JUDGE KENNETH WILLIAMS

IN THE SUPERIOR COURT
FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

DAROLD STENSON, Petitioner, vs. STATE OF WASHINGTON, Respondent.	NO. 93-1-00039-1 PETITIONER'S MOTION FOR DNA TESTING **Noted for: October 17, 2008 at 1:30 p.m.**

Petitioner Darold Stenson, a death sentenced defendant, moves this Court for an order for DNA testing of the items discussed below and enumerated in Exhibit 2. This motion is made pursuant to RCW 10.73.170, the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, sections 3 and 14 of the Washington State Constitution.

I FACTS

In 1994 Stenson was convicted and sentenced to death for the murders of Frank Hoerner, his business partner, and Denise Stenson, his wife. The aggravating factors were that there was more than one murder victim and that Frank Hoerner was murdered

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to conceal the identity of the murderer of Denise Stenson. *State v. Stenson*, 132 Wn. 2d 668, 759-60 (1997).

The evidence against Stenson at trial did not include any confession or any eyewitness testimony. Nor was there any physical evidence directly implicating Stenson. Rather, the State's case depended on its demonstrating that Stenson had the opportunity and motive to commit the crime, that the circumstantial evidence pointed toward him, and that there was no evidence of any other perpetrator.

As explicitly conceded by the prosecution in its closing argument, "The State does not rely on one single item of evidence. We rely upon the totality of the evidence." VRP Trial Volume XI (August 9, 1994) at 1789. The prosecutor made this remark in rebuttal and then immediately rejected the defense criticism of the state's case by saying that the defense was asking the jury to "speculate", to "use your imagination" and that the inability of the defense to be able to point to anyone else meant that "Essentially Mr. Neupert [defense counsel] is conceding to you that there was no one else but the defendant." *Id*.

The State's theory included the allegations that Stenson, motivated by greed, had planned the crime and that a few days before the murder he had gone to Frank Hoerner's home and planted some shell casings in Hoerner's driveway. The State further maintained that a number of cartridges found in Hoerner's pocket had been put there by Stenson and that Stenson had also put a weapon in Hoerner's hand with the intent of making it appear that Hoerner had first killed Denise Stenson and then committed suicide. VRP Trial Volume XI (August 9, 1994) at 1719-20.

The police seized a great many items of physical evidence. This evidence includes the weapon, which could not be traced, the ammunition in Hoerner's pocket, many items of clothing, and a number of fingerprint lifts, including prints that could not

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be identified.

Stenson has always maintained his innocence. From the moment he called 911 to report the murders to the present he has insisted that he played no part in the killings and that there must be another perpetrator. Indeed, it was Stenson's adamancy on this matter which led Stenson prior to trial to request new counsel or the right to represent himself once he learned that his counsel were not fully committed to achieving acquittal. VRP Pretrial Volume XVII (July 13, 1994) at 3118.

At trial, the defense pointed to myriad weaknesses and lacks in the State's case. The defense opening statement characterized the case as a "fascinating whodunit" and stated that the evidence showed that the perpetrator had left the scene before the police arrived. VRP Trial Volume I (July 18, 1994) at 34, 41. Stenson's defense foundered, however, because no physical evidence indicated that anyone else was the perpetrator.

II. DNA TESTING AT TRIAL

A few of the items taken by the police were subjected to DNA testing, using the Restrict fragment length polymorphism (RFLP) method. After an extensive *Daubert* hearing, the results of these tests were mostly excluded, with the court ruling that because of problems with and a lack of consensus in the scientific community about the proper application of the"product rule" and the ceiling principle, that testimony indicating that a sample did not come from Mr. or Mrs. Stenson could be given but that testimony that a sample matched that of Mr. Hoerner or that it did not exclude Mr. Hoerner could not be given. VRP Pretrial Volume V (June 8, 1994) at 799. As a result of this ruling no DNA evidence was introduced at trial.

III. ADVANCES IN DNA TESTING

DNA science has made remarkable strides since the trial. At the time of Stenson's trial the RFLP method of testing was in use. In about 1997, short tandem

repeat (STR testing) replaced RFLP. See attached affidavit of Cassie Johnson, Exhibit 1. Of particular relevance to this motion, a commercially available method using miniature short tandem repeat or Mini-STR testing was developed in 2007. Exhibit 1. This method of testing allows for DNA testing on extremely small samples and on samples that may have been degraded by age, improper storage conditions, or the environment in which the sample was located. The mini-STR method also allows for testing on samples with DNA inhibitors on them. DNA inhibitors may included substances such as the indigo dye found on denim, hematin found in blood, and humic acid found in soil. Exhibit 1.

The STR method is of special value in post conviction cases because it can yield results on samples which are old and have not been properly stored. Mini-STR testing can obtain results from items which would not have yielded a viable sample at the time the evidence was initially examined. Mini-STR has the potential to identify DNA from small numbers of cells that have sloughed off when a person touches an item. Exhibit 1.

IV. DNA AND EXONERATIONS

Testing for DNA has exonerated defendants even in cases where the evidence had seemed beyond dispute. For example, in 1997 Stephan Cowans was convicted of shooting a Boston police officer based on evidence which included an eyewitness identification by a surviving victim and testimony from two fingerprint analysts that Cowan's prints had been found at the crime scene. Yet when a glass of water from which the perpetrator had drunk was tested along with a hat which had fallen off the perpetrator as he fled, the results conclusively excluded Cowans.

The fingerprint that had pointed to Cowans was reanalyzed and the police concluded that both experts had erred. Cowans was exonerated and released from prison. See Jonathan Salzman and Mac Deanier, *Man Freed in 1997 Shooting of*

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Officer, Boston Globe, Jan. 24, 2004. This is but one story among literally hundreds of exonerations which have occurred because of advances in DNA testing.

V. PETITIONER MEETS THE REQUIREMENTS OF RCW 10.73.170.

Petitioner meets all the statutory requirements of RCW 10.73.170. First, the trial court did not admit DNA testing at trial. Alternatively, DNA technology was not sufficiently developed to permit testing of the evidence and new methods of DNA testing will now produce more accurate results and provide significant new information. Petitioner's motion thus states the information demanded by RCW 10.173.170(2)(a)(i) and (ii).

RCW 10.173.170(2)(b) requires the defendant to explain why DNA testing is material to the identity of the perpetrator or to sentencing enhancement. The underlying circumstances of this case allow petitioner to easily satisfy this requirement. Given the State's circumstantial theory that Stenson was the only actor, any DNA testing which shows the presence of an unexplained other person would point toward such a person as the real perpetrator. This would be even more the case if the same DNA from a third person were found in more than one place.

For example, if DNA from the same other person were found both on the casings in Hoerner's driveway and the bullets in Hoerner's pockets this would powerfully point to the other person as the perpetrator.

Petitioner meets the statute's requirement that the evidence would show the likelihood of innocence on a more probable than not basis. RCW 10.73.170(3). In determining whether this standard has been met, the plain language of the statute and common sense demand that defendant need only show that if the DNA testing is performed, and if it reveals evidence of another person, and if this evidence is inconsistent with the State's theory of guilt, then the testing should be ordered.

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The statute does not say that the defendant has to name any particular individual as another suspect. It also does not require that the defendant show that the case against him was weak.

Obviously, in this case, as in all cases under the DNA testing statute, the defendant has been found guilty beyond a reasonable doubt. This does not mean, however, that the Court should deny a motion for testing because of its belief that the defendant is guilty.

Reality shows that courts can err in their assessment of the strength of the evidence. Indeed, out of the first 150 exonerations resulting from post-trial DNA testing, the courts in 50 percent of such cases noted the defendant's likely guilt and in 10 percent explicitly found that the evidence of guilt was "overwhelming." Brandon L. Garrett, *Judging Innocence*, 108 Col. Law. Rev. 55, 107 (2008).

The whole point of the DNA testing is to uncover evidence, unavailable, at trial, which will change the outcome. To deny a motion because the defendant cannot show his innocence without the testing or even cast sufficient doubt on the verdict, is to assume the very point in dispute.

DNA testing is especially critical here because the State's case depends so heavily on the assertion that Stenson was the only one present during the murders and the corollary claim that the absence of any indication of another perpetrator inexorably leads to the conclusion that Stenson is guilty. The items requested to be tested, if they reveal the presence of DNA other than from Stenson, will directly point to another perpetrator. This applies to the bullets found in Hoerner's pockets, the unidentified fingerprints, items of Hoerner's clothing, any scrapings from under Hoerner's fingernails or elsewhere on his hands, the blood scraping from the trash can lid, the .357 revolver found in Hoerner's hand, and the cartridge casings found on Hoerner's property, which

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the State claimed Stenson planted there.

This case is dissimilar to *State v. Riofta*, 134 Wn. App. 669, 142 P.3d 193 (Wn. App. 2006), where the court rejected a DNA request both because testing could have been performed at the time of trial and because the results of testing the item in dispute–a hat–would not have materially aided in identifying the perpetrator of the crime.

If DNA from an unidentified source is located on the items to be tested in this case, by contrast, it will provide significant information implicating the real perpetrator. Admittedly, until the DNA is tested, it is not certain if the individual's DNA is in a database which will permit his or her identification. But this uncertainty does not militate against performing the testing. Any evidence which points away from Mr. Stenson is evidence which is devastating to the State's case and evidence which "would demonstrate innocence on a more probable than not basis." The State's theory, which is based on Stenson being the sole actor and which relies on inferences and circumstances rather than direct evidence, collapses like a house of cards once it becomes clear that another person's DNA is on items that according to the State should only have been touched by Stenson.

The statute also provides that DNA testing may be ordered if it will furnish significant information regarding "sentencing enhancement." This portion of the statute assumes particular importance in a death penalty case where the sentencing enhancement is the difference between life and death, where a jury must unanimously agree to impose death, and where residual doubt may be enough to lead to a vote against death.

Residual doubt has been recognized as the single most powerful mitigating factor. See *Chandler v. United States*, 218 F.3d 1105 (11th Cir. 2000). The presence of

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unexplained DNA on any of the items to be tested would, at the very least, produce such a doubt and make it likely that Stenson would not have been sentenced to death. Presence of DNA from another person on the bullets in Hoerner's pocket or the casings in his driveway would render untenable the State's theory that Stenson planned the murder of Hoerner to conceal the murder of Denise Stenson as well as casting grave doubt on the notion that Stenson killed Hoerner at all. Such findings would be at odds with the aggravating factors that Stenson killed more than one person and that he killed Frank Hoerner to conceal the identity of the murderer of Denise Stenson. These are the two aggravating factors alleged by the State and found by the jury which made Stenson eligible for the death penalty.

Thus, even if the court does not find that testing of the evidence would be likely to show innocence, it must nevertheless order the testing to be performed because the evidence has the potential to produce significant information relevant to "sentencing enhancement."

VI. CONSTITUTIONAL REASONS FOR ORDERING TESTING

Constitutional imperatives also compel ordering DNA testing. The United States Supreme Court has long recognized that the death penalty is qualitatively different from other punishments. See, e.g., *Gregg v. Georgia,* 428 U.S. 153, 188 (1976). It hardly needs to be said that an exoneration post-execution offers few consolations although it may produce much embarrassment and hand-wringing. There are few downsides to performing DNA testing and getting closer to the truth. If the truth points toward Mr. Stenson, then the State is in no worse a position–to the contrary any lingering doubts will be put aside.

If the evidence points to another person, this is evidence of enormous value to the defendant, the citizens of Washington, and the justice system. The modest expenditures

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of time and money involved do not outweigh these interests.

Yet another reason for ordering DNA testing is that it may be relevant to clemency. Executive clemency is the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins,* 506 U.S. 390, 412 (1993). Even if it developed that Mr. Stenson were unable to utilize test results in the judicial process, the results could still be highly relevant to a clemency decision. *McKithen v. Brown*, 2008 WL 2791852 (E.D.N.Y. 2008) (recognizing a due process right to DNA testing if the testing can be performed at negligible cost to the State and if exculpatory results would undermine confidence in the outcome of the trial and discussing at length the relationship between due process, the clemency process, and DNA testing).

The heightened due process involved in the death penalty process, the Eighth Amendment and Article 1, Section 14 of the Washington Constitution alike forbid executing a person when a readily available testing method which could prove his innocence is available and there is evidence that can be tested.

VII. CONCLUSION

For the foregoing reasons, petitioner's motion for DNA testing should be granted.

DATED this 21st day of August, 2008.

Respectfully submitted,

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Sheryl Gordon McCloud
Attorney for Darold Stenson

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CERTIFICATE OF SERVICE

I certify that I mailed, by U.S. Mail, first class, a copy of the foregoing document to Deborah S. Kelly, Clallam County Prosecuting Attorney at 223 East Fourth Street, Suite 11, Port Angeles, Washington 98362, on August 21, 2008.

_____
Robert H. Gombiner
Attorney for Darold Stenson

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