STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP202-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY C. DENNY,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH W. VOILAND, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A person convicted of a crime may move for postconviction DNA testing under Wis. Stat. § 974.07 (2013-14). A court shall order DNA testing if the person's motion satisfies subsection (7)(a)'s heighted requirements. Under *State v. Moran*, 2005 WI 115, ¶ 26, 284 Wis.2d 24, 700 N.W.2d 884, a court may also allow a person to obtain

testing at his or her expense under subsection (6) if the motion satisfies subsection (2)'s requirements.

1. Did Denny satisfy his burden for testing evidence under Wis. Stat. § 974.07(6) at his own expense?

Circuit court answered: No. The circuit court found that the evidence that Denny seeks to have tested is not relevant to his conviction. DNA testing showing the possible involvement of additional persons would not change the evidence that resulted in Denny's conviction for first-degree murder as a party to a crime (228:8-10).

2. Did Denny's motion satisfy the heightened requirements that would have compelled the circuit court to mandate DNA testing under Wis. Stat. § 974.07(7)(b)?

Circuit court answered: No. The circuit court concluded that DNA testing would not make it "reasonably probable" that a jury would not have convicted Denny of murder as a party to a crime. Under the circumstances, DNA testing results would not exculpate Denny (228:11-12).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Few published decisions interpret Wis. Stat. § 974.07's requirements governing motions for postconviction deoxyribonucleic acid (DNA) testing. To the extent that this Court resolves legal questions that go beyond prior published decisions governing postconviction DNA testing motions, the State believes that publication may assist the judiciary and parties prospectively litigating Wis. Stat. § 974.07 motions. While the State believes it has adequately addressed the issues in its brief, it welcomes the opportunity for oral argument.

SUPPLEMENTAL STATEMENT OF THE FACTS

The State does not dispute Denny's recitation of the facts. Denny states that the case against him "consisted primarily of witnesses who claimed that they heard the brothers [Jeffrey and Kent Denny][1] brag about killing [Christopher Mohr]." Denny's brief at 5. But Denny's statement of facts fails to detail the witnesses' trial testimony, which is critical to an understanding of the circuit court's decision. Several witnesses, including Denny's brother, Trent Denny, testified regarding Denny and Kent's admissions.

Denny's admissions to Trent Denny. After the circuit court granted Trent immunity (246:233-35), Trent described his brothers' admissions about their participation in Mohr's death. Several days after Kent told Trent that he killed Mohr (246:235-36), Trent asked Denny if what Kent had told him was true. Denny asked Trent, "why did Kent tell?" (246:238). Denny then told Trent that Denny and Kent had both stabbed Mohr, but that Kent stabbed Mohr first and in the stomach (246:239). Denny told Trent that after Kent stabbed Mohr, Kent asked Mohr how he felt (246:239-40). Kent then gave Denny the knife. Denny told Trent that he got scared and that Denny and Kent decided that they could not let Mohr live (246:240-41). Denny continued stabbing Mohr, Mohr came after Denny, and Kent then hit Mohr over the head with a bong (246:41).

Trent had another conversation with both Denny and Kent regarding the clothes Denny and Kent wore when they killed Mohr. They told Trent that they had to get rid of the clothes (246:245). Trent testified that he and Kent left their house with Lori Jacque, who drove them to a cemetery. Kent exited the car and returned five minutes later carrying a

[1] Throughout its brief, the State will refer to the defendant-appellant, Jeffrey Denny, as "Denny." It will refer to his brothers by their first names.

paper bag that contained clothes (246:246-49). Trent thought that he could smell blood on the clothes in the bag (246:247). Kent later held up a shirt in the car. Trent could see a stain on it but was not sure if it was blood. Jacque then drove Kent and Trent to a dump and Kent tossed the bag into the dump (246:249).

Denny later told Trent that they had to get rid of the knife. Denny showed Trent where the knife was. It was approximately a hundred yards behind the Denny residence. Trent only saw the knife handle and described it as a hunting knife (246:250-51, 288-90).

On another occasion when the brothers were together, Trent again asked Denny and Kent about the murder. Both Denny and Kent told Trent that they did it (246:251).

Denny's admissions to Lori Jacque. Lori Jacque testified under a grant of immunity (247:87-88). Jacque corroborated Trent's testimony regarding Kent's destruction of the clothing. Jacque drove Kent and Trent to a graveyard. Kent exited the car, went into the graveyard, and returned with a bundle of clothes under his arm. (247:90-91). Kent held a shirt up to show to Trent (247:91-92). Jacque provided Kent with a brown paper bag in which to place the clothing. Jacque then drove Kent to a location near a dump to dispose of the clothing (247:92-93). Jacque later heard a conversation between Denny and Kent in which they discussed forgetting the tennis shoes (247:94-95).

On another occasion, while in Kent's room, Jacque recalled that Denny told her about a scratch on his leg. Denny stated that "Chris," referring to Mohr, "scratched him" (247:95-96, 154).

Denny's admissions to Tammy Whittaker. Tammy Whittaker was Denny's sixteen-year-old girlfriend (249:96, 100). Denny told Whittaker about Mohr's murder (249:100-01). Denny claimed that Jonathan Leatherman went to

Mohr's house, started fighting with Mohr, and then stabbed him. Denny told Whittaker that Leatherman asked Denny to help, and Denny complied by hitting Mohr (249:101-02).

On another occasion, Denny told Whittaker that Denny and Kent went to Mohr's house, where Kent started stabbing Mohr. Denny went into the bathroom and asked himself what he had gotten himself into. Denny did not implicate Leatherman on this occasion (249:102). Denny told Whittaker that he got a quarter pound of marijuana from the murder (249:102-03).

Denny's statements to Patricia Robran. Patricia Robran described herself as Denny's friend (247:273). Robran recalled a conversation with Denny in the basement of her parent's house. Denny was crying. When Robran asked why, Denny explained that he and his brother Kent killed "the boy in Grafton." According to Denny, Kent had asked the victim how he was feeling and the victim replied that he was fine. Kent stabbed the victim and asked him how he felt now (247:270-73). Denny admitted to Robran that Denny and Kent stabbed the victim and hit him with a bong. Kent stabbed the victim first and then handed Denny the knife. Kent told Denny to continue what he was doing until Kent returned. Denny could not remember if he stabbed him five, ten, or fifteen times (247:271-72). Denny explained that all he got out of the murder was a quarter pound of marijuana (247:272).

Denny's admissions to Steve Hansen. Denny told Steve Hansen that he and Kent killed Mohr (247:255). Denny explained that they went to Mohr's house and went up to his bedroom. Denny told Hansen that Kent pulled a knife and stabbed Mohr (247:257). In a prior statement to police, Hansen recalled that Denny stated that Mohr was standing near a window when Kent pulled out a knife. Kent looked at Mohr and looked at Denny. Denny nodded his head and Kent started stabbing Mohr in the stomach. After Mohr fell to the floor, Denny kicked Mohr in the stomach (247:264-65).

Denny's admissions to Daniel Johansen. Daniel Johansen was an inmate with Denny in the Ozaukee County jail (249:49). Denny told Johansen about his participation in Mohr's murder. Denny explained to Johansen that Denny and Kent went to Mohr's house. Denny left the room and then heard Kent ask Mohr, "how does this feel"? Denny returned to the room and saw that Kent had stabbed Mohr in the stomach. Kent just started stabbing him (249:50). Denny also hit Mohr over the head with a bong and kicked him a couple times (249:51). Denny also told Johansen that he took some shoes to a sewage treatment plant (249:51).

Denny's disposal of the tennis shoes and their subsequent recovery.[2] Tod Trierweiler testified that he gave Denny a ride to Port Washington. While stopped at a Clark gas station, Denny asked Trierweiler for the keys. Denny then took the keys and placed a grocery bag in the trunk, while Trierweiler filled the car with gas and paid the attendant (249:64-65).

Tammy Whittaker recalled being at the Denny house with Denny, Kent, Trierweiler, and Russell Schram (249:97-98). Whittaker saw Schram put the shoes into a bag. Schram told her the shoes were the "murder shoes" (249:98-99). Schram put the shoes in Trierweiler's car on the back seat (249:99). Whittaker and the others drove to a gas station. While Trierweiler put gas in the car and paid inside the station, Denny and Schram moved the brown paper bag containing the shoes from the interior of the car to the trunk (249:99-100).

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[2] As Denny recognizes, the recovery of the tennis shoes is significant. The tread pattern on the shoes matched the tread pattern of a bloody shoeprint found on a telephone book in the hallway leading to Mohr's room. The Crime Laboratory analyst could not determine whether the shoes that Trierweiler turned over to the police left the shoe print on the phonebook. Denny's brief at 5-6.

Schram also remembered being at the Denny house with Denny, Kent, Treirweiler, and Whittaker. Schram recalled Denny removing a brown grocery bag from a closet, taking it out to a car and placing it on a back seat (249:112-13). Before Denny put the bag in the car's back seat, Denny told Schram that the "murder shoes" were in the bag (249:113). After stopping at a gas station, Denny asked Trierweiler for the keys to the trunk. Trierweiler gave him the keys and Denny placed the grocery bag into the trunk (249:114). Denny subsequently contacted Schram on a couple of occasions and told Schram that he had to get the shoes out of the car (249:115). Schram told Denny that he could get the shoes from Treirweiler (249:116). Denny subsequently called Schram from the jail and told Schram not to say anything about the shoes or he would become an accessory to the murder (249:117). Schram also recalled a conversation with Denny in which Denny told him how long it takes a person to die (249:116).

Sometime after Denny placed the bag with the shoes inside Treirweiler's trunk, Trierweiler looked in the trunk. He opened a bag and saw two pairs of shoes — a pair of blue and white tennis shoes and a pair of brown loafers (249:67-68). Trierweiler gave the loafers to Cindy Otto's brother from Texas. Trierweiler wore the tennis shoes for approximately three months (249:68-69). Trierweiler eventually turned the tennis shoes over to the police, but was not certain that Denny had placed them in his trunk (249:70-71). Otto corroborated Treirweiler's statement about finding the shoes in a grocery bag in Trierweiler's trunk. Otto recalled that Trierweiler wore the tennis shoes and gave a pair of shoes to her brother (249:86-88).

Kent's admissions to other people. Kent also made incriminating statements to several individuals about his involvement in Mohr's murder.[3] Kent told his brother Trent that he killed Mohr (246:235-36). Kent told Lori Jacque that he killed Mohr (247:89). She recalled an occasion when Kent was crying and indicated that he wanted to turn himself in (247:95). A week after Mohr's death, Kent told Diane Hansen that he killed Mohr (247:178). Kent later told Hansen that he killed Mohr by stabbing him in the stomach. Kent did not implicate Denny in his statements to Hansen (247:179). Kent told Lori Ann Jastor Commons that he stabbed Mohr and had asked Mohr how he felt after he stabbed him. Kent stabbed Mohr again and then Denny stabbed him (247:194-95). Kent told Robin Doyle that he killed Mohr (247:215). Kent told Carl Winkler that he knew who killed "the boy in Grafton" and that the person had stabbed "the boy" over drug money (247:241-42). Kent later informed Winkler that he was the guy who murdered Mohr (247:242).

Other Evidence Relevant to this Appeal

Jonathan Leatherman's discovery of Mohr's body, missing marijuana, and Kent's statements to Leatherman. On January 26, 1982, at approximately 9:30 a.m., Jonathan Leatherman spoke with Mohr by telephone, making arrangements to meet later in the morning at Mohr's home and "get stoned" (245:85-86). Leatherman arrived at Mohr's home at approximately 11:00 a.m. (245:87). Leatherman entered Mohr's home and went upstairs. After seeing a blood smear on the wall, he opened Mohr's door and saw him lying on the floor. A lawn chair was over a portion of his body and he saw a hole in Mohr's neck (245:89-90). Leatherman checked Mohr's pulse and called for a rescue squad (245:89-91). Leatherman then returned to Mohr's room to look for a

[3] In *State v. Denny*, 163 Wis.2d 352, 355, 359, 471 N.W.2d 606 (Ct. App. 1991), this Court held that Kent's statements were directly admissible against Jeffrey Denny.

quarter pound of marijuana that remained from the half pound that they had previously purchased. Leatherman did not find the marijuana (245:91-92, 131-32). That same day, Kent called Leatherman and asked Leatherman where he could get some pot. Kent specifically asked about obtaining pot from Mohr and Leatherman told Kent that Mohr was dead (245:99).

The cause of Mohr's death. Dr. Helen Young, a forensic pathologist, opined that Mohr died from a massive hemorrhage due to multiple incised wounds (247:72). Young also explained that the wound would have been caused by a "rigid instrument having at least one cutting edge . . . consistent with it being a knife" (247:73). During her testimony, Young detailed the location of over 50 stab wounds (245:32-71; 215:24). These wounds included "wide gaping wounds which exposed the wind pipe and cut the right carotted [sic] artery" and "two incised wounds of the upper abdomen" (247:32, 67, 72-73). She described the stab wounds to Mohr's stomach as "premortem" (247:71). In addition, Young also observed at least three blunt force wounds to the face and a broken nose (215:24; 247:39). Young examined photographs (Exhibits 36, 37) of the bong pipe and indicated that "these most certainly could produce blunt trauma" (247:39; 215:41).

ARGUMENT

The circuit court properly denied Denny's request for postconviction DNA testing under Wis. Stat. § 974.07(6) & (7).

I. Introduction.

A. Procedural posture of Denny's case.

A jury found Jeffrey Denny and his brother Kent Denny guilt of first-degree murder as a party to a crime for Christopher Mohr's death. The circuit court sentenced Denny to life imprisonment (99). Denny unsuccessfully

sought relief from his conviction through a series of appeals, postconviction motions, and a habeas action.[4]

In 2013, Denny moved for postconviction DNA testing of certain evidence under Wis. Stat. § 974.07 (204). The circuit court referred Denny to the public defender for appointment of counsel under subsection (11) (208). In 2014, following the appointment of counsel, Denny moved for postconviction DNA testing under Wis. Stat. § 974.07 (215; 223).

Denny's motion identified several items that he wanted tested (223:1-6). These items included the following:

a. Pieces of a bong pipe found at the crime scene.

b. Hairs removed from the victim's hands.

c. Stray hairs found on the victim's body.

d. A yellow hand towel.

e. Gloves found near the victim.

f. A bloody hat found near the victim.

g. The victim's bloody clothing.

h. Blood from a metal chair found by the victim's head.

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[4] This Court upheld Denny's conviction. *State v Denny*, No. 83-1311-CR (Wis. Ct. App. Dec. 5, 1984) (unpublished). Denny subsequently moved for postconviction relief. The circuit court denied the postconviction motion and this Court affirmed the circuit court's decision. *State v. Denny*, 163 Wis.2d at 360. Denny petitioned the district court for habeas relief. The district court denied the petition and the Seventh Circuit affirmed. *Denny v. Gudmanson*, 252 F.3d 896 (2001). This Court also affirmed Kent Denny's conviction. *State v. (Kent) Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984).

i. A glass cup found near the victim.

j. A lighter found under the victim's body.

k. The screens imbedded in Mohr's shirt and the flesh of his back.

l. Facial breathing masks found at the crime scene.

Denny's brief at 12-17.

Denny suggests that DNA testing of this evidence could reveal the perpetrator's identity. With respect to several items, Denny simply asserts that the perpetrator may have touched the objects and that DNA recovered from these objects could identify the perpetrator. *See* Denny's brief at 13-17 (e.g., bong pipe, gloves, bloody hat, Mohr's bloody clothing, a metal chair, a glass cup, a lighter, screens found imbedded in Mohr's back, facial breathing masks). The circuit court denied his motion (228:14-15).

Denny appealed (230). He asserts that the evidence that he seeks to have tested was relevant to his conviction. He also contends that if exculpatory results had been available, that it is reasonably probable that a jury would not have convicted him. Denny's brief at 17-20.

Denny has failed to meet a threshold requirement for any DNA testing under Wis. Stat. § 974.07. The circuit court correctly found that Denny failed to demonstrate that the evidence was relevant within the meaning of Wis. Stat. § 974.07(2)(a). Testing that demonstrates others may have been involved with Mohr's death would not exonerate Denny who was convicted as a party to a crime (228:10-11). Because

Denny has not satisfied subsection (2)'s relevance requirement, he is not entitled to testing at his own expense under subsection (6) or the State's expense under paragraph (7)(a).

In addition, the circuit court also correctly determined that the DNA testing in this case would not be exculpatory. Even if the test results revealed someone else's DNA on the evidence Denny seeks to have tested, the presence of a third party's DNA on that evidence does not make it reasonably probable that Denny would not have been prosecuted or convicted (228:11-12). Under Wis. Stat. § 974.07(7)(a), Denny is not entitled to testing at the State's expense.

B. Standard of review applicable to postconviction DNA motions.

Whether Denny has the right to obtain and test certain biological material for DNA involves the application of Wis. Stat. § 974.07 to specific facts. This presents a question of law subject to an appellate court's independent review. *State v. Moran*, 2005 WI 115, ¶ 26, 284 Wis.2d 24, 700 N.W.2d 884. Generally, an appellate court will uphold a circuit court's factual findings unless they are clearly erroneous. *State v. Novy*, 2013 WI 23, ¶ 22, 346 Wis.2d 289, 827 N.W.2d 610.

II. Denny's motion failed to establish that the evidence he wants to have tested satisfies the relevance requirement under Wis. Stat. § 974.07(2)(a) & (6)(d), a prerequisite to obtaining testing at the defendant's expense under subsection (6) or at the State's expense under subsection (7).

A. General legal principles guiding postconviction motions for DNA testing at a defendant's request.

Wisconsin Stat. § 974.07 permits a convicted defendant to move for postconviction DNA testing. A defendant who seeks postconviction DNA testing of evidence at his or her own expense or at the State's expense must satisfy subsection (2)'s requirements. *See Moran*, 284 Wis.2d 24, ¶ 3 (finding a right to test at personal expense under subsection (6)); Wis. Stat. § 974.07(7)(a)3. & (b)2.

As part of the showing under paragraph (2)(a), the defendant must establish that "the evidence is relevant to the investigation or prosecution that resulted in the conviction." Subsection (6) obligates the district attorney to turn over physical evidence that is in its possession and that contains or has biological material. But this obligation does not apply "unless . . . the material being made available is relevant" to the defendant's motion under subsection (2). Wis. Stat. § 974.07(6)(d).

Under Wis. Stat. § 904.01, "relevant evidence" is "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." The question is "whether there is a logical or rational connection between the fact which is sought to be proved and a matter of fact which has been made an issue in the case." *Moran*, 284 Wis.2d 24, ¶ 45 (internal citations and quotations omitted). A circuit court has "considerable discretion" in determining whether a particular piece of

evidence is "relevant." *Id*. And the defendant bears the burden of demonstrating "that the tests he seeks to conduct will be relevant to his prosecution (namely, his conviction or sentence)." *Id*. ¶¶ 46, 58.

B. Denny failed to demonstrate that the evidence to be tested was relevant to his prosecution.

Here, the circuit court concluded that the evidence Denny wants to have tested is "not relevant because it is not evidence 'that resulted in the conviction'" (228:8). The circuit court correctly noted that the State relied on none of this evidence to convict Denny. Instead,

> [t]he evidence that resulted in his conviction was the thirty-six statements made by Denny or his brother to different people, at different times, in different places; the evidence from two people who stated they observed Denny's brother destroying clothes; the evidence from one person who said he saw a knife; and the evidence linking Denny to the scene by a shoeprint on the Cedarburg-Grafton phonebook, and from others who said they saw a bag with the shoes linked to the print. Denny's DNA motion does not relate to any of that evidence.

(228:8).

In deciding that Denny had not satisfied the relevance requirement, the circuit court noted that Denny was convicted as a party to a crime. Thus, even if DNA evidence established that another person was involved in the crime, the circuit court found it would not change the overwhelming evidence that Denny participated in Mohr's murder as a party to a crime. Under the circumstances, DNA testing would have no value in determining Denny's actual innocence (228:9). And because testing this evidence would not exonerate Denny, the circuit court concluded that the items Denny wants to have tested are not relevant under Wis. Stat. § 974.07(2).

As the district attorney observed, "[t]he relevance requirement demands more than supposition, speculation, or long shot hunches, where luck or happenstance might possibly develop a lead, or could conceivable demonstrate a connection between some item tested, the crime, or new 'foil' to be painted as the perpetrator" (225:9). Denny has not satisfied Wis. Stat. § 974.07's relevancy requirement for testing the evidence he wants to have tested.

C. The evidence is also not relevant unless Denny demonstrates that biological material is on the evidence to be tested and its presence would provide relevant results.

In recognizing a defendant's right to test under § 974.07(6), the supreme court qualified the type of evidence that could be tested: evidence that is in the government's possession and "that contains biological material or on which there is biological material." *Moran*, 284 Wis.2d 24, ¶ 3. Because the burden is on the defendant to demonstrate that he has satisfied the requirements for testing under subsections (2) and (6), a defendant must do more than simply speculate that the evidence may contain biological material. A defendant should be required to demonstrate a reasonable likelihood that DNA evidence will be found on the evidence to be tested. *See, e.g., Holberg v. State*, 425 S.W.3d 282, 285 (Tex. Crim. App. 2014) (interpreting Texas postconviction testing law to require that a defendant "must *prove* biological material exists and not that it is merely probable") (emphasis in original).[5]

[5] Unlike Denny, Holberg actually offered expert witness affidavits discussing the potential that DNA had been deposited on the item Holberg sought to have tested. The court did not resolve whether the experts' statements were sufficient to meet the standard for demonstrating that DNA exists because Holberg failed to establish that she would not have been convicted if the DNA evidence were exculpatory. *Holberg v. State*, 425 S.W.3d 282, 285-86 (Tex. Crim. App. 2014).

In some cases, a defendant could satisfy that requirement easily. For example, in a burglary where fresh blood is deposited on broken glass at the point of entry, a defendant will have a relatively easy time asserting that glass has testable biological material relevant to his prosecution. But an assertion that an assailant may have left his skin cells on an object at a crime scene is simply too speculative to assert that the object contains biological material for testing. A speculative assertion that DNA is present does not satisfy relevancy requirements under Wis. Stat. § 974.07(2)(a) & (6)(d).

Denny merely speculates that DNA may be on the evidence to be tested; he offers no evidence in support of his assertion. This failure should defeat Denny's request to test the evidence at his or the State's expense.

1. The potential for cross-contamination and the limitations of touch DNA.

Denny requested the testing of numerous items for the presence of "touch DNA." But Denny offered no evidence to the circuit court in support of his motion that touch DNA could provide relevant evidence in his case (223; 255). Instead, his argument is based merely on speculation that the perpetrator deposited DNA on the items that he wants to have tested and that DNA testing might reveal the perpetrator's identity. Denny's brief at 12-17.

On appeal, Denny quoted from an article that suggests that "If the touched item is collected as possible evidence, Touch DNA analysis may be able to link the perpetrator to the crime." Denny's brief at 8 (quoting from Angela L. Williamson, *Touch DNA: Forensic Collection and Application to Investigations*, 18 J. Ass'n Crime Scene Reconstruction 1 (2012) (R-Ap. 101-06)). But Denny ignores several challenges that Dr. Williamson identified with respect to touch DNA's evidentiary value, including the potential for contamination:

> It is not uncommon to detect DNA profiles from Detectives, Paramedics, and Medical Examiners on evidence from cold cases and it is important that extra precautions be taken at the modern day crime scene.
>
> . . . .
>
> Touch DNA sampling methods, and the downstream DNA processing procedures, are very sensitive. Hence, there is a greater chance of detecting contamination from law enforcement personnel or even the forensic scientist sampling the item. . . . .
>
> . . . .
>
> When contemplating testing for Touch DNA the investigator needs to consider the potential evidentiary value of the DNA. The investigator must take into account . . . any possibility of "innocent transfer" of DNA that may have occurred before the alleged crime.
>
> . . . .
>
> There is also an increased chance of obtaining mixed DNA profiles containing DNA from individuals that may have come into contact with the victim/evidence item near the time of the crime. Contributors to these mixtures could include the victim's spouse or children . . . [o]r, perhaps the DNA profile is from adventitious transfer from crime scene personnel, first responders, laboratory analysts, or crime scene equipment such as fingerprint brushes.

Id. at 2-4 (R-Ap. 102-04).[6]

[6] The State cited the publications referenced in this section in its pleadings before the circuit court (225:2-6).

Contamination may result in false exclusion because "contaminating DNA material can be preferentially amplified over extremely low levels of original material present from the casework sample or may mask the perpetrator's profile in a resulting mixture." John M. Butler, *Forensic DNA Typing* 154 (2d ed. 2005) (R-Ap. 107-09). Butler further explains that:

> While this contamination possibility might only rarely impact a careful forensic DNA laboratory, it can have potential significance on old cases under review including the Innocence Project . . . . For example, if biological evidence from a 20-year-old case was handled by ungloved police officers or evidence custodians (prior to knowledge regarding the sensitivity of modern DNA testing), then the true perpetrator's DNA might be masked by contamination from the collecting officer. Thus, when a DNA test is performed, the police officer's or evidence custodian's DNA would be detected rather than the true perpetrator. In the absence of other evidence, the individual in prison might then be falsely declared 'innocent' because his DNA profile was not found on the original crime scene evidence. This scenario emphasizes the importance of considering DNA evidence as an investigative tool within the context of the case rather than the sole absolute proof of guilt or innocence.

Id. (R-Ap. 109); *see also* Peter Gill, & Amanda Kirkham, *Development of a Simulation Model to Assess the Impact of Contamination in Casework Using STRs*, 49 Journal of Forensic Sci. 485-91 (2004) ("The most probable outcome of a contamination event is false exclusion.") (R-Ap. 111).

The Wisconsin State Crime Laboratory recognizes the danger of DNA contamination. It recommends that evidence collectors follow several important steps to prevent contamination. These steps include using gloves and face shields or masks, changing gloves after handling each item, and avoiding talking, coughing or sneezing near evidence.

Wis. Dep't of Justice, *Physical Evidence Handbook* 61 (8th ed. 2009).

The Crime Laboratory has also identified the challenges and limitations of touch DNA.

> Mixtures of DNA from different people are also common, especially on touched items, which can make interpretation of the results difficult or impossible. A minimum amount of DNA is still necessary for testing resulting in instances when an adequate amount of material cannot be obtained.
>
> Despite the revolutionary ways that DNA testing has changed forensic analysis, there are still some limitations to be aware of:
>
> A. Casual contact does not generally transfer enough DNA for analysis.
>
> . . . .
>
> E. DNA analysis cannot determine when a stain was deposited on an item.
>
> F. Certain environmental factors such as mold, heat, humidity, bacteria and sunlight can destroy DNA very quickly.

Id. at 59. Because of these limitations, efforts to develop touch DNA "[f]requently result in uninterpretable mixtures." *Id.* at 61. As a consequence, the Crime Laboratory will only examine evidence for touch DNA "when no other probative evidence exists" and another laboratory discipline has not previously processed it. Wis. Dep't of Justice, *Submission Guidelines for DNA* 2 (Rev. Aug. 15, 2013), http://www.doj.state.wi.us/sites/default/files/dles/clab-forms/dna-submission-guide.pdf (last visited Aug. 2, 2015).

2. Denny has failed to demonstrate that testing any of the items he wants tested will produce relevant results.

Denny fails to acknowledge significant limitations on the evidence he wants to have tested.

Touch DNA. First, if touch DNA were recovered from the evidence Denny wants to have tested, there is no way to determine when the contributor deposited the DNA on the evidence. For example, Denny wants to have the bong tested to identify "the perpetrator." Denny's brief at 12-13.[7] Even if DNA were recovered from the bong, Denny does not explain how to determine if the DNA is from (a) the assailant; (b) countless other persons, such as Jonathan Leatherman (245:85-86), who may have used the bong to ingest marijuana; or (c) first responders and others who may have inadvertently contaminated the bong with their DNA following the homicide. Testing would not have meaningful relevance because it would not make it more or less likely that the person whose DNA is on the bong is responsible for Mohr's death.

Second, Denny fails to acknowledge the significant potential for cross-contamination and the limitations of touch DNA in his case. The Denny brothers killed Mohr in 1982, before law enforcement collected and processed evidence with an eye toward DNA analysis. There is no evidence that law enforcement took the precautions necessary to prevent contamination of evidence at a crime scene. And it is unclear if law enforcement, prosecutors, and court personnel subsequently handled the evidence in a manner that minimized the risk of contamination from foreign DNA. After trial, the evidence was retained with the

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[7] Denny makes his request as though he had never admitted to others that both he and Kent hit Mohr with the bong during Mohr's murder (249:51; 246:241).

Clerk in the Ozaukee County Courthouse. There is no indication that the evidence was preserved in a manner that both minimized contamination and prevented the degradation of any DNA on it.

Testing the hair. Denny also seeks to test hair recovered from Mohr's hand and clothing. Denny's brief at 13-14. At trial, an expert testified that he examined approximately 200 hairs from the crime scene. With the exception of a hair found on Mohr's shirt and on a sheet, the hairs were consistent with Mohr's hair (249:132-33). The expert also concluded that Denny's hair was inconsistent with any of the hair that the analyst examined (249:147, 160; 215:50-51).

In neither his motion or on appeal, Denny offered no evidence that DNA could be recovered from the hair. The Crime Laboratory can only analyze hair for DNA using STR analysis if cellular material is attached to it. *Physical Evidence Handbook* at 60. Denny had a chance to examine the evidence and has not offered any evidence that the hair has follicle material for DNA testing (253:9-10). Denny has not met his burden of showing that the hair has DNA suitable for testing or that the results would be relevant to his claim at issue.

Denny bears the burden of demonstrating the relevance of the evidence to be tested to his case. He fails to address the real possibility that: (a) DNA is not on the items he wants to have tested; (b) any DNA that exists was deposited by innocent persons before the crime; (c) the evidence was not handled in a manner consistent with current protocols intended to prevent contamination; and (d) any DNA on the evidence has degraded. Denny has offered no evidence to overcome these concerns. His arguments amount to nothing more than speculation about the possible existence of DNA on the evidence he wants to have tested. Under the circumstances, Denny has not demonstrated the

relevance of the evidence he wants to have tested in the context of his case.

Because Denny has not overcome the relevance hurdles under Wis. Stat. § 974.07(2) & (6), this Court should affirm the circuit court's decision denying Denny's motion to test evidence, either at his expense or the State's expense.

D. Contrary to the supreme court's decision in *Moran*, Wis. Stat. § 974.07(6) does not create an independent right of testing.

The State acknowledges that *Moran* governs this case and that under *Moran*, the circuit court correctly denied Denny's request for testing. But the State disputes whether the supreme court correctly interpreted Wis. Stat. § 974.07(6) in *Moran*. This Court is obligated to apply the supreme court's holding in *Moran* recognizing a defendant's right to test under subsection (6). *See Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court can overrule, modify, or withdraw language from its own cases). The State makes this argument to preserve its objections to *Moran* should the supreme court review Denny's case.

The State respectfully submits that the Wisconsin Supreme Court erred when it held that Wis. Stat. § 974.07(6) authorizes a defendant to test evidence at his or her expense, even if the defendant does not satisfy subsection (7)'s testing requirements. *Moran*, 284 Wis.2d 24, ¶ 3. In deciding *Moran*, the supreme court relied upon the State's concession in *State v. Hudson*, 2004 WI App 99, 273 Wis.2d 707, 681 N.W.2d 316.

In *Hudson*, the State argued and the trial court agreed that Wis. Stat. § 974.07(6) does not compel the State to turn evidence over for independent testing because subsection (6) is limited in scope. It merely requires the State to provide a

defendant with access to review material for purposes of allowing a defendant to determine which items a defendant wants to have tested. *Hudson*, 273 Wis.2d 707, ¶ 12. On appeal, the State changed its position and conceded that subsection (6) requires the State to turn over materials for testing if the defendant pays for testing and if the material is relevant to the defendant's claim. *Id.*

In *Moran*, Moran never asserted that Wis. Stat. § 974.07(6) provided a circuit court with authority to authorize testing independent of subsection (7)'s requirements in the trial court or court of appeals. 284 Wis.2d 24, ¶ 29. The supreme court permitted Moran to argue that Wis. Stat. § 974.07(6) allowed a defendant to obtain testing, even if he or she could not satisfy Wis. Stat. § 974.07(7)'s requirements. *Id*. ¶ 31.

In *Moran*, the State disavowed its concession in *Hudson* and asserted that Wis. Stat. § 974.07(6) does not provide an independent basis for testing. Instead, when a defendant petitions for testing under Wis. Stat. § 974.07(2), the claim channels into either a request for mandatory testing under paragraph (7)(a) or discretionary testing under paragraph (7)(b). *Moran*, 284 Wis.2d 24, ¶ 52. The supreme court rejected the State's argument and relied upon *Hudson* when it decided that Wis. Stat. § 974.07(6) permits a defendant to obtain testing of relevant evidence if the defendant pays for it. *Moran*, 284 Wis.2d 24, ¶ 53.

The State submits that the supreme court erred when it concluded that Wis. Stat. § 974.07(6) creates a right to postconviction testing of evidence independent of the mandatory and discretionary testing provisions under subsection (7). Rather, subsection (6) is a limited discovery provision, intended to provide a defendant with the information necessary to facilitate a testing request that meets the requirements for testing under subsection (7). Only a defendant who satisfies the standards for mandatory

or discretionary testing under paragraphs (7)(a) or (7)(b) is entitled to testing under Wis. Stat. § 974.07.

If Wis. Stat. § 974.07(6) does not permit defendants to conduct postconviction DNA testing, then Denny is only entitled to test evidence if his request satisfies subsection (7)'s standards. And under those standards, Denny's claims fail.

III. Denny is not entitled to testing under Wis. Stat. § 974.07(7)(a) because the State would have prosecuted Denny and a jury would have convicted him even if DNA from other persons is on the items Denny wants to have tested.

A. Introduction.

Denny argues that the circuit court erred when it denied him testing under Wis. Stat. § 974.07(7)(a). Denny contends that the circuit court misinterpreted this paragraph's legal requirements entitling him to testing and it misapplied those legal requirements to the facts. Denny argues the circuit court should have granted him DNA testing under paragraph (7)(a) because a jury would not have convicted him if a third person's DNA were found on the items he wants to have tested. Denny's brief at 19-20.

The circuit court rejected Denny's argument that a third party's DNA on any of the evidence "would make it less probable that Denny was the attacker" (228:12). After reviewing the record, it concluded that "DNA testing in this case would not make it 'reasonably probable' that Denny is not guilty of . . . being party to the crime of murder, and would not exculpate him. DNA testing might only show that others, in addition to Denny, may have been involved" (228:11-12).

Neither the circuit court's interpretation of Wis. Stat. § 974.07(7)(a) nor its application to Denny's case is erroneous. Denny's motion fails to establish a reasonable probability that the test results identifying a third party could be exculpatory based on the facts of this case.

B. The mechanics of a request under Wis. Stat. § 974.07(7)(a).

The defendant bears the burden of satisfying Wis. Stat. § 974.07(7)(a)'s heightened requirements for testing at State expense. *Moran,* 284 Wis.2d 24, ¶ 57. The most significant requirement appears in subparagraph (7)(a)2., which provides that: "It is reasonably probable that the movant would not have been prosecuted, [or] convicted . . . for the offense . . . if exculpatory [DNA] testing results had been available before the prosecution, [or] conviction . . . for the offense." The defendant must also satisfy the relevance requirements under paragraphs (2)(a) and (6)(d). Wis. Stat. § 974.07(7)(a)3.[8]

Resolution of Denny's request for testing under Wis. Stat. § 974.07(7)(a) turns on this Court's interpretation of "reasonably probable" and "exculpatory [DNA] testing results."

1. The "reasonably probable" language refers to the "reasonable probability" test for assessing claims of newly discovered evidence.

Denny simply assumes that Wis. Stat. § 974.07(7)(a)'s "reasonably probable" language incorporates *Strickland's* standard of "reasonable probability," which is defined as "a

[8] The State has asserted in Section II above that Denny has not met the relevance standard under paragraphs (2)(a) or (6)(d). But for purposes of argument in this section, the State assumes that Denny has satisfied the relevance standard.

probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Denny's brief at 26.

The State disagrees. Whether a DNA result makes it reasonably probable that a defendant would not have been convicted is more akin to assessing the impact of newly discovered evidence on a verdict. The "reasonable probability" test for assessing claims of newly discovered evidence provides a better means for assessing the potential impact of a new DNA test result on a conviction than the *Strickland* standard. Under the "reasonable probability" test for newly discovered evidence, a reasonable probability of a different outcome exists if "'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" *State v. Love*, 2005 WI 116, ¶¶ 43-44, 284 Wis.2d 111, 700 N.W.2d 62 (quoted source omitted); *see also Hudson*, 273 Wis.2d 707 ¶ 16 (adopting the standard of review for newly discovered evidence claims rather than the standard of review for ineffective claims when reviewing a circuit court's resolution of a Wis. Stat. § 974.07 motion).

In the context of a postconviction DNA motion, the question becomes whether the discovery of a third party's DNA on the evidence to be tested would create a reasonable probability that a jury, considering both the trial evidence and a potentially favorable DNA result, would have a reasonable doubt as to a defendant's guilt.

2. Wisconsin Stat. § 974.07(7)(a) does not require a circuit court to assume that a testing result will be exculpatory.

Denny insists that he is entitled to mandatory DNA testing at public expense because, under § 974.07(7)(a)2., the court must assume that the DNA test results would be "exculpatory." He argues that subparagraph (7)(a)2's plain language "requires courts to assume exculpatory DNA test

results when analyzing whether such results would create a reasonable probability of a different outcome." Denny's brief at 24.

The State disagrees that a circuit court must assume that a DNA test result would always be exculpatory under Wis. Stat. § 974.07(7)(a). Rather, the word "exculpatory" must be read in conjunction with the remainder of the sentence. A DNA result can only be exculpatory if it is "reasonably probable that the movant would not have been prosecuted [or] convicted." *Id*. The fact that a tested object may reveal DNA from someone other than a defendant does not alone make the DNA result exculpatory. Rather, the question is whether the presence of a third person's DNA on the tested object makes it reasonably probable that the defendant would not have been prosecuted or convicted if the third person's DNA were present.

In some cases, evidence may be uniquely exculpatory and it will be reasonably probable that had the evidence been tested, the defendant would not have been prosecuted or convicted. For example, postconviction analysis of an untested vaginal swab for male DNA might well exculpate someone convicted of a sexual assault. And in the context of a case in which the assailant's identity is at issue, a circuit court reviewing a postconviction testing request should assess whether a third person's DNA on the swab creates a reasonable doubt as to a defendant's guilt. In this context, a third party's DNA result would be an exculpatory result for purposes of deciding the motion.

But in other cases, the presence of a third party's DNA on evidence would not necessarily make it exculpatory. First, many explanations may exist for the presence of a third party's DNA on objects found at a crime scene. Unlike male DNA on a vaginal swab, it is often difficult to determine how and when a third party's DNA was transferred to an object at a crime scene. Second, a third party's DNA on an object

does not eliminate the possibility that a defendant committed the crime with accomplices.

Further, a court cannot assess whether the DNA would be exculpatory in a vacuum. Rather, it should do so against the entirety of the evidence in the case, a position that courts in other jurisdictions have adopted.

In *State v. Marra*, 988 A.2d 865, 873 (Conn. 2010), the Connecticut Supreme Court considered a postconviction DNA testing motion in a homicide case under a standard similar to Wis. Stat. § 974.07's "reasonably probable" standard. Under Connecticut law, a court shall order testifying if "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing," and several other criteria are met. Conn. Gen. Stat. § 54-102kk (2012). Based on its interpretation of this language, the court concluded that "[i]n order to determine whether the potential DNA evidence would create a reasonable probability that the petitioner would not have been prosecuted or convicted, we must consider, however, the evidence within the context of the entire trial." *Marra,* 988 A.2d at 874. After reviewing the evidence, which consisted primarily of co-conspirator and witness testimony, the court denied Marra's request for DNA testing. *Id*. at 876.

In a companion case, the Connecticut Supreme Court also denied testing of a hat found at a homicide scene. Several witnesses described the assailant as wearing a hat. Even though the hat had blood on it and holes and was found at the scene near the victim, the court declined to order DNA testing. It determined that the link between the hat that the police recovered and the hat worn by the shooter was tenuous. "In light of these facts, the hat may have belonged to the shooter, to the victim, or to a third party." *State v. Dupigney*, 988 A.2d 851, 863-64 (Conn. 2010). Based on the inconclusive link between the hat and the shooter and the strong evidence unrelated to the hat, including eyewitness identification by two witnesses, the

court concluded that Dupigney failed to satisfy the reasonable probability standard for obtaining testing. *Id*. 864-65.[9]

3. The cases Denny cites do not support his expansive view of the term "exculpatory."

In support of his expansive interpretation of the term "exculpatory," Denny relies upon *State v. Peterson*, 836 A.2d 821 (N.J. Super. Ct. App. Div. 2003), and *Powers v. State*, 343 S.W.3d 36 (Tenn. 2011). Both cases are distinguishable from Denny's case.

In *Powers*, the prosecution relied upon eyewitness identification to convict Powers of two rapes that occurred on different occasions in 1980. Evidence was collected from one of the victims. An analyst identified the presence of spermatozoa on slides, vaginal swabs, and possibly on the victim's underwear. Tests on the vaginal swabs and underwear were indicative of seminal fluids. *Powers*, 343 S.W.3d at 41-42. Powers sought testing of this evidence under Tennessee's DNA testing statute. *Id*. at 39. The Tennessee Supreme Court ordered postconviction DNA testing of evidence. In deciding whether to grant testing, "the analysis must focus on the strength of the DNA evidence as compared to the evidence presented at trial—that is, the way in which 'the particular evidence of innocence interacts with the evidence of guilt.'" *Id*. at 55 (quoted source omitted).

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[9] While the State asks this Court to define "reasonably probable" by following the "reasonable probability" test for newly discovered evidence, the Connecticut Supreme Court applied the *Strickland* standard for assessing ineffective assistance of counsel claims. *State v. Dupigney*, 988 A.2d 851, 859 (Conn. 2010).

The evidence Denny wants to have tested is different from the evidence in *Powers*, which involved the testing of evidence on which an analyst had already detected semen, a biological material conducive to DNA testing. Denny can only speculate that DNA will be recovered from the objects that the assailant purportedly touched. Further, in *Powers*, one could reasonably infer that the evidence to be examined, i.e., seminal fluids, was deposited at the time of the assault and any DNA in those fluids likely belonged to the assailant. Denny can make no such claim that any DNA found on the items he wants to have tested was deposited at the time of Mohr's death.

In *Peterson*, the State relied upon a forensic scientist's determination that hair samples found at the scene of a sexual assault and homicide, including hair recovered from the victim's pubic combing, were consistent with the defendant's hair. 836 A.2d at 824. Other evidence, including blood underneath the victim's fingernails and semen on her pants, had never been tested for DNA. Testing was appropriate because the issue was one of identity and minimal evidence linked Peterson to the crime. *Id.*

Peterson is distinguishable because it relied on case law interpreting a postconviction DNA statute that establishes a lower evidentiary standard than Wisconsin's standard. The New Jersey court relied on an Illinois decision interpreting Illinois' postconviction testing statute. *Id.* at 396, (citing *People v. Urioste*, 736 N.E.2d 706, 711 (Ill. App. Ct. 2000). The Illinois statute requires a court to decide if "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 Ill. Comp. Stat. 5/116-3(c)(1) (2014). Thus, the Illinois DNA testing statute is fundamentally different from Wis. Stat. § 974.07(7)(a). In Illinois, a court must order testing if the testing has the scientific potential to produce new, noncumulative evidence relevant to an assertion of innocence. *Urioste*, 736 N.E.2d at 710. This standard is

lower than the standard under Wis. Stat. § 974.07(7)(a), which only mandates testing if it is reasonably probable that a defendant would not have been prosecuted or convicted given favorable DNA results. Thus, *Peterson* cannot offer persuasive guidance here.

4. Denny's interpretation of "exculpatory" leads to absurd results.

Denny asserts that the circuit court should always assume that a DNA testing result is exculpatory without regard to the reasonableness of the assumption in the context of the case. Denny's brief at 23-24.

If the court must presume to be "exculpatory" any piece of evidence obtained by police from a crime scene that is arguably "relevant to the investigation or prosecution" and might have someone's DNA on it, then there is no practical limit to mandatory postconviction testing under Wis. Stat. § 974.07(7)(a). This approach would require postconviction DNA testing in every single case where items of evidence that conceivably could contain DNA are recovered from a crime scene. Testing at public expense would be mandatory even though the chances that DNA testing years after conviction would produce anything useful are slim and particularly remote. *See also People v. Tookes,* 167 Misc. 2d 601, 603 (N.Y. Sup. Ct. 1996) ("While exoneration of the wrongfully convicted should not be restricted by monetary considerations, automatic testing would impose an unnecessary burden on the State's resources in cases where the results are unlikely to have had any impact upon the verdict.").

Denny's assertion that the court should assume exculpatory results with respect to a Wis. Stat. § 974.07(7)(a) request would render paragraph (7)(b)'s testing provision superfluous. Wisconsin Stat. § 974.07(7)(b), a companion provision to paragraph (7)(a), provides that a court has the

discretion whether or not to order ("may order") DNA testing at public expense when the defendant shows "[i]t is reasonably probable that the outcome of the proceedings that resulted in the conviction . . . would have been more favorable to the movant if the results of [DNA] testing had been available before he or she was prosecuted, [or] convicted." Wis. Stat. § 974.07(7)(b)1. This subparagraph also contains the same threshold minimal relevancy requirement under paragraph (2)(a), as do paragraphs (6)(d) and subparagraph (7)(a)3. *Id*. at subparagraph (7)(b)2.

A defendant would have no reason to risk a discretionary denial under Wis. Stat. § 974.07(7)(b), because the purported presumption of exculpatory test results in subparagraph (7)(a)2. entitles him to non-discretionary, publicly funded testing merely upon making the same minimal threshold relevancy showing as under subparagraph 974.07(6)(d) and (7)(b)2. The defendant would not have to quibble over whether the test results he seeks might exonerate him or just render the outcome of his proceedings "more favorable" (i.e., a reduced charge or lesser sentence). He could simply rely on the presumption that the test results will be "exculpatory" after making the same threshold showing that the evidence to be tested is "relevant to the investigation or prosecution that resulted in the conviction." Wis. Stat. § 974.07(2)(a). Publicly funded testing would be mandatory whether the test results would exonerate or merely be "more favorable" to the defendant.

To avoid such absurd and plainly unintended results, the only reasonable reading of Wis. Stat. § 974.07(7)(a)2., is that the defendant must specifically show in his motion for mandatory DNA testing that there is a reasonable probability exculpatory evidence would be found on one or more of the relevant items to be tested. Closely tracking the language of subparagraph (7)(b)1., the motion under subparagraph (7)(a)2. would have to specifically show a reasonable probability that the defendant would not have been prosecuted or convicted because there was a reasonable probability that DNA testing would have revealed

exculpatory evidence. This reasonable interpretation of subparagraph (7)(a)2., effectively eliminating the purported presumption of exoneration, maintains the statutory integrity of both paragraph (7)(b) without undermining the objective of paragraph (7)(a) to protect the actually innocent when there is a plausible showing that the test results will support actual innocence.

Similarly, under Denny's interpretation of "exculpatory," there would no longer be any reason, then, for defendants to invoke Wis. Stat. § 974.07(6) and pay for testing because they could simply rely on subparagraph (7)(a)2.'s automatic presumption that DNA test results will exculpate them upon making the same minimal threshold showing of relevance. This result flies in the face of the legislature's intent to impose "heightened requirements" for mandatory testing at public expense under subsection (7). *Moran*, 284 Wis.2d 24, ¶ 57.

DNA testing at public expense should be mandatory, but only when the motion specifically proves a reasonable probability that the test results *could be* exculpatory based on all of the evidence in the case.

This interpretation of "reasonably probable" balances a defendant's right to test at State expenses against other legitimate policy considerations. Postconviction DNA testing provisions "recognize the value of DNA evidence but also the need for certain conditions on access to the State's evidence." *District Attorney's Office v. Osborne*, 557 U.S. 52, 63 (2009). Conditioning access to DNA evidence serves important state interests, including respect for the finality of court judgments and the efficient use of limited state resources. *Id.* at 76 (Alito, J., concurring). Legislatures thus have faced the dilemma of "how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice." *Id.* at 62 (majority).

To reconcile these competing interests, legislatures have imposed materiality requirements such as the "reasonably probable" standard at issue in this case. *Dupigny*, 988 A.2d at 860.

The "reasonably probable" test for newly discovered evidence serves these conflicting interests by requiring testing only when there is a reasonable probability based on the evidence in the case that a particular test result could be exculpatory.

5. The legitimate tendency test is useful for assessing whether a defendant has satisfied Wis. Stat. § 974.07(7)(a)'s requirements.

Evidence that "simply affords a possible ground of suspicion against another person should not be admissible." *State v. (Kent) Denny*, 120 Wis.2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). To be admissible, a defendant must satisfy *Denny's* legitimate tendency test, which requires a defendant to demonstrate: (1) that the third party possessed a "motive" to commit the act; (2) that the third party had "opportunity" to commit the act; and (3) that a "direct connection" exists between the third party and the act. *Id.* at 625. As part of this analysis, courts weigh "the strength of the defendant's evidence (that a third party committed the crime) directly against the strength of the State's evidence (that the third party did not commit the crime)." *State v. Wilson*, 2015 WI 48, ¶ 69, 362 Wis.2d 193, 864 N.W.2d 52.

In deciding whether to grant a motion for testing under Wis. Stat. § 974.07(7)(a), a court should consider whether DNA tests that could reveal a third person's DNA would satisfy the legitimate tendency test against the strength of the State's case. The presence of a third person's DNA on the evidence only makes it reasonably probable that a defendant would not have been convicted if the evidence is admissible. And it is only admissible if a defendant satisfies *Denny's* legitimate tendency test. This assessment can only

be done against the strength of the State's case. A postconviction DNA motion that satisfies the legitimate tendency test is one that provides a reasonable probability that the test results *could be* exculpatory.

C. Even if this Court presumes that all evidence "relevant to the investigator or prosecution" is "exculpatory," Denny's motion is insufficient to require testing under Wis. Stat § 974.07(7)(a).

1. Denny's examples do not support the theory that DNA testing would reveal exculpatory evidence.

Denny identifies three scenarios that he characterizes as exculpatory and would provide a reasonable probability of a different outcome at his trial. These scenarios include the following:

(a) Results of one or more items match a convicted offender whose DNA appears in the database would create a probability of a different outcome.

(b) Results exclude Denny as the source of DNA on any of the items.

(c) Results on multiple items match an unknown third party create a reasonable probability of a different outcome.

Denny's brief at 20-23. The State disagrees. None of these potential outcomes make it reasonably probable that a jury would not have convicted Denny had these DNA results been present at the time of trial.

The absence of Denny's DNA on the evidence would not make it reasonably probable that the jury would not

have convicted him. Here, a jury found that the Denny brothers murdered Mohr as a party to a crime. The absence of Denny's DNA on any items would not conflict with the State's theory that Denny participated in the murder with Kent. It merely means that Denny's DNA could not be developed from the items examined thirty-three years after the homicide.

Likewise, neither the presence of a convicted offender's DNA nor an unknown third person's DNA on the items Denny seeks to have tested would diminish the State's case against Denny. A third person's DNA on the items Denny wants to have tested would not reveal when the DNA was deposited on the item and would have no bearing on whether that person participated in Mohr's murder. Anyone with access to Mohr's room or effects before Mohr's death could have deposited their DNA on the items Denny seeks to have tested. This might include family members and friends or other people, including Denny and Leatherman, with whom Mohr sold or used marijuana (215:36; 245:85-97). First responders and others who later processed the evidence may also have contaminated the evidence with their DNA. The existence of a third person's DNA on this evidence would not undermine Denny's statements to several different people, including his brother and girlfriend, that he participated in Mohr's murder.

Citing *People v. Davis*, 2012 IL App (4th) 110305, 966 N.E.2d 570, Denny asserts that courts have allowed DNA testing in cases where the State relied upon a party to a crime theory. Denny's brief at 22-23. *Davis* is readily distinguishable from Denny's case on several grounds. First, at Davis's trial, the State never asserted that a second person participated in the child's homicide and witnesses never suggested another perpetrator in their testimony. *Id.* ¶ 56. Here, the jury found Denny guilty of murder as a party to a crime.

Second, the evidence tested in *Davis* is far more compelling than the evidence Denny seeks to have tested. In

Davis, a child was raped and murdered. Her stepfather discovered her body on a bed in a neighbor's house. The stepfather saw wet stains on the victim's bedclothes which looked like blood and mucus. When touched, the stains seemed sticky or tacky. *Id.* ¶ 32. A DNA expert noted that the semen was mixed with the victim's blood and some of the semen was on top of her blood on the bedding. The expert concluded that the deposit of the blood and semen could only have occurred at the same time. *Id.* ¶ 55. Finally, some of the blood and semen was a match for a key witness and would provide a significant reason for that witness to fabricate testimony implicating Davis. *Id.* ¶ 57.

While a reasonable inference in *Davis* supports a theory that the DNA recovered from semen was deposited at the time of the rape and murder, Denny can make no such claims that any DNA that might be recovered from the items he wants to have tested were deposited at the time of Mohr's murder. Any such assertion would be nothing more than speculative. Denny's motion fails to prove a reasonable probability that the tests results could be exculpatory.[10]

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[10] Denny also seeks to have hair found in Mohr's hands and on Mohr's clothing and the sheet that responders wrapped Mohr's body in tested. An analyst found that the hairs found in Mohr's hands were consistent with Mohr and not with Denny. Denny's brief at 13-14. In denying the motion, the circuit court noted that the jury found Denny guilty despite knowing that the hairs were not his (228:13). In other words, those hairs simply are not exculpatory in the context of Denny's case.

Likewise, the fact that hairs may have been found on Mohr's clothing does not make it reasonably probable that the hairs belonged to a person responsible for Mohr's murder. Denny has offered no theory that suggests that it is reasonably probable that someone deposited those hairs at the time of the murder. Those hairs could have come from Mohr's contact with other persons at his home or in the community before his death or from persons who responded to the crime scene.

2. The presence of a third party's DNA or the absence of Denny's DNA would not be exculpatory because it would not create a reasonable probability that Denny would not have been convicted.

Denny asserts that he is entitled to testing under Wis. Stat. § 974.07(7)(a) because he would not have been convicted if a third party's DNA were found on the evidence he seeks to have tested. Denny describes the State's case as one grounded in "weak, circumstantial evidence." Denny's brief at 26.

The circuit court disagreed. Based upon its review of the record, it found that Denny did not meet his burden of showing that DNA testing in his case would make it "reasonably probable" that a jury would not have convicted him (228:2, 15).

The State agrees. Denny's motion does not specifically establish how any potential DNA results would create a reasonable probability that a jury would not convict him of murder. The State presented a compelling case linking Denny to Mohr's murder. In its Supplemental Statement of Facts, the State detailed evidence against Denny, including Denny's consistent admissions to numerous people at different times and places.

- Trent Denny. On at least two occasions, Denny admitted to his brother Trent that he and Kent killed Mohr by stabbing him (246:240-41, 251). Following a conversation in which Denny and Kent discussed getting rid of the clothes, Kent showed Trent clothes that smelled of blood and Trent saw Kent dispose of the bag with the clothes (246:245-49). Denny also told Trent about getting rid of the knife and showed Trent where it was behind the residence (246:250-51, 288-90).

- Lori Jacque. Denny told Jacque that Mohr scratched his leg (247:95-96, 154). Jacque corroborated Trent's testimony regarding the disposal of the clothes at a dump (247:90-93). Jacque also heard Denny and Kent discuss forgetting the tennis shoes (247:94:95).

- Tammy Whittaker. Denny told his girlfriend, Tammy Whittaker, that he helped Jonathan Leatherman kill Mohr (249:101-02). On a different occasion, Denny told Whittaker that Kent started stabbing Mohr and that Denny got a quarter pound of marijuana out of the murder (249:102-03).

- Patricia Robran. A crying Denny told Robran that he and Kent had killed the boy in Grafton. They stabbed him and hit him with a bong. Denny could not remember how many times Denny stabbed him. Denny got a quarter pound of marijuana from the murder (247:271-72).

- Steve Hansen. Denny told Hansen that he was with Kent when Kent stabbed Mohr. Denny kicked Mohr in the stomach when Mohr fell to the floor (247:264-65).

- Daniel Johansen. Denny told Johansen that he and Kent were at Mohr's house when Kent stabbed Mohr in the stomach. Denny kicked Mohr and hit him over the head with a bong (249:49-51).

Kent Denny's statements also support Denny's admissions that he participated in Mohr's murder. Kent told Lori Ann Jastor Commons that he stabbed Mohr and then Denny stabbed Mohr (247:194-95). Kent also admitted killing Mohr to Trent (246:235-36), Jacque (247:89), Diane Hansen (247:178) and Robin Doyle (247:215). Consistent with Denny's statement that Denny got a quarter pound of marijuana out of the murder, Kent told Carl Winkler that he

had stabbed Mohr and Mohr was stabbed over drug money (247:241-42). Jonathan Leatherman, who discovered Mohr's body (245:89-91), was unable to locate a quarter pound of marijuana that Mohr and Leatherman had previously purchased (245:91-92, 131-32).

Police found a shoe print with a tread pattern similar to a tennis shoe with a tread pattern tied to Denny. Denny's brief at 5-6. The State linked this shoe to Denny through Tod Trierweiler (249:64-65), Tammy Whittaker (249:99-100), and Russell Schram. Denny told Schram that the "murder" shoes were in a bag that Denny placed into Trierweiler's trunk (249:113). Denny later told Schram not to say anything about the shoes or he would become an accessory to the murder (249:117). Trierweiler subsequently found two pairs of shoes in a bag in his trunk. He gave one to his girlfriends' brother and wore the tennis shoes. He eventually turned the tennis shoes over to the police (249:67-70, 86-88).

The State presented compelling evidence demonstrating Denny's participation in Mohr's murder. Recovery of a third person's DNA on the evidence Denny wants to have tested would not prompt a jury to have a reasonable doubt as to Denny's guilt. That a third person's DNA may be present on the items Denny wants to have tested does not mean that the third person had a motive, opportunity, or direct connection to Mohr's murder. At most, it merely raises a suspicion, albeit a remote one, that a third person was involved, which alone is not grounds for admissibility.

In light of the overwhelming evidence against Denny, it is not reasonably probable that a jury would not have convicted him even if a third person's DNA exists on the evidence in question. Denny simply has not met his burden to trigger mandatory testing under Wis. Stat. § 974.07(7)(a). The circuit court properly denied his request for testing under this section.

CONCLUSION

For the above reasons, the State respectfully requests this Court to deny Denny's motion for postconviction DNA testing at either Denny's or the State's expense.

Dated this 11th day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,974 words.

Dated this 11th day of August, 2015.

_____
Donald V. Latorraca
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated this 11th day of August, 2015.

_____
Donald V. Latorraca
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of August, 2015.

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