JUDGE KENNETH WILLIAMS

IN THE SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

DAROLD STENSON, Petitioner, vs. STATE OF WASHINGTON, Respondent.	NO. 93-1-00039-1 PETITIONER'S REPLY TO RESPONSE TO MOTION FOR STAY OF EXECUTION

INTRODUCTION

Respondent, through its "special deputy prosecuting attorney" Pamela Loginsky, has filed a last-minute Response to Petitioner's motion for a stay of execution. The Response relies on a misunderstanding of the facts and an untenable interpretation of RCW 10.73.170, the DNA testing statute. It asks the Court to allow the execution of Mr. Stenson to proceed despite the uncontradicted evidence that a new and superior method of DNA testing exists which can be used to test items that could either exculpate Mr. Stenson or impact his death sentence. Neither the equities nor the law favor the State's approach. A stay of execution should issue.

I. Mr. Stenson's Motion Is Timely.

The State's 13-page Response repetitively complains that Mr. Stenson did not bring his motion for DNA testing quickly enough and insinuates that it is merely an 11th-hour effort to avoid execution. The facts, however, show that Mr. Stenson's

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motion is timely and that it is the State, not Petitioner, which has delayed and sowed confusion in this matter.

The following facts are undisputed: (1) the DNA testing statute contains no time limit for bringing a motion for testing; (2) the statute specifically contemplates that new methods of testing furnish a basis for ordering DNA testing (RCW 10.73.170(iii)); (3) mini-STR testing became available in the forensic setting in 2007 (Response at 8); and (4) mini-STR testing is a particularly good method for testing low-quantity DNA when a sample may contain a mixture of contributors. This is the opinion of the State's own expert. "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 likely to be a mixture, mini-STR testing is superior at sorting out the mixture of a limited number of contributors." November 14, 2008 Affidavit of Michael Croteau, Exhibit 1.

In the face of these facts, Respondent boldly asserts that Mr. Stenson can never secure relief, no matter what the results of the testing, because he waited too long to file his DNA testing motion. Response at 7-8. The State does not explain why, if the legislature intended to have a statute of limitations for DNA testing requests, it would not have included one in the statute. It does not explain how a defendant requesting DNA testing is supposed to know when a new method of testing is sufficiently established to justify making a request or what period of time is short enough to enable the defendant to escape accusations of "negligence and plain inaction." Response at 8. It does not explain why the legislature would pass a DNA statute if it intended not to allow the results of the testing to be meaningfully used.

The State's approach would render DNA testing motions virtually impossible to make render the results irrelevant. A defendant would always be left with a Hobson's choice of filing too soon and having the State argue for dismissal because he had not

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made enough of a showing that the new method "would be significantly more accurate," RCW 10.73.170(2)(iii), or of guessing, in the absence of any statutory authority or case law, as to how quickly he had to file.

II. Mr. Stenson Has Acted Diligently; The State Has Not.

The facts of Mr. Stenson's case do not demonstrate a lack of diligence. Mr. Stenson, contrary to the State's overheated rhetoric, has not "deliberately delayed" bringing this motion. Instead, the record shows that it is the State which has been dilatory. Mr. Stenson filed his motion on August 21, 2008, while his petition for a writ of certiorari in his habeas corpus case was still pending. After filing the motion, the clerk for the Court offered Mr. Stenson three dates for a motions hearing: August 29, September 5, and October 17, 2008. Exhibit 2. Because the first two dates were so soon after the filing of the motion, the October 17th date was selected.

The State did not object to the hearing date. It did not file any response of any sort until October 17, 2008 either to the motion or to the subsequent ancillary motions filed by Petitioner. Instead, the State requested that the hearing date be moved, not forward, but back by a week, which is why the hearing actually took place on October 24, 2008.

When the State finally filed a response it included an affidavit from Michael Croteau which referred in an ambiguous way to mitochondrial DNA testing. At the hearing the prosecutor assured the Court that the State Crime Laboratory did mitochondrial DNA testing. Exhibit 3, p. 28. This information prompted the Court to request explanations about the differences between mitochondrial and STR and/or mini-STR testing and the impact of performing one test on doing another test. Exhibit 3, pp. 36-37.

Another hearing was set for November 21, 2008. Despite the State being well aware that it was seeking to execute Mr. Stenson on December 3, 2008 (Petitioner

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explicitly referenced this date at the hearing) and despite the Court's request regarding mitochondrial testing, it was not until November 14, 2008 that the State furnished a second affidavit from Mr. Croteau which explains that the prosecutor "misunderstood" the prior affidavit and that in fact the State Crime Lab does neither mitochondrial nor DNA testing. Yesterday the State filed yet another affidavit from Mr. Croteau which appears to say that the State Crime Laboratory does STR testing, but does not do any form of low copy DNA testing. At best, this cascade of affidavits leaves unclear exactly what it is the Crime Laboratory does or what it can do. And it was not until yesterday that the State filed any pleadings regarding a stay. It has yet to file a prioritized list of items for testing.

The State now asks the Court to ignore its lack of urgency and the confusion it has created and allow Petitioner to be executed rather than granting a stay and proceeding in a more measured fashion. The equities cut against the State.

III. The Facts Support an Order for DNA Testing

The State's Response evidences a serious misunderstanding of the nature of Petitioner's request and the underlying facts.

The State says that Petitioner has asked to "test every piece of physical evidence that was collected during the investigation." This assertion is flatly wrong. In his initial petition, Mr. Stenson asked for testing of "the items enumerated in Exhibit 2." Petitioner's Motion at 1. This list consisted of about 39 exhibits, which is only a small fraction (well under 10%) of all the items seized in the investigation. Moreover, during the October 24th hearing, counsel for Petitioner agreed with the Court that not all the items in Exhibit 2 were of equal importance and that not all needed to be tested at the same time. Finally, and most importantly, Petitioner, in accordance with the Court's directive, submitted a small list of prioritized items to be tested. Exhibit 4.

The State would have it that the results of tests on these items would be meaningless.

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However, this analysis depends either on "facts" which are not true or on sheer speculation.

(1) The State claims that there is no evidence that any adults other than Denise Stenson, Darold Stenson, and Frank Hoerner were present at Dakota Farms on the night of the murders. Response at 6. This is not so. David Oberman and Tracie Reed were present at the farm on the night of the murders. Both so testified at Mr. Stenson's trial. *See* Testimony of David Oberman, T 1605-1614; Testimony of Tracie Reed, T 1592-1599. Mr. Oberman, in particular, is a convicted felon and a potential suspect.

(2) The State claims that the items to be tested are "mundane objects . . . that were handled by numerous people prior to the murders and after the murders." Response at 5. This statement shows no understanding of the items to be tested and relies on pure speculation as to who may have touched the items.

Far from being "mundane" items, the prioritized list of items focuses on items which if testing showed were not touched by Mr. Stenson but by another person would be powerfully exculpatory. For example, bullets were found in Frank Hoerner's pocket. The State's theory is that Mr. Stenson put them there. If his DNA is not on the bullets or in the pockets, but DNA from someone else is, this would be powerful exculpatory evidence. The same is true of the casings found in the Hoerner driveway, which the State claimed Mr. Stenson planted. Again, if Stenson's DNA is not on the bullets but another person's DNA is, this evidence would be exculpatory. The coffee cup found in the laundry room was claimed by the State to contain the coffee being drunk by Mr. Hoerner. An unidentified latent print was found on the cup. The FBI went to great lengths to eliminate police officers on the scene as being responsible for the print. *See* Exhibits 5. If DNA is obtained from the print and it is not the DNA of Mr. Stenson or Mr. Hoerner, this would again be very powerful evidence of another perpetrator. The bullets found in Mr. Hoerner's gun may contain DNA evidence. Once again, if Mr. Stenson's DNA is not on the bullets but another person's is, this would be strong

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evidence of another perpetrator. (It must be borne in mind that the weapon was never traced to Mr. Stenson or anyone else).

(3) Essentially, the State seeks to prevent testing by assuming that Mr. Stenson's guilt is incontrovertible. This assumption overlooks that the case against Mr. Stenson did not involve either eyewitnesses or a confession but was circumstantial and that Mr. Stenson had always adamantly maintained his innocence.

The State's response does not even mention RCW 10.73.170(2)(b) reference to "sentencing enhancement." Even if testing of the evidence did not establish Mr. Stenson's actual innocence it would still be highly relevant to his sentence of death, given that any evidence casting doubt on Mr. Stenson's guilt and/or establishing the presence of another perpetrator would undermine the State's theory that Mr. Stenson was the killer and that he acted alone.

(4) The State claims that "[t]he exhibits have been subject to handling by crime scene investigators, State forensic experts, defense forensic experts, witnesses, superior court clerks, jurors, supreme court staff, counsel of record, and agents for the counsel of record." Response at 4. The State offers no evidence that any of this is true or that if any of these persons did handle the items they did not wear gloves. Until the items are tested, it is impossible to know if useful results can be obtained.

Ms. Loginsky, perhaps because of her late entry into this matter, also fails to note that her assertions about the evidence contradict what Ms. Kelly said at the October 24th hearing. "While I feel fairly confident that **certainly when collected evidence was handled appropriately**. . . " Exhibit 3, p. 29, emphasis added

Of particular importance, to the extent that evidence may have been handled, this militates in favor of the mini-STR testing proposed by the defense. This is the opinion of the State's own expert: "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

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contributors." Exhibit 1.

The DNA statute, for very good reason, contains no requirement that a petitioner show that items to be tested are in pristine condition. The sort of DNA testing at issue here contemplates that the evidence may be degraded or have been or improperly stored. *See* Affidavit of Cassie Johnson, attached as Exhibit 1 to Petitioner's Motion for DNA Testing. Unsubstantiated speculation about who may have touched an item does not constitute a legal or practical reason not to order testing.

IV. Testing Can Be Done By a Private Laboratory Under Contract to the State Laboratory.

The State insists that DNA testing can only be done by the State Crime Laboratory. This argument is unsupported by authority, seemingly contradicted by Mr. Croteau, and would lead to absurd results.

RCW 10.73.170 explicitly contemplates using new DNA techniques. Here, there is no dispute that such a technique (mini-STR testing) both exists and, by the State's own admission, is a superior method for exactly the kind of evidence which Petitioner seeks to have tested.

Because the State Crime Laboratory does not currently perform the testing does not pose an insurmountable barrier. Mr. Croteau himself in his November 14th affidavit contemplates that testing can be done by a private laboratory which is "under contract to a public laboratory which is supervising the private laboratory's work . . .". Exhibit 1. If mini-STR testing is the best method available then such a procedure should be utilized to effectuate the DNA testing statute's purpose

Petitioner reiterates his position expressed at the October 24th hearing that what is important is that the testing using the best method be done, not what laboratory performs the testing. The State claims that Petitioner is indigent and "provides this Court with no evidence that he has the funds necessary to accomplish this testing."

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Response at 3. At the last hearing, Mr. Stenson told the Court that the federal defender's office would pay for testing if needed. Attached is an affidavit from the deputy director of the office attesting to this fact. Exhibit 6. Also attached is a declaration from investigator Charles Formosa regarding the prices charged by Orchid Cellmark, Inc. for various forms of testing, including mini-STR testing, and the approximate amount of time required (45 days). Exhibit 7. This information shows that funding for testing is available and the testing can be performed expeditiously.

V. The Unsettled Legal Landscape Counsels for a Stay.

The State seeks to have Mr. Stenson executed and DNA testing not provided despite pending decisions which may affect Mr. Stenson's motion. First, the State Supreme Court has heard argument in but has yet to decide *State v. Riofta*, 134 Wash. App. 669 (Div. II, 2006). The forthcoming decision in *Riofta* will be the first case from the Washington State Supreme Court interpreting the DNA statute. Second, the United States Supreme Court has granted certiorari in *Osborne v. District Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008). One of the questions in *Osborne* is whether the Due Process Clause, which Stenson has raised in his petition for DNA testing, gives a defendant the right to have postconviction access to biological evidence when he does not have a legally cognizable claim of freestanding innocence. Response at 10.

Contrary to the State's argument, this question may well impact Mr. Stenson's claim. Indeed, the State's own arguments that Mr. Stenson has no right to DNA testing at this point make *Osborne* and its due process implications especially pertinent.

CONCLUSION

Mr. Stenson has diligently presented undisputed evidence that a new method of DNA testing may provide significant new information which would exculpate him and/or affect sentence enhancement. The State has responded only with delay, contradictory information, and speculation. It now seeks to have Mr. Stenson executed

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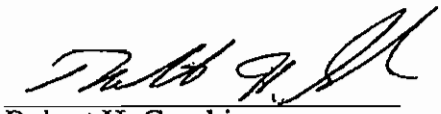
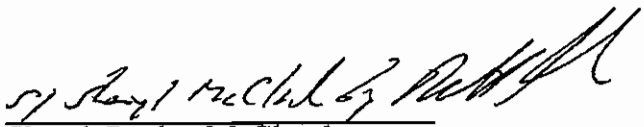
before either the legal issues can be properly resolved or before the testing which could exonerate Mr. Stenson occurs. For both legal and equitable reasons the State's opposition should be overruled and a stay should issue.

DATED this 20th day of November, 2008.

Respectfully submitted,



Robert H. Gombiner
Attorney for Darold Stenson



Sheryl Gordon McCloud
Attorney for Darold Stenson

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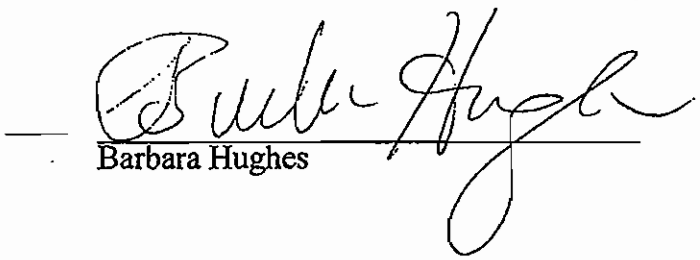
CERTIFICATE OF SERVICE

I certify that on November 20, 2008 I sent by e-mail a copy of the foregoing document to Clallam County Prosecuting Attorney Deborah S. Kelly at: dkelly@co.clallam.wa.us; and Special Deputy Prosecuting Attorney Pamela Loginsky at: pamloginsky@waprosecutors.org.



Barbara Hughes

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EXHIBIT 1

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

DAROLD STENSON,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

NO. 93-1-00039-1

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

See affidavit of Michael Croteau annexed hereto.

DATED this 14th day of November, 2008.

DEBORAH S. KELLY WBA #8582
Prosecuting Attorney

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

CERTIFICATION

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 7th day of November, 2008, at Tulalip, Washington.

Michael Croteau

CLALLAM COUNTY PROSECUTING ATTORNEY

DEBORAH S. KELLY

PROSECUTING ATTORNEY

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From Forks/Clallam Bay
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FACSIMILE COVER SHEET

Please deliver the following 3 page(s) to:

Name	Location/City	FAX Number
Robert Gombiner		( )
		( )

Re: State of Washington v. Henson
Clallam County Cause No.: 93-1-89-1

Comments:

From: Deborah Kelly
Prosecuting Attorney

FAX telephone number: **(360) 417-2469**

Date Sent: ~~October~~ Nov 14, 2008 Time: 3:45 p.m.

EXHIBIT 2

"Clevenger, Melinda" <MClevenger@co.clallam.wa.us>

08/20/2008 08:05 AM

To "Barbara Hughes" <Barbara_Hughes@fd.org>

cc

bcc

Subject RE: FILING A MOTION FOR DNA TESTING IN YOUR COURT - QUESTIONS

History This message has been replied to.

93-1-00039-1 is the correct Clallam County Superior Court case number. I am not sure I understand what you mean by "serve the court." A motion may be filed with the court by messenger or by mail. Only one bench copy is needed for the judge. Unless your proposed order is agreed to by the prosecutor, you will have to note your motion for hearing on the court's regular motion calendar. Judge Williams' next motion calendars are 8/29/08 at 1:30 p.m., 9/5/08 at 1:30 p.m. or 10/17/08 at 1:30 p.m.

Lindy Clevenger
Administrator
Clallam County Superior Court
223 E 4th Street Ste 8
Port Angeles, WA 98362
306.417.2386
fax 417.2581

-----Original Message-----
From: Barbara Hughes [mailto:Barbara_Hughes@fd.org]
Sent: Tuesday, August 19, 2008 6:09 PM
To: Clevenger, Melinda
Subject: FILING A MOTION FOR DNA TESTING IN YOUR COURT - QUESTIONS
Importance: High

I am the assistant to Assistant Federal Public Defender Robert H. Gombiner (WSBA # 16059) who is the attorney for Darold Stenson, currently on death row at Walla Walla. Mr. Stenson's trial took place in Clallam County in 1993. We are going to file a motion on behalf of Mr. Stenson with your court tomorrow and want to confirm that his case # is, in fact:
93-1-00039-1. Is this the correct # we should use on our current motion?
And do we serve the original and one copy to your court (via messenger) - or can it be served on the court by mail? In addition to the original to the court I was not sure how many copies court required. I have looked at the rules but also wanted to check with you. This motion will go to Judge Kenneth Williams (along with a proposed order) and, of course, we will
serve, by mail. the prosecuting attorney, Deborah Kelly. We have not filed in your court and county for many, many years and appreciate your input and confirmattion. Thank you very much.

EXHIBIT 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNT OF CLALLAM

DAROLD STENSON,)

Petitioner,)

vs.) No. 93-1-00039-1

STATE OF WASHINGTON,)

Respondent.)

_____)

BE IT REMEMBERED that on October 24, 2008, above-captioned cause came on duly for hearing before the HONORABLE KEN WILLIAMS, Judge of the Superior Court in and for the County of Clallam, State of Washington; the following proceedings were had, to wit;

Excerpt of Proceedings of Reporter's verbatim transcript

MOTION TO CONDUCT DISCOVERY

LISA C. MC ANENY Official Court Reporter

223 E. 4th Street Dept. II Superior Court

Port Angeles, WA 98362 360-417-2243

APPEARANCES

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FEDERAL PUBLIC DEFENDER
MR. ROBERT GOMBINER MS. SHERYL MC CLOUD
1601 Fifth Avenue, Suite 700
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HONORABLE KEN WILLIAMS
October 24, 2008
Stenson vs. State of Washington
Cause No. #93-1-00039-1
Motion to Conduct Discovery

(On the record)
(Defendant not present, currently at Walla Walla, represented by counsel)
(Parties present in open court)

THE COURT: State vs. Stenson, here for motions. I have had a chance to read the materials submitted. Thank you for that.

It appears that at least 2 of the motions there is no objection to is; that correct?

MS. KELLY: Your Honor, that is correct. However, I would ask with respect to the motion with respect to materials with regard to Allison and Fontenot, I have discussed that with defense counsel, they not be disseminated outside use of the court system, ie, for court filings and that sort of thing.

The Stacy Allison matter is still frankly under investigation and because of that, I

would ask that there be no dissemination further.

And again, with respect to Fontenot, I believe there are -- well, I don't see any need to disseminate beyond use in court basically.

THE COURT: Is that acceptable then?

MR. GOMBINER: Yes, Your Honor.

First, good morning, I'm Robert Gombiner. I'm representing Mr. Stenson. And this is Sheryl McCloud who is also representing Mr. Stenson.

MS. MC CLOUD: Good morning, Your Honor.

THE COURT: Okay, good morning.

MR. GOMBINER: Your Honor, with respect to the dissemination, I don't think we have any problems with it. Just to make sure I understand what the -- Ms. Kelly is requesting, obviously she's given us the materials so we would be able to look at them and discuss them and use them for court purposes, but I would not anticipate making them available to the general public or sharing them with other people or anything of that nature. I don't see any need for that.

MS. KELLY: And obviously any of his staff, they ought to be able to look at them in

assisting him. I'm not asking that they be held simply by Mr. Gombiner and Ms. McCloud and not disseminated beyond them but --

THE COURT: It seems like a protective order is appropriate and could simply say should not be disseminated beyond the need for court purposes.

MS. KELLY: And that order there might be the need to revisit it (sic).

MR. GOMBINER: Your Honor, maybe I can begin with the motion we've filed in respect to the handling of discovery and the evidence in this case.

Ms. Kelly was gracious enough to just furnish me this morning with is some materials. Obviously I just got them a minute ago I have not had a chance it look at them.

I do think this is potentially a significant matter because the gist of our motion is to have evidence examined and for there to be DNA testing. And of course the way the evidence has been preserved is -- that's extremely important and very relevant.

So, um, I think that the defense -- or, I guess, we're the petitioner here, should be allowed to examine these materials and file additional motions as appropriate or possibly we

might have to have a hearing on this. But I do think it has the potential to have an impact on what materials can be tested and might have some other ramifications as well.

So, I don't know if the Court wanted to consider maybe having a briefing schedule or scheduling another conference on this. It's a little hard for me to tell because I just received the materials right now.

THE COURT: Ms. Kelly, your thoughts on that?

MS. KELLY: Your Honor, I guess the problem I have with the motion is it's accompanied by a request for admissions.

Frankly, Mr. Gombiner and Ms. McCloud has had the case far, far longer than I have. Yes it's been in the State's office, but I have never been directly involved other than the morning of the case when the search warrant was obtained. And a very brief sojourn through my office 15 years ago when there was -- or not 15, but since the trial where when there was a brief due and materials were stuck on my desk and I had 2 days to file a brief. And basically what I did was file a motion for extension of time.

I am aware there's been numerous other hearings and I have not been involved in those.

I did respond to a request from the Pardons and Clemency board, but that was directed -- in my review of materials there was a very rapid one and directed at what I felt were sentencing issues rather than guilt issues or anything that would really impact this very much.

So, my command of the case is probably not half that of petitioner's counsel.

And I have no problem whatsoever with being -- furnishing materials to the defense if they contact me and request certain items. Defense counsel have already been -- they know they have access to the evidence because they were there in August, the Sheriff's Department in August, and actually looked at some of the items. I'm not going to obstruct that. Nor is the Sheriff's Department.

Obviously we have no objections to the preservation of evidence that currently is in the Sheriff's Department possession. But I do object to being asked for request for admissions on any of these, frankly because a lot of that is not something that I'm comfortable 15 years after the fact trying to a assemble the records and respond

to, um, so as I said, I'm perfectly comfortable with furnishing materials to the Defendant. I have no problem doing that. And it might be then that further motions would be necessary if the materials are not as satisfactory. But I'm certain that defense counsel -- or petitioner's counsel have the police reports and the transcripts of the trial so that's my only -- that's really any objection to the motion to conduct discovery. I'm not objecting to providing discovery and trying to do it expeditiously when they make a request to me. What I'm objecting to is being forced in to the corner of trying to ferret out for them that which is probably already much of which is already in their possession.

THE COURT: All right. Response?

MR. GOMBINER: Yes, Your Honor.

First, it is true that Ms. McCloud and I are familiar with the case because we've been representing Mr. Stenson during the pendency of his federal habeas corpus proceedings.

Of course, I think the Court is probably more familiar with Mr. Stenson's case than anybody since we all know that the Court presided over the trial itself. And maybe that will make

things easier because I'm sure the Court has a good memory of much of what transpired.

The reason we filed a request for admissions was not to try to put Ms. Kelly in a corner or anything like that. I just thought that it's a procedure that is more obviously used in civil procedures than criminal ones, but it's just sort of a way of making sure that everybody is on the same page as to what's really at issue and that there aren't -- if there are undisputed matters then we're on record that the matters are undisputed.

I'm not really that hung up on the particular form of this. We just want to make sure that we know what evidence is out there, whether or not our review of the records is in fact accurate, things of that nature.

So, it's not -- we're not trying to, you know, trick the State into making some admissions that they don't want to make, I think most of the -- I think there may be one mistake, I think we may have said PCR testing when it was actually RFLP testing. But I think most of the things we were talking about in the request for admissions are pretty straightforward. And to the extent there are things that are controversial, I

think that we could give the State whatever time it needed to respond to that.

So, I guess I'm saying I don't think that's the most important issue here, is the form of the request for admissions. But I do think they're helpful to the extent that they narrow the subject matter down to what's most relevant and what will get us to the proper end result.

THE COURT: Okay.

Well, it appears to me then the motion to preserve evidence, to the extent that it's evidence presently in the custody of the law enforcement here, should be preserved and if I'm wrong let me know, but it sounds like you agree to that?

MS. KELLY: Yes, Your Honor, I do agree to that, and note that again much of the evidence that was admitted at trial is in the possession of the Supreme Court, and it is my understanding although I have no understanding of it, I believe there was a personal restraint petition where one of the issues was the loss of a piece of evidence that apparently disappeared between trial and the Supreme Court. So, that's a known lost item at this point.

THE COURT: All right. Well, I will

sign that order.

As far as conducting discovery by request for admissions, certainly some of the admissions are not problematic in that it's easily answered, but there are some that I think may be more difficult to answer. And I guess the question of whether or not it's appropriate to do that, I think the parties might want to just have some stipulations on to those to the extent they can. But to the extent there is a formal discovery, um, I guess we go through the formal process. And I would understand that the problem here is that, 1, the normal process does not work as well when you have a case that's 14 or 15 years old, and 2, voluminous material for somebody new to go through.

MS. KELLY: And trial counsel is gone and the case agent for the Sheriff's Department recently had a medical emergency and is not going to be available, is my understanding, for anything other than brief questions for approximately 4 to 6 weeks. That was something that occurred this past weekend and unfortunately he'd been on vacation before that, so I have not had a great deal of access to him.

THE COURT: All right. At least he's

still available at some point hopefully.

So I guess as far as requests for admissions, I think let's let the parties see what can happen in terms of getting that done in a reasonable time frame.

If there is an issue that the time frame is unreasonable then it can be brought back to the Court.

MS. KELLY: And I will say this as well, Your Honor, I don't suspect counsel of trying to trick the State, it's simply I'm not comfortable and I don't think frankly in the criminal arena there is any procedure with respect that authorizes requests for admission, I -- I'm not comfortable that my grasp of the case is going to be sufficient to provide accurate answers.

THE COURT: Well that's --

MS. KELLY: And again, I think much of this can be hammered out informally and I'm willing to do that with counsel, but there maybe some sticking points where I say I don't know.

THE COURT: I think I'm saying let's do that in that fashion and come back to the Court if there are issues that frankly you need to resolve on an evidentiary basis. And I can understand the

answer might be that I have insufficient information where it would be unduly burdensome to respond that's an appropriate response if need be.

Sounds like the parties are willing to work together. At this point I will not sign any order directly authorizing or not authorizing requests for admissions, let's see if that becomes problematic and we can take a look at that.

Which gets us to the real motion, which is the motion for DNA testing. Are we ready to proceed?

MR. GOMBINER: Yes, Your Honor.

THE COURT: I will hear from you first.

MR. GOMBINER: Thank you, Your Honor.

We did make this our motion under RCW 10.73.170. We also reference some State and federal constitutional provisions, but I think obviously the place to start is with the statutes. And seems to me that our motion does meet the requirements of the statute.

And I say that for the following reason, first, I think the evidence is undisputed, I think this is emerges both from the affidavit that we filed and also the affidavit that the State filed in response, and I'm referring to Cassie Johnson,

who is the expert that we got an affidavit from and Michael Croteau, who is the person at the Washington State crime lab up in Everett, and that is the affidavit that the State filed.

I think it's absolutely undisputed that first at the time of the trial there was some DNA testing which the Court ultimately did not admit after what were really very lengthy hearings, and the Court gave a pretty extended ruling on it too which I won't repeat in it's entirety. But the bottom line was that it was RFLP testing which was -- I think was the state of the art back in 1994, but things have moved on since then and what we have submitted that first there was a new method of testing called STR which is -- let's get these acronyms confused --

MS. KELLY: Short.

MR. GOMBINER: Short tandem repeat testing, and then the our affidavit indicates that in 2007 Cellmark Lab's, which is a laboratory -- it's a commercial laboratory that our expert works for, again there was a commercially available DNA kit became available that used Mini-STR testing. This is just in 2007. And Mini-STR testing as indicated by our expert is particularly good for

samples that show signs of -- are either degraded or inhibited I guess is a term of art meaning other substances present that make it more difficult to detect DNA. And it also allows for testing that can be used on very small amounts of DNA, and then of course differentiates this from RFLP.

The reason this is important is because the statute, 10.73.170, says when you file a motion for DNA testing it shall state that the Court rule, DNA testing does not meet acceptable scientific standards which I think is true in this case, or, DNA testing technology was not sufficiently developed to test the DNA evidence in this case or the DNA testing now requested would be significantly more accurate than prior DNA testing, or it provides significant new information.

I think the evidence is absolutely uncontested that we more than meet that standard.

Then the statute goes on to say explain why DNA evidence is material to the identity of the perpetrator or accomplice to the crime, or to sentence enhancements.

So there are 3 things that are phrased in the disjunctive.

Actually I think what we are asking for

here is material to all of them. And the reason for that is this, obviously especially because as I've said the Court presided over the trial. I'm not going to review all the evidence in this case, but there is no doubt that this was a case, number 1, in which Mr. Stenson always completely denied that he was the perpetrator. 2, it was a case in which there isn't any eye witness testimony regarding who committed the murders. It was as the State itself argued at trial, it was a circumstantial case in which there was no 1 piece of evidence that said this proves that he did it. And to the extent that there was physical evidence, the physical evidence was contested.

But, as the State also argued, the reason there was an inference that the State drew, which is that Mr. Stenson in their mind was the only person who's identity who was shown to be there at the time of the murders, so as the State said in closing argument, essentially, well, who else could have done it?

Now we've got a way in which we can find out if someone else could have done it.

And it's particularly with respect to several pieces of evidence that had never been

tested for DNA but which with these new methods of testing could be tested and that excluded the murder weapon, there is a gun found, the gun that's used to shoot and it's found -- I believe it was found right next to Frank Hart (sic) or even in his hand.

If evidence was developed that someone's DNA other than Mr. Hoerner's or Mr. Stenson's was on the gun, that would be an extremely significant development.

Number 2, there were bullets that were found in Frank Hoerner's pocket. Now, the State's theory was that Mr. Stenson put the bullets in the pocket. Well, if it turned out that someone else's DNA other than Mr. Stenson's was on those bullets, that would be an extremely significant development.

There were casings that were found at the driveway of Frank Hoerner's house, bullet casings, and the State's theory, as I'm sure the Court will recall, is that Mr. Stenson planted those bullets in the few days prior to the murder in an effort to basically strengthen what the State contended was his ruse that Mr. Hoerner was the one that first killed Denise Stenson and then killed himself.

If someone else's DNA was on those

bullets casings, that would be extremely significant.

There are un-identified fingerprints, and especially if we have a hearing we can present evidence to this, but it is possible to obtain DNA results from fingerprints. If the un-identified fingerprints had DNA from someone else than Mr. Stenson, that could be extremely significant.

So, the basic point is - I don't want to just rattle on about this - but the basic point is that we've got a case where it's possible that DNA testing could reveal evidence of another perpetrator.

Now, given that the State's entire theory was that Mr. Stenson was the sole perpetrator, evidence that there is -- of another perpetrator would be of enormous importance.

First, in my view it would satisfy the standard that Mr. Stenson would be shown to be -- would demonstrate innocence on a more probable than not basis.

Now, I agree this is -- what that means is not all that clear. There is one case that really -- in Washington that really discusses it, which is State vs. Riofta, that which involves a

very, very different set of facts than Mr. Stenson's case. Riofta, that was decided in Division 2, but discretionary review is granted. It's been argued in the Supreme Court, but a decision has not come down yet.

So what that means exactly, I submit, to some extent is still a little bit up in the air. But from any reasonable point of view if the DNA testing reveals the presence of someone else's DNA, on various items of evidence, and I have not enumerated all of them because there's many items of evidence that could potentially be tested, then I think that would just have incredible impact on both the question of guilt and even if it's not the question -- even if the -- even if one found that it didn't mean that maybe Mr. Stenson did it with someone else, it would still of course have a huge impact on what the statute also talks about which is sentencing enhancement.

I mean, we all want to just pretend like here that this is just an ordinary case, this is a death penalty case, and it's a death penalty case in which there is a possibility that Mr. Stenson will be executed in the not too distant future if nothing else happens.

I think other things should happen but that is certainly a possibility. There is no doubt that the whole issue of sentencing enhancements would be dramatically affected by evidence that someone else had actually committed the murders, even the -- if there was some finding that well, maybe Mr. Stenson participated in it anyway.

So, that's something that the Court has to consider here very carefully and the statute specifically refer to sentence enhancements.

I mean, the State's whole theory was that Mr. Stenson deserved the death penalty because he by himself shot his wife, brutally murdered Frank Hoerner, then covered up the crime and lied about it or gave false exculpatory statements or false explanations. Well, you wouldn't feel that -- no one could say that whether or not someone else was there wouldn't have an impact on things. Which is not in any way to say that the most obvious inference would be that someone else did it all together.

And there is absolutely undisputed evidence in the trial record that other people did have access to the property including David Oberman and Stacy Reid who were actually living on the

property at the time and were there.

And there is no dispute that they were there the night of the murder.

So, all those things leave me to the conclusion that this is something that this is exactly what DNA testing is designed for. It's true I can't get up there and say I know who did it. You know, and I can't say that if we do the DNA testing it's going to come back the way I think it might come back. That would just be speculation on my part. But that's why we've got the science, that's why we do DNA testing, exactly for that reason, so that we don't have to speculate.

I mean, I don't want to sound too dramatic about it and it's easy to get rhetorical about these things, but there is something that's really critical about when the State's planning to execute someone and we've got a way of making more sure either that you've got the right person or even more importantly that you maybe got the wrong person, you know, why not do it.

Now, the only other thing I wanted to mention is the State has argued that we brought this thing too late. Well, there are at least 2 obvious responses to that. One is the statute has no time

limit in it. There is nothing in the statute that says that a motion has to be brought at any particular time. So even if this Mini-STR testing had been in existence 12 years ago, under the plain language of the statute there wouldn't be any impediment to Mr. Stenson bringing this motion now. But that's not what the evidence shows.

The evidence shoes this Mini-STR testing only came into existence in 2007. We filed this thing in August of this year. That does not show inordinate delay. I mean, that does not show just sitting around and doing nothing. And we filed this motion while Mr. Stenson's habeas corpus petition was still pending in the United States Supreme Court before certiorari was denied.

The State didn't -- we filed a motion in August, the State didn't even respond until last week. But -- which I'm not faulting them on. All I'm saying is there's nothing about the statute itself or the facts that show that timing is something that should bar consideration of this.

So, what I think we should do is I think we should in an appropriate way I'm asking the Court to let us have the DNA testing, do it in the right way, do it with the best methods available

which even the State's affidavit concedes that Mini-STR testing is better than mitochondrial testing and also you can use the DNA data bases which you can't do with the mitochondrial testing.

I don't really care. It's not a question of what lab does it, I know the State opposes the idea of an independent lab doing it.

Look, we don't care what lab does it as long as the lab does it with the best methods and does it in the most scientifically accurate way.

We're looking for what the truth is here. If the State can't do the STR mini testing then I think it's reasonable to do independent testing. Even if it's under the supervision of a State lab, fine, that's not a problem. But what we want is the testing that will get the results that we need.

And as I say, I think under the terms of the statute without even mentioning the several constitutional provisions that I think apply, I think we've met our -- put forth what we need to get the testing, I think the Court should order it. Thank you.

THE COURT: One of the comments in your brief was the cost factor --

MR. GOMBINER: Right.

THE COURT: -- but I don't hear anything or have anything that indicates what the cost factor might be to do the testing.

MR. GOMBINER: Well, I would say this, cost should not be an issue.

THE COURT: But the case law says it is an issue.

MR. GOMBINER: Right. But I'm going to try to make it not an issue, saying that if the Court required Mr. Stenson or his counsel to pay for it, we would pay for it. If that's the way -- if that's the only way to get the best testing, that's what we would do and actually there's a federal case and I don't know if I cited it in my brief or not, Osborne (sic), that that's one of the things that the 9th Circuit looked at, if there wouldn't be any cost to the State that mitigated in favor of doing the testing. But, I didn't mean that cost isn't an issue in that it's okay, just spend whatever you wanted to, what I meant was that if the only way or if it was necessary for Mr. Stenson to pay for the testing, we'll do it.

THE COURT: Let me ask a couple of other questions. You requested a lot of items to be

tested.

MR. GOMBINER: Right.

THE COURT: If the Court were to allow testing would it be wise to perhaps do it on a step basis? You look at a couple of items and frankly I'll just say if in fact the bullets in Mr. Hoerner's pockets contained Mr. Stenson's fingerprints, that kind of might be a game changer for instance -- or not his fingerprints, his DNA.

MR. GOMBINER: Right. I think I -- I don't think that's -- you know, there are some things I've got, actually trying to make out a list of various items that could be tested, and it's true some of them would be -- I mean, I can't stand up here and say they're all equally important. I would say that there is this coffee cup that had un-identified prints on it, I think that would be important. Frank Hoerner's pants, the bullets, the revolver, the cartridges in the driveway, those would all be things that I think would be pretty important.

There is underwear of Frank Hoerner that might or might not be important.

Yeah, I think that's reasonable. I mean, I'm not sure exactly what the Court's got in

mind, but I think testing it might make sense not to test every item at once because that obviously would be more expensive and might not really contribute that much.

THE COURT: All right.

Ms. Kelly, your response?

MS. KELLY: Well, frankly Your Honor, I don't believe counsel has met the burden. And the main reason I don't believe he's met the burden is because a number of these items clearly at least in my mind - the Court heard the evidence so the Court may have a better feel for it than I do - but it's my understanding that a number of these items appear to be very irrelevant to the crime itself.

For instance, and I'm not talking about the specific items the Court has just listed, but for example .22 bullets, casings (sic) of .9 millimeter ammunition, without knowing myself precisely where they were found, but I seem to recall discussions at the time that there was a great deal of ammunition and holsters and things found out in Mr. Stenson's garage. I don't recall there being any connection between the garage -- evident connection between the garage and the killings. Those are also the sorts of things --

bags of bullets that may have been used by Stenson and friends for target shooting, so there would be a fair likelihood that perhaps there is other DNA on it. But it does not again appear to have any relevance to the crime or real connection to the crime.

We know that a lot of the items were admitted at trial, presumably some of those items were opened up. I don't know whether the firearm itself, how it was handled by the firearms examiner who test fired it. I don't know how it was handled by the jury, if they had the ability to handle it. If that is the case, one might well expect to find low copy DNA on it. But it has no relevance at this point, I would submit, to guilt or innocence because of that handling.

The technology was what it was in 1993, and I'm not suggesting that it may not be appropriate once we know how some of these items were handled by the -- possibly by the jury to say maybe -- and the Court may recall, maybe the firearm was bagged the entire time, maybe the jury never opened it, but counsel has not shown that and at this point that needs to be shown for the Court to say on a more probable than not basis that finding

someone else's DNA on it would demonstrate innocence. And that is what the test is.

So, to some extent I think the motion's a little bit premature.

My point with respect to the timing of the motion is that it shouldn't make it urgent that the request has not been made until this point. We need the information, we need to actually follow the statute, and counsel's requests are I believe outside the purview of the statute with respect to the independent testing.

I want to make another point, mitochondrial testing I believe under forensic scientist Michael Croteau's affidavit is actually the best for low copy DNA. There is no showing that I saw that just storing an item - and again we don't know the conditions under which it's stored, we don't know that there is any degraded DNA even at issue - yes, Mini-STR might be better for that. But for low copy -- we don't know that anything is degraded, we may have great DNA preservation and for that low copy mitochondrial is the best and the State patrol crime lab does indeed do mitochondrial DNA testing.

With respect to the Mini-STR testing,

frankly, it's not at this point shown there's any need for it. The statute clearly says that the State patrol crime lab will do, shall do the DNA testing if the Court authorizes it, and there are valid policy reasons for the legislature to place that requirement there, to say that is the case. Mitochondrial -- if there is DNA that can be detected, and mitochondrial DNA will detect it better, then that is going to be sufficient.

What counsel -- defense counsel is looking for is some evidence that it's somebody else other than Mr. Stenson. We don't -- he doesn't need an identifiable -- other suspect which, yes, maybe he can get with Mini-STR, so the lack of a data base to run a mitochondrial DNA result through is unimportant. We have Mr. Stenson's DNA. We're going to be able to tell if it's his. I just think the request at this point on the showing that is before the Court doesn't meet the standard because we don't know that any given item on the list has been preserved in such a manner that it will in fact yield relevant information at this point.

While I feel fairly confident that certainly when collected evidence was handled appropriately, again that's something that would be

relevant. But my primary concern, because I think the most -- and I'm not even saying there might not be items of evidence that the State and the defense could even agree that for the State crime lab to do mitochondrial DNA testing on, but I don't believe the showing before the Court at this point is insufficient to meet the standard of would more probably than not demonstrate innocence.

THE COURT: Let me ask, the affidavit from the State was a bit confusing to me. Does the crime lab even do the Mini-STR testing?

MS. KELLY: It does not. And there are a number of reasons for that. One of them is as I understand it that the choices that they make are to attempt to get the best possible analysis. They like to wait a little bit of time to see if it's stopped, there are potential application problems when you are dealing low copy DNA and the Mini-STR process. I know the Court is familiar enough with DNA to know there are 2 basic -- 2 (inaudible) that come one from the father, one from the mother. When you get in to low copy DNA analysis the application that's required to bring it up to a testable level can -- there can be differential amplifications (sic). So that is one of the reasons in my

discussions with both the State patrol and, frankly, I talked to the FBI lab back in Virginia, and Ms. Johnson, that that is something that can be a concern with the Mini-STR testing.

So again, I think they're valid policy reasons for the legislature shows that's a requirement of the statute. They certainly considered the procedures for DNA testing and I do not believe there is any basis to disturb that choice, that the State patrol crime lab will be where the testing is done and determine what methods of testing be done.

THE COURT: Do you know if mitochondrial testing, if there is DNA, and I'm assuming it's a minute amount of DNA in the degraded form, would then preclude later doing the test?

MS. KELLY: I do not know the answer to that.

THE COURT: Okay.

Mr. Gombiner?

MR. GOMBINER: I guess I did find the affidavit from Mr. Croteau slightly confusing, because he says I'm reading from the last paragraph on the first page of his affidavit -- or, I guess the certification, he says "spent cartridges from

firearms generally leave some low quantity of DNA that the STR technique is not used in most cases. Mitochondrial DNA would give the highest chance of a typing profile, but would not be searchable in the convicted felon data bases. A Mini-STR technique would give perhaps a slightly better chance of results than the STR used in this laboratory system."

So, I was not sure where the hierarchy of everything ranged, and you know, look, I'm not going to stand up and say -- I'm not an expert on DNA testing, I'm relying on what our expert said and I'm looking at what he said in his certification.

I agree to some extent with Ms. Kelly, that of course the evidence handling is important, and it is true that there hasn't been, you know, any inquiry about that, exactly how all these items were preserved and who handled them. But it seems to me that's not a reason to do the testing, that's a reason to find out about it.

Maybe it is true if 40 people had there hands on the gun and none of them wore gloves, well, I guess that's going to present some issues. But I don't think we really know that at this point. But to me that doesn't get away from the fundamental

point, which is that we should try to determine what items can be tested and then test the items.

I think the Court had a good point about this, um, maybe we should get some more information about whether doing mitochondrial testing precludes doing Mini-STR testing, and also maybe which system really is better. Because I think under the state of the record right now, it's not entirely clear as to which would be the best method.

But I just want to reiterate, like I say, I'm not making this huge argument that we need Cellmark Lab to do the test as opposed to the Washington State patrol crime lab. I'm making argument we need to do the test and we need to do the test in the way that is best calculated to get the information that is necessary.

THE COURT: Well, the statute certainly is the statute and says what it says. And of course part of the language is that the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Which is a fairly high hurdle, I think at least in terms of the actual language.

It does, however, also indicate that it

might relate to a sentence enhancement and just -- frankly, and I'm going to think about this a little bit more, in some respects the sentence enhancement occurred because it was felt that Mr. Stenson committed 2 murders and also to hide a crime which was the theory behind the case.

If in fact evidence were to show that there were 2 people committing murders, I don't know what that does to that particular committing 2 murders prong to the aggravation factors, and again I have not looked at that carefully frankly, and it's been 14 years since I heard the trial, so it's been a while. So I want to take a look at that.

And also, frankly, the evidence in this case that was sort of the -- when it came out it was -- the case was over, was the blood located on Mr. Stenson's pants, that did in fact at least for the purposes of the testing which was used appeared to be that of Mr. Hoerner, it was clearly not that of Mr. Stenson, it was human blood and did with at least some degree of reliability under the enzyme testing that was available for trial.

MS. KELLY: Your Honor, just for the record too, because counsel has referred to the RFLP testing in his request for admissions, he had

indicated that a request on PCR and said today that was a request -- the request for admissions was only RFLP was performed on that particular item of evidence. That's not correct. PCR testing was also performed on that and there is a report dated I believe November of 93.

THE COURT: And that test indicated as my recollection was that Mr. Hoerner could not be excluded as having provided that sample and was probably included on a more probable than not basis.

MR. GOMBINER: I'm sorry, Your Honor, you said he was probably included?

THE COURT: Was more likely than not. He could not be excluded and the probability that it was someone else was at least more likely than not it was from him in light of the circumstances. That was the evidence frankly where defense counsel said okay we need to concentrate on sentencing.

MR. GOMBINER: Your Honor, this is my -- I think we -- what everybody said is true, I think that even Mr. Stenson's own account was that Mr. Hoerner's blood was on his pants. I think the issue, as the Court might recall, was more was it a blood spatter or a blood drip. And frankly, that was quite hotly contested at trial. Mr. Neupert - I

think was just in here - and I remember I read his -- he did quite a cross examination on that, I know that the defense in it's closing argument disputed the accuracy of the blood spatter. I agree though at one point Mr. Leatherman, who he might -- I think he said something to the Court in an ex parte proceeding about that. But my other point is it was not so much really who's blood it was, it was how the blood got there.

THE COURT: And I do understand that. That was sort of the big turning point in the Court's opinion.

I want to take some time to look more carefully about the case and understand a little more. What I would like counsel to do, and we'll set another hearing, and it's 2 things. First of all provide more information on the differences in testing using the mitochondrial versus the short STR or Mini-STR, or STR in general DNA typing. I'd like to know what the costs of it would be to be prepared at the lab, and at the lab it's probably more in terms of time, effort and the like, although maybe they can assign cost to it.

I would like more information on whether or not using one type of testing is likely

to be destructive to the ability to do a follow up test in another type of testing, and what the circumstances might be on that.

And then I would like counsel to prioritize either numerical 1,2,3,4 or in a grouping, of those items that you feel would be appropriate if testing is allowed to be tested first.

And again, my thought would be that depending on the results it might make it more likely that further items need to be tested or less likely. So it seems to me there certainly could be some argument made for the Court to look at and if we do have the DNA testing to start with a couple of items and those may be sufficient to satisfy the Court, that nothing else needs to be done or may peek curiosity that more needs to be done.

So what would be a reasonable time frame to have that material gathered and submitted to the Court and we can take another look - any thoughts on what would be a reasonable time frame to accomplish that?

MR. GOMBINER: Um, well Your Honor, I don't want to -- I want to make full disclosure so the Court knows, Mr. Stenson has completed his

proceedings in federal court, because the 9th Circuit mandate issued him on October 17th actually.

Now, there is a lot of other litigation going on but the State has taken the position that there is an execution date of December 3rd. We have filed a -- we do not agree in any way, shape or form that that is true, but I'm telling you the attorney general's office has taken that position.

So while I'm not -- you know, I think this could affect that, what I guess I'm really saying is I think we should have a reasonable period, I think it's going to take a little time to do these things. I'm not asking -- I'm not going to say 8 months, just to -- even though I might like to say that, I'm not going to. I think we should do it in the appropriate amount of time. I think, um, to talk to our expert and provide the information, I would think, like, 3 weeks would be sufficient to both get the information, write it up, you know, deal with the stipulations that we talked about earlier. So maybe some time in mid-November, something to that nature?

THE COURT: Ms. Kelly?

MS. KELLY: That seems reasonable to me under the circumstances. I would ask if counsel is

able to, if they could furnish me the list of -- the prioritization list I think that would take the least time, I would guess, furnish that to me so I can start looking at where that evidence is, I can send an officer to the Supreme Court to see what the condition of the packaging is in so that we can determine if the jury has opened and handled those items for example. That at least allows me to look at that. Because I think that goes to what -- the hurdle that has to be overcome in terms of whether or not that item should be tested.

THE COURT: Well, frankly it also goes to what type of testing. If in fact the jury has handled them, we're looking for an ability to match any DNA to an individual as opposed to there is some unknown individual's DNA on it. So that may go to the type of typing that is used.

MS. KELLY: And frankly, I have no idea. That's a whole other can of worms. Because I don't even know if all the members of the jury are still living.

THE COURT: It may not be you need to talk to them, it may be -- and frankly I'm talking off the top of my head, if you're talking about the individuals who were alleged to have been on the

scene, the question is is that individual's DNA on it.

MS. KELLY: I suspect that is less likely. I know that although obviously I have no personal knowledge, I suspect that there was probably very good initial evidence handling. My concern really is more what happened after the processing. In 1993 there would have been very little singled out for DNA testing, and once print testing, once certain testing was done, there would not I suspect have been any reason to believe there was any reason not to handle the evidence. So that is the concern I have.

THE COURT: And I understand that. And those -- frankly, those are the things the Court needs to look at in order to make a decision as to what items to test, if the Court in fact allows the testing to proceed.

MR. GOMBINER: And, Your Honor, I think another matter we should probably set some kind of schedule on is the question about the evidence room handling. That's a little difficult for me to say because as I say I just got these materials, I don't know what might flow from that.

THE COURT: We might have a review on

the same date to see where we are in terms of proceeding, if you need something sooner than that note it up.

Certainly the Court is going to accommodate in a death penalty case hearings on shortened notice and the like as long as it's fair to both parties.

MR. GOMBINER: I appreciate that, Your Honor. Thank you.

THE COURT: I'm looking at -- what about November 21st, the Friday before Thanksgiving?

MR. GOMBINER: That would be fine.

MS. KELLY: That would be fine with the State.

THE COURT: Special set it again at 11:00 a.m.

MS. MCCLOUD: I appreciate you special setting this, Your Honor.

THE COURT: You're welcome.

So, I understand counsel may have or will attempt to work out some stipulated order on the 2 issues that are not in dispute, the motion to allow the discovery regarding handling of evidence and the motion to preserve evidence?

MS. KELLY: I don't think there should

be any problem with the motion to preserve evidence. The only thing that might crop up is if we -- in terms of identifying where things are, and I'm not aware of any missing evidence other than the one item that I'm --

THE COURT: All right. If counsel wants to circulate among themselves and then submit an agreed order, I will look at those and get those signed.

I've signed the one minute order. I've signed the that minute order as well.

MS. KELLY: Thank you, Your Honor.

MR. GOMBINER: Thank you, Your Honor.

THE COURT: Anything else today?

MR. GOMBINER: Thank you.

MS. MCCLOUD: Not from the petitioner.

MR. GOMBINER: Not from us, Your Honor. Thank you very much, Your Honor.

THE COURT: Nice to meet you.

(Court at recess on this matter)

(Off the record)

****O****

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) SS.
COUNTY OF CLALLAM)

I, LISA C. MC ANENY, sitting as official Court Reporter of the Superior Court of the State of Washington, County of Clallam, do hereby certify that the foregoing transcription is a true and accurate rendition of the proceedings held herein.

LISA C. MC ANENY CSR #MC-AN-EL-C37707
Notary Public in and for the State of Washington,
Official Court Reporter, Clallam County Superior Court

Reporter's Certificate

EXHIBIT 4

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 LIST OF PRIORITY ITEMS FOR DNA TESTING **Noted for: November 21, 2008 at 11:00 a.m.**

Pending before this Court is Petitioner Darold Stenson's motion for an order for DNA testing. At a hearing on this motion on October 24, 2008, the Court instructed counsel to prioritize the items Petitioner wants tested.

Selected items in possession of Washington State Supreme Court, in order of priority for DNA testing:

1. belt and pants of Darold Stenson, including blood spatter stain
2. coffee cup
3. latent lifts of coffee cup, including unidentified fingerprint(s)
4. pants of Frank Hoerner

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5. bullets from the left front pocket of Frank Hoerner

6. high standard .357 revolver

7. 3 bullets and 3 casings removed from the revolver

8. bullet slug found on carpet near body of Frank Hoerner

9. shoes of Darold Stenson

10. sweatshirt of Darold Stenson

Selected items in possession of Clallam County Sheriff's Department, in order of priority for DNA testing:

1. left and right hand paper bag of Frank Hoerner

2. blood scraping from the trash can lid

3. latent lifts L40, L41, L42

4. latent lifts L43 through L65

5. left front jacket fibers

Petitioner respectfully requests an order for DNA testing of the above-listed items.

DATED this 18th day of November, 2008.

Respectfully submitted,

Robert H. Gombiner
Attorney for Darold Stenson

/s/ Sheryl McCloud by RHG

Sheryl Gordon McCloud
Attorney for Darold Stenson

EXHIBIT 5

FBI (Rev. 2-21-91)

FBI LABORATORY

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

Date: April 1, 1994

To: Sheriff of Clallam County
Attention: Detective Sergeant Monty Martin
Courthouse, 223 East Fourth Street
Port Angeles, Washington 98362-3098

FBI File No. 95A-HQ-1049334

Lab No. L-3830

Reference: Communications February 1, 1994 and February 18, 1994

Your No. Case #9302587

Re: UNKNOWN SUBJECT(S);
DENISE A. STENSON - VICTIM
FRANK C. HOERNER - VICTIM
55 KANE LANE
RURAL CLALLAM COUNTY
SOUTHWEST OF SEQUIM, WASHINGTON
MARCH 25, 1993;
HOMICIDE

Specimens received: February 7, 1994 in Latent Fingerprint Section

Specimens:

Coffee cup, item #15940 (processed prior to receipt)
Elimination fingerprints and palm prints of Phillip Riehle, Laurence Parker, Tina Fernandez, Gary Meyer, Dana Swaim, Thomas Lowe, Hlejandro Otman, William Rogers, Marvin Holden, Allen Knobbs, Roy Harniss, Richard Crabb, Kirk Cheney

One latent fingerprint of value for identification purposes is present on the coffee cup.

The latent fingerprint present on the coffee cup and the latent prints previously reported as being unidentified in this case were compared with the submitted fingerprints and palm prints of Phillip Riehle, Laurence Parker and the remaining above listed individuals, but no identification was effected.

(Continued on next page)

Photographs of the latent print are available for any future comparisons you may request.

The specimens and a mail wrapper are being returned under separate cover.

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EXHIBIT 6

7-1 (Rev. 2-21-91)

FBI LABORATORY

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

Date: May 16, 1994

To: Sheriff of Clallam County
Attention: Detective Sergeant Monty Martin
223 East Fourth Street
Port Angeles, WA 98362-3098

FBI File No. 95A-HQ-1049334

Lab No. L-3830

Reference: Communication April 6, 1994

Your No. Case #9302587

Re: UNKNOWN SUBJECT(S);
DENISE A. STENSON - VICTIM;
FRANK C. HERNER - VICTIM;
HOMICIDE

Specimens received: April 12, 1994

Specimens:

Fingerprints and palm prints of Darol Stenson
Elimination fingerprints and palm prints of Denise Stenson and thirteen other individuals

This report confirms and supplements information furnished telephonically on May 16, 1994.

A latent fingerprint was previously reported on a coffee cup in the captioned case.

After further evaluation, a determination was made that the latent fingerprint present on the coffee cup was of no value for identification purposes.

The unidentified latent prints previously reported in the captioned case are not the fingerprints or palm prints of Randy Pieper.

(Continued on next page)

2294

The remaining latent prints in the captioned case were previously compared with the remaining submitted inked prints and the results of these comparisons were previously reported in separate reports.

The submitted prints are being returned under separate cover.

2295

EXHIBIT 7

JUDGE KENNETH WILLIAMS

SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

DAROLD STENSON, Petitioner, vs. STATE OF WASHINGTON, Respondent.	NO. 93-1-00039-1 AFFIDAVIT OF MICHAEL FILIPOVIC

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

Michael Filipovic, after first being duly sworn on oath, deposes and states as follows:

1. I am the First Assistant Federal Public Defender for the Western District of Washington. I have been licensed to practice law in the State of Washington since 1982.

2. The Federal Public Defender's office has a budget for expert witnesses and other support services that it utilizes to assist in the representation of its clients.

3. The office procedure for authorizing funds for expert services is that the attorney assigned to the case makes a request of the Federal Public Defender Thomas W. Hillier, II, or to me, the First Assistant Federal Public Defender. We are both authorized to approve such funding requests. We review the request and the amount of funds requested

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for the expert services and then either approve or deny the request

4. In the above-captioned case, assistant Federal Public Defender Robert Gombiner has requested funding for DNA testing of samples by a private laboratory in the event that the State Crime Laboratory cannot or will not perform this testing. I have received this request and approved it.

5. Mr. Hillier is presently out of town but has instructed me by telephone that he concurs in this decision.

6. The Federal Public Defender's office will bear the expense of this independent testing of the DNA samples in Mr. Stenson's case.

DATED this 20th day of November 2008.

Michael Filipovic, WSBA No. 12319

SUBSCRIBED AND SWORN to before me on November 20, 2008.

MARY E. PEKICH NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 12-23-08

Mary E. Pekich, Notary Public and for the
State of Washington, residing at Seattle
My commission expires 12/23/2008.

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1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
(206) 553-1100

DECLARATION OF CHARLES P. FORMOSA

I, Charles P. Formosa, do hereby declare:

1. My name is Charles P. Formosa. I am an investigator with the Federal Public Defenders Office in the Western District of Washington.

2. On November 20th, 2008, I spoke with Joan Gullikson, the forensic administrator for Orchid Cellmark laboratories. Ms. Gullikson said the average time it takes to test a piece of evidence after receiving the evidence is 45 business days.

3. Ms. Gullikson told me the cost of each test which are:

   STR test - $1095

   YSTR test - $1295

   Mitochondrial STR test - $2850

   Mitochondrial test on a blood or saliva sample - $1450

   Mini-STR test- $1295

I declare under the penalty of perjury under the laws of Washington and the United States of America that I have read the foregoing declaration and it is true and correct.

Executed this 20th day of November, 2008 in Seattle, Washington.

Charles P. Formosa