91327-7

Court of Appeals No: ~~31758-9-III~~ 31578-9-III
Superior Court No: 07-1-03578-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

V.

ANTHONY L. ALLEN,SR., Petitioner

PETITION FOR REVIEW

Anthony L.Allen,Sr. #726833
Stafford Creek Correction Ctr.
191 Constantine Way
Aberdeen, Washington
98520

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

FEDERAL AUTHORITIES

A. IDENTITY OF PETITIONER

I, Anthony L.Allen,Sr., a pro se petitioner, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of Div.III Court of Appeals decision filed October 9,2014 affirming the Superior Court decision to deny RCW 10.73.170 postconviction motion. A copy of the decision are in the Appendix at pages A-1 to A-12 and A-13 to A-16. Petitioner's motion to reconsider was timely filed November 24,2014 and subsequently denied.

C. ISSUES PRESENTED FOR REVIEW

1. On a RCW 10.73.170 motion, should a trial court presume that DNA results would be favorable and assume DNA results has demonstrated the defendant's innocence on a more probable than not basis? If so, did the Court of Appeals err by not holding to that standard?

2. On a RCW 10.73.170 motion, if the State's forensic evidence is now presumed favorable to a defendant, would a favorable result include a favorable view of all the evidence? If so, does a favorable result support an inference of a defendant's guilt? and did the Court of Appeals err for holding otherwise?

3. On a RCW 10.73.170 motion, if forensic evidence is collected from the blade of a knife and claimed only to be the victims blood, would a favorable DNA result refute this claim? If so, did the Court of Appeals err for holding otherwise?

4. On a RCW 10.73.170 motion, is there a "limited" liberty interest at stake concerning due process or constitutionally entitled to demonstrate actual innocence in a postconviction context? If so, did the Court of Appeals err for holding otherwise?

D. STATEMENT OF THE CASE

Anthony Allen was charged by Information on September 25,2007 with one count of 1°kidnapping, one count of 1°robbery, six counts of 2°assault while armed with a firearm and a deadly weapon other than a firearm. On December 20,2007, a jury convicted Allen of one count of 1°kidnapping and 2°assault against Karla Jones and one count of 2°assault against Dewey

Hudson. Special Verdict Forms returned found Allen was armed with a deadly weapon, to-wit a knife, and found he was not armed with a firearm during the commission of the crimes. RP VOL.I-III at 1-14

At trial, Karla Jones testified she was contacted by Dewey Hudson to retrieve her dog. RP 150 Jones stated she believed Hudson's live-in girlfriend, Wanda Phillips, had stolen her dog. Jones and Phillips have had an ongoing feud since 2002 when Jones caught Phillips having an affair with her husband. RP 146 Jones testified to on at least two occasions to have had physical confrontations with Phillips. RP 147 Jones stated that upon arriving at Hudson's home, she was attacked by Anthony Allen, Wanda Phillips, and Uriah Allen. RP 152 Jones claimed Anthony Allen threw her down and started punching her. RP 153 And when Hudson tried to intervene, Allen hit him and knocked him onto a mattress on the floor. Jones claimed Allen slapped Hudson in the face with the flat of the blade of a butcher knife. RP 154 Then stated Allen continued to cut portions of her hair. RP 155 Jones claimed Allen then pulled out a handgun and hit her in the back of the head. However, no gun was ever recovered and Jones could not describe the gun. RP 156 The jury found Allen was not armed with a firearm. Jones claimed Allen demanded money and stolen a pack of cigarettes from her person. RP 153 And after the attack, Jones stated she grabbed her dog, ran home, taken four shots of Black Velvet Whisky and called the police. RP 161 However, this testimony is drastically contrary to the version she reported to Officer Baldwin the night of the incident. RP 197-200 Jones discrepancy begins with reporting she did not walk with Hudson to his home, but instead had gone to the residence after Hudson had telephoned her. Jones reported that instead of suddenly being attacked, upon arrival, she had engaged in verbal arguments with two males at the residence before the incident became physical and there was no mention of

Wanda Phillips. RP 211

At trial, Jones claims all her teeth were busted out and she could not move for two weeks. RP 159-170 Examination by ER Dr.Penaskovic noted injuries included a mild bump on the back of the head, soft swelling to her face and upper lip. RP 245 The doctor testified he did not appreciate any dental trauma nor injuries consistent with knife injury. RP 246 His overall diagnosis was that Jones appeared emotionally upset and intoxicated. RP 267 In support that Jones suffered no dental trauma, Dr.Richard Bass, a dental surgeon, who was scheduled to remove the fractured tooth in question [RP 69-70] testified this was a pre-existing fracture based on the July 12,2007 radiograph. RP 73-74

Jones third version of events, reported to Dr.Penaskovic, was that Jones declared three individuals came into her home and assaulted her to intimidate her to keep her from testifying against her husband whom she incarcerated. RP 248

Dewey Hudson's version of events disputes the allegation he and Jones were ever assaulted in his home. RP 95-135 Hudson maintained Jones arrived un-invited and un-announced and started an argument with Phillips that became physical, and that's when he assisted Uriah Allen (aka "Schnoo") remove Jones from the premises. Hudson testified Jones was not assaulted by Allen and either denied or could not recollect his statements to Officer Baldwin. Ultimately, Hudson admitted to making a false report to Officer Baldwin the night of the incident in a drunken delusion of retaliation against Anthony Allen. RP 115-117

Officer Baldwin testified that both Jones and Hudson identified Urian Allen (aka "Schnoo") as the assailant armed with the knife that cut Jones hair and held the knife to her throat threatening to kill her. RP 198 Officer

Baldwin stated he secured a butcher-style kitchen knife at the scene that had blood on the blade. RP 205, 208-209, 217-218 The officer testified Jones reported that Anthony Allen was only armed with a handgun to which he hit her on the back of the head with. RP 199 The officer then testified to statements made to him by Hudson and purported Hudson attempted to break up the fight between Jones, Phillips, and Uriah Allen, and that he was successful in wrestling the knife away from Uriah Allen. Hudson confirmed Jones statements that Anthony was believed to be armed with a handgun, to which Allen struck Hudson in the face with rendering him unconscious. RP 203-205

Detective Ferguson testified affirming State's Exhibit 1 contained a "red substance" on the blade, but no blood typing or DNA testing was administered. RP 87-88 Detective Ferguson adamantly maintained there was absolutely no evidence anyone else's blood could possibly be on the knife other than the victims. RP 89 Although the detective later testified that no one actually saw the defendants' the night of the incident to determine if they possibly lost any blood. The detective stated she could not exclude the defendants as possible donors. RP 138 Detective Ferguson then confirms Jones statements to Officer Baldwin indicating Uraih Allen (aka "Shanoo") was identified as the assailant with the knife and cut her hair. RP 139 The detective testified to her awareness that Jones had changed her story and version of events multiple times throughout her investigation. RP 140

Forensic Specialist Jodie Dewey testified to collecting two forensic test samples of a "red substance" found on the blade of State's Exhibit 1. RP 262 The forensic specialist's expert opinion was that she could not classify the red substance as human DNA because no blood typing or DNA testing was conducted to confirm or identify the red matter as such. RP 266-267 She then performed a fingerprint analysis which was inconclusive. RP 256-261

Uriah Allen (aka "Schmoo") testified that he pled guilty to 2°assault, inflicting substantial bodily injury, on Karla Jones. RP 294 Uriah Allen was adamant that Anthony Allen did not assault Jones or Hudson and testified he did not witness Anthony Allen with a gun or a knife. RP 293-294 Uriah Allen testified that while the fight ensued, Anthony was yelling at the group to stop fighting and pleaded to Uriah And Phillips to leave with him. RP 299-300

Anthony Allen testified he was not involved in the altercation that ensued within the Hudson home and stated upon entering the home, he witnessed everybody in the house was engaged in the initial fight. Anthony identified Karla Jones, Wanda Phillips, Dewey Hudson, Uriah Allen and multiple unknown assailants. Anthony states his attempt to locate and subpoena the individuals but was informed they were not interested in testifying because they had warrants. RP 308 Anthony then corroborated testimony that Jones was attacking Phillips and Uriah Allen attempted to protect his mother. Throughout Anthony's testimony he expressed his desire to flee the altercation. RP 311-317

Procedural History

After Allen's conviction was affirmed on appeal and review was denied (see State v. Allen, 168 Wn.2d 1039 (2010)), Allen filed a Personal Restraint Petition #29996-1-III. The petition alleged trial counsel was ineffective for failing to investigate the "red substance" and conduct DNA testing upon the readily available forensic evidence used to convict, and failing to pursue a self-defense theory upon DNA results and request self-defense instructions. His petition was denied May 2012 because "there was never any doubt that the blood on the knife belonged to the victims, so the State did not run DNA tests..." see PRP#29996-1-III (see also RP 89, Detective Ferguson testified

that the only people whose blood could be on the knife were Karla Jones or Dewey Hudson). Ultimately, the petition was denied because Allen did not offer evidence to substantiate his claim concerning the DNA; although he requested an evidentiary hearing for this exact reason which was subsequently denied. Therefore, Allen could not produce the evidence to support a self-defense theory or establish that the blood was not the victims.

In July 2012, Allen moved for DNA testing under RCW 10.73.170 to prove the absence of his fingerprints and establish someone else's, and prove the presence of his blood on the blade of the knife rather than the vitims. The trial court appeared very interested in Allen's direct appeal issues, but denied his motion April 10,2013 because Allen did not offer evidence he was stabbed or nicked with the knife. see 31578-9-III. While this appeal was pending, Allen submitted another motion to release one of the two forensic swabs for DNA testing at Allen's expense outside the provided mechanisms of RCW 10.73.170. However, the trial court again cited to RCW 10.73.170 and denied the motion in June 2014. see Appendix B-1 to B-5 and B-6 to B-10

In the present case, on October 9,2014 Div.III Court of Appeals found that the trial court appeared to have abused its discretion by applying the wrong legal standard to Allen's RCW 10.73.170 motion, but ultimately affirmed the trial court's decision. Allen now appeals.

Summary of Argument

The State's theory was that Anthony Allen was in possession of State's Exhibit 1, a butcher-style kitchen knife, and assaulted Jones by cutting portions of her hair and assaulted Hudson by slapping him in the face with the knife, both acts resulting in a "red substance" discovered on the blade of the knife. Expert testimony of Detective Ferguson removed any doubt as to what this "red substance" was by asserting 1) the red substance on the blade

was actual DNA; 2) it was collected and secured as forensic evidence of assault; and 3) determined this blood to be the victims. RP 87-89

In support, expert testimony of Officer Baldwin maintained the blood on the knife were the victims. RP 205 However, contrary to the officer's and detective's contentions was that of Forensic Specialist Jodie Dewey whose expert opinion was that the red substance could not be classified as human DNA because no blood typing or DNA testing was administered. RP 266

Thus, because 1) initial reports indicate and identify Uriah Allen as the perpetrator with the knife [RP 139]; 2) Karla Jones inconsistent statements and multiple versions of events [RP 140,69-70,73--74,248,95-133, 115-117]; 3) Dewey Hudson admitting he made a false report to Officer Baldwin in an attempt to retaliate against Anthony Allen [RP 115-117] and testifying of Anthony Allen's innocence of assaulting or possessing a gun or a knife the night of the incident; 4) Uriah Allen testifying he alone was guilty of assaulting Jones and maintaining Anthony Allen's innocence of assaulting the victims or possessing a gun or a knife [RP 293-300]; 5) the conflicting expert opinions pertaining to the "red substance" [RP 266-267] versus "the victims blood" [RP 89,205]; 6) the materiality if Allen can refute the State's forensic evidence establishing the blood on the blade is not the victims blood [RP 87-89]; 7) the forensic evidence in question is readily available and the fact Anthony Allen, Uriah Allen, Dewey Hudson and Karla Jones DNA are on file in the Washington State Department of Corrections DNA data base due to prior felony convictions; 8) the fact Allen has met the thresnold of raising a reasonable probability of innocence; and 9) a presumed favorable result would only solidify these facts and warrant testing due to fundamental fairness.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE APPELLATE COURT'S HOLDING THAT ALTHOUGH DNA TESTING WOULD SERVE A NONTRIVIAL PURPOSE, IT'S EMPLOYMENT WOULD NOT BE HELPFUL IN THIS PARTICULAR CASE BEING THE VICTIMS WERE ACQUAINTANCES AND WOULD NOT MISIDENTIFY ALLEN, IS IN CONFLICT WITH WASHINGTON SUPREME COURT DECISIONS AND OTHER WASHINGTON STATE APPELLATE DECISIONS.

Allen is entitled to a presumption of favorable DNA results pursuant to State v. Crumpton. The Washington Supreme Court held in Crumpton, "a trial court must look whether the DNA results, in conjunction with the other evidence from the trial, demonstrates the individuals innocence on a more probable than not basis, assuming the DNA results would be favorable to that convicted individual. A court should not focus on the weight or sufficiency of evidence presented at trial to decide a motion for postconviction DNA testing. It must focus on the likelihood that DNA evidence demonstrate the individual's innocence in spite of the multitude of other evidence against them. Favorable test results would require viewing all the evidence in a different light being the evidence would no longer support an inference of the individual's guilt." Crumpton, 181 Wn.2d 252, 332 3d. 448 (2014).

Division III Court of Appeals concede:

> "There is no indication that the trial court used a standard that included use of a favorable presumption. In it's conclusion of law, the trial court stuck to the statutory language with no mention of a presumption of favorable or hypothetical inferences from an exculpatory test result. Since we have found that this presumption is part of Washington law and should be applied, we are forced to assume the trial court did not apply the proper standard and therefore abused it's discretion." see DECSION at 7

It is apparent both the trial court and Court of Appeals failed to afford Allen a favorable presumption of DNA results and did focus their determinations towards the likelihood of Allen's innocence,rather than guilt, when determining whether to grant DNA testing. see Crumpton at 452. The Court of Appeals predicates it's decision on Riofta and holding the lack of or existence of Allen's DNA on the knife does not make it more probable than not that Allen is innocent. see Riofta, 166 Wn.2d 367, 208 P.3d 467 (2009).

Allen disputes the Court of Appeals contention that favorable dna results would be unavailing or immaterial to Allen's case. It is unreasonable to conclude "[t]he presence of Anthony Allen's dna on the knife would only show that Allen was close enough to the altercation to be involved..." see Op'n at 8. In State v. Gray, the court concluded that if some of the evidence Gray requested to be tested came back as not his dna, it would be material to his innocence, and therefore, the motion for testing was granted. see Gray, 151 Wn.App. 762, 215 P.3d 961 (2009). In the same aspect, the Court of Appeals narrowly construes the weight and impact of favorable dna results that would establish Allen as the only contributor to the blood found on the blade of the knife. The State's case-in-chief was that Allen assaulted Jones and Hudson with this knife. Two forensic samples recovered from the blade solidify the State's expert evidence, i.e:

[Expert testimony of Detective Ferguson]

> "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." RP 89
>
> "Q: Okay. And in this particular case, though, there were--there was blood allegedly on this knife. There was swabs taken, but no dna or blood typing was done, is that correct? A: That is accurate. Q: Okay. So your testimony earlier was that it was believed that the only people whose blood it could be would be Dewey Hudson or Karla Jones, is that correct? A: Yes. Q: But did anyone see Wanda Phillips, Anthony Allen, or Uriah Allen to see if they might have lost some blood? A: That night? Q: Yes. A: I couldn't answer that. Not that I know of. Q: And you don't know who might have been at the residence in and out in the, say, twenty four hours prior to the incident either, do you? A: No." RP 138

[Expert testimony of Officer Baldwin]

> "Now, you indicated that you believe that there was blood on the knife and what area of the knife did you see blood? A: I believe there was some blood on this area of the metal part of the knife. Q: Okay. Now, the blade is not in the condition that you secured it, correct? A:No, there was blood on it at the time." RP 208
>
> "Q: Okay. Now, Back to the knife, you indicated that there had been blood on the knife, exhibit one? A: Yes." RP 217

[Expert testimony of Forensic Specialist Jodie Dewey]

> "Q: ...did you observe any substances on the knife? A: Yes, before processing item number one, the knife, I photographed the item with and without the scale, and there was a red substance on both sides of the knife, of the blade of the knife by the hilt, and I obtained two samples one from each side of the red substance." RP 266-267

Here, by the above testimonial evidence, the Court of Appeal's contention that, "[t]he presence of Allen's dna would further implicate him as the assailant" is readily disposed of by the requirement of a 'presumed favorable dna result' that would compel viewing all evidence in a different light when determining whether to grant a dna test. see Crumpton at 452. Thus, a favorable presumption of the evidence would no longer support an inference that Allen is the assailant, thereby, making it unreasonable to conclude scientific evidence,that would otherwise contradict or refute the State's purported evidence-in-chief, could "only" further implicate Allen as the assailant. see Op'n at 16. The State's expert evidence maintains Allen assaulted Hudson and Jones with the knife by the forensic swabs purported to contain "only" the victims blood. see RP 87-89,138,208,217,259. Therefore, if, by the State's theory, the knife really "is" the vessel used to assault, then the product of that assault (i.e, the victims dna) is relevant and of absolute importance to distinguish the impact of dna results. Favorable scientific evidence concluding only Allen's blood is found on the blade would indicate evidence Allen was assaulted, and consequently, the victim pursuant to the State's expert testimony. It is unreasonable to only conclude Allen's favorable dna result would further implicate him as the assailant. This conclusion is contrary to Crumpton and their respective cases that settled the matter and set precedent concerning dna testing.

The gist of the Court of Appeal's contention is to argue "[A]llen was one of three assailant's that could have handled the knife" and that "[a] kitchen utensil is often used by multiple people and would have multiple

sources of dna." see Op'n at 13. Again, this argument contradicts the State's expert evidence maintaining Allen assaulted the victims with the knife and forensic swabs collected from the knife's blade contain only the victims blood. see RP 85,136,208,217,259. It should be noted, Allen is not asserting nor implying that general dna will exonerate him. Allen is pinpointing a specific "red substance", swabbed and collected from the knife's blade, is his blood--not a generalized biological transfer.

State v.Thompson should apply as additional authority due to the inconsistent statements made to the investigating officer's and conflicting trial testimony that undermine the State's evidence. In Thompson, although police officers witness Thompson pushing the victim out of the hotel room where the rape allegedly occurred, this evidence is undermined by the victims inconsistent testimony at the lack of corroborating physical evidence. The victim testified that she lost consciousness and her awaking at the hospital, had no memory of talking or seeing anyone at the hotel at which the rape occurred, and did not remember speaking to police at the hospital. The court held that if dna evidence excluded Thompson as the single rapist, it is more probable than not he was innocent." see Thompson, 173 Wn.2d 865, 271 P.3d 204 (2012). Allen argues if dna evidence can prove the victims blood is not on the knife, there exists a probability of Allen's innocence of assaulting the victims with State's Exhibit 1 when held against the backdrop of testimony supporting Allen's innocence:

[Expert testimony of Officer Baldwin]

> "Q: What did he [Hudson] tell you? A: He said that they were beating up Karla bad. He said he tried to get in the middle of it and stop them. He said that Shanoo [Uriah Allen] at one point did have a knife, and that he had wrestled it away from him..." RP 204
>
> "A: Dewey [Hudson] confirmed that he believes Schnoo was the one that had the knife, and that's who he wrestled it away from, which was still laying there on the living room floor when I was in the room. Q:

When you were in the Hudson home, did you see a knife in the house? A: I did. There was a large kind of, kitchen knife, butcher-style knife, and it was laying right next to the mattress on the floor with blood on it." RP 205

[Expert testimony of Detective Ferguson]

"Q: Okay. Now, initially, Ms.Jones, Ms.Karla Jones, indicated that someone named Schnoo had a knife and cut her hair, is that correct? A: In the initial report? Q: Right. A: Yes. Q: And then she changed her story to say that someone else had a knife and cut her hair? A: She thought that Mr.Allen had both weapons, yes.

[State's material witness Dewey Hudson]

"Q: Could you tell the jury how your face became so swollen in those photographs? A: Like I said, I had just gotten surgery done on it, and it takes two to three months before I have a plate in here, and I had just had that done, and that was in early part of my surgery at the time. I couldn't really talk or move the jaw. It was always swollen. Q:Okay.Did you ever talk to an officer by the name of Eugene Baldwin? A: I don't remember that. It was said that I did, but I don't recall." RP 109

"Q: Isn't it true that you told Dr.Richardson you were assaulted? A: I don't recall saying that. Q: Okay. Isn't it true that you told Dr.Richardson that you were hit with a butt of a gun? A: I don't know why I do that because that wasn't true. Q: Do you remember talking to the police? A: Not--maybe detective, not no police. Q: Okay. You don't recall when the police were taking your pictures that they, also, were speaking to? A: No. No, I don't. Q: Do you recall telling an officer--

just a second--that there was a situation that took place inside your home involving Karla Cochran? A: I knew, but like I said, I was on painkillers and alcohol, and to exactly remember exactly what happened I can't." RP 111

"Q: Okay. You don't want to testify about what you told the doctor, as as well as Officer Baldwin, what Mr.Anthony Allen did to you, correct? A: He didn't do anything to me. Q: Did you tell Officer Baldwin that you did not want to talk about what happened because they would burn--

you believed they would burn your house down, and you can't say? A: I don't think I'd be saying anything like that. I've known those kids all their life, and I wouldn't even venture to know why I would say anything so outrageous." RP 112

"Q: What did you see Mr.Anthony Allen do to Karla while she was at your house? A: Tried to get her away from Wanda and put her out. I mean, get her away from Wanda, yeah, and put her out of my dad's house so there wouldn't be any--any problem. Q: Didn't you tell Officer Baldwin that they kept hitting her, but you didn't see all they did to her? A: I saw them wrestling trying to get her out of house. I didn't see nobody get hit. Q: You saw Mr.Anthony Allen put his hands on Karla Jones? A: Yeah, to throw her out. RP 113

"Q: During that chaos, did you see Karla Jones get hit? A: No, I didn't. I saw her get thrown out--Q: Okay. Go ahead. I apologize. A:I saw her get thrown out do to the fact that she was having a problem with Randa. I asked her not to be there because she assaulted her twice before. I didn't want her near Randa." RP 114

"Q: Okay. When you were seeing Mr.Anthony Allen get physical with Karla Jones--A: Yeah. Q:--did you try to stop them? A: I tried to help them. She was stuck trying to stay in, and I wanted her out of there. I knew it heated up if she didn't get outta there. Q: Do you remember telling Officer Baldwin that you then stood up to try to stop them, referring to Smooth and Doozy? A: Yeah. Q: And then all of a sudden, Mr.Uriah Allen and Anthony Allen then turned on you? A: I didn't even I'd say that. I've known guys since they were kids. They wouldn't put their hands on me." RP 115

"Q: Did Mr.Allen put his hands on you? A: No, he did not. 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 your 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 I 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 handgun 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." RP 116

"Q: And didn't you tell Officer Baldwin that you believe Doozy, the defendant-- A:Yeah.Q: hit you with the gun on your jaw? A: No,I don't remember saying such a thing. Q: And as a result of being hit with the gun-- A: Hm-hmm. Q: --you were knocked out? A: No, I wasn't knocked out at no time that evening. Long after they had left, I set up and kept watching TV and drinking... Q: Do you recall seeing somebody with a knife? A: No. Q. Do you recall telling Officer Baldwin that you saw Schnoo with a knife? A: I don't recall doing that. Again, I don't know why I would say that about Schnoo. Q: Okay. Do you recall at some point you said, "Schnoo had a butcher-style kitchen knife and was threatening to kill Karla? A: No. Q: And at that point in time, you tried to get the knife away from Schnoo, correct? A: I'm not stupid enough to attack anybody with a knife, so that was definitely be untrue." RP 117-118

"Q: And did you at anytime see a gun? A: No. Q: Okay. And did you see a knife? A:No. Q: Do you remember telling anybody about a knife? A: No RP 127

[Defense witness Uraih Allen]

"Q: So you broke up the fight? A: Pretty much. Q: Did anybody else? A: He just assist me, you know. He assisted it to stop. Q: Who is he? A: My cousin. Q: What is his name? Can you use his name? A: Anthony. Q: Okay. Did you see your cousin punch anybody? A: No." RP 293

"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 the second degree assault? A: I guess breaking up the fight. Q: Did you plead guilty or did you go to a trial? A: I pled guilty." RP 294

"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." RP 299

"Q: Your words 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 the 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 pled guilty to Second Degree Assault, inflicting substantial bodily injury against Ms.Jones, correct? A: Yes, I did." RP 300

Collectively, the above testimonies propels Allen far just the requirement to 'raise a reasonable probability' of innocence threshold pursuant to Riofta as well as Crumpton, Thompson, and Gray. Allen has further established the court abused it's discretion pursuant to State v. Rayfay, 176 Wn.2d 644, 655, 222 P.3d 86 (2009).

2. ALLEN WAS NOT AFFORDED HIS CONSTITUTIONAL RIGHT TO PROVE HIS ACTUAL INNOCENCE BY THE APPELLATE COURT'S HOLDING THAT PREVENTS ALLEN FROM ESTABLISHING NEWLY PRESENTED EVIDENCE THAT COULD OTHERWISE DEMONSTRATE HIS ACTUAL INNOCENCE.

Allen is constitutionally entitled to dna testing to establish newly presented evidence to demonstrate his actual innocence pursuant to Schulp v. Delo. The U.S Supreme Court held that, "a convicted individual has a constitutional right to be released upon proof of 'actual innocence'. An actual innocence claim requires a defendant to support his allegation with

reliable evidence. This may include exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence that was not presented at trial. New evidence in this context does not mean "newly discovered", but "newly presented." see Schulp, 513 US 248, 315, 115 S.Ct. 851, 130 L.Ed 2d 808 (1995).

Allen argues his postconviction motion will establish 'actual innocence' pursuant to Schulp v.Dolo, and as procedurally required under RCW 10.73.170 to prove his innocence pursuant to State v.Rioftu. Respectfully, this Court has never established a standard for review concerning whether the denial of RCW 10.73.170 may have the contingency to infringe upon, prejudice and/or deprive and prohibit a defendant from proving or establishing 'actual innocence', and whether a defendant is constitutionally entitled. Therefore, this presents an "open question" and a "case of first impression." see Foote v. Del Pope, 492 F.3d 1026, 1029 (9th cir.2007) Allen argues that whether a defendant is entitled to dna testing under any provision is a question of law subject to review for clear error. see US v. Fasano, 577 F.3d 572, 575 (5th cir.2009); US v. Jordan, 594 F.3d 1255, 1259 (10th cir.2010). Foreseeable, this Court may contend there is no constitutional right to post-conviction dna testing pursuant to Third Dist. v. Osborne. However, the Osborne court found that although "[d]ue process is not parallel to a trial right...there is a 'limited interest' in postconviction relief." see Osborne, 129 S.Ct. at 2320. Therefore, Allen argues his postconviction motion rests within the scope of this 'limited interest', and argues a necessary premise of this argument is that there exists an 'entitlement', what our precedents call a 'liberty interest', to prove actual innocence even after a fair trial has proven otherwise. see Osborne, Id. By this, Allen contends, "No state shall deprive any person of life, liberty, or property without due process of

law." see U.S.C 14th Amend.§1; Wash. Const. art.I, § 22.

Therefore, the question before the court is to determine just where exactly Allen's liberty interests rest, being incarceration does not divest prisoners of all constitutional provisions. see Shaw v. Murphy, 532 US 223, 228-229, 129 S.Ct.1475, 149 L.Ed 2d 420 (2001).

F. CONCLUSION

Based upon the foregoing facts and authorities, this pro se petitioner urges this Court to grant his Petition For Review.

DATED this 2nd day of April,2015.

Respectfully Submitted,

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APPENDIX A-1 to A-16

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OCTOBER 9, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ANTHONY LAMAR ALLEN, SR., Appellant.	)	No. 31578-9-III UNPUBLISHED OPINION

FEARING, J. — Deoxyribonucleic acid (DNA) testing is a relatively new technology, but the many benefits of DNA testing have caused the use of these methods to explode in a wide variety of applications. Some of the most well-known benefits of DNA testing have been seen in the arena of criminal justice. The guilty are found and convicted, and the innocent are exonerated, all on the basis of microscopic evidence that is more unique than a fingerprint. DNA evidence is particularly helpful when a victim misidentifies an assailant he or she did not know.

A jury convicted Anthony Allen of the crimes of kidnapping and assault. Anthony Allen filed a motion for postconviction DNA testing. Allen contended that (1) negative DNA results would, in combination with other evidence, raise a reasonable probability

that Allen did not commit the crimes; or (2) positive results would, in combination with other evidence, show that he is innocent on a more probable than not basis. From the trial court's denial of the motion, Allen appeals. We affirm the trial court. Although DNA testing serves a worthwhile purpose, its employment is not helpful here, since the victims of the crimes were acquaintances of Anthony Allen and would not misidentify him. Thus, the statutory basis to compel DNA testing is not satisfied.

FACTS

This court addressed Anthony Allen's direct appeal in *State v. Allen*, noted at 2009 WL 2999187 (Wash. App. Div. 3). The following facts and procedure below are drawn from that unpublished opinion and supplemented by the current record.

On August 19, 2007, Karla Jones and Dewey Hudson went to Hudson's Spokane house to retrieve Jones' dog. Unknown to Jones and Hudson, Anthony Allen and two other assailants, Uriah Allen and Wanda Phillips, waited inside Hudson's house. Hudson and Jones had known Anthony Allen for many years.

When Karla Jones and Dewey Hudson reached the porch of the house, Anthony Allen opened the door and pulled Jones into the entryway. Allen and his companions attacked Jones. Hudson tried to intervene, but 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. Allen then used the butcher knife to slash Jones' hair. Allen threatened to kill Jones if

she "messed" with his aunt again. Clerk's Papers at 112. Allen hit Hudson with a pistol. He and the two other assailants then left Hudson's house.

Dewey Hudson begged Karla Jones not to call the police; but Jones took her dog, ran home, and called the police. Officer Eugene Baldwin went to Jones' home within 10 minutes of Jones' phone call. Officer Baldwin saw injuries to Jones' head and face. Jones told Officer Baldwin that Allen and another man assaulted her and Hudson.

Officer Baldwin journeyed to Dewey Hudson's house and found Hudson unconscious in his living room with a swollen and bloody face. Hudson first told Baldwin nothing happened. Then recanting, Hudson told Officer Baldwin that he and Jones were assaulted. Hudson told Officer Baldwin that Allen hit him in the face and head with a handgun when he had tried to intervene. Officer Baldwin recovered the butcher knife from the home. The butcher knife had blood on the blade. Two blood swabs of that blood were taken, but DNA testing was not conducted.

PROCEDURE

On September 25, the State of Washington charged Anthony Allen with first degree kidnapping and two counts of second degree assault with a deadly weapon.

Dewey Hudson's testimony at trial differed from his statement to Officer Baldwin at the scene of the crime. Hudson testified that he incurred his injuries when he tried to remove Karla Jones from his house. Hudson further testified that he did not remember talking to Officer Baldwin and denied that Anthony Allen assaulted him.

Officer Baldwin testified that, after he described to Dewey Hudson, on the day of the assault, the extent of Karla Jones' injuries, Hudson grew receptive to telling the truth. Officer Baldwin repeated for the jury Hudson's earlier version of events, in which Hudson intervened to protect Jones, but Allen hit him with a handgun.

On December 20, a jury found Anthony Allen guilty of first degree kidnapping and two counts of second degree assault with a deadly weapon. By special verdict, the jury found that the deadly weapon was not a firearm.

On November 29, 2012, Anthony Allen moved, under RCW 10.73.170, for postconviction DNA testing of the blood found on the knife. The trial court denied his motion on the ground that testing could not prove his innocence on a more probable than not basis.

LAW AND ANALYSIS

RCW 10.73.170 allows a convicted person currently serving a prison sentence to petition the trial court for postconviction DNA testing. The petitioner must satisfy both procedural and substantive requirements of the statute. RCW 10.73.170(2), (3). The statute, adopted in 2000, reads in pertinent 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, 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 scientific 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 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.
>
> . . . .
>
> (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.

RCW 10.73.170. The statute was adopted to qualify Washington State for federal funding under the Justice For All Act of 2004. Pub. L. No. 108-405, 118 Stat. 2260, 2261-62. The Washington statute is modeled after the federal DNA testing statute, 18 U.S.C. § 3600(a). *State v. Riofta*, 166 Wn.2d 358, 368, 209 P.3d 467 (2009).

Procedurally, the petitioner must: state that DNA testing would provide significant new information; explain why DNA evidence is material to the identity of the perpetrator; and comply with applicable court rules. RCW 10.73.107(2)(a)-(c). Here, the trial court properly determined that Allen met the procedural requirements of RCW 10.73.170(2)(a)(iii), since DNA testing was not done prior to trial.

At issue is whether Anthony Allen satisfied the substantive requirements of RCW 10.73.170. In contrast to the statute's lenient procedural requirements, its substantive standard is onerous. *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009). RCW 10.73.170(3) provides, "The court shall grant a motion requesting DNA testing under this section if . . . the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." A motion for testing is not decided in a vacuum. *State v. Riofta*, 166 Wn.2d at 367-68. The statute requires a trial court to grant a motion for postconviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator. *Riofta*, 166 Wn.2d at 367-68. The legislature intended to restrict the availability of postconviction DNA testing to a limited class of extraordinary cases where the results could exonerate a person who was wrongfully convicted of a crime. *Riofta*, 166 Wn.2d at 369 n.4.

Case law supports using a favorable presumption when deciding whether to grant a motion for post-conviction DNA testing. We formally hold that this presumption is part of the standard in RCW 10.73.170. A court should look to 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. If so, the court should grant the motion and allow testing to be done. Only then can it be determined whether the DNA

actually exculpates the individual and if the results could be used to support a motion for a new trial.

In other words, a court should evaluate the likelihood of innocence based on a favorable test result, not the likelihood of a favorable test result in the first place. There is no indication that the trial court used a standard that included use of a favorable presumption. In its conclusions of law, the trial court stuck to the statutory language, with no mention of a presumption of favorability or hypothetical inferences from an exculpatory test result. Since we have found that this presumption is part of Washington law and should be applied, we are forced to assume the trial court did not apply the proper standard and therefore abused its discretion.

In 1993, a 75-year-old widow living alone in Bremerton was repeatedly raped by an intruder. *State v. Crumpton*, 172 Wn. App. 408, 410, 289 P.3d 766 (2012), *review granted*, 177 Wn.2d 1015, 306 P.3d 960 (2013), *rev'd*, 332 P.3d 448 (2014). The woman was awoken at around 3:15 a.m. and saw a man standing in her room. *Id.* The man covered her head with bedding and raped her five times, four times anally and once vaginally. *Id.* In between each rape, he rummaged through different rooms in the house for valuables. *Id.* The woman was unable to give a good description of the rapist due to the dark room and her head being covered during the encounter. *Id.*

Anthony Allen argues that DNA evidence would show that he was mistakenly identified as the assailant. The *Riofta* court accepted that mistaken eyewitness

identification is a leading cause of wrongful conviction. 166 Wn.2d at 371; *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60 (2008). The court addressed mistaken eyewitness identification by analyzing both the impact of a favorable DNA test and the likelihood of misidentification.

Riofta controls our decision. Alexander Riofta stole a vehicle in which he found a white hat. He wore the white hat when he, accompanied by two others, pulled up to the house of Veasna Sok. Sok previously agreed to testify against Riofta for gang-related activity. When Sok's little brother, the victim, exited the house, Riofta fired three shots at him, missing each time. The victim recognized Riofta as his neighbor of four or five years. Riofta fled the scene leaving behind the white hat and revealing his shaved head. The hat was later identified as belonging to the owner of the stolen vehicle. The State did not analyze the hat for DNA evidence. Riofta was found guilty of first degree assault with a firearm. Riofta then petitioned for postconviction DNA testing of the white hat.

The *Riofta* court analyzed the impact of DNA testing by recognizing that other people's DNA could be found on the hat, and that Alexander Riofta's DNA may not be found on the hat. Most likely, Riofta was not the only person to wear the hat. The hat's original owner could have worn the hat along with either of the two accomplices in the car. The presence of other's DNA would not show the defendant's innocence on a more probable than not basis.

Perhaps more importantly, the *Riofta* court underlined the fact that the victim

knew Alexander Riofta. The two lived in the same neighborhood and had known each other for four or five years. Riofta had visited the victim's home several times to meet with his brother. The victim had ample time to recognize both Riofta and his voice at the time of the attack. When police first interviewed Sok, he promptly provided Riofta's name and an accurate physical description.

Riofta should be juxtaposed with *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012). In the latter case, the state high court reversed the denial of Bobby Ray Thompson's request for DNA testing of vaginal swabs. Thompson had been convicted of first degree rape. The victim was unsure of her ability to identify the attacker and her tentative description did not match Thompson.

We review a trial court's decision on a motion for postconviction relief for abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); *Riofta*, 166 Wn.2d at 370. The lower court did not abuse its discretion under the facts of this case.

Just as the lack of DNA or the presence of other person's DNA on the hat in *Riofta* did not make the defendant's innocence more probable; the lack of or the existence of Anthony Allen's DNA on the knife does not make it more probable than not that Allen is innocent. Allen argues that the presence of his blood on the knife would make it unlikely that he wielded the knife during the assaults. He alternatively argues that, if DNA testing excludes him as a contributor to the DNA, the exclusion would exonerate him as the assailant. Both arguments are illogical.

The presence of Anthony Allen's DNA on the knife would only show that Allen was close enough to the altercation to be involved. Allen does not claim to be a victim. Therefore, the presence of his DNA would further implicate him as the assailant. If Allen's DNA is not found on the knife it would merely show that his DNA was not transferred; it would not show that he did not wield the knife. If another person's DNA was found on the knife, it would only show that at some point prior to the assault someone else handled the knife. Allen was one of three assailants, all of whom were in Hudson's house and could have handled the knife before it ultimately ended up in Allen's hands. A kitchen utensil is often used by multiple people and would have multiple sources of DNA.

Anthony Allen argues that DNA evidence would show that he was mistakenly identified as the assailant. Like *Riofta*, the evidence in this case shows that Dewey Hudson and Karla Jones knew Allen for many years. Hudson and Jones identified Allen as the assailant during the initial investigation, and Jones identified him at trial. Since Jones testified that Allen threatened to kill her, hearing his voice further confirmed an identification. The prior relationship between Hudson, Jones, and Allen reduced the possibility that Allen was mistakenly identified as the assailant.

STATEMENT OF ADDITIONAL GROUNDS (SAG)

Anthony Allen brings two claims in his SAG. First, Allen claims the trial court's denial of his motion for postconviction DNA testing violates his due process rights under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. This court rejected this same argument in *Riofta v. State*, 134 Wn. App. 669, 692, 142 P.3d 193 (2006), *review granted in part*, 161 Wn.2d 1001, 166 P.3d 718 (2007), *aff'd*, 166 Wn.2d 358, 209 P.3d 467 (2009).

Second, Anthony Allen claims he was not afforded effective assistance of appellate counsel in violation of the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. If Allen believes he received ineffective assistance on appeal then he should file a personal restraint petition with this court pursuant to RAP 16.4. The current record is insufficient to address this issue.

Allen's SAG presents no error for which this court could provide relief.

CONCLUSION

We affirm the trial court's denial of Anthony Allen's petition for DNA testing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to

RCW 2.06.040.

Fearing, J.

WE CONCUR:

Brown, A.C.J.

Lawrence-Berrey, J.

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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

Judge Kathleen M. O'Connor
Spokane County Superior Court
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A-13

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

Judge Kathleen M. O'Connor
Spokane County Superior Court
1116 W. Broadway
Spokane, WA 99260
(509) 477-4707

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

Judge Kathleen M. O'Connor
Spokane County Superior Court
1116 W. Broadway
Spokane, WA 99260
(509) 477-4707

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

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APPENDIX B-1 to B-10

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 ones 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 NOTARY PUBLIC COMMISSION EXPIRES AUG. 9, 2014 STATE OF WASHINGTON

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

FILED

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SPOKANE COUNTY CLERK

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 TO RELEASE SWABS FOR DNA TESTING AT DEFENDANT'S EXPENSE
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. The defendant has appealed those convictions.

More recently, the defendant filed a motion pursuant to RCW 10.73.170 to require the State to conduct DNA testing on evidence in the case. That motion, filed November 29, 2012 and argued on January 18, 2013, sought to have not only the two swabs that were obtained from the blade of the knife tested for the defendant's DNA, but also to have the rest of the

136

knife swabbed and tested. The motion was denied on April 10, 2013 per the Court's written ruling on April 9, 2013. The defendant has appealed that ruling. According to the Washington Court's website, that appeal had a non-oral argument hearing on April 30, 2014 but a decision has not been issued.

The defendant is now seeking an order allowing him to test the swabs obtained during the original investigation at his own expense through a private laboratory.

II. ISSUE

1) Whether the Court should enter an order directing law enforcement to release the swabs taken of the blade of the knife during the investigation of the case to a laboratory retained by the defendant for his own DNA analysis?

III. LAW AND ARGUMENT

Mr. Allen's current motion is different than his previous request for DNA testing. The previous motion sought to force the State to perform DNA tests on the knife and swabs. This of course imposes a financial cost on the State and uses up relatively scarce time and resources at the State Patrol Crime Lab to conduct the testing and issue a report. Currently, Mr. Allen seeks to have DNA testing done at his own expense in order to gather evidence to present a motion for a new trial. This motion is only seeking an order from the Court for swabs which have already been taken to be sent to a lab retained by the defendant. This imposes no cost to the State and only a minimal use of time to send the swabs.

Even though the prior motion is still on appeal awaiting decision, RAP 7.2(e) still allows the trial court to hear post-judgment motions. The rule requires the trial court to hear the motion and decide the matter. If the decision of the trial court will change a decision being reviewed by the appellate court, then Mr. Allen would normally need to make a motion in the appellate court to receive permission for the trial court to formally enter its decision. In this case, any decision on this motion would not obviate the decision pending review in Division III. The current motion before the Court is only seeking testing of the swabs, while the motion on appeal also sought new swabs/testing on other parts of the knife. Even though there is some overlap in the issue on both motions, the ruling on one motion does not preclude an order on the other motion from being carried out. Be that as it may, the defendant would also willingly seek permission from Division should he prevail on this current motion for private DNA testing.

Ultimately, Mr. Allen's goal is, and has been, to gather the necessary scientific evidence to be granted a new trial and present a more complete defense than was presented at his original trial. The 6th Amendment to the U.S. Constitution and due process require that a defendant be allowed to present witnesses and evidence. Taylor v. Illinois, 484 U.S. 400, 408, 98 L.Ed.2d 798, 108 S.Ct. 646 (1988). "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." Id. at 409 (citing to U.S. v. Nixon, 418 U.S. 683, 709, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974)).

A fundamental element of due process has long been recognized to include the accused's right to present evidence for his defense. *See*, Washington v. Texas, 388 U.S. 14, 19,

18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967). This fundamental right has also been recognized as part of the state constitution. The 6th Amendment and Article 1, section 22 of the Washington Constitution grants defendants the right to present relevant evidence in their defense. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

Mr. Allen continues to defend himself against the charges for which he was convicted, and can only do so if he is granted access to evidence to support his claim that he is innocent of these charges. DNA evidence is powerful testimony to both courts and juries. A favorable result from testing the evidence in this case may be what finally clears Mr. Allen's name.

Mr. Allen's request should be granted because it places almost no burden on the State, unlike a motion under RCW 10.73.170. In this case, more than one swab was taken from the blade of the knife, so a swab can be sent to the lab of Mr. Allen's choosing at his expense without costing the State any evidence, should it choose to conduct testing of its own at a later date. The cost to the State is negligible, but the gain in protecting Mr. Allen's right to produce evidence on his behalf is immeasurable. Should the Court grant Mr. Allen's motion, an order can be drafted once he has retained a laboratory to conduct the testing for the police to release a swab to that laboratory for testing. Independent testing is often undertaken for DNA, drug analysis, and many other forensic tests. It is a relatively common practice for samples to be packaged and mailed to independent labs, so Mr. Allen's request is not unduly burdening the "system".

Mr. Allen respectfully requests that this motion be granted and he be allowed to have DNA testing conducted, at his own expense, on a swab taken from the blade of the knife. This will protect his rights and allow him to continue to defend himself against these charges.

Respectfully submitted this _____ day of May, 2014.

_____

John Stine, WSBA #26391

DECLARATION

I, Anthony L.Allen,Sr., declare:

1. I am the Petitioner in this matter. I am over the age of 18. I am competent to testify. I assert the following facts from my personal knowledge and observations.

2. I am incarcerated at Stafford Creek Correctional Center in Aberdeen, Washington after a conviction in a Washington State court.

3. I have a deadline of April 6,2015 to submit my Petition For Review. I placed this petition in the outgoing Inmate Legal Mail box on this day and entrusted these documents to the corrections officer on duty.

I do declare under penalty of perjury under the laws of the State of Washington that all of the foregoing is true and correct.

DATED this 2nd day of April, 2015.

Anthony L.Allen,Sr.#720333
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, Washington
98520