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

REPLY BRIEF OF THE STATE OF WISCONSIN

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INTRODUCTION

Denny's response brief only reinforces the State's argument that *State v. Moran*, 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884, must be overruled. Denny offers no meaningful defense for *Moran*'s holding that Subsection (a)2 of Wis. Stat. § 974.07(6) contains a separate DNA testing regime, given that this Subsection merely outlines certain "disclos[ure]" obligations. And Denny abandons *Moran*'s central taxonomy—testing at private expense occurs under Subsection 974.07(6)(a)2, whereas testing at public expense occurs under Section 974.07(7)—because he recognizes that this would render Section 974.07(12)'s indigency provisions meaningless. Instead, Denny seeks to rewrite *Moran*, such that testing under Section 974.07(7) can now *also* occur at private expense, meaning that—in Denny's view—the Legislature adopted two different private-expense DNA testing regimes in the same statute. Finally, Denny asks this Court to delete *Moran*'s requirement that the convicted defendant must show "with particularity" that the evidence sought to be tested "contain[s] biological material." *Moran*, 284 Wis. 2d 24, ¶¶ 41–42 (citation omitted). But this requirement is a necessary limitation on *Moran*'s holding on the Subsection 974.07(6)(a)2 testing regime (if that holding is to be retained), given that this regime is not limited by Section 974.07(7)'s standards.

Instead of accepting Denny's invitation to prop up *Moran*'s textually indefensible analysis with additional

textually unsupportable adjustments, this Court should simply overrule *Moran*. This Court can then apply the statutory text, as written, which provides for testing if the movant shows that there is a "reasonable probab[ility]" that DNA testing would lead to no conviction or prosecution. Wis. Stat. § 974.07(7). Under this statutory regime, Denny's parade of horribles will never come to pass. Convicted defendants who can make a credible showing that DNA testing supports their case, under Section 974.07(7)'s standards, would be entitled to testing. On the other hand, convicted defendants like Denny—who cannot satisfy Section 974.07(7)'s "reasonable probability" requirement—would not obtain testing.

Alternatively, if this Court retains *Moran*, it should reject Denny's request to delete that case's biological material component. Allowing DNA testing for any item collected at a crime scene that could perhaps contain touch DNA would lead to a limitless testing regime that neither *Moran* nor the Legislature contemplated. And if *Moran* survives, Denny should be required on remand to show "with particularity" that each of the items he seeks to test are relevant to his conviction and "contain[ ] biological material."

ARGUMENT

I. Denny's Request That This Court Rewrite *Moran* In Order To Save It Only Shows That *Moran* Cannot Stand

As the State explained in its opening brief, *Moran* should be overruled because its holding that Subsection (a)(2) of Wis. Stat. § 974.07(6) establishes a separate testing regime at private expense: (1) is contrary to Subsection 974.07(6)(a)2's text, which does not mention testing at all; (2) would render Section 974.07(12) meaningless because that provision is the one designed to determine whether testing is done at private or public expense; and (3) includes a necessary biological material limitation that is difficult to apply to touch DNA. *See* Opening Br. 42–45. As such, *Moran* is "objectively wrong," *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405, "unsound in principle," *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257, and "unworkable in practice," *id.*

Denny has no meaningful response to these arguments, and instead attempts either to ignore them or to urge this Court to make textually indefensible adjustments to *Moran*.

First, Denny offers no serious response to the State's argument that Subsection 974.07(6)(a)2 simply does not mention testing. Denny's entire answer to this outcome-determinative point is the terse statement that Subsection 974.07(6)(a)2 "*does not prohibit* DNA testing once a movant

gains access to the evidence." Denny Br. 10 (emphasis added). But Subsection 974.07(6)(a)2 does not mention "testing," while Section 974.07(7) specifically does. When the Legislature declines to use the word "testing" in one subsection, but then uses that word in the very next subsection, the clear implication is that testing is not contemplated by the former. *See Kimberly-Clark Corp. v. PSC,* 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983) ("[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.") (citation omitted). To take just one analogous example, Wis. Stat. § 971.23(1) explains "[w]hat a district attorney must disclose to a defendant," whereas Wis. Stat. § 971.23(5) thereafter provides for "[s]cientific testing" of the items disclosed under some circumstances. Plainly, Section 971.23(1) does not contain an unstated testing component of its own. Accordingly, Denny's claim that a "'discovery' provision . . . means DNA testing is an available option," Denny Br. 11, is simply false.

Denny's cited cases, Denny Br. 12–13, only support the State's argument that an explicit authorization of testing is required. *Price v. Pierce*, discussed an Illinois statute, 725 Ill. Comp. Stat. 5/116–3(a), that specifically provides for DNA testing. 617 F.3d 947, 952 (7th Cir. 2010). Similarly, *Brown v. Secretary for the Department of Corrections*, dealt with a Florida law, Fla. Stat. § 925.11, that specifically deals with

"testing." 530 F.3d 1335, 1337 (11th Cir. 2008). And Justice Alito's opinion in *District Attorney for the Third Judicial District v. Osborne* distinguished between the current "*discovery* rights now available to habeas petitioners" and a new, different right of "scientific *testing* of evidence in possession of the prosecution." 557 U.S. 52, 78 (2009) (Alito, J., concurring) (emphases added).

Second, Denny argues that *Moran* did not render Wis. Stat. § 974.07(12)'s indigency provision irrelevant because, in Denny's view, that provision determines whether testing under Section 974.07(7) occurs at State or private expense. Denny Br. 12. But *Moran* is built around the understanding that Subsection 974.07(6)(a)2 is for testing at private expense, whereas Section 974.07(7) is for testing at public expense. *Moran* made this point explicitly at the beginning and end of the opinion. *See Moran*, 284 Wis. 2d 24, ¶¶ 3, 57. Without this taxonomy, *Moran*'s rationale for creating a separate testing regime under Subsection 974.07(6)(a)2—which is already textually impermissible—becomes inexplicable, as it makes no sense for the Legislature to have adopted two different DNA testing regimes at private expense in the very same statute.* Accordingly, if *Moran* is to be retained, Section

* Denny claims that having two testing-at-private-expense regimes makes some sense because private-expense testing under Section 974.07(7) could be done at the "State Crime Laboratory." Denny Br. 12. This argument is baseless, especially because Section 974.07 does not mention the State Crime Laboratory at all. If access to the State Crime

974.07(12) would be rendered meaningless. This is a particularly important point, given that Section 974.07(12) appears not to have been considered by *Moran*, perhaps because it was not mentioned in the briefing. *See* State's Suppl. Br., State v. Moran, 2005 WI 115, 284 Wis. 2d, 700 N.W.2d 884 (No. 2003AP561), 2005 WL 4888959; Moran's Suppl. Br., State v. Moran, 2005 WI 115, 284 Wis. 2d, 700 N.W.2d 884 (No. 2003AP561), 2005 WL 4888957.

Third, in response to the State's argument that *Moran* only authorizes testing where the movant can show "with particularity" that the evidence sought to be tested "contain[s] biological material," *Moran*, 284 Wis. 2d 24, ¶¶ 41–42 (citation omitted), Denny claims that "there is no such requirement in *Moran*," Denny Br. 17, but this is demonstrably false. *Moran* held: "[w]e conclude that the plain language of § 974.07(6) gives a movant the right to conduct DNA testing of physical evidence . . . *that contains biological material or on which there is biological material*, if the movant meets several statutory prerequisites." *Moran,* 284 Wis. 2d 24, ¶ 3 (emphasis altered). *Moran* announced that "the evidence *containing biological material* must be 'relevant to the investigation or prosecution that resulted in the conviction.'" *Id.* ¶ 42 (emphasis added). And *Moran* explained that "the plain language of § 974.07(6) gives the

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Laboratory was the reason for two separate testing regimes, surely the Legislatures would have mentioned this in the text of the statute.

defendant the right to test the sought-after evidence *containing biological material* if the circuit court determines that [the convicted defendant] meets all statutory prerequisites." *Id.* ¶ 57 (emphasis added).

Denny further argues that the biological material requirement would not "make sense, for it would require the defendant to show the presence of testable DNA before he has a right to even look at the evidence." Denny Br. 17. But that only shows why *Moran* should be overruled. Subsection 974.07(6)(a)2 contains no testing component at all. Instead, it requires the State to "disclose" the evidence to the movant, such that the movant can look at the evidence and then decide whether submitting a motion for DNA testing under Section 974.07(7)'s standards is worth the candle, including after seeing whether the evidence contains biological material. *Moran*'s regime—under which the convicted defendant can obtain testing under Subsection 974.07(6)(a)2 without satisfying Section 974.07(7)'s standards, but only after specifically identifying the biological material he wishes to test—is "unworkable in practice" as applied to (at least) touch DNA. *Johnson Controls*, 264 Wis. 2d 60, ¶ 99.

II. Retaining *Moran*'s Holding That Subsection 974.07(6)(a)2 Contains A Testing Regime, While Deleting *Moran*'s Biological Material Requirement, Would Create A Limitless DNA Testing Statute

Denny's approach of retaining *Moran*'s holding that Subsection 974.07(6)(a)2 includes a separate testing regime,

but deleting *Moran*'s biological materials requirement, would lead to an unlimited testing regime that neither *Moran* nor the Legislature contemplated. Denny would have this Court apply a simple relevancy standard under Section 974.07(2) to any request for testing under Subsection 974.07(6)(a)2, without requiring the movant to make any other showings. Denny admits that this "very broad" standard would allow testing of evidence that has "'any tendency' to make a fact of consequence more or less probable." Denny Br. 19. But the very reason the biological materials requirement is so essential to *Moran*'s framework is that it prevents *Moran*'s Subsection 974.07(6)(a)2 testing regime from becoming entirely unbounded.

The facts of this case illustrate the limitless nature of Denny's version of *Moran*. Denny argues that *any* item is "relevant," and thus subject to DNA testing under Subsection 974.07(6)(a)2, if it *could have* been "grasped by the perpetrator in a violent struggle." Denny Br. 20. The court of appeals' theory was not much different, allowing testing of any item "the assailant(s) *may have* handled." App. 35, ¶ 45 (emphasis added). Denny argues that this would not lead to unlimited testing because in "other cases, with different facts, the items collected by police might not be relevant to identifying the perpetrator." Denny Br. 21. But Denny is unable to identify—*even hypothetically*—any case in which post-conviction DNA testing of evidence collected by the police at the crime scene would not satisfy his view of *Moran*, at

least where the movant asserts that someone else must have done the crime. If the movant simply claims innocence—no matter how overwhelming the evidence against him—then the movant can speculate that the "true" perpetrator could have touched *anything* at the scene of the crime. Such "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).

Denny's assertion that the State's position "would effectively bar" DNA testing and "lock errors in place" is baseless hyperbole. Denny Br. 23. Under the plain statutory text, the movant would obtain DNA testing by filing a motion under Section 974.07(2) seeking to test "evidence . . . relevant to the investigation or prosecution" in the possession of the State that has "not been previously . . . test[ed]" or that may be tested now using a different "scientific technique" yielding "more accurate or probative results." Wis. Stat. § 974.07(2)(a)–(c). A circuit court would then grant such a motion if the movant satisfied Section 974.07(7)'s standards, including the "reasonably probable" requirement. If the movant satisfied Section 974.07(7), the choice of who would pay for the testing would then be decided under Section 974.07(12).

Accordingly, Denny's parade of horribles, *see* Denny Br. 29–30, simply would not occur because convicted defendants

who can satisfy Section 974.07(7)—those with a credible argument that DNA testing satisfies the "reasonably probable" standard in light of the evidence in their particular case—would be entitled to testing, which the State would pay for if they are indigent. That is the sensible, comprehensive DNA testing regime that the Legislature adopted.

III. Denny Cannot Satisfy Section 974.07(7)'s "Reasonably Probable" Standard

Denny argues that the "crux of this case" is whether it is "reasonabl[y] probabl[e]" that DNA testing results would lead to a "different outcome" here. Denny Br. 31. If this Court properly overrules *Moran*, Section 974.07(7)'s "reasonably probable" standard would indeed be the central remaining question in this appeal. That is a standard that Denny cannot meet in light of the overwhelming evidence of his guilt.

As a threshold matter, Denny argues that this Court should apply the standard from *Strickland v. Washington*, 466 U.S. 668 (1984), thereby allowing DNA testing if it would "undermine confidence" in the result. Denny Br. 32–33 (citation omitted). As explained by the State, Opening Br. 38–41, the newly discovered evidence test more closely tracks the text of Section 974.07(7), while *Strickland* seeks to measure the performance of deficient counsel at trial, which is a different inquiry. *Compare State v. McCallum*, 208 Wis. 2d 463, 475, 561 N.W.2d 707 (1997) (describing the newly discovered evidence test as whether there is a "reasonable probability that a jury . . . would have a reasonable doubt as

to the defendant's guilt"), *with State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (describing the *Strickland* test as whether "unprofessional errors" during the course of a trial "undermine confidence in the outcome").

In any event, both the State, Opening Br. 40, and Denny, Denny Br. 35, agree that the ultimate result in this case would be the same under either approach to defining the Section 974.07(7) standard. Just as in *State v. Hudson*, Denny was convicted with "overwhelming evidence." 2004 WI App 99, ¶ 19, 273 Wis. 2d 707, 681 N.W.2d 316. "Denny was not convicted because of a single eyewitness or a dubious confession since retracted." App. 54, ¶ 84. Instead, 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.

Denny imagines several possible DNA test results, *see* Denny Br. 40, but none of these hypothetical results would explain away the 36 inculpatory statements from different, often unconnected witnesses. Denny speculates that DNA evidence could have matched an unknown "convicted offender," Denny Br. 40–41, that none of his DNA on the specific items he seeks to test could be found, Denny Br. 41, or that "redundant DNA profile[s]" that match an unknown third party could be found, Denny Br. 41. This does not come close to satisfying Section 974.07(7)'s standard that it be "reasonably probable" that the results of the trial would have

been different. Denny's arguments that a drug user's bedroom *could* contain some DNA—be it the DNA of friends, family, or criminals who used drugs with him—is entirely insufficient. Indeed, any drug-use area very likely contains DNA from many people, including any number of strangers (including drug users with criminal records).

Denny has no basis to suggest that DNA testing would help exonerate him in the context of the overwhelming evidence of his guilt. Instead, he rests upon the boilerplate argument that DNA evidence might find that someone else was (also) at the scene of the crime, as well as the fact that his lawyer managed to scrounge up a line or two of questioning for each of the large number of witnesses that all testified to the same point: Denny and his brother repeatedly bragged about killing the victim. Denny Br. 46–47. But it would have been remarkable if Denny's attorney was *not* able to ask even a single useful question of the many witnesses who implicated his client in the murder. In all, Denny's arguments—which could be made by almost any convicted defendant claiming that someone else must have done it—do not come close to satisfying Section 974.07(7)'s standard.

IV. If This Court Retains *Moran*, It Should Remand This Case To The Circuit Court For Application Of The Proper Standard

If this Court decides to retain *Moran,* then the Court should remand this case to the circuit court for further proceedings, just as it did in *Moran* itself. The circuit court

never properly decided whether Denny had identified items that were (1) relevant to his case *and* that (2) "contain[ ] biological material" that he wants to test for DNA. Opening Br. 26–34. *Moran* does not permit a movant to simply speculate, as Denny has done so far in this case, that certain items might theoretically be relevant or might contain biological material. *See, e.g.*, Denny Br. 36 ("*Shattered Bong*" "must have" been held by the perpetrator); Denny Br. 38 ("DNA could be on the inside of the gloves"); Denny Br. 38. ("The perpetrator may have worn the cap or grabbed it off [the victim] during the struggle"); Denny Br. 39 ("it is likely the perpetrator touched the chair"). Therefore, if this Court chooses not to overrule *Moran*, Denny should be required to meet *Moran*'s standards on remand. Opening Br. 45.

CONCLUSION

The court of appeals' decision should be reversed.

Dated this 9th day of September, 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 2,963 words.

Dated this 9th day of September, 2016.

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 9th day of September, 2016.

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