STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2015AP202

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JEFFREY C. DENNY,

Defendant-Appellant.

On Review of a Decision of the Court of Appeals, District II, Reversing an Order Denying Post-Conviction DNA Testing Entered in the Circuit Court for Ozaukee County, the Honorable Joseph Voiland, Presiding, Case No. 1982CF000425

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was this Court's unanimous, "plain-language" reading of Wis. Stat. §974.07—the postconviction DNA-testing statute—in *State v. Moran* so plainly wrong that this Court should abandon *stare decisis* and reverse itself 11 years later, even though in the intervening years the legislature has chosen not to accept this Court's invitation to revisit the statute and the "plain language" of the statute has not changed one word since *Moran*?

The State presented this issue in the court of appeals while recognizing that the court was powerless to overrule *Moran*, but then abandoned the issue in its Petition for Review in this Court.[1]

2. Does the relevance threshold requirement for seeking DNA testing or access to evidence for testing at one's own expense under Wis. Stat. §974.07—a requirement that the evidence must be "relevant" to the investigation or prosecution—require the movant to show not only relevance but also that the evidence actually contains testable biological evidence, even before the movant has a statutory right to access or analyze the evidence?

The court of appeals held that the plain language of the "relevance" requirement imposes no obligation on the movant to show that the evidence contains testable biological evidence, in part because a

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[1] Because this Court's Order granting the Petition for Review expressly limited the parties to the issues raised in the Petition, Denny moved to strike Issue III in the State's Brief, which argued that *Moran* should be overruled. This Court denied that Motion, so Denny addresses the State's arguments in this brief.

movant would have no way of making that showing prior to accessing the evidence.

3. Does the additional showing required for court-ordered DNA testing at State expense—that exculpatory DNA test results would create a "reasonable probability" of a different result—impose an "outcome-determinative" (more-likely-than-not) burden on the movant, or a lesser, "undermines confidence" burden?

The court of appeals concluded that the standard is "undermines confidence," given that the showing leads only to discovery of DNA evidence, and not necessarily to a new trial, and given that the common legal understanding of the "reasonable probability" standard is that it is an "undermines confidence" standard.

4. Applying these standards to this case, is Denny entitled under the statute to access the evidence, and to court-ordered DNA testing at state expense?

The court of appeals ruled that Denny had shown that the evidence is "relevant" and that exculpatory DNA test results would indeed create a reasonable probability of a different result, so, given his indigency, he is entitled to court-ordered DNA testing at state expense.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting the State's Petition for Review, this Court has indicated that this case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

When police arrived at the scene of the brutal murder of Christopher Mohr, they found a crime scene strewn with physical evidence that could prove the identity of the perpetrator (215:18-20). Mohr had been stabbed more than 50 times, his throat was slashed, and he had been hit in the head repeatedly with a blunt object (215:24). His shirt was torn, exposing a large gash on his back (215:18). In his hand, Mohr clenched several "possibly foreign" hairs (215:25). Other hairs were stuck by blood to Mohr's face and clothing (215:25). The room was in disarray, indicating a violent struggle (215:19-20). Blood was on the walls, the desk, the bed's headboard, the door, and a beanbag chair (215:20;215:54). A shattered bong pipe was strewn about, as were thumbtacks, screws, safety pins, small filter screens, and a butane lighter (215:19). A metal lawn chair lay overturned by Mohr's head (215:18-19). Two gloves and a stocking cap lay on the floor (215:53). Two facial breathing masks—one clean, one soiled—were found behind the beanbag chair (215:20). A glass of orange juice and partially-melted ice cubes lay spilled on the floor (215:19). The grisly scene extended to the hallway: a yellow, blood-stained hand towel had been dropped on the floor and a telephone book, marked by a bloody footprint, lay nearby (215:21,53).

Recognizing the relevance of this evidence to their investigation—including its potential to identify the murderer—police collected what they could.

None of this evidence, however, was DNA tested—because forensic DNA analysis had not yet been developed (222:20-21). The only biological testing

available in 1982 was ABO-blood typing and visual microscopic-hair comparison (249:129-134). Neither test identified the perpetrator or implicated Denny (249:129-134). Today, while Denny continues to insist on his innocence, all of this evidence (except the breathing masks) sits with the Ozaukee County Clerk of Courts and has yet to be subjected to DNA testing (215:39-43).

In 1982, police began investigating a long list of potential suspects but quickly focused on Kent and Jeffrey Denny after a third brother, Trent, told an acquaintance that Kent had admitted to the murder (215:27,30-34). After interviewing Kent, the police focused on Denny as well (215:36).

Trent admitted that he was high and/or drunk during every conversation he had with his brothers about the murder (246:261). Trent also admitted that his brothers make up stories and that he, himself, imagines conversations (246:281-282). Nonetheless, Trent's statements formed a key component of the investigation and trial.

At a joint trial, the State hypothesized that the brothers took turns stabbing and striking Mohr, using the bong to hit Mohr's head (245:44). The State's case consisted primarily of witnesses who claimed they heard the brothers brag about killing Mohr (245:53-63). During its opening statement, the State called these witnesses the "meat and potatoes of the case" (245:53). The only physical evidence offered to connect Denny to the crime was the bloody shoeprint on the telephone book (215:53;245:63). However, the prosecution's lab analyst could not determine that a shoe purportedly belonging to Denny was the same shoe or even the same-sized shoe that had left the

bloody imprint (249:223). The analyst said the soles of Denny's shoes were mass-produced and not specific to any make of shoe; they were in no way unique to Denny's shoes (249:227-28).

Despite the lack of physical evidence tying the brothers to the murder, the jury found both guilty of first-degree murder, and the court sentenced both to life imprisonment (250:196-197;251:5).

After unsuccessfully appealing his conviction on unrelated issues, Denny filed his only motion for DNA testing in 2014, which he supplemented three months later (215;222). Denny sought testing of crime-scene evidence that could identify the murderer, including (1) pieces of the bong, (2) hairs in Mohr's hands, (3) hairs on Mohr's body, (4) the yellow hand towel, (5) gloves found near Mohr, (6) the bloody stocking cap, (7) Mohr's bloody clothing, (8) blood on the chair near Mohr's head, (9) the spilled glass cup, (10) the butane lighter, (11) pipe screens on Mohr's back and clothing, (12) two breathing masks, and (13) Mohr's hair (215;222). Denny argued he met the statutory requirements for DNA testing at public expense or, alternatively, at his own expense (215:13).

The circuit court denied Denny's motion (228). The court held that the evidence Denny sought to test was not relevant and that no DNA results could create a reasonable probability of a different outcome (228:8-13).

The court of appeals reversed. *State v. Denny*, 2016 WI App 27, 368 Wis.2d 363, 878 N.W.2d 679. The court held that Denny met all of the statutory requirements for court-ordered DNA testing at state expense. The court explained:

> Denny showed that the items he sought to test were relevant to the investigation or prosecution that resulted in his conviction, that it is reasonably probable that he would not have been convicted if exculpatory DNA testing results had been available at the time of his conviction, and the testing he seeks was not available at the time of his conviction.

Id. ¶1. The court held that Wis. Stat. §974.07(2)(a) does not require a defendant to prove that requested items contain biological material—only that the evidence is relevant to the investigation. *Id.* ¶¶35-47. The court also held that the proper standard to apply to decide whether favorable DNA test results would create a "reasonable probability" of a different outcome is *Strickland's*[2] "undermines-confidence" standard, not an "outcome-determinative" standard, and that favorable DNA results here would meet that standard. *Id.* ¶¶48-63. The concurrence/dissent agreed that the evidence was "relevant" and that therefore Denny was entitled to testing at his own expense, but disagreed that the testing should be court-ordered at state expense. *Id.* ¶¶65-66.

The State petitioned for review, and this Court granted review.

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[2] *Strickland v. Washington,* 466 U.S. 668 (1984).

ARGUMENT

I. Introduction

In 2001, Wisconsin joined the states that had created a postconviction right of discovery that allows convicted individuals to access physical evidence for DNA testing. The Wisconsin legislature unanimously adopted 2001 Wisconsin Act 16, which included Wis. Stat. §974.07, the postconviction DNA testing statute. Today, every state in the nation has enacted such a statute, in recognition of the unparalleled truth-telling potential of DNA. Innocence Project, http://innocenceproject.org/acess-post-conviction-dna-testing/.

These statutes were enacted after the advent of forensic DNA testing in the late 1980s, and the parade of DNA exonerations in the 1990s and 2000s demonstrated both that the criminal justice system is susceptible to error and that postconviction-DNA testing can correct those errors. These statutes recognize that the interests in protecting the innocent and identifying true perpetrators who have escaped prosecution demand access to DNA in the postconviction context. In 2001, the bill's chief sponsor, then-Representative Scott Walker, explained that the legislature felt "strongly about the use of DNA in terms of exonerating those who are innocent and equally so…ensuring that the real perpetrator of that crime is…someone that we need to go out and find who's still out in society, that's the proper use of this technology." Walker Presentation, UW Law School (2001), https://law.wisc.edu/fjr/clinicals/ip/.

The interpretations of §974.07 urged by the State are inconsistent with these legislative purposes

and the realities of DNA testing. More basically, the State's arguments are inconsistent with the plain language of the statute, and with the reading of that language by this Court in *State v. Moran,* 2005 WI 115, 284 Wis.2d 24, 700 N.W.2d 884. The State's interpretations would violate the plain meaning of the statute and effectively gut the right to postconviction DNA testing that the legislature sought to codify, essentially eliminating postconviction DNA testing in the future. Innocent individuals would languish in prison and true perpetrators would evade justice. This Court should reject the State's radical reinterpretation of §974.07.

II. *Moran* Correctly Reads The Plain Language Of §974.07.

Eleven years ago, this Court examined the plain language of §974.07 and *unanimously* held that it creates two separate pathways to postconviction DNA testing: first, a right of access to biological evidence, under which a movant, subject to protective conditions imposed by a court, may choose to send the material to a laboratory for DNA testing at the movant's own expense; and a second, under which a movant is entitled to a court order for DNA testing, at state expense if the movant is indigent. *Moran*, ¶57. Although not raised in its Petition for Review,[3] the State now goes so far as to contend that this Court's unanimous plain-text reading of the statute should be overruled, even though the plain language has not changed one word since *Moran*.[4]

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3 *See* footnote 1, *supra.*

4 The only thing that has changed is the State's own position on the statute. In *State v. Hudson,* 2004 WI App 99, ¶21, 273 Wis.2d 707, 681 N.W.2d 316, the State argued that the better reading

A. *Moran* correctly held that §974.07 creates two separate mechanisms for obtaining postconviction DNA testing.

This Court in *Moran* identified two pathways to DNA testing by examining the "plain language of the statute." *Id.* ¶32. This Court first looked to §974.07(2), which provides that any prisoner may seek access to biological evidence for DNA testing if he or she meets three threshold requirements. Quoting the plain language of §974.07(2)[5] this Court held that these three preliminary requirements are:

> First, the evidence containing biological material must be "relevant to the investigation or prosecution that resulted in the conviction…" Second, the evidence must be in the government's possession. Third, the evidence must not have been subjected to forensic DNA testing or, if so tested, "may now be subjected to another test that was not available or was not utilized at the time of the previous testing…"

Id. ¶42.

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of the statute was that the plain language provided the two pathways recognized later by this Court in *Moran*. A year later, in *Moran,* the State reversed course and argued that there was no right to access evidence for DNA testing at one's own expense under §974.07(6), but this Court rejected that contention. As noted, in this case the State again challenged *Moran's* reading of the law, then thought better of it and dropped it from its Petition for Review, only to raise it again in its brief.

[5] Section 974.07(2) is set forth in full in the Supplemental Appendix.

This Court then looked to subsection (6), which provides that once a movant satisfies these preliminary requirements:

> (6)(a) Upon demand the district attorney shall…make available to the movant…the following material:
>
> …
>
> 2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material.

The statute does not prohibit DNA testing once a movant gains access to the evidence. *Moran* therefore concluded that, "[i]f these requirements are satisfied, the plain language of the statute dictates that the movant should receive access to the evidence, and may subject the material to DNA testing at his or her own expense." *Id.* ¶43.

The second pathway to DNA testing applies only if a movant, in addition to meeting the three threshold requirements of §974.07(2), can also satisfy the additional requirements of §974.07(7).[6] Under sub. (7), a court "shall" order not just access to the evidence, but DNA testing itself, and under §974.07(12) the testing must be conducted at state expense if the movant is indigent. The additional requirements for such court-ordered DNA testing are that "[t]he movant claims that he or she is innocent"; "it is reasonably probable that the movant would not have been prosecuted [or] convicted…if exculpatory deoxyribonucleic acid testing results had been available before the prosecution [or] conviction…"; and "[t]he chain of

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6 Section 974.07(7)(a) is set forth in the Supplemental Appendix.

custody of the evidence" is established. Section 974.07(7)(a). Thus, "[t]he language of §974.07(7)(a)2 is plain, requiring us to determine whether it is reasonably probable that the movant would not have been prosecuted or convicted if exculpatory DNA testing results had been available…." *Denny*, ¶53. If so, a movant, if indigent, is entitled to court-ordered DNA testing at state's expense.

B. The State fails to recognize that both §§974.07(6) and (7) are discovery provisions, and therefore both can provide a pathway to DNA testing.

The State contends that, contrary to *Moran,* §974.07(6) cannot entitle one to DNA testing at one's own expense because, "[i]n the State's view, Subsection 974.07(6)(a)2 is just a discovery provision—not a testing provision…." St.Br.41. This argument highlights a fundamental misunderstanding of §974.07—the entire statute, including both subs. (6) and (7), is a discovery provision. Even before §974.07 was enacted, this Court appropriately treated a motion for postconviction DNA testing as a discovery motion in *State v. O'Brien,* 223 Wis.2d 303, 588 N.W.2d 8 (1999). To call something a "discovery" provision does not mean it precludes DNA testing; to the contrary, it means DNA testing is an available option.

Consistently, other courts recognize that postconviction-DNA-testing statutes are discovery statutes, because they provide a mechanism for accessing information, and do not inevitably lead to a challenge to the conviction itself. *See Price v. Pierce,* 617 F.3d 947, 952-953 (7th Cir. 2010)(postconviction-DNA-testing statutes are "discovery" provisions);

Brown v. Sec'y Dep't Corr., 530 F.3d 1335, 1337-38 (11th Cir. 2008) (Florida's postconviction-DNA-testing statute is "an application for discovery only"); *District Attorney for Third Judicial District v. Osborne,* 557 U.S. 52, 78 (2009) (Alito, J., concurring)("What respondent seeks was accurately described in his complaint—the discovery of evidence that has a material bearing on his conviction."). The distinction the State makes between subs. (6) and (7) is a meaningless one.

C. Section 974.07(12) is triggered only when the court rules that the defendant has a right to testing under §974.07(7).

The State argues that *Moran* renders §974.07(12) superfluous. Subsection (12) provides that a court granting court-ordered testing under sub. (7) must order the testing at state expense if the defendant is indigent. Because the State reads *Moran* as holding that testing under sub. (6) is always at the individual's expense, while testing under sub. (7) is always at state expense, and the State cannot see any other difference under *Moran* between the testing under subs. (6) and (7), the State sees nothing for sub. (12) to do. St.Br.44. The State misunderstands *Moran* and the distinctions between subs. (6) and (7).

Moran addressed only the requirements for accessing evidence for DNA testing at one's own expense, under the minimal threshold showings required by sub. (6), which does not entitle one to state-funded testing, or even to testing at the State Crime Laboratory at all. Section 974.07(12), by contrast, applies only if one has met the more demanding requirements for court-ordered DNA testing under sub. (7). It then does more than just

provide a right of access to the evidence. It also provides a right to a court order for testing. That is important because under Wis. Stat. §165.77(2)(a)1, the State Crime Laboratory may do DNA testing only for law enforcement agencies, or for the defense "pursuant to a court order." And then §974.07(12) provides that such court-ordered testing shall be at state expense, but only if the defendant is indigent—not in every case.

In other words, testing under §974.07(7), as opposed to access to evidence under §974.07(6), does at least two things: (1) it entitles one to DNA testing, including at the State Crime Laboratory, by court order; and (2) it triggers sub. (12), which entitles the defendant to that testing at State expense if he is indigent. Properly understood, sub. (12) does important work; there is nothing superfluous about it.

Finally, the State suggests that recognizing a right to self-funded DNA testing under sub. (6) would create equal-protection problems, yet omits that *Moran* already rejected that concern. Justice Wilcox, in his concurring opinion, explicitly raised the equal-protection issue. *Moran,* ¶66. The majority, however, concluded: "The harsh reality of life is that some persons who have been convicted of crime may have the means to hire attorneys or investigators post-conviction under circumstances that would never justify the expenditure of public money." *Id.* ¶56. Allowing a defendant to test evidence at his own expense presents no more of an equal-protection problem than allowing that same defendant to submit Open Records requests or interview witnesses at his own expense.

D. The State has not met its heavy burden of showing necessity to abandon *stare decisis*.

The principle of *stare decisis* is fundamental. This Court has repeatedly explained:

> "This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law."... It is a "longstanding rule that this court 'is bound by its own precedent.'"...
>
> > "Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law 'is open to revision in every case, "deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results."'"... Failing to abide by stare decisis raises serious concerns as to whether the court is "implementing 'principles...founded in the law rather than in the proclivities of individuals.'"...

Progressive Northern Ins. Co. v. Romanshek, 2005 WI 67, ¶¶41-45, 281 Wis.2d 300, 697 N.W.2d 417 (citations omitted).

As Justice Ziegler recently observed, even if the Court were convinced a decision was wrongly decided, that would not be reason to overturn it:

> "Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.' Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. *Accordingly, an argument that we got something wrong—even a good argument to that*

> *effect—cannot by itself justify scrapping settled precedent.*"

State v. Lynch, 2016 App 66, ¶298 (Ziegler, J., dissenting)(quoting *Kimble v. Marvel Entm't, LLC,* 135 S.Ct. 2401, 2409 (2015)(emphasis in *Lynch*)(citations omitted).

And all of this has added weight when, as here, the precedent interprets a statute. Agreeing with Justice Ziegler, the lead opinion in *Lynch* observed:

> "What is more, *stare decisis carries enhanced force when a decision…interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake* it sees.... All our interpretive decisions, in whatever way reasoned, effectively become part of the *statutory scheme, subject* (just like the rest) *to congressional changes.* Absent special justification, they are *balls tossed into Congress's court,* for acceptance or not as that branch elects."

Lynch, ¶13, n.18 (quoting *Kimble* at 2409 (emphasis in *Lynch*)).

There is no justification for upsetting *Moran's* settled reading of the plain statutory language. If it were not what the legislature intended, the legislature could have changed the law—indeed this Court invited the legislature to "revisit" the statute, *see Moran* ¶56—but it chose not to. The State's request to overrule *Moran* therefore amounts to little more than an improper request for this Court to make legislative amendments that the legislature has chosen not to make.

III. *Moran*'s Plain-Language Interpretation Does Not Require Showing That The Evidence "Contains Biological Material."

A. Section 974.07(2) requires showing only that the evidence is "relevant"—not also that the evidence contains biological material suitable for DNA testing.

A key threshold requirement of the DNA-testing statute for both self-funded and court-ordered DNA testing is that the evidence must be "relevant" to the prosecution or conviction. Section 974.07(2). The State seeks to deny Denny access to DNA evidence, arguing for a crabbed reading of "relevant"—a reading that is inconsistent with the plain language of the statute, the common legal meaning of "relevancy," and the express holding of *Moran.*

The State complains, as it did in *Moran,* that permitting defendants to test relevant evidence at their own expense is too broad. St.Br.33. In *Moran,* the State attempted to narrow the import of the plain statutory language by imposing additional requirements on a defendant's right to access evidence for DNA testing at personal expense. But this Court unanimously rejected that invitation to rewrite the statute. Expressing some reservations about the breadth of the disclosure obligation, this Court held: "For good or ill, the plain language of the statute leads us to [reject the State's interpretation]." *Moran,* ¶38. The Court continued: "We would have to add language to the statute in order to justify the State's interpretation.… We are simply "'not at liberty to disregard the plain, clear words of the statute.'"" *Id.* ¶¶39-40 (citations omitted).

Having failed to amend the statute in *Moran*, the State now tries again, offering other language it wants this Court to append to the statute. But just as the statutory language could not bear such revision in *Moran,* it cannot accommodate the State's additions here either.

The State now argues that "a movant must show that there is 'evidence containing biological material' in the evidence that the movant wishes to test." St.Br.26. The State's additional element, however, is not supported by any authority, the plain statutory language, or the realities of DNA testing.

The State's contention takes *Moran's* three-pronged analysis—which considers whether the evidence is (1) relevant, (2) in the government's possession, and (3) not previously tested under currently available methods (*Moran,* ¶42)—and adds to it another requirement mentioned nowhere in *Moran.* The State unabashedly asserts that the "relevancy" prong under *Moran* actually "contains two requirements that the movant must satisfy: he must specify 'with particularity' the evidence '*containing biological material*' that he wishes to test *and* demonstrate that such testing is "relevant to the investigation or prosecution that resulted in the conviction." St.Br.26-27 (*quoting Moran*, ¶¶41-42). In other words, the State contends, a movant must show that the evidence—which he has not yet had a chance to inspect—actually has testable biological material on it. However, there is no such requirement in *Moran*. Nor would any such requirement make sense, for it would require the defendant to show the presence of testable DNA before he has a right to even look at the evidence.

The State attempts to root this statutory misconstruction in Wis. Stat. §971.30(2). *Moran* did indeed cite §971.30(2)—which simply requires that every motion in the circuit court shall "[s]tate with particularity the grounds for the motion and the order or relief sought"—but for a very different principle than the State suggests. This Court explained that the appropriate—and textually supported—threshold limitation on the right to *access* evidence for testing, whether at State or one's own expense, is the simple "relevancy" standard of §904.01, coupled with a requirement, under §971.30(2)(c), that the movant identify "with particularity" the evidence sought. The Court wrote:

> [B]ecause subdivision (6)(a)2 is so open ended in terms of the "physical evidence" that a district attorney is required to disclose, there is a practical necessity that a motion to disclose should comply with Wis. Stat. §971.30(2), stating "with particularity" the evidence or the type of evidence that the movant is seeking.

Moran, ¶41. That is what the statutes plainly require; nothing more.

The State complains that, without proving there is biological material on the evidence, Denny has not stated "with particularity" what he hopes to test. But §974.07(2) and *Moran,* combined with §971.30(2)(c), simply require that the movant state "'with particularity' the evidence or the type of evidence that the movant is seeking." *Moran,* ¶41. Denny has done just that: he has identified with particularity each of the specific pieces of *evidence* that he wants to test.

Moran makes clear that the test for relevancy is the well-established test set forth under Wis. Stat. §904.01.

> Wisconsin Stat. §904.01 defines "relevant evidence" as "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."… We have described the appropriate inquiry as "'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, ¶45. Because evidence is relevant if it has "any tendency" to make a fact of consequence more or less probable, the standard is a very broad one. *See, e.g., State v. Marinez,* 2011 WI 12, ¶33, 331 Wis. 2d 568, 797 N.W.2d 399 (relevancy under §904.01 has an "expansive definition")(quoting Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* §401.1 at 97 (3d ed.2008)).

Accordingly, the court of appeals was entirely correct when it concluded that the plain language of the statute cannot support the State's claim. The court concluded:

> We decline to graft onto the statute the State's additional requirement that Denny was required to demonstrate there is "a reasonable likelihood that DNA evidence will be found on the evidence to be tested." Under WIS. STAT. §974.07(2)(a), the moving defendant must identify relevant "evidence" that is in the actual or constructive possession of the government and not previously tested. When the evidence is shown to be relevant, §974.07(6)(a) puts the onus on the

> district attorney to disclose, upon demand, "[p]hysical evidence…that contains biological material or on which there is biological material." Sec. 974.07(6)(a)2.

Denny, ¶42.

Section 974.07(2) demands a showing only that the *evidence* has *any tendency* to make a proposition of consequence more likely than not; subsection (2)(a), which creates the relevancy requirement, states in full that the movant may request testing if "[t]he *evidence* is relevant to the investigation or prosecution that resulted in the conviction…." (Emphasis added.) The State's interpretation would require this Court to rewrite the statute by inserting the following italicized words: "The evidence, *which the movant must show* '*actually contain[s] testable "biological evidence,*"'[7] is relevant to the investigation or prosecution that resulted in the conviction…." But because the statutory language requires only relevance, and because testing of physical evidence almost certainly grasped by the perpetrator in a violent struggle has more than just a reasonable tendency "to cast any light upon the subject of inquiry,"[8] there can be no serious doubt that the crime-scene evidence in Denny's case is "relevant."

The state complains, nonetheless, that the court of appeals "held that DNA testing of an item at private expense is permitted for *any* item 'collected during a crime scene investigation' that 'has *any* tendency to

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7 St.Br.23.

8 Blinka, *supra,* §401.102 at 101 (quoting Judicial Council Committee's Note, Wis. Stat. §904.01 (quoting *Oseman v. State*, 32 Wis.2d 523, 526, 145 N.W.2d 766, 768-69 (1966)).

contain biological material capable of DNA testing.'" St.Br.23. This, the State ominously warns, will swamp the crime laboratories and undermine legitimate convictions.

In addition to its conflict with the statute's plain language, the State's argument fails for two reasons. First, the court of appeals did not hold that in every case *all* evidence collected at a crime scene must be subjected to DNA testing at the movant's own expense if it has any tendency to contain DNA. Rather, the court held that *in this case* the evidence is relevant because it is likely that the perpetrator would have left DNA on it during a violent struggle. In other cases, with different facts, the items collected by police might not be relevant to identifying the perpetrator.

Second, *Moran* has been the law for eleven years, yet there is no evidence that the system has been overwhelmed by demands for DNA testing, or that legitimate convictions have been undermined. The sky has not fallen. Just as irrelevant evidence is inadmissible at trial, irrelevant physical evidence does not meet the statutory threshold for access to the evidence for DNA testing. Any item of evidence that is not relevant is ineligible for DNA testing under §974.07(2)(a), preventing the opening of floodgates to DNA testing of any evidence.

Moreover, the State's interpretation simply cannot be squared with the salutary purposes of §974.07. If the State's formulation were accepted, a defendant—even an innocent one—would be hard-pressed to meet the State's new requirement of showing that biological material exists. First, the evidence sought for testing is usually in possession of the State and unavailable to a defendant without a

court order under §974.07. *Denny*, ¶44. Second, it is impossible for a defendant to say with any certainty that microscopic DNA will be found on a particular piece of evidence. The first step in DNA analysis is always to assess the very question that the State would require the movant to establish *before* the testing. The first step is to attempt to extract DNA and perform a quantitation analysis—a scientific assessment of whether DNA is present, and if so, whether it is present in sufficient quantities for profiling. "Only after DNA in a sample has been isolated can its quantity and quality be reliably assessed." John M. Butler, *Fundamentals of Forensic DNA Typing*, 111 (3d ed. 2010). As the court of appeals explained:

> Putting the onus on a defendant to prove that an item contains biological material would pose serious impediments, and perhaps insurmountable barriers to him or her ever obtaining testing since these items are in the possession of the State. And testing is often required simply to determine if microscopic biological material containing DNA is on the evidence.

Denny, ¶44.

Numerous demonstrably innocent people would still be in prison—and true perpetrators would remain unidentified—under the State's proposed statutory revision. Consider Robert Lee Stinson, who was exonerated in Wisconsin after DNA testing proved his innocence and identified the true perpetrator. [9] In

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9 *Robert Lee Stinson*, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3666.

2014, convinced of Stinson's complete innocence, the Legislature passed, and Governor Walker signed, a private bill financially compensating Stinson for his 23 years of wrongful imprisonment.[10] The DNA testing was on cuttings from the deceased victim's shirt in areas that had saliva—yet dried saliva is typically undetectable to the naked eye.[11] The only reason the testing was performed was because the testing itself, ordered under §974.07, revealed the presence of DNA. Stinson was not required to show prior to testing what only the testing itself could reveal—that there was DNA on that shirt. Yet if the State's rewrite of §974.07 had been the law, the true perpetrator, Moses Price, Jr.,[12] would remain unknown and unprosecuted, and Stinson would remain in prison today for a murder he demonstrably did not commit.

As DNA technology continues to evolve, future DNA testing will undoubtedly reveal the truth where current technologies cannot. If the State's limitations on §974.07 were adopted, the rule would effectively bar access to these promising new technologies and the truth and justice they can provide. Such a reading would lock errors in place, rather than seize the expanding opportunities for truth-seeking through DNA that the legislature sought to harness.

Finally, this case is no different than *Moran.* There, this Court referred to a "bloody brick" on which

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10 Bryon Lichstein, *Compensation for the Wrongly Convicted: The Story of Wisconsin Innocence Project Exoneree Robert Lee Stinson* (UW Law School), July 1, 2014, https://law.wisc.edu/news/Features/Compensation_for_the_wrongly_con_2014-07-01.

11 *Id.*

12 Robert Lee Stinson, supra.

the defendant sought DNA testing as the "sought-after evidence containing biological material." *Moran,* ¶46. But this Court did not require the defendant to prove that the substance on the brick was blood or any other biological material, or that the substance could provide a DNA profile, or limit the testing to blood. To do so would be neither practical (since the defendant would have no way of offering such proof prior to testing) nor required by the statutory language. Therefore, in this case, the court of appeals appropriately did the only thing that the statute and *Moran* permit when it "decline[d] to graft onto the statute the State's additional requirement." *Denny*, ¶42.

B. The statute imposes the burden to discern "biological material" on the State, not the defendant, and does not limit "biological material" to any particular type.

There is yet another fundamental problem with the State's contention that the defendant's burden to show relevancy under §974.07(2) includes a requirement that he show that the evidence contains biological material. Nowhere does sub. (2), which defines the defendant's threshold burdens, use the words "biological material." The reference to "biological material" appears in sub. (6), which defines *the State's* responsibilities.[13] Subsection (6)(a) states in relevant part: "Upon demand *the district attorney*

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[13] A reference to "biological material" also appears in sub. (5), which, like sub. (6), defines the *prosecutor's* obligations—there, an obligation for the prosecutor to preserve "biological material" once a motion has been filed—further showing that the burden to discern "biological material" rests with the State, not the defendant.

shall disclose to the movant or his or her attorney…[p]hysical evidence that is in the actual or constructive possession of a government agency and *that contains biological material or on which there is biological material*." (Emphasis added.) It makes sense to put the burden on the prosecution, not the defense, given that the State possesses and controls the evidence and has the ability to assess it for biological material. Hence, the court of appeals correctly held, "When the evidence is shown to be relevant, §974.07(6)(a) puts the onus on the district attorney to disclose, upon demand, '[p]hysical evidence…that contains biological material or on which there is biological material.'" *Denny*, ¶42.

The State also attempts to limit the definition of "biological material" to "blood samples or other biological materials that are capable of DNA testing." St.Br.29. The State even contends that when hairs are present—and hairs by any definition are "biological material"—the defendant cannot access those hairs unless he "show[s] that the hair contains materials such as a root that constitute biological materials capable of DNA testing." *Id*. This argument, however, is both inconsistent with the statutory language and barred by *Moran*, where this Court emphasized that "§974.07 does not define the term 'biological material.'" *Moran,* ¶37. Moreover, neither §974.07 nor *Moran* limits "biological material" to material capable of any particular type of DNA testing. Had the legislature intended to limit the type of "biological material," it would have said so, but it did not.

The State's limitations on "biological evidence" for DNA testing are wrong as a matter of biology, genetics, and law. The State suggests that "biological evidence" must be limited to that which is visible to

the naked eye, and amenable to DNA testing. By DNA testing, the State apparently means testing methodologies like PCR-STR[14] testing, which require nucleated cells like those in the roots of a hair (the shaft does not contain nucleated cells). John H. Laub, *DNA for the Defense Bar,* 12, NAT. INST. JUST. (June 2012), https://www.ncjrs.gov/pdffiles1/nij/237975.pdf. But biological material, in the form of sloughed-off skin cells, dried saliva, dried sweat, and the like, can be found on all sorts of materials even though it may not be visible to the naked eye. *Id.* at 11. Moreover, DNA testing is not limited to nuclear DNA testing using PCR-STR technology. *Id.* at 12. Rather, DNA can also be obtained from non-nucleated cells utilizing mitochondrial DNA technology. *Id.* at 14. Even hairs with no root can be subject to mitochondrial DNA testing because hair shafts have mitochondrial DNA. *Id.* at 15. That analysis can include and even more definitively exclude an individual as the source of a hair. *Id.* Indeed, numerous individuals have been exonerated by mitochondrial DNA testing on hairs and other biological materials lacking nucleated cells.[15]

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14 Polymerase Chain Reaction (PCR) is a process of amplifying low-levels of DNA. Short Tandem Repeats (STR) refers to the dominant form of DNA profiling today, which is conducted in concert with PCR. Laub, *supra*.

15 *See, e.g.,* Richard Alexander, http://www.innocenceproject.org/cases/richard-alexander/ (prosecution and defense jointly moved to exonerate Alexander after mitochondrial DNA testing on hair shafts excluded Alexander and matched another man who had confessed to the crime); William Gregory, http://www.innocenceproject.org/cases/william-gregory/ (mitochondrial DNA testing on hairs); Sedrick Courtney, http://www.innocenceproject.org/cases/sedrick-courtney/ (same); Korey Wise, http://www.innocenceproject.org/cases/korey-wise/ (mitochondrial DNA testing of hairs, in combination with STR

If any doubt remains about whether Wisconsin's law includes these types of biological materials and these types of DNA testing, the legislature has directly answered that question. As a part of 2001 Wis. Act 16, which created §974.07, the legislature also provided a new, expansive, statutory definition of DNA profiling. A provision of that Act, Wis. Stat. §939.74(2d)(a), defines a "deoxyribonucleic acid profile" as "an individual's patterned chemical structure of genetic information identified by analyzing biological material that contains the individuals deoxyribonucleic acid."[16] That definition is not limited to nuclear DNA, or to PCR-STR analysis; it is deliberately broad enough to cover all DNA testing.

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testing of semen, exonerated five codefendants in the Central Park Jogger case, despite their confessions); Raymond Santana, http://www.innocenceproject.org/cases/raymond-santana/ (same); Yusef Salaam, http://www.innocenceproject.org/cases/yusef-salaam/ (same); Antrong McCray, http://www.innocenceproject.org/cases/antron-mccray/ (same); Kevin Richardson, http://www.innocenceproject.org/cases/kevin-richardson/ (same); Drew Whitley, http://www.innocenceproject.org/cases/drew-whitley/ (mitochondrial DNA testing on numerous hairs); Santae Tribble, http://www.innocenceproject.org/cases/santae-tribble/ (same); George Rodriguez, http://www.innocenceproject.org/cases/george-rodriguez/ (same); Charles Irvin Fain, http://www.innocenceproject.org/cases/charles-irvin-fain/ (same); Kirk Odom, http://www.innocenceproject.org/cases/kirk-odom/ (mitochondrial DNA testing on hairs and STR testing on semen together exonerated defendant); Wilton Dedge, http://www.innocenceproject.org/cases/wilton-dedge/ (same); Larry Peterson, http://www.innocenceproject.org/cases/larry-peterson/ (same).

16 Wisconsin Statute §971.23(9)(a) provides that this definition is also applicable to Wisconsin's discovery provisions.

Because the physical evidence in this case indisputably includes at least blood and hairs and almost certainly other biological material, and because it is relevant, the burden on the state is clear: the prosecutor must turn this evidence over to the defendant under §974.07(6), who can then choose to test it at his own expense (under appropriate protective restrictions imposed by the court; *see Moran,* ¶36), regardless of whether he meets the requirements for court-ordered testing at state expense under §974.07(7) (addressed below).

The State's real objection appears to be to "touch" DNA testing. Touch DNA simply refers to any DNA shed by an individual when handling an item. Typically, touch DNA is not visible to the naked eye; it can only be detected by the quantitation step in DNA analysis.[17] The State's proposed changes to §974.07 would require defendants to show that DNA is present whenever it is not visible to the naked eye, thereby categorically eliminating all touch DNA, since its presence cannot be established without scientific analysis—that is, without starting the DNA-testing process. Yet this cannot be what the legislature intended. It is certainly not what the statute says, and it is inconsistent with the law's purpose to assure an avenue for postconviction-DNA testing whenever DNA might exonerate. Indeed, while all 50 states now have postconviction-DNA-testing laws like §974.07, not one requires a defendant to prove the presence of DNA

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17 National Institute of Justice, *DNA Evidence: Basics of Identifying, Gathering, and Transporting*, http://nij.gov/topics/forensics/evidence/dna/basics/pages/identifying-to-transporting.aspx; John M. Butler, *Fundamentals of Forensic DNA Typing* 111 (3d ed. 2009).

before the testing can begin, or otherwise bars touch-DNA testing. To the contrary, across this country countless people have been exonerated by touch DNA of the very type the State would make inaccessible to innocent Wisconsin prisoners.

In Wisconsin, for example, nine years after Beth LaBatte was convicted of murder she was exonerated when tests on the murder-weapon handle (a shattered pool cue), a non-root-bearing hair, and touch DNA on a pair of socks used to wipe the victim's blood excluded her and proved her innocence.[18] In Dane County, Forest Shomberg was exonerated six years after his conviction for an attempted sexual assault after male touch DNA from the outside of the victim's pantyhose, where the perpetrator had groped her, excluded him.[19] Following Shomberg's exoneration, the State Claims Board found that this touch DNA proved Shomberg's actual innocence by clear and convincing evidence.[20] In New York, Frank Sterling was convicted of murder based on a false confession.[21] Sterling spent nearly 18 years in prison before testing on the victim's clothing revealed touch DNA where the true perpetrator had grabbed the victim. In Massachusetts, Angel Echavarria spent twenty-one years wrongfully

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18 *Beth LaBatte*, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3367.

19 *Forest Shomberg*, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3633.

20 *Forest Shomberg*, Wrongly Convicted Database Record, http://forejustice.org/db/Shomberg--Forest-.html

21 *Frank Sterling,* National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3662.

incarcerated before postconviction DNA testing on cords used to bind the victim revealed touch DNA and his innocence.[22]

In the end, the State's objections to touch DNA are puzzling given that it is the prosecution, much more than the defense, that typically relies upon touch DNA. Routinely, touch DNA is used to secure convictions. *See, e.g.,* Angela Williamson, *Touch DNA: Forensic Collection and Application to Investigations,* 18 J. Assoc. Crime Scene Reconstr. 1, 3-4 (2012)(noting the evidentiary value of touch DNA on clothing for prosecuting cases, and profiling three cases in which touch DNA was used to solve previously unsolved crimes); *State v. Bullock,* 2014 WI App 29, ¶3, 353 Wis.2d 202, 844 N.W.2d 429(prosecution introduced DNA matching the defendant's from the handle and blade of a knife, the presumed murder weapon); *Williamson v. State*, 993 A.2d 626, 634-35 (Md. 2010)(police obtained DNA from a cup from which the suspect drank during questioning); *Commonwealth v. Bly*, 862 N.E.2d 341, 356-57 (Mass. 2007) (police obtained DNA from cigarette butts and a water bottle the suspect left after an interview with police); *State v. Athan*, 158 P.3d 27, 37 (Wash. 2007)(police obtained DNA from an envelope the suspect licked). The State cannot simultaneously rely on touch DNA to prosecute, while foreclosing it to the innocent who want to use it to exonerate.

The State insists that, to be eligible for DNA testing, a movant must prove that which only testing

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22 *Angel Echavarria*, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4707.

itself can establish. By demanding that a movant prove the existence of biological material, the State undermines the very purpose of the statute. That cannot be what the legislature intended.

IV. A Defendant Is Entitled To Court-Ordered DNA Testing At State Expense If It Is Reasonably Probable He Would Not Have Been Convicted Had Exculpatory DNA Test Results Been Available.

The crux of this case is not relevance—the evidence easily meets the broad test for relevance under §904.01. The issue is whether, assuming DNA testing results favorable to Denny, those results would create a reasonable probability of a different outcome. If so, as the court of appeals properly held, Denny is entitled not only to access evidence for testing at his own expense under §974.07(6), but to court-ordered testing at state expense under §974.07(2).

The State argues that "reasonable probability" of a different outcome is an outcome-determinative test—the movant must show that a different outcome is more likely than not. The court of appeals, however, properly rejected that standard and applied the commonly understood meaning of "reasonable probability" of a different result, as enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), *United States v. Bagley,* 473 U.S. 667 (1985), their progeny, and every other legal context in which the phrase has been used. "Reasonable probability" of a different result is a specific and well-understood legal term of art, long understood to mean that a movant need not prove a different outcome is more probable than not, but merely sufficiently likely as to "undermine confidence" in the outcome. *Strickland* at 694. Indeed,

two years before the legislature codified the statutory right to postconviction-DNA testing, this Court adopted and explained the "reasonable probability" standard as an "undermines confidence" standard in the context of post-conviction-discovery requests for access to evidence for DNA testing. *See State v. O'Brien*, 223 Wis.2d at 320-321 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" (quoting *Strickland* at 694, and *Bagley* at 682)). By using that same language in §974.07(7) the legislature codified the standard already adopted in *O'Brien.*

Lest there be any doubt about the import of that formulation, the U.S. Supreme Court has explained the significance of the wording:

> *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and *the adjective is important*. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434 (1995)(emphasis added).

Because the Wisconsin legislature deliberately chose to utilize the well-defined legal term of art including the important adjective, "reasonable," it must have intended that the term means what it has always meant in the law. After all, "[t]he legislature is

presumed to know the law, and to know the legal effect of its actions." *In re the Commitment of West,* 2011 WI 83, ¶61, 336 Wis.2d 578, 800 N.W.2d 929.

The court of appeals therefore correctly held that the outcome-determinative standard is inappropriate because a motion for access to DNA testing is a threshold issue—a discovery motion, not a motion to vacate a conviction. "Denny is not, at this point, seeking a new trial." *Denny*, ¶80. In *Moran,* this Court also observed that granting testing "does not mean that [the defendant] will get a new trial, or even an evidentiary hearing. Rather, if the testing is done, the circuit court will determine whether or not the results 'support the movant's claim.'" *Moran*, ¶47 (quoting §974.07(10)). It would make little sense to impose a higher (or the same) standard on a threshold issue—whether or not the defendant is entitled to DNA *testing*—than is required for the ultimate issue—whether to grant a new trial. The State elides the request for testing with using results of that test. The latter is not an inevitable consequence of the former.

The only possible exception to this consistent understanding of "reasonable probability" is the uncertainty that has arisen recently over the standard governing motions for a new trial based on newly discovered evidence (NDE). In this regard, the court of appeals was mistaken when it asserted that the NDE standard is the higher, "outcome-determinative" standard. *Denny,* ¶48. In fact, this Court and the court of appeals have repeatedly declared that the NDE standard in criminal cases is unsettled, and the courts have found it unnecessary to resolve the question. *See State v. Avery,* 2013 WI 13, ¶32 n.16, 345 Wis.2d 407, 826 N.W.2d 60 ("We need not decide this issue…");

State v. Edmunds, 2008 WI App 33, ¶22, 308 Wis.2d 374, 746 N.W.2d 590 ("the supreme court has left open the question of what a reasonable probability means in the newly discovered evidence context").

The confusion arises because many formulations of the NDE standard do not include the adjective "reasonable," and instead merely require a movant to prove a "probability" of a different result. Indeed, the statutory NDE rule in Wisconsin does not include the adjective, "reasonable." Wis. Stat. §805.15(3)(d) provides, on this element, that for a new trial based on NDE a court must find that "[t]he new evidence would probably change the result." While that sounds like an outcome-determinative test, that does not resolve the matter in criminal cases, because this Court has held that §805.15 applies only in civil cases. *State v. Henley,* 2010 WI 97, ¶39, 238 Wis.2d 544, 787 N.W.2d 350. In *criminal* cases, the standard is one created by the Court, and it does include the adjective, "reasonable." *See State v. Armstrong*, 2005 WI 119, ¶162, 283 Wis.2d 639, 700 N.W.2d 98.

But this Court again need not resolve the NDE question, because this is not an NDE case; it is merely a discovery request. Regardless of what standard governs NDE motions, the court of appeals correctly concluded that "it is appropriate to use the undermine-confidence test given the difficulty in anticipating DNA results and the jurors' assessment of the impact of the assumed exculpatory evidence on the other evidence introduced at trial." *Denny*, ¶52.

For these reasons, all jurisdictions that use the "reasonably probable" language in their DNA-testing statutes employ the "undermine confidence" test. *See Richardson v. Superior Court*, 183 P.3d 1199, 1204

(Cal. 2008)("reasonable probability" in state's postconviction-DNA statute has the same meaning as in *Strickland*—"a probability sufficient to undermine confidence in the outcome"); *State v. Dupigney*, 988 A.2d 851 (Conn. 2010)(same); *Powers v. State*, 343 S.W.3d 36, 54-55 (Tenn. 2011)(same); *Eubanks v. State*, 113 S.W.3d 562, 565 (Tex. App. 2003)(same); *In re Towne,* 86 A.3d 429 (Vt. 2013)(same); *Ex parte Hammond*, 93 So. 3d 172, 177 (Ala. Crim. App. 2012); *Hood v. United States*, 28 A.3d 553, 564 (D.C. 2011).

Courts have required a more-likely-than-not, or outcome-determinative, showing only where the legislative language clearly demands it. *See, e.g., State v. Thompson*, 271 P.3d 204, 207 (Wash. 2012)(Washington statute provides for postconviction-DNA testing if "the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."). Wisconsin's law does not employ such language.

In any event, given that the different standards draw "a very fine distinction that would affect only the rare case," *Denny*, ¶ 48, this Court need not resolve the matter here, because Denny has met either standard.

V. On The Facts Of This Case Denny Is Entitled to DNA Testing At State Expense.

Applying these legal standards, the State challenges Denny's showing of two of the elements needed to obtain court-ordered DNA testing at state's expense: (1) as discussed above, the State claims the evidence was not "relevant" to the investigation or prosecution; and (2) the State claims that exculpatory DNA test results would not create a reasonable

probability of a different outcome. The court of appeals properly rejected both contentions.

A. The items Denny seeks to test are relevant.

The State's only real challenge to the relevancy of the evidence turns on its misreading of the "relevancy" requirement, discussed above. Once understood properly—the standard does not require the defendant to prove the presence of testable biological evidence before accessing or analyzing the evidence—there is little left of the State's relevancy challenge.

The evidence Denny requests for DNA testing has the potential to determine the identity of the killer(s). As the court of appeals noted, all the evidence Denny submitted for testing was "recovered during the processing of the crime scene and [was] either presented as exhibits and/or testified to at trial." *Denny*, ¶39. All or at least some of the evidence had to have been touched by the killer(s), making it highly relevant to Denny's prosecution and conviction. Relevance becomes apparent by considering what the evidence was and where it was found:

- *Shattered Bong:* Denny requested testing of pieces of the shattered bong (215:5-6;222:3). Police observed that the pipe was broken on one end and pieces lay around Mohr's body (215:19). During trial, the State argued that the perpetrator used the pipe to hit Mohr over the head (245:44-45). The pathologist agreed that the pipe would almost certainly have produced the blunt trauma (247:39). Since the perpetrator must have held the bong to hit Mohr, touch DNA is almost certainly present. Testing has the

potential to reveal the perpetrator's identity.

- *Hairs in Mohr's hands:* Mohr was found clutching hairs in both hands (245:192-93). The lab analyst found these hairs to be consistent with samples from Mohr (249:133). The analyst agreed that hair comparison is an art and not a science and that "the result [was] not a scientific certainty" (249:172). It is now well-known that microscopic hair analysis is unreliable.[23] The nature of the crime scene indicated that Mohr struggled with the perpetrator and thus Mohr might have pulled out that person's hair during the struggle. Testing this hair has the potential to reveal the identity of the perpetrator.

- *Stray hairs on Mohr's body:* Denny requested testing of the hairs found on Mohr, including those collected from the sterile sheet used to wrap Mohr's body (215:6;222:5). Police noticed that many hairs were stuck to Mohr with dried blood (215:25). Two hairs were inconsistent with Mohr (249:134). The analyst also concluded that none of the hairs were consistent with Denny's hair (249:146-47). While committing this crime, the perpetrator likely shed or had hair pulled from his body. A DNA profile from the hairs could identify the perpetrator.

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23 *See* Spencer Hsu, *FBI admits flaws in hair analysis over decades,* Wash. Post (Apr. 18, 2015), https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html.

- *Yellow hand towel:* Police collected a bloody yellow hand towel outside Mohr's bedroom (215:21). The lab analyst found Type O blood on the towel—the same blood type as Mohr (249:129-30). The perpetrator could have used the towel to wipe blood off the murder weapon as he was leaving (just as in the LaBatte case, referenced above in section II). DNA from the towel could identify the perpetrator.

- *Gloves found near Mohr:* Two gloves were found near Mohr's body (215:53). The lab analyst detected blood on at least one, but attempts to match the blood to Mohr's sample were inconclusive (249:131). DNA testing of the blood could reveal the perpetrator's identity. Alternatively, if the perpetrator wore these gloves while committing the crime, his DNA could be on the inside of the gloves. The perpetrator's DNA could also be on the outside of the gloves if, for example, he wiped sweat from his face.

- *Bloody hat:* A blood-stained "knit stocking-type cap" was found near the gloves in Mohr's bedroom (215:53;245:185). The perpetrator may have worn the cap or grabbed it off Mohr during the struggle, especially given that it was covering a partially melted ice cube. Testing the hat could reveal the perpetrator.

- *Mohr's bloody clothing:* Mohr's jacket, torn shirt, jeans and socks, were soaked in blood (245:175-184). The perpetrator must have had contact with Mohr, and almost certainly tore Mohr's shirt. DNA on Mohr's shirt might reveal the

killer's identity.

- *Blood from the chair:* A bloody lounge chair was found near Mohr's head (215:18-19). Officers stated that the chair "apparently was the original location of the victim prior to the accident" (222:16). Given the violence of the attack, it is likely the perpetrator touched the chair, leaving behind DNA that could show his identity.

- *Glass cup found near Mohr:* Police discovered a glass cup on the floor with blood on the outside and an orange liquid inside (245:210). Partially melted ice cubes lay near the glass, indicating that Mohr died a short time before being discovered (245:211). It is likely that either Mohr or the perpetrator drank from the cup, so DNA testing could reveal the perpetrator's identity.

- *Butane lighter:* Officers found a bloody lighter underneath Mohr's shoulder (215:19;245:200). If the attacker used the lighter prior to the attack he would have rubbed off DNA on the lighter, and DNA testing could reveal his identity.

- *Screens found on Mohr's body:* Officers collected several "screened type filters" embedded in Mohr's shirt and the flesh of his back (215:19). The screens may have been touched by the perpetrator during the struggle and could reveal the killer's DNA.

- *Facial breathing masks:* Police collected two facial breathing masks from the crime scene (215:20). Especially because one of the masks

was "heavily soiled," it is possible that the perpetrator wore the mask during the attack, leaving saliva, blood, or epithelial cells on the masks that could produce a DNA profile.

- *Mohr's hair:* Investigators collected Mohr's hair "for purposes of analysis and comparison" (245:188-91). DNA testing on Mohr's hair is necessary to rule out Mohr's profile from other DNA that may be found.

Each item is relevant to the investigation and prosecution of this crime. There is a rational connection between the evidence and the identity of the perpetrator.

B. Favorable DNA results would create a reasonable probability of a different outcome.

Three types of DNA test results would create a reasonable probability of a different result: DNA that matches a convicted offender; DNA that excludes Denny and Kent on all items; or DNA on multiple items matching the same unknown third party ("redundant DNA").

1. ***DNA on one or more items that match a convicted offender:*** If testing reveals a convicted offender's DNA profile on one or more pieces of evidence, those results would identify a perpetrator and demonstrate Denny's innocence. A DNA profile matching a convicted offender's profile in the Combined DNA Index System ("CODIS") would undermine the State's theory of the crime. The State presented no evidence that Denny and Kent committed the crime with anyone else, let alone a convicted offender. The evidence would be virtually

conclusive if there were no indication that any individual identified by the DNA had any connection to the Dennys and there were no innocent explanation for the presence of the offender's DNA.[24] Thus, such an exculpatory DNA testing result would create a reasonable probability that Denny would not have been prosecuted or convicted.

2. ***DNA that excludes Denny and Kent as the source of DNA on all items:*** DNA testing may reveal profiles, but none that match Denny or Kent's DNA, or any other known person in CODIS. This result would be strong evidence that someone other than Denny and Kent committed the crime. Given the violent nature of the crime, and the extraordinary sensitivity of modern DNA testing, it is almost inconceivable that the perpetrator could have committed the crime without leaving at least some detectable DNA at the scene.

3. ***Redundant DNA matching an unknown third party:*** DNA testing may reveal a profile that appears on multiple items found at the crime scene. If this redundant DNA profile does not match Denny or Kent, it would strongly suggest that someone else committed the crime. For example, if the same third-party DNA profile were found on pieces of the bong and the hairs from Mohr's hand, it would indicate that the

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24 *See Jeramie Davis,* National Registry of Exonerations, Apr. 15, 2013, http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4152. After DNA tests matched a convicted offender, the State changed its theory to argue there was more than one perpetrator. The State abandoned this theory when it found no evidence that the convicted offender and Davis knew each other.

person with whom Mohr fought and who hit Mohr on the head with the bong was not Denny or Kent.

There is a reasonable probability that any of these results would cause a rational juror to have a reasonable doubt about Denny's guilt. The prosecution's case rested almost exclusively on disreputable or incentivized witnesses who claimed they heard Kent and Denny brag about killing Mohr (245:53-63).

The State now suggests that Denny could have stood lookout, leaving none of his DNA at the scene. St.Br.35. But such a scenario was never presented to the jury. Instead, Denny was "described by multiple witnesses, as recounted in the State's closing argument, as having stabbed Mohr, possibly 'five, ten, fifteen times.'" *Denny*, ¶41. If the DNA results force the State to now change its theory of the case to suggest that Denny was merely a lookout, then that theory would directly undermine the inculpatory statements attributed to the Denny brothers. An exculpatory result would force the State to concede that those statements are false in their most salient features.

Analogizing to *State v. Hudson,* the State asserts that because the evidence against Denny is "overwhelming," he does not meet the "reasonably probable" threshold. St.Br.36 (citing *State v. Hudson*, 2004 WI App 99, ¶21, 273 Wis.2d 707, 681 N.W.2d 316). But the facts in *Hudson* are significantly different. In *Hudson* 1) an eyewitness encountered Hudson standing over the victim's body, 2) Hudson then fled the scene and police promptly apprehended him after a high-speed chase, 3) Hudson was covered in blood and a bloody knife was found in the vehicle, 4)

Hudson made incriminating statements about having stabbed the victim, and 5) DNA typing matched Hudson. *Hudson*, ¶2-8. No conceivable set of results from additional DNA testing could have undermined the proof of guilt. In Denny's case, by contrast, the evidence against him was much less conclusive and potentially false. Exculpatory DNA test results could fairly conclusively undermine that evidence.

Further, people have been exonerated in cases where the evidence seemed even more "overwhelming." Christopher Ochoa, for example, signed a five-page, single-spaced murder confession filled with details that, seemingly, only the perpetrator could have known.[25] He went on to testify in detail, under oath, against his codefendant, explaining how the two committed the crime together, condemning them both to life sentences. Years later, after the true perpetrator confessed, Ochoa still maintained his story, even after law enforcement officers told him someone else confessed. Despite all of this evidence, Ochoa was proven innocent by DNA testing, and the real perpetrator was prosecuted and sentenced to life imprisonment.

In another case, Bruce Godschalk was initially denied DNA testing because a state court ruled that Godschalk's confession and eyewitness testimony "represented 'overwhelming evidence of…guilt….' The Superior Court also found that Godschalk's conviction 'rests largely on his own confession which contains details of the rapes which were not available to the

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25 *Christopher Ochoa*, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3511.

public.'" *Godschalk v. Montgomery Co. Dist. Atty's Office,* 177 F.Supp.2d 366, 367 (E.D.Pa. 2001). Nonetheless, a federal court ordered postconviction DNA testing, explaining:

> Nevertheless, if by some chance no matter how remote, DNA testing on the biological evidence excludes plaintiff as the source of the genetic material from the victims, a jury would have to weigh this result against plaintiff's uncoerced detailed confessions to the rapes. While plaintiff's detailed confessions to the rapes are powerful inculpatory evidence, so to[o] any DNA testing that would exclude plaintiff as the source of the genetic material taken from the victims would be powerful exculpatory evidence. Such contradictive results could well raise reasonable doubts in the minds of jurors as to plaintiff's guilt. Given the well-known powerful exculpatory effect of DNA testing, confidence in the jury's finding of plaintiff's guilt at his past trial, where such evidence was not considered, would be undermined.

Id. at 370 (footnote omitted). Despite the overwhelming evidence of guilt, and the "remoteness" of the chance that the DNA would exculpate, DNA testing did just that: it proved Godschalk's innocence and freed him.[26]

The State also references the Seventh Circuit opinion denying Denny habeas relief, and Judge Hagedorn's partial dissent in the court of appeals, for the proposition that the evidence against Denny was strong. *Denny v. Gudmanson,* 252 F.3d 896, 905 (7th

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26 *Bruce Godschalk*, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3240.

Cir. 2001); *Denny,* ¶86 (Hagedorn, J., concurring & dissenting). But that does not resolve the question presented now. For DNA testing, the question is not whether the evidence presented at trial was credited by the jury, or even whether, without contradicting DNA evidence, it appeared overwhelming. The proper inquiry is whether it is reasonably probable that, if the jury had exculpatory DNA evidence, the movant would not have been convicted.

One can only dismiss the potential impact of exculpatory DNA evidence if one can be confident that the evidence at trial was *so invincible* that DNA evidence could not reasonably alter the assessment of reasonable doubt. The evidence at trial in this case, however, consisted primarily of two types of evidence: (1) testimony of incentivized witnesses (two witnesses received immunity for their testimony and one was awaiting sentencing (246:243;247:87;249:23)), and (2) purported confessions. Yet the record of proven exonerations reveals that both incentivized informants and false confessions are leading contributors to wrongful convictions.[27]

The State dismisses as a "*banal fact* that some of the witnesses received immunity as part of their promise to provide truthful testimony, had criminal records, or had trouble remembering events and conversations" St.Br.38 (citing *Denny,* ¶¶43-44)(emphasis added). That argument reveals just how misguided the State's assessment of the weight of the evidence is, and how blind it is to the lessons from the

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27 Innocence Project, http://www.innocenceproject.org/causes/incentivized-informants and http://www.innocenceproject.org/causes/false-confessions-admissions/.

history of wrongful convictions. The U.S. Supreme Court has repeatedly and emphatically held that the fact that a witness receives inducements to testify in favor of the state—such as immunity from prosecution—can be a central consideration in assessing credibility. Indeed, repeatedly, the Court has held that any deals a witness has received or might hope to receive is critical evidence because it represents "a prototypical form of bias on the part of the witness." *Delaware v. Van Arsdale,* 475 U.S. 673, 680 (1986); *see also Davis v. Alaska,* 415 U.S. 308, 318 (1974). As noted, the historical record confirms this intuition, as testimony from incentivized informants is indeed a leading contributor to the problem of wrongful convictions.

Here, there were good reasons to discredit the witness testimony attributing inculpatory statements to Denny. There was no physical evidence or eyewitnesses linking Denny to the crime. *Denny*, ¶60. Although Denny allegedly made multiple inculpatory statements to several people, defense counsel impeached several of the witnesses during trial. *Id.* ¶61. Denny's brother Trent received immunity during all proceedings and admitted to ingesting drugs and/or alcohol every time he heard a conversation involving Denny (246:261,270). Trent revealed that the district attorney told him the case "stands or falls" on his testimony (246:273). Lori Jacque received immunity at trial as well (247:87). Jacque acknowledged that she lied, withheld information from police, and used drugs and alcohol during the relevant episodes (247:101,157). Tammy Whitaker acknowledged that Denny told her ten different stories about the death of Mohr—one involved Leatherman, two or three involved Kent and Denny, and the rest "wasn't really involvement" (249:107). Whittaker admitted that

Denny usually made these statements when she was "partying" (249:108). Steve Hansen acknowledged his memory of conversations with Denny was very bad (248:267). Daniel Johansen was a jailhouse snitch with three different convictions and was awaiting sentencing at the time of trial (249:23). And the stories Denny allegedly told were not all consistent. For example, Denny allegedly told Trent that Kent hit Mohr with the bong, but allegedly told Daniel Johansen that it was he who hit Mohr with the bong (246:241;249:51).

Given all this, any DNA evidence identifying a non-Denny perpetrator would cause a reasonable juror to discredit the statements attributed to Denny. It would irrefutably show that those statements—which constituted the core of the State's case—were simply false. DNA has the distinct potential to create a reasonable probability that a juror would find reasonable doubt.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 29th day of August, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 11,000 words.

Dated this 29th day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 29th day of August, 2016.

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SUPPLEMENTAL APPENDIX

Wis. Stat. § 974.07(2) provides:

(2) At any time after being convicted of a crime, adjudicated delinquent, or found not guilty by reason of mental disease or defect, a person may make a motion in the court in which he or she was convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

(a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.

(b) The evidence is in the actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Wis. Stat. § 974.07(7)(a) provides:

(a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).

2. It 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.

3. The evidence to be tested meets the conditions under sub. (2) (a) to (c).

4.The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any materials respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.