NO. 31238-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JULIO DAVILA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The State misunderstands the triggering threshold and prejudice analysis required by Brady, showing its failure to appreciate its basic obligation to disclose material exculpatory or impeaching evidence**

a. *The State misunderstands the basic requirement of a prosecutor's obligation to disclose information in the possession of prosecutorial agencies.*

It is well-settled that the State's fundamental obligation to disclose material exculpatory or impeachment evidence does not hinge on whether the individual prosecutor admits personal knowledge of the information. *See e.g., United States v. Blanco*, 392 F.3d 382, 388 (9th Cir. 2004). "The prosecutor is charged with knowledge of any *Brady* material of which the prosecutor's office or the investigating police agency is aware." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013); *see Youngblood v. West Virginia,* 547 U.S. 867, 869–70, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) ("*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor,'" quoting *Kyles v. Whitley,* 514 U.S. 419, 435, 437-438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

The prosecution "is in a unique position to obtain information known to other agents of the government, [and] it may not be excused from disclosing what it does not know but could have learned." *Carriger v. Stewart,* 132 F.3d 463, 480 (9th Cir.1997) (en banc). "[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

"Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them." *Blanco*, 392 F.3d at 388.

Given the firm legal rule dictating the State's due process obligation to provide material evidence in the hands of state prosecutorial agencies such as the State Patrol's Crime Laboratory, it is hard to understand why the State repeatedly insists that the prosecutor's personal knowledge is the relevant issue. The prosecutor at Mr.

Davila's trial disclaimed knowledge of information contained in the lengthy report detailing Denise Olson's incompetence and laying the groundwork for imposing the "sanction of termination" from employment at the State Police's crime laboratory. The trial court accepted this statement as true. However, this is unimportant, because the suppression of material exculpatory or impeachment evidence "violates due process" under *Brady* "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). It does not matter what the individual prosecutor actually knew. *Brady,* 373 U.S. at 87.

As an aside, it is hard to believe that lawyers and staff in the prosecutor's office did not know about Ms. Olson's history of incompetence. An audit conducted close in time to the Jeramie Davis prosecution, in which Ms. Olson was an important State witness, resulted in "'Brady letters' being sent to eleven prosecuting attorneys notifying them of [Ms. Olson's] problems and her faulty results." CP 256. Surely the Spokane prosecuting attorneys knew about such letters, but again, it does not matter what the trial prosecutor actually knew.

Both the trial court and the prosecution on appeal misapprehend this basic rule by focusing on the prosecutor's actual knowledge. The

trial court rested its finding of a *Brady* violation by concluding that the prosecutor did not know about this damaging report. 4RP 613, 622. Thus, the court applied the wrong legal standard and based its ruling in an erroneous view of the law, which constitutes error. *See State v. Lamb,* 163 Wn.App. 614, 625, 262 P.3d 89 (2011).

The State's efforts to shift focus by claiming it has no duty to search for exculpatory evidence is beside the point. Response Brief at 4, 5. Regardless of whether the trial prosecutor knew about Ms. Olson's termination due to findings of egregious poor performance in testing DNA (and it is hard to believe attorneys in the prosecutor's office did not know), this information was known to the State Patrol who authored the report, known to Ms. Olson's State Patrol direct supervisor Lorraine Heath who was the crucial witness for the prosecution at trial, and it should have been disclosed. *Giglio,* 405 U.S. at 154; *Blanco*, 392 F.3d at 388.

b. *The importance of an incompetent DNA tester in a trial that was almost solely predicated on DNA found at the scene cannot be understated.*

In its Response Brief, the State either misunderstands or misrepresents the lens through which this Court measures the materiality of the withheld information. As explained in Mr. Davila's

Opening Brief, material evidence includes information that "opens up new avenues for impeachment." *Gonzalez v. Wong*, 667 F.3d 965, 984 (9th Cir. 2011). Its value is not controlled by the availability of other impeachment evidence exists. *United States v. Price*, 566 F.3d 900, 914 (9th Cir. 2009); *cf. Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) (holding that withholding *Brady**Error! Bookmark not defined.*** material is likely prejudicial if it "would have provided the defense with a new and different ground of impeachment").

The State's brief asks the Court to measure materiality by its claim that Mr. Davila did not base his closing argument on issues in the Crime Lab, such as Ms. Olson's incompetence or the possibility that she contaminated the sample, or that the work of the Crime Lab could not be trusted because it let people like Ms. Olson perform tests on highly sensitive, easily corrupted evidence such as minute samples of DNA. The fact that Mr. Davila did not call Ms. Olson as a witness is similarly irrelevant when he had no information indicating she had a history of failing to follow critical protocols when extracting and testing DNA. 4RP 620-21. In essence, the State wants to measure the violation based on the trial as it occurred, and not as it could have or would have occurred if Mr. Davila knew during trial what he learned

after trial. The argument that Mr. Davila actually presented to the jury was one made without knowledge of Ms. Olson's potential misconduct and egregiously damaged credibility.

Moreover, *Brady* requires examining what skilled counsel would have done had he or she been aware of the belatedly disclosed information before trial. *Grant v. Alldredge*, 498 F.2d 376, 381 (2d Cir. 1974) (in case involving evidence disclosed late but during trial, court considers "how defense counsel might have utilized his knowledge of the 'added item' in preparation for the trial"). The court must weigh "the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought," when considering the harm caused by belatedly disclosed *Brady* information. *Leka v. Portuondo*, 257 F.3d 89, 102 (2d Cir. 2001).

The evidence against Mr. Davila was not overwhelming. No one saw him at the scene, unlike Jeramie Davis, Mr. Davis's sister, and Mr. Davis's friend, who admitted being inside the store on the night of the killing. 1RP 126-27, 135-36, 2RP 242, 245. Although a few of his fingerprints were found inside the store, so were other people's fingerprints. 2RP 331-37, 352-53, 363-64. The DNA evidence first tested by Ms. Olson was the glue of the case. Not knowing that there

was a reason to question the integrity, accuracy, and reliability of DNA extraction and testing – which is a science requiring great precision – Mr. Davila was left without a persuasive mechanism for challenging it. The failure to inform Mr. Davila's lawyer before trial that Ms. Olson was fired from her job due to a long history of exceedingly poor performance in conducting DNA tests, when the evidence against Mr. Davila hinged on a minute sample of DNA taken from a baseball bat, undermines confidence in the verdict and deprived Mr. Davila of his right to a fair trial by jury.

In its Response Brief, the State focuses on the fact that it did not put Ms. Olson on its witness list. Response Brief at 6. Putting a person on a witness list is not a shield from *Brady* obligations, in fact, it is just as likely that a person who has been terminated due to incompetence was not on the State's witness list because she had been fired. It also asserts that the State Patrol Crime Lab's scathing review of Ms. Olson's abilities in testing DNA contained no procedural or protocol violations in this case. Response Brief at 10. But there is no evidence that the Crime Lab actually reviewed Ms. Olson's work in this case; the report does not claim to have reviewed everything she did. More significantly, the report documents poor performance by Ms. Olson in the same time

frame as she tested DNA in this case. And most importantly, the report's denunciation of Ms. Olson's skills provided an otherwise unavailable platform for questioning the accuracy and reliability of the DNA tests performed in this case – evidence that the State presented as beyond reproach. The basis for questioning Ms. Olson's involvement in the DNA testing did not arise until after the trial, and the serious allegations of longtime poor performance contained in the suppressed report establishes a reasonable probability that the outcome of the trial would have been different had the defense been able to explore reasons to doubt the results of the DNA testing.

c. *The trial court's ruling in Mr. Davila's post-trial efforts to prove the actual contamination of DNA evidence does not resolve the Brady violation.*

After Mr. Davila's trial, the court gave Mr. Davila a limited amount of time to prove actual contamination of the DNA by Ms. Olson. 4RP 596-99, 605-07. Mr. Davila was unable to accomplish complete review and the court refused to give him additional time. 4RP 613. The court then denied his motion for a new trial based on the evidence of actual contamination; the court did not resolve the question raised on appeal about whether the failure to disclose Mr. Olson's unacceptable job performance undermines confidence in the verdict. As

discussed above and in Appellant's Opening Brief in detail, the suppression of actual exculpatory evidence does not settle a *Brady* violation and it is not the only question before the court on appeal.

The trial court's *Brady* analysis is further suspect because it focused only on whether the individual prosecutor knew about the report, not whether it had a *Brady* obligation to disclose it as a report generated by a law enforcement agency bearing on the propriety of the investigation that occurred in the case at bar. The trial court's ruling in the post-trial litigation has only minimal relevance to the issues on appeal because the court did not address and resolve those issues, and it misapplied the law when looking at the threshold question of when a prosecutor has a *Brady* obligation based on information known to governmental agencies working with the State to prosecute a case.

The State failed to disclose information that would have been the focal point of Mr. Davila's defense. In a case resting solely on DNA evidence, the firing of the original extractor and tester of DNA, which is a highly sensitive and technical expertise, cost Mr. Davila the ability to present a critical part of his defense. There is no question that he would have engaged in a very different trial tactics, including his cross-examination, calling his own DNA expert like Dr. Gregory Hapickian

to explain the importance of rigidly adhering to protocols when testing DNA, and presenting a closing argument focused on the trustworthiness of the DNA evidence. CP 301-11. Ms. Olson's termination due to a history of extremely poor job performance was evidence that would have formed the focal point of Mr. Davila's defense had it been disclosed by the State. CP 302, 311. This violation of due process requires reversal of Mr. Davila's conviction and a new trial.

2. The prosecution confuses the relevance of the deceitful arguments made by the State to the jury asking it to uphold two convictions premised on inconsistent theories

The State mischaracterizes the impropriety at issue. The problem for the State is that it misrepresented events to the jury, not that it once sought a conviction against Jeramie Davis based on then-available evidence.

Mr. Davila's case, the State insisted that both men were guilty of the same crime. It insisted that Mr. Davis's conviction was properly obtained and remained valid. The prosecutor told the jury that Mr. Davis's "case is done" and he has "already been convicted for what he did that day." 3RP 543. He called Mr. Davis a "horrible man" but said "he's been punished for what he did that night." 3RP 556, 558.

The State still cannot admit that no evidence shows the two men knew each other or were in the store at the same time, as the trial court found when examining the evidence in the light most favorable to the prosecution. 3RP 502-04.

The State misled the jury by saying Mr. Davis's "case is done" and he has been "convicted for what he did," when it knew that Mr. Davis's conviction rested on an inconsistent theory and Mr. Davis had legal grounds to vacate his conviction.[1] The jury that convicted Mr. Davis was operating under the theory that Mr. Davis swung the bat, as the State had argued. CP 76, 91, 105. To be sure, the State had a basis to present a different argument in Mr. Davila's trial, but it did not have the right to defend both convictions to the jury as if both were entirely appropriate, consistent, and settled. It should not have misrepresented facts not in evidence about Mr. Davis's pending efforts to vacate his

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[1] *See e.g.*, "Wrong man may be in jail for 2007 Spokane murder," Krem.com (July 27, 2011), available at: http://www.krem.com/news/Wrong-man-may-be-in-jail-for-2007-Spokane-murder-126271748.html (Mr. Davis may "make a motion for a new trial given the new evidence"; article written one year before Mr. Davila's trial) (copy attached as Appendix A); C. Bannach, "DNA evidence reveals new suspect in 2007 slaying," Spokesman Review (July 26, 2011), available at: http://m.spokesman.com/stories/2011/jul/26/dna-evidence-reveals-new-suspect-2007-slaying/ (including comment: "I believe they have a good chance of having their murder conviction vacated because of this recent arrest," Spokane police Detective Mark Burbridge said of Davis) (attached as App. B).

conviction or argued that Mr. Davis properly convicted when his conviction was predicated on an inconsistent theory.

On appeal, the State insists Mr. Davis's case was "done," citing the mandate that had issued in Mr. Davis's appeals. Response Brief at 23. Yet, as explained in Appellant's Opening Brief and wholly ignored in the State's Response Brief, Mr. Davis had filed a motion and memoranda for a new trial on June 22, 2012, Spokane Co. No. 07-1-02548-8, several weeks before Mr. Davila's trial started July 10, 2012, in which he was represented by lawyer Anna Tolin from the Innocence Project. The same prosecutor filed a response to this motion on July 19, 2012, and ultimately, the court vacated Mr. Davis's murder conviction on September 20, 2012. State v. Jeramie Davis, Spokane Co. No. 07-1-02548-8. While the conviction was vacated after Mr. Davila's trial, the prosecution knew that Mr. Davis was challenging his conviction due to the DNA evidence the State was using to contend Mr. Davila perpetrated the murder.

The jury knew Mr. Davis had been convicted of first degree murder, and by arguing Mr. Davis's case is "done" and he has been properly punished, the State was arguing inconsistent theories to the

jury and misrepresenting facts not in evidence to seek a conviction against Mr. Davila. 2RP 286.

In its Response Brief, the State claims it is not responsible for the jury hearing evidence about Mr. Davis's conviction because Mr. Davila wanted the jury to know about his conviction. The State introduced evidence of Mr. Davis's involvement and it could not shield the jury from knowing that Mr. Davis had been convicted of the same crime with which Mr. Davila was charged. But again, the impropriety lies in the State's misrepresentation of facts to the jury and its use of inconsistent arguments to press for Mr. Davila's conviction and Mr. Davis's conviction at the same time.

The State further argues that cumulative effect of the various errors does not amount to grounds to reverse. However, errors taken together, preserved and unpreserved, may deny an accused person a fair trial. *State v. Alexander*, 64 Wn.App. 147, 150-51, 822 P.2d 1250 (1992); *see State v. Coe,* 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

Here, the suppression of material information critical to the jury's assessment of the DNA testing was never made available to the defense and the jury never learned of any basis to question its validity and accuracy. On the contrary, the State insisted that the State Patrol's Crime Lab produced unimpeachable results from accredited scientists who are regularly tested to ensure proficiency. 3RP 431, 440, 442-43. Furthermore, the State misrepresented facts not in evidence regarding the propriety of Mr. Davis's conviction and punishment for what he did. These errors, taken together, denied Mr. Davila a fair trial.

B. CONCLUSION.

For the foregoing reasons and those presented in Julio Davila's Opening Brief, Mr. Davila respectfully requests this Court vacate his conviction and order a new trial.

DATED this 3rd day of February 2014.

Respectfully submitted,

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APPENDIX A

Wrong man may be in jail for 2007 Spokane murder

by KREM.com

KREM.com

Posted on July 27, 2011 at 11:50 AM

Updated Monday, Nov 11 at 6:56 AM

SPOKANE – Authorities are investigating whether the wrong man may be in prison for the murder of a Spokane man in 2007.

37-year-old Jeramie Davis is currently serving a 40-year sentence for murdering John Gordon Allen Jr.

In 2007, Allen Jr. owned an adult book store on East Sprague. Authorities accused Davis of beating Allen to death with a baseball bat, and robbing the porn shop.

According to court documents, Davis maintained his innocence. He told authorities he walked into the shop, found Allen laying on the ground and left.

Documents say Davis later returned to the shop with his sister, and they called 911.

Back in 2007, Davis' sister told KREM 2 her brother admitted to robbing, but insisted he did not murder Allen.

A judge sentenced Davis to 40 years for 1st Degree Murder and 2nd Degree Burglary.

Now, new DNA evidence identified a new suspect.

According to court documents, authorities tested DNA found on the bat. In March, the results came back matching another inmate by the name of Julio Davila.

Davila, 45, is already in the Spokane County jail for an unrelated conviction.

Court documents indicate an informant talked do police in early July stating that he or she recalled seeing Davila with more than one dozen new, sealed porn videos around the time of the murder. The informant said Davila traded the videos for drugs, and believed the videos came from the porn shop on Sprague.

Davila denied ever entering the business, and does not know why is DNA would be on the baseball bat.

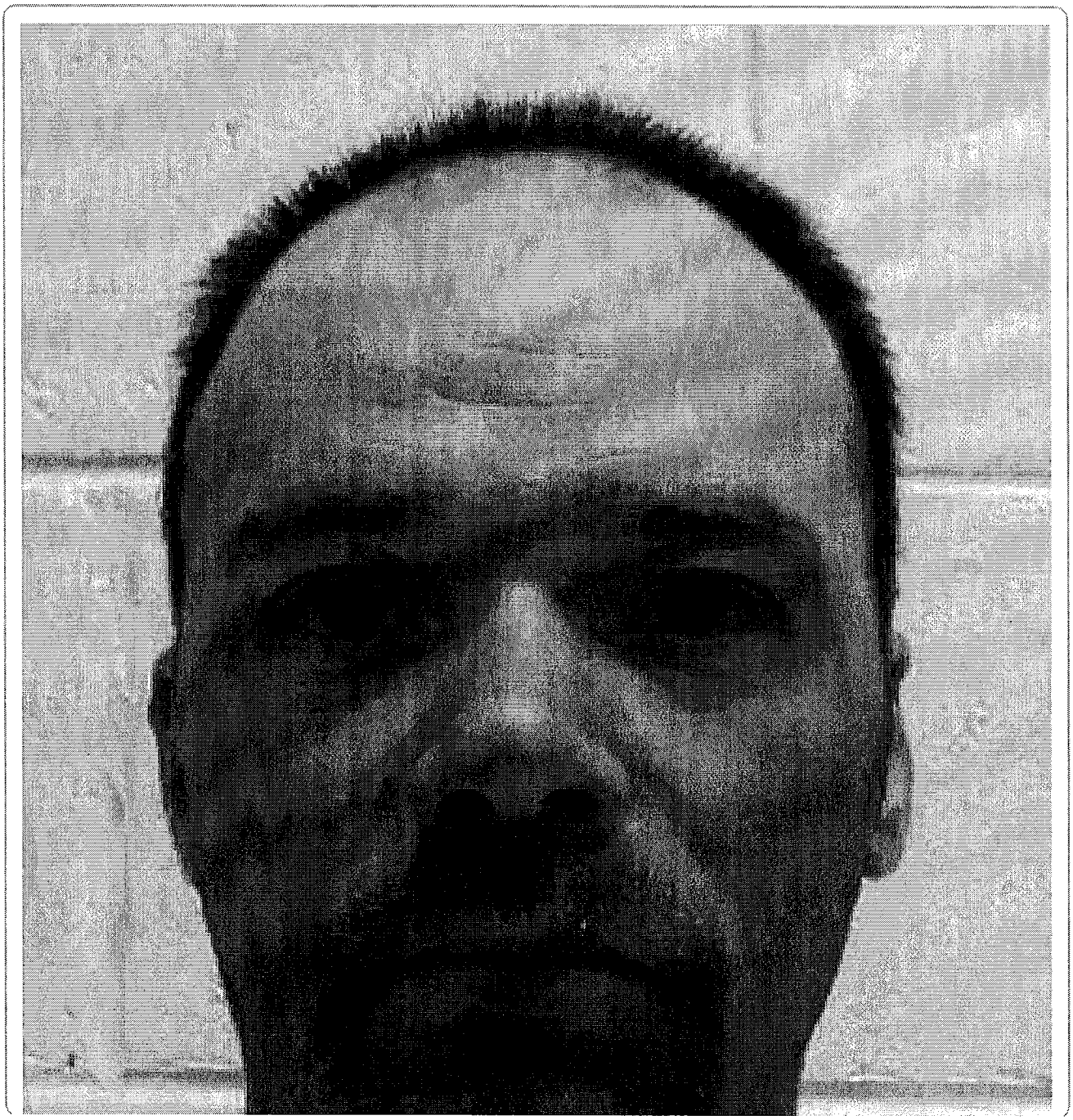
Davis' attorney could make a motion for a new trial given the new evidence.

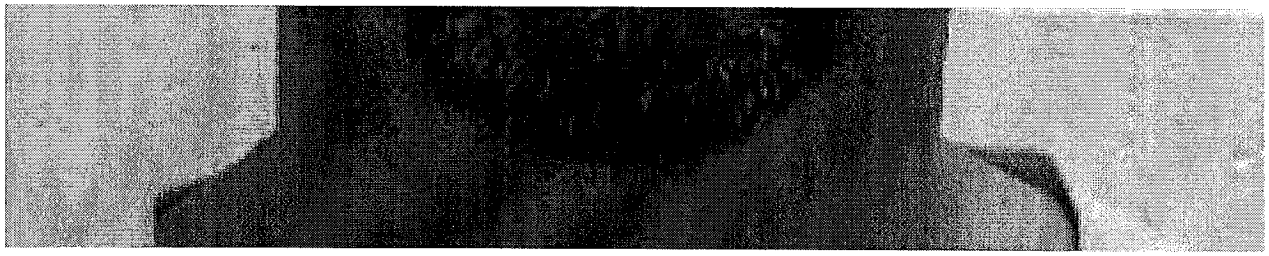
APPENDIX B

THE SPOKESMAN-REVIEW MOBILE

DNA evidence reveals new suspect in 2007 slaying

Man convicted of the crime has always maintained his innocence





Washington Department of Corrections photo

Jeramie R. Davis

Chelsea Bannach and **Meghann M. Cuniff** The Spokesman-Review

July 26, 2011 7:22 p.m. - Updated: 7:39 p.m.

Authorities in Spokane are questioning whether the wrong man was sent to prison for the murder of a porn-shop owner in 2007.

A recent DNA match in the case has identified a new suspect.

Jeramie R. Davis, 37, was recently transferred to the Spokane County Jail the Washington State Penitentiary in Walla Walla, where he was serving a 40-year sentence for the fatal baseball bat beating and robbery of 74-year-old John Gordon Allen Jr., owner of Best Buy Adult Bookstore on East Sprague Avenue.

In March, DNA found on the baseball bat during the initial investigation came back as a match to Julio J. Davila, 45, after Davila's DNA was collected for an unrelated felony conviction.

In an interview with police June 27, Davila denied knowing Allen or Davis and said he didn't know why his DNA would be on the bat. But on July 5, Spokane police detectives talked to an informant who reported seeing more than a dozen new and sealed pornographic videos that Davila traded with people for drugs around the time of the murder.

"The informant advised he/she believed the videos came from the porn shop located a couple blocks east of Division on Sprague," according to a probable cause affidavit filed to support murder charges against Davila. "The informant further advised that during that time period, Davila would regularly carry sticks that were modified into clubs for self defense."

Also on July 5, detectives discovered palm prints found on a glass countertop near the cash register matched Davila's.

Davis, who admitted to stealing property from the store but said he didn't kill Allen, was convicted of first-degree murder and second-degree burglary in 2008. Authorities now question whether he was wrongly convicted of murder.

"I believe they have a good chance of having their murder conviction vacated because of this recent arrest," Spokane police Detective Mark Burbridge said of Davis.

Spokane County Deputy Prosecutor Dale Nagy, who prosecuted Davis, said "it's too early to speculate" whether Davis may have been wrongfully convicted. "As soon as the investigation's done, we'll go from there," he said.

Davis arrived back at the jail last week for interviews. Davila was arrested and booked into Spokane County Jail for first- and second-degree murder July 11.

Staff at the jail did not respond to requests to interview Davila and Davis.

The new charges are the latest development in a case in which Davis has always maintained his innocence. After the week-long trial, Allen's family said they had worried a lack of DNA evidence would lead the jury to acquit Davis; Davis' sister, Tina Jackson, said at the time that DNA would eventually exonerate her brother.

Jackson told The Spokesman-Review after his arrest that her brother told her, "I have God, and I have forensics on my side."

But Nagy said it hasn't been determined if Davis and Davila may have acted together.

"We know nothing definitive at this point," he said. "We obviously found evidence that implicates Mr. Davila in that murder. We're pressing forward on that and we're continuing to investigate the Jeramie Davis part of it."

However, Davis' public defender, Jeffrey Leslie, said he hopes Davis' murder conviction will be vacated in light of the recent arrest.

"I don't think Jeramie did this," Leslie said. "It's a case that's bothered me for the last several years. I'm hoping they believe he didn't do it, as well."

Allen was found on June 17, 2007, unconscious, with an aluminum baseball bat underneath him and pornographic magazines strewn around him. He died the next day of blunt force head trauma. Davis told police he had gone into the porn shop and discovered Allen on the ground, hands at his sides, with his pants zipper open.

"Davis said he thought the victim might have been masturbating to the pornography, intoxicated and had fallen asleep," court documents said. "He thought he heard the victim snoring so he left."

Davis told police he looked around the area for a prostitute before going to Jackson's home. He told his sister about the store's owner, and she said he may have had a seizure and suggested the two return to check on him. Davis said it was then, about four hours after he initially found Allen lying on the floor, that he and his sister realized the man was bleeding from the head and called 911.

Before he and his sister returned to the shop, Davis stole pornographic videos and erotic toys, at one point leaving and returning with a friend to help, police said. He initially denied doing so, but the stolen goods turned up during a search of his sister's house. He admitted to stealing them but said he had not harmed the store's owner.

Davis appealed his convictions, arguing that the court should not have allowed gloves found in his car's trunk to be admitted as evidence. Davis said his lawyer was ineffective for not objecting to the gloves' admittance, but the Division III Court of Appeals disagreed.

"Here, the gloves offer an explanation why fingerprints were not located at the crime scene or on the murder weapon," Judge Stephen Brown wrote in a ruling filed Feb. 22, 2010.

Davis was ordered to pay about $6,100 in legal expenses to cover the cost of his rejected appeal.

Burbridge said while Davis initially lied to detectives and cast doubt on his credibility, the new evidence may indicate he was telling the truth about not being involved in the murder. However, he said, authorities are still investigating.

"If there are reasons to exonerate them, we want them released," Burbridge said. "We wouldn't want an innocent person in jail."

Davis' criminal history includes felony property crime convictions and one assault conviction, but he's stayed out of trouble while in prison. The Washington Department of Corrections says he hasn't received any infractions in the more than three years he's been incarcerated.

Davila has a criminal history dating back to at least 1992, when he was convicted of misdemeanor disorderly conduct involving prostitution in Los Angeles, where he told Spokane authorities he'd moved from five years ago. He has misdemeanor domestic violence convictions in Santa Clara County, Calif., Kootenai County, Idaho, and in Spokane County. He was not convicted of a felony until 2008, when he pleaded guilty to second-degree domestic violence burglary and third-degree assault. That felony conviction led to his DNA sample being entered into the state system, leading to the match with the baseball bat.

Police obtained a second DNA sample June 27 to confirm the match. Davila was sentenced to probation in January for an unrelated methamphetamine conviction and was under Department of Corrections supervision when police arrested him on the murder charges earlier this month.

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DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31238-1-III
	)	
JULIO DAVILA,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JULIO DAVILA 318404 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF FEBRUARY, 2014.

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