JUDGE KENNETH WILLIAMS

IN THE SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DAROLD RAY STENSON, Defendant.	No. 93-1-0039-1 RESPONSE TO PETITIONER'S REPLY TO COURT'S REQUEST FOR FURTHER INFORMATION AND REPLY TO AFFIDAVIT OF MICHAEL CROTEAU **Noted for: November 21, 2008 at 11:00 a.m.**

The State of Washington, by and through its attorney, Pamela B. Loginsky, Special Deputy Prosecuting Attorney for Clallam County, responds to Darold Ray Stenson's reply to court's request for further information and reply to affidavit of Michael Croteau.

The State, in this response, will not repeat the arguments it previously set forth in the response to Stenson's motion for DNA testing and in the response to Stenson's motion for testing by an independent laboratory. The main thrust of those documents, that the DNA testing will not produce evidence that will "demonstrate innocence on a more probable than not basis", RCW 10.73.170(3), has not changed. No other adult was present at Dakota Farms on the day of the murders, and even with evidence that someone left DNA on any of the identified items, Stenson cannot satisfy the foundation for the admission of "other suspect" evidence. *See State v. Stenson*, 132 Wn.2d 668, at 734-35, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) ("*Stenson I*"); *In re Stenson*, 142 Wn.2d 710, 751, 16 P.3d 1 (2001) ("*Stenson II*").

This response will deal primarily with Stenson's contention that the State should fund mini-

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
206 10TH Ave. S.E.
Olympia, WA 98501
(360) 753-2175 FAX (360) 753-3943

STR testing or mitochrondrial testing by an independent laboratory. The State's' decision not to address certain arguments made by Stenson in his November 18th pleading should not be considered as an acknowledgment of the validity of Stenson's analysis.

I. THERE IS NO AUTHORITY FOR THE EXPENDITURE OF STATE FUNDS FOR DNA TESTING BY ANY ENTITY OTHER THAN THE WASHINGTON STATE PATROL CRIME LABORATORY

While the United States Supreme Court has shown special concern for protecting the constitutional rights of indigent defendants, that Court has held that neither the Due Process Clause of the Fourteenth Amendment nor the Equal Protection Clause require a State to appoint counsel for indigent prisoners seeking state post-conviction relief. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 107 S. Ct. 1990, 1993-94 (1987). This holding does not vary with the seriousness of the crimes committed or the harshness of the penalty that was imposed. *Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (capital case).

The rule announced in *Pennsylvania v. Finley, supra*, also applies to requests for the appointment of experts and/or investigators to assist in the prosecution of a collateral attack on a judgment and sentence. *See, e.g., Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005), *cert denied*, 547 U.S. 1077 (2006); *Gardner v. Holden,* 888 P.2d 608, 622 (Utah 1994). Even the Ninth Circuit in *Osborne v. Dist. Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008), *cert granted by Dist. Attorney's Office v. Osborne*, 2008 U.S. LEXIS 7970 (U.S., Nov. 3, 2008), did not hold that Osborne's right to access evidence for further DNA testing included a right to have the State pay for that testing. *Id.* 521 F.3d at 1126 and 1142.

A legislature can statutorily authorize the appointment of counsel and the provision of expert services in cases where such appointment is not constitutionally required. See *Housing Authority v. Saylors*, 87 Wn.2d 732, 740. 557 P.2d 321 (1976); *Murray*, 109 S. Ct. at 2772 (O'Connor, J., concurring). Examples of statutes that authorize the appointment and compensation of counsel when such appointment is not constitutionally required include RCW 13.34.090 (dependency actions) and RCW 26.09.110 (to represent minor or dependent children with respect to parenting plans). Absent such legislation, a court cannot provide for payment of an attorney, expert or investigator appointed to assist an indigent prisoner in a collateral attack on a judgment and sentence. *E.g., Moore v.*

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
206 10TH Ave. S.E.
Olympia, WA 98501
(360) 753-2175 FAX (360) 753-3943

Snohomish County, 112 Wn.2d 915, 774 P.2d 1218 (1989) (fees of expert witness appointed by court pursuant to court rule could not be paid out of public funds in the absence of express language authorizing the expenditure); *Honore v. State Board of Prison Terms*, 77 Wn.2d 660, 678, 466 P.2d 485 (1970) (courts have no power over public funds collected for public purposes absent legislative authorization); Const. article 8, § 4 (amendment 11) (no funds can be disbursed from the public treasury except upon appropriation).

With respect to post-conviction DNA testing, the Legislature has granted trial courts the limited authority to send evidence for testing by the Washington State Patrol Crime Laboratory. RCW 10.73.170(5). The Legislature has not granted trial courts the authority to send evidence to any other laboratory, nor has the Legislature authorized the trial courts to pay for testing in any other laboratory. *See, e.g., State v. Patrick*, 86 S.W.3d 592 (Tex. Crim. App. 2002) (trial court lacked the jurisdiction to authorize post-conviction DNA testing by an independent laboratory at the petitioner's expense, absent specific statutory authorization for such testing). *Accord In re Runyan*, 121 Wn.2d 432, 441-44, 853 P.2d 424 (1993) (a court's authority to take any action post-conviction when the judgment and sentence is valid on its face is limited to the boundaries set by the Legislature).

The only other statute that authorizes the expenditure of funds to assist a defendant in bringing a collateral attack upon a judgment and sentence is RCW 10.73.150. RCW 10.73.150(3) applies to individuals who are under a sentence of death. This provision states that:

> Counsel shall be provided at state expense to an adult offender convicted of a crime and to a juvenile offender convicted of an offense when the offender is indigent or indigent and able to contribute as those terms are defined in RCW 10.101.010 and the offender:
>
> . . . .
>
> (3) Is under a sentence of death and requests counsel be appointed to file and prosecute a motion or petition for collateral attack as defined in RCW 10.73.090. Counsel may be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence, if the court determines that the collateral attack is not barred by RCW 10.73.090 or 10.73.140.

RCW 10.73.150(3).

This provision does not provide a basis to fund Stenson's request, as any PRP or other collateral attack that Stenson should bring based upon the DNA evidence will be his fifth. Stenson's fourth collateral attack was dismissed by the Washington Supreme Court on November 9th as

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
206 10TH Ave. S.E.
Olympia, WA 98501
(360) 753-2175 FAX (360) 753-3943

untimely and as an abuse of the writ.[1] His fifth collateral attack will meet the same fate for the reasons outlined in the State's response to Stenson's stay motion.

Respectfully Submitted this 19th day of November, 2008,

PAMELA B. LOGINSKY
WSBA NO. 18096
Special Deputy Prosecuting Attorney

[1]A copy of this order is attached.

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
206 10TH Ave. S.E.
Olympia, WA 98501
(360) 753-2175 FAX (360) 753-3943

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 19th day of November, 2008, I served a copy of the document to which this proof of service is attached by e-mailing a copy of the document to

Robert Gombiner at robert_gombiner@fd.org

and by faxing a copy of the document to

Robert Gombiner at (206) 553-0120

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 19th day of November, 2008, at Olympia, Washington.

Pamela Beth Loginsky

Pamela B. Loginsky, WSBA 18096

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
206 10TH Ave. S.E.
Olympia, WA 98501
(360) 753-2175 FAX (360) 753-3943

THE SUPREME COURT OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF

DAROLD RAY STENSON, a/k/a DAROLD R.J. STENSON,

Petitioner.

NO. 82332-4

ORDER

This matter came before the Court [Justice Owens recused] on November 18, 2008, for consideration of Petitioner's Personal Restraint Petition as well as the Petitioner's Opening Brief in Support of Personal Restraint Petition, and Memorandum in Support of Motion for Stay of Execution, RAP 16.9 Response to Personal Restraint Petition, and Response to Motion for Order Enjoining Execution, Amicus Curiae Briefs from the ACLU and ACLU of Washington, Washington State Bar Association, and the Murder Victims' Families for Reconciliation, and the State's Response to Amicus Curiae Briefs; the Court being fully advised and having determined, by majority, that the following order should be entered:

Now, therefore, it is hereby

ORDERED:

That Petitioner's Personal Restraint Petition is denied pursuant to the provisions of RCW 10.73.090 and .100 as a successive petition (the Petitioner's fourth Personal Restraint Petition). Petitioner's Motion for Stay of Execution is also denied. Dissents to this order will be filed separately.

DATED at Olympia, Washington this 19th day of November, 2008.

For the Court

Gerry L. Alexander
CHIEF JUSTICE

547/16

In re PRP of Darold R. J. Stenson

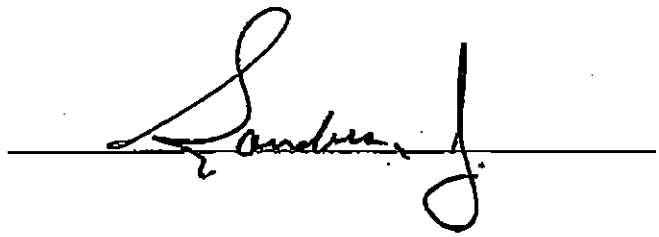
No. 82332-4

SANDERS, J. (dissenting)—After a day of unrelated oral arguments, this Court convened at approximately 3 p.m. on November 18, 2008, to consider Darold R. J. Stenson's personal restraint petition and request for a stay of his execution, set for December 3, 2008. Briefs had previously been circulated; however, due to an administrative oversight, Mr. Stenson's Opening Brief was first circulated less than 24 hours prior to our conference. I moved to stay the execution date to provide more time for careful consideration while still giving Mr. Stenson a reasonable opportunity to seek alternative relief in the event this Court did not act favorably on the merits.

Unfortunately, that stay was denied by majority vote. I then voted on the merits to grant the stay, grant the PRP, and hear oral arguments based on the claims and authority set forth in that Opening Brief. But the majority voted otherwise. I dissent. We need not rush to execution under these circumstances.

No. 80759-1

I dissent.



In re Personal Restraint Petition of Darold R.J. Stenson

No. 82332-4

STEPHENS, J. (dissenting)—The majority today denies Mr. Stenson's motion for a stay of execution and dismisses his personal restraint petition under a procedural rule barring successive petitions. In so doing, it necessarily regards his state constitutional claims as having been previously rejected. *See In re Pers. Restraint of Greening*, 141 Wn.2d 687, 699, 9 P.3d 206 (2000) (recognizing a successive petition is one that renews claims previously heard and determined on the merits).

Yet, this Court has never addressed the merits of Mr. Stenson's claims under Washington Constitution article I, sections 13 and 14. Prior dismissals, like today's refusal to hear this petition, were based on procedural rules. *See In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 144 & n.3, 102 P.3d 151 (2004). Moreover, the factual basis for considering the present issues is before the court for the first time today. I am of the view that, before we may invoke a procedural rule to refuse to hear the merits of a significant constitutional issue that could result in

prohibiting the imposition of a death sentence, the bar to review upon which we rely must be clear and unavoidable.

I find no clear and unavoidable bar to review in this case. Mr. Stenson's petition arguably falls within recognized exceptions to late-filed personal restraint petitions under RCW 10.73.100. At a minimum this justifies a stay to fully consider the arguments raised in Mr. Stenson's petition.

Like Justice Sanders, I fail to understand the rush to execution under these circumstances. I respectfully dissent.

Stephens, J.