

33018-4-III

FILED

APR 15 2015

CLERK OF SUPERIOR COURT  
CHARLETTESVILLE, VA

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IN RE THE PERSONAL RESTRAINT OF  
ROBERT JAMES. MIDDLEWORTH, Petitioner,

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RESPONCE TO STATES RESPONCE TO  
SECOND PERSONAL RESTRAINT PETITION

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PETITIONERS RESPONCE BRIEF

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RESPECTFULLY SUBMITTED

  
Robert James Middleworth

Dated this day 13 of April. 2015

Coyete Ridge Corrections Center  
P.O.Box 769  
Connell. Washington 99326

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## I. IDENTITY OF PETITIONER.

\_ Petitioner, Robert James Middleworth, an inmate in the Coyote Ridge Corrections Center, in the Dept of Corrections is the Petitioner herein!.

## II. ISSUES TO STATE RESPONSE.

Did the Superior Court abuse its discretion when it failed to respond to defendant's post-conviction motion for PCR-DNA testing, to be done by the WSPLab, pursuant to RCW§ 2.08.240, as well as the Washington Constitution Art § 4, section 20.

Which reads, "every case submitted to a Judge of a Superior Court for his/her decision, shall be decided by him/her, within 90 days from the time of submission. Failure to do so would result in forfeiture of the Courts participation in the motion. thus, allowing Petitioner, to seek relief in the Court of Appeals Div III.

Per the request, the initial motion for this testing was filed Jan,28.2014 in the Superior Court of Walla Walla. Amended motion to request, was also filed same day.

Pursuant, to statute, motion was hand delivered "via" Power of Attorney. see, Phyllis Hewitt,.

The record further, shows that the State, participated as far back as March, SEe, request letter to WSPLab. also see, Docit readout. However, the record shows no response being made to Petitioner, until Dec,1.2014. almost one year, after his motion was filed Jan,28.2014. Well after, the the Constitutional 90 day provision the State was allowed.

Thus, the Court withheld Petitioner's Amended motion, and his letter of intent until Feb,19.2014. Petitioner, was not kept apprised of these actions of the Court, other than, through his legal Library, docit readout, located at Coyote Ridge Corrections Center, in the Dept of Corrections. Although, Petitioner, attempted on multiple times, beginning in Feb,27.2014 demand for response and/or actions, but was unsuccessful in his attempts.see, docit readout.

It would seem Petitioners, motion was running its' course, lacking one important element, the Petitioner, the record shows, multiple attempts to participate, in his own motion were made. "Unsuccessfully". Due to these course of actions, Petitioner, was left with the only legal avenue he could take. A Personal Restraint Petition of Robert Middleworth.

As the record shows a copy was sent out to the State to participate, in the action of In re Pers, Restraint of Robert Middleworth, at which acknowledgment, was made by the State motin to appoint Special Prosecutor, Ms. Teresa Chin of Pasco. Washington, as the representative for the Walla Walla County. See, States request to appointment of counsel.

Its' onyl thereafter, the State, contends to allow Petitioner, to participate in his Superior Court action, and due, to Petitioners, now filed petition, pursuant, to Petitioners Personal restraint Petition, Petitioner, opted, to not do, due to fear of his Personal Restraint Petition becoming mote, to the States actions and also to did not feel his request would receive equal protection of the law. Based on the actions or better yet, "non-actions", onto the matter of testing the swab's for suspected Herpe's lesions even exist.

Thus, these test results would testify, to impeaching, States testimony A Ms. Reynolds, rape kit, assault examination of Robert james. Middleworth, these, test results would further, state Mr. Middlweorth did not have a current outbreak, of either Symplex 1 or Symplex 2.

Thus, being the current reasoning, for the State, to now try to duck and dodge the suppression of the where about's of the rape kit, as Petitioner, suspects' the State, has had the kit destroyed in violation Pursuant, RCWS 9A.72.150 Tampering with physical evidence to conceal alter or to hinder its' course of chain of command. see States letter to Petitioner, Deputy Prosecutor Ms. Mulhern;

""Quoting, The State Washington Crime Lab, just does not have the rape kit.

This, coming after Petitioner, filed his motion to secure the evidence, in his first. Requested in the Superior Court of Walla Walla. also in his Personal Restraint #33018-4-III!

The record shows no mention before this Court directed the State to participate in #33018-4-III. Although, it would seem their is a direct violation to suppress exculpatory evidence. Which, brings to question, Petitioners, second request of this Court, in his Personal Restraint Petition. which brings to issue, if the State is correct in their summation of the abilities of the WSPLab, to run these test, then why was not the Rape Kit recalled to be put to proper testing in a proper Hospital lab, as the State, suggested in their statement to the Court. see, RP. at336. 'Only Hospitals can perform these types of test.

The record shows that in the third trial, the State through its leading detective on the case, the Rape Kit, was sent to the WSPLab. A report was made to the fact's. The Kit was received, but not reviewed due to the States request. Item 210, Dated Dec,10,2010. see Rp. at 784;

""The State, in showing you a document, just for the record that is in identification, that is listed as a State Patrol Crime Lab report, it looks like it was dated and received by the College Place Police Dept dated Dec,10,2010, under items examined, if you can look at item 210 there. Duttons response; Correct.

What does that crime lab report indicate.

Response; It indicates, item 210 indentified as a sexual assault evidence collection Kit, was submitted, but was not examined for purposes of this report"".

Therefore, the record shows on Sept/Oct 2010, a rape kit was sent to the State Crime Lab, but never processed. The record showed no order to recall the kit for purposes, of testing, nor has there been an order of destruction ever produced as a matter of law.

The States testimony of Ms. Reynolds, was so important to their case in general, that was needed to establish Petitioner, was with an active outbreak, or more persiest a current outbreak infesis on CURRENT, of Herpes Symplex 1 and 2.

In the matter of the Rape Kit, and in the interest of the Spirit of Fairness The State, had a continuing obligation to also, represent defendants Constitutional right to due process of law. see State V. Monday 171 Wash.2d 667,676, 257 P.3d 551 (2011). The State, had an abiding obligation to test the contents in the Rape kit, whether, there was evidence to test or not, as a negative response upon the swabs of Herpes lesions would have been used to impeach the testimony of one Ms. Reynolds.

Petitioner, asserts had proper testing been performed , the results would have testified, that what Ms Reynolds thought she saw, was not a currentb outbreak of Herpes. For without, Ms. Reynolds, testimony and the suppressed Rape kit and its possibly damaging contents inside, could not have successfully convicted Mr. middleworth for transferring the Herpes Virus to B.

In order for Petitioner, to have had been a participant in the alleged [Crimes Charged], he would of had to have a current outbreak of the Herpes Symplex 2 Virus. Which evidence shows B. was never tested for. see, test report B. Davis.

""This test was counseled due to the States actions. The State, further contends through a second blood draw performed more than, three weeks after the initial first contaminated blood draw was taken, from Mr. Middleworth body, the same time as the rape examination. That Petitioner, had the same form of strands as the Herpes, B. contracted. see, RP. at 780. also see, RP. at 172. Dutton direct.

However, the blood draw test of Mr. Middleworth, produced, by a medical certainty, that Petitioner didi not have an active outbreak of Herpes Symplex 2. What, the test results did state in fact, are NEGATIVE, NO sufficient levels of anti-bodies detected, and although, through three test, two of

which, shows a small amount of anti-bodies were detected at such a low level. The report shows that both tests had to be performed together, in order to produce the response indicated. The report further, shows had the test been performed separately, in themselves the results would have testified, "No sufficient levels of Herpes anti-bodies detected". see, report Herpes test, Middleworth.

The State, violated the Spirit of Fairness, to represent Petitioner, to receive a fair trial, with all the evidence involved, whether it was there to test or not. see, [the test results state no clinically significant level of HSV anti-bodies detected]...

The State, had an abiding obligation to see that Petitioner, received a fair trial, with all the evidence obtained, by the Prosecutors Office. the States, action to suppress the contents located inside the sealed Washington State sexual assault Rape Kit, violates Petitioners right to confront the impeaching evidence of the swabs, and deprives Petitioner, of the fundamental Spirit of Fairness owed to Petitioner, by the State Prosecutor. see,

"State V. James Leroy. Lindsay, Sr V. Jennifer Sarah. Holms, 171 Wn.App 808,288 P.3d at 641 (Div II.2012; amended, (2013), (citing, as a State agent the Prosecution, represents the people and presumptively acts with impartiality in the interest of justice. see State V. Case 49 Wash.2d 66,70 ,298 p.2d 500 (1956)( Quoting, Peoples V. Fielding 158 N.Y. 542,547,53 N.E. 497 (1899)). Our Supreme Court, has pronounced that although prosecutors must deal with all that is coarse and brutal in human life;

"The safeguards which the wisdom of ages, has thrown around persons accused of crimes cannot, be discharged, and such officers are reminded that a fearless impartial discharge of duty, accompanied by the Spirit of Fairness towards, the accused, is the highest commendation they can hope for. Their, devotion to duty is not measured, like the prowess of the savage, by the number of their victims. see, State V. Fisher 165 wash.2d 727,746,202 P.3d 937 (2009);

also see, State V. Warren 165 Wash.2d 17,27-28,195 P.3d 940 (2008) (quoting State V. Charlton 90 Wash.2d 657,665,585 P.2d 142 (1978))...cert,denied. -U.S.-129 S.Ct 2007,173 L.ed.2d 1102 (2009), Recently, our Supreme Court reiterated that Prosecutors have a duty of Fairness to the Defendant. see,

"State V. Monday 171 Wash.2d 667,676,257 P.3d 551 (2011), (defendants are among the people the state prosecutor represents. The Prosecutor owes a duty to Defendants, to see that their rights to a Constitutionally Fair Fair Trial are not violated. Thus, a Prosecutor, must function within boundaries while zealously seeking justice.

The State, attempts to promote that although the Mother K.Davis admits to having, a cold sore at some point before she met Mr. Middleworth, that this is not an admittance to having Herpes Symplex 1. That State, should be allowed to misinterpret the facts.

The State, contends in Middleworth's case, that once you have the virus you always will have it".

Now, the State, tries to lead the facts away from this contention with K.Davis,. although, she had a cold sore [Herpes Symplex 1], she no longer has the Herpes Symplex 1 Virus".

By this shallow, interpretation that there is a cure for cold sore strain's of herpes Symplex 1. The record showed that the Mother, was tested, yet in another 3.6 violation, this too was withheld, from the defense of Mr. Middleworth.

The record further shows, that B. was only tested for Symplex 1, Cold sores' not genital Herpes. Petitioner, asserts that the mother, does admit to having Herpes Symplex 1, as the mother's' test results would have produced a positive outcome. The Mother, did not testify in the first trial, that the people who tested her told her she does not have Herpes. What she testified to was that they did not tell her whether, she had Herpes Symplex 1 or 2 Symplex, only that she's OK now, to inform them if it comes back.



Ms. K. Davis, testified that she understood, what Herpes cold sores is. When she was asked on cross, in the second trial. It was explained to her, as she testified in the first trial, when she gave her account that she to was checked for Herpes. The States own expert witness testified that there are only two ways, to accurately, test for Herpes Symplex "a culture' and and PCR", given this information than one can see that the mother, was tested and due to the test being positive, for Herpes, as K. Davis, admits' to to having in the second trial. And sense the Herpes Symplex Virus, never leaves the body, as the Statein chief, has led the judicial system to believe in the case of State V. Middleworth. Where i might mention the virus physic- ally does not exist in his blood! [No sufficient levels of anti-bodies detect ed (the virus)].

The State, than attempts, to suggest that the Mother has some form of [Cogn- itive delay syndrome], ("Retardation"), and did not under stand the question

However, the State, did not feel this existed when after Mr. Middleworths, conviction was over. Mother, was returned her child with full custody. Are we to assume, this mother can be responsible for the life of her Daughter?, who might possibly be the perpetrator of the transference of Symplex 1 [Cold Sores], but cannot decipher from wrong or right, or whether an event exist or not.

Further, the State, would have this belief that Petitioner, informed 'mother' after being requested to take a look at B's. problem with her potty, the night before she went to the Hospital, that she had a urinary track infection or any thing else. It was just, simply suggested as a possibility. What Peti- tioner, did do after giving B. a medical observation at the mothers' request, was instructed her to take B. to the Hospital as quick as possible, which was done the next day. This was the incident described to medical staff, Child protective services, and Law enforcement officers', who turned good parenting [Mr. Middleworths' actions], into a crime without evidence of contact or

Transference. see RP. at 412-13; 437; 435-36.

The State, further, contends that B. testified that Rob had sex with her in the third trial. [only time throughout, the case in chief, sex is even mention by B.]. What, the State, leaves out is the rest of the testimony, where B. testifies, [That her Mother coerced her to say that Rob had sex with her]. see, RP.at 588.

Furthermore, the record shows that B. is only telling people what they want to hear. see, RP. at 405.

On another note, Petitioner, contends that both States experts. Dr. Wren, who testified that B's. [Hymino Ring], was still intact. Suggesting that no foreign object's had traumatized B's. internal sexual organ's. Whereas, Dr. Edminster, testified, that the cause of the trauma, was due to the out-break of the Symplex 1 virus. Which is, later, described can be contracted from a finger touch. Like the mother cleaning her daughters private area, as she declared, in the first trial, that she is the only one that helps her daughter, to clean to keep her private area clean.

Dr. Edminster, further, testifies the cause of the trauma, was due to the Herpes Virus, through its many [Tear's], (as the pictures that were presented, at all three trial's described). He testified, that "the many ruptured tear's are the normal course of the Herpes Virus". see, RP. at 203-12, (Dr. Edminster describes he swabbed all the infected blister's, he does point out, that there, was no need to do a [Speculum Rape Exam], after the fact of dicussing with prior medical personal, located in Walla Walla at, Walla Walla's General Hospital.

He continues, to describe his diagnoses, by a medical certainty;

""that, the Vaginosi's Bacteria, was not caused, by sexual assault but was, a product of a PH inbalance, due to the trauma, that the Herpes Virus was causeing. In B's. case, there was, a co-infection [Herpes], going on at the same time. He adds', the second infection is due to the PH inbalance

and, that the cause of the Trauma that B's., is experiencing is due to the Herpes Virus. see, RP. at 212. [Not sexual intercourse].

His diagnoses, continues to describe the source of the bleeding, and discharge, came from essentially the [Inirotius], when, they rupture, and the vesical's rupture as well, they weep. So a lot of the moisture, that was seen, was related to the rupture vesical's [Tear's]. Which is the natural progression of the Herpes Virus, "Not Sexual Contact""...

The State, continues to question Dr. Edminster, "Is it possible that these type's of wounds or problems could be caused, by something, other than sexual abuse?... He responded; "Its a possibility, and can not be ruled out". Dr. Edminster, also testified to his diagnoses, of the sexual assault, was based solely on the facts, that a child of this age having Herpes Symplex 1, his diagnoses, was not based on any sexually penetrating signs of Rape. see RP. at 809.

Neither, Dr. Wren, nor Dr. Edminster, testified, to measuring the depths of the Tear's, suggested, by the State, to be caused, due to a sexual assault.

DR. Edminster, testified, that the tear's were caused, by the natural course of the Herpes Virus. No rape Speculum exam to produce the depths of these tears, was performed on B.

The depths', of these notches, was a very important aspect of whether, B. had been assaulted or whether, the tear's, were created, due to the contraction of a medical condition. see, State V. Joel Alexander. Wilson 174 Wash.App 328,298 P.3d 148 (2013), at [298 P.3d 160 (B) (1), Dr. Sugar;

""Where, the leading medical director of the Harborview Center for sexual assault-- addressed accordingly, adolescent girl's have naturally occurring superficial [Notching], on their Hymen's, but it is much less common for them to have [deep], notches on their posterior region of their Hymen's without having sexual intercourse. see, Id, at VRP 151 (Feb,15,2011).

It was further, established, that sexual assault could not be proven by [deep Notches], because, when the Nurse Practitioner, performed the sexual assault examination, she had not used a Q-tip, to separate the folds to see if their, were holes in the tissue [Indicating Deep Notches], and it so to measure the depth of the holes.

In the current case, State V. Middleworth, No Rape exam was done on the alleged victim, within, the area of time of the alleged incident charged.

Dr Edminster, diagnosed the tear's described, were caused, by the Herpes Virus, not any sexual assault. [Their, are no signs of Rape or Assault on B. Davis, as no evidence to this fact exist either]. The swabs, of suspected Herpes lesion's allegedly, located on Mr. Middleworths, penis, it tested would on a more likely than not basis, establish that Mr. Middleworth, did not transfer, the Herpes Virus from his body, to B's. body. Thus declaring, Mr. Middleworth, could not have caused the Trauma on B.

Now, the State, shalowly interprets, that these actions are consistent with the modus operandi, described by the defendants Step-Son?.

The Superior Court in a motion in limine; ""To exclude evidence, ruled ruled the step-sons testimony inadmissible. Due to it lack merit of truth. see RP. at 359-60. To allow, this portion, of the States response would be a miscarriage of justice, not to mention the Spirit of Fairness owed to a defendant, in a criminal case by the Prosecutor. see, RCWS 7.90.030 Evidence (2).

""Which states, that no evidence, inadmissible under this section may be introduced, UNLESS, ruled admissible by the Court after an offer of [Truth] proof, has been made at a hearing held in camera, to determine whether the respondent has evidence to impeach witnesses in the event that prior sexual activity exist"".

"The offer of proof, shall include reasonable specific information as to the date, time and place of past sexual conduct between the Petitioner, and his respondent".

The record shows no said information exist. What is seen here, is the leading law enforcement officer, in the current case, and due to lack of physical evidence in the current case, Pulled Mr. Johnson, now 24 or so years older, into the mix of the case. Mr. C. Johnson, grew up believing that his Step-Father, killed his Mother, 14 years or so ago, during the same time, the State, contends that these allegations of sexual contact, took place. see News Clipping.

In 1997, 14 years prior, to this case, Mr. Middleworth, was charged and found guilty, for substance abuse Homicide [Negligence], for not stopping his wife from using a drug [Meth], that the State, suspected, was the cause of her death. Due to a plea agreement, Mr. Middleworth, was found guilty, and served a term of one day and a year. Prior, to Petitioner, a trouble free environment for more than [10 YEARS ]... at which Mr. Middleworth, was a resident of the State of California. Petitioner, has no prior history of sexual misconduct, in his record.

In 1997, and given the magnitude of the Homicide case, the State, would have had some allege knowledge of sexual violations, going on in their investigation of Mr. Middleworths, background.

Walla Walla Child Protective services, had custody, of all three stepsons, due to the death of their Mother. They were, screened for sexual assault, at the same time, as Mr. Middleworths, Homicide case, and due to a medical certainty's [there, was no evidence of sexual assault nor was there evidence of penetration].

Even the State, condones that they do not believe, that Mr. Middleworth, intentionally caused, his wife to die, see, News Clipping. BUT due to

the laws of the State of Washington. The State, asserted, Mr. Middleworth, had to be held accountable, for her death. Petitioner, took a deal, for one year and a day and no supervision attached. The College Place Police Depts, leading detective Mr. Dutton, was not happy to this account, and declared revenge, upon Mr. Middleworth, as it can be shown, to being carried out in see, RP. at 638-39, Quoting testimony of Martin on direct. ""and you mention one of the officers, was in the room, was that who you consulted with, when you completed the second recorded interview, [I DID], Ms. Martin, testifies, that she attempted to turn over the second recording of the interview, BUT, that Detective Dutton, declined to take possession of the evidence into custody". This information, was not testified to UNTILL THE THIRD TRIAL.

Thus establishing a Brady violation. The substance, of this second recorded disc, was impeaching, and due to the actions or non-actions, of Officer Dutton, and the State Prosecution. Deprived, Mr. middleworth, of this valuable evidence, currently under review in the United States District Court. see, 4:14-cv-5124-TOR, Middleworth V. Jeffrey A. Uttecht, [Amended].

Further, the Superior Court of Walla walla, recognized, that the contents on the second recording, was impeaching. see, RP. at 884.

The State, should not be allowed, to present facts that have already been addressed, as being inadmissible by the Superior Court as having no truth to the facts.

Petitioner, would like to note, that Tampering with Physical evidence, during a criminal investigation, is a crime and violates the fundamental Spirit of Fairness, to defendants ability to defend against evidence. see RCWS 9A.72.150.

Law enforcement should not be held above the Law, to violate peoples Constitutional rights. In order to fit their, investigational purposes. Their job, like the States job, is to uphold justice not violate it, for

vengful, Purposes, as the record shows here. The record of history, shows, that the College Place Police Dept, has a history of violating peoples Constitutional rights.

The Gateway to Innocence Doctrine, as the [Swabs], if tested, would declare that Mr. Middleworth, is innocent on a more probable than not basis, that he is infact innocent. There, is absolutely no mountain of evidence that Mr. Middleworth, committed, the crimes of sexual Molestation for gratification nor evidence, that Mr. middleworth, sexually penetrated [Rape], B.. Further, examination into the record shows there was no Deep holes in the traumatized area, that the tears were, caused, due to the natural course of the Herpes Virus. There, quite simply, is no signs of sexual assault. B. also can be seen as to testifying only to what people want to hear, and that her Mother, who testified to having Herpes Symplex 1, is telling her daughter, what to say on the stan under oath. That there, is no prior, criminal sexual assaults in Mr. Middlewoths record. And due to attempting, to be a good parent, in a time of crises, has been made a victia of a unjustified conviction. Petitioner, second and only test, "Results", state in fact and law by a medical certainty that Mr. middleworth, did not have an active outbreak of HSV 1or HSV 2, and the evidence to produce the truth to this fact is located in the [Swabs], of the suspected lesions, collected at the same time as the Rape assault exam performed on Mr. Middleworth, person.

Further, the State, recognizes, that there is not anything in the Rape Kit to test. That, brings to point, Petitioners, request of this Court to prove exactly that. That there, is nothing on the [Swabs], to validate what Ms. Reynolds says she saw. Even she acknowledges that the [Swabs], need to be tested. Suggesting she was not sure of what she saw.

[Negative], results on the [Swabs], would produce that Mr. Middleworth, is Innocent.

### III. STATEMENT OF THE CASE.

In the third trial, and thereafter, two unsuccessful trials, and due to Judicial and Prosecutorial miscarriages of justice into the evidence and Constitutional deprivations. Petitioner, was unjustly convicted. by a jury, who was also deprived of all the facts into the case of Rape of a child and child Molestation in the first degree. Petitioner, appealed his conviction, claiming his right to be present during a pre-trial evidential hearing, was violated, when, the Court refused to allow Mr. Middleworth to attend and Participate in his own defense,

That, the the public access right, was also violated, where, the errors carried over, to the third trial. The right to Double Jeopardy and a Brady violation are also in effect as well. The Court of Appeals, affirmed the State conviction, in their unpublished opinion, that no remedy is needed for that which already has been given.

The Court, declined to affirm that the error's carried over to the third trial, which intern caused other violations of law, and uncovered new presentable evidence in the form of a second recorded interview of B. see, State V. Middleworth 30850-2-III Wash.App filed Feb,6,2014.

Petitioner, continued to the Sup.Ct.Wash.St. at which, petition for review was denied to be review. Petitioner, than filed a Writ of certiorari to the United States Sup.Ct, at which Petitioner, was unsuccessful. To these circumstances, Petitioner, filed a Habeas Corpus § 2254, with the United States District Court, an order directing Petitioner, to amend his petition. Petition was filed March 4,2015, and is currently pending review in the United States District Court. see (Amended, No. 4:14-cv-5124-TOR-Middleworth V. Uttecht.

Petitioner, F(15) Personal Restraint Petition, is currently pending to be reviewed in the Sup.Ct.Wash.St,



Which, brings Petitioners, second Personal Restraint Petition request, filed within, the Rap Procedures as well as the Constitutional laws of the State of Washington.

In this second Personal Restraint Petition. Petitioner, challenges, the Superior Courts Failure, to address his Post-Conviction Motion, for evidence Swabs to be tested for the purpose, to impeach states number one assumed witness, who attempted to testify to Mr. Middleworth, had a current outbreak. That, she swabbed the area, where, the suspected Herpes lesions, were located. Further, stated that with out proper testing, could not be sure of what she thinks she observed.

The challenge in this Personal Restraint is to prove, by testing that their, is no sign of anti-body's nor Herpes virus on the swabs. In affect it is to prove what is not there.

The Superior Court, forfeited their jurisdiction, when it violated the Constitutional 90 day provision to respond. Under Art 4 § 20, and RCW 2.08.240. The State, participated as far back as the beginning of the first motion being filed. see docit read out. The exeception to time bar, is the Gateway Innocence Doctrine. Petitioners, original motion was filed before, the mandate, became finalized; see mandate, and recall of mandate as well as the new mandate. The State, was apprised of the facts in the case "via", hand delivery,. Petitioner, attempted to participate in his motion, but was ignored until after, filing his Personal Restraint Petition.

Petitioner, also challenges, that the State describes, the State Crime lab is no longer in possession of the, Sexual assault Rape Kit. That it was never able to test the contents inside. Implying, that the State has possession, but refuses to devolve the whereabouts, of the Kit.

The challenge here, is for this Court to direct the Walla Walla state Prosecuting Attorneys Office, to produce it's,"wherrabouts'", so Petitioner,

can have contents in the mandated sealed Washington State Rape Kit, to be tested in a proper lab at Petitioners, expense. Thus, allowing Petitioner, to establish, his Gateway claim, in this Personal Restraint, and to the due process of the law, to confront the evidence that is not there. To date, there has been no evidence produced, or collaborating testimony, that Mr. Middleworth had "Gratifying", sexual contact nor, sexually "Gratifying intercourse", with B. Davis, the record just does not show this.

Although, Petitioner, was not charged, for transferrance of a virus, to cause bodily harm to another. He was prosecuted for having a virus, not for sexually "Gratifying" contact or penetration. The States case, in general, centered around the Transferrance, of the virus, not Two separate acts of sexually gratifying penetrational contact.

Petitioners, challenge is not to obtain evidence, which the State, used through testimony in chief, against him. Petitioners, challenge, is to obtain, the fact of what is not on the swab's. This in itself, would be impeaching against the States, only witness of suspected evidence of a crime. For without, the testimony of Ms Reynolds, there was no current outbreak of the Symplex 1 or 2 Virus.

The first initial blood draw, was collected with the Rape Kit, and turned over to the College Place Police Dept, where it became [""CONTAMINATED""], due to the [NEGLIGENCE] of the evidence officers, lack of training in the handling of "Forensic" evidence. State, relied on the second blood draw extracted from Mr. Middleworth, more than three week, from the initial first draw, which, produced a result, by a Medical certainty, is [NEGATIVE], for the herpes as well as [Not enough sufficient levels of HSV anti-bodies detected], Ms. Reynolds, was not a participant, in the taking of the second blood sample.

Ms. Reynolds, swab's of the Herpes lesion's, were not tested to validate her testimony, pursuant to CrR 6.13. Petitioner, further, challenges that due to the course of new information, see, States letter to Petitioner. Which

Suggest, that the State, has either destroyed, altered, contaminated the contents to move it or the idea, of it still existing around to suppress the [Swab's], from Petitioners defense, to prove his Innocence, under the Gateway of Innocence Doctrine. see, 26 U.S.C. § 2254 (d). seealso, Napue V. Illinois 350 U.S. 264, 79 S.Ct 1173, 3 L.Ed.1217 (1959).

The State, narrowly, interprets RCW§ 10.73.170 (1), The Court is the correct entity, in a Post-Conviction motion to file with, its simply states, to inform the State Prosecuting Attorneys' Office, as Petitioner did.

The State, would have this Court, believe they are the Superior Court. However, this would be incorrect. The Statute states, "an individual convicted of a Felony, in the state Courts- who is serving a term of imprisonment, MAY SUBMIT TO THE COURT THAT ENTERED THE JUDGMENT A VERIFIED WRITTEN MOTION REQUESTING DNA/PCR TESTING," with a copy sent to the State Prosecutors office.

[which Petitioner did, by hand delivery due to prior, violations of the CRCC mail room staff, in the rejection, misconduct and handling of Legal Mail incoming].

Petitioner, is incarcerated in the State Prison, Petitioner, did file with the correct entity, "The Court". Petitioner, did file, before the finalization of the Mandate--Recall Mandate-- New Mandate. Petitioner, through hand delivery did deliver, a copy to the State Prosecutor of Walla Walla county. The record shows the State, participated as far back, as March/April, 2014. Petitioner, can produce a declaration of the Power of Attorney, if requested of needed Via "Gillanno Garcia" or "Phyllis Hewitt".....

#### IV. CONCLUSION.

Petitioner, asserts that he has met the Const, requirement, in order to have his Personal Restraint reviewed, and to have this Court, to amend his request to direct the State Prosecutors office, to produce the Rape Kit unopen and still with its seal intact. or to produce its whereabouts, so proper testing can be performed on the said contents located inside, the sealed Wash

State Rape Kit. Testing, should be done at one of the many resources, A Hospital Lab, which is one of the many resources, obtained by the State Crime Lab of Washington State.

Petitioner, further request as he did in his Jan, 28, 2014 motion to the Superior Court, to secure the Rape Kit, and the contents enclosed, Mainly the Swabs of suspected Herpes Lesion's.

In the alternative, that the State can't produce the "State Rape Kit" or it's whereabouts, Petitioner, would amend his request, to include an Evidential hearing be held, to determine the facts of the chain of custody, of the Kit and its contents inside.

RESPECTFULLY SUBMITTED

Robert James Middleworth #948011  
ROBERT JAMES. MIDDLEWORTH #948011

Dated this day 13 of April, 2015

I certify that a copy of this response and attachments were placed in the Legal mail too;

Teresa Chin  
Special Deputy Prosecutor  
P.O.Box 5869  
Pasco. Washington 99301

Washington State Court of Appeal  
Div III  
500 N. Cedar Street  
Spokane. Washington 99201

Dated this day 13 of April, 2015 Signed Robert James Middleworth #948011

IN THE WASHINGTON STATE  
COURT OF APPEALS, DIV III.

---

IN RE RESTRAINT OF	)	No. 33081-4-III
ROBERT JAMES. MIDDLEWORTH,	)	Memorandum of Authorities
#948011	)	to Support Petitioners
	)	response motion. and/or
	)	Appendices.
	)	
Petitioner,	)	

---

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ISSUE TO STATES RESPONSE AT II.	1,
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--------------------------	-------

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VI. Appendices.

Power of Attorney  
States response from WSPCLao  
Docit Court readout  
States request to appoint special Deputy Prosecutor  
B. Davis counseled test results "Herpes Symplex 2"  
States letter to Petitioner "Kit not at lab anymore"  
Mandates  
First trial mistrial ruling "DUE PROCESS VIOLATIONS"

VRP, Attachments.

RP at 336; RP at 784; RP at 780; RP at 172; RP at 412-13; RP at 437; RP at  
438-38; RP at 588; RP at 405; RP at 203-12; RP at 809; RP at 359-60; RP at  
638-39.

RESPECTFULLY SUBMITTED

Robert James Middlemorth 948011  
ROBERT JAMES. MIDDLEMORTH #948011

This day 31 of March 2015

I certify that a copy of this response and attachments were placed  
in the U.S. Mail via Legal Mail to;

Teresa Chan  
Special Deputy Prosecutor, for Walla Walla.  
P.O.Box 3889  
Pasco. Washington 99301

Original filed at the Court of Appeals  
500 N. Cedar Street  
Spokane. Washington 99201

Dated this day 31 of March 2015

Signed Robert James Middlemorth 948011

original

Power of Attorney

I, ROBERT JAMES MIDDLEWORTH JR (principal's name)

\_\_\_\_\_ (principal's address).

being of sound mind and legal capacity, do hereby appoint

PHYLLIS N. HEWITT (agent's name)

129 S.W 90 ST, COLLEGE PLACE, WA 99324 (agent's address),

as my do and perform the following:

ALL PROPERTY, INTEREST, AND RIGHTS

1. The following property, interests, or rights shall be subject to this Power of Attorney:

true and lawful attorney in fact, to act for me in my name, place, and stead, and on my behalf to  
TO BELIEVE AND ACT UPON ALL LEGAL, MEDICAL, PERSONAL, AND FINANCIAL MATERS THAT HAVE ANYTHING TO DO WITH MY CARE AND REFAIR I ALLOW MY MOTHER FULL POWER OF ATTORNEY WHO IS PHYLLIS N. HEWITT. OVER ALL MATERS, AS WELL AS MEDICAL RECORDS THAT PERTAIN ME. ROBERT MIDDLEWORTH

2. This Power of Attorney shall be effective on the date of FEB, 25, 20 13.

3. This Power of Attorney shall remain in effect in the event that I should become or be declared disabled, incapacitated, or incompetent.

4. This Power of Attorney shall terminate on the date of UNDETERMINED, 20\_\_\_\_, unless I have revoked it sooner. I may revoke this Power of Attorney at any time and in any manner.

5. My agent shall be paid compensation for services pursuant to this Power of Attorney as follows:  
MY AGENT IS NOT PAID COMPENSATION, BUT IN THE INTEREST OF FINANCES, ALL MONEYS, PROPERTY'S, AND INTREST ARE EQUILY OWNED BY MY AGENT, PHYLLIS N. HEWITT

6. This Power of Attorney shall be governed by the laws of the state of WASHINGTON.

7. AND BY THE LAWS GOVERNED BY THE UNITED STATES CONSTITUTION IN THE UNITED STATES OF AMERICA.

In Witness Whereof, I have signed this Power of Attorney of my own free will.

Robert J. Middeworth

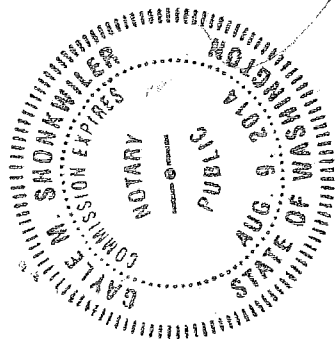
02-25-2013

Principal's Signature

Date

Subscribed and sworn to me before this 25th

Day of February, 2013.



Gayle M. Smok Wilber

Notary for the State of Washington

Residing in Grant County

Commission Expires 8.9.2014



## Court Briefs

### Man pleads innocent in wife's drug death

A College Place man accused of giving his wife methamphetamine that caused her death last month pleaded innocent Monday in Walla Walla County Superior Court.

Robert J. Middleworth, 31, of 129½ S.W. Ninth St., is scheduled to stand trial starting April 14 on a charge of controlled substances homicide.

Middleworth and his wife, Joylee L. Middleworth, 29, allegedly split about ¼-gram of methamphetamine at Robert Middleworth's home on Jan. 5. She got sick and died Jan. 9. An autopsy revealed that she suffered a stroke, which complicated acute methamphetamine intoxication.

The Middleworths were not living together at the time. She lived at 747 Carrie Ave. in Walla Walla.

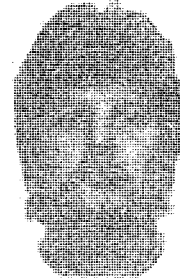
Middleworth isn't accused of intentionally killing his wife. But it's a felony in this state when someone provides a controlled substance to a person and the substance kills the person.

If convicted, Middleworth faces a standard range sentence of 31-41 months in prison.

### Man pleads guilty to taking aid center van

A man who stole the Christian Aid Center's van after representatives lent it to him to move from the center in November pleaded guilty Monday in Superior Court to first-degree theft.

Raymond Tichi, 22, faces a standard range of three-to-nine months in jail when he's sentenced, probably in two weeks. The prosecuting attorney's office is recommending a six-month term.



MIDDLEWORTH



TICHI

A Walla Walla man escaped prison.

In September, he attempted to escape from the state prison.

Lambert County Jail sentenced him to 180 days for escape.

Lambert County Jail returned the van to the center.

Lambert County Jail sentenced him to 180 days for escape.

Although he was sentenced to 180 days in jail, he was released from the Walla Walla County Jail.



JAY INSLEE  
Governor

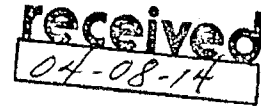


JOHN R. BATISTE  
Chief

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, appearing to read "Jeff Riolo".

Jeffrey Riolo, Laboratory Manager  
Crime Laboratory Division

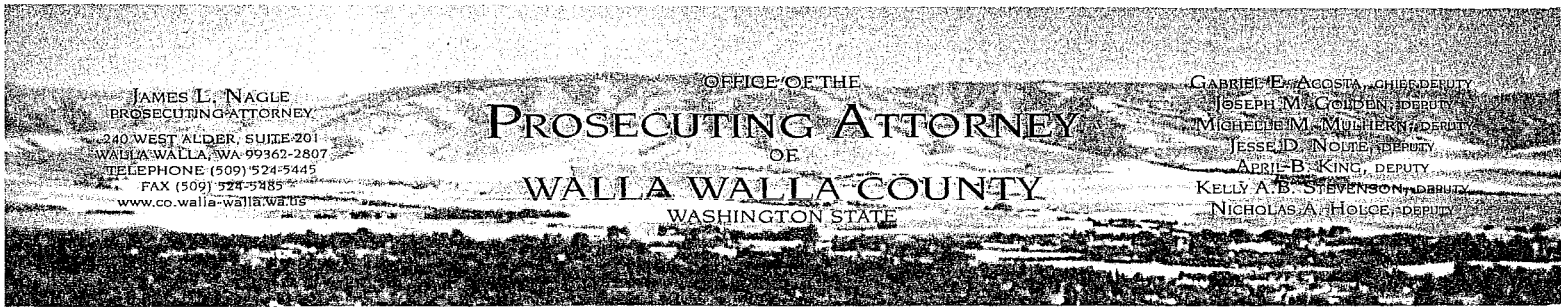
JR:jr



**Court:** Walla Walla Superior  
**Case Number:** 10-1-00287-9

192	01-28-2014	MOTION	Motion For Post Conviction Dna Test	
193	02-19-2014	LETTER	Letter From Robert Middleworth	
194	02-19-2014	MOTION	Motion For Post Conviction Dna Test Amended	
195	02-27-2014	LETTER	Letter Form Robert Middleworth	
196	02-27-2014	MOTION	Motion For Request Of Counsel	
197	03-17-2014	MOTION ACTION	Motion For Exparte Docket Motion For Post Conviction Dna Test	03-24-2014CH
198	03-24-2014	MOTION HEARING ACTION	Motion Hearing Motion For Post Conviction Dna Test	04-21-2014CH
199	04-02-2014	MOTION	Motion To Produce	
200	04-09-2014	ORDER	Order Recalling Mandate	
201	04-21-2014	MOTION HEARING ACTION	Motion Hearing Motion For Post Conviction Dna Test	
	04-22-2014	COMMENT ENTRY	Strike 5/5/14 Per Dpii's Request	
202	04-22-2014	COMMENT ENTRY	E-mail From Michelle Mulhern	
203	05-01-2014	MOTION	Motion To Produce Response To Defendants Request	
204	07-16-2014	CLERK'S TRUST FUND LEDGER	Clerk's Trust Fund Ledger	
205	09-10-2014	MANDATE	Mandate - Affirmed/reversed	
206	09-15-2014	MOTION	Motion To Terminate Restitution	
207	09-15-2014	MEMORANDUM	Memorandum	
208	09-15-2014	OATH	Oath	
209	09-15-2014	NOTE FOR MOTION DOCKET	Note For Motion Docket	
210	12-01-2014	MOTION	Motion - Defendant's	

211	12-01-2014	NOTE FOR MOTION DOCKET ACTION ACTION	Note For Motion Docket Remission Of Legal Financial Obligations	12-15-2014CH
212	12-01-2014	AFFIDAVIT OF MAILING	Affidavit Of Mailing	
213	12-03-2014	WAIVER	State's Memo Re: Waiver Or Reduction Of Lfo's	
214	12-03-2014	CERTIFICATE OF MAILING	Certificate Of Mailing	
215	12-15-2014	ORDER	Order Denying Motion For Remission Of Lfo's	
216	12-15-2014	MOTION HEARING	Motion Hearing	
217	12-16-2014	RESPONSE	Response - Robert Middleworth	
218	12-16-2014	CERTIFICATE OF MAILING	Certificate Of Mailing	



January 27, 2015

Ms. Renee S. Townsley, Clerk  
Court of Appeals/Division III  
500 North Cedar Street  
Spokane, WA 99201

COPY


RE: Personal Restraint Petition of Robert James Middleworth, Jr.  
Court of Appeals case number 330184  
Walla Walla County Superior Court cause no. 10-1-00287-9

Dear Ms. Townsley:

Please add Teresa Chen, WSBA No. 31762, POB 5889, Pasco, WA 99302-5801, as Special Deputy Prosecuting Attorney for Walla Walla County in the above-referenced case.

Copies of all letters generated from the Court of Appeals should be served on this office as well, however, all other correspondence and briefs need only to be served on Special Deputy Prosecuting Attorney Teresa Chen.

Sincerely,

  
James L. Nagle  
Prosecuting Attorney for Walla Walla County

cc:  
Robert James Middleworth, Jr. DOC#948011 ✓  
Coyote Ridge Correction Center  
PO Box 769  
Connell, WA 99826

Teresa Chen

copy

IN 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 *****				
TEST PERFORMED 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.			
TEST PERFORMED 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			
TEST RESULTS FOR ABOVE TEST I AND II TAKEN	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			



Patient Robert  
First

BC#148662 RED  
1011-000019R 2\_RF\_SERUM  
MIDDLEWORTH, ROBERT J 44/M  
F09013500947 (F170766) 10/31/66  
TESTS: HSU 1/11 - 19C, HSU 1/11 -  
SH

Middleworth  
Last

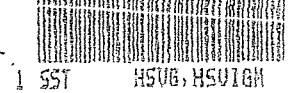
Patient Social Security Numr \_\_\_\_\_

M1923138 15H40  
MIDDLEWORTH, ROBERT J 44/M  
10/11 1383

Hospital Medical Record Number (If applicable) \_\_\_\_\_

ISH40F170766

Attending Physician (If applicable) \_\_\_\_\_



Type of Specimen Blood

1 SST HSU6, HSU1GH

Clothing/Other for Evidence Collection \_\_\_\_\_

(Place in paper sack, avoid plastic where possible)

College Place Rd

200-09-2787-

Lt. Dutton

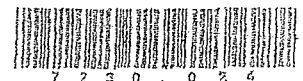
DEW 1306

Det. Michael J. Brown

	FULL SIGNATURE	Dep/Agency	Date	Time
Collected by	<u>Eliann Stadlerman</u>	<u>LAB</u>	<u>10-11-10</u>	<u>1310</u>
Delivered by	<u>Eliann Stadlerman</u>	<u>LAB</u>	<u>10-11-10</u>	<u>1640</u>
Received by	<u>St. Kalsbach</u>	<u>TCL</u>	<u>10-11-10</u>	<u>1640</u>
Delivered by				
Received by	<u>Phylomena M. Yegorov</u>	<u>PAML Viro-testing</u>	<u>10-13-10</u>	<u>0506</u>
Locked up by				
Unlocked by				
Delivered by	<u>Virginia Henderson</u>	<u>PAML VMC Results faxed to</u>	<u>10/13/10</u>	<u>1600</u>
Received by	<u>Received results 10-14-10</u> <u>Teste Scott</u>	<u>Mandi Tsitt-SM MC</u>	<u>10-14-10</u>	<u>0700</u>
Delivered by				
Received by				
Mailed by				
To Whom				

The original copy of this form is to remain with the specimen/evidence at all times. The copy should be placed in the chart of all Emergency or Inpatients. All legal specimens/evidence must remain within eye sight of authorized staff or locked in secure area until delivered to law enforcement officer or mailed to designated laboratory.

ST. MARY MEDICAL CENTER  
Walla Walla, Washington  
CHAIN OF POSSESSION REPORT  
(For Forensic Evidence Collection)





JUL 13 2011

FILED  
JULY MARTIN  
CITY CLERK

JUL 13 A 11:35



WALLA COUNTY  
WASHINGTON

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

STATE OF WASHINGTON,	)	No.: 10-1-00287-9
	)	
Plaintiff,	)	
	)	Order in Re: New Trial
Vs.	)	
	)	
ROBERT JAMES MIDDLEWORTH,	)	
	)	
Defendant.	)	

---

THIS MATTER having come on regularly on June 9, 2011 in open court before the undersigned Judge of the above entitled Court, upon the motion of the defendant for a new trial after a jury verdict of guilty, and the court having considered the motion, the record and the file in this cause, and being fully advised, now, therefore,

87

IT IS ORDERED that the defendant's motion for a new trial be, and the same is hereby granted.

IT IS ORDERED that the following reasons be assigned for judgment. The Court finds the Defendant, by his request to "address the jury" may have been requesting that he be allowed to testify at his trial. The Court did not interpret said statement in that manner. However, because the Defendant voluntarily declined to be present for trial,

and since the Court did not, on the record, inquire, further about the meaning of Defendant's statement, Defendant's right to due process and right to testify in his own behalf may have been violated. This order is based upon the record in this cause.

DONE IN OPEN COURT this 13<sup>th</sup> day of July, 2011

Ronald W. Schacht  
JUDGE

Approved as to Form:

[Signature]  
23160

FILED

APR -7 2014

COURT OF APPEALS  
DIVISION III

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	<u>MANDATE</u>
	)	
v.	)	No. 30850-2-III
	)	
ROBERT JAMES MIDDLEWORTH,	)	Walla Walla County No. 10-1-00287-9
Appellant.	)	
_____	)	<b>COURT ACTION REQUIRED</b>

The State of Washington to: The Superior Court of the State of Washington,  
in and for Walla Walla County

This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on February 6, 2014 became the decision terminating review of this court in the above-entitled case on March 3, 2014. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the Opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 7th day of April, 2014.



Clerk of the Court of Appeals, State of Washington  
Division III

cc: Robert James Middleworth  
David L. Donnan  
Marla L. Zink  
James L. Nagle  
Teresa J. Chen  
Hon. Donald W. Schacht, Presiding Judge  
Department of Corrections

FILED

APR -7 2014


COURT OF APPEALS  
DIVISION III

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
Respondent,	)	
	)	
v.	)	CLERK'S RULING
	)	RECALLING MANDATE
	)	No. 30850-2-III
ROBERT JAMES MIDDLEWORTH, JR.	)	
Appellant.	)	
	)	

Having received on April 2, 2014, a Petition for Review to the Supreme Court, the Mandate issued on April 7, 2014 is hereby recalled. RAP 12.9(b).

DATED: April 7, 2014

  
 \_\_\_\_\_  
 RENEE S. TOWNSLEY  
 CLERK

FILED

SEP - 8 2014

COURT OF APPEALS  
DIVISION III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

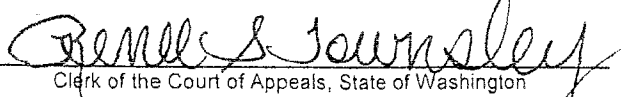
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	<u>MANDATE</u>
	)	
v.	)	No. 30850-2-III
	)	
ROBERT JAMES MIDDLEWORTH,	)	Walla Walla County No. 10-1-00287-9
Appellant.	)	
_____	)	<b>COURT ACTION REQUIRED</b>

The State of Washington to: The Superior Court of the State of Washington,  
in and for Walla Walla County

This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on February 6, 2014 became the decision terminating review of this court in the above-entitled case on July 9, 2014. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the Opinion.

*In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 8th day of September, 2014*

  
Clerk of the Court of Appeals, State of Washington  
Division III

cc: Robert James Middleworth  
David L. Donnan  
Marla L. Zink  
James L. Nagle  
Teresa J. Chen  
Hon. Donald W. Schacht, Presiding Judge  
Department of Corrections

RUN DATE: 10/07/10	Restricted NPR LAB for MEDINET	SHM	PAGE 1
RUN TIME: 0937	Specimen Inquiry		
RUN USER: TSM16	PCI User: TSM16	Lab Database: LAB.OV.SHM	
Name: DAVIS, BRANDY M	Age/Sex: 5Y 01M/F	Attend Dr: Edminster, Joel D	
Acct#: Z22606273	Unit#: Z001169670	Status: DEP ER	Location: Z.GRN
Reg: 09/24/10	Disch:		
Spec #: 10:CM0075133S	CAN	Coll: 09/24/10-1114	Subm Dr: Edminster, Joel D
			Othr Dr: Wren, Joseph
Source: VAGINA			
Ordered: CULTURE, HERPES SIMPLEX SCREEN			
Comments: COMMENTS: PEDS 64			
Procedure	Result		
** CANCELLED **			
Cancelled via INFCE: SHM_SORR23			

*diffuse warts  
Present 2 STD*

Patient: DAVIS, BRANDY M	Age/Sex: 5Y 01M/F	Acct#Z22606273	Unit#Z001169670
--------------------------	-------------------	----------------	-----------------

17  
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: LAE  
DOB: 10/31/65      Reg: 10/11/10      Disch:

SPEC #: 1011:500019R      COLL: 10/11/10-1300      STATUS: COMP      REQ #: 01102770  
RECD: 10/11/10-1419      SUBM DR: Other Doctor

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

Test	Result	Flag	Reference	Units
***** SPECIAL IMMUNOLOGY *****				
TEST HERPES I ANTIBODY-IgG	7.62	H	<0.90	IV
PERFORMED	>1.10 Positive: IgG Ab to HSV Type I Glycoprotein G detected. May indicate a recent or past infection.			
TEST HERPES II ANTIBODY-IgG	7.76	H	<0.90	IV
PERFORMED	>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				
TEST RESULTS HERPES SIMPLEX IgM AB.	0.79		<0.91	OD Ratio
PER ABOVE TEST I AND II TAKEN	<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				



Patient Roberts  
First

Middleworth  
Last

BC#148662 REC  
1011-S80019R 2\_RF\_SERUM  
MIDDLEWORTH, ROBERT J 44/11  
FB0013800947 (F170766) 10/31/66  
TESTS:HSU 1/11 - 1cC:HSU 1/11 -  
sh

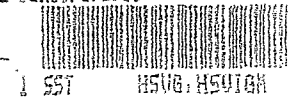
Patient Social Security Num \_\_\_\_\_

M1925130 15H00  
MIDDLEWORTH, ROBERT J 44/11 10/31/66

Hospital Medical Record Number (if applicable) \_\_\_\_\_

ZSP:DF170766

Attending Physician (if applicable) \_\_\_\_\_



Type of Specimen Blood

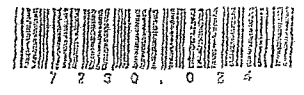
Clothing/Other for Evidence Collection \_\_\_\_\_  
(Place in paper sack, avoid plastic where possible)

College PLACE RD 200-09-2787- Lt. Dutton  
DRAW # 1306 Det. Maidment

	FULL SIGNATURE	Dept/Agency	Date	Time
Collected by	<u>Eliann Shatilman</u>	<u>LAB</u>	<u>10-11-10</u>	<u>1310</u>
Delivered by	<u>Eliann Shatilman</u>	<u>LAB</u>	<u>10-11-10</u>	<u>1640</u>
Received by	<u>St Kabbaco</u>	<u>TEL</u>	<u>10-11-10</u>	<u>1640</u>
Delivered by				
Received by	<u>Phyllis M. ...</u>	<u>PAML Viro-testing</u>	<u>10-13-10</u>	<u>0506</u>
Locked up by				
Unlocked by				
Delivered by	<u>Virginia Henderson</u>	<u>PAML VMO Results faxed to</u>	<u>10/13/10</u>	<u>1600</u>
Received by	<u>Hand results sent to</u>	<u>Mani Psitt-SM MC</u>	<u>10-14-10</u>	<u>0700</u>
Delivered by				
Received by				
Mailed by				
To Whom				

The original copy of this form is to remain with the specimen/evidence at all times. The copy should be placed in the chart of all Emergency or Inpatients. All legal specimens/evidence must remain within eye sight of authorized staff or locked in secure area until delivered to law enforcement officer or mailed to designated laboratory.

ST. MARY MEDICAL CENTER  
Walla Walla, Washington  
CHAIN OF POSSESSION REPORT  
(For Forensic Evidence Collection)





*In the District Court, Walla Walla County  
Or in the  
College Place Municipal Court, College Place Precinct  
The Honorable Richard Wernette Judge*

# *Affidavit For Search Warrant*

*(State of Washington)*

*) ss.*

*Walla Walla County)*

**No. 2010-09-2787 - Blood  
Robert Middleworth**

**Robert G. Dutton**, being first sworn, on oath, requests the issuance of a search warrant to search the person of:

Robert Middleworth - 10/31/1965

and seize the following instruments, articles and things:

Blood Sample – as needed for laboratory testing

which have been used in the commission of, or which constitute evidence of, the offense of:

Rape of a child in the first degree RCW 9A.44.073

Affiant states that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set for the above:

On 09-21-2010 Jane Doe (8/12/2005) was taken to the Blue Mountain Clinic in Walla Walla by her mother Kristina Davis for treatment of a possible

Urinary Tract Infection (UTI). When the pediatrician (Rachel Marsh) examined Jane Doe she noticed excoriation, which is an unusual sign of tearing in the vaginal area. When Dr. Marsh was examining her she asked her to "Tell me about how your pee pee started hurting, did anyone touch your pee pee? Jane Doe answered without hesitation "Rob touched me". Marsh asked her to tell her how this happened. Jane Doe said, "when I was watching cartoons Rob turned off the cartoons and then he layed me down." Marsh said that Jane Doe stopped offering further explanation or information. Further examination discovered that Jane Doe's anal area showed fissures as well and her genitalia were raw and bloody. Later Jane Doe had to be taken to Sacred Heart Medical Center In Spokane for treatment of the bleeding from her genitals. It was discovered that she was not suffering from a Urinary Tract Infection and displayed evidence of having been sexually assaulted. Laboratory testing on Jane Doe found that she was suffering from genital Herpes.

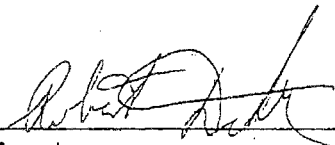
On 9/28/10 Jane Doe was interviewed by Brook Martin at DSHS. During the interview Jane Doe disclosed that Rob had touched her private parts and hurt her "there" really bad.

On 9/29/10 a search warrant was served on Middleworth's residence and person. Middleworth was taken to St. Mary's Medical Center where a physician completed a "rape kit" on him. Blood and urine were taken at the time of the evidence gathering.

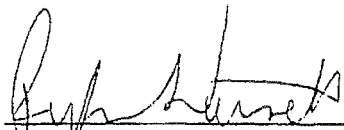
The blood and urine were returned to the College Place Police Department and stored in a refrigerator prior to being sent out to the State Laboratory for testing. Detective Maidment contact<sup>ed</sup> the laboratory in Cheney Washington and found they cannot test for sexually transmitted diseases such as herpes. The Detective contact<sup>ed</sup> Michelle Mulhern at the Walla Walla Prosecutors Office. Mulhern recommended the blood be tested at a local hospital.

On 10/5/2010 Detective Maidment made contact with a technician at St. Mary's Medical Center's laboratory. The Detective was informed that the blood drawn from Robert Middleworth, via a search warrant, the week prior could not be used for testing. The technician advised that the blood needed to be "spun" and separated in the vial at the time of the draw in order to be used for testing any type sexually transmitted disease, i.e. Herpes Virus 1 or 2.

This warrant is requested to obtain another sample Robert Middleworth's blood for testing.

  
\_\_\_\_\_

**Affiant**

  
\_\_\_\_\_

**Judge**

*Subscribed and Sworn* to before me  
This 11 day of OCT 2010.

1           our evidence officer and he proceeded with that and sent  
2           that.

3 Q       Okay. Did you request that the blood samples that were  
4           obtained were tested for the herpes virus?

5 A       I did.

6 Q       Who did you ask to do that testing?

7 A       Well, we initially were going to send that up to the crime  
8           scene laboratory in Cheney, Washington. They advised us,  
9           though, that when the blood was taken, it would not be able  
10          to be used or be able to be examined for the disease.

11 Q      Okay. So what did do when you learned that information?

12 A      I applied for another search warrant for a blood sample  
13          being taken from Mr. Middleworth.

14 Q      Okay. And did you go ahead and get that blood sample?

15 A      I did.

16 Q      Who obtained that sample for you?

17 A      The staff at St. Mary's laboratory. They took it. And I  
18          observed and Detective Maidment observed the taking of the  
19          samples from him.

20 Q      Okay. And once the samples were obtained, where did they  
21          go next?

22 A      They were put in their system for examination for the  
23          laboratories that they send out to -- I am not sure, I  
24          can't remember, I believe it was Spokane for examination.

25 Q      Okay. And what specific things were you asking that the

1 A Most -- Initially I recall seeing some redness around the  
2 external genitalia and the introitus, which is the opening  
3 to the vagina, and the skin around the perineum, which is  
4 the space between the anus and the vagina, redness with a  
5 number of vesicles, which essentially are fluid filled  
6 papules or bumps.

7 Q What did you observe next as you proceeded with the exam?

8 A There was -- I believe there was areas of what are called  
9 anal fissures on the rectal exam, which is a slight  
10 disruption or tear of the anus, as well as some what appear  
11 to be a laceration or an abrasion to the portions of the  
12 introitus.

13 Q I'm sorry. I didn't hear that. Could you repeat that last  
14 part?

15 A To the portions of the external vagina, the introitus.

16 Q Okay. As you proceeded with the exam, what was the next  
17 thing you did after observing the external genitalia?

18 A I wanted to sample one of the bases of the blisters that I  
19 saw. And a swab -- unroof the vesicle and swab the base of  
20 that blister.

21 Q Unroof the vesicle, does that mean that basically you kind  
22 of take the top off of it?

23 A That's right. You rupture it to get to the skin underneath  
24 and to get an accurate sample.

25 Q Okay. After you did that, what was the next thing that you

1 did?

2 A At that point I sent the specimen to the lab. And we have  
3 a child life specialist that assists with children who are  
4 obviously upset and they provided some distraction,  
5 comforting measures afterwards. Typically when my exam is  
6 done, I will leave the room, order additional testing if it  
7 needs to be done and wait for lab studies.

8 Q Did you have an opportunity to examine the interior of  
9 Brandy's vagina with a speculum?

10 A I did not.

11 Q Aside from the -- I think you mentioned some tearing in the  
12 anus and I think a laceration at one point, did you observe  
13 any other fissures or tears in Brandy's genitalia?

14 A Not to my recollection. What I -- What I documented in my  
15 note would be an accurate assessment of my findings.

16 Q Did you also take a urine sample from Brandy?

17 A The nurse would have taken a urine sample, yes.

18 Q Did you have an opportunity to send some specimens off to  
19 your laboratory there at Sacred Heart?

20 A Yes, I did. I, as part of the examination, I did obtain  
21 some other swabs. I forgot to mention that. So there are  
22 additional swabs taken. I didn't perform a speculum exam,  
23 but I did swab the inside of the vaginal canal and I sent  
24 those specimens to the lab as well.

25 Q Why did you take those swabs? What were you concerned

1 about or what were you sending them to the lab to be tested  
2 for?

3 A Specifically my concern was for herpes simplex virus. The  
4 appearance of the lesions are classic appearances of herpes  
5 simplex. And in addition with the report of foul smelling  
6 discharge, I was looking for other signs of infections,  
7 STD's, et cetera. And then I believe she did have some  
8 tenderness on exam just above the pelvis on palpation of  
9 the abdomen. I think I mentioned that. And so whenever  
10 that's the case I always check the urine as well.

11 Q Okay. Did you have an opportunity to review the results of  
12 the lab testing on the swabs?

13 A I did.

14 Q What did they return as far as the result of their lab  
15 testing?

16 A Well, initially I will get a urine sample back. I won't  
17 get -- and I will get what is called a direct exam and a  
18 miscellaneous exam. I will get those immediately reported  
19 to me. Gonorrhoea, Chlamydia and herpes simplex virus, all  
20 three of those take a number of days to return as positive.  
21 So I didn't have those results available to me. I did have  
22 the urine result. I did have the direct exam, the  
23 miscellaneous exam. That's looking for things like  
24 trichomonas, yeast and bacterial vaginosis.

25 Q And did Brandy return as positive for any of those diseases

1       you just mentioned?

2   A    Bacterial vaginosis was suggested on her direct exam.

3   Q    What is that?

4   A    The -- Essentially, it is an overgrowth of bacteria.  
5       Typically it is a microbe called Gardnerella. It is not  
6       always considered to be a sexually transmitted disease.  
7       Typically it is a microbe that will over grow in the  
8       vaginal canal when there is a disruption of the Ph balance.  
9       So it can happen in a number of cases like that.

10  Q    Did you also have an opportunity to review the lab results  
11       for the other testing that you did for gonorrhea, syphilis  
12       and herpes?

13  A    I did several days later.

14  Q    And what were the results of those tests?

15  A    The herpes simplex test was positive for herpes simplex  
16       virus.

17  Q    Was that the only positive result?

18  A    I believe that is the only positive result I had from the  
19       cultures.

20  Q    What would be the course of treatment for the bacterial  
21       vaginosis?

22  A    Typically Flagyl, which is an antimicrobial and antibiotic.  
23       It can be delivered orally or by vaginal suppository. We  
24       opted to treat orally, just due to the circumstances.  
25       Trying to insert a vaginal suppository in this setting, I



1 think, would have been inappropriate, so --

2 Q And is there any treatment course recommended for herpes?

3 A Antivirals. And it varies depending on the presentation.  
4 Typically what is called a primary infection would be  
5 treated more aggressively. And based on the fact that she  
6 had systemic signs, meaning she had a fever and other  
7 findings outside the local findings that would suggest that  
8 this was a primary infection so I treated her aggressively  
9 with acyclovir.

10 Q Is herpes curable?

11 A No, it is not.

12 Q Does acyclovir help manage the symptoms of herpes?

13 A Acyclovir is one of the antivirals that's used, and it  
14 works directly on inhibiting viral replication, so you can  
15 shorten the course and duration of a flare-up, so to speak.  
16 But once the herpes virus itself, the herpes simplex virus  
17 itself infects the nerves, and it will typically crop up in  
18 blisters and then the distribution of that essentially in  
19 the nerve that is infected and then will harbor it and  
20 usually hibernates in the nerve until it decides to flare  
21 up again. Usually when someone's immune system is down,  
22 you will have flare-ups of it. And some people can be  
23 entirely asymptomatic, other people have routine regular  
24 flares. And part of the appropriate management is use of  
25 the antivirals.

1 Q Is it possible to transmit the herpes virus while being  
2 asymptomatic?

3 A Yes.

4 Q Is it possible to transmit the herpes virus through a  
5 casual contact?

6 A Yes.

7 Q And by casual contact, I mean someone drinking out of a  
8 soda pop or a glass that someone with sores on their mouth,  
9 for instance?

10 A I suppose you could get herpes labialis in that regard,  
11 which is a herpes simplex virus, but you would have to have  
12 direct contact to the area that is infected. Meaning if  
13 someone had a cold sore, then I would expect that there had  
14 to be direct contact between the cold sore on the lip and  
15 the vaginal area. It really does require direct contact.  
16 And usually skin is protected by a -- Skin is protected.  
17 And the herpes virus specifically likes broken down,  
18 unprotected skin. So areas that are somewhat irritated are  
19 much more prone to getting infected.

20 Q Okay. To transmit the genital herpes virus, is it  
21 necessary to have an open herpes sore?

22 A No, it is not.

23 Q Skin to skin contact?

24 A No, it is not.

25 Q Can you transmit the herpes virus simply by touching

1 someone's genital area without any contact with the sore,  
2 just simple touching?

3 A It depends on which area is infected. I would suspect you  
4 mean genital to genital touching?

5 Q No. I mean fingers, your hands?

6 A There are cases of herpetic whitlow, where you can have  
7 herpes infection on a finger. And in that case it can.  
8 Typically that is more common to the specific population of  
9 dental hygienists because they have their fingers in  
10 people's mouths quite often, so --

11 Q Okay. You mentioned that there were anal fissures and you  
12 mentioned a vaginal laceration. Did you have an  
13 opportunity to discuss Dr. Wren's findings with him?

14 A I had a conversation with Dr. Wren to ensure follow-up  
15 when the child returned to Walla Walla. I did review his  
16 records. I had a copy of the records faxed to me and a  
17 discussion. I can't be sure that I didn't perform my exam  
18 before or after we had discussed it. I know I spoke  
19 directly to him after my exam was done. I know I had  
20 requested some information. I can't recall honestly at  
21 what point I have read that information.

22 Q Okay. The injuries that you observed, the fissures that  
23 Dr. Wren observed, I think you testified were as the result  
24 of a trauma. What you observed, would that be consistent  
25 with penetrating trauma to the child's vagina or anus?

1 A It would be -- It could be consistent with attempts at  
2 penetrating trauma. I can't say for sure. I didn't  
3 inspect the inside of the vaginal canal, but what I saw  
4 would be consistent with attempts at that.

5 Q Okay. We talked a little bit just briefly about bacterial  
6 vaginosis. And I think your testimony was that it comes  
7 from any disruption in the sort of the climate in the  
8 vagina. Is that something that you typically see in  
9 five-year-old children?

10 A No, it is not.

11 Q What population do you typically see that kind of bacterial  
12 infection?

13 A I typically see it in pubescent and post-pubescent women.  
14 Part of the reason is just the cellular maturity of the  
15 vaginal canal. It isn't quite to the point in a  
16 pre-pubescent female where you run the risk of changing or  
17 interfering with the Ph. Typically it will -- activities  
18 that disrupt that normal Ph will make more inevitable to  
19 essentially create a predilection for this sort of thing.  
20 It could be sexual or nonsexual in nature.

21 Q What would disrupt that Ph balance in a 5-year-old child if  
22 you can answer that question? It might be too speculative.

23 A There is always concern for a co-infection, would be one.  
24 I suppose in this circumstance there's definitely a  
25 co-infection. Another infection going on at the same time

1 in the same region could be a cause for that.

2 Q Okay. Based on your training and experience and I think  
3 you mentioned that you performed a number of child sexual  
4 assault exams, given the bacterial vaginosis diagnosis,  
5 would you be concerned about sexual trauma to the child,  
6 sexual penetration or intercourse?

7 A Well, I can't comment again on penetration because I didn't  
8 examine the inside of the vagina, but based on my exam that  
9 I was concerned about trauma, so --

10 Q When you typically perform a sexual assault exam on a  
11 child, do you typically find trauma of this nature?

12 A Usually not, to be honest with you. Usually it is much  
13 less suggestive. And in this circumstance, I focused my  
14 exam more on the complaint of vaginal discharge and less on  
15 the complaint of sexual assault primarily because of the  
16 fact that the sexual assault exam had been performed  
17 already and I was outside of the time window to collect  
18 evidence, which we usually do looking for stains that would  
19 indicate semen, collecting DNA. So this was a very  
20 abbreviated sexual assault exam focusing more on the  
21 complaint of vaginal discharge.

22 Q Okay. So I'm gathering by your testimony that it is pretty  
23 uncommon to find physical evidence when you do a genital  
24 exam on a child?

25 A It's, I would say, relatively uncommon, yes.

1 Q Does that mean the child wasn't sexually assaulted or  
2 what's your experience with that or --

3 A I'll be honest with you, when I'm doing the exam, I rarely  
4 get the follow-up. I rarely get the feedback. I submit  
5 the evidence.

6 Q Okay.

7 A And unless I'm subpoenaed in that case, I don't know the  
8 end point, and so it is hard for me to speculate on who is  
9 and who is not assaulted.

10 MS. MULHERN: Okay. I don't think I have anything  
11 further. Thank you, doctor.

12 THE COURT: Ms. Siemers?

13 MS. SIEMERS: Thank you.

14 CROSS-EXAMINATION

15 BY MS. SIEMERS:

16 Q Doctor.

17 A Hello.

18 Q Could you tell me then where the source of the bleeding and  
19 the discharge actually came from?

20 A It came from essentially the introitus, which is the  
21 opening to the vagina. And the vesicles, when they  
22 rupture, they weep. And so a lot of the moisture that was  
23 seen was related to ruptured vesicles, which is the natural  
24 progression of the herpes simplex.

25 Q So with that discovery did you then think that any more

1           Whether or not that was done or not done is not certainly  
2 part of Ms. Reynolds' purview. She simply collected the  
3 evidence and made observations. Whether or not the rape  
4 kit was opened, why or why not is something the detective  
5 can testify to because he received the report from the  
6 Washington State Patrol Crime Lab/

7           /In any case, I don't think there is any real issue, that,  
8 hey, there was body fluids found on the victim that wasn't  
9 related to her. In other words, there was semen or  
10 something along those lines that could have been tested and  
11 the State Patrol Crime Lab just didn't do it. I don't  
12 think that is an allegation at all. There just was no  
13 point in opening the rape kit.

14           Also the State Patrol Crime Lab does not do genetic  
15 testing. It does not do pathogen testing. It doesn't test  
16 for diseases. Only hospitals can do that. The State  
17 Patrol Crime Lab doesn't want to deal with that,  
18 understandably. So that's why they also did not open the  
19 rape kit to do any testing. They do not have the equipment  
20 or the ability to test for pathogens/.

21           As far as the nurse's testimony as to whether or not the  
22 lesions were herpes lesions, her opinion will be to a  
23 reasonable medical certainty, a reasonable nursing  
24 certainty based on the location, the size of the lesions  
25 and their general condition, her opinion as to whether or

1           And I also don't think if that was a real issue, in my  
2           opinion, counsel, the appellate court and the Supreme Court  
3           would, number one, say so. And number two, they wouldn't  
4           use that term in their opinions.

5           So just a word to the wise, encourage your witnesses not  
6           to specifically use that term. Let's use the term of the  
7           name or child or person or some other term, but I am not  
8           too concerned about that particular issue.

9           I think -- Oh, Robert Johnson. Testimony of Robert  
10          Johnson. I'm going to sustain the objection to his  
11          testimony. Previously in the prior trial, I had not heard  
12          what his testimony was going to be at the time, and it  
13          appeared -- and I think certainly the offer of proof that  
14          was made and probably Ms. Mulhern's personal opinion as to  
15          that was Mr. Johnson -- and maybe he had in the past, was  
16          going to be more explicit in what he said happened. His  
17          testimony at that trial was vague at best.

18          I have looked at these factors. Although I agree with  
19          Ms. Mulhern in that length of time is not necessarily  
20          prohibitive in allowing this testimony, it doesn't  
21          necessarily bar the testimony. This is, in my opinion, on  
22          the verge of being stale.

23          I think the probative value is outweighed by the  
24          prejudicial effect. Much of Mr. Johnson's testimony had to  
25          do with what he observed happening to his brothers as



1       opposed to what happened to him.

2           And I think considering the nature of these charges, the  
3       fact that this charge involves a child and the very nature  
4       of the general public's disapproval of child sexual crimes,  
5       it would be unfair to Mr. Middleworth to allow Mr. Johnson  
6       to testify. I think it would cause speculation and the  
7       other factors that are set forth in the memorandums,  
8       doesn't convince me that it's probative testimony.

9           So I'm going to sustain the motion in limine to Mr.  
10       Johnson and not allow his testimony.

11          I think I have addressed all of the issues. If there are  
12       issues that I need to enter findings and conclusions on, I  
13       will do so at a later date.

14          I would ask, Ms. Mulhern, maybe you are in the best  
15       position to provide the Court with a copy of the tape and I  
16       will view that. Unless counsel objects, I would just view  
17       it in my chambers at my convenience.

18       MR. MAKUS: No. I have no objection to that.

19       THE COURT: Okay.

20       MR. MAKUS: You know, I don't want to sit here for an  
21       hour and a half while you watch it.

22       THE COURT: I hope it is not an hour and a half long, but  
23       if it is, I will watch it so --

24       MR. MAKUS: It is not quite that long.

25       MS. MULHERN: I offer to drop that off. I can have it in

1 A (Nodded head.)  
2 Q And then she asked you, did he touch you two times and you  
3 said yes?  
4 A Yeah.  
5 Q And then she asked, did he touch you five times and you  
6 said yes?  
7 A I think so.  
8 Q Do you remember when she asked you if you had been touched  
9 ten times and you said yes?  
10 A What?  
11 Q Do you remember when Ms. Mulhern asked you if you had been  
12 touched by Rob ten times and you said yes?  
13 A Yeah, I think so.  
14 Q Okay. You are a little girl; right?  
15 A Yeah.  
16 Q Okay. So people ask these questions of you and you are  
17 trying to tell them what they want to hear?  
18 A Yeah.  
19 Q When you were in that little room with the lady, not in  
20 this room, but the other little room, do you remember them  
21 offering to give you a movie?  
22 A What?  
23 Q When you were in that little room with the lady?  
24 A Yeah.  
25 Q Okay. Do you remember them offering to give you a movie?

1 Q All right. Do you remember when your potty hurt?

2 A Yeah.

3 Q Okay. Did Rob come?

4 A What?

5 Q Did Rob come when your potty hurt?

6 A Yeah.

7 Q Who did you tell that your potty hurt?

8 A My mom.

9 Q Okay. And when Rob came, did he touch your potty?

10 A Yeah.

11 Q Did that hurt?

12 A No.

13 Q When he touched your potty, was your mom there?

14 A Yeah, I think so. Wait -- Yeah.

15 Q When you say he touched you with his finger, is that what

16 -- is that the time you are talking about, Brandy?

17 A What?

18 Q When you said he touched you with his finger, is that the

19 time you are talking about that he touched you?

20 A I think so.

21 Q Brandy, it is really important you not just -- I know that

22 lots of people have asked you questions. It is really

23 important that you not say what everybody wants you to say

24 but you say what you can remember. Can you really remember

25 any of this?

1 A I think so.

2 Q All right. So it's important that you be able to tell the  
3 jury, did he touch you more than once?

4 A I think so.

5 Q Okay. Was your mom there when he touched you?

6 A No.

7 Q Okay. So one time he touched you when the mom was there,  
8 and one time he touched you when the mom was not?

9 A Yeah, I think so.

10 Q Well, when you say you think so, is that the way it was?  
11 A What?

12 Q Who did you tell, Brandy?

13 A I think, my mom. I think -- Wait. No.

14 Q Did you tell your mom?

15 A No.

16 Q Who did you tell?

17 A I think nobody.

18 Q Not ever?

19 A I think so.

20 Q Do you remember going to the doctor?

21 A Yeah.

22 Q Do you remember the lady in the room?

23 A I think so. Wait -- Yeah.

24 Q Do you didn't tell the lady in the room?

25 A What?

1 A Yes.

2 Q Okay. Then she went up and saw a doctor up in Spokane.  
3 Did you take her to the Spokane doctor?

4 A No, I didn't.

5 Q Do you know who did?

6 A I -- Not off hand.

7 Q When you first noticed this on the Thursday or the Friday,  
8 did you try to talk to Brandy at all about this?

9 A I didn't think that -- that -- that this was the case that  
10 what he done.

11 Q Well, you never saw him do anything; did you?

12 A I didn't --

13 Q No.

14 A -- see him do anything.

15 Q But people have -- You know now that he is accused, is  
16 that what you know; is that right?

17 A I didn't see anything happen what he done.

18 Q The questions to Brandy -- When you saw the redness on  
19 Brandy, did you ask her what was wrong?

20 A No, I didn't. I didn't think nothing about it.

21 Q Okay. When you saw the redness on Brandy and Robert came  
22 down and touched her, you described him, did she have  
23 clothes on at that point?

24 A We -- I -- Rob and I had her take her pants and underwear  
25 off, that way we can look better at her.

1 Q The two of you were there together?

2 A Yes.

3 Q And at some point he touched her. Did she have her clothes  
4 on when he touched her?

5 A Just looking at her, seeing what is on her thighs. I was  
6 right there behind him when he was looking.

7 Q I'm sorry. I didn't get that.

8 A I was right there behind him when he had his hands on her  
9 thighs, just moving.

10 Q He had his hands on her thighs, are you talking about her  
11 inner thighs?

12 A Yeah, just moving her thighs to the side so he can have a  
13 better look.

14 Q And when he did that, did Brandy say anything?

15 A No, she didn't.

16 Q Did she in any way express pain?

17 A Just that it hurts when she was going to the bathroom, to  
18 telling both of us that when we were looking.

19 Q Did Rob's mother come down and look too?

20 A Oh, we explained it to her what was going on.

21 Q Uh-huh. What, did she look?

22 A She didn't look.

23 Q When you were advised to take the child to the doctor by  
24 Rob, was that on Thursday or Friday or was it later?

25 A Monday night.

1 Q Monday night? So was the condition hurting more so he said  
2 take her to the doctor?

3 A Yeah.

4 Q Up to Monday night when you were putting baby powder on  
5 hoping to solve the problem?

6 A I stopped using baby powder Saturday night because I  
7 thought it was just a bladder infection. I never seen a  
8 bladder infection before.

9 Q Okay. But you were putting powder on her until Saturday  
10 night?

11 A Yes.

12 Q Now, do you know what a cold sore is?

13 A Yes.

14 Q Have you ever had a cold sore?

15 A Yes.

16 Q Where?

17 A On my mouth.

18 Q And they come back from time to time?

19 A I haven't had one in years.

20 Q Okay. Well, how many years since you have had one?

21 A Since I -- I want to say no more than like 5 years.

22 Q All right. Do other members of your family have cold  
23 sores?

24 A No.

25 Q No? Do you know if Hector has cold sores?

1 Q And do you know what the lady's name was?

2 A No.

3 Q Okay. But you remember that they had a video there?

4 A Yeah.

5 Q Okay. And they videotaped your statement while you talked

6 to them?

7 A Yeah, I think.

8 Q Do you remember telling the lady when you did that, that

9 you were touched on top of the clothes and it only happened

10 once?

11 A Yeah.

12 Q Did you tell the lady the truth, Brandy?

13 A Yes.

14 Q You said Rob had sex with you. Who told you that Rob had

15 sex with you?

16 A No one told me. I just knew.

17 Q Well, do you know what sex is?

18 A Wait, no.

19 Q So somebody told you that Rob had sex with you; wouldn't

20 that be true?

21 A Oh, yeah. I forgot. Yeah.

22 Q Who told you that, Brandy?

23 A I think my mom did, I think.

24 Q All right. Now, you said that Rob held you on his lap?

25 A Yeah.



1 play it again. If we need to play it again just for  
2 clarity, we may do that, but we will see how it goes.

3 Go ahead, detective.

4 (The tape was played for the  
5 jury:)

(DIRECT EXAMINATION CONTINUING)

6 Q Ms. Martin, I think you mentioned at the end of the tape  
7 that you were going to talk to Brandy again. Did you ever  
8 have an opportunity to do that?

9 A I did briefly the next day, yes.

10 Q Okay. Did she add anything to what she said on the  
11 videotape?

12 A She did not.

13 Q Based on your discussions with Brandy, did you do anything  
14 else in particular to investigate the case?

15 A I did not.

16 Q Okay. And you mentioned one of the officers was in the  
17 room. Was that who you consulted with when you left?

18 A I did.

19 MS. MULHERN: I don't think I have any further questions.  
20 Thank you.

21 THE COURT: Mr. Makus?

22 CROSS-EXAMINATION

23 BY MR. MAKUS:

24 Q You say that you interviewed Brandy again the next day?

25 A Yes, I did.

1 Q Was that videotaped?

2 A Yes, it was.

3 Q Where is that videotape?

4 A I assume it is on the camera. It wasn't requested.

5 MR. MAKUS: Well -- Well, that kind of raises a matter  
6 I'll bring up outside the presence of the jury, your Honor.

7 THE COURT: Okay.

8 Q Was it the same room?

9 A Yes.

10 Q How long did the second videotape last?

11 A About 20 minutes.

12 Q What did you do with that videotape when it was done?

13 A They are saved onto the recorder.

14 Q Well, did you -- Was the tape just like we had here today?

15 A Yes.

16 Q Did you give that to the police?

17 A No. They didn't -- They did not want -- they didn't want  
18 it. Can I go into detail? She had said something  
19 concerning --

20 MS. MULHERN: Hang on a second. Probably not if it is  
21 going to be what I think you are going to say.

22 THE WITNESS: Okay.

23 MS. MULHERN: Your Honor, we probably ought to take this  
24 up outside the presence of the jury. I think it pertains  
25 to a matter the Court previously ruled on.

1 rape kit?

2 A That is correct.

3 Q And you understood that she took scrapings?

4 A No. I don't believe she did.

5 MR. MAKUS: I don't have any more questions, your Honor.

6 THE COURT: Any redirect?

7 REDIRECT-EXAMINATION

8 BY MS. MULHERN:

9 Q Lieutenant Dutton, did you observe if Nurse Reynolds took  
10 swabs of the Defendant's genital area?

11 A Yes.

12 Q She did take those swabs, you watched her do that?

13 A Yes.

14 Q And were swabs submitted as part of the complete rape kit?

15 A That would have been in the rape kit, yes.

16 MS. MULHERN: If I can approach the witness, your Honor?

17 THE COURT: You may.

18 Q Lieutenant, I'm showing you a document, just for the record  
19 that is an identification that is listed as a State Patrol  
20 Crime Lab report, it looks like it was dated -- received by  
21 the College Place Police Department dated December 10,  
22 2010, under items examined, if you can look at item 210  
23 there.

24 A Correct.

25 Q What does that crime lab report indicate?

1 Q And was there anything else that you did to assist in sort  
2 of maybe taking care of some of the discharge and bleeding  
3 that you observed?

4 A Ibuprofen for the fever and essentially that is -- was the  
5 treatment of choice there.

6 Q Based on your training and experience, based on what you  
7 observed, as well as reviewing the information from Dr.  
8 Wren, what concerns did you have about Brandy's diagnosis?  
9 What would your diagnosis of her be?

10 MR. MAKUS: Your Honor, I'm going to object to the form  
11 of the question concerning the diagnosis. If it is a  
12 diagnosis with reasonable medical probability, that is one  
13 thing.

14 THE COURT: Reask your question. You used the term  
15 diagnosis and -- Just reask your question, please.

16 Q Doctor, to a reasonable medical certainty, can you provide  
17 a diagnosis as to what was wrong with Brandy when you saw  
18 her?

19 A My diagnosis taken directly from my documentation, sexual  
20 assault with bacterial vaginosis and genital herpes simplex  
21 infection.

22 Q And what did you base the diagnosis of sexual assault on?

23 A The fact that children this age don't get genital herpes  
24 unless there is a sexual assault situation, especially in  
25 lieu of the fact that there was significant trauma that

1 A No.

2 Q Why not?

3 A My evidence tech/detective was contacted by, I believe, the  
4 St. Mary's Medical Lab that told him that they --

5 MR. MAKUS: Your Honor, I'm going to object to whatever  
6 the lab said.

7 THE COURT: Well, I think I'm going to overrule the  
8 objection. I'll hear what the answer is. If it is being  
9 offered to prove something, then I'll sustain that  
10 objection and instruct the jury to disregard it.

11 Go ahead.

12 Q Okay. Why -- What was going on with the blood? Why  
13 wasn't it submitted?

14 A The blood would not be able to be tested.

15 Q Okay. That information you received through your  
16 technician, your evidence technician?

17 A Yes.

18 Q So at that point what did you do?

19 A I went and got a second search warrant.

20 Q Were you able to execute that search warrant?

21 A I was.

22 Q And what was that for?

23 A For a blood draw from Mr. Middleworth.

24 Q Okay. And when was that taken, that second blood draw?

25 A I believe that was on the 5th of October.

