No. 33179-2

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

ROBERT E. LARSON, TYLER W. GASSMAN and
PAUL E. STATLER,

Plaintiff-Appellants,

v.

STATE OF WASHINGTON,

Defendant-Respondent.

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

Diane M. Meyers
Madeline Engel
MILLER NASH GRAHAM & DUNN LLP
2801 Alaskan Way, Suite 300
Seattle, Washington 98121
(206) 624-8300

Counsel for Amicus Curiae
The Innocence Network

David Whedbee
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104

Counsel for Amicus Curiae
American Civil Liberties Union of
Washington

TABLE OF CONTENTS

Page

I. INTRODUCTION AND INTEREST OF AMICI 1

II. ISSUES TO BE ADDRESSED BY AMICI 2

III. FACTUAL BACKGROUND 3

A. The Wrongful Conviction Compensation Act 3

B. Plaintiffs Seek Compensation for Their Period of Wrongful Incarceration 4

IV. ARGUMENT 5

A. The Legislature Intended to Provide the Wrongfully Convicted Broad Remedial Relief under RCW 4.100 et seq 5

1. Remedial Statutes Must Be Construed Broadly To Advance the Legislative Intent 8

2. The Court Erred By Too Narrowly Construing the Act 8

3. The Legislature Intended a "No-Fault" Compensation Scheme Because So Few Other Remedies are Available for the Criminal Justice System Errors that Lead to Wrongful Conviction 11

4. The Trial Court's Decision Denying Compensation Is Inconsistent with the Act's "No-Fault" Regime 14

5. The Larson Plaintiffs Were Convicted Amid Circumstances that Often Result in Miscarriages of Justice... 16

TABLE OF CONTENTS
(continued)

Page

B. The Ineffective Assistance of Counsel Here, Relating to Exculpatory Evidence, Supports a Remedy Under the Act 16

C. The Act does not demand incontrovertible physical evidence to establish innocence 18

V. CONCLUSION 19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Conner v. Heiman,
672 F.3d 1126 (9th Cir. 2012) 12

Connick v. Thompson,
563 U.S. 51, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011).....................12

Herrera v. Collins,
506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 203 (1993).................... 10-11

Pierson v. Ray,
386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).......................12

Polk Co. v. Dodson,
454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981).......................12

Schlup v. Delo,
513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).....................10

Van de Kamp v. Goldstein,
55 U.S. 335, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009).......................12

STATE CASES

Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.,
113 Wn.2d 123, 776 P.2d 666 (1989)..12

Christensen v. Ellsworth,
169 Wn.2d 365, 173 P.3d 228 (2007)..8

Jametsky v. Olsen,
179 Wn. 2d 756, 317 P.3d 1003 (2014)...8

Johnson v. Cont'l W., Inc.,
99 Wn. 2d 555, 663 P.2d 482 (1983)..4

Perez-Farias v. Glob. Horizons, Inc.,
175 Wn. 2d 518, 286 P.3d 46 (2012)..8

TABLE OF AUTHORITIES
(Cont'd)

Page

Ravenscroft v. Wash. Water Power Co.,
136 Wn.2d 911, 969 P.2d 75 (1998)..8

State v. Dobbs,
180 Wn.2d 1, 320 P.3d 705 (2014)..11

State v. Jacobs,
154 Wn.2d 596, 115 P.3d 281 (2005)..8

State v. Riofta,
166 Wn.2d 358, 209 P.3d 467 (2009)..9

FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983.. 12-13

42 U.S.C. § 1988..14

STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

CrR 7.8(b)(2)..9, 10

N.Y. CTC. LAW § 8-b(3)(b) 9

N.Y. CPL. LAW § 440.10 9

RCW 4.100 ....1-2, 4-5, 8, 15, 18

RCW 4.100.010 .... 1, 6-7

RCW 4.100.020 13

RCW 4.100.060 .... 10, 13-15

RCW 4.100.080(1)..13, 15

TABLE OF AUTHORITIES
(Cont'd)

Page

OTHER AUTHORITIES

AP St. News, *$520K to Longview Man for Wrongful Conviction*, Sept. 30 2014 19

Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts To Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004) 7

D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) 19

Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997) 17

Emily M. West, Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases (2010), *available at* http://www.innocenceproject.org/files/Innocence_Project_IAC_Report.pdf 17

Mary C. Delaney et. al., *Exonorees' Hardships After Freedom*, WIS. LAWYER Feb. 2010, at 18 7

Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439 (2009) 11

Steve Miletich, *$496,712 for Freed Prisoner,* The Seattle Times, Sept. 27, 2014 19

Tom Zimpleman*, The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425 (2011) 17

I. INTRODUCTION AND INTEREST OF *AMICI*

This case involves the first appellate consideration of the interpretation of RCW 4.100, Washington's Wrongfully Convicted Compensation Act (hereinafter the "Act"), enacted in 2013, under which the wrongfully convicted can recover damages from the State for the period of their wrongful incarceration. The Act serves the critical remedial purpose of redressing the profound victimization of the wrongfully convicted, who have, as the Legislature recognized, "suffered tremendous injustice by being stripped of their lives and liberty . . . are forced to endure imprisonment and are later stigmatized as felons." RCW 4.100.010. The three wrongfully convicted young men in this case ("*Larson* plaintiffs") were released from prison in 2012, shortly before the Act was passed. Their cases were the subject of floor debate before the House of Representatives voted overwhelmingly (95-2) in favor of the bill that became the Act. Nonetheless, each plaintiff was denied compensation by the trial court. *Amici* here seek to provide a broader perspective on the Act, explaining its role in remedying manifest injustices, and clarifying the errors made below in interpreting the Act, which frustrate the Legislature's plain intent.

The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners seeking relief based on conclusive proof of innocence. The 70 current members of the Network represent hundreds of prisoners with

innocence claims in all 50 States and the District of Columbia and Puerto Rico, as well as Australia, Argentina, Canada, France, Ireland, Italy, the Netherlands, New Zealand, South Africa, and Taiwan.[1] One of its members, the Innocence Project Northwest, helped craft RCW 4.100. The Network does not have private interests in this case, but does have an interest in helping the wrongfully convicted recover compensation for their periods of wrongful incarceration and offering a broader perspective on the Act in the interest of helping exonerees quickly rebuild their lives.

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the preservation of civil liberties. The ACLU has long sought to safeguard constitutional protections in our criminal justice system and ensure the integrity of that system so that it may function fairly and equitably without undue deprivation of individual liberty. The ACLU aims to curb the injustices that lead to unconstitutional convictions, and to mitigate the destructive consequences of incarceration that can result in the loss of individual rights, jobs, housing, family, and years needlessly wasted. The ACLU has participated in countless cases involving the injustices of the criminal justice system as *amicus curiae*, counsel to parties, and public policy advocates.

II. ISSUES TO BE ADDRESSED BY *AMICI*

This brief informs the Court about the barriers to a remedy that the wrongfully convicted face and illuminates the context of the passage of

[1] For a list of the Network's members, see http://www.innocencenetwork.org/index.html.

the Act, which is aimed at removing these barriers to compensation for the wrongfully convicted.

First, the trial court ignored the remedial purpose of the Act when interpreting its provisions to deny compensation to the *Larson* plaintiffs.

Second, the trial court's interpretation of "significant new exculpatory information" is legally incorrect.

Third, the trial court's interpretation of "clear and convincing" incorrectly imposes an impossibly high threshold for relief on compensation claims.

III. FACTUAL BACKGROUND

Amici adopt the factual background set out in the *Larson* plaintiffs' briefs.

A. The Wrongful Conviction Compensation Act

The wrongful compensation bill was passed in 2013, shortly after Statler, Larson and Gassman were released from prison but before they sought relief for their wrongful convictions. Their case was a significant part of the legislative debate on the moral and ethical obligation to compensate the wrongfully convicted. During the House Floor Debate, preceding the near-unanimous passage of the bill, Republican Matt Shea specifically addressed the influence these three wrongful convictions had on his support for the bill:

> I rise in support of this bill today. I have a constituent whose son was wrongfully convicted along with two of his friends and was actually innocent. How much is your life worth? How much is the enjoyment of your children, the enjoyment of your wife, the enjoyment of going outdoors

> and just being in the sunshine? How much is that worth, for years of your life? I think this bill goes a long way toward justice and a long way toward repairing those lives and does it in a way that can be fast and without all the litigation. That's a win win for everybody.

House Floor Debate, Mar. 8, 2013 (testimony of Rep. Shea).[2]

B. Plaintiffs Seek Compensation for Their Period of Wrongful Incarceration.

In January 2014, the *Larson* plaintiffs filed a complaint against the State of Washington for relief under the Act. Larson, Statler and Gassman demonstrated their innocence through alibi evidence and a witness who testified that the robberies were committed by four other people. *Id.* The *Larson* plaintiffs' alibi evidence established unequivocally that they could not have committed the crime on the date first alleged by the State, April 15, 2008. The trial court, however, allowed the State to argue that the robbery could have occurred anytime in April 2008, *after* it was clear the plaintiffs had an alibi for the date the State alleged during the criminal trial that resulted in the wrongful convictions. *See* CP 407-409, 425, 427. This expansion of the charges effectively required the *Larson* plaintiffs to adduce alibi evidence for every day in April 2008. *See* CP 428. ("The plaintiffs may well assert that they are unable to provide an alibi defense for all of these dates given the substantial amount of time that has passed.

---

[2] This testimony begins at 31:45 of the video of the debate, available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013030050C. While Representative Shea's support for this bill does not establish the intent of the entire legislature, it is "instructive as to what the Legislature subsequently intended." *Johnson v. Cont'l W., Inc.*, 99 Wn. 2d 555, 560-61, 663 P.2d 482 (1983) (considering a debate between two senators on the interpretation of Washington's Tort Reform Bill).

Nevertheless, this is not a criminal prosecution whereby the State is required to clearly define when the robberies allegedly occurred.").

The trial court denied plaintiffs' claim, finding they failed to prove by clear and convincing evidence that (1) the convictions were vacated and a new trial was granted "on the basis of significant new exculpatory information," and (2) the plaintiffs/appellants "did not engage in any illegal conduct alleged in the charging documents." CP 406-31. The court interpreted the phrase "significant new exculpatory information" to mean that the information must have been unavailable at the time of the criminal trial, *i.e.*, the information must not have been able to be discovered by defense counsel with an effective investigation. CP 422. The court also determined that the only legal remedy for the plaintiffs/appellants is a legal malpractice action against their attorneys in the criminal case. CP 423. Finally, the court determined the compensation statute required the plaintiffs to meet an "extraordinarily high and truly persuasive standard" of proving actual innocence. CP 430.

IV. ARGUMENT

A. The Legislature Intended to Provide the Wrongfully Convicted Broad Remedial Relief under RCW 4.100 *et seq.*

When Washington lawmakers passed House Bill 1341 in 2013, which became the Act, the Legislature announced its intent to provide the wrongfully convicted with broad remedial relief, in express recognition of the serious hardships and obstacles the newly exonerated face when re-entering society after imprisonment:

> The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped of their lives and liberty, they are forced to endure imprisonment and are later stigmatized as felons. A majority of those wrongly convicted in Washington state have no remedy available under the law for the destruction of their personal lives resulting from errors in our criminal justice system. The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration.

RCW 4.100.010; H.R. 175, 63rd Gen. Assem., Reg. Sess. (Wash. 2013).

The Legislature stressed that because there is effectively "no remedy available under the law" to compensate the wrongfully convicted, the Act was an effort to ameliorate the near-insurmountable legal obstacles to compensation for the years lost to wrongful imprisonment. Contrary to the lower court's finding, the Legislature specifically announced that the Act aimed to rectify "errors in our criminal justice system," signaling that society as a whole would shoulder any burden for compensating the wrongfully imprisoned rather than casting blame on individual actors and requiring exonerees to demonstrate fault as a prerequisite for relief.

Lawmakers recognized, too, that the wrongfully imprisoned are "uniquely victimized" and owed compensation due to hardships that result from the "destruction of their personal lives." This acknowledgment is supported by years of research that once freed from confinement, the wrongfully convicted endure even more significant burdens than properly convicted defendants face upon reentry. Such burdens include the inability to find employment and housing, alienation from their families,

and loss of civil rights on account of felony convictions, not to mention other terrible scars, real and psychological,[3] from what the Legislature called the "tremendous injustice" of innocent citizens "being stripped of their lives and liberty." RCW 4.100.010. Despite freedom from physical confinement, exonerees experience concrete forms of discrimination in housing and employment because the fact of their conviction is still available on public databases.[4] Or they are "stigmatized," as the Legislature expressly recognized,[5] and as one scholar strikingly noted:

> For most, the long awaited and hard won exoneration is the beginning of a new struggle. Exonerees face insuperable hurdles upon release. Lacking recent employment history or experience, work is difficult to secure. Without education or funds, most can't access necessary counseling or relevant training. Often without family, they live alone and lonely. Money alone can never repair damage done by an undeserved prison sentence or fully compensate for pain and suffering. A monetary award, however, does provide a springboard from which to begin life again.

Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts To Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 707 (2004).

In interpreting the Act, the Court should consider the factors the Legislature did: the harms from wrongful conviction and the lack of other legal remedies, what the Legislature rightly called the "unique challenges" the wrongfully convicted must overcome when seeking even modest compensation for their lost lives.

---

[3] Mary C. Delaney et. al., *Exonorees' Hardships After Freedom*, WIS. LAWYER Feb. 2010, at 18, 20. (describing the extraordinarily negative and powerful effects of imprisonment).
[4] *Id.* at 53.
[5] RCW 4.100.010.

1. Remedial Statutes Must Be Construed Broadly To Advance the Legislative Intent.

Washington courts "construe remedial statutes liberally in accordance with the legislative purpose behind them." *Jametsky v. Olsen*, 179 Wn. 2d 756, 763, 317 P.3d 1003, 1006 (2014); *see also Perez-Farias v. Glob. Horizons, Inc.*, 175 Wn. 2d 518, 530, 286 P.3d 46, 52 (2012). When interpreting a statute, "the court's objective is to determine the legislature's intent," and to give plain statutory language the "effect to that plain meaning." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (internal quotation marks omitted). Courts will give an undefined term its "plain and ordinary meaning unless a contrary legislative intent is indicated." *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998). If the statutory language is susceptible to more than one reasonable interpretation, courts may consider statutory construction, legislative history, and case law to discern legislative intent. *Christensen v. Ellsworth*, 169 Wn.2d 365, 373, 173 P.3d 228 (2007).

2. The Court Erred By Too Narrowly Construing the Act

At issue here is the meaning of two phrases: "significant new exculpatory information" and "clear and convincing."

i. "Significant new exculpatory information" does not mean evidence must have been unavailable at the criminal trial.

"Significant new exculpatory information" is not defined in the Act or in the legislative history. *See* RCW 4.100 *et seq*. The lower court incorrectly interpreted this phrase to mean that the evidence on which the

vacation and dismissal was based must have been "unavailable at the time of trial." CP 422. This interpretation imposes a narrow application of the statute inconsistent with the statutory language as well as its purpose.

Nowhere does the Legislature express intent to limit compensation to those exonerees whose convictions were vacated on the basis of newly discovered evidence not available during the underlying trial. If the Legislature had intended such a narrow application it could have included limiting language in the statute, as New York has done in its compensation statute[6] and as Washington has done elsewhere, such as in CrR 7.8(b)(2). The Act does not use the well-established legal standard of "newly discovered evidence," and therefore does not place the same due diligence burden on exonerees as is placed on defendants seeking to vacate their convictions under CrR 7.8(b)(2).

Interpretation of similar language in other remedial statutes also supports this conclusion. In *State v. Riofta*, the court reversed the appellate court's holding that "significant new information" must be information that was not available at trial. 166 Wn.2d 358, 365-66, 209 P.3d 467 (2009) (noting the statute "provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial."). The holding that "significant new information" does not

---

[6] *See* N.Y. CTC. LAW § 8-b(3)(b) (cross-referencing N.Y. CPL. LAW § 440.10 (including a requirement that the petitioner's conviction have been overturned on the basis of "[n]ew evidence [that] has been discovered since the entry of a judgment")).

require the information to be evidence unavailable at trial recognizes the DNA testing statute's "distinct remedial purpose." *Id.* at 366. The similar statutory language in RCW 4.100.060—"significant new exculpatory information"—should also be read to include non-biological yet exonerating information that was available but not used at trial.

ii. "Clear and Convincing" means "highly probable."

The court similarly erred in its application of the "clear and convincing" burden of proof, applying the federal habeas' high threshold for relief to compensation claims under the Act. The trial court's application of the federal habeas corpus case standard is clear in its conclusion that the *Larson* plaintiffs "have not met their extraordinarily high and truly persuasive standard required for a claim of actual innocence." CP 430. This language comes directly from the standards that apply in federal habeas cases. *See Herrera v. Collins*, 506 U.S. 390, 398-400, 113 S. Ct. 853, 122 L. Ed. 203 (1993) (holding that the habeas petitioner's standard is "extraordinarily high" and "truly persuasive"); *Schlup v. Delo*, 513 U.S. 298, 317, 115 S. Ct. 851, 130 L.Ed. 2d 808 (1995) (holding that habeas petitioner's burden is "extraordinarily high"). Indeed, the trial court acknowledged that it was borrowing from and applying the federal habeas standard, quoting at length from both *Herrera* and *Schlup* in its discussion of the applicable standard, requiring the *Larson* plaintiffs' to prove an alibi for every day in April. CP 425, 428.[7]

[7] The State took the position at trial that without DNA evidence, the *Larson* plaintiffs should not be able to (and could not) meet the "super high" burden to prove their actual innocence. Tr. at 702; see also Tr. at 107 ("The legislature was thinking about DNA

Standards that apply in federal habeas cases have no application to or bearing on the proof necessary to be awarded relief under the Act. First, the Act includes its own standard of proof, "clear and convincing" which has a well-settled application in Washington: "highly probable." *E.g.*, *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705 (2014). Second, the posture of a case brought under the Act to secure a remedy for wrongs inflicted by the criminal justice system—coming, like this one has, after a conviction has been vacated and the charges dismissed—warrants a much reduced burden when compared to the burden applied to the habeas corpus petitioner, who seeks to overturn a conviction of guilt. *See Herrera*, 506 U.S. at 398-400. Applying a higher standard here is error under the Act and frustrates its purpose.

3. The Legislature Intended a "No-Fault" Compensation Scheme Because So Few Other Remedies are Available for the Criminal Justice System Errors that Lead to Wrongful Conviction.

Countless studies and articles have shown that wrongful convictions often occur for reasons that are beyond the control of any criminal defendant, including eyewitness misidentification; prosecutorial, police and other governmental misconduct; unreliable or unvalidated forensic science; informants; and inadequate criminal defense lawyering.[8]

---

exonerations and the type of case that has similarly strong, unquestionable evidence of innocence.") As discussed below, the statute does not require DNA evidence, or any particular kind of evidence, and an interpretation of the statute that effectively requires DNA evidence as proof of actual innocence eviscerates the Act's purpose.

[8] *See generally*, *e.g.*, http://www.innocenceproject.org/causes-wrongful-conviction (last visited on Dec. 7, 2015); Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439 (2009).

As the Legislature recognized in passing the Act, there is often no remedy for convictions that arise from these weaknesses and injustices of the criminal justice system. In addition to procedural limitations on remedies like ntations in criminal and civil Convictions follwed.l of the charges. Moreover, was not properlyhabeas petitions, damages remedies are limited because:

- Prosecutors enjoy absolute prosecutorial immunity. *See Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (discussing immunity for *Brady* violations).
- Police may enjoy qualified immunity for any constitutional violations committed during the course of their investigation that leads to a wrongful arrest or criminal charge, the withholding of exculpatory evidence, and perjury. *See, e.g.*, *Conner v. Heiman*, 672 F.3d 1126 (9th Cir. 2012).
- Judges enjoy absolute judicial immunity. *See*, *e.g.*, *Pierson v. Ray*, 386 U.S. 547, 553-54, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).
- Informants who give false testimony, knowingly or not, enjoy absolute immunity. *See Van de Kamp v. Goldstein*, 55 U.S. 335, 336, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009).
- Public defenders do not act under color of state law and therefore are not subject to suit under 42 U.S.C. § 1983 for constitutional violations. *See Polk Co. v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981).
- Forensic witnesses are entitled to immunity. *See Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 128, 776 P.2d 666 (1989).

In most cases, therefore, the actors and participants in the criminal justice system who cause wrongful convictions are immune from suit, leaving the wrongfully imprisoned without a remedy for the deprivation of their liberty. Thus, the Legislature devised a no-fault statutory scheme to

provide an avenue to compensate the wrongfully convicted. For compensation pursuant to the Act, plaintiffs must mainly prove they are "actually innocent," RCW 4.100.020, *i.e.*, that they did not commit the "illegal conduct" in the charging document, or contribute to the underlying conviction by suborning perjury or fabricating evidence. RCW 4.100.060(1)(d), (e). Significantly, the Act requires no inquiry into the cause of the wrongful conviction, which is underscored by the required waiver of all claims against the potential bad actors, including the state, its political subdivisions, officers, employees, agents, and volunteers. RCW 4.100.080(1).

The Legislature also recognized that the new "no-fault" remedy was not the *only* option for the wrongfully incarcerated, but simply one available choice. *See* RCW 4.100.080(1). Indeed, the Legislature provided that a "wrongfully convicted person who elects not to pursue a claim for compensation pursuant to this chapter shall not be precluded from seeking relief through any other existing remedy," including, for instance under 42 U.S.C. §1983. RCW 4.100.080(1). Crucially, this provision does not require exhaustion of other remedies *before* seeking compensation, only a waiver of these fault-based remedies if the exoneree opts to proceed under the Act. RCW 4.100.080(1).

These provisions offer the wrongfully convicted the option of a less onerous "avenue" to obtain compensation, without having to contend with immunities from suit or the burden of demonstrating fault and causation. In exchange, the wrongfully convicted accept more modest

compensation, with the damages capped at $50,000 per year of wrongful imprisonment, and give up potential benefits, such as the potential to recover attorneys' fees under 42 U.S.C. § 1988.[9] RCW 4.100.060(5)(a), (e).

4. The Trial Court's Decision Denying Compensation Is Inconsistent with the Act's "No-Fault" Regime.

In denying the *Larson* plaintiffs' petition for compensation, the trial court described the ineffectiveness of their assigned criminal defense attorneys, including "egregious" and "multiple failures to investigate," and performance that fell below the standard of care, concluding that "but for the trial counsels' unprofessional errors, the result of the proceeding would have been different." CP 412-13.

But based on an erroneous and restrictive interpretation of RCW 4.100.060(1)(c)(ii) as "requir[ing] the vacation of the judgment of conviction and order of dismissal of the charges to be based upon significant new exculpatory information," CP 421, the trial court rejected the *Larson* plaintiffs' compensation claims. It held instead that their convictions were vacated not based on "significant new exculpatory evidence," but rather because "the single reason for the plaintiffs' wrongful convictions was the deficiencies of trial counsel." CP 423.

The *Larson* plaintiffs' brief explains why the lower court's construction of RCW 4.100.060(1)(c)(ii) was erroneous.[10] Of broader

---

[10] Most significantly, in the event of a new trial, the Act only requires a showing that "the claimant was found not guilty at the new trial or the claimant was not retried and the

import for all the wrongfully convicted is the "odd result" of the trial court's construction that "the exonerated individual's eligibility for relief in the circumstance of a dismissal without retrial would 'turn on a decision completely in the State's control.'" Larson Br. at 28. Because the State invariably drafts the dismissal motion and order, it alone gets to say why the charges are dismissed. *Id.* at 28-29.

This also underscores the inconsistency between the trial court's decision and the legislative intent of the Act. The Act is a no-fault statute, and expressly preserves options for the wrongfully convicted. Yet here the trial court incorrectly read the Legislature's preamble to RCW 4.100 as narrowing the choices of the wrongfully convicted and drew the erroneous conclusion that if another remedy is available, compensation under the Act is not permitted. CP 423.

The trial court's interpretation impermissibly imputes a kind of exhaustion requirement that is nowhere in the Act. And the trial court's characterization of the legislative intent is fundamentally wrong. By expressly referring to the often unavailable legal remedies generally, the Legislature made clear the Act's critical role in providing another "avenue" for some relief from the "unique challenges" otherwise faced by the wrongfully imprisoned beyond the usual choices left to an exoneree. RCW 4.100.080(1).

---

charging document dismissed." RCW 4.100.060(1)(c)(ii). Because a new trial was ordered, and the charges were dismissed, the trial court erred. *See* Larson Br. at 27-28.

5. The Larson Plaintiffs Were Convicted Amid Circumstances that Often Result in Miscarriages of Justice.

The *Larson* plaintiffs' wrongful conviction rested on much more than counsel's ineffectiveness. Indeed, these young men had to contend with a raft of systemic problems and deficiencies, known to lead to wrongful conviction. For example, the Spokane Sheriff's Office employed questionable investigative tactics that led to an internal affairs investigation and caused them to focus singularly on these three innocent men, relied too heavily on informant tips from the real perpetrators who had obvious incentives to incriminate others, and threatened and badgered a potential exculpatory witness thereby convincing him not to testify. Larson Br. at 9-13, App'x A at CP 408-11. In addition, the State switched the date of the offense when confronted with alibi evidence of the *Larson* plaintiffs. *Id.* The systemic errors were compounded by the ineffective assistance of their trial counsel.

B. The Ineffective Assistance of Counsel Here, Relating to Exculpatory Evidence, Supports a Remedy Under the Act.

The trial court and the State give short shrift to the *Larson* plaintiffs' innocence claim, characterizing it as simply an ineffective assistance of counsel case, which was not intended to be compensated under the Act. This disregards the fact that it was the exonerating evidence that led to dismissal of the charges. Moreover, a study of the first 255 DNA exonerations revealed that ineffective assistance of counsel claims were raised by innocent defendants in about one out of every five

cases and overwhelmingly rejected by appellate courts, demonstrating the extreme difficulty of prevailing on an ineffective assistance claim and the fact that it is not an adequate remedy for wrongful conviction. *See* Emily M. West, Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases (2010), *available at* http://www.innocenceproject.org/files/Innocence_Project_IAC_Report.pdf Indeed, there is no basis in the statute or its legislative history for the proposition that ineffective assistance of counsel cannot support a compensation claim when it relates to exonerating evidence.[11] Ineffective assistance relating to exonerating evidence includes not interviewing alibi witnesses and eyewitnesses, failing to conduct DNA testing, and failing to investigate an alternate defense and key pieces of evidence.[12] In fact, the roster of the wrongfully convicted is replete with cases involving inadequate representation arising from the failure to uncover exculpatory evidence.

The *Larson* plaintiffs' convictions were vacated based on the criminal court's conclusion that trial counsel failed to competently investigate the case and would have discovered exculpatory evidence if they had. Dismissal of the charges in connection with the exculpatory

---

[11] One scholar opines that the single most important reform to reduce wrongful convictions is "making sure that every defendant has the effective assistance of counsel." Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 261 (1997).

[12] *See* Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 439-40 (2011) (summarizing cases).

evidence then followed. In the compensation case, the trial court concluded that defense counsel's ineffective assistance could not constitute "significant new exculpatory information" and therefore no compensation was permitted. But this conclusion ignores what happened to the criminal case: the conviction was vacated due to counsel's failure to discover exculpatory evidence, *plus* this evidence raised serious doubt about whether a jury would have convicted the three men and led to the State's decision not retry them. This is a form of exoneration, based squarely on new exculpatory evidence. There is no basis under RCW 4.100 to deny compensation for a wrongful conviction in such circumstances.

C. The Act does not demand incontrovertible physical evidence to establish innocence.

At trial, attorneys for the state suggested that without DNA evidence, the *Larson* plaintiffs should not be able to (and could not) meet the "super high" burden to prove their actual innocence. Tr. at 702*; see also* Tr. at 107 ("The legislature was thinking about DNA exonerations and the type of case that has similarly strong, unquestionable evidence of innocence.") The statute does not require DNA evidence, or any particular kind of evidence. And indeed, the state Attorney General's Office has agreed to compensation in cases where the exoneration was based on non-DNA evidence.[13] An interpretation of the statute that

[13] *See, e.g.*, AP St. News, *$520K to Longview Man for Wrongful Conviction,* Sept. 30 2014 (describing circumstances of $520,00 settlement); Steve Miletich, *$496,712 for Freed Prisoner,* The Seattle Times, Sept. 27, 2014, at A1 (recounting praise of the state Attorney General's Office for agreeing to a compensation claim in a non-DNA case).

effectively requires DNA evidence as proof of actual innocence eviscerates the Act's purpose by denying compensation to wrongfully incarcerated persons for whom no DNA evidence exists. Moreover, to limit the application of the wrongful conviction compensation statute to cases in which there is DNA evidence is to exclude numerous wrongful convictions from its reach. *See generally* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 772-73 (2007) (concluding that the lowest empirically demonstrable wrongful conviction rate is 3.3%).

V. CONCLUSION

Washington's Wrongfully Convicted Compensation Act was enacted in 2013 to provide some measure of redress for the injustices suffered by the *Larson* plaintiffs--wrongfully convicted, denied years of their lives and liberty, and stigmatized by their wrongful convictions. Each innocent young man was denied compensation by the trial court because of its narrow and erroneous interpretation of the Act. This Court should clarify the interpretation of the Act and, consistent with the Legislature's plain intent, grant the claims of the *Larson* plaintiffs.

RESPECTFULLY SUBMITTED this 11th day of December, 2015.

By: */s/ Diane M. Meyers*

Diane M. Meyers, WSBA #40729
Email: diane.meyers@millernash.com
Madeline Engel, WSBA #43884
Email: madeline.engel@millernash.com

Counsel for Amicus Curiae
The Innocence Network

David Whedbee, WSBA #35977
Email: davidw@mhb.com

Counsel for Amicus Curiae, American Civil Liberties Union of Washington

70066084.4

CERTIFICATE OF SERVICE

I hereby certify that on the below signed date, I served a true and correct copy of the foregoing document on the following by email:

Melanie Tratnik — melaniet@atg.wa.gov
Richard L. Weber — RickW2@atg.wa.gov
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Matthew J. Zuchetto — zuchetto@washingtonclassaction.com
Boyd M. Mayo — mack@bmayolaw.com
Attorneys at Law
905 W. Riverside Ave., Suite 505
Spokane, WA 99201-1099

Toby J. Marshall — tmarshall@terrellmarshall.com
TERRELL MARSHALL LAW
GROUP PLLC
936 N 34th Street, Suite 300
Seattle, WA 98103

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

DATED 11th day of December, 2015, at Seattle, Washington.

/s/ Elizabeth Anderson
Elizabeth Anderson, Legal Assistant

70066084.5