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No. 15AP202

In The Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT-PETITIONER,

v.

JEFFREY C. DENNY,
DEFENDANT-APPELLANT.

On Appeal from the Ozaukee County Circuit Court, The Honorable Joseph Voiland, Presiding, Case No. 1982CF425

CORRECTED OPENING BRIEF OF THE STATE OF WISCONSIN

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1. To obtain post-conviction DNA testing of evidence, must the movant show that the evidence "contains biological material" that "will be relevant to his prosecution," *State v. Moran,* 2005 WI 115, ¶¶ 3, 46, 284 Wis. 2d 24, 700 N.W.2d 884?

The circuit court did not answer this precise question, but the court of appeals answered "no."

2. To obtain post-conviction DNA testing at state expense, must the movant also show that there is a "reasonable probability that a jury," considering exculpatory DNA test results, "would have reasonable doubt as to the defendant's guilt," *State v. McCallum*, 208 Wis. 2d 463, 475, 561 N.W.2d 707 (1997)?

The circuit court did not answer this precise question, but the court of appeals answered "no."

3. Should this Court overrule *State v. Moran,* 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884?

The circuit court and court of appeals did not answer this question.

ORAL ARGUMENT AND PUBLICATION

By granting the State's Petition for Review, this Court has indicated that this case is appropriate for oral argument and publication.

INTRODUCTION

In 1982, a jury convicted Jeff Denny and his brother of stabbing a man to death. The evidence against Denny was overwhelming, including *thirty-six separate inculpatory statements* that Denny and his brother made confirming their guilt. A jury convicted Denny as a party to the crime, and this conviction has been affirmed by multiple state and federal courts.

Thirty-two years later, in 2014, Denny filed a motion to test twelve items from the crime scene for DNA evidence under Wis. Stat. § 974.07. In *State v. Moran*, 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884, this Court decided that this statute permits post-conviction DNA testing at private expense of items that "contain[ ] biological material," if those results "will be relevant to [the movant's] prosecution." *Id.* ¶¶ 3, 46. *Moran* also held that the statute allows testing at public expense if the movant can show, in addition, that it is "reasonably probable" that exculpatory DNA results would have led to no conviction. *Id.* ¶ 57.

At the circuit court, Denny did not specifically ask to test the "biological material" (i.e. blood) on these twelve items. Instead, Denny requested to test these twelve items because they *might* contain "touch DNA"; that is, invisible evidence that, in Denny's words, the "true perpetrator" of the murder *might* have left behind. R.223:1, 3.

The court of appeals decided that Denny was entitled to testing at both private and state expense. The court held

that all convicted defendants have the unqualified right to test almost any item collected years earlier at almost any crime scene, regardless of whether there is any reason to believe that the items "contain[ ] biological material" suitable for DNA testing. The court of appeals also held that this testing must be done at public expense if there is any reasonable chance that exculpatory results could undermine confidence in the verdict, a standard that, under the court of appeals' permissive approach, will almost always be met.

The court of appeals' approach conflicts with *Moran* and should be rejected. With regard to testing at Denny's own expense, this Court should vacate the court of appeals' erroneous decision, and then remand for further proceedings consistent with *Moran*'s framework, including requiring Denny to establish that any items he wishes to test "contain[ ] biological material" suitable for DNA testing, which are relevant to Denny's case. And as to testing at state expense, this Court should simply affirm the circuit court's entirely correct analysis that there is no "reasonable probability" that exculpatory DNA results would have led to a different outcome, given the overwhelming evidence establishing Denny's guilt.

Alternatively, the State submits that *Moran* was wrongly decided and that a proper interpretation of Wisconsin's DNA testing statute would provide more complete guidance. The State respectfully suggests that this Court should overrule *Moran*.

STATEMENT OF THE CASE

I. Legal Framework

1. Since DNA technology was "first use[d] in criminal investigations in the mid-1980s, there have been several major advances." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,* 557 U.S. 52, 62 (2009). Although DNA testing has exonerated some wrongly convicted individuals, "DNA testing alone does not always resolve a case." *Id.* "Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *Id.*

State legislatures and the Federal Government have passed laws "to ensure the fair and effective use of [DNA] testing within the existing criminal justice framework." *Id.* In 1994, New York became the first state to pass a post-conviction DNA testing statute, *see* N.Y. Crim. Proc. Law § 440.30(1-a)(a), and in 2013, Oklahoma became the fiftieth state to pass such a law. *See* Okla. Stat. tit. 22, § 1373.2. The federal government also has its own post-conviction DNA testing law. *See* 18 U.S.C. § 3600. These laws typically require the sought-after evidence to be "material," *see* 18 U.S.C. § 3600(a)(8), JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty,* 45 U.S.F. L. Rev. 47, 49–51 (2010), while including various provisions relating to additional showings that the movant must make,

see Fla. Stat. § 925.11(2)(a)(3) (requiring defendant to file a sworn affidavit claiming actual innocence), Utah Code § 78B-9-301(4) (denying testing to defendants who declined testing at trial for tactical reasons), Brandon L. Garrett, *Claiming Innocence,* 92 Minn. L. Rev. 1629, 1681 n.242 (2008) (twelve states require the requested testing to "have been technologically impossible at the trial"), and who must pay for the testing, s*ee, e.g.*, N.J. Stat. § 2A:84A-32a(g) (requiring petitioner to pay costs associated with testing), Mich. Comp. Laws § 770.16(6) (requiring cost of testing to be assessed against petitioner, unless he is indigent), *see also* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 Cal. W. L. Rev. 355, 381 n.104 (2002) (collecting statutes).

While most DNA testing has involved visible biological material such as blood, so-called "touch DNA" has become prominent in recent years. Joe Minor, *Touch DNA: From the Crime Scene to the Crime Laboratory*, Forensic Magazine (Apr. 12, 2013).[1] "Touch DNA doesn't require you to see anything, or any blood or semen at all. It only requires seven or eight cells from the outermost layer of our skin." *What is Touch DNA?*, Scientific American (Aug. 8, 2008).[2] "A visible amount of a bodily fluid like semen, blood, or

[1] http://www.forensicmag.com/article/2013/04/touch-dna-crime-scene-crime-laboratory.

[2] http://www.scientificamerican.com/article/experts-touch-dna-jonbenet-ramsey/.

saliva at a crime scene is [ ] no longer needed; police can collect and analyze trace amounts of 'touch' DNA from surfaces like doorknobs, steering wheels, or windows." Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. Ann. Surv. Am. L. 639, 646 (2014). "[T]he relevance and reliability of low-level DNA profiles from surfaces likely to contain DNA from more than one person can be very uncertain." *Id.* at 646. Because "[m]ixtures of DNA from different people are [ ] common [ ] on touched items, [it] can make interpretation of the results difficult or impossible." Wis. Crime Lab. Bureau, *Physical Evidence Handbook* ch. 5, at 59 (8th ed. 2009).[3] DNA analyses of touched items "[f]requently result in uninterpretable mixtures." *Id.* at 61.

Notably, the Wisconsin State Crime Laboratory will not analyze an item for "touch DNA" if the item has already been subject to other testing (e.g. fingerprint analysis). *See* Wisconsin State Crime Laboratory, *Evidence Submission Guidelines*, at 4.[4]

2. In 2001, Wisconsin passed its own post-conviction DNA testing statute. *See* 2001 Wis. Act 16, § 4028j, codified at Wis. Stat. § 974.07. Because the State believes that this

[3] https://wilenet.org/html/crime-lab/physevbook/

[4] https://www.doj.state.wi.us/sites/default/files/dles/clab-forms/2015_Evidence%20Submission%20Guidelines-MLW.pdf

plain text conflicts with this Court's reading in *Moran*, this brief: first (a) lays out the thirteen sections, as written in the text; then (b) summarizes *Moran*'s interpretation; and finally (c) explains the State's understanding of the text.

a. Wisconsin's post-conviction DNA testing statute, Wis. Stat. § 974.07, consists of thirteen sections:

Section 974.07(1), Definitions. "Government agency" is defined as any department, agency, or court of the federal, state, or local government. "Movant" is defined as anyone who makes a motion under Section 974.07(2).

Section 974.07(2), Motion Requirements. A movant may bring a motion for an order "requiring [DNA] testing of evidence" at "any time after being convicted of a crime." The motion must seek testing of evidence that (a) is "relevant to the investigation or prosecution that resulted in the conviction," (b) is in the "actual or constructive possession of a government agency," and (c) "has not been previously subjected to [DNA] testing."[5]

Section 974.07(3), Notice and Duties of the Court. A movant must serve a copy of the motion on the district attorney's office. Likewise, the court must also inform the district attorney of the motion and permit a response.

Section 974.07(4), Notice to Victims. Victims must be notified of the pending motion.

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[5] Evidence may also, under certain circumstances, be tested if it was previously tested.

Section 974.07(5), Duty to Preserve Evidence. The district attorney, upon receiving notice, must "take all actions necessary" to ensure the preservation of "all biological material that was collected in connection with the investigation or prosecution of the case and that remains in actual or constructive custody of a government agency."

Section 974.07(6), Disclosure and Discovery. "Upon demand the district attorney shall disclose to the movant or his or her attorney whether biological material has been tested." The statute further provides that the district attorney "shall make available": (1) "[f]indings based on testing of biological materials," and (2) "[p]hysical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material." This section also imposes a duty upon the "movant" to "disclose to the district attorney whether biological material has been tested." Furthermore, a movant must make available "[f]indings based upon testing of biological materials" and the "movant's biological specimen." The court "may impose reasonable conditions on the availability of material . . . in order to protect the integrity of the evidence."

Section 974.07(7), Ordering Testing. This section lays out the criteria a court must apply when ordering DNA testing, with the critical inquiry being whether the movant has satisfied a "reasonably probable" standard.

Subsection 974.07(7)(a) provides that a court "shall order" DNA testing if: (1) the "movant claims that he or she is innocent of the offense at issue," (2) it 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," (3) the "evidence to be tested meets the conditions under sub. (2)(a) to (c)," and (4) the "chain of custody . . . establishes that the evidence has not been tampered with, replaced, or altered in any material respect" (or the "testing itself can establish the integrity of the evidence").

Subsection 974.07(7)(b) provides that a court "may order" testing if: (1) it is "reasonably probable that the outcome of the proceedings that resulted in the conviction . . . or the terms of the sentence . . . would have been more favorable to the movant if the results of [DNA] testing had been available before he or she was prosecuted [or] convicted," (2) the "evidence to be tested meets the conditions under sub. (2)(a) to (c)," and (3) the "chain of custody . . . establishes that the evidence has not been tampered with, replaced, or altered in any material respect" (or the "testing itself can establish the integrity of the evidence").

Section 974.07(8), Testing Location. "The court may impose reasonable conditions on any testing ordered under this section in order to protect the integrity of the evidence and the testing process." The court may also "order the state

crime laboratories to perform the testing," or that "the material be sent to a facility other than the state crime laboratories for testing."

Section 974.07(9), Disposition of Evidence. If the results do not support the movant's claim, then "the court shall determine the disposition of the evidence."

Section 974.07(10), Relief. If the results of DNA testing "support the movant's claim, the court shall schedule a hearing to determine the appropriate relief." This may include "any of the following" relief in the "interests of justice": (1) an order setting aside or vacating the conviction, (2) a new trial or fact-finding hearing, (3) a new sentencing hearing, (4) an order discharging the movant from custody, or (5) an order specifying the disposition of any evidence "that remains after the completion of the testing,"

Section 974.07(11), Appointment. Motions by unrepresented movants who "claim[ ] or appear[ ] to be indigent" must be referred to the "state public defender for determination of indigency and appointment."

Section 974.07(12), Costs of Testing. "The court may order a movant to pay the costs of any testing ordered by the court under this section if the court determines that the movant is not indigent." This section provides that a movant is indigent if any of the following apply: (1) the movant "was found to be indigent," following a referral to the state public defender's office, or (2) the movant "does not possess the financial resources to pay the costs of testing." If the movant

is not ordered to pay, then the "state crime laboratories shall pay for testing ordered under this section and performed by a facility other than the state crime laboratories."

Section 974.07(13), Appeal. This section provides that an "appeal may be taken from an order entered under this section as from a final judgment."

b. In 2005, in *Moran*, this Court interpreted Wis. Stat. § 974.07 as giving each "defendant the right to test [ ] sought-after evidence containing biological material" if three conditions are met: (1) the "evidence is relevant to the investigation or the prosecution that resulted in the conviction," (2) the "evidence is in the actual or constructive possession of a governmental agency," and (3), the evidence "has not previously been subjected to [DNA] testing." *Moran*, 284 Wis. 2d 24, ¶¶ 27, 57.

Moran held that Wis. Stat. § 974.07 contains a provision for testing at private expense, and a provision for testing at public expense. Under Subsection 974.07(6)(a)2, a successful movant "must conduct any testing of the evidence at his own expense," and "comply with all reasonable conditions imposed by the court to protect the integrity of the evidence." Wis. Stat. § 974.07(6)(a)2; *Moran*, 284 Wis. 2d 24, ¶ 57. "If a movant seeks DNA testing at public expense" under Section 974.07(7), he must also show that it is "reasonably probable" that he would not have been convicted if "exculpatory [DNA] testing results had been available before the [ ] conviction," or that "the outcome of the

proceedings . . . or the terms of the sentence would have been more favorable to [him] if the results of [DNA] testing had been available." Wis. Stat. § 974.07(7)(a) and (b); *Moran*, 284 Wis. 2d 24, ¶ 57.

In a concurring opinion joined by then-Justice Roggensack, Justice Wilcox "reluctantly agree[d]." *Moran*, 284 Wis. 2d 24, ¶ 59 (Wilcox, J., concurring). Justice Wilcox observed that the purpose of Subsection 974.07(6)(a)2 might have been as a "discovery provision," not a testing provision, adding that making the availability of testing at state expense turn on the factors the Court had identified would raise "equal protection" concerns because "there is no reason why someone who cannot afford to pay for such testing would not be equally entitled to such evidence." *Id.* ¶¶ 65–66 (Wilcox, J., concurring).

c. The State respectfully submits that *Moran*'s reading of Wis. Stat. § 974.07's plain text is not correct. The State's understanding of the statutory text is: to obtain DNA testing, a movant must file a motion that satisfies Section 974.07(2)'s requirements, thus complying with the motion provision, and then must also satisfy Section 974.07(7)'s "reasonably probable" standard to obtain an order from the circuit court for such testing. In the State's view, Subsection 974.07(6)(a)2—the provision *Moran* held was a separate provision for a movant-funded DNA test—does not provide for any DNA testing on its own, and is, instead, simply a mandate that the district attorney turn

over evidence to the movant, who can then inspect for biological material as part of the process leading to the circuit court's decision on testing under Wis. Stat. § 974.07(7). If the circuit court ultimately orders testing under Section 974.07(7), that court must then decide who will pay for this testing under Section 974.07(12).

II. Facts Of The Present Case

1. In 1982, a jury found Denny and his brother Kent guilty of murdering Christopher Mohr in a bedroom in Mohr's parents' home in Grafton, Wisconsin. R.99, 215:18. The jury's verdict was supported by the overwhelming evidence, including "thirty-six—*thirty-six*—inculpatory statements made by Denny or his brother [Kent] to different people, at different times, and in different places." App. 53, ¶ 84 (Hagedorn, J., concurring in part, dissenting in part).

Denny's *other* brother—Trent Denny—testified that Denny and Kent admitted to killing Mohr. R.246:235–41. According to Trent, Denny explained that Kent stabbed Mohr first in the stomach, and that Denny then continued to stab Mohr. R.246:239–41. As Mohr came after Denny, Kent hit Mohr over the head with a bong. R.246:41. This was consistent with the testimony offered by the forensic pathologist who performed Mohr's autopsy, explaining that Mohr suffered 50 stab wounds, R.247:32–71, and at least three blunt force wounds that could have been caused by a bong pipe, R.247:39. Denny and Kent also told Trent that

they needed to get rid of the clothes they wore during the murder. R.246:245–46. Denny said that he had to get rid of the knife, and showed Trent where he hid it. R.246:250–51, 288–90. Trent also testified that he was with Kent after the murder when he retrieved a paper bag with clothes from a cemetery that smelled like blood, including a shirt with a visible stain. R.246:246–49. Trent then witnessed Kent tossing the bag into the dump. R.246:249.

Several other witnesses testified against Denny and Kent. Lori Jacque explained that she was present when Kent and Denny retrieved a bundle of clothes from a cemetery, and then tossed the clothes into the dump, R.247:89–93, and later heard Denny and Kent discussing how they forgot the tennis shoes, R.247:94–95. Patricia Robran testified that Denny admitted to killing "that one boy in Grafton," R.247:270–73, and that Denny admitted to getting a quarter pound of marijuana out of the murder. R.247:272. Denny's girlfriend testified that Denny admitted to killing Mohr, R.249:100–02, and that Denny said he got a quarter pound of marijuana there. R.249:102–103. Steven Hansen testified that Denny admitted to killing Mohr with Kent using a knife. R.247:255–57. Daniel Johansen testified that Denny said that Kent stabbed Mohr, and that Denny hit Mohr with a bong and "kicked him a couple times." R.249:49–51.

The State also presented evidence of Denny's "murder shoes." Russell Schram testified that Denny admitted that

his "murder shoes" were in the back seat of a car. R.249:113. Denny subsequently told Schram to get the shoes out of the car. R.249:115–16. Other witnesses corroborated parts of this testimony concerning the shoes. R.249:64–65, 97–100. These shoes were later recovered and their tread was found to be "the same" as the tread impression found at the murder scene. R.249:220–21.

The trial judge instructed the jury that Denny was charged with first-degree murder, Wis. Stat. § 940.01, and as party to the crime, Wis. Stat. § 939.05. R.250:87–89. Denny could be convicted with first-degree murder "although he did not directly commit it," if he "[i]ntentionally aid[ed] and abet[ted] the commission of a crime" by either "render[ing] aid" or being "ready and willing to render aid." R.250:96–97. The jury convicted Denny of first-degree murder and the judge sentenced him to life in prison. R.99.

Denny's conviction has been affirmed. In the direct appeal, the court of appeals found the numerous statements discussed above to be "consistent, made at different times and places, in some instances corroborated by physical evidence, and [ ] found to be credible by the jury." *State v. Denny,* 163 Wis. 2d 352, 360, 471 N.W.2d 606 (Ct. App. 1991). The Seventh Circuit reached the same conclusion. *Denny v. Gudmanson*, 252 F.3d 896, 904–05 (7th Cir. 2001).

2. In 2014, Denny invoked Wisconsin's post-conviction DNA testing statute, seeking to test certain items collected at the crime scene at the State's expense, or in the

alternative, at his own private expense. R.215; R.220; R.222; R.223.[6] These items include:

1. Pieces of a bong pipe
2. Bloody chair
3. Bloody clothing
4. Bloody hat
5. Bloody gloves
6. Stray hairs
7. Victim's hair
8. Lighter
9. Screens
10. Glass cup
11. Bloody towel
12. Facial breathing masks

R.223:3–8. Except for the facial breathing masks, these items were admitted as trial exhibits. R.223:8.

Although many of the items contain blood, *see* App. 18–19, ¶ 2, Denny did not ask to test the blood present on the items. With the exception of some hairs,[7] Denny sought

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[6] Denny, appearing *pro se*, and his attorneys filed five separate motions, some labeled as either supplemental motions or amendments, all seeking post-conviction DNA testing. R.204, 215, 220, 222, 223. Originally, Denny's attorneys stipulated to test certain items at private expense, yet this stipulation was apparently withdrawn by Denny, who filed an amended motion *pro se*. R.220:2.

[7] Denny sought to test hair to determine the DNA profile of the hair. R.223:5. A hair "root" must be present for a complete DNA profile. *See* Wis. Crime Lab. Bureau, *Physical Evidence Handbook* ch. 21, at 159 (8th ed. 2009), *available at* https://wilenet.org/html/crime-

testing for "touch DNA," claiming that these were all items "that the perpetrator touched or very likely touched." R.223:1. For example, Denny sought testing of pieces of the bong pipe because "it is likely that the perpetrator handled the bong, leaving DNA on fragments of the bong." Denny also claimed the perpetrator could have "smoked from the bong before the attack and thus left DNA." R.223:3. Furthermore, Denny claimed that the perpetrator likely "touched" the bloody chair and bloody clothing. R.223:3–4. Denny also theorized that "the perpetrator may have grabbed the victim's hat" and "it is likely that the perpetrator's DNA would be on the hat." R.223:4.

Other items also might contain "touch DNA," Denny argued. Denny claimed that it was "possible that the perpetrator wore" the bloody gloves and "thus left DNA on the inside or outside of the gloves." R.223:4–5. Furthermore, "the perpetrator" could have "used the lighter before the attack" and his "DNA was left on the lighter's spark wheel." R.223:5. And the perpetrator also might have "drank from [the glass] cup around the time of the attack" and testing "the lip of the cup will provide a complete DNA profile of the perpetrator." R.223:6.

3. The circuit court denied Denny's motion for post-conviction DNA testing.

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lab/physevbook/. Denny has never alleged that these hairs have roots attached and are capable of yielding a complete DNA profile.

First, the circuit court held that the DNA tests would not be "relevant" under Section 974.07(2) because, *inter alia*, "DNA evidence showing that additional persons may have been involved would not change the evidence showing that Denny also was involved as a party to the crime, which a jury found." App. 9. This evidence included "the thirty-six statements made by Denny or his brother to different people, at different times, in different places; the evidence from two people who stated they observed Denny's brother destroying clothes; the evidence from one person who said he saw a knife; and the evidence linking Denny to the scene by a shoeprint on the Cedarburg-Grafton phonebook, and from others who said they saw a bag with the shoes linked to the print. Denny's DNA motion does not relate to any of that evidence." App. 8. The circuit court also considered the purposes of the DNA testing statute, and worried about an approach that would lead to all evidence being tested, regardless of its ability to help the movant. App. 8–10.

Second, the circuit court found that Denny was not eligible for testing at state expense because any exculpatory results from such testing would not make it "reasonably probable" that Denny would not have been convicted. App. 11–12. The court explained that the evidence against Denny was overwhelming. App. 4. The circuit court added that "Mohr's killing has never been presented as a single-perpetrator crime." App. 12. In fact, Denny himself alleged "as many as seven individuals were involved in the death."

App. 12. The jury was not asked whether "Denny was the attacker," or what was the "identity of the real killer." App. 12. Instead, "[s]omeone else could have been 'the attacker'" or "could have inflicted what turned out to be the fatal wound." App. 12. Nonetheless, Denny could still have been found guilty. App. 12. For this reason, "[f]inding DNA from persons other than Denny would not 'prove Denny's innocence.'" App. 12–13. "It may only reveal the identity of others who may have been involved." App. 13.

4. The court of appeals reversed, holding that Denny was entitled to test all of the items at state expense.

First, the court decided that Denny had satisfied the standard for testing at his own expense under *Moran*'s reading of Subsection 974.07(6)(a)2. The court reasoned that "[g]iven the nature of the crime scene, and the manner in which Mohr was murdered, the perpetrator(s) might have left DNA evidence, whether in the form of blood, hair, saliva, skin, sweat or other biological material, on the items Denny identified for testing." App. 31–32, ¶ 39. The court then discounted the circuit court's analysis, stating that the "State's theory at trial" was that Denny participated directly in the murder. App. 32, ¶ 41. The court surmised that if "testing of the items should show that another person's DNA is on several of the items, and that the DNA of Denny is not on any of the items identified, such would call into doubt Denny's participation in the murder of Mohr." App. 32, ¶ 41.

The court further held that movants like Denny have a right to test any physical evidence that was "collected during a crime scene investigation" and that "has *any tendency to contain biological material capable of DNA testing*." App. 33, ¶ 43 (emphasis added). The court explained that "[n]early all of the items Denny identified contain biological material in the form of blood or hair," and the remaining items "have a tendency to contain biological material." App. 34–35, ¶ 45.

Second, the court of appeals held that Denny was entitled to testing at the State's expense under *Moran*'s interpretation of Subsection 974.07(7)(a)2 because it was "reasonably probable" that Denny would not have been convicted had "exculpatory DNA testing results" been available before trial. App. 39, ¶ 53; App. 44, ¶62. The court considered whether "exculpatory DNA testing results" would have a "probability sufficient to undermine confidence in the outcome," applying the standard for determining prejudice for purposes of ineffective assistance of counsel claims. App. 36, ¶ 48 (citation omitted). Then, reviewing the trial testimony, the court of appeals considered the "credibility of certain witnesses," including those witnesses who were granted immunity for testimony and one witness whose memory was "very bad." App. 43–44, ¶¶ 61, 62. The court thus concluded that it was "reasonably probable that Denny would not have been convicted, that is, a probability sufficient to undermine confidence in the outcome," if exculpatory DNA results were available. App. 44, ¶ 62.

Judge Hagedorn concurred in part and dissented in part. While he agreed with the majority's holding that Denny was entitled to testing at his own expense under *Moran*, he would have held that Denny failed to meet the higher standard for DNA testing at public expense. App. 46–47, ¶¶ 65–66. Judge Hagedorn explained that "the majority's case for the [ineffective assistance] standard [for obtaining state-funded DNA testing] is, in my view, just as strong, and maybe stronger" than the case made for the newly discovered evidence standard by the statutory text, framework and context, and the court's prior decision in *State v. Hudson*, 2004 WI App 99, 273 Wis. 2d 707, 681 N.W.2d 316, but that these "counter-arguments deserve a hearing" in the event of review by the Supreme Court of Wisconsin. App. 52, ¶¶ 79–80.

Judge Hagedorn then explained that Denny would not be entitled to testing at state expense under either standard. App. 54, ¶ 87. As he noted, "[t]he evidence was vast, overwhelming, and damning. It was not even close. Furthermore, the jury did not have to find that [Denny] personally killed Mohr; Denny was convicted as party to the crime." App. 54, ¶ 86. Judge Hagedorn also noted that the State's argument that *Moran* was wrongly decided was "reasonable," but properly observed that the court of appeals is "bound by the interpretive framework *Moran* articulates." App. 46, ¶ 65 n.1.

The State filed a petition for review, and this Court granted that petition.

STANDARD OF REVIEW

Under the DNA testing statute, the circuit court is granted "considerable discretion" when making relevancy determinations. *Moran*, 284 Wis. 2d 24, ¶ 45 (citation omitted). When a circuit court decides whether there is a "reasonable probability" that the movant would not have been convicted absent new evidence, appellate courts should "defer this determination to the circuit court." *McCallum*, 208 Wis. 2d at 480. Statutory interpretation and the application of a statute to specific facts are questions of law subject to review de novo. *See State v. Harris*, 2004 WI 64, ¶ 25, 272 Wis. 2d 80, 680 N.W.2d 737.

SUMMARY OF ARGUMENT

I. *Moran* held that a movant is entitled to DNA testing at his own expense, under Subsection 974.07(6)(a)2, if he can show "with particularity" the evidence "containing biological material" that he wishes to test and demonstrate that such testing is "relevant to the investigation or prosecution that resulted in the conviction." *Moran*, 284 Wis. 2d 24, ¶¶ 41–42. In the present case, Denny sought to test twelve items, primarily for touch DNA. Both the circuit court and the court of appeals misapplied *Moran*, but for largely different reasons. Accordingly, a remand for further analysis is appropriate, unless this Court overrules *Moran*.

The circuit court's decision denying Denny's testing request at his own expense did not comply with *Moran* in all respects. The circuit court did not consider whether Denny demonstrated that the items he sought to test actually contained testable "biological material." Instead, Denny speculated these items *could possibly* contain testable touch DNA, which falls short of what *Moran* requires. In addition, the circuit court's analysis as to whether Denny had satisfied the "relevant" standard under Section 974.07(2) was mistaken because the court focused on evidence of Denny's guilt. The strength of the State's case is part of the separate inquiry under Section 974.07(7).

The court of appeals' approach to *Moran* was even more flawed. The court held that DNA testing of an item at private expense is permitted for *any* item "collected during a crime scene investigation" that "has *any* tendency to contain biological material capable of DNA testing." App. 33, ¶ 43 (emphasis added). This is contrary to *Moran* and would permit DNA testing of virtually any item found at almost any crime scene. Such "easy access" to DNA testing despite "a mountain of evidence supporting [the] conviction," would have "the potential to overburden our justice system and work great mischief for numerous legitimate convictions." *Moran*, 284 Wis. 2d 24, ¶¶ 63–64 (Wilcox, J., concurring).

II. The circuit court's decision that Denny failed to satisfy the standard for testing at public expense, pursuant to Section 974.07(7), was consistent with *Moran* and the

facts. *Moran* held that to obtain testing at state expense, the movant must also prove that, assuming the presence of "exculpatory" DNA testing results, it is "reasonably probable" that he would not have been convicted. Wis. Stat. § 974.07(7). As the circuit court explained, it is not "reasonably probable" that DNA results would have led to a different outcome here. The proof of Denny's guilt was overwhelming and would not have been impacted by DNA evidence. Denny was "convicted on the strength of thirty-six—*thirty-six*—inculpatory statements made by Denny or his brother to different people, at different times, and in different places." App. 53, ¶ 84 (Hagedorn, J., concurring in part, dissenting in part). As the Seventh Circuit previously explained, "[a]ll of the statements were consistent, made at different times and places, in some instances corroborated by physical evidence, and were found to be credible by the jury." *Denny*, 252 F.3d at 905; *see also Denny*, 163 Wis. 2d at 360.

The court of appeals' conclusion that the proper standard to apply to the "reasonably probable" inquiry under Section 974.07(7) is derived from the ineffective assistance of counsel line of cases is both wrong and would make no difference in the proper resolution of the present case. The proper standard is the one that this Court has adopted in the more analogous context of motions for a new trial based upon newly discovered evidence. *See, e.g.*, *McCallum*, 208 Wis. 2d at 475. In any event, the ineffective assistance and newly discovered evidence standards lead to the same

results in the vast majority of cases. *See State v. Edmunds,* 2008 WI App 33, ¶ 22, 308 Wis. 2d 374, 746 N.W.2d 590. Here, given the overwhelming evidence of guilt, Denny could satisfy neither standard.

III. In the alternative, this Court should overrule *Moran* and hold that Denny is not entitled to any DNA testing because *any* DNA testing under the statute is available only under Section 974.07(7)'s standards.

Moran is irreconcilable with the statutory text. *Moran* concluded that Subsection 974.07(6)(a)2 contains a testing regime at private expense, whereas Section 974.07(7) contains an *entirely separate* testing regime at public expense. But Subsection 974.07(6)(a)2 is simply a discovery regime, which does not mention testing. The only provision for testing in the statute is testing pursuant to court order under Section 974.07(7). In addition, the critical distinction that *Moran* relied upon—privately funded testing under Subsection 974.07(6)(a)2 and state-funded testing under Section 974.07(7)—would render irrelevant Section 974.07(12), which addresses the issue of whether testing is at private or public expense based upon an inquiry into the movant's ability to pay. *Moran* thus violates the core principle that a "statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect." *Donaldson v. State*, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980).

ARGUMENT

I. Under *Moran,* To The Extent Denny Wishes To Conduct DNA Testing At His Own Expense, He Would Need To Show On Remand That He Seeks To Test Particular "Biological Material" That Is "Relevant" To His Case

A. In *Moran,* this Court interpreted Wisconsin's DNA testing statute as including a separate testing regime under Subsection 974.07(6)(a)2 using a three-pronged analysis. *Moran*, 284 Wis. 2d 24, ¶ 43. First, the movant must show that there is "evidence containing biological material" that the movant wishes to test, where testing is "relevant to the investigation or prosecution that resulted in the conviction." *Id.* ¶ 42. In considering whether the movant has satisfied the "containing biological material" mandate in this prong, it must be recalled that "there is a practical necessity that a motion to disclose should comply with Wis. Stat. § 971.30(2), stating 'with particularity' the evidence or the type of evidence that the movant is seeking." *Id.* ¶ 41. Second, "the evidence must be in the government's possession." *Id.* ¶ 42. Third, the evidence must either have not yet been subjected to DNA testing, or may now be subject to "more accurate and probative results" with new testing. *Id.* If these prongs are satisfied, then "the movant should receive access to the evidence, and may subject the material to DNA testing at his or her own expense." *Id.* ¶ 43.

Only the first of these "prongs" is at issue in this appeal, and that prong contains two requirements that the

movant must satisfy: he must specify "with particularity" the evidence "*containing biological material*" that he wishes to test *and* demonstrate that such testing is "*relevant to the investigation or prosecution that resulted in the conviction*." *Moran*, 284 Wis. 2d 24, ¶¶ 41–42 (emphases added).

With regard to the "contain[ ] biological material" requirement, the movant in *Moran* satisfied that mandate, so the issue did not warrant any special discussion. At one point, this Court noted that Moran sought testing of a "bloody brick" from the scene of the crime, *Moran*, 284 Wis. 2d 24, ¶ 46, at another point, the opinion explained that Moran sought testing of "three 'unknown blood samples' taken from inside [the victim's] apartment and the blood sample from the door across the hall," *id.* ¶ 23, and at yet another point the opinion discussed "five blood samples," *id.* Notwithstanding these apparent ambiguities, it is clear that Moran only sought to test the *blood samples*. Such samples, by definition, "contain[ ] biological material."

As to the "relevance" requirement, *Moran* explained that the "appropriate inquiry" is "whether there is a logical or rational connection between the fact which is sought to be proved and a matter of fact which has been made an issue in the case." *Moran*, 284 Wis. 2d 24, ¶ 45 (quoting *Shapiro v. Klinker*, 257 Wis. 622, 626, 44 N.W.2d 622 (1950)). The "burden" for satisfying this requirement is on the moving party, and the circuit court has "considerable discretion" in deciding relevancy. *Id.* ¶¶ 45–46. In the circuit court,

Moran had been convicted of attempted first-degree intentional homicide. *Id.* ¶ 14. As his defense, Moran insisted that he injured the victims only in self-defense. *Id.* ¶ 11. The circuit court denied Moran's motion for post-conviction DNA testing, stating that Moran had not offered any "explanation as to how the testing of the five blood samples could have impact upon . . . the jury verdicts in this matter." *Id.* ¶ 23. "It will be Moran's burden on remand to show that the test he seeks to conduct will be relevant to *his* prosecution (namely *his* conviction or *his* sentence)." *Moran*, 284 Wis. 2d 24, ¶ 46 (emphasis added). "For instance, Moran will have to show that the determination of whose blood is on the 'bloody brick' is evidence having a 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." *Id.*

B. In the present case, Denny sought to test twelve items because, among other things, these items *might* contain "touch DNA." *See supra* pp. 15–17. The circuit court did not consider whether Denny had satisfied the requirement that these particular items "contain[ ] biological material" that Denny wished to test, *Moran*, 284 Wis. 2d 24, ¶ 42, but instead moved directly to the relevancy inquiry. The circuit court then held that Denny did not satisfy the relevancy requirement because, *inter alia*, "DNA evidence showing that additional persons may have been involved would not change the evidence showing that Denny also was

involved as a party to the crime, which a jury found," listing the overwhelming evidence of Denny's guilt. App. 8–9. That approach is not consistent with *Moran* in two respects.

With regard to the "biological material" requirement, the circuit court never decided whether Denny had identified "with particularity" items "containing biological material" that he wishes to test for DNA. *Moran*, 284 Wis. 2d 24, ¶¶ 41, 44. Under *Moran*, it is not sufficient for Denny to speculate that the items *might* contain testable material. He must "with particularity" ask to test blood samples or other biological materials on the evidence that are capable of DNA testing. For example, if Denny wishes to test hairs found at the scene of the crime, he must show that the hair contains materials such as a hair root that constitute biological materials capable of DNA testing. R.225:3; *see supra* pp. 16–17 n.7. And if Denny wishes to test for invisible touch DNA—and not just blood samples or testable hair samples—he must demonstrate with reasonable probability that the items *actually* contain touch DNA, a showing he had never attempted to make. *See also infra* pp. 31–32.

As to the "relevancy" requirement, the circuit court erred by discussing evidence that ultimately supported Denny's conviction.[8] The circuit court should have confined

[8] That evidence is appropriate for discussion as part of the "reasonably probable" inquiry under Section 974.07(7). *See infra* pp. 34–35.

its relevance inquiry to considering the "logical or rational connection between the fact which is *sought to be proved* and the matter of fact which has been made an issue in this case," *Moran*, 284 Wis. 2d 24, ¶ 45 (citation omitted) (emphasis added), which does not turn on the strength of the case the State ultimately presented for Denny's guilt.

In light of these errors, as well as the ambiguities as to whether Denny seeks testing of only touch DNA or, in addition, blood and hair samples, the appropriate disposition under the *Moran* framework would be to remand this case to the circuit court with proper instructions, just as this Court did in *Moran* itself. *See Moran*, 284 Wis. 2d 24, ¶ 46; *but see infra* Part III. In other words, Denny's burden on remand would be to prove that the "determination of whose" DNA is on each item that he establishes contains testable biological material makes any "fact that is of consequence" in his prosecution more or less likely. *Moran*, 284 Wis. 2d 24, ¶ 46.

C. While the court of appeals reversed the circuit court's decision, it did so for reasons inconsistent with *Moran*. In addressing when testing is available under Subsection 974.07(6)(a)2, the court of appeals adopted the following sweeping rule: "If an item collected during a crime scene investigation has *any tendency to contain biological material capable of DNA testing*, including blood, hair, saliva, skin cells, sweat or other biological material, that is sufficient to establish relevance." App. 33, ¶ 43 (emphasis added). This rule is wrong for two independently sufficient

reasons, and would lead to a virtually limitless testing regime.

First, the court of appeals erred in holding that Denny has the right to test items based merely on "any tendency" that they "might" contain biological material, such as touch DNA. App. 31–34. The court of appeals explained that "where it is not evident to the naked eye that [items] contain biological material . . . it is enough for purposes of seeking testing that . . . the assailant(s) *may have* handled them, given the nature of the crime scene." App. 34–35, ¶ 45 (emphasis added). This is contrary to *Moran*'s holding that Subsection 974.07(6)(a)2's testing regime is limited by the textual "contain[s] biological material" requirement. *See Moran*, 284 Wis. 2d 24, ¶¶ 3, 42. Subsection 974.07(6)(a)2 specifically refers to "biological material."

In reaching the conclusion that Subsection 974.07(6)(a)2 contains a separate testing regime at private expense, *but see infra* Part III, *Moran* sought to give meaning to this statutory text. *Moran* did not hold that the evidence sought to be tested "might" contain testable biological material, or have "any tendency to contain biological material," as the court of appeals held in this case. App. 31–31, 34–35, ¶¶ 39, 45. Rather, *Moran* held that the movant must specify "with particularity" the evidence "*containing biological material*" that he wishes to test. *Moran*, 284 Wis. 2d 24, ¶¶ 41–42 (emphasis added).

The court of appeals' approach—embracing *Moran*'s holding that Subsection 974.07(6)(a)2 includes a separate testing regime but then effectively nullifying the "biological material" limitation that *Moran* held applicable to such testing—is impermissibly broad. Given the nature of touch DNA, any convicted defendant who claims that someone else committed the crime will be able to speculate that the "true" perpetrator *might have* touched every single item in the crime scene, and that this perpetrator *might have* left skin cells on each of these items. As Denny argued in this case, the twelve items he sought to be tested for touch DNA *might* contain skin cells with such DNA because "the perpetrator" "possibl[y]" "used the lighter before the attack" or could have "drank from [the glass] cup around the time of the attack." R.223:4–6. It is easy to see how this line of reasoning would be used by virtually any convicted criminal, seeking to test for touch DNA every item found at the crime scene.

Second, the court of appeals' decision wrongly created a legal presumption that anything collected "during a crime scene investigation" is always relevant. App. 33, ¶ 43. *Moran* requires the movant to prove how an individual item may have a "tendency to make the existence of any fact that is of consequence . . . more or less probable." *Moran,* 284 Wis. 2d 24, ¶ 45. The court of appeals erred in *presuming* that anything collected "during a crime scene investigation" is always relevant. App. 33, ¶ 43.

Notably, the combination of these two errors—assuming the presence of testable "biological material" on virtually any item and then presuming "relevance" for anything collected at the crime scene—would lead to a limitless testing regime that the Legislature never envisioned. While properly channeled post-conviction DNA testing has important benefits that the Legislature sought to achieve, *unlimited* testing at the behest of convicted criminals is not an unmitigated good. As Justice Wilcox explained, "easy access" to DNA testing despite "a mountain of evidence supporting [the] conviction" creates "the potential to overburden our justice system and work great mischief for numerous legitimate convictions." *Moran*, 284 Wis. 2d 24, ¶¶ 63–64 (Wilcox, J., concurring).

Such overbroad testing would "have far-reaching consequences for the finality of convictions." *Id.* ¶ 63 (Wilcox, J., concurring); *see also Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir. 2006) (the States have "[c]ompelling interests" in "guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors"); Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 Nw. U.L. Rev. 263, 264 (2008) (the volume of post-conviction DNA testing requests "has overwhelmed state prosecutors' offices, dramatically hampering their ability to process meritorious claims"); Samuel R. Wiseman, *Waiving Innocence*, 96 Minn. L. Rev.

952, 959 (2012) (post-conviction DNA tests "financially burden the system and psychologically burden victims and their families").

II. Under *Moran*, Denny Is Not Entitled To DNA Testing At State Expense Because He Failed To Show That It Is "Reasonably Probable" That He Would Not Have Been Convicted Had Exculpatory DNA Test Results Been Available

A. Under *Moran*'s framework, to obtain DNA testing at state expense, the movant must "satisfy the heightened requirements in" Section 974.07(7). *Moran*, 284 Wis. 2d 24, ¶ 57. Specifically, in addition to proving that the items meet the three-prong test discussed above, *see supra* p. 26, the movant must establish that it is "*reasonably probable that the movant would not have been . . . convicted . . .* if exculpatory [DNA] testing results had been available before the prosecution [or] conviction." Wis. Stat. § 974.07(7)(a)2 (emphasis added).[9] The State agrees with the court of appeals that "exculpatory" DNA results mean that "another identified individual's DNA is found on all of the collected evidence, and none of [the movant's DNA] is found" during any testing that would be ordered. App. 41, ¶ 57.

[9] The circuit court may also, in its discretion, order state-funded testing if the movant establishes that "[i]t is reasonably probable that the outcome of the proceedings that resulted in the conviction . . . or the terms of the sentence . . . would have been more favorable to the movant if the results of [DNA] testing had been available." Wis. Stat. § 974.07(7)(b). That standard is not at issue in this case.

In the present case, the circuit court correctly concluded that Denny had not satisfied this standard because it is not "reasonabl[y] probabl[e] that a jury, looking at both" the overwhelming evidence the State presented at trial *and* testing results showing another individual's DNA in the victim's bedroom "would have a reasonable doubt as to the defendant's guilt." *McCallum,* 208 Wis. 2d at 475. As the circuit court explained, while "DNA testing might [ ] show that others, in addition to Denny, may have been involved," it was not reasonably probable that the tests would show that "Denny is not guilty of doing what the jury determined he is guilty of doing—being a party to the crime of murder." App. 11–12. This conclusion was correct.

As a threshold matter, the mere presence of other DNA (not Denny's) at the crime scene would be irrelevant to the State's theory of prosecution. As Judge Hagedorn explained, "this killing was never presented as a single-perpetrator crime and [ ] Denny himself alleged as many as seven people were involved in the murder." App. 53, ¶ 83. Since "the jury was only asked if Denny was party to the crime of murder, testing revealing the identity of others who may have been involved would not have changed the jury's mind." App. 53, ¶ 83. The jury did not have to agree about whether Denny was the main perpetrator, or simply assisted in the homicide by, for example, acting as a lookout; juries are not required to "agree[ ] as to the theory of participation" under the party-to-a-crime statute. *Holland v. State,* 91

Wis. 2d 134, 143, 280 N.W.2d 288 (1979); *see State v. Plude*, 2008 WI 58, ¶ 48, 310 Wis. 2d 28, 750 N.W.2d 28 (must be a "significant link" between the purportedly new evidence and a theory establishing innocence).

In addition, the strength of the evidence against Denny was overwhelming. *See State v. Hudson*, 2004 WI App 99, ¶¶ 19–20, 273 Wis. 2d 707, 681 N.W.2d 316 (DNA testing under Section 974.07(7) is not available where there is strong evidence of guilt); *see also State v. Kimpel*, 153 Wis. 2d 697, 705–06, 451 N.W.2d 790 (1989) ("overwhelming evidence of guilt renders a different result improbable" even if newly discovered evidence was admitted). Again, as Judge Hagedorn explained, this was never a "close" case. App. 54, ¶ 86. "Denny was not convicted because of a single eyewitness or a dubious confession since retracted." App. 53, ¶ 84. He was "convicted on the strength of thirty-six—*thirty-six*—inculpatory statements made by Denny or his brother to different people, at different times, and in different places." App. 53, ¶ 84. As the Seventh Circuit observed in reviewing the conviction, "[a]ll of the statements were consistent, made at different times and places, in some instances corroborated by physical evidence, and were found to be credible by the jury." *Denny*, 252 F.3d at 905; *see also Denny*, 163 Wis. 2d at 360.

To highlight just some of the overwhelming evidence of Denny's guilt, Denny's brother Trent testified that Denny and Kent confessed to committing the murder on two

separate occasions and witnessed firsthand his brothers disposing of the clothes worn during the murder. R.246:235–41, 246–50. Lori Jacque supported this testimony that Denny and Kent threw away physical evidence of the murder they committed. R.247:88–93. Denny's friend Patricia Robran explained that Denny confessed to killing the "boy in Grafton" and getting a quarter pound of marijuana. R.247:270–73. Denny's girlfriend similarly testified that Denny told her about committing the murder and obtaining a quarter pound of marijuana. R.249:101–03. Denny also admitted to the murder to Steven Hansen and Daniel Johansen, R.247:255; R.249:50–51. In addition, Russell Schram testified that Denny admitted that his "murder shoes" were in the back seat of a friend's car, and asked Schram to get the shoes out of the car. R.249:113–15. These "murder shoes" were later recovered and their tread was found to be "the same" as the tread impression found at the murder scene. R.249:220–21.

In reaching a contrary conclusion, the court of appeals found significant the fact that "defense counsel was able to question the credibility of several of [the] witnesses." App. 43, ¶ 61. Given the large number of people who provided testimony of Denny's guilt, it would be surprising, to say the least, if a defense counsel was unable to raise any question as to any of the witnesses. The court of appeals found particularly persuasive the banal fact that some of the witnesses received immunity as part of their promise to

provide truthful testimony, had criminal records, or had trouble remembering events and conversations. App. 43–44, ¶ 61. Yet, none of this addresses the most significant aspect of the trial: "[a]ll of the statements [of Denny admitting his guilt] were consistent, made at different times and places, in some instances corroborated by physical evidence, and were found to be credible by the jury." *Denny*, 252 F.3d at 905; *see also*, *Denny*, 163 Wis. 2d at 360. It is thus implausible that the jury "would have a reasonable doubt as to the defendant's guilt," *McCallum*, 208 Wis. 2d at 475, if DNA evidence showed someone else had left skin cells in the victim's room.

B. In holding that Denny was entitled to post-conviction DNA testing at state expense, the court of appeals applied the standard for ineffective assistance of counsel derived from *Strickland v. Washington*, 466 U.S. 668 (1984). This test looks to whether, in light of the alleged error of counsel, there is "a probability sufficient to undermine confidence in the outcome." App. 36, ¶ 48 (quoting *Strickland,* 466 U.S. at 694). The court of appeals' approach is both wrong and would make no difference to the proper resolution of this case.

As a threshold matter, the court of appeals erred in holding that the *Strickland* standard is the appropriate one for adjudicating Section 974.07(7)'s "reasonably probable" question. The standard that the State advocates is "whether 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." *McCallum,* 208 Wis. 2d at 475; *see State v. Plude*, 310 Wis. 2d 28, ¶ 32 (applying this test only *after* the defendant is able to establish that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative"). This test—which also governs when newly discovered evidence will lead to a new trial—closely tracks the language of Section 974.07(7). *Compare* Wis. Stat. § 974.07(7) ("reasonably probable" that the defendant "would not have been . . . convicted"), *with McCallum*, 208 Wis. 2d at 245 ("reasonable probability that a jury . . . would have a reasonable doubt as to the defendant's guilt").

Importantly, the newly discovered evidence test serves similar functions to those contemplated by Section 974.07(7)'s DNA testing regime. Section 974.07(7) asks the circuit court to consider a hypothetical question: what would the impact on the trial have been if newly discovered DNA had been introduced along with the other evidence submitted to the jury. That inquiry is of a similar character to that at issue in the newly discovered evidence cases.

In contrast, the *Strickland* test does not align as closely with Section 974.07(7)'s text or purposes. The formulation of the *Strickland* test differs from

Section 974.07(7)'s text. *Compare* Wis. Stat. § 974.07(7) ("reasonably probable" that the defendant "would not have been . . . convicted"), *with State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (looking to whether "unprofessional errors" by an attorney at trial "undermine confidence in the outcome"). Further, the goal of the *Strickland* test—addressing the proper consequence of deficient performance by trial counsel—differs significantly from the concerns at issue when deciding whether new DNA testing is appropriate. While this Court has used the *Strickland* test in determining whether a defendant is entitled to post-conviction *discovery* under the Due Process Clause, *see State v. O'Brien*, 223 Wis. 2d 303, ¶ 24, 588 N.W.2d 8 (1999), Wis. Stat. § 974.07(7) is a DNA *testing* statute, not a discovery regime.[10]

In any event, the precise articulation of the standard applicable to Section 974.07(7) would make no difference in the present case (or, indeed, in the vast majority of cases). *See Strickland,* 466 U.S. at 694–95; *Edmunds,* 308 Wis. 2d 374, ¶ 22. As Judge Hagedorn explained below, "[r]egardless of the test" employed, "the trial court properly exercised its discretion in determining whether the exculpatory [DNA] evidence would make it reasonably probable that a jury

[10] As explained in Part III, *infra*, and the Statement of the Case, *supra*, the State's position is that Section 974.07(6) is the only discovery regime within Wis. Stat. § 974.07.

would not have convicted Denny," in light of the overwhelming evidence of Denny's guilt. App. 52, ¶ 81–82.

III. In The Alternative, This Court Should Overrule *Moran*

As noted in the Statement of the Case, *supra*, and in the State's briefing before the court of appeals, State's Ct. App. Br. Argument Sec. II., the State's position is that DNA testing is *only* available where, *inter alia*, the movant can satisfy Section 974.07(2)'s relevancy standard *and* Section 974.07(7)'s "reasonably probable" standard. In the State's view, Subsection 974.07(6)(a)2 is just a discovery provision—not a testing provision—and its plain text simply provides that the district attorney make available physical evidence to the movant in certain circumstances.[11]

Adopting this approach would require overruling *Moran*. While *stare decisis* is the "preferred course of judicial action," *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶¶ 95, 97, 264 Wis. 2d 60, 665 N.W.2d 60 (citation omitted), this Court is "not required to

[11] This Court may consider this argument even though it was not expressly raised in the Petition for Review. In *Moran* itself, the movant did not raise Wis. Stat. § 974.07(6)(a)2 until oral argument before this Court. *Moran,* 284 Wis. 2d 24, ¶ 29. This Court decided the meaning of Wis. Stat. § 974.07(6)(a)2, explaining that "when an issue involves a question of law, has been briefed by the opposing parties, and is of sufficient public interest to merit a decision, this court has discretion to address the issue." *Id.* ¶ 31. The same rationale applies here.

adhere to interpretations of statutes that are objectively wrong." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405. Additional reasons for overruling precedents include where the prior decision is "unsound in principle," "unworkable in practice," or "detrimental to coherence and consistency in the law." *Johnson Controls*, 264 Wis. 2d 60, ¶¶ 98–100. These standards are satisfied with regard to *Moran* for three reasons.

First, *Moran* violates Subsection 974.07(6)(a)2's plain text, rendering it "objectively wrong," *Wenke v. Gehl Co.*, 274 Wis. 2d 220, ¶ 21, and "unsound in principle," *Johnson Controls*, 264 Wis. 2d 60, ¶ 99. *Moran* held that Subsection 974.07(6)(a)2 involves a separate testing regime at private expense, but such a regime simply does not appear in the text. Subsection 974.07(6)(a)2 addresses when the district attorney must make available "[p]hysical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material." Wis. Stat. § 974.07(6)(a)2. *It does not provide for testing of that material.* Under the plain text, *any* testing can only be ordered by the circuit court under Section 974.07(7). Respectfully, *Moran*'s conclusion that Subsection 974.07(6)(2)a also includes a testing regime, 284 Wis. 2d 24, ¶ 43, is unsupported by relevant textual analysis. While *Moran* discussed some aspects of Subsection 974.07(6)(a)2's text—for example, the fact that "biological materials" is not defined, *Id.* ¶ 37—it did not provide any

textual basis for finding a *testing* component. Instead, *Moran* rejected some aspect of the State's argument in that case about how Subsection 974.07(6)(a)2 should operate, and then moved to discussing Section 974.07(2). *See id.* ¶¶ 38–42.[12]

Second, *Moran* is also "objectively wrong," *Wenke v. Gehl Co.*, 274 Wis. 2d 220, ¶ 21, and "unsound in principle," *Johnson Controls*, 264 Wis. 2d 60, ¶ 99, because it would render Section 974.07(12) meaningless, while also raising equal protection concerns. *Moran*'s holding is based upon the supposition that Wis. Stat. § 974.07 created two testing regimes: (1) testing at private expense under Subsection 974.07(6)(a)2; and (2) testing at state expense under Section 974.07(7). But Section 974.07(12) details a *specific* framework for determining whether testing will be at private or state expense, one that is sensible as a matter of fairness and "equal protection." *See Moran*, 284 Wis. 2d 24, ¶ 66 (Wilcox, J., concurring) (noting that the Court's interpretation raises "equal protection" concerns). Section 974.07(12) provides that whether testing is done at private or state expense is based upon whether the movant

[12] *Moran* "acknowledge[d] the plausibility of the position" that Wis. Stat. § 974.07(6)(a)2 is an "inspection" statute, and not a "testing" statute, 284 Wis. 2d 24, ¶ 49, but rejected that reading based in part on a previous concession of the State, made a year earlier in *State v. Hudson*. *Id.* ¶¶ 49–53. Notwithstanding the State's position at the court of appeals in *Hudson*, the plain statutory text controls the analysis, as *Moran* itself acknowledged. *Id.* ¶ 54.

is "indigent," and lays out standards for making that indigency determination. Wis. Stat. § 974.07(12).

Moran did not address this indigency provision at all, and *Moran*'s holding appears to render it a nullity. After all, if testing under Subsection 974.07(6)(a)2 is always at private expense, and Section 974.07(7) is always at state expense, there would be no work left for Section 974.07(12)'s indigency regime to do. This would violate the principle that a "statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect." *Donaldson*, 93 Wis. 2d at 315.

Third, the issue of "touch DNA" raised by the present case suggests that the *Moran* framework may prove "unworkable in practice." *Johnson Controls*, 264 Wis. 2d 60, ¶ 99. In Part I, *supra*, the State endeavored to apply *Moran*'s holding that Subsection 974.07(6)(a)2 requires the movant to show that there is "evidence containing biological material" that the movant wishes to test to touch DNA. Candidly, whether the movant has satisfied this standard in a particular case may prove challenging given the often invisible nature of touch DNA, raising the specter of this approach being "unworkable." *Johnson Controls*, 264 Wis. 2d 60, ¶ 99. The State respectfully submits that the solution to this problem is to interpret Wis. Stat. § 974.07 consistently with the plain text, such that testing can only occur if ordered by the circuit court under Section 974.07(7).

* * *

Overruling *Moran* would simplify resolution of this case. Assuming this Court adopts the State's understanding of Wis. Stat. § 974.07, if this Court then agrees with the State's argument in Part II that Denny has not met Section 974.07(7)'s "reasonably probable" standard, the circuit court's order denying Denny's testing request would be affirmed in its entirety, without need for remand. And if this Court disagrees with the State's arguments in Parts I and II, and decides that Denny has satisfied Section 974.07(2)'s relevancy standard and Section 974.07(7)'s "reasonably probable" standard, the Court would then remand to the circuit court for determination of whether Denny is "indigent" under Section 974.07(12).

CONCLUSION

The decision of the court of appeals should be reversed.

Dated this 19th day of July, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,689 words.

Dated this 19th day of July, 2016.

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Dated this 19th day of July, 2016.

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