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IN THE SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

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

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

3 ~~The following facts are undisputed:~~ (1) the DNA testing statute contains no time
4 limit for bringing a motion for testing; (2) the statute specifically contemplates that new
5 methods of testing furnish a basis for ordering DNA testing (RCW 10.73.170(iii)); (3)
6 mini-STR testing became available in the forensic setting in 2007 (Response at 8); and
7 (4) mini-STR testing is a particularly good method for testing low-quantity DNA when a
8 sample may contain a mixture of contributors. This is the opinion of the State's own
9 expert. "If a low-quantity sample is known to have come from a single person,
10 mitochondrial DNA is superior for obtaining a useful result; however, if a low-quantity
11 sample is known likely to be a mixture, mini-STR testing is superior at sorting out the
12 mixture of a limited number of contributors." November 14, 2008 Affidavit of Michael
13 Croteau, Exhibit 1.

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

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

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

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

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

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

18 When the State finally filed a response it included an affidavit from Michael
19 Croteau which referred in an ambiguous way to mitochondrial DNA testing. At the
20 hearing the prosecutor assured the Court that the State Crime Laboratory did
21 mitochondrial DNA testing. Exhibit 3, p. 28. This information prompted the Court to
22 request explanations about the differences between mitochondrial and STR and/or mini-
23 STR testing and the impact of performing one test on doing another test. Exhibit 3, pp.
24 36-37.

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

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

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

14 **III. The Facts Support an Order for DNA Testing**

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

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

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

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

2 (1) The State claims that there is no evidence that any adults other than Denise
3 Stenson, Darold Stenson, and Frank Hoerner were present at Dakota Farms on the night
4 of the murders. Response at 6. This is not so. David Oberman and Tracie Reed were
5 present at the farm on the night of the murders. Both so testified at Mr. Stenson’s trial.
6 See Testimony of David Oberman, T 1605-1614; Testimony of Tracie Reed, T 1592-
7 1599. Mr. Oberman, in particular, is a convicted felon and a potential suspect.

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

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

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

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

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

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

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

23 Of particular importance, to the extent that evidence may have been handled, this
24 militates in favor of the mini-STR testing proposed by the defense. This is the opinion
25 of the State's own expert: "However, if a low quantity sample is known to likely be a
26 mixture, mini-STR testing is superior at sorting out the mixture of a limited number of

1 contributors.” Exhibit 1.

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

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

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

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

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

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

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

8 **V. The Unsettled Legal Landscape Counsels for a Stay.**

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

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

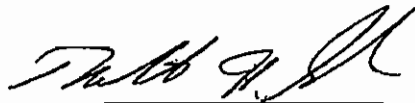
22 **CONCLUSION**

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

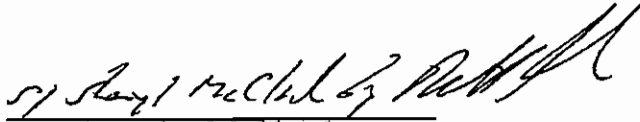
1 before either the legal issues can be properly resolved or before the testing which could
2 exonerate Mr. Stenson occurs. For both legal and equitable reasons the State's
3 opposition should be overruled and a stay should issue.

4 DATED this 20th day of November, 2008.

5
6 Respectfully submitted,

7 

8 Robert H. Gombiner
9 Attorney for Darold Stenson

10 

11 Sheryl Gordon McCloud
12 Attorney for Darold Stenson

1 **CERTIFICATE OF SERVICE**

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

6
7 
8 _____
Barbara Hughes

EXHIBIT 1

<p>IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CLALLAM</p>
--

<p>DAROLD STENSON, Petitioner, vs. STATE OF WASHINGTON, Respondent.</p>


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

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

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).

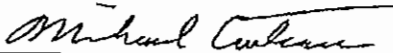
If it is not required to compare the DNA obtained from evidence to the databank, such as if a potential alternative perpetrator is known and a reference sample can be obtained from this person, and the evidence doesn't yield a mixture unsuitable for comparison, an attempt can be made to compare the evidence 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 7th day of November, 2008, at
Tyler, Washington.



Michael Croteau

CLALLAM COUNTY PROSECUTING ATTORNEY

DEBORAH S. KELLY

PROSECUTING ATTORNEY

(360) 417-2301
FAX (360) 417-2469

Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015

Toll Free:
From Seattle (206) 464-7098
From Forks/Clallam Bay
(360) 374-5324

FACSIMILE COVER SHEET

Please deliver the following 3 page(s) to:

Name	Location/City	FAX Number
<i>Robert Gombiner</i>		()
		()

THE INFORMATION IN THIS FAX MESSAGE IS PRIVILEGED AND CONFIDENTIAL. IT IS INTENDED ONLY FOR THE USE OF THE RECIPIENT NAMED ABOVE (OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT). IF YOU RECEIVED THIS IN ERROR, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS MESSAGE IN ERROR, PLEASE NOTIFY US BY TELEPHONE IMMEDIATELY, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA U.S. POSTAL SERVICE. WE WILL, OF COURSE, BE HAPPY TO REIMBURSE YOU FOR ANY COSTS. THANK YOU.

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

Comments:

From: *Deborah Kelly*
Prosecuting Attorney

FAX telephone number: (360) 417-2469

DK
Date Sent: October 15, 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

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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.)

_____)

COPY

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

1 APPEARANCES

2

3 MS. DEB KELLY

4 Prosecuting Attorney

5 223 E. 4th Street

6 Port Angeles, Washington 98362

7

8 FEDERAL PUBLIC DEFENDER

9 MR. ROBERT GOMBINER MS. SHERYL MC CLOUD

10 1601 Fifth Avenue, Suite 700

11 Seattle, Washington 98101

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1 HONORABLE KEN WILLIAMS
2 October 24, 2008
3 Stenson vs. State of Washington
4 Cause No. #93-1-00039-1
5 Motion to Conduct Discovery
6

7 (On the record)
8 (Defendant not present, currently at Walla
9 Walla, represented by counsel)
10 (Parties present in open court)
11

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

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

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

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

1 would ask that there be no dissemination further.

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

5 THE COURT: Is that acceptable then?

6 MR. GOMBINER: Yes, Your Honor.

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

11 MS. MC CLOUD: Good morning, Your
12 Honor.

13 THE COURT: Okay, good morning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: All right. Response?

17 MR. GOMBINER: Yes, Your Honor.

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

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

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

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

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

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

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

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

9 THE COURT: Okay.

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

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

25 THE COURT: All right. Well, I will

1 sign that order.

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

16 MS. KELLY: And trial counsel is gone
17 and the case agent for the Sheriff's Department
18 recently had a medical emergency and is not going to
19 be available, is my understanding, for anything
20 other than brief questions for approximately 4 to
21 6 weeks. That was something that occurred this past
22 weekend and unfortunately he'd been on vacation
23 before that, so I have not had a great deal of
24 access to him.

25 THE COURT: All right. At least he's

1 still available at some point hopefully.

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

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

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

17 THE COURT: Well that's --

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

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

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

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

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

12 MR. GOMBINER: Yes, Your Honor.

13 THE COURT: I will hear from you first.

14 MR.. GOMBINER: Thank you, Your Honor.

15 We did make this our motion under RCW
16 10.73.170. We also reference some State and federal
17 constitutional provisions, but I think obviously the
18 place to start is with the statutes. And seems to
19 me that our motion does meet the requirements of the
20 statute.

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

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

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

17 MS. KELLY: Short.

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

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

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

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

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

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

25 Actually I think what we are asking for

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

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

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

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

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

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

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

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

25 If someone else's DNA was on those

1 bullets casings, that would be extremely
2 significant.

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

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

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

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

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

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

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

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

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

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

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

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

1 property at the time and were there.

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

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

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

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

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

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

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

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

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

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

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

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

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

23 Thank you.

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

1 MR. GOMBINER: Right.

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

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

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

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

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

1 tested.

2 MR. GOMBINER: Right.

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

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

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

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

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

5 THE COURT: All right.

6 Ms. Kelly, your response?

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

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

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

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

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

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

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

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

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

25 With respect to the Mini-STR testing,

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

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

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

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

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

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

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

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

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

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

19 THE COURT: Okay.

20 Mr. Gombiner?

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

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

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

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

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

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

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

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

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

25 It does, however, also indicate that it

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 THE COURT: Ms. Kelly?

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

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

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

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

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

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

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

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

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

25 THE COURT: We might have a review on

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

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

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

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

12 MR. GOMBINER: That would be fine.

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

15 THE COURT: Special set it again at
16 11:00 a.m.

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

19 THE COURT: You're welcome.

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

25 MS. KELLY: I don't think there should

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

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

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

12 MS. KELLY: Thank you, Your Honor.

13 MR. GOMBINER: Thank you, Your Honor.

14 THE COURT: Anything else today?

15 MR. GOMBINER: Thank you.

16 MS. MCCLOUD: Not from the petitioner.

17 MR. GOMBINER: Not from us, Your Honor.

18 Thank you very much, Your Honor.

19 THE COURT: Nice to meet you.

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22 (Court at recess on this matter)

23 (Off the record)

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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

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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 LIST OF PRIORITY
vs.)	ITEMS FOR DNA TESTING
)	
STATE OF WASHINGTON,)	
)	Noted for: November 21, 2008 at
Respondent.)	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

PETITIONER'S LIST OF PRIORITY
ITEMS FOR DNA TESTING

FEDERAL PUBLIC DEFENDER
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
(206) 552 1100

- 1 5. bullets from the left front pocket of Frank Hoerner
2 6. high standard .357 revolver
3 7. 3 bullets and 3 casings removed from the revolver
4 8. bullet slug found on carpet near body of Frank Hoerner
5 9. shoes of Darold Stenson
6 10. sweatshirt of Darold Stenson

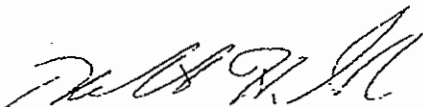
7 Selected items in possession of Clallam County Sheriff's Department, in order of
8 priority for DNA testing:

- 9 1. left and right hand paper bag of Frank Hoerner
10 2. blood scraping from the trash can lid
11 3. latent lifts L40, L41, L42
12 4. latent lifts L43 through L65
13 5. left front jacket fibers

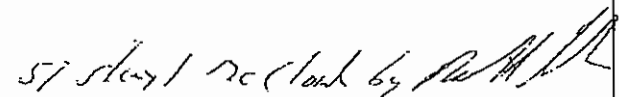
14 Petitioner respectfully requests an order for DNA testing of the above-listed
15 items.

16 DATED this 18th day of November, 2008.

17 Respectfully submitted,

18 

19 Robert H. Gombiner
20 Attorney for Darold Stenson

21 

22 Sheryl Gordon McCloud
23 Attorney for Darold Stenson

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26

PETITIONER'S LIST OF PRIORITY
ITEMS FOR DNA TESTING

FEDERAL PUBLIC DEFENDER
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101

EXHIBIT 5



FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

RECEIVED
APR - 8 1994
CLALLAM COUNTY
PROSECUTING ATTORNEY

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)

2243

Sheriff of Clallam County

April 1, 1994

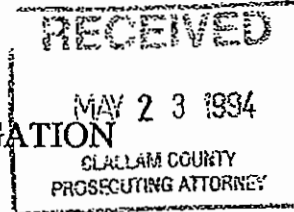
Photographs of the latent print are available for any future comparisons you may request.

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

EXHIBIT 6



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

Sheriff of Clallam County

May 16, 1994

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.

EXHIBIT 7

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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)
COUNTY OF KING) ss

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

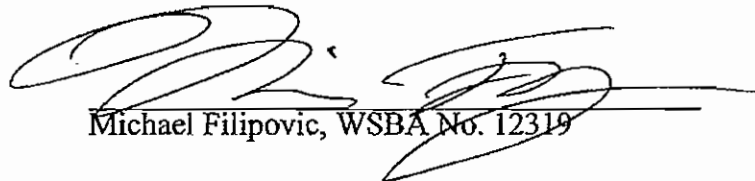
1 for the expert services and then either approve or deny the request

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

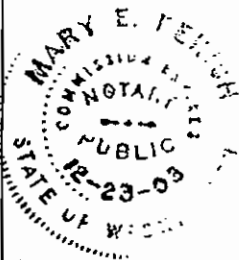
6 5. Mr. Hillier is presently out of town but has instructed me by telephone that
7 he concurs in this decision.

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

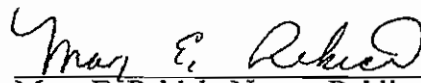
10 DATED this 20th day of November 2008.

11 
12
13 Michael Filipovic, WSBA No. 12319

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



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

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

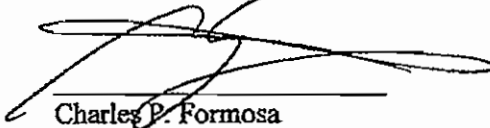
Mitochondrial STR test - \$2850

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