

APPENDIX C

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNT OF CLALLAM

STATE OF WASHINGTON,)

Plaintiff,)

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

DAROLD RAY STENSON,)

Defendant.)

_____)

BE IT REMEMBERED that on November 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

| | |
|------------------------|-------------------------|
| 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

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4 Prosecuting Attorney

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8 MR. ROBERT GOMBINER

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1 HONORABLE KEN WILLIAMS
2 November 24, 2008
3 State vs. Darold Stenson
4 Cause No. #93-1-00039-1
5 Motion to Reconsider

6

7

(On the record)

8

(Defendant NOT appearing, represented by

9

counsel)

10

(Parties present in open court)

11

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MS. KELLY: It is my understanding that

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Mr. Gombiner had ex parte contact with Your Honor

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over the weekend. He left me numerous messages,

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attempted to contact me and Your Honor, but I was

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out of town yesterday and did not receive those

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messages until 11:00 p.m. last night.

18

THE COURT: Let me put on Mr. Gombiner

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did reach me at home yesterday afternoon, told me

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there were new developments and wondered if he could

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be on the calendar and I told him to be here at 9:00

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o'clock and that was the extent of our

23

conversations.

24

MS. KELLY: I understood that to be the

25

case, although I also understand Mr. Gombiner has

1 e-mailed a waiver, filed -- that I filed to the
2 Defense, Your Honor, and I don't know whether or not
3 you have had a chance to review that or the
4 defense's pleadings, which I saw is some time this
5 morning around 7 o'clock.

6 THE COURT: I have reviewed the
7 pleadings and I have not listened to the entire file
8 yet. So --

9 MS. KELLY: So, my question to, Your
10 Honor, with respect to scheduling, the State would
11 like some time to respond. Obviously there are a
12 number of matters which are raised. Law enforcement
13 has done certainly some investigation. At this
14 point there is another recording that should be
15 available this morning of Mr. Lininger who was the
16 individual identified by the Defense as the suspect,
17 this new suspect, or one of the new suspects. So
18 there is quite a bit of information that I believe
19 that the State would like to present to the Court.
20 And frankly I have not had a chance to assemble it.
21 Some will involve affidavits about Mr. Shin and some
22 about affidavits about other piece and some will be
23 this new information.

24 THE COURT: Mr. Gombiner?

25 MR. GOMBINER: Thank you, Your Honor.

1 First, Your Honor, I do appreciate the Court
2 accommodating us at such short notice. But as the
3 Court is aware, this is a extraordinary situation.

4 I completely agree with Ms. Kelly that
5 there is a lot of information that needs to be
6 developed. On the other hand, as the Court is well
7 aware, Mr. Stenson is going to be executed on
8 December 3rd, unless the Court takes the appropriate
9 action here. And, I feel it is absolutely critical
10 that in light of the -- first information provided
11 by Mr. Shin, and second, the subsequent
12 investigation - and the Defense I should say has
13 done some investigation as well and I have a person
14 here, Mr. Kerkering from my office, he's a lawyer in
15 my office who is prepared to testify about his
16 contacts with various people named by Mr. Shin - I
17 think it is essential that we be able to present
18 this information today because there is just no time
19 left.

20 I mean, this is Thanksgiving week, the
21 Court is only going to be in session for 3 days. If
22 -- I believe that the both legally and ethically
23 proper thing to do under these circumstances is for
24 the State to agree to a stay of execution of this
25 matter.

1 If the State -- I think there are ample
2 grounds to justify that. If the State doesn't agree
3 to that, I think we must have a hearing today so
4 that I can present the information that justifies
5 first doing the DNA testing that was the subject of
6 our discussion last Friday, and second to tell the
7 Court why a stay of execution is essential in this
8 matter.

9 And, you know, I think the Court has --
10 all our contacts, the Court has obviously taken this
11 seriously so I don't want to just indulge in a lot
12 of overheated rhetoric about things, but is this a
13 life and death matter. There's been a new
14 development in this case that completely alters the
15 factual situation, it completely alters the basis
16 for the DNA motion, and it absolutely requires that
17 further investigation. And the only way that's
18 going to happen is for the Court to grant a stay of
19 execution.

20 So while I'm sympathetic to Ms. Kelly
21 and I'm sure there's other information, this is
22 very fluid information. I got all this information
23 from Mr. Kerkering after I filed my motion because
24 we were out there investigating all yesterday and,
25 you know, the information came in late last night.

1 But having said all that, December 3rd
2 is still December 3rd. Time does not stop no matter
3 what else is going on. What needs to happen is we
4 need to put a break on this thing because we now
5 have in the Defense view, and as I say we've got a
6 witness who is ready to testify to this, we have
7 credible information that the murders were not
8 committed by Mr. Stenson. And I just can not fathom
9 how it would be possible to allow the execution to
10 proceed with the possibility that an actually
11 innocent man would be put to death, particularly
12 when it is undisputed that there's physical evidence
13 available that could be tested which can shed
14 significant, in fact crucial, light on the --
15 exactly what's at stake here and exactly on the
16 information provided by Mr. Shin.

17 So, I guess what I'm saying is there's
18 a lot that's going on here, but the bottom line is
19 the execution can not go forward under the current
20 state of affairs. There has to be more
21 investigation, there has to be DNA testing, and I
22 don't know how to put it more strongly but I feel
23 that it's not just Mr. Stenson, it really is the
24 whole justice system that is at stake when you have
25 a situation like this.

1 And as the Court knows from the
2 circumstances, the extraordinary timing of this has
3 nothing to do with the Defense. Mr. Shin isn't our
4 witness. He's somebody who walked in to his
5 probation officer's office Friday afternoon and then
6 gave subsequently a statement to Ms. Kelly and a
7 member of the Sheriff's Department. I commend Ms.
8 Kelly very much for promptly letting the Defense
9 know about that interview and providing us with a
10 copy of it and through no fault of Ms. Kelly's but
11 certainly through no fault the Defense, we didn't
12 learn about that until Saturday morning which is
13 when I got -- was woken up by a phone call from Ms.
14 McCloud saying well -- it was basically, you are not
15 going to believe this.

16 But, in any event, that's what needs to
17 happen here. We just -- the whole sequence of
18 events here is making it impossible to sort this
19 matter out properly in the time that's available,
20 and there's nothing sacred about December 3rd.
21 There's something sacred about the idea that justice
22 doesn't allow a person to be executed when new and
23 serious doubts have been raised about whether the
24 person committed the crime for which he's going to
25 be executed.

1 THE COURT: How long do you anticipate
2 the presentation of testimony would take on your
3 behalf?

4 MR. GOMBINER: Probably an hour.

5 THE COURT: Would that include cross
6 examination or the direct?

7 MR. GOMBINER: I think might take hour
8 and a half with cross examination, I don't really --
9 I'm not -- I don't know Kelly's cross examination
10 style, so I guess I can't really say that.

11 THE COURT: Ms. Kelly?

12 MR. GOMBINER: Though, Your Honor, as
13 my co-counsel is pointing out, it probably first
14 makes the testimony a lot more comprehensible, and
15 second would probably shorten it if the Court has
16 the opportunity to listen to Mr. Shinn's tape
17 recorded statement.

18 THE COURT: Ms. Kelly, your thoughts
19 on, one, how long you need to prepare and how long
20 you would need for whatever presentation you need to
21 make at this point?

22 MS. KELLY: Well, Your Honor, of course
23 the rules say that I should have 5 days notice.
24 Obviously this is a matter which the Court is going
25 to want to expedite.

1 There's information already that has
2 been gathered that casts serious doubt upon
3 Mr. Shinn's credibility. So I don't agree that we
4 have credible information at this point pointing to
5 another suspect. Nor do I believe that Mr. Shinn's
6 information given the further information that has
7 already been developed raises serious doubts about
8 Mr. Stenson's guilt.

9 Having said that, obviously the Defense
10 is entitled to present what they're entitled to
11 present. But the State should be permitted
12 sufficient time to prepare -- I know that's not
13 answering your question. I will -- I can't answer
14 it, in part because it is fluid and law enforcement
15 is ongoing, but there's information I need simply to
16 assemble that would take several hours at the very
17 minimum. There will be additional information as
18 well that comes in as law enforcement runs -- tracks
19 down -- Mr. Shinn mentioned a number of individuals
20 as potential witnesses and law enforcement has
21 already started the process of trying to track those
22 down.

23 So, I can't answer when they'll be
24 finished with tracking all of them down, but I
25 believe the information that they have already

1 assembled -- or excuse me, are aware exists and can
2 be assembled is such that it would be helpful to the
3 Court in ruling on this request.

4 And, you know, like counsel I'm not
5 going to try to address some of the merits right
6 now. There are a number of legal arguments that the
7 State would be making, but I think the hearing
8 itself probably will end up being a lengthy one.

9 THE COURT: Well, that creates some
10 problems, obviously.

11 What if we were to set tomorrow
12 9:00 a.m. and have the hearing all day, or is that
13 not available?

14 MR. GOMBINER: Your Honor, this is what
15 the problem is, there are only 3 working days this
16 week, the courts are closed both Thursday and
17 Friday. Mr. Stenson is going to be executed at
18 12:01 Wednesday morning of next week.

19 Now, I am entirely in agreement with
20 Ms. Kelly, as I just said, that there is a huge
21 amount of information that may bear on what Mr.
22 Shinn said. There's all sorts of things that need
23 to be determined. The problem is that if we try to
24 do that it's going to be going on and Mr. Stenson is
25 going to be executed.

1 I wanted to make just one thing clear
2 to the Court because Ms. Kelly keeps talking about
3 Mr. Shinn's credibility, Mr. Shinn's credibility is
4 not what is at issue here. Mr. Lininger is the
5 person that Mr. Shinn says admitted to him that he
6 and a group of other people, namely there's a number
7 of other people all of whom are specifically named,
8 were involved in the murders of -- that
9 Mr. Stenson's been convicted of.

10 We have talked to Mr. Lininger, the
11 police have talked to Mr. Lininger. Mr. Lininger
12 does not deny that he said those things to Mr.
13 Shinn.

14 MS. KELLY: Excuse me Your Honor --

15 MR. GOMBINER: Even though --

16 MS. KELLY: I think it's important
17 we're getting in to the merits of this and there's a
18 recording by Mr. Lininger that I will be supplying
19 to the Court and counsel this morning, and rather
20 than arguing about what Mr. Lininger said I think it
21 is appropriate since the Court already has the wave
22 file of Mr. Shinn to supply that to the Court in
23 advance of the hearing and the Court can listen to
24 that and then get in to the merits of it.

25 The question right now is scheduling

1 and the State thus far -- and I'm not alleging that
2 Mr. Gombiner has tried to do it, but effectively I
3 have been sandbagged. He tried to get hold of me
4 yesterday but he was unsuccessful, that was not his
5 fault, but the People are also entitled to fair
6 hearings and that's all I'm asking for.

7 THE COURT: I will listen to what I can
8 listen to today. I'm going to set this hearing at
9 2 o'clock today in the hopes we can get to it.

10 At the hearing today I will allow some
11 presentation -- previously I think the issue before
12 the Court today is frankly 2 fold, one, whether or
13 not there's a reasonable basis to reconsider the
14 Court's ruling on opening DNA testing, which I think
15 is the issue properly before the Court. And the
16 second would be whether or not the Court should in
17 light of new information issue a stay.

18 In regard to that, I'm going to ask
19 counsel to get me an answer to a question that I
20 would like answered and I'm unable to determine from
21 my own notes. Simply this, was there PCR or DNA
22 testing of the droplets on Mr. Stenson's pants as
23 opposed to other areas of the pants? And I don't
24 know if that answer can be easily given or not. I
25 don't have the transcript, I just have my notes. I

1 don't have the exhibit. I would like to know was
2 there in fact testimony related not merely to the
3 blood on his pants but specifically to the droplets
4 which were the basis of the blood spatter experts
5 conclusions.

6 And if you can get that by this
7 afternoon fine. I think that's something I would
8 like to know as well in addition to the other
9 matters. I would ask the counsel to at least
10 provide as best you can some sort of abbreviation of
11 the testimony this afternoon and we'll have a
12 hearing at 2:00. At least summarize what you
13 anticipate the issues are going to be and again the
14 question is whether they go to the issues of
15 re-opening the discovery phase of this is what it
16 amounts to.

17 Any questions?

18 MS. KELLY: No, Your Honor.

19 MR. GOMBINER: No, Your Honor. Thank
20 you.

21 THE COURT: We'll resume at 2:00 on
22 this matter.

23

24 (Off the record)

25 (Court at recess until 2:00 p.m.)

1 (On the record)

2

3 (Defense Exhibits 1 through 9 marked
4 for identification)

5

6 THE COURT: Counsel I apologize that
7 the Court has had unfortunately lots of other
8 matters to attend to today.

9 I have had a chance to listen to Mr.
10 Shinn's taped statement. I listened to that
11 completely. I have not listened to the one that I
12 have just been handed by Ms. Kelly that says
13 Lininger. My thought would be I would take what
14 testimony and argument I could hear at present and
15 go listen to that and get back. Parties can
16 certainly refer to what is on it for me if they wish
17 to do so

18 MR. GOMBINER: Your Honor, I should
19 indicate 2 things. We were just handed a tape a
20 couple of minutes ago that indicated some recording
21 of an interview with Tanya Chapman. Second, we did
22 get the Lininger tape but we didn't get a chance to
23 finish listening to it because the Court said we
24 were going to be starting at 2:00 so we were sitting
25 in the courtroom -- we came in at around 2:00

1 o'clock, so we listened to some but not all of the
2 Lininger tape.

3 THE COURT: How would you like to
4 proceed?

5 MR. GOMBINER: Your Honor, what I'd
6 like to do is first outline what I think should be
7 the issues here, and what frankly shouldn't be the
8 issues here. And first I wanted to respond to the
9 Court's question of -- that you posed in the morning
10 session about the DNA testing on the pants.

11 I've furnished to the clerk what's been
12 marked as Exhibit 1, which is an FBI report and it's
13 the -- the best I'm able to determine, the FBI
14 report concerning the DNA testing and what it show
15 is that there's an item called Q18, and it says
16 pants of Darold Stenson, and then gives the results
17 of the testing of blood on those pants that then the
18 DNA testing came back consistent with Frank
19 Hoerner's blood. It does not say where on the pants
20 the item tested came from and the evidence shows and
21 the -- in the testimony at trial and the Supreme
22 Court opinion shows that the pants contained a lot
23 of blood in quite a few different places.

24 So, you simply can not tell where the
25 item tested came from -- where on the pants the item

1 came from.

2 Second, in the Supreme Court opinion of
3 this matter which is State vs. Stenson, 94 Pac. 2nd.
4 1249, this is -- I'm reading from I believe it's
5 page 1262, and this is what it says, "the Defense
6 concedes that the stains in the right leg of
7 Stenson's pants were Frank's blood. The smaller
8 stains were not large enough to do further blood
9 testing beyond the presumption (inaudible) testing."

10 One the State's expert, Michael Grubb
11 from the Washington State crime lab, testified that
12 the smaller stains appear to have been, quote, "air
13 borne droplets of blood which were traveling through
14 the air when they struck Stenson's pants leg."

15 So, as far as I can tell, you simply
16 can't tell where the blood that was tested for DNA
17 came from except that the FBI report shows that it
18 was on Mr. Stenson's pants. And as I say, if the
19 Court wants to refer to Exhibit 1, that's where I'm
20 deriving that information from.

21 THE COURT: All right.

22 In terms of proceeding then at this
23 point how would you like to proceed?

24 MR. GOMBINER: Well, this is what I
25 think the situation is. It is undisputed that late

1 Friday afternoon a person named Robert Shinn came in
2 to his probation office and stated that he needed to
3 talk to his probation officer about something
4 relating to Mr. Stenson's case. And then we had the
5 subsequent interview. It is clear that Mr. Shinn
6 came in without ever having talked the Defense, I
7 had never heard of Mr. Shinn any more than the man
8 in the moon before I got this audio recording from
9 Deb Kelly.

10 Mr. Shinn says that what he was doing
11 was he heard on the news or saw on the news that
12 Mr. Stenson was about to be executed and essentially
13 his conscious wouldn't let him not say something
14 because he remembered having a conversation with a
15 person named John Lininger about 8 years ago.

16 I'm not going go through the whole
17 statement that Mr. Shinn makes, but Mr. Shinn gave
18 an extensive account of a conversation that he said
19 he had with Mr. Lininger while both of them were
20 high on drugs and in which Mr. Lininger made a
21 number of statements about the Stenson murders, the
22 essence of which Mr. Stenson had essentially been
23 framed, that Mr. Stenson was not the murderer, but
24 that a group of people including specifically John
25 Lininger, Tom Lininger, Patrick Nelson, Simone

1 Nelson, Ennis Caynor, and Tanya Chapman had been
2 involved in one way or the other.

3 Now, Mr. Shinn was not specific about
4 who did what, but what he says is is that there was
5 some sort of a scheme or interest, primarily in Pat
6 Nelson's part is the way I recall the interview, to
7 obtain some of Mr. Stenson's possessions, in
8 particular his samurai swords, and that the murders
9 occurred as a result of an attempt to secure those
10 swords.

11 Now, in and of itself that's pretty
12 startling evidence. The reason it's startling is
13 because throughout these proceedings and most
14 specifically last Friday, the State has always been
15 contending that Mr. Stenson must have done the
16 murders because there's no evidence that anyone else
17 was on the property.

18 Well, now they have a person coming in
19 and giving an extremely different account.

20 And the State was also contending last
21 Friday that the reason DNA testing was useless was
22 because all it showed at most is some unidentified
23 person might have handled the evidence and you would
24 not be able to say in what circumstances and all
25 sorts of people could have touched it so it would be

1 meaningless. All right, now we've got a list of all
2 the individuals I just named.

3 In and of itself I would concede that
4 if someone just comes in and says hey, I know who
5 killed JFK, I mean, people do things like that all
6 the time and that in and of itself does not create
7 all that much of a doubt.

8 Now, of course it would be interesting
9 why would somebody come in -- Mr. Shinn has
10 absolute -- Mr. Shinn does not know Mr. Stenson.
11 Mr. Shinn has no apparent motive to come in and make
12 this up, but I would concede nonetheless if it was
13 just Mr. Shinn this wouldn't be that big a deal.
14 Might be interesting, but not that big a deal. But
15 that's not what the case is.

16 What happens is the police go out and
17 they interview Mr. Lininger. You know as I've said
18 I have listened to some but not all of the tape
19 recording, but it's clear from the police interview
20 that when -- Mr. Lininger does not admit to either
21 being involved in the murders, and in fact denies
22 to -- it seems to deny saying to Mr. Shinn
23 specifically that other people -- that he knew other
24 people were involved in the murders. He says a
25 tremendous amount of stuff that in fact completely

1 corroborates what Mr. Shinn is saying. He does not
2 say I've never heard of Robert Shinn. He says I
3 know Robert Shinn, I talked to Robert Shinn. And
4 then without any prompting from the police he names
5 the Nelsons, the people that Mr. Shinn says were
6 involved. He names Tanya Chapman. And it's more
7 than just naming them. Mr. Lininger admits that he
8 and Tanya Chapman went to Mr. Stenson's house to
9 have Thanksgiving dinner along with a person named
10 Lonnie Boyd for whom Mr. Lininger was working, and
11 he said after a little questioning it turns out that
12 it's the Thanksgiving right before the murders.

13 Mr. Lininger admits to knowing about
14 this weapons collection that Mr. Shinn says was the
15 motive for the murders. Not only knowing about it
16 but actually seeing it. He makes one statement
17 after another that raises a tremendous number of
18 questions about what he knows.

19 The fact that Mr. Lininger denies
20 committing the murders, that's a matter -- I mean,
21 obviously that does not prove anything. Very few
22 people or most people any way I can say, if somebody
23 says well, you did a murder they're unlikely to say
24 yeah, I did it. I mean, some people do but most
25 people don't.

1 Mr. Lininger himself in terms of
2 credibility, he does have credibility problems.
3 He's got convictions for false reporting, false
4 reporting to a public servant, forgery, crimes of
5 dishonesty, so. Apparently Mr. Shinn may have those
6 too. I have not had Mr. Shinn's criminal record but
7 I know he's got a report.

8 But the point is it's not possible that
9 Mr. Shinn -- how could Mr. Shinn be making up this
10 conversation when the person who's supposedly made
11 the admissions doesn't say none of this happened,
12 but in fact confirms a great deal of what Mr. Shinn
13 said.

14 And Mr. Lininger also says that he
15 specifically says that the Nelsons were living on
16 the property after the murders, that they had a
17 close relationship with Dave Oberman, that people
18 were doing drugs on the property. Mr. Lininger
19 expresses extreme suspicion about what the Nelsons
20 may or may not have done in connection with the
21 murders. He also informs the police that Mr. Nelson
22 is an extremely violent individual and he relates an
23 assault that Mr. Nelson perpetrated on Mr. Lininger.

24 Now, you know, I'm just giving a few of
25 the highlights here. This happened on Friday

1 afternoon, we didn't -- the Defense didn't learn
2 about it until even a little later than that when we
3 got the tape of the tape recording e-mailed to us by
4 Ms. Kelly. We have been working as hard as we can
5 to try to get more information, but obviously at
6 this point we are in no position to ascertain the
7 truth of the information or what really happened
8 here. All we know is that there's something
9 significant going on.

10 Now, how does that relate to what the
11 specific motion before the Court is, which is a
12 motion for reconsideration of the DNA evidence?
13 Well, it relates in a very, very important way. I
14 just read Ms. Kelly's response, she just handed it
15 to me, and I have to say I read it with a certain
16 amount of amazement, her contention that nothing has
17 changed since Friday. In fact everything has
18 changed since Friday, because we now have an
19 individual with no apparent motive to fabricate come
20 forward and saying 8 years ago somebody else told me
21 that Mr. Stenson didn't do it and other people did
22 do it. And we now have the person who was alleged
23 to have made those statements. He does not deny
24 that such statements were made. He denies that he
25 was personally involved in the murders, but he

1 confirmed Mr. Shinn's account. He does not deny Mr.
2 Shinn's account. He furnishes a line of particulars
3 that Mr. Shinn didn't furnish.

4 We have a person who could be executed
5 who may be actually innocent.

6 It is undisputed that we have evidence
7 that could be tested and that could reveal the
8 presence of the DNA of not now the un-named
9 individuals which everyone seemed to perceive as the
10 Achille's heel of the DNA testing motion. The fact
11 that there was not any evidence of a particular
12 perpetrator and the testing of the DNA, even if it
13 revealed someone else's DNA, it would not really
14 prove anything. We have now got names, and not just
15 names of any kind of individuals, every single one
16 of the individuals - and I marked as exhibit their
17 criminal records - every single one of the
18 individuals that Mr. Shinn names has extensive
19 criminal records. And Mr. Nelson in particular has
20 a federal conviction for possession of -- being a
21 felon in possession of a firearm, which he just got
22 a 70 month sentence. In fact, I believe he's in a
23 halfway house finishing out that sentence, he has a
24 burglary conviction, an assault 3 conviction.

25 The other individuals also have records

1 which are also lengthy and serious.

2 Given that, given the information we
3 have now, given the fact it is completely impossible
4 at this point to sort out the all the myriad of
5 facts that have surfaced (sic) much less do the kind
6 of investigation that would be done, but given the
7 fact that one, we have evidence that could be tested
8 and 2, the fact that unless the Court stays the
9 execution Mr. Stenson could be executed and then we
10 can find out after the fact that he's innocent,
11 that's not the way -- that is really not a tolerable
12 result. The Court's already found there's a new
13 method of testing available that's more accurate.
14 We've submitted un-rebutted information about that,
15 we can do the testing. All you have to do is listen
16 to those tapes and the Court has not even had the
17 opportunity to listen to Mr. Lininger's tape, but it
18 certainly raises enough questions that you could not
19 possibly take the chance that there is something to
20 this, that there's a lot to it. There might be
21 enough to it that Mr. Stenson is just flat out
22 innocent and that someone else is guilty.

23 All we're asking for -- we're not
24 asking at this point for the Court to say Mr.
25 Stenson didn't do it. I mean, Ms. Kelly in her

1 response says oh well, there's all these things that
2 it couldn't be true, what does that prove. I mean,
3 Mr. Shinn is someone who admits to being on drugs,
4 who is having a conversation with another person on
5 drugs 8 years ago. The fact that he does not get
6 everything -- tell a perfectly coherent story, I
7 mean, you wouldn't expect anything else. But what
8 is so much more important is that there is a
9 tremendous amount of corroboration that something
10 was going on and all we've got to do -- you know,
11 stories from people who are - to use a possibly too
12 colloquial phrase - meth heads, but I think that is
13 probably what most of these people either are or
14 were, of course there are going to be difficulties
15 with their testimony. But we don't have to just
16 rely on that. We have an evidence that could be
17 tested, and if that evidence comes back -- if the
18 bullets in the revolver, the revolver itself, or the
19 coffee cup contain DNA evidence from Pat Nelson or
20 John Lininger, I mean, that is going to be
21 overwhelming evidence that some version of the story
22 Mr. Shinn heard from Mr. Lininger is true. And it's
23 going to be overwhelming evidence that Mr. Stenson
24 is innocent.

25

How can we not take that chance? The

1 only thing that will happen the other way, the only
2 down side, if it is a down side and I don't think it
3 is a down side, is if it turns out that the story is
4 not true Mr. Stenson will be executed a little later
5 and we'll know that if Mr. Stenson's DNA instead of
6 Lininger's or Nelson's or Caynor's ends up being
7 found, well, so be it. But to do -- but to not even
8 do the testing under these circumstances that is
9 not -- that is an outcome that can only lead to did
10 Is as disaster because that evidence is going to get
11 tested at some point and this is going to get
12 investigated, and if it turns out Mr. Stenson is
13 innocent and has been executed as an innocent person
14 merely because the State of Washington can't wait a
15 few more days to get to the truth, you know, I don't
16 know what to say except the obvious which is that
17 will be the ultimate black mark on the justice
18 system in Washington. And it does not have to
19 happen. The Court has the authority to stay the
20 execution, the order that the Court is referring to,
21 that 1998 order, that was an order that occurred
22 after Mr. Stenson's direct appeal had been denied
23 and it granted a stay of execution and stay
24 proceedings in this Court pending his personal
25 restraint petition. The personal restraint petition

1 has been denied many years ago. The order was
2 listed at that point. The reason Mr. Stenson had a
3 stay of execution for the last 8 or 9 years now is
4 not because of anything to do with the Washington
5 Supreme Court, it has to do with the federal courts
6 that have granted stays of execution. And the
7 reason he does not have a stay of execution now is
8 because the mandate of the 9th Circuit Court of
9 Appeals issued on October, I believe 17th of this
10 year, which is why the execution date is
11 December 3rd, because that's 30 judicial days from
12 that.

13 So the Court has the power to grant the
14 stay of execution that's -- obviously must have the
15 power to grant the stay of execution because
16 otherwise why would there be a DNA statute? You
17 could not very say well, I'm going to order DNA
18 testing but never mind the person's going to be dead
19 before we can get the results. I mean, the power to
20 stay the execution flows inevitably from the Court's
21 power and you are the only Court that can hear the
22 DNA motion under this statute. So you've got the
23 authority to grant the stay of execution which you
24 have been hearing, we can't have a hearing now, a
25 hearing now would be meaningless, we won't even have

1 any witnesses. What we need is to stay the
2 execution and have the appropriate time to number 1
3 conduct the DNA testing and number 2 to investigate
4 these allegations. And if the Court has any doubt
5 about the -- anything I'm saying, I do have
6 Mr. Kerkering present who can if necessary testify
7 regarding what he learned in the investigation he
8 was able to conduct just yesterday. I'm not saying
9 it's a substitute for a hearing, it isn't in any
10 way, shape or form, but if the Court has any doubt
11 about the need for granting a stay of execution,
12 he's available to do that.

13 But, Your Honor, I don't want to go on
14 any longer, but in conclusion I would just urge the
15 Court that this is absolutely essential for justice
16 to be determined. We can do the testing, we've got
17 the evidence to do it and we've got the new means of
18 testing to do it.

19 This is a matter of statutory right and
20 it's also a matter of both federal -- the 6th, 8th,
21 14th Amendments all apply to this issue and State
22 constitutional law, but mostly it's just a matter of
23 simple justice. You can't kill somebody when
24 somebody else is saying I did the murders and you
25 can find out by simple testing whether or not that

1 happened or not. That's just not the way things
2 should work and I hope the Court -- forgives me for
3 maybe going on a little too long but this really is
4 a matter of absolutely tremendous and fundamental
5 important. So I guess I don't apologize for going
6 on too long, but I will at this point stop talking.

7 THE COURT: Ms. Kelly?

8 MS. KELLY: With -- just a moment, Your
9 Honor, I handed forward to the Court the recording
10 of Ms. Chapman's interview as well, and copies of
11 Exhibit C which is referred to in my memorandum
12 which I did not have until I came into the
13 courtroom, after I came in to the courtroom and was
14 waiting.

15 The problem with petitioner's motion is
16 that he still does not meet the test for DNA
17 testing. He must show substantial likelihood of
18 prevailing on the merits, and he must show innocence
19 on a more probable than not basis that the DNA
20 testing would produce evidence of innocence on a
21 more probable than not basis.

22 We still have all the problems with the
23 evidence handling, we still have -- the Court still
24 has no authority to issue a stay any more than it
25 did on Friday.

1 The Supreme Court has never lifted its
2 order to this Court.

3 If we were talking about credible
4 evidence the State would take a different position,
5 but all that exists at this stage is inadmissible
6 hearsay that despite petitioner's claim to the
7 contrary is not significantly corroborated, and this
8 is inadmissible hearsay originating from 2 addicts,
9 meths addicts, who acknowledge they were high on
10 methamphetamine at the time of the conversations.

11 Yes, it is undisputed that Mr. Shinn
12 came forward and made certain allegations. That
13 does not make those allegations true. It does not
14 even -- they aren't prima facia --

15 THE COURT: Frankly, as to Mr. Shinn he
16 even says I don't know if this is true or not.

17 That's correct.

18 Again, I think the Court knows that
19 time has been tight and I apologize for the delay in
20 getting my response and the various exhibits to the
21 Court. I got them to the Court as soon as my
22 response was -- and to counsel as soon as my
23 response was finished and as soon as they came in to
24 my hands I was able to copy them.

25 One of the things I did not put in my

1 memorandum, and frankly because I ran out of time
2 and was focused on other things and forgot, but
3 2 years ago I tried a murder case in this county,
4 State vs. Covarrubias. It is very interesting to me
5 that there was a defense witness who was named but
6 never called, Jacob Bachman, who alleged that Robert
7 Shinn had told him evidence that would prove that
8 Mr. Covarrubias was true. Now, in that case when
9 Mr. Shinn was contacted he said I don't know
10 anything about it. Certainly that's something that
11 causes the State some concern. I think the Court
12 needs to know that.

13 The Court does not have anything on it
14 as yet as I indicated, but it certainly calls Mr.
15 Shinn's credibility into question.

16 Now, Mr. Shinn, if you listen -- have
17 listened to the recording it does appear that he
18 seems to believe what he said even though he's
19 saying I don't know if I'm (sic) anything more than
20 a tweeker meth addict. I have raised a number of
21 issues why Mr. Shinn's story is not credible in my
22 memorandum. I think the Court probably just from
23 its recollection of the trial and knowing what those
24 allegations are now would recognize that there are
25 other things that probably counsel and I are not

1 even aware of that do not make sense with this story
2 of Mr. Shinn. And again, this would require there
3 having been blood evidence, Frank Hoerner's blood,
4 somehow planted on petitioner's pants while he's
5 wearing them. That's a fundamental problem with Mr.
6 Shinn's story. The idea that a bunch of meth
7 addicts plotted this elaborate scheme in order to
8 obtain -- to steal weapons, but then didn't take
9 anything that night and didn't have access to the
10 house until -- and the Court will see in Exhibit C
11 that yes, Simone Nelson, Pat Nelson, at least one
12 other individual are named in some police face
13 sheets and these are all that remain, the computer
14 records that remain from visits to the house in 93,
15 94, 95, but the time period when those names occur
16 is February and March of 95, almost 2 years after
17 the murders. Clearly this group of people couldn't
18 plant petitioner's is. Petitioner's motive existed,
19 petitioner's lies, they didn't make those up. The
20 petitioner did.

21 The Court will recall there was a real
22 estate lady who testified about how petitioner was
23 going to come up with funds that there was clearly
24 no way for him to come up with but for the insurance
25 proceeds on his wife. Are Mr. Lininger's --

1 credibility, certainly all these people are drug
2 addicts but it's my understanding and I have not yet
3 listened to the Lininger tape either, is
4 Mr. Lininger offered to take a polygraph.

5 Counsel says everything has changed
6 since Friday the legal tests have not changed, the
7 Court's -- and petitioner still does not meet them.
8 The Court's authority hasn't changed. What we have
9 is, and I understand and I frankly sympathize with
10 counsel, they're philosophical beliefs are what they
11 are and they clearly believe that it's tantamount to
12 murder for the State to execute somebody pursuant to
13 the death penalty. That's evident in their argument
14 that we can't possibly take the chance, that's not
15 what the legal test is. Says prosecutor says all
16 these things can't be true, what does that have to
17 do with the case? Well, what it has to do is
18 whether the petitioner is entitled to the DNA
19 testing, whether he can show a substantial
20 likelihood of success on the merits or on a more
21 probable than not basis that the test will
22 demonstrate innocence. Not that this will produce
23 some evidence of something, just that -- not simply
24 that they will produce DNA but that that will show
25 petitioner is innocent.

1 Counsel says it's not a down side to
2 the State if the execution is delayed a few days.
3 Well, the Court knows realistically that's not what
4 we're talking about, that's not what petitioner is
5 asking for. Petitioner is asking for a stay in the
6 hopes of postponing the execution for a much longer
7 period of time, and there's no doubt that petitioner
8 will go up no matter -- well, if the Court denies it
9 the petitioner will take this argument on up. But
10 we're not talking just about a few more days.

11 The Supreme Court has the authority to
12 grant a stay if they believe that this evidence is
13 compelling, but the trial Court frankly I think has
14 a better ability to assess the evidence and the --
15 whether or not petitioner meets the tests rather
16 than counsel says it's absolutely essential for
17 justice to be done that this Court order these tests
18 and grant a stay, the States -- and I understand
19 that, that is because he is an advocate for
20 petitioner and believes very strongly in what he's
21 doing. The State's position is that it will result
22 in a further denial of justice.

23 We are 14 years since the trial. The
24 victims' families have been denied justice for that
25 long. It is -- he has had 4 personal restraint

1 petitions in addition to the direct appeal. Now,
2 grant it this is new, I understand that, but it's
3 not credible. And we shouldn't -- the Court
4 shouldn't further delay matters on inadmissible
5 incredible evidence. Petitioner said we can't even
6 have a hearing, we don't even have the witness.
7 Frankly, that sounds to the State like they know
8 they don't meet the legal test at this point.

9 Counsel closed by saying we can't kill
10 someone when someone else is saying I committed the
11 murders and I would point out that is not what we
12 have at this point. We simply don't have that.

13 THE COURT: Well, I assume even if we
14 did have that that's not enough under case law.

15 MS. KELLY: And that is true as well.
16 Unless the Court has questions?

17 THE COURT: How long are these
18 interviews of Mr. Lininger and Ms. Chapman?

19 MS. KELLY: I believe Mr. Lininger is
20 about an hour and Ms. Chapman's interview is 15 or
21 20 minutes.

22 THE COURT: Mr. Gombiner, rebuttal?

23 MR. GOMBINER: Yes, Your Honor.

24 First, it's true I'm an advocate and
25 it's true I don't believe in the death penalty, but

1 that has nothing to do with my arguments. What I
2 would point out is the DNA statute does not require
3 quote, unquote "admissible evidence." It requires
4 making a showing that if DNA testing were performed
5 and if the results came back then in the manner that
6 essentially would be most favorable to the
7 petitioner, would that create a probability that the
8 person would be considered innocent.

9 Now, what I would ask the Court to do
10 is consider this, if you take Mr. Shinn's statements
11 and Mr. Lininger's statements and all the evidence
12 that the only and solely because we have had
13 1 week -- less even than a full weekend to develop
14 any evidence, if DNA testing were performed and the
15 DNA of any of the people named by Mr. Shinn were
16 found on items that realistically would have to have
17 been touched by the perpetrator, for example the
18 bullets found in Mr. Hoerner's pocket or the
19 revolver itself, I think the Court has to ask itself
20 would it really feel that that evidence wouldn't
21 make any difference, that that evidence wouldn't do
22 exactly what the DNA statute is designed to do?
23 That's the whole point here.

24 This -- all this amount of making jury
25 arguments about who's motive it is et cetera, that's

1 not what we're talking about here. We're talking
2 about whether or not we have evidence we can test
3 and if the evidence is tested in light of this new
4 evidence that just surfaced and which we have not
5 even had a chance to fully explore -- not fully
6 explore, we have not even had a chance to even begin
7 to explore it, the only question, the question is
8 not even whether or not ultimately is -- not
9 ultimately we're going to prevail, it's whether or
10 not we're going to say we're not even going to get
11 in to this at all, we're just going to let the train
12 just go right -- keep rolling right along and have
13 Mr. Stenson executed and then what -- when we know
14 we've got evidence that could be tested, that's what
15 we're talking about here. So it's not about my
16 philosophy, it's not about Ms. Kelly's philosophy,
17 it's about the -- it's essentially a very simple but
18 important issue and you know, I can try to answer
19 the Court's questions but it's not the fact that Mr
20 -- I do want to say one thing, the fact that Mr.
21 Shinn says well, I don't know if it's true or not,
22 that does not undermine his credibility, that
23 enhances his credibility. He's not someone who is
24 coming forward and offering up this big elaborate
25 theory saying this is what must have happened, he's

1 at pains (sic) to say I'm not sure what happened,
2 but what's so important is that the person who does
3 maybe know what happened, he does not say I don't
4 know anything about this -- you listen to his tape.
5 He is clearly someone who knows a lot about the
6 Darold Stenson case, and someone who admits to doing
7 all sorts of things at the Stenson home.

8 So, you know, maybe I guess I keep
9 anticipating what the Court will learn so maybe the
10 Court should learn it.

11 But I would like at this point to offer
12 the exhibits I have had marked. I don't think I
13 have actually shown them to Ms. Kelly, may I
14 approach, Your Honor?

15 THE COURT: You may. Ms. Kelly has an
16 exhibit there as well.

17 MR. GOMBINER: I have not been able to
18 examine the contents but I don't think I have any
19 objection to it any way.

20 THE COURT: What is Exhibit C?

21 MS. KELLY: That is the print out from
22 the computer records of the Sheriff's Department,
23 because the original records have all been destroyed
24 at this point dating back to 93, 94, 95. That's the
25 remaining computer record of law enforcement visits

1 or calls to the Dakota Farms property, some of which
2 mention some of these individuals.

3 THE COURT: All right.

4 MS. KELLY: Your Honor, if I could just
5 maybe go through the exhibits with Ms. Kelly?

6 THE COURT: You may.

7 MS. KELLY: The first is the FBI report
8 from the trial record itself, it is probably already
9 in the record some place but I'd like it to be able
10 to be part of this.

11 The second exhibit is just something
12 that Mr. Kerkering prepared which basically outlines
13 what he learned in the investigation. It contains
14 some argument as well. Essentially it's sort of a
15 written version of what I would proffer
16 Mr. Kerkering would say if he were called as a
17 witness and he is available if the Court wants to
18 hear from him.

19 And then, the next 5 exhibits are the
20 criminal record print outs that we were able to
21 obtain for John Lininger, Tanya Chapman, Ennis
22 Caynor, Simone Nelson and Patrick Nelson.

23 And then the last 2 exhibits are my
24 letter to Ms. Kelly of yesterday, and a response
25 from Pamela Loginsky of today and this regards

1 discovery request which I wanted to then have in the
2 record.

3 THE COURT: Ms. Kelly?

4 MS. KELLY: Your Honor, to the extent
5 Exhibit 2 contains argument and impressions of
6 Mr. Kerkering, the State would object to that but I
7 assume that the Court can sort that out.

8 My understanding is that it contains --
9 that he spoke to Mr. Lininger and I trust that
10 counsel will correct me if I'm wrong and Mr.
11 Lininger's ex-wife, perhaps also his mother and
12 contains statements -- his recording of their
13 information.

14 MR. GOMBINER: That's correct except
15 that he also -- Mr. Kerkering also spoke to Tom
16 Lininger who is Mr. John Lininger's twin brother.

17 THE COURT: I will consider that and
18 I'm certain I can sort out.

19 MR. GOMBINER: I don't think you will
20 have any difficulty determining what is argument and
21 what isn't. I will offer those then.

22 THE COURT: I will admit those with the
23 understanding that I will sort out some of the
24 opinion.

25 Counsel, my concern is at this point I

1 would like to listen to these CD's and review the
2 exhibits and there's no way I can do that in the
3 next 35, 45, 55 minutes that we would have until the
4 close of day.

5 Thought perhaps we resume at 10 o'clock
6 tomorrow morning?

7 MS. KELLY: Your Honor, that would be
8 fine with the State. The other thing I would say, I
9 have not marked Ms. Chapman's CD as an exhibit but
10 obviously I would be asking that that be considered.
11 I would also ask that the State be allowed to
12 supplement, I think Defense probably would like the
13 opportunity to do well, up until the point where the
14 Court is (sic) because this is an ongoing situation.

15 THE COURT: I think that's fine, it
16 would be -- frankly, it's my intent to have a ruling
17 tomorrow.

18 MR. GOMBINER: I'm sorry to have?

19 THE COURT: To have a ruling tomorrow
20 morning.

21 I understand there's time issues and we
22 unfortunately had an unfortunate confluence of
23 difficulties getting this matter heard today
24 unfortunately.

25 MS. KELLY: The other thing I've

1 neglected to address the issue of the blood
2 evidence, Court's question about the blood evidence.
3 I'm somewhat behind counsel, but I did locate at
4 least part of the trial court proceedings where
5 there was testimony from Michael Grubb and at least
6 one other, and an FBI agent, and I believe it was
7 probably -- although again, I'm a little behind the
8 curve, probably contains the testimony of the FBI
9 forensic scientist who may have done the testing.

10 Additionally, I am aware although I did
11 not even have a chance to look for it, that there is
12 a photograph of Exhibit QA, so that might be of
13 assistance --

14 THE COURT: It's Q18, I think it's 164,
15 165, those are both of the right knee of the pants
16 is my understanding.

17 MS. KELLY: I believe that's correct.

18 THE COURT: The left knee --

19 MS. KELLY: The Q18 is probably the -

20 THE COURT: Q18 are the pants.

21 MS. KELLY: I will make copies of the
22 transcripts and I assume counsel has that already
23 and provide that to the Court any portion that
24 appear to relate to the blood evidence.

25 THE COURT: I can tell you, counsel, I

1 did find something on my own. I have my trial notes
2 which are my handwritten notes that I don't know why
3 I still have them but I do. Mr. Grubb's testimony
4 is the testimony that I think is probably more
5 pertinent on the issues of what was tested in
6 particular relation to the blood spatter evidence,
7 and I have notes only. So if that transcript is
8 available that would be of some benefit to the
9 Court.

10 MR. GOMBINER: And --

11 MS. KELLY: I'm sorry, go ahead.

12 MR. GOMBINER: My understanding, I
13 think I understood the Court's question correctly
14 was that you wanted to know if you could tell where
15 -- when the DNA testing was performed where on the
16 pants this sample came from?

17 THE COURT: Yes.

18 MR. GOMBINER: And my understanding
19 from everything I have read thus far, there's no
20 indication of where on the pants it came from. Do
21 the Court's notes say anything --

22 THE COURT: What I have that I have
23 found in addition to what I just have been told is
24 Exhibit 1, is that there is a brief that was filed
25 in connection with the DNA issue that said there was

1 DNA tested from the right knee of Mr. Stenson's
2 pants.

3 MR. GOMBINER: Right.

4 THE COURT: And then the blood spatter
5 evidence was mostly on the left side.

6 MR. GOMBINER: Okay, then maybe --

7 MS. KELLY: And I suspect the Court and
8 counsel are right, that that's where the DNA testing
9 was done. The Court had simply asked so I'm trying
10 to respond to that.

11 One last point that was raised in
12 counsel's rebuttal, it is my understanding, and
13 again the Court has Mr. Croteau's affidavits, but
14 it's not just for (inaudible) of an alternative
15 perpetrator, but again the evidence not have been
16 handled -- I think that's still a major hurdle again
17 because of the application process.

18 THE COURT: And those are certainly
19 some issues that we have not addressed in terms of
20 the -- I understand Mr. Croteau said the STR testing
21 will do low touch DNA testing, and again those are
22 issues we'll have to look at.

23 Obviously that's -- we have not reached
24 that threshold old yet.

25 Anything else before we adjourn today?

1 MR. GOMBINER: 10:00 o'clock tomorrow?

2 THE COURT: 10:00 o'clock tomorrow and
3 hopefully that will give me enough time.

4 MR. GOMBINER: Getting very familiar
5 with all of Clallam County.

6 THE COURT: 10:00 o'clock tomorrow
7 morning.

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10 (Off the record)

11 (Court at recess on this matter)

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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