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NO.  
Court of Appeals no. 59366-8-1

**FILED**  
JUN 28 2010  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

BOBBY R. THOMPSON,

Respondent.

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PETITION FOR REVIEW

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### **I. IDENTITY OF PETITIONER**

The State of Washington asks for review of the Court of Appeals decision designated in part II.

### **II. COURT OF APPEALS DECISION**

In a published decision filed March 29, 2010, the Court of Appeals reversed the trial court and remanded for entry of an order permitting DNA testing. The Court of Appeals also determined that the defendant was entitled to appointed counsel on appeal. State v. Thompson, 155 Wn. App. 294, 229 P.3d 901 (2010). The Court denied reconsideration in an order dated May 26, 2010.

The court's opinion is set out in Appendix A. The order denying reconsideration is set out in Appendix B.

### **III. ISSUES PRESENTED FOR REVIEW**

(1) In determining whether to order post-conviction DNA testing under RCW 10.73.170, may the court consider evidence that was available at trial but not offered?

(2) RCW 10.73.170(1) requires that a motion for post-conviction DNA testing be verified. Can the Court of Appeals order testing on the basis of a non-verified motion?

(3) RCW 10.73.170(4) allows discretionary appointment of counsel "solely to prepare and present a motion under this section." Can a court appoint counsel to appeal the denial of such a motion?

#### **IV. STATEMENT OF THE CASE**

On the early morning of April 14, 1995, Lynnwood Police responded to a report of a disturbance in Room 111 of the Landmark Hotel. On arriving, they saw the respondent, Bobby Thompson, leaving that room with J.S. He took her to a nearby emergency exit and started pushing her out the door. When J.S. saw the officers, she started yelling hysterically that he'd beat her and was going to kill her. Thompson continued pushing her out the door. The officers arrested him and summoned aid for J.S. 1 RP 38-41; 2 RP 39, 53-54.

J.S. was crying, shaking, and "out of control." She had been badly beaten. 1 RP 31, 41-42. In the room, police found blood on the bed sheets, the floor, and the bathroom wall. 2 RP 46-48. Sperm was found on vaginal swabs taken from J.S. There was acid phosphatase on the sheets, indicting the presence of semen. 2 RP 72-78.

On being questioned by police, Thompson provided a sworn statement claiming that he had consensual intercourse with J.S.<sup>1</sup> 1 CP 75-76. Prior to trial, the parties stipulated that this statement was voluntary. 1 RP 18-19. The State did not offer it as evidence.

No DNA testing was conducted due to lack of time before trial. 2 RP 78-79. The defense made no request for a continuance to allow such testing. On the day of trial, the defense sought a continuance to subpoena a person who purportedly fit J.S.'s description of the rapist. Defense counsel claimed that the defendant had provided the information supporting this request "about a week and a half ago." 1 RP 8-9. Counsel was allowed to present this information in camera. 1 RP 5. The court denied the continuance. 1 RP 16.

At trial, J.S. testified that she had met Thompson at a bar. He brought her to his hotel room on the pretext of attending a party. Instead, he beat her and raped her. 1 RP 59-73. The defense cross-examined her about statements made during a defense interview, which indicated her lack of recollection about some

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<sup>1</sup> The statement is attached to the respondent's brief as Appendix B.

details of the rapist's description. 1 RP 80-81. The defense put on no evidence.

Over 10 years later, Thompson filed a motion for post-conviction testing. The motion was not verified. Thompson did not provide a sworn statement or any evidence at all, beyond the evidence set out in the trial record. He did not explain or even mention his statement to police. Nor did he provide any explanation of the incriminatory circumstances. 1 CP 89-109. The court denied the motion. 1 CP 44-45.

The Court of Appeals reversed. It determined that because there was only one rapist, an exculpatory test result would establish Thompson's innocence on a more probable than not basis. The court refused to consider Thompson's statement to police, because it was not "newly discovered." The Court therefore remanded the case for entry of an order permitting DNA testing. The court also determined that Thompson was entitled to appointment of counsel at public expense.

The State's brief pointed out that Thompson failed to comply with the statutory requirement that his motion be verified. In a motion for reconsideration, the State again called attention to this statutory requirement. The motion argued that at a minimum,

Thompson should be required to verify his motion on remand. The Court denied the motion for reconsideration without comment.

## **V. ARGUMENT**

### **A. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' CREATION OF NEW EVIDENTIARY REQUIREMENTS THAT ARE UNSUPPORTED BY ANY PROVISION OF THE DNA TESTING STATUTE.**

This case involves application of the post-conviction DNA testing statute, RCW 10.73.170. The full text of that statute is set out in Appendix B. Under the statute, a motion for DNA testing should be granted if "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(3).

In the present case, Thompson provided a sworn statement to police admitting that he had sexual intercourse with the victim on the night of the rape. 1 CP 75-76. He has never repudiated this statement. The prosecutor did not offer the statement at trial -- probably because he did not anticipate any genuine claim of mistaken identity. Prior to trial, defense counsel was allowed to conceal the inconsistent statements on which the defense was based. 1 RP 7.

The statement's statement claimed that the intercourse was consensual. DNA testing cannot, however, shed any light on

whether intercourse was consensual – only whether it occurred. Since the defendant has admitted that the intercourse occurred, there is no likelihood that any DNA evidence would demonstrate innocence on a more probable than not basis.

The Court of Appeals nonetheless refused to consider Thompson's statement. The Court said that "the 'more probable than not' innocence determination is made by considering only evidence that was admitted at trial." Thompson, 155 Wn. App. at 304 ¶ 21 n. 27. The court pointed to nothing in either the language or policy of the statute that would support such a restriction. The purpose of RCW 10.73.170 is to provide a process "for cases where DNA tests could provide evidence of a person's innocence." House Bill Report on HB 2872 at 3 (2004).<sup>2</sup> Why would the Legislature want to waste taxpayer money on DNA tests that are unlikely to demonstrate innocence, simply because the evidence proving that was not introduced at trial?

The Court of Appeals believed that the restriction was created by this court in State v. Riofta, 166 Wn.2d 358, 209 P.3d

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<sup>2</sup> The report is attached to the respondent's brief as Appendix E. Although HB 2872 was not enacted, a similar bill was enacted the following year. House Bill Report on SHB 1014 at 3 (2005) (App. J to respondent's brief).

467 (2009). There, this court said that a trial court should “look to whether, viewed in light of all 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.” Id. at 367 ¶ 24, cited in Thompson, 155 Wn. App. at 302 ¶ 16. In Riofta, however, the State apparently did not offer any evidence beyond that submitted at trial. Riofta, 166 Wn.2d at 370-73 ¶¶ 32-37 (summarizing evidence). To the extent that the court suggested any restrictions on the evidence that can be offered, that language was dicta unrelated to any issue in the case. “General statements in every opinion are to be confined to the facts before the court, and limited in their application to the points actually involved.” State ex rel. Wittler v. Yelle, 65 Wn.2d 660, 670, 399 P.2d 319 (1965).

The analysis of Riofta refutes any suggestion that the court is limited to evidence offered at trial unless it is “newly discovered.” For one thing, Riofta holds that a court can consider the requestor’s failure to seek DNA testing prior to trial. Riofta, 166 Wn.2d at 366 ¶ 21 n. 1. This fact would not normally be introduced into evidence at trial, nor would it be “newly discovered.” Riofta also allows defendants to seek DNA testing even though they chose not to do

so prior to trial. Id. ¶ 20. If evidence could have been discovered before trial by the exercise of due diligence, it is not “newly discovered evidence.” State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981).

In refusing to consider evidence that was available prior to trial, the Court of Appeals imposed a restriction that is unsupported by the language or policy of RCW 10.73.170. Application of this restriction will result in public money being wasted on pointless DNA tests that have no likelihood of producing any exculpatory evidence. Because the issue is one of substantial public interest, and because the Court of Appeals decision conflicts with this court's analysis in Riofta, review should be granted under RAP 13.4(b)(1) and (4).

**B. THE COURT OF APPEALS' REFUSAL TO ENFORCE THE STATUTORY REQUIREMENT OF A VERIFIED MOTION WARRANTS REVIEW BY THIS COURT.**

RCW 10.73.170(1) requires “a *verified* written motion requesting DNA testing. “Verification requires a swearing to the truthfulness of the document by the signor.” State v. Holland, 7 Wn. App. 676, 678, 501 P.2d 1243 (1972). Thompson's motion in this case is unverified. 1 CP 89-109. The Court of Appeals nevertheless directed that this motion be granted.

The court gave no reason for failing to enforce the statute. In Thompson's reply brief, he suggested that the court should give him the opportunity to provide verification on remand. Reply Brief of Appellant at 7. The court did not follow this suggestion. In its motion for reconsideration, the State pointed out that the court had disregarded this statutory requirement. The court denied the motion without explanation.

The requirement of verification plays a key part in the statutory scheme. As this case illustrates, DNA testing can be obtained despite strong evidence of the requestor's guilt. A convicted person may have many reasons to seek such testing: to obtain appointed counsel, to harass the State and the victims, or in the hope that a testing error might provide evidence that appears exculpatory. The State has only one meaningful protection against this abuse: the requirement that the requestor make his claims under oath. He then risks prosecution for perjury if the DNA testing corroborates his guilt.

In this case, Thompson has consistently refused to make any statements about the crime under oath. He did not testify at trial. His request for DNA testing was supported only by unsworn claims. 1 CP 91-92. When the State pointed this out, Thompson's

reply consisted of more unsworn statements. 1 CP 60, 48-49. The only sworn statement he has made about the crime was his statement to police – which admitted sexual intercourse with the victim. 1 CP 75-76. Before Thompson has public money expended on his behalf, he should comply with the statutory requirement of provided a factual basis under oath.

The Court of Appeals disregarded the clear statutory mandate of a verified motion. Its refusal to enforce RCW 10.73.170(1) raises an issue of substantial public interest. Review should be granted under RAP 13.4(b)(4).

**C. THIS COURT SHOULD REVIEW THE COURT OF APPEALS CREATION OF A RIGHT TO COUNSEL AT PUBLIC EXPENSE IN NON-CRIMINAL PROCEEDINGS.**

Finally, this court should determine whether a person who appeals the denial of a motion for DNA testing has a right to counsel at public expense. RCW 10.73.170(4) provides only a limited right to counsel. The trial court, in its discretion, may grant a request for appointment of counsel “solely to prepare and present a motion under this section.” Despite this limitation, the Court of Appeals has decided that there is a right to counsel on appeal, with no exercise of discretion, and without regard to the merits of the issue raised.

The Court of Appeals has thus provided a way for *any* indigent convicted person to obtain counsel at public expense. All the person has to do is file a motion for DNA testing and appeal the denial. There need not be any factual basis for the motion. The person need not comply with the procedural requirements of the statute (as Thompson did not comply with the requirement of verification). There need not even *be* any evidence to test – at the time of the appeal in this case, the record indicated that all of the evidence had been destroyed. 1 CP 61. Once prison inmates realize that filing a motion for DNA testing can give them a right to counsel, they are likely to file a large number of motions will be filed simply to obtain that benefit.

The Court of Appeals relied on RCW 10.73.170(1). That statute provides a right to counsel at state expense when “an adult offender convicted of a crime ... [f]iles an appeal as a matter of right.” The State argued that this statute, when viewed in context, is implicitly limited to appeals that involve challenges to criminal conviction. The Court of Appeals rejected any such limitation. Thompson, 155 Wn. App. at 299 ¶ 11.

Under the Court of Appeals’ analysis, it appears that RCW 10.73.170(1) applies to civil cases. Suppose, for example, that a

convicted person files a personal injury action or a lawsuit seeking access to public records. An unfavorable judgment in such proceedings is appealable as a matter of right. See RAP 2.2(a)(1). Under the Court of Appeals reasoning, it appears that an indigent inmate would have a right to appointed counsel at public expense to appeal such a judgment.

The Court of Appeals decision greatly expands the right to appointed counsel. The court has provided a way for almost *any* convicted person to obtain counsel at public expense. The court's analysis could also support a right to counsel in a large number of other civil proceedings. Many inmates could be motivated to bring such appeals in order to obtain free counsel. In addition to involving a large expenditure of public funds, this could substantially increase the workload of appellate courts. This expansion of the right to appointed counsel involves an issue of substantial public interest. Review should be granted under RAP 13.4(b)(4).

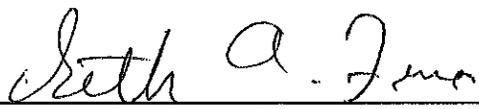
## **VI. CONCLUSION**

This court should grant review, reverse the Court of Appeals, and uphold the trial court's denial of DNA testing. At a minimum, Thompson should be required to verify his petition before DNA

testing is granted. This court should also reverse the Court of Appeals determination that Thompson is entitled to counsel at public expense. Thompson should be required to recoup the cost of appointed counsel.

Respectfully submitted on June 22, 2010.

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Court of Appeals of Washington,  
 Division 1.  
 STATE of Washington, Respondent,  
 v.  
 Bobby Ray THOMPSON, Appellant.  
 No. 59366-8-I.

March 29, 2010.

**Background:** Defendant, who had been convicted of first degree rape, filed a posttrial motion for DNA testing of evidence. The Superior Court, Snohomish County, Gerald L. Knight, J., denied the motion. Defendant appealed.

**Holdings:** The Court of Appeals, Grosse, J., held that:

- (1) defendant was entitled to an order of indigency, and
- (2) defendant was entitled to postconviction DNA testing of evidence collected during rape investigation.

Reversed and remanded.

West Headnotes

[1] Criminal Law 110 ↪1077.1(1)

110 Criminal Law  
 110XXIV Review  
 110XXIV(F) Proceedings, Generally  
 110k1077 Proceeding in Forma Pauperis  
 110k1077.1 Proceeding in General  
 110k1077.1(1) k. In general; right to allowance. Most Cited Cases  
 Defendant was entitled to an order of indigency on appeal challenging the denial of his motion for postconviction DNA testing; denial of motion was "appealable as a matter of right," within meaning of statute and hence appellate rule, because it was final order made after judgment that affected substantial right. RAP 15.2(b)(1)(a); West's RCWA 10.73.150.

[2] Criminal Law 110 ↪1590

110 Criminal Law  
 110XXX Post-Conviction Relief  
 110XXX(C) Proceedings  
 110XXX(C)1 In General  
 110k1590 k. Discovery and disclosure.  
 Most Cited Cases  
 Defendant was entitled to postconviction DNA testing of evidence collected during rape investigation; DNA testing would provide significant new information, since the evidence was not tested for DNA prior to trial, and favorable DNA test results showing that defendant's DNA was not present in the semen samples collected from victim would be strong evidence of defendant's innocence. West's RCWA 10.73.170.

[3] Criminal Law 110 ↪1156.11

110 Criminal Law  
 110XXIV Review  
 110XXIV(N) Discretion of Lower Court  
 110k1156.11 k. Post-conviction relief.  
 Most Cited Cases  
 The Court of Appeals reviews a trial court's decision on a motion for postconviction DNA testing for an abuse of discretion. West's RCWA 10.73.170.  
 \*\*902 David Bruce Koch, Nielsen Broman Koch PLLC, Seattle, WA, for Appellant.

Seth Aaron Fine, Attorney at Law, Snohomish Co. Pros. Ofc., Everett, WA, for Respondent.

GROSSE, J.

\*296 ¶ 1 A postconviction motion for DNA testing of semen samples in a rape case should be granted when testing would provide new information about the rapist's identity and favorable results would establish the defendant's innocence on a more probable than not basis. Here, there was no evidence that anyone other than the rapist had intercourse

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with the victim; thus, DNA results excluding the defendant as the donor of the sperm would provide new information about the rapist's identity and likely establish his innocence. Accordingly, we reverse the trial court's order denying the motion for DNA testing.

#### FACTS

¶ 2 One evening in April 1995, J.S. went out with some friends to a bar in Lynnwood. At some point, she had a brief conversation with a man she later identified as Bobby Thompson. Later in the evening, as she was leaving the bar, the man approached her again and told her there was an after-hours party at the hotel across the street.

\*297 ¶ 3 The two of them then went into a hotel room, but there was no party in the room. When J.S. said she wanted to leave, the man hit her on the head, knocking her unconscious. When she regained consciousness, she realized her clothes were off and the man was raping her. She tried to fight him off, but he hit her again and raped her a second time. When she tried to escape, he attempted to rape her a third time and she ran into the bathroom. He then threw her head against the wall and knocked her out again. When she came to, the bathtub water was running and he was trying to drown her in the tub. The next thing she remembers is being in the hospital.

¶ 4 That same night, shortly before 3:00 a.m., Lynnwood police received a report of a domestic disturbance in a room at the hotel. When one of the officers went to the room, the door was closed and he could hear water running inside the room. He went back to the front desk and waited for the other officers to arrive. When they arrived, they walked backed to the room and heard a door \*\*903 open. They looked down the hallway and saw Thompson leaving the room with J.S. and pushing her out the door into a nearby emergency exit. When the officers approached, J.S. began yelling hysterically that Thompson had beaten her and was going to kill

her. Thompson was detained and arrested.

¶ 5 Officers then went into the room to photograph the scene and gather evidence. They found blood on the sheets, on the floor and on the bathroom wall, and a washcloth that appeared to have blood soaked into it. Sperm was also found on vaginal swabs taken from J.S. No DNA (deoxyribonucleic acid) analysis was conducted on the blood or sperm samples. Blood samples taken from J.S. and Thompson indicated that the blood type in the collected samples matched that of J.S., but not Thompson.

¶ 6 Hotel records showed that the room was registered to Thompson. He had registered as a representative of Loram Corporation, with a Minnesota address. There were 12 or 13 rooms registered to that company.

\*298 ¶ 7 The State charged Thompson with first degree rape. At a defense interview, J.S. said that she thought Thompson was 5'7" or 5'8", had light-colored hair and no facial hair. In fact, Thompson was 6'3", had dark hair and facial hair. Thompson did not present any evidence at trial. On July 25, 1995, a jury convicted him of first degree rape and he was sentenced to 280 months in prison.

¶ 8 On October 20, 2006, Thompson filed a motion under RCW 10.73.170 asking for DNA testing of evidence gathered in his case. He argued that his defense at trial was that he did not commit the rape and that DNA testing would prove his innocence and reveal the rapist's true identity. The court denied the motion, based in part on the fact that the evidence had been destroyed. He appealed and this court dismissed the appeal as moot, based on the assumption that all testable evidence had been destroyed.

¶ 9 After Thompson later discovered that the state patrol in fact had retained blood and semen samples from his case, the State moved this court to recall the mandate in the appeal. This court granted the motion and also ordered the parties to address

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whether the trial court's order denying DNA testing was appealable as of right and whether the RAP rules apply to determining indigency. This court then stayed the appeal pending our state Supreme Court's decision in *State v. Riofta*,<sup>FN1</sup> a case that involved the applicability of RCW 10.73.170. When *Riofta* was decided in June 2009, the stay was lifted and this case was referred to a panel of this court for oral argument.

FN1. 166 Wash.2d 358, 209 P.3d 467 (2009).

#### ANALYSIS

[1] ¶ 10 The State correctly concedes that the denial of a motion for DNA testing under RCW 10.73.170 is appealable as a matter of right because it is a final order made after judgment that affects a substantial right.<sup>FN2</sup> Thompson \*299 also contends that he is entitled to an order of indigency for this appeal under RAP 15.2(b)(1)(a). That rule provides that an indigent party is entitled to public funds for appellate review of "criminal prosecutions or juvenile offense proceedings meeting the requirements of RCW 10.73.150." RCW 10.73.150 provides:

FN2. See RAP 2.2(a)(13).

Counsel shall be provided at state expense to an adult offender convicted of a crime and to a juvenile offender convicted of an offense when the offender is indigent ... and the offender:

(1) Files an appeal as a matter of right....

Thompson contends that because he is entitled to an appeal of an order denying DNA testing as a matter of right, RAP 15.2(b)(1)(a) applies to this appeal. We agree.

¶ 11 The State argues that a motion for DNA testing under RCW 10.73.170 is not a challenge to a conviction, but a request for an order to conduct testing. The State contends that RCW 10.73.150

must be harmonized with the DNA testing statute, RCW 10.73.170, which provides counsel for indigent parties only for motions filed in the trial \*\*904 court, not appellate review. That statute provides in part:

Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request.<sup>[FN3]</sup>

FN3. RCW 10.73.170(4).

Alternatively, the State contends that if the statutes conflict, this statute must apply because it is more specific.

¶ 12 Because Thompson is requesting public funds for appellate review, RAP 15.2(b)(1)(a) and RCW 10.73.150 control because they address appeals as of right. This does not conflict with RCW 10.73.170, which simply addresses public funding of motions in the trial court, not appeals. But even if the statutes did conflict, RCW 10.73.150 is more \*300 specific because it is the one that addresses appeals. Thus, RAP 15.2(b)(1)(a) applies to Thompson's appeal.

[2][3] ¶ 13 Thompson next contends that the trial court erred by denying his motion for DNA testing because he satisfied both the procedural and substantive requirements for testing under RCW 10.73.170. That statute provides that a motion for DNA testing 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

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(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;<sup>[FN4]</sup>

FN4. RCW 10.73.170(2)(a)

(b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement.<sup>[FN5]</sup>

FN5. RCW 10.73.170(2)(b).

The statute further provides that the motion shall be granted if, in addition to establishing these two procedural requirements, "the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."<sup>FN6</sup> We review a trial court's decision on a motion brought under this statute for an abuse of discretion.<sup>FN7</sup>

FN6. RCW 10.73.170(3).

FN7. *Riofta*, 166 Wash.2d at 370, 209 P.3d 467.

¶ 14 Here, the trial court denied Thompson's motion based on the following reasons:

1. As the evidence has been destroyed, there is nothing that can be tested.
2. The defendant fails to satisfy RCW 10.73.170(2)(a). There has been no showing that DNA technology was unavailable at the time of trial, or that current technology is significantly more accurate or would provide significant new information.

\*301 [3.] The defendant has failed to satisfy RCW 10.73.170(3). There is no likelihood that the DNA evidence would demonstrate the defendant's innocence.

¶ 15 It is undisputed that the first reason is no longer supported because the evidence is in fact

available for testing. Thompson also contends that the second reason is without basis because it is inconsistent with our state Supreme Court's decision in *Riofta*. *Riofta* held that DNA testing "is not precluded by the procedural requirements of the statute on the basis that it could have been, but was not, tested prior to the trial."<sup>FN8</sup> Rather, the court concluded that "[t]he plain meaning of the statute allows DNA testing based on either advances in technology or the potential to produce significant information," rejecting the Court of Appeals' reasoning that postconviction testing of an item could not yield new information when the item was not newly discovered evidence and could have been tested at trial.<sup>FN9</sup> Thus, the second reason in support of the trial court's order is also without basis because DNA \*\*905 testing here would produce significant new information about the identity of the rapist.

FN8. 166 Wash.2d at 366, 209 P.3d 467.

FN9. 166 Wash.2d at 365, 209 P.3d 467.

¶ 16 Thompson further contends that the trial court erred by finding that he had not satisfied the third substantive statutory requirement that he has shown the likelihood that the DNA evidence would demonstrate innocence. As the court recognized in *Riofta*, "[i]n contrast to the statute's lenient procedural requirements, [RCW 10.73.170(3)'s] substantive standard is onerous."<sup>FN10</sup> The court noted that the statute's "use of the word 'innocence' indicates legislative 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 \*302 was wrongfully convicted of a crime."<sup>FN11</sup> The court then explained that to determine whether the standard has been met,

FN10. 166 Wash.2d at 367, 209 P.3d 467.

FN11. 166 Wash.2d at 369 n. 4, 209 P.3d 467.

a court must look to whether, viewed in light of all the evidence presented at trial or newly dis-

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covered, 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 postconviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator.<sup>FN12</sup>

FN12. 166 Wash.2d at 367-68, 209 P.3d 467 (emphasis omitted).

The court also noted that “[t]he failure to seek DNA testing at trial is a factor the trial court may take into account in deciding whether there is a likelihood the requested testing would demonstrate innocence on a more probable than not basis.”<sup>FN13</sup>

FN13. 166 Wash.2d at 366 n. 1, 209 P.3d 467; see also 166 Wash.2d at 368-69 n. 3, 209 P.3d 467.

¶ 17 In *Riofta*, the court held that the trial court reasonably concluded that the absence of the defendant's DNA on a hat would not likely demonstrate his innocence on a more probable than not basis.<sup>FN14</sup> The court noted that the hat belonged to another person and was only worn by the shooter for a short time and that the defendant's head was shaved.<sup>FN15</sup> The court further concluded that the presence of a third person's DNA on the hat “is also unavailing” because it did not establish that the person wearing the hat was wearing it at the time of the shooting.<sup>FN16</sup> The court also noted the strong eyewitness identification evidence.<sup>FN17</sup>

FN14. 166 Wash.2d at 370, 209 P.3d 467.

FN15. 166 Wash.2d at 370, 209 P.3d 467.

FN16. 166 Wash.2d at 370-71, 209 P.3d 467.

FN17. 166 Wash.2d at 371, 209 P.3d 467.

\*303 ¶ 18 But in *State v. Gray*,<sup>FN18</sup> this court held that the defendant satisfied the substantive require-

ment of RCW 10.73.170 where vaginal swabs, underwear and hair samples were not tested in a rape case. Gray was convicted for raping two teenagers at a campsite. He was found by police in a field near the campsite after the crime was reported and a truck parked near the campsite was registered to Gray.<sup>FN19</sup> The victims were unable to identify Gray and two other witnesses identified him in one photo montage but not in another.<sup>FN20</sup> Vaginal and rectal swabs taken from the victims tested negative for semen.<sup>FN21</sup> Hair samples from Gray and the victims were also collected.<sup>FN22</sup> Hair comparison analysis did not conclusively establish Gray as the assailant and no DNA analysis was conducted on the hair samples or the swabs collected from the victims.<sup>FN23</sup> The court concluded that the absence of Gray's DNA in any of the hair samples, underwear or swabs would suggest Gray's innocence because the crime was committed by a single person who had intimate contact with the victims.<sup>FN24</sup> The court distinguished *Riofta*, where the absence of Riofta's \*\*906 DNA on the hat did not demonstrate his innocence because more than one person could have worn the hat.<sup>FN25</sup>

FN18. 151 Wash.App. 762, 774, 215 P.3d 961 (2009).

FN19. 151 Wash.App. at 766, 215 P.3d 961.

FN20. 151 Wash.App. at 766, 215 P.3d 961.

FN21. 151 Wash.App. at 767, 215 P.3d 961.

FN22. 151 Wash.App. at 767, 215 P.3d 961.

FN23. 151 Wash.App. at 767, 215 P.3d 961.

FN24. 151 Wash.App. at 774, 215 P.3d 961.

FN25. 151 Wash.App. at 774, 215 P.3d

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961.

¶ 19 Thompson contends that likewise here, the evidence at trial combined with test results showing that his DNA was not found in the samples would raise a reasonable probability of his innocence. He points to the weak eyewitness identification by J.S., noting that her physical description\*304 of him did not match Thompson.<sup>FN26</sup> The State contends that there was also strong eyewitness identification evidence admitted at trial: three police officers saw Thompson pushing J.S. out of the hotel room where the rape occurred and J.S. identified him to the officers at the time as the person who had just beaten her and threatened to kill her.

FN26. He also points to an offer of proof he made pretrial that J.S.'s description actually matched that of another coworker who was also staying at the hotel at the time. But as the State contends, this was not evidence admitted at trial and is therefore not properly considered in the determination of whether he established his innocence.

¶ 20 When evaluated in combination with the other evidence, the absence of Thompson's DNA in the blood samples would not suggest his innocence on a more probable than not basis. Because the blood type matched the victim's, not Thompson's, the absence of his DNA in the blood sample would not necessarily exculpate him. Rather, it would simply indicate that the blood came from J.S.'s injury.

¶ 21 But an absence of Thompson's DNA in the semen samples is highly probative of his innocence because the only donor of the semen was the rapist. Because there was no evidence that J.S. had intercourse that night with anyone other than the rapist, DNA results ruling out Thompson as the sperm donor would rebut even the strong eyewitness testimony indicating that he was the rapist.<sup>FN27</sup> Indeed, favorable DNA results here would be even stronger evidence of innocence than in *Gray* where there was no semen to be tested, but only swabs

from areas where intimate contact may have occurred.

FN27. The State improperly relies on a statement made by Thompson that he admitted to having consensual intercourse with J.S. This statement was not admitted at trial and as discussed above, the "more probable than not" innocence determination is made by considering only evidence that was admitted at trial.

¶ 22 We reverse and remand for an order permitting DNA testing under RCW 10.73.170.

WE CONCUR: APPELWICK and COX, JJ.  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 BOBBY RAY THOMPSON, )  
 )  
 Appellant. )

No. 59366-8-1  
ORDER DENYING MOTION  
FOR RECONSIDERATION

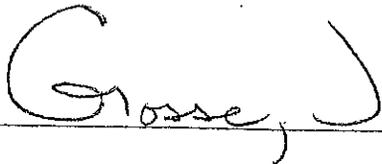
The respondent, State of Washington, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 26<sup>th</sup> day of May, 2010.

FOR THE COURT:



Judge

2010 MAY 26 PM 4:09

## APPENDIX C

### RCW 10.73.170. DNA TESTING REQUESTS

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

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

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

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

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

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

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

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