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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

DAROLD RAY STENSON,

Petitioner.

RAP 16.9 RESPONSE TO SIXTH PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

I. RAP 16.9 RESPONSE TO PERSONAL RESTRAINT PETITION . . . 1

II. AUTHORITY FOR PETITIONER'S RESTRAINT 1

III. STATEMENT OF ISSUES 1

IV. STATEMENT OF FACTS 1

 A. Pre-Trial 2

 B. Trial 9

 1. Testimony Regarding Patrol Car Contamination 9

 2. Testimony Regarding the Delay in Swabbing the
 Pockets 12

 3. Testimony Regarding Who Tested the GSR Kits 16

 4. Closing Argument 18

 C. Post Conviction 20

V. ARGUMENT 24

 A. Stenson's Sixth PRP Must Be Summarily Dismissed as
 Time-Barred 25

 1. Stenson Has Not Established That the Englert
 Photographs and the Gunshot Residue Records
 Were Discovered Since Trial 29

 2. Stenson Cannot Demonstrate That He Could Not
 Have Discovered the Englert Photographs, the GSR
 Records, or the Opinion of a Laboratory Quality
 Auditor, Before Trial by the Exercise of Due
 Diligence 30

a. Englert Photos	30
b. GSR Records	32
c. Analysis By Janine Arvizu	33
3. Stenson's "New Evidence" is Merely Impeaching or Cumulative to the Evidence of Contamination Introduced at Trial	34
4. Stenson Cannot Demonstrate that His "New Evidence" Would Change the Result of the Trial	38
B. Stenson's Sixth PRP Must Be Summarily Dismissed as Successive and Abusive	40
VI. CONCLUSION	41
<i>State of Washington v. Darold R. Stenson</i> , Clallam Cty. Cause No. 93-1-00039-1, Judgment and Sentence	Appendix A
<i>State of Washington v. Darold R. Stenson</i> , Clallam County Cause No. 93-1-00039-1, Defendant's Motion to Dismiss or, in the Alternative, Strike Special Sentencing Proceeding, Continue Trial and Impose Terms, CP 707- 719	Appendix B
<i>State of Washington v. Darold R. Stenson</i> , Clallam County Cause No. 93-1-00039-1, Affidavit of Monty Martin (June 13, 1994), CP 677-690	Appendix C
<i>State of Washington v. Darold R. Stenson</i> , Clallam County Cause No. 93-1-00039-1, Affidavit of David H. Bruneau (June 13, 1994), CP 691-697	Appendix D
<i>State of Washington v. Darold R. Stenson</i> , Clallam County Cause No. 93-1-00039-1, Volume I, Pretrial Hearings, pages 188-202	Appendix E
Declaration of David H. Bruneau (Aug. 19, 2009)	Appendix F
Declaration of Deborah S. Kelly (Oct. 21, 2009)	Appendix G

Supplemental Declaration of Deborah S. Kelly (Oct. 21, 2009)	Appendix H
Declaration of Steven G. Burmeister	Appendix I
Declaration of Paula H. Wulff	Appendix J

TABLE OF AUTHORITIES

Table of Cases

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194,
10 L. Ed. 2d 215 (1963) 24, 25, 26, 27

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354,
158 L. Ed. 2d 177 (2004) 37, 38

Davenport v. Taylor, 50 Wn.2d 370, 311 P.2d 990 (1957) 28

Franklin v. Lynaugh, 487 U.S. 164, 101 L. Ed. 2d 155,
108 S. Ct. 2320 (1988) 40

In re Personal Restraint of Benn, 134 Wn.2d 868,
952 P.2d 116 (1998) 26

In re Personal Restraint of Brown, 143 Wn.2d 431,
21 P.3d 687 (2001) 28, 30

In re Personal Restraint of Gentry, 137 Wn.2d 378,
972 P.2d 1250 (1999) 31

In re Personal Restraint of Jeffries, 114 Wn.2d 485,
789 P.2d 731 (1990) 40

In re Personal Restraint of Lord, 123 Wn.2d 296,
868 P.2d 835 (1991) 29, 39

In re Personal Restraint of Markel, 154 Wn.2d 262,
111 P.3d 249 (2005) 38

In re Personal Restraint of Rice, 118 Wn.2d 876,
828 P.2d 1086, *cert. denied*, 113 S. Ct. 421 (1992) 29

In re Personal Restraint of Runyan, 121 Wn.2d 432,
853 P.2d 424 (1993) 26

In re Personal Restraint of Stenson, 142 Wn.2d 710,
16 P.3d 1 (2001) 21, 38, 39

<i>In re Personal Restraint of Stenson</i> , 150 Wn.2d 207, 76 P.3d 241 (2003)	21, 24, 26, 27, 38
<i>In re Personal Restraint of Stenson</i> , 153 Wn.2d 137, 102 P.3d 151 (2004)	20, 21, 25, 40
<i>In re Personal Restraint of VanDelft</i> , 158 Wn.2d 731, 147 P.3d 573 (2006)	25
<i>Kuhlmann v. Wilson</i> , 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986)	40
<i>Melendez-Diaz v. Massachusetts</i> , ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)	37
<i>Mooney v. Holohan</i> , 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935)	41
<i>Napue v. Illinois</i> , 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)	41
<i>Oregon v. Guzek</i> , 546 U.S. 517, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006)	40
<i>People v. Dungo</i> , 176 Cal. App. 4th 1388, 98 Cal. Rptr. 3d 702 (2009)	37
<i>People v. Gutierrez</i> , 177 Cal. App. 4th 654, 99 Cal. Rptr. 3d 369 (2009)	37
<i>Peoples v. Puyallup</i> , 142 Wash. 247, 252 P. 685 (1927)	27
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 964 P.2d 349 (1998)	26
<i>State v. Evans</i> , 45 Wn. App. 611, 726 P.2d 1009 (1986), <i>review denied</i> , 107 Wn.2d 1029 (1987)	33
<i>State v. Hairychin</i> , 136 Wn.2d 862, 968 P.2d 410 (1998)	32
<i>State v. Harper</i> , 64 Wn. App. 283, 823 P.2d 283 (1992)	33

<i>State v. Harris</i> , 106 Wn.2d 784, 725 P.2d 975 (1986), <i>cert. denied</i> , 480 U.S. 940 (1987)	33
<i>State v. Jackman</i> , 113 Wn.2d 772, 783 P.2d 580 (1989)	32
<i>State v. Kreck</i> , 86 Wn.2d 112, 542 P.2d 782 (1975)	37
<i>State v. Mesaros</i> , 62 Wn.2d 579, 384 P.2d 372 (1963)	33, 35
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998)	39
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	31
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981)	28
<i>Stenson v. Lambert</i> , 504 F.3d 873 (9th Cir. 2007), <i>cert. denied</i> , 129 S. Ct. 247 (2008)	21
<i>United States v. Bodey</i> , 607 F.2d 265 (9th Cir. 1979)	34
<i>United States v. Dube</i> , 520 F.2d 250 (1st Cir. 1975)	34
<i>Vance v. Thurston County Comm'rs</i> , 117 Wn. App. 660, 71 P.3d 680 (2003), <i>review denied</i> , 151 Wn.2d 1013 (2004)	27
<i>Whorton v. Bockting</i> , 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)	38

Constitutions

Washington Constitution art. I, § 13	31, 41
--	--------

Statutes

Chapter 10.55 RCW 37, 38
RCW 10.73.090 24, 25, 26, 27, 38
RCW 10.73.090(1) 40
RCW 10.73.090(3) 26
RCW 10.73.100(1) 28, 30
RCW 10.95.070 31
RCW 7.36.130 40

Rules and Regulations

CrR 4.7 29, 39
CrR 4.7(a)(1)(iv) 38
CrR 4.7(d) 29
CrR 7.8(b) 26
RAP 16.4(d) 21, 38, 39
RAP 16.9 21, 24, 26, 27, 38

Other Authorities

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5B K. Tegland, *Washington Practice: Evidence Law and Practice* (5th ed. 2007). 25

Black's Law Dictionary 768 (8th ed. 2004) 40

Former WPIC 6.51 37

WPIC 1.02 41

I. RAP 16.9 RESPONSE TO PERSONAL RESTRAINT PETITION

Respondent has determined that the relief petitioned for is inappropriate.

II. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint and execution of the petitioner, Darold Ray Stenson, lies within the judgment and sentence entered by the Superior Court of the State of Washington for Clallam County, in Clallam County Cause No. 93-1-00039-1, upon Stenson's conviction of two counts of first degree murder with aggravating circumstances and in the death warrant signed on April 3, 1998, upon the denial of certiorari of Stenson's direct appeal.

III. STATEMENT OF ISSUES

1. Whether this sixth collateral attack must be summarily dismissed as untimely?
2. Whether this sixth collateral attack must be summarily dismissed as abusive and/or successive?

IV. STATEMENT OF FACTS

The instant matter is a sixth collateral attack challenging an August 19, 1994, facially valid judgment and sentence. This personal restraint petition (PRP) follows three PRP's that this Court dismissed as untimely and abusive. *See* RCW 10.73.090(1).

The instant PRP overlaps Stenson's fifth PRP, both temporally and substantively. The State's pleadings in *In re Personal Restraint Petition of Darold Stenson*, Cause No. 83130-1, contains a complete statement of the facts of Stenson's crimes and the history of Stenson's attempts to overturn his convictions. The facts that appear below complement, but do not replace, that prior factual statement.

A. Pre-Trial

In response to Stenson's March 25, 1993, 911 call reporting the death of Frank Hoerner and the shooting of Stenson's wife, Denise, a number of Clallam County Sheriff's Office personnel and paramedics reported to the Stenson farmhouse. RP 53.¹ Once the scene was secure, Clallam County

¹All references to "RP" are to the trial transcripts filed with the Washington Supreme Court in *State of Washington v. Darold Stenson*, S. Ct. Cause No. 61965-4. All references to "Pretrial Hearings RP" are to the separately numbered "Pretrial Hearings" transcripts filed with the Washington Supreme Court in *State of Washington v. Darold Stenson*, S. Ct. Cause No. 61965-4.

All other transcripts, copies of which may be found in the appendix to the State's RAP 2.3(b) Motion for Discretionary Review in *State of Washington v. Darold Stenson*, Cause No. 83558-6, will be cited as follows:

1RP – November 21, 2008, hearing	6RP – March 26, 2009, hearing
2RP – November 24, 2008, hearing	7RP – May 12, 2009, hearing
3RP – November 25, 2008, hearing	8RP – June 26, 2009, hearing
4RP – January 6, 2009, hearing	9RP – July 24, 2009, hearing
5RP – January 20, 2009, hearing	10RP – August 21, 2009, hearing

All references to "CP" are to the clerk's papers filed with the Washington Supreme Court in *State of Washington v. Darold Stenson*, S. Ct. No. 61965-4.

Sheriff's Deputy Charles Fuchser interviewed Stenson in the front seat of Deputy Fuchser's patrol car. RP 69-70, 99, 209.

Deputy Fuchser's interview of Stenson was interrupted by Sergeant Turner. RP 78, 301-02. Sergeant Turner intervened because the location of the interview, the interior of a patrol car, presented a possible contamination problem. The concern was that a patrol car may contain chemicals that are found in firearm primers. RP 79, 100, 301-02,

Sometime after Stenson exited Deputy Fuchser's patrol car, Stenson's clothing was collected from him by Sergeant Monty Martin. RP 662. Stenson's jeans were sent to the FBI for forensic examination on April 8, 1993. The jeans were returned to the Clallam County Sheriff's Department on November 17, 1993. Stenson's CrR 7.8(b) Motion, Exhibit D (hereinafter "CrR 7.8(b) Exhibit D"), at FBI 09-00016.

While the pants were at the FBI, a number of different procedures were conducted on the pants and on other items collected from the crime scene. The forensic testing was performed at the FBI using a combination of professional scientists and/or technicians and examiner level experts. *Declaration of Steven G. Burmeister*, at 1, ¶ 2.² The examiner directs all of the work performed by a professional scientist and/or technician. In every case, the examiner is responsible for evaluating the raw data obtained by a

²Mr. Burmeister's declaration may be found in appendix I.

professional scientist and/or technician, and drawing a final conclusion. The examiner is responsible for preparing the official report and is the person who provides expert testimony. *Id.*

The FBI examiners provided the Clallam County Sheriff's Department with a number of reports prepared by examiner level experts. *See generally* CrR 7.8(b) Exhibit D, at FBI 09-00016 – FBI 09-00026, FBI 09-00085, FBI 09-00091 – FBI 09-00092. The Clallam County Prosecuting Attorney, consistent with CrR 4.7 and the October 8, 1993 Reciprocal Discovery Order, CP 1905, provided Stenson's counsel with copies of each of these opinions in a timely manner. *Declaration of David H. Bruneau* (August 19, 2009)³; Affidavit of David Bruneau (June 14, 1994), CP 691, at ¶ 3.⁴ Contact information for each of the analysts was also provided to defense counsel. *Declaration of David H. Bruneau* (August 19, 2009); Affidavit of David Bruneau (June 14, 1994), CP 691, at ¶ 5; Pretrial Hearings RP 190.⁵

With respect to gun shot residue, the FBI tested swabs taken from both the left and right hands of Stenson.

³Mr. Bruneau's 2009 declaration may be found in appendix F.

⁴Mr. Bruneau's 1994 declaration may be found in appendix D.

⁵The transcript from the hearing regarding the additional discovery related to Stenson's *Frye* motion, may be found in appendix E.

The amounts of antimony and barium detected on specimens Q38 through Q42[, the swabs from Stenson's hands,] are insignificant. Therefore, it could not be determined if DAROLD R.J. STENSON discharged a firearm or was in an environment where gunshot primer residue was present.

CrR 7.8(b) Exhibit D, at FBI 09-00024. *Accord* RP 84.

Shortly after Stenson's jeans were returned to the custody of the Clallam County Sheriff's Department, Stenson's attorneys examined the jeans in the presence of Detective Monty Martin. Affidavit of Sgt. Monty Martin (June 13, 1994), CP 677, at 2 ¶ 1⁶; Declaration of Counsel, CP 710, at ¶ 6.⁷ During this meeting, Stenson's attorney asked Detective Martin to obtain a Polaroid photograph that the FBI had taken of Stenson's pants. Detective Martin fulfilled this request. Affidavit of Sgt. Monty Martin (June 13, 1994), CP 677, at 2 ¶ 3; Declaration of Counsel, CP 710, at ¶ 6.

Since the FBI does not provide blood spatter services, the Clallam County Sheriff's Department contacted Rod Englert. Mr. Englert was employed by the Multnomah County Sheriff's Office and also operates a private consulting business. *See* Declaration of Counsel, CP 711, at ¶ 8. Stenson's attorneys were informed that Mr. Englert's services were being utilized. *Id.*

⁶Detective Martin's declaration may be found in appendix C.

⁷Frederick Leatherman's Declaration of Counsel may be found in appendix B. This declaration is embedded in Stenson's "Defendant's Motion to Dismiss or, in the Alternative, Strike Special Sentencing Proceeding, Continue Trial and Impose Terms."

On April 14, 1994, Detective Martin took Stenson's jeans to Oregon so that criminologist Rod Englert could examine the blood stains. Mr. Englert made notes of his evaluation. These handwritten notes and Mr. Englert's bill, which were provided to Detective Martin on or about March 25, 1994, clearly indicate that: (1) Detective Martin put the pants on; (2) photographs of the pants were taken by Mr. Englert; and (3) that Mr. Englert had possession of those photographs. Affidavit of Sgt. Monty Martin (June 13, 1994), CP 677, ex. 1 and 3. Mr. Englert never completed a formal written report and never provided the photographs to the Clallam County Sheriff's Department or the Clallam County Prosecuting Attorney's Office as his services were terminated due to cost. *Id.*, at 3 ¶ 5; Affidavit of David Bruneau (June 14, 1994), CP 691, at ¶¶ 9-13.

Although the Clallam County Prosecutor's Office decided not to call Mr. Englert as a witness at trial, copies of Mr. Englert's handwritten notes and Detective Martin's report about his meeting with Mr. Englert were both provided to Stenson's trial team. Affidavit of David Bruneau (June 14, 1994), CP 691, at 12; Affidavit of Sgt. Monty Martin (June 13, 1994), CP 677, ¶¶ 6 and 10, and exs. 2 and 3; Declaration of Counsel, CP 709, at ¶ 11. In addition, Detective Martin provided contact information for Mr. Englert to Stenson's defense team, and what Detective Martin believed were Mr. Engler's initial impressions. Affidavit of Sgt. Monty Martin (June 13, 1994),

CP 677, ¶ 7 and 8; Declaration of Counsel, CP 709, at ¶¶ 9-11.

Jeffrey Walker, Stenson's defense investigator for the guilt phase, met with Mr. Englert on June 7, 1994, in Portland. Declaration of Counsel, CP 709, at ¶¶ 10, 12, and 13. During this meeting, Mr. Englert showed Mr. Walker his handwritten report, including his sketches. Declaration of Counsel, CP 709, at ¶¶ 13 - 15. Mr. Walker reported the result of his meeting to Mr. Leatherman. Declaration of Counsel, CP 709, at ¶ 14. While Mr. Leatherman was aware that having Detective Martin try on Stenson's pants was fairly unorthodox, Mr. Leatherman, after consulting with the defense retained blood spatter expert, made a tactical decision against explicitly challenging the chain of custody.⁸

Following his meeting with Mr. Englert, Detective Martin spoke with a special agent at the FBI regarding Stenson's pants. During this conversation, it was agreed that a "GSR Kit" (gunshot residue kit) should be utilized on the inside of both front pockets of Stenson's jeans. CrR 7.8(b) Exhibit D at FBI 09-00218. Detective Martin sent the GSR Kits, that he collected nearly 12 months after the pants were first collected from Stenson, to the FBI. *Id.*

⁸In re the Personal Restraint of Darold R. Stenson, Wash. Supreme Court No. 66565-6, Deposition Upon Oral Examination of Frederick D. Leatherman, at 97-98, 121-22 (Oct. 5, 1999) (hereinafter "Leatherman Deposition").

The examiner in charge of the GSR testing of the April 1994 kits was Roger Peele. Some of the raw data for his analysis was collected by Physical Science Technician Kathy Lundy. CrR 7.8(b) Exhibit D, at FBI 09-00221. *See also* Affidavit of Steven G. Burmeister, at 3 ¶¶ VI and VII.

Roger Peele's conclusions with respect to the gunshot residue testing of Stenson's pockets were provided to the Clallam County Sheriff's Office prior to trial. The bench notes were not. *See* Declaration of Steven G. Burmeister, at 3, ¶ 5. The Clallam County Prosecuting Attorney, as required by CrR 4.7(a)(1)(iv), advised Stenson's defense team of Mr. Peele's team's results. *See Supplemental Declaration of Deborah Kelly*.⁹ The issued report included Mr. Peele's phone number. *Id.* Although Stenson brought a motion in February of 1994 for copies of all bench notes, raw data, and procedures related to Stenson's DNA *Frye* motion, Stenson did not formally or informally request copies of the raw data related to the June 13, 1994, gunshot residue testing report. *See* Discovery Order, CP 1696¹⁰ ("This matter having come before this court on motion of the defendant for entry of an order requiring the prosecution to provide certain information to the defense prior to the *Frye* hearing.. ."); Pretrial Hearings RP 188 ("It's our contention

⁹The "Supplemental Declaration of Deborah S. Kelly" may be found in appendix H.

¹⁰A copy of this order may be found attached, as exhibit B, to Stenson's CrR 7.8(b) motion.

that the requested items are necessary in order for us to prepare for the *Frye* hearing. . .”); Declaration of David H. Bruneau (Aug. 19, 2009), at 2.

B. Trial

At trial, the jury was fully informed about the possibility that gunshot residue could have transferred to Stenson from Deputy Funschser’s patrol car, that GSR kits were not collected from Stenson’s pockets until the pants had been in police custody for an entire year, and that Mr. Peele did not conduct the gunshot residue test alone.

1. Testimony Regarding Patrol Car Contamination

[Mr. Bruneau on behalf of the State:]

Q. All right. First of all, when you were interviewing Mr. Stenson you were interrupted by Sergeant Turner; is that right?

[Deputy Fuchser:] A. Yes.

Q. And what did he want you to do?

A. He had a concern that there might be a possible contamination problem within my patrol car due to chemicals that are found in firearm primers.

Q. All right. And so what did you do?

A. I asked him to please move from my patrol car into the living room.

RP 78-79.

[Mr. Neupert on behalf of Stenson:]

Q. And Sergeant Turner told you to have Mr. Stenson get out of your car; is that right?

[Deputy Fuchser:] A. Yes.

Q. Sergeant Turner was worried, I believe you said about possible contamination if Mr. Stenson was sitting in your car?

A. That's correct.

RP 100.

[Mr. Bruneau on behalf of the State:]

Q. Sergeant Turner, when you arrived do you recall what Deputy Fuchser was doing?

A. Deputy Fuchser had just opened the door, the passenger door in the front to allow male subject into the front seat who did sit down.

Q. That male subject was later identified to you as whom?

A. Darold Stenson.

Q. Had you ever seen him before?

A. No. I had not.

Q. Now did Deputy Fuchser brief you on the situation as he knew it up to that time?

A. Yes, he did.

Q. And did you direct him, well, was he interviewing Mr. Stenson?

A. Yes, he was.

Q. And did you direct him to continue his interview someplace else?

A. Yes, I did.

Q. Why was that?

A. I wanted to ensure that there would not be any A.B. contamination. A.B. being some elements that are present in primers of most ammunition. I wanted to ensure that there was no transfer from a patrol car in the event that there was a dirty gun or some other substances within the vehicle, and I wanted him out of that environment. I'm sure there was no transfer of these particles if they were present in.

Q. Precautionary method?

A. Yes, it was.

RP 301-02.

[Mr. Leatherman on behalf of Stenson:]

Q. Agent Peele, back to the subject of, I think it was Exhibit 88 which has previously been identified as a swab from a Deputy Charles Fuchser's car seat.

And I believe you indicated that you did not and as far as you can determine no one at the FBI laboratory did analysis of that or those swabs, I should say, that are in Exhibit 88?

[Agent Peele:] A. That's correct Sir.

Q. If gunshot powder or gunshot primer residue had been in the interior of that car -- by the way, you sort of describe it as talcum, sort of like talcum powder; is that correct?

A. Yes, sir.

It's a way of potentially visualizing the situation. Not necessarily that the two are alike but some way for you to be able to understand how materials such as this primer residue could be removed and it would be very much similar to ways you can remove talcum powder.

Q. Speaking hypothetically, if there had been gunshot primer residue on the seat or in the interior of Deputy Fuchser's car and an individual sat on that seat or put their hands down on the seat and came in contact with such residue, would you expect the residue to transfer to their hands?

A. I don't know whether or not it would have. I don't even have an expectation, because of what may or may not be there. It's possible that if there were particles on the surface and not down in the inner woven fabric that they could be transferred. That's true. I don't know what all the possibilities might be.

RP 102-03.

2. Testimony Regarding the Delay in Swabbing the Pockets

[Mr. Bruneau on behalf of the State:]

Q. Detective Martin, finally, I'm showing what you [sic] has been marked as State's Exhibit 127.

Would you inspect the contents of that exhibit?

[Detective Martin:] A. 127 contains three items: One is a gunshot residue kit; the other two are small manila folders containing debris that I took from the pockets of the defendant's pants.

- Q. The defendant's pants, Exhibit 123?
- A. Yes, sir.
- Q. When you say gunshot residue, do you mean what has been referred to in testimony as A.B. or antimony barium?
- A. Yes, sir. This is a different method of obtaining the samples.
- Q. And how did you go about obtaining those samples?
- A. Inside the kit and following the direction of this kit is you have a sticky base substance that are on a dabbing tool, small dabbing tool and you dab either the hands or the object that you want to test for gunshot residue.
- Q. All right. And these dabbings were taken from where?
- A. Taken from the pockets of, the front pockets of the defendant's pants.
- Q. You mean you turned the pockets inside out?
- A. Yes, sir.
- Q. All right. Then took those dabbings?
- A. Yes, I did.
- Q. Any place else on the trousers?
- A. No. Just the pockets.
- Q. That would just be the front pockets?
- A. Yes, sir.
- Q. When did you do that?

A. I did that on April 20th, 1994, at 10:41 in the morning.

Q. Now, do the contents -- have the contents of that exhibit changed in any way since that date?

A. This has been opened and analyzed by the FBI.

Q. Other than that it's the same?

A. Should be the same, yes.

RP 670-71.

[Mr. Leatherman on behalf of Stenson:]

Q. Does 123 mean anything to you or is it Q18 that is the evidence number that you are familiar with?

[Mr. Peele:]A. I haven't seen 123. Q18 is the Q number of the pants from which the dabs and the debris from the pockets that I'm aware of.

Q. Okay. You indicated on direct exam that you had analyzed using electron microscope some dabs that were identified to you as having been taken from the right pocket of Q18; is that correct?

A. Yes, sir, that's correct.

Q. And you found some evidence of gunshot primer residue when you conducted that examination; is that correct?

A. Yes, sir.

Q. And were you provided with any information relative to when the dabs that you analyzed were taken?

A. I am -- I do not remember exactly how much information I had. I know I would have asked that

question. I did not write down any specifics on it but in general I asked when things are done. I don't know in this case?

- Q. Is it usually the case in the analysis that you perform that the dabs are done sometime relatively close in point of time to the seizure of the evidence that you are examining?

For example, here you were examining some dabs from the pocket of a pair of pants. Is it usually the case based on your experience that the dabs that you are analyzing would have been taken around the time that the pants themselves were taken into evidence?

- A. In general I don't do analyses on clothing because of the interpretation problems. So we aren't usually faced with that situation. You want things done as quickly as they can, especially on the hand. The hand is the important thing.

- Q. Now if - let's assume, hypothetically, that approximately a year went by from the time that the pants were taken into possession by the Clallam County Sheriff's Office and the time that the dabs were taken and then submitted to you for analysis.

Would you have any concerns about what had been done with those pants during that period of time prior to the dabs being taken?

- A. 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.

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.

RP 1105-08.

3. Testimony Regarding Who Tested the GSR Kits

[Mr. Bruneau on behalf of the State:]

Q. Mr. Peele, I'm going to show you now what has been marked as State's Exhibit 127. Have you had the opportunity to inspect that exhibit?

[Mr. Peele:] A. Yes, sir, I have.

Q. Could you identify that for the record, please?

A. Yes, sir. This Exhibit 127 consists of a number of items. Four of the items are, I'm sorry, two of the items are envelopes containing debris and two other of the items are dabs of the pants pockets and both, both dabs are the same type that I have been talking about earlier: The disk with sticky tape on it, double stick tape, so that something will adhere to that sticky tape as it is pressed against the item.

And these are the pants pocket of Darold Stenson.

Q. And would you explain to the jury, please, what the results of your conclusions, the results of your examinations, your conclusions with regard to those exhibits contained in 127 -- excuse me. Excuse me, Mr. Peele.

Could those exhibits, have they changed during the course of your examination, at the time you received them?

A. Yes, sir. There's a slight alteration to each one of the dabs. In order to be able to analyze it in the scanning microscope, a layer of carbon is put on the top of it so that the surface does not charge up. Electron microscope shines electrons on to the medium of interest and that will cause charging to develop if it is an insulator material.

If it's non-conductive and you then can not see the picture because you are trying to look at other electrons that are boiling off the surface. So a carbon coating is attached and that's alteration. Plus there were lots of fibers on these sticky disks and several columns of these fibers were removed, again, because they would interfere with this analytical process.

As far as the debris from the pants pocket, another examiner examined that stuff. Not myself.

Q. Other than those changes you have noted, does that exhibit appear to be in the same condition as it was when you received it?

A. Yes, sir, it does.

....

Q. And would you explain to the jury the results of your examination and any opinions or conclusion that you drew from those examinations?

A. Okay. The pieces were again given Q numbers. Q85 is a dab from the right front pocket of the pants. Q86 is a dab from the left front pocket of the pants. On Q86 we did not find any particles of gunshot primer residue during our analytical process. For what reason we don't know. We just didn't find any.

On Q85 we did find particles of gunshot residue to the surface represented by those samples, in other words, what was sampled came into contact or came into this environment of gunshot primer residue in some way or another, meaning contacting a contaminated surface or being in the vicinity in order to get that material in it. Those particles were found on Q85 from the right front pocket.

RP 1087-89.

4. Closing Argument

Stenson highlighted the possibility that the gunshot residue that was found in the pocket of his jeans came from contamination during closing argument:

[Mr. Neupert on behalf of Stenson:]

... and you will remember that he had Mr. Stenson sit in the front seat of his patrol car. Deputy Fuchser's car.

Now, when that happened, that is the same time that Sergeant Turner could see Mr. Stenson either getting into or sitting in the front seat of Fuchser's patrol car. That's when Turner went up to Deputy Fuchser and spoke to him to tell him the first order of business was to get Mr. Stenson back out of the car. Get him out of the car. Don't let him sit in your car. And Sergeant Turner told us the reason that he felt that way about it, that he felt so strongly, was that he was worried about what is called AB contamination. Gunshot residue.

We know from the testing we heard about that when a person's hands or clothing is tested for gunshot residue, the chemicals that they are looking for are antimony and barium. The concern was that if Mr. Stenson was in a patrol car, that his hands could become contaminated either from primers or being around a weapon. Something of that nature.

And the only gunshot residue that was attributed to him was in the right pocket of his jeans. Nothing on his hands. Nothing on his arms. Nothing on his shirt. Nothing on the exterior of his clothing.

The only trace, if I can call it a trace, that was found was on the inside of his pants pocket and that certainly is consistent with Sergeant Turner's fears being confirmed, that he picked up some sort of a trace out of the inside of that car, evidently put his hand in his pocket and then within an hour turned the pants over to Detective Sergeant Martin.

The reason that I bring that up is that you would argue that the presence of this gunshot residue is certainly proof that he handled the firearm. That he literally pulled the trigger two times. That would be circumstantial evidence because there is no direct evidence to tell you how it came to be on his hands.

But when you read that circumstantial evidence instruction, it tells you that you look to see if you can infer an exclusion from it. But if you are not, it doesn't tell you, you can reach one conclusion and only one conclusion to the exclusion of every other reasonable point that can be made from that. And that's the point that can be made from that. And that's the point that's made. He was present in the patrol car. Concern was that he would get some traces on his hands. They were found in his pocket.

You also recall when those pants were received at the FBI laboratory in Washington, D.C. for testing. The first person who received those and handled those garments was the Special Agent J.R. Williamson who is in charge of the firearms section. From his own testimony[, he] handles firearms on a regular basis. Handles cartridges, primers, all of these. The sort of AB traces that were found in the pants. So the State can't tell you at what point in the chain this happened.

My point is it could have happened at any point along that chain. And none of that is either direct or circumstantial

evidence of my client having handled the firearm that is in evidence. And the State has acknowledged to you that that firearm can't be traced to Darold Stenson. There's nobody who has come to court to testify that they could make any connection to Darold Stenson and that weapon.....

RP 1751-53.

C. Post Conviction

Following his conviction and the imposition of a death sentence, Stenson filed a direct appeal. The Washington Supreme Court affirmed both Stenson's murder convictions and death sentence, and the matter became final with the issuance of the mandate on March 16, 1998. *See State v. Stenson*, Washington Supreme Court Cause No. 61965-4.

After Stenson's direct appeal was rejected, the Court appointed two experienced attorneys to assist Stenson with his first PRP.¹¹ Judith Mandel and Ronald Ness served as Stenson's counsel of record until the certificate of finality issued in Stenson's first PRP.

Additional attorneys assisted Stenson with respect to his federal habeas corpus action, and his second, third, and fourth PRPs, the instant collateral attack, and his motions for post-conviction DNA testing. All told, Stenson has been represented by at least one of the following attorneys since March 16, 1998: Judith Mandel, Ronald Ness, Sheryl Gordon McCloud,

¹¹Stenson's challenge to the competency of his first PRP counsel was rejected by this Court in Stenson's third PRP. *See In re Personal Restraint of Stenson*, 153 Wn.2d 137, 142-147, 102 P.3d 151 (2004) ("*Stenson IV*").

and/or Robert H. Gombiner. See *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 714, 16 P.3d 1 (2001) (“*Stenson II*”); *In re Personal Restraint of Stenson*, 150 Wn.2d 207, 209, 76 P.3d 241 (2003) (“*Stenson III*”); *In re Personal Restraint of Stenson*, 153 Wn.2d 137, 140, 102 P.3d 151 (2004) (“*Stenson IV*”); *Stenson v. Lambert*, 504 F.3d 873, 875 (9th Cir. 2007), cert. denied, 129 S. Ct. 247 (2008) (“*Stenson V*”); *In re Personal Restraint Petition of Darold Stenson*, No. 82332-4, Personal Restraint Petition.

Stenson has taken an active role in the post-conviction litigation, filing his own pro se action. See, e.g., *In re Personal Restraint Petition of Darold Stenson*, No. 83130-1, Personal Restraint Petition (May 26, 2009) (hereinafter “Fifth PRP”). In his pro se PRP, Stenson claimed that he was entitled to relief because photographs of Detective Martin wearing Stenson’s jeans is newly discovered evidence that the positive gunshot residue test from his jean pockets was the result of contamination. Fifth PRP, at 11-12, and 41. This PRP is still pending a decision.

Both before and after Stenson filed his fifth PRP, the Clallam County Prosecuting Attorney’s Office granted Stenson’s legal team’s requests to view files and for assistance in obtaining records related to Stenson’s prosecution. See Declaration of Deborah S. Kelly (Oct. 21, 2009), at 3.¹² The first request that the Clallam County Prosecuting Attorney’s Office received

¹²Ms. Kelly’s declaration may be found in appendix G.

for assistance in obtaining copies of documents that the FBI might have that relate to Stenson's case, was an oral request from Ms. McCloud in January of 2009. *Id.*, at 2. Ms. McCloud indicated that she was asking the assistance of the Clallam County Prosecuting Attorney's Office and/or the Clallam County Sheriff's Department to obtain the records, because she believed that the FBI would respond to such a request more rapidly than to a Freedom of Information Act (FOIA) request from Stenson's legal team. *Id.* Ms. McCloud supplemented her oral request with an e-mail. *Id.*

The Clallam County Sheriff's Department sent a letter to the FBI requesting the records that Stenson sought on March 18, 2009. The FBI provided the requested documents on May 15, 2009. The documents were forwarded to Robert Gombiner on May 21, 2009. *See* Declaration of Deborah S. Kelly. Stenson submitted a copy of the FBI documents to this Court as an appendix to his September 8, 2009, "Petitioner's Reply to State's RAP 16.9 Response to Petitioner's Fifth Personal Restraint Petition." *See In re Personal Restraint of Darold Stenson*, No. 83130-1.

In August of 2009, Paula Wulff, the Assistant General Counsel in the Office of the General Counsel of the Federal Bureau of Investigation, reviewed the files related to Darold Stenson. With the exception of a request for documentation made by Stenson's attorneys on June 23, 2009, no other request for documents from parties representing Stenson have been received

by the FBI. Declaration of Paula H. Wulff (August 28, 2009).¹³ The laboratory documents were available, pre-conviction, to Stenson's legal team upon a written request. The laboratory documents were available, post-conviction, to Stenson's legal team under the Freedom of Information Act.

Id.

Following the receipt of the FBI's records from the Clallam County Prosecuting Attorney's Office, Stenson, with the assistance of counsel, filed a document entitled "Petitioner Darold Stenson's Motion to Vacate Conviction or Alternatively Vacate Sentence of Death Pursuant to CR. R. 7.8(B)" (hereinafter "CrR 7.8(b) motion"). This motion requests relief on the grounds that the photographs of Detective Martin wearing Stenson's pants, the bench notes from the FBI, and an analysis by Janine Arviszu constitutes newly discovered evidence.

The State filed a motion to transfer Stenson's CrR 7.8(b) motion to the Washington Supreme Court on the grounds that it was untimely. Stenson's opposition to the State's transfer motion was presented orally on August 21, 2009. Stenson's argument was that the allegedly "newly discovered evidence" could have supported a claim of residual doubt that may have resulted in a sentence other than death. *See* 10RP 16-17. As to the impact of the allegedly "newly discovered evidence" on the jury's finding of

¹³Ms. Wulff's declaration may be found in appendix J.

guilt, Stenson stated that:

I don't think it's really just impeaching. I think it really undermines the – I don't think it just impeaches the result, I think it makes the results substantially unreliable.

I guess impeaching is – is a little bit maybe a term of art and maybe sometimes the lines aren't as quite clearly delineated as one might like. But the gist of our motion is not just merely that would have been a little better impeachment, it's that this evidence was no good, period.

10RP 17-18.

Judge Williams ultimately granted the State's motion to transfer Stenson's CrR 7.8(b) motion to this Court, concluding that the evidence Stenson was claiming as "newly discovered" while possibly not cumulative, might be impeaching. *See State v. Darold Stenson*, Clallam County Cause No. 93-1-00039-1, Memorandum Opinion on CrR 7.8(B) Motion to Vacate Conviction or Alternatively Vacate Sentence of Death and Order of Transfer, at 6. (Sep. 9, 2009). Thus, Judge Williams could not conclude that Stenson's sixth collateral attack was not time barred by RCW 10.73.090.

V. ARGUMENT

The instant matter is a sixth personal restraint petition challenging an August 19, 1994, facially valid judgment and sentence. This PRP cannot be filed unless every issue raised in the PRP satisfies one or more of the exceptions contained in RCW 10.73.100. *See* RCW 10.73.090(1); *Stenson III*, 150 Wn.2d 220.

The instant PRP contains a challenge to Darold Stenson's lawful sentence that is already pending in this Court. This claim may be asserted in a successive collateral attack only if Stenson can demonstrate good cause for renewing the claim. *See* RAP 16.4(d).

The instant PRP contains challenges to Darold Stenson's lawful sentence that could have been raised in previous collateral attacks. These issues may only be considered by this Court if they fall within one or more of the exceptions contained in RCW 10.73.100, and if Stenson can demonstrate an intervening change in the law. *See* RCW 10.73.090; *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 737 n.2, 147 P.3d 573 (2006) ("New issues in successive petitions are barred in this court by way of the abuse of the writ doctrine, which applies only where the petitioner has been represented by counsel throughout postconviction proceedings. In addition, the doctrine does not apply where the new issue is based on an intervening change in the law. *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 144-45, 102 P.3d 151 (2004).").

A. Stenson's Sixth PRP Must Be Summarily Dismissed as Time-Barred

A court's authority to reopen a judgment in a criminal case arises from either a statute or the constitution. The constitutional authority, which is contained in article I, § 13, is very narrow and does not permit challenges

that go beyond the face of a final judgment of a court of competent jurisdiction. *In re Personal Restraint of Runyan*, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993). Any inquiry beyond the face of a final judgment results from the legislative authorization found in the habeas corpus statute, RCW 7.36.130.

The habeas corpus statute, RCW 7.36.130, incorporates a mandatory time-bar, after which a Court may not consider challenges brought by a petitioner unless such challenges satisfy one or more of the statutory exceptions contained in RCW 10.73.100. *See* RCW 10.73.090; RCW 10.73.100; *Shumway v. Payne*, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998) (“The statute of limitation set forth in RCW 10.73.090(1) is a mandatory rule that acts as a bar to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more of the [grounds contained in RCW 10.73.100]”); *In re Personal Restraint of Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998) (court rules cannot be used to alter or enlarge the time limit contained in RCW 10.73.090). This time-bar applies to capital cases. *See Id.*; *Stenson III*, *supra*.

Stenson’s death sentence and aggravated murder convictions became final no later than March 16, 1998, when this Court issued its mandate following the United States Supreme Court’s denial of Stenson’s petition for

certiorari. *See* RCW 10.73.090(3). Stenson, therefore, is precluded from filing any collateral attack to his death sentence after March 15, 1999, unless every claim contained in the collateral attack satisfies one or more of the exceptions delineated in RCW 10.73.100. *See Stenson III*, 150 Wn.2d at 220-21.

Stenson's instant collateral attack cites to RCW 10.73.100(1) on page 13. Stenson, however, offers no explanation on how the Englert photographs, the FBI laboratory notes, or the analysis of Janine Arvizu satisfy the requirements of RCW 10.73.100(1). If even one of these items fails the multi-part "newly discovered evidence" exception to the one-year time bar, the entire collateral attack must be dismissed. *Stenson III*, 150 Wn.2d 220.

To be entitled to avoid the RCW 10.73.090 time-bar, Stenson must be able to point to new evidence, and he must establish that he acted with reasonable diligence in discovering the new evidence. *See* RCW 10.73.100(1). A finding of diligence requires a party to show what steps they took to discover the evidence. *See, e.g., Peoples v. Puyallup*, 142 Wash. 247, 252 P. 685 (1927); *Vance v. Thurston County Comm'rs*, 117 Wn. App. 660, 685, 71 P.3d 680 (2003), *review denied*, 151 Wn.2d 1013 (2004).

Here, Stenson sets forth no facts, either by affidavit or otherwise, from which a court can determine what steps he took since his conviction became final to obtain copies of the Englert photographs and the FBI

laboratory documents. This failure alone requires the dismissal of Stenson's sixth collateral attack as time-barred.

The record, however, is not totally silent with respect to Stenson's conduct. The declarations of Paula Wulff and Deborah Kelly establish that Stenson made no requests for the FBI laboratory documents between the denial of his direct appeal in 1998 and 2009. The declarations also establish that there were mechanisms in place by which Stenson could have obtained the records before the one-year granted by the legislature for the filing of a collateral attack expired. Pure non-action, such as that demonstrated by Stenson, does not constitute "reasonable diligence". See, e.g., *Davenport v. Taylor*, 50 Wn.2d 370, 374, 311 P.2d 990 (1957).

Even if Stenson could overcome the "reasonable diligence" threshold of RCW 10.73.100(1), he would still be required to demonstrate with respect to his "new evidence":

"that the new evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new" proceeding.

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

1. Stenson Has Not Established That the Englert Photographs and the Gunshot Residue Records Were Discovered Since Trial

A defendant seeking post-conviction relief must tender competent evidence to support his petition. *See generally In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1991) (allegations supporting a personal restraint petition must be proven by "competent, admissible evidence."); *In re Personal Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 113 S. Ct. 421 (1992) (a petitioner must produce affidavits that "contain matters to which the affiants may competently testify" before s/he will be entitled to a reference hearing on a personal restraint petition).

Here, Stenson's CrR 7.8(b) motion contains an allegation that the State did not provide him with any of the underlying data, bench notes, or reports concerning the FBI's gunshot residue testing (GSR records) or the photographs taken by Rod Englert. *See CrR 7.8(b) Motion at 8-9*. Stenson's motion, however, contains no evidence that Stenson did not possess these items at the time of trial. Notably lacking is a declaration from any of the following persons:

- Stenson's lead trial counsel, Frederick Leatherman, stating that Mr. Leatherman, at the time of trial, did not have copies of and was unaware of the contents of either the Englert photographs or the GSR records.

- Stenson's other trial counsel, David Neupert, stating that Mr. Neupert, at the time of trial, did not have copies of and was unaware of the contents of either the Englert photographs or the GSR records.
- Stenson's guilt phase investigator, Jeffrey Walker, stating that when Mr. Walker met with Mr. Englert on June 7, 1994, Mr. Englert did not show Mr. Walker the photographs that had been taken of Stenson's pants.
- Rod Englert indicating that he never showed the photographs he had taken of Stenson's pants to, or provided copies of the photographs to Jeffrey Walker or to anyone else assisting in Stenson's defense prior to trial.

The lack of competent evidence, from a witness with personal knowledge, on this point prevents Stenson from satisfying the second factor of the *Brown* test. Stenson's sixth collateral attack must, therefore, be dismissed as time-barred.

2. Stenson Cannot Demonstrate That He Could Not Have Discovered the Englert Photographs, the GSR Records, or the Opinion of a Laboratory Quality Auditor, Before Trial by the Exercise of Due Diligence.

a. Englert Photos

Stenson received a copy of Mr. Englert's handwritten report from the

State no later than June 14, 1994. This report, which was a duplicate of the report Mr. Walker reviewed with Mr. Englert on June 7, 1994, clearly indicated that Mr. Englert took photographs of Stenson's pants and that Mr. Englert had possession of these photographs. If, Mr. Englert did not show the photographs to Mr. Walker on June 7, 1994, Stenson has produced no competent evidence of the efforts he made to obtain access to the photographs prior to the start of testimony on July 18, 1994. *See* RP 1.

Many avenues were open to Stenson. He could have sent Mr. Walker back to Mr. Englert's laboratory to obtain copies of the photographs. He could have phoned Mr. Englert and asked him to send Stenson duplicates of the photographs. If Mr. Englert was unwilling to voluntarily provide Stenson with access to or copies of the photographs, the court had the ability and authority to issue a subpoena compelling the production of the photographs. *See* CrR 4.7(d) and Chapter 10.55 RCW. Stenson's failure to request the issuance of such a subpoena is fatal to a finding of due diligence.¹⁴ *See, e.g.,*

¹⁴These same facts are fatal to Stenson's claim that the State violated *Brady*. *See, e.g., State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004) (nondisclosure does not result in a *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) violation if the defendant could have obtained the information himself through reasonable diligence); *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 397, 972 P.2d 1250 (1999) (no evidence was withheld from the defense in violation of *Brady* when the defendant's current counsel were able to find additional documents based upon the information provided by the prosecution to the defendant's trial counsel).

State v. Hairychin, 136 Wn.2d 862, 968 P.2d 410 (1998) (State's failure to issue a subpoena to compel the victim's appearance at the fact finding hearing precluded a finding of due diligence); *State v. Jackman*, 113 Wn.2d 772, 780-81, 783 P.2d 580 (1989) (defendant, who did not request a continuance, to allow for a material witness warrant to be served, did not use due diligence to obtain the evidence prior to trial). See also 12 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 1811, at 413-14 (3d ed. 2004) (a showing of due diligence necessary to obtain a continuance to secure the attendance of a witness or to obtain evidence requires the applicant to demonstrate that he used the means provided by the law to procure evidence or witnesses, such as subpoenas or subpoenas duces tecum).

b. GSR Records

The Clallam County Prosecuting Attorney provided Stenson's trial team with a copy of the FBI's June 13, 1994, report of the GSR testing. This report ended with the following paragraph:

Please call Examiner Ernest R. Peele, (202) 324-3552, if you have any questions concerning the results of examinations in this case.

The records of the FBI contain no evidence that Stenson ever acted upon that invitation. See *Declaration of Paula H. Wulff*. The Clallam County Superior Court's records in *State v. Stenson*, Cause No. 93-1-00039-1, contain no request for a subpoena and no motion, such as that filed by Stenson in

preparation for the *Frye* hearing, for production of the bench notes and other raw data. Stenson, therefore, cannot satisfy the “due diligence” element of a newly discovered evidence claim. The instant PRP, his sixth collateral attack, must be dismissed.

c. Analysis By Janine Arvizu

Included in Stenson’s CrR 7.8(b) motion is a declaration from Janine Arvizu. *See* CrR 7.8(b) Motion, Exhibit E. Ms. Arvizu is a laboratory quality auditor. She opines, based upon “the FBI reports, the testimony of Agent Peele, the notes of Rod Englert and his photographs, and all of the GSR reports provided to the defense”, “that the GSR results obtained do not show enough particles to associate Mr. Stenson with a shooting environment.” CrR 7.8(b) Motion at 9 and Exhibit E at 3 and 16-17. As Ms. Arvizu’s opinion is based upon information that was all available at the time of trial, her opinion does not constitute “newly discovered evidence.” *See, e.g., State v. Harris*, 106 Wn.2d 784, 796, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987) (new expert opinion based upon a review of evidence that was available prior to trial will not support a motion for new trial); *State v. Mesaros*, 62 Wn.2d 579, 588-90, 384 P.2d 372 (1963) (same); *State v. Harper*, 64 Wn. App. 283, 823 P.2d 283 (1992) (same); *State v. Evans*, 45 Wn. App. 611, 614-15, 726 P.2d 1009 (1986), *review denied*, 107 Wn.2d 1029 (1987) (same). Stenson’s entire sixth collateral attack must, therefore,

be dismissed as an untimely mixed petition.

3. Stenson's "New Evidence" is Merely Impeaching or Cumulative to the Evidence of Contamination Introduced at Trial.

Generally speaking, impeachment is the discrediting of a witness' veracity, such "as by catching the witness in a lie or by demonstrating that the witness has been convicted of a criminal offense." Black's Law Dictionary 768 (8th ed. 2004) (defining impeachment). Impeachment can be accomplished in a number of ways. A party may impeach expert testimony introduced by (1) introducing its own expert testimony in rebuttal; or (2) discrediting the opposing party's expert testimony on cross-examination; or (3) relying upon evidence from which the jury may infer that the opposing party's expert testimony depends on an incorrect view of the facts. *United States v. Bodey*, 607 F.2d 265, 269 (9th Cir. 1979); *see also United States v. Dube*, 520 F.2d 250, 252 (1st Cir. 1975) ("Expert testimony is not conclusive even where uncontradicted . . . and it may be rebutted in various ways apart from the introduction of countervailing expert opinion."); 5B K. Tegland, *Washington Practice: Evidence Law and Practice* § 702.50, 705.7, and 705.8, at 182-85 and 296-303 (5th ed. 2007).¹⁵

¹⁵Juries in Washington, including Stenson's jury, are informed that an expert's opinion is not binding upon them. *See generally* CP 370, Jury Instruction 4, quoting Former WPIC 6.51.

This pattern jury instruction provided that:

Here, all of the “new evidence” identified by Stenson falls squarely within the recognized methods of impeaching an expert. The photographs and the number of GSR particles are intended to demonstrate that FBI Examiner Peele’s conclusions are based upon an incorrect view of the facts. Janine Arvizu’s evaluation of the evidence is offered as a contradiction of FBI Examiner Peele’s conclusions, and thus cannot support a claim of “newly discovered evidence.” *See Mesaros*, 62 Wn.2d at 589-590 (opinion of expert obtained post trial that was intended to discredit the testimony of an agent from the FBI laboratory failed the test for newly discovered evidence as it “would be merely impeaching or for the purpose of discrediting evidence produced at trial.”).

Stenson’s claim that the GSR records also establish that Mr. Peele committed perjury at trial is unsupported by the record. Stenson’s claim of perjury is based, almost exclusively, upon how the prosecutor phrased his questions. *See CrR 7.8(b) Motion at 3*. It is a fundamental rule of law,

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

however, that

[t]he lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence.

WPIC 1.02.

The correct focus should be upon a witness' responses. Here, Mr. Peele used the plural pronoun "we", when he reported the detection of GSR on the dabs taken from Stenson's pants pockets:

A. Okay. The pieces were again given Q numbers. Q85 is a dab from the right front pocket of the pants. Q86 is a dab from the left front pocket of the pants. On Q86 *we* did not find any particles of gunshot primer residue during our analytical process. For what reason *we* don't know. *We* just didn't find any.

On Q85 *we* did find particles of gunshot residue to the surface represented by those samples, in other words, what was sampled came into contact or came into this environment of gunshot primer residue in some way or another, meaning contacting a contaminated surface or being in the vicinity in order to get that material in it. Those particles were found on Q85 from the right front pocket.

RP 1089 (emphasis added.) Mr. Peele also candidly acknowledged that another examiner assisted him in the processing of the GSR Kit that was sent to the FBI by Detective Martin. *See* RP 1088.

Mr. Peele's testimony, moreover, is accurate in light of the practices and procedures of the FBI Laboratory. As an examiner, Mr. Peele selected

the method of testing, the order in which testing would be performed, and he brought his training and expertise to bear on the raw data. See Declaration of Steven G. Burmeister. Characterizing the GSR examination as Mr. Peele's, is no less true than a chef stating that it is his entree, when a prep cook actually sauteed the vegetables, stirred the sauce, and grilled the meat.

Mr. Peele's testimony would have been admissible in Stenson's 1994 trial even if Mr. Peele had been questioned about "who" assisted Mr. Peele, and "what" services the assistants performed. See, e.g., *State v. Kreck*, 86 Wn.2d 112, 542 P.2d 782 (1975) (state toxicologist could testify about a test for chloroform that was performed by a trained chemist working under the direction of the state toxicologist). While the continued propriety of having a supervisory analyst testify regarding work performed at his direction is uncertain under *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009),¹⁶ the *Melendez-Diaz* case does not apply retroactively to cases tried before the issuance of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). See generally

¹⁶The appellate courts are currently split on the propriety of this practice under *Melendez-Diaz*. Compare *People v. Gutierrez*, 177 Cal. App. 4th 654, 99 Cal. Rptr. 3d 369 (2009) (the Confrontation Clause was not violated by admission of testimony from a lead nurse practitioner about contemporaneous notations in a sexual assault report prepared by a nontestifying nurse practitioner), with *People v. Dungo*, 176 Cal. App. 4th 1388, 98 Cal. Rptr. 3d 702 (2009) (the Confrontation Clause was violated by admission of testimony from a pathologist about an autopsy report that was prepared by pathologist's employee in the midst of homicide investigation).

Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) (the rule announced in *Crawford* does not apply retroactively to a case that was already final); *In re Personal Restraint of Markel*, 154 Wn.2d 262, 111 P.3d 249 (2005) (same).

Finally, all of Stenson's proffered "new evidence" would have been cumulative to the evidence of contamination offered at trial and to Mr. Peele's testimony that:

In general I don't do analyses on clothing because of the interpretation problems. . . . The hand is the important thing.

RP 1107. Stenson, therefore, has not overcome the time-bar set forth in RCW 10.73.090. *See Stenson III*, 150 Wn.2d at 217-20

4. Stenson Cannot Demonstrate that His "New Evidence" Would Change the Result of the Trial.

Stenson's "new evidence" would not change the result of Stenson's trial. The State's evidence of motive and opportunity is not impacted by Stenson's "new evidence". *See generally Stenson III*, 150 Wn.2d at 211 ("evidence established that Stenson killed his wife in order to collect life insurance benefits and killed Hoerner to get out from under a debt he owed Hoerner and to cast blame on Hoerner for the murder of Denise Stenson"); *Stenson II*, 142 Wn.2d at 751 ("There is no evidence of any adult being present at Dakota Farms at the time of the murders other than Denise Stenson, Darold Stenson, and Frank Hoerner. Two of the adults had been shot

in the head. Forensic evidence showed that the victim with a gun beside his head had probably been knocked unconscious before he was shot. The only other adult present was Stenson.”).

Stenson’s “new evidence”, moreover, does not impact or touch upon the most compelling forensic evidence. Stenson was found in clothing that was spattered with blood from one of his victims. This blood was in areas inconsistent with Stenson finding Frank Hoerner dead on the floor. *Stenson II*, 142 Wn.2d at 756.¹⁷

Stenson’s “new evidence” does not alter the jury’s determination that “more than one person was murdered and the murders were part of a common scheme or plan.” *State v. Stenson*, 132 Wn.2d 668, 682, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) (“*Stenson I*”). Since “lingering doubt” or “residual doubt” is not a constitutional or statutory mitigating factor, “new evidence” that may give rise to such a doubt cannot, as a matter of law, impact the outcome of trial. *See Lord*, 123 Wn.2d at 330 (“Residual

¹⁷As recognized by Judge Williams when he initially denied Stenson’s request for post-conviction DNA testing:

the evidence relating to the blood on the pants of Mr. Stenson, which was Mr. Hoerner's blood and which could only be explained by Mr. Stenson's involvement in Mr. Hoerner's death, I think is overwhelming and there is nothing to indicate that DNA found on any of the items would obviate that conclusion.

doubt as to the defendant's guilt is not one of the 'relevant factors' listed in RCW 10.95.070 (or the jury instructions), nor does the constitution require that it be treated as a mitigating factor. *Franklin v. Lynaugh*, 487 U.S. 164, 101 L. Ed. 2d 155, 108 S. Ct. 2320 (1988). Accord *Oregon v. Guzek*, 546 U.S. 517, 525, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006).

B. Stenson's Sixth PRP Must Be Summarily Dismissed as Successive and Abusive

The instant collateral attack is Stenson's sixth. In each of his five prior collateral attacks, Stenson requested the same relief he seeks here— a new trial and/or the vacation of his death sentence. RAP 16.4(d) prohibits a petitioner from filing more than one petition for similar relief without good cause.

The abuse of the writ doctrine states that "if the petitioner was represented by counsel throughout postconviction proceedings, it is an abuse of the writ for him or her to raise, in a successive petition, a new issue that was "available but not relied upon in a prior petition." *In re Personal Restraint of Jeffries*, 114 Wn.2d 485, 492, 789 P.2d 731 (1990) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986)). The doctrine does not, however, apply if the claim is based upon intervening case law or upon newly discovered evidence, which would have probably changed the outcome of the trial or proceeding. *Stenson IV*, 153

Wn.2d at 145.

Stenson does not claim that his instant collateral attack rests upon an intervening change in law. In fact, his CrR 7.8(b) motion rests entirely upon legal doctrines that were announced long before his convictions became final. See CrR 7.8(b) Motion at 10 (citing to *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935), *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and *Brady v. Maryland*, *supra*).

Stenson's current collateral attack does not fall within the "newly discovered evidence" exception to the abuse of the writ doctrine for the reasons stated in section V. A. of this response. This collateral attack must, therefore, be promptly dismissed.

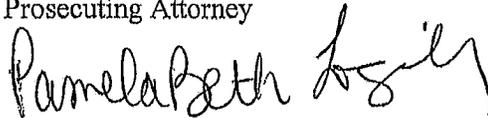
VI. CONCLUSION

Stenson's sixth PRP challenging his death sentence must be dismissed with prejudice as untimely, successive and abusive.

DATED this 23rd day of October, 2009.

Respectfully submitted,

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