No. 1027044

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CHRISTOPHER RAMIREZ,
Petitioner.

MEMORANDUM OF AMICUS CURIAE WASHINGTON INNOCENCE PROJECT IN SUPPORT OF REVIEW

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I. INTEREST OF AMICUS CURIAE

The identity and interest of Amicus Curiae is set forth in the accompanying Motion.

II. INTRODUCTION

> "Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)

Judge Learned Hand wrote those words one hundred years ago. But, in the last 35 years alone, post-conviction DNA testing has exonerated 596 people nationwide. *Nat'l Registry of Exonerations*, UNIV. OF MICH. ("NAT'L REGISTRY"), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. These exonerations prove—with DNA's "unparalleled accuracy," *Maryland v. King*, 569 U.S. 435, 436, 133 S. Ct. 1958, 1964, 186 L. Ed. 2d 1 (2013)—that despite plentiful procedural protections, the "innocent man convicted" is very real indeed.

But the exculpatory potential—or lack thereof—of DNA evidence cannot be known until it is tested. RCW 10.73.170 provides for such testing, "as a way to ensure an innocent person is not in jail." *State v. Crumpton*, 181 Wn.2d 252, 258, 332 P.3d 448, 450 (2014). The statute directs courts to order testing in *every* case where the petitioner meets certain "lenient" procedural requirements and a substantive requirement that is "onerous but reasonable enough to let legitimate claims survive." *Id*. at 261-62. A robust presumption of exculpatory testing results is part of this standard.

Christopher Ramirez seeks review in this Court to be accorded the benefit of that presumption. Below, Mr. Ramirez argued that testing would yield a Combined DNA Index System (CODIS) match to a different individual, a presumption that is well-supported under Washington law. Instead, the Court of Appeals characterized this as "three presumptions daisy-chained together" and found that "[t]o impose such presumptions on the trial court would be to impose additional favorable inferences to

which defendants are not entitled." *State v. Ramirez*, No. 39118-3-III, 2023 WL 8433350, at *3 (Wash. Ct. App. Dec. 5, 2023).

In so doing, the Court of Appeals misapplied RCW 10.73.170's favorable presumption, in direct conflict with prior decisions of this Court and published decisions of the Court of Appeals. RAP 13.4(b)(1), (2). Mr. Ramirez's case also merits review because if our courts continue to misapply RCW 10.73.170 as here, some innocent Washingtonians—like those whose stories appear in part IV.C, *infra*—will be denied DNA testing under the statute that was enacted for the very purpose of providing testing. RAP 13.4(b)(4).

III. STATEMENT OF THE CASE

Amicus adopts Petitioner Christopher Ramirez's Statement of the Case.

IV. ARGUMENT

A. Review is Warranted Because *Ramirez* Conflicts with Established Law Favoring Access to Postconviction DNA Testing.

RCW 10.73.170 recognizes that "[m]any innocent individuals have been exonerated through postconviction DNA tests," and that the technology should therefore be made available to anyone who "might actually be innocent." *Crumpton*, 181 Wn.2d at 261-62. Its "goal" is to provide for DNA testing in every case where "there is a credible showing that it could benefit a possibly innocent individual." *Id.* at 261. Indeed, the statute was amended in 2005 to "broaden access to DNA testing," *State v. Gray*, 151 Wn. App. 762, 773, 215 P.3d 961, 966 (2009) (citing *Riofta*, 166 Wn.2d at 365).[1]

[1] The statute was drafted to be "comparable to" federal DNA testing law to receive federal funding. *Riofta*, 166 Wn.2d at 368. But many provisions of the federal law, which requires detailed, fact-specific engagement with the theory of innocence, were omitted from our statute—a clear sign that our legislature

The substantive standard of RCW 10.73.170 requires only a "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."[2] This Court has held that "an exculpatory DNA test result" is "the appropriate analytical method for achieving the most just resolution to these motions" and must be presumed. *Crumpton*, 181 Wn.2d at 260-61. Applying this robust, flexible presumption, our courts have granted motions for DNA testing notwithstanding "overwhelming physical and circumstantial evidence" of guilt,

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declined these more stringent requirements. *See Bird-Johnson Corp*. v. *Dana Corp*., 119 Wn.2d 423, 428, 833 P.2d 375, 377 (1992).

[2] Although this brief focuses on *Ramirez*'s misapplication of the presumption, there is a concerning trend across all three divisions of the Court of Appeals narrowing the substantive prong by erasing reasonableness—10.73.170's touchstone. *Compare Riofta*, 166 Wn.2d 358 (referencing "reasonable probability" seven times by majority), *and Crumpton*, 181 Wn.2d at 262 ("the standard must be onerous but reasonable enough to let legitimate claims survive") *with Ramirez*, 2023 WL 8433350 (referencing only "a probability" and omitting "reasonable" entirely), *and State v. Braa*, 2 Wn. App. 2d 510, 520, 410 P.3d 1176, 1181 (2018) (omitting "but reasonable enough" from "onerous" standard), *and State v. Tennant*, No. 57939-1-II, 2024 WL 455293 (Wash. Ct. App. Feb. 6, 2023) (same).

recognizing that "there will always be strong evidence against a convicted individual since they were convicted of the crime beyond a reasonable doubt." *Id*. at 262 (citing *Gray*, 151 Wn. App. at 773).

Holding our courts to the strong presumption this Court established has neither overwhelmed our legal system nor our state laboratory because few requests for postconviction DNA are made. Since RCW 10.73.170 was broadened in 2005, WashIP, the only Washington organization fully dedicated to this work, has litigated postconviction DNA testing in 38 cases—approximately two per year. *See also Crumpton,* 181 Wn.2d at 262 ("…no direct evidence showing that labs have in fact been overburdened by an onslaught of postconviction testing"); Supplemental Brief for Innocence Network et al. as Amici Curiae at 12-13, *Crumpton*, 181 Wn.2d 252 (2014) (noting "minute fraction" of postconviction DNA cases at WSPCL—*nine* of 4,536 cases tested in 2012-13).

The *Ramirez* Court correctly noted that "RCW 10.73.170 does not define what exculpatory result courts must presume when ruling on a motion for additional DNA testing." 2023 WL 8433350, at *3. Indeed, our caselaw makes clear that the presumption is intended to be flexible, designed to adapt to each case. Accordingly, the presumed "exculpatory result" has variously meant "an absence of [the defendant's] DNA in conjunction with a match of the DNA of a convicted felon in Washington," *Riofta*, 166 Wn.2d at 367, a result that "conclusively exclude[s]" the defendant, *Thompson*, 173 Wn.2d at 875, "the presence of the same DNA profile on either the vaginal or anal swabs taken from [victim 1] and on any of the samples from [victim 2]," *Gray*, 151 Wn. App. at 775, and "that the DNA was [the decedent's]" to the exclusion of the defendant or any "third party," *Braa*, 2 Wn. App. 2d at 521. In each case, these represent the most favorable testing outcome that accords with the evidence produced at trial.

This is not the presumption *Ramirez* applied. Instead, that court held that "the full extent of the exculpatory presumption to which defendants are entitled under *Riofta* and its line of cases" is only that testing will yield the profile of "a third person and not [the defendant]." 2023 WL 8433350, at *3. In fact, this directly contradicts *Riofta*, 166 Wn.2d at 367—which expressly presumed a CODIS match—and its progeny. So limited a presumption may be an "extremely persuasive" indication of innocence in a single-suspect rape case, *Crumpton*, 181 Wn.2d at 263, but our legislature did not intend RCW 10.73.170 to benefit only those wrongfully convicted of rape. Indeed, of the seven Washington DNA exonerees to date, only three were convicted of rape; three more were convicted of murder and one was convicted of burglary. NAT'L REGISTRY (filter for "Washington" and "DNA"). Applying the presumption Mr. Ramirez seeks—a full profile with CODIS match for Individual A—is not "overbroad," 2023 WL 8433350, at *5. It is the exact presumption that our courts have applied time and again—one

"reasonable enough to let legitimate claims survive." *Crumpton*, 181 Wn.2d at 262. Only then can the court properly analyze the likelihood of Mr. Ramirez's innocence.

Additionally, in characterizing Mr. Ramirez's requested presumption as "overbroad," Division III conflates the standard for postconviction DNA motions with that for a new trial based on newly-discovered evidence. A DNA motion is "simply the first step on the journey for a new trial." *Crumpton*, 181 Wn.2d at 263. DNA motions are made with imperfect information because DNA's exculpatory value "cannot be known until after the testing is completed," *Riofta*, 166 Wn.2d at 375 (C. Johnson, J., dissenting)—hence the presumption. A suspect profile has yet to be identified, much less "a plausible link" to the crime in a case not involving rape by a single suspect. *Ramirez*, 2023 WL 8433350, at *3. This investigation is the work of the new trial motion. Conflating these two very different postures imposes "a standard steeped in the doctrine of finality," *Riofta*, 166 Wn.2d at 379 (Chambers, J., dissenting), on what has always been a

categorically reasonable one, designed to provide evidence that *challenges* the finality of wrongful convictions, *Id.* at 368. Review is warranted to affirm the correct standard.

B. Review is Warranted Because Correct Application of Science by Our Courts is an Issue of Substantial Public Interest.

When Division III holds that "the presumption extends only to the result itself"—and that a CODIS match therefore is part of a "series of speculative eventualities, each depending on those preceding it," *Ramirez*, 2023 WL 8433350, at *4—it engages in arbitrary judicial line-drawing that directly contradicts DNA science. Our courts are ill-equipped to draw such lines, a concern that has persisted since DNA technology first proved that our legal system has made catastrophic mistakes. *See*, *e.g.*, COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., ET AL., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH

FORWARD 53 (2009), http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (finding courts "utterly ineffective" at identifying pseudoscience due, in part, to "common lack of scientific expertise among judges and lawyers who must try to comprehend and evaluate forensic evidence"). Science "is continually evolving"—methods change as scientists "repeatedly reexamine prior conclusions." Tania Lombrozo, *What Makes Science Science?*, NPR: COSMOS & CULTURE (Jan. 30, 2017, 5:06 AM), https://www.npr.org/sections/13.7/2017/01/30/512402110/what-makes-science-science. This contrasts sharply with the legal system's emphasis on finality, without which "the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 1074, 103 L. Ed. 2d 334 (1989).

This Court's strong but flexible presumption balances these tensions while holding the system accountable for its mistakes. *Cf. Riofta*, 166 Wn.2d at 378 (Chambers, J., dissenting) ("Judicial finality is a virtue but a vastly inferior one

to actual substantive justice."). This presumption considers the current state of DNA testing. *Compare Riofta*, 166 Wn.2d at 370 (presuming, in 2009, no DNA on hat Riofta wore only briefly), *with Braa*, 2 Wn. App. 2d at 521 (presuming, in 2018, full DNA profile from small drop of blood). It denies further inferences based on information that current DNA technology cannot provide. *See Braa*, 2 Wn. App. 2d at 521 (denying inference about how or when drop of blood got to a location—information DNA testing still cannot provide); *Middleworth*, 2017 WL 888631 (affirming denial because technology not yet possessed by WSPCL). And it avoids the trap of "freezing the state of the scientific research" that attends more rigid standards. Edward J. Imwinkelried, *The Case Against Evidentiary Admissibility Standards That Attempt to "Freeze" The State of a Scientific Technique*, 67 U. COLO. L. REV. 887, 900 (1996) (warning, in early days of DNA, of dangers of inflexible admissibility standards).

Today, far from a "speculative eventualit[y]," *Ramirez*, 2023 WL 8433350 at *4, CODIS searches are a routine and fully-integrated step when WSPCL tests crime scene evidence. *CODIS Program Standard Operating Procedures*, WASH. STATE PATROL, at 4, https://www.wsp.wa.gov/forensics/docs/crimelab/manuals/technical/codis/CODIS_SOP_Revision_32.pdf. It is standard procedure for WSPCL personnel to search CODIS on all "regular business days" and the software automatically flags matches. *Id*. at 14. A CODIS match is, therefore, just as possible an outcome of DNA testing as *Gray*'s redundant profiles, *Thompson*'s profile that excludes the defendant, or *Braa*'s match to the victim (or other individual). *Ramirez* draws a line that includes some of these possible results while excluding others. This misunderstands the science and has no place in our courtrooms.

C. The Meritorious Motions of Several Innocent Washingtonians Would Not Have Survived *Ramirez*'s Application of RCW 10.73.170.

Consider the case of Jeramie Davis, who was wrongfully convicted of murder in 2008. NAT'L REGISTRY (search "Jeramie Davis"). Although he admitted looting the store where the victim lay dying, Mr. Davis denied brutally beating him with a baseball bat. *Id*. DNA testing on the bat revealed an unknown profile, but the State argued that gloves found in Mr. Davis's car explained the absence of his fingerprints or DNA. *Id.* Police later asked WSPCL to search the unknown profile in Washington databases, which was not automatic at the time. *Id*. It matched prolific felon Julio Davila. On further investigation, crime scene palm and fingerprints also matched Davila. *Id*. Still, the State pursued Mr. Davis—on a newly-minted theory that he and Davila were accomplices. *Id.* In 2013, after a thorough investigation found no evidence that the two men even knew each other, Mr. Davis was finally exonerated. *Id.*

Ted Bradford served his entire sentence after being wrongfully convicted of Rape in 1996. *Id*. (search "Ted Bradford"). The victim described her attacker as being of her brother-in-law's build and stature, but police focused on Mr. Bradford because his car resembled one seen in the area, and he confessed after an hours-long interrogation. *Id*. Years later, DNA testing on a mask used in the attack revealed DNA from the victim and an unknown male—not Mr. Bradford. *Id*. The State tried Mr. Bradford again and he was acquitted. *Id.* In 2017, the unknown profile was identified as the victim's brother-in-law. *Id*.

What if Mr. Davis and Mr. Bradford had faced *Ramirez*'s narrow standard? Neither man would have been permitted to presume what was eventually discovered to be the truth—that DNA testing yielded a match to a convicted felon or other suspect in the case, who turned out to be the true perpetrator. To be sure, in neither case was DNA testing dispositive of innocence, as the State's retrial efforts show. But post-testing investigation

subsequently *proved* both men innocent. If *Ramirez*'s narrow interpretation of RCW 10.73.170 were applied in every case, wrongfully-convicted Washingtonians like Mr. Davis and Mr. Bradford would certainly be denied relief.

"We should not be afraid to be proved wrong." *Riofta*, 166 Wn.2d at 379 (Chambers, J., dissenting). A robust presumption favors testing to uncover the truth. Preventing wrongful convictions and identifying the innocent people in our prisons is an issue of substantial public interest. This Court should grant review.

V. CONCLUSION

Amicus Curiae urges this Court to accept review to affirm a robust and flexible presumption that correctly applies DNA science while offering a lifeline "for those few people that have been convicted of crimes that they did not commit." H.B. Rep. on Substitute H.B. 1014, at 4, 59th Leg., Reg. Sess. (Wash. 2005).

CERTIFICATE OF COMPLIANCE WITH RAP 18.17

Undersigned counsel certifies that, pursuant to RAP 18.17(b), the document contains 2,497 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of amicus curiae memoranda of 2,500 words as required by RAP 18.17(c)(9).

DATED this 28 day of February, 2024.

Respectfully Submitted:

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DECLARATION OF SERVICE

I, Justine Mclean-Riggs, declare that on February 28, 2024 I caused to be electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform. The filing was addressed as follows:

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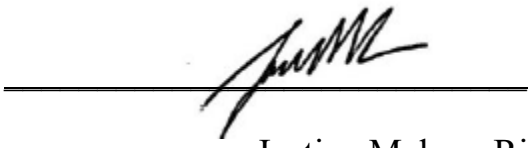
Under penalty of perjury under the laws of the State of Washington, the foregoing is true and correct.

Dated: February 28, 2024



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