STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP190-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES HOWARD,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND THE DENIAL OF A POSTCONVICTION MOTION IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, CASE NO. 2009CF1245, THE HONORABLE JEAN A. DIMOTTO, PRESIDING.

# BRIEF OF PLAINTIFF-RESPONDENT

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# BRIEF OF PLAINTIFF-RESPONDENT

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the briefs are adequate to address the legal theories and arguments, and the issues raised can be resolved by application of established law to the particular facts of this case.

I. THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN DENYING RELIEF WITHOUT AN EVIDENTIARY HEARING ON HOWARD'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS BUCCAL SWABS EVIDENCE.

A. Controlling Legal Standards and Standard of Appellate Review.

A criminal defendant is not entitled to an evidentiary hearing on a postconviction motion simply because he requests one. *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433. Rather, to require an evidentiary hearing, the motion must allege sufficient material facts that, if true, would warrant the requested relief; whether a motion meets this standard is a question of law the appellate courts reviews *de novo*. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 14. The defendant is not entitled to an evidentiary hearing if key allegations are merely conclusory or if the record conclusively demonstrates that the defendant is not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 12, 15. Moreover, "[a]t a minimum, a motion, whether made pretrial or postconviction, must '[s]tate with particularity the [factual and legal] grounds for the motion,' Wis. Stat. § 971.30(2)(c) (2001-02), and must provide a 'good faith argument' that the relevant law entitles the movant to relief, Wis. Stat. § 802.05(1)(a) (2001-02)." *Allen*, 274 Wis. 2d 568, ¶ 10.

When a defendant claims that trial counsel "was ineffective by failing to take certain steps [he] must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Byrge*, 225 Wis. 2d 702, 724,

594 N.W.2d 388 (Ct. App. 1999), *abrogated on other grounds*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. In order to obtain an evidentiary hearing on such a claim, the defendant's motion must allege specifically what actions counsel should have taken, it must allege specific material facts demonstrating what the result of such actions would have been and it must allege specific material facts demonstrating how those results would have altered the outcome of the proceeding. *See Allen*, 274 Wis. 2d 568, ¶¶ 18-24, 29-33.

An evidentiary hearing is required only when the postconviction motion alleges sufficient, specific, material facts that, if true, would entitle the defendant to relief. *Allen*, 274 Wis. 2d 568, ¶ 14. An evidentiary hearing is not required if the defendant alleges only his opinion. To be entitled to an evidentiary hearing, the defendant must allege a factual basis for his opinion. *Allen*, 274 Wis. 2d 568, ¶ 21.

The defendant must allege facts that, if true, would meet the legal standard for establishing ineffective assistance of counsel. The ineffective assistance of counsel analysis is straightforward. A criminal defendant alleging ineffective assistance of trial counsel must prove that his trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis. 2d 259, 635 N.W.2d 838.

The standard for assessing a claim of deficient performance is whether counsel's alleged act or omission was objectively reasonable. The court is not limited to the strategies and explanations trial counsel is able to recall or articulate at the postconviction hearing. Rather, the question is whether, under the circumstances of the case as they existed at the time of trial, the challenged conduct or failure to act could have been justified by an attorney exercising reasonable professional judgment. *Koller*, 248 Wis. 2d 259, ¶ 8; *State v. Kimbrough*, 2001 WI App

138, ¶¶ 31-34, 246 Wis. 2d 648, 630 N.W.2d 752. To prove deficient performance, the defendant must show that counsel's act or omission was "objectively unreasonable." *State v. Oswald*, 2000 WI App 2, ¶ 63, 232 Wis. 2d. 62, 606 N.W.2d 207.

To prove prejudice, the defendant must show that counsel's alleged errors actually had an adverse effect on the defense such that the proper functioning of the adversarial process was undermined and the trial cannot be relied upon as having produced a just result. To make this showing, the defendant must prove there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Koller*, 248 Wis. 2d 259, ¶ 9.

On review, the facts found by the postconviction court will be upheld unless clearly erroneous; whether under those facts trial counsel's performance was deficient and prejudicial is reviewed by the appellate court *de novo*. *Koller*, 248 Wis. 2d 259, ¶ 10.

The court need not address both prongs if the defendant fails to prove either one of the prongs. *State v. Johnson*, 153 Wis. 2d 121, 128, 499 N.W.2d 845 (1990).

### B. The circuit court properly denied relief without an evidentiary hearing because the record conclusively demonstrates Howard is not entitled to relief.

A criminal complaint filed March 11, 2009, alleged that on March 7, 2009, Howard was charged with one count of second degree sexual assault (sexual intercourse with inmate by correctional officer) and one count of third degree sexual assault (sexual intercourse without consent) of Shanika T. and one count of second degree sexual assault (sexual intercourse with inmate by correctional officer) and one count of third degree sexual assault

(sexual intercourse without consent) against Marletha R. (2).

On March 19, 2009, Howard, who was represented by attorney Bridget Boyle, waived his right to a preliminary hearing (6). Boyle did not file any pre-trial motions to suppress evidence. A jury trial was held September 14-17, 2010, and Howard was found guilty of the two charges involving Marletha R., and not guilty of the two charges involving Shanika T. (15; 62; 63; 64; 65; 66; 67; 68). Following trial and prior to sentencing, Boyle filed a belated motion to suppress Howard's buccal swabs evidence and the DNA evidence obtained from his buccal swabs. (16). In that motion, she asserted that on March 7, 2009, the Milwaukee Sheriff Department obtained a search warrant authorizing penile and buccal swabs be taken from Howard's person. Howard was taken by law enforcement to the Sexual Assault Treatment Center where medical staff obtained the penile and buccal swabs (16). The motion sought suppression solely on the ground that no return of the search warrant was filed with the clerk within 48 hours of execution of the search as required by statute (16).

In its response to the motion, the State also stated that the buccal swabs had been obtained pursuant to a search warrant. The State acknowledged that the buccal swabs were the source of Howard's DNA profile, and DNA evidence relating thereto was presented at trial (17). The State, however, argued that the post-verdict motion was procedurally barred, and that controlling case law holds that such statutory violation does not warrant suppression of evidence (17). The trial court agreed, and denied the motion on those grounds (69). Howard does not challenge that ruling on appeal.

Howard was sentenced on May 17, 2011 (70). Following sentencing, Boyle filed a Wis. Stat. § 809.30 motion for postconviction relief alleging a juror had been seen sleeping and challenging Howard's sentence as unduly harsh (34). Boyle was allowed to withdraw at

Howard's request, and present counsel, Lew Wasserman, was substituted as counsel for Howard (40).

By Wasserman, on July 23, 2012, Howard filed an amended postconviction motion in which he asserted that Boyle was ineffective because she failed to file a pre-trial motion to suppress Howard's buccal swabs evidence (47). The motion correctly asserted that both Boyle and the State failed to recognize that the search warrant authorizing clothing and penile swabs to be seized from Howard's person at the Sexual Assault Treatment Center did not also authorize the taking of buccal swabs from Howard (47:9). Howard asserted that because the search warrant did not include buccal swabs, a pre-trial motion to suppress Howard's buccal swabs evidence would have been successful (47:11). He asserted that therefore Boyle's failure to file a pre-trial motion to suppress on the ground the search warrant did not include buccal swabs constituted deficient performance and was prejudicial because the resulting DNA evidence was important at trial.

In its response to the amended postconviction motion, the State candidly admitted that the search warrant for the penile swabs and underwear did not include buccal swabs, and that the State had previously failed to recognize that, and had mistakenly asserted that the buccal swabs were taken pursuant to a search warrant (50:2 & n.2). The State argued, however, that the fact the buccal swabs were not collected pursuant to a search warrant did not entitle Howard to relief on his claim that trial counsel was ineffective for failing to file a motion to suppress the buccal swabs. The State correctly argued:

> Had the court suppressed the buccal swabs collected on March 7, 2009, the State could have obtained the defendant's buccal swabs, and in turn his DNA, by filing with the trial court a motion asking the court to order the defendant to provide buccal swabs or the State could have obtained a search warrant authorizing the collection of buccal swabs from the defendant. Since the defendant's DNA would not

> have changed, it is immaterial when buccal swabs were collected from him.

(50:3).

The postconviction court agreed with the State and denied Howard relief without an evidentiary hearing (52).

The postconviction court properly denied Howard relief without an evidentiary hearing. Even if trial counsel had realized the penile swabs search warrant did not include buccal swabs, even if she had made a pre-trial motion to suppress based on that flaw, and even if the motion had been granted, there is no prejudice. After the suppression hearing, the State could have collected Howard's buccal swabs by either court order or by obtaining a new search warrant. The very same DNA profile of Howard would have been obtained, and the same DNA evidence would have been presented at trial. Accordingly, there is no reasonable probability that but for trial counsel's failure to make a pre-trial motion to suppress, the result of the trial would have been different.

At the time a pre-trial motion to suppress would have been filed and arguably granted, the criminal complaint had been filed, which demonstrates indisputably that probable cause for the collection of Howard's buccal swabs existed. The factual portion of the criminal complaint provides:

> Your complainant is a Milwaukee County Deputy Sheriff and bases this complaint upon information and belief.
>
> Upon the statement of Marletha R. Marletha R. states that she was incarcerated in the Milwaukee County Criminal Justice Facility on March 7, 2009. That morning, while inside of her cell, one of the correctional officers (whom she described as being an African-American male, 5'9"- 5'10", 250-280 lbs.) approached her cell door window and asked her if she had a man. He also asked her if she needed anything and she told him that she would like some Tylenol. A short time later, the correctional officer

returned and slid a note under her door. She read the note and it stated, to the best of recollection, "Tylenol is on the way. Are you going to do something for me?" The correctional officer told her to give the note back after she read it and she did so. A short time later, the same correctional officer came back to her cell and told her to stand up and come to the door. After she did so he opened the cell door and entered her cell and then threatened her with discipline if she said or did anything. She then saw that his penis was exposed and he told her that she would be disciplined if she said anything or did not comply and he then made her perform oral sex, that is his penis went into her mouth. He had to leave her cell because an inmate in another cell was having trouble breathing. She states that she was crying while performing the sex act. She says about one half-hour later, the correctional officer returned and opened her cell door and ordered her to get on her knees. He also told her to take off her shirt and pants because he wanted her naked. He again threatened her with discipline if she did not comply. He assisted her in getting undressed and he then forced her to perform oral sex again, that is his penis went into her mouth. He then had her stand against the sink and he stood behind her and attempted to insert his penis into her vagina. He initially was unable to penetrate her so he put his fingers into her vagina and he then put his penis into her vagina. She states that all of this happened without her consent.

Your complainant states that on March 11, 2009, Marletha R. viewed an array of photos that contained a known photo of James Howard (defendant). After viewing the photos, she identified the photo of James Howard as being the person who assaulted her. She said her level of certainty was 90% as being the correctional officer who assaulted her as described above.

Upon the statement of Shanika T. Shanika T. states that on March 7, 2009, she was incarcerated at the Criminal Justice Facility, 949 North 9th Street. Early that morning a correctional officer was looking in the window of her cell and he said, "What's up?" and then said to her, "I'll be back." About 20 minutes later he returned and dropped a

> note on the floor and pushed it under the door with his foot. To the best of her recollection, the note read, "Do you got a man, Are you ready for me?" He then told her to give him the note back and he then left. He returned a short time later, opened the cell door, and told her she had to move and he directed her to a different cell. After taking her to a different cell, he told her to take her pants off and when she refused he grabbed her around the neck and again ordered her to take her pants off. He pushed her head towards his penis and forced her to engage in penis-to-mouth sexual intercourse. He then bent her over the toilet, and inserted his penis into her vagina. She states that all of this happened without her permission or consent.
>
> Your complainant states that on March 11, 2009, Shanika T. viewed a photo array containing a known photo of James Howard (defendant). After viewing the array she identified the photo of James Howard as being the person who assaulted her. She said her level of certainty was 100%.
>
> Your complainant states that on the morning of March 7, 2009, defendant James Howard was employed as a correctional officer in the Milwaukee County Criminal Justice Facility, 949 North 9th Street. That morning he was assigned to the 6th floor control and was working from 10 p.m., March 6, 2009, to 6 a.m., March 7, 2009. Complainant states that Marletha R. and Shanika T. were both being held on the 6th floor on March 6-7, 2009.

(2:2-3).

In addition, the facts stated in the affidavit for the penile swabs search warrant would have been more than sufficient to establish probable cause for buccal swabs as well (50:19-21; 71:11, 61-62, 66-69). Howard has never claimed and does not now claim that no probable cause existed to support a search warrant for the taking of his buccal swabs.

Accordingly, if a pre-trial motion to suppress had been granted, the State could simply have provided the court with those facts, by sworn affidavit or under oath,

and the State would have obtained authorization to collect Howard's buccal swabs by court order or via a new search warrant. Unlike crime scene evidence that may have dissipated or been removed by the time of a suppression hearing, Howard's own DNA would not have changed. It would have made no difference whatsoever to his DNA profile and subsequent DNA evidence linking him to the crimes, whether the buccal swabs used were the ones collected on March 7, 2009, or new ones collected after a successful pre-trial suppression hearing. The same DNA evidence would have been presented at trial. Therefore, there is no reasonable probability that but for Boyle's failure to file a pre-trial suppression motion, the result of the trial would have been different.

This case is comparable to *State v. Ward*, 2011 WI App 131, ¶ 7, 337 Wis. 2d 655, 807 N.W.2d 23, in which the defendant claimed his trial attorney was ineffective for failing to move to suppress the DNA sample taken from him pursuant to a court commissioner's order because the court commissioner did not require the supporting information to be under oath. This court wisely recognized that Ward had failed to prove ineffective assistance of counsel, even though the order authorizing collection of the DNA sample was flawed and the sample could have been suppressed if trial counsel had filed a pre-trial motion to suppress. This court explained:

> Thus, the court commissioner's July, 2005, order was invalid, and Ward's DNA sample taken under that order could have been suppressed.
>
> But that does not end our analysis because even assuming that Ward's trial lawyer should have sought suppression of Ward's compelled DNA sample, the State could have easily cured the matter by submitting an affidavit that recited: (1) the assaults on Ms. D., and (2) that Ward's fingerprints were found in her home even though, as she testified at the trial, she did not know Ward and that to the best of her knowledge Ward had never been in her home during the six or so months she lived there. This would have more than supported a lawful warrant for a sample of Ward's DNA. Accordingly,

> Ward has not shown prejudice under *Strickland* or that his trial lawyer was constitutionally deficient because a lawyer need not do things that accomplish nothing. *See State v. Byrge*, 225 Wis.2d 702, 724, 594 N.W.2d 388, 397 (Ct.App.1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding."), *aff'd*, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477; *Williams v. Chrans*, 894 F.2d 928, 935–936 (7th Cir.1990) (no *Strickland* prejudice when error "would have been cured" by court's response to timely objection).

*Ward*, 337 Wis. 2d 655, ¶¶ 10-11 (citations omitted).

*Ward* controls here. A successful motion to suppress would have accomplished nothing, because the State could easily have cured the error by obtaining a new search warrant or court order by submitting a sworn affidavit reciting the facts available in the criminal complaint and penile swabs affidavit, which were more than sufficient to establish probable cause to authorize collection of Howard's buccal swabs. Therefore, Howard could not prove Boyle's failure to file a motion to suppress the buccal swabs evidence was either deficient performance or prejudicial. Accordingly, the postconviction court did not err or erroneously exercise its discretion by denying Howard's claim without an evidentiary hearing.

Howard does not provide any meaningful basis to distinguish *Ward*. The fact that the State's representatives erroneously stated there was a search warrant because they did not initially realize that the penile swabs warrant did not include buccal swabs is an unfortunate error, but it does not change the analysis or the result of Howard's ineffective assistance of counsel claim. Howard's assertion that the State engaged in dishonest misconduct is not supported by the record, nor does it provide independent grounds for relief.

C. The postconviction court did not err in finding no prejudice in this case because the State would have been able to obtain and present the same DNA evidence even if trial counsel had made a motion to suppress the buccal swabs.

As discussed above, under *Ward*, the postconviction court correctly found there was no prejudice because even if trial counsel had made a successful motion to suppress Howard's buccal swabs that were obtained without a warrant, the State could have subsequently obtained a court order or search warrant for his buccal swabs, the same DNA profile for him would have been developed and all of the same DNA evidence would have been presented at trial. Therefore, there is no reasonable probability that but for trial counsel's failure to bring the motion to suppress, the result of the trial would have been different.

Although the postconviction court used the term "inevitable discovery" as an alternative ground for denying relief, this case is perhaps better characterized as a failure of Howard to prove prejudice than inevitable discovery. Even if characterized as inevitable discovery, however, the postconviction court was not clearly wrong. The inevitable discovery doctrine allows the fruits of an illegal search to be admitted if those fruits would inevitably have been discovered by lawful means. *State v. Schwegler*, 170 Wis. 2d 487, 499, 490 N.W.2d 292 (Ct. App. 1992). This doctrine applies if the State demonstrates (1) a reasonable probability the evidence in question would have been discovered by lawful means but for the police misconduct; (2) the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) prior to the unlawful search the police were also actively pursuing some alternative line of investigation. *Id.* at 500. The

reviewing court determines whether the doctrine applies *de novo*.

The three criteria are met in this case. If Howard's buccal swabs had not been erroneously collected from him without a warrant on March 7, 2009, the State would no doubt have sought and obtained a lawful court order or search warrant for the swabs, thus, there is a reasonable probability his buccal swabs, his DNA profile and the resulting DNA evidence would have been discovered by lawful means but for the police misconduct. The criminal complaint, warrant and affidavit for the penile swabs demonstrate without contradiction that grounds for obtaining Howard's buccal swabs existed on March 7, 2009, the time of the misconduct. Prior to the unauthorized collection of the buccal swabs, the police were actively pursuing alternative lines of investigation: they had obtained a search warrant for his penile swabs and underwear, biological evidence had been collected from the victims at the Sexual Assault Treatment Center and evidence had been collected at the scenes of the alleged assaults.

Howard asserts that under *State v. Pickens*, 2010 WI App 5, ¶ 50, 323 Wis. 2d 226, 779 N.W.2d 1, the inevitable discovery doctrine does not apply because the police were not actively pursuing the legal alternative of a warrant prior to the unlawful search. In *State v. Avery*, 2011 WI App 124, ¶ 33, 337 Wis. 2d 351, 804 N.W.2d 216, however, this court recognized that *Pickens* did not control because in *Avery*, unlike in *Pickens*, the police had already obtained a search warrant pertaining to the defendant. Here, as in *Avery*, the police had already obtained a search warrant for Howard's residence and a search warrant for collection of his underwear and penile swabs at the Sexual Assault Treatment Center.

Moreover, unlike Howard's case, *Pickens* did not arise in the context of an ineffective assistance of counsel claim for failure to file a suppression motion.

### D. The postconviction court properly refused to find that the State had intentionally manipulated the system.

As the prosecutor explained, he erroneously believed and represented that Howard's buccal swabs were collected pursuant to a search warrant because until he received Howard's amended postconviction motion, he did not realize the search warrant for the penile swabs did not also authorize the collection of Howard's buccal swabs (50:2 n.2). There is absolutely nothing in the record to suggest that this was anything but an honest mistake. The same facts that established probable cause for the search warrant for the penile swabs also would have provided probable cause for collection of Howard's buccal swabs. There is no reason that the detectives who sought the penile swabs search warrant would have intentionally, for some nefarious purpose, have failed to request authorization for collection of the buccal swabs. Obviously, the detectives who obtained the search warrant for the penile swabs simply inadvertently failed to also include a request for authorization for the buccal swabs.

The postconviction court properly found the State had not intentionally manipulated the system by taking the initial erroneous position that Howard's buccal swabs were collected pursuant to a search warrant. Consistent with long-standing law, the Wisconsin Supreme Court held in *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996), that the doctrine of judicial estoppel, which requires a finding of intentional manipulation of the judicial system, does not apply where the party's assertions were based on mistake. The court explained:

> The doctrine looks toward cold manipulation, not an unthinking or confused blunder. Absent an attack on judicial integrity, the inapplicability of the doctrine is justified by the more compelling interest of allowing a party to correct an innocent mistake, in light of the high stakes involved in a criminal proceeding.

*Petty*, 201 Wis. 2d at 354.

Here, the State was not required to be forever bound by its mistaken belief that the penile swabs search warrant also authorized collection of Howard's buccal swabs.

For all of these reasons, trial counsel's failure to file a pre-trial motion to suppress Howard's buccal swabs was not deficient performance and there is no reasonable probability that the result of the trial would have been different if trial counsel had filed such a motion. Accordingly, the postconviction court properly denied Howard's claim without holding an evidentiary hearing.

## II. HOWARD FAILED TO PROVE THAT TRIAL COUNSEL'S FAILURE TO FILE A PRE-TRIAL MOTION TO SUPPRESS THE PENILE SWABS EVIDENCE WAS PREJUDICIAL.

### A. Based on the credibility determinations and facts found by the postconviction court, this court must hold that as a matter of law, Howard failed to prove that trial counsel's failure to file a pre-trial motion to suppress the penile swabs evidence was prejudicial.

In his amended postconviction motion, Howard alleged that trial counsel's performance was deficient and

prejudicial in failing to file a pretrial motion to suppress the search warrant authorizing seizure of Howard's underwear and penile swabs at the Sexual Assault Treatment Center on the ground that the signed, sworn affidavit in support of the search warrant had been lost (47:13-15).

The postconviction court held an evidentiary hearing on this claim, at which the State presented testimony and evidence that the police detectives who sought the penile swabs search warrant had presented Milwaukee County Circuit Court Judge Thomas P. Donegan with a signed, sworn affidavit establishing probable cause in support of the warrant, and the judge reviewed the affidavit and signed the warrant (71:9-61).

Fernando Santiago testified that in March 2009, he was a detective in the Milwaukee County Sheriff's Department (71:9). In regard to the sexual assault investigation of Howard, Detective Santiago testified that in the criminal investigation division of the department, he typed up an affidavit for a search warrant for penile swabs of Howard; the affidavit was reviewed by his captain; he and Detective Rosenstein, who had typed up a separate affidavit for a search of Howard's residence, went together to the jail records section of the Milwaukee County Criminal Justice Facility, where a notary swore Santiago to the information in the affidavit, and Santiago signed the affidavit (71:9-10). Santiago identified Exhibit 2, which was received without objection as an exhibit at the hearing, as an unsigned and unsworn copy of the same affidavit he had written, sworn to and signed (71:11-12). The exhibits from the hearing are not included in the appellate record,[1] but a copy was attached to the State's response to Howard's amended postconviction motion (50:27-28). There is no contention that this is not a true

[1] It was Howard's responsibility, as appellant, to make sure the exhibits were included in the record before this court if he wanted them available for this court's review. *State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774.

.

and accurate copy of the affidavit that was Exhibit 2 at the postconviction hearing.

Santiago was positive that he was sworn to the affidavit, a copy of which is Exhibit 2, by the notary public and signed it before the notary public; he took that signed and sworn affidavit to Judge Donegan's residence; Judge Donegan reviewed it, and issued a search warrant based upon it; he was one hundred percent certain that his affidavit in support of the search warrant that was presented to Judge Donegan had been signed by himself in front of the notary public (71:12-14). He was aware the State and Sheriff's Department were subsequently unable to find his signed and sworn affidavit, and he did not know what became of it (71:14-15). Rosenstein was with Santiago when he presented his affidavit to Judge Donegan and obtained the search warrant (71:14). Santiago testified his affidavit was also reviewed by Assistant District Attorney Erin Karshen (71:22). Santiago denied that he created Exhibit 2, the affidavit in support of the penile swabs search warrant, in response to Howard's postconviction motion (71:27).

Todd Rosenstein, a detective with the Milwaukee County Sheriff's Department, testified that he played a lead role in the Howard sexual assault investigation; he and Santiago were in the same room while Santiago drafted the affidavit for a penile swabs search warrant and Rosenstein drafted an affidavit for a search of Howard's residence (71:29-30). ADA Karshen reviewed both of the detectives' affidavits before they were sworn to and signed (71:31-32). Rosenstein remembered being present when Santiago signed his affidavit in front of a notary public (71:32). He and Santiago went together to Judge Donegan and presented their respective affidavits and search warrants to him; Rosenstein observed Judge Donegan review Santiago's affidavit prior to signing the search warrant (71:34). Subsequent to the search, Rosenstein had searched for Santiago's sworn and signed affidavit, but could not locate it, although he did locate an unsigned copy of it and he located the signed search

warrant (71:35-37). Rosenstein was one hundred percent certain that Santiago signed and had his signature sworn to the affidavit, a copy of which was Exhibit 2 (71:36).

Judge Donegan, who was retired by the time of trial, identified his signature on Exhibit 1, the penile swabs search warrant (71:53). Donegan had no memory of the actual Howard search warrant application process. However, he testified as follows:

> A Well, we certainly look to see that it's a signed affidavit and then we look for the contents of the affidavit to determine whether we believe there is probable cause to authorize the activity asked for without any prior action.
>
> Q Based upon your experience, do you believe that if an affidavit had been presented to you that was not signed and notarized in support of a search warrant you would have recognized that and noticed that?
>
> A Well, I'm convinced I would not sign anything that did not have the signature in the affidavit. We look for a signed affidavit. That's a basic.
>
> . . . .
>
> Q Well, you told us that if you had an unsigned affidavit, you would not sign the warrant. Correct?
>
> A I believe I would not. I believe -- obviously I wouldn't if I saw that it wasn't signed.
>
> Q Right.
>
> A I would have to be pretty sloppy not to notice it wasn't signed.

(71:54, 58-59).

Based on the testimony of the police detectives and Judge Donegan, which the postconviction court found

credible, and the exhibits, the postconviction court made the following findings of fact and conclusions of law:

> The Court makes the following findings of fact having been convinced of them beyond a reasonable doubt. Then Detective Fernando Santiago employed by the Milwaukee County Sheriff's Department on March 7, 2009 prepared a written affidavit on his computer for the purpose of obtaining penile swabs from the defendant, a then suspect in two sexual assaults in the jail where he was a correctional officer. The affidavit was typed in the Criminal Investigation Division offices. The very same office in which Detective Todd Rosenstein, the lead detective on this matter, prepared his affidavit. They were prepared at roughly the same time on separate computers. They were reviewed by A.D.A. Erin Karshen as well as someone in the department itself, that is, the Sheriff's Department, and then both detectives together went to jail records, an area in the Criminal Justice Building, to sign the affidavits after being sworn by a notary. The signature being done in the presence of a notary. Both affidavits were signed in the presence of a notary employed by the Sheriff's Department who was staffing jail records at that time of the late evening, early night hours. Exhibit 2 contains the language and format that constitutes the affidavit prepared by Detective -- then Detective Santiago. The search warrants were signed, one -- strike that -- the affidavits prepared by then Detective Santiago and Detective Rosenstein were signed one after the other in front of the same notary public after each detective was respectively sworn.
>
> The detectives then took the search warrants together to the residence of Judge Donegan. Judge Donegan was the designated duty judge for that particular night. Judge Donegan in his practice and pattern reviewed the respective affidavits to see if they were signed and then to see or determine if probable cause existed in the affidavit such that the search warrant could be signed and the specific search authorized. The search warrant of Detective Rosenstein related to the search of the defendant's premises, his home.

> The affidavit presented for each of those search warrants was signed and notarized by the respective detectives. After which the search warrant for penile swabs was executed at Sinai Sexual Assault Treatment center. A search was made of the likely places where the signed affidavit and search warrant relating to the penile swabs might be. They were not in the Sheriff's Department's case folder for this particular investigation, they were not at I.A.D. that has a copy of that case folder within the Sheriff's Department, they were not within the D.A.'s Office, they were not within or the affidavit was not within the Sexual Assault Treatment Center's premises. Although the search warrant was. They were not within the Clerk's Office either, Exhibit 3 or 4. It's entirely unclear where the existence -- or where the location of exhibit -- strike that -- of what the signed affidavit of then Detective Santiago is.
>
> Mr. Howard should be completely satisfied that every stone was unturned, lifted up, inspected by Mr. Wasserman, even pebbles were looked under, even gravel in pursuit of this post-conviction motion for a new trial.
>
> I'm satisfied that the State has met its burden to reconstruct the events relating to these affidavits -- or affidavit and search warrant, and accordingly, I deny that portion of the post-conviction motion that deals with the loss of the signed affidavit.
>
> Furthermore, because I have denied that, now I find that it would -- or I conclude that had a suppression motion been brought by trial counsel, it too would have been denied, and so there -- the second prong of the Strickland standard for ineffective assistance of counsel is not met, and correspondingly, as is the procedure, I do not address the first prong of it.
>
> Accordingly, I now deny in its entirety the post-conviction motion for a new trial. Thank you for the opportunity to review this matter.

(71:66-69).

Howard failed to meet his burden of proving that trial counsel's failure to file a pre-trial motion to suppress the penile swabs warrant was prejudicial. At the postconviction hearing, the State proved that a signed, sworn affidavit, which indisputably presented probable cause, had been presented to and reviewed by the issuing judge, who then signed the warrant, but the affidavit was subsequently lost. Thus, if a pre-trial suppression motion had been made, the motion would have been denied, the resulting DNA evidence would have been presented at trial and there is no reasonable probability that but for the failure to file the motion, the result of the trial would have been different.

The postconviction court, as finder of fact, was the sole arbiter of credibility. *State v. Ayala*, 2011 WI App 6, ¶ 10, 331 Wis. 2d 171, 793 N.W.2d 511. The facts found by the postconviction court are not clearly erroneous. This court reviews *de novo* whether under those facts, Howard met his burden of proving trial counsel's failure to file a pre-trial motion to suppress the penile swabs evidence was prejudicial. *Koller*, 248 Wis. 2d 259, ¶ 10.

Howard does not argue that these facts as found by the postconviction court are clearly erroneous. Indeed, he virtually concedes that based on the postconviction court's credibility determinations and findings of fact, he did not prove prejudice.

He argues only that the search warrant did not bear an authorized signature and Judge Donegan's testimony that he would not have signed a warrant if he was presented with an unsigned affidavit was improperly admitted. His arguments are without merit, as the State will demonstrate below.

### B. The record does not support Howard's assertion on appeal that the penile swabs search warrant bears an unauthorized signature.

In his postconviction motion, Howard never alleged that the penile swabs search warrant bears an unauthorized signature (47). At the postconviction motion hearing, although he asked Judge Donegan some questions about his signature on the search warrant, he did not present a handwriting expert to provide an opinion that the signature on the penile swabs warrant was not that of Judge Donegan. Howard did not provide any evidence that someone other than Judge Donegan signed the warrant or somehow copied or placed Judge Donegan's signature on the warrant. Indeed, at the close of the evidence, Howard did not argue that Judge Donegan had not signed the search warrant, or that the search warrant did not bear an authorized signature. Thus, the postconviction court did not make a finding of fact on that matter because Howard did not put that matter into controversy. Indeed, he conceded that "[i]f this were a suppression hearing, then in fact it was a valid warrant" (71:64). Howard contended only that the State was required to reconstruct the warrant application event and it could not do so solely because Judge Donegan did not remember the actual event (71:66).

Accordingly, this court should not even consider Howard's appellate claim that the penile swabs search warrant does not bear an authorized signature. *Maclin v. State*, 92 Wis. 2d 323, 328-32, 284 N.W.2d 661 (1979). If this court does consider it, it must find it to be wholly without merit.

At the postconviction hearing, the search warrant authorizing the collection of Howard's underwear and penile swabs, bearing Judge Donegan's signature, was offered and received as Exhibit 1 (71:13, 61-62).

Judge Donegan, who was retired at the time of the postconviction hearing, identified the signature, Thomas P. Donegan, on Exhibit 1 (the penile swabs search warrant) as his signature (71:52). He testified that although the signature on Exhibit 1 and the signature on Exhibit 3 (a search warrant for the search of Howard's residence that he had signed at the same time) were not perfect replicas of each other, they looked to him like the same signature (71:56). It was Judge Donegan's opinion that any slight differences in the signatures was attributable to whether he signed one faster or slower than the other (71:58).

The record does not support Howard's appellate claim that Judge Donegan's signature on the penile swabs search warrant was an unauthorized signature.

### C. Judge Donegan's testimony was properly admitted at the postconviction hearing and any possible error in admitting the evidence was harmless error.

At the postconviction hearing, Judge Donegan, who issued the penile swabs search warrant, identified his signature on the warrant (71:52). He testified that he had no actual memory of the warrant process in this case (71:53). However, he testified as follows:

> Q Do you have a common practice when law enforcement presents you with a search warrant that is based not upon live testimony but based upon an affidavit?
>
> A Well, yes.
>
> Q And can you describe what that would be[?]
>
> A Well, we certainly look to see that it's a signed affidavit and then we look for the contents of the affidavit to determine whether we believe there

is probable cause to authorize the activity asked for without any prior action.

Q Based upon your experience, do you believe that if an affidavit had been presented to you that was not signed and notarized in support of a search warrant you would have recognized that and noticed that?

A Well, I'm convinced I would not sign anything that did not have the signature in the affidavit. We look for a signed affidavit. That's a basic.

(71:54). On cross-examination, he further testified:

Q Well, you told us that if you had an unsigned affidavit, you would not sign the warrant. Correct?

A I believe I would not. I believe -- obviously I wouldn't if I saw that it wasn't signed.

Q Right.

A I would have to be pretty sloppy not to notice it wasn't signed.

(71:58-59).

Howard claims Judge Donegan should not have been allowed to testify to his usual practice. Howard's complaint is contrary to established law. In *Steinberg v. Arcilla*, 194 Wis. 2d 759, 768-770, 535 N.W.2d 444 (Ct. App. 1995), this court held that an anesthesiologist, who had no memory of the surgery at issue, was properly allowed to testify regarding his regular methodology, which he had used in numerous prior surgeries. This court explained that such habit evidence is relevant because it makes it more probable that on the occasion at issue, the individual acted consistent with his habit. *Id.* at 765.

Howard claims Judge Donegan's testimony should not have been permitted in this case because the postconviction hearing occurred nearly three years after

the search warrant was issued, whereas in *State v. Raflik*, 2001 WI 129, ¶ 12, 248 Wis. 2d 593, 636 N.W.2d 690, a reconstruction of the warrant process occurred within 24 hours of the original warrant application.

*Raflik* is not controlling here. In *Raflik*, the State applied for and obtained a search warrant by telephone, but mistakenly failed to record the application process as required by statute. As soon as the error occurred, the applicants and judge reconstructed the warrant application process within 24 hours of the original application.

In Howard's case, in contrast, there was nothing wrong with the original warrant application process. The search warrant was requested and obtained in person, and thus was not required to be recorded. Unfortunately, in this case, after the search warrant was obtained and executed, the supporting affidavit was lost. The postconviction court properly held that where an affidavit is lost, its existence and contents, and the fact that it was presented to the issuing court can be proved by other means.

In *United States v. Lambert*, 887 F.2d 1568, 1571-72 (11th Cir. 1989), the court held that where an affidavit cannot be found and is not in the court file, other evidence may be presented to establish the fact that an affidavit was presented to the issuing magistrate, as well as the contents of the affidavit. *See also United States v. Gibbs*, 421 F.3d 352 (5th Cir. 2005).

In *United States v. Pratt*, 438 F.3d 1264, 1266 (11th Cir. 2006), the search warrant was lost after it had been executed, and the court held that other evidence may be used to establish the existence and contents of a lost search warrant. At a subsequent hearing to suppress the evidence, the judge testified that he did not remember issuing the specific warrant at issue. However, he was allowed to testify that he follows the same process every time, he described that process, and he testified that he was "absolutely sure" that he had done so in this instance

and issued a search warrant with descriptive language identical to that of the affidavit, which was in evidence. *Pratt*, 438 F.3d at 1267-68. The trial court found the judge's testimony, as well as that of the requesting officer's testimony, credible. Based on that evidence the trial court found that a proper and constitutionally valid search warrant existed. The reviewing court upheld the trial court's decision, holding that the government need not prove a lost document's existence with certainty, but only by a preponderance of the evidence. *Pratt*, 438 F.3d at 1270. This is consistent with the State's burden of proof at a suppression hearing, which is by a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974).

In Howard's case, based on the testimony of the detectives and Judge Donegan, which the postconviction court found credible, the evidence was more than sufficient to prove the existence and contents of the lost affidavit by a preponderance of the evidence.

Howard also misplaces reliance on *Glodowski v. State*, 196 Wis. 265, 220 N.W. 227 (1928), in which no record had been made of the facts proffered by the Sheriff to establish probable cause for the search warrant issued. The Wisconsin Supreme Court held that under the circumstances presented in that case, it was error for the judge at the suppression hearing to allow additional evidence of probable cause to be presented.

In Howard's case, in contrast, no additional proof of probable cause was presented. Rather, the contents of the affidavit were proven by an unsigned but accurate copy of the affidavit itself.

For all of these reasons, the postconviction court properly allowed Judge Donegan to testify regarding his ordinary practice. In any event, any error in admitting Judge Donegan's testimony was harmless. The testimony of the Detectives, summarized above, which the postconviction court found credible, was more than

adequate to prove the existence of the affidavit, and to prove that the affidavit was presented to and reviewed by Judge Donegan before he signed the search warrant. Accordingly, it is clear that the postconviction court would have denied relief even absent Judge Donegan's testimony regarding his usual practice.

## III. THE POSTCONVICTION COURT PROPERLY DENIED RELIEF WITHOUT AN EVIDENTIARY HEARING ON HOWARD'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO CERTAIN TESTIMONY OF THE SEXUAL ASSAULT TREATMENT CENTER NURSE EXAMINER.

The postconviction court properly denied Howard's claim that trial counsel was ineffective for failing to object to certain testimony of the sexual assault treatment center nurse examiner because the record conclusively demonstrates that Howard is not entitled to relief. *Allen*, 274 Wis. 2d 569, ¶¶ 9, 12, 15. Because the testimony was not objectionable, trial counsel's failure to object was not deficient performance and the failure to object was not prejudicial.

At trial, the following questions were asked and answered by the sexual assault treatment center nurse who examined Marletha R.:

> Q You had an adult woman presenting who had said a man had forced penis-to-vagina sexual intercourse, correct?
>
> A Yes.
>
> Q You see no injuries, correct?
>
> A I see --

> Q Other than the posterior fourchette, the one that is drawn?
>
> A Yes, that's correct.
>
> Q Is the absence of more injury a reason to disbelieve her story?
>
> A No.
>
> Q Why not?
>
> A Because the vaginal area, a woman's genital areas, especially the vaginal area is very elastic. I kind of compare it to like a balloon. If you think of a balloon, if you don't blow air into it, it's collapsable [sic]. You know, you can take a balloon and put a tampon into it like the vagina. You can put a penis into it, all right. You can even put the head of a baby through the vagina. And there often, and through the cervix, there often is no injury to the vagina and to this whole area. That's a very normal finding.

(65:68-69).

In *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), the State presented the testimony of a psychiatrist who testified about the behavior pattern exhibited by incest victims. This court held that certain further testimony by the psychiatrist, however, was improperly permitted:

> The psychiatrist testified that, in his opinion, Haseltine's daughter presented a typical case of intrafamilial sexual abuse and she was an incest victim. Because the court erred in admitting the psychiatrist's opinion that Haseltine's daughter was an incest victim, and because we cannot conclude that the error was harmless, we reverse the judgment and remand this matter to the circuit court for a new trial.
>
> Haseltine was charged with sexual contact for allegedly fondling his daughter's breasts. This allegedly occurred in her bedroom, which Haseltine

> left only to avoid discovery by another family member. He was charged with threatening to injure his daughter because he allegedly struck and kicked her and threatened her with death if she told anyone that he had been sexually abusing her. The state sought to show that these two incidents were part of a pattern of sexual and physical abuse by Haseltine against family members.
>
> Haseltine's daughter testified that over a two-year period, Haseltine repeatedly had sexual intercourse with her, sometimes more than once a week. She also testified that Haseltine had beaten other family members. Haseltine's older daughter testified that when she was thirteen years old, Haseltine had once entered her bedroom and fondled her breasts. Finally, the state presented a psychiatrist's testimony concerning the pattern of behavior exhibited by incest victims. The psychiatrist was also permitted to give his opinion that there "was no doubt whatsoever" that Haseltine's daughter was an incest victim.
>
> This opinion testimony goes too far. Expert testimony should assist the jury. Section 907.02, Stats. The credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of an expert opinion. "[T]he jury is the lie detector in the courtroom." *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir.1973). The opinion that Haseltine's daughter was an incest victim is an opinion that she was telling the truth. There is no indication that Haseltine's daughter had any physical or mental disorder that might affect her credibility. *See Hampton v. State*, 92 Wis.2d 450, 460–61, 285 N.W.2d 868, 873 (1979). No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth. *See State v. Middleton*, 294 Or. 427, 657 P.2d 1215, 1221 (1983).

*Haseltine*, 120 Wis. 2d at 95-96 (footnote omitted).

In Howard's case, in contrast, the nurse examiner did not testify that Marletha R. was the victim of a sexual assault. Rather, the nurse examiner only explained why

the fact that Marletha did not have any further physical injury was not inconsistent with Marletha's allegation of sexual assault.

In *State v. Elm*, 201 Wis. 2d 452, 549 N.W.2d 471 (Ct. App. 1996), the following occurred:

> During the trial, Dr. Richard Erdman testified that he was on duty in the emergency room at the hospital when Ryanne and her mother arrived to have Ryanne examined. Erdman testified that first he spoke with Ryanne and her mother about Ryanne's allegations of sexual abuse. Erdman said Ryanne told him someone had been "touching my boobs" and "putting his fingers inside of me." Erdman next conducted a physical examination of Ryanne, including examination of her vagina. Erdman testified that he observed two areas of erythema, or abrasions, on Ryanne's vagina. At trial, the prosecutor asked Erdman:
>
> > Doctor, based upon the history you took in this case, the findings from the examination that you conducted, your training and your experiences as an emergency room physician, do you have an opinion to a reasonable degree of medical probability as to the cause of the erythema that you noted in your report on [Ryanne]?
>
> Erdman responded, "My opinion is that she was molested."

*Elm*, 201 Wis. 2d at 457.

This court held the testimony did not constitute an opinion that the child was telling the truth, which would be impermissible under *Haseltine*. Rather, this court held the examining doctor's testimony constituted a medical opinion that the cause of the child's physical condition was sexual molestation. This court distinguished *Haseltine,* explaining:

> The facts of this case are distinguishable from Haseltine, where the psychiatrist based his

> conclusion that the child was an incest victim solely on interviews with the child. Here, Erdman conducted a physical examination of Ryanne and testified about his physical observations and the cause of the child's injuries. Moreover, Erdman's testimony did not purport to identify the individual who may have molested Ryanne or to confirm that the child was telling the truth about the ultimate issue in the case, whether Elm had assaulted her. In contrast, the psychiatrist in Haseltine, by testifying the child had been a victim of incest, not only implied that the victim was truthful, but also that a relative had sexually assaulted the child.

*Elm*, 201 Wis. 2d at 458-59.

The testimony in Howard's case is comparable to the testimony held admissible in *Elm*, and unlike the testimony held impermissible in *Haseltine*. The nurse conducted a physical examination of Marletha R. and testified about her observations; she did not purport to identify the person who assaulted Marletha; and she did not purport to confirm that Marletha was telling the truth about the ultimate issue in the case -- that Howard sexually assaulted her.

The sexual assault nurse examiner's testimony in Howard's case is also comparable to the testimony held admissible in *State v. Ross*, 203 Wis. 2d 66, 79-80, 552 N.W.2d 428 (Ct. App. 1996), in which the nurse examiner was properly allowed to testify "that the victim's physical condition at the time of her treatment was consistent with the victim's statement to her that her vagina had been penetrated." This court held the nurse's testimony was not an impermissible expert opinion on whether the victim was telling the truth under *Haseltine*, but merely her expert opinion on whether the victim's physical condition was consistent with the victim's statement to her that her vagina had been penetrated. *Ross*, 203 Wis. 2d at 81-82.

Similarly, here, the nurse examiner's testimony that Marletha's physical condition was not inconsistent with Marletha's statement to her that she had forced penis to

vagina sexual intercourse, was a properly admitted expert opinion on Marletha's physical condition, not an improper expert opinion that the victim was telling the truth when she said Howard sexually assaulted her.

It was neither deficient performance nor prejudicial for trial counsel to fail to raise a *Haseltine* objection to the nurse's testimony because such an objection would have been rejected as meritless. Even if the evidence was improperly admitted, there is no reasonable probability that the jury would have acquitted Howard of the crimes against Marletha, but for one question asked of and answered by the nurse. In light of Marletha's testimony, which was largely uncontradicted, and the DNA evidence corroborating her testimony, there is no valid concern here that the jury abdicated its fact-finding role to the nurse and did not independently find Howard guilty. *See State v. Patterson*, 2010 WI 130, ¶ 64, 329 Wis. 2d 599, 790 N.W.2d 909 (*Haseltine* violation does not require reversal unless in context it creates too high a risk that the jury abdicated its fact finding role to the expert and failed to independently determine guilt). Accordingly, Howard's motion for postconviction relief on this ground was properly denied without an evidentiary hearing.

## CONCLUSION

Based on the record and the legal theories and authorities presented, the State asks this court to affirm the judgment of conviction and order denying postconviction relief entered below.

Dated this 10th day of September 2013.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,393 words.

_____
Sally L. Wellman
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of September, 2013.

_____
Sally L. Wellman
Assistant Attorney General