

**FILED**  
NOV 23, 2015  
Court of Appeals  
Division III  
State of Washington

NO. 33018-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT MIDDLEWORTH,

Appellant.

---

FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

---

APPEAL FROM DENIAL OF MOTION FOR PRESERVATION OF  
EVIDENCE AND POST-CONVICTION DNA/PCR TESTING

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**A. RELIEF SOUGHT**

Mr. Middleworth asks that the Walla Walla Prosecuting Attorney preserve the rape kit procured by Lieutenant Robert Dutton of the College Place Police Department through St. Mary's Medical Center and nurse Alysa Reynolds on September 29, 2010, and seeks PCR DNA testing of the materials obtained on that date by swabs taken of lesions observed on the defendant's person, under RCW 10.73.170.

**B. ISSUES PRESENTED**

1. May the appellant Robert Middleworth seek post-conviction DNA testing under RCW 10.73.170 based on an argument that DNA testing of evidence collected by the State would provide "significant new information" relevant to his case?

2. Would new information from PCR DNA testing showing that Mr. Middleworth did not have an active, communicable Herpes outbreak at the time of the alleged offense, or that he had a different strain of the Herpes virus than that detected in the complainant, demonstrate his innocence on a "more probable than not" basis?

**C. STATEMENT OF THE CASE**

In August 2010, Robert Middleworth lived with his girlfriend Kristina Davis, and her four-year-old daughter, B. RP 546-49, 567-68,

939.<sup>1</sup> Mr. Middleworth worked long shifts driving a dairy truck. RP 556-57, 940. On one occasion Ms. Davis ran out for 10 to 15 minutes to purchase pet food at the local store; but otherwise, B. was never left in Mr. Middleworth's care. RP 555-56, 562-63, 566, 939.

In late September, after B. had turned five years old, she began complaining of pain in her "potty." RP 552-53. Mr. Middleworth told Ms. Davis she should take B. to the emergency room. RP 553, 559-62. Ms. Davis elected to wait until the next day, September 21, to seek medical attention. RP 559-61, 941-42. Rachel Marsh, a nurse practitioner, examined B. on September 21 and believed B. had experienced some sort of vaginal trauma. RP 751-54. B. told the nurse that her mother's boyfriend had laid her down when she was watching television. RP 754-55, 758. But Ms. Davis told the nurse she wasn't sure how anything could have happened because B. was with her all the time. RP 756.

B. was referred to a pediatrician, Joseph Wren, and Child Protective Services (CPS) was contacted. RP 671, 673, 756. After B. was sent to Spokane for further attention, Dr. Joel Edminster also found trauma

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<sup>1</sup> The transcript references herein are to the record of Mr. Middleworth's direct appeal from his convictions in COA No. 30850-2-III, including the consecutively paginated volumes of verbatim reports of proceedings which will be referred to herein by page number, e.g., "RP 123." Mr. Middleworth filed a motion to transfer the record of appeal No. 30850-2-III to this proceeding on November 23, 2015.

to her vaginal area. VI RP 804-06. She was diagnosed with Herpes and bacterial vaginosis. RP 714-15, RP 806-09. Dr. Edminster did not test B. to determine what type of the Herpes virus she had. RP 810-11.

Antibody tests showed that Mr. Middleworth had Herpes simplex 1 (generally found orally) and 2 (generally found genitally), and showed that his initial exposure had not occurred recently. Exhibit 3 (attached); RP 708-12, 717, 720-21, RP 779-81. The tests, however, also did not show that Mr. Middleworth had a recent outbreak. RP 719-21; see Part D, infra. Witnesses testified that at least 80 percent of the general population has Herpes simplex 1; a somewhat lower percentage might have simplex two. RP 721, 811. Ms. Davis testified she had experienced cold sores, with the most recent outbreak arising before she dated Mr. Middleworth. RP 437.

The State charged Mr. Middleworth with rape of a child in the first degree (RCW 9A.44.073) and child molestation in the first degree (RCW 9A.44.083). CP 10. After several trials, a third trial was held in April 2012. B. claimed, and her mother told her, that Mr. Middleworth had sex with her by putting his fingers in her “private spots.” RP 583-84, 588. B. also said he removed her clothes and she saw his private parts, which she had never stated before. RP 584-85, 589-90, 597-98, 647; see RP 400-01. Mr. Middleworth testified in his own defense and denied he touched B. on her private parts or exposed himself to her. RP 938-48.

Well into the State’s case-in-chief, it was revealed to the defense that B. made comments to a Department of Social and Health Services employee and her foster mother that potentially identified her step-grandfather, Brian P., as the source of her trauma. RP 638-39, 766-70, 900-03, 906-12, 898-99 (B. stayed overnight at her grandparents after moving in with Mr. Middleworth).

A jury ultimately convicted Mr. Middleworth on both counts, and he appealed. CP 1087-88. The Court of Appeals affirmed in an unpublished opinion. State v. Middleworth, 179 Wn. App. 1025, review denied, 180 Wn.2d 1025 (2014). Subsequently, Mr. Middleworth moved for preservation of evidence and PCR DNA testing of the swabs taken during his rape kit examination. The trial court denied the motion and the Washington Appellate Project was appointed to represent Mr. Middleworth.

**D. ARGUMENT**

**(1). DNA testing under RCW 10.73.170 is warranted where Mr. Middleworth showed that PCR DNA testing would provide “significant new information” that would demonstrate his innocence on a more probable than not basis.**

**(a). The statute permits DNA testing in this circumstance.**

RCW 10.73.170(1) allows a convicted person currently serving a prison sentence to file a motion requesting DNA testing with the court that

entered the judgment of conviction. The person requesting testing must satisfy both procedural and substantive requirements. RCW 10.73.170(2), (3). Motions brought under the statute must state the basis for the request, explain the relevance of the DNA evidence sought, and comply with applicable court rules. RCW 10.73.170(2)(a)-(c).

Under RCW 10.73.170(2)(a)(iii), a convicted person may seek DNA testing on the ground that it would demonstrate innocence on a more probable than not basis. Since it was amended in 2005, RCW 10.73.170 authorizes post-conviction DNA testing if the results could “provide significant new information” that would likely exonerate the movant. Laws of 2005, ch. 5, § 1(2)(iii). This requirement of “significant new information” has been held to encompass more than merely evidence available due to post-trial improvements in DNA testing technology; rather, it includes any DNA test results that did not exist at the time of trial, irregardless of whether that DNA testing could or could not have been performed then. State v. Riofta, 166 Wn. 2d 358, 361-62, 209 P.3d 467 (2009).<sup>2</sup>

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<sup>2</sup> As it existed from 2000 through 2004, RCW 10.73.170 allowed postconviction DNA testing only when the defendant was deprived of the opportunity to use DNA test results as exculpatory evidence, either because of an adverse court ruling or because the DNA technology was insufficiently developed to test the DNA evidence in the case. See Laws of 2000, ch. 92, § 1 (allowing DNA testing “if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case”).



In the present matter, Mr. Middleworth's motion filed February 19, 2014, correctly stated that the hospital nurse, who performed a "rape kit" on him following the allegations of sexual abuse, took swabs of lesions in his genital area that were made a part of the rape kit and sent for testing, but which were never tested. Appendix A (Motion for post-conviction DNA testing, at pp. 1-2). As Mr. Middleworth explained in his motion and his later "Personal Restraint Petition," appealing from the denial of his motion, the swab evidence would be *relevant* because PCR DNA testing of the swabs would reveal whether the swabs were a manifestation of an active Herpes infection and whether he had transmitted Herpes to the complainant. Appendix A (Motion, at pp. 3-5); Appendix B (Petition, at pp. 4-7).

If the movant satisfies the procedural requirements, as Mr. Middleworth has done, the trial court must grant the motion if it concludes the movant has shown the required "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3).

**(b). PCR DNA testing would provide significant new information that would demonstrate Mr. Middleworth's innocence on a more probable than not basis.** The trial court abused its discretion when it denied Mr. Middleworth's motion under the reasoning that there is

no reasonable means to test the “DNA of the Herpes virus” and/or that it was unlikely that any evidence of an exculpatory nature would be discovered. Appendix C (Order denying motion, February 9, 2015).<sup>3</sup>

The trial court was incorrect. DNA sequencing can reveal differences in virus strains, including of Herpes 2, for purposes of studying “transmission between individuals.” Appendix D (Kaneko, et al., Discrimination of Herpes Simplex Virus Type 2 Strains by Nucleotide Sequence Variations, 780 Journal of Clinical Microbiology, at 780-84 (Feb. 2008) (<http://jcm.asm.org/content/46/2/780.full.pdf+html>).

More importantly, Mr. Middleworth argues that PCR DNA testing of the swabs would additionally reveal whether the lesions that were swabbed were a manifestation of an active Herpes infection. Appendix A (Motion, at pp. 3-5); Appendix B (Petition, at pp. 4-7).

This testing would provide significant new information. RCW 10.73.170(3) provides:

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.

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<sup>3</sup> In its response to the motion, the State had asserted that it was “unsure for what purpose the defendant is requesting the testing.” Appendix E (Response to Defendant’s Motion). In its response to Mr. Middleworth’s subsequent petition, the State critiqued, as false, Mr. Middleworth’s argument that “a lab can tell by DNA testing of the virus whether the virus in one person had previously passed through another person.” Appendix E (Respondent’s Brief, at p. 6).

RCW 10.73.170(3). Importantly, the court is required to presume that the results of the requested DNA testing would be favorable. State v. Crumpton, 181 Wn. 2d 252, 260-62, 332 P.3d 448 (2014) (a trial court should presume that DNA results would be favorable to a defendant when determining if DNA test would demonstrate his innocence on a more probable than not basis).

This means that Mr. Middleworth is not required to demonstrate his innocence on the basis of the desired test results alone. State v. Riofta, 166 Wn.2d at 367. In determining whether a convicted person “has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis,” a court must look to whether, viewed in light of all of the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis. Riofta, at 367-68.

Here, the trial evidence indicated several important matters pertinent to this standard of RCW 10.73.170:

(1). The record of trial confirms that swabs were taken from Mr. Middleworth’s lesions, indicating that nurse Alysa Reynolds of St. Mary’s Medical Center took multiple swabs in the presence of law enforcement officers, and the kit was then handed over to the officers. Mr.

Middleworth avers that the kit is in the possession of the Walla Walla County Prosecutor, the College Place Police Department, or the Crime Laboratory. RP 776-84 (testimony of College Place Police Department Lieutenant Robert Dutton); RP 790-97 (testimony of Reynolds).

(2). The medical experts concluded that the complainant was suffering from a primary Herpes infection, meaning that her visible symptoms reflected a recent transmission of Herpes vaginitis. RP 699-703 (testimony of Dr. Joseph Wren of Adventist Health Medical Group regarding the detected Herpes, which was not determined as to whether it was Herpes 1 or Herpes 2)).

(3). Additionally, Dr. Wren correctly reviewed the testing evidence regarding the defendant. Exhibit 3. In consultation with pathologists at ARUP, the medical reference laboratory of Adventist Health Medical Group, Dr. Wren concluded that the antibody “IgG,” or “Immunoglobulin G” tests of Mr. Middleworth’s drawn blood indicated that he had been infected with both Herpes 1 and Herpes 2 at some point “in the past.” RP 711-12; 718-19;<sup>4</sup> Exhibit 3.<sup>5</sup>

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<sup>4</sup> Although the transcript states at RP 718-19 that Dr. Wren was asked about what Exhibit 3 showed as to “her” Herpes test results, counsel and the witness were plainly discussing Mr. Middleworth’s test results.

<sup>5</sup> In contrast, Dr. Wren testified that Mr. Middleworth was tested for Herpes simplex by testing for “IgM AB” antibodies. RP 719-20. This reveals if the person is suffering from a recent outbreak, and Mr. Middleworth’s test results for this were

(4). Crucially, Dr. Wren testified that laboratory testing for Herpes includes growing a culture from a swab or scraping to test for the virus or bacteria, and the “next growth standard would be in the age of genetics and now that we know PCR testing, preliminary chain reaction.” RP 713-14. Although Mr. Middleworth’s testing was for *antibodies*, a PCR DNA test would reveal both whether the defendant’s lesions showed he was suffering from an outbreak of Herpes, and whether it was Herpes 1 or 2. RP 713-14, 723-24. As the doctor testified,

What that does is it actually takes a sample and it spins it down and it takes the DNA from that and they are able to identify because they can chop that up into small pieces and figure out what organism it is or what virus it is and they can identify what it is with the preliminary chain reaction [PCR].

RP 714. However, Mr. Middleworth’s test was done solely by blood testing for antibodies – the trial record indicates that there was no testing – much less PCR DNA testing -- of the swab evidence that was collected.

This is pivotal. In addition to Dr. Wren, other witnesses made clear that the transmission of Herpes to the complainant would require an active outbreak on Mr. Middleworth’s part. RP 725 (Dr. Wren); RP 812-15 (Dr. Joel Edminster). Alysa Reynolds, the nurse who examined Mr. Middleworth, was permitted to testify that she believed that the lesions on

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negative. RP 719-21; see also RP 817 (RP 812-15 (Dr. Joel Edminster of Spokane Sacred Heart Hospital, testifying that the IgM test shows no active Herpes)).

his person that she observed represented an active outbreak of Herpes. RP 794-98. But Dr. Wren admitted that the sores that Reynolds stated she observed could not necessarily be Herpes at all. RP 723-24 (Dr. Wren, agreeing that there are other causes of such lesions).

In these circumstances, it is materially significant under RCW 10.73.170 that the swabs taken from those lesions were never tested. RP 785-86. PCR DNA testing of the swabs would show that Mr. Middleworth was not suffering from a current active outbreak of Herpes, and would also show that Mr. Middleworth was likely suffering from a highly common form of Herpes in the form of Herpes 1 – the same common affliction that Ms. Davis was likely suffering from. On either of these bases, this would be significant new information.

Mr. Middleworth has demonstrated that the trial court abused its discretion in denying his motion. The statute requires a trial court to grant a motion for post-conviction testing when the results would, in combination with the other evidence, raise a reasonable probability the movant was not the perpetrator. Riofta, 166 Wn.2d at 367-68. This standard is supported by the federal DNA testing statute, 18 U.S.C. § 3600(a). The Washington statute was drafted to qualify Washington for federal funding under the Justice For All Act of 2004, and in order to qualify for funding under the Act, Washington must provide post-

conviction DNA testing “in a manner comparable to” the federal post-conviction DNA testing outlined in 18 U.S.C. § 3600(a). Pub.L. No. 108–405, 118 Stat. at 2285. Under the federal statute, an inmate can obtain such testing by showing, *inter alia*, that the testing “may produce new material evidence” that would “support a theory” of innocence and “raise a reasonable probability that the applicant did not commit the offense.” 18 U.S.C. § 3600(a)(6), (8)(A), (B).

That standard is met in this case. In making that determination, this Court can consider the minimal nature of the child’s testimony. To determine the probability that a person could demonstrate his innocence with the aid of favorable DNA test results, courts must consider the evidence produced at trial along with any newly discovered evidence and the impact that an exculpatory DNA test could have in light of the evidence. United States v. Fasono, No. CRIM. 3:04–CR–34–WHB, 2008 WL 2954974, \*7 (S.D.Miss. July 29, 2008) (assessing potential impact of exculpatory DNA results in light of “the other evidence produced at trial”).

In this case, if the DNA evidence shows that Mr. Middleworth was not suffering from an active outbreak of Herpes in the days surrounding the alleged act, then he was not the person who transmitted the Herpes to the complainant. The presence of Herpes infection was the basis upon

which the State pursued conviction by the jury - in a case where the testimonial evidence from the complainant B. was thin at best. See Part C., supra; see RP 974-980 (State's closing argument). The court should have granted Mr. Middleworth's post-conviction motion.

**E. CONCLUSION**

This Court should reverse the trial court's order denying Mr. Middleworth's motion for preservation of evidence and PCR DNA testing.

DATED this 23 day of November, 2015.

Respectfully submitted,

s/ OLIVER R. DAVIS  
Washington State Bar Number 24560  
Washington Appellate Project  
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e-mail: oliver@washapp.org



# Exhibit 3

RUN DATE: 10/14/10  
RUN TIME: 0347

ST. MAR: MEDICAL CENTER LABORATORY  
PO Box 1477, Walla Walla, WA 99362

PAGE 1

LABORATORY REPORT

LSS#: G050111

PHYSICIAN  
COLLEGE PLACE POLICE DEPT.

Name: MIDDLEWORTH, ROBERT J      Age/Sex: 44/M      Attend Dr: Other Doctor  
Acct#: F00013500947 Unit#: F170766      Status: REG CLI      Location: LAB  
DOB: 10/31/65      Reg: 10/11/10      Disch:

SPEC #: 1011:S00019R      COLL: 10/11/10-1300      STATUS: COMP      REQ #: 01102770  
RECD: 10/11/10-1419      SUBM DR: Other Doctor

ENTERED: 10/11/10-1304      OTHR DR: COLLEGE PLACE POLICE DEPT.  
ORDERED: HSV I/II - IgG, HSV I/II - IgM

Test	Result	Flag	Reference	Units
***** SPECIAL IMMUNOLOGY *****				
HERPES I ANTIBODY-IgG	7.62	H	<0.90	IV
>1.10 Positive: IgG Ab to HSV Type I Glycoprotein G detected. May indicate a recent or past infection.				
HERPES II ANTIBODY-IgG	7.76	H	<0.90	IV
>1.10 Positive: IgG Ab to HSV Type II Glycoprotein G detected. May indicate a recent or past infection.				
HSV Type Specific antibodies to Glycoproteins gG 1 or gG 2 may not be detected in the early stages of HSV infection and some individuals may be infected with a glycoprotein G deficient HSV virus. In such cases, antibody detection may require testing with a non type specific assay.				
*** NOTICE *** This test was performed with HERPESELECT HSV Type Specific assays that utilize HSV I Glycoprotein gG 1 or HSV II gG2 recombinant antigens.				
Test Performed by PAML, 110 W. Cliff Dr, Spokane, WA 99204				
HERPES SIMPLEX IgM AB.	0.79		<0.91	OD Ratio
<0.91 Negative: No clinically significant level of HSV IgM antibodies detected.				
Due to the cross reactivity between HSV 1 and HSV 2 IgM antibodies, this assay can not discriminate between them and measures HSV Type 1 and Type 2 combined IgM antibodies.				
Test Performed by PAML, 110 W. Cliff Dr, Spokane, WA 99204				

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# Appendix A

FILED  
KATHY MARTIN  
COUNTY CLERK

2014 FEB 19 A 9:02

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

BY [Signature]

STATE OF WASHINGTON	)	NO. 10-1-00287-9
	)	<i>Amended</i>
Plaintiff	)	Motion for Post-Conviction DNA
	)	Testing (RCW.10.73.170
V	)	
	)	<i>Motion to Preserve All Physical</i>
ROBERT J. MIDDLEWORTH	)	Evidence (RCW 10.73.170 (6)
	)	
Defendant	)	

To: Clerk of the Court  
To: County Prosecutor's Office

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COMES NOW, the Defendant, Robert J. Middleworth, to request the Court to initiate an Order based on RCW 10.73.170 (6), to preserve all physical evidence, collected by the Walla Walla County Prosecutor's Office and the College Place Police Department in case No. 10-1-00287-9, until proper PCR testing can be performed on that evidence.

Defendant also moves the Court to Order the Washington State Crime Laboratory to perform PCR testing on evidence swabs of alleged herpes lesions that were collected by the College Place Police Department and allegedly placed in a Sealed Rape Kit and allegedly sent to the Washington State Crime

Laboratory. This Motion is made pursuant to RCE 10.73.170 of the Washington State Constitution and based on the records and files in this cause and upon the transcription of the three trials in this matter.

Defendant bases his motion on:

- (1) RCW.10.73.170, An individual convicted of a felony in a Washington State Court – who is currently serving a term of imprisonment may submit to the Court that entered the judgment, a verified written Motion requesting DNA with a copy of the Motion provided to the County Prosecutor.
- (2) RCW.10.73.170(2)(a)(iii) The DNA now requested would be significantly more accurate than prick DNA testing or would provide significantly new information.
- (3) RCW 10.73.170 (2) (b) Will explain why DNA evidence is material to identity of the perpetrator of the suspected crime.
- (4) RCW.10.73.170 (2) (c) Will comply with all other procedural requirement as established by Court Rules.
- (5) RCW.10.73.170 (3) The Court shall grant a Motion requesting DNA testing under this section of such Motion 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.
- (6) Errors of Law, Court Orders, and abuse of discretion which prevented the Defendant from receiving a fair trial.
- (7) Defendant was denied the right to confront the evidence which was used against him.
- (8) Defendant was denied the right to prepare a compulsory process against the evidence which was used against him.
- (9) Defendant was denied discovery in violation of the law.

- (10) The Court was misinformed by the Prosecutor's Office on what kind of testing had been performed by the Washington Police Crime Lab.
- (11) The State falsified it's case and supplied polluted evidence against the Defendant to the Court.

### ARGUMENT

*Defendant argues that substantial justice has not been met in that:*

Evidence exists in a Washington State mandated sealed rape kit that was sent to the Washington State Police Crime Laboratory, but which was never processed. Defendant was denied the results of those tests simply because the Prosecutor's Office misinformed the Court that the Washington State Crime Laboratory lacked the capability or the equipment to run Herpes testing.

'State v Mezuia', 118 P.3d 378 (2005), establishes that far back as 2001, the State Police Crime Laboratory had and still has the capability of testing for Herpes, by way of PCR test.

In 'State v Russell', 882 P2d, 762.125 wn 2d 24 (1994), during a two week Frye hearing, the State introduced four experts to support PCR testing. A Dr. Daniel Geraghty testified that "PCR testing is the major tehcnological development of the past ten years in molecular immunology and it meets no pockets of resistance."

Dr. Lisa Marr, MD, commenting on sexually transmitted deseases, stated, the "Polymerose Chain Reaction Test... is intended to detect the genetic material of

of the Herpes Virus. It can be used to test a lesion or spinal fluid to evaluate for Herpes and the PCR test can distinguish between HSV 1 and HSV 2."

The State's own witness, a Dr. Wren, testified that PCR testing is the most accurate method of testing for the presence of Herpes. Ms. Reynolds, an RNA at St. Mary's Medical Center, (where the rape kit was performed) testified that the purpose of the rape kit and the collection of evidence was to have it tested for Herpes or its antigens, at the State Crime Laboratory.

Defendant was deprived of the fundamental right to have PCR testing performed on the two swabs taken from alleged Herpes lesions on his penis.

The State had two other possible sources for the Herpes with which the child, Brandy Davis, was infected. The Mother, K. Davis, who testified - in the second trial - that she had active Herpes during the time Brandy was an infant when she was cleaning her and changing her diapers.

That, after she had testified in the first trial that she had never had Herpes and had been tested to prove it; however, the results of that alleged test were never provided to the Defendant in Discovery. The second possible source is Brian Pullson, whom it was brought out in trial that Brandy was in fear of him in regard to her private area.

The State deprived the Defendant of due process by failing to properly

investigate these two individuals, resulting in the possible exclusion of exculpatory evidence, the right to confront these individuals in Court, with the possibility that Defendant would have been more likely to have been found innocent than not.

### CONCLUSION

Defendant is an inmate at the Coyote Ridge Corrections Center. Under RCW 10.73.170, Defendant has the right to request - and to have performed - PCR testing performed on all evidence; especially, (in this matter) the two swabs of materials taken from these allegedly Herpes lesions, which were never processed.

The State violated the Defendants right under Court Rule 6.13 (b) by allowing the testimony of so-called expert witnesses regarding the presence of Herpes and Herpes lesions on the Defendant's person, without having performed the necessary testing on those materials to validate this testimony.

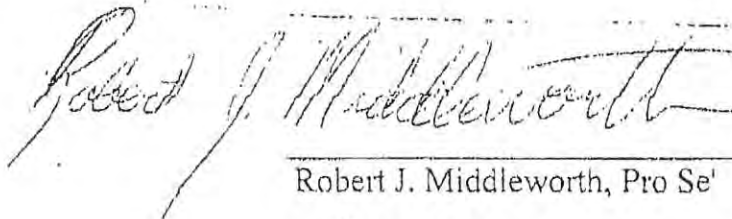
Defendant asserts that had these materials been properly tested, (CrR 6.13b) the negative results of those tests would more likely than not prove his innocence.

Defendant asserts that the Prosecution violated his right to a fair trial under RPC 38(g)(1)(2)(a)(b). When a prosecutor is aware of new, credible and material evidence which might create a reasonable likelihood that a convicted defendant is innocent of the offense and withholds that evidence, it constitutes obstruction.



Subject to evidentiary privileges, the right of an opposing party to obtain evidence through Discovery or subpoena is an essential right of the judicial process. The exercise of that right is illegally frustrated if relevant material is misrepresented, altered, or concealed.

Dated this JAN day of 7, 2014.



Robert J. Middleworth, Pro Se'

# 948011

DOC number

Coyote Ridge Correction Center  
Unit #/Cell G A 0 2  
PO Box 769  
Connell, WA 99326

# Appendix B

FILED

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

DEC 29 2014

IN THE MATTER OF THE APPLICATION	)	No.10-1-00287-9
OF POST CONVICTION DNA TESTING	)	PERSONAL RESTRAINT PETITION
AND THE PERSONAL RESTRAINT OF	)	FOR POST CONVICTION DNA/PCR
	)	TESTING AND PRESERVING EVIDENCE
ROBERT MIDDLEWORTH #948011	)	
Plaintiff.	)	RCW§10.73.170, RAP§ 16.3 (a).

CLERK OF COURT  
STATE OF WASHINGTON  
P.O. BOX 40800  
SEATTLE, WA 98148-0800

A. STATUS OF PETITIONER

Petitioner, Robert Middleworth is currently serving 160 months to life for RCW§ 9A.44.073, and 64 months to life for RCW§ 9A.44.083. This incarceration is currently being served in the Dept of Corrections at their Coyote Ridge Corrections Center. At which his current direct appeal has been filed as a Habeas Corpus 2254 in the District court Eastern Div, Washington State. An additional Personal Restraint Petition is filed in this Court 32632-2-III, currently pending review.

COYOTE RIDGE CORRECTIONS CENTER  
Robert Middleworth #948011 / GA0214  
P.O.Box 769  
Connell. Washington 99326

B. APPLICATION FOR RELIEF FROM  
POST CONVICTION DNA/PCR TESTING.

I am currently in custody serving a sentence upon conviction of a crime. The Court in which I was sentenced is the Superior Court of Walla Walla of the State of Washington.

- 1). I was convicted of the crimes of:
  - A). 9A.44.073 Child Rape first degree
  - B). 9A.44.083 Child molestation first degree
- 2). The Judge who imposed sentence was Judge Donald Schacht, (currently retired).
- 3). I was convicted after three trials.
- 4). The attorney of record Ms. Gail Siemers was the trial counsel during the first trial, (was fired at the beginning of the trial). Ms. Siemers, contracts with the Court of Walla Walla, have been rescinded. Her new practice

is located in Oak Harbor Washington State.

A Mr. Makus was assigned as attorney of record after Petitioners paid attorney a Mr. Randy Lewis was removed with out Petitioners authority to do so. Petitioner was denied the ability to participate in that removal. where Petitioner had no conflict with Mr. Lewis, Petitioner assumes the conflict was with the State and the Trial Court. Mr. Makus was then appointed to represent Petitioner for the next two trials. His representation is currently pending review in this Court #32632-2-III, 2014.

Mr. Jerry Makuses address is 330 W. Main Street, Walla Walla. Wash 99362.

5). I have appealed the decision from the trial Court as well as the unpublished opinion of this Courts Div III in the supreme Court of Washington State. Was denied. (currently filed in the United States District Court.

6). I appealed to the Washington Appellate Court Division III and the Wash Supreme Court.

7). Appellate attorney was a Ms. Marla Zink, Attorney at Law. She represents for the Washington State Appellate Project. Their address is Melbourn Tower, Suite 701, 1511 Third Avenue, Seattle. Washington 98101.

8).The decision of the Appellate Court Division III was Unpublished.

9). Sense my conviction, I have asked the Court for some relief other than whats described above;

A). Motion for Post conviction DNA/PCR testing was filed January 28.2014, in the Superior Court of Walla Walla. Petitioner has not received response to his motion, leaving the Walla Walla Superior Court and the Walla Walla Prosecuting attorneys office in violation RCWS2.08.240 and the Washington Constitution Atr, 4§ 20.

B). Motion was filed Pro-se due to unable to aquire legal representation A request was made to the Superior Court as well for appointment of counsel to assist in investigating and filing motions, also no response made in violation of RCWS2.08.240, and Art 4§ 20. No response has been made to Petitioners request of the Walla Walla Superior Court.

C). Motion for preservation of Physical evidence was also filed, no response made creating another violation of RCWS2.08.240 and Art 4§ 20, No response has been made in almost one year. thus giving the purpose for Petitioners Personal Restraint Petition.

### C. SUPPLEMENTAL INFORMATION

The charge in this case were litigate in three separate trials. Although this petition is concerned only with the request for Post conviction DNA/PCR testing and the preservation of all Physical Evidence involved in Petitioners case No. 10-1-00287-9.

It is important for this Court to recognize the particular request for Post conviction testing was first filed on January 28.2014, a letter of intent was filed of amended motion, same date.

February 27.2014, Motion for request of counsel also with letter of intent was filed. THE above motions were herd Ex Parte March 17.2014, as the docket record shows, see ATTACHMENT A). April 2.2014. Petitioner filed motions to produce. Motions was ignored. March 17.2014 hearing, docket record shows hearing was postponed until April 21.2014. A new hearing was held. No response was made to Petitioner towards the actions taken in that hearing The docket record shows their was action, "Motion for Post Conviction Testing" The record further shows, the State Prosecutors office responding by a strike motion Via E-Mail "Dpiis request", made April 22.2014. see ATTACHMENT A). On may 1.2014 Petitioner filed motion to produce ruling motion was ignored.

Petitioner has been unsuccessful in obtaining a response to the court and the Prosecuting Attorneys offices' actions into his request for Post conviction DNA/PCR testing.

It is currently the month of December,2014. It has been more than 90 days the Law allows the Court and the Prosecutors office to respond Putting them in violation of the Washington State Constitution Atr 4§ 20 of Rcw§2.08. 240.

The contention is founded upon section 20 of Article 4 of the States Constitution, which reads as follows;

"Every case submitted to a judge of a superior Court for his or Her decision shall be decided by him or Her within 90 days, from the time of submission Thereof, provided that if within said period of ninety days a rehearing shall have been ordered, then the period within which he or She is to decide shall commence at the time the cause is submitted upon such a hearing.

As another section of the Constitution declares all of its provisions' to be Mandatory, unless by expressed words they are declared to be otherwise. It is argued that this provision being mandatory can have no force or effect,

if it is not held, that delay beyond the period that was fixed deprives the Court of its Jurisdiction to render a decision. It would seem however, that such Constitution of the section would be directly subversive of its purpose. Manifestly, the purpose of this provision was to secure a speedy determination of causes submitted to the Court for decision. "The Law's Delay" this is not a modern phrase.

Judges of old times, were not wholly unlike their successors in office They too, were inclined to waver between two opinions and fearful of peralence, have always been regarded as something of an unmixed evil when viewed from the standpoint of a litigant or the public. It was to furnish a remedy for this that this clause of the Constitution was adopted.

It was thought that Judges, who derive their authority from that instrument, would obey its command, or if they did not, some means would be found to coerce obedience, indeed it may have been thought that disobedience would be grounds for an impeachment, but certainly it was never thought that remedy was to be found in the holding that Judgment afterward rendered is Negatory. To give it this Constitution is to prolong the very person, whom it was intended should be its beneficiaries [Demaris V. Barker et,al., 74 P.362,33 Wash.200].

Petitioner seeks to the Washington State Appellate Court Division III, for relief in the matter of his motion filed in the Superior Court of Walla Walla requesting DNA/PCR testing, Petitioner still seeks the same remedy as follows;

"Petitioner request this Court to initiate an order preserving all Physical Evidence collected by the Walla Walla County Prosecutors Office and all Evidence collected by the College Place Police Department under the authority of RCW§10.73.170 (6) of cause No. 10-1-00287-9, until proper DNA/PCR testing can be performed on such evidence. Furthermore, Petitioner moves this Court to instruct the Washington State Police Crime Laboratory, located at 580 west 7th street, Cheney Washington 99004-2492. to perform the Polymerase chain reaction test on evidence swabs of alleged Herpes lesions that were collected by College Place Police Department and ST. Mary's Medical Department allegedly Placed in a sealed mandated Washington State Rape Kit and presumably sent to the State Crime Laboratory in Cheney Washington. The authority to this request is made pursuant to RCW§10.73.170, and Rap 16.3 (a), Post Conviction establishes a single proceedure for original proceedings in the Appellate Court to obtain formally available for Post Conviction relief.

#### D.THE FOCUS OF THIS PETITION

- 1). An individual convicted of a felony in Washington State Courts, who is currently serving a term of imprisonment, may submit to the State Courts that interred the Judgment a verified written petition requesting DNA/PCR testing, with a copy of the petition provided to the County Prosecutor. RCW§10.73.170.
- 2). Every case submitted to a Judge of a superior Court for his or Her decision shall be decided by him or Her within 90 days from time of submission thereof; That if within said period of ninety days a rehearing shall have been ordered, then the period within which he or She is to decide shall commence at the time the cause is submitted upon such rehearing, and upon willful failure of any such Judge so to do. He or She shall be deemed to have forfeited his or Her office. RCW§2.08.240.
- 3). RCW§ Const, Art 4§ 20 (establishes same as above). Every cause submitted to a Judge of a superior Court for his decision shall be decided by him or Her within 90 days.
- 4). The DNA of the Herpes virus or its antigens now requested would provide significantly new information RCW§10.73.170.(2)(iii).
- 5). The test results will explain why evidence is material to identity of the perpetrator of the allege crime RCW§10.73.170.(2)(b).
- 6). Testing will comply with all other procedural requirements as established by Court rule and Rap procedures. RCW§10.73.170(2)(c).
- 7). This Court shall grant Petitioners request for DNA/PCR testing under this section of such motion in the required by subsection (2) of this section and the convicted person has shown the likelihood that the DNA/PCR evidence would demonstrate innocence on a more probable than not basis. RCW§10.73.170.(3).
- 8). Error of Law, Court orders and abuse of discretion which prevented Petitioner from receiving a fair trial. His right to confront the evidence which was used against him was denied see State V. Parker 350 S.W, 3d 883 894 Tenn,2011) citing Williams 132 S.Ct at 2253-54 (breyer J. Concurring)

"Once more, the analysts role is to facilitate the operation of a machine, not to make any factual affirmation and not to serve as a witness against anyone. Petitioner was denied the right to prepare a compulsory process against the evidence which was used against him. Petitioner further was denied discovery in violation of the Laws of the State of Washington, CrR§4.7, The Court was Misinformed by the Prosecutors office on what kind of testing can be performed in the State Police Crime Laboratory, and the State Faultsified its case in general and supplied polluted evidence against Petitioner.

#### E. GROUNDS FOR RELIEF.

Petitioner, claims and argues that substantial justice has not been met in that, evidence exists in a Washington State Mandated Sealed rape kit, that was sent to the Washington State Crime Laboratory, but which was never processed.

Petitioner, was denied the results of those tests simply due to the Prosecutors Manifestly misinforming the Trial Court that the Washington State Crime Labortory lacked the capability of the proper equipment to run Herpes Polymerace chain reaction testing. This further, violated Petitioner rights for the evidence to be tested in denying Petitioners motion to the Walla Walla Superior Court, filed on January 28.2014, to have this testing performed.

#### F. GROUNDS PRESENTED.

First Ground; Evidence "favorable to the accused" includes exculpatory evidence and evidence that impeaches a government witness. see U.S. V. Bagley 473 U.S. 667,676 (1985), (quoting Brady, 373 U.S. at 87). see also Gonzales V. Mckune 247 F.3d 1066 (2001), (information about lack of sperm in semen sample collected from victim was exculpatory even though it did not conclusively exonerated defendant who did not have low sperm count, Vacated in Part); see also U.S. V. Triumph Capital Grp.,Inc., 544 F.3d 149,162 (2008), (FBI agents notes favorable to an accused BECAUSE contradicted testimony of government witness.

Petitioner, suggest that evidence exist in a Washington State Mandated sealed Rape Kit that was sent to the Washington State Crime Laboratory, which was never processed. Petitioner asserts his rights were denied to the results of those tests, simply because the Prosecutor Manifestly Misinformed the Trial Court; (citing RP State V. Middleworth, "The (W.S.C.L)'s lack of capability of the proper equipment to run Herpes PCRT testing".

Furthermore, The Prosecutor violated Petitioners rights for evidence to be tested, in ignoring Petitioners motion to test PCR evidence.

State V. Mezuaia 118 P.3d 378 (2005) establishes that as far back as 2001, the WSCL has had and still has the Capability of testing for Herpes, by way of PCRT. see State V. Russell 882 P.2d 762,125 Wn.2d 24 (1994), (During a two week Frye Hearing, the State introduced four experts to support PCRT. A Dr. Daniel



Geraghty, testified that PCRT is the Major technological development of the past Ten years in Molecular Immunology and it meets no pockets of resistance. A Dr. Lisa Marr M.D. commented on sexually transmitted diseases that states the PCRT is intended to detect the Genetic Material of Herpes Viruses. It can be used to test Scab like Lesions or Spinal Fluid to evaluate for Herpes and PCRT can further distinguish between HSV 1 or HSV 2".

The States own expert witness, A Dr. Wren at RP 713-14, at 24-25 and at 1-6, Wren Direct (PCRT, what it does is it actually takes a sample and spins it down and it takes the DNA from that and they are able to Identify because they can chop that into small pieces and figure out what Organism it is it is or what Virus it is and they can Identify what it is with the PCRT.

Even the States own expert witness DR.Wren testified to this form of testing being the most accurate method of testing for the presence of Herpes or its Antigens. Other State experts like Ms. Reynolds testified to the purpose of the rape exam on Petitioner, was to send samples to WSCL to test for Herpes and its Antigens, see RP 792-94 Reynolds direct at 793; at 21-23. and due to the Prosecutors course of action into this matter, Petitioner was deprived of his Fundamental right to have PCRT performed on the two Swabs taken from alleged Herpes Scab-like Lesions from his person.

#### SECOND GROUND

The State had two other possible sources, that quit possibly transferd the Hrepes virus to the Victim.

"First the alleged victims mother Ms. K. Davis testified in the second trial, that she has active Herpes. This account is seen in RP of second trial at RP 437 K. Davis-cross, at14-15. Further, she coerced her daughter to say that Petitioner had sex with her. see B. Davis at RP 588 Cross Third Trial, at 14-23.

"Second The second possible source was a Mr. Pullson, the STEP-Grandfather based on a common Law marriage. Whom it was brought out to the Courts and States Attention in the third trial which was connected to suppressed evidence "A Second Recorded Interview of the Allege Victim", that she was in fear of him in regards to her private area.

The issue here is that Petitioner was deprived of his Constitutional right of due process. When the state failed to properly investigate these individuals, "Given Trial Information," proper testing of these individuals would have given a better insight to the real perpetrator of the Transference of the Herpes Virus to the college victim, B. Davis.

#### C. SUMMARY.

Petitioner, is an inmate at the Coyote Ridge Correctional Center, Petitioner brings this petition to this Court under the established authority RCWS10.73.170, Sup 16.3 (a), Post Conviction relief, which establishes a single procedure for original proceedings for Post Conviction relief.

Further, due to the state and the Superior Courts violation of RCWS10.08.240. Petitioner, respectfully request this Court to decide in favor of Petitioners Personal Restraint Petition for DNA/Polymerase Chain Reaction testing without response or obstruction from the state or the Superior Court Walla Walla.

In light of their forfeiture to participate further in the matter authoritatively enforced under our State Constitution of Art 4, 20 90day provision. Petitioner, has a Constitutional right to the evidence suggested in this petition to be subjected to the PCR that remains in a Rape Kit unopened and untested at WSCL and all other evidence collected by the College Place Police Dept and the State Prosecuting Attorneys Office that hasn't been tested as of yet. This evidence once tested, results should be forwarded to Petitioner and to this Court. Especially the two scab like lesions which were sent to the WSCL and never processed.

Further, the State also suggest with their excuse to not run the the test. "Only a hospital can perform these test". One has to ask sense Mr. Reynolds testimony was so important to the states case to establish a a current outbreak of Herpes Symplex 1 and Symplex 2, why wasn't the evidence Rape Kit rerouted to a proper Hospital for testing as all the other evidence that was tested was done.

The State violated Petitioners Constitutional rights under CRP 6.13 (b), and Discovery Court rule CrR 4.7, by allowing the testimony of so-called expert witnesses regarding the presence of Herpes Scab Like Lesions on Petitioners person, without having performed the necessary testing on the Material located at WSCL to validate the expert witness testimony.

Petitioner further, asserts that the Prosecutor violated Petitioners' right to a fair trial, as did the Superior Court on its APPEARANCE OF FAIRNESS DOCTRINE by allowing expert testimony with out collaborating facts, test results. Authority given; RPC 3.8 (g), (1)(2)-(a)(b), and Guillermo Garcia V. City of College Place at #05-1-00052-7 (2008), (citing; when a Prosecutor is aware of new, creditable and material evidence which might create a reasonable likelihood that a convicted defendant is innocent of the offense and withholds that evidence, "It constitutes Obstruction".

Furthermore, in Judge Schachts address to his opinion of his fairness doctrine, makes the issuance that "the issue is not whether the Judge was actually biased or whether the interest actual effected him, but whether the proceedings appeared to be fair. ("The Defendants conviction in that case was reversed due to its APPEARANCE.

Subject to evidentiary privileges, the right of an opposing party to obtain evidence through Discovery or subpoena is an essential right of the judicial process. The exercise of that right is illegally frustrated if relevant material is, "MISREPRESENTED, ALTERED or CONCEALED.

#### A. CONCLUSION.

Petitioner, respectfully seeks to this Court and request an order to W.S.C.L., to perform PCR testing on the EVIDENCE SWABS of allege herpes soad like lesions that were collected by the College Place Police Department acting on the authority of the Prosecutors office. That placed said evidence into a sealed mandated rape kit and sent it to the W.S.C.L..

This request is pursuant to RCW 10.73.170--RCW 2.06.240--ART 4 § 20--RAP 16.3--RPC 6.13 (b)--and CrR 4.7.....See also Guillermo Garcia V. City of College Place No.05-1-00052-7 (2008). Of our Washington State Const- and is based on the records and files in cause No. 10-1-00287-9 and upon the records and transcripts of all three Trials in which can be found in this Courts Washington State Appellate Court system in Division III, under #30850-2-III.

Petitioner further seeks this Court to make a ruling that pursuant to RCW 10.73.170 (6), all physical evidence in this matter including untested evidence, be preserved. That was collected by a Ms. Reynolds and the Washington State College Place Police Department, as well as the State Prosecution office and all its agents including the W.S.C.L.

and all evidence pertaining to cause No.10-1-00287-9 State V. Middleworth, until said time proper PCRT can be performed on all said evidence.

RESPECTFULLY SUBMITTED

THIS DAY 24 OF Dec. 2014

Robert J. Middleworth 948011

ROBERT J. MIDDLEWORTH #948011

I Robert J. Middleworth, declare under the penalty of that the above petition is true and correct as the records in cause No. 10-1-00287-9, contains dated this day 24 of Dec. 2014.

# Appendix C

FILED  
KATHY MARTIN  
COUNTY CLERK

2015 FEB -9 P 2:40

WALLA WALLA COUNTY  
WASHINGTON

BY 

SUPERIOR COURT OF WASHINGTON – COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

ROBERT J. MIDDLEWORTH ,

Defendant.

NO. 10-1-00287-9

ORDER

THIS MATTER having come before the court on the defendant's motion for DNA virus testing, plaintiff appearing through Michelle M. Mulhern, Deputy Prosecuting Attorney, defendant having filed his motion *pro se*, the defendant appearing not, and the court having reviewed the file and the arguments of the parties, and being advised in the premises thereof, and finding that;

There is no reasonable means available to test the DNA of the herpes virus; the defendant's motion to preserve the virus test swabs was not timely made, nor made to the correct entity, as the Washington State Patrol Crime Lab does not have the swabs; it is unlikely that, even if the virus were able to be tested for DNA evidence, any evidence of an exculpatory nature would be discovered; that the State was not properly served with the defendant's motion; Now, Therefore,

ORDER – P. 1


OFFICE OF THE PROSECUTING ATTORNEY  
240 WEST ALDER, SUITE 201  
WALLA WALLA, WA 99362-2807  
PHONE (509) 524-5445

1  
2  
3 IT IS HEREBY ORDERED that the defendant's motion to test the DNA of the herpes  
4 virus be, and is hereby, denied.

5 Dated this 9 day of Feb, 2015.

6  
7  
8   
9 Judge of the Superior Court

10 Presented by:

11  
12   
13 Michelle M. Mulhern WSBA#23185  
14 Prosecuting Attorney

# Appendix D



## Discrimination of Herpes Simplex Virus Type 2 Strains by Nucleotide Sequence Variations<sup>∇</sup>

Hisatoshi Kaneko,<sup>1</sup> Takashi Kawana,<sup>2</sup> Ken Ishioka,<sup>1</sup> Eiko Fukushima,<sup>1</sup> and Tatsuo Suzutani<sup>1\*</sup>

*Department of Microbiology, Fukushima Medical University School of Medicine, Fukushima 960-1295,<sup>1</sup> and Department of Obstetrics and Gynecology, University Hospital, Mizonouchi, Teikyo University School of Medicine, Kawasaki 213-8507,<sup>2</sup> Japan*

Received 13 August 2007/Returned for modification 4 October 2007/Accepted 20 November 2007

**We determined the polymorphous 400-bp regions in UL53, US1, and US4 for the discrimination of herpes simplex virus type 2 (HSV-2) strains. Thirty-six HSV-2 clinical strains could be differentiated into 35 groups using these three regions and into 36 groups by additional analysis of three noncoding regions previously reported as polymorphous.**

Herpes simplex virus type 2 (HSV-2) often causes genital herpes and, occasionally, meningitis, neonatal infections, and acute retinal necrosis. The study of the relationships between these diseases and virus strains, and the analysis of transmission between individuals, requires accurate and reproducible typing and phylogenetic analyses of clinical strains (4, 9). To achieve this, molecular technologies, in particular restriction fragment length polymorphism (RFLP) analysis, have been widely employed (12, 13, 14). However, the RFLP assay is relatively troublesome, and comparison of results obtained in different laboratories is difficult.

DNA sequencing is much easier to use and is more sensitive

than the RFLP assay in the detection of minor variations between strains. Using this technique, nucleotide sequences are subjected to comparative analysis, and evolutionary relationships between strains are validated. Moreover, the advantage of sequencing is that the results are easily stored and shared electronically; therefore, they can be utilized in laboratories worldwide.

Among human alphaherpesviruses, some genes in both HSV-1 and varicella-zoster virus have already been identified as possessing many nucleotide polymorphisms (1, 2, 6, 8). Recently, polymorphic regions in the noncoding region in HSV-2 were also reported (7), but none have been identified in the

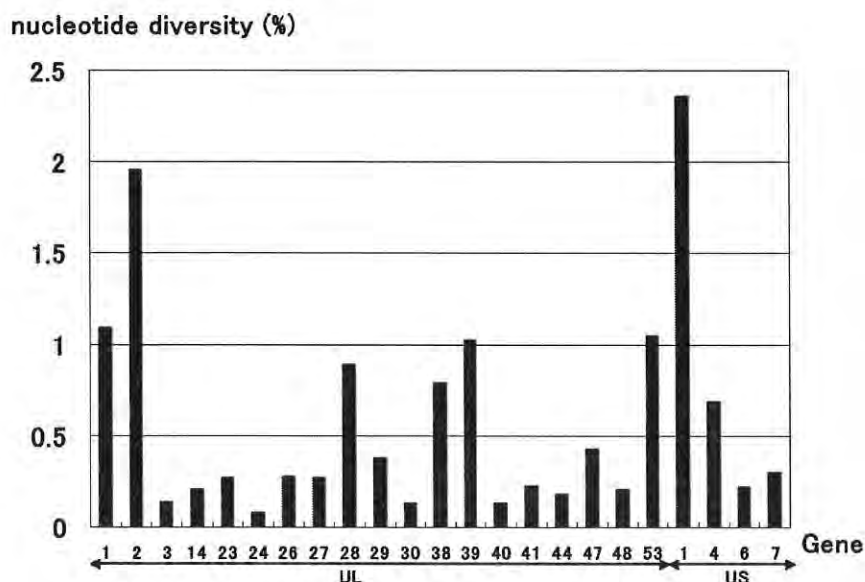


FIG. 1. Nucleotide diversity of each HSV-2 gene. The diversities of 19 UL and 4 US genes were analyzed using sequence data registered in GenBank.

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<sup>∇</sup> Published ahead of print on 12 December 2007.

TABLE 1. Positions of and variations in polymorphic sites in 400-bp regions from the UL53, US1, and US4 genes and three noncoding regions, NC1, NC3, and NC4, from 36 fsHSV-2 clinical strains and strain HG52

Gene or region	Position <sup>a</sup>	Variation(s) (no. of strains)
UL53	113584	C (36), T (1)
	113593	A (36), G (1)
	113611	C (33), T (4)
	113713	C (33), G (4)
	113720	A (35), G (2)
	113765	T (31), C (6)
	113805	C (36), G (1)
	113834	A (33), G (4)
	113847	A (25), G (12)
	113864	G (36), A (1)
	113922	G (36), T (1)
	113926	T (36), C (1)
	113944	T (35), G (2)
	113974–113975	TA (25), CG (11), TA (1)
	US1	133785
133807		A (30), G (7)
133817		T (36), G (1)
133882		A (33), C (4)
133892–133900		TCCTCGACC (32), CCCTCGACC (3), ACC (1), deletion (1)
133910		G (36), A (1)
133932		G (36), C (1)
133955		C (32), G (4), T (1)
134041–134043		CGA (33), TGA (3), deletion (1)
134049–134054		ATGATG (29), ATGATGATG (3), ATG (2), deletion (2), ATCATGATG (1)
134082		C (34), A (3)
134089		T (33), C (4)
134102		C (36), T (1)
134117		C (31), G (6)
134124		C (36), A(1)
US4	138749	A (31), G (6)
	138755–138757	TCG (36), deletion (1)
	138768	G (36), A (1)
	138783	C (36), G (1)
	138807	T (29), C (8)
	138809	C (36), T (1)
	138890	G (35), T (2)
	138911	C (36), T (1)
	138932	C (36), T (1)
	138966	C (35), G (2)
	139011	C (35), T (2)
	139031	C (36), T (1)
	139060	A (34), G (3)
	139092	G (35), C (2)
	139100	C (36), T (1)
	139107	C (36), T (1)
	139145	T (32), C (5)
NC1	40609	G (36), A (1)
	40681	A (35), G (2)
	40684–40687	5A (27), 4A(10)
	40699	A (36), C (1)
	40708	A (36), G (1)
	40735–40737	3A (36), 2A (1)
	40811	T (35), C (2)
	40865	C (36), T (1)
	40866–40871	6C (29), 5C (7), 7C (1)
NC3	48802	C (29), T (8)
	48803–48811	8C (10), 9C (9), 7C (7), 6C (4), 10C (4), 4C (1), 5C (1), 11C (1)
	48812	T (36), C (1)
	48918	C (34), A (3)
	48956	T (34), C (3)
	48957–48963	7C (19), 6C (13), 5C (4), 8C (1)
NC4	84796–84803	4GT (12), 5GT (10), 6GT (9), 8GT (4), 3GT (1), 7GT (1)
	84808	G (33), A (4)
	84809–84812	4G (14), 7G (10), 5G (8), 4G (4), 9G (3), 3G (2)
	84813	C (36), G (1)
	84861	C (27), T (10)

<sup>a</sup> Positions of polymorphic sites on HSV-2 strains. The numbering of positions corresponds to that of the HSV-2 strain HG52 total sequence (4).

TABLE 2. Primers and conditions used in PCR-directed sequencing

Gene	Primer	Size of PCR product (bp)	Position <sup>a</sup>	Sequence	PCR conditions
UL53	HSV2-UL53(F)	1,256	112920–112940	GTCGGGACCAACAACCGCCTA	95°C/3 min, (95°C/30 s, 55°C/60 s, 72°C/90 s) × 40, 72°C/10 min
	HSV2-UL53(R)		114135–114117	CGACGTGCGAGGGTGCCTA	
US1	HSV2-US1(F)	1,481	133649–133667	CGATCCCAACATCCGCGCT	95°C/3 min, (95°C/30 s, 55°C/60 s, 72°C/120 s) × 40, 72°C/10 min
	HSV2-US1(R)		135129–135106	CATTACAGTACGAGCGGTGTCGC	
US4	HSV2-US4c(F)	747	138694–138714	AGCCTGCTGGTGGGGATTACG	95°C/3 min, (95°C/30 s, 55°C/60 s, 72°C/60 s) × 40, 72°C/10 min
	HSV2-US4c(R)		139440–139417	CGTGGCGGTGGTTCGCGGCGACCGA	

<sup>a</sup> Position of the primer sequence on the DNA sequence of the HSV-2 genome (4).

open reading frames (ORFs). In this study, we identified 400-bp regions with many nucleotide polymorphisms in the HSV-2 genes, the nucleotide sequences of which can be determined with one sequencing reaction.

We used 36 HSV-2 clinical isolates (referred to here as strains 1 to 36) from 36 epidemiologically unrelated Japanese patients with genital herpes infections for more than 20 years. All strains were isolated in Vero cells and stored after a few passages. Virus DNA was extracted from the infected cells or clinical samples by proteinase K treatment and phenol-chloroform extraction.

First, we checked all HSV-2 nucleotide sequence data registered in the GenBank database, and sequence alignments were constructed using Web-based Clustal W alignment programs. Sequence information from partial regions in the ORFs was also analyzed, but data from regions shorter than 400 bp were excluded from the analyses.

Nucleotide sequences of 28 unique long (UL) genes and 8 unique short (US) genes from more than two strains of HSV-2 were registered in the GenBank database, and the nucleotide diversity of these 36 genes was evaluated. No polymorphism was observed in 13 genes (UL4, UL5, UL22, UL42, UL43, UL45, UL54, UL55, UL56, US2, US3, US5, and US8), which were therefore excluded as candidate genes. Of the remaining 23 genes, we then examined the 8 genes that showed more than 0.5% nucleotide diversity (Fig. 1) and the 400-bp regions with large numbers of polymorphic sites in 6 of the 8 genes, excluding UL28 and UL38. To evaluate the frequency of polymorphic sites in the candidate regions among the clinical isolates, we sequenced the target regions of five HSV-2 clinical strains by a PCR-directed sequencing method, as described previously (5). The homology of the regions from UL1 and UL39 was 100% for all five strains, and just one nucleotide substitution in one strain was identified in the region from UL2. On the other hand, the numbers of polymorphic sites in the 400-bp regions from the UL53, US1, and US4 genes were 8, 3, and 4, respectively. We regarded these 400-bp regions as highly polymorphous regions and carried out sequence analysis of these regions for the other 31 strains (Table 1). The primers and conditions used in PCR for the three regions are summarized in Table 2.

As a result, polymorphisms at 14, 15, and 17 sites among the 36 strains studied were observed in the regions from UL53, US1, and US4, respectively (Table 1). On the basis of the polymorphisms in the three regions, the 36 strains were classified into 35 groups (Table 3). In contrast, six isolates obtained from different recurrent episodes over 20 years for one genital

herpes patient were found to be identical strains (data not shown).

Phylogenetic analyses of the 36 strains and strain HG52 (3) for each of the three regions were carried out using the neighbor-joining method and visualized by MEGA, version 3.1. The shapes of the phylogenetic trees differed from each other; the strains that formed a genetically related cluster in the analysis of one region were dispersed in the phylogenetic trees obtained from the analyses of the other regions. These results indicated that the three target regions are not genetically linked (Fig. 2A, B, and C).

To confirm the accuracy and reliability of our three test regions, we analyzed the sequences of three noncoding regions, noncoding region 1 (NC1), NC3, and NC4, located between the UL19 and UL20, the UL24 and UL25, and the UL37 and UL38 genes, respectively, and reported as target regions for the discrimination of HSV-2 strains (7). The 36 HSV-2 strains were classified into 34 groups by using these three noncoding regions. Moreover, we could differentiate and classify all 36 Japanese strains through additional analysis of the three noncoding regions with more than two different sites between two closely related strains (Table 3).

Furthermore, we analyzed our 36 HSV-2 strains in comparison with 26 American strains registered in GenBank (7) and strain HG52 (3). Phylogenetic analysis of the NC1 (data not shown), NC3 (Fig. 2D), and NC4 (data not shown) sequences found that no specific clusters formed among the 36 Japanese or the 26 American strains. This observation was different from

TABLE 3. Classification of 36 HSV-2 clinical strains with sequence variations in 400-bp regions from the UL53, US1, and US4 genes and three noncoding regions

Region	No. of groups classified	No. of polymorphic sites <sup>a</sup>
UL53	16	0–8
US1	20	0–8
US4	19	0–7
UL53 + US1 + US4	35	0–14
NC1	11	0–5
NC3	21	0–5
NC4	17	0–4
NC1 + NC3 + NC4	34	0–11
Combination of all six regions	36	2–18

<sup>a</sup> For every 2 strains among the 36 HSV-2 strains.

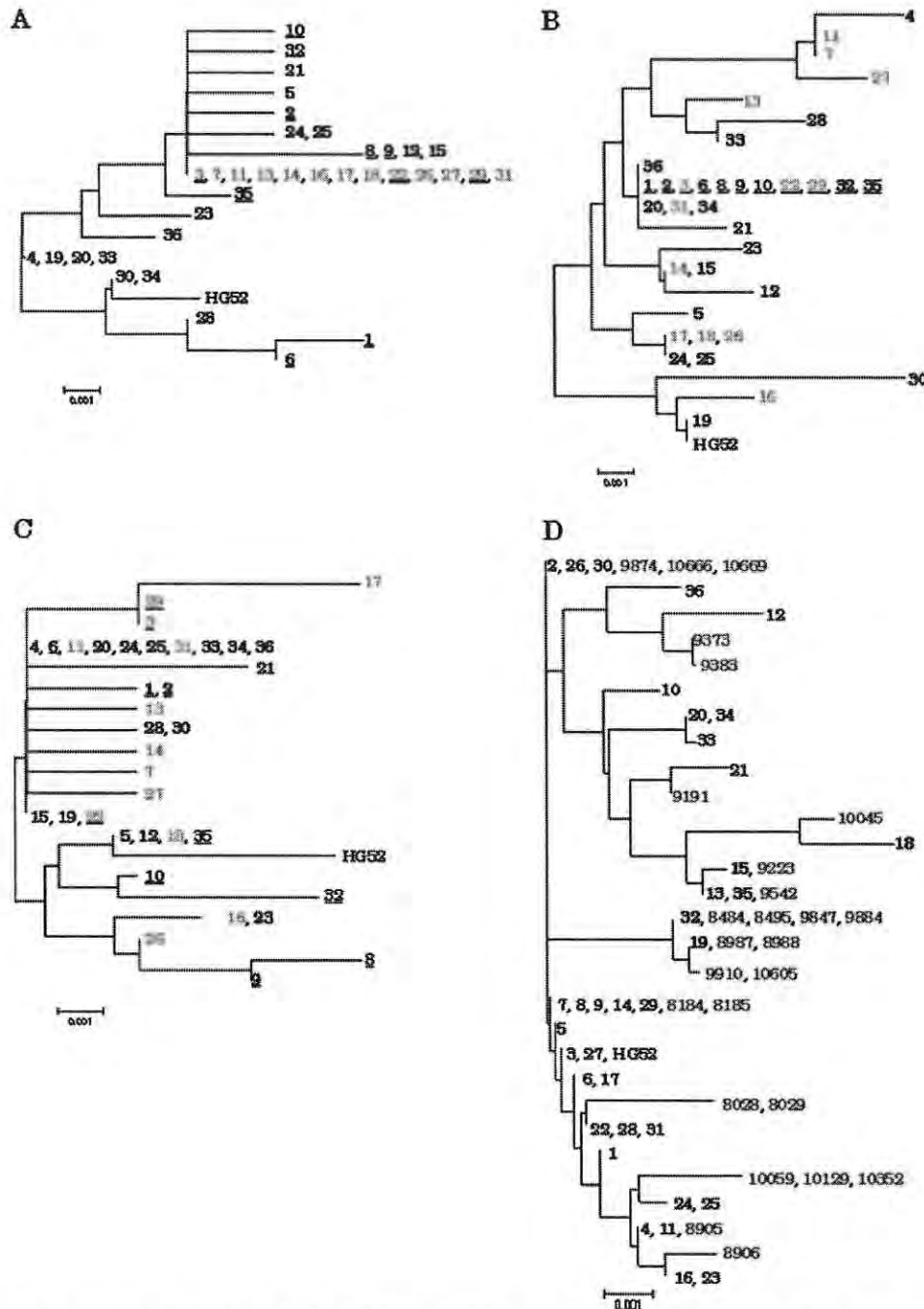


FIG. 2. Phylogenetic analyses of 400-bp regions in the UL53 (A), US1 (B), and US4 (C) genes and in NC3 (D). Sequence data from all 36 HSV-2 clinical strains (shown as strains 1 to 36) and strain HG52 (3) were analyzed by the neighbor-joining method. The names of strains with common sequences in the 400-bp regions from UL53 and US4 are shown in red and underlined, respectively. The 26 American strains registered in GenBank (7) were added for the phylogenetic analysis of NC3. These American strains are shown in blue.

those for other human alphaherpesviruses, HSV-1 and varicella-zoster virus, which formed regional genotypes (1, 6, 10, 11). Moreover, our observations described in this report represent common characteristics among HSV-2 strains and provide a method that is applicable worldwide.

In conclusion, the identification and discrimination of HSV-2 strains by three ORF regions were both accurate and

reliable. These results suggest that our method might also have sufficient sensitivity for application to etiological studies worldwide.

**Nucleotide sequence accession numbers.** The nucleotide sequences determined in this study have been registered in the DDBJ database under accession no. AB290460 to AB290514.

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RUN DATE: 10/14/10  
RUN TIME: 0347

ST. MAR: MEDICAL CENTER LABORATORY  
PO Box 1477, Walla Walla, WA 99362

PAGE 1

LABORATORY REPORT

LSS#: G050111

PHYSICIAN  
COLLEGE PLACE POLICE DEPT.

Name: MIDDLEWORTH, ROBERT J      Age/Sex: 44/M      Attend Dr: Other Doctor  
Acct#: F00013500947 Unit#: F170766      Status: REG CLI      Location: LAB  
DOB: 10/31/65      Reg: 10/11/10      Disch:

SPEC #: 1011:S00019R      COLL: 10/11/10-1300      STATUS: COMP      REQ #: 01102770  
RECD: 10/11/10-1419      SUBM DR: Other Doctor  
ENTERED: 10/11/10-1304      OTH DR: COLLEGE PLACE POLICE DEPT.  
ORDERED: HSV I/II - IgG, HSV I/II - IgM

Test	Result	Flag	Reference	Units
***** SPECIAL IMMUNOLOGY *****				
HERPES I ANTIBODY-IgG	7.62	H	<0.90	IV
>1.10 Positive: IgG Ab to HSV Type I Glycoprotein G detected. May indicate a recent or past infection.				
HERPES II ANTIBODY-IgG	7.76	H	<0.90	IV
>1.10 Positive: IgG Ab to HSV Type II Glycoprotein G detected. May indicate a recent or past infection.				
HSV Type Specific antibodies to Glycoproteins gG 1 or gG 2 may not be detected in the early stages of HSV infection and some individuals may be infected with a glycoprotein G deficient HSV virus. In such cases, antibody detection may require testing with a non type specific assay.				
*** NOTICE *** This test was performed with HERPESELECT HSV Type Specific assays that utilize HSV I Glycoprotein gG 1 or HSV II gG2 recombinant antigens.				
Test Performed by PAML, 110 W. Cliff Dr, Spokane, WA 99204				
HERPES SIMPLEX IgM AB.	0.79		<0.91	OD Ratio
<0.91 Negative: No clinically significant level of HSV IgM antibodies detected.				
Due to the cross reactivity between HSV 1 and HSV 2 IgM antibodies, this assay can not discriminate between them and measures HSV Type 1 and Type 2 combined IgM antibodies.				
Test Performed by PAML, 110 W. Cliff Dr, Spokane, WA 99204				

Leo

# Appendix E

**FILED**

MAR 18, 2015

Court of Appeals  
Division III  
State of Washington

33018-4-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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IN RE THE PERSONAL RESTRAINT OF  
ROBERT MIDDLEWORTH,  
Petitioner.

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SECOND  
PERSONAL RESTRAINT PETITION

---

RESPONDENT'S BRIEF

---

Respectfully submitted:



by: Teresa Chen, WSBA 31762  
Deputy Prosecuting Attorney

P.O. Box 5889  
Pasco, Washington 99301  
(509) 545-3561



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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the denial of the Petitioner's post-conviction motion.

## **III. ISSUE**

Did the superior court abuse its discretion in denying the Defendant's post-conviction motion for DNA testing by the WSP lab, where the WSP lab does not perform the kind of testing the Defendant is seeking, where testing has already determined the Defendant and his victim had the identical viruses, and where the Defendant did not show the likelihood that DNA evidence would demonstrate innocence on a more probable than not basis?

## **IV. STATEMENT OF THE CASE**

In his third trial, the Defendant Robert Middleworth was convicted by jury of child rape in the first degree and child molestation in the first degree. Appendix A. He appealed, requesting reversal of his convictions.

*Id.* The court of appeals confirmed the convictions in an unpublished opinion, No. 30850-2-III, filed February 6, 2014. *Id.* The petition for review was denied on July 9, 2014. Appendix B. The Defendant has filed a petition for writ of certiorari to the United States Supreme Court.

The Defendant's first personal restraint petition, No. 32632-2-III, was dismissed on March 16, 2015. Appendix C.

In this second personal restraint petition, the Defendant challenges the superior court's failure to address his post-conviction motions for DNA testing and asks this Court to order the testing. His motion to the superior court requested the court order "the Washington State Patrol Crime Lab to perform PCR testing on evidence swabs of alleged herpes lesions." Appendix D at 1. The motions were not properly served upon the State and not properly noted for hearing. Appendix E at 1.

Since the filing of the second PRP, the superior court has addressed the motion and denied it, finding:

There is no reasonable means available to test the DNA of the herpes virus; the defendant's motion to preserve the virus test swabs was not timely made, nor made to the correct entity, as the Washington State Patrol Crime Lab does not have the swabs; it is unlikely that, even if the virus were able to be tested for DNA evidence, any evidence of an exculpatory nature would be discovered; that the State was not properly served with the defendant's motion.

Appendix F at 1.

The court's ruling relied upon the State's response. This response explained that, at trial, the State presented reports from a pathology lab and evidence that the Defendant had the same two variants of the herpes virus that his child victim did. The response attached a letter from the WSP crime lab explaining:

The DNA analysis conducted at our laboratories is for human identification. The WSP laboratories do not conduct virus or bacterial analysis. Viral and bacterial testing may be available in a clinical testing laboratory.

App. E at 3.

Both the Defendant and child tested positive for the two kinds of herpes. RP 131-42, 205-06, 700, 709-710, 790-98, 804-09. At the Defendant's trial, there was testimony establishing that this testing was performed elsewhere, because the WSP Crime Lab does not test for diseases. RP 171-73, 781-85, 793-94.

## V. ARGUMENT

THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR POST-CONVICTION DNA TESTING BY THE WSP LAB.

The Defendant complained about the delay in the court's resolution of his motion. Petition at 3. A motion is not properly before

the court if there is failure of service upon any party. *State v. Moen*, 129 Wn.2d 535, 540, n. 2, 919 P.2d 69 (1996) (“Where the criminal rules are silent, the civil rules can be instructive as to matters of procedure.”); CR 5(a) (every pleading shall be served upon each of the parties); CR 6 (describing timely notice to another party). It would be improper for a party to ask for the court’s decision on the ex parte docket where the opposing party was not properly served and able to respond. The superior court found this was the case here.

Before the superior court ever heard the motion, the Defendant filed this petition, asking this Court to decide his motion for post-conviction DNA testing. The law provides that the superior court, “the court that entered the judgment of conviction,” shall determine the motion. RCW 10.73.170(1). This Court sits in review of the lower court’s action. It reviews the trial court’s decision on a motion for post-conviction DNA testing for abuse of discretion. *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009).

The superior court shall grant a post-conviction DNA motion if it is in the form provided by section (2) and the convicted person has shown *a likelihood that the DNA evidence would demonstrate innocence* on a more probable than not basis. RCW 10.73.170(3). The court found that

the Defendant had not met this threshold, because the WSP lab testing he is requesting is not possible. This is tenable. The Defendant appears to be seeking to compare disease strains, not human DNA. This is not something that the crime lab does.

The Defendant believes that the testing for herpes in this case was done at the crime lab. Petition at 7. He is simply wrong. RP 172-73, 709, 781-82, 785, 793-94, 806. The apparent reason for the Defendant's incredulity that the WSP lab does not perform DNA testing on viruses is his misreading of *State v. Mezquia*, 129 Wn. App. 118, 118 P.3d 378 (2002) and *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). Petition at 6. Neither case supports his belief. Both regard the DNA testing of a human profile, not a virus profile. *State v. Mezquia*, 129 Wn. App. at 122; *State v. Russell*, 125 Wn.2d at 32.

In the instant case, there is no question of the identity of the human DNA since the only samples were taken directly from the Defendant Middleworth and his victim.

The court's finding is reasonable considering the science. While viruses have their own DNA, their very short DNA sequences are very different from the enormous human sequences. Every part of the virus' DNA is necessary for its survival. Therefore, you will not see the

variation that you see in humans. There are billions of humans, each with different DNA profiles; but there are only two herpes viruses. App. D at 4 (PCR will only be able to distinguish between HSV 1 and HSV 2).

The Defendant does not and cannot establish that a lab can tell by DNA testing of the virus whether the virus in one person had previously passed through another person. It cannot. Testing only identifies the virus. As Dr. Wren explained at trial, the disease can be identified one of two ways: a culture in a blood test or a PCR test. RP 713-14. Both are reliable. Both would identify whether the virus is simplex 1 or 2. One of those methods was already used here and determined that the same viruses, both HSV 1 and HSV 2, were in both the Defendant and his victim. Therefore, the court also found: “it is unlikely that, even if the virus were able to be tested for DNA evidence, any evidence of an exculpatory nature would be discovered.” App. F at 3. This is tenable. The test has already been performed.

The Defendant appears to believe that PCR will be able to show something that other testing did not. It will not. The technology is used to amplify a few copies of DNA into thousands or millions in order that testing might be performed even where the sample is small. *State v. Russell*, 125 Wn.2d at 38 (“One microbiologist has described PCR as a



genetic photocopy machine.”). This will not be helpful here, because in this case, there was no issue as to the sample size.

While *State v. Crumpton*, 181 Wn.2d 252, 332 P.3d 448 (2014) requires the lower court to presume favorable results, this presumption cannot be applied here where the science the Defendant is asserting does not exist. No existing test can determine whether the virus passed through the Defendant before arriving in the child. The test can only show if the virus is HSV 1 or HSV 2. There are the only two herpes viruses. In our case, the test has already been performed. Both viruses were both present in both people.

The court's finding is also reasonable considering the evidence at trial. Post-conviction DNA testing is permissible in a case where, presuming a favorable DNA test, the inmate could demonstrate that it was more probable than not that he was innocent, for example, in a case where the victim could not identify her single assailant. *State v. Crumpton*, 181 Wn.2d at 260. But this is not that case. Here the child knew the Defendant well and identified him and him alone.

The Defendant was not charged with transmitting herpes. He was charged with touching and penetrating the child's sexual organs. RCW 9A.44.010(1)(b) and (2); RCW 9A.44.073; RCW 9A.44.083. The child

testified that on as many as ten occasions the Defendant touched her under her clothes while she was sitting on his lap. RP 396-405. She testified that the Defendant had sex with her. RP 582-83. When her mother was out shopping, the Defendant would pick her up and put her on his lap, take off her clothes and put his finger in her private spots. RP 583-85. This is consistent with the modus operandi described by the Defendant's stepson. RP 190-92 (when the witness was the same age as the victim in the case, when their mother was out of the house, the Defendant would sit his stepsons on the couch and penetrate them).

There is no testimony that anyone else had sexual contact with the child. RP 586 (child denying anyone else touched her).

The Defendant argued in his motion that the child's mother and grandfather are possible sources of the herpes infection. App. D at 4. His suggestion that a DNA test could demonstrate that the child contracted the viruses from her mother or her grandfather is not plausible. Even if such a test exists, which it does not, there is no suggestion that either the mother or Mr. Paulson have herpes.

The Defendant's assertion that the mother testified at RP 437 that she had herpes is false. Petition at 7. He provides the page in his petition which demonstrates only that she believed that she had a cold sore five

years before. But the mother is not a doctor. (In fact, the mother has cognitive delays such that she believed the Defendant when he told her the raw and bleeding genitalia of her daughter could be the result of a urinary tract infection. RP 144-45, 752-53.) Canker sores, yeast infections, razor burn, ingrown hairs, insect bites, and pimples can be mistaken for herpes related cold sores. Much more probative of the issue is a doctor's diagnosis or test. The child's mother testified that she has never been diagnosed with herpes and was checked for herpes after the child's disclosure. RP 59, 77. This would have been around the time of the CPS referral and foster care placement. RP 102, 145.

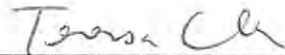
On this record, the court's decision is tenable. There was no abuse of discretion.

**VI. CONCLUSION**


Based upon the forgoing, the State respectfully requests this Court deny the petition.

DATED: March 18, 2015.

Respectfully submitted:



\_\_\_\_\_  
Teresa Chen, WSBA#31762  
Deputy Prosecuting Attorney

Robert J. Middleworth LEGAL MAIL DOC # 948011 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 17, 2015, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201
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# Appendix F

FILED  
KATHY MARTIN  
COUNTY CLERK

2015 JAN -2 P 12: 51

WALLA WALLA COUNTY  
WASHINGTON

BY Palmer

SUPERIOR COURT OF WASHINGTON – COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

ROBERT J. MIDDLEWORTH,

Defendant.

NO. 10-1-00287-9

RESPONSE TO DEFENDANT'S  
MOTION

COMES NOW THE STATE OF WASHINGTON, by and through Michelle M. Mulhern, Deputy Prosecuting Attorney, and hereby submits its response to the Defendant's Pro Se motion for DNA testing.

FACTS

The defendant was convicted of Rape of a Child 1<sup>st</sup> and Child Molestation 1<sup>st</sup>. He is currently incarcerated and serving his 160 month sentence.

The defendant filed a pro se motion, without properly serving or noting it before the court, demanding DNA testing, as far as the State can discern, of the swabs of the lesions taken from his penis during the examination and search by the SANE at Providence St. Mary's Medical Center in Walla Walla.


1  
2  
3 The State is unsure for what purpose the defendant is requesting the testing. However,  
4 the attached letter from the Washington State Patrol Crime Lab makes it clear that WSP does not  
5 conduct DNA testing of viruses, nor does it test for biological pathogens.  
6

7 At trial, the State presented the appropriate reports, from a pathology lab, and evidence  
8 that the defendant had both variants of the herpes virus, as did the victim.

9 **CONCLUSION**

10 Since WSP cannot perform the tests the defendant demands, the State respectfully  
11 requests the court deny his motion.

12 DATED this 31<sup>st</sup> day of December, 2014.

13  
14   
15 Michelle M. Mulhern, WSBA# 23185  
16 Deputy Prosecuting Attorney  
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JAY INSLEE  
Governor



JOHN R. BATISTE  
Chief

STATE OF WASHINGTON  
WASHINGTON STATE PATROL

580 West 7th Street • Cheney, Washington 99004-2492 • (509)625-5401 • [www.wsp.wa.gov](http://www.wsp.wa.gov)

April 3, 2014



Michelle Mulhern, Esq.  
Walla Walla Prosecuting Attorney's Office  
240 W. Alder Street, Suite 201  
Walla Walla, WA 99362

Dear Ms. Mulhern:

It is my understanding you and your agency are requesting clarification on the type of DNA testing conducted at the Washington State Patrol Crime Laboratories. The DNA analysis conducted at our laboratories is for human identification. The WSP laboratories do not conduct virus or bacteria analysis. Viral and bacterial testing may be available in a clinical testing laboratory. If additional human DNA analysis is needed on your samples please submit them to the laboratory.

If you have any questions or concerns please contact me by phone at 509.625.5491 or send an email to [jeff.riolo@wsp.wa.gov](mailto:jeff.riolo@wsp.wa.gov).

Sincerely,

A handwritten signature in black ink that reads "Jeffrey Riolo".

Jeffrey Riolo, Laboratory Manager  
Crime Laboratory Division

JR:jr





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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 33018-4-III
v.	)	
	)	
ROBERT MIDDLEWORTH, JR.,	)	
	)	
Appellant.	)	

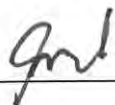
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **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] JAMES NAGLE, DPA WALLA WALLA COUNTY PROSECUTOR'S OFFICE 240 W ALDER ST, STE 201 WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] TERESA CHEN [tchen@co.franklin.wa.us] ATTORNEY AT LAW PO BOX 5889 PASCO, WA 99302-5801	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] ROBERT MIDDLEWORTH, JR. 948011 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2015.

X \_\_\_\_\_ 

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# WASHINGTON APPELLATE PROJECT

**November 23, 2015 - 4:15 PM**

## Transmittal Letter

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Case Name: STATE V. ROBERT MIDDLEWORTH

Court of Appeals Case Number: 33018-4

Party Represented: APPELLANT

Is This a Personal Restraint Petition?  Yes  No

Trial Court County: \_\_\_\_ - Superior Court # \_\_\_\_

### Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
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- Cost Bill
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