

67462-5

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NO. 67462-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID RIGGINS AKA DAWUD MALIK,

Appellant.

REC'D

MAY 23 2012

King County Prosecutor
Appellate Unit

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

The Honorable Timothy A. Bradshaw, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
JUDGE BRADSHAW ERRED WHEN HE FAILED TO ADDRESS OR DECIDE RIGGINS' MOTION.	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Personal Restraint of Gentry</u> 137 Wn.2d 378, 972 P.2d 1250 (1999)	1
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006)	1, 2, 3
<u>State v. Wright</u> 76 Wn. App. 811, 888 P.2d 1214 <u>review denied</u> , 127 Wn.2d 1010 (1995)	1
<u>Tacoma Recycling v. Capitol Material</u> 34 Wn. App. 392, 661 P.2d 609 (1983).....	1

FEDERAL CASES

<u>Pennsylvania v. Ritchie</u> 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).....	2, 3
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RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. XIV.....	2
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A. ARGUMENT IN REPLY

JUDGE BRADSHAW ERRED WHEN HE FAILED TO ADDRESS OR DECIDE RIGGINS' MOTION.

Although the State concedes Judge Bradshaw failed to address or decide Riggins' motion regarding exculpatory evidence, it argues remand is unnecessary because this Court can simply deem the motion meritless. Brief of Respondent, at 1, 10. This is not the proper role of an appellate court. A failure to exercise discretion should be remedied by the court provided that discretion. See State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); Tacoma Recycling v. Capitol Material, 34 Wn. App. 392, 396, 661 P.2d 609 (1983).

Moreover, it is far from clear Judge Bradshaw would simply deny the motion. Citing In re Personal Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999), the State focuses on the fact there is no constitutional right to post-conviction discovery and Riggins cannot obtain discovery short of demonstrating good cause to believe the discovery would prove entitlement to relief. Brief of Respondent, at 7-9. Riggins conceded this standard in his opening brief. See Brief of Appellant, at 6.

But this does not end the inquiry Judge Bradshaw is required to make. As discussed in Riggins' opening brief, Riggins did not demand discovery of the prosecution file. He merely requested an in camera review of the file and access to those portions Judge Bradshaw deems exculpatory. See CP 2-3, 27, 34.

In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the Washington Supreme Court recognized that an in camera review is justified – even where the records at issue are privileged or confidential – upon some plausible showing the records at issue are material to the outcome at trial. Id. at 791. Such a review is grounded in the Due Process Clause of the Fourteenth Amendment.¹ Pennsylvania v. Ritchie, 480 U.S. 39, 55-58, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

The Gregory's court's discussion of Pennsylvania v. Ritchie reveals the type of showing necessary to warrant such a review:

In Ritchie, the defendant was prosecuted for sexually abusing his daughter. Ritchie, 480 U.S. at 43, 107 S. Ct. 989. He argued that his daughter's Children and Youth Services (CYS) file might contain the name of favorable witnesses or other exculpatory evidence, and thus, the trial court erred in refusing to conduct an in camera review of the CYS file. Id. at

¹ The Fourteenth Amendment to the United States Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

44, 107 S. Ct. 989. Even though it was impossible to say whether any information in the CYS records would actually support Ritchie's arguments, the Court held that the defendant was entitled to have the file reviewed by the trial court to determine whether it contained information that probably would have changed the outcome of Ritchie's trial. Id. at 57-58, 107 S. Ct. 989.

Gregory, 158 Wn.2d at 791.

Ritchie was entitled to an in camera review where the CYS file "might contain the name of favorable witnesses or other exculpatory evidence." Riggins has offered an equivalent justification for an in camera review of the prosecution file in his case. Moreover, unlike Ritchie, the State has not even alleged (much less established) any valid interest or privilege in the records at issue warranting their nondisclosure.

Finally, even if Judge Bradshaw were to find that Riggins has no due process *right* to judicial review of the file, it is certainly within his discretion to grant Riggins' request and review the file to determine whether it contains exculpatory evidence. Judge Bradshaw should decide the motion in the first instance.

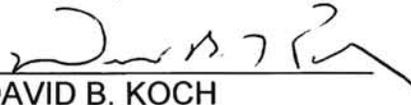
B. CONCLUSION

For the reasons discussed in Riggins' opening brief and above, this Court should remand for consideration of his motion for in camera review.

DATED this 23rd day of May, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67462-5-1
)	
DAVID RIGGINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID RIGGINS
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P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MAY 2012.

x Patrick Mayovsky

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