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TATE OF WISCONSIN CIRCUIT COURT WOOD COUNTY
STATE OF WISCONSIN,
Plaintiff,
V. Case No. 93CF74

TODD FROST,
Defendant.

DEFENDANT'S REPLY BREIF

While the DA sets forth the analysis as established in Youngblood and Greenwold (evidence must be apparently exculpatory, or state must have acted in bad faith), he utterly ignores the inescapable fact that the evidence in question herein is a semen sample which was within the exclusive control of the state at all times, and a PGM type 1 -- a totally different PGM type than the PGM type 2-1 defendant. This fact alone renders the evidence clearly and obviously exculpatory.

Therefore, defense once again asserts that a bad faith analysis is unnecessary due to the clearly apparent and obviously exculpatory nature of this PGM type 1 semen. However, bad faith is shown in several ways.

Detective Smolarek was present at all times during trial and was in attendance when State's expert, Sherry Culhane, identified this evidence as PGM type 1. Wis. Stats. 968.205 (3) provide in part:

"...subject to sub. (5), a law enforcement agency may destroy evidence that includes biological material before the expiration of the time period specified in sub (2), if all of the following apply:

(a) The law enforcement agency sends a notice of its intent to destroy the evidence to all persons who remain in custody as a result of the criminal conviction, and to the attorney of record for each person in custody or the state public defender.

This was not done. Defendant received no notice, and no such notice was found in Attorney's case file when defendant received the file from the Wisconsin Innocence project in March 2013.

DNA was first used in criminal trials in the United States just 6 years prior to the case at bar. It is due to the fact that the courts and states acknowledged the rapidly evolving and advancing technology inherent in DNA analysis, and the extremely probative value of biological evidence, that section 968.205 was enacted to specifically cover biological evidence. It goes without saying that such

evidence has repeatedly exonerated the wrongfully convicted decades after being found guilty by otherwise seemingly overwhelming evidence.

It is due to the probative value of DNA and the continuing advances in this technology that section 974.07 was enacted to enable wrongfully convicted defendants the chance to test and retest evidence. It is the very reason that 968.205 requires the state to notify defendants and the attorneys of their intent to destroy such evidence, which would give defendants (or their attorneys if a defendant could not grasp the ramifications of such an action) an opportunity to have such evidence preserved until advances in technology could provide conclusive results. No such notice was provided.

The state had a duty to provide "reasonable notice to the affected party of a possible claim, the basis for that claim, and a reasonable opportunity to inspect that evidence before its destruction." American Family Mut.Ins.Co. v. Golke, 768 N.W. 2d 729 (2009).

The destruction of this exculpatory evidence can in no way be considered mere negligence due to the facts described herein. The fact that Det. Smolarek is deceased has no bearing on this proceeding, and there is no need to guess what his thoughts and motives were. He intentionally destroyed this evidence, and he failed to provide notice to defendant and counsel.

"Viewed as a whole, neither Trombetta nor Youngblood nor their progeny require a defendant to prove that the mental state of the police officer at the time of the destruction was to foreclose a defense or to deliberately deny defendant's due process rights. Here the evidence had potentially exculpatory value and the evidence was destroyed in violation of the very regulations which the United States contends authorized them to be destroyed. Acting contrary to official instructions which the DEA agent thought to be in effect, is bad faith, whether measured objectively or subjectively. ... it is not confined to the circumstance in which the DEA agent deliberately says unto himself "I shall deprive the defendant of due process or hurt his case. ... Bad faith exists when conduct is knowingly engaged in or where it is reckless..." See United States v. Elliot, 83 F.Supp.2d 637 at 649. (E. Dist. Va. 1999).

Mere negligence, as described in Youngblood, would be the state's failure to preserve evidence in a manner which would render it viable for further DNA testing. Perhaps it could even be an instance where other evidence was slated to be destroyed and the evidence in question was unintentionally mixed in and destroyed. Neither is the situation in this case. This is the distinction between the case at bar and Youngblood. In Youngblood, state negligence resulted in the failure to preserve the evidence in a manner which would render it viable for future testing. The evidence was not destroyed. Police were ignorant about DNA testing at that time. Here, police knew about DNA testing. The FBI lab instructed police how to preserve the evidence. Police intentionally destroyed it. This further distinguishes the case at bar from Youngblood. Negligence assumes some degree of unintentional action or lack of knowledge. Police knew they had to

The history of legal attacks on forensic evidence analysis of blood or other body fluid evidence is highly instructive. ABO blood group typing evidence has been admissible in criminal cases for decades. Nevertheless, defense challenges to the reliability of ABO testing of blood and other stain evidence in criminal cases has occurred.

The allegation, which has been made in court, is that while ABO typing is generally accepted as reliable and accurate when typing freshly drawn blood, as in a hospital, the forensic analysis of blood stains, semen stains, or other evidence from crime scenes, suffers from potential contamination. The thrust of the argument was that the effects of the contamination rendered any results of testing such material unreliable and inaccurate.

That argument has been thoroughly refuted by the research findings of scientists who are knowledgeable and experienced in forensic serology. Both scientific principles and the study of case work typing results demonstrated that any influences of the contamination either had no effect on the ability to obtain an ABO blood group type, or left the sample in such a condition that no type could be obtained. No influence changed the actual ABO type itself. (Denault, G.C.; Takimoto, H.H.; Kwan, Q.Y.; and Pallos, A. "Detectability of selected genetic markers in dried blood on aging," Journal of Forensic Sciences, Jfsca (July 1980), vol. 25 no. 3, 479-498).

The same argument was raised in the 1970's and early 1980's in attacks on the reliability and validity of the typing of polymorphic proteins and enzymes such as PGM, in bloodstains and other body fluid evidence. On many occasions testimony was presented by opponents that the same contamination influences rendered the results of protein typing invalid. (See State v. Washington, 622 P.2d 986, 995 (Kan. 1981); People v. Reilly, 196 Cal. App.3d 1127, 242 Cal. Reporter 496 (Cal. Ct. App. 1987); People v. Young, 425 Mich. 470, 391 N.W.2d 270 (Mich. 1986); and Commonwealth v. Gomes, 526 N.E.2d 1270, 1280 (Mass. 1990).

Again, both scientific research and studies of actual evidentiary samples demonstrated that any contamination either had no effect on the ability to accurately type the evidence material or destroyed the activity of the protein to such an extent that no result could be obtained. (Budwole, B., and Allen, R.C., "Electrophoresis Reliability: I. the contaminant Issue," Journal of Forensic Sciences, JFSCA (Nov. 1987), vol. 32 No.6, 1537-1550).

Essentially, the prosecution wants it both ways. "All of our evidence is based upon infallible science, except this single PGM test." The state knew the semen was PGM type 1. Knew the defendant is PGM type 2-1. Knew that PGM type 1 occurs in 65% of the population. (Initial brief pg. 3, Crime lab report by Sherry Culhane). Yet the state used this evidence assertively by repeatedly stating that, despite the PGM type 1 result, and total lack of DNA profiles similar to defendant, that it could still be the defendant's. As the DA stated during a pretrial hearing:

"Mr. Potter: Here again, there aren't I don't believe any reports that she had sexual intercourse with anyone that I recall a few days prior to that or the evening of." (App. 100, pg. 11: 18-21).

"Mr. Potter: I don't believe – maybe you can correct me if I'm wrong, but I don't recall anywhere in the police reports which indicate any of the individuals had sexual intercourse with her a day, two days, or three days prior to this incident." (App. 101, pg. 12: 2-6).

The DA was convinced the semen belonged to the killer. Even though DNA testing was inconclusive, that did not prevent the DA from using this evidence assertively as proof of defendant's guilt in order to present a case of seemingly overwhelming evidence to the jury. This was sperm. The state clearly knew this evidence was exculpatory when it was identified as PGM type 1. Just because the state argued that it could've been the defendant's does not make it so, and does not change the test results or make it any less exculpatory.

"Sperm DNA can be separated from nonsperm DNA with differential extraction." The Evaluation of DNA Evidence at 84.

"... it is possible to extract the sperm DNA and the DNA of vaginal epithelial cells separately. That allows the genetic contribution of the male and female to be distinguished." DNA Technology at 65-66.

"A. Cell Identification. Potential error can occur when the FBI identifies the source of cells gathered at the crime scene. For example, the FBI could identify cells that come from the victim as cells belonging to the assailant. Agent Coffin testified, however, that the FBI can distinguish types of cells with a microscope. There is no difficulty ... in distinguishing sperm cell from vaginal cell." Gov't of the V.I. v. Penn, 838 F.Supp.1054.

Certainly it was within the state's power to determine, back then, if the tested material was sperm cell or vaginal cell. This could have been discovered by use of a microscope, but this simple procedure was not performed.

"We think that requiring a defendant to show bad faith on the part of police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves, by their conduct, indicate that the evidence could form a basis for exonerating the defendant." Youngblood at 58 (emphasis added).

This is the very situation the Youngblood court meant by that statement. The state believed this evidence would prove to be the defendant's semen – despite the PGM type 1 result. It therefore stands to reason that it could also prove to be exculpatory, and did so when it tested as PGM type 1. This makes it material to guilt or innocence. Because it did not produce the results the state desired does not mean that they can ignore the law and destroy it – in secret. It must be noted that the state destroyed this evidence at the same time the defendant was filing

hotly contested, since it is the statistical probability of a match which a jury must consider to determine if the sample found at the scene is indeed the defendant's. (42 Stan. L. Rev. 465,488).

The state continues to claim a statistic of 1 in 200 million, but has never presented any support to show this claim is even valid. They have not only failed to meet the necessary burden of proof, but to have made these claims in the presence of the jury is unfairly prejudicial. Further, there is now nothing defense can do to challenge the validity of such statistics because there's nothing in the record other than the fact that the FBI then used four single-locus probes and a database of 1,750 individuals to calculate their statistics. This unfounded statistical statement, along with other prejudicial assertions made by the FBI witness, would lead a jury to believe that the system used by the FBI was flawless. This witness went one step further, however, when presented with questions by the jury. The witness cited a report not received into evidence by the National Academy of Sciences (NAS), which he claimed confirmed his testimony that beyond three or four probes, it made no difference on the probability of a match. (R. 633: 1-7). This is a complete and total mischaracterization of the NAS report.

The report by the National Research Counsel of 4-16-1992, titled: DNA Technology in Forensic Science, merely recites the fact that "Today's technology, which uses 3 – 5 loci ..." DNA Technology at 9. In fact, the report suggests that more probes or loci will eventually eliminate the possibility that there would be a match that could occur at the small number of loci currently tested and stated that, "presentations that suggest to a judge or jury that DNA typing is infallible are rarely justified and should be avoided."

The critical inquiry is this: Once it has been determined that two autorads match, what is the likelihood that the suspect and the evidence from the crime scene have the same source? The fact that one autorad matches another has no meaning without the statistical evidence to back it up. If the probes used only detect sites on the DNA molecule which are common to all human beings, the evidence obtained cannot be the basis for identifying a defendant. Thus, the expert must also show that the alleles detected by particular probes used are polymorphic. This showing requires that a sufficient database – a large enough and truly random sample – be the basis of the expert's conclusions.

In addition, in order to make claims about probabilities which are of the high magnitudes usually found in DNA cases, the experts rely on the product rule. The scientist first collects the data pertinent to each allele being compared. Based upon the statistics derived from the database, the expert determines the probability that a sample of known origin will match (on an autorad) the given sample. That probability will vary from one allele to another.

However, "The scientific validity of the multiplication rule depends on whether the events (i.e., the matches at each allele) are statistically independent." DNA at 76. That is, the product rule cannot be applied where the alleles are related, because that increases the likelihood that anyone who has one of the alleles has all of them.

Two central theoretical principles involved in statistical analysis of DNA typing have provoked serious questions. First, it is assumed that each of the probes detects an allele which is independent of the other alleles tested. That is, in calculating the statistics, the scientist attempts to ensure that the various sites tested are not related to each other. This requirement is referred to in the literature as "linkage equilibrium." It has not been sufficiently established that the various probes used detect independent alleles. Various scientists have raised concerns that the databases used do not adequately address the problem of population substructures.

Second, it is assumed that the statistical calculations are based on a truly random population – one which mates randomly and thus mixes the gene pool evenly. This assumption is known as the "Hardy-Weinberg Equilibrium." However, it is not yet agreed that the databases used are sufficiently random or sufficiently developed for any particular group being tested. The NAS committee acknowledged that the area was not settled: "Substantial controversy has arisen concerning the methods for estimating the population frequencies of specific DNA typing patterns. Questions have been raised about the adequacy of the population databases on which frequency estimates are based and about the role of racial and ethnic origin in frequency estimation." (Footnote omitted.) DNA at 74-75. Also, there was a three-locus match found within the FBI databank. DNA at 10.

This directly contradicts the FBI's claim that the database used was adequate, of sufficient size and randomly attained, and further contradicts the expert's mischaracterizations of the NAS report to the jury.

While the rule on admissibility in Wisconsin is not dependent upon the Frye doctrine, Wisconsin's liberal admissibility rules still do not allow just any testimony or evidence, and thus, does not preclude Frye-like standards from applying. Wis. Stat. §907.02 is virtually identical to Fed. R. Evid. 702, which states:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In Daubert v. Merrell Dow Pharmaceuticals, inc., 113 S.Ct. 2786, 2793-94 (1993), the Supreme Court concluded that the Fed. R. Evid. 702 displaced Frye as the governing standard for admission of "scientific evidence" in all federal

statistics. The court rested its decision on the fact that among the scientific community, there is disagreement in the assumptions the FBI methodology makes about distribution of those portions of DNA that are different in different people through various populations. These assumptions are critical to the ultimate expression of probability that the unknown DNA came from the suspect.

The introduction of unreliable evidence and testimony places an unfair burden on defense regardless of the virtually unlimited cross examination allowed in Wisconsin. Certainly DNA evidence and statistical calculations of the probability of a match are relevant and meet the first and second prongs of admissibility. However, the admission of unreliable evidence and testimony will not assist the trier of fact in determining an issue of fact. Unreliable evidence results in confusion of fact, and places an unfair burden on defense in attempting to overcome what essentially amounts to the admission of false evidence or testimony. Under the current rule of admissibility in Wisconsin, the state can essentially present anything it can get an expert to testify to – fact or fiction. False evidence places an unfair burden on defense to prove innocence.

Recently the United States Department of Justice and FBI formally acknowledged that nearly every examiner in the FBI forensic unit gave flawed testimony in nearly every criminal trial in which they offered evidence against criminal defendants over more than a two-decade period before 2000. That examiners overstated forensic matches in ways that favored prosecutors in more than 95% of the trials reviewed so far, according to the National Association of Criminal Defense Lawyers and the Innocence Project. The review confirmed that FBI experts systematically testified to the near-certainty of "matches" of crime-scene evidence to defendants, backing their claims by citing incomplete or misleading statistics drawn from their case work.

In the present case, there was no gate keeping function by the court. There was no hearing in the likeness of Frye to determine the admissibility and validity of the evidence to be presented at trial, beyond the admission of photographic evidence. There is no tangible record of what type of DNA test was even performed upon the evidence presented at trial and the relation of the probes used, which would then change the statistical calculations. There's no mention of the controversy surrounding the FBI's procedures and the calculations of statistical probability. All we have is an FBI agent telling the jury how they've perfected the system, how exact their DNA process is, and how conservative and favorable to a defendant their statistical calculations are, along with his mischaracterizations of the NAS report. The jury was never presented with any evidence of the controversy surrounding the FBI's procedures and statistical calculations at that time, and it is the statistical probability that the jury had to consider. They simply were not provided with the information required to base a reasoned decision.

"DNA evidence, like other scientific and statistical evidence, can pose special problems of jury comprehension." DNA at 147.

In fact, one juror, the retired firefighter, slept through much of the trial and expert testimony, and therefore could not base a reasoned decision upon the evidence or testimony. This violated the defendant's right to an impartial and unbiased jury.

"The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations ... [o]therwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled." Hasson v. Ford Motor Co., 32 Cal.3d 388, 410-411 (1982) (citing sixth and seventh amendments to the U.S. Constitution and finding prima facia improper conduct where some jurors did crossword puzzles and another read a book). A sleeping juror during testimony was constructive absence of the juror during trial that violates a defendant's sixth amendment and due process rights. See e.g., Jordan v. Mass, 225 U.S. 167, 176 (1912); Peters v. Kiff, 407 U.S. 493, 501 (1972); U.S. v. Burrett, 703 F.2d 1076, 1082-83 (CA 9 1982) (finding abuse of discretion and remanding for evidentiary hearing where juror admitted to sleeping during trial, but trial court failed to hold hearing on misconduct). A defendant is entitled to an evidentiary hearing to establish a sleeping juror's misconduct and the resulting prejudice. Remmer v. U.S., 347 U.S. 227, 229 (1954); Tanner v. U.S., 483 U.S. 107, 120 (1987); Barrett, 703 F.2d 1082-83.

This, and other claims presented herein, can be proven by the video recording made by the local cable company, if defendant is allowed to subpoena this evidence to support this claim. The FBI's testimony was impressive despite the absence of actual information. This was a scientist for the largest law enforcement agency in the world. The jury was simply over-awed by the testimony he provided, and the statistical calculations. It certainly seems to be overwhelming proof, at first blush. At least, until you take into account the total absence of actual fact.

State v. Nerison, 401 N.W.2d 1, states that due process requires the prosecutor to disclose all exculpatory evidence, including impeachment evidence, relating to credibility of witnesses for prosecution.

U.S. v. Bagley, 105 S.Ct. 3375, held that impeachment evidence, as well as exculpatory evidence, falls within Brady rule. Government's failure to assist defense by disclosing information that might have been helpful in conducting cross examination amounts to constitutional violation if it deprives defendant of fair trial.

State v. Mordica, 484 N.W.2d 352, holds that unfair prejudice results where proffered evidence, if introduced, would have a tendency to influence the outcome by improper means.

"The prosecutor has a strong responsibility to reveal fully to defense counsel ... all material that might be necessary in evaluating the evidence. That includes information on tests that proved inconclusive..." DNA at 146.

The FBI's testimony supports this:

"... see, the contamination issue really refers to degradation and breaking down... if it was contaminated with bacteria, for example, and broken down, I wouldn't get any result." (R.622: 16-17, R.623: 2-3).

There were several tests that could have been performed which weren't. Perhaps the simplest, most basic of these would have been to place the actual PGM test under a microscope to determine whether or not the cells being tested, or read by the test, were in fact sperm cells or vaginal cells. There was no mixture test performed, no gender test and there was no attempt to wash the sperm. Nothing to support Culhane's testimony of a "mixed" or contaminated sample. In fact, evidence suggests the opposite of Culhane's claim. Surely much of this failure rests with defense counsel. However, it is fairly certain that this evidence was PGM type 1.

The FBI DNA report stated:

"No conclusive DNA profiles, or no DNA profiles unlike the victim were obtained for Q5 and Q6." (BE2a and BE3a, vaginal and cervical swabs).

It is a well established scientific fact that even people with rare DNA profiles can share similar alleles. Further, there's a case in England where a man was picked out of a database of 666,000 individuals as a suspect of a crime by DNA testing conducted using 6 probes, or loci. The defendant had an alibi, so another DNA test was performed using 10 probes, or loci, and the suspect was exonerated. (www.ksg.harvard.edu/dna/transcribe.table.page.htm).

USA Today: "Mismatch calls DNA testing into question." By: Richard Willig, February 8, 2000, at page 3a.

This evidence was sperm, which was PGM type 1. There were no DNA profiles obtained. This was inconclusive. What this report does not state is that there was a match made to the victim, or any other individual, on any of the probes tested. The expert made such distinctions during his testimony regarding sample Q9 (R.606: 5-10) for example. "On the other shoe, Q9, my Q9, I was able to develop a DNA profile on two probes that we use. And that was designated or I was able to determine that that was a match to the DNA profiles that I developed from the victim in that particular case." Q9 was type 1. This was an alleged match at only two loci. As previously stated, a match at three probes or loci was determined to be inconclusive by laboratory standards, so a match at only two probes or loci must have certainly been inconclusive. There was no gender test performed on these samples, and there were no statistics provided for the likelihood of this alleged match. In one alleged match at three probes or loci, there were statistics provided in the report – not to the jury – for a match at each probe. 1 in 10,000 for Caucasians; 1 in 70,000 for Blacks; and 1 in 5,000 for Hispanics. First, we don't know if these probes used were linked or non-linked, or that the database

used was truly random. These results should not have been used at trial. This was unfairly prejudicial – admitting evidence, at trial, as a match, when it was determined to be inconclusive. It was a type 1 sample, as was the semen evidence, and there's no way to know if the source of both samples is not the same source. These results emphasize the point that people can share similar DNA profiles. The victim, a Caucasian, had a closer match on a probe or loci with Hispanics than Caucasians, if this was, in fact, the victim's blood? There could be a Hispanic, or person of Hispanic mix, with similar DNA profiles to the victim, who committed this murder. The jury was never provided with the statistics, and there was no statement of the statistical probabilities of the victim's and defendant's DNA at each probe or loci. We can't know if, in fact, this was the victim's blood, or that of the killer. The expert drew conclusions for the jury on inconclusive evidence without any statistics to support such conclusions. The fact that he declared a match with a statistic of 1 in 5,000 in Hispanics also supports the controversy of linked probes and subgrouping, and shows the flaw in the statistical calculations as previously stated. The NAS report further directly contradicts the expert's assertions regarding the adequacy of the database used. A three-locus match was found within the FBI database.

While the DNA test on the semen was ruled inconclusive, the expert drew conclusions for the jury, which could be nothing more than speculation.

"Okay, on the vaginal and cervical swabs, essentially the only profile I was able to develop was that of the victim, which again, was not uncommon. My report states that no DNA or no DNA profiles unlike the victim were obtained on those particular areas." (R.606: 13-17).

"Again, in a swabbing you're going to get a lot of skin cells and tissue cells which would have a lot of the victim's DNA on it." (R.606: 22-24).

As previously stated, the FBI could distinguish, through the use of a microscope, the difference between sperm cells and vaginal cells. This was not done, yet identifying a source of a sample is a potential point of error. Also previously stated:

"Sperm DNA can be separated from nonsperm DNA with differential extraction." The Evaluation of DNA Evidence at 84.

"... it is possible to extract the sperm DNA and the DNA of vaginal epithelial cells separately. That allows the genetic contribution of the male and female to be distinguished." DNA Technology at 65-66.

"A. Cell Identification. Potential error can occur when the FBI identifies the source of cells gathered at the crime scene. For example, the FBI could identify cells that come from the victim as cells belonging to the assailant. Agent Coffin testified, however, that the FBI can distinguish types of cells with a microscope. There is no difficulty ... in distinguishing sperm cell from vaginal cell." Gov't of the V.I. v. Penn, 838 F.Supp.1054.

The report, DNA Technology, in 1992, stated: "There is a chance that two persons have DNA patterns (i.e., genetic types) that match at the small number of sites examined." DNA Technology at 9.

The DNA expert, in reply to juror questions, stated that the NAS report determined that the number of probes used was sufficient. That is not what the report states. The NAS report merely recites the fact that "Today's technology, which uses 3 – 5 loci, ..." DNA Technology at 9. In fact, the report suggests that more probes or loci will eventually eliminate the possibility that there would be a match that could occur at the small number of loci currently tested. The report went on to specify that other mixtures, such as blood stains or sexual assault samples that involve two or more perpetrators were not possible to separate. i.e., more than one contributor of semen sample. DNA Technology at 66.

None of this was mentioned at trial. The experts testified that there was a mixed sample that prevented a conclusive result, yet none of the controls or tests which existed to obtain a conclusive result were performed. This certainly highlights procedural errors which occurred. The state's DNA expert cited the NAS report as the authority on DNA, yet this same expert not only mischaracterized that report where it suited the state, he failed to follow the procedures outlined in the report. There was no mention by the DNA expert of any superimposed patterns on any autorad, which clearly disputes Culhane's testimony that a mixed sample prevented her from obtaining a decisive result.

Either the test results were accurate and the result was PGM type 1, or the tests were flawed and all the evidence is suspect, and thereby, the defendant was convicted due to the use of flawed evidence and testimony, as well as evidence and testimony which should not have been allowed at trial, in order for the state to present the appearance of overwhelming guilt to the jury. The result was PGM type 1, and due to the state's clandestine destruction, defendant and the court are unable to conduct any testing. The result must stand, and, therefore, the evidence is clearly, apparently, PGM type 1.

To maintain the integrity of the criminal justice system, the jury must be afforded the opportunity to hear and evaluate critical, relevant and material evidence, or, at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts. State v. Hicks, 549 N.W.2d 435 (1996). The state, through the guise of its experts, presented false and/or improper evidence and pro-prosecution testimony relevant to the accuracy of the tests performed, statistical calculations, and the NAS report.

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than 95% of the trials reviewed so far, according to the National Association of Criminal Defense Lawyers and the Innocence Project. The review confirmed that FBI experts systematically testified to the near-certainty of "matches" of crime-scene evidence to defendants, backing their claims by citing incomplete or misleading statistics drawn from their case work.

In Strickland, the court stated that because credibility was the central issue, "the error had a pervasive effect on the inferences to be drawn from the evidence, and altered the evidentiary picture." 466 U.S. at 695-696.

The bottom line is that the semen evidence was PGM type 1, which makes it clearly, apparently exculpatory. The bad faith clause requires only that it be "potentially useful" and reckless disregard will fulfill the bad faith requirement. In the present case, defendant never had an attorney after trial to file for DNA testing on this evidence, as Youngblood's attorney did, which ultimately proved his innocence due to advances in DNA technology.

The general language of the statutes is irrelevant in as much as they explicitly require the preservation of evidence using mandatory language "shall." While defendant's due process rights are guaranteed by the fourteenth amendment, there is also a protected liberty interest created by state statutory enactment, and Article I, §9 of the Wisconsin constitution.

"When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts can fashion an adequate remedy. Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984). See also: Aicher v. Wisconsin Patients Compensation Fund, 237 Wis.2d 99, 613 N.W.2d 849; "Although article I, s. 9, itself may not create new rights, it does allow for a remedy through the existing common law." Thomas v. Mallett, 285 Wis.2d 236, 701 N.W.2d 523. State regulations "may create a liberty protected by the due process clause." Hewitt, 459 U.S. at 469. A regulation confers this right when it constitutes more than a simple procedural guideline and uses "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed, '... The repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest." Id., at 472. "It is basic canon of statutory construction that use of the word 'shall' indicates mandatory intent." Salahuddin v. Mead, 174 F.3d 271.

The state had a duty to take affirmative steps to preserve this evidence, and in the absence of any statutory requirements, the court's order to preserve such evidence takes precedence. Bad faith is proven.

As previously discussed in initial brief, In State v. Hahn, 132 wis.2d 351 (1986), the state's failure to preserve an auto impounded during an investigation and prosecution for homicide by intoxicated use of a motor vehicle caused the vehicle to be inadequate for testing by a defense expert for vehicular defect, an issue relevant to a statutory defense to that charge. This issue is analogous to the situation in the present case. Defendant pled not guilty, asserted the statutory

who informed counsel she wished him to continue to represent defendant, and counsel refused to step down. (App. 102).

It is defendant, not counsel, and not a defendant's family, who determines which counsel to choose. Furhter, counsel then deceived defendant and the defendant's mother into believing that he had obtained independent DNA testing. This he did not do. (App.). Counsel merely had Cellmark Diagnostics review FBI notes to determine if there were any discernable errors. Cellmark did not perform any DNA testing on the PGM type 1 evidence which was destroyed by the state, although counsel told defendant and his mother that he had Cellmark test the blood and semen evidence and that it remained inconclusive. This was not discovered until defendant filed this current §974.06 motion, and could not have been discovered before receiving attorney's case file from the Wisconsin Innocence Project in 2013. It was this deception that led to the denial of appellate counsel. The issue of DNA testing was discussed, but it was determined that, because trial counsel had allegedly had the semen tested and it remained inconclusive, further attempts might degrade that remaining evidence, and it would not be worthwhile to retest until DNA technology advanced. While defendant requested appellate counsel to obtain trial counsel's file, appellate counsel refused to do so.

Defendant in the present case relied upon appellate counsel to file initial papers with appellate court, and once counsel abandoned defendant, he turned to other prisoners, one of whom stole defendant's trial transcripts. The end result was that the direct appeal was dismissed due to this uneducated defendant's inability to file a brief without counsel. Appellate counsel initiated the appellate process in order to get defendant to sign a waiver of rights, then abandoned defendant entirely.

Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, holds that when a state court allows appellate counsel to withdraw without an independent judicial determination of the appeal's merit, the defendant is entitled to a fresh appeal without first demonstrating that initial appeal was non-frivolous. Jumping ship is a form of abandonment, and a defendant abandoned by his lawyer has suffered injury from that very fact – from the loss of advocacy services that could have been used to establish a non-frivolous issue for appeal. See Anders v. California, 386 U.S. 738, Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746.

Trial counsel first refused to withdraw, then deceived defendant about seeking independent DNA testing, and after trial, refused to provide client with the case file upon request, in violation of S.Ct. rule 20.16 (1)(b). Without the case file, defendant could not discover issues he raises now, and due to trial counsel's deceptions, and appellate counsel's failure to investigate, defendant has been denied counsel since trial. Appellate counsel turned his back on defendant.

"There is a definite presumption against finding a waiver of a defendant's sixth amendment right to counsel. Such a waiver must be an intentional relinquishment or

abandonment of a known right or privilege. In faithful adherence to that principle, seventh circuit case law maintains that courts must indulge every reasonable presumption against the loss of constitutional rights." Page v. Frank, 343 F.3d 901 (2003).

The existing record of this case appears, on its face, to show overwhelming guilt, and the only thing any lawyer wants to do is dump it. Appellate counsel abandoned defendant and was able to do so by tricking defendant into signing a waiver of right to counsel. Defendant was thrown out of court due to his inability to file the most basic court document without counsel, who not only initiated the direct appeal, but filed several motions on behalf of defendant, then basically told the defendant "you're on your own."

Defendant wrote to trial counsel, DA, Public Defender, Crime Lab, FBI Lab, Lawyers and the trial court. The basic fact is that every single person or entity involved in this case acted to deny defendant access to the very information before the court now, starting with trial counsel who was in sole possession of the facts which initiated this current proceeding.

Due especially to trial counsel's actions, coupled with the state's withholding of evidence and clandestine destruction, there's no way defendant could have discovered the issues he presents to the court today. Defense counsel's failure to test this evidence was not sound trial strategy and it was an unreasonable decision which severly prejudiced defendant.

In Washington v. Smith, 219 F.3d 620, the court held that counsel's failure to decipher a single page of handwritten notes rendered counsel ineffective and required reversal.

"The failure to investigate a particular lead may be excused if a lawyer has made a reasonable decision that makes particular investigations unnecessary." Strickland at 691.

Defense counsel's failure to obtain DNA testing on inconclusive PGM type 1 semen and blood evidence, and to then lie to defendant and say it remained inconclusive, is so prejudicial to defendant that it can in no way be considered a "reasonable decision" under Strickland or any other standard. Certain errors by counsel are so egregious that it requires no explanation of their thoughts or strategy, as the error is so fundamental that no competent counsel would fail to act. Counsel's failure here was to render assistance so ineffective as to fail to act as counsel at all.

First, as already stated herein, the state withheld the DNA evidence of the type1 semen from defense, as well as the impeachment evidence which would have permitted counsel to conduct a proper cross examination of expert witnesses. As a result, counsel failed to realize that not all of the evidence proffered by the state was admissible and failed to request a hearing to determine which evidence

constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence is undermined."

Trial counsel's duty to a defendant does not end at the conclusion of trial. Counsel has a duty to assure that his actions do not interfere with defendant's appellate rights and appellate counsel's ability to discover issues upon which to appeal.

Attorney lied to client and his family regarding the independent DNA testing of evidence, and the results, and counsel's further actions, combined with the errors of the court and actions of the state violated defendant's constitutional rights. These actions denied defendant the necessary information upon which to determine the proper direction his defense should take, and whether or not to testify. Counsel told defendant and defendant's family he had no choice except to testify.

There was a witness, Matthew Kohlman, who stated to police that he'd seen a male figure following approximately 20 yards behind the victim. This directly contradicts the state's witnesses that it was the defendant who was walking with the victim, yet counsel failed to bring this impeachment evidence to the attention of the jury while he had witness on the stand.

Further, witnesses were sequestered in the back room of the court. As each witness was called by the state to testify, the victim/witness coordinator from the prosecutor's office was calling each witness from that room. Cynthia Emerich, after trial, told defendant that not only were witnesses able to hear everything that went on at trial, but that the victim/witness coordinator was telling each witness where the defendant was sitting at the defense table, and what the defendant was wearing, so that they'd be able to point out the defendant when asked to identify him in front of the jury. U.S. v. Guidry, 406 F.3d 314. Along with the other issues raised herein, a quote from Brady v. Maryland best sums things up:

> "... That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case, his action is not "the result of guile." Brady at 88.

While this court appointed counsel for purpose of this §974.06 motion, counsel withdrew from this case and counsel's review was limited in scope to the issue of destruction of evidence only, further denying defendant an attorney to develop the issues presented herein, and denying defendant counsel protect under the sixth amendment. Counsel told defendant that he "would not read thousands of pages of case law," to research the issues of this case. The court should, therefore, allow these issues to be presented and argued. Defendant remains pro se, and courts must liberally construe pro se petitions. U.S. v. Seesing, 234 F.3d 456; McBride v. Deer, 240 F.3d 1287; Hohn V. U.S. 262 F.3d 811; Aron V. U.S. 291 F.3d 708; Urbina v. Thomas, 270 F.3d 292; Haines v. Kemer, 404 U.S. 519.

The claims presented herein can be proven if defendant is allowed to subpoena evidence and witnesses to provide the required proof the court requires.

The cumulative effect of the errors cannot be overlooked. A leads to B, leads to C. Thomas v. Hubbard, 273 F.3d 1164; Mancuso v. Olivarez, 292 F.3d 939. The state must prove these errors are harmless. A defendant cannot be held accountable for errors committed by counsel, the state, and the court, irrespective of good or bad faith. Defendant requests an evidentiary hearing whereat witnesses will be called to testify, and other evidence will be presented to support the claims defendant makes herein.

Dated:

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