Case # 31578-9

Statement of Additional Grounds For Review

State of Washington
v.

Anthony Lamar Allen, Sr.

COPY

COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

V.

ANTHONY L.ALLEN,SR
Appellant.

No. 31578-9-III

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Pursuant to RAP 10.10, Appellant Anthony L.Allen,Sr. submits his Statement of Additional Grounds to identify and discuss constitutional claims that are at stake and that have not been adequately addressed in the brief filed by counsel, David Gasch, who apparently only raised questions of state law. To present a claim for federal review, a appellant must first present that claim to the State courts for review. 28 U.S.C§2254(d)(1). State prisoner must give state court's the opportunity to resolve any constitutional issues by invoking one complete round of the state's appellate review process. Rose v. Lundy, 455 US 509 (1982). Therefore, Appellant Allen presents the following constitutional claims under both State and Federal Constitution's for resolution on their merits:

i). THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR.ALLEN'S MOTION FOR POST-CONVICTION DNA TESTING IN VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WASHINGTON STATE CONSTITUTION ART.I§3.

ii). MR.ALLEN WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WASHINGTON STATE CONSTITUTION ART.I§22.

ISSUES PERTAINING TO ADDITIONAL GROUNDS

i). The State presented a knife to the jury as State's Exhibit 1 containing a red substance, which it argued with certainty, was blood belonging to either of the alleged victims in this case, leaving the jury with no doubt that the blood could not be Mr.Allen's. However, Allen disputes this fact and argues that the DNA test will prove that the red substance on this knife, is actually his blood and, not either of the alleged victims, which will disprove the State's case and theory that Allen was the perpetrator who assaulted the alleged victims with State's Exhibit 1. The DNA results will prove that Allen was not the perpetrator and prove his innocence on a more probable than not basis under law. A failure to have the DNA test would result in a fundamental miscarriage of justice.

ii). Appellate Counsel's performance amounted to ineffective assistance of counsel, when it fell below an objective standard of reasonableness and that deficiency resulted in prejudice to Mr.Allen, when counsel failed to familiarize himself with the facts of the case; preserve issues for federal review; and misrepresented both the facts and law in his brief.

STATEMENT OF THE CASE

Procedural History:

a) Charging Information

The charges filed by the state were based on allegations against Anthony Allen, Wanda Phillips, and Uriah Allen from an incident dated August 19,2007 for one count of first degree kidnapping and three counts of second degree

assault.

b). Amended Information

On October 9,2007, the State amended the charges as follows: Count One: 1°Kidnapping with intent to inflict bodily injury on Karla Cochran-Jones, and intentionally abduct such person while armed with a firearm, RCW 9.94A.602 and 9.94A.533(3), and armed with a deadly weapon other than a firearm, RCW 9.94A. 602 and 9.94A.533(4); Count Two: 1°Robbery while armed with a firearm, RCW 9.94A.602 and 9.194A.533(3), and deadly weapon other than a firearm, RCW 9.94A 533(4); Count Three: 2°Assault, did intentionally assault Dewey Hudson,Jr. with a deadly weapon, to-wit: a handgun, while armed with a firearm, RCW 9.94A.602 and 9.94A.533(3); Count Four: 2°Assault, did intentionally assault Karla Cochran-Jones and thereby recklessly inflict substantial bodily harm being at said time armed with a firearm, RCW 9.94A.602 and 9.94A.533(3) and/or being at said time armed with a deadly weapon other than a firearm, RCW 9.94A. 533(4); Count Five: 2°Assault, did intentionally assault Karla Cochran-Jones with a deadly weapon, to-wit: a knife, and being at said time armed with a deadly weapon other than a firearm, RCW 9.94A.602 and 9.94A.533(4); Count Six: 2°Assault, did intentionally assault karla Cochran-Jones with a deadly weapon, to-wit: a handgun, and being at said time armed with a firearm, RCW 9.94A.602 and 9.94A.533(3). Mr.Allen was arraigned, entered a not guilty plea and proceeded to jury trial December 17,2007 before the Honorable Kathleen O'Connor. RP Vol.I-III at 1. The State was represented by DPA Ugene Cruz and Allen was represented by Anna Nordvedt of the Public Defenders Office.

c) Second Amended Information:

After trial on December 20,2007, the State filed a second amended information combining the separately charged alternative means of 2°assault against Karla Jones (counts 4, 5, and 6) into one count: Count

Four. CP at 6

d) Verdict and Sentencing Information:

On December 20,2007 following jury trial, Allen was found guilty of: Count One: 1°Kidnapping against Karla Jones; Count Three: 2°Assault against Dewey Hudson,Jr.; Count Four: 2°Assault against Karla Jones. Allen was found not guilty of Count Two: 1°Robbery. Special Verdict Forms were returned on all charges finding Allen was armed with a deadly weapon other than a firearm. The jury did not find that Allen was armed with a handgun. RP 55-56 DEC.20,2007.

Allen was sentenced to 149mo. on Count One, in addition to a 24mo. weapon enhancement and 63mo. on counts Three and Four for 2°Assault, in addition to two 12mo. weapon enhancements. This resulted in a total sentence of 197mo. confinement. Allen appealed his convictions. CP 20-21

SUBSTANTIVE FACTS

a) Relevant Facts Leading to the Allegations of Assault and Kidnapping:

It was the State's theory that the dispute between alleged victim Karla Jones and co-defendant Wanda Phillips, originated in 2002 when Phillips was found to be having a long-standing affair with Ms.Jones husband and on at least two occasions to have had physical confrontations. RP 53,146-148. However, trial counsel asserts evidence will show Ms.Jones was also having an affair with Wanda Phillips live-in boyfriend, Dewey Hudson,Jr. and that most confrontations were fueled by alcohol. RP 57. The State argued Wanda Phillips escalated the confrontation by taking a dog from Jones yard and brought it to the Hudson residence, and Jones had gone over to retrieve her dog. RP 54

b) Relevant Facts of the Alleged Assault and Kidnapping

i) State Witness: KARLA COCHRAN-JONES;

Ms.Jones testified Phillips had been harassing her with phone calls in addition to Phillips stealing her dog. RP 53, 171. Jones testified she went to

the Hudson residence to retrieve her dog at the request of Dewey Hudson.RP 152 Upon arriving, Jones testified she was suddenly attacked by Anthony Allen, Urian Allen, and Wanda Phillips. RP 152 Jones indicated Allen threw her down in the enclave and started punching her in the face. RP 152-53 Jones claimed that Urian Allen and Wanda Phillips continued to assault her while Allen had slapped Dewey Hudson in the face with the flat side of a kitchen knife. RP 154 Then at the direction of Phillips, Jones claimed Allen cut her hair with the knife. RP 155 According to Jones, Allen then pulled out a pistol and hit her in the back of the head with the butt of a firearm. However, no gun was ever recovered and when asked to describe the gun, all Jones could say was that it was black. RP 156 Jones then accused Allen demanded money from her and had taken a pack of cigarettes during the assault. RP 155

ii) State Witness: DEWEY HUDSON,JR:

Hudson's testimony adamantly denied he or Ms.Jones were assaulted at his residence. RP 95-133. He further denied advising Jones that her dog was at his residence. RP 104. Hudson testified he did not permit Jones to come to his home.

He feared for the safety of his girlfriend, Ms.Phillips. RP 114,126-27 Hudson testified that Jones came to his residence and started an argument with Phillips and this argument became physical. Hudson maintained that Jones was the only aggressor in the incident and was attacking Phillips and refused to leave his premises. RP 113-15. Hudson adamantly testified Allen did not assault him with a gun or a knife and, denied all statements made to Officer Baldwin that he was assaulted by Allen. RP 116 Moreover, Hudson testified to making fictitious statements to Officer Baldwin the night of this incident, because he was misled to believe Allen had charged him falsely to a crime and wanted to get even. RP 116 Hudson testified he did not witness an assault on

Jones, but that he did assist in the removal of Jones from his premises.RP 113

iii). State Expert Witness #1:OFFICER BALDWIN

Officer Baldwin was the initial investigating officer who testified to statements made to him by Jones the night of the incident. RP 193-222. Jones had indicated she was telephoned by her friend, Dewey Hudson, to come to his residence to retrieve her dog. RP 197. Jones indicated she gotten into an argument with two males upon arriving at Dewey Hudsons's residence, and stated to Officer Baldwin this argument then turned into a physical confrontation to which she was assaulted. RP 198.

Officer Baldwin testified Jones identified Uriah Allen who had assaulted her with a large butcher-style kitchen knife by cutting her hair with this knife and held it to her throat threatening to kill her if she spoke to the police. RP 198. Officer Baldwin testified to affirming a butcher-style kitchen knife was recovered from the scene that was believed to have blood on it. RP 205, 208-209, 217-218. Officer Baldwin further testified Jones had stated Anthony Allen had a small framed firearm and pointed it at her several times threatening to kill her. Jones stated she was then hit in the back of the head with the firearm and the Officer stated it was probably why Jones had a lump on the back of her head. RP 199.

Officer Baldwin testified to statements made to him by Dewey Hudson the night of the alleged incident. Officer Baldwin testified Hudson had stated Anthony Allen and Uriah Allen had assaulted Jones. Officer Baldwin indicated Hudson he attempted to intervene to break up the fight and was successful in wrestling away a knife from Uriah Allen and that Anthony Allen had a small frame firearm, to which Allen used to hit him several times with and he lost consciousness. RP 203-205.

iv). State Expert Witness #2: DETECTIVE FERGUSON

Detective Ferguson testified to a red substance discovered on the blade of State's Exhibit 1, a kitchen knife, that was recovered from the scene. This red substance was presumed to be blood although no DNA or blood typing was pursued to confirm the detectives speculation. The detective testified at trial a decision was made to collect a sample of this red substance in the future event it will be needed and, submitted the knife for a fingerprint analysis. RP 87-88. Detective Ferguson testified there was no evidence anyone else's blood could possibly be on the knife other than the victims in this case. RP 89. However, later testified that nobody saw the defendants the night of this incident to determine if they had lost some blood and the detective testified she could not exclude the defendants as possible donors to the blood on the knife. RP 138. Detective Ferguson testified confirming Jones statements indicating Uriah Allen had a knife and cut her hair. RP 139. Det.Ferguson further testified to her awareness that Jones changed her story multiple times as to who had the knife and cut her hair. RP 140.

v). State Expert Witness #3: FORENSIC SPECIALIST JODIE DEWEY:

Rideology Specialist Jodie Dewey testified to collecting (2) forensic test samples of a red substance from State's Exhibit 1 at the directions of Detective Ferguson. RP 262. Forensic Specialist Dewey testified that her expert opinion was that she could not classify the red substance as blood on the basis no DNA testing or blood typing had been conducted to confirm or identify the substance as blood. RP 266-267. The forensic officer testified to the process of collecting forensic evidence and fingerprinting analysis indicating State's Exhibit 1 was examined for latent fingerprints that were inconclusive. RP 256-261.

Note: There were three additional expert witnesses on behalf of the state: ER Dr.Penaskovic, Dr.Richardson; and dental surgeon Dr.Bass whom all

testified to not appreciating wounds consistent with knife injuries. RP 60-68; 69-77; 243-253.

vi). Defense Witness #1: CO-DEFENDANT URIAH ALLEN:

Uriah Allen testified to pleading guilty to assaulting Ms.Jones in the second degree,(inflicting substantial bodily injury) during the altercation between his mother, Jones and Hudson. RP 294. Uriah Allen adamantly maintained that Anthony Allen did not assault anyone nor did he witness a weapon at any time. RP 293-294. Urian Allen testified that while the fight ensued, Anthony Allen was not a part of the altercation nor rendered any assistance to the altercation. RP 299-300.

vii). Defense Witness #2: CO-DEFENDANT WANDA PHILLIPS:

Ms.Phillips invoked her Fifth Amendment privilege and did not testify. CP 71-2

viii). Defense Testimony of Anthony Allen:

Allen testified he drove to the Hudson residence at the request of Urian Allen, to give Wanda Phillips a ride. RP 307. Allen testified he waited in the car awhile before coming inpatient and decided to go see what was taking his aunt, Wanda Phillips, and his cousin, Uriah Allen. Upon entering the home, Allen alleged multiple individuals were engaged in group fighting. Allen stated he tried to get these assailants subpoenad, but they refused because they had warrants for their arrest. RP 308 DEC.19,2007 A.Allen/Direct. Allen testified he witnessed Jones beating up Phillips and Uriah Allen was trying to pull the two apart and Hudson was yelling at all the individuals in the altercation. Allen was specifically questioned if he had a gun or a knife or if he hit anyone during this altercation, and Allen stated 'No' to each question, but indicates he was fearful and repeatedly states his desire to flee the situation because everyone in the house was assaulting eachother. RP

308-309. Allen was asked if he intervened to assist Uriah Allen break up the fight between Jones and Phillips, Allen stated he did not and was adamant as to not touching anyone in that house.

Allen's testimony turned to inquiries from trial counsel as to if there was any reasons Allen did not call 911. Allen was forced to divulge he had five warrants for his arrest at the time. Not satisfied, trial counsel then inquired deeper into the severity of the warrants by questioning if they were misdemeanor or felony warrants. Allen was again forced to incriminate himself by stating he had a Department of Corrections probation violation warrant for his arrest and other misdemeanor warrants; violating a Motion in Limine ordered by the trial court that prohibit the use of this criteria. RP 21-24 DEC.17,2007 Pretrial Motions. The State was allowed the opportunity at re-cross examination to inquire into the warrant issue during jury trial that was in violation of the trial court's ER 404 order. RP 313, 315. DEC.19,2007 ix). Defense Expert Witness:

Trial counsel failed to call any expert witnesses or seek the advice of an expert to challenge the State's scientific evidence or expert testimony.

DISPUTED FACTS

a) Pro Se Post-Conviction Motion

On July 12,2012, Allen filed a pro se RCW 10.73.170 motion in the Spokane County Superior Court requesting post-conviction DNA testing upon (2)forensic test samples of a red substance collected from the blade of State's Exhibit 1, the State used as evidence of assault with this knife. Allen relied upon the subsection (iii) of the statute because DNA results would demonstrate his innocence on a more probable than not basis, being the DNA results would prove there could only have been one donor of the biological sample recovered from the knife, and evidence presented at trial was unsupported on account there

was no DNA or blood typing confirming the red substance as the victims blood. Therefore, testing would provide significant new information. The Honorable Kathleen O'Connor appointed counsel to re-brief the motion and present it.

b). Superior Court RCW 10.73.170 Motion

On November 29,2012, appointed counsel, John Stine, filed a motion for post-conviction DNA testing of the knife handle of State's Exhibit 1 in addition to the (2)forensic swabs collected of a red substance found on the blade. Mr.Stine argued Allen has met subsection (iii) of the statute. On December 28,2012, on behalf of the state, DPA Mr.Mark Lindsey filed a Memorandum in Opposition of Allen's motion arguing it is based on a conclusory belief and the State denied the existence of the (2)forensic swabs. Defense counsel filed a Reply Brief in response. (Appendix A: motions filed)

c) Superior Court Post-Conviction Hearing

On January 18,2013, a hearing was held in the Spokane County Superior Court before the Honorable Kathleen O'Connor. The State was represented by DPA Mr.Lindsey and on behalf of the defendant, Mr.Stine, and Mr.Allen appeared telephonic.

THE STATE ARGUED:

At the hearing, the State argued the problem with Allen's DNA request is that it would bring additional facts and possible factors into the situation that the jury did not hear at trial. The DPA indicated that by the trial court considering the DNA request, would provide Allen to switch his defense theory at trial to a completely different theory outside the existing record and the evidence the jury rendered its verdict upon. The DPA agreed, however, any new evidence discovered from a DNA test would be relevant and stated the State does not respectfully request or submits that Allen has not met the threshold to qualify for DNA testing under the statute because possible DNA results

would either exclude or include Mr.Allen's DNA. The DPA based the State's opposition on the likelihood any biological sample remaining to test would have been destroyed by the latent fingerprint analysis conducted upon State's Exhibit 1. see VRP 10-15, JAN.18,2013.

THE DEFENSE ARGUED:

For the defense, Mr.Stine argued Allen met all statute requirements to have DNA testing on both the knife and (2)forensic test samples based upon the material fact it would provide significant new information and the DNA results would establish innocence on a more probable than not basis under State versus Thompson. In addition, counsel argued there were forensic swabs collected of the red substance the State now denied existed, though the existing trial record is clear that the State heavily relied upon the red substance as evidence of assault with this knife by the State referring to the red substance as the victims blood throughout trial. Counsel addressed material fact relevant to the conviction was that the State was claiming to possess scientific evidence at the time of trial, when not even a presumptive test was conducted on the red substance confirming the red substance was not Mr.Allen's blood. Counsel argued if DNA results of the red substance can be proven to be Mr.Allen's blood on the blade of the knife or the absence of his DNA on the handle, it would scientifically disprove that State's case and theory that the blood belonged to either of the victims and establish Allen's innocence on a more probable than not basis. Counsel argued a reasonable doubt exists that Allen did not assault the alleged victims with the knife by indicating there were several other suspects involved in the incident and numerous conflicting accounts of who actually had the knife and who assaulted who, and two other defendants testimony combined with State Witness Hudson's testimony establish a reasonable probability that someone other than Allen could have wielded this

knife. Counsel argued the relevance of DNA testing of the handle was to exclude Allen's DNA and his possession of this knife to disprove the State's assertions Allen was the attacker. And base Allen's blood discovered on the blade of the knife would indicate some other than Allen was wielding this knife during the incident by establishing the material fact the blood is not the alleged victims as argued to the jury.

Counsel attributed the failure to produce DNA evidence to disprove the State's theory befell upon trial counsel, whom he elaborated upon a conflict of interest between trial counsel and Allen during the course of determining what evidence to present to the jury and how to present it (i.e Allen wanted the red substance tested and the results presented to the jury versus counsels theory that the jury would not convict due to the amount of conflicting trial testimony.) Mr.Stine indicates ineffectiveness on behalf of Allen's trial counsel in failing to consult DNA experts before making a decision upon the trial strategy. Counsel argued if scientific evidence was introduced at trial, it would have been the evidence to compel the jury to acquit on account of all the conflicting trial testimony in this case.

SUPERIOR COURT JUDGE STATED:

During the hearing, the Court brought the hearings attention to Allen's direct appeal issues and the unpublished opinion thereof. The trial court noted that it was an extremely interesting fact that within Division III's opinion, no reference to the knife or DNA issue was made. The hearing court stated it did not disagree with the material fact of having DNA results before trial counsel determined a defense and reasoned this failure was a viable appellate issue under ineffective assistance of counsel, and compelled the trial court pose a question to the State whether it would be relevant if the DNA results on the knife's handle excluded Mr.Allen? The State responded

stating it would be relevant. VRP 10-12. The hearing court later reasoned that when a fingerprint analysis is conducted on an item, the process destroys any DNA evidence and contends the record reflects such was the case in this issue before the court. The hearing concluded with instructions all parties will be notified via written order of the Courts decision. see App.B:Verbatim Report)

ADDITIONAL GROUND 1:

THE TRIAL COURT 'S ABUSE OF DISCRETION DENIED ALLEN DUE PROCESS RIGHTS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WASHINGTON STATE CONSTITUTION ART.I§3

Both federal and state constitutions guarantee a defendant due process of law. see U.S XIV Amend. and Wash.Const.art.I§3. The U.S Supreme Court found that when a state enacts a statute providing post-conviction defendants access to evidence and a procedure for accessing such evidence, the State has created a liberty interest that is entitled to due process protection. see Osborne v. Dist.Attorney's Office for the 3rd Judicial Dist.,423 F.3d 1050(9th cir.2005)

Washington State allows a convicted defendant seeking post-conviction discovery of evidence and other relief inescapably associated with the central question of guilt or punishment, to file a motion for DNA testing with the trial court that entered the judgement on conviction. see RCW 10.73.170. Section (2) of the statute sets forth the minimal requirements of the motion. Subsection (a) states that the motion shall: (i) state that either the court ruled that DNA testing did not meet acceptable scientific standards, (ii) the DNA testing technology at the time was not sufficiently developed at the time to test the DNA evidence in the case, or (iii) that the DNA testing currently requested would be significantly more accurate than prior DNA testing or would provide significant new information; the motion shall explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime and the motion must comply with all other procedural requirements of the court

rules. State v.Thompson,173 Wn.2d 865,876,271 P.3d 204(2012);Skinner v.Switzer 562 U.S ____, 131 S.Ct.1289, 179 L.Ed 2d 233 (20011).

Federal courts have only intervened in a State's administration of access where the state's procedures for post-conviction relief offend some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental, or transgress any recognized principle of fundamental fairness in operation. Osborne, 557 U.S at 52. A federal court may upset a state's post-conviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided. Medina v. California, 505 U.S 437,446,112 S.Ct.2572,120 L.Ed 2d 353(1992).Allen was not afforded his due process guarantees because the trial court's denial of post-conviction DNA testing was manifestly unreasonable and based on untenable grounds. A trial courts evidentiary rulings should be reviewed for an abuse of discretion. State v. Gray, 114 Wn.App. 15, 23, 79 P.3d 460 (2003).

Standard For Review

"Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds." State v.Brown, 322 Wn.2d 529, 572 940 P.2d 546 (1997). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable grounds if it is based on an incorrect standard of the facts do not meet the requirements of the correct standard." In re Littlefield, 133 Wn.2d 39,47,940 P.2d 1362(1997). Discretion is also abused when it is exercised contrary to law. State v.Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

In the present case, the statute requires a court to determine the probability that could demonstrate innocence on a more probable than not basis

with favorable results. The court must consider the evidence produced at trial along with any newly discovered evidence or the impact that any exculpatory DNA test could have in light of the evidence at trial. State v.Gray,151 Wn.App 762, 215 P.3d 961 (2009).

Here, in determining Allen's post-conviction motion, the trial court denied Allen's request for DNA testing for the following:

1). The fact that the presence or absence of the defendant's DNA on the knife "may bolster the defendant's testimony", is not sufficient to meet the statutory standard of innocence on a more probable than not basis of RCW 10.73.170." (see Appendix C: Superior Court Order at 4).

On the contrary, the evidence would prove a material fact at issue; the fact that the blood on this knife is not the alleged victims--but Allen's own blood. This material fact would refute the State's argument to the jury that the jury that the red substance was the alleged victims blood, which is a material fact relied upon by the jury in determining their verdict. Moreover, the State only disputes Allen's request for DNA testing because it would refute the fact that the State heavily relied upon this evidence in seeking a conviction against Allen. The trial court overlooked and ignored the substance of the material facts in denying Allen's motion to DNA test the exculpatory evidence. No reasonable jurist would understand the State's challenge to Allen request to have evidence tested that would prove his innocence when the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."Kyles v.Whitley 514 US 419, 115 S.Ct.1555, 131 L.Ed 2d 490(1995). Under Brady a due process violation occurs when: 1)'the evidence at issue is favorable to the accused' either because it is exculpatory or impeaching; 2) the State suppressed the evidence, either willfully or inadvertently; and 3) prejudice ensued.' see Brady v. Marvland, 373 U.S 83, 83 S.Ct.1194, 10 L.Ed 2d 215 (1963).

The State presented a knife to the jury as State's Exhibit 1 containing a red substance which the State argued, with certainty via expert testimony, was the actual blood belonging to either of the alleged victims:

"In this particular case, there was no evidence whatsoever that anyone's blood could possibly be on the knife other than Dewey Hudson or Karla Jones. In other words, if there had been any question that there may be something else there , I would have considered it. I certainly wouldn't have guaranteed we'd have the results, but I would have considered the request. In this case, my expectations was I would find one of the other people who were injured during this incident blood be on the knife. So when you're looking at the value of requesting the DNA analysis and the time it would for it to be done, it did not measure up. DNA analysis is required when it is critical to define whether its--I apologize--whether its the injured person's blood or the accused or the assailant."(RP 89 DEC.18,2007 Det.Ferguson/Direct)

"Q: When you were in Mr.Hudson's home, did you see a knife in the house? A: I did. There was a large kind of kitchen, butcher-knife, and it was laying next to the mattress on the floor with blood on it." (RP 205 DEC.18,2007 Officer Baldwin/Direct).

The expert testimony of Officer Baldwin and Detective Ferguson left the jury with no doubt that the red substance was blood and could not be Allen's. Even when Officer Baldwin and Detective Ferguson's expert testimony completely contradicted the expert opinion of Forensic Specialist Jodie Dewey. Testimony as follows:

"Q: Did you, also, try to check the handle of the knife, as well? A: Yes, I processed the knife in its entirety. Q: Okay. And were you able to lift any latent fingerprints from that knife? A: No, I was not. I was not able to lift any latent fingerprints nor was I able to photograph any fluorescing fingerprints off the knife. Q: With respect the section of the knife where you indicated there was a red substance, could you indicate to the jury where the substance on that knife was located? A: Yes. There was a red substance in this area of the knife and, also, on this same area on the opposite side of the knife, the end of the blade toward the hilt. Q: What happened to the red substance that was on the knife? A: I collected it. Q: And now did you do that? A: We take a sterile swab and apply just a little bit of water to that swab in order to get the substance to adhere to the swab, and then we box that swab in a sterile box and tape it up. Q: And at whose direction did you take the swab? A: Detective Ferguson. Q: And was that swab that was used to collect the red substance on that knife then turned over to Detective Ferguson? A: Yes, it was. It was collected by her when she came and picked up the knife to return to property.[RP 261-262]

Q: And you were able to identify the substance as blood or was it still just a red substance when you swabbed it? A: It was a red substance. I did not do a field test in this case because the amount of the sample would have--half of it would have been destroyed in field testing it. So in lieu of doing that, I tested the entire sample to be submitted for testing, if that was to be done. Q: When was it you collected or swabbed the red matter? A: It was on the same date that I processed the item, which was on 8/21 of '07."(RP 266 DEC.19,2007 Dewey/Cross)

Therefore, the Rules of Evidence (ER702) mandates that any scientific evidence must be relevant and helpful to the trier of fact, and must rise above speculation, conjecture, and mere possibility. A State's expert opinions or testimony must pertain to scientific knowledge that rests upon a reliable foundation that has a valid 'scientific' connection to the red substance as a precondition to admissibility. State v.Cauthron, 120 Wn.2d 879,872,846 P.2d 502(1993); Frye v.U.S, 54 App.46,293 F.1013, 34 A.L.R 145 (DC cir.1923).

Because the court is to consider whether favorable DNA results, viewed in light of the evidence as a whole, including the evidence presented at trial, Allen argues there is sufficient reasonable doubt within the existing record that have been overlooked and ignored. Notwithstanding the conflicting expert opinions as mentioned above, but there was conflicting testimony of other state witnesses. Specifically, the State went as far as to subpoena their own victim with a material witness warrant to have this alleged victim arrested for the soul purpose just to impeach him at trial. RP 3-12 Pretrial Motions DEC.17,2007

The trial court based a substantial portion of the decision upon Officer Baldwin's testimony of Hudson's impeached statements, and did not consider material facts of Hudson's actual trial testimony:

"Q: Did Mr.Allen put his hands on you? A: No, he didn't. Q: Do you recall saying to Officer Baldwin that both males hit you several times in the face and head? A: I wouldn't--I wouldn't imagine, you know, why I would say such a thing. I would like to go into detail. Q: Just hold on, sir. I got to ask you questions, and then--A: Okay. There was a reason for animosity between--Q: Animosity between who? A: Well, months before that--Q: Just animosity between who? A: Anthony and I. Q: Okay. A: Yeah. Q: So you're changing your answer now that there's now animosity between you and Mr.Anthony Allen? A: No, there isn't, but I was led to believe months ago that he had charged me falsely with a crime, and imagine I want to get even with him is why I probably make false

statements towards him. Q: Do you recall telling Officer Baldwin that Doozy had a small 25 auto hand gun and was threatening to kill you? A: No. No. Again, that would have been there were no weapons there, and I wouldn't allow no weapons. That's my dad's house. Q: And you didn't tell Officer Baldwin that you believe, the defendant--A: Yeah. Q: hit you with the gun on you jaw? A: No,I don't remember saying such a thing. Q: And as a result of being hit with the gun--A: Hm-mm. Q:--you were knocked out? A: No, I wasn't knocked out at no point that evening. Long after they had left, I set up and kept watching TV and drinking. Q: Are their knives in you fathers house? A: Cooking knives. Q: And how far is the kitchen from the living room? A: there's a dinning room between the living room and the kitchen. Q: Do you recall seeing anyone with a knife? A: No. Q: Do you recall telling Officer Baldwin that you saw Schmoo [Uriah Allen] with a knife?A: I don't recall doing that. Again, I don't know why I would say that about Schmoo. Q: Okay. Do you recall at some point you said, "Schmoo had a butcher-style kitchen knife and was threatening to kill Karla? A: No. Q: And at some point in time, you tried to get the knife away from Schmoo, correct? A: I'm not stupid enough to attack anybody with a knife, so that was definitely untrue." RP 115-118 DEC.18,2007 Hudson,Jr./Direct

Clearly, from this testimony the State alleged co-defendant Urian Allen had the knife and assaulted alleged victim Jones. This court should note, Uriah Allen testified to pleading guilty to assaulting Jones in the second degree and declared he acted alone. Testimony as follows:

"Q: Did you see any weapons? A: No. Q: No knives? A: No. Q: No guns? A: No. Q: Did you punch anybody? A: No. No. Well, I mean, I'm the one they found guilty, so, you know. Q: What--were you found guilty of something? A: Yeah. Q: What were you found guilty of? A: Second degree assault. Q: Okay. So what did you do to be guilty of second degree assault? A: I guess guess just breaking up the fight. Q: Did you plead guilty or did you go to trial? A: I pled guilty."[RP 294]; "Q: And you don't call 911? A: No. Q: Because you were going to take care of it on your own, right? A: I mean, if that's what they saying, I've obviously been found guilty of it already, so. Q: The question to you, sir, is that you didn't call 911 because you were going to handle it, right? A: No. Q: You and your cousin, Mr.Allen, were going to handle it? A: I was there to give my mother a ride. That's it. Q: Now, you admit you got into this altercation, correct? A: Right. Q: Okay. And you, also admit or testified here this morning that your cousin, Anthony Allen, got into this altercation? A: No, he really didn't have anything to do with it. He stood behind me the whole time. Q: Your words just a few minutes ago was your cousin, Anthony, assisted? A: Yeah, he assisted by saying, "Stop. Come on. Let's go." Q: And that was after the fight and assaults had taken place, correct? A: That's why they were still fighting. Q: There's a fight going on, and it's your testimony that--hold on, sir. That your cousin Anthony Allen says, "Stop. Let's go?" A: We just got there. There to pick up my mom. We just got there. We were trying to get her out the house. Q: You threw some punches at Ms.Jones, correct? A: No. Q: Because that's what you got convicted of, right? A: Right. Q: You plea guilty to second degree assault, inflicting substantial bodily injury against Ms.Jones, correct? A: Yes, I did." RP 299-300 DEC.19,2007 U.Allen/Cross

Allen maintains a DNA test will prove that the red substance on the knife

is his blood and not the blood of either of the alleged victims, which had the jury known, would have exonerated him as the perpetrator who assaulted the alleged victims with the knife (State's Exhibit 1) as argued in the State's case. The trial court should have granted Allen's motion for post-conviction testing under the statute because the exculpatory results would, in combination with the other evidence, raise a reasonable probability that Allen was not the perpetrator. Riofta, 166 Wn.2d at 367, 368.

ADDITIONAL GROUND 2:

MR.ALLEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, ON APPEAL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WASHINGTON CONSTITUTION ART.I§22

"Both the 6th Amend. and Wash.Const.art.I§22, guarantee a defendant effective assistance of counsel. U.S Const.Amen.VI; Wash.Const.art.I§22. To establish ineffective assistance of counsel, the appellate must show that counsel's representation was deficient and that it "fell below an objective standard of reasonableness based on consideration of all the circumstances", and that deficient representation prejudiced that appellant. Smith v.Robbins, 528 US 259,285,120 S.Ct 746, 145 L.Ed 2d 756 (2000); In re Hutchinson, 147 Wn. 2d 197,206,53 P.3d 17 (2000)(applying the 2-prong test of Strickland v.Washington, 466 US 668,687, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

The US Supreme Court has described its decisions providing due process guarantees to criminal appellants as providing "minimal safeguards necessary to make [the] appeal 'adequate and effective.' Evitts v.Lucey, 469 US 387, 392,105 S.Ct 830,83 L.Ed 821 (1985)(quoting Griffin v.Illinois, 351 US 12, 20, 76 S.Ct 585, 100 L.Ed 891 (1956). Evitts describes Griffin as requiring a State that affords a right to appeal, to make the appeal more than a "meaningful ritual." Id.at 394. These are protections of procedural effectiveness and fairness. Further, Evitts states that a criminal defendant

right of counsel guaranteed by the federal and state constitution is not merely a simple right to have counsel appointed, but is a substantive right to meaningful representation. Id.,466 US at 295.

Counsel's perfonmance on appeal was unreasonable because "there is no conceivable legitimate tactical reason explaining counsel's perfonmance." State v. Grier, 131 Wn.2d 17,33,246 P.3d 1260 (2011).

a) Counsel Misrepresented the Facts

i) Appellate counsel failed to familiarize himself with the facts of the case, because counsel's statements within his brief improperly implicates Allen to the crime as a participant by alleging Allen, "intervened to break up the fight", Brief at 3, when it was Allen's co-defendant, Uriah Allen, whom intervened to break up the fight that ultimately resulted in his assault upon Jones. Allen has objected to this same misstatement in previous appeals and has maintained his innocence and uninvolvement in this altercation, RP 300-20 DEC.19,2007 A.Allen/Direct, with supporting witness testimony of Uriah Allen, RP 299-300, 304 DEC.19,2007 U.Allen/Cross.

In addition, counsel also states that "Detective Ferguson testified that the red substance 'may have been' blood, Brief at 4, is a clear indication that counsel overlooked or ignored the fact that the State expressly and affirmatively argued to the jury at trial, the red substance was the victims blood on the knife (State's Exhibit 1). This Court should note that a lawyer who informs a [reviewing court] that it is his view of the evidence that there is no reasonable doubt regarding the only factual issue that are in dispute, has utterly failed to subject the prosecutions case to a meaningful adversarial testing. see Fisher v.Gibson, 282 F.3d 1283 (10th cir.2002) ("Implying a clients guilt by repeatedly lending support to the State's version of events is virtually tantamount to a concession of guilt, and

concluding this contributed to a finding counsel is constitutionally ineffective.").

b) Counsel Misapplied the law

Counsel stated in his Brief that the favorable results of the DNA test would simply "discredit [] Jones' testimony", Brief at 8, and overlooked or ignored the fundamental purpose that Allen seeks the test to: 'disprove a material fact that the State heavily relied upon throughout trial in obtaining against Allen'. In other words, the test results would show that the State lied to the jury on a material fact that should have established Allen's innocence before the trier of fact, had it been known. Counsel should not have limited the test results to only "discrediting Jones testimony", Brief at 8, against the backdrop, thereby rendering ineffective assistance of counsel. see State v.Kyllo, 166 Wn.2d 856,869,215 P.3d 177,183-4 (2009)("failing to research or apply relevant law was deficient performance because it fell below an objective standard of reasonableness based on consideration of all the circumstances.")(quoting Strickland, 466 US at 688-1).

c) Counsel Failed to Preserve Issue

Mr.Allen had instructed appellate counsel to perfect his appeal by preserving the DNA issue for federal review. see Appendix p . however, counsel totally disregarded his client's request and did not make any reference to the constitution or cite federal authority in his Brief. US v.Snitz, 342 F.3d 1154, 1155-56 (10th cir.2003)(a "lawyer who disregards specific instructions to perfect a criminal appeal acts in a manner that is both professionally unreasonable and presumably prejudicial."); see also US v. Williamson, 183 F.3d 458, 466-67 (5th cir.1999)("counsel's failure to cite directly controlling precedent was ineffective.")

Therefore, appellate counsel denied Allen his right to review of the

State court's decision in the federal courts. see Ortberg v.Moody, 961 F.2d 135,138 (9th cir.1992)("A petitioner must properly raise a habeas claim at every level of the state court's review."); Rose v.Lundy, 455 US 509,518-19 (1982)("[s]tate prisoner's must give the State court's one full opportunity to resolve any constitutional issue by invoking one complete round of the State's established appellate review process.").

CONCLUSION

Based upon the above cited authorities and arguments thereof, the Appellant respectfully requests the following relief:

This matter should be remanded with instructions for the trial court to have the (2) forensic swabs collected from State's Exhibit 1, submitted to the appropriate agency for DNA testing; or in the alternative, order an Evidentiary Hearing upon the entire matter.

Respectfully Submitted October 13,2013.

Anthony L.Allen,Sr.#728833
Pro Se
Coyote Ridge Correction Ctr. GA-4-L
P.O Box 769
Connell, Washington

APPENDIX A:
(A 1-28)

1. Pro Se Post-Conviction Motion
2. Attorney John Stine's Post-Convition Motion
3. DPA Mark Lindsey's Memorandum
4. Attorney John Stine's Reply Brief

IN SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff,	)	No.07-1-03758-7
VS	)	MOTION FOR POSTCONVICTION DNA TESTING OF FORENSIC EVIDENCE FROM STATE'S EXHIBIT ONE PURSUANT TO RCW 10.73.170
ANTHONY LAMAR ALLEN,SR. Defendant.	)	

I. IDENTITY OF MOVING PARTY

The defendant, Anthony L.Allen,Sr., asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

COMES NOW, pro se defendant, Anthony Lamar Allen,Sr.#728833 and hereby moves this Court for an Order granting postconviction Deoxyribonucliec Acid testing of State's Exhibit One and/or forensic evidence collected thereof pursuant to RCW 10.73.170. This Motion is based on the Memorandum In Support, the file and record to date.

Dated this 19th day of July,2012.

Respectfully Submitted,

Anthony Lamar Allen,Sr#728833
Coyote Ridge Correction Center HB-43
P.O Box 769
Connell, Washington 99362

IN SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff VS ANTHONY LAMAR ALLEN,SR Defendant	NO.07-1-03758-7 **MEMORANDUM IN SUPPORT OF MOTION REQUESTING DNA TEST OF STATE'S EXHIBIT ONE PURSUANT TO RCW 10.73.170**

I. FACTS

On December 20,2007 the defendant, Anthony L.Allen,Sr. was found guilty by jury of Count One: 1°Kidnapping and Count Four: 2°assault w/weapon against Karla Jones, and Count Three: 2°assault w/weapon against Dewey Hudson,Jr. (see CP at 1) This deadly weapon was a butcher-style kitchen knife recovered from the scene and labeled State's Exhibit One at trial. (see RP 260)

The record file indicates a "red substance" discovered on both sides of the blade of State's Exhibit One by Rideology Specialist Jodey Dewey on August 1,2007. (see report#07-241900). This forensic specialist collected (2) test samples of this "red substance" at the direction of Detective Theresa Ferguson. (see RP 259 & 262). This forensic investigator also conducted a fingerprint analysis resulting in no latent fingerprints being found on State's Exhibit One. (see RP 261). To date, there was no Deoxyribonucleic Acid Test administered on the alleged weapon.

II. LEGAL AUTHORITY

Pursuant to RCW 10.73.170:

(1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.
(2) The motion shall:
(a) State that:
(i) The court ruled that DNA testing did not meet acceptable standards; or
(ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or
(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;
(b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to the sentence enhancement; and
(c) Comply with all other procedural requirements established by court rule.
(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.
(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.
(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.
(6) Notwithstanding any other provision of law, upon motion of defense counsel or the courts own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.
[2005 c 5 1; 2003 c 301 1; 2000 c 92 1].

In addition to the above information see also:

State v. Thompson, (The Court of Appeals reversed the trial courts order denying the motion for DNA testing and remanded the case for the trial court to enter an order permitting DNA testing. The Supreme Court held that the offender is entitled to have the semen samples tested for DNA because testing would provide new information about the perpetrator's identity and favorable results would establish the offender's innocence on a more probable than not basis, the court affirms the decision of the Court of Appeals.)155 Wn App 294, 229 P.3d 901 (2010); see also

State v. Riofta, (The court held that the statutory language "significant new information" includes tests results that did not exist at the time of

trial and that are material to the perpetrator's identity, regardless of whether DNA testing could have been performed at trial.),134 Wn App.669, 142 P.3d 193 (2006).

III. ARGUMENT

In considering a postconviction motion for DNA testing, a court must look to whether, viewed in light of all the evidence presented at trial or newly discovered, favorable DNA results would raise the likelihood that Mr.Allen is innocent on a more probable than not basis. The plain meaning of Wash.Rev. Code 10.73.170 is that evidence is to be tested when it has the potential to produce new information. Read as a whole, the statute provides a convicted person to produce DNA evidence that the jury did not have to consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor or defense counsel not to seek DNA testing prior to trial.

Mr.Allen's request for postconviction DNA testing satisfies the requirement of RCW 10.73.170(iii) because the DNA results would likely demonstrate Mr.Allen's innocence on a more-probable-than-not basis where the DNA results will show there could only have been one donor of the biological sample recovered from the crime scene and identification evidence presented at trial of whose blood is actually on State's Exhibit One was weak and/or unsupported by the evidence on account there was no DNA testing conducted by either the state nor defense counsel in this matter though test samples where readily available. Rideology Specialist Jodey Dewey clearly stipulated to the court of not concluding a DNA test on the "red substance" she collected. However, Detecive Ferguson and trial prosecutor Ugene Cruz declared this red substance to not only be actual blood--but asserts there was never any doubt that this blood was either Karla Jones or Dewey Hudson,Jr's. (see RP 89) There is no established evidence of this upon the record and there was no trial testimony of either Ms.Jones or Mr.Hudson alleging this blood to be there's thus, Detective Ferguson's speculation is unsupported by the evidence produced at trial. (see RP 143-191;95-133)

Mr.Allen has maintained the blood found on this knife will prove to be his. Mr.Allen had informed his counsel of this and has appealed to the Court of Appeals (#29996-1-III) that self-defense should have been argued as the (2) forensic swabs collected from the blade of this weapon proves Mr.Allen was a victim of violence from the wielder of this weapon. Detective Ferguson and the state's contention the blood on this weapon could only be of the victims would attest, then, that Mr.Allen was a victim. As Mr.Allen

has further maintained and stipulated upon the record he witnessed multiple unknown assailants engaged in a fight within the Hudson residence upon entry and his only wish was to flee. (see RP 308,309,310,311,316) Mr.Allen was assaulted by these unknown assailants producing his blood on the blade of State's Exhibit One, therefore, deeming it scientifically and biologically impossible this blood could remotely be Ms.Jones or Mr.Hudson's as the jury was led to believe.

Trial counsel's defense theory was that Mr.Allen merely assisted in the protection of Wanda Phillips from further abuse at the hands of Karla Jones. (see RP 50-51) In support, state witness Dewy Hudson,Jr. testified that Karla Jones entered into his home unwelcomed and unannounced to assault Wanda Phillips. (see RP 127) Mr.Hudson maintained that Karla Jones was the aggressor in this altercation and that Mr.Allen did not physically assault either himself nor Ms.Jones with a gun or a knife at any time.(RP114,115) Further, Mr.Hudson admitted upon record to making false statements against Mr.Allen to the investigating officer the night of this incident due to annomossity he had held against Mr.Allen. (see RP 116) Dewey Hudson,Jr. submitted two affidavits in support Mr.Allen's defense under Victim Impact Statements #0792898660 and #079289861 upon the record file.

Mr.Allen contends that DNA testing under RCW 10.73.170 is not akin to retrying his case. However, forensic evidence exists that would exonerate the use of this weapon against the victims. Detective Ferguson explained in her testimony the reasoning behind no DNA testing was conducted was to the fact that the crime lab was back-logged by 6 months. (see RP 88-89) At first glance one would safely assume the detective's intentions where to obtain DNA testing, but was under a time restraint in the interest of Speedy Trial Rights to the defendant. Nonetheless, if the forensic evidence could now be tested, the results of the tests will constitute "significant new information" under RCW 10.73.170(2)(a)(3) because tests will reveal possitive identification whether Mr.Allen or the victims be the donor of this DNA on the blade of State's Exhibit One. Such evidence was unknown to the jury at the time of trial thus, providing significant new information detramental in establishing Mr.Allen's innocence in accordance and pursuant to the DNA testing statute under RCW 10.73.170 that would demonstrate and exonerate Mr.Allen as the perpetrator and aggressor in this particular altercation,

but was assaulted by the real aggressor and actual wielder of this weapon within the Hudson residence. Such defensive wounds attests to an immediate threat and/or self-defense. The state's assertion that conclusive DNA results were not needed at trial to convict Mr.Allen and Detective Ferguson's failure to provide nor establish legitimate findings that support the forensic's outside her personal beliefs and opinions denied Mr.Allen the ablility and opportunity to adequately defend himself at trial against baseless speculation that was unfounded and unsupported by the evidence at trial. In sum, Mr.Allen's DNA is on record in the Department of Corrections archives and easily ubtainable.

IV. CONCLUSION

Based on the above facts, the case file and the record to date, this Court may in its discretion grant this postconviction motion and Order DNA testing under RCW 10.73.170. The defendant urges this Court to use its discretion by Ordering such testing upon forensic evidence collected from State's Exhibit One that was used to convict Mr.Allen at trial. This motion is supported by the evidence within the record and by good cause.

Dated this 19th day of July,2012

Respectfully Submitted,

Anthony Lamar Allen,Sr.#728833
Coyote Ridge Correction Center HB-43
P.O Box 769
Connell, Washington 99362

STATE OF Washington
COUNTY OF Franklin
This instrument was acknowledged before me
on this 19th day of JUly,2012.

GAYLE M. SHONKWILER
COMMISSION EXPIRES
NOTARY
PUBLIC
AUG. 9, 2014
STATE OF WASHINGTON

Notary Public, in and for the
STATE OF Washington
My commission expires:
8-9-2014

D's copy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	
Plaintiff,	)	No. 07-1-03758-7
v.	)	
	)	MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO RCW 10.73.170
ANTHONY L. ALLEN,	)	
Defendant.	)	

I. SUMMARY OF FACTS

The defendant was convicted of first degree kidnapping and second degree assault (with a deadly weapon) against Karla Jones, and second degree assault (with a deadly weapon) against Dewey Hudson. There were two co-defendants, Uriah Allen, who testified, and Wanda Phillips, who invoked her 5th Amendment privilege and did not testify. The issue in the case centered around whether the defendant was the person who assaulted both victims with a knife found at the scene, or whether the defendant was a bystander who merely intervened to

break up the fight. The knife recovered at the scene and presented at trial as State's exhibit 1 had a red substance on it, which everyone seems to assume was the alleged victims' blood, although it was never tested for the presence of blood and no DNA test was conducted on the substance or the knife. Relevant sections of the trial transcript are attached as exhibits, and referenced in the body of the argument.

II. ISSUE

1) ~~Whether~~ the defendant meets the requirements of RCW 10.73.170 and is entitled to an order to have a DNA test performed on the knife, and swabs taken by the State from the blade of the knife, which was presented as exhibit 1 at his original trial and used as evidence of second degree assaults on both complainants?

III. LAW AND ARGUMENT

RCW 10.73.170 is a statute which allows an incarcerated citizen to petition the trial court for an order for DNA testing post-conviction. Section (1) of the statute states: "A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense. The defendant was convicted of kidnapping and two counts of assault in Spokane Superior Court before the Honorable Kathleen O'Connor and is currently serving the sentence on that conviction. (See Judgment and Sentence in court file.) The defendant has presented a written motion, which has been mailed by counsel to the office of public defense, and so he has satisfied the requirements of section (1).

Section (2) of the statute sets forth the minimal requirements of the motion. Subsection (a) of this section states that the motion shall: (i) State that either the court ruled that DNA testing did not meet acceptable scientific standards, (ii) the DNA testing technology at the time was not sufficiently developed at the time to test the DNA evidence in the case, or (iii) that the DNA testing currently being requested would be significantly more accurate than prior DNA testing or would provide significant new information; the motion shall explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime; and the motion must comply with all other procedural requirements of the court rules.

In the present case, the defendant is relying on subsection (iii) of (2)(a), which states that the DNA testing being requested would provide significant new information. The courts have found that this requirement of "significant new information" is met if the test result will either exculpate or inculpate the defendant as the perpetrator. State v. Thompson, 173 Wn.2d 865, 876, 271 P.3d 204 (2012). It does not matter if any party could have conducted the DNA test at the time of trial. The statute allows a defendant to seek a post-conviction DNA test if the original fact finder did not have the result to consider, whether it was because of a court ruling, inferior technology, or the decision of counsel to not seek a DNA test for trial. Id. (citing to State v. Riofta, 166 Wn.2d 358, 366, 209 P.3d 467 (2009)).

In the case at bar, the record shows there was no DNA test conducted on the knife, apparently due to a decision of both counsel, so no results were presented for the trier of fact to consider. It appears defense counsel opted to make the case a credibility contest rather than obtain forensic evidence and making a strategic defense decision based on that result. Such a

strategy and outcome has previously been held to be ineffective assistance of counsel. See, Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009). If DNA results are obtained from the knife, ~~the result~~ would necessarily tend to either ~~inculpate~~ or exculpate the defendant in the assaults on the two victims. A DNA test result favorable to Mr. Allen would certainly bolster his defense and discredit the main witness for the State. Instead of any test result, the jury was left only with the speculation of Detective Ferguson, Officer Baldwin, and trial counsel, none of whom are qualified to determine whether something is or is not blood, much less the identity of DNA.

The testimony at trial from Ms. Karla Jones was that the only person she saw with the knife was the defendant, Anthony Allen. (RP. 156-7). She said she saw the defendant strike Mr. Dewey Hudson in the face with the knife and that the defendant also cut her hair with the knife. (RP. 154-55). The witnesses and the attorneys for the State and the defendant focused their attention on a "red substance" which was found on the knife. This substance was repeatedly referred to as blood by witnesses and both attorneys. Officer Baldwin testified he found a knife with blood on it at the scene of the assault (RP. 205), Detective Ferguson testified that the red substance may have been blood (RP. 87), but she also testified that nobody saw the defendants the night of the incident so she could not exclude them as possible contributors of blood on the knife (RP. 138), defense counsel stated in her closing argument that there was blood on the knife (RP. 48-9), and the prosecutor stated in his rebuttal closing that he did not see a need to test the blood on the knife because the victims were the only ones with visible injuries and a test would not have shown it to be the defendant's blood (RP. 57). (It should be noted that Dr. Penaskovic testified that he did not see any lacerations on Ms. Jones (RP. 246)).

However, forensic scientist Jodie Dewey testified that she never conducted any test on the red substance (RP. 266), so it was never established whether the red substance actually was blood.

While the entirety of the trial seemed to focus on the red substance, what it was, and where it came from, what does not appear to have been considered was whether DNA testing of other parts of the knife would have provided useful evidence to either party. For instance, since the testimony from the State was that the defendant was the only one holding the knife during this incident, a DNA test on the handle of the knife could have located DNA from whoever was actually holding it. The person holding the knife would be the person who committed the assaults based on the testimony of Ms. Jones, so the test would help identify the perpetrator of the crime.

There are several possible scenarios if the entire knife is submitted for DNA testing. The red substance could be proven to be blood or not blood, and it could be determined if it contained the defendant's blood or not. If the substance proves to be the defendant's blood, that makes it less likely that he was wielding the knife during the assaults. More importantly, if DNA testing on the handle and other parts of the knife is conducted and the result excludes the defendant as a contributor to the DNA on the handle or elsewhere, that casts the entire trial in a new light. At that point the defendant would have scientific evidence which backs up his claim of not being the one assaulting anyone with a knife, and discredits Ms. Jones's claim that the defendant was the only person holding the knife.

From reading the transcript of the trial it is apparent that witnesses gave widely varying statements both before and during the trial. For instance, at trial Mr. Hudson testified in a

manner that mostly exonerated the defendant, claiming that the defendant did not assault either victim and admitted to making false statements to the police (RP 110-118). Prior statements from Mr. Hudson were admitted under ER 613 for impeachment; however, these statements cannot be used as substantive evidence and cannot support a finding or verdict. Therefore, the only evidence presented at trial that could sustain a verdict that the defendant committed these assaults, was the trial testimony of Ms. Jones that the defendant was the only person holding the knife. It was also her testimony at trial which formed the sole basis for the kidnapping and robbery charges. If the DNA testing excludes the defendant as the person holding the knife, that casts powerful doubt on the credibility of Ms. Jones. Doubts about her credibility could have also led to different verdicts on the kidnapping and robbery charges, in addition to the assault charges. The evidence presented at trial against the defendant was certainly not overwhelming. Forensic testing on the knife to determine whose blood (if anyone's) was on the blade, and whose DNA is on the handle, would be far more persuasive than the contradictory testimony of the witnesses presented at trial.

Section (3) states that if the defendant's motion complies with the requirements of section (2), then the court must grant the motion if the defendant has shown that the new DNA evidence would show innocence on a more probable than not basis. This section does not require the defendant to establish what the result of a DNA test would be on a more probable than not basis. It only means that, if the result of the test is favorable to the defendant, does it demonstrate innocence on a more probable than not basis. In the Thompson case, the court noted that the result there would either include or exclude the defendant as a contributor of the DNA, and if it excluded him, it would establish his innocence more probably than not.

Thompson, 173 Wn.2d at 875. This was because there was basically one possible suspect, so excluding the defendant as that suspect established the necessary showing of probable innocence. This was also the case in State v. Gray, 151 Wn. App. 762, 215 P.3d 961 (2009) and In Re Bradford, 140 Wn. App. 124, 165 P.3d 31 (2007). Both of those cases involved crimes with one likely suspect, and both cases found that DNA results excluding the defendant as that suspect met the conditions of RCW 10.73.170.

In the present case, it is true there was conflicting testimony about whether there was more than one suspect involved in the assaults. However, the critical fact is the evidence at trial established there was only one suspect who had the knife in his hands, and that was the defendant. If the DNA test excludes him as a contributor to the DNA on the knife (especially the handle), then that casts doubt on the credibility of the only witness who provided substantive evidence that the defendant committed the assaults. Similarly, if the forensic testing shows the red substance on the blade to be that of the defendant and not of either complainant, that result would also cast doubt on the entirety of the State's theory of the case and the credibility of its main witness. In sum, a DNA test could show the identity of the victim of the use of the knife by identifying the substance on the blade, and could identify the perpetrator by identifying DNA on the handle.

The State may argue that multiple people could have left DNA on the blade and handle, and the result would be inconclusive. However, modern forensic testing can distinguish multiple contributors to a sample, and even classify which are major and which are minor contributors. Even if the DNA sample from the handle is mixed, it can still exclude the

defendant as a handler of the knife. Similarly, if the DNA sample from the blade is mixed, it could exclude the victims as being contributors to the stain on the blade. Either of these results lend powerful evidence to establishing the identity of who was really the victim and who was really the perpetrator, and greatly affect the credibility of the witnesses presented at trial. Again, the defendant does not have to establish what the result of the forensic testing would be; he merely has to show that a favorable result would show his innocence on a more probable than not basis.

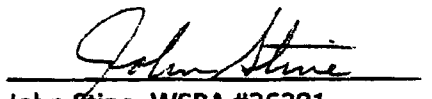
IV. CONCLUSION

The defendant has complied with all three sections of RCW 10.73.170 and is entitled to post-conviction DNA testing. He has presented a written motion, given a copy to the Office of Public Defense, and it has been timely served on the State. This satisfies section (1) of the statute.

The defendant has satisfied section (2)(iii) of the statute by showing that the DNA test would present significant new evidence. Neither the State nor defense counsel requested DNA testing for trial, and a DNA test result would either inculpate or exculpate the defendant as the person committing the assaults with the knife. If the defendant's DNA is on the handle of the knife it would strongly bolster the State's case. However, if the red substance is determined to be the defendant's blood and/or his DNA is not present on the handle of the knife, that result bolsters his testimony and severely damages the State's main evidence. This meets the definition of "significant new evidence" set forth in Thompson, supra.

This same argument supports a finding that the defendant has satisfied section (3) of the statute; that a favorable result on the DNA test shows the defendant's innocence on a more probable than not basis. Since the State's evidence put the sole possession of this knife in the defendant's hands, his exclusion as a handler of the knife so strongly rebuts the inconsistent testimony of the main witness against him that it can be fairly argued that this establishes his innocence more probably than not. The defendant respectfully requests the Court grant his motion and enter an order for the State Patrol Crime Lab to conduct DNA testing on the knife used as evidence in this case.

Respectfully submitted this 29th day of November, 2012.



John Stine, WSBA #26391

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SPOKANE COUNTY

STATE OF WASHINGTON, Plaintiff/Respondent,	)	
	)	No. 07-1-03758-7
vs.	)	
	)	MEMORANDUM IN OPPOSITION
ANTHONY L. ALLEN, Defendant/Petitioner.	)	TO MOTION FOR DNA TESTING UNDER RCW 10.73.170

I. INTRODUCTION

This matter is back before the Court on a motion by counsel for post-adjudication-DNA testing pursuant to RCW 10.73.170. A condition precedent to the Court granting the motion for DNA testing is that the Court must ascertain whether defendant has satisfied the statutory and case law requirements for sustaining such a motion. RCW 10.73.170 conditions the availability of the motion upon the defendant's proving that "the likelihood that the DNA evidence would demonstrate innocence" is more probable than not. The decision in *State v. Riofta,* 166 Wn.2d 358, 209 P.3d 467 (2009), provides guidance for resolving the issues presented by defendant's motions. The Supreme Court noted that RCW 10.73.170(3) sets an "onerous" standard of proof for a defendant seeking DNA testing post-conviction. *Riofta,* 166 Wn.2d at 367.

In *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012), the Supreme Court examined the requirements of RCW 10.73.170 in the context of the fact that the trials in *Thompson* and *State v. Gray*, 151 Wn. App. 762, 215 P.3d 961 (2009), focused on sexual assaults wherein the identity of the perpetrator was limited to one individual. In both of those cases the DNA evidence would provide definitive corroboration of the perpetrator because of the nature of the crimes and the biological samples. Hence, the Supreme Court determined that those cases were distinguishable from its holding in *State v. Riofta*, supra, where the focus of the DNA motion was an item that "may have been handled by other people prior to the incident, making it possible that DNA could be left at the crime scene by someone other than the shooter." *State v. Thompson*, 173 Wn.2d at 874-875.

Here, defendant seeks additional testing of the knife blade and handle found at the crime scene next to the semi-conscious Mr. Hudson; the knife that Mr. Hudson advised Officer Baldwin that Mr. Hudson had wrestled away from the defendant. RP 205.

This memorandum responds to the motions presented.

II. RELEVANT FACTS

Initially, it is important to note that defendant's recitation of relevant facts is rather curtailed as compared to that established by the Washington Court of Appeals, Division III, in its unreported decision affirming defendant's convictions herein. *State v. Allen*, No. 26978-7, *slip. op.* (Div 3. Sept. 22, 2009). The Court of Appeals summarized the evidence as follows:

> Karla Jones and Dewey Hudson Jr. went to Mr. Hudson's home at his suggestion to retrieve her dog. She reached the porch on Mr. Hudson's home. Anthony Allen then opened the door, grabbed Ms. Jones, and pulled her into the entryway. Mr. Allen and another man then started punching her in the face. Mr. Hudson tried to

intervene. Mr. Allen knocked him down, slapped him in the face with a butcher knife, and hit him in the jaw with the butt of the butcher knife. Mr. Allen next used the butcher knife to cut off Ms. Jones's hair while a woman was kicking Ms. Jones in the side. Then Mr. Allen hit Ms. Jones in the back of the head with a pistol, and the three assailants left Mr. Hudson's house. Mr. Hudson pleaded with Ms. Jones not to call the police. But Ms. Jones got her dog, ran home, and called police.

Officer Eugene Baldwin arrived at Ms. Jones's house less than 10 minutes after she called 911. He noticed injuries to Ms. Jones's head and face. And Ms. Jones told him that she and Mr. Hudson had been assaulted by Mr. Allen and another man.

Officer Baldwin then went to Mr. Hudson's home. He found Mr. Hudson in the living room, apparently unconscious, and noticed that his face was swollen and bloody. Mr. Hudson first told the officer that nothing had happened but then later reported that he and Ms. Jones had been assaulted. He told Officer Baldwin that Mr. Allen hit him in the face and head with a handgun when he tried to stop Mr. Allen from assaulting Ms. Jones. Officer Baldwin recovered a butcher knife from the house.

The State charged Mr. Allen, in relevant part, with first degree kidnapping and two counts of second degree assault for allegedly kidnapping and assaulting Ms. Jones and for allegedly assaulting Mr. Hudson "with a deadly weapon, to-wit: a handgun." ...

Mr. Hudson testified at trial. He did not remember talking to Officer Baldwin and denied being assaulted by Mr. Allen. He said that his injuries resulted from trying to get Ms. Jones out of his house.

In response to the State's questions about what Mr. Hudson had told him, Officer Baldwin later testified:

I basically explained to [Mr. Hudson] how bad Karla had been beaten up, and that seemed to trigger in [Mr. Hudson's] own mind how important it was to tell the truth about what had happened, and so he began telling me mostly what had occurred at his house.

...

He said that [Mr. Allen and another man] were beating up Karla real bad. He said that he tried to get in the middle of it and stop them ... [and] that [Mr. Allen] had hit him with a small caliber frame, small framed handgun that he had, and he said he was hit several times, and he, also, lost consciousness.

Attached hereto as Appendix A.

In opening statement, defense counsel conceded to the jury that defendant, with Uriah Allen, physically intervened to break up the fight between Karla Jones and Wanda Phillips. The jury was advised that the defendant's theory of the case was that defendant participated in the physical ejection of Ms. Jones from Mr. Hudson's home, yet was not armed and did not perpetrate the injuries to Ms. Jones or Mr. Hudson.

Defendant contends herein that if DNA results are obtained from the knife, the results would necessarily tend to exculpate or inculpate defendant. Defendant contends that the DNA results would significantly impact the body of evidence because Ms. Jones was the only witness who placed a knife in defendant's hands during the assault. However, the record before the jury included the statement by Mr. Hudson to Officer Baldwin identifying the defendant as the one who had the knife that Mr. Hudson wrestled it away from and that it was still laying there on the floor of the crime scene. RP 205. This was direct evidence from Mr. Hudson properly offered and admitted through Officer Baldwin. Additionally, any potential biological evidence that might have existed on the handle of the knife was most likely either removed or contaminated when the handle was processed for fingerprints. Accordingly, the record before the jury reflects that any DNA analysis of the knife handle or blade would have been unnecessary, inconclusive, or contaminated.

III. ANALYSIS

Initially, it is noteworthy that the amendment of RCW 10.73.170 was enacted in 2005, defendant's trial was completed in 2007 and he was sentenced in early 2008, yet defendant did not file this motion seeking additional DNA testing until another 4 years had passed. Nevertheless, the

defendant has failed to satisfy the threshold burden of proof to qualify for the requested post-conviction DNA testing.

Under RCW 10.73.170, the defendant bears the burden of establishing that DNA evidence would provide significant new information. If defendant satisfies that threshold burden, defendant then must prove the DNA evidence would demonstrate his innocence on a more probable than not basis. Here, defendant's characterizations of the evidence before the jury focus on contending that the only evidence tying defendant to the knife was Ms. Jones, yet Mr. Hudson ties defendant to both the knife and a struggle for control thereof. Defendant contends that Mr. Hudson's prior statements to Officer Baldwin constituted impeachment evidence only, yet those statements were made while he was still under the influence of the assault and hence, admissible as substantive evidence pursuant to ER 803(a)(1) as present sense impressions and 803(a)(2) as excited utterances. The record before the jury included that Mr. Hudson reiterated that he was assaulted at his residence by several individuals who struck him with the butt of a gun when he was being treated by Dr. Richardson at the hospital. Those statements were admissible pursuant to ER 803(a)(4) as made for purposes of facilitating medical diagnosis and corresponding treatment.

Defendant's arguments in support of this motion focus on distinguishing or reinterpreting evidence that was already weighed by the jury in rendering its verdicts. Such is not the standard for evaluating the validity of a post-conviction motion for DNA testing. The defendant must prove DNA evidence will establish his actual innocence on a more probably than not basis. The intent of the Legislature in amending RCW 10.73.170 was not to provide defendants with a post-conviction vehicle to re-litigate the facts already determined by the trier of fact.

A. DNA Evidence.

Defendant claims that there is reason to *believe* that the blade and handle of the knife has sufficient biological deposits of evidence from which a DNA profile could be developed. Defendant contends that if defendant's blood is found on the blade then it would prove that he was the victim of the assault instead of Ms. Jones and Mr. Hudson. However, defendant specifically testified that at no point in time was he involved with the knife or more than peripherally in contact with Ms. Jones or Mr. Hudson. At no point in his testimony did defendant indicate that he was sliced, stabbed, or in any manner injured to the extent that his blood should be expected to be on the knife. Defendant contends that Dr. Penaskovic did not find any lacerations on Ms. Jones, yet the record includes Officer Baldwin's observations of bleeding on her head. RP 196. The bleeding on Ms. Jones' head was observed in the areas where the attackers used the knife to cut off chunks of her hair. RP 196. Finally, it is unlikely that there is any biological sample left on the handle of the knife since none was observed by Forensic Scientist Dewey when she prepared the knife for latent fingerprints. RP 205. Ms. Dewey testified that she carefully inspected the knife handle for trace evidence such as hairs or fibers or substances that may need to be collected. RP 205. Defendant has provided no evidence that either the red substance removed from the knife blade could provide any significant evidence that would exculpate or inculpate defendant since defendant's theory of the case was that he never touched the knife, and was neither cut nor injured in any manner during the incident because he barely touched anyone. Accordingly, post-conviction DNA testing of the red substance cannot provide significant new evidence that would inculpate or exculpate defendant. In addition, post-conviction DNA testing of the knife handle cannot provide significant new evidence by the same analysis. Finally, Ms. Dewey found no significant trace evidence prior to processing

the handle for fingerprints, so it is even less likely that such evidence still exists on the handle after it was processed for latent fingerprints.

Essentially, defendant is asking this Court to accept a shift in his trial defense theory based upon the *possibility* that his DNA is found in the red substance or on the knife handle. Defendant is asking this Court to resolve this motion by speculation, yet this is not significant new evidence, rather, it would be a new defense theory.

B. Defendant Has Not Proved That DNA Testing Is Appropriate Pursuant To The Provisions Of RCW 10.73.170.

Defendant contends that he is entitled to additional DNA testing of the red substance recovered from the knife blade and the knife handle. Defendant claims that DNA testing of the knife blade and handle would yield significant new information. Defendant postulates that the DNA results from the knife might produce a profile that would identify the true perpetrator of the assaults.

In *Riofta*, the Court noted that RCW 10.73.170 sets up a two-step procedure for the trial court to determine whether the defendant has met the statutory burden of proof to qualify for post-conviction DNA testing. First, the court must determine whether the defendant's motion has satisfied the procedural requirements for testing pursuant to the statute. *Id.* at 365. The Supreme Court observed:

> The...statute allows DNA testing based on either advances in technology *or* the potential to produce significant new information...Even before the 2005 amendment, RCW 10.73.170 provided a basis to request post-conviction DNA testing where 'significant new information' was unavailable at trial due to inferior technology...Thus, if 'significant new information'...means anything, it means something more than DNA evidence that could have been obtained at trial...Read as

> a whole, the statute provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial.

Id., 166 Wn. 2d at 365-366.

Here, defendant has not proved that the DNA evidence sought by this motion would prove him more probably than not innocent of the crimes for which he stands convicted.

As noted in *Thompson*, the Supreme Court examined the requirements of RCW 10.73.170 in the context of the sexual assault trials in *Thompson* and *Gray*, where there was only one possible perpetrator due to the nature of the biological material. Both cases involved the situation where the DNA evidence would provide definitive corroboration of the perpetrator. Hence, the Supreme Court determined that those cases were distinguishable from its holding in *State v. Riofta,* supra, where the focus of the DNA motion was an item that "may have been handled by other people prior to the incident, making it possible that DNA could be left at the crime scene by someone other than the shooter." *State v. Thompson*, 173 Wn.2d at 874-875. Here, the focus of defendant's DNA motion is an item that most likely was handled by multiple people prior to the incident which would make it less than a reliable vehicle for exculpatory or inculpatory evidence. The nature of the subject item here brings this case more appropriately under the analysis of the Court in *State v. Riofta,* supra.

In *Riofta,* the Supreme Court held that if a motion satisfies the procedural requirements, the Court must determine whether the motion satisfies "the substantive requirement of the statute." *State v. Riofta,* 166 Wn.2d at 367. The Supreme Court identified the second step as being "onerous." *Id.*, at 367. The Supreme Court observed that RCW 10.73.170(3) provides:

> The court shall grant a motion...under this section if such motion is in the form required by subsection (2)...and the convicted person has shown the *likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.*

Id. at 367.

Thereafter, the Supreme Court held that Mr. Riofta had not satisfied the substantive requirements of the statute and hence did not qualify for the requested DNA testing. Specifically, the Supreme Court concluded:

> RCW 10.73.170 allows a convicted person to request DNA testing *if* he can show the test results would provide new material information relevant to the perpetrator's identity. However, a trial court must grant the motion *only* when the petitioner has 'shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.' RCW 10.73.170(3).
>
> In this case, the trial court properly concluded Riofta failed to satisfy the statutory standard, considering the strength of the eyewitness identification, the evidence of motive, and the limited probative value of the DNA evidence sought.

Id., at 373 (Emphasis added).

Here, defendant asks this Court to conclude that the results of the requested DNA testing combined with all the other evidence produced during trial would make it more probable than not that the defendant is actually innocent. If the requested testing produces results that are negative for the presence of defendant's DNA, such would not necessarily constitute new significant evidence. Such a result would not exculpate defendant since he would still be guilty if any of his accomplices were armed with, or used, the knife. A positive DNA result on the knife would not necessarily constitute new significant evidence either since the presence of defendant's DNA on the knife was not a factor during the trial. Defendant argued to the jury that he did not commit the charged crimes, yet the jury weighed the credibility of the evidence produced and returned verdicts of guilty as charged.

IV. CONCLUSION

Defendant has failed to prove that the DNA testing sought by this motion would result in any new significant material which, when combined with the existing body of evidence, would make it more probable than not that the defendant is innocent. Accordingly, the State respectfully requests that the defendant's motion for DNA testing pursuant to RCW 10.73.170 be hereby denied.

Respectfully submitted this 11th day of December, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorneys for Plaintiff

COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	
Plaintiff,	)	No. 07-1-03758-7
v.	)	REPLY BRIEF
ANTHONY ALLEN,	)	
Defendant.	)	

The State's response basically boils down to an argument that the defendant must prove what the DNA results will be before such a motion can be granted. This is simply not the law. The State uses language such as the "defendant claims that there is reason to *believe* that the blade and handle of the knife has sufficient biological deposits of evidence..." (emphasis in original). Respondent's brief, p. 6. This is not merely a belief; there were swabs taken and stored as evidence in this case. There definitely is biological evidence, collected solely for the possibility of forensic testing, which exists. The State also claims there could be no other such evidence found because a technician looked at the knife and did not see any trace evidence.

Respondent's brief, p. 6,7. Obviously, DNA is not visible to the naked eye. The fact that the knife was handled means there is DNA present. The question is whether enough of it can be collected for an identification. The State speculates that there is not enough of a sample. However, the defendant does not have to prove that a DNA test will yield a successful result, or what that particular result will be, despite the State's suggestion otherwise.

The State goes on to argue that any result of a DNA test on the knife would not present significant new evidence because the presence of DNA on the knife was not a factor at trial. Respondent's brief, p. 9. However, that begs the question because if the DNA testing had been done it would have been a factor at trial, either for the State or the defense. The reason a DNA result would be significant is because it could establish who did or did not have the knife during the commission of the crime.

The State argues tries to distinguish this case from Thompson and Gray by stating that the knife in the present case "likely was handled by multiple people prior to the incident". Respondent's brief, p. 8. It is pure speculation as to how many people handled this knife, and in fact, conflicts with the evidence at trial. The evidence was that only one person was holding the knife, that person being the defendant. If the defendant is excluded as being the person holding the knife, then he is probably innocent of assaulting anyone with the knife. The State is attempting to increase the burden on the defense beyond showing probable innocence, and wants to force the defendant into retrying the case through this motion. That is far beyond what the statute requires. The defendant does not have to establish that a jury would find him innocent at this stage, merely that it is more probable than not that he is innocent. The State

further argues that the DNA is irrelevant because even if it excluded the defendant as the person using the knife, he could be found guilty as an accomplice. Again, the State is stretching the statute to force the defendant to speculate about every possible verdict. The State's witnesses at trial were not claiming that Mr. Allen was merely an accomplice; the testimony was the Mr. Allen was the principal and was the only person armed with the knife. The State may want to argue a new theory at trial, but that is not the proper subject of this motion.

The fact is that the trial testimony showed only one person was in possession of the knife and used it to commit the assaults. If DNA excludes the defendant of possession the knife, then that is sufficient to establish innocence on a more probable than not basis.

The defendant has met the procedural requirements of the statute. DNA results would be significant new evidence because it would either corroborate or contradict the main testimony at trial placing the knife solely in the hands of the defendant. A result that excludes Mr. Allen as handling the knife would establish innocence on a more probable than not basis because if the evidence was that only one person held the knife, and it was not Mr. Allen, then somebody else is responsible, just as Mr. Allen has always claimed. The defendant asks the Court to grant his motion and order DNA testing on the knife held as evidence in this case.

Respectfully submitted this 2nd day of January, 2013.

John Stine, WSBA #26391

APPENDIX B:
(B 1-26)

1. Verbatim Report of Proceedings
   Post-Conviction Hearing
   January 10, 2011

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent, v. ANTHONY L. ALLEN, Appellant.	) SPOKANE COUNTY) SUPERIOR COURT) NO. 07-01-03758-7)) COA NO. 31578-9)

VERBATIM REPORT OF PROCEEDINGS

BEFORE: The Honorable Kathleen M. O'Connor
DATE: January 18, 2013

APPEARANCES:

For the Respondent:
SPOKANE COUNTY PROSECUTING ATTORNEY
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REPORTED BY:
MARK SANCHEZ
Official Court Reporter
Spokane County Superior Court, Dept. 4
West 1116 Broadway Ave.
Spokane, WA 99260
(509) 477-4415

B-1

MR. STINE: This is the State of Washington v. Anthony L. Allen, Case No. 07-1-03758-7. John Stine representing Mr. Allen, Mark Lindsey for the state, and Mr. Allen is appearing telephonically from Coyote Ridge.

THE COURT: Mr. Allen, you are on the phone?

THE DEFENDANT: Yes, I am.

THE COURT: And you can hear Mr. Stine?

THE DEFENDANT: Yes, ma'am.

THE COURT: Then counsel, let me identify what I have received in this matter. I received the defendant's motion for post conviction DNA testing pursuant to RCW 10.73.170, and attached to that motion and memorandum of authorities are a number of excerpts from testimony during the trial of the trial transcript. I suppose I should, for the record, identify which ones I have here. I have excerpts of closing argument from both the defense and the state in this matter. Then I have testimony from Detective Ferguson, testimony from Dewey Hudson. These are excerpts, not the entire testimony. Testimony of Karla Jones, again an excerpt. Testimony from Officer Baldwin. Testimony from Dr. Penaskovic. I do not recall how he pronounced his name, but he is the ER physician.

MR. STINE: Yes.

THE COURT: Then I have the state's

memorandum in opposition to the DNA testing under this particular statute, and I have a copy of the unpublished opinion that was issued by Division III of the Court of Appeals back -- it was filed back in September 22nd, 2009. And I presume a mandate then came out of that decision, correct? It did not go any further.

MR. LINDSEY: Correct, your Honor.

THE COURT: And then I have the defendant's reply brief. I believe I have all the materials provided. Mr. Stine.

MR. STINE: Thank you, your Honor. I believe Mr. Allen does meet the criteria to have a DNA test done on his case. I set out the requirements of the statute in the brief, the motion has been sent to the Office of Public Defense. I also believe he meets the second requirement in that DNA testing would provide significant new information on the case. In this case there was no DNA test, so whatever the result was would be new information for sure. And I believe it would qualify as significant new information under the State v. *Thompson* case. The definition of that was if the evidence would tend to either exculpate or inculpate the defendant as the perpetrator. And my analysis of that sort of runs into the main issue of the case of whether that testimony would show that, on a more probable than

not basis, he was innocent of the charges.

And what we're talking about, in my mind, is two things to be tested. There were swabs taken of a red substance on the blade of the knife that people at the trial referred to as blood, although there was never any indication it was actually blood. Not even a presumptive test was done on the substance, but it was referred to as blood throughout the trial. But there also could be testing done on the other parts of the knife, including the handle. And either one of those, I think, depending on the result, could show that Mr. Allen was innocent of the charges. And I think it's important to note that Mr. Allen doesn't have to show what the result would be at this point, just that if there was a result that was favorable to him, then that could show that he was more probably than not innocent.

My first thought when I read through the transcript was the testimony was pretty specific that for Ms. Jones, that Mr. Allen was the only person in possession of the knife that she saw. And Mr. Hudson had testified at trial that Mr. Allen didn't do anything at all, and then was impeached with his prior statements to the officer that Mr. Allen was involved in the fight. But at the trial, the main testimony was from Ms. Jones stating Mr. Allen was the only one in possession of the

knife.

If a DNA test is now done on the handle of the knife, and even if there's a mixture of DNA on the knife - the labs are getting pretty good at being able to sort that out and the various contributors - Mr. Allen could be excluded as a contributor to the DNA on the handle, which would bolster his claim that he didn't have the knife in his possession at all, and that it was somebody else holding the knife committing the acts that Ms. Jones testified to.

The part that I think Mr. Allen had talked about more with his counsel at trial is having the red substance testify -- or tested. And if that actually did come back as blood, and in fact came back as Mr. Allen's blood, that would bolster his testimony that he was just trying to break things up and that somebody else was wielding the knife during the incident. It appeared from the trial transcript, and I'm sure the court has at least some memory of this trial, it sounded like it was quite a fracas, there were several other people involved, at least two other co-defendants. So there's at least some possibility that somebody else there was using the knife if, in fact, Mr. Allen is excluded as a contributor to DNA on the handle. I think everybody recognizes that if somebody is wielding a

knife, and in a melee like this, then other people can be injured other than the intended victim. That was, I think, Mr. Allen's thrust at trail.

It appeared from the transcript that there had been an ongoing disagreement between him and trial counsel during the course of what evidence to present or how to present it. I wasn't here, so I can only speculate how much of that went on. But it appeared that there was some dispute about what Mr. Allen wanted to present to the jury versus his trial attorney.

But I think, if a DNA test is done and the result is favorable to Mr. Allen, and either the result from showing it's his blood on the knife or excluding him as a contributor to the DNA on the handle, that bolsters his testimony of being more of a bystander, trying to break it up. But to me, more importantly, it directly contradicts the state's main witness, Ms. Jones, saying Mr. Allen was the only one wielding the knife during all of this. If the DNA came back excluding him as a handler of the knife, from the transcript, that didn't leave much evidence that he was actually the attacker.

If the DNA comes back showing that it was his blood on the blade, again that would seem to refute Ms. Jones's suggestion that he was holding it and using

it to assault other people. Under her testimony, she wouldn't have any way of exploiting Mr. Allen's blood on the blade. So I think a favorable result would establish his innocence on a more probable than not basis. And again, that's the burden he has to meet. He doesn't have to prove innocence clear and convincingly or beyond a reasonable doubt, just that it's probable that he's innocent.

And assume we could probably at least venture a guess, with all of these people saying all kinds of different stories before trial and at trial, if scientific DNA evidence were introduced into that, it seems that would probably be the evidence that would be more compelling to most juries than having all of these people with the conflicting statements that were presented at trial.

So I would ask the court to find that he has met his burden under 10.73.170. I know the state argued things like it wouldn't necessarily prove he's innocent because he could be convicted as an accomplice, things along those lines. But from my reading of the transcript, that wasn't anybody's theory at the trail. It was that he was wielding the knife and he committed these assaults.

If there was a new trial, I guess the state

would be free to argue accomplice liability at that point. But I don't think, at this stage, Mr. Allen has to refute all possible arguments that could come in retrial. He just has to show a result in his favor would probably show that he was innocent. I think he meets that burden.

Does the court have any questions?

THE COURT: No I don't, Mr. Stine. Well, let me ask you this. I assume you read the unpublished opinion.

MR. STINE: Yes.

THE COURT: Really the thrust of that opinion was ineffective assistance of counsel. And yet not one word, not one word in that opinion, refers to this knife. I find that extremely interesting.

MR. STINE: I think it's indicative of the conflict between Mr. Allen and his trial counsel throughout the entire thing, from what I could tell. He wanted to pursue a certain defense. He had wanted DNA testing done and his counsel didn't want to do that, and just went with the theory that everybody's gonna come in and say something different so the jury's not gonna believe anybody and acquit you. Which isn't necessarily a bad strategy, per se, but it didn't work in this case. And I think having a DNA result before you made that

decision might have worked out better.

THE COURT: And I do not disagree. But I guess the query is that this -- it seemed to me, this was a viable appellate issue under ineffective assistance of counsel and it was not ever raised.

THE DEFENDANT: I can answer that.

THE COURT: No. I am not positing my question to you, Mr. Allen.

MR. STINE: I'm not sure who did. I think it might have been Mr. Bugby, Mr. Richter that handled the appeal. I don't know. And I don't know why they didn't bring it up. It seemed like there was a lot of other things they brought up and that may have been lost in the shuffle of other things. With the testimony from the officer repeating what Mr. Hudson told them, that was the big thing that jumped out at me, that there should have been some objection and instruction given regarding that. But it appeared they brought up lots of other issues. I don't know why they didn't bring up this.

THE COURT: I noted that when I was reading it. I thought that was -- that's an interesting fact. Whether that has any bearing or not is another matter, but it's an interesting fact. Mr. Lindsey.

MR. LINDSEY: First of all with respect to

how *Thompson* -- the Supreme Court's decision in *Thompson* plays into this particular case, it's important to recognize that when Supreme Court was deciding and resolving the issues in *Thompson*, there was only one possible -- in each of those two cases, there was only one possible perpetrator, one possible source for the DNA that was sought to be tested. That's not so the case here. Hence, as the state argued in its brief, this case would come more under the analysis of *Riofta* than it would under *Thompson*, because in *Riofta* you had multiple --

THE COURT: That is the hat, right?

MR. LINDSEY: Correct.

THE COURT: I have had occasion to read all these cases.

MR. LINDSEY: Right.

THE COURT: But before I go too far along, and it seems to me correct me if I am wrong, it seems the knife we are talking about is a kitchen knife, a butcher knife.

MR. LINDSEY: Yes.

THE COURT: Something that you could go into somebody's kitchen and get it from their drawers, as opposed to a knife somebody carries on their person.

MR. LINDSEY: Correct. And that's part of

the problem here, is you have a situation where now the arguments to the court are basically bringing additional facts or possible factors into this, something the jury had never heard. Now we're going to basically switch our theory of the case from "I never touched the knife" to "I may have touched the knife or I probably touched the knife or I could have touched the knife, and that would have proved I was innocent because I was defending myself." Well, that is a completely different theory, and it is completely outside the record and the testimony. And it is the evidence that the jury decided this case on.

And the statute simply does not allow for that type of a circumstance. The statute is very specific. It provides an opportunity, but it's a narrow opportunity. It says that if you had this additional evidence in light of the existing record, would you be -- would the person be more probably than not innocent of the crime. Not that they could, but that they would more probably than not. And actually, we're going past the 50/50 at the point. The scales of justice are not equal at that point in time. We're saying that he's not guilty. That the inclusion with the body of evidence as it existed before that jury, which include the results of the DNA test, the DNA test

would basically turn it to a not guilty. That's the statute. That's what the statute says. That's what the narrow requirement is.

THE COURT: I do not disagree with you. Are you -- just as a theoretical matter. If you could test on the handle, which you have raised as to whether or not that is even possible. Just assuming for the moment it was possible and it came back excluding the defendant, do you think that would be relevant?

MR. LINDSEY: It would be relevant. But the problem with that type of a circumstance is, all it does is say "well, that's a theory that already existed before the jury." That is a theory that was already premised or proffered to the jury, and the jury said -- based upon the circumstances, they weighed the credibility of that theory and found it lacking. So we've already tried that case. We've already tried that case to the jury. So if his DNA is not on the -- not on the knife, we haven't really changed the body of evidence at all. If it isn't on the knife, we haven't really changed the body of evidence at all, it remains the same. The situation with respect to the knife basically is almost a non-starter because what we're asking -- what Mr. Allen is asking, is basically for the court to allow him to slightly shift his theory.

Well, that's not what the statute allows for. The statute was passed in 2005 for a very genuine and good reason. And I think that's exactly what the Supreme Court was talking about in *Riofta*, and precisely what they -- why they went further in *Thompson* and said if you have this situation, we have one perpetrator, we have only one -- in *Thompson* we have only one possible source of the vaginal/seminal fluids, only one, so test it. And in that circumstance, I'm not sure if the trial court denied it, but they just didn't test it. And the Supreme Court says no, no, no, this is exactly what this is for. But in *Riofta*, you remember, they backed off of that and said that you're gonna have to do a little bit more here to prove the DNA is somehow going to shift the burden and make this a not guilty as opposed to a guilty. Because, after all, in order to actually get to a guilty conviction, the jury has to find the elements of the offense beyond a reasonable doubt.

And so this isn't just a little bit of evidence, this is a significant amount of evidence that the DNA testing is going to provide that is going it overcome that proof beyond a reasonable doubt. I think that's exactly the reason why the legislature was very careful in how it crafted this, and that the Supreme Court has been very circumspect in how they've

interpreted it so that they don't -- and they've come out and said look, this is not for purposes of a new, direct appeal for retrying a case.

This is simply to look at would this change a guilty of beyond a reasonable doubt finding to a not guilty. And based upon the representation, I don't believe the state respectfully requests or submits that Mr. Allen simply hasn't met threshold to qualify under the statute because the possible results of the DNA test are to either exclude his DNA or to include it. Neither one of which changes the basic theory of the case. Not for the one that was presented to the jury. But it would present a different theory of the case if he's gonna switch from the fact that "I never touched it" to "of course I touched it, I was defending myself."

So aside from the possibility that there's simply, based upon the forensic -- the forensics, looking and visually examining the knife and not seeing any sort of circumstance, and understanding, of course, DNA can be absolutely microscopic, but you still have to have something there. There's not even a significant likelihood that there is a sufficient biological sample to even test.

THE COURT: I saw there was a citation to the record in that, but I wanted to see. And I did not

see the actual. Did somebody ask the forensic -- what was her name, Jody...

MR. LINDSEY: Dewey.

THE COURT: Did they ask her specifically whether or not they could test anything on that? Did people even examine her about that directly? I could not tell from the citation.

MR. LINDSEY: Ms. Dewey was called for purposes of discussing the test for -- examination for latent fingerprints.

THE COURT: Fingerprints.

MR. LINDSEY: And she indicated that as part of the process, that she visually examined the knife and didn't see any traces of substances on it. I have the transcript.

THE COURT: What I'm referring to is the representation that because the knife was tested for fingerprints, that that would, more likely than not, at least, obliterate anything in the area where the fingerprint dust was. That is what I gathered from what you were saying. And did she say that? Or did anybody ask her that or did anybody even talk about DNA?

THE DEFENDANT: No.

MR. LINDSEY: Well, I'll let Mr. Stine respond and I'll look for that.

THE COURT: I read from the paraphrasing that maybe somebody inquired, and she concluded and said if I dust for fingerprints, I am going to eliminate any DNA. Which, by the way, that kind of testimony I have heard in another trial that says that. But my question is, did anybody ask her. Which, of course, would then bring up the issue of why there was no DNA testing. So my sense is I kind of doubt that anybody asked her that question.

MR. LINDSEY: I'll read through it.

MR. STINE: I don't recall seeing it. I'm sure Mr. Lindsey will find it there.

THE COURT: Then it raises the DNA issue in front of the jury.

MR. STINE: Right. I think her testimony was just that she had taken swabs of the red substance.

THE COURT: She dusted for fingerprints on the handle.

MR. STINE: Right. Now, Mr. Allen is not now saying that he touched the knife, that he touched it because he was defending himself. He's saying he didn't have the knife, and the DNA test would prove that; it would either exclude him from being the person hanging onto it by the handle, as Ms. Jones testified to. And if the red substance does, in fact, turn out to be his

blood, then the argument would be somebody else was holding the knife, and he was injured from them holding it, not that he was holing the knife and somehow injured himself.

And in regards to the *Thompson*, I believe there was one other case that involved...

THE COURT: Rape.

MR. STINE: The rape case with the one possible perpetrator. If the woman had said she'd been raped by two people, it still wouldn't have changed the outcome of the case. The test still could have excluded Mr. Thompson as one of the two people who had been the perpetrator in that case. So I don't think it's necessarily limited to cases where there's only one possible suspect. There could have been ten people who had raped her, but the tests still could exclude Mr. Thompson as one of those ten people.

And similarly in this case, there may have been more than one person handling the knife, but the trial testimony was that only one person was holding the knife, and that only one person was Mr. Allen. So I think even under the facts of *Thompson*, that test would still be allowable under the statute. But even if a couple different people had been holding the knife, I still think a test could exclude Mr. Allen as being one

of those two or three people holding the knife. So I still think he could get a result excluding him from handling the knife, which, as I said, would directly contradict the state's main evidence at trial that he was the knife wielding assailant in this.

So I still think he's entitled to a test because a good result would show more probable than not that he's innocent. Again whether he would even -- if a test is done, whether he could even get a result and what that result would be, he doesn't have to be establish. He has to show if there is DNA recovered, and the result's favorably, it shows innocence more probably than not and I think he meets that.

THE COURT: Thank you, counsel. Did you find anything in the record?

MR. LINDSEY: I did, your Honor, and I'll...the examination of Ms. Dewey basically starts on report of proceedings page 255. She talks about her background, etc., and then they start talking about the knife itself. She indicates that she examined the kitchen knife. That when she -- then counsel asked what exactly did you do in processing that knife.

"When I processed this knife, I processed with Super Glue," is what she says, "followed by black powders. And then I processed it with yellow dye stain

that excites or is best visibly seen at 450 nanometers with yellow goggles with a forensic light source."

Question: "Prior to doing any applications to see if you could lift any prints on the knife, did you observe any substances on the knife itself?"

Answer: "Yes. Before processing the knife, I photographed the item with and without a scale. There was a red substance on both sides of the knife of the blade by the hilt. I obtained two samples, one from each side, of the red substance. I did not take a control sample due to the fact that it was going to be processed for fingerprints."

And they handed Ms. Dewey the knife, asked her to look at the photographs she took, and then asked if those were -- asked if they were accurate. Those were admitted. At that point in time, they asked Ms. Dewey to examine the knife here in the courtroom. And she -- in the process of doing so, she indicated that she recognized the knife. After removing the knife, she noted that -- the residues that she had referred to previously that still were there. Specifically the powders that had been applied to the blade of the knife to try and lift a print. That was a question. And she said yes --

THE COURT: To the blade?

MR. LINDSEY: To the blade.

Question: "So those are powders that you applied to the blade of the knife to try to lift a print; correct?"

Ms. Dewey: "Yes. There's black powders which I referred to that I used earlier, and there's also evidence of the yellow dye stain."

"Did you also try to check the handle of the knife?"

"Yes. I processed the knife in its entirety."

"Were you able to lift any latent fingerprints from the knife?"

"No, I was not. Was not able to lift any latent fingerprints, nor was I able to photograph any fluorescing fingerprints off the knife."

Question: "With respect to the section of the knife where you indicated there was a red substance, could you indicate where that substance on the knife was located?"

Ms. Dewey responded: "There was red substance in the area of the knife, this area," meaning she showed it to the -- pointed it out to the jury. "Also on this same area on the opposite side of the knife, the end the blade towards the hilt."

Question: "What happened to the red substance that was on the knife?"

Answer: "I collected it."

She took a sterile swab, applied just a little bit of water to that swab to get the substance to adhere to it, and then they placed it in a sterile box and taped it up. I believe on cross-examination, counsel went into further discussions about trace evidence and asked, "Why would that be called trace evidence?" Because Ms. Dewey had indicated that she did a visual examination. And the response was, "Latent fingerprints are quite specific because it has to do with the impressions that we leave behind. Trace evidence refers to any of the other evidence that can be collected and tested; hairs, fibers, substances. Anything that gets sent off to be tested."

Question: "Now as far as fingerprints on the grip of the knife, is there something about that that would make it less likely prints would be there?"

Ms. Dewey: "On this particular knife, as with all knives, the best surface is the blade. In the normal handling of the knife, individuals don't typically handle the blade because it's sharp. This handle is a wooden handle, it has wood grain in it. It also has a lacquer finish. It allows it to be a better

surface for latent prints. However, because of the wood grain is also -- and the texture and the background that could interfere with the ridges being left behind."

Question: "Can you tell if the handle had been wiped?"

Answer: "Sometimes you can. Many times on this surface or a countertop, let's say, once you apply the fingerprint powders to the surface, you can see spotting, water spotting, or something that someone has cleaned it with a chemical and used a rag, you can see the smearing of the cleaner itself. I do not recall that I noticed any of that in processing this item."

She was asked about the condition knife --

THE COURT: What I am really looking for is whether or not she was asked either whether there was any processing of DNA from the handle of the knife, or she responded to some question that because the fingerprint powder was on the handle, you wouldn't be able to pick up any other items of DNA off the handle. Did she ever make that kind of statement?

MR. LINDSEY: No. That's not what she related here, no.

THE COURT: That seemed to me to be the implication of what I was seeing, was, somehow or another, another reason is because we couldn't test the

handle is because she couldn't get anything. And as I say, I've heard that myself in other cases. But this isn't what I've heard in other cases, this is what this record reflects. I take it that that question just was not posed to her. Essentially when you're taking fingerprints, you run the risk of destroying DNA.

MR. LINDSEY: In response to a question about something similar to that, this is Ms. Dewey's response.

The question is: "Would your inquiry or curiosity be in a case that with a serious one supposedly," and they're referring to the red substance.

THE COURT: Is that the state or the defense?

MR. LINDSEY: This is the defense. This is cross-examination.

THE COURT: Okay.

MR. LINDSEY: The answer: "Sometimes. Not very often, no. If we inquire about it, sometimes we are known about it. But those are released to the detective and then taken to the facility that does the testing, which is not our office."

So she's referring to whether --

THE COURT: Goes on to DNA testing.

MR. LINDSEY: Right. She basically doesn't

do that. Okay. That's, again, with the same sort of question.

"Sometimes, most often, if we are made aware of the outcome of the swabs, it's mostly due with the handling of the item itself. Sometimes if there is going to be both things done, DNA and printing, if there is a red substance on the item and it possibly might be blood, and there may be both fingerprints needed to be processed and it needs to be sent off for DNA, then there has to be a communication in conjuncture of that, which is more important in how to handle the item so that both of those things can be done without obscuring either one or the other. But outside of that, we really aren't kept abreast of the information about DNA unless we inquire."

THE COURT: So the implication being that somebody has to tell you they want you to do both.

MR. LINDSEY: Right.

THE COURT: She's saying that did not occur.

MR. LINDSEY: Correct. That is my interpretation.

THE COURT: I do not have any independent recollection of the testimony.

Counsel, I am going to cogitate over this. I do not like to just sit here and do my usual oral

opinion. Because I had another one of these, a little bit more complex than this one, and I want to think about it. There are things that I need to work through a little bit here.

I am very familiar with the case law, though there is not much of it. And there are really only a few key cases in this whole area. As I say, I have some recollections of this case. I have some specific recollections of Mr. Hudson's situation, his reluctance to testify, and all the things they went through with regard to that. I have some recollection, but not a lot. And of course this is not really about what happened at trial particularly, since this issue wasn't litigated at trial. And as I say, it is kind of interesting it was not litigated in the ineffective assistance of counsel, either.

Be that as it may, counsel, I hopefully would like to get something out next week. I say that because then I am going on vacation the next week. But I cannot guarantee it because I am in a trial that we are working hard to get done. I will see what I can do. If not, I have to attend to it when I get back in February.

MR. LINDSEY: Would the court like to borrow a transcript?

THE COURT: Sure. The trial transcript? You have your own, haven't you?

MR. STINE: Yes.

MR. LINDSEY: If I may approach, your Honor.

THE COURT: Nobody ever gives me the trial transcript unless I need it. So then, with that we will close it up. I will get back with you with a written opinion. Hopefully next week, but do not take that to the bank. I will try to do it, but we will see how much I can get done on Monday because that is really the only time I have to do anything.

Thank you very much, Mr. Allen, for being with us. And Mr. Stine will send you a copy of my written opinion.

THE DEFENDANT: Would you like to know why this wasn't brought up on my direct appeal?

THE COURT: No. It is just more of a factoid at this point. You can talk to your lawyer about it. But no fair talking to me without talking to your lawyer, who can tell the state what you are going to say. Okay?

THE DEFENDANT: Okay.

THE COURT: Thank you.

THE DEFENDANT: Thank you.

THE COURT: Bye-bye.
(In Recess.)

APPENDIX C:
(C 1-6)

1. Order Denying Post-Conviction Motion

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APR 09 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY	
STATE OF WASHINGTON, Plaintiff, Vs. ANTHONY LAMAR ALLEN, Defendant.	NO. 2007-01-03758-7 ORDER RE: MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO RCW 10.73.170

I. BASIS FOR MOTION

The defendant filed a Motion for Post-Conviction DNA Testing Pursuant to RCW 10.73.170 on November 29, 2012. In the motion defendant asks the court to order DNA testing of a butcher knife and the swabs taken from the blade of the knife. Thereafter, the court received the following pleadings:

- Memorandum in Opposition to Motion for DNA Testing Under RCW 10.73.170
- Reply Brief

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The court also received a copy of the transcript of the trial that commenced December 17, 2007. Oral argument on the motion took place on January 18, 2013.

II. SUMMARY OF FACTS

The defendant was convicted of kidnapping and two counts of assault with a deadly weapon. The victims were Ms. Karla Jones and Mr. Dewey Hudson. Both victims had known the defendant, Mr. Anthony L. Allen, for many years. Ms. Jones indicated at least 20 years. RP 145. Ms. Jones testified that Mr. Allen assaulted her. Mr. Hudson initially identified the defendant as his assailant to Officer Baldwin at the time the incident occurred. However, when Mr. Hudson testified at trial he disavowed his prior identification of the defendant and claimed he was never assaulted. The state called Officer Eugene Baldwin in response to Mr. Hudson's trial testimony.

In its unpublished opinion, Division III of the Court of Appeals identified the following facts:

> In response to the State's questions about what Mr. Hudson had told him, Officer Baldwin later testified:
>
> > I basically explained to [Mr. Hudson] how bad Karla had been beaten up, and that seemed to trigger in [Mr. Hudson's] own mind how important it was to tell the truth about what had happened, and so he began telling me mostly what had occurred at his house.
> >
> > . . . .
> >
> > He said that [Mr. Allen and another man] were beating up Karla real bad. He said that he tried to get in the middle of it and stop them . . . [and] that [Mr. Allen] had hit him with a small caliber framed handgun that he had, and he said he was hit several times, and he, also, lost consciousness.

State v Allen, No. 26978-7-III, (2009), RP (Dec.18, 2007) at 202-04.

A butcher knife was found at the scene and two swabs were taken but DNA testing was

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not done on either the knife or the swabs.

III. ANALYSIS

RCW 10.73.170 has both procedural and substantive requirements. The defendant has met the procedural burden of RCW 10.73.170(2)(a)(iii) because the requested DNA testing will produce significant new information as DNA testing was not done prior to trial.

The dispute is whether or not the defendant has met the substantive requirements of the statute, specifically 10.73.170(3) "The court shall grant a motion ... if... the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."

"The statute requires a trial court to grant a motion for post-conviction testing when exculpatory results would, *in combination with the other evidence,* raise a reasonable probability the petitioner was not the perpetrator." *State v. Riofta,* 166 Wn. 2d, 358, 367, 368, 467, 472 (2009).

The defendant alleges that the presence of his blood on the knife would demonstrate that he was not the assailant. Specifically, "If the red substance is determined to be the defendant's blood and/or his DNA is not present on the handle of the knife, that result bolsters is testimony".

The potential results in the instant case are similar to those discussed in *Riofta.* The absence of defendant's DNA and/or the presence of another person's DNA and/or the presence of the defendant's blood on the knife are likely to demonstrate his innocence on a more probable than not basis.

The evidence in the case is that the defendant knew both victims for many years. Both victims initially identified him as the assailant and Ms. Jones also identified him at trial. Mr. Hudson did not identify the defendant as the assailant at trial; however, the jury heard testimony from Officer Baldwin that Mr. Hudson had identified the defendant as the

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assailant at the time of the initial investigation. The butcher knife came from Mr. Hudson's kitchen and could have been used by many persons, including the defendant, in the past. There is no evidence of the presence of blood of the defendant in the record. There is no testimony that he was stabbed or nicked. There is testimony that Ms. Jones had blood on her head where he hair was cut. RP 195-196

The fact that the presence or absence of the defendant's DNA on the knife may bolster the defendant's testimony is not sufficient to meet the statutory standard of "innocence on a more probable than not basis" of RCW 10.73.170. Considering all the evidence in the case the defendant's motion for post-conviction DNA testing is denied.

Dated: April 9, 2013.

Kathleen M. O'Connor
Superior Court Judge

Judge Kathleen M. O'Connor
Spokane County Superior Court
1116 W. Broadway
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, vs. ANTHONY LAMAR ALLEN, Defendant.	)	No. 07-1-03758-7 ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION DNA TESTING

I. BASIS

The defendant moved the Court for an order to have post-conviction DNA testing conducted on a knife and swabs taken from that knife. The motion was made pursuant to RCW 10.73.170.

II. FINDING

The Court finds there is not good cause to grant the motion. The Court's findings are set forth in its attached written ruling, and are incorporated into this order by reference.

III. ORDER

The defendant's motion for post-conviction DNA testing under RCW 10.73.170 is denied.

Done in open court this 10th day of April, 2013.

JUDGE

Presented by: awaiting approval

Mark Lindsey
Deputy Prosecuting Attorney

Approved as to form:

John Stine
Attorney for Defendant 26391

APPENDIX D:
(D 1-2)

1. Appellant's Letter to Counsel, David Gasch

Hello Mr. Gasch, Sep. 25, 2013

I recieved that legal mail today and I want you to know I real appreciate your assistance in that matter. I apologize for any misunderstanding and inconvienance I may have caused by the miscommunication between my fiom and I. I am attempting to get money added to my phone account so that I can call you because I reviewed the opening brief you intend to file and I have immediate concerns with this brief. I wuld ask, respectfully, th you not submit this particular brief until we have an opportunity to discuss a few issues. Because if you recall, I phoned you not long ago and informe you about the current exhaustion issues I am having in the federal court due to previous appellate counsel's failure to federalize and preserve the issue for federal review. At the time, you stated you was well aware of preserving my claim so that I will meet the exhaustion requirements. However, you did not cite federal case law nor raise due process issues like we discusse when it appears you also misstated facts by suggesting to the C.O.A I knowing intervened and/or participated in the fight which I did not do. During trial, I denied all involvement in the incident. Then you also misstated evidence by suggesting Det. Ferguson testified that the red substance "may have been blood when throughout trial proceed as the certified criminalist declared the red substance was the victim's blood beyond all possible doubt and the State used this as evidence to convict me. Whether concerns in the way you stated my reason for the DNA test by suggesting it will "discredit witnesses testimony". This is n my reason for DNA test. I just rather, to show my actual innocence that I did not assault either victim with this knife and the DNA on this knife is in fact mine. The DNA test will disprove the State's allegations and establish new evidence the jury was unaware of at the time of trial. prove my innocence.

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What I propose and what I am asking you to do is to either ammend your brief to federalize the claim as you are aware of my pending habeas petition which includes that ~~issue~~ DNA issue, and correct the facts as mentioned above, or if need be, please withdraw your brief if I am unable to call you to make this request; because your brief seriously misstates the material facts in my case.

I look forward to your immediate response and assistance in this matter, Mr. Gasch. Thank You for your time...

Respectfully Submitted,

Anthony L. Allen