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(Consolidated with No. 33262-1-II)

SUPREME COURT OF THE STATE OF WASHINGTON

ALEXANDER NAM RIOFTA,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER RIOFTA

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I. INTRODUCTION

The Washington State Legislature, by enacting a right to post-conviction DNA testing, recognized that our criminal justice system makes mistakes. Post-conviction DNA is a unique and powerful tool to correct the injustice that occurs when an innocent person is convicted of a crime. It has the power not just to exonerate the wrongly convicted, but also to lead to the conviction of the actual criminal. In recent years, more than 200 people have been exonerated through post-conviction DNA testing.¹ A study of the first 200 exonerations reported that in 37% of the cases, the true perpetrator was identified after post-conviction DNA testing freed an innocent person from prison.²

The Washington State Legislature expanded access to post-conviction DNA testing in 2005 by amending RCW 10.73.170. Among other changes, the statute now allows a petitioner to seek relief by filing a motion stating that: “the DNA testing now requested . . . would provide significant new information.” The statute does not require a petitioner to show that the information obtained from post-conviction DNA testing is information that was “unavailable at trial.”

¹ See, The Innocence Project, <http://www.innocenceproject.org> (last visited Oct. 1, 2007).

² Barry Scheck & Peter Neufeld, 200 Exonerated Too Many Wrongly Convicted: An Innocence Project Report On The First 200 DNA Exonerations In The U.S. 38-39 (2007).

Giving the phrase “significant new information” its plain and ordinary meaning enforces the Legislature’s intent to “exonerate[e] convicted offenders and prosecute[e] offenders.”³ Under Washington’s current statute, it does not matter if an innocent person is in prison because a prosecutor failed to ask for DNA testing during the investigation of the case, or because a defense attorney failed to ask for testing prior to trial, or because a forensic scientist mistakenly thought the tests could not be done, or because a judge would not authorize the testing. If the DNA testing “now requested” would provide “significant new information,” a petitioner meets the express requirements of RCW 10.73.170(2)(a)(iii)..

Once a petitioner shows that the testing would lead to “significant new information,” a court must grant the motion for testing if there is “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). This standard is intentionally less stringent than the standard a petitioner must meet to obtain a new trial. The Legislature did not intend to require a petitioner to prove his or her innocence prior to obtaining post-conviction DNA testing. Instead, he or she must show that there is a likelihood that the evidence would probably demonstrate innocence.

³ See App. 5 (Substitute SB 6498 (2000)).

II. ASSIGNMENTS OF ERROR

1. Did the Court of Appeals, by interpreting an amendment to RCW 10.73.170 allowing DNA testing when it would provide “significant new evidence” to mean “significant new evidence unavailable at trial,” render that amendment superfluous?

2. Did the Court of Appeals err in requiring petitioners to prove that post-conviction DNA tests will “exonerate” them, when RCW 10.73.170 requires only that a petitioner show “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis?”

III. STATEMENT OF CASE

No physical or forensic evidence linked Mr. Riofta to the crime with which he was charged. Mr. Riofta was convicted of assault in the first-degree largely on the basis of an identification by a single eyewitness. The 17 year-old victim testified that in the early morning hours of January 27, 2000, he saw an unfamiliar car parked outside his driveway. An individual wearing a white baseball hat got out of the car. The individual spoke briefly with the victim, then pulled out a gun and fired four to five shots at the victim. The shots missed and the victim ran into his house.

The shooter left the white baseball hat he wore at the scene of the crime. Police recovered the hat immediately after the shooting and placed it into evidence. The hat has remained in the State’s possession and control since it was taken into evidence by the police. Prior to trial, neither the prosecution nor the defense requested DNA testing on the hat.

At trial, the State presented the eyewitness testimony of the victim, who identified Mr. Riofta as the shooter. Mr. Riofta denied shooting at the victim. Nonetheless, he was convicted of the crime.

For over five years, Mr. Riofta has sought to establish his innocence through post-conviction DNA testing on the white hat worn by the shooter. His first request came under a prior version of RCW 10.73.170, which allowed testing under only two circumstances: (i) “if DNA testing was not admitted because the court ruled DNA testing did not meet acceptable standards” or (ii) “DNA testing technology was not sufficiently developed to test the DNA evidence in the case.” See App. (6)(c) (2004 statute). His initial request was considered and denied by the Prosecutor and the Attorney General, who had decision-making authority under the prior statute. Id.

In March 2005, the Legislature amended RCW 10.73.170, broadening access to post-conviction DNA testing. It expanded the circumstances under which the right to testing is granted, removed the sunset clause, placed courts – rather than prosecutors - in charge of the decision to grant or deny requests, and authorized the appointment of counsel.⁴ Of specific import to this case, the Legislature added a third

⁴ Under the original version of RCW 10.73.170, passed in 2000, post-conviction DNA testing was limited to prisoners sentenced to death or to life in prison without the

avenue under which a petitioner could access post-conviction DNA testing to the two provisions contained in prior statutes. The third provision expands access to testing to situations in which: (iii) “[t]he DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information.” RCW 10.73.170(2)(a)(iii); App.6(d) (2005 statute).

RCW 10.73.170 currently states in relevant part:

(2) The motion [requesting DNA testing] shall:

(a) State that:

(i) The court ruled that DNA testing did not meet acceptable scientific standards; or

(ii) The DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or

(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;

(b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and

possibility of parole. See App. 6 (a) (2000 law). Prosecutors possessed the exclusive authority to determine whether testing was warranted and a denial could only be appealed to the Attorney General’s Office. Id. In 2001, the Legislature expanded the DNA testing right to all incarcerated felons. A sunset clause mandated that requests be made by December 31, 2004. See App.6(c) (2004 law).

(c) Comply with all other procedural requirements established by court rule.

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. . . .

In May 2005, Mr. Riofta filed a motion for post-conviction DNA testing in Pierce County Superior Court under the provisions of current RCW 10.73.170. The trial court denied the request and Mr. Riofta timely appealed. His appeal was consolidated with his personal restraint petition, The Court of Appeals denied his appeal and denied his personal restraint petition. This Court accepted review of the statutory interpretation issues.

IV. STANDARD OF REVIEW

The standard of review on appeal from a trial court's denial of post-conviction DNA testing under RCW 10.73.170 is a matter of first impression in Washington. The appropriate standard of review for this Court is de novo because both statutory interpretation and the application of a statute to a particular set of facts are exclusively legal issues. See State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005) (statutory interpretation involves questions of law which are reviewed de novo); and

Williams v. Dep't of Licensing, 46 Wn. App. 453, 455, 731 P.2d 531, 532 (1986) (“the question of whether a statute applies to a particular set of facts is a legal issue and fully reviewable on appeal”).

V. ARGUMENT

DNA testing of the shooter's hat is required under the provisions of RCW 10.73.170, because information about DNA profiles on the hat would provide “significant new information” that has “the likelihood of demonstrating innocence on a more probable than not basis. The Court's primary goal when interpreting RCW 10.73.170 is to give effect to the Legislature's intent and purpose. In re Parentage of J.M.K. and D.R.K., 155 Wn.2d 374, 387, 119 P.3d 840 (2005). Where a statute uses plain language and is clear and unambiguous, courts may not look beyond the statute's plain language and must apply the statute as written in order to effectuate legislative intent. Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Only when a statute is ambiguous, will a court turn toward legislative history and the circumstances surrounding the statute's enactment to discern legislative intent. Restaurant Development, Inc. v. Cananwill, Inc., 150 Wn.2d 674, 80 P.3d 598 (2003).

This Court has consistently held if a statute is plain on its face, a court cannot engage in judicial construction by adding language to the

statute. See e.g., Restaurant Development Inc., 150 Wn.2d at 682 (“a court must not add words where the legislature has chosen not to include them”). In the decision below, the Court of Appeals however did just that. It treated the statute as unambiguous, but proceeded to add language to RCW 10.73.170 by requiring proof that: “The DNA testing now requested “would provide significant new information” unavailable at trial.” Riofta v. State, 134 Wn. App. 669, 684, 142 P.3d 193 (2006) (emphasis in original). In doing so, it contravened basic principles of statutory construction and limited access to post-conviction DNA testing, even while acknowledging that the 2005 amendments to RCW 10.73.170 “broaden[ed] access to post-conviction DNA testing.” Id. at 678-79.

Furthermore, the Court of Appeals required Mr. Riofta to meet a higher burden to obtain testing than RCW 10.73.170 requires. Although RCW 10.73.170 has been amended on several occasions since the statute was first enacted in 2000, the standard for post-conviction DNA testing has always remained the same: the convicted person must simply show there is “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3) (emphasis added). The plain meaning of the statute shows that a strict burden should not be placed on an inmate who requests post-conviction

DNA testing. Nevertheless, the Court of Appeals required proof that such tests would “exonerate” Mr. Riofta. Riofta, 134 Wn. App. at 685.

A. The Shooter’s Hat Should Be Tested Because Information About the DNA Profiles On The Hat Would Provide “Significant New Information” as Required Under RCW 10.73.170(2)(a)(iii)

By allowing an inmate to request post-conviction DNA testing if it would lead to “significant new information,” the Legislature provided an avenue for the wrongly convicted to produce exculpatory evidence that was not available under prior versions of the statute. In the 2005 legislation, the Legislature maintained the two avenues for testing set forth in prior versions of RCW 10.73.170. It added a new ground for testing, specifically: (iii) “[t]he DNA testing now requested would be significantly more accurate than prior DNA testing, or would provide significant new information.” RCW 10.73.170(2)(a)(iii). The Legislature did not include language that information obtained from post-conviction DNA testing be information that was “unavailable at trial.”

1. Adding language to amended RCW 10.73.170(2)(a)(iii) requiring “significant new information” to be information that was “unavailable at trial” renders the amendment superfluous.

The three provisions of the 2005 statute must be read in conjunction with each other to determine the legislative intent adding a new ground for testing to the statute. See Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (the plain meaning of a statute “is discerned

from all that the Legislature has said in the statute and related statutes”).

Subsection (i) addresses situations where DNA testing was done and a court ruled the testing did not meet acceptable scientific standards.

Subsection (ii) addresses scenarios where DNA testing was not done because DNA technology was not sufficiently developed. Subsection (iii) addresses the potential of future DNA testing to shed new light on information currently available, either by providing more accurate information than past testing, or providing significant new information.

Thus, the Legislature contemplated three situations that would warrant new testing: situations in which DNA testing was done poorly, situations in which DNA testing technology was inadequate, and situations in which – regardless of what happened in the past – future DNA testing would lead to better information, either by rendering more accurate information, or by providing significant new information.

When the subsections are read in conjunction with each other, the Court of Appeals’ insertion of text into subsection (iii) renders the provision superfluous. This is so because future DNA testing can only provide “significant new information unavailable at trial” when: (i) past DNA tests were ruled inadmissible by the court or (ii) DNA tests were not done because the sample size was too small or too degraded to test with then-existing technology. The Court of Appeals’ interpretation violates

the basic canon of statutory construction which holds that a statute should not be interpreted so as to render one part inoperative. Davis v. State ex rel. Dep't of Licensing, 137 Wn.2d 957, 969, 977 P.2d 554 (1999).

2. Under the plain meaning of the statute, DNA testing in Mr. Riofta's case will provide "significant new information."

Mr. Riofta satisfied the provision of the post-conviction DNA testing statute requiring a petitioner to "[s]tate that . . . [t]he DNA testing now requested . . . would provide significant new information." RCW 10.73.170(2)(a)(iii). If the Legislature leaves a word undefined, this Court gives the term its "plain and ordinary meaning," as defined by the dictionary. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). "New" means "having existed . . . but a short time," "having originated or occurred lately," "recent, fresh," "having been seen or known but a short time although perhaps existing before." Webster's Third New Int'l Dictionary 1522 (2002).

Currently, any information discoverable through forensic DNA testing on the white hat worn by the shooter is unknown. While the hat contains biological material, no information regarding the DNA profile of the person who left that material exists. Thus, information provided by the DNA tests requested by Mr. Riofta would qualify as "new information,"

under Webster’s definition of the word “new.” The information is “significant” because it would provide the only piece of forensic evidence of identity in this case. The information contained with DNA profiles on the shooter’s hat relates directly to the identity of the shooter and has the potential to exonerate Mr. Riofta and identify the true criminal.

The Court of Appeals’ concern that defendants will take a “wait and see” position by trying to get an acquittal without the evidence, but then moving to test the evidence after conviction, is unfounded. Riofta, 134 Wn.App. at 684. Police and prosecutors control the evidence. They can request DNA testing prior to trial, regardless of defense counsel’s wishes. In Mr. Riofta’s case, the prosecutor and defense counsel failed to request DNA analysis of the hat. However, the State has not been accused of taking a “wait and see” position and foregoing testing out of the fear that an unfavorable result would have damaged its case against Mr. Riofta. In Mr. Riofta’s case, DNA testing was not done prior to trial because the police investigation was not thorough and his lawyer was not competent.

3. A plain reading of RCW 10.73.170(2)(a)(iii) reinforces the original intent of the Legislature to expand access to post-conviction DNA testing.

It is only through giving the terms of subsection (iii) their “plain and ordinary meaning” that this Court can give full effect to the Legislature’s intent to expand access to post-conviction DNA testing.

This intent can also be inferred from the material changes to the 2005 statute. Notably, the Legislature made deliberate decisions: (1) to add a new ground for post-conviction DNA testing; (2) to exclude the legal language “unavailable at trial” in the provisions of RCW 10.73.170; (3) to remove the sunset clause provision; (4) to place decision-making power with the courts, rather than with the prosecutor; and (5) to authorize courts to appoint counsel to prepare and present the motion. Vita Food Products, Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) (every amendment is made to effect some material purpose).

B. There Is The Likelihood That The Requested DNA Testing Will Establish Mr. Riofta’s Innocence On A More Probable Than Not Basis.

The Legislature’s specific inclusion of the “likelihood” modifier demonstrates that the standard is not proof of innocence on a “more probable than not basis,” but that there is the “likelihood” of the petitioner eventually demonstrating this probability. Courts will presume that the Legislature did not include unnecessary language in the statute. Judd v. American Tel. and Telegraph Co., 152 Wn.2d 195, 202, 95 P.3d 337 (2004) (no part of a statute should be interpreted as meaningless).

Therefore, courts “give effect to every word in the statute.” City of Olympia v. Drebeck, 156 Wn.2d 289, 126 P.3d 802 (2006) (citing Dennis v. Dep’t of Labor & Indus., 109 Wn.2d 467, 479, 745 P.2d 1295 (1987)).

1. The “plain meaning” of the statute establishes that the Legislature intended a permissive standard to be applied to requests for post-conviction DNA testing

The meaning of the term “likelihood” is not defined in the statute, and thus, it will be given its “plain and ordinary meaning” as is defined by the dictionary. Fraternal Order of Eagles, 148 Wn.2d at 239. Merriam-Webster’s defines “likelihood” as a “probability,” which is then defined as “the chance that a given event will occur.” Merriam-Webster’s Online Dictionary at <http://www.m-.com/dictionary/likelihood> and <http://www.m-w.com/dictionary/probability> (last visited Oct. 5, 2007).

If “likelihood” is given its “plain and ordinary meaning,” the standard a petitioner must establish under RCW 10.73.170 is that there is the chance that the test results would probably demonstrate innocence. If the word “likelihood” is removed from the statute, it would be reasonable for courts to require proof by a preponderance of the evidence that post-conviction DNA testing will establish their innocence. The word “likelihood” however is included in the statute, and must not be rendered meaningless. See State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001) (all language in a statute must be given effect, with no portion rendered meaningless or superfluous).

2. Legislative history supports the intent to apply a permissive standard to requests for post-conviction DNA testing

If this Court determines that the statute is ambiguous, it may turn toward legislative history to interpret the statute and ascertain the legislative intent. City of Olympia, 156 Wn.2d at 295. The legislative history of RCW 10.73.170 shows that although some summaries of the proposed bill did not include the modifier of “likelihood” in defining the standard for DNA requests, all of the final bills enacted into law include the “likelihood” language. See App. 1 (House Bill Report HB 2491 (2000) (does not use “likelihood”)) and App. 2 (Final Bill Report SHB 2491 (2000) (does use “likelihood”)). See also App. 3 (HB 2872 Digest (2004) (does not have “likelihood”)) and App. 4 (HB 2872 Digest of Proposed 1st Substitute (2004) (does have “likelihood”)).

One of the reasons the Legislature intended for prosecutors and courts to apply a permissive standard to requests for post-conviction DNA testing is because it is only the first step in the petitioner’s exoneration process. The next step is a motion for a new trial based on “newly discovered evidence.”⁵ Here, a much more stringent standard is placed on the petitioner because he or she now has the burden to prove that the “newly discovered evidence” would “probably change the outcome of the trial.” See In re Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994).

⁵ See RCW 10.73.100 (allowing petitioners with newly discovered evidence to file collateral attacks after the one year period imposed by RCW 10.73.090 has expired).

The Legislature is presumed to be aware of past legislation, as well as the cases interpreting those statutes. State v. Theilken, 102 Wn.2d 271, 276, 684 P.2d 709 (1984). It would be unreasonable to assume that the Legislature intended the post-conviction DNA statute to have the same high burden of proof as a motion for new trial when the wordings of the burdens of proof are distinct. Instead, the statute should be interpreted to require that petitioners need only show that there is a likelihood, or chance that they could prove their innocence on a more probable than not basis with the DNA test results. A court still has the opportunity to deny the petitioner's motion for new trial if it feels that the "newly discovered evidence" resulting from the DNA tests do not meet the higher burden required to overturn a conviction.

3 If a conviction is based on a single eyewitness, it is more likely that post-conviction DNA testing will demonstrate innocence on a more probable than not basis.

The text of RCW 10.73.170 does not explicitly require a court to analyze the strength of the State's case when deciding whether to grant post-conviction DNA testing. However, it is difficult to imagine how a court would assess the "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis" without measuring the weight of the DNA results against the evidence produced by the State at trial.

Consider, for example, the following hypotheticals. In the first hypothetical, a woman is attacked in her apartment and sexually assaulted by a stranger. The man escapes and the victim later identifies the defendant in a line-up. The defendant is convicted based on the eyewitness identification. He later seeks post-conviction DNA testing of the rape kit. Contrast that to the second hypothetical. A woman is attacked in her apartment and sexually assaulted by a stranger. A neighbor hears her cries and calls 911. Police arrive at the scene and apprehend the defendant in the apartment. The defendant is convicted at trial. He later seeks post-conviction DNA testing of the rape kit. In both hypotheticals, the DNA analysis would provide the same information – the genetic profile of any biological material in the rape kit. And yet, it would be reasonable to only grant the post-conviction DNA tests in the first hypothetical where the results have a chance of being exculpatory. It would be unreasonable to authorize tests in the second hypothetical, where the state’s evidence against the defendant is irrefutable.

The evidence the State offered against Mr. Riofta was not irrefutable. Eyewitness misidentification is the single largest factor contributing to the conviction of innocent people.⁶ It goes without saying that DNA evidence is a more accurate and scientific method of proving

⁶ See e.g., Gary Wells & Elizabeth Olson, Eyewitness Testimony in Annual Review of Psychology 277-295 (Susan T. Fisk, Ed. 2003).

identity than is eyewitness identification. Thus, courts in other states have readily ordered post-conviction DNA testing where eyewitness testimony was the only evidence against a defendant. See e.g., People v. Johnston, 205 Ill.2d 381, 398, 793 N.E.2d 591 (Ill. 2002) (granting testing when evidence against defendant consisted of a sole eyewitness); Sewell v. State, 592 N.E.2d 705 (Ind. Ct. App. 1992) (granting testing when conviction rested largely upon eyewitness identification).

4. DNA profiles from hats have been used by the prosecution and defense to establish a suspect's innocence or guilt.

In Mr. Riofta's case, the undisputed facts establish that two people wore the white hat - the owner of the stolen car and the shooter. Any other hypothesis about who wore the hat is based upon speculation. The DNA profile of the owner of the car can be identified and isolated. Therefore, if a DNA profile on the hat matches a profile in the Combined DNA Index System (CODIS), it likely came from the shooter.

The case of James Ochoa is one in which post-conviction DNA tests obtained from biological material left in a baseball hat freed an innocent prisoner. Ochoa was charged with carjacking. The gunman left a black baseball hat and shirt in the car. DNA profiles obtained from the baseball hat and shirt did not match Ochoa. Initially, there was no hit in CODIS. Ochoa was identified by eyewitnesses and pled guilty based on

the strength of this identification. Nearly a year later, Jaymes McCollum was booked into jail on unrelated charges. When McCollum's DNA profile was entered into CODIS, it matched the profile from the baseball hat seized during the carjacking. McCollum was confronted with the evidence and confessed. The prosecution then moved to dismiss the charges against Ochoa. See H.G. Reza, [Innocent Man Grabs His Freedom and Leaves Town; He Spent 10 Months in Prison for a Carjacking in Buena Park He Didn't Commit](#) Spokeswoman for D.A. says officials 'feel terrible', L.A. Times, Nov. 2, 2006, at B1.

Prosecutors have not hesitated to recognize the value of DNA testing of hats worn by perpetrators when conducting investigations and prosecuting criminal cases. For example, investigators in California reopened a 17 year-old murder case where the victim was abducted from her car and stabbed to death. A DNA profile taken from sweat on a hat found in the victim's car led to the arrest of Tyrone Hamel. At the time of his arrest, Hamel was serving a life term in a Texas prison for two rapes and four robberies. See S.L. Wykes Y Jessie Seyfer, [DNA Link Connects Man With 17-Year-Old Killing: Jailed Texas Rapist Will Face Charges in Woman's Slaying](#), San Jose Mercury News, July 11, 2005 at 6A.

In Kitsap County, prosecutors recently charged a transient with burglary based on DNA results found on a baseball hat left at the crime

scene. The baseball hat was sent to the Washington State Patrol Crime Laboratory (WSPCL). Last August, the WSPCL reported that scientists were able to obtain a DNA profile from biological material left on the hat and match it to the DNA profile of Michael S. Beckhorn. On September 13, 2007 Beckhorn was charged by prosecutors with second-degree burglary. DNA Tags Man as Possible Burglar, Kitsap Sun, Sept. 18, 2007.

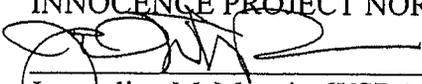
VI. CONCLUSION

Mr. Riofta's request is simple. He asks this Court to allow him to test the hat worn by the shooter. He makes this request because DNA testing can uncover the truth. The truth it offers has exonerated the innocent and punished the guilty. The Legislature was fully aware of the truth-seeking power of DNA when it expanded the right to post-conviction DNA testing in its 2005 amendments to RCW 10.73.170. Testing the hat falls squarely within the provisions of the statute. Mr. Riofta asks this Court to grant him the statutory right to post-conviction DNA testing of the white baseball hat worn by the shooter.

Dated this 5th day of October, 2007.

Respectfully Submitted,

INNOCENCE PROJECT NORTHWEST CLINIC


Jacqueline McMurtrie, WSBA #13587
Attorney for Appellant Riofta

CERTIFICATE OF SERVICE

I declare, under penalty of perjury, that on the 5th Day of October, 2006, a true and correct copy of the foregoing Petitioner's Motion for Discretionary Review was served upon the following, by depositing same with UPS, overnight:

Alexander Nam Riofta
DOC # 805644 / H-5-078U
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Michelle Luna-Green, Deputy Prosecuting Attorney
Office of the Pierce County Prosecuting Attorney
930 Tacoma Avenue S.
County-City Building, Room 946
Tacoma, WA 98402-2105

Suzanne Lee Elliott
Hoge Building
705 2nd Avenue, Suite 1300
Seattle, WA 98104

10/5
2007 Seattle, Wash.
DATE and PLACE

Cynthia S. Fester
CYNTHIA S. FESTER

**FILED AS ATTACHMENT
TO E-MAIL**

Appendix 1

HOUSE BILL REPORT

HB 2491

As Reported By House Committee On:
Criminal Justice & Corrections
Appropriations

Title: An act relating to DNA testing of evidence.

Brief Description: Providing a procedure to conduct DNA testing of evidence for persons sentenced to death or life imprisonment.

Sponsors: Representatives Schindler, Ballasiotes, Koster, Sullivan, Esser, Wood, Crouse, Cairnes, Rockefeller, Edmonds, Mulliken, Clements, Ruderman, McDonald and Dunn.

Brief History:

Committee Activity:

Criminal Justice & Corrections: 1/26/00 [DP];
Appropriations: 2/2/00, 2/8/00 [DPS].

Brief Summary of Substitute Bill

- Provides a procedure for persons sentenced to death or life without the possibility of release to request DNA testing of evidence in certain circumstances.
- Requires the Department of Corrections to adopt rules to govern the procedures used to request and, if appropriate, provide testing.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass. Signed by 8 members: Representatives Ballasiotes, Republican Co-Chair; O'Brien, Democratic Co-Chair; Cairnes, Republican Vice Chair; Lovick, Democratic Vice Chair; B. Chandler; Constantine; Kagi and Koster.

Staff: Jean Ann Quinn (786-7310).

Background:

DNA evidence was first introduced into evidence in a United States court in 1986 and, after numerous court challenges, is now admitted in all United States jurisdictions. It has rapidly become an important forensic technique both for identifying perpetrators and for eliminating suspects when biological tissues such as saliva, skin, blood, hair, or semen are left at a crime scene.

Two states, New York and Illinois, specifically authorize postconviction DNA testing. These statutes permit an indigent inmate to obtain postconviction DNA testing at state expense when certain evidentiary thresholds are met.

The constitution, statutes, and court rules currently provide a framework for convicted defendants who have exhausted the appeals process to challenge a conviction by collateral attack. One mechanism of collateral attack is the writ of habeas corpus which a defendant may pursue in Washington courts by filing a Personal Restraint Petition (PRP). Court rules establish the grounds for filing a PRP, including the following: (1) the convicting court lacked jurisdiction; (2) the conviction was obtained in violation of state law or the state or federal constitution; (3) material facts, not disclosed at trial, exist that in the interest of justice require the petitioner's release; (4) sufficient reasons exist to retroactively apply a post conviction change in the law; (5) there are "other grounds" for a collateral attack on the conviction; (6) the conditions or manner of the petitioner's restraint violates the state or federal constitution; or (7) "other grounds" exist to challenge the legality of the confinement.

A prisoner under sentence of death who files a PRP is not entitled to discovery and/or investigative, expert, or other services as a matter of course, but must show good cause to believe that it will produce information that would support granting a PRP. Further, according to court rule (RAP 16.27), the supreme court may only grant a motion for investigative, expert, or other services if the Legislature has authorized and approved funding for such services.

In Washington, the crime of aggravated murder in the first degree carries a sentence of death or life without the possibility of release. In addition, persistent offenders (those committing three "most serious offenses" or two sex offenses as specified) are subject to life without the possibility of release.

Summary of Bill:

A person sentenced to death or to life without the possibility of release may request the Department of Corrections to issue an order for testing of "any appropriate evidence available for testing which may be a reasonable basis for proving the person's innocence" if DNA test results were either not available when the person was convicted or not allowed in the court where the conviction occurred.

The department must adopt rules to establish procedures for evaluating these requests, determining whether testing is appropriate, sharing the results of the tests with the offender's counsel, and determining when the department will pay for testing.

If a request for DNA testing is determined appropriate under the rules, the order for testing must be served on the law enforcement agency holding the evidence in question, who then has 20 days to petition in superior court to bar or postpone the testing. The order must inform the agency of this ability to petition and also notify the agency that if no petition is filed, the department will schedule the DNA testing and notify them, by regular mail, of the time and place where it will occur.

Appropriation: None.

Fiscal Note: Received on January 26, 2000.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: When you take away someone's life either by putting them in prison for life or by executing them, you better be absolutely positive that you have the right person. This bill helps achieve that certainty. There have been many recent cases, several involving people on death row, where people have been exonerated on the basis of DNA evidence.

Testimony Against: None.

Testified: Representative Schindler; and Kevin Glackin-Coley, Washington State Catholic Conference.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 32 members: Representatives Huff, Republican Co-Chair; H. Sommers, Democratic Co-Chair; Barlean, Republican Vice Chair; Doumit, Democratic Vice Chair; D. Schmidt, Republican Vice Chair; Alexander; Benson; Boldt; Clements; Cody; Crouse; Gombosky; Grant; Kagi; Keiser; Kenney; Kessler; Lambert; Linville; Lisk; Mastin; McIntire; McMorris; Mulliken; Parlette; Regala; Rockefeller; Ruderman; Sullivan; Sump; Tokuda and Wensman.

Staff: Dave Johnson (786-7154).

Summary of Recommendation of Committee on Appropriations Compared to Recommendation of Committee on Criminal Justice & Corrections: Provisions were

added to specify which items must be included in the administrative rules developed by the Department of Corrections. The act neither creates a new cause of action in any court nor limits any causes of action an inmate might otherwise have under any other statutory or constitutional provision. The provisions for requesting tests become effective September 1, 2000. The bill is made null and void if specific funding is not provided in the biennial operating budget.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed except for Section 1 which takes effect September 1, 2000. However, this bill is null and void unless funded in the budget.

Testimony For: When the state takes away someone's life either by putting them in prison for life or by executing them, it should be as positive as anyone can be that it has the right person. This bill helps achieve that certainty.

Testimony Against: None.

Testified: Representative Schindler, prime sponsor.

Appendix 2

FINAL BILL REPORT

SHB 2491

C 92 L 00

Synopsis as Enacted

Brief Description: Providing a procedure to conduct DNA testing of evidence for persons sentenced to death or life imprisonment.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Schindler, Ballasiotes, Koster, Sullivan, Esser, Wood, Crouse, Cairnes, Rockefeller, Edmonds, Mulliken, Clements, Ruderman, McDonald and Dunn).

House Committee on Criminal Justice & Corrections
House Committee on Appropriations
Senate Committee on Human Services & Corrections
Senate Committee on Ways & Means

Background:

DNA evidence was first introduced into evidence in a United States court in 1986 and, after numerous court challenges, is now admitted in all United States jurisdictions. It has rapidly become an important forensic technique both for identifying perpetrators and for eliminating suspects when biological tissues such as saliva, skin, blood, hair, or semen are left at a crime scene. Two states, New York and Illinois, specifically authorize postconviction DNA testing. These states permit an indigent inmate to obtain postconviction DNA testing at state expense when certain evidentiary thresholds are met.

In Washington, a convicted defendant who has exhausted the appeals process may challenge a conviction by collateral attack. One mechanism of collateral attack is the writ of habeas corpus which a defendant may pursue in court by filing a personal restraint petition (PRP). Court rules establish the grounds for filing a PRP, including the following: (1) the convicting court lacked jurisdiction; (2) the conviction was obtained in violation of state law or the state or federal constitution; (3) material facts, not disclosed at trial, exist that in the interest of justice require the petitioner's release; (4) sufficient reasons exist to retroactively apply a post-conviction change in the law; (5) there are "other grounds" for a collateral attack on the conviction; (6) the conditions or manner of the petitioner's restraint violates the state or federal constitution; or (7) "other grounds" exist to challenge the legality of the confinement.

A prisoner under sentence of death who files a PRP is not entitled to discovery or investigative, expert, or other services as a matter of course, but must show good

cause to believe that it will produce information that would support granting a PRP. Further, according to court rule, the Supreme Court may only grant a motion for investigative, expert, or other services if the Legislature has authorized and approved funding for such services.

Criminal charges are brought against a person by indictment or by the filing of an information. To be legally sufficient, an indictment or information must name the defendant or, if his or her name is unknown, describe the defendant by a fictitious name.

Summary of Bill:

A person sentenced to death or to life without the possibility of release may, on or before December 31, 2002, submit a request for postconviction DNA testing to the prosecutor of the county where the conviction was obtained. The request may only be made if the DNA evidence was not admitted in court because it did not meet acceptable scientific standards or the testing technology was not sufficiently developed to test the DNA evidence in the case. After January 1, 2003, DNA issues must be raised at trial or on appeal. The prosecutor must review requests for DNA testing based on the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. If it is determined that testing should occur, and the evidence still exists, the prosecutor must request testing by the Washington State Patrol crime lab. A person denied a request for DNA testing may appeal the denial to the Office of the Attorney General.

The Office of Public Defense is required to prepare a report on the postconviction DNA testing process established under the act. The report must be completed by December 1, 2001, and must include a description of the number of requests approved, the number of requests denied and the basis for the denials, the number of appeals approved, the number of appeals denied and the basis for the denials, and a summary of the results of the tests conducted.

An indictment or information may describe the defendant by reference to the defendant's DNA if his or her name is unknown.

The act does not create a legal right or cause of action, nor does it deny or alter any existing legal right. The act may not be interpreted to deny requests made under existing law by persons who have been sentenced to terms less than death or life imprisonment without the possibility of release.

Votes on Final Passage:

House 96 0
Senate 47 0 (Senate amended)

House (House refused to concur)
Senate 44 0 (Senate amended)
House 98 0 (House concurred)

Effective: June 8, 2000

Appendix 3

2872

Sponsor(s): Representatives Darneille, Pettigrew, O'Brien, Kagi, G. Simpson, Dickerson and Wallace

Brief Description: Revising DNA testing provision.

HB 2872 - DIGEST

(SEE ALSO PROPOSED 1ST SUB)

Provides that a person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing.

Provides that the court shall grant a motion requesting DNA testing under this act if such motion is in the form required by this act, and the convicted person has demonstrated on a more probable than not basis that the proposed DNA testing would provide substantial new evidence related to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement.

Declares that DNA testing ordered under this act shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

Provides that, notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, shall not be destroyed before the date of the convicted person's release from custody or twenty years from the date of conviction, whichever occurs first.

Appendix 4

2872-S

Sponsor(s): House Committee on Criminal Justice & Corrections
(originally sponsored by Representatives Darneille, Pettigrew,
O'Brien, Kagi, G. Simpson, Dickerson and Wallace)

Brief Description: Revising DNA testing provision.

HB 2872-S - DIGEST

(DIGEST OF PROPOSED 1ST SUBSTITUTE)

Provides that a person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing.

Provides that the court shall grant a motion requesting DNA testing under this act if such motion is in the form required by this act, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

Provides that, upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

Declares that DNA testing ordered under this act shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

Provides that, notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing. The court must specify the samples to be maintained and the length of time the samples must be preserved.

Appendix 5

SUBSTITUTE SENATE BILL 6498

State of Washington 56th Legislature 2000 Regular Session

By Senate Committee on Human Services & Corrections (originally sponsored by Senators McCaslin, Franklin and Costa)

Read first time 02/03/2000.

1 AN ACT Relating to post conviction appeals based upon DNA evidence;
2 adding a new section to chapter 10.73 RCW; and creating a new section.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. Sec. 1. It has been found that a number of convicted
5 and incarcerated people have been proven innocent by DNA evidence
6 unavailable at the time of conviction. It is the intent of the
7 legislature to maximize the use of advances in DNA technology for the
8 purposes of exonerating convicted offenders and prosecuting offenders.
9 Use of DNA technology requires a deliberated balance between the
10 pursuit of truth and finality in the criminal justice system. The
11 national institute of justice has published a report from the national
12 commission on the future of DNA evidence. The report entitled
13 "Postconviction DNA: Recommendations for Handling Requests, September
14 1999 NCJ 177626," makes recommendations to prosecutors, defense
15 counsel, law enforcement personnel, the court, victims' advocates, and
16 laboratory personnel. The legislature finds it in the best interests
17 of the public health, safety, and welfare to implement the
18 recommendations of the report state-wide.

1 NEW SECTION. Sec. 2. A new section is added to chapter 10.73 RCW
2 to read as follows:

3 (1) On or before December 31, 2002, a person convicted in this
4 state may submit a request to the county prosecutor in the county where
5 the conviction was obtained for postconviction DNA testing, if DNA
6 evidence was not admitted because the court ruled DNA testing did not
7 meet acceptable scientific standards or DNA testing technology was not
8 sufficiently developed to test the DNA evidence in the case. On and
9 after January 1, 2003, a person must raise the DNA issues at trial or
10 on appeal.

11 (2) The prosecutor shall screen the request. The request should be
12 categorized based upon the likelihood that the DNA evidence would
13 demonstrate innocence, reasonable doubt of guilt, be helpful relevant
14 evidence, or is a frivolous request. The prosecutor must consider the
15 state of evidence or technology to produce inconclusive or conclusive
16 results and the presence of DNA evidence in the case. Upon determining
17 the category of the case and that the case is not frivolous, the
18 prosecutor shall proceed to court with appropriate motions to initiate
19 DNA testing in cases where DNA testing more probably than not would
20 result in newly discovered evidence material for the defendant. Notice
21 shall be served on any party the court may require to produce evidence
22 for DNA testing. Contact with the victims shall be handled through
23 victim/witness divisions, according to the recommendations in the
24 report.

25 (3) A convicted offender has a right to appeal his or her request
26 within thirty days of service of the request upon the prosecutor in the
27 event the prosecutor does not file a motion to initiate DNA testing.
28 The appeal shall be to superior court.

29 (4) Any person who the court determines to be indigent shall be
30 appointed counsel. The costs of DNA testing shall be paid for any
31 indigent person who obtains an order for DNA testing under this
32 chapter.

--- END ---

Appendix 6(a)

2000 Version of Postconviction DNA Testing Statute

10.73.170. DNA testing requests

(1) On or before December 31, 2002, a person in this state who has been sentenced to death or life imprisonment without possibility of release or parole and who has been denied postconviction DNA testing may submit a request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2003, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

[2000 c 92 § 1.]

Appendix 6(b)

2002 Version of Postconviction DNA Testing Statute

10.73.170. DNA testing requests

(1) On or before December 31, 2004, a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

(4) Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005.

[2001 c 301 § 1; 2000 c 92 § 1.]

Appendix 6(c)

2004 Version of Postconviction DNA Testing Statute

10.73.170. DNA testing requests

(1) On or before December 31, 2004, a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request to the state Office of Public Defense, which will transmit the request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. The prosecutor shall inform the requestor and the state Office of Public Defense of the decision, and shall, in the case of an adverse decision, advise the requestor of appeals rights. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

(4) Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005.

[2003 c 100 § 1, eff. July 27, 2003; 2001 c 301 § 1; 2000 c 92 § 1.]

Appendix 6(d)

Current Post-Conviction DNA Testing Statute

RCW 10.73.170. DNA testing requests

(1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

(2) The motion shall: (a) State that: (i) The court ruled that DNA testing did not meet acceptable scientific standards; or (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information; (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and (c) Comply with all other procedural requirements established by court rule.

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

[2005 c 5 § 1, eff. March 9, 2005; 2003 c 100 § 1, eff. July 27, 2003; 2001 c 301 § 1; 2000 c 92 § 1.]