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SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

83606-0

DAROLD STENSON,)	NO. 93-1-00039-1
Petitioner,)	PETITIONER DAROLD STENSON'S
vs.)	MOTION TO VACATE CONVICTION
STATE OF WASHINGTON,)	OR ALTERNATIVELY VACATE
Respondent.)	SENTENCE OF DEATH PURSUANT
)	TO CR. R. 7.8(B)
)	Noted for: 10/1/2009

On January 7, 2009, an investigator working on Darold Stenson's case received photographs that show Detective Monty Martin wearing Mr. Stenson's pants, one week before the same detective took gunshot residue samples from the pants pockets. The photographs show the right front pants pocket turned inside-out and Detective Martin in a crime laboratory, without gloves.

On May 21, 2009, the Clallam County Prosecuting Attorney's Office for the first time provided counsel for Mr. Stenson the FBI's records of the gunshot residue (GSR)

1 testing that was conducted in this case.¹ The FBI records show (1) that the state offered
2 false and misleading testimony concerning the alleged presence of gunshot residue in
3 Mr. Stenson's right front pants pocket, (2) that the state offered false and misleading
4 testimony as to the identity of the analyst who actually performed the gunshot residue
5 tests at issue, (3) that the state offered false and misleading testimony about the
6 possibility of contamination of the pants pocket which allegedly contained the gunshot
7 residue, (4) that the state concealed from its own expert crucial information regarding
8 contamination of the pants, and (5) that the state breached its obligations to provide the
9 defense with exculpatory evidence in its possession.

10 Because the prosecution failed to provide Mr. Stenson's trial counsel with the
11 photographs of Detective Martin wearing Mr. Stenson's pants and the FBI records, and
12 then used this information disparity to its decided advantage, the jury which convicted
13 Mr. Stenson did so under the devastating but untrue belief that unchallengeable scientific
14 proof existed that Mr. Stenson's hand had been "in a shooting environment" and the only
15 explanation for this fact was that Mr. Stenson shot Frank Hoerner and Denise Stenson.
16 The state's actions and inactions render Mr. Stenson's conviction and sentence of death
17 unreliable and violated his rights under the Eighth and Fourteenth Amendments of the
18 United States Constitution and Article I, §§ 3 and 14 of the Washington State
19 Constitution.

20 **I. Facts**

21 This section first discusses the GSR evidence presented at trial and the parties'
22 arguments about the evidence. It next traces the manner in which the pants were
23 handled, the GSR evidence obtained, the tests conducted, and the discovery furnished to
24

25 ¹ While materials that have never before been provided were included, it is unclear whether there
26 are additional records that have not yet been provided to defense counsel. The FBI has not responded to
an additional request for records sent on June 23, 2009.

1 the defense prior to trial. Last, this section details the evidence discovered this year.

2 **A. GSR Evidence at Trial**

3 **1. Agent Peele**

4 **a. Direct Examination**

5 FBI Special Agent Roger Peele testified for the state about GSR. 7/28/94 Tr. at
6 1062.² Agent Peele presented himself as an experienced, well-trained examiner of
7 gunshot residue who had “[l]ooked at literally thousands of cases over this [14-year]
8 period of time, [and] testified in many courts across the United States.” 7/28/94 Tr. at
9 1064.

10 On direct examination he explained to the jury in detail how gunshot residue was
11 deposited and how gunshot residue testing was performed. 7/28/94 Tr. at 1077-1084.

12 The prosecutor then questioned Agent Peele about the GSR testing in this case.
13 These questions all stated or implied that Agent Peele had conducted the testing. *See,*
14 *e.g., id.* at 1083 (“What examinations **did you** ^{Generic FBI} **conduct** on that exhibit?”), 1084 (“And as
15 a result of **your examinations**, what conclusions or opinions did you come to . . .?”),
16 1085 (“And **you conducted examinations** upon the items contained in Exhibit 106.
17 Were they changed or altered in the course or **your examinations**?), 1089 (“And would
18 **you explain to the jury the results of your examination** and any opinions or
19 conclusions that you drew from these examinations.”) (emphases added). Agent Peele
20 never disclosed that he had not conducted the underlying examinations nor did he ever
21 mention the name of FBI analyst Kathy Lundy.

22 Agent Peele testified that state’s exhibit Q85 was from the right front pocket of
23 Mr. Stenson’s jeans and that “On Q85 we did find particles of gun shot residue to the
24 surface represented by those samples, in other words, what was sampled came into
25

26 ² Transcript references are to the original page numbering provided by the court reporter.

1 contact or came into this environment of gun shot primer residue in some way or
2 another, meaning contacting a contaminated surface or being in the vicinity in order to
3 get that material in it.” 7/28/94 Tr. at 1089. The prosecutor followed up on this
4 response by asking if a surface containing residue was “not itself in the vicinity of a
5 shooting environment, would it be the result of having been transferred from something
6 else?” *Id.* After receiving an affirmative response from Agent Peele, the prosecutor
7 asked “If my hand is in a shooting environment and I receive gunshot residue, may I
8 transfer it to something else by touching something else?” Agent Peele responded, “You
9 could transfer some of it over. The more you touch something else, the more potential
10 you could transfer it.” *Id.* at 1089-90.

11 Agent Peele did not offer any testimony about the quantity of gunshot residue
12 found on Mr. Stenson’s pants. He simply testified without elaboration that Mr.
13 Stenson’s right hand pocket contained GSR.

14 **b. Cross-Examination of Agent Peele**

15 The defense asked Agent Peele when he performed the examination and about the
16 possibility of contamination. Agent Peele indicated that the GSR analysis occurred in
17 May of 1994. 7/28/94 Tr. at 1106. He was specifically asked if he knew when the “dabs
18 that you analyzed were taken,” and he replied that “I am – I do not remember exactly
19 how much information I had. I know I would have asked that question. I did not write
20 down any specifics on it but in general I asked when things are done. I don’t know in
21 this case.” *Id.*

22 The defense then asked if “hypothetically” the GSR dabs had not been collected
23 until a year after the pants had been taken by the Clallam County Sheriff’s Office
24 whether this would cause Agent Peele “any concerns.” *Id.* at 1107. Agent Peele replied
25 that if the pockets were disturbed that the “[p]otential for adding contamination comes
26 into play. So depending on what’s being done and what happens to the interior of that

1 pocket, if nothing happens to the interior of the pocket then nothing is disturbed.” *Id.*

2 Mr. Leatherman also attempted to question Mr. Peele about the possibility
3 “speaking hypothetically” of contamination from Mr. Stenson having sat in the backseat
4 of a patrol car after the murders but before the pants were collected. Agent Peele did not
5 offer any opinion on this matter and also testified that no tests had been performed on a
6 GSR sample taken from the back seat of the patrol car. 7/28/94 Tr. at 1102-1103.

7 **c. Redirect Examination**

8 On redirect examination, the prosecutor focused on the importance of the pocket
9 not being disturbed.

10 Q: Mr. Peele, you said with regard to gunshot residue in a
11 pocket, if nothing happened to the pocket, nothing is
disturbed; is that correct?

12 A: Yes, sir that’s correct.

13 Q: And so the integrity of a possible item of evidence would
remain intact over time as long as it was not disturbed?

14 A: That’s correct.

14 7/28/94 Tr. at 1109

15 **2. Michael Grubb’s Testimony**

16 State blood expert Michael Grubb was asked by Mr. Leatherman “whether
17 anyone ever wore the pants?” Mr. Grubb replied “No.” 8/2/94 Tr. at 1401. The
18 question was not limited to whether anyone wore the pants on a particular day. *Id.*

19 **3. Detective Martin’s Testimony**

20 Detective Martin sat at the state’s table throughout the trial and was present when
21 both Agent Peele and Mr. Grubb testified.

22 Detective Martin testified that he collected the gunshot residue samples from the
23 Mr. Stenson’s jeans at “10:41 A.M. on April 20, 1994.” 7/25/94 Tr. at 671.

24 The state never solicited testimony from Detective Martin regarding the fact that
25 on April 14, 1994 during a meeting with Rod Englert Detective had tried on Mr.
26 Stenson’s pants and had turned the right front pocket of the pants inside out while he

1 was not wearing glove, and that Mr. Englert had photographed Detective Martin wearing
2 the pants with the right front pocket turned inside out and with Detective Martin's hands
3 visible and ungloved in close proximity to the pockets.

4 B. Closing Arguments

5 The defense closing argument conceded that if the jury believed that Mr.
6 Stenson's pockets contained GSR and the GSR was not the result of contamination, then
7 this was powerful circumstantial evidence of Stenson's guilt. "The reason that I bring
8 that up is that you would argue that the presence of this gunshot residue is certainly
9 proof that he pulled the trigger. That he literally pulled the trigger two times." 8/9/94
10 Tr. at 1752 (emphasis added).

11 The defense then sought to avoid the implications of the GSR testimony by
12 claiming that the pants could have been contaminated by either Mr. Stenson getting
13 residue on his hands in the patrol car or during the testing at the FBI laboratory. *Id.* The
14 defense, however, was unable to point to any hard evidence of contamination and could
15 only state that "it could have happened at any point along the chain." *Id.* at 1753.

16 The prosecutor devoted several pages of his rebuttal closing argument to the GSR
17 results, mocking the defense's suggestions of contamination. The prosecutor argued that
18 it is always possible to "speculate and come up with some wild theories about events,"
19 but that only the state's argument made any sense. 8/9/94 Tr. at 1777-1778. Mr.
20 Bruneau seized upon the lack of evidence of contamination when he told the jury,
21 "everything that [defense counsel] has had to say to you folks has been an invitation to
22 the rankest forms of speculation. Or imagination." *Id.* at 1778. He went on to insist that
23 the gunshot residue was unchallenged, undeniable evidence of Mr. Stenson's guilt.

24 Mr. Neupert talks about well, perhaps imagine, maybe
25 the defendant picked up that gunshot residue that was found
26 in his right pocket from Deputy Fuchser's car. Or maybe he
got it because J.R. Williamson at the FBI crime lab once
handled this piece of evidence.

1 Well, first of all, I think you know from observing the
2 FBI personnel who testified here that they know how to
3 handle evidence and I think you know now that Sergeant
4 Turner's concerns about the defendant being in Fuchser's car
5 were unfounded. Conscientious but unfounded. Because
6 Roger Peele told you that in order to get the gunshot residue,
7 you have to be in a shooting environment. That's the bottom
8 line. You have got to have your hands in a shooting
9 environment.

10 . . . And there was gunshot residue in the defendant's
11 pockets. And to call upon you for you ladies and gentlemen
12 to speculate about now, maybe, gee, how about he got this
13 gunshot residue this way and maybe, maybe.

14 There's no shooting environment in Deputy Fuchser's
15 car. There's no shooting environment at the FBI Crime
16 Laboratory. Counsel is asking you to imagine something.
17 And I submit, ladies and gentlemen, that a sufficient and
18 direct and simple explanation of the facts is much preferable
19 to monumental speculations that Mr. Neupert would have
20 you undertake. Because the simple, direct and sufficient
21 explanation of the evidence in this case points to the fact that
22 this defendant is guilty as charged.

23 *Id.* at 1779-80.

24 **C. The Discovery Provided to the Defense Prior to Trial**

25 The state was under a court order to provide to the defense copies of all "reports,
26 letters and conclusions prepared by or on behalf of other forensic experts . . ." October
8, 1993 Reciprocal Order Compelling Parties to Provide Discovery in a Timely Manner,
attached as Exhibit A. The state was also obligated to provide "[c]opies of the
laboratory bench notes generated by every laboratory analyst who tested evidence in this
case. Photographs generated from the negatives of any photographs taken by laboratory
personnel relating to the cataloging and analysis of evidence in this case shall also be
provided." February 4, 1994 Discovery Order, attached as Exhibit B. At a hearing held
on June 13, 1994, the state assured the defense and the Court that it was scrupulously
honoring this obligation. 6/13/94 Tr. at 20-22.

The state did not, however, provide the defense with (1) any of the underlying
data, bench notes, or reports concerning the FBI's GSR testing, or (2) any of the

1 photographs taken by Rod Englert of Detective Martin wearing Mr. Stenson's pants with
2 the right pocket turned out on April 14, 1994, six days before Detective Martin took the
3 allegedly incriminating GSR dab from the right pocket. None of Detective Martin's
4 reports contain any mention of his trying on the pants or turning out the right pants
5 pocket or of Mr. Englert taking any photographs of him.³

6 The evidence provided to the defense pretrial also shows that in April of 1993 the
7 state sent the pants to the FBI lab with a request that they be tested for gunshot residue.
8 For unexplained reasons such testing was never performed.

9 **D. New Evidence Undermining Meaning of GSR Test Results**

10 **1. Photographs**

11 On January 7, 2009, an investigator working on Mr. Stenson's case met with Rod
12 Englert to discuss the blood spatter evidence. Mr. Englert provided the investigator with
13 photographs of Detective Martin wearing Mr. Stenson's pants at the Intermountain
14 Forensic Laboratory in Portland, Oregon one week prior to Detective Martin taking the
15 GSR samples. The photographs further show that Detective Martin was not wearing
16 gloves when he wore the pants and that the right pants pocket was turned out.

17 On July 16, 2009, Detective Martin verified that the photographs show him
18 wearing Mr. Stenson's pants on April 14, 1994 at the Intermountain Forensic
19 Laboratory. See Exhibit C.

20 **2. FBI File**

21 On May 21, 2009 the state sent to current counsel the materials contained in
22 Exhibit D. The newly discovered evidence contained in the materials sent to counsel on

23
24 ³ The state ultimately declined to call Mr. Englert as a witness at trial. It did attach Mr. Englert's
25 handwritten notes of the April 14th meeting between Mr. Englert and Detective Martin as an exhibit to
26 its response to a defense motion regarding the State's actions in regard to Mr. Englert. These notes
mention that Detective Martin tried on the pants and that Mr. Englert took photographs. The exhibit does
not include the photographs and the notes do not state that the photographs are of Detective Martin
wearing the pants nor do they state that the right pants pocket had been turned out.

1 May 21, 2009 shows the following:

2 First, only a very low level of GSR was detected on the dab taken from the right
3 front pants pocket, Q85. The recently-provided report further reveals, "The Q85 sample
4 was searched twice . . . due to the limited number of particles detected in the first search.
5 The sample was also searched manually for approximately three hours in areas not
6 covered by the automated searches." Exhibit D at 223. After these three searches, the
7 FBI analyst was able to identify, at most, only four particles consistent with GSR.
8 Precisely how many, and which, particles the FBI analyst identified as consistent with
9 GSR is unknown because the FBI materials do not include this information.

10 Second, both the automated testing and the manual examination of the right pants
11 pocket was performed not by Agent Peele but by analyst Kathy Lundy.

12 Third, the FBI laboratory generated printouts showing the precise metallurgical
13 composition of each of the particles tested for GSR .

14 **E. Analysis By Janine Arvizu**

15 Janine Arvizu is a laboratory quality auditor. See Exhibit E at 2-3. Ms. Arvizu
16 has been furnished with the FBI reports, the testimony of Agent Peele, the notes of Rod
17 Englert and his photographs, and all of the GSR reports provided to the defense. *Id.* at 3.

18 Ms. Arvizu's opinion is that the GSR results obtained do not show enough
19 particles to associate Mr. Stenson with a shooting environment and rather show that
20 there was not a scientific basis for Agent Peele's testimony. *Id.* at 16-17. She is also of
21 the opinion that Detective Martin's handling of the pants was grossly improper and led
22 to an unacceptable risk of contamination such that any GSR testing of the pants post-
23 handling produced meaningless results. *Id.* at 15.

1 **II. The Prosecutor's Failure to Correct False Testimony, Failure to Provide**
2 **Exculpatory Evidence, and Exploitation of these Failures During Closing**
3 **Argument Undermines Confidence in the Jury's Verdict and Violated Mr.**
4 **Stenson's Fourteenth Amendment Right to Due Process of Law**

5 The state's failure to correct false testimony regarding the GSR violated its
6 obligations under *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Napue v. Illinois*, 360
7 U.S. 264 (1959), and its failure to provide the exculpatory FBI reports, also regarding
8 GSR, violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). In closing
9 argument the prosecutor exploited the false testimony and the suppression of evidence,
10 and argued, contrary to the facts that he knew or should have known, that the GSR
11 evidence proved that Mr. Stenson was in a shooting environment and that there was no
12 reason to believe the evidence had been contaminated. In a case such as this, where the
13 suppressed evidence and uncorrected testimony both go directly towards the strongest
14 evidence of guilt, where the prosecutor exploits his misconduct in closing argument, and
15 where a man's life is at stake, the errors undermine confidence in the jury's verdict and
16 require this Court to vacate the conviction, or, at a minimum, to set aside the sentence of
17 death.

18 **A. Legal Standards**

19 The requirements of the Fourteenth Amendment articulated in *Mooney*, *Napue*,
20 and *Brady* collectively guarantee that a prosecutor fulfills his or her obligation to ensure
21 that a jury's verdict is based upon reliable information. The Fourteenth Amendment also
22 imposes "a duty not to exploit false testimony by prosecutorial argument affirmatively
23 urging to the jury the truth of what it knows to be false." *Brown v. Wainwright*, 785
24 F.2d 1457, 1464 (11th Cir. 1986). Likewise, the Washington Constitution also imposes
25 similar obligations upon prosecutors. *See, e.g., In re the Personal Restraint of Pirtle*,
26 136 Wn.2d 467, 965 P.2d 593 (1998); *In re the Personal Restraint of Sherwood*, 118
Wn. App. 267, 270, 76 P.3d 269 (2003).

1 A prosecutor violates his obligation when he knowingly presents false
2 information or fails to “correct the record to reflect the true facts when unsolicited false
3 evidence is introduced at trial.” *Mooney v. Holohan*, 294 U.S. 103 (1935), citing *Napue*
4 *v. Illinois*, 360 U.S. 264 (1959) *Hayes v. Brown* 399 F.3d 972, 984 (9th Cir. 2005). A
5 petitioner is entitled to relief from his conviction if (1) testimony or evidence was false;
6 (2) the state knew or should have known that the testimony was actually false; and
7 (3) the testimony was material. *See, e.g., Hayes* 399 F.3d at 984; *United States v. Zuno-*
8 *Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

9 A prosecutor also violates his obligation to ensure that a jury’s verdict is based
10 upon reliable information when he fails to disclose evidence to a defendant if “(1) the
11 evidence in question is favorable to the accused in that it is exculpatory or impeachment
12 evidence, (2) the government willfully or inadvertently suppresses the evidence, and (3)
13 prejudice ensues from the suppression (*i.e.*, the evidence is ‘material’).” *Silva v. Brown*,
14 416 F.3d 980, 985-86 (9th Cir. 2005) (*citing Banks v. Dretke*, 540 U.S. 668, 691 (2004);
15 *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433
16 (1995)); *Brady*, 373 U.S. at 88.

17 Although the *Napue* materiality standard is lower than the *Brady* materiality
18 standard, courts should consider the cumulative effect of the prosecutor’s errors in
19 determining materiality. *See Kyles*, 514 U.S. at 436 n.10; *Jackson v. Brown*, 513 F.3d
20 1057, 1071 (9th Cir. 2008). Accordingly, the first two elements of each claim are set
21 forth first below, and the final issue of materiality is then addressed with regard to both
22 the *Napue* and *Brady* claims.

23 **B. False Testimony Was Offered At Trial, and the State Knew or Should**
24 **Have Known It Was False**

25 Agent Peele’s testimony suggested that the GSR results were significant. This
26 testimony was misleading. The results recently provided show that a maximum of four

1 GSR particles were confirmed. Exhibit E at 16. Even assuming four GSR particles were
2 found, this number of GSR particles on a piece of clothing does not show anything about
3 whether a person has been in a shooting environment. *Id.* at 8-9, 16-17.

4 Agent Peele also testified that he conducted the GSR testing. Again, this was
5 false. Kathy Lundy conducted the GSR testing.

6 Finally, Mike Grubb testified that no one ever wore Mr. Stenson's pants. This
7 too was false. As documented by the photographs obtained from Rod Englert, Detective
8 Martin wore the pants. The state may claim that Mr. Grubb's testimony was limited to a
9 particular date, but the question asked by Mr. Leatherman and answered by Mr. Grubb
10 was, "Did anyone wear the pants?"

11 C. The FBI Test Results and Reports Were Exculpatory

12 The FBI's GSR test results were exculpatory because they undermined the state's
13 theory of guilt and were thus favorable to Mr. Stenson. *Brady*, 373 U.S. at 87. Contrary
14 to the state's assertions at trial, the GSR test results did not show that Mr. Stenson's
15 hand must have been in a shooting environment. Rather, the low levels of GSR revealed
16 in the reports only recently disclosed are consistent with any other number of situations,
17 including contamination and residual GSR from an earlier firing of a gun. In fact, the
18 test results show that the FBI had to manually search the dab for three hours to come up
19 with, at most, four particles of GSR. Exhibit D at 223; Exhibit E at 16.

20 Additionally, the recently provided results and accompanying documents show
21 that Agent Peele was not given any contemporaneous notes by the responsible analyst,
22 Kathy Lundy. Such notes should have "documented the condition and identity of the
23 samples on receipt, described the sample preparation procedures (including removal of
24 fibers from the sample disks and application of a carbon coating), and documented the
25 number and scope of automatic and manual searches that were performed on each
26 sample." Exhibit E at 16. There is also no evidence that the analyst who actually did the

1 testing used positive and negative controls samples.

2 The GSR test results were necessary to undermine the jury's confidence in Agent
3 Peele's conclusion that there was GSR in Mr. Stenson's pants pockets and to undermine
4 confidence generally in the forensic evidence relied upon by the state. The complete
5 results would have also established that Agent Peele did not conduct the testing, that he
6 had not reviewed any contemporaneous notes in assessing the results provided by Lundy,
7 and that there was no evidence that Lundy used positive and negative controls when she
8 conducted the GSR testing.

9 **D. The State Suppressed The FBI Test Results and Reports and the**
10 **Photographs of Detective Martin**

11 Despite the State's assurances that it was providing all of the relevant reports and
12 outrage at the suggestion that it was not fulfilling its obligations, these materials were
13 not provided to defense counsel until May 2009. The state never provided the
14 photographs of Detective Martin wearing Mr. Stenson's pants, but a defense investigator
15 was able to obtain the photographs in January 2009, and Detective Martin confirmed in
16 July 2009 that the photographs do show him in Mr. Stenson's pants.

17 Mr. Stenson relied upon the representations made by the state that it was
18 fulfilling, and had fulfilled, its discovery obligations and nonetheless diligently
19 attempted to find evidence that would support his claim of innocence.

20 Moreover, because the state suppressed this evidence and it did not become
21 known until this year, Mr. Stenson's motion is timely. Cr. R. 7.8(b)(2); RCW
22 10.73.100(1).

23 **E. The Uncorrected Testimony Was Material Under the *Napue***
24 **Standard, and the Uncorrected Testimony and Suppressed Evidence**
25 **Were Material Under the *Brady* Standard**

26 This Court must vacate a conviction when there is "any reasonable likelihood that
the false testimony *could* have affected the judgment of the jury." *Jackson v. Brown*,

1 513 F.3d 1057, 1076 (9th Cir. 2008), quoting *Hayes v. Brown*, 399 F.3d 972, 985 (9th
2 Cir. 2005) (en banc) (emphasis added in *Jackson*). Here, the false testimony regarding
3 the significance of the few GSR particles, the possibility of contamination, and that
4 Agent Peele conducted the GSR analysis could have affected the jury's verdict and or
5 sentence of death.

6 If this Court determines the false testimony was not material under the *Napue*
7 standard, it must then consider whether the suppressed evidence in combination with the
8 false testimony was material under the *Brady* standard.

9 Under *Brady*, evidence is material "if there is a reasonable probability that, had
10 the evidence been disclosed to the defense, the result of the proceeding would have been
11 different." *Kyles*, 514 U.S. at 433; see also *Banks*, 540 U.S. at 699. "The reasonable-
12 probability standard is not the same as, and should not be confused with, a requirement
13 that a defendant prove by a preponderance of the evidence that but for error things
14 would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9
15 (2004). Materiality therefore "does not require a showing that the defendant would have
16 been acquitted had the suppressed evidence been disclosed, or that disclosure of the
17 suppressed evidence would have reduced the quantum of inculpatory evidence below
18 that required to convict the defendant." *Silva*, 416 F.3d at 986. Materiality "is not a
19 sufficiency of the evidence test." *Kyles*, 514 U.S. at 434-35.

20 1. Significance of GSR Testimony

21 Agent Peele's testimony was not only misleading and false, but – given the state's
22 failure to provide Mr. Stenson with the FBI's results and reports and direct evidence of
23 contamination – it was also uniquely probative and immune from contradiction. It was
24 the evidence that the state pointed to in order to prove that Mr. Stenson's hand was in a
25 "shooting environment." As the prosecutor explicitly argued, "Stenson was guilty as
26 charged" if (1) there was gunshot residue in Stenson's pocket, and (2) the pocket had

1 not been contaminated before testing, there was only one possible explanation. Even the
2 defense itself believed this to be the case and admitted in closing that “you would argue
3 that the presence of this gunshot residue is **certainly proof that he handled the**
4 **firearm. That he literally pulled the trigger two times.** That would be circumstantial
5 evidence because there is no direct evidence to tell you how it came to be on his hands.”
6 8/9/94 Tr. at 1752 (emphasis added).

7 The importance of the GSR evidence is further revealed by the prosecutor’s
8 rebuttal closing argument. *Cf. Kyles*, 514 U.S. at 444. The defense, in its closing, had
9 attempted to refute the evidence by asking the jury to conclude that the residue came
10 from contamination either from the patrol car or from testing in the FBI laboratory.
11 8/9/94 Tr. at 1752-53. Although this approach had little or no chance of success given
12 that there was no evidence at all of contamination in the FBI laboratory and that Agent
13 Peele gave little credence to the possibility of contamination from the patrol car, the
14 prosecutor nonetheless devoted a substantial portion of its rebuttal argument to mocking
15 the defense arguments as “an invitation to the rankest forms of speculation. Or
16 imagination.” *Id.* at 1778. The GSR evidence was irrefutably a critical piece of the
17 state’s case against Mr. Stenson. *See also State v. Stenson*, 132 Wn.2d 668, 680 (1997)
18 (noting gunshot residue); *Stenson v. Lambert*, 504 F.3d 873, 878 (9th Cir. 2007) (same).

19 The other evidence against Mr. Stenson was not overwhelming or of such a
20 nature that the prosecution’s failure to disclose the GSR evidence and failure to correct
21 false testimony regarding the GSR had no effect. Rather, none of the other evidence
22 against Mr. Stenson proved that he had shot his wife and Frank Hoerner. The blood
23 stain evidence, even if believed, showed only that the blood droplets on Mr. Stenson’s
24 pants had, in some unknown way, dripped from a point above the pants. The defense
25 was able to effectively point out that the blood spatter evidence even if believed
26 established nothing whatsoever about “why those drops were there.” 8/9/94 Tr. at 1765.

1 All of the other physical evidence in the case was either nonexistent or
2 exculpatory. For example, there was no evidence of blood or gunshot residue in any of
3 the sinks or sink traps, and there were no fingerprints connecting Mr. Stenson to the gun.

4 The GSR evidence was a critical piece of the state's case against Mr. Stenson.

5 2. Effect of Suppressed Evidence on GSR Evidence

6 Had the prosecution disclosed the GSR testing results, the defense would have
7 been able to counter the notion that the GSR results proved that Mr. Stenson had been in
8 a shooting environment. GSR particles are "long-lasting and mobile in the
9 environment," and "can float in the air, move with air currents, settle onto nearby
10 objects, and be transferred through physical contact." Exhibit E at 7. While high levels
11 of GSR particles may fairly be correlated with the discharge of a firearm, low levels,
12 such as the, at most, four GSR particles found in Mr. Stenson's right pant pocket, cannot
13 fairly be attributed such significance. *Id.* at 7-9.

14 Had the prosecution corrected Mr. Grubb's testimony that no one had worn Mr.
15 Stenson's pants or disclosed the photographs of Detective Martin wearing Mr. Stenson's
16 pants in a crime laboratory, without gloves, and with the right pocket turned inside out,
17 the defense would have been able to show a direct means of contamination of the right
18 pants pocket, based not on speculation of any sort but on photographic evidence and
19 science. This was not theoretical contamination. Rather, the pocket had been disturbed
20 in an environment that was likely to have GSR particles. Exhibit E at 7-8. Combined
21 with the GSR results, showing a maximum of four GSR particles, this documented
22 opportunity for contamination could have been used by the defense to explain how the
23 GSR came to be on the pants. Instead, the defense could come up with theories based
24 only on the "rankest speculation," and no evidence of opportunity for contamination.

1 **3. Mishandling of the Pants**

2 The significance of Detective Martin's mishandling of the pants goes far beyond
3 the GSR testimony. Mr. Stenson's pants were also the source of the blood spatter
4 evidence on which the state also relied. It was Detective Martin who took the pants
5 from Mr. Stenson at 6:35 a.m. on the morning of March 25, 1993, Detective Martin who
6 logged the pants out of evidence for the defense to view on December 7, 1993, Detective
7 Martin who logged the pants out on January 26, 1994 to send to the FBI, Detective
8 Martin who logged the pants out on April 12, 1994, Detective Martin who met with Rod
9 Englert and tried on the pants without wearing gloves on April 14, 1994, and Detective
10 Martin who brought the pants to his home on April 20, 1994 for both GSR and luminol
11 testing.

12 Had the jury been aware of the manner in which Detective Martin handled the
13 pants on April 12, 1994, i.e., wearing the pants at a forensic laboratory without wearing
14 gloves and with one of the pants pockets turned outward, and that he was nonetheless
15 willing to take GSR dabs from the out-turned pocket one week later, the jury would have
16 had reason to question all of the evidence emanating from the pants, including the blood
17 spatter evidence.

18 **4. Questions about Forensic Evidence in General and State's Bias**

19 The suppressed evidence and false testimony also raises questions about forensic
20 evidence in general and the state's biases.

21 First, the suppressed evidence would have shown the jury that forensic evidence
22 is not as clear cut as the state would like it to be, but is rather subject to different
23 interpretations and analyst error. *Cf. Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527,
24 2536 (2009) (recognizing potential value of cross-examination of analysts, including
25 identifying fraudulent and incompetent laboratory work).

26 Second, the suppressed evidence and uncorrected false testimony established the

1 state's determination to find incriminating evidence, even at the expense of sound
2 scientific techniques and full disclosure with its own experts. The analyst who actually
3 did look for GSR particles conducted an automated search and then an extensive manual
4 search. She may have included at least one particle of questionable value. Despite these
5 efforts, the analyst was able to identify only, at most, four GSR particles. More
6 information is needed from the FBI to determine how many particles the analyst did
7 identify and the reliability of her conclusions. Exhibit E at 16.

8 The state never told Agent Peele, who testified about the GSR results, that
9 Detective Martin had worn the pants with the pocket turned inside out, without gloves
10 and in a crime laboratory. The state's failure to be candid with its own witness about
11 this clear opportunity for contamination further reveals its priority of obtaining scientific
12 evidence of guilt, over other concerns including integrity and sound practices.

13 5. Credibility of Witnesses

14 a. Special Agent Peele

15 Not only did the state insulate Agent Peele from any meaningful cross-
16 examination by failing to disclose the GSR results and reports to the defense, but they
17 also shielded Agent Peele's credibility by failing to correct his false testimony that he
18 conducted the GSR testing. Had this information been provided to the defense, Agent
19 Peele's credibility would have been drastically undermined, and may have effected the
20 jury's perceptions of both him and the government's case in general. *See Kyles*, 514
21 U.S. at 445-48.

22 b. Detective Martin

23 Although Detective Martin testified extensively at trial and authored numerous
24 reports about his investigation, he never once mentioned either in his testimony or his
25 reports that he had tried on Mr. Stenson's pants or, even more importantly, that he had
26 turned the pants pockets out and wore the pants inside of a crime laboratory the week

1 before he collected the gunshot residue sample which yielded the seemingly damaging
2 evidence against Stenson. Detective Martin's failure to document or otherwise disclose
3 this critical evidence of contamination undermines his trustworthiness. Detective Martin
4 led the investigation into the murders of Denise Stenson and Frank Hoerner, and the
5 reliability of his work and his credibility were foundations of the state's case. *See Kyles*,
6 514 U.S. at 448-49.

7 6. Exploitation of Misinformation and Non-disclosure

8 Aggravating the state's failure to disclose the exculpatory evidence and to correct
9 the false testimony is the fact that the state then used this imbalance of information to its
10 decided advantage in arguing that the GSR evidence showed Mr. Stenson's hand had
11 been in a shooting environment and that there was no basis in reality to think that the
12 pants pocket could have been contaminated. This closing argument not only
13 independently violated Mr. Stenson's Fourteenth Amendment right to due process of
14 law, but also reveals the materiality of the errors. *See, e.g., Carriger v. Stewart*, 132
15 F.3d 463, 465-66, 481-82 (9th Cir. 1997) (en banc) (finding materiality of prosecution's
16 failure to disclose documents showing state's witness was a liar where prosecutor
17 vouched for witness's credibility during closing argument); *Douglas v. Workman*, 560
18 F.3d 1156, 1190-91 (10th Cir. 2009) (detailing cases recognizing interplay between
19 *Brady* and *Napue* claims and misconduct based on closing arguments that exploit the
20 suppressed evidence, and granting habeas relief on *Brady* claim in part because of
21 prosecutor's closing argument). *See also Armour v. Salisbury*, 492 F.2d 1032, 1037 (6th
22 Cir. 1974).

23 III. Conclusion

24 The state failed to turn over the GSR test results and notes that show, despite the
25 analyst's determination to find GSR, only, at most, four GSR particles in the pants
26 pocket. The state failed to provide information regarding the strongest evidence of

1 contamination of the pants and to correct false testimony about the sanctity of the pants.
2 The state then used its failures to provide exculpatory information and correct false
3 testimony to its decided advantage, by arguing about that the defense theories of
4 contamination were based upon the "rankest forms of speculation." As a result of these
5 actions and inactions, the jury was left with a devastating yet false impression about the
6 significance of the gunshot residue. Mr. Stenson's trial was one "resulting in a verdict
7 worthy of confidence." *Jackson*, 513 F.3d at 1057; *Kyles*, 514 U.S. at 434. Accordingly,
8 this Court should vacate Mr. Stenson's conviction.

9 Even if this Court determines that Mr. Stenson's conviction should not be
10 vacated, his sentence of death must. The "qualitative difference between death and other
11 penalties calls for a greater degree of reliability when the death sentence is imposed."
12 *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *State v. Bartholomew*, 101 Wn.2d 631, 641
13 (1984).

14 DATED this 6th day of August, 2009.

15 Respectfully submitted,

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17 _____
18 Robert H. Gombiner
19 Attorney for Darold Stenson
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CERTIFICATE OF SERVICE

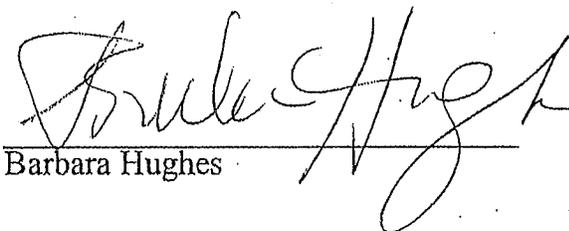
I certify that on August 6, 2009, I served a copy of the above-noted document by U.S. Mail, pre-paid first class, to:

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