

APPENDIX D

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNT OF CLALLAM

3 STATE OF WASHINGTON,)

4 Plaintiff,)

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

6 DAROLD STENSON,)

7 Defendant.)

8 _____)

9

10 BE IT REMEMBERED that on November 25,
11 2008, above-captioned cause came on duly for hearing
12 before the HONORABLE KEN WILLIAMS, Judge of the
13 Superior Court in and for the County of Clallam,
14 State of Washington; the following proceedings were
15 had, to wit;

16

17 Excerpt of Proceedings of Reporter's
18 verbatim transcript

19

20

21 LISA C. MC ANENY Official Court Reporter
22 223 E. 4th Street Dept. II Superior Court
23 Port Angeles, WA 98362 360-417-2243

24

25

COPY

1 APPEARANCES

2

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- 1 INDEX
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

1 HONORABLE KEN WILLIAMS
2 November 25, 2008
3 State vs. Darold Stenson
4 Cause No. 93-1-00039-1
5 Motion to Reconsider/Motion for Stay

6
7 (On the record)
8 (Defendant NOT appearing, represented by
9 counsel)
10 (Parties present in open court)

11
12 THE COURT: State vs. Stenson. Motion
13 for reconsideration, motion for stay.

14 (State's Exhibit 13 and 14 marked for
15 identification)

16 THE COURT: Good morning, please be
17 seated.

18 MR. GOMBINER: Good morning, Your
19 Honor.

20 THE COURT: Counsel, I have reviewed 2
21 additional CD's, Patrick and Simone Nelson, each of
22 them. I also received and have reviewed the direct
23 examination and cross examination of Mr. Grubb from
24 the trial itself.

25 Any other matters that I should have

1 received perhaps and haven't?

2 MR. GOMBINER: Well, Your Honor,
3 there's some information that I don't think you've
4 received which is probably important to the Court,
5 which is that as we were driving over here this
6 morning we got a telephone call and we were informed
7 that Judge Suko in the Eastern District of
8 Washington has issued a stay of execution that
9 regarded our claim about lethal injection.

10 So, that's all I know about it right
11 now.

12 Mr. Stenson's being represented by
13 Perkins Coie in the lethal injection matter, I think
14 Ms. Kelly received the same information from a
15 different source. But there's a stay of execution
16 in effect now.

17 And the way that works in Washington,
18 under Washington law, is that once a stay of
19 execution is issued an execution date is
20 automatically reset only after a court vacates the
21 stay of execution. And once that happens, the
22 execution date is automatically reset for 30
23 judicial days after the vacation of a stay of
24 execution.

25 Obviously there's no vacation of the

1 stay, the stay is just issued, but at the very
2 earliest there couldn't be an execution date now
3 until -- the way I've got it calculated, until
4 January 12th even if -- which I don't expect would
5 happen, but even if today the stay was vacated by
6 the 9th Circuit.

7 THE COURT: Okay, thank you.

8 MR. GOMBINER: So, I think that does
9 impact what I was going to say today. But I wanted
10 to bring it to the Court's attention.

11 THE COURT: Ms. Kelly, anything else
12 that I should have before me that you are aware of?

13 MS. KELLY: Um, no, Your Honor, I do
14 not have anything else. Although basically from my
15 conversations with the Attorney General's office, I
16 believe that their interpretation of whether or not
17 -- they're moving immediately to have the stay
18 dissolved, and my understanding from talking to them
19 is they're still anticipating that if they were
20 successful that execution might proceed.

21 So, I'm not quite as -- counsel
22 certainly has their interpretation, my understanding
23 is it may not be quite as automatic a process in
24 terms of setting an execution date.

25 So, that does not -- at least, again,

1 based on what I've been told by the AG (sic), it
2 does not appear to be automatic, so.

3 MR. GOMBINER: Well, Your Honor, I
4 could just say that I don't know if the Court's got
5 the statutes readily available, but it's 10.95.160
6 subsection 2.

7 THE COURT: Surprisingly enough the
8 current volume I have is dated 1994.

9 MR. GOMBINER: I think --

10 MS. MC CLOUD: I'm not sure what year
11 it was amended. If there's no subsection 2 there
12 you have the un-amended version.

13 THE COURT: Says if it's stayed by a
14 court of competent jurisdiction for any reason, the
15 new execution date is automatically set for 30
16 judicial days by such court.

17 MS. KELLY: I believe there may be an
18 argument about -- and I certainly am not an expert,
19 but there may be an argument, I believe, with
20 respect to whether or not the Court had the
21 jurisdiction.

22 THE COURT: Okay. Well, certainly
23 that's something this Court does not have TO decide.

24 Mr. Gombiner, you indicated you wished
25 to make further argument?

1 MR. GOMBINER: Yes, Your Honor.

2 There's a couple of things I'd like to
3 do which is, first, I offered yesterday I think it
4 was defense Exhibit Number 2, a factual summary of
5 Mr. Kerkering offered in lieu of testimony.

6 I've now got a declaration signed by
7 Mr. Kerkering which I would like to either
8 substitute or add to the exhibit list. Because this
9 is both signed by him and it also eliminates some of
10 the argumentative matters, it's more
11 straightforward.

12 THE COURT: Let me ask, does it contain
13 new factual material?

14 MR. KERKERING: No, it does not.

15 MR. GOMBINER: I think it contains the
16 same facts.

17 THE COURT: Ms. Kelly?

18 MS. KELLY: Your Honor, I'm not going
19 to object is to its substitution. I have not seen
20 this new declaration. I have not seen, frankly, the
21 exhibits that counsel filed yesterday.

22 THE COURT: Would you like some time to
23 do that?

24 MS. KELLY: Um, no, Your Honor, at
25 least they were briefly reviewed so I know basically

1 what they were for the most part. I understood them
2 to be criminal histories, the declaration of
3 Mr. Kerk -- I'm sorry, I'm not even going to try to
4 pronounce it, Mr. K -- Kerkering, I believe. And
5 one or 2 other matters which I think one of them
6 originated -- the Shinn CD originated with the
7 State, even though I think Defense was actually the
8 one who filed it with the Court.

9 THE COURT: Rather than substitute it
10 let's mark it as an additional exhibit. I think for
11 purposes of this hearing certainly what exhibits are
12 presented to the Court are probably under our
13 evidence rule requires less rigid scrutiny, but I
14 think it's probably appropriate to make a full
15 record. I did consider last night in my reading
16 Exhibit 2, so it should probably remain part of the
17 record.

18 MR. GOMBINER: That would be fine.

19 MS. KELLY: I guess what I was
20 suggesting, Your Honor, not that it be removed
21 entirely, but -- and I guess that bell would be hard
22 to un-ring, so it makes sense.

23 MR. GOMBINER: Why don't we add it.

24 THE COURT: Let's add it, because I did
25 review the one that is presently there.

1 MR. GOMBINER: If I can approach, Your
2 Honor?

3 THE COURT: You may.

4 MS. KELLY: And, Your Honor, I'm not
5 sure that the various items that the State has
6 supplied to the Court as this matter has proceeded
7 have actually been marked as exhibits.

8 THE COURT: I have marked all the CD's,
9 I guess I did not mark the direct examination of
10 Mr. Grubb, I guess that is probably part of the
11 record already but why don't we mark this to
12 indicate this was in front of me.

13 MS. KELLY: For purposes of -- I wanted
14 to be sure that did occur for purposes of the
15 record.

16 THE COURT: I believe everything else I
17 have had marked, certainly everything I reviewed
18 last night has now been marked to the best of my
19 knowledge.

20 (Defense 15, State's Exhibit 16 marked
21 for identification)

22 MR. GOMBINER: If the Court wants to
23 hear it, I do have some additional arguments as to
24 why the Lininger tape -- as I indicated yesterday,
25 we had not had the chance to listen to it all the

1 way through. I have some additional arguments
2 regarding that and some other arguments as to why
3 DNA testing would be appropriate, so.

4 THE COURT: It was my intent because
5 not all the evidence was in, and in fact, until
6 8 o'clock last night some of the evidence I now have
7 in front of me didn't exist, it is certainly
8 appropriate for the parties to argue any new
9 information or argument you wish to have, that was
10 my intent.

11 MR. GOMBINER: Thank you. I should
12 indicate we just got from Ms. Kelly - I think she
13 got them as quickly as possible - but we just got
14 the CD's of the Nelson interviews, the Simone and
15 Patrick interviews, so I have absolutely no idea
16 what their content is. I have not listened to any
17 of those.

18 THE COURT: Mr. Nelson's is 11 minutes
19 long and Ms. Nelson's is about 18 minutes long, I
20 believe. Would you like time to listen to them,
21 it's about half an hour total?

22 MR. GOMBINER: Well --

23 THE COURT: We have another judge here
24 today so it's not quite the problem it was
25 yesterday.

1 MR. GOMBINER: That's a good thing.

2 Can I consult with my --

3 THE COURT: You may.

4 MR. GOMBINER: Well, of course I'd like
5 to listen to the tapes. I don't want to indicate to
6 the Court that I think that just listening to the
7 tapes would be a substitute for investigating what's
8 on the tapes or investigating the Nelsons in
9 general. But if the Court would give us a few
10 minutes to listen to them, I don't see how that
11 could hurt.

12 THE COURT: Ms. Kelly, any objection to
13 that?

14 MS. KELLY: No, Your Honor.

15 THE COURT: And I'm assuming Ms. Kelly,
16 that that would be a good opportunity for you to
17 perhaps review the materials you have not had a
18 chance to review as well?

19 MS. KELLY: Actually, Your Honor, if I
20 could just get copies of them, I think I understand
21 what they are.

22 THE COURT: All right. I'll hand the
23 exhibits down. If you tell the clerk what it is you
24 would like copies of we'll make sure that happens.

25 Counsel, when you are ready if you will

1 let the clerk know.

2 MR. GOMBINER: Thank you, Your Honor.

3 MS. KELLY: Thank you, Your Honor.

4 THE COURT: We'll be at recess.

5 (Off the record)

6 (Court at recess)

7

8 (On the record)

9 THE COURT: All right, counsel, I will
10 hear further argument.

11 MR. GOMBINER: Thank you, Your Honor.

12 I just want to point out some things I
13 have gleaned from listening to the Lininger audio
14 recording and the Tanya Chapman audio recording and,
15 well, as best I can from the Pat and Simone Nelson
16 recordings.

17 Let me start with the Lininger one. I
18 think we have to bear in mind that this is taking
19 place after Mr. Shinn has come in and given his
20 statement and named a number of people who included
21 Pat Nelson, Simone Nelson and Tanya Chapman.

22 Now, what's important about the
23 Lininger recording is that first Mr. Lininger
24 independently brings up all 3 of those names - Pat
25 Nelson, Simone Nelson and Tanya Chapman.

1 Second, he associates all those people
2 with the Stenson residence.

3 Third, Mr. Lininger confirms that he
4 was living on Lonnie Boyd's farm in 1992, and I
5 believe he said Lonnie Boyd was another bird farmer
6 in the area.

7 Now, what's also very important is that
8 Mr. Lininger indicates that he actually had
9 Thanksgiving dinner at the Stenson home in November
10 of 1992. In November of 1992, is, what, about 4 --
11 unless I'm not doing the math quite right, but about
12 4 or 5 months before the murders which happened on
13 March the 25, 1992. And Mr. Lininger admits that he
14 saw -- that Mr. Stenson had a collection of weapons
15 and other artifacts, and he indicates that, you
16 know, he knows where these artifacts were located.

17 Further, Mr. Lininger -- you have to
18 remember, Mr. Shinn is saying that these murders
19 were committed as part of a plot to steal items from
20 Mr. Stenson, and Mr. Lininger acknowledges that he,
21 Mr. Lininger himself, stole property, including Pat
22 Nelson's gun, and fenced that or sold those items
23 for money. He also -- I think this is quite
24 important, Mr. Lininger admits that he was supplying
25 marijuana to -- I think it's both Mr. And Mrs.

1 Stenson, it might be just Mrs. Stenson I'm not quite
2 sure if I got this all down correctly, but that any
3 way that he was supplying marijuana to them for
4 their personal use.

5 Additionally, Mr. Lininger identifies a
6 connection between Pat Nelson and David Oberman, and
7 thinks though he's not sure that Oberman -- that
8 they may have -- Mr. Oberman may have been aware of
9 Mr. Stenson -- or Mr. Nelson rather, may have been
10 aware of Mr. Stenson through Mr. Oberman.

11 Mr. Lininger indicates that Mr. David
12 Oberman facilitated the Nelsons squatting on the
13 Stenson property after the murders.

14 Now, this is what is also though of
15 extreme importance, as you recall if you listen to
16 the Shinn's recording, Mr. Nelson is identified by
17 Mr. Shinn as the -- in some ways like the main
18 player, he's the person who is the one who is
19 interested in stealing the swords from Mr. Stenson.
20 He's the -- I mean, Mr. Shinn doesn't always express
21 himself with complete clarity, but he's basically
22 saying that Mr. Nelson is running some kind of a
23 stolen property ring.

24 But, here's what Mr. Lininger says
25 about Mr. Nelson, he says that Pat Nelson is a

1 violent guy. I think the quote is "you'd never want
2 to cross paths with that guy." He specifically says
3 that he assaulted Mr. Lininger. Mr. Lininger says
4 quote "he was trying to straight break my neck."

5 Now, he knows also that Mr. Lininger --
6 or Mr. Nelson was known to carry weapons. And we
7 know that that's corroborated at least by the fact
8 that subsequent to the murders Mr. Nelson is
9 convicted of being a felon in possession of
10 firearms, and in the exhibit that I gave the Court,
11 there's indication that when Mr. Nelson is arrested
12 he's got weapons, he's got knives and he gets a 70
13 month prison sentence.

14 And, although Mr. Lininger himself
15 denies any involvement in the murders of the
16 Stensons (sic), he, Mr. Lininger, expresses a
17 significant amount of suspicion about the fact that
18 the Nelsons, and particularly Pat Nelson, may have
19 been the ones who were behind the crime.

20 Finally, he also identifies another
21 person who was squatting out there, a person named
22 Travis Taylor.

23 And there's another very interesting
24 thing about the Lininger's tape because Mr. Lininger
25 is not the only one present at the time. Beverly

1 Webb, who is John Lininger's mother, is also present
2 during the interview, and at one point she just
3 breaks into the conversations and gives a --
4 recounts an incident that -- where her Tom Lininger
5 Senior, who I guess was her husband, and Pat Nelson
6 were together and she says well, something came up
7 about swords.

8 Now, you know, in and of itself, okay,
9 maybe that's -- I don't know what that would prove.
10 But when you take into account that we've got Mr.
11 Shinn saying the whole plot was about swords and
12 now -- and that Pat Nelson was the one who wanted to
13 get them, and now Beverly Webb who is as far as I
14 can tell wasn't in any way involved in any of this
15 just remembers such a conversation, I think that's
16 pretty significant.

17 I guess what I am saying is what
18 Mr. Lininger -- regardless of whether Mr. Lininger
19 admits or denies involvement that is, is probably
20 the least important fact. Because as I think I was
21 saying yesterday, most people who if they were
22 involved in something like this are unlikely to be
23 just telling a police officer oh yeah, I did it.

24 But Mr. Lininger says a huge number of
25 things that corroborate aspects of Mr. Shinn's

1 statement, and certainly give rise to the idea that
2 testing DNA for both Mr. Lininger then the other
3 people Mr. Shinn named, especially Mr. Nelson, would
4 clearly be a highly useful thing to do.

5 I mean, the one thing we know for sure
6 is Mr. Lininger's statement doesn't deny that he
7 could have said a lot of things to Robert Shinn, and
8 he certainly does -- it certainly doesn't say that
9 what Mr. Shinn was saying was just a fantasy. We
10 definitely can tell that from Mr. Lininger and we
11 get a lot of information that in fact either
12 corroborates part of Mr. Shinn's statement and gives
13 specific details that give rise to suspicions which
14 could be cleared up one way or the other by the DNA
15 testing.

16 Now, the same thing is true of Tanya
17 Chapman. Because first I would say Tanya Chapman's
18 interview is conducted in an extremely poor manner.
19 It's really sort of remarkable that the police
20 officer going out there didn't even know when the
21 murders were committed, which really undermines much
22 of the interview because they keep talking about
23 Thanksgiving of 1993 where Ms. Chapman was then.
24 Unfortunately they either neither Ms. Chapman or the
25 police officer - particularly the police officer -

1 seem to be aware that we're not concerned about when
2 she was in Thanksgiving 1993, because that's after
3 the murders. We're concerned where she was --
4 whether she was at Mr. Stenson's house in
5 Thanksgiving of 1992, which is when Mr. Lininger
6 said she was there.

7 I think that somewhat undermines the
8 validity of the interview and shows why more
9 investigation is needed.

10 But Tanya Chapman clearly knows at
11 least this, she knows Robert Shinn; she knows Lonnie
12 Boyd who was the person where Mr. Lininger was
13 living; she knows John and Tom Lininger; she knows
14 Pat Nelson; she knows Simone Nelson; she knows Ennis
15 Caynor - who is the one of the people named by Mr.
16 Shinn.

17 Now, Ms. Chapman is like, "I don't know
18 nothing about nothing," basically - I'm not
19 grammatically putting it the way she responded - but
20 then she also says other things that are quite
21 inconsistent with that. Including the somewhat
22 unexplained fact that she says that Mr. Stenson's
23 sister contacted Tanya Chapman about a year after
24 the murder to discuss concerns regarding other
25 people's involvement. And she also indicates that

1 Lonnie Boyd is an important person to talk to
2 regarding the Stenson murder.

3 The Nelson interviews I just listened
4 to, and again, I would submit that these are not
5 professionally conducted interviews. And the reason
6 I say that is because in both the interviews it is
7 so obvious that the police - and you can do this by
8 listening to them - the police officer is clearly --
9 who's conducting the interview isn't trying to
10 really find out what happened. Basically he's
11 essentially saying in both of the interviews we know
12 that this didn't -- you know, this is all --
13 essentially intimating that the -- any allegations
14 are pretty much nonsense and we know you really
15 didn't have anything to do with it. He does not
16 actually say it but that's the whole tenor of the
17 thing is and there's no probing questioning
18 whatsoever.

19 But, even despite that, there's still
20 things that come up that raise a lot of doubts.

21 Mr. Nelson, for example, starts out by
22 saying I don't know anything about the Darold
23 Stenson murders. But then he says I don't know
24 anything about the DJ -- you know, what DJ did. DJ
25 is Mr. Stenson's nickname. How is it that 15 years

1 after a crime that he suddenly knows nothing about,
2 he knows his nickname? His account of why he was
3 living at the house makes very little sense. He
4 says he's there to clean the house up. The police
5 reports you've got, the State filed an exhibit, are
6 lengthy. They show one call after another out to
7 that house. They were not there to clean -- they
8 were not living there to clean the house up. He
9 does -- Mr. Nelson does admit to knowing David
10 Oberman. Unfortunately he's asked so few questions
11 and the question's so un-probing that it's hard to
12 know what else he might say.

13 But we know this about Mr. Nelson, we
14 know that Mr. Nelson has got a violent background.
15 In fact, Mr. Lininger himself just indicated -- said
16 that Mr. Nelson violently assaulted him.

17 The other thing we know is -- and this
18 is another thing that DNA testing is so important, I
19 don't know if the Court recalls this from the trial
20 but the evidence is undisputed about this, the
21 weapon that was found in Mr. Hoerner's hands, the
22 .357, was never -- no one was ever able to trace
23 that gun to Mr. Stenson or anyone else. So where
24 that gun came from and who owned it is entirely
25 undetermined, which would mean it would be even more

1 important if Mr. Nelson's or any of the other people
2 named DNA was found on that weapon. Because like I
3 say, it's not something you can say, well, doesn't
4 really matter because we know the weapon belonged to
5 Mr. Stenson. There's no evidence as to who the
6 weapon belonged to and that was actually one of the
7 big mysteries at the trial and one of the things the
8 Defense I believe high-lighted.

9 But, now we've got a way of determining
10 is somebody else's DNA on the weapon. And I didn't
11 address Simone Nelson's testimony, but again, she
12 doesn't -- she's denying everything. And says she
13 doesn't remember everything. But she does admit to
14 knowing David Oberman. She gives an account of how
15 they came to be there that is really not entirely
16 consistent -- at the Stenson place that's really not
17 entirely consistent of Mr. Nelson's account of how
18 they came to be there. But once again, she's not
19 really questioned in any serious investigative way
20 about what happened. Most of the questions are
21 either leading or there so non-confrontational that
22 you don't really learn that much.

23 But what I would say is we have learned
24 over all is we got now more than enough in terms of
25 people saying they were at the Stenson's, people

1 admitting -- well, it's not admitting. We know from
2 independent evidence that all these people have
3 criminal records, we know these people know each
4 other, these -- again, and I don't want to repeat
5 what I said yesterday, that's exactly what the DNA
6 statute is intended for. You've got evidence that
7 if you could test it, it could show whether or not
8 these people were involved. And you've got somebody
9 with no motive to lie saying that hey, I heard this
10 guy talking about this and saying that, um, these
11 people were involved. It's true he does not say it
12 in the clearest fashion, Mr. Shinn I think to his
13 credit didn't try to, you know, embellish things.
14 He admitted that he didn't remember exactly how
15 everything was said. But we definitely corroborate
16 enough to go forward with the DNA testing.

17 And I would say at this point, given
18 the fact that a court in the Eastern District of
19 Washington has issued a stay of execution, there's
20 even -- the State's biggest argument so far has been
21 that it's so critical to kill Mr. Stenson
22 December 3rd, that basically nothing should stand in
23 the way including finding out what the truth is.
24 Now even that argument no longer applies.

25 So what I think the Court should do is

1 -- a stay is an equitable matter as well as a legal
2 one, this Court should issue a stay of execution,
3 order the DNA testing, I've already submitted
4 documents saying one, my office will pay for the
5 testing and number 2, the affidavit I have from my
6 investigator about his conversations with
7 (inaudible) Cellmark said it was 45 days or 45
8 business days, I don't recall off the top of my
9 head, but it's not an extensive period of time.

10 We should just go ahead and do the
11 testing and find out. I mean, that makes sense from
12 every point of view.

13 The only thing I would say is if the
14 Court for reasons that I guess aren't apparent to
15 me, doesn't want to do that, I think at the very
16 least we should do -- we should continue this matter
17 so that we can do further investigation, have a
18 hearing, get these people in here, question them. I
19 mean, frankly, I think I would do a different sort
20 of cross examination than the police were doing on
21 some of them and then find out if the Court doesn't
22 think we've met our burden right now, well then
23 let's find out if we can meet our burden which we
24 have not been able to do because of timing of the
25 new revelation.

1 I don't think we need to do that. I
2 think right now on the basis of the testimony that
3 has already been presented the Court can one, issue
4 a stay of execution, I know you might think that's
5 redundant but it's not necessarily so because we
6 don't know what is going to happen with the other
7 thing, but the Court has got it's separate authority
8 to issue a stay here. The stay will basically just
9 allow the time to do the testing and that is what I
10 would propose.

11 THE COURT: Ms. Kelly, response?

12 MS. KELLY: I do agree with counsel
13 that the stay is not redundant. Counsel had argued
14 the statute to Your Honor and referred that to Your
15 Honor. I looked up the documents on the case and as
16 I believe counsel knows Sagastegui, since it
17 involved the Federal Defender's office and Ms.
18 McCloud, in Sagastegui, the 9th Circuit issued a
19 stay of Mr. Sagastegui's execution date. They
20 issued that stay on October 11, 1998. On October
21 12th, the United States Supreme Court dissolved that
22 stay and on October 13th Mr. Sagastegui was
23 executed.

24 The courts have said that -- basically
25 that that statute doesn't apply unless you are past

1 -- the stay has taken you past the execution date.
2 So a stay in this matter would not be redundant.
3 They're basically legal documents except for the
4 Department of Corrections website showing the day of
5 Mr. Sagastegui's execution.

6 However, again, the Court stated quite
7 clearly on Friday it did not have the authority,
8 that is the State's position. Nothing has changed
9 since Friday. No matter how Mr. Gombiner wants to
10 characterize -- well, he did characterize it. He
11 characterized these things as we have suspicions,
12 and that's really all they have at this point.

13 You had Mr. Shinn who acknowledged that
14 he had no personal knowledge whatsoever of any plot
15 or plan, had information that he felt he needed off
16 his conscious to divulge. He did. We turned that
17 over to the Defense. And we have followed through
18 with interviews of almost every person he's named.
19 There's only one or 2 -- and they are consistent in
20 the main points, no, we were not involved in any
21 conspiracy or plan to frame Mr. Stenson. And
22 that -- and in fact, Pat Nelson, Simone Nelson said
23 hey, we were not even there in that house until
24 almost 2 years later. And that is corroborated by
25 the documents from the Sheriff's Department which

1 show that it's in February and March of 1995 that
2 they're getting called out there to deal with Pat
3 and Simone Nelson and Travis Talyor and some of
4 these other individuals.

5 It is not surprising -- it would be
6 very surprising, and frankly far more suspicious, if
7 all of these individual's stories matched up
8 exactly.

9 We are talking about events that
10 occurred between -- and just use the broad range, 10
11 to 14 years ago. It would be astonishing if --
12 again if those statements did match up to a T, if
13 there were not some discrepancies.

14 What defense counsel argus to the Court
15 that the Court should issue a stay on and order DNA
16 testing on is some of the raucous hearsay and what
17 he turns effectively in to in /AOU en do, that I can
18 imagine. If we were talking about using what is
19 here as the basis for going out and getting a search
20 warrant to take for example Pat Nelsons or is a
21 money Nelsons DNA, there's no way in -- on either
22 that the Court would Grant a search warrant on the
23 basis of what it has before it right now. It does
24 not even rise to the level frankly of reasonable
25 suspicion at this point. The Court would not

1 authorize a detention of those individuals based on
2 what there is for purposes of additional
3 questioning. And the defense, again, has the
4 burden. The Defendant has the burden of showing
5 that the DNA testing on a more probable than not
6 basis is likely to produce some evidence of
7 innocence.

8 Now, Mr -- the petitioner is basing his
9 claim is he wants the DNA so he can present or raise
10 a freestanding claim of innocence. And the burden
11 for that is very high. In the United States Supreme
12 Court, to be entitled to relief petitioner would at
13 the very least be required to show that based on
14 proffered newly discovered evidence in the entire
15 record before the jury, no rational trier of fact
16 could find proof of guilty beyond a reasonable
17 doubt. Jackson vs Virginia, 443 U.S. 307.

18 Herrera vs Collins, affidavits,
19 collected years after the murder and presented
20 until the 11th hour, that consist mainly of hearsay,
21 fall short of meeting that burden. 506 US 390.

22 Counsel has not made any showing that
23 petitioner is likely to prevail on the merits and
24 there has to be more than what has been presented
25 here.

1 I ask the Court to deny the motions.

2 THE COURT: Rebuttal argument?

3 MR. GOMBINER: Yes, Your Honor.

4 First, the argument that the people
5 didn't admit to doing the murders is really a little
6 hard to swallow. I mean, if that were the test then
7 Mr. Stenson should be walking out of the front door
8 of the penitentiary this afternoon because he has
9 always from the moment this -- these murders
10 occurred always said that he didn't have anything to
11 do with that.

12 Now, the State apparently doesn't think
13 that that's enough to exonerate Mr. Stenson.
14 Clearly the same applies to other people who may
15 deny involvement. So that's really -- that's just a
16 red herring.

17 I don't think the prosecutor is really
18 thought through what the DNA statute must be about.

19 Obviously it can't mean that you have
20 to first show that you're more likely than not to be
21 innocent before you get the DNA testing. I mean,
22 it's not like icing on the cake -- it's not like,
23 well, gee, this just really proves everything else
24 we've been saying.

25 The reason they implemented the statute

1 was precisely because of situations like this where
2 you have crimes where there's no eye witness
3 testimony, there's no confession, the crimes are
4 based on circumstantial or forensic evidence. And
5 now you've got a better way of evaluating that
6 evidence.

7 The question is not what would be shown
8 before the testing occurred, it's what would happen
9 after the testing occurred, which is why the testing
10 should occur.

11 And the State keeps bringing up this
12 idea that, well, we've presented stuff that's
13 riddled with hearsay, it's inadmissible et cetera,
14 et cetera. Well, as the Court well knows this, Mr.
15 Shinn came in on Friday afternoon. We have been
16 doing the best we can since then. But if we want to
17 get more direct evidence, if you don't want to have
18 hearsay, let's get these people in here. Let's
19 cross examine them under oath. Let's direct examine
20 them under oath. Let's have the Court observe their
21 demeanor.

22 It's really hardly fair to say that
23 because we have been deprived of the opportunity or
24 haven't at least so far had the opportunity to have
25 a hearing, that that means that we haven't presented

1 the necessary evidence.

2 I mean, you would think that the
3 reverse would be true.

4 You would think that the State would
5 want to have a hearing, you would think that
6 presented with something like this the State would
7 want to put to rest any doubts. If they're so
8 confident that Mr. Stenson committed the murders why
9 are they so scared of having DNA tested? Why are
10 they so scared of find out what it is really going
11 to show? That is an argument that makes no sense to
12 say that we've got evidence that could either prove
13 the person guilty beyond any doubt, and frankly that
14 would be the case.

15 If evidence were found for example that
16 the bullets in Frank Hoerner's pockets had
17 Mr. Stenson's DNA on them, absent some far-fetched
18 plot to plant his DNA - which I'm going to assume
19 could not be the case - that would be I would say
20 incontrovertible evidence of his guilt. Fine.
21 We're willing to take that chance. That's not an
22 issue with us, Mr. Stenson says he's innocent.

23 On the other hand, if for example Pat
24 Nelsons's DNA was found on those bullets then that
25 would exonerate Mr. Stenson.

1 So all we're saying is let's just find
2 out.

3 And all these objections the State is
4 raising are basically just one long excuse for
5 avoiding finding out what the truth is, when a means
6 exists to find it out.

7 And it's true there's one other
8 possibility, maybe we couldn't get any results but,
9 again, that's not a reason to do it. You can't tell
10 until you do the testing, so let's just do the
11 testing.

12 THE COURT: --

13 MS. KELLY: Your Honor, might I respond
14 to 2 points?

15 THE COURT: You may.

16 MS. KELLY: The Defense insisted that
17 this hearing go forward as rapidly as possible.
18 They contacted the judge on a Sunday. I didn't
19 learn about it until 11 o'clock that night. When we
20 started yesterday the Court obviously was fluid,
21 information was still coming in. They could have
22 noted up their hearing for next Monday or next
23 Tuesday even. They could have done that. They
24 chose not to. Now they're laughing because -- but
25 they're the one's asking for a stay. A stay, if it

1 is valid, would operate next Tuesday as well as it
2 would today. They chose to go forward.

3 So to suggest that the State is somehow
4 afraid of what is going to be found is as ludicrous
5 to the State as my comments a moment ago was to
6 them.

7 The State's concern is that low copy
8 DNA is not as accurate, not as sensitive for
9 purposes of determining identity. Virtually all of
10 the evidence that they're proposing to test has
11 clearly been opened, likely been handled by many
12 people. And the fact, it's not likely to produce
13 any evidence. They can't even show that. So to
14 suggest that the State is somehow afraid of what DNA
15 testing would show is not correct.

16 The State doesn't believe that they
17 have met their burden. The State believes that
18 petitioners are -- the petitioner is simply trying
19 all means possible, and as I indicated yesterday I
20 certainly understand that, I understand counsel's
21 passion, but that doesn't change the law.

22 I'll say no more. I know the Court
23 recalls the arguments that were made yesterday, I'm
24 certainly not abandoning them by not repeating them.
25 I notice Your Honor was the trial court judge and

1 you probably know the evidence far better than I do.

2 THE COURT: Any rebuttal to the last
3 remarks?

4 MR. GOMBINER: Yes.

5 First, I do apologize for laughing but
6 it really is a little absurd to suggest that we
7 should have waited until Mr. Stenson would be
8 executed before noting up a motion or noting it up
9 at a time when we would have absolutely no
10 opportunity to appeal anything if that were the
11 case.

12 Now, the one thing that is -- I just
13 want to make sure -- I know the Court knows this,
14 but I want the record to reflect this, we didn't
15 have anything to do with Mr. Shinn or when Mr. Shinn
16 came in to that office. So, the last -- the rushed
17 nature of things is due to matters entirely outside
18 our control in terms of Mr. Shinn.

19 And I really resent the idea that we
20 were supposed to just sort of twiddle our thumbs and
21 note everything up according to more traditional --
22 more normal rules of procedure, when it's the State
23 that has been insisting all along that Mr. Stenson's
24 execution December 3rd is paramount.

25 I wrote Ms. Kelly a letter and said,

1 look, what you should do in light of this is agree
2 to a stay of execution. If the State had done that
3 we wouldn't be in this position right now. But I do
4 apologize for laughing and it was inappropriate.
5 Thank you.

6 THE COURT: All right.

7 Well, obviously matter comes to the
8 Court on short notice. On Friday, November 21, 2008
9 which now seems a long time ago, this Court denied a
10 motion to allow DNA testing in this case. I held
11 that such testing could not realistically lead to
12 any evidence which could point to Mr. Stenson's
13 innocence, and at best could only point to an
14 accomplice's guilt.

15 The idea of an accomplice at all was
16 only based on shear speculation. There was no
17 reason to assume or to suspect or to frankly
18 theorize that anyone else would have been involved.

19 When I wrote this this morning
20 Mr. Stenson had been scheduled to be executed at
21 12:01 a.m. on December 3rd, which counting today
22 leaves 4 judicial days. That may have changed this
23 morning, and certainly that's one of the factors
24 that is involved in this case and the Court can not
25 really be unmindful of that fact.

1 The Defendant asked this Court to
2 reconsider its ruling on the DNA testing and cites
3 to recent developments.

4 On Friday afternoon following this
5 Court's ruling, Robert Shinn went to his probation
6 officer and said he had information about the crime
7 which he felt morally compelled to disclose.

8 He said that about 8 years ago talking
9 to John Lininger at a time that both of them were
10 high on drugs, that John Lininger broke down and,
11 crying, told him of a plan by others to commit the
12 murders and to frame Mr. Stenson so that they could
13 steal Mr. Stenson's valuable swords and antiques..

14 Mr. Lininger said according to Mr.
15 Shinn that Mr. Stenson was not guilty and had been
16 framed.

17 Mr. Shinn said he was told that the
18 people involved were Tanya Chapman, Ennis Caynor,
19 Simone Nelson, Pat Nelson, Tom Lininger and himself
20 - meaning Mr. Lininger.

21 Mr. Shinn said that he was told they
22 had committed the murders, or some had, and then
23 ransacked the place and later squatted in the house.

24 He said he was told it all started
25 because Pat Nelson and Simone Nelson wanted the

1 swords.

2 Mr. Shinn was told that Tanya Chapman
3 was the connection to Stenson.

4 Mr. Shinn said he was told that this
5 group was doing large burglaries at the time,
6 storing the property in a storage unit and then
7 transporting it out of the area for sale.

8 Supposedly, according Mr. Shinn, the
9 group had planted evidence at the scene that would
10 point to Mr. Stenson, and they had purposely
11 contaminated the crime scene.

12 Mr. Shinn was also told there was large
13 quantities of money at the scene on the day in
14 question, in excess of \$10,000 to \$13,000 or
15 something were his words.

16 Mr. Shinn was told they had been
17 watching the house for numerous days and had a break
18 down of when the Defendant would be there, when he
19 would leave there, when he wouldn't be there and the
20 like.

21 Mr. Shinn said he didn't know if any of
22 what he was told was true or not but he felt
23 compelled to disclose what he had been told.

24 On Saturday, November 22, 2008 at
25 11:10 a.m. detectives interviewed Tom Lininger at

1 his mother's home. She was present at the
2 interview, which like Mr. Shinn's interview was
3 recorded.

4 Mr. Lininger said he knew Mr. Stenson
5 and didn't believe that Mr. Stenson was capable of
6 the murders. He referred to Mr. Stenson's
7 brother-in-law, David Oberman, was someone a bit
8 wired, and perhaps -- who perhaps knew a bit --
9 weird, excuse me, and perhaps the Nelsons and others
10 were always high at the time.

11 Mr. Oberman and his girlfriend Debbie
12 Reed resided in a guest camper at the Dakota Farms
13 and were found at the camper the morning of the
14 murders, apparently they had been sleeping. I think
15 the testimony was they still had pillow marks on
16 their faces.

17 Mr. Lininger denied knowing of any
18 plot, but opined, quote, "I honestly believe there's
19 a chance that the Nelsons could be involved."
20 That's not followed further.

21 He recalls talking to Robert Shinn but
22 said he personally has no involvement - but lots of
23 things might have been said. He acknowledges he may
24 have felt that Stenson was being framed.

25 Mr. Lininger said that Mr. Oberman sort

1 of ruled the roost afterwards, and that the Nelsons
2 ended up living there and there was no power or
3 anything to the home.

4 Mr. Lininger said he had been to the
5 Stenson's home with Tanya Chapman for Thanksgiving,
6 he actually said probably 1993, he was not sure,
7 might have been 1992 and the like, but said that's
8 where he saw the swords and Mr. Stenson had taken
9 him to a room where the swords and antiques were.

10 Mr. Lininger's mother, and I'm assuming
11 that is who it is because she's not specifically
12 identified, interrupts during the interview and
13 talks about Tom Hines Senior (sic), the Lininger
14 brother's father, they (sic) recount a story where a
15 black car with tinted windows pulled up and a man
16 asks for Tom Senior, and then said something to the
17 effect of, quote, "tell him the F-er's dead." And
18 I'm amending that a little bit. It's not clear when
19 or what, in what terms that is meant, she did
20 however say this was about the time that Tom Senior
21 had been talking about swords and that discussion
22 was going on with Pat and Simone Nelson.

23 Again, the time this occurred is mushy
24 (sic) at best.

25 John Lininger said that he was at the

1 Stenson house a few times after the murders and said
2 all this stuff was lying around and the place had
3 been ransacked and that that Dave guy was coming
4 around and always strung out and high.

5 He said he knew Pat Nelson was a very
6 violent person. On November 24, 2008, Monday at
7 about 12:20 p.m. detectives interviewed Tanya
8 Chapman. She told them she never met Darold Stenson
9 or his wife. She testified that at Thanksgiving
10 1993 her daughter was only 2 days old and she would
11 have been at her brother's - as noted this would
12 have been after the murders - but denied ever having
13 been at the Stenson's residence. She suggested
14 Mr. Lininger perhaps had another girlfriend in mind.

15 She said about a year after the murders
16 Mr. Stenson's sister called her and said essentially
17 that he was set up. That's unclear why that
18 conversation occurred or what relationship she may
19 have had so that Mr. Stenson's sister would be
20 calling her.

21 In an investigation by defense counsel,
22 it's indicated that Robin Lininger, Tom Lininger's
23 ex-wife, said about 10 years ago that John Lininger
24 stopped by upset and started mentioning dead bodies
25 and he knew about the bodies. No further

1 information is available.

2 Each of the people named by Robert
3 Shinn have histories and would have DNA in the state
4 database. Mr. Oberman's DNA was taken in the
5 investigation and was compared to items at the scene
6 that were type tested.

7 On November 24th, yesterday, at
8 8:00 p.m., Patrick Nelson was interviewed. He
9 stated he has never met Darold Stenson. He stated
10 he and his sister moved in to the house about
11 2 years after the murders in agreement with
12 Mr. Oberman to clean up the house in exchange for
13 being allowed to live there.

14 He testified lots of people were then
15 in and out of the house, and it was a party house.

16 He indicated there were probably lots
17 of people talking and they were trying to impress
18 people, and certain names in the community he felt
19 were sort of a big deal and certain players - and he
20 mentioned name such as Ennis Caynor and Tanya
21 Chapman - were spread around.

22 It's interesting that the Tanya Chapman
23 name comes up first by Mr. Nelson in the interview.
24 I suspect, and there's some indication in the
25 interview, that he may have discussed with the

1 officer before the recording and maybe that's where
2 that name came from, it's not clear.

3 Mr. Nelson stated he did not even know
4 Ennis Caynor until much later in time.

5 Simone Nelson was also interviewed
6 about 8:00 p.m. last night, on November 24, 2008.
7 She stated she and her brother moved in the home
8 some time after the murders, perhaps as much as
9 2 years. She testified the pool was green at the
10 time.

11 David Oberman had suggested it, she had
12 known him for some time, although not sure how long
13 or where she even met him. She indicates her
14 recollection was hazy and she was doing drugs back
15 then.

16 At the time she moved in to the home
17 she was dating Tom Lininger, John's twin brother.
18 She said his father, Tom Hines, had been to the farm
19 before but she had not been to the farm before. She
20 said there were no swords or antiques there. She
21 said she lived there 2 to 3 months and moved
22 indicating the cost to heat the home was excessive
23 and more than they could afford. She moved in with
24 her brother, Patrick Nelson.

25 She said she had no knowledge of any

1 frame or cover up involving the murders.

2 The test which is before this Court is
3 either that under RCW 10.73.170(3), or the federal
4 due process test.

5 RCW 10.73 states in pertinent part:

6 "The court shall grant the motion for
7 DNA testing if it is shown a likelihood that the DNA
8 evidence would demonstrate innocence on a more
9 probable than not basis."

10 In some respects, because of the
11 preamble to the statute that can be amended to read
12 "or would affect a sentence enhancement." Here the
13 sentence enhancement is due to an aggravating factor
14 which would be a fact issue, or might be mitigation
15 which is a fact which if found by a jury would
16 result in a sentence of other than death. And the
17 jury did not find mitigating factors in this
18 instance.

19 It's less clear that the statute
20 applies to that, and there's no case law to provide
21 assistance to the Court.

22 In the federal case in Osborne, the
23 constitutional due process test was stated that;

24 "The standard of materiality applicable
25 to Osborne's claim for post-conviction access to

1 evidence is no higher than a reasonable probability
2 that, if exculpatory DNA were disclosed to Osborne,
3 he could prevail in an action for post-conviction
4 relief. Taking in to account Osborne's declared
5 intention to file a freestanding claim of innocence,
6 materiality would be established by a reasonable
7 probability that Osborne could affirmatively prove
8 that he is probably innocent."

9 In Osborne, it's interesting to note
10 that they specifically rejected a requirement that
11 there be a likelihood that the DNA evidence would in
12 fact result in the ability to establish the
13 reasonable probability, saying that that would put
14 in effect the cart before the horse.

15 But the Court needed to look more to
16 hypothetically if the evidence proved certain
17 things, would that be enough.

18 It's interesting in Osborne also noted
19 this the post-conviction access to DNA is rather new
20 and they, at the end of their opinion they write,
21 the question of whether the scope of the right of
22 post-conviction access should be broader or flexible
23 to accommodate different circumstances where the
24 materiality standard for post-conviction access to
25 everyone, prisoner's with a less compelling case

1 might also be entitled to post-conviction access.
2 All are questions we need not answer and do not
3 purport to answer in deciding this case. We leave
4 them for another day.

5 It's fairly clear then that some of
6 these issues are unresolved. Mr. Stenson seeks
7 testing of numerous items found at the crime scene,
8 and some items located at Mr. Hoerner's residence.

9 In every case DNA evidence might show:

10 1, a lack of the Defendant's DNA;

11 2, some specific persons DNA, and by

12 that I mean an additional person who might be a --

13 for want of a better term a person of interest for
14 argument purposes;

15 3, an unknown individual's DNA;

16 4, Mr. Stenson's DNA; and,

17 5th, no DNA whatsoever.

18 If Mr. Stenson's DNA is found it would
19 be potentially inculpatory and would in no case be
20 exculpatory. Therefore that would be unlikely to
21 demonstrate his innocence.

22 A lack of Mr. Stenson's DNA would
23 similarly be unlikely to demonstrate his innocence.

24 As discussed in the Riofta case, DNA is not always
25 left when one touches things and therefore its

1 absence is less compelling information than its
2 presence.

3 Unknown individuals DNA would also be
4 unhelpful to Mr. Stenson, too many people may have
5 handled the evidence and it may be difficult with
6 low touch DNA testing to determine who they might
7 have been.

8 If there is no DNA, obviously that also
9 would be unhelpful.

10 Therefore, it seems to the Court that
11 it is only if certain specified individual's DNA is
12 found that the material which the Defendant seeks to
13 test could be potentially beneficial to a
14 freestanding claim of innocence by Mr. Stenson.

15 By claim of innocence I include matters
16 that might lead to a basis to argue mitigation
17 within the statute, and that would include matters
18 which might relate not only to guilt or innocence in
19 general but also to sentence enhancements that is
20 discussed in the statute.

21 It was difficult for this Court to
22 determine to what degree that might require a
23 different showing than a showing more direct to
24 Mr. Stenson's innocence.

25 That matter is not clear, nor has it

1 been decided by the courts.

2 On Friday, November 21st, in the
3 morning Mr. Stenson could not point to anyone else
4 as a suspect except Mr. Oberman and Ms. Reed, just
5 because they happened to be at the farm at the time,
6 and Mrs. Hoerner simply because she was a spouse of
7 one of his victims. Those were surely speculative
8 matters which had frankly been argued at the time of
9 trial and rejected, and appropriately so.

10 DNA tests which were trying to search a
11 state wide database for unknown individuals would
12 likely be a fruitless request and response to
13 Mr. Stenson's concerns.

14 What has changed since Friday is that
15 there are more names and known individuals to
16 speculate about, and it is still speculation.

17 The problem for this Court has been
18 that the prior DNA testing which though ruled out at
19 trial nevertheless tied Mr. Stenson's pants, item
20 Q18, to Mr. Hoerner's blood, and especially as to
21 dripped blood.

22 Mr. Stenson said that he found
23 Mr. Hoerner's body and that perhaps while he was
24 kneeling at the body, blood transferred on to his
25 pants.

1 Expert's on spatter said no as to some
2 of that blood.

3 They testified that some of the blood
4 could only have either dripped downward on to the
5 pants and that some other of the blood was likely
6 airborne and accelerated spatter - as it's more
7 correctly determined as Mr. Stenson pulled
8 Mr. Hoerner from the driveway to the area where the
9 body was located, it was there identified that that
10 was when the blood dropped.

11 State vs. Stenson, 132 Wa. 2nd 668, a
12 1997 Supreme Court decision, in this case the Court
13 noted that the defense had conceded that the blood
14 stains on Mr. Stenson's pants, right leg, were of
15 Mr. Hoerner's blood.

16 The Court has reviewed Mr. Grubb's
17 testimony and it is unclear to me which specific
18 right leg stains were tested. Some of them had been
19 removed and tested, it's not clear whether some had
20 or had been not been removed on the right leg.

21 The Defense argued in State vs. Stenson
22 that it was the smaller stains on the left leg which
23 were the strongest evidence of Defendant's guilt,
24 and that's at page 712 of the opinion.

25 The only testimony which was allowed at

1 trial was that those particular spots or stains had
2 been presumptively tested as positive for blood
3 using a phenothaylene test and the observation of
4 the experts.

5 That testimony was allowed and the jury
6 was told it was a presumptive test only.

7 The Defense now argues that these left
8 leg spatters or drips can now be tested for DNA
9 using more modern methods.

10 At the trial, Michael Grubb, a forensic
11 expert, testified as to the blood stains, especially
12 on the right knee. He testified there were small
13 stains on the right thigh, left knee area and lower
14 leg and the left knee, appeared to be an airborne
15 droplet, as were 2 others on the lower left leg.
16 Those stains were presumptively tested as blood but
17 no DNA testing occurred.

18 As to the right knee he found 5 stains
19 soaked all the way through the denim, either dripped
20 on to the pants or contact transfers.

21 Mr. Grubb's conclusion following that
22 was that the stains came to be on the pants while
23 Mr. Hoerner was in some other position than on the
24 floor where he was found. This opinion refuted the
25 Defendant's statement as to finding Mr. Hoerner.

1 It is only if this conclusion is
2 weakened that Mr. Stenson could hope to, quote,
3 "affirmatively prove that he is probably innocence."

4 There was much other evidence,
5 circumstantial and otherwise, tying Mr. Stenson to
6 the crimes.

7 If this spatter on the left part of the
8 pants are not Mr. Hoerner's blood, the State's case
9 would be weaker. If that is the case and a person
10 of interest as suggested by the recent revelations
11 is also tied to the crime scene, the State's case
12 might be even weaker yet. I strongly suspect that
13 DNA testing will show neither. Much other evidence,
14 as I indicated, circumstance, substantial and
15 otherwise, points to the Defendant as the
16 perpetrator of these crimes.

17 Further DNA testing will, in my
18 opinion, be more likely to inculcate the Defendant
19 than exonerate him.

20 But my opinion is not the test.

21 The test is if a Defendant proves right
22 in his hopes for DNA result, would that be enough
23 for a personal restraint petition to be filed and
24 heard.

25 The test before the Court is not

1 whether or not this is likely to lead to any where,
2 but whether or not if the DNA is tested and if it
3 should come back with results as suggested by the
4 Defense, that then would there be enough to have the
5 matter heard.

6 What has changed since the trial some
7 14 years ago is the DNA testing capabilities.

8 What has changed since Friday is that
9 there are now some persons of potential interest.
10 There were none before.

11 Is that potential interest credible?
12 Probably not. But that's not the test that I
13 believe the Court must use in considering a DNA
14 discovery request.

15 The Court notes that other suspect
16 evidence relating to and pointing to another suspect
17 is admissible only "if there is a train of facts and
18 circumstances which tend clearly to point to someone
19 other than the Defendant as the guilty party." Such
20 evidence was rejected at trial.

21 There are no such facts here. As Ms.
22 Kelly notes, the hearsay statement of the recent
23 interviews are not even admissible to support a fact
24 or inference that they might stand for.

25 But the purpose of this motion is not

1 an attempt to find out whether or not the facts are
2 true as stated for hearsay, but whether or not
3 there's any evidence that might otherwise support
4 the bald allegations that have been made.

5 If there are facts which support the
6 allegations, there will need to be much more
7 research and there will need to be many more
8 motions.

9 If DNA testing does not provide any
10 additional facts, some short delay in the carrying
11 out of the sentence will likely need to occur.

12 While the current information which the
13 Court has is likely no more than drug induced
14 bravado as Mr. Nelson suggests, there are at least
15 some bits of it that peaks one's curiosity.

16 Mr. Gombiner has mentioned some of
17 those.

18 Mr. Shinn said there was 10 to \$13,000
19 cash there, at least that's what he was told. It
20 was thought that Mr. Hoerner was to bring \$10,000
21 cash on the morning he was killed. My recollection
22 was no such cash was ever on scene or found, and I
23 could be wrong but there was not sufficient time to
24 fully research that. Nonetheless, it peaks one's
25 curiosity.

1 Both Mr. Shinn in his re-telling of
2 Mr. Lininger's testimony, and Mr. Lininger, used the
3 term "ransacked," and I found that interesting in
4 that it may somewhat be a coincidental use of terms
5 or Mr. Shinn's memory of the conversation is
6 accurate. And again, his credibility is really not
7 much at issue in that there is certainly some
8 admission there was some conversations that went on.

9 Mr. Lininger's mom recalls swords and
10 the Nelsons being tied together somehow. Tanya
11 Chapman said she never went to the Stenson's, yet
12 Mr. Lininger said she did for Thanksgiving.

13 None of this is frankly compelling
14 evidence, and it might be easy to dismiss this out
15 of hand if that were the issue before the Court.
16 But this is also last minute evidence and that is
17 troubling to the Court.

18 If we were 6 months before the date of
19 execution we probably would have no problem in
20 saying let's test the DNA and see what we get.
21 There's a way to see if there is any credibility
22 whatsoever to any of these musings and that's
23 probably giving them more credit than they deserve,
24 but that method is available through DNA testing.

25 In summary, let me say this,

1 Mr. Stenson received a fair trial, numerous
2 reviewing courts have so held. He was represented
3 by capable and competent counsel, as he still is.
4 He was convicted by an able jury of his peers who
5 found no reason for mitigation of his sentence and
6 no reason to doubt his guilt. He presents no
7 evidence at this juncture which would justify a new
8 trial, or even raise a reasonable doubt about his
9 guilt.

10 What he seeks is the Court's permission
11 to attempt to get such evidence through DNA testing
12 which was not available in 1994.

13 His basis today is somewhat the
14 fanciful tale told for the first time on Friday,
15 November 21st of this year.

16 I am sceptical that anything will come
17 of his request, but now issues of delay in bringing
18 the motion and the sheer speculation of other
19 suspects which was the case on Friday has changed
20 only a bit - and only a little bit - but
21 nevertheless some change from those positions.

22 This is a death penalty case.

23 Regardless of what the parties may
24 think it is unlike any other case. Courts must and
25 should let a Defendant exhaust all possibilities

1 where possibilities exist, even if those
2 possibilities are improbable as indicated in my
3 earlier opinion.

4 The cases also hold that justice and
5 the concept of law may be damaged by delay in cases
6 such as this. The 14 years since Mr. Stenson's
7 conviction are likely evidence of that, and delay
8 being a problem, frankly, that ship has sailed years
9 ago.

10 Justice is harmed more than the delay
11 and the immediacy of punishment if no relief is
12 provided when a short delay will allow time to
13 explore new issues, even if the new issues prove to
14 be totally unfounded.

15 I will, therefore, grant the request
16 for the DNA testing.

17 The statute calls for such testing to
18 be held at the Washington State Patrol crime lab.
19 Mr. Croteau, the director, says low touch STR
20 testing is available at the crime lab. He also says
21 such testing is likely destructive.

22 I would note in federal cases which
23 were a access to evidence issue as opposed to under
24 the particular statute, private lab's were allowed
25 to test the items for mini-STR and mitochondrial

1 testing. I do not know, and the information before
2 me is not clear, as to what specifics and
3 difficulties there may be with regard to the
4 specific items sought to be tested by the Defendant.

5 The Defendant indicates that the
6 Defendant is willing to pay for such testing,
7 whether or not that would include reimbursing the
8 State for testing done at the State lab is a matter
9 which ought to be examined further.

10 I would ask the parties to resolve what
11 the State crime lab can reasonably do with the
12 evidence which is to be tested, and to the extent
13 that the State crime lab and the parties disagree as
14 to that, this matter can be heard with further
15 information before this Court.

16 Issues such as the destruction of the
17 sample and the like may need further hearings before
18 this Court.

19 I will allow the testing of the items
20 which are listed in the Defendant's list of
21 priorities with one addition, and that being the
22 bullets and casings which were found in
23 Mr. Hoerner's driveway which was indicated was left
24 off the list as an oversight.

25 The last matter relates to whether or

1 not this Court can grant a stay of execution.

2 Last Friday I ruled against further DNA
3 testing. With such ruling the Court's authority
4 ended.

5 Today I have allowed such testing.

6 It is clear if the current stay issued
7 by the federal court is removed that such testing
8 could not be conducted before the execution date of
9 Mr. Stenson.

10 It is a long held tenet of the law that
11 the courts are not required to make rulings that are
12 futile. I therefore believe that since I have
13 granted the testing of DNA I would have authority
14 under general principles to have my order have some
15 effectiveness. I can only do that in this case by
16 granting a stay of execution. If I am wrong I'm
17 certain the Supreme Court will be able to tell me
18 that quickly.

19 I would like to set some reviews on the
20 DNA discovery. As indicated, it should not take
21 more than a few months to have this matter resolved
22 and proceed. I do not want nor would the citizens
23 of this State want this matter to linger and be
24 continued longer than necessary. To make sure that
25 that last stone has been turned and parties have all

1 had a chance to look underneath it, my suggestion
2 would be that we set a first review within 60 days
3 and that the parties bring motions prior to that
4 time if there are issues related to getting the
5 materials tested.

6 I will hear discussion from the
7 parties.

8 MS. KELLY: Yes, Your Honor. One of
9 the concerns the State has, and has had, there's
10 been no showing by the Defense to the items they
11 want tested. To the extent to which those items
12 have been or may have been handled, I guess I'm
13 asking for the -- is the Court just flat out saying
14 it does not matter, they have been opened or
15 handled, the Court is granting DNA testing with
16 respect to those items?

17 THE COURT: I'm assuming that what will
18 happen in those cases is we'll either say there have
19 been so many DNA samples left on them we're unable
20 to test them appropriately and give with any
21 viability, or it will come back and say we have lots
22 of DNA and none of it matches any of the individuals
23 that frankly are of interest, or it may come back
24 and say it's impossible to DNA type it.

25 Let the State lab at this point

1 determine that on each of the items.

2 It appears to me that those -- that is
3 what is going to happen. It will either find some
4 DNA and they'll be able to tell whose or what it is,
5 or what its traits are, or it will find too much DNA
6 to be able to do anything because it was handled by
7 too many people.

8 Again, those are the sorts of issues
9 that can be resolved on the individual items once we
10 get the lab to look at them more closely.

11 MS. KELLY: Okay.

12 THE COURT: And I expect, frankly, on
13 many of these that will be the answer, that we can't
14 test it.

15 MS. KELLY: I guess I would make the
16 one suggestion to the Court. The Court, I believe
17 it is clear that the pants probably and that's
18 assuming that I've identified the pants down at the
19 Supreme Court as being Mr. Stenson's pants
20 correctly, and I believe I have, the one's that were
21 previously thought to be lost, if I understood the
22 direction of the Court's ruling, the -- if the Court
23 -- if the testing were to discover Mr. Hoerner's
24 blood with respect to the blood spatters
25 specifically on -- I'll probably get it wrong on the

1 one side of the pants, that that kind of answered
2 the Court's question frankly because of the method
3 of placement. If I am wrong, frankly my suggestion
4 would be that the Court points to do this that
5 perhaps would be the first item to be tested.

6 THE COURT: Response to that?

7 MR. GOMBINER: My only response is that
8 first up, I've tried to (inaudible) Mr. Grubb's
9 testimony, I think I had the same argument the Court
10 had. It's hard to figure out exactly what is being
11 talked about. Mr. Grubb's testimony -- I think some
12 of the items the Court -- the droplets, they're
13 pretty small, you can only see them under a
14 microscope. So what I think he -- we should do is
15 probably make arrangements to get all the items
16 tested. I'm not sure it makes sense to get just one
17 item tested, because frankly it is -- I mean, from
18 the Defense's point of view any way, I don't know
19 what the DNA -- obviously I don't know what the DNA
20 is going to show, but one of the things the Court
21 was just mentioning is the sentencing enhancements
22 thing. Even if, again, this is all sheer
23 speculation, but even if you could identify the
24 droplets and test them and they came back with
25 Mr. Hoerner's blood, it would still be worth it to

1 test the other items because there still might be
2 evidence of a perpetrator. And as the Court
3 indicated, that's possibly relevant to sentencing
4 enhancements which as the Court also indicated is an
5 unclear matter.

6 So, I guess I think we should be at
7 least testing the prioritized items.

8 THE COURT: Well, I think that's
9 probably okay. I was going to suggest that there
10 are some items which I think would be -- frankly,
11 might be conclusive if depending on the outcome and
12 that would be the firearms, the bullets, the bullets
13 in Mr. Hoerner's pants, the bullets on Mr. Hoerner's
14 driveway.

15 MR. GOMBINER: If they have
16 Mr. Stenson's DNA on them, I could see a compelling
17 argument under those circumstances. I'm sure the
18 State would enhance it (sic).

19 THE COURT: Let's test those items.

20 My concern -- I have 2. One is I don't
21 know what the cost would be or time involvement of
22 the lab, and that is something -- a factor the Court
23 should look at. On the other hand, I don't want to
24 get in a situation where we test one item and it's
25 inconclusive and we go to the other item and we're

1 talking a year down the road. I don't think that
2 benefits the citizens of this State or Mr. Stenson,
3 frankly.

4 I asked for the list, let's try and
5 test those all at once and see what those results
6 are and have further motion as to whether there's
7 any need to proceed further.

8 Mr. Gombiner has indicated if those
9 items show DNA from the Defendant, there's probably
10 not much need to go further, as well as the issue of
11 the pants, and it is frankly for want of a better
12 term the smoking gun, the compelling evidence in
13 this case, which ties Mr. Stenson in the opinion of
14 this Court irrevocably to the murders. The blood
15 spatter on his pants, certainly lots of other
16 evidence, and it was (sic) a circumstantial case but
17 the direct evidence which the Court found most
18 compelling was the pants, and the Defense noted was
19 the most damaging was the pants and the blood found
20 on it.

21 To the extent that they can be tested
22 they may, and as Mr. Gombiner notes, some can only
23 be seen with a microscope, they may not be able to
24 be tested. We'll find out.

25 In terms of setting a review date,

1 parties have any particular date in mind?

2 MS. KELLY: I think we should set dates
3 fairly expeditiously, Your Honor, because it is not
4 going to be an easy process to resolve, a lot of
5 different issues I think.

6 THE COURT: Is there a particular day
7 of the week that works for everyone on these sorts
8 of hearings?

9 MR. GOMBINER: There's no particular
10 day that's -- Friday's usually a dad day for me. If
11 it's a good day for the Court I'll make the time.

12 THE COURT: What if we set the first
13 review date on January 28th, Wednesday, I anticipate
14 frankly there will be motions heard before then, but
15 at least having some specific review date.

16 MS. KELLY: Your Honor, is there an
17 order -- I would propose that we go ahead and issue
18 an order that would give the State the opportunity
19 to seek review.

20 THE COURT: Do we have a proposed order
21 on the DNA test?

22 MR. GOMBINER: We attached one to our
23 last motion I believe.

24 MR. GOMBINER: Did the Court set a time
25 for the review hearing?

1 THE COURT: It would be at 9:00 o'clock
2 in the morning.

3 MS. MCCLOUD: Would the Court consider
4 making it 10 o'clock in the morning?

5 THE COURT: That's fine, we'll
6 accommodate travel.

7 MR. GOMBINER: We did send you a-

8 THE COURT: You did and it's probably
9 sitting on my desk. Would you grab all this kind of
10 paper that's sitting on the desk.

11 MS. MCCLOUD: It was probably attached
12 to the back.

13 MR. GOMBINER: I know it's attached to
14 the reconsideration motion, there was an order --

15 THE COURT: Counsel may want to review
16 the proposed form of the verdict.

17 Counsel, one other question I do have a
18 hearing scheduled tomorrow relating to the parties
19 allowed to witness the execution. I don't know if
20 that is going to go forward or not and I should
21 probably tell the court administrator --

22 MS. KELLY: I believe, Your Honor, it
23 should continue to go forward at this time. The
24 State will be seeking review. State is seeking to
25 dissolve the stays. It hurts nothing to go forward.

1 It's problematic if the stays are dissolved and it
2 goes forward.

3 THE COURT: You may want to draft a
4 separate order on the DNA.

5 MS. KELLY: Perhaps they can present
6 that tomorrow at the time of the --

7 THE COURT: I'll sign this one.

8 MR. GOMBINER: If we could -- I signed
9 the proposed --

10 THE COURT: Okay. Have you had a
11 chance to review the form?

12 MS. KELLY: No, I haven't.

13 MR. GOMBINER: Is there some way we
14 could possibly present the order telephonically?

15 MS. MCCLOUD: If we faxed it over.

16 MR. GOMBINER: Not that we don't love
17 going up to Clallam County.

18 THE COURT: Any objection?

19 MS. KELLY: No, Your Honor, as long as
20 Mr. Sampson (sic) from the AG's office can argue
21 telephonically tomorrow on the --

22 THE COURT: We will accommodate
23 telephonic argument in this case.

24 MS. MCCLOUD: I actually didn't know
25 that a hearing was set, can you tell me what time it

1 was set for?

2 THE COURT: 1:00 o'clock.

3 MS. MCCLOUD: Okay, thank you.

4 THE COURT: If you want to appear by
5 phone then make arrangements through the court
6 administrator.

7 MS. KELLY: So the presentation of
8 further order will be set for 1:00 o'clock tomorrow
9 at the hearing?

10 THE COURT: Yes.

11 MR. GOMBINER: All right, we'll prepare
12 an order and fax it to you today.

13 THE COURT: We are off the record.

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(Off the record)

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(Court at recess on this matter)

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