No. 88336-0

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LINDSEY CRUMPTON,

Petitioner.

SUPPLEMENTAL AMICI CURIAE BRIEF OF THE INNOCENCE NETWORK AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTEREST OF AMICUS

Amicus Innocence Network ("Network") is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom post-conviction evidence can provide conclusive proof of innocence. The 66 current members of the Network represent hundreds of prisoners with innocence claims in all 50 States and the District of Columbia, as well as Canada, the United Kingdom, Australia, Ireland, France, the Netherlands, New Zealand, South Africa, Puerto Rico, and Italy. For a list of members, see http://www.innocencenetwork.org/index.html. The Network has previously been granted leave to file amicus briefs in this and similar cases.

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to defending and preserving individual rights and liberties guaranteed under the United States and Washington Constitutions. The ACLU has a compelling interest in ensuring that wrongful convictions are prevented and remedied, and it supported adoption of the post-conviction DNA testing statute at issue in this case. The national organization of which ACLU is a part has also been involved with cases where post-conviction DNA testing led to exoneration of a death row inmate. *See,*

e.g., https://www.aclu.org/capital-punishment/louisiana-man-exonerated-after-15-years-death-row-murder. The ACLU has previously been granted leave to file amicus briefs on similar criminal justice issues.

The Innocence Network and ACLU seek status as *amici curiae* because they believe that DNA testing should be granted under Washington's DNA testing statute, RCW 10.73.170, when favorable DNA test results will produce compelling evidence of that person's innocence. The legal standard for obtaining post-conviction DNA testing approved by the Court of Appeals effectively denies wrongly-convicted Washington residents any meaningful opportunity to prove their innocence.

In considering whether applicants for DNA testing under RCW 10.73.170 satisfy their *prima facie* burden, Washington courts are directed to conduct a factual inquiry: the court must look to whether "viewed in light of all evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis." *State v. Riofta*, 166 Wn.2d 358, 367-68, 209 P.3d 467 (2009). This requires the court to *assume* that DNA testing will exclude the defendant as the source of critical items of forensic evidence or identify an alternative perpetrator and then to consider, in light of the entire trial record and any newly discovered evidence, whether such exculpatory results would establish his actual innocence of the crime. *Id.*

at 369.

In this case, the Court must also consider whether hair microscopy evidence—deemed unsound by the National Academy of Sciences—is sufficiently probative of guilt as to bar access to more reliable, more scientifically sound DNA testing. The national experience confirms that hair microscopy results are "highly unreliable" and do not conclusively establish actual guilt. Defendants provided with access to DNA testing have been able to demonstrate that positive hair microscopy results are erroneous. Because the results of modern DNA testing far exceed the evidentiary and probative value of hair microscopy results, *amici* urge this Court to recognize that hair microscopy results do not conclusively establish guilt.

II. ARGUMENT

The extraordinary forensic power of DNA is now well understood. As Judge Michael Luttig wrote in one of the first federal cases to consider post-conviction access to DNA testing, "[t]here is now widespread agreement within the scientific community that this technology, which requires literally cellular-size samples only, can distinguish between any two individuals on the planet...." *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002) (Luttig, J., concurring in denial of rehearing en banc). Post-conviction access to DNA testing has shown that wrongful

convictions occur, despite the supposed infallibility of confessions, eyewitness testimony, and other "forensic science." The disturbing reality of wrongful convictions motivated all fifty states and the federal government to enact post-conviction DNA testing statutes to ensure that if there is some piece of DNA evidence that can establish a person's innocence, the evidence is tested.

Necessarily, for each wrongful conviction, there was once a high degree of confidence—beyond a reasonable doubt—of the individual's guilt. If the inquiry stopped there—if this confidence was enough to preclude access to the powerful forensic tool that has exonerated others when the odds were slim—post-conviction DNA testing would never occur.

The Court of Appeals erroneously conflates its confidence in Crumpton's guilt with the proper application of the substantive requirements of Washington's DNA Testing statute, RCW 10.73.170. *State v. Crumpton*, 172 Wn. App. 408. 289 P.3d 766 (2012). It considered the strength of the evidence presented at trial against Crumpton—including unreliable hair microscopy results—to speculate about DNA test results in this case and conclude it "unlikely" that they would be favorable to Crumpton. *Id.* at 772.

And, on the strength of the evidence, the Court of Appeals further concluded that "the jury likely would still have convicted" Crumpton, no matter the results of DNA testing. *Id.*

In denying Crumpton's motion for DNA testing of the sexual assault kit in a single-perpetrator rape case, the Court of Appeals runs afoul of RCW 10.73.170 and this Court's directive on the statute's application, and also places undue reliance on unsound "forensic" evidence.

A. Petitioners Receive Hypothetically Favorable DNA Evidence Presumption When Determining Whether There is a Reasonable Probability of Actual Innocence

At its core, Washington's DNA testing statute recognizes the unique power of DNA to prove innocence against all odds—indeed, in every one of the 312 DNA exonerations, the person was guilty beyond a reasonable doubt. *See* Innocence Project, *Know the Cases*, http://www.innocenceproject.org/know/ (describing evidence used to convict and exonerate persons around the country). In each of these exoneration cases, the chances of exculpatory results seemed slim.

The case of Bruce Godschalk best illustrates this. In 1987, Mr. Godschalk was convicted of rape on the strength of a detailed confession. *See* Innocence Project, *Know the Cases: B. Godschalk Profile*, available at http://www.innocenceproject.org/Content/Bruce_Godschalk.php (last

visited January 13, 2014). In his post-conviction appeals, Mr. Godschalk requested DNA testing, which the State of Pennsylvania resisted because the chances were too remote that the results would be exculpatory. *Godschalk v. Montgomery Cnty Dist. Atty's Office*, 177 F.Supp.2d 366, 367 (E.D. Pa. 2001). The Pennsylvania state court agreed, denying Godschalk's request because the evidence against him was "overwhelming." *Id.* at 367.

Godschalk persisted and brought his petition for DNA testing to a federal court. That court agreed that the chances of uncovering exculpatory evidence through DNA testing were slim, but ordered the testing anyway. The court observed:

> Nevertheless, if by some chance *no matter how remote*, DNA testing on the biological evidence excludes plaintiff as the source of the genetic material from the victims, a jury would have to weigh this result against plaintiff's uncoerced detailed confessions to the rapes.

Id. at 370 (emphasis added). The DNA testing ultimately proved Mr. Godschalk's innocence. Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES, Feb. 6, 2002, at A14.

The Godschalk case demonstrates precisely why courts presume favorable exculpatory results when considering whether to grant testing under the post-conviction DNA statute. Even where the evidence against

a defendant is particularly powerful, DNA testing has the capability to exonerate a wrongly convicted defendant.

For this reason, Washington's statute focuses not on the probabilities of the testing but on the force of the evidence should it come back exculpatory. RCW 10.73.170 provides that, upon a petition from a convicted person for DNA testing:

> The court shall grant [the] motion [if it conforms to the statute's procedural requirements] and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

RCW 10.73.170(3). Although scope and application of RCW 10.73.170 has expanded since it was first enacted in order to broaden the availability of post-conviction DNA testing, the standard has always remained the same: the convicted person must simply show there is the "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3) (emphasis added).

The plain meaning of RCW 10.73.170, as well as its legislative history, show that a strict burden is not be placed on a convicted person who requests DNA testing; the standard for obtaining testing is intentionally less stringent than the standard required to obtain a new trial. *See Riofta*, 166 Wn. 2d at 368 ("The purpose of [the Washington and federal statutes] is to provide a means for a convicted purpose to obtain

DNA evidence that would support a petition for post-conviction relief."). Until now, this has meant that courts are to presume favorable DNA tests results when considering their impact on an eventual claim of innocence. *See id.*, at 367-68.

The State asks this Court to depart from *Riofta* to adopt a standard that requires a petitioner to show "more likely than not actual innocence." State's Supp. Br. at 5. If the word "likelihood" is removed from the statute, it would be reasonable for courts to require proof that post-conviction DNA testing will establish innocence on a more probable than not basis. But the word "likelihood" *is* included in the statute and must not be rendered meaningless. *See State v. Keller*, 143 Wn.2d 267, 19 P.3d 1030 (2001). To give "likelihood" meaning, the petitioner must establish that there is a chance that the test results would probably demonstrate innocence, not that a petitioner prove actual innocence, as the State proposes.

This Court has twice recognized the fundamental need to presume exculpatory DNA test results in considering petitions for post-conviction DNA testing. Faced with Alexander Riofta's petition, this Court construed the burden on petitioners as follows:

> In determining whether a convicted person "has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis," a court must

> look to whether, viewed in light of all of the evidence presented at trial or newly discovered, ***favorable DNA test results*** would raise the likelihood that the person is innocent on a more probable than not basis. ***The statute requires a trial court to grant a motion for post-conviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator***.

Riofta, 166 Wn.2d at 367-68 (emphasis altered from original).

Riofta's repeated references to "favorable" and "exculpatory" results make clear that petitioners bear only one burden to satisfy RCW 10.73.170(3)'s substantive component: the trial court adds hypothetical DNA evidence supporting petitioner's innocence to the record to determine whether the favorable DNA results are enough to raise the probability that the petitioner is actually innocent. Importantly, *Riofta* does not require petitioners to demonstrate that favorable DNA evidence is likely to be found; they enjoy a preliminary right to this presumption.

The Court reaffirmed this standard in *State v. Thompson*, 173 Wn.2d 865 (2012), stating that "a court must look to whether, viewed in light of all the evidence presented at trial or newly discovered, *favorable* DNA test results would raise the likelihood that the person is innocent on a more probable than not basis." *Id.* at 872-73; *see also State v. Gray*, 151 Wn. App. 762, 773-75, 215 P.3d 961 (2009) (applying *Riofta* to grant petition). Thus, in Washington, a court must presume that DNA testing

would yield exculpatory results when determining whether the petitioner is entitled to DNA testing. Courts are not permitted to speculate as to whether the testing being requested will produce exculpatory results, but rather to assess only whether such exculpatory results, *if they are obtained*, might change the outcome of the case.

This is precisely where the Court of Appeals departed from this Court's precedent. To support its conclusion that Crumpton is not entitled to DNA testing, the Court of Appeals evaluated the *likelihood of a favorable test* result, not the *likelihood of innocence* based on a favorable test result, as the statute and this Court require. *Crumpton*, 289 P.3d at 772. The Court of Appeals pointed to the "factually strong" and "overwhelming evidence" of Crumpton's guilt. *Id.* at 769, 772. It cited the victim's description of her attacker, that he had items taken from the victim's home, his admission of being in the home, Crumpton's shaky explanations of his conduct that night, and hair microscopy results linking Crumpton to a pubic hair found on the victim. *Id.* at 772. It concluded that "DNA testing here would not likely change the outcome" because "finding DNA other than Crumpton's is unlikely," given that the victim lived alone and had not reported a sexual encounter other than the attack or—conversely and inexplicably—that even if DNA test results identified someone else's DNA, it would mean only that the victim had another

sexual encounter. *Id.* The Courts of Appeals estimated, much like the court in *Godschalk*, that "the jury likely would still have convicted" Crumpton because of "overwhelming" evidence against him. *Id.*

The Court of Appeals' speculation about what a jury might do with DNA evidence ignores completely the substantial weight that juries typically accord to biological evidence. *See, e.g.*, *Duncan v. Kentucky*, 322 S.W.3d 81, 93 (Ky. 2010) (holding that jurors are apt to accord DNA evidence "immense weight"). It also ignores the statute's purpose as a vehicle to obtain DNA evidence that would support a petition for post-conviction relief. *See Riofta*, 166 Wn.2d at 368. One of the reasons the Legislature intended that a permissive standard apply to requests for post-conviction DNA testing is because it is only the first step in the petitioner's exoneration process. The next stop is a motion for a new trial based on "newly discovered evidence." *See* RCW 10.73.100 (allowing petitioners with newly discovered evidence to file collateral attacks after the one year period imposed by RCW 10.73.090 has expired). It would be unreasonable to assume that the Legislature intended the post-conviction DNA statute to have the same high burden of proof as a motion for new trial when the wordings of the burdens of proof are distinct. Moreover, the Court of Appeals' insistence that petitioners prove that favorable DNA evidence exists is impractical and unworkable. It is difficult to imagine a

scenario where the evidence against a defendant is both strong enough to convict him at trial, yet inconclusive enough that favorable DNA evidence is more probably than not present.

In *Riofta*, the Court applied the "two favorable outcomes" of DNA testing—absence of Riofta's DNA and the presence of another person's DNA—to determine that neither result would demonstrate the likelihood of his innocence on a more probable than not basis. *See Riofta*, 166 Wn.2d at 473-74. *Riofta* dismissed favorable DNA samples from a hat as unhelpful to the petitioner, since several people in addition to the perpetrator had worn the hat prior to the crime. In *Thompson*, the Court recognized the important difference between Thompson's case—involving only one perpetrator and therefore only one source of DNA—and *Riofta* and reaffirmed the favorable presumption announced in *Riofta.*

In *Riofta* and again in *Thompson*, this Court recognized the scientific potential for favorable DNA testing results to exonerate individuals. In this case, if DNA testing shows the absence of Crumpton's DNA or the presence of another person's DNA, those results would raise the "likelihood that [Crumpton] is innocent on a more probable than not basis" and would meet the substantive requirements of the statute as articulated in *Riofta.* This is so because there was only one alleged perpetrator of the attacks and therefore, there would be only one source of

DNA.[1]

B. Applying a Favorable Evidentiary Presumption Will Not Cripple the State with an Avalanche of DNA Testing.

The State suggests that a favorable presumption is "clearly detrimental" to a "substantial" public interest in conserving its resources, pointing out that "testing is not cheap," the State has "limited facilities" for testing DNA from old cases, and motions for "unnecessary" DNA testing "clog" the courts and labs. *See* State's Suppl. Br. on Petition for Review, at 6).

While *amici* recognize and appreciate Washington's investment in post-conviction DNA testing, the State's effort to apply this argument to narrow the availability of DNA testing under RCW 10.73.170 is specious, at best.

Not only has the State failed to show that DNA testing under RCW 10.73.170 overwhelms state resources, the evidence is to the contrary. Only a minute fraction of the DNA cases tested in Washington's crime laboratories involve post-conviction testing authorized by RCW 10.73.170. The Innocence Project Northwest (IPNW), a member of the Innocence Network, partners with the Washington State Patrol Crime Laboratory Division (WSPCLD) to investigate Washington prisoners'

[1] As the dissent observed, the record is silent on the sexual activity of the victim. *Crumpton*, 289 P.3d at 774 n.14 (Worswick, C.J., dissenting).

claims of innocence and pursue post-conviction DNA cases pursuant to a National Institute of Justice grant. As part of this partnership, WSPCLD and IPNW monitor the number of post-conviction DNA cases being tested. In 2012 and 2013, WSPCLD conducted DNA testing in a total of 4,536 cases. Only nine of those cases (less than 0.2%) involved post-conviction DNA testing ordered pursuant to RCW 10.73.170.

Furthermore, the relatively minimal cost of post-conviction DNA testing must be measured against the actual and human cost of incarcerating innocent persons. *See, e.g.*, RCW 4.100.010 (recognizing that "persons convicted and imprisoned for crimes they did not commit have been uniquely victimized," have "suffered tremendous injustice" and are "forced to endure imprisonment and are later stigmatized as felons"). This cost is not hypothetical. *See* RCW 4.100.060 (permitting compensation of wrongfully convicted persons of up to $50,000 per year of actual confinement plus other costs). And, perhaps most alarmingly, each conviction of an innocent person leaves the true offender free. As of February 2013, the actual perpetrators of crimes were identified in nearly half (149 of 307) of the DNA-exoneration cases reported by the Innocence Project. While free, these offenders are known to have committed at least 123 additional violent crimes, including 32 murders and 68 rapes. J. Acker, *The Flipside Injustice of Wrongful Convictions When the Guilty Go*

Free, 76 ALB. L. REV. 1629, 1632 (2013).

It is simply not the case that a favorable evidentiary presumption is akin to rubberstamping every petition for DNA testing. *Riofta* teaches this: even exculpatory DNA did not raise the likelihood that Riofta was innocent and DNA testing was not ordered. *Riofta*, 166 Wn.2d at 370-71. But the Court should not adopt a rule that will result in the denial of testing in every case, which is the practical effect of the Court of Appeals' decision below.

C. Crumpton's Conviction Relies on Unsound Forensic Evidence That Should Not Bar Access to DNA Testing

At trial, the State presented evidence that hairs collected from the scene and examined by the crime laboratory were found to have the same microscopic characteristics as the control sample collected from Crumpton. (7RP 200-03, 8RP 344-46.) On the basis of this and other circumstantial evidence, the jury convicted Crumpton; the State now uses this evidence to argue that there is "no likelihood" that DNA testing would demonstrate Crumpton's innocence because "there was no evidence of a second perpetrator." *See* State's Br. to Court of Appeals at 1 (incorporated by reference in State's Supp. Br. on Petition for Review, at 1).

Yet the hair microcopy evidence is far from the death knell to Crumpton's request for DNA testing. Science is discrediting the

reliability of hair microscopy evidence at an alarming rate. The "NAS Report" by the National Research Council of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009), has raised concerns about the validity of hair microscopy, documenting that "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." NAS Report at 160.[2]

Following the Innocence Network's earlier briefing to this Court in support of Crumpton's petition for review, the Department of Justice, the FBI, the Innocence Project, and the National Association of Criminal Defense Lawyers announced a landmark partnership, the Hair Microscopy Review Project, to review thousands of criminal cases in which the FBI conducted microscopic hair analysis of crime scene evidence. Two major developments prompted this almost inconceivable partnership.

First, the 2009 NAS Report, which specifically identified microscopic hair comparison evidence as "highly unreliable," observed that "[n]o scientifically accepted statistics exist about the frequency with

[2] The NAS Report is available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

which particular characteristics of hair are distributed in the population" and that "there appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a "match." 2009 NAS Report at 160.

Second and more significantly, between 2009 and 2012, three men who had already served long prison sentences were exonerated by DNA testing that refuted microscopic hair comparison evidence.

Donald Gates was convicted in 1982 of first degree felony murder and rape on the basis of hair microscopy evidence and an informant's testimony. An FBI forensic analyst testified in support of the prosecution that Mr. Gates' hairs were "microscopically indistinguishable" from hairs found on the victim's body. In 2009, Mr. Gates was exonerated when DNA testing eliminated him as the perpetrator. *See* Innocence Project, *Know the Cases: D. Gates Profile*, available at http://www.innocenceproject.org/Content/Donald_Eugene_Gates.php (last visited January 13, 2014).

Santae Tribble was convicted in 1980 of felony murder and armed robbery when an FBI forensic analyst testified that hairs linked him to the crime and "matched in all microscopic characteristics." The prosecution then emphasized this analysis in closing, saying that there was perhaps "one chance in ten million" that the hair could have belonged to anyone

other than Mr. Tribble. In 2012, DNA testing exonerated Mr. Tribble and revealed the FBI's errors, including that it identified a dog hair as human. *See* Innocence Project, *Know the Cases: S. Tribble Profile*, available at http://www.innocenceproject.org/Content/Santae_Tribble.php (last visited January 13, 2014).

Kirk Odom was convicted in 1981 of rape, robbery, and burglary on the basis of eyewitness identification and the testimony of an FBI Special Agent that a hair found on the victim's nightgown was microscopically similar to Mr. Odom's hair "meaning that the samples were indistinguishable." The agent further testified that he found hair samples to be indistinguishable only "eight or 10 times in the past 10 years, while performing thousands of analyses." *See* Innocence Project, *Know the Cases: K. Odom Profile*, available at http://www.innocenceproject.org/Content/Kirk_Odom.php (last visited January 13, 2014). In 2012, DNA testing exonerated Mr. Odom.

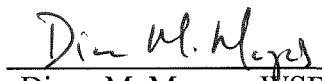
These cases confirm the forensic power of DNA testing to overcome even seemingly reliable evidence used to secure a conviction. And, as the 2009 NAS Report also observed, "[b]ecause of the inherent limitations of hair comparisons and the availability of higher-quality and higher-accuracy analyses based on [DNA testing], traditional hair

examinations may be presented less often as evidence in the future...." NAS Report at 160.

III. CONCLUSION

For the reasons set forth above, *amici* urge the Court to affirm its prior holdings that, in considering petitions for post-conviction DNA testing, courts should presume favorable DNA test results and, as this Court instructed in *Riofta*, consider whether such "exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator." *Riofta*, 209 P.3d at 472. *Amici* also ask the Court to recognize that a microscopic hair match is not a bar to DNA testing.

DATED this 14th day of January, 2014.

By 

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CERTIFICATE OF SERVICE

Elizabeth Anderson affirms and states:

That on this day, I caused to be served a true and correct copy of **Supplemental Amici Curiae Brief of The Innocence Network and American Civil Liberties Union of Washington**, by the method indicated below, and addressed to each of the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States of America, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 14th day of January, 2014.

Elizabeth Anderson, Legal Assistant