STATE OF WISCONSIN – DANE COUNTY

1989CF000946

STATE OF WISCONSIN,

Plaintiff,

vs.

RICHARD BERANEK,

Defendant

STATE'S OBJECTION TO DEFENDANT'S "MOTION FOR NEW TRIAL BASED ON DNA AND OTHER NEWLY DISCOVERED EVIDENCE"

CIRCUIT COURT OF DANE COUNTY,
BRANCH 11, THE HONORABLE DANIEL MOESER, PRESIDING

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Now comes the State of Wisconsin, Plaintiff, by its attorneys, Assistant District Attorney Erin Hanson and Assistant Attorney General Robert J. Kaiser, Jr., and objects to the defendant's motion pursuant to Wis. Stat. §§ 974.06 and 974.07 made after losing his direct appeal, and requests that this Honorable Court deny said motion on its face based on the motion, files and records of this action which conclusively show that the defendant is entitled to no such relief. The support for the State's request is stated herein:

STATEMENT OF THE CASE

Following a three day jury trial held February 6 through February 8, 1990, the defendant was convicted of 9 felony counts. These crimes were committed against the victim, K.D. (DOB 9/9/61) on March 2, 1987, and included multiple counts of first degree sexual assault, multiple counts of burglary with intent to commit a felony, endangering safety by conduct regardless of life and intimidation of a victim (Tr., 2/8/90, p. 112-114). On April 5, 1990, the defendant was sentenced to the maximum sentence on all counts to be served consecutively, totaling 243 years in the Wisconsin State Prison system (Tr., 4/5/90, p. 49-50). After sentencing, David Lehman and David Bartz were appellate

counsel for the defendant. A Notice of Appeal was filed on December 13, 1991. On or about April 27, 1992, the defense filed their appellate brief, and on or about July 15, 1992, their reply to the State's brief. The defendant argued on direct appeal that his conviction should be reversed because the defendant was subject to identification procedures which were unnecessarily suggestive and unreliable; because evidence of hair samples were admitted into evidence for which the evidentiary chain of custody was deficient, depriving the defendant of due process; and because the defendant was subjected to multiplicitous charges and convictions which violated his right against double jeopardy. The Court of Appeals affirmed the defendant's conviction in an unpublished *per curiam* opinion (Attachment A). The defendant has now filed a motion pursuant to Wis. Stat. §§974.06 and 974.07 requesting a new trial.

ARGUMENT

I. INTRODUCTION

Although the defendant commences and couches his motion in terms of Wis. Stat. §974.07(10) (Def. Mot. New Trial, p. 19), he includes in his motion Wis. Stats. §974.06 arguments (Def. Mot. New Trial, p. 24-36) that are barred by the language of §974.06 because they were previously raised and decided. As the Wisconsin Supreme Court held in *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837(1972), "A sec. 974.06 motion is limited in scope to matters of jurisdiction or constitutional dimension. The motion must not be used to raise issues disposed of by a previous appeal."

The claims in Part B of "Claims for Relief" of the defendant's motion are barred by the rule of *State v. Escalona-Naranjo*, 185 Wis. 2d 168,181-182, 517 N.W.2d 157 (1994) because the defendant has either already raised these issues regarding identification and they have been decided against him on appeal, or he has failed to demonstrate a "sufficient reason" for failing to raise these claims in any post-conviction

motion or in his direct appeal. *State v. Lo*, 2003 WI 107, ¶¶31-32, 44, 264 Wis. 2d 1, 665 N.W.2d 756; *State v. Romero-Georgana*, 2014 WI 83, ¶5, 360 Wis. 2d 522, 849 N.W.2d 668. There is no law and the defendant in his motion cites to no law that allows him to raise issues otherwise barred simply because he has met the requirements of Wis. Stat. §974.07(10)(a) allowing him to move for a new trial because he has DNA results that allegedly support his claim for a new trial. The defendant cannot ignore in his motion this clear and longstanding rule of law in Wisconsin of not again raising issues already decided against him, and then be allowed to address this issue in his reply brief, leaving the State no opportunity to respond in writing to what they should have known to explain in the first instance. Certainly the defense was aware of the defendant's prior appeal and decision affirming his conviction, even if they failed to acknowledge its existence in their entire motion and brief. The defendant's failure to acknowledge that arguments regarding the identifications of the defendant have already been made and rejected on direct appeal forecloses any consideration of them in this proceeding.

Turning to the real issue at hand in this motion, Wis. Stat. §974.07(10)(a) allows the defendant to be heard on his request for a new trial where he has obtained favorable DNA evidence by following the procedures outlined in Wis. Stat. §974.07(2)-(8), as the defendant has done in this case. There is no provision in Wis. Stat. §974.07 that allows for a motion pursuant thereto to be combined with a §974.06 motion, as implied by the defendant in the motion. (Def. Mot. New Trial, p. 37)

Although the defendant struggles to squeeze the newly discovered evidence standard from §974.06 into the present litigation (Def. Mot. New Trial, p. 37-40), he need not have bothered. Wis. Stat. § 974.07(10)(b) provides, "A court may order a new

trial under par. (a) without making the findings specified in s. 805.15(3)(a) and (b)." Wisconsin Stat. § 805.15(3) addresses newly-discovered evidence:

> (3) **Newly-discovered evidence.** Except as provided in ss. 974.07(10)(b) and 980.101(2)(b), a new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:
> (a) The evidence has come to the moving party's notice after trial; and
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
> (c) The evidence is material and not cumulative; and
> (d) The new evidence would probably change the result.

By including a specific reference relieving the movant under §974.07(10)(a) of establishing the requirements of § 805.15(3)(a) and (b), the Legislature evidenced its intent to require the balance of § 805.15(3), namely § 805.15(3)(c) and (d), to be established. The rule governing the granting of a new trial on the ground of newly discovered evidence in a criminal case is the same rule which governs the granting of a new trial for newly discovered evidence in a civil case. *Lock v. State*, 31 Wis. 2d 110, 116-17, 142 N.W.2d 183 (1966).

These cross-referenced statutes create a special standard for newly discovered evidence when the new evidence is a DNA test result supporting a post-conviction claim under Wis. Stat. § 974.07. The circuit court should order a new trial if the evidence is material, not cumulative and the new evidence would probably change the result. *See State v. Denny*, 2016 WI App 27, ¶ 76, 368 Wis. 2d 363, 878 N.W.2d 679, rev'd on other grounds, 2017 WI 17, ¶¶63, 71, 82, ("Notably, one finding that still appears to be necessary for the court to order a new trial under § 974.07(10) is that '[t]he new evidence would probably change the result.' Wis. Stat. § 805.15(3)(d)."). Thus the "reasonable probability" test that has been developed for assessing claims of other newly discovered evidence in criminal cases provides the means for assessing the

potential impact of a new DNA test result under § 974.07(10)(a). A reasonable probability of a different outcome exists if "'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" *State v. Love*, 2005 WI 116, ¶¶ 43-44, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted); see also *State v. Hudson*, 2004 WI App 99, ¶¶ 15, 19-21, 273 Wis. 2d 707, 681 N.W.2d 316, applying the *State v. McCallum*, 208 Wis. 2d 463, ¶¶16-18, 561 N.W.2d 707 (1997) standard. As then Chief Justice Abrahamson said in concurrence in *McCallum*,

> On appellate review, I conclude that an appellate court should review the reasonable probability determination under the erroneous exercise of discretion standard. Having heard both the evidence at the original trial . . . [and] the evidence on the motion hearing, a circuit court is in a better position than an appellate court to determine whether confidence in the outcome at the original trial . . . has been undermined.

208 Wis. 2d 463, ¶61

The court in *Hudson*, proceeded to adopt that standard of review, holding that so long as the trial court made its "reasonable probability" determination through a proper exercise of discretion by relying on the facts of record and the applicable law, the trial court would be found to not have erroneously exercised its discretion. *See Hudson*, 273 Wis. 2d 707, ¶ 16.

Clearly the "facts of record" do not include the plethora of evidence referred to by the defendant in his motion which was not presented to the jury at trial. (Def. Mot. New Trial, p. 2-11) As Justice Abrahamson said, the determination of the "reasonable probability" of a different result derives from an examination of "the evidence at the original trial" and "the evidence at the motion hearing." *See McCallum*, 208 Wis. 2d § 61. In this case the evidence at the motion hearing was the evidence that derived from the defendant's motion for DNA testing deriving from his §974.07 motion and from no

other source. Nothing that the defendant cites from the police reports or search warrant or other sources *de hors* the record of the trial is newly discovered evidence pursuant to the statute pursuant to which this motion is made (or in any other "newly discovered evidence" context) nor relevant to the limited inquiry of the motion pursuant to §974.07(10)(a), that is, whether or not the newly discovered DNA evidence creates a reasonable probability that the trial jury would have reached a different result, given all the other evidence the jury heard.

Finally, as a matter of introduction to the defendant's claim that he is entitled to a new trial in the interests of justice, the State believes, first, as a matter of statutory interpretation, that the phrase, ". . . the court shall enter any order that *serves the interests of justice*," Wis. Stat. §974.07(10)(a) (emphasis added) cannot be taken out of the context of the entirety of Wis. Stat. §974.07(10), which includes Wis. Stat. §974.07(10)(b) which provides, "A court may order a new trial under par. (a) without making the findings specified in s. 805.15(3)(a) and (b)." As referenced above, by including a specific reference relieving the movant under §974.07(10)(a) of establishing the requirements of § 805.15(3)(a) and (b), the Legislature evidenced its intent to require the balance of § 805.15(3), namely § 805.15(3)(c) and (d) to be established before a new trial may be granted. The "interests of justice" language in §974.07(10)(a) is not without the qualification of the language from §805.15 as required in §974.07(10)(b).

Thus the statute applicable to this action, 974.07, distinguishes this action from the defense claim that this court has some kind of freestanding, unbridled power to grant a new trial without consideration of §805.15(3). (Def. Mot. New Trial, p. 45) Wis. Stat. §974.07(10), in conjunction with §805.15(3)(c) and (d), define the limitations on the power of a circuit court to grant a new trial in the interests of justice in this case. As

described in *State v. Henley*, 2010 WI 97, ¶75, 328 Wis. 2d 544, 787 N.W.2d 350: "Thus, while circuit courts do have inherent powers, we do not recognize a broad, inherent power to order a new trial in the interest of justice at any time, unbound by concerns for finality and proper procedural mechanisms." (cited in Def. Mot. New Trial, p. 44) In this case, there is a procedural mechanism for obtaining a new trial in the interests of justice which is Wis. Stat. §974.07(10)(a), with the limitation under sub.(b) that the court find that, "The new evidence would probably change the result." Wis. Stat. §805.15(3)(d). To interpret the statute otherwise would be to render Wis. Stat. §974.07(10)(b) surplusage. Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The court should assign the words in the statute their ordinarily accepted meaning. *Id.* The court may also consider the context and structure of the statute. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. [citations omitted] Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* at ¶ 46.

Thus the test of whether or not the DNA evidence warrants a new trial in the interests of justice is this court's determination of whether or not there exists a reasonable probability of a different result, as set forth above. It is not, as the defendant would have it, "the question of whether the real controversy in the case—identity—has been fully tried." (Def. Mot. New Trial, p. 45) The defendant seizes on the phrase "serves the interests of justice" to advocate for the circuit court to determine what relief is appropriate under the "real controversy not fully tried" standard of an "interest of justice" claim. That is a ground statutorily reserved to Wisconsin appellate courts by the

language of Wis. Stat. §§ 751.06 and 752.35. The defendant also relies on *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), and *State v. Armstrong*, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98, two cases involving post-conviction DNA testing, in which the Wisconsin Supreme Court exercised its power under Wis. Stat. § 751.06 to reverse convictions. (Def. Mot. New Trial, p. 23, 44-45) By adopting the "real controversy not fully tried" standard, the defendant seeks to avoid making the required showing that the DNA evidence "create[s] a *substantial probability* of a different result." *Henley*, 328 Wis. 2d 544, ¶ 83. (emphasis added) The defendant's only legitimate grounds for relief before this court requires this Court to construe Wis. Stat. § 974.07(10) (a), and, as demonstrated above, a new trial in the interests of justice under that statute is limited to being granted where this court determines that there is a substantial reasonable probability that the jury, looking at the evidence they heard at the jury trial, and the new DNA evidence offered at the motion hearing, would have reached a different result.

II. §974.06 PORTION OF THE DEFENDANT'S MOTION

In his Motion for New Trial, Part II. Claims for Relief, Part B., the defendant presents a Wis. Stat. §974.06 motion, with all its attachments and incorporated documents, which is barred by the rule of *Escalona-Naranjo*, because the defendant has either already raised these issues and they have been decided against him on appeal or he has failed to demonstrate a "sufficient reason" for failing to raise these claims in any post-conviction motion or in his direct appeal.[1] *See Escalona-Naranjo*, 185 Wis. 2d 168,181-182, 517 N.W.2d 157 (1994).

[1] The State respectfully requests that this Court clearly and expressly rely on the *Escalona-Naranjo* bar if it concludes that *Escalona-Naranjo* and its progeny, as described elsewhere in the State's brief, bar some of the defendant's claims. If this Court "clearly and expressly" relies on *Escalona-Naranjo* in its opinion in finding that the claims already raised or which could have been raised but were not and there is not a sufficient reason why they were not are

"We need finality in our litigation." *State v. Escalona–Naranjo*, 185 Wis.2d 168, 185, 517 N.W.2d 157 (1994). Thus, Wis. Stat. § 974.06 compels an imprisoned offender to raise all constitutional and jurisdictional grounds for post-conviction relief in his or her original, supplemental or amended motion. *Escalona–Naranjo*, 185 Wis.2d at 185, 517 N.W.2d 157. If a convicted offender did not raise his or her grounds for post-conviction relief in a prior post-conviction proceeding, or if prior litigation resolved the offender's claims, they may not become the basis for a new post-conviction motion under § 974.06 unless the offender demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. *Escalona–Naranjo*, 185 Wis.2d at 181–82, 517 N.W.2d 157. As the trial prosecutor argued during the post-conviction motion hearing in *Escalona-Naranjo*, "When are these cases ever completed? It appears that as long as some lawyer can come up with a new theory the appeals continue." *Id.* at 186.

The burden of proof is on the defendant, the prisoner, as to each one of his arguments, "and the degree of proof necessary for relief is clear and convincing evidence," *State v. Walberg*, 109 Wis. 2d 96, 102, 325 N.W.2d 687, 691 (1982). As the court reaffirmed in *State v. Brunton*, 203 Wis. 2d 195, 203, 552 N.W.2d (1996), "The clear and convincing standard of proof is applicable to § 974.06, motions regardless of the particular substantive ground of the motion." The Defendant has failed to carry his burden of proof to show by clear and convincing evidence that he is entitled to again raise issues already raised and rejected.

In the instant matter, the defendant's arguments in sections II.B.1., 2, 3., 4., 5. and 7 of his motion all relate to identification, as did the defendant's first argument on direct appeal. The defendant argued on direct appeal that the circumstances of the

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barred, then the federal courts would be barred from reviewing the merits of those current claims if he were to raise any of them in that a *habeas corpus* proceeding. See *Perry v. McCaughtry*, 308 F.3d 682, 690-92 (7th Cir. 2002).

crimes and the allegedly subsequent divergent and contradictory descriptions given by the victim K.D., starting the day she was raped, undermined the reliability of her identification and that reliability was, as the defendant argued, the linchpin of identification. (Def. Br. App., p. 12-14; Attachment B, Def. Reply Br., p. 2., Attachment C) The defendant argued on direct appeal that the photo array was suggestive both in its content and methodology. (Attachment B, p. 10-12) The defendant argued that the time between the offenses and the identification militated against its admissibility and reliability. (Attachment B, p. 11, 12; Attachment C, p. 2) The defendant argued that the State was wrong to suggest that the unnecessarily suggestive photo-array did not taint the complainant's subsequent identifications of the defendant (Attachment C, p. 2), thus encompassing the defendant's present argument that the subsequent live line up and in court identifications "do not restore confidence in Ms. Dixon's identification." (Motion New Trial p. 33) The arguments already presented and rejected on direct appeal are now duplicated in the defendant's present §974.06 motion. They are thus barred by the rule of *Escalona-Naranjo* and *State v. Thames*, 2005 WI App 101, ¶'s 11, 17, 281 Wis. 2d 772, 700 N.W.2d 285, which held that the defendant's §974.06 claims which had previously been argued on direct appeal were procedurally barred.

Although the present restatement of the arguments made in 1992 may appear slightly different, the law in Wisconsin remains, "A motion under sec. 974.06, Stats., is not a substitute for a direct appeal . . . A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue . . ." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W. 2d 512(1991). That the defendant cites to research in the areas of identification and suggestiveness does not make these arguments new ones. A newfound appreciation for evidence previously argued about or newly discovered importance of evidence

previously argued do not make the evidence or the arguments new ones, but simply a restating and rehashing of previously made arguments which have been rejected. *See State v. Bembenek*, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (1987); *State v. Fosnow*, 2001 WI App 2, ¶16, 240 Wis. 2d 699, 624 N.W.2d 883. The court of appeals rejected the instant defendant's arguments regarding the victim's identifications, (Attachment A, pp 4-5) and thus the defendant is foreclosed from raising these arguments again.

As to the defendant's other 974.06 arguments, his Part II., Claims for Relief, B. 6., regarding the preparation of the drawing of the offender by Madison Detective Ted Mell, working with K.D. on March 12, 1987 (Tr., 2/6/90, pp. 46-47, 98), 10 days after the assault, it is also nothing more than a new found appreciation for evidence already admitted at the trial, and discussed in the defense brief on appeal in support of his argument that the conviction should have been reversed. On direct appeal, the defendant argued that the victim's description as depicted in the flyer, which included the drawing prepared with Detective Mell, was inconsistent with her prior and subsequent identifications (Attachment B, p. 13). That the defendant did not specifically argue the unreliability of the composite drawing as a basis for reversal does not now open the gates for the defendant to make that argument at this time. The basis existed to make the argument in his original appeal, and thus no sufficient reason exists for failing to allege or adequately raise this claim in the prior proceeding and thus this argument is barred as well by the rule of *Escalona-Naranjo*, 185 Wis. 2d at 181-182.

Therefore, the court should deny without further hearing all of the defendant's Claims for Relief, Part B. (Def. Mot. New Trial, pp. 24-36) for failure of the defendant to carry his burden of proof by clear and convincing evidence. The defendant failed to prove both that the issues have not already been raised and decided and whether there is a sufficient reason for ones not having been previously raised.

III. §974.07 PORTION OF THE DEFENDANT'S MOTION

The defendant's arguments in his motion, Part II., Claims for Relief, A., C., D. and E. all relate to the matters surrounding the DNA test results obtained as a result of the defendant's motion made pursuant to Wis. Stat. §974.07. Although the defendant attempts to attach ancillary issues to this §974.07 motion, the fact remains that ultimately this motion is one to be decided pursuant to the applicable statutory authority under which it is brought. Whether there is a substantial reasonable probability of a different result if the jury, now having heard the evidence it heard at trial, and hearing the new evidence derived from the application of §974.07. There would not be a different result, and the State therefore requests that the court deny the motion for new trial.

A. No Due Process Violation

An ancillary issue the defendant has attempted to conjoin to this §974.07 litigation is one touched upon variously in the defense motion (Def. Mot. New Trial, p. 43-44) and at the recent hearing (Tr., 2/16/17, pp. 73-74), described by the defense as a "violation of Due Process." Invoking again Wis. Stat. §974.06 (Def. Mot. New Trial, p. 37), the defendant claims that he is entitled to a new trial or dismissal of the charges as a result of FBI Agent Wayne Oakes "testiff[ing] falsely" (Def. Mot. New Trial, p. 39), "intentionally provided misleading testimony" (Def. Mot. New Trial, p. 41), "falsely exaggerate[ing] the weight of the 'match'" (Def. Mot. New Trial, p. 41), "intentionally misleading testimony" (Def. Mot. New Trial, p. 43); and "The FBI first conceded that Special Agent Oakes testified falsely" (Def. Mot. New Trial, p. 39), "the FBI's intentional deception" (Def. Mot. New Trial, p. 43), "the false testimony of Special Agent Oakes"

(Def. Mot. New Trial, p. 44, n. 20). The defendant has again failed to carry his burden under §974.07 to prove by clear and convincing evidence the substance of his claim, and thus any cry for relief on this basis should be denied.

No matter how often the defense uses the words "false" or "falsely" or "intentionally", they have not carried their burden to show by clear and convincing evidence that Agent Oakes intentionally testified falsely. As the U.S. Supreme Court said in *U.S. v. Dunnigan*, 507 U.S. 87, 94 (1993), "A witness testifying under oath or affirmation violates [the perjury statute] if [the witness] gives false testimony concerning a material matter with the willful intent to provide false testimony. . ." Wisconsin defines the crime of Perjury as, "Whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any matter, cause, action or proceeding, before ... a court ... is guilty of a Class H felony." Wis. Stat. §946.31(1)(a). Wisconsin defines False Swearing as, "Whoever...Under oath or affirmation ... makes or subscribes a false statement which he or she does not believe to be true...is guilty of a Class H felony." Wis. Stat. §946.32(1)(a). The defense has failed to demonstrate that Agent Oakes' testimony was anything other than his held beliefs and opinions at the time he gave the testimony.[2] As he testified, he did, "form an opinion to a reasonable degree of certainty in [his] area of expertise," that the "head hair found in the underwear was consistent with originating from the defendant." (Tr., 2/7/90, p. 60-61).

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[2] First, the State acknowledges that the defense has cited to sources in support of their contention that predate the trial in this case (Def. Mot. New Trial, p. 43) but will not argue that those "Proceedings" are newly discovered evidence. Second, numerous times at the §974.07(10) hearing, the defense expressed words regarding their ability to secure Agent Oakes testimony, had they chosen to do so (Tr., 2/6/17, p. 74, 223-224). The defense presented no evidence that Agent Oakes was "outside [their] ability to serve with process." Wis. Stat. §976.02(3) provides, in conjunction with all other state signators to the Uniform Extradition of Witnesses Act, for the extradition of witnesses in criminal actions in Wisconsin. Its provisions are not limited to only State witnesses. Simply stated, the defendant failed to call Agent Oakes as a witness and failed to present any evidence of false testimony.

"Consistent with originating from the defendant," is no different than the quotation from Agent Oakes' testimony cited in the defense motion as somehow "fraught with vague and misleading assertions." (Def. Mot. New Trial, p. 41). The defense quotes Agent Oakes as testifying, "the one head hair found in the underwear was **microscopically the same** as the known head hairs of the defendant." (Tr., 2/7/90, p. 60-61) (Def. Mot. New Trial, p. 41) (emphasis in defense motion). Agent Oakes' cited conclusion is the same as that reported by Microtrace in their report to the defense: "one hair, designated as 'Hair B' was found to exhibit microscopic characteristics similar to known hair from the suspect's head." (Motion Hearing (Mot.Hrg.) Exh. 3, p. 4). Further, the FBI "Practical Guide and Manual: Microscopy of Hair" (1977) offered by the defense at the Evidentiary Hearing, suggests that one of the conclusions that may be derived through microscopic examination and comparison of hairs includes "that the hairs from the questioned source are consistent with the hairs in a given known sample with respect to their microscopic characteristics and, therefore, would have come from the source of the known sample." (Mot. Hrg. Exh. 51, p. 24). Agent Oakes' testimony, as cited by defense, was not a vague, misleading, improper or erroneous assertion.

The defense attempts to bootstrap the U.S. Department of Justice (DOJ) letter of May 5, 2015 into a claim of intentionally false testimony, or lying to the jury, (Def. Mot. New Trial, p. 39-40) fail on the face of the document itself (Mot. Hrg. Exh. 12). The 2015 DOJ letter says that Agent Oakes' testimony included statements that were "invalid," "exceeded the limits of science," had "error type 2" and "error type 3", which "exceeds the limit of science" and "testimony contained inappropriate statements." (Mot. Hrg. Exh. 12, p. 2, 4, 5 and 7). The letter and attachments were forwarded to the Innocence Project (Mot. Hrg. Exh. 12, p. 3, 5), but that was well after the present litigation was

already underway and the court had granted the testing at issue here. Nowhere do the words "false", "intentionally false" or "intentionally misleading" appear in that document.

The DOJ letter acknowledges that there was "Limiting Language Included in Testimony" (Mot. Hrg. Exh. 12, p. 7) Thus, the 1977 Guidelines provided by the defense do not demonstrate intentional lying to and deception of the jury (Mot. Hrg. Exh. 51, p 24; Tr., 2/16/17, p. 73). Therefore the defense citation to the records of the Symposium are inapposite where, the defense tells us, persons said, "*Unequivocal* identification of an individual from a hair sample does not appear to be possible in the present state of the science." (Def. Mot. New Trial, p. 43). Agent Oakes was not "unequivocal", as acknowledged by the FBI letter of 2015, and the transcripts attached to the defense motion demonstrate this. For example, Agent Oakes testified, "It's not to say that every hair on the head is exactly the same, it's not." (Tr., 2/6/90, p. 179). Agent Oakes also testified, "I can't say it's a positive means of identification, it's not a positive means of identification because I can't exclude the possibility that someone whose hairs I haven't looked at could also look like that individual's, but again our experience is that generally we can tell different persons hairs alike." (Tr., 2/6/90, p. 181). Agent Oakes told the jury that he has in the past testified for the defense where his work has been helpful to them. (Tr., 2/7/90, p. 65-66). Talking about whether or not it is unusual to find head hairs in underwear, Agent Oakes testified, "It's the nature of the evidence is that it can be found anywhere." (Tr., 2/7/90, p. 68). He also told the jury, ". . . the literature suggests that the average person loses approximately a hundred head hairs a day," that it's possible that those hairs would be shed to the floor, and if on the floor and, "came in contact with the shorts, sure . . . head hair could be there or if you brushed your jacket and the shorts were close, sure." (Tr., 2/7/90, p. 68-69).

Further, Agent Oakes testified, and documented in his report, which was received in evidence at the trial (Tr. Exh. 30), "hair comparisons do not constitute a basis for absolute personal identification . . . hair comparisons are not a positive means of personal identification. They are not like fingerprints and not like [DNA] profiling . . . because not having examined all the Caucasian head hairs in the world, I can't discount the possibility that someone's head hairs don't microscopically match those of the defendant . . . So hair examinations and comparisons in my opinion constitute a basis for strong association, but not a positive association." (Tr., 2/7/90, p. 69-70). He also did not testify with "scientific certainty" or "absolute certainty" that the hair he examined came from the defendant (Tr., 2/7/90, p. 70). He said, "I can only base it on my experience that it's likely that it did, although not positively come from him." (Tr., 2/7/90, p. 70). He conceded on cross examination that his report only used the word "consistent", and that was what was reviewed by his superior. His report did not say, "highly likely," although he warranted that that was his opinion. He conceded that not everything he testified to had been in his report, but that both, "accurately reflect my results in my opinion." (Tr., 2/7/90, p. 70-71).

It also is clear from this record that the State of Wisconsin did not know and could not have known of this turn of events in regards to Agent Oakes' testimony until the DOJ letter of 2015 was sent. The State was not aware at the time of the trial that there were errors in Agent Oakes' testimony, or that he made statements which exceeded the the limits of the science, as described in the letter from the FBI. "A defendant's due process rights are violated when newly discovered evidence is evidence that the government knew about, but did not disclose. *Giglio v. United States*, 405 U.S. 150 (1992); *Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Plude*, 2008 WI 58, ¶38, n. 13, 310 Wis. 2d 28, 750 N.W.2d 42. Thus the defendant's reliance on *Kyle*

v. Whitley, 514 U.S. 419, 428-429, 431-432 (1995) (Def. Mot. New Trial, p. 41) is inapposite on the facts since in that case the prosecution was aware of and failed to disclose exculpatory matters. As the court noted, "As the ruling pertaining to Kersh's affidavit is not before us, we do not consider the question whether Kyles's conviction was obtained by the *knowing* use of perjured testimony and our decision today does not address any claim under the first *Agurs* category [the prosecution introduced trial testimony that it knew or should have known was perjured, [*U.S. v. Agurs*,] 427 U.S. [97] at 103-104 [1976]]" Kyle, 514 U.S. at 433 and note 7. (emphasis added) In the instant case, there is neither perjury nor State's knowledge of erroneous testimony, and therefore no due process violation.

The State's position in the instant matter is the same position as the State in *Plude*, ¶¶3, 30, 310 Wis. 2d 28, ¶¶3, 30 (Def. Mot. New Trial, p. 43-44) where the State was not aware of their expert witness' falsification of his qualifications. (In *Plude* the expert's testimony regarding his qualifications were patently false, not "erroneous" or "exceed[ing] the limits of the science" as in the instant matter.) The test for whether or not to grant a new trial, as set forth in *Plude*, 310 Wis. 2d 28, ¶¶36, 49, is the same as the test already described above for warranting a new trial based on the newly discovered evidence of results of DNA testing, that is, "had the jury discovered that [the State's expert] lied about his credentials, [would it] have had a reasonable doubt as to Plude's guilt." The court even entitled the portion of their opinion between paragraphs 36 and 49, "Reasonable Probability." Exactly. The State asks that this court apply the same test to the FBI agent's testimony as the court applies to the DNA evidence derived from the §974.07(10) motion at issue in this case: is there a substantial reasonable probability that the jury, having heard the evidence they heard at trial, and now having heard the evidence presented at the hearing on the §974.07(10) motion, would have

reached a different result? In this case, Agent Oakes' testimony is nothing more than the "evidence or other matters presented at the hearing" delineated in §974.07(10). Because there is not a substantially reasonable probability that the jury, having heard the evidence at the trial and hearing the new evidence derived from the §974.07(10) hearing would reach a different result, the motion for a new trial must be denied.

B. The Evidence at Trial

1. The Attack

On February 6, 1990, the jury heard from the victim, K.D., about the brutal attack she survived on March 2, 1987 (Tr., 2/6/90, pp. 30-76). K.D. was a twenty-eight-year-old mother of two, living in a residential area approximately one mile away from a highway (Tr., 2/6/90, pp. 30-31). Upon arriving at her home at around 4 o'clock in the afternoon, K.D. went into her bedroom to change clothes when she heard a noise coming from behind her (Tr., 2/6/90, p. 32). When she heard the noise, K.D. turned around and saw a person who she identified as being the defendant, Richard Beranek (Tr., 2/6/90, pp. 32-33). K.D. testified that she was scared when she saw the defendant (Tr., 2/6/90, p. 33). The jury observed K.D. cry while testifying (Tr., 2/6/90, p. 33). K.D. explained that when she turned around, the defendant was right in front of her, said he was finally going to get her, and grabbed her arms (Tr., 2/6/90, p. 33). K.D. testified that it was light in her bedroom and that she was able to see the defendant (Tr., 2/6/90, pp. 54-55).

K.D. testified that the defendant ripped her shirt open, causing the buttons to fall off, grabbed her breast, and took her bra off (Tr., 2/6/90, pp. 33-34). The defendant had a "pliers like thing" in his hand that appeared to be sharp (Tr., 2/6/90, p. 34). K.D. testified that the defendant threw her onto her bed (Tr., 2/6/90, p. 34). At this point in

her testimony, the judge informed K.D. that if she would like to take a break, she should just say so and a break would be given (Tr., 2/6/90, p. 35). K.D. testified that up to this point in the attack, she had been able to see the defendant, but then he covered her head up with a quilt (Tr., 2/6/90, p. 35). K.D. testified that the defendant then ripped her underwear off with the previously-described pliers-type object (Tr., 2/6/90, p. 35). When K.D. told the defendant that she had her period, the defendant laughed at her and removed her tampon (Tr., 2/6/90, p. 36). The defendant then removed the quilt from her face (Tr., 2/6/90, p. 36).

The defendant then told her to suck his penis, got on her shoulders and straddled her with his penis exposed (Tr., 2/6/90, p. 36). K.D. testified that she was trying to get away and grabbed the defendant and scratched him (Tr., 2/6/90, p. 36). The defendant then "got really angry" and hit K.D.'s head on the back of the headboard, causing her pain (Tr., 2/6/90, p. 37). K.D. testified that the defendant grabbed her head, pulled her hair, put the plier-type object to her neck and told her to knock it off or he would cut her hair and cut her (Tr., 2/6/90, p. 37). The defendant kept telling her to suck his penis, and when she did, he jammed it into her mouth and was gagging her (Tr., 2/6/90, p. 38). K.D. was scared, crying, and rolled up in a ball (Tr., 2/6/90, p. 37). K.D. testified that the defendant then jammed his hand into her vagina, causing her pain (Tr., 2/6/90, p. 38). K.D. was screaming, and the defendant stuck his penis into her (Tr., 2/6/90, p. 38). At this point in her testimony, the court again asked K.D. if she would like to take a break (Tr., 2/6/90, p. 38). K.D. continued testifying, and said that she told the defendant, in an attempt to dissuade him from the attack, that she had herpes (Tr., 2/6/90, p. 39). In response, the defendant "got really, really mad" and started screaming at her, calling her names like "bitch" and "slut" (Tr., 2/6/90, p. 39). K.D. testified that the defendant "got really furious then" and picked her up and turned her around (Tr.,

2/6/90, p. 39). The defendant bent K.D. over the bed and stuck his penis in her "butt" (Tr., 2/6/90, pp. 39-40). K.D. testified that she was hurt, scared and crying, but the defendant was laughing and said he should make her "suck it again" (Tr., 2/6/90, p. 40). K.D. testified that she then observed the defendant by her bedroom door, holding the plier-type object and his shirt (Tr., 2/6/90, p. 40). The defendant told K.D. that she better not tell anybody or he would get her children (Tr., 2/6/90, p. 40). K.D. testified that the defendant then told her to shut her eyes and not move (Tr., 2/6/90, p. 41). K.D. laid on her bed even after hearing the back door close, crying, scared, and not knowing what to do (Tr., 2/6/90, p. 41).

K.D. told the jury that the furthest distance the defendant was from her during the entire attack was within arms' length (Tr., 2/6/90, p.60). K.D. observed the defendant's face when he was laughing at her and when he warned her not to tell anyone (Tr., 2/6/90, p. 60). K.D. told the jury there was no doubt in her mind that the defendant sitting in the courtroom was the person who attacked her (Tr., 2/6/90, p. 60).

2. After the Attack

The jury heard that K.D. decided to call her ex-husband (Tr., 2/6/90, p. 41). Before her ex-husband arrived at her house, K.D. cleaned herself up and threw the messed up quilt back over the bed (Tr., 2/6/90, p. 42). When her ex-husband did arrive, K.D. was "really crying" and was upset, and did not tell her ex everything that happened and did not want to call the police right away because she was scared (Tr., 2/6/90, p. 42). K.D. also testified that when a sheriff's deputy spoke with her that day, she did not tell him all of the details of the attack because she was scared (Tr., 2/6/90, p. 43). She did not supply all of the details of the attack in a written statement she provided to the first officer (Tr., 2/6/90, pp. 61-64), again because she was scared of

what he would do to her kids (Tr., 2/6/90, p. 43). K.D. testified that within the three days after the attack, there were at least two investigating officers in her house (Tr., 2/6/90, p. 68). Deputy Ellis testified for the defense that he had contact with K.D., inside of her home, on March 2, 1987, and that K.D. provided a written statement and a description of her attacker (Tr., 2/7/90, pp. 96-98). Deputy Ellis testified that K.D. did not volunteer much information, but did answer questions and did provide a description of the attacker, including that he wore a blue shirt, dark blue pants and had dirty hands and fingernails (Tr., 2/7/90, pp. 98, 101). Detective Macaluso testified that he met with K.D. on March 3, 1987, and that she provided "somewhat of a description" of her attacker, but that she was distraught and upset and that there was a lot that she did not say during the interview. (Tr., 2/7/90, pp. 102-103, 106). K.D. stated that she later gave all of the details of the attack to Detective Kevin Hughes (Tr., 2/6/90, p. 44).

3. Hair Evidence

K.D. stated that the first night of the attack, she stayed in her house with her ex-husband (Tr., 2/6/90, p. 45). They slept on top of the covers and her ex-husband slept with everything on, including his boots (Tr., 2/6/90, p. 45). K.D. thinks she stayed at the house a couple of nights, but then couldn't stand staying there anymore (Tr., 2/6/90, p. 45). K.D. stayed at her ex-husband's house until she found an apartment (Tr., 2/6/90, p. 45). When K.D. was going to move into her apartment, she went to her house and into the bedroom, and took the sheets and the mattress pad, but not the quilt, and threw them into the washer (Tr., 2/6/90, p.45). The washer was located in the basement (Tr., 2/6/90, p. 68). It had been "awhile" since she had been back in her house (Tr., 2/6/90, p.45). K.D. testified that she believed it was less than a month from the time of the attack to when she stripped her bed and threw the bedding in the wash (Tr., 2/6/90, p.

58). The washer overloaded, so K.D. took the wet bedding out and threw it all on the floor (Tr., 2/6/90, p. 46).

K.D. testified that when she took the items out of the overloaded washer, she saw a pair of underwear—men's underwear (Tr., 2/6/90, p. 46). She had never seen the underwear before and believed it to be the defendant's (Tr., 2/6/90, p. 46). K.D. testified that the underwear were on top of the sheets, which were on the floor (Tr., 2/6/90, p. 71). The defense attorney disputed this, and Detective Hughes testified that K.D. told him that the underwear had fallen to the floor (Tr., 2/7/90, p. 24). Detective Hughes stated that K.D. informed him that she had "pushed" the underwear aside, on the floor, away from the laundry section of her basement (Tr., 2/7/90, p. 25). K.D. testified that she called her counselor, Nancy Newton, and then put the underwear in a bag and in her car, and then gave the bag to her counselor the next time she saw her (Tr., 2/6/90, pp. 46, 58, 71; Trial Exh. 8). K.D. testified that the bag in which she put the underwear was "more than likely" a used bag (Tr., 2/6/90, p. 72). K.D. did not know the length of time that passed from when she found the underwear to when she gave them to her counselor (Tr., 2/6/90, p. 59).

The counselor, Nancy Newton, testified that K.D. provided her with a brown paper bag on May 27, 1987, and that the bag contained a pair of men's underwear (Tr., 2/6/90, p. 78). After opening the bag, Newton rolled the top of the bag down (Tr., 2/6/90, p. 81), but did not secure it with tape (Tr., 2/6/90, p. 83). Newton said that she put the bag in a carton in a storage room at the Rape Crisis center and labeled it with a sign instructing others not to touch or move it (Tr., 2/6/90, pp. 78-79). All of the staff of the Rape Crisis Center, from ten to twenty people, would have had access to the storage room (Tr., 2/6/90, p, 83-84). Newton testified that she turned the bag over to Detective Hughes on June 19, 1987 (Tr., 2/6/90, p. 80). Newton testified that it was

possible that others could have gotten into the room, into the box, into the bag and handled the shorts from the period of May 27, 1987 through June 19, 1987 (Tr., 2/6/90, p. 85). Newton testified that when she picked up the bag, it appeared to be in exactly the same condition as when she placed it in the room (Tr., 2/6/90, p. 86).

Detective Hughes testified that he received a package that Newton had left on his desk on June 19, 1987 (Tr., 2/6/90, p. 146). Detective Hughes looked in the sack and observed men's underwear inside (Tr., 2/6/90, p. 147; Trial Exh. 8, 9). Detective Hughes did not observe any hair or other debris (Tr., 2/7/90, p. 28). Detective Hughes then placed the underwear and sack into another, larger paper sack (Tr., 2/6/90, p.148; Trial Exh. 15). Detective Hughes secured the larger sack and placed all of the items into a secure locker (Tr., 2/6/90, p. 148). On June 19, 1989, Detective Hughes removed the bag from the locker, examined the underwear, and noticed hair in the underwear (Tr., 2/6/90, pp. 154-155). He left the hair in the underwear and put them back in the bag (Tr., 2/6/90, p. 162). On August 30, 1989, Detective Hughes placed the bag and a sexual assault evidence kit containing samples from the defendant in a box and shipped it to the FBI laboratory in Washington, D.C. (Tr., 2/6/90, pp. 155-156). The defense attorney at trial rigorously questioned Detective Hughes's handling of the hairs and underwear and the overall chain of custody of said items (Tr., 2/7/90, pp. 26-28, 31-33, 45-48). Detective Hughes admitted that he did not examine the bag itself for the presence of hairs and did not request the FBI to examine hairs that might be found in the bag (Tr. 2/7/90, p. 48).

4. Identification of Defendant

The jury heard testimony from K.D. that on or about March 12, 1987, approximately 10 days after the attack, she sat down with a sketch artist from the Madison Police Department and helped him do a sketch of the attacker (Tr., 2/6/90, pp.

46-47; Trial Exh. 1; Attachment D). K.D. testified that the sketch seemed "about ninety percent accurate" (Tr., 2/6/90, p. 47). K.D. did not remember seeing a mustache, but described the attacker's face as being "potted" and having a "mark" (in the chin) (Tr., 2/6/90, p. 74). Trial Exhibit 1, the sketch, had a typed portion in the lower-left corner describing the attacker (Trial Exh. 1; Attachment D; Tr. 2/7/90, p. 42). Detective Hughes testified that he typed in the description (Tr. 2/7/90, p. 43). Detective Hughes testified that he made a mistake when he typed "blue eyes" in the description of the attacker (Tr. 2/7/90, p. 43). Detective Hughes searched his recollection of conversations with K.D. and all of his police reports and did not find one place, time or conversation when K.D. described her attacker as having blue eyes (Tr. 2/7/90, p. 43). Detective Hughes even submitted a police report before trial to the State and defense describing his error (Tr. 2/7/90, p. 43). In contrast to the typing on the sketch (Trial Exh. 1; Attachment D), K.D. testified that she never said the attacker had blue eyes and that in fact he did not have blue eyes (Tr., 2/6/90, p. 74).

K.D. met with Detective Hughes on a number of occasions and looked at "all kinds of pictures" (Tr., 2/6/90, p. 48). Detective Hughes testified that he showed photo arrays to K.D. fourteen times before she identified anyone as being her attacker (Tr., 2/6/90, p. 144; Trial Exh. 14). K.D. had looked at hundreds of photos before identifying anyone (Tr., 2/7/90, p. 18).

The jury heard that on April 12, 1989, detectives visited K.D. and wanted her to look at pictures, despite K.D. not wanting to look at pictures because she got "really scared" (Tr., 2/6/90, pp. 48-49). K.D. stated because of her fear, it always took her awhile to look at them (Tr., 2/6/90, p. 49). K.D. explained to the jury that on April 12, 1989, Detective Hughes laid the photos out on the kitchen table while she sat in the living room (Tr., 2/6/90, p.49). After a while, she went to get a drink of water and

walked past the table where the pictures were (Tr., 2/6/90, p.49). K.D. then "got scared" and "started crying" (Tr., 2/6/90, p. 49). K.D. told the jury she got scared and started crying because she saw "his eyes" (Tr., 2/6/90, p.49). Detective Dawn Johnson observed K.D. walk past the kitchen table, look down at the photographs and immediately gasp and start to cry (Tr., 2/6/90, p. 104). Detective Johnson heard K.D. explain her reaction to the photo as, something to the effect of, "I'll never forget those eyes" (Tr., 2/6/90, p. 105). The jury learned that K.D. knew immediately when she saw the picture that it was the person who attacked her—the defendant (Tr., 2/6/90, p. 50; Trial Exh 2; Attachment E).

K.D. was then shown the pictures one at a time and she again picked out the defendant as being the person that raped her (Tr., 2/6/90, p. 50). Detective Johnson noted that K.D. was "very scared" when she picked out the defendant's photo (Tr., 2/6/90, p. 106). Detective Johnson informed the jury that K.D. stated, in comparing the photo to her memory, the facial features were very similar, but the features were slightly darker than she recalled (Tr., 2/6/90, p. 107). The eyes were the feature that made K.D. know the photo was of her attacker (Tr., 2/6/90, p. 107). Detective Hughes added that K.D. initially focused on the eyes, but also stated that the general structure of the face, the way his shoulders were and a general "mean cold appearance" were other features shared by the photograph of the defendant she selected and her attacker (Tr., 2/6/90, pp. 151-152).

In June of 1989, K.D. viewed an in-person line-up at the police department (Tr., 2/6/90, pp. 51-52). K.D. was present when the persons came out onto a stage and she started crying when she observed person number three (Tr., 2/6/90, p. 52). The jury heard that person number three in the line-up was identified by K.D. as the person who attacked her (Tr., 2/6/90, p. 53). K.D. testified that she knew it was him (the person who

attacked her) as soon as he walked through the door (Tr., 2/6/90, p. 54). Detective Johnson was present during the in-person line-up and observed that when the defendant walked onto the stage, K.D. gasped and immediately started to cry (Tr., 2/6/90, p. 109). Detective Johnson testified that K.D. identified the defendant, person number three in the line-up, as the attacker (Tr., 2/6/90, p. 111). Detective Johnson observed that as soon as K.D. got outside the door of the room, she "just broke into sobbing tears" (Tr., 2/6/90, p. 112). After K.D. calmed down, she said that as soon as the defendant entered the door she recognized him (Tr., 2/6/90, p. 112).

5. Hair Comparison

During the jury trial, Wayne Oakes, a supervisory special agent with the FBI, testified about hair comparisons. He explained the microscopic appearance of hair to the jury (Tr., 2/6/90, pp. 177-178). Oakes testified that an experienced examiner can detect subtle differences in the microscopic characteristics (Tr., 2/6/90, p. 178). Oakes explained how side-by-side hair comparisons are done using a compound microscope (Tr., 2/6/90, p. 180). Oakes testified, that in general, if he notes microscopic differences between a questioned hair and a known hair (standard), he concludes that the questioned hair did not originate from the known hair source (Tr., 2/6/90, p. 180). However, if the hairs are microscopically indistinguishable, he concludes that the questioned hair is consistent with originating from the known hair source; or stated another way, the questioned hair either originated from the known source or from another source of the same racial group whose hairs exhibit all of the same microscopic characteristics (Tr., 2/6/90, pp. 180-181). Oakes testified that when he associates a known hair and a standard, it "carries a high degree of probability it originated from that person, although I can't say it's a positive means of identification, it's not a positive

means of identification because I can't exclude the possibility that someone whose hairs I haven't looked at could also look like that individuals..." (Tr., 2/6/90, pp. 180-181).

Oakes testified that the FBI received a sealed bag (Trial Exh. 15) that contained men's underwear (Tr., 2/7/90, p. 58). These underwear (Trial Exh. 8) were removed from the sealed bag and scraped of debris, hairs and fibers which were then put in a pill box (Tr., 2/7/90, p. 59). The hairs from the pill box were mounted on a glass microscope slide and Oakes compared them to known hair standards from the defendant (Tr., 2/7/90, p. 59; Trial Exh. 20). Oakes testified that one head hair of Caucasian origin was found in the underwear and that he examined this hair and compared it with the known head hair standards from the defendant (Tr., 2/7/90, p. 60). Oakes found that the one head hair found in the underwear was microscopically the same as the known head hairs of the defendant—he concluded that this "head hair found in the underwear was consistent with originating from the defendant" (Tr., 2/7/90, p. 61). Oakes stated, "That's correct" when asked if it was his testimony that from root to tip the known sample was indistinguishable from the sample recovered from the underpants (Tr., 2/7/90, pp. 62-63). Oakes stated that he has worked on approximately 3000 cases and has worked on billions of hairs (Tr., 2/7/90, p. 63). Oakes testified that Special Agent Michael Malone confirmed Oakes's work and that his report would not have gone out if both he and Malone did not agree that the hair is a match (Tr., 2/7/90, pp. 63-64). Oakes's report was sent out "as a match" (Tr., 2/7/90, p. 64; Trial Exh. 30).

The jury heard a lengthy cross-examination of Oakes by the defense. Oakes testified that in addition to the questioned hair in the underwear, he also found limb hairs and very fine body hairs that were not suitable for comparison (Tr., 2/7/90, pp. 66-67). Oakes informed the jury that it was not particularly unusual to find head hair in underwear, because it is the nature of hair that it can be found anywhere (Tr., 2/7/90, p.

68). The jury learned that the average person loses approximately a hundred head hairs a day (Tr., 2/7/90, pp. 68-69).

Oakes testified that hair comparisons do not constitute a basis for absolute personal identification (Tr., 2/7/90, p. 69). Oakes stated that he could not discount the possibility that someone else's head hairs microscopically match those of the defendant (Tr., 2/7/90, p. 69). Oakes informed the jury that hair comparisons are not like fingerprints and are not like DNA profiling (Tr., 2/7/90, p. 69). Hair comparisons, in Oakes's opinion, constitute a basis for a strong association, but not a positive association (Tr., 2/7/90, p. 70). Oakes admitted that he cannot say with absolute scientific certainty that the questioned hair came from the defendant (Tr., 2/7/90, p. 70). Oakes testified that it was likely, perhaps even highly likely that the hair came from the defendant, but that his report stated only that the hair was "consistent" with having come from the defendant (Tr., 2/7/90, pp. 70-71).

The defense also presented a hair expert, Arthur Varriale, from the Wisconsin State Crime Laboratory (Tr., 2/7/90, p. 111). Varriale was the head of the laboratory section which examines blood, semen, hairs and textile fibers (Tr., 2/7/90, p. 111).[3] Varriale testified that he received evidence from Detective Hughes with a request that Varriale compare a questioned hair, reportedly recovered at the FBI laboratory from the men's underwear with the head hair standards of the defendant (Tr., 2/7/90, p. 113). Varriale used a comparative microscope, allowing him to examine two hairs at the same time (Tr., 2/7/90, pp. 113-114). Varriale's conclusion after comparing the questioned hair with the defendant's hair was that the "questioned hair was consistent in all color and morphological detail that I detected both in the question[ed] and the head

[3] Varriale was not "a defense retained expert" as claimed by the defense in their postconviction motion (Def. Mot. New Trial, p. 40).

hair standards of Beranek; and from that I concluded that Richard Beranek is a potential source of that questioned hair which was recovered from the shorts." (Tr., 2/7/90, pp. 114-115). 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 with one exception; and that one exception is the use of D[N]A analysis..." (Tr., 2/7/90, p. 115). Varriale stated that the questioned hair recovered from the underwear could have originated from somebody else other than the defendant (Tr., 2/7/90, p. 115).

Varriale showed the jury some photo micrographs of the questioned hair and the defendant's hair (Tr., 2/7/90, p. 116; Trial Exhs. 33,34). Varriale described for the jury that the questioned hair did not have a medulla, although some of the defendant's hairs did; that there were ovoid bodies in both the questioned hairs and the defendant's standards (Tr., 2/7/90, pp. 117-118). Varriale stated he would not render an opinion, to any degree of probability or confidence level, that the questioned hair was the defendant's (Tr., 2/7/90, pp. 118-119).

Varriale also conducted a hair comparison between the questioned hair from the men's underwear and a hair standard the victim's ex-husband (Tr., 2/7/90, p. 119). He noted some dissimilarities, but not enough to absolutely exclude the ex-husband as being a potential source of the hair (Tr., 2/7/90, p. 119). Varriale described to the jury that part of the problem with conducting the hair comparisons was that the questioned hair was not a complete long head hair, that it was approximately an inch and three-quarters long in morphological detail (Tr., 2/7/90, pp. 119-120; 121).

Varriale ultimately testified that based on his examination of the known hairs from the defendant and from the ex-husband, he concluded that the questioned hair could have come from either person (Tr., 2/7/90, p. 122).

When asked if he examined any other hairs found in the men's underwear, Varriale stated that there were some other hairs, but that he considered them to be less than suitable for comparison purposes (Tr., 2/7/90, p. 126). These other hairs included animal hair and light-colored hair (Tr., 2/7/90, pp. 126-127).

6. Other Incriminating Evidence

The jury heard from Norman Grosland, a former employer of the defendant. Grosland stated that the defendant worked for him at Red Apple Enterprises, Inc., a trucking business, out of Marshfield, Wisconsin (Tr., 2/6/90, p. 115). The defendant drove for Grosland in 1986 and through January 23, 1987, using the name Richard Beranek (Tr., 2/6/90, pp. 115, 125, 130). There was a period following January 23, 1987, that the defendant did not work for Grosland (Tr., 2/6/90, pp. 115-116, 126-127). Grosland testified that the defendant returned to driving for him by March 28, 1987, but this time used a different name—Randy Baumann (Tr., 2/6/90, p. 127, 130). On cross-examination, Grosland testified that the defendant's appearance hadn't changed a great amount since 1987 (Tr., 2/6/90, p. 128). Grosland could neither confirm nor deny that the defendant had a moustache in January of 1987 (Tr., 2/6/90, p. 128-129).

In March of 1987, the defendant possessed a truck, providing him with a personal mode of transportation (Tr., 2/7/90, p. 18).

K.D. described her attacker to a deputy sheriff as wearing a "blue shirt, dark blue pants, as those that would be worn by a mechanic...the individual had dirty hands with dirt under his fingernails like a mechanic or machinist would have." (Tr., 2/7/90, p. 98). During the alibi portion of the testimony, the defendant's own brother-in-law agreed that the defendant could have been wearing a blue shirt and blue jeans and could possibly have had dirt under his fingernails near the time of the attack (Tr., 2/7/90, p. 192).

7. The Alleged Alibi Evidence

The defense put on alibi witnesses, attempting to establish that the defendant was in North Dakota during the attack on March 2, 1987. The first witness was Rose Beranek, the defendant's mother (Tr., 2/7/90, pp. 128-129). Rose testified that from January 1987 up to February 27, 1987, the defendant had been residing in her home in Junction City, Wisconsin (Tr., 2/7/90, p. 129). Rose testified that the defendant was working with his brother-in-law in North Dakota at the end of the month of February in 1987 (Tr., 2/7/90, pp. 131-132). Rose told the jury that the defendant left on February 26, 1987, on a Greyhound bus out of Stevens Point, Wisconsin, heading towards North Dakota (Tr., 2/7/90, p. 132). Rose testified that she knew that the defendant arrived in Devils Lake, North Dakota because she received a telephone call from him on February 27, 1987 (Tr., 2/7/90, pp. 132-133). She next had a telephone conversation with him on March 5, 1987, when he was going to come back home (Tr., 2/7/90, p. 133). These phone calls were documented on Rose's telephone bill as coming from the phone number at her daughter and son-in-law's home to Rose's phone (Tr., 2/7/90, p. 135; Trial Exh. 39).

On cross-examination, Rose was confronted with the fact that on July 29, 1988, she was at her residence when deputies knocked on the door and asked her to open the door (Tr., 2/7/90, p. 142). Rose acknowledged that after deputies came into the house and searched the residence, they located Rose hiding under blankets in a closet (Tr., 2/7/90, p. 142). Rose denied telling deputies that she did not know where the defendant was. She admitted the defendant was present in the house at that time (Tr., 2/7/90, p. 143). When confronted again about whether or not she told deputies that she was alone in the house, Rose stated, "I don't remember what I said" and "I don't know"

(Tr., 2/7/90, p. 143). Rose admitted that after she eventually told deputies the defendant was present, they located the defendant in the house (Tr., 2/7/90, p. 143). The judge instructed the jury that the testimony that law enforcement was looking for the defendant was permitted for the jurors to consider deciding what weight to give the testimony of Rose (Tr., 2/7/90, pp. 143-144).

Rose denied knowing that the defendant ever used the name Randy Baumann (Tr., 2/7/90, p. 136-137).

Susan Hanson, the defendant's sister was the next witness called to support the defendant's alibi. Susan testified that her brother came to visit her home in Devil's Lake, North Dakota, on February 27, 1987 (Tr., 2/7/90, pp. 144-145). Susan stated that the defendant stayed at her trailer for about six days (Tr., 2/7/90, pp. 145-146). Susan testified that the defendant left on March 6, 1987, and between his arrival and departure, he stayed in her home continuously (Tr., 2/7/90, p. 147). Susan testified that on February 28, 1987, she, her husband and the defendant performed a "painting job" in Cando, North Dakota for Janice and Darrell Reed (Tr., 2/7/90, p. 148). Susan testified that the defendant was still with her on March 2, 1987, and that she was not certain, but thinks that maybe she took him to Job Service and Target Roofing (Tr., 2/7/90, p. 152). Susan testified that the defendant was still staying with her on March 3, 1987 (Tr., 2/7/90, p. 153). Susan said that while the defendant stayed with her, he did not have access to an automobile and did not have much money (Tr., 2/7/90, p. 154). When asked about the dates between February 28 and March 6, Susan continuously stated, despite being asked leading questions, that she did not recall what happened on those dates (Tr., 2/7/90, 151-154).

Susan said that she observed the defendant on a phone call with his mother on March 5, 1987 (Tr., 2/7/90, p. 154). This happens to coincide with Rose's testimony and the phone bill (Tr., 2/7/90, p. 133; Trial Exh. 39).

Susan also testified that on March 5, 1987, she took the defendant to the Ramsey County Social Services office (Tr., 2/7/90, pp. 154-155). Susan said she went there to apply for food stamps and also included the defendant in her application so she would obtain extra stamps (Tr., 2/7/90, pp. 155-156). Susan stated that she put down the defendant's birth date and his social security number and presented his social security card so a copy could be made (Tr., 2/7/90, p. 155). Susan stated that the defendant did not go into the office and instead stayed in the car with her children (Tr., 2/7/90, p. 155). She said that the defendant gave her his social security card and that she took it to the office (Tr., 2/7/90, p. 156). No one from Ramsey County Social Services ever saw the defendant (Tr., 2/7/90, p. 161).

Susan testified that although the defendant left the next day, March 6, 1987, she did not notify the Social Services office about the defendant's departure or the excess food stamps she received (Tr., 2/7/90, p. 156-157). She admitted to filling out a form stating that the defendant left her home on April 2, 1987, and admitted that she knew that he had left in March, and that what she wrote on the form was not true (Tr., 2/7/90, pp.167, 174). She admitted to receiving food stamp benefits for the defendant for the entire month of April (Tr., 2/7/90, p. 174). She also admitted to filling out the incorrect information on a form that said, "state and federal laws provide for a fine and/or imprisonment for any person who fraudulently receives or attempts to receive assistance to which he or she is not entitled" (Tr., 2/7/90, p. 174). Susan also admitted that she did not document all of the money the family received from working during

February and March, even though she was supposed to bring the documents to Social Services (Tr., 2/7/90, p. 160, 165; Trial Exhs. 40, 42).

Susan also testified that when she was trying to figure out what happened during the first week of March, 1987, she called her mother Rose and tried to work out with her where they thought the defendant had been (Tr., 2/7/90, p. 158). She admitted that she had spoken with Rose and defense counsel several times in an attempt to sort out the dates (Tr., 2/7/90, p. 170). She admitted that she remembered telling Detective Hughes "some" of the following information on November 16, 1989: that she was basing her recollection of the information she provided about the defendant's whereabouts on information she received from Rose (Tr., 2/7/90, p. 159).

The next alibi witness was Layle Hanson, Susan's husband and the defendant's brother-in-law (Tr., 2/7/90, p. 175). Layle testified that the defendant visited his home in Devils Lake, ND during the time period of February 27 through March 6, 1987 (Tr., 2/7/90, p. 176). Layle stated that he, Susan and the defendant "did a paint job" on February 28, 1987, for the Reeds in Cando, ND (Tr., 2/7/90, p. 178-179). He recalled stopping at his parents' house to pick up equipment (Tr., 2/7/90, p. 179). Layle stated that he got paid, $200, right when he finished the job, but that the Reeds had postdated the check so he could not cash it (Tr., 2/7/90, p. 181; Trial Exh. 46). Layle stated that he instead went to his dad's place and his dad cashed it for him with money from a safe (Tr., 2/7/90, p. 181). Layle admitted not reporting the receipt of that money to Social Services (Tr., 2/7/90, p. 182, 185).

Layle stated that he believed he and the defendant went fishing on March 1, but his memory was based on his paystub saying he worked Monday through Friday that week (Tr., 2/7/90, p. 182). Layle testified that he saw the defendant Monday, Tuesday,

Wednesday and Thursday after work, but could not testify as to any specific memory (Tr., 2/7/90, p. 182-184).

On cross-examination, Layle admitted to telling Detective Hughes on November 16, 1989, that his recollection of the defendant's visit to North Dakota was based on information that he received from Rose, pertaining to telephone calls and the Social Service records, not his independent recollection (Tr., 2/7/90, p. 187). Layle also testified that his memory was refreshed by the check issued by the Reeds (Tr., 2/7/90, p. 191). He said "If I wouldn't have seen that check, I wouldn't have been able to testify" (Tr., 2/7/90, p. 191). Layle also testified that the time of the defendant's visit was a "bad time of the year to come look for work" and that he was anxious for the defendant to leave as soon as possible (Tr., 2/7/90, p. 188).

Finally, Layle testified that the defendant appeared cleaner cut at the time of trial, as compared to March 2, 1987, but that his moustache looked "exactly the same" (Tr., 2/7/90, p. 191). Layle agreed that the defendant possibly could have had dirt under his fingernails and could have been wearing a blue shirt and blue jeans (Tr., 2/7/90, p. 192). K.D. described the defendant to the original responding deputy sheriff as wearing a "blue shirt, and dark blue pants, as those that would be worn by a mechanic ..." and the individual had "dirty hands with dirt under his fingernails like a mechanic or machinist would have" (Tr., 2/7/90, p. 98).

Janice Reed was the next witness to attempt to support the defendant's alibi. She lived in Cando, North Dakota, and had Layle Hanson paint her living room and dining room on February 28, 1987 (Tr., 2/7/90, pp. 193-194). Janice testified that she remembered the date because the check was dated the following Monday (Tr., 2/7/90, p. 194; Trial Exh. 46). Janice said that besides Layle, Layle's wife and brother were there painting (Tr., 2/7/90, p. 195). When asked if she was given the brother's name,

she replied, "I'm sure we were at the time, yes" (Tr., 2/7/90, p. 195). When asked to recall the name, she said "Richard," but said that she would not be able to recognize him and that she did not observe him close up throughout the day (Tr., 2/7/90, pp. 195, 198). Janice testified that she postdated the check because it was the end of the month and she wanted to make sure that Layle didn't cash the check before pay day on the 1st (Tr., 2/7/90, pp. 195-196).

During cross-examination, Janice stated that the back of the check indicated that it was deposited in the bank on Monday, March 2, 1987 (Tr., 2/7/90, p. 197; Trial Exh. 46). Janice stated that she met with Merrill Henke, an Investigator for the State Office of Investigations in North Dakota (Tr., 2/7/90, pp. 198-199). Janice testified that Henke showed her some photographs and asked if she was able to identify the person who was with the Hansons when they painted (Tr., 2/7/90, p. 199). Janice viewed the photos in court and could not identify the person who was with the Hansons (Tr., 2/7/90, p. 199; Trial Exh. 48, Attachment F). Janice said that photograph two within the exhibit did not appear to be the person with the Hansons (Tr., 2/7/90, p. 199-200).[4]

The next witness was Darrel Reed. He testified that Layle and Susan Hanson painted his house on February 28, 1987, and that he was sure of the date because he did not want the check (for painting) to go through the bank, so they dated it for March 2, 1987 (Tr., 2/7/90, p. 202). Darrel testified that a third person was present with the Hansons and that he was introduced as being "Susan's brother from Wisconsin" (Tr., 2/7/90, p. 202). Darrel testified that he also met with Henke, who showed him some photos (Tr., 2/7/90, p. 204-205; Trial Exh. 48, Attachment F). Darrel admitted that when

[4] Although both the prosecution and defense stipulated that one of the eight photos, (presumably photo 2), in Trial Exhibit 48 was of the defendant (Tr., 2/7/90, p. 257), this was never read to the jury. As the trial judge stated, however, "the jury would reach the same conclusion [that photo 2 was a photo of the defendant] when they viewed Exhibit 48 anyway." (Tr., 2/7/90, p. 258).

he looked at the photos, he could not tell whether anyone in the photos was the person who was with the Hansons at his house (Tr., 2/7/90, p. 205). Darrel also equivocated on whether the person had a mustache (Tr., 2/7/90, p. 206).

The next "alibi" witness was Joyce Hanson, Layle's mother and Susan's mother-in-law (Tr., 2/7/90, p. 207). She testified that she met the defendant once for "about five minutes" "a few years ago" when he helped Layle and Susan with a painting job (Tr., 2/7/90, p. 207). Joyce was not able to say what day it was that she met the defendant. After looking at trial Exhibit 46, Joyce testified that her husband gave Layle cash for the check because the banks weren't open on Saturday (Tr., 2/7/90, p. 208; Trial Exh. 46). After several questions by defense counsel, Joyce testified that the painting job "would have had to have been on Saturday the 28th" (Tr., 2/7/90, p. 209). However, on cross-examination, Joyce testified that "it's hard to recall everything back that far" (Tr., 2/7/90, p. 210). Joyce also admitted that she never saw the defendant at Layle and Susan's trailer (Tr., 2/7/90, p. 212). She testified that she only saw the defendant one time, the morning of the painting job, despite Layle and Susan being "in and out of my house all the time" (Tr., 2/7/90, p. 211).

8. State's Rebuttal Evidence

Faye Christianson, an employee of Ramsey County Social Services, in Devils Lake, North Dakota, testified that Susan Hanson would have been given a Job Service form to provide to the defendant, who would then be required to take it to Job Services in order to comply with Social Service's requirements (Tr., 2/7/90, p. 223; Trial Exh. 45). Christianson testified that the only way Social Services would know if the defendant had gone to Job Services to fill out the form would be if he brought it back in order to continue receiving aid (Tr., 2/7/90, p. 224). Christianson never received a form from the

defendant (Tr., 2/7/90, p. 224). Christianson testified that if a person spends more than one day in a house and is need of food stamps, the family would get paid for the entire month in extra food stamps (Tr., 2/7/90, p. 222). Christianson informed the jury that there had been a previous overpayment of food stamps to the household of Layle Hanson (Tr., 2/7/90, p. 222).

Glen Gourde, the manager of the Devils Lake Job Service program testified that if a person brings a form from Social Services to Job Services, a job application is filled out and Job Services gives the form back to the individual, who then brings the original back to Social Services and could keep his own copy (Tr., 2/7/90, pp. 226-227, 228). Gourde testified that he was not able to find any records indicating that the defendant applied to Job Services between February and March 1987 (Tr., 2/7/90, p. 227). Gourde testified that the records were normally purged after a fifteen month period of inactivity, therefore many records from 1987 were purged from their office, but the individual could choose to keep his own copy (Tr., 2/7/90, pp. 228-229).

Merril Henke, a Special Agent for the North Dakota Bureau of Criminal Investigations testified that when he visited with Janice Reed, he showed her the photographs in Exhibit 48 and she set photo number 2 to the side and indicated that it did not appear to be the person (Tr., 2/7/90, p. 232; Trial Exh. 48, Attachment F). Henke testified that Janice stated that photograph 1 most resembled the person. (Tr., 2/7/90, p. 232).

Henke testified that he also met with Darrel Reed, and that when shown Exhibit 48, Darrel did not identify anyone as being the person with the Hansons while painting his house (Tr., 2/7/90, p. 233; Trial Exh. 48, Attachment F). Henke stated that Darrel believed photo one of Exhibit 48 looked the closest (Tr., 2/7/90, p. 233; Trial Exh. 48, Attachment F).

C. The Evidence at the Motion Hearing

1. Victim's Underwear

The laboratory report from Bode Technology dated August 25, 2014 (Mot. Hrg. Exh. 20) lists as "Forensic Biology Results," the presence of spermatozoa in four sampled areas of Trial Exhibit 7 (Tr., 2/6/90, p. 57), K.D.'s panties that were torn, having been ripped from her body (Def. Mot. For 974.07 testing, 11/7/11, p. 3) when she was raped by the defendant (Tr., 2/6/90, p. 35). The Bode report states that the defendant is excluded as a possible contributor to the major component of the Y-STR profile, but no conclusions could be reached regarding whether or not the defendant was a contributor to the minor profile in the sample. (Def. Mot. New Trial, p. 19 and sec. 20, p. 1-2).[5]

2. Male Underwear

The laboratory report from Bode Technology dated March 5, 2013 (Mot. Hrg. Exh. 19) lists as "Forensic Biology Results," that there was no spermatozoa, seminal fluid or saliva on Trial Exhibit 9 (Tr., 2/6/90, p. 58), the male underwear recovered by K.D. after the assault (Tr., 2./6/90, pp. 45-46). Y-STR Processing resulted in findings of a mixture of at least two individuals but Bode could reach no conclusions on the partial Y-STR profile obtained (Def. Mot. New Trial, p. 18 and sec. 15, p. 1-2).

3. Hair Evidence

As described in Argument III.A., *supra*, so only briefly summarized here, the court received as Motion Hearing Exhibit 12, the May 5, 2015 letter from the U. S. Department of Justice delineating testimony Agent Oakes gave in this trial that was, "invalid," "exceeded the limits of science," and "contained inappropriate statements."

[5] This testing of K.D.s panties for sperm or semen was done in spite of the fact that the defense motion for testing (Def. Mot. For 947.07 testing, 11/7/11) made absolutely no mention of any DNA testing for spermatozoa or semen and only argued for testing for "trace biological evidence stemming from casual contact" (Def. Mot. For 974.07 testing, 11/7/11, p. 3).

(Mot. Hrg. Exh. 12, p. 2, 4, 5, 7) The DOJ letter also acknowledged that there was "Limiting Language included in Testimony" (Mot. Hrg. Exh. 12, p. 7), as described above in the summary of Agent Oakes' testimony, *infra*, p. 15.

In addition to the DOJ letter regarding Agent Oakes' testimony, Skip Palenik testified that he is an expert in the field of hair microscopy and has been for decades (Tr., 2/14/17, pp. 121-134). Palenik testified that the portions of the 1990 jury trial that he reviewed were, ". . .parts of it specifically having to do with a certain letter that I was asked to sort of associate with that testimony." (Tr., 2/14/17, pp. 134, 201). He did not review the testimony of the defense hair expert (Tr., 2/14/17, p. 201), Art Varriale, of the Wisconsin State Crime Lab, outlined above, *infra*, pp. 28-30. Palenik did not review Agent Oakes' report (Tr., 2/14/17, p. 207). Palenik agreed that Varriales' description to the jury in this case of his methods and conclusions was consistent with the state of practice of hair microscopy (Tr., 2/14/17, pp. 202-206). Palenik associated the portions of the DOJ letter describing Agent Oakes' testimony with the actual language in the transcript, and described his agreement or disagreement with the DOJ's conclusions regarding the appropriateness of Agent Oakes' testimony (Tr., 2/14/17, pp. 134, 208).

Palenik affirmed that the DOJ letter accurately described Agent Oakes' as having provided an opinion regarding statistical probability or likelihood or rareness of a positive association and this was an Error Type 2 (Tr., 2/14/17, pp. 139, 161-163, 164-165). Palenik also agreed that when Agent Oakes' testified at the jury trial that, ". . . hair examinations and comparisons in my opinion constitute a basis for strong association, but not a positive association," that that testimony was consistent with what he should have been saying at the time (Tr., 2/14/17, p. 209).

Palenik agreed that Agent Oakes' committed Error Type 3, but disagreed with the FBI's document that Error Type 3 was when an, "examiner cites the number of cases or

hair analyses worked on 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" (Tr., 2/14/17, pp. 145-146). Palenik did not point to a specific place in Agent Oakes' testimony where Agent Oakes testified that "a hair belongs to a specific individual." Palenik agreed that when Agent Oakes was asked if he could associate the questioned hair to Beranek, Agent Oakes was testifying within the limits of the science when he 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., 2/14/17, pp. 204-206). Palenik opined that, in general, he found it objectionable that Agent Oakes testified that, ". . . again our experience is that generally we can tell different persons hairs alike," (Tr., 2/14/17, p. 211), or that, "base[d] . . . on my experience that's likely that it did" come from the defendant (Tr., 2/14/17, p. 210). Palenik agreed with the DOJ that there was Error Type 3 when Agent Oakes testified about his experience with 3000 cases in eight and a half years (Tr., 2/14/17, pp. 157-158) or that the supervisor who reviewed his work had worked many more cases (Tr., 2/14/17, pp. 172-175). Palenik also said that Agent Oakes was testifying consistent with what he ought to have been saying when he testified that his opinion was not "absolute," or about the hair "not positively coming from [the defendant]," (Tr., 2/14/17, p. 210), or, "not a positive association" (Tr., 2/14/17, p. 209).

Palenik also described that he was the person who opened the slide mailer marked, "Item E4. . .1/25/90 . . .case number 90-149" (Tr., 2/14/17, p. 214). When opening it, he noted that the slide was just resting over the cover slip, marked "E4", and he noted, "no hair, no mounting medium" (Tr., 2/14/17, pp. 216-217). He concluded from viewing Motion Hearing Exhibit 4, a photograph of the microscope slide E4 before it was taken apart, that there had been no permount used to permanently mount the

hairs contained in the slide (Tr., 2/14/17, pp. 204-205, Mot. Hrg. Exh. 4). He was also the person who reviewed Katie White's work on the hairs received from Bode Technologies. He concurred in her conclusion that the hair labelled "B" was possibly the hair written about in Agent Oakes' report. She reported, and he agreed, that the hair was, "consistent with the suspect's head hair" (Tr., 2/14/17, p. 219).

Rachel Neagle testified before this court by telephone without any visual connection to the courtroom (Tr., 2/15/17, pp. 179-180). Neagle testifed that in 2012 and 2013, she was a forensic biology analyst and DNA analyst at Bode Technologies (Tr., 2/15/17, p. 134). She had started working at Bode after she completed her master's degree at Virginia Commonwealth in 2010. Bode received the hair evidence on July 9, 2012 (Tr., 2/15/17, p. 144). Neagle began examining the evidence on July 20, 2012 (Tr., 2/15/17, p. 146). She documented what she received to work on, including "Item E4...questioned" and "Item E2...Head Hair Standards" (Tr., 2/15/17, p. 148; Mot. Hrg. Exh. 16). On July 23, 2012, she examined the slide holder labeled by her as "E4 questioned." She used a compound microscope to observe the apparent hairs that were present in the slide to determine if any were suitable for nuclear DNA analysis. She believed one hair was suitable for nuclear DNA analysis, and "five of the apparent hairs were not suitable for nuclear DNA analysis," for a total of six hairs (Tr., 2/15/17, pp. 150-151). The hairs were permanently mounted in the slide (Tr., 2/15/17, pp. 151-152, 155). The photograph of "EO5" or Item E4 (Mot. Hrg. Exh. 4) showed the hairs she designated as "EO5a" and little squiggly lines that she did not mark on the slide (Tr., 2/15/17, pp. 158-159, Mot. Hrg. Exh. 4).

On August 15, 2012, Neagle removed the slide labeled "questioned" from the cardboard slide holder and used a xylene substitute to remove the mounting media that had been used to secure the hairs in the microscope slide (Tr., 2/15/17, pp. 160-162,

164). She then used tweezers to try to peel back the cover slip and get underneath it and pull out the hairs (Tr., 2/15/17, p. 165, 167). She cut the apparent root end of what she had designated as hair A for DNA analysis and put the remainder of hair A on a Post-it note. She then put the apparent hairs that were not suitable for nuclear DNA analysis on a different Post-it note (Tr., 2/15/17, p. 164, 169). "They're folded on the hairs to keep them secure . . ." (Tr., 2/15/17, p. 175). Neagle could point to no training materials or books written about how to secure hair evidence where using Post-it notes was described as standard operating procedure. When asked how many cases she used Post-it notes on, Neagle said, " . . . it was standard to place hairs on Post-it notes, and I don't even know how many cases I have worked that had hair." (Tr., 2/15/17, p. 203).

Neagle described the precautions she took in dealing with the microscope slide containing the questioned hairs after carrying it to the workbench, including, opening the slide E4 inside a petri dish inside a "hood" which was glass enclosed on three sides. She wore gloves, a lab coat and a hair net. The Post-it notes were nearby in the lab, but not under the hood (Tr., 2/15/17, pp. 199-202).

Neagle agreed that she was focused on one particular hair she wanted to make sure got out of the slide safely because that was the one from which she thought she could get some DNA (Tr., 2/15/17, p. 202). Neagle testified that if she had noted "fragment" that meant she did not observe a root; she testified, "and of all of the six apparent hairs that I observed, I observed an apparent root end on each of them" (Tr., 2/15/17, p. 204). About the hair she was focused on, the hair she designated as hair A, she believed it was suitable for nuclear DNA analysis (Tr., 2/15/17, pp. 204-205) because it had a root end which would have to be consumed for DNA analysis (Tr., 2/15/17, p. 150-151, 155). She went on to admit under cross examination that hair A

was the only hair that had a root end, and that the other hairs she identified, were either fragments or were otherwise not suitable for nuclear DNA analysis (Tr., 2/15/17, pp. 204-206).

Neagle noted that, "There are six blue markings on the slide," marked 'E4' (Tr., 2/15/17, pp. 209-210, Mot. Hrg. Exh. 45). FBI Hairs and Fibers/Trace Evidence Unit Analyst Karen Thiessen, whose experience and qualifications were set forth in her CV (Tr., 2/16/17, pp. 6-7; Mot. Hrg. Exh. 46), described the "two U-shaped blue markings on E4, Exhibit 4" as "the opposite ends of the same hair," allowing the examiner to "trace the hair from one end to other, from the root end to the tip" (Tr., 2/16/17, p. 32). She described the blue markings on E4 (as depicted in Mot. Hrg. Exh. 4) as being a useful tool for persons doing hair examination on microscopic slides to mark roots or hair ends (Tr., 2/16/17, p. 32). This testimony supports WSCL analyst Varriale's report that there were five (5) hairs on the slide, not six (6) (Tr., 2/14/17, pp. 72-76, Mot. Hrg. Exh. 6), before Neagle took it apart.

Microtrace microscopist Katie White testified that the goal of microscopy is to determine whether questioned hairs could have originated from a known person that is, are the hairs consistent with that individual, or can the individual be excluded. Either way it can't be said that the hair came from that individual (Tr., 2/14/17, pp. 30-31). On May 9, 2014, Microtrace received from Bode evidence to examine and determine if there was a questioned hair that was consistent with the defendant's known head hair standard (Tr., 2/14/17, pp. 36-37). Microtrace received an envelope containing a total of six hairs on two Post-it notes (Tr., 2/14/17, pp. 40-41). She designated the six questioned hairs as A, B, C, D, E and F, then proceeded to compare each of those hairs with use of a compound microscope, to the known hair, designated by the FBI as K1

(Tr., 2/14/17, pp. 44-47). White determined the hairs, other than B, were inconsistent with the defendant's hair standard K1 (Tr., 2/14/17, p. 47).

In regards to hair B, microscopist White found that hair B "cannot be excluded as having originated from Mr. Beranek and is the most likely single hair referenced in the FBI's report . . . it would be similar enough to the known head hair standards so as to be indistinguishable from them . . . it just exhibits microscopial similarities," but she cannot say that it actually came from any specific person (Tr., 2/14/17, pp. 48-49). Hair microscopy is still an accepted science and these are all still permissible conclusions for a hair microscopy expert to reach and to testify about (Tr., 2/14/17, pp. 50-51). According to White, any testimony by an expert that the hairs are not dissimilar, are consistent, are indistinguishable, or that Richard Beranek cannot be ruled out as the source of the questioned hair, is still today proper testimony (Tr., 2/14/17, pp. 52-53).

Defense counsel sent, via email, to microscopist White the image of a slide, designated E4 (Mot. Hrg. Exh. 4) which counsel received from Bode and which counsel identified as an image of the slide containing "6" hairs before the hairs were removed (Tr., 2/14/17, pp. 56-57). Microscopist White identified the designator of the slide as E4 to be Art Varriale of the Wisconsin State Crime Lab, a defense witness at the jury trial, whose testimony, not report, she reviewed, after she did her examination (Tr., 2/14/17, pp. 60-62, 71). From the photos of slide E4, she observed "two to four hairs" on the slide (Tr., 2/14/17, p. 61). Varriale's report (Mot. Hrg. Exh. 6), which designated slide E4 (shown in Mot. Hrg. Exh. 4), was prepared for and sent to the defendant's trial lawyer, Archie Simonson, at his request. Varriale designated, "Item E4—One glass slide with hairs mounted reportedly representing hairs recovered by the FBI Laboratory from the undershorts of item C" (Mot. Hrg. Exh. 4). Varriale reported, "Examination of the hair slide of item E4 revealed the presence of five hairs . . . Only one of the hairs

was suitable for reliable comparison purposes" (Mot. Hrg. Exh. 4). Varriale concluded that hair, "revealed a high degree of consistency in color and morphological characteristics," when compared to the known head hair standards of the defendant (Tr., 2/14/17, p. 66-69; Mot. Hrg. Exh. 4). The two Post-it note folds microscopist White received in the envelope labeled "apparent hairs" contained one hair in one Post-it, and five hairs in the other (Tr., 2/14/17, p. 70). Microscopist White was never given Varriale's report to review (Tr., 2/14/17, p. 66), and compare to the work from Bode (Tr., 2/14/17, p. 73), even though in her line of work it is customary to rely on the work done by other people (Tr., 2/14/17, p. 71).

In trying to figure out how the hairs were removed from the slide designated E4, Microscopist White concluded that the slide "was never permanently mounted" (Tr., 2/14/17, p. 81). Based on the information White and Palenik received from Bode, they assumed that the six hairs on the Post-it notes came from slide E4 (Tr., 2/14/17, p. 41, 133; Mot. Hrg. Exh. 4). Putting hairs on Post-it notes was not something folks in the microscopy business have ever learned or been taught about in school and does not appear in any how-to book (Tr., 2/14/17, pp. 80-82). Microscopist White did not say she felt confident that whatever shows up on a Post-it note is not only what it claims to be but how many of them there are is how many of them there are claimed to be; she would only say that in this case, she received the six hairs on two Post-it notes in a sealed envelope (Tr., 2/14/17, pp. 82-83).

Microscopist White testified that the hairs could have been mounted on slide E4 without permount, and that she knew what she was looking at on the Post-it notes from an email sent from Neagle to defense counsel, where Neagle said, "The apparent hairs/fibers on the 'questioned' slide were examined, it has 6 apparent human hairs mounted." (Tr., 2/14/17, p. 85). Of the six hairs received, in an attempt to identify the

single hair referenced in Agent Oakes' report (Tr., 2/14/17, p. 87), microscopist White found one hair of the six to be the "best bet" to be "consistent" with the known hairs of the defendant (Tr., 2/14/17, p. 93).

Forensic Biologist and DNA analyst at Bode, Emily Koch, nee, Emily Herren (Tr., 2/14/17, p. 237), sampled the root of what Neagle had designated as hair A for DNA and found, "Male DNA was not detected . . ." (Tr., 2/14/17, pp. 258-259, 272). She then processed the sample for Y-STR, "targeting specifically the Y chromosome, so only male DNA would be detected," and found, "No Y-STR profile was obtained from sample EO5." (Tr., 2/14/17, p. 259). Bode could have done mitochondrial DNA testing but did not (Tr., 2/14/17, p. 260). Koch never saw the actual slide E4, from which the hairs were extracted (Tr., 2/14/17, p. 281). Bode used Post-it notes for hair analysis, but Koch did not know if any other lab did (Tr., 2/14/17, pp. 261-262). Hairs can stick to Post-it notes and Post-it notes can pick up hairs (Tr., 2/14/17, p. 281). Although Analyst Koch allowed that if mistakes were to happen, they were to be noted (Tr., 2/14/17, p. 291), she also testified that their lab never received Varriale's report (Mot. Hrg. Exh. 6) which said there were five (5) hairs on slide E4 (Tr., 2/14/17, p. 292-293) in order for Bode to know that there had been a mistake.

Charity Holland worked at Mitotyping Techologies (Tr., 2/15/17, pp. 44-45) for over 10 years. She received materials from Microtrace on December 18, 2014 (under a letterhead from Microtrace dated 17 June 2011) containing six (6) hairs which Mitotyping then designated as Q1, Q2, Q3, Q4, Q5 and Q6 (Tr., 2/15/17, p. 66). Mitotyping also received a manila envelope from Bode dated 6-13-14 with barcode stickers and an "Oshkosh Correctional Institution" mailing label (Tr., 2/15/17, p. 71; Mot. Hrg. Exh. 41). The six (6) hairs received were tested and compared and the results were that Microtrace labeled hairs B, C, F and A, which were Mitotyping designated, in

order, Q1, Q2, Q4 and Q5, "gave different mitochrondrial DNA profiles from Richard Beranek. Therefore he and his maternal relatives can be excluded as the contributor of these four hairs." Holland further testified, "One of the hairs, Mitotyping Q3, Microtrace Hair D, gave a mixture of two or more mitochondrial DNA profiles. Despite the presence of the mixture, the data observed in the analysis supports the conclusion that Richard Beranek and his maternal relatives are excluded as possible donors of the mitochondrial DNA in this hair sample." Hair Q6, Microtrace Hair E was determined to be from a domestic dog (Tr., 2/15/17, p 77). Varriale also determined that one of the five (5) hairs he discovered on the slide which he designated as E4 was an animal hair (Tr., 2/14/17, p. 72; Mot. Hrg. Exh. 6).

Sgt. Michael R. Mitchell of the Oshkosh Correctional Institute testified by telephone, without a video connection (Tr., 2/15/17, pp. 108, 127), that he was viewing documents related to collecting DNA from an individual in the institution (Tr., 2/15/17, pp. 110-112). He had no recollection of collecting "the exact sample" in question (Tr., 2/15/17, p. 113). The form he was looking at was in his handwriting (Tr., 2/15/17, p. 113) and he had been trained in taking buccal swab DNA samples from individuals in the institution (Tr., 2/15/17, pp. 109-110). He recounted his regular habit and practice regarding securing DNA samples from individuals (Tr., 2/15/17, pp. 115-122), including securing fingerprints, but he was unable to say where the paperwork with the fingerprints on them were at the time of his testimony (Tr., 2/15/17, pp. 124-125). The fingerprints on various objects secured during DNA collection would be of no use to anyone who did not have access to a fingerprint database to affirm their origin nor would the fingerprints be of any use to someone with such access who didn't have access to the alleged fingerprints (Tr., 2/15/17, pp. 125-126). No testimony was provided that these fingerprints were run through a database and proven to be the

defendant's. Sgt. Mitchell, being on the phone when he was testifying, could not say whether the defendant sitting in the courtroom was the person he observed when collecting the DNA sample in question (Tr., 2/15/17, p. 127). However, inmates do have correctional ID numbers and part of the procedure he described included Sgt. Mitchell viewing an inmate photo of the person from whom he was taking the DNA sample (Tr., 2/15/17, p. 129; see also Attachment G). Sgt. Mitchell's testimonial notebook, provided by the defense, included no photograph of the person from whom the records show a DNA sample was taken on June 4, 2014 (Mot. Hrg. Exhs. 40, p. 3; 42, p. 2).

FBI Analyst Karen Thiessen provided the history and context of Agent Oakes' analysis of the evidence the FBI received from Dane County Sheriff's Detective Kevin Hughes on September 11, 1989. The first item received was a pair of men's underwear, the second a sexual assault kit containing known samples from the defendant (Tr., 2/16/17, pp. 8-10; Mot. Hrg. Exh. 47, p. 5). "K1" was the designation the FBI gave the known head hair sample from the defendant (Tr., 2/16/17, pp. 13-14; Mot. Hrg. Exh. 47, p. 7). Hairs and Fibers Unit technician Angie Moore received the underwear for processing, and she scraped them down so that any hairs, fibers or other debris were collected into a pillbox. She then took the pill box to a separate room and mounted the hairs from the pill box onto microscope slides (Tr., 2/16/17, pp. 15-16; Mot. Hrg. Exh. 47, p. 15). To mount the hairs on the slide (Mot. Hrg. Exh. 4), Ms. Moore would have put some xylene on the slide, laid the hairs on it, dabbed some of the xylene, and laid Permount on it, with a covering over the Permount (Tr., 2/16/17, pp. 33-34). There is no way the slide could have lasted from 1989 to 2012 without the Permount (Tr., 2/16/17, p. 35). The FBI never used Post-it notes to preserve hair evidence to be examined because, "If you're only putting it in a Post-it note, if it's not sealed up, you could have contamination, either things that were not initially put in there could get in, or

you could lose what sample you have in there," and folding the Post-it note over so that it sticks together does not constitute sealing the evidence (Tr., 2/16/17, pp. 36-37).

Thiessen testified that after Agent Oakes received the known and unknown hairs, he examined them using a comparison microscope and took notes (Tr., 2/16/17, pp. 17-18; Mot. Hrg. Exh. 47, p. 14). His notes reflect that he found one "head hair with natural root like K1" (Tr., 2/16/17, p. 20). In his written dictation, Agent Oakes noted, "A single head hair which exhibits the same microscopic characteristics as head hairs in specimen K1 was found in the debris removed from the Also Submitted underwear. Accordingly, this hair is consistent with having originated from the suspect, Richard E. Beranek. No other hairs suitable for significant comparison purposes were found in the debris from the underwear. It is pointed out that hair comparisons do not constitute a basis for absolute personal identification" (Tr., 2/16/17, pp. 20-21; Mot. Hrg. Exh. 47, p. 12). That dictation was then repeated word for word in Agent Oakes' report (Tr., 2/16/17, pp. 21-22; Mot. Hrg. Exh. 47, pp.1-2).

IV. NO NEW TRIAL IN THE INTERESTS OF JUSTICE

As stated previously, the *Henley* court held that circuit courts do not have the inherent power to order a new trial for a criminal defendant in the interest of justice when the case is not before the court under a proper procedural mechanism. *See Henley*, 328 Wis. 3d 544, ¶ 75. That power should be invoked only when it is necessary to the functioning of the court. *See id.* at ¶ 74. It is not necessary here, because the trial court can decide this case based on Wis. Stat. § 974.07. Even if this court proceeds contrary to *Henley*, the defendant's case is distinguishable from both *Hicks* and *Armstrong* on numerous important points.

Although the defense relies on *Hicks* to support its position that the defendant should be granted a new trial, and at first blush, the *Hicks* case seems similar to the defendant's, the *Hicks* case is factually distinguishable from the defendant's. The *Hicks* case was brought before the Wisconsin Supreme Court as an ineffective assistance of counsel case, but the Court decided it on different grounds—they granted a new trial in the interest of justice, pursuant to their statutory authority in Wis. Stat. §751.06, because the real controversy of identification was not fully tried. *See Hicks*, 202 Wis. 2d at 152, 160. The Court found that the real controversy was not fully tried inasmuch as: (1) the DNA evidence excluding Hicks as the donor of one of the hair specimens was relevant to the critical issue of identification; (2) the jury did not hear this evidence; and (3) instead, the State used the hair evidence assertively and repetitively as affirmative proof of Hicks' guilt. *Id.* at 153.

The instant case differs from *Hicks* because: (1) although DNA evidence excludes the defendant as the donor of a hair specimen, the defense has failed to prove that the hair specimen was the same specimen that was testified about at trial by the State's FBI hair expert; (2) the jury heard the hair evidence already challenged during the trial; and (3) although the State did present the microscopic comparison of the hair specimen as evidence at trial, the State did not "assertively and repetitively" use it as affirmative proof of the defendant's guilt.

A. DNA Evidence

Please see Section III C, "The Evidence at the Motion Hearing" above for the primary argument as to the DNA evidence. As compared to the *Hicks* case, the most significant difference is that Hicks had DNA testing done on the actual hair that was previously microscopically compared with Hicks' and testified about. "Exhibit 38" in the *Hicks* case was a slide that was shown to the jury. *See Hicks*, 202 Wis. 2d at 166, 167.

That slide, which the hair expert examined, contained the hair that was transferred to the DNA laboratory and was tested there. *See id.* at 167. Hicks was eliminated as the source of the hair sample, labeled "01(3)", which came from the slide. *See id.* The chain of custody regarding the questioned hair was very clear in *Hicks*, leaving no doubt that the questioned hair was the same one DNA-tested by a lab. The same cannot be said here.

In the instant case, the hair that was examined by the hair experts was on a slide that contained five (5) hairs (Mot. Hrg. Exh. 6). That slide was later taken apart by a person with little experience at Bode lab, where for the first time six (6) hairs now appeared to be on the same slide (Mot. Hrg. Exh. 19, p. 2). The defense reports, at best, indicate that "Hair B cannot be excluded as having originated from Richard E. Beranek and is the most likely candidate for the 'single hair' referenced in the FBI's report" (Mot. Hrg. Exh. 3; p. 4 of 18). This hair, among others, was later DNA-tested, and the defendant was excluded as being the source. However, there is nothing in the record of this case that definitively and conclusively proves that any of the hairs from which the defendant was excluded as being a contributor, or from which no determination could be made, were the single hair that the FBI expert testified about at trial.

B. Jury Heard the Hair Evidence Challenged During Trial

One great difference between *Hicks* and the present case is that this jury was presented with several opportunities to discredit the hair testimony of the State's witness, Oakes. The defense not only presented a hair expert, Varriale from the Wisconsin State Crime Laboratory, who diminished the strength of the conclusions reached by Oakes, but the defense also questioned the weight of the hair evidence by

questioning the chain of custody. The *Hicks* jury, on the other hand, had no basis on the record from which to challenge the hair evidence.[6]

Varriale made clear to the jury that hair comparison was not an absolute identification method and that although the defendant was a potential source of the questioned hair, the hair could have originated from somebody else other than the defendant (Tr., 2/7/90, pp. 114-115). Varriale refused to render an opinion to any degree of probability or confidence level, that the questioned hair was the defendant's (Tr., 2/7/90, pp. 118-119). Varriale could not exclude K.D.'s ex-husband as a source of the hair (Tr., 2/7/90, p. 119). Varriale even told the jury that a limit of the hair evidence was that the questioned hair was not a complete long head hair (Tr., 2/7/90, pp. 119-120; 121).

The jury heard the defense question the integrity and chain of custody of the underwear and the hair evidence. For example, K.D. testified that her ex-husband stayed overnight on her bed after the attack and that the same bedding as at the time of the attack was still on the bed (Tr., 2/6/90, pp. 45, 66). As stated previously, the defense's expert testified that the questioned hair could have come from the ex-husband (Tr., 2/7/90, p. 122). K.D. also testified that at least two investigators had been in her home after the attack (Tr., 2/6/90, p. 68). In *Hicks*, the victim was unequivocal that no black males other than her assailant had ever been inside her apartment, and that it had been two years since a black female had come to her door. *See Hicks*, 202 Wis. 2d at 171. The same degree of unequivocalness does not exist in Beranek's case.

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[6] The defendant's reliance on *Armstrong* in this regard is also misplaced (Def. Mot. New Trial, pp. 21, 37). Unlike the instant case, where the hair was found in underwear from wet laundry in a washing machine and may have been pushed across a basement floor, then put in a paper bag and left to sit in a paper bag in a car trunk and then left to sit in a detective's locker for two years, some of the hairs in *Armstrong,* 2005 WI 119, ¶ 88, 283 Wis. 2d 639, 700 N.W. 2d 98, were on the bathrobe belt (likely the murder weapon) draped across the victim's body and in the victim's fecal matter near her body. As in *Hicks*, there was no challenge to the hair comparisons at the trial.

The integrity of the hair evidence was further questioned by the defense when K.D. testified that it had been "awhile" since she had been back in her house, and that it was awhile until she stripped her bedding, carried it into the basement, and threw it into the washing machine (Tr., 2/6/90, pp. 45, 58, 68). The washer overloaded, K.D. became upset and threw the wet bedding on the floor (Tr., 2/6/90, pp. 46, 70). K.D. could not remember if she first saw the men's underwear in the washing machine or on the sheets on the floor (Tr., 2/6/90, p. 70). Defense counsel hinted at the mobility of hair by having K.D. testify that she cleaned and swept the basement around the same time as she attempted to do the laundry (Tr., 2/6/90, p. 69). Defense counsel also questioned Detective Hughes about whether the underwear fell on the sheets or on the basement floor (Tr., 2/7/90, p. 25). Detective Hughes testified that K.D. told him that the underwear had fallen to the floor and that she had "pushed" the underwear aside, on the floor, away from the laundry section of her basement (Tr., 2/7/90, pp. 24-25).

Both the integrity of the evidence and the chain of custody were questioned when the defense questioned K.D. about what she did with the underwear. K.D. testified that she put them in a bag, and although she could not remember what kind of bag she put them in, it was "more than likely" a used bag (Tr., 2/6/90, p. 72). K.D. could not even be sure that she put the bag containing the underwear in her car trunk the same day she discovered the underwear (Tr., 2/6/90, p. 72). She admitted that she did not inspect the trunk of her car for hairs before placing the bag in it (Tr., 2/6/90, p. 72). K.D. could not say for how long the underwear and bag remained in her trunk (Tr., 2/6/90, p. 72). However, Newton testified that K.D. gave her the brown bag containing men's underwear on May 27, 1987, almost three months after the attack (Tr., 2/6/90, p. 78). Thus, the bag, underwear, and hair sat in a car trunk for almost three months. Newton testified that she looked inside the bag (Tr., 2/6/90, p. 78). Newton testified that she

placed the bag in a room and did not take it to the Sheriff's Department until June 19, 1987 (Tr., 2/6/90, p. 80).

On cross-examination, the defense forced Newton to admit that she was not trained as an investigator in the preservation of evidence in criminal cases (Tr., 2/6/90, p. 82). Newton also admitted that she did not have exclusive control of the room in which the bag was stored (Tr., 2/6/90, p. 83). Newton testified that she rolled down the top of the bag, but did not otherwise secure it (Tr., 2/6/90, p. 83). Finally, on cross-examination, Newton admitted that it was possible that others could have gotten into the room and into the bag and into the underwear between May 27 and June 19, 1987 (Tr., 2/6/90, p. 85).

Detective Hughes testified that on May 28th or May 29th of 1987, he had a conversation with Newton, who stated that K.D. had found a pair of underwear (Tr., 2/6/90, p. 145). Newton told Hughes that she had them in her possession (Tr., 2/6/90, p.145). Detective Hughes did not pick them up from Newton right away and could not remember why he did not pick them up (Tr., 2/6/90, p. 145). Hughes testified that he finally received the package from Newton on June 19, 1987—Newton left the package on his desk when he was out of his office (Tr., 2/6/90, p. 146). When Hughes found the paper bag on his desk, he opened it up and looked inside (Tr., 2/6/90, p. 147). He then placed the bag in a larger paper bag, sealed the larger bag and placed it in a locker (Tr., 2/6/90, p. 148). Hughes testified that he did not examine the underwear for the presence of hair in 1987, but did open up the bag, move it around and look inside the underwear to note the size and brand (Tr., 2/6/90, p.26; Tr., 2/7/90, p. 35). Hughes then decided to re-examine the evidence after the defendant became a suspect in 1989 (Tr., 2/7/90, p. 28). The bags containing the underwear stayed in the locker until June 19, 1989, when Detective Hughes removed them and examined the underwear (Tr., 2/6/90,

p. 154). June 19, 1989 is the first time that hair was observed in the underwear. On cross-examination, Hughes testified that he failed to make any notation on the outer paper bag that the underwear contained hair (Tr., 2/7/90, p. 31). Hughes admitted that there was no corroborating evidence, besides his report, that he observed hairs in the underwear on June 19, 1989 (Tr., 2/7/90, p. 31). It was not until August 30, 1989, that Detective Hughes sent the underwear, along with other items, to the FBI Laboratory in Washington D.C. (Tr., 2/6/90, pp. 155-156).

During cross-examination, questionable handling of the hair evidence was further emphasized—defense counsel read from a publication by the Wisconsin Department of Justice entitled, "Criminal Investigation and Physical Evidence Handbook" (Tr. Exh. 29), stating, "If the evidence which is submitted has been contaminated or is of uncertain origin because of improper packaging or the introduction of extraneous materials into the crime scene, its value is almost entirely negated and no amount of laboratory work will be of any assistance." (Tr., 2/7/90, p. 46). Detective Hughes admitted this was a statement from the handbook (Tr., 2/7/90, p. 46). Defense counsel also stated in front of the jury, "The importance of the custodial chain involving physical evidence cannot be overemphasized." (Tr., 2/7/90, p. 46). Detective Hughes admitted that he never examined the bag (Tr. Exh. 8) for the presence of hairs, despite it coming from K.D.'s home and having contained the underwear (Tr., 2/7/90, p. 47). Hughes further admitted that no police officer recovered the evidence from K.D.'s home (Tr., 2/7/90, p. 47).

In *Hicks*, the hair evidence was collected by police shortly after the incident. In Beranek, the underwear containing the hair evidence was collected by K.D. "awhile" after the incident, passed to Nancy Newton, and then finally given to Detective Hughes, where it sat in a locker for two years. The defense made sure to highlight the handling, or possible mishandling, of the evidence for the jury. This is a far departure from Hicks,

where no challenge was made to the integrity or the chain of custody of the hair evidence.

C.The State Did Not "Assertively and Repetitively" Use Microscopic Hair Comparison as Evidence as Affirmative Proof of the Defendant's Guilt

The Wisconsin Supreme Court even made it clear that, "[b]y itself, the fact that Hicks obtained post-conviction DNA evidence might not persuade us to remand this matter for a new trial in the interest of justice. The determinative factor in the present case is the fact that the State assertively and repetitively used hair evidence throughout the course of the trial as affirmative proof of Hicks' guilt." *Hicks*, 202 Wis. 2d at 164. In *Armstrong*, the determinative factor appeared to be that the State went *beyond Hicks* and argued to the jury that the physical evidence "conclusively" and "irrevocably" established Armstrong as the killer. *See Armstrong*, 283 Wis. 2d 639, ¶¶ 63, 146.[7] As in *Hicks*, the State might now have to make an attempt to downplay its use of the hair evidence at trial. *See id.* at 165. Except, in this case, the State did not use the hair evidence throughout the trial, and did not use it as "assertively and repetitively" as it was used in *Hicks*. The State did not include the hair evidence in its opening statement to the jury (Tr., 2/6/90, pp. 23-27). The defense also did not mention the hair evidence during its opening to the jury (Tr., 2/6/90, pp. 27-30). In *Hicks*, the State "relied heavily" upon it's hair expert's opinion during opening arguments (*See Hicks*, 202 Wis. 2d at

[7] *Armstrong* differs from the present case because it involved other physical evidence, because of the sheer volume of hair comparisons, because most of the evidence was located on or very near to the victim and because the State argued the importance of the evidence that was later debunked much more resolutely and vigorously in *Armstrong*. The *Armstrong* evidence included Armstrong's fingerprints in the victim's apartment, nine semen stains on a bathrobe found near the victim's body, hemosticks that showed the presence of certain proteins found in blood on the defendant's fingers and toes, two head hairs found on a bathrobe belt draped across the victim's body that were "consistent" with or "similar" to the defendant's, two head hairs found in the sink that were consistent with the defendant, one head hair found in the blood and fecal-like matter that was consistent with the defendant and one head hair from a fan in the victim's apartment that was similar to the defendant's. *See Armstrong*, 283 Wis. 2d 639, ¶¶ 63-90. The present case would be more analogous to *Armstrong* if the only physical evidence discovered in *Armstrong* was the hair found in the fan that was testified to as being consistent with the defendant's and was later found to not contain his DNA.

164). The State's opening statements in *Hicks* about hair evidence even forced the defense to respond by acknowledging the importance of the hair evidence to the State's case (*See id.* at 165). No such response was compelled in the defendant's case.

Another difference in the presentation of the State's case in *Hicks* was the use of enlarged photographs of microscopic views of the hair comparisons (*See id.* at 165-166). The jury was given the opportunity to examine the photographs giving two examples from which the State's expert reached her conclusion that four of five hairs were "consistent" with Hicks' hair. *See id.* at 166. Defense counsel objected to the use of these photo enlargements and argued that they were both prejudicial and suggestive. *See id.* At trial, the State, outside of the presence of the jury, argued vehemently to the court the power and strength the hair comparisons would have on the jury. *See id.*

In Beranek's case, the State did not use photographic evidence of the hair comparisons. In fact, Oakes testified that the FBI routinely did not use them (Tr., 2/7/90, p. 62). Oakes testified that using photographs, "could be misleading because it would be possible to find areas of two different hairs that were alike in that one particular spot, but if you looked at the hair along its entire length, it could be variable or there could be differences there" (Tr., 2/7/90, p. 63). Clearly, Oakes did not want the jury to be misled by using photographs, which may have occurred in *Hicks*. In the instant case, it was the defense's hair expert, Varriale, who showed photographs to the jury in explaining his hair comparison (Tr., 2/7/90, p. 116; Trial Exhs. 33,34). Thus, the large source of the argument highlighted in the *Hicks* decision was not a factor in Beranek's case. *See Hicks*, 202 Wis. 2d at 166-167.

The *Hicks* Court also highlighted the numerous times the State relied heavily upon its hair expert's opinion in it closing arguments. *See id.* at 167-170. By the State's count, the *Hicks* Court highlighted more than a dozen times that the State argued about

the hair consistencies or "matches" in its closing arguments (both opening close and rebuttal). *See id.* at 168-170. In contrast, in Beranek's case, the State argued about it's expert's hair consistencies or "matches" only three times in its opening closing argument: (1) "a hair that is absolutely identical to the defendant" (Tr., 2/8/90, p. 65); (2) "...which is corroborated by the underpants and by the hair identification performed by both the Wisconsin State Crime and the FBI, who tell you that there was no difference between those hairs whatsoever" (Tr., 2/8/90, p. 70); and, (3) "No ones saying because it matches, you have to find that he's the person, but..., that's not just an incredible coincidence because hair was blowing through the air" (Tr., 2/8/90, p. 71).

The State argued more about the hair comparison in its rebuttal closing argument, but did so in response to arguments defense counsel made about the hair, which was more than half of the defense's closing argument (Tr. 2/8/90, pp. 76-81).

The State apologized if it argued the hairs "absolutely matched" and pointed out that hair comparisons are not like fingerprints. The State explained that hair comparison, rather than being a useless exercise, serves the function, as it did in this case, to allow a jury to learn of an identification, see it in court, and evaluate the credibility of the witnesses and determine whether the hair comparison supports the testimony (Tr., 2/8/17, p. 96).[8] The State ended its rebuttal closing, though, focusing on discrediting the alibi witnesses. For example, the State pointed out that Janice and Darrel Reed were not able to select the defendant out of a group of photos as being the person that was in their house on February 27, 1987 (Tr., 2/8/90, p. 102). The Reeds did not claim to see the defendant on the date of the incident, March 2, 1987 (Tr., 2/8/90, p. 102). The State pointed out that the defendant was a truck driver, used to

[8] This also distinguishes the instant case from *Armstrong*. There, the Wisconsin Supreme Court held that the State, in closing arguments, "...went further, much further" than the State in *Hicks*. *Armstrong*, 283 Wis. 2d 639 at 146. It cannot be said in the instant case that "...the State flaunted powerful conclusions before the jury that the physical evidence conclusively and irrevocably" established the defendant as the perpetrator. *Id.* at 154.

driving long distances, and that he owned a truck at the time of the incident (Tr., 2/8/90, p. 103). The State also repeatedly referred to the untruthfulness of the other alibi witnesses (Tr., 2/8/90, pp. 104, 106). In regards to Susan and Layle Hanson, the State discussed that their "willingness to lie and suffer...a fine and/or imprisonment for any person who fraudulently receives or attempts to receive assistance to which he or she is not entitled for a few food stamps....What do you think they are willing to do for her brother?" (Tr., 2/8/90, p. 104). The State then contradicted the alibi witnesses with the positive identifications made by K.D., even stating that "Who could I bring in here that could make a more positive identification? There is no one." (Tr., 2/8/90, pp. 104-105).

In *Hicks*, the court does not make reference to the defendant's alibi, because the court found that it was not really an alibi. *See Hicks*, 202 Wis. 2d at 155; *see also Hicks* at 176 (dissenting opinion). In other words, even if the witnesses who testified for Hicks were telling the truth, he still could have committed the crime. In the instant case, as demonstrated above, the State undermined the defendant's alibi by both cross-examination and evidence. If the jury had accepted the alibi evidence, it would have precluded the defendant from committing the crime. The hair was not the sole piece of evidence undermining and discrediting the defendant's "alibi" witnesses and the jury could consider the fact that the defendant attempted to present an alibi that was discredited to support their conclusion that the defendant was the attacker.

Further, the *Hicks* case involved more than one hair. One head hair was found on the comforter of the victim's bed, and four pubic hairs were found at the foot of the bed during a vacuum sweeping. *See Hicks*, 202 Wis. 2d, p. 154, 169. The hairs were thus found at the exact scene of the crime—the bed. And, most dissimilar from Beranek's case, a hair "consistent" with a sample provided by the victim, was found in Hicks' pants when he was taken into custody. *See id.* at 154. Thus, the *Hicks* jury

heard expert testimony regarding six hairs—how four of the five hairs were consistent with Hicks, how one hair was "similar" to Hicks and how the hair found in Hicks' pants was "consistent" with the victim's hair. *See id.* at 166, 154. The jury in Beranek's case simply did not hear the repetitiveness of an expert testifying about multiple hairs.

D. Other Evidence

The *Hicks* opinion does not reflect whether the State's case would have been charged or further prosecuted without the hair analysis. In the present case, the hair analysis results were not reported by the FBI until November 29, 1989 (Trial Exh. 30; Motion Hearing Exh. 25). The criminal complaint was issued previously, on September 12,1989 (*See* Criminal Complaint). The preliminary hearing was held on September 29, 1989 (Court File; Preliminary Hearing Tr., 9/29/89). Therefore, it is clear that the State would have prosecuted this matter, with or without the hair analysis results.[9]

The *Hicks* opinion does not reflect whether or not the defendant developed an alias after the attack. In the present case, the jury heard from the defendant's former employer, Norman Grosland, that the defendant returned to work, driving truck, around March 28, 1987, and was using a different name (Tr., 2/6/90, p. 127, 130). Thus, shortly after the attack on K.D., the defendant returned to work using an alias—Randy Baumann (Tr., 2/6/90, p. 127, 130).

The *Hicks* court failed to consider some of the evidence presented by the State at trial, for example, the drawing that bears an uncanny resemblance to the defendant and the victim making a positive identification at a police line-up. *See Hicks*, 202 Wis. 2d at 176 (dissenting opinion). Further, as the dissent pointed out, the trial court had the best opportunity to witness the credibility and demeanor of the witnesses. *See id.* at

[9] *See* Wis. Stat. §974.07(7)(a)2.

177 (dissenting opinion). This court, as the presiding judge at the time of trial, was in the best position to witness the credibility and demeanor of the witnesses. Was K.D. believable in her retelling of the attack? Did the sketch bear an uncanny resemblance to the defendant? Was K.D. believable in her identification of the defendant and in her visceral reactions to the defendant's photo and police line-up? Or was the defendant's mother, who admits hiding from law enforcement in a closet and not revealing the defendant was in the house, believable? Were the defendant's sister and brother-in-law believable, when they admit to committing fraud on the government and lack a clear recollection of the defendant's time during the week he allegedly spent with them more than two years prior to their testimony?

CONCLUSION

This court will be found to have properly exercised its discretion if this court relies on the facts of record and the applicable law, as described above, in determining that there is not a "substantial probability of a different result," *Henley*, 328 Wis. 2d 582, ¶83, when looking at the "evidence at the original trial" and "the evidence on the motion hearing." *Hudson*, 273 Wis. 2d 707, ¶16. At the trial, the jury had the opportunity to see and hear K.D. testify, describe her opportunity to view the defendant when he was attacking her, and describe and identify the drawing of the defendant, the years of viewing hundreds of arrest photos until she finally saw the photo of the defendant, and then her identification of him in the lineup and in court. The jury had the opportunity to hear of his occupation as a truck driver, giving him the opportunity to commit these heinous offenses and then disappear. The jury had the opportunity to hear of the defendant's lies about his name after his attack of her, and the attempts of the family to provide an alibi for him, which attempts were undermined by cross examination.

The jury had the opportunity to hear that the defendant ripped K.D.'s underwear off of her and to see them displayed to them in court, demonstrating their torn condition which would have precluded her from putting them back on after the attack.

The jury had the opportunity to hear of the circumstances under which men's underwear, unfamiliar to K.D., were recovered by her in laundry, wet and possibly kicked into a corner, then placed in a paper bag where they remained for years. The jury had the opportunity to hear that the underwear were scraped and their detritus examined by an FBI hair and fibers expert who opined that a hair recovered from those men's underwear were consistent with the defendant's known head hair. They also heard from a hair and fibers expert from the Wisconsin State Crime Lab who agreed that the hair was consistent with the defendant's but emphasized, as the FBI agent had conceded, identical hair morphology is not a basis for positive identification as coming from a specific person. The expert from the Wisconsin State Crime lab examined the unknown hairs on the same slide as did the FBI agent, labelled the slide, "E4" and affirmatively noted in his report that there were 5 hairs on the slide and that one of those hairs was an animal hair.

As part of the evidence derived from their §974.07 post-conviction motion, the defense presented evidence that the defendant's DNA was not present on K.D.'s underpants ripped from her, and either not present or least no conclusion could be reached regarding the presence of his DNA on the male underwear. This evidence associates him no more or less with the underwear than any other evidence the jury heard at the trial.

At the post-conviction motion hearing, an FBI analyst testified that when the slide in question was created, the hairs would have been mounted on the slide with a permanent mounting compound. Two defense experts opined that as well, while two

others claimed that the hairs had never been mounted on the slide with a permanent mounting compound, but could not explain how the hairs would have stayed in the slide. A defense expert, who had not read the entire jury trial transcript, and in fact had not even read all of the FBI agent's testimony at trial, affirmed that the U. S. Department of Justice was correct when it issued a letter criticizing the FBI agent's testimony before the jury in this case for including in his testimony statements which exceeded the limits of the science. The USDOJ letter also noted that the testimony included appropriate limiting statements regarding how if in any way the hair comparisons should be used. Such limitations had already been described to the jury by the analyst from the Wisconsin State Crime lab.

Although the defense presented evidence that two of the hairs in the slide examined by the FBI agent and labeled "E4" by the Wisconsin State Crime lab analyst had nuclear or mitochondrial DNA that excluded the defendant as their source, the defense experts claimed there were 6 hairs on the slide, and one of those was an animal hair. The analyst from the Wisconsin State Crime lab wrote a report in 1990 which the court received in evidence at the post-conviction motion hearing that stated there were five hairs on the slide he designated as E4 and that one of those 5 hairs was an animal hair. No explanation for the discrepancy was offered at the post-conviction motion hearing. Although a defense expert testified that there were 6 blue marks on E4, the FBI analyst who testified at the post-conviction motion hearing identified the two U shaped blue marks on the slide as encompassing the opposite ends of the same hair, for a total of 5 hairs. A defense expert who looked at a photograph of the slide before it was deconstructed opined that she could observe only two to four hairs on the slide. The defense expert who deconstructed slide E4 testified by telephone without a video connection to the court. It was often difficult to be sure that the parties in court were

observing the same things the witness was. She testified that she preserved the hairs she removed from slide E4 in Post-it notes, but could point to no authoritative source that would support that method of preserving hair evidence as adequate to preserving the integrity of the evidence. She admitted that, prior to this case, she could not remember another case involving hair that she had worked on. The FBI analyst who testified at the post-conviction motion hearing testified that using Post-it notes is not a method used by the FBI and would not be an acceptable method of preserving hair evidence.

The correctional officer from Oshkosh Correctional Institute testified by telephone without a video connection regarding securing a buccal swab of DNA and could not observe any of the people or objects or evidence in the courtroom. In particular, he could not observe nor identify the defendant. The defense offered no photo of the defendant at the time the DNA sample was taken, and the officer said that although he recognized his handwriting on the paperwork and could testify to what he had always done in following protocol for collection of a DNA sample, he had no recollection of this particular event.

Given this evidence -- the evidence from the trial, and the evidence from the 974.07 post-conviction motion hearing – there is not a substantial probability of a different result, that is, a substantial probability of a not guilty verdict. At trial, the jury was instructed that the State was required to prove "every fact necessary to constitute guilt" beyond a reasonable doubt (Tr., 2/8/90, p. 6). The only fact at issue was identification, and K.D. identified the defendant with the drawing, which bore and continues to bear a striking resemblance to the defendant, with her photo array identification and with her line up and in court identifications. As the jury was told, "reasonable" means "based upon reason and common sense . . . arising from a fair and

rational consider of the evidence or lack of evidence." (Tr., 2/8/90, p. 6). That the defendant's DNA was not identifiably recovered from K.D.'s underpants is easily understandable as she could not have put them on after the assault. That the defendant's DNA was not recovered from the men's underwear is easily understandable, even if they were his, as the offender clearly did not put them on after the assault and they were thrown into a washing machine with enough other items to be laundered that the washing machine stopped running and all the laundered objects came soaking wet out of the machine.

That any hair which was examined turns out not to have been the defendant's does not sufficiently counter K.D.'s testimony as to undermine confidence in the original outcome of the trial. Whatever hairs were recovered from the men's underwear went through the washing machine with much other bedding and landed on the basement floor, so how they came to adhere to the underwear is unknown and cannot be proved. They were not recovered by the police, even if the police back then had a protocol for preserving DNA evidence, which they did not. The jury heard the testimony that people lose upwards of 100 head hairs a day. What hairs got tested for DNA and where they came from simply has not been proved to a degree that would allow this issue to overcome this jury's verdict. The defense expert from the Wisconsin State Crime lab reported that there were 5 hairs on the slide in question, now apparently, the defense claims, there are 6 hairs on the slide. There is no explanation where a sixth hair came from, but certainly there is some question regarding the advisability of the "Post-it Note" method of "preserving" hair evidence, especially when that method does not appear in written industry wide protocols and is certainly not utilized by the FBI. There is no way to tell if the hairs excluding the defendant by DNA testing had anything to do with this

case originally or not. The integrity and chain of custody of the hairs since the time of the jury trial is questionable at best.

The jury was instructed that they may take into account matters of their common knowledge and observations and experience in the affairs of life (Tr., 2/8/90, p. 9). It is likely that jurors would have experiences and observations that would include the fact that, as observed by one defense expert, "a Post-it note can pick up hairs." (Tr., 2/14/17, p. 281).

In this case, the hair evidence was no more or less strong than the hair evidence was at the original trial. The defense failed to prove that any hair tested for DNA was the same hair examined and testified about at the jury trial by two competing expert witnesses. The remaining DNA evidence adduced as a result of the defendant's §974.07 motion fails to undermine confidence in the original guilty verdict, and therefore, when the court applies the law to the facts of record in this case, the conclusion is that no new trial is warranted.

Therefore the State respectfully requests that this Honorable Court deny the defendant's motion for a new trial because there is not a substantial reasonable probability of a different result had the jury heard the evidence it heard in this case and the additional evidence derived by the defense from its litigation of this §974.07(10) motion.

Respectfully submitted this April 3, 2017.

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COURT OF APPEALS
DECISION
DATED AND RELEASED

May 20, 1993

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-3010-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD E. BERANEK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane county: DANIEL R. MOESER, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Richard Beranek appeals from a judgment of conviction entered as the result of a jury trial in which he was found guilty of five counts of first-degree sexual assault, contrary to sec. 940.225, subs.(1)(b) and (5)(b),

Stats.; two counts of burglary, contrary to sec. 943.10, subs. (1)(a) and (2)(a), and (1)(a) and (2)(d), Stats., with the second burglary count including an added penalty for use of a dangerous weapon, contrary to sec. 939.63(1)(a), Stats.; one count of recklessly endangering safety, contrary to sec. 941.30, Stats., with an added penalty for use of a dangerous weapon, contrary to sec. 939.63(1)(a) and one count of intimidation of victims, contrary to secs. 940.44(1) and 940.45(3), Stats. All counts were also subject to increased penalties for habitual criminality, contrary to sec. 939.62, Stats. Beranek was sentenced to a total of 243 years in the Wisconsin State Prison System. For the reasons set forth below, we affirm.

BACKGROUND

On March 2, 1987, the victim was assaulted against her will by a man who fondled her breasts, and who engaged in four different types of sexually-based forcible bodily intrusion, involving three different bodily orifices. During the course of the assaults, he threatened the victim with a pair of pointed pliers, and after the assaults, he warned the victim not to tell anyone. The burglaries consisted of entering her home with intent to sexually assault her.

Shortly after the assaults, the victim met with a sheriff's department detective. During this meeting, a composite sketch of the assailant was developed.

Copies of the sketch were widely distributed, and ultimately contributed to the defendant's arrest two years later.

Several days after the assaults, the victim returned to her home to wash her bedding and clothes. She placed a load of wash into a washing machine, but the machine was overloaded, and the load did not wash. When unloading the machine, the victim noticed a pair of men's underwear. She turned the underwear over to her counselor at a rape crisis center, and the counselor placed it in a bag. The bag was stored in an unused office, with a notation not to touch the bag because it contained evidence. In June of 1987, the underwear was turned over to the sheriff's department, and was then placed in a locked evidence locker.

Over the course of the next two years, the victim was shown several photo arrays of suspects. At one point, the victim recognized the defendant in a photo array, and identified him as the assailant. Thereafter, an in-person line-up was arranged, and the victim again identified the defendant.

After the defendant was arrested, a sample of his hair and a sample of hair retrieved from the underwear were analyzed by the FBI crime lab in Washington D.C. At trial, defendant's expert witness testified that the hair in the underwear could have come from the defendant or the victim's ex-husband. The state's expert

witness testified that the hair from the underwear was "microscopically the same as the known head hairs of the defendant."

DEFENDANT'S ARGUMENTS

Defendant argues that:

1. He was subject to an unnecessarily suggestive identification procedure, such that he was denied due process.

2. The chain of custody for the underwear was deficient, and the admission of the hair samples from the underwear deprived him of due process.

3. He was subject to multiplicitous charges and convictions, such that he was subject to double jeopardy.

4. The trial court's errors were not harmless.

5. His sentence was excessive and subjected him to cruel and unusual punishment.

6. The interest of justice requires he be given a new trial.

We reject each argument for the reasons set forth below.

IDENTIFICATION PROCEDURE

In the trial court, and again in this court, defendant argues that the photo array from which the victim identified him was "unnecessarily suggestive,"

because he was the only person on the array "depicted as wide-eyed with raised eyebrows." The trial court found that the array was "remarkably unsuggestive." Having examined the array ourselves, we conclude that the trial court was correct. The array shows several men of similar age, height and weight, with similar coloring. At least one of the photos depicts a man with raised eyebrows. Nothing in fact or law singles out the defendant's photo from any other in the array.

Because the defendant failed to carry his burden of proof to show impermissible suggestiveness, we need not consider his arguments with respect to identification further. ***Powell v. State***, 86 Wis.2d 51, 68, 271 N.W.2d 610, 618 (1978).

CHAIN OF CUSTODY -- HAIR SAMPLES

Defendant argues that because the underwear sat in the rape crisis center counselor's office for several months, the chain of custody of the underwear is necessarily deficient. However, if that chain is sufficiently complete to render it "improbable" that the original item was contaminated or exchanged, ***In re J.S.C.***, 135 Wis.2d 280, 290, 400 N.W.2d 48, 53 (Ct. App. 1986), then admission of the evidence is within the discretion of the trial court. ***State v. Simmons***, 57 Wis.2d 285, 295-96, 203 N.W.2d 887, 894 (1973). Thus, provided a threshold of reliability is

reached, gaps in the chain of custody go to the weight, not the admissibility of the evidence.

Here, the defendant's identity was unknown until the victim picked his photo out of an array. It is therefore improbable that the defendant's hairs were deliberately or inadvertently placed on underwear found in the victim's washing machine or on underwear stored in a bag in a counselor's office for several months. We conclude that there was no error in admitting into evidence the underwear and the hairs which were on it.

Defendant also argues that the trial court erred in permitting expert evidence that the hair in the underwear was very similar to his hair. Essentially, defendant argues that because his expert's opinion was that the hair sample comparison was inconclusive, the trial court erred in permitting hair sample testimony to go to the jury. We reject this argument.

As the state correctly points out, defendant ignores the fact that the state's expert concluded that the hair samples were conclusive and that the hairs were "microscopically the same" as defendant's. Further, the state's expert was able to testify that his opinion on similarity was to a reasonable degree of certainty. Where an expert can testify to a reasonable degree of certainty, it is not error for the trial

court to permit the testimony. *Cf.* ***Pucci v. Rausch***, 51 Wis.2d 513, 518-19, 187 N.W.2d 138, 141-42 (1971).

DOUBLE JEOPARDY

Defendant argues that because four of the counts of sexual assault are made criminal by the same statute, he can, at most, be guilty of one assault. This reasoning was explicitly rejected by our supreme court in ***State v. Eisch***, 96 Wis.2d 25, 34, 291 N.W.2d 800, 805 (1980). There, our supreme court stated that although different types of sexual assault are prohibited by the same statute (sec. 940.225, Stats.), each type of assault is separately enumerated. Therefore, "although ... these different acts [are] ... deemed to be the same in law, they [are] so different in fact that a specific incorporation in the definition of sexual intercourse was required to make them applicable" to the crime of sexual assault. ***Eisch***, 96 Wis.2d at 35, 291 N.W.2d at 805.

The court concluded that where "[e]ach of these methods of bodily intrusion is different in nature and character .... [i]t is clear ... that our decisional and legislative history recognizes that [separate and factually different acts of bodily intrusion] constitute separate crimes which may be charged separately." ***Id.*** at 35-36, 291 N.W.2d at 805. Stated otherwise, where a defendant engaged in factually different types of sexual assault, the different types of assault "may be separately

charged *although arising out of a unitary assaultive episode perpetrated upon the body of the same victim.*" ***Id.*** at 42, 291 N.W.2d at 808 (emphasis supplied).

In light of this holding, and in light of the facts of the assault we briefly detailed in the background section, defendant was not subjected to double jeopardy.

EXCESSIVE SENTENCE

Defendant was sentenced to 243 years in the Wisconsin State Prison System. Given the nature and number of the crimes for which defendant was convicted, we cannot say this sentence is excessive as a matter of law or that it constitutes cruel and unusual punishment.

Cruel and unusual punishment arises when a sentence is "so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people ...." ***Hanson v. State***, 48 Wis.2d 203, 206, 179 N.W.2d 909, 911 (1970). Erroneous exercise of discretion arises when a trial court fails to consider the relevant factors in setting the sentence.

Stated otherwise, unless a sentence transgresses the prohibition on cruel and unusual punishment, sentencing lies within the trial court's discretion, ***id.*** at 207, 179 N.W.2d at 911, and our review is limited to whether the trial court erroneously exercised that discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535,

541 (Ct. App. 1987). The primary factors which the trial court must consider are the gravity of the offense, the character of the offender, and the need for public protection. ***Id.*** at 427, 415 N.W.2d at 541. The weight to be given to each of these factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The sentencing court considered that defendant had a prior history of violent sexual attacks, and the court heard evidence to this effect from a prior victim. The court described the nature of the crimes for which defendant was convicted to be "incredibly degrading and traumatic." The court considered that defendant was not a good candidate for rehabilitation, because he refused to acknowledge responsibility or express remorse.

Defendant seeks to extrapolate from the court's consideration of his capacity for rehabilitation, an impermissible attempt to force him to admit his guilt. We reject this argument. As we stated in ***State v. Wickstrom***, 118 Wis.2d 339, 355-56, 348 N.W.2d 183, 192 (Ct. App. 1984), where a court makes no attempt to compel an admission of guilt and considers a lack of remorse in the context of "considering personal deterrence and whether efforts at rehabilitat[ion] ... would be successful," considering lack of remorse among other factors is not an erroneous exercise of sentencing discretion.

The trial court imposed a long sentence in order to protect the public. The sentence, while long, does not shock the public's conscience. Given the defendant's previous history, the sentence is rationally related to the goal of public protection. Under the facts of this case, the trial court properly considered the relevant ***Larsen*** factors, and we find no erroneous exercise of discretion in the weight the trial court gave to the need to protect the public from further attacks by this habitual criminal. The prohibition against cruel and unusual punishment has not been violated. The court did not erroneously exercise its discretion.

HARMLESS ERROR/NEW TRIAL

Defendant argues that the trial court's errors were not harmless. Because we have rejected every attempted assignment of error, we need not consider that argument. Defendant argues that we should grant a new trial under sec. 752.35, Stats. We decline to do so. The real controversy was fully tried. We are not satisfied that a second trial probably will produce a different result. For those reasons, we should not order a new trial under sec. 752.35. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).

By the Court.--Judgment affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Case No: 91-3010-CR

RICHARD E. BERANEK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE
ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE DANIEL R. MOESER PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATE OF WISCONSIN,

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THE HONORABLE DANIEL R. MOESER PRESIDING

ISSUES PRESENTED

I. Was the defendant subject to identification by the complainant which was unnecessarily suggestive and unreliable, thereby depriving the defendant of due process?

Trial Court Answered: No, identification not unnecessarily suggestive. Issue of reliability not presented to trial court.

II. Was the defendant subject to the admission into evidence of hair samples for which the evidentiary chain of custody was deficient, thereby depriving the defendant of due process?

Trial Court Answered: No

III. Was the defendant subject to multiplicitious charging and convictions which violated his right against double jeopardy?

Trial Court Answered: No

IV. Did the defendant receive an excessive sentence which violated his right against cruel and unusual punishment?

Trial Court Answered: Not presented to trial court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does not request oral argument, but does request publication in this matter. The Defendant-Appellant believes that his appeal presents issues to the Court of Appeals which involve important constitutional rights.

Specifically, the Defendant-Appellant believes that his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution were violated by an unnecessarily suggestive and unreliable identification by the complainant and the admission into evidence of hair samples for which the evidentiary chain of custody was deficient. Further, the Defendant-Appellant believes that his right against double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution was violated through his being subject to multiplicitious charging and convictions.

Finally, the Defendant-Appellant believes that his right against cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, Section 6 of the Wisconsin Constitution was violated by the extremity of the sentence which was imposed in his case.

Oral argument not requested.

Publication of opinion requested.

STATEMENT OF CASE

The defendant was charged by criminal complaint alleging four counts of first degree sexual assault in violation of sec. 940.225(1)(b) and (5)(b), Stats., another count of first degree sexual assault in violation of sec. 940.225(1)(b), Stats., armed burglary in violation of sec. 943.10(2)(a), Stats., burglary and battery in violation of sec. 943.10(2)(d), Stats., endangering safety in violation of sec. 941.30(1), Stats., intimidating a victim in violation of sec. 940.45(3), Stats., as well as being a habitual criminal as defined by sec. 939.62, Stats., with the attendant penalty enhancers being attached to each of the underlying charges as set forth herein. [R. 1]

At his Initial Appearance on September 15, 1989, the State was put on notice regarding the fact that the defendant intended to raise the alibi defense that he was out of the state at the time of the alleged offense. [R. 81:2] Subsequent to his Initial Appearance, a formal Notice of Alibi was filed. [R. 25]

At a Motion hearing held on November 8, 1989, the defendant's trial counsel made a motion to suppress the complainant's identification of the defendant stemming from a photo array shown to her by police officers on April 12, 1989, as being unduly suggestive. The trial court denied this motion. [R. 84: 45-46]

At a Motion hearing held on December 5, 1989, the defendant's trial counsel made a motion to strike the four charges of first degree sexual assault based upon sec. 940.225(1)(b) and (5)(b), Stats., arguing that they were subsumed within the separate, general charge of first degree sexual assault pursuant to sec. 940.225(1)(b), Stats., since all of the crimes charged constituted one continuous act, the defendant would have had no time to reflect between the various acts which he allegedly committed and that no additional facts needed to be proved beyond that of the general charge of first degree sexual assault to sustain the other four additional charges of first degree sexual assault. [R. 86:12-13] The trial court denied the defendant's motion to strike. [R. 86:21]

On February 6, 1990, the first day of the defendant's trial, the defendant's trial counsel raised an objection to the admission into evidence of hair samples found at the complainant's home after the assault which indicated that the defendant could have been the assailant, based upon the integrity of the chain of custody as it pertained to the hair samples. [R. 89:182] The trial court denied this objection. [R. 89:191]

On February 8, 1990, after a three-day jury trial, the defendant was found guilty of all nine counts charged. [R. 91: 112-115] A Judgment of Conviction was entered by the trial court on April 5, 1990, and the defendant was sentenced to serve 243 years in the Wisconsin State Prison System. [R. 75:1-2 (Appendix A)]

A Notice of Intent to Pursue Post-Conviction Relief was filed on April 9, 1990. [R. 76 (Appendix B)] A Notice of Appeal was filed on December 13, 1991. [R. 94 (Appendix C)]

STATEMENT OF FACTS

On March 2, 1987, at approximately 4:00 p.m., the complainant was sexually assaulted in her home in Pleasant Springs, Wisconsin. [R. 89: 31-40]

On March 3, 1987, the police met with the victim and she described her assailant in great detail. The police made a rough sketch which the victim indicated was 90% accurate. [R. 90:47] The police then took the sketch along with the description and issued a flier which was distributed to law enforcement agencies. This flier was based upon all the information obtained from the complainant, the investigative reports filed by law enforcement officers, and all the other information the police had at that time. In the flier it indicated that the assailant had light brown hair, blue eyes and no mustache. [R. 90:103]

The defendant's mother testified at trial that on February 26, 1987, the defendant left her house in Junction City, Wisconsin. He was taken by her to the Greyhound Bus Station in Stevens Point, Wisconsin, for the purpose of traveling to Devil's Lake, North Dakota, to visit his sister and brother-in-law and to look for work. [R. 90:132]

The defendant called his mother on February 27, 1987, and told her that he arrived in Devil's Lake, North Dakota. [R. 90-133]

The defendant's sister testified at trial that he spent the entire day of the alleged sexual assault with her and his brother-in-law.[R. 90:153] Susan Hanson testified that the defendant left her house on March 6, 1987, at 8:00 p.m. [R. 90-146]

The defendant's mother further confirmed the defendant's statement that he arrived back at her house in Wisconsin on March 7, 1987. [R. 90:134] Before, after and during his visit to Devil's Lake, North Dakota, the defendant had brown eyes, dark hair and a mustache. [R. 90:130]

The complainant testified at trial that she discovered a pair of mens underwear sometime after the sexual assault. Both the underwear and the bedding had been laundered by the complainant. [R. 89:46-58] The underwear was turned over to the Rape Crisis Center in Madison, Wisconsin and kept there one month before being turned over to the Dane County Sheriff's Office [R. 89:78]

The Dane County Sheriff's Office kept the item for two years without supervision. [R. 90:28] The underwear and hair were introduced as evidence against the defendant over the objection of trial counsel. [R. 89:182]

After several photo identification sessions with the Dane County Sheriff's Office on April 12, 1989, the complainant was shown a photo array of potential suspects by detectives of the Dane County Sheriff's Department from which, she identified the defendant, which led to his being a suspect in the case. [R. 89:106]

Based upon this identification of the defendant, the defendant was placed in a line-up which was subsequently video taped by the Dane County Sheriff's Department. [R. 89:52] Based upon the identification, the defendant was charged with nine (9) separate criminal offenses with regard to the victim.

Additional facts will be set forth as necessary to allow for a better understanding of the issues presented herein.

ARGUMENT

I. THE DEFENDANT WAS SUBJECT TO AN IDENTIFICATION PROCEDURE WHICH WAS UNNECESSARILY SUGGESTIVE AND UNRELIABLE AND WHICH DEPRIVED THE DEFENDANT OF DUE PROCESS.

A. Standard of Review.

The standard of review for a trial court's exercise of discretion starts with the presumption that the trial court acted reasonably. The burden is upon the appealing party to show an unreasonable or unjustifiable basis on the record. Ocanas v. State, 70 Wis.2d 179, 233 N.W.2d 457 (1975), Drinkwater v. State, 73 Wis.2d 674, 245 N.W.2d 664, (1976).

The Supreme Court has acted in the past in finding abuse of discretion in certain areas. The Court has held that the trial court must make a finding upon which to rest its decision. State v. Johnson, 174 Wis.2d 126, 245 N.W.2d 687 (1976). Further, if the judge bases his exercise of discretion based upon errors of law, his conduct is beyond the limits of his discretion. State v. Hudnick, 39 Wis.2d 754, 169 N.W.2d 733 (1964), see also Hedtcke v. Sentry Insurance Company, 109 Wis.2d 461, 326 N.W.2d 727 (1982).

The facts as established by the trial court are not subject to review. However, with regard to questions of law, the appellate court can make its own determination without deference to the views

of the trial court. State v. Marty, 137 Wis.2d 352, 404 N.W.2d 120 (Ct. App. 1987), see also State v. Lee, 122 Wis.2d 266, 362 N.W.2d 149 (1985).

In addition, constitutional issues are reviewed de novo, without deference to the trial court. State v. Woods, 117 Wis.2d 701, 715, 345 N.W.2d 457 (1984), ~State v. Harvey, 139 Wis.2d 353, 382, 407 N.W.2d 235 (1987). The application of constitutional rights are not questions of evidentiary or historical fact but rather, questions that require application of constitutional principles. State v. Mazur, 90 Wis.2d 293, 309, 280 N.W.2d 194 (1979) at 309 quoting Brown v. Allen, 344 U.S. 443, 507 (1953).

Thus, the Court of Appeals is required to review the record de novo with no regard to the findings of the trial court on constitutional principles. Cuyler v. Sullivan, 446 U.S. 335 (1980).

Further, violation of the defendant's due process rights is a constitutional right and is to be reviewed de novo by the trial court. Due process is violated where identification is unnecessarily suggestive and lacks certain features of reliability. ~Simos v. State, 83 Wis.2d 251, 254-256, 265 N.W.2d 278 (1978).

B. The Photo Array which the Complainant was Shown, and Which Lead to her Identification of the Defendant, was Unnecessarily Suggestive.

On April 12, 1989, the complainant identified the defendant as her alleged assailant after viewing a photo array consisting of eight photographs which were shown to her by detectives of the Dane County Sheriff's Department. [R. 84:6-8]

At a Motion hearing held on November 8, 1989, at which the defendant's trial counsel challenged the photo array as being unnecessarily suggestive, the complainant testified that when she saw the photograph of the defendant which was included in the photo array, she "noticed the eyes right away." [R. 84:9] The photograph of the defendant depicted him as wide-eyed with raised eyebrows. [R. 84:36] The detective testified on testimony that he handed the photographs to the complainant one-by-one, [R. 84:28] He further testified that she said, and which the detective concluded was identification, "this looks almost like the guy." [R. 84:30] This identification despite the fact that she had earlier given the detectives a statement in which she indicated that she was 90% certain was the description of the defendant, [R. 84:23] which was entirely different from the photograph she picked out.

Further, upon being questioned about what the detectives said to her, she indicated, "I don't remember what they were [words police detectives said to her]." [R. 84:21]

The defendant argued that of the eight photographs comprising the photo array, only the defendant's photograph was the one so depicting its subject. [R. 84:44]

The trial court ruled that the photo array was not unnecessarily suggestive and denied the defendant's motion to suppress the complainant's identification of the defendant. [R. 84:45-46] The trial court's decision on page 46 indicates only that he finds the photo line-up "remarkably unsuggestive." He clearly stated, "The only evidence I have before me is that the photographs did not influence identification at all in the in-person line-up."

It is well settled that some aspect of the photographs included in a photo array may render an identification procured through a photo array unnecessarily suggestive. State v. Mosley, 102 Wis.2d 636, 652, 307 N.W.2d 200 (1981). Further, any inquiry regarding whether an identification procedure is unnecessarily suggestive "has two aspects: the degree of suggestiveness and the ease with which it could have been avoided." Simos, supra, at 256. Among the factors to be considered to determine whether an identification procedure is unnecessarily suggestive are "the time between the crime, the arrest, and the [identification]; ... the witness' consciousness of the distinctive feature; ... and the visibility of the distinctive item." Id.

The court in Mosley considered whether an array of five photographs, in which the defendant was the only subject shown with a tatoo, was unnecessarily suggestive. In-court testimony by one of the alleged victims revealed that the tatoo was significant in the victim's identification of the defendant. Mosley, supra, at 653. While the Mosley court held that the photo array in question was not impermissibly suggestive it did indicate that, pursuant to the "totality of circumstances" test enunciated in Neil v. Biggers, 409 U.S. 188, 199-200 (1972), the identification was also reliable and therefore admissible. The court noted that both of the defendant's victims, "attentively observed [the defendant] during the robbery and described him accurately [to investigating officers]" and "moreover, the identifications were made only one week after the robbery." Mosley, supra, at 654-655.

In the instant case, the complainant's identification of the defendant should have been ruled inadmissable pursuant to Mosley and Biggers since the indicia of reliability which those two cases require to render a potentially unnecessarily suggestive photo array reliable were completely lacking.

The photo array which lead to the defendant being identified was shown to the complainant more than two years after the alleged incident. More importantly, and as will be discussed later, the description which the complainant gave of her alleged assailant to investigating police officers varied dramatically from the physical characteristics which the defendant actually possessed.

C. The Identification of the Defendant was Inherently Unreliable.

On March 2, 1987, the day on which the complaint was sexually assaulted, she described her assailant as having light brown or sandy colored hair. [R. 90:98] A report of one of the investigating officers, dated March 3, 1987, included a description by the complainant indicating that her assailant had sandy blondish brown hair and no mustache. [R. 90:103] A flier sent to law enforcement agencies based upon information provided by the complainant and the investigative reports prepared by law enforcement officers indicated that the complaint's assailant had light brown hair and blue eyes. [R. 90:20-22] The complainant testified that on March 12, 1987, she described her assailant as having light brown hair and blue eyes for purposes of the preparation of a composite drawing which accompanied that flier. [R. 84:17] At no time during the investigation of her assault did she indicate that her assailant had a mustache and she consistently maintained that her assailant had light, sandy colored hair. [R. 84:36]

Before, during and after the assault upon the complainant, the defendant had dark hair and a mustache. [R. 90:130] That the defendant had a mustache at this time was indicated by his mother [R. 90:130] and his brother-in-law, who he was visiting in North Dakota at the time of the incident [R. 90:192], and one Darrel

Reed, who he met in North Dakota at the time of the incident. [R. 90:206] It should be noted that the defendant also has brown eyes, not blue eyes. [R. 84:36]

Since "reliability is the linchpin in determining the admissability of identification testimony ..." and since reliability is based upon the "totality of circumstances" which include both the accuracy of the victim's prior description of the alleged criminal and the time which has elapsed between the crime and the identification, the identification of the defendant by the complainant as her assailant must be considered constitutionally infirm. Simos, supra, at 255. (citation omitted) The complainant consistently described her assailant as possessing markedly different physical characteristics than those of the defendant and only after being shown an unnecessarily suggestive photo array did she first decide that the defendant looked like her assailant.

Further, it is clear that the court has failed to make the requisite showing that it applied the correct legal standard and further, that there was sufficient records to document as stated in Johnson, a finding for the court's decision. All these matters contribute to require the Court of Appeals to reverse the trial court's decision with regard to denial of the Motion to Suppress Identification.

II. THE DEFENDANT WAS SUBJECT TO THE ADMISSION INTO EVIDENCE OF HAIR SAMPLES FOR WHICH THE EVIDENTIARY CHAIN OF CUSTODY WAS DEFICIENT AND WHICH DEPRIVED THE DEFENDANT OF DUE PROCESS.

A. Standard of Review.

The elements of the standard of review previously enunciated with regard to the trial court's abuse of discretion and due process also apply to this issue. While the degree of proof necessary to establishing of custody of evidence in this trial is discretionary with the trial court. State v. Simmons, 57 Wis.2d 285, 295-296, 203 N.W.2d 887 (1973). However, as stated above, if the trial court bases its exercise of discretion upon errors of law, its decision is beyond the limits of its discretion. See Hudnick, supra, p. 763. Matters of law are reviewed de novo by the trial court. See Marty supra.

Finally, due process is violated where the beneficiary of a constitutional evidentiary error cannot prove, and the reviewing court cannot state, beyond a reasonable doubt, that the error did not contribute to the verdict, and was harmless. State v. Poh, 116 Wis.2d 510, 529, 343 N.W.2d 108 (1984). ~State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 221 (1985).

B. The Chain of Custody with Respect to Hair Samples Purportedly Placing the Defendant at the Complainant's Home on the Date of the Incident was not Sufficiently Established.

In order for a chain of custody, or authentication, to be established so that an item, or testimony regarding the item, may be admitted as relevant evidence, the testimony establishing the chain of custody must be sufficiently complete "so as to render it improbable that the original item has been exchanged, contaminated or tampered with." In re the Paternity of J.S.C., 135 Wis.2d 280, 289-290, 400 N.W.2d 48 (Ct. App. 1986). In the instant case, the testimony elicited at trial graphically indicated that certain hair samples "found" at the complainant's home had been contaminated.

A number of days after she had been sexually assaulted, but less than a month after, the complainant found a pair of men's underwear in some bedding. Both the underwear and the bedding had been laundered by the complainant. [R. 89:46, 58-59] The complainant subsequently placed the underwear in a bag and kept the bagged underwear in her car trunk until she gave the bag to her rape counselor. [R. 89:71-73] The complainant's rape counselor testified that she received a brown paper bag containing the underwear from the complainant on May 27, 1987, placed the bag in an unused room at the Rape Crisis Center in Madison, Wisconsin, instructed her staff not to touch the bag and put the bag in a

cardboard carton with a sign on it indicating that no one should touch the items inside. [R. 89:78-79] All of the staff members of the Rape Crisis Center had access to the room in which the brown paper bag was placed, as well as any client of the center. [R. 89:83-84] The complainant's rape counselor turned the bag over to an officer of the Dane County Sheriff's Department on June 19, 1987. [R.89:80]

After taking possession of the bag containing the underwear, the underwear was examined by a detective with the Dane County Sheriff's Department at which time he made no observation of hair or other debris on them. [R. 90:28]

The first time hair was observed on the underwear was after the defendant became a suspect in the case. [R. 90:28] The bag with the underwear in it sat in a locker in the evidence receiving room of the Dane County Sheriff's Department for two years until the hair was noticed. [R. 89:153-154] The underwear contained animal hair, dark hair and blondish colored hair. [R. 90:126-127]

Nancy Newton, the complainant's rape counselor, testified at trial that she did not know if the underwear in the bag she received from the complainant were those found by the complainant. [R. 89:184] She further testified that she did not know if the underwear she delivered in the bag to the Dane County Sheriff's Department officer were the same as those that were given to her by

the complainant. [R. 89:184-185] She also testified that she did not know or check to see if the underwear had hair on them, or if the underwear had changed in any way during their time at the Rape Crisis Center. [R. 89:184-185] Finally, she testified that the items were left in a sack in an unlocked closet unsupervised for one month. [R. 89:185]

The expert analyst whose testimony was offered by the State and who conducted the procedures to determine whether the hair samples taken from the underwear matched hair samples taken from the defendant indicated that some of the hair in the underwear could have come from either the defendant or the complainant's ex-husband [R. 90-122]. The analyst was unable to say to a reasonable degree of scientific certainty that the hair came from the defendant, RICHARD BERANEK. The examiner determined that it was a head hair found in the underwear. However, he could not determine anything else. He stated that after doing a microscopic hair examination between RICHARD BERANEK and the hair found in the underwear,

> "Given the state of the art of hair comparisons, it is not possible at this time to identify a questioned hair back to a given individual with one exception, that one exception is the use of DNA analysis and examining the tissue material at the root sheet where the hair is anchored to the scalp." [R. 90:115]

He further stated upon cross-examination:

Question: From your examination could you conclude that the recovered from the undershorts could have originated from someone else other than Richard Beranek?

Answer: Yes, but if I can't identify it specifically to Beranek, obviously it could have come from somebody else. [emphasis mine] [R. 89:115]

Question: From your examination, could you determine to any degree of probability that, the questioned hair was that of Richard Beranek?

Answer: No, I would not render an opinion concerning the distribution of that particular hair profile. By that, I mean a level of certainty, a confidence level. There just wasn't enough in the questioned hair to make me feel comfortable with rendering some opinion in the are of a confidence level. [R. 90:-110]

He went on further to say on question at cross-examination:

Question: Did you conduct the examination of that sample of hair of Tom Dixon with questioned hair?

Answer: Yes I did.

Question: From that examination, did you draw a conclusion to a reasonable degree of scientific and forensic probability of the relationship of the relationship of the standard hair to the questioned hair?

Answer: Well, in terms of comparison, I noticed some dissimilarities between the questioned hair and those of Thomas Dixon, but they were not enough to exclude absolutely Thomas Dixon as being a potential source of that hair. [emphasis mine]

Finally, he concluded:

Question: From your examination of the sample of hair from Richard Beranek and Thomas Dixon, can you conclude the questioned hair could have come from either one of them?

Answer: It could have come from either one of them.

The evidence was not probative, nor sufficient to allow it to be presented to the jury. Further, as the expert could not state to a reasonably degree of medical certainty that the hair came from the defendant, or from Thomas Dixon, or from anyone else, the evidence only served to confuse the jury as it was not sufficiently reliable to be allowed before the jury. It was mere speculative evidence. The admission of this evidence was an abuse of discretion by the court.

The issue of introduction of expert testimony has been decided by the court on several instances. Initially, in Pucci v. Rausch, 51 Wis.2d 513, 518, 187 N.W.2d 138 (1971), the court determined that the evidence, at the very least, must have a medical probability if not a medical certainty. The court stated at page 141:

> "The term medical probability more accurately expresses the standard. The standard requires a conviction of the mind or that degree of positiveness that the doctor has in his opinion, which is based upon his knowledge of medicine and case facts, that his belief is correct to a reasonable medical probability."

The court goes on to state at page 142

> "This court has often said an expert opinion expressed in terms of possibility or conjecture is insufficient." Citing Casimere v. Herman, 28 Wis.2d 437, 445, 137 N.W.2d 73 (1965).

This case was filed again in McGarrity v. Welch Plumbing Co., 104 Wis.2d 414, 430, where the court again cited Pucci, supra stated:

> "The Court of Appeals correctly held that an expert opinion expressed in terms of possibility or conjecture is insufficient and the trial court erred in allowing the introduction of this testimony. McGarrity argues on review that the error was harmless. We agree with the Court of Appeals on examination of the entire record requires us to conclude the error was not harmless."

The testimony in this case was totally without foundation. It was clear from the testimony shown above, that the expert could not even state where the hair was from or with any level of confidence or certainty that the hair came from RICHARD BERANEK. Therefore, it was an error to allow this testimony to be presented to the jury.

It is well settled that prejudicial error exists with respect to an evidentiary chain of custody if (a) the condition of an item is altered, (b) there exists an unexplained or missing link with respect to who had control of the item, or (c) the item is not in substantially the same condition at the time of an exam by forensic experts as when it was first obtained by law enforcement officers. State v. McCarty, 47 Wis.2d 781, 788, 177 N.W.2d 819 (1970).

In the defendant's case, the underwear which contained the hair samples implicating the defendant went through the laundry, could have been effected or altered in any number of ways between

March 2, 1987 and June 19, 1987, and was in the "custody" of, essentially, no one during that period of time. The complainant knew nothing about the underwear until she discovered them and could remember little about them after she discovered them. [R.89:72-74] The complainant's rape counselor, whose testimony regarding the underwear's care and custody is set forth above, clearly demonstrated that the chain of custody of the underwear which yielded the hair samples was legally deficient.

Other jurisdictions which have dealt with similar chain of custody questions uniformly have held that the evidence in question was not admissible. For example, where the State's evidence did not show what was done with hair samples taken from the victim which had similar characteristics to those removed from the defendant's underwear from the time the hair samples were taken from the victim to the time they were delivered to a police officer, the hair samples linking the defendant to the sexual assault of the complainant were not admissible. Robinson v. Commonwealth, 212 Va. 136, 183 S.E.2d 179, 180-181 (1971).

In Driskell v. State, 659 P.2d 343 Okla. Cr. (1983), the court found that fiber and hair samples taken from the victim's clothing, which had hung exposed and accessible to a number of persons in a police evidence room for a period of seven days, were

not admissible since "the careless handling...created an unreasonably high probability that the evidence was contaminated." Id. at 355. In People v. Brown, 469 N.Y.S.2d 272, 115 App. Div.2d 610 (1985), the trial court erred in admitting into evidence a piece of rug upon which the defendant had allegedly ejaculated during the course of perpetrating a rape since:

> "the prosecutor failed to establish that it was actually the one involved in the crime, and that it had not been tampered with from the date of the crime until its recovery five days later from complainant's home. [emphasis added]

Based upon all of these factors it is clear, that the court abused its discretion and the evidence was improperly admitted when it should have been excluded.

III. THE DEFENDANT WAS SUBJECT TO MULTIPLICITIOUS CHARGING AND CONVICTIONS WHICH VIOLATED HIS RIGHT AGAINST DOUBLE JEOPARDY.

Double jeopardy is violated when a defendant is charged, tried or convicted for offenses which are substantially alike and are part of the same general episode. State v. Eisch, 96 Wis.2d 25, 34, 291 N.W.2d 800 (1980).

In State v. Rabe, 96 Wis.2d 48, 63, 291 N.W.2d 809 (1980), a two pronged test was enunciated for determining whether a charge is multiplicitious. First, the court must determine whether the charges are identical in law and fact. Second, the court must assess the legislative intent concerning the allowable unit of prosecution pursuant to the statute under which the charge is rendered. Additionally, the "additional fact" test is uniformly used in Wisconsin to determine multiplicity. This test examines "whether each count requires proof of an additional fact which the other count or counts do not." Id.

In holding that charging the defendant with four counts of violating sec. 940.225(2)(a) and (5)(c), Stats., (Genital Intercourse, Anal Intercourse, Fellatio and Insertion of an Object into the Victim's Genitals) was not multiplicitious, the Eisch court weighed three factors which it felt were indicative of factual differences significant enough to overcome the question of

multiplicity. These factors were that (a) each of the methods of bodily intrusion was different in nature and character, (b) each intrusion required a separate volitional act, and (c) each of the intrusions was accompanied by separate threats and separate and distinct uses of force. Eisch, supra, at 37.

In support of this factually-based analysis, the Eisch court relied on cases from other jurisdictions. For example, it cited Arizona v. Hill, 104 Ariz. 238, 240, 450 P.2d 696 (1969), three counts charged in a sexual assault which occurred over the period of one and one-half hours, and People v. Saars, 584 P.2d 622, 629 (Colo. 1978), three counts charged in a sexual assault episode lasting all afternoon. It should be noted that the case in Eisch involved a sexual assault which occurred over the course of two and one-half hours, Eisch, supra, at 28, and that the Eisch court stated, as a legal matter, that multiplicitious charging does not occur where the additional facts are separated in time from one another. Id. at 31. Thus, the time between the individual acts is also a factor to be considered in any analysis of multiplicity under Eisch.

In addition to the foregoing factors, there is precedent indicating that where the assailant does not take time to reflect upon his actions between separate acts of sexual assault or sexual

intercourse, that an individual should not be charged or convicted of multiple violations of the sexual assault statute. Harrell v. State, 88 Wis.2d 546, 560, 277 N.W.2d 462 (Ct. App. 1979).

In the instant case, the defendant was charged with and convicted of four counts of first degree sexual assault, pursuant to sec. 940.225(1)(b) and (5)(b), Stats. (Oral Sex, Hand in Vagina, Vaginal Intercourse and Anal Intercourse), as well as one count of first degree sexual assault pursuant to sec. 940.225(1)(b), Stats.

Based upon the foregoing precedents, it is obvious that the defendant's being charged with and convicted of a separate, general charge of first degree sexual assault pursuant to sec. 940.225(1)(b), Stats., was multiplicitious since that charge was subsumed within each of the other four counts of first degree sexual assault for which the defendant was charged with and found guilty of. In addition, since it is not apparent from the record that there was any appreciable lapse of time between the defendant's alleged acts or any pausing for contemplation between the alleged acts as was present in Harrell, fundamental fairness requires that the charging of the defendant with and convicting him of the four specific individual counts of sexual assault be deemed mulitiplicitious. State v. Hirsch, 140 Wis.2d 468, 475, 410 N.W.2d 638 (Ct. App. 1987).

IV. THE DEFENDANT RECEIVED AN EXCESS SENTENCE WHICH VIOLATED HIS RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. Standard of Review.

Cruel and unusual punishment may include sentences within the statutory range when the duration of the sentence is greatly disproportionate to the offense committed. A sentence is cruel and unusual when it is "so excess and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." Hanson v. State, 48 Wis.2d 203, 206-207, 179 Wis.2d 909 (1970), see also, Steeno v. State, 85 Wis.2d 663, 271 N.W.2d 396 (1978).

While the trial judge has discretion in determining the length of a sentence within the statutory range, a sentence which is cruel and unusual may be a reversible abuse of discretion on the part of the trial judge. See Hanson, supra. The court has said in the past, even when a sentence is within the statutory maximum, it may constitute cruel and unusual punishment when the sentence is greatly disapportioned to the offense committed. State v. Bruesewitz, 57 Wis.2d 475, 204 N.W.2d 514 (1973).

B. The Sentence of the Defendant was Cruel and Unusual in that it Resulted from his being Convicted of Multiplicitious Charges and Abuse of Discretion by the Court.

As was stated previously, the defendant was subject to multiplicitious charging and to multiplicitious convictions for the crimes which he allegedly committed. Thus, the defendant's sentence transcended disproportionality. In effect, the defendant was sentenced for crimes which he should not have been charged with or convicted of. Such a sentence in a democratic society must certainly shock public sentiment and violate the judgment of reasonable people.

In addition, the discretion involved in sentencing, which is analyzed to determine whether a sentence is excess so as to render it cruel and unusual:

> "contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards."

McCleary v. State, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). The defendant maintains that the proper legal standards were not applied with respect to the multiplicitious charging his conviction.

Further, the defendant's sentence should be reviewed and reconsidered since it appears that the trial court, in exercising its sentencing discretion, did so "without the underpinnings of an explained judicial reasoning process." Id. at 278.

Among the objectives of sentence review by appellate courts is the correction of sentences which are excessive in length, "having regard to the nature of the offense, the character of the offender, and the protection of the public interest". Id. at 274 (quoting A.B.A. Approved Standards on Appellate Review of Sentences, page 7.).

The sentence should reflect the court's two-fold responsibility both to the individual found guilty and to society which criminal laws are intended to protect. Neil v. State, 47 Wis.2d 330, 177 N.W.2d 79 (1970). The purpose of a criminal conviction is not merely to punish the guilty, but to protect society from antisocial individuals during their period of rehabilitation. Schwab v. State, 46 Wis.2d 1, 173 N.W.2d 66 (1970). As state above, the A.B.A. Standards clearly indicate that the sentence should reflect the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitation needs of the defendant. A.B.A., Standards Relating to Sentencing Alternatives and Procedures Approved Draft 1971 sec. 2.2.

In its statement at the defendant's sentencing, the trial court noted, among other things, that the defendant continued to claim innocence in the face of overwhelming evidence to the contrary [R. 93:42-43] and that this was one of the reasons for

rendering the sentence that it did. The trial court also indicated, in spite of the potential for multiplicitious convictions, that each of the acts allegedly committed by the defendant was a separate act and that there should be a penalty for each of those acts. [R. 93:44] The trial court also referred to the defendant's Presentence Report, specifically stating that "the defendant could still do something constructive and he has decided not to do that in two areas: maintaining his innocence to his mother and indicating to the "victim" why she was chosen. [R. 93:45]

The court apparently has taken into consideration two factors that are not related whatsoever to the defendant's sentencing. Additionally, the court has held in Scales vs. State, 64 Wis.2d 485, 219 N.W.2d 286 (1974), that the court may not take into account the defendant's refusal to admit guilt at sentencing, which this court in fact did because the defendant maintained his innocence throughout the entire proceeding and still maintained his innocence to his mother and to the court.

This improper factor on top of the testimony of a prior victim which the court considered indicae of reliability. Do not reconcile themselves with the requirements of the logical, rational judicial reasoning process which McCleary contemplates. Further, this sentence is not based upon such rationale, and therefore, does not

satisfy the constitutionality based standard for determining whether sentences are cruel and unusual as is described in Hanson, supra, McCleary, supra, Steeno, supra, and Bruesewitz, supra.

Therefore, the court should reverse and remand this matter for resentencing consistent with the requirements and pronouncements of the State Supreme Court.

V. THE ERRORS OF THE TRIAL COURT WERE NOT HARMLESS ERROR.

The Wisconsin Supreme Court has developed a single standard for courts to use to determine whether errors at trial may be deemed harmless. The Court spelled out this standard in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985).

> We conclude that, in view of the gradual merger of this court's collective thinking in respect to harmless versus prejudicial error, whether or omission of commission, whether of constitutional proportions or not, the test should be whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the State.... The State's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction. Dyess, 124 Wis.2d at 543. (citation omitted)

The Dyess court quoted the Strickland court standard for reversal:

> "... there is a reasonable probability that, but for [the] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

> ...[T]he question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt... Taking the [findings unaffected by error] as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if ... the decision reached would reasonably likely have been different absent the errors."

Dyess, 124 Wis.2d at 544; quoting Strickland, 104 S.Ct. at 2068-69.

The court went on to say that its "reasonable possibility" test is substantively the same as the United States Supreme Court's "reasonable probability" test in Strickland. Dyess, 124 Wis.2d at 544.

The Dyess court recognized in a footnote that an exception to using the same standard in both constitutional and constitutional situations would be those cases where the constitutional error automatically results in reversal. Dyess, 124 Wis.2d at 543, footnote 10. Such exceptions could include the right to be free from coerced confessions, right to counsel and the right to an impartial judge. Id.

Although the Dyess standard has been criticized by the Wisconsin Supreme Court (See State v. Grant, 139 Wis.2d 45, 405 N.W.2d 744 (1987)), it continues to be the applicable standard for Wisconsin courts.

The errors of the trial court served to deny the defendant a fair trial and the burden is upon the beneficiary of the error, here the State, to demonstrate that such possibility does not

exist. Dyess, 124 Wis.2d 525, 543. The reasonable possibility test of Dyess is not the equivalent of determining that there is more likely than not that a new trial will result in a different outcome. Dyess, supra.

In this state, the court need only to hold a possibility that the error contributed to the results exists sufficient to undermine the confidence in the outcome of the proceeding. Dyess, supra.

In the instant case, credibility was the entire issue of the case. The defendant's story was directly contradictory to that of the complainant. In State v. Stanfield, 105 Wis.2d 553, 314 N.W.2d 349 (1982), the court went into detail to discuss credibility and the jury's function in reviewing credibility where they stated at page 563:

> "Whether the defendant possessed a particular intent is to be determined by the jury upon consideration of the totality of the circumstances. Although the defendant's testimony is relevant to this determination, his credibility and trustworthiness are for the jury to determine."

In the instant case, the jury needed to assess the defendant's credibility as his testimony was diametrically opposed to that of the victim.

All the errors of trial combined constitute error wherein the Court of Appeals cannot say there is no possibility that the errors did not contribute to result sufficient to undermine the confidence of the outcome of the proceedings as required by Dyess, supra.

VI. THE INTEREST OF JUSTICE REQUIRES THAT THE DEFENDANT BE GIVEN A NEW TRIAL.

The court should grant the defendant a new trial in the interest of justice due to the cumulative effects of trial counsel's deficient representation, and trial court errors.

Pursuant to sec. 805.15, Stats., a trial court in this state can order a new trial in the interest of justice. State v. Harp, 150 Wis.2d 861, 879, 433 N.W.2d. 38, 48 (Ct. App. 1989). The Harp court went on to point out that when granting a new trial in the interest of justice, the trial court should explain why a new trial is required and enunciate the reasons which require that a new trial be granted in the interest of justice. The court noted that,

> "For example, the trial court could consider where it is probable that justice was miscarried or that the real controversy had not been fully tried."

Id. at 886-887.

These standards for granting a new trial in the interest of justice, in turn, are taken from those appellate cases which have construed the authority of appellate courts in this State to grant discretionary reversals pursuant to either sec. 751.06, Stats. (for the Supreme Court), or sec. 752.35, Stats., (for the Court of Appeals).

In construing the appellate discretionary reversal statute in State v. Wyss, 124 Wis.2d 281, at 735-736, 370 N.W.2d 745 (1985) (over ruled on other grounds, 153 Wis.2d 506, (1986), the Supreme Court made it clear that a new trial may be ordered in either one of two ways:

(1) Whenever the real controversy has not been fully tried or

(2) Whenever it is probable that justice has for any reason miscarried. Separate criteria exists for determining each of these two distinct situations.

The court went on to explain that when exercising its power of discretionary reversal the Court of Appeals can grant a defendant a new trial in the interest of justice without finding that there is a probability of a different result on retrial when it concludes that the real controversy has not been fully tried. The court stated as follows with regard to this issue:

> The case law reveals that situations in which the controversy may not have been fully tried have arisen in two factually distinct ways:
>
> (1) When the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case, e.g., Cuyler, Garcia, and Logan; and (2) When the jury had before it evidence not properly admitted which so clouded a crucial issue that he may be fairly said that the real controversy was not fully tried. E.G., Lorenz.
>
> In either of these situations, the court is not confined to apply the mechanistic formula articulated in Lock v. State, 31 Wis.2d 110, 142 N.W.2d 183 (1966), which required it to find a substantial probability of a different result on retrial. Lorenz, at 414. As we have previously noted in such situations, "it is apparent that we cannot say, using the mechanistic rule of Savina [which restated the Lock rule], that on a retrial the [petitioning party] plaintiff would probably win." Lorenz at 415.

Wyss, 124 Wis.2d at 735.

Thus, the court must have the liberty in such situations to consider the totality of circumstances and determine whether a new trial is required to accomplish the ends of justice.

Further, the cumulative effect of these errors makes justice miscarried and the real controversy has not been fully litigated. The defendant should be allowed a new trial in the interest of justice.

CONCLUSION

The defendant first became a suspect in the case by virtue of an identification by the complainant which was unnecessarily suggestive and inherently unreliable. After the constitutionally infirm identification, some two years after the incident in question, evidence purportedly implicating the defendant which lacked a reliable chain of custody to constitutionally legitimize it was permitted to be introduced into evidence against the defendant at his trial.

The defendant was charged with and convicted of crimes which, according to the structure of the statutes and interpretive case law, he could not be charged with or convicted of lest he be placed in double jeopardy. The defendant was sentenced for those crimes which he could not have been charged with or convicted of and the

rationale underlying the imposition of his sentence exhibited an abuse of discretion on the part of the trial court. As a result, the defendant received a sentence of cruel and unusual proportions.

For all of these reasons, as explained in greater detail above, the decision of the trial court in this case must be reversed and the case remanded for further consideration of the defendant's conviction and sentence.

Dated this 24th day of April, 1992.

Respectfully submitted,

LEHMANN LAW OFFICE, S.C.

David E. Lehmann
Attorney for Richard Beranek

ADDRESS:

315 West Gorham Street
Madison, WI 53703
(608)256-7790

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Case No: 91-3010-CR

RICHARD E. BERANEK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE
ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE DANIEL R. MOESER PRESIDING

APPENDIX OF DEFENDANT-APPELLANT

WISCONSIN CIRCUIT BRANCH # 11 DANE COUNTY

State of Wisconsin, Plaintiff

-vs-

RICHARD E. BERANEK, Defendant

6-12-58
Defendant's Date of Birth

JUDGMENT OF CONVICTION

[XX] Sentence to Wisconsin State Prisons

[ ] Sentence Withheld, Probation Ordered

[ ] Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER 89 CF 946

The defendant entered plea(s) of: [ ] Guilty [XX] Not Guilty [ ] No Contest

The [ ] Court [XX] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
Counts 1 through 4: FIRST DEGREE SEXUAL ASSAULT	940.225(1)(b) 940.225(5)(b)	F	B	3-2-87-ALL
Count 5: FIRST DEGREE SEXUAL ASSAULT	940.225(1)(b)	F	B	3-2-87
Count 6: BURGLARY	943.10(1)(A)(2)(a)	F	B	3-2-87
Count 7: BURGLARY	943.10(1)(a)(2)(d)	F	B	3-2-87
PENALTIES USE OF DANGEROUS WEAPON	939.63(1)(a)(2)			
Count 8: RECKLESSLY ENDANGERING SAFETY	941.30	F	D	3-2-87
PENALTIES USE OF DANGEROUS WEAPON	939.63(1)(a)(3)	CONTINUED ON REVERSE SIDE		

The defendant is convicted on 8th day of Feb. 19 90.
The defendant is sentenced on 5th day of April 19 90.

IT IS ADJUDGED that the defendant is convicted as found guilty, and:

[XX] is sentenced to the Wis. prison for SEE REVERSE SIDE FOR TOTAL SENTENCE IMPOSED.

[ ] is placed on probation for _____,

[ ] is to pay:

fine of ..... $_____
attorney fees of ..... _____
court costs of ..... _____
restitution of ..... _____
TOTAL $_____

(COURT IMPOSED-$50 VW + $20 FEE + $10 JA-C
1/$50 VW + $10 JA EACH ON COUNTS
2 THROUGH 9 = OR 14 DAYS FORTHWITH
CONSECUTIVE)

[ ] is to pay mandatory victim/witness surcharge(s):

felony _____ counts ..... $ _____
misdemeanor_____ counts..... _____
TOTAL $ _____

[ ] is to be incarcerated in the County Jail:

period of ..... _____
and

[ ] is granted work/study release privileges.

[ ] other:

IT IS ADJUDGED that _____days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of WAUPUN/DODGE CORRECTIONAL INSTITUTION

BY THE COURT:

Circuit Court Judge/Clerk/Deputy Clerk

April 5, 1990
Date Signed

NAME OF JUDGE DANIEL R. MOESER
PLAINTIFF'S ATTORNEY ROBERT KAISER, ADA
DEFENSE ATTORNEY ARCHIE SIMONSON

DEPARTMENT OF CORRECTIONS

APPENDIX A

Wisconsin Statutes, Sections 939.50, 939.51, 972.13 & Chapter 973

JUDGMENT OF CONVICTION AND SENTENCE

CRIME		WIS. STATUTE			DATE
Count 9:	INTIMIDATION OF VICTIMS; MISDEMEANOR	940.44(1);			
	INTIMIDATION OF VICTIMS; FELONY	940.45(3)	F	D	3-2-87

ALL COUNTS WITH-INCREASED PENALTY FOR HABITUAL CRIMINALITY 939.62

**NOTE-NUMBER ORDER OF COUNTS ON INFORMATION WERE RENUMBERED BY THE COURT FOR PURPOSE OF JURY INSTRUCTION-NOTE NUMBERS AND JUDGE'S INITIALS

SENTENCE IMPOSED

Count 1: 30 years;
Count 2: 30 years
Count 3: 35 years
Count 4: 14 years
Count 5: 30 years
Count 6: 30 years
Count 7: 30 years
Count 8: 30 years
Count 9: 14 years

ALL CONSECUTIVE TO EACH OTHER AND CONSECUTIVE TO ANY OTHER SENTENCE.

2 closed cases diff #'s INC this #

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

5/9

STATE OF WISCONSIN,

Plaintiff,

v.

RICHARD E. BERANEK,

Defendant.

DEFENDANT'S NOTICE OF INTENT TO PURSUE POSTCONVICTION RELIEF

Case No. 89 CF 946

RECEIVED
APR 10 1990
STATE PUBLIC DEFENDER
MADISON APPELLATE

TO: Clerk of Courts
Criminal & Traffic Div.
City-County Building
Madison, WI 53709

cc: Mr. Robert Kaiser
Asst. District Attorney
City-County Building
Madison, WI 53709

The Defendant hereby gives notice of intent to seek postconviction relief from the Judgment entered in the above court on the 5th day of April, 1990 in which the defendant was sentenced to a total of 243 years for a conviction of violation of Wis. Stats., 943.10(1)(a)(2)(a); 940.225(1)(b); 943.10(1)(a)(2)(d); 941.30; 940.45(3); 939.63(1)(a); 939.62.

Defendant's trial counsel was appointed by the state public defender, and the defendant's financial circumstances have not materially improved since the date the defendant's indigency was determined. The defendant requests that the state public defender appoint counsel for purposes of postconviction relief.

The defendant's current address is Columbia County Correctional Institute, P.O. Box 900, Portage, WI 53901.

Dated this 9th day of April, 1990.

Archie E. Simonson
Trial counsel for defendant
106 E. Doty St., Suite 320
Madison, WI 53703

(608) 255-0236

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 89-CF-946

v.

RICHARD E. BERANEK,

Defendant.

NOTICE OF APPEAL

TO: Judith Coleman
Clerk of Circuit Court
Dane County Courthouse
210 Martin Luther King, Jr., Blvd.
Madison, WI 53709

District Attorney 's Office
Attn: Robert Kaiser
Dane County Courthouse
210 Martin Luther King, Jr., Blvd.
Madison, WI 53709

NOTICE IS HEREBY GIVEN that the defendant in the above-captioned case appeals to the Court of Appeals, District IV, from the Judgment of Conviction and sentence entered on April 5, 1990, in the Circuit Court for Dane County, the Honorable Daniel R. Moeser, presiding, in which the defendant was sentenced to 243 years in the Wisconsin State Prison System.

This is not an appeal within sec. 752.31(2), Stats.

This is not an appeal to be given preference pursuant to statute.

Dated this 13th day of December, 1991.

LEHMANN LAW OFFICE, S.C.

David J. Bartz
330 E. Wilson St., #100
Madison, WI 53703
(608) 256-7790

cc: Marilyn Graves
Clerk, Court of Appeals

State Attorney General
Attn: Sally Wellman
Assistant Attorney General

DH

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Case No: 91-3010-CR

RICHARD E. BERANEK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE
ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE DANIEL R. MOESER PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

LEHMANN LAW OFFICE, S.C.

David E. Lehmann

Assisted by David J. Bartz
Attorneys for Richard E. Beranek

ADDRESS:

315 W. Gorham Street
Madison, WI 53703
(608)256-7790

Receipt of copy of the within acknowledged
the 15th day of July
19 92 3:00
Attorney General of Wisconsin
By Donna J. Conrad
Attorney General

Attachment C

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. THE PROCEDURE BY WHICH THE DEFENDANT WAS INITIALLY IDENTIFIED WAS UNNECESSARILY SUGGESTIVE AND SAID PROCEDURE TAINTED SUBSEQUENT IDENTIFICATIONS.

> "In cases which involve the validity of subsequent in-court identifications the rule is clear: once the defendant shows that the out-of-court identification was improper, the state has the burden of showing that the subsequent in-court identification derived from an independent source and was thus free of taint." Powell v. State, 86 Wis.2d 51, 55-56, 271 N.W.2d 610 (1978). [citations omitted]

As the State points out, photo arrays may be unnecessarily subjective when "some distinctive feature... is highlighted in the photographs themselves." [State's Brief, pp. 3-4] [citations omitted] Further, it is well settled that "a photographic identification procedure which includes a photo which is unique in a manner directly related to an important identification factor may be held impermissibly suggestive." Id. at 66-67 (citing Fells v. State, 65 Wis.2d 525, 223 N.W.2d 507 (1974); Schaffer v. State, 75 Wis.2d 673, 250 N.W.2d 326 (1977)).

In the instant case, it certainly cannot be said that the photograph of the defendant which was included in the photo array which led to his arrest did not portray him in a unique manner directly related to an important identification factor. When viewing the photo array, the complainant "noticed the eyes right away." [R. 84:9] In addition, the defendant's photograph was the only one that had "raised eyebrows and is wide-eyed." [R. 84:44]

Furthermore, the State's brief conveniently neglects to address the holding of Simos v. State, 83 Wis.2d 251, 256, 265 N.W.2d 278 (1978), which stated that among the factors to be considered in determining whether an identification procedure is unnecessarily suggestive are the time between the crime, the arrest and the identification, the victim's consciousness of a distinctive feature and the visibility of the distinctive item.

Obviously, much to the detriment of the defendant, "the eyes had it" with respect to the most important physical feature which contributed to her identification of the defendant. Further, the more than two years which elapsed between the alleged assault and the initial identification of the defendant by the complainant indicates that the identification procedure in question was indeed unnecessarily suggestive.

Based upon the foregoing, especially considering that the complainant did consistently describe her assailant as possessing markedly different physical characteristics than those of the defendant, it is illogical to assert, as the State has done in its brief, that the unnecessarily suggestive photo-array did not taint the complainant's subsequent identifications of the defendant.

The factors which the court cited as indicating that it was improbable that the blood sample evidence was not subject to a legally deficient chain of custody were as follows:

(a) No other male was alleged to be the possible father or involved in sexual intercourse with the mother. "Thus, the possibility of confusion of blood samples with other possible fathers... [was] ... not present here." Id. at 290-291.

(b) The medical doctor also testified that based upon the tests, "the probability of paternity [was] 98.25% of the probability that the alleged father in this case... [was]... the father of the child." Id. at 291.

In the instant case, the State's expert witness indicated that certain hair samples taken from the bag carried a "high degree of probability" that they originated from the defendant but that he could not "exclude the possibility that someone whose hairs that I haven't looked at could also look like" the defendant's. [R. 89:181]

The defendant's expert witness testified that he was unable to give an opinion, to any degree of probability, that the hair came from the defendant. [R. 90:118-119] Further, testimony of the defendant's expert witness indicated that the hair samples taken from the underwear could have come either from the defendant or the complainant's ex-husband. [R. 90:122]

Thus, the fact based "indicia of improbability" required by J.S.C. are not present in the instant case. It is well settled that prejudicial error exists with respect to an evidentiary chain of custody if, as in the present case, there exists an unexplained or missing link with respect to who had control of the item. State v. McCarty, 47 Wis.2d 781, 788, 177 N.W.2d 819 (1970).

The defendant would refer the State to the examples raised in his initial brief regarding how other jurisdictions, in less egregious circumstances as those present here, have uniformly held that the evidence in question was not admissible. [Defendant-Appellant's Brief and Appendix, pp. 22-23]

III. THE MULTIPLICITIOUS NATURE OF THE CHARGES AND CONVICTIONS WAS FUNDAMENTALLY UNFAIR, CRUEL AND UNUSUAL.

As the State has indicated, the test for multiplicitiousness as set forth in State v. Rabe, 96 Wis.2d 48, 63, 291 N.W.2d 809 (1980), involves an assessment of legislative intent which involves a consideration of fundamental fairness. State v. Eisch, 96 Wis.2d 25, 34, 291 N.W.2d 800 (1980).

Based upon the cases which the Eisch court relied upon from other jurisdictions in its analysis, which involved multiple counts of sexual assault occurring over spans of hours [see Defendant-Appellant's Brief and Appendix, p. 25], it was fundamentally unfair to this defendant to charge and convict him in the manner which he was subject to. It is not apparent from the record that there was

any appreciable lapse of time between the defendant's alleged acts or any pausing for contemplation by him between the alleged acts. Fundamental fairness requires that the charging of the defendant with and convicting him of the four specific individual counts of sexual assault be deemed multiplicitious. [Defendant-Appellant's Brief and Appendix, p. 26, citing State v. Hirsch, 140 Wis.2d 468, 475, 410 N.W.2d 683 (Ct. App. 1987).]

Finally, despite the State's assertion to the contrary, the defendant, in his initial brief, did raise the issue that since he was subject to multiplicitious charging and to multiplicitious convictions, his sentence was cruel and unusual.

> "Thus, the defendant's sentence transcended disproportionality. In effect, the defendant was sentenced for crimes for which he should not have been charged with or convicted of. Such a sentence in a democratic society must certainly shock public sentiment and violate the judgment of reasonable people." [Defendant-Appellant's Brief and Appendix, p. 28] See Hanson v. State, 48 Wis.2d 203, 206-207, 179 N.W.2d 909 (1970); Steeno v. State, 85 Wis.2d 663, 271 N.W.2d 396 (1978).

CONCLUSION

For the reasons set forth herein, and for the reasons set forth in the Defendant-Appellant's Brief and Appendix, the decisions of the trial court in the defendant's case must be reversed and the case remanded for further consideration by the trial court.

Respectfully submitted this 14th day of July, 1992.

LEHMANN LAW OFFICE, S.C.

David E. Lehmann
Attorney for Defendant-Appellant

David J. Hartz
Attorney for Defendant-Appellant

ADDRESS:

315 West Gorham Street
Madison, Wisconsin 53703
(608) 256-7790

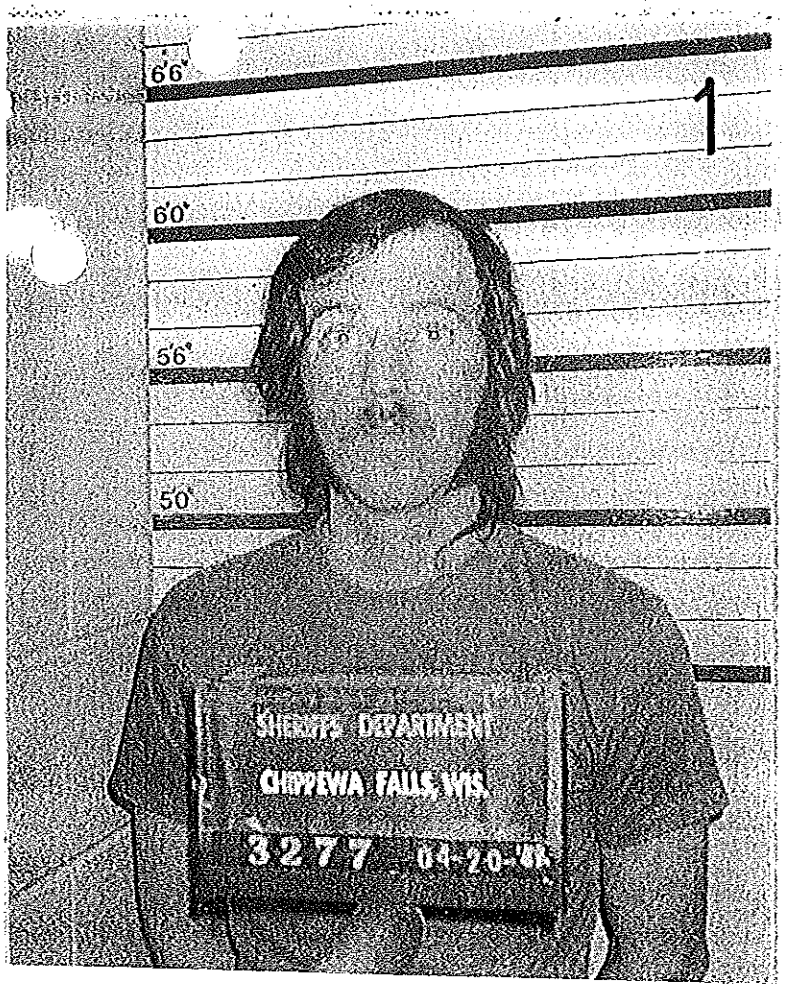
ST DEGREE SEXUAL ASSAULT
CC. 4PM MON 3/2/87
ANE CO. TWN PLEASANT SPRINGS
/W, LT. BRO HAIR; BLUE EYES
'9 - 5'10"; SLENDER BUILD
's to MID 30's
LEFT ON CHIN
AS WEARING LT. BLUE SHIRT,
ARK PANTS, DARK BELT

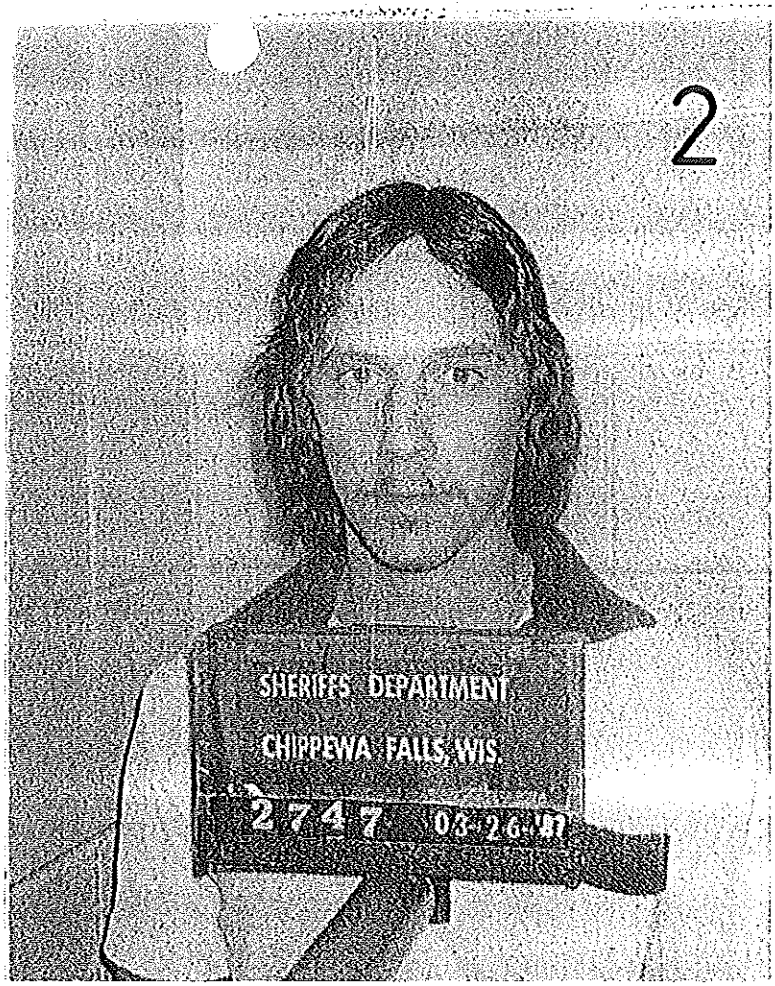
- - - - - - - - - -

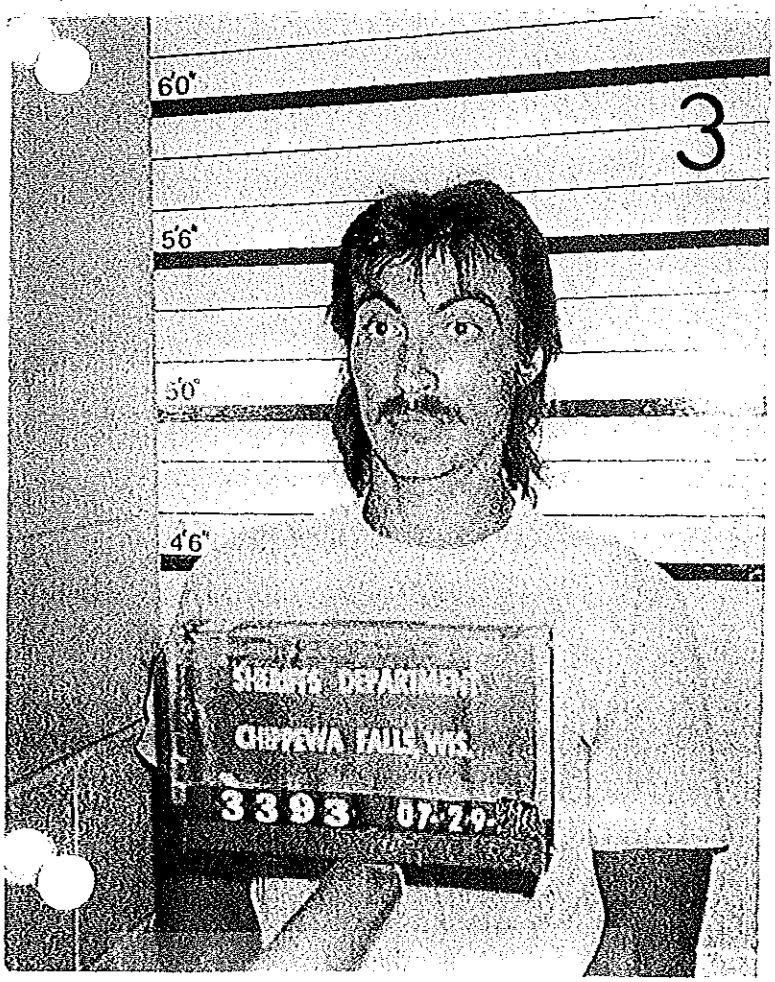
NY INFO CONTACT:
ET. KEVIN HUGHES, DANE CO. SO

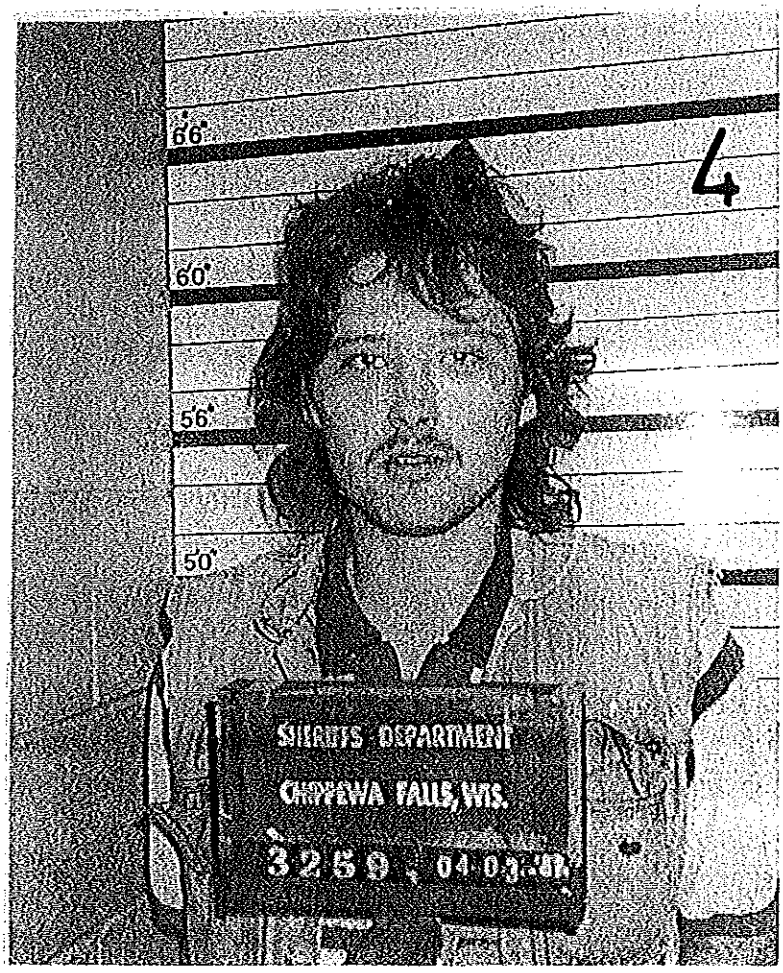
191013
DCSD
T.C.M
3-12-87

Attachment D



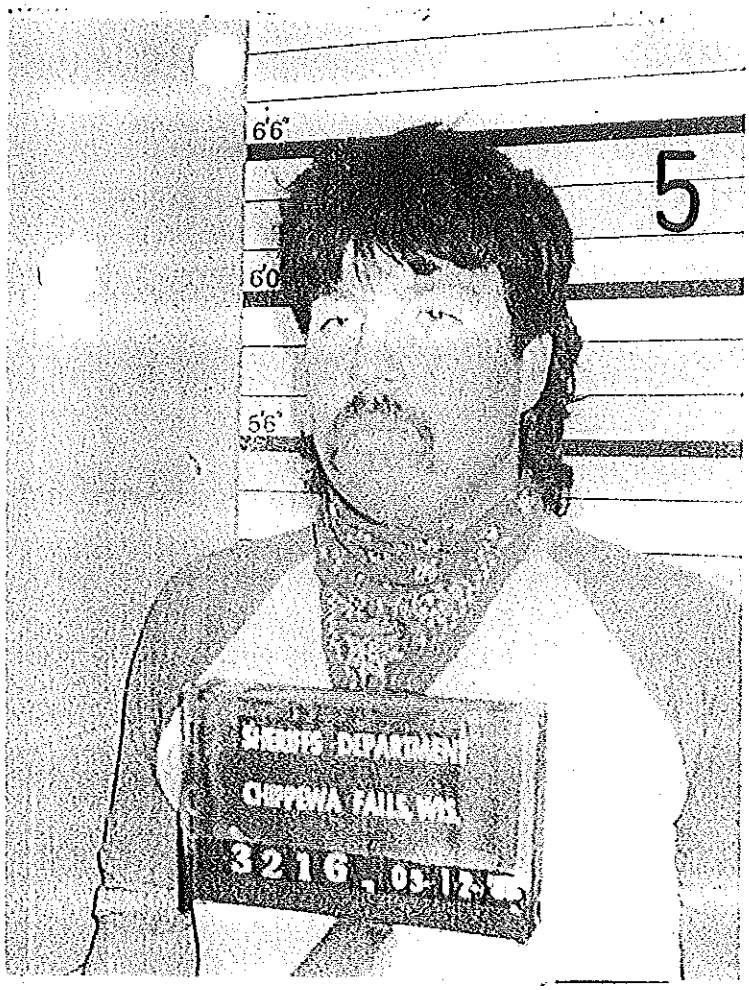






RICHARD E. BERANEK

Attachment E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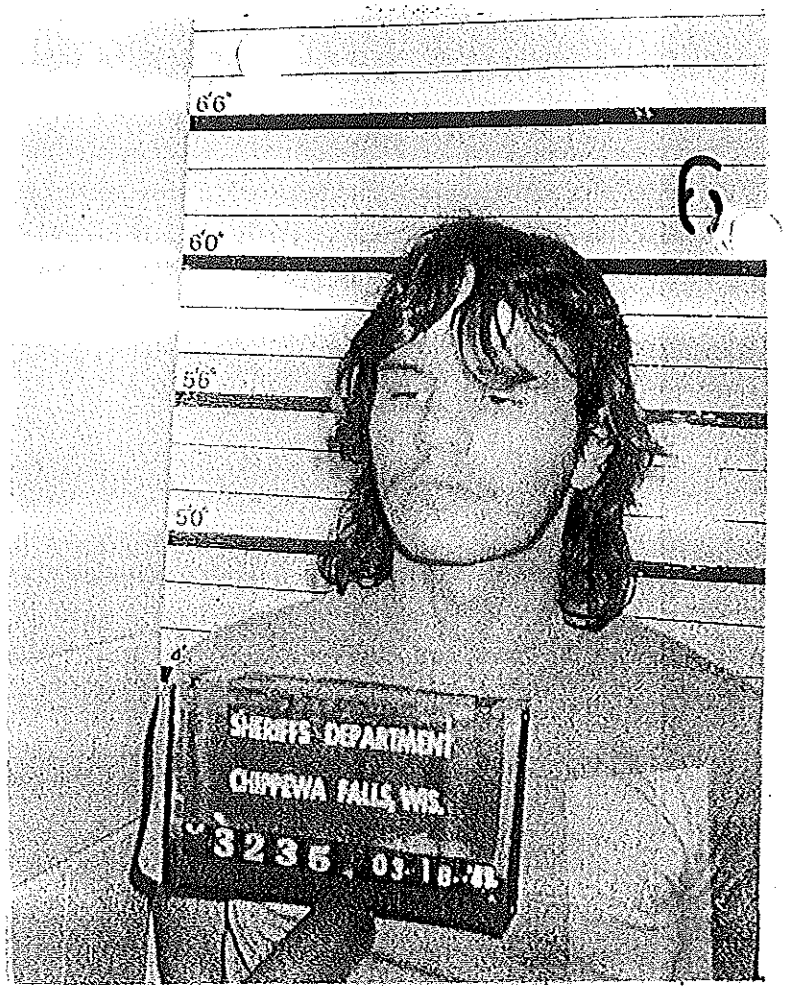
CHIPPEWA FALLS, WIS.
3216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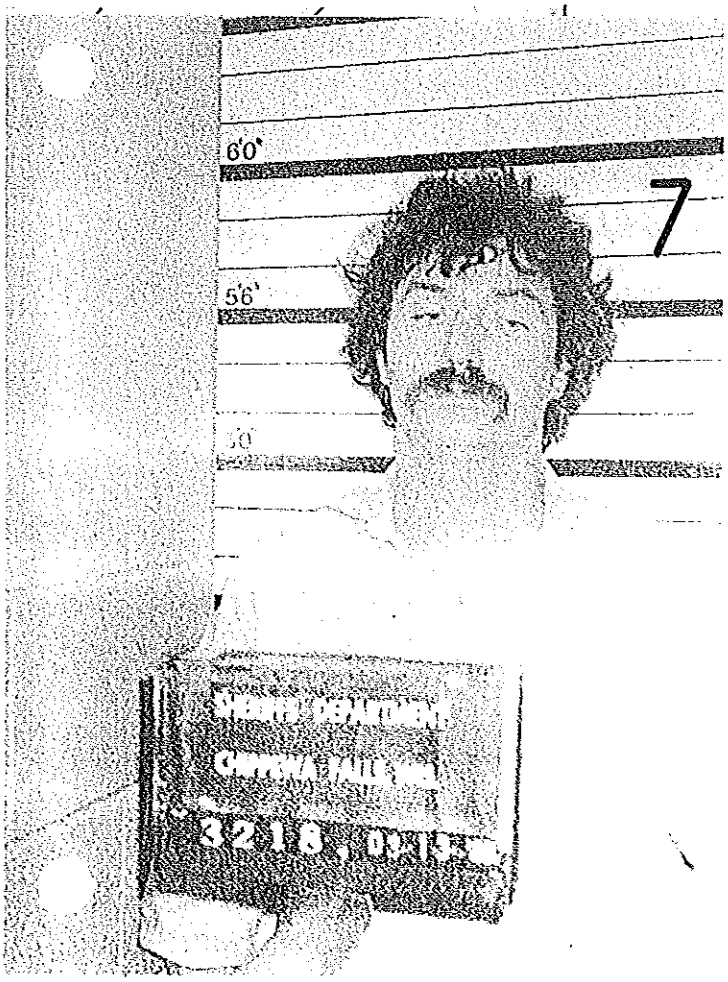
CHIPPEWA FALLS, WIS.
3235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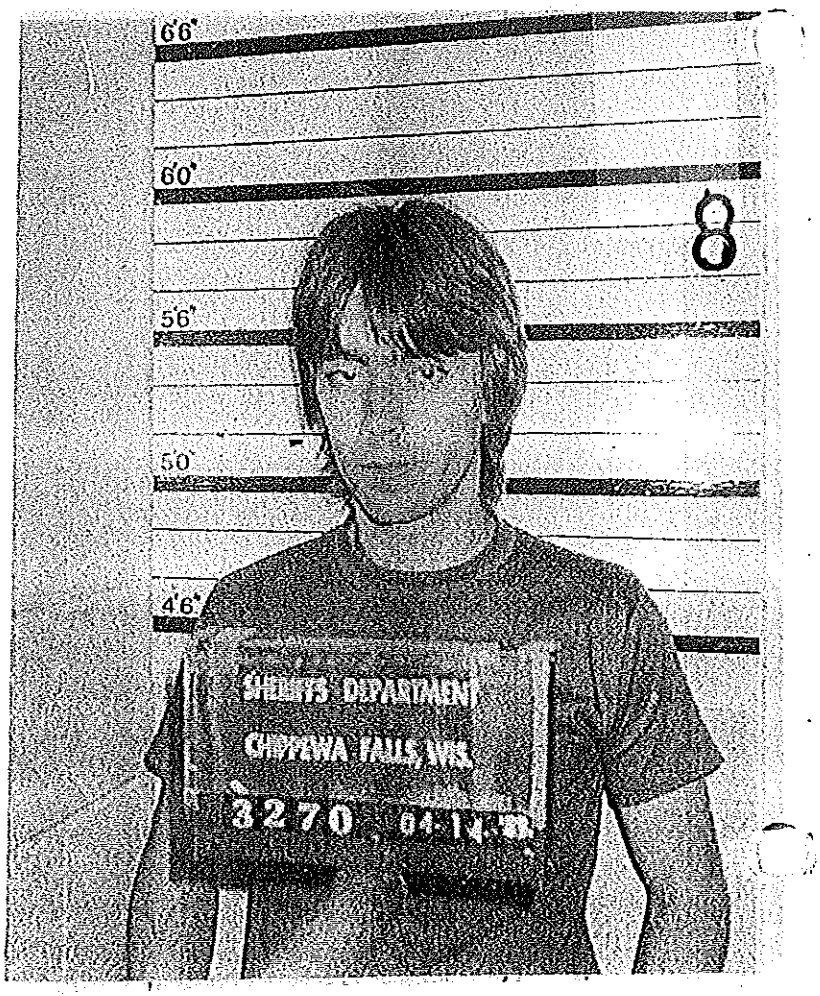
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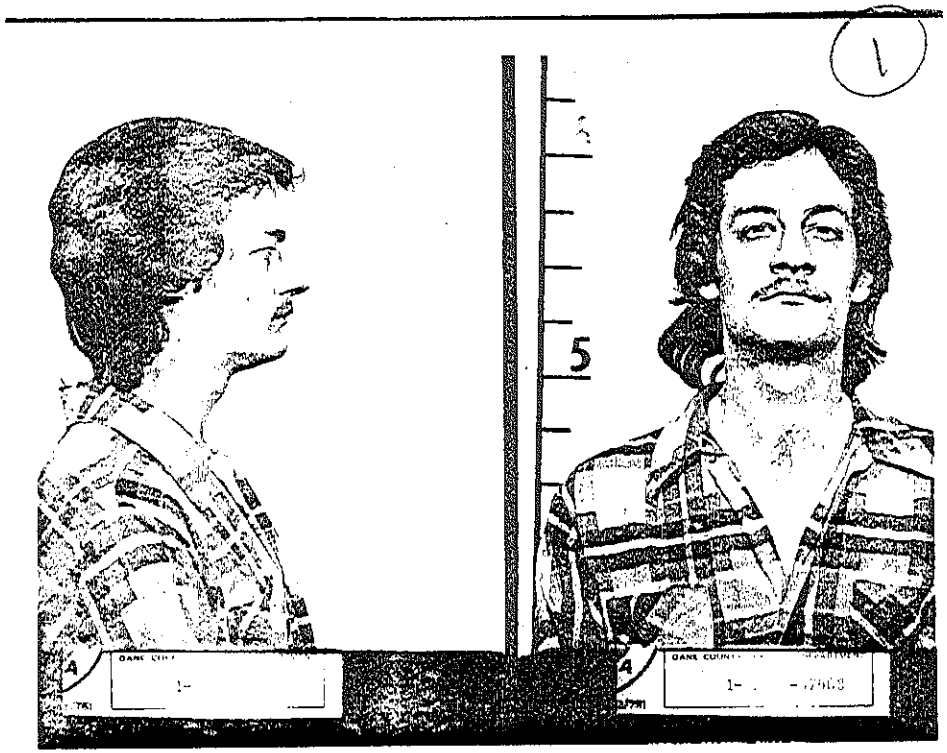
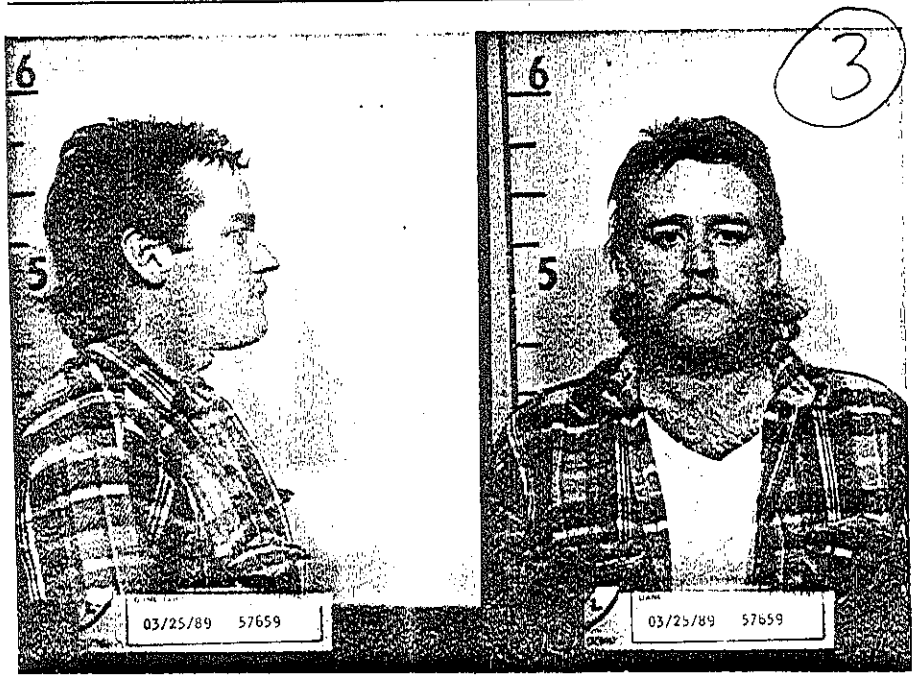
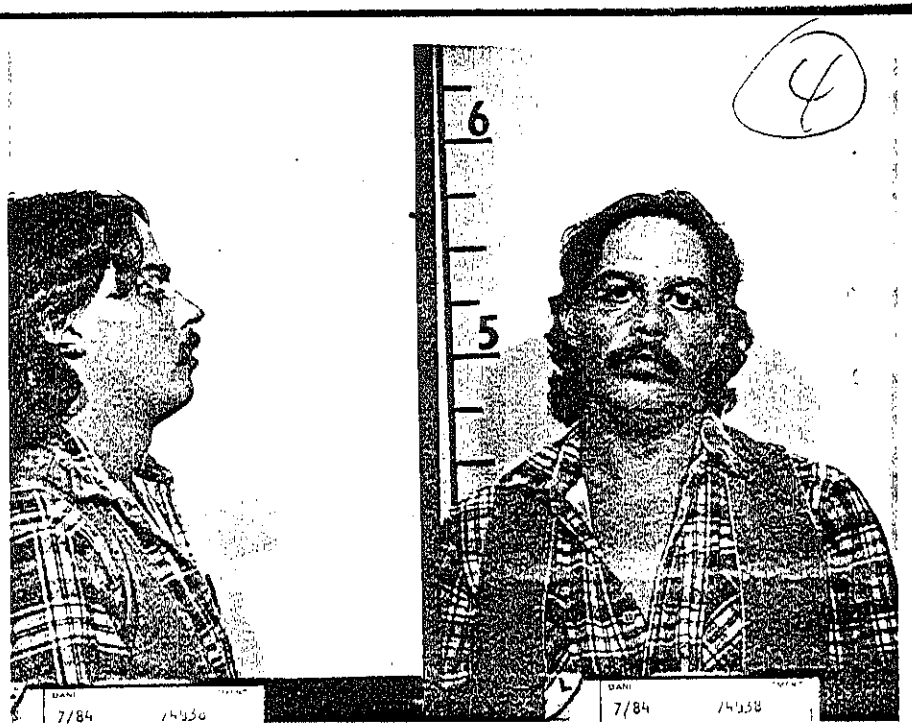
SHERIFF'S DEPARTMENT
CHIPPEWA FALLS, WIS.
3270

Attachment F







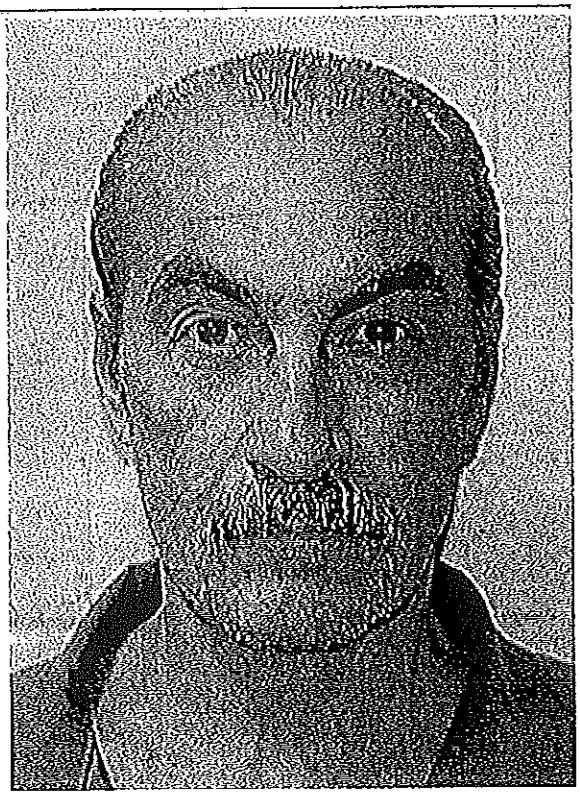
DANE COUNTY SHERIFF'S DEPARTMENT
5-85
77068
DANE COUNTY SHERIFF'S DEPARTMENT
5-15-87
85517
DANE COUNTY SHERIFF'S DEPARTMENT
04/21/87
85021
DANE COUNTY SHERIFF'S DEPARTMENT
05/00
#01341

Wisconsin Department of Corrections

Offender Basic Information Sheet

Name: BERANEK, RICHARD E

DOC #: 00122606
Birth Year: 1958
Age: 58
Height: 5' 10" Weight: 180
Race: WHITE
Hair Color: GRAY
Eye Color: BROWN
Sex: MALE
Dexterity: UNKNOWN
PhotoDate: 11/01/2016



WI-DOC OFFENDER INFO SHEET PRINTED 03/07/2017

Attachment G