

**FILED**

JAN 11, 2016

Court of Appeals  
Division III  
State of Washington

33018-4-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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IN RE THE PERSONAL RESTRAINT OF  
ROBERT MIDDLEWORTH,  
Petitioner.

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SECOND  
PERSONAL RESTRAINT PETITION

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RESPONDENT'S SUPPLEMENTAL BRIEF

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Respectfully submitted:



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TABLE OF CONTENTS

Page No.

**I. SUPPLEMENTAL ARGUMENT.....1**

The Superior Court Did Not Abuse Its Discretion  
In Denying The Motion For Post-Conviction  
DNA Testing By The WSP Lab.....1

A. The court did not abuse its discretion  
in refusing to order testing that  
the State Crime Lab does not perform.....1

B. The court did not abuse its discretion  
in finding that WSPCL does not have the swabs,  
and a motion to preserve was not timely made.....2

C. The court did not abuse its discretion  
in finding it “unlikely that even if the virus  
were able to be tested for DNA evidence,  
any evidence of an exculpatory nature  
would be discovered”.....4

**II. CONCLUSION .....7**

TABLE OF AUTHORITIES

State Cases

Page No.

*In re Gentry*, 137 Wn.2d 378, 972 P.2d 1250 (1999) .....2  
*LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989) .....1  
*In re Runyan*, 121 Wn.2d 432853 P.2d 424 (1993) .....2  
*State v. Mezquia*, 129 Wn. App. 118, 118 P.3d 378 (2005) .....4  
*State v. Patrick*, 86 S.W.3d 592 (Tex. Crim. App. 2002) .....2  
*State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994) .....4

Statutes and Rules

RCW 10.73.170 .....1, 2  
RCW 43.43.752-.758 .....1  
WAC Chapter 446-75 .....1

Secondary Source

Quest Diagnostics Nichols Institute. Herpes Simplex Virus, Type 1/2  
DNA, Real-Time PCR,  
[http://www.questdiagnostics.com/testcenter/testguide.action?dc=TS\\_HerpesSimplex\\_DNA](http://www.questdiagnostics.com/testcenter/testguide.action?dc=TS_HerpesSimplex_DNA) .....6n

## I. SUPPLEMENTAL ARGUMENT

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

This Court may affirm the lower court's use of discretion on any theory supported in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

- A. The court did not abuse its discretion in refusing to order testing that the State Crime Lab does not perform.

The statute limits post-conviction DNA to that performed by the Washington State Patrol Crime Lab (WSPCL). *See* RCW 10.73.170(5). The DNA testing that is performed at WSPCL is authorized by RCW 43.43.752-.758 and WAC Chapter 446-75 for the purpose of identifying and collecting human DNA.

The crime lab's letter is attached to the Response to the Defendant's Motion. Respondent's Brief, Appendix E. It states:

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. The Defendant is asking for virus testing.

The DNA testing the Defendant requests is not within the purview of the WSPCL, their training, equipment, or protocol. If a defendant is

seeking testing that the WSPCL does not perform, then it is not covered by RCW 10.73.170, and the defendant must fund the testing out of his/her own pocket. *See, e.g., State v. Patrick*, 86 S.W.3d 592 (Tex. Crim. App. 2002) (trial court lacked the jurisdiction to authorize post-conviction DNA testing by an independent laboratory at the petitioner's expense, absent specific statutory authorization for such testing). *Accord In re Gentry*, 137 Wn.2d 378, 390-93, 972 P.2d 1250 (1999) (no constitutional right to discovery, counsel, experts, or investigators to assist a defendant in a collateral attack); *In re Runyan*, 121 Wn.2d 432, 441-44, 853 P.2d 424 (1993) (a court's authority to take any action post-conviction when the judgment and sentence is valid on its face is limited to the boundaries set by the Legislature).

The court did not abuse its discretion in finding that there is no reasonable means available to test the herpes DNA where the statute limits post-conviction DNA to that performed by the WSPCL, and the WSPCL does not perform non-human DNA testing.

B. The court did not abuse its discretion in finding that WSPCL does not have the swabs, and a motion to preserve was not timely made.

The court found that the evidence was not in the possession of the WSPCL and the Defendant's motion to preserve was not timely made.

The Defendant challenges this finding, claiming that the evidence is in the possession of the WSPCL. In support of his claim, he relies upon the testimony of Nurse Alysa Reynolds at RP 792-794.

This testimony explains that the nurse swabbed the sore on the Defendant's penis. The nurse had no involvement in the care of the child victim. Therefore, even had this evidence been preserved, the record does not demonstrate that samples were taken from the child and preserved.

The "swabs that were collected from the lesions were sent with the rape kit, which was released to the police department." RP 793, ll. 13-15 (emphasis added). Ms. Reynolds explained that she did not request police seek any further testing. RP 793, l. 12. She had thought the state crime lab might test them. RP 793, ll. 21-23. But she was unaware that the WSPCL does not perform disease testing. RP 793-94. Once she released swabs to the police, regardless of her intentions or beliefs, she had no control over where the police would send them. The police would not send the evidence to the WSPCL, because they do not perform this kind of testing.

Therefore, there is no evidence supporting the Defendant's belief that the evidence is in the possession of the crime lab. It is not. And no motion to preserve the evidence was timely made.

The court does not abuse its discretion in refusing to order testing of evidence which was not preserved.

C. The court did not abuse its discretion in finding it “unlikely that even if the virus were able to be tested for DNA evidence, any evidence of an exculpatory nature would be discovered.”

The Brief of Appellant (BOA) claims that the Amended Motion and Personal Restraint Petition established that DNA testing “would reveal whether the swabs were manifestation of active Herpes infection and whether he had transmitted Herpes to the complainant.” BOA at 6. The amended motion and PRP does no such thing.

The filings cite to two cases. In *State v. Mezquia*, 129 Wn. App. 118, 122, 132, 118 P.3d 378 (2005), saliva on the murder victim’s nipples was tested for **human** DNA and compared with Mezquia’s DNA taken from a cheek swab. The case explains that DNA testing involved polymerase chain reaction (PCR) and short tandem repeat methodology. It does not mention herpes. Likewise, in *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), PCR is mentioned; herpes is not.

Nothing in the briefing establishes that DNA testing can show whether the Defendant’s outbreak was caused by something other than herpes. Nothing establishes that DNA testing can show transmission between parties.

On September 21, 2010, the child victim went to the doctor with a painful genital herpes outbreak. RP 672-76, 699-700, 803-09. Following this incident and in the same month, Nurse Reynolds observed “fairly large, surprisingly large” wounds encompassing the majority of the top of [the Defendant’s] penis.” RP 790-91. The yellowish colored sore had a scab on top, not blistering as if from a burn, not draining or bleeding, but drying and crusty. RP 790-91. The sores appeared to be from a sexually transmitted disease, likely herpes, gonorrhea, but not chlamydia. RP 793. She explained that the incubation period for a herpes outbreak is 3-12 days. RP 794.

While these particular swabs were not tested, their appearance as well as other lab testing (which showed the Defendant had both genital and oral herpes) suggests that the Defendant was recovering from a herpes outbreak just as the child was experiencing one after an appropriate incubation period. RP 797-98.

The Defendant does not establish that testing the swab would determine whether the lesion was from an active herpes infection or something else. If the Defendant had herpes in his system, and he did, it stands to reason that regardless of the cause of the sore, a test of his sore would show herpes DNA. The Defendant was tested and found positive



for herpes and no other STD. Therefore, there is no evidence to suggest that the Defendant had any other infection which could have produced herpes-type genital sores.

The goal of PCR testing of herpes is to distinguish between HSV-1 and HSV-2.<sup>1</sup> HSV-2 poses a higher risk of transmission, and is associated with an increased risk of acquiring and transmitting HIV.

The BOA provides an interesting article describing some nucleotide sequence variations in HSV-2. The purpose of the study was to identify the strains only. It does not explain the meaning of these sequence variations. It posits that this research may lead to later research which could analyze the transmission between individuals in the future.

Neither the pro se filings, nor the attorney's brief provides any explanation, expert or otherwise, of how and why this very short herpes genome mutates. If the mechanism of mutation is unknown, perhaps herpes mutates between hosts and becomes inoperative. If that is so, then DNA testing of fine strand differences may provide little useful information about transmission.

Such a motion for **non**-human DNA testing should be

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<sup>1</sup> Quest Diagnostics Nichols Institute. Herpes Simplex Virus, Type 1/2 DNA, Real-Time PCR, [http://www.questdiagnostics.com/testcenter/testguide.action?dc=TS\\_HerpesSimplex\\_DNA](http://www.questdiagnostics.com/testcenter/testguide.action?dc=TS_HerpesSimplex_DNA)

accompanied by an expert's affidavit which explains what can be interpreted and whether the interpretation is based on a generally accepted theory.

The Defendant has offered no information, expert or otherwise, to show that DNA testing of virus can show transmission between parties. Where the motion is unsupported by any expert declaration explaining the mutation and transmission of virus DNA, the court did not abuse its discretion in finding it unlikely that testing will provide any exculpatory evidence.


The court did not abuse its discretion in refusing ordering what is not possible because no evidence from the child's virus was preserved and because the WSPCL does not test disease DNA.

## **VI. CONCLUSION**

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

DATED: January 11, 2016.

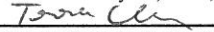
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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED January 11, 2016, Pasco, WA



**Original filed at the Court of Appeals, 500 N.  
Cedar Street, Spokane, WA 99201**

**WALLA WALLA COUNTY PROSECUTOR**

**January 11, 2016 - 3:27 PM**

**Transmittal Letter**

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Party Represented: State of Washington  
Is This a Personal Restraint Petition?  Yes  No  
Trial Court County: Walla Walla - Superior Court # 10-1-00287-9

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**Comments:**

No Comments were entered.

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