No. 1029365

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY LUCIOUS,

Petitioner.

MEMORANDUM OF AMICI CURIAE WASHINGTON INNOCENCE PROJECT AND INNOCENCE NETWORK IN SUPPORT OF REVIEW

Kaylan Lovrovich, WSBA#55609
WASHINGTON INNOCENCE PROJECT
P.O. Box 85869
Seattle, Washington 98145-1869
206-636-9474
kaylan.lovrovich@wainnocenceproject.org

Jamie T. Lau, NC Bar No. 39842
INNOCENCE NETWORK
Duke Law Wrongful Convictions Clinic
210 Science Drive
Durham, NC 27708
919-613-7764
jamie.lau@law.duke.edu

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I. INTEREST OF AMICI CURIAE

The identity and interest of Amici Curiae is set forth in the accompanying Motion.

II. INTRODUCTION

Postconviction DNA testing is "widely accepted as a way to ensure an innocent person is not in jail." *State v. Crumpton*, 181 Wn.2d 252, 258 (2014). In the last 35 years alone, DNA testing has exonerated 598 wrongly convicted people nationwide. *Nat'l Registry of Exonerations*, UNIV. OF MICH. ("NAT'L REGISTRY"), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

But the exculpatory potential of DNA—or lack thereof—cannot be known until it is tested. RCW 10.73.170 directs courts to order testing in *every* case where the petitioner meets certain "lenient" procedural requirements, and a substantive requirement that is "onerous but reasonable enough to let legitimate claims survive." *Crumpton*, 181 Wn.2d at 261-62. This Court has held

that a robust presumption of exculpatory test results is part of this standard. *Id.* at 260.

Timothy Lucious seeks review to be afforded the full benefit of the required presumption, and an application of RCW 10.73.170 that aligns with its intent to make DNA testing accessible to "possibly innocent individual[s]." *Id.* at 261. This Court should accept review to correct a concerning trend in which Washington courts—including the *Lucious* Court—are restricting access to postconviction DNA testing by: (1) eroding the robust, flexible presumption of exculpatory results, and (2) conflating the standard for DNA testing with the higher standard required to challenge a conviction based on exculpatory DNA results, thereby denying wrongly-convicted Washingtonians access to evidence that could prove their innocence.

The urgency of this Court's review is further highlighted by the story of one innocent Washingtonian who, if subjected to the *Lucious* Court's misapplication of RCW 10.73.170, would still be wrongly imprisoned today.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case of Petitioner Timothy Lucious.

IV. ARGUMENT

A. Review is warranted because *Lucious*'s erosion of the presumption of exculpatory results conflicts with established law and the clear intent of RCW 10.73.170.

Recognizing that "[m]any innocent individuals have been exonerated through postconviction DNA tests," RCW 10.73.170 was enacted "to provide a means for a convicted person to obtain DNA evidence that would support a petition for postconviction relief." *Crumpton*, 181 Wn.2d at 261-62; *State v. Riofta*, 166 Wn.2d 358, 368 (2009). It has been amended to "broaden access to DNA testing," in alignment with its "goal" to provide testing in every case where "it could benefit a possibly innocent

individual." *Crumpton*, 181 Wn.2d at 261; *State v. Gray*, 151 Wn. App. 762, 773 (2009).[1]

The primary way the statute achieves its broad goal is by requiring a presumption that DNA results would be exculpatory to the petitioner. *Crumpton*, 181 Wn.2d at 260. Courts must then view the presumed-exculpatory results alongside all the evidence from trial and determine whether the results would "raise a reasonable probability the petitioner was not the perpetrator." *Riofta*, 166 Wn.2d at 368. Applying this standard, courts have granted testing notwithstanding "overwhelming physical and circumstantial evidence of guilt," recognizing that "there will always be strong evidence against a convicted individual." *Crumpton*, 181 Wn.2d at 262.

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[1] RCW 10.73.170 was drafted to be "comparable to" the federal DNA testing law. *Riofta*, 166 Wn.2d at 368. But many provisions of the federal law, which requires detailed, fact-specific engagement with the petitioner's theory of innocence, were omitted from our statute—a clear sign that our legislature declined to enact these more stringent requirements. *See Bird-Johnson Corp*. v. *Dana Corp*., 119 Wn.2d 423, 428 (1992).

It is impossible to know the outcome of testing until it is completed. *Id.* at 261. For this reason, courts must balance the statutory intent to provide testing to possibly innocent individuals with a desire to limit testing to those with "legitimate claims" by presuming the *best possible* hypothetical test results in favor of the petitioner. *Id.* at 262. In other words, if an outcome exists within the realm of current DNA testing capabilities that could raise a reasonable probability of innocence, the statute's intent is to provide testing. It is this hypothetical analysis that "accomplishes th[e] balance" of making RCW 10.73.170's "onerous" standard "onerous *but reasonable enough to let legitimate claims survive*." *Id.* (emphasis added). When a court holds a petitioner to an "onerous" standard without also affording them the full benefit of the required presumption, it fails to apply "the appropriate analytical method for achieving the most just resolution to these motions." *Id*. at 261.

Because the best possible test result is necessarily case-specific, the presumption is designed to be flexible. "Exculpatory

results" has variously meant "an absence of [the defendant's] DNA in conjunction with a match of the DNA of a convicted felon in Washington," *Riofta*, 166 Wn.2d at 367, a result that "conclusively exclude[s]" the defendant, *State v. Thompson*, 173 Wn.2d 865, 875 (2012), "the presence of the same DNA profile on either the vaginal or anal swabs taken from [victim 1] and on any of the samples from [victim 2]," *Gray*, 151 Wn. App. at 775, and "that the DNA was [the decedent's]" to the exclusion of the defendant or any "third party" in a self-defense case. *State v. Braa*, 2 Wn. App. 2d 510, 521 (2018).

For Mr. Lucious, exculpatory results would be a redundant profile on all shell casings excluding Mr. Lucious and matching another individual present at the scene with no connection to him—a presumption well-supported by Washington law and current testing capabilities. But instead of following this Court's precedent and presuming the *most exculpatory* result, *Lucious* arbitrarily narrowed the hypothetical universe by presuming only "that further testing will indicate the absence of the defendant's

DNA and the presence of *some other person's* DNA." *State v. Lucious*, No. 39338-1-III, 2024 WL 1070154, at *2 (Wash. Ct. App. Mar. 12, 2024) (emphasis added). This erosion of the presumption is not a one-off, but a concerning trend that this Court should correct. *See State v. Ramirez*, No. 39118-3-III, 2023 WL 8433350 at *3 (Wash. Ct. App. Dec. 5, 2023) (holding that "the full extent of the exculpatory presumption" is only that testing will yield the profile of "a third person and not [the defendant]").

Arbitrary line-drawing that stops short of the most exculpatory possible result contradicts this Court's law. Of course, the presumption must be grounded in reality and articulate an outcome that can be achieved through routine testing. Courts may correctly decline to extend the presumption to a result that DNA testing *cannot* provide. *See Braa*, 2 Wn. App. 2d at 521 (declining to presume how or when blood got to a specific location). But this Court has upheld various hypothetical exonerating results that DNA testing *can* provide,

including "an absence of [the defendant's] DNA in conjunction with a match of the DNA of a convicted felon in Washington." *Riofta*, 166 Wn.2d at 367.

Presuming that DNA would exclude Mr. Lucious and include a specific third-party is a result that DNA testing *can*, and regularly *does*, provide. The Washington State Patrol Crime Laboratory Division (WSPCLD) performs searches in the Combined DNA Index System (CODIS) as a fully integrated step in the DNA testing process, and profiles are routinely compared to reference samples from known parties. *CODIS Program Standard Operating Procedures*, WASH. STATE PATROL, at 4, 14, available at https://www.wsp.wa.gov/forensics/docs/crimelab/manuals/technical/codis/CODIS_SOP_Revision_32.pdf.

This Court should accept review to clarify that the presumption must extend to the *most favorable result that can be obtained through current DNA technology*, as this Court presumed in *Crumpton*, *Thompson*, and *Riofta*. Anything less invites arbitrary judicial line-drawing that both conflicts with

modern DNA science and renders our legal system vulnerable to flawed "scientific" findings that have themselves led to wrongful convictions. *See*, *e.g.*, COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., ET AL., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 53 (2009), available at http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

B. Review is warranted because *Lucious* heightened the standard for postconviction DNA testing in conflict with established law.

RCW 10.73.170's standard "is not akin to retrying the case." *Thompson*, 173 Wn.2d at 873. Yet, the *Lucious* Court's misapplication of the standard encroaches on the higher burden required for requesting a new trial. *Compare Riofta*, 166 Wn.2d at 368 (whether exculpatory results "would raise a reasonable probability of innocence") *with State v. Williams*, 96 Wn.2d 215, 233 (1981) (whether newly discovered evidence "will probably change the result of the trial"). Because DNA testing is an

investigative tool intended to allow defendants to *gather* new evidence, the standard for obtaining testing must inherently be less stringent than standards used to challenge a conviction *based on* new evidence. *See Crumpton*, 181 Wn.2d at 263 (DNA testing is "simply the first step" and "does not affect whether the individual will be granted a new trial"). *Lucious*'s conflation of the two standards risks foreclosing a potential avenue of relief for innocent people before DNA can even be tested.

First, *Lucious*—like other appellate courts across the State—heightened the standard by erasing its touchstone: reasonableness. *Compare Riofta*, 166 Wn.2d 358 (standard is whether exculpatory results raise a "reasonable probability" of innocence), *and Crumpton*, 181 Wn.2d at 262 ("the standard must be reasonable enough to let legitimate claims survive") *with Lucious*, 2024 WL 1070154 at *2 (stating that innocence must be "not merely possible, but probable" and omitting reasonableness); *Ramirez*, 2023 WL 8433350 (referencing only "a probability" and omitting "reasonable"), *and Braa*, 2 Wn.

App. 2d at 520 (omitting "but reasonable enough" language from "onerous" standard), *and State v. Tennant*, No. 57939-1-II, 2024 WL 455293 (Wash. Ct. App. Feb. 6, 2023) (same). Omission of this key language effectively requires those seeking testing to definitively prove their innocence—a burden impossible to meet before testing the evidence to see whether it "actually exculpates" them. *Crumpton*, 181 Wn.2d at 261.

Second, *Lucious* heightened the standard by holding that exculpatory results must be viewed alongside "the remaining *inculpatory* evidence," *Lucious*, 2024 WL 1070154 at *2 (emphasis added), rather than "*all* of the evidence presented at trial." *Riofta*, 166 Wn.2d at 367 (emphasis added). In doing so, it improperly credited the strength of the State's trial evidence, while discounting the potential exculpatory impact of DNA results. *See Crumpton*, 181 Wn.2d at 262 (the court must "focus on the likelihood that DNA evidence could demonstrate the individual's innocence," rather than "the weight or sufficiency" of the trial evidence).

DNA from shell casings is powerful evidence of innocence: Last year, Richard Horton was exonerated after DNA from *a single shell casing* at the crime scene excluded him, despite eyewitness identifications. NAT'L REGISTRY (search "Richard Horton"). And, ironically, the State uses DNA from shell casings to support convictions. *See, e.g.*, *State v. Monday*, 171 Wn.2d 667, 670 (2011) (police deceptively told defendant his DNA was on shell casings from the crime scene to obtain a confession); *State v. Kerby*, 180 Wn. App. 1023, 2014 WL 1389044, at *9 (Wash. Ct. App. Apr. 8, 2014) *cited pursuant to GR 14.1* (prosecutor requested testing on shell casings because, "[o]bviously, if [the defendant's] fingerprints or DNA had been found on the shell casings it would be material evidence").

Finally, *Lucious* heightened the standard by inaccurately finding that DNA showing Mr. Lucious did not load the gun "would not have contradicted" the trial evidence. *Lucious*, 2024 WL 1070154 at *3. At trial, the State argued that Mr. Lucious "loaded a gun" and maintained that his decision to "put a clip in

that gun" and "rack that load" established premeditation. RP 9/15/10 at 559, 561. Permitting the State to alter its trial theory to prevent DNA testing would create an impossible moving target for defendants—requiring them to confront new theories that could be presented at a new trial in order to obtain the evidence necessary to move for one—and violates constitutional principles. *See Cola v. Reardon*, 787 F.2d 681, 688 (1st Cir. 1986) (citing *Dunn v. U.S.*, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979)) ("it is a violation of due process to affirm a conviction on a basis neither set forth in the indictment nor presented to the jury at trial"); *see also* Jacqueline McMurtrie, *The Unindicted Co-Ejaculator and Necrophilia: Addressing Prosecutors' Logic-Defying Responses to Exculpatory DNA Results*, 105 J. CRIM. L. & CRIMINOLOGY 853, 855, 872 (2015) (proposing the use of judicial estoppel to prevent prosecutors from advancing "new and bizarre theories" in postconviction proceedings that "contradict[] the position they asserted at the defendant's trial").

Review is warranted to affirm the correct standard.

C. Review is warranted because identifying wrongful convictions is an issue of substantial public interest.

Countless wrongly convicted people would never have been exonerated under *Lucious*'s misapplication of RCW 10.73.170. One of them is WashIP client Jeramie Davis.

In 2008, Jeramie Davis was wrongly convicted of the murder of a storekeeper. NAT'L REGISTRY (search "Jeramie Davis"). Although he admitted to looting the store where the victim lay dying, Mr. Davis denied beating him with a baseball bat. *Id*. DNA testing on the bat excluded Davis and revealed an unknown profile, and no fingerprints in the store belonged to Davis. *Id.* The State argued that gloves found in Mr. Davis's car explained the absence of his DNA and prints. *Id*.

Police later asked WSPCLD to search the unknown profile in CODIS, which was not automatic at the time. *Id*. It matched felon Julio Davila. *Id.* On further investigation, crime scene palm and fingerprints also matched Davila. *Id*. Still, the State pursued

Mr. Davis—on a new theory that he and Davila were accomplices. *Id.* In 2013, after a thorough investigation found no evidence that the two men even knew each other, Mr. Davis was finally exonerated. *Id.*

Had Mr. Davis been subjected to *Lucious*'s narrow standard, he would have certainly been denied the testing that eventually proved his innocence. If "some other person's DNA" on the shell casings would not "tend to show [Mr. Lucious] was not the shooter," *Lucious*, 2014 WL 1070154 at *3, then a court could also reason that "some other person's DNA" on the bat would not "tend to show" Davis did not wield the bat to kill the storekeeper, especially given the State's argument that Davis was wearing gloves.

Under *Lucious*, Mr. Davis would have been precluded from presuming what was eventually discovered to be the truth—that testing would exclude him and match a known individual with no connection to him. He would still be in prison today, and Davila might still be free—an outcome at odds with RCW

10.73.170's clear intent to "ensure an innocent person is not in jail." *Crumpton*, 181 Wn.2d at 258.

V. CONCLUSION

"We should not be afraid to be proved wrong." *Riofta*, 166 Wn.2d at 379 (Chambers, J., dissenting). A robust and flexible presumption and an accessible standard consistent with the statute's intent favor testing to uncover the truth in cases where current DNA technology has the potential to demonstrate innocence. Identifying the innocent people in our prisons is an issue of substantial public interest. This Court should grant review.

CERTIFICATE OF COMPLIANCE WITH RAP 18.17

Undersigned counsel certifies that, pursuant to RAP 18.17(b), the document contains 2,497 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation

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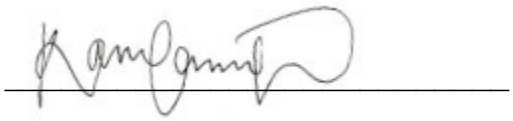
DATED this 4th day of June, 2024.

Respectfully Submitted,



WASHINGTON INNOCENCE PROJECT
Kaylan Lovrovich, WSBA#55609
PO Box 85869
Seattle, WA 98145-1869
206-636-9474
kaylan.lovrovich@wainnocenceproject.org

s/Jamie Lau

INNOCENCE NETWORK
Jamie T. Lau, NC Bar No. 39842
Duke Law Wrongful Convictions Clinic
210 Science Drive
Durham, NC 27708
919-613-7764
jamie.lau@law.duke.edu

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I, Justine Mclean-Riggs, declare that on June 4, 2024 I caused to be electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform. The filing was addressed as follows:

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- willa@washapp.org
- bpearce@spokanecounty.org
- scpaappeals@spokanecounty.org

Under penalty of perjury under the laws of the State of Washington, the foregoing is true and correct.

Dated: June 4, 2024

Justine Mclean-Riggs
Paralegal, Washington Innocence Project
P.O. Box 85869
Seattle, WA 98145-1869
(206) 636-9479

WASHINGTON INNOCENCE PROJECT

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