STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 90 CRS 23102-04

STATE OF NORTH CAROLINA,
Plaintiff,

v.

TIMOTHY SCOTT BRIDGES,
Defendant.

BRIEF OF AMICUS CURIAE THE INNOCENCE NETWORK IN SUPPORT OF DEFENDANT

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Dated: March 19, 2015

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INTEREST OF AMICUS CURIAE

The Innocence Network (the "Network") is an association of 66 organizations dedicated to providing pro bono legal and investigative services to wrongly convicted individuals seeking to prove their innocence. The Network represents hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. Based on the Network's experience exonerating innocent individuals and examining the causes of wrongful convictions, it has become keenly aware of the role that unreliable or improper scientific evidence has played in producing miscarriages of justice, particularly in cases such as this one where the prosecution is largely dependent on an expert opinion. The "science" underlying many such convictions has been exposed as flawed and, in some cases, outright false.

In approximately one-half of the 321 convictions overturned through DNA evidence in the United States, forensic evidence distorted by flawed science—such as blood-type testing, hair analysis, fingerprint analysis, and more—played a role in the wrongful conviction. For that reason, especially in science-dependent cases such as the present one, the Network is committed to ensuring, as an essential component of a fair and just determination of the facts, that convictions are premised upon accurate forensic work and application of sound, proven scientific methodology, an interest directly implicated by Timothy Bridges' case.

The Network also has a direct interest in preventing wrongful convictions based on unreliable informant testimony. Through its work, the Network has exposed the unfortunate and substantial role that unreliable informants play in wrongful convictions. In 18% of wrongful conviction cases overturned through DNA evidence, an informant testified against the defendant at the original trial. Given the degree to which false testimony from government informants can corrupt the justice system, it is of upmost importance to subject such testimony to scrutiny by

allowing newly discovered evidence to test its veracity. Confirming the accuracy of informant testimony is also particularly important to Mr. Bridges' case where, without the so-called "scientific" evidence, such testimony forms the sole basis for conviction.

The Duke University Wrongful Convictions Clinic and the North Carolina Center on Actual Innocence are Network member organizations located in North Carolina. The Duke Wrongful Convictions Clinic is a legal clinic at Duke University School of Law that identifies, investigates, and, when necessary, litigates claims of innocence made by North Carolina inmates. The North Carolina Center on Actual Innocence (the "Center") is a 501(c)(3) nonprofit established to coordinate the efficient and effective review and investigation of innocence claims submitted to North Carolina's Innocence Projects®. The Center identifies, investigates, and advances credible innocence claims, as well as educates policymakers, the public, and legal and law enforcement communities about the factors that contribute to wrongful convictions and solutions that can help increase conviction reliability.

STATEMENT OF THE FACTS

The Network adopts by reference the statement of the facts set forth in Mr. Bridges' Motion for Appropriate Relief, filed on October 9, 2014 (the "MAR").[1]

SUMMARY OF THE ARGUMENT

This is not a traditional post-conviction challenge. Instead, it is a specialized situation created by the erroneous use of now-discredited hair comparison evidence in the criminal justice system that this Court can remediate. For over two decades, Mr. Bridges has been imprisoned for a conviction that is based on scientifically flawed conclusions concerning hair microscopy

[1] In the same vein and to conserve judicial resources, the Network adopts by reference the arguments advanced in the MAR that have been omitted herein. Citations to the transcript from Mr. Bridge's 1991 trial are denoted "T. __." The full transcript was provided as Ex. Q to the MAR. Unless otherwise indicated, citations to Exhibits are those Exhibits attached to the MAR.

evidence and, to a much lesser degree, unreliable informant testimony.[2] The FBI recently admitted that hair microscopy evidence is scientifically invalid and that FBI-trained examiners, like the one who testified at Mr. Bridges' trial, provided false, unreliable, and misleading evidence. This admission requires Mr. Bridges to be afforded a new trial to ensure that he is not being erroneously incarcerated in violation of his constitutional rights. More specifically, the FBI's affirmation that the hair microscopy evidence admitted at Mr. Bridges' trial was scientifically invalid is newly discovered evidence requiring a new trial under North Carolina Gen. Stat. § 15A-1415(c). In addition, the admission of that false and misleading evidence violated Mr. Bridges' right to Due Process under the United States Constitution and § 19 of the North Carolina Constitution.

In May of 1989, an elderly woman was sexually assaulted and beaten in her North Charlotte home. The woman neither identified the assailant nor provided a consistent description of his characteristics. The criminal investigation uncovered no physical evidence identifying Mr. Bridges—no semen, no fingernail scrapings, no fingerprints, no blood, no DNA. Nothing. Indeed, the State's experts agreed that the only *probative* physical evidence, a bloody palm print located on the wall of the victim's apartment, *excluded* Mr. Bridges as the possible source. At trial, State witness, Elinos Whitlock, an FBI-trained hair examiner, testified that two hairs collected at the scene were examined microscopically and "were consistent with" Mr. Bridges' hair and "likely . . . originated" from him. Whitlock also invented statistics to falsely bolster the alleged probative value of his conclusions, which are now known to be false and misleading themselves. The State's only other evidence supporting its prosecution was testimony from three informants, at least one of whom was incentivized to testify against Mr. Bridges, who only

[2] The only other evidence supporting Mr. Bridges' conviction is testimony from three informants, at least one of whom was incentivized to testify against Mr. Bridges.

provided statements to law enforcement months after the incident occurred. On this record, the jury returned a verdict of guilty and Mr. Bridges was sentenced to life in prison.

Now twenty-three years into Mr. Bridges' life sentence, the FBI has publicly renounced testimony of the sort provided by Whitlock and admitted that it is false and misleading as a matter of science. The remaining evidence implicating Mr. Bridges' at trial—informant testimony—also is known to be inherently unreliable and therefore cannot, in effect, "cure" the use of the false and misleading hair microscopy evidence. In fact, 18% of all wrongful conviction cases overturned through DNA testing involved an informant testifying against the defendant at the original trial. Given the now-known failings of the microscopic hair evidence that was used to convict Mr. Bridges, and the dearth of other reliable evidence implicating him, a new trial is required.

The Court of Appeals' divided decision in this case further supports ordering a new trial. In his dissent, Judge Greene expressly called for a new trial, noting the paucity of evidence against Mr. Bridges and finding that "there exist[ed] a reasonable possibility that a different result would have been reached had the erroneous [hair microscopy] evidence not been before the jury." The majority, for that matter, even held that the trial court erred in admitting certain portions of the hair comparison testimony, although it erroneously concluded that Mr. Bridges was not prejudiced because that testimony "did not constitute an improper identification of [the] defendant."

Justice requires a new trial.

ARGUMENT

I. Hair Microscopy Evidence Like That Admitted Against Mr. Bridges Is False, Misleading, and Has Contributed to an Incalculable Number of Wrongful Convictions

DNA exonerations nationwide have proven that invalidated and improper forensic science, such as the hair microscopy analysis in this case, undermines the truth-seeking function of criminal proceedings and is a leading cause of wrongful convictions.[3]

A. Hair Microscopy Evidence Is False and Misleading

To date, DNA evidence has been used to exonerate 325 individuals who were wrongfully convicted in the United States.[4] Faulty and misleading forensic evidence—akin to the hair microscopy evidence on which Mr. Bridges' conviction rests—contributed to false convictions in approximately half of those cases.[5] In addition to the FBI's recent admission that the hair microscopy evidence promulgated by those it trained is scientifically invalid, there is ample evidence that hair microscopy evidence is unreliable and scientifically misleading, if not outright false.

First, a 2009 study analyzing the trials of 137 exonerated individuals whose trials included the introduction of forensic evidence found that 60% involved invalid forensic testimony.[6] Approximately half of those trials involved microscopic hair comparison

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[3] *See* Innocence Project, *Forensic Oversight*, http://www.innocenceproject.org/fix/Crime-Lab-Oversight.php (last visited Jan.26, 2015).

[4] Innocence Project, *Know the Cases*, http://www.innocenceproject.org/know/ (last visited Jan. 26, 2015).

[5] *See* Innocence Project, *Forensic Oversight*, http://www.innocenceproject.org/fix/Crime-Lab-Oversight.php (last visited Jan. 26, 2015).

[6] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony & Wrongful Convictions*, 95 Va. L. Rev. 1, 9 (2009).

testimony—the forensic evidence at issue here.[7] The study also concluded that the invalid forensic testimony "was not the product of just a few analysts in a few states," but rather was epidemic, originating from 72 forensic analysts at 52 laboratories or medical practices in 25 states.[8] The number of DNA exonerations and related publicity has helped highlight the systemic problem of reliance on flawed forensic evidence, leading courts and legislators to widely acknowledge both the fallibility of faulty forensic evidence and the gross injustice flowing from misleading testimony that rests on such evidence. *See Hinton v. Ala.*, 134 S. Ct. 1081, 1090 (2014).[9]

Second, in an effort to understand the scope of wrongful convictions, Congress tasked the National Academy of Sciences ("NAS") with evaluating the scientific validity and reliability of various forensic techniques, including hair microscopy, and with examining ways to improve the quality of those forensic techniques in criminal investigations and trials. The NAS investigation culminated in the publication of a report that revealed fundamental flaws with hair comparison evidence, among other common forensic disciplines and related testimony.[10] NAS reported that there is "no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA."[11] NAS also highlighted the unreliability and subjectivity of hair comparison

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[7] *Id.* at 9. Most of the verdicts that involved hair microscopy evidence also rested on additional seemingly probative evidence, such as eyewitness identification testimony. The opposite is true here; the *only* probative evidence against Mr. Bridges is the hair microscopy evidence that has been entirely discredited.

[8] *Id.* at 9.

[9] *See also* Daniel S. Medwed, *California Dreaming: The Golden State's Approach to Newly Discovered Evidence of Innocence*, 40 U.C. Davis L. Rev. 1437, 1439 (2007) ("[F]orty-one state legislatures have passed laws allowing inmates to request DNA testing and gain access to the biological evidence from their cases.").

That hair microscopy evidence is now widely acknowledged as completely unreliable does not conflict with the conclusion that the FBI's admission is newly discovered evidence. There is a stark difference between a general recognition by scholars and courts that hair comparison evidence is unreliable and an affirmative concession from the FBI, the largest proponent of this evidence, that it is false and misleading as a matter of science.

[10] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) ("NAS Report").

[11] *Id.* at 161.

testimony, concluding that "[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population," and "[t]here appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match.'"[12]

Third, hair microscopy evidence is subject to the unintended, but critical, consequences of testifying examiners' vulnerability to unconscious and unavoidable bias. That is, "context and expectations influence an individual's perceptions and interpretations of what he observes."[13] This phenomenon, known as the "observer effects," means that human beings often see what they expect or desire to see.[14] In fact, a robust body of scientific research has revealed that the findings of forensic science experts may be skewed by contextual bias and human error.[15] As relevant here, research demonstrates that experts can be biased by "domain-irrelevant" information that points to a particular conclusion, such as providing information to a hair comparison expert that the exemplar hair is from the individual police believe is the assailant.[16]

This flawed hair microscopy evidence formed the foundation for Mr. Bridges' conviction, and without it, he would not have been convicted. FBI trained expert Whitlock testified that two hairs found at the crime scene were "consistent with" Mr. Bridges' head hair

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[12] *Id.* at 160.

[13] D. Michael Risinger, *et al.*, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1, 12 (2002).

[14] *Id.*

[15] *See, e.g.*, Saul M. Kassin, *et al.*, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 Journal of Applied Research in Memory & Cognition 42-52 (2013); Michael J. Saks, *et al.*, *Context Effects in Forensic Science: A Review and Application of the Science of Science to Crime Laboratory Practice in the United States*, 43 Sci. & Just. 77-90, 78 (2003) ("[M]odern research has shown ... the tendency of observers to accept more readily information that supports existing beliefs than information that challenges those beliefs" and "the tendency to test a hypothesis by looking for instances that confirm it rather than by searching for potentially falsifying instances (even though most scientists and philosophers of science agree that the better method is to proceed by seeking falsification).").

[16] *See* Gary Edmond, *et al.*, *Contextual Bias and Cross-Contamination in the Forensic Sciences: the Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals*, Law Probability & Risk (2014).

and that it was "likely that [the two hairs] originated from" him. (T. 824-25). Whitlock's testimony exposes the bias that infected his analysis leading to the improper identification of Mr. Bridges. He testified that to conduct his analysis he chose hairs that investigators collected at the crime scene that "were the closest to the hair standards from [Mr.] Bridges." (*Id.* at 820-21). That is, he invited domain-irrelevant information into his analysis, and deliberately sought to "match" the exemplar of Mr. Bridges' hair to crime scene hair. Indeed, Whitlock admitted that "the majority of the hairs [collected at the crime scene] were obviously different from [Mr. Bridges'.]" (*Id.*). Whitlock's analysis therefore was engineered to identify Mr. Bridges as the perpetrator.

B. Hair Microscopy Evidence Plays a Decisive Role in Wrongful Convictions

The use of false hair comparison evidence to associate a defendant with hair found at a crime scene has played a role in at least 74 wrongful convictions.[17] The perilous consequence (*i.e.*, the unconstitutional deprivation of liberty) of admitting this evidence is rooted in its effect on juries. As NAS reported, jurors give "undue weight" to scientific evidence, irrespective of its validity, and social science research has further demonstrated that jurors have difficulty detecting flaws in putative scientific evidence.[18] Evidence introduced through an expert witness tends to make jurors less critical of the evidence and more likely to be persuaded by it than they otherwise would be.[19] This phenomenon, often referred to as the "gatekeeper effect," results

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[17]*See* Innocence Project, *Statement of the Innocence Project National Commission on Forensic Science*, http://www.justice.gov/sites/default/files/ncfs/legacy/2014/05/13/inno-prj.pdf (last visited Jan. 26, 2015).

[18]NAS Report at 4; *see also* Bradley D. McAuliff, *et al.*, *Can Jurors Recognize Missing Control Groups, Confounds, and Experimenter Bias in Psychological Science?*, 33 L. & Hum. Behav. 247, 248 (2009) ("Overall, [the] mixed findings regarding laypeople's ability to reason about scientific issues in everyday and legal settings suggest that jurors may have difficulty differentiating valid research from junk science in trials containing expert testimony.").

[19]*See* N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol., Pub. Pol'y & L. 1 (2009); *see also United States v. Addison*,

from jurors assuming that judges review all expert evidence before it gets to the courtroom, and causes jurors to treat expert testimony as having an added air of legitimacy.[20] Where, as here, "expert" testimony included misleading terminology calculated to overstate the probative value of the evidence, *e.g.*, Mr. Bridges' hair "exhibits all the same . . . microscopic characteristics" (T. 772) as the hair from the crime scene, jurors are led to believe that an exact match has been found.[21] The U.S. Supreme Court has likewise recognized the paralyzing effect of expert evidence on jurors, stating that it may be assigned talismanic significance in the eyes of lay jurors and that it "can be both powerful and quite misleading." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993).

Looking at just two of the many examples of exonerations where hair microscopy evidence formed the basis of the convictions demonstrates the deleterious impact of hair comparison testimony. These two miscarriages of justice, like the case at hand, also involved informant testimony—evidence that was proven false through post-conviction DNA testing.

- In the trial of Charles Irvin Fain, Mr. Fain was convicted and sentenced to death for murder, rape and kidnapping based on invalidated forensic evidence and the testimony of two jailhouse informants. At trial, a FBI hair analyst testified that Mr. Fain's hairs and the hairs from the crime scene were similar and shared an uncommon trait. After serving nearly 18 years on death row for a murder and rape he did not commit, Mr. Fain was released by court order in August 2001.[22]

- In Donald Eugene Gates' trial, Mr. Gates was convicted of rape and murder on evidence from a police informant and testimony from an FBI forensic analyst who stated that Mr. Gates' hairs were "microscopically

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498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may "assume a posture of mystic infallibility in the eyes of a jury of laymen").

[20] *Id.*

[21] *See* Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, 1170 (2008).

[22] Innocence Project, *Know the Cases*, http://www.innocenceproject.org/Content/Charles_Irvin_Fain.php (last visited Jan. 26, 2015).

indistinguishable" from hairs found on the victim's body. Mr. Gates was exonerated after serving 28 years in prison for crimes he did not commit.[23]

C. The FBI Has Conceded That the Type of Hair Comparison Evidence Admitted Against Mr. Bridges as "Scientific" Evidence of Guilt Is Scientifically Invalid

On July 18, 2013, the FBI—the agency responsible for developing the hair comparison technique, training hundreds of examiners, and the most ardent propagator of hair microscopy evidence—publicly conceded that testimony offered for decades by its hair examiners, and those it trained, has been exaggerated and is scientifically invalid with respect to the significance of the claimed link between a suspect's hair and a crime-scene hair. (Ex. B). The FBI has now identified three types of testimonial errors that FBI-trained examiners typically made:

- Type 1 Error: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others.
- Type 2 Error: The examiner assigned to the positive association a statistical weight or probability, or provided a likelihood that the questioned hair originated from a particular source or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association.
- Type 3 Error: The examiner cited the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belonged to a specific individual.

(*See* Ex. C (the "FBI Agreement")).

As the FBI conceded, these testimonial conclusions—all three of which are pervasive in the evidence admitted against Mr. Bridges at trial—are scientifically invalid. The FBI further admitted that the only possible probative value of hair microscopy is that it may indicate, at the broad class level, that a contributor of a known sample *could be* included in a pool of people of unknown size, as a *possible source* of the hair evidence. *Id.* Testimony that exceeds this narrow

[23] Innocence Project, *Know the Cases*, http://www.innocenceproject.org/Content/Donald_Eugene_Gates.php (last visited Jan. 26, 2015).

range of conclusions, like that which formed the foundation of Mr. Bridges' conviction, is completely unreliable as a matter of science. *Id.* Nevertheless, until the FBI's concession, hair microscopy examiners routinely exaggerated the significance of their analyses, especially when claiming a defendant's hair "matched" a hair found at the scene of a crime.[24]

In an effort to remediate the harm caused by this false and misleading hair microscopy testimony, the FBI is auditing more than 2,000 criminal cases in state and federal court that were processed between 1985 and 2000, as well as an unknown number of cases processed in the preceding years, in which FBI agents provided microscopic hair analysis of the crime scene evidence. (*See* Ex. B). In recognition of both the power of misleading evidence to corrupt the truth-seeking function of criminal trials and the injustice of raising procedural bars to litigating whether the invalid "scientific" evidence they themselves presented to the jury influenced the verdict, the FBI has agreed, for the first time in its history, to waive any procedural objections (*e.g.*, statute of limitations) and to provide free DNA testing in cases where an error is identified. *Id.*

Two of the many tragic examples involving innocent defendants show how state analysts, like Whitlock, used Type 2 errors to falsely inflate the alleged probative value of their testimony:

- In the trial of Jimmy Bromgard, the laboratory manager at the Montana Criminalistics Laboratory testified that the head and pubic hairs found at the crime scene were indistinguishable from Mr. Bromgard's hair samples and that there was less than a one in 10,000 chance that the hairs did not belong to Mr. Bromgard. (Tr. 236-38). As is the case here, there was no other physical evidence connecting Mr. Bromgard to the crime scene. After spending 14.5

[24] The word "match" imputes an unsupportable level of certainty and ostensibly implies that a crime-scene hair could only have been left by the suspect with whom the hair is associated. However, "no data that could permit forensic scientists to offer an identification 'to the exclusion of all others in the world' exist, and they are unlikely to come into being in the foreseeable future." Michael J. Saks & Jonathan J. Koehler, *The Individualization Fallacy in Forensic Science Evidence*, 61 Vand. L. Rev. 199, 217 (2008). For example, "[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population." NAS Report at 160. And there are no consistently accepted standards on the number of hair characteristics required to constitute a so-called "match." *Id.*

years in prison, starting at the young age of 18, Mr. Bromgard was exonerated on October 1, 2012.[25]

- In the trial of Calvin Lee Scott, a state criminologist with the Oklahoma State Bureau of Investigation testified that the hairs submitted by Mr. Scott were microscopically consistent with those found at the crime scene. (Tr. 45-46). Mr. Scott spent 20 years in prison before he was exonerated in 2003.[26]

These cases, and over 70 other known wrongful convictions associated with hair microscopy evidence, underscore the power of such unreliable "scientific" evidence to convict innocent people.

As noted, the FBI's repudiation of hair comparison testimony is not limited to cases in which only FBI experts testified. Instead, because of the FBI's pervasive influence over hair examiners nationwide, it applies to all cases in which such evidence was admitted. It is now known that between 600 and 1,000 state and local forensic examiners who testified in thousands of criminal cases involving hair microscopy evidence were trained by FBI agents and instructed to apply the same standards that the FBI recently renounced.[27] Indeed, the hair microscopy experts in Mr. Bromgard's and Mr. Scott's trials, like Whitlock in this case, were not FBI agents, but were instead trained by the FBI. Whitlock, a Quantico FBI-trained examiner, attended numerous seminars and schools conducted by the FBI, including specialized intensive training on hair and fiber analysis. (T. 766). In short, it is the character of the evidence presented to the jury, not the character of the witness who testified, that must guide this Court's evaluation of Mr. Bridges' MAR.

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[25] Innocence Project, *Know the Cases*, http://www.innocenceproject.org/Content/Jimmy_Ray_Bromgard.php (last visited Jan. 26, 2015).

[26] Innocence Project, *Know the Cases*, http://www.innocenceproject.org/Content/Calvin_Lee_Scott.php (last visited Jan. 26, 2015). The testimony referenced for Mr. Bromgard's and Mr. Scott's trials and other supporting information is available at the website of Professor Brandon L. Garrett, http://www.law.virginia.edu/html/librarysite/garrett_exoneree.htm (last visited Jan. 26, 2015).

[27] Spencer S. Hsu, *FBI Lab's Woes Cast Growing Shadow*, The Washington Post (Dec. 23, 2012), http://www.pulitzer.org/files/finalists/2013/washpostps2013/washpostps10.pdf (last visited Jan. 26, 2015).

D. Whitlock's False and Misleading Testimony About Mr. Bridges Included All Three Error Types Identified By the FBI, Which Were Capitalized and Relied Upon By the State

Whitlock's testimony far exceeded the narrow range of what the FBI had defined as appropriate testimony and was instead infected by all three errors now identified by the FBI.[28]

1. Error Type 1: Association With a Specific Individual to the Exclusion of All Others

Whitlock testified that he identified two unknown head hairs that did not match the victim's and that, when he compared those hairs to Mr. Bridges' head hair, they "were consistent with" Mr. Bridges' hair. (T. 823). Whitlock also testified that "the hair standard from [Mr. Bridges] had quite a variation in length, and these hairs fit into that range of length." (*Id.* at 824). Then, to distill the testimony into an easy conclusion for the jury, and in direct contrast to what the FBI now acknowledges is scientifically invalid, Whitlock testified that "it is likely that [the unknown hairs collected at the crime scene] *originated from*" Mr. Bridges. (*Id.* at 825 (emphasis added)).

2. Error Type 2: Assigned a Probability or Likelihood of Origination

Whitlock's affirmation that the unknown hairs "likely . . . originated from" Mr. Bridges also falls within the Type 2 error condemned by the FBI. (T. 825). Whitlock falsely testified that the probability of two Caucasian individuals having indistinguishable head hair was "very low," and that his "conservative estimate . . . would be . . . approximately one in a thousand." (*Id.* at 804).

[28] Because the MAR covers this topic in detail, the Network will focus on only the most egregious false and misleading testimony. *See* MAR at 18-24, 33-40.

3. Error Type 3: Bolstering Conclusions Based on the Number of Cases Worked

Whitlock testified that Caucasian hairs are "[t]he most easily identifiable or most easily distinguish[able]," that he had examined between 500 and 800 of such hairs, and that during his career he had never "been unable to distinguish between two Caucasian head hair samples." (T. 802). This testimony falsely conveyed to the jury that Caucasian head hair "matches" were particularly probative and that Whitlock had particular expertise in Caucasian head hair, the exact hair type at issue in the case, thus cloaking his testimony with even more unfounded credibility.

4. The State Capitalized, Exaggerated, and Relied Upon Whitlock's Erroneous Testimony

The inherent errors in Whitlock's testimony were compounded by the State in its opening and closing statements. During the opening, the prosecutor stated that "lab personnel will testify that two hairs found at [the crime scene] will match the defendant's." (T. 295). Thus, before hearing the testimony, the jury was predisposed to the conclusion that "scientific" evidence established that Mr. Bridges' hair was found at the crime scene. The prosecutor then leveraged Whitlock's false and misleading testimony in closing, claiming that "we have the hairs that match the defendant." (*Id.* at 999). The newly discovered evidence establishes that the prosecutor improperly misled the jury to draw conclusions from Whitlock's testimony that were not supported by the evidence. It is now known that each component of Whitlock's testimony was false and misleading, and its pernicious effects were even more pronounced when taken as a whole and augmented by the prosecutor's unsupportable statements. Whitlock's conclusions—a primary ground for Mr. Bridges' conviction—were scientifically invalid and unsupportable, and if offered today, would not be admissible. *See Williamson v. Reynolds*, 904 F. Supp. 1529, 1557 (E.D. Okla. 1995) (ruling inadmissible expert testimony implying that four hairs found at a

victim's apartment belonged to the defendant and finding prosecutor's mischaracterization of the evidence proving "a match" misleading), *aff'd in part*, 110 F.3d 1508 (10th Cir.), *abrogated on other grounds*, *Nguyen v. Reynolds*, 131 F.3d 1340 (10th Cir. 1997).

II. A New Trial Is Required Free From the Newly Discredited, False, and Misleading Hair Microscopy Evidence

In North Carolina, a new trial is warranted on the basis of newly discovered evidence when "evidence is available which was unknown or unavailable to the defendant at the time" of trial and the evidence has "a direct and a material bearing upon . . . the defendant's guilt or innocence." N.C. Gen. Stat. § 15A-1415(c).

A. The FBI's Affirmation That the Hair Microscopy Evidence Admitted at Mr. Bridges' Trial Was Scientifically Invalid Is Newly Discovered Evidence

Relief is warranted on a new evidence claim when the defendant establishes that: (i) the witness or witnesses will give newly discovered evidence; (ii) such newly discovered evidence is probably true; (iii) it is competent, material, and relevant; (iv) due diligence was used and proper means were employed to procure the testimony at trial; (v) the newly discovered evidence is not merely cumulative; (vi) it does not tend only to contradict a former witness or to impeach or discredit him; and (vii) it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. *State v. Peterson*, 744 S.E.2d 153, 157-58 (N.C. Ct. App. 2013).

As discussed below, the FBI's admission that its agents, and by extension those it trained, provided false and misleading testimony and the FBI's identification of the specific types of errors in testimony admitted at Mr. Bridges' trial satisfy the requirements for a new trial.[29] Indeed, courts have held that revelations about and new understandings of flaws in traditionally

[29] Although the Network focuses on the FBI's recent admission that hair comparison evidence is scientifically invalid as the newly discovered evidence, it agrees that the NAS Report and exonerations on this basis augment the FBI's disclosures as set forth in the MAR.

accepted forensic sciences constitute newly discovered evidence. *See State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008) (holding that new scientific developments undermining the reliability of critical scientific evidence presented at trial constituted newly discovered evidence requiring a new trial); *see also In re Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012) (same); *State v. Gillispie*, 2d Dist. Montgomery No. 24456, 2012-Ohio-1656, ¶ 58, 2012 Ohio App. LEXIS 1453, at *31 (Apr. 13, 2012) (considering developments in the field of eyewitness testimony to buttress new evidence). Here, the FBI did not discover and/or did not admit the flaws in the testimony admitted at Mr. Bridges' trial until 2013, and the state of scientific knowledge prior to the release of the FBI Agreement could not have put Mr. Bridges on notice of the invalidity of the scientific evidence used to convict him.

1. Requirements One, Two, Five, and Six Are Established

It cannot be contested that the witness will give newly discovered evidence (requirement one), that such newly discovered evidence is probably true (requirement two), that the newly discovered evidence is not merely cumulative (requirement five), and that it does not tend only to contradict a former witness or to impeach or discredit him (requirement six).

At a retrial, evidence of the FBI's concession of the errors rampant in hair comparison testimony—the exact evidence offered in this case—will be presented, and preclude the introduction of the hair comparison evidence. *See* N.C. R. Evid. 702(a). This new evidence goes beyond being "probably true." In addition to the FBI's admission (which there is no reason to doubt), the NAS Report and over 70 recent exonerations involving hair microscopy evidence—a number that undoubtedly will only continue to grow—affirm the veracity of the newly acquired evidence.

The newly discovered evidence is also not cumulative of what was offered at Mr. Bridges' trial—indeed, it could not be. The FBI's repudiation of the evidence promulgated

by its agents and those it trained, like Whitlock, was not disclosed until after Mr. Bridges' trial in 1991 and his appeal in 1992. Although Mr. Bridges' trial counsel challenged Whitlock's testimony (*see, e.g.*, T. 773-74), his objections were rooted on the general unfounded scientific basis of Whitlock's testimony—which we now know as a matter of science were improperly rejected by the court, the prosecutor, and Whitlock himself—not the incontrovertible proof that exists today that the testimony offered was invalid science and misleading. Similarly, the new evidence does not tend *only* to contradict a former witness or to impeach or discredit him. Rather, this is exculpatory evidence tending to prove Mr. Bridges' innocence and his wrongful conviction.

2. Requirement Three: The Newly Discovered Evidence Is Competent, Material, and Relevant to Mr. Bridges' Conviction

The competency of the newly discovered evidence is indisputable. The evidence has caused the FBI to audit more than 2,000 criminal cases where it has been used and to agree, for the first time in history, to waive any procedural objections so that these cases may be adjudicated on the merits. The NAS Report's conclusion that hair microscopy evidence should be entirely discredited and over 70 recent exonerations involving this evidence further confirm the competency of this evidence.

The newly discovered evidence is also material and relevant to Mr. Bridges' conviction because it renders the only physical evidence used to convict him inadmissible. Without the hair comparison evidence, Mr. Bridges' conviction and life sentence rest solely on the testimony of three individuals who Mr. Bridges knew to be informants, each of whom waited months before providing conflicting information to law enforcement. The untrustworthiness of such testimony has long been recognized by courts. *See Lee v. United States*, 343 U.S. 747, 757 (1952) ("The use of informers [is] . . . 'dirty business' [that] may raise serious questions of credibility."); *Perry*

v. New Hampshire, 132 S. Ct. 716, 728 (2012) (recognizing that informant testimony is "inherently untrustworthy."). In fact, it is well-documented and accepted that false informant testimony is a leading cause of wrongful convictions on par with flawed scientific evidence.[30] In the United States alone, in 18% of all wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial.[31]

The veracity of the informant testimony here is particularly dubious. First, Mr. Bridges knew that these individuals were informants, thereby eliminating the possibility that he made the statements they allege he did. Second, the informants failed to disclose Mr. Bridges' purported confessional statements to law enforcement when he allegedly made them, instead waiting until months later. (T. 463-68; 508-11; 528). This lengthy period between the alleged confessions and when the informants disclosed the statements to law enforcement increases the degree of error in the informants' statements and diminishes their credibility. *See United States v. Harrison*, 764 F. Supp. 29, 32 (S.D.N.Y. 1991) ("The Court is aware that the passage of time does affect witnesses' memories and it may be relevant to the credibility of their testimony."). The inconsistencies among the informants' testimony underscores this point. Third, one of the informants, Hamilton, only provided his statement to law enforcement after being arrested and incarcerated for carrying a concealed weapon (T. 465) and thus had motive to lie in an attempt to receive leniency. *See Williams v. Nish*, No. 07 Civ. 1302, 2007 WL 2852443, at *7 (E.D. Pa.

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[30] *See, e.g.*, Myrna S. Raeder, *Introduction to Wrongful Convictions Symposium*, 37 Sw. L. Rev. 745, 748 (2008) ("Today there is virtual agreement that [a] major cause[] of wrongful convictions [is] ... informant testimony"); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. Crim. L. & Criminology 329, 330 (2012) ("Erroneous guilty verdicts often rest on ... a police informant's testimony regarding a defendant's incriminating statements."); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 Minn. L. Rev. 592, 608-09 (2013) ("Informant testimony is another leading characteristic of wrongful conviction cases.").

[31] Innocence Project, *Understand the Causes*, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Jan. 26, 2015).

Sept. 26, 2007) (noting that an informant's open drug charges against him may have provided a motive to lie).

The State's reliance on the hair microscopy evidence further underscores the new evidence's materiality. As noted above, in his opening statement, the prosecutor claimed that the "hairs found at the scene match[ed] the defendant's." (T. 295, 999.) In closing, he exploited the "gatekeeper" effect, reminding the jury that "Whitlock was qualified by the judge as an expert," and that he testified it was "likely" that the hairs found at the crime scene came from Mr. Bridges. (*Id.* at 1000.) The prosecutor also used the hair comparison testimony to diminish the unreliability of the informant witnesses, arguing that the hair comparison evidence was in fact corroborated by the informants' testimony: "So not only do we have the hairs that match the defendant, but lo and behold, we've got all these people saying these horrible things about him." (*Id.* at 999.) This exposes the State's awareness that it could not secure a conviction on the informants' testimony alone; Whitlock's testimony was crucial to its case and necessary to lend credibility to the informants' testimony.

In short, the materiality and relevance of the hair comparison evidence is indisputable given that the informant testimony in this case would not be sufficient by itself to uphold Mr. Bridges' conviction. *See United States v. Hands*, 184 F.3d 1322, 1331 (11th Cir. 1999) (recognizing that where a conviction rests on unreliable informant testimony and the trial court has committed evidentiary errors, the conviction should be vacated); *State v. Stallings*, 77 N.C. App. 189, 191 (N.C. Ct. App. 1985) (recognizing that "cases involving comparative microscopy evidence indicate[] that [such evidence] must be combined with other substantial evidence to take a case to the jury.").

3. Requirement Four: Due Diligence and Proper Means Were Employed to Procure the Newly Discovered Evidence at Trial

Evidence is not "newly discovered" if it "was known or available to the defendant at the time of trial." *State v. Rhodes*, 366 N.C. 532, 537 (2013). Mr. Bridges was tried in 1991. Given that the newly discovered evidence was entirely in the custody of the FBI prior to its disclosure in July 2013, it was inconceivable for Mr. Bridges' trial counsel to have obtained this information, particularly because its very existence was unknown. The NAS Report and the recent exonerations also all follow the time of trial.

4. Requirement Seven: It is Highly Probable That the Newly Discovered Evidence Would Result in Exonerating Mr. Bridges

The North Carolina Court of Appeals' divided decision in this case confirms that the newly discovered evidence would result in exonerating Mr. Bridges. In a case such as this, where the newly discovered evidence affirmatively removes the only physical evidence on which the conviction was based, justice requires a new trial. *See State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008) (holding that "the emergence of a legitimate and significant dispute within the medical community as to the cause of [certain] injuries . . . constitutes newly discovered evidence" and that there was a "reasonable probability" that the introduction of such evidence could impact the jury's decision to convict); *cf. Commonwealth v. Chiappini*, 889 N.E.2d 966, 973 (Mass. App. Ct. 2008) (identifying that newly discovered evidence entitles a petitioner to a new trial if it "would probably have been a real factor in the jury's deliberations" (internal quotation and citation omitted)).

The North Carolina Court of Appeals' majority's decision affirming the conviction of Mr. Bridges as related to the hair microscopy evidence was premised on two principal points: (i) Mr. Bridges had failed to demonstrate that he was prejudiced by the inadmissible testimony, even though the court concluded that the trial court erred in admitting Whitlock's statistical

probability testimony (*i.e.*, the likelihood of two Caucasians having indistinguishable head hair would be approximately one in a thousand); and (ii) Whitlock's testimony that it was "likely" that the unknown hairs found at the crime scene originated from defendant was admissible because that "testimony did not constitute an improper identification of defendant." *State v. Bridges*, 107 N.C. App. 668, 672 (N.C. Ct. App. 1992), *aff'd*, 333 N.C. 572 (1993). The newly discovered evidence nullifies the very basis of the court's "no prejudice finding" because Whitlock's testimony *was* improper identification of the defendant and thus should have been held inadmissible.

Judge Greene's dissent is further, if not dispositive, indication that a new trial would likely result in Mr. Bridges' exoneration. Judge Greene found that there existed "a reasonable possibility that a different result would have been reached had the erroneous [hair comparison] evidence not been before the jury." *Bridges*, 107 N.C. App. at 677. Judge Greene underscored this point by noting that, in addition to the "weakness of the State's evidence, there [was] physical evidence that someone other than [Mr. Bridges] could have been the assailant" as proven by the "bloody palm print found at the scene which was positively identified as not belonging to the defendant."[32] *Id.*

B. The Admission of False and Misleading Evidence Violated Mr. Bridges' Right to Due Process Under the United States Constitution and § 19 of the North Carolina Constitution

"A conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (collecting cases). The evidence need not be false; it is sufficient if it was

[32] That the bloody palm print was a potentially highly probative piece of physical evidence is made manifest by the State's effort to associate it with over 50 potential suspects. (*See* T. 650). It is not unreasonable to conclude that had a suspect been associated with that bloody print, he or she would likely have been indicted for the crimes instead of Mr. Bridges.

misleading or created a false impression. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (*per curiam*). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269; *see also Basden v. Lee*, 290 F.3d 602, 614 (4th Cir. 2002) ("[A] State denies a defendant due process by knowingly offering or failing to correct false testimony."). A new trial is necessary if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Finally, if a prosecutor *should have* known that evidence was false, the same standard applies. *Id.*; *United States v. Wilson*, 162 F.3d 1158 (4th Cir. 1998) (*per curiam*). In short, the use of the hair microscopy evidence at Mr. Bridges' trial violated his right to due process, thus providing an independent basis for his conviction to be vacated and for a new trial to be ordered.

The interplay between the "newly discovered evidence" and due process arguments for Mr. Bridges is telling. Evidence is not "newly discovered" if it was known or available at the time of trial. *See Rhodes*, 366 N.C. at 536-37. Thus, if the FBI's concessions are found to not be newly discovered evidence, the false and misleading nature of Whitlock's testimony must then, by definition, either have been known or available, at the time it was introduced, thereby violating Mr. Bridges' due process rights.[33]

1. The Hair Microscopy Evidence Was Indisputably False and Misleading, and the Prosecution Knew or Should Have Known So

Whitlock knew or should have known, and by imputation the State also knew or should have known, that he was providing false and misleading hair microscopy evidence. The prosecution's knowledge is not limited to the prosecutors presenting the case on behalf of the

[33] In that regard, if the State disputes that this evidence is "newly discovered," the Court should deem the State to have conceded that it knew about the false and misleading evidence, or at minimum it was available to the State, at the time it was proffered to the jury.

State. Rather, the knowledge of persons "acting on the government's behalf in the case" is imputed to the State. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also Daughtry v. Polk*, 190 F. App'x 262, 271 (4th Cir. 2006) (*per curiam*) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf." (internal quotation and citation omitted)); *State v. Bates*, 348 N.C. 29, 38 (1998) (citing to *Kyles* recognizing that the State "has a duty to learn of any favorable evidence known to the others acting on the government's behalf").

Although the issues regarding hair microscopy evidence were not widely known or discussed by the public at the time of Mr. Bridges' trial, hair analysts, like Whitlock, knew that the evidence was not the shield of infallibility they presented in courts. As noted in the MAR, this prior-existing knowledge was recently revealed in a deposition by Michael Malone, a former Supervisory Special Agent in the FBI's Hair and Fiber Unit. Malone, who had trained state hair and fiber examiners, like Whitlock, all over the country during his 20-year tenure with the FBI (Malone Dep. Tr. 33, 43) made a series of admissions as to what he knew to be actually true during the course of his career.[34] These admissions included his and FBI-trained examiners' awareness of the lack of evidence giving rise to a "Type 3" error. (*See id.* at 199-200). Moreover, Quantico FBI-trained examiners, like Whitlock, have disclosed that they were trained to bolster their testimony despite the lack of scientific support. (*See* Ex. I). It follows then that Whitlock also knew—and thus imputed to the State—that he was providing false and misleading evidence. Even if Whitlock did not know that his testimony was false when he gave it, the facts demonstrate that he, and thus the State, should have known, which in itself suffices to establish a violation of Mr. Bridges' due process rights. *See, e.g.*, *Agurs*, 427 U.S. at 103.

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[34] References to Malone Dep. T. are to the deposition of Michael P. Malone, attached as Exhibit R to the MAR.

2. The False and Misleading Evidence Affected the Jury's Judgment

As detailed herein and in the MAR, the false and misleading hair microscopy evidence was integral to the State's case against Mr. Bridges and undoubtedly influenced the jury to convict. Without this evidence, the prosecution would have been left with no physical evidence linking Mr. Bridges to the crimes, a bloody palm print positively excluding Mr. Bridges as the assailant, no witness identification of Mr. Bridges, no consistent description of the perpetrator by the victim, and three tellingly inconsistent statements from self-serving serial informants. Given that the false and misleading hair microscopy evidence was central to Mr. Bridges' conviction, he is entitled to a new trial. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (a "new trial is required" if false evidence "could . . . in any reasonable likelihood have affected the judgment of the jury") (internal quotation and citation omitted).

C. The Introduction of the Hair Microscopy Evidence Was Fundamentally Unfair to Mr. Bridges, Thereby Violating His Right to Due Process

Due process is implicated even more broadly where, as here, newly discovered evidence rendered the trial fundamentally unfair. *See Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993) (Stevens, J., concurring) ("The Fourteenth Amendment prohibits the deprivation of liberty 'without due process of law'; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings.").

The absence of the newly discovered evidence caused a breakdown in the adversarial process. When the adversarial process has not served its truth-seeking purpose, the doctrine of "fundamental fairness" requires that such a conviction be vacated. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due

Process Clause guarantees the fundamental elements of fairness in a criminal trial."); *Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.").

The adversarial process guaranteed to Mr. Bridges did not operate as constitutionally mandated, and therefore his right to due process was violated. Mr. Bridges' trial counsel was precluded from adequately challenging (at no fault of his own) the invalidity of the hair microscopy evidence at the time of trial because it was not then available. (*See* T. 840 (unsuccessfully attempting to elicit a full refutation of the science from Whitlock)). There was thus no meaningful adversarial testing of the decisive (yet false and misleading) evidence masquerading as "scientific" evidence that was wrongly used to convict Mr. Bridges. That rendered his trial fundamentally unfair. *See, e.g.*, *State v. Allen*, 360 N.C. 297, 304-05 (2006) ("[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."); *cf. Schlup v. Delo*, 513 U.S. 298, 325 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."). A conviction premised on false and unreliable scientific evidence, as it is here, is fundamentally unfair and cannot stand.

CONCLUSION

For the reasons discussed above, Mr. Bridges is entitled to a new trial pursuant to North Carolina Gen. Stat. §§ 15A-1415(b)(3), (c), § 19 of the North Carolina Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, free from the discredited hair microscopy evidence that has resulted in his incarceration for more than the last two decades.

Respectfully submitted,

This the 9th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served, via prepaid, regular U.S. mail, a copy of the foregoing Brief of Amicus Curiae the Innocence Network in Support of Defendant upon all parties at the following addresses:

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