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STATE OF WASHINGTON
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NO. 83606-0 AND 83130-1

CRB

SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint of:

DAROLD RAY STENSON,

Petitioner.

RESPONSE TO DAROLD STENSON'S
REQUEST FOR ORAL ARGUMENT

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I. IDENTITY OF RESPONDING 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 Respondent respectfully request that this Court deny Darold Stenson's request for oral argument.

III. FACTS RELEVANT TO MOTION

Darold Stenson was convicted of two brutal murders in 1994. His convictions and the related death sentences were affirmed by this Court in 1997. *See State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Stenson's first collateral attack upon the facially valid judgment and sentence was denied in 2001. *See In re Personal Restraint of Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001). Three subsequent collateral attacks were dismissed as time-barred and/or as an abuse of the writ. *In re Personal Restraint of Stenson*, 150 Wn.2d 207, 76 P.3d 241 (2003); *In re Personal Restraint of Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004); *In re Personal Restraint of Stenson*, Wash. S. Ct. Cause No. 82332-4, Order (Nov. 19, 2008).

Darold Stenson, who during his murder trial, flirted with the possibility of representing himself,¹ filed a fifth personal restraint petition that has been assigned supreme court cause number 83130-1. Throughout this PRP, Stenson explained his desire to speak directly to the court, rather than through attorneys. *See, e.g., In re Personal Restraint Petition of Stenson*, No. 83130-1 (Fifth PRP), Opening Brief in Support of Personal Restraint Petition, at 5², 43³ (May 15, 2009).

While Stenson's Fifth PRP was pending, Sheryl McCloud and Robert Gombiner filed a sixth collateral attack. This collateral attack was eventually assigned supreme court cause number 83606-0. While Stenson affirmatively accepted Ms. McCloud and Mr. Gombiner's representation in Cause No.

¹*See State v. Stenson*, 132 Wn.2d 668, 739-40, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) ("*Stenson I*"). As late as 2007, Stenson complained that he should have been allowed to represent himself. *See Stenson v. Lambert*, 504 F.3d 873, 882-85 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 247 (2008).

²Stenson explained the reason he was filing his fifth collateral attack personally, as follows:

Because I have been represented by lawyers who have been motivated by their own missions, afraid or unwilling to challenge a system of injustice, and also unwilling to listen to what I have had to say, my true story has never been told to this or any other court. No court has seen me as a human in this wrongful conviction. I do not have any more time to let lawyers continue arguing about the law and ignoring the facts of my case.
Fifth PRP, Opening Brief in Support of Personal Restraint Petition at 5.

³Stenson's basis for acting pro se was not limited to a dissatisfaction with trial counsel. To the contrary, Stenson claims "that my own lawyers did not try to prove my innocence has infected *every* stage of my case since trial." [Emphasis in the original.] Fifth PRP, Opening Brief in Support of Personal Restraint Petition at 43.

83606-0, he has never affirmatively renounced his self-representation with respect to the Fifth PRP.

This Court has never consolidated Stenson's fifth PRP and his Sixth PRP. Throughout the joint remand hearings held in these two matters, Stenson has continued to represent himself in the fifth PRP, and counsel has continued to represent Stenson in the sixth PRP.

On March 4, 2011, Sheryl Gordon McCloud filed a request for oral argument in this Court. This request lists the cause numbers for both the sixth PRP and the fifth PRP.

IV. ARGUMENT

A. NO HYBRID REPRESENTATION

Washington has long preserved an individual's right to appear in court actions without counsel. *See, e.g.*, Const. art. I, § 22; RCW 2.48.190 ("That any person may appear and conduct his or her own case in any action or proceeding brought by or against him or her, or may appear in his or her own behalf in the small claims department of the district court:"). Washington does not, however, provide a right to hybrid representation. *See, e.g., State v. Deweese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991) (no Sixth Amendment right to hybrid representation); *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (same); *State v. Romero*, 95 Wn. App. 323, 326, 975 P.2d 564 (1999) (no state constitutional right for a litigant to serve as co-counsel with

an attorney).

The right to represent oneself in court exists, not because this is necessarily in a litigant's best interest, but because a litigant "has a personal right to be a fool." *State v. Fritz*, 21 Wn. App. 354, 359, 585 P.2d 173 (1978) (quoting *People v. Salazar*, 74 Cal. App. 3d 875, 141 Cal. Rptr. 753, 761 (1977)). Although, the exercise of the right to self-representation "will almost surely result in detriment to both the defendant and the administration of justice," *id.*, the individual's "choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta v. California*, 422 U.S. 806, 834, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975) (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970) (Brennan, J., concurring)). The respect for the individual requires both opposing counsel and the court to do nothing that removes control of the case from the pro se litigant or that destroy's the perception that the individual is representing himself. *See, e.g., McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (unsolicited assistance from stand-by counsel violates a defendant's *Faretta* rights when it prevents the defendant from making his own voice heard)); *Frantz v. Hazey*, 533 F.3d 724, 739-40 (9th Cir. 2008) (a pro se litigant's absence from a chambers conference on an issue of law is a violation of the pro se litigant's right to control the litigation); *United States v. Davis*, 285 F.3d 378 (5th Cir.), *cert. denied*, 537

U.S. 1066 (2002) (judge's appointment of an "independent attorney" to represent the "public's interest" in a capital sentencing hearing violated the defendant's right to autonomy).

Ms. McCloud is a stranger to the fifth PRP. She is not a party to that action, nor is she a counsel of record. Ms. McCloud may neither submit motions nor oral argument with respect to the fifth PRP.

To the extent Ms. McCloud is advancing Stenson's request for oral argument in his fifth PRP, the request should be denied. "[A] prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." *Price v. Johnston*, 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 2d 1356 (1948). *Accord Whipple v. Smith*, 33 Wn.2d 615, 618, 206 P.2d 510 (1949). Granting Stenson's request for oral argument in the fifth PRP would put the government to great and unnecessary expense, and would unnecessarily provide an opportunity for escape.

B. NEED FOR TIMELY JUSTICE

"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). *See also* . The *Nelson v. Campbell*, 541 U.S. 637, 644, 124 S. Ct. 2117, 158 L. Ed. 2d 924

(2004) (the “State retains a significant interest in meting out a sentence of death in a timely fashion.”).

Stenson’s request for oral argument should be denied as this will merely prolong litigation in this matter. This Court’s oral argument settings for the Spring 2011 term have been filled. Unless this Court were to create a special setting, oral argument in Stenson’s sixth PRP could not be held until September of 2011. Given that Stenson’s conviction has been final for 12 years, 11 months, and 21 day, the additional four months delay to allow for oral argument would be unconscionable.

This is particularly true as the issues in this case have been fully and capably briefed by the parties. The facts, once Stenson’s eleventh hour false allegations are discounted,⁴ are relatively straight forward. Any anticipated benefits from holding oral argument are far outweighed by the associated delay.

⁴While the State recognizes that counsel in a capital case have an obligation to vigorously and diligently represent capital defendants, this does not provide a license to allege prosecutorial misconduct without a factual basis. Bringing unsupported allegations is “demeaning to the criminal justice system in general, and to the processing of capital cases in particular.” *Young v. Ninth Judicial Dist. Court*, 107 Nev. 642, 818 P.2d 844, 848 (1991).

In the instant case, not only did Stenson’s counsel falsely claim that the State had not provided them with certain bench notes, but they castigated counsel for the State for refusing to stipulate to the accuracy of the allegation. *See, e.g.*, RP (Jan. 3, 2011) at 62-64. Other states have expressed their disapproval of these defense tactics, as should this Court. *See Young v. Ninth Judicial Dist. Court, supra.*

C. TRANSPARENCY IS ALREADY SATISFIED

Every document that has been filed by both the State and Stenson in this Court with respect to Stenson's fifth and sixth collateral attacks are available to the public. Most documents that have been filed in the Clallam County Superior Court⁵ are also publicly available to the public. The evidentiary hearing that this Court ordered was conducted in open court, and covered by the media.

The public's access to the pleadings and to the court hearings fully satisfy the requirement that "[j]ustice in all cases shall be administered openly." Const. art. I, § 10. While a reasoned published opinion from this Court would further enhance the public's understanding of collateral attacks and issues of finality, oral argument has never been considered essential in PRPs. In fact, most capital PRPs in Washington have been resolved without oral argument.

V. CONCLUSION

Stenson's counsel's request for oral argument in the sixth PRP should be denied. To the extent Ms. McCloud's pleading is accepted for filing in Stenson's fifth PRP, oral argument should also be denied in that case.

⁵The superior court docket reveals the existence of some sealed documents. These documents were filed by Stenson without notice to either the State or the Department of Corrections. *Contra* GR 15. It does not appear that the findings mandated by *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1992), were ever entered.

DATED this 9th day of March, 2011.

Respectfully submitted,

DEBORAH S. KELLY, WSBA No. 8582
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Pamela B. Loginsky", written over a horizontal line.

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

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 9th day of March, 2011, 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 the following individuals:

Assistant Attorney General John Samson at JohnS@ATG.WA.GOV.

Sheryl McCloud, Counsel for Darold Stenson, at sheryl@sgmcccloud.com

Robert Gombiner, Federal Public Defender, at robert_gombiner@fd.org

Peter Avenia, Federal Public Defender, at Peter_Avenia@fd.org

A copy of this document was placed in the United States Mail, in an envelope addressed as follows:

Darold Stenson
DOC No. 232018
Washington State Penitentiary
1313 North 13th Avenue
IMU/N-D-4
Walla Walla, WA 99362-8817

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

Signed this 9th day of March, 2011, at Olympia, Washington.

A handwritten signature in black ink, appearing to read "Pamela B. Loginsky". The signature is written in a cursive style with a horizontal line underneath it.

Pamela B. Loginsky, WSBA 18096

