**STATE OF WISCONSIN**

**IN SUPREME COURT**

**DISTRICT I**

**Appeal No. 2018AP0591-CR**

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STATE OF WISCONSIN,

Plaintiff-Respondent,

**LC Case No. 00-CF-3635**

v.

ANTONIO L. SIMMONS,

Defendant-Appellant-Petitioner.

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# REPLY TO PLAINTIFF-RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

**TABLE OF CONTENTS**, cont'd



## ARGUMENTS

### I. A DECISION BY THE SUPREME COURT IN THIS CASE WILL CLARIFY TERMS IN WIS. STAT. 974.07

Simmons argued in his petition that a decision by this court will help develop, clarify, and harmonize the 974.07 DNA testing statute and give meaning to the words "investigation", "before the prosecution", "reasonably probable", and provide the proper "standard of review" for courts to consider.

Simmons argued in his petition that the Court of Appeals decision is in

conflict with controlling opinions of the United States Supreme Court, the Wisconsin Supreme Court, and other court decisions in ***Arizona v. Youngblood***, 488 U.S. 51 (1988); ***California v. Trombetta***, 467 U.S. 479 (1984); ***State v. Moran***, 2005 WI 115, 284 Wis.2d 24 overruled on other grounds; ***State v. Denny***, 2017 WI 17, 373 Wis.2d 390; ***State v. McGrone***, 798 So.2d 59 (Miss. 2001); and ***U.S. v. Elliott,*** 83 F.Supp.2d 637 (E.D. Va. 1999).

The respondent argues that once the circuit court determined that Simmons has not met 974.07(7)(a)2's reasonable probability requirement, the circuit court had no reason to decide the other issues. Response at 11. Sec. 974.07(2)(a)-(c) demands the court to determine if the evidence is relevant to the investigation or prosecution that resulted in the conviction. The court must determine if the evidence is in the actual or constructive possession of a government agency. The court must determine if the evidence was ever tested for DNA. The court must perform the above requirements "before it can move on to determining 974.07(7)(a)2's reasonable probability requirement". This court stated in ***Moran***, that the circuit court "must undertake the three- pronged analysis in 974.07(7)(2)". If these requirements are satisfied, the plain language of the statute dictates that the movant should receive access to the evidence and may subject the material to DNA testing. Id at ¶ 43. The circuit court in ***Moran*** did not evaluate whether the evidence met the requirements

in sub (2) because it concluded that the defendant's motion offers no explanation as to how the testing of five blood samples could have impacted the jury verdicts and that such evidence would not make more credible the defendant's absurd theory that he stabbed Ms. Pinchard nine times inadvertently. Because the circuit court did not analyze the language of 974.07(2), it did not specifically determine whether the evidence was relevant. Because the court in the case at bar did not consider ***Moran*** under the standards set out in 974.07(2) and (6), the circuit court proceeded on the wrong theory of the law. Id at ¶¶ 44-45, 48. As in ***Moran***, in the Simmons case the circuit courts did not undertake the three-pronged analysis in 974.07(2), therefore it proceeded on the wrong theory of the law.

## II. THE DNA TESTS ON THE EVIDENCE IN AND AROUND THE WHITE CAR WOULD HAVE SUPPORTED THE 3RD PARTY DEFENSE

Simmons argued that DNA test on the hat, shoes, headwrap, and bottles of partially consumed alcohol would have allowed him to present a 3rd party defense at trial. Zakea Jones was chased from the scene of the shooting in the white car the eyewitnesses testified to seeing Simmons shoot from. Jones was apprehended inside the white car. Jones told Officer Davis that a guy named C-Note fled from the car. Jones told the detectives that she did the shooting. Jones confessed to the shooting in a sworn affidavit. The evidence inside and around the white car was " relevant"

to the eyewitness testimony. If the evidence contains C-Note's DNA on it, it would corroborate Jones' statement to Officer Davis that the man in the white car was C-Note and not Simmons. DNA evidence in and around the white car identifying C-Note would undermine the reliability of the four eyewitnesses and allow Simmons to present a 3rd party defense at trial. Petition at 22-23.

## III. THE FAILURE OF THE POLICE TO COLLECT AND INVENTORY THE EVIDENCE WAS A DENIAL OF DUE PROCESS

The Respondent argues that in the case of ***State v. Greenwold***, 189 Wis.2d 24 (Ct. App. 1994), due process protections do not extend to evidence never collected in the first instance nor that it applies in postconviction proceedings under 974.07. Simmons' case implicates the state's duty to preserve evidence. The case of ***District Attorney's Office for the Third Judicial District v. Osborne***, 557 U.S. 52 (2009) decides the question of whether the state violated any constitutional obligations it had to preserve evidence. The state argues that Simmons cannot make a prima facie showing under ***Youngblood's*** standards establishing a due process violation if the evidence was not inventoried. Response at 3, 14. If the police can simply not collect DNA evidence, it would make 974.07 and 968.205 meaningless and render void, as a matter of law, all citizens right to a fair trial and due procees. The respondent's argument is like stepping back into the stone age. His proposal is

inconsistent with any DNA statue, and allows law enforcement to not collect or to destroy (same thing) all evidence that could not only exonerate an individual, but also lead police to the guilty. Further, the Court of Appeals stated in ***State v. Parker***, 2002 WI App 159, ¶ 13, 256 Wis.2d 154, that ***Trombetta*** and ***Youngblood*** are in fact applicable to the postconviction destruction of evidence.

## IV. THE REFUSAL OF THE CIRCUIT COURT TO HOLD A HEARING AS TO WHY THE EVIDENCE WAS NOT COLLECTED AND INVENTORIED WAS A SECOND DENIAL OF DUE PROCESS

Simmons argued that he was denied due procees twice. The first denial was the police officers failure to collect and inventory evidence in the form of a baseball hat, shoes, head wrap, and bottles of alcohol. The Milwaukee Police Department's Standard Operating Procedures "require" the "collection" and "inventory" of such evidence which could contain possible DNA, which could be used to identity perpetrators. The second denial was the denial of a hearing at which the police would be forced to testify and explain why the evidence was recorded in Det. Armbruster's police report, why Armbruster drew a diagram of where he found the evidence, why Armbruster placed crime scene placards next to each item prior to the evidence being photographed, why Armbruster had identification technician Officer LeCourt photograph and fingerprint the evidence, but, finally, why that evidence was

never collected and inventoried. Petition at 12-17. The Respondent did not address this argument.

## V. THE ISSUE OF WHETHER THE PETITION FOR REVIEW WAS UNTIMELY FILED HAS BEEN DECIDED

The Respondent argues that this court should reassess whether it properly reinstated Simmons untimely filed petition for review. The respondent is attempting to use the petition for review forum by placing an untimely and unresponsive issue in his responsive brief. Issue number 3 is unresponsive to this court's directive for the respondent to respond to Simmons' petition. He is also attempting to circumvent the 14 days he was given to respond to Simmons' habeas corpus filing. He is well beyond that date.

To be sure, on October 13, 2020, this court acknowledged receipt of counsel's construed habeas corpus petition. On that same date, the respondent received his copy too. This attorney sent all parties copies on that date. This court then issued its decision on 11/19/2020, and ordered a 14 day time period for a response to the petition for review, thereby closing the door on its habeas corpus decision.

Furthermore, the untimely response fails to acknowledge this court's inherent authority to make discretionary decisions in the interest of justice, and completely determine issues under that legal doctrine.

## VI. A DENIAL UNDER 974.07 WIS. STATS. CAN BE APPEALED

The respondent also misstated the right to appeal the 974.07 action by stating it is an appeal of a collateral matter related to a conviction. He missed 974.07(13) Wis. Stat. which holds "An appeal may be taken from an order entered under this section as from a final judgment." Further, this action is directly related to Simmons' direct appeal as it relates to DNA evidence withheld by the respondent, and the state's continued interference in Simmons' due process right to a fair trial.

## CONCLUSION

For the reasons stated in his Petition for Review and the reasons stated above, Simmons prays this court recognizes the miscarriage of justice in this case and constitutional violations, and grant the Petition for Review.

Respectfully submitted this 2nd day of February, 2021.

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## CERTIFICATION OF COMPLIANCE WITH 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 § 809.19(12).

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

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

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 829.62(4), Wis. Stats., for a brief produced with a proportional serif font. The length of this brief is 1,415 words.

Dated: February 2, 2021

*s/Robert N. Meyeroff*
ROBERT N. MEYEROFF