

NO. 88336-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

LINDSEY LADELL CRUMPTON,

Petitioner.

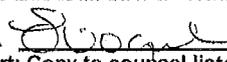
ON DISCRETIONARY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 42173-9-II  
Kitsap County Superior Court No. 93-1-00265-1

SUPPLEMENTAL BRIEF OF RESPONDENT

RUSSELL D. HAUGE  
Prosecuting Attorney

RANDALL A. SUTTON  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

<b>SERVICE</b>	<p>Thomas E. Weaver Po Box 1056 Bremerton, Wa 98337 tweaver@tomweaverlaw.com Diane M. Meyers Kellen A. Hade Ste. 300, 2810 Alaskan Way Seattle WA 98121 dmeyers@grahamdunn.com khade@grahamdunn.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the right, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 5, 2013, Port Orchard, WA  Original e-filed at the Supreme Court; Copy to counsel listed at left.</p>
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## I. COUNTERSTATEMENT OF THE ISSUE

Whether the Court of Appeals correctly concluded that plain language of RCW 10.73.170 contains no “presumption of favorability” that must be applied when considering whether a defendant has met the substantive statutory requirement of showing “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis”?

## II. STATEMENT OF THE CASE

The State relies on the statement of the case it presented to the Court of Appeals, as supplemented by *In re Crumpton*, Court of Appeals No. 17588-6-II.

## III. ARGUMENT

**THE PLAIN LANGUAGE OF RCW 10.73.170 CONTAINS NO “PRESUMPTION OF FAVORABILITY” THAT MUST BE APPLIED WHEN CONSIDERING WHETHER A DEFENDANT HAS MET THE SUBSTANTIVE STATUTORY REQUIREMENT OF SHOWING “THE LIKELIHOOD THAT THE DNA EVIDENCE WOULD DEMONSTRATE INNOCENCE ON A MORE PROBABLE THAN NOT BASIS.”**

The State largely relies on its briefing in the Court of Appeals. It writes here to address *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012), which was decided after the case was briefed below, as well as to address certain contentions raised by Crumpton and Amici in this Court.

***1. The decisions below are consistent with the holding in State v. Thompson***

Crumpton argues that *Thompson* supports his contention that the when considering a motion for DNA testing the trial court must presume that the results will be favorable. The *holding* of *Thompson* did not address this issue, and as such is obviously not controlling.

This Court clearly stated the *only* issue that was before it in *Thompson*:

The only issue before us is whether the trial court erred when it considered evidence available to the State at the time of trial but not admitted at trial.”

*Thompson*, 173 Wn.2d at ¶ 14. Since the only issue before the Court was whether the trial court should have considered evidence not admitted at trial, it follows that any discussion of *State v. Gray*, 151 Wn. App. 762, 215 P.3d 961 (2009), that followed its resolution of the issue before the Court was *dicta*.

For the reasons discussed in its briefing below, the State maintains that *Gray* misinterpreted both the statute and *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009). See Brief of Respondent, at 15-17. As the *Thompson* Court specifically noted, the questions presented are strictly controlled by the statutory language:

We must be careful to keep the focus on the statutory requirements of RCW 10.73.170 and not unduly expand the inquiry.

*Thompson*, 173 Wn.2d at ¶ 17. The statute only permits testing if the defendant shows a likelihood that the *results* will demonstrate innocence:

RCW 10.73.170 allows a convicted person to request DNA testing if he can show the test results would provide new material information relevant to the perpetrator's identity. However, a trial court must grant the motion *only* when the petitioner "has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3).

*Riofta*, 166 Wn.2d at ¶ 24 (emphasis supplied). The Legislature could easily have written: "the convicted person has shown the likelihood that *favorable* DNA evidence would demonstrate innocence on a more probable than not basis." It did not.

To the extent that the *dicta* in *Thompson* approved the *Gray* formulation, it was both incorrect and harmful, and should be reconsidered. *State v. Barber*, 170 Wn.2d 854, ¶ 20, 248 P.3d 494 (2011).

In *Barber* the Court discussed the meaning of the phrase "incorrect and harmful." It noted that the meaning of "incorrect" included a decision that was inconsistent with a statute. *Barber*, 170 Wn.2d at ¶ 21 (citing *State v. Devin*, 158 Wn.2d 157, 168-69, 142 P.3d 599 (2006)). It also noted that a decision could be incorrect if it relies on authority to support a proposition that the authority itself does not actually support. *Id.*

Here, as discussed in the State's brief below, the *Gray* standard

comports neither with the statutory language nor the legislative intent. As the Court noted in *Riofta*, the primary emphasis is on the requirement that a defendant show actual innocence.

*Riofta* emphasized that the Legislature used the word “innocence” “to restrict the availability of postconviction DNA testing to a limited class of extraordinary cases where the results could exonerate a person who was wrongly convicted of a crime.” *Riofta*, 166 Wn.2d at ¶ 28 n.4. “RCW 10.73.170 is not aimed at ensuring a defendant had a fair trial. Its purpose is to provide a remedy for those who were wrongly convicted despite receiving a fair trial.” *Id.* RCW 10.73.170 “asks a defendant to show a reasonable probability of his innocence before requiring State resources to be expended on a test.” *Riofta*, 166 Wn.2d at ¶ 30. Accordingly, the focus is on the defendant’s innocence. *Id.* “Innocent” means that the State convicted the wrong person. *Riofta*, 166 Wn.2d at ¶ 28 n.4 (citing *Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992)).

The State is mindful that that this Court has rejected invitations to overrule prior decisions “based on arguments that were adequately considered and rejected in the original decisions themselves.” *Barber*, 170 Wn.2d at ¶ 21. It does not appear, however, that *Gray’s* interpretation of the statute or *Riofta* were in play in *Thompson*. To the contrary, the

primary issue presented and discussed by both the majority and the dissent was whether the trial court could consider the defendant's statement where it had not been admitted at the original trial. If the issue was given great consideration, it is not reflected in the opinion.

*Barber* also noted that the common thread in decisions that the Court had held to be "harmful" "was the decision's detrimental impact on the public interest." *Barber*, 170 Wn.2d at ¶ 22. In a view four sitting justices of this Court adopted, the dissent in *Thompson* reminded the Court that "the purpose of the statute [is] to assess a defendant's showing of actual innocence, not to assess guilt under the standards that govern criminal trials." *Thompson*, 173 Wn.2d at ¶ 71 (Madsen, CJ, dissenting) (citing *Riofta*). The *Gray* formulation does not serve this purpose. As previously noted *Riofta* also emphasizes this view of the statute.

The second, substantive, requirement of the statute sets forth an "onerous" standard, *Riofta*, 166 Wn.2d at ¶ 22, in which the defendant must show more likely than not actual innocence. *Gray* permits a much lesser showing, in which exculpatory DNA results are presumed. This standard as a practical matter leaves very few cases in which a defendant's request would be properly denied. Given that the purpose of the statute's substantive requirement is to narrow the availability of testing to those who can show a likelihood of actual innocence, *Riofta*, 166 Wn.2d at ¶ 28

n.4, the *Gray* formulation is clearly detrimental to the public interest. *Barber*, 170 Wn.2d at ¶ 22. This public interest is substantial. DNA testing is not cheap, and using the limited facilities of the State for testing evidence in old cases where the defendant has not shown a likelihood of actual interest adversely affects the speedy and accurate resolution of present-day cases. *See Thompson*, 173 Wn.2d at ¶ 54 n.8 (Madsen, CJ, dissenting) (noting costs).<sup>1</sup> Moreover, requiring a defendant to meet the standard actually prescribed in the statute will benefit those defendants who actually can meet the standard by not clogging the courts and the labs with motions and testing that is unnecessary.

For the foregoing reasons, to the extent *Thompson* could be deemed to hold that *Gray* sets forth the proper substantive standard, its holding is both incorrect and harmful. Any such reading should be disavowed and *Gray* should be disapproved.

**2. *The State has and not, and does not, claim that Crumpton's motion was procedurally inadequate.***

In his motion to strike and his supplemental brief, Crumpton claims that the State may not cite to a prior ruling in this very case in support of a claim that his motion was “procedurally barred.”

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<sup>1</sup> *See also* King 5 News, *Labor Shortage at Washington State Patrol Crime Labs* (Dec. 21, 2012) (noting backlog of 700 cases for DNA testing), <http://www.king5.com/news/investigators/Labor-shortage-in-the-lab-at-State-Patrol-184499081.html> (viewed July 4, 2013).

Supplemental Brief of Petitioner, at 1. The State makes no such claim.

In the prior ruling, that the Court of Appeals rejected Crumpton's claim that trial counsel were ineffective for failing to seek DNA testing before trial, citing counsels' affidavit:

The affidavit of Crumpton's trial counsel reveals that the decision not to have the DNA characteristics of the samples tested was a tactical decision. That affidavit provides:

We discussed the pros and cons of such testing with Mr. Crumpton indicating that the tests could inculpate or exculpate him. We also discussed the fact that DNA testing could not be completed within the 60-day speedy trial period, and that Mr. Crumpton would have to waive his right to a speedy trial if he wished us to proceed with DNA testing. Mr. Crumpton adamantly advised us that he was unwilling to waive speedy trial because he wished to get the trial over with. We were bound by this decision.

*In re Crumpton*, Order Dismissing Petition, at 2-3 (No. 17588-6-II Apr. 18, 1994).

Although not a per se bar to postconviction DNA testing, a court may take into account a defendant's failure to seek DNA testing at trial. *Riofta*, 166 Wn.2d at ¶ 21 n.1. RCW 10.73.170 "does not allow defendants to adopt a 'wait and see' approach. A defendant's failure to request DNA testing at trial of evidence he now claims to be exculpatory must be weighed against his claim of probable innocence unless circumstances exist to justify the failure." *Riofta*, 166 Wn.2d at ¶ 27 n.3.

The Court's finding is thus relevant to the *substantive* position that the State has maintained throughout these proceedings: that Crumpton has not shown a likelihood of actual innocence.

Because the State is not raising a new issue in its supplemental brief, Crumpton's claims regarding estoppel have no application. To the contrary, a different, well-settled principle applies: An appellate court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court's reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

Further, this Court "may rely on unpublished opinions as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties." *Martin v. Wilbert*, 162 Wn. App. 90, ¶ 2 n.1, 253 P.3d 108, *review denied*, 173 Wn.2d 1002 (2011) (*citing Island County v. Mackie*, 36 Wn. App. 385, 391 n.3, 675 P.2d 607 (1984)). The general rule is that unpublished opinions may be cited for evidence of facts established in earlier proceedings in the same case involving the same parties. *In re Davis*, 95 Wn. App. 917, 920 n. 2, 977 P.2d 630 (1999), *aff'd*, 142 Wn.2d 165 (2000). They can also be cited to

establish facts in a different case that are relevant to the current case. *Davis*, 95 Wn. App. at 920 n.2. Moreover, prior appellate court rulings become the law of the case, unless challenged and overruled under RAP 2.5. *State v. Strauss*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992); accord *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (under law of the case doctrine, appellate court's holding must be followed in all subsequent stages of the same litigation).

Because this Court may properly consider factual determinations made in previous proceedings in this case, the Court may consider the fact that Crumpton declined DNA testing before trial. Likewise, because that fact supports the upholding of the verdict of the trial court and the holding of the Court of Appeals, it should be considered in this Court's review.

***3. Crumpton and the dissent below ask this court to reconsider policy decisions the Legislature has already and properly decided.***

Whether Judge Worswick's dissent is "eloquent" or not, Supplemental Brief of Appellant, at 3, the rationale set forth therein, as with the arguments of Crumpton and amici, rely on policy considerations that the Legislature has presumably already undertaken. This Court's job is to apply the language of the statute as it is written. *Thompson*, 173 Wn.2d at ¶ 17. As written, the statute contains no "presumption of favorability." Brief of Petitioner, at 4; see also *State v. Crumpton*, 172

Wn. App. 408, ¶¶ 17-21, 289 P.3d 766 (2012) (Worswick, J, dissenting). To the contrary, as explained above in and at greater length in the State's brief below, it requires the defendant *to show* more likely than not that the testing *would* be favorable. If the statutory language is plain, "courts must effectuate it, even if it evinces policy choices that we consider to be ill-advised. Even assuming for argument's sake that the statute is ambiguous, the court should not proceed directly to policy reasoning, but should first look to the legislative history of the statute to discern and effectuate legislative intent." *State v. Gossage*, 165 Wn.2d 1, ¶ 19, 195 P.3d 525 (2008).

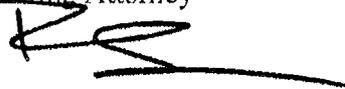
Finally, as also noted previously, there is no constitutional right to postconviction DNA testing. *See also Thompson*, 173 Wn.2d at ¶¶ 49-51 (Madsen, CJ dissenting). It is thus entirely a creature of legislative grace. Under these circumstances the policy considerations Crumpton advances must be left to the Legislature. The statute should be applied as written, and the decisions of the courts below affirmed.

**IV. CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Court affirm the Court of Appeals.

DATED July 5, 2013.

Respectfully submitted,  
RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. Hauge', written over the printed name of the prosecuting attorney.

RANDALL A. SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

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*LORI A. VOGEL, LEGAL ASSISTANT  
KITSAP COUNTY PROSECUTORS OFFICE  
614 DIVISION STREET, MS-35  
PORT ORCHARD, WA 98366  
DESK: 360-337-7239  
FAX: 360-337-4949  
EMAIL: [LVogel@co.kitsap.wa.us](mailto:LVogel@co.kitsap.wa.us)*