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7 **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF WASHINGTON
8

9 Darold R.J. Stenson,

10 Plaintiff,

11 v.

12 Eldon Vail, Secretary of
Washington Department of
Corrections (in his official
13 capacity), et al.,

14 Defendants.

NO. CV-08-5079-LRS

SUPPLEMENTAL
RESPONSE TO MOTION
FOR TEMPORARY
RESTRAINING ORDER

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

18 **I. INTRODUCTION**

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

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

5 **II. ARGUMENT**

6 **A. THE COURT MUST ABSTAIN UNDER *YOUNGER*.**

7 The *Younger* doctrine requires abstention where there is ongoing state
8 court litigation. *Younger v. Harris*, 401 U.S. 37, 43 (1971). Such a state court
9 action currently exists. Stenson initiated the state court action himself, suing
10 the same defendants, raising the same claims, and seeking the same relief as in
11 this federal court action. See Defendant's Exhibits 3-5; Plaintiff's Exhibits E-F.
12 Although the state court denied a preliminary injunction, Stenson has filed an
13 interlocutory appeal, asking the Washington Supreme Court to grant
14 discretionary review and a stay of execution. See Exhibit 12, Emergency
15 Motion for Discretionary Review, *Stenson v. Vail, et al.* More over, since the
16 trial court denied the motion to dismiss, the action remains pending. Since the
17 state court action seeking identical relief remains pending, this Court must
18 abstain. And, since Stenson is seeking injunctive relief, this Court must dismiss
19 this action. *Gilbertson v. Albright*, 381 F.3d 965, 981 (9th Cir. 2004) (court
20 must dismiss action for injunctive relief under *Younger*); *Foster v. Kassulke*,
21 898 F.2d 1144 (6th Cir. 1990) (abstention in capital case).

22

1 **B. THE STATUTE OF LIMITATIONS BARS REVIEW.**

2 42 U.S.C. § 1983 does not contain a statute of limitations, so the
3 applicable state statute must be applied. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir.
4 1981); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758 (9th Cir. 1991).
5 Washington imposes a three year statute of limitation for alleged injury to a
6 person. RCW 4.16.080(2). This statute of limitations began to run on the
7 challenges to the method of execution when the death sentence became final
8 upon conclusion of direct review in 1998. *See McNair v. Allen*, 515 F.3d
9 1168, 1174-75 (11th Cir. 2008); *Cooley v. Strickland*, 479 F.3d 412, 419-22
10 (6th Cir. 2007); *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir. 2006); *Crowe*
11 *v. Donald*, 528 F.3d 1290, 1292-93 (11th Cir. 2008); *Henyard v. Secretary,*
12 *DOC*, 543 F.3d 644, 647-49 (11th Cir. 2008); *Cooley v. Strickland*, 544 F.3d
13 588 (6th Cir. 2008). Washington made lethal injection the primary method of
14 execution in 1996. RCW 10.95.180 (amended 1996 Wash. Laws c. 251 § 1).
15 Stenson was sentenced to death in 1994, and his sentence became final no
16 later than 1998 when the Supreme Court denied certiorari. *State v. Stenson*,
17 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As
18 an individual sentenced to the death penalty, with a sentence of death final
19 upon direct review in 1998, Stenson's cause of action to challenge lethal
20 injection began to run in 1998. Stenson filed his complaint on November 21,
21 2008, well after the statute of limitations expired. Stenson's claims are
22 barred under the statute of limitations.

1 **C. THE CLAIMS ARE BARRED UNDER *RES JUDICATA***

2 *Res judicata* bars review since Stenson’s current claims could have been
3 raised in any one of his multiple prior judicial actions. After his sentence was
4 affirmed on direct review, Stenson filed four personal restraint petitions, one
5 federal habeas corpus petition, one state court petition for a writ of prohibition
6 or mandamus, and one state court action for DNA testing (the listed actions do
7 not include the additional pending state court challenge to lethal injection
8 mentioned above). See *In re Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001); *In re*
9 *Stenson*, 150 Wn.2d 207, 76 P.3d 241 (2003); *In re Stenson*, 153 Wn.2d 137,
10 102 P.3d 151 (2004); Defendant’s Exhibits 1 and 2; and *Stenson v. Lambert*,
11 504 F.3d 873 (9th Cir. 2007). Since Stenson could have raised his claims in
12 any these prior proceedings, the claims are barred under *res judicata*.

13 **D. STENSON CANNOT SHOW A LIKELIHOOD OF SUCCESS.**

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

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

1 stays were vacated following the issuance of the Court’s opinion in *Baze*. See,
2 e.g., *Nooner v. Norris*, 2008 WL 3211290 (E.D. Ark. August 5, 2008) (No.
3 5:06CV00110 SWW) (granting motion for summary judgment and dissolving
4 stay of execution); *Cooey v. Strickland*, 2008 WL 4411395 (S.D. Ohio Sept. 25,
5 2008) (No. 2:04-cv-1156) (granting motion to dismiss); *Cooey v. Strickland*,
6 544 F.3d 588 (6th Cir. 2008) (affirming); *Jackson v. Danberg*, 2008 WL
7 1850585 (Del. Super. April 25, 2008) (No. 07M-09-141 RRC) (granting motion
8 to dismiss), *affirmed*, 2008 WL 4717426 (Del. Supr. October 28, 2008).¹

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

18
19 ¹ Stenson relies on two stays issued for Mr. Cooey, but Mr. Cooey was
20 subsequently executed, and according to the Death Penalty Information Center,
21 thirty four executions have occurred since *Baze* issued in April 2008. See
22 <http://www.deathpenaltyinfor.org/executions-united-states-2008>.

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

7 Third, Stenson argues that execution under the lethal injection policy will
8 violate due process. However, the method by which a sentence of death is
9 carried out is a procedural matter and not a “substantial” right. *McKenzie v. Day*,
10 57 F.3d 1461, 1469 (9th Cir.), *opinion adopted by en banc panel*, 57 F.3d 1493
11 (9th Cir. 1995) (en banc). The procedures applicable to an execution “are
12 ‘regulations that do not affect [the prisoner’s] substantial rights.’” *Id.* (quoting
13 *Holden v. Minnesota*, 137 U.S. 483, 491 (1890)); *see also Langford v. Day*, 134
14 F.3d 1381, 1382 (9th Cir. 1998) (a defendant has “no constitutionally protected
15 interest in a choice of punishment.”). The substantive right in Stenson’s life was
16 properly taken from him through the criminal proceedings that resulted in this
17 judgment and sentence. Since execution under the existing policy will not deprive
18 Stenson of a protected right, he cannot show a due process violation.

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

22

1 **E. ANY INJUNCTION SHOULD BE NARROWLY TAILORED.**

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

9 For example, assuming the Court determined that Stenson has shown he
10 will be subject to a “cut down,” then the Court should only enjoin the use of a
11 “cut down,” and not the use of lethal injection itself. *See Nelson v. Campbell*,
12 541 U.S. at 648 (noting an injunction should be narrowly tailored only to
13 prohibit a “cut down” since broader relief may transform action into habeas).

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

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

16 Preventing an execution by hanging in cases where a Court enjoins lethal
17 injection would directly contradict the Legislature’s intent as expressed in the
18 severability clause. *See In re Lord*, 123 Wn.2d 296, 325-26 n. 11, 868 P.2d
19 835 (1994) (if one method is unconstitutional, then execution will occur
20 using the other statutory method). Stenson’s claims challenging lethal
21 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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