No. 1031840

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CODY KLOEPPER,
Petitioner.

MEMORANDUM OF AMICUS CURIAE WASHINGTON INNOCENCE PROJECT IN SUPPORT OF REVIEW

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I. IDENTITY AND STATEMENT OF INTEREST

The identity and interests of amicus are laid out in the Motion for Leave to File Amicus Memorandum Supporting Petition for Review and is incorporated here by reference. Amicus relies upon the Petitioner's Statement of Facts.

II. INTRODUCTION

Post-conviction DNA testing has exposed a harsh reality: innocent people are convicted "despite truthful witnesses, good lawyers, good juries, good judges, and fair trials." *State v. Riofta*, 166 Wn.2d 358, 376-77, 209 P.3d 467 (2009) (Chambers, J., concurring in dissent). Advances in DNA science and technology provide innocent defendants a path to freedom where other legal avenues have failed. In fact, "many innocent individuals have been exonerated through postconviction DNA tests, including some who had overwhelming evidence indicating guilt." *State v. Crumpton*, 181 Wn.2d 252, 261-62, 332 P.3d 448 (2014). Everyone seeking DNA testing in pursuit of a new trial was

necessarily convicted beyond reasonable doubt on compelling evidence of guilt.

The standard for a new trial does not require defendants to prove it would be impossible for the State to obtain a conviction considering post-conviction DNA results. It certainly does not require defendants to disprove theories never presented at trial before obtaining relief based on the DNA results. In a single-perpetrator sexual assault, DNA results excluding the defendant and including another man's semen—across multiple locations on the victim's person—are among the strongest indicators of innocence. The lower court's ruling denying Mr. Kloepper's motion for a new trial under exactly these circumstances reflects a troubling misapplication of the law. It risks rendering our DNA testing statute superfluous and jeopardizes the ability of *any* individual to seek post-conviction relief based on exonerating DNA results. This will only lead to more innocent people languishing in prison.

III. ARGUMENT

A. Washington's DNA Statute Cannot Fulfill its Purpose if Exculpatory Results Never Come Before a Jury.

Underscoring its original purpose of "ensur[ing] that an innocent person is not in jail," RCW 10.73.170—Washington's post-conviction DNA testing statute ("the Statute")—has been amended over time to "broaden access to DNA testing." *State v. Gray*, 151 Wn.App. 762, 773, 215 P.3d 961, 966 (2009) (citing *Riofta*, 166 Wn.2d at 365). RCW 10.73.170 requires a defendant to show that presumed exculpatory DNA evidence is material to the identity of the perpetrator and would demonstrate innocence on a more probable than not basis. The Statute does not establish a new form of relief based on favorable results. Instead, defendants seek relief through existing methods, such as a CrR 7.8 motion. The standard for obtaining a new trial remains the same: if newly discovered evidence, considered alongside all the evidence admitted at trial, would probably have changed the trial's outcome, then a new trial is warranted. *In re. Bradford*, 140 Wn. App. 124, 129-30, 165 P.3d 31 (2007).

The Statute focuses on exoneration and, therefore, allows for testing only when "DNA evidence is material to the identity of the perpetrator." RCW 10.73.170(2)(b). It was enacted and expanded by the legislature with full understanding that it would only apply to individuals convicted beyond a reasonable doubt at trial. Denying a person a new trial despite compelling exculpatory DNA results—indeed, perhaps the strongest, most exculpatory DNA results imaginable in a single-perpetrator sexual assault case—defeats the statute's purpose.

When considering whether to grant DNA testing in single-perpetrator sexual assault cases, Washington courts have repeatedly reasoned that exclusion of the defendant, alone, supports factual innocence. For example, in *State v. Thompson*, 173 Wn.2d 865, 875, 271 P.3d 204 (2009), this Court stated "[i]f DNA testing results should conclusively exclude Thompson as the source of the collected semen, it is more probable than not that his innocence would be established." In *Gray*, 151 Wn. App. at 775, the appellate court reasoned:

> "Gray could be identified with certainty as the perpetrator… Or, [testing] could show that the DNA profiles from C.S.'s hair combings, underwear, or swabs match to the DNA profile of the hair sample taken from R.J.'s clothing, but did not match Gray's DNA profile. This would suggest Gray's innocence on a more probable than not basis."

The significance of the hypothetical result in *Gray* is precisely equal to the significance of the actual test results in this case. The lower courts' departure from the sound reasoning applied in *Gray* in the context of a CrR 7.8 motion based on the new evidence renders the goal of DNA statute meaningless. Here, semen and spermatozoa from a single source excluding the defendant found across and inside the victim's clothing are extraordinarily strong evidence of a perpetrator's identity. By far, the most logical interpretation of such results is that this DNA belonged to the true perpetrator of this crime and Mr. Kloepper is innocent. Yet, because of the lower court's decision in this case, jurors will never get to consider these results for themselves.

B. The State's Contradictory New Theory Cannot Preclude a New Trial.

The denial of a new trial was based on a new, contradictory theory presented by the State. At trial, Mr. Contreras testified he did not have sexual contact with Mr. Kloepper and did not know the victim, let alone have sexual contact with her. Yet DNA evidence subsequently proved Mr. Conteras' semen and sperm were present on and inside the victim's clothing. Both assertions cannot be true. Accordingly, the State's new post-testing theory posits Mr. Contreras had a direct sexual encounter with Mr. Kloepper before the assault, resulting in Mr. Contreras ejaculating and Mr. Kloepper somehow transferring that semen—without any of his own DNA—across and inside the victim's clothing during the attack. There is no conceivable way this theory could have occurred without Mr. Contreras having some form of sexual contact with Mr. Kloepper—contact that Mr. Contreras testified at trial did not occur. This contradiction

alone qualifies Mr. Kloepper for a new trial. There, before a jury, the State can test its new theory.

C. This Decision Creates an Impossible, New Standard for Innocent People to Get New Trials.

The State has never been required to prove its secondary-transfer theory under any burden of proof, let alone beyond a reasonable doubt. Instead, because Mr. Kloepper did not prove the new theory *didn't* occur, the theory was accepted as fact "however unlikely" it was, and he was denied a new trial. *State v. Kloepper*, 39076-4-III, 2024 WL 1636271, at *5 (Wash. Ct. App. Apr. 16, 2024). This was error.

Mr. Kloepper is required only to show that, considering the new evidence alongside the admitted trial evidence, a jury would probably have reached a different outcome. Requiring defendants to disprove all potential new theories, regardless of plausibility, sets an impossible standard that will leave innocent people in prison. Evidence of guilt, inherent in every conviction beyond a reasonable doubt, will be used as a basis to deny new

trials, no matter the strength of newly discovered DNA evidence. This is not the proper standard and would set an extremely dangerous precedent for other innocent persons seeking a new trial in Washington.

D. Applying Other Legal Standards to the Court's Reasoning Demonstrates Its Absurdity.

The Court of Appeals opinion asserts no reasonable juror would disregard all the inculpatory evidence against Mr. Kloepper and the exculpatory evidence favoring Mr. Contreras. Consider this assertion in a *hypothetical* scenario wherein the State knew in 2010 Mr. Contreras's semen was all over the victim's clothing, but Mr. Kloepper's was not, and the State had charged Mr. Contreras instead of Mr. Kloepper. Even strong circumstantial evidence of guilt against Mr. Kloepper would not prevent the prosecution of Mr. Contreras from proceeding. No defendant whose semen was found on multiple areas of a rape victim's clothing would succeed in arguing the State could not prosecute him because circumstantial evidence implicated

another person or based on an implausible DNA transfer theory. In this hypothetical, Mr. Contreras would not meet the legal standards for either a *Knapstad*[1] motion or a *Green*[2] motion to dismiss. No reasonable juror could disregard the presence of Mr. Contreras' semen, nor the lack of any DNA deposited by Mr. Kloepper.

Mr. Kloepper is not arguing any sufficiency barriers to a retrial here. This hypothetical is solely intended to expose the fundamental flaws behind the court's inferences and reasoning. If application of the same reasoning and inferences to any other situation would lead to absurd results, it is clear the decision was manifestly unreasonable and an abuse of discretion. This decision cannot stand.

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[1] Sufficient evidence exists for a prima facie case of the crime(s) charged. *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986)

[2] Sufficient evidence justifies a rational trier of fact-finding guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

E. If Mr. Kloepper Does Not Meet the New Trial Standard, No One Can.

In *In re Bradford*, 140 Wn. App. 124, the Court thoroughly evaluated the standard for granting a new trial based on newly discovered DNA evidence. Adopting, arguendo, the logic of the lower court, it could also be said that there was overwhelming evidence against Mr. Bradford, perhaps more than in Mr. Kloepper's case. That is because the jury heard Mr. Bradford's (false) confession in addition to significant circumstantial evidence linking him to the crime. DNA testing by no means nullified his confession nor the other evidence against him. The State argued that Mr. Bradford was still the assailant, despite the presence of another male's DNA on critical evidence. *Id*. at 130. Yet, Mr. Bradford still properly received a new trial, because "[t]he factual disputes regarding Mr. Bradford's confession and alibi, like the other factual disputes noted by the parties, remain open questions for a jury to resolve upon retrial and *in the context* of the new DNA evidence." *Id.* at 131 (emphasis added).

Had Mr. Bradford been held to the same standard as Mr. Kloepper, he would not have received a new trial. The "overwhelming" evidence against Mr. Bradford did not disappear when the DNA test results were obtained. Mr. Bradford never presented an explanation for how and why the unknown male's DNA was on the evidence, nor could he have. He was still properly granted a new trial, because those were questions that must be answered by a jury at retrial rather than by Mr. Bradford. Under the improper *Kloepper* standard, Mr. Bradford, who was acquitted upon retrial, would have never had a chance for the jury to consider the new evidence demonstrating his innocence.

F. The Denial Was Based In Part on Unreliable Identifications and Inappropriate Ethnic Stereotyping.

The lower court's ruling relied on inappropriate ethnic stereotyping unsupported by the record and unreliable, contaminated identifications. Mr. Contreras is identified in the rulings as "Hispanic", and the victim described her attacker as "White." This was used as a basis to deny the new trial motion.

Yet, the victim also initially identified Mr. Goering, an unrelated man, as her attacker with such a high level of confidence the State initially charged him with the rape. Mr. Kloepper was in the photo array presented during the identification of Mr. Goering and the victim denied he was the attacker. Her identification only changed when she was given inaccurate information about Y-STR testing on the rubber fragment. Indeed, her description of a "White" attacker was credited as unimpeachable by the lower courts. But her inconsistent identification of another individual and her exclusion of Mr. Kloepper was not even acknowledged in the lower court's analysis, let alone credited. It is an abuse of discretion to acknowledge only evidence favorable to one side, while disregarding evidence favorable to the other.

Still more concerning is the denial of a new trial based on the supposed ethnic incongruity between Mr. Contreras' appearance and the victim's description, as well as unfounded assumptions about his presumed "accent." This was a blatant abuse of discretion. Underlying the lower court's reasoning is an

assumption that because Mr. Contreras is of "Hispanic" origin, there is no conceivable way he could ever be described as "White". Skin tone differs amongst members of the same racial and ethnic group and appearance can change over time. Further, in 2010, the U.S. Census Bureau did not include "Hispanic" as a separate race category, requiring a selection of either "White" or "Other"[3]. The victim's use of the term "White" could very well have been inclusive of Hispanic origin. The ability to accurately perceive and remember is also greatly impacted by environmental factors—such as lighting—and traumatic experiences, such as a violent attack. The victim's subjective description of a person's ethnic or racial appearance does not make it impossible or even implausible that someone of a different ethnic or racial background committed the offense.

[3] 2010 Census Briefs, *Overview of Race and Hispanic Origin: 2010* (March 2011) available at https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-02.pdf

The Court of Appeals, in affirming the denial of a new trial, also cites to the purported "fact" that Mr. Contreras has a "strong" accent. This was not a fact found by the trial court in its ruling. It is even more concerning that the Court of Appeals would conflate someone's supposed ethnic background with the assumption that the individual must have had such a strong accent he could never mask it nor have been described as White. People can modulate the sound of their voice, imitate other accents, and change how they speak over time. Ethnic stereotypes do not belong in court proceedings. See *State v. Zamora*, 199 Wn.2d 698, 512 P.3d 512 (2022). It is a blatant abuse of discretion for the Court of Appeals to affirm a denial of a new trial based on an unproved allegation unsupported by the trial court's findings. It is also a compelling public policy interest that courts do not determine prosecutions or new trials based on ethnic or racial stereotypes.

IV. CONCLUSION

Newly discovered DNA evidence meets the standard for a new trial if it is sufficiently relevant and material to the identity of the perpetrator that it would likely have changed the outcome of the original trial if heard by the jury. Mr. Contreras' is the source of the seminal fluid and spermatozoa found on the victim's clothing, not Mr. Kloepper. Mr. Contreras testified he did not have sexual contact with Mr. Kloepper, yet the theory adopted by the State to deny Mr. Kloepper a new trial could only have happened if Mr. Contreras ejaculated while with Mr. Kloepper. The post-conviction DNA testing statute can fulfill its purpose only if there is an accessible means for relief when DNA testing indicates compelling evidence of innocence, as in Mr. Kloepper's case.

The standard for a new trial cannot be so high that it is impossible for any defendant to meet no matter how strong the test results are. Unless this Court intervenes and corrects the errors made by the courts below, exonerations based on post-

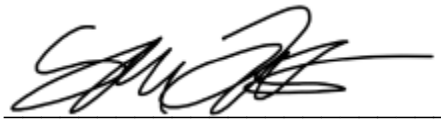
conviction DNA testing will cease. It is imperative this Court accept review to ensure there is still a functional and accessible avenue for relief based on post-conviction DNA evidence.

CERTIFICATE OF COMPLIANCE

This document contains 2500 words, excluding the parts of the document exempted from the word count pursuant to RAP 18.17.

Dated this 14th day of August, 2024.

Respectfully submitted,



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DECLARATION OF SERVICE

I, Justine Mclean-Riggs, declare that on August 14, 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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Under penalty of perjury under the laws of the State of Washington, the foregoing is true and correct.

Dated: August 14, 2024.

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WASHINGTON INNOCENCE PROJECT

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