

67708-0

67708-0

NO. 67708-0-1

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

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STATE OF WASHINGTON

Appellant

v.

KEVIN E. SLATTUM,

Respondent

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERROR**

1. The trial court erred when it entered conclusion of law number 1 stating the defendant is serving a term of imprisonment within the meaning of RCW 10.73.170 because he is on community custody.

## **II. ISSUES**

1. Where the trial court denied a motion to stay an order granting post-conviction DNA testing, should this Court consider the propriety of the order granting testing where it involves an issue of substantial public interest?

2. Is an offender who has been released on community custody entitled to post conviction DNA testing under the provisions of RCW 10.73.170 which requires an offender to be serving a term of imprisonment?

## **III. STATEMENT OF THE CASE**

N.R. was born March 31, 1988. On December 18, 2001 N.R. went to C.M.'s house after school. C.M. was a classmate and friend, but that was the first time N.R. had been to C.M.'s home. C.M.'s brother Michael, her mother Sherry, her grandfather Louis, and the defendant, Michael Slattum were home when the girls

arrived. The defendant was Sherry's boyfriend. 1 RP 13-19, 21, 122-23.

Once they arrived the girls snacked on cucumbers. They then proceeded to share four beers within about one hour. After the fourth beer N.R. felt affected by what she had to drink. She was unable to walk straight, her speech was affected and she got sick. 1 RP 25-26, 32-33, 73-74, 169-70; 2 RP 296.

Sherry left the home around 6:00 p.m. and did not return until about 10:30 p.m. The defendant and Louis stayed home with C.M. and her younger sister S.M, her brother Michael, some of Michael's friends, and N.R. Michael, Jason, Richie, C.M., K.L, and N.R. went into a bedroom to watch television. While in there Jason and N.R. kissed. After kissing all of the kids except C.M. and N.R. left the apartment. Only C.M., S.M., and N.R. were home with the defendant and Louis when Sherry returned later in the evening. 1 RP 35, 38, 125 171, 187, 198-99; 2 RP 296, 300.

N.R. did not drink any more alcohol after she was in the bedroom with Jason and the others. She started to sober up. 1 RP 36, 75, 191.

After the others left C.M., S.N., and N.R. laid down on a hide a bed. The defendant was on another couch and Louis was sitting

on a chair in the living room. N.R. was dressed. Her clothing included underpants and a pair of short overalls. After the other girls and Louis fell asleep the defendant came over to N.R. and began playing with her hair. He then licked N.R.'s ear. N.R. moved around to try and get away from the defendant. The defendant moved away for a moment but then came back. He then kissed N.R. on the mouth, inserting his tongue into her mouth. N.R. described the kiss as "slimy." N.R. pushed the defendant away. 1 RP 220-21, 38-40-45.

Two minutes later the defendant came back. He grabbed N.R. by her rear end, pulled her up by her arms and brought her into the bedroom. The defendant laid N.R. on the bed with her legs hanging off the side of the bed. The defendant then stood in between N.R.'s legs and put his hand up N.R.'s pant leg. He reached under her underpants and inserted his finger in her vagina. N.R. pushed the defendant away with her foot. The defendant then put his tongue on her vagina and moved it around "like a worm." N.R. could feel the defendant's hair on her legs. She pushed the defendant away and went back to the hide a bed where she laid down next to C.M. 1RP 45-49.

The next day N.R. went to school. During P.E. she got sick and became very emotional. N.R. told her friend K.R. that she'd spent the night at C.M.'s house, got drunk, and C.M.'s "uncle" raped her. N.R. then spoke with the school counselor Mrs. Bavis and the school resource officer, Officer Jessup. Afterwards N.R.'s mother, Kathryn Serwold, picked N.R. up from school. 1 RP 53-54, 56-57, 142-144, 156-159; 2 RP 206-207, 242.

After N.R. got home she went to sleep. When she woke up she changed her underpants to get ready to go to church. Ms. Serwold found N.R.'s underpants on top of some dirty clothes on the floor. When she looked at them she noticed that there was blood on them. N.R. was not having a period at the time. Ms. Serwold then asked N.R. what happened. When N.R. told her mother what had happened Ms. Serwold took N.R. to the hospital for an exam. 1 RP 58-61; 2 RP 245-257.

Deanne Mecham is a sexual assault nurse examiner (SANE) nurse. She examined N.R. on December 19 at about 7:30 p.m. Ms. Mecham noticed N.R.'s hymen was torn, red, swollen, and bleeding. She also noted an abrasion on N.R.'s genitals. N.R. identified the defendant as the person who raped her, noting he had dark skin, long hair and a moustache. N.R. was in pain and crying during the exam. Ms. Mecham opined that the physical findings were consistent with the history of sexual assault. Ms.

Mecham got N.R.'s underpants and packaged them. She then gave them to the police for evidence. 2 RP 266-286.

The next day, December 20, Detective Jensen located the defendant and arrested him for rape of a child. The defendant agreed to waive his rights and talk to the detective. The defendant denied touching N.R. Detective Jensen obtained swabs from the defendant's fingers. N.R's DNA was not found on those swabs. 2 RP 216-219.

The defendant was charged with rape of a child second degree. 1 CP 116-17. He was convicted after a jury trial. 1 CP 97. He was sentenced to an indeterminate sentence of Life with a minimum term of 102 months confinement. 1 CP 102.

The defendant appealed his conviction. This Court affirmed the conviction. A mandate issued on July 25, 2003. 1 CP 88-94.

On June 6, 2011 and July 25, 2011 the defendant filed a motion for an order directing the State Patrol to conduct DNA testing on N.R.'s overall shorts and underpants pursuant to RCW 10.73.170. 1 CP 16-27, 68-87. The defendant had been released from custody and was on community custody when he brought the motion. 1 CP 71.

The State argued the defendant did not meet the threshold requirement for bringing a motion under the statute because he was not currently imprisoned. 7-25-11 RP 19-24. The State also argued the defendant had not shown that DNA testing would likely

demonstrate his innocence on a more probable than not basis. It was likely that DNA from a person who had nothing to do with the rape would have transferred to N.R.'s clothing because of the people she came in contact with during the night and how her clothes had been handled before being collected as evidence. Further, N.R. provided credible evidence that it was the defendant, and not someone else who raped her despite her intoxication. 7-25-11 RP 25-30.

The court granted the motion for DNA testing. The Court concluded the defendant met the threshold requirement for bringing the motion because the term "imprisonment" was broad enough to encompass someone who was on community custody. 1 CP 13. The court further concluded that the defendant had shown DNA testing of the victim's underpants would be material to the identity of the perpetrator. The court also concluded that the defendant had shown the likelihood that DNA evidence would demonstrate his innocence on a more probable than not basis. 1 CP 14. The court denied the State's motion to stay the order pending an appeal. 1 CP 2.

#### IV. ARGUMENT

##### A. WHETHER AN OFFENDER WHO IS ON COMMUNITY CUSTODY IS “IMPRISONED” FOR THE PURPOSES OF RCW 10.73.170 IS AN ISSUE OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST WHICH SHOULD BE CONSIDERED BY THE COURT.

“A case is moot if a court can no longer provide effective relief” Orwick v. Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). The trial court denied the State’s motion to stay the order granting DNA testing. The testing has already been completed. The issue is therefore moot.

Although the issue raised is moot, a reviewing court may in its discretion consider the issue when the case presents matters of continuing and substantial public interest. Seattle v. Johnson, 58 Wn. App. 64, 67, 791 P.2d 266 (1990). The criteria to consider in determining whether an issue falls within this category are (1) the public or private nature of the question, (2) the need for future guidance of public officers, and (3) the likelihood that the issue will reoccur. Id.

This Court found those criteria had been met in Johnson where the question presented was the constitutionality of a city ordinance. This Court found the statute affected many areas of public behavior, and since the ordinance had not been amended

since the action had been filed, it presented a strong likelihood that the issue would reoccur. Id. at 67.

The Court also found a moot question involved an issue of public interest In re Cross, 99 Wn.2d 373, 662 P.2d 838 (1983). The case involved the question of a judicial officer's authority to act under a statute. Id. at 377. Because the procedure used by the lower court was more convenient than what the Court believed was required, it found the likelihood of recurrence was high. Id. at 378.

Similar to Johnson and Cross the issue here meets the criteria for consideration even though the issue is moot. The question involves the interpretation of a statute. In particular it concerns the circumstances under which the court has authority to require DNA testing at State expense. The trial court's interpretation of the statute to include persons who are on community custody greatly expands the plain language of the statute. Under the trial court's interpretation anyone who has been convicted of a felony and is subject to community custody conditions and otherwise meets the statutory criteria is entitled to post conviction DNA testing at State expense.

The public also has a substantial interest in the determination of questions that involve the expenditure of public

funds. Seattle v. State, 100 Wn.2d 232, 236-37, 668 P.2d 1266 (1983) (holding as an alternative ground for considering a challenge to a expired City ordinance that provided funding for candidates for public office constituted an issue of “continuing and substantial public interest” because it involved public financing.) Here the trial court’s interpretation potentially could result in an expenditure of funds far greater than intended by the Legislature.

In addition, this is an issue that is likely to recur. The Innocence Project Northwest (hereafter the Project) brought the petition on behalf of the defendant. The Project’s mission statement says in part that it was founded “to assist prisoners who could be proven innocent through DNA testing....”<sup>1</sup> The Innocence Project Northwest states that it regularly receives 30-50 new requests for assistance each month.<sup>2</sup> Given the large number of requests received by the Project, and the trial court’s expansion of the statute to include those who are on community custody in this case, it is anticipated that the Project will likely bring similar petitions in the future.

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<sup>1</sup> [www.innocenceproject.org/about/Mission-Statement.php](http://www.innocenceproject.org/about/Mission-Statement.php)

<sup>2</sup> <http://www.law.washington.edu/Clinics/IPNW/>

Under the circumstances the Court should accept review to give judicial officers guidance when asked to apply this statute to persons who are on community custody. Should this Court agree with the trial court's interpretation of the statute, it should accept review to give the Legislature an understanding of how this statute has been interpreted. Review in that case would give the Legislature the opportunity to amend the statute if its intent was different from the Court's interpretation of the statute.

The State alternatively argued that under the facts of the case the defendant has not shown that DNA testing would likely demonstrate his innocence on a more probable than not basis. The trial court agreed with the State's argument as to one article of clothing, but found the defendant had met his burden with respect to the N.R.'s underpants. 1 CP 14. The State does not concede that this is a correct ruling. However, whether the trial court erred in reaching that conclusion is a fact specific determination which does not present an issue of substantial public concern. The State therefore does not argue the Court should review that particular decision of the trial court.

**B. A PERSON WHO IS ON COMMUNITY CUSTODY IS NOT IMPRISONED WITHIN THE MEANING OF RCW 10.73.170.**

“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.” RCW 10.73.170(1). The defendant, Kevin Slattum, filed a motion pursuant to RCW 10.73.170 for post-conviction DNA testing. 1 CP 16-27, 68-87.

The trial court entered findings of fact and conclusions of law. A copy of the findings and conclusions is attached as Appendix A.

The court found the defendant had served the minimum term of confinement, and was on community custody at the time he filed his motion. 1 CP 12. The court further found the defendant was subject to the conditions which could result in being transferred to a more restrictive confinement status if he was found in violation of a condition of his community custody. 1 CP 12-13. The trial court concluded that the defendant was serving a term of imprisonment within the meaning of RCW 10.73.170 because he was on community custody. 1 CP 13.

The State does not challenge any of the trial court's factual findings. The State does challenge the trial court's conclusion that the defendant is serving a term of imprisonment within the meaning of RCW 10.73.170, because the undefined term "imprisonment" is broad enough to include someone who is currently serving a term of community custody. 1 CP 13. Conclusions of law are reviewed de novo. State v. Whitney, 156 Wn. App. 405, 408, 2332 P.3d 582, review denied, 170 Wn.2d 1004, 245 P.3d 226 (2010).

Whether RCW 10.73.170 permits an offender who is on community custody to petition the court for post-conviction DNA testing at State expense is a question of statutory construction. The Court interprets a statute in order to give effect to the Legislature's intent. Bremerton Public Safety Association v. Bremerton, 104 Wn. App. 226, 230, 15 P.3d 688 (2001). The Court presumes that the Legislature is familiar with past judicial interpretations of its enactments. In re Custody of Stell, 56 Wn. App. 356, 365, 783 P.2d 615 (1989). When construing the meaning of a statute the Court assumes the Legislature meant exactly what it said, and applies the statute as written. State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005).

The term “imprisonment” is not defined in RCW 10.73.170. Undefined terms are given their plain and ordinary meaning as found in a dictionary. State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). “Imprison” is defined as “to confine a person in prison.” Black’s Law Dictionary, 773 (8<sup>th</sup> Edition 2004). “Imprisonment” is defined as “1. The act of being confined, esp. in a prison ...2. The state of being confined; a period of confinement...” Id. see also <http://dictionary.reference.com/browse/imprisonment> “to confine in or as if in a prison.”

Imprisonment is distinct from community custody. While the Legislature relied on the ordinary meaning of imprisonment to identify those persons eligible to petition for post conviction DNA testing, it provided a specific definition for “community custody.” RCW 9.94A.030(5). Where the Legislature has defined a term in a particular statute, that definition applies in the construction of that statute. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992). Community custody is specifically limited to that portion of an offender’s sentence which is served in the community. “A person in community custody ‘can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life.’” In re Blackburn, 168

Wn.2d 881, 884, 232 P.3d 1091 (2010), quoting Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed. 484 (1972). By definition, community custody cannot occur while an offender is in prison.

In Blackburn the Court recognized the difference between community custody and imprisonment when it considered the degree of specificity in a notice of violation that Due Process required before the Department of Corrections could reclassify an offender from community custody to total confinement. Total confinement is defined as “confinement inside the physical boundaries of a facility or institution operated or utilized under contract or any other unit of government for twenty four hours a day or pursuant to RCW 72.64.050 and RCW 72.64.060.” RCW 9.94A.030(51). The Court treated total confinement the same as “imprisonment” when it held “that for DOC to lawfully reclassify an offender for imprisonment for a violation of an ‘obey all laws’ condition of community custody, the notice must allege the facts and legal elements that DOC would have to prove to show an offender did not obey all laws.” Blackburn, 168 Wn.2d at 886-87. (emphasis added).

Similarly the Court rejected an argument that “imprisonment” as that term was used in RCW 9.95.062(3) was interchangeable with “confinement” as defined in RCW 9.94A.030(8). State v. Anderson, 132 Wn.2d 203, 206-08, 937 P.2d 581 (1997). RCW 9.95.062(3) authorized post-conviction jail time credit pending appeal only when the offender has been “unable to obtain release.” The Court found a release on bond subject to home detention was not the same thing. Id. at 208.

In the context of other statutes the Legislature has clearly signaled the intent that the term “imprison” means confinement in a jail or prison facility. Thus defendants have a statutory right to demand trial on pending, untried Informations or complaints when they have “entered upon a term of imprisonment in a penal or correctional institution.” RCW 9.98.010(1) (emphasis added). Offenders who commit misdemeanor violations of Chapter 69.50 must serve a minimum term of imprisonment which may only be suspended or deferred if the court finds “that the imposition of the minimum imprisonment will pose a substantial risk to the defendant’s physical or mental well-being or that local jail facilities are in an overcrowded condition..” RCW 69.50.425. (emphasis added). An offender convicted of an aggravated murder and

sentenced to death “shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty...” RCW 10.95.170. Persons who are subject to confinement for an offense punishable by imprisonment may be confined in the jail of any city or county contracting with the prosecuting city or county for jail services. RCW 70.48.220.

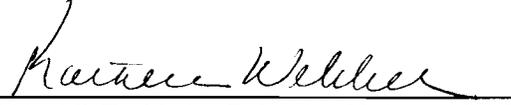
The trial court erred when it construed the term “imprisonment” as used in RCW 10.73.170 to include the statutorily defined terms “confinement” and “community custody.” That construction is contrary to decisions of the Court which have found “imprisonment” is distinct from those terms in other contexts. There is nothing that distinguishes the statutory language in RCW 10.73.170 from other statutes in which the Court has construed the term “imprisonment”. The trial court’s construction of “imprisonment” is contrary to the Legislature’s intent in other statutes which have used that term. While serving a term of community custody the defendant is not “serving a term of imprisonment” which is a necessary prerequisite to filing a petition for post-DNA testing.

## **V. CONCLUSION**

The State asks the Court to review the issue presented in this appeal even though the order for DNA testing was not stayed pending appeal because it presents an issue of substantial public interest. The State further asks the Court to find the trial court erred in concluding that an offender who is on community custody meets the threshold procedural requirement that he “currently is serving a term of imprisonment” at the time he files his motion for post-conviction DNA testing.

Respectfully submitted on February 1, 2012.

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## FINDINGS OF FACT

1. The defendant, Kevin Eugene Slattum, was charged by Information with one count of Rape of a Child Second Degree committed between December 18 and 19, 2001. He was tried by a jury in May of 2002.

2. Although there were certainly other things alluded to, the principal argument at trial was that the victim is mistaken in her identification primarily because of her state of intoxication. There is no question that the victim, who was a relatively young person, had had too much to drink. There was certainly an argument as to her actual state of sobriety at the time of the assault, but at least at some point in course of the evening she became drunk and sick and the primary thrust of identification at trial centered on sobriety. There were other questions as to the identification, but that was the primary issue.

3. In 2002, the victim's underpants were sent to the Washington State Patrol Crime Laboratory. They were initially marked for testing both for blood and for DNA. Shortly before trial, the prosecuting attorney instructed the laboratory to only test for blood typing. That was done. The blood on the underwear did match the blood type of the victim. It is not currently known whether blood typing of the defendant was taken, whether that was even submitted to laboratory, or whether a test was done to see if it matched. The victim's underpants were taken into custody the day following the incident by the examining nurse and placed into evidence. They are available for further DNA testing.

4. Neither the prosecution nor defense requested that DNA testing be completed on the underpants prior to trial. There is nothing before the court to suggest why either side took that position. Therefore, it would be improper for the court to conjecture as to the reasons why DNA testing was not conducted prior to trial.

5. The victim's shorts were collected by the prosecuting attorney a couple weeks prior to the May 2002 trial date. It is unknown how these shorts were maintained between the time of the incident and their collection by the prosecuting attorney. Presumably they were

1 worn, they were washed, and they were cleaned. Any number of things could have happened to  
2 them by any number of people. It not even known whether the victim continued to wear the  
3 shorts or another girl wore them or where they were kept.

4 6. It is clear that the defendant has maintained his innocence. He cooperated with  
5 the investigation and gave a DNA sample from his fingertips. The sample was analyzed and did  
6 not contain the victim's DNA.

7 7. A jury convicted the defendant of one count of Rape of a Child Second Degree.  
8 The defendant was sentenced to a maximum term of life imprisonment and a minimum term of  
9 102 months confinement.

10 8. The defendant has served the minimum prison sentence and is on community  
11 custody subject to the conditions set out in Appendix A of the judgment and sentence. Those  
12 restraints include restrictions on travel, restrictions on certain people that he may have contact  
13 with, a requirement that he participate in treatment, and that he is subject to searches from the  
14 Department of Corrections.

15 9. If the defendant violates any of the conditions of his community custody he may  
16 be returned to confinement.

17 10. RCW 10.73.170 requires that an offender seeking post-conviction DNA testing at  
18 government expense be serving a term of imprisonment. That statute does not define the term  
19 "imprisoned."

20 11. Pursuant to RCW 9.94A.030 "confinement" may be total or partial confinement.

21 12. Pursuant to RCW 9.94A.030, "community custody" is defined as "that portion of  
22 an offender's sentence of confinement in lieu of earned release time or imposed as part of a  
23 sentence under this chapter and served in the community subject to controls placed on the  
24 offender's movement and activities by the department."

25 13. Pursuant to RCW 9.94A.633(2)(f), an offender sentenced to an indeterminate  
26 sentence pursuant to RCW 9.94A.507 may be transferred to a more restrictive confinement status  
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1 for a violation of a condition of community custody and will receive credit for time served while  
2 on community custody. The Department of Corrections makes no distinction between  
3 confinement in prison and community custody when calculating good time credit. The  
4 Department of Corrections treats an offender on community custody as in a quasi-confinement  
5 status. The very name "community custody" implies a custody status. An offender may no  
6 longer be in total confinement but nevertheless be under direct control of the Department of  
7 Corrections.

8 14. The requested DNA testing was not available at the time of the defendant's trial in  
9 2002. Philip Hodge, an analyst from the Washington State Patrol Crime Laboratory has  
10 frequently testified in this court. He indicated that currently there is more sophisticated DNA  
11 testing than was available in the year 2002. The current Y-STR DNA analysis can analyze  
12 minute and even partially degraded samples.

#### 14 CONCLUSIONS OF LAW

15 1. The defendant is serving a term of imprisonment within the meaning of RCW  
16 10.73.170 because he is on community custody. The Legislature did not say that a petitioner  
17 must be incarcerated or totally confined. Rather, the Legislature chose a term which is broad  
18 enough to include someone who is currently serving a term of community custody.

19 2. The DNA testing was not performed at the time of the defendant's trial and since  
20 that time new technology has been developed which can be performed on the evidence collected  
21 in this case.

22 3. DNA testing on the overall shorts would not produce evidence which is material  
23 to the identity of the perpetrator of the rape against the victim and would not likely demonstrate  
24 that the defendant is innocent on a more probable than not basis. First, they are the outer  
25 garments and DNA could be transferred by any number of means and not just sexual touching.  
26 But more important is the lapse of time and the condition that the shorts were not preserved in  
27 the same condition they were in at the time of the incident.



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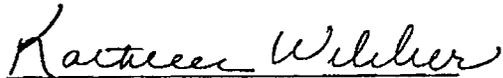
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THE STATE OF WASHINGTON,

Appellant,

v.

KEVIN E. SLATTUM,

Respondent.

No. 67708-0-1

AFFIDAVIT OF MAILING

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AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 1<sup>st</sup> day of February, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Respondent of the following documents in the above-referenced cause:

BRIEF OF APPELLANT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 15<sup>th</sup> day of February, 2012.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal dashed line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit