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No. 83828-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

DAROLD R. J. STENSON

Petitioner-Plaintiff,

v.

ELDON VAIL, Secretary of Washington Department of Corrections (in his official capacity); et al.,

Respondents-Defendants.

THIS IS A CAPITAL CASE

PETITIONER'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Respondents fail to address core elements of Stenson's appeal. Their opposition depends on two meritless themes: (1) claimed waiver and (2) the promises of the Department of Corrections ("DOC") Superintendent to try to do better in the future. They fail to address the absence of evidence for key findings and conclusions by the trial court.

Respondents' approach to the weighty task of carrying out executions is truly disturbing. For example, they ask the Court to rule that the manner in which the state executes its citizens is not a legislatively delegated function, but simply "internal prison policy." (Resp. Br. at 27.) They urge that execution using the three-drug protocol is *per se* constitutional because it is "even more humane than hanging." (*Id.* at 41, 44.)

Respondents completely fail to address a critical error of the trial court: its findings regarding the competency of the execution team in the absence of *any* information about the qualifications of its members. It is impossible to gauge DOC's ability to assemble a competent lethal injection team in the absence of any evidence that DOC has ever done so, especially in light of the sudden resignation of the entire team. Respondents do not see the *en masse* resignation as problematic because Superintendent Sinclair says he "intends" to seek qualified individuals. (*Id.* at 33.) Sinclair's personal intentions, however, are irrelevant to the validity of lethal injection protocol. Rather, binding rules, subject to judicial review and the protections of an approved rule-making process, must be the basis for finding that an execution protocol passes

constitutional muster.

Respondents provide no basis for rehabilitating the erroneous rulings of the trial court. Washington's lethal injection protocol—conceived, implemented, and revised without proper legislative authority—is not substantially similar to Kentucky's protocol, and it runs afoul of Washington's more stringent constitutional standards.

II. THE TRIAL COURT ERRONEOUSLY DISMISSED STENSON'S UNLAWFUL DELEGATION CLAIM

A. Stenson Did Not Abandon This Claim

Respondents begin with the specious notion that Stenson abandoned his claim that the DOC acted without lawfully delegated authority "because he deleted the claim when he filed his second amended complaint." (Resp. Br. at 26.) Because the order granting summary judgment on this claim was interlocutory, it could not be appealed until entry of final judgment. *See* RAP 2.2(d).[1] Yet, Respondents argue that Stenson should have re-pleaded the dismissed claim in his second amended complaint, in contravention of the trial court's order. To do so not only would have been "needlessly formalistic," but it would have exposed Stenson's counsel to the risk of sanctions. *Young v. City of Mt. Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) ("It is needlessly formalistic to require a plaintiff to replead claims already dismissed without leave to

[1] The trial court granted summary judgment on March 19, 2009. CP3380-81. Stenson filed his second amended complaint on April 1, 2009. CP1148-79.

amend in order to preserve the right to appeal the dismissal."); *Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998) ("If the plaintiff were required to reallege claims dismissed on summary judgment to avoid waiving them, plaintiff's counsel would be forced to bear the risk of sanctions to preserve his client's right to appeal.") None of the cases Respondents cite involved claims that had been previously dismissed.

B. DOC Promulgated Execution Policy Without Properly Delegated Legislative Authority

The trial court granted summary judgment on this claim without explanation. CP3381. It erred in so ruling.

Respondents claim that the protocol is exempt from the legislative requirements because the method by which the state executes its citizens is merely "an executive directive governing internal operations at a prison." (Resp. Br. at 27.) To the contrary, it is beyond question that the courts are the final arbiters of the constitutionality of states' execution protocols. *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). Likewise, this Court has held that "adequate procedural safeguards must be provided ... for *testing the constitutionality of [an agency's] rules after promulgation*" to protect against "unnecessary and uncontrolled discretionary power." *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979) (citations omitted, emphasis added). The cases Respondents cite did not involve the manner in which an inmate is executed. *See Joyce v. Dept. of Corrections*, 155 Wn. 2d 306, 199 P.3d 825 (2005) (responsibilities of community corrections officers); *State v. Brown*, 142

Wn. 2d 57, 11 P.3d 818 (2000) (privileges and discipline for prisoners); *Dawson v. Hearing Comm.*, 92 Wn. 2d 391, 597 P.2d 1353 (1979) (prison disciplinary hearings). Respondents may not evade review by characterizing the execution protocol as an internal policy.

Respondents next argue that the requirements for legislative delegation have been met here. But they point to no legislative "standards or guidelines" about "what is to be done," as required by this Court in *Powell*. 92 Wn. 2d at 891. The statutes Respondents cite neither delegate authority to establish execution procedure nor provide guidance on how to carry out an execution.[2] The unavoidable fact is that no such standards or guidance exist, and the DOC is essentially unrestrained in conceiving, revising, and implementing execution policy.

Respondents' assertion that "adequate procedural safeguards" exist is similarly unavailing. They ignore this Court's admonition that "it is imperative to consider the magnitude of interests" at stake in deciding the appropriate level of safeguards—i.e., the greater the interest, "the greater the safeguards required." *Id.* at 892. In *Powell*, the fact that the petitioner's personal liberty was implicated by the agency action was

[2] *See* RCW 10.95.180 (execution "shall be supervised by the superintendent" and "shall be inflicted by intravenous injection of a substance or substances in a lethal quantity"); RCW 10.95.160 (death warrant "shall be directed to the superintendent"); RCW 10.95.190 (superintendent must maintain death warrant and return to clerk of trial court after execution). RCW 72.01.090, RCW 72.02.040, RCW 72.09.050, and RCW 72.02.045 pertain only to the management of the Department of Corrections and do not even mention execution procedures. *Compare* Utah Code Ann. § 77-19-10 (mandating specific lethal injection procedures and stating, "the department shall adopt and enforce rules governing procedures for the execution of judgments of death").

critical to the Court's determination that the delegation of authority was unlawful. *Id.* at 893. Stenson's interest here is at least as substantial, and comparable levels of procedural safeguards are therefore required.

The "safeguards" Respondents identify are not remotely adequate given the magnitude of Stenson's interest. DOC claims for the first time in this lawsuit that it "has an administrative review process for challenging the protocol," but gives no clue where this hitherto undisclosed process may be found. (Resp. Br. at 29.) The statutes Respondents cite regarding judicial review of agency action involve only extraordinary remedies such as mandamus or writs of prohibition. (*See* Resp. Br. at 29.) No safeguards exist that would enable an inmate or the public to discover, review, or challenge the execution protocol in an orderly manner and before it is adopted or revised. Moreover, Respondents state incorrectly that the lethal injection protocol "has been judicially reviewed in the past." (*Id.* at 8, 29.) The cases Respondents cite predate the 2008 protocol and hold only that lethal injection as a method of punishment is constitutional.

That the DOC is utterly unconstrained by legislative guidance or adequate safeguards is manifest by its conduct related to the current protocol. Superintendent Sinclair has assumed the power to change the protocol personally, and the lethal injection team's wholesale resignation effectively stymied the trial court's judicial review of the team's competency. Further, the Superintendent, who the policy indicates "will direct the acquisition of the appropriate quantities of lethal substances" (DOC 490.200), did so in complete violation of state and federal drug

laws.[3] (*See* Section VI *infra.*) A policy that entails illegal conduct plainly exceeds lawfully delegated authority.

III. THE 2008 PROTOCOL VIOLATES THE EIGHTH AMENDMENT

A. Stenson Properly Assigned Error to the Trial Court's Rulings

Respondents lead with the formalistic argument that Stenson failed to assign error to a number of the trial court's findings—including Finding 14, that the 2008 protocol is substantially similar to the Kentucky protocol—because he did not explicitly state the corresponding numbers of the findings in his opening brief.

This argument borders on frivolous. First, it is simply wrong. Stenson specifically assigned error to the trial court's finding regarding substantial similarity. (*See* Assignment of Error No. 3, Opening Br. at 4.) Indeed, Respondents' own statements defy reason: they contend that "Stenson did not assign error to Finding 14," but in the very next sentence they quote Stenson's opening brief, in which he stated that Finding 14 was "based on a series of dependent factual findings (FOF3-13) that are against the clear weight of the evidence." (Resp. Br. at 15.) The same paragraph in Stenson's Opening Brief states that "the court's findings [of substantial similarity] are erroneous in at least four general ways." (Opening Br. at 31.) These statements are not ambiguous.

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[3] Other states have recognized the necessity of proper delegation of authority in this respect. *See, e.g.*, O.R.S. 137.473; Fla. Stat. 922.105; N.R.S. 453.377.

Second, if it is Respondents' position that Stenson must "say the magic words" for his appeal to be heard, they are mistaken. The Rules of Appellate Procedure require "a separate concise statement of each error a party contends was made by the trial court." *See* RAP 10.3.[4] Stenson complied with that requirement. (*See* Opening Br. at 3-4.) Moreover, this Court in *State v. Olson*, which Respondents cite, held that "where the nature of the appeal is clear and the relevant issues are argued in the body of the brief ... there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." 126 Wn. 2d 315, 323, 893 P.2d 629 (1995). Even if Respondents were not so blatantly wrong, *Olson* would govern the current circumstances.

Incredibly, Respondents conclude that Stenson "specifically argues as erroneous only findings 3, 4, 9, 29, and 30" (Resp. Br. at 31). They therefore respond only to those findings, and fail to offer argument or evidence to rebut Stenson's primary challenges, including, for example, the failure of evidence regarding the lethal injection team or the trial court's complete disregard of DOC's flatly erroneous assessment of proper IV insertion sites.

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[4] *See also* RAP 1.2(a) (stating "[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands").

B. The Trial Court's Finding That the 2008 Protocol Satisfies the Eighth Amendment Was Not Supported by Substantial Evidence

Respondents fail to rebut Stenson's showing that the 2008 protocol, on its face and as implemented, poses a substantial risk of serious harm to Stenson and is not substantially similar to the Kentucky protocol. Respondents fail to address the unavoidable fact that *nothing* is known about the qualifications of the lethal injection team because of the trial court's denial of critical discovery and the team's resignation. This deficiency alone renders the protocol *per se* deficient under *Baze*.

Respondents assert that "the Supreme Court in 2008 expressly rejected the very claims now presented by Stenson." (Resp. Br. at 35.) This misconstrues the Supreme Court's ruling in *Baze*, which mandated a fact-specific examination of the procedures utilized by a state that executes inmates by lethal injection. 128 S. Ct. at 1532. Likewise, decisions by other appellate courts regarding other states' lethal injection protocols say nothing whatsoever about the constitutional validity of Washington's protocol. Ultimately, *Baze* requires a searching factual inquiry into each state's lethal injection procedures.

1. Respondents fail to rebut Stenson's showing that the 2008 protocol is facially deficient

In his opening brief, Stenson described numerous ways in which the trial court turned a blind eye to significant deficiencies in the 2008 protocol as compared to the Kentucky protocol. Respondents have not countered with any showing that the trial court's rulings were supported by substantial evidence.

First, Respondents fail to rebut Stenson's showing that the trial court's rulings regarding the competency and qualifications of the lethal injection team were against the weight of the evidence. The Supreme Court's decision in *Baze* was grounded in large part on Kentucky's stringent competency requirements, and the Court's finding that the team, in fact, was highly qualified. 128 S. Ct. at 1533, 1569.

The minimum requirements for occupations that would qualify an individual for the lethal injection team in Washington are not comparable to those in Kentucky. (*See* Opening Br. at 12, 32.) Neither Respondents nor the trial court addressed this deficiency.

Moreover, unlike Kentucky, Washington's protocol does not require that the team's qualifications be current or that they regularly site IVs. DOC's only response to this deficiency is to point to the trial court's finding that the Superintendent testified that he would "seek to use individuals with current IV experience." (Resp. Br. at 14-16, 33; FOF3.) But the constitutional validity of the 2008 protocol cannot hinge on one man's stated intentions or hopes, credible or not. The Superintendent could leave his position for any number of reasons, or he could simply fail to realize his goal of finding competent individuals. The Constitution requires standards that outlast the tenures of those responsible for their implementation, and which are based on reality, not wishful thinking.

Second, Respondents fail to rebut Stenson's showing that the 2008 protocol's practice session provisions are deficient. The Supreme Court concluded that Kentucky's practice session requirements were sufficient

based on the fact that the team members "participated in at least 10 practice sessions per year." *Baze*, 128 S. Ct. at 1534. It is undisputed that Washington's protocol requires only three practice sessions, and only when an execution is scheduled to take place. The Washington protocol requires far fewer practices than Kentucky.[5]

The response of the trial court and Respondents to this significant deficiency is to point to the Superintendent's unenforceable intention "to have the lethal injection team engage in more than the minimum number of practice sessions." (FOF4; Resp. Br. at 16.) But again, mere intention cannot remedy the protocol's deficiencies. If the practice requirements are to comply with the Supreme Court's holding in *Baze*, they must actually be a part of the protocol.

Third, the trial court ignored critical differences between the Kentucky and Washington requirements for physical examination prior to an execution. Unlike Kentucky, Washington's protocol does not require a physical examination. Even Superintendent Sinclair testified that he needs to know the condition of the inmate's veins before carrying out an execution. RP77. The 2008 protocol does not ensure that he will have that information. Even if, as the trial court concluded, the medical

[5] Respondents concede that "Kentucky required the entire team to hold ten practices" but say that the written policy required just two sessions. (Resp. Br. at 16.) Regardless of the basis for the requirement, the Supreme Court's holding that the Kentucky protocol was constitutionally sufficient depended on the Court's assumption that the team participates "in at least 10 practice sessions per year" which "encompass a complete walk-through of the execution procedures." *Baze*, 128 S. Ct. at 1533.

condition of the inmates is "well known" to the prison's medical staff (FOF9), the same is not true for the lethal injection team.

Fourth, the trial court ignored compelling evidence that the protocol's provisions for assessment of consciousness after administration of sodium thiopental are inadequate. Under the 2008 protocol, only the Superintendent is charged with assessing the inmate's consciousness. Kentucky, on the other hand, requires that two people monitor consciousness. *Baze*, 128 S. Ct. at 1528. The only expert to opine on the Superintendent's qualifications in this respect testified that he is not "in any way" qualified to assess consciousness. RP370.

Fifth, the court ignored compelling evidence that the protocol does not ensure adequate monitoring of IV lines once they have been placed. Unlike in Kentucky, the Superintendent is the sole individual charged with monitoring the continued integrity of the IV lines, and he has no training that would enable him to perform this function adequately. Respondents' own expert testified to problems that have occurred in other executions from subcutaneous delivery of sodium thiopental caused by inadequate IV monitoring. (Opening Br. at 18.)

Sixth, the trial court ignored that Washington's protocol, unlike Kentucky's, provides no guidance on where IV lines may be sited. Further, in failing to prohibit procedures such as "cut-downs" or placement of an IV in the neck, the protocol unnecessarily exposes the inmate to the risk of severe pain.

Collectively, these significant deficiencies establish that the

Washington protocol, even on its face, does not meet the standards set out by the Supreme Court in *Baze*. Respondents point to no substantial evidence to support a contrary conclusion.

2. Respondents fail to rebut Stenson's showing that the 2008 protocol is deficient as implemented

Even a protocol not plagued by the facial deficiencies of the DOC's 2008 protocol violates the Constitution if improperly implemented. *See Baze*, 128 S. Ct. at 1532. DOC has failed in numerous respects to implement the 2008 protocol in a manner that ensures constitutional compliance. The trial court erroneously discounted these problems, and Respondents ignore them altogether.

First, and most egregiously, the DOC failed to comply with the 2008 protocol's (inadequate) requirements for the qualifications and competence of the lethal injection team. As of today, in fact, the DOC has *no lethal injection team at all*, and no information is available on the competence of the team prior to its resignation. Moreover, Superintendent Sinclair's admission at trial that he will have difficulty constituting a qualified team in the future due to concerns about confidentiality underscores the fact that his stated intent to use qualified individuals cannot of itself satisfy *Baze*'s requirements. *See* RP672-73. The trial court's findings as to the competence of the lethal injection team were not based on substantial evidence—or indeed on any evidence—and Respondents do not even address this critical failure in their brief.

Second, the trial court completely ignored evidence that the DOC

has failed to comply with its own requirements for practice sessions. (*See* Opening Br. at 34-35.) The DOC's *ad hoc* and incomplete practice sessions do not comport with the written protocol, and in no way approach the "complete walk-through of the execution procedures, including the siting of IV catheters into volunteers" that satisfied the Supreme Court. *Baze*, 128 S. Ct. at 1534.

Respondents seriously mislead the court with their assertion that "the Superintendent testified that the Department will conduct numerous practices, *including full rehearsals*, for any future execution," citing RP702:12-703:11 (emphasis added), and that the court found this testimony "to be credible," citing FOF25. (Resp. Br. at 18.) *They simply made this up*. The cited testimony says *nothing* about plans for future complete rehearsals. Rather, it was merely Sinclair defending his practice of holding rehearsals off-site in the kitchen of a private home.[6] FOF25

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[6] Q. We heard testimony that previous rehearsals occurred
I believe it was at the team member's home; is that correct:
A. Yes, ma'am.
Q. In the future, do you anticipate doing lethal injection team rehearsals off site of the penitentiary?
A. We may do some rehearsals off site.
Q. What is the purpose of doing rehearsals off site?
A. Because the confidentiality of that team. Where this is physically located in the facility, in order to get there, you have to go through about four to six gates, and they are all staffed at every control point. So there is a lot of staff that have the ability to observe folks to include towers that can see in.
So the concern is around the team's confidentiality, so it would be my hope to limit their exposure to that. I mean a new team will have to be in the chamber. They need to know the environment, be familiar with that.
And we will probably do that a couple three times, because there is some choreography as far as bringing them into the area, and they will need to experience that at least a couple times.
RP702:12-703:11.

was simply a general finding that Sinclair "testified about the expected implementation of the Washington protocol for a future execution" and the court "finds the superintendent's testimony to be credible." In any event, even had Sinclair testified as Respondents claim, Sinclair's "intent" is irrelevant to the protocol's requirements. The uncontroverted evidence before the Court is that DOC's practice sessions have been completely inadequate in the past, and it is undisputed that no lethal injection team has been in place since March 2009.

Respondents also try to sidestep the Superintendent's testimony that he does not plan to follow the 2008 protocol's requirement that practice sessions include actual IV insertion, which is required by the 2008 protocol and is one of the most critical components of rehearsals. They claim Stenson "misstates" the testimony (Resp. Br. at 18) but do not show how. In fact, at trial, Sinclair confirmed his prior deposition testimony:

> Q. Okay. Now, you testified in your deposition that *you went through this IV insertion process to gain personal familiarity* and be able to talk about the process, correct?
>
> A. Correct, receive some medical training, so to speak.
>
> Q. And that was *the only purpose*, correct?
>
> A. *Yes.*
>
> Q. In fact, you told me at your deposition that you normally would not stick needles into people for practices, correct?
>
> * * *
>
> Q. (By Ms. Peterson) At line 24, you stated "but *we don't routinely have people come and have the needles inserted for practice sessions*" and over on 55, "because, again, that's part of Position No. 3's regular and routine duties." Did you give that testimony?
>
> A. *Yes, ma'am,* if it's in my deposition.

RP632-33 (emphasis added). Sinclair did *not* testify at trial that he would, in fact, require IV insertion at future practice sessions nor did he in any way contradict this testimony that he had not, and did not plan to, make IV insertion part of regular team practices. DOC's citation to RP 702:2-703:13 (discussing holding practices off-site) is not to the contrary, as discussed *supra*.

Third, the trial court erroneously ignored the uncontradicted evidence that DOC lacks both guidance and the ability to select appropriate sites for IV insertion in general, and in particular to prepare for insertion consistent with an individual's medical condition. The DOC protocol does not require a physical exam, as does Kentucky, and DOC eliminated the medical file review required by its prior policy.

Uncontradicted evidence established that a chart given to executioners purporting to show optimal sites for IV insertion into Stenson (1) was not based on any physical exam, contrary to Sinclair's assumption, and (2) contained erroneous information. (*See* Opening Br. at 21-22.) Another more generic chart relied on by Sinclair likewise contained numerous sites that were completely inappropriate for IV insertion. (*Id.* at 22-23.) The court inexplicably ignored this evidence and Respondents do not address these failures in their brief.

Finally, the trial court ignored uncontested testimony that Stenson's medical condition will frustrate IV placement, and its findings to the contrary are against the weight of the evidence. Respondents state that prison medical staff have successfully drawn Stenson's blood in the

past, but they provide no evidence—nor could they—that the *lethal injection team* will be able to place the requisite two IVs despite Stenson's medical condition. Nor do Respondents address the fact that both sides' experts agree that insertion of an IV is far more complicated than drawing blood. (*See* Opening Br. at 24-25.) Moreover, the successful placement of an IV into Stenson during a surgical procedure demonstrates only that trained, qualified professionals—not members of a nonexistent lethal injection team—have been able to place a single IV in Stenson's arm after he was premedicated. RP383-84.

3. Respondents ignore overwhelming evidence of a readily available alternative procedure

DOC failed to show any "legitimate penological justification" for using the three-drug protocol instead of a one-drug alternative that would significantly reduce the substantial risk of serious pain. *See Baze*, 128 S. Ct. at 1532. The trial court simply found that "Plaintiffs have failed to prove that an alternative one-drug protocol has actually been used to execute an inmate."[7] (FOF29.) But the court did not address undisputed evidence, including testimony from both of DOC's experts, establishing that a single dose of sodium thiopental would cause death without any risk of pain. (*See* Opening Br. at 37.) The court's finding therefore does not

[7] Prior to 1986, the one-drug protocol was mandated in Washington. *See* RCW 10.95.180 (1981). Respondents assert that amendment of the statute by the legislature in 1986 "allowed the 'use of modern up-to-date lethal solutions rather than limit the choice to sodium thiopental.'" (Resp. Br. at 5.) But this language came from DOC's own agency comment on the pending legislation, not from either chamber of the legislature. CP1205.

support its conclusion that Washington's lethal injection protocol does not inflict unnecessary pain on inmates. (*See* Concl. 6.)

As of early February 2010, Ohio had executed three inmates using a one-drug protocol. (*See* article attached hereto as Ex. A.) Ohio switched to the one-drug protocol in November 2009 after it was plagued by what the Sixth Circuit labeled "serious and troubling difficulties in executing at least three inmates" using its prior three-drug protocol. *Reynolds v. Strickland*, 583 F.3d 956, 957 (6th Cir. 2009). And, a bill is pending in the California legislature to adopt a one-drug protocol. (CA Senate Bill 1018, attached hereto as Ex. B.) "According to medical experts this procedure removes any risk of the inmate experiencing pain or suffering" and it "will eliminate cruel or unusual punishment concerns," according to the bill's sponsor. (Interview excerpt, attached hereto as Ex. C.)

Respondents ignore both the undisputed evidence at trial supporting this procedure and the fact that it is currently being used. Instead they merely state that "the experts at trial testified that ... no state had executed an inmate using an alternative one-drug protocol," and that "the validity of a one-drug protocol is hypothetical and based solely upon anecdotal evidence." (Resp. Br. at 7.)

IV. THE 2008 PROTOCOL VIOLATES THE WASHINGTON CONSTITUTION

A. Respondents Ignore Established Authority Holding That Article 1, Section 14 Offers Broader Protection Than the Eighth Amendment

This Court and other Washington appellate courts have repeatedly

held that the Washington constitution's cruel punishment clause affords greater protection than the Eighth Amendment's "cruel and unusual" punishment clause. *State v. Roberts*, 142 Wn. 2d 471, 505-506, 14 P.3d 713 (2000) (noting the Supreme Court's "repeated recognition" that Art. 1, Sec. 14 provides greater protection than the Eighth Amendment); *State v. Manussier*, 129 Wn. 2d 652, 674, 921 P.2d 473 (1996); *State v. Bartholomew*, 101 Wn. 2d 631, 639-40, 683 P.2d 1079 (1984); *State v. Fain*, 94 Wn. 2d 387, 392-93, 617 P.2d 720 (1980); *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000); *State v. Ames*, 89 Wn. App. 702, 710, 950 P.2d 514 (1998). These rulings explicitly extend the greater protections of Article 1, Section 14 to the imposition of the death penalty. *Roberts*, 142 Wn. 2d at 505; *Bartholomew*, 101 Wn. 2d at 640. In *Bartholomew*, this Court ruled that "since the death penalty is the ultimate punishment," the state constitution requires "strict procedural safeguards" to ensure that the punishment is not cruel—a more rigorous standard than that under the Eighth Amendment. 101 Wn. 2d at 640.

The trial court ignored this established authority, concluding, without explanation, that "for the purposes of this case" the Washington Constitution's cruel punishment clause "does not suggest a different standard" than the Eighth Amendment standard. (*See* Concl. 19.) Respondents cite *State v. Dodd*, 120 Wn. 2d 1, 838 P.2d 86 (1992), for the proposition that Article 1, Section 14 need not be read more broadly. (Resp. Br. at 39.) That case, however, was decided before this Court's more recent (and unambiguous) rulings in *Roberts* and *Manussier*. These

later cases make clear that *Dodd*—in which the Court analyzed the six factors included in *State v. Gunwall*, 106 Wn. 2d 54, 720 P.2d 808 (1986)—was limited to the narrow circumstances of that case. In fact, *Roberts* held that "[a]s we apply *established principles of state constitutional jurisprudence* here, a *Gunwall* analysis is not required." 142 Wn. 2d at 506 (citing *State v. White*, 135 Wn. 2d 761, 769, 958 P.2d 982 (1998)) (emphasis added).

Moreover, the Court in *Dodd* acknowledged the limited nature of its ruling. That case addressed whether Dodd could waive appellate review of his death sentence. The Court acknowledged that the nature of the state constitution as a limitation on the "otherwise plenary power of the State ... supports construing constitutional amendments more broadly, to protect a defendant's personal rights." *Dodd*, 106 Wn. 2d at 22. The Court, however, noted that "this rationale ... is not persuasive in a situation such as Dodd's, where the defendant emphatically does not wish to exercise his personal rights." *Id.* This differs markedly from the instant case, in which Stenson plainly seeks to vindicate his right not to be subjected to cruel punishment.[8]

[8] Even if *Gunwall* were relevant here, which it is not, Respondents inappropriately conflate the constitutionality of capital punishment in principle with the constitutionality of execution *procedures*, which this Court has addressed only once, in *State v. Frampton*, 95 Wn. 2d 469, 627 P.2d 922 (1981). In that case, the Court deferred to the judgment of the legislature regarding the method of execution. Here, however, the legislature did not create or approve the 2008 protocol.

B. Respondents Offer No Compelling Alternative to the "Unnecessary Pain" Standard

Respondents' only argument regarding the scope of the right guaranteed under Article 1, Section 14 is that at the time of the adoption of the state constitution, "hanging was a universally acceptable method of execution." (Resp. Br. at 43.) According to Respondents, essentially any method of execution that is "even more humane than hanging" *per se* meets the requirements of the Washington Constitution. (Resp. Br. at 44). That argument disregards the recognition in *Frampton* that the overwhelming movement in the English-speaking world away from hanging "indicate[s] execution by hanging can hardly be compatible with 'the evolving standards of decency that mark the progress of a maturing society.'" 95 Wn. 2d at 492 (citing *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)). Contemporary values inform the interpretation of what is "cruel." *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (ruling that execution of mentally retarded persons violated Eighth Amendment, though court had rejected that argument 12 years earlier); *State v. Gitchel*, 5 Wn. App. 93, 486 P.2d 328 (1971) (applying evolving standards concept under Article 1, Section 14 and striking down life-time banishment from the state).

Further, *Frampton* recognized that the constitutionality of a method of execution is partly contingent on whether it is "properly performed." 95 Wn. 2d at 496 ("Grim as these accounts may be, the results can be described only as horrifying when the hanging is not

properly performed."). Three justices invoked the "unnecessary pain" standard, but the Court declined to hold hanging unconstitutional out of deference to the legislature.

Given this Court's "repeated recognition" that Article 1, Section 14 provides greater protection than the Eighth Amendment, (*see Roberts*, 142 Wn. 2d at 505-506), the "unnecessary pain" standard protects the personal rights of the inmate without placing undue burden on the state.

C. Because the 2008 Protocol Violates the Eighth Amendment, it is *a fortiori* Incompatible With Article 1, Section 14

The trial court did not articulate what standard it was applying to the state constitutional claim. Nonetheless, under any reading of Article 1, Section 14 that properly entails greater protection than the Eighth Amendment, the 2008 protocol does not pass constitutional muster.

Respondents argue that the trial court found that the protocol would result in a rapid and painless death, and that what they term the "unnecessary risk" standard therefore has been met. (Resp. Br. at 44.) But that finding was not supported by substantial evidence, and it ignores the availability of an alternative procedure that virtually eliminates the risk of unnecessary pain altogether. The Washington Constitution requires that DOC take these simple steps to avoid the severe pain that may arise from the foreseeable risks of maladministration of sodium thiopental.

V. STENSON PROPERLY ARGUED HIS ASSIGNMENT OF ERROR FOR PRETRIAL RULINGS

Assignment of Error No. 2 challenges the various ways the trial court prevented disclosure of information about the competency and

qualifications of the lethal injection team, and the court's conclusion that the team would nonetheless be competent. (Opening Br. at 4.) According to Respondents, "Stenson fails to present any specific argument, citation to the record, and citation to legal authority to support this assignment of error." (Resp. Br. at 44.)

This is self-evidently false. Stenson argued this assignment of error extensively throughout his opening brief (*see* Opening Br. at 9-12, 23, 30-34, 47), and argued that these acts and omissions by the trial court were errors of constitutional magnitude:

> Because of the lower court's erroneous decision to deny Stenson access to critical discovery—and to make any findings of fact about the actual qualifications of DOC's execution team or DOC's ability to field a competent team—the court's evaluation of the constitutional sufficiency of the DOC's execution policy and methods is *per se* deficient under *Baze*.

(Opening Br. at 33-34.)

VI. STENSON HAS A RIGHT TO SEEK EQUITABLE RELIEF FOR DOC'S VIOLATIONS OF THE CONTROLLED SUBSTANCES ACTS

Respondents' arguments regarding Stenson's challenge to DOC's violations of state and federal drug laws ignore the following undeniable facts: (1) state and federal laws require that the substances to be used for Stenson's execution be acquired and dispensed only with a prescription; (2) DOC obtained the substances, and admittedly intended to dispense

them, without a prescription;[9] and (3) the legislature has not granted DOC any exemption from the drug laws that would enable it to acquire and dispense the drugs legally.

The trial court did not address these facts, and it ignored the request for declaratory relief altogether. CP2886-87. Respondents argue that under *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002), Stenson may not seek declaratory relief because he has no "rights, status or other legal relations" under the controlled substances acts. (Resp. Br. at 47.) But that case is inapposite—it addressed the standard for stating claims under 42 U.S.C. § 1983, not the standard under any statute for declaratory relief. Indeed, under the straightforward terms of Washington's Declaratory Judgments Act, Stenson has a right to seek declaratory relief. *See* RCW 7.24.020; *Branson v. Port of Seattle*, 152 Wn. 2d 862, 877, 101 P.3d 67 (2004).[10]

Both the federal and Washington State controlled substances acts provide state courts with jurisdiction over suits for injunctive relief. *See* 21 U.S.C. § 882(a); RCW 69.50.503.[11] In a recent amendment to the federal act adding a subsection that does not apply here, Congress stated

---

[9] The Drug Enforcement Administration explicitly warned DOC that it is not permitted to use sodium thiopental without a prescription. CP1916.

[10] Respondents' contention that Stenson does not have standing to seek declaratory relief because he is not within the "zone of interests" of the controlled substances acts is bizarre. *See, e.g.*, *Branson*, 152 Wn. 2d at 876. Stenson, after all, is the individual to whom the illegally obtained drugs are to be administered. Whatever the scope of the "zone of interests" encompassed by the acts, Stenson falls squarely within it.

[11] Respondents are incorrect that Stenson did not offer argument regarding the state controlled substances act. *See* Opening Br. at 48 & n.28.

specifically, "no private right of action is created under this *subsection*." 21 U.S.C. § 882(c)(5) (emphasis added). By using this language, Congress evinced its intent to *retain* a private right of action under the remainder of the *subchapter*, in accordance with 21 U.S.C. § 882(a).

Finally, Respondents argue that RCW 10.95.180 authorizes DOC to obtain the lethal drugs for an execution. (Resp. Br. at 48.) But that statute does not authorize Respondents to obtain the drugs without a prescription, and there can be little question that the Washington legislature lacks power to imply authority to contravene federal law.[12] Respondents must comply with the federal and state controlled substances acts in acquiring and using drugs for executions.

VII. THE TRIAL COURT ERRED IN AWARDING COSTS

Respondents' argument that transcript costs may be awarded for "depositions of individuals who testified at trial" (Resp. Br. at 49) is wrong. The rule allows costs only if the party *used* the depositions at trial, and even then only on a pro rata basis. RCW 4.84.010(7).

VIII. STENSON'S CHALLENGE IS TIMELY

Respondents' assignment of error to the trial court's statute of limitations ruling fails for several reasons. First, statutes of limitations do not even apply to purely equitable claims. *See, e.g.*, *Holmberg v.*

[12] Respondents also contend that the controlled substances acts "exempt state officers acting in accordance with the law." (Resp. Br. at 48.) But the acts only exempt state officers from civil liability and do not grant any immunity from suits to enjoin their actions. *See* RCW 69.50.506(c); 21 U.S.C. 885(d). And here again, the officers in question are not acting in accordance with the law.

Armbrecht, 327 U.S. 392, 396, 66 S. Ct. 582, 90 L. Ed. 743 (1946). Instead, the equitable doctrine of laches governs. Laches does not bar an action unless the plaintiff (1) had a reasonable opportunity to discover the basis for the claim, (2) unreasonably delayed in commencing the action and (3) the defendant has been damaged by the delay. *In re Marriage of Leslie*, 112 Wn. 2d 612, 619, 772 P.2d 1013 (1989). Respondents meet none of these requirements. They are not prejudiced by court review of their methods, which is required by *Baze*, or by waiting to execute inmates until they have a constitutional policy.

Second, numerous courts have recognized that constitutional challenges to systemic policies such as this (1) are not subject to any statute of limitations and/or (2) constitute challenges to continuing violations for which the statute of limitations has not yet began to run. *See, e.g.*, *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984); *Devey v. City of Los Angeles*, 129 Fed. Appx. 362, No. 03-55605, at *1 (9th Cir. Apr. 15, 2005); *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2001).

Finally, even if Washington's three-year statute of limitations did apply, Stenson's claim was filed within the statutory period, which did not begin to run until discovery of the basis of the claim. *Holmberg*, 327 U.S. at 397. DOC revised its policy in June 2007, *Baze* was decided in April 2008 and DOC revised its policy again in October 2008.

IX. CONCLUSION

Petitioner Stenson respectfully requests that the Court grant his requested relief.

RESPECTFULLY SUBMITTED this 24th day of February, 2010.

PERKINS COIE LLP

By:

Sherilyn Peterson, WSBA No. 11713
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Hugh Handeyside, WSBA No. 39792
Attorneys for Petitioner Darold J. Stenson

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CERTIFICATION OF SERVICE

This certifies that on February 24, 2010, I caused a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** to be served by mail on the following counsel of record at the stated addresses:

Sara J. Olson
John J. Samson
Assistant Attorneys General
Attorney General of Washington
Corrections Division
PO Box 40116
Olympia, WA 98504-0116

And, by agreement of counsel, by electronic delivery on the following counsel of record:

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Suzanne Elliott
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Attorney for Cal Brown

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on February 24, 2010.

Sherilyn Peterson

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ORIGINAL

Exhibit A

Ohio could set state record for lethal injections

By ANDREW WELSH-HUGGINS (AP) – Feb 5, 2010

LUCASVILLE, Ohio — After a relative lull in the number of executions Ohio carries out annually, it appears poised to sharply increase lethal injections in the months to come, possibly setting a state record for most in a year.

The state executed condemned killer Mark Brown on Thursday, the third execution in as many months and one of nine scheduled for this year.

In addition, prosecutors have already asked the Ohio Supreme Court, which schedules executions, to set dates for five additional death row inmates.

Ohio put seven people to death in 2004, a record for the state and second in the nation behind Texas, and executed four last year. It executed two people in each of the two previous years.

Brown, 37, had been sentenced to die for killing a Youngstown store owner in a 1994 shooting that mimicked a scene from the Samuel L. Jackson movie "Menace II Society." He was pronounced dead Thursday morning from a dose of a powerful anesthetic under the state's new injection procedure, with death coming about nine minutes after the drug began flowing.

The state recently switched from a three-drug lethal-injection process, which opponents said could cause severe pain, to the one-drug system.

Though Brown had challenged the qualifications of Ohio's executioners and alleged the procedure could cause severe pain as execution team members tried to find a vein, his death was quick and almost problem-free.

Three months ago, the country had never put someone to death with just one drug. Brown's execution was Ohio's third use of the procedure, and in each case death came in just a few minutes. However, it did take executioners about 30 minutes to insert needles in the arm of condemned inmate Kenneth Biros in December before beginning his execution for killing a woman he met at a bar..

Ohio is the only one of 35 death penalty states to use one drug, though other states are watching Ohio's experience.

Brown did not give a last statement. After the dose of thiopental sodium was administered at 10:40 a.m., he blinked several times, closed and opened his eyes and swallowed once before shutting his eyes a last time. At 10:42 a.m., his chest heaved, he appeared to yawn, his chest rose and dropped slightly several more times, then he fell still.

Federal lawsuits allege Ohio's execution team isn't properly trained, but the procedure went as smoothly Thursday as any execution in recent memory. Members of the team easily inserted needles in Brown's arms in about five minutes, sticking him just once on each arm.

Relatives of the store owner Brown killed, Isam Salman, witnessed the execution.

"As sad as this may be, and it's very sad, justice has been served," sister Terri Rasul said afterward. "I just hope that this is a lesson for the young children today that they will learn not to do what Mark Brown had did to my brother."

Brown also killed a store clerk, and he received a life prison term for that. He said he shot the clerk but didn't remember shooting the store owner.

Last month, he argued unsuccessfully for a new trial, saying witnesses could testify that his friend shot the store owner. A judge said the witnesses weren't credible.

The Ohio Parole Board rejected Brown's request for mercy last month.

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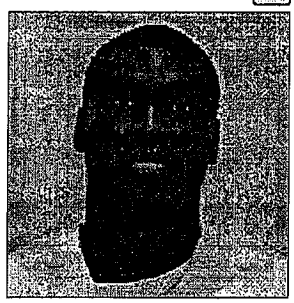

FILE - In this undated file photo released by the Ohio Department of Rehabilitation and Correction shows Mark Aaron Brown. Brown was executed Thursday Feb. 4, 2010 in the 1994 slayings of a convenience owner and a clerk. (AP Photo/Ohio Department of Rehabilitation and Correction)

Map

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Exhibit B

SENATE BILL **No. 1018**

Introduced by Senator Harman

February 10, 2010

An act to amend Section 3604 of the Penal Code, relating to the death penalty.

LEGISLATIVE COUNSEL'S DIGEST

SB 1018, as introduced, Harman. Death penalty: sodium thiopental.

Existing law provides that a person sentenced to death shall have the opportunity to elect to have the punishment imposed by lethal gas or by a lethal injection of a nonspecified substance by standards established under the direction of the Department of Corrections. If no election is made, the penalty of death shall be imposed by lethal injection.

This bill would specify that the substance to be used for the lethal injection shall be sodium thiopental.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

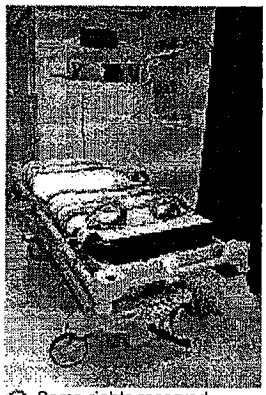
1 SECTION 1. Section 3604 of the Penal Code is amended to
2 read:
3 3604. (a) The punishment of death shall be inflicted by the
4 administration of a lethal gas or by an intravenous injection of ~~a~~
5 ~~substance or substances~~ *sodium thiopental* in a lethal quantity
6 sufficient to cause death, by standards established under the
7 direction of the Department of Corrections *and Rehabilitation.*
8 (b) Persons sentenced to death prior to or after the operative
9 date of this subdivision shall have the opportunity to elect to have
10 the punishment imposed by lethal gas or lethal injection. This

1 choice shall be made in writing and shall be submitted to the
2 warden pursuant to regulations established by the Department of
3 Corrections *and Rehabilitation*. If a person under sentence of death
4 does not choose either lethal gas or lethal injection within 10 days
5 after the warden's service upon the inmate of an execution warrant
6 issued following the operative date of this subdivision, the penalty
7 of death shall be imposed by lethal injection.
8 (c) Where the person sentenced to death is not executed on the
9 date set for execution and a new execution date is subsequently
10 set, the inmate again shall have the opportunity to elect to have
11 punishment imposed by lethal gas or lethal injection, according to
12 the procedures set forth in subdivision (b).
13 (d) Notwithstanding subdivision (b), if either manner of
14 execution described in subdivision (a) is held invalid, the
15 punishment of death shall be imposed by the alternative means
16 specified in subdivision (a).

O

Exhibit C

STATE SENATOR INTRODUCES DEATH PENALTY REFORM BILLS



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Orange County Republican State Senator Tom Harman says his legislation is intended to speed up death penalty appeals and change how lethal injections are administered.

By: Steve Shadley

Thu Feb 11, 2010

Related Resources

Photos

Aired 2/11/2010 on All Things Considered
Aired 2/18/2010 on Morning Edition

(Sacramento, CA)
A State Senator has introduced a bill that would change how lethal injections are given to death row inmates.

Capital Public Radio's Steve Shadley reports...

****

Orange County Republican Senator Tom Harman says his bill offers a "smart and simple solution" to constitutional concerns surrounding lethal injections.

His measure would remove two of the three chemicals used. Harman says it requires future executions to be carried out with a single lethal dose of anesthesia...

Harman: "According to medical experts this procedure removes any risk of the inmate experiencing pain or suffering. The change will eliminate cruel or unusual punishment concerns..."

Executions have been on hold in California since 2006.

That's when a death row inmate challenged the constitutionality of the so-called three-drug cocktail.

Harman has also introduced two other bills intended to speed up the appeals process.

One would require the state to hire more attorneys for capital punishment appeals.

The other would allow the State Supreme Court to directly transfer death appeals to the Superior Court.

Currently, there are about 700 inmates on California's Death Row.

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Good Afternoon,

Please file the attached Petitioner's Reply Brief.

Case Name: Darold Stenson v. Eldon Vail
Case Number: 83828-3
Attorney: Sherilyn Peterson
Phone: (206) 359-8320
Bar No. 11713
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<<20100224 - P-Plaintiff - Petitioner's Reply Brief.PDF>>
Thanks,

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