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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY JW  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

CECIL LARCEL MORTON, III, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 94-1-00829-5

**BRIEF OF RESPONDENT**

GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court's denial of defendant's motion for post-conviction DNA testing was proper when defendant cannot meet the requirements set forth in RCW 10.73.170.

B. STATEMENT OF THE CASE.

1. Procedure

This is an appeal from a denial of a motion for post-conviction DNA testing. On August 2, 1994, a Pierce County jury convicted CECIL LARCEL MORTON, III, hereinafter "defendant," of three counts of rape in the first degree, one count of robbery in the first degree and one count of burglary in the first degree. CP 7-17. The court imposed an exceptional sentence on each of the first degree rape convictions based on the lack of remorse and deliberate cruelty. CP 7-17. The court sentenced defendant to a total of seven hundred and twenty months (60 years) in confinement. CP 7-17.

On March 13, 1998, this Court affirmed defendant's conviction and sentence by Unpublished Opinion No. 18682-9-II. On September 3, 1999, the superior court entered an order granting defendant's motion to allow access to evidence for DNA testing. CP 54-57. On June 8, 2000, this Court denied defendant's personal restraint petition No. 25171-0-II. This Court's opinion included the following:

Petitioner asserts that he has ordered the DNA testing and that he would provide the results to this court. He has not done so. In fact, George Lauer, a forensic investigator with the Pierce County Sheriff's Department, avers that petitioner's attorney has never picked up the materials for testing from the Pierce County Sheriff's Department.

CP (Order Denying Petition under Cause No. 25171-0-II).

On December 27, 2004, defendant submitted another request for DNA testing under the 2003 version of RCW 10.73.170. CP 143-156. On June 10, 2005, the Pierce County Prosecutor's Office denied the request and informed defendant of his right to appeal. CP 143-156. Defendant appealed to the State Attorney General's Office. CP 143-156. In 2005, the Legislature "re-enacted" and amended RCW 10.73.170 whereby DNA requests are made to the trial court and indigent defendants may be given court appointed counsel.

On September 20, 2005, defendant filed a Motion for Appointment of Counsel to Prepare and Present Motion for DNA Testing. CP 68-135. On December 30, 2005, the court entered an Order of Indigency. CP 140-141. Counsel was appointed June 8, 2006 and filed a motion on behalf of defendant for post-conviction DNA testing on October 9, 2007. CP 142-156. The State filed its response on February 22, 2008. CP 203-247. A hearing was held and the superior court entered an order denying defendant's motion for post conviction DNA testing on March 24, 2008. CP 251-252. The same day, defendant filed a notice of appeal. CP 248-250.

## 2. Facts<sup>1</sup>

On February 18, 1994, J.H. was 17 years old and five months pregnant. About 7:00 p.m., she walked to a store two blocks from her apartment, to wait for the parents of a friend to pick her up. At the same time, Cecil Morton III was driving around with David Heppard, Eldridge Miles, Eugene Jones, Larry Taylor, and Shannon Stewart as his passengers. None of the six men knew J.H.

When Morton saw J.H. walking on the street, he asked the others in his car if they wanted to rape her. After Heppard said he was willing, Morton stopped the car and he, Heppard, and a third man forced J.H. into the back seat.

Hoping the men would let her go, J.H. told them she was pregnant. Morton responded by saying “[p]regnant girls are the best ones.” When J.H. asked them not to hurt her, Morton rubbed a machete against her skin and said to shut up or he would use it on her. At some point, someone said they would kill her baby too.

Morton drove to an area where he and the others took J.H. into the woods. They ordered her to undress, and she complied. Then, five or six of them, including Morton and Heppard, raped her vaginally, orally, or both.

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<sup>1</sup> The judge who denied the motion for testing was not the trial judge. CP.251-252. Facts are quoted verbatim from the Court of Appeals Unpublished Opinion No. 18682-9-II. The Judge did have the earlier opinion available for review in the court file.

Upon leaving the woods, the men then ordered J.H. to get back into the car. She was not yet dressed, and Heppard forced her to have oral sex again.

Morton then drove J.H. to her apartment, where Stewart and Jones raped her again, and Morton stole a speaker, video cassette player, and video games. When the men left, J.H. called a friend, and that person notified the police.

Dispatch had not yet broadcast the rapes when, about 8:00 p.m., Pierce County deputies stopped Morton for driving with defective equipment. Observing a machete in the car, they searched for weapons and found another weapon, video games, J.H.'s ID card, a speaker, an answering machine, and various other items. Being unaware of the rapes, they then released the six men.

During the stop, Morton heard over a police radio that J.H. had reported the rapes to the police. After the police left, he told the others that they should have killed her, and "[i]f we don't get caught, she must die."

Soon after the rapes were reported, one of the deputies located and arrested Morton. When interviewed by a detective, Morton said he was driving the car when Heppard brought J.H. into it, that he went into the woods where he saw some of the men having sex with J.H., and that he himself only touched her breasts. He saw Heppard have oral sex with J.H.

in the car, and he had gone to her apartment, from which he took some of her property.

At trial, Taylor and Miles testified for the State, and Morton testified in his own defense. Although Morton testified that no one had threatened J.H., and that she had accompanied the six men voluntarily, he admitted to taking property from her apartment without her consent.

3. Other relevant trial facts presented to the court at the hearing on the Motion for Post-Conviction DNA Testing<sup>2</sup>

Several days before the rapes of J.H., Morton said, in the presence of Eldridge Miles, that “he wanted to get into a lot of fights. He wanted to see what it would feel like to kill a person. And he wanted to see what it would feel like to rape a person.”

The cooperating co-defendants testified at trial that the defendant instigated the attack, that he was the first to have sexual intercourse with the victim, and that the defendant had condoms with him at the time of the attack. There was testimony at trial that the defendant used a condom during the time he had sexual intercourse with the victim. Both cooperating co-defendants testified the defendant had penile-vaginal sexual intercourse with the victim. One of them said the defendant used a

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<sup>2</sup> Taken from the State’s Response to Motion for Post-Conviction DNA Testing CP 203-247.

condom. At least five men had penile-vaginal intercourse with the victim, two of them more than once.

The defendant testified at trial. The defendant maintained the victim voluntarily went with the defendant and his friends and that the sexual intercourse she had with the men was consensual. During his testimony, the defendant denied having sexual intercourse with the victim.

Also during the trial, the State called Charles Solomon, a forensic scientist with the Washington State Patrol Crime Laboratory. Solomon testified to having examined saliva and vaginal samples taken from the victim, but was unable to draw any conclusions from the antigen testing. Solomon testified that because of a natural flushing action during intercourse and fellatio, vaginal and oral samples would only reveal the semen of the last perpetrator and that it would be "very unlikely" to find the semen of the first perpetrator. Solomon was then asked:

Q: Are there any additional tests you could have done on this case that was not done?

A: Yes. We could have done enzyme typing and we could have sent the evidences to DNA.

Q: And why did you not complete those tests?

A: In the case of multiple semen donors I did a narrowing down to one individual with enzyme typing, and it's virtually nil in my past experience with multiple donors. The enzyme typing just doesn't give good results to bring it down to more likely this individual and any other individual. In the case of DNA, after discussion with the

prosecutor and considering the circumstances of the case, we felt that due to the low likelihood of finding any of the first individual, either oral or vaginal semen, that it wasn't a wise—or, expedient use of the State's resources.

During cross examination, defense counsel for Morton asked Solomon:

Q: If you had done DNA or enzyme testing, it could have determined who the donor of the sperm was, correct?

A: Maybe, yes.

Q: "Maybe." Much more likely to do it than if you didn't do the test, correct?

A: That's correct.

...

Q: You did not do any DNA testing, is that correct?

A: That is correct.

Q: Okay. You did not do any enzyme testing, correct?

A: That is correct.

Q: You have no way of tying spermatozoa to Mr. Morton, is that correct?

A: That is correct.

...

Q: So, basically what you're telling us then is that really you don't know whether or not Mr. Morton had sexual intercourse with the victim, is that correct?

A: That's true.

Q: And, likewise you did not do the same testing on the spermatozoa that was found on the saliva swabs, is that correct?

A: That's true.

Q: So you cannot tie that to Mr. Morton, correct?

A: Correct.

C. ARGUMENT.

1. THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR POST-CONVICTION DNA TESTING WAS PROPER AS DEFENDANT HAS FAILED TO MEET THE REQUIREMENTS SET FORTH IN RCW 10.73.170.

RCW 10.73.170 governs post-conviction DNA testing and allows a convicted person currently serving a prison sentence to file a motion requesting DNA testing. The person must satisfy both the procedural and substantive prongs of the statute. The procedural portion of the statute requires:

(2) The motion shall:

(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.

RCW 10.73.170.

If the procedural requirements of the statute are met, the defendant must also show “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). A trial court’s decision on a motion for post-conviction relief is reviewed for an abuse of discretion. *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). In the present case, defendant fails to meet the substantive requirement of the statute thereby negating the need to meet the procedural requirement of the statute.

a. Defendant has failed to meet the substantive requirement of the statute.

Unlike the leniency afforded the procedural requirement of the statute, the substantive standard is an onerous one. *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009). The use of the word “innocence” by the legislature indicates their “intent to restrict the availability of post-conviction DNA testing to a limited class of extraordinary cases where the

results could exonerate a person who was wrongfully convicted of a crime.” *Riofta*, 166 Wn.2d at 369, footnote four (citing *Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992) (to say a person is “innocent” means the State has convicted the wrong person of the crime)).

A defendant seeking post-conviction relief faces a heavy burden and is in a significantly different situation than a person facing trial. *Riofta*, 166 Wn.2d at 369-70 (citing *Schlup v. Delo*, 513 U.S. 298, 326 n. 42, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (a convicted person claiming innocence as the basis for post-conviction relief must overcome a strong presumption of guilt); *Herrera v. Collins*, 506 U.S. 390, 399, 400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (a petitioner claiming innocence “does not come before the Court as one who is ‘innocent,’ but, on the contrary, as one who has been convicted by due process”). The statute ultimately asks a defendant to show a reasonable probability of his innocence before requiring State resources to be expended on a costly DNA test. *Riofta*, 166 Wn.2d at 370.

To determine whether a convicted person has met this substantial burden, 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.” *Riofta*, 166 Wn.2d at 367. In other words, “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.”

*Riofta*, 166 Wn.2d at 367-68. (Emphasis in original).

- i. **The jury already considered the lack of DNA evidence when assessing defendant’s guilt. New evidence would not affect the balance of information.**

In the present case, the defendant was convicted and sentenced to exceptional sentences for three first degree rape charges. CP 7-17. Two of the convictions stemmed from defendant’s position as an accomplice to first degree rapes perpetrated by his co-defendants. CP 7-17. Only one of the defendant’s convictions was based upon him being the principal rapist. CP 7-17. The principal rapist conviction is the only conviction for which DNA analysis would be remotely relevant. The other two convictions dealt with defendant as an accomplice and DNA evidence is therefore irrelevant to those convictions. Thus, defendant’s “innocence” on the two convictions where he was convicted as an accomplice cannot possibly be shown by the requested DNA testing. This fact alone provides a sufficient reason for denying the motion.

On the count where he was convicted as the principal rapist, when all the evidence before the court is considered, it is clear that even if defendant’s DNA profile was not found with subsequent testing, the defendant cannot satisfy the burden that this shows he is innocent on a

more probable than not basis. The evidence presented against the defendant showing that he raped J.H. was overwhelming. The best defendant can hope for with testing is for the results to provide no evidence of his DNA. This is the same factual scenario that was presented to the jury at trial. The evidence before the jury was that defendant's DNA had not been linked to the swabs taken during the victim's rape examination. The jury took the failure of the state to connect defendant to the crime with DNA evidence into consideration when it found defendant guilty.

DNA technology is primarily used when there are identity issues in the case. Identity is not an issue in this case. Defendant admits he was at the scene. CP 203-247. The victim says he was at the scene. CP 203-247. Defendant's two co-defendant's say he was at the scene. CP 203-247. DNA testing in this case would do nothing to show a "misidentification" of a rapist. There is overwhelming evidence that defendant was at the scene.

If DNA analysis is done on the samples, there are two possible outcomes: Defendant's DNA is present in the sample or it is not. If defendant's DNA is present, it confirms that he raped J.H. If there is no DNA present, it does not prove he did not rape J.H. and it does not satisfy the burden of proving innocence on a more probable than not basis. Rather, there are a multitude of reasons why defendant's DNA would not

be present in the sample eradicating the notion that he is innocent on a more probable than not basis.

First, it is unknown how many of the rapists ejaculated and/or whether defendant himself did. CP 203-247. If defendant did not ejaculate, the likelihood of finding DNA evidence would be greatly reduced. This is especially true if he was the first perpetrator and multiple other penetrations occurred afterwards. If that was the case, his small DNA sample, if present at all, could have been flushed out and be anywhere.

Secondly, Miles and Taylor testified that defendant had condoms with him at the time of the attack. CP 203-247. One even testified that defendant used a condom during the rape of J.H. CP 203-247. If that is the case, there would be a reason why his DNA would not be found on any swabs or clothing recovered from the scene. Under the evidence presented at trial, it is probable that his DNA will not be found. This lack of information would not affect the jury's assessment of the credibility of the witnesses who testified that defendant raped the victim. This is exactly the reason why a lack of DNA proves absolutely nothing in this case.

Third, although there was testimony that J.H. laid on a jacket during the assaults, it is pure speculation to assume it was in the perfect position to catch semen from all the penetrations. It is possible that she

did not lay on a jacket. If that was the case, defendant's DNA sample could have been flushed out onto the ground beneath her and not be present on items recovered from the scene.

Essentially, there are too many reasons in this case that could explain why defendant's DNA would not be present on any swabs or items. With every one of these reasons, it becomes clearer that defendant would be unable to meet the burden of showing his innocence would be more probable than not if DNA testing were done. Defendant is trying to find impeachment evidence against the three other people who testified he raped J.H. His conviction is based on the jury's determination of credibility of these witnesses as well as defendant's own credibility. At best, defendant could hope to produce inconclusive impeachment evidence. For all of these reasons, defendant cannot reach the burden of proving his innocence on a more probable than not basis.

**ii. Defendant's evidence is insufficient to meet the burden.**

To rebut the substantial amount of evidence against the defendant at trial and the multitude of reasons why his DNA might not be present, defendant has provided the court with four documents. He alleges the four documents prove the need for DNA testing as a lack of defendant's DNA will show he is innocent on a more probable than not basis. None of them are conclusive of anything.

Sharyn Morton's declaration only relates to DNA evidence for scientific purposes and provides the court with no evidence relevant to the incident that occurred. Thurman Sherrill's affidavit contains improper hearsay under ER 801. Mr. Sherrill described conversations he had in prison with one of the other co-defendants, Eugene Jones, who did not testify at defendant's trial. Unless defendant produces an affidavit by Eugene Jones stating his personal knowledge, Mr. Sherrill's affidavit should be dismissed as improper.

The declarations of Kerstin Gleim and Thomas Fedor present their professional opinions regarding DNA testing in the case at bar. These are simply expert witness opinions and conclusions who disagree with Charles Solomon's testimony. The jury already weighed the credibility of Mr. Solomon and defendant was given an opportunity at trial to present his own experts. Presenting witnesses who disagree with expert witness testimony at trial does not affect what was already evaluated by the jury.

The defendant must be held to the standard of proving "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.*" ***Riofta***, 166 Wn.2d at 367(emphasis added). Even with these expert opinions, defendant cannot meet this burden. There was overwhelming evidence at trial presented that he raped J.H. and there are a multitude of reasons why his DNA might be present. This does not come close to establishing that a

lack of defendant's DNA would prove him innocent on a more probable than not basis.

**iii. The present case is distinguishable from *In Re Bradford*.**

A good contrast to the present case showing where a favorable DNA test would actually meet the standard of proving a defendant innocent on a more probable than not basis is *In re Bradford*, 140 Wn. App. 124, 165 P.3d 31 (2007). In *Bradford*, an appellate court granted a new trial to the defendant, who was convicted of rape, based on new DNA evidence which questioned the identity of the single assailant. *In re Bradford*, 140 Wn. App. at 124. During the attack, the perpetrator placed a mask with tape covering the eyeholes on the victim. *In re Bradford*, 140 Wn. App. at 126. The victim testified that there was only one perpetrator. *In re Bradford*, 140 Wn. App. at 126. The mask that the perpetrator used had been prepared by him and brought by him to the attack. *In re Bradford*, 140 Wn. App. at 126. The victim also told police that the perpetrator continually pushed the mask down over her eyes. *In re Bradford*, 140 Wn. App. at 128.

Years after the trial, in 2006, a forensic scientist was able to determine that the DNA from preparing the mask and tape was from an unidentified male, not the defendant. *In re Bradford*, 140 Wn. App. at 126. Because the defendant's DNA was not found on the mask or any of

the tapes surfaces, the court found that “it makes common-sense that a jury could give weight to the proposition that the person who prepared the mask more likely than not is the person who committed the crime or that [the defendant], if present, would have left DNA on some surface of the mask.” *In re Bradford*, 140 Wn. App. at 128. (*quoting* Finding of Fact XVI. At 8).

Although this decision was prior to the *Riofta* decision which established the current burden on defendant’s seeking post-conviction DNA testing, the court in *Bradford* performed a similar analysis by looking at the new DNA evidence *combined* with the lack of and weak evidence that was presented against the defendant at trial.

At trial, the victim was not able to identify the defendant as the perpetrator and there were no other witnesses to the crime. *In re Bradford*, 140 Wn. App. at 127. The defendant’s confession “varied substantially with the details given by the victim and required consideration of its reliability and weight in light of the numerous disagreements between the description and details given by [the defendant] and the victim.” *In re Bradford*, 140 Wn.App. at 127. The only other evidence linking the defendant to the crime was testimony of the victim’s neighbor who said at some point earlier she saw the defendant

driving a white car in the neighborhood. *In re Bradford*, 140 Wn. App. at 127.

The court found that the favorable DNA results showing a lack of defendant's DNA evidence on the mask "is evidence that a jury would consider and *more probably than not*, would cast some great and substantial doubt about whether [defendant] was at the scene of the crime." *In re Bradford*, 140 Wn. App. at 128. (emphasis added). The court continued on to say that "[defendant] has produced new evidence, not previously available, that when considered with the other evidence admitted at [defendant's] trial, would probably change the result of that trial." *In re Bradford*, 140 Wn. App. at 129. Although this was prior to the *Riofta* decision, the *Bradford* court applied an incredibly similar standard that defendant's innocence would be more probable than not given the DNA evidence.

But, the decision in *Bradford* was premised on a very different set of facts. Those facts, when compared to the facts of the present case, show why defendant in the present case cannot meet the similar burden that the defendant in the *Bradford* case was able to meet.

Moreover, there was significant eyewitness testimony that defendant raped J.H., unlike in *Bradford*. J.H. and two of defendant's accomplices testified that he was the initial rapist. CP 203-247. Defendant also made comments about wanting to rape someone before the

attack on J.H. CP 203-247. There is significantly more evidence that defendant raped J.H. in the present case when compared to the lack of evidence that tied the defendant in *Bradford* to his crime. As a result of such a great discrepancy, there is no way the defendant in the present case comes close to meeting the burden of his innocence being more probable than not as the defendant in *Bradford* did.

Finally, defendant's argument that the trial court misapplied defendant's actual burden on the substantive portion of RCW 10.73.170 is not relevant to the ultimate decision of this court. The trial court decided the present motion while the *Riofta* decision was pending in the Supreme Court. As a result, the trial court was forced to interpret the standard a court should apply to the substantive portion of RCW 10.73.170.

Although the court used the term "actual innocence," which defendant alleges was incorrect, the reasoning behind the trial court's decision was the same as the *Riofta* court. The court opined:

I am going to deny the relief. For me, the most important distinction is the *requirement that there be more likely than not innocence proven*. I think that most of [defendant's] arguments go to the fact that the trial results would be different. The trial results being different means that the State wouldn't be able to carry their burden beyond a reasonable doubt that this person was guilty. But it's not the reverse of that that needs to be proven. What needs to be set forth here is that the DNA would more likely than not result or prove innocence. Wouldn't prove innocence beyond a reasonable doubt but would at least prove innocence by the greater weight of the evidence, and that's a different thing than you do at trial.

....

Perhaps when we get a ruling from the Supreme Court in the...*Riofta*, there would need to be some kind of correction, but I think that that's the appropriate result under the law as it exists now.

RP<sup>3</sup> 2/22/08 32. (Emphasis added).

Without clarification available, the court was left to interpret what it believed to be the appropriate standard under the law at that time. Even if the court improperly used of the term "actual innocence" or mistakenly relied on the argument that defendant's result at trial would have been different, the court's ultimate decision to deny defendant's motion for post conviction DNA testing was proper. In such cases where the reasoning of the appellate court differs from that of the trial court, an appellate court may still affirm the decision of the trial court upon other valid grounds. *State v. Williams*, 93 Wn. App. 340, 347-48, 968 P.2d 26 (1998). Therefore, the trial court's decision was proper, even if it applied the wrong standard, and this court should affirm the denial of defendant's motion as defendant has failed to satisfy the burden of proving his innocence is more probable than not.

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<sup>3</sup> The designated verbatim record of proceedings includes two volumes which will be differentiated by date with 2/22/08 referring to the February 22, 2008 proceedings and 3/24/08 referring to the March 24, 2008 proceedings.

- b. It is unclear, given the record before the court, whether defendant can meet the procedural requirements of the statute.

A defendant's request for testing of evidence is not precluded by the procedural requirements of the statute on the basis that it could have been, but was not, tested prior to trial. *State v. Riofta*, 166 Wn.2d 358, 366, 209 P.3d 467 (2009).

In the case at bar, the record before the trial court was incomplete and an improper basis upon which to decide whether defendant had met the procedural requirements of RCW 10.73.170(1-2). The trial court was not the original court to try the case during defendant's trial. CP 7-17, 251-52. The trial court was presented with the limited factual scenario as described in the Court of Appeals Unpublished Opinion No. 18682-9-II. The affidavit of Thurman F. Sherrill is improper hearsay. CP 200-202. The trial court was also only presented minimal excerpts of the testimony of Charles Solomon, the forensic scientist who testified on behalf of the State at trial. CP 143-156, 203-247.

After reviewing the evidence before it, the trial court denied defendant's motion for post-conviction DNA testing stating:

Under RCW 10.73.170, the defendant bears the burden of establishing DNA evidence would provide 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 his second.

CP 251-52 (emphasis added).

The court was clearly unable to determine whether defendant had met the procedural burden. Instead, because the court properly concluded defendant could not meet the substantive prong of the statute, the issue with respect to the procedural prong was moot. In light of the minimal evidence the court was presented with and the fact that the court did not preside over the defendant's trial, the trial court's decision to move on to the second prong of the statute was proper.

Furthermore, defendant's reliance on the advancement of DNA technology *In re Bradford*, 140 Wn. App. 124, 165 P.3d 31 (2007), as invoking RCW 10.73.170(2)(a)(ii) (that DNA technology was not sufficiently developed to test the DNA evidence at the time of trial) is misplaced given the particular facts of that case. Just because one case discusses the advancement of DNA technology over a period of years in a particular case does not mean that such an advancement affects every other case involving DNA technology. The facts of each case vary greatly and DNA technology advancements in the *Bradford* case may not be relevant at all to the facts of the present case.

Specifically, in *Bradford*, a defendant's rape conviction was overturned based on DNA evidence from a mask with tape over the eyes that the perpetrator prepared and forced the victim to wear during the attack. *In re Bradford*, 140 Wn. App. at 126. There was also only a single perpetrator in that case and the DNA found on the mask was from an unidentified male, not the defendant's. *In re Bradford*, 140 Wn. App. at 126. In contrast, the present case deals with multiple perpetrators who raped a victim multiple times. CP 203-247. The DNA samples in the present case are also from mixed seminal and vaginal fluid, not skin cells on one's face. CP 203-247. To say that because the court found DNA technology had advanced in *Bradford*, the DNA technology in the present case must have also advanced the same way is to compare apples and oranges. The facts of the cases do not allow for such a comparison to be drawn.

Thus, defendant's argument that he has satisfied RCW 10.73.170(2)(a)(ii) by citing *Bradford* is wrong. The court was properly unable to conclude whether the procedural prong was met. The court correctly found that because defendant was unable to meet the substantive portion of the statute, whether the procedural prong was met was a moot point. Because defendant was unable to satisfy the requirement within the

statute, the court should deny his motion for post-conviction DNA testing and affirm his conviction.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court deny defendant's motion for post-conviction DNA testing and affirm defendant's conviction and sentence.

DATED: OCTOBER 7, 2009

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

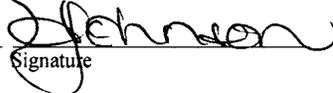
  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Chelsey McLean  
Rule 9

09 OCT -7 PM 2:25  
STATE OF WASHINGTON  
DEPUTY  
COURT OF APPEALS  
DIVISION II

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

10/10/09   
Date Signature