NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2008

ELDON VAIL, SECRETARY OF WASHINGTON DEPARTMENT OF CORRECTIONS, ET AL.,

Applicant,

v.

DAROLD R. J. STENSON,

Respondent.

APPLICATION TO VACATE STAY OF EXECUTION

To the Honorable Anthony M. Kennedy, Circuit Justice for the Ninth Circuit:

Applicants Eldon Vail, Secretary of the Washington Department of Corrections, Stephen Sinclair, Superintendent of the Washington State Penitentiary, and the Washington Department of Corrections,[1] respectfully apply for an Order vacating the Order, granted by the United States District Court of the Eastern District of Washington, staying the execution of Darold R. J. Stenson. The United States Court of Appeals for the Ninth Circuit denied as moot the State's emergency motion to vacate the stay of execution.

[1] Applicants will be referred to hereafter as the State.

I. STATEMENT OF THE CASE

Stenson was sentenced to death pursuant to his 1994 Washington state convictions for aggravated first degree murder. *See State v. Stenson*, 132 Wash.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). The state supreme court denied three post-conviction challenges to the convictions and sentence. *In re Stenson*, 142 Wash.2d 710, 16 P.3d 1 (2001); *In re Stenson*, 150 Wash.2d 207, 76 P.3d 241 (2003); *In re Stenson*, 153 Wash.2d 137, 102 P.3d 151 (2004). The district court denied Stenson's habeas corpus petition, and the Ninth Circuit affirmed in 2007. *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007). This Court denied certiorari on October 6, 2008. *Stenson v. Uttecht*, 129 S. Ct. 247 (2008). The Ninth Circuit issued the mandate on October 17, 2008, and under Washington Revised Code 10.95.160(2), the date of execution automatically reset to December 3, 2008.

Under Washington law, the State has twenty four hours on the scheduled date in order to carry out the execution. If the execution does not occur on the date scheduled, as a result of a stay of execution issued by a court of competent jurisdiction, then the date of execution will automatically reset for thirty judicial days after the stay of execution is terminated. Wash. Rev. Code § 10.95.160(2). The thirty judicial days excludes weekends and holidays, and therefore is approximately forty five calendar days after the stay is terminated. In other words, if the State does not execute Stenson on December 3, 2008, and the execution does not occur because of a court's order staying then execution, the State will not be able to execute Stenson until the date of execution resets after termination of the stay.

In September 2008, Stenson filed an action in the Thurston County Superior Court challenging Washington's methods of execution, both lethal injection and hanging. (*see* Wash. Rev. Code § 10.95.180 – authorizing two methods of execution). Stenson named as defendants the applicants before this Court. Stenson alleged that execution under the Washington policy for lethal injection and hanging would violate his rights under both the Washington State Constitution and the United States Constitution. The defendants moved to dismiss, and Stenson moved for a stay of execution. On November 21, 2008, the state court dismissed the challenge to hanging, denied the motion to dismiss the challenge to lethal injection, and denied a stay of execution. Appendices C and D. The judge concluded, although the claims did not fail to state a claim as a matter of law, that Stenson's likelihood of success on the merits of the claims was slight. Appendix D. The judge determined the interests of finality weighed against a stay, and he concluded the harm that Stenson could suffer did not outweigh the remoteness of success on the merits. Appendix D.

On November 21, 2008, after the state court ruling, Stenson filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Washington. Raising the same claims as raised in state court, the complaint challenged Washington's protocol for lethal injection. Stenson moved for a temporary restraining order and a preliminary injunction. On November 25, 2008, the district court granted a stay of execution. Appendix A. The district court stayed the execution, preventing the execution by either lethal injection, or the alternative method of hanging. Appendix A. In doing so, the district court expressly ruled:

> **PENDING FURTHER ORDER OF THIS COURT, PLAINTIFF'S EXECUTION, WHETHER BY HANGING OR LETHAL INJECTION, IS STAYED, AND PROCEEDINGS IN THE CAPTIONED ACTION ARE STAYED.** Plaintiff's Motion For Temporary Restraining Order (Ct. Rec. 5) and Motion For Preliminary Injunction (Ct. Rec. 12) are **STAYED.**
>
> While this stay has the same effect as a temporary restraining order or preliminary injunction and is based on the policy rationale and reasoning underlying those remedies, this court is not labeling it as such in recognition that it has not made a final decision on the propriety of *Younger* abstention. At this time, this court is not making any determination regarding likelihood of success on the merits and its stay is not intended to reverse the Thurston County Superior Court's denial of a preliminary injunction

Appendix A, at 2-3 (emphasis in original).

The district court noted, while Stenson still had an opportunity to pursue injunctive relief in the Washington Supreme Court and perhaps this Court, that regardless of what ruling may occur regarding the state trial court's ruling denying a stay of execution, the federal court stay of execution would remain because the district court had not dismissed or adjudicated the merits of Stenson's federal claims. Appendix A, at 3. The district court recognized that either Stenson or the State may wish to seek an interlocutory appeal, and the district court certified the order for an immediate appeal pursuant to 28 U.S.C. § 1292(b). Appendix A, at 3. Moreover, despite the decision not title the stay as a preliminary injunction, the stay is in effect a preliminary injunction in that it will continue until further order of the district court, and it indefinitely stays the execution by either method allowed under state law. Appendix A, at 2-3. Since the order is in effect a preliminary injunction, it is appealable as a matter of right under 28 U.S.C. § 1292(a).

The State filed a notice of appeal to the Ninth Circuit on November 25, 2008, and the State filed with the Ninth Circuit an emergency motion to vacate the stay of execution. The State indicated that the stay of execution severely prejudices the State because it prevents the execution of a lawful judgment and sentence, previously reviewed by both the state and federal courts, on the date scheduled, December 3, 2008. The State informed the Ninth Circuit that if the stay of execution is not vacated on or before 11:59 p.m. on December 3, 2008, the date of execution will expire and the date of execution will automatically reset under Washington law. Wash. Rev. Code § 10.95.160(2). Under state law, if the date of execution passes as a result of a stay without an execution, the date will automatically reset for thirty judicial days. Wash. Rev. Code § 10.95.160(2).

After the district court entered its stay, the Clallam County Superior Court entered a stay of execution. Appendix E. This stay concerned Stenson's motion for DNA testing of the evidence gathered for his state court criminal trial proceedings. Appendix E. The county prosecutor has filed an emergency motion with the Washington Supreme Court, asking the court to vacate the state court stay prior to December 3, 2008. The county prosecutor's motion is pending before the Washington Supreme Court, although the county prosecutor has asked for accelerated review of the motion.

On November 26, 2008, the Ninth Circuit issued an order denying as moot, without prejudice, the State's emergency motion to vacate the federal court stay of execution. Appendix B. The Ninth Circuit's order stated;

> The State of Washington's motion to vacate the district court's stay of execution is denied as moot in light of the existing stay entered by the state court. The denial is without prejudice to renewal of the motion under changed circumstances. The Clerk's November 25, 2008 scheduling order is vacated.

Appendix B.

The State now respectfully submits this application to vacate the federal court stay of execution.

II. ARGUMENT

A. THE ISSUE IS NOT MOOT BECAUSE THE STAY PROHIBITS THE STATE FROM EXECUTING STENSON REGARDLESS OF THE OUTCOME THE STATE COURT PROCEEDINGS.

The Ninth Circuit determined the State's motion to vacate the district court's order granting a stay of execution was moot because a state trial court had also granted a stay of execution. Appendix B. The issue is not moot because the resolution of the validity of the district court's stay of execution is a continuing controversy, it affects a compelling State interest, and the State is severely prejudiced when any stay of execution is allowed to continue.

"[A] State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson v. Campbell*, 541 U.S. 637, 644 (2004). The State has a compelling interest in the timely execution of a criminal judgment and sentence, and the State's interest is severely prejudiced by any stay of execution. *In re Blodgett*, 502 U.S. 236 (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 (2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 555 (1998).

Regardless of the existence of a state court stay, the district court's stay of execution severely prejudices the State because the federal stay prohibits the enforcement of a lawful state court judgment and sentence, and the federal stay prohibits the enforcement of the sentence regardless of the outcome of the concurrent state court proceedings. The State's challenge to the validity of the federal court stay is not moot.

First, if the federal stay is not vacated before the end of December 3, 2008, it will prevent the execution from occurring on December 3, 2008, even after the Washington Supreme Court vacates the stay granted by the state court. With less than three judicial days remaining, if the State is required to wait to file its motion to vacate the federal court stay until after the Washington Supreme Court rules on the validity of the state court stay, the State will be irreparably injured because the State will not have time to re-file the motion, have Stenson file a response, have the motion heard by the Ninth Circuit, and have the federal stay vacated in time for the execution to occur on December 3, 2008. The failure to hear the State's challenge to the validity of the district court's stay will prevent the State from carrying out its lawful judgment and sentence in the time allowed by state law. The failure to hear the State's motion will necessarily cause the date of execution to reset and further delay the execution the lawful sentence. The State's request is not moot.

Stenson may argue the issue is moot because, as a result of the stay of execution issued by both the state and federal courts, the date of execution has already automatically reset past December 3, 2008. Any such argument is incorrect

under Washington law. The provision governing resetting of a date of execution, Wash. Rev. Code § 10.95.160(2), applies only if the date of execution passes without an execution as a result of a stay. The provision does not apply if the stay is vacated prior to the end of the date of execution. If the stay is vacated prior to the end of December 3, 2008, the execution may occur on that date, and the date of execution does not reset.

This is exactly what occurred in the execution of Jeremy Sagastegui in 1998. Sagastegui was scheduled to be executed on October 13, 1998. *Vargas v. Lambert*, 159 F.3d 1161, 1163 (9th Cir. 1998). The Ninth Circuit issued a stay of execution on October 11, 1998. *Id.* This Court then granted the State's application to vacate the stay of execution on October 12, 1998. *Lambert v. Vargas*, 525 U.S. 925 (1998). Since the stay of execution was vacated prior to expiration of the date of execution of October 13, 1998, the date of execution remained in place. Sagastegui's mother, Ms. Vargas, then filed an action in the Washington Supreme Court, contending that the Ninth Circuit's stay of execution, although vacated prior to the date of execution, reset the date of execution under Wash. Rev. Code § 10.95.160(2). The Washington Supreme Court rejected this argument, ruling "that because the execution date has not yet passed, the circumstances presented in this case do not trigger the provisions of [Wash. Rev. Code] 10.95.160(2). Appendix M. The state court denied a stay, and Sagastegui was executed on October 13, 1998.

Second, the action is not moot, regardless of how the Washington Supreme Court rules on the state court stay. Even if the state court stay continues, and the

execution does not occur on December 3, 2008, the controversy over the validity of the federal court stay still exists, and the State is still harmed because the federal court stay remains in place. The federal court stay utterly prevents an execution, by either lethal injection or hanging. The stay, entered without any finding as to the likelihood of success on the merits and without any consideration of equity, will remain in place indefinitely. Regardless of how the state courts ultimately rule, the district court's stay will prohibit the enforcement of Stenson's lawful sentence until the district court decides otherwise. The validity of the stay remains a live controversy, and the State's request to vacate the stay is not moot.

B. THE COURT SHOULD VACATE THE STAY BECAUSE STENSON DID NOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CLAIMS, AND EQUITY DISFAVORS A STAY IN THIS ACTION FILED ON THE EVE OF AN EXECUTION.

The court granted the stay without finding that Stenson had shown a likelihood of success on the merits, and without considering whether equity disfavors a stay. A court should not automatically grant a stay of execution solely for the reason that the party seeking the stay will be put to death absent a stay. A stay of execution must reflect "the presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 894-95 (1983). A federal court may grant a stay only when the petitioner shows a significant possibility of success on the merits. *Barefoot v. Estelle*, 463 U.S. at 888; *Delo v. Stokes*, 495 U.S. 320, 110 S. Ct. 1880, 1881 (1990). By granting a stay without even considering equity or the likelihood of success on the merits, the district court abused its discretion and failed to follow this Court's clear standards governing the granting of a stay of execution.

1. The District Court Failed To Consider Whether Stenson Had Shown A Likelihood Of Success In This Civil Rights Action.

a. The District Court Failed To Consider That Stenson Has Not Exhausted Administrative Remedies.

No action may be brought by a prisoner challenging the conditions of his sentence until administrative remedies are exhausted. Exhaustion is mandatory under the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e; *Jones v. Bock*, 127 S. Ct. 910, 918-19 (2007); *Booth v. Churner*, 532 U.S. 731, 740, 742 (2001); *Porter v. Nussle*, 543 U.S. 516, 524-32 (2002); *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). Stenson failed to fully exhaust his administrative remedies. Although Stenson filed a grievance, which upon reconsideration was denied, *see* Appendix F, Grievance and Responses, he did not then further appeal his remaining administrative remedies. Appendix G, Declaration of Devon Schrum. Stenson was required to file a Level II appeal to the Superintendent, and a Level III appeal to the Department of Corrections Headquarters. Appendix G, at 2. Stenson failed to pursue these appeals, and he did not properly exhaust his administrative remedies. Appendix G, at 3. A stay is not proper for this reason. *See* 42 U.S.C. § 1997e; *see also Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (any claim challenging lethal injection is subject to PLRA).

b. The District Court Failed To Consider Whether The Claims Would Likely Succeed On The Merits.

Stenson's complaint challenges Washington's protocol for lethal injection. This Court recently rejected the very claims raised by Stenson, holding lethal injection is constitutional. *Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008). In light of

this Court's ruling on the constitutionality of lethal injection in *Baze*, Stenson cannot show a likelihood of success on the merits.

The Court began its analysis of the constitutionality of lethal injection 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 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. As the state trial court found in denying a stay, Washington's protocol is similar to Kentucky. Appendix D. Stenson cannot show a likelihood of success on the merits.

In reviewing Kentucky's protocol, the 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 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 (1879); *In re Kemmler*, 136 U.S. 436 (1890)). These methods were adopted to provide a more humane execution than previous methods and the Court noted 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." *Baze*, 128 S. Ct. at 1531. Because the 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 could eliminate a significant risk of harm. *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.*

Baze also raised the other allegations advanced by Stenson's complaint, and the Court rejected each claim. First, the 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. *Baze*, 128 S. Ct. at 1533. 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 Court rejected the proposition 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 Washington'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 improper setting of IVs by trained and experienced personnel – cannot remotely be characterized as 'objectively intolerable.'" *Baze*, 128 S. Ct. 1537.

Contrary to any argument Stenson may make, *Baze* does not require "extensive hearings" or an individualized factually specific inquiry into the execution protocol of each and every State. Declaring that additional fact finding is not needed to review the constitutionality of lethal injection protocols in other States, Chief Justice Roberts rejected the suggestion that the Court "leaves the disposition of other cases uncertain. . . ." *Baze*, 128 S. Ct. at 1537. "A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Id.* Justice Alito specially concurred on this point, clarifying that, when properly understood, the *Baze* standard will not "lead to litigation that enables 'those seeking to abolish the death penalty . . . to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.'" *Id.* at 1538 (Alito, J., concurring). Justice Alito stressed that only a misinterpretation of the *Baze* standard, the one advanced by Stenson in the courts below, "would create a grave danger of extended delay." *Id.* at 1542.

As the state trial court found in denying a stay of execution, *see* Appendix D, Washington's protocol is substantially similar to Kentucky's protocol. DOC Policy 490.200 expressly requires minimum qualifications of members of the lethal injection team, sufficient practice sessions, 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. *See* Appendix H, Attachment A. The individual who will site the intravenous lines during the execution regularly inserts intravenous lines as a part of his/her professional duties, and it is reasonable to assign this task to this individual. Appendices I, J and K. Additionally, the three practice sessions with the siting of IV lines have occurred. Appendices I and L. Washington's policy is substantially similar to Kentucky's protocol. The proper application of the protocol will result in a rapid, painless and humane death. Appendices J and K. The policy is constitutional.

Finally, Stenson may argue in this Court that he has shown a due process violation, alleging the State lacks authority to promulgate an execution policy. 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. *See Meachum v. Fano*, 427 U.S. 215, 224-25 (1976) (prisoner's liberty interest extinguished by criminal trial). Since execution under the existing policy will not deprive Stenson of a protected right, he cannot show a due process violation.

Stenson's claim that the lethal injection policy violates due process is really an issue of state law that is without merit. First, Stenson's claim is based upon his allegation that the policy was not the result of proper "legislative delegation," but this state law claim fails because the rule advanced by Stenson does not apply. The policy is a directive governing internal operations at a prison, and is not an administrative rule that creates law. *Joyce v. Dept. of Corrections*, 155 Wash.2d 306, 323, 199 P.3d 825 (2005). Washington 's Administrative Procedures Act does not apply to policies governing offenders and prisons. Wash. Rev. Code § 34.05.030(1)(c); *Dawson v. Hearing Committee*, 92 Wash.2d 391, 597 P.2d 1353 (1979); *Foss v. DOC*, 82 Wash. App. 355, 358-59, 918 P.2d 521 (1996). Second, even if the rule applied, the policy is a lawful delegation since the legislature described in general terms what is to be done and by which agency. *State v. Simmons*, 152 Wash.2d 450, 455, 98 P.3d 789 (2004); Wash. Rev. Code § 10.95.160-.190; Wash. Rev. Code § 72.01.090; Wash. Rev. Code § 72.02.040; Wash. Rev. Code § 72.09.050; Wash. Rev. Code § 72.02.045. And there are adequate procedural safeguards to control against arbitrary agency action. *Simmons*, 152 Wash.2d at 457; *State v.*

Crown Zellerbach, 92 Wash.2d 894, 901, 602 P.2d 1172 (1979). Such protections exist under current Washington law. *See, e.g.*, Washington Rules of Appellate Procedure 16.2; Wash. Rev. Code § 7.16.150; Wash. Rev. Code § 7.16.290.

2. The District Court Failed To Consider Whether Stenson Had Shown A Likelihood Of Success In This Civil Rights Action.

The Court has recognized that a "State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson v. Campbell*, 541 U.S. 637, 644 (2004); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 555 (1998)). In considering whether to grant a stay 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 (1992)).

The district court entered the stay simply because Stenson had filed a challenge to lethal injection, and because a stay was needed to consider his claims. However, a stay of execution is not available as a matter of right, and the filing of an action "does not entitle the complainant to an order staying an execution as a matter of course." *Hill*, 547 U.S. at 583-84. The Court should "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez*, 503 U.S. at 654. The Court "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 merits without requiring entry of a stay.**" *Id.* at 650 (emphasis added); *see also Hill*, 547 U.S. at 584; *Hill v. McDonough*, 464 F.3d 1256 (11th Cir. 2006); *Hill v. McDonough*, 548 U.S. 940 (2006).

Equity bars a stay of execution in this case. Stenson's sentence became final in 1998 when this Court denied certiorari on direct review. *Stenson v. Washington*, 523 U.S. 1008 (1998). Stenson has also known since 1996 that he will be executed by lethal injection unless he elects hanging. Wash. Rev. Code § 10.95.180. This Court held as early as 2004 that challenges to lethal injection could be brought under 42 U.S.C. § 1983. *Nelson v. Campbell*, 541 U.S. 637 (2004). Stenson delayed bringing this action until the eve of his execution, just six judicial days before the scheduled date of December 3, 2008. Equity bars a stay of execution. The district court erred in failing to consider whether equity favors a stay.

While an inmate may challenge lethal injection in a civil rights action, the filing of such an action does not entitle the inmate to a stay of execution as a matter of right. *Hill*, 547 U.S. at 584. In *Hill*, after holding that a challenge to lethal injection may be brought under 42 U.S.C. § 1983, the Court directed the lower courts to consider whether Hill was entitled to a stay of execution. *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." *Hill*, 547 U.S. at 584. On remand, the Eleventh Circuit ruled "the equities do not support Hill's request" for a stay of execution. *Hill*, 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 challenges to lethal injection even earlier, *see, e.g., In re Pirtle*, 136 Wash.2d 467, 496, 965 P.2d 593 (1998), Stenson could have brought this action earlier. Stenson simply chose to wait. Equity bars a stay. *See, e.g., 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); *see also Gomez*, 503 U.S. at 654; *White v. Johnson*, 429 F.3d 572, 574 (5th Cir. 2005); *Cooey v. Strickland*, 479 F.3d 412, 419-20 (6th Cir. 2007); *McNair v. Allen*, 515 F.3d 1168, 1177 (11th Cir. 2008).

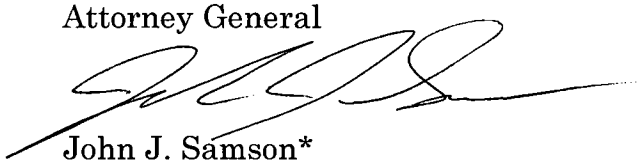
In light of the strong presumption against granting a stay of execution, equity demands the denial of any stay of execution. The district court clearly erred because it failed to consider whether equity barred a stay of execution.

III. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court immediately vacate the district court's Order granting a stay of execution.

RESPECTFULLY SUBMITTED,

ROBERT M. MCKENNA
Attorney General



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