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STATE OF WASHINGTON

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SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

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CLALLAM COUNTY
APR 16 2010
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BARBARA CHRISTENSEN, Clerk

3
4 IN RE THE PERSONAL RESTRAINT)
PETITION OF:)

5 DAROLD RAY STENSON,)

6 Petitioner,)

7 -----)
8 IN RE THE PERSONAL RESTRAINT,)
PETITION OF:)

9 DAROLD RAY STENSON,)

10 Petitioner)
11 -----)

Supreme Court No. ~~83130-1~~
Clallam County No. 93-1-00039-1

Supreme Court No. 83606-0
Clallam County No. 93-1-00039-1

REFERENCE HEARING
FINDINGS AND CONCLUSIONS

12
13 PROCEDURAL HISTORY

14 This matter was remanded to this court for a reference hearing.

15 Following that hearing this court makes the following FINDINGS OF FACT
16 and CONCLUSIONS RE REFERENCE HEARING:

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18 1. Darold Stenson was convicted of two counts of Aggravated First Degree
19 Murder for the March 26, 1993, shooting deaths of his wife and business partner. The
20 State sought the death penalty. Mr. Fred Leatherman and Mr. David Neupert were
21 defense counsel. The Prosecutor was Mr. David Bruneau.

22
23 2. Prior to trial there were numerous hearings and discovery orders entered.
24 On June 4, 1993, the trial court entered an Omnibus Order compelling the State to
25 provide the defense with all evidence "favorable to the defense on the issue of guilt and
26 to provide the defense with the name of every expert witness and a copy of that
27 witness's report." (Reference hearing Ex. 11) On October 8, 1993, another discovery
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SCANNED-29

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order – the Reciprocal Order – was entered. (Reference hearing Ex. 10) The Reciprocal Order compelled the State to provide the defense with “reports, letters and conclusions prepared by or on behalf of lab or other forensic experts.”

3. Trial commenced with motions on June 6, 1994. Jury selection took place from June 13, 1994, through July 14, 1994. The presentation of testimony began on July 18, 1994 and ended on August 13, 1994. Mr. Stenson was found guilty. A special sentencing hearing was held on August 15 through August 19, 1994. The jury found an absence of mitigation. Mr. Stenson was sentenced to death.

4. Mr. Stenson’s conviction was appealed to the Washington State Supreme Court and affirmed at 132 Wn. 2d 668, 940 P. 2d 1239 (1997). Four subsequent Personal Restraint Petitions were filed and rejected by the Court.

5. Mr. Ron Ness and Ms. Judith Mandell were appointed on behalf of Mr. Stenson to file an initial Personal Restraint Petition. In 2001 Robert Gombiner and Sheryl McCloud, Mr. Stenson’s current counsel, were appointed on his behalf.

6. On May 26, 2009, Mr. Stenson filed a Personal Restraint Petition on his own behalf with the Washington State Supreme Court. (PRP No. 5.) On August 6, 2009, Mr. Gombiner and Ms. McCloud filed a motion in the Clallam County Superior Court for either a new trial or vacation of the sentence of death. That matter was referred to the Washington State Supreme Court, and is Personal Restraint Petition No. 6.

7. On December 8, 2009, the Washington State Supreme Court directed a reference hearing on specific questions relating to two matters which are claimed to be newly discovered evidence. These are the bench notes and data from the FBI lab, and

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2 photographs (the Englert photos) showing Mr. Stenson's pants being handled by an
3 ungloved law enforcement officer, with the pockets turned inside out, six days prior to
4 the pockets being sampled for gunshot residue.

5 8. This court held a reference hearing beginning on the 8th of March, 2010,
6 which concluded on the 18th of March, 2010, after eight days of testimony.

7 9. The Washington State Supreme Court has requested answers to the
8 following questions:
9

10 "Whether the photographs and FBI file satisfy each factor of the five-part
11 "newly discovered evidence" test. See *In re Personal Restraint of Stenson*, 153 Wn. 2d
12 137, 144, 102 P. 3d 151 (2004). These factors are whether the evidence (the
13 photographs and the FBI file):

- 14 (a) will probably change the result of the trial or proceedings,
15 (b) was discovered since the trial or proceedings,
16 (c) could not have been discovered before the trial or proceedings by the
17 exercise of due diligence,
18 (d) is material, and
19 (e) is not merely cumulative or impeaching.

20 *Id.* (quoting *In re Pers. Restraint of Brown*, 143 Wn. 2d 431, 453, 21 P. 3d 687
21 (2001) (quoting *State v. Williams*, 96 Wn. 2d 215, 222-23, 634 P. 2d 868 (1981)).

22 In addition, the trial court shall determine whether:

- 23 (1) Stenson acted with reasonable diligence in discovering the photographs
24 and the FBI file, see RCW 10.73.100(1),
25 (2) Stenson acted with reasonable diligence in filing the 'Personal Restraint
26 Petition' (No. 83130-1),
27 (3) Stenson's counsel acted with reasonable diligence in discovering the
28 photographs and the FBI file, see *Id.*, and
29 (4) Stenson's counsel acted with reasonable diligence in filing 'Petitioner
Darold Stenson's Motion to Vacate Conviction or Alternatively Vacate
Sentence of Death Pursuant to CrR 7.8(b),' later accepted by this court
for consideration as a Personal Restraint Petition (No. 83606-0), see
Order 569/113 (Oct. 1, 2009)."

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GUNSHOT RESIDUE (GSR)

10. The issues raised involve gunshot residue (GSR). Gunshot residue is only created during the discharge of a firearm. As the primer in a firearm ignites it creates a cloud and within the cloud are spherical particles which contain antimony, barium and lead. These are quite small, and are easily transmitted from one object to another. They are small enough to be able to "float" in the air. They are not visible without magnification. Special Agent Ernest R. Peele of the FBI testified at trial that gunshot residue was found in Mr. Stenson's right, front pocket. Special Agent Peele assumed the dab sampling test was done on the pockets during the early stages of the investigation before everything was handled or "fooled with" (Reference Hearing exhibit 14.) In actuality the dabs had only been taken at late stages of the investigation and more than one year after the pants were seized and after the pants had traveled to the FBI laboratory in the Hoover Building in Washington D.C., to the Intermountain Laboratory in Portland, Oregon, and to other places.

11. In 2005 it was learned the Hoover Building, which contained two shooting ranges, was itself contaminated with GSR.

12. Lead Detective Monty Martin testified at trial that he took the dab samples used for the gunshot residue test.

Question: "You mean you turned the pockets inside out?"

Answer: "Yes, sir."

Question: "All right. Then took those dabbings?"

Answer: "Yes, I did."

Question: "When did you do that?"

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Answer: "I did that on April 20, 1994, at 10:41 in the morning." (RP 102-103)

13. The answers of Special Agent Peele at trial included the following (RP 671):

"The particles there are not removed if nothing is physically done to the surface. Or in this case, let's say the interior of the pocket. If things come in contact with the interior of the pocket (sic), things are removed from the interior of the pocket, then the potential for removing particles comes into play. Potential for adding contamination comes into play."

interior "So depending on what's being done and what happens to the interior of that pocket, if nothing happens to the interior of the pocket then nothing is disturbed."

"If the interior of the pocket is used for everything (sic), then something can happen to the particles, taking away or adding."

14. Detective Martin was present when Special Agent Peele testified in 1994.

15. There is no dispute that the right front pants pocket of Mr. Stenson contained a few particles of gunshot residue. Unless a massive amount of GSR is found the number of particles is of relative insignificance. A small amount only has meaning because particles are in fact present. A finding of small amounts may suggest contamination of the sort discussed by Special Agent Peele or may merely be limited through the nature of the sampling technique used.

16. The finding of GSR within a pants pocket reasonably leads to a conclusion that something containing gunshot residue went into the pocket. The first two items that inferentially jump to mind are a firearm or a hand after it has fired a

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firearm. Those inferences change dramatically if the pocket has been turned inside out prior to sampling. The potential sources of contamination broaden considerably.

17. Dr. Jean Arvisu, an expert in quality assurance for testing laboratories, testified at the reference hearing. She opined that under the circumstances now known there would be no validity to the GSR results to any reasonable degree of scientific certainty. She testified our ability to detect GSR exceeds our ability to ascribe significance to the finding. Finding GSR on clothing is especially problematic. She testified that the FBI lab's own contamination of evidence with GSR was first disclosed in a 2005 FBI symposia. The lab problems were not known at the time of the Stenson trial. Dr. Arvisu testified that although Special Agent Peele's testimony was accurate it was so narrowly focused that it didn't adequately address sources of uncertainty. She testified that if dabs were taken from outside of the pockets there would be more concern of contamination than if taken from the inside. She stated: "Seeing the pockets turned out drives me crazy." She testified that collectively Special Agent Peele's answers were very misleading because they implied that the "shooting incidents" in his testimony were the shootings at issue in the trial, when any "shooting environment" would have been enough to account for the GSR found. A "shooting environment" for GSR purposes could include even a home where firearms are merely stored. Dr. Arvisu testified that in light of the Englert photos the presence of GSR "in" Mr. Stenson's pocket does not lead to any reasonable conclusion as to how it might have gotten there.

BRADY ISSUES:

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2 The State argues that the two items of evidence at issue were in existence prior
3 to the initial trial of Mr. Stenson, and were available defense counsel both then and
4 subsequently. The defense argues that Mr. Stenson's defense and post-conviction
5 counsel acted diligently but nevertheless did not learn the truth "because they relied in
6 good (albeit misplaced) faith on the State's assertions that it was turning over all Brady
7 evidence and forensic results and because an unusual sequence of events operated to
8 cloud the truth." (Petitioner's trial brief, page 2, lines 3 - 5.)
9

10 Petitioner's Post-hearing Brief discusses Brady (*Brady vs. Maryland*, 373 U.S.
11 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)) and subsequent cases and states: "Those
12 cases and their progeny hold that when the state puts on false evidence and makes false
13 and misleading arguments to a jury, a new trial is required if any "reasonable
14 likelihood: exists that the misconduct affected the verdict." (Petitioners Post-hearing
15 Brief, pg. 2, lines 8-10)
16

17 18. This court's ability to act in a case that is pending at an appellate court is
18 limited. The questions sent to the undersigned by the Washington State Supreme Court
19 do not include a request to determine whether or not Brady violations occurred. This
20 court will therefore not attempt to determine that issue. Nor will this court apply the
21 "reasonable likelihood" standard used in cases where a new trial is requested under
22 Brady analysis. The requirements of Brady , however, also relate to discovery
23 obligations and may therefore be relevant to the question of whether or not defense
24 counsel and/or Mr. Stenson acted with due diligence under the circumstances. Brady
25 requires a prosecutor to disclose all evidence in his or her possession that might be
26 favorable to the defense. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held
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1 that a prosecutor has a duty to disclose exculpatory material even in the absence of a
2 request by defense. The duty to disclose may extend to those working on the
3 prosecutors behalf, including law enforcement officers. *State v. Lord*, 161 Wn. 2d 276,
4 292, (2007) A prosecutor may even have a duty to learn of any exculpatory evidence
5 known to those acting on the State's behalf. *Kyles v. Whitley*, 514 U.S. 419, 436-438,
6 (1995)
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10 HOW DEFENSE OBTAINED THE FBI FILES AND ENGLERT PHOTOS

11 19. Defense counsel Robert Gombiner testified that on the 26th of November
12 and again on the 3rd of December 2008, he received letters relating to comparative
13 bullet lead analysis. The latter letter stated that Special Agent Peele who had testified
14 about bullet lead analysis at the Stenson trial had exceeded the scope of what the
15 evidence could have shown. The bullet lead testimony was of virtually no significance
16 in Mr. Stenson's case. Nevertheless, defense counsel determined they should look
17 closer at all of Special Agent Peele's testimony.
18

19 20. After the November 26, 2008 letter, the defense decided to re-
20 interview a number of people. The interviews were not focused solely on GSR issues or
21 Special Agent Peele's testimony. The defense at that time also had information about
22 specific other potential suspects based on a report made to law enforcement in 2008 by
23 Mr. Robert Shinn. A stay of execution was in place. However, counsel felt the stay
24 was precarious and so defense "were throwing out as wide a net as they could" to be
25 able to present an "actual innocence" claim. They primarily wanted to re-interview
26 anyone who had worked on the blood spatter evidence. Mr. Englert was therefore
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2 contacted and his file examined. The photos from Mr. Englert's file were received by
3 defense on January 7, 2009.

4 21. The Defense also requested more information from the FBI on all testing
5 involved in the case and in January, 2009, asked Clallam County Prosecuting Attorney
6 Deborah Kelly to help get the FBI files. Sergeant Martin requested the FBI file on
7 March 17, 2009 (Reference Hearing Exhibit 7). The FBI provided the file to Sergeant
8 Martin on May 15, 2009, and on May 21, 2009, the files were provided to Mr.
9 Stenson's attorneys. Mr. Stenson was personally informed of the material contained in
10 the FBI file shortly thereafter.
11

12 22. The lab notes indicate that Kathy Lundy, not Agent Peele, had actually
13 performed the testing for GSR and that only four grains of GSR had been found after a
14 series of examinations. (Dr. Arvisu believes the data supports only two grains.) To
15 further investigate the significance of this information defense counsel contacted Dr.
16 Arvisu. She was also provided the Englert photos (Reference Hearing Exhibit 4).
17

18 23. The evidence contained in the FBI file and in the Englert photos as they
19 relate to GSR were discovered by chance.
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21 **THE FBI LAB MATERIALS:**

22 24. The State hired Mr. Rod Englert as a blood spatter expert. Detective
23 Monty Martin took Mr. Stenson's pants to Mr. Englert on the 14th of April, 1994. Mr.
24 Englert suggested to Detective Martin that Mr. Stenson's pants pockets be tested for
25 GSR. The pants pockets were turned out that day to look for blood evidence. On a
26 drawing of the pants, (Reference Hearing Exhibit 68) Mr. Englert's handwritten notes
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2 state : "check pockets for GSR" with arrows towards the pants pockets .There is a note
3 slightly underneath that suggestion stating: "nothing visible." This does not mean that
4 the pockets were checked for GSR on April 14, 1994. Mr. Englert's testimony at the
5 reference hearing was that the pockets were checked for blood smear. The "check
6 pockets for GSR" was only a suggestion for future examination and the "nothing
7 visible" which is separated a bit and written with a lighter pressure likely refers to the
8 lack of any blood stains or spatter on the left thigh area of the pants which is where the
9 notation has been written on the drawing.
10

11 25. On April 20, 1994, in Detective Martin's garage, GSR sampling dabs of
12 the pants pockets were taken as well as luminal testing of the pants. The pants pockets
13 were again turned inside out. Debris from the pockets was separately packaged on
14 April 20, 1994. (One wonders what debris there could have been since the pockets had
15 been turned inside out six days earlier.) The dab samples were then sent to the FBI.
16 Special Agent Peele issued his two page report on the 13th of June, 1994. (Ex. 17) This
17 report was received by the defense on June 20, 1994. At the time of receipt of the GSR
18 report trial had already commenced and jury selection was well underway. At that time
19 the defense was dealing primarily with other forensics issues, particularly blood spatter
20 issues which also arose near the trial date. The blood spatter issues were the subject of
21 a request for a trial continuance and/or dismissal which was hotly contested due to the
22 lateness of the issue being raised.
23

24 26. Special Agent Peele testified that he believes he would have brought the
25 entire FBI lab file with him at the time of testimony. The trial transcript indicates he
26 had an illustrative exhibit with him showing a cloud around a discharging gun which
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1 indicates he brought supporting material to trial. If it was present, the file would have
2 been available for review at that time by either the State or the defense. Prior to that
3 time, the FBI would only have released the file to the Prosecuting Attorney and the FBI
4 policy would be to have provided the entire file only if it was asked for.
5

6 27. As might be expected memories have faded or disappeared over the 16
7 years since trial. For example, defense investigator Jeff Walker has no present
8 recollections of any of the events in this case. Prosecuting attorney David Bruneau says
9 he has some vivid recollections but has many areas without recollection or recall.
10 Detective Sergeant Monty Martin has vivid memories which he now realizes are
11 incorrect. Accordingly there is some difficulty in piecing together precisely what may
12 have occurred at some of the earlier times for which inquiry needs to be made.
13

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15 **ANSWERS TO THE COURT'S QUESTIONS RE "NEWLY DISCOVERED**
16 **EVIDENCE":**
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18 **I. THE FBI FILES**

19 As to the FBI files this court provides the following answers to the questions
20 raised:

21 **(a) Will the evidence probably change the result of the trial or**
22 **proceedings?**

23 28. Mr. Walker, the defense investigator, talked to Special Agent Peele on
24 July 20, 1994, prior to the testimony on GSR, and issued a report to the defense
25 attorneys. (Reference Hearing exhibit 14) In that report he indicates that Special Agent
26 Peele told him that the testing by the FBI was qualitative not quantitative. He was told
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that the amount of GSR found would be insignificant beyond the fact that some GSR was found where it was found. Mr Walker was informed that issues of potential contamination were important to address. Mr. Leatherman indicated that the testimony of Agent Peele raised no red flags or significant issues with him. He believed that the FBI had in fact found some gunshot residue in Mr. Stenson's right front pants pocket. There is no reason to doubt that finding today. Mr. Leatherman believed that the testimony would indicate a number of inferences could be drawn from that testimony but that they would be limited. Appropriate attempts to limit the impact of the testimony were made at trial.

29. The present significance of the undisclosed FBI bench notes as they relate to GSR seems minimal. It is difficult to see how accurate testimony regarding which person performed the testing would have any direct significance to the result of the testing without some additional indication of testing protocol violation or incompetence. Nor does the actual number of particles of GSR found appear overly significant. All parties at trial were aware at the time that the test was qualitative rather than quantitative and were aware that some particles of GSR had been found. It is the finding of GSR that was significant not the quantitative amount which had been located.

The Petitioner argues that if the FBI lab files had been disclosed, either as required by discovery orders or under Brady, that such disclosure would have allowed impeachment of the State's inculpatory GSR evidence and undermined the State's argument that the forensics and law enforcement investigation were of the highest quality and any argument otherwise would be desperate speculation.

CONCLUSION:

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By itself the information in the FBI file would not likely have changed the court's allowance of the GSR test results nor precluded argument that the results could be deemed inculpatory. Accordingly, the Court finds that had the FBI file and the material contained within the FBI file been known at trial that information alone would have not "probably changed the result of the trial or proceeding."

(b) Was the evidence discovered since the trial and proceedings?

CONCLUSION:

Other than FBI personnel it appears that neither the State nor the defense had seen the full FBI lab file until the year 2009, long after the trial had been completed. To the extent the contamination of the Hoover Building with GSR is a factor that fact was also unknown at time of trial. The answer therefore is "yes."

(c) Could the evidence have been discovered before the trial or proceedings by the exercise of due diligence?

30. Mr. Leatherman testified that he was aware that he did not have the FBI bench notes. At the time he did not believe that was of any significance and he believed that issues relating to potential contamination could be raised to rebut the inferences which rose from finding GSR in Mr. Stenson's pockets.

31. The Court had issued various orders and certain representations had been made as to discovery. At the hearing on the motion to continue and/or dismiss, Prosecuting Attorney Bruneau promised that the defense would have all of the various expert and crime lab materials and bench notes and the names of all of the investigators.

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This did not occur. A question is raised whether or not the defense was entitled to rely on those representations and would therefore be excused from further efforts in discovering the materials. This is where the implications of Brady come into play. Brady requires disclosure of potentially exculpatory evidence under certain circumstances whether requested by defense or not. This may include evidence which is impeaching in character as well. *United States v. Bagley*, 473 U.S. 667, 677 (1985)

32. Black's Law Dictionary defines "due diligence" as "such a measure of prudence, activity, or assiduity as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." (*Black's Law Dictionary*, Revised Fourth Edition, West Publishing Company (1968))

In some respects the State seems to argue for the proposition that the standard of due diligence is one of perfection. In other words, if something could possibly have been done to acquire the information, such as a Freedom of Information Act request or the like, and was not done, that such constitutes a failure of due diligence. Neither the author, nor likely any reader of this opinion could ever meet that standard. Reasonableness for purposes of due diligence presumes consideration of all of the circumstances under which the action was being taken.

33. Here there were different circumstances at each of the levels the Court is asked to inquire about. First, the GSR issue literally came up at the last minute. The defendant was in trial already and that circumstance is difficult to ignore. Investigation on GSR issues continued well into the presentation of testimony at trial. At the same

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time the defense was dealing primarily with other forensics issues, particularly the blood spatter issue which also arose only near the actual trial date itself and which became the subject of a heated motion for a trial continuance or dismissal. Mr. David Neupert, defendant's second chair trial counsel testified that the FBI report made it clear that attacking the methods of testing for GSR would not be fruitful. This Court finds it hard to fault the actions of defense counsel who at the time rightfully concluded that the FBI lab results would not likely be successfully challenged and that the defense should prioritize its efforts in areas more likely to be productive. All parties knew the bench notes existed. The bench notes well may have been literally in front of all the parties at the time of trial. Neither party apparently believed there was anything worth looking at in the FBI file. If, however, the material contained exculpatory or impeaching matter it should have been provided to defense counsel under Brady. Defense counsel had a right to rely on that requirement as well as its own reasonable assessment of need to further inquiry into the file and therefore had no duty to pursue further discovery when no materiality appeared likely.

CONCLUSION:

Simply put, if the test of due diligence is one of reason, and if there is no reason to seek, can there be a duty to nevertheless find? This court answers that question: "no." Therefore the court finds there was no lack of due diligence by defense trial counsel or defense counsel on subsequent PRPs in failing to discover the full FBI file material.

(d) Is the evidence material?

34. The material contained in the FBI bench notes was material to issues at trial. However, everyone at trial assumed that the FBI did a competent test. It did.

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Everyone assumed that the FBI found GSR particles in the pants pocket. It did.
Everyone assumed that the amount of GSR was at the low end in terms of quantity. It was. Nothing contained in the FBI file would appear to change those conclusions which were testified to at trial. As Dr. Arvisu noted, Special Agent Peele's testimony was accurate, although potentially misleading. Nothing in the FBI lab file would have pointed to the potentially misleading characteristics of Special Agent Peele's testimony. The only potentially material aspect of the FBI notes is whether or not the testimony itself would have been allowed at all as to findings of GSR when the technician who did the examination was not at trial to testify as to the results she received, or whether the file contained potentially impeaching material.

CONCLUSION:

The answer to this question is that the FBI file contained very little new information that was directly material to the GSR issue.

(e) Is the evidence not merely cumulative or impeaching?

CONCLUSION:

With the possible exception of having the wrong witness identify the results of the tests, the material contained in the FBI file as it relates to GSR would be either for purposes of impeachment (Special Agent Peele's credibility in testifying as he did) or would be merely cumulative information. As to the amount of GSR found the information would only have been more accurate than the generalized "small amount" which the parties believed had been found. The answer here is that the evidence in the FBI file is no more than impeachment or cumulative information.

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The court therefore finds that neither the circumstances of discovery nor the contents of the FBI files satisfy every factor of the five part "newly discovered evidence" test.

II. THE ENGLERT PHOTOS:

The court answers the questions submitted as they relate to the Englert photographs as follows:

(a) Will the evidence probably change the result of the trial or proceedings?

35. Prior to the discovery of the pictures of Detective Martin wearing the pants ungloved with the pockets having been turned out, it would have been difficult to argue that GSR contamination of the pocket more likely occurred than not. As Special Agent Peele noted, something had to go into the pocket. GSR would not likely fall from the sky into a pants pocket. The most reasonable inference would be either a firearm, or a hand which had recently fired a firearm, went into the pocket. That would also likely be Mr. Stenson, because they were his pants. Contamination would only be a potential explanation, but not a likely one. The picture, however, shows that prior to the GSR sampling the pocket came out. It came out at a place where the pants and the jacket of a shooting victim (Mr. Hoerner) had been examined and where one examiner was ungloved. Dr. Arvisu stated that these circumstances, alone or coupled with the other known circumstances of potential contamination is such as to make finding gunshot residue in the pants pocket meaningless from any scientifically valid standpoint. Had the ungloved handling and the turning out of the pockets been known

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2 to the trial court and an appropriate objection made, the GSR testimony would have
3 been excluded. Attorney Fred Leatherman testified at the reference hearing that had he
4 seen the photo he would have made a motion to exclude the GSR testimony. Because
5 the GSR testimony was one of only two pieces of evidence from which inferences
6 directly tying the defendant to the shootings themselves could reasonably be drawn,
7 (the other being blood spatter) it would be hard to say that an error in admitting the
8 GSR testimony would have been harmless. That question, however, is not a question
9 raised in these proceedings.
10

11 36. The fact that GSR was found in Mr. Stenson's right front pants pocket
12 would not be admitted as evidence against him if the matter were tried today. The
13 Englert photos are the compelling reason for such an evidentiary ruling. A
14 memorandum to the first PRP attorneys from investigator Ron Bright (Exhibit 83)
15 states: "We need to hire an expert to look into GSR as that was one of the nails in his
16 coffin."
17

18 37. However there was other evidence against the defendant. The case was
19 largely circumstantial. In the "Respondent State's Prehearing Memorandum" beginning
20 at line 11 on page 10 and continuing through page 16, the State summarizes the general
21 nature of testimony which was provided at Mr. Stenson's trial. The court will not
22 attempt to summarize the 1994 trial here.
23

24 38. In "Petitioner's Post-hearing Brief" at page 9, Petitioner states: "The
25 nonforensic evidence, including testimony regarding finances, insurance policies,
26 demeanor, and Stenson's own statements, was at best ambiguous. Most of the forensic
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evidence had little or no inculpatory value (fingerprints, blood on wall, bullet lead analysis, gunshot residue from Stenson’s hand).” This is correct as well.

39. Nevertheless, the State’s case presented motive and opportunity which implicated the defendant. The most significant evidence was testimony as to blood spatter. Blood spatter found on Mr. Stenson’s pants came from the blood of Mr. Frank Hoerner, one of the victims. According the testimony at trial by the State’s blood spatter expert, the defendant’s presence at the time Mr. Hoerner was initially assaulted and before he was shot at the location where the body was found was established by the blood spatter pattern on the defendant’s pants. The droplets would have been deposited on Mr. Stenson’s pants when Mr. Hoerner was struck on the head while standing in the driveway, or while he was in a more upright position being dragged into the room where he was ultimately shot and killed. (VRP 1381 thru 1406.)

40. The blood spatter evidence and opinion as to its ultimate meaning, while challenged by cross examination, was not rebutted at trial.

41. The circumstantial evidence against Mr. Stenson was strong. The GSR evidence made the case stronger. The blood spatter evidence, however, not the GSR evidence, was the most significant evidence at trial. Even if one completely overlooks the GSR testimony, the weight of the circumstantial evidence against Mr. Stenson coupled with the blood spatter evidence directly linking him to the initial attack on Mr. Hoerner is compelling. The blood spatter evidence is a hurdle too high. As long as it stands this court cannot find that even without the GSR testimony the result of the guilt phase of the trial would “probably” have been changed. Petitioners seek a different test

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under Brady as to whether the new evidence would have “undermined confidence in the verdict.” That is not a question submitted to this court.

42. In death penalty cases there are two phases. There is the guilt phase and there is the penalty phase. In the penalty phase, the jury is requested to determine whether or not there are mitigating factors justifying imposition of a sentence other than death. Without GSR testimony one might wonder whether or not the mitigation finding would have been different. In order for it to be different, the issue would be whether or not the lack of what was, in the words of investigator Bright, “one of the nails in his coffin”, would lead to residual doubt. The State’s statutory death penalty scheme does not list residual doubt as a factor for the jury to consider. A request for a residual doubt instruction was presented at trial, denied, and the denial of such instruction was affirmed by the Washington State Supreme Court. In Franklin v. Lynaugh, 487 U.S. 164, 108, S.C.T. 2320, 101 L.ED. 2D. 155, (1988) the Court held that residual doubt is not constitutionally required to be a mitigating factor in death penalty cases. Since the jury is not required by either constitution or statute to consider residual doubt, it would be difficult to speculate that they would have considered residual doubt and “probably” have found mitigation factors had they not been presented with the GSR testimony.

CONCLUSION:

The court therefore finds that while the evidence related to the Englert photographs would have led to an exclusion of GSR testimony, that exclusion would not have “probably changed the outcome of the trial or proceeding”.

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(b) Was the evidence discovered since the trial and proceedings?

43. While the parties knew Mr. Englert had taken photos of the pants the full content of photos were known only to Mr. Englert, Detective Martin, and perhaps Mr. Walker. The new evidence is not the photos as much as it is that the photos show the pockets turned out with an ungloved Detective Martin holding them. Only Mr. Englert and Detective Martin would have known that had taken place. (Detective Martin testified that he has a vivid recollection that he had gloves on. He acknowledges that his recollection is wrong. He stated that if he had been asked in 1994 he would have likely recalled even then that he had been gloved.)

CONCLUSION:

The court finds that the "evidence" shown in the photos was therefore discovered since the trial.

(c) Could the evidence have been discovered before the trial or proceedings by the exercise of due diligence?

44. The testimony is that the photographs were available to investigators representing both the State and defense. The testimony of Mr. Englert is that when met with the defense investigator Walker, they met for lunch, and that the entire file which included the photographs was on the table. Mr. Walker's reports note the existence of photographs and describe several of them. Two copies of the photographs were printed. Only one remains in Mr. Englert's file. Mr. Walker's report states that Mr. Englert suggested he get copies of the file and photographs from the Prosecuting

1 Attorney as it would be cheaper. Mr. Englert told Mr. Walker that Detective Monty
2 Martin had a copy of the photographs (Reference hearing exhibit 16, note 7). Mr.
3 Englert was paid for mailing. The testimony at the reference hearing was that neither
4 Detective Martin nor the Prosecuting Attorney recalled receiving copies of the
5 pictures. Mr. Englert testified that he would not have released the pictures or his file to
6 the defense team without permission. Prosecuting Attorney Bruneau testified that he
7 had never seen the photos nor knew the pants pockets had been turned out on the
8 fourteenth until 2010. A motion for discovery of the Englert notes was filed and
9 argued and the notes were provided. However at the same time the Prosecuting
10 Attorney stated that Mr. Englert would not be called as a witness.
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13 The petitioner argues that because the pictures contain potentially exculpatory
14 evidence they were required to be turned over under Brady even though Mr. Englert
15 was not a witness at trial. Petitioner alleges that he had a right to rely on disclosure
16 under Brady and the discovery orders and because of that there was not any lack of
17 diligence in failing to obtain the photographs at the time. In a footnote at page 24 of
18 the Petitioner's Post Hearing Brief, Petitioner notes:
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20 At the time that Mr. Walker interviewed Mr. Englert, the
21 defense had no idea that inculpatory gunshot residue
22 existed and had no idea that the pants were going to be
23 subjected to any further testing. Nothing in either Mr.
24 Englert's notes or Sergeant Martin's report gave any hint
25 that Martin had turned the pockets inside out, much less
26 that he did so without wearing gloves.

27 By the time gunshot residue became an issue, the State had
28 told the defense that Mr. Englert would not be a witness.
No one at trial relied in any way on anything that Mr.
Englert said or did. There was no reason for the defense
to investigate Mr. Englert or to believe that he possessed
any evidence relevant to gunshot residue. Nor was there

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any reason for the defense to request photographs from Mr. Englert, given that he was not a witness and no one at trial mentioned or relied in anyway on his photographs.

If due diligence means merely finding that which is there to be found, that requirement would apply to both parties. The Prosecutor would have the same obligation to find the material and, under Brady, would have had an obligation to provide the material (that the pockets had been turned out on the fourteenth) to the defense.

If, on the other hand, the concept of reason applies to due diligence, then all of the surrounding circumstances are appropriately viewed. Again, that seems the more rational concept of due diligence. Discovery in general requires some connection to an issue to be worth pursuing. Mere "fishing expeditions" for evidence are routinely prohibited. Mr. Englert's sole connection to GSR was that he made a suggestion that the pants pockets be tested.

45. Nothing in materials provided to defense stated that the Englert examination included turning the pockets out and anyone being ungloved. It was reasonable to assume, as defense did, that nothing in Mr. Englert's possession would have had any relevance to GSR or even to the case once it was determined that Mr. Englert would not be testifying.

46. No attorney at trial or thereafter realized the significance of the pictures to GSR until the year 2009. Why would they? There was no reason to suspect they would have any connection to GSR. The ultimate discovery of that connection was one of sheer chance.

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CONCLUSION:

The court finds that defense counsel acted with reasonable diligence at the time of trial and thereafter as regards the discovery of the facts of the pockets being turned out on April 14, 1994.

(d) Is the evidence material?

47. The evidence is material. The information in the photographs of April 14, 1994, is sufficient evidence to cause subsequent tests to be wholly unreliable. Without that photograph or some disclosure by the State of the facts it shows the potential sources of contamination could be, and were, easily explained away.

CONCLUSION:

The content of the Englert photographs therefore are material to the issue of GSR testimony and its validity.

(e) Is the evidence not merely cumulative or impeaching?

48. The photographs would lead to the elimination of the GSR evidence from the trial. They are not merely impeaching. One might argue that they are cumulative in that they simply present another possible source of GSR contamination. The distinction, however, is that the content of the Englert photographs do not merely show another possible source of contamination, they show a potential source of contamination which rises to such a degree that subsequent finding of GSR in the pants

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pocket no longer has any evidentiary viability in light of the potential for unfair prejudice to the defendant.

CONCLUSION:

However, because the evidence would not “probably” change the outcome of the trial, the discovery of the Englert photos and what they show do not meet the “newly discovered evidence test.”

ANSWERS TO QUESTIONS RE PETITIONER’S REASONABLE DILIGENCE IN ACTING ON THE EVIDENCE:

The Washington State Supreme Court has further requested the trial court to determine whether:

- 1) **Did Stenson act with reasonable diligence in discovering the photographs in the FBI file, see RCW 10.73.100 (1)?**

RCW 10.73.100 sets forth time limits for filing collateral attacks. Subsection (1) relates to newly discovered evidence and waives the time limit “if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;”

49. Mr. Stenson has been incarcerated since his arrest in 1993. During all of that time he has been represented by counsel with the exception of PRP No. 5. Does a defendant represented by legal counsel have any duty to investigate or participate in matters concerning his or her conviction beyond counsel’s representation? This Court has been presented with no authority on that issue.

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50. To the extent that discovery involves formal pleadings, as it often does, it would be unwise to require an individual represented by counsel to also perform his or her own discovery as it might interfere with, or even be contrary to the purposes and strategies of the attorney representation. A rule requiring a defendant to independently seek out evidence while represented by counsel would be illogical.

51. Mr. Stenson, as is his right, chose to represent himself in filing PRP 5 upon receiving the Englert photos.

CONCLUSION:

The Court finds that Mr. Stenson acted with reasonable diligence in locating the FBI file and the evidence which is contained in the Englert photographs. He reasonably relied on his counsel.

(2) Did Stenson act with reasonable diligence in filing the "Personal Restraint Petition (No. 83130-1)?"

52. The State suggests that the Court set some specific timelines within which a PRP should be filed upon receipt of new information. The State suggests reference to time periods used for other rules and statutes or proceedings. Mr. Stenson faces a sentence of death. Death penalty cases are different. Although a year of active discovery preceded Mr. Stenson's trial, issues of blood spatter and gunshot residue came up only at the time trial commenced. Mr. Stenson learned of the Englert photographs on February 9, 2009. He mailed PRP No. 5 to the Court on May 13, 2009, ninety-two days later.

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53. The FBI file was not provided to Mr. Stenson's counsel until May 21, 2009, after Mr. Stenson had filed his PRP No. 5.

54. On January 15, 2009, Ms. McCloud sent an email to Prosecuting Attorney Kelly requesting assistance in obtaining the FBI file. The file was produced on May 21, 2009, some 106 days later. The complications of obtaining the file from the FBI appear to be far less than the complications of filing a Personal Restraint Petition, especially pro se from an inmate held under the close custody circumstances Mr. Stenson serves as testified to at the reference hearing.

CONCLUSION:

The Court finds that Mr. Stenson acted with reasonable diligence in filing Personal Restraint Petition No. 5.

(3) Did Stenson's counsel act with reasonable diligence in discovering the photographs and the FBI file? see *Id.*

55. This question is more difficult to answer. Stenson's trial counsel, as noted, did not believe that the FBI file would contain any relevant information. Defendant's first Personal Restraint Petition attorneys had it suggested to them that the GSR issue be looked at closely but, based on limited resources decided to prioritize their investigation into the blood spatter issue which they felt was more significant. It was. Counsel for the PRP No. 6 requested the FBI file only when their curiosity was piqued by the fact that Special Agent Peele's bullet lead analysis testimony was deemed to have exceeded the scope the evidence could support and after Mr. Shinn had come forward. None of the attorneys at trial or thereafter, including the State's attorneys, felt

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2 that the FBI file and bench notes would have contained information worth expending
3 energies on pursuing until after subsequent events occurred. It is hard for this Court to
4 second guess counsel's assessments and choice in the setting of priorities. It is only
5 with the advent of the Englert photographs that the material in the FBI file becomes
6 potentially relevant. The FBI file was requested as soon as the Englert photos were
7 discovered. As indicated, the photographs were discovered not by design but rather by
8 luck.

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11 **CONCLUSION:**

12 The Court finds that at each stage of the proceedings Stenson's counsel acted
13 with reasonable diligence in discovering the photographs and the FBI file.

14 **(4) Did Stenson's counsel act with reasonable diligence in filing**
15 **"Petitioner Darold Stenson's Motion to Vacate Conviction or Alternatively Vacate**
16 **Sentence of Death Pursuant to CrR 7.8(b)". Later accepted by this Court for**
17 **consideration as a Personal Restraint Petition (No. 83606-0), see Order 569/113**
18 **(Oct. 1, 2009)?**

19
20 56. Defense counsel were in receipt of both the Englert photographs and the
21 FBI file as of May 20, 2009. The Motion to Vacate Conviction, etc., and supporting
22 documentation was filed in the Clallam County Superior Court on August 7, 2009,
23 seventy-seven days later. During the time between receipt of the photographs in
24 January of 2009, and the filing of the motion in early August 2009, defense counsel
25 were taking numerous steps to investigate the meaning of the evidence and in preparing
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for the post-conviction action taken. Under the circumstances the Court does not find that the time taken or the investigations made before filing were unreasonable.

CONCLUSION:

The Court finds Stenson's counsel acted with reasonable diligence in filing the Motion to Vacate, etc (PRP No. 6).

DATED this 16th day of April, 2010.

Respectfully submitted,



KEN WILLIAMS
JUDGE

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