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DIVISION II

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STATE OF WASHINGTON

No. 33539-5

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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Alexander Nam Riofta, Appellant.

APPELLANT'S REPLY BRIEF

Jacqueline McMurtrie
Attorney for Appellant
INNOCENCE PROJECT NORTHWEST CLINIC
University of Washington School of Law
246 William H. Gates Hall
P.O. Box 85110
Seattle, WA 98145-1110
(206) 543-5780
WSBA # 13587

Joshua Field
Legal Intern

Janel Ostrem
Rule 9 Legal Intern

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I. ARGUMENT IN REBUTTAL

The shooter wore a white hat and left it at the scene of the crime. These two facts are undisputed. DNA testing is a powerful tool that can isolate an individual DNA profile using just a single cell of biological material. When entered into the nationwide CODIS database, an individual profile isolated in the hat can be definitively matched with profiles obtained from more than 2.6 million convicted felons.

Despite the fact that the hat at issue in this appeal was the sole piece of physical evidence connecting the shooter to the crime, the hat was never subjected to DNA testing. At Alexander Riofta's trial, neither his lawyer nor the State requested testing of the hat. CP at 17. Following his conviction, Mr. Riofta obtained new counsel and immediately sought to have DNA tests performed on the hat. For the past four years, Mr. Riofta has pursued his statutory right under RCW 10.73.170 to DNA testing of the white hat.

The State now asks this Court to punish Mr. Riofta for mistakes made by his trial attorney. To allow an innocent person to remain in jail when evidence is available for DNA testing is contrary to the plain language of RCW 10.73.170 as well as the legislative intent behind this truth-seeking statute. Because Mr. Riofta has met the statutory

requirements of RCW 10.73.170, this Court should order testing of the white hat.

II. ISSUES PRESENTED

1. Whether de novo review is appropriate when this Court is asked only to interpret RCW 10.73.170 and apply undisputed facts to this interpretation.
2. Whether RCW 10.73.170 compels DNA testing when a petitioner has shown that the DNA testing in his case would provide significant new information that is material to the identity of the perpetrator.
3. Whether due process and fundamental fairness compel DNA testing under the circumstances of this case.

III. ARGUMENT

The appropriate standard of review is de novo because this case involves only statutory interpretation and the application of undisputed facts to that interpretation. Under the plain meaning of the statute, a petitioner can satisfy RCW 10.73.170 by stating that the requested DNA testing will provide “significant new information” pertaining to the identity of the perpetrator. This is true even if modern DNA testing was available at trial. Even if RCW 10.73.170 were considered ambiguous, legislative intent shows that the statute was specifically amended to

expand access to potentially exculpatory DNA evidence, therefore supporting testing in this case. Mr. Riofta has satisfied the requirements of 10.73.170 by demonstrating that DNA testing on the white hat “is significant new information,” material to “the identity of the perpetrator” that will likely demonstrate his innocence on a more probable than not basis. Therefore, this Court should reverse the trial court and order testing on the white hat.

A. The Appropriate Standard of Review is De Novo

This case is reviewed de novo because it requires only statutory interpretation and the application of a particular set of facts to a statutory scheme. Both are exclusively legal issues. *See Opening Brief of Appellant* at 25-27. This Court will review the case as the trial court did, based solely on motions and briefs submitted by the parties. *See id.* at 25. In such cases, deference to the trial court is not justified. *See id.* at 25-26.

The State provides no authority for its argument that DNA testing requests under RCW 10.73.170 should be reviewed for abuse of discretion because other motions codified under Title 10.73 are reviewed under this standard. *See Opening Brief of Respondent* at 8. Rather, the State references *State v. Hardisty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996), a case in which the Washington State Supreme Court applied an abuse of discretion standard to review the lower court’s decision to vacate a

judgment under CrR 7.8. *Id.* The *Hardisty* court did not analyze the standard of review for a statute codified under Title 10.73. *Id.* The fact that a motion to vacate a judgment on the basis of fraud is reviewed for abuse of discretion under CrR 7.8 does not assist this Court in determining the appropriate standard of review for a denial of DNA testing under RCW 10.73.170.

Further, the State's analysis mistakenly associates a statute's standard of review with its place in the code. This assumption is erroneous because statutes codified in the Revised Code of Washington are organized according to topic or subject matter, not by their standard of review on appeal. *See* Washington State Legislature, Revised Code of Washington, *available at* <http://apps.leg.wa.gov/rcw/> (the RCW "is a collection of Session Laws *arranged by topic*, with amendments added and repealed laws removed") (emphasis added). Courts should determine a statute's standard of review based on the justifications for deference to the trial court rather than looking at the way a statute is codified. *See Opening Brief of Appellant* at 26.

The State *does* concede that de novo review is appropriate for cases involving statutory interpretation. *See Opening Brief of Respondent* at 9. Its arguments for an abuse of discretion standard of review are flawed, however, because the application of a particular set of facts to a

statute is also an exclusively legal issue and completely reviewable on appeal. *See Opening Brief of Appellant* at 25.

This Court should follow the reasoning of other jurisdictions which have reviewed denials of statutory postconviction DNA testing under the state statutes governing such testing. These jurisdictions hold that de novo is appropriate because deference is not necessary in such appellate reviews. *See Opening Brief of Appellant* at 26-27.

B. Based on the Language and History of RCW 10.73.170, Mr. Riofta's Request to Test the White Hat Should Be Granted

Under the plain meaning of RCW 10.73.170, Mr. Riofta satisfied section (2)(a) by stating in his *Motion for Postconviction DNA Testing* that a DNA test on the white hat would provide significant new information. CP at 5. The State twists the plain meaning of the statute by misconstruing the word "or" and ignoring the "Last Antecedent Rule." Even if RCW 10.73.170 was ambiguous, legislative intent favors granting petitioners broad access to DNA testing.

1. The Plain Meaning of the Statute Compels Testing

As required by RCW 10.73.170(2)(a), a petitioner's 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.*

(emphasis added). Mr. Riofta stated that DNA testing on the hat would provide significant new information in his *Motion for Postconviction DNA Testing*, thus satisfying section (2)(a). CP at 5.

Because the statute's meaning is "plain on its face," this Court "must give effect to that plain meaning as an expression of legislative intent." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The State mistakenly argues that a petitioner can fulfill this section of the statute only if he or she states that the requested DNA testing "would provide significant new information than prior DNA testing." *Opening Brief of Respondent* at 12. Under this flawed analysis, the State concludes that if modern DNA testing was available at the time of trial, a petitioner cannot fulfill the requirements of the statute.

The State's interpretation of RCW 10.73.170 cannot be considered the statute's "plain meaning" because it substitutes the word "and" for the word "or." The Washington Supreme Court holds that "ordinarily, the word 'or' does not mean 'and' unless there is clear legislative intent to the contrary." *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning and Land Services*, 148 Wn.2d 451, 474 n.94, 61 P.3d 1141 (2003). If the

State's interpretation of the statute was correct, the "or" in the statute would effectively be read as an "and."

The State further strains the statute's plain meaning by disregarding the "Last Antecedent Rule" of statutory interpretation. Under this rule, "unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent." *State v. Wentz*, 149 Wn.2d 342, 351, 68 P.3d 282 (2003). The State argues that the modifying phrase "than prior DNA testing" modifies both the terms (a) "would be significantly more accurate," and (b) "would provide significant new information." *Opening Brief of Respondent* at 12. However, under the Last Antecedent Rule, the modifying phrase "than prior DNA testing" can modify *only* the antecedent – "would be significantly more accurate" – that preceded it. Thus, the statute allows testing if a petitioner states either that "the 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) (emphasis added).

2. Even if the Statute Was Ambiguous, Legislative Intent Favors Broad Access to Testing

When interpreting a statute, a "fundamental objective" of the court is to ascertain the intent of the legislature. *See Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If a court determines that the

language of the statute is ambiguous, it should look to legislative history in order to determine the intent of the legislature. *Bellevue Fire Fighters Local 1604, Intern. Ass'n of Fire Fighters v. City of Bellevue*, 100 Wn.2d 748, 751, 675 P.2d 592 (1984). Both the legislative history and the statute's amendment history show that RCW 10.73.170 was intended to allow potentially exculpatory DNA testing even if such testing was available at trial.

a. The Legislative History of RCW 10.73.170 Supports Testing

By amending RCW 10.73.170 in 2005, the legislature broadened access to exculpatory DNA evidence for prisoners who claim they were wrongfully convicted. *See Opening Brief of Appellant* at 15-16. In doing so, legislators made it clear that DNA evidence should be used to “seek the truth,” even if it reveals a mistake made by the State. *Id.* at 16.

Defendants are often unaware of forensic analysis available for their defense at trial. Because of this, the legislature intended the statute to reach petitioners who, although they had access to modern DNA testing at the time their trials, never benefited from such technology. By expanding the provisions of RCW 10.73.170, the legislature intended that innocent people should not remain in prison because of their lawyers' mistakes at trial. *See Id.* at 15-16.

b. *The State's Interpretation of RCW 10.73.170 Would Render Amendments to the Statute Meaningless*

The State ignores the fact that when the legislature amended RCW 10.73.170 in 2005, it intended to expand the reach of the statute. The amendments broadened a prisoner's right to post-conviction testing, allowing it even in cases where such testing was available at trial.

This Court must assume that changes made in statutes were made in furtherance of a legislative purpose. *Trudeau v. Pacific States Box & Basket Co.*, 20 Wn.2d 561, 575, 148 P.2d 453 (1944); *see also JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 10, 891 P.2d 720 (1995) (“[w]hen interpreting statutes, a court must assume that the legislature does not engage in meaningless acts.”). RCW 10.73.170 has been amended three times since its initial passage in 2000. *See Opening Brief of Appellant* at 3. With each revision, the legislature created more avenues to DNA testing, helping to ensure that the wrongly convicted do not remain in prison and that justice is brought to the true perpetrators. *See id.* (referencing all four versions of RCW 10.73.170, attached as appendices). Prior to March 9, 2005, an inmate who sought DNA testing on potentially exculpatory evidence had to show that such evidence was not admitted either because the court ruled DNA testing did not meet acceptable scientific standards or because DNA testing technology was not sufficiently developed to test the

DNA evidence in the case. *See id.* at 13. Under this version of RCW 10.73.170, petitioners could not obtain relief if contemporary DNA testing was available at trial.

Under the current RCW 10.73.170(2)(a), petitioners can seek DNA testing for one of four reasons, two of which were added by the 2005 Amendments. In addition to having the option of stating that DNA testing was unavailable at trial, petitioners can also meet the requirements of the statute by stating “that the DNA testing now requested would be significantly more accurate than previous DNA testing *or* that DNA testing would provide significant new information.” RCW 10.73.170(2)(a)(iii) (emphasis added).

Although the State argues that the language of the statute should be analyzed “as a whole,” *see Opening Brief of Respondent* at 11, its interpretation fails to take into account the changes the legislature made through the amendment process. The State treats the new statute as if it was the old one, arguing that the statute allows petitioners access to exculpatory DNA testing *only* when such testing was not available to them at trial. This analysis is erroneous because it renders the legislative amendments meaningless. The legislature did not amend the statute to keep it the same. Indeed, the current statute gives petitioners more

options. Thus, even if DNA testing was available to a petitioner at trial the petitioner may still access DNA testing under the amended statute.

c. *Mr. Riofta Did Not Choose to Forgo DNA Testing at Trial*

The State's argument that postconviction DNA testing will enable petitioners to strategically avoid DNA testing at trial is not applicable to Mr. Riofta's case. Although the State argues that Mr. Riofta "chose not to pursue" DNA testing at trial, *Opening Brief of Respondent* at 12-13, in fact, this assertion is unsupported by the record. Once informed about the exculpatory power of DNA testing, Mr. Riofta has steadfastly sought the truth by requesting testing of the white hat. CP 15-16.

Both Mr. Riofta's trial counsel and the State failed to request DNA testing on the white hat. CP at 17. The failure on the part of his counsel is cited in Mr. Riofta's ineffective assistance of counsel claim. *See In re Riofta, Brief in Support of Personal Restraint Petition* at 21-27 (consolidated with this appeal). Indeed, for four years – from the time he was assigned new counsel – Mr. Riofta has sought forensic DNA testing to avail himself of the exculpatory power of DNA testing at trial. CP 15-16.

The State's concern that defendants will strategically forego testing at the trial stage can be alleviated if law enforcement simply subjects

evidence that may contain probative biological material to DNA testing. Such procedures are commonplace and recommended by the Department of Justice. *See* U.S. Dep't of Justice, *Using DNA to Solve Cold Cases* (2002), *available at* <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf> (last visited March 4, 2006).

Mr. Riofta did not strategically forego DNA testing at trial. The State's request that this Court punish Mr. Riofta for the mistakes of his trial attorney is contrary to the plain language of RCW 10.73.170 and the legislature's intent to use DNA testing to seek the truth.

C. A DNA Test on the White Hat Will Provide Significant New Information, Likely Demonstrating Mr. Riofta's Innocence on a More Probable Than Not Basis.

The State fails to comprehend the true exculpatory power that DNA testing on the white hat can yield. *See Opening Brief of Respondent* at 14. Everyone agrees that the shooter wore the white hat. This hat constitutes the sole piece of testable physical evidence recovered from the crime scene. To scientifically identify individuals who were in contact with the white hat, only single-cell samples of biological materials, such as those left by skin cells and sweat, are needed. *See Opening Brief of Appellant* at 16-20. Whoever wore the hat – even if he was bald – most likely left at least a cell of biological material in the hat.

DNA testing technology can use single-cell biological samples to isolate DNA profiles left by multiple individuals. These profiles can then be entered into the CODIS database in an attempt to identify the shooter. A match in CODIS would provide a definitive picture of individuals in contact with the hat. When compared to the State's circumstantial case based on a single eyewitness identification that changed several times, the DNA test will provide a scientifically accurate and objective evidentiary analysis. Thus, DNA testing on the samples found in the white hat would likely demonstrate innocence on a more probable than not basis.

1. Testing Will Provide a Scientific Picture of Who Wore the White Hat

Until the white hat is tested, neither Mr. Riofta nor the State will know the true exculpatory power of the DNA profiles found within the hat. Once it is tested, one of several situations may arise; some would further Mr. Riofta's claims of innocence, others would not. To discover the truth, DNA testing must be conducted. Performing such a test is simply good police work, and should have been done by law enforcement during the investigation. Indeed, the Department of Justice specifically recommends that law enforcement request DNA tests on hats found at crime scenes during criminal investigations. *See U.S. Dep't of Justice, Using DNA to Solve Cold Cases 21 (2002), available at*

<http://www.ncjrs.gov/pdffiles1/nij/194197.pdf> (last visited March 4, 2006). The significance of a test on the hat should be no different simply because a prisoner – pursuant to a statutory right – now requests that it be tested.

A DNA test on the white hat would constitute the sole forensic test conducted on the only piece of testable physical evidence from the crime scene. Because a test will identify whose DNA profiles are present inside the hat undisputedly worn by the shooter, this test will constitute significant new information in Mr. Riofta's case.

The State's argument demonstrates a lack of understanding as to how biological material is transferred. On one hand, the State argues that the shooter – who wore the hat for an extended, stressful period of time – could not have contributed a sufficient amount of biological material for testing because the shooter was bald. *Opening Brief of Respondent* at 13. On the other hand, the State worries that mere incidental contact by witnesses, attorneys and jurors could taint the DNA test. *Id.* The State cannot have it both ways.

In fact, DNA testing requires only a single cell of biological material and is not dependant on the presence of hair. Because this testing is so sensitive, it may well identify those who incidentally handled the hat. It will very likely, however, identify the shooter who wore the hat for an

extended period of time. Thus, the existence of the shooter's DNA profile in the hat is significant new information that, when combined with the power of the CODIS database, will likely demonstrate Mr. Riofta's innocence on a more probable than not basis. *See Opening Brief of Appellant* at 16-20.

2. CODIS is a Powerful Tool That Can be Used to Identify the Shooter

The State's concern that DNA testing would be ineffective because multiple people had contact with the white hat is misplaced. DNA profiles obtained from the white hat can be entered into the CODIS database to see if they match one of 2.6 million DNA profiles taken from convicted felons. *See Opening Brief of Appellant* at 16-20. If a match is made, it will supply the identity of an individual who had contact with the hat. After incidental contact is ruled out, this CODIS match would positively identify the shooter.

A DNA match in CODIS could also confirm or deny the information given by gang member Jimmee Chea's attorney. The State takes issue with Mr. Riofta's reference to an unsworn letter from Mr. Chea's attorney. *Opening Brief of Respondent* at 16-17. The letter states that although he is unwilling to name names, Mr. Chea can verify Mr. Riofta's innocence and knows that the shooter is a convicted felon with

ties to the gang. Mr. Riofta agrees that on its own, at this point in the proceedings, this information conclusively demonstrates little. But, if Mr. Chea is telling the truth, the shooter is likely an Asian man, with ties to gang activity, who has a motive – identical to one the State pinned on Mr. Riofta – for shooting at Mr. Sok.

The tip from Mr. Chea is simply one example of how CODIS can be used to identify the shooter. Independent of this tip, CODIS can still hold the key to identifying the shooter. If the man who shot at Mr. Sok is a convicted felon, it is likely that the DNA profile in the hat will match a profile in CODIS. *See* RCW 43.43.754 (describing DNA collection from convicted felons and noting that such samples are added to the CODIS database). If incidental profiles from jurors, witnesses and/or lawyers are discovered in the hat, they likely will not show up in CODIS and can be excluded. Thus, if a DNA profile from the hat is matched to one in CODIS, the profile will likely be that of the shooter.

3. When Comparing the Scientific Power of DNA Testing to the State's Case, a DNA Test on the White Hat Will Likely Demonstrate Mr. Riofta's Innocence on a More Probable Than Not Basis

It is clear that Mr. Riofta was convicted based on a single eyewitness identification and circumstantial evidence. While Mr. Riofta and the State disagree about the strength of the State's case against him at

trial, the only way to determine the truth in this case is through DNA testing on the white hat - the only piece of physical evidence linking the shooter to the crime. Had the State tested the hat and matched Mr. Riofta's profile to the DNA profile found inside the hat, few would question the strength of the evidence against him. Unfortunately, no test was ever conducted.

When evaluating the likelihood that DNA testing will demonstrate the petitioner's innocence on a more probable than not basis, a court should weigh the relative strength of the evidence offered by the state against a petitioner against the exculpatory potential of DNA tests. *See Opening Brief of Appellant* at 31-36. 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 postconviction DNA testing, it is reasonable for a court to undertake such an analysis. *See id.* Other jurisdictions with postconviction DNA testing statutes often consider the evidence against the petitioner when making a decision to grant or deny DNA testing. *See id.* When eyewitness identification is the central piece of evidence against a petitioner, these courts are likely to grant statutory requests for DNA testing. *See id.*

In stark contrast to eyewitness identification, DNA testing is a scientifically conclusive identification procedure. *See Opening Brief of*

Appellant at 16-24. Other than circumstantial evidence, Mr. Riofta's conviction was based solely on a single eyewitness identification. No DNA test was ever conducted on the sole piece of physical evidence that linked the shooter to the crime.

Although the State argues that Mr. Sok's eyewitness identification was strong because Mr. Sok knew Mr. Riofta, the State overlooks several factors which put the accuracy of Mr. Sok's identification in question. Most significantly, the State has not rebutted the fact that eyewitness misidentification is the leading cause of conviction of the innocent. In this case, Mr. Sok changed his description of the shooter several times. *See Opening Brief of Appellant* at 4. Like any eyewitness, Mr. Sok is subject to normal psychological factors that affect memory and manifest themselves in misidentifications. *See id.* at 21-24. Even with the best intentions, Mr. Sok cannot overcome these factors.

The State is also incorrect in associating Mr. Sok's level of certainty with the accuracy of his identification. Indeed, certainty in eyewitness identifications is not correlated to accuracy. *See* CP 28-41; *see also Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (Ga. 2005) (rejecting an instruction which allowed jurors to consider the certainty of an eyewitness identification because of the "scientifically-documented lack of correlation between a witness's certainty in his or her identification

of someone as the perpetrator of a crime and the accuracy of that identification.”).

Unlike eyewitness identifications, DNA evidence is infallible scientific proof of identity. Modern DNA testing requires only single-cell biological samples to isolate multiple profiles left on physical evidence like the hat at issue in this case. After such profiles are processed in CODIS, it is likely that the shooter’s identity will be revealed, thereby demonstrating Mr. Riofta’s innocence on a more probable than not basis. Because Mr. Riofta has met the requirements of RCW 10.73.170, this Court should reverse the trial court’s decision to deny him DNA testing on the white hat.

D. Due Process and Fundamental Fairness Also Compel Testing.

Mr. Riofta’s reply to the State’s Due Process and Fundamental Fairness arguments are addressed in his *Personal Restraint Petition*, which is consolidated with this appeal and incorporated by reference.

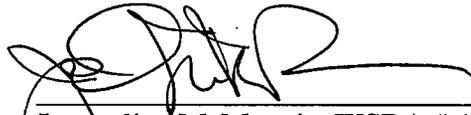
IV. CONCLUSION

At the time of his trial, neither Mr. Riofta’s trial counsel nor the prosecution tested the one piece of physical evidence that undisputedly linked the shooter to the crime. For the past four years, Mr. Riofta has sought to uncover the truth that remains in that white hat. Indeed, as Pierce County Prosecutor Jerry Costello noted, even prosecutors “want the

truth to be out there.” CP at 5. Because Mr. Riofta has met the requirements of RCW 10.73.170, he respectfully asks this Court to reverse the trial court’s decision and grant his statutory request for postconviction DNA testing.

Dated this 9th day of March, 2006.

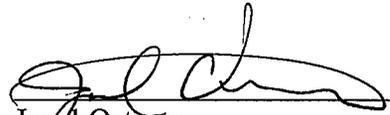
Respectfully Submitted,



Jacqueline McMurtrie, WSBA # 13587
Attorney for Petitioner



Joshua Field
Legal Intern



Janel Ostrem
Rule 9 Legal Intern

CERTIFICATE OF SERVICE

I certify that on March 9, 2006, I arranged for service by United Parcel Service, overnight express the Petitioner's Reply Brief on:

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

Michelle Luna-Green
Office of the Pierce County Prosecuting Attorney.
930 Tacoma Ave. S., Rm. 946
Tacoma, WA 98402

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Cynthia S. Fester
CYNTHIA S. FESTER