

ATTACHMENT T

JUDGE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAROLD J. STENSON,

Petitioner

NO. C01-252P

vs.

JOHN LAMBERT,

Respondent

THIS IS A CAPITAL CASE

DECLARATION OF MONROE H. FREEDMAN
AS AN EXPERT WITNESS ON LAWYERS' ETHICS

Monroe H. Freedman declares under penalties of perjury:

Introduction

1. My name is Monroe H. Freedman. I am the Howard Lichtenstein Distinguished Professor of Legal Ethics, and the former Dean, of Hofstra University Law School, Hempstead NY 11550.
2. Counsel for Mr. Stenson have retained me to serve as an expert witness in this case, with reference to the irreconcilable conflict issue. I have waived my standard retainer for serving as an expert witness, and

have agreed to accept whatever fee, if any, the Court might deem appropriate.

3. Counsel understand that I will not serve as an advocate on behalf of Mr. Stenson, but that I will offer my opinion, as a qualified expert, regarding issues of lawyers' ethics as they relate to the case.

4. My qualifications as an expert witness on lawyers' and judges' ethics are set forth more fully in Exhibit A to this affidavit; in addition, Exhibit B is a standard resume. In brief:

(a) I have qualified as an expert witness on lawyers' and judges' ethics in state and federal courts and before the Judiciary Committees of the United States Congress.

(b) I have served as a consultant and expert witness on lawyers' ethics for the United States Department of Justice.

(c) For a third of a century, I have concentrated on lawyers' and judges' ethics. I currently teach lawyers' ethics each semester at Hofstra Law School, and, since 1978, I have lectured twice a year on trial advocacy and lawyers' ethics at Harvard Law School.

(d) My first ethics book, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975), received the American Bar Association's Gavel Award Certificate of Merit. About three dozen favorable reviews of the book have appeared. The *Harvard Civil Rights/ Civil Liberties Law Review* called it one of the few "monumental contributions to legal education in the past generation."

(e) My second book is *UNDERSTANDING LAWYERS' ETHICS*

(Matthew Bender, 1990). *The Professional Lawyer*, published by the ABA Center for Professional Responsibility, calls the book "thoughtful and eloquent," "rich with practical examples," and "idealistic in the best sense of the word."

(f) My testimony, books, and/or articles have been relied upon by numerous courts, including the Supreme Court of the United States.

(g) An article in *The Journal of the Legal Profession* concludes:

[Monroe Freedman's] thinking, writing and lectures ... have been the primary creative force in legal ethics today, both in the practice of law and in legal education.

(h) I have received the ABA's highest award for professionalism, the Michael Franck Award, for "outstanding contributions to the field of professional responsibility" and "a lifetime of original and influential scholarship" on lawyers' ethics.

5. Counsel have provided me with the following documents, which are the basis for my understanding of the facts in the case: Trial Transcript, pp. 00006621-6632, 00004581-4584, 00004641-4663, and 00004771-4808; Petitioner's Opening Brief on direct appeal, pp. 00009772-9784; and a 12-page portion of the Statement of Facts of Petitioner's Opening Brief.

Opinion

6. In my opinion, there was an irreconcilable conflict¹ and an actual conflict of interest² between Mr. Stenson and his counsel that was likely to and that did adversely affect counsel's performance at trial.

7. Essential to this issue is whether Mr. Stenson or his counsel had the authority to determine whether to use all reasonable means at trial to establish Mr. Stenson's innocence (which was Mr. Stenson's decision) or to forgo that effort and instead focus principally on the penalty phase (which was counsel's decision).³

8. In *In the Matter of the Personal Restraint of Darold J. Stenson*,⁴ the Supreme Court of Washington properly considered the American Bar

¹ The phrase "irreconcilable conflict" is used here to mean a "breakdown of a relationship between attorney and client from irreconcilable differences [which] results in the complete denial of counsel." *United States v. Moore* 159 F.3d 1154, 1158 (9th Cir., 1998).

² The phrase "actual conflict" is used here as it is used in *Mannhalt v. Reed*, 847 F.2d 576, 583 (9th Cir., 1988), where a prosecution witness had accused the defense lawyer of criminal conduct related to the crime for which the defendant was being tried.

³ On this issue generally, see M.H. Freedman, UNDERSTANDING LAWYERS' ETHICS, Ch. 3, esp. 52-57 ("Strategy and Tactics") (Matthew Bender, 1990).

⁴ 142 Wash.2d 710, 736, 16 P.3d 1, 15 (2001).

Association's "judgment that the tradition of legal practice in this country has divided up the responsibilities between attorney and client."⁵ In considering the judgment and tradition of the bar, however, the Court looked only to the ABA Standards for Criminal Justice, Std. 4-5.2.⁶

9. In examining Std. 4-5.2, the Court erroneously concluded that "[o]ne can infer from the ABA standards that a decision to admit guilt during the penalty phase would fall within the exclusive province of the lawyer." What the Court failed to recognize was that counsel's decision not to fully contest Mr. Stenson's guilt in order to reduce the chances of the death penalty was tantamount to pleading him guilty for the same purpose (but without the assurance of a plea deal). Thus, counsel effectively violated Mr. Stenson's right under Std. 4-5.2(a)(i) to determine "what plea to enter."⁷

10. In addition, Std. 4-5.2 limits the lawyer's province to

⁵ 142 Wash.2d at 736, 16 P.3d at 15.

⁶ The Court quoted the 2nd ed., Supp. 1986). The references here are to the 3rd ed., 1993.

⁷ It is particularly odd that the Court missed this point, since it was made forcefully by Judge Sanders in his dissent. 142 Wash.2d at 757, 16 P.3d at 26.

"strategic and tactical decisions." Both words refer to the *means* of achieving a *goal* or an *end*.⁸ Mr. Stenson consistently insisted upon his innocence, and his goal was a verdict of not guilty; nevertheless, his counsel refused to use methods (or tactics) that made achievement of that goal more, rather than less, likely. As acknowledged by Mr. Stenson's lawyer, "from the perspective of Mr. Stenson, the only issue that is important to him is whether he is acquitted or not. Because we disagree over *that fundamental decision*, we have differing ideas about *how we should proceed tactically in the guilt phase*...."⁹ Counsel added: "tactically I will not do anything that is going to prejudice saving his life in the penalty phase."¹⁰ Thus, Mr. Stenson's "fundamental decision" on

⁸ See Random House Webster's Collegiate Dictionary (2nd ed., 1997), defining "strategy" as "a plan or method for achieving a specific goal," and "tactic" as "a plan, procedure, or expedient for promoting a desired end."

Neither "strategy" nor "tactics" is defined in Black's Law Dictionary, indicating that these words have no special meaning in a legal context.

⁹ Tr. 00004773-4774 (July 13, 1994) (emphasis added). An analogy would be a lawyer sued by a former client for malpractice. If the lawyer's overriding goal is to demonstrate that he acted with skill and competence, his lawyer would not be permitted to give up on that issue and impose the goal of limiting the insurer's financial loss.

¹⁰ *Id.* at 00004779.

"the only issue that is important to him," that is, his goal of a not-guilty verdict, was thwarted by his counsel's preemptive decision regarding "tactics."

11. Furthermore, counsel's rejection of Mr. Stenson's decision was based on their moral opposition to the death penalty.¹¹ This is a conflict of interest that precluded Stenson's lawyers from adequately representing him, because "the representation [was] ... materially limited by the lawyer's own interests" under Rule 1.7(b) of the Rules of Professional Conduct.

12. Moreover, the ABA's judgments during the past century regarding the traditional view of the lawyer-client relationship are not limited to the Standards for Criminal Justice. Other expressions of the bar's judgment, traditions, and professional responsibilities make it even clearer that counsel for Mr. Stenson violated their professional obligations in disregarding his insistence on presenting "every defense that the law of the land permits" in his trial on the merits.

13. The traditional division of responsibilities between lawyer and

¹¹ Tr. at 00004780 (July 13, 1994).

Comment *b* to §22 adds the important rationale: "Because a representation concerns a client's affairs and is intended to advance the client's lawful objectives as the client defines them ..., *the client has general control over what the lawyer does.*"¹⁸ That is, Mr. Stenson had the right to general control over what his counsel did, because what was at stake was not counsel's day in court, but Mr. Stenson's.

21. In addition, Restatement §22, Cmt. *e*, lists five criteria for determining when the lawyer is required to defer to the client's "general control." Significantly, both together and individually, these criteria point inescapably to recognizing Mr. Stenson's right to decide whether to fight to establish his innocence. These are:

(a) How important the decision is for the client [*Here: Inordinately important*];

(b) Whether the client can reach an informed decision on authorizing the lawyer [*Here: Yes, he can*];

(c) Whether reserving decision to the client would necessitate interrupting trials or constant consultations [*Here: No, it would not*];

¹⁸ Emphasis added.

(d) Whether reasonable persons would disagree about how the decision should be made [*Here: Yes, they would*]; and

(e) Whether the lawyer's interests may conflict with the client's [*Here: Yes, as acknowledged by the lawyer*].

22. The decision in *Mannhalt v. Reed*¹⁹ bears out this analysis. Finding an "actual conflict [that] likely affected [counsel's] performance," the Ninth Circuit listed four ways in which this had happened. Significantly, each of these four ways represent the kind of decision that the Washington Supreme Court in this case deemed "tactical" matters, including two that relate to whether and how to cross-examine witnesses.²⁰

23. *First*, counsel's cross-examination in *Mannhalt* "included much of his own unsworn testimony."²¹ *Second*, counsel cross-examined a witness "in an unseemly and emotional manner."²² *Third*, counsel did not question the defendant on direct about the witness' accusation against

¹⁹ 847 F.2d 576 (9th Cir., 1988).

²⁰ 847 F.2d at 583.

²¹ *Id.*

²² *Id.*

counsel;²³ and *Fourth*, counsel did not attempt to negotiate a plea bargain (which the defendant might or might not have ultimately agreed to).²⁴ All of these matters are "tactics" or "strategy" within the definition of the Washington Supreme Court.

24. Moreover, rules of ethics must be interpreted in a way that is consistent with constitutional requirements. Applying the defendant's Sixth Amendment right to confront witnesses, the Supreme Court held in *Brookhart v. Janis* that a denial of cross-examination without a waiver by the defendant is "a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."²⁵

25. Waiver, of course, must be informed and intentional.²⁶ There is not even a suggestion here that Mr. Stenson waived his right of

²³ *Id.*

²⁴ *Id.*

²⁵ *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246 (1966).

²⁶ 384 U.S. at 4, 86 S.Ct. at 1247.

confrontation in this case.²⁷ On the contrary, he was insistent that Ms. Hoerner be cross-examined regarding her discussions about the possibility of killing her husband in order to collect the insurance on his life.²⁸ Also, as acknowledged by defense counsel (even as he was refusing to confront Ms. Hoerner as Mr. Stenson wanted), "She's a mess, quite frankly, psychologically, which pre-dates any of the things that occurred in this case, and she said some things to people that would make you wonder."²⁹

26. The decision of the United States Supreme Court in *Brookhart v. Janis* was 8-1. Writing a separate opinion in which no other Justice concurred, Justice Harlan agreed with the position taken in this case by the Washington Supreme Court that "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's ... explicit disapproval." Justice Harlan added, "The decision, for

²⁷ Nor, of course, did Mr. Stenson waive his right to call witnesses on his behalf, specifically, the two witnesses who would have testified that Ms. Hoerner had told each of them, separately, that she would like to see her husband dead.

²⁸ See, e.g., Tr. 00004793-4794 (July 13, 1994).

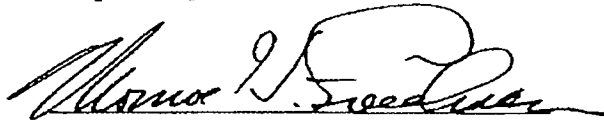
²⁹ *Id.* at 00004794. As a former criminal defense lawyer, the former Director of the Criminal Trial Institute in Washington, D.C. (1965-1966), and an instructor in trial advocacy for 23 years at Harvard Law School, that looks like reasonable doubt to me.

example, whether or not to cross-examine a specific witness is, I think, very clearly one for counsel alone." Again, all eight of the other Justices repudiated this view. In Mr. Stenson's case, therefore, the Constitution as well as the Rules of Professional Conduct condemn counsel's failure to confront the witness in accordance with Mr. Stenson's decision.

Conclusion

27. In my opinion, therefore, there was an irreconcilable conflict and an actual conflict of interest between Mr. Stenson and his counsel that was likely to and that did adversely affect counsel's performance at trial. Mr. Stenson, not counsel, had the authority to decide to use all reasonable means at trial to establish Mr. Stenson's innocence, and counsel had no authority to forgo that effort and to focus principally instead on the penalty phase.

Respectfully submitted,



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