No. 12-191

In the Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

DAROLD RAY STENSON,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Darold Ray Stenson, pursuant to Supreme Court Rule 39, asks leave to file the attached Brief in Opposition to the State of Washington's Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis.*

Mr. Stenson has had the assistance of court-appointed counsel throughout the state court proceedings, beginning in Clallam County Superior Court in 1993 for his initial trial, and continuing through his direct appeal, post-conviction proceedings, and the pending retrial. On May 12, 2010, the Washington Supreme Court granted Mr. Stenson's motion for appointment of counsel at public expense for the post-conviction petition that

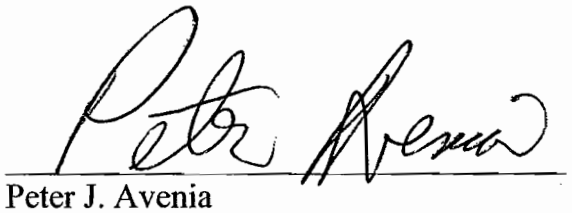
is the subject of the state's petition for writ of certiorari. Most recently, in July 2012 the Clallam County Superior Court appointed counsel to represent Mr. Stenson during the pending retrial.

Mr. Stenson has also had the assistance of appointed counsel, pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, in federal courts. On February 21, 2001, the United States District Court for the Western District of Washington appointed the Federal Public Defender of Western Washington to represent Mr. Stenson in his federal habeas petition.

Respondent's declaration in support of this motion is attached hereto.

WHEREFORE, the Respondent, by and through undersigned counsel, respectfully prays for leave to proceed in the Supreme Court of the United States *in forma pauperis.*

DATED this 7th day of September, 2012.



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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Darolyn R. Stevens, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child Support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance (such as welfare)	$	$	$	$
Other (specify): _____	$	$	$	$
Total monthly income:	$	$	$	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$ 0
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$ 0
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$ 0	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model N/A
Value 0

☐ Motor Vehicle #2
Year, make & model N/A
Value 0

☐ Other assets
Description
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? 0

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? 0

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been forced to exist in a steel & concrete box for the last 19 plus years, not allowed to work.

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

Executed on: 08-20, 2012

Darold R J Stinson

(Signature)

No. 12-191

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

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DAROLD RAY STENSION,

Respondent.

CERTIFICATE OF SERVICE

I certify under penalty of perjury that the following is true and correct:

I am a member of the Supreme Court bar. Pursuant to Supreme Court Rule 29.3, I served a copy of the Respondent's Motion for Leave to Proceed *In Forma Pauperis* and a copy of Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Washington on all parties by depositing a copy using Federal Express, on September 7, 2012, addressed to:

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Jay D. Geck
Paul D. Weisser
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Criminal Justice Division
2425 Bristol Court S.W.
Olympia, WA 98502
(360) 586-1445

(Attorneys for Petitioner)

DATED this 7th day of September, 2012.

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

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v.

DAROLD RAY STENSON,

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On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATEMENT

On May 10, 2012, the Supreme Court of Washington, in an 8-to-1 decision, reversed Darold Stenson's 1994 capital murder convictions based on a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). It ruled that the prosecution had suppressed important exculpatory evidence at trial, that the defense had been diligent in discovering that evidence many years later, and that the evidence was material because it created a reasonable probability of a different result at trial.

Petitioner now seeks certiorari on a single question:

> Is undisclosed evidence material because of a possibility that it would have led counsel to further investigate the prosecution's case for potential exculpatory evidence, when the defendant does not show that such an investigation would have uncovered evidence creating a reasonable probability of a different verdict in light of the record as a whole?

Petitioner argues that the state court applied the wrong materiality standard under *Brady*. It asserts that the Washington Supreme Court "concluded the undisclosed evidence was material not because of the inherent exculpatory or impeachment value, but because it would have led defense counsel to further investigate the prosecution's critical forensic evidence." Pet. i. This interpretation of *Brady*, says the state, conflicts with this Court's *Brady* jurisprudence and with other state and federal decisions.

A review of the state court's decision, however, shows that Petitioner has mischaracterized the basis of that court's ruling. The suppressed evidence in question involved gunshot residue (GSR), one of two key pieces of forensic evidence tying Stenson to the murders. The new evidence – photographs and an FBI laboratory file – showed that test results finding GSR in Stenson's right front pants pocket were utterly unreliable because of mishandling of the pants prior to testing and should never have been admitted at trial.

Far from concluding that the suppressed evidence had no "inherent exculpatory or impeachment value," the Washington Supreme Court concluded the opposite. The new evidence was exculpatory enough to completely discredit one of the most important pieces of evidence in the case. In addition, the court said, the new evidence would have provided powerful impeachment of the state's general investigation, evidence-gathering, and case presentation, all of which had been touted by the state at trial as highly professional and carefully managed.

Not only is the Question Presented not presented by the Washington Supreme Court's decision, but there is no reason for this Court to review the state court's grant of post-conviction relief. The Washington Supreme Court based its decision on the factual findings of the reference court following an exhaustive evidentiary hearing. The state's complaints with those findings are both unfounded

and unworthy of this Court's attention. The Washington Supreme Court's ruling that the suppressed evidence was material because of its important impeachment and exculpatory value closely follows this Court's *Brady* jurisprudence and creates no conflict with this or any other court. Respondent respectfully requests that the petition be denied.

A. The Trial

In the early hours of March 25,1993, Darold Stenson called 911 from his home in Clallam County, Washington to report the shooting of his wife, Denise, and his business associate, Frank Hoerner. Upon the arrival of the police, Stenson led them to a downstairs bedroom where Hoerner lay face down on the floor, dead from a gunshot wound to the head. Upstairs they found Mrs. Stenson in bed, still alive, but also shot in the head. Mrs. Stenson died later at a hospital. Pet. App. 2a.

Stenson told the police that Frank Hoerner had come over earlier to sign some business papers before going to work. Stenson and Hoerner were in Stenson's office (in a separate building on the property) when Hoerner said he needed to use the bathroom. When Hoerner failed to return, Stenson went looking for him and found that both Hoerner and his wife had been shot. Stenson told police he thought Hoerner might have shot his wife and then turned the gun on himself. Pet. App. 2a.

Investigation later established that Hoerner had not committed suicide but had been struck in the back of the head in the driveway and then dragged back into the house, where he was shot. Stenson was later arrested and charged with two counts of aggravated first-degree murder. Trial commenced in the summer of 1994. The state's theory was that Stenson had committed the murders because his exotic bird-breeding business was failing, and he hoped to both collect insurance on his wife and extricate himself from a business debt owed to Hoerner. Although the evidence against Stenson was largely circumstantial, two pieces of forensic evidence tied him to the murders: (1) blood stains on Stenson's pants consistent with Hoerner's blood protein profile and (2) gunshot residue (GSR) found in Stenson's right front pants pocket. Pet. App. 3a.

In explaining the blood on his pants, Stenson said he may have kneeled next to Hoerner's body when he found it on the floor. Hoerner's blood had been found in many locations, both inside and outside the home. Hoerner's body and clothing also had blood on them, and a large blood stain was found on the carpet where Hoerner's body lay. A state forensic specialist in blood stain analysis opined that the stains on the pants were inconsistent with Stenson's explanation and that the blood had been deposited before the body reached its final resting position. Pet. App. 3a.

The second piece of forensic evidence directly tying Stenson to the murders was gunshot residue found in Stenson's right front pants pocket. The FBI had conducted tests on dabs taken from the pocket. E. Roger Peele, an analyst from the FBI laboratory in Washington, D.C., testified as the state's expert about gunshot residue in general and about the positive test results reported by the FBI laboratory.

Peele said that GSR particles were created whenever a firearm was discharged, and the fact that GSR was found in Stenson's pants pocket indicated that the pocket, or something placed in the pocket, had been in a shooting environment. When asked about the possibility of contamination from other sources, Peele said it depended on how the testing had been done. If the pockets had not been disturbed, then there should be no concern about contamination. Pet. App. 55a; 109a.

The prosecutor in summation, responding to defense counsel's suggestions that the positive GSR test might have been caused by contamination, derisively dismissed such claims as "wild theories." Resp. App. 5a. He went on to say that there was only one reasonable explanation for the GSR found in Stenson's pocket: that Darold Stenson had fired the gun that killed his wife and business partner. Resp. App. 6a. The jury convicted Stenson of the murders and sentenced him to

death.

B. Post-Conviction Proceedings

Stenson's direct appeal was denied by the Washington Supreme Court in 1997. In the years that followed, he filed a series of state court post-conviction challenges, called personal restraint petitions (PRPs), as well as a federal habeas corpus petition, raising a variety of legal issues. The Washington Supreme Court denied each PRP, and the federal courts denied the habeas petition.

In late 2008, two significant developments occurred. First, on November 21, 2008, a previously unknown witness, Robert Shinn, reported to his probation officer that he had information implicating other individuals in the murders of Denise Stenson and Hoerner, some of whom had made admissions to the murders. Second, on November 26, 2008, the Clallam County Prosecutor's office informed Stenson's habeas counsel that the FBI was concerned that FBI experts who had testified about bullet lead analysis might have expressed opinions that went beyond what the science supported.[1] In addition to his GSR testimony, Peele had testified at Stenson's trial about bullet lead analysis.

Stenson's defense team undertook the task of tracking down and

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[1]The FBI first notified the Clallam County Sheriff of concerns with bullet lead analysis in April 2008. Mr. Stenson was scheduled to be executed on December 3, 2008.

interviewing all of the people named by Shinn. At the same time, in order to reassess the trial testimony and other evidence in light of Shinn's disclosures, they asked for Peele's FBI laboratory file and the file of Rod Englert, a prosecution forensic expert who was never called to testify.

In 2009, the defense obtained both the FBI file and the Englert file. The FBI file showed two things of significance. Although Peele had implied at the trial that he had conducted the GSR tests himself, the file showed that the testing had actually been performed by a laboratory trainee, Kathy Lundy. Lundy's tests had been run several times. The first results were negative. Further testing produced a positive result, but the amount of GSR detected was exceedingly small, no more than two to four particles. Pet. App. 61a.

The Englert file also proved fruitful. It contained photographs of the lead detective, Monty Martin, wearing Stenson's pants during a forensic session with Englert six days before dabs were taken for GSR testing. Pet. App. 53a. In one photograph, Martin is shown wearing Stenson's pants, without protective gloves, and holding the pockets inside out. Pet. App. 25a.

Based on this new evidence, Stenson filed another state court challenge, this time alleging that the prosecution had suppressed material exculpatory evidence, in violation of *Brady v. Maryland*, and had knowingly presented false testimony

and argument, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). Pet. App. 5a. The Washington Supreme Court responded by ordering the trial court to conduct a reference hearing on the claims, including whether the claims satisfied the state law test for newly-discovered evidence. Pet. App. 5a-6a.

The trial court held an eight-day evidentiary hearing, allowing both sides great latitude in presenting their cases. Among the evidence presented was the testimony of a laboratory quality control expert, Janine Arvizu, who reviewed the FBI materials and the Englert photographs. She opined that the way in which the dab testing had been done made the GSR test results forensically meaningless.

The reference hearing judge, who was also the trial judge, agreed. Had he known of the suppressed evidence at the time of trial, he said, he would have excluded the GSR evidence entirely. Pet. App. 70a. He also found that the defense had been diligent in finding the new evidence. Pet. App. 68a. He ruled, however, that the evidence did not meet Washington's state-law standard for newly-discovered evidence. He declined to rule on the *Brady* claim because he had not been instructed to do so by the Supreme Court. Pet. App. 59a.

Stenson returned to the Washington Supreme Court and argued that the reference court had erroneously deferred ruling on the *Brady* claims. The high court agreed and remanded the case for further hearings. In a second set of

findings, the reference court reconsidered its earlier ruling in light of *Brady*. It found again that the defense had been diligent in discovering the evidence, that it had been unlawfully suppressed by the state, and that it was important exculpatory evidence because it would have completely neutralized a key piece of inculpatory forensic evidence. Nonetheless, the court ruled that the evidence was not material under *Brady* in light of the blood spatter testimony and circumstantial evidence. Pet. App. 33a.

On appeal, the Washington Supreme Court adopted nearly all of the lower court's factual findings. It disagreed, however, with its ultimate conclusion on materiality, a mixed question of fact and law that it reviewed de novo. In an 8-to-1 opinion, the court ruled that Stenson had met his burden of showing that the new exculpatory evidence created a reasonable probability of a different result at trial. Accordingly, it reversed his two murder convictions and remanded for a new trial. The court did not decide the *Napue* claim. In July 2012, the court denied the state's motion for a stay and issued a certificate of finality. Stenson has now been moved back to Clallam County, where retrial proceedings are in progress.

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REASONS FOR DENYING THE PETITION

A. The State Mischaracterizes the Grounds for the Washington Supreme Court's Decision and the "Question Presented" Is Not One Presented by the Decision.

In framing its Question Presented, Petitioner asserts that the Washington Supreme Court granted Darold Stenson relief under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the state's failure to disclose evidence,

> not because of the inherent exculpatory or impeachment value [of the suppressed evidence], but because it would have led defense counsel to further investigate the prosecution's critical forensic evidence.

Pet. i . Petitioner then asks this Court to answer the following question:

> Is undisclosed evidence material because of a possibility that it would have led counsel to further investigate the prosecution's case for potential exculpatory evidence, when the defendant does not show that such an investigation would have uncovered evidence creating a reasonable probability of a different verdict in light of the record as a whole?

Id.

In fact, both the Washington Supreme Court and the Clallam County Superior Court emphasized repeatedly that the newly-discovered evidence relating to gunshot residue (GSR) had exceptional inherent exculpatory and impeachment value. The state tries to suggest that the Washington Supreme Court was narrowly

fixated on the blood spatter evidence, and that it considered the primary value of the suppressed GSR evidence to be its "speculative" effect on blood spatter. But a review of the court's opinion shows that the reference to blood spatter was just one example given by the court of the many exculpatory uses to which the new evidence could have been put. Pet. App. 22a.

The state thus asks the Court to answer a question not presented by the decision. The Washington Supreme Court did note that, if the state had not suppressed evidence showing the mishandling of the jeans, the defense would have further inquired into "possible corruption of the blood spatter evidence." Pet. 22a. But the state then takes this isolated statement and offers it as the sole basis for the Washington Supreme Court's decision, ignoring the broader and more central reasons offered by the Washington Supreme Court and the many ways in which the court found the evidence to be exculpatory and impeaching.

Despite the state's arguments to the contrary, gunshot residue played a key role at trial, and the Washington Supreme Court properly recognized that fact. In holding that the suppressed evidence "undermined confidence in the outcome of [Stenson's] trial," Pet. App. 20a, citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), the court first noted that GSR and blood spatter evidence were the only items of incriminating forensic evidence. Pet. App. 20a. The court explained that the new

evidence "undermined" the "cumulative reliability" of this evidence. Pet. App. 20a.

The court then turned to the broader impact of the suppressed evidence. Adopting arguments advanced by the defense, the court reasoned as follows:

> To rebut claims that the investigation was meticulous, impeccable, and highly professional, Stenson could point to the haphazard and cavalier way in which critical pieces of evidence were treated. He could show that the lead investigator was biased, or suffered from memory problems. He could show that at least one state's expert (Peele) testified misleadingly, implying that he had personally conducted forensic tests when in fact they had been done by a trainee assistant. He could argue that the state had knowingly proffered worthless forensic evidence and then touted it in closing as highly probative of guilt. The mishandling of the pants would serve as a prime example of why the state's evidence, witnesses, and arguments should all be viewed with extreme skepticism.

Pet. App. 21a (quoting from Stenson's brief to the Washington Supreme Court).

In ruling that the suppressed evidence had both high exculpatory and high impeachment value, the court had the benefit of two sets of factual findings made by the reference court following an exhaustive eight-day evidentiary hearing. It adopted nearly all of the reference court's factual findings.[2]

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[2]Following Washington law, the court said it would defer to the trial court and not "disturb findings of fact supported by substantial evidence even if there is conflicting evidence." Pet. App. 16a (quoting *Merriman v. Cokely*, 230 P.2d 162, 164 (Wash. 2010)).

The factual findings made by the reference court include the following:

- The evidence against Stenson "was largely circumstantial." Pet. App. 46a. "Motive, opportunity and timing of events were argued based upon circumstantial evidence." Pet. App. 46a. The trial record contained a substantial amount of nonforensic evidence relating to motive, demeanor, and opportunity. Much of this evidence (e.g., regarding Stenson's finances, insurance policies, and his own statements) was at best ambiguous. Pet. App. 71a-72a.
- Most of the forensic evidence (fingerprints, blood on the wall, bullet lead analysis) had little or no inculpatory value. Only two items of forensic evidence, GSR found in Stenson's right front pants pocket and blood spatter on Stenson's jeans, tied Stenson to the shootings. Pet. App. 70a-71a.
- Special Agent E. Roger Peele of the FBI testified as a GSR expert at trial. He said that laboratory tests showed that GSR had been found in Stenson's right front pants pocket. Peele assumed the testing had been done early on in the investigation before items of evidence were

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With respect to mixed questions of law and fact, the review was de novo, allowing the court to "draw[] our own legal conclusions." Pet. App. 16a-17a (citing *In re Pers. Restraint of Brett*, 16 P.3d 601 (Wash. 2001)).

handled. In response to questioning about possible contamination, Peele said that "if nothing happens to the interior of that pocket, then nothing is disturbed." In fact, the pockets had been tested more than a year after they were seized and after Detective Martin wore the pants with the pockets turned out. Pet. App. 55a-56a.

- In closing, the prosecutor referred to the competence of the professionals who testified as state witnesses and dismissed all defense attempts to suggest possible sources of GSR contamination as mere speculation. Pet. App. 47a.
- Prior to discovery of the photographs, it would have been difficult to argue that contamination of the pocket was likely. The most reasonable inference of the test result was that a firearm, or a hand that had recently fired a firearm, had gone into Stenson's pocket. Since they were Stenson's pants, the most reasonable inference was that Stenson had fired the weapon. Pet. App. 70a.
- Evidence of contamination of the pockets shortly before testing rendered the GSR results forensically meaningless. Had the information been known at trial, the court would have excluded the test results entirely. Pet. App. 70a.

- The photographs were neither cumulative nor merely impeaching because they would have led to "the elimination of the GSR evidence from the trial" because the "subsequent finding of GSR in the pants pocket" would "no longer have any evidentiary viability." Pet. App. 77a-78a.
- "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." Pet. App. 70a-71a.

In adopting these findings, the Washington Supreme Court can hardly be accused of saying that the newly-discovered GSR evidence had no inherent exculpatory or impeachment value. Yet, the Question Presented blandly asserts that the Washington Supreme Court considered the value of the suppressed GSR evidence to be limited to its "speculative" effect on the blood spatter evidence.

The Washington Supreme Court not only adopted the factual findings of the trial court but also analyzed them in detail. It described the suppressed FBI file as "favorable to Stenson" and noted that it could have been used "for impeachment purposes during Peele's [the State's GSR expert] testimony." Pet. App. 17a.

Peele's testimony "contained a false implication that he had personally performed the GSR tests." Pet. App. 17a. It was not until the full FBI file was disclosed that counsel learned that a trainee had actually performed the test and had found at most a few particles of GSR. Pet. App. 18a.

These are not the comments of a court fixated on speculative notions of materiality. The court well understood and well articulated how the attack on GSR evidence would have not only neutralized a key piece of inculpatory evidence, but would have helped the defense to attack the prosecution's general methodology. It recognized, for example, that, had the defense been able to challenge the expert credentials of the true examiner, they could have "impeach[ed] the credibility of the results, and potentially undermine[d] the State's argument as to the professionalism of its witnesses." Pet. App. 17a (quoting from reference court's findings).

Despite the attempts by the state to characterize the basis of the state court's decision as outside the boundaries of this Court's *Brady* jurisprudence and exclusively focused on the blood spatter evidence, the true – and broader – basis could not have been more clearly stated:

> Had the defense trial team been privy to the suppressed evidence at issue here, the integrity and quality of the State's entire investigation, evidence handling

> procedures and case presentation would have been called into question.

Pet. App. 20a. The Question Presented, as framed by the state, is not a question presented by the Washington Supreme Court decision. Accordingly, this Court should deny the petition for a writ of certiorari.

B. Petitioner's Criticisms of the State Court's Factual Findings Are Both Unfounded and Unworthy of this Court's Attention, Particularly Given the Narrow Scope of the Question Presented.

The state claims that GSR evidence played an insignificant role at trial and that, at any rate, the defense was able to effectively impeach the GSR evidence as possibly contaminated. Both suggestions were rebutted at the reference hearing and rejected by both the trial judge and the state supreme court. *See, e.g.,* Pet. App. 38a ("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.").

Although omitted from the state's lengthy recitation of the facts, one need only look to the prosecution's closing argument to see what use was made of the GSR evidence. The prosecutor made three important points in summation that are relevant to the new evidence. First, there was testimony at trial that Stenson had been placed briefly in the back of a patrol car. The defense had suggested that this

could have been a potential source of GSR contamination. The prosecutor ridiculed this notion as nothing more than "an invitation to the rankest form[] of speculation. Or imagination." Resp. App. 5a. Second, the prosecutor emphasized that the investigating authorities were highly professional and knew how to handle evidence carefully. Resp. App. 5a.

Third, the prosecutor argued that the presence of gunshot residue in Stenson's pocket could only be reasonably explained by Stenson's guilt. Since gunshot residue is only created by firing a weapon, whatever had gone into that pocket (i.e., Stenson's hand or gun) had been in a shooting environment:

> [Defense counsel] talks about well, perhaps imagine, maybe the defendant picked up that gunshot residue that was found in his right pocket from Deputy Fuchser's car. Or maybe he got it because J.R. Williamson at the FBI crime lab once handled this piece of evidence.
>
> Well, first of all. I think you know from observing the FBI personnel who testified here that they know how to handle evidence and I think you know now that Sergeant Turner's concerns about the defendant being in Fuchser's car were unfounded.... Because Roger Peele told you that in order to get the gunshot residue, you have got to be in a shooting environment. That's the bottom line. You have got to have your hands in a shooting environment.
>
> * * *
>
> There's no shooting environment in Deputy Fuchser's

> car. There's no shooting environment at the FBI Crime Laboratory. Counsel is asking you to imagine something.

Resp. App. 5a-6a.

During Peele's testimony, the prosecutor was careful to close the door on the contamination issue. His last question to Roger Peele on redirect was: "And so the integrity of a possible item of evidence would remain intact over time as long as it was not disturbed?" Peele answered, "That's correct." Resp. App. 2a.

The Washington Supreme Court considered the effect of the suppressed evidence in light of the state's overall case. There was no eyewitness testimony and no confession. The weapon allegedly used to strike Hoerner was never found, and the reference court agreed that the circumstantial evidence was "at best ambiguous." Pet. App. 71a.

Moreover, at trial the state touted the professionalism of its forensic team, since the forensic evidence was central to its case. Scientific experts and technicians testified on a variety of topics. These included autopsy results, fingerprint analysis, bullet lead analysis, fingerprint identification, blood spatter, and blood typing.

The prosecution focused on the care with which the crime scene was processed and the transparency of the investigation, as purportedly documented by

photographs and videotapes. The prosecutor argued that this careful and transparent processing of the crime scene was conducted under the supervision of longtime veteran Det. Sgt. Monty Martin, who led the investigation.

Martin sat next to the prosecutor throughout the trial. The jury knew it was Martin who had supervised the police and facilitated the experts' work. It was Martin who shuttled important evidence back and forth for examination, including Stenson's jeans. The jury's confidence in the state's evidence depended heavily on its confidence in Martin. If Martin's judgment, evidence-gathering procedures, and evidence-handling techniques could be exposed as seriously flawed, it would have repercussions for everything Martin touched or supervised.

And the questions would not be limited to Martin. As the Washington Supreme Court observed, the new evidence would have called into question "the detectives' investigation techniques and showed the extent to which the law enforcement officers mishandled the evidence." Pet. App. 23a.

The Washington Supreme Court's ruling that the new evidence was extremely important and highly exculpatory is amply supported by the record. Although the state argues that the court's factual findings and legal conclusions were erroneous, its Question Presented is narrowly limited to the claim that the court applied an incorrect materiality standard. A careful reading of their brief

shows that the state's real argument is that the Washington courts' factual findings were wrong. That claim does not warrant this Court's review.

C. The Washington Supreme Court's Analysis Follows this Court's *Brady* Jurisprudence.

1. The Washington Supreme Court Correctly Stated and Correctly Applied this Court's Materiality Test.

The state complains that the Washington Supreme Court misstated and misapplied this Court's rules under *Brady*. A review of the decision shows that the state court took great pains to trace and understand the development of this Court's *Brady* jurisprudence. In conducting its legal analysis the Washington Supreme Court relied almost exclusively on Supreme Court case law.

The Washington Supreme Court begins its legal analysis by quoting from a long line of *Brady* cases dating back to *Brady* itself. Pet. App. 14a-15a (citing *United States v. Agurs,* 427 U.S. 97 (1976); *United States v. Bagley,* 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); and *Strickler v. Greene,* 527 U.S. 263 (1999)). Citing those cases, the court accurately articulates the components of a *Brady* violation, as well as the rights and obligations of both the defense and the prosecution. Pet. App. 14a-15a.

After restating those bedrock rules of *Brady* analysis, the Washington Supreme Court focuses on the materiality test, the only aspect of the analysis

challenged by the state in its petition. Once again, the Washington Supreme Court relies on this Court's teachings almost exclusively. The court notes that "[o]ver time, the United States Supreme Court's explanations of the *Brady* standard have resulted in a decidedly nuanced body of case law." Pet. App. 15a.

The court then accurately sets forth its understanding of the materiality test:

> With this in mind, we heed that Court's advisement to take into account several aspects of the materiality analysis that bear particular emphasis. *See Kyles*, 514 U.S. at 434. One of the most important characteristics is that it is "not a sufficiency of the evidence test." *Id.* (relying on *Bagley,* 473 U.S. 667). Thus, a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* 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." *Id.*
>
> What, then, must a petitioner show to prove materiality? He or she must show "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"*Id.* at 433-34 (quoting *Bagley,* 473 U.S. at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part, concurring in judgment)). A "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434 (quoting *Bagley,* 473 U.S. at 678). One does not show a *Brady* violation by demonstrating

> that some of the inculpatory evidence should have been excluded, but rather by showing that the favorable evidence could reasonably be taken to put the whole case in a different light. The suppressed evidence must be considered collectively, not item by item.[3]

Pet. App. 15a-16a.

The Washington Supreme Court not only states *Kyles*' legal standard correctly but also closely follows *Kyles*' methodology. After discussing the devastating effect of the new evidence on the GSR test results, the court goes on to describe how the new evidence would also have supported a potent general attack on the state's investigative methods, noting that "the integrity and quality of the State's entire investigation and case presentation would have been called into question." Pet. App. 20a. In *Kyles*, this Court made a similar observation:

> Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. . . . Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part

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[3]Although the last two sentences in the final paragraph are uncited, they too come from *Kyles*. *See* 514 U.S. at 434-36. The second-to-last sentence is a direct quotation.

of the police.

Kyles, 514 U.S. at 21. The Supreme Court of Washington quotes directly from *Kyles* on this point:

> In *Kyles,* the United States Supreme Court noted that, had the favorable evidence been disclosed to the jury, then the jury would have counted "the sloppiness of the investigation against the probative force of the State's evidence.... [I]ndications of conscientious police work will enhance probative force and slovenly work will diminish it."

Pet. App. 21a-22a (citing *Kyles*, 514 U.S. at 446 n. 15).[4]

The court then discusses how the evidence suppressed in Stenson's case would have had a similar effect: "Had the FBI file and photographs been properly disclosed here, Stenson's counsel would have been able to demonstrate to the jury that a key exhibit in the case – Stenson's jeans – had been seriously mishandled and compromised by law enforcement investigators." Pet. App. 22a.

The state nonetheless accuses the Washington Supreme Court of going beyond this Court's *Brady* jurisprudence because on one occasion it asked whether the new evidence "might" have produced a different result. Pet. App. 23a. According to the state, this isolated reference proves that the Washington Supreme

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[4]Although *Kyles* is the key case, the court also cites more recent cases applying *Kyles. See* Pet. App. 23a, n. 11 (citing *Smith v. Cain*, __U.S. __, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); and *Cone v. Bell*, 556 U.S. 449 (2009)).

Court ignored everything else it had said about the materiality standard and had engaged in rank speculation in clear violation of *Brady*.

At worst, this one sentence is an imprecise statement of the materiality standard. That the Washington court knew and applied the correct standard is shown only a few lines later, where the court clarifies and reemphasizes the precise standard that Stenson, in its judgment, had met – the "burden of showing there is a *reasonable probability* that, had the FBI file and photographs been disclosed to the defense, the result of his trial would have been different." Pet. App. 23a (emphasis in the original). And, in the very next line, the court concludes that relief is required because the suppressed evidence "undermines confidence in the verdict." *Id.*

Given the Washington Supreme Court's repeated citation to, quotation from, and application of Supreme Court case law, one can hardly claim that the state court was unaware of, did not understand, or deliberately ignored this Court's clear *Brady* precedents. "This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Woodford v. Viscotti*, 537 U.S. 19, 23-24 (2002) (per curiam).

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2. The Washington Supreme Court Did Not Ignore The Inculpatory Evidence.

The state also complains that the Washington Supreme Court improperly focuses on the forensic evidence and fails to consider other evidence in the case. That argument is belied by the state court's opinion, the lower court's rulings, and the extensive reference hearing record.

The Washington Supreme Court correctly notes that "[o]ne does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but rather by showing that the favorable evidence could reasonably be taken to put the whole case in a different light." Pet. App. 16a.

The court's opinion shows that it took "the whole case" into account. It specifically refers to all the evidence the state considered most inculpatory. The court acknowledges that the murders occurred at the Stenson home in the middle of the night, that Stenson had made the 911 call, that Frank Hoerner had come over at Stenson's request to sign business papers, that Stenson told police he thought Hoerner might have shot his wife and then committed suicide, and that Hoerner had not committed suicide but had been beaten unconscious in the driveway and dragged into the home, where he was then shot. The court acknowledges the state's theory that the murders had been planned to collect

insurance on Denise Stenson's life and to get out from under a debt owed to Frank Hoerner. It also recognizes that Stenson's account of how he found Hoerner's body conflicted with the opinion of a blood spatter expert, who believed that blood on Stenson's pants must have been deposited before Hoerner came to his final resting position on the floor. Pet. App. 2a-3a.

Only *after* itemizing all of the most inculpatory pieces of evidence does the court then describe "the remainder of the evidence" as "largely circumstantial." Pet. App. 2a-3a. Significantly, many of the inculpatory facts in the itemized list are circumstantial facts. Thus, when the court refers to the remaining evidence as "largely circumstantial," it is not suggesting that only non-circumstantial evidence is important. Rather, after reciting the most potent parts of the state's case, it is merely indicating that what remains is of lesser probative value and also mostly circumstantial.

Finally, the Washington Supreme Court was undoubtedly familiar with the factual record. As the state notes, the same court affirmed Stenson's conviction on direct appeal and denied four other personal restraint petitions filed by Stenson. The court was aware of all the evidence and acknowledged it. That it weighed the evidence differently from how the state would prefer does not mean that it failed to consider it in its totality.

D. The Washington Supreme Court's Decision Does Not Conflict with Decisions of This Court, Other State Courts of Last Resort, or a United States Court of Appeals.

In a last-ditch effort to gain review, the state tries to construct a "conflict" with decisions from other courts. That attempt fails because the purported conflict is based on a flawed premise: that the Washington Supreme Court endorsed the kind of speculation rejected in *Wood v. Bartholomew*, 516 U.S. 1 (1995). In *Wood*, the new evidence consisted of polygraph results of two prosecution witnesses. Both parties conceded that the test results would not have been admissible as evidence. Nevertheless, the Ninth Circuit reasoned that, had the defense known of the polygraph, it could have deposed one of the witnesses and possibly extracted an admission that he had lied about his own participation in the crime. *Wood*, 516 U.S. at 5.

The Court reversed the grant of habeas relief, noting not only that the test results were inadmissible but also that the defense had little to offer about what indirect effect the results could have had. The defense said it could have deposed one of the witnesses in the hope that he might confess, even though such a confession, had it occurred, would be in no way inconsistent with Wood's guilt. In addition, Wood was actually given a chance to cross-examine the witness at an evidentiary hearing but was able to obtain no contradictions or admissions. *Id.* at

7-8. On that record, the Court held that "it should take more than supposition on weak premises offered by respondent to undermine a court's confidence in the outcome." *Id.* at 8.

In contrast to *Wood,* the Washington Supreme Court did not speculate about the value of the suppressed photographs and FBI file. To the contrary, the court granted relief to Stenson because the suppressed evidence would have led to the exclusion of the GSR evidence at trial and would have cast the entire investigation and trial in a different light. Pet. App. 20a-23a. The court was not concerned with some investigation that might have occurred, but with the reasonable likelihood of a different result if the jury had known: that a key forensic test for GSR proved nothing; that the investigation was not meticulous and professional, but haphazard and cavalier; that the lead investigator was not objective and competent, but biased or incompetent; that the FBI expert had not conducted the test himself but implied that he had; and that the prosecution was willing to tout the value of worthless forensic evidence as highly probative of guilt. Pet. App. 21a.

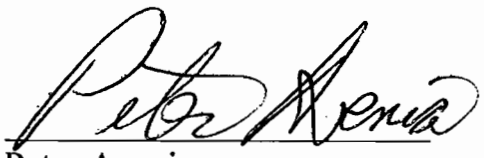
Unlike the evidence in *Wood* and the other cases cited by the state, there was nothing hypothetical or speculative about the value of the new evidence here, and no obstacle to its admissibility. In citing these cases, the state merely shows how fact-bound most *Brady* cases are, including this one. That different courts

arrive at different results in no way shows that they are misapplying this Court's precedents. Rather, state and federal courts are routinely called upon to make complex findings of fact and then to carefully weigh them in their materiality analysis. In the end, the state is unhappy with its own high court's fact-finding and weighing process. That it disagrees with the Washington Supreme Court is not grounds for this Court's review.

CONCLUSION

The fundamental premise of the state's petition is flawed. The Washington Supreme Court did not grant relief to Darold Stenson because of some hypothetical future investigation that might have occurred, but because the suppressed evidence rendered a critical piece of forensic evidence meaningless and would have undermined the jury's confidence in the "integrity and quality" of the state's entire case – including investigative techniques, case presentation, candor of witnesses (especially experts), and reliability of prosecutorial arguments. Pet. App. 20a-23a. Without this false premise, the state's arguments are complaints about adverse state court factual findings – complaints that have been made to and rejected by the state courts. These disputed factual claims do not merit review by this Court. The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,



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APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLALLAM

[Caption Omitted]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

July 28, 1994

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[1109]

[Peele - Redirect]

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REDIRECT EXAMINATION

BY MR. BRUNEAU:

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

A. Yes, sir, that's correct.

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

A. That's correct.

MR. BRUNEAU: Thank you, Mr. Peele. I have no further questions.

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APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLALLAM

[Caption Omitted]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

August 9, 1994

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[1777]

[Mr. Bruneau's Rebuttal]

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Secondly, ladies and gentlemen, and this has to do with more or less the totality, if you will, of what Mr. Neupert had to say. And that is, ladies and gentlemen, that when an event occurs, as in this case when a crime occurs, evidence is left. And if you consider the evidence and if you interpret it correctly, there is a correct answer and that correct answer is the truth.

However, although things only happen one way, that is, although there is only one correct version of events, and I submit that the evidence that I presented to you and the evidence that you have been presented by the State and the theory that I have put to you is the correct version of events, although there is only one correct version of events, a person can still imagine various possibilities. You can still speculate and come up with

some wild theories about events. You have a correct version which is the truth and yet the imagination sores. That's why some lawyers are never lost for words. Because they can come up with imaginations and ask you to speculate about things which are not correct.

Now, I cannot disprove any of the things that Mr. Neupert would like you to imagine. I can not disprove some of the things that he would like you to speculate about. But I must tell you, ladies and gentlemen, at the outset that if doubt is to prevail, that is to say, in a criminal case if you are to have a reasonable doubt, if doubt is to prevail, it must be reasonable and not speculative. It must not be what you might imagine. What you might speculate about. And I submit that everything that Mr. Neupert has had to say to you folks has been an invitation to the rankest forms of speculation. Or imagination.

One of those, just to give you an example: Mr. Neupert talks about well, perhaps imagine, maybe the defendant picked up that gunshot residue that was found in his right pocket from Deputy Fuchser's car. Or maybe he got it because J. R. Williamson at the FBI crime lab once handled this piece of evidence.

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

Mr. Hoerner's left hand, left palm, excuse me, was in a shooting environment. And there was gunshot residue in the defendant's pockets. And to call upon you for you ladies and gentlemen to speculate about now, maybe, gee, how about he got this gunshot residue this way and maybe, maybe.

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

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