

NO. 83606-0

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

DAROLD RAY STENSON,

Petitioner.

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STATE OF WASHINGTON

SUPPLEMENTAL BRIEF REGARDING THE EFFECTS OF THE
"REFERENCE HEARING FINDINGS AND CONCLUSIONS"

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I. INTRODUCTION

This matter is Darold Stenson's sixth collateral attack upon a facially valid judgment and sentence. This matter was first filed on August 6, 2009, 11 years, 4 months, and 21 days, after Stenson's aggravated first degree murder case became final.¹ This matter must be dismissed as time-barred pursuant to RCW 10.73 and as successive and abusive pursuant to RAP 16.4(d), unless Stenson establishes that each and every claim falls within his alleged "newly discovered evidence" exception.

This matter was remanded to the Clallam County Superior Court for a reference hearing to determine whether Stenson used due diligence in discovering the allegedly new evidence and in filing the instant collateral attack, and whether the allegedly new evidence satisfied the five-part "newly discovered evidence test."² The reference hearing resulted in the entry of "Reference Hearing Findings and Conclusions." This brief responds to the Court's question of the "effects" of these findings and conclusions.³

¹See *State v. Stenson*, Washington Supreme Court Cause No. 61965-4, Mandate (Mar. 16, 1998); RCW 10.73.090(3)(b); RAP 12.5(c)(3); Reference Hearing Findings and Conclusions ¶ 6 (Hereinafter cited as "Findings").

²*In re Personal Restraint of Stenson*, No. 83606-0, Order 575/46 (Dec. 8, 2009).

³See *In re Personal Restraint of Stenson*, No. 83606-0, Letter to Counsel (Apr. 29, 2010) ("Counsel are directed to file supplemental briefs discussing the effects of the "Reference Hearing Findings and Conclusions" filed by Judge Ken Williams on April 16, 2010.").

This brief deals solely with issues of law, as the reference hearing record had not been transferred to this Court at the time of its preparation.⁴ The State has not assigned error to Judge Williams' failure to adopt certain of its proposed findings⁵ and has not assigned error to some of the findings Judge Williams entered that the State believes to be unsupported by the record, as these actions exceed the parameters for the supplemental brief identified in the April 29, 2010, letter. If requested, the State will submit a supplemental brief that responds to any factual challenges Stenson should mount.

II. STATEMENT OF ISSUES

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

III. FACTS AS FOUND BY JUDGE WILLIAMS

This supplemental brief deals with the "effects" of the Reference Hearing Findings and Conclusions (hereinafter "Findings"). The fact that appear below are drawn from Judge Williams' findings and are relevant to the "effect" that must be given to the Findings. These facts, for purposes of

⁴The order granting Stenson's motion to transfer the record was received by the State at 2:27 on May 12, 2010.

⁵A copy of the State's Proposed Findings of Fact is contained in appendix A of this brief. The State's proposed findings identify that portion of the reference hearing record that supports each factual statement.

this supplemental brief, are presumed to be accurate and to be fully supported by the evidence produced during the reference hearing.

A. FBI File

On April 20, 1994, six days after Stenson's pants were examined in Rod Englert's laboratory, gunshot residue (GSR) sampling dabs were collected from Stenson's pants. These dab samples were sent to the FBI for testing. Findings ¶¶ 24 and 25.

On June 13, 1994, Special Agent (SA) Roger Peele issued a two page report summarizing the GSR testing of the dabs. Findings ¶ 25.

A copy of SA Peele's report was provided to Stenson prior to the start of testimony. Stenson's attorney, Fred Leatherman, was aware that this two page report did not include the bench notes from the GSR testing. Mr. Leatherman did not believe that the bench notes were of any significance because issues relating to potential contamination could be raised to rebut the inferences which rose from finding GSR in Stenson's right pocket. Findings ¶ 30.

Subsequent to the issuance of the two page report, SA Peele was interviewed by Stenson's investigator, Jeff Walker. During this interview, SA Peele told Walker that: (1) the testing by the FBI was qualitative not quantitative; (2) the amount of GSR found would be insignificant beyond the fact that some GSR was found; and (3) issues of potential contamination are

important to address. Findings ¶ 28.

SA Peele testified during Stensons' trial. Findings ¶ 26. SA Peele's habit was to bring the entire FBI file with him to court, and it appears that he followed this habit in the instant case. SA Peele's file was available for review by Stenson at the time of his testimony. Prior to that time, the FBI file would have only been available to Stenson if requested from the FBI by the prosecution. Findings ¶ 26.

Stenson's trial attorneys believed that SA Peele's testimony would support a number of inferences that would be of limited value. Stenson's attorneys made appropriate steps to limit the impact of the GSR testimony at trial. Findings ¶ 28.

In late 2008, Stensons attorney decided to reexamine the blood spatter evidence that was offered at trial. Findings ¶ 20. As part of this examination, Stenson requested assistance from the Clallam County Prosecuting Attorney in obtaining a copy of the FBI files in January of 2009. Findings ¶ 21. This was Stenson's first effort to obtain a copy of the FBI files since his trial because Stenson apparently believed that there was nothing worth looking at in the file and Stenson prioritized his efforts in areas more likely to be productive. Findings ¶ 33 and 55.

The FBI files were requested by Sergeant Martin on March 17, 2009. The FBI files were received by Sergeant Martin on May 15, 2009, and were

provided to Stenson's attorneys on May 21, 2009. Findings ¶ 21.

Stenson's review of the FBI files yielded no new information regarding the blood spatter evidence, but, by chance, led Stenson to challenge the GSR evidence. Findings ¶ 23. The "new" information contained in the FBI files related to GSR is "minimal" and would not have changed the results of the trial or proceeding. Findings ¶ 29. This is because the testimony related to the GSR was accurate and the bench notes establish that the FBI did a competent test. Findings ¶¶ 29 and 34. The information contained in the FBI file, moreover, "is no more than impeachment or cumulative information." Findings ¶ 34(e).

Nonetheless, Stenson filed a sixth collateral attack 77-days after receipt of the FBI files on August 6, 2009. Findings ¶ 6, 21, and 56. Stenson's sole justification for filing this successive and abusive collateral attack is that the FBI files are "newly discovered evidence."

B. Englert Photographs

On April 14, 1994, Stenson's pants were taken by Sergeant Monty Martin to Rod Englert's laboratory for blood spatter testing. Findings ¶ 24. During the session, Mr. Englert examined the pants pockets for blood and he recommended that GSR testing be performed on the pants pockets. Mr. Englert noted the results of his examination and his recommendation in his handwritten notes. Findings ¶ 24.

On April 14, 1994, photographs were taken of Stenson's pants by Mr. Englert. The existence of these photographs was known by Stenson prior to trial, and Stenson's investigator, Jeff Walker, was aware of the contents of the photographs. Findings ¶¶ 43 and 44. Stenson's attorneys reasonably believed that the photographs would have no bearing on the GSR evidence, and it was reasonable for them to not pursue copies of the photographs once the State announced that Mr. Englert would not be called as a witness at trial. Findings ¶¶ 44-45.

During Stenson's first PRP, investigator Ron Bright alerted Stenson's attorneys that "We need to hire an expert to look into GSR as that was one of the nails in his coffin." Findings ¶ 17. Stenson did not follow up on this recommendation until after January 7, 2009, when he obtained copies, from Mr. Englert, of the photographs that Mr. Englert took on April 14, 1994. Findings ¶ 20, 46, 55, and 56.

Stenson filed the sixth collateral attack that contains a claim based upon the Englert Photographs on August 6, 2009, 212-days after receipt of the Englert Photographs. Findings ¶ 6 and 20. Stenson's sole justification for filing this successive and abusive collateral attack is that the Englert Photographs are "newly discovered evidence."

The Englert Photographs, however, merely provide an additional basis for challenging the GSR test result. Findings ¶ 48. While the challenge

may be sufficient to exclude the results entirely, Findings ¶ 47 and 48, the

weight to the circumstantial evidence against Mr. Stenson coupled with the blood spatter evidence directly linking him to the initial attack on Mr. Hoerner is compelling. The blood spatter is a hurdle too high. As long as it stands this court cannot find that even without the GSR testimony the result of the guilt phase of the trial would “probably” have been changed.

Findings ¶ 41. Accord ¶ 48(e).

IV. ARGUMENT

The instant matter is a sixth personal restraint petition challenging an August 19, 1994, facially valid judgment and sentence. This PRP cannot be filed unless every issue raised in the PRP satisfies one or more of the exceptions contained in RCW 10.73.100. *See* RCW 10.73.090(1); *In re Personal Restraint of Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003) (“*Stenson III*”).

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

The instant PRP contains challenges to Darold Stenson's lawful sentence that could have been raised in previous collateral attacks. These issues may only be considered by this Court if they fall within one or more of the exceptions contained in RCW 10.73.100, and if Stenson can

demonstrate an intervening change in the law. *See* RCW 10.73.090; *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 737 n.2, 147 P.3d 573 (2006).

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

A court's authority to reopen a judgment in a criminal case arises from either a statute or the constitution. The constitutional authority, which is contained in article I, § 13, is very narrow and does not permit challenges that go beyond the face of a final judgment of a court of competent jurisdiction. *In re Personal Restraint of Runyan*, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993). Any inquiry beyond the face of a final judgment results from the legislative authorization found in the habeas corpus statute, RCW 7.36.130.

The habeas corpus statute, RCW 7.36.130, incorporates a mandatory time-bar, after which a Court may not consider challenges brought by a petitioner unless such challenges satisfy one or more of the statutory exceptions contained in RCW 10.73.100. *See* RCW 10.73.090; RCW 10.73.100; *Shumway v. Payne*, 136 Wn.2d 383, 397-98, 964 P.2d 349 (1998); *In re Personal Restraint of Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998). This time-bar applies to capital cases. *See Id.*; *Stenson III, supra*.

Stenson's death sentence and aggravated murder convictions became final no later than March 16, 1998, when this Court issued its mandate

following the United States Supreme Court's denial of Stenson's petition for certiorari. *See* RCW 10.73.090(3). The instant PRP, which was filed more than 11 years after the issuance of the mandate, must be dismissed unless Stenson can establish that every claim contained in his Sixth PRP satisfies one or more of the exceptions delineated in RCW 10.73.100. *See Stenson III*, 150 Wn.2d at 220-21.

Stenson asserts that the instant PRP satisfies the "newly discovered evidence" exception in RCW 10.73.100(1). To be entitled to avoid the RCW 10.73.090 time-bar, Stenson must be able to point to new evidence, and he must establish that he acted with reasonable diligence in discovering the new evidence. *See* RCW 10.73.100(1).

1. Reasonable Diligence

The Findings entered by Judge Williams establish that Stenson made no effort to examine the GSR test results between 1994, when his trial counsel received the two-page report, and January of 2009, when he obtained copies of the Englert Photographs. *See generally* Findings 20, 33, 46, 55, and 56. As a matter of law, Stenson's non-action precludes a finding of due diligence.⁶ *See, e.g., Davenport v. Taylor*, 50 Wn.2d 370, 374, 311 P.2d 990

⁶The phrases "due diligence" and "reasonable diligence" have the same meaning. *See, e.g., People v. Cogswell*, 48 Cal. 4th 467, 477, 2010 Cal. LEXIS 2357 (Cal. April 1, 2010) ("Reasonable diligence, often called "due diligence" in case law, "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'").

(1957). *See also Commonwealth v. Stokes*, 598 Pa. 574, 959 A.2d 306, 310-12 (2008) (appellant did not exercise diligence where 12 years elapsed between the date his direct appeal was decided and the date he first requested the files, where the existence of the files was known to the defendant for years prior to his making the request).

a. Stenson Did Not Exercise Due Diligence in Discovering the FBI Files and the Englert Photographs

Judge Williams' conclusion to the contrary was based upon his unwillingness to "second guess counsel's assessments and choice in the setting of priorities." Findings ¶ 55. This was error. Every attorney must make difficult decisions regarding the allocation of resources. That counsel did so in choosing to pursue other defenses or claims, which were more likely to succeed than investigation into additional means of attacking the GSR evidence, does not establish that the State withheld any evidence, that the later discovered evidence is "new", or that counsel acted with "due diligence" with respect to the "new" evidence. *State v. Lord*, 161 Wn.2d 276, 293-94, 165 P.3d 1251 (2007).⁷

⁷Although *Lord* dealt with a *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), claim, it is relevant to the instant diligence analysis, because proof of a *Brady* violation requires a court to determine that the defense team could not have discovered the allegedly withheld evidence through a diligent investigation. *See, e.g., State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007); *State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004).

A defendant's obligation to conduct a diligent investigation arises whenever the defendant knows or should know of the existence of the evidence. *See, e.g., United States v. Hicks*, 848 F.2d 1 (1st Cir. 1988) (knowledge that a witness testified before the grand jury sufficient to trigger the defendant's duty of investigation); *Benn*, 134 Wn.2d at 916-17 (obligation to investigate further imposed where defendant receives a summary of a proposed witnesses' testimony). This is an objective standard of diligence, that is not dependent upon the defendant's awareness of the possible import of the evidence. *See Wood v. Spencer*, 487 F.3d 1, 5 (1st Cir.), *cert. denied*, 552 U.S. 912 (2007).

The United States Supreme Court has long stated that the American Bar Association ("ABA") standards are evidence of what a reasonably diligent counsel would do in a particular case. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is a reasonable investigation); *Strickland v. Washington*, 466 U.S. 668, 688-89, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like... are guides to determining what is reasonable").

Specific ABA standards have been adopted with respect to capital cases. These standards explain that post-conviction counsel has a duty to reinvestigate the case. *See* American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases 1989, Guideline 11.9.3 (hereinafter “1989 ABA Guidelines”) ; American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Revised Edition February 2003, Guidelines 10.7 and 10.15.1, 31 Hofstra L. Rev. 913, 1015, 1079 (2003) (hereinafter “2003 ABA Guidelines”). This duty is not dependent upon collateral attack counsel determining that there is new information to be found.

These standards indicate that counsel should utilize both formal and informal mechanisms, and should seek the underlying information for all forensic tests. These guidelines are consistent with Washington law which requires a person to utilize available legal mechanisms to obtain evidence and to locate witnesses.⁸ These guidelines are also consistent with *State v.*

⁸*See, e.g., State v. Jackman*, 113 Wn.2d 772, 780-81, 783 P.2d 580 (1989) (defendant, who did not request a continuance, to allow for a material witness warrant to be served, did not use due diligence to obtain the evidence prior to trial); *Chadwick v. Ek*, 5 Wn.2d 554, 106 P.2d 104 (1940) (due diligence not shown where counsel spoke with “new” witness multiple times prior to trial, knew the witness was itinerant, and counsel took no precaution whatever to secure his deposition or subpoena him as a witness); *State v. Douglas*, 193 Wash. 425, 75 P.2d 1005 (1938) (due diligence not demonstrated where defendant did not determine that the subpoena was properly served on his witness); *State v. Bengston*, 159 Wash. 296, 159 P.2d 1107 (1930) (due diligence not shown where defendant did not request a continuance to secure the presence of a witness who had not been served a subpoena prior to trial); *State v. Sweeney*, 135 Wash. 276, 278, 237 P. 507 (1925)

Letellier, 16 Wn. App. 695, 702, 558 P.2d 838 (1977), which recognizes that "[d]oing nothing, and relying entirely upon the efforts of the State, fails to meet requirements of . . . due diligence."⁹

Although RAP 16.26, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, Public Disclosure Act, former RCW 42.17.310 through

(due diligence not shown when defendant did not request a continuance of the trial when his two subpoenaed alibi witnesses did not appear); *State v. McChesney*, 114 Wash. 208, 195 Pac. 221 (1921) (due diligence not shown where defendant knew about the witness prior to trial and he simply failed to find and subpoena the witness). See also 12 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 1811, at 413-14 (3d ed. 2004) (a showing of due diligence necessary to obtain a continuance to secure the attendance of a witness or to obtain evidence requires the applicant to demonstrate that he used the means provided by the law to procure evidence or witnesses, such as subpoenas or subpoenas duces tecum). Accord *Betterbox Communs., Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 332 (3rd Cir. 2002) (denying a motion for new trial based upon newly discovered evidence because the moving party did not show that it exercised due diligence in attempting to obtain the evidence; an attempt to depose or subpoena the evidence is required even if the moving party believes that the entity being subpoenaed would refuse to provide the evidence); *United States v. Ardoin*, 19 F.3d 177, 181 (5th Cir.), cert. denied, 513 U.S. 933 (1994) (failing to subpoena documents counsel knew existed amounted to lack of due diligence).

⁹This concept appears repeatedly in *Brady* cases. *Brady* does not compel the government "to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *United States v. Starusko*, 729 F.2d 256, 262 (3rd Cir. 1984) (quoting *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979). Accord *United States v. Wolf*, 839 F.2d 1387, 1391 (10th Cir.), cert. denied, 488 U.S. 923 (1988) ("If the means of obtaining the exculpatory evidence has been provided to the defense, however, a *Brady* claim fails, even if the prosecution does not physically deliver the evidence requested."). Some cases even treat this "due diligence" requirement as a fourth element of a *Brady* claim. See, e.g., *State v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003) ("To establish a *Brady* violation, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the petitioner; (3) the evidence was material either to guilt or punishment; and (4) nondiscovery of the allegedly favorable evidence was not the result of a lack of due diligence.").

42.17.31921, and Public Records Act, Chapter 42.56 RCW, were all available to Stenson, he chose to utilize none of them.¹⁰ See Findings ¶¶ 32, 33, 55. Instead, Stenson chose to rely solely upon the efforts of the State. The relative speed with which Stenson obtained the Englert Photographs and the FBI Files after the entry of the November 2008, stay of execution indicates that he could have obtained them, with the exercise of due diligence, long before 2009. See, e.g. *Lord*, 161 Wn.2d at 292-93 (no evidence was withheld from the defense in violation of *Brady* when defendant's counsel were able to locate the dog handler based upon the information provided prior to the defendant's first trial); *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 397, 972 P.2d 1250 (1999) (no evidence was withheld from the defense in violation of *Brady* when the defendant's current counsel were able to find additional documents based upon the information provided by the prosecution to the defendant's trial counsel). This PRP must, therefore, be dismissed as time-barred.

¹⁰Stenson's collateral attack counsels' decision to deviate from the accepted standard of practice does not create a basis for relief. See generally *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) (no constitutional right to counsel in capital collateral attack proceedings); *Wainwright v. Torna*, 455 U.S. 586, 587-88, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

b. Stenson Did Not Exercise Due Diligence in Filing the Sixth Collateral Attack

Judge Williams found that although Stenson obtained copies of the Englert Photographs on January 7, 2009, he did not file the instant collateral attack until August 6, 2009. Judge Williams further found that although Stenson obtained a copy of the FBI Files on May, 2009, he let 77 days elapse before filing the instant collateral attack. *See Findings ¶¶ 6, 20, 21, 56.* These undisputed facts establish, as a matter of law, that Stenson did not exercise due diligence in the filing of this collateral attack.

While no Washington case explains what constitutes “reasonable diligence in filing the petition,” a number of other jurisdictions have explored this concept, and generally use a 30 to 60 period to be “reasonable”. *See, e.g., Evans v. Chavis*, 546 U.S. 189, 210, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006) (using 30 to 60 days as general measurement for reasonableness based on other states' rules governing time to appeal to the state supreme court); *Carey v. Saffold*, 536 U.S. 214, 219, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (same); *Chaffer v. Prosper*, 592 F.3d 1046 (9th Cir. 2010) (same). Federal courts¹¹ have found that diligence was not displayed when petitioners

¹¹The federal court opinions reference here either deal with the equitable tolling of the one-year statute of limitations or the requirements that must be met to present evidence on a claim for the first time in federal court. Both of these federal concepts require the petitioner to establish diligence. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (28 U.S.C.S. § 2254(e)(2) prohibits a prisoner, who failed to develop the factual basis for his claim in state

waited more than 60 days from the triggering event to the filing of the collateral attack. *See, e.g., Chaffer v. Prosper, supra* (diligence not displayed where there was a 115-day gap between the denial of his first habeas petition in the Lassen County Superior Court and the filing of his second habeas petition in the California Court of Appeal, and a 101-day gap between the denial of his second habeas petition and the filing of his third habeas petition); *Harper v. Ercole*, 2009 U.S. Dist. Lexis 117615 (E.D. N.Y. 2009)¹² (due diligence not shown where petitioner took 65 days after release from the hospital to file his habeas petition); *Ragan v. Horn*, 598 F. Supp. 2d 677 (E.D. Pa. 2009) (due diligence not shown by condemned inmate where 102 days passed between the end of the “extraordinary circumstances” that prevented his timely filing and the actual filing of his collateral attack); *Beards v. Dailey*, 38 Ore. App. 309, 589 P.2d 1207 (1979) (motion to set aside default not filed with reasonable diligence where 82 days elapsed between the day notice of the judgment was sent to the defendant and the

court, from obtaining an evidentiary hearing in federal court; a lack of diligence and a failure to use the available state procedures to seek the evidence constitutes a “failure”); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir.), *cert. denied*, 130 S. Ct. 244 (2009) (with regard to a petition for a writ of habeas corpus, to receive equitable tolling, a petitioner bears the burden of showing (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way).

¹²A copy of this opinion is attached to this memorandum as required by GR 14.1(b).

filing of the motion to set aside the judgment).

The 30 to 60-day time period is consistent with a multitude of judicially established deadlines. *See, e.g.*, RAP 10.2(a) (briefs of appellants due 45 days after the record is filed with the appellate court); RAP 10.2(b) (respondent's brief in civil cases due 30 days after service of the appellant's brief); RAP 10.2(c) (respondent's brief in criminal cases due 60 days after service of the appellant's brief); RAP 13.5(a) (motion for discretionary review must be filed within 30 days after the Court of Appeals' decision is filed); RAP 13.4(a) (petition of review must be filed within 30 days of the filing of the Court of Appeal's decision).

A 30 to 60-day rule is also consistent with this Court's decree that a "reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period ." *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840 , 847, 991 P.2d 1161 (2000). In the instant context, the "analogous statutory or rule time period" is either CrR 7.5(b)'s 10-days for filing a motion for new trial based upon newly discovered evidence, or RAP 5.2(a) and (b)'s 30-day time period for filing a notice of appeal or notice of discretionary review.

Stenson exceeded the 30 to 60 day time period with respect to the Englert Photos by a factor of three. Even with respect to the FBI File, Stenson missed the 60 day mark by more than two weeks. Accordingly, this

collateral attack must be dismissed as time-barred.

2. Newly Discovered Evidence

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

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

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

Judge Williams found that neither the FBI Files nor the Englert Photographs satisfy the first factor. *See* Findings ¶¶ 29 and 41. This finding recognizes Stenson’s motive, his opportunity, the absence of any other adult at the Stenson farmhouse house during the critical 15 minutes, and the compelling blood spatter evidence. *See generally Stenson III*, 150 Wn.2d at 211; *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 751 and 756, 16 P.3d 1 (2001) (“*Stenson II*”). Stenson’s “new evidence” regarding the GSR does not alter the jury’s determination that “more than one person was murdered and the murders were part of a common scheme or plan.” *State v. Stenson*, 132 Wn.2d 668, 682, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S.

1008 (1998) (“*Stenson I*”). Judge Williams’ juxtaposition of the strength of the State’s evidence of guilt with the defendant’s allegedly new evidence fully complies with the procedure this Court set out in *State v. Peele*, 67 Wn.2d 724, 409 P.2d 663 (1966), and mandates the rejection of Stenson’s “newly discovered evidence” claim.

The rejection of Stenson’s newly discovered evidence claim is further supported by Judge Williams’ legally sound finding that the FBI file “is no more than impeachment or cumulative information.” Findings ¶ 34(e). As this Court noted in its dismissal of Stenson’s second personal restraint petition, impeaching and cumulative evidence will not overcome the time-bar set forth in RCW 10.73.090. *See Stenson III*, 150 Wn.2d at 217-20.

With respect to the Englert Photographs, Judge Williams found that their existence was known to Stenson prior to trial, and the photos were actually viewed by Stenson’s trial investigator. Findings ¶ 43 and 44. Judge Williams found that the new evidence is not the photos, but the contents of the photos. Findings ¶ 43.¹³ This Court has repeatedly rejected claims of

¹³The State’s obligations regarding the photographs was satisfied when the State informed Stenson of their existence. The State had no duty to describe the contents of the photographs to Stenson. *See, e.g., Rhoades v. Henry*, 596 F.3d 1170, 1182 (9th Cir. 2010) (there is “no authority requiring the prosecution to single out a particular segment of a videotape, and we decline to impose one.”); *United States v. Pelullo*, 399 F.3d 197, 212-13 (3rd Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006) (the government is not required to specify which documents, portions of recorded statements, or other information will be helpful to the defense); *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997), *cert. denied*, 523 U.S. 1071 (1998)

newly discovered evidence that was based upon the contents of evidence whose existence was known prior to trial. *See, e.g., State v. Harris*, 106 Wn.2d 784, 794-97, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987) (capital case; MMPI test results of an MMPI test that was administered prior to trial but not scored until after trial will not support a motion for new trial); *State v. Pope*, 73 Wn.2d 919, 442 P.2d 994 (1968) (due diligence not shown where defense counsel was aware of witnesses prior to trial and had discussed the substance of their information with defense counsel, and defense counsel simply did not recognize the importance of the witnesses' testimony); *State v. Douglas*, 193 Wash. 425, 429, 75 P.2d 1005 (1938) (due diligence not used where defendant knew about the witnesses' existence prior to trial and did not ascertain the nature and extent of his information). These cases mandate the dismissal of the instant PRP.

(noting "that 'there is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents with[in] a larger mass of material that it has already turned over'" (quoting *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997))); *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992) ("While the Supreme Court in *Brady* held that the government may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the government to conduct a defendant's investigation or assist in the presentation of the defendant's case." (citation omitted)).

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

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

The abuse of the writ doctrine states that "if the petitioner was represented by counsel throughout postconviction proceedings, it is an abuse of the writ for him or her to raise, in a successive petition, a new issue that was "available but not relied upon in a prior petition." *In re Personal Restraint of Jeffries*, 114 Wn.2d 485, 492, 789 P.2d 731 (1990) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986)). The doctrine does not, however, apply if the claim is based upon intervening case law or upon newly discovered evidence, which would have probably changed the outcome of the trial or proceeding. *In re Personal Restraint of Stenson*, 153 Wn.2d 137, 145, 102 P.3d 151 (2004) ("*Stenson IV*").

Since Stenson's PRP rests entirely upon legal doctrines that were announced long before his convictions became final,¹⁴ and Judge Williams'

¹⁴See CrR 7.8(b) Motion at 10 (citing to *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935), *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3

findings establish that neither the FBI file nor the Englert Photographs are “newly discovered evidence”, this collateral attack must be dismissed as abusive and successive.

VI. CONCLUSION

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

DATED this 14th day of May, 2010.

Respectfully submitted,

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L. Ed. 2d 1217 (1959), and *Brady v. Maryland, supra*).

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 14th day of May, 2010, I e-filed the State's Supplemental Brief Regarding the Effects of the "Reference Hearing Findings and Conclusions" with the Washington Supreme Court by sending this document to supreme@courts.wa.gov.

A copy of this document was served by e-mail on the following individuals:

Sheryl McCloud, Counsel for Darold Stenson, at sheryl@sgmcloud.com

Robert Gombiner, Federal Public Defender, at robert_gombiner@fd.org

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 14th day of May, 2010, at Port Orchard, Washington.

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