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Supreme Court No. _____ Case #: 1029373
NO. 39446-8-III

THE SUPREME COURT FOR THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN CORTES AGUILAR,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CHELAN
COUNTY

PETITION FOR REVIEW

MOSES OKEYO
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4 Sebastian Cortes Aguilar asks this Court to review the opinion of the Court of Appeals in *State v. Cortes Aguilar*, No. 39446-8-III (attached in the appendix).

B. ISSUE PRESENTED FOR REVIEW

The legislature requires the trial court to grant a person's motion for post-conviction DNA testing where the person shows a likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. The court must presume favorable DNA results and consider them in the context of all the evidence. Here, both the trial court and the Court of Appeals failed to consider that Mr. Cortes Aguilar's conviction was based on conflicting eyewitness accounts, without the DNA evidence that supported his theory of self-defense. The Court must consider any

new evidence in light of what the jury heard. Did the trial court and the Court of Appeals erroneously deny post-conviction DNA testing?

C. STATEMENT OF THE CASE

In August 2011, Mr. Cortes Aguilar and his wife, Ortencia Alejandre argued in their living room. CP 19. Their daughter was watching television in the living room and their son was in the kitchen. CP 21. Later When police arrived Mr. Cortes Aguilar had defensive wounds in his arms, shoulders, and back. CP 41. His wife was dead from stab wounds and a knife was underneath her body. CP 40. Their 13-year-old daughter had some defensive wounds as well. CP 40. The State charged Mr. Cortes Aguilar by amended information with the first-degree murder of his wife and first-degree assault of his daughter. CP 3-6.

Ms. Alejandre was peeling a cucumber with a knife as the couple argued because Ms. Alejandre had been exchanging phone calls with another man. CP 20, 40. Ms. Alejandre became upset and lunged at Mr. Cortes Aguilar with the kitchen knife she was holding. CP 20, 41. She said she wanted to kill him and she stabbed him. CP 20, 41. Mr. Cortes Aguilar became fearful he would be killed. CP 20, 42-43.

. To save his own life, Mr. Cortes Aguilar grabbed the knife from Ms. Alejandre and instinctively struck out at her without intending to stab or to kill her. CP 20, 42-43.

Responding police saw and documented injuries all over Mr. Cortes Aguilar's hands, shoulder and back. CP 21. Police photographed injuries to his frontal shoulder and two defensive cuts on his right hand. CP 41. During the lengthy interview with police Mr.

Cortes Aguilar insisted that he did not intend to kill his wife and he only defended himself. CP 41. Mr. Cortes Aguilar's daughter and son offered conflicting accounts. CP 20-21; 40. The defense did not request self-defense instructions. CP 41.

In closing argument, the State argued all the blood on the ground, in Mr. Cortes Aguilar's vehicle, and on the walls belonged to his deceased wife. CP 41. Mr. Cortes Aguilar could not rebut this contention because the prosecution did not present any DNA evidence confirming the State's theory. Mr. Cortes Aguilar argued Ms. Alejandre lunged at him with a knife and he became fearful, took away the knife and accidentally caused her death in the process. CP 41-42.

A jury found Mr. Cortes Aguilar guilty of first-degree murder for the stabbing of Ms. Alejandre and

second-degree assault for the defensive wounds on his daughter. CP 39-40.

Mr. Cortes Aguilar's theory of defense was that he acted in self-defense. But he was forced to make this argument without the DNA evidence he seeks, without the favorable burden shifting on the State to disprove self-defense, and without the jury instruction of self-defense. See CP 21.

On August 5, 2021, Mr. Cortes Aguilar filed a motion in superior court requesting testing of several pieces of evidence for DNA—including the blood splatters from the living room, kitchen, driveway, vehicle, clothing collected from the scene, the knife, and all finger nails retrieved from the scene, among other items—under RCW 10.73.170(2)(a)(iii). CP 37-38. He argued the DNA evidence will provide significant new information that would show, more probably than

not, he was not guilty of the crime of conviction because his actions were lawful as he acted in self-defense. CP 37-38. Mr. Cortes Aguilar also submitted an affidavit explaining how the new evidence will show he acted in self-defense.

The State did not oppose Mr. Cortes Aguilar's motion for DNA testing. But the trial court summarily denied Mr. Cortes Aguilar's request and held he had not met his burden to show that the DNA evidence would prove his innocence. CP 54. The Court of Appeals rejected Mr. Cortes Aguilar's arguments and affirmed the denial of his request for DNA testing. Slip. Op. The reasoning of the Court of Appeals conflicts with the reasoning of this Court and the Court of Appeals precedents in *Riofta*, *Braa*, and *Crumpton*.

D. ARGUMENT

The Court should grant review because both lower courts erred in denying Mr. Cortes Aguilar’s request for post-conviction DNA testing.

RCW 10.73.170 provides convicted persons a statutory vehicle to seek DNA testing to prove their innocence. DNA testing is a powerful tool for remedying unjust convictions, as countless, “innocent individuals have been exonerated through postconviction DNA testing,” even when there is overwhelming evidence indicating guilt. *State v. Crumpton*, 181 Wn.2d 252, 262, 332 P.3d 448 (2014).

To guard against condemnation and imprisonment of innocent people by our criminal justice system, Washington law provides that a convicted person may request DNA testing. RCW 10.73.170; *Crumpton*, 181 Wn.2d at 258 (citing *State v. Riofta*, 166 Wn.2d 358, 368, 209 P.3d 467 (2009)). The

purpose of the statute is to provide a means for a convicted person to obtain evidence in support of a motion for post-conviction relief, such as a personal restraint petition on the grounds of newly discovered evidence. *Riofta*, 166 Wn.2d at 368. A trial court must permit testing when the person meets the procedural and the substantive requirements of the statute. RCW 10.73.170.

To satisfy the statute's procedural requirement, "[t]he motion must state the basis for the request, explain the relevance of the DNA evidence sought, and comply with applicable court rules." *Riofta*, 166 Wn.2d at 364 (citing RCW 10.73.170(2)(a)-(c)). If the procedural requirements are met, a court "shall" grant a motion if the petitioner shows a "likelihood that the DNA evidence would demonstrate [his] innocence on a

more probable than not basis.” RCW 10.73.170(3).

(emphasis added).

Mr. Cortes Aguilar’s case meets both the procedural and substantive requirements for post conviction DNA testing.

- a. *Mr. Cortes Aguilar showed that a favorable DNA test was material, relevant, and necessary to prove he acted in self-defense, thus his actions were lawful.*

To satisfy the statute’s procedural requirement, “[t]he motion must state the basis for the request, explain the relevance of the DNA evidence sought, and comply with applicable court rules.” *Riofta*, 166 Wn.2d at 364 (citing RCW 10.73.170(2)(a)-(c)).

Mr. Cortes Aguilar clearly satisfies the statute’s “lenient” procedural component. *Riofta*, 166 Wn.2d at 367. He explained that the DNA evidence was relevant to proving he acted in self-defense and his actions were lawful. RCW 10.73.170(2); *State v. Thompson*, 173

Wn.2d 865, 875-76, 271 P.3d 204 (2012). One who acts in self-defense is not guilty of the crime. Self-defense is a lawful act. See RCW 9A.16.020(3). *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). Since a person acting in self-defense acts lawfully, self-defense negates intent, and the State therefore must disprove self-defense when the issue is properly raised. *Acosta*, 101 Wn. 2d at 617. When *any* evidence of self defense is presented, the State must disprove self defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 619 (emphasis added); *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). The jury must be instructed that the State bears the burden of disproving the defense beyond a reasonable doubt. *Id.* at 619.

If the blood splatter in each piece of evidence contains Mr. Cortes Aguilar's DNA and blood, the

burden shifts to the State to disprove self-defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 619.

Mr. Cortes Aguilar argued the DNA evidence requested was material, relevant, and necessary to demonstrate he acted in self-defense; thus acted lawfully.

Mr. Cortes Aguilar clearly satisfied the statute's "lenient" procedural component. The trial court erred in concluding he did meet the statute's procedural requirement. CP 54. The Court of Appeals also erred in siding with the trial court.

The DNA test results are some evidence supportive of self-defense. The trial court would be required to instruct the jury on self-defense. The DNA results would shift the burden on the State to disprove beyond a reasonable doubt Mr. Cortes Aguilar acted in self-defense. Given the jury would be instructed it must

acquit unless the State proves beyond a reasonable doubt Mr. Cortes Aguilar did not act in self defense, *Acosta*, 101 Wn.2d at 619, it is impossible to imagine it would not have mattered to a single juror's decision to know Mr. Cortes Aguilar's blood was commingled with other blood all over the scene when he was stabbed by his wife moments before she was killed.

In short, because a favorable DNA result would support Mr. Cortes Aguilar's self defense claim and require the State to prove beyond a reasonable doubt that Mr. Cortes Aguilar was not acting self-defense, a jury presented with this new evidence and a full defense could acquit Mr. Cortes Aguilar based on the DNA results.

- b. A favorable DNA result negates intent, and shifts the burden to the State to disprove self-defense. In light of the evidence presented at trial, the State cannot prove beyond a reasonable doubt that Mr. Cortes Aguilar did not act in self-defense.*

The substantive burden is met when there exists a “likelihood that the DNA would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3).

In assessing a request for DNA testing, the court must assume the result would be favorable to the convicted person. *Crumpton*, 181 Wn.2d at 255. The court must allow the testing when a favorable DNA result would “raise a reasonable probability the petitioner was not the perpetrator.” *Riofta*, 166 Wn.2d at 367-68. In the context of self-defense, the evidence must raise a reasonable probability that the petitioner acted in self defense and thus acted lawfully.

Accordingly, a court “look[s] 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.” *Crumpton*, 181 Wn.2d at 260; *State v. Braa*, 2 Wn. App. 2d 510, 521, 410 P.3d 1176 (2018).

The question is whether the result probably would have been different if that same evidence *plus the new evidence* were presented to a jury. See *State v. Davis*, 25 Wn. App. 134, 140-41, 605 P.2d 359 (1980) (a new trial should be granted if probable result of jury hearing new evidence combined with introduced evidence would be acquittal or conviction on a lesser offense); *State v. Hutcheson*, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.E.2d 177 (2004) (in deciding whether newly discovered evidence would probably change the result, “the trial court must evaluate the credibility, significance and cogency of the new evidence”).

The new evidence must be weighed against the evidence the jury heard. The jury did not hear that Mr. Cortes Aguilar's blood was all over the scene. The jury was not instructed the State had the burden to disprove beyond a reasonable doubt Mr. Cortes Aguilar acted in self-defense. Again, when any evidence of self defense is presented, the State must disprove self defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 619. The State's burden would shift to disproving beyond a reasonable doubt Mr. Cortes Aguilar acted in self defense and the jury would be instructed to acquit Mr. Cortes Aguilar unless State proves beyond a reasonable doubt he did not act in self defense. *Id.*

There is a reasonable probability a jury could find Mr. Cortes Aguilar is not guilty of murder because he acted in self-defense to save himself from being stabbed to death by his wife. There is a reasonable probability

the jury would acquit Mr. Cortes Aguilar on hearing the new DNA evidence and receiving the instruction at a new trial that a person acts justifiably in self-defense when the person “reasonably believed that the person slain intended to inflict death or great personal injury” and the person “reasonably believed there was imminent danger of such harm being accomplished.” citation.

DNA testing of the blood splatter evidence on the walls, clothing, driveway and the other places would show the decedent attacked Mr. Cortes Aguilar causing defensive wounds to his front shoulder and his arm, shortly before she died.

There is a reasonable probability that a jury hearing Mr. Cortes Aguilar’s testimony that his wife posed an imminent threat of killing him with a knife and considering the new DNA test results could

conclude he acted in justifiable self-defense. The new evidence would give rise to a reasonable probability that Mr. Cortes Aguilar acted in self-defense and acted lawfully.

Although the court must assume the DNA test is favorable to the accused, *Crumpton*, 181 Wn.2d at 255, here, the blood drop DNA provides independent evidence he was acting on self-defense. His injuries, and Mr. Cortes Aguilar's testimony to that effect, corroborate the theory of self-defense and his credibility. The new evidence also controvert the only damning testimony from his daughter.

● On a more probable than not basis, a favorable DNA test result, when considered alongside the evidence adduced at trial—including the negation of intent, burden shifting for the State to disprove self-defense, corroboration of Mr. Cortes Aguilar's account,

the impeachment value against the key witness for the prosecution, jury instruction—would demonstrate that Mr. Cortes Aguilar conduct was lawful. So long as a single juror would probably doubt the State's theory in light of the new evidence Mr. Cortes Aguilar is entitled to a new trial where he can present the new evidence of innocence.

The trial court erred in concluding Mr. Cortes Aguilar did meet the statute's substantive requirement. CP 54. Mr. Cortes Aguilar clearly met his substantive burden under RCW 10.73.170(3); *Riofta*, 166 Wn.2d at 367-68. Accordingly, the superior court abused its discretion by denying Mr. Cortes Aguilar request for DNA testing. *Braa*, 2 Wn. App. 2d at 523.

c. The Court of Appeals' decision conflicts with several Supreme Court precedent.

The Court of Appeals' opinion conflicts with *Riofta*, *Crumpton*, *Braa*, as it did not consider the

impact the DNA test and the blood splatter pattern in light of the remaining evidence. *Riofta*, 166 Wn.2d at 367-68; *Crumpton*, 181 Wn.2d at 260; *Braa*, 2 Wn. App. 2d at 521.

The Court of Appeals did not consider whether based on the blood splatter from multiple locations inside the entire home and garage, it is likely Mr. Cortes Aguilar could be innocent on a more probable than not basis. Instead the Court of Appeals improperly weighed evidence supportive of guilt as contradicting the theory of “excusable homicide” as a matter of law. This clearly shows that the Court of Appeals applied the wrong legal test and arrived at the wrong conclusion. App. 5.

The Court of Appeals incorrectly held that Mr. Cortes Aguilar did not meet the procedural burden for DNA testing. The record is proves the contrary. Mr.

Cortes Aguilar sought to test several pieces of evidence to establish the presence of his blood on them. CP 37-38. He sought to show that the blood splatter was consistent with someone defending themselves.

Contrary to the Court of Appeals opinion, the DNA evidence along with the blood splatter position was significant new information that could not be gleaned from the original testing. App. 4-5. And this “significant new information” could have persuaded the jury on a more probable than not basis that Mr. Cortes Aguilar was not guilty of as they tended to negate the existence of a crime and a perpetrator. CP 37-38. The Court of Appeals incorrectly holds the contrary view. App. 5.

Additionally, the Court of Appeals incorrectly ruled that Cortes Aguilar does not meet the substantive criterion because the discovery of his blood

at the crime scene would not furnish any basis on which a jury could acquit him. App. 8. This is incorrect. As explained above, the presence of Mr. Cortes Aguilar's blood at the crime scene would establish his self-defense argument.

The Court of Appeals is also incorrect that the DNA evidence would merely duplicate the evidence the jury already heard concerning the lacerations he sustained. App. 8.

Contrary to the view of the Court of Appeals, the DNA evidence and the blood splattered pattern would corroborate Mr. Cortes Aguilar's theory of defense that he acted in self-defense. *Crumpton*, 181 Wn.2d at 261. The favorable DNA test would show a blood splatter consistent with self-defense and "raise a reasonable probability the petitioner was not the perpetrator." *Riofta*, 166 Wn.2d at 367-68.

E. CONCLUSION

Mr. Cortes Aguilar requests the Court to accept review and reverse and remand for the trial court to grant his request for DNA testing.

This brief complies with RAP 18.17 and contains 3,220 words.

DATED this 5th day of April 2024.

Respectfully submitted,



MOSES OKEYO WSBA—57597
Washington Appellate Project
Attorneys for Petitioner

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 39446-8-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
SEBASTIAN CORTES AGUILAR,)	
)	
Appellant.)	

LAWRENCE-BERREY, C.J. — In 2012, a jury convicted Sebastian Cortes Aguilar of first degree murder of his wife and second degree assault of his daughter. In 2022, the trial court denied his motion for postconviction DNA testing of the crime scene for his own blood. We affirm.

FACTS

In August 2011, Sebastian Cortes Aguilar stabbed his wife to death after confronting her about telephone conversations with another man. Mr. Cortes Aguilar’s wife, Ortencia Alejandre, suffered five stab wounds in the attack—one to her neck and four to her chest, ranging from three inches deep to six inches deep—as well as multiple defensive wounds on her hands and arms. The couple’s 13-year-old daughter also was

injured in the attack. After fleeing the scene, Mr. Cortes Aguilar confessed the killing to a family friend and asked to hide in that friend's garage. The State eventually charged Mr. Cortes Aguilar with first degree murder and first degree assault, before amending the latter charge to second degree assault.

After his arrest, Mr. Cortes Aguilar claimed he had killed Ms. Alejandre only after she had brandished the knife at him. Fearing for his safety, he claimed, he had disarmed his wife before turning the knife on her. Mr. Cortes Aguilar claimed that in the process of disarming Ms. Alejandre, he had suffered defensive wounds. He remembered his daughter intervening in the struggle but did not remember injuring her. At trial, Mr. Cortes Aguilar's daughter disputed this version of events. She testified that Mr. Cortes Aguilar had beat Ms. Alejandre with a belt before retrieving a knife from the kitchen and resuming his attack. She testified that her father during other altercations had retrieved a knife in this manner.

The jury convicted Mr. Cortes Aguilar of murder and assault. In an unsuccessful appeal, Mr. Cortes Aguilar challenged his murder conviction on the grounds of insufficient evidence and deficient counsel. He subsequently petitioned the trial court for additional DNA testing. Specifically, Mr. Cortes Aguilar asked the court to authorize initial tests, or additional tests, on 26 items of evidence. The court denied this request,

along with Mr. Cortes Aguilar's attendant motion to appoint counsel, on the grounds that he did not meet the statutory threshold to secure additional testing.

Mr. Cortes Aguilar timely appeals the portion of the trial court's order denying additional testing.

ANALYSIS

THRESHOLD FOR ADDITIONAL TESTING

Mr. Cortes Aguilar argues the trial court should have granted him additional testing because he met both the procedural and substantive requirements under RCW 10.73.170. Because he cannot establish two of the procedural criteria as well as the substantive criterion, we affirm.

Standard of review

We review a trial court's denial of postconviction relief for abuse of discretion. *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). A trial court operates within its discretion when its findings derive from the factual record, its conclusions apply sound law, and its decisions are not manifestly unreasonable. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Threshold for additional testing

To secure additional DNA testing of evidence from trial, an incarcerated defendant must satisfy three procedural criteria and one substantive criterion. RCW 10.73.170(1)-(3).

i. Procedural criteria

A petition for additional testing carries its procedural burden if (1) the DNA testing initially performed was deficient, or else the testing now sought offers higher accuracy or “would provide significant new information,” (2) the testing now sought is material to the identity of the perpetrator, and (3) the petition complies with applicable court rules. RCW 10.73.170(2). Where additional testing might negate the existence of a crime, as in supporting a theory of lawful self-defense, the testing likewise would negate the existence of a perpetrator; in that circumstance, the petitioner satisfies criterion (2) above. *State v. Braa*, 2 Wn. App. 2d 510, 519, 410 P.3d 1176 (2018).

Here, Mr. Cortes Aguilar satisfies the third procedural criterion because nothing in the record indicates his petition flouted any applicable rules. However, Mr. Cortes Aguilar does not satisfy the first and second criteria.

Mr. Cortes Aguilar does not satisfy the first criterion because he merely identifies what other tests he wishes to conduct, without explaining why the original testing was flawed or why the new tests would yield meaningful new information. Generally, Mr.

Cortes Aguilar’s basis for securing additional testing is that the tests would show the presence of his own blood, supporting a self-defense theory. However, the discovery of his own blood at the crime scene would not yield “significant new information” because the jury, when it convicted Mr. Cortes Aguilar, already knew he had sustained lacerations at the crime scene. RCW 10.73.170(2)(a)(iii). To the extent a jury may be trusted to know lacerations bleed, the tests Mr. Cortes Aguilar seeks would not illuminate any new facts.

Mr. Cortes Aguilar also fails the second criterion, as the discovery of his blood at the crime scene would not suggest any fact that would substantiate a self-defense theory, thereby negating the existence of a crime and perpetrator.

1. No excusable homicide defense

A defendant is not liable by reason of self-defense when he commits excusable homicide. *State v. Moreno*, 26 Wn. App. 2d 681, 692, 529 P.3d 431 (2023). Excusable homicide arises when, while defending himself, the defendant “causes the victim’s death ‘by accident or misfortune.’” *Id.* at 693 (quoting RCW 9A.16.030).

Here, Mr. Cortes Aguilar cannot plausibly claim excusable homicide because Ms. Alejandre suffered a multitude of wounds, each of which necessarily was inflicted successively. These facts defeat excusable homicide as a matter of law because no inadvertence exists where a defendant deliberately inflicts an extended sequence of life-

threatening wounds. This is true notwithstanding any DNA test placing Mr. Cortes Aguilar's own blood at the crime scene.

2. No justifiable homicide defense

A defendant is not liable by reason of self-defense when he commits justifiable homicide. *Id.* at 692. Justifiable homicide arises when the defendant kills intentionally while under the reasonable belief that the victim posed “an imminent danger to the defendant.” *Id.* at 693 (citing RCW 9A.16.050(1)).

Here, Mr. Cortes Aguilar cannot claim justifiable homicide because there can be no reasonable belief of “imminent danger” where only one weapon is in evidence and where the slayer has disarmed the victim prior to the homicide. *Id.* (citing RCW 9A.16.050(1)). To the extent Ms. Alejandre posed any threat to Mr. Cortes Aguilar—and eyewitness testimony suggests she did not—Mr. Cortes Aguilar neutralized the threat when he secured the knife from Ms. Alejandre. While justifiable homicide could have occurred during the struggle for the knife, Mr. Cortes Aguilar himself admitted that the killing occurred after he wrested control of the knife from Ms. Alejandre. This account is consistent with the defensive wounds Ms. Alejandre sustained to her hands and arms.

In sum, Mr. Cortes Aguilar does not show why the original DNA testing was flawed or why additional tests would yield meaningful new information. Moreover, the

testing he sought could not defeat the existence of a crime, and thus is not material to the identity of the perpetrator. We conclude that the trial court properly found that Mr. Cortes Aguilar did not carry his procedural burdens under RCW 10.73.170(2).

ii. Substantive criteria

A petition for additional DNA testing carries its substantive burden when the defendant shows that additional testing would likely demonstrate his innocence “on a more probable than not basis.” RCW 10.73.170(3). When considering a petition for additional testing, the court must extend to the defendant a presumption that further testing will yield a favorable result. *Riofta*, 166 Wn.2d at 368-69. Unlike the procedural criteria, however, the RCW 10.73.170(3) substantive criterion is “onerous.” *Id.* at 367; *see also State v. Crumpton*, 181 Wn.2d 252, 261, 332 P.3d 448 (2014). A defendant will not secure additional testing unless the presumed favorable result would so offset the remaining evidence against him that his innocence becomes not merely a possibility, but a probability. *See Riofta*, 166 Wn.2d at 369 (“[C]ourts must consider . . . the impact that an exculpatory DNA test could have in light of [the remaining] evidence.”); *see also Crumpton*, 181 Wn.2d at 260 (“[C]ourts 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.”).

Here, Mr. Cortes Aguilar fails the substantive criterion because the discovery of his blood at the crime scene would not furnish any basis on which a jury could acquit him. Mr. Cortes Aguilar admitted killing Ms. Alejandre. His own account of the killing, along with Ms. Alejandre’s defensive wounds and the protracted nature of the attack, proves the killing was intentional and premeditated. Mr. Cortes Aguilar’s own daughter testified that the killing was deliberate and that Ms. Alejandre posed no threat to Mr. Cortes Aguilar. For reasons already described, Mr. Cortes Aguilar cannot plausibly raise an excusable homicide or justifiable homicide defense. All of this is true notwithstanding any discovery of his blood at the crime scene—especially when such a discovery would merely duplicate evidence the jury already heard, that Mr. Cortes Aguilar sustained lacerations during the attack. We conclude the trial court properly found that Mr. Cortes Aguilar did not carry his substantive burden under RCW 10.73.170(3).

Statements of additional grounds (SAG)

In addition to arguments presented by counsel, Mr. Cortes Aguilar states several additional grounds for review.

i. Ground 1

Mr. Cortes Aguilar asks this court to consider his case in light of *Braa*, 2 Wn. App. 2d 510; SAG at 1. The opinion of this court accounts for that case.

ii. Ground 2

Mr. Cortes Aguilar asks this court to presume a favorable DNA test as described in *Crumpton*, 181 Wn.2d 252; SAG at 3. Our opinion presumes that every additional DNA test Mr. Cortes Aguilar seeks would test positive for his blood.

iii. Ground 3

Mr. Cortes Aguilar argues the trial court erred by not considering his ineffective assistance claim when considering his petition for additional testing. SAG at 4. However, ineffective assistance of counsel was not before the court when it considered Mr. Cortes Aguilar's petition. The success of an additional testing petition under RCW 10.73.170 turns on the probability of demonstrating actual innocence, irrespective of performance of prior counsel. Accordingly, ineffective assistance of counsel likewise is beyond the scope of this court's review of the trial court's order.

iv. Ground 4

Mr. Cortes Aguilar argues the trial court erred by not considering evidence cumulatively when assessing probability of innocence. SAG at 6. However, for the reasons described above, no quantity of positive tests for Mr. Cortes Aguilar's blood at the crime scene would offset the remaining evidence such as to establish probability of innocence.

No. 39446-8-III
State v. Cortes Aguilar

v. Grounds 5-7

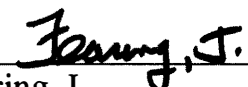
The final three additional grounds allege judicial and prosecutorial misconduct at trial and do not address Mr. Cortes Aguilar's petition for additional testing. SAG at 8-10 (as translated). Accordingly, these grounds lie outside the scope of Mr. Cortes Aguilar's current appeal.

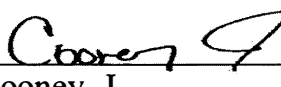
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Lawrence-Berrey, C.J.

WE CONCUR:


Fearing, J.


Cooney, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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respondent Ryan Valaas
[ryan.valaas@co.chelan.wa.us]
Chelan County Prosecutor's Office
[prosecuting.attorney@co.chelan.wa.us]

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: April 5, 2024

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