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JUDGE KENNETH WILLIAMS

SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

DAROLD STENSON,	)	NO. 93-1-00039-1
	)	
Petitioner,	)	
	)	PETITIONER'S MOTION FOR STAY
vs.	)	OF EXECUTION
	)	
STATE OF WASHINGTON,	)	<b>Noted for: November 21, 2008 at</b>
	)	<b>11:00 a.m.</b>
Respondent.	)	
_____	)	

Petitioner Darold Stenson asks this Court for a stay of execution until the conclusion of the proceedings in this matter. This motion is based on RCW 2.28.150, RCW 10.73.170, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 3 and 14 to the Washington Constitution.

**MEMORANDUM IN SUPPORT OF MOTION**

**I. Factual Background**

On August 21, 2008, Mr. Stenson moved for DNA testing pursuant to RCW 10.73.170, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 3 and 14 to the Washington Constitution.

On October 24, 2008, this Court held a hearing on the motion. The DNA testing

1 statute requires consideration of, *inter alia*, how the DNA evidence is material to a  
2 sentencing enhancement. At the hearing, the Court acknowledged this issue and indicated  
3 that it “wanted to think a bit more” about the statute’s language.

4 The Court directed counsel to provide more information on mitochondrial and mini-  
5 STR testing and whether one type of testing would impact on the ability to test a sample by  
6 another method. The Court also requested counsel to prioritize items to be tested. The  
7 Court did not rule on Mr. Stenson’s motion for DNA testing, but the matters which the  
8 Court asked for further information appear to anticipate that testing will occur.

9 The Court scheduled another hearing for November 21, 2008.

10 The State intends to execute Darold Stenson less than two weeks after this next  
11 hearing, on December 3, 2008.

## 12 II. Argument in Support of Stay

13 In order to accomplish any testing and to determine how the evidence was handled,  
14 a stay is needed.

15 This Court – by its inherent authority, statute, and case law – has the authority to  
16 grant a stay of execution. RCW 2.28.150 provides that when jurisdiction is conferred a  
17 court “all the means to carry it into effect are also given.” Here there is no dispute that the  
18 court has the jurisdiction to entertain petitioner’s motion for DNA testing. *See* RCW  
19 10.73.170 (requiring motion for DNA testing to be filed in court of conviction). In  
20 *Goodsell v. Goodsell*, 38 Wn.2d 135, 138 (1957), the Washington Supreme Court  
21 recognized that “[a] court not only has the right but it is its duty to makes its decrees  
22 effective and to prevent evasion thereof.”

23 There can be no doubt that petitioner’s execution on December 3, 2008 will prevent  
24 the matters before the Court from being resolved. A stay is necessary in order to allow for  
25 DNA testing.

1 Even if this Court remains uncertain about whether it should grant the motion for  
2 DNA testing, a stay is nonetheless necessary. First, uncertainty about the DNA testing  
3 statute weighs in favor of granting the stay of execution. As this Court recognized at the  
4 October 24, the meaning of the “sentencing enhancement” provision of the DNA statute is  
5 unclear, and there is no precedent or case law interpreting the provision. Moreover, the  
6 Washington Supreme Court has yet to decide *State v. Riofta*, 134 Wn. App. 669, 142 P.3d  
7 193, review granted, 161 Wn.2d 1001, 166 P.3d 718(2007), a case from Division II that  
8 interprets the showing needed to secure DNA testing.

9 Also favoring a stay is the just-announced grant of certiorari by the United States  
10 Supreme Court in *District Attorney’s Office v. Osborne*, No. 08-6 (cert. granted Nov. 3,  
11 2008). *Osborne* will review a Ninth Circuit decision involving a post-trial request by an  
12 Alaska prisoner for DNA testing. One of the issues which will probably be resolved by  
13 *Osborne* is whether there is a federal constitutional due process right to DNA testing. The  
14 petition in this case asserts that such a right exists. *Osborne* will be the first Supreme Court  
15 case to address DNA testing in the post-conviction context.

16 Given that (1) this is a death penalty case; (2) the sentencing enhancement aspect of  
17 the DNA testing statute has not yet been the subject of any appellate decisions; (3) the  
18 Washington Supreme Court has not yet issued an opinion in *Riofta*; and (4) the United  
19 States Supreme Court just granted review to decide whether there is a federal due process  
20 right to DNA testing, a stay is necessary even if the Court decides not to order DNA testing.

21 Rule of Appellate Procedure 16.24 governs standards for when a defendant requests  
22 a stay related to a successive personal restraint petition. In those instances, a petitioner need  
23 show only that he has made “a substantial showing” that the petition is not barred by RCW  
24 10.73 or RAP 16.4(d). The rule does not apply to the instant proceeding because a motion  
25 for DNA testing is not a personal restraint petition. However, even if the rule did apply it  
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1 shows that petitioner should be granted a stay. This is because the DNA statute does not  
2 contain any time requirements for filing. At an absolute minimum, Mr. Stenson has made  
3 a "substantial showing" that his motion for DNA testing is properly filed and deserves to  
4 be considered on the merits.

5 The grant of a stay is essential to insure the orderly and efficient administration of  
6 justice. Conversely, not granting a stay means that Mr. Stenson will be put to death before  
7 any of the DNA issues in this case are resolved.

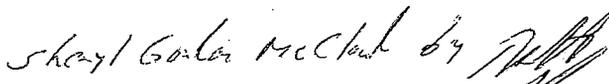
8 **III. Conclusion**

9 For the foregoing reasons, the Court should stay the execution until the conclusion  
10 of the proceedings in this matter.

11 DATED this 14th day of November, 2008.

12 Respectfully submitted,

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14 \_\_\_\_\_  
15 Robert H. Gombiner  
16 Attorney for Darold Stenson

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19 Sheryl Gordon McCloud  
20 Attorney for Darold Stenson

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**CERTIFICATE OF SERVICE**

I certify that I mailed, by U.S. Mail, first class, a copy of the foregoing document to: Deborah S. Kelly, Clallam County Prosecuting Attorney at 223 East Fourth Street, Suite 11, Port Angeles, Washington 98362; and Pamela Loginsky, Special Deputy Prosecuting Attorney, 206 - 10th Avenue S.E., Olympia, Washington 98501-1399, on November 14, 2008.

  
Barbara Hughes



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Presented by:



Robert H. Gombiner  
WSBA # 16059  
Attorney for Darold Stenson

(PROPOSED) ORDER GRANTING  
PETITIONER'S MOTION FOR  
STAY OF EXECUTION

**FEDERAL PUBLIC DEFENDER**  
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(206) 553-1100