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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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b/h

STATE OF WASHINGTON,

Respondent,

v.

LINDSEY LADELL CRUMPTON,

Appellant.

ON DISCRETIOANRY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 42173-9-II
Superior Court No. 93-1-00265-1

RESPONDENT'S ANSWER TO
THE SUPPLEMENTAL BRIEF OF AMICI CURIAE

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I. ARGUMENT

RCW 10.73.170 CONTAINS NO PRESUMPTION OF FAVORABILITY, AND THERE IS NO BASIS FOR THIS COURT TO REWRITE THAT LEGISLATIVE DECISION.

1. Amici's Legal Contentions

Amici fault the Court of Appeals for “conflat[ing] its confidence in Crumpton’s guilt with the proper application of the substantive requirements of” RCW 10.73.170. Brief of Amici at 4. Amici fail to explain how this contention shows error.

They argue that the statute “focuses not on the probabilities of testing but on the force of the evidence should it come back exculpatory.” Brief of Amici at 7. This is a curious reading of the statute. RCW 10.73.170(3) provides:

The court shall grant a motion requesting DNA testing under this section if ... the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

The operative language is the “likelihood that the DNA evidence would demonstrate innocence.” The burden is squarely on the defendant. If Crumpton has the burden of showing that the DNA evidence would demonstrate innocence, it is unclear how the statute may be read as having a presumption that the DNA results would be favorable.

Amici argue that “the plain meaning” of the statute shows that “a strict burden should not be placed on the convicted person.” Brief of

Amici at 7. This assertion is directly contrary to the holding of *Riofta v. State*, 166 Wn.2d 358, ¶ 22, 209 P.3d 467 (2009), where this Court described the substantive burden under subsection (3) of the statute as “onerous.”¹ Moreover this assertion is also contrary to the legislative history:

By keeping the high “proof of innocence” standard in the bill, the number of requests will remain low and testing will only be ordered in cases where there is a credible showing that it likely could benefit an innocent person.

House Bill Report on HB 2872 at 3 (2004).

Amici argue that the State’s reading of the statute reads the term “likelihood” out of the statute or renders it surplus. Brief of Amici at 8. This is not so. The pertinent phrase reads “the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” A “likelihood” is *what* the defendant must prove. On the other hand, the phrase “on a more probable than not basis” indicates the burden of proof. The terms are not synonymous. The Legislature could have required the defendant to show “the likelihood that the DNA evidence would demonstrate innocence by clear and convincing evidence” or to show “the likelihood that the DNA evidence would demonstrate innocence by prima facie evidence.” What is unreasonable is

¹ This is “[i]n contrast to the statute’s lenient procedural requirements.” *Riofta*, 166 Wn.2d at ¶ 22. The State has never claimed that Crumpton’s *procedural* showing was inadequate.

to read “likelihood” to mean “likelihood, assuming that the results are favorable.”

The State has previously addressed Crumpton’s claims regarding the holdings of *Riofta*, *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012), and *State v. Gray*, 151 Wn. App. 762, 215 P.3d 961 (2009), which Amici repeat in more or less identical fashion. The State will not reiterate its discussion here.

2. Amici’s Factual Contentions

Notably, amici devote very little discussion to the actual facts of this case. The one exception is their discussion of hair evidence. It is well-settled that this Court does not consider issues raised first and only by amici. *Madison v. State*, 161 Wn.2d 85, 104, 163 P.3d 757, 769 (2007). This Court should therefore decline to consider this issue, which was raised only by Amici.

Moreover, even if this issue were to be considered, the underlying science of hair analysis is sound. The issue, as cited by amici, Brief of Amici, at 16, is whether experts reached conclusions beyond the reach of that science. *See, e.g.*, FBI Press Release, *FBI Clarifies Reporting on Microscopic Hair Comparisons Conducted by the Laboratory* (Jul. 13, 2012) (“The validity of the science of microscopic hair comparison is not

at issue”).² This very point was made in the National Academy of Sciences report Amici cite:

The success of hair analyses to make a positive identification is limited in important ways. *Most hair examiners would opine only that hairs exhibiting the same microscopic characteristics “could” have come from a particular individual. ...*

However, several members of the committee have experienced courtroom cases in which, despite the lack of a statistical foundation, microscopic hair examiners have made probabilistic claims based on their experience, as occurred in some DNA exoneration cases in which microscopic hair analysis evidence had been introduced during trial.

National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward*, 159-60 (2009) (emphasis supplied).³

Here, Amici offer no evidence that the forensic examiner in *this case* in any way improperly represented the science or the conclusions to be drawn from the evidence.

Finally, the hair comparison was a minor part of the quite incriminating evidence. Omitting it from the State’s brief below, the following would remain:

Within 8 minutes after the victim reported the rapes, Crumpton was stopped by the police less than half a mile away. He was running, sweaty and out of breath, and he gave an unlikely account of his presence on the streets at

² Available at <http://www.fbi.gov/news/pressrel/press-releases/fbi-clarifies-reporting-on-microscopic-hair-comparisons-conducted-by-the-laboratory> (last viewed Feb. 3, 2014).

³ Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (last viewed Feb. 3, 2014).

5:30 a.m. He matched the victim's description of her assailant, including emitting a strong odor of cologne. He was carrying several items that the rapist had taken from the victim's home, including a telephone cord, a flowered-print bed sheet that matched the linens in her home, monogrammed handkerchiefs, and jewelry that was identified by the victim and matched the broken pieces left at the scene. ... Further, Crumpton himself admitted being in the apartment and there is no evidence that any other assailant was present that evening. There was no likelihood that the DNA results would have been favorable and no probability on a more likely than not basis that they would have demonstrated Crumpton's innocence.

Brief of Respondent at 14 (ellipsis is where single sentence referencing hair evidence appeared). Not noted in that brief was the additional fact that Crumpton declined to have DNA testing done before trial. *See Riofta*, 166 Wn.2d at ¶ 27 n.3 (“A defendant’s failure to request DNA testing at trial of evidence he now claims to be exculpatory must be weighed against his claim of probable innocence unless circumstances exist to justify the failure”).

3. Amici's Policy Arguments

Much of Amici's brief is devoted to policy arguments. Brief of Amici at 1-4, 5-7, 11-12, 13-15, 17-19. As the State has previously pointed out, however, there is no constitutional right to postconviction DNA testing. *District Attorney's Office v. Osborne*, 557 U.S. 52, 72-74, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009); *see also Thompson*, 173 Wn.2d at ¶¶ 49-51 (Madsen, CJ, dissenting). It is thus entirely a creature of legislative grace. Presumably the Legislature has already weighed the

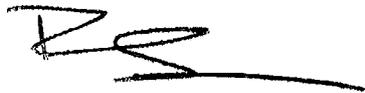
policy considerations Amici and Crumpton urge upon this Court. This Court's job, however, is to apply the language of the statute as it is written. As written, the statute contains no "presumption of favorability." The decisions below should be affirmed.

II. CONCLUSION

For the foregoing reasons, and those set forth in the State's prior briefing, the decisions of the Superior Court and the Court of Appeals should be affirmed.

DATED February 5, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
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A handwritten signature in black ink, appearing to read "RS", with a long horizontal flourish extending to the right.

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