

STEVENS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 08A471

ELDON VAIL, SECRETARY OF WASHINGTON
DEPARTMENT OF CORRECTIONS, ET AL. *v.*
DAROLD R. J. STENSON

ON APPLICATION TO VACATE STAY OF EXECUTION

[December 3, 2008]

The application to vacate the stay of execution of sentence of death entered by the United States District Court for the Eastern District of Washington on November 25, 2008, presented to Justice Kennedy and by him referred to the Court, is granted.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

On November 21, 2008, the Thurston County Superior Court denied respondent's motion for a preliminary injunction that would have prevented the State from executing respondent until the court considered respondent's constitutional challenge to the State's lethal injection protocol. Rebuffed by the state court, respondent immediately filed an identical constitutional challenge under Rev. Stat. §1979, 42 U. S. C. §1983, in the United States District Court for the Eastern District of Washington and moved for a preliminary injunction. The District Court concluded that a stay of execution was warranted to allow the state court sufficient time to fully and fairly consider the merits of respondent's constitutional claim. In my view, the entry of the stay was improper. The state court decided under state law that the execution could proceed while respondent's constitutional claim was pending. Accordingly, the District Court should not have entered a

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stay to give the state court additional time it decided was not warranted. In light of that procedural error, and on that basis alone, I vote to grant the application to vacate the stay of execution entered by the District Court.