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 OF AMICUS CURIAE, THE INNOCENCE NETWORK, SUPPORTING DEFENDANT-APPELLANT JEFFREY C. DENNY

Robert DeBauche
State Bar No. 1031390
DeBauche Law Firm
P.O. Box 8608
Madison, WI 53708-8608

Counsel for Amicus Curiae

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I. INTEREST OF *AMICUS CURIAE*

The Innocence Network is made up of 70 member organizations around the globe dedicated to providing pro bono legal and investigative services to wrongly convicted individuals seeking to prove their innocence. The Network represents hundreds of prisoners with innocence claims in all 50 states, Puerto Rico, and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, the Netherlands, France, Italy, South Africa, Taiwan, and Israel.

The Network and its members also seek to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Inasmuch as post-conviction DNA testing can (1) exonerate the convicted innocent, (2) identify perpetrators who so far have escaped justice, and (3) help to illuminate those aspects of the criminal justice system that lead to the conviction of actually innocent citizens, amicus has a compelling interest in ensuring that courts reviewing requests for post-conviction DNA testing apply the most liberal construction of laws possible to allow easy access to such powerful evidence.

II. SUMMARY OF ARGUMENT

The power of DNA cannot be denied in achieving justice for those convicted of crimes they did not commit. To date, over 330 individuals nationwide have been proven factually innocent although juries or judges determined them guilty beyond a reasonable doubt. Ensuring access to physical evidence to allow for DNA testing is a critical first step in every DNA exoneration. As DNA technology quickly develops, courts must keep pace in assuring their statutes allow for the most advanced testing.

Amicus urges this Court to grant Mr. Denny the DNA testing he seeks. The State's arguments, aimed at the Wisconsin Supreme Court, are inconsistent with established law and would erect profound barriers for the convicted innocent to access the very evidence that could prove their innocence. Suggesting that petitioners prove the existence of evidence detectable only by the use of the very testing sought is irrational and would thwart the remedial purpose of Section 974.07. Moreover, because touch DNA has been used by law enforcement nationwide to determine the identity of perpetrators, this Court should have no reservations regarding its reliability. Finally, this Court is urged to confirm the Legislature's intent that those seeking post-conviction DNA testing through Section 974.07 are entitled to a presumption that such testing would produce exculpatory results. Only then will the intent of the statute be carried out and can the innocent achieve justice through testing.

III. ARGUMENT

A. Requiring Petitioners Bear A Burden In Proving "Biological Material" Exists Before Testing Is Patently Unreasonable.

The State argues Mr. Denny cannot avail himself of DNA testing pursuant to Section 974.07 because he failed to prove the evidence sought for testing "contains biological material." Resp. Brief at 15. However, the DNA testing statute has no such requirement. *See, generally* ***State v. Moran***, 284 Wis. 2d 24, 30, 700 N.W. 2d 884, 887 (2005). Neither the statute nor caselaw requires a defendant to prove biological evidence is present on physical items before testing. *See* Wis. Stat. § 974.07.

Requiring a movant to meet such a standard would place an irrational and unobtainable burden on an incarcerated defendant. As DNA is contained within cellular material it is often not possible to reliably determine whether blood, skin cells, or other sources of trace biological material are present on an item without undertaking the testing process.[1] Some forms of biological evidence, such as blood or saliva, may be detectable through the use of screening tests,[2] yet, even presumptive tests may fail to detect small amounts of DNA. Others, such as skin cells, are only detectable—if at all—by

[1] *See, e.g.*, Daly, Murphy & McDermott, *Transfer of Touch DNA From Hands to Glass, Fabric, and Wood*, 6 Forensic Sci. Int'l: Genetics 41, 41, 44-45 (2012) ("The success rate in getting a DNA profile from the surface of a touched object will depend on the individual who has touched the object, which hand they have used, the activities of the individual prior to touching the object and the nature of the object."); and J. Sewell et al, *Recovery of DNA and Fingerprints from Touched Documents*, 2 Forensic Sci. Int'l: Genetics 281, 281-285 (2008).

[2] J. Butler, *Fundamentals of Forensic DNA Typing* 90-91 (2009). *See also* J. Butler, *Advanced Topics in Forensic DNA Typing: Methodology* 10-14 (2012).

performing a "quantitation" of the evidence.[3] However, both screening methods ordinarily occur in a laboratory setting[4] and neither method is available to the individual post-conviction movant before testing. Thus, were this Court to adopt the State's position, it would place defendants such as Mr. Denny in the untenable and forensically impracticable position of having to demonstrate the presence of biological material on evidence without the ability to first forensically examine the evidence.

B. Touch DNA Is Reliable, Has Aided Numerous Exonerations, And Any Concerns Regarding Potential Contamination Must Be Addressed Only After Testing Is Done.

1. Touch DNA is widely accepted by courts and law enforcement

Touch DNA refers to DNA from skin cells left behind when a person comes into contact with an item. Nat'l Institute of Justice, *DNA for the Defense Bar* 177 (2012). Forensic laboratories nationwide routinely test evidence for "touch" or "handler" DNA;[5]

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[3] Modern DNA analysis has multiple steps, and one of the first is quantitation. ***Commownealth v. Barbosa***, 457 Mass. 773, 781 (2010). During quantitation, a lab analyst determines the actual amount, if any, of human DNA on the sample being tested. ***Id.*** This step serves as a "screening tool," and the results permit the analyst to decide whether further DNA analysis is actually necessary, or what particular test should be used (e.g., Y-STR for male-female mixed samples, miniSTR for degraded samples or those containing small amounts of DNA). Cupples et al, *STR Profiles from DNA Samples With "Undetected" or Low Quantifiler Results*, 54 J. Forensic Sci. 103, 103 and 105 (2009). However, it should be noted, that samples occasionally show zero or low amounts of DNA, and highly sensitive STR tests still produce full DNA profiles for reliable forensic comparison. ***Id***. at 104-105.

[4] *See* Butler, *Fundamentals of Forensic DNA Typing* at 90 ("[Evidence from the crime scene] will have to be carefully examined in the forensic laboratory before selecting the area to sample for further testing. Prior to making the effort to extract DNA from a sample, presumptive tests are often performed to indicate whether or not biological fluids such as blood or semen are present.").

[5] A. Williamson, *Touch DNA: Forensic Collection and Application to Investigations*, 18 J. Ass'n. Crime Scene Reconstruction 1, 1 (2012). Importantly, modern DNA tests, such as STR, do not differentiate between DNA from skin cells, saliva, sweat, or any other microscopic biological material. van Oorschot, Ballantyne & Mitchell, *Forensic Trace DNA: A Review*, 1:14 Investigative Genetics 2-3 (2010). Thus, researchers and DNA analysts refer to these biological materials simply as "trace DNA." Id. at 3.

the practice is roundly embraced by law enforcement.[6] The molecular stability of DNA molecules over time has also led to an increased reliance on DNA testing of trace evidence in the contexts of both cold case investigations and post-conviction DNA exonerations. It is now well established that "biological evidence can be analyzed to produce a reliable DNA profile years, even decades, after it is collected." R. Fourney, Nat'l DNA Databank of Canada, Forensic Laboratory Services, *Forensic Reality and The Practical Experience of DNA Typing* 5 (2002). Forensic laboratories routinely test evidence for "touch" or "handler" DNA.[7]

2. Touch DNA has resulted in numerous exonerations of the actually innocent.

Testing of Touch DNA has played a substantial role in exonerating innocent people. This technology has produced astonishing DNA exonerations results due to both the minute traces of evidence involved and the grave errors that the exonerations have revealed. Although many more cases exist, the following serve as mere representations.

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[6] *See* Nat'l Institute of Justice, *Using DNA to Solve Cold Cases* (July 2002) at 29 ("[T]hrough recent advancements in DNA technology . . . [investigators] can identify a suspect in ways previously seen only on television. Evidence invisible to the naked eye can be the key to solving a residential burglary, sexual assault, or murder. The saliva on the stamp of a stalker's threatening letter, the perspiration on a rapist's mask, or the skin cells shed on the ligature of a strangled child may hold the key to solving a crime.").

[7] A. Williamson, *Touch DNA: Forensic Collection and Application to Investigations*, 18 J. Ass'n. Crime Scene Reconstruction 1, 1 (2012). Touch DNA refers to DNA from skin cells left behind when a person comes into contact with an item. Nat'l Institute of Justice, *DNA for the Defense Bar* 177 (2012). Importantly, modern DNA tests, such as STR, do not differentiate between DNA from skin cells, saliva, sweat, or any other microscopic biological material. van Oorschot, Ballantyne & Mitchell, *Forensic Trace DNA: A Review*, 1:14 Investigative Genetics 2-3 (2010). (A.A. 2-3). Thus, researchers and DNA analysts refer to these biological materials simply as "trace DNA." Id. at 3. For consistency with the parties' briefs, amici will use the term "touch DNA" when referring to DNA from skin cells or any other trace amount of biological materials.

Frank Sterling served over 17 years in New York prisons before DNA testing obtained by Network member The Innocence Project led to his exoneration in 2010. In 2006, testing for Touch DNA to detect sweat and skin cells left by a perpetrator was performed on numerous pieces of the victim's clothing. Results on two key areas of the clothing where the perpetrator would have grabbed the victim while beating her and dragging her body conclusively excluded Sterling and implicated another person. The DNA evidence of Sterling's innocence was corroborated in January 2010 when the real perpetrator gave a detailed confession. On April 28, 2010, Sterling was officially exonerated at the age of 46.[8]

In 2014, **Henry Lee McCollum** and **Leon Brown**, both convicted in North Carolina of the 1983 rape and murder of a teenage girl, were exonerated after another man's DNA was found on a cigarette butt left near the victim's body. *See* J. Katz and E. Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, NY Times, Sept. 3, 2014, at A1. Notably, the DNA on the cigarette was recovered thirty years after the crime, *id.*, and thus, presumably, thirty years after the evidence was collected by the police and placed in storage. Like in Mr. Denny's case, it would not have been possible to know DNA was available on the cigarette butt before testing.

Finally, **Uriah Courtney** was exonerated from his California conviction in a 2004 rape case after DNA tests found another male's skin cells on the victim's shirt and skirt.[9]

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[8] *See* Innocence Project, *The Cases: Frank Sterling*, available at http://www.innocenceproject.org/Content/Frank_Sterling.php.

[9] *See* Innocence Project, *The Cases: Uriah Courtney*, available at http://www.innocenceproject.org/Content/Uriah_Courtney.php.

The victim said the perpetrator put his chin on her shirt. Kristina Davis, *DNA Clears Man Convicted of Rape*, SAN DIEGO UNION-TRIBUNE, June 25, 2013. A CODIS search of the DNA profile found on the clothes linked to a man similar in appearance to Courtney, who lived near the crime scene.[10]

3. Any potential contamination can be addressed once testing is completed.

The State objects to the granting of DNA testing using Touch DNA on the fully hypothetical contention of cross-contamination. Resp. Brief at 16-19. This is no reason to block testing; rather, it is a matter concerning results obtained from testing.

Indeed, the law enforcement community routinely analyzes old, potentially contaminated crime scene evidence for potential touch DNA or other trace biological materials. The practice regularly occurs in cold case investigations.[11] Since the mid-1990s, with the advent of PCR DNA testing methods, law enforcement agencies have recommended testing an increasing number of items not previously considered suitable for DNA analysis.[12] In 1997, when researchers discovered forensic tests could isolate and analyze touch DNA from microscopic skin cells left behind on objects,[13] this discovery "opened up possibilities and led to the collection [by law enforcement] of DNA from a wider range of exhibits (including: tools, clothing, knives, vehicles, firearms,

[10] Innocence Project, *The Cases: Uriah*, *supra*.

[11] *See* NIJ, *Using DNA to Solve Cold Cases*, *supra* at 29.

[12] R. Wickenheiser, *Trace DNA: A Review, Discussion of Theory, and Application of the Transfer of Trace Quantities of DNA Through Skin Contact*, 47 J. Forensic Science 442, 442 (2002).

[13] Balogh et al, *Fingerprints from Fingerprints*, 1239 Int'l Congress Series 953, 956 (2003); van Oorschot & Jones, *DNA Fingerprints from Fingerprints*, 387 Nature 767, 767 (1997).

food, bedding, condoms, lip cosmetics, wallets, jewelry, glass, skin, paper, cables, windows, doors and stones)."[14] As a result, law enforcement agencies are permitted to use exactly the type of testing on exactly the same type of evidence collected from time frames similar to Mr. Denny's case to secure convictions.

Moreover, to deny DNA testing because of the possibility of contamination would both fail to presume the exculpatory results as required in Section 947.07(7), and would also reward the State for failing to take proper care in the handling and preservation of evidence.

Instead, this Court should honor the purpose of the Legislature and grant DNA testing because mere speculation about contamination cannot preclude testing under the statute, although discovery of contamination later may preclude relief. Indeed, contamination cannot be discovered until testing is completed. Should testing be performed and DNA mixtures identified, only then would the State's arguments be relevant—going to the weight of the results and not to whether testing is permitted.

C. Post-Conviction DNA Testing Statutes Should Be Interpreted With A Presumption Exculpatory Results Will Be Achieved

As a final matter, amicus urges this Court to confirm Section 974.07 must be read to assume exculpatory results, rather than the State's contention "that the defendant must specifically show in his motion . . . that there is a reasonable probability exculpatory evidence would be found on one or more of the relevant items to be tested." Resp. Brief at 15. This reading of Section 947.07 would thwart the remedial purpose of post-

[14] van Oorschot, *Forensic Trace DNA* at 2.

conviction DNA testing statutes and go against the national trend of assuming results will be exculpatory in weighing testing requests.

A key purpose of the Wisconsin DNA testing statute is to take the guesswork out of the process. *See* Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 Wis. Lawyer 20, 59 (2001) (discussing the "features of mandatory testing."). Even where the evidence against a defendant is particularly powerful, or where the likelihood of achieving results is particularly remote, DNA testing has the capability to reveal the truth and exonerate a wrongly convicted defendant. *See* ***Godschalk v. Montgomery Cnty Dist. Atty's Office***, 177 F.Supp. 2d 366, 370 (E.D. Pa. 2001) (granting testing because "if by some chance no matter how remote DNA testing . . . excludes plaintiff . . . a jury would have to weigh this result" against evidence from trial). For this reason, the focus of the statute is not on the probabilities of testing, but on the force of the evidence should it come back exculpatory.

Section 974.07(7)(a)(2) requires courts to *presume* DNA testing would yield exculpatory results when determining whether the movant is entitled to DNA testing at public expense. The language of the statute is plain: DNA testing is mandated if, among other things, "[i]t is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense at issue in the motion under sub. (2), *if exculpatory deoxyribonucleic acid testing results had been available* before the prosecution, conviction, finding of not guilty or adjudication for the offense." (Emphasis added.) The statute does not permit courts to speculate as to whether the testing being requested *will produce* exculpatory results, but

rather to assess only whether such exculpatory results, *if they are obtained*, might change the outcome of the case. *See* Findley, *New Laws Reflect the Power and Potential of DNA*, at 59 (Under Wisconsin's statute, "the movant need not prove that the tests will be favorable—the statute assumes favorable test results and requires testing if favorable results would create a reasonable probability of a different outcome"). Thus, a proper interpretation of the statute presumes testing will lead to exculpatory results and requires courts to order testing where such results would likely have precluded the movant's prosecution or conviction. Indeed, other jurisdictions with similar statutes have interpreted their meaning in precisely this way. *See, e.g.*, ***Nelson v. State***, 2011 WL 6349720 (Tenn. Crim. App. 2011) ("Although 'it is difficult to anticipate what results DNA testing may produce in advance of actual testing,' we must assume that the DNA analysis results will be exculpatory.") (internal citations omitted); ***State v. Peterson***, 836 A.2d 821, 827 (N.J. Super. Ct. App. Div. 2003).

IV. CONCLUSION

Amicus urges this Court to reject the State's arguments that binding authority was incorrectly decided. Post-conviction DNA testing should remain available to those who meet the statutory requirements. The power of DNA to right terrible wrongs is undeniable; those innocent people wrongfully imprisoned are entitled to have access to the evidence to establish their unjust imprisonment.

Dated this 11th day of September, 2015.

Respectfully submitted,

Robert J. DeBauche
State Bar No. 1031390

DeBauche Law Firm
P.O. Box 8608
Madison, WI 53708-8608

On behalf of The Innocence Network
Amicus Curiae

CERTIFICATION

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 this brief is 2,878 words.

Signed: _____

Robert DeBauche
State Bar No. 1031390

DEBAUCHE LAW FIRM
P.O. Box 8608
Madison, WI 53708-8608
(608) 354-3664

ELECTRONIC FILING CERTIFICATION

Pursuant to s. 809.19(12)(f), I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Signed: _____

Robert DeBauche
State Bar No. 1031390

DEBAUCHE LAW FIRM
P.O. Box 8608
Madison, WI 53708-8608
(608) 354-3664