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

RESPONSE TO MOTION TO CONDUCT DNA TESTING

The State respectfully opposes the Petitioner's motion for DNA testing for the following reasons:

1. The request should be time-barred under RCW 10.73.090 and 10.73.100 as the Petitioner's motion and supporting documentation state that mini-STR testing has been commercially available for approximately one year. Additionally "touch or low copy DNA" analysis has been widely available for approximately the past four to five years and the State crime laboratory performs such analysis. Instead of bringing this motion in a timely manner, the Petitioner has waited for his appeals to be exhausted. Due diligence in bringing the motion has not been demonstrated.

2. Under RCW 10.73.170, the court has no jurisdiction or ability to authorize testing by an outside laboratory. Subsection (5) states in pertinent part: "DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory." RCW 2.28.150 does not authorize the court to allow for independent testing as Petitioner because "the course of proceeding [IS] specifically pointed out by statute." See discussion of jurisdiction

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under RCW 2.28.150 in In re Cross, 99 Wn.2d 373; 662 P.2d 828 (1983). As in the Cross case, Petitioner has not met either of the two conditions precedent to permit the devising of alternate procedures.

Additionally, in construing a statute, t objective is to ascertain and give effect to the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Where a statute uses plain language and defines essential terms, the statute is unambiguous. City of Olympia v. Thurston County Bd. of Comm'rs, 131 Wn. App. 85, 93, 125 P.3d 997 (2005). If the statute is clear and unambiguous, the court may not look beyond the statute's plain language or consider legislative history but should glean the legislative intent through the plain meaning of the statute's language. Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). When a statute's plain meaning is clear from its unambiguous language, the statute must be applied as written. Enterprise Leasing v. City of Tacoma, Fin. Dep't, 139 Wn.2d 546, 552, 988 P.2d 961 (1999). State v. Riofta, 134 Wn. App. 669, 680-681 (Wash. Ct. App. 2006)

Finally, there are numerous valid reasons for the legislature's policy choice not to authorize independent testing ; disagreement with those policy choices is simply not a basis to reject them.

3. The Petitioner has not met the requirements of RCW 10.73.170 (2)(b) nor the requirements of subsection (3) in that he has not shown the likelihood that the DNA evidence **would** demonstrate **innocence** on a more probable than not basis. Petitioner's argument that this standard should be interpreted to mean that "defendant need only show that if the DNA testing is performed, and if it reveals evidence of another person, and if this evidence is inconsistent with the State's theory of guilt, then the testing should be performed" cites absolutely no authority. This is not surprising since such an interpretation would render the statutory requirement completely meaningless. At a minimum, the Petitioner must show that

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the testing will more probably than not produce evidence not simply of another perpetrator but also of his own innocence. This, he has not done.

The court will recall that the State's DNA evidence was excluded at trial (showing that Frank Hoerner's blood was on Stenson's pants, limiting the State to evidence of blood serology to establish the smaller likelihood of that fact). The court will also recall that the evidence was this blood evidence was "dripped" rather than "transfer" staining and that Petitioner's statements admitted at trial were that he had never touched Hoerner's body. Thus, the DNA evidence done at the time, which the jury never heard, clearly pointed to Petitioner's guilt.

Moreover, even if the evidence pointed to the possibility of an additional perpetrator, this would not meet the standard of showing **innocence** on a more probable than not basis. Under RCW 9A.08.020(6), even if there were an additional perpetrator, i.e., an accomplice, the fact such a person has not been identified or convicted does not equate to Petitioner's innocence. Here, the jury deliberated and not only found guilt but also that Petitioner premeditated these horrific murders.

Additionally, it is simply not correct to assert as Petitioner does that "any DNA testing which shows the presence of an unexplained other person would point toward toward such a person as the real perpetrator." Much of the property which Petitioner seeks to have tested were in locations and of a sort that would logically have been touched or handled by other persons without any connection to the crime, e.g., friends or visitors to the Petitioner's residence, manufacturers, service persons. For example, Petitioner's motions seek testing of boxes of .22 caliber and 9 mm ammunition. These are totally irrelevant to the issue of innocence since both victims were shot with .38 caliber bullets but the tests could conceivably yield low touch DNA from representatives of the manufacturers, shop owners or employees, customers, and/or any friends of Stenson who may have gone target-shooting with him.

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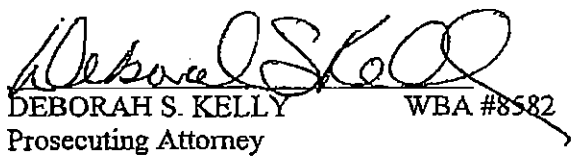
For the foregoing reasons, Petitioner's motion for independent DNA testing should be denied.

RESPECTFULLY SUBMITTED this 17th day of October, 2008.



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Attachment A

SENT ON OCTOBER 17, 2008 VIA FAX FOR FILING IN CLALLAM COUNTY SUPERIOR COURT

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. I have been with the Washington State Patrol Crime Laboratory for nineteen years.

The DNA typing technology currently validated in this laboratory system is called STR, for short tandem repeat. Other types of DNA typing technologies are also used in the forensic community, commonly as a special circumstances service when the STR technique is unlikely to yield results. Among these types of technologies are the mini-STR technology and the mitochondrial DNA technology. Mini-STR technology is particularly useful for degraded DNA, and may have some utility for low quantity DNA. Mitochondrial DNA is particularly useful for low quantity DNA. The limitation of mitochondrial DNA typing as compared to mini-STR typing is that it is has less utility for discrimination and is not useful for searching against the convicted offender DNA databases. Mitochondrial DNA is inherited matrilineally, so an individual would have the same mitochondrial DNA types as his brothers and sisters who share the same mother, and the same types as his mother and her brothers and sisters who share the same grandmother, etc. assuming no mutations. Practically speaking, a match between an individual and a full mini-STR profile would (assuming the individual doesn't have an identical twin sibling) would show identity. Typically, a mitochondrial DNA profile can reduce the number of unrelated potential contributors to one person in a few thousand. At some time in the future, this laboratory system may validate a mini-STR technique.

Spent cartridges from firearms generally yield such low quantities of DNA that the STR technique is not useful in most cases. Mitochondrial DNA would give the highest chance of a typing profile, but would not be searchable in the convicted felon databases. A mini-STR technique would give perhaps a slightly greater chance of a result than the STR technique used in this laboratory system. Please keep in mind that if a spent cartridge casing has been

significantly handled after the cartridge being fired, such as being collected by an ungloved individual or having been examined by a firearms examiner, unless special precautions were taken you would expect not to find the DNA of the individual who loaded the weapon.

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 17TH day of October, 2008, at Tulalip, Washington.

Michael Croteau

Attachment B

SENT ON OCTOBER 17, 2008 VIA FAX FOR FILING IN CLALLAM COUNTY SUPERIOR COURT

CERTIFICATION

I, Darrell Spidell, am a former deputy sheriff with the Clallam County Sheriff's Department. I was employed from March 19, 1979 through December 31, 2003. Since December 2003 I have owned and operated Hi-Caliber Guns at 2720 E. Hwy 101, Port Angeles, WA 98362. Additionally I retired from the U.S Coast Guard & US NAVY with 26 years military service.

During the course of these three careers I have owned and operated firearms of various calibers & manufacturers.

As a business owner, dealing in firearms and ammunition sales, I have ordered, handled and sold over $50,000.00 worth of assorted brands, calibers, and sizes of ammunition. When ammunition is delivered to my store, it is sealed in cardboard shipping boxes. After opening, individual boxes are removed, priced and placed on shelves for retail sale. I often open the unsealed ammunition boxes and inspect them for damage or discoloring. Additionally, customers frequently open the unsealed boxes, looking for a particular style of bullet. Bullets are handled on an almost daily basis.

During my law enforcement and military careers, I purchased ammunition from retail stores. To the best of my knowledge, ammunition is contained in unsealed boxes, with few exception

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 17th day of October, 2008, at Port Angeles, Clallam Washington.

Darrell Spidell

Darrell Spidell

630677-1643

Greetings, again,

I spoke with my partner who gets involved with these things. He gave me the name of Rick Reibman at 312/627-2278 as a person to contact. We, in the business, make a distinction between commodities vs securities. Rick is a commodity legal expert. If you need a securities guy, he might be able to give you a lead. Let me know.

Richard Reibman's practice in Dykema's Chicago office is concentrated within the areas of commodity futures regulation, broker-dealer regulation, investment management, and creditors' rights and bankruptcy law. His practice as a commodity futures lawyer includes representation of futures commission merchants, proprietary trading groups, introducing brokers, trade execution firms, commodity trading advisors, commodity pool operators and exchange members. On the security side, Mr. Reibman advises broker-dealers, investment advisors, hedge fund managers and individual registrants. He has successfully represented clients on numerous occasions before the National Futures Association, the National Association of Securities Dealers, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and various futures and securities exchanges. Mr. Reibman represents registered and unregistered fund managers in the formation and operation of private investment funds concentrating in the trading of securities, futures, options and related cash products. Mr. Reibman's creditors' rights and insolvency practice includes the representation of banks and other secured creditors, trade creditors, debtors, bankruptcy trustees, assignees, and landlords in a wide variety of issues, both in and out of bankruptcy court, including loan workouts and restructurings, Chapter 11 reorganization, Chapter 7 liquidations, and assignments for the benefit of creditors. On numerous occasions, he has handled the prosecution or defense of avoidance actions, such as those involving fraudulent transfers and preferential transfers. Since 1995, Mr. Reibman has been an active member of the adjunct faculty of IIT/Chicago-Kent College of Law, where he regularly teaches courses in financial services regulation and in creditors' rights and bankruptcy law. He was formerly the law clerk for the Honorable Marvin E. Aspen and served as assistant editor of the *Police Law Quarterly*.

I recommend Scott Early of Foley and Lardner. He is a long time friend and was the Chicago Board of Trade's lawyer. As a member of various committees at the CBOT including the rules committee, I had the opportunity to watch Scott in action. He is probably both a very good litigator and I know him to be wise (as wise relates to legal issues, choices, and weighing options). Last, few attorneys have been on the front lines of government agencies like Scott has. I am including his link below:

http://www.foley.com/people/bio.aspx?employeeid=16614 312.832.4352
Scott E. Early, a partner with Foley & Lardner LLP, is the former vice chair of the firm's Securities Litigation, Enforcement & Regulation Practice and a member of the firm's Transactional & Securities Practice. Mr. Early focuses on futures and derivatives regulatory counseling, as well as financial litigation. He counsels on matters involving federal regulation of financial services, and tries lawsuits involving a broad spectrum of business and financial concerns in all forums from state and federal court to arbitration and regulatory enforcement actions. Currently, Mr. Early is general counsel to the Kansas City Board of Trade and provides counsel to numerous other exchanges and clearing