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JUDGE KENNETH WILLIAMS

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

DAROLD STENSON,	)	NO. 93-1-00039-1
	)	
Petitioner,	)	PETITIONER'S REPLY TO COURT'S
	)	REQUEST FOR FURTHER
vs.	)	INFORMATION AND REPLY TO
	)	AFFIDAVIT OF MICHAEL
STATE OF WASHINGTON,	)	CROTEAU
	)	
Respondent.	)	<b>Noted for: November 21, 2008 at</b>
	)	<b>11:00 a.m.</b>

The State's most recent submission – an affidavit from Michael Croteau, a Supervising Forensic Scientist with the Washington State Patrol Crime Laboratory – does not contradict the earlier submitted affidavit of Cassie Johnson, Petitioner's expert, which explains the need for DNA testing in this case. Rather, Mr. Croteau's affidavit further establishes the need for DNA testing and the need for a stay of execution so that the testing can be completed.

**I. The State's New Affidavit Undermines the Basis on Which the Court Requested Information on the Differences in Testing Using the Mitochondrial and mini-STR Methods.**

At the hearing on this matter on October 24, 2008 the State informed the Court

PETITIONER'S REPLY TO COURT'S  
REQUEST FOR FURTHER INFORMATION &  
REPLY TO AFFIDAVIT OF MICHAEL CROTEAU

**FEDERAL PUBLIC DEFENDER**  
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1 that the Washington State Crime Laboratory performed mitochondrial DNA testing.  
2 “But for low copy—we don’t know that anything is degraded, we may have great DNA  
3 preservation and for that low copy mitochondrial is the best and the **State patrol crime**  
4 **lab does indeed do mitochondrial DNA testing.”** 10/24/08 Transcript at 28, emphasis  
5 supplied.

6 After receiving this information, the Court asked that the parties

7 . . . provide more information on the difference in testing  
8 using the mitochondrial versus the short STR or Mini-STR,  
9 or STR in general DNA typing. I’d like to know what the  
10 cost of it would be to be prepared in the lab, and at the lab in  
11 terms of time, effort and the like, although maybe they can  
12 assign cost to it.

13 I would like more information on whether or not  
14 using one type of testing is likely to be destructive to the  
15 ability to do a follow up test in another type of testing, and  
16 what the circumstances might be on that.

17 10/24/08 Transcript at 36-37.

18 On November 14, 2008, the State sent petitioner a second affidavit from Mr.  
19 Croteau. This affidavit, in direct contradiction to what the State asserted at the October  
20 24<sup>th</sup> hearing, states that the Washington State Crime Laboratory does not do  
21 mitochondrial DNA testing. Mr. Croteau writes that “**The Washington State Crime**  
22 **Laboratory currently performs neither mitochondrial nor mini-STR testing.”** See  
23 Exhibit 1, ¶ 2, emphasis supplied.

24 Mr. Croteau’s new affidavit thus undermines the basis for the Court’s request to  
25 the parties regarding the differences between mitochondrial and mini-STR testing.  
26 Mini-STR testing does not have to be put on hold in order to allow for Washington State  
Crime Laboratory to conduct mitochondrial testing, because the crime laboratory in fact  
conducts neither kind of testing. At the same time, the affidavit recognizes the potential  
utility of DNA testing and thus supports Mr. Stenson’s motion for DNA testing and

1 motion for a stay of execution.

2 **II. The New Affidavit Admits that Both Mitochondrial and mini-STR Testing**  
3 **Are Suitable for Low-Quantity DNA Testing.**

4 Mr. Croteau does not address what kind of testing the Washington Crime  
5 Laboratory does do, if any, regarding low quantity DNA. He does, however, state that  
6 both mitochondrial and mini-STR testing “are suitable for testing low quantity DNA”  
7 although “each has limitations.” Exhibit 1, ¶ 2. Mr. Croteau goes on to assert that mini-  
8 STR testing is “superior at sorting out the mixture of a limited number of contributors.”  
9 Mitochondrial DNA is, in Mr. Croteau’s view, a better tool when a low-quantity sample  
10 is “known to have come from a single person.” *Id.* Given the circumstances present in  
11 this case, Mr. Croteau’s affidavit supports Mr. Stenson’s position that mini-STR testing  
12 is appropriate here.

13 **III. The DNA Statute Does Not Address What to Do In this Situation**

14 The DNA statute, RCW 10.73.170 (5), directs that DNA testing be done by the  
15 Washington State Crime Laboratory, but does not address what should occur if there are  
16 valid methods of testing available which may yield results but these methods are not  
17 used by the crime laboratory. The obvious answer is for the State to contract with a  
18 private laboratory that does do the necessary testing.

19 Much of Mr. Croteau’s new affidavit addresses the problems that may arise if a  
20 item has been handled by many persons. Obviously, however, until and unless an item is  
21 tested, it is not possible to know whether or not a useful result can be obtained.

22 The new affidavit from Mr. Croteau confirms that both mitochondrial and mini-  
23 STR testing are both available and potentially useful, with each of the methods having  
24 certain advantages. The DNA statute’s mandate that testing be performed by the Crime  
25 Laboratory should not be so narrowly construed as to make it impossible to use such

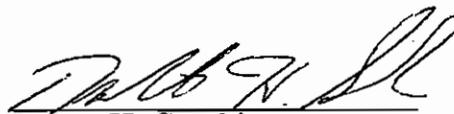
1 methods because they are not currently used by the Washington State Crime Laboratory.  
2 Such an interpretation would contravene the statute's other provisions, which recognize  
3 that new and more accurate forms of DNA testing may justify new testing. See RCW  
4 10.73.170 (2)(a)(i)-(iii). Such an interpretation would also violate Mr. Stenson's  
5 constitutional rights to due process of law. U.S. Const. amend. XIV; Wash. Const. art. I,  
6 § 3; *Osborne v. District Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008), cert. granted,  
7 \_\_ U.S. \_\_ (Nov. 3, 2008).

8 **IV. The Court Should Order Mini-STR Testing by a Private Laboratory Under**  
9 **Contract with the Washington State Crime Laboratory.**

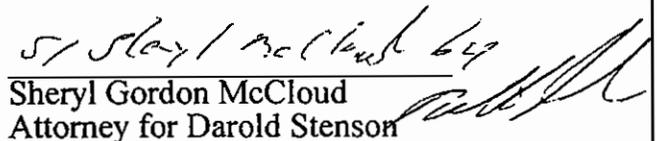
10 Petitioner has submitted a prioritized list of items to be tested. In view of  
11 petitioner's un rebutted position (and indeed confirmed by the State's own affidavit) that  
12 mini-STR testing is a particularly useful method for testing old and/or degraded  
13 evidence, the Court should order that the Washington State Crime Laboratory contract  
14 with either a private laboratory which does mini-STR testing or another State's public  
15 laboratory to test such items. Mr. Croteau's latest affidavit references the possibility of a  
16 public laboratory entering into a contract with a private laboratory. Affidavit, p. 1.

17 DATED this 18th day of November, 2008.

18 Respectfully submitted,

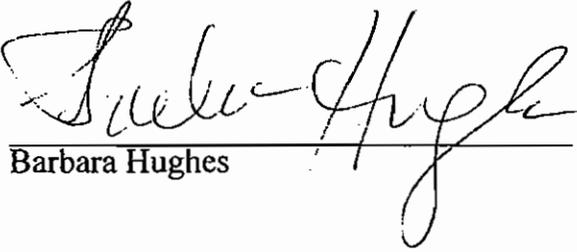
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20 Robert H. Gombiner  
21 Attorney for Darold Stenson

22   
23 Sheryl Gordon McCloud  
24 Attorney for Darold Stenson

1 **CERTIFICATE OF SERVICE**

2 I certify that on November 18, 2008, I mailed, by first class U.S. Mail, and/or  
3 faxed a copy of the foregoing document to: Deborah S. Kelly, Clallam County  
4 Prosecuting Attorney at: 223 East Fourth Street, Suite 11, Port Angeles, Washington  
5 98362. I also certify that on November 18, 2008, I mailed, by first class U.S. Mail, a  
6 copy of this same document to: Special Deputy Prosecuting Attorney Pamela Loginsky,  
7 206 - 10th Ave. S.E., Olympia, Washington 98501-1399.

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11 Barbara Hughes  
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# **EXHIBIT 1**

**RECEIVED**

NOV 14 2008

CERTIFICATIONCLALLAM COUNTY  
PROSECUTING ATTORNEY

I, Michael Croteau, am a Supervising Forensic Scientist with the Washington State Patrol Crime Laboratory in Marysville, Washington. I supervise the DNA section in the Marysville Laboratory and have been with the Washington State Patrol Crime Laboratory for nineteen years. I have previously provided an affidavit to the State to explain the capabilities of our lab with respect to DNA testing. In speaking with Deborah Kelly, Prosecuting Attorney for Clallam County, after the court's last hearing, it is apparent that she misunderstood some things outlined in my previous affidavit. This affidavit is provided to clarify and to attempt to answer other questions to which I am informed the court wishes answers.

The Washington State Patrol Crime Laboratory currently performs neither mitochondrial nor mini-STR testing. While both are suitable for testing low quantity DNA, each has limitations. If a low-quantity sample is known to have come from a single person, mitochondrial DNA is superior for obtaining a useful result; however, if a low quantity sample is known to likely be a mixture, mini-STR testing is superior at sorting out the mixture of a limited number of contributors. Limitations for the application of these technologies in a case such as this include:

1. Currently, private laboratories are not allowed to submit profiles into the Washington State Patrol Combined DNA Index System (CODIS) databank and the National DNA Index System (NDIS) of CODIS. Only public crime laboratories are allowed to enter profiles at this time. Therefore, any profile developed from the evidence by a private laboratory (unless under contract to a public laboratory which is supervising the private laboratory's work) could not be used to search against convicted offenders in the databank.
2. No miniSTR kit has yet been approved to enter profiles into the databank, whether done by a public or private laboratory.
3. Both the mitochondrial and miniSTR techniques are likely to be worthless in providing useful information if the item has been handled by a large number of persons, such as a jury. A large number of potential handlers greatly raises the possibility that DNA from several different people will be extracted and copied together, resulting in a DNA typing profile that reflects the combination of several individuals. Such a mixture profile of multiple contributors is unlikely to yield a statistically significant association when compared against a known person's profile (should a potential alternate perpetrator be identified by other means).

If it is not required to compare the DNA obtained from evidence to the databank, such as if a potential alternative perpetrator is known and a reference sample can be obtained from this person, and the evidence doesn't yield a mixture unsuitable for comparison, an attempt can be made to compare the evidence profile to the reference profile. Of course, it remains important to be as certain as possible that the particular item is actually related to the crime, ideally handled solely by the perpetrator of the crime.

In summation, testing evidence in a post-conviction case by a private lab using a mini-STR technique may be useful if:

1. There is no need to search any developed profile against the convicted offender databank.
2. There exists evidence, related to the crime, handled by an alternative perpetrator - but by few to zero other individuals.
3. A reference sample from the alternative perpetrator is available.

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

SIGNED AND DATED this 7<sup>th</sup> day of November, 2008, at  
Tulalip, Washington.



Michael Croteau

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STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

DAROLD STENSON,  
  
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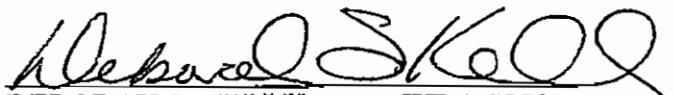
NO. 93-1-00039-1

SECOND AFFIDAVIT IN SUPPORT  
OF RESPONDENT'S OPPOSITION  
TO REQUEST FOR DNA TESTING

U

See affidavit of Michael Croteau annexed hereto.

DATED this 14th day of November, 2008.

  
DEBORAH S. KELLY WBA #8582  
Prosecuting Attorney

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PROSECUTING ATTORNEY  
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