IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Petitioner V. JEFFREY A. WOGENSTAHL, Defendant-Appellant	Case No. 2016-0423 Appeal taken from the Hamilton County Court of Appeals First Appellate District C.A. Case No. C-140683 **This is a death penalty case.**

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE INNOCENCE NETWORK

IN SUPPORT OF DEFENDANT-APPELLANT JEFFREY WOGENSTAHL

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***Not admitted in this Court**

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INTEREST OF AMICUS CURIAE

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.

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. Much of the so-called

"science" underlying such testimony and the resulting convictions has been exposed as flawed and, in some cases, outright false.

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 Jeffrey Wogenstahl's case. The *amici* have filed similar briefs in microscopic hair comparison cases in the Florida Supreme Court, Arkansas Supreme Court, and Supreme Judicial Court of Massachusetts.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

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. The use of microscopic hair comparison evidence to associate a defendant with hair found at a crime scene is particularly problematic, having 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.

In 2013, following the exoneration of three men who were convicted due to the erroneous testimony of FBI hair analysts, the FBI admitted for the first time that its agents provided scientifically invalid evidence involving the use of microscopic hair analysis in hundreds of cases. The Innocence Project (a member of *amicus* Innocence Network) and *amicus* NACDL partnered with the FBI and U.S. Department of Justice (DOJ) to review the lab work and testimony of the formerly elite FBI Hair and Fiber Unit through the Microscopic Hair Comparison Analysis Review ("MHCA Review").

The FBI's admission concerning the severely limited probative value of microscopic hair comparison and the concomitant acknowledgement that its agents had nevertheless provided erroneous "scientific" testimony for decades is unprecedented. In honoring its duty to correct the record and to address potential miscarriages of justice, the FBI has committed to reviewing individual cases and notifying courts, defendants, and prosecutors where its agents provided such testimony. The FBI has since reviewed thousands of cases and abandoned the use of this technique in the absence of confirmatory mitochondrial DNA testing. *See,* Spencer S. Hsu, *Justice Department, FBI to Review Use of Forensic Evidence in Thousands of Cases,* WASH. POST, July 10, 2012.

As the nation's leading forensic science agency, the FBI's concession that science of hair comparison only allows a hair examiner to conclude—at most—that an unknown hair *could have* originated form a suspect, has led state agencies and crime laboratory governing bodies to conduct their own retrospective case reviews as well. For example, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the primary crime laboratory accrediting agency in the United States issued the following reminder to its member laboratories:

> 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.

Recognizing that it is critically important for courts to thoroughly evaluate the record in

these cases to ensure that the errors did not taint verdicts, 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. The Department of Justice reaffirmed in a letter to the Senate Judiciary Committee on September 15, 2015, that they are committed to "allow[ing] the parties to litigate the effect of the false evidence on the conviction in light of the remaining evidence in the case." Letter from Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to United States Senator Richard Blumenthal (Sept. 15, 2015). That letter explicitly acknowledges that the flawed testimony was "[...]false evidence and that knowledge of the falsity should be imputed to the prosecution." *Id.* at 2.

Now, as criminal cases affected by the flawed testimony identified through the MHCA Review reach adjudication, courts too are acting to rectify the injustice caused by the introduction of flawed forensic testimony. *See, e.g.*, *Massachusetts v. Perrot*, No. 85-5415, 5416, 5418, 5420, 5425, 2016 WL 380123, at *35 (Mass. Super. Jan. 26, 2016) (ruling that FBI Microscopic Hair Comparison Analysis Review results are newly discovered evidence and granting new trial pursuant to the Massachusetts Rules of Criminal Procedure); *Wisconsin v. Armstrong*, 2005 WI 119, ¶113 (Wis. 2005) (granting a new trial in the interest of justice after DNA testing revealed inculpatory hair was not defendant's); *United States v. Flick* No. 15-1504, 2016 WL 80669, at *2 (W.D. Pa. Jan. 7, 2016) (vacating and correcting defendant's sentence under 28 U.S.C. § 2255 on a finding that FBI microscopic hair comparison analysis is invalid); *See also,* Consent Order, *State of North Carolina v. Bridges,* No. 90-CRS-23102-04 (Mecklenburg County Superior Ct. Oct. 1, 2015) ("The admission of testimony containing the

error types [identified in the FBI review] violated the Defendant's right to due process because it exceeded the limits of science and overstated the significance of the hair analysis to the jury.").

The lower court's decision has important and troubling implications that extend beyond the facts of Mr. Wogenstahl's case. It is vital that this Court grant jurisdiction to clarify for the lower courts what exactly is at issue in MCHA Review cases. The lower court incorrectly issued a blanket statement that the science of hair microscopy is not at issue in MHCA Review cases, when in fact the agreed limits of the science and what types of statements exceed those limits forms the very basis of the review. *State v. Wogenstahl*, 2015-Ohio-5346, ¶ 23. This statement was drawn from one line of the notification letter—a document that also concedes that erroneous and false testimony was given by an FBI expert. *See* Letter to Joseph Deters from Department of Justice (August 20, 2013). While *amici* take no position as to the materiality of the false evidence introduced at defendant-appellant's trial, the lower court's ruling could lead other courts to wrongly find that hair comparison evidence is still valid "science" so long as "limitations language" is offered—even if offered in conjunction with false and misleading claims concerning the capabilities of this forensic discipline. This is not the position of the FBI, the DOJ, the Innocence Project, or NACDL. *See,* FBI Microscopic Hair Comparison Analysis Review Lab Report/Transcript Review Guidance (April 4, 2013) at 2 ("Although transcripts may, at various points, reflect appropriate science or limiting language, individual statements will be evaluated independently with no assessment of materiality.").

The FBI made its position explicit in the notifications generated to guide courts and litigants on the parameters of the MHCA Review. To that end, the FBI now acknowledges that the strongest conclusion supported by science concerning the association between two hairs 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." Letter to Joseph Deters, Hamilton County Prosecutors Office, from U.S. Department of Justice (Aug. 20, 2013). Put differently, an association made by a hair examiner could mean that 1 in 5 people might also be associated with the hair, or 1 in 5 million people. *See, Perrot*, 2016 WL 380123, at * 57. Conclusions beyond the statement that a suspect *could* be a source of a questioned hair exceed the limits of science and are therefore false and misleading testimony. *See* Letter from Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to United States Senator Richard Blumenthal (Sept. 15, 2015).

Moreover, disclaimer language (cited as "limitations language" by the lower court and the FBI) does not mitigate the introduction of false testimony. The lower court improperly implied that the presence of limiting language would somehow cure the false and misleading conclusions that were nevertheless proffered as "scientific" evidence of guilt. But an expert is simply not free to testify falsely so long as she occasionally throws in a disclaimer. False testimony infects the entirety of the expert's opinion and cannot be mitigated or parsed out to save the opinion as a whole. *See Perrot*, 2016 WL 380123, at *41 (the "[...]testimony's effect on the jury requires consideration of his testimony as a whole[...].").

The lower court's decision has the potential to undermine the purpose of the FBI MHCA Review—which is to ensure that the false and misleading evidence proffered by FBI experts did not results in the miscarriage of justice. While the *amici* take no position on the quantum of evidence introduced against Mr. Wogenstahl, we do seek to provide guidance to the Court on the science of hair comparison evidence, the MHCA Review protocols, and the impact that scientific evidence has on lay jurors.

STATEMENT OF FACTS

In the interest of brevity, the Network and NACDL adopt by reference the summary of facts in Mr. Wogenstahl's *Memorandum in Support of Jurisdiction.*

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. The Terms of the Microscopic Hair Comparison Analysis Review Firmly Establish the Parameters of Microscopic Hair Comparison. Testimony that Exceeds Those Limits is False and Erroneous Testimony.

A. The Terms Of The MHCA Review Established The Limits Of The "Science" Of Microscopic Hair Comparison For The First Time

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. For decades, hair comparison evidence proffered by well-credentialed FBI experts was admitted in courts around the country, and in Ohio, on the assumption that those hypotheses had been scientifically validated. They have not.

In 2009, the National Academies of Science ("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.

On July 18, 2013, the FBI—which had always defended the validity of the underlying techniques—admitted for the first time 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 NACDL Joint Press Release, *Innocence Project and NACDL Announce Historic Partnership with the FBI and Department of Justice on Microscopic Hair Analysis Cases* http://www.innocenceproject.org/news-events-exonerations/2013/innocence-project-and-nacdl-announce-historic-partnership-with-the-fbi-and-department-of-justice-on-microscopic-hair-analysis-cases. Put differently, the FBI conceded that the second hypothesis—that a scientifically valid expression of the probative value of the evidence was possible—had never been proven, and that any such conclusions were false as a matter of science.

What is *not* at issue in the MHCA Review, and what was meant by the line the lower court quoted in the FBI position papers—that the "subject of this review" is not "[t]he science underlying microscopic hair comparison"—is the first hypothesis discussed above, the ability of a hair examiner to simply make an association between a known and a questioned hair (though it bears note that the NAS found there was no scientific basis for this ability either). *See supra,* NAS Report.

What *is* at issue are the testimonial conclusions concerning how much weight an association can be given. Such testimony communicates to a jury `that the examiner was able to identify conclusively the defendant as the source – or likely 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).

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 are scientifically invalid. The FBI stated, in announcing the Review, 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." Letter to Joseph Deters, Hamilton County Prosecutors Office, from U.S. Department of Justice (Aug. 20, 2013). As noted, the only scientifically supportable use of hair comparison, according the FBI, 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.*

B. Juries Are Overly Confident In Subjective "Sciences" Such As Microscopic Hair Comparison

The number of DNA exonerations has lead courts and scholars 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).

Courts and scholars have also increasingly recognized that forensic evidence is often elevated by jurors "to an unsupported level of certainty" ; some legal scholars have expressed concern that jurors "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 give "undue weight to evidence and testimony derived from imperfect testing and analysis." NAS Report at 4. Though hair comparison is "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 highly-credentialed "experts" 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.* Social science research has further demonstrated how difficult it is for lay jurors to detect flaws in putative scientific evidence. *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).

Courts, including the United States 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, as here, it is invalid. (NAS Report at 4, 95.) This is true regardless of the presence of so-called "limitations language."

II. THE LOWER COURT IMPROPERLY EVALUATED THE SIGNIFICANCE OF THE MHCA REVIEW

According to the Department of Justice, testimonial error identified by the FBI through the MHCA Review is false testimony. Those "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). In an effort to set a tone for the rest of the country, the DOJ agreed to waive procedural bars in federal cases, which "will allow the parties to litigate the effects of the false evidence on the conviction in light of the remaining evidence in the case." *Id.* at 2.[1]

Such false testimony cannot be severed or parsed to save the opinion as a whole. Particularly where, as here, the erroneous testimony forms the basis of the expert's opinion, it is inextricably intertwined with, and thus colors *all* of, the expert's testimony and conclusions about the hair evidence in this case. *See* NAS Report (finding there is no accepted statistical basis or uniform standards underpinning hair comparison and noting that juries give "undue weight to evidence and testimony derived from imperfect testing and analysis.").

[1] The FBI identified all three types of error in the microscopic hair comparison testimony given in this case. *See* Memorandum from U.S. Federal Bureau of Investigation, *Microscopic Hair Comparison Analysis Results of Review*, (Dec. 4, 2013) (identifying three segments of transcript that contained Error Types 1, 2, and 3).

Without those statements the expert's opinion is irrelevant. One can hardly be qualified as an expert without expressing an opinion that the jury could not arrive at by simple observation. Yet, the lower court attempted to save the "match" between the pubic hair and Mr. Wogenstahl by severing the erroneous testimony from the expert opinion testimony as a whole. *State v. Wogenstahl,* 2015-Ohio-5346, ¶ 38 ("The results of the FBI's review did not have the effect of 'remov[ing] [from] the state's case' those statements in Deedrick's report and testimony that conformed with the scientific standards."). This simply cannot be done. The jury heard the invalid testimony, which repeatedly and erroneously bolstered the conclusions and weight of the hair evidence.

Similarly, so-called "limitations language" cannot be used to mitigate the effect of erroneous or false testimony presented by FBI hair examiners. Under the terms of the FBI review, "limitations language" is wholly irrelevant to whether an error occurred. The FBI instructs its review team to identify specific statements that constitute error, regardless of the presence or absence of limiting language. *See,* FBI Microscopic Hair Comparison Analysis Review Lab Report/Transcript Review Guidance (April 4, 2013) ("Although transcripts may, at various points, reflect appropriate science or limiting language, individual statements will be evaluated independently with no assessment of materiality."). Any effect of the limiting language on the jury is speculative. The DNA exonerations of defendants who were convicted by expert testimony containing both "limitations language" and all three error types prove that the effect of such disclaimers on the jury is negligible. Instead, the court must focus on the effect of the identified error on the outcome of the trial, regardless of the presence or absence of "limitations language."

CONCLUSION

For the reasons stated above *amicus curiae* Innocence Network and NACDL ask the court to accept jurisdiction to rectify the failure by the Court of Appeals to provide appropriate guidance to lower courts on the radical shift in the scientific community's understanding of the evidentiary value of microscopic hair comparison. This Court must now clarify the inquiry under Ohio Rule of Criminal Procedure 33 for lower courts faced with MHCA Review litigation. As science progresses, Ohio will face more claims like Mr. Wogenstahl's. Thus, it is vitally important for this Court to establish clear and coherent case law that correctly articulates the status of microscopic hair comparison.

The *amici* take no view on the merits of this case, but are only concerned that Ohio courts are evaluating microscopic hair comparison claims appropriately. We simply urge this court to accept jurisdiction to give appropriate guidance to lower courts considering these claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2016, a copy of the foregoing was sent electronically to Hamilton County Prosecutor Joseph Deters and Counsel of Record, Assistant Hamilton County Prosecutor Phillip Cummings by electronic mail, and a copy mailed to the Hamilton County Prosecutors Office, 230 E. Ninth Street, Ste. 4000 Cincinnati, OH 45202.

/s/ Kristina W. Supler

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