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STATE OF WASHINGTON

No. _____
BY _____ DEPUTY COA No. 33539-5-II
(Consolidated with No. 33262-1-II)

SUPREME COURT OF THE STATE OF WASHINGTON

ALEXANDER NAM RIOFTA,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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STATE OF WASHINGTON

PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Appellant Alexander Nam Riofta asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION

The Court of Appeals, Division II, filed its published opinion in this case on August 22, 2006. *State v. Riofta*, --- Wn. App. ---, 142 P.3d 193 (2006). App. 1. An Order Denying Appellant’s Motion to Reconsider was filed on September 14, 2006. App. 2.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by adding language to the post-conviction DNA statute limiting a prisoner’s access to exculpatory DNA testing?
2. Did the Court of Appeals err in requiring prisoners to prove that post-conviction DNA tests will “exonerate” them, when the statute requires a showing of “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis”?
3. Did the Court of Appeals err by denying Mr. Riofta access to DNA tests, when the tests are necessary to establish the violation of his constitutional rights?

D. STATEMENT OF CASE

1. Statement of Facts

a. Trial and Appeal

At approximately 6:40 a.m. on January 27, 2000, seventeen-year-old Ratthana Sok left for school through the open garage door at his home.

TR: 177.¹ Mr. Sok noticed an unfamiliar Honda parked outside his house with two or three occupants. TR: 179-81. One of the passengers – who wore a black jacket and a white baseball hat – got out of the car, approached Mr. Sok and asked for a cigarette. TR: 181-82; 187; 219. Mr. Sok stated he was not a smoker, and continued to walk away. TR: 181-82.

It was still dark at the time of the encounter. TR: 188-89. Only a few street and house lights illuminated the approaching individual. *Id.* When Mr. Sok was a few feet away, the individual pulled a revolver from his pocket and pointed it at Mr. Sok's face. In shock, Mr. Sok immediately turned and ran back toward his house as the individual fired four or five shots at him. Every shot missed, and Mr. Sok escaped safely into his house. TR: 183-86.

Police responding to a call from the Sok residence found the shooter's white baseball hat on the sidewalk near the driveway. RP 219; 232. A spent bullet shell was also recovered. RP 217-18. The spent bullet and the white baseball hat were not examined for fingerprints. TR: 235. More significantly, the white hat was not subjected to DNA analysis to

¹ The following designations are used to designate the record in *State v. Riofta*, Pierce Co. Sup. Ct. No. 00-1-00511-5: TR = Report of Proceedings for the trial; HR = Report of Proceedings for the Motion for a New Trial; DNA HR = Report of Proceedings for the Hearing on the Motion for Post-Conviction DNA Testing; CP = Clerk's Papers; App. to PRP = Appendices to Personal Restraint Petition; Mot. for Recons. = Motion for Reconsideration.

determine whether genetic material – found in hair, skin cells or sweat – was on the white hat worn by the shooter. TR: 224-239.

Later, it was discovered that the car used to transport the shooter to the crime was stolen. TR: 289. The theft occurred less than twelve hours before the shooting. TR: 287-88. The white hat worn by the shooter and left at the crime scene belonged to the owner of the stolen car. *Id.*

Immediately after the shooting, Mr. Sok told police the shooter “looked like Alex” and that the shooter was white. TR: 220, 222-223.² At a later interview, Mr. Sok described the shooter as a Cambodian male, 17 or 18 years old, five-two or five-three, light build with a mustache and shaved head.” TR: 204, 246. When pressed, Mr. Sok admitted he had not seen the shooter’s head, because the shooter wore a hat. TR: 204.

Police composed a montage consisting of Asian individuals named “Alex” or “Alexander,” without regard to matching the physical attributes given by Mr. Sok. TR: 247. Mr. Sok viewed the montage and identified Alexander Riofta. TR: 249. Mr. Sok said he knew Mr. Riofta from playing basketball with him four or five years prior. TR: 186-87.

Police arrested Mr. Riofta, who was then 22 years old, at his home the day after the shooting. TR: 247-51; 258. Mr. Riofta denied any

² Although Mr. Sok later testified that he told the police officers that “it was Alex,” not that “it looked like Alex,” he agreed whatever he told the first officer was the truth. TR: 199-200.

involvement with the shooting. He said he had been out drinking with friends after he got off work, and then walked home, went to bed and slept until 11:00 a.m. the day of the shooting. TR: 252-53. Jennifer Saldana, Mr. Riofta's mother, testified in support of his alibi. TR: 301- 307.

At trial, the State did not introduce any physical evidence linking Mr. Riofta to the crime. Instead, the State relied on Mr. Sok's eyewitness identification. The State also introduced circumstantial evidence implying that Mr. Riofta was connected to a gang, and that the January 27th shooting was meant to intimidate Mr. Sok's brother, who at the time was cooperating with the State's investigation and prosecution of the gang-related Trang Dai shooting. TR: 257, 176. The State attempted to connect Mr. Riofta to the gang based on his statement that certain gang members were his "homeys" and because police found a newspaper article about the gang-related shooting in his home. TR: 255-57. At trial, the defense's primary argument was that the victim – the sole eyewitness in this case – mistakenly identified Mr. Riofta as the shooter. TR 371-83.

On November 30, 2000, Alexander Riofta was convicted of first-degree assault with a deadly weapon for the shooting. TR: 396. On April 26, 2001, Mr. Riofta filed a CrR 7.8 motion. HR: 403-62. The CrR 7.8 motion was denied on December 14, 2001. HR: 455-462. The Court of Appeals, Division II, denied Mr. Riofta's appeal on September 2, 2003.

State v. Riofta, 118 Wn. App. 1025 (2003). This Court denied Mr. Riofta's petition for review on May 4, 2004. *State v. Riofta*, 151 Wn.2d 1019 (2004). The Court of Appeals issued a mandate on May 10, 2004.

b. Post-Conviction DNA Requests under RCW 10.73.170

Mr. Riofta initially requested post-conviction DNA testing through his attorney, Sheryl Gordon McCloud, pursuant to the requirements of former RCW 10.73.170. CP: 15-16. In its prior version, RCW 10.73.170 afforded the prosecutor decision-making authority regarding post-conviction DNA test requests. *See* App. 3. If the prosecutor denied the request, the petitioner could submit an appeal to the Office of the Attorney General. The Pierce County Prosecutor's Office denied Mr. Riofta's request. CP: 18-20. Mr. Riofta then appealed the denial to the Attorney General's Office. CP: 21-23. In this appeal, Ms. McCloud noted she had "received [additional] information indicating that the actual shooter is a person with an arrest and conviction history, whose DNA would therefore . . . be available to the state" via the Combined Offender DNA Index System (CODIS) DNA database. CP: 21-23.³ Nonetheless, the Office of the Attorney General denied the appeal. CP: 25-26.

³ Ms. McCloud received this information from attorney Kristi L. Minchau. At the time, Ms. Minchau represented Jimmee Chea, a man convicted for his involvement in the Trang Dai murder case. Chea disclosed the identity of Mr. Sok's shooter to Ms. Minchau and told her that the shooter was incarcerated in Washington for a violent offense. CP: 24. Ms. Minchau informed the Attorney General that her client had not "granted

In March 2005, the Washington State legislature amended RCW 10.73.170. *See* App. 4. The amendments shifted decision-making authority from the Prosecutor and Attorney General to the trial court. More importantly, the Legislature broadened access to post-conviction DNA testing by adding an avenue of relief not included under the old version of the statute. Under this new statutory provision, petitioners can request testing if they “[s]tate . . . [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). Pursuant to the amended law, Mr. Riofta filed a Motion for Post-Conviction DNA Testing with the superior court on April 22, 2005. CP: 1-41. The superior court denied Mr. Riofta’s request in an Order filed on September 2, 2005. CP: 63-64. Mr. Riofta filed a timely appeal. CP: 59-62.

c. Personal Restraint Petition Proceedings

Mr. Riofta also sought access to post-conviction DNA testing through a personal restraint petition. Prior to filing the petition, law students working on the case met with Mr. Riofta’s trial counsel. Ex. 3 & Ex. 4 to Mot. for Recons. (Johnson Decl. & Woolson Decl.). During the meeting, on March 8, 2005, trial counsel stated he had not considered the possibility of requesting DNA testing on the white hat worn by the

permission . . . to disclose the identity of the shooter.” *Id.* She also noted she found her client’s “information to be reliable and accurate, not just occasionally, but always.” *Id.*

shooter. *Id.* Trial counsel further stated he had never requested DNA testing in any of his cases. *Id.*

Numerous attempts were made to obtain a declaration from trial counsel prior to the expiration of the one-year filing deadline. Ex. 3 to Mot. for Recons. At the last minute, on April 22, 2005, trial counsel faxed a declaration to undersigned counsel's office. *Id.* In his declaration, trial counsel stated for the first time: "I believe I would have sought DNA testing of the hat found at the scene had I received the letter . . . fingering a different person in this case . . ." App. 7 to PRP. Trial counsel deleted language in the declaration which set forth what he told students during their meeting – he did not consider the possibility of requesting DNA testing of the white hat. Ex. 3 & Ex. 4 to Mot. for Recons.

Mr. Riofta filed his petition with the Court of Appeals on April 25, 2005. He requested post-conviction DNA testing under his Due Process and Sixth Amendment rights to access exculpatory evidence, and under his Sixth Amendment right to effective assistance of counsel.

The Court of Appeals consolidated Mr. Riofta's Personal Restraint Petition with his Appeal on October 18, 2005. On August 22, 2006, the Court of Appeals affirmed the superior court's denial of Mr. Riofta's request under RCW 10.73.170 for post-conviction DNA testing and

denied Mr. Riofta's personal restraint petition. App. 1. Mr. Riofta's Motion for Reconsideration was denied on September 14, 2006. App. 2

E. ARGUMENT WHY RELIEF SHOULD BE GRANTED

This case addresses the right of innocent prisoners, convicted in Washington state, to obtain post-conviction DNA testing that can establish their innocence. There is no doubt that our criminal justice system makes errors. Post-conviction DNA testing has proven to be a powerful tool in correcting these injustices. In the past few decades, at least 184 people were exonerated through post-conviction DNA testing. *See*, The Innocence Project, <http://www.innocenceproject.org> (last visited Oct. 12, 2006). In essence, this case centers upon enforcing basic principles of our criminal justice system by ensuring that the innocent are freed and the guilty convicted. As such, it involves an issue of substantial public interest under the provisions of RAP 13.4(b)(4) and RAP 13.5(b)(3).

Our Legislature recognized the exculpatory power of DNA testing when it expanded access to post-conviction DNA testing in 2005. The statute now allows a petitioner to seek relief by filing a motion that "[s]tate[s]" that: "The DNA testing now requested . . . would provide significant new information." RCW 10.73.170(2)(a)(ii). The Court of Appeals effectively re-wrote the statute to require proof that: "The DNA testing now requested would provide significant new information

unavailable at trial.” See App. 1 at 12. By re-writing RCW 10.73.170(2)(a)(ii) to impose a “newly discovered evidence” standard, the Court of Appeals limited access to post-conviction DNA testing. It did so even as it acknowledged that the 2005 amendments to RCW 10.73.170 “broaden[ed] access to post-conviction DNA testing.” App 1 at 6. See Section E.1, *infra*.

Under RCW 10.73.170(3), a court must grant a motion for post-conviction DNA testing if a petitioner “has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” While the statute delineates reasonable requirements for a petitioner to satisfy, the Legislature did not intend to require a prisoner to prove his or her innocence prior to testing potentially exculpatory evidence. The Court of Appeals disregarded the statute’s permissive standard when denying Mr. Riofta relief because he did not demonstrate DNA testing would “*exonerate*” him. App. 1 at 13 (emphasis added). See Section E.2, *infra*.

Mr. Riofta has consistently maintained his innocence. He alleges that his restraint is unlawful because it violates his constitutional rights. RAP 16.4(c)(2). He requests access to post-conviction DNA testing to establish the violation of those rights. In particular, Mr. Riofta seeks to correct the Court of Appeals’ erroneous finding that his trial counsel

“likely made a tactical decision to forgo DNA testing of the white hat.”

App. 1 at 17. *See* Section E.3, *infra*.

1. Requiring Petitioners To Prove “New Evidence” Was “Unavailable At Trial” Adds Language To An Unambiguous Statute And Conflicts With The Legislature’s Intent To Broaden Access to Post-Conviction DNA Testing

Washington courts have consistently held if a statute is plain on its face, courts cannot engage in judicial construction by adding language to the statute. *American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 518-19, 91 P.3d 864 (2004); *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002), *Killian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002); *State v. Pope*, 100 Wn. App. 624, 628, 999 P.2d 51 (2000).

a. Under the plain meaning of the statute, post-conviction DNA testing will provide significant “new” information

Currently, any information discoverable through forensic DNA analysis on the white hat worn by the shooter is unknown. It does not exist. Thus, information provided by the DNA tests requested by Mr. Riofta would be “new information,” falling within Webster’s Dictionary and Black’s Law Dictionary definitions of the word “new.” App. 1 at 10-11. Such information is obviously significant as it could exonerate Mr. Riofta of a crime he claims he did not commit.⁴ Accordingly, Mr. Riofta

⁴ Even under the Court of Appeals’ interpretation of the statute, it is possible that the testing requested by Mr. Riofta will provide information that was unavailable at trial. A substantial number of exonerations have resulted from a CODIS match with a DNA

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).

b. The Legislature did not adopt a “newly discovered evidence” standard for post-conviction DNA testing

By adding a new avenue of relief to RCW 10.73.170 in 2005, the Legislature evidenced its intent to broaden access to exculpatory post-conviction DNA testing. Had the Legislature wished to limit this right as narrowly as the Court of Appeals, it could have adopted statutory language providing for post-conviction DNA testing in cases of “newly discovered evidence.” Under RCW 10.73.100(1), a petitioner may bring a newly discovered evidence claim “if the defendant acted with reasonable diligence in discovering the evidence.” Washington courts interpret this statutory language to mean that the new evidence “was discovered since the trial” and “could not have been discovered before trial by the exercise of due diligence.” *See, In re Stenson*, 150 Wn.2d 207, 217-20, 76 P.3d 241 (2003), *State v. Williams*, 96 Wn.2d 215, 634 P.3d 868 (1981).

The Legislature is presumed to be aware of its past legislation governing “newly discovered evidence” and the judicial interpretations of

profile obtained through post-conviction DNA testing. *See* Section E.2.b. *infra*. If the actual shooter’s DNA profile was added to CODIS after Mr. Riofta’s trial, this information would not have been available to Mr. Riofta at trial, even if the hat had been tested at that time. Thus, it would qualify as “new information” under the Court of Appeals’ own interpretation of the statute.

its statutes. *State v. Theilken*, 102 Wn.2d 271, 276, 684 P.2d 709 (1984); *In re Marriage of Little*, 96 Wn.2d 183, 189-90, 634 P.2d 498 (1981). The Legislature expressed its intent to broaden access to exculpatory DNA testing by its deliberate decision to expand access to such testing and by excluding the legal language “unavailable at trial” in RCW 10.73.170. Yet, the Court of Appeals interpreted RCW 10.73.170(2)(a)(iii) to echo the existing newly discovered evidence statute allowing testing only if the evidence was “unavailable at trial.” App. 1 at 11-12.

c. The Legislature did not intend to replicate existing remedies

In order to subject physical evidence to post-conviction DNA testing under the statute as re-written by the Court of Appeals, that physical evidence must have been unavailable at trial.⁵ However, if the government withheld the physical evidence sought to be tested, the remedy is a claim of prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). If the physical evidence was unknown to either party and suddenly appeared post-conviction, the remedy is a claim of “newly discovered evidence.” See CrR 7.5(a)(3); RAP 16.4(c)(3). The Legislature could not have intended to duplicate

⁵ RCW 10.73.170 already provides for post-conviction DNA testing in other scenarios where the evidence was unavailable at trial, *e.g.*, if: (1) the trial court ruled that DNA testing did not meet “acceptable scientific standards” or (2) “the DNA testing technology was not sufficiently developed.” RCW 10.73.170(2)(a)(i) & (ii).

remedies already in existence when it broadened access to post-conviction DNA testing in 2005. *See e.g., State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994) (courts must avoid construing a statute in a manner that renders a provision meaningless).

d. The Legislature did not intend to deny prisoners access to exculpatory DNA testing on the basis of counsel's errors

By expanding access to post-conviction DNA testing, the Legislature intended to provide access to exculpatory DNA analysis, regardless of whether the prosecution or defense failed to seek DNA testing at trial. The Court of Appeals' concern that defendants will take a "wait and see" approach prior to trial (App. 1 at 12) is unfounded. 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, both the prosecution and defense failed to request DNA testing on the white hat. However, no one has accused the State of foregoing testing out of the fear that an unfavorable result would have damaged its case against Mr. Riofta. Instead, the combination of an investigation that was not thorough and an incompetent lawyer resulted in no tests being done prior to trial.

Under the statute, as re-written by the Court of Appeals, an inmate convicted of rape whose attorney egregiously failed to seek available DNA testing of semen left by the perpetrator would not be entitled to post-

conviction DNA testing. The Legislature could not have intended such an absurd result. As the New Jersey court stated, access to post-conviction DNA testing should not be precluded if defense counsel failed to request testing prior to trial because “our jurisprudential system . . . punish[es] criminal defendants for their crimes, not for their attorneys’ mistakes.”

State v. Thomas, 586 A.2d 250, 254 (N.J. Super. Ct. App. Div. 1991).

2. To Obtain Post-Conviction DNA Tests Under RCW 10.73.170, Petitioners Must Show The “Likelihood That The DNA Evidence Would Demonstrate Innocence On A More Probable Than Not Basis,” Not That The Tests Will “Exonerate” Them

The Court of Appeals required Mr. Riofta to meet a higher burden to obtain testing than the statute requires. It held that even if a DNA profile in the white hat matched the profile of a convicted felon in CODIS, “the results do not exonerate Riofta.” App. 1 at 13. The Court reached this conclusion by hypothesizing that the individuals in the stolen car passed the hat around and tried it on. *Id.* Additionally, the Court of Appeals declined to weigh the relative strength of the known evidence offered by the State against Mr. Riofta against the exculpatory potential of DNA tests. *Id.* Such an analysis is appropriate under the statute’s correct standard, which requires an assessment of the “likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3).

- a. The known facts establish, on a more probable than not basis, that the shooter left genetic material on the hat

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. Thus, the people who likely left genetic material on the hat were the owner of the stolen car and the shooter. 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 CODIS, it likely came from the shooter. Mr. Riofta has explained why post-conviction DNA testing is material to the identity of the perpetrator and shown “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis” as required by RCW 10.73.170(2)(b) & (3).

Even under the Court of Appeals’ scenario, DNA testing would produce material evidence leading to additional evidence “likely to demonstrate innocence on a more probable than not basis.” The other individuals in the car were accomplices to the crimes. More importantly, the other individuals in the car witnessed the shooting, and therefore know the identity of the shooter. Testing the white hat could lead to the apprehension of these accomplices, and through investigation subsequently identify the true perpetrator of this crime.

b. The statutory standard for obtaining post-conviction DNA testing is permissive

In his testimony before the Legislature in support of the bill, former King County Superior Court Judge George Finkle contrasted the permissive standard courts should apply when a petitioner seeks post-conviction DNA testing with the “very tough standard” applied when a petitioner seeks a new trial. *Revising DNA Testing Provision: Hearing on Senate Bill 6447, Before the Comm. on Criminal Justice & Corrections, 2004 Leg., 58th Sess. (WA 2004)*. The recent exoneration of Douglas Warney, poignantly illustrates the need to apply the standard permissively when determining whether to grant post-conviction DNA testing.

In 1996, Douglas Warney was convicted of murder based almost entirely on his in-depth confession. The confession appeared reliable because it contained details of the crime not known to the general public. *People v. Warney, 299 A.D.2d., 750 N.Y.S.2d 731 (N.Y. App. Div. 2002)*. Ten years later Warney sought DNA testing of biological evidence collected at the crime scene, including blood and tissue recovered from under the victim’s fingernails. His counsel proffered that a match between a DNA profile obtained from the evidence and a CODIS profile would prove Warney’s innocence. Prosecutors responded by arguing that this outcome would not prove innocence because portions of Warney’s

confession made reference to an accomplice. The post-conviction court ruled that the possibility DNA testing could result in a match with an individual on file with the felon DNA database was “too speculative and improbable” to grant testing. Jim Dwyer, *Inmate to be Freed as DNA Tests Upend Murder Confession*, NEW YORK TIMES, May 16, 2006, at B1.

While the post-conviction court’s denial of Warney’s request was on appeal, prosecutors chose to conduct DNA testing on their own initiative. This testing excluded Warney as the source of the DNA found at the crime scene and revealed a profile of an unknown male perpetrator. Prosecutors then ran the recovered profile through the state’s DNA database. This additional investigatory step identified the DNA from the crime scene as belonging to Eldred Johnson, Jr. When contacted by the authorities, Johnson told investigators he did not know Mr. Warney and that he acted alone in killing the victim.⁶ *Id.*

Evidence that a convicted felon, and not Mr. Riofta, wore the white hat is both “material to the identity of the perpetrator” and “like[ly] would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(2)(b) & (3). As in Douglas Warney’s case, post-conviction DNA

⁶ Tragically, during the time that Mr. Warney was wrongfully imprisoned Eldred Johnson committed two other brutal attacks, slashing the throats of two men in Rochester, New York and leaving them to die. *False Conviction Gives Cause for Recording of Interrogations*, NORTH COUNTY GAZETTE, June 5, 2006.

testing – coupled with a CODIS match - has the power to ultimately exonerate Mr. Riofta, and identify and apprehend the true shooter.

- c. 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

While 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, it is reasonable for a court to undertake such an analysis. The weaker the case against a petitioner, the more likely untested evidence could prove to be exculpatory. Courts in other states recognized this common-sense proposition when ordering post-conviction DNA testing in cases where eyewitness testimony was the only evidence against a defendant.⁷ *People v. Johnston*, 205 Ill.2d 381, 398, 793 N.E.2d 591 (Ill. 2002) (granting post-conviction DNA testing when evidence against defendant consisted of a sole eyewitness); *Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1992) (granting post-conviction DNA testing when conviction rested largely upon eyewitness identification).

3. Mr. Riofta Is Entitled To Discovery Or A Reference Hearing On The Constitutional Claims Raised In His Petition

By denying Mr. Riofta the ability to conduct discovery, either through post-conviction DNA testing or an evidentiary hearing, the Court

⁷ Eyewitness misidentification is the single largest factor contributing to the conviction of innocent people. See e.g., Gary Wells & Elizabeth Olson, *Eyewitness Testimony in ANNUAL REVIEW OF PSYCHOLOGY* 277-295 (Susan T. Fisk, Ed. 2003).

of Appeals protected a lawyer who chose to safeguard his own interests, rather than his client's interests. The Court of Appeals misread the veiled language in trial counsel's declaration, and inferred that trial counsel likely made a tactical decision not to seek DNA testing prior to trial. App. 1 at 23. In Mr. Riofta's case, trial counsel's decision to forgo testing was not strategic. He specifically stated, before re-writing his declaration, that he did not consider the possibility of DNA testing. Ex. 3 & Ex. 4 to Mot. for Recons.

Mr. Riofta respectfully requests that this Court allow him access to forensic DNA analysis to develop the facts supporting his constitutional claims. This Court has recognized a right to discovery exists under state rules of appellate procedure. *See, In re Gentry*, 137 Wn.2d 378, 392, 972 P.2d 1250 (1999) ("discovery may be allowed . . . in rare circumstances where the petitioner can demonstrate a substantial likelihood the discovery will lead to evidence that would compel relief [from unlawful restraint]"). Other courts have recognized a right to discovery when a defendant seeks forensic DNA testing to support claims of constitutional violations. *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir.1996) (allowing habeas petitioner alleging ineffective assistance of counsel to conduct DNA and other tests on the physical evidence because discovery was essential to prove his ineffectiveness claim).

D. CONCLUSION

The decision below is the first to interpret RCW 10.73.170. As a published decision, it establishes precedent governing the interpretation of the statute. If the decision is allowed to stand, the ability of prisoners to access exculpatory DNA testing will be limited in a manner that the Legislature did not intend. If the decision is allowed to stand, prisoners will have to meet a higher burden of proof than the statute requires.

At this stage, the remedy Mr. Riofta requests is the ability to access post-conviction DNA testing. By denying him his statutory right to post-conviction DNA testing and denying his request for discovery or a reference hearing, the Court of Appeals shut the door to the scientific truth of DNA analysis. The search for truth is precisely what the Legislature contemplated when it enacted an expanded right to post-conviction DNA testing in Washington state. Mr. Riofta respectfully requests that this Court accept review and grant him the right to access the truth through post-conviction DNA testing.

Dated this 13th day of October, 2006.

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 13th day 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

10/13
2006, Seattle, Washington
DATE and PLACE

Cynthia S. Fester
CYNTHIA S. FESTER

FILED
COURT OF APPEALS
DIVISION II

06 AUG 22 AM 8:35

STATE OF WASHINGTON

BY _____
DEPUTY

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

ALEXANDER NAM RIOFTA,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

No. 33539-5-II
(Consolidated with
No. 33262-1-II)

PUBLISHED OPINION

VAN DEREN, A.C.J. — Alexander Nam Riofta was convicted for first degree assault with a firearm in November 2000.¹ Following conviction, Riofta filed unsuccessful requests with the Pierce County prosecutor and the attorney general under former RCW 10.73.170 (2001) for post-conviction DNA testing of a white hat worn by the shooter.

In March 2005, the legislature amended RCW 10.73.170² to broaden access to post-conviction DNA testing. Riofta (1) renewed his request for post-conviction DNA testing under amended RCW 10.73.170; and (2) filed a personal restraint petition (PRP), arguing that (a) he has a due process right to post-conviction DNA testing under the Fourteenth Amendment of the

¹ We rejected his direct appeal in an unpublished decision in September 2003. 2003 Wn. App. LEXIS 1880 (Wash. Ct. App. Sept. 2, 2003).

² Laws of 2005, ch. 5, § 1.

United States Constitution; and (b) his trial counsel was ineffective for not requesting DNA testing of the white hat. The trial court denied Riofta's request under RCW 10.73.170. He appeals that denial. We consolidated Riofta's PRP and his direct appeal of the trial court's denial of his request for post-conviction DNA testing.³ We affirm the trial court's denial of his statutory request for post-conviction DNA testing and deny his PRP.

FACTS

On July 5, 1998, five people were murdered and five were wounded at the Trang Dai Café in Tacoma. Eight people were arrested in connection with the incident, including Veasna Sok, whom the State charged with five counts of aggravated murder and five counts of first degree assault. Veasna Sok agreed to cooperate with the State and testify against his codefendants in exchange for a specific prison sentence. Although his codefendants, Jimmee Chea and Johnny Phet, retaliated and assaulted him in the courtroom, Veasna Sok continued to cooperate with the State.

Ratthana Sok is Veasna Sok's brother. At about 6:40 A.M. on January 27, 2000, 17-year-old Sok⁴ walked out of his garage on his way to school. It was dark and foggy outside, but the area in front of Sok's house was lit by a streetlight and a house light over the garage. When Sok walked out of his garage, he noticed two or three individuals in an unfamiliar vehicle parked on the street to the right of his driveway. One of the passengers exited the vehicle, approached Sok, and asked him for a cigarette. Sok responded that he did not smoke and continued walking

³ The direct appeal and Riofta's PRP are part of the Innocence Project Northwest Clinic at the University of Washington School of Law.

⁴ For clarity, we refer to Ratthana Sok as "Sok" and refer to his brother, Veasna, by his first name.

through the gate of his driveway. The individual—who wore a black jacket and white hat—then pulled a chrome revolver from his pocket and pointed it at Sok's forehead from two or three feet away. Sok turned and ran toward his house as the individual fired four or five shots, all of which missed Sok. Sok did not see the person flee, but the vehicle was gone when Sok's mother called the police.

Police found the shooter's white hat on the sidewalk near the driveway. The only other physical evidence at the scene was a spent bullet shell and bullet holes in Sok's garage and in his parents' cars. The hat and the bullet shell were never tested for fingerprints or DNA.

Two days later, police recovered a stolen vehicle a few blocks from Riofta's residence that was similar to the one Sok saw near his driveway.⁵ The vehicle's owner testified that the car had been stolen late January 26 or early January 27, 2000, and that there was a white hat in the car when it was stolen. He also testified that the hat was missing when the vehicle was recovered and that the white hat found on Sok's sidewalk was the one he had left in the vehicle.

Immediately after the shooting, Sok told police that he recognized the shooter as someone who "looked like Alex," a 5'2" or 5'3", 125-130 pound male. In a second interview and at trial, Sok stated more definitively that the shooter's name was "Alex" and described him as a 17 or 18 year-old Asian male with a light build, shaved head, and a moustache. At trial, Sok admitted that he had not seen the shooter's head because the shooter was wearing a white hat but that he knew "Alex" had a shaved head because his father had seen him in the neighborhood the morning before the shooting. Sok also testified at trial that "Alex" was an acquaintance with whom he had played basketball four or five years before the shooting.

⁵ Sok and Riofta lived about six blocks from one another.

Police conducted an identification procedure using a database containing thousands of photographs. They searched the database using the terms "Alex," Asian, and male. The search produced 12 photographs of five different people, none of whom Sok identified as the shooter. Police then modified the search to use the name "Alexander" rather than "Alex." This search produced 24 photographs of seven different people. Sok identified Riofta as the shooter from the second batch of photographs, stating, "That's him right there, I'm positive." Report of Proceedings (1RP) at 248-49.⁶

Police arrested Riofta at his home on January 28, 2000. When advised that he was under arrest for a shooting that had occurred the day before, Riofta angrily yelled, "I didn't shoot no mother fucker yesterday. I was here drinking all night. I worked yesterday from -- at The News Tribune from 1:00 to 5:30. I don't even own no gun, how could I shoot some mother fucker?" 1RP at 250-51.

During a custodial interrogation after waiving his *Miranda*⁷ rights, Riofta denied any involvement in the shooting. He explained that he had been drinking with friends the night before the shooting, that he left his house at about 11:00 A.M. the day of the shooting, that he worked from 1:00 P.M. to 5:30 P.M. conducting sales for The News Tribune, and that, after

⁶ "1RP" indicates the verbatim report of proceedings from Alexander Riofta's November 2000 trial. Although the official transcript of Riofta's trial is not included in the record, the State appended 300-400 pages to its August 16, 2005 Response to Personal Restraint Petition. "2RP" indicates the verbatim report of proceedings from Riofta's June 2005 hearing on his request for DNA testing.

⁷ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

getting a beer with a coworker, he went home at 8:30 or 9:00 P.M.⁸ He stated, "If I had shot at someone, I would kill them. I am not stupid enough to get identified." 1RP at 254. Without elaboration, he further stated that his arrest was a "bullshit conspiracy" and that Sok probably identified him because he walked up and down Sok's street everyday. Riofta also admitted that he had visited Sok's brother, Veasna, at Sok's house before Veasna was arrested and that, "Veasna was a sucker for snitching on the [h]omeys, and that he deserved to get choked up in court for snitching on [Jimmee Chea]." 1RP at 255. Riofta had a copy of a newspaper article depicting all the "homeys" (the Trang Dai defendants) at his house. He also told police that he used to hang out with another Trang Dai defendant, Sarun "Chewy" Ngeth, but that he stopped hanging out with him because Ngeth had a reputation for shooting people.

The State charged Riofta with first degree assault with a firearm on January 31, 2000. *State v. Riofta*, 2003 Wn. App. LEXIS 1880 at *5. A trial was held on November 27-30, 2000. The jury returned a guilty verdict on November 30, 2000.

On April 26, 2001, Riofta moved to vacate his conviction, asserting that he was incompetent at the time of trial and that his trial counsel was ineffective because he did not request a mental health evaluation or obtain the services of an eyewitness expert. *Riofta*, 2003 Wn. App. LEXIS 1880 at *10. The trial court denied the motion, ruling that Riofta was competent at his trial and that his trial counsel had provided effective assistance. *Riofta*, 2003 Wn. App. LEXIS 1880 at *13. Riofta appealed, arguing among other things that his trial counsel

⁸ Riofta's mother testified that when she returned from work at about 3:30 A.M. on January 27, 2000, Riofta was sleeping in his room. Although she went to bed, she told the jury that she sleeps with her door open and that she would have heard Riofta leave, but she did not. She further testified that Riofta woke her up at 11:00 A.M. to request bus money to get to work.

was ineffective because his trial counsel (1) failed to raise the issue of his competency before trial; and (2) failed to retain and present an expert on eyewitness testimony. *Riofta*, 2003 Wn. App. LEXIS 1880 at *27-*30. In an unpublished opinion filed on September 2, 2003, we affirmed Riofta's conviction. *Riofta*, 2003 Wn. App. LEXIS 1880 at *30.

In late May 2002, while the appeal was pending, Riofta requested post-conviction DNA testing of the white hat under former RCW 10.73.170. During this request process, Kristi Minchau, Jimmee Chea's defense attorney, wrote a letter to the Attorney General in which she stated that Chea, whom she found to be trustworthy, told her who shot at Sok and why Sok lied about the shooter's identity. She stated that she could not reveal the shooter's name but knew that he had a prior conviction in Washington and that his DNA should be on file with the State. Both the Pierce County Prosecutor's Office and the Washington State Attorney General's Office denied Riofta's request.

Then, in March 2005, the Washington Legislature amended RCW 10.73.170, broadening access to post-conviction DNA testing. Laws of 2005, ch. 5, § 1. The current version requires convicted felons to file a motion in the superior court where they were convicted (as opposed to the prosecutor's office) and to meet several procedural and substantive requirements to qualify for post-conviction DNA testing. *See* RCW 10.73.170. Riofta renewed his request for post-conviction DNA testing of the white hat under the current version of RCW 10.73.170 by filing a motion with the superior court in May 2005. The trial court denied Riofta's renewed request for post-conviction DNA testing.

Riofta appeals the trial court's denial of his second request. In his PRP, Riofta raises three constitutional issues in addition to his fourth constitutional claim that his trial counsel was ineffective because he failed to request DNA testing at trial.

ANALYSIS

I. DIRECT APPEAL—POST-CONVICTION DNA TESTING UNDER RCW 10.73.170.

Riofta appeals the trial court's denial of his request for post-conviction DNA testing of the white hat under RCW 10.73.170. Riofta argues that (1) RCW 10.73.170's legislative history indicates the legislature's desire to broaden access to post-conviction DNA testing and supports his request for DNA testing here; (2) his request should be considered in light of weaknesses in the State's case; (3) DNA testing of the white hat will provide "significant new information," specifically, who wore or did not wear the white hat; and (4) an absence of his DNA on the hat in conjunction with DNA matching that of a convicted felon in Washington's felony DNA database would establish his innocence on a "more probable than not" basis under RCW 10.73.170(3).⁹

The State responds that (1) nothing in RCW 10.73.170 requires a court to consider Riofta's request in light of alleged weaknesses in the State's case; (2) DNA testing would not provide "significant new information" because the white hat and comparable DNA testing were available at trial; and (3) Riofta has not shown a likelihood that DNA testing will demonstrate his innocence on a "more probable than not" basis under RCW 10.73.170(3).

⁹ Riofta also asserts that he did not choose to forego DNA testing at trial. He implies that his trial counsel never discussed it with him and that his trial counsel never considered DNA testing of the white hat. This contention is effectively a reiteration of Riofta's ineffective assistance of counsel claim discussed in his PRP and will not be addressed here.

A. Standard of Review

The parties disagree whether the standard of review in this case is de novo or abuse of discretion. Because this case involves the interpretation and application of a statute to a set of facts, it is a matter of law we review de novo. *State v. Law*, 110 Wn. App. 36, 39, 38 P.3d 374 (2002); *New W. Fisheries, Inc. v. Dep't of Revenue*, 106 Wn. App. 370, 375, 22 P.3d 1274 (2001).

B. Statutory Interpretation

In construing a statute, our objective is to ascertain and give effect to the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Where a statute uses plain language and defines essential terms, the statute is unambiguous. *City of Olympia v. Bd. of Comm'rs*, 131 Wn. App. 85, 93, 125 P.3d 997 (2005).

If the statute is clear and unambiguous, we may not look beyond the statute's plain language or consider legislative history but should glean the legislative intent through the plain meaning of the statute's language. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *C.J.C. v. Corp. of Catholic Bishop*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). When a statute's plain meaning is clear from its unambiguous language, we must apply the statute as written. *Enterprise Leasing v. City of Tacoma, Fin. Dep't*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999).

But if a statute is subject to more than one reasonable interpretation, it is ambiguous. *Jacobs*, 154 Wn.2d at 600-01. When a statute is ambiguous, we will resort to principles of statutory construction, legislative history, and relevant case law to assist in interpretation. *Yousoufian v. King County Executive*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004). Moreover, if a

statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary. *Jacobs*, 154 Wn.2d at 601.

C. RCW 10.73.170

RCW 10.73.170, amended in March 2005, states that a convicted felon currently serving a prison sentence may file a motion requesting DNA testing with the court that entered the judgment on conviction. RCW 10.73.170(1). The person requesting DNA testing under RCW 10.73.170 must satisfy both procedural and substantive requirements. RCW 10.73.170(2) and (3).

RCW 10.73.170 states:

- (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.

RCW 10.73.170(2) and (3).

Here, there is no dispute that RCW 10.73.170(2)(a)(i) and (ii) are not at issue. RCW 10.73.170(2)(a)(iii) and (b) are procedural requirements relating to the motion's content. RCW 10.73.170(2)(a)(iii) requires the person requesting testing to state that "[t]he DNA testing now requested would be significantly more accurate than prior DNA testing *or* would provide

significant new information.” (Emphasis added.) We presume that the word “or” does not mean “and” and that a statute’s use of the word “or” is disjunctive to separate phrases unless there is a clear legislative intent to the contrary. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 473 n.95, 61 P.3d 1141 (2003); *State v. Weed*, 91 Wn. App. 810, 813, 959 P.2d 1182 (1998). Moreover, the phrase “than prior DNA testing” modifies only the antecedent phrase “would be significantly more accurate” and does not modify the phrase “would provide significant new information.” RCW 10.73.170(2)(a)(iii); see also *In re Welfare of A.T.*, 109 Wn. App. 709, 714, 34 P.3d 1246 (2001) (where no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent). Thus, RCW 10.73.170(2)(a)(iii) requires that a motion requesting post-conviction DNA testing state that *either* the requested testing would be significantly more accurate than prior DNA testing *or* that it would provide significant new information.

Here, Riofta’s motion states that DNA testing “would provide significant new information;” therefore, he technically satisfies RCW 10.73.170(2)(a)(iii). But Riofta admits that the white hat is not newly discovered evidence and that DNA testing will reveal only information that was available at trial, including the potential identity of a person whose DNA profile may be among convicted felons in Washington. Thus, the key issue here is whether the testing would provide “new” information.

Because the legislature does not define “new,” we give it its plain and ordinary meaning. *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). “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

INTERNATIONAL DICTIONARY 1522 (2002). Black's Law Dictionary defines "new" as "recently come into being" or "recently discovered." BLACK'S LAW DICTIONARY 1068 (8th ed. 2004).

The information that post-conviction testing of the white hat might uncover does not meet any of these definitions. Thus, there is nothing "new" about the white hat or any information that it may contain. DNA testing of comparable accuracy was available at trial. Because Riofta chose not to test the white hat at trial does not mean that any information discoverable through post-conviction testing is now "new."

If the only requirement for post-conviction DNA testing is that a convicted person simply state that requested DNA testing "would provide significant new information," then the legislature created only an illusory procedural burden under RCW 10.73.170(2)(a)(iii). Applying such a literal interpretation of the provision would render the phrase "would provide significant new information" effectively meaningless in light of undisputed evidence and Riofta's admissions that the white hat, and any information that could be obtained by testing it, was available at trial. We avoid construing a statute in a manner that renders a provision meaningless. *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

Moreover, we read statutes as a whole and consider various statutory provisions in light of each other. *Dahl-Smyth, Inc. v. Walla Walla*, 148 Wn.2d 835, 844, 64 P.3d 15 (2003). When we apply this principle and read RCW 10.73.170(2)(a)(iii) in conjunction with the other provisions of RCW 10.73.170(2)(a), it is clear that the legislature did not intend that a convicted person be able to obtain post-conviction DNA testing merely by stating that DNA testing would provide significant new information when it is undisputed and the person acknowledges in other pleadings that all information that may result from current testing was available at trial through

testing of equal accuracy. RCW 10.73.170(2)(a)(i), (ii), and the first half of (iii) clearly indicate that the information to allegedly be gathered through post-conviction DNA testing was unavailable at trial. These provisions allow for post-conviction DNA testing, so long as the substantive requirement of RCW 10.73.170(3) is satisfied, when (1) the trial court ruled that DNA testing did not meet scientific standards acceptable at the time of trial; (2) DNA testing technology was not sufficiently developed at the time of trial to test the evidence at issue; or (3) the DNA testing conducted at trial was significantly less accurate than the DNA testing currently available. RCW 10.73.170(2)(a)(i)-(iii).

Given the thrust of RCW 10.73.170(2)(a)'s other provisions, a strained consequence results if we were to assign the hyper-literal interpretation Riofta urges, allowing a defendant to take a "wait and see" position on DNA testing by trying to gain acquittal without the DNA information but, following conviction, moving to test the DNA. We will not assign meaning to statutory language if it results in absurd or strained consequences. *Dahl-Smyth*, 148 Wn.2d at 844.

Accordingly, we hold that the legislature intended that a party requesting DNA testing under the second half of RCW 10.73.170(2)(a)(iii) must state that the testing "would provide significant new information" *unavailable at trial*. If a person requests DNA testing of evidence available at trial, information that the same or comparable testing might reveal post-conviction is not "new" under RCW 10.73.170(2)(a)(iii).

In addition to the procedural requirements under RCW 10.73.170(2)(a), the post-conviction DNA testing request must also explain why DNA evidence is material to the identity of the perpetrator. RCW 10.73.170(2)(b). Riofta argues that DNA test results from the white hat

are material to the identity of the shooter because, according to Jimmee Chea's defense attorney, they may match that of a convicted felon in Washington's DNA database. But DNA testing may show only who wore the hat after the car was stolen. DNA testing will not resolve who wore the hat during the shooting. Thus, we conclude that the trial court did not err in finding that RCW 10.73.170(2) was not satisfied and in refusing to order DNA testing.

Moreover, even if Riofta satisfied RCW 10.73.170(2)'s procedural requirements, he does not satisfy the substantive requirement under RCW 10.73.170(3). That provision states in relevant part that "[t]he court shall grant a motion requesting DNA testing under this section if . . . the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). Riofta does not meet this substantive requirement for the same reason he does not satisfy RCW 10.73.170(2)(b). DNA evidence from the hat will not demonstrate either his innocence on a more probable than not basis or the identity of the shooter. Even if Riofta obtains the DNA test results he seeks—an absence of his DNA in conjunction with a match of the DNA of a convicted felon in Washington, the results do not exonerate Riofta. Two or three people waited in the shooter's car. More than one person in the car may have worn the hat. Riofta has not satisfied RCW 10.73.170(3)¹⁰ and the trial court did not err in refusing to grant his request for post-conviction DNA testing of the white hat.

¹⁰ The State is correct that nothing in RCW 10.73.170's language suggests that we must engage in an analysis of the relative strength or weakness of the State's case.

II. PERSONAL RESTRAINT PETITION

We address three constitutional issues Riofta raises in his PRP as well as his claim of ineffective assistance of counsel. First, he contends that *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), establishes that the principle of fundamental fairness under the Fourteenth Amendment's due process clause requires access to post-conviction DNA testing. Second, Riofta relies on *Osborne v. State*, 110 P.3d 986 (Alaska Ct. App. 2005), to argue that he has a general due process right to post-conviction DNA testing under certain circumstances. Third, he argues that denial of post-conviction DNA testing constitutes a denial of his Sixth Amendment right to compulsory process because he is unable to present a viable defense to the charges. Finally, Riofta claims that his trial counsel was ineffective because he did not request DNA testing of the white hat found at the crime scene.¹¹

A. Standard of Review

We have original jurisdiction in PRP proceedings in which the death penalty has not been decreed. RAP 16.3(c). We grant appropriate relief if the petitioner is under a "restraint" as defined under RAP 16.4(b)¹² and the petitioner's restraint is unlawful for one or more of the reasons defined in RAP 16.4(c). RAP 16.4(a). The arguably applicable reasons under RAP 16.4(c) in Riofta's case are:

¹¹ In his reply, Riofta clarifies that his PRP is primarily based on ineffective assistance of counsel. Because other portions of both his PRP and his PRP Reply are not entirely clear on this matter and suggest broader *Brady* and due process claims, we address the three issues individually.

¹² Among other things, a petitioner is under a "restraint" if the petitioner is confined under a judgment and sentence resulting from a decision in a criminal proceeding. RAP 16.4(b).

....
(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

....
(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government;
....

RAP 16.4(c).

In addition to the eligibility requirements for PRPs, we limit the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and at times deprives society of the right to punish admitted offenders. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004). As a general rule, PRPs may not simply reiterate issues finally resolved at trial and on direct review, but rather, must raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. *Davis*, 152 Wn.2d at 670-71. The petitioner may not renew an issue raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. *Davis*, 152 Wn.2d at 671.

A petitioner may, however, collaterally challenge his conviction and sentence by raising genuinely new issues, whether constitutional or non-constitutional. *Davis*, 152 Wn.2d at 671. To obtain relief based on a constitutional error, the petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the error. *Davis*, 152 Wn.2d at 671-72. Under limited circumstances the petitioner's burden to establish actual and substantial prejudice may be waived when the error results in a conclusive presumption of prejudice. *Davis*, 152 Wn.2d at 672.

Non-constitutional errors, in contrast, require more than a mere showing of prejudice. *Davis*, 152 Wn.2d at 672. We consider non-constitutional errors only when they constitute a fundamental defect that inherently results in a complete miscarriage of justice. *Davis*, 152 Wn.2d at 672.

B. *Brady* Due Process Claim

Citing decisions from other states,¹³ Riofta argues that *Brady* and its progeny establish that fundamental fairness under the due process clause requires access to post-conviction DNA testing even when the defendant did not request it at the time of trial.

The State responds that there is no post-conviction *Brady* due process right to DNA testing.¹⁴ We agree with the State.

In *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999), our Supreme Court explained that due process requires the State to disclose evidence that is both favorable to the accused and material to either guilt or punishment. But there is no *Brady*

¹³ Riofta's cited cases were decided when DNA testing was relatively new technology, and not as widely accepted or affordable. *See, e.g., Dabbs v. Vergari*, 149 Misc. 2d 844, 570 N.Y.S.2d 765 (N.Y. Sup. Ct. 1990); *State v. Thomas*, 245 N.J. Super. 428, 586 A.2d 250 (N.J. Super. App. Div. 1991); *Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1992); *Commonwealth v. Brison*, 421 Pa. Super. 442, 618 A.2d 420 (Pa. Super. Ct. 1992). But during Riofta's trial in 2000, DNA testing was established and common.

¹⁴ Citing *Herrera v. Collins*, 506 U.S. 390, 400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the State contends that absent an independent constitutional violation occurring in the underlying state criminal proceeding, Riofta cannot assert a claim of innocence based on newly discovered evidence, namely, prospective DNA test results of the white hat. *Herrera* is inapplicable here. Riofta has not advanced a freestanding claim of innocence based on newly discovered evidence, a requirement for *Herrera* to apply. 506 U.S. at 400. Rather, he in fact claims an independent constitutional violation at the underlying state criminal proceeding--specifically, that his Sixth Amendment right to effective assistance of counsel was violated at trial because his trial counsel did not request DNA testing of the white hat. Further, Riofta himself concedes that any DNA evidence recovered from the white hat is not "newly discovered evidence." PRP Reply at 15.

violation if the defendant, using reasonable diligence, could have obtained the information at issue. *Gentry*, 137 Wn.2d at 396 (quoting *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998)). Here, Riofta had access to the white hat before and during trial and could have submitted it for DNA testing at that time. The State did not fail to disclose the white hat or prevent Riofta from seeking DNA testing. Thus, there is no *Brady* violation.

Citing *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992), Riofta suggests that the State's *Brady* obligation to produce exculpatory evidence post-conviction applies here. Riofta is incorrect. In *Goldsmith*, the 9th Circuit Court of Appeals explained that the State has a continuing obligation under *Brady* to provide exculpatory evidence after trial that is relevant to an instant habeas corpus proceeding. In *Goldsmith*, the State suppressed exculpatory semen evidence at trial and continued to withhold it during the subsequent habeas corpus proceeding. *Goldsmith*, 979 F.2d at 749-50. But here, the State disclosed the white hat and did not prevent Riofta from seeking DNA testing.

Riofta also asserts that the overall weakness of the State's case requires post-conviction DNA testing of the white hat. Riofta cites only *State v. Thomas*, 245 N.J. Super. 428, 586 A.2d 250 (N.J. Super. App. Div. 1991), in support of this contention. In *Thomas*, the court suggested that where the State's case is weak and based largely on eyewitness identification, defendants should have access to post-conviction DNA testing if they were improperly denied access to it at trial. *See* 586 A.2d at 251-54.

Here, Riofta was not improperly denied access to DNA testing at trial; both the hat and DNA testing were readily available at trial. Further, as we discuss later, Riofta's attorney was effective and likely made a tactical decision to forego DNA testing of the white hat. Moreover,

DNA testing was not widely accepted and was expensive at the time of the *Thomas* defendant's trial; thus, his situation is distinguishable from Riofta's where DNA testing was common and available. See *Thomas*, 586 A.2d at 251-53. Finally, we will not weigh the strength of the State's case post-conviction, particularly the accuracy of Sok's eyewitness testimony, because we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Riofta has suffered no *Brady* violation.

C. General Due Process Claim

Although Riofta never expressly argues that he has a general due process right to post-conviction DNA testing, his application of the three-part test adopted by the Alaska Court of Appeals in *Osborne v. State*, 110 P.3d 986, 995 (Alaska Ct. App. 2005), implies that such a right exists. Riofta's lengthy discussion of *Osborne* and his argument that *Osborne*'s holding must apply to his case raise the issue of whether Riofta has a post-conviction due process right to DNA testing if he satisfies the three-part test adopted in Alaska and other states.

In *Osborne*, the Alaska Court of Appeals held that although (1) the defendant did not have a due process right under the federal constitution to present new evidence to establish his factual innocence; (2) relevant Alaska statutory law likely precluded post-conviction DNA testing of physical evidence available at trial; and (3) it had already rejected the defendant's claim that his trial counsel was ineffective because counsel did not request more discriminating DNA testing, the defendant could nevertheless obtain post-conviction DNA testing if he satisfied a three-part test adopted in other states. *Osborne*, 110 P.3d at 992, 995. That test requires that a

defendant seeking post-conviction DNA testing must, at a minimum, show that (1) the conviction rested primarily on eyewitness identification evidence; (2) there was a demonstrable doubt concerning the defendant's identification as the perpetrator; and (3) scientific testing would likely be conclusive on that issue. *Osborne*, 110 P.3d at 995.

Although Washington courts have not adopted a version of the three-part *Osborne* test, our Supreme Court favorably referred to a three-part test in *Gentry* regarding post-trial discovery. 137 Wn.2d at 392. In *Gentry*, the defendant filed several post-conviction motions for discovery, requesting, among other things, documents, depositions of various county prosecutors, and the appointment of an investigator and an expert. 137 Wn.2d at 390. In rejecting the defendant's discovery requests, the Court explained:

There are few published decisions involving requests for appointment of investigators or experts in connection with postconviction proceedings. Two courts have held that an expert should be appointed to perform DNA testing if the defendant consistently maintained his innocence, the victim's identification testimony was challenged, and the testing could conclusively prove the defendant's innocence. *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997); *Commonwealth v. Reese*, 444 Pa. Super. 38, 663 A.2d 206, 208-09 (1995). But none of these cases authorize either discovery such as depositions, or the appointment of investigators or experts to identify or develop grounds for challenging convictions or sentences. They merely allow the defendant to interview known witnesses or to obtain or test existing evidence in the government's possession. They also require a showing there is reason to believe a specific discovery request will support a particular, identified claim for relief.

Gentry, 137 Wn.2d at 392.

We conclude that Riofta cannot satisfy the critical requirement of demonstrating that DNA testing of the white hat would conclusively, or even likely, prove his innocence. The absence of Riofta's DNA on the white hat does not necessarily indicate that Riofta was not the shooter because Riofta may not have transferred his DNA to the hat. For example, evidence

indicates that the shooter could have worn the hat for only a relatively short period of time because the car in which the hat was located was stolen within twelve hours of the shooting. Moreover, the presence of someone else's DNA (other than the hat's owner who testified at trial) does not exonerate Riofta because Riofta and other persons could have worn the hat without all of them transferring DNA. At best, DNA testing might raise an interesting question in light of Jimmee Chea's attorney's letter about statements Chea made about Riofta's innocence. But even if DNA on the white hat matched that of a particular convicted felon in Washington, it does not conclusively establish Riofta's innocence given the number of persons Sok saw in the car who may have worn the hat.

D. Sixth Amendment Claim

Riofta also argues that by prohibiting access to post-conviction DNA testing of the white hat, the State is denying him an opportunity to present a viable defense to the charges against him, thus stripping him of his Sixth Amendment right to compulsory process under the United States Constitution. The State responds that Riofta was afforded due process at trial, that he had ample opportunity to test the white hat for DNA at that time, and that he has no constitutional right to post-conviction discovery.

The State is correct; it did not deny Riofta an opportunity to present a defense to the crime charged. Indeed, Riofta had a jury trial, during which he had the opportunity to defend against the crime charged by presenting evidence, including any favorable information from DNA testing of the white hat. Riofta's citations in support of his compulsory process contention are inapposite. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), and *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), deal with

situations in which defendants were improperly prohibited from presenting certain witness testimony at trial. And Riofta does not assert that he was prevented from presenting DNA evidence from the white hat at trial.

E. Ineffective Assistance of Counsel

Finally, Riofta argues that his trial counsel was ineffective because he did not subject the white hat to DNA testing before or during trial. Riofta attempts to bolster his contention by claiming that his trial counsel failed even to consider DNA testing of the white hat. The State responds that there were legitimate tactical reasons supporting a decision not to seek DNA testing of the white hat at trial.

Effective assistance of counsel is guaranteed under the federal and state constitutions. See U.S. CONST. amend VI; WASH. CONST. art. I, § 22. To prove ineffective assistance of counsel, an appellant must show that counsel's performance was deficient and that the deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). A failure to establish either element of the test defeats an ineffective assistance of counsel claim. *Davis*, 152 Wn.2d at 673.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). We afford great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective and that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We evaluate the reasonableness of counsel's performance from counsel's perspective at the time of the

alleged error and in light of all the circumstances. *Davis*, 152 Wn.2d at 673. Further, we defer to an attorney's strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances. *Strickland*, 466 U.S. at 689-91. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ. *Strickland*, 466 U.S. at 691. But a lawyer who fails to adequately investigate and introduce evidence that demonstrates his client's factual innocence, or that raises sufficient doubt that undermines confidence in the verdict, renders deficient performance. *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002).

Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Riofta cites two aging, out-of-state cases to support his ineffective assistance of counsel claim. He argues that in *State v. Thomas*, 245 N.J. Super. 428, 586 A.2d 250 (N.J. Super. App. Div. 1991), and *State v. Hicks*, 195 Wis. 2d 620, 536 N.W.2d 487 (1995), courts held that a defense attorney's failure to seek DNA testing of physical evidence constituted deficient performance falling below an objective standard of reasonableness, even if the failure was a tactical decision. Riofta's argument fails.

In *Hicks*, the Wisconsin Court of Appeals itself acknowledged that it did "not intend to suggest that failure to obtain DNA test results is always deficient performance." *Hicks*, 536 N.W.2d at 492. The court in *Thomas* effectively second-guessed the trial counsel's tactical decision not to seek DNA testing after it acknowledged that trial counsel's decision was reasonable. *Thomas*, 586 A.2d at 252. Because the State's case in *Thomas* was weak, and

because the identifications in *Thomas* were uncorroborated except for each other, the court explained that:

[T]he defense, based on defendant's inability to drive a car and his apparent presence at work in Irvington at the time the assailant was seen in Newark, appeared sufficient in the circumstances to raise a reasonable doubt as to his guilt. Defense counsel may well have believed his client would be acquitted without incurring either the risk or expense of perhaps inadmissible DNA testing.

Thomas, 586 A.2d at 252. But in Washington, legitimate trial tactics are within trial counsel's province and cannot be the basis for an ineffective assistance of counsel claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993). Finally, neither case is binding authority on this court. See *State v. Salavea*, 151 Wn.2d 133, 144 n.9, 86 P.3d 125 (2004); *State v. Gonzales-Morales*, 138 Wn.2d 374, 382, 979 P.2d 826 (1999).

Riofta argues that his trial counsel did not consider DNA testing of the white hat, relying primarily on a declaration Riofta's trial counsel submitted and which was filed with Riofta's PRP. But Riofta's trial counsel does not state that he did not consider DNA testing. Rather, he states only that he would have sought DNA testing had he possessed Minchau's post-conviction letter regarding Jimmee Chea's statements that Riofta was not the shooter and that the shooter was a convicted felon in Washington. This declaration does not imply that Riofta's trial counsel did not consider DNA testing; if anything, it implies that he did consider it but deliberately chose not to seek it for tactical reasons. And beyond the assertions of an appellate attorney who represented Riofta during his first request for post-conviction DNA testing in 2002, nothing in the record suggests that Riofta's trial counsel failed to consider DNA testing. Riofta also attached the declaration of attorney Mark Prothero to his PRP. Prothero's opinion that it was

objectively unreasonable for Riofta's trial counsel not to request DNA testing is not helpful in analyzing whether Riofta's trial counsel was ineffective. What one defense attorney may find strategically sound another may find lackluster.

Here, the State is correct that legitimate tactical reasons support Riofta's trial counsel's decision to forego DNA testing of the white hat. Specifically, given (1) Riofta's association with the Trang Dai defendants and with Sok's brother, Veasna; (2) Riofta's inflammatory statements regarding Veasna and favorable statements toward other Trang Dai defendants;¹⁵ and (3) Sok's confident eyewitness identification of Riofta as the shooter,¹⁶ Riofta's trial counsel likely feared that Riofta's DNA would be discovered on the white hat, effectively ending the case and inculcating Riofta beyond a reasonable doubt.

Riofta also contends that if his trial counsel's failure to request DNA testing was not ineffective assistance, then his trial counsel's other alleged errors, when considered in conjunction with his failure to request DNA testing, cumulatively amounted to ineffective assistance. In particular, Riofta argues that his trial counsel (1) failed to raise his competency as an issue despite evidence that he may have been incompetent; and (2) failed to secure an eyewitness expert.

But we specifically rejected these claims in *State v. Riofta*, 2003 Wn. App. LEXIS 1880. PRPs may not reiterate issues finally resolved on direct review and may not renew issues raised

¹⁵ In its closing argument, the State contended that Riofta assaulted Sok to intimidate Veasna so that he would not testify against his Trang Dai codefendants. Veasna did repudiate his agreement with the State to testify against the co-defendants within about two weeks of the assault on his brother.

¹⁶ See 1RP at 246-249.

and rejected on direct appeal unless the interests of justice require relitigation of that issue. *Davis*, 152 Wn.2d at 670-71. Raising a new basis for an ineffective assistance of counsel claim, as Riofta does here, does not warrant reconsideration of bases already addressed.

Under the circumstances of this case, trial counsel's decision not to seek DNA testing of the white hat can be characterized as a legitimate trial tactic and thus cannot be the basis for Riofta's ineffective assistance of counsel claim. And because Riofta's trial counsel's performance was not deficient, we do not address whether trial counsel's alleged failure to request DNA testing was prejudicial to Riofta.

We deny Riofta's personal restraint petition and affirm the trial court's denial of his request under RCW 10.73.170 for post-conviction DNA testing.

Van Deren, A.C.J.
Van Deren, A.C.J.

We concur:

Armstrong, J.
Armstrong, J.
Hunt, J.
Hunt, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER NAM RIOFTA,

Appellant.

No. 33539-5-II

ORDER DENYING MOTION TO
RECONSIDER

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

APPELLANT moves for reconsideration of the court's decision terminating review, filed August 22, 2006. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Van Deren, Armstrong, Hunt

DATED this 14th day of September, 2006.

FOR THE COURT:

Van Deren, A.C.J.
ACTING CHIEF JUDGE

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HOUSE BILL 1391

Passed Legislature - 2003 Regular Session

State of Washington

58th Legislature

2003 Regular Session

By Representatives Kagi, Delvin, O'Brien, Campbell, Sullivan, McIntire, Cooper, Moeller, Simpson, Flannigan, Wallace, Wood and Kenney

Read first time 01/24/2003. Referred to Committee on Criminal Justice & Corrections.

1 AN ACT Relating to requests for postconviction DNA testing; and
2 amending RCW 10.73.170.

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

4 **Sec. 1.** RCW 10.73.170 and 2001 c 301 s 1 are each amended to read
5 as follows:

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

17 (2) The prosecutor shall screen the request. The request shall be
18 reviewed based upon the likelihood that the DNA evidence would
19 demonstrate innocence on a more probable than not basis. The

Appendix 3

1 prosecutor shall inform the requestor and the state Office of Public
2 Defense of the decision, and shall, in the case of an adverse decision,
3 advise the requestor of appeals rights. Upon determining that testing
4 should occur and the evidence still exists, the prosecutor shall
5 request DNA testing by the Washington state patrol crime laboratory.
6 Contact with victims shall be handled through victim/witness divisions.

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

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

--- END ---

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; 2003 c 100 § 1; 2001 c 301 § 1; 2000 c 92 § 1.]

Notes:

Effective date -- 2005 c 5: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 9, 2005]." [2005 c 5 § 2.]

Construction -- 2001 c 301: "Nothing in this act may be construed to create a new or additional cause of action in any court. Nothing in this act shall be construed to limit any rights offenders might otherwise have to court access under any other statutory or constitutional provision." [2001 c 301 § 2.]

Report on DNA testing -- 2000 c 92: "By December 1, 2001, the office of public defense shall prepare a report detailing the following: (1) The number of postconviction DNA test requests approved by the respective prosecutor; (2) the number of postconviction DNA test requests denied by the respective prosecutor and a summary of the basis for the denials; (3) the number of appeals for postconviction DNA testing approved by the attorney general's office; (4) the number of appeals for postconviction DNA testing denied by the attorney general's office and a summary of the basis for the denials; and (5) a summary of the results of the postconviction DNA tests conducted pursuant to RCW 10.73.170 (2) and (3). The report shall also provide an estimate of the number of persons convicted of crimes where DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or where DNA testing technology was not sufficiently developed to test the DNA evidence in the case." [2000 c 92 § 2.]

Intent -- 2000 c 92: "Nothing in chapter 92, Laws of 2000 is intended to create a legal right or cause of action. Nothing in chapter 92, Laws of 2000 is intended to deny or alter any existing legal right or cause of action. Nothing in chapter 92, Laws of 2000 should be interpreted to deny postconviction DNA testing requests under existing law by convicted and incarcerated persons who were sentenced to confinement for a term less than life or the death penalty." [2000 c 92 § 4.]