STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No.: 2017AP002452

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSE A. REAS-MENDEZ,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING POST-CONVICTION RELIEF ENTERED NOVEMBER 27, 2017 IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. CONEN PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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I. Did the circuit court err in denying DNA testing pursuant to Wis. Stat. section 974.07(7)(a) of a knife, jacket, and fingerprints collected by police and proffered against Mr. Reas-Mendez at trial by holding that Mr. Reas-Mendez did not meet the reasonable-probability-of-a-different-result standard.

The circuit court denied the DNA motion, without a hearing, finding there is not a reasonable probability that DNA evidence would have altered the verdict. (R. 87:3) (A-App. 104).

II. Did the circuit court err in denying DNA testing of fingerprints collected at the scene, without a hearing, based on disputed facts regarding whether testing would destroy the evidence.

The circuit court denied the testing, without a hearing, stating that "[t]he court would not allow DNA testing of the fingerprint lift card for the reasons set forth by the State." (R. 87:3 n.5) (A-App. 104). The State had argued, in its Response, that testing the fingerprints would "destroy the fingerprints and ruin the integrity of the evidence," (R. 84:6) (A-App. 193), which according to the State, is contrary to Wis. Stat. section 974.07(6)(c). (R. 84:6) (A-App. 193).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Jose Reas-Mendez welcomes oral argument to clarify any questions the Court may have. Publication is not requested because the issues will be resolved by settled law.

STATEMENT OF THE CASE AND FACTS

The Crime

On May 20, 2008, the victim, C.C., awoke in the middle of the night to the noise of someone moving on her bedroom floor. (R. 97:32.) She sat up, looked around, and with the light from her TV, saw a man on his hands and knees on the floor. (R. 97:32-34.) C.C. testified the intruder was wearing a dark jacket and pants, and had a white shirt covering his face except for his eyes, forehead, and black, slicked-back hair. (R. 97:36-37.) The intruder also had a long knife in his hand. (R. 97:36-37.) After noticing the intruder, C.C. screamed, causing the man to stand. (R. 97:35.)

The intruder told C.C. to "shut up" and to "give [him] all her money." (R. 97:38.) C.C. testified that she communicated with the intruder in a mixture of English and Spanish, and that the intruder spoke English with a "Spanish dialect." (R. 97:47-48.) The intruder took approximately two hundred dollars and a cell phone from the victim's purse. (R. 97:38-41, 50.) After taking the money, he asked C.C. "Is anyone else aqui?" (R. 97:42.) C.C. understood that the perpetrator was asking in Spanish if anyone else was in the apartment. (R. 97:42.) The intruder then got on top of C.C.'s bed and started crawling toward her. (R. 97:42-43.) He then tried to pull down C.C.'s shirt and attempted to pull down her pants, but C.C. was able to stop him by telling him in "half" Spanish that she was "sick down there." (R. 97:43-45.) The man went back to trying to pull down C.C's shirt and rubbed her chest over her shirt, at which point C.C. told the intruder he should leave because someone could have heard her scream. (R. 97:45-47.) The intruder then asked C.C., in English, "Are you going to tell anyone? Are you going to call the police?" (R. 97:47-48.) After C.C. said she would not, the intruder left her bedroom. (R. 97:48.)

C.C. heard the man rummaging around in her apartment. (R. 87:49.) She heard a loud slam, which she assumed to be her front door closing. (R. 97:49.) C.C. waited about five minutes, then walked out of her bedroom and did not see anyone in her apartment. (R. 97:49.) C.C. testified that she looked at her windows, but did not "go to [her] windows, touch them, anything like that to the window." (R. 97:87.) C.C. also noticed that the deadbolt in her front door was locked,

meaning that if the intruder left through the door, he would have to have had a key to lock it from the outside. (R. 97:50.) Scared that the intruder was outside her front door, C.C. waited in her apartment for 20-30 minutes before leaving to go to her sister's apartment to call the police around 2:00 or 2:30 a.m. (R. 97:51-52.)

The Police Investigation

Police responded to the 911 call and interviewed C.C. at her sister's house. (R. 97:53.) C.C. reported during that interview that she believed the intruder was one of the maintenance workers at her apartment complex and that she believed her windows had been locked. (R. 98:24.) Police then went to C.C.'s apartment to investigate the crime scene. (R. 98:22.)

On the same day as the assault, almost eight hours later, a person called the police and reported seeing two men beating another man, pull that man into a vehicle, and then drag him into the building at 8831 N. 96th St., another building in the same apartment complex as C.C.'s apartment. (R. 79:21, 25) (A-App. 126, 130). A nearby officer reported seeing Mr. Reas-Mendez running from the area of the fight. (R. 79:26) (A-App. 131).

When officers arrived at the scene, the apartment manager at a nearby apartment building flagged the officers down and reported noises in the attic of 9720 W Brown Deer Rd. (R. 79:25-26; 97:92) (A-App. 130-31). When police checked the attic, they found Mr. Reas-Mendez hiding and took him into custody for trespassing. (R. 79:26) (A-App. 131). Officers did not find any of the items stolen from C.C. on Mr. Reas-Mendez or in the attic. (R. 79:26, 29) (A-App. 131, 134).

While leaving the apartment building where police found Mr. Reas-Mendez, almost eight hours after the assault on C.C., the officers saw a black-handled kitchen stainless steel knife and a man's dark blue jacket lying on the ground in between 9720 and 9726 Brown Deer Rd. (R. 97:94-95.) The officers collected these items as evidence and inventoried them. (R. 97:95.) Officers later determined they fit the description of the items used in the attack on C.C. (R. 97:95.) Therefore, officers turned them over to a detective on C.C.'s case, Detective Hall. (R. 97:96.) Officer Gordy testified, "I discovered the

evidence. I safeguard had [sic] the evidence. The evidence was given to my partner and the evidence was inventoried." (R. 97:97.)

Later that day, an officer showed C.C. a photo lineup, which included a photo of Mr. Reas-Mendez. (R. 98:28.) After carefully reviewing the photos, C.C. did not identify Mr. Reas-Mendez as her attacker. (R. 97:58-59, 91; 98:28.)

The next day, on May 21, 2008, Detective Ortiz interviewed Mr. Reas-Mendez in a mixture of Spanish and English. (R. 79:31) (A-App. 136). Mr. Reas-Mendez told Detective Ortiz that he learned the office manager did not like him and that the office manager brought two people from Chicago to beat and kill him. (R. 79:31) (A-App. 136). Mr. Reas-Mendez explained that he was in fact attacked by two people from Chicago on May 20, providing a description of events that matched the incident observed by witnesses who called police about the beating. (R. 79:32) (A-App. 137). He said one of the men had a gun, and the men threatened his life. (R. 79:32) (A-App. 137). Mr. Reas-Mendez told Detective Ortiz that he was able to get away and hide in the attic where police found him. (R. 79:32) (A-App. 137). When asked whether he had a knife or blue jacket, Mr. Reas-Mendez denied having either. (R. 79:32) (A-App. 137). Detective Ortiz then "informed" Mr. Reas-Mendez that he had committed the crime against C.C. and falsely told him that his fingerprints had been found in the apartment. (R. 79:32) (A-App. 137). Mr. Reas-Mendez adamantly denied being in a woman's apartment or being involved in such an offense. (R. 79:32) (A-App. 137). He expressed confusion and asked what he was accused of doing and where his fingerprints were found. (R. 79:32) (A-App. 137). Mr. Reas-Mendez stated that he wanted to take the matter to court and requested an attorney. (R. 79:32) (A-App. 137).

The following day, on May 22, 2008, the police invited C.C. to the station for an interview and live line-up. (R. 98:30.) During the interview, C.C. told police that when she returned to her apartment in the previous two days, she noticed damage to her living room window. (R. 98:34.) C.C. testified that when she went back to her apartment on May 22, after only having been in and out of the apartment the prior two days to grab clothes, she noticed a trail of grass and rocks on her carpet that led from the living room window to her bedroom. (R. 97:56.) C.C. stated that the rocks and grass were not there when she

went to bed the evening of May 19. (R. 97:56.) C.C. also testified that she noticed the curtain over her living room window hanging differently than it usually did—something she stated she had not paid attention to previously. (R. 97:57.)

C.C. then viewed a live-lineup consisting of four people, including Mr. Reas-Mendez. (R. 98:30-33, 38.) Out of all of the participants in the photo and live lineups, Mr. Reas-Mendez was the only person included in both. (R. 97:85-86.) During the lineup, participants wore bandanas over their noses and mouths and were instructed to say the phrase "'Are you going to tell anybody? Are you going to call the police?'" in English. (R. 98:30-33.) Mr. Reas-Mendez was the only participant with a heavy Spanish accent in the lineup. (R. 72:7.) After hearing the participants speak, C.C. identified Mr. Reas-Mendez as the perpetrator. (R. 97:65; 99:38.)

After C.C.'s identification of Mr. Reas-Mendez in the live lineup, an Identification Technician was dispatched to C.C.'s home to process the exterior surface of the living room windows for fingerprints. (R. 97:99.) The technician recovered three lifts from the window using black magnetic powder and cellophane see-through lift tape, which she pressed on the prints, peeled off, and adhered to a white card. (R. 97:100, 104.) After the technician recovered the prints, she "put them in a latent case envelope, turned them into the Identification Division in order for them to go to the next person which would be a latent print examiner." (R. 97:102-103.) The next morning, a latent print examiner compared the recovered prints from the known prints of Mr. Reas-Mendez and identified Mr. Reas-Mendez as the source of two of the three lifts. (R. 98:12-14.) The print examiner determined the third lift lacked sufficient quality to establish identity. (R. 98:12.) On May 24, 2008, Mr. Reas-Mendez was charged with the burglary, sexual assault, and armed robbery of C.C. (R. 1.)

The Trial

The main issue at trial was the identification of the perpetrator. C.C. testified that Mr. Reas-Mendez was her attacker and that the jacket and knife found outside the building where Mr. Reas-Mendez was arrested looked like those used by the perpetrator. (R. 97:65, 72.) The latent print examiner testified that "the fingerprints recovered match the fingerprints from Jose Reas-Mendez and that there is no

way that those fingerprints could have been placed there by any other person." (R. 98:14.) Finally, the prosecution further argued that "within about eight hours of the offense within about a hundred yards of where the crime happened and near where he is arrested is a knife that looks similar and a jacket to the person [sic] who broke into the home." (R. 99:28.)

The defense produced no witnesses and Mr. Reas-Mendez did not testify. (R. 98:41-43.) Rather, the defense relied on cross-examining C.C. and attempted to point out inconsistencies in her statements identifying Mr. Reas-Mendez as her attacker. (R. 99:29-34.)

Although Mr. Reas-Mendez had a legitimate reason for hiding in the attic – that he was being attacked by two individuals from Chicago, (R. 79:21, 25-26, 31-32) (A-App. 126, 130-31, 136-37) – defense counsel, for reasons never made clear on the record, requested to exclude this evidence, and the court granted that request. (R. 97:69-70.) As a result, the jury was given no reason to explain why Mr. Reas-Mendez was hiding in an apartment attic near where C.C. was attacked other than that he must have committed the crime. (R. 99:28.)

While deliberating, the jury submitted several questions to the court, indicating they could not reach an agreement, including, "'What happens if we're not in agreement[?],'" and, "is there a time limit on our decision?'" (R. 100:2-5.) They also asked, "'Was he offered a plea bargain?'" (R. 100:2-5.) The jury ultimately returned a guilty verdict, after which the court sentenced Mr. Reas-Mendez to 20 years of initial confinement and 5.5 years of extended supervision. (R. 100:2-5; 101:18.)

Postconviction DNA Motion

On August 21, 2017, Mr. Reas-Mendez filed a motion for DNA testing pursuant to Wis. Stat. section 974.07. (R. 79) (A-App. 106-190). In the motion, he sought testing of evidence collected at and near the scene of the crime, which was left by the perpetrator, including the knife, the jacket, and the fingerprints. (R. 79) (A-App. 106-190). He argued that he met the statutory requirements for DNA testing pursuant to subsection 974.07(7)(a)2. (R. 79) (A-App. 106-190). After responsive pleadings from both parties, the circuit court denied Mr. Reas-Mendez's DNA motion without first holding a hearing, in a

written decision and order filed November 27, 2017. (R. 84, 86, 87) (A-App. 191-200, 201-09, 102-05). In the Decision and Order, the circuit court adopted the State's analysis, finding Mr. Reas-Mendez had not met the reasonable probability criteria of section 974.07(7)(a)2 of the DNA statute. (R. 87:3-4) (A-App. 104-05). Mr. Reas-Mendez now appeals.

SUMMARY OF ARGUMENT

The circuit court erred in denying Mr. Reas-Mendez's motion for post-conviction DNA testing pursuant to Wis. Stat. section 974.07(7)(a) of a knife, a jacket, and fingerprints collected by police and proffered against Mr. Reas-Mendez at his trial. Mr. Reas-Mendez meets all four criteria required by the mandatory testing scheme of subsection (7)(a). The circuit court's holding that Mr. Reas-Mendez has not shown a reasonable probability that he would not have been convicted if exculpatory DNA results had been available is erroneous.

As a preliminary matter, Mr. Reas-Mendez meets all four criteria of subsection (7)(a). He maintains his innocence as required by subsection (7)(a)(1). (R. 79:8) (A-App. 113). He has complied with the three criteria of subsection (2)(a) to (c), referenced in subsection (7)(a)(3), which the court assumed he had met. (R. 87:3) (A-App. 104). He has shown that the evidence to be tested, which was introduced at trial, is relevant, in the possession of a government agency, and has not previously been subjected to DNA testing. (R. 79:8,11-13; 86:1-3.) In compliance with subsection (7)(a)(4), he has shown that the chain of custody of the evidence establishes that it has not been tampered with, replaced, or altered in any material respect. (R. 79:12-13; 86:4-6) (A-App. 117-18, 204-06).

Mr. Reas-Mendez has also complied with subsection (7)(a)(2) by demonstrating that there is a reasonable probability that he would not have been convicted had exculpatory DNA results been available before conviction. (R. 79:13-17; 86:6-8) (A-App. 118-122, 206-08). The circuit court's holding, adopting the State's analysis, that Mr. Reas-Mendez did not meet this subsection was erroneous for several reasons. First, the court failed to assume exculpatory results, as required by the statute. Second, the court incorrectly required that Mr. Reas-Mendez show he *could not have been* convicted in order to meet

the reasonable probability criteria. Third, the court's analysis relied on a misunderstanding of the uncontested facts in the case. If the court had applied the correct legal standard and correctly understood the facts of the case, the court should have found that there is a reasonable probability he would not have been convicted if exculpatory DNA results were available.

The circuit court also erred in not granting a hearing before determining whether to grant testing of the fingerprints. A hearing was necessary to resolve a factual dispute as to whether the integrity of the fingerprint evidence could be preserved prior to conducting the DNA testing.

As a result, this Court should reverse the circuit court's erroneous ruling and order DNA testing of the knife, jacket, and fingerprints consistent with Wis. Stat. section 974.07(7)(a).

ARGUMENT

Standard of Review

The Wisconsin Supreme Court has expressly left open whether decisions to grant or deny post-conviction DNA testing under Wis. Stat. section 974.07(7)(a)2 are reviewed *de novo* or for an erroneous exercise of discretion. *State v. Denny*, 2017 WI 17, ¶ 75, 373 Wis. 2d 390, 891 N.W.2d 144. This Court, however, need not resolve that question here either, for two reasons. First, the circuit court's decision misinterprets and misapplies the legal standards under 974.07, and hence constitutes an error of law. Interpretation and application of a statute are questions of law reviewed *de novo*. *Denny*, 2017 WI 17, ¶ 46. Second, even if this Court applies the erroneous exercise of discretion standard, Mr. Reas-Mendez's claim still succeeds because the circuit court based its decision on a misunderstanding of the facts of record and unreasonably and incorrectly failed to recognize that exculpatory DNA test results would almost certainly establish Mr. Reas-Mendez's innocence and hence produce a different outcome.

DNA Postconviction Statute

Postconviction DNA testing in Wisconsin is governed by Wis. Stat. section 974.07. The statute provides that a person convicted of a crime may, at "any time" after being convicted, "make a motion in the court in which he . . . was convicted . . . for an order requiring forensic [DNA] testing of evidence." Wis. Stat. § 974.07(2) (2015-16)[1].

Section 974.07(7)(a) states that a circuit court "shall" grant a motion for DNA testing if four requirements are met:

(1) "The movant claims that he . . . is innocent of the offense at issue";

(2) "It is reasonably probable that the movant would not have been prosecuted [or] convicted . . . for the offense at issue . . . if exculpatory [DNA] results had been available before the prosecution [or] conviction . . . for the offense";

(3) "The evidence to be tested meets the conditions under [Wis. Stat. § 974.07(2)(a), (b), & (c)]"; and,

(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 material 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."

Wis. Stat. § 974.07(7)(a)1-4.

As noted above, the third requirement of subsection (7)(a) references subsection (2), which also has three requirements. Under subsection (2)(a), (b), & (c), the evidence sought to be tested must be (1) "relevant to the investigation or prosecution that resulted in the conviction," (2) "in the actual or constructive possession of a government agency," and (3) "not previously been subjected to forensic [DNA] testing." Wis. Stat. § 974.07(2)(a)-(c).

In contrast to the mandatory scheme under subsection (7)(a), subsection (7)(b) provides a discretionary scheme where the circuit court "may" grant the motion if three requirements are met. *Denny*,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

2017 WI 17, ¶¶ 51-54. Under subsection (7)(b) the court may order testing if (1) "it is reasonably probable that the outcome of the proceedings that resulted in the conviction . . . for the offense at issue . . . would have been more favorable to the movant if the results of [DNA] testing had been available before he . . . was prosecuted, convicted," (2) "The evidence to be tested meets the conditions under [Wis. Stat. § 974.07(2)(a), (b), & (c)]," and (3) "The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material 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." Wis. Stat. § 974.07(7)(b).

Subsection (8) provides that if a court orders testing, "[t]he court may impose reasonable conditions on any testing ordered . . . in order to protect the integrity of the evidence and the testing process." Wis. Stat. § 974.07(8). Further, if a court orders testing, the court "may" order the movant to pay for the costs of testing "if the court determines the movant is not indigent." Wis. Stat. § 974.07(12); *see also Denny*, 2017 WI 17, ¶ 57. Therefore, the State is required to pay for any testing ordered on behalf of an indigent defendant. See *Denny*, 2017 WI 17, ¶ 57.

I. The Circuit Court Erred in Holding that Mr. Reas-Mendez did not meet the Reasonable Probability Standard.

The circuit court erred when it denied DNA testing of evidence proffered against Mr. Reas-Mendez at trial, holding that Mr. Reas-Mendez did not meet the reasonable probability standard. The circuit court's holding, adopting the State's analysis, was based on a mistaken understanding of both the law and facts. The circuit court failed to assume the DNA testing would have exculpatory results, as required by the statute. The court also misinterpreted the reasonable probability standard to require a showing of absolute certainty that Mr. Reas-Mendez could not have committed the offense, rather than merely a reasonable probability that he would have been acquitted. Further, the court misunderstood the undisputed facts regarding where the jacket sought to be tested was found. If the circuit court had applied the correct legal standard and understood the undisputed facts,

the court should have found there is a reasonable probability at least one juror would have had reasonable doubt if exculpatory DNA results had been available.

A. The circuit court failed to assume the results of the DNA testing on the knife, jacket, and fingerprints would be exculpatory when performing the reasonable probability analysis under subsection (7)(a)2.

The plain language of subsection (7)(a)2 requires that a court assume the results of DNA testing will be exculpatory when determining whether there is a reasonable probability of a different result. Subsection (7)(a)2 states that a court must order DNA testing, if among other things:

> It is reasonably probable that the movant would not have been prosecuted [or] convicted . . . for the offense at issue . . . if exculpatory [DNA] results had been available before the prosecution [or] conviction . . . for the offense.

In *State v. Denny*¸ the recent Wisconsin Supreme Court case interpreting this provision of the statute, the Court assumed, and the State did not dispute, that for purposes of analyzing the reasonable probability prong the court must assume the DNA results would be exculpatory. *Denny*, 2017 WI 17, ¶ 76, 373 Wis. 2d 390, 891 N.W.2d 144; *see also State v. Hudson*, 2004 WI App 99, ¶ 17, 273 Wis. 2d 707, 681 N.W.2d 316 (assuming exculpatory DNA results in determining whether they would lead to a reasonable probability of a different result). The Court considered three exculpatory scenarios proposed by *Denny*: (1) DNA results that matched a convicted offender; (2) DNA results that excluded the defendants; and, (3) DNA on multiple tested items matching the same unknown third party.[2] *Denny*, 2017 WI 17, ¶ 76.

The circuit court in Mr. Reas-Mendez's case failed to assume the results of the DNA testing on the knife, jacket, and fingerprints

[2] The Court noted, however, that it is not settled whether a court is bound to consider each of these hypothetical DNA test results exactly as the defendant presented them. *Denny*, 2017 WI 17, ¶ 76 n.19.

would be exculpatory. In his pleadings, Mr. Reas-Mendez presented several scenarios where exculpatory DNA results would create a reasonable probability of a different result including finding DNA on the knife, jacket, and fingerprint that excluded him and included a third party. (R. 79:15; 84:6) (A-App. 120, 196). The circuit court, however, ignored these scenarios and instead adopted the State's position, which did not include exculpatory scenarios *excluding* Mr. Reas-Mendez.

In discussing the reasonable probability prong, the circuit court stated that it was "in complete agreement with the State's analysis of the defendant's motion." (R. 87:3) (A-App. 104). The State's argument that exculpatory DNA results would not create a reasonable probability of a different result was as follows:

> [E]ven if the results of the DNA tests came back with other persons' DNA on it, it would not change any charging decision, and would not have affected the ultimate outcome of the jury. As stated previously, the only potential relevant testing would be if the Defendants [sic] DNA came back on the knife and jacket, and those results would only bolster the States [sic] claim.

(R. 84:7) (A-App. 197). Hence, the only exculpatory scenario considered by the State and circuit court, was one where the DNA results include a third party, but do not exclude Mr. Reas-Mendez. That is contrary to the plain meaning of exculpatory, which at the very least should include results excluding the defendant.[3] The court erred as a matter of law by failing to consider the very real possibility that the DNA results would not only identify DNA from some other person or persons, but would also exclude Mr. Reas-Mendez.

In denying DNA testing of the fingerprint evidence the circuit court either failed to assume exculpatory results or failed to understand the superior reliability of DNA testing over comparison of fingerprints. The circuit court held:

[3] Black's Law Dictionary defines "exculpatory evidence" as "Evidence tending to establish a criminal defendant's innocence." Black's Law Dictionary (10th ed. 2014), evidence.

> [T]he court is not persuaded that there is a reasonable probability that DNA testing of these items would have had any material impact on the prosecution of this case or the outcome of the trial, *particularly given the fingerprint evidence*. The jury ultimately found the defendant guilty beyond a reasonable doubt without the benefit of DNA evidence. The court finds there is not a reasonable probability that DNA evidence relating to the knife or the jacket would have altered the verdict.

(R. 87:3) (A-App. 104) (emphasis added). The circuit court's analysis reveals that it failed to consider a scenario where the DNA results of the knife, jacket, and fingerprints excluded Mr. Reas-Mendez, thus undermining the evidence introduced at trial to inculpate him.

The circuit court erroneously assumed that the fingerprint evidence was unassailable. The court erred as a matter of law and logic when it assumed that the fingerprint evidence could not be overcome by DNA testing. The very purpose of the DNA testing would be to determine if the fingerprint analysis was erroneous. The court failed to recognize that the fingerprint evidence simply would no longer have much, if any, probative value if the DNA from those prints excluded Mr. Reas-Mendez. The only explanation for the circuit court's rationale is that it erred as a matter of law by failing to consider or assume a scenario in which the DNA testing proved that the fingerprints were in fact not Mr. Reas-Mendez's.

The circuit court seemed to place great weight on the State's latent print examiner's testimony at trial that the fingerprints found on the victim's window "match[ed]" Mr. Reas-Mendez. (R. 96:14.) The circuit court ignored or dismissed the possibility that DNA testing could prove that the examiner's testimony was wrong.

The circuit court's uncritical and inflexible confidence in fingerprint evidence is misplaced. DNA testing and other evidence has proven fingerprint analyses to be wrong on numerous occasions.[4]

[4] *See, e.g.,* The Innocence Project, Stephan Cowans, https://www.innocenceproject.org/cases/stephan-cowans/ (Cowans was convicted in part based on a fingerprint match, which subsequently was shown by post-conviction DNA testing and then follow-up fingerprint analysis to have been erroneous); Simon Cole, *More Than Zero: Accounting for Error in Latent*

Proficiency testing of fingerprint analysts has revealed alarmingly high error rates.[5] And, as explained by the National Academies of Sciences (NAS), following its exhaustive review of the state of forensic sciences, the scientific foundation of fingerprint evidence is questionable:

> [T]he scientific foundation of the fingerprint field has been questioned, and the suggestion has been made that latent fingerprint identifications may not be as reliable as previously assumed. The question is less a matter of whether each person's fingerprints are permanent and unique—uniqueness is commonly assumed—and more a matter of whether one can determine with adequate reliability that the finger that left an imperfect impression at a crime scene is the same finger that left an impression (with different imperfections) in a file of fingerprints.

NAS Report[6] at 43. By contrast, the NAS explained that the scientific rigor used in DNA analysis makes it the only forensic science reliable enough to connect evidence to a specific individual:

> With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

Fingerprint Identification, 95 J. Crim. L. & Criminology 985 (2005) (analyzing 22 documented cases involving fingerprint errors).

[5] In 2016, the President's Council of Advisors on Science and Technology (PCAST) reported that fingerprint analysis error rates in proficiency tests "could be as high as one error in 306 cases based on [an] FBI study and 1 error in 18 cases based on a study by another crime laboratory." PCAST Report to the President, Forensic Science in Criminal Courts: Ensuring Validity of Feature-Comparison Methods, 9-10 (Sept. 2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

[6] National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Washington, DC: National Academies of Sciences, 2009 ("NAS Report"), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

NAS Report at 7. Further, as explained in the NAS Report, the examiner's testimony expressing complete certainty that the fingerprint belonged to Mr. Reas-Mendez is scientifically unsound:

> "Given the general lack of validity testing for fingerprinting; the relative dearth of difficult proficiency tests; the lack of a statistically valid model of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified."

NAS Report at 142 (quoting J.L. Mnookin, *The validity of latent fingerprint identification: Confessions of a fingerprinting moderate*. Law, Probability and Risk 7:127 (2008)).

More recently, in 2016, the President's Council of Advisors on Science and Technology (PCAST) reviewed the scientific literature and concurred with the NAS's conclusion that fingerprint analysis lacks a solid scientific foundation. In particular, while observing that "[t]he studies collectively demonstrate that many examiners can, under *some* circumstances, produce correct answers at *some* level of accuracy,"[7] the PCAST Report went on to conclude that "[t]he empirically estimated false positive rates are *much higher* than the general public (and, by extension, most jurors) would likely believe based on longstanding claims about the accuracy of fingerprint analysis."[8]

Although the information from the NAS was presented to the circuit court explaining the superior scientific reliability of DNA evidence over fingerprint analysis and the fingerprint analyst's erroneous assertion of certainty in his identification of the print, the court either ignored or dismissed this evidence. (R. 79:10-11; 86:8) (A-App. 115-16, 208). In doing so, the circuit court erred. The circuit court was required to assume the DNA testing of the fingerprints would affirmatively exclude Mr. Reas-Mendez and prove the analyst's testimony was wrong. The circuit court erred in failing to assume these exculpatory results for the fingerprint evidence.

[7] PCAST Report, *supra*, at 95 (emphasis in original).

[8] *Id.* (emphasis in original).

In sum, the circuit court erred by failing to assume that DNA testing of the jacket and knife could not only match a third party, but also affirmatively exclude Mr. Reas-Mendez. The circuit court also erred in failing to understand that DNA testing of the fingerprints could prove the State's fingerprint examiner's testimony regarding a "match" was wrong. Had the court properly assumed that DNA testing of the jacket, knife, and fingerprints, which were introduced by the State to inculpate Mr. Reas-Mendez, could exculpate him, the court should have found that the exculpatory evidence would lead to a reasonable probability of a different result.

B. The circuit court erroneously found that meeting the reasonable probability standard requires showing that Mr. Reas-Mendez could not have committed the offense.

The circuit court incorrectly interpreted the meaning of "reasonably probable," imposing a higher burden of proof than what the statute requires.

In *State v. Denny*, the Wisconsin Supreme Court noted two possible interpretations of what "reasonably probable" means:

> The State asserts that "reasonably probable" means a "reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." *State v. McCallum*, 208 Wis.2d 463, 475, 561 N.W.2d 707 (1997). In contrast, Denny believes that "reasonably probable" means "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

State v. Denny, ¶ 81 n. 21. The Court declined to resolve the parties' dispute, finding that Denny's motion should be denied under either standard. *Id*. Similarly, in *State v. Love,* the Wisconsin Supreme Court declined to resolve the parties' dispute regarding the meaning of reasonable probability in the newly discovered evidence context. 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62. In *Love*, the State argued that the reasonable probability criteria required an "outcome determinative" showing, whereas Love claimed it required a showing that confidence in the outcome had been undermined. 2005 WI 116,

¶¶ 52-53. Finding that Love would succeed under either standard, the Court did not decide which definition was correct. *Id.* at ¶ 54. In *State v. Edmunds*, where this Court was confronted with the same debate by the parties regarding the meaning of reasonable probability for the newly discovered evidence test, this Court found that there was only a "very fine distinction" between the two standards and that it would only be a "rare case" where such a distinction would make a difference. 2008 WI App 33, ¶ 22, 308 Wis.2d 374, 746 N.W.2d 590, 598. In *Edmunds*, as in *Denny* and *Love*, this Court did not resolve the issue and found that the defendant was entitled to relief under either standard. *Id.*

In Mr. Reas-Mendez's case, the circuit court imposed a reasonable probability standard higher than that proposed by either party in *Denny*, *Edmunds*, or *Love*—a standard that finds no support in the statutory language or the decisions of this Court or the Wisconsin Supreme Court. The circuit court interpreted the reasonable probability standard to require a showing not just of a "reasonable probability" of a different outcome, but that "he couldn't have committed the offense." (R. 87:4) (A-App. 105). Referring to the reasonable probability criteria under subsection (7)(a)2 and (7)(b)1[9], the circuit court explained its analysis as follows:

[9] The court also mistakenly believed that Mr. Reas-Mendez was seeking DNA testing at his own expense under section 974.07(7)(b), although he clearly moved for testing only under section 974.07(7)(a). (*See* R. 79:7, 17; 86:1, 9) (A-App. 112, 122, 201, 209). The court misunderstood Mr. Reas-Mendez's offer to pay for the DNA testing with available grant funds, even if the court ruled he was entitled to testing under subsection (7)(a), which requires testing at the State's expense. (R. 79:17-18) (A-App. 122-23).

Furthermore, misreading *Denny*, the court interpreted subsection (7)(b) as allowing testing at private expense. (R. 87:3-4, citing *Denny*, 2017 WI 17, ¶¶ 51-53) (A-App. 104-05). The court in *Denny* noted that subsection (7)(b), unlike the mandatory testing scheme in subsection 7(a), gave courts discretion whether to order testing, but did not hold it provided a vehicle for testing at private expense. *Denny*, 2017 WI 17, ¶¶ 51-53. Contrary to the court's understanding, *Denny* did not hold that "a movant who seeks to have evidence tested at his own expense under sec. 974.07(6), Stats., must demonstrate a right to relief under sec. 974.07(7)(b), Stats." (R. 87:3) (A-App. 104). In fact, *Denny* overruled the holding in *State v. Moran*, 2005 WI 115, ¶ 57, allowing for testing at private expense under section 974.07(6). *Denny*, 2017 WI 17, ¶71. The court's analysis illustrates its misunderstanding of Mr. Reas-Mendez's request, the holding in *Denny*, and the operation of the statute.

> The court's analysis under sec. 974.07(7)(a)2., Stats., is equally applicable to it [sic] analysis under sec. 974.07(7)(b)1., Stats., as well as to all items for which the defendant seeks DNA testing. Even if DNA testing would show that the defendant's DNA was not on the knife and jacket, *it does not mean he couldn't have committed the offense*.

(R. 87:4) (A-App. 105) (emphasis added). Although the courts have not decided the exact definition of "reasonable probability" under either the DNA statute or in the newly discovered evidence context, it is clear that the standard does not require a showing that a defendant could not have committed the offense. The circuit court erred in requiring that Mr. Reas-Mendez show that there was *no probability*, indeed *no possibility*, that he would have been convicted, as opposed to a reasonable probability, as required by the Statute. This was erroneous even under the definition of reasonable probability proposed by the State in *Denny*, which requires showing that a jury would have a reasonable doubt as to the defendant's guilt looking at the evidence presented at trial and the new DNA evidence. *See Denny*, ¶ 81 n. 21 (citing *McCallum*, 208 Wis. 2d at 475.) Jurors need not find that a defendant could not have committed an offense in order to have a reasonable doubt about his guilt. The circuit court's definition of the reasonable probability standard as requiring a showing that the defendant could not have committed the offense heightened the burden on Mr. Reas-Mendez beyond that required by the statute.

C. The circuit court's analysis of whether Mr. Reas-Mendez meets the criteria of section 974.07(7)(a)2 was based on a mistaken understanding of the undisputed facts.

The circuit court's decision was premised on a mistaken understanding of the undisputed facts. The circuit court stated that the victim "identified the jacket the defendant had when he was arrested as the exact same one the man had in her apartment." (R. 87:2) (A-App. 103). Neither the police, the State, nor the defense has ever alleged such facts. Rather, as was testified to at trial and repeated by both the State and Mr. Reas-Mendez in the briefings, Milwaukee police officers arrested Mr. Reas-Mendez in an unrelated incident at 9720 W. Brown Deer Rd., and when they were leaving that apartment

complex they found a kitchen knife and a dark blue jacket lying on the ground. (R. 97:94-95; 84:2; 79:3-4) (A-App. 192, 108-09). There has never been an allegation that Mr. Reas-Mendez had the jacket in his possession when he was arrested. Perhaps this explains why the circuit court erroneously failed to consider the possibility that the DNA testing might actually *exclude* Mr. Reas-Mendez, as well as identify the profile or profiles of others.

Similarly, the circuit court's later reference to the jacket illustrates its confusion regarding where it was found. The circuit court stated, "The defendant was arrested within eight hours of the offense in the attic of a building about a hundred yards away from the victim's apartment. A dark jacket and a kitchen knife were found at the scene." (R. 87:2 n.2) (A-App. 103). It is unclear what the court meant by "the scene." Again, the jacket and knife were not found on or with Mr. Reas-Mendez when he was arrested in the attic for trespassing, the "scene" of his arrest. (R. 97:94-95.) Nor were the jacket and knife found in C.C.'s apartment, the "scene" of the assault.

To be clear, Mr. Reas-Mendez requests testing of the jacket found outside the apartment complex where Mr. Reas-Mendez was arrested. To the extent the circuit court relied on its erroneous understanding of where the jacket was found to deny DNA testing, the circuit court erred. DNA testing of the jacket, which was identified by the victim as being exactly like the one worn by the perpetrator, yet was not found on Mr. Reas-Mendez nor in the attic where he was arrested, is critical to identify the true perpetrator. The testing could exclude Mr. Reas-Mendez and identify the true perpetrator, either by matching a third-party DNA profile to a profile in the government's databank of convicted offenders, or by matching third-party DNA on the jacket to DNA on the knife and/or the fingerprint. The court erred by failing to consider these possibilities, apparently because it believed Mr. Reas-Mendez had the jacket in his possession when arrested, and therefore could not possibly have been excluded from any connection to the jacket.

D. If exculpatory DNA results are assumed and an accurate understanding of the facts and law are considered, it is reasonably probable that Mr. Reas-Mendez would not have been convicted.

Courts must analyze potential exculpatory DNA test results within the context of the evidence presented at trial when deciding whether exculpatory DNA test results would create a reasonable probability of a different outcome. *See*, *e.g.*, *Denny*, 2017 WI 17, ¶¶ 76-80; Wis. Stat. § 974.07(7)(a)2. In this case, had exculpatory DNA testing results been available at trial, they would have raised a reasonable doubt in the mind of at least one juror that Mr. Reas-Mendez committed the offense.

At trial, the prosecution presented four major pieces of evidence: a knife, a jacket, fingerprints, and the victim's statements. The prosecutor argued that the knife and jacket showed that Mr. Reas-Mendez was the perpetrator because the items were found outside of the building where he was arrested and the victim identified the items as looking just like the ones used in the attack. (R. 99:28.) The prosecutor argued that the fingerprints matched Mr. Reas-Mendez and showed that he climbed through the window to commit the assault. (R. 99:28.) Finally, the victim identified Mr. Reas-Mendez as the perpetrator in a live lineup and at trial, though not initially in the photo line-up. (R. 97:58-59, 65.) Though the jury ultimately convicted Mr. Reas-Mendez, they initially had doubts as demonstrated by their notes to the court, which included "'What happens if we're not in agreement[?]'" and "'is there a time limit on our decision?'" (R. 100:5.)

There is a reasonable probability that exculpatory DNA results would have had an impact on the jury's decision. Exculpatory DNA evidence on the physical evidence linking Mr. Reas-Mendez to the crime would significantly undermine the prosecution's case. Had the jury been presented with evidence that (1) DNA testing revealed the presence of a male profile on the evidence, (2) the profile excluded Mr. Reas-Mendez, and (3) the profile either reoccurred on multiple items or matched a convicted offender in the government's databank, at least one juror would have had a reasonable doubt about Mr. Reas-Mendez's guilt.

Assuming the results of DNA testing of the knife, jacket, and fingerprints are exculpatory, the only remaining evidence that connects Mr. Reas-Mendez to the crime are: 1) the victim's positive identification, 2) the fact that Mr. Reas-Mendez was arrested near the crime scene, and 3) fingerprint comparison testimony. Exculpatory DNA test results of the knife, jacket, and fingerprints would raise a reasonable doubt about Mr. Reas-Mendez's guilt in at least one juror's mind given the flaws in the remaining evidence.

1. The victim's identification of Mr. Reas-Mendez is too unreliable to overcome exculpatory DNA test results.

If presented with exculpatory DNA evidence, the State's case would then rest on little more than (1) the fact that Mr. Reas-Mendez was found hiding in a nearby attic, *nearly eight hours after the assault on C.C.*, and after having been himself attacked in an independently witnessed assault; and (2) the victim's eventual eyewitness identification of Mr. Reas-Mendez under suggestive circumstances and after initially excluding him. That evidence simply would not be enough to overcome the DNA and establish guilt beyond a reasonable doubt to the satisfaction of all jurors.

The scientific research into eyewitness identification shows that the circumstances of the victim's identification of Mr. Reas-Mendez lead to an inherently unreliable identification. The victim's limited view of the perpetrator, initial failure to identify him, repeated exposure to Mr. Reas-Mendez in a photo-array and line-up, and inclusion of fillers in the lineup who did not match the description of the perpetrator are all circumstances that many scientific studies have shown can lead to an unreliable identification. In many cases DNA evidence has shown that eyewitness mistakenly identified a perpetrator when these flawed identification procedures were used. In

fact, eyewitness misidentification is the leading cause of wrongful convictions in cases of DNA exonerations.[10]

Obviously, the victim's limited ability to see the perpetrator affected the reliability of her identification.[11] She was attacked in a dark room with the only light being supplied from the television. (R. 97:32.). The perpetrator had partially covered his face with a shirt. (R. 97:36.).[12]

In addition, the circumstances of the identification procedures are known to create unreliable results. C.C. initially excluded Mr. Reas-Mendez as her attacker from a photo array the day of the attack, and subsequently only identified him after viewing a questionable lineup. On May 20, 2008, the day of the assault, C.C. viewed six photos in a photo array. (R. 97:58-59; 98:28.) This photo array included Mr. Reas-Mendez. (R. 97:85-86.) However, C.C. did not identify Mr. Reas-Mendez as her attacker. (R. 97:59.) On May 22, 2008, two days after the assault, C.C. viewed a live lineup that included four individuals, one of which was Mr. Reas-Mendez. (R. 98:30, 33.) Police instructed the men to say "Are you going to tell anyone? Are you going to call the police?" in English. (R. 98:33.)

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[10] Seventy percent of DNA exonerations since 1989 involved eyewitness misidentification. *See* DNA Exonerations in the United States < https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ > (as of March 11, 2018); *see also State v. Dubose*, 2005 WI 126, ¶ 30, 285 Wis.2d 143, 699 N.W.2d 582 ("[E]yewitness testimony is often 'hopelessly unreliable.'… The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." (internal citations omitted)).

[11] Fredric D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969, 978 (1977) (Finding that accuracy of eye-witness identification is dramatically reduced when there are poor lighting conditions or a limited time period for viewing).

[12] Research shows that any masking of the face, in whole or in part, dramatically reduces eyewitness reliability. *Encyclopedia of Psychology and Law* 288 (Brian L. Cutler, ed.) (2008) (citing Joanna D. Pozzulo & Siobhan Marciniak, *Comparing identification procedures when the perpetrator has changed appearance*, 12 J. Psych Crime & L. 429 (2007)) ("Research indicates that participants are almost twice as likely to provide an accurate identification of the culprit when there is no disguise than when a disguise is donned.").

Even though the victim told police that the perpetrator spoke with a heavy Spanish accent, the police did not include any people in the lineup with a heavy Spanish accent other than Mr. Reas-Mendez. (*See* R. 72:7). Only after the men spoke did C.C. identify Mr. Reas-Mendez as her assailant. (R. 97:65.) In addition to Mr. Reas-Mendez being the only participant in the live lineup with a Spanish accent, Mr. Reas-Mendez was the only person in the live lineup who had also been in the photo lineup. (R. 97:85-86.)

The presence of a suspect in successive identifications procedures is a factor known to cause eyewitnesses to misidentify a perpetrator. Social science research shows that people struggle remembering the context in which they originally learned a piece of information, such as a person's face. Nancy K. Steblay and Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures With the Same Suspect*, Journal of Applied Research in Memory and Cognition 5, 284-89, 285 (2016). In the context of criminal investigations, "[w]hen a witness fails to identify a suspect at a first attempt (mugshot, showup, photo array or lineup) but later makes a positive suspect identification, the recognition may stem from exposure at the first identification task rather than from the crime scene." *Id.* at 285. In addition, "repeated identification procedures are inherently *suggestive*, in that a witness may discern which person is common to both procedures—the police suspect." *Id.* at 285 (emphasis in original) (internal citations omitted). In fact, the Wisconsin Department of Justice Model Policy and Procedure for Eyewitness Identification, which is based on these social science research studies, instructs police to "[a]void multiple identification procedures in which the same witness views the same suspect more than once." State of Wisconsin, Office of the Attorney General, *Model Policy and Procedure for Eyewitness Identification*, Final Draft April 1, 2010; (R. 79:58, 61) (A-App. 163, 166).

Thus, as shown by social science research, the circumstances of the victim's later identification of Mr. Reas-Mendez led her to make an inherently unreliable identification.[13] Especially under these

[13] Although the Court of Appeals rejected Mr. Reas-Mendez's claim that trial counsel was ineffective for failing to move to suppress the pretrial line-up based on his being the only participant with a Spanish-accent, the court did not consider the fact that he was also the only participant in the previous photo-array. (R. 72:7 n4.*)* In any event, Mr. Reas-Mendez is not attempting here to re-litigate any claim

circumstances, exculpatory DNA would have been especially powerful. The circuit court erred in failing to recognize the potential of exculpatory DNA to create reasonable doubt.

2. Mr. Reas-Mendez had a legitimate and corroborated reason, unrelated to the attack on C.C., for hiding in the attic where he was arrested.

On the same day as the assault, almost eight hours later, a person called the police and reported seeing two men beating on another man, pull that man into a vehicle, and then drag him into the building at 8831 N. 96th St. (R. 79:21, 25) (A-App. 126, 130). A nearby officer reported seeing Mr. Reas-Mendez running from the area of the fight. (R. 79:26) (A-App. 131). When officers arrived at the scene, an apartment manager at a nearby apartment flagged the officers down and reported noises in the attic of 9720 W Brown Deer Rd. (R. 79:25-26; 97:92) (A-App. 130-31). When police checked the attic, they found Mr. Reas-Mendez hiding and took him into custody for trespassing. (R. 79:26) (A-App. 131). Mr. Reas-Mendez told the officers he was hiding in the attic because he was fleeing two men who were attacking him. (R. 79:31-32) (A-App. 136-37). When officers accused him of assaulting C.C., Mr. Reas-Mendez denied the allegations. (R. 79:32) (A-App. 137). Officers did not find any items stolen from the victim on Mr. Reas-Mendez or in the attic. (R. 79:26, 29) (A-App. 131, 134).

Therefore, the fact that Mr. Reas-Mendez was arrested nearly eight hours after the attack on C.C., when he was hiding in an adjacent building, is not particularly inculpatory given evidence that he was hiding from men who had just assaulted him, as witnessed by a bystander who called 911. (R. 79:4-5) (A-App. 109-10).

3. DNA testing is an undisputedly more reliable science than fingerprint comparison analysis.

At trial, the State argued that the perpetrator came through the window, and the State's latent print examiner testified that "the fingerprints recovered match the fingerprints from Jose Reas-Mendez and that there is no way that those fingerprints could have been placed

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that counsel should have moved to suppress the eyewitness identification evidence. His only point now is that the identification evidence was sufficiently vulnerable to attack that exculpatory DNA evidence could indeed overcome it.

there by any other person." (R. 98:14.) As shown above, the fingerprint analyst's testimony expressing absolute certainty about the match is scientifically unsound. Further, DNA testing could prove that the fingerprint match was wrong. As explained in the NAS Report, DNA evidence is the only "forensic method [that] has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." NAS Report at 7.

The latent fingerprint card in this case contains the DNA of the person who left the fingerprint because the print examiner used cellophane tape to remove the fingerprint from the window and transfer it to the latent print card. The tape and card can be swabbed to collect those cells that were left by the person who touched the window. Assuming, consistent with Wis. Stat. section 974.07(7)(a)2, that the results of DNA testing of the fingerprint are exculpatory, it is undisputable that the DNA test results would outweigh the fingerprint comparison results as more reliable, and therefore more compelling.

Exculpatory DNA testing results from the knife, jacket, and fingerprints would undermine much of the incriminatory evidence presented by the prosecution, including the victim's flawed identification, and would lead to a reasonable probability that Mr. Reas-Mendez would not have been convicted. In light of all the evidence, at least one juror would have had a reasonable doubt about Mr. Reas-Mendez's guilt.

II. The circuit court erred in denying DNA testing of the fingerprints, without a hearing, where factual disputes were at issue.

The circuit court also erred in denying testing of the fingerprints, without a hearing, to the extent it adopted the State's assertion that the integrity of the fingerprints would be necessarily destroyed through DNA testing. The circuit court indicated that it denied the fingerprint testing "for the reasons set forth by the State." (R. 87:3, n.5) (A-App. 104). The State not only argued that DNA testing of the fingerprints should be denied based on subsection (7)(a)2, as discussed *supra*, but also based on subsection (6)(c). In its Response, the State argued:

> In addition to the lack of merit in the argument that fingerprint identification is not a scientifically sound method of identification, the Defendant is asking to destroy the fingerprint lift card in his pursuit to test for DNA. In order to test the [fingerprint] card for DNA, the tape would need to be removed from the card. This removal would destroy the fingerprint and ruin the integrity of the evidence. Under Wisconsin Statute 974.07(6)(c), 'the court may impose reasonable conditions on availability of materials requested … in order to protect the integrity of the evidence.' Wis. Stat. § 974.07(6)(c). The State can think of no greater assault to the integrity of the evidence than destroying it by unnecessary DNA testing.

(R. 84:6) (A-App. 196).

Mr. Reas-Mendez responded to the State's argument, asserting that the State's objection was "based on a mistaken understanding that [DNA testing] would require destroying the fingerprint evidence." (R. 86:3) (A-App.203). To support this argument, Mr. Reas-Mendez explained that the fingerprint evidence can be preserved by conducting digital imaging of the fingerprints, which can then continue to be used to compare them to other fingerprints. (R. 86:3) (A-App. 203). In explaining this, Mr. Reas-Mendez provided the circuit court a specific example where such a process was conducted by the Wisconsin State Crime Lab after DNA testing of fingerprints was granted. (R. 86:3) (A-App. 203). Mr. Reas-Mendez then requested a hearing to present testimony from a Wisconsin State Crime Lab analyst in order to further support the efficacy of the process. (R. 86:3-4) (A-App. 203-04).

Despite Mr. Reas-Mendez's fully supported factual assertion that the fingerprint evidence would not be destroyed, as well as Mr. Reas-Mendez's request for a hearing to supplement these assertions, the circuit court denied testing of the fingerprints, without a hearing, adopting the State's contested facts. (R. 87:3 n.5) (A-App. 104). Because Mr. Reas-Mendez asserted sufficient facts regarding the ability to test fingerprints without destroying the integrity of the

evidence, the circuit court erred in denying testing without a hearing.[14] *See State v. Allen*, 2004 WI 106, ¶¶ 12-13, 274 Wis. 2d 568, 682 N.W.2d 433 (holding that the circuit court "must hold a hearing when the defendant has made a legally sufficient postconviction motion," and applying the standard beyond motions based on ineffective assistance of counsel).

[14] In any event, the State and court's concern for protecting the integrity of the fingerprint card is hard to understand as a basis for denying DNA testing, given that it's not clear what the State wants to preserve the card for, if not for DNA testing. The fingerprint analysis has already been conducted, the trial completed, and the conviction obtained. What more is the State hoping to do with the fingerprint card? There seems to be no reason to preserve the fingerprint card in its current form other than to stop the DNA testing and its scientifically more powerful means of assessing the evidence. That cannot be a legitimate basis for denying DNA testing under a statute designed to unlock the potential of DNA evidence to help the system discover the true perpetrator of a crime and possible errors of wrongful conviction.

CONCLUSION

For the foregoing reasons, Mr. Reas-Mendez respectfully requests that this Court reverse the circuit court's denial of Mr. Reas-Mendez's DNA testing motion, and order testing of the knife, jacket, and fingerprints.

Dated this 15th day of March, 2018.

Respectfully,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 9,252 words.

Dated this 15th day of March, 2018.

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Maria de Arteaga
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CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of March, 2018.

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CERTIFICATION AS TO APPENDIX

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

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

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