NO. 83474-1

IN THE WASHINGTON STATE SUPREME COURT

CAL COBURN BROWN AND JONATHAN GENTRY

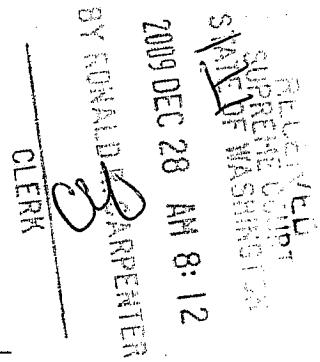
Appellants,

v.

ELDON VAIL, et. al. ,

Respondents.

THIS IS A CAPITAL CASE



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE WASHINGTON FOR THURSTON COUNTY

The Honorable Christopher Wickham, Judge

BRIEF OF APPELLANTS

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A. ASSIGNMENT OF ERROR

Brown and Gentry adopt and incorporate by reference the assignments of error in Darold Stenson's Opening Brief filed in *Stenson v. Vail* #83828-3 and attached to this document.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Brown and Gentry adopt and incorporate by reference the issues pertaining to the assignments of error in Darold Stenson's Opening Brief.

B. STATEMENT OF THE CASE

Brown and Gentry adopt and incorporate by reference the statement of the case in Darold Stenson's Opening Brief.

C. ARGUMENT

Brown and Gentry adopt and incorporate by reference the arguments in Darold Stenson's Opening Brief, attached to this document, except for those relating exclusively to Stenson's medical conditions.

D. CONCLUSION

For the foregoing reasons, Brown and Gentry ask this court to hold, as a matter of law, that the 2008 protocol violates article 1, section 14 of the Washington constitution and the Eighth Amendment of the United States Constitution. In the alternative, Brown and Gentry ask that this court remand to the lower court for further proceedings including discovery pertaining to prior execution team members and prior executions, and a new trial with all relevant evidence once a lethal injection team is assembled and capable of being reviewed, and applying

the proper federal and state standards of review. Plaintiffs also request that the award of costs be vacated.

DATED this 24th day of December 2009.

Respectfully submitted,

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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.

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I. INTRODUCTION

This civil rights case challenges the constitutionality of Washington's execution methods under the Eighth Amendment and the broader prohibition on "cruel punishment" in article 1, section 14 of the Washington Constitution, as well as the Department of Corrections's ("DOC") authority to promulgate execution policy.

Punishment is a legislative function. While the legislature may delegate, with guidance, some of its responsibilities regarding punishment, the statute authorizing lethal injection does not expressly delegate to DOC the duty to promulgate execution policy, much less give DOC any guidance for how to establish execution policy. As a result of this insufficient delegation, DOC's policy was adopted without public notice or hearing and is changed at will by DOC. The legislature's failure to adequately delegate authority to DOC—including standards governing DOC's conduct—has led to a host of arbitrary actions that exacerbate the underlying constitutional violations, including DOC's admitted violation of federal and state drug laws.

DOC has responded to this lawsuit by changing—numerous times—how it says it will carry out lethal injection executions. It formally rewrote its policy in October 2008 and has attempted to supplement the written policy with verbal promises by the current Superintendent of the Washington State Penitentiary ("Superintendent") regarding how he plans to carry out the written policy. Evidence showed that the written policy and its actual implementation fell far short of satisfying either the federal

or state constitutions.

The Eighth Amendment demands, *inter alia*, proof that the written protocol is sufficient and that the people tasked with implementing it are qualified and competent to administer lethal injection humanely. *Baze v. Rees*, 128 S. Ct. 1520, 1533, 170 L. Ed. 2d 420 (2008). DOC's policy meets neither test. DOC resisted providing evidence that its executioners were properly trained and capable. When the trial court granted a motion to require this evidence, the execution team resigned *en masse* and was not replaced. The complete lack of proof on a critical safeguard required to assure constitutionality renders the policy inadequate as a matter of law. Further, even apart from this flaw, DOC failed to follow its insufficient written policy—instead it conducted incomplete and inadequate training sessions and relied on incorrect medical information to prepare for executions. There is simply no assurance that the policy as written and implemented avoids a substantial risk of serious harm.

Although the standard for assessing a lethal injection method under Washington's prohibition on "cruel" punishment has never been decided, this Court has repeatedly held that article 1, section 14 is more protective than the Eighth Amendment. Ignoring these clear authorities, the trial court concluded that the federal and state constitutional standards were the same. But the Washington Constitution demands more. Article 1, section 14 requires that the state avoid unnecessary pain and forbids any method that unnecessarily risks pain. The use of such a method when a clear alternative is presented that would avoid all pain is "cruel."

Other courts applying more rigorous state laws to assess lethal injection methods have struck them down. The Kentucky Supreme Court recently held unlawful the policy reviewed in *Baze* because Kentucky officials failed to follow Kentucky law when adopting it. *Bowling v. Ky. Dep't of Corrs.*, No. 2007-SC-000021-MR, 2009 WL 4117353, *8-*10 (Ky. Nov. 25, 2009). An Ohio court found that Ohio's three-drug protocol violated Ohio law. *Ohio v. Rivera*, No. 04-65940 (Ct. of Common Pleas, June 10, 2008). Ohio abandoned that protocol in favor of the same one-drug alternative proposed in this case. Order vacating stay, *Cooey v. Strickland*, No. 09-4300, 2009 WL 4061632, at *1 (6th Cir. Nov. 25), *reh'g and reh'g en banc denied,* (6th Cir. Dec. 4), *cert denied,* (Dec. 7, 2009) ("*Cooey* Order").

The trial court abdicated its responsibility to scrutinize DOC's untested, never-before implemented lethal injection policy. It accepted DOC's eleventh-hour changes, ignored faulty procedures and inadequate safeguards, and never once examined the fitness of the personnel performing the executions. Its judgment should be reversed.

II. ASSIGNMENTS OF ERROR

1. Whether DOC exceeded its jurisdiction in establishing the 2008 Protocol when the legislature failed to identify DOC as the administrative body to establish execution policy and provided DOC no standards for how to establish such a policy.

2. Whether the court erred in its rulings regarding the execution team by: (1) denying requests for discovery regarding current

and prior execution teams and prior executions, (2) refusing to apply an adverse inference regarding DOC's ability to assemble a competent team when DOC refused to reconstitute the team after it resigned, (3) denying a motion to continue the trial until the team was reconstituted and its qualifications reviewed, and (4) approving the execution policy in the absence of evidence of the qualifications and competence of the execution team or DOC's ability to assemble a competent team.

3. Whether the 2008 Protocol violates the Eighth Amendment because it causes a substantial risk of serious harm, is not substantially similar to the methods approved in *Baze*, and there are alternatives that eliminate any risk of pain.

4. Whether the court erred in applying the federal standard to state constitutional claims when this Court has repeatedly held that article 1, section 14 of the Washington Constitution is more protective.

5. Whether the 2008 Protocol violates article 1, section 14 because it does not include safeguards to avoid unnecessary pain and ignores alternatives that eliminate any risk of pain.

6. Whether the court erred in not enjoining or declaring unlawful DOC's admitted violations of federal and state drug laws.

7. Whether the court erred in awarding DOC costs for transcripts it never used as evidence or for impeachment.

III. STATEMENT OF THE CASE

A. Background

1. Washington's Lethal Injection Statute

Under Washington law, death sentences are carried out by "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead." RCW 10.95.180(1). The statute prescribes no standards for how this should be done—no specific drugs, dosages, manner of intravenous access, or minimum qualifications or training for executioners.

DOC implements RCW § 10.95.180[1] through its policy, DOC 490.200, which DOC revises from time to time. Changes to this policy require approval by the Secretary of the Department of Corrections. Ex. 88; Record of Trial Proceedings ("RP"), 64-65.

2. Washington's Execution Protocol

At the outset of this litigation, lethal injection was administered pursuant to a version of DOC 490.200 that became effective June 21, 2007 ("2007 Protocol"). Ex. 2 at 8-9. The 2007 Protocol called for the sequential administration of three drugs: sodium thiopental, pancuronium bromide, and potassium chloride. *Id.* Other than identifying the drugs and sequence, the 2007 Protocol provided no guidance for how to prepare for or carry out a lethal injection execution. *Id.* The policy just "more or less" specified the drugs to be injected. *Id.*; RP769.

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[1] A copy of RCW 10.95.180 is attached in the Appendix at Tab 1.

Shortly after this lawsuit was filed, DOC modified its execution policy ("2008 Protocol"). Ex. 1.[2] The 2008 Protocol uses the same drugs (although different quantities) as the 2007 Protocol. The first drug, sodium thiopental, an anesthetic, induces a deep, coma-like unconsciousness when properly given in the amounts used for lethal injection. RP272. The second drug, pancuronium bromide, a paralytic agent, inhibits muscular-skeletal movements and stops respiration by paralyzing the diaphragm. RP275. The third drug, potassium chloride, a heart attack-inducing agent, interferes with the electrical signals that stimulate heart contractions. RP277-78. Failure to properly administer the first drug will cause constitutionally unacceptable levels of pain associated with the paralysis and cardiac arrest caused by the second and third drugs. RP282; *Baze*, 128 S. Ct. at 1530-31. Thus, a court reviewing the constitutionality of a three-drug execution procedure must evaluate the risk of improper administration of sodium thiopental. *Id.*

Lethal injection executions in Washington are carried out by a team of four executioners ("the injection team") under the supervision of the Superintendent. Ex. 1; RP617-18. The injection team positions the intravenous lines ("IVs") into the inmate, mixes the lethal chemicals, prepares the syringes, and injects the drugs through 14½ feet of IV tubing.

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[2] DOC gave no notice of its changed policy—it was simply attached to a reply brief supporting DOC's Motion to Dismiss, which urged the court to throw out the lawsuit based on its newly minted policy. (Ex. 1, the current policy, is attached at App. Tab 2.)

Ex. 1; RP618. After the inmate is brought into the execution chamber and placed on the execution table under restraints, the team enters the chamber to insert two IVs into the inmate.[3] Ex. 1. It then returns to, and remains in, an adjacent room behind one-way glass. RP228. Only the Superintendent monitors the inmate's consciousness and the integrity of the IVs after they are placed. Ex. 1; RP228. Although insertion of IVs and injection of a large volume of drugs are medical tasks requiring practice and experience, the 2008 Protocol requires only minimal qualifications for team members and no requirement that their qualifications be current or that they have regularly practiced siting IVs. Ex. 1.

B. Procedural Posture

Darold R.J. Stenson brought this action on September 5, 2008, challenging the adequacy of DOC's lethal injection policy under the federal and state constitutions. (Clerk's Papers ("CP") 3315-52.) This case was consolidated with separate actions filed by plaintiffs Cal Brown and Jonathan Gentry, and tried in May 2009. CP3376-79.

1. The Court Denied DOC's Dispositive Motions Finding that This Case Presented Complicated Issues

Prior to this case, Washington's lethal injection methods had never been reviewed by any court. When DOC moved to dismiss shortly after

[3] Exhibit 39 is a photograph of the execution chamber and table. *See* RP220-21 for a description of the physical layout of the chamber.

the case was filed, the court ruled that a civil case was a proper way to review DOC's lethal injection execution procedures and noted the value of submitting the policy to the civil discovery process:

> The question is whether the Washington policy is substantially similar to the Kentucky policy. It is apparent that there have been some changes and there are differences from the Kentucky policy. The question is whether these differences are significant such that the Plaintiff could prove a violation of the Eighth Amendment. The issues are complicated and present a significant challenge for the trial court to evaluate and make factual findings.

CP564.[4]

Before any discovery was conducted, DOC moved for summary judgment. CP223-333. In opposition, Stenson submitted declarations from his expert witness, Dr. Michael Souter, a highly qualified anesthesiologist,[5] who reviewed the 2007 and 2008 Protocols and concluded that neither was substantially similar—even as written—to the Kentucky policy upheld in *Baze*. CP593-602, 695-99. Dr. Souter explained that more information regarding DOC's implementation of the Protocol was necessary to allow a reasoned evaluation of the risks of

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[4] When Stenson filed his complaint, his petition for writ of certiorari was pending with the U.S. Supreme Court, and no execution date had been set. CP437-519. After that Court declined Stenson's petition, his execution was set for December 3, 2008. Stenson moved for a preliminary injunction so this case could be heard. Although there was no dispute that Stenson would suffer irreparable injury if executed before the case resolved, the court refused to enter an injunction. CP558-61. This case proceeded after the Clallam County Superior Court entered a stay of execution in a separate proceeding.

[5] Dr. Souter was qualified as an expert in anesthesiology and the medical considerations involved in lethal injection procedure. RP270; Ex. 3.

maladministration. *Id.* The court agreed and denied DOC's motion, citing the "need for the public, as well as the plaintiff, to have a complete understanding as to the methods to be used in this case and an opportunity to examine them in a court of law" and to permit the parties to develop a "more complete record ... [to] better understand the methods of execution adopted by the State of Washington." 1/26/09 Tr. 4-5.

2. The Court Precluded Discovery Regarding DOC's Current Or Prior Execution Teams

Stenson requested discovery of the qualifications, training, skills, experience, and selection of the current and prior injection teams. CP977, 991-93. Although the court agreed that Stenson had a "right to some assurance that the individuals charged with carrying out Washington's capital punishment policy are properly trained and capable," it initially ordered extremely limited discovery: it planned to review documents *in camera*, refusing to permit Stenson or his counsel access to the information, even pursuant to a protective order. CP913-15.[6]

Even with this unprecedented level of secrecy, DOC and the execution team were not satisfied. After the court denied DOC's motion to reconsider this order, the execution team resigned *en masse*, and DOC told the court that it would not replace the team until after the lawsuit concluded. CP1028-32, 2532-73. *As a result, DOC had no execution*

[6] The court initially stated that the information DOC provided it would remain under seal in the court file. CP910-11. On reconsideration, the court modified that to permit the information to be returned to the DOC's counsels' office for safekeeping. CP1026-27.

team during trial and still has none now. RP40-42.

The court denied Stenson's motion to enforce the discovery order, stating that information as to the qualifications of the just-resigned execution team were no longer relevant. 4/30/09 Tr. at 15-16. Stenson requested, in the alternative, a trial continuance to give DOC time to find a new team and permit review of its qualifications. CP2124-99. The court denied that request (CP2849-51), and Plaintiffs were forced to go to trial without any evidence regarding the execution team. But this also meant that DOC had no evidence to establish that it *was* capable of selecting a properly qualified and capable execution team. DOC could not even show that the team it had in place to conduct the scheduled executions for Stenson on December 3, 2008 and Brown on March 13, 2009 had been qualified. Thus, the court had no evidence on which to base findings for this critical component of the execution process.

3. The Court Dismissed Petitioner's Challenge to DOC's Violation of Federal and State Drug Laws

Each drug identified in DOC's 2008 Protocol is regulated by state and federal law, and one drug, sodium thiopental, is a Schedule III federally-controlled substance. 21 U.S.C. § 829; RCW 69.50.208. All require prescriptions. The U.S. Drug Enforcement Agency, in fact, warned DOC not to use sodium thiopental without a prescription. CP1916. Yet, the Superintendent admitted that the drugs obtained for Stenson's scheduled execution had been acquired without a prescription and that DOC would not use a prescription to acquire or dispense them in

the future. CP2026, 2030.

The court granted summary judgment on Count III of the Second Amended Complaint, dismissing Stenson's claim challenging these illegal actions on the ground that he had no right of action. CP2886-87.

C. Evidence Presented at Trial Established Constitutional Violations

At trial, plaintiffs presented evidence of the many deficiencies in the 2008 Protocol that create a substantial risk of maladministration, and documented that, in practice, DOC did not follow its own Protocol.

1. Risks of Maladministration

Dr. Souter described how the 2008 Protocol, as written and implemented by DOC, creates a substantial risk of maladministration of the first drug, sodium thiopental, which risks "the inmate being conscious for the delivery of the pancuronium bromide." RP334. If the inmate is conscious for delivery of pancuronium bromide, he is "unable to communicate distress or pain" caused by either the pancuronium bromide or the potassium chloride. *Id.*

a. The 2008 Protocol's "Qualifications" Requirement Is Deficient

The U.S. Supreme Court requires that the execution team be comprised of competent personnel with demonstrated ability and continued competency in the tasks they are assigned, particularly with respect to siting IVs. *Baze*, 128 S. Ct. at 1533, 1569. Dr. Souter testified that without an execution team in place, it is simply not possible to assess the sufficiency of DOC's policy because "the critical factor [in the

Protocol] is the competence and technical ability of the team involved and being able to deliver the drugs." RP365. Without knowing their qualifications, "you can't really say anything about the ability of the policy to be able to carry out its stated purpose." *Id.*

Further, the qualifications for injection team members set out in the Protocol are flawed.[7] The 2008 Protocol does not require that the very minimal listed qualifications even be current. Ex. 1; RP367, 613-14. As Dr. Souter explained: "they could have obtained [their qualifications] ten years ago but be out of practice...[they] may not be undertaking regular practice of siting IV cannula to an extent that is sufficient enough to maintain your skill set." RP367.

Nor, as Sinclair conceded, does the policy require that team members regularly site IVs, even though three members may be called upon to perform this procedure. RP614-18. Even DOC's expert, Dr. Dershwitz, would demand proof that team members perform the

[7] The October 2008 policy added a requirement that minimum qualifications include a year or more experience as a certified medical assistant, phlebotomist, EMT, paramedic, military corpsman, or "similar occupation." Ex. 2 at 8. Though written in an apparent attempt to mirror Kentucky's policy, it did not do so; Kentucky's policy contains no undefined catchall "or similar occupation." Further, the qualifications required in Washington for most of these occupations are markedly less stringent. In Kentucky, medical assistants must graduate from a accredited program, pass a national exam, obtain a license, and keep it current. *See* KRS § 311.840-844. Washington requirements vary from no licensing, no continuing education, to some post-secondary education required. *See* RCW 18.135.020; WAC 246-826-040, 246-826-050. Kentucky EMTs must be certified and approved by the National Registry of EMTs, satisfy continuing educational requirements, renew their licenses, and recertify regularly. *See* KRS §§ 311A.010(10), 311A.095(1). Washington EMTs need only have a high school diploma, approved training, and pass an exam. *See* WAC 246-976-141; CP2952-3063.

procedures regularly and competently as part of their day job. RP563-64.

This contrasts starkly to the Kentucky protocol. Indeed, *Baze* found that Kentucky's "most significant" safeguard was the experience of the execution team members. *Baze*, 128 S. Ct. at 1533; *see also id.* at 1569 (noting that the two executioners had 8 and 20 years of professional experience, respectively and, on a daily basis, established IV lines in Kentucky's prison population).

b. The Practice Sessions Requirement Is Deficient

The 2008 Protocol requires three practice sessions "preceding an execution." Ex. 1 at 7.[8] In contrast, Kentucky requires a minimum of 10 sessions, each to include a "complete walk through" of the execution procedures including siting IVs into volunteers. *Baze*, 128 S. Ct. at 1534. Practice sessions do not occur in Washington unless an execution is scheduled and an execution team is assembled. When they do occur, a complete walk-through of the procedure is not done as it is in Kentucky.

The 2008 Protocol—which was in place for the scheduled executions of Stenson and Brown—requires that practice sessions "*shall* include siting of intravenous (IV) lines." Ex. 1 at 7 (emphasis added). The undisputed evidence confirmed, however, that DOC has never conducted three practice sessions with IV siting under the 2008 Protocol, and has never conducted even a single *complete* practice session. The

[8] Presumably this requirement contemplates *complete* rehearsals; if not, the Washington Protocol would be significantly inferior to the Kentucky policy in this respect also.

sessions DOC held were haphazard and incomplete, occurring mostly in a kitchen in a private home, using a kitchen counter as the execution table. RP627, 637.

In preparation for Stenson's execution, the DOC held, at most, two rehearsals with IV siting.[9] DOC conducted *no* rehearsals with IV siting in preparation for Brown's execution. RP627, 632-35; Ex. 89 at 54-55, 90, 94. The rehearsals fell far short of complying with the 2008 Protocol requirements in other respects as well. No rehearsal included practice mixing the drugs. RP629. Most omitted other basic steps such as pushing the drugs (or fluids simulating the drugs) through the lengthy IV tubing.[10] Many sessions proceeded despite the absence of team members, or the Superintendent himself. RP629-37; Ex. 89 at 15, 67. Rarely did a practice proceed with the correct length of IV lines, and they often proceeded without any IV line set up. Ex. 89 at 73-74. Although Sinclair said it was his job to supervise practice sessions (RP627), he did not attend all of the sessions (Ex. 89 at 67), and his testimony established that the practice sessions were completely inadequate. Further, Patricia Rima, the DOC official charged to ensure that practice sessions were carried out, did not supervise: "[m]y purpose was to ensure that they had a practice, and I

[9] Sinclair said IV siting occurred at two rehearsals but the DOC official present and charged with assuring that rehearsals were carried out, recalled only one. Ex. 89 at 31.
[10] Sinclair could only remember one session where any fluids were pushed. RP635-36. Practicing this aspect of the protocol is significant because any pressure changes that occur when pushing liquid through the syringe is "a sign that something may be amiss" with the IV. RP324-25; 562.

reported that they practiced. My position was not to ensure that they did it accurately." *Id.* at 31. Instead of supervising, Rima read a book and checked her email. *Id.* at 57.

DOC plans to continue its deficient practices in the future. Sinclair testified that he would *not* have the team practice siting IVs in future rehearsals (RP632-33), though this is one of the most critical steps in the execution sequence and a plain requirement of the 2008 Protocol. He said that the only reason that IV insertions were done on him and another official last fall was so that he could gain personal familiarity with the process. In the future he will not "stick needles into people for practices." RP632. Sinclair did not appear to understand that practicing on a kitchen counter in a private home hardly mimics the layout, equipment, and serious atmosphere of the execution chamber. He will continue to hold practices off-site. RP703-04. Nor did Sinclair give any indication that he believed any of the other deficiencies in the practice sessions needed to be changed to assure complete rehearsals as required by the Protocol.

c. The Consciousness Assessment Is Inadequate

Dr. Souter testified that assessment of an inmate's consciousness after the first drug is injected is one of the most important safeguards to ensure that an inmate does not experience excruciating pain. The only person tasked to perform any consciousness assessment in Washington is the Superintendent. Ex. 1. The Protocol does not require that a properly trained individual monitor the inmate to ensure proper sedation. Instead, it provides only that the Superintendent will "observe" the inmate "for signs

of consciousness." Ex. 1 at 9. This is contrary to Dr. Souter's advice (RP365-70), and contrary to the recommendations of DOC's expert, Dr. Fiona Couper, who advised DOC to require that the assessment be performed by someone qualified to do it, "ideally" a physician or an anesthesiologist. RP772.

The 2008 Protocol also contains no guidance for how to conduct a consciousness assessment. Dr. Souter, as well as defense experts, testified that graded stimuli should be applied, including verbal and tactile stimuli (RP347-48, 587-90), and Dr. Dershwitz testified that this could be easily implemented in the execution setting. RP587-90.

Sinclair gave contradictory testimony regarding the assessment he intends to perform. At his deposition—after two scheduled execution dates had passed (when Sinclair was presumably ready to perform the assessments)—he testified that, at most, he might "whisper something" and was adamant that he would not touch the inmate. RP620-21. Dr. Souter testified that Sinclair's approach was "completely inadequate" to assess consciousness. RP369. At trial, Sinclair testified that he "changed [his] stance" and his new "plan" would "include touching an offender now." RP621-22. Sinclair attributes his contradictory testimony to "learn[ing] things" and "grow[ing] as I go along." RP234. But Sinclair also thought that he had been "absolutely" ready for the scheduled December 3 and March 13 executions. RP36, 620.

The 2008 Protocol requires no training whatsoever in how to assess consciousness, and Sinclair has no medical training for that.

RP624-25. Dr. Souter—the only expert to express an opinion on Sinclair's qualifications to assess consciousness—testified that he is not "in any way" qualified to "assess consciousness." RP370.[11]

d. The Intravenous Line Assessment Is Inadequate

Under the 2008 Protocol, the only person in a position to observe whether an IV is delivering the lethal drugs, once placed, is the Superintendent. RP228, 420. From his position "at the inmate's side," he will have, at most, a view of only one of the two IVs and one of the sites will be obscured by a sheet that covers the inmate. RP328, 367, 641-42. The 2008 Protocol does not require that anyone palpate the injection sites to ensure that the drugs are traveling into the veins rather than the surrounding tissue. RP332. Especially because the inmate is secured to the table with arm restraints, which could hinder the flow of the drugs through the veins (RP356), palpation is an important step to ensure proper delivery of the drugs to the central circulation system. RP344.

The 2008 Protocol does not require that the Superintendent undergo any training to enable him to perform adequate IV assessment. Ex. 1. Sinclair has no training or experience to evaluate if an IV has been established correctly and is adequately delivering the lethal drugs into the

[11] Even crediting Sinclair's claims about what he personally plans to do, absent a requirement for a competent consciousness assessment, the protocol provides no assurance that one will be done, because Sinclair designates another DOC official to assume his duties on the execution date should he be unable to serve. RP642-43; Exs. 55-56.

veins rather than the surrounding tissue. RP365-66, 639-40. Once IVs are placed, the injection team sequesters itself in the separate injection room and has no view of the IV sites and no ability to monitor them remotely. RP228, 420. Dr. Souter concluded that "there are insufficient checks being made on the intravenous line, its adequacy, its function" and the viability of the IVs is not assured. RP365-66.

Dr. Souter gave extensive testimony regarding the consequences of inadequate administration of the thiopental. RP334-56. For example, if the IVs are not properly placed and maintained in the vein, the thiopental may be injected into subcutaneous tissue rather than the vein. RP325, 345. Dr. Dershwitz attributed two botched lethal injection executions to this:

> [t]he executions of Joseph Clark on May 2, 2006, in Ohio and of Angel Diaz on December 13, 2006, in Florida were characterized by prolonged periods following the administration of thiopental during which the inmates did not lose consciousness as would have been expected had the medication been introduced intravenously.

Ex. 33 at 949. Dr. Dershwitz thought that "some or most of the medication was delivered subcutaneously." RP546-47, 549.

e. The 2008 Protocol Does Not Require a Physical Exam and It Eliminated Medical File Review

The 2008 Protocol does not require a physical examination as required in the Kentucky policy. Ex. 5 at 4. Further, an important part of the protocol was changed in October 2008—DOC removed the requirement for a medical file review. *Compare* Ex. 2 at 7 *with* Ex. 1.

at 7. Because a variety of conditions affect ease of IV placement and sedation, an assessment of physical condition is necessary to "gauge the effects that your drugs are likely to have" and understand the "difficulties you might encounter for the actual physical administration of the drug." RP338-39. Even Sinclair conceded that he needs to know whether an inmate has veins healthy enough to carry out an execution. RP77. The failure to require a physical examination and elimination of a medical file review create a significant, unnecessary risk of maladministration of the lethal drugs, well-illustrated by Stenson's particular medical conditions, described below.

f. The 2008 Protocol Lacks Guidance for IV Siting and Permits Invasive Procedures

The 2008 Protocol contains no limits or guidance for where or how an IV may be placed (Ex. 1 at 8-9), in contrast to the Kentucky policy that permits IV access only in "arms, hands, ankles and/or feet, neck" in that order. Ex. 5 at 6. Washington's protocol, for example, does not preclude placement of an IV in the neck, a procedure that Dr. Souter does not even permit his medical residents to perform until they have demonstrated competence. This procedure was declared unconstitutional by the Kentucky trial court in *Baze*. *Baze v. Rees*, No. 04-CI-1094, at 8 (Franklin Cir. Ct. July 8, 2005).

2. Significant Differences Exist Between 2008 Protocol and Kentucky Policy

Given the haste with which DOC assembled its new policy, it is not surprising that even a cursory comparison shows that it lacks many of

the critical safeguards found in the Kentucky policy it purports to follow:

- Kentucky's injection team "must remain certified in their profession and must fulfill any continuing education requirements in their profession." Ex. 5 at 15. In fact, Kentucky team members, a certified phlebotomist and EMT with 8 and 20 years experience, respectively, demonstrated daily and current experience inserting IVs into the prison population. *Baze*, 128 S. Ct. at 1533, 1569.
- Kentucky required ten practice sessions annually, each including a complete walk through of the execution and insertion of two IVs into a volunteer, regardless of whether an execution is scheduled. Ex. 5 at 15; *see also Baze*, 128 S. Ct. at 1534.
- Kentucky required physical and psychological examinations of the inmate, as well as weekly evaluation of the inmate's medical condition after an execution order is received. Ex. 5 at 2-5.
- Kentucky required that two persons monitor the inmate's consciousness and IVs. *Baze*, 128 S. Ct. at 1528, 1534.
- Kentucky's injection team had one hour to establish both the primary and back-up IVs. Ex. 5 at 7.
- Kentucky used only five feet of tubing. *Baze*, 128 S. Ct. at 1528.
- Kentucky used a cardiac monitor. Ex. 5 at 7, 11.
- Kentucky required a physician present to assist in reviving the inmate in the event of a last-minute stay. *Id.* at 16.
- Kentucky required medical equipment to revive the inmate in the event of a last-minute stay. *Id.*

See also RP370-78, 451-55; Illustrative Ex. 6.

3. Superintendent Sinclair's Implementation of 2008 Protocol Establishes the Risks of Maladministration

DOC's implementation of the 2008 Protocol has been incompetent, as evidenced by the resignation of the execution team and flawed training sessions discussed above. Further deficiencies are detailed here.

a. Sinclair's Claimed Examination of Stenson for "Veinological" Integrity Never Happened

Sinclair submitted declarations in support of various motions representing that he "reviewed Mr. Stenson's medical records" and knew that "Mr. Stenson's veins had been examined" (CP249) to support DOC's claims that it would have no trouble inserting IV lines in Stenson. In fact, these statements were later proved false.

Sinclair testified that he had requested a "veinological" review and report on Stenson's veins, and that "there was an exam done." RP78-80. In preparation for the December 3 execution, he relied on a chart prepared by DOC physician assistant Dan Delp that Sinclair thought was based on Delp's examination of Stenson. *Id.* at 89-91; Exs. 24, 26. Sinclair said this chart gave him "an indication that [Stenson] had good veinological health for receiving an IV," and showed "at least three locations on [Stenson's] arm" suitable for IVs: "I use it as an indicator of whether or not he had suitable veins to receive an IV, ma'am." RP91-92. This chart was shared with the execution team because Sinclair wanted to give the team some idea where it should site IVs on Stenson. RP85-88.

Sinclair could give no details about the examination he claims

occurred. RP92. The sole record produced to support DOC's claim that a physical exam was conducted related to a medical visit for a different purpose in April 2008, months before Stenson's execution date had been set and four months *before* Sinclair became Superintendent. RP79, 82, 93-96. It is undisputed that during this medical visit, Delp simply sat across a table from Stenson and wrote his prescriptions; he did not conduct a physical exam. RP147; Ex. 24. Stenson was wearing a long sleeved sweatshirt and no one saw his arms, hands, or other parts of his body suitable for siting an IV. RP145-48. It is also undisputed that the purported examination for "veinological" integrity did *not* in fact involve any examination of Stenson for IV access. RP391-92. ("[N]owhere ... is there any assessment of patient's vasculature, by that, I mean veins in their arm.") Further, Dr. Souter gave uncontradicted testimony that *only one* of the several IV sites identified in the chart as appropriate were potentially suitable for Stenson. *Id.* Thus, ***no*** examination of Stenson's candidacy for IVs was performed in April or at any other time, and the information in the chart Sinclair shared with the execution team was wrong.

b. Sinclair Relied on Another Erroneous Chart Showing Improper Sites for IV Insertion

Sinclair also relied on a circulation chart prepared by DOC medical staff at his request to "show[] possible areas where they could site needles or site IVs" in general, not specific to Stenson. RP222; Ex. 26. Sinclair used this chart to prepare an informal checklist he describes as the "Superintendent's Checklist," which, while not part of the policy, he said

will assist him in executions. RP224-26, 695-700. Dr. Souter, the only expert to review the circulation chart, testified that many of the veins identified on it—including veins in the palm of the hand, shoulder, back of the feet, back of the knee—"are inappropriate sites" and "not veins you would employ" for IV insertion. RP392-94. Inserting IVs in some of these sites would be "quite tortuous and quite susceptible to rupture." RP394.

4. Evidence of DOC's Problems During Prior Lethal Injection Executions Was Offered But Not Considered

Washington has executed two people by lethal injection. Execution logs produced by DOC showed that a doctor in the execution chamber actually inspected the IVs during Jeremy Sagastegui's execution. RP648-53, 663; CP3164-80. An hour elapsed between the siting of IVs and the directive to proceed with the execution, suggesting that problems occurred. The trial court refused to permit discovery regarding these executions on the ground that the protocol had changed (4/30/09 Tr. at 16), and refused to admit the execution logs at trial. RP653.

5. Stenson's Medical Condition—Typical of Many Inmates—Poses Foreseeable Challenges that Execution Protocol Should Address

The failure to require a physical examination and elimination of a medical file review requirement create unnecessary and significant risks of maladministration, especially given the general poor health of inmates. RP832-33. Stenson suffers from medical conditions that make him more susceptible to maladministration than a healthy individual. He has Type-II

diabetes, high blood pressure, high cholesterol, hypertension, gout, and is obese (conditions he did not suffer from prior to entering the penitentiary). RP121, 381-83. Dr. Souter's physical examination of Stenson revealed limited opportunities for IV access because the superficial veins in Stenson's arms are poorly developed, and deeper veins are obscured by peripheral obesity. RP378-80, 445-47, 449, 456-57. Only one vein in his arms is potentially suitable for IV access. RP378-89. Stenson's condition makes it difficult to insert one catheter, much less the two required by the 2008 Protocol—one in each arm at the same time.[12]

Only Dr. Souter conducted an examination of Stenson to assess potential IV access; neither DOC nor DOC's experts conducted such an exam and Dr. Souter's testimony regarding Stenson's physical condition was uncontested. RP478-79, 515, 593, 774-75. In fact, Dr. Dershwitz agreed that it is harder to site IVs into obese people. *Id.* Although Sinclair expects to execute Stenson in the future and was made aware of Dr. Souter's examination, he chose not to learn the results. RP116-17.

The DOC lab technician who draws Stenson's blood has done so for over a decade, and her extensive practice has improved her ability to draw from him. RP122, 133, 187-88. Although there is presently no injection team, the person inserting IVs during an execution will be unfamiliar with inserting IVs on Stenson. Further, inserting IVs is far

[12] This difficulty will be exacerbated by anxiousness caused by the execution and by DOC's limitations on inmate medications prior to execution. RP149-50, 378-89.

more complicated, and requires greater expertise, than the simple act of drawing blood.[13] A history of blood draws does not establish a likelihood of successful IV placement. RP380.

The difficulty in accessing Stenson's veins was amply illustrated by the failed blood draws DOC conducted for DNA testing in February 2009. DOC's ***Director of Nursing***, Richard Cross, a registered nurse with 26 years of experience and a self-professed expert in starting IVs in the "hard cases," could not access Stenson's veins for a single blood draw. RP160, 163; Ex. 14. Cross was "surprised" by his failure, testifying that it was "unusual" for him to miss a vein. RP171-72.

6. Readily Available Alternatives Exist

DOC's experts agree that a one-drug protocol using only sodium thiopental is workable and readily available. Dr. Dershwitz explained that a large dose of thiopental will result in death within "a period of several minutes, where several is a single digit." RP569. He endorsed a single drug policy calling for administration of sodium thiopental, with additional doses as necessary. RP572. This would avoid all risk of any significant pain and "[t]he observers will probably be less likely to remark on the inmate manifesting involuntary muscle movements due to the

[13] Dr. Souter described the important distinction—unappreciated by DOC—between drawing blood by puncturing a vein, and the harder task of inserting a plastic catheter into a vein for the purpose of injecting drugs. *Compare* RP118 ("Other than inserting of the needle, it's pretty much the same.") *with* RP380 (describing the significant medical differences). Dr. Dershwitz agreed that the experience and training required to insert an IV is different from that required to simply draw blood. RP593-94.

potassium chloride." RP574; 499, 575-77. DOC's second expert, Dr. Couper, agreed that this process would cause death. RP767-68.[14]

This one-drug protocol was in fact mandated in Washington as the sole means for lethal injection executions prior to 1986. *See* RCW 10.95.180 (1981).[15] It has been adopted in, and used by, Ohio in a recent execution. *See Cooey* Order, *supra.*

D. The Lower Court's Decision

After six days of trial, the court issued its decision, findings of fact, and conclusions of law.[16] The court concluded that DOC's policy does not violate the Eighth Amendment because it is "substantially similar" to the policy used in Kentucky and approved by *Baze*, citing eleven findings of fact to support this conclusion. CP3191-94, 3213.

The court also concluded as a matter of law that, "for purposes of this case," the prohibition on "cruel" punishment in article 1, section 14 "does not suggest a different standard than the term 'cruel and unusual' in the Eighth Amendment." CP3207, 3214-15. Accordingly, the court upheld the 2008 Protocol under Washington's constitution and entered

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[14] In fact, DOC's attorneys advocated for and represented that DOC was prepared to use this method at Brown's execution scheduled for March 13. (3/11/09 Tr. at 32.)

[15] The court erroneously suggested that lethal injection has only been in effect in Washington since 1996. (Concl. 4.) It was first adopted in 1981, when the Legislature required that lethal injection be carried out using only sodium thiopental.

[16] The court's decision and its findings and conclusions are included in the Appendix at Tabs 3 and 4.

judgment July 28, 2009. CP3438-39.[17]

IV. LEGAL ARGUMENT

A. Standard of Review

This Court reviews the trial court's findings of fact to determine whether they are supported by substantial evidence and, if so, whether they in turn support the conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45, 49 (1986). Substantial evidence is that sufficient to persuade a fair minded person of the truth of the declared premise. *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477, 481 (1990). Matters of law, including interpretation of the federal and state constitutions, are reviewed *de novo*. *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595 (2007).

B. The Legislature Has Not Delegated DOC Authority to Promulgate Execution Policy

No agency may establish or implement a policy without (1) a legislative grant of authority, (2) standards from the legislature to guide its actions, and (3) an established procedure to promulgate the policy and review it. *In re Powell*, 92 Wn.2d 882, 891, 602 P.2d 711 (1979). To

[17] After judgment, DOC moved for the cost of *every* deposition transcript it ordered during this case, though it did not introduce any portion of a deposition at trial, or use a deposition for impeachment. CP3217-35. The court awarded $4,555.40 (CP3447-48), including costs for depositions: (1) not introduced or used by either party (Souter and Stern); (2) used only by Stenson (Cross, Robertson, Bowman, Sinclair, Dershwitz, Couper); and (3) offered by Stenson with DOC's minor cross-designations (Rima), though the court did not cite Rima's testimony to support its decision. CP3191-3216, 3303-08.

delegate authority to a state administrative body:

> First, the legislature must provide standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it.
>
> Second, adequate procedural safeguards must be provided, in regard to the Procedure for promulgation of the rules and for testing the constitutionality of the rules after promulgation. Such safeguards can ensure that administratively promulgated rules and standards are as [s]ubject to public scrutiny and judicial review as are standards established and statutes passed by the legislature.

Id. (internal quotation marks and citations omitted). In *Powell*, the Court held that a delegation to the Board of Pharmacy to promulgate emergency regulations was unlawful because it did not provide public notice.

None of the requirements for delegation are met in this case. First, no statute identifies DOC as the "the administrative body" to establish procedures by which lethal injection will be administered. DOC's policy cites RCW 10.95.160-190 as the sole authority for its power to establish and implement execution policy. (Ex. 1 at 2.) But that provides only that the superintendent will "supervise[]" the execution; there is no express delegation of authority to DOC. RCW 10.95.180.

Second, no statute supplies "standards or guidelines"—even in "general terms"—about "what is to be done" as *Powell* requires. 92 Wn.2d at 891.[18] The greater the "magnitude of interest[] affected by the

[18] Between 1981 and 1986, RCW 10.95.180 provided that, at the inmate's election, death would be inflicted by "continuous, intravenous administration of a lethal dose of sodium thiopental." RCW 10.95.180 (1981). The statute no longer provides any instruction on the drugs to be used in a lethal injection execution.

legislative grant of authority," the greater the demand for standards to guide and restrain agency action. *Id.* at 892.

Third, RCW 10.95.180 provides no safeguards, much less "adequate procedural safeguards" to prevent arbitrary administrative action and to test "the constitutionality of the [policy]" after promulgation. *Powell*, 92 Wn.2d at 891.

Because "punishment is a legislative function," *State v. Ermert*, 94 Wn.2d 839, 847, 621 P.2d 121 (1980), the absence of an express legislative delegation that includes adequate safeguards is particularly problematic. Although the legislature may delegate this authority, it must specifically define what is to be done and identify the administrative body to do it, which it typically does by a specific enabling statute. *E.g.*, RCW 9.94.070(2) (directing DOC to promulgate rules designating "serious infraction" pursuant to RCW 72.09.130). There is no analogous grant of authority to DOC to enact execution policy.

The harms associated with the absence of a proper legislative delegation are apparent in this case. Throughout the litigation, DOC and Sinclair have made constant changes to how they plan to execute. First, DOC completely revamped its written policy and then used this revision to attempt to evade judicial review. DOC's position has been that its policy is not subject to judicial review or any review. Second, DOC's position is that its policy—which requires the approval of the Secretary of the Department of Corrections, presumably to assure the integrity of the policy—can nonetheless be changed informally by the Superintendent. In

fact, DOC's defense depends on the court permitting legal review of the written policy *as supplemented by* Sinclair's ever-changing and non-binding informal lists and verbal promises described *infra*, none of which are part of the written policy or approved by the Secretary. Finally, because the legislature prescribed no standards for DOC's conduct, its litigation strategy to prevent any review of the adequacy of the policy's most important component—the competency of the execution team—was successful. The delegation doctrine is intended to avoid the very type of arbitrary and haphazard agency decision-making that occurred here, and to assure orderly review of agency policy.

C. The 2008 Protocol Violates the Eighth Amendment's Prohibition on Cruel and Unusual Punishment

1. The Court Reviews Both the Written Policy and Its Implementation

In *Baze*, the Court held that an execution method "can be viewed as 'cruel and unusual' under the Eighth Amendment" where the inmate can establish a "substantial risk of serious harm" and a "feasible, readily implemented" alternative that would "significantly reduce" that risk. 128 S. Ct. at 1532 (internal quotation marks and citation omitted). In a three-drug protocol, the failure to administer "a proper dose of sodium thiopental that would render the prisoner unconscious" creates "a substantial, constitutionally unacceptable risk of suffocation ... and pain." *Id.* at 1533. The constitutional validity of an execution protocol depends on whether a policy contains certain safeguards and whether the state demonstrates adequacy of their implementation to ensure that "an

adequate dose of sodium thiopental is delivered." *Id.* at 1533.[19]

2. The Court's Conclusion That Washington's Policy Is Substantially Similar to Kentucky's Is Legally Erroneous and Based on Factual Findings That Are Against the Weight of the Evidence

The court stated that the 2008 Protocol did not violate the Eighth Amendment because it was substantially similar to Kentucky's policy. Decision ("Dec.") at 5. But this legal conclusion and its related factual finding (FOF14) were based on a series of dependent factual findings (FOF3-13) that are against the clear weight of the evidence. The court's findings are erroneous in at least four general ways.

First, the court ignored the complete lack of evidence regarding the qualifications and competence of the execution team. Second, the court relied on informal *ad hoc* changes to (or promises to change) execution methods made at various times by Sinclair after the policy was adopted in October 2008. Third, the court ignored major differences between the Washington and Kentucky protocols—as written and as implemented. Finally, the court ignored evidence that DOC failed in practice to follow

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[19] An Eighth Amendment violation may result from a state's practices, not just a deficient written procedure. *Baze*, 128 S. Ct. at 1532. In *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006), the court concluded that "a pervasive lack of professionalism in the implementation" of California's lethal injection protocol—using injection team members who had smuggled drugs into prison, suffered from post-traumatic stress disorder, had no knowledge of the drugs they were using or the risks associated with the procedure, failed to follow simple directions in mixing drugs, and were generally unprepared for an execution—undermined reliance on California's written policy. *Id.* at 979.

its own policy in many significant respects.[20]

a. Lack of Proof of Qualifications and Competence of the Team

The trial court's finding that Washington's injection team met the requirements in *Baze* (FOF3), was legally erroneous and against the weight of the evidence. Kentucky requires that its injection team satisfy certain specific professional criteria and have current and regular experience siting IVs. In *Baze*, Kentucky provided proof that the team members, a phlebotomist and an EMT, had 8 and 20 years of professional experience respectively and, on a daily basis, practiced establishing IVs in Kentucky's prison population. *Baze*, 128 S. Ct. at 1569. The Supreme Court described these qualifications as the "most significant" safeguard. *Id.* at 1533. Washington's protocol, by contrast (1) contains job qualifications whose requirements are not comparable to Kentucky's, (2) does not require that they be current, and (3) does not require that team members regularly practice siting IVs.

The trial court did not address the failure of the qualifications in Washington's protocol to match up with the quality of those in Kentucky. Nor did the court address the fact that the 2008 Protocol does not require that the job qualifications even be current. The court addressed only the

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[20] Based on DOC's manipulation of evidence regarding the competence of the execution team, Stenson requested, but was denied, a spoliation presumption under *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977). DOC's refusal to provide critical evidence in its control amounted to spoliation under *Pier 67*, and the court erred in not drawing an adverse inference regarding the team members' qualifications.

third flaw: the lack of *any* requirement that team members regularly site IVs. The court found adequate Sinclair's claim that he "would seek to use individuals with current IV experience." (FOF3.)

Unlike *Baze*, the court was not presented with *any* evidence that Washington has ever employed qualified individuals who regularly site IVs and are current in their professional qualifications. Washington has not executed anyone by lethal injection since 2001, and no execution has been carried out under the current (or even predecessor) policy. The team in place when Sinclair became Superintendent in August 2008 was selected prior to the time DOC 490.200 contained *any* qualification requirements. That team resigned without any review of its qualifications and there was no proof that DOC has ever assembled a qualified execution team. Certainly no presumption can be drawn that DOC can assemble a team that meets the new policy's requirements.

Even if genuinely intended, what Sinclair hopes to do has no bearing on what he is likely able to do. The weight of the evidence shows, in fact, that he will not be able to assemble a competent team. Sinclair testified during his deposition that it was unlikely he could field a qualified team in the future because he cannot give team members any assurance that their identity will be kept confidential, and he conceded at trial that this was still a problem. RP672-73.

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*. Alternatively, the court's meager findings regarding the execution team were insufficient and against the weight of the evidence.

b. Incomplete Training Sessions

The trial court acknowledged that Kentucky required at least ten practice sessions—encompassing a complete walk through, including IV siting—each year, regardless of whether Kentucky has an execution or not. FOF4; *Baze*, 128 S. Ct. at 1534. Washington's 2008 Protocol, on its face, is not "substantially similar" to that requirement. The 2008 Protocol requires only three practice sessions, *if* an execution is set.

Further, practice sessions conducted prior to the past two scheduled executions failed to comply with either the Protocol or the higher standards required by *Baze*. DOC did not complete three full practice sessions with IV siting, as required, and the sessions it held were not full walk-throughs. The team practiced siting IVs, at most, at only two sessions, never practiced mixing drugs, rarely simulated pushing fluids through the lengthy IV tubing, often went forward missing team members or the Superintendent, and often proceeded without even with the correct length of IV line or any IV line set up.

The court's sole basis for upholding the rehearsal session provision in the written Protocol, and DOC's implementation of it, was Sinclair's "intent" to have more than the minimum three practice sessions required by the policy. FOF4. This ignored (1) marked differences between the

Washington and Kentucky practice requirements described above, (2) undisputed evidence that DOC never adhered even to the written requirements in its protocol, and (3) DOC's clear intent to violate the protocol's written requirements in the future. Sinclair testified that he will omit from future practice sessions any IV siting because the IV practice was only for his educational benefit, and DOC will not normally "stick needles into people for practices." RP632-33. The sessions will continue to take place off-site and will not mimic the layout, equipment, or atmosphere of the execution chamber. Nothing about DOC's rehearsals is even remotely similar to Kentucky's sessions.

c. Lack of Physical Exam and Elimination of Medical File Review

The court found insignificant the failure of the 2008 Protocol to require a physical examination (as required by Kentucky) and its deletion of a requirement for a medical file review. The court stated that the Protocol "allows" a medical examination and credited Sinclair's claim that the "medical condition of the inmates is well known to staff." FOF9.

The court disregarded Sinclair's admission that he needs to know whether an inmate has veins healthy enough to carry out an execution (RP77), and disregarded undisputed expert testimony that a medical review is necessary to "gauge the effects that your drugs are likely to have" and to understand the "difficulties you might encounter for the actual physical administration of the drug." RP338-39.

The court ignored the evidence that DOC has shown itself

incapable of arriving at a competent assessment of veinological integrity under its current policy. While DOC claims that it performed a "veinological" exam of Stenson before his scheduled execution, the undisputed evidence at trial disclosed that ***no*** examination of Stenson's candidacy for IV insertion was ever performed and that a chart shared with the execution team that was supposed to guide it as to appropriate sites for inserting IVs into Stenson identified inappropriate sites. RP221-24, 230-32, 391-92; Ex. 24. Sinclair also relied on other misinformation about Stenson's medical condition, including the erroneous belief that DOC routinely drew blood from Stenson's inner elbow. Undisputed evidence demonstrated that for years Stenson's blood has been drawn exclusively from the back of his hand (RP183-98), which Stenson testified was done to avoid past difficulties in drawing from his inner arm. RP129-30.[21]

3. The Court Disregarded Undisputed Evidence That There Is an Alternative Procedure That Effectively Reduces the Risk of Any Harm

Baze required petitioners to prove an "alternative procedure" that is "feasible, readily implemented" and "in fact significantly reduce[s] a substantial risk of serious pain." 128 S. Ct. at 1532.[22] A state's refusal to adopt the alternative "in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of

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[21] The 2008 Protocol differs from Kentucky's protocol in a number of other important ways as described in Section III.C.2.

[22] The U.S. Supreme Court had no record of such an alternative before it. *See Baze*, 128 S. Ct. at 1534-35 (noting that no alternatives were presented to the Kentucky state court).

execution" is "cruel and unusual." *Id.*

Stenson easily satisfied this requirement by providing undisputed evidence that a protocol consisting of a large dose of the sodium thiopental would serve as an "alternative procedure" that is "feasible [and] readily implemented." *Id.*; *see also Morales*, 465 F. Supp. 2d at 983 (noting that removal of the second and third drugs from the protocol "would eliminate any constitutional concerns"); *Rivera, supra* at 6 (holding that the use of "pancuronium bromide and potassium chloride[] creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death"). As the *Rivera* court concluded, "a single massive dose of sodium thiopental or another barbiturate or narcotic drug will cause certain death, reasonably quickly." *Id.* at 7.[23]

Both of DOC's experts agree that a single dose of sodium thiopental, alone, will cause death without *any* risk of pain. Dr. Dershwitz admitted that not only would it eliminate *any* risk of pain, it would reduce the discomfort of witnesses by making it less likely that the inmate would involuntarily convulse from the administration of potassium chloride.

Ignoring the undisputed testimony of DOC's own expert witnesses, the lower court concluded that "Plaintiffs have similarly failed to

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[23] Ohio recently adopted and used the one-drug protocol. *See Cooey* Order *supra*. In Washington, prior to 1986, the one-drug protocol was statutorily mandated as the sole method for lethal injection executions. *See* RCW 10.95.180 (1981). The three-drug protocol devised by DOC is not due any legislative deference because it was not adopted by the Washington legislature but by unelected DOC officials with no specialized medical knowledge, and merely because other states had selected the same drugs. RP52.

demonstrate by a preponderance of the evidence that the use of additional feasible and readily available safeguards could be, but are not, utilized by the State." Concl. 13. The court also concluded that the second drug—pancuronium bromide—should remain part of the procedure because it serves two state interests: "it preserves the dignity of the procedure, and it hastens death by stopping breathing." Concl. 14.

The court reached these conclusions solely by finding that the opinions of DOC's experts, who testified unequivocally about the viability of the one-drug protocol, were "based solely upon anecdotal evidence." FOF29-30. This conclusion, however, impermissibly disregarded the learned, scientific and uncontradicted testimony of these experts. There is simply no evidence to support the court's finding that the expert opinions of the *State's* toxicologist and DOC's expert anesthesiologist were merely "anecdotal." Moreover, the court's finding regarding the "dignity of the procedure" was contrary to Dr. Dershwitz's testimony that dignity is best preserved by the one-drug protocol because it will avoid all risk of involuntary convulsions.

For the foregoing reasons, the court's ruling that the 2008 Protocol was substantially similar to the Kentucky methods approved in *Baze* was legally erroneous and against the weight of the evidence.

D. The Court Erred in Holding that the Washington Constitution Offers No More Protection Than the Eighth Amendment

1. Washington's Constitution Provides Greater Protection Than the Eighth Amendment

The court disregarded controlling precedent that article 1,

section 14 of the Washington Constitution's prohibition on infliction of "cruel punishment" provides greater protection than the Eighth Amendment. *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). Despite this longstanding interpretation, the court erroneously concluded that the "term 'cruel'" in the Washington Constitution for the purposes of this case does not suggest a different standard than the term 'cruel and unusual' in the Eighth Amendment. Concl. 19.

Washington's constitutional ban on "cruel punishment" affords "greater protection than its federal counterpart." *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996). This Court has twice struck down laws that violated this "cruel punishment" ban: *Fain*, 94 Wn.2d at 402 (held as "cruel" life sentence disproportionate to crime), and *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984). As the *Fain* Court explained, "[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation." 94 Wn.2d at 393.

In *Bartholomew*, this Court held that the due process and cruel punishment provisions of Washington's constitution were violated in a capital case by a state statute allowing introduction of evidence in the penalty phase, regardless of its admissibility under the Rules of Evidence:

> Since the death penalty is the ultimate punishment, due process under this state's constitution requires ***stringent procedural safeguards*** so that a fundamentally fair proceeding is provided. Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution.

101 Wn.2d at 640 (emphasis added). Thus, article 1, section 14 requires that the state employ stringent safeguards to ensure that a method of execution is not "cruel," a more rigorous standard than that applied under the Eighth Amendment in *Baze* or by the trial court in this case.

The lower court apparently believed that it should analyze the issue under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and that a *Gunwall* analysis did not support interpreting the state constitution more broadly. Concl. 18-19. However, *Fain*, *Bartholomew*, and three post-*Gunwall* cases confirm that the term "cruel" in article 1, section 14 is interpreted more broadly than "cruel and unusual" in the Eighth Amendment. *See Manussier*, 129 Wn.2d at 674; *State v. Rivers*, 129 Wn.2d 697, 713, 921 P.2d 495 (1996); *State v. Thorne*, 129 Wn.2d 736, 772-73, 921 P.2d 514 (1996). Because this Court has already concluded that article 1, section 14 provides broader protection than the Eighth Amendment, it was legal error for the court to depart from this precedent and engage in the *Gunwall* analysis. *E.g.*, *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) (relying on pre-*Gunwall* case holding that article 1, section 7 provides more protection than the Fourth Amendment and concluding that "[n]o *Gunwall* analysis is necessary").

Even were a *Gunwall* analysis warranted here, it would reach the same result. *Gunwall* looks at six criteria to determine whether the Washington Constitution extends broader rights: (1) the language of the state constitution; (2) differences in the texts of parallel provisions; (3) differences in state constitutional and common law history;

(4) differences in preexisting state law; (5) differences in constitutional structure; and (6) differences that may emerge from matters of particular state or local concern. *Gunwall*, 106 Wn.2d at 61-62.

Factors (1), (2), (3), and (5) have already been addressed by this Court and need not be examined again. *State v. Johnson*, 128 Wn.2d 431, 445, 909 P.2d 293 (1996) ("[A]nalysis under factors (1), (2), (3) and (5) generally remains the same each time a constitutional provision is examined."). *Fain* addressed factors (1), (2), and (3), relying on the textual differences between two constitutional provisions to hold that Washington's bar on "cruel" punishment is more stringent than its federal counterpart. 94 Wn.2d at 392-93; *see also Rivers*, 129 Wn.2d at 723-24 (Sanders, J., dissenting) (observing that "cruel punishment" requires a "more absolute definition" than "cruel and unusual"). The *Fain* Court observed: "[t]he historical evidence reveals that the framers of Const. art. 1, s. 14 were of the view that the word 'cruel' sufficiently expressed their intent, and refused to adopt an amendment inserting the word 'unusual.'" *Fain*, 94 Wn.2d at 393.

Bartholomew addressed factor (5), relying on structural differences to conclude that article 1, section 14 is more protective. 101 Wn.2d at 639-40. These structural differences "support construing constitutional amendments more broadly, to protect [an individual's] personal rights." *State v. Dodd*, 120 Wn.2d 1, 22, 838 P.2d 86 (1992). Factor (6) addresses whether the right at issue relates to a peculiarly local or state concern. The lower court acknowledged that this factor was satisfied. Concl. 18.

The remaining factor (4) (differences in preexisting state law) weighs in favor of a broader standard, or is at most neutral.[24] The Court examined a method of execution only once before, in *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981), when it assessed whether hanging was constitutional. Three justices concluded that hanging was cruel, "even when performed by a competent hanger" because the State could provide "no assurance" that future hangings would not involve "unnecessary pain, lingering torture, and slow death." *Id.* at 497. Although the majority upheld the constitutionality of hanging it did not disagree with the standard applied by these three justices; it deferred to the legislature's judgment as to the appropriate method of execution and did not agree that the evidence established a constitutional violation. *Id.* at 514 (Stafford, J., concurring); 527 (Dore, J., concurring). Legislative judgment is not implicated in this case because the legislature did not create or approve the 2008 Protocol (or its predecessors). Thus, the only Washington case that identifies a standard for reviewing the constitutionality of a method of execution under article 1, section 14 judged that method by whether the state can provide "assurance" that the method will not cause "unnecessary pain," a more exacting standard than applied under the Eighth Amendment. *Id.* at 497. Consequently,

[24] Consideration of factors (3) and (4) may not even apply to this analysis. Whether a punishment is cruel (or cruel and unusual) "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378, 30 S. Ct. 544, 54 L. Ed. 793 (1910).

factor (4) of the *Gunwall* analysis weighs in favor of the conclusion that the state prohibition on "cruel" punishment is more protective than its federal counterpart, or is at most neutral.

2. Washington's Constitution Prohibits Methods That May Cause "Unnecessary Pain"

The standard for assessing whether Washington's lethal injection method is "cruel" has not yet been articulated by this Court. The meaning of words in the constitution is taken from their "ordinary use" and the "meaning adopted" at the time of the constitution's ratification. *See Bloomer v. Todd*, 3 Wash. Terr. 599, 615, 19 P. 135 (1888). In *Rivers*, Justice Sanders cited in dissent several contemporaneous definitions of "cruel" and "cruelty:" "hard-hearted," "harsh," or "severe," "unnecessary infliction of pain," and "unnecessary pain or distress." 129 Wn.2d at 723-24 (Sanders, J., dissenting) (citations omitted). From these definitions, he concluded that a disproportionate sentence is "cruel" and rejected the application of an Eighth Amendment case that focused on whether the punishment was "unusual." *Id.* at 734-35.[25]

The definition of "cruel" as whether the state can provide assurance that its method will not cause "unnecessary pain" has been recognized by members of this Court in the execution context in *Frampton*

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[25] U.S. Supreme Court also recognizes the difference between "cruel" and "cruel and unusual." *E.g., Harmelin v. Michigan*, 501 U.S. 957, 967, 111 S. Ct. 2680, 2687, 115 L. Ed. 2d 836 (1991) ("[A] disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be 'unusual.'").

where three justices applied it to conclude that hanging was cruel "even when performed by a competent hanger." 95 Wn.2d at 497. DOC's Protocol attempts to conform to this standard by requiring that executioners carry out lethal injection "without any unnecessary pain." Ex. 1 at 8; RP56.

The omission of "unusual" in Washington's constitution renders inapposite the inquiry performed by the *Baze* plurality, which relied heavily on the fact that similar protocols were used in other states and hence were not "unusual:"

> [I]t is difficult to regard a practice as "objectively intolerable" when it is in fact widely tolerated.... Thirty States, as well as the Federal Government, use a series of sodium thiopental, pancuronium bromide, and potassium chloride, in varying amounts.

128 S. Ct. at 1532 (plurality opinion). In fact, the "substantially similar" test discussed in *Baze* is just a proxy for asking whether the method is unusual and is *not* the proper inquiry under the Washington Constitution.

The lower court found no "meaningful difference" between "cruel" and "cruel and unusual" and decided the state constitutional issue by finding that Washington's Protocol was "substantially similar" to the Kentucky protocol. (Dec. at 7.) This ignored *Baze*'s heavy reliance on the execution methods used by other states—concluding that Kentucky's method was not "unusual" by comparison—and the Court's reluctance to intrude on "the role of state legislatures in implementing their execution procedures," 128 S. Ct. at 1531. Neither of these factors are part of the constitutional analysis under Washington's prohibition of "cruel"

punishment.

3. The 2008 Protocol Causes "Unnecessary Pain"

The issue here is whether DOC's Protocol is "cruel," not whether it adopts practices employed by Kentucky or other jurisdictions. Given the political process failure that led to the blind adoption of the three-drug protocol,[26] Washington's more exacting constitutional scrutiny is particularly warranted. In *Baze*, Justice Stevens forecast the need for more rigorous inquiry when he denounced "the failure of other state legislatures, or of Congress, to outlaw the use of the drug on condemned prisoners" and cautioned that this failure should not "be viewed as a nationwide endorsement of an unnecessarily dangerous practice." *Id.* at 1545 (Stevens, J., concurring) (internal citation omitted). Justice Stevens was particularly offended that the three-drug protocol was a "product of 'administrative convenience' and a 'stereotyped reaction' to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion." *Id.*

The cruelty in this case is the suffering or pain that will occur with improper administration of sodium thiopental and DOC's failure to implement stringent safeguards to avoid "unnecessary pain." When

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[26] The three-drug protocol was first adopted by Oklahoma in 1977. *Baze*, 128 S. Ct. at 1526. The medical examiner who devised it now disavows the use of pancuronium bromide. *Id.* at 1545 n.6 (Stevens, J., concurring). The drugs in the Washington's Protocol were selected by unelected DOC officials with "no specialized medical knowledge and without the benefit of expert assistance or guidance," and their selection is not entitled to the deference afforded legislative decisions. *Id.*

DOC employs a method of execution that is vulnerable to multiple errors, any one of which may result in the infliction of agonizing pain, it has a state constitutional obligation to provide adequate, practicable safeguards against those errors. By choosing procedures that may well involve the infliction of gratuitous pain in some executions, especially when other alternatives are available that *completely eliminate* that risk, DOC violates the state constitution. *See id.* at 1567-72 (Ginsburg, J., dissenting) (noting the interrelationship between degree of risk, magnitude of pain and availability of alternatives and observing that a "strong showing on one reduces the importance of the others").

4. Any Conclusion that the 2008 Protocol Does Not Cause "Unnecessary Pain" Is Against the Weight of the Evidence

It is unclear precisely what standard the court applied to the state constitutional claim. The court's decision concludes that "plaintiffs presented no evidence that defendants intended to impose punishment that was cruel," and that the protocol "appears to have been designed" to be humane. (Dec. at 8.) If the court applied a standard requiring intent, it committed legal error. Alternatively, several findings suggest that the court approved the policy because it deemed it to be substantially similar to the policy on review in *Baze*. (FOF5, 10-14, 19.)[27]

[27] Although conclusions 6, 8 and 16 and finding 62 refer to "unnecessary pain," these few references do not appear to alter the standard actually applied by the court when it determined that the federal and state standards were the same. Further confusing the

If the court's decision could somehow be read as having applied an "unnecessary pain" standard, its findings were plainly against the weight of the evidence. The court's findings regarding team qualifications and competency, practice sessions, lack of physical examination or medical file review, and other elements of the policy were against the weight of evidence even when judged against the requirements of the Eighth Amendment, as described above. Further, two other safeguards would be called for under the more protective state constitutional standard even if the failure to include them would not be considered a federal constitutional violation: a rigorous consciousness check and an adequate IV line assessment. *See* Sec. C.III.1.c-d. Neither of the measures, as practiced by DOC, are adequate to prevent unnecessary pain.

The 2008 Protocol violates the state constitution because the DOC has provided no assurance that it will avoid unnecessary pain and there is a readily available alternative.

E. The Lower Court Erred in Dismissing Count III

DOC's admitted intent to use illegally acquired drugs for executions without a prescription compounds the facial deficiency of the 2008 Protocol. The legislature has not granted DOC any exception from the drug laws that require a prescription to obtain and dispense the lethal

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court's analysis, its sixth conclusion refers to "unnecessary pain" but actually concludes that the improper administration of the 2008 Protocol would not cause "substantial pain."

drugs.[28] In fact, DEA warned DOC that it is not permitted to use sodium thiopental without a prescription. CP1916.

The trial court erred in dismissing Stenson's claims for declaratory and injunctive relief based on its conclusion that Stenson had no private right of action for injunctive relief under the federal Controlled Substances Act ("CSA"). The court completely ignored that Stenson has a clear right to declaratory relief under the Uniform Declaratory Judgments Act ("UDJA") (*see* RCW 7.24.020) as "a person whose rights, status, or other legal relations are affected by a statute" and may "have any question concerning the construction of that statute determined by the court." *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 935, 121 P.3d 95 (2005) (citing *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004)), *aff'd*, 160 Wn.2d 173, 157 P.3d 847 (2007). Stenson's dispute with DOC is ongoing; he has a substantial interest in preventing his execution with illegally-acquired and illegally-dispensed drugs; and his claim involves the narrow and discrete issue of the legality of DOC's actions in acting without a prescription. Stenson therefore has presented a justiciable controversy under the UDJA. *See Branson*, 152 Wn.2d at 877.

Further, the court's determination that Stenson could not proceed

[28] The controlled substances acts require a validly issued prescription for the dispensing and administering controlled substances. *See* 21 U.S.C. §§ 812(c), 829(b) ; RCW 69.41.030, 69.50.308(d); *see also* 21 U.S.C. § 842(a)(1), 842(c) ; RCW 69.50.402, 69.41.010(12); WAC 246-905-020, 246-883-020. Other states have created statutory exceptions from drug laws for executions. *E.g.*, O.R.S. § 137.473.

under the CSA was error. In finding that Stenson had no right of action under the CSA, the court relied on a subsection entitled "State Cause of Action Pertaining to *Online Pharmacies*," Pub. L. 110-425 § 3(h), 122 Stat. 4830 (enacted Oct. 25, 2008) (emphasis added), that applies *only* to controlled substances dispensed online. 21 U.S.C. § 882(c)(5) ("No private right of action is created under this subsection."). Congress clearly intended to retain the private right of action expressly permitted in the rest of the subchapter, which permits courts to "enjoin violations of this subchapter." 21 U.S.C. § 882(a). It *only* expressly denied a private right of action under the online pharmacy provision (subsection (c)), which is not at issue here. *See e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 20, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (applying principle of *expression unius est exlusion alterius* to conclude that rule in statute's subsection does not apply to the rest of statute); *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (the absence of language used in one clause from the remainder of the statute is intentional).[29]

F. The Court Erred in Awarding Transcript Costs

RCW 4.84.010(7) permits deposition costs to a prevailing party

[29] The court's reliance on *McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 787 (S.D.W.Va. 2001), is misplaced. In *McCallister*, plaintiffs challenged removal of state action for *damages*. The court concluded that removal would be appropriate only if the CSA preempted state law. *Id.* at 792. Because CSA jurisdiction is limited to claims for *injunctive* relief, not suits for damages, the court concluded that it did not preempt the claim for damages. Stenson does not seek damages, only injunctive relief, and *McCallister* does not apply.

only if (1) that party used depositions at trial "necessary to achieve the successful result," and even then, only (2) on a pro rata basis for the portions used. DOC did not use *any* deposition testimony in either its case or to impeach Stenson's witnesses; it made only minor cross designations to testimony of Patricia Rima, which the court did not rely on. DOC fails to meet both prerequisites for recovering costs under RCW 4.84.010(7), and the award of costs should be vacated.

V. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Stenson asks this Court to hold, as a matter of law, that the 2008 Protocol violates the Eighth Amendment and article 1, section 14 of the Washington Constitution. In the alternative, Stenson asks that this Court remand to the lower court for further proceedings, including discovery related to prior execution team members and prior executions, and a new trial with all relevant evidence, once a lethal injection team is assembled and capable of being reviewed, and applying the proper federal and state standards of review. Plaintiff also requests reinstatement of Count III of his amended complaint and vacation of the award of costs.

RESPECTFULLY SUBMITTED this 24th day of December, 2009.

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CERTIFICATION OF SERVICE

This certifies that on December 24, 2009, I caused a true and correct copy of the foregoing Opening Brief of Darold R.J. Stenson to be served by mail on the following counsel of record at the stated addresses:

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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 December 24, 2009.

Diane M. Meyers
Diane Meyers

No. 83828-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

DAROLD R. J. STENSON, CAL COBURN BROWN,
and JONATHAN GENTRY

Petitioners-Plaintiffs,

v.

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

Respondents-Defendants.

THIS IS A CAPITAL CASE

APPENDIX IN SUPPORT OF OPENING BRIEF

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Exhibit 1

West's Revised Code of Washington Annotated Currentness
Title 10. Criminal Procedure (Refs & Annos)
Chapter 10.95. Capital Punishment--Aggravated First Degree Murder (Refs & Annos)
→ 10.95.180. Death penalty--How executed

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

CREDIT(S)

[1996 c 251 § 1; 1986 c 194 § 1; 1981 c 138 § 18.]

Current with all 2009 legislation

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Exhibit 2

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS	APPLICABILITY **PRISON**		
	REVISION DATE 10/25/08	PAGE NUMBER 1 of 12	NUMBER DOC 490.200
POLICY	TITLE **CAPITAL PUNISHMENT**		

REVIEW/REVISION HISTORY:

Effective: 9/3/93
Revised: 6/15/98
Revised: 8/10/01
Revised: 6/21/07
Revised: 10/25/08

SUMMARY OF REVISION/REVIEW:

Title and Team Name changes throughout
I.A.1., II.C. & VIII.A.1., & VIII.C.2. – Added clarifying language
III.B.3. – Added requirements for ISDP incoming mail
III.B.4.b. & 5.b. – Added clarifying language regarding attorney of record
Revised IV.A.1. to specify a single media event
Added IV.B.1. & DOC 21-575 Acknowledgment of Visitor Search Requirements for searches of media representatives
Revised V.F. regarding search requirement for witnesses
VI.C. – Revised housing requirements for female ISDP
VIII.A.2. – Added requirement for 3 practice sessions for lethal injections
VIII.B. – Removed medical file review; revised physical examination requirement
IX.A.1.d. – Added that Lethal Injection Team members must be trained; added qualifications
IX.A.2.a. – Changed Director of Health Services to Superintendent
IX.A.4.b. & d. – Revised requirements for lethal injection
IX.A.4.h. – Removed requirement that Lethal Injection Team remove apparatus and saline
X.A. – Calls to Headquarters will be made to the Department Emergency Operations Center
X.F. – Removed requirement that Death Certificate be signed before removal of body
Several changes to Attachment 1

APPROVED:

Signature on File

ELDON VAIL, Secretary
Department of Corrections

10/23/08
Date Signed

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS	APPLICABILITY PRISON		
	REVISION DATE 10/25/08	PAGE NUMBER 2 of 12	NUMBER DOC 490.200
POLICY	TITLE CAPITAL PUNISHMENT		

REFERENCES:

DOC 100.100 is hereby incorporated into this policy; RCW 10.95.160-190; WAC 137-48-050; DOC 410.040 Incident Command System (ICS)

POLICY:

I. The Department has established procedures governing capital punishment to meet the requirements of RCW 10.95.160-190. These procedures set forth:

A. Security requirements for an Inmate Subject to the Death Penalty (ISDP),
B. Protocol for conducting an execution,
C. The care provided the ISDP while a valid Death Warrant is in force, and
D. The method of execution by lethal injection or hanging.

II. The Department Secretary designates the Assistant Secretary for Prisons to coordinate:

A. The responsibilities of the Washington State Penitentiary (WSP) Superintendent, and

B. A review of the procedures and all operational decisions in carrying out the execution, as well as the legal status of the Death Warrant.

DIRECTIVE:

I. ISDP Housing

A. Upon receipt of an ISDP and prior to receipt of a Death Warrant:

1. Male ISDPs shall be housed in a single person cell located in a segregated area of WSP.

2. Female ISDPs shall be housed in a segregated area of the Washington Corrections Center for Women (WCCW). Prior to the execution date, the female ISDP will be transported to WSP for housing and execution.

II. Pre-Execution Procedure

A. Consistent with RCW 10.95.190, a log shall be maintained with the Death Warrant in the Superintendent's Office.

B. Responsibilities are listed in the Execution Procedures and Assignments Checklist (Attachment 1).

C. Only staff assigned by the Superintendent will attend the execution. No facility staff will be required to participate in any part of the execution procedure.

III. Notification to ISDP

A. After receiving confirmation of a valid Death Warrant, the Superintendent will designate an Associate Superintendent to personally interview the ISDP regarding procedures relating to the execution.

B. The Associate Superintendent will provide the ISDP with a written summary of procedures, to include mail, visits, telephone usage, and available religious services. The ISDP will be informed of the following:

1. The date of the execution.

2. The punishment of death shall be by lethal injection.

   a. The ISDP may elect hanging as an alternate means of execution.

   b. The procedure to be used will be determined 14 days prior to the execution and the method cannot be changed after that date. If the ISDP elects hanging, it must be stated in writing no later than 14 days prior to the execution date.

3. Mail procedures for an ISDP with an active Death Warrant will be as follows:

   a. The Mail Room Sergeant will be instructed, in writing, to forward all incoming mail, unopened, to the designated Associate Superintendent, who will screen and exclude any items which may threaten the order and security of the facility with regard to the ISDP.

      1) Mail intended to harass the ISDP will be considered a threat to the orderly operation of the facility and restricted per WAC 137-48-050.

      2) Legal mail will be screened, not read.

   b. The Mail Room Sergeant will maintain a log of all incoming and outgoing mail, noting the date and time of receipt and delivery. A separate log will be maintained for all legal mail.

4. All visits between the ISDP and authorized visitors will be no contact.

a. Visitation for an ISDP will be consistent with the visiting procedures of other offenders housed in the Intensive Management Unit (IMU).

b. Seven days prior to the execution, daily visits will be authorized in addition to visits with the attorney of record.

c. Twenty-four hours prior to the execution date, all visits and visitors require the approval/denial of the Superintendent.

d. After the ISDP is moved to the execution holding cell, visits will be restricted to approved clergy and the attorney of record.

5. The ISDP will have unlimited phone access during the daily yard period. Fourteen days prior to the execution date, an additional daily one hour yard will be provided.

a. There will be no limit on the number or duration of calls to and from the attorney of record.

b. Only calls from the attorney of record will be authorized following transfer to the execution holding cell.

IV. Media Relations

A. The Superintendent/designee will coordinate all requests for information concerning an execution.

1. A single event to provide representatives of major and local media an opportunity to access the chamber will be authorized by the Superintendent and coordinated by designated staff.

B. The Superintendent will establish procedures for selecting media witnesses as specified in the Witness Selection section of this policy.

1. No audio/electronic/video equipment, cameras, telephones, or recording/communication devices will be permitted in the chamber. Media witnesses will be subject to an electronic and pat search. Written consent for search will be required using DOC 21-575 Acknowledgment of Visitor Search Requirements.

2. The only items that are allowed in the chamber are pens, pencils, and writing tablets supplied by the facility.

C. Requests from media representatives for access to the Information Center must be submitted in writing.

1. Information Center access will not be permitted more than 3 hours prior to an execution.

D. Media access to a designated area of the facility parking lot will be permitted at a designated time the day prior to the execution.

E. Media will not be permitted to film or conduct interviews with facility staff without the prior authorization of the Superintendent/designee.

F. All normal facility security procedures will apply. Failure to comply with these procedures, Department policies, operational memorandums, or directions from authorized personnel may be cause for removal from the facility and/or facility grounds. The Superintendent may establish emergency rules and procedures.

V. Witness Selection

A. Not less than 20 days prior to an execution, individuals who wish to attend and witness the execution must submit a letter of request (e.g., application) to the Superintendent. The letter must designate the relationship to the ISDP and reason(s) for wishing to attend. Eligible individuals include:

1. Judicial officers (i.e., the Judge who signed the Death Warrant for the ISDP, the current Prosecuting Attorney or a Deputy Prosecuting Attorney of the county from which the final Judgment and Sentence and Death Warrant were issued, and the most recent attorney of record representing the ISDP),

2. Law enforcement representatives (i.e., officers responsible for investigating the crime for which the inmate was sentenced to death),

3. Media representatives,

4. Representatives of the families of the victims (i.e., immediate family or victim advocates of the immediate family), and

5. Representatives from the ISDP's immediate family.

B. Not less than 15 days prior to the execution, the Superintendent shall determine the total number of individuals, other than Department employees, who will be allowed to attend and witness the execution.

1. The Superintendent shall determine the number of witnesses allowed in each category of eligible individuals.

a. No less than 5 media representatives will be included, with consideration given to news organizations serving communities affected by the crimes or the execution.

b. Up to 2 law enforcement representatives will be included. The chief law enforcement officer of the jurisdiction where the crime was committed shall designate the law enforcement representatives.

2. Once the list is composed, the Superintendent shall serve the list on all parties who have submitted a letter (e.g., application) to witness the execution.

C. Not less than 10 days prior to the execution, the Superintendent shall file the witness list with the Superior Court from which the conviction and Death Warrant were issued. The witness list will be filed with a petition asking that the court enter an order certifying the list as a final order identifying the witnesses to attend the execution. The final order of the court certifying the witness list shall not be entered less than 5 days after the filing of the petition.

D. Unless a show cause petition is filed with the Superior Court from which the conviction and Death Warrant were issued within 5 days of the filing of the Superintendent's petition, the Superintendent's list, by order of the Superior Court, will become final and no other party will have standing to challenge its appropriateness.

E. In no case may the Superintendent or the Superior Court order or allow more than 17 witnesses to a planned execution, excluding required staff.

F. All witnesses must adhere to the facility's search and security provisions in regards to witnessing an execution and may be subject to emergency rules and procedures. Written consent for search will be required using DOC 21-575 Acknowledgment of Visitor Search Requirements.

VI. Execution Holding Cell

A. Prior to the execution, but no sooner than 24 hours before, the ISDP will be moved to the execution holding cell.

B. The holding cell will contain:

1. Bedding that includes a mattress, 2 sheets, 3 blankets, a pillow, and a pillow case,

2. Personal hygiene items that include 2 towels, a washcloth, and a bar of soap,

3. Approved personal items and clothing that include underwear, facility clothing, legal materials, religious items, jewelry, or other personal items as requested by the ISDP and approved by the Superintendent, and

4. Other personal items as requested by the ISDP and approved by the Superintendent to be retained by holding cell staff and issued as requested by the ISDP.

C. A female ISDP may be housed in the WSP Intensive Management Unit (IMU) prior to being moved to the execution holding cell.

D. Two correctional staff will be posted at the holding cell at all times and a complete log of activities will be maintained.

VII. Final Meal

A. At the meal period just prior to the time of execution, the ISDP will be allowed to provide his/her meal selection from a menu prepared and provided by the Food Service Manager. The Food Service Manager will ensure preparation and delivery of the meal to the ISDP.

VIII. Execution Preparation

A. The Superintendent will appoint individuals to support the execution process.

1. No staff will be required to participate in any part of the execution procedure.

2. Briefings and rehearsals will be conducted as necessary to ensure adequate preparation for the execution. For an execution by lethal injection, there shall be a minimum of 3 practice sessions preceding an execution that shall include the siting of intravenous (IV) lines.

B. Medical Review

1. A physical examination of the ISDP may be conducted to determine any special problems (e.g., collapsed veins, obesity, deterioration of bone or muscular structure) that may affect the execution process. The ISDP's height and weight will be measured during the examination.

2. Based upon the physical examination, the Superintendent may consult with appropriate experts to determine whether deviation from the policy is advisable to ensure a swift and humane death.

C. Crowd Control

1. The Superintendent will notify law enforcement agencies of the date of execution, enabling them to prepare for any traffic and crowd control issues that may arise.

2. Prior to the execution, the Superintendent will hold briefings for local and state law enforcement agencies to determine the manner and extent to which WSP and Department resources will support law enforcement in managing crowd control and potential external threats.

3. An area(s) will be designated for the general public.

4. The WSP Emergency Response Team (ERT) will provide crowd control for the protection of the WSP grounds.

   a. The ERT Commander(s) will be briefed by the Superintendent prior to the execution.

   b. In the event that protesters and/or onlookers gather, law enforcement assistance will be requested to direct them to the designated area.

IX. Execution Procedure

A. Lethal Injection

1. Lethal Injection Materials/Personnel

   a. All tubing, syringes, saline solution, and other apparatus will be on site and verified no later than 7 days prior to the execution.

   b. The Superintendent will direct the acquisition of the appropriate quantities of lethal substances. These will be available and on site 7 days prior to the execution date.

   c. The Superintendent will ensure the security and continued verification of all materials.

   d. Lethal Injection Team members will have sufficient training or experience to carry out the lethal injection process without any unnecessary pain to the ISDP. Minimum qualifications include one or more years of professional experience as a certified Medical Assistant, Phlebotomist, Emergency Medical Technician, Paramedic, military corpsman, or similar occupation.

2. Lethal Injection Table

a. The Superintendent, in conjunction with the Plant Manager, will examine and verify that the lethal injection table is in working order with all restraints available.

3. Preparation of the Execution Area

a. The Lethal Injection Team will inspect the area designated for lethal injection and make any final recommendations to the Superintendent.

b. The Lethal Injection Team will assemble all necessary materials for transport to the chamber no less than one hour prior to the time of execution. The Lethal Injection Team Leader will secure the lethal substances and personally transport them to the chamber.

c. The solutions for injection will be prepared not more than 30 minutes prior to administration.

4. Execution Process

a. The Superintendent will direct that the ISDP be brought to the chamber. The Escort Team will place the ISDP on the lethal injection table and appropriately secure the ISDP to the table. The Escort Team will then leave the room.

b. The Lethal Injection Team will establish 2 IV lines and start a normal flow of saline through each line. The Lethal Injection Team will ensure that a slow, normal saline flow is maintained through each line.

c. The Superintendent will ask the ISDP if s/he has any last words.

d. Upon notification from the Superintendent, the Lethal Injection Team will introduce the following lethal solutions using a bolus injection into the tubing in the order specified:

1) 3 g thiopental sodium
2) 50 cc normal saline
3) 100 mg pancuronium bromide
4) 50 cc normal saline
5) 240 mEq potassium chloride (KCl)

e. Either line may be used for injection of solutions as required. The Superintendent shall observe the ISDP for signs of consciousness before the Lethal Injection Team administers the pancuronium

bromide. If the Superintendent observes that the ISDP is conscious following the first dose of thiopental sodium, s/he shall direct the Lethal Injection Team to administer an additional 3 g dose of thiopental sodium.

f. The Lethal Injection Team Leader will signal the Superintendent when all of the solutions have been administered.

g. At a time deemed appropriate by the Superintendent, the curtains will be closed. The Superintendent will call for the physician to examine the body and make a pronouncement of death.

h. After the pronouncement of death, the Lethal Injection Team will remain in the area until directed to leave.

i. Post-execution procedures will be followed.

B. Hanging

1. The gallows area trap door(s) and release mechanisms will be inspected for proper operation.

2. A determination of the proper amount of drop of the ISDP through the trap door will be made. The following standard military execution drop chart will be used:

WEIGHT (Pounds)	DROP DISTANCE
120	8'1"
125	7'10"
130	7'7"
135	7'4"
140	7'1"
145	6'9"
150	6'7"
155	6'6"
160	6'4"
165	6'2"
170	6'0"
175	5'11"
180	5'9"
185	5'7"
190	5'6"
195	5'5"

200	5'4"
205	5'2"
210	5'1"
220 and over	5'0"

3. Equipment

   a. Hood – The hood will be a neutral color with an outer surface made of rough material, split at the open end so that it will come down over the chest and back.

   b. Collapse Board – A board will be provided for use in case the ISDP collapses.

   c. Restraints – Restraints will be used to ensure that the hands and arms of the ISDP are securely held to his/her front and sides.

   d. Rope –The rope will be manila hemp, at least ¾ inch and not more than 1¼ inches in diameter and approximately 30 feet in length. The rope will be soaked and then stretched while drying to eliminate any spring, stiffness, or tendency to coil. The knot will be treated with wax, soap, or clear oils ensuring a smooth sliding action through the knot. The knot will be tied according to Army regulations.

4. Execution Process

   a. Restraints will be placed on the ISDP by assigned staff.

   b. The Escort Team will escort the ISDP to the gallows area. The ISDP will be placed, standing, in the spot designated by the Superintendent. The Superintendent will ask the ISDP if s/he has any last words.

   c. The hood will be placed on the ISDP and leg restraints applied. If a collapse board appears to be necessary, the Escort Team will put the board in place.

   d. The noose will be placed snugly around the ISDP's neck in such a manner that the knot is directly behind the left ear.

   e. The Superintendent will direct the trapdoor be released.

   f. The Escort Team will move to the lower floor location to assist with removal of the deceased ISDP. The curtains will be closed.

g. At a time deemed appropriate by the Superintendent, the physician will be called to make a pronouncement of death.

X. Post-Execution Procedure

A. The Assistant Secretary for Prisons will notify the Secretary and Incident Command Center of the time of death. Necessary calls to Headquarters will be made to the Department Emergency Operations Center.

B. The Superintendent will inform a designated staff of the time of death, who will then inform the witnesses.

C. The witnesses will be escorted out of the execution area immediately after the pronouncement of death.

D. The media witnesses will be escorted to the Information Center.

E. The Chaplain will provide official notification to the family of the time of death.

F. The body will be removed from the facility by a pre-determined route.

G. A post-trauma specialist and the Chaplain will be available to staff preceding, during, and after the execution. Staff will also be provided a confidential list of off-site locations where counseling and/or spiritual support will be available.

H. Within 20 days after the execution, the Superintendent shall return the Death Warrant to the clerk of the trial court from which it was issued, along with the log identified in the Pre-Execution Procedure section of this policy.

DEFINITIONS:

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.

ATTACHMENTS:

Execution Procedures and Assignments Checklist (Attachment 1)

DOC FORMS:

DOC 21-575 Acknowledgment of Visitor Search Requirements

DEPARTMENT OF CORRECTIONS
WASHINGTON STATE PENITENTIARY
EXECUTION PROCEDURES AND ASSIGNMENTS CHECKLIST

Inmate:

Date of Execution:

DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
Compliance Date: Approximately 30 days prior to the scheduled execution		
	Superintendent appoints an Execution Incident Commander.	
	Execution Incident Commander determines the Incident Command System (ICS) objectives, strategies, tactical direction, and organizational structure needed for the execution event and identifies planning elements required.	
	Execution Incident Commander develops a draft Incident Action Plan (IAP) for the execution and submits to the Superintendent for approval. The IAP will contain, at a minimum, all elements identified in this checklist.	
	ISDP is informed of the statutory requirements regarding the method of execution and is advised the Superintendent will request s/he submit his/her election of alternate method in writing.	
	ISDP is given opportunity to designate family members as witnesses.	
	ISDP has been provided a written summary of the procedures governing mail, visitation, telephone use, and available religious services.	
	Mail Room Supervisor is informed, in writing, of the ISDP's name and execution and instructed that: ☐ All incoming mail addressed to ISDP will be forwarded unopened to a designated Associate Superintendent ☐ A log will be maintained of all incoming/outgoing mail noting date and time of receipt and distribution ☐ A separate log will be maintained for legal mail	

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DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
	The facility Public Information Officer has been informed of scheduled date and directed to prepare a media plan.	
	The Intensive Management Unit (IMU) Manager has been informed of mail, visit, telephone use, and available religious services as they apply to the ISDP.	
	ISDP is placed on 30 minute check. Observed behavior is entered in designated log.	
	Chaplain is assigned as Religious Specialist and briefed.	
	Sources and procedures for acquiring the substances necessary for lethal injection have been investigated. Plans being made for acquiring all necessary equipment essential to carry out either mode of execution.	
	Coordination meeting with local law enforcement is scheduled.	
	Lethal Injection Team or Hanging Team, as necessary, is identified and notified.	
	Individuals eligible to witness execution are identified. Appropriate letters sent.	
Compliance Date: Not less than 20 days prior to the execution		
	Superintendent completes changes to IAP and returns to the Execution Incident Commander.	
	Staff assigned an organizational role within the ICS structure are identified and briefed.	
	ICS organization completes identified planning elements, required forms, and documentation for the IAP.	
	Letters received from potential witnesses have been processed.	

DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
	The chamber has been inspected to ensure the following systems are functional: ☐ Plumbing ☐ Lighting ☐ Emergency Lighting ☐ Mechanical Systems ☐ Locking Systems ☐ Telephones ☐ Sanitation ☐ Furnishings ☐ Toilet Facilities	
	Execution Incident Commander ensures all staff assigned to positions within the chamber receive a briefing and notification of the date and time of "on-site" rehearsal.	
	Execution Incident Commander ensures a written report detailing the condition of the chamber has been submitted to the Superintendent citing any deficiencies. A schedule of corrective actions will be provided.	
Compliance Date: 15 days prior to the execution		
	All changes, improvements, or renovations to the chamber have been completed.	
	Total number of individuals to attend/witness the execution, other than staff, has been identified.	
	Witness applicants have been notified of the final witness list.	
Compliance Date: 14 days prior to execution		
	ISDP is authorized one additional hour of yard time each day.	
	ISDP is provided final opportunity to choose alternate method of execution.	
	All equipment has been procured for either mode of execution.	
	Notification to staff/ISDP for program changes if needed (e.g., visiting, etc.).	
	Arrangements made to ensure Death Certificate will be available. Superintendent is advised.	
Compliance Date: Not less than 10 days prior to the execution		

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DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
	List of authorized witnesses is filed with Superior Court in county of conviction from which Death Warrant issued.	
	Physical examination is conducted, if needed.	
	The following have been checked: ☐ All equipment required for lethal injection ☐ All equipment required for hanging, if necessary.	
	Conduct at least 3 lethal injection practice sessions, if necessary, including siting of IV lines.	
	Gallows area trap door(s) and release mechanisms are inspected for proper operation, if necessary.	
	Proper amount of drop of ISDP through the trap door is determined, if necessary.	
	IAP specifically details crowd control strategies and tactics and identifies the operational supervisor/leader.	
Compliance Date: 7 days prior to the execution		
	Execution Incident Commander submits final IAP to the Superintendent and receives signature approval.	
	ISDP is authorized daily visits (in addition to with attorney of record).	
	Instructions are provided to staff on entrance and egress routes.	
	Mobile restroom facilities are placed in the designated demonstration area.	
	Post-execution handling of ISDP is coordinated.	
	Lethal solutions, if required, have been obtained and placed in security lock box.	
	The specific route and mode of body removal is determined and information transmitted to: ☐ Superintendent ☐ Execution Incident Commander ☐ Captain ☐ Shift Commander ☐ Washington State Patrol	
	Menu for final meal is prepared and presented to Superintendent for approval.	
Compliance Date: Approximately 5 days prior to the execution		

DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
	On-site rehearsal has been conducted with all Execution Event staff participating.	
	The holding cell area has been inspected and is ready for occupancy.	
	Security inspections of the entire chamber have been conducted.	
	The holding cell is prepared and equipped with: ☐ 1 Mattress ☐ 2 Sheets ☐ 3 Blankets ☐ 1 Pillow ☐ 1 Pillowcase ☐ 2 Towels ☐ 1 Washcloth ☐ 1 Bar of Soap	
	Chamber and all systems have been checked for operation and readiness. All equipment present and functional.	
	Notices are issued to any contract/volunteer staff and/or construction workers of planned suspension of their activities.	
	Arrangements for Death Certificate are confirmed and communicated to the Superintendent/Execution Incident Commander.	
Compliance Date: Approximately 4 days prior to the execution		
	Coordination briefings with local law enforcement agencies have been conducted.	
	All staff assignments made: ☐ Chamber Security Team ☐ Correctional Program Managers ☐ Captain ☐ Chamber Media Escort Team ☐ Visiting Room Media Monitor ☐ Chaplain ☐ Transport/Restraining Team ☐ Holding Cell Security Team ☐ Health Care Manager 2 ☐ Incident Command Post Staff (Security/Communication) ☐ Specialty Team Group Supervisor/ERT Leader ☐ Specialty Team Group Supervisor/SERT Leader	

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DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
	Staff escorts assigned for all non-WSP individuals attending.	
Compliance Date: 24 hours prior to execution		
	Superintendent approves all visitors.	
	ISDP is requested to designate disposition of his/her property/remains in writing.	
	A thorough security inspection of the entire chamber area, including search of cells, has been conducted.	
	Clocks are coordinated.	
	ISDP is moved from IMU to holding cell. Visitors limited to approved clergy and attorney of record.	
	Upon arrival at the holding cell, ISDP is informed of conditions of confinement.	
	The IAP is initiated and Incident Command Post opened and staffed.	
	Main facility is briefed at roll call of extraordinary security measures.	
	A designated staff to operate PBX reports for work.	
Execution Day		
	Chamber Access Security Team (Shift A) reports to duty station in chamber.	
	Cell Security Team (Shift A) reports to duty station in chamber.	
	Lethal solutions, if needed, are transferred to the injection room in the chamber.	
	Final meal is prepared and served to ISDP.	
	Chamber Access Security Team Shift B relieves Shift A.	
	Cell Security Team Shift B relieves Shift A.	
	Authorized media representatives are allowed access to the facility and are briefed by the Superintendent/designee.	
	All witnesses have been assigned escorts and allowed access to the facility.	
	All traffic through information desk area, visitor tunnel is cleared.	
	All staff designated as participants are at duty stations in the chamber.	

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DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
	Department Secretary has been contacted by telephone from the Incident Command Post/Communications Center and an open line from the Department Emergency Operations Center to the chamber is established.	
	Incident Command Post/Communications Center contacts the Attorney General's Office by telephone and maintains an open line.	
	Lethal Injection Team enters and the equipment for injection mode and back-up equipment is tested, if necessary.	
	Hanging Team enters the gallows area and the equipment and back-up equipment is tested, if necessary.	
	Open line participants verify and concur no stay has been received. The time is _____ or later and the execution is to proceed.	
	Superintendent is in place in chamber.	
	ISDP is placed in restraints and escorted to the appropriate execution area.	
	All pre-execution preparations are completed. All participants are in place.	
	Assistant Secretary confirms that no stays have been granted.	
	Assistant Secretary informs Superintendent that there are no stays.	
	Superintendent signals the execution to proceed.	

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Exhibit 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DAROLD R.J. STENSON, Plaintiff, v. ELDON VAIL, et al. Defendants.	No.08-2-02080-8 DECISION OF THE COURT
CAL COBURN BROWN and JONATHAN GENTRY, Plaintiffs, v. ELDON VAIL, et al. Defendants.	No. 09-2-00273-5 (consolidated with 08-2-02080-8) DECISION OF THE COURT

This matter came before the Court for trial on May 26, 2009. Closing argument was on June 2. The Court is today entering separately Findings of Fact and Conclusions of Law. The Decision of the Court follows.

Background

This is a civil action brought by three inmates awaiting imposition of sentence of death at the Washington State Penitentiary. The three cases have been consolidated for purposes of trial and stays of execution have been entered by other courts while this matter is resolved. All plaintiffs have exhausted all criminal appeals of their convictions and sentences. Plaintiffs are not challenging the death penalty statute, the constitutionality of the death penalty, or the legality of lethal injection as a means of execution. Instead, Plaintiffs allege that the method of administering lethal injection in the State of Washington subjects them to cruel and unusual punishment under the Eighth Amendment to the United States Constitution and to cruel

punishment in violation of Article I, Section 14 of the Washington Constitution. A four day trial has been held in which the parties have presented evidence about the method of administering lethal injection in Washington and the likelihood that plaintiffs will suffer some form of harm as a result of misadministration of the death penalty.

United States Constitutional Claims

This case parallels *Baze v Rees*, ___ US ___, 128 S. Ct. 1520 (2008), in which the Kentucky method of lethal injection was challenged in a civil proceeding. The plurality opinion in that case was written by Chief Justice Roberts. The Court upheld the constitutionality of Kentucky's protocol. Excerpts of the Chief Justice's opinion that are relevant to this proceeding include the following:

> "... A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States. It is also the method used by the Federal Government....
>
> "Of these 36 States, at least 30 (including Kentucky) use the same combination of three drugs in their lethal injection protocols.... The first drug, sodium thiopental ... is a fast-acting barbiturate sedative that induces a deep, coma-like unconsciousness when given the amounts used for lethal injection... The second drug, pancuronium bromide ... is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration.... Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.... The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs...." 128 S. Ct. 1520, 1527.

In Washington, the Superintendent of the Washington State Penitentiary, Stephen Sinclair, is charged with supervising the punishment of death. RCW 10.95.180. Washington uses a three drug combination similar to Kentucky for lethal injection. The Washington protocol is set forth at DOC 490.200 (Exhibit 1) and is patterned after the Kentucky protocol that passed review by the Supreme Court. Plaintiffs claim that Washington is not capable of administering the three drugs such that Plaintiffs will not be subject to "cruel and unusual" pain.

Chief Justice Roberts, in the plurality opinion of *Baze v Rees*, wrote on this subject as follows:

> "The Eighth Amendment to the Constitution ... provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted... 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....
>
> "This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.... In *Wilkerson v Utah* [a case upholding death by firing squad]... the Court cited cases from England in which 'terror, pain, or disgrace were sometimes superadded' to the sentence, such as where the condemned was 'embowelled alive, beheaded, and quartered,' or instances of 'public dissection in murder, and burning alive.'.... What each of the forbidden punishments 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." 128 S. Ct. 1520, 1529-1530.

As in this case, the Plaintiffs in v *Baze v Rees* were not claiming that lethal injection or the proper administration of the particular protocol

adopted in Kentucky would subject them to cruel and unusual punishment. Rather, the claim was that there is a significant risk that the procedures will not be properly followed, resulting in severe pain.

The Chief Justice in *Baze* discussed this claim as follows:

> "Simply 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....
>
> "... In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure gives rise to a 'substantial risk of serious harm.'
>
> "Much of petitioners' case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures....
>
> "Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures.... Accordingly, we reject petitioners' proposed 'unnecessary risk' standard as well as the dissent's 'untoward' risk variation....
>
> "Instead, the proffered alternatives must effectively address a 'substantial risk of serious harm.' ... To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment....

> "We agree with the state trial court and State Supreme Court, however, that petitioners have not shown that the risk of an inadequate dose of the first drug is substantial. And we reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified....
>
> "...A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. *A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.*" 128 S. Ct. 1520, 1531-1537. [emphasis added]

As noted earlier, the Washington protocol was amended in 2008 after the *Baze* decision to follow the Kentucky protocol. The evidence presented at trial established some minor variations from Kentucky: e.g. the length of the tubing, the location of the injection team, the amount of sodium thiopental, the number of practice sessions for the team. Granting relief on this level of evidence places the Court in the role of a board of inquiry, as the Chief Justice warned. This Court finds that the Washington protocol is "substantially similar" to the Kentucky protocol and therefore does not result in cruel and unusual punishment under the Eighth Amendment.

Washington Constitutional Claim

The claim Petitioners present under the Washington Constitution is essentially the same claim as presented under the United States Constitution. Petitioners argue that the Washington Constitution requires a different result because the standard for a constitutional violation is different.

Article I, Section 14 of the Washington Constitution provides that:

> Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

The cases interpreting this provision largely predate the case of *State v Gunwall*, 106 Wn.2d 54 (1986) and so do not apply the criteria prescribed in that case for determining if the Washington Constitution should be considered as extending broader rights to its citizens than does the United States Constitution. Justice Sanders, however, in his dissent in *State v Rivers*, 129 Wn.2d 697 at 733 (1996), did apply the analysis. In so doing he considered the differences between the state and federal language, a *Gunwall* factor:

> "Cruel and unusual" is relative, defined by comparing it to others. Cruel without unusual, on the other hand, requires a more absolute definition." *State v Rivers*, 129 Wn. 2d 697, 733.

In reviewing the textual language (a *Gunwall* factor) he went on to explain that "cruelty was generally understood to encompass two elements: (1) punishment beyond that which is necessary and (2) absence of mercy." 129 Wn.2d 697, 723.

In *State v Fain*, 94 Wn.2d 387 (1980), the Court did consider the differences in language between the state and federal provisions and the constitutional and common law history:

> "Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation." 94 Wn.2d 387,
>
> "The historical evidence reveals that the framers of Const. art. I, Sec. 14 were of the view that the word "cruel" sufficiently expressed their intent, and refused to adopt an amendment inserting the word "unusual". 94 Wn.2d

It seems clear, then, that Washington could extend broader protection to inmates under a *Gunwall* analysis than the United States Constitution provides. But in order to do so, the Court would need to find a meaningful difference between the intent of "cruel" as used by the framers of the Washington Constitution and "cruel and unusual" as used by the framers of the United States Constitution. Accepting Justice Sanders' understanding of "cruel" as an absolute term, the Roberts test of "a demonstrated risk of severe pain ... [the risk of which] is substantial when compared to the known and available alternatives" would be objective enough to provide an absolute standard as to what method of execution would rise to the level of "cruel". The fact that other states might use more or less humane methods would be irrelevant, under this analysis.

In previous decisions, the Washington Supreme Court has found death by hanging is not cruel punishment. *State v Frampton*, 95 Wn.2d 922 (1981). The Court made this finding despite evidence of hangings which had caused extreme pain and extended suffering.

In that case, Justice Rossellini remarked:

> "It is for the legislature, as the prescriber of the punishment for crime, to determine what method shall be used, in the absence of a definitive showing that unnecessary cruelty is involved. There is no such showing here." 95 Wn.2d 512

And Justice Stafford went further:

> "A law should not be declared unconstitutional just because one does not like it. It is only when a statute contravenes a constitutional provision or principle that it must be invalidated. "The majority say hanging is cruel and unusual punishment because it offends civilized standards of decency. This is purely subjective reaction, however. The legislature is mentally and morally as well attuned as the members of this court to

> precisely determine the point at which civilization is in the 'evolving standard of decency' or where such punishment fits in. In a case such as this wherein wholly subjective observations and reasoning are involved, we should defer to the legislature's judgment. The legislature is, after all, the body most closely representative of the people whose standards of decency are said to be impacted." 95 Wn.2d 478, 514.

At trial, Plaintiffs presented no evidence that Defendants intended to impose punishment that was "cruel". The procedure to be used by Defendants, although not fail-safe, appears to have been designed to administer the death penalty in a way that is humane for both the inmate and the observers. It is an attempt to provide some dignity to this most grave event. Accordingly, this Court cannot find that the Washington protocol as implemented by the State is "cruel" under the Washington Constitution. Petitioners' claims are denied.

DATED THIS 10TH DAY OF JULY, 2009

CHRIS WICKHAM
Judge, Thurston County Superior Court

Exhibit 4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DAROLD R.J. STENSON, Plaintiff, v. ELDON VAIL, et al. Defendants.	No.08-2-02080-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW
CAL COBURN BROWN and JONATHAN GENTRY, Plaintiffs, v. ELDON VAIL, et al. Defendants.	No. 09-2-00273-5 (consolidated with 08-2-02080-8) FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Based upon the evidence presented at trial, the Court finds as follows:

1. Plaintiffs Stenson, Brown and Gentry are inmates subject to the death penalty, as that phrase is used by the Department of Corrections (DOC), because they have been convicted and sentenced to death..
2. Washington's current lethal injection protocol is set forth in DOC Policy 490.200, Capital Punishment, effective October 25, 2008, admitted as Plaintiff's Exhibit 1.
3. Washington's protocol requires that the minimum qualifications for members of the lethal injection team "include one or more years of professional experience as a

certified Medical Assistant, Phlebotomist, Emergency Medical Technician, Paramedic, military corpsman, or similar occupation." Members of Kentucky's team "must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. App 984. Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population.... 128 S. Ct. 1520, 1533. The Washington Superintendent testified that he would seek to use individuals with current IV experience.

4. Washington's protocol requires that IV team members and the rest of the execution team shall have a minimum of 3 practice sessions preceding an execution that shall include the siting of intravenous (IV) lines. Superintendent Sinclair testified that in one or more of these practice sessions he volunteered to have the IV line sited in him. In addition, the Superintendent testified that when implementing the Washington protocol he intends to have the lethal injection team engage in more than the minimum number of practice sessions. The Kentucky protocol requires IV team members, along with the rest of the IV team, participate in at least 10 practice sessions per year. These practice sessions encompass a complete walkthrough of the execution procedures, including the siting of IV catheters into volunteers. 128 S. Ct. 1520, 1534.

5. Washington's protocol provides that the Superintendent will remain in the execution chamber to observe for signs of consciousness. The Superintendent testified that he would be monitoring the IV insertion site as well and the IV flow. The Kentucky protocol places the Warden and Deputy Warden in the chamber to assure that the prisoner is unconscious and watch for any problems with the IV tubing. 128 S. Ct. 1520, 1528, 1534.

6. Washington's protocol requires that the inmate is to be administered an additional 3 grams of sodium thiopental through the second IV line if the superintendent observes the prisoner to be conscious after the first dose. Kentucky similarly provides that a second dose of sodium thiopental will be administered if Warden or Deputy Warden observe signs of consciousness. 128 S. Ct. 1520, 1528.

7. The Superintendent testified that a cut-down procedure would not be performed in Washington if there was difficulty in inserting the IV. Kentucky similarly agreed to not use this procedure during the trial court proceedings.

8. The Superintendent also testified that IVs would not be inserted in the neck of the inmate. The trial court in *Baze v Rees* required that this not be permitted in Kentucky.

9. Washington protocol allows a medical exam of the inmate to determine any special problems that may affect the execution process. The Superintendent testified that the medical condition of the inmates is well known to staff as they have been under their medical care for an extended period of time, and so a full medical exam would not be necessary in every case. The Kentucky protocol provides for a physical exam 7 days prior to the execution.

10. The Kentucky protocol has a physician present to assist in any effort to revive the prisoner in the event of a last minute stay. 128 S. Ct. 1528. In Washington an Assistant Attorney General is in phone contact with the Governor's office and the Supreme Court to determine if a last-minute stay has been entered before the procedure begins.

11. The Washington protocol requires two intravenous lines. The Kentucky protocol requires a primary and backup line. 128 S. Ct. 1528.

12. The Washington protocol requires the introduction of 3 g. thiopental sodium, 100 mg pancuronium bromide, and 240 mEq postassium chloride, separated by

saline flushes. Kentucky requires 3 g thiopental, 50 mg pancuronium bromide, and 240 mEq potassium chloride. 128 S. Ct. at 1528.

13. The Kentucky protocol has death confirmed by an electrocardiogram. 128 S. Ct. 1528. In Washington death is confirmed by a physician.

14. Considering all of the foregoing, the Washington lethal injection protocol is substantially similar to the Kentucky protocol reviewed by the United States Supreme Court in *Baze v. Rees, 128 S. Ct. 1520 (2008).*

15. Sodium thiopental is a barbiturate used to cause unconsciousness. Three grams of sodium thiopental properly administered will render the inmate unconscious so the inmate will not feel pain. The properly administered 3 grams of sodium thiopental will cause such unconsciousness within approximately 30 to 45 seconds, and will result in the inmate being unconscious for at least one hour. This dosage of sodium thiopental is substantial enough to likely cause death in many individuals when administered alone.

16. Pancuronium bromide is a muscular paralytic agent. One hundred milligrams of pancuronium properly administered will cause the rapid onset of paralysis in the inmate.

17. Potassium chloride is a chemical compound that interferes with the electrical signals that stimulate the contractions of the heart. Proper administration of 240 milli equivalents of potassium chloride will cause cardiac arrest in the inmate.

18. The 50 cc normal saline flushes are used to ensure the drugs do not mix or interact within the intravenous tubing and catheter, so as to avoid risk of precipitate and clogging of the tubing and catheter. The saline flushes do not alter the effectiveness of the sodium thiopental or the other drugs.

19. The experts testifying at trial all agreed that Washington's three drug lethal injection protocol, when properly administered, will result in a quick and painless death.

20. In promulgating the October 25, 2008 version of DOC Policy 490.200, the Department of Corrections (DOC) modified former versions of the policy. The former versions of the policy had been previously reviewed by Dr. Wanke, and by Dr. Barry K. Logan, who at the time was the Washington State Toxicologist.

21. During the spring of 2008, Dr. Fiona Jane Couper, the current Washington State Toxicologist, reviewed the 2007 version of DOC Policy 490.200. As a result of her review, Dr. Couper recommended amending the protocol to increase the dosage of sodium thiopental from 2 grams to 3 grams, to provide for a delay between the administration of the sodium thiopental and the pancuronium bromide, to provide for the administration of a second dose of 3 grams of sodium thiopental if the inmate still appeared conscious following the first dose of sodium thiopental, and to include minimum qualifications for the lethal injection team.

22. Dr. Couper made these recommendations sometime during the spring or early summer of 2008. These recommended changes were eventually adopted in the 2008 version of the protocol. Having reviewed the 2008 protocol, Dr. Couper is of the opinion that if properly followed the Washington protocol will likely result in a swift and painless death.

23. Dr. Mark Dershwitz, an anesthesiologist at the University of Massachusetts Medical Center and the University of Massachusetts Medical School, reviewed the current version of DOC Policy 490.200. Dr. Dershwitz opined that an execution conducted under the policy will result in a quick and painless death without the infliction of unnecessary pain.

24. Plaintiffs asserted that the following factors can compromise the delivery of an adequate dosage of sodium thiopental or the consciousness of the inmate: (1) improper insertion of the intravenous catheter; (2) perforation or rupture of, or leakage from, the vein injected; (3) migration of the intravenous catheter, even if properly inserted, out of the vein; (4) leaking from the tubing; (5) incorrect syringe selection; (6) the drug is not mixed properly in an aqueous solution; (7) the 14 ½ feet of tubing used by DOC makes it difficult for the team member to determine if the line is properly inserted; and (8) the inmate is someone who experiences intra-operative awareness. Plaintiff has failed to prove by a preponderance of the evidence that any one of these difficulties is likely to occur if the Washington protocol is followed.

25. The Superintendent of the Washington State Penitentiary testified about the expected implementation of the Washington protocol for a future execution. The Court finds the Superintendent's testimony to be credible.

26. The Superintendent testified that his primary goal in implementing the Washington protocol is to administer an execution by lethal injection in the most humane manner, without the infliction of unnecessary pain.

27. Exercising his authority under RCW 72.02.045, the Superintendent of the Washington State Penitentiary has prepared an execution checklist to use during the execution to implement DOC Policy 490.200, and to ensure the execution is performed in a humane manner. The Secretary of the Department of Corrections and the Director of Prisons have reviewed the checklist.

28. In developing the Superintendent's execution checklist, the Superintendent reviewed the Supreme Court's decision in *Baze v. Rees*, reviewed the Kentucky protocol, and personally attended and witnessed two executions by lethal injection in the State of Texas.

29. Plaintiffs have argued that the Defendants should use an alternative one-drug protocol, using only sodium thiopental, for an execution. Plaintiffs have failed to prove that an alternative one-drug protocol has actually been used to execute an inmate. The lethal injection protocols of the federal government and thirty states use the same or similar three drug protocol for lethal injection as the Washington state protocol.

30. There are no clinical studies supporting the use of an alternative one-drug protocol for lethal injection. The experts testifying at trial have admitted that any opinion concerning the validity of a one-drug protocol is based solely upon anecdotal evidence, and any opinion on the one-drug protocol is "hypothetical". The experts agreed, however, that administration of 3 grams of sodium thiopental alone would likely cause death in most individuals.

31. At the time of trial, there was not a lethal injection team prepared to participate in an execution. The team had resigned during the course of pre-trial discovery. Because Washington has not executed an inmate using lethal injection since 2001, there is not a standing team ready and able to perform executions. This fact alone does not create an unnecessary risk of substantial pain.

32. Washington's protocol requires a member of the lethal injection team to reconstitute the sodium thiopental into solution form prior to injection. The sodium thiopental used in Washington comes in a two vial set. One vial contains a set volume of sterile water, and the other vial contains the sodium thiopental in powder form. Reconstitution requires inserting a syringe into the sterile water vial supplied by the manufacturer, withdrawing the entire volume of sterile water from the vial into the syringe, injecting the sterile water from the syringe into the vial containing the powder, and then shaking the vial until the powder dissolves into the sterile water.

33. The process for reconstitution is not difficult, and a person can easily be instructed on how to perform this task. In addition, the manufacturer's instructions for reconstitution are provided with the sodium thiopental. The manufacturers' instructions for reconstitution of sodium thiopental can be easily followed, and if the instructions are followed, the reconstituted sodium thiopental will be in the proper concentration. Despite evidence to the contrary, this Court finds that a layperson could perform this task without difficulty.

34. DOC Policy 490.200 requires the lethal injection team to insert two intravenous lines in the inmate. Under the Washington protocol, the two intravenous lines will be inserted in the inmate's arms, hands, legs, or feet. Each of those lines is inserted using an intravenous needle. Should the team be unable to insert two intravenous lines, the execution will be rescheduled.

35. DOC Policy 490.200 does not expressly provide for the insertion of intravenous lines into the neck of the inmate. The Superintendent has determined the neck of the inmate will not be used to insert intravenous lines during an execution. . Rather, the intravenous lines will be inserted into a vein in the inmate's arms, hands, leg or feet.

36. Washington's protocol provides the lethal injection team with up to one hour to find suitable intravenous sites and to correctly insert intravenous catheters into the arm, hand, leg, or foot of the inmate.

37. It is not uncommon for a medical professional attempting to insert an intravenous line to make repeated attempts at inserting the intravenous line. It is also not uncommon for a medical professional attempting to insert an intravenous line to attempt to use multiple veins before finding a suitable injection site. Any pain that results from repeated attempts to site an intravenous line in a vein or veins is not substantial and is necessary for the insertion of the intravenous line.

38. If the lethal injection team cannot insert the two intravenous lines during the one hour period, the Superintendent will notify the Attorney General's Office, and will seek to reschedule the execution.

39. Plaintiffs Brown and Gentry have provided no proof that their medical conditions will make it difficult for the lethal injection team to site two intravenous lines.

40. Plaintiff Stenson has alleged that his medical condition will make it difficult for the lethal injection team to insert two intravenous lines into his veins. Plaintiff Stenson testified that medical providers at the Washington State Penitentiary have had difficulty drawing his blood, that they are unable to draw blood from his arms, and that he has not received an intravenous injection during recent surgery. The Court finds Plaintiff Stenson's testimony is not credible.

41. Clinical Laboratory Technician Robertson testified that she has been able to regularly draw Plaintiff Stenson's blood from veins in Stenson's hands, that Stenson's veins in his hands are plump, and that she routinely only has to try once or twice to insert the needle into Stenson's veins. Ms. Robertson testified that when she tried to draw blood from Stenson's arms, he refused to grant her access to his arms, and insisted that she instead draw the blood from a vein in his hands. The Court finds Ms. Robertson's testimony to be credible.

42. Plaintiff Stenson has proven only one instance where a medical provider was unable to draw his blood. Nurse Cross testified that in February 2009 he twice attempted to insert a needle into a vein on Stenson's hands. Nurse Cross could determine immediately that the needle was not in Stenson's vein. Nurse Cross testified that Stenson refused to allow him to try to draw blood from Stenson's arms. The Court finds Nurse Cross's testimony to be credible.

43. Plaintiff's expert observed Plaintiff Stenson's arms but did not attempt to insert an intravenous line. Plaintiff's expert agrees that Plaintiff Stenson has a vein

suitable for an intravenous injection in his right arm, and Plaintiff Stenson recently had an intravenous injection in his arm for the induction of anesthesia during a surgical procedure. Plaintiff's expert did not examine Stenson's legs, ankles or feet for possible veins for an intravenous injection. Plaintiff's expert agreed the medical records from Stenson's recent surgery did not show any complication that prevented the insertion of the intravenous lines, and Plaintiff Stenson admitted he did not observe any indication on his arm of any repeated or failed attempts to insert an intravenous line. Plaintiff Stenson has failed to prove by a preponderance of the evidence that his medical condition will prevent the lethal injection team from being able to insert the two intravenous lines.

44. If Plaintiff Stenson's medical condition were to prevent the lethal injection team from inserting two intravenous lines, Stenson still fails to show he will be subjected to unnecessary pain since the execution will not occur at that time.

45. The Washington protocol provides sufficient safeguards to avoid improper insertion of intravenous lines. Even if the alleged difficulty prevented the member of the team from inserting two lines, the Plaintiffs will not suffer unnecessary pain because the protocol requires in such a situation that the execution be rescheduled.

46. Washington's protocol requires that the Superintendent ensure no stays are in place at two different times before the execution: once before the inmate is brought into the execution chamber, once immediately prior to the administration of the sodium thiopental.

47. The Superintendent and the lethal injection team members will observe the insertion of the intravenous lines and observe the inmate for signs that the intravenous line has not been properly inserted into a vein.

48. There are a number of factors that a person can observe to indicate whether an intravenous needle is properly inserted into a vein. Once the needle enters the vein there is a "flash" of blood which enters the hub of the needle. The "flash" may indicate that a vein has been entered. Once the connector needle has entered the vein, the sheath is pushed down into the vein and the connector needle is removed. A syringe is then attached to the connector tubing and a "pull back" of the syringe's plunger is done to see if blood enters the connector tubing, indicating a vein has been entered. Once it is determined that a vein has been entered, the syringe is removed and the connector tubing is attached to the intravenous tubing and the saline flow begins. Both the "flash" and the presence of blood during the "pull back" indicate the intravenous needle is properly within the vein.

49. After inserting the intravenous line, the lethal injection team members ensure that a slow, normal saline flow is maintained through each intravenous line. The presence of a steady flow of saline also indicates the intravenous line is properly within the vein.

50. In addition to the presence of blood in the "flash" and the "pull back", the presence or absence of discomfort in the injection site will signal whether the intravenous line has entered and remains in the vein. If the inmate complains of pain or discomfort after the insertion of the intravenous line, this will indicate the line is not properly inserted. The Superintendent has testified that he will require the lethal injection team to check the insertion site if the inmate complains of pain or discomfort. The Court finds the Superintendent's testimony to be credible.

51. In addition, the presence or absence of swelling around the injection site will signal whether the intravenous line is in the vein. If the line is not in the vein, and the saline and sodium thiopental in the amounts required by the protocol are injected into the subcutaneous tissue, the swelling will be noticeable. The Superintendent

has received training to look for potential swelling. The Superintendent has testified that he will require the lethal injection team to check the insertion site if he observes any swelling. The Court finds the Superintendent's testimony to be credible.

52. If sodium thiopental is injected into the subcutaneous tissue, it will cause discomfort of a burning sensation. This sensation will cause the inmate to react by complaining of the discomfort. Plaintiff Stenson testified he will complain if he feels any pain after a needle is inserted into him. The Court finds it unlikely that sodium thiopental will be injected into the tissue without the inmate reacting and the Superintendent becoming aware.

53. In addition to observing for signs of improper insertion of the intravenous lines, the Superintendent and the members of the lethal injection team will observe the intravenous injection tubing for any signs of leakage or kinking.

54. The proper insertion of the intravenous line into the inmate's vein ensures the three grams of sodium thiopental will be introduced into the inmate's circulatory system. The Plaintiffs' expert agrees, however, that even if an error results in some of the sodium thiopental leaking into the surrounding tissue rather than the vein, the introduction of less than three grams of sodium thiopental will likely still be sufficient to render the person unconscious.

55. Washington's protocol requires the flushing of the intravenous lines with saline between the administration of each drug to prevent the clogging of the intravenous line which may be caused by the combination of sodium thiopental and pancuronium bromide. The experts testifying at trial agree this flushing of the line will eliminate the risk that the drugs will mix so as to clog the tubing.

56. Washington's protocol does not require the use of an electrocardiogram or a BIS monitor during the administration of the drugs to monitor for consciousness.

Plaintiffs have failed to prove that the BIS monitor is readily available for use in an execution in Washington. The experts also agreed that the BIS monitor is simply one additional factor that may be used to assess a lack of consciousness. The Kentucky protocol upheld in *Baze* also did not use an electrocardiogram or a BIS monitor during the execution to monitor consciousness.

57. Once the intravenous lines have been inserted, and the Superintendent has determined that the execution is to proceed, the Superintendent signals for the administration of the three grams of thiopental sodium, followed by the 50 cc saline flush. The Superintendent will then check the inmate for signs of consciousness. The Superintendent will observe the inmate for a full sixty seconds. The Superintendent stands or sits approximately one foot away from the inmate throughout the execution.

58. The Superintendent will observe the inmate for eye movement, speech, slacking of facial muscles, and rising and falling of the chest. The Superintendent will speak to the inmate during the execution, will pinch the inmate's skin, and will observe the inmate for any reaction to sound or touch. The experts testifying at trial agree these factors may be assessed by a lay person, and are some tools used to assess someone for consciousness. In addition, the Superintendent personally witnessed two executions by lethal injection in Texas, and he was able to observe the inmate in those executions for these signs.

59. If the Superintendent has any doubt as to whether the inmate is conscious or unconscious, he will order that an additional three gram dose of sodium thiopental be administered through the second intravenous line. Once the inmate is determined not to be conscious, the Superintendent will order the administration of the remaining two drugs, pancuronium bromide and potassium chloride.

60. If the Superintendent has any doubt as to whether the inmate is still conscious after the administration of the second dose of sodium thiopental, the Superintendent will not allow the lethal injection team to proceed with the administration of the remaining drugs.

61. Although Plaintiff's expert testified that there is a risk of maladministration of the sodium thiopental, he could not quantify the risk.

62. The Court finds a risk of unnecessary pain is not inherent in the Washington protocol, and that any risk would arise only from an error or accident in the administration of the protocol. The Court finds that the risk of such an error is minimal.

63. All the experts testifying at trial agreed the proper application of the protocol, as outlined in DOC Policy 490.200, will result in a rapid, painless and humane death and the inmate will not experience any unnecessary pain or suffering.

CONCLUSIONS OF LAW

1. The Eighth Amendment to the United States Constitution applies to the states through the Fourteenth Amendment. Robinson v California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

2. The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. Article I., Section 14 of the Washington Constitution provides that "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

4. RCW 10.95.180 (amended by 1996 Wash. Laws c. 251, §1) went into effect in March 1996 and requires that executions be carried out by "intravenous injection of a substance or substances in a lethal quantity sufficient to cause

death and until the defendant is dead." An inmate may elect the alternative method of hanging.

5. In *Baze v. Rees*, ___ U.S. ___, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), the United States Supreme Court concluded that Kentucky's lethal injection protocol does not violate the Eighth Amendment. The Supreme Court also concluded that other state protocols "substantially similar" to Kentucky's protocol would be similarly constitutional.

6. The Plaintiffs have not demonstrated by a preponderance of the evidence that Washington's lethal injection protocol inflicts unnecessary pain upon the inmate. The risk of an accident occurring or an error on the part of DOC employees does not demonstrate a constitutional violation. Plaintiff has not demonstrated by a preponderance of the evidence that such an accident or error, if committed, would be likely to cause substantial pain to the inmate.

7. This Court recognizes that "[s]ome risk of pain is inherent in any method of execution," and "that the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008). Washington's policy does not inflict pain for the sake of inflicting pain, nor does it "superadd" pain for the sake of torture.

8. The Plaintiffs have not demonstrated by a preponderance of the evidence that Washington's protocol is "sure or likely" to cause unnecessary pain.

9. The Plaintiffs have not demonstrated by a preponderance of the evidence that Washington's protocol creates a substantial risk of serious harm.

10. The Plaintiffs have not demonstrated by a preponderance of the evidence that Washington's protocol subjects them to an objectively intolerable risk of harm which would result in cruel and unusual punishment.

11. The Plaintiffs argue that the lethal injection team may have difficulty finding suitable veins for intravenous injection due to the Plaintiffs' medical condition. The possibility that there may be difficulty locating a vein does not subject the inmate to offensive punishments, prohibited by the Eighth Amendment or Article I, Section 14.

12. The risk of maladministration of the sodium thiopental through improper mixing of chemicals and improper insertion of intravenous lines by trained and experienced personnel is remote and is not an objectively intolerable risk of serious harm.

13. The Plaintiffs have not demonstrated by a preponderance of the evidence that the risk of maladministration of the sodium thiopental amounts to a constitutional violation. The Plaintiffs have similarly failed to demonstrate by a preponderance of the evidence that the use of additional feasible and readily available safeguards could be, but are not, utilized by the State and that the State's failure to use those additional safeguards violates Plaintiffs' constitutional rights.

14. The Plaintiffs have not demonstrated by a preponderance of the evidence that pancuronium bromide should be omitted from the procedure. Pancuronium bromide serves two legitimate state interests – it preserves the dignity of the procedure, and it hastens death by stopping breathing. Plaintiffs' argument that pancuronium bromide is barred for use by veterinarians fails because it overlooks the States' legitimate interest in providing for a quick, certain death.

15. Washington's lethal injection protocol does not violate the Eighth Amendment of the United States Constitution.

16. Washington's lethal injection protocol does not submit the defendant to punishment beyond that which is necessary.

17. Washington's lethal injection protocol does not demonstrate an absence of mercy.

18. Applying the factors set forth in *State v Gunwall*, 106 Wn.2d 54 (1986), the subject of this case could be considered a matter of particular state interest or local concern. However, Plaintiffs have not demonstrated a basis under *State v Gunwall* for a constitutional limitation on the State's intended method of administration of the death penalty.

19. The term "cruel" in the Washington Constitution for the purposes of this case does not suggest a different standard than the term "cruel and unusual" in the Eighth Amendment to the United States Constitution.

20. Plaintiffs have presented no evidence that Defendants intend to impose punishment that is "cruel" under the Washington Constitution.

21. Washington's lethal injection protocol does not violate Article I, sections 3 and 14 of the Washington constitution.

DATED this 10th day of July, 2009.

CHRIS WICKHAM
Judge, Thurston County Superior Court