STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 89-CF-946

RICHARD BERANEK,

Defendant.

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

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Richard Beranek's Reply to the State's Objection

The Defendant Richard Beranek files this Reply to the State's Objection. Because Mr. Beranek filed a detailed Motion for New Trial and the Court is familiar with the record at trial and presided over the recent evidentiary hearing, this Reply will focus only on those issues responsive to the State's Objections.

I.
Introduction

New DNA evidence as well as an admission by the FBI that it provided false or misleading expert testimony requires this Court to grant a new trial. Mr. Beranek was convicted on the basis of two mutually corroborating pieces of identification evidence: (1) then eyewitness identification by the victim made two years after the crime and (2) microscopic hair comparison identifying Mr. Beranek as the source of a hair collected from underwear left by the rapist in the victim's bed. *See State v. Beranek*, No. 91-3010-CR at 2-3 (Wis. Ct. App. May 20, 1993) (summarizing evidence of guilt).

At trial, the State's identification evidence was contradicted by six witnesses whose testimony established that Mr. Beranek left the State of Wisconsin and arrived in North Dakotas on February 27, 1987, and remained in North Dakota until March 6, 1987—making it impossible for him to have committed the crime on March 2nd. The testimony of these witnesses was corroborated by contemporaneous documents, including a government food stamp application listing Mr. Beranek as a resident of his sister's home as of February 27th.

In the face of this powerful alibi evidence, the State repeatedly emphasized the

importance of the FBI's hair identification in both corroborating the eyewitness identification and refuting Mr. Beranek's six alibi witnesses. As to corroborating the eyewitness identification, Mr. Kaiser argued:

> and then a pair of underpants that have never been seen by her or used by her husband appear in her house and from them and from her house comes a hair that is absolutely identical to the defendant…. It's what we call corroboration. It supports her testimony.[1]

TR Vol. 3 65. He then used the FBI's hair identification to undermine the Mr. Beranek's alibi witnesses:

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

Id at 70. Later in his argument, Mr. Kaiser repeated his theme that the FBI's hair comparison was important corroboration of the victim's eyewitness identification:

> [The hair comparison] can lead to identification in court by a witness whom a jury is allowed to evaluate the credibility of and whom a jury is allowed to then listen to the experts regarding the hair comparison and made a decision. Does that support her testimony? That's what it does.

Id. at 96-97. Compounding the admittedly false and misleading testimony by the FBI analyst Wayne Oakes, Mr. Kaiser emphasized the virtual certainty of the FBI's identification of Mr. Beranek's hair at the crime scene:

[1] At the hearing on this motion, the Court suggested that it was the defense's claim that these underwear were left by the perpetrator. But, of course, the underwear would have been utterly irrelevant to this case, the prosecutor could not have claimed that they were corroborative of anything, unless it was *the State's* contention that the underwear were left by the perpetrator, and that the hair was the perpetrator. It was the State, not the defense, that introduced this evidence and argued that it helped to identify the perpetrator.

> the evidence was according to Mr. Oakes's testimony that in 3,000 examinations or so that he's done, he's only ever had one instance where a questioned hair matched the hair of two different people and it was a pubic hair of Negroid origin. So, he's never had it on the head hair of a Caucasian person; and when pressed on cross examination of counsel, he told you that his superior with more experience than him, having done more examinations, had a lower percentage of instances in which a questioned hair matched hairs of two different people; and that person had done over ten thousand examinations.

Id. Picking up the phony statistic offered by the FBI (and now disavowed), Mr. Kaiser again returned to the importance of the FBI's hair identification in corroborating the victim's eyewitness identification:

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

Id at 96-97.

The extensive argument cited above highlights the particularly damning nature of the FBI hair identification in this case which both corroborated the victim's eyewitness identification and discounted Mr. Beranek's alibi witnesses. It was not surprising that the jury credited the State's identification evidence over Mr. Beranek's alibi and convicted.

The uncontradicted DNA evidence presented at the hearing conclusively establishes that the hair that Mr. Beranek was alleged to have left at the crime scene did not, in fact, belong to Mr. Beranek. Further, the FBI has now admitted that its agent Wayne Oakes testified in a false and misleading way. In light of the strong alibi presented at trial and the weakness of the underlying evidence used to convict, a new trial must be granted under sections 974.06 and 974.07 of the Wisconsin Code.

II.
Argument

A. A New Trial Must Be Granted Under Wis. Stat. § 974.07(10) Based on Exculpatory DNA Evidence.

The new DNA evidence excludes Mr. Beranek as the source of all of the hairs that were collected by the FBI from the underwear left by the perpetrator of the crime, conclusively contradicting the hair identification relied on by the State to convict. Mr. Beranek also proffered evidence that DNA testing excluded Mr. Beranek as the major profile source of DNA detected on a semen stain on the victim's underwear that was forcibly removed by the perpetrator of the crime. This was the only interpretable DNA profile obtained from testing both the victim's underwear and the underwear left by the perpetrator.[2]

Although the State presented no evidence to contradict the results of the DNA testing it raises a bevy of meritless objections to both the integrity of the evidence presented and its effect on the verdict including:

1) Challenging the legal standard for relief under section 974.07(10);

2) Challenging the chain of custody of the hair evidence;

3) Arguing that the new DNA evidence is not material because the defense challenged the weight of the hair identification; and

4) Minimizing the importance of the hair identification that is now disproven by DNA evidence.

[2] Because the State relied on this evidence in its response and did not renew its objection, the Court should accept Mr. Beranek's proffer as evidence because the State has now placed this evidence at issue.

None of these objections will withstand the Court's careful consideration of the record and applicable law.

1. Legal Standard Under Section 974.07(10).

Although the State does not contest this Court's jurisdiction to grant relief under Section 974.07(10), it argues that the "interest of justice" standard used by the Supreme Court in *State v. Hicks*, 202 Wis.2d 150 (1996) and *State v. Armstrong*, 283 Wis. 2d 639 (2005) does not apply to Mr. Beranek's motion for new trial. Instead, the State asks this Court to import the newly discovered evidence standard from Section 805.15(3) which requires a defendant to show that the newly discovered evidence "would probably change the verdict". State's Objection at 4. Although this issue is likely moot because Mr. Beranek can satisfy either standard, this Court should correctly construe section 974.07(10) and apply the same standard for a new trial in the interests of justice used in *Hicks* and *Armstrong*.

This Court is bound by the plain language of the Statute it is applying, which is section 974.07. The plain language of section 974.07(10) indicates that that the governing standard for this Court is the "interests of justice":

> After the hearing, and based on the results of the testing and any evidence or other matter presented at the hearing, ***the court shall enter any order that serves the interests of justice***, including any of the following:
>
> 1. An order setting aside or vacating the movant's judgment of conviction, judgment of not guilty by reason of mental disease or defect, or adjudication of delinquency.
>
> 2. An order granting the movant a new trial or fact-finding hearing. . . .

Wis. Stat. Ann. § 974.07 (10) (a) (emphasis added). The State asks this Court to ignore the plain language of section 974.07(10), which adopts an interests of justice standard and instead import the higher reasonable probability standard found in the general newly discovered evidence remedy found at section 805.15(3)(d), though the section 974.07 does not explicitly reference subsection (d). However, the only authority cited by the State for this proposition is the concurring and dissenting opinion of a single appellate judge in *Denny v. State*, 2016 WI App. 27. ¶76, rev'd on other grounds, 2017 WI 17 (Hagedorn, J, concurring and dissenting). Because Section 974.07(10) provides a remedy separate and apart from Section 805.15(3) and because it expressly states that a new trial should be granted "in the interests of justice," this Court should apply the interests of justice standard found in *Hicks* and *Armstrong*.[3]

Moreover, the State's attempt to import the standard from § 805.15(3) is unavailing, because the Wisconsin Supreme Court has expressly held that § 805.15 applies only in civil cases, and not at all in criminal cases. *State v. Henley*, 2010 WI 97, ¶¶ 39, 44, 328 Wis. 2d 544, 787 N.W.2d 350 (§ 805.15 "applies to civil cases only") (litigants "should not be looking to the civil statutes for guidance regarding … postconviction options"). And the "interest of justice" standard had a clear and well-

[3] Because Section 974.07(10) is itself a statutory new trial remedy, the State's reliance on *State v. Henley*, 2010 WI 97, ¶75 is inapplicable. This Court also has the inherent authority to grant a new trial in the interests of justice ancillary to Mr. Beranek's claim of actual innocence and his Due Process claim brought under section 974.06. *Compare Henley*, 2010 WI 97, ¶75 (inherent authority to grant motion for new trial in interests of justice must be tethered to another claim providing court jurisdiction over the matter).

established meaning in the law when the legislature chose to employ it in § 974.07(10). *See, e.g., State v. Hicks,* 202 Wis. 2d 150, 160, 549 N.W.2d 535 (1996). Given that, when "construing statutes, [courts] presume that the legislature knew existing law when it enacted a statute," *Prosser v. Leuck,* 225 Wis. 2d 126, ¶ 40, 592 N.W.2d 178 (1999), the only reasonable conclusion is that the legislature intended to employ the "interest of justice" language as a legal term of art, with all its well-established meaning in Wisconsin law. The State's argument would require this court to conclude that the legislature intended to jettison that well-established meaning of the phrase and incorporate—without ever saying so—a standard from a civil statute establishing a different standard, which the Wisconsin Supreme Court has ruled has no applicability in criminal cases. The plain reading of the statutory language is obviously the better reading.

2. The hairs tested are proven to be the hairs examined by the FBI.

At trial, the State relied on the opinions of FBI analyst Wayne Oakes and Wisconsin Crime Lab Scientist Arthur Varriale regarding the hair evidence collected from the perpetrator's underwear. Although the State notes that the defense questioned chain of custody at trial, this issue was resolved in favor of the State both at trial and on appeal. *See State v. Beranek,* No. 91-3010-CR at 5-6 (attached to State's Objections as Attachment A). The chain of custody of the hair evidence through trial is law of the case, and otherwise barred by issue preclusion.[4]

[4] Issue preclusion bars relitigation of chain of custody through trial because (1) the same parties are involved in this proceeding as at trial; (2) the issue was "actually litigated" in the prior proceeding; and

Furthermore, the chain of custody of the hair evidence through the DNA testing was proven in painstaking detail over the three-day evidentiary hearing presided over by the Court. FBI Agent Thiessen testified that the hairs collected from the perpetrator's underwear were permanently mounted on a slide at the FBI lab prior to Wayne Oakes's examination. *See* HTR Vol. III at 15-16. Agent Thiessen identified the slide depicted in Exhibit 4 as the slide that Wayne Oakes based his conclusions on. *See* HTR Vol. III at 49-51. She also confirmed that the slide depicted in Exhibit 4 appeared to be permanently mounted. The slide also bears markings indicating that these were the same hairs examined by Wisconsin Crime Lab scientist Varriale. A marking "E4" on the slide corresponds with Varriale's report from 1990 that gave the slide he examined the designation "E4", describing it as the slide containing hairs recovered by the FBI from the men's undershorts. *Compare* Exhibit 4 *with* Exhibit 6. The report also notes that he was asked by the defense to offer a second opinion as to hair comparison from the hairs on E4. *See* Exhibit 6. Underneath the "E4" marking on the slide are the initials "av" which obviously correspond with Arthur Varriale. *See* Exhibit 4.

Pursuant to this Court's DNA testing orders, the slide depicted in Exhibit 4 was transferred from the Dane County Clerk's Office to the Bode DNA lab on July 6, 2012. *See* HTR Vol. II at 146. The slide was photographed by Bode analyst Rachel Neagle

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(3) there is nothing fundamentally unfair in prohibiting the State from attacking the integrity of the evidence that the State itself sponsored as evidence of Mr. Beranek's guilt. *See Paige K.B. v. Steven G.B.*, 226 Wis.2d 210, 223-25, 594 N.W.2d 370 (1999)

when she began work on the evidence. *See* HTR Vol. II at 149.[6] Ms. Neagle's initials and the date appear in the photograph, which also match an activity log in the Bode case file. *See* HTR Vol. II at 146. Ms. Neagle testified, consistent with her bench notes and the contemporaneous photographs, that the slide was permanently mounted when it was received. *See* HTR Vol. II at 141- 142. , and Exhibit 4 is one of the photographs taken at that time. *See* HTR Vol. II at 158- 159. At 7:44 a.m. on August 15, 2012, Neagle began work on the slide. Id. at 161. She dissolved the mounting medium used by the FBI to lock the hairs in place using a xylene substitute solution—even documenting the batch number of the solution she used. *Id*. 162-165. While dissolving the mounting media, she removed the single hair that she found suitable for autosomal DNA testing (apparent hair A) on the sticky potion of one post-it note and the remaining five apparent hairs were placed together on a second post it note. Id., *see also* Exhibit 19. This was standard practice for hairs at Bode because the adhesive on the post-it note prevents hairs from getting lost. *See* HTR Vol. II at 175-76. Neagle then cut the root portion from apparent hair A for DNA testing and then repackaged the hair evidence. *See* HTR Vol. II at 176. The post-it notes were folded over themselves to retain the hairs on the adhesive portion and then both post-it notes, containing all six hairs, were placed in an envelope which was sealed closed with evidence tape. *Id*. The sealed envelope containing the six hairs that were removed from the permanently mounted slide were then returned to the evidence room at Bode. *Id*.

[6] In her testimony, Ms. Neagle walked the Court though how she opened the packaging with reference to photographs she took as she opened the packaging and case notes recording (with date and time stamp) when each step was accomplished.

The evidence was later shipped from Bode to the Microtrace lab on May 9, 2014. *See* HTR Vol. I at 37. Microtrace employee Katie White examined the hair evidence that was received from Bode and mentioned the importance of maintaining chain of custody. *Id*. She photographed the sealed envelope that was marked by Neagle with the Bode case number and the designation "apparent hairs". *See* HTR Vol. I at 38- 40.; Exhibit 3 at 9. White photographed the post-it notes bearing Neagle's initials and designations. *Id*. White testified that it was not unusual for hair evidence to be folded onto post-it notes when received at her laboratory. *Id*. White then collected the six hairs from these post-it notes and mounted them on separate slides for additional examination. *See* HTR Vol. I at 37. The examination of these hairs by White and Microtrace Lab Director Skip Palenek also confirmed that the hairs they received were the same as those collected from the underwear by the FBI. *See* HTR Vol. I at 99- 100. Consistent with the findings of the FBI and Wisconsin Crime Lab, White and Palenek reported that one of the six hairs was microscopically consistent with Mr. Beranek and (as reflected in the Wisconsin Crime Lab report) one of the hairs was determined to be an animal hair. *See* HTR Vol. I at 48- 49.

After microtrace completed its examination, the hairs (now individually mounted on slides) were then sent to the Mitotyping Lab for DNA testing. *See* HTR Vol. I at 49. All six hairs were tested and Mr. Beranek was conclusively excluded as the source of all of the hairs removed from the slide that was originally examined by FBI Agent Oakes. *See* HTR Vol. II at 77. The hair evidence was then returned to *See* HTR Vol. II at 78.

The State attempted to cast doubt as to the integrity of the hair evidence by pointing to the report from Wisconsin Crime Lab scientist Arthur Varriale, which describes only five hairs on the slide. *See* Exhibit 6. The State contends that, because six hairs were removed from the slide at Bode, Mr. Beranek has not proven that the hair FBI Agent Oakes associated with Mr. Beranek was actually subjected to DNA testing. *See* State's Objection at 49. Because the FBI did not document how many hairs were collected, the State cites only Varriale's report of examining the mounted slide in alleging a discrepancy. However, both FBI Agent Thiessen and forensic microscopist Skip Palenek testified that it is difficult to obtain an accurate count of hairs when they are mounted on a slide. Vol. I at 228; Vol. III at 64. Exhibit 4 shows that, when mounted, some of the hairs were overlapping, making is difficult to accurately count the number of hairs. *Id*.

In sum, the FBI permanently sealed an uncounted number of hairs onto a slide in 1990 and the hairs stayed sealed within that slide until they were removed at the Bode Lab. The testimony at the hearing was that it is essentially impossible for hairs to fall out of a permanently mounted slide or for new hairs to later slip under the coverslip and become embedded in the hardened mounting medium. Because the hairs remained permanently mounted on the slide until six hairs were removed by Neagle in 2012, Varriale's report counting five hairs on the slide must have been an error.

Furthermore, the State's attack on chain of custody must be viewed in light of the showing that was accepted by the Court and the jury at trial to convict. The quantum of evidence presented over the course of three days far exceeded the State's showing at trial.

In addition, there is no plausible support for the State's challenge to the integrity of the evidence. For the State's attack on the evidence to be correct, Mr. Beranek's hair must have somehow escaped from the permanently mounted slide sometime after it was observed by Agent Oakes and Mr. Varriale and then two additional hairs (one microscopically consistent with Beranek's hair) would have had to have slid under the coverslip and embedded themselves into the hardened mounting medium. This is fantasy. There is also no chance that the hairs were substituted at Bode because the undisputed evidence was that the hairs were safeguarded and accounted for at every step of the analysis. The integrity of the hair evidence is sound; the evidence was overwhelming that the 6 hairs tested—all of which exclude Mr. Beranek—were the same hairs examined by FBI agent Oakes.

3. Defense Expert Varriale's testimony is not equivalent to a DNA exclusion.

In arguing that the Court should deny relief, the State contends that the New DNA evidence would not have made an impact on the trial because the defense already challenged the weight of the hair identification at trial and the jury still convicted. *See* State's Objection at 52-53. This is a gross mischaracterization of the evidence at trial. The defense expert Vairrialle did not rebut the conclusions of the FBI; he confirmed them. Varriale testified that the hair was microscopically consistent with Mr. Beranek. The only dispute between Varriale and the FBI was the level of certainly applied to the conclusion.

4. The Hair Identification of Mr. Beranek was Crucial Evidence.

In summarizing the evidence supporting Mr. Beranek's conviction, the Court of Appeals discussed only the eyewitness identification and the hair identification. *See State v. Beranek*, No. 91-3010-CR at 2-3. This is because the other evidence cited by the State is not persuasive. For example, the State alleged that Mr. Beranek's use of an alias to obtain a driver's license subsequent to the crime was evidence of consciousness of guilt. State's Objection at 61. However, this makes no sense where (1) Mr. Beranek was not known to the victim and (2) the perpetrator of the crime did not tell the victim his name. There would have been no reason for Mr. Beranek to have changed his name. The fact that Mr. Beranek had to obtain a drivers license under an alias subsequent to the crime is actually supportive of his innocence. It confirms that, at the time of the crime, Mr. Beranek was not occupied as a truck driver, thus negating the State's opportunity evidence. *Compare* State's Objection at 62 (occupation as truck driver gave Beranek opportunity to commit crime) *with* 61 (Beranek did not return to work as truck driver until three weeks after the crime).

The State also emphasizes an "uncanny" resemblance between Mr. Beranek and the composite sketch created by the victim. However, as discussed in the Motion for New Trial, there were significant discrepancies between the victim's description of her attacker and Mr. Beranek's actual appearance—most notably, Mr. Beranek had a mustache, which is absent from the composite sketch. Furthermore, the State's citation to the resemblance between Mr. Beranek and the composite sketch actually reiterates key problems in the identification procedure utilized in this case when compared to the Wisconsin Attorney General's guidelines. *See* Motion for New Trial at 32.

The fact that Mr. Beranek arguably resembles the composite actually explains *why police* targeted him and then *why the victim then mistakenly* identified him. Having been targeted by police because of his resemblance to the sketch, it is hardly surprising that the victim then saw the resemblance and picked him. But that hardly proves he was the perpetrator. As the Wisconsin Department of Justice explained in its Model Policy:

> The unreliability of composites raises concern about the possibility that an inaccurate composite might taint an eyewitness's memory and lead to a misidentification. For instance, if authorities produce a composite and then arrest a person who resembles the composite but who unknown to them is innocent, the eyewitness may then identify the innocent suspect because of the suspect's resemblance to the composite. In this way, an inaccurate composite, and the innocent suspect who resembles it, can contaminate an eyewitness's actual memory of the perpetrator.

Wis. DOJ Model Policy, at 26.

B. This Court is Not Prohibited From Considering the Attorney General's Model Policy and Other Persuasive Authority in Weighing the Impact of the DNA Evidence and FBI's Admission of Error Against the Trial Evidence.

Contrary to the assertions of the State, Mr. Beranek is not seeking to relitigate his challenge to the eyewitness identification raised on direct appeal or to bring some new claim based on the unreliability of the eyewitness identification procedures. *See* State's Objection at 8-11. Rather, the extensive briefing on the unreliability of the eyewitness identification in this case brings to the Court a multitude of legislative facts, including published literature on the issue, concerns and guidance in various judicial opinions, and the Wisconsin Attorney General's own model policies on eyewitness identification. It is entirely appropriate for this Court to consider such briefing in its weighing of Mr. Beranek's case. *See* Wis. Stat. Ann. § 902.01, Judicial Council Committee Note 1974

(““legislative facts” deal not only with the content of law and policy but are also those “which help the tribunal ... to exercise its judgment and discretion in determining what course of action to take.”).

Sections 974.06 and 974.07 require this Court to weigh (under varying standards) the impact of the new evidence presented by Mr. Beranek against the evidence used by the State to convict. Where the FBI’s hair identification of Mr. Beranek has been factually disproven by DNA evidence and otherwise shown to have been based on false or misleading expert testimony, the only other evidence that would support the jury’s verdict was the victim’s eyewitness identification. In this context, Mr. Beranek’s thorough briefing discussing the weakness of the eyewitness identification is both appropriate and dispositive in applying the harm standards for relief under both Sections 974.06 and 974.07.[9]

C. A New Trial Must Be Granted Under Wis. Stat. § 974.06 Based on the New DNA Evidence, the False or Misleading Testimony of FBI Agent Wayne Oakes, and Mr. Beranek’s Actual Innocence.

[9] It is worth pointing out the inconsistency in the State’s arguments about the eyewitness identification. A page 61 of its objection, the State relies on an asserted “uncanny resemblance” between the composite sketch and Mr. Beranek as evidence of his guilt that distinguishes his case from *Hicks*. However, the State also argues that this Court is bound by prior findings that the lineup procedures were not suggestive—a finding premised on the absence of an uncanny resemblance between Mr. Beranek and the sketch in comparison to the fillers selected. State’s Objection at 61. Moreover, the record does not support the State’s description of the resemblance as “uncanny”. Although here is some resemblance between Mr. Beranek and the sketch (despite the absence of a mustache), several of the “filler” photographs in the array also bear this same “uncanny resemblance”. *Compare* State’s Objection at Attachment D (composite sketch) *with* Attachment E (photo lineup filler ## 1,2,6,8). And even if there were an “uncanny resemblance,” such a resemblance has actually been shown in published literature, and is recognized in Attorney General’s Model Policy, to taint the identification, not bolster it. *See* Motion for New Trial at 32-33.

Mr. Beranek has also proven his due process and newly discovered evidence and innocence claims for a new trial under section 974.06. While the Court need not reach these claims if relief is granted under the DNA remedy articulated in section 974.07(10), his conviction was also tainted by the false or misleading testimony of FBI agent Wayne Oakes. It was undisputed at the hearing that the FBI recently admitted that the testimony of Wayne Oakes "exceeded the limits of science". *See* Hearing Exhibit 12. In addition to the letter admitting error, Skip Palenik, a leading expert in hair microscopy with over 40 years of experience, confirmed that Oakes's testimony was false and misleading:

- Palenik agreed with errors identified in the FBI letter concerning agent testimony on hair analysis that exceeds the limits of science and found multiple instances in Oakes testimony that were flagged by the FBI. *See, e.g.,* Tr., 2/14/2017 pp. 137- 139

- Palenik testified that Oakes's testimony was false or misleading because he provided a likelihood or rareness that Baranek's hair matched that of the hair found in the perpetrators underwear. *See, e.g.,* Tr., 2/14/2017 pp. 139- 145

- Palenik testified that Oakes's testimony was false or misleading because he used using his years of experience to bolster his conclusion that the hair of Beranek matches that of the hair removed from the perpetrators underwear.

  > "to imply that your vast experience can distinguish different hairs that you've looked at really doesn't hold water… to say that all the hairs an agent looked at over the years can compare back to this one questioned hair, is just ludicrous, because it can't be done"

  See, e.g., Tr., 2/14/2017 pp. 148- 149

- Palenik testified that Oakes's reference to the number of cases he and Agent Malone had worked and the few, if any instances they could not distinguish hairs, on was false and misleading because it could (and was) misunderstood by the prosecutor and jury as providing a statistical weight to the hair association *See* Tr., 2/14/2017 pp. 178-79 ("Its very easy for a person . . . to be mislead in this and to present the evidence in this case as having a probabilistic validity"). Palenik testified based on his review of relevant portions of the transcript that he believed the jury was mislead. *See* id. at 179.

- Mr. Palenek testified (as a proffer in light of a sustained objection[10]) that a reasonable hair examiner such as Agent Oakes should have known that his testimony offered in 1990 was in error. Id. at 179-180.

Mr. Palenik's expert confirmation of the FBI's admission of error was based on his own experience as well as his review of a memorandum in which FBI agent Malone (who confirmed agent Oakes's work on Mr. Beranek's case in 1990 and was relied on by Oakes as even more experienced and infallible than himself) was reprimanded by the FBI for testifying in 1989 in the same manner as agent Oakes did at Mr. Beranek's trial:

> SSA Malone may have overemphasized his opinion in two areas. He offers that on two occasions of the ten thousand known hair samples he has examined, he was unable to distinguish known samples from two individuals. Although this is not given as a probability that hairs came from a particular individual, it is too easily interpreted as such by a jury. In order to avoid this, the significance of hair associations should be given without the use of numbers. SSA Malone has been instructed . . . not to quote his experience in such a way that it could be interpreted as a statistic during testimony or during discussions with contributors and prosecutors.

Exhibit 13. This reprimand is understandable because a 1977 manual published by the FBI and used as a resource by its microscopic hair examiners in 1990 instructs analysts that the strongest statement that can be made is:

> 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, could have come from the source of the known sample.

Exhibit 51. Highlighting the limitations on the conclusions that could be reliably be offered by an FBI agent, the reference guide then reiterates"

[10] In light of the legal briefing on the due process standard, Mr. Beraenek respectcully requests that the Court reconsider its decision to sustain the State's objection because Due Process is violated where a State's witness should have known his testimony was false. *See State v. Cramer*, 2013 WI App 138, ¶ 22, 351 Wis. 2d 682, 840 N.W.2d 138 (applying "should have known" standard).

> Note in conclusion (1) above, it is stated that the questioned hair "could have" come from the source of the known sample.

Id. Contrary to the primary reference on the subject, published by his own agency, Agent Oakes testified in a manner that repeatedly individualized the identification to Mr. Beranek and implied an unfounded and misleading statistical weight to his association. The evidence presented at the hearing establishes that Agent Oakes knew, or at least should have known, that his testimony was false and/or misleading in that it grossly overstated the weight of his hair identification of Mr. Beranek. And the letter from the FBI (and the absence of any effort to defend Oakes's opinion) establishes that the State has now learned that Oakes's testimony at trial was false and/or misleading.

As a preliminary matter, Mr. Beranek notes that the State has not raised any objection to his showing of the procedural requirements under Section 974.06 which have been met by clear and convincing evidence. Mr. Beranek's claim is based on unquestionably new evidence of the exculpatory DNA results and the recent admission of error by the FBI. The State did not dispute these facts, and they represent substantial grounds for this court to consider Mr. Beranek's underlying claims for relief. *Cf. Strawhacker v. State*, 500 S.W.3d 716 (Ark. 2016) (FBI letter conceding erroneous hair comparison testimony grounds for *coram nobis* jurisdiction).

Mr. Beranek has also proven the due process violation he alleged. The Wisconsin Supreme Court held in *State v. Nerison*, that "Due process prevents a prosecutor from

relying on testimony the district attorney knows to be false, or later learns to be false." 136 Wis. 2d 37, 54–55, 401 N.W.2d 1, 8 (1987) (citing *Giglio v. United States*, 405 U.S. 150, 153–54 (1972)). The Wisconsin Supreme Court more recently applied the same *Giglio* standard for a due process violation in *State v. Plude* (a case relied on by the State in its Objection at page16) where the State's witness testified falsely even though the prosecuting attorney did not know:

> Even though the prosecuting attorney was unaware that an immunity agreement had been made, the court attributed the knowledge of the agreement to the prosecuting attorney. *Id.* at 154, 92 S.Ct. 763.
>
> As part of its analysis of whether Giglio should be granted a new trial, the Supreme Court observed that a new trial is required if there exists a reasonable likelihood that the false testimony of a witness affected the judgment of the jury:
>
> > When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.... A new trial is required if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury."
>
> *Id.* at 154, 92 S.Ct. 763 (citations omitted).

State v. Plude, 2008 WI 58, ¶¶ 39-40, 310 Wis. 2d 28, 52, 750 N.W.2d 42, 54; *see also In Re M.P.A.*, 364 S.W.3d 277, 285 (Tex. 2012) (due process where State unknowing presented false testimony by psychologist); *Sanders v. Sullivan*, 863 F.2d 218, 222 (2d Cir. 1988).[11] This decision draws from in the United States Supreme Court's opinion in

[11] Although the Seventh Circuit has held that the presentation of false testimony by a lay witness does not violate due process absent some level of knowledge by the "prosecuting authorities," *see* U.S. ex rel. Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir. 1980), FBI agent Oakes was part of the prosecution team and his knowledge must be imputed to the State. *See Giglio*, 405 U.S. at 153-54. Furthermore, the Wisconsin Supreme Court's controlling opinion in *Nerison* provides a more expansive interpretation of Due Process which finds a

Giglio in which the Supreme Court held that due process is violated "irrespective of the good faith or bad faith of the prosecution". 405 U.S. at 153-54. Further, the testimony need not be technically false, Due Process is violated where a witness's testimony, taken as a whole, gave the jury a false impression. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). This doctrine applies to false expert testimony where the state was unaware of the problems with the expert's testimony until after trial. "Due process requires a new trial if the prosecutor in fact used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury." *State v. Nerison*, 136 Wis. 2d 37, 54, 401 N.W.2d 1, 8 (1987).[12]

In Mr. Beranek's case, there is no evidence that the proseuctor knew that agent Oakes was testifying in a false or misleading fashion. But the evidence presented at the hearing (especially the admission of error by the FBI) clearly proves that the State now knows that his testimony was false or misleading. Furthermore, Mr. Palenik's testimony which was based in part on the disciplinary memorandum recognizing that similar testimony was misleading when offered in 1989, as well as the FBI's own resource guidelines from 1977, establishes that Agent Oakes, a member of the prosecution team, knew or should have known that

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violation where the State "later" finds out that the evidence it sponsored was untrue. 136 Wis. 2d at 54–55, 401 N.W.2d at 8; *State v. Plude*, 2008 WI 58, ¶¶ 39-40, 310 Wis. 2d 28, 52, 750 N.W.2d 42, 54.

[12] This is the appropriate standard because Agent Oakes either knew or should have known that his expert testimony was false and/or misleading. Where the State presents expert testimony that was valid at the time, but subsequently found to be false or misleading, some courts have applied the fundamental fairness standard for a Due Process violation. *See Han Tak Lee v. Glunt*, 667 F.3d 397, 405 (3rd Cir. 2012) (developments in science invalidated arson expert's testimony offered 20 years earlier). Mr. Beranek would meet this standard as well due to the importance of the hair identification in both corroborating the otherwise weak eyewitness identification and disputing Mr. Beranek's alibi.

the testimony he was giving was false or misleading at the time of Mr. Beranek's trial. This establishes a Due Process violation under *Nerison* and the other authority cited above which requires a new trial under Section 974.06.[13]

D. Mr. Beranek's conviction and continued incarceration violates the United States Constitution because he is actually innocent.

Mr. Beranek's conviction and continued incarceration violate the Due Process guarantee of fundamental fairness and the Eighth Amendment proscription against cruel and unusual punishment because he is actually innocent.

In *Herrera v. Collins*, the United States Supreme Court assumed without deciding that executing an innocent person would violate the constitution. 506 U.S. 390, 417 (1993). Although, the Justices did not agree on what showing would be required to prevail on a freestanding claim of actual innocence, the majority held that it would be "extraordinarily high" and that Herrera's innocence showing was insufficient to meet that threshold. *Id.*; *see also* 506 U.S. at 419-420 (O'Connor, J. and Kennedy, J., concurring) (recognizing a constitutional right to make a "truly persuasive" showing of actual

[13] Section 974.06 also provides an independent statutory remedy for a new trial based on newly discovered evidence absent a constitutional violation. *See State v. Love*, 2005 WI 116, ¶43, n.18, 284 Wis. 2d 111, 700 N.W.2d 62 (In a motion for a new trial under § 974.06, "Due process and its guarantee of fundamental fairness ensure that a defendant at least have access to the courts and an opportunity to be heard where newly discovered evidence creates a reasonable probability that a different result would be reached at a new trial, as long as the newly discovered evidence meets the minimum criteria [for a new trial based on newly discovered evidence]."); compare Wis. Stat. 805.16(5) (exempting requests for new trial based on newly discovered evidence under 974.06 from time limitations). For the reasons stated *supra* that Mr. Beranek is entitled to a new trial under 974.07, a new trial based on the exculpatory DNA results may be granted under section 974.06.

innocence as a basis for federal habeas relief); *id*. at 429 (White, J., concurring) (same); *id*. at 430 (Blackmun, J., Stevens, J., and Souter, J., dissenting) (same).

The principle that incarcerating an innocent individual violates the constitution is not limited to capital cases. Rejecting arguments that the capital nature of the case rendered Herrera's case different, the Court stated that "[i]t would be a rather strange jurisprudence" that would vacate a death sentence because of actual innocence, only to leave the innocent petitioner imprisoned for life. *Id*. at 405, 113 S. Ct. 853. Furthermore, the Court indicated that there was "elemental appeal" in the proposition that "the Constitution prohibits the imprisonment of one who is innocent." 506 U.S. at 398, 113 S. Ct. 853.

Courts have also recognized that in some situations newly discovered evidence of innocence "'is so compelling that it would be a violation of the fundamental fairness embodied in the Due Process Clause not to afford a defendant a new trial in which the evidence could be considered.'" *Moore v. Casperson*, 345 F.3d 474, 491 (2003) (citing *Coogan v. McCaughtry*, 958 F.2d 793, 801 (7th Cir. 1992) (internal quotation marks and citations omitted)); *see also State v. Love*, 284 Wis.2d 111, 134, 700 N.W.2d 62, 73 n.18 (2005) (concluding court of appeals properly found that due process may require granting a new trial under Wis. Stat. § 974.06 where newly discovered evidence creates a reasonable probability of a different result).

The compelling evidence of innocence presented in this postconviction proceeding meets the high threshold identified in *Herrera* and requires under the Due Process clause that Mr. Beranek be provided a new trial to present the new evidence. The new DNA

evidence excluding Mr. Beranek from the hair affirmatively presented as the perpetrator's during the trial, in conjunction with the six alibi witnesses and documentary evidence establishing Mr. Beranek was in North Dakota at the time of the crime provides truly persuasive evidence that he has been wrongfully convicted. The only remaining evidence of guilt – the eyewitness testimony – was procured based on fundamentally flawed identification procedures that numerous scientific studies have shown can lead to misidentification. Accordingly, Mr. Beranek is innocent of the crime for which he was convicted, his conviction is unconstitutional, and it should be reversed.

Respectfully submitted,

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