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BY RONALD R. CARPENTER

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CLALLAM COUNTY  
JAN 20 2011  
9:30 AM  
BARBARA CHRISTENSEN, Clerk

**SUPERIOR COURT OF WASHINGTON  
COUNTY OF CLALLAM**

IN RE THE PERSONAL RESTRAINT )  
PETITION OF: )

Superior Court No. 83130-1

DAROLD RAY STENSON, )  
 )  
Petitioner )

Clallam County No. 93-1-00039-1

IN RE THE PERSONAL RESTRAINT )  
PETITION OF: )

Superior Court No. 83606-0

DAROLD RAY STENSON, )  
 )  
Petitioner. )

Clallam County No. 93-1-00039-1

I. DIRECTIVE:

The Washington State Supreme Court has directed this Court "to determine, based on the record from the reference hearing conducted in March 2010, whether during Stenson's trial the Prosecution suppressed the newly discovered photographs and FBI evidence in violation of Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)."

The Court specifically directed this court to consider whether the suppressed evidence was:

"... 'material' to guilt or punishment irrespective of good faith or bad faith, evidence being material 'only if there is a reasonable probability' (a reasonable probability being not whether the defendant would more than likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a probability sufficient to undermine confidence in the outcome of the trial)"



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4 The Parties submitted briefing to the Superior Court pursuant to the Supreme  
5 Court's directive, and the matter was argued to the undersigned on the 3<sup>rd</sup> of January,  
6 2011.  
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9 II. APPLICABLE STANDARD:

10 In Brady the U.S. Supreme Court held "that the suppression by the Prosecution  
11 of evidence favorable to an accused upon request violates due process where the  
12 evidence is material either to guilt or to punishment, irrespective of the good faith or  
13 bad faith of the Prosecution." Brady v. Maryland, 373 U.S. 83, at 87, 83 Supreme Court  
14 1194, 10 Led. 2d 215 (1963).  
15

16 Subsequent cases held that the duty to disclose such evidence was applicable  
17 even when there had been no request by the accused and the duty to disclose  
18 encompassed impeachment evidence as well as exculpatory evidence. Moreover, the  
19 Brady rule encompasses the required disclosure of evidence known only to police  
20 investigators and not to the Prosecutor. In order to comply with Brady the Prosecutor  
21 has a duty to learn of exculpatory evidence known to others acting on the government's  
22 behalf and provide it to the Defense.  
23

24 Not every violation of the duty of disclosure establishes a constitutional  
25 violation. There are three essential components of a "true" Brady violation: "The  
26 evidence at issue must be favorable to the accused, either because it is exculpatory, or  
27 because it is impeaching; that evidence must have been suppressed by the State, either  
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willfully or inadvertently; and prejudice must have ensued.” Strickler v. Greene, 119 S.Ct. 1936 at 1939-1940, 527 U.S. 2, 63, 144 Led. 2d 286 (1999).

III. SPECIFIC EVIDENCE AT ISSUE:

A. Englert Photos:

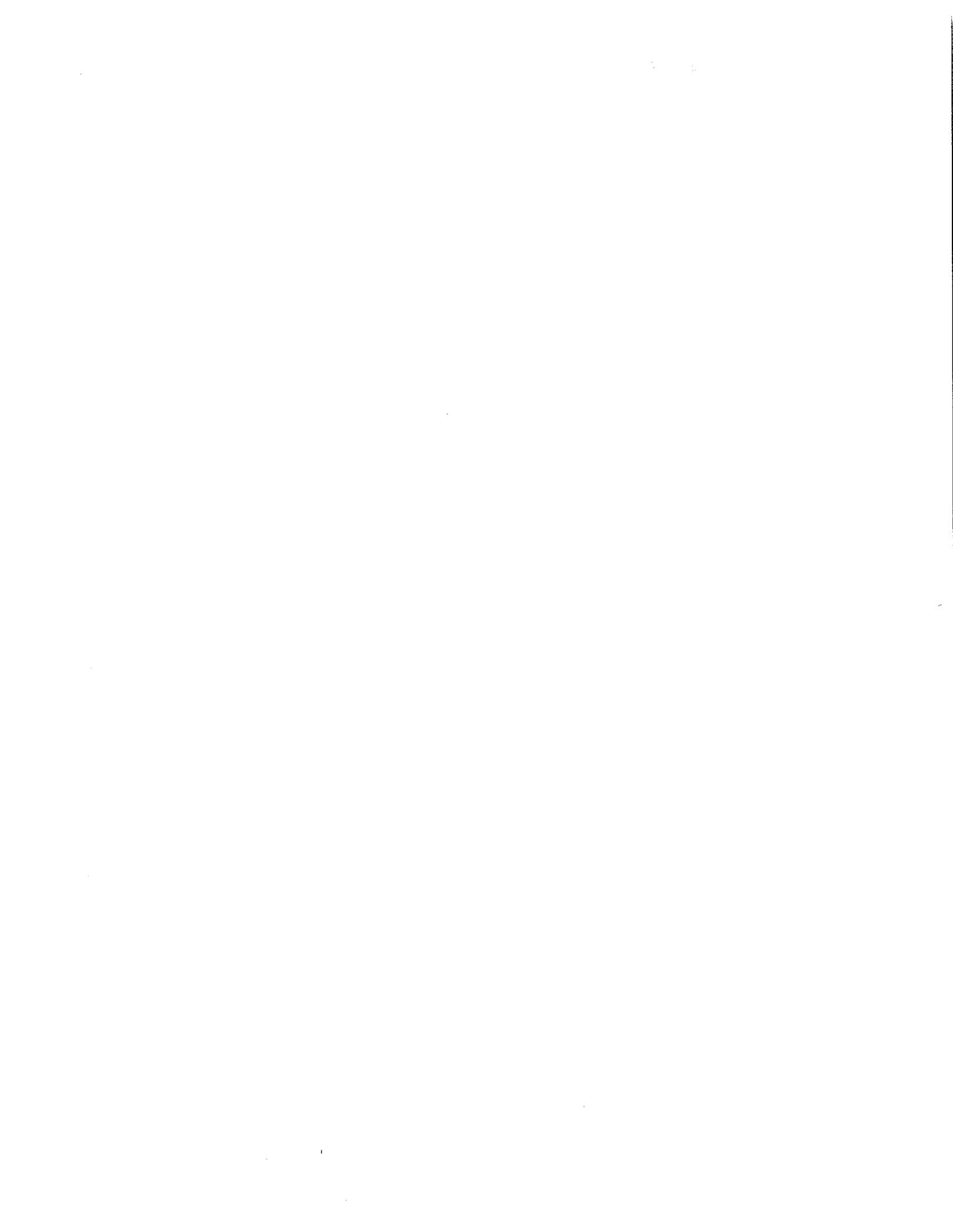
The direction to this court to review involves two items of non-disclosed evidence. The first relates to photographs of the lead investigator in the case, Sergeant Monty Martin of the Clallam County Sheriff’s office, wearing the defendant’s pants ungloved and with the pockets turned inside out. The photographs were taken six days prior to the pockets being examined for gunshot residue (GSR). A more complete history is in the court’s prior reference hearing findings and conclusions.

B. FBI Lab Bench Notes:

The second item is the bench notes from the FBI Lab on testing for GSR. The bench notes disclosed the amount of GSR found and disclose that the actual testing was performed by a different individual than the FBI expert who testified at trial (Special Agent Peele).

C. WSP Crime Lab Bench Notes:

There is, however, a third potential Brady issue. Attached to briefing filed with the Court by Mr. Stenson’s defense team on December 30, 2010, are copies of Michael



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Grubb's bench notes relating to his blood spatter examination of Mr. Stenson's pants. Mr. Grubb, of the WSP Forensics Lab was the State's blood spatter expert witness. The bench notes were apparently not supplied nor seen by the defense until 2009 following a Freedom of Information Act request. The bench notes contain information indicating that Mr. Stenson's pants had been folded in some manner while the blood on them was still wet enough to leave faint mirror image prints. (These were detected when Luminol was applied.) The defense argues that these bench notes are further proof that the pants in question had been mishandled and should be considered by this court under the present Brady analysis. The State correctly argues that the question remanded to this court is narrow, and that consideration of the bench notes of Mr. Grubb go beyond the directive from the State Supreme Court. Further the State argues that to the extent that the non-disclosed bench notes might contain information of relevance, that a court would be required to conduct a full investigation including additional testimony from trial counsel, investigators and others prior to any "true" Brady determination as to the materials disclosed in the Grubb bench notes.

The blood evidence on Mr. Stenson's jeans was the most compelling evidence at trial. Whether the fact that the jeans had been folded in some manner at a time when the blood on the jeans was fresh would in any way impact the conclusions which were otherwise drawn from the pattern of the bloodstains is not clear. The failure on the part of the State to turn over the bench notes of Mr. Grubb may well constitute "suppression" by the State under Brady. Arguably the Grubb bench note information



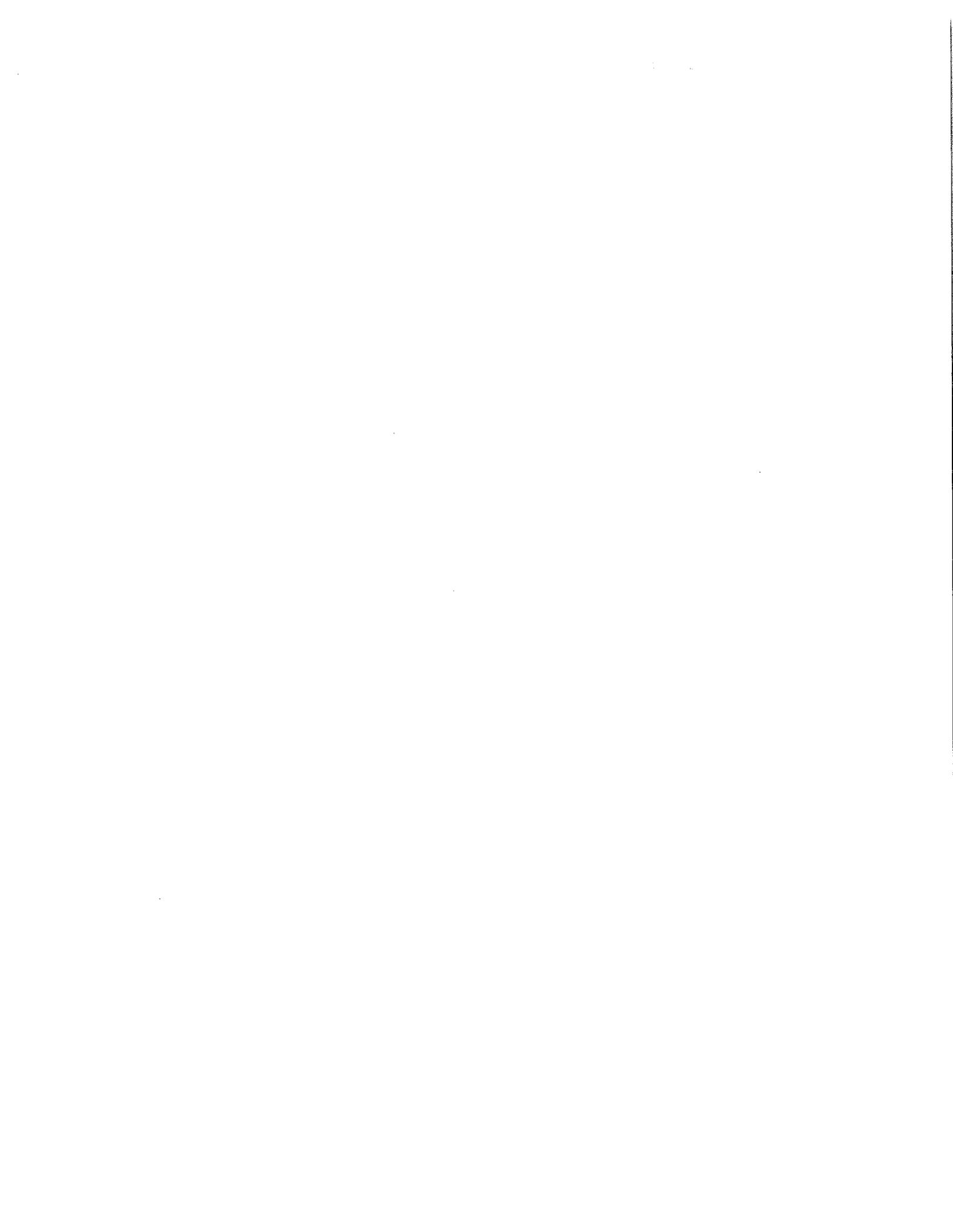
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could be used to impeach the entire forensics investigation in that it would show potential mishandling of the pants. The reason for the shadow spots might be as simple as having occurred when Mr. Stenson took his pants off, or it may have been more sinister such as an improper folding and/or negligent collection of evidence. This Court would have to speculate at the present time as to the importance of such information.

The direction to this court was to answer specific questions “based on the record from the reference hearing conducted in March 2010,” and was also to be limited to the specific items of the Englert photos and the FBI file evidence. Therefore this Court finds that issues raised relating to the nondisclosure of blood spatter expert Grubb’s bench notes are not before this Court at this time.

In the course of a Brady analysis the Court it is to look at the cumulative effect of all Brady type non-disclosures and to look at the totality of the case in assessing the impact. This would include an analysis of what admissible evidence competent counsel may have been able to discover if the suppressed evidence had been timely disclosed. Paradis v. Arave, 240 F. 3d 1169 (9<sup>th</sup> Cir. 2001). While the newly uncovered Grubb bench notes may fall within the Paradis ambit the inability to fully assess the potential materiality of the Grubb bench notes hampers a complete Brady analysis under the limits of the directive given this court.

Therefore, this Court’s analysis and conclusion is given with the realization that analysis of the Grubb notes could lead to a different conclusion.



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IV. ANALYSIS AS TO BRADY COMPONENTS:

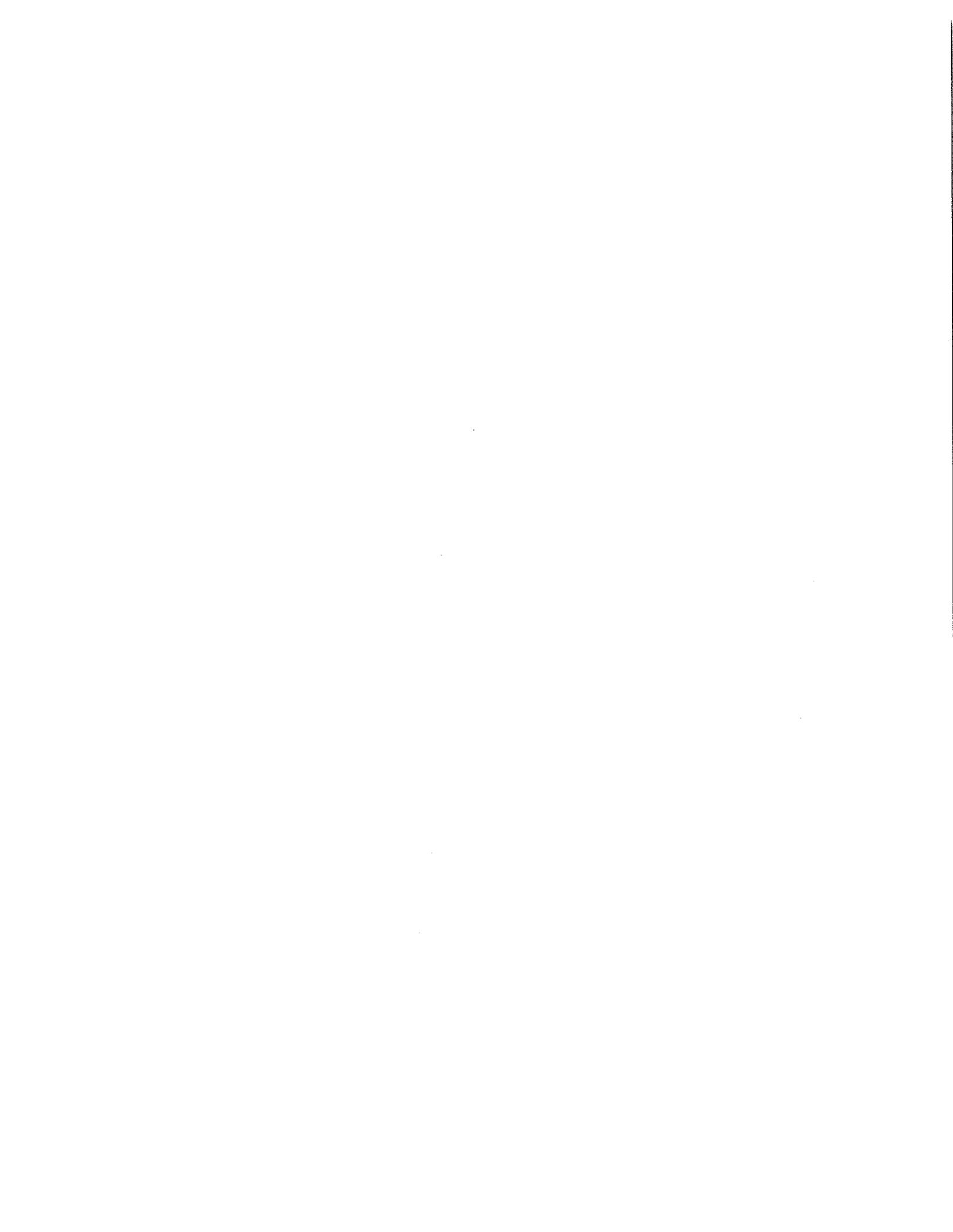
A. Was the Evidence Exculpatory or Impeaching:

(i) The Englert Photos:

The Englert photos could be used to impeach the validity of the subsequent GSR tests which were inculpatory. The evidence indicates that not only were the pockets turned out, but that the pockets were turned out again one week later to examine for gunshot residue. The pockets were therefore turned back in at some point between the date of the Englert photo and the subsequent examination. While other potential sources of contamination were argued to the jury by the defense, they were mostly speculative and were easily debunked in closing argument by the Prosecutor. The particular source of potential contamination shown in the photo would not be as speculative and could have impeached not only the GSR test results, but also the State's argument that it carefully and appropriately handled all of the evidence which was presented at trial.

(ii) FBI Lab Bench Notes:

The FBI Lab bench notes show that a different analyst actually performed the tests which were testified to at trial. The fact that a different expert tested the item would not be exculpatory. At trial Special Agent Peele's testimony implied that he was the person who performed the tests. The test results were admitted based on the expert qualifications of Special Agent Peele, without the defense counsel's ability to challenge



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the expert credentials of the actual examiner of the GSR swabs. That could serve to impeach the credibility of the results, and potentially undermine the State's argument as to the professionalism of its witnesses.

B. Was the Evidence Suppressed By the State, Either Willfully or Inadvertently?

At the previous reference hearing the Court determined that both the Englert photographs and the FBI bench notes constituted newly discovered evidence. The Court also noted that the entire GSR issue came up only after jury selection had begun.

(i) The Englert Photos:

There is some issue as to whether or not a defense investigator saw the Englert photographs in question. The investigator has no recollection of seeing the photographs (nor recollection of any other part of his investigation). For defense counsel to have received a copy of the photographs a request would have been required to have been made of the Prosecuting Attorney. There is no actual evidence that the Prosecuting Attorney ever had the photographs. Detective Sergeant Martin was present at trial when Special Agent Peele testified as to gunshot residue. A portion of the testimony indicated that if anything had gone into the pocket before the swabbing of the pockets for GSR examination there would have been concern for contamination. There was no disclosure at that time or any other that something had gone into the pocket. That information was



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available to Detective Sergeant Martin who was the Prosecutor's lead investigator on the case. That should have been disclosed. It does not matter whether non-disclosure was inadvertent or deliberate. Strickler at page 281.

The Defense investigator who met with Mr. Englert, did so understanding Mr. Englert was a blood spatter expert only. GSR had not been raised as an issue by the State at the time the investigator met with Mr. Englert and viewed his file. The investigator had no reason to consider GSR implications. The Court finds that the Englert photos and the fact of Detective Sergeant Martin's handling of the pants in the manner indicated in the photos was "suppressed" for Brady analysis purposes.

(ii) FBI Lab Bench Notes:

There was a specific request, a specific Court order, and a specific promise by the Prosecutor to turn over the FBI Lab bench notes. They were not provided. There is some question as to whether the FBI Lab bench notes were available at the time of trial. Special Agent Peele indicated that he may have brought his entire file with him. He is not certain of this. As noted above the testimony of Special Agent Peele implied that he was the expert who had performed the test. This lends some credence to finding that the FBI Lab bench notes related to GSR testing were not provided to the defense in any meaningful manner even if they were perhaps available in Special Agent Peele's briefcase at the time he testified. The Court finds therefore that the FBI Lab bench notes were, for purposes of Brady, "suppressed" by the prosecution.



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Accordingly, the Court finds that the second component of a true Brady violation has been found.

C. Did Prejudice Ensur From the Nondisclosure?

The third component of a true Brady violation is the most important. The nature of the "prejudice" which must be shown has been the subject of much debate in subsequent cases. In Kyles v. Whitley, 54 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 2d 490 (1995), the Court discussed the prejudice issue by noting that a true Brady violation is shown when there is suppression by the prosecution of evidence favorable to an accused and the evidence is "material" either to guilt or to punishment.

In Kyles the Court discusses the four aspects of materiality for Brady purposes as determined in United States v. Bagley, 473, U.S. 667, 105 S.Ct. 3375, 87, L.Ed. 481.

"Bagley's touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is (not whether the defendant would more likely than not have received a different verdict with the evidence, but) whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' Bagley, 473 U.S. at 678, 105 S. Ct. at 3381." Kyles, supra, at page 434.

The second aspect of the Bagley materiality test is that it is not to be a sufficiency of the evidence test.



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“The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Kyles, supra, at page 435.

The third aspect is that once a Court finds a constitutional error under Brady there is no need for a further harmless error review since the constitutional standard for materiality under Bagley imposes a higher burden than the harmless error standard.

“The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.” Kyles, supra, at page 436.

In Strickler v. Greene, supra, Justice Souter in an opinion concurring in part and dissenting in part noted:

“Before I get to the analysis of prejudice I should say something about the standard for identifying it, and about the unfortunate phrasing of the of the shorthand version in which the standard is customarily couched. The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a “reasonable probability” of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. See *ante*, at 1952-1953; Kyles v. Whitley, 514, U.S. 410, 434-435, 115 S.Ct. 1555, 131 L.Ed 2d 490 (1995). Instead, the Court restates the question (as I have done



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elsewhere) as whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence' in the outcome." *Ante* at 1952-1953 (quoting *Kyles, supra*, at 435, 115 S.Ct. 1555.).

"I think 'significant possibility' would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence." *Strickler v. Greene, supra*, at pages 297 and 298.

"We would be better off speaking of a 'significant possibility' of a different result to characterize the *Brady* materiality standard. Even then, given the soft edges of all of these phrases, the touchtone of the enquiry must remain whether the evidentiary suppression 'undermines our confidence' that the fact finder would have reached the same result." *Strickler, supra*, at pages 300 and 301.

In *Bagley* the Court noted:

"The reviewing Court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the Defense in the trial would have taken had the Defense not been misled by the Prosecutor's incomplete response." *Bagley, supra*, at page 683.

In *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed. 2d 638

(1987), the Court noted:

"[o]ur duty to search for constitutional error with painstaking care is never more exhausting than it is in a capital case."



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The defendant points to two potential sources of prejudice which disclosure may have alleviated.

First, the GSR evidence, which was inculpatory, would have been far less viable. (Information made available subsequent to trial, not available to any party at the time of trial, would likely result in the GSR testimony being wholly excluded. (See prior reference hearing findings.))

The State argues that the GSR evidence, while perhaps able to be impeached more credibly with the additional information contained in the Englert photographs, nevertheless, was not that important in any event under the totality of the evidence.

The State points to Barker v. Fleming, 423 F. 3d 1085, 1096-98 (9<sup>th</sup> Cir. 2005) to argue that the GSR reliability was already impeached and that the withheld impeachment evidence was merely “cumulative icing on an already crumbling cake.”

The second area of prejudice according to Defense goes to the credibility of the investigators in the case. The defense argues that a compelling argument in what was largely a circumstantial evidence case, was the State’s vouching for the care and professionalism of all of the investigators, including Detective Sergeant Martin and Special Agent Peele. The argument is that impeaching their credibility would have allowed the jury to question or even disregard the facts presented by them or their ultimate opinions, or the opinions of other experts.

The evidence “suppressed” was not exculpatory. It was impeaching in potential.

In Bagley, at page 676 the Court noted:



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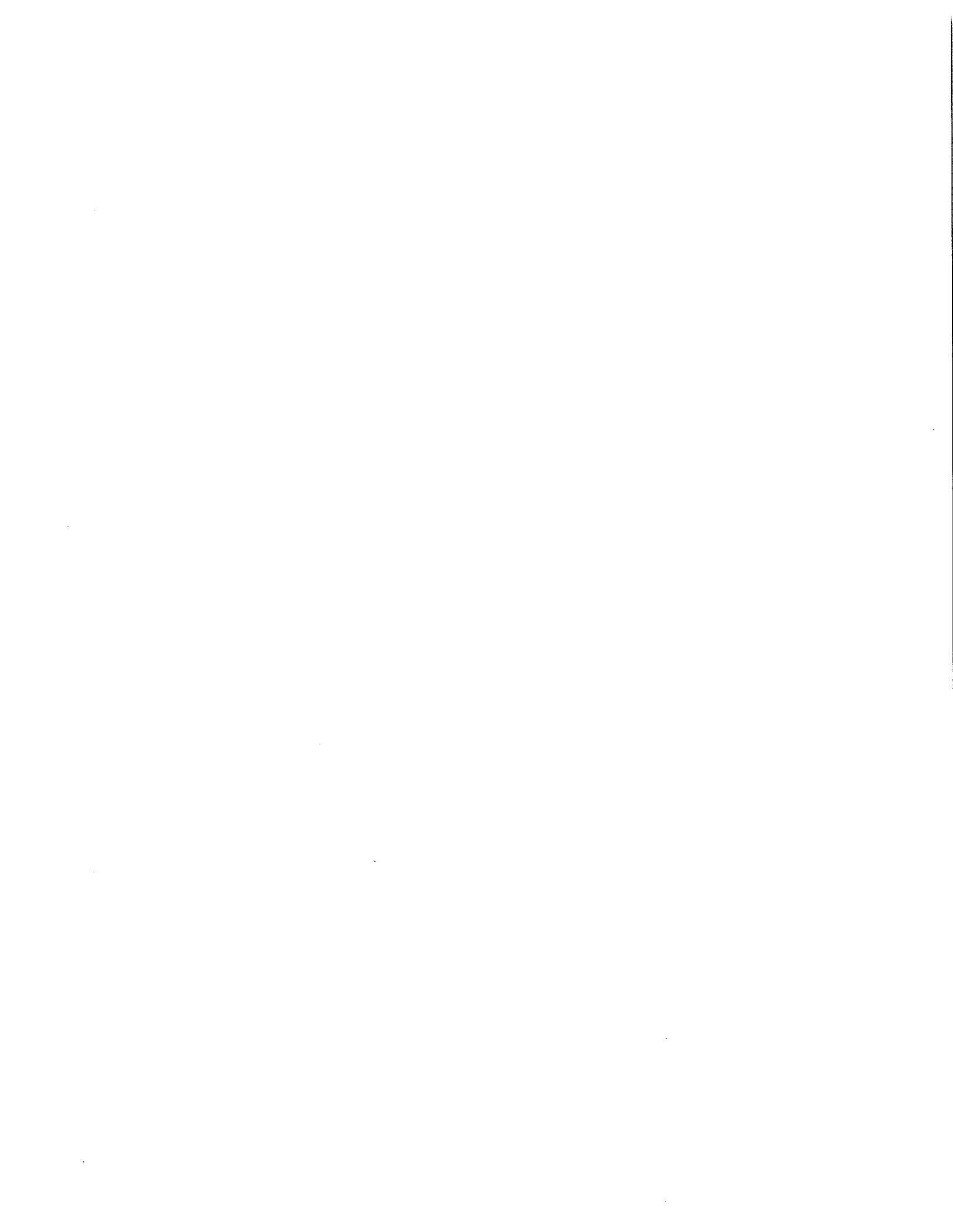
“Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule . . . (case cites omitted). Such evidence is ‘evidence favorable to an accused’ Brady, 373 U.S. at 87, 83 S.Ct. at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. CF. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed. 2d 1217 (1959) (‘The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend’).”

The evidence against Mr. Stenson was largely circumstantial. Motive, opportunity and timing of events were argued based upon circumstantial evidence. The forensic evidence which linked Mr. Stenson to the crime scene was evidence of Mr. Hoerner’s blood on Mr. Stenson’s pants. Mr. Grubb testified that in his opinion the victim’s blood on Mr. Stenson’s pants came to be there before Mr. Hoerner came to his final resting position at the scene. That would place Mr. Stenson present at the time of the attack on Mr. Hoerner, not afterwards as Mr. Stenson claimed.

The GSR evidence was a second piece of forensic evidence which, circumstantially, indicated that Mr. Stenson had been in a shooting environment while wearing the pants.

In Strickler v. Greene, *supra*, at page 290 the Court noted:

“The District Court’s conclusion that the admittedly undisclosed documents were sufficiently important to establish a violation of the Brady rule, was supported by the Prosecutor’s closing argument. That argument relied on Stoltzfus’ testimony to demonstrate petitioner’s violent



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propensities and to establish that he was the instigator and leader in Whitlock's abduction and, by inference, her motive. The Prosecutor emphasized the importance of Stoltzfus' testimony in proving the abduction."

Here, the Prosecuting Attorney briefly mentioned the GSR evidence in his initial closing statement. In rebuttal the Prosecutor used the defense attempts to point to possible potential GSR contamination sources to discredit and discount the defense case as mere speculation. In closing argument the Prosecutor referred to the competence of the professionals who testified to support his argument that the jury verdict should be guilty.

The evidence of Mr. Hoerner's blood on the defendant's pants remains the compelling evidence at trial. Mr. Grubb's opinion testimony on the meaning of the blood on the defendant's pants was un rebutted at trial and unimpeached. The defense argues that because Sergeant Martin handled the pants in an inappropriate manner that all of the testimony relating to the pants would therefore be impeached. Without full consideration of the issue of the "folded over" evidence relating to Mr. Stenson's pants as disclosed in Mr. Grubb's bench notes the court has some difficulty in seeing impeachment of the Grubb testimony to any significant degree by the Englert photos.

"The materiality of the failure to disclose evidence must be evaluated in the context of the entire record: "It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to 'destroy' the particular prosecution witness or items of prosecution evidence to which the undisclosed evidence relates. It is Petitioner's burden to show that in light of all the evidence, including that untainted by the Brady

**REN WILLIAMS**  
JUDGE  
Clallam County Superior Court  
223 East Fourth Street, Suite 8  
Port Angeles, WA 98362-3015



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violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding the Petitioner's guilt." Kyles v. Whitley, *supra*, at page 460.

The suppressed evidence does not impact any of the other circumstantial evidence which pointed at the defendant. It substantially impacts the GSR evidence which was inculpatory. The specific two items of evidence which this Court is asked to comment upon do not significantly impact the viability of the blood spatter/pants evidence and opinion presented to the jury. Any impeachment value on that issue is negligible without full consideration of the implication of Grubb bench notes. The court cannot consider the Grubb bench notes, at this time.

There are two phases in a death penalty case. The guilt phase and the sentencing phase. Both are to be considered in a Brady analysis where a death penalty verdict has issued. Justice Souter in his opinion in Strickler v. Greene notes that at least one study "tells us that the evidence and arguments presented during the guilt phase of a capital trial, will often have a significant effect on the juror's choice of sentence." Strickler v. Greene, *supra*, at page 305.

Jurors who are "death penalty qualified", that is, able to state that they could impose the death penalty in a particular case, tend to be more likely to convict during the guilt phase. (See, Lockheart v. McCree, 476 U.S. 162, (1986).) To the extent that the Court is required to attempt to substitute its opinion for that of the actual jury who heard the case, those factors may be significant.



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In United States v. Price, 566 Fed. 3d 900, 914 (9<sup>th</sup> Cir. 209) the Court stated that a reasonable probability of a different result need only amount to the possibility of a non-unanimous jury. In O’Neel v. McAninch, 513 U.S. 432, 435, 115 S. Ct. 992, 130 L.Ed 2d 947 (1995), the Court stated “We consider here the legal rule that governs the special circumstance in which record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury’s verdict. (By grave doubt we mean that, in the judge’s mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.) We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.”

As noted in this Court’s previous findings of fact following the reference hearing, the State of Washington does not recognize residual doubt as a mitigating circumstance for purposes of avoiding the death penalty. Jurors, however, may well use such in their actual phase two decision making. It is exceedingly difficult to know how a particular piece of forensic evidence may have actually impacted a particular juror.

CONCLUSION:

It is clear that some of the evidence used to convict the defendant, the GSR evidence, was unfair. Some witnesses’ credibility may have been able to be impeached. Based in part on that evidence the defendant was found guilty of two murders and sentenced to death. The question presented to this Court, however, is whether use of that evidence was so unfair as to undermine confidence in the verdict.

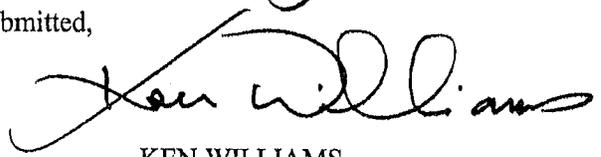


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Viewing the totality of the evidence at trial I cannot find that had the evidence of the Englert photos and FBI bench notes been timely disclosed to the defense that the result of the proceeding would have been different. It would not be sufficient to undermine confidence in the verdict of the jury.

DATED this 20<sup>th</sup> day of January, 2011.

Respectfully submitted,



KEN WILLIAMS  
JUDGE

