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Jordan McCrite

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STATE V. CRUMPTON: HOW THE WASHINGTON STATE SUPREME COURT IMPROVED ACCESS TO JUSTICE IN POST-CONVICTION DNA TESTING

Jordan McCrite*

Abstract: Post-conviction DNA testing is a valuable tool for ensuring innocent people are not wrongfully incarcerated. Society has strong interests in confirming that available, yet previously untested, DNA evidence matches the person convicted. Access to post-conviction DNA testing, however, has been limited to maintain finality and avoid an over-burdened court system. This Note examines post-conviction DNA testing in Washington State, particularly after the 2014 Washington State Supreme Court decision, *State v. Crumpton*. In *Crumpton*, a majority of the Court—over a strongly worded dissent—read a favorable presumption into Washington’s post-conviction DNA testing statute. The favorable presumption requires courts to presume the DNA test would be favorable to the petitioner, thus making it easier for convicted persons to access testing. Given the trend in other states, the astonishing number of exonerations, and the apparent falsity of the myth that DNA requests are over-burdening courts, Washington’s interest in justice supports expanding access to post-conviction DNA testing.

INTRODUCTION

Imagine you are incarcerated, spending day after day in prison for a crime you did not commit. With each appeal, hope and fear fill your mind. Ronald Cotton felt this way when he learned, after spending eleven years in prison for a rape he did not commit, that a court granted his motion for post-conviction DNA testing.¹ Ronald describes the period between the motion and the DNA results as a waiting game, a time filled with nightmares:

I don’t know what I was more afraid of: the fact that this was my last shot at freedom and it could all backfire like it had before, or that it might work, and I would finally walk into the world again. . . . I didn’t know how much more my nerves could take. I resolved to put the case out of my mind. There was nothing more I could do now.²

* The author interned for a county prosecuting attorney’s office during law school. While there, she did not work on or learn of any matters relating to post-conviction DNA testing, or the statutes and cases cited herein.

1. JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 175–76 (2009).

2. *Id.* at 176–78.

On the other hand, imagine you were the victim of a horrendous crime; you are trying to heal, and build a life outside of the pain inflicted upon you. As each court date approaches, you anticipate closure, only to find out there will be more court dates in your future. Jennifer Thompson-Cannino, the victim in Ronald Cotton's case, felt this way upon learning a court granted the man convicted of raping her post-conviction DNA testing.³ Police asked Jennifer to give a sample of her blood for the laboratory to determine what DNA belonged to her and what belonged to her attacker.⁴ Jennifer described how this felt:

I couldn't believe how unfair it all was, that a twice-convicted rapist who was supposed to be sent away to die in prison could keep messing with my life. Weren't the two trials enough? There was a part of me that wanted to say, "Screw it, his lawyers are going to have to come with a search warrant before they get a drop of my blood." And this, I thought, looking out at our neatly mowed lawn and the tricycle parked by the garden, this is *mine*, and Ronald Cotton has no right to encroach on any of it. Still, the thought that this would go on any longer—that it would keep coming back into my life—was enough to make me agree. If this would finally make it go away, then I'd comply.⁵

These two perspectives illustrate the high stakes of post-conviction review and the very real impact it can have on people's lives. Although there are many different post-conviction review procedures and remedies, this Note focuses on post-conviction DNA testing. In particular, this Note analyzes the right to post-conviction DNA testing in Washington State under RCW 10.73.170, as the Washington State Supreme Court recently interpreted it in *State v. Crumpton*.⁶

In *State v. Crumpton*, a jury convicted Lindsey Crumpton of five counts of first degree rape and one count of residential burglary.⁷ Eighteen years after his conviction, Crumpton sought post-conviction relief under RCW 10.73.170, which permits those in prison for a felony to seek DNA testing of evidence.⁸ The trial court denied Crumpton's motion, and the court of appeals affirmed this denial.⁹ After granting review, the Washington State Supreme Court held that in deciding

3. *Id.* at 194–96.

4. *Id.* at 194–95.

5. *Id.* at 195–96 (emphasis in original).

6. 181 Wash. 2d 252, 332 P.3d 448 (2014).

7. *Id.* at 255–57, 332 P.3d at 449–50.

8. *Id.* at 257, 332 P.3d at 450.

9. *Id.*

whether to grant a motion for post-conviction DNA testing, a court should presume the DNA test results would be *favorable* to the petitioner.¹⁰ Then, the court must determine if such favorable, exculpatory DNA results would demonstrate the petitioner's innocence on a more probable than not basis.¹¹

This Note will examine the *Crumpton* decision and analyze why the Washington State Supreme Court was sharply divided. Part I will first explore the background of DNA testing and post-conviction DNA remedies under both Washington State and federal law. Part I will also discuss the Washington State Supreme Court cases on post-conviction DNA testing pre-*Crumpton*. Part II will detail the facts of *Crumpton* as well as the procedural background leading up to the Court's decision. Part III will describe the legal analysis of both the majority and dissenting opinions, and explore how the justices' analyses align with policy goals. Part IV will examine how intermediate appellate courts have applied *Crumpton*. Finally, Part V will evaluate the prudence of the favorable presumption established in *Crumpton* by comparing Washington State's approach to DNA testing to the interpretations of DNA statutes in other states.

I. UNDERSTANDING POST-CONVICTION DNA SCIENTIFICALLY AND LEGALLY

To understand the Washington State Supreme Court's holding in *State v. Crumpton*, this Note will first examine the scientific and legal background of post-conviction DNA testing. First, this Part will provide an overview of the science behind DNA testing, and how that science can be useful—and not useful—in the courtroom. Then, the statutory authority for post-conviction DNA testing in Washington State, as well as its federal counterpart, will be explored. Finally, this Part details the two primary Washington State Supreme Court decisions regarding post-conviction DNA before *Crumpton*—*State v. Riofta*¹² and *State v. Thompson*.¹³

10. *Id.* at 264, 332 P.3d at 453.

11. *Id.*

12. 166 Wash. 2d 358, 209 P.3d 467 (2009).

13. 173 Wash. 2d 865, 271 P.3d 204 (2012).

A. *Scientific and Legal Foundations of DNA Evidence Used in Post-Conviction Review*

Deoxyribonucleic acid (DNA) is a blueprint of an individual's genetic characteristics.¹⁴ DNA can be anywhere.¹⁵ The most commonly known sources of DNA evidence are blood, semen, hair, skin, and saliva; however, DNA can also be found on cigarette butts, bottles, clothing, or even a phone.¹⁶ A "DNA match" occurs when a reference sample is compared with evidence and the DNA profiles are the same.¹⁷ To make this comparison, first, a technician produces a DNA profile from a sample taken from the suspect—perhaps voluntarily or by court order.¹⁸ Second, a technician produces a DNA profile from the biological evidence connected to the crime.¹⁹ Finally, the technician compares the two samples' genotypes, and if there is a match, the technician determines the probability that a random person could have created the match.²⁰ This process produces an objective probability that the suspect was the source of the biological evidence from the crime "to an extremely high degree of confidence."²¹

It is tempting to assume that a DNA match between a piece of evidence and a suspect is determinative of that suspect's guilt.²² Both prosecutors and defense attorneys assign DNA evidence such "mythic infallibility" as a forensic technique.²³ This myth has led to the idea that "DNA testing serves as a 'truth machine' that can definitively determine guilt or innocence beyond doubt."²⁴ But as the United States Supreme

14. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, DNA FOR THE DEFENSE BAR 3 (2012); see also Aaron J. Lyttle, *Return of the Repressed: Coping with Post-Conviction Innocence Claims in Wyoming*, 14 WYO. L. REV. 555, 573 (2014) ("Nucleic acids (adenine, thymine, guanine, and cytosine) form nucleotide base pairs along a sugar phosphate backbone in a double spiral structure—called a double helix. This material, . . . (DNA), provides instructions for the functioning and development of living organisms.").

15. NAT'L INST. OF JUSTICE, *supra* note 14, at 8.

16. *Id.*

17. *Id.* at 18.

18. Lyttle, *supra* note 14, at 574.

19. *Id.* at 575.

20. *Id.*

21. *Id.*

22. See, e.g., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 1 (1999) (noting that DNA has become "the foremost forensic technique for identifying perpetrators, and eliminating suspects").

23. Jay D. Aronson, *Certainty vs. Finality: Constitutional Rights to Postconviction DNA Testing*, in REFRAMING RIGHTS 125, 133 (Sheila Jasanoff ed., 2011).

24. *Id.*

Court has recognized, “DNA testing alone does not always resolve a case;” where there is an explanation for the DNA result and enough incriminating evidence, DNA science alone will not prove innocence.²⁵ The utility of DNA evidence is far more complicated. As articulated by the National Institute of Justice:

When an individual is excluded as the potential source of DNA, it does not necessarily mean the individual was not involved. For example, a true perpetrator who left no detectable biological material will be excluded as a source of DNA. Conversely, if an individual is a potential source of DNA at a crime scene, it does not necessarily mean that person was involved in the crime.²⁶

Further, DNA tests do not always conclusively identify a particular person.²⁷ There may be inconclusive or uninterpretable results due to complications such as multiple contributors, contamination, or degradation of samples.²⁸ Complexities in DNA matching may increase more as scientific knowledge advances—for example, the increasing awareness of people with chimeric DNA.²⁹ Given the complexities of DNA evidence, the dilemma has become “how to harness DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice.”³⁰

DNA testing in criminal trials in the United States began in the mid-1980s.³¹ Usually, a petitioner obtains post-conviction testing through application under the law of the state of the conviction.³² By the end of

25. *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 62 (2009).

26. NAT’L INST. OF JUSTICE, *supra* note 14, at 18.

27. *Id.*; NAT’L INST. OF JUSTICE, *supra* note 22, at 28–29.

28. NAT’L INST. OF JUSTICE, *supra* note 14, at 18; NAT’L INST. OF JUSTICE, *supra* note 22, at 28–29.

29. Chimeric DNA arises when one person has two separate and distinct DNA strands in his body, which could result in a DNA sample taken from a buccal swab not matching a semen sample taken from the same person. Although beyond the scope of this Note, chimeric DNA could prove to further complicate the legal landscape of post-conviction DNA testing. See Catherine Arcabascio, *Chimeras: Double the DNA-Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 AKRON L. REV. 435 (2007) (exploring the current research on chimeric DNA, its potential interaction with the criminal justice system, and, briefly, how it could impact post-conviction DNA testing).

30. *Osborne*, 557 U.S. at 62.

31. Christine E. White, Comment, *Clearly Erroneous: The Court of Appeals of Maryland’s Misguided Shift to a Higher Standard for Post-Conviction DNA Relief*, 71 MD. L. REV. 886, 889 (2012) (citing *Osborne*, 557 U.S. at 62).

32. NAT’L INST. OF JUSTICE, *supra* note 14, at 158; see also *Osborne*, 557 U.S. at 62 (noting that the task of harnessing “DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice” belongs to state legislatures).

2013, all fifty states had laws providing an avenue for post-conviction DNA testing,³³ but these statutes vary widely from state to state.³⁴ According to the National Institute of Justice, “prosecutors frequently consent either to testing or to a motion under the statute, and courts routinely order testing on opposed motions under state statutes.”³⁵ Unfortunately, there is not an abundance of case law interpreting the states’ post-conviction DNA testing statutes across all states because of the statutes’ infancy.³⁶

Post-conviction DNA testing has had an incredible impact on the criminal justice system. There have been 330 DNA exonerations across the United States, and 140 actual perpetrators found as a result.³⁷ DNA exonerations have provided insight into the fallibility of particular types of evidence and have opened the door for exonerations in all types of cases, not just those involving DNA.³⁸ For example, a DNA exoneration could expose problems of eyewitness error or false confessions that are not limited to cases that have DNA evidence.³⁹ Overall, there have been 1650 exonerations across the United States, including DNA and non-DNA cases.⁴⁰ In Washington State, of the reported thirty-seven exonerations, four were the result of post-conviction DNA testing.⁴¹ If

33. John M. Leventhal, *A Survey of Federal and State Courts’ Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(G-1)?*, 76 ALB. L. REV. 1453, 1474 (2013).

34. See Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 811–22 (2011) (exploring the varying one-step, two-step, or three-step requirements for petitioners under different state statutes for post-conviction DNA testing); Lyttle, *supra* note 14, at 592–93 (setting forth the approaches by New York and Illinois—which were at the forefront of adopting post-conviction DNA testing statutes—as well as the model legislation promulgated by the Innocence Project).

35. NAT’L INST. OF JUSTICE, *supra* note 14, at 158.

36. *Id.*

37. INNOCENCE PROJECT, <http://innocenceproject.org> (last visited Aug. 24, 2015).

38. Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 574–75 (2004).

39. *Id.*

40. The National Registry of Exonerations, *Exonerations by Year: DNA and Non-DNA*, U. MICH. L. SCH., <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited Aug. 24, 2015).

41. The National Registry of Exonerations, U. MICH. L. SCH., <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (on the “State” column heading, select “Washington” from the dropdown list) (last visited Aug. 24, 2015). For more information about the exonerations in Washington State, and to read the stories of the exonerees, see The Innocence Project Northwest, *Our Clients’ Stories of Innocence*, U. WASH. SCH. L., <http://www.law.washington.edu/Clinics/IPNW/stories.aspx> (last visited Mar. 8, 2015).

not for post-conviction DNA testing, these four people would still be wrongfully incarcerated. Without post-conviction DNA testing, and the statutes that authorize it, people like Ronald Cotton⁴² would still be incarcerated despite their innocence, and the actual perpetrators would not have been identified. Thus, post-conviction DNA testing is an invaluable tool for ensuring justice in the criminal justice system. Because of the novelty of DNA statutes, however, there is limited case law interpreting them, and post-conviction DNA testing remains a critical area for research, judicial interpretation, and legislative action.⁴³

B. RCW 10.73.170: Washington Statutory Authority for Post-Conviction DNA Testing

As acknowledged by the United States Supreme Court, the task of harnessing DNA's power to prove innocence belongs to the legislatures.⁴⁴ In Washington State, RCW 10.73.170 is the statutory authority for granting post-conviction DNA testing.⁴⁵ In 2004, the previous Washington statute⁴⁶ authorizing post-conviction DNA testing was set to expire, and the Washington legislature was on track to draft a new statute to replace it.⁴⁷ However, due to time constraints, the

42. See *supra* notes 1–5.

43. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000) (“A more commanding view awaits further study by legal scholars and journalists of all innocence cases.”).

44. *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 62 (2009) (noting that the task of harnessing “DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice” belongs to state legislatures).

45. WASH. REV. CODE § 10.73.170 (2014).

46. *Id.* § 10.73.170(1)–(2) (2004) That version stated:

(1) On or before December 31, 2004, a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request to the state Office of Public Defense, which will transmit the request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. The prosecutor shall inform the requestor and the state Office of Public Defense of the decision, and shall, in the case of an adverse decision, advise the requestor of appeals rights. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

Id.

47. H.R. REP. NO. 58-2872, Reg. Sess. (Wash. 2004).

legislature tabled it for the 2005 session.⁴⁸

The stated purpose of the proposed legislation was to “ensure that a process remains in place for cases where DNA tests could provide evidence of a person’s innocence.”⁴⁹ The testimony in support of the bill, however, made clear that, “[b]y 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.”⁵⁰

The current statute authorizing post-conviction DNA testing, in relevant part, reads:

(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.⁵¹

The substantive requirement of RCW 10.73.170(3)—the primary focus of this Note—is that a convicted person must show “the likelihood that the DNA evidence would demonstrate innocence on a more probable

48. H.R. REP. NO. 59-1014, Reg. Sess. (Wash. 2005).

49. H.R. REP. NO. 58-2872, Reg. Sess. (Wash. 2004).

50. *Id.*

51. WASH. REV. CODE § 10.73.170 (2014).

than not basis.”⁵²

C. *18 U.S.C. § 1300: Federal Statutory Authority for Post-Conviction DNA Testing and How It Has Been Judicially Interpreted*

In 2004, President Bush signed the Justice for All Act⁵³ that, among its protections for crime victims, included the Innocence Protection Act of 2004.⁵⁴ The Innocence Protection Act of 2004, in relevant part, reads:

(a) In General – Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the “applicant”), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply: (1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent

(6) The applicant identifies a theory of defense that—
(A) is not inconsistent with an affirmative defense presented at trial; and
(B) would establish the actual innocence of the applicant

(8) The proposed DNA testing of the specific evidence may produce new material evidence that would—
(A) support the theory of defense referenced in paragraph (6); and
(B) raise a reasonable probability that the applicant did not commit the offense.⁵⁵

The Innocence Protection Act established the Kirk Bloodsworth⁵⁶ Post-Conviction DNA Testing Grant Program to award grants to states to help defray the costs of post-conviction DNA testing.⁵⁷ Congress had three broad goals in establishing the Innocence Protection Act. At the forefront, Congress intended to protect crime victims’ rights.⁵⁸ Congress also sought to improve the state of DNA analysis by eliminating the

52. *Id.*

53. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (codified as amended in scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.)

54. H.R. REP. NO. 59-1014, Reg. Sess. (Wash. 2005); *see also* 18 U.S.C. § 3600(a) (2012).

55. 18 U.S.C. § 3600(a).

56. Kirk Bloodsworth was the first man in the United States sentenced to death but later cleared because of DNA evidence. STANLEY COHEN, *THE WRONG MEN* 15 (Carroll & Graf 1st ed. 2003).

57. White, *supra* note 31, at 890 (citing Innocence Project Act of 2004, Pub. L. No. 108-405, 118 Stat. 2284 (2004) (codified at 42 U.S.C. § 14136e (2004))).

58. H.R. REP. NO. 108-711, at 1 (2004).

substantial backlog of DNA samples, improving and expanding DNA testing capacity at federal and state crime laboratories, increasing research and development of DNA testing technologies, and developing new training programs for the collection and use of DNA evidence.⁵⁹ Finally, Congress wanted to provide post-conviction DNA testing to exonerate the innocent.⁶⁰

Although *Crumpton* analyzed the Washington State post-conviction DNA testing statute,⁶¹ the state legislature modeled the Washington statute after the Innocence Protection Act.⁶² Thus, it is important to understand how the Washington and federal statutes differ. For example, the substantive requirements under the Washington statute require the petitioner to demonstrate “the likelihood that DNA evidence would demonstrate innocence on a more probable than not basis,”⁶³ while, under the federal statute, the petitioner must demonstrate DNA testing would result in new material evidence that would raise a “reasonable probability” of innocence.⁶⁴ Neither of the statutes explicitly call for a presumption that the DNA evidence would be favorable to the petitioner; however, courts have applied both statutes with a favorable presumption.⁶⁵ Other approaches and the utility of explicit presumptions will be discussed in Part V.⁶⁶

The Supreme Court of the United States has not yet issued a decision regarding the “reasonable probability” requirement found in 18 U.S.C. § 3600.⁶⁷ However, various circuit courts have interpreted the statute as

59. *Id.*

60. *Id.*

61. *State v. Crumpton*, 181 Wash. 2d 252, 258, 332 P.3d 448, 450 (2014) (citing WASH. REV. CODE § 10.73.170 (2014)).

62. *Id.* at 266, 332 P.3d at 454 (Stephens, J., dissenting).

63. WASH. REV. CODE § 10.73.170.

64. 18 U.S.C. § 3600(a)(8)(B) (2012).

65. *Crumpton*, 181 Wash. 2d at 264, 332 P.3d at 453; *infra* note 68.

66. *See infra* Part V.A.

67. The Supreme Court of the United States, in evaluating a post-conviction DNA claim out of Alaska, has stated, “[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man.” *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 68 (2009). Therefore, he no longer has a presumption of innocence. *Id.* at 69. Although many courts, including the *Crumpton* Court, cite *Osborne* in opinions regarding post-conviction DNA testing, *see, e.g., Crumpton*, 181 Wash. 2d at 258, 332 P.3d at 450, the issues of *Osborne* were limited to the due process rights of post-conviction DNA testing by the states. *Osborne*, 557 U.S. at 68–70. In holding that Alaska’s procedures were not inconsistent with any recognized principle of fairness, the Court did not further elaborate on the particular methods of review states should use or that which the federal statute requires. *Id.* And the “presumption of innocence” concerned post-conviction testing more broadly, which is distinct from the “favorable presumption” applied to DNA testing results.

requiring a favorable presumption—even though there is no favorable presumption written into the statute—when reviewing district court decisions on post-conviction DNA testing motions.⁶⁸ For example, in *United States v. Fields*,⁶⁹ the Fifth Circuit quoted the district court’s reasoning in denying the petitioner’s motion: “even assuming that the outcome of any DNA test would be *favorable* to [petitioner], he has not established that such outcome would raise a reasonable probability of his actual innocence” given the compelling evidence of his guilt presented at trial.⁷⁰ Therefore, although the reviewing court affirmed the denial of the motion, the court evaluated the motion assuming a favorable result.

In drafting RCW 10.73.170, the Washington State House of Representatives recognized that in order to receive federal funding to further its goals of innocence protection, the bill needed to meet federal standards, and drafted it to do so.⁷¹ The Washington State Supreme Court has recognized the conformance of RCW 10.73.170 with the Innocence Protection Act.⁷² Like RCW 10.73.170, there is no explicit favorable presumption in the Innocence Protection Act.⁷³

D. Previous Decisions by the Washington State Supreme Court Interpreting the State’s Post-Conviction Relief Statute

The leading case out of the Washington State Supreme Court interpreting RCW 10.73.170 is *State v. Riofta*.⁷⁴ The Court, in an opinion authored by Chief Justice Madsen, held that a trial court is required to grant a motion for post-conviction DNA testing when favorable results would raise a reasonable probability that the petitioner was not the one

68. See, e.g., *United States v. Thomas*, 597 F. App’x 882 (7th Cir. 2015) (even presuming the absence of petitioner’s DNA on tested materials, such testing would not disprove his involvement in the drug conspiracy); *United States v. Fields*, 761 F.3d 443 (5th Cir. 2014) (assuming a favorable DNA result); *United States v. Pitera*, 675 F.3d 122 (2d Cir. 2012) (even absence of DNA on tested gun would not raise a reasonable probability of innocence); *United States v. Jordan*, 594 F.3d 1265 (10th Cir. 2010) (favorable DNA result is not inconsistent with the government’s theory of the case such that it calls into question his guilt); *United States v. Fasano*, 577 F.3d 572 (5th Cir. 2009) (if testing does not find petitioner’s DNA, the government’s strong case evaporates and a reasonable probability of innocence is shown).

69. 761 F.3d 443 (5th Cir. 2014).

70. *Fields*, 761 F.3d at 479–80 (emphasis added).

71. H.R. REP. NO. 59-1014, Reg. Sess., at 3 (Wash. 2005) (“In order to receive a portion of that initiative funding, state law must conform with federal law. This bill as drafted meets those standards.”).

72. *State v. Crumpton*, 181 Wash. 2d 252, 266, 332 P.3d 448, 454 (2014).

73. Compare 18 U.S.C. § 3600(a)(8)(A)–(B) (2012), with *Crumpton*, 181 Wash. 2d at 266, 332 P.3d at 454.

74. 166 Wash. 2d 358, 209 P.3d 467 (2009).

who committed the crime.⁷⁵ *Riofta* involved a gang-related shooting, where the shooter dropped a white hat on the sidewalk as he fled the scene.⁷⁶ The victim had known Riofta for several years prior to the shooting, identified him when police arrived, and subsequently picked him from a photo montage.⁷⁷ After his conviction for first degree assault with a firearm, Riofta sought DNA testing of the white hat without success.⁷⁸ The trial court's denial was affirmed by the court of appeals.⁷⁹

In reviewing the denial of his motion for post-conviction DNA testing, the Washington State Supreme Court began by analyzing the procedural requirement of RCW 10.73.170.⁸⁰ The Court stated the statute “provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider,” for whatever reason.⁸¹ Thus, even though the white hat at issue in *Riofta* was available for testing at trial, DNA testing was not precluded by the procedural requirement of RCW 10.73.170 on that basis because the hat had not actually been tested at trial.⁸²

The Court went on to analyze the substantive requirement of RCW 10.73.170.⁸³ First, the Court recognized—as had been pointed out by the court of appeals—that because more than one person could have worn the hat, DNA test results excluding Riofta “would not show the likelihood that he would demonstrate his innocence.”⁸⁴ The Court went on to say, “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.”⁸⁵ Put differently, under the statute, a trial court is required to “grant a motion for postconviction testing when exculpatory results would, *in combination with other evidence*, raise a reasonable probability the petitioner was not the perpetrator.”⁸⁶ The Court also reiterated that petitioners seeking post-conviction relief face a

75. *See id.* at 373, 209 P.3d at 475.

76. *Id.* at 362, 209 P.3d at 469–70.

77. *Id.* at 362–63, 209 P.3d at 470.

78. *Id.* at 363, 209 P.3d at 470.

79. *Id.* at 364, 209 P.3d at 470.

80. *Id.* at 365–66, 209 P.3d at 471.

81. *Id.* at 366, 209 P.3d at 471.

82. *Id.* at 366, 209 P.3d at 472.

83. *Id.* at 367, 209 P.3d at 472.

84. *Id.*

85. *Id.* (emphasis added).

86. *Id.* at 367–68, 209 P.3d at 472 (emphasis in original).

“heavy burden.”⁸⁷

After *Riofta*, the Washington State Supreme Court addressed the denial of a motion under RCW 10.73.170 in *State v. Thompson*.⁸⁸ *Thompson* involved the rape and beating of a woman at a hotel.⁸⁹ The victim met a man at a bar who invited her to an after-hours party at a nearby hotel.⁹⁰ The victim went to the man’s hotel room but soon realized that no one else was present.⁹¹ She then attempted to leave, but the perpetrator would not let her escape and began to brutally beat, rape, and attempt to strangle and drown her, causing her to lose consciousness many times.⁹² Responding police saw Thompson push the victim out of the room where the rape occurred, and police arrested Thompson on the scene.⁹³ The victim suffered from memory problems due to the trauma, and reported her attacker “might have had blond hair, did not have facial hair, and was between 5’7” and 5’8” tall.”⁹⁴ A jury found Thompson guilty of first degree rape, and nine years later a court denied his motion for post-conviction DNA testing.⁹⁵

The Court in *Thompson* was primarily concerned with whether evidence not admitted at trial could be used in a post-conviction DNA testing motion.⁹⁶ In Thompson’s case, the evidence was a statement made by Thompson to arresting officers.⁹⁷ The Court held the trial court improperly relied on the unadmitted statement when denying testing.⁹⁸ However, the Court also considered whether Thompson had met the requisite substantive burden in his motion.⁹⁹

In *Thompson*, the Court embraced the standard from *Riofta*, noting the “statute requires a trial court to grant a motion for postconviction testing

87. *Id.* at 369, 209 P.3d at 473 (“[D]efendants seeking postconviction relief face a heavy burden and are in a significantly different situation that a person facing trial.”).

88. 173 Wash. 2d 865, 271 P.3d 204 (2012).

89. *Id.* at 867, 271 P.3d at 205.

90. *Id.*

91. *Id.* at 867–68, 271 P.3d at 205.

92. *Id.*

93. *Id.* at 868, 271 P.3d at 205.

94. *Id.* at 869, 271 P.3d at 205.

95. *Id.* at 869, 271 P.3d at 206.

96. *Id.* at 872–73, 271 P.3d at 207.

97. *Id.*

98. *Id.* at 876, 271 P.3d at 209.

99. *Id.* at 874–76, 271 P.3d at 208–09. The Court only considered the limited issue of whether the trial court erred when it considered evidence available to the State at the time of trial but not admitted at trial. Therefore, the Court did not discuss the procedural burden Thompson had under RCW 10.73.170. *Id.* at 871, 271 P.3d at 206–07.

when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator.”¹⁰⁰ Emphasizing that there was only one perpetrator, the Court stated, “[i]f DNA test results should conclusively exclude Thompson as the source of the collected semen, it is more probable than not that his innocence would be established, *particularly in light of the weakness of the victim’s identification* of Thompson as her attacker.”¹⁰¹ Ultimately, the Court agreed with the court of appeals that the trial court should have granted Thompson’s motion for post-conviction DNA testing.¹⁰² *Riofta* and *Thompson* set the stage for the Washington State Supreme Court to decide *Crumpton* and the fate of post-conviction DNA testing in Washington State.

II. THE FACTS AND PROCEDURE OF *CRUMPTON* BEFORE THE WASHINGTON STATE SUPREME COURT

On April 10, 1993, D.E. awoke at 3:15 AM to a man standing in her room.¹⁰³ The man attacked D.E., pulled her clothing off, and covered her head with pillows before raping her anally.¹⁰⁴ The man raped D.E. five times that night, rummaging through other rooms in her house between each rape.¹⁰⁵ After the last attack, the perpetrator rammed handkerchiefs from a nightstand inside D.E., poured something cold on her, and washed her.¹⁰⁶ After the man fled, D.E. went to a neighbor’s house and they called 911 around 5:15 AM.¹⁰⁷ Because the attacker covered her head during the attack, the only description D.E. could give of the man was that he was “a big black man” who felt “greasy” and smelled of cologne.¹⁰⁸

At 5:23 AM, a responding officer noticed a heavy-set black man running a half a mile from D.E.’s home.¹⁰⁹ This man was Lindsey

100. *Id.* at 874, 271 P.3d at 208 (quoting *State v. Riofta*, 166 Wash. 2d 358, 367–68, 209 P.3d 467, 472 (2009)).

101. *Id.* at 875, 271 P.3d at 208 (emphasis added).

102. *Id.* at 876, 271 P.3d at 209.

103. *State v. Crumpton*, 172 Wash. App. 408, 410, 289 P.3d 766, 767 (2012).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 411, 289 P.3d at 767.

108. *Id.* at 410–11, 289 P.3d at 767 (quoting *State v. Crumpton*, No. 17502-9-II, 1996 WL 1083334 (Wash. Ct. App. June 14, 1996), *review denied*, 130 Wash. 2d 1018, 928 P.2d 415 (1996)).

109. *State v. Crumpton*, 181 Wash. 2d 252, 256, 332 P.3d 448, 449 (2014).

Crumpton.¹¹⁰ The officer described the man's skin as "wet looking," said he smelled of cologne, and stated he was carrying a piece of flowered print bedding that appeared to have blood smears on it.¹¹¹ In a search incident to Crumpton's arrest, officers found the following on his person: a large quantity of women's jewelry, a cigarette case, a ring case, three soiled and oily white handkerchiefs, a flannel sheet, and a telephone cord.¹¹² Crumpton told officers he had just left his sister's house and was on the way to his mother's house.¹¹³ Crumpton admitted to being in D.E.'s house, but he denied raping D.E.¹¹⁴

The investigation at D.E.'s house revealed the front door forced open and the bedroom in "complete disarray."¹¹⁵ In the hallway, a telephone cord was cut.¹¹⁶ A bottle of Crisco oil and a soaked handkerchief with a "reddish stain" were found in D.E.'s bedroom.¹¹⁷ The oil caused any fingerprints found to have no usable value.¹¹⁸ The sheet found on Crumpton matched the sheet on D.E.'s bed, and D.E. identified the jewelry, cigarette case, handkerchiefs, and other items as hers.¹¹⁹ Investigators discovered sperm on the rectal swab of D.E. and on her sheets.¹²⁰ In addition, investigators collected hairs from D.E.'s bedroom, one of which "matched the characteristics of a pubic hair sample taken from Crumpton."¹²¹

The State charged Crumpton with five counts of first degree rape and one count of residential burglary.¹²² The jury found him guilty as charged.¹²³ The judge sentenced Crumpton to an exceptional sentence

110. *Crumpton*, 172 Wash. App. at 411, 289 P.3d at 768.

111. *Id.* at 411, 289 P.3d at 768 (quoting *Crumpton*, 1996 WL 1083334).

112. *Id.* at 411–12, 289 P.3d at 768.

113. *Id.* at 412, 289 P.3d at 768.

114. *Id.* at 420, 289 P.3d at 772.

115. *Id.* at 412, 289 P.3d at 768 (quoting *Crumpton*, 1996 WL 1083334).

116. *Id.*

117. *Id.* (quoting *Crumpton*, 1996 WL 1083334).

118. *Id.*

119. *Id.*

120. *Id.* The items were not tested for DNA for the trial.

121. *Id.* at 413, 289 P.3d at 768 (quoting *Crumpton*, 1996 WL 1083334). Although beyond the scope of this Note, it should be acknowledged that hair microscopy evidence has been criticized as unreliable. *See, e.g.*, Jessica D. Gabel & Margaret D. Wilkinson, "Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics, 59 HASTINGS L.J. 1001, 1007 (2008) (raising concerns of the lack of peer review, no proficiency testing, high error rates, and simple "eyeballing" that occurs with hair microscopy evidence).

122. *State v. Crumpton*, 181 Wash. 2d 252, 257, 332 P.3d 448, 450 (2014).

123. *Id.*

based on deliberate cruelty and particular vulnerability of the victim.¹²⁴ Crumpton appealed, the court of appeals affirmed his conviction, and the Washington State Supreme Court denied review.¹²⁵

Eighteen years after his conviction, Crumpton petitioned for post-conviction DNA testing under RCW 10.73.170 of the following: items from the victim's rape kit, a flannel sheet, two white handkerchiefs, and hairs collected at the scene of the crime.¹²⁶ The trial court denied Crumpton's motion for post-conviction DNA testing under RCW 10.73.170, finding that Crumpton had failed to show a reasonable probability of his innocence.¹²⁷ Crumpton appealed to Division II of the Washington State Court of Appeals.¹²⁸

The court of appeals subsequently issued a published opinion¹²⁹ in which it held that the trial court did not abuse its discretion in denying Crumpton's post-conviction request for DNA testing under RCW 10.73.170.¹³⁰ After articulating the abuse of discretion standard of review,¹³¹ the court relied on *Riofta*'s interpretation of RCW 10.73.170 to affirm the trial court.¹³² Interpreting *Riofta*, the court of appeals explained that when reviewing motions for post-conviction DNA testing, the lower courts must consider whether, in light of all other evidence presented at trial, *favorable* DNA results would demonstrate the petitioner's innocence on a more probable than not basis.¹³³ Thus, the court of appeals acknowledged the standard for reviewing such motions is to presume favorable DNA results.

Despite its application of the favorable presumption, the court of appeals affirmed the trial court's denial of Crumpton's motion.¹³⁴ The court agreed with the State that, when combined with other evidence, a DNA test in this case would simply not raise an inference of innocence.¹³⁵ The court then weighed the various evidence presented at

124. *Id.*

125. *Id.*

126. *Crumpton*, 172 Wash. App. at 413, 289 P.3d at 769.

127. *Id.* at 414, 289 P.3d at 769.

128. *Id.*

129. *Id.* at 408, 289 P.3d at 766.

130. *Id.* at 410, 289 P.3d at 767.

131. *Id.* at 416, 289 P.3d at 770 (citing *State v. Riofta*, 166 Wash. 2d 358, 370, 209 P.3d 467, 473 (2009)).

132. *Id.* at 418, 289 P.3d at 771 (citing *Riofta*, 166 Wash. 2d at 367, 209 P.3d at 472 (citing WASH. REV. CODE § 10.73.170(3) (2014))).

133. *Id.* (citing *Riofta*, 166 Wash. 2d at 367, 209 P.3d at 472).

134. *Id.* at 410, 289 P.3d at 767.

135. *Id.* at 419, 289 P.3d at 772.

trial—including Crumpton’s presence near the home, his possession of the victim’s belongings, and his admission to being in the home—against the possibility of a favorable DNA test.¹³⁶ The court found even exculpatory DNA results would not exonerate Crumpton; “[i]n short, DNA testing here would not likely change the outcome.”¹³⁷

However, the three-judge panel was split two to one.¹³⁸ The dissent and majority agreed the rule for evaluating the motion was whether, viewed in light of all evidence presented at trial, favorable DNA results would raise a likelihood of innocence.¹³⁹ But the dissent argued the majority misapplied the rule by “basing its decision on the strength of the evidence presented at trial and its conclusion that DNA evidence is unlikely to help Crumpton.”¹⁴⁰ Under the dissent’s approach, one must not look at the strength of the evidence of guilt, for the evidence will always be strong because a jury has already found the convicted person guilty beyond a reasonable doubt.¹⁴¹ Rather, the court must look to see how the evidence stands up in the presence of a *favorable* DNA test result.¹⁴² Crumpton sought review from the Washington State Supreme Court, and the Court granted review in June of 2013.¹⁴³

III. *STATE V. CRUMPTON*: THE WASHINGTON STATE SUPREME COURT DECISION

A. *Justice Fairhurst’s Majority Opinion: Reading a Favorable Presumption into the Statute to Allow Petitioners Access to Post-Conviction DNA Testing*

The Washington State Supreme Court announced *State v. Crumpton* on August 21, 2014.¹⁴⁴ Justice Fairhurst authored the opinion, with Justices Johnson, Wiggins, González, Gordon McCloud, and Dwyer concurring.¹⁴⁵ Justice Stephens filed a dissenting opinion, with Justice Owens and Chief Justice Madsen concurring.¹⁴⁶ As characterized by the

136. *Id.* at 419–20, 289 P.3d at 772.

137. *Id.* at 420, 289 P.3d at 772.

138. *See generally id.*

139. *Id.* at 422, 289 P.3d at 773 (Worswick, J., dissenting).

140. *Id.*

141. *Id.* (citing *State v. Gray*, 151 Wash. App. 762, 773, 215 P.3d 961 (2009)).

142. *Id.* (emphasis added).

143. *State v. Crumpton*, 177 Wash. 2d 1015, 306 P.3d 960 (2013) (order granting review).

144. *State v. Crumpton*, 181 Wash. 2d 252, 332 P.3d 448 (2014).

145. *Id.* at 255–64, 332 P.3d at 449–53.

146. *Id.* at 264–71, 332 P.3d at 453–57.

majority, the issue facing the Court was, “the standard the court should use to decide a motion for postconviction DNA testing and whether a court should presume DNA evidence would be favorable to the convicted individual when determining if it is likely the evidence would prove his or her innocence.”¹⁴⁷

After acknowledging the statute has procedural and substantive components, and that the State conceded Crumpton met his procedural burden, the Court began exploring the substantive portion of RCW 10.73.170.¹⁴⁸ Crumpton argued the trial court should presume the DNA results would be favorable in deciding whether to grant his motion for post-conviction DNA testing.¹⁴⁹ The State, on the other hand, argued Crumpton must show the DNA evidence would demonstrate his innocence on a more probable than not basis in light of all the other evidence presented at trial to obtain testing.¹⁵⁰

Before reaching its holding, the Court examined the statutory requirements of RCW 10.73.170, the case law interpreting RCW 10.73.170, and the policy considerations supporting a finding of a favorable presumption.¹⁵¹ The majority read a favorable presumption—presuming a DNA test would be favorable to the petitioner—into RCW 10.73.170, thus expanding a petitioner’s right to post-conviction DNA testing.¹⁵² The Court further recognized, “[w]hile the text of RCW 10.73.170(3) does not specifically mention a favorable presumption, cases applying this statute and the substantive standard therein have discussed the favorable results.”¹⁵³

The first case the Court discussed was *State v. Riofta*.¹⁵⁴ The Court emphasized that in *Riofta* the Court applied the facts by looking at each of the two possible favorable outcomes for Riofta: the absence of Riofta’s DNA or the presence of another person’s DNA.¹⁵⁵ However, because neither favorable result made Riofta’s innocence more or less

147. *Id.* at 255, 332 P.3d at 449.

148. *Id.* at 258–59, 332 P.3d at 450–51 (exploring the requirement that the person show “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis” (citing WASH. REV. CODE § 10.73.170(2) (2014))).

149. *Id.* at 258, 332 P.3d at 449.

150. *Id.* at 258–59, 332 P.3d at 450–51.

151. *Id.* at 259–63, 332 P.3d at 451–53.

152. *Id.* at 260, 332 P.3d at 452.

153. *Id.* at 259, 332 P.3d at 451.

154. *Id.*; *State v. Riofta*, 166 Wash. 2d 358, 209 P.3d 467 (2009).

155. *Crumpton*, 181 Wash. 2d at 259–60, 332 P.3d at 451 (citing *Riofta*, 166 Wash. 2d at 370, 209 P.3d at 473–74).

likely, the Court denied the testing.¹⁵⁶ The majority concluded, “[t]he *Riofta* court recognized that a court should assess the impact of an *exculpatory* DNA test in light of all the evidence from trial when deciding a motion for postconviction DNA [testing].”¹⁵⁷ Therefore, *Riofta* supported applying a favorable presumption when reviewing post-conviction DNA motions.¹⁵⁸

Next, the Court analyzed *State v. Thompson*.¹⁵⁹ The majority focused on the language in *Thompson* that discussed how any DNA evidence that excluded him as a possible source would show Thompson’s innocence on a more probable than not basis because it was a single perpetrator rape case.¹⁶⁰ The majority went on to conclude, “[l]ike the court in *Riofta*, the *Thompson* court presumed the evidence would be favorable to the convicted party to decide the motion.”¹⁶¹

The last case the Court analyzed in *Crumpton* was a court of appeals decision, *State v. Gray*.¹⁶² *Gray* involved a single perpetrator rape and attempted rape of two teenage girls that were camping with friends.¹⁶³ The *Crumpton* Court explained, “[t]he [court of appeals] concluded that if some of the evidence Gray requested be tested came back as not his DNA, it would be material to his innocence and therefore the motion for postconviction testing should be granted.”¹⁶⁴ The Court went on to say that *Gray* also recognized, “[i]f only one person committed the crime, then the presence of other DNA would suggest innocence on a more probable than not basis.”¹⁶⁵

156. *Id.* (citing *Riofta*, 166 Wash. 2d at 370, 209 P.3d at 474–75).

157. *Id.* at 259–60, 332 P.3d at 451 (emphasis in original) (citing *Riofta*, 166 Wash. 2d at 369, 209 P.3d at 473).

158. *See id.*

159. *Id.* at 260, 332 P.3d at 451; *State v. Thompson*, 173 Wash. 2d 865, 271 P.3d 204 (2012).

160. *Crumpton*, 181 Wash. 2d at 260, 332 P.3d at 451 (citing *Thompson*, 173 Wash. 2d at 875, 271 P.3d at 208).

161. *Id.* (citing *Thompson*, 173 Wash. 2d at 875, 271 P.3d at 208).

162. *Id.*; *State v. Gray*, 151 Wash. App. 762, 215 P.3d 961 (2009).

163. *Gray*, 151 Wash. App. at 765, 215 P.3d at 963.

164. *Crumpton*, 181 Wash. 2d at 260, 332 P.3d at 451 (citing *Gray*, 151 Wash. App. at 774, 215 P.3d at 967). It should be noted that there were various pieces of evidence requested for testing in *Gray*. Therefore, the court’s analysis of whether exculpatory DNA results would demonstrate *Gray*’s innocence considered the various pieces of evidence and how they fit together, rather than just one piece of evidence that may not alone be dispositive of *Gray*’s innocence. For example, the court said, “if testing revealed a matching DNA profile from the swabs taken from C.S., and from R.J.’s clothing or hair taken from her clothing, this evidence would be clearly material to the identity of the perpetrator.” *Gray*, 151 Wash. App. at 772, 215 P.3d at 966.

165. *Crumpton*, 181 Wash. 2d at 260, 332 P.3d at 451 (citing *Gray*, 151 Wash. App. at 774, 215 P.3d at 967).

The Court found *Thompson* and *Gray* were factually analogous to *Crumpton*.¹⁶⁶ According to the Court, “[e]ach case involved weak identification evidence but otherwise had very strong physical and circumstantial evidence tying the convicted individual to the crime.”¹⁶⁷ The majority also focused on the cases having only a single perpetrator.¹⁶⁸ Single perpetrator cases are particularly important because if there is only one possible DNA source, testing of that DNA would bear heavily on a person’s guilt or innocence.¹⁶⁹ As the Court explained, “[a]ny DNA evidence left on the items Crumpton petitioned to test would almost certainly have been left by the perpetrator of the rape. Exculpatory results of DNA testing in this case would directly affect the likelihood Crumpton was innocent.”¹⁷⁰ Therefore, the Court concluded, as the courts in *Thompson* and *Gray* had done, it too must grant post-conviction DNA testing, “even in the context of all the strong evidence of guilt.”¹⁷¹

The Court reaffirmed *Riofta*’s conclusion that the legislature intended the substantive requirement in the statute to be “onerous.”¹⁷² The Court recognized the important balance between the opportunities for exonerations with DNA testing and the potential that laboratories will be overburdened and state resources wasted by frivolous requests.¹⁷³ However, the majority described reading a favorable presumption into RCW 10.73.170 as “the appropriate analytical method for achieving the most just resolution to these motions.”¹⁷⁴ The Court aimed to create a standard that is “onerous but reasonable enough to let legitimate claims survive.”¹⁷⁵ The Court further cautioned against focusing on the overwhelming physical and circumstantial evidence against Crumpton, because there will always be strong evidence against a convicted individual as they were convicted of the crime beyond a reasonable doubt.¹⁷⁶

166. *Id.* at 261, 332 P.3d at 452.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* (citing *State v. Riofta*, 166 Wash. 2d 358, 367, 209 P.3d 467, 472 (2009)). Although the Court in *Crumpton* does not define “onerous,” Black’s Law Dictionary defines it as “[e]xcessively burdensome or troublesome; causing hardship.” BLACK’S LAW DICTIONARY 1198 (9th ed. 2009).

173. *Crumpton*, 181 Wash. 2d at 261–62, 332 P.3d at 452.

174. *Id.* at 261, 332 P.3d at 452.

175. *Id.* at 262, 332 P.3d at 452.

176. *Id.*

The Court ultimately held:

Case law supports using a favorable presumption when deciding whether to grant a motion for postconviction DNA testing. We formally hold that this presumption is part of the standard in RCW 10.73.170. A court should look to whether, considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis. If so, the court should grant the motion and allow testing to be done. Only then can it be determined whether the DNA actually exculpates the individual and if the results could be used to support a motion for a new trial.¹⁷⁷

Because the majority found there was no indication the trial court had applied the favorable presumption, they found the trial court abused its discretion.¹⁷⁸ Thus, the Court reversed and remanded the case to the trial court to apply the proper standard in reviewing Crumpton's motion for post-conviction DNA testing.¹⁷⁹ The Court also dictated the result: "[u]sing this presumption Crumpton's motion must be granted."¹⁸⁰

B. Justice Stephens's Dissenting Opinion: Focusing on Legislative Intent to Limit Post-Conviction DNA Testing

Justice Stephens authored a dissenting opinion joined by Justice Owens and Chief Justice Madsen.¹⁸¹ The dissent concluded that Crumpton's motion for post-conviction DNA testing should have been denied because he did not meet his statutory burden, the plain language and legislative intent of RCW 10.73.170 did not support a favorable presumption, and the precedent did not require a favorable presumption.¹⁸²

First, the dissent looked to the language of the statute, which does not contain an explicit "favorable presumption."¹⁸³ The substantive requirement of the statute provides the petitioner must show "the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."¹⁸⁴ Further, the federal statute, which

177. *Id.* at 261–62, 332 P.3d at 451–52.

178. *Id.* at 263–64, 332 P.3d at 453.

179. *Id.* at 264, 332 P.3d at 453.

180. *Id.* at 261, 332 P.3d at 452.

181. *Id.* at 264, 271, 332 P.3d at 453, 457 (Stephens, J., dissenting).

182. *Id.* at 271, 332 P.3d at 456–57.

183. *Id.* at 264, 332 P.3d at 453.

184. WASH. REV. CODE § 10.73.170(2) (2014).

Justice Stephens characterized as the “driving force” behind RCW 10.73.170, contains no explicit favorable presumption.¹⁸⁵ Justice Stephens noted, “[a]s is the case with the Washington statute, the burden under the federal statute is heavy. A petitioner who has already been convicted does not enjoy the same liberties as existed prior to trial; the ‘presumption of innocence disappears.’”¹⁸⁶

Second, the dissent addressed the statute’s legislative history.¹⁸⁷ At the forefront, the dissent recognized the delicate balance the legislature sought between “society’s interest in justice with its interest in finality” in matters that have already been decided by a jury.¹⁸⁸ The balance struck placed a high burden—an onerous standard—on obtaining post-conviction DNA testing.¹⁸⁹ “As the legislature explained, ‘[b]y 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.’”¹⁹⁰ To the dissent, the legislative history was evidence that “the legislature intended to create an avenue, not a freeway, for post-conviction DNA testing.”¹⁹¹

Third, the dissent expressed concern about how the statute, read with the favorable presumption, would apply in single perpetrator rape cases.¹⁹² The dissent argued that a favorable presumption eliminates the onerous statutory burden under RCW 10.73.170 because a petitioner “must present a theory of innocence and not simply contend, ‘I didn’t do it’” to meet the rigorous statutory standard.¹⁹³ According to the dissent,

185. *Crumpton*, 181 Wash. 2d at 266, 332 P.3d at 454; see 18 U.S.C. § 3600(a) (2012).

186. *Crumpton*, 181 Wash. 2d at 266, 332 P.3d at 454 (quoting Dist. Attorney’s Office v. Osborne, 557 U.S. 52, 68–69 (2009)). It must be noted that the “presumption of innocence” and the “favorable presumption” for DNA testing are very different. The “presumption of innocence” language is used by Justice Stephens here to explain why federal courts have applied a “heavy burden” for relief under the federal statute, not to equate the standards. *See id.*

187. *Id.* at 265–66, 332 P.3d at 454.

188. *Id.* at 265, 332 P.3d at 454.

189. *Id.*

190. *Id.* at 265–66, 332 P.3d at 454 (alteration in original) (quoting H.B. REP. NO. 58-2872, Reg. Sess., at 3 (Wash. 2004)).

191. *Id.* at 266, 332 P.3d at 454. Notably, Chief Justice Madsen wrote the majority opinion in *Riofta*, the case relied on most heavily by the Court in *Crumpton*. Although the Chief Justice did not write a dissenting opinion in *Crumpton* to illuminate her exact reasoning, it is difficult to reconcile the majority’s analysis of *Riofta* with her dissenting vote in *Crumpton*. If interpreting *Riofta* necessitates finding a favorable presumption in RCW 10.73.170, as the majority characterized, then it is surprising that the justice who wrote that opinion seems to disagree with that interpretation.

192. *Id.* at 267, 332 P.3d at 455.

193. *Id.*

Crumpton rested his motion on nothing more than the contention that, because this is a single perpetrator rape case, DNA evidence would prove his innocence; Crumpton did not advance any new theory of defense, nor did he show any link between DNA testing and his innocence.¹⁹⁴

Justice Stephens also argued that policy considerations supported not reading a favorable presumption into RCW 10.73.170 because of the impact of the presumption in single perpetrator cases.¹⁹⁵ The favorable presumption may be seen as taking discretion away from the trial courts in single perpetrator cases to consider each possible DNA testing result—whether favorable, inconclusive, or negative.¹⁹⁶ As the dissent said, the legislature “vested discretion in the trial court to consider the evidence at trial in conjunction with any new evidence and the possibility of favorable DNA results . . . [C]onclusively applying a favorable presumption practically eliminates the trial court’s discretion in a single perpetrator rape case.”¹⁹⁷

Fourth, the dissent distinguished the cases that guided the majority’s analysis.¹⁹⁸ Beginning with *Riofta*, the dissent took issue with the majority’s characterization of the issue presented.¹⁹⁹ The court of appeals holding that caused concern in *Riofta* was that a petitioner must demonstrate his innocence based on the DNA test results alone.²⁰⁰ According to the dissent, the Court in *Riofta* never considered whether RCW 10.73.170 required a favorable presumption, and nothing in *Riofta* “supports a reading of the statute that would allow the petitioner in a case such as this to rest on the presumption of favorable test results alone.”²⁰¹

The dissent also found *Thompson* was not factually analogous to *Crumpton* because of the weak identification of the attacker by the victim.²⁰² The victim in *Thompson* did not get a good look at the perpetrator, she lost consciousness several times, had lapses in memory, and there was a lack of corroborating evidence, such as injuries on

194. *Id.* at 268, 332 P.3d at 455.

195. *Id.* at 267–68, 332 P.3d at 455.

196. *Id.*

197. *Id.* at 267, 332 P.3d at 455.

198. *Id.* at 268–71, 332 P.3d at 455–56.

199. *Id.* at 269, 332 P.3d at 455.

200. *Id.* at 264, 332 P.3d at 453 (citing *State v. Riofta*, 166 Wash. 2d 358, 367, 209 P.3d 467, 472 (2009)).

201. *Id.* at 269, 332 P.3d at 456.

202. *Id.* at 270, 332 P.3d at 456.

Thompson.²⁰³ The facts in *Crumpton*, as the dissent described, were “not nearly as precarious” because Crumpton admitted to being in the house, police found him nearby, he had the victim’s possessions on him, and the victim’s description of her attacker was consistent with Crumpton’s physical features.²⁰⁴

Finally, the dissent expressed concern that shifting the focus away from whether the petitioner had shown innocence on a more probable than not basis may “create a revolving door for individuals already convicted beyond a reasonable doubt to postpone finality and burden the system with requests for DNA testing solely on the ground that new DNA technology now exists.”²⁰⁵ In conclusion, the dissent reasoned, “[r]ather than reading a favorable presumption into the language of RCW 10.73.170, we should require the petitioner to show what the statute’s plain language demands—a ‘likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.’”²⁰⁶ The dissent stated Crumpton did not meet this evidentiary burden; rather, the majority’s favorable presumption satisfied the burden for him.²⁰⁷

IV. HOW *CRUMPTON* HAS BEEN APPLIED: INTERMEDIATE APPELLATE COURTS HAVE APPLIED *CRUMPTON*’S FAVORABLE PRESUMPTION TO AFFIRM DENIALS OF MOTIONS FOR POST-CONVICTION DNA TESTING

There has been little judicial application of *Crumpton*’s favorable presumption in the months since its enactment. As of this writing, there have been three unpublished intermediate appellate decisions citing *Crumpton*.²⁰⁸ In these cases, the courts applied a favorable presumption but, nonetheless, affirmed the denial of post-conviction DNA testing under RCW 10.73.170.²⁰⁹

The first case, decided by a three judge panel in Division III of the

203. *Id.*

204. *Id.*

205. *Id.* at 268, 332 P.3d at 455.

206. *Id.* at 271, 332 P.3d at 457 (citing WASH. REV. CODE § 10.73.170 (2014)).

207. *Id.* at 268, 332 P.3d at 455.

208. *See* State v. Allen, No. 31578-9-III, 2014 WL 5089235 (Wash. Ct. App. Oct. 9, 2014); State v. Tovar, No. 70721-3-I, 2015 WL 540903 (Wash. Ct. App. Feb. 9, 2015); State v. Jones, No. 32182-7-III, 2015 WL 3618633 (Wash. Ct. App. June 9, 2015). *Jones* will not be discussed further because Jones’s motion was denied because no DNA evidence was ever collected. *Jones*, 2015 WL 3618633, at *1. Therefore, there was no evidence available for post-conviction testing.

209. *See* Allen, 2014 WL 5089235; Tovar, 2015 WL 540903.

Washington State Court of Appeals, is *State v. Allen*.²¹⁰ In that case, a jury convicted Anthony Allen of kidnapping and assault.²¹¹ Allen filed a motion for post-conviction DNA testing under RCW 10.73.170, and the superior court denied his motion.²¹² The court of appeals affirmed the trial court, holding that “[a]lthough DNA testing serves a worthwhile purpose, its employment is not helpful here, since the victims of the crimes were acquaintances of Anthony Allen and would not misidentify him. Thus, the statutory basis to compel DNA testing is not satisfied.”²¹³

The court in *Allen* specifically stated that *Riofta* controlled its decision.²¹⁴ The opinion cites *Crumpton* when detailing the factual background of post-conviction DNA testing cases in Washington.²¹⁵ After applying the standard set forth in *Riofta*, the court in *Allen* simply said, “[c]ase law supports using a favorable presumption when deciding whether to grant a motion for post-conviction DNA testing.”²¹⁶ The court did not cite to *Crumpton* for this proposition; in fact, there was no citation at all.²¹⁷ However, the recognition of a favorable presumption when evaluating motions under RCW 10.73.170 is consistent with the holding of *Crumpton*.²¹⁸

The second case, decided by a three judge panel in Division I of the Washington State Court of Appeals, is *State v. Tovar*.²¹⁹ In that case, a jury had convicted Michael Tovar of second degree rape while armed with a deadly weapon.²²⁰ Tovar’s argument in support of post-conviction DNA testing was that a favorable DNA result would demonstrate the victim had lied when she testified she was monogamous with Tovar; therefore, she was not a credible witness against him.²²¹ Tovar’s defense

210. *See Allen*, 2014 WL 5089235.

211. *Id.* at *1.

212. *Id.*

213. *Id.*

214. *Id.* at *4. *Allen* is factually analogous to *Riofta* as they both involve an object which could have been readily used by multiple people, therefore it could have multiple DNA sources. In *Allen* the evidence in question was a kitchen knife, whereas in *Riofta* the evidence was a baseball hat. *Id.* at *4; *State v. Riofta*, 166 Wash. 2d 358, 362, 209 P.3d 467, 469–70 (2009).

215. *Allen*, 2014 WL 5089235, at *4.

216. *Id.* at *3.

217. *Id.*

218. *State v. Crumpton*, 181 Wash. 2d 252, 260, 332 P.3d 448, 452 (2014) (holding that “[a] court should look to whether, considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis”).

219. No. 70721–3–I, 2015 WL 540903 (Wash. Ct. App. Feb. 9, 2015).

220. *Id.* at *1.

221. *Id.*

at trial was consent.²²² The superior court denied Tovar's motion for post-conviction DNA testing under RCW 10.73.170,²²³ and the court of appeals affirmed the denial because a favorable DNA test "would not raise a reasonable probability of Tovar's innocence."²²⁴

The court in *Tovar*, unlike the court in *Allen*, specifically relied on *Crumpton* in reaching its decision. The court stated that "[w]hen determining if it is likely the DNA evidence would demonstrate innocence, 'a court should presume DNA evidence would be favorable to the convicted person.'"²²⁵ After relying on the standard set forth in *Crumpton*, the court distinguished *Crumpton* factually from *Tovar*.²²⁶ The court found that in *Crumpton*, the perpetrator's identity was at issue, and therefore, exculpatory DNA results would affect the likelihood of innocence.²²⁷ On the other hand, in a defense of consent or excuse, as Tovar had raised, an exculpatory DNA result would not exclude Tovar as the perpetrator, but only shed light on the victim's credibility.²²⁸ Therefore, the DNA evidence would "add little" to determining Tovar's innocence and the motion for post-conviction DNA testing was properly denied.²²⁹

These two cases illustrate how lower courts are beginning to apply *Crumpton*. Interestingly, *Tovar* involved a single-perpetrator where the court applied a favorable presumption but still denied the motion for post-conviction DNA testing,²³⁰ a scenario that Justice Stephens dissenting in *Crumpton* expressed concern could not happen when applying the favorable presumption.²³¹ However, unlike in *Crumpton*, in both *Allen* and *Tovar* the identity of the perpetrator was not the primary issue.²³² Therefore, although the impact of *Crumpton* on post-conviction

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at *2 (citing *State v. Crumpton*, 181 Wash. 2d 252, 255, 332 P.3d 448, 449 (2014)).

226. *Id.* at *3.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at *1.

231. *State v. Crumpton*, 181 Wash. 2d 252, 268, 332 P.3d 448, 455 (2014) (Stephens, J., dissenting).

232. *Id.* at 256–57, 332 P.3d at 450 (majority opinion) (noting that *Crumpton* admitted to being in the victim's house but denied hitting or raping her); *State v. Allen*, No. 31578-9-III, 2014 WL 5089235, at *1 (Wash. Ct. App. Oct. 9, 2014) (noting the victims knew *Allen* and would not misidentify him); *State v. Tovar*, 2015 WL 540903, at *3 (noting *Tovar*'s defense was consent or excuse).

DNA testing motions is still unclear, these cases demonstrate a willingness in the courts to take into consideration the entire body of evidence before determining whether to permit testing rather than letting the favorable presumption create a “revolving door.”²³³ As time passes, courts will likely further interpret the favorable presumption set forth in *Crumpton* and there will be more evidence of its successes and failures.

V. READING A FAVORABLE PRESUMPTION INTO RCW 10.73.170 ALIGNS WITH THE APPROACHES OF OTHER STATES, LEGISLATIVE GOALS OF JUSTICE, AND SOCIETY’S DESIRE TO EXONERATE THE INNOCENT

This Part will consider the prudence of the Court’s favorable presumption. First, this Part will compare *Crumpton*’s requirement of a favorable presumption to the approaches of post-conviction DNA testing in other states. Then, the alignment of the favorable presumption with both federal and state legislative goals of justice will be examined. Finally, this Part will argue that the favorable presumption properly furthers policy goals of avoiding incarcerating the innocent, particularly because the fear of courts being overburdened by requests for DNA testing has not yet played out in Washington courts.

A. *A Favorable Presumption Is Consistent with the Statutes of Other States*

Many states have avoided the question the Washington State Supreme Court faced in *Crumpton* because their statutes explicitly state that evaluation of post-conviction DNA testing motions should presume “exculpatory results.”²³⁴ Texas’s statute, for example, requires DNA testing if the court finds “the person would not have been convicted if *exculpatory results* had been obtained through DNA testing.”²³⁵ Texas appellate courts have explained the task under the statute is not to determine the likelihood of a favorable DNA result; rather, the statute demands the court “assume that the results of the DNA testing would

233. See *Crumpton*, 181 Wash. 2d at 268, 332 P.3d at 455 (Stephens, J., dissenting) (“The effect [of the favorable presumption], at least in single perpetrator rape cases, is to create a revolving door for individuals already convicted beyond a reasonable doubt to postpone finality and burden the system with requests for DNA testing solely on the ground that new DNA technology now exists.”).

234. Brooks & Simpson, *supra* note 34, at 81.

235. TEX. CODE CRIM. PROC. ANN. art. 64.03 (West, Westlaw through 2015 Reg. Sess.) (emphasis added).

prove favorable to appellant.”²³⁶ Hawaii’s statute requires a court to order DNA testing if it finds “[a] reasonable probability exists that the defendant would not have been prosecuted or convicted if *exculpatory* results had been obtained through DNA analysis, even if the defendant later pled guilty or no contest.”²³⁷ The model post-conviction DNA testing statute promulgated by the Innocence Project also contains explicit favorable presumption language.²³⁸

In 2013, Oklahoma became the final state to pass a law permitting post-conviction DNA testing.²³⁹ The text of Oklahoma’s statute explicitly requires that reviewing judges apply a favorable presumption to DNA testing results.²⁴⁰ The statute reads: “A court shall order DNA testing only if the court finds . . . [a] reasonable probability that the petitioner would not have been convicted if *favorable results* had been obtained through DNA testing at the time of the original prosecution.”²⁴¹

Oklahoma promulgated the statute after recognizing that it was the only state without access to post-conviction DNA testing.²⁴² The Oklahoma Justice Commission—the group that prompted the drafting of the legislation²⁴³—detailed the shortcomings of laws in other states it sought to overcome.²⁴⁴ The Commission recognized that the laws of many other states presented insurmountable hurdles to the petitioner, placing the burden on the defense to “effectively solve the crime and prove that the DNA evidence promises to implicate another individual.”²⁴⁵ The Commission recommended a “reasonable standard” to establish proof of innocence.²⁴⁶ The proposed legislation required a

236. *In re Morton*, 326 S.W.3d 634, 641 (Tex. Ct. App. 2010).

237. HAW. REV. STAT. § 844D-123(a)(1) (emphasis added).

238. INNOCENCE PROJECT, MODEL LEGISLATION: AN ACT CONCERNING ACCESS TO POST-CONVICTION DNA TESTING 3 (2012), available at http://www.innocenceproject.org/free-innocent/improve-the-law/Access_to_Post_Conviction_DNA_Testing_Model_Bill.pdf (“A reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if *favorable* results had been obtained through DNA testing at the time of the original prosecution.” (emphasis added)).

239. OKLA. STAT. ANN. tit. 22, § 1373.4(A)(1) (West, Westlaw through 2015 1st Reg. Sess.); see OKLA. JUSTICE COMM’N, REPORT TO THE OKLAHOMA BAR ASSOCIATION 24 (2013) (noting that Oklahoma was the last state in the United States to not have a post-conviction DNA testing law).

240. OKLA. STAT. ANN. tit. 22, § 1373.4(A)(1).

241. *Id.* (emphasis added).

242. OKLA. JUSTICE COMM’N, *supra* note 239, at 24.

243. Press Release, Okla. Bar Ass’n, Oklahoma Justice Commission Issues Final Report, Adjourns (Mar. 1, 2013), available at <http://www.okbar.org/news/Recent/2013/DNATesting.aspx>.

244. OKLA. JUSTICE COMM’N, *supra* note 239, at 24.

245. *Id.*

246. *Id.*

finding that there is “a reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution.”²⁴⁷ The legislature ultimately adopted the Commission’s proposed language.²⁴⁸ Thus, Oklahoma’s solution to the insurmountable hurdles petitioners faced in other states was to include an explicit favorable presumption in its statute.

Since the 2013 enactment of the Oklahoma post-conviction DNA testing statute two appellate opinions have addressed it.²⁴⁹ In *State ex rel. Smith v. Neuwirth*,²⁵⁰ an appellate court reversed a lower court’s grant of post-conviction DNA testing on procedural grounds.²⁵¹ The lower court judge, in granting the motion for post-conviction DNA testing, reasoned:

In looking at the statute itself . . . a reasonable probability the petitioner would not have been convicted if favorable results had been obtained I don’t understand how you could ever deny that, if you have favorable results, they are such that they show exculpatory evidence I don’t believe under the statute I have any other decision other than to allow it.²⁵²

In reversing this decision, the appellate court found that the trial court abused its discretion by finding a reasonable probability that favorable DNA results would have prevented the conviction.²⁵³ The court reversed because the petitioner failed to include the statutorily required affidavit in his motion requesting DNA testing.²⁵⁴ Despite its reversal, the appellate court focused only on the procedural shortcoming—the missing affidavit—and did not criticize the commentary of the lower court judge that the favorable presumption generally requires the granting of post-conviction DNA testing.²⁵⁵

Other states—such as Georgia and Iowa, as well as the District of

247. *Id.* at 83.

248. *Compare id.* (“[A] reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution.”), with OKLA. STAT. ANN. tit. 22, § 1373.4(A)(1) (West, Westlaw through 2015 1st Reg. Sess.) (adopting the exact same language).

249. *State ex rel. Smith v. Neuwirth*, 337 P.3d 763 (Okla. 2014) (explored in detail below); *Watson v. State*, 343 P.3d 1282, 1283 (Okla. 2015) (holding the petitioner was procedurally barred from filing a second motion for post-conviction DNA testing).

250. 337 P.3d 763 (Okla. 2014).

251. *Id.* at 764.

252. *Id.*

253. *Id.* at 766.

254. *Id.*

255. *Id.* at 766–67.

Columbia—have post-conviction DNA testing statutes that contain ambiguous “reasonable probability” language and no explicit favorable presumption.²⁵⁶ For example, the California Penal Code requires, among other things, that the petitioner “[e]xplain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person’s verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.”²⁵⁷

Scholars have criticized the California statute because its ambiguous standard could lead to frustration of the statute’s purpose.²⁵⁸

The only way the statute can be interpreted without frustrating its purpose is to take a “one-step” approach. The court should determine whether the result of a favorable DNA test *could* produce evidence that, even when considering all the evidence produced at trial, creates a reasonable probability the convicted person’s verdict or sentence would have been more favorable if the results of the DNA testing had been available at the time of trial. If the court fails to make the presumption of a favorable DNA testing result, the statute can never achieve its purpose.²⁵⁹

The scholars argue post-conviction DNA statutes that purport to have the purpose of ensuring justice must be read with a favorable presumption.²⁶⁰ Although the “reasonable probability” language may be ambiguous, the Supreme Court of California later read a favorable presumption into the statute.²⁶¹ Twice in that opinion, the Court stated the trial court’s decision included assuming a DNA test result favorable to the petitioner.²⁶²

It is important to note that President Bush did not sign the Innocence Protection Act into law until 2004.²⁶³ Many of the developments in state law allowing for post-conviction DNA testing have occurred—or advanced—after the passage of the federal statute. For example, the Innocence Protection Act influenced the Washington State post-

256. Brooks & Simpson, *supra* note 34, at 812.

257. CAL. PENAL CODE § 1405(d)(1)(D) (West, Westlaw through 2015 Reg. Sess.).

258. Brooks & Simpson, *supra* note 34, at 812 (emphasis in original).

259. *Id.*

260. *Id.*

261. *Richardson v. Superior Court*, 183 P.3d 1199, 1201 (Cal. 2008). Although the decision pre-dates the most recent 2015 version of the statute, the relevant language in the new version remains unchanged. See CAL. PENAL CODE § 1405(c)(1)(B) (2005).

262. *Richardson*, 183 P.3d at 1203, 1205–06.

263. 18 U.S.C. § 3600(a) (2012).

conviction DNA statute, as seen in its legislative history.²⁶⁴ Given Washington and California's eventual reading of a favorable presumption into their statutes, and the many statutes that explicitly have a favorable presumption, post-conviction DNA law may be in a state of transition to expand access to justice.²⁶⁵ Therefore, if the expansion of access to justice is occurring in other states, the majority's favorable presumption in *Crumpton* is consistent with that legal trend.

B. A Favorable Presumption Is Consistent with the Legislative Goals of Justice

Beyond the statutory text explored above, *Crumpton*'s favorable presumption is consistent with the overarching legislative goals of justice as articulated by both the federal and Washington State legislatures. Congress passed the Innocence Protection Act with an understanding that the desired path to justice was a complicated one.²⁶⁶ Opening the hearing before the United States Senate on post-conviction DNA testing in 2000, Senator Orrin Hatch made the following remarks:

No one here today will quarrel with the assertion that post-conviction DNA testing should be made available when it serves the ends of justice. Reaching agreement on a practical definition for justice, however, is a difficult and different matter. After all, justice does mean different things to different people. . . . [W]e have an obligation to balance the adequacy of procedural protections afforded to defendants against the need for integrity and finality in State and Federal courts. It is my hope that in holding this hearing, we can take a first step toward reaching consensus on how best to strike this balance in the area of post-conviction DNA testing, and in doing so serving, of course, the cause of justice.²⁶⁷

As the hearing continued, the various witnesses and senators debated the appropriate standard necessary to carry out their goals of justice, particularly if the testing should presume an exculpatory result.²⁶⁸ In the

264. See H.R. REP. NO. 59-1014, Reg. Sess. (Wash. 2005) (recognizing the need to conform to the Justice for All Act in order to obtain federal funding for post-conviction DNA testing).

265. See CONTROVERSIES IN INNOCENCE CASES 3–6 (Sarah Lucy Cooper ed. 2014) (summarizing the beginning, and continuing momentum, of the “innocence revolution”).

266. See *Post-Conviction DNA Testing: When Is Justice Served?: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 1 (2000).

267. *Id.*

268. *Id.* at 98. (“[T]he court in ordering DNA testing has to determine that testing would produce non-cumulative exculpatory evidence relevant to the claim.” (statement of Sen. Leahy)); *cf. id.* at

end, the Innocence Protection Act was passed with the requirement that the proposed DNA testing may produce new material evidence that would “raise a reasonable probability that the applicant did not commit the offense,”²⁶⁹ rather than an explicit presumption of an exculpatory result.

This complex balance between the rights of convicted persons and societal interests in finality continued to permeate the debate on post-conviction DNA testing after the passage of the Innocence Protection Act. Years later, the Washington legislature grappled with this balance as it formulated RCW 10.73.170.²⁷⁰ Washington weighed the need to “ensure that a process remains in place for cases where DNA tests could provide evidence of a person’s innocence” against the desire to minimize the number of requests by “keeping the high ‘proof of innocence’ standard in the bill.”²⁷¹ Although the legislature weighed both considerations of justice, ultimately the intent was to maintain the high proof of innocence standard in order to limit testing to cases where credible DNA testing “could benefit an innocent person.”²⁷² The Court continues to describe this standard as “onerous.”²⁷³

It is difficult to reconcile the legislative intent to maintain an onerous standard for post-conviction DNA testing with the favorable presumption the Court reads into RCW 10.73.170. There is, of course, an argument that if the legislature intended for there to be a favorable presumption, they would have written it into the statute as many other states had done. The State, in its response brief filed with the Court for *Crumpton*, even argued the policy statements being raised had been “plainly considered and rejected by the Legislature when it enacted the statute.”²⁷⁴ However persuasive this reliance on purported legislative intent may be, its weight in the ultimate evaluation of *Crumpton*’s favorable presumption must be balanced against the aforementioned overarching legislative goals of justice that are furthered by the favorable presumption.

107 (“[R]equiring granting of DNA typing so long as that evidence is . . . relevant and exculpatory[.] . . . that is a standard that is of some difficulty to me” (statement of George Clarke)).

269. 18 U.S.C. § 3600(a)(8)(B) (2012).

270. H.R. REP. NO. 58-2872, Reg. Sess. (Wash. 2004).

271. *Id.*

272. *Id.*

273. *State v. Crumpton*, 181 Wash. 2d 252, 261, 332 P.3d 448, 452 (2014) (citing *State v. Riofta*, 166 Wash. 2d 358, 367, 209 P.3d 467, 472 (2009)).

274. Brief for Respondent at 18, *State v. Crumpton*, 172 Wash. App. 408, 389 P.3d 766 (2012) (No. 42173-9-II).

C. *A Favorable Presumption Advances Society's Desire to Avoid Incarcerating the Innocent and Will Not Likely Overburden the Courts*

The number of exonerations that have occurred across the nation is astonishing,²⁷⁵ and the litigation resulting from post-conviction DNA testing motions has been sparse.²⁷⁶ One reason for this, cited by the National Institute of Justice, is that often the State will simply consent to a petitioner's request for post-conviction DNA testing, obviating the need for further litigation.²⁷⁷ In fact, the guidelines promulgated by the National Institute of Justice state a prosecutor should consent to testing in many cases.²⁷⁸ "For example, when a rape case turned solely, or in large part, on eyewitness testimony, where serology at the time was inconclusive or not highly discriminating, and newer, more discriminating tests are now available, the prosecutor should order DNA testing."²⁷⁹ Therefore, the need to avoid over-burdening the judicial system would thus far appear not to be a concern—or at least, not enough of a concern to override the interest in exonerating innocent prisoners.

The myth of over-burdened courts due to post-conviction DNA testing has also not come to fruition in Washington. According to the Office of Public Defense, eighteen people have filed for relief under RCW 10.73.170 since its enactment in 2005.²⁸⁰ In addition, according to the Innocence Network's amicus brief in *Crumpton*, "only three of the state crime lab's 967 backlogged DNA cases were the result of an RCW 10.73.170 petition."²⁸¹ Although these numbers do not fully represent the pressure put on Washington courts and labs, they can help put the burden into perspective. However, as Justice Stephens argues in her dissent,²⁸² the burdens on the system thus far have not taken into account

275. As of March 8, 2015, there have been 1560 total—DNA and non-DNA—exonerations across the United States. The National Registry of Exonerations, *supra* note 40.

276. NAT'L INST. OF JUSTICE, *supra* note 14, at 158.

277. *Id.*

278. NAT'L INST. OF JUSTICE, *supra* note 22, at 40.

279. *Id.*

280. Memorandum from Wash. State Office of Pub. Def. (received Jan. 27, 2015) (noting that motions are not required to be filed with the Office of Public Defense). Number is calculated using motions filed with the Office of Public Defense after the March 9, 2015 enactment date. See WASH. REV. CODE § 10.73.170 (2014).

281. Amicus Curiae Brief of Innocence Network in Support of Petition for Review at 7–8, *State v. Crumpton*, 181 Wash. 2d 252, 332 P.3d 448 (2014) (No. 88336–0).

282. *Crumpton*, 181 Wash. 2d at 271, 332 P.3d at 457.

the favorable presumption found by the Court. Therefore, even if the burden on the system does not outweigh the benefit of justice for the wrongfully convicted now, the favorable presumption may open the door for such a burden. However, any such argument at this point would be speculative because the favorable presumption has thus far had limited application.²⁸³

Additionally, as discussed previously in the context of the California Penal Code, the Court's reading of a favorable presumption into the statute is consistent with cases interpreting statutes in other states with similar "reasonable likelihood" language.²⁸⁴ As articulated by the National Institute of Justice:

The "reasonable likelihood" prong ensures that the evidence to be tested has probative value. Because it is impossible to know the outcome of DNA testing in advance of actual testing, this inquiry *requires the court to presume favorable test results* and determine the significance of those favorable test results – that is, whether it is 'reasonable likely' that favorable test results would be probative enough to establish the applicant's innocence. The "reasonable probability" prong requires the court to consider *the probative value of favorable test results* on the case – not whether it thinks it is likely, as a matter of fact, that the applicant is actually innocent.²⁸⁵

The Court's holding in *Crompton* is consistent with this analysis.

Although Justice Stephens's well-reasoned dissent asserts many complex policy considerations against reading a favorable presumption into RCW 10.73.170, it is not clear that the concerns addressed by those policy arguments have come to fruition. Creating a "revolving door" for single perpetrator cases may conflict with the intent of the legislature, but absent evidence of the evils the onerous standard was meant to protect against, the countervailing interest in justice for the wrongfully convicted weighs more heavily.

CONCLUSION

Post-conviction DNA testing is a valuable tool in ensuring the most just outcomes in Washington's criminal justice system. Given the astonishing number of exonerations and the apparent myth of over-

283. *See supra* notes 208–30.

284. *Supra* notes 257–62262.

285. NAT'L INST. OF JUSTICE, *supra* note 14, at 159 (emphasis added) (citing *State v. Peterson*, 836 A.2d 821, 827 (N.J. 2003); *State v. DeMarco*, 904 A.2d 797, 804 (N.J. 2006)).

burdened courts, expanding access to post-conviction DNA testing is a desirable result. Although the legislature intended to maintain an onerous standard for access to post-conviction DNA testing, the Washington State Supreme Court properly found the current legal and social landscapes supported reading a favorable presumption into RCW 10.73.170. Evaluating motions for post-conviction DNA testing with a presumption the DNA evidence requested would be favorable to the petitioner is also consistent with the approaches of many other states. Although federal law has not yet adopted the explicit favorable presumption, Washington can consider itself among the trailblazers in expanding access to justice through post-conviction DNA testing.