No. 82440-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DAROLD RAY STENSON, Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHIGTON FOR Clallam COUNTY

The Honorable Kenneth Williams, Judge

RESPONSE IN OPPOSITION TO STATE'S MOTION FOR ACCELERATED REVIEW

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I. Introduction

The state seeks accelerated review of its motion to vacate Judge Kenneth Williams's November 25, 2008 order staying Darold Stenson's execution. Judge Williams issued a stay of execution with an order for DNA testing, pursuant to RCW 10.73.170. The order for DNA testing is scheduled to be presented to Judge Williams at 1 p.m. this afternoon. The state has not filed a motion for discretionary review with this Court. Yet the state asks this court to accelerate its procedures and summarily reverse Judge Williams so that it can execute Mr. Stenson on December 3, before DNA testing can be conducted.

In its fervor to execute Mr. Stenson, the state ignores the statute governing the setting of the execution date, RCW 10.95.160, the complexity and novelty of both the factual and legal aspects of the underlying claim, and the unnecessary, yet enormous, risks attendant in rushed consideration of the issue. [1]

II. Factual Background

Mr. Stenson filed his motion for DNA testing pursuant to RCW 10.73.170, which specifically directs petitioners to file in "the court that entered the judgment of conviction." RCW 10.73.170(1).

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[1] Mr. Stenson will respond to the State's Motion to Vacate Stay of Execution in a separate pleading.

Judge Lonnie Suko of the United States District Court for the Eastern District of Washington also entered an order staying Mr. Stenson's execution on November 25. The state is making similar requests for expedited review of that ruling.

III. Argument Against Accelerated Review

A. RCW 10.95.160(2) Mandates that the Execution be Reset for 30 Days Later if Judge Williams's Stay is Vacated.

Even if this Court vacates the stay of execution ordered by Judge Williams, the state cannot execute Mr. Stenson on December 3 as it hopes. RCW 10.95.160(2), which governs the setting of execution dates, provides,

> If the date set for execution under subsection (1) of this statute 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 . . ..

The plain language of the statute requires that if an execution is stayed, the execution occurs only thirty judicial days after that stay is lifted. This Court must give effect to this plain language. *Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982).

The only prerequisite to the rule that the execution date be reset for thirty days later is that the court that enters the stay be a court of

competent jurisdiction. RCW 10.95.160(2). The state does not contend that Clallam County Superior Court is not a court of competent jurisdiction, and cannot do so given the unambiguous language of RCW 10.73.170 makes Clallam County the court in which to file a motion for DNA testing.

B. Judicial Estoppel Forbids the State from Taking Its Current Position.

The state's argument for accelerated review advances a position in conflict with an interpretation of RCW 10.95.160 it advocated in filings in this Court just last month. There the state argued, regarding this very same statute,

> If the execution "is stayed by a court of competent jurisdiction for any reason," the date of execution automatically resets at thirty judicial days after termination of the stay. RCW 10.95.160(2). The execution occurs on the reset date unless the execution is again stayed. *Lord*, 123 Wn.2d at 741. If the execution is again stayed, the date will again reset upon termination of the subsequent stay under RCW 10.95.160(2).

Answer to Petition Against State Officers for Writ of Prohibition and/or Mandamus at 12.

The rules of profession conduct, and principles of judicial estoppel and due process, prohibit the state from taking two inconsistent positions. *State v. Roberts*, 142 Wn.2d 471, 498, 14 P.3d 713 (2000); *see also Russell v. Rolfs*, 893 F.2d 1033; *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000).

C. The Merits of the Stay Order are Irrelevant to the Application of RCW 10.95.160(2).

The state attacks the merits of Judge Williams's order, but these arguments are irrelevant to the question of whether the execution date is cancelled pursuant to RCW 10.95.160(2), because that statute says an execution date is reset if a stay is issued "for any reason."

D. Vargas v. Lehman Does Not Apply.

The state also relies on the unpublished order in *Vargas v. Lehman.* In *Vargas*, the original execution date had not passed and so the statue did not apply. The state has been scheduled for execution three times: first on May 20, 1998, second on March 13, 2001, and now on December 3, 2008. The first two execution dates have passed. Here, because the original (and second) execution date has passed, the statute necessarily applies.

The language of RCW 10.94.160(2) is unusual, and decidedly different from the statues governing the setting of execution dates in most states. It evidences a legislative purpose to avoid exactly the kind of haphazard, rushed judicial review the state is asking for here. The statute requires an orderly process that minimizes the risk of error or miscommunication, and allows for adequate preparation by the person to be executed, his family, the families of the victims, and, importantly, the Department of Corrections. It is designed to avoid the unseemly spectre

of conflicting orders issued by different courts, a circumstance that occurs in some states in the hours before an execution.

Moreover, the harried schedule advocated by the state does not allow for the measured, careful consideration required in a case like this. *State v. Woods*, 143 Wn.2d 561, 624, 23 P.3d 1046 (2001); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 492 L.Ed.2d 944 (1976).

IV. Conclusion

Darold Stenson may be an innocent man and a court of competent jurisdiction has ordered a stay of execution to allow the DNA testing which may establish his innocence. In direct violation of an unambiguous statute, in direct conflict with the unpublished order in *Vargas v. Ehman*, in direct contradiction to the position it has previously maintained in this case, the state asks the Court to ignore the mandate of RCW 10.95.160(2) and simply allow Mr. Stenson to be killed without any DNA testing and without any consideration of the merits of Judge Williams's orders staying the execution and ordering DNA testing.

The state's unseemly fervor in seeking death while ignoring the law should be rejected.

The Court should issue an order denying the state's request for

expedited hearing and stating clearly that, pursuant to statute, Mr. Stenson's execution will not occur on December 3, 2008.

DATED this 26th day of November, 2008.

Respectfully submitted,

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