No. 82440-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAROLD R. J. STENSON,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

MOTION FOR LEAVE TO FILE ATTACHED SUPPLEMENTAL RESPONSE

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I. IDENTITY OF MOVING PARTY

The petitioner is Darold Stenson. Mr. Stenson is scheduled to be executed on December 3, 2008.

II. RELIEF REQUESTED

Mr. Stenson seeks leave to file a supplemental response to the State's motion for accelerated review of its RAP 8.3(b) motion to vacate the stay of execution. Mr. Stenson's supplemental response is attached and by this reference incorporated.

III. ARGUMENT

On the evening of November 25, 2008 the State filed an 8.3 (b) motion to vacate the stay of execution issued by Judge Williams the same day and sought "accelerated review" of its motion.

In view of the relief requested by the State, which sought to have this Court immediately review and lift the stay and maintain Mr. Stenson's execution date of December 3, 2008, Mr. Stenson filed a response to the motion for accelerated review the following morning, November 26. He did so because there were only three court days left prior to the date of execution. The State's 33-page motion mentioned RCW 10.65.160(2) only on its last page and made no argument about its application to Mr. Stenson's case. Mr. Stenson's response pointed out that even if the Court did lift the stay entered by Judge Williams, RCW 10.65.160(2) requires that the execution could not occur until 30 judicial days after the date the stay was lifted. The State then filed later on November 26, 2008 a reply to this response in which it raised a host of new arguments in support of its contention that the plain language of RCW 10.65.160 (2) does not apply to Mr. Stenson's case.

The application of RCW 10.65.160(2) to the situation here is a matter of first impression and obvious importance. The State's reply advances numerous arguments which demand reply. If the relief the State seeks were to be granted, Petitioner will not have the chance to reply to these arguments in any forum because he will have been executed.

Petitioner therefore seeks to file the attached supplemental response to the new arguments raised in the State's reply. Petitioner should be granted to leave to file the attached brief. RAP 1.2 states that "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."

IV. CONCLUSION

Especially in view of the exigencies present here and the need for Petitioner to have the opportunity to respond to and rebut the State's arguments, Mr. Stenson asks the Court to accept his attached supplemental response.

DATED this 30th day of November, 2008.

Respectfully submitted,

Robert H. Gombiner, WSBA # 16059

s/ Sheryl McCloud by Robert Gombiner

Sheryl Gordon McCloud, WSBA # 16709

Corey Endo, WSBA # 34270

No. 82440-1

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DAROLD R. J. STENSON,

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STATE OF WASHINGTON,

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SUPPLEMENTAL RESPONSE TO STATE'S MOTION FOR ACCELERATED REVIEW OF ITS RAP 8.3(b) MOTION TO VACATE THE STAY OF EXECUTION

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I. INTRODUCTION

The State moves this Court to grant "accelerated review" of the stay issued by Judge Williams with the goal of having the stay lifted by December 3, 2008 so that Mr. Stenson may be executed on that date. The State wants to achieve this result by ignoring the unambiguous mandate of RCW 10.95.160(2). Pursuant to the plain language of the statue, even if Judge William's stay were to be lifted immediately, the execution could not occur on December 3, because the execution date would be reset for 30 judicial days from the time the stay is lifted. To avoid this result, the State asks this Court to substitute for the statute that exists one that exists only in the State's imagination. To rewrite the statute in the manner desired by the State would offend basic principles of statutory construction and cause incalculable harm to both Mr. Stenson and the Washington system of justice.

II. FACTS

Petitioner filed a motion for DNA testing in Clallam County Superior Court, as required by RCW 10.73.170. On Friday, November 21, 2008, Judge Kenneth Williams, the judge who presided over Mr. Stenson's trial and the judge who sentenced Mr. Stenson to death, denied the motion and also denied Mr. Stenson's motion for a stay of execution. The denial came after the motion had been briefed and after two hearings. Judge Williams denied the motion because he found that even if DNA testing revealed the presence of some unknown person the lack of any evidence of another perpetrator would make such evidence unpersuasive and would not enable petitioner to meet the DNA statute's standard for obtaining testing. Judge Williams did not find that the motion had been filed in an untimely fashion. *See* Order Denying Petitioner's Motion for Stay of Execution (Nov. 21, 2008) (attached as Exhibit 1); Appendix B to State's 8.3(b) Motion

and Motion for Accelerated Review (11/21/08 Transcript) at 8.

Following the hearing an extraordinary and unforeseeable series of events occurred. On the afternoon of November 21, 2008 after Judge Williams had denied the motions for testing and for stay of execution, a person named Robert Shinn contacted his community corrections officer and told him that he had learned on the news that Mr. Stenson was about to be executed and that he had information that Mr. Stenson was innocent and had been framed for the murders for which he was to die. Shortly thereafter, Mr. Shinn was questioned at length by the Clallam County Prosecuting Attorney Deborah Kelly and a Clallam County sheriff. The interview was tape recorded.

Mr. Shinn related that about eight years ago he had a conversation with one John Lininger, in which Mr. Lininger told Mr. Shinn that Mr. Stenson was innocent and that Mr. Lininger, together with five other persons, had been involved in a an effort to steal possessions of Mr. Stenson, including valuable swords and that the murders had occurred in an attempt to steal the swords. Mr. Shinn said that Mr. Lininger named the people involved as himself, his brother, Tom Lininger, Patrick Nelson, Simone Nelson, Tanya Chapman and Ennis Caynor. According to Mr. Shinn, Mr. Nelson was named by John Lininger as the person who wanted to acquire the swords.

Mr. Shinn said he had never before told anyone about this conversation, and that he did not know Mr. Stenson. He did not ask for anything in return for his statement. Mr. Shinn was a person completely unknown to Mr. Stenson's lawyers.

The prosecutor e-mailed an audio file of the interview to Mr. Stenson's attorneys at about 5:30 P.M. on November 21. Both the police and Mr. Stenson began investigating the statement.

During the next day and a half much of what Mr. Shinn stated was corroborated. Of particular significance, the police located John Lininger and obtained a tape recorded statement from him. Mr. Lininger denied participating in the murders or having direct knowledge of them. However, he admitted to speaking to Mr. Shinn about the murders, to knowing Darold Stenson and selling drugs to Mr. Stenson and Mr. Stenson's wife (and murder victim) Denise Stenson, to having been at Mr. Stenson's home prior to the murders and having seen Mr. Stenson's trophy room, and to knowing all the other persons named by Mr. Shinn. In fact, Mr. Lininger stated that he and Tanya Chapman had Thanksgiving dinner at the Stensons' home the Thanksgiving prior to the murders. Mr. Lininger admitted to knowing Patrick Nelson very well. He stated that Mr. Nelson was a very violent individual who had assaulted him and that Mr. Nelson was capable of having committed the murders. He also told the police that Mr. Nelson and his sister lived at the Stensons' home after the murders.

Defense investigators located Tom Lininger's ex-wife Robin Lininger. She told them that the first time she met John Lininger, he started talking about "dead bodies."

On Sunday, November 23, defense counsel, after repeatedly but unsuccessfully trying to contact the prosecuting attorney by e-mail and telephone, telephoned Judge Williams and requested an emergency hearing.

On November 24, Judge Williams held a hearing on petitioner's motion for reconsideration. Because of the flood of new information and the limited court time available (Judge Williams was the only Clallam County Superior Court judge present on November 24) the court had to continue the hearing until Tuesday, November 25. By the time of that hearing, the court had received a great deal of evidence, including audio recordings of statements made by

John Lininger, Robert Shinn, Tanya Chapman, Patrick Nelson and Simone Nelson; an extensive written offer of proof from Mr. Chris Kerkering, an attorney in the federal defender's office who had participated in the defense investigation; and the lengthy criminal records of all of the individuals named by Mr. Shinn. Before ruling Judge Williams also reviewed his trial notes.

Late in the morning of November 25, after hearing extensive argument and after listening to the audio recordings, Judge Williams reversed his previous rulings and granted the defense motions for DNA testing and for a stay of execution. It is the court's grant of a stay of execution for which the State now seeks "accelerated review.

III. ARGUMENT

A. The Language of the Statute Is Plain and Must Be Enforced As Written.

RCW 10.95.160 (2) provides in pertinent part:

> If the date set for execution under subsection (1) of this section [governing the issuance of a death warrant after mandatory review by the Washington Supreme Court] 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.

(Emphasis added.)

The statutory command is unequivocal and crystal clear: if a stay is entered for any reason by a court of competent jurisidiction and then later vacated, the execution is reset for thirty judicial days from the time the stay is lifted. This Court must give effect to the plain language of the statute. See, e.g., *Human Rights Comm'n ex. rel. Spangenberg v. Cheny Sch. Dist. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982).

Here there is no question that (1) a stay of execution has been entered, (2) that the court which entered the stay is a court of competent jurisdiction (Judge Williams is an elected Superior Court judge from Clallam County and Clallam County is the appropriate court in which to file a motion for DNA testing (see RCW 10.73.170), and (3) the stay has been entered for "any reason." *See* Appendix D to State's 8.3(b) Motion and Motion for Accelerated Review (11/25/08 Transcript) . The statute does not in any way condition the application of the thirty judicial day provision on whether the stay is issued before or after the date of execution has passed.

If the Washington legislature wanted to limit the scope of the thirty day rule in the manner suggested by the State in its response, it could easily have done so. *See* RCW 10.95.200 (when an execution date "shall have passed" for a reason other than a stay, the trial court must issue a new death warrant). Other states have also enacted rules which specifically mention the effect of a stay expiring after an execution date has passed. *See, e.g.,* Rule 9 of Montana's Rules for Automatic Review of a Death Sentence.

B. The State's Efforts to Circumvent 10.95.160 Are Meritless and Reprehensible.

The State makes a serious of unsupported and implausible arguments to avoid the clear language of RCW 10.95.160 (2). The legal reasoning it employs is bad, the policy underlying its efforts is worse.

1. The Department of Correction's Alleged Interpretation of 10.95.160 (2) is Entitled to No Deference.

Without providing a shred of evidentiary support, the State baldly claims that "in the past the Washington State Department of Corrections has interpreted" RCW 10.95.160(2) in the manner the state desires and that this interpretation is "entitled to deference." Response at 3.

The Department of Corrections does not have authority to interpret the Statute. DOC follows no apparent administrative process, standards, or guidelines when it construes RCW 10.95.160(B) in a way that it says permits it to execute Mr. Stenson on December 3 despite the stays entered in federal and state court. None exists.

There is no suggestion that the Legislature intended that the DOC would be charged with the interpretative duties it has arrogated to itself, and State has never cited any authority demonstrating such legislative intent.

The DOC may not establish, interpret or implement a statute (1) without a legislative grant of authority, (2) without standards or guidelines from the Legislature to guide its actions and (3) that permits no review or oversight of its actions. *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979). Washington law protects against precisely the "unnecessary and uncontrolled discretionary power" by administrative agencies that DOC hopes to exercise here. *Id.* In order for the legislature to permissibly delegate authority to a state administrative body, it must satisfy a two-part test:

> First, the legislature ***must provide standards or guidelines*** which indicate in general terms what is to be done and the administrative body which is to do it . . . . Second, ***adequate procedural safeguards must be provided***, in regard to the Procedure for promulgation of the rules and for testing the constitutionality of the rules after promulgation. Such safeguards can ensure that administratively promulgated rules and standards are as a Subject to public scrutiny and judicial review as are standards established and statues passed by the legislature.

Id. at 891 (citation omitted; emphasis added) (holding that a legislative delegation of authority to the State Board of Pharmacy to promulgate emergency regulations without public notice was an unlawful delegation of authority).

DOC's proposed interpretation of RCW 10.95.160(B) satisfies neither prong of the *Powell* test. First, there is no statute identifying DOC as "the administrative body" to establish and implement the procedures by which execution dates are set. Nor is there any statute providing "standards or guidelines"—even in "general terms"—about "what is to be done." *Powell*, 92 Wn. 2d at 891. RCW 10.95.160(2) provides only that "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..." There is no express delegation to DOC, or to any administrative body, to interpret this statute. And there are certainly no standards or guidelines to direct this interpretation, which is contrary to the express terms of the statute.

Nor does DOC meet the second prong of the *Powell* test. RCW § 10.95.180 provides no safeguards, much less "adequate procedural safeguards," for how to review its interpretation. *Powell*, 92 Wn.2d at 891.

Moreover, where DOC's interpretation is at odds with the express terms of the statute, it is entitled to no deference. *W. Wash. Operating Engineers Apprenticeship Committee v. Wash. S. Apprenticeship and Training Council*, 130 Wn. App. 510, 123 P.3d 533 (2005) (rejecting agency's interpretation of code provision because it was "contrary" to code's "plain language").

2. The State Relies On an Egregiously Misleading Citation to Support Its Claim that the Court Can Rewrite the Statute and Insert New Language.

The State next asks the Court to read into the 10.95.160 (2) language which nowhere appears in the statute in order to achieve the goal it desires. It claims that Washington law supports such an undertaking and quotes *State v. Brasel*, 28 Wn. App. 303, 309 (1981) for the

following proposition:

> Although some courts have been hesitant to supply or insert words, the better practice requires that a court enforce the legislative intent or evident statutory meaning where it is clearly manifested. The inclusion of words necessary to clear expression of the intent or meaning is in aid of the legislative authority; the denial of the power to insert when the intent or meaning is clear is more nearly a usurpation of legislative power for it results in destruction of the legislative purpose."

State's Reply to Response in Opposition to Motion for Accelerated Review at 4.

The State's citation to *Brasel* is egregiously misleading. *Brasel* is a case about whether a person acquitted by reason of insanity who poses a danger only to himself can be ordered detained. In 1973 the legislature passed a bill amending a statute which addressed when persons acquitted by reason of insanity could be detained. The bill made clear that only persons who posed a danger to others could be detained. However, the bill which contained this change in policy contained "significant drafting errors" including the inclusion of the word "not" in a sentence which completely altered the sentence's meaning and allowed for the commitment of persons who did "not" present a substantial likelihood of committing felonious acts jeopardizing safety or security. The Governor vetoed the legislation because he "...recognized the word "not" was an obvious drafting error that did not reflect the intent of the legislature."and that if he signed the bill it would accomplish the "exact opposite" of what was intended. *Brasel*, 28 Wn. App. at 308. As a result of this veto, the statute that was supposed to be amended continued in its unamended form, even though the legislature and the Governor alike wanted a different result.

In light of this evidence, the *Brasel* court concluded that "It is apparent that neither the legislature nor the Governor intended persons to be committed as criminally insane merely upon

a showing of dangerousness to themselves." *Id.* at 309. The *Brasel* court further noted that unless the statute were construed in a way that limited confinement to persons who posed a danger to others and not just themselves it would lead to the absurd result that."a defendant could be criminally committed merely upon a showing that he is dangerous to himself, although he immediately would be entitled to final discharge or conditional release under RCW 10.77.200." *Id.* at 310.

The language quoted by the State from *Brasel* in no way suggests that courts are free to insert words into legislation merely because the court wants to see a different result. In fact, *Brasel* recognizes the opposite is true. "Our Supreme Court often has stated that we are not authorized to read into a statute those things we conceive the legislature may have left out unintentionally." *Id.* at 309. Instead, the precedential value of *Brasel* is confined to a situation which does not even arguably exist here – a situation in which a clear drafting error results in a statute which creates an obviously absurd result. Here there is absolutely no evidence of any drafting error, no evidence that anyone has ever thought there was any error, and there is no absurd result.

3. The State's Arguments About the Statute's Intent Lack Any Evidentiary Support and Reflect Only the State's Own Wishes About How the Statute Should Be Written.

In implicit recognition of the meritlessness of its statutory construction arguments, the State's principle contention is that the provision for resetting the execution date is a "technicality", that it would be an "injustice" if Mr. Stenson were not to be executed on December 3rd, and that the statute's intent will be "frustrate[d] if the plain language of the statute is implemented.

First, this appeal to "legislative intent" is misplaced because the statute's language itself is clear.

> A court interprets a statute so as to give effect to the Legislature's intent in creating the statute. *If the statute is unambiguous, its meaning is to be derived from the language of the statute alone.* If, however, the intent of the statute is not clear from the language of the statute itself, the court may resort to statutory construction. Such construction may include the consideration of legislative history.

Cherry v. Municipality of Metropolitan Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991) (emphasis added).

The statute at issue is clear so there is no need for statutory construction. But even if there were, the legislative history in no way supports the state's request to rewrite the statute or even mentions the topic. To the contrary, the legislative history contains absolutely no reference to any distinction between a stay vacated before or after a date of execution has passed and the State's response cites to no legislative history at all. The State's references to legislative intent, rather than referencing any facts, have been created out of thin air.

4. The State's Policy Arguments Impugn the Integrity of the State and Federal Judiciary.

The gist of the State's argument can be found in the following remarkable passage from its Reply.

> To interpret the statute otherwise would frustrate its intent and only lead to an unnecessary delay of the existing execution date. Moreover, offenders would be encouraged to abuse the statute as a technical means for seeking repeating extensions of an execution date, without any substantive benefit or purpose. The likelihood that continuous stays would be entered, during the 30-day period, and the potential for endless resetting of the execution date, would lead to an injustice resulting from a technicality; this injustice ins

properly avoided by construing the statute in light of its intent.

Reply at 5.

The State fails to identify exactly which judges will hand out "continuous stays" like penny candy. The State's suggestion that this will be the result of implementing the plain language of 10.95.160 evidences open contempt for the judiciary of this state and the federal courts. Yet the State offers no evidence to back up its reckless accusations.

5. The State's Definitions of "Technicality" and "Justice" Have No Basis in Law or Justice.

The State offers dismaying definitions of what constitutes a "technicality" and what justice means. It appears to think that a stay of execution issued because a court believes that DNA testing may reveal evidence of actual innocence is a stay of execution "without any substantive benefit or purpose" and should be summarily overturned, and it contends that for a court to grant a stay on the basis that a defendant should not be executed when DNA testing has the potential to exonerate him produces an "injustice." Reply at 5. The State cannot muster any legal or moral authority for these definitions.

C. The State's Approach Is Really a Call for No Review at All and Can Only Lead to Potentially Disastrous Results.

Judge Williams was the trial judge in *State v. Stenson* and his decisions in that case have withstood intensive scrutiny in both the state and federal courts. *See State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997); *In re the Personal Restraint of Stenson,* 142 Wn.2d 710, 757, 16 P.3d 1 (2001); *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007). The State has consistently championed Judge Williams rulings and has never intimated that he has been anything but scrupulously fair and thoughtful.

Now, however, the State asks that this Court to review within a few days, most of which has been taken up by the Thanksgiving weekend, Judge William's stay of execution and his extensive and fact-intensive findings and then summarily overturn his order and then ignore the mandate of RCW 10.95.160(2), all so that Mr. Stenson can be killed on December 3.

The State's position is unworthy of prosecutors whose goal is supposed to be justice and adopting it may leave an indelible stain on Washington. Judge Williams granted the stay and ordered DNA testing because of the possibility that Mr. Stenson may be innocent and because DNA testing can, depending on the results, exonerate Mr. Stenson. If Mr. Stenson is executed on December 3 and investigation, including DNA testing, done after he is killed, shows he is innocent, this will be a calamity not just for Mr. Stenson but for our justice system.

The State has never been able to articulate why it is so frightened of the truth and why an immediate execution is more important than finding out if Mr. Stenson is innocent. Nor can it explain why Judge Williams changed literally overnight from a careful judge into one who has issued a baseless stay of execution and one not even worthy of review.

The State's position imposes an impossible and unneeded burden on the Court and creates the chaotic situation which application of the plain language of RCW 10.95.160(2) avoids. For reasons beyond the control of Mr. Stenson, a person came forward with new evidence. The court heard this evidence and the results of further investigation and changed its mind about the need for DNA testing and for a stay of execution. The information furnished by Mr. Shinn is still being investigated and no DNA testing has been done. This court cannot conceivably reach a reliable and careful conclusion about the merits of Judge Williams stay before December 3rd.

To rush to judgment would not only defy the plain language of 10.95.160 (2) but would directly contravene this Court's long expressed view that "death is different," that this difference impacts on the Court's decision making and that the Court must show the "utmost solicitiousness for the defendant's position." *State v. Martin*, 94 Wn. 2d. 1, 21, 614 P.2d 164 (1980), citations omitted.

The State's approach would turn *Martin* on its head. It would have the Court show not the most care but the least. There is no need for this. This is particularly so given the fact-intensive nature of the inquiry, the length of the trial record, the quickly-unfolding new evidence, and the fact that the DNA statute has yet to be interpreted by this Court. *State v. Riofta*, 134 Wn. App. 669, 142 P.3d 193 (Wn. App. 2006), *review granted*, 161 Wn.2d 1001, 166 P.3d 718 (2007), the only case interpreting this statute, was argued many months ago before this Court and is yet to be decided.

The State asks this Court to find that a decision which Judge Williams issued after presiding over the trial, after presiding over four lengthy hearings on the motion for DNA testing, after initially denying the motion for DNA testing, after reviewing his trial notes, after reading the briefing and hearing the arguments of the parties, after listening to audiotapes and considering the rest of the new evidence, should be summarily overturned. The State suggests this Court can determine that Judge Williams's decision was an abuse of discretion in a couple of days, without briefing on the merits, without oral argument, and without reasonable time for this Court to even familiarize itself with an extremely complicated factual record, and equally complicated legal issues regarding DNA testing.

The blizzard of pleadings, all of the anxiety and stress suffered by everyone involved in

this litigation, and all of the confusion engendered could and should have been eliminated simply by following the plain language of the statute. That the State wants to stampede the Court into precipitous and possibly disastrous decisions, in conflict with a statute's unambiguous mandate, is reprehensible.

D. The State's References to *Vargas v. Lehman* Should Be Stricken.

Petitioner moves to strike the States' reference to and reliance on the Court's unpublished order in *Vargas v. Lehman.* There is no authority in Washington for using as precedent unpublished orders of this Court. This Court has consistently abjured the use of unpublished authority. *See, e.g, Dahl-Smyth v. City of Walla Walla*, 148 Wn.2d 835, 839 n.4, 64 P.3d 125, 17 (2003) ("Although both the trial court's decision and our opinion discuss the *College Place* ruling, we do not suggest that this or **any other unpublished opinion should be relied on as precedent.**") (emphasis added). *Cf.* RAP 10.4 (h).

Reliance on *Vargas* is especially inappropriate and would raise grave due process concerns. First, *Vargas* was decided in a matter of hours without any chance for meaningful briefing or argument. Second, *Vargas* involves an entirely different set of facts. The Ninth Circuit granted a stay in a petition brought by a next friend and the Supreme Court vacated the stay because the next friend lacked standing and the federal court was therefore without jurisdiction to entertain the stay. Thus, RCW 10.95.160 (2) did not apply because the Supreme Court of the United States ruled that the Ninth Circuit did not have jurisdiction and therefore the stay was not issued by a "court of competent jurisdiction" as required by RCW10.95.160(2). Second, Jeremy Sagastegui was a volunteer whose original date of execution had not passed. In this case, the execution date has been set three times, first on May 20, 1998, second on March 13,

2001, and now on December 3, 2008. Even if *Vargas* did have any precedential value, it thus does not apply to Mr. Stenson's case.

E. The State's Construction of 10.95.160 (2) Is Unconstitutional.

Rewriting RCW 10.95.160(2) in the manner suggested by the State would also violate the Washington state and federal constitutions. Mr. Stenson has a due process right to receive notice of precisely how Washington interprets the statute that governs his execution. He cannot be deprived of his right of fair warning by the "retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Colombia*, 378 U.S. 347 (1964). *See also In re Medley,* 134 U.S. 160, 10 S. Ct.384 (1890). In *Medley,* the Court granted habeas relief and ordered the immediate release of a death sentenced defendant because of the retroactive application of a new statute which provided that persons sentenced to death be kept in solitary confinement rather than under less onerous conditions and that the prisoner not be informed of the precise time of execution where before the law was that he be so informed.

There is no need for this Court to plunge into a constitutional quagmire by reading into a clear statute language which is not present.

IV. CONCLUSION

The State's position on RCW 10.95.160(2) conflicts with the plain language of the statute in pursuit of a result that is unworthy of an institution which is supposed to seek justice. It reflects a "win at all costs" mentality even if a possible consequence of its position is the state-sponsored execution of an innocent man. It asks the Court to find that the trial judge in this case, all of whose previous rulings have withstood exacting scrutiny and all of whose previous rulings have been defended by the State, has mysteriously changed into a judge who has issued a stay on

an irrational basis. And it asks the Court to reach this remarkable conclusion without the Court having any meaningful opportunity to understand the facts and determine the law. The State's request denigrates the careful ruling issued by Judge Williams and if granted would preclude the careful consideration required by this Court.

DATED this 30th day of November, 2008.

Respectfully submitted,

Robert H. Gombiner, WSBA # 16059

Sheryl Gordon McCloud, WSBA # 16709

Corey Endo, WSBA # 34270

EXHIBIT 1

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 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 21ST day of November, 2008.

JUDGE KENNETH WILLIAMS

PRESENTED BY:

DEBORAH S. KELLY, WSBA No. 8582
Prosecuting Attorney

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

APPROVED FOR ENTRY/COPY RECEIVED:

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