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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Darold R.J. Stenson, Plaintiff, v. Eldon Vail, Secretary of Washington Department of Corrections (in his official capacity), et al., Defendants.	NO. CV-08-5079-LRS SUPPLEMENTAL RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER

The Defendants, by and through their attorneys, Robert M. McKenna, Attorney General, and John J. Samson, Assistant Attorney General, submits this supplemental response to Plaintiff's motion for a temporary restraining order.

I. INTRODUCTION

On the afternoon of Friday November 21, 2008, Defendants' counsel learned that Stenson was filing the above captioned civil rights action. Anticipating that Stenson may seek injunctive relief to stop his execution, Defendants filed a response to an expected motion for temporary injunctive relief.

Defendants' counsel did not receive Stenson's actual motion for a temporary restraining order until after the close of business on Friday November 21, 2008. Having received and reviewed the motion, Defendants now submit this supplemental response to the motion.

II. ARGUMENT

A. THE COURT MUST ABSTAIN UNDER *YOUNGER*.

The *Younger* doctrine requires abstention where there is ongoing state court litigation. *Younger v. Harris*, 401 U.S. 37, 43 (1971). Such a state court action currently exists. Stenson initiated the state court action himself, suing the same defendants, raising the same claims, and seeking the same relief as in this federal court action. *See* Defendant's Exhibits 3-5; Plaintiff's Exhibits E-F. Although the state court denied a preliminary injunction, Stenson has filed an interlocutory appeal, asking the Washington Supreme Court to grant discretionary review and a stay of execution. *See* Exhibit 12, Emergency Motion for Discretionary Review, *Stenson v. Vail, et al.* More over, since the trial court denied the motion to dismiss, the action remains pending. Since the state court action seeking identical relief remains pending, this Court must abstain. And, since Stenson is seeking injunctive relief, this Court must dismiss this action. *Gilbertson v. Albright*, 381 F.3d 965, 981 (9th Cir. 2004) (court must dismiss action for injunctive relief under *Younger*); *Foster v. Kassulke*, 898 F.2d 1144 (6th Cir. 1990) (abstention in capital case).

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B. THE STATUTE OF LIMITATIONS BARS REVIEW.

42 U.S.C. § 1983 does not contain a statute of limitations, so the applicable state statute must be applied. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758 (9th Cir. 1991). Washington imposes a three year statute of limitation for alleged injury to a person. RCW 4.16.080(2). This statute of limitations began to run on the challenges to the method of execution when the death sentence became final upon conclusion of direct review in 1998. *See 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*, 543 F.3d 644, 647-49 (11th Cir. 2008); *Cooey v. Strickland*, 544 F.3d 588 (6th Cir. 2008). Washington made lethal injection the primary method of execution in 1996. RCW 10.95.180 (amended 1996 Wash. Laws c. 251 § 1). Stenson was sentenced to death in 1994, and his sentence became final no later than 1998 when the Supreme Court denied certiorari. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As an individual sentenced to the death penalty, with a sentence of death final upon direct review in 1998, Stenson's cause of action to challenge lethal injection began to run in 1998. Stenson filed his complaint on November 21, 2008, well after the statute of limitations expired. Stenson's claims are barred under the statute of limitations.

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C. THE CLAIMS ARE BARRED UNDER *RES JUDICATA*

Res judicata bars review since Stenson's current claims could have been raised in any one of his multiple prior judicial actions. After his sentence was affirmed on direct review, Stenson filed four personal restraint petitions, one federal habeas corpus petition, one state court petition for a writ of prohibition or mandamus, and one state court action for DNA testing (the listed actions do not include the additional pending state court challenge to lethal injection mentioned above). *See 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); Defendant's Exhibits 1 and 2; and *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007). Since Stenson could have raised his claims in any these prior proceedings, the claims are barred under *res judicata*.

D. STENSON CANNOT SHOW A LIKELIHOOD OF SUCCESS.

In addition to the arguments provided in the initial response, Defendants provide the following points concerning Stenson's claim that he can show a likelihood of success on the merits.

First, Stenson argues that this Court should grant a stay because other courts have granted stays of execution to allow review of lethal injection policies. To support this argument, Stenson cites to various unpublished orders. Motion, at 9-10. These unpublished orders have no precedential value in this action. Moreover, a majority of these stays were entered prior to the Supreme Court's decision in *Baze v. Rees*, 128 S. Ct. 1520 (2008), and most of the cited

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stays were vacated following the issuance of the Court's opinion in *Baze*. *See, e.g., Nooner v. Norris*, 2008 WL 3211290 (E.D. Ark. August 5, 2008) (No. 5:06CV00110 SWW) (granting motion for summary judgment and dissolving stay of execution); *Cooey v. Strickland*, 2008 WL 4411395 (S.D. Ohio Sept. 25, 2008) (No. 2:04-cv-1156) (granting motion to dismiss); *Cooey v. Strickland*, 544 F.3d 588 (6th Cir. 2008) (affirming); *Jackson v. Danberg*, 2008 WL 1850585 (Del. Super. April 25, 2008) (No. 07M-09-141 RRC) (granting motion to dismiss), *affirmed*, 2008 WL 4717426 (Del. Supr. October 28, 2008).[1]

Second, Stenson argues the lethal injection policy is unconstitutional because it would allow for a "cut down," but he fails to present any competent proof that a "cut down" will be used in his execution. Stenson alleges he has type-2 diabetes and his veins are difficult to access, but to support this allegation he presents only a declaration from a lay witness, containing Stenson's hearsay statements. Motion, at 3 (citing Plaintiff's Exhibits A-C). Similarly, although Dr. Souter opines about the use of a "cut down," he does not state that his opinion is based upon a medical examination of Stenson, and he does not state the use of a "cut down" is probable in this execution.

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[1] Stenson relies on two stays issued for Mr. Cooey, but Mr. Cooey was subsequently executed, and according to the Death Penalty Information Center, thirty four executions have occurred since *Baze* issued in April 2008. *See* http://www.deathpenaltyinfor.org/executions-united-states-2008.

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Stenson's argument that a "cut down" might be used is pure speculation. Stenson fails to present any medical records or expert testimony showing he is a likely subject for a "cut down" in this execution. Moreover, as discussed below in section E, assuming Stenson is a likely candidate for a "cut down" and assuming this would violate the Constitution, the Court should only stay the use of a "cut down." The Court should not stay the use of lethal injection itself.

Third, Stenson argues that execution under the lethal injection policy will violate due process. However, the method by which a sentence of death is carried out is a procedural matter and not a "substantial" right. *McKenzie v. Day*, 57 F.3d 1461, 1469 (9th Cir.), *opinion adopted by en banc panel*, 57 F.3d 1493 (9th Cir. 1995) (en banc). The procedures applicable to an execution "are 'regulations that do not affect [the prisoner's] substantial rights.'" *Id*. (quoting *Holden v. Minnesota*, 137 U.S. 483, 491 (1890)); *see also Langford v. Day*, 134 F.3d 1381, 1382 (9th Cir. 1998) (a defendant has "no constitutionally protected interest in a choice of punishment."). The substantive right in Stenson's life was properly taken from him through the criminal proceedings that resulted in this judgment and sentence. Since execution under the existing policy will not deprive Stenson of a protected right, he cannot show a due process violation.

Stenson cannot show a likelihood of success on the merits. Even assuming the complaint is not barred under *Younger*, the statute of limitations, and *res judicata*, his claims fail on the merits.

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E. ANY INJUNCTION SHOULD BE NARROWLY TAILORED.

Stenson's motion asks this Court to enjoin Defendants from "Carrying out the execution of Darold R. J. Stenson." Motion, at 1. However, any injunctive relief should be narrowly tailored to prevent only the alleged unconstitutional injury. *Nelson v. Campbell,* 541 U.S. 637, 648 (2004). Assuming, *arguendo,* that Stenson is entitled to injunctive relief, he is not entitled to an injunction that utterly prevents the execution. Stenson would only be entitled to an injunction that prevents an unconstitutional procedure.

For example, assuming the Court determined that Stenson has shown he will be subject to a "cut down," then the Court should only enjoin the use of a "cut down," and not the use of lethal injection itself. *See Nelson v. Campbell*, 541 U.S. at 648 (noting an injunction should be narrowly tailored only to prohibit a "cut down" since broader relief may transform action into habeas).

More importantly, even if the Court determined the Defendants should be enjoined from using lethal injection altogether, the Court should not enjoin the execution itself. Under Washington law, there are two methods of execution – lethal injection and hanging. RCW 10.95.180. Although lethal injection is the primary method unless the defendant elects hanging, any injunction should only prohibit the use of lethal injection. The statute contains a severability clause in case part of the statute is unconstitutional. 1996 Wash. Laws c. 251 § 1. If any provision of the act or its application to a person or circumstances is held invalid, the remaining portions or application of the act is not affected. *Id*.

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The language of RCW 10.95.180 and the severability clause provide for execution by hanging if this Court enjoins lethal injection. The statute provides that the punishment of death "shall" be inflicted, "either" by lethal injection "or" hanging. RCW 10.95.180. When used in a statute, the term "shall" imposes a mandatory duty. *State v. Dodd*, 120 Wn.2d 1, 14, 838 P.2d 86 (1992). The statute mandates the State to carry out the "punishment of death;" death is not an option, but a certainty. Similarly, the terms "either" and "or," in common usage, presents an "alternative formula," implying that there are only two alternatives. *Home Box Office v. Showtime/The Movie Channel*, 665 F.Supp. 1079, 1084 (S.D.N.Y. 1987) (citing *Webster's New World Dictionary of the English Language*). The legislature's intent is that the execution "shall" be carried out, "either" by lethal injection "or" by hanging. The only choice the Legislature provided was the choice between lethal injection and hanging, not between lethal injection and life without parole. RCW 10.95.180. Where lethal injection is no longer an option, the sentence shall be carried out by hanging.

Preventing an execution by hanging in cases where a Court enjoins lethal injection would directly contradict the Legislature's intent as expressed in the severability clause. *See In re Lord*, 123 Wn.2d 296, 325-26 n. 11, 868 P.2d 835 (1994) (if one method is unconstitutional, then execution will occur using the other statutory method). Stenson's claims challenging lethal injection cannot bar an execution by hanging.

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III. CONCLUSION

For the reasons stated above and in Defendants' initial response, the Defendants respectfully requests that the Court deny Plaintiff's motion for a temporary restraining order.

DATED this 24th day of November, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2008, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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