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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY: [Signature]
CLERK

Appeals No. 40708-6-II

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

**STATE OF WASHINGTON
Respondent**

vs.

**GREGORY W. CHAPMAN
Appellant**

THURSTON COUNTY CASE NO. 01-1-1443-2

**REPLY BRIEF OF APPELLANT
UNDER RAP 10.2 (b)**

**Gregory W. Chapman, 929253
P.O. Box 769
Connell, WA, 99326**

I. IDENTITY OF APPELLANT

Appellant, Gregory W. Chapman, appearing Pro-se ask this court to strongly consider this Reply Brief with the Appellant's Opening Brief.

II. QUESTION(S) PRESENTED

Did the Trial Court error in not considering Appellants motion for DNA testing and motion for new trial under innocence on a more probable than not basis as held in the Washington State Supreme Court holding in *State v. Riofta*, 166 Wn. 2d 358; 209 P.3d 467 (2009).

III. ISSUES PRESENTED

- A. RCW 10.73.140 does not apply to the Appellant's appeal or motion for new trial and motion for DNA testing.
- B. Mr. Chapman's motion for DNA testing under RCW 10.73.170, would demonstrate "significant new information" showing Mr. Chapman is innocent on a more probable than not basis.
- C. The Washington State Supreme Court holdings in *State v. Riofta* apply to Mr. Chapman's case.

IV. ARGUMENT

RCW 10.73.140 does not apply to the Appellant's appeal or motion for DNA testing and motion for new trial. RCW 10.73.140, states, "If a person has previously filed a petition for personal restraint the Court of Appeals will not consider the petition" The Appellant Mr. Chapman does not file a personal restraint petition in this Court as governed under RAP 16.4.

The Appellant filed a motion for DNA testing and motion for new trial under RCW 10.73.170, in the Superior Court for Thurston County and now challenges this appeal under RAP 2.3.

(b). RCW 10.73.140, governs collateral attacks on convictions filed directly in this court the Appellant filed his motion in the Trial Court for a DNA test based on the DNA, showing “significant new information” of the blood that was on this knife the Appellant was accused of committing an assault.

The State creates a stipulated order that was not signed by the Appellant and now has no reasonable argument and uses RCW 10.73.140 as an argument, which does not apply to the Appellants appeal under RCW 10.73.170. Furthermore counsel Lisa Talabout was assigned to represent Mr. Chapman. There is no guarantee to counsel for collateral attack, if this was a collateral attack counsel would not have been assigned to represent Mr. Chapman for these reasons RCW 10.73.140 does not apply to the Appellant’s appeal and Appellant’s motion for DNA testing under RCW 10.73.170.

This motion should be granted and ordered by this Honorable Appellate Court. Mr. Chapman motions for DNA testing under RCW 10.73.170, and that this would demonstrate “significant new information”, showing innocence on a more probable than not basis. The Washington State Supreme Court held in State v. Riofta that the “significant new information” includes DNA test that did not exist at the time of trial and that are material to the perpetrators identity, regardless of whether DNA test could have been performed at trial.

The Appellant’s case here should be held to this standard, here in Mr. Chapman’s case at the time of trial there were no DNA test that existed because it is claimed that Mr. Chapman did not continue the trial date, and the State never ask for a continuance, even if Mr. Chapman ask for a continuance for DNA test purposes the court would have denied it. The Trial Court does not need Mr. Chapman’s permission or objection for a continuance, besides the forensic expert testified at the time of trial that DNA testing was

initially requested by the Olympia Police Department but was not done because he and the prosecutor consulted with each other and both decided the blood on the knife used to convict Mr Chapman was the alleged victim, stating they used a scientific method to determine the blood was the alleged victim so there was no need to do DNA testing. Further the trial court on its own motion could have granted a continuance for this DNA test to be done for the States case in chief.

The State blames Mr. Chapman for this DNA evidence not being produce at the time of trial when Mr. Chapman has no duty to bring himself to trial.

The State covers up the fact that had the DNA test been produced by the State at the time of trial it would have discredited the allege victim's testimony, it would have also discredited the Washington State Patrol Crime Laboratory expert witnesses testimony because it would have shown that Mr. Chapman did not do this so called injury to the leg of the allege victim who would have to come up with some other basis for his alleged injury under RCW 10.73.170, the Appellant satisfies all procedural test, the Appellant through the prison legal mail system served the Office of Public Defence by penalties of perjury properly filed this motion for DNA testing with all parties and with the Superior Court for Thurston County who made no ruling under the holdings from the Washington State Supreme Court in *State v. Riofta* or under RCW 10.73.170 (3), which held "when a motion for DNA testing is filed in the Superior Court under RCW 10.73.170 (3), the Trial Court shall determine the motion on a more probable than not standard in Appellant's case the Trial Court erred by agreeing to a proposed stipulated agreement from the prosecutor's office.

The Appellant satisfies the substantive test by the DNA test itself, to show that he was not the perpetrator of this crime.

The “significant new information” that the DNA test would reveal to this Court is material to the identity of the perpetrator in this charged offense without this test being conducted the State incarcerates a innocent man, with the DNA test being performed the State would have to question its whole case for truthfulness which is supposed to be the goal of the justice system, this DNA test being produced at the time of trial would show the truthfulness of the perpetrator.

The State did not produce this evidence at the time of trial, producing this evidence of the DNA would have prevented any doubt of who the perpetrator is of this crime Mr. Chapman jury was presented a knife with blood on the blade, the prosecutor stated, at the time of trial, belonged to the allege victim, they did not get to hear anything different.

The Trial Court erred by not following the Washington State Supreme Courts holdings in *State v. Riofta* and RCW 10.73.170. The motion for DNA testing should be granted and ordered by this Honorable Court.

The Washington State Supreme Court holding in *State v. Riofta* applies to Mr. Chapman case. In *Riofta, Supra* he was convicted of first degree assault with a firearm. The instant court concluded that *Riofta's* request for post-conviction DNA testing of the white hat pursuant to Wash. Rev. Code 10.73.170, was not preclude on the basis that the hat could have been, but was not tested prior to trial. However it also concluded that *Riofta* failed to establish the likelihood that the DNA evidence he sought would demonstrate his innocence.

Here, in the Appellant's case the DNA test he seeks was precluded by the State on the basis of a continuance, the Appellants innocence is relied upon by the DNA testing of the knife because this is what was alleged to have been used in this charge offense and was the basis of his conviction therefore if the Appellant Mr. Chapman had used this knife to stab the allege victim, then the victims blood would be on the blade of this knife which would show that a assault was committed, if the allege victim's blood is not on the blade of the knife it would discredit the allege victim and show that the Appellant did not commit the charged offense.

The Washington State Supreme Court also held in *Riofta* under 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 on conviction. The person requesting DNA testing must satisfy both procedural and substantive requirements RCW 10.73.170, (2) (3). The motion must state the basis for the request explain the relevance of the DNA evidence sought and comply with applicable court rules.

The *Riofta* Court also held under RCW 10.73.170 (3), if the petitioner.

satisfies these procedural requirements the trial court must grant the motion if it concludes the petitioner has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

The Trial Court did not conclude that the Appellant satisfied or did not satisfy the procedural and substantive requirements as held in *Riofta* and RCW 10.73.170 (3). Now the State argues this issue on appeal, it has not been shown by the Trial Court that the Appellant did not meet these requirements.

This authority was not applied to the Appellant's motion for DNA testing, the Trial Court simply allowed the State to propose a stipulated agreement that was not agreed upon by the Appellant, the States stipulated order should not be consider on the basis of successive and or time barred, other facts include that Department (1), of the Thurston County Superior Court ordered the motion to be heard on the merits which now in the subsequent case has not been met because had the Trial Court determined the Appellant's motion on the merits and on a more probable than not basis as authorized in *Riofta*, the Appellant Mr. Chapman's motion for DNA testing would have been granted on the basis it would show that Mr. Chapman is innocent on a more probable than not basis demonstrating that he's not the perpetrator in the charged offense of assault, with a deadly weapon knife.

V. CONCLUSION

The Trial Court erred in not determining the Appellant's motion for DNA testing under the Washington State Supreme Courts holdings in *State v. Riofta* and under RCW 10.73.170, (3).The Appellant Gregory W. Chapman motion for DNA testing to show his innocence should be granted and ordered.

CERTIFICATE OF SERVICE

I certify that I served a copy of the Reply Brief of Appellant on the date below as follows:

U.S Mail Postage Prepaid from Coyote Ridge Corrections Center P.O. Box 769 Connell, Washington 999326 addressed to the following:

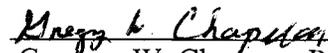
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

DATED this 30 day of March, 2011 at Connell, Washington.



Gregory W. Chapman Pro-se