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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Darold R.J. Stenson, Plaintiff, v. Eldon Vail, Secretary of Washington Department of Corrections (in his official capacity), et al., Defendants.	NO. CV-08-5079-LRS RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

The Defendants, by and through their attorneys, Robert M. McKenna, Attorney General, and John J. Samson, Assistant Attorney General, responds to Plaintiff's motion for a temporary restraining order or preliminary injunction.

I. STATEMENT OF THE CASE

Stenson was sentenced to death in 1994. The state supreme court affirmed the sentence in 1997, and denied a first collateral challenge in 2001. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *In re Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001). The state court

subsequently denied three collateral challenges as barred under state law. *In re Stenson*, 150 Wn.2d 207, 76 P.3d 241 (2003); *In re Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004); Exhibit 1, Order, *In re Stenson*, Cause No. 82332-4.

Stenson sought habeas corpus relief in federal court in 2001. The Ninth Circuit affirmed the denial of relief, and the Supreme Court denied certiorari on October 6, 2008. *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 247 (2008). The Ninth Circuit issued the mandate, the stay of execution terminated, and the date of execution reset to December 3, 2008. In September 2008, Stenson filed a state court action, challenging the date of execution. The state court denied the petition, and denied a stay of execution. Exhibit 2, Order, *Stenson v. Vail*, Cause No. 82197-6.

In October 2008, Stenson filed an amended complaint in the state trial court. Exhibit 3, First Amended Complaint, *Stenson v. Vail, et al.*, Thurston County Cause No. 08-2-02080-8. Stenson alleged that both lethal injection and hanging are cruel and unusual punishment, and that he has been denied a right to make an informed election of a method of execution, and that there is not a proper delegation of legislative authority to develop a policy for methods of execution. Stenson named the same defendants and raised the same claims presented in this federal complaint. *See* Exhibit 3. Defendants moved to dismiss the state complaint. Stenson moved for a stay of execution. The state court granted in part and denied in part the motion to dismiss. Exhibit 4, Order, *Stenson v. Vail*,

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Thurston County Cause No. 08-2-02080-8. The court dismissed the hanging claim, but denied the motion to dismiss Stenson's remaining claims challenging lethal injection. Exhibit 4. The action remains pending before the state trial court. The court denied the motion for a preliminary injunction. Exhibit 5, Order, *Stenson v. Vail, et al.*, Thurston County Cause No. 08-2-02080-8. The judge found that Stenson did not show a likelihood of success on the merits.

For the reasons set forth below, the Court should deny a stay of execution.

II. ARGUMENT

A. EQUITY BARS A STAY, AND STENSON CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

1. Equity Bars A Stay Of Execution.

"State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson v. Campbell*, 541 U.S. 637, 644 (2004); *see also In re Blodgett*, 502 U.S. 236 (1992). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 555 (1998). In considering whether to grant a stay of execution, "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Nelson*, 541 U.S. at 649 (quoting *Gomez v. U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992)).

A stay of execution is not available as a matter of right, and the filing of an action "does not entitle the complainant to an order staying an execution as a

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matter of course." *Hill*, 547 U.S. at 583-84. The Court should "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez*, 503 U.S. at 654. The Court "must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649-50. "Given the State's significant interest in enforcing its criminal judgment, . . . there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 650; *see also Hill*, 547 U.S. at 584; *Hill v. McDonough*, 464 F.3d 1256 (11th Cir. 2006); *Hill v. McDonough*, 548 U.S. 940 (2006).

Equity bars a stay of execution. Stenson's sentence became final in 1998 when the Supreme Court denied certiorari on direct review. *Stenson v. Washington*, 523 U.S. 1008 (1998). Stenson has also known since 1996 that he would be executed by lethal injection. RCW 10.95.180. The Supreme Court held as early as 2004 that challenges to lethal injection could be brought under 42 U.S.C. § 1983. *Nelson v. Campbell*, 541 U.S. 637 (2004). Stenson delayed bringing this action until the eve of his execution, just six judicial days before the scheduled date. Equity bars a stay of execution.

While an inmate may challenge lethal injection in a civil rights action, the filing of such an action does not entitle the inmate to a stay of execution as a

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matter of right. *Hill*, 547 U.S. at 584. The Court directed the lower courts to consider whether Hill was entitled to a stay of execution. *Id*. The Court stressed there is "'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584. On remand, the Eleventh Circuit ruled "the equities do not support Hill's request" for a stay of execution. *Hill*, 464 F.3d at 1259. Among other things, Hill did not file his claim until the eve of his execution in 2006, even though the state court had rejected a similar challenge to lethal injection as early as 2000. *Id.* Since Washington has had challenges to lethal injection even earlier, *see, e.g.*, *In re Pirtle*, 136 Wn.2d 467, 496, 965 P.2d 593 (1998), Stenson could have brought this action earlier. Stenson simply chose to wait. Equity bars a stay. *See, e.g.*, *Crowe v. Donald*, 528 F.3d 1290, 1292-94 (11th Cir. 2008); *Lambert v. Buss*, 498 F.3d 446, 453-54 (7th Cir. 2007); *Woods v. Buss*, 496 F.3d 620, 623 (7th Cir. 2007); *Nooner v. Norris*, 491 F.3d 804, 807-10 (8th Cir. 2007); *Grayson v. Allen*, 491 F.3d 1318, 1322-26 (11th Cir. 2007); *Workman v. Bredesen*, 486 F.3d 896, 911-13 (6th Cir. 2007); *Jones v. Allen*, 485 F.3d 635, 638-41 (11th Cir. 2007); *Cooey v. Strickland*, 484 F.3d 424, 425 (6th Cir. 2007); *Hamilton v. Jones*, 472 F.3d 814, 816 (10th Cir. 2007); *Diaz v. McDonough*, 472 F.3d 849, 850-51 (11th Cir. 2006); *Rutherford v. McDonough*, 466 F.3d 970 (11th Cir. 2006); *Brown v. Livingston*, 457 F.3d

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390, 391 (5th Cir. 2006); *Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006); *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir. Cir. 2006). "[A] death-sentenced inmate may not wait until execution is imminent before filing an action to enjoin a State's method of carrying it out." *Berry v. Epps*, 506 F.3d 402, 404 (5th Cir. 2007); *see also Workman*, 486 F.3d at 913; *Gomez*, 503 U.S. at 654; *White v. Johnson*, 429 F.3d 572, 574 (5th Cir. 2005); *Cooey v. Strickland*, 479 F.3d 412, 419-20 (6th Cir. 2007); *McNair v. Allen*, 515 F.3d 1168, 1177 (11th Cir. 2008); *Henyard v. Secretary, DOC*, 543 F.3d 644 (11th Cir. 2008). In light of the strong presumption against granting a stay of execution, equity demands that the denial of any stay of execution.

2. Stenson Fails To Show A Substantial Likelihood Of Success.

a. The Action Is Barred Under *Younger*.

The *Younger* doctrine requires federal court abstention where there is ongoing state court litigation. *Younger v. Harris*, 401 U.S. 37, 43 (1971); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Ex Parte Royall*, 117 U.S. 241 (1886); *Moore v. Sims*, 442 U.S. 415, 423 (1979). The *Younger* doctrine is "fully applicable to civil proceedings in which important state interests are involved." *Moore*, 442 U.S. at 423 (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). The ongoing state court action, initiated by Stenson himself, satisfies the three prong test for abstention. "The first prong requires that the state proceedings be ongoing." *Mission Oaks*

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Mobile Home Park v. City of Hollister, 989 F.2d 359, 360-61 (9th Cir. 1993). Stenson filed the state court action, raising the same claims and naming the same defendants as in the action before this Court, and the action remains pending before the state trial court. "The second prong requires that the proceedings implicate important state interests." *Id*. at 361. This prong is satisfied because the action involves the State's compelling interest in carrying out a lawful sentence. "The third and final prong requires that the state proceedings provide an adequate opportunity to raise federal questions." *Id*. "The Supreme Court has indicated it will assume that state court proceedings are adequate 'in the absence of unambiguous authority to the contrary.'' *Id*. Since Stenson's state court action is still pending, this Court must abstain. Stenson cannot show a likelihood of success on the merits.

b. Stenson Has Not Exhausted Administrative Remedies.

No action may be brought by a prisoner challenging the conditions of his sentence until administrative remedies are exhausted. Exhaustion is mandatory. *Jones v. Bock*, 127 S. Ct. 910, 918-19 (2007); *Booth v. Churner*, 532 U.S. 731, 740, 742 (2001); *Porter v. Nussle*, 543 U.S. 516, 524-32 (2002); *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). Stenson failed to fully exhaust his administrative remedies. Although Stenson filed a grievance, which upon reconsideration was denied, *see* Exhibit 6, Grievance and Responses, he did not then further appeal his remaining administrative remedies.

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c. Stenson's Claims Fail On The Merits.

Lethal injection is presumed constitutional. *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994) (*en banc*). Stenson must rebut the presumption by presenting evidence that the method of execution is actually cruel punishment. *Id.*; *In re Kemmler*, 136 U.S. 436, 447 (1890). Speculation that an execution might cause an unnecessary risk of pain does not show a constitutional violation. The possibility of an accident "cannot and need not be eliminated from the execution process in order to survive constitutional review." *LeGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998).

The Supreme Court rejected the very claim now presented by Stenson, holding that lethal injection is a constitutional method of execution, *Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008). The Court held that a lethal injection protocol substantially similar to Kentucky's would not violate the Eighth Amendment. *Id*. at 1537. Washington's protocol is substantially similar to Kentucky's protocol. DOC Policy 490.200 expressly requires minimum qualifications of members of the lethal injection team, sufficient practice sessions, the establishment of two intravenous lines with a normal flow of saline through each line, the administration of 3 grams of sodium thiopental, the Superintendent to observe the inmate for signs of consciousness after the administration of sodium thiopental and before the administration of pancuronium bromide, and the administration of an additional dose of 3 grams of sodium thiopental before the pancuronium bromide if the

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Superintendent observes the inmate is conscious after the administration of the first dose of sodium thiopental. *See* Exhibit 8, Declaration of Dell-Autumn Witten, Attachment A. The individual who will site the intravenous lines during the execution regularly inserts intravenous lines as a part of his/her professional duties, and it is reasonable to assign this task to this individual. Exhibit 7, Declaration of Stephen Sinclair; Exhibit 11, Declaration of Fiona Jane Couper, Ph.D.; Exhibit 10, Declaration of Mark Dershwitz, M.D., Ph.D. Additionally, the three practice sessions with the siting of IV lines have occurred. Exhibit 7, Declaration of Sinclair; Exhibit 9, Declaration of Dan J. Pacholke. The amended policy is substantially similar to Kentucky's protocol. The proper application of the protocol will result in a rapid, painless and humane death. Exhibits 10 and 11. The policy is constitutional. *See Emmett v. Johnson*, 532 F.3d 291 (4th Cir. 2008); *Workman*, 486 F.3d at 905-10; *Lambert v. Buss*, 498 F.3d 446, 448-54 (7th Cir. 2007); *Woods v. Buss*, 496 F.3d at 622-23; *Hamilton v. Jones*, 472 F.3d 814, 816-17 (10th Cir. 2007); *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004); *Poland v. Stewart*, 151 F.3d. 11014 (9th Cir. 1998); *Woolls v. McCotter*, 798 F.2d 695 (5th Cir. 1986); *Cooey v. Strickland*, 544 F.3d 588 (6th Cir. October 9, 2008).

Finally, Stenson alleges the State lacks authority to promulgate an execution policy. The issue of state law is without merit. First, the "legislative

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delegation" rule advanced by Stenson does not apply. The policy is a directive governing internal operations at a prison, and is not an administrative rule that creates law. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306, 323, 199 P.3d 825 (2005). The APA does not apply to policies governing offenders and prisons. RCW 34.05.030(1)(c); *Dawson v. Hearing Committee*, 92 Wn.2d 391, 597 P.2d 1353 (1979); *Foss v. DOC*, 82 Wn. App. 355, 358-59, 918 P.2d 521 (1996). Second, even if the rule applied, the policy is a lawful delegation since the Legislature described in general terms what is to be done and by which agency. *State v. Simmons*, 152 Wn.2d 450, 455, 98 P.3d 789 (2004); RCW 10.95.160-.190; RCW 72.01.090; RCW 72.02.040; RCW 72.09.050; RCW 72.02.045. And there are adequate procedural safeguards to control against arbitrary agency action. *Simmons*, 152 Wn.2d at 457; *State v. Crown Zellerbach*, 92 Wn.2d 894, 901, 602 P.2d 1172 (1979). Such protections exist under existing Washington law. *See, e.g.*, RAP 16.2; RCW 7.16.150; RCW 7.16.290.

III. CONCLUSION

For the reasons stated above, the Defendants respectfully requests that the Court deny Plaintiff's motion for a stay of execution.

DATED this 21st day of November, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2008, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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