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Case Number 218,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

OPENING BRIEF

COLLINS & PRICE

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Dated: August 9, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

Other Authorities

NATURE OF THE PROCEEDINGS

The Superior Court case

Mr. Bass had a robbery case that slightly preceded the rape case that is the subject of this postconviction matter.[1] He went to trial on that case on April 27, 1983 and was convicted of some charges and not others.[2] The Superior Court sentenced Mr. Bass to 25 years.[3] This Court affirmed his convictions and sentence.[4] That sentence concluded on September 8, 2003.[5] Since then, Mr. Bass has been serving the sentence for the rape case that is the subject of this postconviction matter.

In Mr. Bass' rape case, a grand jury returned an indictment[6] on January 18, 1983 alleging criminal offenses arising out of three incidents:

As to victim SK:[7]

I. Burglary Third Degree
II. Robbery First Degree
III. Rape First Degree
IV. Kidnapping First Degree
(November 10, 1981)

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[1] ID No. 83000074DI.
[2] A822; D.I. 9.
[3] A824; D.I. 16.
[4] A825; D.I. 28.
[5] A600.
[6] A82-85.
[7] This Brief adopts the Superior Court's practice of using initials to identify the victims. *See, State v. Bass*, 2022 WL 2093956 at *1, fn. 6 (Del. Super. June 10, 2022).

As to victim AS:

V. Burglary Second Degree
VI. Robbery First Degree
VII. Rape First Degree
VIII. Kidnapping First Degree
(July 10, 1982)

As to victim SM:

IX. Burglary Second Degree
X. Attempted Robbery First Degree
XI. Kidnapping First Degree
(August 26, 1982)

On May 20, 1983, defense counsel filed a motion to sever the offenses.[8] The Superior Court denied the motion on May 23, 1983.[9] The Court also denied motions to suppress the out-of-court identifications and the blood typing evidence.[10]

Mr. Bass' case proceeded to trial on May 31, 1983 and lasted four days. The jury found Mr. Bass guilty of all counts.[11] The Court dismissed Mr. Bass' *pro se* motion for new trial as untimely filed.[12] The Court sentenced Mr. Bass to five life sentences plus 45 years.[13]

[8] A92-93. Only the first page of the motion is available.
[9] A94.
[10] A95-97, A98-101, A102.
[11] A3; D.I. 11.
[12] A597.
[13] A600-602.

Direct appeal and prior postconviction motions

Mr. Bass appealed to this Court. One of his two issues on appeal tangentially involved microscopic hair comparison. Appellate counsel argued that the FBI expert's testimony about a new (at the time) Minnesota study that showed positive matches in 100% of cases was not a study relied upon by the expert community.[14] This Court rejected this claim, mainly because the expert, FBI Agent Gary Podolak, testified so persuasively about the match that any error in mentioning the new study was not prejudicial.[15] This Court found no error in the Superior Court overruling the defense objection to the testimony.[16] This Court affirmed Mr. Bass' convictions and sentence.[17]

Over the ensuing years, Mr. Bass filed several *pro se* motions for postconviction relief.[18] None of them asserted a claim pertaining to microscopic hair evidence. This Court denied Mr. Bass' most recent *pro se* motion in 2014.[19]

Mr. Bass' current postconviction case

The FBI and United States Department of Justice conducted a comprehensive review of cases in which FBI agents testified about microscopic

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[14] A701-702.
[15] A703.
[16] A702-703.
[17] *Bass v. State*, No. 14, 1984 (Del. Sept. 20, 1985); A699-708.
[18] *See, e.g., State v. Bass*, 2003 WL 21538107 (Del. Super. May 2, 2003)(discussing prior denials of four motions for postconviction relief).
[19] *State v. Bass*, 2014 WL 4793005 (Del. Super. Sept. 26, 2014).

hair comparison evidence. The review found that in over 90% of such cases, the FBI examiners testified erroneously and/or authored lab reports containing false statements. In fact, 26 out of 28 FBI examiners testified erroneously and/or authored reports with false statements.[20]

A Special Counsel for the USDOJ wrote to the Delaware Attorney General on June 25, 2015 to inform him that Mr. Bass' case was one in which the FBI agent, Podolak, committed error by overstating his conclusions and "exceeding the limits of science" in his testimony.[21] The Delaware DOJ took no action on this letter.

Ultimately, the case made its way to the undersigned counsel, who was appointed to file any motions as appropriate. On April 26, 2018, the undersigned attorney filed a Motion for Postconviction Relief.[22] The State filed its response to the motion on August 9, 2018,[23] followed by a reply filed by the defense on September 5, 2018.[24]

Prior to the scheduled evidentiary hearing, the State learned that the Superior Court Prothonotary still had hair evidence from Mr. Bass' 1983 trial. The State sought to send the hair to the FBI for DNA testing, without opposition from

[20] A994-995.
[21] A17.
[22] A867-936.
[23] A937-979.
[24] A981-1001.

postconviction counsel.[25] Mr. Bass agreed to provide a DNA sample for comparison. On February 7, 2019, the Commissioner approved a stipulation regarding FBI testing.[26]

The parties stipulated to the results of the FBI's analysis.[27] The defense submitted a Supplemental Memorandum,[28] followed by the State's Supplemental Response.[29] Briefing concluded with the defense Reply on February 12, 2021.[30]

On December 15, 2021, the Commissioner issued a Report and Recommendation that Defendant's Motion for Postconviction Relief Should Be Denied.[31] On January 26, 2022, counsel filed an Appeal from Commissioner's Findings of Fact and Recommendation.[32] The State filed its Response on February 25, 2022.[33]

On June 10, 2022, the Superior Court issued a Memorandum Opinion adopting the Commissioner's Report and Recommendation and denying

[25] A1002-1003.
[26] A1004-1005.
[27] A1006-1009.
[28] A1010-1058.
[29] A1059-1084.
[30] A1221-1229.
[31] *State v. Bass*, 2021 WL 5984262 (Del. Super. Dec. 15, 2021); A1238-1265.
[32] A1268-1311.
[33] A1312-1369.

postconviction relief to Mr. Bass.[34] Mr. Bass, through counsel, filed a timely Notice of Appeal. This is his Opening Brief.

[34] *State v. Bass*, 2022 WL 2093956 (Del. Super. June 10, 2022); Exhibit A.

SUMMARY OF 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.

In 1983, a jury convicted Alan Bass of Rape First Degree and other charges. Crucial testimony came from an FBI agent and microscopic hair examiner, who testified that hair from pubic combings of two victims matched Mr. Bass' hair in every observable characteristic. The agent, Podolak, touted an unpublished study using FBI methods that matched hairs with 100% accuracy. He also testified that he had never gotten an analysis wrong in over 3,000 attempts.

The identification testimony from the victims and other witnesses was weak. In most cases, the detective told the witnesses that the photo they had selected or narrowed down was the defendant or prime suspect in the case. As to one victim, personnel from the Attorney General's office told her that the defendant was indeed her attacker and would be seated at one of the tables in the front of the courtroom.

Years later, in 2015, the United States Department of Justice and FBI released a statement that they were jointly reviewing all reports and testimony from FBI hair experts from the 1980s and 1990s. They concluded that the examiners' testimony and reports exceeded the limits of science. Since 1999, mitochondrial DNA testing was used to supplement microscopic hair analysis. But

before then, the task force undertook a massive investigation. It revealed that 26 out of 28 FBI examiners testified wrongly about the accuracy of microscopic hair comparison – over 90 percent of cases were affected.

Mr. Bass' case was such a case. In 2015, a USDOJ special prosecutor wrote to the Delaware Attorney General, identifying the error, and notifying him that federally, the USDOJ would waive all procedural defenses to litigants such as Mr. Bass. It does not appear the Attorney General took any action. This postconviction case ensued.

The Superior Court erred in finding that Mr. Bass' motion for postconviction relief does not overcome the actual innocence exception to the procedural bars of Rule 61. It did so by minimizing the pervasive effect of Podolak's testimony about microscopic hair evidence. It did so by ignoring and otherwise downplaying the significant lack of other reliable identification evidence at trial.

Mr. Bass respectfully seeks reversal of the Superior Court.

STATEMENT OF FACTS

The incident involving SK

SK, a legal secretary, was attacked at the law office where she worked on November 10, 1981.[35] The man who came to the office was dressed in black sunglasses, a golf hat, a sportscoat, and a turtleneck. He was wearing plastic gloves.[36] SK could only see the man's cheeks, but thought he was dark-complected and between 20 and 30 years old.[37] The attacker took SK's watch and jewelry and had SK walk into a dark back room and told her not to look at him.[38]

The attacker tied SK's feet up and had her unbutton her pants.[39] SK's head was covered.[40] She stated, "I couldn't see anything. I couldn't see anything at all."[41] The attacker sexually assaulted SK by vaginally penetrating her.[42] He did not ejaculate.[43] The attacker told SK to put her clothes back on and not look at him. SK took her sweater off her head and briefly glimpsed her attacker.[44] The attacker

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[35] A135.
[36] A136.
[37] A137.
[38] A139.
[39] A141-42.
[40] A143.
[41] A143.
[42] A144.
[43] A145.
[44] A145.

went to another room and got a sweater and put it over SK's head, rendering her unable to see. Then SK was tied and gagged.[45]

Prior to Mr. Bass' trial, SK never identified her attacker. The police conducted a live lineup with SK. She viewed six men, none of whom was Mr. Bass. The person SK said looked most like her attacker was a Wilmington police officer.[46] She tried to make a composite sketch of the attacker but had trouble.[47] She was placed under hypnosis prior to a second composite sketch.[48] The police showed SK photo lineups including Mr. Bass' photo on two occasions, and she failed to identify Mr. Bass as the assailant.[49]

At trial, SK testified that when asked to identify her assailant, she was "sure he'd be at one of the tables in the front."[50] At trial, SK identified Mr. Bass as her attacker with absolute certainty.[51] A week before trial, however, SK had met with members of the Attorney General's office.[52] Those individuals told SK that Mr. Bass was in fact the person who committed the attack against her.[53] They told SK that the evidence showed that the person who committed the attack would be at the

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[45] A146.
[46] A190.
[47] A161.
[48] A162.
[49] A170; A193-196.
[50] A126.
[51] A154.
[52] A170.
[53] A171.

defense table.[54] Someone from the AG's office told SK that they had evidence that proved that the person who raped her would be in court.[55]

The prosecutor attempted to rehabilitate SK on redirect by asking whether the Attorney General personnel's statements influenced her identification; she replied that it did not.[56] However the record reflects that throughout two composite sketches (one after hypnosis) and viewing Mr. Bass' photo in two lineups, SK did not identify him. Her in-court identification of Mr. Bass came after the discussion with members of the DOJ.

The incident involving AS

On July 10, 1982, AS was working at an insurance office on Philadelphia Pike.[57] As she was working, a man appeared in her office doorway.[58] He was disguised, wearing sunglasses and a sweater covering most of his head.[59] She saw the man from the nose down and noted he was thin. He had some facial hair on his chin.[60] The man was very "hyper."[61] He grabbed AS's wrist and demanded

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[54] *Id.*
[55] A171.
[56] A174.
[57] A218.
[58] A223.
[59] *Id.*
[60] A224.
[61] A226.

money. AS offered checks, and the man said, "I don't like that."[62] AS saw that the man was holding a screwdriver.[63]

They went to the conference room. The man threw AS to the floor. He demanded AS's wedding and engagement rings and threatened to kill her if she did not give them to him.[64] He then punched her in the side of the face.[65] On the floor, AS got a good look at the man's shoes: gray slip on Hush-puppie type shoes with a soft crepe sole.[66] He tied AS up and undressed her from the waist down.[67] The attacker raped AS vaginally, although he had difficulty maintaining an erection and it lasted about a minute to a minute and a half.[68] The man gave up and said, "forget it."[69]

The man redressed AS and was much calmer at this point.[70] He covered her with a raincoat and left. AS stayed on the floor for some time and then ran across the street to a restaurant for help.[71]

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[62] A227.
[63] A229.
[64] A232.
[65] *Id.*
[66] A225-226.
[67] A233.
[68] A234.
[69] A235.
[70] *Id.*
[71] A237-238.

AS completed a composite sketch but was never satisfied with it.[72] She testified that she looked at photographic lineups "six or seven times."[73] On one photo lineup, AS picked out three people that resembled her attacker: Mr. Bass, Alvin Purnell, and Harold Germain.[74] When asked who looked more like the attacker, AS chose Purnell.[75] The only common person in the second lineup was Mr. Bass. In fact, for every lineup, the detective shuffled other photos and retained only Mr. Bass' photo.[76] Again, she picked out Mr. Bass (from a more recent photo) and another person as resembling her attacker. This time she said Mr. Bass looked more similar than the other person.[77]

Before they could get to the third lineup, the detective told AS that the photo of Mr. Bass was the photo of the "prime suspect" in the case, and that the detective believed he was AS's rapist.[78] At that point, the detective decided not to administer the third lineup.[79] Ultimately, AS never positively identified her attacker from any photo lineup.[80]

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[72] A240.
[73] A241.
[74] A243.
[75] A318.
[76] A324.
[77] *Id.*
[78] A319.
[79] A320.
[80] A321.

Despite being told by the detective that she had selected the guilty person, AS did not make a positive in-court identification. She testified that Mr. Bass was the right height and build but was heavier than her attacker.[81] (After AS testified, the lead detective testified that Mr. Bass seemed about 10-15 pounds heavier at trial than on the date of the incident.[82] The next witness was another State Police detective, who estimated a 15-20 pound weight gain.)[83]

In any event, AS agreed that people's weight can change. She testified that Mr. Bass resembled the person who attacked her.[84] Then the prosecutor asked if anyone had told her Mr. Bass would be in the courtroom. She replied, "no one told me that positively he would be, no."[85]

The prosecutor tried to get AS to identify a pair of shoes later seized from Mr. Bass as the shoes he was wearing during AS's attack. AS testified that they resembled the shoes in color, but the shoes she saw were suede Hush-puppie type shoes. The evidence shoes were regular leather and had normal rather than crepe-type soles.[86]

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[81] A249.
[82] A314.
[83] A325-326..
[84] A250.
[85] *Id.*
[86] A244-245.

The incident involving SM

The Commissioner's Report describes this incident as follows:

> On Thursday, August 26, 1982, S.M. was alone at work. At approximately 9:00 a.m., she heard someone approaching her from behind. When she turned around, a tall, thin black man wearing a blue shirt walked up to her and covered her mouth with his hand. He asked if she had any money. She said she did not. He led her down the hallway from behind. She tried to scare the man off by first telling him her supervisor was in the other room. After that failed, she told him the police and the Bank of Delaware chief investigator were coming to investigate the theft of her pocketbook that had been stolen a couple of weeks before.
>
> The man took S.M. into a dark, windowless room. The man hit her on the head with his fist and told her to kneel down which she did. She lost control of her bladder and urinated. After she lost control of her bodily functions, she heard clothes rustling and the door at the far end of the room shut. She got up to see if he had left. When she reached the door, she locked herself in the office. The assailant was in S.M.'s office a total of about 3-5 minutes from the time he first came in and grabbed her to the time he left. She armed herself with a metal object and called the police.[87]

SM was unable to identify her assailant. She saw he had a blue shirt, and she saw a black hand over her mouth with long, thin fingers.[88] However, two other witnesses presented identification testimony.

Christine Shaw worked at an office in the same building as SM. On the morning of August 26, 1982 at about 9:00 AM, she was on the way to the ladies'

[87] *State v. Bass*, 2021 WL 5984262 at *9 (Del. Super. Dec. 15, 2021).
[88] A374.

room.[89] Shaw passed a black man coming from the direction of Nipa Labs. He said "hello" to her.[90] Shaw testified the man was about 30, thin, with a short to medium afro and dressed neatly.[91] The man wore tinted glasses, but Shaw testified they were not sunglasses.[92] She was sure that the man did not have a beard but was not sure whether he had a mustache.[93]

Forty days later, the detective showed Shaw a photo lineup. She selected Mr. Bass' photo.[94] She admitted on cross-examination that what stood out about the person she saw was that he had a smaller nose and features "than most [B]lack people you see."[95] None of the other photos in the lineup had those similar features.[96] After Shaw selected Mr. Bass' photo, the detective told her she had picked out the person who the police thought committed the assault on SM.[97] The detective testified that since he would not be showing Shaw any more lineups, "I could not see why I could not tell her, 'well, that's who the suspect is.'"[98] Then the

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[89] A428.
[90] A429.
[91] A430.
[92] *Id.*
[93] A434, 438.
[94] A432.
[95] A435.
[96] A436.
[97] A438.
[98] A454.

detective continued showing Shaw more photos of Mr. Bass,[99] for a total of about five.[100] Unsurprisingly, Shaw also identified Mr. Bass in court.[101]

Roger Reynolds was a building manager at Concord Plaza; his office was on the second floor of the Hagley Building.[102] After SM called the police, the police in turn called Reynolds.[103] He looked around the building and eventually entered the men's room. There was a man in the stall. He could see that the shoes worn by the man were light gray suede shoes with a thin sole.[104] Looking further over the stall, he could see the man "from the eyebrows up."[105] He could also see from looking through the crack in the door that the man had a "bushy" beard.[106]

Despite Reynolds having only seen the man's forehead, the police nevertheless showed him a photo lineup. The detective was sure Reynolds' impression was that the suspect would be in the photo array.[107] He selected Mr. Bass' photo,[108] stating that "the forehead looked similar." Even though Reynolds was the second witness to describe the shoes as suede and having a low heel, he

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[99] A437.
[100] A438.
[101] A434.
[102] A387.
[103] A389.
[104] A391.
[105] A392.
[106] *Id.*
[107] A452.
[108] A393.

nevertheless agreed with the prosecutor that the non-suede leather shoes with a regular heel in evidence looked like the same shoes.[109]

Uncharged misconduct evidence of check stealing

The State introduced evidence of Mr. Bass' history of going into office buildings, stealing checks, and giving them to others to cash. He dressed neatly and attempted to blend into office environments.[110] The main witness for this evidence was Mr. Bass' friend Loretta Schoell. Schoell testified pursuant to an immunity agreement with the State,[111] although it does not appear the jury was informed of that fact.

Mr. Bass at times lived with Schoell.[112] Schoell testified that Alan Bass gave her a check belonging to William Stevens and she cashed it the same day.[113] A dictating machine belonging to Stevens' insurance company was also found in Schoell's car.[114] Schoell did not testify she got the machine from Mr. Bass.[115] This alleged theft was significant because it occurred eight days before the incident with AS at the same office.

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[109] A394.
[110] A353.
[111] A105-106.
[112] A341.
[113] A344-345.
[114] A443-444.
[115] A353.

Six weeks before SM was attacked, her office held a reception. Her wallet was stolen during this event.[116] Schoell testified that she and Mr. Bass had been to the Hagley Building on that day and Bass had stolen SM's wallet.[117]

Alan Bass

Mr. Bass testified that he supported himself by stealing checks and also by getting checks from other people to cash.[118] When he took checks from office buildings, he tried to be unobtrusive and not draw attention to himself.[119] He sometimes went into buildings with three or four other people to steal checks.[120] Mr. Bass did not have much recall as to what checks he took or from whom.[121] Mr. Bass was occasionally confronted by office workers. When that occurred, he would ask for a person or a location and the worker would either give him directions or ask him to leave.[122]

Mr. Bass also testified that he did not return to office buildings where he had previously stolen checks:

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[116] A379.
[117] A350.
[118] A519.
[119] *Id.*
[120] A520-521.
[121] A523-524.
[122] A526.

> I haven't went back to the office buildings personally that I have taken things from because I don't make it a habit of doing that. I may have taken somebody else to, say, the complex or something and waited in the car because I was driving or something, you know, waited for them, but I have never went back anywhere that I have taken anything personally from.[123]

Mr. Bass also testified that he would not say anything to anyone when leaving office buildings.[124] Mr. Bass denied raping or assaulting any of the victims and testified he had never seen them before.[125] Although portions of Mr. Bass' transcript were lost and later reconstructed, it does not appear that either attorney asked him whether he had stolen the dictating machine.

Microscopic hair comparison testimony

FBI forensic examiner Andrew Gary Podolak testified. He had testified approximately 20 times prior to testifying at Mr. Bass' trial.[126] Podolak testified that, with regards to human hair, he can tell, from looking at hair through a microscope, the racial characteristics of the person the hair came from, if the hair fell out naturally or was forcibly removed, if the hair has been cut, and "within approximate time periods, determine how long it's been cut since it's been cut."[127]

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[123] A527.
[124] A527, A697 (reconstructed transcript).
[125] A535-536.
[126] A27.
[127] A30.

Then Podolak explained how he made an association between two hairs by likening it to identifying 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.[128]

He testified that he analyzed hairs found on various clothing items of SK and AS, as well as pubic combings from them. He found "dark brown pubic hairs of negroid origin" in the pubic combings taken from SK. He concluded that hair found in the combings of SK's pubic area matched a sample of the defendant's pubic hair: "I found dark brown pubic hairs of Negroid origin, which microscopically match in every observable characteristic the known pubic hairs of Alan Bass."[129]

He further testified that he compared a hair sample taken from Mr. Bass with hairs taken from AS's clothing and "found a dark brown head hair of Negroid

[128] A34-35.
[129] A52.

origin which microscopically matched the known head hair sample of Alan Bass in every observable microscopic characteristic."[130]

On cross-examination, Podolak admitted that "hair comparisons do not constitute a basis for absolute personal identification" and added, "That's correct. I think the key word is absolute."[131] He admitted that he could not say with "100% surety" whether the hair he identified as Mr. Bass, SK, or AS was actually their hair.[132]

On redirect examination, the prosecutor asked Podolak if it is easier to identify the hairs of a person of one race, compared to all others. Over defense counsel's objection, Podolak testified that "Negroid" hairs were much easier to identify than hairs coming from white people, or people of mixed racial heritage: "Being an expert in the area … my opinion is that Negroid hairs are much easier to identify and compare than Caucasian or mongoloid hairs."[133] He went on to testify that Mr. Bass' pubic hair was unique and had characteristics he had only seen on very few occasions.[134]

Podolak was asked about the understanding that microscopic hair comparisons do not constitute "a basis for absolute personal identification."

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[130] A62.
[131] A67.
[132] A71.
[133] A73.
[134] A74.

Podolak testified that, "Now, over the years, we have persisted in that hair comparisons are a very good means of identification, not a hundred percent, but a very good means of identification. And we have testified to this on our own experience as examiners."[135] Then Podolak, over defense counsel's objection, referred to a recent study where hair examiners matched "questioned" hair samples with "known" hair samples 100% of the time, using the FBI's methodology.[136] After discussing the study, Podolak continued to tout his own skill as a hair examiner. He testified that he had conducted over 3,000 hair comparisons and had never once been unable to distinguish between the hair of two individuals.[137]

The joint FBI/DOJ investigation of microscopic hair comparison testimony by the FBI's expert witnesses

On April 19, 2015, the USDOJ and FBI announced they were working with the Innocence Project to address errors made by FBI examiners prior to 1999 regarding microscopic hair analysis.[138] FBI experts testified improperly in 90% of cases; 26 out of the 28 agents submitted improper reports and/or provided improper testimony.[139] The press release made clear that since 1999, the FBI used

[135] A75.
[136] A77-78.
[137] A78.
[138] A992.
[139] A994.

mitochondrial DNA (mtDNA) testing in addition to microscopic hair comparison and that the agents are no longer making such erroneous statements.[140]

The FBI/USDOJ along with the Innocence Project undertook a review of almost 3,000 cases in which FBI microscopic hair comparison linked a defendant to a crime.[141] Out of the first 268 cases reviewed involving testimony, the FBI witness testified erroneously in 257.[142]

Then-FBI Director James Comey wrote to all governors on June 10, 2016, explaining that until 1999, when the agency began using mtDNA in addition to hair comparison, "we have discovered problems with the way our examiners talked about the nature of hair comparisons." Director Comey further explained:

> In many cases, we have discovered that the examiners made statements that went beyond the limits of science in ways that put more weight on a hair comparison than scientifically appropriate. Hair is not like fingerprints, because there aren't studies that show how many people have identical-looking hair fibers. Especially before we started using mitochondrial DNA to provide additional information regarding the hair evidence, appropriate testimony should have made the limits of hair comparison clear. Unfortunately, in a large number of cases, our examiners made statements that went too far in explaining the significance of a hair comparison and could have misled a jury or judge.[143]

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[140] A994-995.
[141] A995.
[142] A996.
[143] A1000.

The USDOJ and FBI reviewed Mr. Bass' case and found error. Specifically, the review found 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 – this type of testimony exceeded the limits of science."[144] The special prosecutor's June 25, 2015 letter to the Delaware Attorney General provided a transcript of Agent Podolak's testimony and cited specifically to the sections where Type 1 errors occurred.[145] The letter also notified the Attorney General that in the interest of justice, the USDOJ is waiving all procedural default and statute of limitations defenses "in order to permit the resolution of legal claims arising from the erroneous presentation of microscopic hair examination laboratory reports or testimony.[146]

Results of mitochondrial DNA testing during the postconviction case

According to the FBI, mitochondrial DNA (mtDNA) typing cannot be used to conclusively identify an individual because mtDNA is maternally inherited; all maternally related individuals therefore have the same profile. Moreover, "unrelated individuals may have the same mtDNA profile within the sequenced

[144] A18.
[145] A23.
[146] A18-19.

range."[147] Moreover, mtDNA testing cannot determine ethnicity of the DNA contributor.[148]

In Mr. Bass' case, the pubic hair combings of both SK and AS were examined. There was no useable result as to AS's testing, as it yielded a mixed profile. Mixtures of mtDNA are not interpretable.[149] The FBI issued its Laboratory Report on January 14, 2020.[150]

At the time of testing, the CODIS mtDNA database contained profiles for 10,629 individuals, of whom 2,449 are African-American.[151] A DNA sequence from the SK combings and Mr. Bass occurred in 11 out of the 2,449 profiles. As such, the FBI analyst concluded that the upper-bound frequency of occurrence is .074% in the African American population. That is to say, up to one out of every 135 African-Americans could have the same mtDNA sequence as was observed on the evidentiary sample.[152]

No DNA evidence was available related to victim SM.

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[147] A1038.
[148] A1034.
[149] A1035.
[150] A1037-1039.
[151] A1034.
[152] *Id.*

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.

A. Question Presented

Whether the Superior Court erred in denying Mr. Bass' Motion for Postconviction Relief. This issue was preserved by the filing, through counsel, of a Motion for Postconviction Relief,[153] the subsequent briefing and the Appeal from Commissioner's Findings of Fact and Recommendation.[154]

B. Scope of Review

This Court reviews the Superior Court's denial of a motion for postconviction relief for abuse of discretion.[155] Legal or constitutional questions are reviewed *de novo* by this Court.[156]

C. Merits of Argument

Applicable legal standards for actual innocence postconviction claims

Subsequent motions for postconviction relief are summarily dismissed unless Superior Court Criminal Rule 61(d)(2) applies:

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[153] A867-936.
[154] A1268-1311.
[155] *Swan v. State*, 248 A.3d 839, 855 (Del. 2021).
[156] *Green v. State*, 238 A.3d 160, 173 (Del. 2020).

> 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; or (ii) pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.[157]

To qualify under the actual innocence exception, the movant bears the burden of establishing:

> (1) the evidence is such as will probably change the result if a new trial is granted;
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> (2) the evidence was discovered after trial and could not have been discovered before by the exercise of due diligence; and,
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> (3) the new evidence is not merely cumulative or impeaching.[158]

This Court recently discussed the actual innocence exception in *Purnell v. State*. This Court considered several evidentiary items that were knowable at the time of trial and were "unavailable *to him* at trial" due to his attorney's disabling conflict of interest.[159] This Court noted that satisfying the actual innocence test is "by design, a heavy burden, and such meritorious claims are exceedingly rare."[160]

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[157] Super. Ct. Crim. R. 61(d)(2).
[158] *Purnell v. State*, 254 A.3d 1053, 1097 (Del. 2021).
[159] *Id.* at 1060 (emphasis in original).
[160] *Id.* at 1100.

The new evidence must be persuasive enough that, "when considered in the context of all the relevant evidence by a properly instructed jury, is such as will probably change the result if a new trial were granted."[161]

The *Purnell* Court also held that innocence of the acts underlying the charges requires "more than innocence of intent; it requires new evidence that a person other than the petitioner committed the crime."[162] This language first appeared in *State v. Taylor*.[163] Milton Taylor sought to invoke the actual innocence exception not on the basis that he did not commit the crime, but rather, that he could not have formulated the requisite intent for first degree murder. In support of this theory, Taylor presented new forensic and psychological evidence tending to establish that Mr. Taylor lacked intent to commit the crime.[164] The Superior Court, citing federal habeas precedent, held that "a petitioner who argues only that he lacked the requisite intent fails to establish a strong inference of actual innocence under amended Rule 61."[165] This Court affirmed the Superior Court's holding.[166]

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[161] *Id.* at 1114.
[162] *Id.* at 1095.
[163] 2018 WL 3199537 (Del. Super. June 28, 2018).
[164] *Taylor* at *6-7.
[165] *Id.*at *7.
[166] *Taylor v. State*, 2019 WL 990718 (Del. Feb. 27, 2019).

Due process and eligibility for relief after the revelation of erroneous microscopic hair comparison testimony by federal agents

As noted, the USDOJ waived all procedural defenses and statutes of limitations in cases with identified microscopic hair comparison misstatements.[167] Courts have also granted relief from procedural bars long after convictions became final. In the *Commonwealth of Massachusetts v. Perrot*,[168] the Superior Court granted defendant's Motion for a New Trial based on a showing that the microscopic hair comparison testimony of the FBI expert in the case exceeded the limits of science. The *Perrot* Court opined that the microscopic hair comparison evidence was new and material, and "constitutes a strong finding. It is not a close call; it is a determination that recognizes the strength of the inadmissible statements and opinions that [the FBI expert] conveyed to the jury, and recognizes that without that evidence, the Commonwealth's claims of [defendant's] violence were open to several lines of attack conducive to the creation of reasonable doubt."[169]

The Pennsylvania Supreme Court in *Commonwealth v. Chmiel* has also addressed microscopic hair comparison evidence and found it is new evidence and

[167] A18-19.
[168] 2016 WL 380123 (Mass. Super. Ct. Jan. 26, 2016).
[169] *Id*. at *42 (emphasis added).

material, overcoming procedural bars.[170] Of the FBI's admission of error in microscopic hair comparison cases, the Court held:

> [T]he FBI press release is not old wine in a new bottle … it was a public admission by the FBI, as the nation's premier law enforcement agency and the proponent of the forensic technique, of widespread error. It is this concession … that triggers the … window within which [petitioner] was required to file his claim. The concession did not exist prior to April 20, 2015.[171]

In *Chmiel*, the hair expert was a state police officer who did not work for the FBI and was never trained by the FBI.[172] As such, Chmiel's case was not one reviewed by the USDOJ/FBI. At trial, the officer confined his testimony to stating the hairs from a homemade mask were microscopically similar to the defendant's but did not make an identification.[173] Nor did he assign any statistical weight to the positive association between hairs.[174] Chmiel had tried on the homemade mask and made preparations for a home invasion robbery that resulted in three murders.[175] The Court on remand found that the state police officer did not commit any of the three error types identified by the FBI/USDOJ and properly limited his testimony.[176] Moreover, the Court found that there was no likelihood of a different

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[170] 173 A.3d 617 (Pa. 2017).
[171] *Id*. at 626.
[172] *Commonwealth v. Chmiel*, 240 A.3d 564, 569 (Pa. 2020).
[173] *Commonwealth v. Chmiel*, 2019 WL 2090611 at *14 (Pa. Com. Pl May 13, 2019).
[174] *Id.*
[175] *Id.* at *6-7.
[176] *Id.* at *17.

verdict without the microscopic hair comparison evidence. Chmiel confessed to his brother on tape, revealing many inculpatory facts.[177] At trial, he admitted that he planned the home invasion robbery with his brother, but claimed he abandoned the idea once realizing the victims were at home.[178]

For these reasons, the Court on remand denied Chmiel's postconviction motion.[179] The Pennsylvania Supreme Court affirmed.[180]

In federal habeas cases, the Government admits error as to microscopic hair comparison evidence. The question then becomes whether the error is material. In *United States v. Ausby*,[181] the D.C. Circuit reversed the District Court decision holding that the usual FBI agent overstatement of the hair evidence was not material to the conviction. At Ausby's trial, the expert testified that hairs taken from the victim's apartment and found on her body were "microscopically identical" to Ausby's hairs.

Applying *Napue v. Illinois*,[182] the D.C. Circuit held that the Government's introduction of false testimony is material if the evidence "could…in any reasonable likelihood have affected the judgment of the jury."[183] The Court held

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[177] *Id.* at *21.
[178] *Commonwealth v. Chmiel*, 240 A.3d 564, 567 (Pa. 2020).
[179] *Chmiel*, 2019 WL 2090611 at *22.
[180] *Chmiel*, 240 A.3d at 575.
[181] 916 F.3d 1089 (D.C. Cir. 2019).
[182] 360 U.S. 264 (1959).
[183] *Ausby* at 1092, *citing, Napue* at 271.

that the standard is not even "more likely than not," or preponderance. Rather, the standard is only that the false testimony undermines confidence in the verdict.[184] The evidence is material even if it may not have affected the verdict; rather, "it is material if it reasonably *could* have affected the verdict."[185] The *Ausby* Court framed the question as whether Ausby could establish "that [the FBI agent's] false testimony reasonably could have altered the outcome of his case, thereby undermining confidence in the jury's guilty verdict."[186]

The Court reversed, holding that the District Court should have vacated Ausby's conviction.[187]

The following year, in *United States v. Butler*, the D.C. Circuit again reversed a District Court decision denying relief to a petitioner.[188] In Butler's trial, the FBI agent deployed the same improper testimony: he testified that hairs found on the victim's jacket, shirt and pants "match[ed] in all microscopic characteristics" and were "microscopically the same or alike" to Butler's hairs. The hair expert further testified that "My report and testimony is that these hairs are the same [as Butler's]. They are alike in all identifiable microscopic characteristics."[189]

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[184] *Ausby* at 1093.
[185] *Id.* (Internal citations omitted)(emphasis in original).
[186] *Ausby* at 1093.
[187] *Id.* at 1095.
[188] *U.S. v. Butler*, 955 F.3d 1052 (D.C. Cir. 2020).
[189] *Id.* at 1056.

Once again, the Government waived all procedural defenses and conceded the hair microscopy evidence was false, so the Circuit Court needed only decide whether the use of the hair testimony was material and therefore violated Butler's constitutional rights.[190]

In Butler's case, the defense was able to expose inconsistencies in the testimony of the Government's witnesses in this murder case.[191] Because the Government's witnesses were flawed, the Circuit Court noted the "powerful corroboration" of the hair evidence:

> In the absence of the confirming role played by the false hair evidence, a reasonable juror could have found that the government fell short of meeting its heavy burden on that score, even without the defense advancing a compelling alternative theory.[192]

As such, the *Butler* Court found the hair evidence material in such a manner as to violate Butler's constitutional rights and reversed. The Circuit Court took the opportunity to again explain the materiality of the hair evidence to both Ausby and Butler:

[190] *Id.* at 1057.
[191] *See*, *Butler* at 1054-1055.
[192] *Id.* at 1062.

> In both cases, the jury might well have convicted the defendants based on that [non-microscopic hair comparison] evidence, regardless of the false hair microscopy testimony introduced against them. But Butler need not show that the jury could not (or would not) have convicted him without the false hair evidence**.** Recall that a defendant against who the prosecution introduces false testimony need not show that the jury more likely than not would have acquitted him without that evidence. Rather, "even if the false testimony *may* not have affected the jury's verdict, it is material if the evidence reasonably could have affected the verdict."[193]

State legislatures have also acted to eliminate procedural bars for petitioners whose convictions are potentially tainted by scientific evidence later revealed to be flawed. California and Texas amend their state habeas statutes to permit relief under such circumstances. [194] Connecticut removed the time bar for habeas petitions based on scientific advancements, new guidelines, and expert recantations of scientific understanding.[195] Michigan now permits successive petitions for habeas relief based on scientific evidence and changed science.[196] Such evidence may take the form of shifts in a field of scientific knowledge or consensus, or the method upon which the scientific evidence at trial was based.[197] Nevada has now dispensed with its time bar when defendants present new evidence of factual

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[193] *Id*. at 1064 (quoting *Ausby*, 916 F.3d at 1093)(emphasis in original).
[194] CAL PENAL CODE § 1473 (2019); TEX. CODE CRIM. PROC. ANN. art. 11.073(b), (d) (West 2015).
[195] CONN. GEN. STAT. § 52-582(a) (2019).
[196] Mich. Ct. R. 6.502(G)(2)-(3).
[197] *Id.* at 6.502(G)(3)(a)–(c).

innocence based on forensic evidence that was not available at trial or presents new evidence that materially undermines the forensic evidence presented at trial.[198]

The American Bar Association House of Delegates enacted a resolution in 2017 urging all prosecutors "to consider establishing a policy, in the interest of justice, of waiving any statute of limitations or procedural defense, in order to permit the resolution of post-conviction claims arising from errors that undercut the reliability of the conviction[.]"[199]

The Superior Court erred in finding that the microscopic hair evidence at Mr. Bass' trial was "limited."

The Superior Court began its *Purnell* analysis by noting that the evidence of the expert exceeding the limits of science is new and that "the newness prong is satisfied."[200] The Court also found that the new evidence is neither cumulative nor impeaching.[201] The bulk of the Court's analysis focused on the persuasiveness prong; that is to say, whether the new evidence considered in the context of all the relevant evidence will probably change the result of a new trial.[202]

The Superior Court's Memorandum Opinion minimizes the significant impact of Podolak's false testimony on the jury. It focuses on a few snippets of

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[198] NEV. REV. STAT. 34.930 (2019).
[199] A830-31.
[200] *State v. Bass*, 2022 WL 2093956 at *8 (Del. Super. June 10, 2022).
[201] *Id.*
[202] *Id., citing Purnell*, 254 A.3d at 1114.

cross-examination as demonstrative of the limitations on Podolak's testimony. The record reveals otherwise.

On direct examination, Podolak equated microscopic hair comparison with recognizing 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.[203]

Podolak then testified that as to the pubic combings from SK, the hairs of "Negroid origin" microscopically matched in every observable characteristic the known pubic hairs of Mr. Bass.[204] He made the same claim as to the hair from AS's pubic combings.[205]

The limiting language came upon cross-examination. Podolak admitted that hair comparisons are not like fingerprints and not 100% accurate.[206] When questioned about the disclaimer that hair does not form a basis for absolute

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[203] A34-35.
[204] A52.
[205] A62.
[206] A67.

identification, Podolak responded, "that's correct. I think the key word is 'absolute.'"[207] Although the Superior Court found that last statement to be a limitation on Podolak's opinion,[208] it reads more like Podolak affirming that microscopic hair comparison is a basis for identification. Cross-examination concluded with Podolak admitting that he could not say with "one hundred percent surety" that the hair came from Mr. Bass, AS, or SK.[209]

Had questioning stopped there, the testimony would have been sufficiently limited, and the Superior Court would be correct. But the problems began on redirect examination.

First, Podolak testified that he is more adept at identifying and comparing "Negroid hairs" than other types.[210] In fact, Podolak testified that Mr. Bass' hairs were 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."[211]

Podolak then testified that defense attorneys have disputed FBI examiners' testimony for years because of lack of statistics. He began testifying about a partial, introductory study.[212] This drew an objection, which the Court overruled.

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[207] *Id.*
[208] *Bass*, 2022 WL 2093956 at *9.
[209] A71.
[210] A73.
[211] A74.
[212] A76-77.

In this introductory study, the examiner used the FBI technique "that we taught her" and determined a *match* 100% of the time.[213]

Finally, Podolak touted his own skill as an examiner. He testified that he had performed over 3,000 microscopic hair comparisons and had yet to find any hair from two different individuals "that I cannot distinguish between their hair characteristics."[214]

There was a little recross. Podolak agreed that two hairs from the same head might not be microscopically similar. He testified that is why a certain number of samples is necessary.[215] He also testified that gray hair is more difficult to distinguish than pigmented hair, but the difficulty "usually arises from inexperienced examiners trying to compare those hairs."[216]

The State rested after Podolak's testimony.[217]

In its Memorandum Opinion, the Superior Court held,

> the jury therefore heard that hair comparison analysis was neither one hundred percent accurate nor absolute for personal identification. Considered in its totality, the impropriety of the expert's testimony lacks the requisite force to impact the State's case against Defendant.[218]

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[213] A78 (emphasis added).
[214] *Id.*
[215] A80.
[216] *Id.*
[217] A81.
[218] *Bass*, 2022 WL 2093956 at *9.

In so holding, the Superior Court inordinately focused on a few cross-examination questions and answers and ignored Podolak's egregiously self-validating statements on redirect examination. The jury heard directly from Podolak that Negroid hairs are easier for him to identify. They heard that Podolak concluded Mr. Bass' hair had very unusual identifying characteristics. They heard from Podolak that a forthcoming study established that using FBI methods, an examiner got 100% of hair comparisons correct. They heard Podolak aver that he personally had never been wrong in over 3,000 examinations.

A few qualifying answers on cross-examination cannot undo the absolute certainty with which Podolak identified Mr. Bass' hair. The Superior Court erred in finding this new evidence unpersuasive within the meaning of *Purnell*.

The Superior Court erred in holding that the result of the trial would not change even without the microscopic hair evidence.

Podolak was a wise choice for the State's last witness. His egregiously overstated testimony about the certainty of his identification of Mr. Bass shored up a case that was otherwise based on flawed identifications. The Superior Court erred in finding that without Podolak, the result of the trial would not have changed.[219]

[219] *Bass*, 2022 WL 2093956 at *10.

While it is certainly true that certain elements of the crimes established a *modus operandi*,[220] that only established that the same person very likely committed all three attacks. It is also true that Mr. Bass supported himself by stealing checks. However, he testified that he never went to the same office building twice. The crucial issue at trial was identification. Podolak established identity through overstated hair evidence. The rest of the trial did not.

SK never identified her attacker before trial, despite hypnosis, a live lineup, and several photo lineups. At the live lineup, she selected a Wilmington police officer as the one most resembling her attacker. It was not until after she met with members of the Attorney General's office that she made an identification in court. That is because that DOJ personnel told SK that they had evidence establishing that Mr. Bass was her attacker. Although she testified that she was not sure the defendant was her attacker until she walked in the courtroom, she admitted that she had been told by the Attorney General's office that her attacker was the defendant, who would be at one of the tables in the front.

AS tried to complete a composite sketch but was dissatisfied with it. She looked at six or seven photo lineups. She picked multiple photos, eventually settling on Alvin Purnell as most resembling the attacker. As the police continued to show her lineups, only Mr. Bass' photo remained in each one. The detective

[220] *See*, *Id.* at 10-11.

eventually told AS that Mr. Bass was the prime suspect and that he believed Mr. Bass to be the attacker. However, despite all that, AS did not positively identify Mr. Bass in court. She indicated that Mr. Bass resembled her attacker. She testified that no one had told her "positively" that Mr. Bass would be in the courtroom. AS did not go along with the prosecutor in identifying the gray shoes from Mr. Bass. The shoes were the right color, but AS saw suede Hush-puppie type shoes with a different sole than the shoes in evidence.

The identification of Mr. Bass in the SM attack came from other witnesses, because SM never identified her attacker. Forty days after the incident, police showed Christine Shaw, who worked in the same office building as SM, a photo lineup. She selected Mr. Bass, because he had a smaller nose and other features "than most Black people you see." Shaw was sure the man did not have a beard but was unsure about a mustache. Again, the detective tainted any in-court identification of Mr. Bass by telling Shaw that she had selected the right person. To make matters worse, the detective continued showing Shaw photos of Mr. Bass.

Despite Shaw's certainty that the person she saw had no beard, building manager Roger Reynolds was sure the man he saw through a crack in the bathroom stall had a bushy beard. Also, despite only seeing the man in the stall from the eyebrows up, he nevertheless was shown a lineup by police and identified Mr. Bass – the man with the bushy beard who moments before had no beard and maybe a

mustache. Reynolds described the shoes worn by the man as suede with a low heel. The shoes in evidence were leather with a regular heel.

Of course, none of the victims can be faulted for attempting to make an identification and in most cases being unable to do so. SK, AS, and SM only had fleeting looks at the attacker and were under the most extreme duress. But there was significant reasonable doubt regarding the identity of Mr. Bass as the attacker – without Podolak's vastly overstated identification testimony.

The Superior Court points out that these witnesses were all cross-examined and challenged regarding the identifications made.[221] The 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."[222]

To hold that challenges to the identifications in this trial are "without merit" is demonstrably at odds with the record. The Court holds on the one hand that the identifications were vigorously challenged on cross-examination and on the other hand that all the challenges were without merit. They had merit. Every identification in the case was weak, contradictory, or induced by police or DOJ personnel.

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[221] *Bass*, 2022 WL 2093956 at *12.
[222] *Id.*

Without Podolak, no reasonable juror would find Mr. Bass guilty beyond a reasonable doubt. It was his improper testimony that swept away any doubt about Mr. Bass' guilt. After all, Podolak testified he had never been wrong in over 3,000 identifications he had done personally. And the draft study using methods taught by FBI examiners had a 100% match rate.

For these reasons, the Superior Court erred in finding that without Podolak's testimony, the result of the trial would probably not have changed.

The Superior Court erred in holding that Mr. Bass was required to establish another person committed the crimes.

The Superior Court properly held that the Commissioner erred in finding that the recent mtDNA testing was a "match" for Mr. Bass.[223] The Superior Court properly found that "no conclusions can be drawn from a victim's sample that merely establishes Defendant cannot be excluded as the source."[224] The Court properly noted that mtDNA evidence is not as conclusive as nuclear DNA testing.[225]

Where the Court erred, however, is holding that Mr. Bass' motion must fail because "the new evidence did not *establish* that someone other than defendant committed the crime."[226] The Court is misreading this Court's finding in *Purnell*

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[223] *Bass*, 2022 WL 2093956 at *10.
[224] *Id.*
[225] *Id.*
[226] *Id.* (Emphasis in original).

that "more than innocence of intent; it requires new evidence that a person other than the petitioner committed the crime."[227] This holding simply means that an attempt to assert actual innocence based solely on purported lack of intent – as Milton Taylor did – is insufficient to overcome the procedural bars. In that case, the Superior Court held, "a petitioner who argues only that he lacked the requisite intent fails to establish a strong inference of actual innocence under amended Rule 61."[228]

The Superior Court has transformed that holding into a requirement that Mr. Bass produce a different individual who committed these offenses. Neither *Taylor* nor *Purnell* impose such a requirement upon a petitioner. The only import of the "someone other than defendant" language is to make clear that a petitioner will not overcome procedural bars by asserting the petitioner himself or herself committed the crimes but lacked intent to do so.

***Mr. Bass has met the heavy burden of establishing entitlement to relief under Rule 61(d)(2)*[229]**

The legal rubric for determining whether Mr. Bass overcomes the procedural bar of Rule 61(d)(2) is:

> (1) the evidence is such as will probably change the result if a new trial is granted;

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[227] *Purnell*, 254 A.3d at 1095.
[228] *Id.*at *7
[229] Super. Ct. Crim. R. 61(d)(2).

> (2) the evidence was discovered after trial and could not have been discovered before by the exercise of due diligence; and,
>
> (3) the new evidence is not merely cumulative or impeaching.[230]

The Superior Court held that Mr. Bass established that the evidence is "new" within the meaning of this test, and that the evidence is not merely cumulative or impeaching. The Court erred by finding that the newly discovered evidence that FBI Agent Podolak vastly overstated the accuracy of microscopic hair comparison. His testimony falsely established that he was never wrong, nor were his methods ever wrong. Any limiting statements were undone by his boast of having never once been wrong in over 3,000 tries.

The remaining evidence of identification was weak and did not amount to proof beyond a reasonable doubt. Much of it was the product of disclosures by the Attorney General's office and the detective. Without Podolak's testimony, a different trial result would have probably occurred.

Mr. Bass seeks reversal of the Superior Court's denial of his motion for postconviction relief.

[230] *Purnell v. State*, 254 A.3d 1053, 1097 (Del. 2021).

CONCLUSION

For the foregoing reasons, Appellant Alan Bass respectfully requests that this Court reverse the judgment of the Superior Court.

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