

**Court of Appeals No. 37511-7-II**

APPELLANT'S BRIEF  
COURT OF APPEALS  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

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**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**STATE OF WASHINGTON,**

**Plaintiff/Respondent,**

**v.**

**CECIL LARCEL MORTON,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 94-1-00829-5**

**The Honorable Kathryn J. Nelson, Presiding Judge**

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**TABLE OF CONTENTS**

**Page(s)**

<b>A.</b>	<b>ASSIGNMENT OF ERROR.....</b>	<b>1</b>
<b>B.</b>	<b>ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....</b>	<b>1</b>
<b>C.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>1-10</b>
	<b>1. Procedural History.....</b>	<b>1-4</b>
	<b>2. Factual Summary.....</b>	<b>4-7</b>
	<b>3. Motion for Post-Conviction DNA Testing.....</b>	<b>7-10</b>
<b>D.</b>	<b>ARGUMENT.....</b>	<b>10-20</b>
	<b>THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MR. MORTON’S MOTION FOR POST-CONVICTION DNA TESTING.</b>	
	<b>a. <u>Mr. Morton’s motion satisfied the procedural requirements of RCW 10.73.170.....</u></b>	<b>11-15</b>
	<b>b. <u>Mr. Morton has satisfied the substantive requirement of RCW 10.73.170.....</u></b>	<b>15-20</b>
<b>E.</b>	<b>CONCLUSION.....</b>	<b>20</b>

**TABLE OF AUTHORITIES**

**Page(s)**

**Washington Cases**

*In re Bradford*, 140 Wash.App. 124,165 P.3d 31 (2007).....13

*State v. Riofta*, S.C. No. 79407-3 (6-11-09).....1,4,11-18

**Washington Statutes and Court Rules**

RCW 9.10.73.170.....1,3,9-10,12-14,17,20

RCW 9A.56.19.....1

RCW 9A.56.200 (1) (a)(b).....1

RCW 9.94A.125.....1,2

RCW 9.94A.370.....1,2

RCW 9A.52.020 (1)(b).....1

RCW 9A.44.040 (1)(b).....2

CrR 3.3.....2

**Federal Cases**

District Attorney’s Office for the Third Judicial District V.  
Osborne, No. 08-6 (U.S. 6-18-09).....16

*United States v. Boose*, 498 F.Supp. 2d 887 (W.D. Miss. 2007).....16

**A. ASSIGNMENT OF ERROR**

The trial court erred when it denied Mr. Morton's motion for post-conviction DNA testing because Mr. Morton satisfied both the procedural and substantive requirements of RCW 10.73.170.

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Did the trial court commit reversible error by denying Mr. Morton's motion where his motion met the procedural requirements of RCW 10.73.170 (a) - (c), and where he established the likelihood that DNA evidence would demonstrate his innocence on a more probable than not basis, pursuant to *State v. Riofta*?

**C. STATEMENT OF THE CASE**

***1. Procedural History***

On August 2, 1994, the defendant/appellant, Cecil L. Morton, was convicted by jury verdict of one count of first degree robbery with a deadly weapon,<sup>1</sup> one count of first degree burglary,<sup>2</sup> and three

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RCW 9A.56.190, 9A.56.200 (1) (a)(b), 9.94A.125, 9.94A.370.

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RCW 9A.52.020 (1)(b).

counts of first degree rape with a deadly weapon.<sup>3</sup> CP 7-17. The trial court imposed an exceptional sentence as to each of the first degree rape convictions, based on the aggravating factors of deliberate cruelty and lack of remorse. The total sentence imposed was seven hundred and twenty months (sixty years) in the Department of Corrections. CP 7-17.

This Court affirmed Mr. Morton's judgment and sentence on March 13, 1998 by Unpublished Opinion No. 18682-9-II.<sup>4</sup>

On June 8, 2000, this Court entered an Order Denying Petitioner in Court of Appeals No. 25171-0-II.<sup>5</sup>

On September 3, 1999, the trial court entered an Order Allowing Defense Access to Evidence for DNA Testing. CP 54-57.

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<sup>3</sup> RCW 9A.44.040 (1)(b) 9.94A.125, 9.94A.370.

<sup>4</sup> In his direct appeal Mr. Morton challenged evidentiary rulings, a CrR 3.3 ruling, the imposition of consecutive sentences, and the length of the exceptional sentence.

<sup>5</sup> Mr. Morton's Personal Restraint Petition raised the claim of ineffective assistance of counsel, based on trial counsel's failure to properly investigate and prepare for trial, including the failure to have DNA testing performed on semen stains and samples.

Mr. Morton, however, was unable to obtain the DNA testing without access to public funds and legal assistance. CP 68-135.

On December 27, 2004, Mr. Morton sent a request for DNA testing to the Pierce County Prosecutor, pursuant to former RCW 10.73.170 (2003). On June 10, 2005, the request was denied. Mr. Morton then filed an appeal with the State Attorney General's Office, in accordance with former 10.73.170 (2003). CP 143-156. While Mr. Morton's appeal was pending, RCW 10.73.170 was substantially amended to provide that DNA requests are now made to the trial court, and allowing court appointed counsel for indigent defendants. RCW 10.73.170 (1)(4).

On September 20, 2005, Mr. Morton filed a Motion for Appointment of Counsel to Prepare and Present Motion for DNA Testing. CP 68-135. On December 30, 2005, an Order of Indigency was entered. CP 140-141. Counsel was appointed on June 8, 2006. CP 142. Counsel for Mr. Morton filed a Motion for Post-Conviction DNA Testing on October 9, 2007. CP 143-156. The motion was heard and

denied on February 22, 2008. RP 2-22-08, 1-33,<sup>6</sup> The written Order denying the motion was filed on March 24, 2008. CP 251-252. On the same date a Notice of Appeal was filed. CP 248-250.

On October 10, 2008, this Court granted Mr. Morton's Motion to Stay pending a ruling in *State v. Riofta*, S. C. No. 79407-3. *Riofta* was decided on June 11, 2009. On June 13, 2009, appellate counsel so notified this Court, and the stay was lifted on June 18, 2009.

## 2. *Factual Summary*<sup>7</sup>

The State's theory was that on February 18, 1994, J.H., who was seventeen (17) years old and five months pregnant, was forced into a vehicle driven by Mr. Morton and occupied by five other young male passengers. The other young men included David Heppard, Eldridge Miles, Eugene Jones, Larry Taylor, and Shannon Stewart.<sup>8</sup>

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The RPs are unnumbered, and therefore, will be referenced by identifying the date of the proceeding, followed by the page numbers of the RP.

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The factual summary, paraphrased here, was set out in detail by this Court in Mr. Morton's direct appeal, No. 18682-9-II, filed March 13, 1998.

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All six men were criminally charged. Only Mr. Morton and Mr. Heppard went to trial.

J.H. was taken to a wooded area where five or six men raped her, either vaginally, orally, or both. After leaving the woods and returning to the car, co-defendant, David Heppard forced J.H. to have oral sex again. Mr. Morton drove the car to J.H.'s apartment where co-defendants Shannon Stewart and Eugene Jones raped her again. Mr. Morton stole a speaker, video cassette player, and video games from the apartment. When the men left, J.H. called a friend, who contacted the police.

The same evening Pierce County deputies stopped Mr. Morton for driving with defective equipment. The deputies observed a machete in the car. They then searched for weapons and found another weapon, as well as items belonging to J.H. The deputies were not yet aware of the rape report, and they released the six men. Soon thereafter, Mr. Morton was arrested as a suspect in the reported rapes. Mr. Morton told the detective that Mr. Heppard brought J.H. into the car. Mr. Morton admitted that he had driven the car, had seen some of the other men having sex with J.H., and had taken some property from J.H.'s apartment. He denied having sex with J.H., but admitted to touching her breast at some point.

Co-defendants Eldridge Miles and Larry Taylor testified against Mr. Morton and Mr. Heppard at trial in exchange for lenient sentences. They testified that Mr. Morton was the first to rape J.H. vaginally. Additionally, the co-defendants attributed some highly incriminating statements to Mr. Morton. Specifically, that Mr. Morton stated “[p]regnant girls are the best ones,” and “[i]f we don’t get caught, she must die.”

During the trial, forensic scientist with the Washington State Patrol Crime Laboratory, Charles Solomon, testified to having examined saliva and vaginal samples taken from J.H. Mr. Solomon did not perform any DNA testing. He testified that because of “flushing” that occurs during repeated sexual relations, the vaginal and oral samples would only reveal the semen of the last perpetrator. He was unable to draw any conclusions from the antigen testing he performed, and conceded that he could not form a forensic conclusion that Mr. Morton had sexual intercourse with J.H.

At trial, Mr. Morton testified that no one had threatened J.H., and that she had voluntarily accompanied the six men. He admitted, however, to taking property from her apartment without her

permission.

### ***3. Motion for Post-Conviction DNA Testing***

At the hearing on Mr. Morton's motion, the trial court considered new information provided by the defense. The State presented no new information. The new information consisted of the declarations of Kirsten Gleim and Sharyn Morton, a letter from Thomas Fedor, and the Affidavit of Thurman F. Sherrill.

Kirsten Gleim, a forensic scientist with the firm of Emerald City Forensics in Seattle, Washington, updated her analysis submitted by a 1999 declaration to reflect 2007 practices and developments in DNA testing. Ms. Gleim certified that in her expert opinion: 1) Mr. Solomon's (the State's expert at trial) conclusion that DNA analysis would not be useful due to the "flushing" theory, was in error, 2) that present day DNA testing would "answer questions about the degree of involvement of Cecil Morton in the sexual assault of the woman," and 3) that the passage of time would not be expected to compromise the testing and evidentiary value of the items previously collected, assuming such items are available.<sup>9</sup>

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The State did not contest the availability of the items. Potential testing items

Ms. Gleim's conclusion that DNA testing would be useful was also based on the assumption that Mr. Morton had not had a vasectomy at the time of the offenses, and therefore, would produce identifiable spermatozoa in his semen. CP 159-167. Sharyn Morton's declaration confirmed that he had not. CP 157-158.

Thomas Fedor, a forensic scientist with the Serological Research Institute in Richmond, California, concurred with Ms. Gleim's conclusions. Additionally, Mr. Fedor pointed out that Mr. Solomon's "flushing" theory assumes that the multiple assailants ejaculated inside the victim, which is not a fact that was proved or could have been known to Mr. Solomon. Moreover, Mr. Fedor concluded that the presence or absence of Mr. Morton's semen on items of clothing (or other evidence) would not be effected by the "flushing" theory.

Mr. Fedor was highly critical of Mr. Solomon's and the prosecution's failure to attempt more meaningful laboratory analysis.

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include internal and external swabs that were taken as part of the sexual assault medical examination, "[o]ne pair of blue jeans with blackish stains on the exterior," "[o]ne white T-shirt bearing a few yellowish stains," a "few [other] clothing items," and a cutting from a wash cloth. CP 143-156, at p. 8-9.

In this regard Mr. Fedor stated:

Mr. Solomon testified that he and the prosecutor together determined not to attempt laboratory analysis of the evidence (beyond, apparently, the tests he reported, but see below) that would potentially identify any assailant. I find this determination extraordinary, and unprecedented in my experience. In addition, the omission from his report of his finding that Mr. Heppard is excluded from the semen on the vaginal swabs is troubling.

It is unclear to me what evidence may have been available to examine. Mr. Solomon's report indicates there were unspecified items of victims's clothing available in addition to those items he did report examining. Moreover, his report declares that unreported examinations "may" have been undertaken in respect of unspecified items of evidence. One is curious whether the omission of further examination from his report was of the prosecution team's "determination", and whether additional conclusions may also have been omitted. CP 168-189.

Finally, Thurman Sherrill, who was a prison cell mate of Eugene Jones for over a year, attested that Mr. Jones had confided in him that he had provided false testimony against Mr. Morton, and that Mr. Morton had not in fact been involved in the rapes. CP 200-202.

The trial court's Order Denying Motion for Post-Conviction DNA testing reads in pertinent part:

Under RCW 10.73.170, the defendant bears the burden of establishing DNA evidence would prove significant new information. If he meets that burden, the defendant must then prove the DNA evidence would demonstrate his innocence on

a more probable than not basis. Assuming the defendant has met his first burden, he cannot meet the second. Most of the arguments made by the defendant in this motion suggest DNA testing could have made the result at trial different than it was. That is not the standard for post-conviction DNA testing. The defendant must prove DNA evidence will establish his actual innocence per case law. Under the particular facts of this case, a gang rape committed by multiple perpetrators acting as both principals and accomplices to each other, the absence of a particular defendant's DNA markers does not exonerate him. (Two of the defendant's three rape convictions are specifically based on his complicity with another person who engaged the victim in forced sexual intercourse.) As such, the defendant has not met his proving his actual innocence, and he does not qualify for post-conviction DNA testing under RCW 10.73.170.

**D. ARGUMENT**

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MR. MORTON'S MOTION FOR POST-CONVICTION DNA TESTING.**

DNA testing requests are governed by RCW 10.73.170, which states in relevant part:

- (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:
  - (a) State that:
    - (i) The court ruled that DNA testing did not meet acceptable

scientific standards; or

(ii) DNA testing 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.

RCW 10.73.170, as amended in 2005, requires a trial court to order DNA testing if the petitioner's request satisfies both the statute's procedural and substantive requirements. *State v. Riofta*, S.C. No. 79407-3 (6-11-09). The meaning of RCW 10.73.170 is reviewed de novo, while the trial court's application of the statute is reviewed for abuse of discretion. *State v. Riofta*, S.C. No. 79407-3 (6-11-09) at p. 4,6.

a) **Mr. Morton's motion satisfied the procedural requirements of RCW 10.73.170.**

RCW 10.73.170 (2) (a)(b) and (c) are procedural requirements that pertain to the content of the motion. “The motion must state the basis for the request, explain the relevance of the DNA evidence sought, and comply with applicable court rules. RCW 10.73.170 (a) - (c).” *State v. Riofta*, S.C. No. 79407-3 (6-11-09) at p. 3. The plain meaning of RCW 10.73.170 (2) (a) (iii) is to allow DNA testing “based on either advances in technology or the potential to produce significant new information.” (Emphasis added) Additionally, subsections (2) (a) (i)- (ii) allow DNA testing where the court has ruled that DNA testing at the time of adjudication did not meet acceptable scientific standards, or where DNA testing technology was previously underdeveloped to test the DNA in question.

As the Supreme Court explained in *Riofta*:

Each subsection of section .170 (2) (a) represents a distinct remedial purpose, allowing post-conviction DNA testing when: (i) the court previously denied admission of test results; (ii) the DNA evidence was unavailable due to inferior technology; and (iii) Current technology will yield more accurate results than those previously obtained or, if testing is requested for the first time, will produce significant new information. Read as a whole, the statute provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense

counsel not to seek DNA testing prior to trial.

Furthermore, trial counsel's failure to request DNA testing is not a bar to post-conviction testing. *State v. Riofta, Supra*.

In Mr. Morton's case, the trial court concluded that RCW 10.73.170 first requires the petitioner to show that DNA evidence would provide significant new information. The trial court correctly "assumed" that burden was met. CP 251-252. Defense experts Kirsten Gleim and Tom Fedor established that DNA testing would be helpful to determine Mr. Morton's role in the sexual assault. Moreover, Mr. Fedor avered that Mr. Solomon's conclusions were in error due to "unprecedented" faulty forensic methodology and practices, coupled with Mr. Solomon's agreement with the prosecutor to severely limit the laboratory testing. CP 168-189.

In addition to satisfying RCW 10.73.170 (2) (a) (iii) on the basis of "significant new information," Mr. Morton established (2) (a) (iii) was met on the basis that DNA testing is "significantly more accurate" than it was in 1994. In support of this conclusion, defense counsel offered not only the expert opinions, but also cited *In re Bradford*, 140 Wash.App. 124,165 P.3d 31 (2007) in which Division Three noted the

advances in DNA testing between 1995 and 2007. RP 2-22-08, 9. These advances in DNA testing also provide a basis to invoke RCW 10.73.170 (2) (a) (ii) because DNA testing technology is plainly more “developed” than it was in 1994, when Mr. Solomon performed his analysis.<sup>10</sup>

The *Riofta* appellant relied on the “significant new information” portion of RCW 10.73.170 (2) (a) (iii). The Supreme Court held that the procedural requirement had been satisfied, because the DNA could have been tested prior to the trial, but it was not. The same reasoning applies to Mr. Morton’s case. *State v. Riofta, Supra.* at p.4.

While the “materiality” showing required in RCW 10.73.170 (2) (b) was not significantly discussed by the Supreme Court in *State v. Riofta*, the Court clearly concluded that section (2) (b) is a procedural

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10

The prosecutor advised the trial court that “DNA testing was not done before the defendant’s trial.” CP 203-247 at p. 6. To the extent this representation meant that DNA technology was not used in criminal trials before 1994, this claim was inaccurate. Forensic use of DNA technology began in 1986, and in 1987 the first person was convicted of rape on the basis of DNA evidence. “Forensic DNA analysis: Issues,” Washington, D. C: U.S. Department of Justice, Bureau of Justice Statistics, June 1991, at 4, note 8. DNA technology was first used in a Washington criminal trial in 1989 in Snohomish County, Genalex: DNA in the courtroom. www.healthanddna.com.

requirement. Moreover, a reasonable inference is that the “materiality” showing is absorbed by the substantive requirement that DNA evidence would demonstrate innocence on a more probable than not basis. That is to say, if the DNA evidence establishes probable innocence, then it is by definition “material.” Interestingly, section (2) (b) also takes into consideration that DNA testing can impact sentencing enhancements as well as convictions.

Here, Mr. Morton demonstrated that the DNA testing and evidence would be material both to establishing the identity of the perpetrators of the sexual offenses, and to examining the propriety of the sentencing enhancements he received.

**b. Mr. Morton has satisfied the substantive requirement of RCW 10.73.170.**

The *Riofta* Court concluded that, under RCW 10.73.170 (3), once the petitioner has satisfied the procedural requirements of the statute, the trial court must grant the motion if the petitioner has demonstrated the “likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” *State v. Riofta, Supra.* at p.4. The analysis required of the reviewing Court was stated thusly:

In determining whether a convicted person “has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis,” a court must look to whether, viewed in light of all of the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis. The statute requires a trial court to grant a motion for post-conviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator.

State v. Riofta, Id at p.5.

The Riofta Court noted that this analysis is supported by the federal DNA testing statute, upon which Washington’s statute was drafted, in order to qualify for federal funding under the Justice for All Act of 2004. 18 U.S.C. § 3600 (a). See also United States v. Boose, 498 F.Supp. 2d 887 (W.D. Miss. 2007).<sup>11</sup>

In the 6-3 decision, the Riofta Court reasoned that post-conviction DNA statutes are enacted to provide an “intermediate step,” with the final step being a petition for a new trial based on the newly discovered evidence doctrine. The purpose of both the federal and

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11

Seven days after the Riofta decision was filed the U.S. Supreme Court held that prisoners do not have a federal due process right to DNA Testing. District Attorney’s Office for the Third Judicial District V. Osborne, No. 08-6 (U.S. 6-18-09). The Riofta Court did not specifically address the rights of prisoners to have DNA testing under Washington’s constitution.

state DNA testing statutes is to offer convicted person a means to obtain DNA evidence. Favorable DNA evidence could then be utilized in a petition for post-conviction relief. *State v. Riofta*, Id <sup>12</sup>

In the case at bar, the trial court repeatedly adopted the State's use of the term "actual innocence" both in its oral and written rulings. CP 251-252. The term "actual innocence" is not included in RCW 10.73.170, nor was such a standard applied by the *Riofta* Court. Additionally, the trial court's ruling appears to be based on the misguided perception that the standard for the substantive portion of RCW 10.73.170 is that the petitioner must prove the DNA testing results will "exonerate him." CP 251-252.

The trial court also appears to have misunderstood Mr. Morton's arguments: "most of the arguments made by the defendant is this motion suggest DNA testing could have made the result at trial different than it was." CP 251-252. On the contrary, Mr. Morton's argument was that "subsection (3) was satisfied because DNA testing

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12

In his dissenting opinion, Justice C. Johnson criticizes the majority opinion for creating "an extra burden to obtain post-conviction DNA testing similar to that for newly discovered evidence." Concurring in dissent, Justice Chambers urges legislative intervention and clarification of RCW 10.73.170.

will ‘more probably than not’ demonstrate [his] innocence.” CP 143-156. Mr. Morton’s arguments were consistent with the Supreme Court’s holding in State v. Riofta.

Turning to the application of Riofta’s analysis to the present case, Mr. Morton showed the likelihood that DNA evidence would demonstrate his innocence on a more probable than not basis, viewed in light of the trial evidence, and assuming favorable DNA test results. The State’s theory of the case was that Mr. Morton was the first perpetrator of the rapes, and that he was an accomplice to two rapes committed by two co-defendants. This theory was formulated on the basis of the co-defendants’ testimony. In support of this theory, Mr. Solomon testified that DNA testing would not be useful, because the first perpetrators’s semen would be flushed out by subsequent ejaculations. Experts Gleim and Fedor, however, did not agree with Mr. Solomon’s “flushing” theory, and Fedor pointed out that it was contingent upon the other perpetrators ejaculating inside J.H., which was not a fact known to Mr. Solomon. Moreover, Gleim and Fedor concluded that, even assuming the validity of the “flushing” theory, semen would still be found on other items of evidence, such as

clothing.

Here, favorable DNA results, that is, the absence of Mr. Morton's DNA, would support the defense theory that Mr. Morton did not participate in the rapes, which is consistent with his testimony, and further supported by Thurman Sherrill's affidavit. Furthermore, the absence of Mr. Morton's DNA casts serious doubt on the veracity of the co-defendants, upon whose testimony the State's theory was built.

The trial court's reasoning that the absence of Mr. Morton's DNA markers "does not exonerate him" because "[t]wo of the defendant's three rape convictions are specifically based on his complicity with another person who engaged the victim in forced sexual intercourse" is misguided. Evidence that supported the theory that Mr. Morton did not rape J.H. would likely lead to a reversal of at least one rape conviction, which would effect his sentencing. Additionally, evidence that supported the theory that Mr. Morton did not engage in rape himself would also raise doubt as to his accomplice liability in the other rapes.

Favorable DNA evidence would call into question the State's

entire case. As experts Gleim and Fedor concluded, the absence of Mr. Morton's semen on the medical swabs, on the items of clothing confiscated, or on the other evidence obtained from multiple venues where J.H. was sexually assaulted, would provide much more information about Mr. Morton's role in the sexual assaults. It is likely it would demonstrate his innocence on a more probable than not basis.

**E. CONCLUSION**

Based on the foregoing reasons and conclusions, Mr. Morton submits that he has satisfied both the procedural and substantive requirements of RCW 10.73.170, and he, therefore, respectfully requests that this Court reverse the trial court's Order Denying Post-Conviction DNA testing.

Respectfully Submitted this 6<sup>th</sup> day of July, 2009.

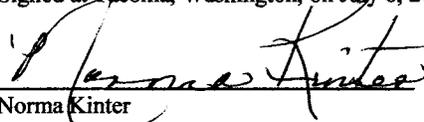


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**CERTIFICATE OF SERVICE**

The undersigned certifies that on July 6, 2009, I delivered by U. S. Mail to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Tacoma, Washington 98402, and appellant, Cecil L. Morton, DOC # 725136, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520, true and correct copies of this brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on July 6, 2009.

  
Norma Kinter

CO. 01-9-0111-91  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY