SUPREME COURT NO. 102704-4

NO. 39118-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER RAMIREZ,

Petitioner.

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

The Honorable Raymond Clary, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Christopher Ramirez, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the unpublished decision of the Court of Appeals in State v. Ramirez, no. 39118-3-I, entered on December 5, 2023. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Under RCW 10.73.170, a convicted person is entitled to post-conviction DNA testing when such testing could reveal additional information material to the identity of the perpetrator and a favorable test would probably establish innocence. Here, DNA from a hat at the scene of the crime was linked to Ramirez and "Individual A" who could not be identified. New testing could result in a full, searchable profile for Individual A. When Ramirez' DNA was innocently explained because he previously resided with the victims and was their nephew, did the court err in denying Ramirez' request for testing that could identify another suspect?

2. Under principles of due process and In re Personal Restraint of Gentry,[1] a defendant is entitled to post-conviction discovery when there is good cause to believe the discovery will show an entitlement to relief. Hairs embedded in the hat can be examined to determine whether they were deposited by someone who wore the hat, as opposed to trace contact or secondary transfer. Did the court err in denying Ramirez' request for post-conviction discovery?

C. STATEMENT OF THE CASE

1. Substantive facts

Christopher Ramirez was implicated in a murder investigation when his DNA was found on a hat and glove found at the scene. CP 262, 264-65. Ramirez' uncle, Arturo Gallegos, was lying dead on the bed next to the hat and glove, in his apartment. CP 275. Arturo Gallegos' brother Juan[2] was found

[1] In re Pers. Restraint of Gentry, 137 Wn.2d 378, 390-91, 972 P.2d 1250 (1999).

shot to death in the hallway of the apartment complex. CP 202. There was evidence that a jealous husband may have been responsible, as Arturo was known to have romantic encounters. CP 194. Arturo was also having a problem with a friend who had borrowed but not returned his truck. CP 196-97. No weapon was ever found. CP 217.

Shortly after the shootings, a neighbor, Carlton Hritsco, had contact with a man who cut through his back yard from the direction of the Gallegos' apartment and identified himself as "Demon." CP 223. Hritsco told police he would be able to identify the person. CP 216. However, when shown a photo montage of six local persons going by the moniker "Demon," (including Ramirez) Hritsco did not recognize any of them. CP 214-15. A few days later, police tried again. RP 51. Still Hritsco did not identify a suspect. RP 51. Hritsco described a Hispanic male, approximately five feet, eight inches tall, 180 pounds with

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[2] This brief refers to the Gallegos brothers by their first names to avoid confusion. No disrespect is intended.

slicked back black hair and acne scars on his face. CP 213. He did not mention any age range. RP 53. Ramirez is roughly 20 pounds heavier and 2-3 inches taller than Hritsco's description. RP 53-54. He has no acne scars. RP 53-54.

Nearly two years later, just before trial, Hritsco reached out to the police. RP 47-48. After seeing multiple media reports about Ramirez' upcoming trial, Hritsco suddenly claimed to recognize Ramirez as the man he had seen in his back yard in the middle of the night for a few minutes nearly two years before. CP 229.

Several months before the murders, Ramirez had an acrimonious text message exchange with several family members. CP 175. The message stated, "Tio. We all die. Rest in peace. Fuck you all if that's how it is." CP 175. This message was sent to Arturo and Juan Gallegos as well as Arturo's son Angel and his wife. CP 175. This message was not taken seriously enough to prompt them to contact police or seek a restraining order. CP 198.

Since then, Ramirez and his uncles had reconciled. CP 352. Ramirez had helped his uncles move out of their apartment. CP 197-98. Arturo had asked Ramirez to act as a reference for him as he searched for a new place to live. CP 352, 369. Arturo had offered suggestions when Ramirez needed to find a new apartment as well. CP 352-53. These more recent communications were non-threatening, suggesting instead familial relationships and possible endearment terms. CP 369-70.

The night his uncles were killed, text messages showed Arturo and Ramirez had arranged to meet, and Arturo had given Ramirez his new address. CP 359-62. Cell phone data also showed Ramirez was in the area of Arturo's apartment the night of the murders. CP 340.

DNA testing at the time revealed Ramirez as the major contributor to the material on the interior of a hat and glove found next to Arturo's body. CP 262, 264-65. Stains on the exterior of the hat and glove tested positive for Arturo's blood. CP 266-67. The presence of Ramirez' DNA in Arturo's apartment was

unsurprising because he and his uncles had been roommates in the past and he had recently helped them move. CP 198. DNA could shed no light on when the DNA was deposited on the inside of the glove and hat. CP 279.

Forensic evidence showed Arturo was shot once at close range, probably while on the bed, and died almost instantly. CP 294-99, 326-27. Juan died of multiple gunshot wounds, some of which would not necessarily have immobilized him. CP 301-24.

2. Procedural facts

Ramirez was convicted of two counts of first-degree murder and one count of unlawful possession of a firearm. CP 15-16. The court imposed a de facto life sentence of 988 months. CP 20. The convictions were affirmed on direct appeal. State v. Ramirez, 5 Wn. App. 2d 118, 121, 425 P.3d 534 (2018).

In 2021, Ramirez filed a motion for post-conviction DNA testing. CP 86. He explained that, at the time of trial, there was not enough DNA to obtain a profile from the minor contributor to the profile found inside the hat and glove. CP 86. With recent

developments in DNA technology, it was possible the second contributor, Individual A, could now be identified. CP 86, 92-93. Ramirez argued new DNA testing could lead to a viable other suspect, raising a reasonable probability of innocence. CP 95-96. (He withdrew a similar request regarding the glove. CP 378.) He supported his motion with a declaration from forensic scientist Ethan Smith. CP 415-16. Smith declared that newer testing has the potential to glean more genetic information, making it possible to create a full profile sufficient for comparison to the national database. CP 415-16.

A few months later, in early 2022, Ramirez filed a second post-conviction motion, this one for discovery. CP 439. He asked to have examined, at his own expense, the hat and the hairs found embedded in it. CP 439. In support, he presented a declaration from forensic scientist Chesterene Cwiklik that a microscopic hair examination could show whether the hairs were merely deposited as debris, or instead whether they were embedded by a second person who actually wore the hat. CP 427. The

microscopic hair examination could also potentially exclude Ramirez (and the decedents) as the source of the hairs. CP 427. He argued he was entitled to post-conviction discovery because the hair examination could show an entitlement to relief either on subsequent petition for DNA testing or on a personal restraint petition grounded in ineffective assistance of counsel for not having the hairs examined before trial. 2RP 8.

The superior court denied the petition for DNA testing and the motion for leave to examine the hat. CP 450-60, 517-27. The court concluded the DNA was not material because it would only indicate someone wore the hat, not that that person was the shooter. CP 455. The court noted there was circumstantial evidence pointing to Ramirez and no evidence pointing to any other suspect. CP 456-59. The court denied the discovery motion on the grounds that it was speculative that someone else wore the hat at the time of the murders. CP 523. The court rejected the idea that Ramirez could be entitled to relief on a personal restraint petition because any petition would be successive. CP 526-27.

Ramirez timely appealed both orders. CP 482, 528. The Court of Appeals affirmed. Appendix (App.) at 13, 17. Ramirez now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. Ramirez is entitled to post-conviction DNA testing that could reveal the identity of another suspect.

Christopher Ramirez asked for DNA testing that could identify another suspect in the murders for which he stands convicted. This Court should grant review because the Court of Appeals' overly strict interpretation of the post-conviction DNA testing law is out of line with precedent, legislative intent, the rule of lenity, and constitutional due process.

a. DNA testing is authorized when a favorable result is likely to lead to evidence of innocence, not merely when test results alone will prove innocence.

To guard against the possibility that an innocent person has been condemned and imprisoned by our criminal justice system, Washington law provides that a convicted person may request

DNA testing. RCW 10.73.170; State v. Crumpton, 181 Wn.2d 252, 258, 332 P.3d 448 (2014) (citing State v. Riofta, 166 Wn.2d 358, 368, 209 P.3d 467 (2009)). The purpose of this law is to provide a means for the convicted person to obtain evidence in support of a motion for post-conviction relief on the grounds of newly discovered evidence. Riofta, 166 Wn.2d at 368.

Testing must be permitted when the procedural and substantive requirements of the statute are met. RCW 10.73.170. The lenient procedural requirements are that the petitioner is currently serving a term of imprisonment pursuant to a Washington felony conviction and DNA testing would yield significant new information about the identity of the perpetrator. RCW 10.73.170(1), (2); State v. Thompson, 173 Wn.2d 865, 875-76, 271 P.3d 204 (2012); Riofta, 166 Wn.2d at 367.

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 the probability of innocence, the court must assume a favorable

test result. Crumpton, 181 Wn.2d at 255. The court must also assess the impact of the DNA evidence in light of the other evidence at trial. Id. at 262. Courts should not, however, focus on the weight of the other evidence, since any trial leading to a guilty verdict likely has strong evidence of guilt. Id. In this light, the court must allow the testing when a favorable DNA test would "raise a reasonable probability the petitioner was not the perpetrator." Riofta, 166 Wn.2d at 367-68.

While the substantive prong of the DNA testing statute is more onerous, it does not require the ability to demonstrate innocence on the basis of the DNA test results alone. Id. at 367. Instead, the law is designed to afford post-conviction DNA testing when that testing could lead to the production of new evidence that could, in conjunction with other evidence, support a theory of innocence. Id. at 368. The amendments to the statute since its original enactment have served to broaden, not restrict, access to DNA testing. Id. at 365. This Court should grant review under RAP 13.4(b)(1) because the Court of Appeals

decision is in conflict with the legislative intent and this Court's holding in Riofta.

Moreover, this Court should grant review to answer the question left open by this Court's decision in Crumpton, 181 Wn.2d 252. In Crumpton, the court made clear that, in ruling on a request for post-conviction DNA testing, courts must assume a favorable result. Id. at 255. Since then, however, courts have struggled with the nature of that presumption. As the court pointed out in this case, the law does not define "what exculpatory result courts must presume" when ruling on a motion for DNA testing. App. at 8. The availability of post-conviction DNA testing to exonerate the innocent is a matter of substantial public interest. State v. Slattum, 173 Wn. App. 640, 648, 295 P.3d 788 (2013). Review is also warranted under RAP 13.4(b)(4).

In Ramirez' case, the Court of Appeals defined the presumption too narrowly when it rejected as insufficient Ramirez' claim that DNA testing could identify another viable

suspect. In effect, the Court of Appeals' approach would limit DNA testing to single-perpetrator rape cases, where DNA results alone could likely demonstrate innocence. Such a result is inconsistent with this Court's precedent. The dissent in Crumpton was concerned that the presumption of a favorable DNA test result would open the floodgates by allowing post-conviction DNA testing in every single-perpetrator rape case. Crumpton, 181 Wn.2d at 265, 268 (Stephens, J., dissenting). But the Court of Appeals holding in this case lurches to the opposite extreme, effectively limiting post-conviction DNA testing to *only* such cases.

In many cases, DNA evidence, combined with other evidence, may lead to undiscovered evidence that can amount to a likelihood of innocence. This Court's previous caselaw recognized this possibility and incorporated it into its understanding of RCW 10.73.170. For example, in Riofta, this Court noted that the purpose of the law is to allow the person to obtain newly discovered evidence. 166 Wn.2d at 368. The court

noted that the law was intended to provide substantially similar relief to a federal statute, which allows testing upon a showing that the testing "may produce new material evidence" that would "support a theory of innocence." Riofta, 166 Wn.2d at 368 (quoting 18 U.S.C. § 3600(a)(6), (8)(A), (B)). This Court explained that Washington's law, like the federal statute, required petitioners to show that a favorable DNA result "could lead to the production of evidence that would raise a reasonable probability of innocence." Riofta, 166 Wn.2d at 368. Notably, this Court did *not* say that the favorable DNA result must, on its own, raise the reasonable probability of innocence.

The Court of Appeals' approach effectively conflates the standard for DNA testing with the standard for a new trial motion. In his dissenting opinion in Riofta, joined by Justices Tom Chambers and Richard Sanders, Justice Charles Johnson warned of the dangers of conflating these standards. Riofta, 166 Wn.2d at 374-76 (Johnson, J., dissenting). The majority and the dissent in Riofta agreed that DNA testing authorized by RCW

10.73.170 is aimed at allowing testing that may allow the person to develop evidence supporting a motion for a new trial. Riofta, 166 Wn.2d at 368 (majority opinion), 374-75 (Johnson, J., dissenting). Thus, it is logical that, whether a person can already meet the standard for a new trial should not be the deciding factor. Riofta, 166 Wn.2d at 374-75 (Johnson, J., dissenting). DNA testing should not be limited to those situations in which a successful new trial motion is all but guaranteed.

Yet that is just what the Court of Appeals effectively required for Ramirez to prevail in this case. The Court of Appeals explained, "'[N]either our Supreme Court nor this [appellate] court has held that a petitioner is entitled to additional inferences in his favor beyond the assumption of a favorable DNA test result.'" App. at 8 (quoting State v. Braa, 2 Wn. App. 2d 510, 521, 410 P.3d 1176 (2018)). The Court of Appeals thus declined to consider the likelihood, in light of the other evidence, that the presumed-favorable DNA testing would identify another viable suspect in light of the other evidence in the case. App. at 8-9. The

decisions in Braa and in this case show that guidance is needed regarding the scope of the presumption established by Crumpton and the interplay between that presumption and the court's assessment of the other evidence in the case and the potential that newly discovered evidence could raise a reasonable probability of innocence.

The limited view of the favorable presumption required by Crumpton appears to lead the courts to do precisely what this Court has deemed inappropriate and focus too heavily on the strength or weight of the remaining state's evidence. Crumpton, 181 Wn.2d at 262. The fundamental purpose of the DNA testing law is to acknowledge that, despite fair trials and apparently copious evidence, including confessions, innocent persons can be convicted and imprisoned. Riofta, 166 Wn.2d at 369 n. 4; Thompson, 173 Wn.2d at 872 n. 1, n. 2 (possibility of false confessions is one reason for the importance of the DNA testing statute). For this reason, courts are cautioned that the weight of the evidence at trial should not play a great role in the decision

whether to grant post-conviction DNA testing. Crumpton, 181 Wn.2d at 262.

Instead, the question is whether the testing could lead to the production of new evidence that would support a theory of innocence. Riofta, 166 Wn.2d at 368. Since the advent of DNA testing, people have been exonerated when DNA testing led to another suspect. For example, one man was exonerated after confessing and pleading guilty when subsequent DNA testing showed that another man was guilty of a series of similar crimes that led to him being dubbed the "Southside Strangler." Colin Miller, Why States Must Consider Innocence Claims After Guilty Pleas, 10 UC Irvine L. Rev. 671, 675 (2020). Based on the similar modus operandi of these crimes and the likelihood the Southside Strangler was the true culprit, the Virginia Governor pardoned David Vasquez on January 4, 1989. Id.

The Court of Appeals' interpretation is also not in line with the remainder of the statutory language. Courts generally construe statutes so as to harmonize different statutory

provisions. Dahl–Smyth, Inc. v. Walla Walla, 148 Wn.2d 835, 844, 64 P.3d 15 (2003). At issue here is the substantive prong of the DNA testing statute, RCW 10.73.170(3). But this substantive requirement should also be viewed in light of the other statutory provisions. The procedural requirement in subsection (2) is satisfied if DNA testing "would provide significant new information" about the identity of the perpetrator. RCW 10.73.170(2). If the substantive requirement could only be met if the DNA testing would, alone, conclusively show innocence, the broad language of the procedural requirement of "significant new information" would be meaningless. Courts do not construe statutes in a way that renders statutory language meaningless or superfluous. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

The Court of Appeals' overly strict interpretation of RCW 10.73.170 is also inconsistent with constitutional due process. When Alaska's DNA testing statute was challenged as violating due process, the United States Supreme Court upheld the law, in

part because the Alaska State Constitution also appeared to provide for testing, as a "failsafe" for cases that could not meet the strict requirements of the statute. Dist. Attorney's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 70, 129 S. Ct. 2308, 2320, 174 L. Ed. 2d 38 (2009). The Osborne court's rationale shows that an overly strict interpretation of a DNA testing statute may well violate due process.

Finally, the rule of lenity also requires a more lenient interpretation of the statutory language. The rule of lenity applies to the DNA testing statute, and mandates that any ambiguity be interpreted in favor of the convicted person requesting the testing. Slattum,173 Wn. App at 658-61. Ramirez believes the plain language of the DNA testing statute is not ambiguous. However, to the extent the law could be construed as ambiguous, the broader interpretation is required under the rule of lenity.

The statute requires a "likelihood" that the evidence could show innocence on a "more probable than not" basis. RCW 10.73.170. It does not require a showing that a favorable DNA

test would create a near certainty of innocence and that "the test itself will yield an exculpatory result." App. at 8-10. When the statute is properly considered, Ramirez is entitled to post-conviction DNA testing because, in light of all the evidence in the case, the potential to identify another viable suspect is likely to show a probability of innocence.

b. Ramirez is entitled to post-conviction DNA testing.

The Court of Appeals' overly strict view of the DNA testing statute led it to err in assessing Ramirez' request. Neither the state nor the Court of Appeals has disputed the premise of Ramirez' argument: if Individual A were identified as a viable other suspect, confidence in the outcome of the trial would be undermined. Nevertheless, the Court of Appeals rejected Ramirez' arguments on the grounds that it cannot be assumed the profile of individual A will give rise to a viable other suspect. App. at 8-10. The problem with this position is that whether individual A turns out to be another viable suspect can never be known without doing the testing. DNA testing is the intermediate

step that may lead to exoneration. By refusing to indulge in what it views as additional positive inferences, the Court of Appeals excludes many potential innocence claims from ever being developed. The purpose of the law is to *facilitate* the development of such claims. Riofta, 166 Wn.2d at 368.

The Court of Appeals also erred in its comparison of Ramirez' situation to Riofta. Mistaken eyewitness identification has played a significant role in the exonerations that have occurred since the advent of DNA testing. Riofta, 166 Wn.2d at 371 (citing Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 60 (2008)). According to more current statistics from the Innocence Project, 63 percent of their cases exonerating formerly convicted persons involved eyewitness misidentification. https://innocenceproject.org/exonerations-data/, last visited 12/20/23.

But Riofta was not a likely case of eyewitness misidentification. The eyewitness had known Riofta for years, had a good opportunity to see him at the time of the shooting, and

had named Riofta immediately. Riofta, 166 Wn.2d at 371-72. Moreover, there was strong evidence of motive. Id. Thus, the evidence in Riofta was not susceptible to disproof by DNA evidence of another suspect.

Ramirez' case, by contrast, involves extremely suspect eyewitness testimony. The eyewitness in this case did not see the shooting. He merely saw someone in his backyard a short time later. CP 223. When initially presented with a photomontage, he did not recognize Ramirez. CP 214-15. It was only after seeing media coverage of the trial that he claimed to be able to recognize Ramirez as the person he had seen once, at the time of the shooting which was, by that point, nearly two years in the past. CP 229; RP 47-48. The motive evidence was similarly weak. While evidence of acrimony between Ramirez and his uncles was stale and had dissolved into familial relationships before the time of the shootings. CP 197-98, 352, 369-70.

The Court of Appeals reasoned that, even if identified in the CODIS database, Individual A may turn out to have been

incarcerated, or deceased at the time of the shootings in this case. App. at 12. But without DNA testing, no one will ever know.

The court also reasoned that any such person identified by the federal database would likely have even fewer ties to the area and thus be a less likely suspect. Id. But the reverse inference is equally valid. Ramirez' presence is unsurprising and non-incriminatory because he lives in the area and the victims are his uncles, whom he had recently helped move and whom he had reason to visit. CP 197-98. By contrast, a felon identified via the database would have no such innocent explanation for the presence of his DNA, rendering it far more incriminating of Individual A than it is of Ramirez.

Examination of the hat, as Ramirez requested in his second motion, could make the case for his innocence even stronger. Hair examination could establish that another suspect actually wore the hat, ruling out far-flung theories of secondary transfer to explain away DNA evidence of Individual A's presence. CP 427.

Washington law authorizes post-conviction DNA testing when it is likely such testing could raise a probability of innocence. RCW 10.73.170. That standard is met in this case. Ramirez, therefore, asks this Court to grant review and reverse, affording him the ability to test the DNA. He likewise asks this Court to grant review and reverse the order denying him access to post-conviction discovery.

2. The courts below have failed to recognize the critical role hair sample analysis would play in establishing that Ramirez is likely innocent.

The hair examination Ramirez seeks would cost the state nothing and could enhance the exculpatory value of the DNA evidence. As has been repeatedly pointed out, DNA cannot establish the circumstances under which it was deposited in the location where it is found. Riofta, 166 Wn.2d at 372 (noting anyone could have worn the hat at any time after the car was stolen; CP 279 (expert testimony that DNA could not pinpoint when the DNA was left on the hat). Even trace contact can leave DNA to be found years later. See, e.g., State v. Gray, 151 Wn.

App. 762, 770, 215 P.3d 961 (2009). Secondary transfer can occur, in which a person's DNA is left in one location and transferred by a different person or object to an entirely new location. State v. Cox, 17 Wn. App. 2d 178, 192, 484 P.3d 529, rev. denied, 198 Wn.2d 1020 (2021).

The hair sample analysis Ramirez seeks could make the DNA evidence sought above more probative of innocence. It could establish that someone else wore the hat, ruling out that Individual A's DNA was left there by trace contact or secondary transfer. Such a finding would make it far more likely that Individual A is a viable other suspect. For this reason, Ramirez has shown good cause entitling him to access the evidence for purposes of doing his own testing. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 390-91, 972 P.2d 1250 (1999); Bracy v. Gramley, 520 U.S. 899, 908-09, 117 S. Ct. 1793, 1799, 138 L. Ed. 2d 97 (1997). This Court should also grant review of the discovery issue because, as with DNA testing, access to evidence for the purpose of showing that an

innocent person has been convicted and incarcerated is an issue of substantial public interest under RAP 13.4(b)(4).

E. CONCLUSION

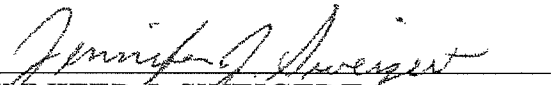
For the foregoing reasons, Ramirez respectfully requests this Court grant review and reverse.

DATED this 4th day of January, 2024.

I certify that this document was prepared using word processing software and contains 4,382 words excluding the parts exempted by RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

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

STATE OF WASHINGTON,	)	No. 39118-3-III
	)	(consolidated with
Respondent,	)	No. 39280-5-III)
	)	
v.	)	UNPUBLISHED OPINION
	)	
CHRISTOPHER B. RAMIREZ,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, A.C.J. — Christopher Ramirez, previously convicted of two counts of first degree murder and unlawful possession of a firearm, appeals the trial court's denial of his postconviction motions for DNA testing and for leave to examine evidence. We affirm.

FACTS

On November 1, 2014, brothers Arturo and Juan Gallegos were fatally shot at the Broadway Square Apartments in Spokane Valley, where they resided together. Data obtained from cellular towers placed Christopher Ramirez, nephew of Arturo and Juan,[1]

[1] To avoid confusion, we refer to the Gallegos brothers by first name.

in the vicinity of the apartments at the time of the murders. Mr. Ramirez used the alias "Demon." Rep. of Proc. (RP) at 463. Within minutes of the shootings, an individual identifying himself as "Demon" appeared in the backyard of Carlton Hritsco, two blocks south of the Broadway Square Apartments. RP at 514. The individual behaved nervously, ducking behind Mr. Hritsco's vehicle when traffic passed in the street. Before leaving the property, the individual inquired about nearby bus service, then placed a call on his cell phone. Cellular data later indicated Mr. Ramirez, at approximately this time, used his own cell phone to call Spokane Transit Authority's (STA's) bus information line. This call was placed from the vicinity of Mr. Hritsco's home.

Two hours later, a law enforcement K-9 tracked a human scent from the Broadway Square Apartments to Mr. Hritsco's home. After learning of the above encounter, investigators showed Mr. Hritsco a photo array of the five individuals known locally to use the alias "Demon," one of whom was Mr. Ramirez. RP at 477-78. Mr. Hritsco was unable to identify Mr. Ramirez as the individual who had appeared in his yard, as the hairstyles of the photographed men were dissimilar to the man he had seen. However, Mr. Hritsco eventually identified Mr. Ramirez after seeing an updated photograph of him on TV news. In his first interview with law enforcement, Mr. Hritsco had estimated the man who entered his yard to be five feet, eight inches tall. Although Mr. Ramirez's photo

identification listed him as six feet tall, a subsequent booking photograph showed him to be approximately five feet, nine inches tall.

Besides Mr. Hritsco, investigators in the hours following the murders also contacted Angel Valerio, a son-in-law of Arturo's. Upon hearing of the murders, Mr. Valerio immediately expressed his suspicion that Mr. Ramirez was involved. According to Mr. Valerio, Mr. Ramirez and his uncle Arturo had had an acrimonious relationship. Several months before the murders, on a family text chain, Mr. Ramirez had threatened Arturo specifically and the family in general, stating: "'Tio. We all die. Rest in peace. Fuck you all if that's how it is.'" RP at 376. On another occasion, Mr. Ramirez had pulled a knife on Arturo.

The State charged Mr. Ramirez with two counts of murder in the first degree and one count of unlawful possession of a firearm. At trial, law enforcement officers, an FBI cellular data expert, Mr. Hritsco, and Mr. Valerio all testified to the facts above. Additionally, the State offered testimony from a DNA analyst who had examined two items discovered near Arturo's body: a knit hat and a glove. Swabs from within both items showed Mr. Ramirez was a major contributor of genetic material, with Arturo and Juan ruled out as contributors. Swabs of bloodstains on the exterior of the hat showed the blood belonged to Arturo. The interior swabs also revealed an unidentified minor

contributor, whom the DNA analyst labeled "Individual A." RP at 813. When compared against the Washington State DNA database, Individual A yielded no matches. Individual A's DNA was not compared against the national database. Individual A was not then and still has not been identified.

Mr. Ramirez called just one witness at trial, another resident of Broadway Square Apartments who was an acquaintance of Maceo Williams—another of the five individuals known locally to use the alias "Demon." RP at 1094. The witness, Nick Foss, did not place Mr. Williams at or near Broadway Square Apartments on the night of the murders. He merely testified that he was acquainted with Mr. Williams.

Concerning the State's evidence, Mr. Ramirez challenged the reliability of Mr. Hritsco's identification of him, influenced as it was by media coverage of the case. Mr. Ramirez also argued that under the time frame Mr. Hritsco gave for his encounter with Demon, the person he was speaking with would have arrived in his yard well before the first 911 calls reporting the murders and possibly before the murders themselves. Finally, Mr. Ramirez argued law enforcement mismanaged the investigation when they neglected to DNA-swab a vomit trail they discovered at the crime scene. While it is true law enforcement did not swab the vomit for DNA, the State's DNA expert testified that vomit is a poor source of DNA, as the stomach acid in vomit degrades any testable sample.

The jury convicted Mr. Ramirez on all three counts, and the trial court sentenced him to 988 months' imprisonment. Mr. Ramirez filed an unsuccessful appeal and unsuccessful personal restraint petition. *In re Pers. Restraint of Ramirez*, No. 37774-1-III (Wash. Ct. App. Jul. 12, 2022) (unpublished) http://www.courts.wa.gov/opinions/pdf/377741_unp.pdf.

Later, he sought postconviction relief from the trial court in the form of (1) further DNA testing of the samples collected from the hat and the glove found at the crime scene, and (2) leave to conduct forensic analysis of hairs discovered in the hat. In support of his request for relief, Mr. Ramirez offered a declaration from Chesterene Cwiklik, a forensic scientist qualified to perform the analysis. Ms. Cwiklik stated that such analysis could determine which hair samples were deposited from wear and which were deposited as debris. The analysis could also compare hair samples for consistency. However, only DNA testing could definitively identify which individuals contributed which hairs.

The trial court issued memorandum opinions denying Mr. Ramirez's motions. It concluded further DNA testing was unwarranted because even a favorable result from an additional test would not mitigate the body of evidence supporting Mr. Ramirez's conviction. It concluded forensic analysis of the hairs in the hat was unwarranted because (1) such analysis could produce no evidence that was not cumulative to the DNA

evidence already produced, and (2) Mr. Ramirez failed to identify the relief to which he would be entitled after analysis of the hairs.

Moreover, the court noted Mr. Ramirez had not explained how a personal restraint petition would even be viable at this stage, as he had exceeded the one-year limitation on collateral attacks under RCW 10.73.090. While RCW 10.73.100 provides exceptions to the one-year ban, Mr. Ramirez had not explained how an exception would apply to his case.

Mr. Ramirez appeals the trial court's denial of these two requests for postconviction relief.

ANALYSIS

POSTCONVICTION DNA TESTING

Mr. Ramirez argues the trial court erred in denying further DNA testing because identification of the unknown DNA contributor at the crime scene would tie another felon to the scene and indicate Mr. Ramirez was probably innocent. We disagree.

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 abuses its discretion when it exercises authority "'on untenable grounds or [for] untenable

reasons.'" *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

Petition for additional testing

RCW 10.73.170 allows a convicted defendant to secure additional DNA testing of evidence from trial if three procedural[2] and one substantive[3] criteria are met. The State limits its argument to the substantive criterion, which requires the defendant to show that additional DNA evidence 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 an exculpatory result. *Riofta*, 166 Wn.2d at 369. However, the RCW 10.73.170(3) substantive requirement 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 exculpatory 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]

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[2] *See* RCW 10.73.170(1), (2)(a), (2)(b).

[3] *See* RCW 10.73.170(3).

evidence."); *see also Crumpton*, 181 Wn.2d at 260 (Courts must "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.").

i. Exculpatory result limitations

RCW 10.73.170 does not define what exculpatory result courts must presume when ruling on a motion for additional DNA testing. However, the cases interpreting this statute make clear the defendant is entitled only to a presumption that the test result itself will be exculpatory and not a presumption that the test result will trigger a chain of discoveries all favorable to the defendant. *See State v. Braa*, 2 Wn. App. 2d 510, 521, 410 P.3d 1176 (2018) ("[N]either our Supreme Court nor this [appellate] court has held that a petitioner is entitled to additional inferences in his favor beyond the assumption of a favorable DNA test result."). In *Riofta*, for example, a defendant convicted of assault with a firearm enjoyed only the presumption that further DNA testing of a hat worn by the shooter would show either the absence of the defendant's DNA or the presence of a third person's DNA. 166 Wn.2d at 370. The court did not presume any further exculpatory "result" in the form of collected DNA implicating any third person in the crime. *See id.* at 370-71.

Here, Mr. Ramirez argues the court when considering his petition must presume not only that further testing will identify a third person's DNA, but that the DNA will match in the national CODIS[4] database, thereby implicating someone else in the murders. However, what Mr. Ramirez characterizes as a single presumption in his favor in fact is three presumptions daisy-chained together: (1) identification of a third person's DNA, (2) a CODIS match, and (3) a plausible link to Broadway Square Apartments on the night of the murders. To impose such presumptions on the trial court would be to impose additional favorable inferences to which defendants are not entitled. *Braa*, 2 Wn. App. 2d at 521. Accordingly, we impose only the first presumption—namely, that further testing of Individual A's DNA will show Individual A is a third person and not Mr. Ramirez. This is the full extent of the exculpatory presumption to which defendants are entitled under *Riofta* and its line of cases. 166 Wn.2d at 370; *see also State v. Gray*, 151 Wn. App. 762, 774, 215 P.3d 961 (2009); *State v. Thompson*, 155 Wn. App. 294, 304, 229 P.3d 901 (2010), *aff'd*, 173 Wn.2d 865, 271 P.3d 204 (2012).

Mr. Ramirez opposes this view, arguing the presumed exculpatory result cannot be information already in the record without further testing. Instead, the result must exculpate the defendant in some new way. In his view, because the State's DNA expert

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[4] Combined DNA Index System.

testified at trial that Mr. Ramirez was not the source of Individual A's DNA, the court now must presume a further DNA test would yield an exculpatory result in excess of that conclusion.

We disagree. That a jury when it convicted Mr. Ramirez was already in possession of an exculpatory DNA test does not broaden the presumption to which he is entitled when seeking postconviction relief. On the contrary, it suggests an exculpatory DNA test, in light of other evidence, was not sufficient to persuade the jury even of reasonable doubt, let alone probability of innocence. In this way, the exculpatory result introduced at trial weighs against Mr. Ramirez's petition for additional testing, rather than lightening his burden when seeking it.

We hold that a defendant seeking additional DNA testing under RCW 10.73.170 is entitled only to the presumption that the test itself will yield an exculpatory result and not that the test will trigger a sequence of downstream exculpatory discoveries. This holding does not conflict with *Braa*, where the court determined the defendant was entitled to the presumption that the tested DNA would belong to the victim, rather than simply *not* belonging to the defendant. Even in that case, the presumed result remained one discrete, binary result—the DNA would belong to the victim or it would not, just as, in a more typical case, the DNA would belong to the defendant or it would not. Whatever the

details of a presumed test result, we hold the presumption extends only to the result itself and not to any series of speculative eventualities, each depending on those preceding it.

ii. Probability of innocence

A petitioner under RCW 10.73.170(3) will secure postconviction DNA testing only if an exculpatory result would, on a more-probable-than-not basis, "demonstrate [his] innocence in spite of the multitude of other evidence against [him]." *Crumpton*, 181 Wn.2d at 262. For the reasons discussed below, the considerable evidence of Mr. Ramirez's guilt would withstand the impact of an exculpatory test result.

First, the jury already possessed exculpatory DNA evidence when it convicted Mr. Ramirez of the murders. The State's DNA expert testified that he swabbed two genetic profiles from the hat and glove discovered near Arturo's body. The major contributor was Christopher Ramirez. The minor contributor was an unidentified "Individual A" who was neither Mr. Ramirez nor either of the victims.

RP at 813. Were this court to order additional DNA testing, the results, under the presumption described above, would merely duplicate these facts. The additional testing would register no impact at all on the evidence presented at trial because the results of that testing were themselves presented at trial.

Even if, arguendo, we broadened the exculpatory presumption to encompass not only a favorable test result but indeed a match with that result in the national CODIS database, Mr. Ramirez still could not demonstrate his innocence on a more-probable-than-not basis. After all, the State's DNA expert already established that Individual A did not match against any felons in Washington's own CODIS database. Accordingly, any match new testing identified would be with an out-of-state felon whose connection to the crime scene was, one might assume, more tenuous than Mr. Ramirez's own connection. Mr. Ramirez could argue that individual *was* connected to the crime scene, as his DNA was found in the hat, but then again Mr. Ramirez's own DNA was found in that same hat, and as a major contributor. Mr. Ramirez's argument also assumes the felon identified as Individual A would prove not to have been incarcerated at the time of the murders, or deceased, or otherwise vindicated by an alibi. By contrast, existing evidence shows Mr. Ramirez was not incarcerated at the time of the murders, nor was he deceased, nor did he offer an alibi.

At the time of the murders, Mr. Ramirez was carrying a phone that was pinging cellular towers in the vicinity of the Broadway Square Apartments. Someone matching Mr. Ramirez's description was showing up in a backyard two blocks from the Broadway Square Apartments, introducing himself as "Demon," Mr. Ramirez's own alias. RP at

463. That individual behaved suspiciously, ducking behind cars when traffic passed in the street. That individual inquired as to bus routes and made a call on his phone at approximately the same time Mr. Ramirez himself, using his own phone, called the STA bus information hotline. Finally, Mr. Ramirez several months before the murders had threatened to kill one of the victims. On another occasion, he had pulled a knife on that victim. When the son-in-law of that victim heard about the murders, the first word out of his mouth was "Chris." RP at 369-70.

In sum, DNA evidence played only an ancillary role in convicting Mr. Ramirez. Any further DNA testing would, for that reason, lack sufficient import to offset the "multitude of other evidence against [him]." *Crumpton*, 181 Wn.2d at 262. This is true even if this court were to extend to Mr. Ramirez an overbroad exculpatory presumption to which petitioners under RCW 10.73.170(3) are not entitled.

Finding no abuse of discretion, we affirm the trial court's denial of further DNA testing.

POSTCONVICTION HAIR ANALYSIS

Mr. Ramirez argues the trial court should have permitted postconviction discovery of hair found at the crime scene because such discovery would entitle him to relief in the form of (1) a meritorious personal restraint petition and (2) access to postconviction DNA

testing. Furthermore, Mr. Ramirez argues the court should have awarded such discovery because the burden it would impose on the State is slight compared to the procedural protection it would afford him. We disagree.

Standard of review

Washington courts have not announced a uniform standard of review for a trial court's denial of postconviction discovery. *See State v. Asaeli*, 17 Wn. App. 2d 697, 699, 700, 491 P.3d 245, *review denied*, 198 Wn.2d 1026, 498 P.3d 955 (2021). However, the emerging practice across jurisdictions is to apply abuse-of-discretion review. *See, e.g.*, *State v. Butler*, 315 Kan. 18, 20-21, 503 P.3d 239 (2022); *see also State v. O'Brien*, 214 Wis. 2d 328, 344, 572 N.W.2d 870 (Ct. App. 1997), *aff'd*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999); *Commonwealth v. Bridges*, 584 Pa. Super. 589, 595, 886 A.2d 1127 (2005); *Reed v. State*, 116 So. 3d 260, 267 (Fla. 2013); *Elliott v. State*, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). Abuse of discretion is the standard of review Washington courts apply to other postconviction relief matters (such as postconviction DNA testing, as discussed above). *See State v. Smith*, 159 Wn. App. 694, 699, 247 P.3d 775 (2011); *Riofta*, 166 Wn.2d at 370. Additionally, it is the standard of review Washington courts apply to *pretrial* discovery motions. *Asaeli*, 17 Wn. App. 2d at 699. For these reasons, we apply abuse of discretion to this issue as well.

Good cause

There is no constitutional right to postconviction discovery. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 391, 972 P.2d 1250 (1999) (quoting *Campbell v. Blodgett*, 982 F.2d 1356, 1358 (9th Cir. 1993)). Petitioners seeking postconviction discovery will prevail "only to the extent [they] can show good cause to believe the discovery would prove entitlement to relief." *Id.*

Here, Mr. Ramirez contends postconviction forensic analysis of hairs found at the crime scene would entitle him to relief in the form of (1) a meritorious personal restraint petition and (2) access to postconviction DNA testing. Under Mr. Ramirez's theory, forensic analysis of hairs found at the crime scene would undergird a successful personal restraint petition because that analysis would show ineffective assistance of counsel. Specifically, Mr. Ramirez argues the forensic analysis would identify a plausible second suspect in the Gallegos murders, which would show his counsel had been deficient by not requesting such analysis before trial. In support of this view, Mr. Ramirez cites *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which requires defense counsel to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Mr. Ramirez also cites *Richter v. Hickman*, 578 F.3d 944, 953 (9th Cir. 2009), *rev'd and remanded on other*

grounds sub nom. Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), which held that representation is deficient when counsel fails to pursue forensic testing that is "critical to the success of [the] defense."

However, Mr. Ramirez's counsel was not deficient for failure to pursue forensic analysis of the hair because such analysis could produce no material evidence that was not already produced at trial. Mr. Ramirez's expert on this issue, Chesterene Cwiklik, stated in her declaration that forensic analysis of the hair, on its own, could determine which hairs had been deposited in the hat by wear, versus which were deposited as debris. The analysis could also compare hair samples to determine consistency between them. However, such analysis could not determine the source of a given strand of hair. Such a determination, Ms. Cwiklik conceded, would require DNA testing. In sum, the forensic analysis Mr. Ramirez seeks is of cruder evidentiary value than the sophisticated DNA analysis the State already performed on the hat and presented to the jury.

Moreover, as the trial court recognized, Mr. Ramirez fails to explain how a personal restraint petition would even be viable at this stage, as he has exceeded the one-year limitation on collateral attacks under RCW 10.73.090. While RCW 10.73.100 provides exceptions to the one-year ban, Mr. Ramirez does not explain how any of the exceptions would apply here.

For the above reasons, we conclude the trial court did not abuse its discretion in denying Mr. Ramirez's request for postconviction discovery.

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, A.C.J.

WE CONCUR:

Pennell, J.

Staab, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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