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SUPREME COURT  
STATE OF WASHINGTON  
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No. 95509-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY E. WHITFIELD  
Petitioner.

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

The Honorable James J. Dixon, Judge  
Cause No. 04-1-00617-5

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ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the Petitioner has provided any basis pursuant to RAP 13.4(b) upon which this Court should grant review where Whitfield failed to demonstrate an adequate basis for DNA testing pursuant to RCW 10.73.170.

B. STATEMENT OF THE CASE.

In 1992, the Appellant, Anthony Whitfield, was diagnosed with HIV. State v. Whitfield, 132 Wn.App. 878, 883, 134 P.3d 1203 (2006). Despite his diagnosis, from 1999, to 2004, he embarked on a journey of unprotected sex with seventeen different women, all of whom were unaware of the dangers he posed.<sup>1</sup> Id. at 883-84. Of those seventeen women, at least five were later diagnosed with HIV, and according to witness testimony, during this time period, Whitfield told others that if he had HIV, he would spread it to as many people as possible. Id. at 884.

Whitfield was eventually tried for these acts, and convicted of 17 counts of first degree assault with sexual motivation. Id. at 883. The trial court found that he had exposed all seventeen women to HIV, thus satisfying the third alternative means of first degree assault. Id. at 887; see also RCW 9A.36.011. As a result,

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<sup>1</sup> Even after Whitfield had been served with a cease and desist order, mandating that he refrain from activities which could expose others to HIV, Whitfield continued to engage in unprotected sex. *Whitfield*, 132 Wn.App. at 885.

Whitfield was sentenced to 178 years in prison. Whitfield, 132 Wn.App. at 883.

In 2016, Whitfield filed a motion under RCW 10.73.170 seeking post-conviction DNA testing, which the trial court denied. State v. Whitfield, Unpublished Opinion, No. 49469-8-II, 1 (Div. II 2018). In his motion, Whitfield requested DNA testing of five of his victims who reportedly contracted HIV. Id. at 3. Whitfield appealed the denial of his motion. On appeal, Whitfield alleged in a Statement of Additional Grounds that the trial court violated the appearance of fairness doctrine and the right to due process, the prosecution committed prosecutorial misconduct and the State spoiled evidence and coerced victims to testify falsely. Finding that “Whitfield’s RCW 10.73.170 motion for post-conviction DNA testing fails to show that DNA is material to a sentence enhancement” the Court of Appeals affirmed the ruling of the trial court.

### C. ARGUMENT.

1. Whitfield’s claims are without merit and he provides no basis under RAP 13.4(b) for which this Court should accept review.

A petition for review will be accepted by this Court only:

“(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”

RAP 13.4(b). Whitfield’s Motion for Discretionary Review does not address the requirements of RAP 13.4(b).

Whitfield only assigns error to the Court of Appeals’ denial of the claims he included in his Statement of Additional Grounds. It should not be lost in that fact that the motion hearing that he appealed was grounded in RCW 10.73.170. The Court of Appeals correctly noted that he failed to demonstrate the facts required for a motion under RCW 10.73.170 to be granted.

In Whitfield’s trial the facts led the court to find that Whitfield had exposed his victims to HIV, which is one of the means of committing first degree assault. See RCW 9A.36.011(1)(b). The court did not address whether Whitfield actually infected his victims with HIV, nor was it required to do. To obtain court ordered DNA testing under RCW 10.73.170, Whitfield was required to show there is a likelihood that the requested DNA evidence would demonstrate he was innocent of his crimes or sentence enhancements on a

more probable than not basis. Because it was not disputed that Whitfield exposed his victims to HIV, and that was the sole basis of his conviction, the requested DNA tests will not demonstrate his innocence on a more probable than not basis, thus, the trial court rightly denied Whitfield's motion. RP 9; RCW 10.73.170 (3). DNA tests pursuant to RCW 10.73.170 are "limited to situations where there is a credible showing that [DNA testing] could benefit a possibly innocent individual." State v. Crumpton, 181 Wn.2d 252, 258, 261, 332 P.3d 448 (2014). The Court of Appeals correctly stated,

"A review of Whitfield's judgment and sentence makes it clear that Whitfield received a sentence within the standard range for each of his first degree assault convictions, and he did not receive any type of sentencing enhancements. Consequently, Whitfield's RCW 10.73.170 motion for post conviction DNA testing fails to show that DNA is material to a sentence enhancement. Thus, the trial court did not err in denying his motion."

Whitfield, No. 49469-8-II, at 7.

Because Whitfield's convictions required only that he exposed his victims to HIV, whether or not he transmitted HIV to his victims is immaterial to his guilt or innocence. Moreover, as the trial court did not impose any type of sentencing enhancement, Whitfield cannot demonstrate that DNA testing would be material to

his sentence. Even though the trial court did find special allegations of sexual motivation, Whitfield did not receive a sentence enhancement. The findings that he acted with sexual motivation did not require the State to prove he infected his victims with HIV. See RCW 9.94A.835. It was undisputed that he exposed his victims to HIV through sexual contact. The trial court's ruling denying his motion was absolutely correct and consistent with the law.

Whitfield continues to argue that the trial court violated Canon 1 of the Code of Judicial Conduct because Whitfield was not given the opportunity to reply to the State's argument at the motion hearing. The Court of Appeals correctly noted that "Whitfield failed to point to any evidence that the trial court judge was biased against him." Whitfield, No. 49469-8-II, at 9. Whitfield's motion was clearly without merit. The trial judge was acting within its inherent authority to manage parties and proceedings. State v. Gassman, 175 Wn.2d 208, 211, 283 P.3d 113 (2012).

Whitfield further assigns error to the Court of Appeals ruling that the prosecutor's arguments at the hearing were not improper. A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v.



Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id.<sup>2</sup> A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id.

The Court of Appeals noted that the prosecutor’s references asking to treat the motion as a personal restraint petition may have misstated the law, but correctly noted that Whitfield failed to show that any misstatement had a substantial likelihood of affecting the motion hearing. Whitfield, No. 49469-8-II, at 10. In fact, Whitfield cannot show prejudice because the trial court correctly applied the law from RCW 10.73.170 and Whitfield’s motion had no merit.

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<sup>2</sup> This was a motion hearing, so the standard would be whether any misconduct affected the outcome of the hearing.

Further, Whitfield claimed that the prosecutor's statement that the Court has no jurisdiction of over the victims constituted misconduct. Id. at 12. The State is aware of no law that allows for collection of DNA from the victim of a crime in a post-conviction proceeding. Crime victims have a right to privacy, which Whitfield ignores in his argument. There was no merit in his claim, and as stated above, he cannot show prejudice from the prosecutor's statement.

With regard to his claim regarding spoilage of evidence, the Court of Appeals correctly noted that the attachments to his Statement of Additional Grounds were outside the record, and appellate courts "do not consider matters outside the record on direct appeal." Id. at 12, *See also*, State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). There was no error in the Court of Appeals decision not to consider that claim.

In short, the trial court correctly ruled that Whitfield had not made an adequate showing to grant DNA testing pursuant to RCW 10.73.170 and the Court of Appeals correctly applied the law and affirmed the ruling of the trial court. Whitfield disagrees with those rulings, but provides no grounds that establish that the rulings were

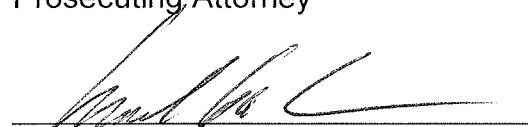
incorrect and provides no basis for this Court to conclude that review is appropriate pursuant to RAP 13.4(b).

D. CONCLUSION.

The trial court correctly ruled that Whitfield's motion for post-conviction DNA testing had no merit. The Court of Appeals decision correctly upheld that ruling. Whitfield provides no basis upon which this Court should accept review. The State respectfully request that this Court deny Whitfield's Motion for Discretionary Review.

Respectfully submitted this 14<sup>th</sup> day of March, 2018.

JON TUNHEIM  
Prosecuting Attorney



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Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Answer to Motion for Discretionary Review on the date below as follows:

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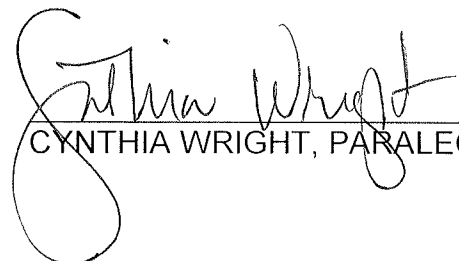
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P O BOX 769: BB-15  
CONNELL WA 98326-0769

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

Dated this 14 day of March, 2018, at Olympia,

Washington.

  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**March 14, 2018 - 11:40 AM**

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