No. 331792-III

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

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

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON,

Defendant/Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In 2009 Robert Larson, Tyler Gassman, and Paul Statler were wrongly convicted of a crime they did not commit. Their convictions were based on the false accusations and testimony of a teenager who admitted his own role in the crime and sought to avoid the consequences by implicating Larson, Gassman, and Statler. The men spent more than four years wrongfully imprisoned before the criminal court vacated their convictions and ordered new trials based on significant new exculpatory information. The State subsequently dismissed all charges.

Larson, Gassman, and Statler brought civil claims against the State under the Wrongly Convicted Persons Act, chapter 4.100 RCW. Enacted in 2013, the Act is a remedial statute that allows exonerated individuals to obtain relief for the injustice of being wrongfully stripped of their liberty. During a four-day bench trial—the first trial conducted under the Act—the men established the elements of their claims with clear and convincing evidence. The court, however, entered judgment for the State.

The trial court's decision is based on several erroneous legal conclusions. Among other things, the trial court wrongly interpreted "significant new exculpatory information" to mean information unavailable at trial. The trial court relied on a Court of Appeals decision that had been reversed by the Washington Supreme Court, which held significant new information includes information available at trial but never presented to the fact finder. Moreover, the trial court wrongly

interpreted the Act to exempt exonerated individuals from coverage if they have other available legal remedies, even though the statute explicitly requires claimants to waive all other remedies—a requirement that would be unnecessary if the trial court's interpretation were correct.

The trial court also wrongly concluded that Larson, Gassman, and Statler failed to prove the charging documents were dismissed on the basis of significant new exculpatory information even though the issue was undisputed and, under the plain language of the statute, the reason for dismissal is immaterial because a new trial was ordered.

Most importantly, the trial court erred in concluding as a matter of law that Larson, Gassman, and Statler failed to prove their actual innocence clearly and convincingly. In reaching this conclusion, the court wrongly rejected the well-established "highly probable" standard and erroneously adopted an "impossibility" standard imposed on convicted individuals in habeas corpus proceedings. The trial court also erred by requiring Larson, Gassman, and Statler to provide alibi evidence for an entire five-week period even though the undisputed evidence established both that the crime could have occurred only on April 4 or 15, 2008, and that the men could not have participated.

In conjunction with these legal errors, the trial court ignored substantial evidence proving Larson, Gassman, and Statler are actually innocent of the charges filed against them. For the following reasons, this Court should reverse the decision of the trial court and remand with instructions to enter judgment in favor of Larson, Gassman, and Statler.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Larson, Gassman, and Statler proved their convictions were vacated on the basis of significant new exculpatory information, and the trial court erred in concluding otherwise.

2. The trial court erred in holding that for Larson, Gassman, and Statler to prevail, the State must have dismissed the underlying charging documents expressly on the basis of significant new exculpatory information.

3. The trial court erred by failing to give due consideration to difficulties of proof caused by the unavailability of witness Eric Weskamp.

4. Larson, Gassman, and Statler proved by clear and convincing evidence that they are actually innocent, and the trial court erred in concluding otherwise.

5. Substantial evidence demonstrates the crime must have occurred on April 4 or 15, 2008, and the trial court erred in finding otherwise. (Finding of Fact 10.)

6. The trial court erred in finding "limited evidence was presented that was not put before the jury in the criminal trial." (Finding of Fact 44.)

B. Issues Pertaining to Assignments of Error

1. Does "significant new exculpatory information" in RCW 4.100.060(1)(c)(ii) include evidence that was available at the time of the

criminal trial but never presented to the fact finder? Yes. (Assignment of Error 1.)

2. Can a claimant satisfy the "significant new exculpatory information" requirement when there were additional grounds for the criminal court's decision to vacate the conviction and order a new trial? Yes. (Assignment of Error 1.)

3. Can a claimant prevail on a wrongful conviction claim even when there are other potential remedies available under the law? Yes. (Assignment of Error 1.)

4. Where a claimant's conviction was vacated and a new trial ordered on the basis of significant new exculpatory information but the charging document was subsequently dismissed, may the claimant prevail without showing the dismissal was also based on significant new exculpatory information? Yes. (Assignment of Error 2.)

5. Should the trial court have admitted the recorded interview of Eric Weskamp under the relaxed evidentiary standard in RCW 4.100.060(3)? Yes. (Assignment of Error 3.)

6. Does "clear and convincing evidence" in RCW 4.100.060(1) mean evidence indicating that the fact to be proved is highly probable? Yes. (Assignment of Error 4.)

7. Are the stringent burdens placed on convicted individuals in habeas corpus proceedings inapplicable to exonerated individuals pursuing claims under the Act? Yes. (Assignment of Error 4.)

8. If the evidence presented at trial demonstrated the alleged crime must have occurred on April 4 or 15, 2008, was it improper to require Larson, Gassman, and Statler to provide alibi evidence for other dates? Yes. (Assignments of Error 4, 5.)

9. Did Larson, Gassman, and Statler prove it is highly probable they are actually innocent of the illegal conduct alleged in the charging documents? Yes. (Assignments of Error 4, 5, 6.)

III. STATEMENT OF THE CASE

A. Statement of Facts

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. Another was armed with a baseball bat. RP 465:8-9. Bandannas covered the intruders' faces. RP 425:17-19.

Holding Turner and Hall hostage, the masked men searched the apartment for drugs. RP 463:4-13, 465:6-9, 466:6-9. During the robbery, the bandanna on one intruder's face slipped down. RP 465:25– 466:5. Turner and Hall recognized the intruder 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 vehicle used in the robbery, a red Nissan pickup belonging to the Dunhams' mother. RP 463:16-19, 466:16-20, 613:20-23. The police found the stolen purse and laptop in a nearby dumpster. RP 468:17–469:3, 599:7-9. The police also found other evidence linking the four men to the Turner/Hall 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.

Matthew Dunham repeatedly lied to the police about his involvement in the robbery. RP 472:1–474:25. For example, the officer asked Matthew Dunham whether the four men left Nick Smith's apartment that evening, and Dunham said no. RP 472:16-21. That was a lie. *Id.* The officer asked Matthew Dunham whether he had gone to the apartment complex where Turner and Hall lived. RP 472:22-25. Dunham lied again and said no. *Id.*

After learning Larry Dunham and Nick Smith had confessed, the officer questioning Matthew Dunham asked whether he left out any important information in his answers. RP 473:1-10. Matthew Dunham

lied again, saying he had told the officer everything he could remember. *Id*. The officer then started to confront Matthew Dunham with the information obtained from Larry Dunham and Nick Smith. RP 473:1–474:25. But the lies continued. *Id*. Matthew Dunham repeatedly changed his story and lied about numerous aspects of the robbery. *Id*.

The Turner/Hall robbery was the last in a string of similar crimes: it was the third "drug-rip" robbery in Spokane in just over a week and the fifth that year. 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 involved a forced entry or assault. *Id*. Each robbery involved a shotgun. *Id*. Each robbery involved a red pickup as the getaway car. *Id*.

Matthew Dunham was only 17 years old when he was arrested. RP 475:3-8. He was booked and sent to juvenile detention. *Id*. Within two days, however, he was transferred to county jail. RP 475:5-10. Facing up to 40 years in prison, Matthew Dunham was scared. RP 475:20–476:5, 476:11-18.

Soon a friendly face appeared: that of Anthony Kongchunji. RP 476:19–477:1. The accomplices were housed in the same section of the jail. *Id*. Over the next several weeks, Kongchunji and Dunham talked every day. RP 218:1–219:5, 220:1-13, 477:2-24. To obtain leniency from

the State, the two conspired during this time to frame others as accomplices in the series of robberies. *Id.*

Spokane detectives Doug Marske and William Francis investigated the string of drug-rip robberies. RP 608:1-6. Two months before the Turner/Hall incident, Marske told Francis he suspected Paul Statler for one of the robberies. RP 638:22–639:2, 642:7-10. A drug dealer named Chris Selfridge, a victim in the robbery, told Marske he heard a rumor that Paul Statler and Bryan Bewick may have been involved. RP 639:3-20.

When Marske relayed this information to Francis, Francis said Statler was involved in a pawnshop robbery with a person by the name of Tyler Gassman in 2003, when the men were juveniles. RP 16:2-11, 633:2-15, 638:22–639:2. Marske and Francis never sought a search warrant for the home of either Statler or Gassman. RP 624:14-19. Instead, Marske directed the Department of Corrections to search Statler's home. RP 632:17–636:20. The search uncovered nothing related to the robberies. RP 634:7-19. Nevertheless, Marske stayed locked in on Statler. RP 638:18–640:6, 642:19-25.

A month after his arrest, Matthew Dunham met with Marske and Francis for a "free talk." RP 607:10–610:10. Dunham told the detectives he committed the Turner/Hall robbery. RP 564:23–568:16. He also told the detectives he 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

other people. RP 616:10-18. Specifically, he said he committed the Dishman robbery with Anthony Kongchunji, Paul Statler, Tyler Gassman, and someone named "Andy." *Id*.

Five days later, Matthew Dunham met again with Marske and Francis. RP 616:25–620:13. Dunham told the detectives he was also involved in a drug-rip robbery that occurred on E. Cataldo. *Id*. The E. Cataldo robbery was substantially similar to the Turner/Hall and Dishman robberies. RP 612:5–613:23, 619:18–620:13. It occurred at night and involved an assault on known drug dealer named Eric Weskamp. *Id*. The suspects wore dark clothes and bandannas, and one had a shotgun. RP 463:16–464:25, 613:4-7, 619:18–620:13. In each case, the robbers left in a red Nissan pickup. RP 613:11-23.

Dunham told Marske and Francis that 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*. The detectives claimed they tried to identify "Andrew," but their reports had no information about his race, height, address, or relationship to Dunham. RP 617:20–618:11.

Within a week of the second meeting, Matthew Dunham obtained a plea agreement with the prosecutor. Ex. 38. Dunham 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 he ultimately received. RP 428:16-19. In return, Matthew Dunham had to assist the detectives in their ongoing

investigations into the robberies. Ex. 38. If he failed to do so, Dunham's guilty plea and sentence would be withdrawn, and he would return to court for full prosecution. *Id*.

Shortly after Matthew Dunham entered into his plea agreement, Marske and Francis learned Paul Statler had a cousin named Robert "Bobby" Larson. 625:3–629:15. The detectives also learned where Bobby lived. *Id*. Within one hour of recording this information in their files, the detectives met yet another time with Dunham. *Id*. According to their notes, the detectives asked him again who else was involved in the Dishman and E. Cataldo robberies. *Id*. Dunham answered that 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*. The detectives asked Dunham additional questions in an effort to identify Bobby, and Dunham told them Bobby is Paul Statler's cousin. *Id*. Dunham also told the detectives he knew where Bobby lived. *Id*.

The detectives prepared probable cause statements alleging Robert Larson, Tyler Gassman, and Paul Statler committed the E. Cataldo robbery on April 15, 2008 at 10:00 p.m. in the evening. 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 date of the E. Cataldo robbery, which allegedly occurred on April 15, 2008, at 10:00 p.m. Exs. 16, 17, 18 at 2:8-15. Larson clocked into work at 9:48 p.m. the evening of April 15, 2008, 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 in the E. Cataldo case, 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*. On the way, Marske threatened to have the prosecutor file additional charges against Kongchunji if he testified at the trial of Larson, Gassman, and Statler. *Id*. As a result, Kongchunji did not testify, and Larson, Gassman, and Statler were convicted of the E. Cataldo robbery. RP 221:24–222:18; Exs. 7, 8, 9. Robert Larson was sentenced to 20 years in prison. Ex. 7. Tyler Gassman was sentence to 25.75 years in prison. Ex. 8. And Paul Statler was sentenced to 41.5 years in prison. Ex. 9.

The prosecutor also charged Paul Statler and Bryan Bewick with Selfridge drug-rip robbery. RP 640:7–643:13. On the day of trial, the

prosecutor learned there was a problem with a photo montage Marske had presented to Selfridge and from which Selfridge purportedly identified Statler. *Id*. The day before Marske met with Selfridge, another detective interviewed Selfridge. *Id*. That detective had also heard the rumor about Statler, and he presented Selfridge with a photo montage that included Statler. *Id*. Selfridge, however, was unable to identify Statler in the first photo montage. *Id*. When this and other alibi information came to light, the prosecutor dropped the charges against Statler and Bewick. *Id*.

The prosecutor also tried 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 on the basis of significant new exculpatory information and ordering a new trial. Exs. 13-18. The State subsequently dismissed all charges without retrial. Exs. 19-21.

In 2013, Detective Marske was the subject of an internal investigation regarding his work on the cases that led to the wrongful convictions of Larson, Gassman, and Statler. RP 630:8-14. The investigator found numerous inaccuracies in Marske's probable cause statements. RP 630:8-14, 655:22–656:21. The investigator determined Marske made assumptions and mistakes that negatively impacted the investigation. *Id*. The investigator found Marske accepted the statements

of witnesses who had obvious credibility issues and reasons to be untruthful but made little or no effort to confirm their veracity. *Id*. Marske received a written reprimand. *Id*.

B. Procedural Background

In January 2014, Larson, Gassman, and Statler filed a complaint against the State for relief under the wrongful conviction statute. CP 3. Approximately 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. 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*. Though the issue was not in dispute, the court also concluded as a matter of law that the claimants failed to prove the charges against them were dismissed on the basis of significant new exculpatory information. *Id*. Finally, the trial court concluded as a matter of law that Larson, Gassman, and Statler failed to prove their actual innocence by clear and convincing evidence. *Id*.

A copy of the trial court's decision is attached to this brief as Appendix A. A copy of the Act is attached as Appendix B.

IV. ARGUMENT

A. Summary of the Argument

The wrongful conviction statute, chapter 4.100 RCW, allows a person who has been wrongly convicted of a felony and imprisoned as a result to bring a civil suit against the State for money damages and other compensation. Among other things, a claimant must show the following by clear and convincing evidence to obtain a favorable judgment: (1) that the claimant's conviction was reversed or vacated on the basis of significant new exculpatory information; (2) that if a new trial was ordered, the claimant was found not guilty or the charging document was dismissed without retrial; and (3) that the claimant did not engage in any illegal conduct alleged in the charging documents.

The trial court erred in concluding 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. As the Washington Supreme Court held in a decision overturning the ruling upon which the trial court relied, "significant new exculpatory information" includes information that was available at the time of trial but never presented to the original fact finder. This construction furthers the remedial objective of the Act, which must be liberally construed.

The trial court also erred in concluding as a matter of law that Larson, Gassman, and Statler were unable to meet the significant new exculpatory information requirement. In a written ruling, the criminal court explicitly based its decision on such information.

The trial court also erred in concluding as a matter of law that Larson, Gassman, and Statler are excluded from the Act's coverage because they have another remedy available under the law. Exemptions from remedial legislation are narrowly construed, and the court's conclusion is at odds with the Act. Specifically, the statute requires claimants to waive any and all other remedies, which would be unnecessary if the court's interpretation were correct. In addition, the focus of the Act is on the innocence of wrongly convicted persons rather than the culpability of the individuals or entities whose conduct resulted in those wrongful convictions.

The trial court also erred in concluding as a matter of law that Larson, Gassman, and Statler were required to prove the State dismissed the charges against them on the basis of significant new exculpatory information. This element of the Act was undisputed by the State. Furthermore, under the plain language of the statute, it is unnecessary for a claimant to prove the grounds on which the State dismissed the charging document if a new trial was ordered. Otherwise, the basis for the dismissal would be in the State's control, which is an absurd result given the State's conflicting interests. Even if it were necessary for Larson, Gassman, and Statler to prove the State dismissed the charges against them on the basis of significant new exculpatory information, the record before the trial court satisfied this requirement.

The trial court also erred by failing to give due consideration to the difficulties of proof caused by the unavailability of witness Eric

Weskamp. The Washington legislature has explicitly directed that in ruling on the admissibility of evidence presented in support of a claim under the wrongful conviction statute, a trial court must consider such difficulties. It is within the legislature's purview to relax the standards for the admission of hearsay evidence, and ER 802 allows for a statutory override of the usual hearsay rules. The trial court's decision to strictly apply the hearsay exception requirements in ER 804(b)(1) renders the directive meaningless and contradicts the Act's underlying policy objectives. By applying the wrong legal standard, the trial court abused its discretion in ruling on the State's motion to exclude the recorded interview of Weskamp. Given the substantial burden of proof on Larson, Gassman, and Statler, the relevance of the statements Weskamp made, and the authenticity of the recording, the evidence should have been admitted.

The trial court erred in concluding as a matter of law that Larson, Gassman, and Statler failed to prove they are actually innocent by clear and convincing evidence. "Clear and convincing" means the fact at issue must be shown to be highly probable. The court failed to utilize this standard and, instead, adopted standards that apply to individuals seeking to overturn their convictions in habeas corpus proceedings. Specifically, the court erroneously held the men to a burden of proving it was impossible for them to have committed the robbery. Such a standard is inconsistent with both the plain language of the Act and the liberal construction the statute is afforded.

The trial court also erred by requiring Larson, Gassman, and Statler to provide alibi evidence for various dates even though there was no evidence the robbery could have occurred on those dates. The testimony and exhibits admitted at trial fixed the robbery as occurring after dark on either April 4 or April 15, 2008. Larson, Gassman, and Statler presented uncontroverted evidence that they were elsewhere on both dates. This evidence satisfied their burden of proving it is highly probable they did not engage in the alleged conduct. Additional evidence further proves they are actually innocent.

B. Standards of Review

Statutory interpretations are reviewed de novo. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

Conclusions of law are also reviewed de novo. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons." *Id*. at 668-69 (internal marks and citation omitted).

Findings of fact are reviewed for substantial evidence. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 352, 172 P.3d 688 (2007). Substantial evidence is evidence sufficient to persuade a fair-minded,

rational person of the finding's truth. *Id*., 162 Wn.2d at 353. A trial court's findings of fact must justify its conclusions of law. *Id*.

C. Larson, Gassman, and Statler Proved Their Convictions Were Vacated on the Basis of Significant New Exculpatory Information, and the Trial Court Erred in Concluding Otherwise

To prevail under the wrongful conviction statute, Larson, Gassman, and Statler were required to establish several elements by clear and convincing evidence. *See* RCW 4.100.060(1)(a)–(e). Only three are in dispute. The first is that the convictions were vacated on the basis of "significant new exculpatory information." RCW 4.100.060(1)(c)(ii). Interpreting this phrase to mean evidence that was 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. For the following reasons, the trial court erred.

1. "Significant new exculpatory information" includes evidence available at the time of the criminal trial but never presented to fact finder

The phrase "significant new exculpatory information" is undefined in the Act, and there is no case law interpreting the provision. In light of this, the trial court relied on a Court of Appeals decision construing a similar phrase in a different statute. CP 422 (citing *Riofta v. State*, 134 Wn. App. 669, 683-84, 142 P.3d 193 (2006)). In *Riofta*, Division Two held that for purposes of a post-conviction motion for DNA testing, "significant new information" means information from evidence "unavailable at trial." 134 Wn. App. at 684 (interpreting RCW

10.73.170(2)(a)(iii)). Adopting this definition, the trial concluded as a matter of law that Larson, Gassman, and Statler failed to establish the requirement set forth in RCW 4.100.060(1)(c)(ii) because "the evidence cited by [the criminal court] in granting the motion to vacate the judgments of convictions is evidence that was available at the time of the criminal trial but went undiscovered by trial counsel." CP 422.

The trial court's conclusion is erroneous for two reasons. First, the Washington Supreme Court overruled Division Two on this very issue. *See State v. Riofta*, 166 Wn.2d 358, 365-66, 209 P.3d 467 (2009). Specifically, the Supreme Court held "that Riofta's request for testing . . . is not precluded . . . on the basis that it could have been, but was not, tested prior to the trial." *Riofta*, 166 Wn.2d at 366 (emphasis added). Noting "[e]ach subsection of [RCW 10.73.170(2)(a)] represents a distinct remedial purpose," the Supreme Court concluded "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.*; *see also State v. Thompson*, 155 Wn. App. 294, 300-301, 229 P.3d 901 (2010), *aff'd* 173 Wn.2d 865, 271 P.3d 204 (2012) (evidence satisfied "significant new information" requirement even though available at trial).

Second, the trial court's conclusion fails to advance the remedial objective of the Act. *See* RCW 4.100.010. Washington courts "liberally" construe a remedial statute "in order to effect the remedial purpose for

which the Legislature enacted the statute." *In re Myers*, 105 Wn.2d 257, 267, 714 P.2d 303 (1986); *see also Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 882, 154 P.3d 892 (2007) (remedial statutes "are to be liberally construed in favor of the beneficiary"); *Go2net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006) ("remedial statutes are liberally construed to suppress the evil and advance the remedy") (citation omitted). The remedial purpose of the Act is "to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives" and to "help address the unique challenges faced by the wrongly convicted after exoneration." RCW 4.100.010.

If adopted, the trial court's interpretation of "significant new exculpatory information" would thwart, rather than advance, this goal because many (perhaps even the vast majority) of exonerated individuals would be barred from obtaining relief. Exculpatory evidence is often available at trial but withheld from the fact finder for numerous reasons, including bad defense lawyering, governmental misconduct, incomplete investigative work, improper testing, judicial mistakes, or a combination of these factors.[1] The Act is a remedial, no-fault statute, and the focus is

[1] *See, e.g., State v. DeSimone*, 839 N.W.2d 660, 662-63 (Iowa 2013) (conviction vacated because of "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 based on "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 that exonerated defendant); *Fay v. State*, 610 N.E.2d 622, 622 (Ohio Ct. Claims 1988)

on innocence. That the exculpatory evidence was available at the time of trial but never presented has no bearing on this determination.

2. A claimant can satisfy the "significant new exculpatory information" requirement even if there were additional grounds for the decision to vacate the conviction

In holding Larson, Gassman, and Statler failed to establish their convictions were vacated on the basis of "significant new exculpatory information," the trial court concluded as a matter of law that "the single reason for the plaintiffs' wrongful convictions was the deficiencies of trial counsel." CP 422. This conclusion is erroneous.

When it vacated the convictions of Larson, Gassman, and Statler, the criminal court explicitly based its decision on the significant new exculpatory information that post-conviction counsel presented. Exs. 16, 17, 18. That information included:

- "Eric Weskamp's work records," which the criminal court found "corroborate[] that the crime occurred on April 15th, when Larson was clocked in at work." Exs. 16, 17, 18 at 4:11-19, 7:15-16; *see also* CP 412 & n.2, 413, 427 (concluding "Weskamp's time card proves that the robber[y] could not have occurred on April 17, 2008, as alleged in the amended information").
- "[P]hone records" of Matt Dunham, which the criminal court found "raise significant questions about the State's account of the crime and the witnesses' version of events" since Mr. Dunham—the State's star witness—testified he did not know any of the victims, but the records showed he was actually in

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(conviction vacated because "further investigation led to proof that other individuals committed the crime").

communication with them. Exs. 16, 17, 18 at 4:21–5:8; *see also* CP 412, 413 & n.3, 427 (concluding Dunham's phone records "would have assisted trial counsel in impeaching his credibility").

- "[T]estimony of [Shane] Neilson," which the criminal court found refutes "the impression . . . Mr. Statler was 'in the know' about the April 23 robbery" or acted as an "accomplice in other crimes." Exs. 16, 17, 18 at 5:10-18; *see also* CP 412, 413 & n.4, 427 (concluding Neilson's testimony would contradict evidence implicating Statler).

The criminal court referred to this evidence as "[s]trong, credible alibi evidence" and "critical information" of an "exculpatory" nature. Exs. 16, 17, 18 at 4:18-19, 5:7, 7:6-8. Moreover, the court concluded the evidence established "prejudice" to Larson, Gassman, and Statler because it "undermin[ed] confidence in the outcome of the trial." Exs. 16, 17, 18 at 7:18-19, 8:1-2. Thus, the criminal court vacated the convictions on the basis of significant new exculpatory information.

This significant new exculpatory information led to the criminal court's finding of ineffectiveness based on defense counsel's failure to investigate. Indeed, without the new information, there would have been no finding of error on the part of defense counsel, and the convictions would have stood. Stated differently, significant new exculpatory information was the foundation of the criminal court's decision to vacate the convictions. This is the very definition of "basis." *See* Oxford English Dictionary 985 (2d ed. 1989) (defining "basis" as "[t]hat by or on which anything immaterial is supported or sustained; a foundation, support").

Courts in other jurisdictions have reached similar conclusions, recognizing exculpatory information is often presented because of legal errors such as ineffective assistance of counsel or prosecutorial misconduct. In *Guzman v. Commonwealth*, for example, the Supreme Judicial Court of Massachusetts "interpret[ed] one of the eligibility provisions of the . . . Massachusetts Erroneous Convictions Law, which provides legal redress to certain individuals who can show that they have been wrongfully convicted of a felony and incarcerated." 937 N.E.2d 441, 442 (Mass. 2010). The persons eligible to obtain relief include "those who have been granted judicial relief by a state court of competent jurisdiction, *on grounds which tend to establish the innocence* of the individual . . . ." *Guzman*, 937 N.E.2d at 443 (emphasis in original) (quoting Mass. Gen. Laws ch. 258D, § 1(B)(ii) (2004)). Noting "[t]he term 'grounds' refers to 'the foundation or basis on which knowledge, belief, or conviction rests," the Supreme Judicial Court found the phrase at issue "is properly understood to mean judicial relief on 'grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime.'" *Id*. at 447 (citations omitted).

In the criminal case out of which *Guzman* arose, the court vacated the defendant's conviction and granted a new trial because defense counsel's conduct "constituted ineffective assistance of counsel that prejudiced [defendant's] right to a fair trial by causing the exclusion of testimony crucial to his defense of mistaken identity." *Id*. at 448. In the subsequent civil case, the trial judge concluded as a matter of law that the

claimant "was not eligible under the statute 'because the charges against him were not dismissed on grounds which tend to show innocence.'" *Id*. at 449. The Supreme Judicial Court reversed, holding:

> Although presented in the context of a claim of ineffective assistance of counsel, the relief granted to [defendant] rested on the assumption, articulated by the trial judge, that the erroneously omitted evidence was probative of the conclusion that the culprit was someone else.

Id. at 449-50; *see also Coakley v. New York*, 640 N.Y.S.2d 500, 500 (N.Y. App. Div. 1996) (claimant satisfied requirement that conviction be vacated based on new evidence "notwithstanding the fact that the conviction was also vacated on grounds of ineffective assistance of counsel").

Significant new exculpatory information was the foundation for the criminal court's decision to vacate the convictions of Larson, Gassman, and Statler because their "counsel's ineffective assistance took the form of depriving [the men] of the introduction of evidence tending to establish [their] actual innocence." *Guzman*, 937 N.E.2d at 450 n.20. Thus, the significant new exculpatory information requirement of RCW 4.100.060(1)(c)(ii) is satisfied.

3. A claimant can prevail under the Act even if there are other potential remedies available under the law

In ruling that Larson, Gassman, and Statler are not entitled to compensation under the Act, the trial court concluded as a matter of law that the men are excluded from the Act's coverage because they have "a[nother] remedy available under the law—legal malpractice." CP 422.

The court based this conclusion on a determination that "[t]he Legislature's intent in passing the Wrongly Convicted Person statute is to provide a remedy to those that would otherwise not have a remedy under the law." *Id*. The court's conclusion is erroneous for three reasons.

First, "[e]xemptions from remedial legislation . . . are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000). The "Intent" section of the Act starts with this statement: "The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized." RCW 4.100.010. The section concludes: "The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and to help address the unique challenges faced by the wrongly convicted after exoneration." *Id*.

If the legislature meant to provide relief only to those wrongly convicted persons who have no other remedy available to them, it easily could have said as much. Moreover, the legislature could have added an element requiring claimants to demonstrate they lack any alternative remedy. Neither of these things occurred. To the contrary, the legislature specified: "[a]s a requirement of making a request for relief under [the Act], the claimant waives <u>any and all other remedies</u>, causes of action, and other forms of relief or compensation against the state . . . <u>related to the claimant's wrongful conviction and imprisonment</u>." RCW 4.100.080(1)

(emphasis added). Such a waiver is unnecessary if claimants are exempt from coverage when other available remedies exist. The legislature's recognition that "[a] majority of those wrongly convicted in Washington state have no remedy available" is insufficient to support the categorical exemption that the trial court read into the statute. RCW 4.100.010.

Second, the Act focuses on the innocence of wrongly convicted persons rather than the culpability of the individuals or entities whose conduct resulted in those wrongful convictions. Indeed, nothing requires the claimant to prove that a certain individual or entity caused the wrongful conviction. *See* RCW 4.100.060(1). In this regard,

> [the] statute is not designed to compensate a claimant for a tort actually committed by the state, but rather views the state as the most appropriate party to assume liability for an unjust conviction. A criminal prosecution is, after all, brought in the name of the "People of the State," a conviction is for an act made criminal by state law usually with the imprimatur of a state court, and a convicted person generally is confined in a state correctional facility.

Deborah F. Buckman, *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R.6th 305 § 2 (2010).

Third, the trial court did not analyze whether Larson, Gassman, and Statler truly have viable legal malpractice claims. For example, the court did not identify a basis for tolling the statute of limitations, which is three years for legal malpractice and which has been held to accrue on the

date an adverse judgment is entered. *See* RCW 4.16.080(3); *Richardson v. Denend*, 59 Wn. App. 92, 98, 795 P.2d 1192 (1990).

Chapter 4.100 RCW is a remedial statute designed to redress the "tremendous injustice" of a wrongful conviction in Washington State, whatever the cause. Larson, Gassman, and Statler have satisfied the requirement of demonstrating their convictions were vacated on the basis of significant new exculpatory information, and they are within the statute's coverage. Thus, the trial court's ruling must be reversed.

D. The Trial Court Erred in Concluding the Charging Documents Must Be Dismissed on the Basis of Significant New Exculpatory Information

The wrongful conviction statute requires a claimant to prove that

> [t]he claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information **or**, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed.

RCW 4.100.060(1)(c)(ii) (emphasis added).

Overlooking the disjunctive conjunction in this provision, the trial court interpreted the statute as requiring Larson, Gassman, and Statler to prove the "orders dismissing the charges [against them] were based upon 'significant new exculpatory information.'" CP 419. The court then concluded as a matter of law that "the orders dismissing the charges were not based upon significant new exculpatory information, but rather upon

'insufficient evidence to proceed with trial.'" *Id*. at 423 (quoting Exs. 19, 20, 21). For the reasons that follow, the trial court erred.

First, this element of the Act was among the undisputed issues listed in the Trial Management Joint Report. *See* CP 243-44 (stipulating that charging documents were dismissed as required by the Act). Thus, the trial court had no basis to rule on it. *See Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 442-43, 191 P.3d 879 (2008) (challenge to element of claim is waived if not contested in trial management report).

Second, under the plain language of the RCW 4.100.060(1)(c)(ii), it is unnecessary for a claimant to prove the grounds on which the charging document was dismissed when a new trial was ordered. Rather, the claimant need only show the claimant was acquitted or the charging document was dismissed without retrial. RCW 4.100.060(1)(c)(ii); *see also Coakley*, 640 N.Y.S.2d at 500 (interpreting analogous provision in N.Y. Ct. Cl. Law § 8-b (2007) and "reject[ing] defendant's additional argument that both the vacatur of the conviction and the dismissal of the accusatory instrument must be based on [new evidence]").

Third, the trial court's construction, if adopted, would lead to an "odd result"—namely, the exonerated individual's eligibility for relief in the circumstance of a dismissal without retrial would "turn on a decision completely in the State's control." *State v. DeSimone*, 839 N.W.2d 660, 667 (Iowa 2013). This is because the State invariably drafts the dismissal motion and order. Indeed, that was the case here, and the court below concluded the charges against Larson, Gassman, and Statler were

dismissed for a reason stated by the prosecutor. Exs. 19, 20, 21. "[I]n construing a statute, a reading that [leads to] absurd results must be avoided because it will not be presumed that the legislature intended absurd results." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (internal marks and citation omitted).

Fourth, even if Larson, Gassman, and Statler were required to prove the State dismissed the charges on the basis of significant new exculpatory evidence, the record before the trial court satisfied this requirement. Each motion for dismissal was explicitly "based upon the records and files" in the case "and upon the [prosecutor's] certificate." Exs. 19, 20, 21 (emphasis added). The records and files include the findings of fact and conclusions of law underlying the criminal court's decision to vacate the convictions, and those findings and conclusions are firmly rooted in significant new exculpatory information. *See* Exs. 16, 17, 18 at 4:18-19, 5:7, 7:6-8, 7:18-19, 8:1-2; *see also Coakley*, 640 N.Y.S.2d at 500 (statutory requirement is satisfied where "dismissal is 'clearly predicated' on the prior order vacating the judgment"). Thus, the trial court's ruling to the contrary must be reversed.

E. The Trial Court Erred by Failing to Give Due Consideration to Difficulties of Proof Caused by the Unavailability of Witness Eric Weskamp

The wrongful conviction statute provides: "In exercising its discretion regarding the weight and admissibility of evidence, the court must give due consideration to difficulties of proof caused by the passage

of time or . . . [the] unavailability of witnesses . . . or other factors not caused by the parties." RCW 4.100.060(3) (emphasis added). At trial, Larson, Gassman, and Statler sought to admit a recorded interview of Eric Weskamp, a victim in the robbery, after demonstrating they were unable to secure his attendance. CP 237, 246, 252-60. In a pretrial motion, the State moved to exclude the interview. RP 58:22–59:7, 61:9-14.

The trial court granted the State's motion. RP 66:6–67:9. In doing so, the court failed to follow the statutory directive set forth in RCW 4.100.060(3) and, instead, strictly applied ER 804(b)(1). *See id*. Specifically, the court excluded the interview because it was made outside of a hearing or deposition and there was no cross-examination. RP 66:13–67:9. The court concluded that "an unsworn interview without any involvement by the State goes beyond the scope of what's contemplated in RCW 4.100.060." RP 67:5-7. For the following reasons, the trial court's interpretation of RCW 4.100.060 is erroneous, and the court's decision to exclude the recorded interview was an abuse of discretion.

The Washington legislature has explicitly dictated that in ruling on the admissibility of evidence presented in support of a claim under the wrongful conviction statute, a trial court "must" consider the "difficulties of proof caused by the passage of time" and the "unavailability of witnesses." RCW 4.100.060(3). Because the claimant bears the burden of proof, the plain purpose of this provision is to relax the evidentiary rules so that the fact finder can take in more evidence than the claimant would otherwise be allowed to present for the claim of innocence. This makes

sense given the claimant is placed in the difficult position of proving a negative by clear and convincing evidence: that the claimant "did not engage in any illegal conduct alleged" to have occurred long ago. RCW 4.100.060(1)(d); *see also Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) ("[P]roving a negative is a challenge in any context."); *Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative.").

"[R]ules of evidence may be promulgated by both the legislative and judicial branches." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Indeed, the legislature often enacts statutes that address the admissibility of classes of evidence for specific types of claims based on overarching policy concerns.[2] In addition, hearsay may be admitted "as provided by [the evidence] rules, by other court rules, or by statute." ER 802 (emphasis added). Thus, the trial court was obligated to follow the relaxed admissibility provision in RCW 4.100.060(3).

The trial court's determination that an unsworn interview goes beyond the scope of RCW 4.100.060(3) is erroneous because it renders pointless the "death or unavailability of witnesses" portion of the provision. If ER 804 is to be strictly applied, as the trial court concluded, there is no need for subsection .060(3). The evidence rule is already in

[2] *See, e.g.*, RCW 5.64.010 (evidence of furnishing or offering to pay medical expenses and expressions of apology, sympathy, etc., inadmissible in negligence action against health care provider); RCW 5.66.010 (evidence of expressions of sympathy inadmissible against party in a civil action seeking damages for death or personal injury; RCW 46.61.506 (establishing standards for the admissibility of breath analysis test results).

place. *See* ER 804(b)(1). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation omitted). Thus, subsection .060(3) must be read as a deviation from the usual rule.

The trial court's determination is also erroneous because it contradicts the statute's underlying policy objectives. The legislature has specifically recognized that exonerated individuals may have difficulty securing the attendance of witnesses to events from years past. *See* RCW 4.100.060(3). When a witness goes missing, it is uncommon to have former testimony on hand, let alone testimony from a proceeding in which the opposing party had an opportunity to conduct cross-examination. *See* ER 804(b)(1) (limiting admission of statement by unavailable witness to "[t]estimony given . . . at another hearing . . . or in a deposition . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination"). Thus, the legislature has promulgated a rule that allows exonerated individuals to present evidence of the statements of unavailable witnesses even though the form of those statements falls outside the usual hearsay exceptions. *See* RCW 4.100.060(3). Due consideration of the circumstances surrounding such evidence provides a necessary balance to the heavy burden borne by claimants.

In ruling on the State's motion to exclude the recorded interview of Weskamp, the trial court acknowledged it was "aware" of RCW

4.100.060(3) but failed to consider how Weskamp's unavailability impacted the ability of Larson, Gassman, and Statler to prove their claims. As such, the trial court abused its discretion. *Salas*, 168 Wn.2d at 669 ("A decision is . . . for untenable reasons if the trial court applies the wrong legal standard . . . .") (citation omitted).

A proper consideration of the difficulties of proof faced by Larson, Gassman, and Statler compels the admission of the recorded interview. Weskamp has firsthand, personal knowledge regarding the facts of the alleged crime. Exs. 1-3; Ex. 52 at 226:2-21. He was one of the victims of the robbery. *Id*. Weskamp told the interviewer he recognized Matt Dunham, Anthony Kongchunji, and Larry Dunham as the men who robbed him. CP 254-56, 258. Weskamp also told the interviewer that he knew the robbery occurred on April 15 and that April 17 was incorrect because it failed to match his time records. CP 258.

Weskamp explained that he failed to testify to these facts at the criminal trial because he felt "pressured and threatened" by the prosecutor and detectives to say something else. CP 259. For example, Weskamp recalls telling the prosecutor that the State was wrong about the alleged date, but the prosecutor said his concern was "irrelevant." CP 257. The prosecutor continued, "[W]e have the testimony against these guys . . . we have a date . . . this is what you need to say." *Id*. "[I]f you just go along with this we're not going to have any problems." *Id*.; *see also* CP 259.

Weskamp's statements are evidence of the actual innocence of Larson, Gassman, and Statler, as they contradict the testimony of Matthew

Dunham and support the assertion that the E. Cataldo robbery was done by the Dunhams along with Kongchunji and Smith.

It is undisputed that Larson, Gassman, and Statler made substantial efforts to secure Weskamp's attendance but were unable to do so. RP 63:17-18, 66:9-10; CP 320-25. In addition, they were prepared to present the investigator who made the recording. CP 249. Thus, the authenticity of the recording would have been verified, and the State would have had an opportunity to inquire into the circumstances surrounding it.[3]

The trial court erred in its construction of RCW 4.100.060(3) and abused its discretion by failing to follow the legislature's directive. In light of the substantial burden faced by Larson, Gassman, and Statler, the difficulty of proving a negative, the unavailability of Weskamp, and the authenticity of the recording, the recording should have been admitted. Moreover, "a liberal practice in the admission of evidence is followed in this state" when actions are "tried to [a] court sitting without a jury." *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). The State's inability to cross-examine Weskamp regarding his interview statements could have been considered in weighing the evidence, though the trial court would have been obligated to balance this by giving due consideration to the difficulties of proof borne by Larson, Gassman, and Statler as a result of the unavailability of Weskamp. RCW 4.100.060(3).

[3] The investigator worked for the Innocence Project Northwest, which was instrumental in obtaining the orders vacating the convictions, and interviewed Weskamp at a restaurant in Washington in 2013. RP 61:18-25.

F. Larson, Gassman, and Statler Proved by Clear and Convincing Evidence that They Are Actually Innocent, and the Trial Court Erred in Concluding Otherwise

To prevail under the wrongful conviction statute, a claimant "must show by clear and convincing evidence that . . . [t]he claimant did not engage in any illegal conduct alleged in the charging documents." RCW 4.100.060(1)(d). Instead of following established Washington law on the clear and convincing standard, the trial court applied the much more stringent standards that govern federal habeas corpus petitions. CP 424, 425, 430. In doing so, the court substantially increased the burden placed on Larson, Gassman, and Statler. *See id.* The court ultimately concluded as a matter of law that the men failed to prove it was impossible for them to have committed the alleged crimes. CP 428-29. For the reasons that follow, the trial court erred.

1. "Clear and convincing evidence" means evidence indicating that the fact to be proved is "highly probable"

The wrongful conviction statute requires a claimant to prove his case by "by clear and convincing evidence." RCW 4.100.060(1). 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)). The central fact to a claim under the Act is that "[t]he claimant did not engage in any illegal conduct alleged in the charging documents." RCW 4.100.060(1)(d) (emphasis added). Thus, the burden is on the claimant to prove it is highly probable he did not engage

in any of the illegal conduct charged against him. If the claimant satisfies this burden, he is deemed "[a]ctually innocent." RCW 4.100.020(1)(a).

The burden on claimants is moderated in two respects. First, "[f]ull and conclusive proof is not required where a party has the burden of proving a negative." *Higgins v. Salewsky*, 17 Wn. App. 207, 210-11, 562 P.2d 655, 657 (1977) (citation omitted). Second, as noted above, "the court must give due consideration to difficulties of proof" when weighing the evidence. RCW 4.100.060(3) (emphasis added).

The trial court erred as a matter of law by failing to apply the statute in accordance with its plain language and well-established law.

2. The stringent burdens placed on defendants in habeas corpus proceedings are inapplicable to exonerated individuals pursuing claims under the Act

In its written decision, the trial court cites four federal cases that address habeas corpus petitions: *Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993); *Jackson v. Virginia*, 443 U.S. 307 (1979); and *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997).[4] CP 425. The court also cites one case from Washington that addresses a personal restraint petition, the state-law analogue to a habeas corpus petition: *In re Weber*, 175 Wn.2d 247, 284 P.3d 734 (2012). CP 424.

The federal cases establish three different standards for habeas corpus petitions. The first is the standard "to be applied in a federal

[4] The trial court quotes from a fifth federal case, *House v. Bell*, 547 U.S. 518 (2006), but mistakenly attributes the quote to *Schlup*. CP 425.

habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence." *Jackson*, 443 U.S. at 309. The United States Supreme Court has determined that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 319 (emphasis in original). "[This] inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit." *Herrera*, 506 U.S. at 402 (emphasis in original). If "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," then "the applicant is entitled to habeas corpus relief." *Jackson*, 443 U.S. at 324. The trial court below cited the *Jackson* standard as being applicable to the claims of Larson, Gassman, and Statler. CP 425.

The second standard is the one applied when a convicted person asserts a "gateway" claim of innocence in habeas corpus proceedings. *Schlup*, 513 U.S. at 315; *see also In re Weber*, 175 Wn.2d 247, 259, 284 P.3d 734 (2012) (adopting *Schlup* standard for "gateway actual innocence claim[s] in the context of a conviction"). In this scenario, the petitioner "faces procedural obstacles that he must overcome before a federal court may address the merits of [his] constitutional claims." *Schlup*, 175 Wn.2d at 314. The innocence claim is "a gateway through which [the] habeas petitioner must pass to have his otherwise barred constitutional claim

considered on the merits," but the claim of innocence "does not by itself provide a basis for relief." *Id*. at 315 (quoting *Herrera*, 506 U.S. at 404).

A convicted person asserting a gateway claim of innocence must prove "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id*. at 327. In other words, "[t]he meaning of actual innocence . . . does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id*. at 329. As Justice O'Connor remarked, this standard "properly balances the dictates of justice with the need to ensure that the actual innocence exception remains only a 'safety valve' for the 'extraordinary case.'" *Id*. at 333 (O'Connor, J., concurring) (internal marks and citations omitted). The trial court below cited the *Schlup* standard as being applicable to the claims of Larson, Gassman, and Statler. CP 425.

The third standard applied by the trial court—and the most stringent—is the standard that governs a convicted person's "freestanding" claim of innocence in a habeas proceeding. *House v. Bell*, 547 U.S. 518, 554-55 (2006) (citing *Herrera*, 506 U.S. at 417). In this scenario, the petitioner maintains "his innocence would render his execution a 'constitutionally intolerable event'" even though "the proceedings that had resulted in his conviction and sentence were entirely fair and error free." *Schlup*, 513 U.S. at 314 (quoting *Herrera* 506 U.S. at 419 (O'Connor, J., concurring)). The standard of review on this claim is "extraordinarily high," and the claim "[will] fail unless the federal habeas court is itself

convinced that [the] new facts unquestionably establish . . . innocence." *Id*. at 317. "Unquestionably" means "[w]ithout or beyond question; indisputably, indubitably." Oxford English Dictionary 156 (2d ed. 1989).

Though it referenced all three of the habeas corpus standards identified above, the trial court ultimately held Larson, Gassman, and Statler to a burden of proving they are "unquestionably" innocent of the charges brought against them. *See* CP 425, 430 (referencing the "extraordinarily high" and "truly persuasive" standard from *Herrera*). The court determined:

> Both Mr. Larson and Mr. Statler have credible evidence about the dates and times they were not available to commit the robberies. By all accounts, the robberies occurred when it was dark out, getting dark out, or late in the evening. The evidence presented by the plaintiffs establishes when the plaintiffs were unavailable to commit the crimes, but do[es] not prove that they did not engage in any of the illegal conduct alleged in the charging documents. Surely, the robberies 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).

The trial court's conclusion 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 conduct alleged in the charging documents*. For several reasons, this standard of impossibility (or unquestionability)—which is even more stringent than proof beyond a reasonable doubt—is inapplicable in a civil suit for relief under the wrongful conviction statute.

First, the standard is inconsistent with the plain language of the statute, which provides that the burden of proof is "clear and convincing evidence." RCW 4.100.060(1)(d). The clear and convincing standard means Larson, Gassman, and Statler had to prove it was "highly probable" they did not engage in the conduct alleged. *Dobbs*, 180 Wn.2d at 11. This "does not require a showing beyond a reasonable doubt," and "[the] court does not need to rule out all possibilities . . . ." *Id*. at 16.

Second, as noted above, the Act is a remedial statute that must be "liberally construed in favor of the beneficiary," *Silverstreak*, 159 Wn.2d at 882. A habeas petitioner's freestanding claim of innocence, on the other hand, is strictly "evaluated on the assumption that the [criminal] trial . . . had been error free" and the petitioner had been "tried before a jury of his peers, with the full panoply of protections that [the United States] Constitution affords criminal defendants." *Schlup*, 513 U.S. at 315 (quoting *Herrera* 506 U.S. at 419 (O'Connor, J., concurring)).

Third, a claimant suing under the Act has had his conviction vacated. *See* RCW 4.100.060(c)(ii). A habeas corpus petitioner, however, has a standing conviction and is presumed to be guilty. *Herrera*, 506 U.S. at 398-99. "[I]n the eyes of the law, [the] petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law . . . ." *Id*. at 399-400. Thus, "when a petitioner makes a freestanding claim of innocence, he is claiming that he is entitled to relief <u>despite a constitutionally valid conviction</u>." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997).

By applying the wrong burden of proof to the claims of Larson, Gassman, and Statler, the trial court erred as a matter of law.

3. The evidence presented at trial demonstrated that the alleged crime must have occurred on April 4 or 15, and the trial court erred by requiring Larson, Gassman, and Statler to provide alibi evidence for other dates

When the State originally charged Larson, Gassman, and Statler, it alleged the underlying robbery occurred "on or about April 15, 2008." Exs. 1-3. Larson subsequently notified the State of an alibi defense—namely, a timecard from his employer that showed Larson was at work the evening of April 15, 2008. Ex. 29. Shortly before trial, the State amended the information to allege the robbery occurred "on or about April 17, 2008." Exs. 4-6; *see also* Exs. 16-18. This is the date that was in place when the charging documents were dismissed without retrial. Exs. 19-21.

In the proceedings below, the trial court held that Larson, Gassman, and Statler "have been successful in proving that the robber[y] did not occur on April 17, 2008." CP 427. Nevertheless, the court concluded this was insufficient as a matter of law to prove their actual innocence. *See* CP 428. The court's reasoning was that "[t]he criminal conduct alleged in the charging documents is specific to the event . . . but broad as to the dates it may have occurred." *Id*. The court further held, "this is not a criminal prosecution whereby the State is required to clearly define when the robber[y] allegedly occurred." *Id*. The court ultimately found the robbery occurred "[a]t some point between late March, 2008 through April, 2008." CP 408.

The court's conclusions and findings are erroneous. It is well established in Washington that "when a precise time is fixed by the evidence, as is the usual case, and the [person charged asserts an] alibi, then the time element becomes a material one," and a determination that the person charged engaged in the alleged conduct "must be buttoned to the exact time as fixed by evidence." *State v. Pitts*, 62 Wn.2d 294, 297, 382 P.2d 508 (1963). The trial court erred by abandoning this rule on the ground that the State is the defendant in a civil case and has no burden to define the date of the alleged crime. Whether the State has such a burden is immaterial, however, as the focus of the rule is on the evidence and, specifically, whether the evidence fixes the date of the alleged crime. Because Larson, Gassman, and Statler have alibis proving they are actually innocent of the alleged conduct, the *Pitts* rule applies in this case. Such application accords with the remedial nature of the Act.

The potential date of the robbery is fixed by the testimony Eric Weskamp and Clifford Berger, which they gave at the criminal trial and which was admitted at the civil trial, as well as by the documentation of Weskamp's employment. Ex. 50 at 99:1-4; Ex. 52 at 248:15-19; *see also* CP 427. Weskamp and Berger testified the crime occurred at night (after dark) on a day they worked. Ex. 50 at 100:16-17; Ex. 52 at 216:2, 248:15-17. Weskamp and Berger also testified that due to the injuries Weskamp sustained, he left work early the next day. Ex. 50 at 105:22-23, Ex. 52 at 248:16-17; Ex. 111 at 73:2-6, 88:22-24. Because Weskamp's timecards show the dates and times he worked, the records can be used to

identify when the crime may have occurred and when it could not have occurred.

For example, the timecards admitted into evidence show Weskamp worked a full day on April 18, 2008. Ex. 28. Because of this, the trial court concluded that Larson, Gassman, and Statler proved the robbery did not occur on April 17. CP 427. Inexplicably, however, the trial court ended its analysis there.

A further comparison of Weskamp and Berger's testimony and the timecards narrows the robbery to only two possible dates: April 4 or April 15. The evidence is clear. The timecards show Weskamp left work early on April 5, April 16, April 21, and April 23. Ex. 28. This narrows the possible date of the crime to only four days. The timecards also show Weskamp was absent from work on April 20 and 22. *Id*. Because Weskamp worked the day of the crime, this further narrows the possible date to only two days. Ex. 50 at 100:16-17; Ex. 52 at 216:2, 248:15-17. Based on the undisputed evidence, the robbery must have taken place on either April 4 or April 15. Thus, the trial court erred in requiring Larson, Gassman, and Statler to provide alibi evidence for other dates.

Even if the *Pitts* rule is not applicable in a civil case, the trial court erred in finding that the crime could have occurred any day from "late March, 2008 through April, 2008." CP 408. The finding is wholly unsupported by the record. There is no evidence the crime took place in March. Indeed, witnesses uniformly testified the crime occurred in April. Exs. 1-6; Ex. 50 at 99:1-4; Ex. 52 at 248:18-19; Ex. 111 at 63:25–64:7;

Exs. 115, 118, 121; RP 432:17-24, 433:9-15. Similarly, there is no evidence the crime occurred on any date in April other than April 4 or 15. Ex. 28; Ex. 52 at 248:15-19; Ex. 111 at 73:2-6, 88:22-24. Finally, the crime could not have occurred after April 23, the date of Dunham's arrest. RP 204:5-15, 598:16–599:14. Thus, Finding of Fact 10 is erroneous.

4. Larson, Gassman, and Statler Proved It Is Highly Probable They Are Actually Innocent of the Illegal Conduct Alleged in the Charging Documents

The trial court concluded as a matter of law that Larson, Gassman, and Statler "have not presented sufficient evidence for the Court to conclude they are actually (factually) innocent of the crimes alleged in the charging documents." CP 430. The court based this determination on the erroneous conclusions and findings set forth above and on the erroneous finding that the men "rely on a relatively small amount of evidence to prove they are actually innocent of the robber[y] committed against Mr. Weskamp and Mr. Berger." CP 414 (Finding of Fact 44), 425.

For the following reasons, Larson, Gassman, and Statler presented sufficient evidence to meet their burden of proving it is highly probable they did not engage in the illegal conduct alleged.

a. *Substantial alibi evidence proves Larson, Gassman, and Statler were unable to have committed the robbery on April 4 or 15*

In addition to proving the robbery could have only occurred on April 4 or 15, 2008, Larson, Gassman, and Statler proved they were unable to be present at the scene of the crime on either date. All of the

witnesses to the robbery agree it was "dark" out when the event occurred.[5] At trial, the court took judicial notice of official data and other information identifying the specific time it became dark in Spokane during the evenings of April 4 and April 15. RP 391:9–392:5; CP 388-99. This information and data came from the U.S. Naval Observatory Astronomical Applications Department and concerned "Astronomical Twilight Time" and "Daylight Time." CP 388-99.

Astronomical Twilight Time is "the point [in the evening] where the sky completely turns dark." CP 389 ¶ 5, 396 (emphasis added). Daylight Time is when "civil clocks in most areas of the United States [including Washington] are adjusted ahead one hour in the summer months. CP 391. In 2008, Daylight Time began on March 9. *Id*.

On April 4, 2008, Astronomical Twilight Time ended (and it became dark) at 9:14 p.m., as adjusted for Daylight Time. CP 394. This is the earliest time that the robbery could have occurred that evening. Matthew Dunham, who admits to having committed this and several other robberies, testified that he and his accomplices drove for "around 30 minutes" after the robbery and then stopped at a house and went inside to split up the money. RP 446:10-14, 448:9–449:21, 450:24–452:4. If

[5] *See* Ex. 50 at 100:6-17, 127:20-25 ("Q. Was already dark? A. Yes."); Ex. 52 at 84:20-23, 222:14-17, 235:6-8; 242:4-12, 248:12-14 ("Q. How many people were you confronted by? A. Kind of hard to say because it was dark."); Ex. 111 at 50:11-18, 56:9-12, 70:20-22 ("Q. Was it dark at that time? A. Yes."); RP 217:9-10 ("Q. Do you recall if it was dark out? A. Yeah. Yes."); RP 436:6-7, 438:5-6, 479:17-25, 487:4-6, 487:13-17 ("Q. Was it dark? A. Yeah."); RP 523:10-14 ("Q. So when you arrived at Cliff Berger's and Joni Jeffries' house, it was dark out, correct? A. Yeah.").

Larson was present during all of this as alleged, he would have had to leave the house and go to work after splitting up the money. Ex. 29.

The State failed to put on any evidence of the distance from the house to Larson's place of employment, but the State did present evidence of the addresses of each location. RP 591:14-25. This Court can take judicial notice of the fact that the locations are 2.5 miles apart by way of surface streets and that it takes approximately five to seven minutes to travel by car from one point to the other. *See* www.maps.google.com and www.mapquest.com (with request for directions from 415 N Dick Rd, Spokane, WA 99212 to 6328 E Utah Ave, Spokane, WA 99212); *see also Fusato v. Wash. Interscholastic Activities Assoc.*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999) ("Judicial notice may be taken at any stage of the proceeding.") (quoting ER 201(f)); *State ex rel. Wenatchee-Beebe Orchard Co. v. Superior Court for Chelan County*, 57 Wn.2d 662, 666, 359 P.2d 146 (1961) (taking judicial notice of distance between points).

Assuming it took five minutes to split up the money and five minutes to get to work, the earliest Larson could have arrived (if he was involved in the crime) was 9:54 p.m. Larson's work records, however, show that he clocked in at 9:51 p.m. the evening of April 4, 2008. Ex. 29. Moreover, the trial court accepted the testimony of Mr. Larson's employer that "it was necessary [for Larson] to arrive to work a few minutes early"—that is, before clocking in—"in order to obtain information necessary for the next shift." CP 428; *see also* RP 138:23–139:8. Indeed, the trial court concluded that Larson presented "credible evidence about

the dates and times [he was] not available to commit the robber[y]." CP 429. Thus, Mr. Larson arrived to work no later than 9:46 p.m. that evening.

As for April 15, the original date alleged, Mr. Larson clocked in at 9:48 p.m. Ex. 29. This means he arrived to work no later than 9:43 p.m. that evening. RP 138:23–139:8; CP 429. It became dark at 9:36 p.m., as adjusted for Daylight Time, in Spokane on April 15, 2008. CP 394. If Larson was involved in the robbery, the earliest he could have arrived to work was 10:16 p.m.

This uncontroverted evidence satisfies the burden of showing it is highly probable that Larson did not engage in the conduct alleged in the charging document and is actually innocent. An alibi for Larson is also an alibi for Gassman and Statler, as Dunham testified that all three men were together at the time of the alleged conduct, during the 30 minutes spent driving around afterward, and during the time the money was split at the house. RP 446:10-14, 448:9–449:21, 450:24–452:4. Thus, the claimants have presented uncontroverted evidence showing it is highly probable they did not engage in the alleged conduct and are actually innocent.

b. *Other substantial evidence proves it is highly probable that Larson, Gassman, and Statler did not engage in the alleged conduct*

Larson, Gassman, and Statler presented other substantial evidence that, taken together, proves it is highly probable they are actually innocent. Among other things:

- Matthew Dunham, Larry Dunham, Nick Smith, and Anthony Kongchunji were caught red-handed and eventually pleaded guilty to the Turner/Hall robbery, which bore the same hallmarks as the other "drug-rip" robberies that occurred in the late winter and early spring of 2008, including the E. Cataldo robbery. Exs. 32-37. This evidence shows it is highly probable that the Dunhams, Smith, and Kongchunji committed the E. Cataldo robbery.

- Nearly two months before Matthew Dunham and his accomplices were arrested, detectives locked in on Statler as a suspect based on an unsubstantiated rumor and his previous involvement with the criminal justice system. RP 631:7–633:7. The detectives knew Gassman was an associate of Statler's and also had a run-in with the criminal justice system. RP 633:8-10. Dunham implicated Statler and Gassman at his subsequent free talks, but the other name he repeatedly gave was "Andy" or "Andrew." RP 616:10–618:9. Weeks later, after Dunham signed a plea agreement, the detectives learned that Statler had a cousin named Bobby Larson and also learned where Bobby lived. RP 625:3–626:25. Within an hour, Dunham identified Larson as the third culprit, saying he knew "Bobby" was Statler's cousin and knew where Larson lived. RP 627:4–628:20. This evidence shows it is highly probable Larson, Gassman, and Statler are innocent.

- Detective Marske obtained a positive identification of Statler from a witness who, the day before, was unable to identify Statler when a different detective placed him in a photo lineup. RP 638:22–640:24. This evidence supports the conclusion that the claimants are innocent.

- Detective Marske was reprimanded in relation to his investigation into Larson, Gassman, and Statler. RP 656:20-21. An internal investigation found numerous mistakes and inaccuracies in his work. RP 655:25–656:5, 656:17-19. The investigator also found Marske believed witnesses who had obvious credibility issues or incentives to lie and made little-to-no effort to

confirm their veracity. RP 656:6-16. This evidence supports the conclusion that Larson, Gassman, and Statler are innocent.

- Prof. Alexandra Natapoff explained how confirmation bias leads to the abandonment of evidence that contradicts an informant and to the preservation of any evidence that appears to confirm the informant. RP 286:25–287:4. Prof. Natapoff concluded that in the criminal investigation and trial of Larson, Gassman, and Statler, the government failed to follow the best practices necessary to guard against the substantial risk of wrongful convictions. RP 287:9–288:22. This evidence supports the conclusion that the men are innocent.

- Prof. Natapoff identified factors tending to indicate reliability or unreliability of informant testimony and then explained how those factors applied to Dunham. RP 276:12–282:17. The conclusion was one of overwhelming unreliability. RP 280:17-21. This evidence shows it is highly probable Larson, Gassman, and Statler are innocent.[6]

- Prof. Natapoff explained that Dunham and Kongchunji had substantial opportunity to collude to falsely incriminate others while they were housed together in Spokane County jail. RP 281:7-17, 282:6-11. This evidence shows it is highly probable that Larson, Gassman, and Statler are innocent.

- Prof. Natapoff explained that Dunham's testimony was uncorroborated and, indeed, contradicted. RP 282:6-17.

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[6] "[T]rial courts should rely on expert opinion to help reach an objective, rather than subjective, evaluation of the issue." *In re Custody of Stell*, 56 Wn. App. 356, 368, 783 P.2d 615, 621 (1989) (quoting *In re Marriage of Woffinden*, 33 Wn. App. 326, 330-31 n.3, 654 P.2d 1219 (1982)). Prof. Natapoff testified (among other things) that "Mr. Dunham exhibited many of the most classic indicia of unreliability," and "the deal [he] got for his own leniency was extraordinary." RP 276:12-22, 277:11–278:14, 278:15-19. The trial court failed to discuss this or any other aspect of Prof. Natapoff's unrebutted expert testimony. This was an abuse of discretion. *Stell*, 56 Wn. App. at 368.

This evidence supports the conclusion that Larson, Gassman, and Statler are innocent.

- Prof. Natapoff explained that a number of studies have linked criminal informants with wrongful convictions and that individuals like Larson, Gassman, and Statler—all of whom had previously been through the criminal justice system—were particularly vulnerable to false informant testimony. RP 267:5–268:8. This evidence supports the conclusion that they are innocent.

The trial court improperly failed to consider any of this evidence.[7]

V. CONCLUSION

The purpose of chapter 4.100 RCW is to remedy the injustice of a wrongful conviction, and the statute must be liberally construed in favor of the persons it was designed to benefit. Robert Larson, Tyler Gassman, and Paul Statler are those very individuals. They spent a combined total of nearly thirteen years in prison for a crime they did not commit. They were exonerated on the basis of significant new exculpatory information, and the State dismissed the charges against them without retrial. They have proven their innocence by clear and convincing evidence. Accordingly, Larson, Gassman, and Statler respectfully ask this Court to reverse the decision of the trial court and enter judgment in their favor.

[7] The trial court found that Larson, Gassman, and Statler presented only limited evidence that was not put before the jury in the criminal trial—namely, the testimony of Kongchunji, the testimony of Natapoff, Weskamp's timecards, and Williams' phone records. CP 414 (Finding of Fact 44). This is erroneous. Larson, Gassman, and Statler also presented Astronomical Twilight and Daylight Time data, testimony from Ashley Shafer, testimony from Shane Neilson, and Testimony from Doug Marske. RP 391:9–392:5, 362:16-19, 643:14-22, 668:11-13, 674:20-25.

RESPECTFULLY SUBMITTED AND DATED this 27th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that, on August 27, 2015, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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— EXHIBIT A —

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

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

Plaintiffs,

vs.

STATE OF WASHINGTON,

Respondent.

NO. 2014-02-00090-6

COURT'S DECISION

This matter came before the Court for trial from January 26 through January 29, 2015. The plaintiffs, ROBERT E. LARSON, TYLER W. GASSMAN, and PAUL E. STATLER, are represented by Matthew Zuchetto and Boyd Mayo, of the Scott Law Group, P.S., and Toby Marshall, of Terrell Marshall Daudt & Willie, PLLC. The defendant, STATE OF WASHINGTON, is represented by Melanie Tratnik and Richard Weber, of the Attorney General's Office.

The plaintiffs are seeking relief and damages pursuant to the Wrongly Convicted Person statute, codified under RCW 4.100. At trial, testimony by Robert Larson, Tyler Gassman, Paul Statler, Professor Alexandra Natapoff, Anthony Kongchunji, Alan Barnes, Darren Bowerman, Robert Hibdon, Ashley Shafer, Janelle Larson, Matthew Dunham, Detective Doug Marske, Detective William McCrillis, Kyle Williams, and Shane Neilson was given. In addition to the testimony, the parties offered numerous exhibits.

I. FINDINGS OF FACT

After reviewing the evidence and being mindful of the arguments of the parties, the Court finds by clear and convincing evidence the following facts:

1. Sometime in April, 2008, Anthony Kongchunji, Matthew Dunham, and three other males assaulted and robbed Eric Weskamp and Clifford Berger. After committing the robberies, one of the fleeing robbery suspects fired a gun from Mr. Dunham's vehicle towards Kyle Williams and Mr. Weskamp.
2. During the time period of April, 2008, Robert Larson was residing in a trailer behind his parent's home. This residence was approximately three blocks from the Quarry Tile Company where Mr. Larson was employed.
3. On the days he was scheduled to work, Mr. Larson consistently clocked into work between 9:46 p.m. and 9:55 p.m. Mr. Larson testified that he habitually arrived at work between 9:10 p.m. and 9:20 p.m.
4. During the time period of April, 2008, Robert Hibdon was Mr. Larson's supervisor at the Quarry Tile Company. Mr. Hibdon testified that it was necessary for Mr. Larson to arrive at work a few minutes before the beginning of his shift.
5. During the time period of April, 2008, Tyler Gassman was unemployed and residing with his girlfriend, Elizabeth Holder, in northern Idaho. Mr. Gassman resided with Ms. Holder for approximately one year.
6. Mr. Gassman testified that in the one year he resided with Ms. Holder, he never left the residence without her.
7. During the time period of April, 2008, Paul Statler was residing with his mother on Dick Road. Also residing with Mr. Statler and his mother was Mr. Statler's girlfriend, Ashley Shafer, and Shane Neilson.

8. During the period of April, 2008, Mr. Statler was being monitored by a VICAP through the Department of Corrections. Mr. Statler was required to provide breath samples in the VICAP every day at 6:00 a.m., 6:00 p.m., and 10:00 p.m. Mr. Statler would have to be available for a short period of time both before and after each breath sample time.
9. Between late March, 2008 through April, 2008, Mr. Weskamp and Mr. Berger were attempting to purchase OxyContin from Mr. Kungchunji. The sale price of the OxyContin was $4000.
10. At some point between late March, 2008 through April, 2008, Anthony Kongchunji was riding as a passenger in a vehicle driven by Matthew Dunham. There were three additional males in the back seat of the vehicle. During this trip, Mr. Kongchunji placed a call to Mr. Weskamp as these five individuals were on their way to sell OxyContin to Mr. Weskamp and Clifford Berger.
11. Once Mr. Kongchunji and Mr. Dunham arrived at Mr. Weskamp's house, the three males in the back seat of the vehicle got out and, with their faces covered by bandanas, hid and waited for Mr. Weskamp and Mr. Berger. At least one of the three men was arrned with a shotgun or rifle.
12. Once Mr. Weskamp and Mr. Berger emerged from the house, the three males with bandanas covering their faces assaulted and robbed Mr. Weskamp and Mr. Berger. One of the males used either or shotgun or rifle during the assault.
13. Subsequent to the robbery, the five males returned to Mr. Dunham's truck and fled the scene. Kyle Williams and Mr. Weskamp gave chase in Mr. Williams's vehicle until shots began being fired from Mr. Dunham's vehicle.
14. Later, on April 23, 2008, Mr. Kongchunji and Mr. Dunham were arrested for a similar type of robbery. Shortly thereafter, law enforcement received information that the

firearm used by Mr. Kongchunji and Mr. Dunham in the most recent robbery was at Mr. Statler's residence.

15. In the early morning hours of April 24, 2008, Det. McCrillis went to Mr. Statler's house and recovered a shotgun which was hidden under Mr. Statler's mother's mattress. The shotgun recovered was similar to the shotgun used in the April 23, 2008, robbery as well as the firearm used in the robbery of Mr. Weskamp and Mr. Berger.
16. After being arrested on April 23, 2008, Mr. Kongchunji chose not to speak with law enforcement. Mr. Dunham, on the other hand, continually provided false statements to law enforcement concerning his involvement in the robberies.
17. Once booked into jail, Mr. Kongchunji and Mr. Dunham spent approximately one month housed in the same unit of the Spokane County Jail. During this time, Mr. Kongchunji and Mr. Dunham had numerous opportunities to communicate with one another.
18. Prior to resolving his charges, Mr. Kongchunji chose to engage in a free-talk with the State. In consideration of providing information to law enforcement, Mr. Kongchunji was seeking a non-prison sentence. During the free-talk, Mr. Kongchunji identified the three males involved in the robberies against Mr. Weskamp and Mr. Berger as Mr. Larson, Mr. Gassman, and Mr. Statler.
19. Subsequent to the free-talk, the State failed to offer Mr. Kongchunji a non-prison sentence. Mr. Kongchunji responded by alleging that Mr. Larson, Mr. Gassman, and Mr. Statler were not involved in the robberies. Det. Marske informed Mr. Kongchunji that if he lied at trial he would be charged with perjury. Neither the State nor the plaintiffs called Mr. Kongchunji as a witness at the criminal trial. Mr. Kongchunji

never asserted his Fifth Amendment protections against self-incrimination, he simply was never called as a witness.

20. Similarly, Mr. Dunham, who was 17 years old at the time of his arrest, engaged in a free-talk with the State. Like Mr. Kongchunji, Mr. Dunham was facing a substantial prison sentence. Also, like Mr. Kongchunji, Mr. Dunham identified the three males involved in the robberies against Mr. Weskamp and Mr. Berger as Mr. Larson, Mr. Gassman, and Mr. Statler.
21. Unlike Mr. Kongchunji, Mr. Dunham testified at the plaintiffs' criminal trial that Mr. Larson, Mr. Gassman, and Mr. Statler were involved in the robberies of Mr. Weskamp and Mr. Berger. In consideration of his cooperation, Mr. Dunham was given a sentence of 17 months confinement in a juvenile detention facility.
22. On July 28, 2008, Plaintiff Robert Larson, was charged by information in the Spokane Superior Court under case number 08-1-02445-9 with Count I - First Degree Robbery, Count II - Attempted First Degree Murder (or in the alternative First Degree Assault), Count III - Attempted First Degree Murder (or in the alternative First Degree Assault), Count IV - Drive by Shooting, and Count V - Drive by Shooting. The information alleged these crimes occurred on or about April 15, 2008.
23. On July 28, 2008, Plaintiff Tyler Gassman, was charged by information in the Spokane Superior Court under case number 08-1-02444-1 with Count I - First Degree Robbery, Count II - Attempted First Degree Murder (or in the alternative First Degree Assault), Count III - Attempted First Degree Murder (or in the alternative First Degree Assault), Count IV - Drive by Shooting, and Count V - Drive by Shooting. The information alleged these crimes occurred on or about April 15, 2008.
24. On July 28, 2008, Plaintiff Paul Statler, was charged by information in the Spokane Superior Court under case number 08-1-02442-4 with Count I - First Degree

Robbery, Count II - Attempted First Degree Murder (or in the alternative First Degree Assault), Count III - Attempted First Degree Murder (or in the alternative First Degree Assault), Count IV - Drive by Shooting, and Count V - Drive by Shooting. The information alleged these crimes occurred on or about April 15, 2008.

25. On January 12, 2008, the State moved to amend each plaintiff's information. The Court granted the motions and each plaintiff's information was amended, alleging the crimes occurred on or about April 17, 2008.
26. Each plaintiff was represented by an attorney throughout the criminal proceedings: Mr. Larson was represented by Anna Nordtvedt, Mr. Gassman was represented by David Partovi, and Mr. Statler was represented by Timothy Note.
27. The criminal trial was held in February, 2009. At trial, all three plaintiffs presented alibi defenses.
28. At the conclusion of the trial, Mr. Larson, Mr. Gassman, and Mr. Statler were each found guilty of First Degree Robbery, two counts of First Degree Assault, and two counts of Drive by Shooting.
29. Mr. Larson was sentenced to 240 months of confinement. He served a part of this sentence through the State of Washington, Department of Corrections, between the dates of July 23, 2009 through December 14, 2012.
30. During the period of Mr. Larson's confinement, he was not serving a concurrent sentence for any charges other than those that form the basis of this claim.
31. Mr. Gassman was sentenced to 309 months of confinement. He served a part of this sentence through the State of Washington, Department of Corrections, between the dates of July 9, 2009 through December 14, 2012.
32. During the period of Mr. Gassman's confinement, he was not serving a concurrent sentence for any charges other than those that form the basis of this claim.

33. Mr. Statler was sentenced to 498 months of confinement. He served a part of this sentence through the State of Washington, Department of Corrections, between the dates of July 16, 2009 through December 14, 2012.

34. During the period of Mr. Statler's confinement, he was not serving a concurrent sentence for any charges other than those that form the basis of this claim.

35. Subsequent to being convicted, all three plaintiffs moved for a new trial under CrR 7.5(a)(3), claiming newly discovered evidence. The Honorable Michael Price denied the motions.

36. The plaintiffs appealed Judge Price's denial of their motions for new trials. The Court of Appeals affirmed Judge Price, concluding that the motions for new trials were properly denied, the plaintiffs were not provided ineffective assistance of counsel, the plaintiffs were not prejudiced by the amended informations, and the plaintiffs were not placed in double jeopardy.[1]

37. The plaintiffs then filed motions for relief from judgment under CrR 7.8. In granting the plaintiffs' motions, Judge Price found trial counsel for each plaintiff was ineffective in a number of regards. Specifically, Judge Price found trial counsel for each plaintiff failed to obtain victim Eric Weskamp's work records,[2] failed to obtain

[1] State v. Larson, 160 Wn.App. 577, 249 P.3d 669 (2011); State v. Gassman, 160 Wn.App. 600, 248 P.3d 155 (2011); State v. Statler, 160 Wn.App. 622, 248 P.3d 165 (2011).

[2] Victim Eric Weskamp's work records would have showed he left work early on April 16, 2008, the only day of the week he did so. This evidence would have allowed trial counsel to argue the crime occurred on April 15, 2008 and not April 17, 2008. Plaintiffs' Exhibit P-16, P-17 & P-18 (*Judge Price's Findings of Fact, Conclusions of Law & Order, pg. 4).*

Matthew Dunham's phone records,[3] failed to interview the detectives, and failed to interview Shane Neilson.[4]

38. Judge Price ultimately concluded that the plaintiffs were denied their Constitutional right to effective counsel. He found that the plaintiffs established that trial counsels' representation was deficient; falling below the objective standard of reasonableness and that the plaintiffs were prejudiced by this deficient performance.
39. Judge Price further found that trial counsels' failure to investigate was especially egregious based upon their failure to discover potentially exculpatory evidence.
40. Judge Price concluded that but for trial counsels' unprofessional errors, the result of the proceedings would have been different.
41. On December 14, 2012, Judge Price entered orders vacating the judgments of conviction against Mr. Larson, Mr. Gassman, and Mr. Statler.
42. On May 31, 2013, the Honorable James Triplet entered an order dismissing the charges against Mr. Larson. The certification forming the basis for the motion to dismiss the charges asserted the motion was founded upon insufficient evidence to proceed with trial.
43. On July 23, 2013, Judge Triplet entered orders dismissing the charges against both Mr. Gassman and Mr. Statler. The certification forming the basis for the motions to dismiss the charges asserted the motions were founded upon insufficient evidence to proceed with trial.

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[3] Matthew Dunham was the State's star witness. He testified he did not know the victims. The phone records contained post-conviction showed he had been in communication with the victims. This information would have assisted trial counsel in impeaching his credibility. Plaintiffs' Exhibit P-16, P-17 & P-18 (*Judge Price's Findings of Fact, Conclusions of Law & Order, pgs. 4-5).*

[4] Shane Neilson would have testified that he received the gun used in a robbery on April 23, 2008, without the knowledge of Mr. Statler. Without this information, the jury was left with the impression Mr. Statler was "in the know" about the April 23, 2008, robbery. Plaintiffs' Exhibit P-16, P-17 & P-18 (*Judge Price's Findings of Fact, Conclusions of Law & Order, pg. 5).*

44. At trial, limited evidence was presented that was not put before the jury in the criminal trial; specifically, the testimony of Mr. Kongchunji, Mr. Weskamp's time card, Kyle Williams phone records, and the testimony of Professor Alexandra Natapoff.[5]

II. CONCLUSIONS OF LAW

After considering the evidence and being mindful of the arguments of counsel, the Court enters the following conclusion of law:

The plaintiffs' claims are brought pursuant to the Wrongly Convicted Person statute, codified under RCW 4.100. Jurisdiction and venue before this court are proper pursuant to RCW 4.100.030 and RCW 4.12.020(1).

In order to obtain judgment under the Wrongly Convicted Person statute, the plaintiffs are required to show by clear and convincing evidence that: (1) They were convicted of one or more felonies in superior court and sentenced to varying terms of imprisonment;[6] (2) They have served all or any part of the sentence;[7] (3) They are not currently incarcerated for any offense;[8] (4) That during their period of confinement for which they are seeking compensation, they were not serving a term of imprisonment or a concurrent sentence for any conviction other than those that are the basis for the claim;[9] (5) Their judgments of conviction were vacated and the charging document dismissed on the basis of significant new exculpatory information;[10] (6) They did not engage in any illegal conduct alleged in the charging documents;[11] and (7) They did not commit or suborn perjury or fabricate evidence to cause or bring about their convictions.[12]

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[5] Prof. Natapoff testified as an expert witness primarily on issues surrounding the lack of credibility of criminal informants.
[6] RCW 4.100.060(1)(a).
[7] RCW 4.100.060(1)(a).
[8] RCW 4.100.060(1)(b)(i).
[9] RCW 4.100.060(1)(b)(ii).
[10] RCW 4.100.060(1)(c)(ii).
[11] RCW 4.100.060(1)(d).
[12] RCW 4.100.060(1)(e).

As stated, the burden of proof required under RCW 4.100.060(1) is by clear and convincing evidence. This burden has been defined as something greater than a preponderance of the evidence and less than beyond a reasonable doubt. Holmes v. Raffo, 60 Wn.2d 421, 374 P.2d 536 (1962); Matter of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). "Substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305, 312 (2005) *quoting* In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). The Court will apply this burden of proof to the elements the plaintiffs are individually required to establish.

CONVICTED OF ONE OR MORE FELONIES IN SUPERIOR COURT AND SENTENCED TO A TERM OF IMPRISONMENT – RCW 4.100.060(1)(A).

By way of amended information filed January 12, 2009, Mr. Larson was charged under case number 08-1-02445-9 in the Spokane County Superior Court with: Count I – First Degree Robbery, Count II – Attempted First Degree Murder (or in the alternative First Degree Assault), Count III – Attempted First Degree Murder (or in the alternative First Degree Assault), Count IV – Drive by Shooting, and Count V – Drive by Shooting.[13] On February 17, 2009, following a jury trial, Mr. Larson was convicted of all five felony counts.[14] On June 3, 2009, Mr. Larson was sentenced to a term of imprisonment.[15]

By way of amended information filed January 12, 2009, Mr. Gassman was charged under case number 08-1-02444-1 in the Spokane County Superior Court with: Count I – First Degree Robbery, Count II – Attempted First Degree Murder (or in the alternative First Degree Assault), Count III – Attempted First Degree Murder (or in the alternative First Degree Assault),

[13] Plaintiffs' Exhibit P-4.
[14] Plaintiffs' Exhibit P-10.
[15] Plaintiffs' Exhibit P-10.

Count IV – Drive by Shooting, and Count V – Drive by Shooting.[16] On February 17, 2009, following a jury trial, Mr. Gassman was convicted of all five felony counts.[17] On June 2, 2009, Mr. Gassman was sentenced to a term of imprisonment.[18]

By way of amended information filed January 12, 2009, Mr. Statler was charged under case number 08-1-02442-4 in the Spokane County Superior Court with: Count I – First Degree Robbery, Count II – Attempted First Degree Murder (or in the alternative First Degree Assault), Count III – Attempted First Degree Murder (or in the alternative First Degree Assault), Count IV – Drive by Shooting, and Count V – Drive by Shooting.[19] On February 17, 2009, following a jury trial, Mr. Statler was convicted of all five felony counts.[20] On June 4, 2009, Mr. Statler was sentenced to a term of imprisonment.[21]

The plaintiffs have individually established by clear and convincing evidence that they have each been convicted of one or more felonies in superior court and sentenced to a term of imprisonment. The Court concludes that the plaintiffs have individually satisfied the element that they have each been convicted of one or more felonies in superior court and sentenced to a term of imprisonment as required by RCW 4.100.060(1)(a).

SERVED ALL OR ANY PART OF THE SENTENCE – RCW 4.100.060(1)(A).

Mr. Larson was sentenced to 240 months of confinement.[22] He served part of this sentence through the State of Washington, Department of Corrections, between the dates of July 23, 2009 and December 14, 2012.[23] Mr. Gassman was sentenced to 309 months of confinement.[24] He served part of this sentence through the State of Washington, Department of

[16] Plaintiffs' Exhibit P-5.
[17] Plaintiffs' Exhibit P-11.
[18] Plaintiffs' Exhibit P-11.
[19] Plaintiffs' Exhibit P-6.
[20] Plaintiffs' Exhibit P-12.
[21] Plaintiffs' Exhibit P-12.
[22] Plaintiffs' Exhibit P-7.
[23] Plaintiffs' Exhibit P-22.
[24] Plaintiffs' Exhibit P-8.

Corrections, between the dates of July 9, 2009 and December 14, 2012.[25] Mr. Statler was sentenced to 498 months of confinement.[26] He served part of this sentence through the State of Washington, Department of Corrections, between the dates of July 16, 2009 and December 14, 2012.[27]

The plaintiffs have individually established by clear and convincing evidence that they have each served part of their sentences. The Court concludes that the plaintiffs have individually satisfied the element that they had served all or any part of their sentences as required by RCW 4.100.060(1)(a).

NOT CURRENTLY INCARCERATED FOR ANY OFFENSE – RCW 4.100.060(1)(B)(I).

The Court finds by clear and convincing evidence that the plaintiffs were not incarcerated (currently incarcerated) for any offense at the time of trial. Indeed, all three of the plaintiffs attended the entire trial. The Court concludes that the plaintiffs have individually satisfied the element that they were not currently incarcerated for any offense as required by RCW 4.100.060(1)(b)(ii).

NOT SERVING A TERM OF IMPRISONMENT OR A CONCURRENT SENTENCE FOR ANY CONVICTION OTHER THAN THOSE THAT ARE THE BASIS FOR THE CLAIM – RCW 4.100.060(1)(B)(II).

While incarcerated with the Department of Corrections, Mr. Larson was only serving a sentence for the charges under case number 08-1-02445-9.[28] While incarcerated with the Department of Corrections, Mr. Gassman was only serving a sentence for the charges under case number 08-1-02444-1.[29] While incarcerated with the Department of Corrections, Mr. Statler was only serving a sentence for the charges under case number 08-1-02442-4.[30] The plaintiffs have individually established by clear and convincing evidence that during the period of

[25] Plaintiffs' Exhibit P-23.
[26] Plaintiffs' Exhibit P-9.
[27] Plaintiffs' Exhibit P-24.
[28] Plaintiffs' Exhibit P-22.
[29] Plaintiffs' Exhibit P-23.

confinement for which they are seeking compensation, none of them were serving a term of imprisonment or a current sentence other than those that form the basis of these claims. The Court concludes that the plaintiffs have individually satisfied the elements of RCW 4.100.060(1)(b)(ii).

JUDGMENTS OF CONVICTION VACATED AND CHARGING DOCUMENT DISMISSED ON THE BASIS OF SIGNIFICANT NEW EXCULPATORY INFORMATION – RCW 4.100.060(1)(c)(ii).

In order to prevail on their claims, the plaintiffs are individually required to prove by clear and convincing evidence that their judgments of convictions were vacated and the charging documents dismissed. RCW 4.100.060(1)(c)(ii). Furthermore, the plaintiffs bear the burden of individually proving that the vacation of the judgments of conviction and dismissal of charging documents were based upon "significant new exculpatory information." Id.

On December 14, 2012, Mr. Larson's convictions were vacated and a new trial date scheduled.[31] The order vacating Mr. Larson's convictions and scheduling a new trial date was followed up by Judge Price's Findings of Fact, Conclusions of Law and Order, filed January 4, 2013.[32] On May 31, 2013, the Judge Triplet entered an order dismissing with prejudice the charges against Mr. Larson.[33] The certificate forming the basis for the motion to dismiss the charges stated that "there is insufficient evidence to proceed with trial."[34]

On December 14, 2012, Mr. Gassman's convictions were vacated and a new trial date scheduled.[35] The order vacating Mr. Gassman's convictions and scheduling a new trial date was followed up by Judge Price's Findings of Fact, Conclusions of Law and Order, filed January 4, 2013.[36] On May 31, 2013, Judge Triplet entered an order dismissing with prejudice the

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[30] Plaintiffs' Exhibit P-24.
[31] Plaintiffs' Exhibit P-13.
[32] Plaintiffs' Exhibit P-16.
[33] Plaintiffs' Exhibit P-19.
[34] Plaintiffs' Exhibit P-19.
[35] Plaintiffs' Exhibit P-14.
[36] Plaintiffs' Exhibit P-17.

charges against Mr. Gassman.[37] The certificate forming the basis for the motion to dismiss the charges stated that "there is insufficient evidence to proceed with trial."[38]

On December 14, 2012, Mr. Statler's convictions were vacated and a new trial date scheduled.[39] The order vacating Mr. Statler's convictions and scheduling a new trial date was followed up by Judge Price's Findings of Fact, Conclusions of Law and Order, filed January 4, 2013.[40] On May 31, 2013, Judge Triplet entered an order dismissing with prejudice the charges against Mr. Statler.[41] The certificate forming the basis for the motions to dismiss the charges stated that "there is insufficient evidence to proceed with trial."[42]

The plaintiffs have established by clear and convincing evidence that their judgments of convictions were vacated and the charging documents dismissed. In addition to proving that the judgments of conviction were vacated and the charging documents dismissed, the plaintiffs are further required to prove by clear and convincing evidence that the vacation of judgments of convictions and orders dismissing the charges were based upon "significant new exculpatory information."

After considering the plaintiffs' motions to vacate the judgments, Judge Price made a number of conclusions that resulted in his order vacating the judgments of convictions.[43] Judge Price concluded, among other things, that: (1) "Trial Counsel failed to competently investigate the case";[44] (2) Trial counsel "conducted no new investigation into the date of the crime.";[45] (3) "This is not a case of trial strategy gone badly; here there was no strategy at all.";[46] (4) "Trial

[37] Plaintiffs' Exhibit P-20.
[38] Plaintiffs' Exhibit P-20.
[39] Plaintiffs' Exhibit P-15.
[40] Plaintiffs' Exhibit P-18.
[41] Plaintiffs' Exhibit P-21.
[42] Plaintiffs' Exhibit P-21.
[43] Plaintiffs' Exhibits P-13, P14 & P-15.
[44] Plaintiffs' Exhibits P-13, pg. 4, P-14, pg. 4 & P-15, pg. 4.
[45] Plaintiffs' Exhibits P-13, pg. 4, P-14, pg. 4 & P-15, pg. 4.
[46] Plaintiffs' Exhibits P-13, pg. 4, P-14, pg. 4 & P-15, pg. 4.

Counsel were trying to fit a square peg into a round hole; they threw in the towel.";[47] (5) "An hour or two of investigation by Trial Counsel would have cast doubt on the State's case.";[48] (6) The plaintiffs "were denied their constitutional right to effective assistance of counsel.";[49] (7) "Trial Counsel's representation was deficient; falling below an objective standard of reasonableness.";[50] (8) The plaintiffs "were prejudiced by Trial Counsel's deficient performance.";[51] (9) The plaintiffs had "shown 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'";[52] (10) "Trial Counsel did not conduct an adequate investigation.";[53] (11) "The failure to investigate is considered 'especially egregious' when a defense attorney fails to discover potentially exculpatory evidence.";[54] (12) "Trial Counsel's failure to investigate Weskamp's work records and discover evidence ... was especially egregious.";[55] (13) "Trial Counsel's errors, cumulatively, prejudiced the defendants.";[56] (14) "Trial Counsel did not investigate the phone records of the State witness, they did not interview the detectives, and they did not interview Shane Nielson.";[57] and (15) "When viewed cumulatively, the aggregate effect of Trial Counsel's errors undermines confidence in the outcome of trial."[58]

Judge Price found that the sheer volume of evidence presented in the motion to vacate the judgments of convictions established that trial counsel failed to competently investigate the case.[59] The "sheer volume of evidence" considered by Judge Price consisted of Eric

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[47] Plaintiffs' Exhibits P-13, pg. 4, P-14, pg. 4 & P-15, pg. 4.
[48] Plaintiffs' Exhibits P-13, pg. 6, P-14, pg. 6 & P-15, pg. 6.
[49] Plaintiffs' Exhibits P-13, pg. 6, P-14, pg. 6 & P-15, pg. 6.
[50] Plaintiffs' Exhibits P-13, pg. 6, P-14, pg. 6 & P-15, pg. 6.
[51] Plaintiffs' Exhibits P-13, pg. 6, P-14, pg. 6 & P-15, pg. 6.
[52] Plaintiffs' Exhibits P-13, pg. 6, P-14, pg. 6 & P-15, pg. 6.
[53] Plaintiffs' Exhibits P-13, pg. 7, P-14, pg. 7 & P-15, pg. 7.
[54] Plaintiffs' Exhibits P-13, pg. 7, P-14, pg. 7 & P-15, pg. 7.
[55] Plaintiffs' Exhibits P-13, pg. 7, P-14, pg. 7 & P-15, pg. 7.
[56] Plaintiffs' Exhibits P-13, pg. 7, P-14, pg. 7 & P-15, pg. 7.
[57] Plaintiffs' Exhibits P-13, pg. 7, P-14, pg. 7 & P-15, pg. 7.
[58] Plaintiffs' Exhibits P-13, pg. 9, P-14, pg. 9 & P-15, pg. 9.
[59] Plaintiffs' Exhibits P-13, pg. 4, P-14, pg. 4 & P-15, pg. 4.

Weskamp's work records, Matthew Dunham's phone records, trial counsel's failure to interview the detectives, and trial counsel's failure to interview Shane Neilson.[60] Absent from Judge Price's findings of fact and conclusions of law are any findings or conclusions stating that the vacations of convictions were based upon significant new exculpatory information.

Similarly, absent from Judge Triplet's orders dismissing the charges are any findings that the dismissals were based upon significant new exculpatory information. Rather, the certificate accompanying the orders dismissing the charges asserted the motions were based upon "insufficient evidence to proceed with trial."[61]

RCW 4.100.060(1)(c)(2) requires the vacation of the judgment of conviction and order of dismissal of the charges to be based upon significant new exculpatory information. The Wrongly Convicted Person statutes do not define what constitutes "significant new exculpatory information." Further, based upon the Wrongly Convicted Person statute being recently enacted, there is no case law defining what constitutes "significant new exculpatory information" as it relates to RCW 4.100.060(1)(c)(ii). Therefore, the Court must first decide what the legislature intended when it included the requirement that the vacation of the judgment of conviction and dismissal of the charges be founded upon "significant new exculpatory information."

By way of comparison, RCW 10.73.170 authorizes a person convicted of a felony to submit a motion requesting post-conviction DNA testing. A condition precedent to the motion is that the DNA testing would provide "significant new information." RCW 10.73.170(2)(a)(iii). Although RCW 4.100.060(1)(c)(ii) requires "significant new *exculpatory* information" and RCW 10.73.170 mandates "significant new information," case law defining what constitutes *significant new information* for purposes of post-conviction relief under RCW 10.73 is useful.

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[60] Plaintiffs' Exhibits P-13, P-14, & P-15.
[61] Plaintiffs' Exhibits P-19, P-20 & P-21.

Division Two of the Court of Appeals analyzed what constitutes significant new information as it relates to RCW 10.73.170. Riofta v. State, 134 Wn.App. 669, 142 P.3d 193, (2006). The Court stated:

> 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). Id. at 683, 142 P.3d at _____.

Based upon this definition of "new," the Court concluded:

> ... that the legislature intended that a party requesting DNA testing under ... 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). Id. at 684, 142 P.3d at 200 (Emphasis added).

Under this definition, the court must make a determination as to whether the information was available at the time of trial. If the information was unavailable at the time of trial, it would be considered new information for purposes of RCW 4.100.060(1)(c)(ii).

Judge Price's finding of fact and conclusions of law indicate that an hour or two of investigation by trial counsel would have cast doubt on the State's case.[62] He supported this finding by citing to the "sheer volume of evidence presented" in plaintiffs' motions to vacate their judgments of convictions.[63] Judge Price then listed the "sheer volume" of evidence he relied upon in vacating the judgments of conviction. This evidence consisted of Mr. Weskamp's work records, Mr. Dunham's phone records, and the failure to interview the detectives and Mr. Neilson. All of the evidence cited by Judge Price in granting the motion to vacate the judgments of convictions is evidence that was available at the time of the criminal trial but went undiscovered by trial counsel.

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[62] Plaintiffs' Exhibit P-13, pg. 4, P-14, pg. 4 & P-15, pg. 4.
[63] Plaintiffs' Exhibit P-13, pg. 4, P-14, pg. 4 & P-15, pg. 4.

The Legislature's intent that the vacation of the judgment of conviction and orders dismissing the charges be founded upon substantial new exculpatory information is reflected in RCW 4.100.010. Although not an element to be proved at trial, the intent of the Wrongly Convicted Person statute is useful in determining what types of claims are intended to be meritorious. RCW 4.100.010 states, in part, "A majority of those wrongly convicted in Washington state **have no remedy available under the law** for the destruction of their personal lives resulting from errors in our criminal justice system." (Emphasis Added).

In this case, the single reason for the plaintiffs' wrongful convictions was the deficiencies of trial counsel. The record forming the basis for the vacation of the judgments of conviction is grounded in trial counsels' failures to investigate evidence that then existed as well as trial counsels' failure to interview witnesses. The Legislature's intent in passing the Wrongly Convicted Person statute is to provide a remedy to those that would otherwise not have a remedy under the law. Here, there is a remedy available under the law – legal malpractice. Surely, the Wrongly Convicted Person statutes were not enacted with the intent of indemnifying private and public defense counsel for their negligent representation of those accused of crimes.

The vacation of the plaintiffs' judgments of convictions was not based upon substantial *new* exculpatory information. Rather, the vacation of the plaintiffs' judgments of convictions was based upon "the aggregate effect of Trial Counsel's errors."[64] Likewise, the orders dismissing the charges were not based upon significant new exculpatory information, but rather upon "insufficient evidence to proceed with trial."[65] Therefore, the plaintiffs have failed to present sufficient facts to prove by clear and convincing evidence that the vacation of their judgments of conviction and orders dismissing the charges were based upon significant new exculpatory information as required by RCW 4.100.060(1)(c)(ii).

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[64] Plaintiffs' Exhibits P-13, pg. 8, P-14, pg. 8 & P-15, pg. 8.
[65] Plaintiffs' Exhibits P-19, pg. 1, P-20, pg. 1 & P-21, pg. 1.

DID NOT ENGAGE IN ANY ILLEGAL CONDUCT ALLEGED IN THE CHARGING DOCUMENTS — RCW 4.100.060(1)(D).

In addition to proving all of the other elements of RCW 4.100.060 by clear and convincing evidence, the plaintiffs are also required to prove that they (individually) did not engage in any of the illegal conduct alleged in the charging documents. The terms "charging documents" contained in RCW 4.100.060(1)(d) are referred to in the plural. Since there can only be one charging document, the intent of the Legislature must have been to include other documents associated with the charging process. In the motions *in limine*, the Court ruled that the probable cause affidavits are documents covered under the language "charging documents" in RCW 4.100.060(1)(d).

RCW 4.100.060(1)(d) requires the plaintiffs to prove they did not engage in any illegal conduct alleged in the charging documents. Not engaging in any illegal conduct alleged in the charging documents is the definition of the terms "actually innocent" as contained in RCW 4.100.030(2)(a). Therefore, the plaintiffs are required to prove by clear and convincing evidence that they are actually innocent. Based upon the Wrongly Convicted Person statutes being recently enacted, this Court is unable to find any authority outside of the statute expanding on the plaintiffs' burden under this element.

Although not specific to RCW 4.100, the Supreme Court in In re Pers. Restraint of Carter, 172 Wn.2d 917, 263 P.3d 1241 (2011) discussed the actual innocence doctrine with respect to collateral attack petitions under RCW 10.73. In doing so, the Court applied the federal habeas corpus doctrine of actual innocence to evade the time bar of a personal restraint petition. This requires that the applicant demonstrate by clear and convincing evidence that an alleged constitutional error resulted in the conviction of one who is actually (factually) innocent. The actual innocence doctrine is concerned with *actual* (factual) innocence as compared to

legal innocence. The Supreme Court held that a claim of a legal error—not factual error—does not rise to the level of actual innocence. Id. at 934.

The federal courts have wrestled not only with the definition of actual innocence, but also the burden in proving actual innocence. The Supreme Court explained that an actual innocence finding "requires a holistic judgment about 'all the evidence' and its likely effect on reasonable jurors applying the reasonable-doubt standard." Schlup v. Delo, 513 U.S. 298, 328, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). In order to meet the Schlup standard, a petitioner must demonstrate that "in light of new evidence, it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt." Id. at 327. This new evidence must be reliable, and the reviewing court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." Id. at 332. The 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." Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed. 203 (1993).

To be entitled to relief, the petitioner would, at the very least, be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L.Ed. 560 (1979). Further, to be entitled to relief, the petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent. Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997); *See also*, Herrera, 506 U.S. 390 at 442-44, 113 S. Ct. at 882-83 (Blackmun, J., dissenting).

Here, the petitioners rely on a relatively small amount of evidence to prove they are actually innocent of the robberies committed against Mr. Weskamp and Mr. Berger. Mr. Kongchunji was a participant in the robbery committed in April, 2008 against Mr. Weskamp and

Mr. Berger. After being arrested for a different robbery occurring on April 23, 2008, Mr. Kongchunji engaged in a free-talk with law enforcement. Mr. Kongchunji's goal in engaging in the free-talk was to avoid a prison sentence. After Mr. Kongchunji implicated the plaintiffs in the robberies of Mr. Weskamp and Mr. Berger, he discovered the State would not agree to a non-prison sentence. Mr. Kongchunji then recanted and informed law enforcement that he would testify at trial that Mr. Larson, Mr. Gassman, and Mr. Statler were not involved in the robberies of Mr. Weskamp and Mr. Berger.

At the plaintiffs' criminal trial, Mr. Kongchunji never asserted his Fifth Amendment protections. Rather, after recanting, Mr. Kongchunji was not called as a witness by any of the parties. Clearly the State would not want to offer his testimony based upon the recantation. Likewise, the plaintiffs would not be inclined to call him as a witness based upon numerous issues surrounding his credibility. Trial counsel made the strategic decision not to call Mr. Kongchunji as a witness, a decision which was affirmed on appeal.[66]

Mr. Kongchunji asserts his recantation was based upon the original information he provided during the free-talk being false. He further asserts that Det. Marske threatened to charge him with perjury if he gave a conflicting story at trial. Mr. Kongchunji testified that he and Mr. Dunham spent approximately one month being housed in the same area of the Spokane County Jail. He claims it was at that time that he and Mr. Dunham agreed to provide the State with false information implicating the plaintiffs.

The State responds that Mr. Kongchunji's recantation was based upon Mr. Kongchunji coming to the realization that he was facing a prison sentence. Mr. Kongchunji testified as to the difficulties prison inmates face if they are found to have testified against codefendants. This

[66] State v. Larson, 160 Wn.App. 577, 249 P.3d 669 (2011); State v. Gassman, 160 Wn.App. 600, 248 P.3d 155 (2011); State v. Statler, 160 Wn.App. 622, 248 P.3d 165 (2011).

testimony was mirrored by the testimony of Prof. Natapoff. The State asserts Mr. Kongchunji's recantation was based upon his desire for self-preservation while in prison.

This Court makes two conclusions regarding Mr. Kongchunji's testimony. First, Mr. Kongchunji does not present any new information. All the information provided by Mr. Kongchunji was available to all of the party both prior to and throughout the criminal trial. Each party, for reasons already stated, chose not to call Mr. Kongchunji as a witness. Second, and more importantly, this Court gives virtually no weight to Mr. Kongchunji's testimony. Mr. Kongchunji testified that he is never honest with the police. After his arrest, he implicated the plaintiffs in the robbeies against Mr. Weskamp and Mr. Berger. Once his request for a non-prison sentence was not granted, he chose to recant. At trial, Mr. Kongchunji's testimony fluctuated as much as it did after his arrest. Additionally, Mr. Kongchunji has numerous convictions for theft, robbery, and burglary – all which reflect adversely on his credibility.

In addition to relying on Mr. Kongchunji's testimony to prove actual innocence, the plaintiffs rely on Mr. Weskamp's timecard. Mr. Weskamp's time card proves that the robberies could not have occurred on April 17, 2008, as alleged in the amended information. Mr. Weskamp testified that due to his injuries he left work early the day following the robberies. Mr. Weskamp's timecard shows he did not leave work early on April 18, 2008. The plaintiffs have been successful in proving that the robberies did not occur on April 17, 2008. However their burden is to prove by clear and convincing evidence that they did not engage in **any** illegal conduct alleged in the charging documents.

The Court earlier ruled that the charging documents include the probable cause affidavit. The probable cause affidavit places the robberies on or about April 15, 2008.[67] This date is also uncertain based upon the crimes not being investigated until approximately July, 2008. Mr. Weskamp's timecard is useful for proving what dates the robberies most likely did not occur.

They are not, however, useful for establishing that the plaintiffs are actually innocent. As the State pointed out, there are at least four other dates in April, 2008 that the robberies may have occurred. The plaintiffs may well assert that they are unable to provide an alibi defense for all of these dates given the substantial amount of time that has passed. Nevertheless, this is not a criminal prosecution whereby the State is required to clearly define when the robberies allegedly occurred. This is a civil action in which the plaintiffs are burdened with proving by clear and convincing evidence they did not engage in any of the illegal conduct alleged in the charging documents (of which the probable cause affidavit is included). The criminal conduct alleged in the charging documents is specific to the event (the robberies of Mr. Weskamp and Mr. Berger), but broad as to the dates it may have occurred.

For the month of April, 2008, each plaintiff generally asserted an alibi defense covering the entire month. In the spring of 2008, Mr. Larson would always clock into work between 9:46 p.m. and 9:55 p.m. on the days he worked.[68] At trial, Mr. Larson testified that he would always arrive to work between 9:10 p.m. and 9:20 p.m. He testified he was required to be at work at least 30 minutes prior to his shift to speak with the employee he was relieving. The plaintiffs offered the testimony of Mr. Larson's supervisor, Robert Hibdon, to support Mr. Larson's testimony. Mr. Hibdon testified that it was necessary to arrive to work a few minutes early in order to obtain information necessary for the next shift. A few minutes early does not equate to 30 minutes early, especially without being compensated for the time.

Mr. Gassman's alibi for the month of April, 2008, consists of his testimony that during the month of April, 2008 he resided in northern Idaho with his girlfriend, Elizabeth Holder. Mr. Gassman testified that he lived with Ms. Holder for approximately one year. Mr. Gassman further testified that during that period of time he was unemployed and never left the residence

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[67] Defendant's Exhibits D-115, D-118 & D-121
[68] Plaintiffs' Exhibit P-29.

without Ms. Holder. The Court does not find it credible that Mr. Gassman resided with Ms. Holder for an entire year and never left the residence without her. His testimony is further scrutinized based upon his convictions for felony crimes of dishonesty.

Mr. Statler's general alibi defense for the month of April, 2008, was based upon him being monitored by the VICAP through the Department of Corrections. This monitoring required him to provide breath samples every day at 6:00 a.m., 6:00 p.m., and 10:00 p.m. Further, Mr. Statler was required to be available for a period of time both before and after each allotted breath test time. This evidence is persuasive in that Mr. Statler would not have been available shortly before or after 10:00 p.m.

The Court finds it compelling that the firearm used in the commission of a similar robbery was found at Mr. Statler's residence. Mr. Statler denied knowing the firearm was in his residence. The Court deems this testimony unpersuasive given the conflicting testimony of Det. McCrillis, Mr. Neilson, and Mr. Statler on the issues surrounding the firearm. Mr. Statler's testimony is further scrutinized based upon his convictions for felony crimes of dishonesty. Lastly, even with the VICAP testing requirement, Mr. Statler would have been available to commit the crimes alleged in the charging documents prior to providing his 10:00 p.m. breath sample.

Both Mr. Larson and Mr. Statler have credible evidence about the dates and times they were not available to commit the robberies. By all accounts, the robberies occurred when it was dark out, getting dark out, or late in the evening. The evidence presented by the plaintiffs establishes when the plaintiffs were unavailable to commit the crimes, but do not prove that they did not engage in any of the illegal conduct alleged in the charging documents. Surely, the robberies 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.

The plaintiffs have presented a clear and persuasive case that they are not guilty (legally guilty) of the charges alleged in the amended information. After being convicted, the plaintiffs submitted evidence showing that a reasonable doubt exists as to each one of the crimes charged. However, merely casting doubt on their guilt is insufficient to establish they are actually (factually) innocent. Clearly, the legislative intent in enacting the Wrongly Convicted Person statute was not to provide monetary compensation to those who are convicted and later found to be not guilty. If that were the case, the language of RCW 4.100.060(1)(d) would have reflected as much.

The plaintiffs in this case have not presented sufficient evidence for the Court to conclude they are actually (factually) innocent of the crimes alleged in the charging documents. The new evidence presented by the plaintiffs does not, alone or in conjunction with other evidence, prove they did not engage in any illegal conduct alleged in the charging documents. While the petitioners' evidence certainly casts doubt on the State's case, they have not met their extraordinarily high and truly persuasive standard required for a claim of actual innocence.

DID NOT COMMIT OR SUBORN PERJURY, OR FABRICATE EVIDENCE TO CAUSE OR BRING ABOUT THEIR CONVICTIONS – RCW 4.100.060(1)(E).

Neither party introduced any evidence showing that the plaintiffs suborned perjury or fabricated evidence to bring about their convictions. This Court was not provided the record from the criminal trial that resulted in the plaintiffs' convictions. However, based upon the evidence before this Court, a finding may be made by clear and convincing evidence that the plaintiffs did not suborn perjury or fabricate evidence to cause or bring about their convictions. The Court concludes that the plaintiffs have individually satisfied the elements of RCW 4.100.060(1)(e).

III. CONCLUSION

Based upon the foregoing, the Court concludes that the plaintiffs have proven by clear and convincing evidence the elements of:

1. RCW 4.100.060(1)(a) - having been convicted for one or more felonies in superior court, sentenced to a term of imprisonment, and served all or part of the sentence;

2. RCW 4.100.060(1)(b)(i) - not currently incarcerated for any offense;

3. RCW 4.100.060(1)(b)(ii) - not serving a term of imprisonment or a concurrent sentence for any conviction other than those that are the basis of the claim, and

4. RCW 4.100.060(1)(e) - did not commit or suborn perjury or fabricate evidence to cause or bring about their convictions.

Based upon the foregoing, the Court concludes that the plaintiffs have not proven by clear and convincing evidence the elements of:

1. RCW 4.100.060(1)(c)(ii) - judgments of conviction vacated and charging documents dismissed on the basis of significant new exculpatory information; and

2. RCW 4.100.060(1)(d) - did not engage in any illegal conduct alleged in the charging documents.

Therefore, the Court enters judgment in favor of the State.

DATED this 12th day of February, 2015.

Judge John O. Cooney

— EXHIBIT B —

Chapter 4.100 RCW

WRONGLY CONVICTED PERSONS

Chapter Listing

RCW Sections

4.100.010
Intent.

The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped of their lives and liberty, they are forced to endure imprisonment and are later stigmatized as felons. A majority of those wrongly convicted in Washington state have no remedy available under the law for the destruction of their personal lives resulting from errors in our criminal justice system. The legislature intends 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.

[2013 c 175 § 1.]

4.100.020
Claim for compensation — Definitions.

(1) Any person convicted in superior court and subsequently imprisoned for one or more felonies of which he or she is actually innocent may file a claim for compensation against the state.

(2) For purposes of this chapter, a person is:

(a) "Actually innocent" of a felony if he or she did not engage in any illegal conduct alleged in the charging documents; and

(b) "Wrongly convicted" if he or she was charged, convicted, and imprisoned for one or more felonies of which he or she is actually innocent.

(3)(a) If the person entitled to file a claim under subsection (1) of this section is incapacitated and incapable of filing the claim, or if he or she is a minor, or is a nonresident of the state, the claim may be filed on behalf of the claimant by an authorized agent.

(b) A claim filed under this chapter survives to the personal representative of the claimant as provided in RCW 4.20.046.

[2013 c 175 § 2.]

4.100.030
Procedure for filing of claims.

(1) All claims under this chapter must be filed in superior court. The venue for such actions is governed by RCW 4.12.020.

(2) Service of the summons and complaint is governed by RCW 4.28.080.

[2013 c 175 § 3.]

4.100.040
Claims — Evidence, determinations required — Dismissal of claim.

(1) In order to file an actionable claim for compensation under this chapter, the claimant must establish by documentary evidence that:

(a) The claimant has been convicted of one or more felonies in superior court and subsequently sentenced to a term of imprisonment, and has served all or part of the sentence;

(b)(i) The claimant is not currently incarcerated for any offense; and

(ii) During the period of confinement for which the claimant is seeking compensation, the claimant was not serving a term of imprisonment or a concurrent sentence for any crime other than the felony or felonies that are the basis for the claim;

(c)(i) The claimant has been pardoned on grounds consistent with innocence for the felony or felonies that are the basis for the claim; or

(ii) The claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed; and

(d) The claim is not time barred by RCW **4.100.090**.

(2) In addition to the requirements in subsection (1) of this section, the claimant must state facts in sufficient detail for the finder of fact to determine that:

(a) The claimant did not engage in any illegal conduct alleged in the charging documents; and

(b) The claimant did not commit or suborn perjury, or fabricate evidence to cause or bring about the conviction. A guilty plea to a crime the claimant did not commit, or a confession that is later determined by a court to be false, does not automatically constitute perjury or fabricated evidence under this subsection.

(3) Convictions vacated, overturned, or subject to resentencing pursuant to *In re: Personal Detention of Andress*, 147 Wn.2d 602 (2002) may not serve as the basis for a claim under this chapter unless the claimant otherwise satisfies the qualifying criteria set forth in RCW **4.100.020** and this section.

(4) The claimant must verify the claim unless he or she is incapacitated, in which case the personal representative or agent filing on behalf of the claimant must verify the claim.

(5) If the attorney general concedes that the claimant was wrongly convicted, the court must award compensation as provided in RCW **4.100.060**.

(6)(a) If the attorney general does not concede that the claimant was wrongly convicted and the court finds after reading the claim that the claimant does not meet the filing criteria set forth in this section, it may dismiss the claim, either on its own motion or on the motion of the attorney general.

(b) If the court dismisses the claim, the court must set forth the reasons for its decision in written findings of fact and conclusions of law.

[2013 c 175 § 4.]

4.100.050
Appeals.

Any party is entitled to the rights of appeal afforded parties in a civil action following a decision on such motions. In the case of dismissal of a claim, review of the superior court action is de novo.

[2013 c 175 § 5.]

4.100.060
Compensation awards — Amounts — Proof required — Reentry services.

(1) In order to obtain a judgment in his or her favor, the claimant must show by clear and convincing evidence that:

(a) The claimant was convicted of one or more felonies in superior court and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence;

(b)(i) The claimant is not currently incarcerated for any offense; and

(ii) During the period of confinement for which the claimant is seeking compensation, the claimant was not serving a term of imprisonment or a concurrent sentence for any conviction other than those that are the basis for the claim;

(c)(i) The claimant has been pardoned on grounds consistent with innocence for the felony or felonies that are the basis for the claim; or

(ii) The claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed;

(d) The claimant did not engage in any illegal conduct alleged in the charging documents; and

(e) The claimant did not commit or suborn perjury, or fabricate evidence to cause

or bring about his or her conviction. A guilty plea to a crime the claimant did not commit, or a confession that is later determined by a court to be false, does not automatically constitute perjury or fabricated evidence under this subsection.

(2) Any pardon or proclamation issued to the claimant must be certified by the officer having lawful custody of the pardon or proclamation, and be affixed with the seal of the office of the governor, or with the official certificate of such officer before it may be offered as evidence.

(3) In exercising its discretion regarding the weight and admissibility of evidence, the court must give due consideration to difficulties of proof caused by the passage of time or by release of evidence pursuant to a plea, the death or unavailability of witnesses, the destruction of evidence, or other factors not caused by the parties.

(4) The claimant may not be compensated for any period of time in which he or she was serving a term of imprisonment or a concurrent sentence for any conviction other than the felony or felonies that are the basis for the claim.

(5) If the jury or, in the case where the right to a jury is waived, the court finds by clear and convincing evidence that the claimant was wrongly convicted, the court must order the state to pay the actually innocent claimant the following compensation award, as adjusted for partial years served and to account for inflation from July 28, 2013:

(a) Fifty thousand dollars for each year of actual confinement including time spent awaiting trial and an additional fifty thousand dollars for each year served under a sentence of death pursuant to chapter 10.95 RCW;

(b) Twenty-five thousand dollars for each year served on parole, community custody, or as a registered sex offender pursuant only to the felony or felonies which are grounds for the claim;

(c) Compensation for child support payments owed by the claimant that became due and interest on child support arrearages that accrued while the claimant was in custody on the felony or felonies that are grounds for the compensation claim. The funds must be paid on the claimant's behalf in a lump sum payment to the department of social and health services for disbursement under Title **26** RCW;

(d) Reimbursement for all restitution, assessments, fees, court costs, and all other sums paid by the claimant as required by pretrial orders and the judgment and sentence; and

(e) Attorneys' fees for successfully bringing the wrongful conviction claim calculated at ten percent of the monetary damages awarded under subsection (5)(a) and (b) of this section, plus expenses. However, attorneys' fees and expenses may not exceed seventy-five thousand dollars. These fees may not be deducted from the compensation award due to the claimant and counsel is not entitled to receive

additional fees from the client related to the claim. The court may not award any attorneys' fees to the claimant if the claimant fails to prove he or she was wrongly convicted.

(6) The compensation award may not include any punitive damages.

(7) The court may not offset the compensation award by any expenses incurred by the state, the county, or any political subdivision of the state including, but not limited to, expenses incurred to secure the claimant's custody, or to feed, clothe, or provide medical services for the claimant. The court may not offset against the compensation award the value of any services or reduction in fees for services to be provided to the claimant as part of the award under this section.

(8) The compensation award is not income for tax purposes, except attorneys' fees awarded under subsection (5)(e) of this section.

(9)(a) Upon finding that the claimant was wrongly convicted, the court must seal the claimant's record of conviction.

(b) Upon request of the claimant, the court may order the claimant's record of conviction vacated if the record has not already been vacated, expunged, or destroyed under court rules. The requirements for vacating records under RCW 9.94A.640 do not apply.

(10) Upon request of the claimant, the court must refer the claimant to the department of corrections or the department of social and health services for access to reentry services, if available, including but not limited to counseling on the ability to enter into a structured settlement agreement and where to obtain free or low-cost legal and financial advice if the claimant is not already represented, the community-based transition programs and long-term support programs for education, mentoring, life skills training, assessment, job skills development, mental health and substance abuse treatment.

(11) The claimant or the attorney general may initiate and agree to a claim with a structured settlement for the compensation awarded under subsection (5) of this section. During negotiation of the structured settlement agreement, the claimant must be given adequate time to consult with the legal and financial advisor of his or her choice. Any structured settlement agreement binds the parties with regard to all compensation awarded. A structured settlement agreement entered into under this section must be in writing and signed by the parties or their representatives and must clearly state that the parties understand and agree to the terms of the agreement.

(12) Before approving any structured settlement agreement, the court must ensure that the claimant has an adequate understanding of the agreement. The court may approve the agreement only if the judge finds that the agreement is in the best interest of the claimant and actuarially equivalent to the lump sum

compensation award under subsection (5) of this section before taxation. When determining whether the agreement is in the best interest of the claimant, the court must consider the following factors:

(a) The age and life expectancy of the claimant;

(b) The marital or domestic partnership status of the claimant; and

(c) The number and age of the claimant's dependants.

[2013 c 175 § 6.]

4.100.070
Provision of information — Statute of limitations.

(1) On or after July 28, 2013, when a court grants judicial relief, such as reversal and vacation of a person's conviction, consistent with the criteria established in RCW **4.100.040**, the court must provide to the claimant a copy of RCW **4.100.020** through **4.100.090**, **28B.15.395**, and **72.09.750** at the time the relief is granted.

(2) The clemency and pardons board or the indeterminate sentence review board, whichever is applicable, upon issuance of a pardon by the governor on grounds consistent with innocence on or after July 28, 2013, must provide a copy of RCW **4.100.020** through **4.100.090**, **28B.15.395**, and **72.09.750** to the individual pardoned.

(3) If an individual entitled to receive the information required under this section shows that he or she was not provided with the information, he or she has an additional twelve months, beyond the statute of limitations under RCW **4.100.090**, to bring a claim under this chapter.

[2013 c 175 § 7.]

4.100.080
Remedies and compensation exclusive — Admissibility of agreements.

(1) It is the intent of the legislature that the remedies and compensation provided under this chapter shall be exclusive to all other remedies at law and in equity against the state or any political subdivision of the state. As a requirement to making a request for relief under this chapter, the claimant waives any and all other remedies, causes of action, and other forms of relief or compensation against the

state, any political subdivision of the state, and their officers, employees, agents, and volunteers related to the claimant's wrongful conviction and imprisonment. This waiver shall also include all state, common law, and federal claims for relief, including claims pursuant to 42 U.S.C. Sec. 1983. A wrongfully convicted person who elects not to pursue a claim for compensation pursuant to this chapter shall not be precluded from seeking relief through any other existing remedy. The claimant must execute a legal release prior to the payment of any compensation under this chapter. If the release is held invalid for any reason and the claimant is awarded compensation under this chapter and receives a tort award related to his or her wrongful conviction and incarceration, the claimant must reimburse the state for the lesser of:

(a) The amount of the compensation award, excluding the portion awarded pursuant to RCW **4.100.060**(5) (c) through (e); or

(b) The amount received by the claimant under the tort award.

(2) A release dismissal agreement, plea agreement, or any similar agreement whereby a prosecutor's office or an agent acting on its behalf agrees to take or refrain from certain action if the accused individual agrees to forgo legal action against the county, the state of Washington, or any political subdivision, is admissible and should be evaluated in light of all the evidence. However, any such agreement is not dispositive of the question of whether the claimant was wrongly convicted or entitled to compensation under this chapter.

[2013 c 175 § 8.]

4.100.090
Actions for compensation.

Except as provided in RCW **4.100.070**, an action for compensation under this chapter must be commenced within three years after the grant of a pardon, the grant of judicial relief and satisfaction of other conditions described in RCW **4.100.020**, or release from custody, whichever is later. However, any action by the state challenging or appealing the grant of judicial relief or release from custody tolls the three-year period. Any persons meeting the criteria set forth in RCW **4.100.020** who was wrongly convicted before July 28, 2013, may commence an action under this chapter within three years after July 28, 2013.

[2013 c 175 § 9.]