SUPREME Ct. No. 94361-3
Ct. APP. No. 47960-5-II

IN THE SUPREME COURT FOR WASHINGTON STATE

STATE OF WASHINGTON,
RESPONDENT,

V.

JEROME CEASAR ALVERTO,
PETITIONER,

PETITION FOR REVIEW
OPENING BRIEF

PRESENTED BY:
JEROME CEASAR ALVERTO

MONROE CORR. CMPLX.
P.O. BOX 777
MONROE, WA. 98272

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IN THE SUPREME COURT FOR WASHINGTON STATE

STATE OF WASHINGTON, RESPONDENT, V. JEROME CEDGAR ALVERTO, PETITIONER.	SUPREME COURT No. (C.O.A. No. 47960-5) PETITION FOR REVIEW (R.A.P. 13.4)

I. IDENTITY OF PETITIONER

COMES NOW, JEROME CEDGAR ALVERTO, PRO SE, ASKS THIS COURT TO ADHERE TO LESS STRINGENT RULES UNDER HAINES V. KERNER, 404 U.S. 519, 92 S.Ct. 594 (1972), AND REQUEST THIS COURT ACCEPT THIS PETITION FOR REVIEW OF THE ISSUE(S) PRESENTED HEREIN, GRANTING THE RELIEF REQUESTED IN SECTION II BELOW.

THIS PETITION FOR REVIEW IS SUPPORTED BY AFFIDAVIT OF JEROME CEDGAR ALVERTO ATTACHED AS ATTACHMENT 1.

II. RELIEF REQUESTED

MR. ALVERTO REQUESTS THIS COURT REMAND THE CASE FOR POST-CONVICTION DNA TESTING.

III. Facts

ON MAY 13, 2006, STEPHANIE WILSON DRANK ALCOHOL, REPORT OF PROCEEDINGS (RP) (AUG. 6, 2008) AT 327-28, AND FOUGHT WITH HER BOYFRIEND, ERIC ROGERS, RP (JULY 30, 2015) AT 7, BECAUSE HE WAS NOT PAYING ATTENTION TO WILSON. RP (AUG. 6, 2008) AT 265. WILSON WAS "UPSET" WITH ROGERS. RP (AUG. 6, 2008) AT 326. SHORTLY THEREAFTER, WILSON WAS ATTACKED AND SHOT MULTIPLE TIMES. RP (AUG. 6, 2008) AT 273, 286-90.

THE ATTACKER WORE DARK CLOTHING AND A BANDANA COVERING HIS FACE. RP (AUG. 6, 2008) AT 274, 363.

WILSON FOUGHT WITH HER ATTACKER, STARTING AT HER HOME, RP (AUG. 6, 2008) AT 273, AND ENDING ON HER NEIGHBOR'S BACK PORCH, RP (AUG. 6, 2008) AT 286, WHERE POLICE DISCOVERED A "HEAP", RP (AUG. 13, 2008) AT 857, ~~ALIVED~~ TRAPPED IN WILSON'S BLOOD. RP (JULY 30, 2015) AT 8, 10.

MEDICS AND POLICE ARRIVED, THEY FOUND ROGERS COMING OUT OF WILSON'S HOUSE SHORTLY AFTER THE SHOOTING OCCURRED,

RP (JULY 26, 2008) AT 92, RP (AUG. 7, 2008) AT 171-72, AND BEFORE THEY FOUND WILSON.

MR. ALVERTO LIVED A FEW MILES FROM WILSON'S HOME. MR. ALVERTO HAS NEVER BEEN TO WILSON'S HOME, OR THE SCENE OF THE CRIME. RP (JULY 30, 2015) AT 6. AT THE TIME OF THE INCIDENT, MR. ALVERTO WAS ARRESTED AT HIS OWN HOME BY DEPUTY BRIAN CLINE. DEPUTY CLINE APPROACH SEVERAL POLICE CAR THAT ARRIVED ONSITE. PRIOR TO BEING ARRESTED, MR. ALVERTO DID "NOT INITIALLY..." "[HAVE] BLOOD ON [HIS] CLOTHES", RP (JULY 30, 2015) AT 7, "...[NOT UNTIL DEPUTY CLINE WIPED BLOOD ONTO MY PANTS, BECAUSE I WATCHED HIM DO IT]". RP (JULY 30, 2015) AT 7 (THE COURT FAILED TO TRANSCRIBE THIS PORTION OF THE RECORD). AT TRIAL, NO EXPLANATION WAS OFFERED ABOUT HOW THE BLOOD WAS PLACED ONTO MR. ALVERTO'S PANTS.

WILSON GAVE HER "OPINION" THAT MR. ALVERTO BROKE INTO HER HOME TO COMMIT THE CRIME. RP

(AUG. 6, 2008) AT 357-58. POLICE FOUND NO SIGNS OF FORCED ENTRY INTO WILSON'S HOME. RP (AUG. 12, 2008) AT 686. ROGERS HAD WILSON'S AUTOMATIC GARAGE DOOR OPENER, WHICH ALLOWED ACCESS TO HER HOME. RP (AUG. 12, 2008) AT 639.

MR. ALVERTO WAS ARRESTED WITHIN MINUTES OF WILSON BEING ATTACKED; MR. ALVERTO HAD ABSOLUTELY NO "BRUISES" OR "INJURIES" TO HIS PERSON AS WOULD BE EXPECTED IF HE'D FOUGHT WITH WILSON. RP (AUG. 13, 2008) AT 818-19, RP (AUG. 18, 2008) AT 1145-48. ADDITIONALLY, MR. ALVERTO HAD ABSOLUTELY NO BLOOD ON HIS HAIR, FACE, BODY, SHIRT, SHOES OR CAR AS WOULD BE EXPECTED IF HE'D FOUGHT WITH WILSON. RP (AUG. 13, 2008) AT 828.

POLICE ALLEGEDLY FOUND A "RIFLE" AND A "NOTEBOOK" CONTAINING A HANDWRITTEN "TO-DO-LIST", FOR KILLING SOMEONE, IN MR. ALVERTO'S CAR. RP (AUG. 11, 2008) AT 565;

RP (AUG. 13, 2008) AT 788.

THE PROSECUTOR PURPORTED THAT MR. ALVERTO USED THE "RIFLE", RP (AUG. 11, 2008) AT 565, TO COMMIT THE CRIME AGAINST WILSON. RP (JULY 16, 2008) AT 77. IT WAS LATER DISCOVERED THAT WILSON WAS SHOT WITH "A HANDGUN, NOT WITH A RIFLE", RP (JULY 16, 2008) AT 76, RP (AUG. 6, 2008) AT 318-19, CONFIRMING THAT POLICE FABRICATED THE ALLEGED RIFLE.

TWO NEIGHBORS SAW PART OF THE ATTACK, AND NEITHER WAS ABLE TO IDENTIFY WILSON'S ATTACKER(S). RP (AUG. 7, 2008) AT 420-23, RP (AUG 12, 2008) AT 650-53.

AT TRIAL, MR. ALVERTO'S PRIMARY THEORY WAS THAT ERIC ROGERS HAD ARGUED WITH WILSON AND THEN CAME AND HID INSIDE HER HOUSE. HE'D USED HIS GARAGE DOOR OPENER TO GAIN ENTRANCE, COVERED HIS FACE, AND IMPERSONATED MR. ALVERTO

WHILE ASSAULTING WILSON. RP (AUG. 19, 2008) AT 1298-1369.

IN JUNE 2014, MR. ALVERIO FILED A MOTION FOR POST-CONVICTION DNA TESTING OF THE ITEM, RP (AUG. 13, 2008) AT 857, HE SUPPORTED THE MOTION WITH: FIRST, NEWLY DISCOVERED TESTIMONY EVIDENCE OF MAURICE THROWER. THROWER STATED THAT AROUND JUNE 2006 HIS FRIEND, "E (ERIC ROGERS)", CONFESSED TO SHOOTING HIS GIRLFRIEND, WILSON, AND THAT HER EX-HUSBAND, MR. ALVERIO, WAS WRONGLY ACCUSED AND WRONGLY CONVICTED OF THE CRIME. THROWER GAVE AN ACCURATE PHYSICAL DESCRIPTION OF HIS FRIEND, "E", WHICH MATCHED IDENTICAL TO ROGERS. PHYSICAL DESCRIPTION. MEMORANDUM OF LAW (EXHIBIT 1) FILED JUNE 9, 2014, SUPP. CP.

SECOND, MR. ALVERIO SUPPORTED HIS MOTION WITH

NEWLY PRESENTED EVIDENCE OF A LETTER BY HANDWRITING EXPERT, DAVID GA. CUPP, WHICH CONCLUDED THAT ROGERS, RATHER THAN MR. ALVERIO, HAD AUTHORED THE NOTEBOOK, RP (AUG. 13, 2008) AT 786, THAT PROVED TO BE A CRITICAL PIECE OF INCULPATORY EVIDENCE AT TRIAL. MEMORANDUM OF LAW (EXHIBIT 2) FILED JUNE 9, 2014, SUPP. CP.

THIRD, MR. ALVERIO ALSO SUPPORTED HIS MOTION WITH NEWLY PRESENTED EVIDENCE OF PHONE RECORDS, SHOWING THAT HE DID NOT MAKE THE THREATENING TELEPHONE CALLS THAT WILSON CLAIM SHE RECEIVED JUST PRIOR TO THE ATTACK. MEMORANDUM OF LAW (EXHIBIT 3) FILED JUNE 9, 2014, SUPP. CP.

INITIALLY, THE TRIAL JUDGE GRANTED MR. ALVERIO MOTION. CP 1.

THE STATE FILED A MOTION TO RECONSIDER. CP 53.

THE TRIAL JUDGE FOUND THE STATE'S MOTION

UNTIMELY, BUT NEVERTHELESS RESCINDED HER PRIOR ORDER. CP 66

MR. ALVERTO APPEALED. THE DIVISION TWO COURT OF APPEALS AFFIRMED. UNPUBLISHED OPINION (MARCH 7, 2017).

MR. ALVERTO SEEKS DISCRETIONARY REVIEW.

THESE FACTS ARE SUPPORTED BY AFFIDAVIT OF JEROME CEDZAR ALVERTO ATTACHED AS ATTACHMENT 1.

CERTIFICATION OF THE FACTS

I, JEROME CEDZAR ALVERTO, DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREMENTIONED FACT ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE AND BELIEF

DATED: 3-29-17

JEROME CEDZAR ALVERTO

SWORN AND SUBSCRIBED BEFORE ME THIS 29TH DAY OF MARCH, 2017.

DENNIS R MCNAMARA NOTARY PUBLIC STATE OF WASHINGTON MY COMMISSION EXPIRES MAY 14, 2020

STATE OF WASHINGTON)
)SS
COUNTY OF SNOHOMISH)
SUSCRIBED AND SWORN to before me this 29 day of MARCH, 20 17

Dennis R. McNamara NOTARY PUBLIC

Dennis R. McNamara
My commission expires 05/14/~~2016~~ 2020

IV. GROUNDS FOR RELIEF AND ARGUMENT

1. MR. ALVERTO ASKS THIS COURT TO REVERSE THE ORDER DENYING DNA TESTING AND TO HOLD HE HAS SHOWN DNA TESTING WOULD DEMONSTRATE INNOCENCE ON A MORE PROBABLE THAN NOT BASIS.

RCW 10.73.170 PROVIDES, IN RELEVENT PART:

(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 JUDGMENT OF CONVICTION A VERIFIED WRITTEN MOTION REQUESTING DNA TESTING....

(2) THE MOTION SHALL:

(a) STATE THAT:

(i) THE COURT RULED THAT DNA TESTING DID NOT MEET ACCEPTABLE SCIENTIFIC STANDARDS; OR

(ii) DNA TESTING TECHNOLOGY WAS NOT SUFFICIENTLY DEVELOPED TO TEST DNA EVIDENCE IN THE CASE; OR

(iii) THE DNA TESTING NOW REQUESTED WOULD BE SIGNIFICANTLY MORE ACCURATE THAN PRIOR DNA TESTING OR WOULD PROVIDE ~~SIGNIFICANTLY~~ MORE

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 PROCEDURES REQUIREMENTS ESTABLISHED BY THE COURT.

(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,

IN WASHINGTON, A PERSON SERVING A TERM OF IMPRISONMENT IS ENTITLED TO POST-CONVICTION DNA TESTING WHEN THE RESULTS "WOULD PROVIDE SIGNIFICANT NEW INFORMATION" AND THE PERSON SHOWS A "LIKELIHOOD THAT THE DNA EVIDENCE WOULD DEMONSTRATE INNOCENCE ON A MORE PROBABLE THAN NOT BASIS," RCW 10.73.170. MR. ALVERTO HAS MET

THE REQUIREMENTS OF THE STATUTE; ACCORDINGLY, HE IS ENTITLED TO AN ORDER FOR DNA TESTING UNDER RCW 10.73.170(3).

"THE SUPREME COURT HELD THAT THE LANGUAGE 'SIGNIFICANTLY NEW INFORMATION' INCLUDES DNA TEST RESULTS." STATE V. RIOFTA, 166 Wn.2d 358 (2009). "DNA TESTING OF THE HAIR' WOULD BE MATERIAL TO THE IDENTITY OF THE PERPETRATOR', RCW 10.73.170(2)(b), BECAUSE THERE WAS A SINGLE PERPETRATOR" IN MR. ALVERIO'S CASE. STATE V. GRAY, 151 Wn. App. 1001 (2009). "IN LIGHT OF NEW EVIDENCE, IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND PETITIONER GUILTY BEYOND A REASONABLE DOUBT." HOUSE V. BELL, 547 U.S. 518, 126 S.Ct. 2064 (2006).

INVESTIGATORS FOUND A STRANGE HAIR ~~STUCK~~

TRAPPED IN WILSON'S BLOOD ON A GLASS DOOR NEAR HER BODY. RP (AUG. 13, 2008) AT 857. THE HAIR WAS NOT TESTED, AN ANALYSIS WOULD BE MATERIAL; WHEREBY ~~THE VICTIM~~ WILSON TESTIFIED THAT ONLY ONE PERSON ATTACKED HER, AND SHE STRUGGLED WITH THAT PERSON; THEREFORE, IT IS "MORE PROBABLE THAN NOT" THAT THE HAIR CAME FROM HER ATTACKER. RCW 10.73.170(3).

AT TRIAL, THE DEFENSE THEORY WAS THAT WILSON'S BOYFRIEND, ERIC ROGERS, COVERED HIS FACE WITH A BANDANA, DRESSED IN A BLACK TURTLENECK AND OTHER DARK CLOTHING, AND IMPERSONATED MR. ALVERTO DURING AN ASSAULT ON WILSON. POLICE FOUND ROGERS AT THE SCENE OF THE CRIME.

MR. ALVERTO EXPLAINED IN HIS MOTION FOR DNA TESTING THE TESTING OF THE HAIR WILL TIP THE

BALANCE OF EVIDENCE TOWARD ROGERS FOR SEVERAL REASONS: (1) ROGERS HAD MOTIVE TO COMMIT THE CRIME BECAUSE HE AND WILSON HAD BEEN FIGHTING THAT DAY; (2) ROGERS, BUT NOT MR. ELVERTO, HAD A GARAGE DOOR OPENER FOR WILSON'S HOUSE AND THERE WAS NO FORCED ENTRY; (3) THE HANDWRITING IN THE SMALL NOTEBOOK CONNECTED TO THE CRIME WAS FOUND TO BE ROGERS HANDWRITING; AND (4) THE EYEWITNESS'S PHYSICAL DESCRIPTION OF THE PERPETRATOR'S BUILD MATCHED ROGERS, NOT MR. ELVERTO. MEMORANDUM OF LAW, FILED JUNE 9, 2014.

ONCE TESTED FOR DNA, THE HAIR WILL "PROVIDE SIGNIFICANT NEW INFORMATION" IMPLICATING ROGERS. RCW 10.73.170(2)(a)(ii).

DNA RESULTS IMPLICATING ROGERS "WOULD, IN COMBINATION WITH THE OTHER EVIDENCE, RAISE A

REASONABLE PROBABILITY [MR. ALVERTO] WAS NOT THE PERPETRATOR."

RIOFTA, 166 WIS. 2d AT 367-68 (EMPHASIS IN ORIGINAL).

THE TRIAL COURT ERRORED WHEN IT DENIED MR. ALVERTO'S MOTION FOR DNA TESTING WITHOUT EVER CONSIDERING MR. ALVERTO'S: (1) NEWLY DISCOVERED WITNESS TESTIMONY OF MR. THROWER, WHO STATED THAT ROGERS CONFESSED TO SHOOTING WILSON, AND BRAGGED THAT MR. ALVERTO IS BEING PUNISHED FOR ROGERS CRIME AGAINST WILSON; (2) NEWLY PRESENTED HANDWRITING ANALYSIS SHOWING ROGERS, NOT MR. ALVERTO, AUTHORED THE SMALL NOTEBOOK, IN WHICH ROGERS INDICATED HIS PLAN TO USE A "STRANGER HAIR" AS A TOOL TO COMMIT THE CRIME AGAINST WILSON, MEMORANDUM OF LAW (EXHIBIT 2) AT 11, AND (3) NEWLY PRESENTED PHONE RECORDS SHOWING THAT MR. ALVERTO DID NOT MAKE THREATENING PHONE CALLS TO WILSON JUST PRIOR TO THE ATTACK.

THE COURT OF APPEALS ERRORED WHEN IT FAILED:

(1) BE IMPARTIAL TOWARD MR. THROWER'S TESTIMONY;

(2) ADDRESS MR. ALVERIO'S PHONE RECORDS; AND

(3) CONSIDER THE HANDWRITING ANALYSIS.

MR. ALVERIO ASKS THIS COURT GRANT DISCRETIONARY REVIEW AND REVERSE THE ORDER DENYING DNA TESTING.

2. MR. ALVERIO ASKS THIS COURT TO TEMPORARILY DEFER THIS MATTER TO ALLOW HIM THE OPPORTUNITY TO OBTAIN A SWORN DECLARATION TO THE HANDWRITING ANALYSIS.

ON JUNE 9, 2014, MR. ALVERIO, ACTING IN GOOD FAITH, SUPPORTED HIS MOTION FOR DNA TESTING WITH NEW EVIDENCE OF A HANDWRITING ANALYSIS CONDUCTED BY HANDWRITING EXPERT, DAVID G. CUPP. MEMORANDUM OF LAW (EXHIBIT 2) FILED JUNE 9, 2014, SUPP. CP.

MR. ALVERIO BELIEVED THAT SINCE THE HANDWRITING ANALYSIS WAS PERFORMED BY AN EXPERT, THAT IT

MET ALL LEGAL REQUIREMENTS OF A COURT OF LAW.

ON MARCH 7, 2017, DIVISION TWO - COURT OF APPEALS RULED THE HANDWRITING ANALYSIS WAS UNSWORN; AND THEREFORE, WOULD NOT BE CONSIDERED. UNPUBLISHED OPINION (MARCH 7, 2017) AT 8.

NOW, MR. ALVERTO HAS SENT LETTER(S) TO MR. CUPP REQUESTING THAT HE PROVIDE MR. ALVERTO A SWORN HANDWRITING ANALYSIS. THEREFORE, MR. ALVERTO REQUEST THIS COURT DEFER THIS MATTER TO ALLOW HIM THE OPPORTUNITY TO OBTAIN, AND PRESENT THE COURT, A SWORN COPY OF THE HANDWRITING ANALYSIS.

V. CONCLUSION

FOR THE REASONS STATED ABOVE AND IN MR. ALVERTO'S MOTION FOR DNA TESTING, MR. ALVERTO RESPECTFULLY REQUEST THIS COURT GRANT DISCRETIONARY REVIEW AND REVERSE THE ORDER DENYING DNA TESTING.

RESPECTFULLY SUBMITTED THIS 25TH DAY OF MARCH, 2017.

/s/ Jerome Leysal Alverto
Jerome Leysal Alverto

SERVICE DECLARATION

I, JEROME LEYSAL ALVERTO, DECLARE UNDER PENALTY OF PERJURY THAT I SENT FOR DELIVERY, VIA U.S. POSTAL SERVICE, A TRUE AND CORRECT COPY OF THE DOCUMENT TO WHICH THIS DECLARATION IS ATTACHED, TO:

(1) COURT OF APPEALS, DIVISION TWO
CLERK'S OFFICE
950 BROADWAY
TACOMA, WA. 98402

(2) PIERCE COUNTY PROSECUTOR'S OFFICE
930 TACOMA AVE. S.
TACOMA, WA. 98402

EXECUTED THIS 29TH DAY OF MARCH, 2017.

/s/ Jerome Leysal Alverto
Jerome Leysal Alverto

ATTACHMENT A

AFFIDAVIT OF

JEROME CEASAR ALVERTO

1. I, JEROME CEASAR ALVERTO, DEPOSE AND SAYS:

2. I AM OVER THE AGE OF 21 YEARS, AND A CITIZEN OF THE UNITED STATES OF AMERICA;

3. I AM COMPETENT TO TESTIFY TO THE FACTS HEREIN, AND UNLESS OTHERWISE STATED, I HAVE FIRSTHAND KNOWLEDGE OF THESE FACTS;

4. ON MAY 12-13, 2006, STEPHANIE LYNN WILSON DRANK A COPIOUS AMOUNT OF ALCOHOL AND FOUGHT WITH HER BOYFRIEND, ERIK DERWIN ROGERS, WILSON WAS UPSET WITH ROGERS BECAUSE HE WAS NOT PAYING ATTENTION TO WILSON, SO SHE WENT TO HER HOME,

5. SHORTLY AFTER ARRIVING HOME, IN PARAGRAPH 4 ABOVE, WILSON WAS ATTACKED BY A PERSON WEARING DARK CLOTHES AND A COVERING OVER HIS FACE TO CONCEAL HIS IDENTITY, THE ATTACKER PHYSICALLY FOUGHT WITH WILSON, AND THEN SHOT HER MULTIPLE TIMES;

6. WILSON FOUGHT WITH HER ATTACKER STARTING IN HER HOME AND ENDING ON HER NEIGHBOR'S PROPERTY;

7. DURING THE FIGHT, IN PARAGRAPH 5 ABOVE, WILSON INJURED HER ATTACKER BY MAKING DEEP SCRATCHES ON HER ATTACKER BODY SO THAT SHE OBTAINED HIS DNA UNDER HER FINGERNAILS;

8. POLICE DISCOVERED A HAIR TRAPPED IN WILSON'S BLOOD, ON A GLASS DOOR, WHERE THE FIGHT ENDED, IN PARAGRAPH 6 ABOVE;

9. MEDICS AND POLICE ARRIVED, THEY FOUND ROGERS COMING OUT OF WILSON'S HOME SHORTLY AFTER THE SHOOTING HAD OCCURRED, IN PARAGRAPH 5 ABOVE;

10. I LIVED A FEW MILES FROM WILSON'S HOME, I WAS NOT AT WILSON'S HOME, IN PARAGRAPH 5 ABOVE, AND I HAVE NEVER BEEN TO HER HOME OR THE SCENE OF THE CRIME, I WAS AT MY OWN HOME WHEN DEPUTY BRYAN DWAIN CLINE ARRESTED ME, I'VE APPROACHED SEVERAL POLICE CARS THAT ARRIVED ONSITE, PRIOR TO BEING ARRESTED, I DID NOT HAVE BLOOD ON MY CLOTHES OR BODY, NOT UNTIL DEPUTY CLINE WIPED THE BLOOD ONTO MY PANTS, BECAUSE I WATCHED WITH MY OWN EYES AS DEPUTY CLINE WIPED THE BLOOD ONTO MY PANTS;

11. AT TRIAL, NO EXPLANATION WAS OFFERED ABOUT HOW THE BLOOD WAS PLACED ONTO MY PANTS;

12. WILSON TESTIFIED THAT IT WAS HER "OPINION" THAT I BROKE INTO HER HOME TO COMMIT THE CRIME, IN PARAGRAPH 5 ABOVE, HOWEVER, POLICE FOUND NO SIGNS OF FORCED ENTRY INTO WILSON'S HOME, ROGERS TESTIFIED THAT HE HAD WILSON'S AUTOMATIC GARAGE DOOR OPENER, WHICH ALLOWED HIM TO ACCESS WILSON'S HOME;

13. I WAS ARRESTED WITHIN MINUTES OF WILSON BEING ATTACKED, HOWEVER, I HAD ABSOLUTELY NO BRUISES, OR SCRATCHES, OR INJURIES THAT WILSON INFLICTED ONTO HER ATTACKER, IN PARAGRAPH 7 ABOVE; ADDITIONALLY, I HAD ABSOLUTELY NO BLOOD ON MY HAIR, FACE, BODY, SHIRT, SHOES OR CAR;

14. MY HOME WAS NOT THE CRIME SCENE, NOR HAD THERE EVER BEEN ANY COMPLAINTS OR CALLS OF CRIMINAL ACTIVITY PLACED AGAINST MY HOME., HOWEVER, DEPUTY CLUNE CHOSE TO ABUSE HIS POWER TO VIOLATE MY CONSTITUTIONAL RIGHTS WHEN HE ENTERRED AND SEARCHED MY HOME WITHOUT A SEARCH WERRANT OR MY CONSENT, AT THE TIME OF THE ARREST, IN PARAGRAPH 10 ABOVE,

15. DEPUTY CLUNE DEMANDED THAT HE GUARD MY CAR BY HIMSELF AND WITH NO ONE ELSE PRESENT

16. THERE WERE NO RIFLES (OR ACCESSORIES), HANDGUNS (OR ACCESSORIES) OR SMALL NOTEBOOK WITH A HANDWRITTEN PLAN TO KILL SOMEONE, IN MY CAR PRIOR TO DEPUTY CLUNE GUARDING IT, IN PARAGRAPH 15 ABOVE,

17. THERE WERE NO HANDGUNS (OR ACCESSORIES) IN MY HOME PRIOR TO DEPUTY CLUNE'S ILLEGAL ENTRANCE, IN PARAGRAPH 14 ABOVE, WILSON HAD TAKEN THE HANDGUN (AND ACCESSORIES) WITH HER AT THE TIME SHE AND I HAD SEPARATED/DIVORCED A YEAR EARLIER, I HAVE NOT SEEN OR HELD THE HANDGUN (OR ACCESSORIES) SINCE THE SEPERATION,

18. POLICE ALLEGEDLY FOUND HANDGUN ACCESSORIES IN MY HOME, PROVING THAT DEPUTY CLUNE FABRICATED THE ACCESSORIES DURING HIS ILLEGAL ENTRY OF MY HOME, IN PARAGRAPH 17 ABOVE,

19. POLICE ALLEGEDLY FOUND RIFLE (ACCESSORIES) AND

A SMALL NOTEBOOK CONTAINING A HANDWRITTEN PLAN, "TO-DO-LIST", FOR KILLING SOMEONE IN MY CAR, PROVING THAT DEPUTY CLUNE FABRICATED THE RIFLE AND SMALL NOTEBOOK DURING THE TIME HE GUARDED MY CAR, IN PARAGRAPH 16 ABOVE;

20. PIERCE COUNTY PROSECUTOR, BRIAN MEAD WASANKARI PURPORTED THAT I USED THE RIFLE, IN PARAGRAPH 19 ABOVE, TO COMMIT THE CRIME AGAINST WILSON, IN PARAGRAPH 5 ABOVE; HOWEVER, IT WAS LATER DISCOVERED THAT WILSON WAS SHOT WITH A HANDGUN, IN PARAGRAPH 5 ABOVE, WHICH FURTHER PROVES THAT DEPUTY CLUNE FABRICATED THE RIFLE DURING THE TIME HE GUARDED MY CAR, IN PARAGRAPH 16 ABOVE;

21. TWO INDIVIDUALS SAW PART OF THE ATTACK, IN PARAGRAPH(S) 5 & 6 ABOVE, AND NEITHER WAS ABLE TO IDENTIFY WILSON'S ATTACKER;

22. AT TRIAL, I SHOWED THAT ROGERS HAD ARGUED WITH WILSON, HE'D THEN WENT AND HID INSIDE HER HOUSE, HE USED HIS GARAGE DOOR OPENER TO GAIN ENTRANCE INTO HER HOUSE UNDETECTED, HE COVERED HIS FACE, AND IMPERSONATED ME WHILE ASSAULTING WILSON;

23. IN JUNE 2014, I FILED A MOTION FOR POST-CONVICTION DNA TESTING OF THE HAIR, IN PARAGRAPH 8 ABOVE.

24. I SUPPORTED MY MOTION, IN PARAGRAPH 23 ABOVE, WITH:

a. NEWLY DISCOVERED TESTIMONY EVIDENCE OF MAURICE THROWER, THROWER STATED THAT AROUND JUNE 2006 HIS FRIEND "E (ERIC ROGERS)" CONFESSED TO SHOOTING HIS GIRLFRIEND, STEPHANIE WILSON, AND THAT HER EX-HUSBAND, ME, WAS WRONGLY ACCUSED AND WRONGLY CONVICTED OF THE CRIME, IN PARAGRAPH 5 ABOVE,

THROWER'S DESCRIPTION OF HIS FRIEND "E" MATCHED IDENTICAL TO ROGERS PHYSICAL DESCRIPTION: BLACK MALE, MID 30'S, ABOUT 5'10", ABOUT 200 LBS, MUSCULAR BUILD, MINI AFRO HAIR STYLE, EYEGLASSES,

b. NEWLY PRESENTED EVIDENCE OF A LETTER BY HANDWRITING EXPERT, DAVID A. CURD, WHICH CONCLUDED THAT ROGERS, RATHER THAN ME, HAD AUTHORED THE SMALL NOTEBOOK, IN PARAGRAPH 19 ABOVE, THAT HAD PROVED TO BE A CRITICAL PIECE OF INCULPATORY EVIDENCE AT TRIAL, AND,

c. NEWLY PRESENTED EVIDENCE OF PHONE RECORDS SHOWING THAT I DID NOT MAKE THE THREATENING TELEPHONE CALLS THAT WILSON RECEIVED JUST PRIOR TO THE ATTACK, IN PARAGRAPH 5 ABOVE,

25. CONTAINED IN THE SMALL NOTE BOOK, IN PARAGRAPH 19 ABOVE, ROGERS LISTED NUMEROUS ITEMS

THAT HE LABELED "TOOLS", THAT HE PLANNED TO USE TO COMMIT THE CRIME AGAINST WILSON, IN PARAGRAPH 5 ABOVE, AND ONE OF THE TOOLS ROGERS PLANNED TO USE WAS A "STRANGLER HAIR",

26. UPON INFORMATION AND BELIEF, ROGERS PROBABLY PLANNED TO USE THE HAIR, IN PARAGRAPH 25 ABOVE, TO DRAW ATTENTION AWAY FROM HIMSELF, TO CONFUSE POLICE INVESTIGATION, AND/OR TO PROBABLY CAUSE POLICE TO MISIDENTIFY AN INNOCENT PERSON;

27. INITIALLY, THE TRIAL JUDGE GRANTED MY MOTION, IN PARAGRAPH 23 ABOVE;

28. IN 2015, THE PIERCE COUNTY PROSECUTOR'S OFFICE FILED A MOTION TO RECONSIDER THE TRIAL JUDGE'S ACTION, IN PARAGRAPH 27 ABOVE;

29. THE TRIAL JUDGE FOUND THE STATE'S MOTION UNTIMELY, IN PARAGRAPH 28 ABOVE, BUT NEVERTHELESS RESCINDED HER PRIOR ORDER, IN PARAGRAPH 27 ABOVE.

VERIFICATION

AFTER BEING FIRST DULY SWORN UNDER OATH, I DEPOSE AND SAY THAT I AM THE AUTHOR OF THIS DOCUMENT, THAT I HAVE READ AND KNOW ITS CONTENTS, AND BELIEVE THIS DOCUMENT IS TRUE TO THE BEST OF MY KNOWLEDGE.

DATED THIS 28TH DAY OF MARCH, 2017.

x Jerome Leggar Alverto

JEROME LEGGAR ALVERTO

NOTARY PUBLIC

I CERTIFY THAT I KNOW OR HAVE SATISFACTORY EVIDENCE THAT MR. JEROME CEASER ALVERIO IS THE PERSON WHO APPEAR(S)(ED) BEFORE ME, AND SAID PERSON ACKNOWLEDGE THAT HE SIGNED THIS INSTRUMENT AND ACKNOWLEDGE IT TO BE HIS FREE AND VOLUNTARY ACT FOR THE USE(S) AND PURPOSES MENTIONED IN THIS INSTRUMENT.

DATED: 03/28/17

Notary Public
State of Washington
MIAM DOMINIQUE KASTLE
MY COMMISSION EXPIRES
MAY 8, 2020

NOTARY PUBLIC FOR THE STATE OF WASHINGTON. MY COMMISSION EXPIRES: 05-08-2020

DECLARATION OF SERVICE

I, JEROME CAESAR OLIVERIO, DECLARE UNDER PENALTY OF PERJURY THAT I SENT FOR DELIVERY, VIA U.S. POSTAL SERVICE, A TRUE AND COMPLETE COPY OF THE DOCUMENT TO WHICH THIS DECLARATION IS ATTACHED, TO:

(1) COURT OF APPEALS, DIVISION TWO
CLERK'S OFFICE
950 BROADWAY
TACOMA, WA. 98402

(2) PIERCE COUNTY
PROSECUTOR'S OFFICE
930 TACOMA AVE. S.
TACOMA, WA. 98402

EXECUTED THIS 29TH DAY OF MARCH, 2017.

Jerome Caesar Oliverio
JEROME CAESAR OLIVERIO

Filed
Washington State
Court of Appeals
Division Two

March 7, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEROME CEASAR ALVERTO, Appellant.	No. 47960-5-II UNPUBLISHED OPINION

MAXA, A.C.J. – Jerome Ceasar Alverto was convicted of attempted first degree murder, first degree burglary, and first degree robbery for crimes committed against Stephanie Wilson, his former wife. Alverto appeals the trial court's denial of his motion for postconviction DNA (deoxyribonucleic acid) testing of a hair found at the crime scene. He argues that the trial court erred in denying his motion because the results of DNA testing of the hair, combined with other new evidence he submitted, would show his innocence.

We hold that the trial court did not err because regardless of whether DNA testing showed that the hair belonged to someone other than Alverto, it would not demonstrate Alverto's innocence. Accordingly, we affirm the trial court's order denying Alverto's motion for DNA testing.

FACTS

Attempted Murder

Wilson spent the evening of May 12, 2006 with her boyfriend, Eric Rogers, and then returned home. In the early morning of May 13, Wilson received a phone call from Alverto. Alverto asked Wilson about her concealed weapons permit and told her that she should not have married him. Alverto also asked Wilson if she was going to marry her boyfriend, Eric Rogers. Wilson hung up on Alverto and sent a text message to Rogers, who called her back.

Wilson then was attacked from behind. The attacker wore dark clothing, gloves, and a bandanna around his face. He hit Wilson on the head repeatedly with a gun and stated that she should not have married him. Wilson recognized the attacker as Alverto by his eyes, body, and voice.

At some point during the attack, Wilson was able to run out the front door and toward her neighbor's house. Alverto chased Wilson and shot her in the chest and then again in the hand. Wilson pretended she was dead until she heard Alverto leave, and then she continued to the neighbor's patio. But Alverto came back and shot Wilson in the back of the neck. Wilson collapsed, and Alverto grabbed her by the hair and pulled her down the patio steps onto the neighbor's lawn. He then shot Wilson twice in the head and left.

Wilson was able to reach another neighbor's house and knocked on the door. The neighbor called 911 and police arrived. The police encountered Rogers coming out of Wilson's housed and briefly detained him. Wilson told both the neighbor and the police that it was Alverto who attacked her.

Investigation

Police went to Alverto's residence and observed Alverto in his car wearing dark clothing, including blood stained pants. DNA from the blood on Alverto's pants was later tested and matched Wilson's DNA. Police found a notebook in the front seat of Alverto's car that appeared to be a detailed "to-do list" for attacking someone. Report of Proceedings (RP) (Aug. 13, 2008) at 788.

Forensic investigators examined the scene of Wilson's attack, including the area around her house and neighboring houses. A forensic examiner collected a hair from the sliding glass door on the neighbor's patio, but did not test it. At the hospital where Wilson was treated for her injuries, a detective directed medical staff to take Wilson's fingernail scrapings in order to collect DNA. But the police never received any fingernail scrapings from the medical staff.

Later that morning, a contractor found a duffle bag at a nearby construction site and called the police. The bag contained a handgun with blood on it, a backpack, a leather jacket, light blue respirator masks, four gas masks with filters, and a blue bandanna. In the jacket pockets were two pairs of handcuffs and Wilson's cell phone. In the backpack were three trash bags, two stocking caps, jeans, a garage door opener for Wilson's garage door, a photograph of Wilson and Rogers, and two bracelets. Wilson later identified one of the bracelets as one she had given to Alverto when they were in a relationship. Inside the pair of jeans was a piece of paper with Alverto's name on it.

Alverto's Conviction, Appeals, and Postconviction Motions

The State charged Alverto with attempted first degree murder, first degree burglary, and first degree robbery. The case went to trial in August 2008. The jury found Alverto guilty on all charges. The trial court sentenced him to 460.5 months in prison.

Alverto filed a direct appeal, and in July 2010 this court affirmed his conviction. *State v. Alverto*, noted at 157 Wn. App. 1011, 2010 WL 2927452, at *7. Alverto later filed a personal restraint petition which raised numerous issues, including DNA testing of the hair and fingernail scrapings. This court dismissed his petition.

Alverto then filed a motion for postconviction DNA testing of hair and fingernail scrapings in the trial court. The trial court denied his motion, ruling that he had failed to show the likelihood that the DNA evidence would demonstrate his innocence on a more probable than not basis. On appeal, a commissioner of this court ruled that Alverto's appeal was frivolous and affirmed the trial court.

Present Motion for Postconviction DNA Testing

In June 2014, Alverto filed a second motion for postconviction DNA testing. This motion requested DNA testing of only the hair evidence.

Alverto submitted additional evidence with his motion. First, he submitted the affidavit of Maurice Thrower, a fellow inmate. Thrower stated that around June 2006 he met a man called "E" who confessed to him that he shot his girlfriend and let her ex-husband take the blame. After meeting Alverto, Thrower believed that "E" could have been Eric Rogers. Second, Alverto submitted an unsworn opinion from handwriting examiner David Cupp that the notebook found in Alverto's car was not Alverto's handwriting, but could be Rogers' handwriting. Third,

Alverto submitted his cell phone records from May 2006 to show that he did not call Wilson before she was attacked.

In November 2014, the trial court granted Alverto's motion for postconviction DNA testing. Eight months later, the State filed a motion for reconsideration. Although the trial court noted that the State's motion for reconsideration was untimely, the trial court decided to reverse its earlier ruling granting Alverto's motion for DNA testing. The trial court stated that "if it's just the hair . . . that's all we're dealing with, I can't see how that would, on any basis, show your innocence." RP (July 30, 2015) at 12. Alverto filed a motion for reconsideration which the trial court denied.

Alverto appeals.

ANALYSIS

A. MOTION FOR POSTCONVICTION DNA TESTING

Alverto argues that the trial court should have granted his motion for DNA testing of the hair found on the sliding glass door at Wilson's neighbor's house because a favorable result, combined with the new evidence he submitted, would demonstrate his innocence. We disagree.

1. Legal Principles

"RCW 10.73.170 provides a mechanism under Washington law for individuals to seek DNA testing in order to establish their innocence." *State v. Crumpton*, 181 Wn.2d 252, 258, 332 P.3d 448 (2014). Under RCW 10.73.170, a person currently imprisoned for a felony conviction may file a motion with the trial court requesting DNA testing. The trial court must grant a motion which meets certain procedural requirements and the substantive requirement that the "convicted person has shown the likelihood that the DNA evidence would demonstrate

innocence on a more probable than not basis." RCW 10.73.170(3); *see State v. Gentry*, 183 Wn.2d 749, 764, 356 P.3d 714 (2015).

When determining the likelihood that DNA evidence will demonstrate the convicted person's innocence, the trial court must presume that the result of testing the DNA evidence will be favorable to the convicted person. *Gentry*, 183 Wn.2d at 765. But the trial court also must evaluate the presumed favorable DNA evidence in the context of all the evidence presented at trial against the convicted person and any newly discovered evidence. *Id.* at 766-68; *State v. Riofta*, 166 Wn.2d 358, 369, 209 P.3d 467 (2009). "It is only within the context of the other evidence that the court can determine whether DNA evidence might demonstrate innocence." *Crumpton*, 181 Wn.2d at 262. The inquiry is whether "considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis." *Id.* at 260.

The defendant's burden to show that favorable DNA evidence would demonstrate innocence is onerous. *Id.* at 261. "Testing should be limited to situations where there is a credible showing that it could benefit a possibly innocent individual." *Id.*

We review a trial court's denial of postconviction DNA testing for an abuse of discretion. *Gentry*, 183 Wn.2d at 764. A trial court abuses its discretion when the record does not support its decision or when it applies the wrong legal standard. *Id.*

2. Analysis

Alverto argues that DNA from the hair found on the neighbor's door must be tested because if it matches Rogers' DNA, it would exculpate Alverto. We disagree.

Alverto asserts that his new evidence – the fellow inmate's affidavit, the handwriting analysis, and his phone records – supports his theory that Rogers attacked Wilson and framed Alverto. According to Alverto, if the hair from the neighbor's door is tested and matches Rogers' DNA, that evidence would demonstrate Alverto's innocence on a more probable than not basis.

We must presume that the DNA testing would be favorable to Alverto. *Gentry*, 183 Wn.2d at 765. Under Alverto's theory, the most favorable DNA result would be that the hair provides a DNA match with Rogers.[1] However, when considering a motion for postconviction DNA testing we must look at *all* the evidence, not just the evidence supporting the defendant's theory. *Crumpton*, 181 Wn.2d at 262. In this case, even if DNA testing on the hair matches Rogers, that result would not demonstrate Alverto's innocence on a more probable than not basis.

Rogers' hair could have ended up on the neighbor's door by innocent means. Rogers was Wilson's boyfriend and he had spent time with her earlier in the evening before the attack. So it would be possible that Wilson transported his hair to the neighbor's door when she went for help. Therefore, the presence of Rogers' hair would not inculpate him as Wilson's attacker. This is not the type of case where the evidence found at the scene could only have come from the attacker. *See Gentry*, 183 Wn.2d at 767-68 (holding that the trial court did not abuse its

[1] Here, one favorable result would be that the DNA from the hair does not match Alverto, but the *most* favorable result to support Alverto's theory would be that the DNA from the hair matches Rogers. Case law does not specify whether the trial court must presume only that the DNA evidence does not match the defendant or whether it also must presume that the DNA matches a particular individual. We do not address this issue because DNA testing of the hair would not show Alverto's innocence even if it matched Rogers' DNA.

discretion in denying a motion for DNA testing of hair found on a murder victim's body because the hairs could have come from sources other than the perpetrator).

Alverto's new evidence, even in conjunction with DNA testing showing that the hair belonged to Rogers, cannot overcome the evidence against Alverto on a more probable than not basis. Thrower's affidavit is clearly dubious and may be treated with skepticism. *Riofta*, 166 Wn.2d at 372-373. And we need not consider the handwriting analysis because it is unsworn. *See id.* at 372. Finally, under RCW 10.73.170(3) the question is whether "*the DNA evidence* would demonstrate innocence on a more probable than not basis." (Emphasis added.) As noted above, even DNA test results showing that the hair belonged to Rogers would be inconclusive.

Accordingly, we hold that the trial court did not abuse its discretion in denying Alverto's motion for postconviction DNA testing.

B. APPELLATE COSTS

Alverto requests that we refrain from awarding appellate costs if the State seeks them. The State has not yet sought appellate costs. We decline to consider the issue.

Under *State v. Grant*, a defendant is not required to address appellate costs in his or her briefing to preserve the ability to object to the imposition of costs after the State files a cost bill. 196 Wn. App. 644, 650-51, 385 P.3d 184 (2016). A commissioner of this court will consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if Alverto objects to that cost bill.

CONCLUSION

We affirm the trial court's order denying Alverto's motion for DNA testing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, A.C.J.
MAXA, A.C.J.

We concur:

Worswick, J.
WORSWICK, J.

Sutton, J.
SUTTON, J.