banc* on March 19, 2008. Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007). Stenson's petition for a writ of certiorari was denied by the United States Supreme Court on October 6, 2008. Stenson v. Sinclair, U.S. Supreme Court Cause No. 08-5328. The Ninth Circuit issued its mandate on October 17, 2008. Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007). Pursuant to RCW 10.95.160(2), the date of execution automatically reset for 30 judicial days after termination of the stay. Stenson will be executed on December 3, 2008.

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II. STATEMENT OF FACTS

Stenson has been under sentence of death since 1994. His death sentence became final in 1997. RCW 10.95.180 (amended by 1996 Wash. Laws c. 251, §1) went into effect in March 1996 and requires that Stenson's sentence will be carried out by lethal injection unless he selects the alternative method of hanging. Stenson has not selected the alternative method of hanging, as of November 7, 2008. Exhibit 1, Declaration of Stephen Sinclair.

On October 25, 2008, Department of Corrections (DOC) Policy 490.200, Capital Punishment went into effect in its current format. Exhibit 2, Declaration of Dell-Autumn Witten, Attachment A, DOC Policy 490.200. DOC Policy 490.200 Directive IX(1)(d) requires that members of the Lethal Injection Team have "sufficient training or experience to carry out the lethal injection process without any unnecessary pain" to the Inmate Subject to the Death Penalty (ISDP). Id. Specifically, members of the Lethal Injection Team must have minimum qualifications which include "one or more years of professional experience as a certified Medical Assistant, Phlebotomist, Emergency Medical Technician, Paramedic, military corpsman, or similar occupation." Id. Each member of the Lethal Injection Team selected to participate in Stenson's execution, should he be executed by lethal injection, meets this criteria. Exhibit 1.

DOC Policy 490.200 Directive VIII(A)(2) requires that briefings and rehearsals by the Lethal Injection Team are "conducted as necessary to ensure adequate preparation for the execution." Exhibit 2, Attachment A. Additionally, the Lethal Injection Team must conduct "a minimum of 3 practice sessions preceding an execution that shall include the siting of intravenous lines." Id. Since October 6, 2008, the Lethal Injection Team has conducted three full practice sessions. Exhibit 1. The Lethal Injection Team members have inserted intravenous (IV) lines six times (each time two have been inserted into the person playing the role of the inmate), at the full practice sessions. Id.; Exhibit 3,

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Declaration of Dan J. Pacholke. There have been no problems with the insertion of IV lines at any one of these practice sessions. Id. The member of the Lethal Injection Team who will site the IV lines during Mr. Stenson's execution regularly inserts IV lines as a part of his/her professional duties. Exhibit 1. It is, therefore, reasonable to assign the task of inserting the IV lines to this individual. Exhibit 4, Declaration of Mark Dershwitz, M.D., Ph.D. Additionally, the Escort Team has conducted 15 - 20 hanging practice sessions. Exhibit 1. The hanging mechanism has functioned properly and without incident at each of these practice sessions. Id.; Exhibit 3.

DOC Policy 490.200 Directive IX(A)(4)(b) requires the Lethal Injection Team to site two IV lines in the ISDP. Exhibit 2, Attachment A. Each of those lines is sited using an intravenous needle. Exhibit 1. The intravenous needle has a connector needle, which is a fine-pointed needle, with a fine, plastic sheath around it, with the needle protruding approximately an inch, and an approximately 3-inch length of connector tubing attached to it. Id. The connector needle is inserted into the vein. Id. Once the connector needle enters the vein there is a "flash" of blood which enters the hub of the needle. Id. The "flash" indicates that a vein has been entered. Id. Once the connector needle has entered the vein, the sheath is pushed down into the vein and the connector needle is removed. Id. A syringe is then attached to the connector tubing and a "pull back" of the syringe's plunger is done to see if blood enters the connector tubing, indicating a vein has been entered. Id. Once it is determined that a vein has been entered, the syringe is removed and the connector tubing is attached to the intravenous tubing and the saline flow begins. Id. The Lethal Injection Team members ensure that a slow, normal saline flow is maintained through each IV line. Exhibit 2, Attachment A. The Superintendent will observe the insertion of the IV lines and observe the ISDP for signs that the intravenous line has not been properly inserted into a vein. Id. If a vein is missed, the "flash" will not occur, the "pull back" will not work, and there will be

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swelling at the injection site once the saline begins to enter the subcutaneous muscle. Exhibit 1.

Once the IV lines have been sited in the arms of the ISDP, and the Superintendent has determined that the execution is to proceed, the Superintendent signals for the administration of the first chemical: 3 grams of thiopental sodium. Id.; Exhibit 2, Attachment A. Thiopental sodium is an ultra-short acting barbiturate typically used as an anesthetic and/or induction agent. Exhibit 5, Declaration of Fiona Jane Couper, Ph.D. Thiopental sodium induces a deep, coma-like unconsciousness within 30-60 seconds, and typical anesthetic/induction doses are approximately 100-250 mg, rarely more than 1 gram. Id. Following a 3 gram dose, respiratory function would be significantly depressed or stopped within approximately one to two minutes. Id. While unconscious, the ISDP will have no sense of physical pain or suffering. Id. Death will likely occur as a result of the 3 gram dose of thiopental sodium alone. Exhibit 4. The proper application of the protocol, as outlined in DOC Policy 490.200, will result in a rapid, painless and humane death and the ISDP will not experience any unnecessary pain or suffering. Id.; Exhibit 5.

The Superintendent, who stands less than one foot away from the right arm of the ISDP, observes the ISDP for signs of consciousness. Exhibit 1. If any signs of consciousness are observed, after the thiopental sodium has been administered, the Superintendent will direct that Lethal Injection Team to administer a second dose of 3 grams of thiopental sodium. Id.; Exhibit 2, Attachment A. When no signs of consciousness are observed, the Superintendent will signal for the flushing of the IV line with 50 cc normal saline, followed immediately by 100 milligrams of pancuronium bromide, followed immediately by the flushing of the line with 50 cc normal saline, followed immediately by 240 mEq potassium chloride. Id. Pancuronium bromide is a neuro-muscular blocking agent that inhibits muscular-skeletal movements thereby paralyzing the diaphragm and other respiratory muscles, and stopping respiration. Exhibit

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5. Typical therapeutic doses are 0.04-0.10 mg/kg. Id. At a 100 mg dose, respiratory paralysis should occur within 30-60 seconds of administration. Id. Additionally, the heart would stop beating within approximately one to three minutes. Id. Potassium chloride is a chemical compound that interferes with the electrical signals that stimulate the contractions of the heart. Id. A dose of 240 mEq would be sufficient to cause death by cardiac arrest within approximately one to three minutes. Id.

In each of the hanging practice sessions which have occurred since October 6, 2008, either a mannequin has been "dropped" through the trap door or a metal container with weights weighing 230 pounds (to simulate Mr. Stenson's body weight) has been "dropped" through the trap door. Exhibit 1; Exhibit 3. In each hanging practice session involving the mannequin, of which there have been at least ten, the individual who will be placing the noose around the ISDP's neck has practiced the placing and tightening of the noose. Id. In order to ensure a swift, painless death, the noose is placed tightly around the ISDP's neck with the noose directly behind the ISDP's left ear and the running part of the noose (i.e. the part that moves when the noose is tightened) placed along the front of the neck. Id. Four different ropes have been "stretched" which includes wetting the rope and stretching it to eliminate any risk of recoil once the trap door has opened and the ISDP has fallen the drop length of five feet. Exhibit 1. In the practice sessions with the mannequin, after the noose has been securely placed, the trap door is opened and the mannequin falls through and the rope is extended to the full five feet. Id.; Exhibit 3. In each hanging practice session involving the metal crate containing weights totaling 230 pounds, of which there have been at least five, the metal crate has been placed on the trap door and the rope has been attached to the metal crate. Exhibit 1. When the trap door drops, the metal crate falls through and the rope is extended its full five feet. Id.

The Superintendent who will attend Stenson's execution has personally witnessed hanging practice sessions and the lethal injection practice sessions. Id.; Exhibit 3.

ATTORNEY GENERAL OF WASHINGTON
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Additionally, the Superintendent who will attend Stenson's execution has acted as the stand-in for the ISDP and has had two intravenous lines. Id. Additionally, the DOC Prison Administrator has acted as the stand-in for the ISDP and has had two intravenous lines sited. Id.

III. ISSUES PRESENTED

1. Whether lethal injection, as administered according to DOC Policy 490.200, violates the Eighth Amendment to the United States Constitution and Article 1 sections 3 and 14 of the Washington State Constitution?

2. Whether hanging, as administered according to DOC Policy 490.200, violates the Eighth Amendment to the United States Constitution and Article 1 sections 3 and 14 of the Washington State Constitution?

3. Whether allowing Stenson to choose his method of execution, according to DOC Policy 490.200, violates the Fourteenth Amendment to the United States Constitution?

4. Whether the Department has the authority to draft policies governing prison administration and offender management?

5. Whether Stenson's claims are barred by the statute of limitations, laches, or the doctrine of *res judicata*?

IV. EVIDENCE RELIED UPON

Defendants rely upon this motion with the attached declarations of Stephen Sinclair, Dell-Autumn Witten, Daniel Pacholke, Dr. Mark Dershwitz M.D., Ph.D., and Fiona Jane Couper, Ph.D., and attachments thereto and the records and files maintained herein.

V. ARGUMENT

A. SUMMARY JUDGMENT STANDARD OF REVIEW.

A motion for summary judgment should be granted where "there is no genuine issue of material fact or if reasonable minds could reach only one conclusion on that issue based

upon the evidence in the light most favorable to the nonmoving party." Weatherbee v. Gustafson, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992) (citing Sea-Pac Co. v. United Food & Comm'l Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 [1985]); see CR 56. As the moving party, Defendants bear the initial burden, however, a "moving defendant may meet the initial burden by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 [1986]) (internal quotation marks omitted). The moving party is entitled to summary judgment if the documentary evidence produced by the parties permits only one conclusion. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In the present case, even viewed in the light most favorable to Stenson, there is insufficient evidence to support his claims.

B. STENSON'S CHALLENGES TO LETHAL INJECTION FAIL AS A MATTER OF LAW.

Stenson alleges lethal injection as performed under DOC's existing policy violates both the Washington State Constitution and the United States Constitution. Stenson's claim fails as a matter of law.

The Legislature selected lethal injection as the primary method of execution for Washington. RCW 10.95.180(1). As a legislatively chosen method of execution, lethal injection is 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 lethal injection is cruel punishment. See e.g. 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).

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Stenson's speculation that DOC's method of lethal injection might cause an unnecessary risk of pain because the policy allegedly does not set forth sufficient safeguards, does not require sufficient qualifications, and does not ensure officials will not commit errors when administering the lethal substances, does not demonstrate a violation of either the Eighth Amendment to the United States Constitution or Article I, Section 14 of the Washington Constitution. Contrary to Stenson's claims, speculation of a possibility of risk of pain 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." LaGrand v. Stewart, 133 F.3d 1253, 1265 (9th Cir. 1998) (quoting Campbell, 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 already has rejected the claim that lethal injection is unconstitutional. In re Pirtle, 136 Wn.2d 467, 496, 965 P.2d 593 (1998); In re Lord, 123 Wn.2d 296, 325-26 & n.11, 868 P.2d 835 (1994). In addition, the United States Supreme Court this past year rejected the very claim now presented by Stenson. Baze v. Rees, __ U.S. __, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). Therefore, Stenson's claim fails as a matter of law.

The Baze Court began its analysis by noting that the Federal Government and 36 States, including Washington, have adopted lethal injection as the exclusive or primary means of execution. Baze, 128 S. Ct. at 1526-27 & n.1. The Court then noted that at least 30 States (which includes Washington) use the same combination of the three drugs in their lethal injection protocol – first the administration of sodium thiopental, then pancuronium bromide, and then potassium chloride. Id. at 1527. The Court noted that the proper administration of the first drug, sodium thiopental, "ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second

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and third drugs." Id. Reviewing the protocol used in Kentucky, the Court noted that Kentucky also uses this three drug protocol. Id. at 1528. The Court granted certiorari to determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment. Id. at 1529. After considering Baze's claims (which Stenson's claims mirror), the Court held the protocol was constitutional. Id. The Court further held that a lethal injection protocol substantially similar to Kentucky's protocol would not violate the Eighth Amendment. Id. at 1537. Since Stenson's claims are the same as the claims rejected by the Court in Baze, the Court's ruling disposes of Stenson's claim as a matter of law.[1] Stenson's case should be dismissed as a matter of law.

In reviewing Kentucky's protocol, the Supreme Court began with the principle that capital punishment is constitutional, and "[i]t necessarily follows that there must be a means of carrying it out." Baze, 128 S. Ct. at 1529. From this principle, the Court recognized,

> Some risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure. It is clear then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

Baze, 128 S. Ct. at 1529.

The Supreme Court noted it has never held a method of execution to be unconstitutional, and has upheld firing squads and electrocution as methods of execution. Baze, 128 S. Ct. at 1530 (citing Wilkerson v. Utah, 99 U.S. 130, 25 L. Ed. 345 [1878]; In re Kemmler, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 [1890]). These methods were adopted to provide a more humane execution than previous methods and the Court noted

[1] Stenson may argue that because Baze was a plurality opinion, it does not dispose of his claim. However, since the fourth and fifth Justices joining the Court's judgment (Justices Thomas and Scalia) would apply a rule even more deferential to the State, and would find no violation unless the State deliberately inflicted unnecessary pain, Stenson's claims clearly fail under the reasoning of a majority of the Justices of the Court. See U.S. v. Marks, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (the holding of the Court is that position taken by the justices who concurred on the narrowest grounds).

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that what the types of punishment forbidden by the Constitution "had in common was the deliberate infliction of pain for the sake of pain – 'superadd[ing]' pain to the death sentence through torture and the like." Baze, 128 S. Ct. at 1530. Addressing the contention that lethal injection presents a risk of pain, the Court rejected Baze's "unnecessary risk" standard, and ruled that to establish an Eighth Amendment violation, the conditions presenting risk must be "sure or likely" to cause needless suffering. Id. at 1530-32. The Court stressed "there must be a 'substantial risk of serious harm,'" and that "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual punishment." Id. at 1531. Because the Supreme Court rejected the unnecessary risk standard, Stenson's claim that lethal injection under the Department's policy is unconstitutional because it creates an unnecessary risk of pain fails as a matter of law.

Like Stenson, Baze had also alleged the three-drug protocol created an unnecessary risk of the infliction of pain because an alternative method (the one-drug protocol) would eliminate a significant risk of harm.[2] Baze, 128 S. Ct. at 1531. Rejecting this argument, the Court ruled a prisoner cannot successfully challenge a State's method of execution by simply showing the existence of a safer alternative. Id. Such a "safer alternative" rule would improperly transform the courts into boards of inquiry charged with determining "best practices" for executions, would improperly embroil the courts in ongoing scientific controversies, and would improperly intrude upon the role of state legislatures to select a method of execution. Id.

[2] Stenson repeatedly alleges that there is an alternative method, but he fails to specifically identify the details of this alternative method. Defendants assume the alternative method is the untried one drug method that the Baze Court held States need not adopt. Baze, 128 S. Ct. at 1534-35.

ATTORNEY GENERAL OF WASHINGTON
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Baze also raised the other allegations now advanced by Stenson's complaint. The Supreme Court rejected each claim. First, the Supreme Court found it is not "objectively intolerable" for a State to use the three drug protocol for lethal injection that is employed by thirty states. Baze, 128 S. Ct. at 1532 and 1534. Second, the Court found the risk that the first drug, sodium thiopental, might be improperly prepared or administered was not sufficient to establish a constitutional error. Id. at 1533. Thus, contrary to Stenson's claim, speculation that prison officials might make an error in the preparation and administration of the first drug is not sufficient to render the method unconstitutional. Id. Third, the Court rejected the claim that states should omit the second drug, pancuronium bromide. The Court ruled the use of the drug does not offend the Eighth Amendment. Id. at 1535. The Court noted that the drug serves two legitimate state interests – it preserves the dignity of the procedure, and it hastens death by stopping breathing. Id. The Court rejected the argument that pancuronium bromide is barred for the use by veterinarians because the argument "overlooks the States' legitimate interest in providing for a quick, certain death." Id. The Court also noted the drug is used by officials in the Netherlands for physician-assisted suicide in order to avoid a prolonged, undignified death. Id.

Finally, the Baze Court also rejected the proposition now advanced by Stenson, that a method of execution is unconstitutional if additional safeguards could be, but are not, utilized by the State to avoid risks of pain. Baze, 128 S. Ct at 1537. Stenson faults the Department's policy, alleging it fails to set forth minimum qualifications, fails to require specific training and practices, and fails to require other safeguards to prevent unnecessary pain. However, the Court held "an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures." Id. "[W]hat the [Eighth] Amendment prohibits is wanton exposure to 'objectively intolerable risk,' . . . not simply the possibility of pain." Id. "The risks of maladministration they have suggested – such as improper mixing of chemicals and

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improper setting of IVs by trained and experienced personnel – cannot remotely be characterized as 'objectively intolerable.'" Id. Stenson's claims fail under the Supreme Court's decision in Baze.

In addition to the Supreme Court and the Washington Supreme Court, the numerous state and federal courts that have considered the constitutionality of lethal injection have overwhelmingly found it to be a constitutional method of execution. See LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998); 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). In particular, since the decision in Baze, multiple federal and state courts have rejected challenges to the constitutionality of lethal injection. See Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008) (applying Baze and rejecting claims identical to Stenson's); Poland v. Stewart, 151 F.3d. 1014 (9th Cir. 1998); Bennett v. State, 990 So. 2d 155, 160-61 & n.1 (Miss. 2008) (rejecting, without hearing, lethal injection challenge in a collateral attack); Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415, 431-32 (2008) (rejecting lethal injection challenge in direct appeal); People v. Salcido, 44 Cal.4th 93, 186 P.3d 437, 494 (2008) (rejection of lethal injection challenge on direct appeal); Sexton v. State, No. SC07-286, 2008 WL 4240155, at *12 (Fla. Sept. 18, 2008) (rejecting lethal injection challenge in a collateral attack); Ex Parte Chi, 256 S.W.3d 702, 704 (Tex. Crim. App. 2008) (rejecting lethal injection challenge in

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writ of habeas corpus); Ex Parte Belisle, No. 1061071, 2008 WL 4447593 (Ala. Oct. 3, 2008) (lethal injection challenge rejected on direct review).[3]

Lethal injection is a constitutional method of punishment, and Stenson's challenge to the particular procedures used in Washington fail as a matter of law as the Washington policy is substantially similar to Kentucky's policy. 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 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 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. 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. Exhibit 1, Declaration of Stephen Sinclair. It is, therefore, reasonable to assign the task of inserting the IV lines to this individual. Exhibit 4, 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. Exhibit 1.

The amended policy is substantially similar to Kentucky's protocol and is being properly followed in anticipation of Mr. Stenson's December 3, 2008, execution. Therefore, Stenson's allegations are now moot and Defendants should be granted judgment

[3] For the Court's convenience, a copy of these cases has been attached to the Bench Copy of this motion. A copy of these cases has also been sent to Stenson's counsel via the United States Postal Service.

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(360) 586-1445

as a matter of law with regard to Stenson's challenges to the constitutionality of lethal injection.

C. STENSON'S CHALLENGE TO HANGING FAILS AS A MATTER OF LAW.

Stenson also challenges the constitutionality of hanging. This claim fails as a matter of law. First, Stenson lacks standing to challenge this method of execution since he has not elected hanging as a method of execution. Second, as with his challenge to lethal injection, this claim is also foreclosed by the holdings of the Washington Supreme Court and other courts.

1. Stenson Lacks Standing To Challenge Hanging.

Washington law provides the sentence of death shall be carried out by lethal injection unless the defendant elects hanging. RCW 10.95.180(1). As of this date, Stenson will be executed by lethal injection. Consequently, Stenson lacks standing to challenge hanging. As the Washington Supreme Court held in rejecting a similar claim:

> The defendant contends that hanging constitutes cruel and unusual punishment. . . . Moreover, the Legislature recently amended the death penalty statute to require that death sentences be carried out by lethal injection unless the defendant affirmatively elects hanging. RCW 10.95.180(1), as amended by Laws of 1996, ch. 251, § 1. [footnote omitted] The defendant has not made that election and is therefore not facing a method of execution he believes to be cruel. He therefore lacks standing to raise this issue.

In re Benn, 134 Wn.2d 868, 933, 952 P.2d 116 (1998). In the absence of standing to challenge hanging, Defendants should be granted judgment as a matter of law with regard to this claim.

2. Assuming Stenson Has Standing To Challenge Hanging, His Claim Fails As A Matter Of Law.

Even if Stenson has standing to challenge hanging, his claim fails as a matter of law in light of the decisions of the Washington Supreme Court. The Washington Supreme Court first determined hanging was constitutional in State v. Frampton, 95 Wn.2d at 512-

ATTORNEY GENERAL OF WASHINGTON
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(360) 586-1445

14 and 527. The Court reaffirmed this decision in State v. Campbell, 112 Wn.2d 186, 192, 770 P.2d 620 (1989), and has subsequently reaffirmed this conclusion by rejecting other challenges to hanging. Pirtle, 136 Wn.2d at 496; Lord, 123 Wn.2d at 325-26. This Court is bound by the decisions of the Washington Supreme Court.

The Ninth Circuit has also held that "judicial hanging, as conducted under the Washington Field Instruction, does not involve the wanton and unnecessary infliction of pain, and therefore does not violate the Eighth Amendment." Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994). In reaching its decision, the court noted that the mechanisms of death involved in hanging include:

> (1) Occlusion of the carotid arteries, (2) occlusion of vertebral arteries, (3) occlusion of the jugular veins, (4) reflexive cardiac arrest, (5) occlusion of the airway, (6) tearing, transection, trauma, or shock to the spinal cord, (7) fracture or separation of the cervical spinal column, (8) interruption of the odontoid process, and (9) irreversible brain stem damage.

Campbell, 18 F.3d at 683.

The Ninth Circuit held the mere fact that "there is no way to predict with a high degree of accuracy which of the various mechanisms will contribute to unconsciousness and death in any given hanging" does not render hanging unconstitutional. Campbell, 18 F.3d at 684. The Ninth Circuit found that "these various mechanisms can, and probably do, occur in concert; thus, there is no single 'pathway' to death by judicial hanging." Id. at 1403. The court held that a hanging conducted pursuant to the Department's policy will cause rapid unconsciousness and death and will not cause the unnecessary and wanton infliction of pain.

The Ninth Circuit also considered the claim that errors by officials in conducting the hanging posed a risk of death by asphyxiation or decapitation that rendered hanging cruel punishment. For the purposes of argument, the Ninth Circuit accepted the existence of such a risk, but rejected the claim. The court held:

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> Campbell is not entitled to a painless execution, but only to one free of purposeful cruelty. Resweber, 329 U.S. at 464. The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.

Campbell, 18 F.3d at 687 (citing Louisiana v. Resweber, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 [1947]).

Finally, every state court to consider the issue has held that hanging is a constitutional method of execution. See Deshields v. State, 534 A.2d 630 (Del. 1987); State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979); McKenzie v. Osborne, 195 Mont. 26, 640 P.2d 368 (1981); State v. Kilpatrick, 201 Kan. 6, 439 P.2d 99 (1968); State v. Butchek, 121 Or. 141, 253 P. 367 (1927); State v. Burris, 194 Iowa 628, 190 N.W. 38 (1922).

Every court to consider the issue has found that hanging is a constitutional method of execution. DOC Policy 490.200, with respect to hanging, is clear and the policy is being followed in anticipation of the scheduled execution of Mr. Stenson on December 3, 2008. Exhibits 1 and 3. The Washington Supreme Court has repeatedly held that hanging is constitutional, and this Court is bound by that decision. Stenson fails to state a claim for relief with regard to hanging and Defendants should be granted judgment as a matter of law on this claim.

D. THE CLAIM THAT STENSON IS DENIED DUE PROCESS BECAUSE HE IS UNABLE TO MAKE AN INFORMED ELECTION AS TO THE METHOD OF EXECUTION FAILS AS A MATTER OF LAW.

Stenson claims the Department's alleged failure to adequately describe the manner and methods of execution violates due process because he is unable to make an informed election of the method of execution. This claim fails as a matter of law.

Under Washington law, the defendant is not required to participate in the selection of the method of execution, and is not required to elect a method of execution. RCW 10.95.180; Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994). The statute provides the defendant will be

executed by lethal injection if no election is made. RCW 10.95.180; Campbell, 18 F.3d at 687. The defendant is not required to choose, and allowing the defendant the option to elect does not violate the Constitution. State v. Rupe, 101 Wn.2d 664, 701-02, 683 P.2d 571 (1984); Campbell, 18 F.3d at 687; Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997).

Stenson's claim that he cannot make an informed election does not show he has been denied a liberty interest protected by the Due Process Clause, especially where he is still allowed the opportunity, but is not required, to elect hanging. The threshold question in any due process challenge is whether the person is deprived of a protected liberty interest. In re Cashaw, 123 Wn.2d 138, 143, 866 P.2d 8 (1994); In re Meyer, 142 Wn.2d 608, 615, 16 P.3d 563 (2001). If the state action in question does not deprive the person of a protected interest, there is no due process violation. Meyer, 142 Wn.2d at 615-16. Stenson does not show the denial of a protected interest.

First, Stenson fails to show the opportunity to elect hanging even constitutes a protected interest. A defendant has "no constitutionally protected interest in a choice of punishment." Langford v. Day, 134 F.3d 1381, 1382 (9th Cir. 1998). The only protected interest a condemned defendant has in the execution process is the interest in one's own life. The process due to the defendant prior to taking this life interest was already provided by the trial court proceedings that resulted in the conviction and sentence of death. See Meachum v. Fano, 427 U.S. 215, 224-25, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) (prisoner's liberty interest extinguished by criminal trial). The defendant has no protected interest in the execution process itself. Langford, 134 F.3d at 1382; McKenzie v. Day, 57 F.3d 1461, 1469 (9th Cir. 1995) (quoting Holden v. Minnesota, 137 U.S. 483, 491 [1890] (matters governing the place and procedures for execution "are 'regulations that do not affect [the prisoner's] substantial rights.'")). Second, even if Stenson has a protected interest in electing hanging, he fails to show the alleged failure to provide him with information deprived him of this interest since Stenson may still elect hanging. McKenzie, 57 F.3d at 1469 ("McKenzie's claim that he was denied due process of law because the state did not disclose the identity of the executioner and gave him insufficient time and information to make a reasoned

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selection of the method of execution is similarly without merit."). Stenson fails to state a claim for relief, and his challenge to the election of an execution method should be dismissed and Defendants should be granted judgment as a matter of law.

E. THE DEPARTMENT'S POLICY DOES NOT VIOLATE THE RULE AGAINST THE UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

Stenson's original complaint alleged the Department's lethal injection policy was unconstitutional. Stenson alleged he was not trying to prevent his execution, but was merely challenging the particular procedure adopted by the Department for implementing lethal injection. For example, Stenson complained the policy did not contain sufficient details and lacked sufficient safeguards to guard against an unnecessary risk of pain. Stenson alleged that because he was challenging only the particular procedure set forth in the existing policy, his complaint was not an attack on the sentence imposed by the superior court. Subsequent to the filing of the first complaint, the Department promulgated an amended policy that eliminated the concerns raised by Stenson's original complaint.[4] Stenson has now filed an amended complaint, adding a new claim that alleges the Department 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 does not merely wish to challenge the particular procedures selected by the Department. Instead, Stenson wishes to prevent his execution from ever occurring. Stenson's complaint is a collateral attack to his sentence because he is directly seeking to prevent the execution of the sentence. This complaint is a collateral attack, and it 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 Department was not acting in a quasi-legislative function when it

[4] Stenson alleges without any support that the Department amended its policy simply as a reaction to his original complaint. In fact, the Department 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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