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 MOTION FOR STAY OF EXECUTION **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 motion for a stay of execution.

I. FACTS RELEVANT TO STAY REQUEST

In 1994, Stenson was tried for the aggravated first degree murders of his wife and his business partner. Prior to trial, both PCR and RFLP DNA testing was performed on the evidence. Both the RFLP and PCR results established that victim Frank Hoerner's blood was present on Stenson's pants. *See State v. Stenson*, 132 Wn.2d 668, 735 n. 14, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) ("*Stenson I*"). The presence of Mr. Hoerner's blood on Stenson's pants was inculpatory, as it was inconsistent with the version of events Stenson provided to police. *Stenson I*, 132 Wn.2d at 678, 731.[1] Stenson successfully prevented the jury from learning of the

[1]The State's experts all testified that the evidence showed that the spatters of Frank Hoerner's blood on Stenson's pants could not have occurred by Stenson kneeling next to Mr. Hoerner's body as Stenson claimed. *Stenson I*, at 731.

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inculpatory DNA results, under a theory that was inconsistent with opinions issued two years after Stenson's trial concluded. *Stenson I*, 132 Wn.2d at 735 n. 14, citing *State v. Copland*, 130 Wn.2d 244, 922 P.2d 1304 (1996), and *State v. Jones*, 130 Wn.2d 302, 922 P.2d 806 (1996).

A jury convicted Stenson of the two counts of aggravated murder, and he was sentenced to die. The Washington Supreme Court affirmed the convictions and sentence on direct review in 1997, and the United States Supreme Court denied certiorari in 1998. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). The Supreme Court denied Stenson's first personal restraint petition (PRP) on the merits in 2001, and denied as procedurally barred two subsequent PRPs in 2003 and 2004. *In re Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001) ("*Stenson II*"); *In re Stenson*, 150 Wn.2d 207, 76 P.3d 241 (2003) ("*Stenson III*"); *In re Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004) ("*Stenson IV*"). A fourth PRP is currently pending in the Washington Supreme Court.

Stenson filed a habeas corpus petition in 2001 challenging his convictions and sentence in federal court. *Stenson v. Lambert*, US District Court Cause No. C01-252P. The district court denied the petition in 2005, the Ninth Circuit affirmed dismissal of the petition in September 2007. *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007). The Supreme Court denied certiorari on October 6, 2008. *Stenson v. Sinclair*, ___ S. Ct. ___ (2008). The Ninth Circuit issued the mandate on October 17, 2008. The mandate terminated the stay of execution issued by the federal court. Pursuant to RCW 10.95.160(2), when the stay terminated, the date of execution automatically reset for 30 judicial days. *In re Lord*, 123 Wn.2d 737, 740-41, 870 P.2d 964 (1994). The date of execution is currently scheduled for December 3, 2008. The Washington Supreme Court issued an order denying a stay of execution on November 6, 2008.[2]

> Defense counsel sought and received funding to hire a nationally recognized expert in the field of forensic science to analyze the blood spatters on the Defendant's pants. Stuart James, a consulting blood analyst from the Florida Department of Law Enforcement, was hired by the defense, and his opinion was generally in agreement with the of the State's experts who said the spatter evidence was entirely inconsistent with Stenson's repeated statements to officers that he found Frank dead. Mr. James did not testify at trial.

Stenson I, 132 Wn.2d at 731, n. 13.

[2]A copy of the order denying the stay of execution is attached.

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One year before Stenson filed his federal habeas corpus petition in federal court, the Washington Legislature enacted a statute that provided funds for post-conviction DNA testing of certain exhibits. *See* Laws of 2000, ch. 92. Five years later, the Legislature significantly amended the statute to allow for defendants to request testing from the court that entered the judgment of conviction, and authorized the appointment of counsel to assist a defendant. *See* Laws of 2005, ch. 5, § 1, codified as RCW 10.73.170. As of the March 9, 2005, effective date of RCW 10.73.170, Washington's appellate courts deemed the following more sensitive methods of DNA testing to be admissible at trial: D1S80 system, *see State v. Gore*, 143 Wn.2d 288, 305-07, 21 P.3d 262 (2001), and DQ-alpha PCR DNA, *see State v. Gentry*, 125 Wn.2d 570, 587, 888 P.2d 1105 , *cert. denied*, 516 U.S. 843 (1995). Since the March 9, 2005, effective date of RCW 10.73.170, Washington's appellate courts have also found Short Tandem Repeat (STR) DNA testing to be acceptable. *See State v. Gregory*, 158 Wn.2d 759, 832-33, 147 P.3d 1201 (2006).

On August 21, 2008, nearly two years after the Washington Supreme Court approved STR DNA testing, Stenson filed a motion for DNA testing. This motion requests DNA testing of literally every piece of physical evidence by a procedure, miniature short tandem repeat (mini-STR or Minifiler), that was released for forensic testing over a year before Stenson filed his request for DNA testing. Although Stenson's certiorari petition was pending before the United States Supreme Court, Stenson noted his motion for DNA testing for October 17, 2008, or 57 days after he filed the motion.

Stenson's motion acknowledges that RCW 10.73.170 only authorizes a court to order DNA testing in the Washington State Crime Laboratory. Stenson requested that the Washington State Crime Laboratory DNA test every piece of physical evidence that was collected during the investigation. The Washington State Crime Laboratory, however, does not offer mini-STR. The Washington State Crime Laboratory, however, has performed a variety of "touch or low copy DNA" analysis since at least 2004.

Stenson's motion acknowledges that the Washington State Crime Laboratory does not perform mini-STR. Stenson's motion requests that mini-STR testing be performed at his expense by a private laboratory. Stenson, who is indigent, provides this Court with no evidence that he has the funds necessary to accomplish this testing. Stenson also fails to provide this Court with any proof

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that the independent laboratory has agreed to perform the testing or how long such testing will take.

The evidence that Stenson is seeking to have tested has not been maintained in "ideal" circumstances. The exhibits have been subject to handling by crime scene investigators, State forensic experts, defense forensic experts, witnesses, superior court clerks, jurors, supreme court staff, counsel of record, and agents for the counsel of record. There is no evidence that gloves were worn by any of these individuals, and any DNA located on the exhibits are likely to have been deposited in the 14 years subsequent to the murders. *See* Declaration of Deborah Kelly and Declaration of Michael Croteau. DNA on some of the items, such as the bullets, could have also been deposited by uninvolved individuals prior to the crime. *See* Declaration of Darrell Spindel.

With the execution less than 20 days away, Stenson now moves for a stay of execution, seeking to prevent the carrying out the lawful sentence imposed by the Clallam County Superior Court. However, the procedure for obtaining DNA testing from the State Crime Laboratory has been in place for over three years. Stenson simply chose not to avail himself of this procedure until the eve of his execution. Stenson's delay in bringing this action not only renders his request untimely, and therefore unreviewable under the applicable statutes of limitations, but it also renders his request inequitable since the balancing of interests weighs against the grant of a stay in this eleventh hour challenge to a lawful execution. Stenson cannot show a clear legal or equitable right, the invasion of such a right, or actual and substantial injury, and Stenson cannot show the balance of the interests weighs in favor of stay. For these reasons, the Court should deny Stenson's motion for a stay of execution.

II. ARGUMENT

A. A Stay of Execution Cannot Be Granted Because Stenson Cannot Demonstrate that He is Entitled to Post-Conviction DNA Testing

Stenson's convictions for aggravated first degree murder and his death sentence were affirmed on appeal, and the mandate has issued. Post-issuance of the mandate, the superior court's jurisdiction in this matter is limited to that conferred upon it by statute. *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).

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One statute, RCW 10.73.170, authorizes this Court to order DNA testing to be performed by the Washington State Patrol Crime Laboratory, RCW 10.73.170(5),[3] if a petitioner, who has been convicted of a felony, demonstrates

> (1) Either that the trial court that DNA testing did not meet acceptable scientific standards, or that DNA testing technology available at the time of trial was not sufficiently developed to test the DNA evidence in the case; or that the DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information; and
>
> (2) that the DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and
>
> (3) that the DNA evidence would demonstrate innocence on a more probable than not basis.

RCW 10.73.170(2) and (3).

Stenson has not satisfied these factors. This is not a case in which the perpetrator left biological fluids, such as blood or semen, at the time of the offense. This is a case involving mundane objects, such as bullets, clothing, belts, and other items, that were handled by numerous people prior to the murders and after the murders. Each and every person who handled the items could have contributed skin cells or sweat. The presence of DNA from such skin cells or sweat is not evidence that the person was a perpetrator or, an accomplice to the murders.

Stenson cannot demonstrate that the DNA testing will even yield admissible evidence, much less evidence that will demonstrate his innocence on a more probable than not basis. "Evidence connecting another person with the crime charged is not admissible unless there is a train of facts or

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[3]There is no statutory authorization for post-conviction DNA testing by any entity other than the Washington State Crime Laboratory. This Court, therefore, lacks the authority to grant Stenson's request for DNA testing by an independent 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 Personal Restraint of Gentry*, 137 Wn.2d 378, 390-93, 972 P.2d 1250 (1999) (no constitutional right to discovery, counsel, experts, or investigators to assist a defendant in a collateral attack); *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).

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circumstances which tend clearly to point to some-one other than the defendant as the guilty person." *Stenson I*, 132 Wn.2d at 734. As noted by the Washington Supreme Court, Stenson has produced nothing beyond his unsubstantiated suspicions that tends to point to anyone else as the murderer. Specifically, Stenson has failed to establish any evidence that Denise Hoerner was involved, or that any other adult was present at Dakota Farms at the time of the murders. *Stenson I*, 132 Wn.2d at 734-35; *Stenson* II, 142 Wn.2d at 751.[4] The presence of low-touch DNA will not change this as Stenson lacks the ability to demonstrate that the DNA was deposited at the scene at the time of the crime. *See Stenson* II, 142 Wn.2d at 751 ("There is no evidence of any adult being present at Dakota Farms at the time of the murders other than Denise Stenson, Darold Stenson, and Frank Hoerner."). Other courts have denied capital defendant's request for DNA testing under similar conditions. *See, e.g., Arthur v. King*, 500 F.3d 1335, 1341 n. 4 (11th Cir.), *cert denied*, 128 S. Ct. 660 (2007) (DNA testing denied because the testing would merely show that another person was with the victim or in her home at some unspecified time); *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002) (DNA testing denied because the victims were murdered in a place of business where many other people could have unwittingly deposited genetic material in the months preceding the murder).

Even a successful motion for DNA testing, however, cannot, by itself, result in relief from a conviction or sentence. It is simply a vehicle for obtaining a certain type of evidence, which might then be used in a state or federal collateral proceeding. *Cf. Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005) (discussing the nature of the similar Texas post-conviction DNA statute). In other words, a defendant must take any favorable DNA evidence and then file either a habeas corpus petition, a PRP, or a motion for new trial. The mere filing of such a motion, however, does

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[4]The Washington Supreme Court summarized Stenson's defense team's efforts to inculpate Denise Hoerner as follows:

> Finally, Leatherman did investigate the possibility that Denise Hoerner committed the crimes. Leatherman asked Jeff Walker, his investigator, to stake out her house and look into a possible boyfriend she may have had. Dep. of Leatherman at 55. Leatherman subpoenaed her bank records to see if the account might suggest that she hired a hit man. *Id.* at 55-56. He concluded there was no evidence. *Id.* at 56. Walker confirmed that there was no evidence to suggest that Denise Hoerner was the killer and that he had investigated the possibility fully. Dep. of Walker at 26.

Stenson II, 142 Wn.2d at 751-52.

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not affect the finality of the conviction. *See generally In re Hews*, 108 Wn.2d 579, 588, 741 P.2d 983 (1987); *State v. LaBeur*, 33 Wn. App. 762, 657 P.2d 802, *review denied*, 99 Wn.2d 1013 (1983); CrR 7.8(b).

B. A Stay of Execution Cannot Be Granted Because Stenson Cannot Demonstrate that Any Collateral Attack He Might Bring Based Upon Post-Conviction DNA Testing Will Not Be Time-Barred

A Washington court will only have the ability to hear a PRP, habeas corpus petition, or a motion to vacate judgment based upon DNA evidence if the petition is filed within the time period established by the Legislature in RCW 10.73.090 and RCW 10.73.100. *See* RCW 7.36.130(1); RAP 16.4(d); CrR 7.8(b); *Shumway v. Payne*, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998) ("The statute of limitation set forth in RCW 10.73.090(1) is a mandatory rule that acts as a bar to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more of the [grounds contained in RCW 10.73.100]"); *In re the Personal Restraint Petition of Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998) (court rules cannot be used to alter or enlarge the time limit contained in RCW 10.73.090). Stenson must make a substantial showing that the collateral attack he might bring based upon DNA testing is not barred by RCW 10.73 and RAP 16.4(d) before he can be granted a stay of execution. *See* RAP 16.24(d).

Favorable DNA evidence will allow for a collateral attack to be filed more than one-year after the judgment and sentence became final, only when a defendant "acted with reasonable diligence in discovering the evidence and filing the petition or the motion." RCW 10.73.100(1). Stenson cannot satisfy either prong of this test. Stenson did not file the instant motion for DNA testing until

- 14 years after conviction
- 10 years after the mandate issued from Stenson's direct appeal
- 8 years after the Legislature first enacted a statute authorizing post-conviction DNA testing at public expense
- 4 years after the Washington State Patrol Crime Laboratory became capable of testing "touch or low-copy" DNA
- 3 years after the Legislature amended the statute authorizing a petitioner to directly

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approach the court for post-conviction DNA testing, and for the appointment of an attorney to assist in the motion

- 2 years after the Washington Supreme Court held that STR-DNA is admissible under *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923)
- 1 year after mini-STR became available in the forensic setting

Due diligence in discovering the presence of alien DNA on any of the evidence requires more than the "negligence and plain inaction" demonstrated by Stenson. *See Davenport v. Taylor*, 50 Wn.2d 370, 374, 311 P.2d 990 (1957). A tactical decision to delay bringing a motion until the eve of execution does not constitute "reasonable diligence." RCW 10.73.100(1). Thus, Stenson's request for a stay must be denied. *See* RAP 16.24(d).

C. A Stay of Execution Cannot Be Granted Because Stenson Purposefully Delayed the Filing of His Motion for Post-Conviction DNA Testing Until the Eve of Execution

The equities also mandate a denial of Stenson's stay motion. The Washington Supreme Court has recognized that "death penalty litigation is fraught with the potential for false claims and deliberate delay." *State v. Harris*, 114 Wn.2d 419, 435, 789 P.2d 60 (1990). Death row inmates have an obvious incentive to make last minute claims and file eleventh hour petitions with the hope of delaying the execution of a lawful sentence. *Id.* Consequently, the Washington Supreme Court has stated that in death penalty cases, courts should deny a stay of execution unless the petitioner can make a substantial showing of success on the merits of the underlying claim. *Id.* For example, in *Harris*, the defendant sought a stay of execution, arguing that he lacked the sufficient mental capacity to be executed. The Washington Supreme Court said it would not grant a stay of execution unless the defendant made a "substantial threshold showing" of insanity. *Harris*, 114 Wn.2d. at 435. The Court noted this stringent standard for a stay of execution was necessary to avoid against undue delay:

> Without a substantial threshold requirement, the eleventh hour petitions asserting insanity would be encouraged because the death row petitioner would know that the mere filing of a conclusory petition would result in a stay of execution. Placing no initial burden on the petitioner is an invitation to specious insanity claims.

Harris, 114 Wn.2d at 435.

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The United States Supreme Court has also expressly recognized the "State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson v. Campbell*, 541 U.S. 637, 644, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004). The State has a compelling interest in the timely execution of a criminal judgment, and the State's interest is severely prejudiced by a stay of execution. *In re Blodgett*, 502 U.S. 236, 112 S. Ct. 674, 116 L. Ed. 2d 669 (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, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 555, 118 S. Ct. 1489, 140 L. Ed.2d 728 (1998) (State has a compelling interest in the enforcement of a criminal judgment).

A stay of execution is not available as a matter of right. *Hill*, 547 U.S. at 584. The filing of an action seeking post-conviction DNA testing does not entitle the complainant to an order staying an execution as a matter of course. *Arthur*, 500 F.3d at 1340. Instead, the Court must "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez*, 503 U.S. at 654. Before granting a stay of execution, the courts "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 (emphasis added); *see also Arthur*, 500 F.3d at 1340.

Equity bars the entry of a stay of execution pending the performance of futile DNA tests. Stenson was sentenced to die in 1994, his sentence became final upon direct review in 1998. A mechanism by which Stenson could obtain post-conviction DNA testing has existed since 2000. Stenson, however, waited until August of 2008, when his execution was likely imminent to first seek DNA testing. The courts have overwhelmingly held that equity disfavors a stay under similar circumstances. *See, e.g., Arthur*, 500 F.3d at 1341-42 (stay of execution denied where defendant did not bring an action to compel DNA testing until five years after the Eleventh Circuit issued an opinion explaining how defendant's could obtain such testing and at a time when the merits could not be fully

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adjudicated without a stay); *Thacker*, 177 S.W.3d at 926 (stay of execution denied where defendant waited until October of 2005 to make a motion for DNA testing utilizing procedures that became available in 2002 and 2004).

D. A Stay of Execution Cannot Be Granted Based Solely on the United States' Supreme Court's Grant of Certiorari in an Unrelated Case

Stenson, standing before this Court with unclean hands, contends that a stay is necessary because the United States Supreme Court just granted certiorari in *District Attorney's Office v. Osborne*, No. 08-6. The questions presented in *Osborne* are as follows:

> 1. May Osborne use § 1983 as a discovery device for obtaining postconviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material?
>
> 2. Does Osborne have a right under the Fourteenth Amendment's Due Process Clause to obtain postconviction access to the state's biological evidence when the claim he intends to assert - a freestanding claim of innocence - is not legally cognizable?

District Attorney's Office for the Third Judicial District and Adrienne Bachman, District Attorney, v. William G. Osborne, Petition for Writ of Certiorari, at i (available at http://www.scotusblog.com/wp/wp-content/uploads/2008/10/08-6_pet.pdf).

These questions are irrelevant to Stenson's instant motion. Osborne may emerge victorious in the United States Supreme Court without affecting Stenson's case. This is because Washington already provides all felony defendants with a statutory right of access to DNA testing if the defendant makes the necessary showing. Stenson has not made such a showing, as any DNA from a third person's hair, skin, or sweat could have been deposited on the evidence before or after the murders.

In addition, Osborne was not sentenced to die. The United States Supreme Court's resolution of Osborne's case will not alter that Court's repeated statements that a stay of execution should not be granted were a defendant deliberately delayed in bringing the action.

The granting of certiorari in *Osborne*, moreover, does not change the law for any other cases. The granting of the government's petition for certiorari in *Osborne* does not suggest a view of the merits. Accordingly, courts have refused to grant a stay of execution solely on the grounds that the Supreme Court has granted certiorari in another case presenting a similar, or even identical, issue. *See, e.g. Robinson v. Crosby,* 358 F.3d 1281, 1284 (11th Cir.) (declining to grant a stay pending the

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Supreme Court's decision in another case because "the grant of certiorari alone is not enough to change the law of this circuit or to justify this Court in granting a stay of execution on the possibility that the Supreme Court may overturn circuit law"), *abrogated on other grounds by Hill v. McDonough,* 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006); *Jones v. Roper*, 311 F.3d 923 (8th Cir. 2002) (denying stay of execution on the grounds that the United States Supreme Court granted certiorari in another case; "The Supreme Court, obviously, will be better able than we to weigh the possibility that the result in *Wiggins* might help petitioner in the present case."); *Thomas v. Wainwright,* 788 F.2d 684, 689 (11th Cir.1986) (denying a stay even though certiorari had been granted in another case on the same issue, because "[t]o date, the law in this Circuit, which has not been modified by Supreme Court decision, mandates a denial of relief to petitioner on this issue," and "any implications to be drawn [from the grant of certiorari in the other case] may be discerned by application to the Supreme Court" (internal marks and citations omitted) (quoting *Jones v. Smith,* 786 F.2d 1011, 1012 (11th Cir.1986).

Even if the United States Supreme Court were to hold in *Osborne* that a defendant has a due process right to file a 42 U.S.C. § 1983 action for DNA testing, this will not provide grounds for a stay under the conditions presented here. This is established by the Supreme Court's recent opinion in *Hill v. McDonough, supra*. In *Hill*, the Supreme Court held that while an inmate may challenge lethal injection in a civil rights action, the filing of the action did not entitle the inmate to a stay of execution as a matter of right. *Hill*, 547 U.S. at 584. To the contrary, when, as in the instant case, the defendant delays bringing the claim until such a time that the merits cannot be adjudicated without a stay of execution, 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.*

This maxim was, in fact, applied to Hill upon remand. When he returned to the lower courts following his win in the United States Supreme Court. Those courts denied his request for a stay to allow him to litigate his lethal injection claim, and the United States Supreme Court refused to interfere with that decision. *See Hill v. McDonough*, 464 F.3d 1256, 1259 (11th Cir.), *stay denied*, 127 S. Ct. 34 (2006), *cert. denied*, 127 S. Ct. 465 (2006).

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III. CONCLUSION

The State's compelling interest in the timely execution of a criminal judgment requires that Stenson's motion for a stay of the December 3, 2008, execution date be denied.

Respectfully Submitted this 19th day of November, 2008,

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

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Olympia, WA 98501
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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 B. Loginsky, WSBA 18096

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206 10TH Ave. S.E.
Olympia, WA 98501
(360) 753-2175 FAX (360) 753-3943

THE SUPREME COURT OF WASHINGTON

DAROLD R.J. STENSON,

Petitioner,

v.

ELDON VAIL, et al.,

Respondents.

ORDER

Supreme Court No.
82197-6

This matter came before the Court on its November 6, 2008, En Banc Conference and a majority of the Court [Justice Owens recused] having determined that the following order should be entered:

Now, therefore, it is hereby

ORDERED:

That the Original Action Against State Officers for Writ of Prohibition and/or Mandamus, the Motion for Oral Argument, and the Motion for Stay are all denied.

DATED at Olympia, Washington this 7th day of November, 2008.

For the Court,

CHIEF JUSTICE

545/176

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

THIS MATTER having come on pursuant to the Defendant's motion for an order granting a stay of execution; the State being represented by Deborah S. Kelly, Prosecuting Attorney for Clallam County, and by Pamela B. Loginsky, Special Deputy Prosecuting Attorney; the defendant being represented by Robert H. Gombiner, Federal Public Defender; and the Court having reviewed the Petitioner's Motion for Stay of Execution, the Response to Motion for Stay of Execution, the Motion for DNA Testing, the State's Response to the Motion for DNA Testing, and the files and records and being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED that motion for stay of execution is denied because

☐ Darold Stenson has not established that the requested DNA testing will demonstrate his innocence of the murders of Denise Stenson and Frank Hoerner "on a more probable than not basis." RCW 10.73.170(3).

☐ Darold Stenson has not made a substantial showing that any collateral attack based upon the DNA test results will not be barred by RCW 10.73 and RAP 16.4(d). *See* RAP 16.24(d).

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☐ Darold Stenson unnecessarily delayed in bringing his motion for DNA testing and his motion for stay.

DATED this ___ day of November, 2008.

_____
JUDGE KENNETH WILLIAMS

PRESENTED BY:

_____
DEBORAH S. KELLY, WSBA No. 8582
Prosecuting Attorney

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PAMELA B. LOGINSKY, WSBA No. 18096
Special Deputy Prosecuting Attorney

APPROVED FOR ENTRY/COPY RECEIVED:

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ROBERT H. GOMBINER, WSBA No. 16059
Attorney for Defendant

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