

STATE OF WISCONSIN
IN SUPREME COURT
Appeal No. 2015AP0202 –CR

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09-27-2016

**CLERK OF SUPREME COURT
OF WISCONSIN**

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
POSTCONVICTION DNA TESTING ENTERED IN THE
CIRCUIT COURT FOR OZAUKEE COUNTY,
THE HON. JOSEPH VOILAND, PRESIDING

AMICUS BRIEF IN SUPPORT OF
OF DEFENDANT-APPELLANT BY THE INNOCENCE
NETWORK

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I. INTEREST OF *AMICUS CURIAE*

The Innocence Network is made up of 69 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 Australia, Argentina, Canada, Ireland, Italy, the Netherlands, New Zealand, the United Kingdom, and Taiwan. (A full list of Network members is provided in Appendix A.)

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 develops, courts must keep pace in assuring their statutes allow for the most advanced testing.

Amicus urges this Court to affirm the Court of Appeals' decision granting Mr. Denny the DNA testing he seeks. The State's arguments 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

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, 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 "actually contained testable 'biological material.'" State's Brief at 23. However, the DNA testing statute has no such requirement. *See State v. Moran*, 284 Wis. 2d 24, 30, 700 N.W. 2d 884, 887 (2005). Neither the statute nor case law

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 performing a “quantitation” of the

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).

evidence.³ However, both screening methods occur in a laboratory setting⁴ and neither method is available to an 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.

Further, the State's position ignores the plain language of the statute. Section 974.07(7)(a)(2) requires courts to *presume* DNA testing would yield exculpatory results when determining

³ Modern DNA analysis has multiple steps, and one of the first is quantitation. *Commonwealth 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," permitting the analyst to decide whether further DNA analysis is 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, 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.").

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, the plain language 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).

Requiring a defendant to prove that biological material exists before testing can be done is impractical and renders the plain language of the statute meaningless. This Court should reject the State's arguments and affirm the Court of Appeals.

B. Touch DNA Is Reliable And Has Aided Numerous Exonerations.

- 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).⁵ Forensic laboratories nationwide routinely test evidence for "touch" or "handler" DNA⁶; the practice is roundly embraced by law enforcement.⁷ The molecular stability of DNA molecules over time has led to an increased reliance on DNA testing of trace

⁵ Importantly, modern DNA tests, such as STR, do not differentiate between DNA from skin cells, saliva, 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, amicus will use the term "Touch DNA" when referring to DNA from skin cells or any other trace amount of biological materials.

⁶ 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, 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.

⁷ 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.").

evidence in 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. Fournery, Nat’l DNA Databank of Canada, Forensic Laboratory Services, *Forensic Reality and The Practical Experience of DNA Typing* 5 (2002).

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 exoneration 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. Notably, in none of these cases could the defendant have proven that the Touch DNA biological material was present on the evidence requested for testing prior to the testing.

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 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. 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

⁸ *See* Innocence Project, *The Cases: Frank Sterling*, available at <http://www.innocenceproject.org/cases/frank-sterling/>.

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 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

Like Denny, all of the above-referenced defendants requested Touch DNA testing in an effort to disprove the otherwise "overwhelming evidence" against them. Amicus urges this Court to affirm the Court of Appeals and grant Mr. Denny

⁹ See Innocence Project, *The Cases: Uriah Courtney*, available at <http://www.innocenceproject.org/cases/uriah-courtney/>.

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

testing, and uncover the DNA of whoever committed the brutal murder of Christopher Mohr.

**C. Post-Conviction DNA Testing Results Can Create A
“Reasonable Probability Of A Different Outcome”
Even In The Face of Other Evidence.**

As a final matter, amicus urges this Court to affirm the Court of Appeal’s finding that, should exculpatory results be found, there is a reasonable probability of a different outcome. The State contends Denny cannot satisfy this standard because of the “overwhelming evidence the State presented at trial.” State’s Brief at 35. In making its argument, the State points to the witness testimony supporting “thirty-six inculpatory statements” purportedly made by Denny or his brother. *Id.* at 36. In arguing that DNA results excluding Denny and implicating a third party are not enough, the State ignores the reality and the lessons of the over 330 individuals exonerated by DNA evidence in the United States. In each of these cases, there was “overwhelming evidence” used against them—indeed, they were convicted. Nonetheless, new DNA testing proved powerful enough to overcome that evidence, including cases with significant witness

accounts like here. In addition to the cases presented above, there are numerous examples of cases wherein “overwhelming evidence” in the form of confessions to other witnesses, witness testimony, and even forensic evidence implicated an individual, but DNA ultimately revealed the truth—that the defendants were innocent.

For example, **Dennis Fritz** and **Ron Williamson** were convicted of a rape and murder of a young waitress in Pontotoc County, Oklahoma in 1988.¹¹ Fritz and Williamson were convicted based upon fingerprint and hair evidence linking Fritz to the crime, and—like the evidence used against Denny—testimony from multiple witnesses implicated Fritz and Williamson. That testimony included statements that Fritz had confessed, that Williamson had been seen at the restaurant the night before, and that Williamson had told police he had dreams about the crime.

¹¹ Maurice Possley, *Dennis Fritz*, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3222>; Maurice Possley, *Ronald Williamson*, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3752>.

Id. By many accounts, the case against Fritz and Williamson was “overwhelming.” And there was forensic evidence, arguably stronger than the case against Denny. Nonetheless, DNA evidence proved both Fritz and Williamson’s innocence and both were exonerated in 1999. *Id.* Without access to the DNA testing and without an understanding of how easily non-DNA evidence can be created, misinterpreted, or manipulated, Fritz would still be behind bars, and Williamson potentially executed.

Similarly, **William Dillon** was exonerated and released from a Florida prison in 2008 when postconviction DNA testing showed a yellow t-shirt stained with blood from the victim was not worn by Dillon, but rather by the real killer who had been hitchhiking in the area at the time of the crime.¹² There was significant evidence used at trial: Dillon and his brother, like Denny and his brother, gave what police contended were incriminating statements upon questioning; Dillon’s girlfriend testified she was

¹² Maurice Possley, *William Dillon*, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3177>

with him the night of the crime and saw him standing over the body, wearing the yellow t-shirt; an inmate testified Dillon had confessed to him; and a scent-tracking dog linked the t-shirt to Dillon. *Id.* Nonetheless, the evidence linking the t-shirt to the victim and to the real perpetrator overcame all of that, leading to Dillon's release.

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.

IV. CONCLUSION

Amicus urges this Court to reject the State's arguments. Postconviction 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 27th day of September, 2016.

Respectfully submitted,

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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 2,947 words.

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ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief and appendix is identical to the text of the paper copy of the brief and appendix.

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APPENDIX A

Innocence Network Member Organizations

The Actual Innocence Clinic,

After Innocence,

Alaska Innocence Project,

Arizona Innocence Project,

Arizona Justice Project,

California Innocence Project,

Center on Wrongful Convictions,

Committee for Public Counsel Services Innocence Program,

Connecticut Innocence Project/Post-conviction Unit,

The Duke Center for Criminal Justice and Professional Responsibility,

Exoneration Initiative,

George C. Cochran Innocence Project,

Georgia Innocence Project,

Hawai'i Innocence Project,

Idaho Innocence Project,

Illinois Innocence Project,

Innocence Canada,

Innocence Project,

Innocence Project Argentina,

Innocence Project London,
Innocence Project at UVA School of Law,
Innocence Project New Orleans,
Innocence Project New Zealand,
Innocence Project Northwest,
Innocence Project of Florida,
Innocence Project of Iowa,
Innocence Project of Texas,
Irish Innocence Project at Griffith College,
Italy Innocence Project,
Justicia Reinvindicada,
Kentucky Innocence Project,
Knoops' Innocence Project (the Netherlands),
Life After Innocence,
Loyola Law School Project for the Innocent,
Michigan Innocence Clinic,
Michigan State Appellate Defender Office, Wrongful Conviction Units,
Mid-Atlantic Innocence Project,
Midwest Innocence Project,
Minnesota Innocence Project,

Montana Innocence Project,
Nebraska Innocence Project,
New England Innocence Project,
New Mexico Innocence and Justice Project at the University of New Mexico School of Law,
North Carolina Center on Actual Innocence,
Northern California Innocence Project,
Office of the Ohio Public Defender, Wrongful Conviction Project,
Ohio Innocence Project,
Oklahoma Innocence Project,
Oregon Innocence Project,
Osgoode Hall Innocence Project (Canada),
Pennsylvania Innocence Project,
Reinvestigation Project,
Resurrection After Exoneration,
Rocky Mountain Innocence Center,
Sellenger Centre Criminal Justice Review Project (Australia),
Taiwan Association for Innocence,
Thurgood Marshall School of Law Innocence Project,
University of Baltimore Innocence Project Clinic,

University of British Columbia Innocence Project at the Allard School of Law (Canada),

University of Miami Law Innocence Clinic,

Wake Forest University Law School Innocence and Justice Clinic,

West Virginia Innocence Project,

Western Michigan University Cooley Law School Innocence Project,

Wisconsin Innocence Project,

Witness to Innocence, and

Wrongful Conviction Clinic at Indiana University School of Law.