STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP2452

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSE A. REAS-MENDEZ,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING POSTCONVICTION DNA TESTING UNDER WIS. STAT. § 974.07, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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ISSUE PRESENTED

Did the trial court erroneously exercise its discretion when it denied postconviction DNA testing of the jacket and knife found on the ground near the scene of the crime eight hours after the break-in, and of the card containing lifts of fingerprints from the victim's apartment window that matched Jose A. Reas-Mendez's fingerprints?

The trial court held that Reas-Mendez failed to prove a reasonable probability that he would not have been prosecuted or convicted had these items been tested for DNA before trial because even exculpatory results would not have discredited the evidence introduced at trial or made it any less likely that he was the perpetrator.

This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The parties' briefs should adequately address the legal and factual issues presented.

Publication may be of benefit if this Court addresses the issue whether Wis. Stat. § 974.07(7)(a) mandates testing at public expense on nothing but an allegation of actual innocence coupled with the presumption that the items sought to be tested will contain "exculpatory" DNA test results.

INTRODUCTION

Reas-Mendez would have been prosecuted and convicted even if DNA testing of the jacket, knife, and fingerprint lift card produced favorable results because the State would still have gone ahead with the prosecution, and the jury would in all reasonable probability still have found

him guilty. The victim positively identified Reas-Mendez as the perpetrator after having viewed and conversed with him at close range for several minutes in her bedroom, police recovered his fingerprints and palm print from her window, and police found him hiding in the attic of an adjacent apartment building.

Reas-Mendez believes, however, that he is entitled to DNA testing on demand. He reads Wis. Stat. § 974.07(7)(a) to mandate DNA testing at public expense in *every* case where the movant claims to be actually innocent and where any item deemed to be "relevant to the investigation" is presumed to be "exculpatory" of the movant. The statute plainly does not allow Reas-Mendez to embark on this "fishing expedition" more than ten years after trial to see whether DNA testing of these items might possibly point to someone other than him as the perpetrator. The standard for mandatory DNA testing at public expense must be more demanding than what amounts to an "anything is possible" standard.

Reas-Mendez's motion offered nothing beyond unsubstantiated conclusions and rank speculation to convince the trial court that there was a reasonable probability his DNA would not be found on those items and that a third-party perpetrator's DNA would be found on them.

Although the standard for review is not settled, this Court should review the trial court's decision to deny postconviction DNA testing at public expense under Wis. Stat. § 974.07 for an erroneous exercise of discretion.

The trial court did not erroneously exercise its discretion because the Legislature never intended when it enacted this intricate statute to mandate postconviction testing at either public or private expense on a whim. It was reasonable for the trial court to require more.

This Court should affirm.

STATEMENT OF THE CASE

In the early morning of May 20, 2008, a Hispanic man broke into C.C.'s apartment at 9836 West Brown Deer Road in Milwaukee, robbed and sexually assaulted her. (R. 97:32–50.) She awoke to see the man, illuminated by the light of her television, crawling along the floor with his face partially concealed by a T-shirt or bandana and wearing a dark jacket. (R. 97:36–37.) When C.C. screamed, the man arose, told her to "shut up," and demanded money. (R. 97:38.) The man held a knife with a long blade in his hand. (R. 97:37, 72.) When he demanded money, C.C. told him she had some in her purse. The man took the money out of her purse. (R. 97:38–41, 50.) He then crawled onto the bed and, against her protests, began fondling C.C.'s breasts and rubbing her vaginal region. (R. 97:42–43, 45–47.) They conversed briefly face-to-face in both English and Spanish. C.C. looked him in the eye. C.C. eventually succeeded in convincing the man to leave. He told her not to call police. (R. 97:47–48.)

Reas-Mendez's fingerprints and palm print were recovered by police from the outside of the unlocked living room window to C.C.'s apartment. According to C.C., the window was locked when she went to bed that night. (R. 97:73–74, 99–100; 98:12–14.) Milwaukee Police Department Latent Print Examiner Douglas Knueppel testified there is "no way" those prints came from anyone but Reas-Mendez. (R. 98:14.)

Eight hours later, in response to an unrelated call, police officers found Reas-Mendez hiding in the attic of an adjacent apartment building across a courtyard 100 to 125 yards from where C.C. lived. (R. 97:92–93; 98:39–40.) Police found a long knife and a jacket matching the description of the jacket worn by C.C.'s assailant on the ground outside, five feet from the apartment building where Reas-Mendez was hiding. (R. 97:94–96; 98:36.)

C.C. positively identified Reas-Mendez as her assailant in a police lineup held two days later (R. 97:64–65; 98:30–33, 39), and again from the witness stand at trial held on September 15–17, 2008. (R. 97:65–66.) C.C. was "positive" after seeing his eyes and hearing his voice that Reas-Mendez broke into her apartment, robbed and assaulted her. (R. 97:71.) She had sufficient opportunity to see her assailant at close range, illuminated as he was by the light of the television in the bedroom. (R. 97:76; 98:21.) She identified Reas-Mendez by his dark eyes, into which she looked directly at close range as he assaulted her on the bed, and by his voice when he repeated at the lineup what her assailant asked with a Spanish accent just before he left: "Are you going to tell anyone? Are you going to call the police?" (R. 97:64–65; 98:33.)

Although C.C. was unable to identify Reas-Mendez (or anyone else) in a six-photo array displayed to her by police the same day of the incident (May 20), and she asked to view a live lineup instead (R. 97:58–59; 98:27–28), C.C. denied that the photo array in any way influenced her identification of Reas-Mendez in the live lineup two days later or in court. "I didn't even think about the photos when I looked at the faces personally," C.C. testified (R. 97:90).

Police showed C.C. the jacket they recovered just outside the adjacent apartment building where Reas-Mendez was hiding. She said the jacket "look[ed] exactly like" the one worn by her assailant. (R. 97:72.) Police showed her the knife recovered at the same spot. C.C. said the blade was the same length as the one brandished by her assailant, but she did not see its handle. (R. 97:72.)

Neither the State nor the defense requested DNA testing of these items or, for that matter, of any items from the victim's bedroom and apartment before trial. Reas-Mendez does not challenge the reasonableness of his trial attorney's strategic decision not to seek DNA testing of anything.

Reas-Mendez did not testify (R. 98:43), and put on no defense at trial (Reas-Mendez's Br. 6). He challenged only the State's ability to prove its case beyond a reasonable doubt, arguing to the jury that he was an "easy target" (R. 99:35), and there were too many discrepancies in the victim's identification of him to prove his guilt beyond a reasonable doubt. (R. 99:29–36.) More to the point, he did not put on the defense that a third party committed the crimes. The evidence pointed to Reas-Mendez and to no one else. The jury found him guilty of all three charges. (R. 100:7.)

Reas-Mendez filed a direct postconviction challenge and a direct appeal in 2010 challenging trial counsel's effectiveness for not objecting to the pretrial lineup and the in-court identification. This court held on direct appeal, in a decision issued on August 23, 2011, that the ineffective assistance challenge lacked merit because there was no basis for challenging either the police lineup or the in-court identification. (R-App. 101–11.)

Nearly nine years after his trial, on August 21, 2017, Reas-Mendez filed a collateral postconviction motion requesting DNA tests of the jacket, knife, and fingerprint lift card at public expense under Wis. Stat. § 974.07. (R. 79.) He argued that the trial court had no discretion but to order testing at this late date because he claimed actual innocence and § 974.07(7)(a) creates a legal presumption that DNA testing of those items will exculpate him. (R. 79:7–8, 13–14.) "There are a number of possible exculpatory results, including a DNA profile that matches a convicted offender, or a DNA profile on multiple items that match the same unknown third party." (R. 79:14.) "Assuming the results are exculpatory, the only remaining piece of evidence that places Mr. Reas-Mendez

at the crime scene is the victim's positive identification." (R. 79:15.)[1]

The trial court denied the motion in a written decision and order issued on November 22, 2017. (R. 87, A-App. 102–05.) It was "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." (R. 87:3, A-App. 104.) "There is not a reasonable probability that the outcome of the proceedings that resulted in the defendant's conviction would have been more favorable if DNA testing had been available before he was prosecuted or convicted because DNA testing would not have made it any less likely that he was the perpetrator, and it certainly would not have discredited the victim's identification as supported by the fingerprint evidence which was obtained and admitted." (R. 87:4, A-App. 105.)

Reas-Mendez appeals from the trial court's order denying DNA testing at public expense pursuant to Wis. Stat. § 974.07(13). (R. 88.)

STANDARD OF REVIEW

The issue whether Reas-Mendez is entitled to DNA testing at public expense under Wis. Stat. § 974.07(7) is one of statutory construction, subject to independent review in this court. *State v. Denny*, 2017 WI 17, ¶ 46, 373 Wis. 2d 390, 891 N.W.2d 144; *State v. Moran*, 2005 WI 115, ¶ 26, 284 Wis. 2d 24, 700 N.W.2d 884, *overruled on other grounds by Denny*, 373 Wis. 2d 390, ¶¶ 60–72.

[1] This allegation is false. In addition to the victim's positive identification of him, as noted above, police recovered Reas-Mendez's fingerprints and palm print from her window. Those prints matched no one but him. (R. 98:12–14.)

The Wisconsin Supreme Court has not resolved the issue whether the trial court's decision to deny a motion for court-ordered DNA testing at public expense under § 974.07 is to be reviewed de novo or for an erroneous exercise of discretion. *Denny*, 373 Wis. 2d 390, ¶¶ 74–75. *See State v. Hudson*, 2004 WI App 99, ¶16, 273 Wis. 2d 707, 681 N.W.2d 316 (the court of appeals adopted an erroneous exercise of discretion standard). The State will address and argue for adoption of the erroneous exercise of discretion standard of review below.

ARGUMENT

The trial court properly held that Reas-Mendez was not entitled to DNA testing at public expense.

A. The law applicable to postconviction DNA testing

1. The postconviction DNA testing statute

The statute authorizing postconviction DNA testing is Wis. Stat. § 974.07. The outcome of this case turns on this Court's interpretation of the scope of § 974.07(2) and (7). "Subsection (2) is the linchpin of the testing regime." *Denny*, 373 Wis. 2d 390, ¶ 65. "Subsection (7) explains the conditions under which an order will issue." *Id.* The full text of those provisions (pertinent to Reas-Mendez's challenge to his conviction) appears below:

> (2) At any time after being convicted of a crime . . . a person may make a motion in the court in which he or she was convicted . . . 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.

(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.

. . . .

(7) (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 [or] convicted for the offense at issue in the motion under sub. (2), *if exculpatory* deoxyribonucleic acid testing results had been available before the prosecution [or] conviction.

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 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.

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

1. It is *reasonably probable* that the outcome of the proceedings that resulted in the conviction . . . for the offense at issue in the motion under sub. (2), or the terms of the sentence . . . would have been *more favorable* to the movant if the results of deoxyribonucleic acid testing had been available

> before he or she was prosecuted [or] convicted for the offense.
>
> 2. The evidence to be tested meets the conditions under sub. (2) (a) to (c).
>
> 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.

(Emphasis added.)

2. The governing principles of statutory construction

When interpreting a statute, the court starts with the statutory language. The inquiry generally stops if the meaning of the language is plain. *Denny*, 373 Wis. 2d 390, ¶ 46; *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The statutory language is to be interpreted "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (citation omitted).

When construing a statutory provision such as § 974.07(7), this Court must consider the meaning of that provision in the context of the entire statute and related sections. *Peterson v. Volkswagen of Am., Inc.*, 2005 WI 61, ¶ 19, 281 Wis. 2d 39, 697 N.W.2d 61; *State v. Matthew A.B.*, 231 Wis. 2d 688, 708, 605 N.W.2d 598 (Ct. App. 1999). This Court must avoid construing a section of the statute in such a way that it would render another section of the same statute

superfluous. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 22, 254 Wis. 2d 266, 647 N.W.2d 158.

The courts must also avoid a construction of the statute that would produce unreasonable or absurd results. *State v. Kittilstad*, 231 Wis. 2d 245, 260, 603 N.W.2d 732 (1999). The common-sense meaning of the statute should be taken into account in order to avoid an unreasonable or absurd result. *Matthew A.B.*, 231 Wis. 2d at 709. "In interpreting a statute, our ultimate aim is to give effect to the legislature's intent, and rules of statutory interpretation cannot be used when they defeat the purpose of the statute." *Kittilstad*, 231 Wis. 2d at 262.

B. This Court should apply the erroneous exercise of discretion standard of review.

As noted above, the Wisconsin Supreme Court has not decided whether review of the trial court's decision to deny postconviction DNA testing under § 974.07 is for an erroneous exercise of discretion or de novo. *Denny*, 373 Wis. 2d 390, ¶¶ 74–75. This Court has, however, held that review of the trial court's denial of postconviction DNA testing should be under the deferential erroneous exercise of discretion standard, *Hudson*, 273 Wis. 2d 707, ¶ 16. The State agrees. *See also State v. Dean*, 708 N.W.2d 640, 643 (Neb. 2006) ("A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.").

The deferential approach would be consistent with how other collateral postconviction proceedings are reviewed in Wisconsin. The trial court in its discretion may summarily deny a direct or collateral postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the movant is not entitled to relief. *State v. Balliette*, 2011 WI 79, ¶¶ 50, 56–59, 336 Wis. 2d 358,

805 N.W.2d 334; *State v. Bentley*, 201 Wis. 2d 303, 309–11, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). *See Balliette*, 336 Wis. 2d 358, ¶ 68 (a defendant may not rely on conclusory allegations of ineffective assistance of counsel to let him embark on a postconviction evidentiary "fishing expedition" so he might discover whether or not he has a claim); *State v. Romero-Georgana*, 2014 WI 83, ¶ 37, 360 Wis. 2d 522, 849 N.W.2d 668 (to require an evidentiary hearing, the postconviction motion must allege sufficient material facts that, if true, answer the questions: who, what, when, where, how, and why the defendant is entitled to relief.).

The same reasoning applies to motions under Wis. Stat. § 974.07. The Legislature did not intend "to permit convicted offenders who are unable to meet the surmountable sub. (7) standard to engage in postconviction fishing expeditions in attempts to cast doubt upon and upset those convictions." *Denny*, 373 Wis. 2d 390, ¶ 66.

Moreover, when enacting this statute, the Legislature kept in mind the interest of crime victims to "closure following the infliction of harm upon them." *Denny*, 373 Wis. 2d 390, ¶ 70 n.16. The victim's interest in closure must be balanced against the movant's interest in reopening an old case in a belated attempt to prove his innocence. *Id.* This further suggests an exercise of discretion by the trial court that would normally be subject to deferential review; balancing as it must the victim's interest in closure against the movant's desire, as here, to engage in a DNA "fishing expedition."

C. The trial court properly exercised its discretion to deny Reas-Mendez's motion, as it was based on only conclusory allegations and conjecture.

Reas-Mendez is not permitted to engage in a DNA "fishing expedition" based on nothing but conjecture. *Denny*, 373 Wis. 2d 390, ¶ 66. That is precisely what Reas-Mendez tried to do here. The trial court properly refused to let him troll the waters at public expense.

The "dispositive question" is whether the trial court erroneously exercised its discretion "in concluding that DNA testing would not produce noncumulative, exculpatory evidence relevant to [Reas-Mendez's] claim that he was wrongfully convicted." *Dean*, 708 N.W.2d at 644.

The State agrees that Reas-Mendez's motion satisfied the requirements of § 974.07(2)(a)–(c). The motion falls far short, however, of satisfying the pleading requirements of subsection (7)(a).

While, as required, the motion proclaimed Reas-Mendez's actual innocence, § 974.07(7)(a)1., and satisfied the requirements of § 974.07(2), *see* § 974.07(7)(a)3., it relied on only an unsubstantiated, conclusory allegation that there is a "reasonable probability" he would not have been prosecuted or convicted "if exculpatory" DNA evidence were to be found on these items. Wis. Stat. § 974.07(7)(a)2.

1. The motion failed to establish the evidentiary integrity of the jacket and knife for testing as required by Wis. Stat. § 974.07(7)(a)4.

As a threshold matter, the motion failed to show that the integrity and chain of custody of the knife and jacket found lying on the ground eight hours after the break-in had been maintained. Wis. Stat. § 974.07(7)(a)4. Those items could have been handled and contaminated by any number of

people in the eight hours between the break-in and their discovery outside the apartment building where Reas-Mendez was arrested. *See State v. Phelps*, 727 N.W.2d 224, 228 (Neb. 2007) (The kidnapping victim's "clothing was not discovered for nearly 3 months after [she] disappeared. It was recovered from a wildlife refuge, in a location where the clothing would have been exposed to weather elements and animals. The clothing was then handled by numerous persons during the investigation and at trial.").

As one detective explained with regard to the jacket and knife: "After the recovery, the officers did not know what the involvement was [with the break-in] and the items had been handled by numerous people." (R. 98:37.) It should, therefore, come as no surprise that someone else's DNA with no connection to the crime might be found on the jacket and knife. The trial court's order should be affirmed on this ground alone.

Moreover, the presence of someone else's DNA on these items would not diminish the likelihood that Reas-Mendez's DNA, and perhaps C.C.'s DNA, would also be found on the jacket; or that Reas-Mendez's DNA would also be found on the knife. The motion offered no plausible reason to believe that DNA from a heretofore unidentified third-party *perpetrator* (as opposed to an investigator or innocent passerby) would be found on those items. The only conceivably favorable evidence would be the absence of Reas-Mendez's own DNA on the jacket and knife. But that negative does not prove the positive that someone else broke into C.C.'s apartment, robbed and assaulted her. *See Commonwealth v. Heilman*, 867 A.2d 542, 547 (Pa. 2005) ("[A]n absence of evidence is not evidence of absence."). The absence of Reas-Mendez's DNA would show only that such a result is "at best inconclusive, and certainly not exculpatory." *Dean*, 708 N.W.2d at 644.

C.C. testified that the jacket resembled the one worn by her assailant, and the knife blade was the same length as the

one brandished by her assailant, but she did not see the handle. (R. 97:71–72.) It is conceivable that the jacket and knife either did not belong to Reas-Mendez or were not possessed by C.C.'s assailant. But, those unlikely possibilities do nothing to exonerate Reas-Mendez.

Moreover, *even the presence of Reas-Mendez's DNA* on these items does not necessarily prove his involvement in the burglary, robbery and assault. He may have simply discarded those items at the wrong place at the wrong time before he hid in the nearby attic, unaware of the nearby break-in and became, as his attorney argued to the jury, an "easy target." (R. 99:35.) The items were then handled by "numerous people" before they were connected to the break-in. DNA testing of these items—whose evidentiary integrity has been so compromised—would serve no purpose and, at best, would produce only inconclusive test results.

2. DNA testing of the fingerprint lift card would do nothing to disprove the presence or diminish the evidentiary impact of finding Reas-Mendez's fingerprints at the scene.

DNA testing of the fingerprint lift card containing Reas-Mendez's fingerprints and palm print from C.C.'s window pane would, in all reasonable probability, have produced only Reas-Mendez's DNA. Why? Because two of the lifts contained only *his* fingerprints and the third lift was inconclusive as to anyone. Reas-Mendez did not dispute the accuracy and the reliability of the fingerprint evidence at trial. It is too late for him to challenge it now.[2]

[2] At page 13 of his brief, Reas-Mendez argues that the trial court "erroneously assumed that the fingerprint evidence was unassailable." There was no error because Reas-Mendez did not "assail" the fingerprint evidence at trial or on direct appeal. He also

The presence of third-party DNA elsewhere on the lift card would do nothing to diminish the evidentiary impact of the presence of Reas-Mendez's fingerprints (and no one else's) lifted by police from the window onto that card. It would also do nothing to diminish the evidentiary force of C.C.'s positive identification of Reas-Mendez at the police lineup and in court.[3]

Although not at all clear, Reas-Mendez seems to be postulating a theory that the presence of a third party's *DNA* on the lift card would somehow call into question his own *fingerprint match* because it is possible that an unidentified third party might have left those fingerprints. This rank speculation would hold up only if the third party's

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has not challenged the reasonableness of trial counsel's strategic decision not to challenge the fingerprint evidence.

Reas-Mendez argues further that "[t]he very purpose of the DNA testing would be to determine if the fingerprint analysis was erroneous." (*Id*.) If so, that DNA testing could have and should have been done by the defense before trial when fingerprint evidence could be timely challenged based on those pretrial test results. No doubt, trial counsel saw this as only a quixotic venture that did not warrant the extravagant waste of defense resources and valuable trial preparation time that pretrial testing would entail.

[3] At page 22 of his brief, Reas-Mendez insists that, "[o]bviously, the victim's limited ability to see the perpetrator affected the reliability of her identification." That argument is "obviously" false. C.C.'s opportunity to see Reas-Mendez was anything but "limited." She had ample opportunity to see him close up for several minutes face-to-face, and looked him directly in the eye as he tried to sexually assault her and spoke to her while being illuminated by the light of the television. (R. 97:33–50, 64–66, 71; 98:21.)

Reas-Mendez also falsely asserts that C. C. "excluded" him from a photo array. (Reas-Mendez's Br. 22.) She did not "exclude" him. She could not positively identify anyone in the array, and asked to see a live lineup instead. (R. 97:58–60; 98:27–28.) C.C. was unsure, but she did not "exclude" Reas-Mendez or anyone else by proclaiming, for example: "That is not him."

fingerprints also matched the prints recovered from the window to the same extent that Reas-Mendez's prints matched them. There is "no way," the fingerprint expert testified at trial, that the prints would match anyone but Reas-Mendez. (R. 98:14.) This is, therefore, nothing but speculation on speculation unsupported by facts. A third-party fingerprint match to those lifted from the window is but a remote possibility and not a reasonable probability. The only known match of the prints on the card was with Reas-Mendez's prints. The motion failed to allege any plausible factual scenario whereby the card containing Reas-Mendez's own latent prints would *also* contain the DNA *and matching fingerprints* of a third party *perpetrator*. Reas-Mendez offers no reason to believe that anyone's DNA, other than his own or perhaps that of the police officer who lifted the prints, would be found on the card.

Finally, at page 13 of his brief, Reas-Mendez concedes that he is relying only on a remote possibility and not on a reasonable probability that something favorable will turn up. "The circuit court ignored or dismissed the *possibility* that DNA testing could prove that the [fingerprint] examiner's testimony was wrong." This "anything is possible" standard of pleading ignores the "reasonable probability" standard in the statute. Because the motion offered only an absurd theory of innocence based on speculation and conjecture—but not on new facts—in the ten years since trial, the trial court properly exercised its discretion to deny it.

3. There is a significant risk the fingerprint evidence will be destroyed.

The trial court properly determined that there is a significant risk the fingerprint evidence would be destroyed in the testing process. (R. 84:6); Wis. Stat. § 974.07(6)(c). Reas-Mendez argues that the fingerprint evidence would not be destroyed, but the trial court was not required to take him

at his word. The court believed the State's assertion that "the tape would need to be removed from the card" for testing and this would "ruin the integrity of the evidence." (R. 84:6.)

If the tape is removed, experience teaches that the fingerprint evidence will in all likelihood be destroyed and its integrity ruined. Reas-Mendez "explained" why that is not necessarily so (Reas-Mendez's Br. 26), but he did not proffer an affidavit or even an unsworn statement from anyone at the State Crime Laboratory to support his allegation that there is no risk the fingerprint evidence would be destroyed in the testing process. Instead, he "requested a hearing to present testimony" to that effect from some unidentified person at the State Crime Laboratory. (*Id.*) That makes his allegation that the evidence would not be destroyed in the testing process only a conclusory one that the trial court could reject as lacking evidentiary support. At the very least, the *risk* of destruction is substantial even assuming the evidence might not *necessarily* be completely destroyed.

In the end, Reas-Mendez does not care that the fingerprint evidence might be destroyed because he sees no valid reason why the State would want to preserve it. (Reas-Mendez's Br. 27 n.14.) The trial court reasonably decided that the State had good reason to want to preserve the integrity of this evidence, especially when Reas-Mendez claims the right to testing on demand for the first time more than a decade after trial in hopes of winning a new trial where the fingerprint evidence would once again take center stage. If the fingerprint evidence is destroyed, then Reas-Mendez could gain a windfall acquittal on retrial.

The trial court reasonably decided not to take that unnecessary risk. There was no plausible showing in the motion that testing of the fingerprint card now would produce anything of value to the defense that was not apparent when trial counsel decided against either pursuing a DNA test on it

or challenging the fingerprint evidence lifted from the window onto the card over a decade ago.

4. The motion failed to show a reasonable probability that a third-party perpetrator's DNA will be found on any of these items.

In his motion, Reas-Mendez claimed that he is actually innocent and, by necessary implication, that an unidentified third party committed the crimes. (R. 79:14–15.) His fishing expedition would rest on the hope that test results would reveal "DNA on the knife, jacket, and fingerprint that excluded him and included a third party." (Reas-Mendez's Br. 12.) At trial, however, Reas-Mendez did not take the stand to proclaim his actual innocence and did not argue that a third party committed these crimes. He did not put on an alibi defense. He put on no defense other than to argue that the prosecution failed to meet its "beyond a reasonable doubt" burden of proof because of supposed weaknesses in C.C.'s identification of him.[4]

Reas-Mendez did not try to prove at trial that a third-party committed the crimes. *See State v. Denny*, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984) (the third-party defense is difficult to establish; the defendant must show more than "a bare possibility that a third party might be the culprit"). To put on a third-party defense, the defendant must establish motive, opportunity, and a direct connection

[4] Reas-Mendez apparently now wants to present a new defense: he was hiding out in the nearby attic not because he broke into C.C.'s apartment, but because he was hiding from two men who he claims attacked him. (Reas-Mendez's Br. 24.) Reas-Mendez does not explain why he and his trial attorney chose not to put on that defense. He does not challenge counsel's effectiveness for strategically deciding against putting it on. Just how DNA test results of the jacket, knife, and fingerprint lift card would enhance this new defense is anyone's guess.

between the third party and the crime. *Id.* at 624; *State v. Oberlander*, 143 Wis. 2d 825, 836, 422 N.W.2d 881 (Ct. App. 1988), *rev'd on other grounds*, 149 Wis. 2d 132, 438 N.W.2d 580 (1989). To put on a third-party defense at trial, the defendant must allege specific facts to show there is a "legitimate tendency" that a third party committed the crime and that he did not. *Denny*, 120 Wis. 2d at 623.

Reas-Mendez did not make any such showing at trial and made no such showing in his postconviction motion. He presented only speculation, but not a "legitimate tendency," that an unidentified third party committed these crimes. The motion did not offer any new third-party-perpetrator evidence that came to light since trial. There was not at the time of trial and there is not now any evidence pointing to anyone but Reas-Mendez as the perpetrator. If there were any plausible, new third-party evidence, Reas-Mendez certainly would have included it in his motion. He did not because there is none.

Reas-Mendez apparently hopes that DNA testing will turn up something that will now enable him to prove the "legitimate tendency" of third-party liability that he did not try to prove at trial. *Denny*, 120 Wis. 2d at 623. His motion did not, however, offer any new evidence pointing to a third party with the same motive and opportunity to commit the crimes, or to a third party with a direct connection to the crimes. His motion alleged only "a bare possibility" that some unidentified third party may have committed the crimes. *Id.* at 622. His motion failed because it did not address the questions: who, what, when, where, how, and why there was not then but there is now plausible ("legitimate tendency") third-party liability evidence that would make DNA testing something other than the extravagant flyer at public expense that it appears to be. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 37.

D. Reas-Mendez is not entitled to testing in hopes of finding a "shot in the dark" match on a national database.

Reas-Mendez insists that mandatory, court-ordered testing on his naked allegation of actual innocence must include a blind comparison with national DNA databases in his "shot-in-the-dark" hope that there might be a match with a known criminal somewhere. (Reas-Mendez's Br. 19 ("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 database of convicted offenders").) That is precisely the sort of "fishing expedition" decried by the *Denny* court. 373 Wis. 2d 390, ¶ 66.

The motion offered no reason to believe that a blind comparison of third-party DNA found on any of these items would match anyone on the national database (other than Reas-Mendez). *See Dean*, 708 N.W.2d at 644 (citing *State v. Lotter*, 669 N.W.2d 438, 447 (Neb. 2003)) (DNA testing "presupposes at least two samples of biological material" for comparison). The Florida Supreme Court summarily rejected a similar argument that mandatory postconviction testing should include blind profile comparisons with those on the state's DNA database based on nothing more than speculation:

> Gore asserted in his motion filed with the trial court that DNA testing will allow the Florida Department of Law Enforcement to "compare those profiles to the profiles of known perverts." This is exactly the sort of speculation and fishing expedition for which [the postconviction testing statute] was not intended.

Gore v. State, 32 So. 3d 614, 619–20 (Fla. 2010) (citing *Lott v. State*, 931 So. 2d 807, 820–21 (Fla. 2006)). The trial court properly exercised its discretion to deny testing for this speculative purpose.

E. A motion must allege specific facts to enable the postconviction court to determine whether there is, in fact, a reasonable probability that exculpatory DNA test results before trial would have prevented the prosecution or conviction.

Reas-Mendez insists that he was not required to make any factual showing in his motion. Testing at public expense is mandatory based only on his conclusory allegation of actual innocence. This is so, he believes, because the statute *presumes* that DNA testing of any item deemed to be relevant only to the police *investigation* will exonerate him. (R. 79:7–8, 14–15.)[5]

This is an unreasonably broad construction of § 974.07(7) because it excuses any motion filed under § 974.07 from including the factual specificity that is required for all

[5] Rather than offer specific facts, Reas-Mendez's motion offered only anecdotal articles showing that, on rare occasions, eyewitness identification testimony may not be reliable depending on the circumstances (Reas-Mendez's Br. 21), and offered an article "analyzing 22 documented cases involving fingerprint errors" (*Id.* at 13–14 n.4). This is neither new nor remarkable. The article about fingerprint evidence was published in 2005, four years before trial. Reas-Mendez also disregards the countless cases where fingerprint evidence has withstood scrutiny. Moreover, he cites no case law rejecting fingerprint evidence as unreliable under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). A *Daubert* challenge to the fingerprint evidence would have been baseless. *See, e. g.*, *United States v. Crisp*, 324 F.3d 261, 265–70 (4th Cir. 2003) (and cases cited therein); *State v. Favela*, 323 P.3d 716, 718–20 (Ariz. Ct. App. 2014) (and cases cited therein). So, the same fingerprint evidence would come in at a retrial. Finally, as this Court held on direct appeal, there was no basis for trial counsel to challenge the police lineup procedure or C.C.'s in-court identification of Reas-Mendez as her assailant. (R-App. 101–11.) Reas-Mendez is procedurally barred from raising these issues anew or for the first time now. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181–86, 517 N.W.2d 157 (1994).

other postconviction motions. It also would not require the motion to answer the essential who, what, when, where, how, and why factual questions that would explain to the trial court why testing is called for now even though it was not requested before trial. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 37. Assuming the motion adequately answered those factual questions, the trial court could better assess the need for testing. It would not be required to order DNA testing on demand based on nothing but the movant's conclusory say-so.

Most important, testing on demand based only on conclusory, factually unsubstantiated allegations contravenes the *Denny* court's proscription against § 974.07 "fishing expeditions." 373 Wis. 2d 390, ¶ 66. It takes the victim's compelling interest in closure out of the equation. *Id.* at ¶ 70 n.16. It also ignores the compelling State interest in the finality of criminal convictions. *E.g., State v. Henley*, 2010 WI 97, ¶ 75, 328 Wis. 2d 544, 787 N.W.2d 350 (a court may not grant discretionary reversal until after it has balanced the compelling state interests in the finality of convictions and proper procedural mechanisms against factors favoring reversal); *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482 (the exacting "manifest injustice" standard for plea withdrawal preserves the compelling interest in the finality of criminal convictions once the plea is entered and sentenced is imposed).

The plain language of § 974.07(7)(a) also defeats Reas-Mendez's boundless construction of its scope. The statute provides: "*A court* . . . shall order" DNA testing if, under sub. (7)(a)2., "[i]t is reasonably probable that the movant would not have been prosecuted [or] convicted . . . if exculpatory [DNA] testing results had been available before the prosecution [or] conviction." "A court" cannot make that inherently factual "reasonable probability" determination in a factual vacuum. The statute does not, after all read: "If the *movant alleges* that there is a reasonable probability he would not have been

prosecuted or convicted, the court shall order testing." Instead, the statute requires "[a] court" to make that inherently factual determination based on what is alleged in the motion. A conclusory allegation of innocence bereft of any supporting facts does not give the court any basis for finding that there is a *reasonable probability* the movant would not have been prosecuted or convicted if, despite the long odds, something "exculpatory" turns up.

The court is required to order testing—it has no discretion in the matter—only when the motion alleges sufficient facts to support the allegation of need for testing, giving the court plausible reasons for it to find that there is *in fact* a *reasonable probability* the movant would not have been prosecuted or convicted if exculpatory test results were available before trial. The motion must, accordingly, adequately address and answer the fact questions: who, what, when, where, how, and why in the factual context of the particular case to enable "[a] court" to accurately assess the need for testing based on more than conclusory allegations.

Reas-Mendez was, of course, free to rely only on his speculation and conclusory allegations, but the trial court was, as with any other postconviction motion, free in its discretion to reject the motion on that basis alone.

Reas-Mendez's motion offered nothing new or specific beyond what was known at trial. It did not, for instance, identify a third-party perpetrator or allege the post-trial discovery of reliable new eyewitnesses or physical evidence. *See McQuiggin v. Perkins*, 569 U.S. 383, 394–96 (2013); *Coleman v. Lemke*, 739 F.3d 342, 349 (7th Cir. 2014), *cert. denied*, 134 S. Ct. 2317 (2014) (to overcome a procedural default in federal habeas, the petitioner must present new and reliable evidence of actual innocence).

Reas-Mendez would still have been prosecuted and convicted because DNA results showing the absence of his

DNA or the presence of a third-party's DNA with no motive and opportunity to commit the crimes would not have diminished the force of the State's trial evidence. *See Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005) ("[I]t is black letter law that testimony of a single eyewitness suffices for conviction even if 20 bishops testify that the eyewitness is a liar.") The victim's strong identification testimony based as it was on her observations of the assailant at close range, fully corroborated as it was by the presence of Reas-Mendez's fingerprints on her window and by his arrest while hiding in the attic of a building roughly a football field away, would still in all reasonable probability have resulted in his conviction. "The idea that the DNA results [Reas-Mendez] seeks would tip the scales and cause police or a jury to reject the substantial evidence against [him] is simply conjecture." *Denny*, 373 Wis. 2d 390, ¶ 80.

F. Reas-Mendez's open-ended reading of Wis. Stat. § 974.07(7)(a) is unreasonable in the context of the rest of the statute and leads to the absurd result of requiring postconviction DNA testing at public expense of every item deemed relevant to the investigation whenever the indigent defendant proclaims actual innocence.

Reas-Mendez insists that, because the statute presumes the results will be "exculpatory," testing is required based only on his allegation that he is actually innocent. (Reas-Mendez's Br. 11–12.)

Though the statute requires the court to "assume" exculpatory results, *Denny*, 373 Wis. 2d 390, ¶ 76, that assumption creates more questions than it answers. Is the assumption to be made in a factual vacuum? Is testing at public expense mandatory based on nothing more than an allegation of innocence and a presumption of "exculpatory" results? Does this presumption attend to every item deemed

relevant "to the investigation" even if it was not relevant at trial? What does "exculpatory" mean in this context? Is the presumption of "exculpatory" results subordinate to the "reasonable probability" standard? Or, is it the other way around? Do presumed exculpatory test results of anything deemed relevant to the investigation automatically create a reasonable probability of an exoneration? Or, is that reasonable probability standard met only when the presumption of exculpatory results is paired with a reasonably probable evidentiary theory of actual innocence?

This presumption does not allow for DNA testing on demand of virtually every item seized by police. It requires a factual context sufficient to convince the court that, assuming the results are exculpatory, the movant would not in all reasonable probability have been prosecuted or convicted given those plausible facts as alleged. In short, the presumption of exculpatory results cannot exist in a factual vacuum. It must be paired with a plausible evidentiary theory of actual innocence. The movant is not entitled to a "shot in the dark" at public expense based on nothing but the presumption.

Reas-Mendez would have the Court read the "reasonable probability" standard out of the statute by not requiring any showing of reasonableness at all. Given that the movant may request the testing of any evidence that "is relevant to the *investigation or* prosecution that resulted in the conviction," Wis. Stat. § 974.07(2)(a), testing would be required in every case on nothing more than the movant's whim. Evidence is, after all, "[r]elevant" if it has "*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." Wis. Stat. § 904.01. *See Moran*, 284 Wis. 2d 24, ¶ 45. *State v. Hereford*, 195 Wis. 2d 1054, 1066, 537 N.W.2d 62 (Ct. App. 1995) (same).

Reas-Mendez's argument also begs the question what is an "exculpatory" DNA test result? Is it one that exonerates or merely favors the movant? The answer is not clear. *Denny*, 373 Wis. 2d 390, ¶ 76 n. 19. Section 974.07(7) employs two separate and distinct terms to describe the anticipated test results: "if exculpatory" in sub. (7)(a)2.; and "favorable" in subsection (7)(b)1., without explaining the difference.

The United States Supreme Court has broadly determined that evidence is "exculpatory" if it is "favorable" to the accused and is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See State v. Nerison*, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987). With respect to whether the evidence in question is "favorable" to the defense, the *Brady* rule extends to evidence that may be used to impeach the credibility of a prosecution witness. *Id.* at 54–56. Favorable evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id. See Banks v. Dretke*, 540 U.S. 668, 698, 702–03 (2004).

The broader "favorable" result standard ties neatly into subsection (7)(b)1., which gives the trial court discretion to order DNA testing, even when the movant does not allege actual innocence, if the motion shows "it is reasonably probable that the outcome of the proceedings that resulted in the conviction . . . would have been *more favorable* to the movant if the results of [DNA] testing had been available before [the movant] was prosecuted [or] convicted." This seems to allow for testing in situations where the movant alleges, again with sufficient factual specificity, that it is reasonably probable "favorable" pretrial DNA test results would have resulted in a reduced charge or a lesser sentence.

The broad "favorable" result standard, which ties directly into the *Brady* definition, does not tie neatly into subsection (7)(a)2., which uses the term "exculpatory," rather than subsection (7)(b)1.'s broader "more favorable" standard, in the context of its over-arching required allegation of actual innocence.

If this Court were to adopt the *Brady* definition of "exculpatory," then the presumption under § 974.07(7)(a)2. would extend to all "favorable" test results, even those that go only to general credibility and do not exonerate. *Brady*, 373 U.S. at 87. Evidence that is merely "favorable" to the defense, by definition, encompasses far more than evidence that proves actual innocence.

For example, Reas-Mendez insists that DNA testing of the fingerprint lift card might prove that the match with his fingerprints was "erroneous." (Reas-Mendez's Br. 13.) Proof that the fingerprint comparison was erroneous might create reasonable doubt, but it does not exonerate Reas-Mendez.

Something more than "favorable" evidence should be required to trigger the "exculpatory" evidence presumption in subsection (7)(a)2. Something more is required because that subsection is tied directly into the allegation that the movant is actually innocent, and it is encompassed by the inherently factual "reasonable probability" standard that the movant would not have been prosecuted or convicted if the "exculpatory" DNA test results were known before trial. The motion must, therefore, ground the allegation of actual innocence on specific new facts to activate the presumption that DNA test results would have exonerated the movant.

Moreover, if the postconviction court must presume to be "exculpatory" (be it exonerating or merely "favorable"), every piece of evidence obtained by police from a crime scene that someone deemed "relevant to the *investigation*," there would be no logical stopping point. DNA testing at public

expense will be mandatory in virtually every case based on nothing more than a conclusory allegation of actual innocence, coupled with a showing that police collected items they thought at the time were relevant to the investigation, even though they ultimately turned out not to be relevant at trial. That is an absurdly broad and unreasonable interpretation of the statute.

The statute also does not clarify who makes the determination whether an item is "relevant to the investigation." Is it made by the investigating police officer who retrieved the items or by the detective who examined them and sought charges? Is it made by the prosecutor at trial? Or, is it made by the defendant ten years after his trial by merely making a conclusory allegation that the items were relevant to the investigation?

In *People v. Tookes*, 639 N.Y.S.2d 913, 915 (Sup. Ct. 1996), the court rejected the notion that New York's testing statute, similar to Wisconsin's, mandates DNA testing "on demand."[6] The court reasoned: "While exoneration of the wrongfully convicted should not be restricted by monetary considerations, automatic testing would impose an unnecessary burden on the state's resources in cases where the results are unlikely to have had any impact upon the verdict." (*Id.*)

To obtain postconviction DNA testing under the federal counterpart to § 974.07, the movant must present a theory of

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[6] In *Anderson v. State*, 831 A.2d 858, 866 n.18 (Del. 2003), the Delaware court observed that, "Wisconsin follows New York, but appears to favor lenient application of the model." That observation is now called into serious doubt by the Wisconsin Supreme Court's recent proscription of DNA "fishing expeditions" and its requirement that the victim's interest in closure be balanced against the need for DNA testing under § 974.07. *Denny*, 373 Wis. 2d 390, ¶¶ 66, 70 n.16. It would seem that the reasoning of *Tookes* has greater force now more than ever in Wisconsin.

innocence and not simply claim innocence. "Such a bare allegation hardly meets the rigorous standard" set forth in 18 U.S.C. § 3600(a)(6). *United States v. Boose*, 498 F. Supp. 2d 887, 892 (N.D. Miss. 2007).

As discussed above, Reas-Mendez's broad interpretation of subsection (7)(a) runs counter to the compelling state interests in preserving the finality of presumptively valid criminal convictions, in proscribing postconviction "fishing expeditions" at public expense based only on conclusory allegations, and in protecting the desire of crime victims for closure. Additionally, the undue burden on law enforcement, the high cost to the State, and the needless usurpation of already-stretched State Crime Laboratory resources that would be caused by mandatory DNA testing at public expense of any item(s) deemed by someone to be "relevant to the investigation," detached from any plausible showing of actual innocence, should be obvious.

The most reasonable reading of the phrase "if exculpatory" in subsection (7)(a)2., in the context of the entire statute, is that the movant must make a plausible allegation and showing in his motion, grounded on specific facts that, "if exculpatory," the DNA test results would have in all reasonable probability have exonerated him in light of the new evidence and there would, therefore, have been no prosecution or conviction.

Examples of new evidence sufficient to trigger the presumption of exculpatory results that would have prevented the prosecution or conviction are: a third-party confession, a new eyewitness, another suspect with similar motive and opportunity to commit the crime, or new and reliable physical evidence, Reas-Mendez did not offer any such evidence in his motion, much less anything showing a "legitimate tendency" that someone else committed the crimes. Obviously, if he had such new and reliable evidence of

his actual innocence at hand, Reas-Mendez most assuredly would have presented it in support of his motion.

This specific allegation of new evidence in the motion would enable "a court" to determine whether it is sufficient to show that the movant would not have been prosecuted or convicted because there is a reasonable probability the DNA test results would have exonerated him. Conclusory allegations of bare possibilities are not enough.[7]

The trial court, in its discretion, was free to deny testing at public expense absent any showing of need beyond Reas-Mendez's hope that "favorable" test results might *possibly* but not *probably* sustain a "reasonable doubt" defense at a new trial—the same "reasonable doubt" defense based on the same evidence that failed at Reas-Mendez's first trial over a decade ago.

Reas-Mendez's motion offered only unreasonable possibilities—but not reasonable probabilities—based on conjecture, speculation, a too-late attack on the reliability of the fingerprint evidence, and a baseless, previously-rejected attack on the victim's identification testimony. The trial court properly exercised its discretion to deny postconviction DNA testing at public expense absent more.

[7] The only exception to this would be the situation, unlike here, where DNA testing was not available at the time of trial or where new DNA testing procedures will produce more reliable results. Wis. Stat. § 974.07(7)(a)3.

CONCLUSION

This Court should affirm the trial court's decision and order denying DNA testing at public expense.

Dated this 1st day of June, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,896 words.

Dated this 1st day of June, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of June, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

SUPPLEMENTAL APPENDIX TO
BRIEF OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

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

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

Dated this 1st day of June, 2018.

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DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 1st day of June, 2018.

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DANIEL J. O'BRIEN
Assistant Attorney General