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Court of Appeals No: 33179-2-III

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

v.

STATE OF WASHINGTON,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

When the legislature enacted the wrongful conviction compensation act in 2013, it limited financial recovery to instances where a claimant was pardoned or their conviction overturned based on “significant new exculpatory information,” and even then, only if the claimant was “actually innocent.” In light of these limitations, proponents of the act and the legislature understood that financial recovery would be rare. In this case, however, the Court of Appeals adopted an unreasonably broad definition of “new information” that defies common understanding of the term and defeats the legislature’s intent. This Court should review this overbroad interpretation and reverse.

After their convictions were vacated and dismissed, Plaintiffs Robert Larson, Tyler Gassman, and Paul Statler brought a joint claim for compensation under the act. The trial court conducted a four-day bench trial, the first wrongful conviction compensation trial held in Washington. The trial court found that (1) Plaintiffs failed to establish that their convictions had been vacated and dismissed on the basis of “significant new exculpatory information,” and (2) they failed to prove by clear and convincing evidence that they were “actually innocent.”

The Court of Appeals rejected the superior court’s understanding of “new information” and remanded, holding that “new information”

“must be construed broadly to include information that was available at the criminal trial but was not presented to the fact finder.” *Larson, v. State*, No. 33179-2, slip op. at 15 (Wash. Ct. App. June 28, 2016). This definition ignores ordinary usage, as it would define information as “new” even if the defense actually possessed the information at the time of trial and simply chose not to use it for strategic or other reasons. This definition is also contrary to legislative intent; the legislature never contemplated a wrongful conviction claim based on information that the criminal defendant intentionally withheld or strategically did not present to the jury. This is the first time an appellate court has articulated the meaning of “new information” under the wrongful conviction compensation act. The State respectfully seeks review of this issue of substantial public interest.

The Court of Appeals also improperly faulted the trial court for considering prior judicial interpretations of the term of art “actual innocence.” Despite the trial court’s statements to the contrary, the Court of Appeals concluded the trial court failed to apply the clear and convincing burden of proof. The proper application of the “actual innocence” prong is also an issue of substantial public importance that should be reviewed, thus providing guidance to lower courts.

II. ISSUES PRESENTED FOR REVIEW

If this Court grants the petition for review, the issues will be:

1. Whether the Court of Appeals' interpretation of "significant new exculpatory information" to include any information that "was not presented to the fact finder" is so broad that it contradicts the statute's plain language and legislative intent.
2. Whether the Court of Appeals erred when it faulted the trial court for considering prior judicial interpretations of the term of art "actual innocence" where the trial court otherwise expressly applied the clear and convincing burden of proof.
3. Whether the Court of Appeals erred when it remanded for a new trial on "actual innocence" where the trial court relied on credibility determinations after a four-day trial to conclude that Plaintiffs had not met their clear and convincing burden.

III. STATEMENT OF THE CASE

Sometime in April 2008, Anthony Kongchunji, Matthew Dunham, and three masked men robbed drug dealer Eric Weskamp of about \$4,000 at gunpoint. Ex. P50 at 97-105; Ex. P52 at 213-25, 233-35. Mr. Weskamp and a companion gave chase, and one of the robbers fired shots at their pursuers. CP at 407-08 (FOFs 1, 12, 13).¹ No one reported the crime at the time. Ex. P50 at 114-15; Ex. D111 at 62.

Later in April 2008, Mr. Kongchunji and Mr. Dunham were arrested for a similar robbery. CP at 408-09 (FOF 14). They then identified the three masked men as Plaintiffs in this case: Robert Larson, Tyler Gassman, and Paul Statler. CP at 409-10 (FOFs 18, 20). Mr.

¹ Unless noted otherwise, all cited Findings of Fact are unchallenged and are therefore verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Plaintiffs challenged only Findings of Fact 10 and 44. Appellant's Opening. Br. at 3 (Assignments of Error).

Kongchunji recanted this accusation before the criminal trial. CP at 409-10 (FOF 19).

Mr. Larson, Mr. Gassman, and Mr. Statler were charged with first degree robbery, two counts of attempted first degree murder (or, in the alternative, first degree assault), and two counts of drive by shooting. Exs. P1-P3. The information originally alleged that the crimes had occurred on or about April 15, 2008. CP at 410-11 (FOFs 22-24). But the criminal trial judge later granted motions to amend the information to allege the crimes occurred on or about April 17, 2008. CP at 411 (FOF 25).

Neither side called Mr. Kongchunji to testify at the criminal trial. CP at 409 (FOF 19). Mr. Dunham, on the other hand, testified against Plaintiffs in exchange for a lighter sentence, something the jury was informed about. CP at 410 (FOF 21). All three were convicted of first degree robbery, two counts of first degree assault, and two counts of drive by shooting. CP at 411 (FOFs 27-28).

After an initial motion for a new trial was unsuccessful and rejected on appeal,² Plaintiffs filed motions for relief from judgment under CrR 7.8. CP at 412 (FOF 37). Spokane County Superior Court Judge Price granted these motions. CP at 412 (FOF 37). He found that after the State

² *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).

amended the information to change the date of the crime, defense counsel (1) failed to investigate Mr. Weskamp's work records, which would have shed additional light on the likely date the crime was committed; (2) failed to investigate Mr. Dunham's phone records, which showed he was in contact with the victims, even though he claimed at trial he did not know them; and (3) failed to interview key witnesses, including the investigating detectives and Shane Nielsen, Mr. Statler's roommate, who would have testified that Mr. Statler was unaware that the gun used in the robbery was stashed in their home. CP at 412-13 (FOF 37); Exs. P16-P18 (FOFs VII, VIII, IX). Judge Price concluded that Plaintiffs' defense counsel did not adequately investigate, that they failed to uncover "potentially exculpatory evidence," and that, "the aggregate effect of [defense counsel's] errors undermine[d] confidence in the outcome of the trial." Exs. P16-P18 (COL, II-V); CP at 413 (FOFs 38-40).

Judge Price vacated Plaintiffs' convictions. CP at 413 (FOF 41); Exs. P16-P18. Soon after, the superior court dismissed the charges against Plaintiffs because there was "insufficient evidence to proceed with [re-] trial." CP at 413-14 (FOFs 42, 43, challenged FOF 44).

Plaintiffs then filed claims for monetary damages under the wrongful conviction compensation act, RCW 4.100. CP at 406. Spokane County Superior Court Judge Cooney held a four-day bench trial. Judge

Cooney then issued findings of fact, almost all of which are unchallenged, and conclusions of law. CP at 406-31. Judge Cooney recited the elements that Plaintiffs had to prove to prevail, including that their convictions were vacated and charges dismissed based on “significant new exculpatory information,” and that Plaintiffs were “actually innocent,” meaning they “did not engage in any illegal conduct alleged in the charging documents.” CP at 414. Judge Cooney expressly applied the clear and convincing burden of proof required by the statute. CP at 415, 431.

Relying on a Court of Appeals case analyzing similar language in a different statute, Judge Cooney read “new exculpatory information” to mean that the information had to have been unavailable at trial. CP at 422 (discussing *Riofta v. State*, 134 Wn. App. 669, 142 P.3d 193 (2006)).³ Because the potentially exculpatory evidence at issue here was available at trial, but went undiscovered by defense counsel, Judge Cooney found it did not meet this definition of “new information.” CP at 422-23. In addition, the order vacating the convictions was based on the ineffective assistance of counsel—counsel’s cumulative errors—while the order dismissing the charges was based on insufficiency of the evidence. CP at 423. Thus, Plaintiffs failed to present sufficient facts to show that their convictions were vacated and dismissed based on significant new

³ Judge Cooney failed to note that this Court of Appeals decision was later reviewed by this Court, which adopted a different analysis as discussed below.

exculpatory information. CP at 423.

In addition, Judge Cooney concluded that Plaintiffs failed to show by clear and convincing evidence that they were “actually innocent.” CP at 424, 431. Judge Cooney found that Mr. Kongchunji, who testified on Plaintiffs’ behalf, did not offer any new information because everyone was aware of his recantation before the criminal trial, and no party called him to testify. CP at 427. In addition, the trial court found Mr. Kongchunji’s testimony in this case was not credible. CP at 427.

Judge Cooney also found that even if Mr. Weskamp’s time cards show the robberies could not have happened on April 17, 2008, that does not prove actual innocence because there were other dates when the robbery could have occurred. CP at 427-28. Judge Cooney did not find Plaintiffs’ alibi testimony to be credible. Mr. Larson’s boss’s testimony about when Mr. Larson arrived at work contradicted Mr. Larson’s. CP at 428. Judge Cooney did not believe Mr. Gassman, who had previously been convicted for a felony crime of dishonesty, when he testified that for a whole year he never left his residence without his girlfriend. CP at 428-29. And Judge Cooney found Mr. Statler, who had also been convicted of a felony crime of dishonesty, was not credible in his testimony about the firearm used in the crime, and he could have committed the robbery before he provided a breath sample for monitoring

at 10:00 pm. CP at 429. While Judge Price found some doubt warranting vacation of the convictions, Judge Cooney concluded, based in part on his credibility determinations, that Plaintiffs failed to show actual innocence by clear and convincing evidence. CP at 430.

The Court of Appeals reversed and remanded. First, the court rejected the trial court's definition of "new information," concluding instead that "significant new exculpatory information" must include any "information that was available at the criminal trial but was not presented to the fact finder." *Larson*, slip op. at 15. Applying that definition, the Court of Appeals concluded that these convictions were vacated and the charges dismissed based on new information that was not presented to the jury at the criminal trial. *Id.* at 16-18. The Court of Appeals also concluded that the trial court had improperly required the claimants to meet a burden higher than clear and convincing evidence to show their actual innocence. *Id.* at 23. The Court of Appeals remanded for the trial court to determine whether the claimants proved by clear and convincing evidence that they are actually innocent. *Id.* at 25.

The State now petitions for this Court's review.

IV. ARGUMENT

This case involves the first civil trial under the wrongful conviction

compensation act since the act was adopted in 2013.⁴ The Court of Appeals adopted a definition of “new information” that flies in the face of ordinary usage and departs significantly from the legislature’s intent. It is important that this Court correct the error so that it is not replicated in future cases. This Court should instead consider “new information” under the wrongful conviction compensation act to be evidence whose existence was unknown to the defense at the time of trial and that did not go undiscovered as a matter of defense strategy.

This case presents an important issue of statutory interpretation and the lower courts need guidance in applying the statute going forward. *See* RAP 13.4(b)(4). Appropriate interpretation of the act is an issue of substantial public importance. *Id.*

A. This Court Should Grant Review to Determine the Meaning of “Significant New Exculpatory Information” Under the Wrongful Conviction Compensation Act

While the wrongful conviction compensation act requires a claimant to prove several elements by clear and convincing evidence (*see* RCW 4.100.060), only two elements are at issue here: (1) whether “the claimant’s judgment of conviction was reversed or vacated and the

⁴ In *Newton v. State*, 192 Wn. App. 931, 934, 369 P.3d 511 (2016), the trial court dismissed on the State’s motion for summary judgment and the Court of Appeals affirmed, concluding that appellate reversal of a conviction for insufficiency of the evidence is not “significant new exculpatory information” under the act. A petition for review is pending at this Court. *Newton v. State*, No. 93008-2.

charging document dismissed on the basis of significant new exculpatory information” (RCW 4.100.060(1)(c)(ii)), and (2) whether the claimants were actually innocent, meaning they “did not engage in any illegal conduct alleged in the charging documents.” RCW 4.100.060(1)(d).

The Court of Appeals broadly interpreted “new information” to include any information that “was not presented to the fact finder.” *Larson*, slip op. at 15. Under this reading, a claimant could satisfy this element even if the judgment was vacated based on information that was known and available at the criminal trial but was not presented to the jury for strategic reasons or because a defendant withheld information from their attorney (e.g., because the information implicated someone the defendant did not want to identify). The Court of Appeals’ expansive definition could even incorporate evidence not presented to the jury because of evidentiary rulings. This definition ignores the ordinary meaning of “new information” and the legislative history showing that the legislature intended recovery to be narrowly available.

The Court of Appeals’ interpretation of “new information” as any “information not presented to the fact finder” flies in the face of the plain and ordinary meaning of “new information.” *Black’s Law Dictionary* defines “new” as “recently come into being” or “recently discovered.” *Black’s Law Dictionary* 1204 (10th ed. 2014). And in ordinary speech, if a

person said “I have some new information,” the listener would be quite surprised to learn that the person had the information before and simply chose not to share it. As these definitions and example show, the common and ordinary understanding of “new information” would not include information a person already has.

The Court of Appeals’ overbroad interpretation is also contrary to the legislature’s intent. Proponents of the act wanted to be sure legislators understood that the “significant new exculpatory information” requirement was a limiting factor. Proponents assured the legislature that the law would provide “strict and narrow criteria for obtaining compensation.” S.B. Rep. on Engrossed Second H.B. 1341, 63d Leg., Reg. Sess., at 4 (Wash. Apr. 9, 2013) (staff summary of public testimony on bill as amended). One of the “requirements” for “narrow qualification” was the “significant new exculpatory evidence” prerequisite. H.B. Rep. on H.B. 1341, 63d Leg., Reg. Sess., at 6 (Wash. Mar. 1, 2013) (staff summary of public testimony in support of substitute bill).

The fiscal note also informed legislators that successful claims would be severely limited. The fiscal note estimated up to five claims per year for the first three years, but proponents believed this was excessive, noting that “[t]his bill has the strictest criteria in the country.” *Id.* The fiscal note estimated only one to three claims per year after the initial three

years. Judicial Impact Fiscal Note to 1341 S H.B. PL, at 2-3, 63d Leg., Reg. Sess. (Wash. 2013) (prepared by Admin. Office of the Courts). This is generally consistent with the rate of exonerations in Washington and with the number of claims that have actually been filed so far, a total of 19 since 2013.⁵ Fiscal Note to 1341 S H.B. PL, at 3, 63d Leg., Reg. Sess. (Wash. 2013) (prepared by Dep't of Corr.) (describing three Innocence Project exonerations since 1992); Fiscal Note to 1341 S HB PL, at 2, 63d Leg., Reg. Sess. (Wash. 2013) (prepared by W. Wash. Univ.) (Seattle Times reported 15 inmates released because of wrongful conviction in 14 years). In light of this legislative history, it is hard to believe that the legislature would have understood “new information” to include information not provided to the jury, even though the defendant, his counsel, or even the trial judge knew the information.

The Court of Appeals relied on the principle of statutory construction that courts will “construe remedial statutes liberally in accordance with the legislative purpose behind them.” *E.g.*, *Jametsky v. Olsen*, 179 Wn.2d 756, 763, 317 P.3d 1003 (2014); *Larson*, slip op. at 15. But this rule should not be indiscriminately applied here, where there is evidence that the legislature understood the statute’s purpose and scope to be narrow. S.B. Rep. on Engrossed Second H.B. 1341, 63d Leg., Reg.

⁵ Seven of those claims have been paid.

Sess., at 4 (Wash. Apr. 9, 2013); H.B. Rep. on H.B. 1341, 63d Leg., Reg. Sess., at 6 (Wash. Mar. 1, 2013). While the legislature certainly intended to remedy a harmful wrong, RCW 4.100.010, that purpose was expressly balanced by specific proof requirements that were intended to limit successful claims.

The Court of Appeals also relied on this Court's decision in *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009). But the DNA testing statute at issue in *Riofta* has a different purpose and legislative history than the wrongful conviction compensation act. In *Riofta*, this Court evaluated whether a convicted person was entitled to DNA testing post-conviction where the material to be tested was available but was not tested before the criminal trial. *Id.* at 363-64. The DNA testing statute, RCW 10.73.170(1), allows a convicted person serving a sentence to seek DNA testing if it would "provide significant new information." *Id.* at 364-65; RCW 10.73.170(2)(a)(iii). Based on the statute's legislative history, this Court rejected an argument that DNA testing could be allowed only if it was previously unavailable because of prior limitations in technology. *Riofta*, 166 Wn.2d at 365-66. But the holding was based on the specific history of amendments to that statute, and in any case, does not support the Court of Appeals' decision here. Nothing in *Riofta* indicated that if the defense had actually tested the DNA before trial but simply chosen not to

present the evidence, that another test would still “provide significant new information.” RCW 10.73.170(2)(a)(iii). Yet that would be the result under the Court of Appeals’ ruling here, which defines “new information” to include any information that “was not presented to the fact finder.” *See Larson*, slip op. at 15.

Ultimately, nothing in *Riofta* or any other case cited by Plaintiffs supports the idea that “new information” must include all “information that was available at the criminal trial but was not presented to the fact finder.” *Id.* At the very least, where evidence was known to the defendant or the defense team at the time of the criminal trial, it should not be considered “new information” under the wrongful conviction compensation act. For example, there is no indication that the legislature intended a criminal defendant to be able to receive compensation under the act where he or she kept some information from defense counsel or the jury, or where the defense chose not to present or pursue readily obtainable evidence as a matter of trial strategy. *E.g.*, *State v. Barry*, 25 Wn. App. 751, 760, 611 P.2d 1262 (1980) (where defense strategy was not to use known or obtainable evidence, a decision to change strategy after an unfavorable verdict does not render the evidence “newly discovered”). Instead, this Court should consider “new information” under the wrongful conviction compensation act to be evidence whose existence was

unknown to the defense at the time of trial and that did not go undiscovered as a matter of defense strategy.

In sum, interpretation of “new information” under the act is an issue of substantial public importance and this Court should correct the Court of Appeals’ error, made in a published opinion, rather than allowing an overly broad interpretation to remain precedent in this new area of Washington law. Otherwise there will be a significant risk that claims will reach beyond what the legislature, and even the law’s proponents, intended, risking an unexpected burden on courts and the state budget.

B. This Court Should Also Reverse the Court of Appeals’ Holding That the Trial Court Applied the Wrong Burden of Proof When Considering Actual Innocence

This Court should also grant review and reverse the Court of Appeals’ holding that the trial court misapplied the burden of proof. Proof of actual innocence means proof that the claimant “did not engage in any illegal conduct alleged in the charging documents.” RCW 4.100.020(2)(a). The Court of Appeals faulted the trial court for referring to prior judicial interpretations of “actual innocence” in other contexts in order to evaluate whether Plaintiffs met their burden in this case. *Larson*, slip. op. at 22-23.

Judge Cooney stated unequivocally that “plaintiffs are required to prove by clear and convincing evidence that they are actually innocent,” and that Plaintiffs failed to prove “by clear and convincing evidence” this

element of their claim. CP at 407, 431. He also discussed case law explaining that proof of actual innocence requires more than simply raising reasonable doubt sufficient to overturn the conviction. CP at 425. Proving actual innocence is a high burden and the evidence must be “truly persuasive.” CP at 425.

The trial court did not err when it considered what prior cases have said about “actual innocence,” a legal term of art, and the Court of Appeals failed to appreciate the difference between the meaning of “actual innocence” and the clear and convincing burden of proof. When the legislature incorporates a term into a statute, it is presumed to be aware of prior judicial interpretations of the term. *E.g.*, *State v. Monfort*, 179 Wn.2d 122, 141, 312 P.3d 637 (2013); *Gimlett v. Gimlett*, 95 Wn.2d 699, 701-02, 629 P.2d 450 (1981). It was proper for the trial court to consider cases discussing the meaning of “actual innocence” in other contexts, so long as the court’s reasoning did not ultimately conflict with the statute’s plain language. Thus, while the trial court noted that the burden to prove a freestanding claim of actual innocence in federal habeas proceedings is “extraordinarily high” and must be “truly persuasive,” *Herrera v. Collins*, 506 U.S. 390, 416-17, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), this description simply takes into account the distinction between establishing a reasonable doubt as to guilt and proving “actual innocence.” CP at 425.

Similarly, there was no error in the trial court citing one of this Court's personal restraint petition cases regarding "actual innocence," especially given that the standard of proof this Court applied there was identical to the statutory requirement here: "by clear and convincing evidence." CP at 424 (citing *In re Personal Restraint of Carter*, 172 Wn.2d 917, 931, 263 P.3d 1241 (2011)).

The trial court's discussion of what "actual innocence" means, in light of prior judicial definitions, was not inconsistent with the clear and convincing burden of proof, nor was this discussion improper. This Court should grant review so that it can correct the Court of Appeals' error and reiterate that prior judicial interpretations of a term can inform its meaning, so long as the court's decision ultimately remains consistent with the plain language of the statute.

C. This Court Should Conclude As a Matter of Law That the Claimants Failed to Meet Their Burden to Show They Are Actually Innocent

If this Court accepts review to clarify the law in this new area, it should also reverse the Court of Appeals' decision to remand for further proceedings. Instead, this Court should uphold the trial court's finding, based in part on the trial judge's credibility determinations, that Plaintiffs failed to prove actual innocence. This Court should do so even if it determines that the trial court applied too high a burden to prove actual

innocence, because applying the clear and convincing standard, Plaintiffs failed to meet their burden as a matter of law.

The trial court's unchallenged findings of fact are verities on appeal. *E.g., State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Here, the trial judge presided over a four-day trial where 15 witnesses testified. The trial judge saw the witnesses testify and was in a unique position to judge their credibility as the finder of fact. *See, e.g., Morse v. Antonellis*, 149 Wn.2d 572, 575, 70 P.3d 125 (2003). The trial court gave "virtually no weight to Mr. Kongchunji's testimony." CP at 427. The Court did not find Mr. Gassman credible when he testified as to his alibi: that during the entire year he lived with his girlfriend, he never left their home without her. CP at 429. The trial court did not find Mr. Larson credible when he testified he regularly arrived at work 30 minutes before he clocked in on his timecard, in light of conflicting testimony from his boss. CP 428. Finally, the trial court found Mr. Statler not to be credible when he testified regarding the firearm used in the crime, also in light of conflicting testimony. CP at 429.

Plaintiffs go to great lengths to argue that they could not have committed the crime on the date stated in the charging documents, but the plain language of the wrongful conviction compensation act requires them to prove by clear and convincing evidence that they "did not engage in any

illegal conduct alleged in the charging documents.” RCW 4.100.060(1)(d). Thus, even if the charging documents identified the wrong date, Plaintiffs still had to prove they did not commit the illegal conduct on a different date. *See also, e.g., State v. Larson*, 160 Wn. App. 577, 593-94, 249 P.3d 669 (2011) (where charging document uses “on or about” a date, defendant is on notice charge is not limited to that specific date).

The trial court’s evaluation of the credibility of key witnesses, including all three plaintiffs themselves, was central to the trial court’s findings. Appellate courts do not substitute their judgment on witness credibility for that of the fact finder. *See Morse*, 149 Wn.2d at 575.

Moreover, even if we assume Plaintiffs are correct regarding the date of the crime, the trial court found, after evaluating all of the testimony, that they still had not established alibis by clear and convincing evidence. CP at 429. The trial court explained that Mr. Larson could have committed the robbery before work, Mr. Gassman’s assertion he was always with his girlfriend was not credible, and Mr. Statler could have committed the robbery before checking in for his VICAP breath test. CP at 428-29. Thus, while Plaintiffs raised some doubt as to whether they had committed the crimes, the evidence in the record was insufficient to establish by clear and convincing evidence that they were actually innocent. As a result, if this Court grants review, it should also conclude,

as a matter of law, that Plaintiffs failed to meet the clear and convincing burden to prove actual innocence, and no remand is necessary.

V. CONCLUSION

The Court of Appeals' published decision is the first appellate decision to arise out of a trial under the wrongful conviction compensation act. This Court should grant review because trial courts, claimants, and the State would benefit from clarity in this new area of the law, making these issues matters of substantial public importance. If the Court of Appeals' erroneously broad definition of "new evidence" is permitted to stand, despite its contradicting ordinary usage and what the legislature intended, lower courts could misapply the statute in future cases and there could be significantly more claims than the legislature intended. This Court should grant review and reverse.

RESPECTFULLY SUBMITTED this 28th day of July 2016.

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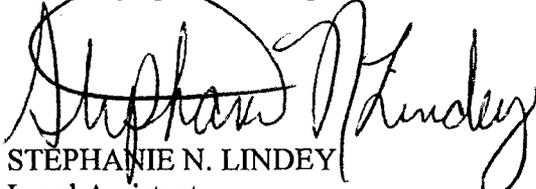
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Appendix

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ROBERT E. LARSON; TYLER W.)	No. 33179-2-III
GASSMAN; and PAUL E. STATLER,)	
)	
Appellants,)	
)	
v.)	PUBLISHED OPINION
)	
STATE OF WASHINGTON,)	
)	
Respondent.)	

LAWRENCE-BERREY, A.C.J. — The wrongly convicted persons act (WCPA), chapter 4.100 RCW, provides statutory compensation for wrongly convicted persons who prove they were actually innocent. To receive compensation, a claimant must prove six elements by clear and convincing evidence.

Robert Larson, Tyler Gassman, and Paul Statler (the claimants) appeal the trial court's decision that they failed to establish the fourth and fifth elements of their WCPA claims. We interpret the fourth WCPA element (significant new exculpatory information) liberally, to reflect the remedial purpose of the legislation, so a wrongly convicted person may more readily receive statutory compensation. We interpret RCW 4.100.060(3) as

authorizing a trial court to admit evidence that would otherwise be excluded under the rules of evidence. Finally, we interpret the burden of proof for the fifth WCPA element (actually innocent) to be clear and convincing evidence.

As a result, we (1) reverse the trial court's interpretation of "significant new exculpatory information," (2) hold that the trial court did not abuse its discretion by excluding hearsay evidence, and (3) reverse the trial court's imposition of an improperly high burden of proof on the "actually innocent" element. We remand to the trial court for it to decide whether the claimants have proved by clear and convincing evidence they are actually innocent.

FACTS

The parties tried this case to the bench. The trial court heard testimony from 15 witnesses over a period of four days, and admitted and reviewed numerous exhibits. The trial court prepared and issued an extensive written decision, consisting of 44 findings of fact. The claimants assign error to only two of these findings. We therefore set forth the pertinent findings of the trial court, and separately analyze the two disputed findings:

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 [violent incident criminal apprehension program (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.
-
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.
-
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 Matthew Dunham's phone records,³ failed to interview the detectives, and failed to interview Shane Neilson.⁴

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).

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).

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.

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

Clerk's Papers (CP) at 407-14.

ANALYSIS

Overview of the WCPA

The WCPA was passed in 2013, and came into effect on July 28 of that year.

LAWS OF 2013, ch. 175, §§ 1-9. The first section of the WCPA indicates the legislature's intent and provides:

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.

RCW 4.100.010.

To prevail on a claim under the WCPA claimants must show, by clear and

⁵ Prof. Natapoff testified as an expert witness primarily on issues surrounding the lack of credibility of criminal informants.

convincing evidence,⁶ that: (1) they were convicted of one or more felonies in superior court and subsequently sentenced to a term of imprisonment, and have served all or any part of the sentence,⁷ (2) they are not currently incarcerated for any offense,⁸ (3) 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,⁹ (4) the 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 claimants were found not guilty at the new trial or the claimants were not retried and the charging document dismissed,¹⁰ (5) they did not engage in any illegal conduct alleged in the charging documents,¹¹ and (6) they did not commit or suborn perjury, or fabricate evidence to cause or bring about their convictions.¹² The dispute in this case focuses on the fourth and fifth elements.

A. *Convictions vacated and charges dismissed on the basis of significant new*

⁶ RCW 4.100.060(1).

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) (there is an alternative fourth element under RCW 4.100.060(1)(c)(i), that relates to pardons, but is not applicable in this case).

¹¹ RCW 4.100.060(1)(d).

¹² RCW 4.100.060(1)(e).

exculpatory information

The claimants argue the trial court erred in defining “significant new exculpatory information” as evidence that was unavailable at trial. The claimants also argue the trial court erred in finding their convictions were not vacated and their charges not dismissed on the basis of the new information. These two arguments are discussed in turn below.

1. Significant new exculpatory information

The parties dispute the meaning of “significant new exculpatory information.” That phrase is not defined in the definitional section of the statute. *See* RCW 4.100.020. “The meaning of a statute is a question of law reviewed de novo.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Statutory interpretation is used “to determine and give effect to the intent of the legislature.” *State v. Reeves*, 184 Wn. App. 154, 158, 336 P.3d 105 (2014) (internal quotation marks omitted) (quoting *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013)). If statutory language is plain and unambiguous, this court does not engage in statutory interpretation. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). We determine the phrase is ambiguous because “new” might narrowly refer to information that was unavailable at trial, or “new” might broadly refer to information that was not presented to the jury.¹³

¹³ In *Newton v. State*, 192 Wn. App. 931, 932-33, 369 P.3d 511 (2016), Isaiah

The trial court noted that RCW 10.73.170 contains language similar to the language at issue here, and considered prior judicial interpretation of that similar language important in its analysis. We agree. RCW 10.73.170 authorizes a person convicted of a felony to submit a motion requesting postconviction DNA¹⁴ testing. Before the motion can be granted, the moving party must demonstrate the DNA testing would provide “significant new information.” RCW 10.73.170(2)(a)(iii). The trial court relied on *State v. Riofta*, 134 Wn. App. 669, 142 P.3d 193 (2006), *aff’d*, 166 Wn.2d 358, 209 P.3d 467 (2009). Because that case was reviewed by our Supreme Court, we start our analysis with *State v. Riofta*, 166 Wn.2d 358.

In *Riofta*, a man approached the victim, asked him for a cigarette, and then pulled a revolver from his coat and shot three times toward the victim, missing him each time. *Id.* at 362. The assailant fled, and in the process, left behind his white hat. *Id.* The victim knew the assailant, identified him as “Alex,” and provided a physical description to the

Newton filed a lawsuit under the WCPA after we reversed his first degree burglary conviction. Our reversal of his criminal conviction was based on insufficiency of the evidence. *Id.* The trial court granted the State’s motion for summary judgment on Newton’s WCPA claim. *Id.* In affirming the trial court we stated, “significant new exculpatory information necessarily refers to something other than the appellate reversal itself. The appellate reversal must be *based on* some new information.” *Id.* at 938. In *Newton*, we held “significant new exculpatory information” required “new information.” Here, we more specifically address the nature of this “new information.”

¹⁴ Deoxyribonucleic acid.

investigating officer. *Id.* at 362-63. The victim looked at a photograph database and identified his assailant as Alexander Riofta. *Id.* at 363. The State charged Mr. Riofta with first degree assault with a firearm. Neither the prosecution nor the defense sought DNA testing of the white hat. *Id.* The jury convicted Mr. Riofta. *Id.* After his conviction, Mr. Riofta requested DNA testing of the white hat pursuant to RCW 10.73.170. *Id.* The trial court denied his request. *Id.* at 364. The appellate court also denied his request, holding that “[Mr.] Riofta failed to establish the DNA testing could yield ‘significant new information’ because the white hat was available for testing at trial.” *Id.*

The Supreme Court reached the same result as the lower courts, but used a different basis. *Id.* at 367-73. Prior to discussing the different basis, the Supreme Court defined “significant new information” broadly—not narrowly—as did the appellate court. The Supreme Court held, “[RCW 10.73.170] provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial.” *Id.* at 366. Accordingly, the Supreme Court held Mr. Riofta’s request for DNA testing of the white hat was not precluded simply because such testing could have been, but was not, conducted prior to trial. *Id.*

Application of a similarly broad interpretation of “significant new exculpatory information” would be consistent with the legislature’s intent in enacting the WCPA. The statute is remedial in nature, and ““remedial statutes are liberally construed to suppress the evil and advance the remedy.”” *Go2net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006) (internal quotation marks omitted) (quoting *Kittilson v. Ford*, 23 Wn. App. 402, 407, 595 P.2d 944 (1979)). The remedy the WCPA seeks to advance is “to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration.” RCW 4.100.010.

If, instead, we defined “significant new exculpatory information” narrowly to include only information unavailable at trial, the number of wrongly convicted persons eligible for relief under the WCPA would be greatly restricted. The only eligible wrongly convicted persons would be those fortunate enough to discover significant new exculpatory information that was unavailable at trial. All other wrongly convicted persons would never be able to pursue a claim under the WCPA. We hold that “new” in the context of “significant new exculpatory information” must be construed broadly to include information that was available at the criminal trial but was not presented to the fact finder.

2. *Convictions vacated and charges dismissed on the basis of the new information*

The trial court found that the claimants failed to prove by clear and convincing evidence their convictions were vacated and their charges were dismissed based on the new information. The trial court found the sole basis for vacation of their convictions and dismissal of their charges was deficient performance of criminal counsel. The claimants argue the trial court erred because the criminal court vacated their convictions because deficient performance of criminal counsel *caused* significant exculpatory evidence not to have been presented at trial.

The criminal court's decision to vacate the claimants' convictions was based on two documents and one witness not presented to the jury. The criminal court first discussed the work records of Eric Weskamp, records that were not presented to the jury. According to the criminal court, the work records provided "[s]trong, credible alibi evidence" that would have allowed trial counsel to argue the date of the crime was April 15, 2008 and not April 17, 2008. Ex. P-16, at 4; Ex. P-17, at 4; Ex. P-18, at 4. But the evidence went undiscovered due to the deficiencies of trial counsel.

The criminal court next discussed the telephone records of the State's main witness, Matthew Dunham. These records also were not presented to the jury. The telephone records show Mr. Dunham spoke with the victims of the Weskamp robbery

before the crime occurred. However, at trial, Mr. Dunham stated he did not know any of the victims of the Weskamp robbery. The telephone records contained “critical information” and raised “significant questions” about the State’s account of the crime and Mr. Dunham’s version of events. Ex. P-16, at 5; Ex. P-17, at 5; Ex. P-18 at 5. If trial counsel had obtained the telephone records, they would have been able to “effectively challenge the State’s case and raise doubt.” Ex. P-16, at 5; Ex. P-17, at 5; Ex. P-18 at 5.

The criminal court next discussed the information that could have been elicited through Shane Nielson, a witness who did not testify in the criminal trial. After the April 23 robbery, Anthony Kongchunji took the shotgun used in that robbery to Mr. Statler’s home and left it there with Mr. Nielson. Mr. Nielson did not tell Mr. Statler about the shotgun until the police arrived to search the home later in the evening. Without Mr. Nielson’s testimony, “the jury was left with the impression that Mr. Statler was ‘in the know’ about the April 23 robbery,” making it more plausible he was an accomplice in the other robberies. Ex. P-16, at 5; Ex. P-17, at 5; Ex. P-18 at 5.

Based on all the above information that was not presented to the jury, the criminal court concluded the claimants were denied their right to effective assistance of counsel. The criminal court’s finding that criminal counsel was ineffective was based on their multiple failures to discover “[s]trong, credible alibi evidence,” “critical information,”

and other “potentially exculpatory evidence.” Ex. P-16, at 4-5, 7; Ex. P-17, at 4-5, 7; Ex. P-18 at 4-5, 7. The criminal court vacated the convictions because the effect of criminal counsels’ deficiencies undermined confidence in the verdicts. The State soon after dismissed all criminal charges because it determined it had insufficient evidence to proceed to trial. The only difference between initially proceeding to trial and later not proceeding to trial was the new information.

The State argues that the information that the criminal court found to be exculpatory was not actually exculpatory. In general, the State argues the information was not so critical or contradictory to have undermined the confidence in the jury’s verdict. The State’s argument misses the point. The statutory language does not ask whether the criminal court correctly vacated the convictions. Rather, the statutory language asks whether the convictions were vacated and the charges were dismissed based on the new information. The answer is an emphatic yes.

In summary, the existence of significant new exculpatory information was the sole basis for the criminal court’s decision to vacate the convictions, which soon after resulted in the dismissal of all criminal charges. We hold the trial court erred when it found the

claimants failed to satisfy the fourth WCPA element by clear and convincing evidence.¹⁵

B. *Nonadmittance of hearsay evidence despite statutory directive to give due consideration to difficulties of proof*

Despite substantial efforts, the claimants were unable to locate and subpoena Mr. Weskamp to testify at their January 2015 WCPA trial. They, therefore, sought to admit an April 2013 recorded interview between Mr. Weskamp and an investigator for the Innocence Project.

In the interview, Mr. Weskamp implicated Mr. Dunham's brother as a third person involved in the robbery, and said he was unable to identify the other person or two persons involved. By implication, Mr. Dunham lied when he did not identify his brother as an assailant. By further implication, the one or two unknown persons were not the three claimants. Mr. Weskamp further stated he was sure the robbery occurred early in the week, perhaps April 15. He said he was pressured by the State to accept the State's date, which he thought was April 18.

The State filed a motion to exclude the recorded interview. In response, the claimants argued the recorded interview should be considered pursuant to

¹⁵ Claimants assign error to finding 44, "limited evidence was presented that was not put before the jury in the criminal trial." This assignment relates to the claimants' argument that they met their burden of proof on the fourth WCPA element. We agree the claimants met their burden of proof on this element and do not address this assignment.

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RCW 4.100.060(3). The State argued the recorded interview was hearsay, they were not invited to participate in the interview, and admitting the recorded interview would prevent it from cross-examining Mr. Westkamp about his statements. The trial court granted the State's motion and excluded the recorded interview.

The standard of review for a trial court's decision to admit evidence under RCW 4.100.060(3) has not been articulated. RCW 4.100.060(3) provides:

In exercising its discretion regarding the weight and admissibility of evidence, the court must give due consideration to difficulties of proof caused by the passage of time or 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.

Because the statute recognizes the trial court's discretionary authority to weigh and admit evidence, we hold that a trial court's decision to admit or not admit evidence under RCW 4.100.060(3) is reviewed for an abuse of discretion. *See State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the claimants argue the trial court's rigid application of evidentiary rules was an abuse of discretion because if the legislature intended hearsay rules to apply, RCW 4.100.060(3) would be superfluous. The claimants also argue policy considerations

favor the legislature's decision to loosen the evidentiary rules.

We agree with the claimants that the legislature loosened the rules of evidence to assist wrongly convicted persons establish their proof. We hold RCW 4.100.060(3) authorizes a trial court to admit otherwise inadmissible evidence.

But we disagree with the claimants that a trial court abuses its discretion when it enforces the rules of evidence. Evidentiary rules have a purpose—to keep out unreliable evidence.

RCW 4.100.060(3) requires the court, in its discretion, to give due consideration to difficulties of proof. If the court decides the difficulties of proof do not warrant admitting certain evidence, the court has discretion to not admit it. That is what happened here. The trial court listened to and considered the parties' arguments for and against admitting the recording. The trial court then decided against admitting the recording because (1) it was hearsay, (2) the statements in the recording were not made under oath, and (3) admission would deprive the State of its ability to cross-examine Mr. Weskamp. The trial court's decision was not manifestly unreasonable, and thus was not an abuse of discretion.

C. *Did not engage in any illegal conduct*

RCW 4.100.060(1)(d) requires a claimant to prove by clear and convincing

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evidence he or she “did not engage in any illegal conduct alleged in the charging documents.” RCW 4.100.020(2)(a) makes the preceding quoted phrase synonymous with “actually innocent.” The claimants did not assign error to the trial court’s legal ruling that “charging documents” include the probable cause affidavits. Here, the probable cause affidavits included a temporal component of “on or about April 15, 2008.” Ex. D-115; Ex. D-118; Ex. D-121.

The claimants argue the trial court erred when it found they did not sufficiently prove they were actually innocent. Specifically, they argue the trial court erred (1) by using a heightened burden of proof applicable to personal restraint petitions and writs of habeas corpus, (2) by requiring them to prove they could not have committed the robbery anytime in April, when the evidence established the robbery occurred on either April 4 or April 15, and (3) by not finding them actually innocent. We examine the first argument separately, but because the second and third arguments are related, we examine them together.

1. Burden of proof

Statutory interpretation is a question of law that this court reviews de novo. *Berger*, 144 Wn.2d at 104-05. If the statute is plain and unambiguous, this court does not engage in statutory interpretation. *Id.* at 105.

RCW 4.100.060 explicitly requires a claimant to prove the six statutory elements by clear and convincing evidence. “Actually innocent,” being synonymous with the fifth WCPA element, is one of the statutory elements. We hold that RCW 4.100.060(1)(d) requires a claimant to prove he or she was actually innocent by clear and convincing evidence.

In its conclusions of law, the trial court resorted to the interpretations of “actually innocent” in the context of personal restraint petitions and writs of habeas corpus. The trial court noted, “The standard for establishing a freestanding claim of actual innocence is ‘extraordinary high’ and . . . the showing [for a successful claim] would have to be ‘truly persuasive.’” CP at 425 (quoting *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)). In concluding its analysis of whether the claimants proved their actual innocence, the trial court stated, “While the [claimants’] 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.” CP at 430 (emphasis added). Intermixed between these pages in the trial court’s decision, the trial court sometimes refers to the clear and convincing burden of proof. Nevertheless, we are convinced the trial court required the claimants to meet the heightened burden of proof requirement for personal restraint petitions and writs of habeas corpus. In doing so, the

trial court erred.

2. Application of correct standard of proof to facts

The claimants argue the trial court erred in requiring them to prove actual innocence by proving they could not have committed the robbery anytime in April 2008. They argue the facts establish the robbery had to have occurred on either April 4 or April 15.¹⁶ They then contend the facts establish they could not have committed the robbery on either of those two dates.¹⁷ Thus, they argue, this court should direct a verdict in their favor on the fifth WCPA element.

First, although we agree the evidence shows the robbery probably occurred on April 15, this question is for the trier of fact. Second, the testimony is unclear if the robbery occurred when it was getting dark or when it was completely dark. Third, Mr. Dunham's recollection of a 30-minute delay between the robbery and when they divided

¹⁶ Specifically, Mr. Weskamp testified in the criminal trial he worked the day of the evening when he was beaten, and missed work the following day. Examination of Mr. Weskamp's time cards establish four days he missed work, but only two in which he worked the prior day—April 4 or April 15.

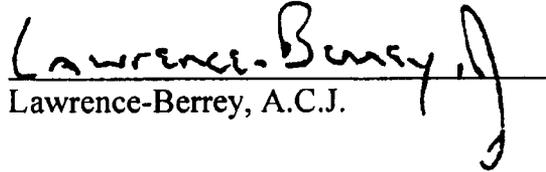
¹⁷ Specifically, records establish it was not completely dark until 9:14 p.m. on April 4. Mr. Dunham testified they drove for 30 minutes after the robbery and before returning to a house to split the stolen money. Assuming it would take five minutes to divide the money and another five minutes for Mr. Larson to travel 2.5 miles from the house to his work, the earliest Mr. Larson could have been to work was 9:54 p.m. But Mr. Larson's time card shows he clocked in three minutes earlier, at 9:51 p.m. According to the claimants, this three minute overlap establishes by clear and convincing evidence

the money at the house was possibly only a rough estimate.

If the timeline was as certain as the claimants contend, we might be persuaded to direct a verdict. But the facts are uncertain. We deem it proper for the trier of fact—the trial court here—to determine whether the claimants have proved by clear and convincing evidence they are actually innocent. We remand for this purpose.

CONCLUSION

We affirm the trial court’s evidentiary ruling excluding the recorded statement. We reverse the trial court’s legal conclusion that “significant new exculpatory information” must be evidence that was unavailable at trial. We also reverse the trial court’s legal conclusion that the claimants’ evidentiary burden to prove actual innocence is greater than clear and convincing. We remand this case to the trial court for it to make a factual determination whether the claimants have proved by clear and convincing evidence they are actually innocent.


Lawrence-Berrey, A.C.J.

WE CONCUR:


Siddoway, J.


Pennell, J.

they did not commit the robbery.

Chapter 4.100 RCW**WRONGLY CONVICTED PERSONS**

Chapter Listing

Sections

4.100.010	Intent.
4.100.020	Claim for compensation—Definitions.
4.100.030	Procedure for filing of claims.
4.100.040	Claims—Evidence, determinations required—Dismissal of claim.
4.100.050	Appeals.
4.100.060	Compensation awards—Amounts—Proof required—Reentry services.
4.100.070	Provision of information—Statute of limitations.
4.100.080	Remedies and compensation exclusive—Admissibility of agreements.
4.100.090	Actions for compensation.

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.]

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Court of Appeals Case Number: 33179-2

Party Represented: State of Washington

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Dear Clerk,

Attached for filing is a Petition for Review in the above referenced matter from the Court of Appeals, Division III. This was filed with Division III as well. Thank you!

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