

NO. 33713-4-II

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

STATE OF WASHINGTON

Respondent,

v.

GREGORY W. CHAPMAN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before The Honorable Chris Wickham, Judge

REPLY BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

PM

TABLE OF CONTENTS

	<u>Page</u>
A. STATEMENT OF THE CASE.....	1
B. STATEMENT OF FACTS	1
C. ARGUMENT.....	1
I. <u>THE APPELLANT’S MOTION FOR POST-CONVICTION RELIEF UNDER CrR 7.8(b) SHOULD NOT HAVE BEEN DENIED BY THE LOWER COURT BECAUSE THE FACTS ALLEGED ESTABLISH LEGAL GROUNDS FOR THE RELIEF REQUESTED</u>	1
C. CONCLUSION	6

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>In Re Stenson</i> , 150 Wn.2d 207, 76 P.3d 214 (2003).....	4
<i>State v. Chapman</i> , 2004 LEXIS 1569	3
<i>State v. Garcia-Martinez</i> , 88 Wn. App. 322, 994 P.2d 1104 (1997)	6
<i>State v. Hardesty</i> , 129 Wn.2d 668, 940 P.2d 1080 (1996)	5
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.1239 (1997).....	6
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).....	4, 5
<u>COURT RULES</u>	<u>Page</u>
CrR 7.8.....	4, 5
CrR 7.8(b)	1, 5
CrR 7.8(c)	1, 2, 5
CrR 7.8(c)(2).....	2, 6

A. STATEMENT OF THE CASE

The facts of this case are fully set forth in the Appellant's Brief.

B. STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his Opening Brief.

C. ARGUMENT

I. THE APPELLANT'S MOTION FOR POST-CONVICTION RELIEF UNDER CrR 7.8(b) SHOULD NOT HAVE BEEN DENIED BY THE LOWER COURT BECAUSE THE FACTS ALLEGED ESTABLISH LEGAL GROUNDS FOR THE RELIEF REQUESTED

Appellant Greg Chapman assigns error to the decision of the lower court to not hold an evidentiary hearing pursuant to the Appellant's CrR 7.8(b) motion for new trial. Chapman filed his motion for new trial on July 18, 2005. Clerk's Papers [CP] at 35-78.

The court denied the motion without evidentiary hearing on September 23, 2005. CP at 32.

CrR 7.8(b) is an appropriate mechanism by which to collaterally attack a judgment.

CrR 7.8(c) provides:

(c) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Initial Consideration. The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. The court may transfer a motion to the Court of Appeals for consideration as a personal restraint petition if such transfer would serve the ends of justice. Otherwise, the court shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

The court is allowed three options under CrR 7.8(c)(2) when addressing a motion such as that filed by Chapman. The court may deny the motion without a hearing if the facts alleged in the affidavit do not establish grounds for relief. Judge Wickham noted that the issues raised in the motion were “adequately and thoroughly addressed by the Court of Appeals, you having raised them in your appeal of your conviction ” and that “[t]here do not appear to be any new issues that can or should be considered by this trial court.” CP at 32. In his motion, however, Chapman raised issues not addressed by the trial court, including a *Brady* violation—alleging that the State withheld exculpatory evidence regarding the DNA and that the prosecution initially failed to disclose that the complaining witness, Curtis Wilcox, changed his mind about which knife was used until shortly before

trial or the day of trial. At that time, the defense learned that Wilcox now was saying that he was stabbed with the curved edge knife, not the straight edge knife. This Court addressed several issues raised in Chapman's Statement of Additional Grounds. In his SAG Chapman discussed the newly discovered DNA evidence, arguing that the blood on curved bladed knife does not match Wilcox' blood. This Court found that Chapman failed to show how the evidence would have changed the outcome of the trial, citing *In Re Stenson*, 150 Wn.2d 207, 217, 76 P.3d 214 (2003). *State v. Chapman*, 2004 LEXIS 1569 at 24. The Court noted that the defense argued during closing that that the State failed to meet its burden of proof because it did not perform an examination of the blood on the knives. Wilcox also admitted that he changed his mind as to which of the two knives he claimed that he was stabbed with. Nevertheless, the court found that "it is unlikely that further evidence impeaching Wilcox's credibility would have led the jury to a different outcome." *Chapman*, 2004 LEXIS 1569 at 24.

This Court also found that the DNA evidence could have been discovered before trial with due diligence. The Court noted that "[a]t Chapman's sentencing hearing, the prosecutor informed the court that he had spoken with Chapman's defense counsel regarding DNA testing the knives

but chapmen refused to continue his trial date in order to do so.” *Chapman*, 2004 LEXIS 1569 at 25.

This Court also addressed the issue of prosecutorial misconduct regarding comments made by the state during closing that the intimation that the blood on the curved blade knife was Wilcox’s. This Court noted that Chapman did not object to the statements and therefore waived the right to assert prosecutorial misconduct unless it is flagrant and ill-intentioned to the degree that that it causes enduring projection that cannot be otherwise cured by an instruction. This Court found that “the prosecutor did not state that the blood on the knife was Wilcox’s; rather, he simply drew reasonable inferences from the evidence and argued those inferences to the jury.” *Chapman*, 2004 LEXIS 1569 at 27.

This Court also addressed Chapman’s claim of ineffective assistance of counsel on the basis that he did not have the knives tested for DNA. This Court found that Chapman refused to grant a continuance beyond the speedy trial date in order to obtain DNA testing. *Chapman*, 2004 LEXIS 1569 at 27-28.

A *Brady* violation, however, was not addressed.

In his CrR 7.8 motion, Chapman argued that the failure of the

prosecution to inform the defense about the change in Wilcox's testimony was a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Brady*, the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." This was not addressed by this Court in *Chapman*, contrary to Judge Wickham's letter opinion. Given that fact, the court had two options: to either transfer the motion for the Court of Appeals for consideration as a personal restraint petition or to enter an order setting a time and place for the hearing on the merits. Given that Chapman raised a new issue in the form of a *Brady* violation, it was error for the court to fail to hear the matter on the merits.

The State in the Respondent's Brief, argues, *inter alia*, that the Appellant's affidavit alleging prosecutorial misconduct was unsigned. This issue, however, was not addressed by the lower court. Respondent's Brief at 17-18. Moreover, the State does not address the *Brady* violation on the merits, preferring to instead sidestep the issue by its contention that an affidavit submitted by Chapman was not signed.

A review of a trial court's decision regarding a CrR 7.8 motion is

made under an abuse of discretion standard. *State v. Hardesty*, 129 Wn.2d 668, 701, 940 P.2d 1080 (1996). Chapman submits that an abuse of discretion occurs if the court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.1239 (1997). A refusal to exercise discretion at all, when requested is an abuse of discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 994 P.2d 1104 (1997), rev. den. 136 Wn.2d 1002 (1998). Accordingly, the trial court should have granted a hearing on the merits.

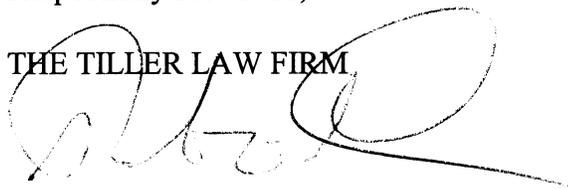
C. CONCLUSION

For the above-stated reasons, and those set forth in Chapman's Opening Brief, this Court should grant the relief requested in the opening brief.

DATED: July 3, 2006.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

CERTIFICATE

I certify that I mailed a copy of the foregoing Reply Brief of Appellant, postage pre-paid on July 3, 2006, at the Centralia, Washington post office addressed as follows:

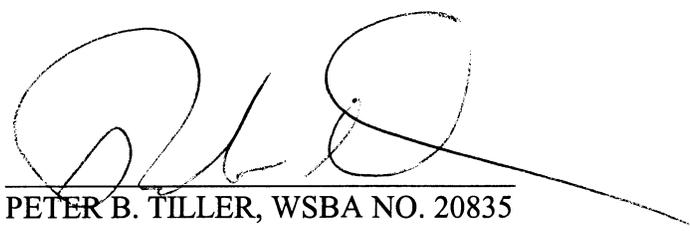
Mr. James C. Powers
Deputy Prosecuting Attorney
Courthouse Complex, Bldg #2
2000 Lakeridge Drive SW
Olympia, WA 98502

Mr. David Ponzoha
Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

Mr. Gregory W. Chapman
DOC #929253
Stafford Creek Corrections Center
191 Constantine Way H-3-B-48
Aberdeen, WA 98520

06 JUL 05 11:39
WA STATE COURT OF APPEALS

Dated: July 3, 2006.



PETER B. TILLER, WSBA NO. 20835