



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

ALAN BASS, )  
)  
Defendant Below- ) No. 218, 2022  
Appellant, )  
) ON APPEAL FROM  
) THE SUPERIOR COURT OF THE  
v. ) STATE OF DELAWARE  
) ID No. 83000508DI  
STATE OF DELAWARE, )  
)  
Plaintiff Below- )  
Appellee. )

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE IN AND FOR NEW CASTLE COUNTY

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**REPLY BRIEF**

**COLLINS & PRICE**

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Dated: September 26, 2022

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Alan Bass, through the undersigned counsel, replies to the State's

Answering Brief as follows:

## ARGUMENT

### **I. THE SUPERIOR COURT ERRED IN DENYING MR. BASS' MOTION FOR POSTCONVICTION RELIEF; THE DISCOVERY OF IMPROPER MICROSCOPIC HAIR COMPARISON TESTIMONY WILL PROBABLY CHANGE THE RESULT IF A NEW TRIAL IS GRANTED.**

The systemic overreach of FBI hair examiners for decades resulted in a different approach to postconviction relief in many state courts, state legislatures, and the federal courts. Through court decisions, state laws, and the waiving of any procedural bars by the United States Department of Justice, petitioners whose convictions were tainted by false microscopic hair comparison testimony have been permitted to overcome procedural bars and have their cases heard on the merits.<sup>1</sup> This is unsurprising due to the significant prejudice of an expert telling the jury that the defendant's evidentiary hair is identified to the exclusion of all others.

The State asserts that Mr. Bass is not eligible to overcome the procedural bar articulated in Superior Court Criminal Rule 61(d)(2)(i).<sup>2</sup> The State argues that

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<sup>1</sup> See, Op. Br. at 30-36.

<sup>2</sup> Super Ct. Crim. R. 61(d)(2)(i). *Second or subsequent postconviction motions.* A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted after a trial and the motion either:

(i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted.

because Agent Podolak's testimony contained limiting statements, Mr. Bass does not meet the *Purnell* standard for consideration of his claim.<sup>3</sup> Podolak did make limiting statements on cross-examination. But the prejudicial statements were made on direct and redirect examination. On direct examination, Podolak equated microscopic hair comparison with the uniqueness of a human face:

The most important part of the hair comparison is the arrangement of the characteristics in association with one another. Take the human face for example. We all have eyes, nose, mouth, ears, hairline, chin, and so forth. And if you look from one individual to the other, you'll see that some of these characteristics are the same, from one individual to the next. But it's the arrangement of those characteristics on your face that gives you a uniqueness to you that when someone looks at you, they can say, 'That's so and so.' It's the same thing with hair. It's the arrangement of the characteristics that we have in association with each other that gives a uniqueness to the hair which then allows us to make an association of that hair to a particular individual.<sup>4</sup>

On redirect examination, Podolak testified that he was better at identifying and comparing Negroid hairs than other types.<sup>5</sup> He testified Mr. Bass' hair was even more unique because they were very light at the root and very dark at the tip. He testified, "this is also an unusual occurrence among the normal."<sup>6</sup> Podolak

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<sup>3</sup> Ans. Br. at 32-35.

<sup>4</sup> A34-35.

<sup>5</sup> A73.

<sup>6</sup> A74.

went on to testify that he had performed over 3,000 microscopic hair comparisons and had in every case been able to distinguish hair characteristics among them.<sup>7</sup>

Podolak also testified about a preliminary study from Minnesota in which the FBI taught the examiner their technique and the examiner determined a match 100% of the time.<sup>8</sup>

The State does not address most of this testimony but does address the Minnesota study, stating, “this Court has already made findings in this case consistent with the Superior Court’s conclusions.”<sup>9</sup> On direct appeal, this Court found that the trial judge’s overruling of the objection to the Minnesota study was not plain error. This Court found that the agent’s opinion was not based on or dependent upon the Minnesota study.<sup>10</sup> This Court’s plain error review of this narrow issue about the study did not address the other improper statements made by Podolak because those statements were not raised on appeal.

The State also cites to cases from this Court holding that hair comparison is not as positive a means of identification as fingerprints.<sup>11</sup> That rather underscores the significant prejudice arising out of Agent Podolak’s many impermissible statements. Both the Superior Court and the State have focused on the qualifying

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<sup>7</sup> A78,

<sup>8</sup> *Id.*

<sup>9</sup> Ans. Br. at 33.

<sup>10</sup> A702-704.

<sup>11</sup> Ans. Br. at 33-34.

statements made on cross-examination rather than the entirety of Podolak’s testimony. Any reasonable juror would have been convinced that Podolak, who told the jury he had never gotten one wrong, got it right again in Mr. Bass’ case.

The State next argues that Mr. Bass has not shown that a person other than him committed the attacks.<sup>12</sup> The State cites to the Commissioner’s Report’s holding that “Bass was still included as a source of the pubic hair” in SK’s attack.<sup>13</sup> However, the Commissioner’s Report erroneously held that the “S.K. sample matched Bass.”<sup>14</sup> The Superior Court judge correctly held that the Commissioner was incorrect to reference the mtDNA testing as a “match” for Mr. Bass.<sup>15</sup> The Superior Court correctly found that no conclusions can be drawn from a finding that Mr. Bass cannot be excluded as a source and that mtDNA is not as conclusive as nuclear DNA testing.<sup>16</sup> Indeed, as the State notes, mtDNA cannot be used to produce a unique identification.<sup>17</sup>

In *Purnell v. State*, this Court found that the petitioner established new evidence sufficient to overcome the relevant procedural bar.<sup>18</sup> This Court found new evidence in the form of ballistics evidence, evidence inculcating other

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<sup>12</sup> Ans. Br. at 35-37.

<sup>13</sup> A36, citing, *State v. Bass*, 2021 WL 5984262 at \*15 (Del. Super. Dec. 15, 2021).

<sup>14</sup> *Id.*

<sup>15</sup> *State v. Bass*, 2022 WL 2093956 at \*10 (Del. Super. June 10, 2022).

<sup>16</sup> *Id.*

<sup>17</sup> Ans. Br. at 36.

<sup>18</sup> 254 A.3d 1053 (Del. 2021).

individuals, and evidence of Purnell's physical limitations at the time of the incident.<sup>19</sup> Purnell was convicted in April 2008.<sup>20</sup> The entire record and investigation from the 2006 incident was available for review by postconviction counsel, the State, the Superior Court, and this Court.

Mr. Bass' convictions occurred almost 40 years ago. It is not possible for Mr. Bass to develop evidence tending to establish that someone else committed these crimes due to the passage of time. That does not diminish the fact, however, that the improper testimony by the FBI agent cured any doubt in the jury's mind regarding the flawed identifications made by the witnesses.

Next, the State argues that Mr. Bass therefore has no basis to assert actual evidence, even if Podolak's testimony were excluded entirely.<sup>21</sup> The State notes the similarities in the attacks.<sup>22</sup> It is certainly true that the attacks were similar and evinced a similar *modus operandi*. However, that only establishes that the same person likely committed all the attacks. It does not establish Mr. Bass as the perpetrator.

The State further argues that Mr. Bass' commission of other crimes in the same office buildings are evidence of Mr. Bass' guilt. It is true that Mr. Bass stole

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<sup>19</sup> *Id.* at 1113-1114.

<sup>20</sup> *Id.* at 1087.

<sup>21</sup> Ans. Br. at 37.

<sup>22</sup> Ans. Br. at 38-40.

checks from the office buildings. However, as explained in the Opening Brief, Mr. Bass testified that he never returned to office buildings from where he stole checks.<sup>23</sup>

The State asserts that the witness identifications confirm Mr. Bass as the assailant.<sup>24</sup> As explained in the Opening Brief, the identifications were untrustworthy due to police coaching, the limited ability to observe the attacker, direct contradictions, or a combination of all three.<sup>25</sup>

SK failed to identify Mr. Bass despite numerous lineups and hypnosis. Just before trial, members of the Attorney General's office told her the evidence established Mr. Bass was the attacker. In addition, they told her that the attacker was the defendant, who would be seated at one of the tables in the front.

AS initially picked out a different person as the attacker. The police continued to show her lineups, leaving only Mr. Bass as the one constant in each photo array. When she narrowed it down to two photos, the detective told her Mr. Bass was the prime suspect. At trial, AS did not agree with the prosecutor that the shoes seized from Mr. Bass were the shoes she saw the attacker wearing.

Although SM never saw the attacker, two witnesses testified. Christine Shaw identified Mr. Bass from a photo lineup; the detective promptly told her she had

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<sup>23</sup> Op. Br. at 19-20; A527.

<sup>24</sup> Ans. Br. at 41-48.

<sup>25</sup> Op. Br. at 41-44.

selected the right person. Shaw was sure that the person she saw had no beard – perhaps a mustache. Roger Reynolds, the building manager, also identified Mr. Bass after only seeing a portion of the person’s face through a crack in a bathroom stall. Directly contradicting Shaw, Reynolds identified the person as having a bushy beard.

The Superior Court held that the jury “was free to weigh the credibility of these witnesses and the inconsistencies of the evidence as to the identification...Challenges to any flaws in the identification processes are without merit and insufficient to disturb the jury’s verdicts.”<sup>26</sup> However, any challenges to these flawed identifications paled in comparison to the unwavering but improper identification made by Podolak. Even the most effective cross-examination could not overcome Podolak’s excessively certain testimony.

The State cites to other cases in which relief has been denied to petitioners whose cases were tainted by excessive microscopic hair comparison testimony. The sole Delaware case mentioned is *State v. Crump*.<sup>27</sup> *Crump* is inapplicable. In that case, postconviction counsel moved to withdraw. The Innocence Project had previously established through nuclear DNA evidence that Crump’s spermatozoa was on pubic combings from the victim.<sup>28</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> 2017 WL 6403510 (Del. Super. Dec. 14, 2017)

<sup>28</sup> *Id.* at \*1.

In *Duckett v. State*,<sup>29</sup> the Florida Supreme Court denied relief to a petitioner seeking successive postconviction review after the FBI overstated its microscopic hair comparison testimony. But in *Duckett*, there was significant identification evidence of his guilt, not the least of which was the fact that his fingerprints were commingled with the victim's fingerprints on the hood of his patrol car, where the attack took place.<sup>30</sup> Moreover, the distinctive tire tracks of the patrol car were found at the lake where police located the body.<sup>31</sup> Mr. Bass' case featured no forensic identifications such as fingerprints – except for the overstated hair comparison testimony.

The State's final case, *Pitts v. State*,<sup>32</sup> is similarly inapposite. In *Pitts*, the defendant was obsessed with the victim's wife and made no attempt to conceal his identity when harassing and stalking her. He made numerous threats to kill her husband. A search of *Pitts*' home turned up a receipt for roses sent to the victim's wife. Finally, the victim received a bullet in the mail with his name scratched on it. A handwriting expert identified the writing as that of *Pitts*.<sup>33</sup> The identification of *Pitts* by the victim's wife was not a stranger identification as was the case in Mr. Bass' trial. As such, this case is not relevant, either.

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<sup>29</sup> 231 So. 3d 393 (Fla. 2017).

<sup>30</sup> *Id.* at 397.

<sup>31</sup> *Id.*

<sup>32</sup> 591 S.W. 3d 786 (Ark. 2020).

<sup>33</sup> *Pitts v. State*, 617 Ark. 849, 850 (Ark. 1981).

Every microscopic hair comparison case is certainly different, and some petitioners will be entitled to relief while others will not. Mr. Bass has met the *Purnell* standard for overcoming the procedural bar to consideration of his successive postconviction case. It was error to hold otherwise.

## **CONCLUSION**

For the foregoing reasons as well as those stated in the Opening Brief, Appellant Alan Bass respectfully requests that this Court reverse the judgment of the Superior Court.

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