No. 93421-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT E. LARSON, TYLER W. GASSMAN
and PAUL E. STATLER,

Respondents,

v.

STATE OF WASHINGTON,

Petitioner.

RESPONSE TO WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS' AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

The Washington legislature enacted the Wrongly Convicted Persons Act (WCPA), chapter 4.100 RCW, to afford remedies to those who have been wrongfully incarcerated for crimes they did not commit and to redress the years they lost in prison. In light of these remedial objectives, the Court of Appeals correctly interpreted the phrase "significant new exculpatory information" to include information that was available at trial but never presented to the factfinder. This Court should reject the arguments to the contrary set forth in the amicus curiae brief of the Washington Association of Prosecuting Attorneys (WAPA).

II. ARGUMENT

A. The Wrongly Convicted Persons Act is remedial.

"Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddendham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (emphasis added) (discussing remedial nature of Crime Victims Compensation Act and citing 3 Sutherland, *Statutory Construction* § 60.02 (4th rev. ed. 1974)); *see also* Black's Law Dictionary 1296 (7th ed. 1999) (defining "remedial" as "[a]ffording or providing a remedy; providing the means of obtaining redress . . . [i]ntended to correct, remove, or lessen a wrong") (emphasis added); *Wash. State Coalition for the Homeless v.*

Dep't of Soc. & Health Servs., 133 Wn.2d 894, 916, 949 P.2d 1291 (1997) ("The Uniform Declaratory Judgment Act is a remedial statute" because "[i]ts purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations."); *State v. Von Thiele*, 47 Wn. App. 558, 562, 736 P.2d 297 (1987) ("A statute is remedial when it provides for the remission of penalties and affords a remedy for the enforcement of rights and redress of injuries.").

The WCPA is expressly remedial, as its stated intent is to provide redress to a specific class of harmed individuals:

> The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration.

RCW 4.100.010 (emphasis added); *see also* RCW 4.100.060 (outlining compensation, reentry services, and other available forms of redress available to wrongly convicted persons); RCW 4.100.080 (referring to "remedies and compensation provided under this chapter").

An analogous remedial statute is the Crime Victims' Compensation Act, chapter 7.68 RCW, which was enacted to provide various remedies to victims of crimes. In *Haddenham*, this Court declared the Act remedial:

> The intent of the crime victims compensation act is to compensate and assist the residents of Washington who are the innocent victims of criminal acts. Its purpose is patently remedial. Prior to the enactment of the crime victims compensation act, the innocent victim of a criminal act had little chance of recovery for the physical injuries or disabilities and financial hardships which he or she, or his or her dependents, may innocently suffer as a consequence of the criminal act. The act is an attempt to remedy that situation.

87 Wn.2d at 149.

The Court of Appeals in this case correctly concluded that the WCPA is remedial and that "remedial statutes are liberally construed to suppress the evil and advance the remedy." *Larson v. State*, 194 Wn. App. 722, 735, 375 P.3d 1096 (2016) (quoting *Go2net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006)); *see also Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 498, 256 P.3d 321 (2011) ("[A]s a remedial statute . . . the debt adjusting statute should be construed liberally in favor of the consumers it aims to protect."); *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992) ("As a remedial statute, the ARA is to be liberally construed to further [its] legislative purpose."); *State v. Sup. Ct. of Pierce Cnty.*, 104 Wash. 268, 272, 176 P. 352 (1918) ("statutes providing remedies against either public or private wrongs are to be liberally construed").

WAPA relies on *Johnston v. Bene. Mgmt. Corp. of Am.*, 85 Wn.2d 637, 538 P.2d 510 (1975), and *Bayless v. Cmty. Coll. Dist. No. XIX*, 84 Wn. App 309, 927 P.2d 254 (1996), to argue that the WCPA is not remedial. Such reliance is misplaced.

WAPA conflates the standards for determining whether a statute is remedial with the standards for determining whether a statute should apply retroactively. Specifically, WAPA contends that a statute is not remedial if it affects a substantive or vested right. But WAPA's own authority proves this assertion to be incorrect. In *Johnston*, the Court found the Consumer Protection Act, RCW 19.86.090, is remedial even though it created a new cause of action. 85 Wn.2d at 641. The Court nevertheless refused to apply the statute retroactively because it was "couched in language expressed in the present and future tenses rather than the past tense," thus demonstrating "that the legislature intended it to apply to future transactions only." *Id.* at 641-42.

In contrast, the Washington legislature has explicitly directed that the Wrongly Convicted Persons Act shall have retroactive application: "Any person[] . . . who was wrongly convicted before July 28, 2013, may commence an action under this chapter within three years after July 28, 2013," the date the law was enacted. RCW 4.100.090. This further

demonstrates the Act is remedial in nature, as it was specifically designed to redress wrongs that occurred before the statute was even enacted.

WAPA also misreads *Bayless*, arguing the case stands for the proposition that a statute may only be considered remedial if it enhances an existing cause of action or can be combined with an existing cause of action. This was simply an argument put forward by one of the parties in that case, not a conclusion of the Court of Appeals. *See Bayless*, 84 Wn. App. at 312 ("Mr. Bayless contends that the amendment is remedial because a right to a private cause of action already existed . . . ."). The appellate court's holding that the remedial statute applied retroactively turned on its determination that "[t]he Legislature clearly did not express an intent that the whistleblower statute is only to apply prospectively." *Id.* at 314-15. Here there is a clear expression by the legislature of retroactive application. *See* RCW 4.100.090.

The Court of Appeals correctly determined that the WCPA is remedial and must be liberally construed.

B. The Court of Appeals correctly interpreted the phrase "significant new exculpatory information."

The WCPA requires a claimant to show that "if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the

claimant was not retried and the charging document dismissed . . . ." RCW 4.100.060(1)(c)(ii). In its decision below, the Court of Appeals held "that 'new' in the context of 'significant new exculpatory information' must be construed broadly to include information that was available at the criminal trial but was not presented to the fact finder." *Larson*, 194 Wn. App. at 736.

This conclusion is correct. Indeed, by interpreting "new" to include information available at trial but never presented to the factfinder, the Court of Appeals has both promoted the objectives of the WCPA and followed this Court's guidance in the interpretation of a similar statute. *See* RCW 4.100.010 (stating intention to provide redress for those who have been wrongly convicted); *see also State v. Riofta*, 166 Wn.2d 358, 361-66, 209 P.3d 467 (2009) (discussing "significant new information" in context of DNA testing and concluding "the statute provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial") (emphasis added).

WAPA ignores this Court's decision in *Riofta* and instead focuses on the objectives of the WCPA, arguing the Court of Appeals "construed the 'significant new exculpatory information' requirement in a manner not

supported by the statute's plain language and inconsistent with the legislative content." Amicus Brief at 9. WAPA's argument is based on the assertion that "[a] new trial may only be ordered on the basis of new evidence if the evidence . . . was discovered since the [proceeding]" and "could not have been discovered before [the proceeding] by the exercise of due diligence." *Id.* at 9-10 (quoting *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001)). WAPA is incorrect.

In the decision from which WAPA quotes, this Court was identifying the requirements for "a new sentencing proceeding" under RAP 16.4(c)(3). *In re Brown*, 143 Wn.2d at 453. The Court held that those requirements are the same as the requirements "applied to a motion for new trial based upon newly discovered evidence." *Id.* Two court rules allow for new trials based on "newly discovered" (as opposed to simply "new") evidence. The first is CrR7.5(a)(3), which concerns a motion for new trial brought within ten days of the verdict and specifically on the basis of "[n]ewly discovered evidence . . . which the defendant could not have discovered with reasonable diligence and produced at the trial." The second is CrR7.8(b)(2), which concerns a motion for relief from judgment brought within one year of the judgment and specifically on the basis of "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5."

The problem with WAPA's argument is that these are not the only rules under which a new trial may be granted. Indeed, the criminal court in this case "vacated Plaintiffs' convictions pursuant to CrR 7.8(b)(5)." Exs. 13, 14, 15. CrR 7.8(b)(5) allows a defendant to obtain a new trial for "[a]ny other reason justifying relief from the operation of the judgment." Unlike the criminal rules to which WAPA alludes, there is no limitation in CrR 7.8(b)(5) on the presentation of evidence available at the time of trial.

Moreover, if the legislature had intended to limit the coverage of the WCPA to wrongful convictions involving "newly discovered" evidence, it would have adopted the very language found in CrR 7.5(a)(3) and CrR 7.8(b)(2)—namely, "newly discovered evidence . . . which the defendant could not have discovered with reasonable diligence and produced at trial." Instead, however, the legislature employed the phrase "significant new exculpatory information," which says nothing about the availability of the information at the time of trial or the diligence of the claimant in discovering that information. RCW 4.100.060(1)(c)(ii).

Finally, if WAPA's narrow interpretation were adopted, it would thwart the goals of the WCPA by preventing scores of exonerated individuals from obtaining relief. *See* Response to Petition for Review at 9-15 (exculpatory evidence is often available at trial but not presented to the factfinder for many reasons, including ineffective defense lawyering,

governmental misconduct, incomplete investigative work, improper testing, and/or judicial mistakes). Such a construction would also lead to absurd results. *See id.* (construing "new" broadly for purposes of RCW 10.73.170 but narrowly for purposes of RCW 4.100.060 would prevent person exonerated by DNA testing from obtaining redress under WCPA).

III. CONCLUSION

For the reasons set forth above, Respondents Robert Larson, Tyler Gassman, and Paul Statler respectfully ask this Court to reject WAPA's arguments, deny the State's petition for review, and remand the case to the trial court for further proceedings consistent with the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED AND DATED this 1st day of November, 2016.

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I certify that on November 1, 2016, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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