NO. 33179-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON,

Defendant/Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Plaintiffs Robert Larson, Tyler Gassman and Paul Statler brought a joint claim for monetary compensation pursuant to the Wrongful Conviction Compensation Act, Ch. 4.100 RCW ("Act"). Their claim is premised upon their 2009 jury trial convictions for one count of First Degree Robbery, two counts of First Degree Assault and two counts of Drive By Shooting while armed with a firearm.[1]

A four-day bench trial was held in front of the Honorable John O. Cooney. The trial court found that Plaintiffs failed to meet two essential elements necessary to prevail on their wrongful conviction claim. First, Plaintiffs failed to establish that their convictions had been vacated and dismissed on the basis of "significant new exculpatory information." Second, Plaintiffs failed to prove they were "actually innocent" of the crimes they were convicted of in 2009.

Plaintiffs failed to meet the Act's requirement to establish by clear and convincing evidence that their "judgment of conviction was reversed or vacated and the charging documents dismissed on the basis of

[1] Plaintiffs refer to the crimes collectively as "the Cataldo robbery." Judge Cooney's order refers to the crimes collectively as "the robbery." Since these crimes are intertwined the State's brief follows this same format in referring to the crimes collectively as "the Cataldo robbery" or "the robbery."

significant new exculpatory information." RCW 4.100.060(1)(c)(ii). Judge Cooney found that Plaintiffs' showing was deficient in two regards.

First, Plaintiffs' convictions were vacated on the basis of ineffective assistance of counsel, not on the basis of significant new exculpatory information. Second, Plaintiffs' convictions were dismissed due to insufficient evidence to proceed to a second trial and not on the basis of significant new exculpatory information.

Second, the Act also required Plaintiffs to prove by clear and convincing evidence that they were "actually innocent" of these crimes. RCW 4.100.060(1)(d); RCW 4.100.020(1)(a). Judge Cooney found that Plaintiffs had presented only "a relatively small amount of evidence to prove they are actually innocent of the robberies." CP 425. Plaintiffs' evidence merely expanded the possible dates on which the robbery was committed. However, each individual Plaintiff's alibi was insufficient to prove that he did not commit the robbery on these additional dates.

Plaintiffs failed to make even the threshold showing necessary for an actionable claim.[2] Nevertheless, they received a full trial and failed to meet their burden of establishing by clear and convincing evidence that

[2] Judge Cooney ruled that Plaintiffs had failed to prove by clear and convincing evidence that their "judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information" as required to prevail under RCW 4.100.060(1)(c)(ii). Notably, RCW 4.100.040(1)(c)(ii) allows a court to summarily dismiss a claim without holding a trial for failing to meet this requirement.

they were actually innocent. The trial court's order denying their claim should be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether Plaintiffs failed to prove their convictions were vacated and dismissed on the basis of significant new exculpatory information.

B. Whether the court abused its discretion when it refused to admit a recorded witness interview that was taken without any notice to the State, without any opportunity to cross examine and was not under oath.

C. Whether the court erred when it found that the robbery could not have occurred on April 17, 2008.

D. Whether Plaintiffs failed to prove they are actually innocent of First Degree Robbery, two counts of First Degree Assault, and two counts of Drive By Shooting While Armed With a Firearm.

III. STATEMENT OF THE CASE

A. Plaintiffs' 2009 criminal trial.

In April 2008, Joni Jeffries and Cliff Berger were dating. P's Ex. 50 at 97. The couple lived together at 1507 East Cataldo. *Id.* Berger worked at Progressive Tool and Dye where he met Eric Weskamp. *Id.* at 98. In April 2008, Jeffries bought ten OxyContin pills from Weskamp. P's Ex. 50 at 99. Jeffries indicated she wanted to purchase a second larger amount and Weskamp said he could arrange that. P's Ex. 50 at 99. Weskamp made arrangements to purchase OxyContin from Anthony

Kongchunji, a man from whom he had previously bought and sold drugs. P's Ex. 52 at 214, 221.[3] Jeffries provided $4000 to $4500 to Berger and Weskamp to buy the drugs. P's Ex. 50 at 101-02; P's Ex. 52 at 213; D's Ex. 111 at 49. The drug buy was set to occur that evening at Berger and Jeffries' Cataldo home. P's Ex. 50 at 99-100.

That evening, Kongchunji called Weskamp to tell him he was near the Cataldo home. P's Ex. 52 at 216; P's Ex. 50 at 103. Kongchunji arrived at the Cataldo home in the passenger seat of a red pickup driven by Matthew Dunham. P's Ex. 52 at 217, 219-20. Weskamp knew Kongchunji and recognized Dunham as someone he had previously met through Kongchunji. *Id.* at. 219-20. Dunham parked across the street from 1507 East Cataldo. *Id.* at 217. Jeffries gave Weskamp the money and he and a man named Rob Syler[4] proceeded to the red pickup. P's Ex. 52 at 217-18.

Weskamp and Syler got into the back of the pickup, but exited when they sensed something was wrong. P's Ex. 52 at 222. Outside the truck three masked assailants armed with a shotgun and a handgun assaulted Weskamp and Syler and took all the money. *Id.* at 220-25, 233. The assailants drove off as Weskamp and Syler returned to the home.

[3] Kongchunji goes by the nickname "Poncho" which is how he is frequently referred to in the transcripts. P's Ex. 52 at 221.

[4] See P's Ex. 52 at 249 identifying "Rob" as Robert Syler.

Berger and a man named Kyle Williams jumped into Williams' white Cadillac and chased the assailants. P's Ex. 50 at 104-05. They broke off the chase when someone in the pickup shot at them. P's Ex. 52 at 108-110. No one ever contacted the police to report these crimes. P's Ex. 50 at 113-14; P's Ex. 50 at 238; D's Ex. 111 at 62.

On April 23, 2008, Matthew Dunham was arrested for a different robbery committed that same day (the "Turner-Hall robbery"). CP 6; RP 423, 427; *State v. Gassman*, 160 Wn. App. 600, 606, 248 P.3d 155 (2011). In May 2008, Detective Doug Marske met with Dunham and Dunham's attorney. CP 7; RP 428-29. During this meeting Dunham told Marske about the Cataldo robbery, and that he had committed it along with Larson, Gassman, Statler and Kongchunji. *Gassman,* 160 Wn. App. at 606. Dunham entered into a plea agreement in which he was sentenced to 18 months in juvenile detention in exchange for testifying against Larson, Gassman and Statler. *Id.* at 606; CP 38.[5]

Police also engaged in a free talk with Kongchunji. He also identified Larson, Gassman, and Statler as his accomplices in the Cataldo robbery. *Gassman,* 160 Wn. App. at 606. After not receiving the no-prison

[5] Plaintiffs frequently highlight that Dunham was facing a possible 30-40 year sentence. But this high sentencing range only exists because Dunham disclosed his involvement in three robberies after he was arrested for the Turner-Hall robbery. Prior to Dunham's voluntary disclosures, police did not have any evidence connecting Dunham to any robbery other than the Turner-Hall robbery. In fact, police did not even know the Cataldo robbery had occurred until Dunham told them about it. RP 478-480; RP 575-77.

plea deal he sought, Kongchunji recanted his statements and refused to testify. CP 427; RP 232.

In July 2008, police began contacting the victims and witnesses of the Cataldo robbery. P's Ex. 50 at 120; P's Ex. 52 at 241. These witnesses confirmed that Weskamp and Syler were robbed and assaulted. P's Ex. 50 and 52; D's Ex. 111. Weskamp confirmed that Kongchunji and Dunham committed the robbery, but no one was able to identify their accomplices because their faces had been covered. P's Ex. 52 at 222; D's Ex. 111 at 93. None of the originally contacted witnesses were able to specify when the robbery occurred other than to say it was dark outside and occurred in April 2008. P's Ex. 50; P's Ex. 52; D's Ex. 111.

On July 28, 2008, Larson, Gassman and Statler were charged with multiple felonies for the Cataldo robbery. P's Ex. 1, 2, 3. The original charging documents listed the crimes as having occurred "on or about April 15, 2008." *Id.* On January 12, 2009, the court granted the prosecutor's motion to amend the date of the crimes from "on or about April 15, 2008" to "on or about April 17, 2008."[6] P's Ex. 4, 5, 6.

[6] The Court of Appeals rejected Plaintiffs' argument that this amendment prejudiced them. "Where the [information] alleges that an offense allegedly occurred 'on or about' a certain date, the defendant is deemed to be on notice that the charge is not limited to a specific date." *Larson*, 160 Wn. App. at 593-94, citations omitted.

The April 17 date arose when police interviewed Kyle Williams whom police had not been able to locate until October 2008 after charges had already been filed. *State v. Larson,* 160 Wn. App. 577, 583, 249 P.3d 669 (2011). Williams identified the robbery date as April 17, 2008, based on his cell phone records showing he called Syler on April 18, 2008 to discuss the robbery that had occurred the prior day. *Id.* at 584. Williams testified to this date and the events surrounding the crime at Plaintiffs' joint criminal trial. *Id.*

Dunham testified at Plaintiffs' trial and identified them as his accomplices in the Cataldo crimes. *Gassman,* 160 Wn. App. at 606-07. The jury was advised of Dunham's plea deal. *Id.* 607; P's Ex. 38. The jury was also provided with WPIC 6.05 which provides, "Testimony of an accomplice, given on behalf of the [plaintiff], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth." *Gassman*, 160 Wn. App. at 613; *State v. Statler*, 160 Wn. App. 622, 635, 248 P.3d 165 (2011).

Defense counsel argued that Dunham implicated Larson, Gassman and Statler in the Cataldo robbery in order to receive a favorable plea deal

and to protect his brother Larry who they claimed had helped commit the robbery. *Larson,* 160 Wn. App. at 585. On February 17, 2009, a jury unanimously rejected this argument and found each Plaintiff guilty of one count of First Degree Robbery, two counts of First Degree Assault and two counts of Drive By Shooting while armed with a firearm. *Id.*.

B. Post trial events.

On February 26, 2009, Plaintiffs' filed a motion for a new trial and a motion to arrest judgment, claiming their counsel was ineffective for not calling Kongchunji to testify after he recanted his statement implicating them in the robbery. CP 15. On May 20, 2009, the trial court denied both motions. *Id.*

On March, 15, 2011, the Court of Appeals, Division III, affirmed Plaintiffs' convictions. *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).

On January 4, 2013, the trial court vacated Plaintiffs' convictions pursuant to CrR 7.8. P's Ex. 13, 14, 15. On May 20, 2013, Plaintiffs' charges were dismissed. P's Ex. 19, 20, 21.

On January 9, 2014, Plaintiffs brought a claim[7] for monetary compensation pursuant to the Wrongful Conviction Compensation Act, Ch. 4.100 RCW. *Statute Attached as Appendix A.*

A bench trial was held in front of the Honorable John O. Cooney from January 26, 2015 through January 29, 2015. On February 12, 2015, Judge Cooney issued Findings of Fact, Conclusions of Law and the Court's Decision denying Plaintiffs' claim. CP 406-431, *Attached as Appendix B*. This timely appeal follows.

IV. ARGUMENT

A trial court's findings of fact that are supported by substantial evidence will not be disturbed on appeal. *Robertson v. Bindel*, 67 Wn.2d 172, 174, 406 P.2d 779 (1965). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Cingula Wireless, L.O.C. v. Thurston County*, 131 Wn. App. 756, 768, 120 P.3d 300 (2006). When a party challenges a court's findings following a bench trial, the non-moving party "is entitled to the benefit of all evidence and reasonable inference therefrom in support of the findings of fact entered by the trial court." *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 853, 792 P.2d 142 (1990).

[7] CP 1-207.

Findings of fact must support the conclusions of law. *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. V. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Statutory interpretation is a question of law reviewed de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001).

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1996). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Jackson,* 111 Wn. App. 660, 669, 46 P.3d 257 (2002).

A. Plaintiffs failed to meet their burden of proving that their convictions were vacated and dismissed on the basis of significant new exculpatory information.

On December 14, 2012, Judge Michael Price vacated Plaintiffs' convictions pursuant to CrR 7.8(b)(5). P's Ex's 13, 14, 15. Judge Price subsequently entered Findings of Facts and Conclusions of Law and Order. P's Ex. 16, 17, 18. These conclusions of law explicitly state that Plaintiffs' convictions were being vacated because they "have shown they were denied their constitutional right to effect [sic] assistance of counsel. P's Ex. 16, 17, 18 at p. 6. Judge Price subsequently dismissed Gassman

and Statler's charges because "there is insufficient evidence to proceed with trial." P's Ex's 20, 21. Larson's complaint was also dismissed.[8]

In order to prevail on their wrongful conviction claim Plaintiffs had the burden of establishing by clear and convincing evidence that they met the requirements of RCW 4.100.060(1)(c)(ii) which provides:

> The claimant's judgement 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.

Pursuant to the aforementioned provision, Plaintiffs had to show both that their conviction was vacated and that the charging document was dismissed on the basis of significant new exculpatory information. Because Plaintiffs proved neither, their claim was properly denied.

1. Plaintiffs' convictions were not vacated on the basis of significant new exculpatory information.

Judge Cooney found that Plaintiffs had failed to meet the requirements of RCW 4.100.060(1)(c)(ii), explaining that "[a]bsent from Judge Price's findings of fact and conclusions of law are any findings or conclusions stating the vacations of convictions were based on significant new exculpatory information." CP 421. This ruling should be affirmed,

[8] It is unclear from the signature which judge signed Larson's dismissal order and there is no stamp underneath the signature indicating the judge's name.

because ineffective assistance of counsel was the sole basis upon which Plaintiffs' judgements were vacated. P's Ex. 16, 17, 18 at pp. 6-9.

2. Plaintiffs' convictions were not dismissed on the basis of significant new exculpatory information.

Plaintiffs also failed to prove by clear and convincing evidence that their convictions were dismissed on the basis of significant new exculpatory information as required by RCW 4.100.060(1)(c)(ii). Plaintiffs misrepresent the record when they claim that "this element of the ACT was among the undisputed issues listed in the Trial Management Joint Report." P's brief at p. 28., citing CP 243-44. The joint report states only that "the charging documents were dismissed" but provides no reason. CP 243. There is no dispute that the charges were dismissed.

The disputed issue is whether Plaintiffs proved that the charges were dismissed on the basis of significant new exculpatory information. Judge Cooney correctly held that Plaintiffs failed to meet their burden, explaining that the dismissal orders, at least two of which were signed by Judge Price, do not contain "any findings that the dismissals were based upon significant new exculpatory information." CP 421.

For a claim to be actionable, a plaintiff must show that his conviction was reversed or vacated or that a new trial was ordered pursuant to the presentation of significant new exculpatory information.

RCW 4.100.060(1)(c)(ii). When a conviction is vacated the Act imposes an additional requirement that any subsequent dismissal was also based on significant new exculpatory information. *Id.*

Plaintiffs argue that pursuant to the second half of RCW 4.100.060(1)(c)(ii) they were not required to prove that their charges were dismissed based on significant new exculpatory information because a new trial was scheduled after their conviction was vacated. Their argument fails, because RCW 4.100.060(1)(c)(ii) sets forth different requirements for plaintiffs whose convictions were vacated than for those who have a new trial ordered through other mechanisms.

Plaintiffs' convictions were "vacated" pursuant to CrR 7.8, a court rule which allows a court to "relieve a party from a final judgment, order, or proceeding." CrR 7.8(c). "Vacate" is the same legal term explicitly used in the first section of RCW 4.100.060(1)(c)(ii). This first section requires that if a conviction is vacated then both the vacation and any subsequent dismissal must be based on significant new exculpatory information. RCW 4.100.060(1)(c)(ii). Plaintiffs failed to prove either, and thus their claim was properly denied.

3. The information presented for the motion to vacate was not "new."

Additionally, the information relied upon in vacating the convictions was not "new' information within the meaning of RCW 4.100.060(1)(c)(ii). Plaintiffs incorrectly cite *State v. Riofta* for the proposition that "new" means any evidence that was not presented to the trier of fact at the underlying trial. This is not the standard. *Riofta* holds that "the statutory language, 'significant new information,' includes DNA test results that did not exist at the time of trial and that are material to the perpetrator's identity, regardless of whether DNA testing could have been performed at trial." 166 Wn.2d 358, 361, 209 P.3d 467 (2009).

A new trial may be granted pursuant to CrR 7.5 if a defendant demonstrates that there is "[n]ewly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at trial."

A conviction may be vacated pursuant to CrR 7.8(b)(2) if a defendant demonstrates that there is "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5."

By incorporating the new trial and vacation mechanisms into the Act the legislature clearly intended that a wrongful conviction claim must be based on evidence that the defendant could *not* have discovered with reasonable diligence before trial. The information relied upon by Plaintiffs

fails to meet this test. In vacating Plaintiffs' convictions Judge Price explained: "An hour or two of investigation by trial counsel would have cast doubt on the state's case." P's Ex. 16, 17, 18 at p. 4. Judge Cooney recognized that the information was not "new," and that the convictions were vacated due to ineffective assistance of counsel. Defendants who are able to establish that they received ineffective assistance of counsel are entitled to have their conviction reversed or vacated, but they are not entitled to receive monetary compensation through the wrongful conviction compensation act. Plaintiffs' claims were properly denied.

4. The information presented for the motion to vacate was not exculpatory.

Plaintiffs claim that despite Judge Price's explicit conclusion that their convictions were vacated due to ineffective assistance of counsel, they have nevertheless met the requirements of RCW 4.100.060(1)(c)(ii), because his findings and conclusions criticize trial counsel for not having conducted a more thorough investigation and mentions information their counsel failed to produce. P's Ex. 16, 17, 18. Plaintiffs' argument fails because Judge Price's comments merely detail his legal conclusion that they received ineffective assistance of counsel. His comments do not change his conclusion, nor do they satisfy the clear and narrowly-drafted requirements of the Act. Moreover, Judge Price refers to the information

trial counsel failed to produce as "potentially exculpatory evidence," a characterization that is a far cry from the Act's requirement that a conviction be vacated on the basis of *actual* "significant new exculpatory information."

The three "potentially exculpatory evidence" items mentioned in Judge Price's findings, conclusions and order are 1) Matthew Dunham's phone records, 2) counsel's failure to interview Shane Neilson[9] and 3) Eric Weskamp's employment timecard. CP 412-13, 420-22; P's Ex. 16, 17, 18 at pp. 4-5. None of these are exculpatory.

a. Matthew Dunham's phone records contain no exculpatory information.

In the motion to vacate, Judge Price accepted Plaintiffs' claim that Matthew Dunham's phone records, obtained after completion of the criminal trial, undermined Dunham's credibility because it supposedly showed that he lied at the criminal trial when he said he did not know any of the victims. P's Ex. 16, 17, 18 at pp. 4-5. Judge Price also accepted Plaintiffs' representation that the phone records could help identify the date the crime occurred. *Id.* At the wrongful conviction trial, Plaintiffs' expert Professor Alexandra Natapoff also argued that Dunham's phone

[9] Judge Price's findings of fact and conclusions of law spell this name as "Nielson." The trial transcripts and Judge Cooney's findings, conclusions and order spell the name as "Neilson." This brief will use the latter spelling.

records undermined his credibility because it showed he may have had phone communication with one of the victims the day of the robbery. RP 300. However, Natapoff admitted she was never shown the phone records. Similarly, it is questionable whether Judge Price saw the records given that they were not attached to the motion to vacate. RP 283-84.

Plaintiffs claim that Dunham's phone records were exculpatory is troubling given the fact that they were never given to Natapoff, were never provided to the State despite a timely request, and appear to have never been shown to Judge Price. RP 283-84. If there is any doubt that these phone records did not contain a shred of exculpatory information that doubt is erased by the fact that Plaintiffs made no attempts to enter them into evidence at the wrongful conviction trial.

It appears Judge Price and Natapoff accepted Plaintiffs' claims without scrutiny and without reviewing the trial transcripts.[10] Had that been done, they would have learned that Plaintiffs' assertion that Matthew Dunham testified that he did know any of the victims is contrary to the record. Dunham said he did not recognize the victims' names, but when Weskamp was physically described to him Dunham explained that he may

[10] Natapoff testified that she reviewed "just pieces" of the trial transcripts. RP 298. When asked about Dunham's testimony that he may know Weskamp she replied "I don't recall." RP 300. When she was asked about Weskamp's testimony that he recognized Dunham but only vaguely knew him she again replied "I don't recall." RP 302.

in fact know Weskamp. RP 301. This corresponds with Weskamp's testimony that he recognized Dunham from having seen him before, but that he did not know him very well. P's Ex. 52. at 219-20. Weskamp did not know Dunham's last name. *Id.* at 220. When Weskamp approached the truck Dunham was in the driver's seat. *Id.* at 222. Dunham looked straight ahead and never acknowledged Weskamp, making it questionable whether Dunham even saw Weskamp during the robbery. *Id.* at 222. All of this information was known to the jury that convicted Plaintiffs.

Judge Price and Natapoff also accepted Plaintiffs' claim that Dunham's phone records proved he had phone communication with the victims prior to the robbery. This claim also does not hold up to scrutiny. Witnesses testified that Kongchunji had phone contact with Weskamp before the robbery, including getting directions and calling when he arrived at the Cataldo home. P's Ex. 52 at 216, 219; RP 438, 441, 443. At the wrongful conviction trial Kongchunji confirmed he spoke with Weskamp before the robbery, and that it was not uncommon for him to use Dunham's phone. RP 217, 252. Given that Dunham was the driver and Kongchunji was the passenger it is quite likely Kongchunji was using Dunham's phone to talk with Weskamp. P's Ex. 52 at 219, 222; RP 438. No one testified that they had spoken with Dunham on the phone. And even is such testimony existed, it would not undermine Dunham's

credibility because it was acknowledged that Dunham and Weskamp may have a passing familiarity with each other.

Plaintiffs' claim that Dunham lied when he said he did not know any of the victims is false. Plaintiffs' claim that Dunham's phone records prove Dunham was in contact with Weskamp prior to the robbery is false, and even if true is not incriminating. Plaintiffs' claim that the phone records pinpoint the date of the crime to a date favorable to them is clearly false given that they refused to provide the records to the State and never sought to admit them at the wrongful conviction trial. In short, Dunham's phone records contain no exculpatory information whatsoever.

b. Shane Neilson provided no exculpatory information.

Plaintiffs claimed that Shane Neilson, who was not interviewed by their criminal trial counsel and did not testify in the criminal trial, had exculpatory information. P's Ex 16, 17, 18 at p. 5. Judge Price noted that the failure to interview Neilson contributed to his conclusion that counsel provided ineffective assistance of counsel. But once Neilson's testimony was heard it was found to have no exculpatory value. CP 429.

Neilson testified at the wrongful conviction trial that Kongchunji came to Statler's home around 3:00 or 4:00 a.m. and gave Neilson a case saying "hold onto this for me." RP 665. Neilson claimed the case did not

look like a gun case but "looked like a tripod or something." RP 671. Neilson claimed it was not until police later arrived that he realized the case contained a firearm. RP 671-72. He claimed that although Statler was home when Kongchunji came by he did not tell Statler until the police arrived that Kongchunji had dropped off a large firearm. RP 667.

The court did not find Neilson's incredible testimony persuasive. Neilson admitted he was aware of the criminal trial, but never contacted anyone such as Statler's public defender or the police to advise them of his willingness to testify on Statler's behalf. RP 675. Neilson admitted to being "good friends" with all the plaintiffs. RP 668-70. After some sidestepping and minimizing he admitted to having two prior robbery convictions, being aware that Statler also has a prior robbery conviction, and being in prison at the same time as all the plaintiffs. RP 670, 675-76.

Neilson's testimony did nothing to refute the highly incriminating fact that the shotgun used in the Turner-Hall robbery, and which appeared to be the same shotgun used in the Cataldo robbery, was confiscated by police at Statler's home. Dunham testified that Statler was the shooter in the Cataldo robbery, and identified the shotgun seized from Statler's home as the one Statler used. RP 454. Judge Cooney found:

> 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 deemed this testimony unpersuasive given the conflicting testimony of Det. McCrillis,[11] 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.[12] CP 429.

Neilson's testimony did not undermine the facts establishing Statler and the other Plaintiffs' guilt. Neilson provided no exculpatory information, and his testimony was properly rejected by Judge Cooney.

c. Weskamp's timecard does not contain significant exculpatory information.

At the criminal trial, Berger and Weskamp testified that Weskamp left work early the day after the robbery due to injuries sustained during the robbery. Post-conviction counsel obtained Weskamp's employment timecard showing he left work early on April 5, 16, 21 and 23, and then stopped working altogether on April 23 because he had missed so much work. P's Ex. 28. Kyle Williams' phone records, entered into evidence by the State during the wrongful conviction trial, provide compelling

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[11] Detective McCrillis testified at the criminal trial and at the wrongful conviction trial. RP 550. He testified that he went to Statler's home on April 24, 2008 around 4:00 or 5:00 a.m. based on information that the shotgun used in the Turner-Hall robbery may be there. RP 545. When officers knocked on Statler's door officers could see people inside the home, and it took some time until Statler finally answered the door. RP 547-48. Statler appeared nervous. RP 548. He initially claimed he did not know anything about the shotgun, but then admitted the shotgun was in the home and claimed he had nothing to do with it. RP 549. Upon request, Statler took Detective McCrillis to the shotgun which was loaded and hidden under Statler's mom's mattress. RP 549-50.

[12] Statler was convicted in 2003 of Robbery in the First Degree committed while armed with a deadly weapon. Gassman was his codefendant. RP 169.

evidence that the crime occurred on April 17, 2008. Using Weskamp's timecard to try and expand the possible robbery dates to four additional days in April does not exculpate Plaintiffs. CP 427-28.

Even if Plaintiffs could establish the crime occurred on a day in April other than April 17, the evidence supports the court's conclusion that they have not proven they are actually innocent. CP 429. After all, Plaintiffs each asserted an alibi defense covering the entire month of April, and each alibi was found to be insufficient to prove that Plaintiffs could not have committed the robbery on any day in April. CP 428-29.

B. The court did not abuse its discretion when it refused to admit a recorded witness interview that was taken without any notice to the State, without any opportunity to cross examine and was not under oath.

Plaintiffs hired investigator Tim Provost to help prepare their wrongful conviction claim. On May 3, 2012, Provost contacted Weskamp and asked him if he knew or could confirm if Gassman, Larson and Statler were involved in the Cataldo robbery. CP 54. Weskamp refused to engage in a conversation, stating only "they're in prison for a reason." CP 54.

On April 19, 2013, Provost conducted a recorded interview with Weskamp in a restaurant. P's Ex. 31; P's fn 3, opening brief p. 34. Plaintiffs made transcript *excerpts* which highlight portions of Weskamp's interview that support their claims. CP 252-260. Listening to the entire

interview instead of relying on Plaintiffs' selective excerpts reveals that the interview began with Provost asking Weskamp how the Cataldo robbery occurred, and Weskamp replying "pretty much what was on record like what happened that day is that's pretty much spot on." CP's Ex. 31. When Weskamp confirms the accuracy of his prior under oath testimony, Provost cuts him off. P's Ex. 31.

When the interview resumes, a third unidentified person intermittently interrupts and assists Weskamp with his answers, at times even "correcting him."[13] P's Ex. 31. As the interview progresses, Weskamp proceeds to contradict parts of his trial testimony and suddenly begins remembering numerous things he claimed he could not recall when he testified at trial over four years earlier.[14]

Plaintiffs sought to enter Weskamp's recorded statement into evidence pursuant to RCW 4.100.060(3) which provides as follows:

> 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 of or unavailability of witnesses, the destruction of evidence, or other factors not caused by the parties.

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[13] Q – "Do you remember the day of the week it happened?" Weskamp – "I want to say the day I had off was the 15th." Unidentified third person – "Well I thought it was the 16th."

[14] At trial, Weskamp testified he could not identify anyone other than Kongchunji and Matt Dunham. RP 232-33. But over four years later, and after saying Plaintiffs "were in prison for a reason," he suddenly claimed other people committed the robbery. P's Ex. 31.

The court did not abuse its discretion when it held that the "unsworn interview without any involvement by the State goes beyond the scope of what's contemplated in 4.100.060." RP 67. Weskamp's unsworn statement was hearsay. RP 66. The State received no notice of the interview and was deprived of any opportunity to cross-examine him. RP 66. The interference by a third unknown person and leading nature of the questioning would never be allowed in a court of law. P's Ex. 31.

Plaintiffs do not cite any authority to support their claim that the court should have admitted this statement because they bore the burden of proof. Evidence rules apply to all parties and there is no evidence rule that allows an unsworn, wholly unchallenged statement to be admitted.

RCW 4.100.060(3) allows the court to consider factors such as the release of evidence or the difficulty of locating witnesses due to the passage of time. But these situations are entirely different than admitting an unsworn statement when the witness refuses to come to court and face cross examination regarding his statement. Weskamp was not unavailable because of the passage of time or because he could not be located; he simply refused to come to court after giving a suspect statement that flies in the face of his prior testimony. RP 59. Moreover, Plaintiffs' complaint

that the court failed to consider Weskamp's "unavailability" lacks merit given that the Court admitted his prior trial testimony.

C. The court erred when it found that the robbery could not have occurred on April 17, 2008.

The trial court concluded that Plaintiffs established the robbery could not have occurred on April 17, 2008. CP 427. A cross appeal is necessary only if "The respondent seeks affirmative relieve as distinguished from urging additional grounds for affirmance." *In re Doyle*, 93 Wn. App. 120, 126-27, 966 P.2d 1279 (1998). Because the State prevailed below in the current case, it is "entitled to argue any grounds in support of the superior court's order that are supported by the record." *McGowan v. State*, 148 Wn.2d 278, 287-88, 60 P.3d 67 (2002). Here, the State's "cross-assignment of error" merely provides additional reasons to affirm the trial court's verdict.

Prior to trial, the State amended the Information to change the date of violation from "on or about April 15" to "on or about April 17." This was done after police located Kyle Williams in October 2008, after charges had already been filed. RP 514. Williams told police he met Rob Syler the night of the robbery, that the men exchanged phone numbers and that Syler called him the day after the robbery. RP 512-515. Williams

printed a page of his phone records from the internet which showed the aforementioned sequence of events and gave it to police. RP 514-15.

The State did not obtain Williams' full phone records for the criminal trial, relying instead on the one-page printout. RP 493, 515. Plaintiffs argued at the criminal trial that the one-page printout was not credible evidence because Syler could have called Williams on additional dates not reflected on the printout. RP 493, 495. Plaintiffs argued that without Williams' actual full phone records the State's claim of an April 17 robbery date had not been proven. *Id.* The jury rejected Plaintiffs argument and convicted them.

All parties obtained a complete copy of Williams' April 2008 phone records before the wrongful conviction trial. RP 494-95, 497-99. These records establish that the robbery occurred on April 17, just as the State proved at the criminal trial. These records were authenticated by Williams and entered into evidence at the wrongful conviction trial over Plaintiffs' strenuous objections. RP 518; D's Ex. 127.

Williams testified at both trials. RP 515. Williams testified he arrived at the Cataldo home around 9:00 or 10:00 p.m. the night of the robbery. RP 505-06. Williams met Syler there and exchanged phone numbers with him later that night. RP 510-11. Weskamp testified that Syler was from Coulee City. P's Ex. 52 at 236. Williams received

only three calls from Coulee City. D's Ex. 127. They are all from (509) 681-0505. *Id.* Williams identified that number as the calls from Syler. RP 520.

Williams' phone records show he and Syler exchanged phone numbers at 1:08 a.m. on April 18 and that Syler called Williams on April 18 at 5:32 p.m. and 10:34 p.m. D's Ex. 127 at 58-60. These are the only calls Williams received from Syler. D's Ex. 127. Because the robbery occurred the night before Syler called Williams, the evidence showed that the robbery had to have occurred on April 17, 2008.

Williams does not know Kongchunji, the Dunhams or any of the plaintiffs. RP 502-03. Plaintiffs have not provided any evidence to show that Williams has any interest in this case. Williams' testimony and phone records establish that the robbery occurred on April 17, just as the State charged and the criminal jury concluded. Thursday April 17, 2008, was a work day for Larson but he did not clock in that day. P's Ex. 29. April 17 is the only day that week that Larson failed to show up to work, and one of only two workdays he missed the entire month. P's Ex. 29.

At the criminal trial, the jury found that the robbery occurred on April 17, 2008. Substantial additional credible evidence (Kyle Williams' phone records) supports the jury's finding that the robbery occurred on

April 17th. The court erred in finding that Plaintiffs proved the robbery did not occur on April 17, 2008.

D. Plaintiffs failed to prove that they are actually innocent.

1. The trial court applied the correct burden of proof.

To prevail in a claim filed under the wrongful conviction compensation act a plaintiff must show by "clear and convincing evidence" that he is "actually innocent" of illegal conduct for which he was previously convicted. RCW 4.100.020(2)(a), 4.100.060(1)(d). For purposes of the Act, "a person is 'actually innocent' of a felony if he or she did not engage in any illegal conduct alleged in the charging documents[.]" RCW 4.100.020(2)(a).

Plaintiffs contend that Judge Cooney misunderstood the burden of proof they had to meet in order to prevail on their claim. Specifically, Plaintiffs claim that Judge Cooney should not have referenced case law using the term "actually innocent" and that he imposed an "impossibility standard" on them. Both arguments are without merit.

The trial court explicitly stated that "the burden of proof required under RCW 4.100.060(1) is "clear and convincing evidence." CP 415. The trial court further concluded that "substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." CP 415, citing *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).

Plaintiffs do not disagree with these conclusions, but contend the trial court erred when it reviewed how the term "actually innocent" was used in the case law. The suggestion that a trial court's review of case law constitutes error is absurd. The court is permitted – indeed expected - to look at appellate courts' use of terms in order to ascertain their meaning. In order to understand statutory terms "prior judicial use of a term will be considered since the legislature is presumed to know the decisions of this [appellate] courts." *Miller v Paul Reverse Life Ins. Co.*, 81 Wn.2d 302, 308, 501 P.2d 1063 (1972). See also, *State v. Roby*, 67 Wn. App. 741, 746, 840 P.2d 218 (1992), citations omitted (Legislature is presumed to know the prior judicial use of the term).

The specific term "actually innocent" has existed in case law for decades, and is used specifically to address post-conviction relief. Because the legislature is presumed to know prior judicial use of a term, especially when used in a similar context, Judge Cooney properly considered State and Federal appellate courts' use of the term "actually innocent" to seek guidance on its use and meaning. CP 424-25, citations omitted.

The cases cited by Judge Cooney confirm that "actual innocence" requires a showing of actual factual innocence and that evidence

which merely casts doubt on a person's guilt does not establish "actual innocence." CP 424-25, citing *In re Pers. Restraint of Carter*, 172 Wn.2d 917, 263 P.3d 1241 (2011), *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), *Herrera v. Collins*, 5-6 U.S. 390, 113 S. Ct. 853, 122 L. Ed 203 (1993). This standard does not impose an overly stringent burden on plaintiffs nor does it impose an "impossibility standard." Any supposed burden of proving it was impossible for Plaintiffs to have committed the crimes is the result of their chosen defense of alibi, not the result of any misunderstanding by the trial court regarding the burden of proof or the meaning of the term "actually innocent."

Alibi is "a provable account of an individual's whereabouts at the time of the commission of a crime which would make it impossible or impracticable to place him at the scene of the crime. An alibi negates the physical possibility that the suspected individual could have committed the crime." *Barron's Law Dictionary*, (3d ed. 1991). Any alleged "heightened" burden was self-imposed by the choice of defense, and not attributable to the wrongful conviction compensation act or the trial court's rulings.

2. Plaintiffs failed to prove they are actually innocent.

At the wrongful conviction 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 [sic] phone records, and the testimony of Professor Alexandra Natapoff." CP 414. This information considered individually and cumulatively, failed to prove by clear and convincing evidence that Plaintiffs are actually innocent. CP 430.

a. The testimony of Mr. Kongchunji did not establish Plaintiffs' actual innocence.

After being arrested for the Turner-Hall robbery Kongchunji engaged in a free talk with police in which he implicated Larson, Gassman, and Statler in the Cataldo robbery. *Gassman* , 160 Wn. App. at 606; *Statler,* 160 Wn. App. at 629. In exchange for this information, Kongchunji sought a deal with prosecutors in which he would not have to serve prison time. RP 230. When the State refused to give Kongchunji the no-prison deal he sought, Kongchunji refused to testify at the Cataldo trial.[15] RP 232; CP 427. Kongchunji understood that in prison "self-preservation is the rule of the day" and that it is not well received in prison if an inmate testifies against another inmate. RP 236.

After Plaintiffs were convicted, Kongchunji wrote a letter to Statler's father. RP 214; CP 49-50. Plaintiffs filed a motion for a new trial,

[15] After recanting, Kongchunji claimed people other than Plaintiffs committed the Cataldo robbery with him. But at the wrongful conviction trial he explained he would not have testified against them either. RP 239. "It's not healthy to be a snitch." RP 237.

claiming Kongchunji's letter exonerated them and that Kongchunji had been unavailable to testify because he had asserted his Fifth Amendment Privilege. The trial court denied the motion. CP 15.

On appeal, Plaintiffs argued the court erred when it denied them a new trial because Kongchunji's potential testimony was exculpatory and trial counsel was ineffective for not presenting it. *Statler*, 160 Wn. App. at 630-34; *Larson,* 160 Wn. App. at 582; *Gassman,* 160 Wn. App. at 605-612. The Court of Appeals, noting that Kongchunji's letter did not even mention the Cataldo robbery, affirmed the convictions.[16] *Statler*, 160 Wn. App. at 630-32; *Gassman*, 160 Wn. App. at 608; *Larson*, 160 Wn. App. at 585.

Plaintiffs transported Kongchunji from prison to testify at the wrongful conviction trial. RP 244. He repeatedly insisted he did not want to testify, was only in court because he was forced there, and that he did not remember anything. RP 204, 227-29, 242, 245, 250, 257-58. Plaintiffs again claimed Kongchunji's letter and now his testimony exculpated them. Judge Cooney became the third judge to reject these claims.

Kongchunji acknowledged that the aforementioned letter to Statler's father was about the Dishman robbery, not the Cataldo robbery.

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[16] The Court of Appeals also rejected Plaintiffs' contention that the State improperly threatened Kongchunji with perjury to dissuade him from testifying at trial. *Larson*, 160 Wn. App. at 591.

RP 256-57. In truth, Kongchunji never claimed plaintiffs were innocent of the Cataldo robbery until he allegedly signed an unsworn statement written and provided to him by the Plaintiffs' investigator almost three years after Plaintiffs' were convicted.[17] RP 256-57. Kongchunji does not remember the conversation with the investigator who brought him the scripted statement, nor does he even remember signing it.[18] RP 245.

The court found that Kongchunji presented no new information, because everything he testified to was available during the criminal trial when no one called him to testify. CP 427. The court gave "virtually no weight to Mr. Kongchunji's testimony" because of his numerous convictions for theft, robbery and burglary and his constantly changing and conflicting statements." CP 427. Kongchunji's testimony did nothing to exculpate Plaintiffs.

b. Professor Natapoff's testimony did nothing to establish Plaintiffs' actual innocence.

Plaintiffs claim that testimony by Professor Natapoff regarding the use of cooperating codefendants helped establish their actual innocence. Actually, Natapoff was thoroughly discredited at trial. Natapoff testified for the plaintiffs after reviewing only limited "portions of the trial

[17] Plaintiffs were convicted on February 17, 2009. The statement was signed on December 26, 2011.

[18] The statement contains a place for a notary to sign but it was not notarized.

transcript, filings in this case, alibi materials, other background materials and filings." RP 264. She admitted she did not talk to Dunham, jurors or any state actors such as prosecutors or law enforcement. RP 290-91. Natapoff drew conclusions from records she had never seen and without reviewing transcripts that contradicted her conclusions. RP 283, 300-02. When she was asked about testimony that undermined her claims she frequently claimed she could "not recall" such testimony, and had to have the testimony shown to her. RP 300-03.

Natapoff testified at length about a study she claimed showed that when jurors assess a cooperating co-defendant's testimony they disregard the benefit that witness received in exchange for their testimony notwithstanding jury instructions instructing them to carefully scrutinize such testimony. RP 270-72. But on cross Natapoff could "not recall" how many people were in the study or even how the study was conducted. RP 321-22. Most troubling of all, is that she did not know whether the study had ever been replicated. Natapoff conceded that if the sample size was not large enough or if the study had not been replicated then the study she relied on is not scientifically valid. RP 322.

Natapoff tried to undermine Dunham's credibility by claiming he testified at the criminal trial that he did not know any of the victims when his phone records allegedly proved otherwise. RP 300. Natapoff later

admitted she had never seen the phone records upon which she was basing her conclusions, and that she "did not recall" reading transcripts in which Dunham testified he may in fact know who Weskamp is. RP 283, 300-02. After being shown Dunham and Weskamp's trial transcripts Natapoff was forced to concede that Dunham never claimed he did not know Weskamp, a fact known to the jury that convicted the plaintiffs. RP 301.

Natapoff agreed that phone records only show what calls were made to and from a specific phone. RP 308. Kongchunji's testimony that he called Weskamp from the passenger seat of Dunham's truck and that he sometimes uses Dunham's phone seriously undermines Natapoff's claim that Dunham's phone records weakened his credibility. RP 217, 252.

Natapoff agreed that "jury trials are one of the American system's most important checks on informant reliability." RP 324. Natapoff failed to provide any testimony that undermined the State's evidence or the jury's finding that Plaintiffs committed the Cataldo robbery. Her testimony did nothing to prove that Plaintiffs were actually innocent.

c. Weskamp's timecard does not establish Plaintiffs' actual innocence.

(1) The evidence shows only that the robbery occurred sometime in April 2008.

Other than Williams who used his phone records to determine the date the robbery occurred, no witness at either trial was able to identify the

date the robbery occurred. In fact, no witness was able to even provide a reasonable time frame as to when the robbery was committed other than to say it occurred in April 2008. The testimony of all witnesses who were asked to identify the robbery date is as follows:

- **Joni Jeffries** testified she did not know when police contacted her about the Cataldo incident. D's Ex. 111 at 62-63. She said the closest she could get is "April." *Id.* at 63. When she was asked whether she was sure the crime occurred in April she responded "I couldn't be completely sure about it." *Id.* at 64. Jeffries was then asked, "[t]o the best of your knowledge, if you could tell the jury why do you think this happened in April 2008," to which Jeffries responded "I have no idea. Maybe because that is the date that I keep hearing." *Id.* at 89.
- **Cliff Berger** testified that he was first contacted by police "around the middle of July." P's 50 at 120. Berger was never asked when the crime occurred, and when the deputy prosecutor questioned him about the Cataldo incident the prosecutor referred to the date of the crime as "April 2008."
- **Eric Weskamp** testified he was first contacted by law enforcement in July. P's Ex. 52 at 241. He was only able to identify the date as "April." *Id.* at 248.

- **Matt Dunham** testified he believed the robbery occurred at the "[b]eginning of April in 2008." RP 433.
- **Anthony Kongchunji** was not asked when the robbery occurred.

The testimony establishes only that the robbery occurred sometime in April. Williams' testimony, supported by documentary evidence, established a specific date within April 2008. Weskamp's timecard identifying other possible robbery dates is not exculpatory.

(2) Weskamp's timecard does not identify the date the robbery occurred.

Plaintiffs claim Weskamp's timesheet proves they are actually innocent. At trial, Berger and Weskamp testified that Weskamp left work early the day after the robbery due to injuries sustained during the robbery. P's Ex. 50 at 134-45; P's Ex. 52 at 248. Post-conviction counsel obtained Weskamp's employment timecard showing that he left work early four times between April 1 and April 23, 2008. P's Ex. 28. Any conclusions drawn from this evidence is tenuous given Berger and Weskamp's highly questionable ability to recall events and testify to them accurately.

Both men were first contacted three months after the robbery, and they did not testify until ten months after the robbery. P's Ex. 50 at 120; P's Ex. 52 at 241. Berger admitted he was a drug user and drug dealer, and was using drugs the day he was robbed. P's Ex. 50 at 125.

Weskamp testified that he and Berger used drugs together at work. P's Ex. 52 at 252. Weskamp admitted he used drugs the day he was robbed. *Id.* at 244. Weskamp said he thought the robbery was committed in April. *Id.* at 248. But he also testified he worked with Berger from "summertime going into fall," a period that does not include April. *Id.* at 251. Weskamp said three times that the events surrounding the robbery were "blurry" to him. *Id.* at 216, 233, 234. He explained that his substance abuse was so out of control during this time period that he lost his job. *Id.* at 251-52. "I was using heavily and drinking. I couldn't sustain a steady job and be an addict at the same time." *Id.* at 252.

Plaintiffs' contention that Weskamp worked the day after the robbery and left early rests on the shaky foundation that two drug-addicted men were able to accurately recall and communicate these events ten months after they occurred. This premise is further undercut by strong credible documentary evidence that the crime occurred on April 17, the date identified by Williams and upon which the jury convicted.

The timecard shows Weskamp left work early on April 5, 16, 21 and 23. P's Ex. 28. Even if one accepts Plaintiffs' analysis, the timecard identifies four dates the robbery could have occurred: April 4, 15, 20 and 22. CP 428. But Plaintiffs claim the robbery could not have occurred on April 20 or 22. Plaintiffs claim testimony on p. 100 of P's Ex. 50 and pp.

216 and 248 of P's Ex. 52 shows that Weskamp worked the day of the robbery. They contend the robbery could not have occurred on April 20 and 22 because Weskamp's timecard shows he did not work those days. The evidence does not show this.

On p. 100 of plaintiffs' exhibit 50 Berger is asked "Do you recall what time you got off of work?" Berger responds "4:30." The prosecutor never asked Berger if he worked the day of the robbery. Instead, the prosecutor assumed Berger worked that day because the robbery was charged as having occurred on Thursday, April 17. Berger's response that he "[g]ot off at 4:30," is a fact he could not known for certain ten months later, without the aid of timesheets which were not obtained until after this testimony. Berger is simply stating the time of day he generally leaves work. The prosecutor then asks Berger "did Eric leave work with you on that date?" to which Berger replies "[h]e met me at my house later." This exchange says nothing about where Weskamp was before he met Berger.

Plaintiffs also cite to pp. 216 and 248 of Plaintiffs' exhibit 52. Page 216 does not say anything about Weskamp working. On page 248 Weskamp is asked "do you know what day of the week this [the robbery] happened" to which Weskamp replies "I know it was during the weekday

(sic)[19] because the next day I did try to go to work." Weskamp's conclusion ignores the fact that Mondays are always preceded by non-work days, i.e. Sundays. April 20, 2008, one of the days before which Weskamp left work early, is a Sunday.

Weskamp also testified he sold drugs to Kongchunji earlier the day of the robbery, and Berger testified that Weskamp sold drugs twice the day of the robbery including once to Jeffries. P's Ex. 52 at 215; P's Ex. 50, 128-130. This testimony further calls into question Plaintiffs' claim that Weskamp worked the day of the robbery.

Even if Weskamp left work early the day after the robbery, this does not establish actual innocence. Any of the four dates his time card shows he left early could have been the day after the robbery. Plaintiffs did not prove they are actually innocent as they still could have committed the robbery on each of those four dates. CP 428-430.

(3) The robbery occurred between 6:00 and 10:00 p.m.

No witness was able to provide any solid or precise information as to what time of day the robbery occurred other than to say it was dark outside. Witnesses who were asked what time the robbery occurred responded as follows:

[19] This "sic" appears in the transcript, it was not added for purposes of this brief.

- **Joni Jeffries** testified that the crime occurred "in the early evening," and that it was "dark." D's Ex. 111 at 50. She stated she was "not completely sure on time" and testified "I'm assuming between 6:00 and 8:00, 9:00 and 8:00." *Id.* at 50.
- **Cliff Berger** testified "[i]t was evening. It was dark already, so I'm not sure. It was about 6:00, 7:00 at night." P's Ex. 50 at 100. When defense insisted the crime occurred at 10:00 p.m., Berger replied, "I thought it was a little earlier, but – very easily could have been." *Id.* at 128. However, Berger qualified his answer as follows: "You know, it was dark. It was a long time ago. Things were moving really fast. There was a lot of confusion when something like that happens. And you are not really paying attention." *Id.* at 127.
- **Eric Weskamp** testified that Kongchunji called him "right around dark." P's Ex. 52 at 216. Beyond it being dark, Weskamp repeatedly insisted he could not remember when the robbery occurred, saying first "I can't say for sure what time … it's all kind of blurry to me." *Id.* at 216. When pressed, Weskamp again explained that "time just seemed to be blurry. I don't know for sure." *Id.* at 234. When asked by defense counsel for his "best estimate," Weskamp asked repeatedly if he should guess. *Id.* at 242. When counsel persisted, Weskamp finally replied "it

was dark out; would say around – between 8:00 and 10:00ish." *Id.* at 257.

- **Kyle Williams** testified he arrived at the home around 9:00 to 10:00 as the robbers were fleeing in a truck. RP 505-06.
- **M.D.** testified the robbery was committed "sometime in the evening, that it "was dark outside" and that it was "later in the night." RP 436.
- **Anthony Kongchunji** testified he did not know when the robbery occurred. He could only say it was "dark out." RP 217.

Witness testimony places the time of the robbery between 6:00 and 10:00 p.m. Plaintiffs urge this Court to simply ignore first-hand witness testimony placing the time of the crime as early as 6:00 p.m., and contend the court should instead conclude that the robbery occurred after "astronomical twilight time." "Astronomical twilight time" is "the point [in the evening] where the sky *completely* turns dark. CP 389 (emphasis added). "Astronomical twilight time" occurred on April 4, 15, 20 and 22 at 9:14, 9:36, 9:47 and 9:51 p.m. respectively. *Id.*

Plaintiffs' argument is without merit because no one testified that it was "completely dark" outside when the robbery occurred. Instead, witnesses testified it was "dark out, getting dark out, or late in the evening." CP 429. Darkness is a relative term with many gradations that in

no way equals the time of night when it is "completely" dark. Indeed, Jeffries was across the street approximately 50 feet away[20] when the robbery occurred and was still able to testify to what she saw. The trial court recognized the distinction regarding levels of darkness and rejected Plaintiffs' claim, concluding that each Plaintiff could have easily committed the robbery while it was dark outside and before the time period that their alibis took effect. CP 429.[21]

3. Plaintiffs' alibis do not establish their actual innocence.

The trial court found that the date of the robbery was not established other than to say that it occurred "[a]t some point between late March, 2008 through April, 2008." CP 408. The trial court explained 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" and that "this is not a criminal prosecution whereby the State is required to clearly define when the robbery allegedly occurred." CP 428.

The trial court's reasoning is sound because to prevail in their claim Plaintiffs had to prove by clear and convincing evidence that they "did not engage in any illegal conduct alleged in the charging documents."

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[20] Williams testified that the distance across the street from the driveway is approximately 50 feet. RP 524.

[21] Concluding that "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.

RCW 4.100.060(1)(d). "The actual innocence doctrine is concerned with actual (factual) innocence." CP 424, citing *In re Pers. Restraint of Carter*, 172 Wn.2d 917, 934, 263 P.3d 1241 (2011). A person who is unable to prove he did not commit a crime, regardless of when the crime was committed, cannot be said to be factually and actually innocent.

Plaintiffs' claim that *State v. Pitts* required the State to pinpoint the date the robbery was committed for purposes of their wrongful conviction claim. *State v. Pitts,* 62 Wn. 2d 294, 382 P.2d 508 (1963). Plaintiffs' reliance on *Pitts* is perplexing given that *Pitts* held that the State is not required to specify an exact date for the commission of a crime when it cannot intelligently do so. *Id.* at 298. This remains the case when the defense is alibi. *Id.* The Court reasoned that when witnesses are unable to identify the precise time a crime occurred "a defendant should not escape his transgressions merely because the time of commission cannot be fixed in precise terms." *Id.* See also, *State v. Cozza*, 71 Wn. App. 252, 259, 858 P.2d 270 (1993)(upholding a three-year charging period and finding that a defendant charged with a sex offense does not have a due process right to raise an alibi defense).

Such is the case here. There is conflicting evidence as to when the robbery occurred during a timeframe that spans from April 1 to April 23, 2008. The State charged the "on or about April 17" date because

compelling evidence shows this is when the robbery occurred. The jury convicted Plaintiffs of committing the robbery on this date. At the wrongful conviction trial, Plaintiffs presented evidence they claim expands the timeframe during which the robbery occurred. Given that they are the party that expanded the timeframe and who bears the burden of proof, their claim that they have been unfairly burdened by the very uncertainty they created is absurd.

Plaintiffs complain that the difficulty in conclusively identifying the robbery date unfairly required them to present an alibi for multiple dates. This complaint lacks merit for several reasons. First, courts have affirmed much broader charging periods in recognition of the fact that narrowing the date of a crime to a specific date or short timeframe is not always possible. See, for e.g., *State v. Jordan*, 6 Wn.2d 719, 721, 108 P.2d 657 (1940)(upholding a 60-day charging period); *Fawcett v. Bablitch,* 962 F.2d 617 (7th Cir. 1992)(upholding a 6-month charging period). Second, this was a civil trial in which Plaintiffs bore the burden of establishing their actual innocence notwithstanding any ambiguity regarding when the crime was committed. Lastly, as the trial court pointed out, "For the month of April, 2008, each plaintiff generally asserted an

alibi defense covering the entire month" and each plaintiff's alibi was insufficient to establish their actual innocence.[22] CP 428-29.

a. Larson could have easily committed the robbery before reporting to work.

Larson's alibi was a timecard showing when he arrived at work in April 2008. P's Ex. 29; CP 428. Larson's timecard shows he did not clock in at work on April 10 and April 17, both of which were weekdays. P's Ex. 29. On every other weekday in April 2008 Larson clocked in between 9:46 and 9:55 p.m. P's Ex. 29. Substantial evidence was presented at both trials that the robbery was committed on April 17, one of only two days in April 2008 that Larson did not report to work. P's Ex. 29.

But even if this Court finds that Weskamp's timesheet identifies robbery dates other than April 17, Larson's alibi fails because the trial court properly found that"[s]urely, the robberies may well have taken place prior to Mr. Larson's work commitment of 9:45." CP 419.

The robbery was committed at E. 1507 Cataldo Avenue. Larson's workplace, Quarry Tile, is at 6328 East Utah Avenue. RP 591. Quarry tile is four miles from the Cataldo crime scene. RP 591. It takes approximately nine minutes to drive between Quarry Tile and the crime scene. RP 591.

[22] The defendant in *Pitts* also presented alibi evidence that covered the entire multiday time period in question. The Court affirmed the conviction. *Pitts*, 62 Wn.2d at 300.

Given the short drive from the crime scene to Larson's workplace Larson could have easily committed the crimes during the three and a half hour window from 6:00 to 9:30 p.m. and still made it to work by 9:46 p.m.

Notably, the jury rejected a similar alibi defense made by Statler at the criminal trial. Statler claimed he could not have committed the robbery on April 17 because he blew into a breath machine at 10:14 p.m. that day. RP 340. The jury rejected Statler's argument that his presence at home at 10:14 p.m. proved he could not have committed the crime on April 17. Larson's alibi relies on nearly the same time frame already rejected by the jury at Statler's criminal trial. Judge Cooney also rejected this argument, and this Court should as well. CP 428.

b. Statler could have easily committed the robbery before blowing into a breath machine.

Statler's alibi was that he had to be at home around 10:00 p.m. every night in April 2008 to blow into a breath machine. Community Corrections Officer Darron Bowerman testified that Statler was on enhanced supervision in April 2008 for being in violation of his probation.[23] RP 333. This supervision required Statler to provide a breath

[23] Statler was convicted in 2003 for Robbery in the First Degree committed while armed with a deadly weapon. Gassman was his codefendant. RP 170.

sample upon receiving a phone call by using a "VICAP"[24] machine at his home every day in April at 6:00 a.m., 6:00 p.m., and 10:00 p.m. RP 333. Although probationers are advised to be available within forty-five minutes of their tests, Statler's tests were consistently conducted within fifteen minutes of the 10:00 p.m. timeslot. RP 334-35, 344.

If a probationer takes the phone off the hook then the VICAP won't connect. RP 346. There were four days in April 2008 that the VICAP failed to connect to Statler's home. CP 343, 348-49. At the wrongful conviction trial, Bowerman was not able to identify the four days this occurred because he no longer had the VICAP records. RP 343. When Statler was not providing a breath test he was free to leave his home, during which time his whereabouts were unknown. RP 345-46.

The jury that convicted Statler rejected the same alibi he presented at his wrongful conviction trial. Bowerman testified at both trials that Statler blew into the VICAP at 10:01 p.m. on April 15 and at 10:14 p.m. on April 17. RP 338-40.[25] Statler lived at 415 North Dick Road. RP 169.

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[24] The VICAP system is a video alcohol monitoring system which takes the person's photo before and after he provides a breath test. RP 333-34.

[25] At the criminal trial, Bowerman testified to the times Statler blew into the VICAP on April 15 and April 17 based on records he had at the time. At the wrongful conviction trial Bowerman no longer had these records so he was only able to testify about the April 15 and April 17 times again by referring to his prior testimony. Since Bowerman had no records at the latter trial he could not provide the exact times that Statler blew into the VICAP on other dates in April other than to say he was always scheduled to do so at 10:00 p.m. RP 337-39.

This location is 5.9 miles or about a thirteen minute drive from the Cataldo Avenue crime scene. RP 591-92. Witness testimony places the robbery between 6:00 and 10:00 p.m. Given the short distance between the crime scene and Statler's home, Statler could have easily committed the crimes during the three and a half hour window from 6:00 to 9:30 p.m. and still made it home in time for his scheduled 10:00 p.m. breath tests.

Judge Cooney found that the VICAP evidence showed that Statler "would not have been available shortly before or after 10:00 p.m." to commit the robbery, but that "surely, the robberies may well have taken place prior to ... Mr. Statler's breath testing of 10:00 p.m." CP 429. Because the evidence established only that it was dark or getting dark outside, and witnesses place the time of the crime between 6:00 and 10:00 p.m., the trial court's conclusion should be affirmed.

c. Gassman's incredible alibi failed to prove he was actually innocent.

Gassman's alibi was that he resided with his girlfriend Elizabeth Holder for one year including April 2008, and that during *that entire year* he never left the residence without her. RP 159-60, emphasis added. The trial court found Gassman's alibi was not credible because of its sheer absurdity, and also in light of Gassman's convictions for felony crimes of

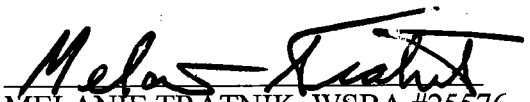
dishonesty.[26] CP 429. Because Gassman's alibi is unbelievable, he could have easily committed the robbery on any day in April 2008.

V. CONCLUSION

Plaintiffs failed to meet two essential elements necessary to prevail in a claim filed under the wrongful conviction compensation act. First, none of the plaintiffs met their burden of proving by clear and convincing evidence that their convictions were vacated and the charging documents dismissed on the basis of significant new exculpatory information. Second, none of the plaintiffs proved by clear and convincing evidence that they are actually innocent of the crimes they were convicted of in 2009. For the foregoing reasons, the State requests that this Court affirm the trial courts' order denying each Plaintiff's wrongful conviction claim.

RESPECTFULLY SUBMITTED this 28 day of October, 2015.

ROBERT W. FERGUSON
Attorney General of Washington



MELANIE TRATNIK, WSBA #25576
RICHARD L. WEBER, WSBA #16583
Assistant Attorney General

[26] Gassman was convicted in 2003 of Attempted Robbery in the First Degree. RP 158. Statler was his co-defendant.

APPENDIX A

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.]

APPENDIX B

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 Nellson 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 armed 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

[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 Nelson.[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

NO. 33179-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LARSON, ROBERT E.; GASSMAN, TYLER W.; AND STATLER, PAUL E., Plaintiffs/Petitioners v. STATE OF WASHINGTON, Defendant/Respondent	DECLARATION OF SERVICE

I, Lissa Treadway, declare as follows:

On October 28, 2015, I deposited in the United States mail true and correct copies of the Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

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

DATED this 28th day of October, 2015, at Seattle, Washington.

LISSA TREADWAY