

NO. 82440-1

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 WASHINGTON FOR Clallam COUNTY

The Honorable Kenneth Williams, Judge

RAP 8.3(B) MOTION TO VACATE STAY OF
EXECUTION AND MOTION FOR ACCELERATED
REVIEW OF RAP 8.3(b) MOTION TO VACATE STAY
OF EXECUTION

CAPITAL CASE
EXECUTION DATE OF DECEMBER 3, 2008

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I. IDENTITY OF MOVING PARTY

The Respondent, the State of Washington, by and through its attorneys, Deborah S. Kelly, Clallam County Prosecuting Attorney and Pamela B. Loginsky, Clallam County Special Deputy Prosecuting Attorney, asks this Court for the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that this Court vacate the superior court stay of execution entered November 25, 2008. A copy of the stay order appears in appendix A.

The State further requests that this Court decide the instant motion on an accelerated basis.

III. FACTS RELEVANT TO VACATE STAY

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. The RFLP results established that victim Frank Hoerner's blood was present on Stenson's pants. The PCR tests were inconclusive. *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 inculpatory DNA results, under a theory that was rejected in 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. This 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). This Court denied Stenson's first personal restraint petition (PRP) on the merits in 2001, and denied as procedurally barred three subsequent PRPs in 2003, 2004, and November of 2008. *In re Stenson*, Cause No. 82332-4, Order (Nov. 19, 2008); *In re Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001) ("*Stenson II*"); *In re Stenson*, 150

¹The State's experts all testified 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.

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.

Wn.2d 207, 76 P.3d 241 (2003) (“*Stenson III*”); *In re Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004) (“*Stenson IV*”).

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, prior to the entry of the challenged stay, was scheduled for December 3, 2008.

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.

The evidence that Stenson sought 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 Kelly² 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.

On November 14, 2008, Stenson filed a motion for stay of execution pending resolution of his DNA motion. The request for stay was heard by the Honorable Kenneth Williams at the same time as Stenson's motion for DNA testing. Both motions were denied by Judge Williams because Stenson failed to demonstrate 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)." *Order Denying Petitioner's Motion for Stay of Execution* (Nov. 21, 2008).

Judge Williams explained his reasons for entering this order as follows:

As I indicated, it appears to me that whether there is some unknown individual's DNA on any of these items would be irrelevant, and frankly, not helpful to a reviewing court.

Under the standard that has to be met, Mr. Stenson's

²These affidavits and any other affidavit referenced in this response may be found in appendix F.

DNA or lack of it would not be helpful, it would only be if there was DNA of, frankly, someone who would not have conceivably handled the evidence either before or after the incident, and who would be unexplained. And at best, in the opinion of the Court that would lead to an accomplice liability rather than innocence. And the statute in the language talks about showing innocence as opposed to accomplice liability and obviously in order to prevail on that sort of theory, even to exclude an additional suspect or other suspect, there are some hurdles you have to go through and those are difficult things that any of you have to do on a personal restraint petition and get to the extent of the underlying conviction. I don't think additional DNA evidence would in fact be sufficient to meet that standard.

What I've struggled with is whether or not at the penalty phase of a death penalty case that is something different, and the statute was written obviously with all kinds of felonies in mind rather than the death penalty.

And frankly, in the opinion of the Court, and it's certainly difficult to come to, I do not believe that the fact that there may or may not have been another individual involved would be likely even if show to have changed the outcome of the trial.

And again, primarily it's because frankly the evidence relating to the blood on the pants of Mr. Stenson, which was Mr. Hoerner's blood and which could only be explained by Mr. Stenson's involvement in Mr. Hoerner's death, I think is overwhelming and there is nothing to indicate that DNA found on any of the items would obviate that conclusion.

I think I'm required to follow that conclusion which has been followed by all the reviewing Courts.

Under those circumstances, I think the Court has no choice but to deny the request for the DNA testing, and I will deny it.

RP (Nov. 21, 2008) at 43-45.³

Stenson filed an immediate notice of appeal to the Washington Supreme Court. This appeal has been assigned Supreme Court Cause No. 82440-1.

Subsequent to Judge Williams denial of Stenson's DNA testing motion and requested stay, Robert Shinn, a convicted felon, provided the Clallam County Sheriff's Office with a taped statement.⁴ In this taped statement, Shinn claims that between January and April of 2000, an individual named John Linninger, told him that Mr. Linninger, Ennis Caynor, Tanya Chapman, Simone Nelson, Pat Nelson, and Tom Hines actually committed the murder at Dakota Farms in order to take possession of Stenson's swords. Appendix E, at 2-3, 5. Shinn, however, contradicted even this statement later in the interview. *See* Appendix E, at 10 ("but he didn't say who committed the murder.").

Shinn admitted that he had no personal knowledge of the murder plot or the plot to gain possession of the swords. Appendix E, at 4 ("Now I was not involved. This is all secondhand information..."); 9 ("All I know is what he told me."), 16 ("All I know is what John told me. And it's secondhand information, what you consider hearsay. . ."). Shinn acknowledges that both

³The transcript of the November 21, 2008, hearing is reproduced in Appendix B.

⁴A transcript of Shinn's November 21, 2008, interview appears in Appendix E.

he and Mr. Linninger were high on methamphetamine when this discussion occurred. Appendix E, at 2, 8, 15. Finally, Shinn concedes that he does not know if it is true or not. Appendix E, at 7 (“I don’t know whether it’s true, I don’t know whether there’s any validity to it because I was not involved.”).

Following Shinn's taped interview, Mr. Linninger was contacted by police.⁵ Mr. Linninger denied any involvement in the murders at Dakota Farms. Appendix G, at 5, 6, 13.. Mr. Linninger indicated that he knew Stenson prior to the murder, that he celebrated Thanksgiving at the Stenson farm prior to the murders, and that he personally believed that Stenson did not commit the murders. Appendix G, at 6 and 13. Mr. Linninger indicated that he may have expressed his opinion that Stenson was innocent to Shinn, and that he believed Stenson was being framed. *Compare* Appendix G, at 13 (“spoke of my opinions of that I felt that it wasn’t Stenson and that he was, you know, being you know, framed”) *with* Appendix E, at 10 (“He just specifically said that, that Mr. Stenson was innocent and that he was framed.”). Mr. Linninger, however, emphatically stated that he has no personal knowledge regarding the murders and he has no evidence to support his speculation that someone other than Stenson actually committed the murder. Appendix G, at 17-18.

On Monday, November 24, 2008, and November 25, 2008, Stenson's

⁵A transcript of John Linninger’s November 22, 2008, taped statement may be found in appendix G.

November 23, 2008, motion for reconsideration and stay of execution were considered by Judge Williams. Judge Williams reversed himself and entered a stay of execution based upon Judge Williams' new understanding of *Osborne v. District Attorney's Office*, 521 F.3d 1118 (9th Cir.), *cert. granted*, 2008 U.S. Lexis 7970 (Nov. 3, 2008). *See* RP (Nov. 25, 2008) at 43-45.

During the course of his oral ruling, however, Judge Williams indicated that “[f]urther DNA testing will, in my opinion, be more likely to inculcate the Defendant than exonerate him.” RP (Nov. 25, 2008) 50. Judge Williams also stated that the only thing that had changed since Friday, November 21, 2008, when he denied both DNA testing and a stay of execution is that Stenson now had “more names and known individuals to speculate about.” RP (Nov. 25, 2008) 47. As to these new individuals of interest, Judge Williams found that there were no facts and circumstances that clearly led to them as the guilty party and that the evidence giving rise to any suspicion that they may be involved in the murder was not “credible” or “compelling.” RP (Nov. 25, 2008) 51 and 53.

In fact, Judge Williams summed up the current status of the case as follows:

Mr. Stenson received a fair trial, numerous reviewing courts have so held. He was represented by capable and competent counsel, as he still is. He was convicted by an able jury of his peers who found no reason for mitigation of his sentence and no reason to doubt his guilt. He presents no evidence at this juncture which would justify a new trial, or even raise a

reasonable doubt about his guilt.

RP (Nov. 25, 2006) 54.

The stay order, which amounts to an injunction, contains no findings of fact or conclusions of law in support of its issuance. *See* Appendix A. The order places no requirements upon Stenson. Specifically, the stay order does not require that:

1. Stenson obtain this Court's permission under RAP 7.2(e) for the Clallam County Superior Court to enter an order authorizing DNA testing.
2. Stenson enter into a stipulation regarding the handling of the exhibits by a certain date. *See, e.g., State of Washington v. Jonathan Lee Gentry*, Supreme Court Cause No. 58415-0, Release of Exhibits (Jan. 12, 2006).⁶
3. Stenson act with due diligence to procure the actual DNA testing.
4. Stenson file any collateral attack predicated upon the result of DNA testing within so many days of receiving the DNA test results.

The only "obligation" placed upon Stenson in exchange for the entry of the stay order is that he resolve which testing that the Washington State Crime

⁶A copy of this order may be found in appendix H.

Laboratory can do, and whether Stenson should be required to reimburse the State for the cost of such testing. RP (Nov. 25, 2008) 56. Finally, to prevent this matter from lingering any longer than necessary, Judge Williams directed the parties to return to court in 60 days, on January 28, 2009. *See* RP (Nov. 25, 2008) at 57-58, 63.

The State files this timely motion to vacate the stay of execution.

IV. GROUNDS FOR RELIEF AND ARGUMENT

RAP 8.3 gives this court the authority to vacate a stay of execution. No case law, however, discusses the standard by which such a motion will be judged. The case law does, however, speak to when a stay of proceedings is proper.

These cases generally involve economic interests and appeals from final decisions on the merits. *See, e.g., Boeing Co. v. Sierracin, Corp.*, 43 Wn. App. 288, 719 P.2d 956 (1986). The test for whether a stay should be granted in those circumstances is whether the movant can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation. *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985), *cert. dismissed*, 478 U.S. 1029 (1986).

The test for whether a stay should be dissolved would appear to be whether the moving party can demonstrate that the likelihood that DNA

testing will provide Stenson with a viable claim is small, and the equities of the situation support the vacation of the stay. The State contends that both of these factors are met in the instant appeal.

A. MERITS

1. The Requested DNA Testing Will Not Establish Stenson's Innocence of the Murders "On a More Probable Than Not Basis."

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, a 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).

One statute, RCW 10.73.170, authorizes a court to order DNA testing to be performed by the Washington State Patrol Crime Laboratory, RCW 10.73.170(5),⁷ if a petitioner, who has been convicted of a felony,

⁷There is no statutory authorization for post-conviction DNA testing by any entity other than the Washington State Crime Laboratory. A Washington 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

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).

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). *See also Osborne*, 521 F.3d at 1132. 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 not affect the finality of the conviction. *See generally In re Hews*, 108 Wn.2d 579, 588, 741 P.2d 983

any action post-conviction when the judgment and sentence is valid on its face is limited to the boundaries set by the Legislature).

(1987); *State v. LaBeur*, 33 Wn. App. 762, 657 P.2d 802, review denied, 99 Wn.2d 1013 (1983); CrR 7.8(b).

Stenson sought the DNA testing in order to raise a “free standing claim of innocence.” RP 8-9. The actual showing that must be made to prevail on such a claim is extremely high. Justice White has indicated that

a persuasive showing of "actual innocence" made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

Herrera v. Collins, 506 U.S. 390, 429, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (White, J., concurring). Affidavits, collected years after the murder and not presented until the eleventh hour, that consist mainly of hearsay and are riddled with inconsistencies, fall far short of meeting this burden. *Herrera*, 506 U.S. at 417-18, 429.

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, coffee mugs, 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 was convicted based upon his

Motive: The insurance policy on his wife's life would pay off the purchase contract on Dakota Farms.

Frank Hoerner's death would relieve Stenson of the obligation to immediately return Mr. Hoerner's investment to him.

Opportunity: Frank Hoerner's expected presence at Dakota Farms in the wee hours of the morning was only known to Stenson, Mr. Hoerner, and Denise Hoerner.

The only adults at the Stenson home during the relevant time was Stenson, Denise Stenson and Frank Hoerner. *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.”).

Forensics: Frank Hoerner's blood was spattered on Stenson's pants in a manner inconsistent with Stenson's version of events.

Both RFLP and PCR DNA testing established that the blood on Stenson's pants came from Frank Hoerner.

Particles of gunshot residue were found inside Stenson's right front pocket.

Other: Stenson's false statement regarding the deaths of his wife and business partner.

The presence of low-touch DNA will not change the above factors, 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).

The presence of low-touch DNA will not, in itself, result in a viable other suspect defense. “Evidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend clearly to point to some-one other than the defendant as the guilty person.” *Stenson I*, 132 Wn.2d at 734. To establish the necessary “train”, Stenson would have to link the low-touch DNA to a particular person, and then identify a motive, means and opportunity for that person. RCW 10.73.170 does not, however, establish a vehicle for linking the DNA results to a particular person as it does not include any mechanism for obtaining elimination samples from every juror, witness, forensic scientist, court clerk, bailiff, attorney, or other person who may have come into contact with the

evidence after the commission of the crime or for obtaining reference samples from every visitor to the Stenson and/or Hoerner homes who may have contacted any of the exhibits on a date other than the murder.

As previously noted by this 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 751.⁸ The presence of DNA from an unknown person, deposited at an unknown time, will not change this fact.

Shinn's November 21, 2008, taped statement will not change the fact that Stenson does not have a viable other suspect defense. Shinn's recollection of a conversation held 8 years ago between two people in a drug-

⁸This Court summarized Stenson's defense team's efforts to inculcate 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.

induced haze has glaring internal inconsistencies.⁹ Shinn's transformation of Mr. Linninger's verbal support of Stenson's innocence into a broad conspiracy to frame Stenson for a murder in order to steal Stenson's collectibles has been denied by every person contacted in the follow-up investigation. As stated by Judge Williams, this new information is likely no more than drug induced bravado that "peak's one's curiosity," RP (Nov. 25, 2008) 52, and that can properly be characterized as a "fanciful tale." RP (Nov. 25, 2008) 54.

Stenson, himself, does not claim that the presence of the alien DNA will exonerate him. All Stenson claims is that the discovery of DNA from the same person on multiple pieces of evidence would be "a genuine powerful scientifically incontrovertible showing that there is another perpetrator involved." RP (Nov. 21, 2008) 15. The involvement of an accomplice, even someone who has never been convicted of the crime, does not exonerate Stenson. See RCW 9A.08.020(6) (a person may be convicted on proof of the

⁹This "hearsay" does not satisfy the exacting standards of a free-standing actual innocence claim, and does not even support the granting of a new trial. See generally *Herrera v. Collins*, *supra*; *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 113 S. Ct. 421 (1992) ("*Rice II*") (a petitioner must produce affidavits that "contain matters to which the affiants may competently testify" before s/he will be entitled to a reference hearing on a personal restraint petition); *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989) (it is improper for a court to rely on inadmissible hearsay when ruling on a motion for new trial); *Gardner v. Malone*, 60 Wn.2d 836, 843, 376 P.2d 651 (1962) (obvious hearsay is eliminated in determining whether affidavits and sworn statements in form of depositions require the granting of a motion for new trial); *State v. Wicker*, 10 Wn. App. 905, 909-910, 520 P.2d 1404 (1974) ("it would appear axiomatic that evidence offered in support of a motion for new trial must reflect an admissible character").

commission of the crime and his complicity in the crime, even if another person who is also accused of committing the crime has not been prosecuted or convicted of the crime). Stenson, therefore, cannot demonstrate a reasonable likelihood of prevailing on the merits of any collateral attack that he may ultimately bring based upon any DNA test results.

2. The Requested DNA Testing Will Not Establish Stenson's Innocence of the Sentencing Enhancements "On a More Probable Than Not Basis."

In Washington, a defendant is eligible for a death sentence if a jury finds at least one aggravating circumstance and the prosecuting attorney has filed a timely notice of special sentencing proceeding. RCW 10.95.020; RCW 10.95.030; RCW 10.95.040; *see also State v. Yates*, 161 Wn.2d 714, 789, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008) (“and as the State points out in the present case, “[p]revious cases have found the death penalty not disproportionate when based on a single aggravator.” Br. of Resp't at 226 (citing Luvane Trial Judge Report (TJR) 135; Gentry TJR 119; Benn TJR 75; Harris TJR 29)”).

In Washington, aggravating circumstances are not “weighed” against mitigating circumstances under Washington’s death penalty statute. *See State v. Brown*, 132 Wn.2d 529, 616-17, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Thus, insufficient evidence of one aggravating circumstance does not impact the defendant's sentence if the jury

unanimously found the presence of another aggravating circumstance. *Cf. State v. Lord*, 117 Wn.2d 829, 882-83, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992) ("The evidence was sufficient to establish rape as an aggravating factor supporting Lord's aggravated first degree murder conviction. Accordingly, we need not inquire further as to if the evidence was also sufficient to establish kidnapping.").

Stenson's jury unanimously found the presence of two aggravating circumstances:

(1) the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, and (2) more than one person was murdered and the murders were part of a common scheme or plan.

Stenson I, 132 Wn.2d at 682.

No amount of DNA testing will change the fact that both Denise Stenson and Frank Hoerner were killed on the same day, during the same half-hour, as part of the same scheme or plan. Stenson, therefore, cannot "demonstrate innocence on a more probable than not basis", RCW 10.73.170(3), of the aggravating circumstance.

The post-conviction DNA testing statute requires a reasonable probability of innocence of the sentencing enhancement, not of the sentence imposed. In other words, Stenson bears the burden of demonstrating that the DNA evidence would result in an inability of a juror to vote for death.

The most Stenson has ever claimed is that the DNA evidence might make a juror reluctant to vote for death. *See, e.g.*, RP 39-41. This "lingering doubt" or "residual doubt" that might arise from the DNA testing is not a constitutional or statutory mitigating factor. *See In re PRP of Lord*, 123 Wn.2d 296, 330 n. 13, 868 P.2d 835 (1994) ("Residual doubt as to the defendant's guilt is not one of the 'relevant factors' listed in RCW 10.95.070 (or the jury instructions), nor does the constitution require that it be treated as a mitigating factor. *Franklin v. Lynaugh*, 487 U.S. 164, 101 L. Ed. 2d 155, 108 S. Ct. 2320 (1988)."). *Accord Oregon v. Guzek*, 546 U.S. 517, 525, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006). Stenson, therefore, cannot demonstrate that he is likely to prevail on the underlying appeal. The stay of execution must, therefore, be vacated.

3. The Ninth Circuit's Opinion in *Osborne* Does Not Provide an Independent Basis for Granting Post-Conviction DNA Testing

The United States Supreme Court recently granted the government's petition for writ of certiorari of the Ninth Circuit's opinion in *Osborne v. District Attorney's Office for the Third Judicial District*, 521 F.3d 1118 (9th Cir. 2008). Neither the grant of certiorari nor the Ninth Circuit's analysis impacts the instant case.

The Ninth Circuit does not serve as an appellate court with respect to Washington Courts. A Ninth Circuit opinion is not binding upon Washington

Courts. See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 122 L. Ed. 2d 180, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) (state courts not bound by a lower federal court's interpretation of federal law); *In re Grisby*, 121 Wn.2d 419, 430, 853 P.2d 901 (1993) (Washington Supreme Court is not obligated to follow Ninth Circuit decisions); *State v. Barefield*, 110 Wn.2d 728, 756 P.2d 731 (1988); *State ex rel. Jahn v. Searing*, 120 Wash. 117, 207 Pac. 5 (1922) (state courts are not bound by non-United States Supreme Court federal habeas corpus cases).

In *Osborne*, the Ninth Circuit interprets *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), as requiring more than the mere disclosure of exculpatory evidence. *Osborne* interprets *Brady* as requiring the opportunity to expand an investigation post-conviction in the hopes of developing evidence that might support a freestanding claim of actual innocence. *Osborne*, 521 F.3d at 1130-32. This interpretation, however, is inconsistent with this Court's understanding of *Brady* and of the right to discovery post-conviction. See *In re Personal Restraint Petition of Gentry*, 137 Wn.2d 378, 391, 972 P.2d 1250 (1999) (prisoners seeking post-conviction relief are not entitled to discovery as a matter of ordinary course); *State v. Judge*, 100 Wn.2d 706, 717-18, 675 P.2d 219 (1984) ("Neither *Brady* nor *Wright*, or their progeny, imposes a duty on the State to expand the scope of a criminal investigation."). See also, *State v. Jones*, 26 Wn. App. 551,

554, 614 P.2d 190 (1980) ("The State 'is required to preserve all potentially material and favorable evidence.' This rule, however, has not been interpreted to require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case. The police are required only to preserve that which comes into their possession either as a tangible object or a sense impression, if it is reasonably apparent the object or sense impression potentially constitute material evidence.").

Osborne also interprets *Brady* as permitting post-conviction access to DNA testing on the grounds that the new evidence may lead to new investigation and additional new evidence. *Osborne*, 521 F.3d at 1139. This understanding of *Brady* is contrary to United States precedent. See *Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1994) (evidence that is not admissible or that might only lead to new lines of investigation is not "material" under *Brady* and *Kyles v. Whitley*, 514 U.S. 419, 433-434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)). As discussed *supra*, the DNA test results sought by Stenson will not provide the necessary foundation for the admission of an "other suspect" defense.

Even the Ninth Circuit indicated that its decision in *Osborne* did not "purport to answer" whether prisoners with a less compelling case might also be entitled to post-conviction access. *Osborne*, 521 F.3d at 1142. A simple comparison between the evidence at issue in *Osborne* and the theory of the

case in *Osborne* clearly establishes that Stenson falls within the “less compelling case” category.

Osborne was convicted of kidnapping and sexual assault. The victim of the assault stated that one of the two rapists wore a blue condom during the attack. *Id.* at 1122. A blue condom was collected at the crime scene, that based upon snow fall had been deposited there during the actual rape. *Id.* at 1122-23 and 1137-39. Biological samples collected from the blue condom was consistent with Osborne’s DQ Alpha type DNA, but this type is present in one of every 6 or 7 black men. *Id.* at 1123. Hairs found on the condom were microscopically consistent with Osborne’s hair, but were not subjected to DNA testing. *Id.* at 1124. This condom’s presence at the crime scene, while not the sole basis for finding Osborne guilty, played a major part in the jury’s verdict, and “the State’s proposed hypotheticals for reconciling exculpatory DNA tests with Osborne’s guilt are so inconsistent with an improbable in light of the evidence in the trial record that they cannot negate the materiality of further DNA testing to possible post-conviction relief.” *Osborne*, 521 F.3d at 1139.

Stenson, on the other hand, is seeking low touch DNA testing of exhibits that play a peripheral role in establishing his guilt. The State’s hypothetical for the presence of “alien” DNA on these items is consistent with the trial court record, and with the handling of these items both prior to

the murder and after the murder. As discussed *supra*, even “favorable DNA results”, as defined by Stenson will lead to no more than the presence of a possible accomplice. This is insufficient to stay an execution.

With respect to the stay, *Osborne* dealt with the grant of testing that could “be easily performed without cost or prejudice to the [State]”. *Osborne*, 521 F.3d at 1141, quoting *Osborne v. District Attorney’s Office*, 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006). The Ninth Circuit could make this statement because the DNA testing in *Osborne* was not accompanied by a stay of sentence. The Ninth Circuit, therefore, did not have to reconcile the new threshold it set for post-conviction DNA testing with United States Supreme Court precedent regarding stays of execution. See Section IV. B. Equities, *infra*. Consideration of the relevant Supreme Court precedent mandates the vacation of the stay of execution.

B. EQUITIES

1. 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

This 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, this

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. This 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.

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 v. United States District Court*, 503 U.S. 653, 654, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992). 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. Here, 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 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
- 11 months after the Ninth Circuit affirmed the denial of Stenson's federal habeas corpus action, *See Stenson v. Lambert*, 504 F.3d 873 (9th Cir. Sept. 24, 2007), *cert. denied*, 2008 U.S. LEXIS 6030 (U.S., Oct. 6, 2008)

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 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). Stenson's tactical decision to delay filing his motion for DNA testing, mandates the denial of his motion for a stay of execution.

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

The questions presented in *District Attorney's Office v. Osborne*, No. 08-6, 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 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).

C. ACCELERATED CONSIDERATION OF MOTION

The same equities that preclude granting a stay of execution in this case, support accelerated consideration of the State's motion to vacate the superior court's November 25, 2008, order. Stenson, not the State, delayed filing the underlying motion for DNA testing. Stenson, not the State, prepared the woefully inadequate stay order. The current order of stay provides incentive for Stenson to take no action whatsoever, and contains no findings or conclusions in support of its entry. This is clearly improper. *See generally Nelson*, 541 U.S. at 648 (stays of execution must be narrowly drawn). *See also Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 63, 738 P.2d 665 (1987) (an injunction will be reversed where the trial court fails to set forth any reasons for it and fails to include findings or conclusions).

RAP 18.12 allows for the accelerated consideration of motions. Such consideration is appropriate in the instant case. Even Judge William's joins in this conclusion, stating that "[i]f I am wrong [in entering a stay] I'm certain the Supreme Court will be able to tell me that quickly." RP (Nov. 25, 2008)

57.

The reason for speed is apparent. Stenson's execution date is currently December 3, 2008. The vacation of the stay prior to 11:59 p.m. on December 3, 2008, allows the execution to go forward as scheduled. *See Vargas v. Lehman*, Washington Supreme Court Cause No. 67190-7, Order (Oct. 12, 1998).¹⁰

V. CONCLUSION

The State respectfully requests accelerated consideration of the instant motion, and the prompt vacation of the stay of execution entered in the Clallam County Superior Court on November 25, 2008.

DEBORAH S. KELLY, WSBA No. 8582
Prosecuting Attorney



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

¹⁰A copy of this order is contained in appendix I.

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 25th day of November, 2008, I e-filed a copy of the document to which this proof is attached with the Washington Supreme Court by sending this document to supreme@courts.wa.gov.

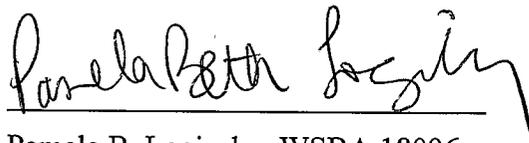
A copy of this document was served by e-mail on counsel for Darold Stenson, by sending this document to:

Sheryl McCloud at sheryl@sgmcloud.com

Robert Gombiner at robert_gombiner@fd.org

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

Signed this 25th day of November, 2008, at Olympia, Washington.



Pamela B. Loginsky, WSBA 18096