STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT II

Appeal No.: 2015AP202-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JEFFREY C. DENNY,
Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING POST-CONVICTION RELIEF ENTERED JANUARY 2, 2015 IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, THE HONORABLE JOSEPH W. VOILAND PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, JEFFREY C. DENNY

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ISSUES PRESENTED

I. Did the circuit court err in denying DNA testing at state and private expense by finding that the evidence was not *relevant* for purposes of the DNA testing statute, Wis. Stat. § 974.07, even though it was collected from the crime scene and admitted against Jeffrey Denny at his trial?

The circuit court denied the DNA motion, finding that "[t]he evidence Denny now wants tested is not relevant because it is not the evidence 'that resulted in the conviction'" (228:8, App. A:8), that "the relevance of finding DNA from an additional person is further weakened when considering that Denny was convicted as a party to the crime" (228:9, App. A:9), and that "testing, even at his own expense, is not relevant within the meaning of section 974.07(2)." (228:10, App. A:10).

II. Did the circuit court err in denying DNA testing at public expense under Wis. Stat. §974.07 by finding that even if the DNA testing produced results favorable to Denny, there was not a reasonable probability that those DNA test results would create a different outcome?

The circuit court denied the DNA motion, finding that "DNA testing in this case would not make it 'reasonably probable' that Denny is not guilty of doing what the jury determined he is guilty of doing – being a party to the crime of murder, and would not exculpate him" (228:11-12, App. A:11-12).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Jeffrey Denny does not request oral argument because the briefs will adequately address the issues. Publication is not requested because the issues will be resolved by settled law.

STATEMENT OF THE CASE AND FACTS

The Murder

On January 26, 1982, C.M. was murdered at his home in Grafton, Wisconsin. (215:18). His friend, Jon Leatherman, stated that he arrived at C.M.'s house that morning, walked through the unlocked front door, and made his way to C.M.'s bedroom. (215:18). The two had spoken on the telephone less than two hours earlier. (215:18). But when Leatherman entered C.M.'s room, he found his friend lying face down, covered in blood. (215:18). Leatherman called the police, who responded immediately. (215:18). They also found C.M. lying face down and covered in blood. (215:18). Unable to find a pulse, the officers presumed C.M. was dead. (215:18).

C.M.'s shirt was torn, revealing a large gash on his back. (215:19). Pieces of a shattered bong pipe were strewn around, on, and under his body, as were thumbtacks, screws, safety pins, small screens, and a red butane lighter. (215:19). By C.M.'s head, a metal lawn chair had been tipped over. (215:18-19). Two gloves and a dark blue stocking cap lay on the floor. (215:53; 245:185, 186). Two fiber-type facial breathing masks—one clean, one heavily soiled—were found behind a beanbag chair. (215:20). A glass of orange juice was spilled on the floor, and was so freshly spilled that the ice cubes from the glass still had not melted when police arrived. (215:19). Blood was everywhere: on the walls, the desk, the bed's headboard, the door, the beanbag chair. (215:20; 215:54). The grisly scene extended to the hallway: A yellow, blood-stained hand towel had been dropped on the floor. (215:20-21). A telephone book, marked by a bloody footprint, lay nearby. (215:53). Blood was smeared along the wall. (215:20-21).

At the morgue, Dr. Helen Young examined C.M.'s body. (215:24). She surmised that someone had hit him

multiple times in the head with a heavy, blunt object—possibly the bong pipe—and had broken his nose. (215:24; 247:39). Someone had stabbed him 52 times in the back and side. (215:24). Dr. Young found additional knife wounds on C.M.'s abdomen, neck, forehead, hand, and forearm. (215:24-25).

Dr. Young collected a number of hairs, "possibly foreign," found stuck to C.M.'s face and clothing and clenched in his left hand. (215:25). She gathered C.M.'s bloody jacket, shirt, jeans, and socks and placed them in sealed bags. (223:18, 22). A great deal of biological and physical evidence was collected and preserved, but could not be tested for DNA in 1982. (223:20-21). The State tested these items using the only forensic analyses available at the time, blood typing and visual microscopic hair comparison. (249:129-134). However, the results were inconclusive and could not identify the perpetrator. (249:129-34; 249:140-47).

The Grafton Police Department worked with the Wisconsin State Crime Lab in Madison to investigate the case. (223:17). Officers originally hypothesized that C.M. was killed by a freak explosion with a butane lighter, but quickly realized that C.M.'s injuries were not accidental. (215:21). After investigating a long list of potential suspects (215:30-34), officers received a tip that Trent Denny told an acquaintance that his brother, Kent Denny ("Kent"), admitted to committing the crime. (215:27). The police settled on Appellant Jeffrey Denny ("Jeffrey") as an additional suspect after interviewing Kent. (215:36-37).

When Jeffrey was questioned by police, he admitted to knowing C.M. because he occasionally bought marijuana from him through John Leatherman. (215:36). Jeffrey had been at C.M.'s residence on two occasions; once, in the summer of 1980 and again, approximately one to one and a half months before C.M.'s death. (215:36). He did not admit

to committing the crime and stated that he learned about C.M.'s death through Leatherman. (215:36).

During their subsequent investigation, police heard from Trent Denny that Jeffrey showed him the knife used to kill C.M. half-buried behind their house—but the knife never appeared. (246:251; 245:56; 215:39-43). Police heard from Lori Jacque that Kent put some clothing purportedly worn during the murder in a dump. (247:93). But again, the police could not find the clothing. (245:56). Despite their investigation, the police never found any of the victim's belongings in the Denny brothers' possession. Yet both brothers were charged with first-degree murder, as party to the crime. (1).

The Trial

Jeffrey and Kent were jointly tried for C.M.'s homicide, the State hypothesizing that the brothers took turns stabbing and striking C.M. (2:3). The case against them consisted primarily of witnesses who claimed that they heard the brothers brag about killing C.M. (245:53-59, 61). During opening, the State claimed that these witnesses were the "meat and potatoes of the case." (245:53). Some of these witnesses were granted immunity for their testimony. (245:64-65).

The Wisconsin State Crime Lab analyzed the physical evidence using the only methods available to it in the early 1980s: blood typing and microscopic hair comparison. (249:129-34; 249:140-47). Although a host of physical evidence collected from the crime scene was admitted at trial, none of it connected Jeffrey to the crime through forensic analysis—in fact, hairs found at the scene of the crime were visually compared to Jeffrey's hair and found to be inconsistent. (249:146). The only piece of physical evidence offered to directly connect Jeffrey to the crime scene was a bloody shoeprint found on the telephone book in the hallway

leading to C.M.'s room. (215:53). The prosecution claimed at trial that a pair of shoes belonging to Jeffrey matched this bloody shoeprint. (245:63).[1] On cross-examination, however, a lab analyst testifying for the prosecution stated that the soles of Jeffrey's shoes were mass-produced and sold to various shoe companies, who put them on a variety of shoes. (249:227-28). The analyst could not determine that the shoe recovered by the police was the same shoe – or even the same-sized shoe - that had left the imprint on the telephone book. (249:223).

Regardless, the jury found Jeffrey and Kent guilty of first degree-murder (250:197) and the court sentenced them both to life imprisonment. (99:1; App. B:1). The Court of Appeals affirmed Jeffrey's conviction on direct appeal, holding that the trial court did not err by denying Jeffrey and Kent's motions for severance. (156).

Jeffrey filed his first and only motion for DNA testing on May 1, 2014, which he supplemented on August 8, 2014 ("974.07 Motions"). (215; 222). In the motions, he sought testing of evidence collected at the scene of the crime, which could have been left or touched by the perpetrator, including pieces of the shattered bong pipe, the hairs collected from the victim's grasp, the yellow, bloody hand towel, a variety of other bloody items, and various other items found scattered near the body. (215; 222) He argued that he met the statutory requirements for DNA testing at public expense or, alternatively, at private expense. (215:13). After a hearing on the matter (253), the circuit court denied Jeffrey's 974.07 Motions in a written Decision and Order filed January 2, 2015. (228, App. A). The circuit court found that the evidence

[1] During their investigation, the police obtained a pair of sneakers from Jeffrey's acquaintance. (245:60). The acquaintance claimed that Jeffrey left the shoes in his car trunk. (245:60). The acquaintance stated that he wore the shoes for several months before handing them over to the police. (245:60).

that Jeffrey identified for DNA testing was not relevant to his conviction and that no DNA testing results could cause a reasonable probability of a different outcome in Jeffrey's case (228:8-13, App. A:8-13). Jeffrey now appeals.

ARGUMENT

Jeffrey requests now-available post-conviction DNA testing pursuant to Wis. Stat. § 974.07 in order to determine the identity of the perpetrator. "DNA testing has an unparalleled ability to both exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009). In addition to being able to obtain DNA profiles from bodily fluids, such as blood and saliva, analysts are also able to obtain DNA profiles from items that a perpetrator touched. "If the touched item is collected as possible evidence, Touch DNA analysis may be able to link the perpetrator to the crime." [2]

Jeffrey requested testing at both state and private expense of various items collected from the crime scene that the perpetrator may have contacted or left behind. (215; 223). Wis. Stat. § 974.07(2) & (7)(a) require courts to order DNA testing of evidence at *state expense* when (a) the movant claims innocence of the crime; (b) the evidence is relevant to the investigation or prosecution that resulted in the conviction; (c) the State possesses the evidence to be tested; (d) the evidence has not been altered or replaced; (e) the evidence has not been subjected to DNA testing previously or may now be tested using a new technique that was not previously available; and (f) it is reasonably probable that the movant would not have been prosecuted or convicted if exculpatory DNA results had been available before prosecution or conviction. *See also State v. Moran*, 2005 WI 115, ¶ 3, 284 Wis. 2d 24, 700 N.W.2d 884.

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[2] Angela L. Williamson, *Touch DNA: Forensic Collection and Application to Investigations*, J. Assoc. Crime Scene Reconstr. 2012:18(1);1. (Attached as App. C:1).

In order to obtain DNA testing at *private expense*, a defendant must meet a lesser burden. *Moran*, 2005 WI 115, ¶ 56-57("We are unable to discern from the plain language of § 974.07 a clear legislative intent to block testing demanded by a person willing and able to pay until that person satisfies the requirements for publicly funded DNA testing."). Wis. Stat. § 974.07(2) & (6) require courts to order DNA testing of evidence at private expense if the movant shows merely that (a) the evidence is relevant to the investigation or prosecution that resulted in the conviction; (b) the State possesses the evidence to be tested; and (c) the evidence has not been subjected to DNA testing or may now be tested using a new technique that was not previously available. *See also Moran*, 2005 WI 115, ¶ 3.

The circuit court found that Jeffrey did not satisfy two of the elements required to obtain testing - relevance (required for testing at public or private expense) and a reasonable probability of a different outcome (additionally required for testing at public expense). (228, App. A). There is no dispute that Jeffrey met the other requirements for testing: he maintains his innocence, (215:5), the physical evidence is still in the possession of the Ozaukee County Clerk of Courts, and the evidence has never been subjected to DNA testing (215:39-43).

The circuit court's decision denying all testing was mistaken because the evidence at issue was collected from the crime scene and autopsy and was introduced as evidence at trial, making it highly relevant to Jeffrey's prosecution and conviction. The evidence easily satisfies the very minimal standard required to establish relevancy. *See* Wis. Stat. § 904.01. Further, this ruling was flawed because there are a number of possible DNA testing results that would create a reasonable probability of a different outcome in Jeffrey's prosecution and conviction. This Court should reverse the circuit court's erroneous ruling and order DNA testing of the

crime scene evidence in order to identify the perpetrator(s) of this crime.

Standard of Review

Statutory interpretation is a question of law reviewed *de novo*. *State v. Moran*, 2005 WI 115, ¶ 26. Likewise, this court reviews a circuit court's application of a statute to specific facts *de novo*. *Id.* This court "accept[s] the circuit court's findings of fact unless they are clearly erroneous." *State v. Dearborn*, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97.

I. The evidence Jeffrey seeks for DNA testing was relevant to his prosecution or conviction.

In his 974.07 Motions, Jeffrey sought testing of several items of evidence collected by the Grafton Police Department from the crime scene. (215:2; 222:8). These items included: pieces of a bong pipe, hair collected from the victim, a yellow hand towel, facial breathing masks[3], blood from a metal chair found by the victim's head, the victim's bloody clothing, a bloody hat, gloves, lighter, screens, glass cup, and the victim's hair standard for comparison purposes. (215:13; 222:8).

All of the items were found in close proximity to the victim or in the hallway leading to the victim's bedroom. (245:174-211). All of the items were collected by police during the investigation of this case. (245:174-211). All items except the facial breathing masks were entered by the State as evidence during trial. (235:1-6).

[3] The facial breathing masks were collected from the crime scene, but not found with the other evidence retrieved in 2013. Denny requested their testing to preserve his ability to do so in the event that they are located. (226:3-4).

In denying the 974.07 Motions, the circuit court found that these items were not relevant because 1) they were "not evidence 'that resulted in the conviction'"; 2) Jeffrey was convicted as a party to a crime; and 3) the requested testing did not relate to the purpose of the DNA testing statute. (228:8-9, App. A:8-9). The circuit court erred in this analysis.

A. The circuit court misinterpreted the relevance requirement of the DNA statute, because the evidence requested for testing *is* relevant to Jeffrey's investigation and prosecution.

In order to obtain DNA testing at private or public expense, a defendant must show that the evidence sought for testing "is *relevant to the investigation or prosecution* that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect." Wis. Stat. § 974.07(2)(a)(emphasis added). The circuit court found that because the evidence requested for testing did not relate to any of the evidence presented *against* Jeffrey at trial, it was not relevant. (228:8). In reaching this conclusion, the circuit court misinterpreted the plain language of Wis. Stat. § 974.07.

Wis. Stat. § 974.07 does not require that the evidence sought for testing resulted in the conviction. The evidence must simply be relevant to the investigation or prosecution from which the defendant seeks relief and not a separate, unrelated charge. The clause "that resulted in the conviction" simply identifies to which conviction the evidence must be relevant. The statutory language does not require the evidence to have been presented at trial or considered by a jury. *Id*. By stating that the evidence must be that which "resulted in the conviction," (228:8, App. A:8) the circuit court added a requirement that does not exist.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence." Wis. Stat. § 904.01. "Evidence is relevant when it indicates that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from the evidence. Any fact which tends to prove a material issue is relevant." *Rogers v. State*, 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980).

In *State v. Moran*, the Wisconsin Supreme Court explained what a defendant would have to show in terms of relevance before he could receive DNA testing. 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 88. In *Moran*, the defendant sought DNA testing of blood samples taken from a crime scene, including a bloody brick. *Id*. ¶19. The Court stated that "Moran will have to show [in the circuit court] that the determination of whose blood is on the 'bloody brick' is evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id*. ¶ 46. Thus, the Court used the Wis. Stat. §904.01 definition of relevancy when deciding a case involving a request for DNA testing under Wis. Stat. §974.07.

The evidence Jeffrey requests for DNA testing has the potential to determine the identity of the killer or killers. Each of the items requested for testing was collected by police from the crime scene—in the room where the victim was found or just outside, in the hallway—or from the victim's body. (245:174-209). Given the disarray and scope of the crime scene, it is likely that the perpetrator(s) struggled with the victim and came into contact with each of the requested items, leaving behind DNA.

a. *Pieces of a bong pipe*: Jeffrey's 974.07 Motions requested testing of several portions of the bong pipe, including a large portion of the tube, the base of the pipe, and other broken pieces of the pipe. (215:5-6, 223:3). When the police arrived, they observed that the pipe was broken on one end and

pieces of the pipe were surrounding the victim's body. (215:19; 245:202). During trial, the State argued that the perpetrator used the pipe to hit the victim over the head. (245:44-45). The State's pathologist testified that the pipe would almost certainly have produced the blunt trauma to the victim's head. (247:39). Because the perpetrator must have touched the bong in order to hit C.M., it has the potential to reveal that person's identity through testing for touch DNA.

b. *The hairs removed from the victim's hands*: The victim was found clutching a number of hairs in both of his hands. (245:192-93). At the time of trial, the lab analyst found these hairs to be consistent with the hair samples from C.M. (249:135-36). However, the lab analyst clarified that when using the term consistent he was "basically facing the question could this individual have produced this hair." (249:145). Further, the analyst agreed that the comparison of hairs is an art and not a science and that "the result [was] not a scientific certainty." (249:172). It is now better known that microscopic hair analysis is unreliable [4] and therefore, it is possible that C.M. was not the source of the hairs. The nature of the crime scene indicated that the victim struggled with the perpetrator and thus a reasonable inference is that C.M. may have pulled out the person's hair during the struggle. Testing this hair has the potential to reveal the identity of the perpetrator.

[4] Spenser S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, WashingtonPost.com (April 18, 2015), http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html ("[T]here is no accepted research on how often hair from different people may appear the same.").

c. *Stray hairs found on the victim's body*: Jeffrey's 974.07 Motions requested testing of the hairs found on the victim, including those collected from the sterile sheet used to wrap the victim's body. (215:6; 223:5). At the crime scene, the police noticed that many strands of hair were stuck to the victim with dried blood. (245:193-197). Several hairs from the victim's shirt and the sterile sheet were analyzed at the time of trial and found to be inconsistent with the victim. (249:136). The lab analyst also concluded that none of the collected hairs were consistent with Jeffrey's hair. (249:144-147). While committing this violent crime, it is likely that the perpetrator shed hair, or had it pulled from his body. That the hair was stuck to the victim with blood makes it more likely that they were left in the victim's bedroom during the crime. A DNA profile developed from the hairs could identify the perpetrator(s).

d. *The yellow hand towel*: Police collected a yellow hand towel with several areas of blood on it from the hallway. (215:21; 245:188). This towel was in close proximity to the victim's bedroom (245:188) and contained the same type blood as the victim's. (245:129-30). The towel could have been used by a perpetrator to wipe blood off a weapon as he was leaving. DNA from the towel could also identify the perpetrator.

e. *Gloves found near the victim*: Two caramel-colored gloves with sheepskin linings were found by police in the room with C.M.'s body. (223:17; 245:185-186). The police collected the gloves and submitted them to the Wisconsin State Crime Lab for further inspection and analysis, but DNA testing, of course, was not available. (223:20-21). The lab

analyst concluded that blood was present on at least one of the gloves, but was unable to match the blood to the victim's sample, finding that the serological typing results were inconclusive. (249:130-31). If not matched to the victim, DNA testing of the blood could reveal the perpetrator's identity. If the perpetrator wore these gloves while committing the crime, his DNA could also be found on the inside of the gloves. The perpetrator's touch DNA could also be found on the outside of the gloves if, for example, he wiped sweat from his face during or after the attack.

f. *The bloody hat found near the victim*: A "dark blue knit stocking-type cap" was also found in the victim's bedroom, near the gloves. (223:17). An officer testified at trial that the hat was found on the victim's bedroom floor and had some blood on it. (245:185). The hat was on top of an ice cube, suggesting that it had recently been dropped or placed there. (246:73). It was submitted to the Wisconsin Regional Crime Lab for further inspection and analysis, but not DNA testing. (223:20). It is possible that the perpetrator wore the hat or grabbed the hat off the victim during the struggle, especially given that it was covering an unmelted ice cube. Testing the hat could reveal the perpetrator.

g. *The victim's bloody clothing*: Officers collected and packaged the victim's clothing, including his jacket, torn shirt, jeans and socks. (223:18; 245:175-183). Officers described the clothing as being soaked in blood. (245:175, 182-184). The perpetrator likely touched the victim's clothing, and almost certainly tore the victim's shirt, during the struggle and DNA testing has the potential to reveal the killer's identity.

h. *Blood from the metal chair found by the victim's head*: A wire mesh outdoor lounge chair was found over the victim's head. (223:12-13). Officers noted that the chair contained numerous areas of human blood and noted in a report that it "apparently was the original location of the victim prior to the accident." (223:16). Given the violent nature of the scene, it is likely that the perpetrator touched the chair during the attack, leaving behind DNA which could show his true identity.

i. *The glass cup found near the victim*: When the police arrived at the crime scene, they discovered a glass cup on the floor with blood on the outside and an orange liquid on the inside. (245:210). Unmelted ice cubes were found near the glass, indicating that the victim died a short time before being discovered. (245:211). It is likely that either the victim or the perpetrator drank from the cup around the time of the attack and DNA testing could be used to show the identity of that person.

j. *The lighter found under the victim's body*: Officers collected a red disposable lighter underneath the victim's right shoulder on the floor. (245:200). Like many of the items, the lighter was covered in blood. (245:200). With the State arguing that the victim was struck with the bong, it is possible that the lighter was used prior to the attack and that DNA testing of this item could reveal the identity of the perpetrator.

k. *The screens found on the victim's body*: Officers collected several small screens or "screened type filters" from the victim's back. (223:13). These screens were imbedded in the victim's shirt or the

flesh of his back. (223:13). It is possible that the killer(s) had contact with these items during the struggle.

l. *The facial breathing masks*: The police found and collected two facial breathing masks from the crime scene. (215:20). As one of the masks was "heavily soiled", it is possible that the perpetrators wore the masks during the attack, thus leaving salivary, epithelial, or blood cells on the masks that could be used to develop a DNA profile. (215:20).

m. *The victim's hair*: During autopsy, the victim's hair was collected "for purposes of analysis and comparison." (245: 189). Jeffrey is now requesting DNA testing on the victim's hair in order to rule out the victim's profile from others that may be found on the evidence.

Each of the above-listed items is relevant to the investigation and prosecution of this crime. There is a rational connection between the evidence Jeffrey requests for testing and the true identity of the perpetrator.

B. The evidence is relevant regardless of Jeffrey's conviction as a party to a crime.

The circuit court also incorrectly concluded that the evidence was not relevant because Jeffrey was convicted as a party to the crime. (228:9, App. A:9). The court reasoned that "DNA evidence showing that additional persons may have been involved would not change the evidence showing that Jeffrey also was involved as a party to the crime, which a jury found." (228:9, App. A:9). The court further reasoned that "A jury could have found Denny guilty as a party to the crime if he acted in concert with the others who inflicted the wounds, while Denny stood lookout in the hallway, leaving none of his DNA at the scene." (228:2, App. A:2).

However, the circuit court's analysis ignores that the State portrayed Jeffrey as an active participant in the crime during trial. (250:112-13). During closing argument, the prosecutor argued that Jeffrey stabbed and kicked C.M. during the attack. (250:113, 118). The prosecutor further argued that "Jeff said that he and Kent killed the boy in Grafton, they stabbed him and hit him with the bong pipe." (250:117-18). None of the people who testified against Jeffrey at trial alleged that he was a look out, or was an otherwise passive observer. Jeffrey never made incriminating statements in which he said that he was a look out. Having DNA results showing that someone other than Jeffrey or his brother was present undermines the State's theory at trial – that Jeffrey and Kent acted as principals in the crime – and is relevant to the identity of the perpetrator.

Moreover, regardless of what theory the circuit court or the State may now imagine about Jeffrey's possible involvement in the crime, DNA testing could make that theory significantly less likely. Should the DNA evidence show that neither Jeffrey nor his brother was present on any of the biological evidence from the crime scene, even a party to the crime theory of responsibility would become less tenable. And that is all-the-more true if the biological evidence should identify some other party or parties, especially if they had no demonstrable connection to Jeffrey and his brother. The DNA evidence is clearly *relevant* at the least.

Finally, in denying Denny's request for DNA testing, the circuit court stated that the requested testing was also not relevant because it was not "related to the statute's purpose of exoneration of the wrongly convicted…" (228:10, App. A:10). The circuit court went on to state that "[t]he purpose is not to allow a convicted offender to demand testing to show that an additional person may have been involved. Rather, its purpose is to serve as a tool for those who have been wrongly

convicted to assist in exonerating themselves." (228:10, App. A:10).

However, if a defendant meets the statutory criteria to obtain DNA testing, then he is entitled to the testing, without some additional showing that he meets the purpose of the statute; indeed, satisfying the statutory requirements alone establishes that he meets the purpose of the statute. Jeffrey is seeking DNA testing to show that he is actually innocent of the crime for which he was convicted. (215:5). If his profile is not found, and other profiles are discovered, it undermines the State's theory presented against him. That is precisely the type of scenario that the statute plainly contemplates.

II. If exculpatory DNA results had been available, it is reasonably probable that the State would not have prosecuted or convicted Jeffrey.

Jeffrey also meets the requirements for postconviction DNA testing at state expense because "[i]t is reasonably probable that [Jeffrey] would not have been . . . convicted . . . if exculpatory [DNA] testing results had been available before the prosecution [or] conviction . . . ." Wis. Stat. § 974.07(7)(a)(2). The circuit court mistakenly decided that no DNA testing results could possibly exculpate Jeffrey when, in fact, there are a number of possible exculpatory DNA testing results in Jeffrey's case that would create a reasonable probability of a different outcome. (228:12-13, App. A:12-13).

Exculpatory DNA testing results would outweigh the testimonial evidence presented by the prosecution at Jeffrey's trial. The circuit court erred not only in its application of the statutory requirements to the facts but in its interpretation of the statutory language. The statute requires the court to assume exculpatory testing results and simply requires the court to assess whether those potential exculpatory results

would create a reasonable probability of a different outcome. Wis. Stat. § 974.07(7)(a)(2). If exculpatory DNA testing results had been available before or during trial, there is indeed a reasonable probability that Jeffrey would not have been prosecuted, or, if he were, that the jury would not have found Jeffrey guilty.

A. A variety of exculpatory DNA testing results would provide a reasonable probability of a different outcome.

Contrary to the circuit court's decision, exculpatory results with the potential to change the outcome are possible. The definition of exculpatory DNA testing results will vary based on the facts of each case. In this case, several types of exculpatory DNA testing results would outweigh the evidence that was presented against Jeffrey at trial and would create a reasonable probability that he would not have been prosecuted or convicted.

1. Results on one or more items that match a convicted offender would create a reasonable probability of a different outcome.

One exculpatory result that DNA testing may reveal is a convicted offender's DNA profile on one or more pieces of evidence collected from the crime scene. These results would identify a perpetrator and demonstrate that Jeffrey had not touched those items. The perpetrator(s) attacked C.M. in a violent rage and could have left behind skin cells, perspiration, saliva and their own blood on several items collected from the crime scene. They could have lost hairs during the struggle around C.M.'s bedroom. They may have left skin cells on the yellow towel, which was found lying on the floor of the hallway outside C.M.'s bedroom. (215:21). Testing revealing a DNA profile that matches a convicted

offender's profile in the Combined DNA Index System ("CODIS")[5] would undermine the State's theory of the crime because the State presented only circumstantial evidence that Jeffrey and his brother Kent attacked C.M. in his bedroom. Thus, such an exculpatory DNA testing result would create a reasonable probability that Jeffrey would not have been prosecuted or convicted.

2. Results that exclude Jeffrey as the source of DNA on all items would create a reasonable probability of a different outcome.

DNA testing may reveal profiles, but none that match Jeffrey's DNA. This result would be strong evidence that someone other than Jeffrey and Kent committed the crime. If Jeffrey's DNA is not found anywhere on the items that were collected at the crime scene, it would conflict with the State's trial theory of the crime and undermine confidence in the outcome at trial.

Exculpatory DNA testing results in Jeffrey's case would create a reasonable probability of a different outcome at trial. The absence of Jeffrey's DNA on any of the relevant evidence found at the crime scene could cause a rational juror to reasonably doubt the inconsistent, third-party statements[6] and the bloody shoeprint—which the State could not match to the shoe that was purportedly Jeffrey's—introduced at trial.

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[5] For example, Chaunte Ott was freed from prison after DNA evidence collected in his case was linked to Milwaukee serial killer Walter Ellis. *See* Bruce Vielmetti, *Milwaukee to Pay $6.5 Million to Man Cleared after 13 Years in Prison*, Milwaukee Journal Sentinel (March 31, 2015), http://www.jsonline.com/news/crime/milwaukee-to-pay-65-million-to-man-cleared-after-13-years-in-prison-b99472841z1-298216201.html.

[6] These inconsistencies are explained further on pages 29-30 below.

3. Results on multiple items matching an unknown third party would create a reasonable probability of a different outcome.

DNA testing may reveal a profile that appears on multiple items found at the crime scene. If this redundant DNA profile does not match Jeffrey or Kent, it would strongly suggest that someone other than Jeffrey committed the crime, thus undermining confidence in Jeffrey's conviction. For example, if a third-party DNA profile were found on pieces of the bong pipe and the hairs from C.M.'s hand, it would indicate that the person whom C.M. fought with and who hit C.M. on the head with the bong was not Jeffrey or Kent. This evidence would conflict with the State's theory of the crime and show that someone else was the killer, creating a reasonable probability that Jeffrey would not have been prosecuted or convicted.

Courts in other states have allowed DNA testing in cases where the defendant was convicted as a party to a crime. For example, an Illinois man, Andre Davis, was exonerated by DNA testing despite the State's argument that he could have been a party to the crime and thus still be found guilty despite the lack of DNA evidence linking him to the crime. *People v. Davis*, 966 N.E.2d 570 (Ill. App. 2012). Davis was originally convicted of murdering a three-year-old girl in Illinois in 1983. *Id*. at 572. Over 20 years later, DNA testing revealed that alternate suspect Maurice Tucker's DNA matched most of the biological evidence—blood and semen—found at the crime. *Id.* at 572, 577. Another unknown male profile was also found in the biological evidence tested. *Id.* at 577. The circuit court adopted the State's argument that the new exculpatory DNA evidence did not create a reasonable probability of a different outcome at trial because Davis could have committed the crime in concert with Tucker. *Id.* at 582. However, the Illinois Court of Appeals rejected the State's argument and ordered a new trial in 2012, finding that "[t]he State's narrative of the crime, the theory

upon which it relied throughout the trial, and closing remarks all were designed to prove defendant raped the victim and then murdered her." *Id.* at 577. Because "[n]o one else was considered as a possible perpetrator" at the time of Davis' original trial, the State could not revise its theory of the case to include an accomplice later on. *Id.* at 581. The court found that because the new DNA evidence "changes how a jury would view all the evidence [it] undermines confidence in the outcome of the trial." *Id.* at 583. The prosecutor later dismissed the charges and Davis was freed.[7]

Likewise, a DNA profile on multiple pieces of evidence presented at Jeffrey's trial could undermine confidence in the outcome of Jeffrey's trial. The State relied on inconsistent third-party statements and a single piece of physical evidence, the questionable shoe print. A redundant DNA profile that does not match Jeffrey on the evidence collected from the crime scene could overcome the inconsistent third-party statements and weak physical evidence presented at Jeffrey's trial. These exculpatory results would raise reasonable doubt regarding the State's theory at trial that Jeffrey actively participated in killing C.M., creating a reasonable probability that Jeffrey would not have been prosecuted or convicted.

B. The statute requires circuit courts to assume exculpatory results when determining whether there is a reasonable probability of a different outcome.

In its decision, the circuit court improperly determined, as a threshold question, whether the results of DNA testing would be exculpatory. (228:11, App. A:11). The court erred

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[7] *See* Maurice Possley, *The National Registry of Exonerations: Andre Davis*, (July 6, 2012), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3939.

in making this determination because the plain language of the DNA testing statute requires courts to assume exculpatory DNA test results when analyzing whether such results would create a reasonable probability of a different outcome. Wis. Stat. § 974.07(7)(a)(2). Yet the trial court found that "DNA tests could not exculpate Denny." (228:11, App. A:11). This Court should reject the circuit court's incorrect interpretation of § 974.07(7)(a)(2).

The "starting point" of judicial analysis "is the statutory text." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003); *accord State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. When "the words of the statute are unambiguous, the judicial inquiry is complete." *Desert Palace*, 539 U.S. at 98 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)) (internal quotation marks omitted); *accord Seider v. O'Connell*, 2000 WI 76 ¶ 50, 236 Wis. 2d 211, 612 N.W.2d 659.

The plain language of Wis. Stat. § 974.07 requires courts to order DNA testing at public expense when the other requirements discussed are fulfilled and "it is reasonably probable that the movant would not have been prosecuted [or] convicted . . . if exculpatory deoxyribonucleic acid testing results had been available before the prosecution [or] conviction . . . ." Wis. Stat. § 974.07(7)(a)(2). Subsection (7)(a)(2) requires the trial judge to determine whether exculpatory DNA testing results would result in no prosecution or conviction in a specific case. The statute does not ask the circuit court to determine *whether* DNA testing results could be exculpatory.[8] Because "the statute's language is plain, the sole function of [this C]ourt[] . . . is to enforce it

[8] In order for "exculpatory" to be the focus of the judge's analysis, the subsection would read, "it is reasonably probable that results would have been exculpatory if deoxyribonucleic acid testing had been performed."

according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)) (internal quotation marks omitted); *accord Seider*, 2000 WI 76, ¶ 52.

Even if this Court were to look beyond the statute's plain meaning, secondary sources confirm that the legislature intended the statute to require courts to assume exculpatory results when considering whether those results could create a reasonable probability of a different outcome. An article drafted immediately after the statute was enacted explained that "the statute assumes favorable test results and requests testing if favorable results would create a reasonable probability of a different outcome." [9] Courts in other jurisdictions with similar post-conviction DNA testing statutes have held that their statutes require courts to assume favorable results. *See State v. Peterson*, 364 N.J. Super. 387, 836 A.2d 821 (App. Div. 2003); *Powers v. State*, 343 S.W.3d 36 (Tenn. 2011). For example, like Wisconsin's statute, the post-conviction DNA testing statute in Tennessee requires that a "reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis." Tenn. Code § 40-30-304(1). Tennessee courts have determined that when analyzing this section of the statute, courts "begin with the proposition that DNA analysis will prove to be exculpatory." *Powers*, 343 S.W.3d at 42.

The circuit court determined that "DNA tests could not exculpate Denny" despite the fact that Wis. Stat. § 947.07(7)(a)(2) requires the court to assume exculpatory results. (228:11, App. A:11). This Court should correct the

[9] Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 Wis. Lawyer No. 5 (May 2002), http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=75&Issue=5&ArticleID=353.

circuit court's mistaken interpretation of the statute. The true question is not whether the results could be exculpatory but whether exculpatory results could cause a reasonable probability of a different outcome.

C. Exculpatory results could lead to a reasonable probability of a different outcome because the evidence presented at trial only weakly supported the prosecution's theory of Jeffrey's involvement.

Courts must analyze potential exculpatory DNA test results within the context of the evidence presented at trial when deciding whether exculpatory DNA test results would create a reasonable probability of a different outcome. Wis. Stat. § 974.07(7)(a)(2). Section 974.07(7)(a)(2) turns on "reasonable probability," a term of art defined as "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *accord State v. O'Brien*, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999). To fulfill § 974.07(7)(a)(2), Jeffrey "need only demonstrate to the court that the outcome is suspect [with the inclusion of exculpatory DNA test results], but need not establish that the final result of the proceeding would have been different." *State v. Smith*, 207 Wis. 2d 258, 275-76, 558 N.W.2d 379 (1997).

At Jeffrey's original trial, the State presented weak, circumstantial evidence supporting its theory that Jeffrey and Kent attacked C.M. with one or more knives and a bong in C.M.'s bedroom, eventually killing C.M. (250:112-13). The potential exculpatory DNA test results described in Section II.A. above create a reasonable probability of a different

outcome when compared to the weak evidence presented at trial.

The prosecution's case rested almost exclusively on witnesses who claimed they heard Kent and Jeffrey brag about killing C.M. (245: 53-59, 61). Some of these witnesses were granted immunity. (245: 64-65). Although the witnesses' testimony matched the State's general theory that Jeffrey was an active participant in the murder, the details varied. For example:

- Trent Denny[10] testified that "Jeff told [him] that Kent . . . gave the knife to Jeff. [C.M.] was coming after Jeff while Jeff was stabbing him . . . after that Kent hit him over the head with the bong." (246:240-41).

- Patricia Robran testified that Jeffrey told her that he and Kent stabbed C.M. (247:271).

- Daniel Johansen testified that Jeffrey told him that Jeffrey "hit [C.M.] over the head with a bong and kicked him a couple of times." (249:51).

- Lori Jacque testified that Jeffrey told her he had "a scratch on his leg . . . that was from where [C.M.] had scratched him." (247:96).

The prosecution also presented Lori Jacque's testimony that she was with Kent when he took "a bundle of clothes," including a shirt, from a graveyard and threw them in a dumpster. (247: 91-93).

The State combined these witnesses' statements into its hypothesis of how the crime occurred: "Kent Denny

[10] Trent Denny was granted immunity for his testimony at trial. (246:234-35).

stabbed [C.M.] first in the stomach and then Jeffrey Denny took the knife away from Kent Denny and began stabbing [C.M.] numerous times." (2: 3). The State presented this story to the jury during its opening statement: "[C.M.] charged at Jeff . . . Kent Denny then struck [C.M.] in the head with a bong pipe several times, breaking the bong pipe, knocking [C.M.] down. At that point Jeff Denny bega[n] to stab [C.M.] and [C.M.] died somewhere in the sequence." (245: 53-54). The State reiterated this story during its closing statement:

> Kent stabbed [C.M.] first in the stomach. He asked him how do you feel. He stabbed him again and said how do you feel now. Kent then gives the knife to Jeff. [C.M.] then charges at Jeff. Jeff begins to stab [C.M.] and Kent then begins to hit [C.M.] over the head with a bong pipe.

(250:112-13).

The only piece of physical evidence used to convict Jeffrey was the bloody shoeprint found on a telephone book in the hallway leading to C.M.'s room. (215:53). This identification was very weak and the connection to Jeffrey was therefore quite tenuous, but even if the jury believed it showed a link to Jeffrey, it necessarily indicated that he was an active participant in the crime: the blood on the shoeprint came from inside C.M.'s room, meaning that the wearer of the shoe would have made the print after standing in the pools of blood in C.M.'s room. Exculpatory DNA results would rebut this evidence by showing that Jeffrey was not this active participant.

The circuit court erred in creating an alternate version of Jeffrey's involvement in the crime when considering whether DNA test results would create a reasonable probability of a different outcome at trial. The circuit court theorized that no test results could create a reasonable probability of Jeffrey's non-prosecution or conviction because he could have "stood lookout in the hallway, leaving

none of his DNA at the scene." (228:2, App. A:2). But such a scenario was never presented to the jury during Jeffrey's trial and so cannot uphold Jeffrey's conviction, even under Wis. Stat. § 939.05. *See State v. Hecht*, 116 Wis. 2d 605, 617-18, 324 N.W.2d 721 (1984) (reviewing each theory of the crime for sufficiency of the evidence to sustain the defendant's conviction). Moreover, exculpatory DNA testing results that reveal that neither Jeffrey nor Kent was the perpetrator would completely undermine the case presented to the jury at trial. This Court should correct the circuit court's error and consider exculpatory DNA test results within the context of the State's theory of the crime at trial, instead of a theory of the crime that was not presented to the jury and was not supported by the available evidence.

CONCLUSION

For the foregoing reasons, Jeffrey Denny respectfully requests that this Court reverse the circuit court's denial of Jeffrey's DNA testing motions, and order testing of the specified items at public or private expense.

Respectfully submitted this 11th day of May, 2015.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7,512 words.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). 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.

_____

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TABLE OF APPENDICIES