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I. ISSUE PRESENTED

RCW 10.73.140 prohibits the filing and consideration of successive collateral attacks. The lower court denied Chapman's motions because they were time-barred and successive. By appealing the lower court's ruling, may he now re-argue the merits of his motions?

II. STATEMENT OF THE CASE

In November 2001, Gregory Wayne Chapman was convicted of two counts of second degree assault, first degree kidnapping, first degree extortion, and second degree unlawful possession of a firearm, after a jury trial, with the Honorable Daniel Berschauer (retired) presiding. At the December 3, 2001 sentencing hearing, the defense requested a continuance to obtain DNA testing on one of the knives used in one of the assaults. The State argued that the results were not available pre-trial because of the backlog at the crime lab, and informed the Court that the defendant had—through his then-counsel—elected to proceed with his speedy trial rather than wait for the DNA results. The Court denied the continuance, but informed the defendant that, if the DNA results came back indicating that the blood on the knife was not the victim's, Chapman could bring a motion based on newly discovered evidence, which the court could consider at the appropriate time.

Chapman filed a direct appeal on December 6, 2001. Thereafter, the crime lab submitted results indicating that the blood on the knife was not the victim's blood, but was Chapman's blood. On September 16, 2002, Chapman filed a CrR 7.8(b) Motion for New Trial, citing the post-trial DNA evidence and prosecutorial misconduct as the bases for a new trial. This motion was transferred to the Court of Appeals to be treated as a Personal Restraint Petition. On May 19, 2003, Chapman filed a Personal Restraint Petition (PRP) in the Court of Appeals, raising the post-trial DNA, prosecutorial misconduct issues again, and adding the allegation that his trial counsel provided ineffective assistance by failing to have the DNA tested before trial. As part of his direct appeal, Chapman filed a Pro Se Statement of Additional Grounds (SAG), in which he raised, *inter alia*, the newly discovered DNA evidence issue. All three of these—the direct appeal, the transferred CrR 7.8(b) motion, and the PRP—were consolidated by the Court of Appeals. The court issued an unpublished opinion on July 20, 2004, in which it affirmed all but the extortion conviction. Specifically, the court addressed the DNA, ineffective assistance, and prosecutorial misconduct issues raised by Chapman, and denied relief on all of them.¹

¹ See this Court's opinions in No. 28159-7-II (consolidated with No. 29429-0-II and 30476-7-II) 2004 Wash. App. LEXIS 1569.

Because the appellate court reversed one count, Chapman was resentenced by the Honorable Judge Wickham. At the July 18, 2005 resentencing hearing, Chapman filed another Motion for New Trial based on newly discovered evidence (DNA), prosecutorial misconduct, and ineffective assistance of counsel. The court did not hear argument on the motion, and sentenced Chapman. Chapman appealed. The court later issued a memorandum decision denying Chapman's motion, citing the Court of Appeals previous ruling on the issues (i.e., that it was successive), and the Court of Appeals upheld this Court's decision, ruling that it was not necessary to hold an evidentiary hearing on the motion before denying it.² Chapman was represented in this *and* his previous direct appeal by appointed counsel.

Before the Court of Appeals even issued the afore-mentioned ruling, Chapman had filed yet another PRP in the Court of Appeals, yet again raising the same issues. And yet again, the appellate court denied the petition, finding that it was another successive petition.³ Notably, Chapman petitioned the dismissal of this PRP to the Washington State Supreme Court, which denied review. He then petitioned the United States Supreme Court, which denied *certiorari* on June 15, 2009.⁴

² See this Court's opinion in No. 33713-4-II; 2006 Wn.App. LEXIS 2396.

³ See this Court's opinion in No. 34793-8-II.

⁴ 162 Wn.2d 1003, 175 P.3d 1092, 2007 Wash. LEXIS 911 (Wash., 2007)US Supreme

On May 22, 2009, Chapman filed a CrR 7.8(b) Motion for Relief from Judgment in Thurston County Superior Court, asserting that his first CrR 7.8(b) motion (filed September 16, 2002 and transferred to the Court of Appeals) should not have been transferred. The motion raised two of the same issues: Newly discovered evidence, and prosecutorial misconduct.⁵ Shortly before the hearing on the aforementioned motion, Chapman filed yet another motion, this time asking the superior court to order DNA testing, and indicating that the results of the DNA testing would be used to impeach the victim's testimony at a new trial.⁶

Chapman's motions were argued on March 18, 2010. He attended telephonically, and was allowed to argue the merits of his motion.⁷ The court ruled—by memorandum decision and later with a written order—that Chapman's motions were both time-barred and successive.⁸

Chapman now appeals the lower court's denial of his motions, but frames his appeal only in terms of the merits of his claim, not the court's ruling that his claims are procedurally barred.

Court certiorari denied by *Chapman v. Wash.*, 128 S. Ct. 1883, 170 L. Ed. 2d 757, 2008 U.S. LEXIS 3237 (U.S., Apr. 14, 2008).

⁵ CP 18-53.

⁶ CP 56-106.

⁷ RP 7-17.

⁸ CP109-110; 116.

III. ARGUMENT

RCW 10.73.140 PROHIBITS THE FILING AND CONSIDERATION OF SUCCESSIVE COLLATERAL ATTACKS. THE LOWER COURT DENIED CHAPMAN'S MOTIONS BECAUSE THEY WERE TIME-BARRED AND SUCCESSIVE. BY APPEALING THE LOWER COURT'S RULING, MAY HE NOW RE-ARGUE THE MERITS OF HIS MOTIONS?

A. The motions are barred as successive petitions.

As detailed above, Chapman has previously filed two direct appeals, two Personal Restraint Petitions, and two CrR 7.8(b) motions. All have addressed the same three issues—in one form or another, or in one combination or another—and all have been resolved against Chapman. Moreover, the issues have previously been decided on the merits by this Court. To the extent that they have denied review/*certiorari*, the Washington State Supreme Court and the United States Supreme Court have also determined that Chapman is not entitled to the relief he seeks.

RCW 10.73.140 provides:

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon

review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

Similarly here, Chapman has either previously (and repeatedly) raised his current claims, or fails to establish that he could not have raised them previously. As such, RCW 10.73.140 bars any further consideration of the claims. Thus, this Court should not allow Chapman to re-argue these issues in their present form.

B. Chapman fails to establish that RCW 10.73.170 authorizes DNA testing.

Notwithstanding the foregoing argument, in the event that this Court reviews the merits of Chapman's claim that the lower court erred in denying DNA testing his request must be denied. RCW 10.73.170,⁹

⁹ RCW 10.73.170 States:

(1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

(2) The motion shall:

authorizes a court to order DNA testing under certain narrow circumstances. To obtain relief under the statute, the petitioner must satisfy both procedural and substantive tests. Chapman satisfies neither.

(a) State that:

(i) The court ruled that DNA testing did not meet acceptable scientific standards; or

(ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or

(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;

(b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and

(c) Comply with all other procedural requirements established by court rule.

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

As regards the procedural requirements, Chapman fails to establish that he provided a copy of the motion to the Office of Public Defense. Further, he fails to state that, either: the court ruled that DNA testing did not meet acceptable scientific standards; that DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or that the DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information. He fails to explain why DNA is material to the *identity* of the perpetrator, and as argued above regarding successive petitions, he fails to establish that he followed all other procedural requirements established by court rules. Indeed, he only re-hashes his prior claim: that the post-trial DNA results bear upon the victim's *credibility*. This is not the same as being material to the identity of the perpetrator, which the statute requires. Moreover, DNA testing has already occurred. Chapman fails to state any reason for this Court to order DNA testing all over again. As the court pointed out in *State v. Riofta*¹⁰, [t]he plain meaning of the statute allows DNA testing based on either advances in technology or the potential to produce significant new information." The *Riofta* court noted that the statute is aimed at exonerating the *actually innocent*, rather than ensuring that the

¹⁰ 166 Wn.2d 358, 365, 209 P.3d 467 (2009),

defendant had a fair trial.¹¹ Chapman's claims surrounding the DNA evidence all relate to his claim that he did not receive a fair trial, not that he is not the actual perpetrator. Thus, he fails the substantive test laid out by the statute, and to which the *Riofta* court referred.¹²

IV. CONCLUSION

Chapman's motions are barred as successive petitions, which have previously been addressed by this Court and by appellate courts. He fails to meet either the procedural or substantive tests required by RCW 10.73.170 and *Riofta*. For the reasons cited above, relief should be denied.

V. REQUEST FOR COSTS

Should this Court determine that the State substantially prevails in this matter, the State requests that Chapman be required to pay all taxable costs of this appeal, pursuant to RAP Title 14.

Respectfully submitted this 9th day of March, 2011.

JON TUNHEIM

Thurston County Prosecuting Attorney

By: 

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Criminal Trials Division Chief

¹¹ *Id.* at 369, fn. 4.

¹² *Riofta* at 470.

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent and Supplemental Designation of Clerk's Papers on the date below as follows:

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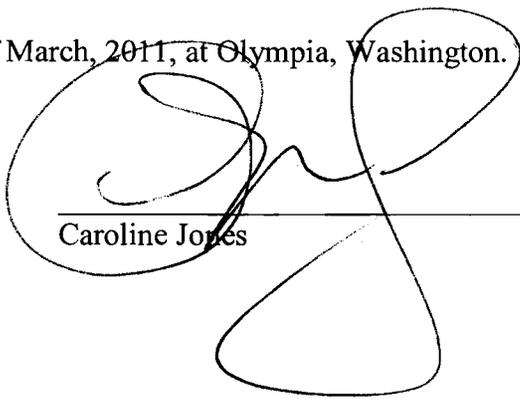
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of March, 2011, at Olympia, Washington.



Caroline Jones