STATE OF WISCONSIN
IN SUPREME COURT
No. 03-0561-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

JAMES M. MORAN,
Defendant-Appellant-Petitioner.

ON REVIEW OF AN ORDER DENYING A POSTCONVICTION MOTION FOR DNA TESTING ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DAVID T. FLANAGAN PRESIDING

NON-PARTY BRIEF OF THE WISCONSIN INNOCENCE PROJECT OF THE FRANK J. REMINGTON CENTER, UNIVERSITY OF WISCONSIN LAW SCHOOL

KEITH A. FINDLEY
Bar No. 1012149

JOHN A. PRAY
Bar No. 01019121

BYRON C. LICHSTEIN
Bar No. 1048483

SHELLEY FITE
Law Student

Amicus Curiae
Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

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I. THE STANDARD FOR DNA TESTING UNDER WIS. STAT. §974.07 IS NOT AN "OUTCOME-DETERMINATIVE" STANDARD.

A. By using the phrase "reasonable probability," the legislature intended to draw from U.S. Supreme Court jurisprudence defining that phrase.

Under Wis. Stat. §974.07(7)(a) (2003), a judge *must* permit postconviction DNA testing where it is "reasonably probable" that the movant would not have been convicted if exculpatory DNA testing results had been available at trial. Under Wis. Stat. §974.07(7)(b), a judge *may* permit postconviction DNA testing where it is "reasonably probable that the outcome of the proceedings that resulted in the conviction…would have been more favorable to the movant" if DNA testing results had been available at trial. By using the term "reasonable probability" in both situations, the drafters of §974.07 invoked a legal term of art, the origins of which can be traced to landmark Supreme Court decisions in ***Brady v. Maryland***, 373 U.S. 83 (1963), ***United States v. Bagley***, 473 U.S. 667 (1985), and ***Strickland v. Washington***, 466 U.S. 668 (1984).

By fixating on the effect of potential DNA results on the "outcome" of the defendant's case, to the exclusion of the phrase "reasonable probability," the State misses the statute's use of this term of art, and thus fundamentally misreads what should be the unambiguous meaning of §974.07.

In ***Strickland***, the United States Supreme Court explained that the reasonable probability standard does not

require a defendant to show that an error "more likely than not altered the outcome in the case," but rather that the error creates "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. The standard looks to the outcome of a case, but is focused on the fairness of the proceeding and "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal…" ***Kyles v. Whitley***, 514 U.S. 419, 434-35 (1995).

This Court has adopted ***Strickland's*** "reasonable probability" standard. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69 (1996). Like ***Strickland*** itself, this Court has explained that "the defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different… [T]he ***Strickland*** test is not an outcome-determinative test." ***State v. Smith***, 207 Wis.2d 258, 275-76, 558 N.W.2d 379 (1997).

In ***State v. O'Brien***, 223 Wis.2d 303, 320-21, 588 N.W.2d 8 (1999), this Court applied the ***Strickland/Bagley*** standard to a motion for postconviction discovery. This Court affirmed that, in that context as well, a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id.* (citing ***Bagley*** at 682 and ***Strickland*** at 694). The State points to summary language later in ***O'Brien*** stating that "a party who seeks postconviction discovery must show that…had the evidence been discovered, the result of the proceeding would have been different," 223 Wis.2d at 323. State's brief at 14. The State ignores that this language immediately follows this Court's assertion that postconviction discovery is governed by the reasonable probability standard, that this is an

"undermines confidence" standard, and that the standard is drawn from ***Strickland*** and ***Bagley***. ***O'Brien*** at 320-21**.**

The terminology chosen by the legislature is significant. The legislature did not demand that movants establish a "probability" of a different outcome, but merely a "*reasonable* probability" of a different outcome. As the U.S. Supreme Court has recognized in holding that the standard is not outcome-determinative, "the adjective is important." ***Kyles,*** 514 U.S. at 434. The State cannot rewrite the statute by ignoring the language explicitly chosen by the legislature.

A partial reading of the materiality standard also flaws the State's review of the legislative history. The State is correct that, in drafting §974.07, legislators rejected a version of the law that permitted testing of "relevant" DNA evidence in favor of the "reasonable probability" standard because that toughened the standard and more directly connected it to the trial's outcome. This does not suggest, however, that the legislature intended to enact an "outcome-determinative" standard. The State bypasses the second step—examining the meaning of "reasonable probability." That standard is more stringent than a mere "relevancy" standard, but it is not "outcome-determinative."

Although not "outcome-determinative," experience shows that the "reasonable probability" or "undermines confidence" standard is still a tough standard. "Few petitioners will be able to pass through the 'eye of the needle' created by ***Strickland***." ***Sullivan v. Fairman***, 819 F.2d 1382, 1391 (7th Cir. 1987). Indeed, the standard has been criticized for creating "an almost insurmountable hurdle." Martin C. Calhoun, Note & Comment: *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating*

Ineffective Assistance of Counsel Claims, 77 Geo. L. J. 413, 427 (1988); *see also* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 Utah L. Rev. 1, 1 (noting that courts "rarely reverse convictions for ineffective assistance of counsel…" because they are disinclined to find prejudice). This court does not need to read an outcome-determinative standard into §974.07 to ensure that weak claims fail; the legislature's intended standard—though not outcome-determinative—already does so. To heighten the burden even more at the discovery stage would undermine the statute's purpose to facilitate postconviction DNA testing.

B. The State's interpretation of §974.07 cannot be correct because, in many cases, it would require a higher standard of proof for *discovery* of DNA evidence than for ultimate *relief* that might be based upon the DNA test results.

What is at issue at this point in the proceedings is discovery—access to DNA material for scientific testing—not ultimate relief from a judgment. This is a gateway stage through which a prisoner must pass to develop a case for eventual relief. The evidence produced might provide a basis for relief from the conviction or sentence on a variety of grounds, many of which employ standards much lower than the outcome-determinative standard proposed by the State. It would make no sense to set a discovery standard more stringent than the standard required for ultimate relief. To interpret §974.07 as employing a strict "outcome-determinative" standard would suggest that most defendants would be better off with witness recantation evidence, which could be obtained independently, than with objective DNA evidence, which they would be barred even from discovering.

It would suggest that, rather than facilitating DNA discovery, §974.07 has shut the door to such discovery for all but a lucky few.

For example, if counsel could have obtained DNA test results that prove innocence, but unreasonably failed to do so before trial, the favorable DNA test results might provide a ground for proving prejudice under a claim of ineffective assistance of counsel. That was the basis upon which the court of appeals granted relief in ***State v. Hicks***, 195 Wis.2d 620, 630-31, 536 N.W.2d 487 (1995), *aff'd on other grounds*, 202 Wis.2d 150, 549 N.W.2d 435 (1996). Because the prejudice standard is the non-outcome-determinative "reasonable probability" standard, applying a strict outcome-determinative standard at the discovery stage would preclude access to the evidence that might prove a claim of ineffective assistance.

Similarly, favorable DNA results might provide grounds for a claim that the State withheld exculpatory evidence, if the State failed to disclose that biological material had been collected. As noted above, under ***Brady v. Maryland***, materiality is evaluated under a non-outcome-determinative standard identical to that in ***Strickland***. Again, a stricter discovery standard would deny access to evidence that could prove a ***Brady*** violation.

New DNA evidence might also provide grounds for a new trial in the interest of justice, as this Court held in ***Hicks***. In Wisconsin, courts have "both inherent power and express statutory authority to reverse a judgment of conviction and remit a case for a new trial in the interest of justice." ***Hicks***, 202 Wis.2d at 159. Where the court finds that the real controversy has not been fully tried, it "may exercise its

power of discretionary reversal…without finding the probability of a different result on retrial." *Id*. at 160. Again, an outcome-determinative standard under §974.07 would deny access to DNA test results that might, as in ***Hicks***, provide grounds for granting a new trial in the interest of justice.

Finally, DNA evidence might constitute newly discovered evidence. In ***State v. Armstrong***, Case Nos. 01-2789 and 02-2979, this Court is currently deciding the standard that governs motions for a new trial based on newly discovered evidence under §974.06. If this Court were to determine that anything less than an outcome-determinative standard ever governs such cases—such as where the State relied upon false evidence at trial—then an outcome-determinative discovery standard would deny access to DNA results that might meet the standard for a new trial.

All of these examples show that the materiality standards for postconviction motions for ultimate relief are often lower than an outcome-determinative standard. The legislature could not have intended that the standard for discovery under §974.07 be higher than the standard for ultimate relief.

C. A more stringent standard is not required to stem a "flood" of requests for DNA testing.

The "undermines confidence" standard does not open the floodgates to postconviction challenges. Rather, "the empirical evidence suggests that fears of an avalanche of requests are vastly overblown." Margaret A. Berger, *Lessons from DNA: Restriking the Balance between Finality and Justice*, in DNA AND THE CRIMINAL JUSTICE SYSTEM 109, 115 (David Lazer ed. 2004)(footnote omitted). In 1994 New

York became the first state to adopt a postconviction DNA testing statute. Despite its enormous prison population, it had a total of only about 100 applications for postconviction DNA testing in the first seven years after the statute was adopted. *Id*. Similarly, the district attorney in the County of San Diego, which has a population of three million, is reviewing all convictions obtained prior to 1993 to identify cases in which postconviction DNA testing might be appropriate. "With about 75 percent of the work completed, only three cases had been identified in which DNA testing might have made a difference in the outcome of the original trial, but in only one was there a possibility that testing would be done." *Id*.

The experience in Wisconsin is similar. The Wisconsin Innocence Project almost certainly reviews the vast majority of cases in this state in which inmates seek assistance with postconviction DNA testing requests. Very few of the applications seek DNA testing; in most cases, there is simply no relevant DNA to test, either because no biological material was ever collected in the case, or because any such evidence that might have been collected was not preserved. Since 1998, the Project has received thousands of requests for assistance, but few of those requests from Wisconsin inmates have sought postconviction DNA testing. In total, the Project has identified 13 Wisconsin cases in which a request for postconviction DNA testing might be appropriate under the ***Strickland*** "undermines confidence" standard.

Moreover, the demand for postconviction DNA testing will only diminish over time. DNA testing is now conducted in most cases *before* trial, so the pool of cases in which untested biological material remains available for

postconviction testing will continue to shrink. The State's proposed stringent standard for postconviction DNA testing will not stem a flood, but choke off a trickle of rare but very important cases involving possibly innocent people.

D. Wisconsin's materiality standard for postconviction DNA testing, invoking the *Strickland* standard, comports with other states' standards.

The State asserts that many of the similar postconviction DNA statutes in other states are "outcome-determinative." State's brief at 15. However, the State does so in continued reliance on a partial reading of these states' materiality standards. Again, the State focuses on the statutes' references to a trial's outcome to the exclusion of all else—including the definition of "reasonable probability."

The law review article that the State uses to support its assertion that other states have outcome-determinative standards concludes that, "[r]egardless of which materiality standard is used, it is notable that many of these statutes describe the materiality showing in terms of a 'reasonable probability.' This is identical to the prejudice standard set forth in Strickland v. Washington: a reasonable probability that confidence in the outcome of the trial has been undermined." Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Postconviction" DNA Testing Statutes*, 38 Cal. W. L. Rev. 355, 367-70 (2002).

Most states whose statutes incorporate the "reasonable probability" standard have no case law explaining what that standard means—probably both because the statutes are relatively new, and because the standard employs a term of art that is well established as an "undermines confidence"

standard. For example, despite the State's claim that New York has adopted an outcome-determinative standard, there is in fact no New York case law that holds that the "reasonable probability" standard means anything other than "undermines confidence," its traditional meaning under ***Strickland*** and ***Brady***. The two cases the State cites do nothing more than restate, without explanation, that the New York statute employs a "reasonable probability" standard. *See* ***People v. Oliveira***, 636 N.Y.S.2d 441, 443 (App. Div. 1996); ***People v. Kellar***, 640 N.Y.S.2d 908, 909-10 (App. Div. 1996).

II. APPELLATE COURTS SHOULD APPLY A *DE NOVO* STANDARD OF REVIEW FOR §974.07(7)(a)2 AND A DISCRETIONARY STANDARD OF REVIEW FOR §974.07(7)(b)1.

Section 974.07 is silent on what standard appellate courts should apply to decisions granting or denying postconviction DNA testing. In two recent decisions the Court of Appeals has arrived at conflicting results. In this case, the Court of Appeals reviewed the "reasonable probability" determination under a "clearly erroneous" standard, 2004 WI App 88, ¶8, while in ***State v. Hudson*** it reviewed that same determination under a discretionary standard. 2004 WI App 99, ¶16, 273 Wis.2d 707, 681 N.W.2d 316. Apart from their inconsistency, neither approach is appropriate.

A. Appellate courts should apply a *de novo* standard when reviewing the "reasonable probability" determination in requests for "mandatory" DNA testing.

Under subsection (7)(a)2, trial courts "shall" order DNA testing if exculpatory test results would produce a

reasonable probability of a different outcome. Three aspects of this subsection suggest that a *de novo* standard of review is appropriate for review of the "reasonable probability" decision.

First, the subsection directs trial courts to apply facts to a legal standard. Generally speaking, whether facts satisfy a legal standard is a question of law reviewed *de novo*. State Bar of Wisconsin, Appellate Practice and Procedure in Wisconsin, §3.17 (2002).

Second, the nature of DNA evidence means that trial courts will be in no better position than appellate courts to conduct the "reasonable probability" test. Decisions under this subsection will be made by considering the "cold record" from the trial side-by-side with the DNA results the defendant expects. DNA evidence is not subject to a credibility determination, and thus the "reasonable probability" decision will not be closely linked to any testimony heard by the trial court. *See, e.g.*, ***Rivera v. State***, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002)("Although there may be subsidiary fact issues that are reviewed deferentially, the ultimate question of whether a reasonable probability exists that exculpatory DNA tests would prove innocence is an application-of-law-to-fact question that does not turn on credibility and demeanor and is therefore reviewed *de novo.*).

Third, because subsection (7)(a)2 *requires* trial courts to grant DNA testing if the legal standard is met, the statutory language implicitly rejects a discretionary standard of review. When the standard in subsection (7)(a)2 is met, the statute leaves no room for the trial court to deny relief. If the statute intended a discretionary act, it would not speak in terms that mandate trial court action.

De novo review is also consistent with the manner in which courts review "reasonable probability" determinations in other contexts. *See, e.g.*, ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985)("reasonable probability" of a different outcome in ineffective assistance of counsel cases is reviewed *de novo*); ***State v. DelReal***, 225 Wis.2d 565, 571, 593 N.W.2d 461 (Ct. App. 1999) ("reasonable probability" of a different outcome in ***Brady*** violation cases is reviewed *de novo*).

The picture is not as clear when it comes to the standard that governs review of decisions to grant a new trial based on newly discovered evidence. As Chief Justice Abrahamson suggested in her concurrence in ***State v. McCallum***, Wisconsin appellate courts have been somewhat unpredictable in reviewing trial court decisions concerning newly discovered evidence. 208 Wis.2d 463, 484-6, 561 N.W.2d 707 (1997). As the cases suggest, newly discovered evidence comes in different forms, and it makes sense that trial courts' decisions concerning different kinds of newly discovered evidence might require different standards of review. Accordingly, Justice Abrahamson suggests that a trial court's decision about whether a recantation creates a "reasonable probability of a different outcome" should be given deference because that decision is closely linked to findings about the credibility of the recantation. *Id.* at 491.

Under this rationale, when the "reasonable probability" decision is not closely linked to a credibility finding—such as when objective DNA evidence constitutes the newly discovered evidence—that decision need not receive deference.

B. Appellate courts should apply a discretionary standard when reviewing requests for "discretionary" DNA testing.

Under subsection (7)(b)1, trial courts "may" order DNA testing if it is reasonably probable that exculpatory test results would produce a more favorable outcome at a new proceeding. Because the verb "may" in (7)(b)1 explicitly contemplates discretion on the part of the trial court, it is appropriate to review those decisions for an erroneous exercise of discretion.

CONCLUSION

For these reasons, this Court should hold that the materiality standard under §974.07 is an undermines-confidence standard, not an outcome-determinative standard. Further, decisions on mandatory postconviction DNA testing should be reviewed *de novo*, and decisions on discretionary DNA testing should be reviewed for an erroneous exercise of discretion.

Dated this 2nd day of March, 2005.

Respectfully submitted,

KEITH A. FINDLEY
Bar No. 1012149

JOHN A. PRAY
Bar No. 01019121

BYRON C. LICHSTEIN
Bar No. 1048483

SHELLEY FITE
Law Student

Amicus Curiae
Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2960 words.

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Keith A. Findley