

ORIGINAL

NO. 83606-0

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

DAROLD R. J. STENSON,

Petitioner,

BY RONALD R. CARPENTER

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SUPREME COURT  
STATE OF WASHINGTON

PETITIONER'S SUPPLEMENTAL BRIEF ON EFFECT OF  
REFERENCE COURT'S FINDINGS AND CONCLUSIONS

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## I. INTRODUCTION

The reference court's findings, which followed an eight-day evidentiary hearing, establish that Darold Stenson has satisfied the gatekeeping requirements of RCW 10.73.100(1) and that his *Brady*<sup>1</sup> and *Napue*<sup>2</sup> claims must be considered on the merits. Judge Williams found that defense counsel at all stages acted diligently in discovering both 1) the FBI laboratory bench notes concerning gunshot residue testing and 2) the photographs of the State's lead detective wearing Stenson's pants with the pockets turned out and with the detective's hands ungloved.

Judge Williams explicitly declined to rule on whether the FBI files and the pants photographs entitle Stenson to relief under the constitutional standards enunciated in *Brady v. Maryland* and *Napue v. Illinois*. He did find that, as the trial judge, he would never have admitted the gunshot residue evidence had the facts about contamination of the samples been known to him. He also found that the gunshot residue evidence was among the most important evidence at trial and that its erroneous admission was not harmless.

The effect of Judge Williams' findings is to clear the way for this Court to consider the consequences of the State's failure to comply with its

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<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

<sup>2</sup> *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

duty to disclose exculpatory evidence and its duty to refrain from presenting false and misleading testimony and arguments. While Judge Williams decided that the new evidence would not have “probably changed the result at trial” under Washington’s five-factor test for newly discovered evidence, that finding constitutes neither a ruling on the merits of Stenson’s legal claims nor a bar to this Court’s consideration of them on their merits.

By acting with due diligence, Petitioner has fulfilled the requirement set forth in RCW 10.73.100(1) for filing a personal restraint petition after the normally applicable one-year statute of limitations and has also satisfied the “good cause” requirement for filing a successive petition under RCW 10.73.140. RCW 10.73.100(1) sets forth a single test for filing late claims based on new evidence – that a petitioner demonstrate reasonable diligence in discovering and presenting his claims. Issues of materiality and standards for reversal go to the merits of the claim. Those issues must be analyzed according to the nature of the claim raised. Although Petitioner has presented legal claims *based* on new evidence, he has not raised substantive newly discovered evidence *claims*. Rather, he raises constitutional due process claims of trial error under *Brady* and *Napue*. These claims are governed by a different standard of materiality in determining whether a new trial is required. The five-factor test for substantive new evidence claims does not apply to *Brady* or *Napue* claims.

The reference hearing showed that the prosecution failed to turn over information it was under court order to disclose. That information later proved to be highly exculpatory evidence. In addition, the hearing showed that the prosecution allowed false and misleading testimony and evidence concerning gunshot residue to be presented to the jury. Sixteen years later, the reference court concluded that the GSR evidence never should have been admitted in the first place and that its erroneous admission was not harmless because it concerned some of the most damaging evidence in the case. Under *Brady* and *Napue*, these findings require that Darold Stenson's conviction and sentence be set aside.

## II. THE REFERENCE COURT'S FINDINGS AND CONCLUSIONS

The evidentiary hearing considered claims raised in two separate post-conviction challenges: a *pro se* Personal Restraint Petition (PRP No. 5) filed by Mr. Stenson on May 26, 2009 and a Motion to Vacate Conviction or Alternatively Vacate Sentence of Death Pursuant to CrR 7.8(b) filed by Stenson's counsel on August 6, 2009 (later transferred to this Court as PRP No. 6). RHFC ¶ 6.

The petitions cited the discovery in 2009 of two items of important exculpatory evidence. The first consisted of photographs (the "Englert photos") of the State's lead detective mishandling and contaminating a crucial piece of physical evidence – Stenson's pants – shortly before the

pockets were to be tested for gunshot residue. RHFC ¶ 7. The second consisted of FBI laboratory bench notes indicating that the amount of microscopic gunshot residue particles (GSR) found in Stenson's right pocket was negligible – no more than four particles, and perhaps as few as two. RHFC ¶ 22. Further, the notes showed that the testifying expert from the FBI, Roger Peele, had not actually performed the tests himself. They had been done by a trainee, Kathy Lundy. *Id.* The notes also indicated that Ms. Lundy had found nothing at all in her first attempt to test the pocket.

Janine Arvizu, a laboratory quality control expert called at the hearing. Based on her review of the bench notes and the Englert photographs, she said “there would be no validity to the GSR results to any reasonable degree of scientific certainty.” RHFC ¶ 17. The critical photograph in question showed the lead detective, Monty Martin, wearing Stenson's pants, without gloves and with the pockets turned out and exposed to the air. RHFC ¶ 7. The photographs were taken shortly before the dab samples were sent off to the FBI lab for GSR testing. *Id.*

At trial, the State's expert, Roger Peele, was asked about the possibility of contamination. Peele said there would be no problem so long as the pockets were not disturbed. RHFC ¶ 13. At the reference hearing, he said he was never told that the pockets had in fact been disturbed. Neither had he seen the photograph of Monty Martin. Had he known, he said, there

would have been no reason to do the test for any inculpatory purpose. Peele Testimony at 154, 176.

Ms. Arvizu agreed. She said that the photographs and the bench notes, individually and cumulatively, rendered the GSR test results useless. The photographs showed that the integrity of the testing sample had been seriously compromised. RHFC ¶ 17. The bench notes indicated that the number of particles found was so negligible that it was impossible to say what caused the positive result. Together, they made the test result worthless.

Judge Williams was not persuaded that the FBI bench notes alone were significant. RHFC ¶ 29, though he did find that they were material. RHFC ¶ 34. They would not by themselves, he said, have “pointed to the potentially misleading characteristics of Special Agent Peele’s testimony.” RHFC ¶ 34. On the other hand, he was strongly persuaded that the photographs were highly material. He concluded that, had he known of them at the time of trial, he would have excluded the GSR testimony altogether as unreliable and prejudicial. RHFC ¶¶ 35; 48. He said:

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

Nor could the erroneous and prejudicial admission be considered

harmless. Judge Williams found that the GSR evidence was among the most damaging evidence introduced against Darold Stenson at trial:

Because the GSR testimony was one of only two pieces of evidence from which inferences directly tying the defendant to the shootings themselves could reasonably be drawn, (the other being blood spatter) it would be hard to say that an error in admitting the GSR testimony would have been harmless. That question, however, is not a question raised in these proceedings. RHFC ¶ 35.

Judge Williams noted that he had not been asked to rule on Petitioner's due process claims under *Brady v. Maryland* and *Napue v. Illinois* ("Petitioners seek a different test under *Brady* as to whether the new evidence would have 'undermined confidence in the verdict.' That is not a question submitted to this court."). RHFC ¶ 41. Whether Mr. Stenson should be granted relief under those cases and their progeny was not for him to say, though he agreed that the prosecutor had a duty under *Brady* to provide the Englert photos. RHFC ¶ 44. Having only been asked to determine whether the new evidence would have "probably changed the outcome of the trial or proceeding," RHFC ¶ 42, he concluded that it would not.

### **III. THE EFFECTS OF THE REFERENCE HEARING FINDINGS AND CONCLUSIONS**

#### **A. Under RCW 10.73.100(1), the Only Requirement for Filing a Petition after the One-year Time Limit, When Based on New Evidence, Is Reasonable Diligence in Discovering and Presenting the New Evidence.**

RCW 10.73.090 requires that collateral attacks on convictions be filed

within a year after the judgment becomes final. However, under RCW 10.73.100, certain exceptions apply. One is for newly discovered evidence:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is solely based on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion . . .

RCW 10.73.100(1).

**1. The Five-Factor Test for Newly Discovered Evidence Claims Is Not a Statutory Gatekeeping Requirement and In Any Event Does Not Apply Here At All Because Darold Stenson Has Not Raised Newly Discovered Evidence Claims.**

The State may argue that Mr. Stenson's post-conviction challenge is subject to dismissal because he has failed to meet all of the threshold requirements for filing a petition raising newly discovered evidence claims. These requirements, according to the State, are those listed in Washington's five-factor test. *See In re Personal Restraint of Stenson*, 153 Wn.2d 137, 144, 102 P.3d 151 (2004). They were considered by Judge Williams and referred to in his Findings and Conclusions. Under that test, new evidence is evidence that:

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

RHFC ¶ 9, citing *In re Stenson, supra, In re Personal Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001), *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).

The State argues that these five factors are all threshold factors that must be satisfied before a late petition can be considered on the merits. The State, however, misconceives both the nature of Mr. Stenson's legal claims and the meaning of RCW 10.73.100(1).

a. **Constitutional Claims Based on Newly Discovered Evidence are not the Same as Substantive Newly Discovered Evidence Claims.**

The State's argument is based on an attempt to equate the term "newly discovered evidence," as used in RCW 10.73.100(1), with the term used in Washington case law to describe a specific type of substantive legal claim commonly raised as a ground for a new trial. They are not the same.

Newly discovered evidence as a stand-alone, substantive ground for relief from a criminal conviction refers to any claim concerning new evidence that was not available at trial but which raises significant questions about the defendant's guilt. It need not involve any claim of constitutional error at trial. In fact, a newly discovered evidence claim assumes that the trial was conducted fairly but that new evidence still requires the proceedings to be reexamined in the interest of justice. *See* RAP 16.4(c)(3).

The classic example is the hitherto unknown witness who suddenly

comes forward with exculpatory evidence. Another example is a witness who recants previous inculpatory trial testimony. *See State v. Scott*, 150 Wn. App. 281, 207 P.3d 495 (2009). A third example would be the development of new forensic tests that were not available at the time of trial. Such claims need not be rooted in any constitutional, statutory, or rule violation at trial. They are simply claims that new evidence of innocence has surfaced which is important enough to warrant a new trial.

Not surprisingly, courts view such claims with a critical eye and impose stringent requirements for relief. In Washington, the five-factor test is used to ensure that these new evidence claims meet requirements of both timeliness and materiality. Historically, the test dates back to at least 1931 and has remained virtually unchanged since its first formulation. *Libbee v. Handy*. 163 Wn.2d 410, 1 P.2d 312 (1931). Significantly, the test was announced in a civil case and was decided long before the landmark Supreme Court decisions of *Brady* and *Napue* concerning exculpatory evidence. The test also predates the enactment of RCW 10.73.100.

Darold Stenson is not raising a substantive “newly discovered evidence” *legal claim*. Instead, he proffers newly discovered evidence to support claims of federal constitutional violations under *Brady v. Maryland* and *Napue v. Illinois*. Specifically, he claims that the State had a duty to disclose exculpatory evidence relating to gunshot residue and that it failed to

discharge that duty. In addition, Mr. Stenson claims that the new evidence shows the State knew at the time of trial that the testimony and argument concerning gunshot residue was false and misleading, yet it allowed that testimony and argument to go uncorrected.

The new evidence supporting the *Brady/Napue* claims requires a new trial under the federal standard of review announced by the United States Supreme Court and adopted by this Court: under *Brady* a defendant is entitled to a new trial if the new evidence creates a “reasonable probability of a different result,” a standard which has been further defined as evidence sufficient to “undermine confidence in the outcome.” *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 115, 131 L.Ed.2d 490 (1995), citing *United States v. Bagley*, 473 U.S. 667, 668, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). These are claims of due process violations. At no point has Mr. Stenson argued that the new evidence, standing alone and irrespective of any constitutional violations by the State, requires a new trial.

b. ***In Re Rice* Recognizes the Distinction Between *Brady* Claims and Newly Discovered Evidence Claims.**

This Court has recognized the distinction between newly discovered evidence *substantive claims* and constitutional claims based on new *evidence*. See *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992). In *Rice*, the petitioner filed a successive petition more than a year after his

conviction was final. In his new petition he raised a claim under *Brady v. Maryland*, arguing that he had only recently learned of suppressed exculpatory evidence after his first petition had been denied. The new evidence concerned the State's psychiatric expert, Dr. Harris, who had previously diagnosed the defendant as suffering from paranoid delusional disorder. This significant fact, Rice claimed, was known by the State but not disclosed to the defense. *In re Rice*, 118 Wn.2d at 882, 887.

Although this Court ultimately denied Rice's claim, the case is important for two reasons. First, the Court explicitly analyzed Rice's claim under *Brady v. Maryland*, ruling that *Brady* and its progeny require a new trial if exculpatory evidence is withheld by the State that is material to guilt or punishment.

Second, the Court distinguished a *Brady* claim from a new evidence claim. It found that the prosecution had not failed to disclose the information at issue and thus had committed no *Brady* violation. 118 Wn.2d at 888. It further found that Rice had not shown how the information would have helped him in any event. *Id.* at 893. After denying Rice's *Brady* claim, however, the Court took an additional step. Although Rice had not raised a newly discovered evidence claim, the Court conducted a second analysis of the evidence, this time as a newly discovered evidence *claim*:

Finally, given our disposition of the *Brady* claim, we must

consider whether the result here would be different under the standards for newly discovered evidence. One of the available grounds for granting a personal restraint petition is the existence of material facts "which have not been previously presented and heard, which in the interest of justice require vacation of the ...sentence." RAP 16.4(c)(3). Although Rice has not directly raised this ground for relief, we wish to make clear that Dr. Harris' diagnosis would not entitle Rice to relief on this ground. Relief would be merited only if, among other things, the "new" evidence "would probably have changed the outcome" of the trial. *In re Jeffries*, 114 Wn.2d 485, 493, 789 P.2d 731 (1990). It is quite clear from the foregoing discussion that Rice cannot show that Dr. Harris' diagnosis probably would have changed the outcome of the penalty phase.

*In re Rice*, 118 Wn.2d at 893, 828 P.2d at 1096.<sup>3</sup>

*Rice* shows that there is a clear difference between newly discovered evidence and a newly discovered evidence *legal claim*. Many kinds of late claims can involve new evidence, including *Brady* claims, *Napue* claims, and substantive newly discovered evidence claims. All claims raised late because of new evidence must clear the diligence hurdle of RCW 10.73.100(1).

Once that procedural hurdle is cleared, however, each type of legal

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<sup>3</sup> This Court has made clear that "newly discovered evidence" has a specific meaning when raised as "a separate ground for relief." See *In re the Personal Restraint of Benn*, 134 Wn.2d 868, 886, 952 P.2d 115 (1998):

Newly discovered evidence would justify a prisoner's failure to raise an argument earlier; this is in fact a *separate ground for obtaining relief* in a personal restraint petition. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 319; RAP 16.4(c)(3). *When raised as a separate ground for relief, "newly discovered evidence" has the same meaning as in a motion for a new trial. In re Lord*, 123 Wn.2d at 319, 868 P.2d 835 (emphasis supplied).

claim must be analyzed on the merits according to the standard of review applicable to the kind of claim presented. A substantive new evidence claim must satisfy Washington's five-factor test. A late, but duly diligent, *Brady* claim must be analyzed according to the *Brady* standard of materiality. A late, but diligent, *Napue* claim must be analyzed according to the *Napue* standard. To do otherwise would risk violating the Supremacy Clause by using a different and more stringent state-law standard to review claims of federal constitutional violations.

**2. RAP 16.4 Also Distinguishes Between Constitutional Error Claims and Newly Discovered Evidence Claims.**

The Rules of Appellate Procedure governing personal restraint petitions also recognize the difference between substantive new evidence claims and other kinds of legal claims. RAP 16.4 lists various grounds for relief that can be brought in a PRP. Subsection (c)(2) lists convictions "obtained...in violation of the Constitution of the United States or the Constitution or the laws of the State of Washington." Subsection (c)(3) lists as a separate ground for relief claims involving "[m]aterial facts...which have not been previously presented and heard, which in the interest of justice require vacation of the conviction...."

Note that (c)(2) refers to claims of legal error while (c)(3) simply refers to new material facts which *in the interest of justice* require vacation

of the conviction. In other words, under subsection (3), a petitioner need not claim that his constitutional rights were violated in any way. He may have had a perfectly legal trial with full due process yet still be entitled to a new trial because of the new evidence. It is this kind of new evidence claim – a claim requiring no allegation of constitutional error – that is subject to the strict five-part test for newly discovered evidence.

Furthermore, even when the five-part test does apply, it enters the equation as part of the merits analysis only *after* a petitioner has met the threshold requirement of due diligence under RCW 10.73.100. *See State v. Scott*, 150 Wn. App. 281, 207 P.3d 495 (2009).<sup>4</sup>

As *Scott* demonstrates, RCW 10.73.100(1) contains only one gatekeeping requirement for late petitions based on new evidence – a showing of reasonable diligence in discovering the evidence and presenting the claim. There is no additional threshold requirement of materiality in the statute. And as shown above, this Court has not engrafted (and could not engraft) any additional – statutorily unauthorized – threshold requirements,

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<sup>4</sup> In *Scott*, a defendant brought a late motion to withdraw his *Alford* plea after learning that the victim and several witnesses who accused him of child rape had recanted their statements. The Court of Appeals conducted a two-step analysis. First, it considered whether Scott was time-barred under RCW 10.73.090 and .100. It concluded he was not because he had acted with reasonable diligence in discovering the new evidence. *Id.* at 292-93. After deciding the threshold procedural issue, it moved on to the merits of the new evidence claims. Since the claims involved the recantation of witnesses and the victim, they easily qualified as new evidence claims. *Id.* at 294. Having made his diligence showing, Scott was found eligible for a hearing on the merits of his new evidence claims under the five-factor test. *Id.*

despite the State's arguments to the contrary.

The language of the statute is unambiguous. Further, if RCW 10.73.100(1) were interpreted as the State wishes (as containing multiple gatekeeping requirements), it would be illogical and redundant. If all claims based on newly discovered evidence had to meet the five-factor test – and meet that test as a threshold matter – why would the statute refer to reasonable diligence as a sole criterion? The answer must be that newly discovered evidence can support claims of various kinds. All must meet a diligence test. Those that do are then analyzed on their merits. The analysis varies with the type of claim raised. Substantive new evidence claims, as in *Scott*, are subject to the five-factor test. *Brady* claims, as in *Rice*, are subject to the *Brady* standard. Thus, the five-factor test cannot be a threshold requirement because 1) the statute does not allow it, and 2) the test does not apply *at any stage* to constitutional claims not framed as substantive new evidence claims.

RCW 10.73.100(1) plainly imposes one, and only one, gatekeeping requirement of reasonable diligence. All other issues are merits issues. Based on the March 2010 reference hearing, Darold Stenson has met his threshold requirement under the statute. He has shown that he was reasonably diligent in both discovering and presenting his claims. Having met that threshold requirement, this Court must now consider his constitutional claims on their

merits. RAP 16.13.

**B. The Reference Court, in Assessing the Importance of the Gunshot Residue Evidence at Trial, Applied the Wrong Test in the Wrong Way.**

Judge Williams' findings faithfully address the questions posed by this Court in its Order directing a reference hearing. The result, however, is that some dispositive questions have been left unanswered by the court below and some non-dispositive questions have been addressed under an inapplicable legal standard.

Judge Williams definitively ruled that the Englert photos completely undermined confidence in the GSR evidence at trial, so much so that, had he known of the photographs, he would have entirely excluded the GSR evidence as prejudicial and unreliable. He then imagined the trial without the GSR evidence and asked himself whether a jury would still have convicted Darold Stenson without it. He concluded that they probably would have still convicted him, even without the GSR evidence.

**1. *Brady v. Maryland* Imposes a More Lenient Standard of Review Than the Five-Factor Newly Discovered Evidence Test.**

Judge Williams applied the wrong test to the wrong question. He applied the five-factor test and asked whether the new evidence would probably have resulted in an acquittal. He answered that question by imagining the trial without the tainted evidence and asking whether sufficient

evidence remained to support a conviction. That may have been an appropriate way to analyze a stand-alone new evidence claim, but it was the wrong question and the wrong methodology for analyzing a *Brady* violation.

In clarifying the meaning of the “reasonable probability test,” the Supreme Court has been careful to say what it does *not* mean. It has “rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal.” *Bagley*, 473 U.S. at 680 (citing *United States v. Agurs*, 427 U.S. 97, 111 (1972); *Kyles v. Whitley*, 514 U.S. at 434 (defendant need not show that suppressed evidence would have made a different result more likely than not). The difference in standards of review is based on the fact that, with *Brady* claims, the new evidence is really *old* evidence improperly suppressed by the State:

[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in an acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State’s possession as when it was found in a neutral source, there would be no special significance to the prosecutor’s obligation to serve the cause of justice.

*Agurs*, 427 U.S. at 111 (footnote omitted); *see also*, *Bagley*, 473 U.S. at 681 (standard of materiality, even in the absence of specific request, is stricter

than harmless error standard but more lenient than newly discovered evidence standard); *In re Personal Restraint of Woods*, 154 Wn.2d 400, 428 (2005) (evidence is material if a reasonable probability exists that if evidence had been disclosed, result would have been different).

The Supreme Court has made it clear that the appropriate standard of review for *Brady* claims is *not* one of sufficiency of the evidence. *Kyles v. Whitley*, 514 U.S. at 434-35. A court reviewing a *Brady* claim does not simply add in the withheld evidence, subtract the discredited evidence, and then ask whether sufficient evidence remains to sustain a conviction. The Supreme Court in *Kyles* put it this way:

A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. 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*, 514 U.S. 419, 434-35 (emphasis supplied); *see also In re Personal Restraint of Benn*, 120 Wn.2d 631, 649 (agreeing that “reasonable probability” is a probability sufficient to undermine confidence in the verdict).

As Mr. Stenson argued below, imagining a hypothetical trial without

the tainted GSR evidence is wrong for two reasons. First, it is nothing more than a sufficiency of the evidence test. Second, it rewards the prosecution for its misconduct by sanitizing the record and shielding it from the consequences of its actions.

Instead of imagining a trial without the GSR evidence, a reviewing court must imagine the same trial with the same jury hearing the same evidence and argument, *along with* the new exculpatory evidence. It should then consider the likely effects of that new evidence. One effect would certainly be to completely discredit the GSR evidence as probative of guilt. Another would be to cast doubt on the State's evidence-handling procedures in general. A third effect would be to cast doubt on the prosecution's arguments and witnesses. *See Kyles v. Whitley*, at 445-46 (new evidence would have not only have discredited physical evidence but would have called into question the thoroughness and good faith of the investigation).

At trial the State made a point of establishing that its investigators were highly professional and its investigation impeccable. Any suggestion of contamination or mishandling of evidence was ridiculed as desperation tactics. Further, the prosecutor highlighted the GSR evidence in closing and encouraged the jury to rely on it as highly probative of guilt. Had the jury heard the prosecutor make that same argument – stressing the importance of the GSR evidence and touting the consummate professionalism of the State's

investigators – they would, after also hearing the new evidence, have had ample grounds to doubt the State’s allegedly rock-solid circumstantial case.

They would have learned that the lead detective not only mishandled a crucial piece of evidence, but had never bothered to tell the lab of the contamination. They would have learned that the same detective was willing to sit silently at counsel table while a State witness testified that the pockets had not been disturbed. They would have learned that the testifying FBI expert had not done the actual testing himself, though he said or implied that he had. They would have learned that the test had been done by a trainee who first found nothing, and then only a negligible number of particles. They would have learned that the forensic test result they were being encouraged to consider as powerful inculpatory evidence was in fact proof of virtually nothing.

In short, the new evidence would put the whole case in a different light. Other forensic evidence would be called into question. The blood spatter evidence would be weakened, because it too was found on the same piece of mishandled clothing as the gunshot residue. Blood spatter expert testimony would be viewed more skeptically. The jury would rightly wonder whether the State’s expert, opining on the meaning of a few tiny droplets of blood, was overstating his claims.

Instead of a record sanitized of the tainted GSR evidence, a reviewing

court would need to consider a jury's reaction to the original record plus the new evidence. Such a record would surely have undermined the jury's confidence in the State's case, just as the new evidence now undermines a court's confidence in the jury's verdict. The question under *Brady* is not whether the State had a sufficient case to support a conviction without the GSR evidence. The question is whether, with the new evidence added to the old, a court can confidently conclude that the jury would still have returned a unanimous guilty verdict. Judge Williams found that the GSR evidence was among the most damaging evidence in the case and that its prejudicial effect was not harmless. RHFC ¶ 35. The *Brady* standard, correctly articulated and correctly applied, will entitle Darold Stenson to a new trial.

**2. *Napue v. Illinois* Imposes a More Lenient Standard of Review than is Required Under *Brady*.**

Besides his *Brady* claim of evidence suppression, Darold Stenson has raised a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), asserting that the State committed intentional acts of misconduct at trial by permitting false and misleading evidence and argument to be presented to the jury. Under *Brady*, a new trial is required if the suppressed evidence undermines confidence in the verdict. By contrast, when the prosecution presents or fails to correct false evidence in violation of *Napue*, the test is whether "there is any reasonable likelihood that the false testimony *could* have affected the

judgment of the jury.” *Hamilton v. Ayers*, 583 F.3d 1100, 1110 (9<sup>th</sup> Cir. 2009) (emphasis in original).

The trial prosecutor assured the jury that the gunshot residue evidence pointed conclusively toward Mr. Stenson’s guilt. He told them that defense suggestions of contamination of the sample were nothing more than desperate and groundless speculation. He made these remarks during his rebuttal summation, when the defense had no opportunity to respond. The reference hearing showed not only that the GSR evidence was worthless, but that the prosecutor knew it.

On cross-examination at the hearing, Mr. Bruneau admitted he was familiar with gunshot residue evidence but attached little importance to it. He said that “might be” evidence would be a more accurate term for it, because GSR evidence was inherently ambiguous. “They’re [gunshot residue test results] never going to say Mr. X fired a gun.” T 142. As the hearing showed, the prosecutor not only failed to disclose evidence, but affirmatively misled the jury about evidence whose value he recognized as highly dubious.

“[T]he district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.” *Napue v. Illinois*, 360 U.S. at 269-70; *see also, State v. Reeder*, 46 Wn.2d 888, 892 (1955) (prosecutor is a quasi-judicial officer whose duty is to see that a defendant gets a fair trial; he has no right to mislead a jury in summation).

The prosecutor carefully questioned his expert to elicit the testimony he needed for his argument – testimony described by Janine Arvizu as highly misleading. RHFC ¶ 17. To dispel any question about the validity of the test, he asked his expert whether the pockets could have been contaminated. Not if they had not been disturbed before testing, said the expert. RHFC ¶¶ 10; 13. While this testimony was being given, the prosecution’s lead detective sat silently at counsel table. RHFC ¶ 14. He knew that a week before the pockets were tested he had tried on the pants. While wearing them, he turned the pockets inside out, without protective gloves, and was photographed doing so by another State witness. No one told the testifying GSR expert of this episode and no one bothered to correct his testimony.

The prosecution made deliberately deceptive statements to the jury about the meaning of crucial GSR evidence and failed to correct testimony it knew to be misleading and untrue. Such acts, if demonstrated, require reversal under an even more lenient standard than that required under *Brady*. *United States v. Agurs*, 427 U.S. at 103 ; *Napue v. Illinois*, 360 U.S. at 271 (new trial required if false testimony could in any reasonable likelihood have affected the judgment of the jury).

#### IV. CONCLUSION

Judge Williams’ Findings and Conclusions are extensive, but incomplete. He definitively answered some questions critical to this

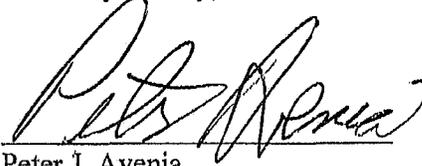
litigation, answered some that were not critical, and left others unanswered.

The critical questions that Judge Williams answered are these: He found that the new evidence was indeed new, *i.e.*, that it could not have been reasonably discovered by the defense earlier through the exercise of due diligence. RHFC ¶¶ 33;43;46. He also found that the evidence was in the possession of or accessible to the State, that the State had a duty to disclose the evidence, and that it failed to do so. RHFC ¶¶ 18;31;33. Further, he found that the evidence – specifically the photographs – was material, that it was highly exculpatory, that it concerned some of the most important *inculpatory* evidence in the case, and that the highly inculpatory GSR evidence ought never have been admitted at trial. RHFC ¶¶ 35;45;48. Lastly, he found that the erroneous admission of the GSR evidence at trial could not be considered harmless. RHFC ¶ 35.

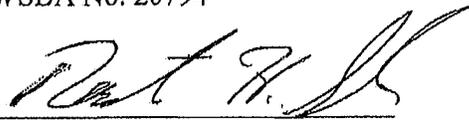
Mr. Stenson asked Judge Williams to decide his *Brady/Napue* claims. He declined, and answered only those specific questions referred to him by this Court. He pointedly left open all other dispositive issues, including whether Mr. Stenson is entitled to relief under the federal constitutional standards of *Brady* and *Napue*.

For all of the foregoing reasons, Petitioner asks the Court to set a briefing schedule for consideration of Petitioner's claims on their merits.

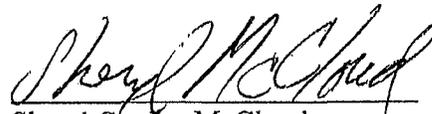
Respectfully submitted on this 14th day of May, 2010.



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**CERTIFICATE OF SERVICE**

I certify that on May 14, 2010, I served a copy of the above-noted document by e-mail, to:

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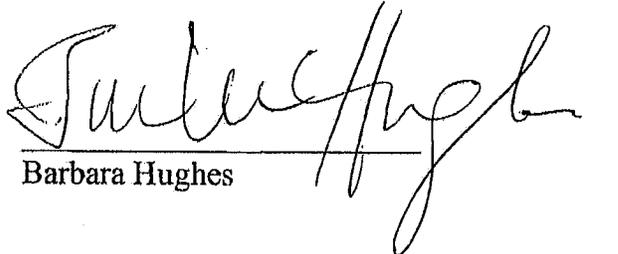
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And I also certify that on this same date I sent a copy of the above-noted document, by U.S. Mail, pre-paid first class, to:

Mr. Darold Stenson  
DOC # 232018  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Avenue / IMU N-D-4  
Walla Walla, WA 99362

DATED this 14th day of May, 2010, at Seattle, Washington.

  
Barbara Hughes

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**Subject:** DAROLD STENSON - PETITIONER'S FILING OF SUPPLEMENTAL BRIEF (number 83606-0)  
**Importance:** High

Attached for filing with the Court is Mr. Stenson's Supplemental Brief on the Effect of the Reference Court's Findings and Conclusions. Thank you.