No. 93421-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

v.

STATE OF WASHINGTON,

Defendant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Plaintiffs-Respondents Robert Larson, Tyler Gassman, and Paul Statler respectfully ask the Court to decline the State's request for discretionary review of the decision of the Court of Appeals in *Larson v. State*, ___ Wn. App. ___, 375 P.3d 1096 (June 28, 2016). The case involves the Wrongly Convicted Persons Act, chapter 4.100 RCW, a remedial statute that allows exonerated individuals to obtain relief for the injustice of being wrongfully stripped of their liberty. Courts are supposed to liberally construe such statutes. The trial court below failed to do this, however, and the Court of Appeals reversed in a decision that adopts this Court's construction of a similar remedial statute. The State's challenge fails to present an issue of substantial public interest.

The Court of Appeals also reversed the trial court's conclusion on the question of actual innocence, holding the lower court applied an erroneous burden of proof based on the stringent standards of federal habeas corpus law. The proper standard is clear and convincing evidence, as the Act unambiguously provides. The State's challenge again fails to present an issue of substantial public interest.

This Court should decline review so that the matter may be remanded to the trial court for a determination of actual innocence under the correct evidentiary standard.

II. ISSUES PRESENTED FOR REVIEW

For the reasons set forth below, Respondents respectfully ask the Court to exercise its discretion and decline to review the issues raised by the State. Respondents do not request review of additional issues.

III. STATEMENT OF THE CASE

Early in the morning on April 23, 2008, Aramis Turner and Jenalee Hall were sitting in their living room when several men broke through the front door. RP 204:5-15, 465:5-12. One of the men was armed with a shotgun. RP 205:6-13. Bandannas covered the faces of the intruders. RP 425:17-19.

The masked men searched the apartment for drugs while holding Turner and Hall hostage. RP 463:4-13, 465:6-9, 466:6-9. During the robbery, one intruder's bandanna slipped down. RP 465:25– 466:5. Turner and Hall recognized the man as Anthony Kongchunji. *Id.* They also recognized another intruder by the sound of his voice. RP 466:3-5. It was Larry Dunham. *Id.*

The robbers eventually left the apartment, taking with them a purse and laptop computer. RP 466:10-15. Turner and Hall called the police, who went to Nick Smith's apartment a short time later and found and detained four individuals: Anthony Kongchunji, Nick Smith, Larry Dunham, and Matthew Dunham. RP 598:16–599:14. Brothers Larry and Matthew Dunham were roommates with Kongchunji, and all four of the men were friends. RP 460:25–462:13.

In the parking lot of Smith's apartment building, the police located the getaway vehicle: a red Nissan pickup belonging to the Dunhams' mother. RP 463:16-19, 466:16-20, 613:20-23. The police found the purse and laptop stolen from Turner and Hall in a nearby dumpster. RP 468:17–469:3, 599:7-9. The police also found other evidence linking the four men to the robbery, including dark clothing. RP 468:12-16.

The police arrested Kongchunji, Smith, and the Dunhams and interrogated them. RP 204:5-15. Larry Dunham confessed, offering extensive details of the robbery. RP 600:6-22. Smith also confessed. RP 600:25–601:2. Kongchunji asked for an attorney. RP 601:3-5. As for Matthew Dunham, he lied several times to the police about his involvement, repeatedly changing his story. RP 472:1–474:25.

The Turner/Hall robbery was the last in a string of similar crimes: it was the fifth "drug-rip" robbery in Spokane that year and the third to occur in just over a week. RP 611:22–612:7, 613:8-10, 619:18-24, 620:6-7, 620:14-16. The target of each robbery was a known or suspected drug dealer. RP 204:5-22, 215:5-12, 216:6-16, 463:16–464:25, 479:10-25, 487:4–488:6, 612:11-21, 613:4-7, 613:11-23, 619:1–620:24. Each robbery took place at night when it was dark. *Id.* Each robbery was committed by suspects wearing dark clothing and bandannas to hide their faces. *Id.* Each robbery included a forced entry or assault and a shotgun. *Id.* Each robbery involved a red pickup as the getaway vehicle. *Id.*

Matthew Dunham was only 17 years old when he was arrested. RP 475:3-8. He was booked and sent to juvenile detention but transferred

to county jail within two days. RP 475:3-10. Facing up to 40 years in prison, Matthew Dunham was scared. RP 475:20–476:5, 476:11-18. Soon, though, a friend appeared: Anthony Kongchunji. RP 476:19–477:1. The two men were housed in the same section of the jail and over the next several weeks, they talked every day. RP 218:1–219:5, 220:1-13, 476:19–477:24. To obtain leniency from the State, the two conspired to frame others as accomplices in the series of drug-rip robberies. *Id.*

Spokane detectives Doug Marske and William Francis were assigned to investigate the robberies. RP 608:1-6. Two months before the Turner/Hall incident, Marske told Francis that he suspected Paul Statler for one of the thefts, which involved drug dealer Chris Selfridge. RP 638:22–639:2, 642:7-10. Marske's suspicion was based on a rumor Selfridge heard about the possible involvement of Paul Statler and Bryan Bewick. RP 639:3-20. When Marske relayed this information to Francis, Francis said Statler had been implicated in a pawnshop robbery with Tyler Gassman in 2003, when the men were juveniles. RP 16:2-11, 633:2-15, 638:22–639:2. Marske directed the Department of Corrections to search Statler's home, but nothing related to the robberies was uncovered. RP 632:17–636:20. Nevertheless, Marske stayed locked in on Statler. RP 638:18–640:6, 642:19-25.

A month after being arrested, Matthew Dunham met with Marske and Francis for a "free talk." RP 607:10–610:10. Dunham admitted to the detectives that he had committed the Turner/Hall robbery. RP 564:23–568:16. He also told the detectives he had committed an earlier drug-rip

robbery on Dishman Road. RP 611:7-10. The Dishman robbery was substantially similar to the Turner/Hall robbery and occurred only 28 hours earlier. RP 612:5–613:23. Dunham claimed, however, that the Dishman robbery involved different people. RP 616:10-18. Specifically, he said he performed the Dishman robbery with Anthony Kongchunji, Paul Statler, Tyler Gassman, and someone by the name of "Andy." *Id.*

Five days later, Matthew Dunham met again with Marske and Francis and admitted to the detectives that he had also committed a drug-rip robbery on E. Cataldo. RP 616:25–620:13. The E. Cataldo robbery was like the Turner/Hall and Dishman robberies. RP 612:5–613:23, 619:18–620:13. All three crimes occurred at night and involved an assault on a known drug dealer. *Id.* The robbers wore dark clothes and bandannas, and one had a shotgun. RP 463:16–464:25, 613:4-7, 619:18–620:13. The escape vehicle was a red Nissan pickup. RP 613:11-23.

Dunham said he committed the E. Cataldo robbery with Anthony Kongchunji, Paul Statler, Tyler Gassman, and someone named "Andrew." RP 616:19–617:19. Dunham repeated the name "Andrew" several times. *Id.* Marske and Francis claimed they tried to identify "Andrew," but their reports had no information about his race, height, address, or relationship to anyone else. RP 617:20–618:11.

Within a week of the second meeting, Matthew Dunham secured a plea agreement with the prosecutor. Ex. 38. He admitted to three armed robberies and faced decades in prison, but the State promised to recommend an "exceptional" sentence of less than 16 months in juvenile

detention. *Id.* And that is what Dunham ultimately received. RP 428:16-19. In return, he had to assist with the ongoing robbery investigations. Ex. 38. If he failed to do so, Dunham's guilty plea and sentence would be withdrawn, and he would be subject to full prosecution. *Id.*

Shortly after Matthew Dunham signed his plea agreement, Marske and Francis learned that Paul Statler had a cousin named Robert "Bobby" Larson. 625:3–629:15. The detectives also learned where Bobby lived. *Id.* Within an hour of recording this information in their files, the detectives met yet another time with Dunham. *Id.* According to their notes, the detectives again asked Dunham who else was involved in the Dishman and E. Cataldo robberies. *Id.* This time, Dunham said he committed the robberies with Anthony Kongchunji, Paul Statler, Tyler Gassman, and someone named "Andrew" or "Bobby." *Id.* Dunham then thought it over for a moment and said he now believed the fourth person's name was "Bobby." *Id.* For the first time, Dunham also said this person was Paul Statler's cousin and Dunham knew where he lived. *Id.*

The detectives prepared probable cause statements that alleged Robert Larson, Tyler Gassman, and Paul Statler committed the E. Cataldo robbery on April 15, 2008. Exs. 115, 118, 121. The detectives also prepared statements accusing the men of committing the Dishman robbery on April 21, 2008. RP 651:2-21.

After their arrests, Larson, Gassman and Statler agreed to talk to Marske and Francis. RP 649:12–650:9. Each maintained his innocence. *Id.* Larson and Statler later presented the prosecutor with documented

alibis for the E. Cataldo robbery, which allegedly occurred at 10:00 p.m. on April 15, 2008. Exs. 16, 17, 18 at 2:8-15. Larson clocked into work at 9:48 p.m. on April 15, and he remained at work until 6:31 a.m. the following morning. Ex. 29. Statler was at home that evening taking a VICAP test, which is a home breathalyzer exam with video. RP 333:5–334:16, 338:13–339:1; Ex. 30. At 10:01 p.m. on April 15, Statler blew into the VICAP machine while his picture was taken simultaneously. RP 338:13–339:1; Ex. 30. After learning of the alibis, the prosecutor amended the information to allege the E. Cataldo robbery took place on April 17. Exs. 16, 17, 18 at 2:8-15.

On the eve of trial, Anthony Kongchunji agreed to testify that Larson, Gassman, and Statler were innocent. RP 221:24–222:18, 645:2–646:12. The following day, Doug Marske transported Kongchunji to a meeting with the prosecutor. *Id.* Along the way, Marske threatened to have the prosecutor file additional charges against Kongchunji if he testified. *Id.* Kongchunji did not testify, and the men were convicted of the E. Cataldo robbery. RP 221:24–222:18; Exs. 7, 8, 9. Larson was sentenced to 20 years in prison, Gassman to 25.75 years in prison, and Statler to 41.5 years in prison. Exs. 7-9.

The prosecutor also charged Paul Statler and Bryan Bewick with the Selfridge drug-rip robbery. RP 640:7–643:13. On the day of trial in that case, the prosecutor learned there was a problem with Marske's presentation of a photo montage to Selfridge, who purportedly identified Statler. *Id.* Another detective had previously interviewed the dealer and

shown him a montage with Statler's photo, but Selfridge was unable to identify Statler. *Id.* When this and other alibi information came to light, the prosecutor dropped the charges. *Id.* The prosecutor did try Statler, Gassman, and Larson for the Dishman robbery. RP 651:2-21. The jury acquitted. RP 652:14-16; CP 266 n.2.

In 2012, the Innocence Project Northwest and its cooperating counsel brought a CrR 7.8 motion for relief from the judgment in the E. Cataldo case. Exs. 16, 17, 18 at 1:15-22. The criminal court granted the motion, vacating the convictions and ordering a new trial on the basis of significant new exculpatory information that was never presented to the jury due to ineffective assistance of counsel. Exs. 13-18. The State subsequently dismissed all charges without retrial. Exs. 19-21.

In January 2014, Larson, Gassman, and Statler filed a complaint against the State under the Wrongly Convicted Persons Act, chapter 4.100 RCW. CP 3. One year later, the case was tried during a four-day bench trial. CP 402-03. Fifteen witnesses testified, and the court admitted 51 exhibits into the record. CP 402-03; Dkt. No. 12 (RP Index).

The trial court entered judgment in favor of the State. CP 431. Among other things, the court concluded as a matter of law that Larson, Gassman, and Statler failed to prove their convictions were vacated on the basis of significant new exculpatory information. *Id.* The court also concluded as a matter of law that Larson, Gassman, and Statler failed to prove they are actually innocent. *Id.*

Larson, Gassman, and Statler appealed to Division III. The Court of Appeals "reverse[d] the trial court's legal conclusion that 'significant new exculpatory information' must be evidence that was unavailable at trial." *Larson v. State*, ___ Wn. App. ___, 375 P.3d 1096, 1107 (June 28, 2016). The Court of Appeals also "reverse[d] the trial court's legal conclusion that the claimants' evidentiary burden to prove actual innocence is greater than clear and convincing." *Id.* The Court of Appeals remanded the case to the trial court to determine whether the actual innocence requirement is satisfied under the proper standard. *Id.*

IV. ARGUMENT

This Court will review a decision of the Court of Appeals only when the petitioner satisfies one or more of the conditions set forth in RAP 13.4(b). The State argues for review based solely on "substantial public interest." *See* Pet. for Rev. at 9; *see also* RAP 13.4(b)(4). For the reasons that follow, the State's arguments fail. Accordingly, the Court should decline review.

A. The Court of Appeals properly interpreted "significant new exculpatory information" to include information available at trial but never presented to the factfinder.

To prevail on their claims, Larson, Gassman, and Statler were required to establish six elements by clear and convincing evidence. *See* RCW 4.100.060(1)(a)–(e); *see also Larson*, 375 P.3d at 1102. The decision of the Court of Appeals focuses on the fourth and fifth elements. *Larson*, 375 P.3d at 1102. The fourth element requires a claimant to show

the underlying conviction was vacated on the basis of "significant new exculpatory information." RCW 4.100.060(1)(c)(ii). Interpreting the phrase to mean evidence unavailable at the time of trial, the trial court concluded the men failed to satisfy their burden as a matter of law. CP 422-23. The Court of Appeals reversed, holding "that 'new' in the context of 'significant new exculpatory information' must be construed broadly to include information that was available at the criminal trial but was not presented to the fact finder." *Larson*, 375 P.3d at 1104.

The decision of the Court of Appeals is consistent with both the remedial nature of the Wrongly Convicted Persons Act and this Court's interpretation of the same term in a similar remedial statute. As such, the State has failed to raise an issue of substantial public interest.

1. The Wrongly Convicted Persons Act is a remedial statute and must be liberally construed.

In enacting the Wrongly Convicted Persons Act, the legislature "intend[ed] to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration." RCW 4.100.010. The Act is thus remedial in nature. *See* Black's Law Dictionary 1296 (7th ed. 1999) (defining "remedial" as "[a]ffording or providing a remedy; providing the means of obtaining redress"; "[i]ntended to correct, remove, or lessen a wrong").

The Court of Appeals correctly recognized that "remedial statutes are liberally construed to suppress the evil and advance the remedy."

Larson, 375 P.3d at 1103-04 (quoting *Go2net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006)). By interpreting "new" to include information that is available at the criminal trial but never presented to the factfinder, the Court of Appeals has promoted the Act's objectives.

The State's proposal for a narrow interpretation, if adopted, would thwart the Act's goals by precluding many (perhaps the vast majority) of exonerated individuals from obtaining relief. *See id.* at 1104. Exculpatory evidence is often available at trial but withheld from the factfinder for many reasons, including bad defense lawyering, governmental misconduct, incomplete investigative work, improper testing, judicial mistakes, or a combination of these factors.[1] A person wrongfully convicted because of a *Brady* violation,[2] for example, would be denied redress even if he were able to prove his innocence. This is contrary to the Act's primary purpose. *See* RCW 4.100.010.

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[1] *See, e.g.*, *State v. DeSimone*, 839 N.W.2d 660, 662-63 (Iowa 2013) (conviction vacated due to "State's failure to disclose the exculpatory information it had received from [a] witness's employer"); *Baba-Ali v. State*, 975 N.E.2d 475, 477 (N.Y. 2012) (conviction vacated due to "manner in which certain evidently exculpatory evidence had been dealt with, both by the trial prosecutor and by defense counsel"); *Harris v. State*, 828 N.Y.S.2d 463, 464 (N.Y. App. Div. 2007) (criminal court twice failed to hear evidence exonerating defendant); *Fay v. State*, 610 N.E.2d 622, 622 (Ohio Ct. Claims 1988) (conviction vacated when "further investigation" showed others committed the crime).

[2] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment").

2. The decision of the Court of Appeals accords with this Court's decision in *State v. Riofta*.

This Court has already interpreted the phrase "significant new information" in the context of a remedial statute designed to provide relief to persons who may have been wrongfully convicted. *See State v. Riofta*, 166 Wn.2d 358, 361-66, 209 P.3d 467 (2009) ("[e]ach subsection of section .170(2)(a) represents a distinct remedial purpose"). In that case, defendant Alexander Riofta sought DNA testing of "a white hat that was worn by the perpetrator of a shooting for which [Riofta] was convicted." *Riofta*, 166 Wn.2d at 361. The trial court denied the motion on the merits, concluding "Riofta failed to establish the likelihood that the DNA evidence he seeks would demonstrate his innocence." *Id.* at 362. The Court of Appeals affirmed on an alternative ground, holding "Riofta failed to establish the DNA testing could yield 'significant new information' because the white hat was available for testing at trial." *Id.* at 361-62, 364 (emphasis added).

This Court rejected the reasoning of the Court of Appeals, concluding "the statute provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial." *Id.* at 366 (emphasis added). The Court held "Riofta's request for testing of the white hat is not precluded . . . on the basis that it could have been, but was not, tested prior to trial." *Id.* (emphasis added).

The trial court below erroneously followed the reasoning of the intermediate appellate court in *Riofta* and overlooked the contrary conclusion reached by this Court on review. CP 421-22 (quoting *Riofta v. State*, 134 Wn. App. 669, 142 P.3d 193 (2006)). The Court of Appeals correctly recognized the trial court's mistake and reversed. *Larson*, 375 P.3d at 1103.

Moreover, construing "new" broadly for purposes of RCW 10.73.170 but narrowly for purposes of RCW 4.100.060 would lead to absurd results. Assume, for example, that an incarcerated person obtains DNA testing by showing it would provide significant new information—that is, information available at the time of trial but never presented to a jury. If the criminal court subsequently vacated the person's conviction and dismissed the charging documents based on the exculpatory nature of that information, the person would have no recourse under the Wrongly Convicted Persons Act. This, again, would be contrary to the Act's objectives. *See* RCW 4.100.010.

3. The State seeks review on the basis of an irrelevant hypothetical.

In its petition for review, the State repeatedly maintains that construing "new" to include information available at trial will allow a wrongly convicted person to obtain compensation even when the defense has "simply chose[n] not to use [exculpatory information] for strategic or other reasons." Pet. for Rev. at 2. There is no allegation, however, that the defense in this case purposefully withheld the exculpatory information

that led to the vacated convictions. To the contrary, it is undisputed the information was never found because the attorneys representing Larson, Gassman, and Statler "failed to competently investigate the case." Exs. 13-15. Thus, the State is asking this Court to accept review in order to address a hypothetical set of facts.

Even if it were possible to imagine a scenario in which an incarcerated person has his conviction vacated based on exculpatory information the defense strategically withheld, the most prudent course would be to wait for those facts to manifest themselves before accepting review. As this Court has said for years, "without a factual controversy before us we believe that an advisory opinion would not be beneficial to the public or to other branches of government." *DiNino v. State*, 102 Wn.2d 327, 332, 684 P.2d 1297 (1984).

But the hypothetical set of facts offered by the State does not exist in reality. To even get to the question of "significant new exculpatory information," a claimant must first convince a court to reverse or vacate his conviction. RCW 4.100.060(1)(c)(ii). In this case, Larson, Gassman, and Statler moved to vacate their convictions under CrR 7.8(b)(5). That rule "will not apply when the circumstances used to justify the relief existed at the time the judgment was entered." *State v. Smith*, 159 Wn. App. 694, 700, 247 P.3d 775 (2011). Thus, if the claimants had been aware of the exculpatory evidence during their criminal trial, they would have had no basis for relief under CrR 7.8(b)(5). Likewise, if defense counsel had withheld the evidence "for legitimate reasons of trial strategy

or tactics (i.e., for the defendant's ultimate benefit)," there would have been no grounds for concluding counsel was ineffective. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003); *see also State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002) ("If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim . . . [of] ineffective assistance of counsel.").

The decision of the Court of Appeals furthers the remedial objectives of the Act and is in line with this Court's construction of the same term under a similar statute. The State's arguments to the contrary are founded on conjectural facts that find no presence here and are unlikely to occur elsewhere. The Court should decline review.

B. The Court of Appeals properly determined that the trial court applied the wrong burden of proof.

The fifth element of the Wrongly Convicted Persons Act requires a claimant to prove "by clear and convincing evidence" that he "did not engage in any illegal conduct alleged in the charging documents." RCW 4.100.060(1)(d). It is well established in Washington that "clear and convincing" means "the fact at issue must be shown to be 'highly probable.'" *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705 (2014) (quoting *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)). Instead of applying this standard, however, the trial court applied the most stringent standard found in federal habeas corpus law. CP 425, 430 (quoting and then applying *Herrera v. Collins*, 506 U.S. 390 417 (1993)). Specifically, the court concluded as a matter of law that Larson, Gassman, and Statler

failed to prove it was impossible for them to have committed the alleged crime over a period of several weeks. CP 428-29. The Court of Appeals correctly reversed, holding "the trial court erred" by holding Larson, Gassman, and Statler to "the heightened burden of proof requirement for personal restraint petitions and writs of habeas corpus." *Larson*, 375 P.3d at 1106-07.

The language of the Act is unambiguous: each element "must [be] show[n] by clear and convincing evidence." RCW 4.100.060(1). Indeed, the State agrees that "clear and convincing" is the proper burden of proof. *See* Pet. for Rev. at 15-20. Thus, there is no issue of substantial public interest for the Court to review regarding the standard for proving actual innocence.

The State attempts to circumvent this by asserting that in relying on federal habeas corpus law, the trial court was focused not on the burden of proof but on the definition of "actual innocence." *See id.* at 16 (arguing "actual innocence" is "a legal term of art" and "[i]t was proper for the trial court to consider cases discussing the meaning of 'actual innocence' in other contexts"). As the trial court's ruling unequivocally shows, however, the court turned its attention to federal law in order to "expand[] on the plaintiffs' burden under this element." CP 424 (emphasis added). Utilizing precedent in habeas corpus cases, the court held that "[t]he standard for establishing a freestanding claim of actual innocence is 'extraordinarily high' and the showing for a successful claim would have to be 'truly persuasive.'" CP 425 (quoting *Herrera*, 506 U.S. at 417)

(internal marks and brackets omitted). The court then applied this test in concluding that Larson, Gassman, and Statler "have not met the[] extraordinarily high and truly persuasive standard required for a claim of actual innocence." CP 430.[3]

Furthermore, the trial court had no reason to look to federal law for an interpretation of "actual innocence," as the legislature explicitly defined the phrase in the Act. *See* RCW 4.100.020(2)(a) ("For purposes of this chapter, a person is . . . '[a]ctually innocent' of a felony if he or she did not engage in any illegal conduct alleged in the charging documents."). It is only "[w]here a statute fails to define a term . . . [that] prior judicial use of a term will be considered . . . ." *Gimlett v. Gimlett*, 95 Wn.2d 699, 701, 95 P.2d 450 (1981); *see also State v. Torres*, 151 Wn. App. 378, 212 P.3d 573 (2009) ("When a statute fails to define a term, the term is presumed to

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[3] The State suggests the trial court followed the "clear and convincing" standard applied in the case of *In re Personal Restraint of Carter*, 172 Wn.2d 917, 263 P.3d 1241 (2011). That case, however, involved a "gateway actual innocence claim in the sentencing phase." *Carter*, 172 Wn.2d at 924. This Court has clarified the difference between a gateway claim of innocence and a "freestanding" claim of innocence:

> The applicable test differs depending on the nature of the habeas applicant's innocence claim. If the petitioner is raising a freestanding constitutional claim . . . then federal habeas relief may be available only where . . . the petitioner can meet the 'extraordinarily high' burden of showing actual innocence. *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). Alternatively, where the petitioner is alleging actual innocence to avoid a procedural bar that prevents judicial review of an alleged constitutional error, the petitioner's claim takes the form of a 'gateway' actual innocence claim. *Schlup v. Delo*, 513 U.S. 298, 314, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Id. at 923-24 (continuing to discuss the two "subcategories" of gateway claims and the burdens of proof applicable to each). As noted above, the trial court applied the federal habeas corpus standard for a freestanding claim of actual innocence. CP 425, 430.

have its common law meaning and the Legislature is presumed to know the prior judicial use of the term.") (quoting *State v. McKinley*, 84 Wn. App. 677, 684, 929 P.2d 1145 (1997)).

The decision of the Court of Appeals follows the plain language of the Act and the well-established "highly probable" test for clear and convincing evidence. The State's arguments to the contrary fail to raise an issue of substantial public interest. This Court should decline review.

C. The trial court should have an opportunity to determine actual innocence under the proper evidence standard.

Because the judgment below was based on an erroneous burden of proof, the Court of Appeals remanded the case to the trial court "to determine whether the claimants have proved by clear and convincing evidence they are actually innocent." *Larson*, 375 P.3d at 1107. In its petition, the State asks this Court to sidestep the trial court and decide actual innocence in the first instance. Pet. for Rev. at 17-20. The Court should decline the invitation.

The trial court was the finder of fact in this non-jury case. *Id.* After observing a four-day trial and reviewing the admitted materials, the court determined the claimants presented "credible evidence about the dates and times they were not available to commit the robber[y]." CP 429. But because the court applied the legally incorrect (and "extraordinarily high") burden of proof applicable in certain habeas corpus cases, the court concluded it was unable to grant relief to the men. CP 430. The court's reasoning can be summed up as this: Larson, Gassman, and Statler came

close but failed to prove it was impossible for them to have engaged in the alleged conduct because, for example, the robbery "may well have taken place prior to Mr. Larson's work commitment of 9:45 p.m. and Mr. Statler's breath testing of 10:00 p.m." CP 429 (emphasis added).

Under Washington law, "[the] court does not need to rule out all possibilities" in order to conclude that Larson, Gassman, and Statler have satisfied their burden. *Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705 (2014). Rather, the court need only find their innocence is "highly probable"—in other words, that it is highly probable they did not engage in the conduct alleged. *Id.* This is the proper application of the clear and convincing standard. *See id.*

The State's request for this Court to assume the role of the trial court should be rejected.

V. CONCLUSION

The State fails to demonstrate an issue of substantial public interest for review. The Court has already interpreted "new" in the context of a remedial statute aimed at providing relief to persons who may have been wrongfully convicted, and it is undisputed that the burden of proof under chapter 4.100 RCW is clear and convincing evidence. Accordingly, the Court should deny the State's petition and allow the trial court below to apply the correct evidentiary standard to the facts before it.

RESPECTFULLY SUBMITTED AND DATED this 29th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that on August 29, 2016, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Richard L. Weber Email: rickw2@atg.wa.gov Melanie Tratnik Email: melaniet@atg.wa.gov ATTORNEY GENERAL'S OFFICE Criminal Just Division 800 Fifth Avenue, Suite 200 Seattle, Washington 98104-3188	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Hand Delivered via Messenger Service Overnight Courier Facsimile Electronic Service

Attorneys for Defendant/Respondent State of Washington

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of August, 2016.

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Subject: Documents to be filed with the Supreme Court (Larson, et al. v. State of Washington - Case No. 93421-5)

Attached please find Plaintiffs/Respondents Robert E. Larson, Tyler W. Gassman and Paul E. Statler's Response to Petition for Review, to be filed in *Larson, et al. v. State of Washington*, Supreme Court Case No. 93421-5.

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