

# **ATTACHMENT R**



1           2.     I have previously been qualified as an expert witness in matters relating to the  
2 Sixth Amendment right to effective assistance of counsel in a number of jurisdictions  
3 including: United States District Courts for the Eastern and Western Districts of Washington,  
4 Oregon, Wyoming, and Alaska, and for Superior Courts in the counties of Chelan, Grays  
5 Harbor, Island, King, Kitsap, Klickitas, Mason, Pierce, Snohomish, Spokane, Walla Walla,  
6 Watcom, and Yakima among others.

7           3.     I have served as counsel on matters relating to the Sixth Amendment before the  
8 United States Supreme Court, the United States Court of Appeals for the Ninth, Tenth, and  
9 District of Columbia Circuits, as well as for the District of Wyoming, District of Oregon,  
10 District of Columbia, the Washington State Supreme Court, Washington Court of Appeals for  
11 Divisions I, II, III and in several county Superior Courts.

12           4.     I have experience as a prosecutor, a criminal defense attorney, and a pro tem  
13 judge. I have testified as an expert on Sixth Amendment effective assistance of counsel issues  
14 for both prosecution and defense. I have lectured on the subject of effective assistance of  
15 counsel, legal ethics and discipline for attorneys in some 15 States as well as participated in  
16 continuing legal education presentations on the law of ethics and standards for legal  
17 malpractice in the State of Washington in more than 200 presentations.

18           5.     I have published articles and performed professional research and writings in  
19 these fields as reflected in part in the attached curriculum vitae (Exhibit A). I have served on  
20 the Rules of Professional Conduct Committee for the Washington State Bar Association for  
21 most of the last 12 years. I direct a clinical program in legal discipline through Seattle  
22 University School of Law. In this clinical program, law students investigate bar complaints  
23 under my direction and make recommendations to the Washington State Bar Office of Legal  
24 Discipline on probable cause. The program was awarded the 1995 Gambrell Award by the  
25 American Bar Association for Service to the profession. I also serve as Special District  
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(STENSON) - 2

**FEDERAL PUBLIC DEFENDER**  
1551 Broadway, Suite 501  
Tacoma, Washington 98402  
(253) 593-6718

1 Counsel investigating bar complaints for the Washington State Bar Association and having  
2 investigated more than 150 grievances since 1991.

3 6. I have served as a consultant to the King County office of Public Defense  
4 establishing contract standards for public defender appointments on felony cases. I have also  
5 served as a supervisor of felony deputies at public defender offices and was responsible for  
6 developing standards of minimum competency for felony representation. I was Chairman of  
7 the Board of the Washington Appellate Defender Association for some eight (8) years. I have  
8 served on Washington State Supreme Court task forces on appellate advocacy and indigent  
9 representation. I currently serve on the Executive Committee of the Washington State Bar  
10 Association Criminal Law Section and have done so for more than 20 years.

11 7. I am currently an Associate Professor of Law at Seattle University School of  
12 Law with teaching responsibilities in the fields of Professional Responsibility, Criminal  
13 Procedure, Criminal Law, and Constitutional Law. Specifically in the field of Professional  
14 responsibility, I have taught in the fields of legal ethics and legal malpractice since 1976. I  
15 periodically supervise clinical students in juvenile court for King County. I teach the law of  
16 the Sixth Amendment every year and have done so since 1976.

## 17 II. SCOPE OF OPINION

18 I have been asked to opine whether:

19 1. Mr. Stenson received ineffective assistance of counsel from his Defense  
20 Counsel at trial, viewing the trial as whole. In addition to his representation taken as a whole,  
21 I have been asked to opine on four issues related to Defense Counsel's performance in the  
22 trial as a whole.

23 a. Defense Counsel's obligations under the Sixth Amendment when there was an  
24 actual conflict between Defense Counsel and Mr. Stenson,  
25  
26

- 1           b.     Defense Counsel's obligations to seek separate representation of Mr Stenson at  
2           the hearing on substitution of counsel;
- 3           c.     Despite Mr. Stenson's claim of innocence and his demand that his innocence be  
4           asserted, Defense Counsel's concession of guilt to the trial judge in a pretrial  
5           hearing including Defense Counsel's revelation of a defense consulting expert's  
6           opinions consistent with guilt; and
- 7           d.     Defense Counsel's decision to abandon "residual doubt" as a mitigating factor  
8           and his conduct in admitting the defendant's guilt in the penalty phase despite  
9           his client's demand and that his innocence be asserted.

### 10                                   III. STANDARD OF REVIEW

11           1     In making my review, I have relied on Sixth Amendment standards as stated in  
12     Strickland v. Washington, 466 U.S. 668, 104 S Ct 2052, 80 L. Ed 2d 674 (1984), the  
13     Washington Rules of Professional Conduct, as well as my own experience, training, and  
14     teaching of standards of competence in representing criminal defendants in Washington

### 15                                   IV. MATERIALS REVIEWED IN ORDER TO RENDER OPINION

16           In order to render my opinion, I have reviewed the following materials:

- 17           1     The entire verbatim report of proceedings of trial including all pretrial hearings,  
18     trial proceedings, penalty phase proceedings, and judgment and sentence, totaling some of  
19     7500 pages of transcript;
- 20           2.     The entire record including all those documents filed at pretrial and trial;  
21     various pleadings from the State Supreme Court original appeal and the subsequent PRP;
- 22           3     A detailed index of the materials reviewed is attached to this declaration as  
23     Exhibit B.



1 assistance of counsel. Defense Counsel's concession of Mr. Stenson's guilt to the trial judge  
2 in the pretrial hearings and his release to the trial judge of Mr Stenson's consulting expert's  
3 negative opinions violated Sixth Amendment effective assistance of counsel standards owed  
4 to Mr. Stenson. Finally, Defense Counsel's abandonment of "residual doubt" and his  
5 concession of Mr. Stenson's guilt in the penalty phase to the jury as well as producing  
6 evidence confirming Mr Stenson's guilt in the penalty phase despite Mr Stenson's insistence  
7 on his innocence denied Mr Stenson the effective assistance of counsel in the penalty phase  
8 of his death penalty trial

## 9 VII. ANALYSIS OF OPINIONS

### 10 A. Background Facts.

11 1 Mr Stenson was charged with the aggravated murder of Denise Hoerner and  
12 Frank Hoerner. Lead defense counsel, Fred Leatherman, began representing Mr. Stenson in  
13 December of 1993. Mr. Leatherman was at all times the lead counsel for Mr Stenson and the  
14 person who exercised control over attorney decisions in the case. From his initial interviews  
15 by the police onward Mr Stenson insisted that he was innocent of the homicides. He directed  
16 his attorneys that his sole objective at trial was exoneration and that he viewed life  
17 imprisonment without parole a sentence equally unacceptable as the death penalty

18 2 Shortly after undertaking Mr. Stenson's representation, lead Defense Counsel  
19 became very pessimistic about the prospects of winning the trial. Lead Defense Counsel  
20 decided that the goal should be to avoid the death penalty rather than to establish innocence

21 3 Mr Stenson became increasingly concerned that lead Defense Counsel was not  
22 concentrating on the guilt phase of the trial and developing the evidence needed to win the  
23 guilt phase. Mr. Stenson became convinced that his defense counsel were not representing  
24 his claim of innocence and lost confidence in them, leading him to a breakdown of  
25 communication. A confidential defense blood spatter expert retained by the defense to

1 evaluate the state's circumstantial evidence informed Defense Counsel that he substantially  
2 agreed with the state's conclusions consistent with Mr. Stenson's guilt. Defense Counsel  
3 confronted Mr. Stenson and advised him that because in his opinion Mr. Stenson's guilt was  
4 certain he would do nothing at trial that would antagonize the jury or lessen the chances for a  
5 life verdict in the penalty phase. Lead Defense Counsel convened a meeting with co-counsel,  
6 the investigator, and a mitigation expert to persuade Mr. Stenson to accept this view of his  
7 case. Mr. Stenson objected to the refusal to assert his innocence in an unequivocal manner  
8 and demanded that counsel remove themselves from representing him.

9         4         Defense Counsel prepared a motion to present to the court seeking either a  
10 substitution of counsel or, in the alternative, pro se representation by Mr. Stenson. At the  
11 hearing on the motion prepared by Defense Counsel, Defense Counsel did not seek  
12 representation of Mr. Stenson's request by other counsel appointed for this purpose and made  
13 no effort to have the motion regarding substitution assigned to a judge other than the Trial  
14 Court. Although the hearing was *ex parte*, no independent lawyer screened information to be  
15 presented to the Court in support of the motion for a substitution of counsel. The Trial Court  
16 denied Mr. Stenson's request for substitution of counsel and denied his request under *Faretta*  
17 to self-represent.

18         5         Consistent with Defense Counsel's refusal to engage in any action which might  
19 antagonize the jury for the penalty phase, Defense Counsel did not attempt to introduce  
20 evidence of another suspect in the guilt phase and conceded defendant's guilt and produced  
21 evidence in the penalty phase which established his own personal belief in the guilt of his  
22 client in an effort to avoid "antagonizing the jury," thereby hoping to avoid the death penalty  
23 for Mr. Stenson.

24         6.         Lead Defense Counsel's decision to avoid antagonizing the jury by asserting  
25 innocence in a way which might antagonize the jury led him to refuse to establish through  
26

1 available testimony what could have been used to establish Denise Hocner as another  
2 suspect

3 **B. Mr. Stenson's Sixth Amendment Rights Were Violated by His**  
4 **Representation By Defense Counsel With an Actual Conflict of Interest.**

5 **a. Mr. Stenson has the Right to Decide the Goals of His**  
6 **Representation.**

7 1. Once Defense Counsel became convinced of his client's guilt and decided that  
8 the sole goal of the representation should be preserving the defendant's life, Defense Counsel  
9 has invaded his client's right to decide the goals of representation

10 2. Under Washington Rules of Professional Conduct, (hereafter RPC) 1.2(a), the  
11 defendant's rights at trial, which are personal to the defendant, are the most fundamental  
12 aspects of the attorney-client relationship in a criminal case. It is the defendant's right to  
13 choose to assert his innocence and the attorney's obligation to effectively advocate that  
14 innocence within the bounds of the law. Once Defense Counsel had attempted to persuade  
15 Mr. Stenson to adopt Defense Counsel's view of the case and failed to do so, Defense  
16 Counsel was bound to represent Mr. Stenson's claim of innocence and his effective assistance  
17 of counsel must be measured by his performance in presenting Mr. Stenson's claim of  
18 innocence.

19 **b. Defense Counsel's Disagreement With Mr. Stenson's Goal of**  
20 **Innocence Is An Actual Conflict of Interest.**

21 1. Once Defense Counsel became convinced in his own mind that such a claim of  
22 innocence was inconsistent with preserving Mr. Stenson's life, despite Mr. Stenson's  
23 understanding and rejection of Defense Counsel's advice, Defense Counsel either had to  
24 assert innocence in an effective manner, or, in the alternative, had a mandatory duty to resign  
25 as counsel under WRPC 1.7(b) and WRPC 1.15(a)(1) and (b)(3) because he was unable or  
26 unwilling to represent and advocate fully Mr. Stenson's claim of innocence.

1           2.     Defense Counsel may have disagreed with Mr. Stenson's judgment. However, it  
2 was Mr. Stenson's right to decide whether to assert his innocence. The choice was not a  
3 tactical decision as described by Defense Counsel. Once an attorney and a client have  
4 reached an impasse on a legitimate position to assert which the lawyer's judgment disagrees  
5 in asserting, the lawyer can either fully advocate the client's position or withdraw. There is  
6 no half-way position.

7           3.     In my opinion, the statements made by lead Defense Counsel on July 13, 1994 at  
8 the motion for new counsel reflect an actual conflict with Mr. Stenson's right under RPC 1.2,  
9 the Fifth Amendment to the United States Constitution, and the Fourteenth Amendment to the  
10 United States Constitution to assert his innocence at both trial guilt and penalty phases.  
11 Defense Counsel's laudable dedication to saving his client's life does not free him of the  
12 obligations to effectively represent his client's claim of innocence.

13                   c.     **Defense Counsel Had A Mandatory Duty to Resign.**

14           1.     Washington RPC 1.7b requires that a lawyer resign from representation when  
15 the lawyer's personal interests may materially adversely affect the representation. RPC 1.2  
16 reserves the right of the client to decide whether to assert guilt or innocence and RPC 1.15  
17 requires resignation when a lawyer is unable to fulfill his client's legitimate goals of  
18 representation and zealously advocate them. In this case, Defense Counsel's dedication to  
19 preserving his client's life, contrary to his client's directions to assert innocence, even if that  
20 compromised the penalty phase, cannot be viewed as a tactical decision. Instead, lead  
21 Defense Counsel was under an obligation to resign from the representation given his  
22 unwillingness and inability to assert fully his client's claim of innocence. Defense Counsel  
23 was convinced his client's claim of innocence was unrealistic (but not frivolous or improper).  
24 Defense Counsel assigned himself the role of savior in spite of his client's desire to claim  
25 innocence. This represents precisely the kind of personal conflict to the client's litigation  
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FEDERAL PUBLIC DEFENDER  
1541 Broadway, Suite 501  
Tacoma, Washington 98402  
(253) 593-6719

1 rights which requires resignation as an actual conflict of interest under WRPC 1.7(b) and  
2 WRPC 1.15

3 **d. Defense Counsel's Actual Conflict Violated the Sixth Amendment**  
4 **Standards for Minimum Competence.**

5 1. A defense counsel with a personal conflict of interest with legitimate goals of  
6 representation of his client cannot render the minimum effective advocacy. The importance of  
7 fully advocating the client's goal of representation in a death penalty case has been  
8 emphasized by the Washington Supreme Court in State v. Dodd, 120 Wn.2d 1, 838 P.2d 86  
9 (1992) and State v. Sagastegui, 135 Wn. 2d 67, 954 P.2d 1311 (1998) in which the  
10 Washington Supreme Court recognized that the client's right to effective advocacy of the  
11 client's choice of death overcomes the officer of the court obligation of the defense counsel to  
12 create an adequate record for the State Supreme Court's exercise of its proportionality review.  
13 The decision whether to seek life or death is a fundamental right of the client to which the  
14 lawyer owes effective advocacy. Defense Counsel's decisions not to offer alternative  
15 perpetrator evidence and to decline cross examination exposing other perpetrator motives as  
16 well as his decision to admit guilt on his client's behalf in the penalty phase are all specific  
17 examples of the effects of this conflict of interest. In my opinion, a minimally competent  
18 defense lawyer in a death penalty case has the obligation to effectively advocate his client's  
19 claim of innocence or withdraw. Defense Counsel in Mr. Stenson's case violated this  
20 standard.

21 **C. Defense Counsel's Failure to Arrange for Separate Representation for Mr.**  
22 **Stenson in the Motion to Withdraw, or in the Alternative, for Self-**  
23 **Representation, Violates the Sixth Amendment.**

24 1. Defense Counsel did not inform Mr. Stenson of his decision not to fully contest  
25 guilt until the meeting he arranged during voir dire. Once Mr. Stenson was confronted with  
26 his Defense Counsel's refusal to follow his directions on the claim of innocence at this

1 meeting, Mr Stenson ordered his Defense Counsel to remove themselves from his case and  
2 provide him with someone who would fully advocate his innocence Mr. Stenson was entitled  
3 to effective representation presenting his request for new counsel given the conflict between  
4 Mr. Stenson and his existing Defense Counsel.

5       2     Defense Counsel made no effort to have independent counsel appointed for the  
6 substitution and withdraw hearing. Instead, counsel chose to assert an antagonistic position to  
7 Mr. Stenson by setting forth all of the evidence which convinced Defense Counsel and the  
8 defense investigator why Mr Stenson was going to be found guilty in the guilt phase and  
9 which justified Defense Counsel's claim that he would do nothing at trial which might  
10 antagonize the jury

11       3.     Indeed, while laying out the evidence to the trial judge who was about to hear the  
12 case and rule on numerous evidentiary and other legal matters during the guilt phase of the  
13 trial, Defense Counsel told the court that their client was guilty. Defense Counsel abandoned  
14 any semblance of representing their client's legitimate desires and instead contaminated the  
15 trial judge's view of the case.

16       4     Throughout the new counsel motion hearing, Mr. Stenson was without the advice  
17 of counsel as to how accomplish his desire for representation of his claim of innocence;  
18 without advice as to what information could legitimately be revealed by Defense Counsel in an  
19 effort to retain the representation; and without adequate advice of the difference between a  
20 tactical decision under RPC 1.2 and a goal of representation under RPC 1.2 No one was  
21 present to dispute the lawyers' inappropriate characterization of the decision to assert  
22 innocence in the guilt phase as "tactical."

23       5     No independent counsel was available to advise Mr Stenson of the wisdom of  
24 having a judge other than the Trial Court hear the ex parte matter of removal of his trial  
25 counsel because of the conflict between them.

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FEDERAL PUBLIC DEFENDER  
1531 Broadway, Suite 201  
Tacoma, Washington 98402  
(253) 593-6710

