

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 17, 2014, 8:10 am
BY RONALD R. CARPENTER
CLERK

NO. 89620-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN LEE GENTRY,

Appellant.

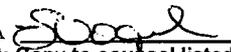
ON DIRECT REVIEW FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 88-1-00395-3

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

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

<p>SERVICE</p> <p>Tim Ford Ste. 1500, 705 2nd Ave Seattle, WA 98104 Email: TimF@MHB.com</p> <p>Rita Griffith Email: griff1984@comcast.net</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, or, if an email address appears to the left, electronically. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED June 17, 2014, Port Orchard, WA </p> <p>Original e-filed at the Supreme Court; Copy to counsel listed at left.</p>
--	--

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

A. PRIOR PROCEDURAL HISTORY 1

B. POST-CONVICTION DNA PROCEEDINGS 4

III. ARGUMENT 8

A. UNDER BOTH RAP 2.5 AND THE PEREMPTORY RECUSAL STATUTE, GENTRY HAS WAIVED HIS CLAIM THAT THE JUDGE SHOULD HAVE TREATED HIS RECUSAL MOTION AS AN AFFIDAVIT OF PREJUDICE.8

B. JUDGE FORBES DID NOT ABUSE HER DISCRETION IN DECLINING TO RECUSE HERSELF WHERE THERE WAS NO EVIDENCE FROM WHICH AN OBJECTIVE OBSERVER WOULD CONCLUDE THAT SHE COULD NOT FAIRLY ADJUDICATE THE CASE, WHERE SHE LEFT THE PROSECUTOR’S OFFICE MANY YEARS EARLIER, HAD NEVER HAD ANY INVOLVEMENT IN GENTRY’S CASE, AND HAD NO OTHER PERSONAL INTEREST IN IT.14

C. THE TRIAL COURT’S CONSIDERATION OF THE STATE’S MOTION TO MODIFY ITS PREVIOUS ORDER WAS WITHIN ITS DISCRETION.....17

D. THE TRIAL COURT CORRECTLY CONCLUDED THAT IN LIGHT OF THE NEW DNA TEST RESULTS, GENTRY WAS UNABLE TO MEET HIS BURDEN OF SHOWING THAT FURTHER TESTING WOULD LIKELY SHOW HIS INNOCENCE.21

IV. CONCLUSION..... 34

TABLE OF AUTHORITIES

CASES

<i>Bargreen v. Little</i> , 27 Wn.2d 128, 177 P.2d 85 (1947).....	12
<i>Buechler v. Wenatchee Valley College</i> , 174 Wn. App. 141, 98 P.3d 110 (2013).....	15, 16
<i>District Attorney's Office v. Osborne</i> , 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).....	21, 22
<i>Garvey v. Skamser</i> , 69 Wash. 259, 124 P. 688 (1912).....	12
<i>Gentry v. Sinclair</i> , 576 F.Supp.2d 1130 (W.D. Wash. 2008), <i>aff'd</i> , 705 F.3d 884, 902-05 (9th Cir. 2013)	3
<i>Herrera v. Collins</i> , 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).....	23
<i>In re Gentry</i> , 137 Wn.2d 378, 972 P.2d 1250 (1999).....	3
<i>In re Gentry</i> , 179 Wn.2d 614, 316 P.3d 1020 (2014).....	3, 5
<i>In re Haynes</i> , 100 Wn. App. 366, 996 P.2d 637 (2000).....	15, 16
<i>In re Meredith</i> , 148 Wn. App. 887 201 P.3d 1056 (2009).....	14
<i>Lemon v. Lemon</i> , 59 Wn. App. 568, 799 P.2d 748 (1990).....	10
<i>Riofta v. State</i> , 166 Wn.2d 358, 209 P.3d 467 (2009).....	passim
<i>Sawyer v. Whitley</i> , 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).....	20, 31
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	14
<i>State v. Barber</i> , 170 Wn.2d 854, 248 P.3d 494 (2011).....	30, 31, 32

<i>State v. Clark</i> , 139 Wn.2d 152, 985 P.2d 377 (1999).....	21
<i>State v. Davis</i> , 141 Wn.2d 798, 10 P.3d 977 (2000).....	21
<i>State v. Davis</i> , 175 Wn.2d 287, 290 P.3d 43 (2012).....	14
<i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	12
<i>State v. Espinoza</i> , 112 Wn.2d 819, 774 P.2d 1177 (1989).....	10
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	2, 3, 26, 27
<i>State v. Gray</i> , 151 Wn. App. 762, 215 P.3d 961 (2009).....	passim
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	9, 10
<i>State v. Ryncarz</i> , 64 Wn. App. 902, 826 P.2d 1101 (1992).....	13
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	9
<i>State v. Smith</i> , 13 Wn. App. 859, 861, 539 P.2d 101 (1975).....	12
<i>State v. Thompson</i> , 173 Wn.2d 865, 271 P.3d 204 (2012).....	passim
<i>Tatham v. Rogers</i> , 170 Wn. App. 76, 283 P.3d 583 (2012).....	14
<i>Wolfkill Feed & Fertilizer Corp. v. Martin</i> , 103 Wn. App. 836, 14 P.3d 877 (2000).....	14

STATUTORY AUTHORITIES

Laws of 2000, ch. 92, § 1.....	22
RCW 4.12.050.....	10
RCW 4.12.050.....	11
RCW 10.73.150.....	25

RCW 10.73.170 passim

OTHER AUTHORITIES

149 Cong. Rec. S14046 (daily ed. Nov. 5, 2003) 23
HB 1014 (2005) 22
HB 2872 (2004) 22
House Bill Report on HB 2872 (2004) 22, 23
House Bill Report on HB 1014 (2005) 22

RULES

CJC 2.11 15
CrR 7.8 18
KCLCR 59 18
KCLCR 81 18
KCLCrR 1.1 18
RAP 2.5 9

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether under both RAP 2.5 and the preemptory recusal statute, Gentry has waived his claim that the judge should have treated his recusal motion as an affidavit of prejudice?

2. Whether Judge Forbes acted within her discretion in declining to recuse herself where there was no evidence from which an objective observer would conclude that she could not fairly adjudicate the case where she left the prosecutor's office many years earlier, had never had any involvement in Gentry's case, and had no other personal interest in it?

3. Whether the trial court's consideration of the state's motion to modify its previous order was within its discretion?

4. Whether the trial court correctly concluded that in light of the new DNA test results, Gentry was unable to meet his burden of showing that further testing would likely show his innocence?

II. STATEMENT OF THE CASE

A. PRIOR PROCEDURAL HISTORY

Jonathan Lee Gentry was charged in 1990 with first-degree aggravated murder of 12-year-old Cassie Holden. Following a trial and conviction, he was sentenced to death. Gentry appealed, and this Court affirmed. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*,

516 U.S. 843 (1995). That opinion sets forth the facts of the case:

In early June 1988, the 12-year-old victim lived with her father and stepmother in Pocatello, Idaho. On June 11, 1988, she traveled to Kitsap County, Washington, to spend the summer with her mother at her mother's home near Bremerton. On June 13, 1988, at approximately 4:30 p.m., the young victim went for a walk. She was expected home at 6 p.m. for dinner, but never returned.

Her body was found early June 15, 1988, behind a large log at the bottom of a path running from a trail through a wooded area adjacent to Rolling Hills Golf Course, near Bremerton, Washington. The victim's eyeglasses, earring and a bouquet of flowers were found approximately 148 feet up the foot path on and near the main trail.

The victim appeared to have been sexually assaulted, as her jeans and underpants were pulled down and her T-shirt and bra pulled up. Her blue sweatshirt had been removed from one arm and pulled up partially covering her face. She had been struck in the head approximately 8 to 15 times, suffering 10 "significant" injuries.

Kitsap County sheriff deputies investigated the murder scene and determined that a trail of blood was splattered from the main trail, down the footpath about 148 feet to where the body was found. They found a 2.2-pound rock that had blue fibers crushed into it. The fibers matched the fibers in the victim's sweatshirt. The rock also had red spots on it that appeared to be blood. The rock was believed to be the murder weapon.

The autopsy showed that the victim had been killed by one of the blows to her head. The results of the autopsy could not show the order in which the blows were received or which blow actually killed the victim. The autopsy did not conclusively show that the young victim had been raped.

* * *

The investigation eventually focused on the Defendant. *A search of his residence was conducted and*

clothing samples, including a pair of shoes, were seized. Examination of the shoes indicated that blood had been wiped from the shoes. Spots of blood were found on the shoelaces and those bloodstains were the subject of a number of scientific tests. ... According to the State's experts, none of the tests performed on the bloodstains on Defendant's shoelaces eliminated the victim as the source of the blood.

* * *

Other evidence linking Defendant to the murder included the testimony of three persons who reported seeing a man matching Defendant's description near the place of the murder and around the time of the murder, and three former jailmates of the Defendant who testified that the Defendant admitted to them he had killed someone.

Gentry, 125 Wn.2d 579-81 (footnotes omitted; emphasis added).

Following his direct appeal, Gentry filed a personal restraint petition in this court, which was also denied. *In re Gentry*, 137 Wn.2d 378, 972 P.2d 1250 (1999).

In 1999, Gentry filed a federal habeas corpus petition, which was ultimately denied. *Gentry v. Sinclair*, 576 F.Supp.2d 1130 (W.D. Wash. 2008), *aff'd*, 705 F.3d 884, 902-05 (9th Cir.), *cert. denied*, 134 S. Ct. 102, *rehearing denied*, 134 S. Ct. 726 (2013).

In October 2011, Gentry filed a second PRP in this Court, along with a motion to withdraw the mandate in his original direct appeal. Both the petition and the motion were denied. *In re Gentry*, 179 Wn.2d 614, 316 P.3d 1020 (2014).

B. POST-CONVICTION DNA PROCEEDINGS

On February 3, 2011, Gentry file a motion for post-conviction DNA testing. CP 1. The State responded to the motion and agreed in part to testing. CP 478. On July 25, 2011, the superior court entered the agreed order granting the motion. CP 486.

On July 16, 2013, the state crime lab completed testing on the shoelace¹ taken from the shoe found in Gentry's closet. The report stated in pertinent part:

The partial DNA profile obtained from the left shoelace stains (25-9B) matches the DNA profile of Cassie Holden (from item 2-8). The estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is .1 in 110 trillion.

CP 519. The State then filed a motion to deny further testing. CP 505.

The motion was based on the futility of further testing:

In the present case, in addition to the substantial evidence admitted at trial, we now know that the odds are 1 in 110 *trillion* that the blood on Gentry's shoe was Cassie Holden's. There is now no possibility that the State has convicted the wrong man. Gentry should not be permitted to further waste the limited resources of the state crime lab on testing of additional evidence.

For the foregoing reasons, the State asks that the Court's order of July 25, 2011, be amended to deny further DNA testing of the evidence in this case.

CP 507 (emphasis in original).

On July 18, 2013, the State filed a note for motion docket setting

¹ See the italicized portion of the direct appeal opinion quoted above.

the matter for hearing on September 20, 2013. Supp. CP. The note indicated the matter would be set before Judge Forbes. *Id.*

Four days before the hearing,² Gentry set a letter to Judge Forbes. Gentry did not file any written motion to recuse or any affidavit of prejudice. The letter stated, in its entirety:

I understand that this case has recently been assigned to you for a hearing on a State's Motion now set for September 20, 2013. This is a capital case that was being actively litigated by the Kitsap County Prosecuting Attorney's Office from 1996 to 1999, a period during which I understand you were a Deputy Prosecuting Attorney in that office. I have not seen any indication you were directly involved in the case, but it was and is a prominent one and involves claims (still pending in other courts) of prosecutorial misconduct.

Because that appears to create a conflict and obviously implicates the appearance of fairness, I felt I should alert you to this prior to filing any motion for reassignment.

CP 695.

At the hearing, Judge Forbes acknowledged the letter, but pointed out that she had never met former prosecutor Danny Clem, or former trial prosecutor Irene Asai. RP (9/20) 2-3. She did know former trial prosecutor Brian Moran and former appellate prosecutor Pam Loginsky. However, she knew nothing about Gentry's case, and therefore declined to recuse herself:

Well, as I indicated before, I hear a number of cases out of

² The record does not indicate when the judge actually received the letter, although she had received it by the time of the hearing. RP (9/20) 2.

the prosecutor's office on a daily basis involving people that I have worked with who are the prosecutors.

I guess if you have a little more information about who it would be that might have the finger pointed at them, I might rethink my position on that. But I don't feel that my hearing this case on that issue presents an appearance-of-fairness question.

I also worked as a criminal defense attorney. I have handled matters as a defense attorney against this prosecutor's office. I have, you know, actively litigated cases against the prosecution. I was a member of WACDL. I have a more varied background than just being a prosecutor. And I haven't worked in the prosecutor's office since 2006. I wasn't in the criminal division since 2002, I believe. So it's been a while. And so at this point, I feel comfortable and I'm distant enough. I had no contact with this case when I was in the prosecutor's office. I think I saw the name on a box on a shelf, maybe at best, would be the most contact I had.

* * *

I know nothing about this case. I don't really even know the fact pattern about this case. I had no involvement in this case when I was in the prosecutor's office. I recall no discussions about this case when I was in the prosecutor's office.

The only issue of concern I would have is if you had evidence or you intended to offer evidence or argument of prosecutorial misconduct against people who I have already formed an opinion about, then I would entertain a request at that time. And I need to have more information.

I don't know Irene Asai. Never met her. I don't know Danny Clem. I have never met him. And so - I have met Mr. Moran. I worked with him for a little while, but I never worked a case with him. He was always in a different division.

At this point, there's nothing presented that makes me concerned about my ability to proceed on this case at this time, but I'm happy to revisit that if you want to comb through your files a little bit and present information to me.

If it is somebody that I knew and I feel that I have a predisposition to believe one way or another about who they are as a person and that is an issue of substance in this case, I would agree and I would remove myself from the case, but I don't have that in front of me.

RP (9/20) 5-6, 8.

Judge Forbes also disclosed that she had checked with her husband, who had been a Bremerton³ police officer at the time of the crime. However, he had not had any substantive involvement in the case:

I do want to mention that my husband is a retired police officer. He was not actively involved in this case. He worked for the Bremerton Police Department at the time. I did ask him if he was involved because I wanted to make sure that he wasn't involved, because any cases he was actively involved in, I don't, obviously, get involved in. And he indicated to me that he, I guess, worked as backup to the sheriff's office on crime scene containment, wrote no reports, to his recollection, and did not testify, was not a person who was actively involved in this case. In my opinion, that doesn't create an issue for me because he was not involved and I do not believe he will be a witness in the case, but I do want to make sure that it's clear to all what his involvement was.

RP (9/20) 6. The Court then proceeded to the substance of the State's motion, and after argument, took the matter under advisement. RP (9/20) 26.

On October 4, 2013, Gentry filed a written motion to recuse Judge Forbes.⁴ CP 580. The motion added no facts beyond those that were

³ The murder occurred in unincorporated Kitsap County and was investigated by the Sheriff's Office.

⁴ The State took no position on this issue in the trial court. CP 669.

discussed at the hearing regarding the participation of either Judge Forbes or her husband in Gentry's case.

On October 25, 2013, Judge Forbes, noting that Gentry's motion to recuse contained "arguments... substantially similar to those made orally" treated it as a motion to reconsider her oral decision, and denied the motion. CP 671.

On October 28, 2013, the court entered a written order granting the State's motion and denying further post-conviction DNA testing. CP 672. This appeal follows.

III. ARGUMENT

A. UNDER BOTH RAP 2.5 AND THE PEREMPTORY RECUSAL STATUTE, GENTRY HAS WAIVED HIS CLAIM THAT THE JUDGE SHOULD HAVE TREATED HIS RECUSAL MOTION AS AN AFFIDAVIT OF PREJUDICE.

Gentry first argues that the trial judge should have sua sponte treated his motion to recuse her as an affidavit of prejudice. This claim is without merit because Gentry never filed an affidavit of prejudice, never asserted that he believed Judge Forbes would be unable to fairly judge his case, and never suggested to Judge Forbes that she should recuse herself because Gentry was entitled to her recusal as a matter of right. The Court should decline to consider this claim for the first time on appeal.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (*citing* RAP 2.5(a)). One exception is that a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right.; *Kirkman*, 159 Wn.2d at 926 (*citing* RAP 2.5(a)(3)).

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be “manifest” and truly of constitutional dimension.. The defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. *Kirkman*, 159 Wn.2d at 926-27.

RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of “manifest” constitutional magnitude. *Kirkman*, 159 Wn.2d at 934. The Supreme Court has rejected the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” *Kirkman*, 159 Wn.2d at 934 (*quoting State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). Exceptions to RAP 2.5(a) must be construed narrowly. *Kirkman*, 159 Wn.2d at 935.

The reason for the rule is that appellate courts will not approve a

party's failure to raise the issue at the trial level where it could have identified error that the trial court might have corrected. *Kirkman*, 159 Wn.2d at 935. The failure to raise the issue deprives the trial court of this opportunity to prevent or cure the error. *Id.* The decision not to object is often tactical. *Id.* If raised on appeal only after losing below, further proceedings may be required with substantial consequences. *Id.*

Here, had Gentry actually filed an affidavit of prejudice, there is little likelihood that Judge Forbes would have heard the proceedings below. Instead, Gentry waited for an adverse result and now argues he is entitled to a new proceeding because the judge did not sua sponte treat his recusal motion as an affidavit of prejudice.

The right to recusal of the judge without a showing of actual prejudice flows from RCW 4.12.050. "There is no constitutional right to the removal of a judge; the right is created by statute." *Lemon v. Lemon*, 59 Wn. App. 568, 572, 799 P.2d 748 (1990), *reversed on other grounds*, 118 Wn.2d 422 (1992); *accord*, *State v. Espinoza*, 112 Wn.2d 819, 826, 774 P.2d 1177 (1989) ("the right to peremptory removal of a judge is not constitutional, but statutory").

At no point below did Gentry ever assert his rights under RCW 4.12.050. He never asserted that he believed he would be unable to receive a fair trial before Judge Forbes, in a declaration or affidavit, or

otherwise. His letter to the court only invoked the appearance of fairness doctrine. CP 695. His motion asserted only that “ an impartial observer could question the appearance of fairness.” CP 584. Even his oral argument before the court actually disavowed any claim that the judge was not impartial:

It seemed to me that given it's a capital case and the appearance of fairness, and the test I always use is, how do I explain to my client this is happening. If I explain to my client, a lawyer from this prosecutor's office, who it is contended was racially discriminatory and withheld evidence from him, is now going to be the judge in your case, it's not going to seem fair to him. And I don't think it would seem fair to most people. *And it has nothing to do with Your Honor personally, but it does have to do, I think, with the professional association and the appearance of fairness in that kind of circumstance.*

RP (9/20) 5 (emphasis supplied). Later, Gentry makes it clear that he is not contemplating a peremptory recusal under RCW 4.12.050, but one based on a showing of prejudice under RCW 4.12.040:

[W]e would make a motion then for Your Honor to recuse yourself and we would ask the opportunity to present that information and have that heard.

RP (9/20) 9. Because this issue was not raised below, and because it is not of constitutional magnitude, this Court should decline to consider it.

Moreover, even apart from RAP 2.5, the statute itself requires that the matter be raised in the trial court. Failure to call to the judge's attention an affidavit that was *actually filed* waives the issue:

[W]e do not believe that it should be the responsibility of

the trial judge to meticulously examine each file before him for the possible existence of an affidavit of prejudice.

State v. Smith, 13 Wn. App. 859, 861, 539 P.2d 101, *review denied*, 86 Wn.2d 1002 (1975); *accord Bargreen v. Little*, 27 Wn.2d 128, 177 P.2d 85 (1947) (failure to comply with statutory requirement that affidavit be “filed *and called to the attention of the judge*” waives claim for appeal) (*quoting* Rem. Supp. 1941, § 209-2)⁵ (emphasis the Court’s). Because Gentry neither filed an affidavit of prejudice nor called to the judge’s attention his intent to invoke his statutory right to peremptorily recuse her, the claim is waived.

None of the cases cited by Gentry require a different result. Most of them cite only general principles involving the statute. Brief of Appellant at 25-26. The remaining two cases only stand for the proposition that an affidavit *actually filed and brought to the attention of the judge* should not be construed in a hypertechnical manner. *See Garvey v. Skamser*, 69 Wash. 259, 262, 124 P. 688 (1912). (“The respondent argues that the affidavit is insufficient, in that it avers that the affiant ‘believes’ the judge to be prejudiced, whereas it should state that he ‘is prejudiced.’ The purpose of the statute is to give a change of judges upon a timely application, where the ‘party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge.’ The affidavit

⁵ The statutory language has stood materially unchanged for at least the past 100 years. *State v. Dennison*, 115 Wn.2d 609, 621 n.12, 801 P.2d 193 (1990).

is sufficient.”). Likewise *Ryncarz* also involved a technicality:

At his arraignment, Mr. Ryncarz filed an unverified affidavit and a motion for change of venue, purportedly based on RCW 4.12.030(2), .040, .050 and RCW 10.25.070. *Mr. Ryncarz made it clear by citing RCW 4.12.050* that he wanted not only a change of venue but a change of judge. There is no basis whatsoever for the change of venue in this record.

RCW 4.12.050 provides a mechanism for a change of judge as a matter of right if an affidavit of prejudice is timely. Mr. Ryncarz’ purported affidavit of prejudice was rejected for lack of proper form; it had not been signed before a notary public. The judge or clerk of court is authorized to administer oaths and affirmations. RCW 5.28.010. Nothing in RCW 4.12.050 precludes them doing so. Under RCW 9A.72.085 and GR 13, a notarized act is unnecessary if there is certification or declaration in the form prescribed. The record shows the judge or clerk of court could have corrected the purportedly improper form when Mr. Ryncarz appeared at his arraignment. When such a simple remedy is available and the result is otherwise so prejudicial, form should not prevail over substance. Mr. Ryncarz was entitled to a change of judge.

State v. Ryncarz, 64 Wn. App. 902, 903, 826 P.2d 1101 (1992).

Here, on the other hand, Gentry never made it known that he wished to peremptorily excuse Judge Forbes. Indeed, his every argument was that she should recuse herself because the appearance of fairness doctrine required it. At no point did Gentry ever assert that he did not believe Judge Forbes could fairly decide his case. Substance *should* prevail over form. Here, however, there was no substance whatsoever. This unpreserved claim should be rejected.

B. JUDGE FORBES DID NOT ABUSE HER DISCRETION IN DECLINING TO RECUSE HERSELF WHERE THERE WAS NO EVIDENCE FROM WHICH AN OBJECTIVE OBSERVER WOULD CONCLUDE THAT SHE COULD NOT FAIRLY ADJUDICATE THE CASE, WHERE SHE LEFT THE PROSECUTOR'S OFFICE MANY YEARS EARLIER, HAD NEVER HAD ANY INVOLVEMENT IN GENTRY'S CASE, AND HAD NO OTHER PERSONAL INTEREST IN IT.

Gentry next claims that Judge Forbes should have recused herself under the appearance of fairness doctrine. However, based on the record, no objective observer would question her impartiality.

A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *In re Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (citing *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000)), review denied, 167 Wn.2d 1002, 220 P.3d 207 (2009). This Court reviews a trial judge's decision whether to recuse herself to determine if the decision was manifestly unreasonable or based on untenable reasons or grounds. *State v. Davis*, 175 Wn.2d 287, 305, 290 P.3d 43 (2012); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). "The test

for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Tatham*, 170 Wn. App. at 96 (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d cir.1988)). The asserting party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough. *In re Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000). Gentry did not meet this burden.

For example, in *Buechler v. Wenatchee Valley College*, 174 Wn. App. 141, 98 P.3d 110 (2013), the judge disclosed that she had previously worked as an assistant attorney general representing the defendant college. That affiliation had lasted for eight years and ended several years before the lawsuit was instituted. *Buechler*, 174 Wn. App. at 147-48. The judge was also acquainted with the school's dean. *Id.* The Court held that the judge had no duty to recuse herself, finding CJC 2.11(A)(6)(a) & (b) controlling.⁶ *Buechler*, 174 Wn. App. at 161.

That rule provides that in the case of a former government

⁶ Gentry cites to Canon 3(D)(1). However, under the current Code of Judicial Conduct, adopted effective January 1, 2011, there is no Canon 3(D)(1). The current Canon 2 and, more specifically, the Rules thereunder, *see* CJC, Scope, applies to the to the claim presented by Gentry.

employee, the judge need recuse herself only where the judge “participated personally and substantially as a public official concerning the proceeding.” *Id.* In *Buechler*, because the judge had not worked for the Attorney General for many years and had had no personal involvement in the case before the court, recusal was not required. *Id.*

The situation is remarkably similar here. Judge Forbes was in private practice for some 6 years before taking the bench in 2012. *See Kitsap Sun 2014 Election Guide*, <http://elections.kitsapsun.com/candidates/jennifer-forbes/> (accessed June 13, 2014). Before that she worked in the civil division of the prosecutor’s office, handling non-criminal matters, between 2003 and 2006. *Id.* She had not been employed in the criminal division of the office since 2003. *Id.*

Moreover, she only worked in that capacity from 1997 to 2003. The certificate of finality in Gentry’s first PRP proceeding was issued on July 21, 1999, thus ending the office’s direct involvement in litigating this case until Gentry’s second PRP was filed in 2011.⁷ Judge Forbes thus worked for the prosecutor’s office for a total of two years while the Kitsap prosecutor’s office was actively litigating Gentry’s case. There is no evidence she was in any way personally involved in those proceedings. Nor is it likely that newly-hired deputy prosecutor would have been

⁷ The case was involved in federal habeas corpus litigation, handled by the Attorney General, from March 1999 through January of the current year.

working on a capital murder case.⁸ It is more likely that she would have been trying DUIs and fourth-degree assaults.

Gentry cites no factually analogous case or other authority that would require recusal under circumstances like those here. He cites no evidence that Judge Forbes had any interest in the outcome of the case. The record is uncontradicted that she had nothing to do with the trial or appellate proceedings in this case. Nothing in the record suggests she had any relationship with the individuals involved in the prosecution of this case some 15 years ago that would impair her ability to be fair.⁹ In short, Gentry has offered nothing but speculation and innuendo. No reasonable objective observer would question Judge Forbes's impartiality. She did not abuse her discretion in denying Gentry's motion to recuse her.

C. THE TRIAL COURT'S CONSIDERATION OF THE STATE'S MOTION TO MODIFY ITS PREVIOUS ORDER WAS WITHIN ITS DISCRETION.

Gentry next claims that the trial court erred in granting the State's motion to modify its own prior order. This claim is without merit.

⁸ Judge Forbes was admitted to the Washington Bar in October 1996. https://www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr_ID=26043 (accessed June 16, 2014).

⁹ Judge Forbes had met only two of prosecutors about whom Gentry expressed concern. Of those, Pam Loginsky left the office in 1998, *see* <http://www.waprosecutors.org/staff/PAM.HTML> (accessed June 16, 2014), and Brian Moran left in 1999. *See* <http://www.orrick.com/Lawyers/Brian-T-Moran/Pages/default.aspx> (accessed June 16, 2014).

First, Gentry persists in characterizing the State's motion below as one for "reconsideration." The State's motion was clearly not one for reconsideration. Indeed, the State consented to the entry of the original order based on the allegations and the facts existing at the time it was entered. CP 478. Rather, the State's motion was based on evidence recently developed, and was filed the *same day* the report was produced by the WSP Crime Lab. See CP 505, 519. Since the facts on which the motion was based did not exist until the day the motion was filed, it is unclear how the motion could be deemed untimely. In actuality, the State's motion was one to modify the Court's prior order based on new evidence.

In an apparent attempt to create an appearance of unfairness where none existed Gentry characterizes as "ironic" the trial court's application of KCLCR 59 to his recusal motion.¹⁰ Brief of Appellant at 31 n.11. In fact, that rule applies only to motions for reconsideration. Since the State's motion relied on new evidence, CrR 7.8, which has no local-rule counterpart applied. Moreover, KCLCR 81 provides that the "Court may modify or suspend any of these rules, in any given case, upon good cause being shown therefore or upon the Court's own motion." Thus even if KCLCR 59's 10-day limit applied, the court would have been within its

¹⁰ The local civil rules apply to criminal matters when not inconsistent. KCLCrR 1.1.

discretion to overlook that limit. Since the evidence upon which the State's motion was based did not even exist within the 10 days set forth in the rule, the court would clearly not have abused its discretion in doing so.

Secondly, he asserts that the trial court had no substantive right to reconsider its own previously-entered order. He faults the court because the statute has no specific provision to allow the court to revisit its order for testing. Gentry, however, is the appellant, and bears the burden of showing trial court error.

Nothing in the statute prohibits such a reconsideration. Moreover, such a reconsideration is far more in keeping with the Legislative intent that a rule that would require continuous testing even when there was likelihood that it would establish innocence.

RCW 10.73.170(3) requires that the defendant show "the likelihood that the [further] DNA evidence would demonstrate innocence on a more probable than not basis." See *Riofta v. State*, 166 Wn.2d 358, ¶ 22, 209 P.3d 467 (2009).

This onerous substantive standard is not met merely by the defendant's showing that favorable DNA results might be obtained:

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 postconviction 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 ¶ 24 (emphasis the Court's).

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)).

In the present case, in addition to the substantial evidence admitted at trial, we now know that the odds are 1 in 110 *trillion* that the blood on Gentry’s shoe was Cassie Holden’s. There is now no possibility that the State has convicted the wrong man. Gentry should not be permitted to

further waste the limited resources of the state crime lab on testing of additional evidence.¹¹

D. THE TRIAL COURT CORRECTLY CONCLUDED THAT IN LIGHT OF THE NEW DNA TEST RESULTS, GENTRY WAS UNABLE TO MEET HIS BURDEN OF SHOWING THAT FURTHER TESTING WOULD LIKELY SHOW HIS INNOCENCE.

Gentry also substantively faults the trial court's conclusion that further DNA testing was not warranted. Since Gentry offers no plausible outcome that would likely demonstrate his innocence, the trial court acted within its discretion in refusing to authorize further waste of state resources.

There is no constitutional right to post-conviction DNA testing. *District Attorney's Office v. Osborne*, 557 U.S. 52, 72, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009). The Legislature has, however, authorized the use of public funds for such testing under specified circumstances. The issue in this case is whether Gentry meets these statutory requirements.

The Legislature first provided for postconviction DNA testing in

¹¹ Gentry twice refers to the report as "unsworn" Brief of Appellant at 31, 33. He does not actually present any argument that the report was not what it purported to be, *i.e.* a true and accurate copy of the report issued by the Washington State crime lab after testing the shoelace from Gentry's shoe. Nor did he interpose any objection to the authenticity of the report at the hearing below, or in his written submissions to the trial court. *See* RP (9/20); CP 521-24, 577-78. Generally, questions of the admissibility of evidence, are not of constitutional magnitude and do not fall within RAP 2.5's exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999).

2000. Laws of 2000, ch. 92, § 1. That statute provided for an administrative procedure. The decision whether to authorize testing was made by the prosecutor, with appeal to the attorney general. This statute expired December 31, 2004.

In the 2004 legislative session, a bill was introduced to reauthorize postconviction testing. The decision-making authority was to be transferred to the court of conviction. HB 2872 (2004). This bill was not enacted.

A similar bill was introduced the next year. HB 1014 (2005). The House Bill Report explained the relationship of this bill to the previous year's bill: "This was an agreed upon bill in 2004, but due to lack of time, the Legislature did not get a chance to have it moved and voted off the suspension report." House Bill Report on SHB 1014 at 3 (2005). The 2005 version of the bill was enacted.

Postconviction DNA testing involves a balancing of interests. On the one hand, it is important to have "a process ... in place for cases where DNA tests could provide evidence of a person's innocence." House Bill Report on HB 2872 at 3 (2004). On the other hand, it is important to avoid unnecessary testing. Postconviction testing can be costly and place a burden on laboratories that are already overloaded. It does not always lead to useful results. *Osborne*, 557 U.S. at 80-82 (Alito, J., concurring).

[E]xperience also points to the need to ensure that post-conviction DNA testing is appropriately designed so as to benefit actually innocent persons, rather than actually guilty criminals who wish to game the system or retaliate against the victims of their crimes. Frequently, the results of post-conviction DNA testing sought by prisoners confirm guilt, rather than establishing innocence. In such cases, justice system resources are squandered and the system has been misused to inflict further harm on the crime victim.

149 Cong. Rec. S14046 (daily ed. Nov. 5, 2003) (statement of Sen. Kyl, *quoting* Sarah Hart, Director, National Institute of Justice).

The Washington statute resolves this problem by setting a high standard for testing. “By keeping the high ‘proof of innocence’ standard in the bill, the number of requests will remain low and testing will only be ordered in cases where there is a credible showing that it likely could benefit an innocent person.” House Bill Report on HB 2872 at 3 (2004). The standard recognizes that while a criminal defendant is presumed innocent until proven guilty and his guilt must be proven beyond a reasonable doubt, a post-conviction petitioner “does not come before the Court as one who is ‘innocent,’ but ... as one who has been convicted by due process of law” of a violent felony. *Herrera v. Collins*, 506 U.S. 390, 399-400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

RCW 10.73.170 provides:

(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.

Subsection (2) is a pleading provision. *Riofta*, 166 Wn.2d at ¶ 13.

If the defendant's motion contains the requisite allegations, the Court then considers whether the probable innocence standard has been met. *Id.*

Subsection (3) sets forth the substantive requirements that the defendant must meet. "In contrast to the statute's lenient procedural requirements, its substantive standard is onerous." *Riofta*, 166 Wn.2d at ¶ 22.

The State has not contested that Gentry can meet the pleading

requirement under RCW 10.73.170(a)(ii) & (b). The only question is whether he can meet the substantive likely innocence requirement.

The onerous substantive standard is not met merely by the defendant's showing that favorable DNA results might be obtained:

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).

In *Riofta*, the Court concluded that even a favorable test result would not exonerate *Riofta*. There was therefore no need to examine whether there was any probability that the testing would be favorable. *See Riofta*, 166 Wn.2d at ¶ 21 (framing the issue before the Court of Appeals as whether *Riofta* could show innocence on a more likely than not basis "even if" the test results were favorable).

RCW 10.73.150 thus requires that there be a likelihood that *the DNA evidence*, along with other relevant evidence, would show innocence. Here, there was no such likelihood.

In the present case, in addition to the substantial evidence admitted at trial, we now know that the odds are 1 in 110 *trillion* that the blood on Gentry's shoe was Cassie Holden's. There is now no possibility that the

State has convicted the wrong man. Gentry should not be permitted to further waste the limited resources of the state crime lab on testing of additional evidence.

Gentry claims the report of Kay Sweeney casts doubt on the crime lab's results. He repeats this assertion several times, as if this will make it true. An examination of Sweeney's report,¹² fails to reveal the basis for this claim.

Sweeney observed that he was unsure if the spots on the shoelaces had not been tested to determine if they were in fact blood. CP 572. He went on to note, however, that a microscopic examination showed they had a "microscopic appearance typical of blood deposits." CP 572. The crime lab confirmed they were. CP 519.

Sweeney also opined that the shape and appearance of the spots on the laces were inconsistent with blood spatter based on their volume and the lack of "surface crust." CP 572. He acknowledged, however, that the removal of the laces from the shoes could have scraped the crust off. *Id.* He stated he also would have expected spatter on the shoes as well. CP 573. Sweeney apparently was unaware, or ignored, the fact that the trial evidence shoes indicated that blood had been wiped from the shoes.

Gentry, 125 Wn.2d at 580.

¹² The State would note that this report, like the crime lab's is also unsworn. Nor does there appear to be any description of Sweeney's credentials in the record.

Likewise, Gentry's assertions regarding the hair evidence also fail to meet his burden of showing likely innocence. The trial testimony showed that two hairs found on the victim were consistent physically with those of Gentry and his brother (who was at sea at the time of the crime). *Gentry*, 125 Wn.2d at 579-80. Additionally, PCR-DNA testing was performed on these hairs. *Gentry*, 125 Wn.2d at 580. The analysis excluded Gentry and the victim, but not Gentry's brother.¹³ *Id.*

Even in the unlikely event that further analysis (assuming it would even be possible) of this single hair were to exclude Gentry's brother as the donor, Gentry again fails to explain how, in light of the test results on the shoe, he can demonstrate any reasonable probability of innocence.

Gentry finally argues that the trial court was incorrect under *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012). Gentry argues that under *Thompson*, 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

¹³ Gentry's brother was at sea in the Navy at the time of the murder. *Gentry*, 179 Wn.2d at 637.

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 this was the only issue before the Court, 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*.

The State maintains, however, that *Gray* misinterpreted both the statute and *Riofta*. *Gray* begins its analysis of the substantive portion of the statute (RCW 10.73.170(3)) by citing *Riofta* as enunciating that the “legislative intent behind the 2005 amendment to RCW 10.73.170 was to broaden access to DNA testing.” *Gray*, 151 Wn. App. at ¶ 25. The cited passage in *Riofta*, however, was addressing the new *procedural* aspects of the statute, which are lenient. *Riofta*, 166 Wn.2d at ¶ 15 (“in 2005, the legislature broadened procedural requirements of the statute.”) *Gray*, however applies that exegesis to the *substantive* portion of the statute, which *Riofta* held created, in contrast, an “onerous” standard. *Riofta*, 166 Wn.2d at ¶ 22.

From this premise, it takes the language discussed above in *Riofta* as a mandate and imports a requirement that the trial court assume the DNA results will be favorable when weighing whether a defendant has met his burden of showing likely innocence. *Gray*, 151 Wn. App. at ¶ 27. Insertion of the gloss “favorable results” into the statutory language

directly defeats the statutory intent of *limiting* testing to those cases where there was a likelihood of innocence. The statute permits testing only where the defendant can show “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). Nothing in the statute permits a presumption that the evidence will be favorable. Indeed the plain reading is that the defendant must show that it is likely to be favorable. As noted above, *Riofta* contemplates that the failure to request DNA testing at the time of trial may in some cases raise an inference that the defense believed the results would be unfavorable, and that such evidence may be considered in weighing the defendant’s proof under RCW 10.73.170(3). If the court is to assume the DNA evidence will be favorable, such a calculus would make no sense.

As this 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 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 emphasized 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).¹⁴ 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.

Finally, even were such an interpretation of the statute justifiable on an initial examination, there is simply no justification for such a presumption to continue once new DNA testing of the most significant piece of evidence has positively connected the defendant with the victim. Such is the case here. As discussed, Gentry presents no plausible basis to conclude that he is likely innocent. Nor is there any conceivable justification for continuing to waste the State's resources in this case. The ruling below should be affirmed.

¹⁴ 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 June 16, 2014).

IV. CONCLUSION

For the foregoing reasons, Gentry's conviction and sentence should be affirmed.

DATED June 17, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R D Hauge', with a long horizontal flourish extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, June 17, 2014 8:11 AM
To: 'Lori Vogel'
Subject: RE: In re: State of WA vs Jonathan Gentry, 89620-8, Respondent's Brief

Rec'd 6-17-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lori Vogel [mailto:LVogel@co.kitsap.wa.us]
Sent: Tuesday, June 17, 2014 7:53 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: In re: State of WA vs Jonathan Gentry, 89620-8, Respondent's Brief

Please see the attached document. Thanks!

- **Case name:** In re State of WA vs Jonathan Gentry
- **Case number:** 89620-8
- **Name of the person filing the document:** Randall Avery Sutton
- **Phone number of the person filing the document:** 360-307-4301
- **Bar number of the person filing the document:** 27855
- **E-mail address of the person filing the document:** rsutton@co.kitsap.wa.us

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