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No. 88336-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

LINDSEY CRUMPTON,

Respondent.

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SUPREME COURT  
STATE OF WASHINGTON  
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AMICUS CURIAE BRIEF OF THE INNOCENCE NETWORK  
IN SUPPORT OF PETITION FOR REVIEW

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**ORIGINAL**

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## I. INTRODUCTION AND INTEREST OF AMICUS

The Innocence Network is an affiliation of more than sixty organizations dedicated to providing pro bono legal services to convicted individuals determined to prove their innocence. It seeks status as amicus curiae because it believes that persons petitioning for post-conviction DNA testing under RCW 10.73.170 are entitled to a presumption of favorable test results—*i.e.*, those excluding the convicted person as the genetic donor. To hold otherwise would subvert the legislative policy behind the statute, render illusory the relief it purports to provide, and strip from wrongly-convicted Washingtonians one of the most powerful tools to prove their innocence. The Court should accept review here.

RCW 10.73.170 provides convicted persons with a straightforward path to obtain DNA testing of evidence at the State's expense. Once petitioners comply with a handful of procedural instructions, the statute directs the trial court to order testing when 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). According to this Court, the statute requires DNA testing where, "viewed in light of all the evidence presented at trial or

newly discovered, *favorable* DNA test results would raise the likelihood that the person is innocent on a more probable than not basis.” *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2008) (emphasis added). Thus, a convicted person is entitled to navigate RCW 10.73.170’s substantive analysis with a presumption that that DNA testing will yield an exculpatory result. The Court reaffirmed this standard just over one year ago. *State v. Thompson*, 173 Wn.2d 865, 872-73, 271 P.3d 204 (2012).

Yet despite this clear call for a favorable evidentiary presumption, confusion still exists about its application. Indeed, in direct conflict with this Court’s decisions in *Riofta* and *Thompson*, the Court of Appeals below refused to presume that DNA results would identify an individual other than Lindsey Crumpton, the Petitioner. *State v. Crumpton*, \_\_\_ Wn. App. \_\_\_, 289 P.3d 766 (2012). Over a reasoned dissent from Chief Judge Worswick, the 2-1 majority ignored this Court’s interpretation of the statute and held, for the first time, that a convicted person must make a preliminary showing that the same evidence that was strong enough to convict him beyond a reasonable doubt also reveals that exculpatory DNA is likely available. It expressly rejected the favorable presumption that this Court endorses.

In so doing, the majority's opinion sets an impossible standard and guts any meaningful relief from RCW 10.73.170.

Amicus The Innocence Network urges the Court to accept review and hold definitively that convicted persons enjoy a presumption of exculpatory DNA results and are entitled to post-conviction DNA testing where, in the context of all the evidence presented at trial, the exculpatory DNA raises the likelihood that the person is more probably than not innocent. It should remand with instructions to decide Crumpton's petition with the benefit of this presumption.

## II. ARGUMENT

### A. **This Court's Precedent Accords Petitioners the Benefit of Hypothetically Favorable DNA Evidence When Determining Whether there is a Reasonable Probability of Actual Innocence.**

This Court first interpreted the "broadened"<sup>1</sup> language of RCW 10.73.170 in 2008. *Riofta*, 166 Wn.2d at 364. The statute provides that, upon a petition from a convicted person for DNA testing:

The court shall grant [the] motion [if it conforms to the statute's procedural requirements] and the convicted person has shown the likelihood that the DNA evidence

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<sup>1</sup> The Legislature amended the statute in 2005.

would demonstrate innocence on a more probable than not basis.

RCW 10.73.170(3). Faced with a petition for post-conviction DNA testing from Alexander Riofta, who a jury convicted of assaulting an acquaintance with a firearm, this Court had occasion to fine-tune the mechanics of the statute's substantive analysis. After considering the statute, the legislature's intent behind it, and the federal counterpart on which RCW 10.73.170 is modeled, this Court construed the burden on petitioners as follows:

In determining whether a convicted person "has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis," a court must look to whether, viewed in light of all of the evidence presented at trial or newly discovered, *favorable DNA test results* would raise the likelihood that the person is innocent on a more probable than not basis. *The statute requires a trial court to grant a motion for postconviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator.*

*Riofta*, 166 Wn.2d at 367-68 (emphasis altered from original).

*Riofta's* repeated references to "favorable" and "exculpatory" results make clear that petitioners bear only one burden to satisfy RCW 10.73.170(3)'s substantive component: the trial court adds hypothetical DNA evidence supporting petitioner's innocence to the record to

determine whether the favorable DNA results are enough to raise the probability that the petition is actually innocent. Importantly, *Riofta* does not require that a petitioner demonstrate that favorable DNA evidence is likely to be found; they enjoy a preliminary right to this presumption. The Court reaffirmed this standard just last year. *Thompson*, 173 Wn.2d at 872-73; *see also State v. Gray*, 151 Wn. App. 762, 773-75 (2009) (applying *Riofta* to grant petition).

**B. The Court of Appeals Decision Constructs an Insurmountable Barrier to Post-Conviction DNA Testing.**

But the Court of Appeals' decision creates an additional substantive hurdle that is supported neither by the statute's text nor by this Court's prior case law. It refused to analyze whether Crumpton had satisfied RCW 10.73.170(3)'s requirement with the benefit of favorable DNA results. *State v. Crumpton*, 289 P.3d 766, 773, n. 9 (2012). Instead, it announced that Crumpton and other petitioners must demonstrate initially that the record supports an inference that exculpatory DNA evidence exists in the first place. Only after petitioners make this threshold showing will the Court of Appeals analyze whether that favorable evidence is enough to raise the likelihood of actual innocence.

This Court has cautioned that RCW 10.73.170's analysis "is not akin to retrying the case." *Thompson*, 173 Wn.2d at 873. Yet this is exactly what the Court of Appeals would require of trial courts. Under its newly announced standard, the court must comb through the record to determine whether it is likely favorable DNA evidence exists before ever applying the statute. Limiting the trial court's initial review to evidence already in the record not only ignores the statute's purpose as a vehicle to consider previously-unavailable evidence, but leaves no room in RCW 10.73.170's analysis for the substantial weight that juries typically accord to biological evidence.<sup>2</sup>

In essence, the Court of Appeals has improperly converted *Riofta's* one-step inquiry into a two-step analysis that virtually guarantees denial of the petition.<sup>3</sup> Consider the burden the Court of Appeals places on convicted persons. Using only the evidence in the record that, by definition, was sufficient to convict them beyond a reasonable doubt, petitioners must show a probability that DNA evidence exists that tends to negate their guilt. It is difficult to imagine

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<sup>2</sup> See, e.g., *Duncan v. Kentucky*, 322 S.W.3d 81, 93 (Ky. 2010) (holding that jurors are apt to accord DNA evidence "immense weight").

<sup>3</sup> Only *in dicta* did the Court of Appeals "paraphras[e]" *Riofta's* holding, refer back to its misapplication of RCW 10.73.170, and determine, without further analysis, that even "favorable" DNA results would not aid Crumpton. *Id.* at 772.

a scenario where the evidence against a defendant is both strong enough to convict him at trial, yet inconclusive enough that favorable DNA evidence is more probably than not present post-conviction. The Court of Appeals has rendered the relief that RCW 10.73.170 purports to promise Washington residents merely imagined.

**C. Applying a Favorable Evidentiary Presumption Will Not Cripple the State with an Avalanche of DNA Testing.**

Amicus recognizes that the State has an economic interest in limiting the availability of post-conviction DNA testing. But according convicted persons a favorable evidentiary presumption does not sacrifice this interest. Such a presumption is not akin to rubberstamping every petition for testing. Indeed, the Court of Appeals needed only look to *Riofta* to allay its concern, where this Court determined that even exculpatory DNA would not raise the likelihood that the petitioner was innocent.<sup>4</sup> *Id.*, 166 Wn.2d at 370-71.

Moreover, the favorable presumption, which, contrary to the Court of Appeals decision, has been the law since 2009, has not overwhelmed the State's resources. As of last year, only three of the

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<sup>4</sup> *Riofta* dismissed favorable DNA samples from a hat as unhelpful to the petitioner, since several people in addition to the perpetrator had worn the had prior to the crime.

state crime lab's 967 backlogged DNA cases were the result of an RCW 10.73.170 petition.<sup>5</sup> And the statute's threshold procedural requirements limit the numbers of petitions that the courts have to entertain.

The experience of how courts have applied RCW 10.70.173 since 2008 clarifies that a favorable presumption does not render a petition infallible, and it is not *amicus*' position that the statute should compel testing in every case. But to keep RCW 10.73.170 from denying testing in every case, which is the practical effect of the Court of Appeals' decision below, this Court must accord convicted persons the presumption that testing will produce exculpatory DNA results.

**D. If "Overwhelming Evidence" of Guilt Alone is Reason Enough to Deny Testing Under RCW 10.73.170, as the Court of Appeals Reasons, Then No Petition Would Be Successful.**

To support its conclusion that Crumpton is not entitled to DNA testing, the Court of Appeals harkened to the "factually strong," "overwhelming evidence" of Crumpton's guilt. *Crumpton*, 289 P.3d at 769, 772. It cited Crumpton matching the victim's description of her attacker, that he had items taken from the victim's home, his admission

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<sup>5</sup> If this Court grants review, *amicus* will update these numbers and append a declaration to its brief.

of being in the home, hair microscopy results linking Crumpton to a pubic hair found on the victim,<sup>6</sup> and Crumpton's shaky explanations of his conduct that night. *Id.* at 772. The Court of Appeals concluded that "DNA testing here would not likely change the outcome."

From its opinion, however, it is apparent that the Court of Appeals' deference to the "factually strong" circumstantial evidence against Crumpton prevented it from appreciating the weight that juries accord to DNA. For example, it dismissed favorable results as having any effect, since they "would show only the possibility that the victim had sex with someone other than Crumpton before or after the rape." *Id.* But this ignores the more obvious—or at least just as plausible—conclusion that someone else committed the rape. It is clear that the Court of Appeals never considered how DNA evidence might change how the jury would view the other evidence in the case.<sup>7</sup>

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<sup>6</sup> This evidence is far from the death knell to Crumpton's petition. Science is discrediting the reliability of hair microscopy evidence at an alarming rate. The "NAS Report" by the National Research Council of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009), has raised concerns about the validity of hair microscopy, documenting that "several members of the committee have experienced courtroom cases in which, despite the lack of a statistical foundation, microscopic hair examiners have made probabilistic claims based on their experience, as occurred in some DNA exoneration cases in which microscopic hair analysis evidence had been introduced during trial." Report at 160. The report is available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

<sup>7</sup> See, e.g., *Esparza v. Texas*, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009) (holding that "overwhelming eye-witness identification and strong circumstantial evidence . . .

Post-conviction DNA testing has exonerated 303 innocent persons nationwide who were sentenced up to life in prison and including death on what juries once believed to be reliable evidence.<sup>8</sup> Here, the Court of Appeals denied Crumpton's petition *because of* strong evidence of guilt. But the Legislature designed RCW 10.73.170 to provide relief to innocent defendants that a jury convicted *in spite of* strong evidence of guilt. Indeed, "troubling facts" accompany every conviction, but the statute still requires post-conviction DNA testing in some cases. *Thompson*, 173 Wn.2d at 875, n.3. If RCW 10.73.170 is to have any practical effect, then the strength of the case against a petitioner at trial cannot be used to justify a conclusion that no exculpatory evidence exists.

### III. CONCLUSION

"It is both beyond doubt and profoundly disturbing that innocent people are convicted despite truthful witnesses, good lawyers, good juries, good judges, and fair trials." *Riofta*, 166 Wn.2d at 376-77

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is inconsequential" when faced with exculpatory DNA evidence in a single-attacker sexual assault, like Crumpton's); *Godschalk v. Montgomery Cnty Dist. Atty's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001) ("Nevertheless, if by some chance no matter how remote, DNA testing on the biological evidence excludes plaintiff as the source of the genetic material from the victims, a jury would have to weigh this result against plaintiff's uncoerced detailed confessions to the rapes.").

<sup>8</sup> Amicus The Innocence Project has compiled a detailed list of all 303 exonerations, available at <http://www.innocenceproject.org/know/Browse-Profiles.php>.

(2009) (Chambers, J., dissenting). The Court of Appeals has effectively deprived wrongly-convicted Washington residents from a fair opportunity to test perhaps the only evidence capable of proving their innocence. Amicus implores this Court to give effect to the remedial intent behind RCW 10.73.170, accept review, and remand this case with instructions to determine Crumpton's petition with the benefit of a favorable evidentiary presumption.

DATED this 8th day of March, 2013.

**GRAHAM & DUNN PC**

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**CERTIFICATE OF SERVICE**

Darlyne De Mars affirms and states:

That on this day, I caused to be served a true and correct copy of *Brief of Amici Curiae The Innocence Network*, by the method indicated below, and addressed to each of the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States of America, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 8<sup>th</sup> day of March, 2013.

  
 \_\_\_\_\_  
 Darlyne De Mars

## APPENDIX A

Innocent Network's member organizations include:

Alaska Innocence Project  
Association in Defence of the Wrongly Convicted (Canada)  
California Innocence Project  
Center on Wrongful Convictions  
Connecticut Innocence Project  
Downstate Illinois Innocence Project  
Duke Center for Criminal Justice and Professional Responsibility  
The Exoneration Initiative  
Georgia Innocence Project  
Hawaii Innocence Project  
Idaho Innocence Project  
Innocence Network UK  
Innocence Project  
Innocence Project Arkansas  
Innocence Project at UVA School of Law  
Innocence Project New Orleans  
Innocence Project New Zealand  
Innocence Project Northwest Clinic  
Innocence Project of Florida  
Innocence Project of Iowa  
Innocence Project of Minnesota  
Innocence Project of South Dakota  
Justice Project, Inc.  
Kentucky Innocence Project  
Maryland Innocence Project  
Medill Innocence Project  
Michigan Innocence Clinic  
Mid-Atlantic Innocence Project  
Midwestern Innocence Project  
Mississippi Innocence Project  
Montana Innocence Project  
Nebraska Innocence Project  
New England Innocence Project  
Northern Arizona Justice Project  
Northern California Innocence Project  
Office of the Public Defender (State of Delaware)

Office of the Ohio Public Defender  
Wrongful Conviction Project  
Ohio Innocence Project  
Osgoode Hall Innocence Project (Canada)  
Pace Post-Conviction Project  
Palmetto Innocence Project  
Pennsylvania Innocence Project  
Reinvestigation Project (Office of the Appellate Defender)  
Rocky Mountain Innocence Center  
Sellenger Centre Criminal Justice Review Project (Australia)  
Texas Innocence Network  
Thomas M. Cooley Law School Innocence Project  
Thurgood Marshall School of Law Innocence Project  
University of British Columbia Law Innocence Project (Canada)  
Wake Forest University Law School Innocence and Justice Clinic  
Wesleyan Innocence Project  
Wisconsin Innocence Project  
Wrongful Conviction Clinic

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Attached please find the following documents which are being submitted on behalf of The Innocence Network:

- (1) Motion of The Innocence Network for Permission to File Amici Curiae Brief;
- (2) Appendix to Motion; and
- (3) [Proposed] Amicus Curiae Brief of The Innocence Network in Support of Petition for Review.

Please feel free to contact our office with any questions you may have. Thank you.

### **Darlyne T. De Mars**

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