

STATE OF WISCONSIN,

Plaintiff,

-vs-

Case No. ....

.....,

Defendant.

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**NOTICE OF LEARNED TREATISE AND MOTION FOR JUDICIAL NOTICE**

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The defendant, through his attorney, and pursuant to Wis. Stat. § 908.03(18), hereby gives notice that he intends to use the following learned treatises as direct evidence at the upcoming jury trial:

1. The National Academy of Sciences (NAS) Report on Forensic Sciences, *Strengthening Forensic Science in the United States: A Path Forward*, pp. 136-145 (The National Academies Press 2009) [hereinafter “NAS Report”], and
2. Expert Working Group on Human Factors in Latent Print Analysis, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (U.S. Department of Commerce, National Institute of Standards and Technology 2012) [hereinafter “Report on Human Factors in Latent Print Analysis”].<sup>1</sup>

The defendant now moves the court to take judicial notice that the authors of the learned treatises are “recognized in [their] profession or calling as an expert in the subject.” Wis. Stat. § 908.03(18). In support, the defendant provides the court with the following information:

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<sup>1</sup> The NAS Report, pp. i-xx, 136-145, and the Report on Human Factors in Latent Print Analysis are attached to and incorporated in this motion as Attachments 1 and 2.

## **RELEVANCE**

Latent print analysis is an issue in this case. The State Crime Lab submitted their final report on \_\_\_\_\_. Out of the prints analyzed, the report identifies \_\_\_\_\_ print(s) as belonging to the defendant. The state intends to call as a witness the Wisconsin State Crime Lab employee who conducted the latent print analysis.

Latent print analysis has been a staple in the criminal justice system for decades. However, recent studies, by some of the most prestigious scientific organizations in the world, such as the National Academy of Sciences and the American Academy of Forensic Sciences,<sup>2</sup> have called into question the reliability and validity of latent print analysis upon finding that there is no existing research that demonstrates that latent print identification evidence is valid. Studies have now been undertaken to better understand why errors occur and how to prevent them. The defendant has the constitutional and statutory right to present this evidence to the jury. *See* Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, article I § 7 of the Wisconsin Constitution; and Wis. Stat. § 980.03 (discussing the defendant's right to present a defense – by presenting evidence, calling witnesses, and rebutting evidence).

## **LEGAL STANDARD**

A learned treatise is a document that is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the writer's reputation at stake. 6 Wigmore, Evidence § 1692 (Chadbourn rev. ed. 1976). In most jurisdictions, learned treatises are inadmissible evidence pursuant to the hearsay rule. Wisconsin, however, provides an exception to the hearsay rule for learned treatises. Pursuant to Wis. Stat. § 908.03(18):

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<sup>2</sup> *See* Press Release, Am. Acad. Of Forensic Scis., The American Academy of Forensic Sciences Approves Position Statement in Response to the National Academy of Sciences' "Forensic Needs" Report, (Sept. 4, 2009). Attached as Attachment 3.

A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of the matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert on the subject.

This hearsay exception was first adopted in *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 76, 146 N.W.2d 505, 509 (1966). The rule mirrors Rule 529 of the Model Code of Evidence of the American Law Institute. *See id.* Upon adoption of this rule, the court wrote that “[t]his is but another example of accepting the scientific process in the search for truth instead of reliance upon the efficacy of an oath as a guaranty of trustworthiness.” *Id.*

Wisconsin's hearsay exception for learned treatises is one of the most expansive in the country because it allows for the use of learned treatises as direct evidence in addition to impeachment on cross-examination. A learned treatise that is received into evidence is no different than if an expert had testified under oath. *See Wis. Stat. § 908.03(18).*

The proponent of the learned treatise must provide written notice to opposing counsel at least 40 days before trial. Wis. Stat. § 908.03(18)(a). Moreover, “[t]he notice shall fully describe the document...giving the name...author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered,” and provide the opposing counsel with a copy. *Id.*

## THE NAS REPORT

The National Academy of Sciences is one of the most prestigious scientific organizations not only in the United States, but in the world:

The **National Academy of Sciences** is a private nonprofit, self-perpetuating society of distinguished scholars engaged in scientific and engineering research, dedicated to the furtherance of science and technology and to their use for the general welfare. Upon the authority of the charter granted to it by the Congress in 1863, the Academy has a mandate that requires it to advise the federal government on scientific and technical matters.

NAS Report, *iii*.

Members are elected to the National Academy of Sciences in recognition of their distinguished and continuing achievements in original research. Membership is a widely accepted mark of excellence in science and is considered one of the highest honors that a scientist can receive.

NAS Membership, *available at* <http://www.nasonline.org/about-nas/membership>.

The Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council wrote the NAS Report. A full listing of the 17 Committee members can be found in the NAS Report, p. v (Attachment 1). The forensic science and legal community was well represented by this committee:

The Committee was composed of a diverse and accomplished group of professionals. Seven of the 17 Committee members are prominent professionals in the forensic science community, with extensive experience in forensic analysis and practice; 11 members of the Committee are trained scientists (with expertise in physics, chemistry, biology, engineering, biostatistics, statistics, and medicine); 10 members of the Committee have Ph.Ds, 2 have MDs, 5 have JDs, and one has an M.S. in chemistry.

The Committee's project involved an extraordinary amount of time, because of the extensive research and countless interviews that we undertook. In addition, there were many hours of Committee meetings – which involved deliberations between forensic analysts and practitioners, experts in the physical and life sciences, a former federal prosecutor, a defense attorney, a crime lab director, a medical examiner, an engineer, statisticians, educators, and a judge. Our interactions were challenging and fruitful. And, in the end despite our differing professional perspectives, the Committee was unanimous in its findings and recommendations.

Hon. Harry T. Edwards, *The [NAS] Report on Forensic Sciences: What it Means for the Bench and Bar*, presentation at the Superior Court of the District of Columbia (May 6, 2010)<sup>3</sup>, 1.

The NAS Report, pp. 136-145, addresses friction ridge analysis – “experienced-based comparisons of the impressions left by the ridge structures of volar (hands and feet) surfaces.” The report provides a detailed explanation of the method of data collection and analysis known as ACE-V, methods of interpretation, and the reporting of results. The report provides a summary of its assessment of friction ridge analysis on pp. 142-145. The report is written for professionals in the forensic science community. *See* NAS Report, *xix* (“In adopting this report,

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<sup>3</sup> Hon. Harry T. Edwards's paper/presentation is attached to and is incorporated in this motion as Attachment 4.

the aim of our committee is to chart an agenda for progress in the forensic science community and its scientific disciplines.”).

### **REPORT ON HUMAN FACTORS IN LATENT PRINT ANALYSIS**

The Report on Human Factors in Latent Print Analysis “was produced with funding from the U.S. Department of Justice’s National Institute of Justice [NIJ] and in collaboration with the Law Enforcement Standards Office in the U.S. Department of Commerce’s National Institute of Standards and Technology [NIST].” Report on Human Factors in Latent Print Analysis, ii. A full listing of members of the Expert Working Group on Human Factors in Latent Print Analysis can be found on pp. x-xiii. “The Working Group consisted of experts from forensic disciplines, statisticians, psychologists, engineers, other scientific experts, legal scholars, and representatives of professional organizations.” *Id.* at vii. The Working Group’s task was “to examine human factors in latent print analysis and to develop recommendations to reduce the risk of error and improve the practice of latent print analysis.” *Id.*

The ten-chapter/234-page report discusses the latent print examination process, human factors and errors, interpretation of latent prints, emerging and improving technology, reports and documentation, testimony, systems approach to the work environment, training and education, human factors issues for management, and the group’s recommendations.

### **CONCLUSION**

The defendant has adequately established that the NAS Report and Report on Human Factors in Latent Print Analysis are learned treatises – documents that were written primarily and impartially for professionals. Clearly, these documents are seminal works in forensic science and latent print analysis in particular. Accordingly, the defendant requests that the court take

judicial notice that the authors of the reports are recognized in their profession or calling as experts in the subject, and find that the defendant has complied with the notice requirement outlined in Wis. Stat. § 908.03(18). Such findings would allow the defendant to utilize both documents as learned treatises at the upcoming jury trial.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Respectfully submitted:

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ATTORNEY FOR DEFENDANT