CR-80-40

In The
ARKANSAS SUPREME COURT

EUEGENE ISSAC PITTS,

Petitioner

V.

STATE OF ARKANSAS,

Respondent.

Pulaski County Circuit Court

Fifth Division
60CR-79-471

AMENDED PETITION FOR WRIT OF ERROR CORAM NOBIS

BRIEF OF AMICUS CURIAE THE INNOCENCE NETWORK & NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

Seth Miller, *President**

THE INNOCENCE NETWORK
1100 East Park Avenue
Tallahassee, FL 32301
(850) 561-6767

Steven R. Morrison, *Vice-Chair**
NACDL *Amicus Curiae* Committee
1526 Robertson Ct.
Grand Forks, ND 58201
(617)749-7817

Amelia R.V. Maxfield*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street N.W., 12th Floor
Washington, D.C. 20036
(202) 465-7646

Attorneys for *Amicus Curiae*

Russell L. Hirschhorn*
Patrick Rieder *
Martine Seiden*
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000

J. Blake Hendrix
ABN # 86066
FUQUA CAMPBELL, P.A.
Riviera Tower
3700 Cantrell Road, Ste. 205
Little Rock, AR 72202
(501) 975-7123 - direct

On behalf of Attorneys for *Amicus Curiae*

*Not admitted in this Court

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INTEREST OF AMICUS CURIAE

The Innocence Network (the "Network") is an association of more than sixty organizations dedicated to providing pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The sixty-nine current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. Based on its experience exonerating innocent individuals and examining the causes of wrongful convictions, the Network has become keenly aware of the role that unreliable or improper scientific evidence has played in producing miscarriages of justice, particularly in cases where the prosecution is largely dependent on expert forensic testimony. The so-called "science" underlying such testimony and the resulting convictions has been exposed as flawed and, in some cases, outright false.

In approximately half (46%) of the 337 convictions overturned through DNA evidence in the United States, flawed or inaccurate forensic evidence played a role in the wrongful conviction. Nearly one-quarter of wrongful convictions overturned have involved the use of microscopic hair analysis.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or

misconduct. Founded in 1958, NACDL has a nationwide membership of approximately 9,000 direct members in 28 countries, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files amicus briefs in the U.S. Supreme Court, this Court, and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. To improve the reliability of forensic science, NACDL has been working with the U.S. Department of Justice, the FBI, and the Innocence Project on an unprecedented review to identify cases in which testimony or reports on microscopic hair comparison analysis exceeded the limits of science. NACDL also is working with the U.S. Department of Justice to notify all defendants whose cases were affected by the 1996 Office of the Inspector General Report, which identified unethical and improper practices within the FBI laboratory.

Especially in convictions resting on purportedly scientific evidence, the Network and NACDL are committed to ensuring that convictions are premised upon accurate and reliable forensic work – an interest directly implicated by Eugene Issac Pitts' case.

STATEMENT OF FACTS

In the interest of brevity, the Network and NACDL adopt by reference the summary of facts in Mr. Pitts' amended Writ of Error Coram Nobis, Writ of Audita Querela, or Other Relief Based on Newly Discovered Evidence filed on October 26, 2015 and in the Addendum accompanying it.

SUMMARY OF ARGUMENT

The issue for this Court is whether there is a reasonable probability that Mr. Pitts' conviction would not have been rendered, or would have been prevented, had the State, the Court and the jury known that the hair comparison evidence introduced at his trial – which was the foundation of Mr. Pitts' conviction – exceeds the limits of science. The answer is indisputably yes. This Court should therefore grant Mr. Pitts the relief requested and order that a hearing take place in the trial court to determine that Mr. Pitts is entitled to a new trial.

In 2013, thirty-four years after Petitioner Eugene Issac Pitts was convicted, the Federal Bureau of Investigation ("FBI") admitted for the first time that its agents provided scientifically invalid evidence involving the use of microscopic hair analysis in thousands of cases. *See* Joint Press Release, *FBI Testimony On Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review: 26 of 28 FBI Analysts Provided Testimony or Reports With Errors*, April 20, 2016, https://www.fbi.gov/news/pressrel/press-releases/fbi-

testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review (hereinafter "Joint Press Release"). The FBI has since undertaken a review of every case in which its agents proffered microscopic hair comparison evidence to connect a defendant to a crime and concluded that in over 90% of these cases – including in Mr. Pitts' case – the hair comparison testimony offered at trial is scientifically invalid. *See id.* With respect to Mr. Pitts, the FBI issued a written report dated December 29, 2014, entitled "Microscopic Hair Comparison Analysis Result of Review," and concluded that on six separate occasions former FBI Special Agent Malone gave testimony that "exceeds the limits of science." Memorandum from U.S. Federal Bureau of Investigation, *Microscopic Hair Comparison Analysis Results of Review*, (Dec. 29, 2014). Put simply, were the State to offer today the same testimony used to convict Mr. Pitts, it would be inadmissible as a matter of law.

Scientifically invalid testimony is a leading contributor to wrongful convictions. Of the 337 DNA exonerations in the United States, approximately half (46%) have involved faulty and misleading forensic science evidence, and nearly a quarter involved the use of so-called microscopic hair analysis. *See* Innocence Project, *DNA Exonerations Nationwide*, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide. The FBI's concession that its agents had been providing

false "scientific" testimony for decades, and its commitment to reviewing individual cases and notifying courts, defendants, and prosecutors where its agents provided such testimony, is an historic step to address the miscarriages of justice caused by this discredited technique.

Throughout the long appellate history of this case, the courts and the State repeatedly returned to the testimony offered by former FBI Special Agent Malone to uphold Mr. Pitts' conviction. In doing so, they repeatedly ignored Justice Purtle's dissenting opinion in which he stated:

> I think the hair which supports this conviction is not strong enough to bear the weight of the burden of the sentence of life without parole. There is nothing else upon which this verdict could stand. I am of the opinion that the facts in this case are so weak that they cannot uphold the verdict pronounced by the jury.

Pitts v. State, 273 Ark. 220, 231, 617 S.W.2d 849, 855 (1981) (Purtle, J. *dissenting*). The majority opinion also found that the jury "could certainly have relied upon [former Special Agent Malone's hair microscopy testimony] in returning a verdict of guilty." *Id.* at 225, 617 S.W.2d at 852. The fundamental importance of the hair comparison testimony to Mr. Pitts' conviction is indisputable. And unlike the appellate opinions from 1981, today we know that the hair comparison testimony used to convict Mr. Pitts was false and misleading, passed off as "scientific" evidence of guilt, without which there is insufficient

evidence to support a conviction.

In most states, "newly discovered evidence" statutory schemes or common law doctrine accommodate claims that new evidence establishes that scientific or expert testimony proffered at trial has been invalidated. These legal procedures allow the courts to weigh the materiality of the evidence at issue to ensure that justice is done.[1] These results are occurring with even greater frequency across the country in cases involving microscopic hair analysis. *See, e.g.*, *Reid v. Connecticut*, No. CV020818851, 2003 WL 21235422, at *13-20 (Conn. Super. Ct. May 14, 2003) (granting a new trial pursuant to CONN. GEN. STAT. ANN. § 52-270 (West 2015)); *Massachusetts v. Perrot*, No. 85-5415, 5416, 5418, 5420, 5425, 2016 WL 380123, at *35 (Mass. Super. Jan. 26, 2016) (granting new trial pursuant to the Massachusetts Rules of Criminal Procedure); *Wisconsin v. Armstrong*, 2005

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[1] *See,e.g.*, TX. CODE. ANN., CRIM. PROC. ART. 11.073 (allowing for a writ of habeas corpus where a conviction rests on discredited scientific evidence); *Maxwell v. Roe*, 628 F.3d 486, 507 (9th Cir. 2010) ("[T]o permit a conviction based on uncorrected false material evidence to stand is a violation of a defendant's rights under the Fourteenth Amendment."); *New Jersey v. Behn,* 868 A.2d 329, 343 (N.J. Super. Ct. App. Div. 2005) (defendant was entitled to new trial based on newly-discovered comparative bullet lead analysis evidence).

WI 119, ¶113 (Wis. 2005) (granting a new trial in the interest of justice pursuant to WIS. STAT. § 974.06 (West 2015)).

Yet the post-conviction law of Arkansas is uniquely restrictive, and its application to the facts of this case would preclude this Court from weighing the materiality of the evidence that the proffering agency now – thirty years later – concedes was false. *See* ARK. CODE ANN. § 16-91-105(b) (West 2015) (requiring a defendant to move for a new trial based on newly discovered evidence within thirty days of conviction). This result would be contrary to fundamental notions of due process and contrary to the goal of the FBI audit – to identify cases like Mr. Pitts' where false testimony was introduced at trial and allow courts to determine the impact of such testimony on the outcome of the verdict. This purpose is echoed by the Department of Justice, which has agreed to waive any procedural objections that might otherwise be available in federal hair audit cases to ensure this goal is met. *See* Joint Press Release. In fact, the Department of Justice will concede that the testimony given by FBI hair examiners was false evidence. Spencer Hsu, *In a First, Judge Grants Retrial Solely on FBI Hair 'Match,'* WASH. POST, Feb. 3, 2016.

The forensic community has similarly accepted its duty to correct fundamental miscarriages of justice resulting from flawed science. Significantly, the American Society of Crime Laboratory Directors/Laboratory Accreditation

Board (ASCLD/LAB), the primary crime laboratory accrediting agency in the United States, sent notice to state crime labs informing lab directors of the FBI audit, alerting them to the potential need and obligation to conduct a state audit, and issuing the following reminder:

> We have an ethical obligation to take appropriate action if there is potential for, or there has been, a miscarriage of justice due to circumstances that have come to light, incompetent practice or malpractice.

Tara Dolin, Notification from the ASCLD/LAB Board of Directors to Interested Parties Concerning Potential Issues with Hair Comparison Testimony, http://www.ascld-lab.org/notification-from-the-ascldlab-board-of-directors-to-interested-parties-concerning-potential-issues-with-hair-comparison-testimony.

Because there is no adequate remedy under Arkansas' newly discovered evidence statute, Mr. Pitts has petitioned this Court for leave to proceed in the trial court under the writ of error *coram nobis*. The writ allows courts to grant relief from a conviction "under compelling circumstances to achieve justice and to address errors of the most fundamental nature." *State v. Larimore*, 341 Ark. 397, 406, 17 S.W.3d 87, 92 (2000). It should be granted where, as here, "there [is] a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the exculpatory evidence been disclosed at trial." *Id.* at 408, 17 S.W.3d at 93. The FBI's admission, combined

with Justice Purtle's dissenting opinion, leaves no room for doubt that there is a reasonable probability that Mr. Pitts' conviction would not have been rendered, or would have been prevented, without former Special Agent Malone's microscopic hair comparison testimony.

As scientific knowledge advances and the reliability of convictions outside of the realm of DNA evidence is questioned, Arkansas must have a means to ensure that its citizens were not convicted due to flawed or rebuked forensic science. As a due process matter, when the science underpinning a conviction is found to be false, a defendant is entitled to a remedy. This Court should ensure a means for Mr. Pitts and other similarly situated petitioners to seek relief from convictions based on discredited forensic science.

In short, this Court should grant Mr. Pitts leave to proceed in the trial court with a writ of error *coram nobis*.

ARGUMENT

I. FLAWED FORENSIC EVIDENCE LIKE THAT USED TO CONVICT MR. PITTS IS SCIENTIFICALLY INVALID

A. Faulty Forensic Evidence and Related False Testimony Have Contributed To The Convictions Of Innocent People

In the United States alone, DNA evidence has thus far been used to exonerate 337 people who were wrongfully convicted. Faulty and misleading forensic evidence – like the hair comparison evidence on which Mr. Pitts'

conviction is based – contributed to the underlying conviction in approximately half of these cases. *See* Innocence Project, *Unvalidated or Improper Forensic Science*, http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science. Indeed, a study analyzing the trial transcripts of 137 individuals who have been exonerated and whose trials included the introduction of forensic evidence found that 60% involved invalid forensic testimony. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009). The study also found that the scientifically invalid testimony "was not the product of just a few analysts in a few states, but of 72 forensic analysts employed by 52 laboratories or medical practices in 25 states." *Id.* at 9.

Nationwide, DNA exonerations prove that flawed forensic science and misleading testimony based on faulty forensic techniques are devastating to the truth-seeking function of the criminal justice system, and that what often appears to be conclusive evidence of guilt is not always reliable. Because crime labs can subject genetic material to DNA analysis in no more than approximately ten percent of all criminal cases, labs oftentimes rely upon other forensic techniques. *See* Daniel S. Medwed, *California Dreaming: The Golden State's Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1440 (2007); *see also* The National Registry of Exonerations, Univ. of Mich. Law Sch.

& Ctr. on Wrongful Convictions at Northwestern Univ. Sch. of Law, https://www.law.umich.edu/special/exoneration/Pages/about.aspx. Petitioners have been exonerated when the testimony of forensic experts was discredited and in cases where the forensic evidence was undermined by the advancement of scientific understanding and the attendant recognition that the conclusions offered by experts in these disciplines at trial were false or misleading. *See* Michael J. Saks & David Faigman, *Failed Forensics: How Forensic Science Lost Its Way and How It Might Yet Find It*, ANN. REV. L. & SOC. SCI. 149, 150-53 (2008).

The number of DNA exonerations has helped highlight the dangers of flawed forensic evidence, leading courts to acknowledge both the unreliability of certain forensic techniques and the perilous effects of misleading testimony relating to such evidence. *See, e.g., Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) ("We have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts."); *see also Glossip v. Gross*, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting) (citing flawed forensic sciences generally, and the FBI's flawed microscopic hair comparison testimony specifically as evidence that the death penalty may be unconstitutional) (internal citations omitted). Accordingly, Congress tasked the National Academies Science ("NAS") with evaluating the scientific validity and reliability of various forensic techniques – including microscopic hair comparison – and examining ways to

improve the quality of those forensic techniques in criminal investigations and trials.

In 2009, the NAS published a report that revealed fundamental flaws in many common forensic disciplines and acknowledged that "[n]ew doubts about the accuracy of some forensic science practices have intensified with the growing numbers of exonerations resulting from DNA analysis (and the concomitant realization that guilty parties sometimes walk free)." Comm. on Identifying the Needs of the Forensic Sci. Cmty., Nat'l Research Council of the Nat'l Acads., *Strengthening Forensic Science in the United States: A Path Forward* (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (the "NAS Report"), at 7. With respect to hair comparison evidence, the NAS was particularly critical:

> No scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population . . . . There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match.'

Id. at 160.

Despite the NAS report, it was not until 2012, following a trio of exonerations in cases where the testimony and lab work of FBI hair examiners factored heavily into the convictions, that the FBI conceded that testimony and lab work done by their hair and fiber unit exceeded the limits of science. *See* Spencer

S. Hsu, *Justice Department, FBI to Review Use of Forensic Evidence in Thousands of Cases,* WASH. POST, July 10, 2012.

B. Forensic Evidence Plays A Key Role In Wrongful Convictions Because Such Evidence Is Generally Perceived As Infallible

Forensic evidence has been elevated "to an unsupported level of certainty," and legal scholars have expressed concern that jurors will "blindly believe forensic evidence," even if there are good reasons to doubt its credibility. *See* Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth* (2006) 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 437. The NAS likewise concluded that juries will give "undue weight to evidence and testimony derived from imperfect testing and analysis," and social science research has further demonstrated how difficult it is for lay jurors to detect flaws in putative scientific evidence. (NAS Report at 4). *See also* N.J. Schweitzer & Michael J. Saks, *Jurors and Scientific Causation: What Don't They Know, and What Can Be Done About It?*, 52 JURIMETRICS J. 433, 450 (2012); Bradley D. McAuliff & Tejah D. Duckworth, *I Spy with My Little Eye: Jurors' Detection of Internal Validity Threats in Expert Evidence*, 34 L. &HUM. BEHAV. 489, 496 (2010); Mark A. Godsey & Marie Alao, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI Effect"*, 17 TEX. WESLEYAN L. REV. 481, 483-84 (2011). Although many forensic disciplines, and in particular hair comparison, are "based on observation, experience, and reasoning without an underlying scientific theory"

(NAS Report at 128), lay jurors typically presume that forensic evidence is neutral and objective, since it is presented with the trappings of actual science and proffered by a well-credentialed "expert" using esoteric scientific jargon. *Id.* at 48, 222.

Research has demonstrated that introducing evidence through an expert witness tends to make jurors less critical of the evidence and more likely to be persuaded by it than they otherwise would be. *See* N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 PSYCHOL., PUB. POLICY & L. 1 (2009). This concept, sometimes called the "gatekeeper effect," suggests that jurors assume that judges review all expert evidence before it gets to the courtroom. *Id.* Courts, including the U.S. Supreme Court, have likewise recognized that "[e]xpert evidence can be both powerful and quite misleading." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 595 (1993); *see also United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse"); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may "assume a posture of mystic infallibility in the eyes of a jury of laymen"); *Arizona v. Krause,* No. 2 CA-CR 2015-0326-PR, 2015 WL

7301820, at *5 (Ariz. Ct. App. Nov. 19, 2015) ("Courts have recognized that jurors may give significant weight to scientific evidence.").

In short, the aura of infallibility associated with "science," the "gatekeeper effect" of expert-delivered testimony, and difficulties understanding expert testimony and detecting flaws in such "science" all contribute to the danger of juries overvaluing forensic evidence even when it is invalid. (NAS Report at 4, 95.) This is particularly true where, as here, former Special Agent Malone was clearly identified as an expert from the FBI Crime Laboratory in Quantico, widely acknowledged as the premier forensic science provider in the nation. That identification enhanced his credibility to the jury, making the false evidence introduced against Mr. Pitts all the more intrinsic to his conviction.

II. THE HAIR COMPARISON EVIDENCE USED TO CONVICT MR. PITTS HAS BEEN DISCREDITED

A. Hair Comparison Evidence Like That Proffered Against Mr. Pitts Is False And Has Contributed To At Least 74 Wrongful Convictions

The use of microscopic hair comparison evidence to associate a defendant with hair found at a crime scene has played a role in no fewer than 74 wrongful convictions. *See* Innocence Project, *DNA Exonerations Nationwide*, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide. Just last month the Massachusetts Superior Court for Hampden County granted George D. Perrot a new trial. In a 79-page decision, the

court explained that the results of the FBI microscopic hair comparison review constituted newly discovered evidence and that the testimony offered by the FBI examiner in that case "exceeded the limits of the science and ought not to have been admitted." *Perrot*, 2016 WL 380123, at *37. Without such evidence the State's case was open to several lines of attack that would lead to reasonable doubt, and therefore a new trial was warranted. *See id.* at *42.

At its most basic level, hair comparison relies on two hypotheses: (1) that a properly trained hair examiner can make an association between an evidentiary hair and a known sample (from a criminal suspect or victim); and (2) that the examiner can provide a scientifically valid estimate of the rareness or frequency of that association.

On July 18, 2013, the FBI – the agency that had trained thousands of hair examiners nationwide and frequently defended the validity of the underlying techniques – admitted that the testimony offered by its hair examiners has for decades been exaggerated and scientifically invalid with respect to the significance of the link between a suspect's hair and a crime-scene hair. *See* Innocence Project, *Memorandum of Potential Post-Conviction Arguments and Authority Based on Discredited Hair Microscopy Analysis*, http://www.americanbar.org/content/dam/aba/events/criminal_justice/Forensics_Update_Post_Conviction_Discredited_Science.pdf. Following that announcement,

the FBI identified three types of testimonial errors that its examiners frequently made:

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

Id. at 1, n.1.

According to the FBI, these testimonial conclusions – all of which were presented to Mr. Pitts' jury – are scientifically invalid. The FBI admitted that "[a]n examiner report or testimony that applies probabilities to a particular inclusion of someone as a source of a hair of unknown origin cannot be scientifically supported." Memorandum from U.S. Department of Justice, *Microscopic Hair Comparison Analysis* (Nov. 9, 2012). The FBI stated that the only scientifically supportable use of hair comparison is "that it could indicate, at the broad class

level, that a contributor of a known sample could be included in a pool of people of unknown size, as a possible source of the hair evidence." *Id.* Testimony regarding a positive association that exceeds this bare conclusion is false as a matter of science. *See id.*

In recognition of both the power of misleading evidence to corrupt the truth-seeking function of criminal trials and the injustice of raising procedural bars to litigating whether the invalid "scientific" evidence they themselves presented to the jury influenced the verdict, the U.S. Department of Justice has agreed for the first time in its history to waive any procedural objections in order to permit the resolution of legal claims arising from this erroneous evidence. *See* Innocence Project, *Memorandum of Potential Post-Conviction Arguments and Authority Based on Discredited Hair Microscopy Analysis*, at 2. Additionally, the FBI Laboratory has agreed to provide free DNA testing if the hair evidence is still available and the chain of custody can be established, pursuant to either a court order or a request by the prosecution. *See* Joint Press Release.

Most recently, the Department of Justice reaffirmed in a letter to the Senate Judiciary Committee on September 15, 2015 that it is critically important to "allow the parties to litigate the effect of the false evidence on the conviction in light of the remaining evidence in the case." The DOJ stated in unprecedented terms that "erroneous statements should be treated as false evidence and that knowledge of

the falsity should be imputed to the prosecution." Letter from Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to United States Senator Richard Blumenthal (Sept. 15, 2015).

B. The Hair Comparison Evidence Introduced Through Former Special Agent Malone Was Erroneous

Former Special Agent Malone's testimony infected Mr. Pitts' trial with all three types of error identified by the FBI. It provides a disturbing example of the impact that the submission of this discredited testimony can have, particularly in a capital case that lacks any other physical evidence connecting a defendant to the crime.

As stated in the results of the FBI's review in this case and illustrated by the transcript excerpts noted below, former Special Agent Malone's testimony fell squarely within all three types of errors identified by the FBI as beyond the bounds of science:

- ". . . for that hair to have come from anybody else but Mr. Pitts it's definitely going to have to have certain qualifications." Error 1 (Tr. 1477.)
- ". . . it was the hair that I matched to Mr. Pitts." Error 1 (*Id.* at 1491.)
- ". . . in my experience, as a hair examiner and over the years I examined thousands and thousands of hairs the only way I have seen hairs matched the way the one from the pants matched Mr. Pitts hair is when in fact it did come from the same man." Error 3 (*Id.* at 1478.)
- ". . . That person, if he does exist each individual microscopic characteristic of his hair would have had to match Mr. Pitts' hairs

exactly. All twenty. There could be no dissimilarities." Error 2 (*Id.* at 1477-1478).

- ". . . [I]f that individual whose hairs matched Mr. Pitts does exist he would have had to be in a position where his hairs would have been deposited on these pants." Error 2 (*Id.* at 1478).

Former Special Agent Malone drove his testimony home by citing his training and experience as an FBI analyst, and testifying about his ability to differentiate the members of the jury by the microscopic characteristics of their hair. (Tr. at 1486). He told the jury that during his training he was:

> given fifty sets of hairs from fifty different individuals. I was also given fifty hairs from the same individuals, but they were all mixed up. And the only way I was qualified as an expert at the FBI lab is if I could go through and match all fifty of the mixed up hairs to the fifty hairs I had which I did without any mistakes.

(Tr. at 1487.)

As the FBI has conceded, there is absolutely no scientific basis for former Special Agent Malone's testimony, in part because the size of the pool of people who could be included as a possible source of a specific hair is unknown. His testimony exemplifies precisely what has been expressly discredited and abandoned by the FBI: implying that hair analysis like that performed by former Special Agent Malone can associate a found hair of unknown origin with a specific individual. Such testimony generally leads a jury to believe that the examiner was able to identify conclusively the defendant as the source of the hair, just as it did in

the *Perrot* case. *See Perrot*, 2016 WL 380123, at *41 (discussing how jurors perceive expert testimony to draw improper inferences); *cf.* Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 HASTINGS L.J. 1159, 1170 (2008) (finding that phrases such as "analytically indistinguishable" and "similar in microscopic characteristics" generally lead jurors to believe that an exact match has been found). Former Special Agent Malone reiterated his experience to the jury and expressed high levels of self-confidence in his own ability to match hairs using the FBI method of microscopic hair analysis. Such firm insistence from an experienced member of the FBI would compel any reasonable jury to assume that microscopic hair analysis could identify an individual as the originator of a hair found at a crime scene.[2]

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[2] Throughout his career former Special Agent Malone was both prolific and erroneous. His work was the subject of the 1996 Office of the Inspector General Report and Department of Justice Investigative Task Force. *See,* U.S. Department of Justice, Office of the Inspector General *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* (1996). He is responsible for at least six other wrongful convictions based on his unreliable analysis and testimony. *See Gates v. District of Columbia* (deposition dated January 10, 2013);

Indeed, former Special Agent Malone's erroneous testimony about a single hair has supported the incarceration of Mr. Pitts for the last 37 years. The late Justice Ingram Purtle's opinion dissenting from this Court's decision to affirm Mr. Pitts' conviction illustrates how important the hair analysis testimony was in this case and leaves no doubt that this Court should approve issuance of the writ and grant the trial court the ability to address Mr. Pitts' request for a new trial. Justice Purtle stated:

> For the first time I am dissenting solely upon the ground that I do not find the testimony of a witness to constitute substantial evidence. Without the testimony of the widow there would only be one possibility of the appellant being connected in any way to this crime. Other than the widow's testimony, one witness, an expert from Washington, D.C., stated that one Negroid hair was found about the decedent's clothing. According to the expert, the 20 characteristics found in the hair were the same as the characteristics found in appellant's hair. There were more than a dozen Caucasian hairs found about the decedent's clothing but none of them were identified. The expert from Washington admitted he could not positively identify appellant by hair like he could by fingerprints.
>
> . . . .
>
> I think the hair which supports this conviction is not strong enough to bear the weight of the burden of the sentence of life without parole. There is nothing else

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Geoff Earle, *Discredited Ex-FBI Agent Hired Back As A Private Contractor Years Later*, NEW YORK POST July 21, 2014.

> upon which this verdict could stand. I am of the opinion that the facts in this case are so weak that they cannot uphold the verdict pronounced by the jury; therefore, I would reverse this conviction.

Pitts v. State, 273 Ark. 220, 227-28, 231, 617 S.W.2d 849, 853, 855 (1981).

Justice Purtle's unprecedented dissent demonstrates both the weakness of the other evidence used to convict Mr. Pitts, and that a new trial, untainted by false "scientific" testimony, would likely result in Mr. Pitts' exoneration. With the absence of any other physical evidence tying Mr. Pitts to the crime, the hair analysis became the lynchpin of the State's case.[3] Given the central importance of the hair analysis evidence, it is clear that there were fundamental errors in the process that led to Mr. Pitts' conviction.

In short, the FBI conceded that a claim that one hair "matches" a specific individual, or was very likely to have originated from an individual, is groundless and unsupportable. Such testimony is particularly damaging when a witness cloaked in scientific expertise testifies – as former Special Agent Malone did – that

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[3] The only witnesses either reported seeing two white men (Mr. Pitts is African American) approaching the car in which the victim's body was later found, or were unable to see the face of the attacker. The victim's wife was the only witness who identified the assailant as Mr. Pitts. She did so despite the fact that the attacker was wearing a mask and it was dark inside the house.

forensic evidence can be "matched" because that testimony is likely to be accepted as conclusive.

III. MR. PITTS IS ENTITLED TO RELIEF BASED ON THE STATE'S RELIANCE ON NOW DISCREDITED MICROSCOPIC HAIR COMPARISON EVIDENCE

Arkansas post-conviction law is inadequate for dealing with flawed or discredited science. Science develops slowly, and the types of revelations that lead to the FBI Microscopic Hair Comparison Analysis Review are rare, but when they occur Arkansas defendants must have a way to get back into court when the science underpinning their convictions is rebuked.

Meanwhile, courts around the country have considered the results of the FBI Microscopic Hair Comparison Analysis Review as sufficient for rehearing or a new trial. *See, e.g.*, *Perrot*, 2016 WL 380123, at *35; *United States. v. Flick*, No. 15-1504, 2016 WL 80669 (W.D. Pa. Jan. 7, 2016) (order granting *pro se* motion for resentencing under 18 U.S.C. § 2255(a), agreeing that the petitioner's guilty plea was an unconstitutional violation of due process because it was based on discredited microscopic hair comparison); *see supra* pp. 6-7.

For over a century, Arkansas has recognized the writ of error *coram nobis* as a vehicle for individuals convicted of a crime to seek post-conviction relief. *See Adler v. State*, 35 Ark. 517 (1880). Although a relatively rare remedy, the importance of the writ cannot be overstated, particularly where, as here, more

traditional vehicles for post-conviction relief are not available.[4]

The purpose of the writ of error *coram nobis* is to "achieve justice and to address errors of the most fundamental nature." *Larimore*, 341 Ark. at 406, 17 S.W.3d at 92 (2000). It secures relief from a judgment where, as here, "there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the exculpatory evidence been disclosed at trial." *Id.* at 408, 17 S.W. 3d at 94.

This Court first recognized the writ in 1880. *See Adler*, 35 Ark. 517. It was

[4] Having been incarcerated for more than three decades, absent amendment of the Arkansas Code, Mr. Pitts would not appear to be entitled to a new trial based on newly discovered evidence, since such motions must be filed within thirty days of judgment. *See* ARK. CODE ANN. § 16-91-105(b) (West 2015). Other Arkansas post-conviction remedies are also inadequate. Mr. Pitts is not entitled to relief under Arkansas Rule of Criminal Procedure 37. *See Cigainero v. State,* 321 Ark. 533, 535, 906 S.W.2d 282, 284 (1995). Relief is similarly unlikely under ARK. CODE ANN. § 16-112-201 (West 2015) because discredited forensic science will rarely establish actual innocence as required under subchapter (1). *See also* Judge Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After A State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629, 632 (2000).

alleged that Adler was legally insane at the time of trial, but because Adler refused counsel and never himself raised the issue of his own sanity, the issue never arose. Because the factual issue of sanity could undermine the judgment against Adler, he was permitted to challenge his judgment using the writ in the court of conviction.

Over the past century, this Court has gradually expanded the scope of the writ to apply to different kinds of fundamental error. It was initially expanded to apply to technical errors made by the courts and to confessions obtained through mob coercion. *See, e.g., Bass v. State*, 191 Ark. 860, 861, 88 S.W.2d 74, 75 (1935) (reviewing early *coram nobis* cases).

Next, after the U.S. Supreme Court adopted the *Brady* doctrine, Arkansas courts recognized that material, exculpatory evidence that was not disclosed by the prosecution implicated the primary purpose behind the writ of *coram nobis* and determined that the writ applies allegations of a *Brady* violation. *See, e.g., Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (listing *Brady* claims as a category appropriate for relief).

The Arkansas Supreme Court also reviewed a petition for the writ of *coram nobis* based on a confession to the crime given by an unrelated party. *See id.* At the time, the writ was not directly applicable to the factual scenario presented. The *Penn* Court analyzed the State of Arkansas criminal procedure and concluded that it would be unconscionable to deny Penn the opportunity to have the trial court

review his case in light of the new and compelling confession because there was no other avenue for Penn to obtain relief in the face of compelling evidence of his innocence. Rather than denying Penn's petition on the grounds of rigid formalism, this Court chose to create a new category – third party confession to the crime of conviction – available for petitioners seeking to overturn their wrongful convictions.

The touchstone of the *Penn* decision was the "rule of reason," *i.e.* "the writ ought to be granted or else a miscarriage of justice will result." *Id.* at 576, 670 S.W. 2d at 429. This Court concluded that in Penn's situation it was appropriate for courts to employ the rule of reason in order to plug a serious procedural gap that, left open, would allow for the innocent to remain incarcerated. *Id.* (quoting Haley, *Coram Nobis and the Convicted Innocent*, 9 ARK. L. REV. 118 (1955)).[5]

The time is ripe for this Court to employ the rule of reason and apply the writ of error *coram nobis* to situations where, as here, the evolution of science results in previously admissible evidence now being discredited and recognized as

[5] Although an allegation of newly discovered evidence is not in and of itself a basis for *coram nobis* relief, *Wallace v. State*, this is not such a case. 2015 Ark. 349, 471 S.W.3d 192 (2015). Rather, this is a case in which the evolution of science has deemed previously admitted microscopic hair comparison evidence as exceeding the limits of science and therefore scientifically unsound.

exceeding the limits of science. This Court is confronted today by the very same situation as it was in 1984, when Penn petitioned for the writ. Mr. Pitts has exhausted his procedural remedies and substantive appeals. His petition is supported by credible evidence that a fundamental error occurred in his trial. The knowledge that the hair comparison evidence presented by former Special Agent Malone is false would have prevented the jury from convicting Mr. Pitts. To ignore the FBI's admission and refuse to review the impact that discredited pseudoscientific evidence had on his case would contravene the principle on which the writ of error *coram nobis* is based.

The claims in discredited forensic science cases will not always adhere to the contours of traditional DNA exoneration cases. But defendants prejudiced by faulty hair comparison evidence are no less entitled to relief. The Microscopic Hair Comparison Analysis Review is not the first time the government has reviewed whether flawed forensic sciences contributed to false convictions, and it will likely not be the last.[6]

[6] In 2005, the FBI conducted a post-conviction review of 2,500 Comparative Bullet Lead Analysis cases from around the country. *See* John Solomon, *Bullet Proof? FBI's Forensic Test Full of Holes*, WASH POST. Nov. 18, 2007. In 1996, the Office of the Inspector General began a review of the FBI crime lab and the Department of Justice simultaneously created a task force to notify defendants. *See* U.S.

Finally, as in *Penn*, the possibility of outside relief should not foreclose this Court from establishing another category where the writ of error *coram nobis* may operate. Executive clemency remains a final outlet to seek justice in Arkansas, but it is granted irregularly and subject to political forces. The Governor's power to grant clemency requests is entirely discretionary and unreviewable. *See* ARK. CODE ANN. § 16-93-204 (West 2015). Petitioners like Mr. Pitts deserve the benefit of the truth-seeking powers and procedures of the courts when they present credible claims that their trial was tainted by fundamental error.

CONCLUSION

For the reasons discussed above, this Court should grant Mr. Pitts leave to proceed in the trial court with a writ of error *coram nobis*.

CERTIFICATE OF SERVICE

I certify that on February 12, 2016, a copy of the foregoing was left in the Attorney General's box at the Arkansas Supreme Court, an electronic version was served on Senior Deputy Attorney General David Raupp by electronic mail, and a copy mailed to the Prosecuting Attorneys Office, 224 S. Spring Street, Little Rock, AR 72201.

Department of Justice, Office of the Inspector General, *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* (1996).

J. Blake Hendrix
Arkansas Bar No. 86066
FUQUA CAMPBELL, P.A.
3700 Cantrell Road, Ste. 205
Little Rock, AR 72202
(501) 975-7123 (direct dial)
bhendrix@fc-lawyers.com

CERTIFICATE OF COMPLIANCE

I certify that I have submitted and served on opposing counsel an unredacted and, if required, a redacted PDF document that complies with the Rules of the Supreme Court and Court of Appeals. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties on February 12, 2016.

J. Blake Hendrix
Arkansas Bar No. 86066
FUQUA CAMPBELL, P.A.
3700 Cantrell Road, Ste. 205
Little Rock, AR 72202
(501) 975-7123 (direct dial)
bhendrix@fc-lawyers.com