No. 331792-III

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

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

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON,

Defendant/Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

STATE CASES

FEDERAL CASES

STATE STATUTES

STATE RULES

OTHER AUTHORITIES

I. INTRODUCTION

This appeal arises from the first trial ever conducted under the Wrongly Convicted Persons Act, chapter 4.100 RCW, a remedial statute designed to redress the "tremendous injustice" of a wrongful conviction in Washington State. In denying the claims of Appellants Robert Larson, Tyler Gassman, and Paul Statler, the trial court failed to construe the statute liberally and, instead, treated the men as though they were still convicted. Chief among its many errors, the trial court applied an incorrect, overly stringent burden of proof that demanded Larson, Gassman, and Statler prove a negative with absolute certainty.

The State maintains this Court should affirm the trial court's narrow interpretation of the Act and, in doing so, establish a nearly insurmountable bar for all future wrongful conviction claimants. For the following reasons, the State's arguments must be rejected.

II. REPLY ARGUMENT

A. The orders vacating the convictions and granting a new trial were based on significant new exculpatory information.

In their opening brief, Larson, Gassman, and Statler demonstrated that the orders vacating their convictions and granting a new trial were based on significant new exculpatory information, and the trial court erred in concluding otherwise. Apps.' Br. at 18-27. In response, the State makes four arguments, one of which is based on an incorrect reading of *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009), and three of which are grounded in unsupported, conclusory assertions. The arguments fail.

1. "Significant new exculpatory information" includes evidence available at the time of the criminal trial but never presented to fact finder.

The State argues that the trial court correctly concluded "significant new exculpatory information" means information unavailable at the time of trial. Resp.'s Br. at 14. In making this argument, the State fails to address the court's reliance on an overturned appellate holding.

A close reading of *Riofta* demonstrates the trial court erred. The defendant, Alexander Riofta, sought DNA testing "of a white hat that was worn by the perpetrator of a shooting for which [Riofta] was convicted." *Riofta*, 166 Wn.2d at 361. The trial court denied the motion on the merits, concluding "Riofta failed to establish the likelihood that the DNA evidence he seeks would demonstrate his innocence." *Id*. at 362. The Court of Appeals affirmed on an "alternative" ground, holding "Riofta failed to establish the DNA testing could yield 'significant new information' because the white hat was available for testing at trial." *Id*. at 361-62, 364 (emphasis added). The Supreme Court specifically rejected this conclusion. *Id*. at 362, 366.

In its decision, the Court explained that the issue was whether information available at trial falls within the meaning of "significant new information" under RCW 10.73.170(2)(a)(iii):

> Riofta sought DNA testing under the amended statute. He alleged the test results 'would provide significant new information.' The State opposed the motion. It argued 'significant new information' means information that is newly available due to advances in technology and does not include information that could have been

> obtained at trial. The Court of Appeals held postconviction testing of the white hat could not yield 'new' information because the white hat was not newly discovered evidence and could have been tested at trial.

Riofta, 166 Wn.2d at 365 (internal citations omitted) (emphasis added).

In overturning the Court of Appeals on this point, the Supreme Court concluded that "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." *Id*. at 366 (emphasis added). Accordingly, the Court held "that Riofta's request for testing of the white hat is not precluded . . . on the basis that it could have been, but was not, tested prior to trial." *Id*. (emphasis added). In other words, significant new information includes information that was available at trial but never presented to the factfinder.

The State goes on to cite two criminal court rules that are inapplicable to *Riofta* and this matter. The first, CrR 7.5(a)(3), 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, CrR 7.8(b)(2), 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 State asserts that "[b]y incorporating the new trial and vacation mechanisms into the Act the legislature clearly intended that a wrongful conviction claim must be based on evidence that the defendant could *not* have discovered with reasonable diligence before trial." Resp.'s Br. at 14 (emphasis in original). If this were so, however, the legislature would have adopted the very language found in those rules—namely, "newly discovered evidence . . . which the defendant could not have discovered with reasonable diligence and produced at the trial." CrR 7.5(a)(3) (emphasis added); *see also* CrR7.8(b)(2). Instead, 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).

Furthermore, as the State recognizes, the criminal court in this case "vacated Plaintiffs' convictions pursuant to CrR 7.8(b)(5)." Resp.'s Br. at 10 (citing Exs. 13, 14, 15). This rule allows a defendant to obtain a new trial for "[a]ny other reason justifying relief from the operation of the judgment." CrR 7.8(b)(5) (emphasis added). Unlike the criminal rules cited by the State, there is no limitation in CrR 7.8(b)(5) on the presentation of evidence available at the time of trial.

2. Significant new exculpatory information formed the basis of the criminal court's new trial orders.

The State next argues the trial court was correct in concluding that Larson, Gassman, and Statler did not satisfy the requirements of RCW

4.100.060(1)(c)(ii). Resp.'s Br. at 11-12. In support of this, the State asserts that "ineffective assistance of counsel was the sole basis upon which Plaintiffs' judgments were vacated." *Id*. No further explanation or analysis is provided. *See id*.

As Larson, Gassman, and Statler have shown, the criminal court explicitly based its orders on "[s]trong, credible alibi evidence" and "critical information" of an "exculpatory" nature that "undermin[ed] confidence in the outcome of the [criminal] trial." Exs. 16, 17, 18 at 4:18-19, 5:7, 7:6-8, 7:18-19, 8:1-2. Courts have concluded that significant new exculpatory information can form the basis of an order vacating a conviction and granting a new trial even when a finding of ineffective assistance of counsel was also made. *See* Apps.' Br. at 23-24 (citing cases). The State fails to address either of these points.

3. A claimant can prevail under the Act even if there are other potential remedies available.

Next, the State claims: "[d]efendants who are able to establish that they received ineffective assistance of counsel . . . are not entitled to receive monetary compensation through the wrongful conviction compensation act." Resp.'s Br. at 15. But the State offers no explanation to support this assertion. *See id*. Moreover, the Act is a remedial statute that must be "liberally construed in favor of the beneficiary." *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 882, 154 P.3d 892 (2007). Courts must reject efforts to exempt individuals from the Act's coverage unless the grounds for doing so are "unmistakably consistent

with the terms and spirit of the legislation." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000).

The statute's overarching goal is to provide relief to "those who have been wrongly convicted in Washington." RCW 4.100.010. If the legislature intended the Act to be limited to those "who have been wrongly convicted in Washington and have no other remedy," it could have easily said as much. But it did not. To the contrary, the legislature explicitly recognized that some claimants may have other remedies available to them, and the legislature drafted language requiring the waiver of such remedies as against the State. RCW 4.100.080(1).

4. The significant new information underlying the criminal court's order was exculpatory.

For its final argument on this issue, the State maintains the significant new information on which the criminal court based its decision to vacate the convictions and grant a new trial was not "exculpatory." Resp.'s Br. at 16. The State's assertion is erroneous.

The State misapprehends the meaning of the word "exculpatory," which is defined as "[e]vidence tending to establish a criminal defendant's innocence." Black's Law Dictionary 566 (7th ed. 1999) (emphasis added). The State takes the position that the evidence must have actually exculpated Larson, Gassman, and Statler. For example, the State asserts that "Neilson's testimony did not undermine the facts establishing Statler and the other Plaintiffs' guilt." Resp.'s Br. at 21 (emphasis added). The appropriate question, however, is not whether the significant new

information actually proved the claimant's innocence; rather, the question is whether the information had a tendency to establish innocence.

In his rulings, Judge Price concluded "there [was] a reasonable probability . . . the result of the [criminal] proceeding would have been different" had the jury considered the significant new information presented to him. Exs. 16, 17, 18 at 6:17-20. Indeed, Judge Price referenced the new information in reaching this conclusion. *See id*. at 7:14–8:1 (concluding, for example, "[t]here is a reasonable possibility that had [the jury been presented with] Weskamp's work records, the outcome of the trial would have been different" because the records "corroborate[] that the crime occurred on April 15th, when Mr. Larson was clocked in at work").[1] Even the trial court recognized that Judge Price found the new information to be exculpatory. *See* CP 412-13 & nn.2-4.

[1] In his order, Judge Price wrote: "Phone records obtained by post-conviction counsel show that Matt Dunham, the State's star witness, was in communication with the victims" even though Dunham testified at trial "that he did not know any of the victims." Exs. 16, 17, 18 at 5:1-3. The State claims "it is questionable whether Judge Price saw the records" to which he was referring, a serious accusation. Resp.'s Br. at 17. The State's allegation is supported only by State counsel's own assertion that she was unable to locate the records. *See id*. But at trial, counsel admitted asking for "a certified copy of the consolidated memorandum in support of CR 7.8 Motion for Relief from Judgment of Order." RP 498:1-8 (emphasis added). The criminal court's docket, of which this Court may take judicial notice, shows the "Dclr Of M Fernanda Torres W/attach[ments]" was submitted with the memorandum at Sub # 136. *See* dw.courts.wa.gov (select "Case Search Options" and search Superior Court Cases for number 08-1-02442-4 in Spokane Superior Court); *see also Porter v. Ollison*, 620 F.3d 952, 954-55 & n.1 (9th Cir. 2010) (taking judicial notice of dockets in related proceedings, including those located on internet). As for the State's claim that it "timely" requested copies of the records from Plaintiffs, Resp.'s Br. at 17, the assertion is false. Indeed, the State failed to propound any discovery requests in accordance with the rules, let alone timely discovery requests. RP 499. Finally, with respect to the State's assertion that Larson, Gassman, and Statler failed to impeach Dunham with the phone records in the civil trial, the record establishes

B. Where a new trial was granted, it is unnecessary to prove the basis for the dismissal of the charging document.

In their opening brief, Larson, Gassman, and Statler demonstrated how the trial court erred in requiring them to show that the criminal court dismissed the charging document on the basis of significant new exculpatory information. Apps.' Br. at 27-29. Ignoring the plain language of the statute and the authorities on which Larson, Gassman, and Statler rely, the State makes three arguments in opposition. All three fail.[2]

1. There was no dispute at trial regarding the basis for dismissing the charging document.

The State first argues that one of the disputed issues at trial was whether the criminal court dismissed the charging document on the basis of significant new exculpatory information. Resp.'s Br. at 12. This is false. The local rules required the parties to list all disputed issues in the Trial Management Joint Report. Super. Ct. of Spokane Cnty. LCR 16(a)(3); CP 242, 244. The trial court specifically warned that "[i]ssues not identified [in the report as disputed] may not be raised at trial without leave of court." CP 244. The parties jointly identified only three issues for trial, none of which concerned the dismissal of the charging document. CP 244. Indeed, on that point the parties were in agreement: "Plaintiffs

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Dunham was successfully discredited in other ways, as demonstrated by the fact that the trial court made no reference to Dunham's testimony in its conclusions. *See* CP 414-31.

[2] The State confusingly refers to the dismissal of the "convictions" in both the heading and the first sentence of the section of the response brief addressing this issue. *See* Resp.'s Br. at 12. The assignment of error, however, concerns the dismissal of the charging document. *See* Apps.' Br. at 3, 27-29.

were not retried, and the charging documents were dismissed." CP 243. This tracks the elements that must be satisfied where a criminal court orders a new trial. *See* RCW 4.100.060(1)(c)(ii) (requiring proof that "the claimant was not retried and the charging document dismissed"). The State is precluded from now raising the issue. *See Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 442-43, 191 P.3d 879 (2008) (challenge to element of claim waived if uncontested in trial management report).

2. Where a new trial was ordered, the claimant need not demonstrate the grounds on which the charging document was subsequently dismissed.

The State next argues the Act "imposes an additional requirement" on a claimant whose conviction has been vacated—namely, that the claimant must prove "any subsequent dismissal was also based on significant new exculpatory information." Resp.'s Br. at 13 (emphasis added). In support of this, the State asserts that RCW 4.100.060(1)(c)(ii) treats those "whose convictions were vacated" differently from "those who have a new trial ordered through other mechanisms." Resp.'s Br. at 13. Notably, the State fails to explain how it derived this interpretation from the statute. The State also fails to identify the "other mechanisms" for ordering a new trial that purportedly warrant a different analysis of the dismissal. For the following reasons, the State's argument is erroneous.

When a court orders a second criminal trial based on significant new exculpatory information, the court will necessarily have to reverse or vacate the underlying conviction. Otherwise, the second trial will be

unnecessary because the conviction will remain. Thus, under the State's logic, the standard for analyzing the dismissal of a charging document would actually be the same for all claimants regardless of whether new trials were granted because all claimants would have had their convictions reversed or vacated. Such an interpretation is unsupported by the plain language of the RCW 4.100.060(1)(c)(ii), which utilizes a disjunctive conjunction to differentiate between claimants who were granted a new trial and those who were not.

The State inappropriately asks the Court to rewrite RCW 4.100.060(1)(c)(ii) in the following manner:

> The claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information **and**~~or~~, 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~~.

This request should be denied. "A court must, when possible, 'give effect to every word, clause and sentence of a statute.'" *Am. Legion Post #149 v. Wash. State Dept. of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008) (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)). Moreover, "[a] provision coming later in [a] chapter must prevail so long as it is more specific than the provision occurring earlier in the sequence." *State v. J.P.*, 149 Wn.2d 444, 453-54, 69 P.3d 318 (2003). Convictions may be reversed or vacated with or without the ordering of a new trial.

Thus, the second half of RCW 4.100.060(1)(c)(ii) is more specific and governs the claims of Larson, Gassman, and Statler. *See id*.

A sound interpretation of RCW 4.100.060(1)(c)(ii) recognizes the provision is focused on two things: (1) determining whether the criminal court's order was based on significant new exculpatory information, and (2) determining whether the criminal case is final. If an order reverses or vacates a conviction and simultaneously dismisses the charges based on significant new exculpatory information, there is finality. But if an order reverses or vacates a conviction and grants a new trial based on significant new exculpatory information, there is no finality and further proof is required. The claimant must either show that he was retried and found not guilty or show that the charging document was dismissed without a retrial. Under the plain language of the statute, neither of these actions has to be based on significant new exculpatory information.

3. The orders dismissing the charging document are predicated on the order vacating the judgment.

For its third argument, the State maintains that the orders dismissing the charging document are not based on significant new exculpatory information because they lack specific findings. Resp.'s Br. at 12. But as Larson, Gassman, and Statler explained in their opening brief, each motion for and order of dismissal was explicitly "based upon the records and files" in the case and the fact "that the defendant's conviction was vacated December 14, 2012." Exs. 19, 20, 21. Significant new exculpatory information provided the foundation for the criminal

court's decision to vacate the convictions. *See* Exs. 16, 17, 18 at 4:18-19, 5:7, 7:6-8, 7:18-19, 8:1-2. Thus, to the extent they were required to do so, Larson, Gassman, and Statler established that the orders dismissing the charging document were also predicated on such information.

C. The trial court erred by failing to give due consideration to difficulties of proof caused by the unavailability of witness Eric Weskamp.

In their opening brief, Larson, Gassman, and Statler demonstrated how the trial court erred by strictly applying ER 804(b)(1) to exclude the recorded interview of Eric Weskamp rather than following the statutory directive in RCW 4.100.060(3). That directive required the trial court to consider the "difficulties of proof caused by the . . . unavailability of witnesses." RCW 4.100.060(3). It is undisputed that Weskamp, a victim in the robbery, was unavailable at trial. *See* RP 59 ("we're not contesting that he's unavailable"). It is also undisputed that the trial court refused to follow RCW 4.100.060(3) on the ground that an "unsworn interview without any involvement by the State goes beyond the scope of what's contemplated in [the statute]." State's Resp. at 24 (quoting RP 67).

Without any explanation or citation to authority, the State asserts "there is no evidence rule that allows an unsworn, wholly unchallenged statement to be admitted." *Id*. Evidence Rule 802, however, specifically provides that hearsay may be admitted as allowed "by statute." Moreover, the Washington Supreme Court has stated that "rules of evidence may be

promulgated by both the legislative and judicial branches." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006).

With RCW 4.100.060(3), the legislature has enacted a statute that allows courts to admit and consider hearsay evidence in light of the difficult task a claimant has to prove a negative—that is, to prove "[t]he claimant did not engage in any illegal conduct alleged in the charging documents," conduct that often purportedly occurred many years earlier. RCW 4.100.060(1)(d) (emphasis added). To conclude, as the trial court did, that the Rules of Evidence must be strictly applied regardless of the factors set forth in RCW 4.100.060(3) is to render the provision meaningless. This is contrary to well-established principles of statutory construction. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("[s]tatutes must be interpreted . . . so that all the language used is given effect, with no portion rendered meaningless") (citation omitted).

The magnitude of the trial court's error is compounded by the significance of Weskamp's recorded statements. Like Anthony Kongchunji, Weskamp recalled being "pressured and threatened" to provide testimony that differed from his actual experience. CP 259. Specifically, the prosecutor told him, "this is what you need to say," and "if you go along with this we're not going to have any problems." CP 257. As a result, Weskamp failed to testify that the crime occurred on April 15 and that he recognized Larry Dunham as one of the men who robbed him. CP 254-58. These assertions corroborate other evidence presented by Larson, Gassman, and Statler to prove their innocence,

including evidence of the modus operandi of Matthew Dunham, Larry Dunham, Nick Smith, and Anthony Kongchunji, all of whom were captured shortly after committing a robbery that was identical to (and the last of) a string of drug-rip robberies that occurred in early 2008, including the E. Cataldo robbery. *See* Exs. 32-37; RP 204:5-22, 215:5-12, 216:6-16, 463:16–464:25, 466:3-5, 479:10-25, 487:4–488:6, 598:16–599:14, 612:11-21, 613:4-7, 613:11-23, 619:1–620:24.

D. Larson, Gassman, and Statler have proven by clear and convincing evidence that they are actually innocent.

In their opening brief, Larson, Gassman, and Statler demonstrated that they are actually innocent of the charges brought against them and that the trial court erred in concluding otherwise. Apps.' Br. at 35-50. The State's responsive arguments only underscore the trial court's errors.

1. The trial court applied an incorrect burden of proof.

For its first argument, the State maintains the trial court applied the proper burden of proof to the claims of Larson, Gassman, and Statler. Resp.'s Br. at 28. The State bases this argument on the fact the court stated that "the burden of proof required under RCW 4.100.060(1) is 'clear and convincing evidence.'" *Id*. (quoting CP 415).

Merely stating the correct standard does not equate to applying it. In fact, the trial court went on to expressly adopt federal habeas corpus case law for the purpose of "expanding on the plaintiffs' burden" of proof under RCW 4.100.060(1)(d). CP 424. Indeed, the court echoed the language of federal decisions in its ruling, ultimately concluding that

Larson, Gassman, and Statler "have not met their extraordinarily high and truly persuasive standard required for a claim of actual innocence." CP 430 (applying federal standard set out at CP 425) (emphasis added).

The State acknowledges all of this but maintains it was appropriate for the trial court to apply habeas corpus law to wrongful conviction compensation claims because both types of cases involve determinations of actual innocence. Resp.'s Br. at 29-30. The State's argument overlooks several key distinctions. *See* Apps.' Br. at 40. First and foremost, a habeas corpus petitioner has been "convicted by due process of law" and is presumed guilty. *Herrera v. Collins*, 506 U.S. 390, 398-400 (1993). The petitioner's burden, therefore, is "extraordinarily high." *Schlup v. Delo*, 513 U.S. 298, 317 (1995). In order to grant relief, the court must be "convinced that [the] new facts unquestionably establish [the petitioner's] innocence." *Id*. (citing *Herrera*, 506 U.S. 390).

A wrongful conviction claimant, on the other hand, has a much less demanding burden of proof—"clear and convincing evidence." RCW 4.100.060(1). "[A] court does not need to rule out all possibilities" in order to conclude the burden has been met. *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705 (2014). Instead, the court need only find that the claimant's innocence is "highly probable." *Id*. The trial court erred by failing to apply this burden of proof.

2. The trial court erred by requiring Larson, Gassman, and Statler to provide alibi evidence for a span of weeks.

The trial court determined that Larson, Gassman, and Statler offered "credible" evidence "establish[ing] when [they] were unavailable to commit the crimes." CP 429. The court also determined that the men proved "the robber[y] could not have occurred on April 17, 2008, as alleged in the amended information." CP 427. Nevertheless, the court ultimately concluded that the evidence presented was insufficient to establish actual innocence under the Act because "the robber[y] may well have taken place" on other dates and at other times. *Id*. The court recognized the men were "unable to provide an alibi defense for all these dates given the substantial amount of time that has passed," yet the court held them to this burden. *Id*. at 428-29.

The term "alibi" is defined as "[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." Black's Law Dictionary 72 (7th ed. 1999) (emphasis added). By requiring Larson, Gassman, and Statler to present alibi evidence covering many hours every day for a period of more than three weeks, the trial court applied an "impossibility" standard rather than a "clear and convincing" standard. Though the evidence presented sufficiently proved it is "highly probable" that the men did not engage in the alleged conduct, the trial court demanded absolute certainty.

The State agrees that absolute certainty is what the trial court demanded. Resp.'s Br. at 22. Indeed, the State notes that "each alibi was found [by the trial court] to be insufficient to prove that Plaintiffs could not have committed the robbery on any day in April." *Id*. (citing CP 428-29) (emphasis added). But the State maintains the "burden of proving it was impossible for Plaintiffs to have committed the crimes is the result of their chosen defense of alibi." *Id*. at 30 (emphasis added); *see also* CP 428 (referring to "alibi defense"). Such a notion is incorrect.

Larson, Gassman, and Statler are not defending against criminal claims. Their convictions were vacated. The criminal charges against them were dismissed. The men are pursuing a civil case under a statute designed to remedy the "tremendous injustice" of having been "stripped" of their liberty and "forced to endure imprisonment." RCW 4.100.010. They recognize the Act imposes a difficult burden on them to prove a negative—namely, that it is highly probable they did not engage in the alleged conduct. RCW 4.100.060(1)(d). The trial court, however, set the bar so high as to be insurmountable.

The State maintains it was proper for the trial court to set a high bar because Larson, Gassman, and Statler "presented evidence they claim expands the timeframe during which the robbery occurred." Resp.'s Br. at 45. This is incorrect. Larson, Gassman, and Statler specifically moved to restrict the alleged date of the robbery to April 15 or April 17, but the court denied their motion. RP 5:10–7:14, 15:5-9.

The State also maintains it was proper for the court to require the men to prove their whereabouts during most of April 2008, citing to *State v. Pitts*, 62 Wn.2d 294, 382 P.2d 508 (1963). Resp.'s Br. at 44. In *Pitts*, however, the Washington Supreme Court held that a trial court errs when it allows the State to argue an alleged timeframe so "flexible" as to be "prejudicial" to the defendant's ability to defend. 62 Wn.2d at 298-99 ("Obviously, in the event of an alibi, the state may not put the time at large for this would put an intolerable burden upon the defendant.").[3] The spirit of *Pitts* is particularly applicable here. It is difficult enough for a claimant to prove a negative as to a specific date but once the claimant meets that burden, it is unreasonable to make him further prove the negative for entire weeks before and after the alibi date, especially when there is insufficient (if any) evidence that the crime occurred on another day or that the claimant played any role in the event.

Finally, the State maintains it was appropriate to require Larson, Gassman, and Statler to answer for every day from April 1 to April 23 because there was little evidence as to the date or time of the robbery, "other than to say it was dark outside." Resp.'s Br. at 36, 40. Setting aside the fact that substantial evidence shows the robbery occurred on

[3] The State also cites *State v. Jordan*, 6 Wn.2d 719, 721, 108 P.2d 657 (1940), and *Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992), but these cases are inapposite. In *Jordan*, the defendant "did not seek to prove an alibi." 6 Wn.2d at 720. And in *Fawcett*, the criminal conduct at issue occurred "many times from summer 1985 through the end of the year," and the state "afforded [the defendant] notice sufficient to permit him to defend against the charge." 962 F.2d at 619.

April 15, 2008, as explained in detail below, Larson, Gassman, and Statler should not suffer the consequences of the State's failure to establish the date and time of the crime. If anything, this was the fault of the State and Detective Marske, who was reprimanded after an internal review found numerous mistakes in his investigation, including (among other things) believing witnesses who had obvious credibility issues and making little-to-no effort to confirm their veracity. RP 655:25–656:16, 656:17-19.

3. Larson, Gassman, and Statler proved it is highly probable they are actually innocent.

Larson, Gassman, and Statler presented substantial evidence at trial proving they are innocent of the conduct alleged in the information. *See* Apps.' Br. at 41-50. In particular, the men demonstrated the robbery occurred after dark on either April 4 or April 15, and they could not have participated because they were elsewhere on both dates. *See id*. at 41-47. The State challenges these conclusions, but the arguments fail.

The State first maintains that no witness was able to "identify" the date of the E. Cataldo robbery "other than to say it occurred in April 2008." Resp.'s Br. at 35-36. This is misleading. While nobody stated a particular date, several witnesses provided information that, when considered with documentary evidence, narrowed the date to April 4 or 15. Apps.' Br. at 42-43. The State argues the testimony of these witnesses is "tenuous" because a few months passed before they were contacted and all of them were drug users. Resp.'s Br. at 37-38. But the witnesses that the State attacks were called by the State during the

criminal trial, and the State relied on their testimony to wrongfully convict Larson, Gassman, and Statler. Ex. 50 at 211:17-19; Ex. 52 at 97:1-3; Ex. 111 at 47:8-10. Thus, the State's position is disingenuous.

The State also argues that the timecard evidence does not identify the date the robbery occurred. Resp.'s Br. at 37. Notably, the State does not question the veracity of the timecards; instead, the State challenges the testimony of Eric Weskamp, Cliff Berger, and Joni Jeffries regarding the work schedules of Berger and Weskamp on the day of the robbery and the following day. *See id*. at 37-40. A close review of this testimony in conjunction with the timecard evidence confirms the robbery could have occurred only on April 4 or 15. Indeed, the examination establishes the only highly probable conclusion to be drawn from the evidence: that the robbery occurred on April 15, the date originally alleged by the State.

The key, undisputed testimony is this: Berger and Jeffries said the robbery occurred at night (after dark) on a day that Berger worked. Ex. 50 at 98:5-8, 100:5-17, 127:20-25, 128:15-23 (Berger stating the robbery occurred after he "got off of work" and "it was dark" at the time); Ex. 111 at 49:1–50:18, 70:20-21 (Jeffries stating the robbery occurred "after [Berger and Weskamp] had gotten off work" and it was "dark" at the time). The State selectively quotes from Berger's transcript, overlooking the following exchange: "Q. Now, the evening in question, how many drug transactions had taken place between yourself and Mr. Weskamp? A. That was the third one—the one where we were robbed was the third one. Q. Okay, well let's go into these individual transactions . . . . You

arrived home from work? A. Yes." Ex. 50 at 128:15-23. The State also overlooks the testimony of Jeffries: "Q. Do you recall what time this purchase was supposed to take place? A. . . . after they had gotten off work . . . ." Ex. 111 at 50:11-16.

Berger went on to testify that he also worked the day after the robbery and that Weskamp was there but left due to his injuries. Ex. 50 at 105:17–106:3, 115:11-15, 134:4–135:2 (stating "[b]oth me and [Weskamp] had to work the next day" and "[I] saw [Weskamp] the next day at work," but Weskamp "left work because of the injury"). Weskamp likewise testified that he worked the day after the robbery but left early due to his injuries. Ex. 52 at 248:12-17, 251:6-11 (stating "it was dark" when the robbery occurred and "the next day I did try to go to work"). The State does not dispute these statements. *See* Resp.'s Br. at 21, 37.

The April 2008 timecards for Berger and Weskamp were admitted into evidence. Ex. 28. Weskamp's timecards show that he left work early on April 5, April 16, April 21, and April 23. *Id*. This narrows the date of the robbery to four possibilities—April 4, April 15, April 20, and April 22—because Weskamp left work early following each of these dates. *Id*. Berger worked the day of the robbery, and a review of his timecards further narrows the possible date to April 4 or April 15, as Berger did not work on April 20 or April 22. *Id*. Berger also worked the day after the robbery, and his timecard has no entry on April 5 but does show him working on April 16. *Id*. Thus, the evidence in the record establishes it is highly probable the robbery occurred on April 15.

To summarize, the date on which the robbery took place can be determined by analyzing the timecards in light of the following facts: (1) Cliff Berger worked on the day of the robbery; (2) Cliff Berger also worked the day after the robbery; and (3) Eric Weskamp worked the day after the robbery but left early. A review of the timecards shows April 15 is the only date that satisfies all three:

DATE	BERGER WORKED THAT DAY	BERGER ALSO WORKED THE FOLLOWING DAY	WESKAMP WORKED THE FOLLOWING DAY AND LEFT EARLY
April 4	X		X
April 15	**X**	**X**	**X**
April 20		X	X
April 22		X	X

Recognizing that Larson clocked in at work at 9:48 p.m. on April 15 and that Statler blew into a machine at his home at 10:01 p.m. the same evening, the State attempts to expand the time the robbery could have taken place to as early as 6:00 p.m. Resp.'s Br. at 40-43; Ex. 29; Ex. 30; RP 338:13-339:1. In support of this, the State relies solely on witnesses who consistently testified it was "dark" outside when the robbery occurred but could only speculate as to the time. Resp.'s Br. at 6, 40-42. The consistency with which these witnesses recalled the darkness renders that fact a certainty, whereas the conjectures as to time carry no weight.[4]

[4] The State cites the trial court's statement that "witnesses testified it was 'dark out, getting dark out, or late in the evening." Resp.'s Br. at 42 (quoting CP 429). No witness, however, testified that it was "getting dark out." Rather, they all testified it was "dark." *See* Ex. 50 at 100:6-17, 127:20-25; Ex. 52 at 84:20-23, 222:14-17, 235:6-8; 242:4-12, 248:12-14; Ex. 111 at 50:11-18, 56:9-12, 70:20-22; RP 217:9-10 ; RP 436:6-7, 438:5-6, 479:17-25, 487:4-6, 487:13-17; RP 523:10-14.

The undisputed evidence shows that on April 15, 2008 in Spokane, Washington, it became dark outside at 9:36 p.m., as adjusted for Daylight Time. CP 394. Larson was clocked in at work 9:48 p.m., and Statler was in his home at 10:01 p.m. Exs. 29, 30. All witnesses agree it was dark out when the robbery took place, and Matthew Dunham testified that he and his accomplices were chased and drove around for "30 minutes" after the robbery before splitting up the money. RP 446:10-14, 448:9–449:21, 450:24–452:4. Simply put, it was impossible for Larson and Statler to have been present, and an alibi for one is an alibi for all. At a minimum, Larson, Gassman, and Statler have proven it is highly probable that they were not involved in the E. Cataldo robbery.

For its final argument, the State repeats the trial court's conclusion that "surely, the robber[y] may well have taken place" on another date, at another time. Resp.'s Br. at 46, 49 (quoting CP 429). But there is no evidence, let alone substantial evidence, to support the court's conclusion. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 352, 172 P.3d 68 (2007) (substantial evidence must justify conclusions of law). At best, the court's supposition is an extremely remote possibility. The existence of such a possibility in no way negates the conclusion that it is highly probable Larson, Gassman, and Statler are innocent.

E. The trial court correctly concluded that the robbery did not occur on April 17, 2008.

The State maintains the trial court "erred when it found that the robbery could not have occurred on April 17, 2008." Resp.'s Br. at 25. The Court should reject the State's arguments for two reasons.

First, unlike the trial court's other conclusions, the determination that the robbery could not have occurred on April 17 is supported by factual findings that are grounded in substantial evidence: "Mr. Weskamp testified that due to his injuries he left work early the day following the robber[y]," and "Mr. Weskamp's timecard shows that he did not leave work early on April 18, 2008." CP 427; *see also* Ex. 28. The State fails to discuss, let alone challenge, these findings. *See* Resp.'s Br. at 25-28.

Second, the testimony of Kyle Williams, on which the State exclusively relies, is contradicted by other testimony and documentary evidence. For example, Williams testified that he exchanged phone numbers with "[a] kid named Rob [Seiler]" at 1:08 a.m. the night of the robbery. RP 510:9-17, 519:8-10. Weskamp, however, testified that Seiler left the scene with Weskamp and traveled to Spokane Valley hours earlier. *See* RP 509:14-15, 510:3-17, 532:4-9 (Williams testifying he returned from chase around 10:15 p.m.); Ex. 52 at 233:22–234:12, 235:3-15 (Weskamp testifying Seiler and he left within twenty minutes of Williams returning from chase). Williams further testified it was Seiler who called Williams to exchange phone numbers. RP 511:7-12. But phone records show that it was Williams who called Seiler and that the call lasted two

minutes, longer than necessary to simply record a phone number. Ex. 127 at 58; RP 535:23–536:10. Finally, Williams testified that he spoke with Seiler only one time after the incident, when Seiler called Williams on April 18. RP 512:18–513:1, 517:20-22, 520:10-23. The records, however, show it was Williams who again called Seiler. RP 519:16-520:12. Moreover, the records show Williams called Seiler two separate times. Ex. 127 at 59-60 (5:32 p.m. and 10:34 p.m.).[5]

As Williams admitted, his memory at trial was "pretty hazy." RP 536:25–537:5. The trial court correctly concluded the robbery did not occur on April 17.

V. CONCLUSION

The trial court applied the wrong burden of proof, demanding that Larson, Gassman, and Statler show it was impossible for them to have engaged in the alleged conduct. The trial court also overlooked substantial evidence establishing it is highly probable the men are actually innocent. This Court should reverse the trial court's decision and enter judgment in favor of Larson, Gassman, and Statler. Doing so will provide justice both for the men and for future exonerees who seek the remedies the legislature intended to provide under the Act for wrongful convictions.

[5] Throughout its brief, the State attempts to support its arguments with references to the jury verdicts that resulted in the wrongful convictions of Larson, Gassman, and Statler. *See* Resp.'s Br. at 18, 26, 27, 35, 38, 45, 47, 48. The State also cites to the Court of Appeals decisions affirming those verdicts. *See id*. at 5, 7, 8, 31, 32. The criminal court, of course, later set aside the verdicts based on significant new exculpatory information the jury never considered. Exs. 16, 17, 18. For the State to continue relying on the verdicts—which resulted from an unconstitutional trial—is, frankly, beyond the pale.

RESPECTFULLY SUBMITTED AND DATED this 14th day of December, 2015.

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CERTIFICATE OF SERVICE

I certify that, on December 14, 2015, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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