No. 83606-0

J.M. JOHNSON, J. (dissenting)—I respectfully disagree with the majority opinion in this case and would deny Darold Stenson's fifth and sixth personal restraint petitions. A jury heard weeks of testimony and in 1994 unanimously found Stenson guilty beyond a reasonable doubt of the aggravated murder of his wife and business partner. This court has reviewed and affirmed both guilt and sentence over the intervening 18 years. The trial judge, Judge Williams, on two separate remands from this court, held that the alleged nondisclosed *Brady*[1] evidence here did not meet the requirement of prejudice. Based on these findings, we must conclude that the elements of the *Brady* test are not met. Accordingly, we should deny Stenson's fifth and sixth personal restraint petitions and uphold his conviction. The interests of finality in justice to provide peace for the families of Stenson's victims argue

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

for the same result. Thus, I dissent.

A. Totality of Evidence

The majority opinion fails to consider the totality of evidence before the jury and exaggerates the potential prejudice of a late-discovered photo of Stenson's pants with the right pocket pulled out, where some gunshot residue (GSR) evidence was found.

In March 1993, Stenson had arranged for both victims to be at his home at 3:30 a.m. Shortly after the murders, Stenson made a 911 call suggesting that his business partner, Frank Hoerner, murdered Stenson's wife and then committed suicide. However, that account was quickly proven false (and there has never been another viable suspect). The evidence indicated that the murder gun was placed on Hoerner's hand after his death. The evidence at trial also established that Hoerner "had been beaten unconscious, dragged into the [Stenson] house from the gravel driveway . . . where he was shot in the head at close range." *State v. Stenson*, 132 Wn.2d 688, 679, 940 P.2d 1239 (1997). Stenson owed Hoerner $50,000 that he could not pay. Further, Stenson had insured his wife for more than $400,000. She was the second victim. These two crimes solve Stenson's financial problems, a

powerful motive.

The weapon used to beat Hoerner unconscious outside before he was dragged inside and shot was consistent with a missing set of nunchaku sticks that were displayed on the wall of Stenson's office. Investigation also uncovered Hoerner's blood in the driveway and laundry room and Stenson's bloody fingerprint on the freezer inside the house. There was blood splatter on Stenson's pants. Some of the blood spatter fit Hoerner's blood profile and could only have been deposited before Hoerner came to his final resting place. This evidence flatly contradicted Stenson's claim to the jury that Hoerner went voluntarily into the house to use the restroom.

Moreover, the reliability of the GSR evidence tangentially challenged here had already been impeached before the jury with other evidence (Stenson had been restrained in the back of a sheriff's car that had been used by gun carrying officers). In light of all these considerations, the "new" question with respect to the GSR evidence cannot meet the *Brady* requirement of prejudice. The trial court decision of a sworn jury and two separate reviews by Judge Williams should be upheld.

B. Overwhelming Blood Spatter and Other Evidence

Contrary to the majority's argument, none of the alleged anomalies with the GSR evidence significantly impact the reliability of the blood spatter evidence or any other evidence presented at trial. The defense knew that the jeans may have been folded over when wet but did not argue this to challenge the blood spatter evidence. It is not likely that other contaminating sources for the GSR evidence would have a potent effect.[2] Defense had argued the exposure in a police car could have caused the contamination.

While the majority emphasizes the importance of scrutinizing convictions with painstaking care, the interests of justice requires some balance. That system of justice relies on juries to determine guilt or innocence and should defer to such decisions.

The majority also overstates the importance of the GSR evidence, a matter of only several grains of powder mentioned only *once* in passing in all this court's prior decisions affirming Stenson's conviction. The majority also fails to present a compelling reason that this alleged *Brady* evidence meets that test's requirement that prejudice be shown, especially given the victim's blood spatter on the front of Stenson's jeans and the mountain of other

[2] One last theory is still argued: that the FBI lab in Washington, D.C., was in a building with a target range in the basement. A jury is unlikely to consider this a probable contaminant source.

evidence linking Stenson to the crime. The jury convicted Stenson after a four-week trial, and Judge Williams, on special remand from this court, expressly found that the third *Brady* requirement of prejudice was not met. We should defer to the jury and trial court in its findings of fact and affirm its decision on the legal question of prejudice. Both heard all the evidence; this court has heard arguments. Note too that the victims' families were never heard in this court.

The alleged *Brady* evidence also does not give rise to a reasonable probability that, had the evidence been disclosed earlier, the jury result would have been any different. *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1982)). In light of the mountain of other evidence in this case, four particles of GSR evidence was not a key piece of forensic evidence supporting the conviction. *See Stenson*, 132 Wn.2d at 679-80.

Trial Judge Williams expressly indicated that the blood spatter evidence on Stenson's jeans was the most compelling evidence at trial. Even without the blood spatter evidence, the circumstantial evidence alone is

overwhelming. The majority's decision substitutes its own judgment for those who actually heard the facts and totally disregards the jury, Judge Williams, and the victims of this heinous crime.

As a result, the alleged "new" *Brady* evidence is not sufficient "to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. We thus should deny Stenson's fifth and sixth personal restraint petitions.[3]

Conclusion

I would affirm the jury conviction and Judge Williams' findings of no prejudice and deny Stenson's fifth and latest petitions. The majority fails to

[3] Stenson's fifth personal restraint petition claims ineffective assistance of counsel because of the alleged failure on the part of counsel to discover anomalies with respect to the GSR evidence. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution protect the right to effective assistance of counsel in criminal cases. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on an ineffective assistance of counsel claim, the defendant must show not only deficient performance on the part of counsel but also prejudice. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 226. We should deny Stenson's fifth petition because Judge Williams found that Stenson's counsel acted with reasonable diligence in discovering the alleged anomalies with the GSR evidence and in filing Stenson's sixth personal restraint petition alleging *Brady* and *Napue* violations. *See* majority at 9. This finding demonstrates that there was no deficient performance on the part of Stenson's counsel. Additionally, we should deny Stenson's fifth personal restraint petition because the alleged anomalies with the GSR evidence do not give rise to a reasonable probability that, had the evidence been disclosed to the defense, the jury would have reached a different verdict. *See Kyles*, 514 U.S. at 433-34. Thus, the prejudice requirement has not been met under Stenson's ineffective assistance of counsel claim or under his *Brady* claim, and we should deny his fifth and sixth personal restraint petitions.

take the totality of evidence into consideration in its evaluation. None of the alleged anomalies with the GSR evidence affect the credibility of the blood spatter evidence or the mountain of other circumstantial evidence that was presented against Stenson at trial. His debts to his business partner and the $400,000 insurance proceeds from his wife's death provided motive enough. The extraordinary 3:30 a.m. presence of the victims at Stenson's home was admittedly arranged only by Stenson. We should not disregard the *Brady* requirement that prejudice be shown as it is a limited remedy for unfair trials or improper convictions. Here, the jury verdict was fair and based on overwhelming evidence. Thus, I would uphold Stenson's conviction and leave the victims (families) at peace. I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: