STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2023AP2086
(Kenosha County Case No. 1998CF519)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARNIAL C. CRAIG,

Defendant-Appellant.

Appeal from a Final Order Denying §974.06 Post-Conviction Relief, Entered in the Circuit Court for Kenosha County, the Honorable Jason A. Rossell Presiding

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BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUE PRESENTED FOR REVIEW

The sexual assault victim, who had previously misidentified her attacker several times, identified Darnial Craig at trial as the attacker who committed all three of the vagina-to-penis assaults against her. At trial, the state's DNA expert testified that DNA testing of a vaginal swab was inconclusive but that more sensitive testing had come into existence which might help. Was subsequent, more sensitive DNA testing which excluded Mr. Craig as the source of the DNA new evidence which required a new trial as a matter of due process?

The postconviction court said no. Although the postconviction court held that the evidence was discovered after trial and was not cumulative, the postconviction court also held that the failure to discover the evidence was negligent and that it was not material because the evidence was not admissible. The postconviction court also held that there was no reasonable probability of a different result.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stats. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication may be warranted under Wis. Stats. (Rule) 809.23.

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STATEMENT OF THE CASE

The issue at trial was who committed the crime, not whether the crime was committed, Mr. Craig did not dispute that two armed men broke into the apartment of LC and her then-boyfriend, AW, during the night, tied up AW and LC, took various items, that they sexually assaulted LC. (although only one did so vaginally), and that one of them forced LC to drive to an ATM, eventually sexually assaulting her again.

According to LC's trial testimony, there were four sexual assaults:

Man 1 committed three vaginal sexual assaults, two of which were with his penis and potentially left semen in LC's vagina. These included one assault

committed with a vibrator and two committed with his penis. (R98:44, 56-58, 71-73, 120). LC initially said he ejaculated (R98:62) but testified at trial that she was "not sure one way or the other" (*id.*:63).

Man 2 committed only a single mouth-to-penis sexual assault, which did not have the potential to deposit semen in LC's vagina. (*Id.*:47). Although LC testified that he ejaculated, she swallowed all of it. (*Id.*:47-48).

Although, at trial, LC identified Darnial Craig as Man 1 and Lebor Keys as Man 2, she had great difficulty identifying her assailants prior to trial. The police conducted three photo lineups with her:[1]

1. **In the first photo lineup, LC identified an innocent man as Man 1**. Slightly more than a month after the assaults, LC picked out a cousin of Mr. Craig's as Man 1. (R98:64, 131-132). She insisted she was "100 percent positive." (R99:12; *see also* R98:69). The police then determined that this man was innocent. (R99:13).

2. **In the second photo lineup, LC stated that Man 1 was not present, although Mr. Craig's picture was in the lineup.** (R98:137-38). (For that matter, she stated that Man 2 was not present, although Lebor Keys' picture was in the lineup.**)**

3. **In the third photo lineup (which was the**

[1] AW could not identify either person (R99:59).

> **second time police presented Mr. Craig's picture and occurred after Mr. Craig's arrest), she identified Mr. Craig's photo as one of Man 1.** *(Id.*:65). This lineup occurred between 2 ½ months and three months after the assaults. *See id.*:138, 140. LC had not seen her assailant's hair, *id.*:17, 75, his hairline, or his ears, *id.*:45-46 but the key difference between the photo of Mr. Craig in the second lineup and in the third was his hair, *id.*:41. As she had done earlier when identifying the incorrect man, LC claimed she was "absolutely positive." *Id.*:65.

Mr. Keys, who was arrested before Mr. Craig and pointed the finger at Mr. Craig, (R99:27, 131, 141). testified under a plea agreement that reduced the charges against him to two and required the state to recommend consecutive probation on one of those counts. (R99:86-87, 99).

Mr. Keys testified as if he were Man 2–up to a point. He contradicted LC's story multiple times. First, he swore he never sexually assaulted her. (*Id.*:97, 102-103). Second, he denied threatening anyone and claimed he got only $20 from all the cash and goods taken. (*Id.*:100, 106). Third, he insisted Mr. Craig was the only one with a gun. *(Id.*:90-91). Fourth, he denied he decided to tie up the couple and claimed it was Mr. Craig's decision. (*Id.*). Fifth, he claimed Mr. Craig committed all the sexual assaults. (*Id.*:92, 95).

Despite the denials of Mr. Craig's brother on the stand (*id.*:70-71), and his claims of intimidation by police (*id.*:76), the police claimed at trial that the brother told

them that Mr. Craig committed the crime (*id.*:126-27).

In addition, a white jailhouse snitch claimed that Mr. Craig boasted to a multi-racial group of jail inmates that he had committed the crime. (*Id.*:118-120).

The only physical evidence introduced at trial consisted of unclear pictures of LC and her attacker which were taken at a bank. No witness, including Mr. Craig's mother who knew both Mr. Keys and Mr. Craig, could identify who was with LC. (*Id.*:36-37,153). The coat the attacker wore had been available to both Mr. Keys and Mr. Craig. (*Id.*:153-54).

The DNA expert at trial, Laura Kwart, testified on behalf of the state that she tested a vaginal swab from LC that had semen on it, but the results failed to meet the State Crime Lab's standards for DNA interpretation. (R98:152-53, 155). To everyone's surprise, she also testified that new, more sensitive testing procedures had recently become available. (*Id.*:156-67).

The State Crime Lab then re-examined the rape kit to see if re-testing was possible, but the Lab believed (inaccurately as it would turn out) that there was no other semen to test. (*Id.*: 159). Thus, although procedures had advanced, the State Crime Lab did no additional testing because their personnel believed no additional material was available for testing. (*Id.*:156-57).

Mr. Craig was convicted of one count of burglary while armed as party to a crime, contrary to Wisconsin Statutes §939.05 and 943.10(2)(a)(1997-1998), four counts of first degree sexual assault with use of a dangerous weapon as party to a crime, contrary to Wisconsin Statutes

§939.05 and 940.225(1)(b) (1997-1998), and one count of kidnaping, contrary to Wisconsin Statutes §940.31(1)(a) (1997-1998). The circuit court, the Honorable Wilbur W. Warren III, sentenced him to an aggregate sentence of 145 years in prison with an additional sentence of 50 year, which was stayed in favor of 30 years of probation. (R4; R101).

Following trial, the Kenosha County District Sheriff's Office agreed to store the trial exhibits and other evidence, but gave them to the Kenosha Police Department under number 1998-029838. (R192:15).

A few months after the trial, the State Crime Lab began using even more powerful technology to enhance their STR DNA testing ability. That technology was the Powerplex 16 kit. (*See* R165.). That kit amplifies certain loci on the DNA. See https://www.promega.com/products/forensic-dna-analysis-ce/str-amplification/powerplex-16-hs-system/?catNum=DC2101.

Postconviction counsel, whom the Office of the State Public Defender appointed to pursue an 809.30 appeal (R109), reviewed matters. Although he originally believed no issue concerning DNA existed, he eventually realized that the State Crime Lab was mistaken and a vaginal swab from LC was still available for testing. (*Id*:2). The state then stipulated with Mr. Craig that the material be submitted to Dr. Alan Friedman. (*Id.).* Dr. Friedman then owned Helix Biotech Incorporated, which specialized in forensic DNA and paternity testing. (R187:8). Lab accreditation was not required at the time and Helix was an unaccredited lab. (*Id*.:22).

Dr. Friedman did a "blind test" of half the material

available. (R108:3). In other words, he received the vaginal swab without having DNA profiles for either Mr. Craig, Mr. Keys, or AW (the other victim of the robbery and LC's then boyfriend), (R187:11), so he could not shape his results to favor Mr. Craig. Dr. Friedman was to report the profile he developed to the state and it then would be compared with Mr. Craig's DNA profile.

Dr. Friedman did have a DNA sample that was entirely female from LC. (*Id.*:12). He then tested the semen material sample and developed "a very low level of an additional profile" in addition to LC's. (R172).

That profile consisted of alleles. An allele is a variation of a particular gene. (R187:13). Individuals carry DNA from both their mother and their father so the presence of more than two alleles at a particular gene location indicate there is a mixture. (*Id.*) A minor allele is one where the quantity is lower but, according to Dr. Friedman, an allele whose quantity met a higher threshold would not be more reliable. (*Id.*:25).

The additional profile consisted of minor alleles at three locations:

- D16;
- CSF1PO; and
- Penta D.

(R187:12; *see also* R173).

Following this testing, postconviction counsel filed a motion to withdraw because Mr. Craig wished to hire another attorney. (R106). Mr. Craig had been pushing for

DNA testing before trial and at sentencing[2] so a high probability exists that Mr. Craig's problem with postconviction counsel was his failure to pursue DNA evidence further.

Two years later, by authority of the Kenosha County District Attorney, the Kenosha County Sheriff's Office destroyed all of the evidence they were holding. (R192:1-2).

Approximately eight years later, Mr. Craig contacted the Wisconsin Innocence Project. The Innocence Project arranged to have Bode Technologies, an accredited laboratory, compare DNA from a buccal swab from Mr. Craig and a DNA sample from Mr. Keys with the partial profile Dr. Friedman developed. (R164:1; R186:6-7). Bode Technologies received paper data and Dr. Friedman's report from his testing. (R186:8; *see also* R184).

Bode Technologies assigned the job to Sarah Shields, who was then a Senior DNA analyst. (R186:4). She has since made a career change and now is a DNA analyst with the Jefferson County Sheriff's Office in Colorado. (R183).[3]

After generating separate DNA profiles for both Mr. Craig and Mr. Keys (R186:8-9), she compared them to the partial profile Dr. Friedman generated (*id.*:11).

Ms. Shields concluded that Mr. Craig was excluded as

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[2] *See* R143:5, 8-9 (Mr. Craig seeks a new attorney before trial because original trial attorney will not call a DNA expert) and R21:12-13 (Mr. Craig complains at sentencing of failure to use the newer DNA test).

[3] The transcript of her testimony appears to have an error so this information is clearer on her curriculum vitae. (Compare R186:4 with R183.)

a contributor to the partial profile. *Id*.:12.

Despite this information, the Wisconsin Innocence Project did not file any motion on Mr. Craig's behalf and referred him to the Legal Assistance to Incarcerated Persons Program, which also did not file any motion on Mr. Craig's behalf.

Mr. Craig himself is and was in prison and is and was indigent. After a time, Mr. Craig's family was able to gather sufficient funds to hire Henak Law Office to represent him.

Mr. Craig then filed a postconviction motion under Wisconsin Statutes §974.06 seeking a new trial based upon new evidence on February 24, 2022. The circuit court held evidentiary hearings on this matter on September 22, 2022 and on November 16, 2022. (R186; R187).

Sarah Shields testified first. (R187). She excluded Mr. Craig as a source of the DNA because he did not have a 13 allele at locus[4] D16S539 and he did not have an 8 allele at locus Penta D. (R186:12-13). While it is possible that parts of the DNA of the profile were missing (which is called "dropout"), the possibility of dropout did not change her conclusion that Mr. Craig could not have been a contributor to the semen sample. (*Id*.:13).

She did not think that it likely that Mr. Craig was a contributor despite his having a 10 allele at locus CSF1PO because it "would mean that there were an additional two

[4] The locus is a label for a particular gene location. (R187:13).

minor contributors[5] that were present at roughly the same amount as that 10 so, you know, I felt that that 10 likely did not belong to Mr. Craig simply because of the other information that I had." (*Id.*:21-22). There was no evidence within this testing that proves there was more than one minor contributor (*id.*:23), based upon the amount of DNA that contributes to make the peaks in Dr. Friedman's data (*id.*:27). Those peaks were roughly the same size which would mean roughly the same amount of DNA was contributing to each of those peaks. (*Id.*:27). That technique, which is called "allele count" is regularly used in her field. (*Id.*:29).

She used this chart for her explanation:

Comparison of Key DNA Loci

Locus	Vaginal Swab, C3-f2	Vaginal Swab, C3-f1 (likely victim's)	Craig Sample	Keys Sample
D16S539	9, (13)	9	9, 10	11, 13
CSF1PO	(10), 11, 12	11, 12	10, 11	10, 12
PentaD	(8), 10, 14	10, 14	9, 13	8, 12

(R 181).

Dr. Friedman, who reviewed Ms. Shields report, (R187:16), also testified. He agreed that Mr. Craig was excluded if there was only one minor contributor (*id.*:17). Like Ms. Shields, he reasoned that there was only one minor contributor because there was no evidence to support otherwise given that there were only three alleles in the

[5] LC, who contributed most of the DNA to the sample, was the major contributor. Anyone who contributed less DNA would be a minor contributor. (R187:24-25)

minor component and no more than two alleles at any given locus. (*Id*.:29). Dr. Friedman further noted that a 10 allele in CSF1PO is very common and that 26% of the African-American community (to which both Mr. Keys and Mr. Craig belong) and 25% of the Caucasian community carry that allele. *(Id*.:31).

Ms. Shields could neither include nor exclude Mr. Keys as one of the minor contributors to the material on the vaginal swab. (R186:12). When she compared the partial profile to Mr. Keys, the partial profile was consistent with him. (*Id*.:12-13). Both Mr. Keys and the partial profile had a 13 allege at D16S539, they both had a 10 allele at CSF1PO, and they both had an 8 allele at PentaD. *(Id*.; see also R181). The possibility of dropout in this circumstance means that she could not exclude Mr. Keys because what dropped out could be consistent with his DNA but it also means that she could not include Mr. Keys because what dropped out could be inconsistent with his DNA. (R186:13).

Dr. Friedman concurred with Ms. Shields' conclusion that Mr. Keys could be neither included nor excluded as a source of the DNA. (R187:17-18). His statistics, based off of the FBI Database, suggests that the presence of the three alleles found would exclude 99.54% of African Americans. (*Id*.:19).

Following the postconviction hearings and after briefing, the circuit court, the Honorable Jason A. Rossell presiding, issued a written decision denying the motion for a new trial. (R 194; App. 3-14). Although the court held that Mr. Craig had shown both that the evidence was discovered after trial and that it was not cumulative, the court also held that Mr. Craig was negligent in not seeking it sooner

after the trial, was not material because it was not admissible, and that there was no reasonable probability of a different outcome with the evidence.

A notice of appeal was timely filed. (R197).

ARGUMENT

DARNIAL C. CRAIG SHOULD RECEIVE A NEW TRIAL AS A MATTER OF DUE PROCESS BASED UPON THE NEWLY-DISCOVERED EVIDENCE THAT DNA TESTING OF THE VAGINAL SWAB FROM LC EXCLUDED HIM AS A SOURCE OF THE SEMEN IN LC'S VAGINA

LC first identified someone else as her attacker, then failed to pick Mr. Craig out of a photo lineup on her second attempt, and her boyfriend, who was present at the time of the crime, could not identify any perpetrator at all. As a result, any physical evidence of the identify of Man 1 was crucial. But what the jury, defense counsel, and Mr. Craig did not know was that the semen found in LC's vagina that night could not have come from Mr. Craig. They did not know because DNA testing sensitivity changed and the state's errors in handling the swabs with DNA on them caused the defense to believe that no more material was available to test at the time of trial. This information was material and would not have been cumulative. More important, it would have created a reasonable probability of a different result because of LC's problems with identification and the physical nature of the evidence excluding Mr. Craig.

Newly discovered evidence is a matter of due process. *E.g.*, ***State v. Love***, 2005 WI 116, ¶43, n.18, 284 Wis.2d 111, 700 N.W.2d 62. The Court of Appeals has explained the requirements for a newly-discovered evidence claim:

> To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." [***State v. Armstrong,*** 2005 WI 119, ¶161], 283 Wis.2d 639, 700 N.W.2d 98 (citation omitted). Once those four criteria have been established, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof. *Id.,* ¶¶160-62 (abrogating ***State v. Avery,*** 213 Wis.2d 228, 234-37, 570 N.W.2d 573 (Ct. App. 1997)).

State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590.

Mr. Craig's newly discovered evidence satisfies all the requirements for newly discovered evidence, and this Court therefore should reverse the denial of his postconviction motion and remand the matter for a new trial as a matter of due process.

Although the decision whether to grant a new trial on grounds of newly-discovered evidence is normally a discretionary decision of the trial court, "whether due process requires a new trial because of newly-discovered evidence is a constitutional question subject to independent review in this court." ***State v. Kimpel***, 153 Wis. 2d 697, 702, 451 N.W.2d 790 (Ct. App. 1989)(citing ***State v. Bembenek***, 140 Wis.2d 248, 252, 409 N.W.2d 432 (1987)).

A. As the Circuit Court held, the DNA testing evidence was discovered after conviction.

Twelve years after the trial, Mr. Craig learned from

Ms. Shields' testing at Bode Technology that DNA testing excluded him as a source of the semen that was in LC's vagina. (*See* R164). Doing that testing and reaching that conclusion required learning at trial from the state's expert discovery that a more sensitive type of testing was available, *(see* R98:156-57) and finding out that, despite the state expert's erroneous testimony at trial otherwise (*id*.:159), DNA material was still available. (R109; *see also* R166). The circuit court therefore correctly held that Mr. Craig met this criterion.

For at least the last 57 years, the Wisconsin Supreme Court has considered evidence to be "newly-discovered" if it was discovered "after a trial." *See* ***Lock v. State*****,** 31 Wis.2d 110, 116-17, 142 N.W.2d 183 (1966); *see also* ***Bembenek***, 140 Wis.2d at 252; ***State v. Boyce***, 75 Wis.2d 452, 457, 249 N.W.2d 758 (1977). The language used has varied, but the principle has remained the same. The Wisconsin Supreme Court has also phrased the test as whether the evidence has been discovered "after conviction." *See, e.g.,* ***State v. McAlister***, 2018 WI 34, ¶31, 380 Wis.2d 684, 911N.W.2d 77; ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis.2d 28, 750 N.W.2d 42.

Regardless whether the evidence need be discovered "after trial" or "after conviction," the new DNA testing evidence meets the test. It was discovered after Mr. Craig's conviction. He was convicted at a trial occurring in November 2000 (R97, 98, 99, 100, 136) and was sentenced in January 2001 (R21). Postconviction counsel did not discover the existence of the additional vaginal swab until the fall of 2001 (R166:2-3), Dr. Friedman did not develop the partial profile until March 2002 (R173), and Ms. Shields did not develop profiles for Mr. Keys and Mr. Craig

and compare them to the partial profile to reveal useful results of DNA testing until August 2012 (R164).

The evidence meets this criterion because it was discovered after Mr. Craig was convicted, ***Plude***, 2008 WI 58, ¶32. The State Crime Lab did not correct its mistake about the existence of the swab until a year after trial and the full testing was not completed twelve years after trial, well after conviction and well after the time for appeal had run.

B. Mr. Craig was not negligent in seeking the new DNA testing evidence prior to trial.

The issue of negligence is solely a question whether the defendant was negligent in not discovering the evidence *prior* to trial. ***State v. Vollbrecht***, 2012 WI App 90, ¶22, 344 Wis.2d 69, 820 N.W.2d 443. Mr. Craig was not negligent before trial so the trial court erred in considering what occurred after the trial in deeming Mr. Craig negligent.

The state's error, not Mr. Craig's, caused the absence of defense testing before trial and caused everyone, including the State Crime Lab personnel, to believe that there was no additional DNA testing possible. Prior to trial, defense counsel[6] arranged for DNA testing at Analytic Genetic Testing Center, Inc., in Colorado. (R167). But the State Crime Lab negligently failed to include the available

[6] There were two trial attorneys. The first, Attorney David Celebre, who initially represented Mr. Craig, attempted to have DNA testing done at Analytical Genetic Testing Center in Colorado. (R167). He believed that the Colorado lab "came back with the same conclusions as did the State Crime Lab." (*See* R143:5). The second, Attorney Michael Backes, tried the case.

remaining vaginal swab in the sexual assault evidence kit when they had the police mail it to Colorado lab before the trial. (*See* R167; R168). That trial counsel believed that items allowing more testing were in the kit or it would have made no sense for him to have the State send it to the Colorado laboratory. In any event, the State was responsible for packing the material and sending it.

Nor did the State Crime Lab catch its error before trial. The testifying Crime Lab analyst was aware of the Colorado laboratory report. (*See* R98:157). Despite that report, she still believed there was no material available for additional testing (*id.*:159). Expecting defense counsel to know differently than the state's expert is unreasonable.

It therefore does not matter there was a delay in bringing the new evidence to the court after the trial. The "negligence prong of the newly discovered evidence test" does *not* "impose a duty to act promptly after the discovery of new evidence." ***Vollbrecht***, 2012 WI App 90, ¶22. "[A]ny delay in raising newly discovered evidence can be adequately explored at trial and weighed by the fact finder in determining the credibility of any explanations provided, as well as the evidence itself." *Id.*

Moreover, just as in ***Vollbrecht***, the delay can be adequately explored at trial and the fact-finder could weigh the credibility of the DNA testing of Dr. Friedman and Ms. Shields. There is no reason to distinguish ***Vollbrecht*** as the circuit court tried to do. (*See* R 194:7-8; App. 9-10). Just as the state questioned Dr. Friedman at the motion hearing about gaps in his records (*see* R187:23-24, 39), the state could do so at a new trial. Just as the state questioned Dr. Friedman about his lab's credentials at the motion hearing

(*see id.*:17-18, 22-24), the state could do so at a new trial. Just as the state questioned Ms. Shields' results based upon her reliance on Dr. Friedman's testing (*see* R186:23), the state could do so at a new trial. Just as the state questioned both experts based upon the possibility of other contributors (*see id.*:21-22; R187:29), the state could do so at a new trial.

Moreover, lack of proof of compliance with the stipulation with the State also could be explored at trial. The stipulation itself is available to introduce at trial. (*See* R171). Dr. Friedman presumably would be available to testify that he was aware of the terms of the stipulation. As he did at the postconviction motion hearing, he could testify that he did not know if he used up all the DNA material (*see* R187:26), and the State could explain to the jury that the current absence of the material meant that no retesting was possible. The jury could then consider that information in reaching a verdict, even though the defense rebut the suggestion that Dr. Friedman did not comply by calling witnesses to establish that the Kenosha County Sheriff destroyed evidence in this case in 2004 at the direction of the Kenosha County District Attorney. *(See* R192:15-16).

In any event, the ability to conduct additional testing is not a bar to challenging credibility. State witnesses often testify when additional material is not available for more testing. Ms. Kwart, for example, testified in this case even though she and everyone else believed that no sample was available for additional testing. No one suggested that questioning her was not possible for that reason and it would not have made sense to suggest that.

Attempting to consider possible negligence in

discovering the evidence *after trial* is an improper attempt to apply the doctrine of laches to §974.06 claims. When, as here (*see* R194:6), a circuit court attempts to consider the possibility of prejudice to the state, the circuit court is improperly applying the doctrine of laches.

Laches against a defendant exists when (1) the defendant unreasonably delays in bringing a claim, (2) the state lacks knowledge that the defendant will assert the claim, and (3) the delay t results in prejudice to the state. ***State v. Prihoda***, 2000 WI 123, ¶37, 239 Wis.2d 618 N.W.2d 857.

But the Wisconsin Supreme Court has held that laches does not apply to a motion under Wisconsin Statutes §974.06, ***State v. Evans***, 2004 WI 84, ¶35, 273 Wis.2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900, because a motion under §974.06 is an action at law. "Laches is an affirmative, *equitable* defense." ***Wisconsin Small Businesses United, Inc. v. Brennan***, 2020 WI 69, ¶11, 393 Wis.2d 308, 317, 946 N.W.2d 101 (emphasis added). By contrast, actions at law instead have "the statute of limitations as an issue." ***Elkhorn Area Sch. Dist. v. E. Troy Community School District***, 127 Wis.2d 25, 31, 377 N.W.2d 627 (Ct. App. 1985).

Nor does the equivalent of the statute of limitations here create a time limit for bringing claims under Wisconsin Statutes §974.06. The legislature has said that no time limit exists for bringing a claim of newly-discovered evidence under this statute. Wisconsin Statutes §805.16 states the time limits for most motions brought after verdict. But Section 805.16(5) explicitly exempts newly-

discovered evidence claims brought under §974.06 from the reach of those time limits, even though the legislature imposed such time limits on claims in other circumstances, *see* Wis. Stat. §805.16(4).

In any event, assuming, for purposes of argument only, that negligence in bringing the claim matters, the circuit court is wrong that what occurred here amounted to negligence.

Documents already on file establish that only time to review the material away from the pressures of trial and additional training in these technical matters at a CLE created the conditions for questioning whether additional swab material was available and whether new testing could provide more answers. Postconviction counsel then looked a second time at the Colorado report and contacted Ms. Kwart, eventually discovering that, contrary to the erroneous position she took at trial (R98:159), there actually was material that might allow more definitive testing. (R 166:3[7]).

Similarly, documents on file also provide a basis for inferring that postconviction counsel did not see a basis for pursuing the claim, most likely because the profile Dr. Friedman obtained from the vaginal swab was only a partial profile. Mr. Craig had been assiduously seeking DNA testing since long before trial (R143:7-8), and was angry about the lack of it at sentencing (R21:12-13, 16).

After postconviction counsel and Mr. Craig disagreed on the merits of the case (R106), Mr. Craig did not let

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[7] This motion was filed in this Court in ***State v. Darnial Craig***, Appeal No. 01XX015083-CR.

things go and contacted the Wisconsin Innocence Project which arranged for Ms. Shields' testing at Bode Laboratory (R164).

Mr. Craig, who has only a tenth grade education and is indigent (R83:2), was in no position to pursue the matter on his own and the Innocence Project did not file a motion. Eventually, Mr. Craig was able to hire counsel, but it took some time for his family to get the money together to do that so Mr. Craig could file the §974.06 motion.

Thus, Mr. Craig was not negligent as that term is used in the criteria for evaluating §974.06 motions.

C. The evidence was material to the key issue whether Mr. Craig was Man 1 and vaginally assaulted LC as the victims and the co-defendant testified and was material to whether he was guilty as party-to-a-crime because it directly challenged the credibility of key witnesses.

Any admissible evidence that makes it more or less probable that Mr. Craig did not have vagina-to-penis sexual contact with LC, either in the bathroom or in the car, is material because materiality is nothing more than relevance. *See* ***State v. Sarfraz,*** 2014 WI 78, ¶42 n.7, 356 Wis.2d 460, 851 N.W.2d 234; *see also* Wis. Stat. §904.01 (defining relevant evidence). Just as with relevance, materiality turns on "the relation between the propositions for which the evidence is offered and the issues in the case." ***State v. Becker***, 51 Wis.2d 659, 667, 188 N.W.2d 449 (1971). Asking whether something is material is the same as asking whether it is "probative of a fact (or proposition) 'of consequence' to the determination of the action." ***Sarfraz***, 2014 WI 78, ¶42 (citing 7 Daniel D. Blinka,

Wisconsin Practice Series: Wisconsin Evidence, §401.101, at 98 (3d ed. 2008)).

In the circuit court, the state argued after the testimony at the evidentiary hearing the evidence was inadmissible (*see* R190:3-4) and the circuit court accepted that argument (R194:8-10) in holding erroneously that the new evidence was not admissible. The state's argument is unavailing both because the state waived the argument and because the new evidence is admissible.

1. Assuming the evidence is admissible, the new evidence is material because it is relevant.

The circuit court never reached this issue, but had it done so, it should have found that the evidence was material.

Materiality is basically relevance to a key fact. Relevance is a matter of whether evidence makes a key proposition more or less probable. *See* Wis. Stats. §904.01. Because whether Mr. Craig committed the sexual assault is a determinative fact, whether he could have been the source of the semen is probative of a determinative fact and therefore material. ***Sarfraz***, 2014 WI 78, ¶42.

The determinative factual question is whether Mr. Craig was Man 1, as the victim and Mr. Keys claimed. Both DNA experts testified the new DNA results exclude Mr. Craig as the source of the vaginal DNA. (R186:12-13; R187:17). Ms. Shields held this opinion, despite Mr. Craig having a 10 allele at locus CSF1PO, because of the amount of contribution it would have required and because of other information in the testing. (R186:21-22). Her technique in reaching this conclusion is regularly used in her field. *(Id.*:29).

If Mr. Craig is not a source of the DNA on the vaginal swab and someone else is, it is far less likely that he was Man 1 and sexually assaulted LC penis-to-vagina three times that night. Although she was in bed with her boyfriend (and fellow victim) AW, Mr. Craig's counsel could elicit from both LC (see R162) and AW (see R163)at a new trial, the information in the police reports that they did not have intercourse. That information suggests that AW was not a source of the DNA on the vaginal swab. Moreover, when combined with Dr. Friedman's calculation that the partial profile would exclude 99.93% of Caucasians (R187:19), the elimination of AW as a source becomes even stronger.

Moreover, the new information that Mr. Craig is not a source of the DNA undercuts not only the suggestion that he directly committed the crimes; it also undercuts the notion that he committed the crimes indirectly as party-to-a-crime. By itself, it undermines LC's identification of him as someone who was there. If she is wrong that he was the perpetrator with whom she had the most contact and whose conduct made it most likely she would remember, it is far more likely her belief that he was there was completely wrong. It further undercuts her third-try identification of him in photographs (*see* R98:64, 131-32 (try 1); *id*.:137-38 (try 2); *id*.:65 (try 3)), and increases the likelihood that his face became the face of the crime because she saw it multiple times–in both photo lineup 2 where she failed to identify him (*see id*.:137-38) and photo lineup 3 (*see id*.:65).

The new evidence also makes it less probable that Mr. Keys was telling the truth when he testified that Mr. Craig was with him during the crimes. The new information that Mr. Craig was not a source of the DNA in

LC's vagina, especially when coupled with the inability to exclude Mr. Keys as a source of that DNA (*see* R186:12-13; R187:17-18), implies that Keys lied about almost everything when he testified at trial. He lied not only when he testified that Mr. Craig sexually assaulted LC in the bathroom (R99:92), but also when he said that Mr. Craig told him about it (*id*.:95). He lied when he testified that Mr. Craig told him that Mr. Craig sexually assaulted LC in the car (*Id*.:95). Although he was lying when he said he never sexually assaulted LC (*id*.:102) as he did it either orally or vaginally, it increases the chances he was lying that he was not the person who did so both in the bathroom and in the car. If he were the person who sexually assaulted her multiple times, then he had even more at stake in making the plea deal he made with the state *(see id*.:86-89) and even more reason to frame Mr. Craig or someone else as the main perpetrator of the crime.

2. The state waived the argument whether the new evidence is admissible but, in any event, the new evidence is admissible either through Dr. Friedman or as a basis for the opinion of Ms. Shields.

If evidence is not admissible, it cannot be material to the issue of guilt or innocence. ***Vollbrecht,*** 2012 WI App 90, ¶25. But the issue of whether evidence is admissible is one that can be waived, *See, e.g.,* ***State v. Edwards,*** 2002 WI App 66**,** ¶9, 251 Wis.2d 651, 642 N.W.2d 537, although the circuit court's decision did not discuss this possibility.

Here, the state failed to object to the admissibility of the new DNA results and the state filed to indicate in any way that it planned to raise this argument either before the hearing or at the evidentiary hearing. The state did not raise the argument or mention Wisconsin Statutes §907.02

until after the hearing. This omission was not an oversight. The state's questioning shows the state knew that it was planning eventually to question the admissibility of Dr. Friedman's testing and testimony based upon Wisconsin Statutes §907.02.

When evidentiary objections are not timely raised, they are waived. Wisconsin Statutes §907.03 objections must be made when the evidence is offered. *See* ***State v. Cameron***, 2016 WI App 54, ¶12, 370 Wis.2d 661, 885 N.W.2d 611 (citing with approval ***Maritime Overseas Corp. v. Ellis***, 971 S.W.2d 402, 409 (Tex.1998) ("To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or *when the evidence is offered*.")).

Moreover, had the state not sandbagged on this matter, Mr. Craig could have better developed the record with Dr. Friedman. Had the state noted its objection, Mr. Craig could have the opportunity to cure this claimed defect and this Court would have a record on which to properly consider the matter. *Cf.* ***State v. Van Camp***, 213 Wis.2d 131, 144, 569 N.W.2d 577 (1997) (finding waiver when the state's timely objection would have allowed proper development of the record at the evidentiary hearing in the trial court). Dr. Friedman could have testified about his reasons for believing that the detection threshold probably was 150 RFU. He could have explained his usual procedures at the time. Counsel did not flesh out this information because counsel had no indication either before or at the evidentiary hearing that the state planned this argument. This Court therefore should hold that the state waived the argument.

In any event, the new evidence is admissible under Wisconsin Statutes §907.02 and the lower court's holding to the contrary (R194:8-9) is wrong.

Section 907.02 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

No dispute exists or existed that Dr. Friedman is, as the circuit court found, "clearly qualified as an expert in DNA testing." (R194:9; App. 11). In other words, he has the "scientific, technical, or other specialized knowledge" to assist a jury in evaluating the new DNA evidence, *see* Wis. Stats. §907.02, and is qualified to do so. Instead, the dispute appears to be over: (1) whether his testimony "is based upon sufficient facts or data," (2) whether it is "the product of reliable principles and methods," and (3) whether he "applied the principles and methods reliably to the facts of the case."

In this case, the defense turned over not only Dr. Friedman's report (R173), but also 13 pages of raw data in the form of Genotype Plot print-outs, (R171:1-13), a Forensic Evidence Inventory (*id*.:16-17), a Forensic Amplification Worksheet (*id*.:14), and an "Amended Approval" from the State Public Defender reflecting what Dr. Friedman was paid (R180).

In addition, Dr. Friedman's memory did not interfere with discussion of such technical matters as detection thresholds.[8] Dr. Friedman, although he was not able to definitively say what testing threshold he used, testified that he probably used a detection threshold of 150 RFU.[9] (R187:23-24). The documentary evidence in his report supported his testimony that he used *some* detection threshold as he reported that "a number of DNA fragments were present at very low levels and were below the detection threshold of the software." (R173:2). Dr. Friedman's probable detection threshold was higher than the 75 RFU detection threshold that possibly was used at Bode Technologies at the time (*see* R186:18), and "above that threshold [DNA analysts] were confident that any peak was a true DNA peak" (*id.*:19 (testimony of Ms. Shields)).

Moreover, it is sufficient if the expert information is "generally accepted within [the] discipline and was not the product of ungrounded speculation." *See* ***State v. Smith***, 2016 WI App 8, ¶9, 366 Wis.2d 613, 874 N.W.2d 610. (accepting state's expert evidence as reliable on this basis without any underlying data). Ms. Shields, who also was an expert in the field of DNA testing, found that information

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[8] A detection threshold is "the lowest RFU value at which DNA can be distinguished from noise." *See* Gretchen Brune, STR Analysis Using Thresholds – Forensic Focus #5, ThermoFisher Scientific (2017) (https://www.thermofisher.com/blog/behindthebench/str-analysis-using-thresholds-forensic-focus-5/).

[9] RFU stands for "relative fluorescence unit." "A 'relative fluorescence unit' is a unit of measurement used in analysis which employs fluorescence detection. *See* https://en.wikipedia.org/wiki/Relative_fluorescence_units.

and data sufficient to use in her analysis. (R164: R187). She viewed the results as reliable enough and unremarkable enough within the community of DNA experts to use them. The import of her use of Dr. Friedman's testing results and the information available from them is that she believed that Dr. Friedman's results were sufficiently based upon facts or data, sufficiently the product of reliable principles and methods which those in the field use, and that the principles and methods of DNA testing were reliably enough applied to the facts of the case to form her own opinions. She did not hesitate to use the results in forming opinions from which she did not waiver. *See* R186. Her acceptance of the results itself vouches for the view of the community of DNA experts that Dr. Friedman's results meet the standards for admission under §907.02.[10]

Although the circuit court below believed that the data produced was insufficient, the circuit court does not explain why the missing data matters. (*See* R194:8-9; App. 10-11). The court could not do so because the state below produced no evidence, either testimonial or documentary, that any of the missing material mattered. The state did not get Ms. Shields to testify that it mattered and Ms. Shields' testimony showed that it did not matter to her as she was willing to draw conclusions based upon the data she had. The state did not call its own witness either. Thus, the court's holding is based upon mere speculation, instead of reasoning from facts of record and is an erroneous

[10] Note that "[i]t is incredibly rare to find any discussion of reliability [in court cases], except in one context, when courts exclude defense experts." *See* Brandon L. Farret & M. Chris Frabricant, The Myth of the Reliability Test, 86 Fordham L. Rev. 1559, 1571 (2018).

exercise of discretion. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457 (1975) ("The exercise of discretion contemplates a process of reasoning *based on facts that are of record or that are reasonably derived by inference from the record...*") (emphasis added).

Nor, as the circuit court erroneously held (R194:8-10; App. 10-12), is the new evidence inadmissible pursuant to Wisconsin Statutes §971.23(2m)(am) because the defense could not turn over requisite information. That statute requires the defendant turn over to the district attorney prior to trial *either*:

> "[1]any reports or statements of experts made in connection with the case **or**,
>
> [2] if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial.

(emphasis added)

The requirements are disjunctive. Dr. Friedman prepared a report which was turned over to the state at the time the §974.06 postconviction motion was filed and therefore could be turned over prior to a trial. (R173). That report was "a written summary of the expert's findings or the subject matter of his or her testimony" and included "the results of" his DNA testing. The results of his DNA testing were:

Results

The DNA profiles were analyzed using *Applied Biosystems* GeneScan V.3.1.2 and Genotyper V.2.5 on an Apple Macintosh G3 computer. The resulting DNA profiles are presented in Table 2.

Table 2- Helix Biotech DNA Profiling Results

Sample	D3	THO1	D21	D18	Pen. E	D5	D13	D7
9947A	14,15	8,9.3	30	15,19	12,13	11	11	10,11
C3-f1	14	8,9	29	14,19	7,14	11,14	11,14	8,9
C3-f2	14	8,9	29	14,19	7,14	11,14	11	8,9

Sample	D16	CSF	Pen. D	Amel.	vWA	D8	TPO	FGA
9947A	11,12	10,12	12	x	17,18	13	8	23,24
C3-f1	9	11,12	10,14	x	16,20	14,15	8	20,22
C3-f2	9 (13)	11,12(10)	10,14(8)	x	16,20	14,15	8,12	22

(R 173). A defendant need not turn over both the report and the data prior to trial.

In addition, contrary to the circuit court's holding (*see* R194:8-9; App. 10-11), Wisconsin Statutes §907.05 cannot render the new DNA testing evidence inadmissible. Section 907.05 is a timing statute, not an admissibility statute or a discovery statute as the circuit court apparently believed. Section 907.05 provides:

> The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Section 907.05 is nearly identical to Federal Rules of Evidence 705 and Rule 705 governs the presentation of the evidence at trial, not discovery or admissibility. As the Notes to the Advisory Committee on Rules–1993 Amendment noted, this rule " relates to the manner of presenting testimony at trial."

Finally, even if this Court were to hold that Dr. Friedman's testing and testimony were inadmissible directly, Sarah Shields' testing and testimony still would be admissible under Wisconsin Statutes §907.03. It was Ms. Shields, not Dr. Friedman, who concluded that Mr. Craig was excluded as a source of the DNA.

Section 907.03 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

As the Supreme Court has noted elsewhere, "It is rare indeed that an expert can give an opinion without relying to some extent upon information furnished by others." *See* ***State v. Williams***, 2002 WI 58, ¶29, 253 Wis.2d 99, 644 N.W.2d 919. Doctors, for example, frequently rely on medical evidence they have no personal knowledge of but is in the medical record. *See* ***State v. Heine***, 2014 WI App 32, ¶12, 354 Wis.2d 1, 844 N.W.2d 409. Although the second portion of the rule prevents an expert "from being a mere conduit for inadmissible material," the underlying data, even if inadmissible, can be disclosed to show that the expert's reasoning was sound. *See id*. ¶¶13-14.

Here, Dr. Friedman's testing results were "of a type reasonably relied upon by experts in the particular field." The indicator of reliability in this context is that experts relied on them. Ms. Shields is assumed to have the skill to properly evaluated that evidence, *see* ***State v. Weber***, 174 Wis.2d 98, 108 n.7, 496 N.W.2d 782 (Ct. App. 1993)**,** and she examined it and found it reliable enough for her to use. Upon questioning at the hearing, she stuck to her opinions and conclusions even after the state pointed out that she was relying upon Dr. Friedman's conclusions.

Thus, her conclusion that DNA testing excluded Mr. Craig as the source of the semen on the vaginal swab would be admissible.[11]

D. The evidence is not merely cumulative because no other evidence directly supported Mr. Craig's position that he did not sexually assault LC.

As the circuit court correctly held (R194:10), and the state conceded below (R190:7), the new evidence is not cumulative. No conclusive DNA evidence at all was presented at trial. The original testing was inconclusive (*see* R98:152-53) and neither helped nor hurt the defense case. The results of the new, more advanced testing excluded Mr. Craig (*see* R186:12-13; R187:17-18) and created a situation in which the only physical evidence available would help the defense.

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[11] The circuit court would have the options of permitting full disclosure of Dr. Friedman's results and giving a limiting instruction, allowing Ms. Shields to testify freely about Dr. Friedman's results as a basis for her opinion, or precluding mention of Dr. Friedman's report on direct examination. *See* ***Weber***, 174 Wis.2d 98, 107 n.6.

"Evidence is cumulative when it 'supports a fact established by existing evidence.'" ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000) (quoting Black's Law Dictionary 577 (7th ed. 1999)). This new evidence does not address any fact that the evidence at trial established. *See* ***McAlister***, 2018 WI 34, ¶37. The DNA testing result is not "additional evidence of the same general character, to some fact or point, which was subject of proof before." ***Id***., ¶39. Certainly, no DNA evidence exonerating Mr. Craig as the person who sexually assaulted LC and placed semen in her vagina was presented at trial.

E. The DNA evidence creates a reasonable probability of a different result by providing direct physical evidence that someone else was Man 1, by undercutting the testimony of LC, of Mr. Keys, of AW, and of the jailhouse snitch., and by gutting the state's argument at closing that acquitting Mr. Craig required the jury to believe he had "bad luck."

When, as here, the first four criteria for newly discovered evidence are met, this Court must determine whether a reasonable probability exists that, with the new evidence, a jury would reach a different result at trial. ***Edmunds***, 2008 WI App 33, ¶13. "A reasonable probability of different outcome exists 'if there is 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.'" ***Love***, 2003 WI 116, ¶44.

Courts need to evaluate the strength of the evidence of both parties because "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." ***Holmes v. South***

Carolina, 547 U.S. 319, 320 (2006); *see also* ***United States v. Wolf****,* 787 F.2d 1094, 1098-99 (7th Cir. 1986) (even if the evidence is overwhelming if the prosecution witnesses are believed, improprieties that negatively affected the defendant's credibility can be prejudicial when the jury had reason to doubt those prosecution witnesses). Although the circuit court held that the first four criteria were not met, the circuit court also erroneously held that there was no reasonable probability of a different result. (R194:10-12; App. 12-14).

A reasonable juror, in light of all of the evidence here, either would have to start from the proposition that the semen was from Man 1 or improperly speculate that it was from a totally unknown source about whom they had no information.

Based upon the state's testing, LC had semen in her vagina after the incident. (R98:152-53). Her recollection was inconsistent about whether Man 1 had ejaculated inside her vagina, but a reasonable juror could conclude from her testimony that he had. LC admitted at trial that she told the police immediately after the assaults that Man 1 had ejaculated. (*Id.*:62). She also admitted at trial that she had testified at the preliminary hearing that Man 1 had ejaculated inside her. (*Id.*:70). By the time of trial, her testimony was that she did not know if he ejaculated and was "not sure one way or another." (*Id.*:44, 63). She explained this discrepancy by noting that "he stopped, so I assumed that he ejaculated because he stopped." (*Id.*:44).

But no reasonable juror could conclude from her testimony that Man 2, the one she identified as Mr. Keys, was the source of the semen in her vagina. She testified

that Man 2 "took out his penis, placed it in my mouth and made me give him oral sex until he ejaculated and made me swallow it." (*Id.*:47-48). She then again confirmed that she swallowed "whatever he ejaculated." (*Id.*:48).

Nor does the evidence available support the conclusion that AW was the source of the semen. No evidence at trial said that LC and AW had sex that night and the information in the police reports, which could be elicited from LC and AW at a new trial, was that they did not have sexual intercourse. (*See* R162; R163).

Nor does any of the detective's testimony establish that the assailant did not ejaculate. Even if DNA is rarely found in sexual assault cases, that fact says nothing about what happened in this particular case. Each sexual assault is an independent event. The probability of getting heads on a given coin toss remains the same no matter how many times someone has tossed the coin before. Similarly, one cannot determine whether the assailant ejaculated this time based upon what has happened in other cases. Moreover, the state's having the vaginal swab tested itself demonstrates that it concedes that those who commit sexual assaults can ejaculate.

With this starting point, reasonable jurors would have to evaluate the testimony and not, as the circuit court did (R194:11; App. 13), merely take it at face value and as true. *See* ***Holmes***, 547 U.S. at 320.

Here, Mr. Craig's conviction relied primarily upon the testimony of two people: LC and Mr. Keys. In addition, the state presented a supposed confession to a jailhouse snitch. The new DNA testing and results create a reasonable probability that a jury would reach a different result at

trial because (1) it provides the only physical evidence and that evidence excludes Mr. Craig and (2) this new evidence undercuts the credibility of these witnesses who already had some credulity issues.

First, in isolation, the new DNA testing and results are strong, favorable evidence for Mr. Craig. The state's presentation at trial indicates just how powerful the state believed DNA evidence to be. The state was so concerned about the impact of presenting inconclusive DNA evidence at trial that the state felt a need to explain the absence of definitive DNA results to the jury. It used part of its opening argument to explain that police do not expect to find physical DNA in sexual assault cases (R98:24-25) and called the lead detective to testify at length and in detail to the reasons why (*id.*:107-116). Just as the state considered DNA testing results to be important to the jury, so too this Court should consider DNA testing results to be important to a jury. *Cf.* ***Kyles v. Whitley***, 514 U.S. 419, 448 (1995) ("If a police officer thought so, a juror would have, too") (footnote omitted).

This new DNA evidence also undercuts a significant part of the state's argument to the jury at trial. One of the themes of the state's argument was that Mr. Craig had to have a lot of "bad luck." (*See, e.g.,* R100:47, 48). One of the important pieces of "bad luck" the state cited was that "the crime lab indicates through its witness that the testing was inconclusive" but a sample "did have semen." *(Id.*:47). With the new DNA evidence positively excluding Mr. Craig as a source of the semen, the original, inconclusive DNA results really were bad luck.

In any event, when evaluating whether a reasonable probability of a different result exists, Wisconsin courts are not to weigh credible evidence and decide whether the evidence for the state or the evidence for the defense is strong. ***Edmunds***, 2008 WI App, 33, ¶18.

Here, both experts, Dr. Friedman and Ms. Shields, the expert currently employed by a law enforcement entity, agree that the DNA testing excluded Mr. Craig as the source of the male DNA on LC's vaginal swab. (R186:12; R187:17-18). While the state would be free to attack their conclusions at a new trial, those attacks are irrelevant to whether there exists a reasonable probability of a different result.

This Court cannot reject new testimony or evidence not presented at the original trial merely because the Court may choose to disbelieve them or because the Court may find the trial evidence more believable. ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id***., ¶¶69-98 (Crooks, J., concurring). Rather, the only question for the Court is whether evidence creating a reasonable probability of a different result *could be* credited by a reasonable jury sufficiently to create a reasonable doubt. So long as the evidence is not incredible as a matter of law, i.e. "In conflict with ... nature of with fully established or conceded facts," ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567 (1974), it is the jury that must resolve credibiltiy disputes, not the Court. ***Id***.; *see* ***Jenkins,*** 2014 WI 59, ¶64.

In any event, the state's attacks are not very strong. None of the state's attacks at the evidentiary hearing on the experts' conclusions changed their conclusion that Mr.

Craig was excluded as the source of the foreign DNA material on LC's vaginal swab. Both experts agreed that, although dropout of alleles occurred, that dropout does not affect their conclusion. (R186:13; R187:17). Both experts think and would testify at a new trial that, despite the presence of a single, common allele 10 at locus CSF1PO which could match Mr. Craig's DNA (R187:31; *see also* R186:21-22), the DNA testing did not support finding that there was more than one contributor to the partial profile (R186:21-22; R187:29). Ms. Shields explained that, based upon the regularly-used technique of allele count, she saw that the peaks were roughly the same size which meant roughly the same amount of contributor DNA was contributing to each of the peaks. (R186:29). Although Ms. Shields' interpretation of the data rested on Dr. Friedman's blind testing that produced the partial profile (R186:23), she did not testify that anything in the data she received made her suspicious about the validity of that testing.

Second, this new DNA evidence undercuts the testimony of the key witnesses. LC, the victim of the sexual assaults, was one of the primary witnesses on the issue of identity. But her identification of Mr. Craig as the man who committed the penis-to-vagina assaults had weaknesses, despite her insistence that she was certain. Her difficulties with identification, while perhaps surprising to a jury, should not be surprising to a court. As the United States Supreme Court pointed out years ago, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *See* ***United States v. Wade***, 388 U.S. 218, 228 (1967).

LC first identified the wrong person, a cousin of Mr. Craig's, from a photographic lineup. (R98:64, 131-32). She was "100 percent positive" of this identification too and the detective saw her visibly shaken and upset when she made this incorrect identification. (R99:12; *see also* R98:69).

In the second attempt, having seen, but not identified Mr. Craig in a prior photo lineup and after police had figured out she had identified an innocent man (R99:13), she saw pictures of Mr. Craig and Mr. Keys and failed to pick either of them out (R98:137-38).

Only with her third attempt, after police had arrested Mr. Craig on Mr. Keys' word, (R99:27, 131, 141), did LC manage to pick out Mr. Craig, (R98:65). Despite all of her previous mistakes, she again claimed to be "absolutely positive." (*Id.*).

Despite these problems, the state in closing argued that the jury should believe LC as to identity because "she was unshakeable as to who had done this to her" (R100:40), and because that belief caused her such emotion and outrage, (id.:41-42). In the state's reply closing, the state emphasized again that, for the jury to find reasonable doubt, LC "would have to be so incredibly wrong." (*Id.*:71).

But the state's argument is substantially weaker – and the misidentifications even more disturbing – if the jury knows that DNA testing excluded Mr. Craig as the man who deposited semen in LC's vagina. In that circumstance, LC is "incredibly wrong" and even the third identification – the one of Mr. Craig as the one who sexually assaulted her in the bathroom and took her on a long, frightening car ride in which he assaulted two more times – was incorrect.

Thus, these problems also bolster the defense. The defense in closing attempted to explain LC's identification of Mr. Craig as Man 1 in the third attempt by reminding the jury that "[t]his photo is in front of her how many times," and referring to "[b]ias." (*Id.*:42). If the new DNA evidence strongly suggests that LC is wrong, the argument that her identification of Mr. Craig may be the result of Detective Bentz inadvertently conveying the correct answer to LC is even stronger. *See generally* Margaret Bull Kovera & Andrew J. Evelo, "The Case for Double-Blind Lineup Administration," 23 Psychol. Pub. Pol'y & L. 421, 422 (2017). The misidentification more strongly indicates that this third identification either may be the result of source confusion or unconscious transference. Nancy K. Steblay, "Maintaining the Reliability of Eyewitness Evidence: After the Lineup," 42 Creighton L. Rev. 643, 648-49 (2009). Source confusion occurs when the eyewitness reacts to the feeling that the face is familiar, but the correct context for that memory has been lost. *Id*. In other words, it results when the familiarity of seeing the face in the previous lineup causes the eyewitness, based on familiarity, to believe that she is seeing the face of the assailant. Unconscious transference is similar in that it occurs when the actual memory of the face from the first lineup supplants the memory of the face of the assailant. *Id*.

In other words, the additional information from the new DNA testing creates a reasonable probability that a jury would have a reasonable doubt about LC's identification of Mr. Craig as a participant in the crime at all (whether as principal or as party-to-a-crime).

The second important witness for the state was Mr. Keys, who claimed Mr. Craig broke into AW's apartment

with him. The new DNA testing results also makes his testimony even less reliable. As it is, "[a]dmitted accomplices testifying in exchange for immunity or dismissal of charges are inherently dubious witnesses." *See* ***Dudley v. Duckworth***, 854 F.2d 967, 972 (7th Cir. 1988). Although the state itself noted that Mr. Keys "lied to [the jury] about whether he sexually assaulted [LC], the state also suggested the jury ignore that problem because Mr. Keys had "taken responsibility for" several charges, including "party to a crime of sexual assault." (R100:48).

But the new DNA evidence not only excludes Mr. Craig as Man 1, it also neither includes nor excludes Mr. Keys as Man 1. (R186:12; R187:17-18). In doing so, it raises the question whether Mr. Keys was Man 1. If, as the state believed, Mr. Keys' role was as Man 2, the man who sexually assaulted LC by placing his penis in her mouth (*see* Doc.98:47), then Mr. Keys's DNA should not be in LC's vagina because she swallowed his ejaculate (*see* R98:47-48).

The distinct possibility, which the new DNA evidence raises, that Mr. Keys is Man 1 suggests two things. First, it suggests that Mr. Keys had even stronger motive to point to Mr. Craig than the police knew, which makes his testimony even less reliable. Second, it suggests that the state's argument that Mr. Keys statement can be "combined" with that of LC and make both statements stronger is meaningless. (*See* R100:49).

As for AW, he was not a key witness on the issue of identity because he only testified about what happened and did not testify about who did it. At best, he identified a lighter-skinned and darker-skinned participant in the crime. (*See* R99:78). But the undercutting of LC's

identification and that of Mr. Keys also undercuts the value of his minor contribution. At closing, the state, assuming the two men were Mr. Craig and Mr. Keys, noted the identification of skin corroborated LC's identification. (R100:41).

Finally, the new DNA results and the events leading up to them undermine the testimony of the jailhouse snitch. Under the best of circumstances, the use of jailhouse snitches "may raise serious questions of credibility." ***On Lee v. United States*****,** 343 U.S. 747, 757 (1952). Here, the white-skinned jailhouse snitch testified not only that black-skinned Mr. Craig had said that "during the burglary that he sexually assaulted this woman," he also claimed that Mr. Craig said that he was going to get away with it because, among other things, "they had no proof, that the DNA was inconclusive." (R99:119-120).

But the new DNA evidence itself would have allowed counsel at trial to attack the jailhouse snitch more effectively. If Mr. Craig was not Man 1, it undercuts the idea that Mr. Craig believed an inconclusive DNA test was better for him than a conclusive test would have been. In addition, it undercuts the state's argument to the jury in closing that Mr. Craig would have believed he was "going to get away with it" or that it was "the perfect crime" as the jailhouse snitch implied he did. *(See* R100:49-50).

Because the new DNA evidence provided direct physical evidence that someone else was Man 1, undercut the testimony of LC, of Mr. Keys, of AW, and of the jailhouse snitch, and gutted the state's arguments at closing, Mr. Craig asks this Court to hold that there is a reasonable probability that the jury hearing the new DNA

evidence would have a reasonable doubt that he committed these crimes and asks this Court to hold that he has established that he has newly discovered evidence.

CONCLUSION

Darnial Craig therefore requests that this Court reverse the order denying postconviction relief, vacate the judgment of conviction, and remand with instructions to grant him a new trial.

Dated at Milwaukee, Wisconsin, December 28, 2023

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8g) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief. The length of this brief is 10,692 words.

Electronically signed by Ellen Henak
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Craig COA brief.wpd