No. 1031840

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CODY KLOEPPER,
Petitioner.

AMENDED MEMORANDUM OF AMICI CURIAE INNOCENCE NETWORK AND CENTER FOR INTEGRITY IN FORENSIC SCIENCES IN SUPPORT OF REVIEW

Jamie T. Lau
INNOCENCE NETWORK
210 Science Drive
Durham, NC 27708
919-613-7764
Jamie.lau@law.duke.edu

Katherine H. Hudson
CENTER FOR INTEGRITY IN FORENSIC SCIENCES
33 E. Main Street, Suite 400
Madison, WI 53703
608-736-2437
kate@cifsjustice.org

Lara Zarowsky, WSBA#40745
INNOCENCE NETWORK
P.O. Box 85869
Seattle, Washington 98145-1869
206-636-9479
lara.zarowsky@wainnocenceproject.org

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I. IDENTITY AND STATEMENT OF INTEREST

The identity of amici and statement of interest are laid out in the Motion for Leave to File Memorandum of Amici Curiae Supporting Petition for Review and is incorporated here by reference.

II. SUMMARY OF FACTS

Amici adopts Petitioner's Summary of Facts.

III. INTRODUCTION

> "Impossibility is so rare that it cannot be a requirement for 'actual innocence.'" *U.S. v. Watson*, 792 F.3d 1174, 1179, 15 Cal. Daily Op. Serv. 7610 (2015).

The post-conviction DNA results in Cody Kloepper's case are powerful and compelling evidence of his innocence. Semen and sperm cells were in multiple spots on the victim's clothing that she wore during the rape and interactions with her assailant. In all those locations deemed suitable for testing, Cody Kloepper was excluded as a possible source of the biological material.

Male DNA from the semen and sperm cells ran through CODIS hit to the DNA profile of Sal Contreras. Sal Contreras was a key State's witness at Mr. Kloepper's trial and testified that he had no sexual contact with Mr. Kloepper during their time together prior to the time the rape occurred. Yet at Mr. Kloepper's motion for a new trial after he received the DNA results and CODIS information, Mr. Contreras contradicted his trial testimony by now claiming that he did have a sexual encounter with Mr. Kloepper and that Mr. Contreras ejaculated. For the very first time at the motion hearing, the State presented a theory that Mr. Contreras's DNA was on Mr. Kloepper after intimate encounter, and that Mr. Kloepper transferred Mr. Contreras's DNA onto the victim's clothing when Mr. Kloepper later committed the rape.

A jury must be allowed to determine Mr. Kloepper's guilt or innocence while considering the startling new DNA results. Amici has provided examples of exonerations in this briefing that were confirmed despite some involving more evidence against the claimant than in this case. Notably, these occurred in states

with similar or more onerous standards to obtain a new trial based on newly discovered DNA evidence than under Washington State law. These are just a handful of examples of exonerations based on DNA evidence in the United States with similar exculpatory DNA results. If the same reasoning used to deny Mr. Kloepper's motion had been applied to their cases, these innocent people would still be incarcerated.

IV. ARGUMENT

A. Post-Conviction DNA Testing Requires a Method for Relief

Like in many states across this country, Washington law provides a mechanism for innocent prisoners to request post-conviction DNA testing if they show a likelihood the DNA evidence would demonstrate their innocence on a more probable than not basis. Once results are obtained, the standard for relief based on newly discovered post-conviction DNA evidence varies by jurisdiction. In Washington, the law requires that the evidence

would "probably [have] change[d] the result of trial" had it been introduced. *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

In Florida, relief is merited when the impact of the evidence is "of such nature that it would probably produce an acquittal on retrial" *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998); citing *Jones v. State*, 591 So.2d 911 (Fla. 1991). This is satisfied when the newly discovered evidence "weakens the case against [a defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526, citing *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996).

In Illinois, to obtain a new trial, the impact must be that "it is of such a conclusive character it will probably change the result on retrial." *People v. Davis*, 966 N.E.2d 570, 576, 2012 IL App (4th) 110305 (2012); citing *People v. Gabriel*, 398 Ill. App. 3d 332, 350, 924 N.E.2d 1133 (2010). In New Jersey, to obtain a new trial based on newly discovered post-conviction evidence,

the impact of the evidence must be "of the sort that would probably change the jury's verdict if a new trial were granted." *State v. Peterson*, 364 N.J. Super. 387, 398, 836 A.2d 821, 828 (N.J. Super. Ct. App. Div. 2003), citing *State v. Carter*, 85 N.J. 300, 314, 426 A.2d 501 (508) (1981).

B. "Overwhelming" Evidence Cannot Be a Bar to Post-Conviction Relief

Hildwin v. State, 141 So.3d 1178 (Fla. 2014) addressed the denial of a motion for new trial based on exonerating post-conviction DNA results. The trial court indicated that the new evidence would not likely result in an acquittal given all the other circumstantial and direct evidence of guilt. *Id.* at 1185. Florida's Supreme Court reversed, finding that the exonerating DNA evidence not only supported the defendant's trial theory, but also changed the very character of the case, despite the significant evidence of guilt. *Id.* 1192-1193. This is notable because Florida law requires that newly discovered evidence establish a

likelihood of acquittal specifically, unlike Washington's standard, which requires only the probability of a different outcome.

The Supreme Judicial Court of Massachusetts has also analyzed the standard for obtaining a new trial in the face of exonerating post-conviction DNA results, granting relief under a more stringent standard than what is required under Washington law. In Massachusetts, newly discovered evidence must cast real doubt on the justice of the conviction, which occurs when there is a "substantial risk" that the jury would have reached a different conclusion had the newly discovered evidence been admitted at trial. *Com. v. Grace*, 397 Mass. 303, 305, 491 N.E.2d 426 (1986). In *Com. v. Sullivan,* 469 Mass. 340, 353, 14 N.E.3d 205 (2014), the court granted a new trial despite acknowledging "much of the evidence the Commonwealth presented against the defendant remains, and that the Commonwealth may have been able to carry its burden to prove beyond a reasonable doubt." In finding the lower court had abused its discretion, the court stated that—

like Mr. Kloepper's case—the evidence related to whether the defendant was present with the victim during the crime and was not "merely cumulative" of other physical evidence. *Id.* at 351-52.

C. A New Theory Presented By the State to Account for DNA Results Cannot Prohibit Relief if the New Theory Contradicts Trial Testimony or Arguments

Prosecutors routinely invent new theories for how a crime occurred when post-conviction DNA testing results contradict evidence and arguments made at the original trial. It is so common it has a nickname playing off a familiar legal concept[1]: "the unindicted co-ejaculator[2]." Courts have traditionally—and

[1] Unindicted co-conspirator is a term referencing someone not formally charged but alleged to have participated in crime(s).
[2] Jacqueline McMurtrie, *The Unindicted Co-Ejaculator and Necrophilia: Addressing Prosecutors' Logic-Defying Responses to Exculpatory DNA Results,* 105 J. Crim. L. & Criminology 853-879 (2015).

appropriately—placed themselves in a gatekeeping role when it comes to theories not presented at trial to the factfinder.

"As petitioner argues, he cannot be expected to have access to the evidence necessary to disprove a theory of guilt that was never charged or presented during the original criminal proceedings." *People v. Palmer*, 182 N.E. 3d 672, 684, 2021 IL 125621 (2021). In *People v. Davis,* the Illinois court found a new trial was warranted, in part, *because of* "the necessity to change [the trial theory] now due to the DNA evidence." *Id.* at 583. Here, the State contradicted its own trial theory to reconcile exonerating DNA evidence - circumstances that clearly warrant a new trial under Washington's standard. The Court of Appeals applied an erroneous and impossible standard. This Court must intervene to protect the ability of innocent prisoners to obtain relief.

D. Exonerees Similarly Situated to Cody Kloepper

i. Clemente Aguirre-Jarguin

In 2004 a jury convicted Clemente Aguirre-Jarquin[3] of murdering a woman and her adult daughter. Ostensibly overwhelming evidence of guilt was presented against him. One witness, Samantha Williams, the daughter and granddaughter of the victims, testified about Aguirre-Jarquin's prior suspicious behavior. Mr. Aguirre-Jarquin worked at a restaurant; the murder weapon was a chef's knife, and his employer reported a knife went missing prior to the homicides. He admitted to being at the scene of the crime, his fingerprint was on the murder weapon, bloody footprints at the scene were matched to his shoes, and blood from the victims was found on his clothing and shoes.

Upon finding out Samantha Williams purportedly told others she committed the murders, he unsuccessfully moved for

[3] Clemente Aguirre-Jarquin – *Nat'l Registry*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5406 (last visited July 25, 2025).

a new trial. He then sought out post-conviction DNA testing. The testing revealed that his DNA was excluded from the crime scene while Ms. Williams' DNA was found on multiple locations closely associated with the attacks. Mr. Aguirre-Jarquin again requested a new trial, and appealed after this was denied.

The Supreme Court of Florida overturned the conviction, ordering that he receive a new trial. The prosecution argued Ms. Williams' DNA was expected to be found in the home because Ms. Williams lived with the victims. However, because her DNA was found mixed with the victims' blood, the results still raised doubt as to Mr. Aguirre-Jarquin's guilt. The Court acknowledged in the opinion that "a second jury may ultimately resolve these (and other) conflicts in the evidence against Aguirre." *Aguirre-Jarquin v. State*, 202 So. 3d 785, 795 (Fla. 2016). Despite the State still having evidence sufficient to obtain a conviction, the evidence merited a new trial.

ii. Larry Peterson

In 1987, a jury convicted Larry Peterson[4] of sexual assault and murder in New Jersey. Multiple witnesses tied Mr. Peterson to the crime. A forensic scientist testified that pubic hairs on and around the victim matched Mr. Peterson. The jury heard that seminal fluid and sperm were found on the victim's clothing. Mr. Peterson was sentenced to life in prison.

Post-conviction DNA testing revealed that the pubic hairs originally identified as Mr. Peterson's in fact belonged to the victim herself. Further, sperm was detected on anal, oral, and vaginal swabs taken during the autopsy of the victim. Two male DNA profiles were found; Mr. Peterson was excluded as a source of the genetic material. One of the profiles belonged to someone the victim had consensual sex with prior to her death, the other

[4] Larry Peterson – Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3532 (July 25, 2024).

was an unknown male profile. That same unknown male's DNA profile was also found under the victim's fingernail scrapings.

However, Mr. Peterson almost did not receive the post-conviction DNA testing, as his request was initially denied. The prosecution argued any DNA testing results would not be relevant to the identity of the perpetrator because there was overwhelming evidence of Mr. Peterson's guilt at the original trial. In an appeal, he was granted DNA testing. That opinion acknowledged the "strong evidence of his guilt" but found the DNA test results relevant regardless of other strong evidence. *Peterson* at 392.

iii. Andre Davis

In 1980, a jury convicted Andre Davis[5] of the rape and murder of a toddler. Her naked body was found in the home of her next-door neighbor, and she had blood and fecal matter on

[5] Andre Davis Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3939 (last visited July 25, 2024).

her. Semen and suspected blood stains were found on the bedding used to wrap her body. Mr. Davis had visited that home earlier in the day, and police began to investigate him after receiving a tip. The police claimed he made inculpatory statements during their investigation.

During a physical examination, a police officer claimed he saw grass in Mr. Davis' groin area,[6] and a physician stated he detected fecal matter under Mr. Davis' foreskin. The jury heard the victim and Mr. Davis possessed the same blood type, and the semen found was from a non-secretor[7], which Mr. Davis was. At trial, the prosecution argued only Mr. Davis committed the crime.

Mr. Davis sought post-conviction DNA testing. The testing excluded Mr. Davis as a source of the semen and blood found on the victim and the bedding, instead revealing the DNA

[6] The victim was last seen playing in her yard.
[7] Someone who does not secrete blood type antigens in bodily fluids.

profiles of two other men. One of those DNA profiles was Maurice Tucker's, who testified against Mr. Davis at his trial.

The prosecution opposed Mr. Davis's motion for new trial, arguing the DNA evidence was not conclusive of his innocence and was of minimal evidentiary value. The trial court agreed and denied his motion. The prosecution convinced the court enough "freestanding" evidence existed to support the defendant's conviction, even despite the new DNA evidence. *Davis* at 577. The prosecution also offered other speculative theories regarding the DNA testing results: that he may have been only one of multiple perpetrators, that he may have worn a condom, or that he might not have ejaculated. *Id.* at 582.

The appellate court found the prior ruling an abuse of discretion. Because at trial the State argued Mr. Davis alone committed the rape and murder of the victim, the biological material found on and near the victim was central to the case against him, as it constituted physical evidence about the identity

of the perpetrator. *Id.* at 582. The appellate court also noted some of the incriminating evidence against Mr. Davis came from the witness whose DNA was found in the post-conviction testing, which raised significant questions about his credibility and motive to lie at trial. *Id.* The court concluded that while "these competing or conflicting pieces of evidence do not show defendant would be found not guilty", they merited a new trial. *Id.* at 583.

iv. Cody Kloepper

Like the above cases, Mr. Kloepper's DNA results excluded him from biological material on relevant evidentiary items and instead belonged to a prosecution witness. Notwithstanding the startling new DNA results, substantial evidence remained against Mr. Kloepper. To account for the DNA testing results, prosecutors were forced to invent a new DNA transfer theory that directly contradicted the evidence and the prosecution's theory presented at trial. Further, in Mr.

Kloepper's case, the lower courts failed to recognize that a trial witness's credibility is significantly impacted when their DNA is found on crucial evidentiary items.

VIII. CONCLUSION

The individuals in the case examples above are widely recognized as actually innocent. If these innocent men were held to the same standard applied to Mr. Kloepper in the court below, they would likely still be in prison for crimes they did not commit. Multiple states with similar—or stricter—requirements for newly discovered DNA evidence to justify a new trial have recognized that even "overwhelming" evidence of guilt does not inherently diminish exculpatory DNA results. These jurisdictions have held that if the prosecution must contradict their own theory and testimony of witnesses presented at trial, a new trial is appropriate. We encourage this Court to accept review because justice requires Cody Kloepper receive a new trial where a jury can consider this new scientific evidence. If this Court does not

accept review, the decision below will negatively impact the ability of any wrongly convicted Washingtonian to prove their actual innocence.

CERTIFICATE OF COMPLIANCE

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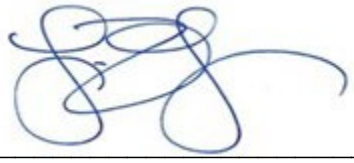
Dated this 16th day of August, 2024.

Respectfully submitted,



Lara Zarowsky, WSBA# 40745
Counsel for Amici Curiae
Co-Vice President, Innocence Network
Washington Innocence Project
PO Box 85869
Seattle, WA 98145
206-636-9479
lara.zarowsky@wainnocenceproject.org

Jamie T. Lau
Co-Vice President, Innocence Network
Duke Law Wrongful Convictions Clinic
210 Science Drive
Durham, NC 27708
919-613-7764
jamie.lau@law.duke.edu

Katherine H. Hudson
Center For Integrity in Forensic Sciences – Executive Director
33 E. Main Street, Suite 400
Madison, WI 53703
608-736-2437
kate@cifsjustice.org

DECLARATION OF SERVICE

I, Justine Mclean-Riggs, declare that on August 16, 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:

- prosecuting@co.benton.wa.us
- terry.bloor@co.benton.wa.us
- wapofficemai@washapp.org
- greg@washapp.org
- sarahbeth.johnson@wainnocenceproject.org
- jennifer.aronson@gtc.ox.ac.uk

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

Dated: August 16, 2024.

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

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- terry.bloor@co.benton.wa.us
- wapofficemai@washapp.org
- wapofficemail@washapp.org

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Filing on Behalf of: Lara Zarowsky - Email: lara.zarowsky@wainnocenceproject.org (Alternate Email:)

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SEATTLE, WA, 98145
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