

No. 82440-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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DAROLD R. J. STENSON,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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MOTION TO DISMISS REVIEW OR, IN THE ALTERNATIVE, TO GRANT  
LEAVE PURSUANT TO RAP 7.2(e) TO TRIAL JUDGE TO  
FORMALLY ENTER ORDER

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## **I. Identity of Moving Party and Relief Requested**

Appellant Darold Stenson moves this Court to dismiss review of the Clallam County Superior Court's November 21, 2008 ruling, or, in the alternative, to grant leave pursuant to Rule of Appellate Procedure 7.2(e) to the trial judge, Clallam County Superior Court Judge Ken Williams, to formally enter an order embodying its oral ruling of November 25, 2008, granting DNA testing under RCW 10.73.170 of certain items of crime scene evidence relevant to the murders for which Mr. Stenson has been condemned to death.

## **II. Facts Relevant to Motion**

On November 21, 2008, Judge Ken Williams denied Petitioner Darold Stenson's motion pursuant to RCW 10.73.170 for DNA testing and motion for a stay of execution. Central to the state's argument against the motion for DNA testing and to Judge Williams's ruling was the belief that the presence of an unknown person's DNA on the objects Mr. Stenson sought to have tested would not be informative. *See, e.g.*, 11/21/08 Report of Proceedings at 43.<sup>1</sup>

Mr. Stenson was scheduled to be executed on December 3, 2008, five judicial days hence. Mr. Stenson's counsel, accordingly, immediately filed a notice of appeal from the ruling denying both the motion for DNA testing and the motion for a stay of execution.

An extraordinary, and unforeseeable, series of events then took place. In the afternoon of November 21, after the hearing and after the notice of appeal had been filed,

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<sup>1</sup> This transcript has not yet been filed. A copy was attached as Exhibit B to the State's RAP 8.3(b) Motion to Vacate Stay of Execution and Motion for Accelerated Review of RAP 8.3(b) Motion to Vacate Stay of Execution filed November 26, 2008.

an individual named Robert Shinn advised his community corrections officer that he had learned on the news that Mr. Stenson was about to be executed and that he had information about Mr. Stenson's innocence. Shortly thereafter, Mr. Shinn was questioned at length by the Clallam County Prosecuting Attorney, Deborah Kelly, and a Clallam County sheriff. Mr. Shinn described a conversation he had with John Lininger some eight years earlier in which Mr. Lininger told Mr. Shinn that Mr. Stenson was innocent and that Mr. Lininger, together with five other people, had been involved in an effort to steal possessions of Mr. Stenson, including valuable swords, and that the murders had occurred during an attempt to steal the items. According to Mr. Shinn, Mr. Lininger named Tom Lininger (his brother), Patrick Nelson, Simone Nelson, Tanya Chapman, and Ennis Caynor as those involved. Mr. Lininger, according to Mr. Shinn, said that Patrick Nelson was the person who wanted the swords. Mr. Shinn had never told any one in law enforcement about this conversation, and he was an individual completely unknown to the defense. He told the police that he had never met Mr. Stenson and he did not ask for anything in return for his information.

The Clallam County Prosecuting Attorney sent an email and an audio file of this interview to Mr. Stenson's lawyers later that day. Mr. Stenson's defense team and the prosecution and police began investigations into Mr. Shinn's statement. Over the weekend, much of the information in Mr. Shinn's statement was corroborated. Of particular significance, the police located John Lininger, and Mr. Lininger gave a tape-recorded statement to law enforcement. Mr. Lininger denied participating in the murders, but admitted to speaking with Mr. Shinn about them. He admitted to knowing the other persons named by Mr. Shinn. He also stated that he had been at Mr. Stenson's house

prior to the murders and viewed Mr. Stenson's weapon collection. He confirmed that Tanya Chapman had also been at Mr. Stenson's house prior to the murders. Mr. Lininger not only admitted to being well acquainted with Patrick Nelson, but opined that Mr. Nelson was an extremely violent individual who was capable of the murders. He told the police that Mr. Nelson had lived at the Stensons' home at some time after the murders. The defense located Tom Lininger's ex-wife, Robin Lininger, who told a defense investigator and lawyer that the first time she met John Lininger he started talking about "dead bodies."

Based on this and other developing information, defense counsel contacted Judge Williams and requested an emergency reconsideration hearing. Judge Williams agreed to have a hearing on Monday, November 24.

Because of the flood of new information, including more statements that were provided to the court at the start of the hearing on Monday, the court was unable to issue a decision on Monday and continued the matter until the following day, Tuesday, November 25. By the time of that hearing, the Court had received a great deal of evidence, including the tape-recorded statements of John Lininger, Tanya Chapman, Patrick Nelson, and Simone Nelson, an offer of proof from federal public defender attorney Chris Kerkering regarding his investigation for Mr. Stenson the previous weekend, and the lengthy police records for all of the individuals named in Mr. Shinn's statement. Judge Williams, who presided over Mr. Stenson's trial, also reviewed his trial notes and heard extensive arguments from both parties. In a ruling that occupies 25 pages of transcript, Judge Williams granted Mr. Stenson's motion to reconsider the

November 21 ruling, and granted both Mr. Stenson's motion for DNA testing and his motion for a stay of execution. *See* 11/25/08 Transcript (Attachment A).

After issuing this ruling, Judge Williams signed a written order granting the stay of execution. The next day, November 26, the parties had a telephone conference with Judge Williams and discussed a written order for Judge Williams to sign regarding the granting of the motion for DNA testing. Because the state wanted clarification on some aspects of the order, Judge Williams asked the parties to confer and to present another order on Monday, December 1, 2008. Petitioner anticipates that this order will be signed on Monday.

### **III. Argument Supporting Motion**

Judge Williams's decision on reconsideration obviously supersedes and negates his November 21, 2008 decision and Petitioner's appeal from that decision. It renders the first decision moot and review of it pointless. Once entered, it will quite plainly change the ruling under review in this decision, and therefore, in order for the Superior Court to enter it requires leave of this Court. *See* RAP 7.2(e).

Mr. Stenson therefore moves for an order dismissing the appeal filed on November 21, 2008, or, in the alternative, an order granting permission of this Court for Judge Williams to formally enter the order he has orally issued and is expected to sign on Monday. *See* RAP 7.2(e) and 18.2. A written consent to dismiss the appeal signed by Mr. Stenson is attached (Attachment B).

Neither RAP 7.2(e) nor RAP 18.2 sets forth what a party must show in order to obtain permission for entry of an order, under RAP 7.2(e), or dismissal of an appeal, under RAP 18.2. The rules do not articulate a party's burden of proof or any other

standard. RAP 1.2, however, provides the necessary guidance, as that rule instructs that the rules of appellate procedure “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands . . .” RAP 1.2(a).

Here, RAP 1.2 and principles of equity and justice require this Court to allow for Judge Williams to formally enter his order granting DNA testing – whether by dismissing Mr. Stenson’s appeal or by giving Judge Williams leave to enter the order. When Mr. Stenson filed his notice of appeal, he was faced with a looming execution date and no way in which to predict the turn of events. He acted promptly and in good faith in filing the appeal and equally promptly in seeking reconsideration and dismissal of the appeal in light of the extraordinary and unpredictable events that followed it.

Moreover, the state will not suffer any unfair prejudice from an order dismissing the appeal or from an order allowing Judge Williams to formally enter the ruling he has already made, reversing his November 21 decision. As the state noted in reply to Mr. Stenson’s preliminary opposition to accelerated review of the RAP 8.3 motion, the state may file a notice of appeal until December 20, 2008. *See Reply to Response in Opposition to State’s Motion for Accelerated Review* at 2, n.1. The state has not relied in any way to its detriment on Mr. Stenson’s notice of appeal, and the state can have no legitimate interest in interposing procedural barriers that would prevent Judge Williams’s ruling on this grave matter from formally taking effect, or that would keep this Court from fully and fairly reviewing the ruling.

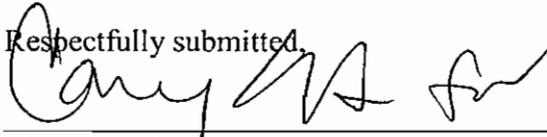
Perhaps most importantly, allowing for the formal entry of the order is justified because it will begin the process of DNA testing authorized by statute, in a case where the trial judge who has lived with this case for 14 years has found that new evidence raises a question about whether a condemned man, who has always protested his innocence, has been wrongly convicted and sentenced to death. The DNA testing also could provide more evidence that Patrick Nelson, Simone Nelson, Ennis Caynor, Tanya Chapman, John Lininger, and Tom Lininger were actually responsible for the murders for which Mr. Stenson is scheduled to die and have escaped punishment for it by framing Mr. Stenson.

If Judge Williams were not allowed to rule, there would be serious constitutional issues raised. This Court should interpret its rules and statutes to avoid such constitutional questions. *Hauser v. Arness*, 44 Wn.2d 358, 369, 267 P.2d 691 (1954). Because RCW 10.73.170 creates a right to DNA testing under certain conditions, and a judge has found Mr. Stenson has satisfied those conditions, the due process guarantees of the Fourteenth Amendment and Article I, § 3 of the state constitution attach to this statutorily-created right. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974); *Walker v. Deeds*, 50 F.3d 670, 673 (9th Cir. 1995); *Ballard v. Estelle*, 937 F.2d 453 (9th Cir. 1991); *Indeterminate Sentence Review Board v. Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994).

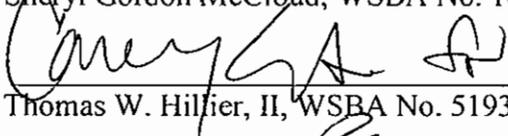
For the foregoing reasons, Petitioner respectfully requests this Court grant his motion to dismiss the appeal or, in the alternative, grant Judge Williams leave to formally enter his order granting the motion for DNA testing.

DATED this 30th day of November, 2008.

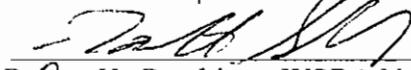
Respectfully submitted,



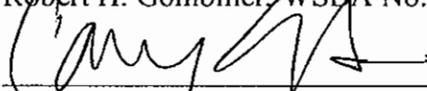
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# **ATTACHMENT A**

1           IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2                    IN AND FOR THE COUNTY OF CLALLAM  
3           STATE OF WASHINGTON,                   )  
4                    Plaintiff,                    )  
5           vs.   ) No. 93-1-00039-1  
6           DAROLD STENSON,                        )  
7                    Defendant.                    )  
8           \_\_\_\_\_ )

COPY

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

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1 INDEX

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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 shear  
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. MCCLLOUD: 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. MCCLLOUD: 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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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

# **ATTACHMENT B**

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, ) CAUSE NO. 82440-1  
Plaintiff )  
 )  
V. ) MOTION FOR VOLUNTARY  
 ) WITHDRAWAL OF REVIEW  
 )  
DAROLD J. STENSON, )  
Defendant. )  
\_\_\_\_\_ )

**I. Identity of Movant**

I, Darold J. Stenson, am the defendant in Clallam County  
Cause No. 93-1-00039-1.

**II. Relief Requested**

I filed a notice of appeal from the Superior Court's November  
21, 2008 order denying my motion for DNA testing and for a stay of  
execution. I hereby move to withdraw my notice of appeal regarding  
that order.

DATED this 25th day of November, 2008.

  
Darold J. Stenson