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SUPREME COURT  
STATE OF WASHINGTON

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No. 83474-1

(consolidated with No. 83828-3)

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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

Appellants,

v.

ELDON VAIL, et al. ,

Respondents.

REPLY TO RESPONSE TO  
MOTION TO DISMISS AS  
MOOT THE CLAIMS THAT  
THE THREE DRUG  
PROTOCOL IS  
UNCONSTITUTIONAL

The Respondents (the State), by and through their attorneys, Robert M. McKenna, Attorney General, John J. Samson, Senior Counsel, and Sara J. Olson, Assistant Attorney General, submit this reply to Appellants' response to the motion to dismiss the cruel punishment claims as moot. For the reasons set forth below and in the motion to dismiss, the Court should dismiss as moot the cruel punishment claims and any issues associated with the claims.

ORIGINAL

## I. REPLY ARGUMENT

[T]he use of sodium thiopental alone eliminates the risk of any pain, unnecessary pain, substantial pain, any pain. It is simple. It is effective. It can be administered easily. Inadequacy of the team or the consciousness checks are not relevant.

As Dr. Dershwitz explained, if the team fails to administer sodium thiopental the first time, it can administer a second dose. It will take less than ten minutes. It will, in fact, cause less witness discomfort than the use of the three-drug protocol.

5 RP 914:8-19 (Stenson's closing argument).

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." RP 569 He endorsed a single drug policy calling for administration of sodium thiopental, with additional doses as necessary. RP 572. This would avoid all risk of any significant pain. . . .

Stenson's Opening Brief, at 25.

[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.

Stenson's Opening Brief, at 37 (emphasis in original).

[A] single dose of sodium thiopental would cause death without any risk of pain.

Stenson's Reply Brief, at 16.

Stenson repeatedly stated in the superior court and in this Court that adoption of the one drug protocol will eliminate *any* risk of pain. Stenson admitted that the one drug protocol is simple, easily implemented, and will render irrelevant issues such as the qualifications of the lethal injection team. However, now that the Department has formally adopted the one drug protocol as the presumed method of execution, thereby mooting the challenge to the three drug protocol, Stenson has reversed himself. Despite having repeatedly contended in the trial court and this Court that the Department should adopt the one drug protocol, despite having repeatedly contended that the one drug protocol will eliminate any risk of pain, and despite having repeatedly told the courts that the one drug protocol is easy to implement, Stenson now takes a completely contradictory position. Stenson argues the Court should disregard his prior arguments about the one drug protocol by simply contending "Arguments of counsel are not evidence." Stenson's Response, at 4 n. 2. By doing so, Stenson is not being candid with this Court.

Despite his attempt to distance himself from his prior arguments, Stenson's prior admissions remain. As Stenson admitted, the administration of sodium thiopental will not inflict any pain. Because the one drug protocol will not inflict pain, there is no cruel punishment. Because there is no cruel punishment, there is no constitutional violation.

Stenson now complains the adoption of the one drug protocol does not moot his concern about the Department's ability to assemble a qualified lethal injection team. Stenson's Response, at 3-4. However, as Stenson admitted, the adoption of the one drug protocol makes such a concern irrelevant. 5 RP 914:8-19. The simple reality is that an inmate will not suffer unnecessary pain under the one drug protocol because the administration of sodium thiopental does not inflict pain.

Stenson's concern about the lethal injection team was as follows: (1) the unqualified team would improperly insert the intravenous lines and/or improperly prepare the sodium thiopental; (2) the improper insertion of the intravenous lines and/or improper preparation of the sodium thiopental would then prevent the proper administration of the sodium thiopental to the inmate, thus not causing sufficient unconsciousness; and (3) the subsequent administration of the pancuronium bromide and potassium chloride will cause torturous pain to the still conscious inmate. But the one drug protocol eliminates this concern because sodium thiopental does not inflict pain. The two drugs that allegedly caused pain are no longer part of the Department's primary and presumed protocol. Because sodium thiopental does not cause pain, the inmate will not suffer pain even if the sodium thiopental is not properly administered.

Stenson also contends that the amended policy does not expressly prohibit insertion in the neck or the use of a cut-down. Stenson's Response, at 1 & n. 1. This contention also fails. The policy provides the "insertion site of preference shall be the following order: arms, hands, ankles and/or feet." Appendix A, DOC Policy 490.200 (3/8/10), Attachment 2, at 1 # 6. The policy provides the team with one hour to insert the intravenous lines in those sites. Appendix A, Attachment 2, at 1 # 8; *see also* FOF 36 and 38. If the lines cannot be inserted in those sites within one hour, the execution will be rescheduled. Appendix A, Attachment 2, at 1 # 8; *see also* FOF 36 and 38. No language in the policy authorizes the insertion of the intravenous line in the inmate's neck. Appendix A; *see also* FOF 34 and 35 (unchallenged findings of fact that the former version of the policy did not provide for insertion in the neck). No language in the policy authorizes the use of a cut-down procedure. Appendix A. The Superintendent testified that the neck and a cut-down will not be used for an execution. FOF 7 and 8. The superior court found the Superintendent's testimony to be credible. FOF 25. Stenson also failed to prove a team could not insert an intravenous line into his veins in his arms, hands, ankles, or feet. FOF 40-43. Stenson's contention on this point is based upon speculation, and ignores the policy, the Superintendent's sworn testimony, and the findings of the superior court.

Stenson objects to the timing of the adoption of the one drug protocol, contending the Department should have adopted the protocol last October or November. Stenson's Response, at 5. However, as the superior court previously found, the one drug protocol had never actually been used to execute a condemned inmate, there were no clinical studies supporting the use of the one protocol, and the opinions on the one drug protocol were "hypothetical" and based upon anecdotal evidence. FOF 29-30. After the State of Ohio used the one drug protocol in December, January and February, it was shown the one drug protocol was effective. At that time, the Department reasonably adopted the one drug protocol based upon the use of the protocol in the recent executions in Ohio.

Moreover, regardless of the timing, the adoption of the protocol renders the challenge to the three drug protocol moot because Stenson, Brown, and Gentry will not be executed under the three drug protocol. Regardless of whether the one drug protocol had been adopted three months before argument, or three months after argument, the one drug protocol will be used to execute Stenson, Brown, and Gentry. The sodium thiopental will not cause pain, and the two drugs that would have allegedly caused unnecessary pain will not be used for their execution. The adoption of the one drug protocol renders moot the appellants' challenge to the constitutionality of the three drug protocol.

Stenson also attempts to distinguish *Cooley v. Strickland*, 588 F.3d 921 (6th Cir. 2009), a Sixth Circuit case that dismissed as moot the challenge to Ohio's former three drug protocol, by citing to *Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009). Stenson's Response, at 6. Stenson suggests the Sixth Circuit granted a stay to allow consideration of Ohio's new one drug protocol. However, the Sixth Circuit in a subsequent case pointed out that the *Reynolds* case involved the former Ohio protocol:

In requesting a stay, Biros relies heavily on the stay order granted to another Ohio death-sentenced prisoner by a panel of this court following the halted Broom execution. *See Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009). He reasons that because the panel in *Reynolds* granted a stay, so should we. However, we find this argument unpersuasive. *First, the lethal injection protocol challenged in Reynolds was that used during the attempted Broom execution -- that is, the old protocol....*

*Cooley v. Strickland*, 589 F.3d 210, 218 n. 2 (6th Cir. 2009) (emphasis added).

Stenson argued below and in this Court that the Department should adopt the one drug protocol. Stenson contended in the superior court and in this Court that the adoption of the one drug protocol was simple, and would eliminate the constitutional concerns with the existing three drug protocol for execution by lethal injection. Now that the Department has adopted the one drug protocol, Stenson backtracks from this position, arguing further delay is needed.

The one drug protocol will not inflict any pain. Thus, there is no cruel punishment. The claims of cruel punishment are moot. By contending there are still alleged defects in the amended policy, Stenson no longer challenges the protocol based upon the alleged infliction of cruel pain in violation of the Constitution. Instead, Stenson now asks this Court to simply substitute its judgment for that of the Department, so as to determine the best way to draft the execution policy. In short, Stenson believes the details of the policy could be improved, and he asks this Court to demand that the Department write a better prison policy before it is allowed to carry out an execution. The Court should reject Stenson's invitation to rewrite the policy. As the Supreme Court recognized, transforming the courts into boards of inquiry charged with determining "best practices" for executions would improperly embroil the courts in ongoing scientific controversies, and would improperly intrude upon the role of the other branches of government to select the method of carrying out an execution. *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008).

The Department has now adopted the one drug protocol, and Stenson, Brown, and Gentry will be executed under this one drug protocol. The one drug protocol will not inflict pain. The cruel punishment claims concerning the three drug protocol, and the issues associated with those claims are now moot.

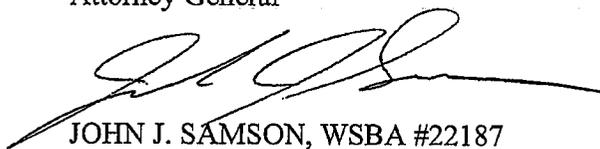
## II. CONCLUSION

For the reasons set forth above and in the State's motion, the State respectfully requests that the Court grant the motion, and dismiss as moot the claims that the three drug protocol is unconstitutional and also dismiss any issues associated with those claims.

DATED this 10<sup>th</sup> day of March, 2010.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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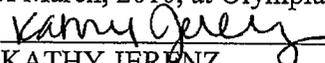
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EXECUTED this 10<sup>th</sup> day of March, 2010, at Olympia, Washington.

  
KATHY JERENZ

ORIGINAL

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**APPENDIX A**



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON**

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3/8/10

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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  
 Revised: 3/8/10

**SUMMARY OF REVISION/REVIEW:**

III.B.2. and IX.A.4.d. - Added one drug protocol as primary and presumed method of execution  
 Attachment 1 - Removed Health Care Manager 2 from staff assignments  
 Added Superintendent Checklist Attachments 2 and 3 regarding one drug and 3 drug protocol

**APPROVED:**

Signature on file

\_\_\_\_\_  
**ELDON VAIL**, Secretary  
 Department of Corrections

3/5/10  
 \_\_\_\_\_  
 Date Signed

APPENDIX A

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p><b>POLICY</b></p>	<b>APPLICABILITY</b> <b>PRISON</b>		
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**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).



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- 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 primary and presumed method of execution will be an intravenous injection using a one drug protocol (thiopental sodium followed by a saline flush).
    - b. The ISDP may elect an intravenous injection of the 3 drug protocol (thiopental sodium, normal saline flush, pancuronium bromide, normal saline flush, and a final injection of potassium chloride) as one alternate means of execution.
    - c. The ISDP may elect hanging as another alternate means of execution.
    - d. 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 the 3 drug protocol or hanging, it must be stated in writing no later than 14 days prior to the execution date. The one drug protocol shall be the exclusive method of execution unless one of the alternate means is elected by the ISDP in writing.
  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.



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- 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.



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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,

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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.

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#### 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.



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### **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.



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- b. The Superintendent will direct the acquisition of the appropriate quantities of lethal substance(s). 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.



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- 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 solution(s) using a bolus injection into the tubing in the order specified:
    - 1) The One Drug Protocol per the Superintendent's Checklist - One Drug Protocol (Attachment 2):
      - a) 5 g thiopental sodium
      - b) 50 cc normal saline
    - 2) The 3 Drug Protocol per Superintendent's Checklist - 3 Drug Protocol (Attachment 3):
      - a) 3 g thiopental sodium
      - b) 50 cc normal saline
      - c) 100 mg pancuronium bromide
      - d) 50 cc normal saline
      - e) 240 mEq potassium chloride (KCl)
      - f) 50 cc normal saline
  - e. In the event the 3 drug protocol is used, 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. Either line may be used for injection of the solution(s) as required.
  - g. The Lethal Injection Team Leader will signal the Superintendent when the solution(s) have been administered.
  - h. 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.
  - i. After the pronouncement of death, the Lethal Injection Team will remain in the area until directed to leave.
  - j. Post-execution procedures will be followed.
- B. Hanging



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY <b>PRISON</b>		
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TITLE <b>CAPITAL PUNISHMENT</b>		

**POLICY**

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:

<u>WEIGHT (Pounds)</u>	<u>DROP DISTANCE</u>
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.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p><b>POLICY</b></p>	<b>APPLICABILITY</b> <b>PRISON</b>		
	<b>REVISION DATE</b> 3/8/10	<b>PAGE NUMBER</b> 12 of 13	<b>NUMBER</b> <b>DOC 490.200</b>
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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.

 STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS	APPLICABILITY <b>PRISON</b>		
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<b>POLICY</b>			

- 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)
- Superintendent's Checklist - One Drug Protocol (Attachment 2)
- Superintendent's Checklist - 3 Drug Protocol (Attachment 3)

**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
<b>Compliance Date:</b> 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: <ul style="list-style-type: none"> <li><input type="checkbox"/> All incoming mail addressed to ISDP will be forwarded unopened to a designated Associate Superintendent</li> <li><input type="checkbox"/> A log will be maintained of all incoming/outgoing mail noting date and time of receipt and distribution</li> <li><input type="checkbox"/> A separate log will be maintained for legal mail</li> </ul>	

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.	
<b>Compliance Date:</b> 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: <input type="checkbox"/> Plumbing <input type="checkbox"/> Lighting <input type="checkbox"/> Emergency Lighting <input type="checkbox"/> Mechanical Systems <input type="checkbox"/> Locking Systems <input type="checkbox"/> Telephones <input type="checkbox"/> Sanitation <input type="checkbox"/> Furnishings <input type="checkbox"/> 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.	
<b>Compliance Date:</b> 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.	
<b>Compliance Date:</b> 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.	
<b>Compliance Date:</b> Not less than 10 days prior to the execution		

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: <input type="checkbox"/> All equipment required for lethal injection <input type="checkbox"/> 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.	
<b>Compliance Date: 7 days prior to the execution</b>		
	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: <input type="checkbox"/> Superintendent <input type="checkbox"/> Execution Incident Commander <input type="checkbox"/> Captain <input type="checkbox"/> Shift Commander <input type="checkbox"/> Washington State Patrol	
	Menu for final meal is prepared and presented to Superintendent for approval.	
<b>Compliance Date: Approximately 5 days prior to the execution</b>		

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.	
	<p>The holding cell is prepared and equipped with:</p> <input type="checkbox"/> 1 Mattress <input type="checkbox"/> 2 Sheets <input type="checkbox"/> 3 Blankets <input type="checkbox"/> 1 Pillow <input type="checkbox"/> 1 Pillowcase <input type="checkbox"/> 2 Towels <input type="checkbox"/> 1 Washcloth <input type="checkbox"/> 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.	
<b>Compliance Date:</b> Approximately 4 days prior to the execution		
	Coordination briefings with local law enforcement agencies have been conducted.	
	<p>All staff assignments made:</p> <input type="checkbox"/> Chamber Security Team <input type="checkbox"/> Correctional Program Managers <input type="checkbox"/> Captain <input type="checkbox"/> Chamber Media Escort Team <input type="checkbox"/> Visiting Room Media Monitor <input type="checkbox"/> Chaplain <input type="checkbox"/> Transport/Restraining Team <input type="checkbox"/> Holding Cell Security Team <input type="checkbox"/> Incident Command Post Staff (Security/Communication) <input type="checkbox"/> Specialty Team Group Supervisor/ERT Leader <input type="checkbox"/> Specialty Team Group Supervisor/SERT Leader	
	Staff escorts assigned for all non-WSP individuals attending.	

DATE COMPLETED/ STAFF INITIALS	TASK	ASSIGNED PERSONNEL
<b>Compliance Date: 24 hours prior to execution</b>		
	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.	
<b>Execution Day</b>		
	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.	

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.	

**DEPARTMENT OF CORRECTIONS  
WASHINGTON STATE PENITENTIARY  
SUPERINTENDENT'S CHECKLIST - ONE DRUG PROTOCOL**

	SEQUENCE OF EVENTS	TIME OF COMPLETION
1	Assistant Secretary indicates there are no stays per the Execution Procedures and Assignments Checklist (Attachment 1).	
2	Superintendent orders the ISDP escorted to the execution chamber and strapped to the table.	
3	After the ISDP is secured to table, Superintendent checks restraints then restraint team exits execution chamber.	
4	Superintendent secures all doors to execution chamber prior to Lethal Injection Team's entry from the injection room.	
5	Lethal Injection Team enters chamber and runs IV lines to the ISDP, sites and inserts one primary IV line and one backup IV line in locations deemed suitable by the team members.	
6	The insertion site of preference shall be the following order: arms, hands, ankles and/or feet.	
7	To best ensure that a needle is inserted properly into a vein, the IV team members should look for the presence of blood in the valve of the sited needles.	
8	If the Lethal Injection Team cannot secure one or more sites within one hour, the Secretary shall contact the Attorney General's Office and request that the execution be scheduled for a later date.	
9	Lethal Injection Team starts a saline flow, checking to ensure regular drip of saline is flowing.	
10	Lethal Injection Team then moves back to the injection room.	
11	Superintendent rechecks all restraints and determines they are secure.	
12	Superintendent makes one final check with the Assistant Secretary stationed outside the execution room. No stay, then proceed.	
13	The Superintendent/designee notifies Incident Command Post (ICP) to begin moving witnesses to gallery.	
14	Gallery Security Team notifies Superintendent that gallery is seated.	
15	Superintendent opens the curtain and turns on the microphone.	
16	Superintendent states: "At this time, we will carry out the legal execution of (ISDP Name)"	
17	Superintendent asks the ISDP if s/he wants to make a final statement, 2 minutes allowed.	
18	Microphone is turned off.	

	SEQUENCE OF EVENTS	TIME OF COMPLETION
19	<p>Upon the Superintendent's order to proceed (tape removed from small window), a designated Lethal Injection Team member begins a rapid flow of lethal chemicals in the following order:</p> <p><u>One Drug Protocol:</u></p> <p>1) thiopental sodium (5 g)</p> <p>2) normal saline (50 cc)</p>	
20	Lethal Injection Team signals the completion of this dosage by placing another roll of tape in the small window.	
21	Superintendent closes the curtain.	
22	<p>A Doctor is called to the chamber to pronounce death and then exit chamber.</p> <p>NOTE: If the Doctor is unable to pronounce death, Superintendent shall re-open the curtain and signal the IV team to proceed with the second dose of thiopental sodium followed by the normal saline flush to be administered in the back up IV location. Process begins again at Step #19.</p>	
23	When death is pronounced, the Superintendent notes the time and states to the gallery attendant: "At approximately (Time) A.M. on (Date), the execution of (ISDP Name) was carried out in accordance with the laws of Washington State".	
24	Witnesses are escorted out of the gallery.	
25	Lethal Injection Team prepares the body for departure.	
26	Superintendent clears all areas for the departure of the Lethal Injection Team and escorts them out of the chamber.	

**DEPARTMENT OF CORRECTIONS  
WASHINGTON STATE PENITENTIARY  
SUPERINTENDENT'S CHECKLIST - 3 DRUG PROTOCOL**

	SEQUENCE OF EVENTS	TIME OF COMPLETION
1	Assistant Secretary indicates there are no stays per the Execution Procedures and Assignments Checklist (Attachment 1).	
2	Superintendent orders the ISDP escorted to the execution chamber and strapped to the table.	
3	After the ISDP is secured to table, Superintendent checks restraints then restraint team exits execution chamber.	
4	Superintendent secures all doors to execution chamber prior to Lethal Injection Team's entry from the injection room.	
5	Lethal Injection Team enters chamber and runs IV lines to the ISDP, sites and inserts one primary IV line and one backup IV line in locations deemed suitable by the team members.	
6	The insertion site of preference shall be the following order: arms, hands, ankles and/or feet.	
7	To best ensure that a needle is inserted properly into a vein, the IV team members should look for the presence of blood in the valve of the sited needles.	
8	If the Lethal Injection Team cannot secure one or more sites within one hour, the Secretary shall contact the Attorney General's Office and request that the execution be scheduled for a later date.	
9	Lethal Injection Team starts a saline flow, checking to ensure regular drip of saline is flowing.	
10	Lethal Injection Team then moves back to the injection room.	
11	Superintendent rechecks all restraints and determines they are secure.	
12	Superintendent makes one final check with the Assistant Secretary stationed outside the execution room. No stay, then proceed.	
13	The Superintendent/designee notifies Incident Command Post (ICP) to begin moving witnesses to gallery.	
14	Gallery Security Team notifies Superintendent that gallery is seated.	
15	Superintendent opens the curtain and turn on the microphone.	
16	Superintendent states: "At this time, we will carry out the legal execution of (ISDP Name)"	
17	Superintendent asks the ISDP if s/he wants to make a final statement, 2 minutes allowed.	
18	Microphone is turned off.	

	SEQUENCE OF EVENTS	TIME OF COMPLETION
19	<p>Upon the Superintendent's order to proceed (tape removed from small window), a designated Lethal Injection Team member begins a rapid flow of lethal chemicals in the following order:</p> <p><u>3 Drug Protocol:</u></p> <p>1) thiopental sodium (3 g) 2) normal saline (50 cc)</p>	
20	<p>Lethal Injection Team signals the completion of this dosage by placing another roll of tape in the small window.</p>	
21	<p>NOTE: If it appears to the Superintendent that the ISDP is not unconscious within 60 seconds from the time the Lethal Injection Team signals completion of first dosage, the Superintendent shall stop the flow of thiopental sodium in the primary site and order that the backup IV be used with a new flow of thiopental sodium (Step #19). This direction will be given verbally through the small window.</p>	
22	<p>Once the Superintendent has determined the ISDP is unconscious, a second signal to proceed (place first roll of tape on top of second roll in small window) will be given for the injection of the remaining chemicals:</p> <p>3) pancuronium bromide (100 mg) 4) normal saline (50 cc) 5) potassium chloride (240 mEq) 6) normal saline (50 cc)</p>	
23	<p>Lethal Injection Team signals once all chemicals have been administered by removing both rolls of tape.</p>	
24	<p>Superintendent closes the curtain.</p>	
25	<p>A Doctor is called to the chamber to pronounce death and then exit chamber.</p> <p>NOTE: If the Doctor is unable to pronounce death, the injection process will resume at Step #19.</p>	
26	<p>When death is pronounced, the Superintendent notes the time and states to the gallery attendant: "At approximately (Time) A.M. on (Date), the execution of (ISDP Name) was carried out in accordance with the laws of Washington State".</p>	
27	<p>Witnesses are escorted out of the gallery.</p>	
28	<p>Lethal Injection Team prepares the body for departure.</p>	
29	<p>Superintendent clears all areas for the departure of the Lethal Injection Team and escorts them out of the chamber.</p>	

## OFFICE RECEPTIONIST, CLERK

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**To:** Jerez, Kathy (ATG)  
**Cc:** Faulk, Camilla; SPeterson@perkinscoie.com; DMeyers@perkinscoie.com; Scott J. Engelhard; Suzanne Elliott; dunne@ACLU-wa.org; ntalner@aol.com; bandrus@skellengerbender.com; Courts - Gil Levy Lawyer  
**Subject:** RE: Brown/Gentry/Stenson 83474-1

Rec. 3-10-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** Jerez, Kathy (ATG) [mailto:KathyJ@ATG.WA.GOV]

**Sent:** Wednesday, March 10, 2010 9:28 AM

**To:** OFFICE RECEPTIONIST, CLERK

**Cc:** Faulk, Camilla; SPeterson@perkinscoie.com; DMeyers@perkinscoie.com; Scott J. Engelhard; Suzanne Elliott; dunne@ACLU-wa.org; ntalner@aol.com; bandrus@skellengerbender.com; Courts - Gil Levy Lawyer

**Subject:** Brown/Gentry/Stenson 83474-1

Good morning,

Please find Respondents' Reply to Response to Motion to Dismiss as Moot the Claims that the Three Drug Protocol is unconstitutional for filing in the above referenced matter. If you have any questions, please let me know.

Thank you

<<Reply to Motion to Dismiss.pdf>>

**Kathy Jerez**  
Legal Assistant

**Attorney General's Office**  
**Corrections Division**  
**360-586-5146**

Please print only when necessary