STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 89-CF-946

RICHARD BERANEK,

Defendant.

MOTION FOR NEW TRIAL BASED ON DNA AND OTHER NEWLY DISCOVERED EVIDENCE

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INTRODUCTION

Richard Beranek files this Motion for a New Trial because exculpatory DNA results establish his longstanding claim of innocence. He asks this Court to vacate his convictions for the sexual assault of K[redacted] D[redacted] and related offences in this case and grant him a new trial pursuant to Wis. Stat. § 974.07. In addition, this Court should grant Mr. Beranek a new trial based on newly discovered evidence under Wis. Stat. § 974.06 as well as in this Court's inherent authority to grant a new trial in the interest of justice based on the exculpatory DNA results and the recent admission by the FBI that its special agent testified falsely in Mr. Beranek's case.

The only physical evidence linking Mr. Beranek to the crime was a single hair collected from underwear left at the scene by the rapist. An FBI hair analyst, Special Agent Wayne Oakes, testified that his microscopic examination of this hair showed that it was a "match" to Mr. Beranek. Not only was this damning affirmative evidence of guilt, but it provided the only corroboration of Ms. D[redacted]'s eyewitness identification, which she made approximately two years after she saw her assailant, and also contradicted the six alibi witnesses who placed Mr. Beranek in North Dakota at the time of the assault. The FBI has recently admitted that Special Agent Oakes's testimony in this case "exceeded the limits of science" and was therefore false and misleading.

Indeed, DNA testing ordered by this Court has conclusively proven that the hair comparison testimony in this case was wrong. Mitochondrial DNA testing of all of the hairs collected from the perpetrator's underwear shows that none of these hairs originated from Mr. Beranek. Results of other DNA testing on the victim's underwear further support the fact that Mr. Beranek did not commit this crime. Based on this new forensic

evidence and the misleading expert testimony at trial, Mr. Beranek respectfully asks this Court to grant him a new trial.

I.

BACKGROUND

A. The Crime

On March 2, 1987, at around 4 p.m., a man entered the home of K[redacted] D[redacted] and sexually assaulted her. Ms. D[redacted]'s home was in a small residential neighborhood, surrounded by farmland, outside of Stoughton, Wisconsin. *See* Exhibit 1 (Satellite Photo of Stoughton Neighborhood). Earlier in the day, at around 12:30 to 1:00 p.m., an unknown man phoned Ms. D[redacted]'s home and sexually propositioned her. After asking Ms. D[redacted] what she was doing, the caller said "Would you like to screw?" and "Do you like it when you get eaten out?" *See* Exhibit 2 (Statement of K[redacted] D[redacted], 3/2/87).[1] [2] Ms. D[redacted] received a second call at around 3:00 p.m. in which the caller again asked "do you like to be eaten out." *See* Exhibit 2. Ms. D[redacted] also reported that a man fitting the description of the person who assaulted her had been stalking her for the past 8-9 months. *See* Exhibit 3 (DCSD Supp. Rpt., 3/3/87). On one occasion, this same man approached her daughter in the supermarket and handed her daughter a note asking for sex:

> She was at Tom's Market in the City of Stoughton when this man who was following her, gave a note to her daughter. She stated this note said in essence that the man was fond of her and would like to go to bed with her. She states this note was written on the back of a new car invoice or slip of paper from a car dealership. She stated she believed that this person lived on Page St. in Stoughton and drove a newer vehicle.

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[1] Ms. D[redacted] told police that she had been getting prank phone calls for a long time, but had never thought they would amount to anything. TR Vol. 1 at 63.

[2] "TR Vol. __ at __" denotes citations to the trial transcript of *State of Wisconsin v. Richard Beranek.*

Id. Law enforcement documents do not reflect why Ms. D[redacted] believed the man lived on Page Street in Stoughton or what efforts (if any) were made to investigate whether this stalker was responsible for the rape.

Ms. D[redacted] provided a detailed account of the assault to police and testified at trial. She stated that, after the phone call, she dropped off her kids at her sister in law's home and came home to prepare for a date that evening. TR Vol. 1 at 62. Ms. D[redacted] came home around 4 p.m., turned on the TV, and went to her bedroom to change clothes. A man surprised her while she was changing, and Ms. D[redacted] stated that "he had to have come out of the bedroom closet." *Id.* The two struggled as the man ripped off Ms. D[redacted]'s clothing and threw her on the bed. *Id.* at 33-34. Ms. D[redacted] resisted, scratching the man in the face. *Id.* at 36. During the struggle, Ms. D[redacted] recounted that the man said to her, "I'm finally going to get you." *Id.* at 63. Consistent with the phone call Ms. D[redacted] received earlier that day, the assailant also made some type of comment about oral sex. *See* Exhibit 4 (DCSD Supp. Rpt., 3/10/87).

During the assault, the man brandished a sharp tool resembling pliers and threatened to cut her. *Id.* at 37. The perpetrator pushed her down onto her bed and covered her head with a quilt. *Id.* at 35. Ms. D[redacted] recounted that her assailant raped her orally, vaginally, and anally during the attack. *Id.* at 38-40. Before he left, the assailant threatened that if Ms. D[redacted] reported the assault, he would harm her children. *Id.* at 40. Once alone, Ms. D[redacted] contacted her ex-husband, T[redacted] D[redacted], who then spent the night at her residence. *Id.* at 41-42. The police were called soon after Mr. D[redacted] arrived, and Ms. D[redacted] gave a short statement at around 6:30 that evening. *Id.* at 43. A fuller description of the events was obtained by police from Ms. D[redacted] over the course of the

following weeks.

B. Description of the Assailant

The morning following the assault, police re-interviewed Ms. D[redacted] and recorded her description of her attacker as a white male, no mustache or beard, without glasses, wearing blue work pants and a blue work shirt. *See* Exhibit 3. In a later interview, she estimated his height to be approximately 5'8 to 5'10. *See* Exhibit 4. On March 12, 1987—ten days after the assault—Ms. D[redacted] met with a police sketch artist and created a composite sketch that she described as 90% accurate. TR Vol. 1 at 97-98. The sketch depicts a clean shaven man Caucasian man with a cleft chin and hair reaching almost to his shoulders. *See* Exhibit 5 (Composite Sketch, 3/12/87). The lower left-hand corner of the sketch listed the following description:

> ... /W, LT. BRO HAIR; BLUE EYES
>
> ...'9 – 5'10''; SLENDER BUILD
>
> ...'S TO MID 30'S
>
> ...LEFT ON CHIN
>
> ...AS WEARING LT. BLUE SHIRT
>
> ...ARK PANTS, DARK BELT

Id.[3] A law enforcement bulletin published on May 1, 1987 contained a slightly different description:

> M/W, lt. brown hair, 5'9-5'11, slender build, cleft
> on chin and acne scars on face.

See Exhibit 6 (DCSD Bulletin). Ms. D[redacted] also described the assailant has having dirty

[3] The copy of this sketch in undersigned counsel's possession is cut off at the edge, a full description can be found on the State's Trial Exhibit 1.

hands with dirt under his nails such as an auto mechanic may have. *See id.*

C. The Investigation

The two-year investigation of this case is not well documented. However, police records indicate that detectives with the Dane County Sheriff's Department and Ms. D[redacted] herself believed the assailant to have been familiar with Ms. D[redacted], and that the assault was connected to the unknown stalker and obscene phone calls. For example, the Law Enforcement Bulletin distributed by the Dane County Sheriff's Department reports that "[t]he suspect gave the victim the impression that he had previous knowledge of her and her children. . . ." The Bulletin also noted that it was believed that the assailant was hiding in Ms. D[redacted]'s home "awaiting her return." Exhibit 6; *see also* TR Vol. 3 at 53 (State argued "He's already in the house when she gets there."). Less than two weeks after the crime, a local man named Michael Edwards who lived on Page Street[4] was identified by the Stoughton Police Department as a suspect. However, Ms. D[redacted] did not pick him out of a photo lineup. *See* Exhibit 4.

Other evidence likewise suggested that the perpetrator was a local man familiar with Ms. D[redacted]. Ms. D[redacted] moved away from her home soon after the assault and did not reside there for over a year after the assault. TR Vol. 1 at 45. Soon after she moved back in, the harassing phone calls resumed. Ms. D[redacted] described one call she received in the middle of the night on February 6, 1989 or early morning hours of February 7, 1989 in which a male caller identifying himself as a sheriff's deputy informed her that a suspect had been arrested and attempted to set up a meeting with her at her home. *See* Exhibit 7 (DCSD Supp. Rpts.). Sherriff's officers determined that this call was not from

[4] Records from a 1994 burglary conviction list his address as on Page Street in Stoughton. *See State v. Edwards*, No. 1994 CF 000774 (Dane Co. Circuit Ct.).

law enforcement officers working on the case. *Id.* Arrangements were made to trace phone calls to Ms. D[redacted]'s home. *Id.* Less than two weeks later, a male trying to disguise his voice called and said something to the effect of "I know the cops are there but that won't stop me." *Id.*

Ms. D[redacted] also reported on February 20, 1989 that, six weeks earlier, she saw someone walking around her home. *Id.* She called her boyfriend, P[redacted] E[redacted], who checked her home. *Id.* Although the suspicious person was no longer there, footprints were found by Ms. D[redacted]'s back door. *Id.* E[redacted] had also received an unsigned, threatening note in his mail box. D[redacted] stated that the note warned E[redacted] to "keep away from K[redacted] D[redacted] because the unsigned author of the note was going to have her for his girl." *Id.* The note was fashioned from cut out letters to conceal its author's identity. *Id.*

On February 21, 1989, the day after she received the threatening phone call stating that the police "won't stop me," Ms. D[redacted] was followed in her car by a suspicious person. *Id.* She drove through Stoughton, making turns to determine if she was being followed. *Id.* The car continued to follow her until she pulled into a parking lot where a State Police vehicle was parked. *Id.* Ms. D[redacted] gave a description of the car that followed her as a newer model red 2 door with a CB antenna and a large base in the middle of the trunk. *Id.* The car had no rear license plate. Ms. D[redacted] was only able to describe the driver as a "white male, with possible light colored hair." *Id.*[5]

From March 1987 until April 1989, officers from the Sheriffs' Department

[5] Mr. Beranek could not have been the person who called and followed Ms. D[redacted] in 1989 because he was incarcerated at the time for an unrelated offense. *See* Exhibit 22 (Motion for Sentence Credit, *State v. Beranek*, No. 88-CF-65 (Chippewa County Circuit Ct.) (noting Mr. Beranek's confinement began on July 29, 1988).

periodically visited Ms. D[redacted] with photographic line-ups of suspects in the case. Other than the man immediately identified by the Stoughton Police Department, the record is silent as to the identity of any of these suspects or what other evidence led police to attempt to make an identification. On 14 such visits, no positive identification was made by Ms. D[redacted]. *See* Exhibit 8 (DCSD Supp. Rpts. re: Photo Lineup).

D. Mr. Beranek Identified

Mr. Beranek only became a suspect after he pleaded no contest in Chippewa County Circuit Court to second degree sexual assault in March of 1989. That conviction arose from allegations that Mr. Beranek sexually assaulted a 16-year-old girl on July 26, 1988, near his residence at that time in Bloomer, Wisconsin—over 200 miles from Ms. D[redacted]'s home. Because Chippewa detectives believed Mr. Beranek resembled the description given by Ms. D[redacted], a photographic lineup was prepared by the Chippewa Sheriff's Department and sent to Dane County investigators to be presented to Ms. D[redacted]. A copy of this photographic lineup is attached as Exhibit 9 (Photo lineup). On April 12, 1989, Ms. D[redacted] viewed the 8 photograph array and identified Mr. Beranek. *See* Exhibit 8. She stated that she was "almost positive" that Mr. Beranek's photo was of the man who raped her and went on to say that the photo "looks so much like him." *Id.* This identification was made over two years after the assault.

Based on the identification using a photographic lineup, arrangements were made to have Mr. Beranek appear in a live lineup. *See* Exhibit 10 (DCSD Supp. Rpt., 5/30/89). On June 14, 1989, Ms. D[redacted] again identified Mr. Beranek out of a lineup consisting of 8 persons. *See* Exhibit 11 (DCSD Supp. Rpt., 6/14/89). Ms. D[redacted] also identified Mr. Beranek while he was sitting at the defense table during her testimony at trial. *See* TR

Vol. 1 at 33.

E. Mr. Beranek was in North Dakota on the Day of the Crime

A number of witnesses testified that Mr. Beranek was in North Dakota—over 600 miles from Ms. D[redacted]'s home—during the week of March 2, 1987. Mr. Beranek's mother, Rose Beranek, stated that her son was living at his parents' home in Junction City, Wisconsin in February 1987. *See* TR Vol. 2 at 129. Junction City is over 130 miles from Ms. D[redacted]'s residence. *See* Exhibit 12 (Regional Map). Mrs. Beranek purchased a bus ticket for her son and put him on a bus leaving Stevens Point on his way to North Dakota to visit his sister. *See* TR Vol. 2 at 131. Mrs. Beranek received a phone call on the 27th, confirming he had arrived at his sister's home in Devils Lake, North Dakota. *Id.* at 133; *see* also Tr. Ex. 39[6] (phone bill corroborating call). Susan Hansen, Mr. Beranek's sister, confirmed that she picked Mr. Beranek up at the bus station in Devils Lake on February 27, 1987 and that he stayed at her home for six days. *Id.* at 145-46. The day after he arrived, Mr. Beranek assisted Ms. Hansen and her husband on a house painting job in Cando, North Dakota on February 28th. *Id.* at 148. Ms. Hansen testified that Mr. Beranek did not have money or access to a vehicle while he was in North Dakota. *Id.* at 154. Ms. Hanson confirmed that Mr. Beranek was with her for most of the week except one day in the middle of the week in which he found work loading potatoes onto a truck in Webster, North Dakota. *Id.* at 153.

Mr. Beranek's brother-in-law, Layle Hansen, also testified that Mr. Beranek was in North Dakota during the week of March 2, 1987. *See generally* TR Vol. 2 at 177-184. He described Mr. Beranek's work on the painting job on February 28th and also

[6] "Tr. Ex __" references exhibits introduced at Mr. Beranek's trial (*State of Wisconsin v. Richard Beranek*).

confirmed that Mr. Beranek stayed at their home from February 27th until he left for Wisconsin on March 6th. *Id.*

The testimony of Susan and Layle Hansen was corroborated by two people who had no relationship to Mr. Beranek. Darrell Reed testified that he hired Layle and Susan Hansen to paint his living room and dining room. TR Vol. 2 at 202. Mr. Reed said that he was introduced to Richard Beranek as Susan's brother who was helping on the job. *Id.* Mr. Reed identified Richard Beranek in court as the man who helped paint his house on February 28, 1987. *Id.* at 202-203. Janice Reed (Darrell's wife) also confirmed that she was introduced to a man named Richard who was painting her house that day. Although she described the man as having shoulder length dark hair, a mustache, dark eyes, and a slender build, she could not positively identify him in court or from a prior photographic lineup. *Id.* at 194-195.

In addition, Mr. Beranek was also seen in North Dakota by Joyce Hanson, his sister's mother in law. Joyce Hanson testified that she met Mr. Beranek (whom she identified in court) on Saturday, February 28, 1987. *Id.* at 207-209. Mr. Beranek accompanied his sister and brother-in-law to Joyce Hanson's residence to borrow painting supplies for the job in Cando, North Dakota. *Id.* Joyce Hanson remembered being introduced to Mr. Beranek as Susan's brother and that she gave Mr. Beranek a hug. *Id.*

Mr. Beranek's trip to North Dakota was also corroborated by documentary evidence. The Reeds wrote a check to Layle Hansen for $200, dated March 2, 1987. *See* Tr. Ex. 46. The Hansen's explained that the check was given to the Layle Hanson on February 28th, but postdated to March 2nd after Mr. Reed's paycheck would be deposited

into the account. TR Vol. 2 at 195-196. Mr. Beranek's presence in North Dakota is also reflected on an application for food stamps submitted to the Ramsey County, Devils Lake, Social Services Office. A form submitted by Susan Hansen on March 4, 1987 lists Mr. Beranek as a member of her household as of February 27, 1987. *See* Tr. Ex. 43. Mr. Beranek was added to the household for only that month, consistent with his account that he only stayed with his sister from the 27th of February to the 6th of March. TR Vol. 2 at 224.

F. Collection of Evidence

Because Ms. D[redacted] did not immediately inform police of the full extent of the assault, a rape kit was not taken the evening of the assault. However, the clothing Ms. D[redacted] was wearing at the time of the assault, specifically, torn underwear and a ripped blouse, was collected by Dane County Sheriff's Department Sgt. Macaluso the day after the assault.

Because she did not feel comfortable living in the house, Ms. D[redacted] stayed at her ex-husband's home and then found an apartment. TR Vol. 1 at 45. When she was preparing to move into her new apartment, she returned to her house. On that day, Ms. D[redacted] took the sheets and mattress pad from her bed and threw it into the washing machine. *Id.* However, the machine overloaded, leaving the contents wet, but not washed. *Id* at 46. Ms. D[redacted] then removed the contents from the washing machine and discovered a pair of men's underwear among the sheets. *Id.* She had never seen this underwear before and believed it to be left by her assailant. *Id.* Upon finding the underwear, she called her counselor at the rape crisis center, put the underwear in a bag, and then gave the underwear to her counselor at her next appointment. *Id.*

The rape crisis counselor, Nanci Newton, testified that Ms. D[redacted] gave her a brown paper bag on May 27, 1987 containing a pair of men's underwear. *Id.* at 78. Ms. Newton stored the bag securely at her office and then delivered it to the Dane County Sheriff's Department on June 19, 1987. Detective Kevin Hughes confirmed his receipt of the paper bag on that date. In recounting the facts of the case for an application for a search and seizure warrant, Detective Hughes described the underwear as "size 34 white 'Towncraft' briefs." *See* Exhibit 13 at 5 (Complaint for Search Warrant).

G. The Trial

Mr. Beranek's trial began on February 6, 1990. The State's case relied on the (1) eyewitness identification of the defendant by Ms. D[redacted] and (2) forensic hair comparison which associated Mr. Beranek with the underwear left by the assailant in Ms. D[redacted]'s bed.[7] Ms. D[redacted] testified about the details of the assault, the collection of the perpetrator's underwear, and subsequent identification of Mr. Beranek. *See generally* TR Vol. 1 at 31-76. Other witnesses, including DCSD detectives, provided additional context to Ms. D[redacted]'s description of the assault, established chain of custody for the evidence and discussed the procedures used to obtain an identification of Mr. Beranek. *See generally* TR Vol. 1 at 103-173; Vol. 2 at 16-55.

The only forensic evidence connecting Mr. Beranek to the assault was provided by FBI Special Agent Wayne Oakes. Special Agent Oakes testified that he received the men's underwear that had been recovered from Ms. D[redacted]'s bedclothes, and scraped the

[7] The State also presented evidence that Mr. Beranek obtained a driver's license under an assumed name on March 27, 1987 and contended that this was evidence of his consciousness of guilt. *See* TR Vol. 3 at 69. The defense explained that Mr. Beranek obtained the false identification so that he could continue working as a truck driver after his license was suspended. This was consistent with Mr. Beranek's work history in which he returned to driving a truck soon after obtaining a new license.

garment to collect hairs, fibers, and other debris. TR Vol. 2 at 59. Special Agent Oakes collected some hairs from the underwear and mounted them on a slide so that they could be examined and compared to known hair standards from the defendant. *Id.* Based on this examination, Special Agent Oakes told the jury that Mr. Beranek's hair was found in the underwear:

> Q. As a result of your examination and comparison of the known hair standards to the hairs scraped from the underpants, did you form an opinion to a reasonable degree of certainty in your area of expertise as to the question of whether or not the person whose hair was in the known standard was the same person whose hair was found in the underpants?
>
> A. Yes. I did, present in the debris removed from the underwear was one head hair of Caucasian origin. I compared this hair with the known head hair standards from the defendant . . . and the one head hair found in the underwear was microscopically the same as the known head hairs of the defendant.

Id at 60-61. Special Agent Oakes also told the jury that an even more experienced examiner, FBI Special Agent Malone had examined the hair and reached the same conclusion. *Id* at 63. Special Agent Oakes then bolstered the certainty of his match by reference to his past experience:

> In approximately 3,000 cases examined in eight and a half years . . . on only one occasion have I had known hairs from two different people that I compared I could not tell them apart and those were Negroid, but like hairs, I have never had any Caucasian hairs, I have never not been able to differentiate two Caucasian head hairs.

See TR Vol. 1 at 181-182. Special Agent Oakes used the same device to bolster his absent and more experienced colleague's confirmation of the match:

> He concurred with me that the hairs match. Okay. His experience is more vast than mine and he has had less instances wherein he has not been able to differentiate known person's hair samples from each other. So, he testifies somewhat stronger than I do based on his experience which is more than mine.

See TR Vol. 1 at 71. Having presented the unwavering opinions of two FBI special agents that Mr. Beranek's hair was found in underwear left by the perpetrator during the rape of Ms. D[redacted], the State rested its case in chief.

Mr. Beranek's defense focused on the evidence that he was over 600 miles away in North Dakota at the time Ms. D[redacted] was attacked. As discussed *supra* Part I(E), Mr. Beranek's mother, Rose Beranek, sister, Susan Hanson, brother-in-law, Layle Hanson, the couple who saw him paint their home, Janice and Darrell Reed, and Layle Hanson's mother, Joyce Hanson, all remembered Mr. Beranek being in North Dakota during the week of March 2, 1987. *See generally* TR Vol. 2 at 128-225. These witnesses (and photographs taken around the time of the assault) also established that Mr. Beranek had a full mustache, in contrast to Ms. D[redacted]'s description of a clean shaven assailant. *Id.*; Tr. Ex. 37, Tr. Ex. 38.

In a somewhat futile effort to discount the opinions of FBI Special Agents Oakes and Malone, the defense even called a hair microscopy expert from the Wisconsin State Crime Lab, Art Varriale. Mr. Varriale testified that, "given the state of the art of hair comparisons, it's not possible at this time to identify a questioned hair back to a given individual. . . ." TR Vol. 2 at 115. However, Mr. Varriale concluded that one of the hairs collected from the perpetrator's underwear was consistent in all color and morphological detail to Mr. Beranek's hair. On cross examination, Mr. Varriale testified that Mr. Beranek was "the more likely source of the hair" than Ms. D[redacted]'s ex-husband. He further characterized the hair from the underwear as "highly consistent" with Mr. Beranek. *See* TR Vol. 2 at 122, 126.

In closing argument, the State relied heavily on the positive identification of the

hair by their expert witness in corroborating the victim's identification. Mr. Kaiser argued:

> [A]nd then a pair of underpants that have never been seen by her or used by her husband appear in her house and from them and from her house comes a hair that is absolutely identical to the defendant.... It's what we call corroboration. It supports her testimony.

TR Vol. 3 at 65. He then used this forensic evidence to undermine the defendant's alibi:

> None of what Lyle or Susan Hanson [defense alibi witnesses] says to you from that witness stand is sufficient to overcome the weight of the testimony... which is corroborated by the underpants and by the hair identification performed by both the Wisconsin State Crime and the FBI...

Id. at 70.

The State further bolstered the reliability of this match and the combined force of the hair match and Ms. D[redacted]'s identification:

> [The hair comparison] can lead to identification in court by a witness whom a jury is allowed to evaluate the credibility of and whom a jury is allowed to then listen to the experts regarding the hair comparison and made a decision. Does that support her testimony? That's what it does. And counsel pressed Mr. Oakes and so Mr. Oakes testified in his belief as a scientist to a reasonable degree of certainty in the science of hair comparison that it was highly probably that that hair came from the defendant and Mr. Varriale said it certainly is more likely that it came from the defendant than from T[redacted] D[redacted].
>
> Counsel has now raised the question of whether or not lots of other people of similar origins could have produced that hair somehow in K[redacted]'s house? We don't know, but that's his speculation, not based on the evidence, but the evidence was according to Mr. Oakes's testimony that in 3,000 examinations or so that he's done, he's only ever had one instance where a questioned hair matched the hair of two different people and it was a pubic hair of Negroid origin. So, he's never had it on the head hair of a Caucasian person; and when pressed on cross examination of counsel, he told you that his superior with more experience than him, having done more examinations, had a lower percentage of instances in which a questioned hair matched hairs of two different people; and that person had done over ten thousand examinations.

> What an incredible coincidence. Somehow K[redacted] managed to pick out of a photo array some one in ten thousand people who had a hair that matched a hair that happened to be in her house from some unknown place.

Id. at 96-97. Knowing that the positive identification of the questioned hair as belonging to Richard Beranek was extremely powerful affirmative evidence of guilt that also both (1) corroborated Ms. D[redacted]'s identification of Mr. Beranek two years after the fact and (2) undermined the six alibi witnesses placing Mr. Beranek over six hundred miles away, the State hammered it home again and again. After a short deliberation, the jury convicted Mr. Beranek of nine offenses arising from the rape of Ms. D[redacted].

H. Post-Conviction Forensic Testing:

Mr. Beranek initiated the current proceedings when he filed his motion for DNA testing on November 8, 2011. In February 2012, this court approved DNA testing on the victim's blouse, the victim's underwear, the perpetrator's underwear, and the hair used for microscopic comparison pursuant to Section 974.07. In January 2014, this court signed a supplemental testing order approving additional examination and mitochondrial DNA testing on the hairs in evidence.

1. DNA Testing Proves that Mr. Beranek is not the Source of the Hair From the Perpetrator's Underwear

Pursuant to this Court's Order, the hair evidence originally examined at the FBI and the Wisconsin State Crime Lab was forwarded to an independent, accredited forensic DNA lab, Bode Technology ("Bode"). Bode Analyst Rachel Neagle examined a slide that was labeled E4 that was contained in a slide holder labeled "Item e-4 questioned." *See* Exhibit 14 (Photos of Hair Evidence Received at Bode). This slide contained six apparent hairs or fibers, including one hair with a root suitable for STR DNA testing. *See*

Exhibit 15 (Bode Report, 3/5/13).[8] Ms. Neagle identified this hair as apparent hair A. The remaining five hairs were deemed unsuitable for STR testing, but possibly suitable to conduct mitochondrial DNA testing which can generate a DNA profile from the shaft of the hair. *Id.*[9] She then sampled the hair root from apparent hair A for DNA testing, and repackaged the remainder of the evidence on post-it notes. *See* Exhibit 16 (Bode Evidence Inventory). DNA testing of the root, however, did not produce any result. *See* Exhibit 15.

Pursuant to a second order by this Court, the hair evidence was then transferred to the Microtrace Laboratory for microscopic examination and then to Mitotyping Technologies Laboratory so that mitochondrial DNA testing could be performed. The Microtrace Lab fully examined each of the questioned hairs and documented their characteristics. These findings are represented in the table below that was also included in the Microtrace report:

Table 1. Microscopic characteristics of questioned hairs (E4)

Hair	Length (cm)	Class	Color	Medulla	Other notes
A	1.3	human	light brown	fragmented	damage to hair (*e.g.*, split)
B	5.5	human	brown	absent	clumped/streaked pigment
C	5.0	Human	blonde/colorless	absent	proximal intact, though worn
D	6.5	human	blonde/colorless	absent	damage to hair (*e.g.*, split)
E	4.0	animal	brown → colorless	patterned	damage to hair (*e.g.*, bent)
F	2.8	human	brown	fragmented	damage to hair (*e.g.*, twist)

Exhibit 17 (Microtrace Rpt., 12/18/14). These six hairs were also compared to Mr.

[8] STR DNA testing involves testing DNA from the nucleus of cells. DNA profiles from standard forensic STR testing are used for comparison in the CODIS DNA database.

[9] Mitochondrial DNA testing involves testing the DNA from the mitochondria inside cells. It is commonly used for testing hair and bones which do not contain nucleated cells. Mitochondrial DNA profiles are not compatible with the CODIS DNA Database

Beranek's known head hair standards. Based on this examination, Microtrace concluded that only one hair, Hair B, exhibited microscopic characteristics similar to Mr. Beranek's hair. *Id.* Accordingly, the Microtrace scientists found that Hair B was the most likely candidate for the single hair referenced in Special Agent Oakes's testimony. *Id.*[10]

Having fully documented the questioned hairs microscopically, they were then sent to Mitotyping Technologies, a forensic DNA lab specializing in mitochondrial DNA testing. Preliminary testing (as well as the prior microscopic examination) indicated that one hair, Hair E, is an animal hair. *See* Exhibit 18 (Mitotyping DNA Rpt., 1/14/16). Mitotyping then subjected the remaining hairs to mitochondrial DNA testing and compared the results to the mitochondrial DNA profile of Mr. Beranek. *Id.* This testing demonstrated that, contrary to expert testimony at trial, Mr. Beranek is conclusively excluded as the source of all the hairs found on the perpetrator's underwear. *Id.*

2. Admission of Error by FBI

While the DNA results prove that the expert opinions offered by the State were incorrect, the Department of Justice and FBI have also recently admitted that Special Agent Oakes testified falsely in Mr. Beranek's trial. On May 5, 2015, the FBI sent a letter to the Dane County District Attorney stating that its internal review of Special Agent Oakes's testimony found that Special Agent Oakes gave unreliable and erroneous testimony. *See* Exhibit 19 (FBI Letter 5/5/15). The FBI found that on seven occasions during his testimony, Special Agent Oakes:

assigned to the positive association a statistical weight or probability or

[10] As further confirmation that the questioned hairs were the same as those examined at trial, the Microtrace Report is consistent with the findings of Wisconsin Crime Lab analyst Art Varriale. Mr. Varriale likewise described finding an animal hair amongst the questioned hairs collected from the underwear left by the perpetrator. TR Vol. 2 at 126.

> provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association *that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association.* This type of testimony exceeds the limits of science.

Id. (emphasis added). The FBI also found another error in the testimony described below:

> [Special Agent Oakes] cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value *to bolster the conclusion that a hair belongs to a specific individual.* This type of testimony exceeds the limits of science.

Id. (emphasis added). Although this letter was sent to the Dane County District Attorney on or about May 5, 2015, it was not immediately disclosed to undersigned counsel. This letter was not received by Mr. Beranek's counsel until October 28, 2015, when the letter was forwarded to counsel by the Department of Justice on counsel's request.[11]

3. Additional Exclusionary DNA Results

Additional DNA testing was performed on the perpetrator's underwear and Ms. D[redacted]'s clothing. Preliminary testing of the perpetrator's underwear revealed almost no measurable male DNA. *See* Exhibit 15. Y-STR testing, which tests for only male DNA, was conducted on the perpetrator's underwear in order to maximize the chances of obtaining results. However, only a very partial Y-STR DNA profile was detected. *Id.* Bode reported that this partial profile was consistent with a mixture of at least two males, but due to the low level of DNA was not suitable for comparison. *Id.*

DNA testing was also conducted on Ms. D[redacted]'s underwear, which was torn off

[11] Mr. Beranek may have received this letter some time earlier at the prison, but counsel requested the letter from the Department of Justice as soon as Mr. Beranek advised that he had received some paperwork from the government.

of her during the assault. No male DNA was detected on samples taken from the waistband, where the assailant most likely grabbed the underwear. *See* Exhibit 20 (Bode Supp. DNA Rpt. 8/25/14). However, sperm cells were identified on the crotch area of the underwear. *Id.* Because of the very small amount of male DNA present, Y-STR DNA testing was utilized. *Id.* Testing of the sperm cells found on Ms. D[redacted]'s underwear revealed a mixture of male DNA of at least two contributors, with one profile considered the major contributor. *See* Exhibit 20. Mr. Beranek is excluded as the major contributor. However, the minor profile was too partial in nature to be suitable for comparison. *Id.* Mr. Beranek has requested the State's assistance in obtaining reference samples of any potential innocent source of this sperm, but the State declined to cooperate.

II.

CLAIMS FOR RELIEF

A. Under Wisconsin Statute § 974.07(10), Mr. Beranek is Entitled to Relief Based on the DNA Results that Support His Longstanding Claim of Innocence

Wisconsin Statute § 974.07(10) provides that, where "deoxyribonucleic acid testing ordered under this section support the movant's claim, the court shall schedule a hearing to determine the appropriate relief to be granted to the movant. After the hearing, and based on the results of the testing...the court shall enter any order that serves the interests of justice." The statute grants broad discretion to this Court to fashion an appropriate remedy including granting a new trial. *Id.* § 974.07(10)(a). The "interests of justice" standard applied under Section 974.07(10) is the same standard articulated in other motion-for-new-trial contexts where a finding of a reasonable probability of a

different outcome is not required. *See State v. Hicks*, 202 Wis. 2d 150, 158-161, 549 N.W.2d 435, 439-440 (1996). The Supreme Court explained that relief in the interests of justice may be granted "whenever the real controversy has not been fully tried." *Id.* at 159-160. The Court further articulated two distinct ways in which the real controversy may not have not been fully tried:

> (1) When the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; or
>
> (2) When the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

Id. at 160. In the context of new exculpatory DNA results which contradict earlier hair comparison testimony, both ways are implicated because (1) "the jury did not hear important DNA evidence that bore on an important issue in the case" and (2) "the testimony the jury heard with respect to the hair as affirmative proof of guilt was inconsistent with what later DNA analysis revealed, thus clouding the crucial issue of identification." *Id.* at 161.

As discussed above, DNA testing performed on the probative items of evidence in this case all support Mr. Beranek's longstanding claim of innocence. Mr. Beranek is excluded as the source of the identifiable DNA profile obtained from sperm on the victim's underwear.[12] And more importantly, he was excluded as the source of hairs collected from the perpetrator's underwear. This DNA result contradicted the damning expert testimony in which two FBI special agents matched a hair from underwear left at

[12] The record is silent as to whether the victim attempted to put her underwear back on after the attack or whether the perpetrator handled the underwear during the assault in a manner in which his sperm could have been transferred. Currently the results of DNA testing are favorable in that someone else's sperm has been found on the underwear. Only further investigation and testing of any consensual partners will conclusively establish if the sperm detected is from the perpetrator.

the scene by the rapist, during the rape, to Mr. Beranek. Placing Mr. Beranek's hair at the scene served as vital corroboration of the victim's otherwise weak eyewitness identification made two-years after the fact. Further, this now disproven hair match directly contradicted Mr. Beranek's six alibi witnesses who placed him in North Dakota at the time of the crime. Had the jury heard that Mr. Beranek was not the source of the hair on the perpetrator's underwear, they would have credited the six alibi witnesses—including two who had no relationship whatsoever with Mr. Beranek—whose testimony was corroborated by contemporaneously made documents from the week of the crime.

The substantial merit of Mr. Beranek's request for relief is obvious when the facts of his case are compared to those underlying the Wisconsin Supreme Court's grant of a new trial in the factually similar Dane County cases of Anthony Hicks and Ralph Armstrong. *See State v. Hicks*, 202 Wis.2d at 159-160; *State v. Armstrong,* 2005 WI 119, 283 Wis.2d 639, 700 N.W.2d 98. As in Mr. Beranek's case, Anthony Hicks was convicted of sexually assaulting a woman in her home based on (1) the eyewitness identification of the victim and (2) microscopic hair comparison associating hairs found at the crime scene with Mr. Hicks. *Id.* at 153-155. Subsequent DNA testing on the hair evidence in Mr. Hicks's case excluded him as the source of one of the several hairs that were associated with him at trial, but either no results or inconclusive results were obtained on the remaining hairs. *Id.* at 155-157. However, the Wisconsin Supreme Court took the extraordinary action of granting a new trial in the interests of justice sua sponte based on the exclusion of Mr. Hicks as the source of the hair. *Id.* at 172-175.[13]

[13] Because it granted a new trial *sua sponte,* the Supreme Court did not reach the State's appeal of a lower court's finding that trial counsel in *Hicks* provided ineffective assistance in failing to request DNA testing.

Explaining its decision, the Wisconsin Supreme Court noted the importance of the hair comparison where the only other evidence of guilt was an eyewitness identification:

> To the extent that the jury may have had questions about the accuracy of D.F.'s identification, these questions were likely answered by the State's affirmative use of the hair evidence. . . . To maintain the integrity of our system of criminal justice, the jury must be afforded the opportunity to hear and evaluate such critical, relevant, and material evidence, or at the very least, no be presented with evidence on a critical issue that is later determined to be inconsistent with the facts.

Id. at 171. The Supreme Court's observations regarding the prejudicial impact of the hair evidence in *Hicks* apply with even greater force in Mr. Beranek's case, because here, unlike in *Hicks*, the claim of innocence is corroborated by extensive alibi evidence, and other DNA testing also excludes Mr. Beranek as the source of semen found in the victim's underwear.

Moreover, even the DNA testing on the hairs in this case was alone of more evidentiary value than the testing of the hair in *Hicks*. Only a single hair from the perpetrator's underwear was matched to Mr. Beranek through microscopic hair comparison. And as discussed *supra* Part I(H), DNA testing now excludes Mr. Beranek from all of the hairs collected from the perpetrator's underwear. In *Hicks*, by contrast, five negroid hairs collected from the crime scene were found through microscopic examination to be consistent with Mr. Hicks. *Id.* at 154. Further, a hair collected from Mr. Hicks's pants was found to be consistent with the victim. DNA testing of the hair associated with the victim yielded no results, leaving the microscopic examination undisturbed. *Id.* at 155-157. Likewise, DNA testing of four of the five hairs associated with Mr. Hicks yielded either no results or inconclusive results, again leaving the microscopic examination undisturbed as to four of five hairs. *Id.* Thus, the Wisconsin Supreme Court granted a new trial based on Mr. Hicks's exclusion from only one of the

hairs collected from the crime scene, even though the victim was not excluded as the source of the Caucasian hair retrieved from Mr. Hicks's pants.

The exculpatory weight of excluding Mr. Beranek from all hair evidence in the case is far greater than the results in *Hicks,* which did not exclude Mr. Hicks as the source of four out of five of the crime scene hairs and did not exclude the victim as the source of the hair from Mr. Hicks's pants. Accordingly, the new DNA results in Mr. Beranek's case was both (1) important evidence that the jury did not hear relating to the central issue of identity and (2) proof showing that the testimony of the hair comparison experts which associated the hair with Mr. Beranek was erroneous, thus clouding the central issue of identification. *See id.* at 440.

Likewise, in *Armstrong* the Wisconsin Supreme Court held that a new trial was warranted in the interest of justice when new DNA testing proved that physical evidence the State relied upon at trial to connect the defendant to the scene and to corroborate eyewitness evidence was incorrect. As here, in *Armstrong* the State used physical evidence—including microscopic hair comparison evidence—"assertively and repetitively as affirmative proof of Armstrong's guilt." 283 Wis.2d 639, at ¶ 139. When subsequent DNA testing proved that evidence false, the Court ordered a new trial.

Indeed, this case perfectly fits the prototype described by the Wisconsin Supreme Court of a case in which a new trial is warranted. In *State v. Brian Avery*, the Court reviewed the holdings in *Hicks* and *Armstrong* and concluded that the prototypical case in which the interests of justice demand a new trial because the real controversy was not fully tried is one in which new evidence "discredit[s] a pivotal piece of evidence that the State used 'assertively and repetitively' at trial to prove . . . guilt." *State v. Avery,* 2013

WI 13, ¶ 58, 345 Wis.2d 407, 826 N.W.2d 60. Here, the new DNA (and, as argued below, the new FBI letter admitting forensic error) does just that. No longer is this a case in which, as the prosecutor told the jury, the possibility that the dispositive hair came from someone other than Mr. Beranek is "speculation, not based on the evidence" (TR Vol. 3 at 97); now that possibility is a proven fact. No longer is this a case in which, as the prosecutor also argued to the jury, it is an "incredible coincidence ... [that s]omehow K[redacted] managed to pick out of a photo array some one in ten thousand people who had a hair that matched a hair that happened to be in her house from some unknown place." *Id.* Now we know that she in fact picked someone out of a lineup who was conclusively *excluded* as the source of the hair at issue. Having relied so thoroughly on the hair evidence at trial, just as in *Hicks* and *Armstrong,* the State cannot now disavow the significance of the hair now that we know the trial evidence was false.

B. The Eyewitness Identification in Mr. Beranek's Case Was Suspect

In weighing what the interests of justice requires in light of the new exculpatory DNA results, the Court should also consider the underlying weakness of Ms. D[redacted]'s identification now that her identification is no longer corroborated by forensic evidence. Mr. Beranek was first identified by Ms. D[redacted] from a suggestive photographic lineup over two years after the attack, despite the fact that Mr. Beranek did not match her description of the perpetrator in several significant ways. Reviewing the abundant literature discussing the perils of relying on eyewitness identification to establish guilt in a criminal case, the Wisconsin Supreme Court explained:

> These studies confirm that eyewitness testimony is often "hopelessly unreliable." *Commonwealth v. Johnson,* 420 Mass. 458, 650 N.E.2d 1257, 1262 (1995). The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful

> convictions in the United States, and responsible for more wrongful convictions than all other causes combined. *See* Wells, *Eyewitness Identification Procedures,* 22 L. & Human Behav. at 6. In a study conducted by the United States Department of Justice of 28 wrongful convictions, it determined that 24 (85 percent) of the erroneous convictions were based primarily on the misidentification of the defendant by a witness. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin,* 2003 Wis. L.Rev. at 532-33. In a similar study conducted by the Innocence Project at the Benjamin Cardozo School of Law, mistaken identifications played a major part in the wrongful conviction of over two-thirds of the first 138 post-conviction DNA exonerations. *Available at,* http://www.innocenceproject.org/causes/mistak enid.php. These statistics certainly substantiate Justice William J. Brennan, Jr.'s concerns in *Wade* that "the annals of criminal law are rife with instances of mistaken identification." *Wade,* 388 U.S. at 228, 87 S.Ct. 1926 (footnote omitted).

State v. Dubose, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 162-63, 699 N.W.2d 582, 592. Noting these same problems, the Office of the Attorney General of Wisconsin promulgated detailed model eyewitness identification procedures to help diminish the risk of false identifications (many of which were not followed here, as discussed below). *See* Exhibit 21 (Office of the Attorney General of the State of Wisconsin, Model Policy and Procedure for Eyewitness Identification). These model procedures and other research and judicial decisions highlight the multiple factors demonstrating the unreliability of the identification of Mr. Beranek by Ms. D[redacted]. Considering the problematic eyewitness identification procedures utilized in Mr. Beranek's case, the identification should be given even less weight than was afforded in *Hicks*.

1. The Circumstances of the Crime Decreased the Reliability of Ms. D[redacted]'s Identification

Before examining the flawed identification procedures employed in this case, it should be noted that the circumstances of the crime itself may have decreased the reliability of Ms. D[redacted]'s identification. Although Ms. D[redacted] had a good opportunity to view her attacker before he covered her head with a quilt, the stress of the encounter and

the perpetrator's brandishing of a weapon are factors known to diminish the reliability of identifications.

At trial, the State emphasized Ms. D[redacted]'s emotional response to bolster the reliability of her identification. While this argument may fit the lay person's intuitive ideas regarding memory, research proves otherwise. High levels of stress have a negative effect on memory, reduce identification accuracy, and increase the risk of mistaken identification.[14] As with many of the scientific findings, most jurors do not appreciate that high stress can negatively affect memory and instead wrongly believe that "faces seen in highly stressful situations can be 'burned into' a witness's memory." *State v. Lawson*, 352 Or. 724, 770, 291 P.3d 673, 701 (2012). Moreover, stress can interact with other factors affecting a witnesses' ability to accurately encode an event. High levels of stress also exacerbate what scientists term the "weapon focus effect." The Oregon Supreme Court summarized the research as follows:

> Studies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy because witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter... That diminished attention factor frequently impairs the witness's ability to encode things such as facial details into memory, resulting in decreased accuracy in later identifications... The negative effect of weapon-focus on identification accuracy may be magnified when combined with stress, short exposure times, poor viewing conditions, or longer retention intervals, and may also result in less accurate initial descriptions of the perpetrator.

Lawson, 352 Or. at 771-772.

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[14] *See, e.g.,* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum Behav. 687 (2004) (high stress reduced correct identification rates by one-third, from 59% to 39%, compared to identification rates involving low stress.) *See also infra* n.19.

2. The Passage of Time Decreases the Reliability of the Identification

Mr. Beranek was not identified until two years after Ms. D[redacted] saw her assailant. Both common sense and Wisconsin law recognize the uncontroversial notion that memory fades over time. *See Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 28, 237 Wis. 2d 99, 117, 613 N.W.2d 849, 860 (three-year statute of limitations on tort claim imposed because "truth may be obfuscated by . . . faded memories"). The Attorney General's Model Policy also discusses the detrimental impact the passage of time has on the reliability of an identification, noting that "long time delays risk less accuracy or effectiveness for the victim and eyewitness." Exhibit 21 at 7; *see also United States v. Wade*, 388 U.S.218, 241 (1967) (lapse of time between alleged act and lineup should be considered in assessing reliability of identification).

In fact, the scientific research bears this out. A 2008 meta-analysis of 53 "facial memory studies," Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 142 (2008), confirmed that "memory strength will be weaker at longer retention intervals . . . than briefer ones." *Id.* Even a delay of just one week can cause the "typical eyewitness viewing a perpetrator's face that [is] not highly distinctive . . . to have no more than a 50% chance of being correct in his or her lineup identification." *Id.* at 147; *see* Carol Krafka and Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 65 (1985) (finding substantial misidentification in target-absent arrays from two to twenty-four hours after event); *State v. Henderson*, 208 N.J.208, 266-268, 27 A.3d 872, 907; *Lawson*, 352 Or. at 777-779. In addition, as time passes, memories are more likely to be

contaminated by post-event information, identification procedures, and other external elements.

Where the Supreme Court reversed the conviction of Mr. Hicks based on an identification made two days after the attack, this Court should not hesitate to discount the identification of Mr. Beranek made after more than two years time. See *Hicks*, 202 Wis.2d at 159-160

3. No Evidence Pointed to Mr. Beranek Prior to His Identification

Mr. Beranek's photograph was shown to Ms. D[redacted] solely because (1) he had committed a factually dissimilar sexual assault in a jurisdiction approximately 200 miles away from Ms. D[redacted]'s home and (2) Chippewa detectives believed he resembled a composite sketch produced by the victim. There was no credible indication that Mr. Beranek had any connection to the crime or even the small town where Ms. D[redacted] lived. Rather, all of the evidence indicated that the perpetrator was someone familiar with Ms. D[redacted], knew her phone number and where she lived.

Ms. D[redacted] told police that a man meeting the description of her assailant had been stalking her for months before the attack and that this man had even handed a sexually oriented note to her daughter while in a Stoughton store. *See supra* Part I(A). Ms. D[redacted] received sexually oriented phone calls immediately before the assault. *See id.* The perpetrator had broken into Ms. D[redacted]'s home and laid in wait for her return to attack her. During the assault, the perpetrator stated that he "finally" was going to get her, *id.* (TR Vol. 1 at 63), and made reference to her children and the same subject matter as in the harassing phone call from earlier in the day. *See id.* The harassing phone calls resumed soon after Ms. D[redacted] returned to her home in 1989, over a year after the attack.

See supra Part I(C). On February 20, 1989—over six months after Mr. Beranek was incarcerated in Chippewa County—Ms. D[redacted] received a phone call in which a caller told her that the police "won't stop me." *Id.* The following day, a suspicious driver followed Ms. D[redacted] in her car through Stoughton, only breaking his pursuit when she pulled into a parking lot where a State Police vehicle was parked. *See id.*

Noting the risk of false identifications leading to wrongful convictions, the Wisconsin Attorney General's Model Policy discourages the use of lineups absent some independent and credible indication of guilt:

> Every lineup has the potential of jeopardy for innocent suspects. So, investigators must ask when a person should be placed in a line-up procedure. There should be some credible and/or verifiable indication that the suspect is actually the perpetrator before placement in an identification procedure. This concept precludes using line-up procedures for a "fishing expedition." Rather, consider the consequences of presenting a lineup to a witness if there is a strong possibility that the culprit is not in it - it is not a risk free practice. Before you begin consider carefully "why is this suspect being placed into the lineup to begin with?" Remember that a misidentification is harmful not only because it can lead to a wrongful conviction, but also because it can irreparably taint an eyewitness's memory, making that eyewitness less useful for future identification procedures that might contain the true perpetrator.

Exhibit 21 at 7. Based on these concerns, the Attorney General's Model Policy states that "[i]t is incumbent upon investigators to at least check alibis before conducting a[n identification] procedure." *Id.*

Had such an investigation been conducted in Mr. Beranek's case prior to the lineup, the detectives would have discovered that:

1) Mr. Beranek had no connection to Ms. D[redacted] or the town of Stoughton where she lived;

2) Mr. Beranek was over 600 miles away in North Dakota at the time of the crime, and his presence in North Dakota was corroborated by contemporaneous documents and unbiased witnesses; and

3) Mr. Beranek could not have been the source of the post-attack phone calls and stalking.

Again contrasting Mr. Beranek's case to *Hicks*, where the Supreme Court granted a new trial, Mr. Hicks had no alibi. He lived in the same apartment complex as the victim and was admittedly alone and only a 90-second walk from the victim's apartment at the time of the crime. *See Hicks*, 202 Wis.2d at 153-158.

4. Mr. Beranek Did Not Match the Victim's Description

Ms. D[redacted]'s various descriptions of her assailant included the following characteristics: (1) Light brown hair, (2) blue eyes, and (3) no mustache or beard. *See supra* Part I(B). These three characteristics do not match Mr. Beranek, who consistently wore a thick mustache at the time of the crime, has dark hair, and dark eyes.[15] As common sense would dictate, any discrepancy between the witness's pre-lineup description and the appearance of the person ultimately identified is a key factor in assessing the reliability of the identification. *See State v. Walker*, 154 Wis.2d 158, 188-191, 453 N.W.2d 127, 140 (1990) (*quoting Wade*, 388 U.S. at 241). Again, this factor is grounded in science. Scientific research has established that there is a correlation between the presence of incorrect descriptors and inaccurate identifications. Christian A. Meissner, et al., *A Theoretical Review and Meta-Analysis of the Description-Identification Relationship in Memory for Faces*, 20 Eur. J. Cognitive Psychol. 414, 431, 435 (2008) (as the number of incorrect descriptors of a suspect increases, identification accuracy decreases). This finding has been manifested in the cases of people exonerated

[15] Mr. Beranek did meet the 5'8-5'11' height range, his hair was similar in length to that described by Ms. D[redacted], and has somewhat similar facial features as those depicted in the composite sketch which Ms. D[redacted] described as 90% accurate.

through DNA testing. Professor Garrett's study of the first 250 DNA-based exonerations found there was a substantial mismatch between the description provided by witnesses and the actual appearance of the innocent defendant in a full 62 percent of wrongful conviction cases based in part on misidentification (100 out of 161 cases). Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* at 68-69 (Harvard 2011).

5. The Photographic Lineup was Suggestive

Even the most cursory examination of the photographic lineup from which Ms. D[redacted] first identified Mr. Beranek shows its suggestiveness. The Attorney General's Model Policy dictates that fillers in a photo array should be chosen to resemble the witness's description, and not the suspect:

> In general, fillers should resemble the witness's description of the perpetrator in significant features (such as face, profile, height, weight, age, build, posture, hair and facial hair, specific articles of clothing, etc., to the extent applicable to the photos being used) or, in cases where a composite was used, fillers should resemble the composite. If a person who has never seen the perpetrator would be able to pick out the suspect from the array based on knowing only the description of the perpetrator given by the eyewitness, then the fillers may not sufficiently resemble the description of the perpetrator.

Exhibit 21 at 8. Here, the fillers clearly did not resemble the victim's description or the composite sketch. The two most striking characteristics are height and facial hair. Even though Ms. D[redacted] described her assailant as without beard or mustache, only one of the seven fillers chosen met this aspect of her description. Regarding height, various descriptions placed the assailant's height at between 5'8 and 5'11. *See supra* Part I(B). However, the photographs of four of the seven fillers in the lineup showed their heights on a background scale to be above six feet, with one man's height measured as 6'6". *See*

Exhibit 9. Of the three fillers who could not be immediately ruled out based on height, one man's curly hair and stocky build clearly did not resemble the victim's description or the composite. *See id.* (Photo #7). Excluding the issue of facial hair, only two of the seven fillers placed in the lineup with Mr. Beranek were even nominally consistent with the victim's description and the composite sketch.

6. The Composite Sketch Tainted the Identification

The use of a composite sketch, especially when coupled with the significant delay between the attack and identification, raises additional concerns about the reliability of the identification of Mr. Beranek. To date, 373 individuals have been exonerated through post-conviction DNA testing; of these, 71 percent (or 239) involved the testimony of at least one eyewitness, making eyewitness misidentification the leading contributing cause of DNA exonerations. Within those cases, the use of composite sketches feature prominently, having been used in 28 percent of cases. Scientific research offers an explanation for the relationship between composite sketches and wrongful convictions. The creation and use of composites can contaminate eyewitness memory, decreasing an eyewitness's ability to identify the true perpetrator in a subsequent lineup. Gary L. Wells & Lisa E. Hasel, *Facial Composite Production by Eyewitnesses*, 16 Current Directions Psychol. Sci. 1, 6 (2007); Gary L. Wells et al., *supra,* Note 6, at 147. Studies have shown that building a composite lowers the likelihood that witnesses will later identify the actual perpetrator, for several reasons. First, the act of building the composite tends to contaminate the witness's memories of the perpetrator—essentially replacing the witness's original memory of the perpetrator with the memory of the composite face. Gary L. Wells, et al., *Building Face Composites Can Harm Lineup Identification*

Performance, at 147 (2005). Second, because face memory occurs holistically and not in a piecemeal fashion, most people are not able to create a composite (a piecemeal process) that bears a good likeness to their memory of the perpetrator. As a result, composite images often bear a poor resemblance to the perpetrator, creating a risk that an innocent person who bears a resemblance to the composite (or is perceived to bear such a resemblance) will be made a suspect and then mistakenly identified. *Id.* at 148. Accordingly, Mr. Beranek's resemblance to the black and white composite sketch—where he does not match the factual description—made him more susceptible to a false identification. Precisely for these reasons, the Wisconsin Attorney General's Model Policy urges great caution in using composite sketches. Exhibit 21 at 27-28.

7. Subsequent Live Lineup and In-Court Identifications Do Not Restore Confidence in Ms. D[redacted]'s Identification

The Wisconsin Attorney General's Model Policy also discourages the multiple identification procedures used in Mr. Beranek's case because the first identification renders the subsequent procedures suggestive:

> Avoid multiple identification procedures in which the same witness views the same suspect more than once. . .
>
> *Explanation*: Showing a witness the same suspect in more than one identification procedure can be highly suggestive and can influence the witness to pick out that suspect based on remembering the suspect from the first identification procedure, rather than from the crime.

Exhibit 21 at 22. In Mr. Beranek's case, it is not surprising (and should be given no weight) that Ms. D[redacted] picked Mr. Beranek out of a live lineup where she had previously identified his photograph with "almost" certainty. *See* Exhibit 8.

Ms. D[redacted]'s in-court identification of Mr. Beranek is even less reliable. An in-court identification is essentially a "show up" procedure that takes place before the jury.

The defendant has been identified by the State as the likely suspect, is seated with counsel at the defense table, and is often the only person matching the perpetrator's description not just at counsel table, but in the well of the court. *See Commonwealth* v. *Crayton*, 470 Mass. 228, 236-238, 21 N.E.3d 157, 165-168 (2014) (in-court identification akin to show up procedure: "The presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime."); *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir. 1984) (trial court has an obligation to ensure that an in-court identification does not amount to a show-up). Both involve a witness asked to identify a suspect under circumstances that suggest that the State—in the form of the police or the prosecutor—believes the suspect is guilty. *See, e.g.*, *State* v. *Ledbetter*, 275 Conn. 534, 549, 881 A.2d 290, 302 (2005) (recognizing that show-ups are "inherently and significantly suggestive because [they] convey[ ] the message to the [witness] that the police believe the suspect is guilty"). As with show-ups, there are no "wrong answers" to in-court identifications. A witness who is asked to identify the defendant as the perpetrator will most likely know exactly who the defendant is and be able to identify him or her. *See, e.g.*, *Archibald*, 734 F.2d at 941 ("Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant . . . .").

The Wisconsin Supreme Court has recognized the inherent suggestiveness and unreliability of show-up evidence, banning it in criminal cases unless police were confronted with exigent circumstances that prevented them from using a more reliable identification procedure. *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d

582. And yet an in-court identification is itself a form—a particularly suggestive and unreliable form—of a show-up.

Although there are similarities between the two, in-court identifications are actually much worse than show-ups. *First*, an in-court identification is much *more* suggestive than a one-on-one show-up. *See Crayton*, 470 Mass. at 237. In a show-up, the witness is not always aware that the person they are being shown is the only suspect, nor are they aware of how confident the police are that the suspect is, in fact, the perpetrator. *See* Exhibit 21 at 23-24 (procedures to counteract impression that "police think they have caught the perpetrator and want confirmation"). With an in-court identification, the witness knows that the defendant is the only suspect and that he or she has been charged with the crime. That fact conveys to the witness that the "prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime." *Crayton*, 470 Mass. at 237-238. *Second*, unlike a show-up, which must take place relatively soon after the crime occurs, in-court identifications can occur months or years, after the crime. In fact, many courts will require that a show-up occur within a couple of hours of when the witness first viewed the perpetrator or will otherwise recognize the decreasing reliability of a show-up that occurs much later. The passage of time greatly increases the risk of misidentification for in-court identifications, as opposed to show-ups, because memory degrades over time. *Third*, none of the circumstances that may justify a show-up, such as public safety or other exigency, none of these factors support admission of in-court identifications. *See* Exhibit 21 at 23-24. Because show-ups are so suggestive, courts allow their admission only when compelling circumstances outweigh the risks. In-court identifications are

more suggestive than show-ups, are less reliable than show-ups, and are never justified by exigent or compelling circumstances. The National Academy of Sciences has criticized the use of in-court identifications, emphasizing that they "do not reliably test an eyewitness' memory" due to the fact that the witness can "easily see where the defendant is sitting." National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* at 36 n.28 (2014).

While the unreliable procedures used to obtain Ms. D[redacted]'s identification of Mr. Beranek may have been common in 1989, no reasonable law enforcement agency would endorse such procedures today. As discussed by the Wisconsin Supreme Court, in the Attorney General's Model Policy and in countless other authorities, suggestive identification procedures like those utilized in Mr. Beranek's case have led to dozens of wrongful convictions.

C. The Court Should Vacate Mr. Beranek's Conviction Based on the Exculpatory DNA Results and Grant a New Trial

Pursuant to Section 974.07(10), a new trial should be granted in the interests of justice based on the new exculpatory DNA results that excludes Mr. Beranek from sperm on the victim's underwear and as the source of hairs found on the perpetrator's underwear left at the scene. Microscopic hair comparison testimony linking Mr. Beranek to a hair found in underwear left by the perpetrator was used at trial in three devastating ways: (1) as affirmative evidence of Mr. Beranek's guilt; (2) powerful corroboration of Ms. D[redacted]'s identification; and (3) damning impeachment of Mr. Beranek's alibi defense. The State's closing argument highlights the important role that this now disproven evidence played at trial. For example, the State argued that the hair associated with Mr. Beranek was proof that he struggled with Ms. D[redacted] during the assault:

> She was scared, but one thing we know she did do was she fought back. And when she did that, she grabbed the hair in the back of his head; and what we found eventually and ultimately was a head hair that matches the defendant's, that is indistinguishable from the defendant.

TR Vol. 3 at 91. The State further argued that the hair comparison was corroboration of Ms. D[redacted]'s identification:

> What an incredible coincidence. Somehow K[redacted] [D[redacted]] managed to pick out of a photo array some one in ten thousand people who had a hair that matched a hair that happened to be in her house . . . . K[redacted] D[redacted]'s testimony is corroborated by the physical evidence."

TR Vol. 3 at 97, 99. And finally the State used the hair evidence to effectively discount the alibi witnesses who saw Mr. Beranek in North Dakota the week of the crime:

> None of what Lyle or Susan Hanson says to you from that witness stand is sufficient to overcome the testimony . . . of K[redacted] D[redacted], which is corroborated by the underpants and the hair identification performed by both the Wisconsin State Crime [Lab] and the FBI. . . .

TR Vol. 3 at 70. Where DNA testing now disproves the central forensic evidence so forcefully relied upon by the State at trial, the interests of justice require this Court to grant Mr. Beranek a new trial. *See Hicks*, 202 Wis.2d at 170-175.

D. Under Wisconsin Statute § 974.06, Mr. Beranek is Entitled to Relief Based on Newly Discovered Evidence of (1) Exculpatory DNA Results and (2) the FBI's Concession that its Special Agent Gave False Testimony

In the alternative to relief under Section 974.07, this Court should grant post-conviction relief to Mr. Beranek pursuant to Section 974.06 based on both the exculpatory DNA results as well as the recent concession by the FBI that Special Agent Oakes testified falsely at trial. To obtain post-conviction relief based on newly discovered evidence under Section 974.06, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue

in the case; and (4) the evidence is not merely cumulative." *Armstrong,* 283 Wis.2d 639, ¶ 161, 700 N.W.2d 98 (citation omitted); *see also State v. Edmunds*, 2008 WI App 33, ¶ 13, 308 Wis.2d 374, 384-385, 746 N.W.2d 590, 595 (2008). "Once those four criteria have been established, the court looks to 'whether a reasonable probability exists that a different result would be reached in a trial.' *Id.* (citation omitted). "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." *Id.,* ¶¶ 160-62 (abrogating *State v. Avery,* 213 Wis.2d 228, 234-337, 570 N.W.2d 573 (Ct.App.1997)); *see also Edmunds*, 746 N.W.2d at 595. Although Wisconsin case law has not fully defined the "reasonable probability" standard, it has clarified that a court should root its consideration of the newly discovered evidence in the context of the State's burden to prove guilt beyond a reasonable doubt:

> The correct legal standard when applying the "reasonable probability of a different outcome" criteria is whether there is a reasonable probability that a jury, looking at both [the old and the new evidence], would have a reasonable doubt as to the defendant's guilt.

State v. Edmunds, 2008 WI App 33, ¶ 22, 308 Wis. 2d 374, 390-91, 746 N.W.2d 590, 598 (quoting *State v. McCallum*, 208 Wis.2d 463, 474, 561 N.W.2d 707, 711 (1997)).[16]

As to the DNA evidence, the first four elements of the standard are easily shown by clear and convincing evidence. First, it is undisputed that the DNA results were not obtained until years after Mr. Beranek's conviction. Second, Mr. Beranek was clearly not negligent in seeking the DNA evidence because mitochondrial DNA testing was not available to him at the time of trial. *See* TR Vol. 2 at 115 (Wisconsin Crime Lab scientist explaining that DNA analysis only available in examining root sheath material); M.M.

[16] The Wisconsin Supreme Court has not defined the meaning of "reasonable probability" and whether it is the same as the well-established standard in *Brady* and ineffective assistance of counsel claims of evidence that "confidence in the outcome undermined." *Edmunds*, 308 Wis.2d at 389-391. As in *Edmunds*, the newly discovered evidence in Mr. Beranek's case would meet the standard regardless of how it is defined.

Holland and T.J. Parsons, *Mitochondrial DNA Sequence Analysis—Validation and Use for Forensic Casework*, 11 Forensic Sci. Rev. 21 at 40 (first criminal case in which Mitochondrial DNA evidence introduced in court was in 1996). No DNA testing was commonly available for criminal defense purposes until years after Mr. Beranek's February 1990 trial. The materiality of the new DNA evidence is also obvious. As explained *supra* part II(A)(3), the DNA results conclusively contradict the hair comparison testimony that was used as (1) affirmative evidence of Mr. Beranek's involvement in the crime, (2) corroboration of Ms. D[redacted]'s otherwise unreliable identification of Mr. Beranek as the perpetrator, and (3) impeachment of Mr. Beranek's alibi. Moreover, the exclusion of the defendant as the source of sperm on underwear collected from the victim is unquestionably material to guilt or innocence in a sexual assault case that turns on the question of identity. The DNA results are also clearly not cumulative. Experts called by the State and the defense associated the hair with Mr. Beranek and there was no mention at trial of anyone innocently leaving sperm on the victim's underwear. Excluding Mr. Beranek as the source of the hair evidence and from the sperm detected on the victim's underwear is unquestionably non-cumulative of the evidence presented at trial. Each of these four elements is proven by clear and convincing evidence.

The initial four elements are likewise proven by clear and convincing evidence as to the concession of error by the FBI. The FBI first conceded that Special Agent Oakes testified falsely in Mr. Beranek's case by letter dated May 5, 2015. Accordingly, the evidence of the FBI's concession of false testimony was clearly not discovered until after conviction. Likewise, Mr. Beranek cannot be found to have been negligent in seeking the

FBI's concession of error. The FBI's hair comparison review program was not initiated until 2013,[17] and Mr. Beranek diligently sought review by the FBI. For the same reasons stated above with regard to the DNA results, the FBI's concession that its Special Agent gave false testimony is clearly material to the case. And finally, this evidence is clearly not cumulative. Even though the defense called a scientist from the Wisconsin Crime Lab who was more conservative than the FBI regarding the weight of the comparison results, an admission of error by the FBI itself is qualitatively different than mere partial contradiction by a defense retained expert.

Having established the first four elements of the test of post-conviction relief based on newly discovered evidence, this Court should also find that there is a reasonable probability of a different outcome had the new evidence been presented to the jury. Obviously the strongest evidence is the DNA test results establishing that none of the hairs found on the perpetrator's underwear came from Mr. Beranek. As explained *supra* part II(A)(3), excluding Mr. Beranek as the source of the hair would (1) eliminate the only affirmative forensic proof of his guilt, (2) leave Ms. D[redacted]'s tainted, two-year-old identification uncorroborated, and (3) give the jury no reason to distrust the uncontradicted testimony of Mr. Beranek's six alibi witnesses. This alone creates a reasonable probability of a different outcome. But there is more. The exclusion of Mr. Beranek from sperm on the victim's underwear that was removed by the perpetrator during the rape is additional affirmative proof that the rape was committed by this unidentified person and not Mr. Beranek.

[17] *See* https://www.fbi.gov/about-us/lab/scientific-analysis/fbi-doj-microscopic-hair-comparison-analysis-review.

Adding the FBI's concession of that Special Agent Oakes testified falsely to the mix does far more than merely undermine the now disproven hair comparison testimony in this case. The FBI's letter constitutes an admission that Special Agent Oakes intentionally provided misleading testimony so that the State could argue a high statistical relevance of the hair "match" that was not supported by the science. Such an admission would be devastating to the jury's confidence in the integrity of the investigation and prosecution as a whole. *See Kyles v. Whitley*, 514 U.S. 419, 446-447 (1995) (evidence of misconduct by law enforcement may "throw the reliability of the investigation into doubt" and "sully the credibility" of the investigating officers).

Special Agent Oaks's testimony was fraught with vague and misleading assertions that one of the hairs found in the perpetrator's underwear came from Mr. Beranek. For example, Mr. Oakes stated to the jury "the one head hair found in the underwear was ***microscopically the same*** as the known head hairs of the defendant." TR Vol. 2 at 60-61. Later, he described the association made by himself and Special Agent Malone as "a match" to Mr. Beranek. TR Vol. 2 at 64 (Oakes testifying that "two agents must concur that the hair is a match" and that his report went out as "a match").

Mr. Oakes then falsely exaggerated the weight of the "match" to Beranek through testimony that implied a statistical relevance he knew did not exist. When asked about his experience working in this field, Mr. Oakes testified that he has worked on approximately three thousand cases of forensic hair analysis, and made the incredible claim that he had examined "billions" of hairs.[18] TR Vol. 2 at 63. He then claimed that in his examination of "billions" of hairs, that he had only once had a case in which he

[18] To examine just one billion hairs, a hair analyst would need to look at over 270,000 hairs under the microscope every day for 10 years.

was unable to distinguish between two hairs originating from different people. TR Vol. 1 at 181. He then further bolstered the reliability of his "match" to Beranek by claiming that the single time he was unable to distinguish between hairs involved negroid hairs, and that "I have never not been able to differentiate two Caucasian . . . head hairs." TR Vol. 1 at 182. And he never explained that, in fact, there was no scientific basis for his claim, because there was no way to know if his past record of "matching" hairs was perfect or filled with errors (like the previously unrecognized error in this case).

Unsatisfied with misleading the jury based on his own experience, Special Agent Oakes further exaggerated the weight of his hair "match" through a description of his supervisor Special Agent Malone's experience. Special Agent Oaks explained that his "match" was confirmed by his supervisor Special Agent Malone. TR Vol. 2 at 63. Special Agent Oaks emphasized that Malone had fourteen or fifteen years experience in which he had worked in excess of ten thousand cases. TR Vol. 2 at 63-64. And according to Special Agent Oakes, his supervisor "has had less instances wherein he has not been able to differentiate known persons hair samples from each other." TR Vol. 2 at 71. Where Special Agent Oakes claimed only a single instance, this testimony implied that Special Agent Malone had never been unable to distinguish hairs from different sources in the course of his work on over ten thousand cases spanning fifteen years. The implied, but misleading, assertion of the statistical relevance of the "match" to Beranek was not lost on the prosecutor. In closing, the State argued that the odds of Mr. Beranek's match to the hair were "one-in-ten thousand." TR Vol. 3 at 97.

As recognized in the FBI's letter, it has long been the consensus of scientists in the forensic hair comparison field that a positive identification cannot reliably be made

through comparisons of small numbers of sample hairs. At the Proceedings of the International Symposium on Forensic Hair Comparisons hosted by the FBI in Quantico, Virginia in June 1985—four and a half years before this trial—experts cautioned analysts not to draw positive identification matches from small numbers of sample hairs. "Unequivocal identification of an individual from a hair sample does not appear to be possible in the present state of the science." Edwin Kaszynski, *Hair Growth: Mechanism and Regulation,* Proceedings of the International Symposium on Forensic Hair Comparisons (June 25-27, 1985) at 30.[19] "Although there are many things that can be done with hair and many scientific determinations can be made, it usually cannot be positively identified exclusively with one person." *Id.* at 35 (Richard E. Bisbing, *Human Hair in a Forensic Perspective*. Special Agent Oakes was a moderator of this symposium. *See id.* at v.

However, it was not until May 2015 that the FBI acknowledged the intentionally misleading testimony provided by Mr. Oakes "exceeds the limits of science." Exhibit 19. Had the jury known that FBI Special Agent Oakes was knowingly testifying to phony statistics in an unscientific manner, and that the State's closing argument was based on the FBI's intentional deception, the credibility of the entire prosecution team would have been implicated. Where, in this case, the close contest on the ultimate issues of identity and alibi depended on the jury's assessment of credibility, the FBI's concession alone is dispositive both as newly discovered evidence as well as a violation of Due Process under *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). *See State v.*

[19] *Available at* https://www.ncjrs.gov/pdffiles1/Digitization/116592NCJRS.pdf (last viewed on 5/27/16).

Plude, 2008 WI 58, ¶ 38, 310 Wis. 2d 28, 51, 750 N.W.2d 42, 54.[20] And when weighed along with the exculpatory DNA results finding another man's sperm on the victim's underwear and excluding Mr. Beranek from the hairs in the perpetrator's underwear, there is a reasonable probability of a different outcome.

Considering all of the evidence, this Court must find that there is a reasonable probability that the outcome of Mr. Beranek's trial would have been different if the newly discovered evidence had been presented. *See Edmunds*, 308 Wis.2d at 389-391.

E. A New Trial in the Interests of Justice Should be Granted Pursuant to the Court's Inherent Authority

This Court may grant a new trial in the interests of justice under the Court's inherent authority ancillary to Mr. Beranek's proceeding under Section 974.07 based on both the new DNA evidence and the FBI's concession of error. Although the Wisconsin Supreme Court held in *State v. Henley* that a circuit court lacks the authority to grant a free-standing motion for new trial based on the interests of justice, it left open the question of the circuit court's authority to grant such a claim when brought ancillary to a proper procedural mechanism. *See State v. Henley*, 328 Wis.2d 544, 577-580, 787 N.W.2d 350, 366-368 (2010). However, the Wisconsin Supreme Court's exercise of its own inherent authority in similar circumstances indicates that this Court likewise may grant a new trial in the interests of justice here. *See Hicks*, 202 Wis.2d at 158-161 (granting new trial sua sponte in post-conviction appeal raising ineffective assistance of counsel).

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[20] As to the false testimony of Special Agent Oakes, this Court should apply the lower burden set forth for relief in *Giglio v. United States* in which the conviction should be overturned where "the false testimony . . . could in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at154. Neither this Court nor the Wisconsin legislature may modify the federal constitutional standard by imposing a "reasonable probability" burden on top of the standard articulated by the United States Supreme Court.

Mr. Beranek has filed a motion for new trial pursuant to Section 974.07(10) through which this Court may grant a new trial in the interests of justice based on the exculpatory DNA results. This Court's determination of the appropriate relief to be granted is guided by the question of whether the real controversy in the case—identity—has been fully tried. *See Hicks,* 202 Wis.2d at 158-161. However, the statute is silent as to whether related exculpatory evidence developed post-conviction, such as the FBI's concession of error, may be considered in this analysis. In Mr. Beranek's case the concession of error by the FBI goes to the heart of the crucial issue of identity. Based on the false testimony of FBI Special Agent Oakes, the State made the persuasive and misleading argument to the jury that the odds of the hair match to Mr. Beranek was 1 in 10,000:

> What an incredible coincidence. Somehow K[redacted] [D[redacted]] managed to pick out of a photo array some one in ten thousand people who had a hair that matched a hair that happened to be in her house . . . .

TR Vol. 3 at 97. It would be artificial and unjust to weigh the new exculpatory DNA evidence against the trial record without also recognizing that the FBI and the State grossly overstated the weight of the hair "match" which has now been disproven through DNA testing. The knowledge that the FBI provided false testimony should diminish this Court's confidence in the integrity of investigation and prosecution as a whole. *See Kyles,* 514 U.S. at 446-447 (evidence of misconduct by law enforcement may "throw the reliability of the investigation into doubt" and "sully the credibility" of the investigating officers). To the extent the path to a new trial may be obstructed by either an evidentiary limitation under Section 974.07 or the failure to meet one of the five elements under Section 974.06, this Court may grant a new trial in the interests of justice ancillary to the Section 974.07 proceeding based on the Court's inherent authority.

CONCLUSION AND PRAYER

The newly discovered evidence detailed herein demonstrates that Mr. Beranek has been wrongfully convicted. Mr. Beranek established at trial though six witnesses and contemporaneous documents that he was over six hundred miles away when the crime occurred. The jury rejected this substantial alibi because despite the weakness of Ms. D[redacted]'s two-year-old identification, two FBI Special Agents concluded with certainty that Mr. Beranek's hair was present on underwear left by the assailant in Ms. D[redacted]'s bed. Where DNA evidence and the FBI's own admission of error now disproves this critical forensic proof used to convict, the only just outcome is a new trial.

Respectfully submitted,

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