STATE OF WISCONSIN
SUPREME COURT

No. 2011AP1803-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

On Review of a Judgment of the Court of Appeals
Reversing a Judgment and Order
Of the Milwaukee County Circuit Court
The Honorable Victor Manian and
The Honorable Jeffrey A. Conen, Presiding,
Circuit Court Case No. 1993 CF 931541

BRIEF OF DEFENDANT-APPELLANT GENERAL GRANT WILSON

Anne Berleman Kearney
State Bar No. 1031085
Joseph D. Kearney
State Bar No. 1033154
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

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ISSUES PRESENTED FOR REVIEW

1. Whether, under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), General Grant Wilson's third-party-perpetrator defense should have been admitted, where the state concedes the presence of two *Denny* factors—the motive and direct connection of the third party, Willie Friend, to the offense—and Friend's opportunity was established through eyewitness testimony placing Friend on the scene at the time of the offense.

The circuit court answered "no." The Court of Appeals answered "yes."

2. Whether the circuit court's exclusion of evidence of a third-party perpetrator was harmful error, where the excluded evidence was essential to the theory of the defense and the "conflicting evidence" (as summarized by the Court of Appeals, Pet-Ap. 107-110) comprising the state's case against Mr. Wilson meant that the state failed to prove "no reasonable possibility" (*State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231 (1985)) that the exclusion contributed to the conviction.

The circuit court answered did not address this issue. The Court of Appeals answered "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is a routine application of longstanding Wisconsin precedent (specifically, *Denny*). Nonetheless, there is always value in a published opinion of this Court, and in all events oral argument is warranted.

STATEMENT OF THE CASE

This case involves as fundamental a right as our legal system recognizes: the constitutional guarantee ensuring that one charged with a crime has "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also* U.S. Const. Amends. VI, XIV; Wis. Const. Art. I, § 7. General Grant Wilson was denied any such meaningful opportunity when the circuit court refused to permit him to introduce evidence of a specific third-party perpetrator: Willie Friend. The court so proceeded even though it recognized the relevance of the evidence; in fact, the third-party evidence was an integral part of Mr. Wilson's defense. (Pet-Ap. 105.)[1] But the circuit court, in the succinct characterization of the Court of

[1] Mr. Wilson's brief uses "(R.__:___)" to provide the docket number and page cite of record references. The brief also cites the appendix ("Pet-Ap. __") contained in the Brief and Appendix of Plaintiff-Respondent-Petitioner ("State's Brief at __").

Appeals here, "express[ed] skepticism" (Pet.-Ap. 105) about the decision, *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), that permits such evidence to be admitted.

By disregarding *Denny* and thus refusing to admit third-party evidence concerning Willie Friend, the circuit court denied Mr. Wilson his constitutional right to put fully before the jury his theory of the events underlying the shooting of Ms. Evania Maric. This was especially harmful because the state's case was largely circumstantial. In fact, many of the circumstances making up the state's case came from testimony *by* Willie Friend. Yet an eyewitness (Carol Kidd-Edwards) placed Friend at the scene. (R.51:97-99,100.)

The Court of Appeals here corrected the circuit court's error by reversing the judgment of conviction, which had conferred a life sentence upon Mr. Wilson, and remanding the case for further proceedings. (Pet-Ap. 111; R.61:46-54.) The Court of Appeals was right. As the United States Supreme Court explained in *Holmes v. South Carolina*, 547 U.S. 319 (2006), "[t]he point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or

cast doubt." *Id.* at 331 (recognizing constitutional right to introduce third-party evidence in appropriate cases). In Mr. Wilson's case, "no logical conclusion" could be reached unless the jury had the opportunity to hear about Willie Friend, a third party whom an eyewitness placed on the scene with Ms. Maric at the time of the shooting, and who had motive, opportunity, and a direct connection to the crime.

This required the Court of Appeals merely to apply the *Denny* decision (to which *Holmes*, 547 U.S. at 327 n.1, refers), which sets out the criteria for introduction of third-party-perpetrator evidence in Wisconsin courts. Indeed, the state concedes the correctness of the *Denny* test. (State's Brief at 15.) In short, the Court of Appeals applied the *Denny* factors and held that General Grant Wilson satisfied the elements necessary for admission of a third-party defense under *Denny*, and it further held that the circuit court's refusal to admit this critical aspect of Mr. Wilson's defense was harmful error. (Pet-Ap. 107,110.)

To demonstrate why this Court should affirm the Court of Appeals, it is necessary to set forth the central role of Willie Friend in (1) the underlying events and the trial and (2) the decision of the Court of Appeals.

1. Lower Court Proceedings and Willie Friend

a. Background and Preliminary Matters

This case involves the homicide of Eva Maric on the north side of Milwaukee. (R.51:96-98.) At the time of her death (the early morning of April 21, 1993), Ms. Maric was sitting in her car with Willie Friend. (R.51:34,57,96-97,136.) They were outside an illegal nightclub operated by Willie Friend's brother. (R.51:31-33.) Willie Friend was in an "intimate relationship" with Ms. Maric and had been involved with her for some time. (R.51:18-19.)

Eva Maric was frightened of Willie Friend, as testimony from Ms. Maric's friends would have demonstrated if admitted at trial. (R.56:30-33.) As Ms. Larson's offer of proof showed, Friend had slapped and made a death threat against Ms. Maric only two weeks before her murder. (R.56:16-17.) Friend had eight criminal convictions on his record. (R.51:18.)

And it was Willie Friend whom an eyewitness, Carol Kidd-Edwards, put near the car containing Ms. Maric, immediately after the gunshots were fired that killed Ms. Maric. (R.51: 97-98, 100.)

When questioned, Willie Friend told the police that *Mr. Wilson* had committed the offense. (R.51:46-47,150.) Mr. Wilson was a friend of Eva Maric. (R.55:4.) The police went to arrest Mr. Wilson at his job. (R.51:175.) Mr. Wilson worked full-time for Krause Milling, as he had done for sixteen years. (R.51:175; 55:33.) Mr. Wilson was a senior miller in the production department and a union steward. *Id.* Mr. Miller also was in his eighteenth year of service in the United States Army Reserve. (R.55:102.)

The police arrested Mr. Wilson.[2] (R.51:177.) He was charged with first-degree intentional homicide while using a dangerous weapon and with the attempted homicide of Willie Friend, again while using a dangerous weapon. (R.2; 4.)

In the preliminary hearing, the prosecutor identified that the "main witness, the person whose testimony will be critical . . . is a person by the name of Willie Friend." (R.43:3.) Willie Friend testified at the preliminary hearing and, in his testimony,

[2] While he was being booked, Mr. Wilson overheard that someone was dead. (R.55: 208-209.) One of the officers thought Mr. Wilson had said, "she's dead? You guys didn't tell me she was dead." (R.51:208-209.) But as Mr. Wilson explained, he heard the officers talking about "the location of the shooting," learned the affirmative answer to "did someone die?" and found out it was a homicide for which he had been arrested not a shooting. (R.55:49.)

pointed at Mr. Wilson for the crime. (R.43:20.) Friend later admitted (at trial and only after asking whether he was under oath) "that he had made a telephone call from the courthouse before the preliminary hearing in which he stated . . . that 'he had to get his story together' about what happened the night of the murder." (Pet-Ap. 108; R.51:88-89.)

Based on the preliminary hearing, largely the testimony of Willie Friend, Mr. Wilson was bound over for trial in the circuit court. (R.43:46.) Mr. Wilson was arraigned and he entered a plea of not guilty. (R.44:2.) He proceeded to trial.

b. Willie Friend and the Eyewitness Testimony of Carol Kidd-Edwards

The state's case at trial included testimony from a citizen eyewitness, Ms. Carol Kidd-Edwards, who placed Willie Friend at the scene at the time of the offense. (R.51:97-98.) Ms. Kidd-Edwards testified that in the early morning of April 21, 1993, she heard "loud gunshots." (R.51:96-98.) She hit the floor of her bedroom after she heard the first gunshot. (R.51:97.) Four additional loud shots followed. (*Id.*) When the gunshots stopped, Carol Kidd-Edwards pulled herself off the floor. (R.51:97.) She went to the window and looked at a car parked across the street

from her house. (R.51:98.) Ms. Kidd-Edwards saw Willie Friend at that car, which she later learned belonged to Ms. Maric. (R.51:97-98,100.)

Carol Kidd-Edwards testified that she saw Willie Friend running away from the car. (R.51:100.) Eva Maric, who was inside the car, died from a bullet shot, which likely had been fired in close contact from a larger-caliber gun. (R.53:50,77,113-118.) Ms. Kidd-Edwards heard no loud shots after Willie Friend started running away from the car in which he left Ms. Maric. (R.51:97.)

Ms. Kidd-Edwards next saw a man exit the passenger side of another car, a "gold-toned Continental," and approach the driver's side of the car that contained Ms. Maric. (R.51:101,103-104.) That man had a gun in his hand. (R.51:103.) Ms. Kidd-Edwards described the man as of "slight build," about 6-feet tall, and wearing a leather jacket fitted at the waist. (R.51:123.)

Ms. Kidd-Edwards saw this man of "slight build" approach the driver's side of Ms. Maric's car, and then she heard shots fired that were not as loud as the first shots she had heard. (R.51:104,119.) Ms. Kidd-Edwards testified that the slightly-built man then walked back to the passenger side of the other car

after the shooting. (R.51:102,106,120.) The car drove off. (R.51:106.) Ms. Kidd-Edwards testified that the car had a regular license plate with red numbers and letters, but she did not remember more. (R. 51:129-131; Pet-Ap. 109.)

c. Willie Friend's Story

The state's case at trial relied substantially on the testimony of Willie Friend. As the Court of Appeals observed, "Friend was the only person to directly link Wilson to the crime." (Pet-Ap. 108.)

Friend admitted that he was outside an illegal after-hours night club with Eva Maric when she was killed. (R.51:33-34,57.) He had also been inside that after-hours club (which was owned by his brother) with Eva before her death. (R.51:32.) The Court of Appeals noted this: "Friend admitted that he lied in his statement to the police and in his testimony at the preliminary hearing, and that they had, in fact, been in the club in the hours before the murder." (Pet-Ap. 109.)

Friend testified that he and Eva were sitting in her car outside the after-hours club for over an "hour or two," when another car pulled up to theirs. (R.51:33-34,57.) According to

Willie Friend, a "medium" man with "gold-rimmed glasses" got out of the other car. (R.51:51,63.)

According to Friend's testimony at the preliminary hearing and at trial, the man walked over to the driver's side of Ms. Maric's car with a gun in his left hand. (R.43:20-21; 51:67.) Willie Friend testified that "he looked at me, and he just started shooting." (R.51:39.) Willie Friend testified that he heard first shots that were "louder and heavier." (R.51:42.) There was no break in the shoots according to his testimony: "[H]e was shooting. . . . I know that he was shooting at me from the fragment, from the concrete that he was shooting at me. . . . I ducked. I ran." (R.51:40.)

There were bullet strikes in the concrete that had been made by a larger-caliber gun, but they were adjacent to Ms. Maric's car. (R.53:49.) (Preliminary-hearing testimony from Detective Dubis said the strikes were some twenty to forty feet from Ms. Maric's car. (R.43:10.)) Smaller-caliber bullets were recovered from the car. (R.51:156.) Willie Friend was not shot. (R.51:41.)

When the police arrived, officers found Willie Friend waiting outside. (R.51:46.) First, Friend told the officers that,

immediately after the shooting, he had gone into to his brother's house before going to see the neighbor, Ms. Kidd-Edwards. (R.51:45.) In another account, Friend said that he went to the house of the neighbor, Ms. Kidd-Edwards, and asked for help. (R.43:24; 51:109.) Willie Friend himself needed no medical treatment.

Detective Dubis expressly wrote in report submitted to the crime lab that he wanted to show that Willie Friend did not do the shooting. (R.53:80.)

Willie Friend told the police that it was Mr. Wilson who had shot Ms. Maric. (R.51:46-48.) Friend told the police that he had come to the conclusion that it was Mr. Wilson's car involved because he saw the "color, fresh paint job, clean car." (R.51:36.) He also stated that the car had a specialty plate. (R.51:47.) Friend was the only witness who gave testimony about a specialty plate linked to the car (R.51:47), and that testimony differed from the testimony of Ms. Kidd-Edwards. (R.51:129-131; Pet-Ap. 109.)

d. Mr. Wilson's Defense and the Exclusion of Evidence

In his defense, Mr. Wilson sought to examine Willie Friend, as well as other prosecution witnesses, about Friend's motive, opportunity, and direct connection to the shooting.[3] (*See, e.g.,* R.51:7-8,231-232; 56:13-24.) In particular, counsel for Mr. Wilson argued to the circuit court, throughout the trial, that Mr. Wilson should be permitted to elicit evidence of third-party perpetrators as set forth in *State v. Denny*. (*See, e.g.,* R.51:7-8, 233; 56:85-86.) At first, the circuit court told counsel that he should "probably prepare an offer of proof." (R.51:233.) But the court dismissed counsel's verbal offer of proof. (R.51:248.) As a result, the circuit court prohibited the questions, including ones directed to Willie Friend. (*See, e.g.,* R.51:76-77,92-93; 53:231-234.) The defense moved for dismissal at the close of the state's evidence; the court denied the motion. (R.53:120.)

[3] Mr. Wilson also raised questions about the connection of Willie Friend's brother, Larnell (Jabo) Friend, to the shooting. Brief of Defendant-Appellant General Grant Wilson at 2, 15. The Court of Appeals determined that it did not need to discuss Jabo Friend because of its conclusion that Willie Friend had motive, opportunity, and direct connection to the shooting. Pet.-Ap. 107 n.4. Jabo Friend's connection to the crime thus has not been taken to this Court.

Mr. Wilson testified on his own behalf that he had not been at the after-hours club or involved in the shooting of Ms. Maric. (R.55:7,16-33.) He had been in the company of lady friends that evening (Terry Bethly until 8:30 or 9 p.m. and then Roseanne Potrikus from 10 p.m. until after bar closings), he testified; after they went their separate ways, he was home sleeping from 3:30 or 4:00 a.m. onward (until he woke up Ms. Potrikus with a 5:33 a.m. wakeup call). (R.53:10-11,16-32,163; 56:64-66.)

Other evidence also did not accord with the state's theory. Mr. Wilson was not a man of "slight build." (R.54:42-43 (admitting Army Reserve physical exam exhibit).) Mr. Wilson and witnesses testified that Mr. Wilson had never worn gold rimmed glasses. (R.53:8,124,128,136,139-140,148; 56:60.) Mr. Wilson, colleagues in the United States Army Reserve, and army records confirmed that Mr. Wilson shoots right-handed, not left-handed. (R.53:139; 54:39,42-44; 54:39-40,42-43; 55:107.)

Mr. Wilson introduced evidence that there were at least four gold Lincoln Marks registered to individuals in the area of the shooting. (R.53:175-181.) Ms. Kidd-Edwards had seen "[a] gold-toned Continental, a mark version of the Continental." (R.51:101.) Ms. Kidd-Edwards also stated that the license plate

was a regular plate with red letters and numbers. (R.51:129-131; 54:55-56; Pet-Ap. 109.) Mr. Wilson drove a gold Lincoln Continental, with a doubly distinctive license plate: red, white, and blue, with the letters G-BALL. (R.51:173,176; 53:86; 54:62.)

The state's questions challenged Mr. Wilson. The prosecutor asked Mr. Wilson at trial about his previous possession of a .44 caliber gun. (R.53:99-100.) Monty Lutz, an expert witness for the prosecution, had done the analysis and testified that the bullets from the larger-caliber gun (responsible for the death of Ms. Maric and the bullet strikes on concrete away from the car) were from a .44 caliber gun. (R.53:55-56.) Mr. Lutz identified the bullets as from a Sturm Ruger gun. (R.53:55-56.) (*See also* R.54:29 (Richard Thompson discussing differences between markings on Smith & Wesson and Sturm Ruger with conclusion that it was "highly unlikely" that bullets in Ms. Maric's body were from a Smith & Wesson).) Mr. Wilson testified at trial that he had owned, before its being bartered away, a Smith & Wesson .44 Magnum, not a Sturm Ruger. (R.55:56-60.)

Most importantly for these appellate proceedings: Counsel for Mr. Wilson argued to be able to bring forward witnesses demonstrating the connection of a third person to the crime.

(*See, e.g.,* R.56:17-33.) In particular, counsel for Mr. Wilson sought to admit the testimony of Mary Lee Larson, a friend of the victim, Eva Maric, that Willie Friend slapped and threatened Eva Maric two weeks before her murder. (R.56:13-17.) She further spoke, in the offer of proof, about Friend's death threat to Ms. Maric:

> A. Willie stated right to me and my girlfriend that he had to keep Eva in check. If –
> The Court: He said what?
> A. Eva. He said he had to keep Eva in check.
> The Court: Oh.
> A. If he didn't keep – if she wouldn't be in check, he'd kill her, and she knew it.
> Q. Did Eva respond to that?
> A. She said he would.

(R.56:16.) Ms. Larson's account was supported by that of Barbara Lange. (R.56:27.) Ms. Lange was not permitted to testify even through an offer of proof, but Mr. Wilson's counsel informed the court that Ms. Lange would have testified that Willie Friend slapped Ms. Maric in the weeks before the shooting—and did, indeed, threaten to kill Ms. Maric. (R.56:35-36; Pet-Ap. 104.)

The court rejected defense counsel's request to admit this evidence, stating:

> The evidence that the State has put in, in my view, is very strong to allow this witness [Ms. Larson] now to – who wasn't on the witness list, as I understand it, and came in as kind of an afterthought here after the defense had rested and the case was reopened, seems to me is just going to lead to speculation.

(R.56:22.) But later, with respect to timing, the circuit court told counsel for Mr. Wilson, "I assumed that with the three-day interval that you'd think of some witnesses to call, so I assumed that we would reopen the defense and allow you to put them on." (R.56:3.)

As for the state, it knew of Ms. Larson's evidence. Detective Michael Dubis later testified that "he had questioned Mary Larson and Barbara Lange in connection with the homicide and they had both told him that they observed Friend slapping Maric shortly before the murder and they both thought Friend was involved in Maric's death, not Wilson." (Pet-Ap. 104-105; R.56:30-32.)

When the circuit court initially would not make a decision, counsel for Mr. Wilson went to the home of the District Attorney,

E. Michael McCann, and made a direct request. (R.57:2; Pet-Ap. 149.) The following day counsel for Mr. Wilson explained to the court that he discussed the case with District Attorney McCann, and it was counsel's impression that "[t]he State's position is now that they are not objecting to this evidence and we should put it in per Mr. McCann's instructions." (R.57:4; Pet-Ap. 151.) The prosecutor told the court that "I do not agree on how Denny applies to this case, but he is my boss and he has instructed me not to object." (R.57:5; Pet-Ap. 151-152.) The prosecutor further informed the court that she would need to put in rebuttal evidence. (R.57:4-5; Pet-Ap. 152.) Defense counsel was "not objecting [for the prosecutor] to have whatever time she needs." (R.57:5; Pet-Ap. 152.)

The circuit court balked at this agreement of the parties. (R.57:5; Pet-Ap. 152.) The court objected that, "Mr. McCann was not here, he's not the trial counsel. That puts the whole – the whole trial into a different posture. . . It's going to take another couple of days to finish this case." (R.57:6; Pet-Ap. 153.) The court continued: "I'm not just going to [interruption from counsel for Mr. Wilson] let her be, you know [interruption from counsel for Mr. Wilson] hanging out there on a limb at the last minute

just because Mr. McCann wants to play it completely safe." (R.57:7; Pet-Ap. 154.)

Counsel for Mr. Wilson argued the *Denny* case to the circuit court. The court's response was to express concern that this was a "Court of Appeals decision" and that it would "encourage claims that . . . don't even have to be substantiated." (R.57:12-13; Pet-Ap. 159-160.)

At the request of the prosecutor, the court granted a recess, so she could confer again with District Attorney McCann. (R.58:3; Pet-Ap. 171.) After that recess, the prosecutor reported the District Attorney's assessment of it as a "close call":

> I talked at some length with Mr. McCann about this, about the facts of the case. Mr. McCann instructed me to tell the Court as follows: that he as the District Attorney believes that this is a close call, that he is considering the sentence that this man faces and probably will result if convicted. He has read the Denny case. He [instructed] me not to object. But he's also indicated to me that I could convey to the Court that he and I disagree about this, and that we fully expect the Judge to make an independent ruling based on all the evidence that has come forth in this case at this point and all of the arguments that have been set forth in the record up until this point. He also indicated that I should say that we don't intend to confess error at a later time.

(R. 58: 3-4; Pet-Ap. 171-172.) During the recess, the circuit court had a conversation of its own:

> Well, in the interim, I also had an opportunity to confer informally with a Circuit Court Judge who's a long time member of the Criminal Jury Instructions committee, and his response was the same as mine, he thinks that this will lead to speculation, that it's not a proper procedure, and that if it is a close issue, which apparently everyone agrees it is, it should be decided by the Supreme Court sooner rather than later.

(R.58:4-5; Pet-Ap. 172-173.) The court moved on to closing arguments. (*Id.*) Mr. Wilson proffered jury instructions setting out the third-party defense, which the circuit court refused to give. (R.12:1-3; 58:5-25.) The circuit court ultimately denied Mr. Wilson's motions for a mistrial. (R.58:4-6, 149-153.) The case went to the jury. (R.58:148.)

e. Deliberations, Verdict, and Judgment

On July 7, 1993, the jury told the circuit court that it had reached an impasse. (R.58: 154-156.) The court sent the jury home for the evening. (R.58:160.) Later the following day, the jury found Mr. Wilson guilty of both charges. (R.13; 14; 60:2-3.) Mr. Wilson's motion for judgment notwithstanding the verdict was denied. (R.60:8.)

The court entered a judgment of conviction on October 4, 1993. (R.19.) On that same day, it sentenced Mr. Wilson to life imprisonment with a potential eligibility for parole in 30 years from the date of sentencing on the first count and, on the second count, to a consecutive sentence of an indeterminate term not to exceed 20 years. (R.1:14-15, 19; 61:52-54.)

f. Post-Trial Proceedings

Although counsel for Mr. Wilson filed a notice to pursue post-conviction relief, it was over two years before anything further was filed on Mr. Wilson's behalf, and that was merely two pages. (R. 22.) Almost three years from the date of sentencing, a nine-page motion for a new trial and sentence modification was filed; the court denied it. (R. 23; 24.)

Counsel did not file additional post-conviction motions. Counsel did not file a notice of appeal for Mr. Wilson. On April 21, 2008, counsel for Mr. Wilson was publicly reprimanded for this post-trial misconduct. *See* Public Reprimand of Peter J. Kovac, 2008-OLR-05.

On September 14, 2010, the Court of Appeals restored Mr. Wilson's appeal rights and his right to bring a post-conviction motion because of post-trial ineffectiveness on the part of Mr.

Wilson's counsel. (R.25:3.) After denial of his post-conviction motion (R.39; Pet-Ap. 112-115), Mr. Wilson directly appealed. (R.40.)

2. Willie Friend and the Court of Appeals' decision

On direct appeal, the Court of Appeals reversed the judgment of conviction and the denial of post-conviction relief and ordered a remand for further proceedings. (Pet-Ap. 102.) The Court of Appeals carefully examined the record and concluded that the circuit court had erred. (Pet-Ap. 105.) In particular, the Court of Appeals determined that the circuit court (as "the State concedes") acted with "reasons for refusing to admit the evidence [that] were not a proper exercise of discretion" despite "acknowledg[ing] that the testimony was relevant to Wilson's defense." (Pet-Ap. 105.)

In its review, the Court of Appeals applied *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). (Pet-Ap. 103.) The Court of Appeals observed that the "State acknowledges that Wilson's offer of proof was arguably sufficient to establish that Friend had a motive [and] also acknowledges that Friend was present at the shooting scene, establishing that Friend had a

direct connection to the crime based on his proximity." (Pet-Ap. 106.)

The Court of Appeals then turned to the third *Denny* factor—opportunity—and emphasized the testimony of Carol Kidd-Edwards, "the only citizen eyewitness to the shooting": "Her testimony places Friend at the scene when the first round of shots was fired, and is consistent with Wilson's contention that Friend was involved in the murder by luring Maric to a place where she would be ambushed. As for the physical evidence, it does not preclude Friend's involvement." (Pet-Ap. 106-107.)

Upon its review of the evidence, the Court of Appeals concluded that Willie Friend had "opportunity" to commit the offense, "either by firing the first weapon or in conjunction with others by luring Maric to the place where she was killed." (Pet-Ap. 107.) Accordingly, the Court of Appeals held that "[u]nder *Denny*, Wilson should have been allowed to introduce evidence that Friend was involved in Maric's murder." (Pet-Ap. 107.)

The court held that exclusion of the third-party defense was harmful error. (Pet-Ap. 110.) As the court concluded, the "State cannot meet its burden of showing that there is no reasonable possibility that the error [of excluding evidence that Friend was

involved in Maric's murder] contributed to the verdict." (Pet-Ap. 110.) "We therefore reject the State's argument that the error is harmless." (Pet-Ap. 110.)

This Court granted the state's petition for review.

ARGUMENT

There is no question of the applicable law here: As the state acknowledges, "*State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), sets forth the analysis for determining the admissibility of evidence that a third party committed the charged offense." (State's Brief at 15.) In fact, the state does not defend the grounds on which the circuit court denied the third-party-perpetrator evidence. *See, e.g.*, Pet.-Ap. 105 (observation of the Court of Appeals that "[t]he State concedes, as it must with this record, that the circuit court's reasons for refusing to admit the evidence were not a proper exercise of discretion").

In short, the issue before this Court is nothing more than the application of the well-settled standard of *Denny* to the circumstances of Mr. Wilson's case. The Court of Appeals was correct to conclude that, under *Denny*, the circuit court's

exclusion of this integral part of Mr. Wilson's defense violated constitutional right to a complete defense. (Pet-Ap. 103, 110.)[4]

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT UNDER *STATE V. DENNY* THE CIRCUIT COURT IMPROPERLY EXCLUDED EVIDENCE OF A THIRD-PARTY DEFENSE.

Under Wisconsin law (i.e., *Denny*), the Court of Appeals correctly concluded that a defendant has the ability to bring before the jury evidence that a third person may have committed the crime with which the state has charged the defendant. Rejecting a test that would require "substantial evidence" connecting the third party to the offense, *Denny* adopted a "legitimate tendency" test:

> [Where] motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place, or circumstances, the evidence should be admissible.

Denny, 120 Wis. 2d at 624, 357 N.W. 2d at 17. This "'legitimate tendency' test" is an "appropriate[ ] . . . mechanism of balancing

[4] Whether a defendant has been deprived of his constitutional rights is a "question of 'constitutional fact' that this court determines independently of the circuit court and court of appeals, but benefiting from their analysis." *State v. St. George*, 2002 WI 50, ¶16, 252 Wis. 2d 499, 514, 643 N.W.2d 777, 782 (citation omitted).

the accused's right to present a defense against the State's interest in excluding evidence" that does not meet basic evidentiary standards. *State v. Avery*, 2011 WI App 124, ¶ 50, 337 Wis. 2d 351, 386, 804 N.W.2d 216, 233.[5]

In Mr. Wilson's case, the state's concessions *themselves* establish the "legitimate tendency" of a third party to commit the crime charged, the shooting of Ms. Maric. The State agrees that Willie Friend had a motive. (State's Brief at 17-18.) Moreover, the state recognizes that Willie Friend had a direct connection with the crime, stating that "[t]he court of appeals was undisputedly correct in finding Friend had a direct connection to Eva's murder." (State's Brief at 17.) As the state admits, "After all, he was at the scene, standing outside her car." *Id.* According to the state, what remains is its challenge to the conclusion that Willie Friend had *opportunity*. (State's Brief at 18.)

But in the factual circumstances of Mr. Wilson's defense, there is no meaningful distinction between direct connection and

[5] Approximately 25 states have recognized a third-party defense along the lines of Wisconsin's in *Denny*, with its look at the "direct connection" of the third-party with the offense. *See* David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else Is Guilty*, 63 Tenn. L. Rev. 917, 936 & n.99 (1996).

opportunity—or certainly no distinction that would go to evidentiary admissibility (as opposed to weight). Both of these factors are satisfied with the evidence—provided by the testimony of Carol Kidd-Edwards and the admissions of Willie Friend himself—that Willie Friend was at the car, then outside the car, and then running from the car in which Ms. Maric died, all at the moments of her shooting and death. (R.51:68-70, 114.)

Unable to deny these facts, the state instead tries to isolate "opportunity" from "motive" and "direct connection," and thereby to dissociate the facts comprising those two elements from opportunity. However, the state's approach, which it has attempted before, was rejected by the Court of Appeals in *State v. Vollbrecht*, 2012 WI App. 90, 344 Wis. 2d 69, 820 N.W.2d 443. In *Vollbrecht*, the state, as here, sought to separate opportunity from defendant's showing of motive and direct connection. The court rejected the state's attempts to dissociate motive and direct connection from opportunity. It explained that these "facts give meaning to other facts and . . . *the significance of the [third-party's] opportunity to commit the crime depends on his alleged motive and direct connection*." 2012 WI App. 90, ¶ 26, 344 Wis. 2d at 91, 820 N.W.2d at 454 (emphasis added).

In *Vollbrecht*, the court—upon examining together all three *Denny* factors, i.e., motive, direct connection, and opportunity—affirmed the post-conviction decision that the circuit court erred in excluding third-party evidence and rejected the state's argument that opportunity could not be shown. 2012 WI App. 90, ¶ 2, 344 Wis. 2d at 74, 820 N.W. 2d at 446.

In its brief here, the state nowhere explains its definition of "opportunity" under *Denny*. But in its brief to this Court *Vollbrecht*, the state provided "illustrative" examples of "opportunity." For example, the state drew the Court's attention to *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881, (judgment vacated and remanded for further consideration in light of *United States v. Patane*, 542 U.S. 630 (2004) (*Miranda*)), *decided and rev'd on other grounds*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, a case in which opportunity was established by evidence placing a third party in "proximity to the location where the homicide occurred and near the time of the murder." State's Brief in *Vollbrecht* at 23 (citing *Knapp*, 2003 WI 121, ¶ 182, 265 Wis. 2d at 352-353, 666 N.W.2d at 919). And, in doing so, the state argued (unsuccessfully) in *Vollbrecht* against

the "opportunity" element's being satisfied on the ground that none of the evidence had a tendency to show that the third party "had access to [the victim] during the ninety minute span" after she was last seen and then discovered. (*Id*. at 24.)

The circumstances of this case, by contrast, do satisfy those elements: Willie Friend's location at the scene at the time of Ms. Maric's shooting provides the proximity and access that are consistent with the state's "illustrative" example. In short, it demonstrates "opportunity."

The circumstances of this case also come within the Wisconsin precedent of *Vollbrecht* itself. In *Vollbrecht*, the Court of Appeals ultimately determined that the third party (Brown) had a "limited but sufficient opportunity" under *Denny*. 2012 WI App. 90, ¶ 26, 344 Wis. 2d at 90, 820 N.W.2d at 453. It did so by examining geography and timing—in particular, the evidence establishing that "Kim Brown was in the general area of the homicide at the time Hackle was murdered." *Id.*

The Court of Appeals thus was squarely within settled law in holding here that, if Mr. Wilson had been permitted to present the *Denny* factors as part of his defense, he would have demonstrated opportunity as well as the other factors of motive

and direct connection. Part of this would have simply been to rely on aspects of the state's case: the testimony of Carol Kidd-Edwards, a neighbor and eyewitness, satisfies the geography and timing required to demonstrate that Willie Friend had opportunity. Indeed, Ms. Kidd-Edwards's testimony was clear: around 5 a.m, she heard five loud gunshots. (R.51:96-98, 109.) After the first gunshot, she dropped to the floor. (R.51:97.) When the shots ended, she rose from the floor and looked out the window. (R.51:97.) Ms. Kidd-Edwards "saw a man with a brown leather jacket on running away from a car parked across the street from my house." (R.51:97.) Ms. Kidd-Edwards identified that man as Willie Friend. (R.51:98.)

As the Court of Appeals explained, "[h]er testimony places Friend at the scene when the first round of shots was fired." (Pet-Ap. 107.) "Our review of the evidence shows that Friend had the opportunity to commit the crime, either by firing directly the first weapon or in conjunction with others by luring Maric to the place where she was killed." *Id.* The testimony of this neutral eyewitness amply establishes the geography and timing that is necessary to show "opportunity" consistent with applicable Wisconsin law.

Moreover, the state's accounts rely on the testimony of Willie Friend—and on the issue of "opportunity," his testimony supports his involvement. Willie Friend himself testified that he and Eva Maric had been sitting in her car for "an hour or two" outside the illegal after-hours club across the street from Ms. Kidd-Edwards's house. (R.51:33-34, 57.) At a minimum, Willie Friend's testimony that he was in the passenger side of the car and that the gunman was approaching the driver's side would have meant that Eva Maric was sandwiched in the car. (R.51:68.) Willie Friend's proximity and access to Ms. Maric means that he had the opportunity to be involved in the shooting of Ms. Maric.

The state seeks to place a burden on Mr. Wilson that, as defendant, he does not have to bear under *Denny*. In *Denny*, the court emphasized that "a defendant should not be required to establish the guilt of third parties with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted." 120 Wis. 2d at 623, 357 N.W.2d at 17. Mr. Wilson's burden under *Denny* was to show by a preponderance of the evidence that a third party had the motive, opportunity, and direct connection to the commission of an

offense. 120 Wis. 2d at 623-625, 357 N.W.2d at 17. The matter then goes to the jury.

Mr. Wilson satisfied *Denny*'s motive, direct connection, and opportunity requirements. *See Denny*, 120 Wis. 2d at 624, 357 N.W. 2d at 17. Mary Lee Larson and Barbara Lange, friends of Ms. Maric, would have testified (as they told Detective Dubis when he interviewed them in connection with the shooting) that Willie Friend slapped Eva Maric and threatened her life—wanting her to "keep [her] in check"—not more than two weeks before her death. (R.56:16, 35-37.) As the Court of Appeals noted, "Wilson also testified that Maric told him that 'if something happened to her, that there would be the place,' referring to the illegal club owned by Larnell and Willie Friend, whom he had never met." (Pet-Ap. 108; R.56:8.)

Carol Kidd-Edwards' testimony about Willie Friend cements the "legitimate tendency" that Willie Friend "committed the crime." Ms. Kidd-Edwards's eyewitness evidence proved that Willie Friend was present at the scene of the crime at the time of the shooting. (R.51:97-98, 100.) And the evidence showed Willie Friend's proximity and access to Ms. Maric at the time of the

shooting, which under the precedents (*see supra* pp. 24-28) showed "opportunity."

Because *Denny* does not require it in order to show "opportunity," Mr. Wilson is under no obligation to prove the precise nature of Friend's involvement as shooter or accomplice (as well as someone who planned to frame Mr. Wilson), as the state maintains. *See* State's Brief at 18 (arguing that "the evidence Wilson wanted to present . . . failed to establish that Friend had the opportunity to kill Eva, either by firing the first weapon or by conspiring with others to lure her to the site where she was slaughtered"); *id.* at 18-25 (elaborating on that argument).[6] However, if the Court is concerned as to whether there was evidence of Willie Friend's involvement, the "conflicting evidence" in the next section demonstrating harmful error supports the Court of Appeals' finding of Willie Friend's involvement.

Some of this harmful-error evidence, for instance, draws into question the state's supposition that "[g]iven the logistics of

[6] Nor would the state have to identify specifically whether an individual was the shooter or, instead, an accomplice to sustain its burden of proving that an individual had committed a crime. *See Holland v. State*, 91 Wis. 2d 134, 144, 280 N.W. 2d 288, 293 (1979); Wis JI-Criminal 400.

the situation and the apparent spontaneity of Friend's and Eva's plans during the hours before her murder, Friend would have had little time to locate two confederates to kill Eva and direct them to where her car would be parked." State's Brief at 32. Willie Friend testified that he sat with Eva Maric for about *"an hour or two" outside his brother's after-hours club*. (R.51:57 (emphasis added).) Friend also testified that he and Eva had been inside the after-hours club during that evening—where his brother was. (R.51:33, 76.) The large amount of time available to Friend near potential (and family-member) confederates would have permitted the locating and directing of the operation. The state may characterize the "time" here as "little," but that sort of thing—along with the persuasiveness or unpersuasiveness of the rest of the state's demonstration here, *e.g.*, State's Brief at 18-25—should have been for the jury to determine.

Moreover, in examining the confederate theory, the Court of Appeals also pointed to Carol Kidd-Edwards's testimony: "[s]he testified that the shooter walked to the passenger side of the [getaway] car after the shooting, which was inconsistent with the State's argument that Wilson acted alone in committing this crime of passion, but arguably consistent with Wilson's argument

that Friend and unnamed confederates killed Maric and framed him." (Pet-Ap. 109.)

In short, "opportunity" is shown, and there is evidence of Friend's involvement. This Court should affirm the Court of Appeals' decision that the *Denny* factors were satisfied in Mr. Wilson's case and that "Wilson should have been allowed to introduce evidence that Friend was involved in Maric's murder." (Pet-Ap. 107.)

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT DENIAL OF MR. WILSON'S RIGHT TO PRESENT A COMPLETE DEFENSE WAS HARMFUL ERROR.

The Court of Appeals properly found constitutional error in the exclusion of third-party evidence that was critical to Mr. Wilson's defense. "Where error is present, the reviewing court must set aside the verdict unless it is sure that the error did not influence the jury or had such slight effect as to be *de minim[i]s*." *State v. Dyess*, 124 Wis. 2d 525, 541-542, 370 N.W.2d 222, 231 (1985). It is "the state's burden, then to establish that there is no reasonable possibility that the error contributed to the conviction." 124 Wis. 2d at 543, 370 N.W.2d at 232.

The state cannot meet that burden. The third-party evidence was a central part of Mr. Wilson's defense. Mr. Wilson pointed to Willie Friend, who had the motive, opportunity, and direct connection to the crime that killed Eva Maric. (*See, e.g.,* R. 56:17.) The importance of Mr. Wilson's third-party defense is especially heightened because the state's case against Mr. Wilson was only circumstantial—or, to the extent that it was not, this was so only because of the testimony of Willie Friend himself. In this case, Mr. Wilson needed the chance to question the state's witnesses and introduce witnesses on his behalf who would have testified to a story different from that offered by the state. (*See, e.g.,* R.51:7-8; 56:13-27, 35-37.) Otherwise, the result would be that identified by the United States Supreme Court in *Holmes*: "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." 547 U.S. at 331.

An examination of the relevant factors that a court may consider when determining the harm of the error—or, as this Court has put it, what is required for a court to "declare a belief that [the constitutional error] was harmless beyond a reasonable

doubt," *State v. Billings*, 110 Wis. 2d 661, 668, 329 N.W.2d 192, 195 (1983)—makes all the more apparent how the exclusion of third-party evidence *harmed* Mr. Wilson's defense. Those factors include "(1) the frequency of the error, (2) the nature of the state's case, and (3) the defense presented at trial." *Id.* at 669, 329 N.W.2d at 195.

These factors make the harm apparent. As for frequency, the harm to Mr. Wilson was *continual*, throughout the trial. With respect to the "defense presented at trial," it was missing a critical part: Mr. Wilson's ability to tell the entirety of what happened, including the involvement of Willie Friend. From the beginning to the end of the trial, counsel for Mr. Wilson tried, unsuccessfully, to submit third-party evidence about Willie Friend's involvement—from the questioning of state witnesses, to the testimony of defense witnesses, to the submission of jury instructions.

The most that Mr. Wilson was able to do—as the state puts forward in its brief as sort of a consolation prize for the circuit court's having excluded Mr. Wilson's third-party evidence and defense (State's Brief at 28-30)—was to have his counsel relate in closing argument a partial potential motive for Willie Friend. Of

course, in no way can an attorney's remarks *establish* for the jury the critical elements of motive, direct connection, and opportunity needed to advance a third-party defense. On any number of occasions, this Court has explained that argument of counsel is not evidence, *see*, *e.g.*, *State v. Eugenio*, 219 Wis. 2d 391, 402, 579 N.W.2d 642, 647 (1998), and the jury was so instructed in this case. (R.51:15.) Even to put to one side the factors of Willie Friend's direct connection and opportunity (argument on which was impeded because Mr. Wilson's counsel could not question the state's witnesses on the points and highlight their testimony), counsel's remarks did not suffice to inform the jury of critical aspects of motive.

Evidence of that would have come from witnesses—whom the jury could hear and whose demeanor the jury could view, as the state concedes is important. (State's Brief at 34.) As demonstrated in the offer of proof from Mary Lee Larson and the proposed offer of proof from Barbara Lange, the testimony of these friends of Eva Maric would have provided evidence demonstrating Willie Friend's physical abuse of Eva Maric and his threats toward her. (R.56:16-17, 35-36.)

In the last harm factor—the nature of the state's case—the state fares no better. For the state relied heavily on the testimony of Willie Friend, and that testimony is filled with discrepancies. The Court of Appeals examined the evidence, and "as the brief partial summary of the evidence [in its opinion] shows, the evidence introduced at trial was contradictory." (Pet-Ap. 110.) Much like the Court of Appeals in *Dyess* when looking at whether the "evidence was close and disputed," 124 Wis. 2d at 546, 370 N.W. 2d at 233, the Court of Appeals here appropriately noted the "conflicting evidence" adduced by the state in this case to determine that the error in Mr. Wilson's trial was harmful.

An especially significant piece of evidence weighing against the conviction of Mr. Wilson (this is to leave aside for the moment the improperly *excluded* testimony) is the testimony of the eyewitness, Carol Kidd-Edwards. Ms. Kidd-Edwards described a man with a "slight build" getting out of the car and then approaching Ms. Maric's car to shoot. (R.51:123.) But Mr. Wilson is not a man with a "slight build."

The state seizes on Ms. Kidd-Edwards's testimony that a "gold-toned Lincoln" pulled up near Ms. Maric's car. (R.51:101.) Mr. Wilson introduced evidence that there were at least four gold

Lincoln Continental Marks registered to individuals in the neighborhood near the vicinity of the shooting. (R.53:175-181.) Mr. Wilson drove a gold Lincoln Continental; however, his car had a distinctive license plate: red, white, and blue, with the letters G-BALL. (R.51:173, 176; 53:86; 54:62.) Ms. Kidd-Edwards testified that the license plate she saw was a regular plate with red letters and numbers. (R.51:12-131; 54:55-56; Pet-Ap. 109.)

Willie Friend talked about a specialized plate, but that was unsupported. Interestingly, Friend had seen the specialty plate on Mr. Wilson's car earlier that evening when Eva Maric pointed out the car and "design license plate" as belonging to Mr. Wilson ("General's car") when she and Friend passed the unoccupied car that was parked in front of a bar that was closed. (R.51:23.)

Willie Friend's testimony played a large role in the state's case, but that testimony is suspect. There are many instances where Friend's testimony conflicts with other evidence (even the admitted evidence). First and foremost, Friend's identification of Mr. Wilson as a shooter is inconsistent with the description that Friend gave of the shooter. Friend testified that a "medium" man with "gold rimmed glasses" stepped out of the car with a gun in

his left hand and started shooting at him. (R.51:40,51,67.) According to Friend, the shooter was left-handed. (R.43:20-21; 51:67.) However, Mr. Wilson introduced credible evidence from witnesses that he had never worn gold-rimmed glasses. (R.53:8,124,128,136,139-140, 148.) Army Reserve colleagues and army records reflected that Mr. Wilson shoots right-handed. (R.53:139, 54: 39, 42-44; 55:107.)

In certain other respects as well, Friend's testimony does not add up. Friend testified that, while by Ms. Maric's car, he was shot at. There were no bullet strikes in the concrete close to the car where Friend claims he was shot at. Bullet strikes, which had been made by the larger caliber bullets, were adjacent to Ms. Maric's car (some 20 to 40 feet away from Ms. Maric's car as stated in the preliminary hearing by Detective Dubis). (R.42:10; 53:49.)

Friend testified that shots were fired at him when he was by the passenger door (R.51:40) (smaller-caliber bullets were found in the lower half of the passenger door of Ms. Maric's car, not the upper half where the chance of hitting Friend was more serious) and when he was running up the hill. However, it is hard to credit that, with bullets raining around Willie Friend, he

was not shot. (R.51:41.) The Court of Appeals rightly noted the discrepancy in Willie Friend's story of "bullets landing everywhere, but none hitting Friend, despite the fact that Wilson is a skilled marksman." (Pet-Ap. 110.) The point, in all events, is not the persuasiveness of this particular testimony in isolation; it is that the admission of this testimony shows the prejudice of denying Wilson the third-party defense which he was entitled to offer to the jury.

Willie Friend testified that Ms. Maric was afraid of Mr. Wilson.[7] (R.51:52-54; 56:62-70.) Barbara Lange, a friend of Eva, testified that she did not see Eva as being afraid of Mr. Wilson. (R.56:39.) In addition, Mr. Wilson introduced nine taped telephone messages left on Mr. Wilson's answering machine, the last as close as two days before Ms. Maric died. They gave evidence, in the words of the Court of Appeals, of "Maric . . . at ease, mak[ing] casual conversation, and stat[ing] that she loves Wilson 'madly' and misses him because he had been away on

[7] For instance, according to Friend, Ms. Maric told him that Wilson tried to run her off the road some time after 2 a.m. on April 21. Mr. Wilson denied that this occurred. And Willie Friend's actions were inconsistent with Ms. Maric's (or his) being exposed to such danger. When the car approached the after-hours club some hours later, Friend testified that he got out of the car to talk to the other man (who Friend said was Mr. Wilson), despite the earlier supposed threat.

vacation." (Pet-Ap. 108; R.56:14-34.) And, if the testimony had been admitted, Ms. Maric's friends would have testified that Ms. Maric was afraid of Willie Friend, who had eight convictions. (R.51:18.)

There are also the instances of Friend's untruthfulness:

- In his statement to the police, Friend testified that he and Maric had not been at his brother's nightclub the night of the murder. (R.51:86.) At the preliminary hearing, Friend testified the same. At trial, Friend admitted that they had been there. (R.51:90.)

- At one point, Friend told the police that he first went to seek help for Ms. Maric with the neighbor, Ms. Kidd-Edwards. (R.43:24; 51:109.) In another account, Friend testified that he went into the after-hours club to get his brother first. (R.51:45.)

- Friend "admitted at trial that he had made a telephone call from the courthouse before the preliminary hearing in which he had stated . . . he 'had to get his story together' about what happened the night of the murder." (Pet-Ap. 108; R.51:88-89.)

The state seeks to rely on physical evidence. The Court of Appeals had it exactly right, legally and factually: "As for the physical evidence, it does not preclude Friend's involvement." (Pet-Ap. 107.) Even if the standard were different (as it is not), the physical evidence does not link Mr. Wilson to the crime. No weapon was recovered, which the state acknowledges. (State's

Brief at 19.) The bullet strikes (and likely the fatal shot of Ms. Maric) were, as the expert for the state testified, from a larger-caliber gun (specifically, a .44 caliber gun), and the bullet rifling markings were those of a Sturm Ruger. (R.53:56.) The state questioned Mr. Wilson at trial about a Smith & Wesson .44 Magnum that he had owned and, as he explained at trial, had bartered on embarrassing terms. (R.55:56-60, 96-100.) But that gun was beside the point: there was *no* evidence of Mr. Wilson's owning a Sturm Ruger—the weapon identified by the state's expert, Monty Lutz, as the type from which the larger-caliber bullets hitting Ms. Maric had been fired.[8]

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[8] Indeed, Monty Lutz showed the jury (for "illustrative purposes") a .44 magnum Sturm Ruger gun. (R.53:53.) The prosecutor asked him: "Can you tell us whether or not this is the type of gun that fires bullets such as [the .44 magnum bullets in front of you as exhibits]?" (R.53:55.) Mr. Lutz stated in response: "This is the same type and the same make that is indicated by the rifles, the marking characteristics that are on the fired bullets that I looked at. The manufacturer of Stern Rouger [i.e., Sturm Ruger] makes rifles like the rifles that I found on the evidence bullets that were submitted to me." (R.53:55-56.)

Notwithstanding Monty Lutz's testimony that the rifle marks on the recovered larger caliber bullets were from a Sturm Ruger, the state seeks to hedge the point in its brief. (State's Brief at 8.) But there was less hedging in the letter that counsel for the state sent to the Court of Appeals on September 17, 2013, successfully seeking a change in the opinion (specifically, the deletion of a criticism of counsel) and acknowledging: "In short, upon reflection I agree that one reading – and perhaps the better reading – of Lutz's testimony is that the bullets were fired from a Sturm Ruger." Letter Dated September 17, 2013, at 3 (docketed as motion for miscellaneous relief).

In the end, after examining the "conflicting evidence," the Court of Appeals determined "the State cannot meet its burden of showing that there is no reasonable possibility that the error contributed to the verdict." (Pet.-Ap. 110.)[9] In *Vollbrecht*, the court found that the defendant's inability to advance to the jury viable third-party evidence required reversal under this standard. 2012 WI App. 90, ¶¶ 34-36, 344 Wis. 2d 69, 99, 820 N.W.2d 443, 458. The Court of Appeals was correct in *Vollbrecht*, and it was correct here: there was a reasonable possibility that Mr. Wilson's trial would have come out differently if he could have introduced all his third-party evidence pointing to Willie Friend.

Mr. Wilson, as the Court of Appeals concluded, was "denied his constitutional right to present a complete defense during his criminal trial because the circuit court did not allow him to introduce evidence that Friend was involved in the murder

[9] The state attempts to diminish the Court of Appeals' conclusion regarding the evidence by noting that the Court of Appeals did not have the benefit of the "numerous photographs and diagrams introduced as exhibits" at trial. (State's Brief at 30 & n.6.) But the absence of those photographs and diagrams is the fault of the state, which had those in its safekeeping. Because of the state, there is no reason to credit the state's argument that "the trial court was therefore in a superior position to the court of appeals with respect to understanding the testimony and other evidence presented at trial." (State's Brief at 30.)

despite having shown that Friend had a motive, the opportunity and a direct connection to the crime." (Pet-Ap. 110.)

The case is not hard, but it is important, both to Mr. Wilson, who is serving a life sentence, and for a fair criminal justice system.

CONCLUSION

For all of these reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

s/ Anne Berleman Kearney

Anne Berleman Kearney
State Bar No. 1031085
Joseph D. Kearney
State Bar No. 1033154
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

Attorneys for Defendant-Appellant General Grant Wilson

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief of Defendant-Appellant General Grant Wilson conforms to the rules contained in s. 809.62(4) for a brief produced with a proportional serif font. The length of this brief is 9,231 words.

s/ Anne Berleman Kearney

_____

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

Attorney for Defendant-Appellant
General Grant Wilson

CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this Brief of Defendant-Appellant General Grant Wilson, excluding the appendix, if any, which complies with the requirements of section 809.62 and 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

s/ Anne Berleman Kearney

_____

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966
Attorney for Defendant-Appellant
General Grant Wilson

MAILING CERTIFICATION

I, Anne Berleman Kearney, do hereby certify that the Brief of Defendant-Appellant General Grant Wilson was hand-delivered to a third-party carrier (Federal Express) on May 20, 2014 for delivery to

Ms. Diane Fremgen
Clerk of Court
Wisconsin Supreme Court
110 E. Main Street, Suite 215
Madison, Wisconsin 53703

s/ Anne Berleman Kearney

Anne Berleman Kearney (WBN 1031085)
Appellate Consulting Group
Post Office Box 2145
Milwaukee, Wisconsin 53201-2145
(414) 332-0966

Attorney for Defendant-Appellant General Grant Wilson