APPENDIX I

THE SUPREME COURT OF WASHINGTON

KATIE VARGAS,
Petitioner, an individual and on behalf of her next friend, Jeremy Sagastegui

v.

JOSEPH LEHMAN, Director of the Department of Corrections, and JOHN LAMBERT, Superintendant Washington State Penitentiary

Respondent.

NO. 67190-7

ORDER

CLERK

Jeremy Sagastegui is scheduled to be executed on October 13, 1998. He has not sought to challenge the execution. Katie Vargas, seeking to act as his next friend, petitions for writs of prohibition and mandamus, directed to officials of the Department of Corrections, to require the execution date to be reset under RCW 10.95.160(2). The en banc court, having considered by telephonic conference call Ms. Vargas' petition and the State's response, concludes that Ms. Vargas has no standing to seek the writ, and that because the execution date has not yet passed, the circumstances presented by this case do not trigger the provisions of RCW 10.95.160(2) regarding the setting of a new execution date. Accordingly,

EXHIBIT E

It is hereby ordered:

The petition for writs of prohibition and mandamus is denied.

Jerry L. Alexander
for a majority of the Court

October 12, 1998

THE SUPREME COURT OF THE STATE OF WASHINGTON

KATIE VARGAS, Petitioner, an individual and on behalf of her next friend, Jeremy Sagastegui,

v.

JOSEPH LEHMAN, Director of the Department of Corrections, and JOHN LAMBERT, Superintendent Washington State Penitentiary,

Respondents.

No. 67190-7

DISSENTING OPINION TO ORDER (dated Oct. 12, 1998)

Filed OCT 16 1998

SANDERS, J. (dissenting)—At 11:07 p.m. on Monday, October 12, this court's order denying a stay of Jeremy Sagastegui's imminent execution was filed with the Clerk of the Court. At 12:40 a.m. on Tuesday, October 13, less than two hours later, Segastegui was executed at the Washington State Penitentiary. Thus, a dissent to the majority's action is as anticlimactic now as it was futile at its inception. Nevertheless I will state my reasons for

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dissenting, not for the benefit of the condemned man, but for those who survive him.

The majority casts its order refusing to halt the execution as a simple and summary response to a motion brought by Katie Vargas, the mother of the prisoner. It concluded that because Ms. Vargas "has no standing to seek the writ" and "the execution date has not yet passed," this court lacks the necessary lawful authority to delay the execution for 30 days. *Vargas v. Lehman*, No. 67190-7, Order (Oct. 12, 1998).

On October 11, 1998, at 3:32 p.m., the United States Court of Appeals for the Ninth Circuit stayed Mr. Sagastegui's execution date pending further proceedings to determine whether his mother, Katie Vargas, was entitled to pursue his cause as his "next friend." *Vargas v. Lambert*, Order, No. 98-99028 (9th Cir. Oct. 11, 1998) 1998 WL _____ (hereinafter Vargas Order). That stay was issued by a two to one majority of the three judge panel, the dissenter being Circuit Judge Kleinfeld who prophetically, I believe, observed: "This case, like all eve of execution death penalty cases, suffers from the defects of deliberation caused by last-minuteness." Vargas Order, slip op. at 25 n.1 (Kleinfeld, J., dissenting).

Certainly if such "last-minuteness" was a defect in the deliberation of the United States Court of Appeals, it is even a greater defect in ours since the stay of the Court of Appeals decision was lifted by the United States Supreme Court through filing a written order to that effect with this court at 7:31 p.m. Pacific time on Monday, October 12, "execution eve," only four and a half hours before the time originally scheduled for Mr. Sagastegui's execution. After that order was filed one can only imagine the hysterical agony of the grieved mother and the desperate panic of her attorneys—then joined by a single purpose—to stay the executioner's hand, not to mention the haste of attorneys representing the State to respond.

I therefore submit especially in matters infected by the defect of last-minuteness we must particularly heed to the fact that "[t]he United States Supreme Court has more than once reminded us of the indisputable fact that 'death is different' and that this difference must impact on the court's decision making, requiring the utmost solicitousness for the defendant's position." *State v. Martin*, 94 Wn.2d 1, 21, 614 P.2d 164 (1980) (citations omitted).

I. *The statute clearly and literally required this execution to be rescheduled.*

At issue is the application of RCW 10.95.160(2):

> If the date set for execution under subsection (1) of this section is stayed by a court of competent jurisdiction for any reason, the new execution date is automatically set at thirty judicial days after the entry of an order of termination or vacation of the stay by such court unless the court invalidates the conviction, sentence, or remands for further judicial proceedings. The presence of the inmate under sentence of death shall not be required for the court to vacate or terminate the stay according to this section.

A court must give effect to the plain language of a statute when construing it. *Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982) ("Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself."). The court should not strain the clear language of a statute to achieve a result. *Wright v. Engum*, 124 Wn.2d 343, 351-52, 878 P.2d 1198 (1994). Moreover, the court may look to the purpose of a statute only if the language is susceptible to more than one meaning and is therefore ambiguous. *Harmon v. Department of Soc. & Health Servs.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998); *Lynch v. Department Labor & Indus.*, 19 Wn.2d 802, 814, 145 P.2d 265 (1944) ("[the statutory language]

has but one meaning, and there is but one conclusion that can be drawn from it. When such is the case, a statute does not have to be construed or interpreted so as to ascertain the intent of the lawmaking body."). And this is, after all, a death case where we indulge every latitude to the condemned. *Martin, supra.*

The majority held RCW 10.95.160(2) only applies in cases where the original date scheduled for execution has passed. However I find nothing in the language of the statute to suggest that the original date of execution must have passed before the statute is applicable. And no authority so holds.

RCW 10.95.160(2) clearly and unequivocally states if an execution is stayed by a competent court for any reason, the new execution date is automatically set for thirty days after entry of the order of vacation. Although the statute literally applies by its terms to this case, the date was not reset.

Here the 9th Circuit (a court of competent jurisdiction) stayed the execution. This stay was subsequently vacated by the United States Supreme Court. According to the plain words and ordinary meaning of RCW 10.95.160(2), the order of the United States Supreme Court which

vacated the 9th Circuit's stay required "automatic" rescheduling of the date of execution to 30 days' hence. This plain and obvious meaning of the statute's words was confirmed in *In Re Personal Restraint Petition of Lord*, 123 Wn.2d 737, 870 P.2d 964 (1994), where this court stated that "[t]he statute [RCW 10.95.160(2)] contemplates that the Department of Corrections will, as a matter of course, set a new execution date once the stay is lifted." *Lord*, 123 Wn.2d at 741. No judicial involvement is even contemplated! Rescheduling is a ministerial act.

Nor does it make sense to contend that the "date" of this execution was not "stayed" because the date had not yet passed. "Stay" means "a stopping; the act of arresting a judicial proceeding by the order of a court . . . ." *Black's Law Dictionary* 1413 (6th ed. 1990). What the Ninth Circuit did was exactly that: It stopped the execution. The vacation of the stay by the United States Supreme Court was the exact circumstance contemplated by this statute, which is operative precisely when a stay is lifted "by an order of termination or vacation . . . ." What could be clearer?

The state argued, and the majority apparently accepted, the *policy* behind RCW 10.95.160(2) is to provide for rescheduling of an execution

date only where the original date had passed. I do not share that view, but even if the majority were correct, men's lives are not to be taken on unwritten policy grounds. Policy is not law. If the legislature wished to limit the statute to *only* situations where the execution date had passed, it could easily have said so by simply and clearly including specific language to that effect. *Cf., e.g.*, RCW 10.95.200 (when execution date "shall have passed" for a reason other than a stay, the trial court issues a new death warrant). Since the legislature did not include language limiting RCW 10.95.160(2) to such situations, we are in no position to judicially amend the statute to deny the statutory reprieve to the condemned.

Moreover, there *are* sound policy reasons to explain and justify the automatic statutory delay of an execution following vacation of a stay at literally the eleventh hour before a life is to be taken.

When the execution date is "revived" by at the last minute lifting the stay the defendant suddenly faces imminent death with little time to consult with counsel, and virtually no time to properly research and prepare briefs to aid the diligent consideration of his case by the court. Nor can the court

reliably discharge its responsibility to uphold the law. The facts of this case are very much in point.

At least one other jurisdiction has implemented our state's policy by court rule. *See* Montana Rules of Court, Rule 9 of Rules for Automatic Review of a Death Sentence, page 118 ("If the stay expires upon affirmance of a death sentence after the date set for execution of sentence has passed *or within five days prior to the execution date*, the execution date will be vacated, and the Supreme Court will remand the case to the district court for the setting of a new execution date . . . .") (emphasis added). Certainly a plain language application of RCW 10.95.160(2) which mandates automatic rescheduling of the execution date in cases such as this where the stay of execution is vacated only a matter of hours before the time scheduled for execution, serves the interest of preserving life to ensure all arguments arising after vacation of the last stay are properly heard and considered. If we need to *justify* the statute to apply it, we can.

II. Standing is not the issue.

RCW 10.95.160(2) requires the execution date to be "automatically" delayed for 30 days without judicial proceeding or adversary contest.

RCW 10.95.160(2), *Lord*, 123 Wn.2d at 74. Standing is a rule for adversarial litigants, not administrative discharge of ministerial duties.

Moreover, the majority's claim that the matter may not be determined on the merits because of lack of standing is belied by its holding, *on the merits*, that the statute does not pertain to situations such as this. In point of logic, and law, if standing is mandatory, the absence of standing necessarily negates the possibility of any holding on the merits because the most important purpose of the standing doctrine is to ensure that claims will be thoroughly and forcefully submitted to the court so as to aid their appropriate disposition on the merits. When claims are not thoroughly and forcefully submitted, it is said, we cannot trust the result. But in this case we have a holding that there is no standing *and* a result on the merits. Such suggests either (1) lack of standing is no impediment to reaching the merits and/or (2) it is the result to be achieved which really matters, and ultimately drives all other considerations before it.

Since we previously denied Ms. Vargas's application to intervene as her son's "next friend," a decision in which I personally concurred (*Vargas v. State*, No. 67190-7, *Order Denying Motions* (Wash. Oct. 1, 1998)), I

would certainly also concur in the majority's observation that Ms. Vargas has no standing in the instant proceeding. However that avoids the more fundamental question of whether or not the standing of Ms. Vargas is a condition precedent to the authority of this court to order the execution to be rescheduled in accordance with RCW 10.95.160(2).

Indeed, the whole proceeding before this court involving a detailed evaluation of the propriety of imposing the death penalty upon Mr. Sagastegui was conducted without being invoked by a party with standing. *State v. Sagastegui*, 135 Wn.2d 67, 954 P.2d 1311 (1998). Lest we forget, Mr. Sagastegui did not appeal to this court from the imposition of a death penalty and those submittals reaching this court from the prisoner rather unequivocally stated his position that no further proceedings should be had, urging his own execution transpire forthwith. Moreover, in the context of that review on the merits, we granted permission to the Death Penalty Committee of the Washington Association of Criminal Defense Lawyers to act as amicus and raise arguments in opposition to the death penalty and we considered, and rejected on the merits, those arguments in a comprehensive written decision, to which I also subscribed my name. *State v. Sagastegui,*

135 Wn.2d at 70. Therefore in a case which we have previously adjudicated on the merits, absent standing, I find the claim that we may not require the execution to be "automatically" rescheduled for lack of standing to be anomalous at best.

Nor do the considerations which even prompt concern for standing arise in this case. "The standing doctrine prohibits a litigant who is not adversely affected by a public act or statute from asserting the legal rights of another." *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997). Thus the standing doctrine is a disability to the litigant, not a limitation to the court's jurisdiction. The policy behind the judicial invention of the standing doctrine is "to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982). But in the instant proceeding at the time of this court's oral deliberations, it is rather obvious that we were not debating a hypothetical or academic point. An

execution of a human being was at stake! The legal issue was specific, narrow, and easily resolved: to delay or not to delay the execution, that was the question. Nor were the facts associated with the motion incompletely presented nor, even conceivably, misstated: The Ninth Circuit had stayed the execution date, the United States Supreme Court had vacated the stay, and the Department of Corrections intended to execute this man at the stroke of midnight, or shortly thereafter.

Under these circumstances, given the statutory imperative to reset the execution date, the unwillingness of the Department of Corrections to follow the statute, the unwillingness of the condemned man to demand that the lawful processes of this state be followed with respect to his execution, the "defects of . . . last minuteness," our judicial recognition that "death is different," as well as the specific statutory scheme which not only eschews standing in death penalty review, but specifically states on the face of the

operative statute that "the new execution date is *automatically* set at thirty judicial days after the entry of an order of termination or vacation of the stay. . . ." RCW 10.95.160(2) (emphasis added), I conclude that it was the independent duty of this court to mandate that the execution of this man be rescheduled for 30 judicial days after entry of the order vacating the stay in accordance with the statutory mandate and that Ms. Vargas's lack of standing neither changes the law nor our responsibility to uphold it.[1]

[1] I request this opinion be published.