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PENNSYLVANIA SUPERIOR COURT
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	)	
Respondent-Appellee,	)	**551 EDA 2020**
v.	)	**CP-09-CR-0005060-1991**
	)	**First-degree murder**
	)	**Post-Conviction DNA Testing**
JOHN BROOKINS	)	
Petitioner-Appellant.	)	

Petitioner-Appellant's Opening Brief

Appeal from the January 14, 2020 Order Dismissing John Brookins's *Post-Conviction DNA Testing Motion* Under 42 Pa. C.S. § 9543.1 Entered by the Honorable Gary B. Gilman of the Bucks County Common Pleas Court, Criminal Division, CP-09-CR-0005060-1991

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STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the January 14, 2020 order dismissing John Brookins's *Post-Conviction DNA Testing Motion* under 42 Pa. C.S. § 9543.1 entered by the Honorable Gary B. Gilman of the Bucks County Common Pleas Court, Criminal Division, CP-09-CR-0005060-1991.[1]

On January 27, 2020, Mr. Brookins appealed.[2]

On January 27, 2020, Mr. Brookins filed his *Concise Statement of Errors on Appeal.*[3]

On February 24, 2020, Judge Gilman issued his opinion.[4]

CLAIMS PRESENTED

I. The PCRA court erred when it concluded Mr. Brookins's DNA testing motion is untimely. U.S. Const. admts. 6, 8, 14; Pa. Const., art. I, §§ 9, 10, 14.

II. The PCRA court erred when it said there was no reasonable probability modern DNA testing could produce exculpatory results that would prove Mr. Brookins's actual innocence. U.S. Const. admts. 6, 8, 14; Pa. Const., art. I, §§ 9, 10, 14.

SCOPE AND STANDARD OF REVIEW

In reviewing the grant or denial of PCRA relief, the Court examines whether the PCRA court's findings and conclusions are supported by the record and free of legal error. *Commonwealth v. Mitchell*, 141 A.3d 1277, 1283-1284 (Pa. 2016). The PCRA court's factual findings are entitled to deference, but its legal conclusions are reviewed *de novo*. *Commonwealth v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006).

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[1] Rp. 1. Rp = Reproduced Record page number(s).
[2] Rpp. 2-3
[3] Rpp. 4-16.
[4] As required by the appellate rules, a copy of Judge Gilman's opinion is attached as an appendix to this brief.

Also, because this appeal involves statutory construction, which is a legal question, the Court reviews the PCRA court's statutory interpretations *de novo*. *Commonwealth v. Conway*, 14 A.3d 101, 108 (Pa. Super. 2011). Lastly, because the General Assembly "unanimously passed" 42 Pa. C.S. § 9543.1, it's a "remedial statute" and must be "interpreted liberally in favor of the class of citizens who were intended to directly benefit therefrom, namely, those wrongly convicted of a crime." *Id.* at 113.

PROCEDURAL HISTORY

On December 20, 1990, someone brutally murdered Sheila Ginsburg. On June 19, 1991, the Bristol Police Department ("BPD") arrested John Brookins and charged him with first-degree murder. The Bucks County District Attorney's Office ("DAO") formally charged Mr. Brookins with capital murder and robbery and sought the death penalty. The BPD and DAO didn't charge or arrest anyone else in connection with Sheila's murder.

On July 17, 1992, the jury convicted Mr. Brookins of first-degree murder, but acquitted him of the robbery count. At his punishment phase hearing, the jury acquitted him of the death penalty, sentencing him to life imprisonment. Mr. Brookins appealed, but this Court affirmed on May 28, 1998, and the Supreme Court denied allocator on February 4, 1999.

On January 18, 2000, Mr. Brookins filed a timely *pro se* PCRA petition. Once filed, the procedural history becomes torturous because the PCRA court never adjudicated his January 2000 PCRA petition. In 2005, with the hopes of prompting the PCRA court to address his January 2000 PCRA petition, Mr. Brookins filed an amended PCRA petition. The PCRA court and court administration, however, wrongly and inexcusably believed the PCRA court had addressed and denied Mr. Brookins's January 2000 PCRA petition. Thus, court administration informed Mr. Brookins he couldn't amend a PCRA petition that had already been adjudicated and denied.

Mr. Brookins appealed. On appeal, this Court realized the error made by the PCRA court and court administration and remanded Mr. Brookins's case back to the PCRA court with instructions for it to adjudicate the January 2000 PCRA petition.

On April 1, 2009, the PCRA court held an evidentiary hearing, after which Mr. Brookins filed a counseled amended PCRA petition.

On August 13, 2010, Mr. Brookins deposed Paul Cottman, who gave critical testimony supporting Mr. Brookins's trial defense that Sharon Ginsberg, Shelia's drug-addicted daughter, murdered Sheila.

On October 29, 2010, while his initial PCRA petition was still pending, Mr. Brookins filed a *Motion to Subject Seized Gloves for Testing* ("*Glove DNA Motion*") The motion concerned information developed during Paul Cottman's deposition, namely: Cottman found a pair of red gloves in his car days after Sheila's murder, which he believed Sharon had on when she murdered Sheila, and that Sharon planted the red gloves in his car after the murder to frame him for Sheila's murder. Cottman said the BPD collected the red gloves in January 1991.

The DAO didn't respond to the *Glove DNA Motion.* The PCRA court, therefore, granted the *Glove DNA Motion.* Once granted, the DAO asked if it could file a belated response to *Glove DNA Motion.* On April 11, 2011, the PCRA court granted the DAO's request, prompting the DAO to file a response objecting to the *Glove DNA Motion.*

On April 27, 2011, the PCRA court struck its initial order granting DNA testing and denied the *Glove Motion.*

On June 15, 2011, the PCRA court held an evidentiary hearing.

On June 27, 2012, twelve-and-a-half years after Mr. Brookins filed his *pro se* PCRA petition, the PCRA court denied it.

Mr. Brookins appealed, but on September 5, 2013 this Court affirmed, and the Supreme Court denied allocator on March 24, 2014.

On June 27, 2019, Mr. Brookins filed the instant DNA testing motion.[5]

On September 6, 2019, the DAO filed its *Answer in Opposition to DNA Testing*.[6]

On September 19, 2019, Mr. Brookins filed a *Reply Brief* to the DAO's *Answer*.[7]

On September 19, 2019, the DAO filed a *Sur-Reply* to Mr. Brookins's *Reply Brief*.[8]

On September 27, 2019, Mr. Brookins filed a *Reply* to the DAO's *Sur-Reply*.[9]

On January 15, 2020, the PCRA court entered its dismissal order.[10]

On January 27, 2020, Mr. Brookins appealed.[11]

On February 25, 2020, the PCRA court filed its opinion.[12]

INTRODUCTION

Any factual summary of this case must begin by acknowledging the pain suffered by Sheila Ginsberg on December 20, 1990. The pain she suffered creates strong emotions in all those who've reviewed this case. Thus, it's understandable everyone wants someone to be held accountable. When emotions enter the guilt-innocence calculus, however, determining what truly happened can easily result in a miscalculation.

Science, however, is immune to emotion and can decipher complex riddles with the smallest quantity of evidence. Accordingly, while the injuries and disrespect inflicted on Sheila produce strong visceral responses, they also tell us we can identify the true perpetrator with DNA testing. Indeed,

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[5] Rpp. 17-63.
[6] Rpp. 64-120.
[7] Rpp. 121-149.
[8] Rpp. 150-158.
[9] Rpp. 159-174.
[10] Rp. 1.
[11] Rpp. 2-3.
[12] *See* appendix.

John Brookins's 1992 murder conviction represents a quintessential case for post-conviction DNA testing. "There is no question that the development of additional evidence — evidence that can be easily obtained by DNA testing — will add to the reliability of the reconstruction of the events of that tragic day." *Commonwealth v. Conway*, 14 A.3d at 112.

DNA testing will prove what Mr. Brookins has known since he walked into Sheila's apartment on December 20, 1990 and saw Sharon Ginsberg stomping her mother: Sharon brutally murdered her mother. The DNA evidence will seal Sharon's fate. The facts and evidence amassed by the BPD, DAO, and Mr. Brookins's defense team, on the other hand, answer the motive question: Sharon brutally murdered Sheila because she wanted money for drugs. It's that simple and the DAO even conceded, *in its own pleading*, that "Sharon was a drug addict with a temper who did not get along with her mother[.]"[13] Sharon is an evil human being who's escaped justice for three decades while Mr. Brookins has languished in prison fighting to prove his innocence. Modern DNA testing, however, can finally right this utterly tragic dual injustice.

Based on Sheila's wounds and the physical evidence these things are clear: Sharon wielded, manipulated, and handled several key items that likely resulted in a transfer of her DNA (or skin cells) to these items. Sharon manipulated Sheila's shirt, sweater, and bra, causing Sheila's breasts to be exposed. Sharon wielded the scissors with such force they penetrated Sheila's skull twice and rib cab thrice. Also, Sharon wielded a marble-based trophy with such vigor the marble based fractured Sheila's skull. Lastly, multiple hairs and hair fragments were collected from Sheila's clothing, which, due to their violent interaction, could easily be from Sharon.

Pre-trial forensic testing produced inconclusive results, *i.e.*, they didn't incriminate or exonerate Mr. Brookins. The pre-trial testing, however, relied on antiquated forensic technology and, therefore, was unable to determine whether there were trace amounts of Sharon's DNA on these

[13] Rp. 94, fn. 11.

items or whether the hair evidence came from Sharon. Mr. Brookins's conviction, consequently, is based on circumstantial forensic evidence, *i.e.*, fingerprints lifted from neither of Sharon's opportunistic weapons, *i.e.*, the scissors and trophy, or any other object associated with Sheila's murder.

Modern DNA testing, however, can identify Sharon's skin cells or hairs on Sheila's shirt, sweater, bra, and fingernail scraping, the scissors, the trophy, and the afghan Sharon draped over Sheila. If Sharon's DNA is on one or more of these items, *i.e.*, a DNA redundancy, this would "establish" Mr. Brookins's "actual innocence," 42 Pa. C.S. § 9543.1(a)(6)(i), based on *who* the DAO did and didn't charge and *how* it presented its case to the jury. More importantly, the Court must "assum[e]" this "exculpatory" redundancy when evaluating the "actual innocence" issue. 42 Pa. C.S. § 9543.1(c)(3)(ii); *Commonwealth v. Conway*, 14 A.3d at 110.

The record evidence is also clear on these points: (1) the DAO only charged one person with Sheila's murder – John Brookins; and (2) the DAO's theory at trial was that Mr. Brookins – and he alone – murdered Sheila. The following facts make these points clear:

First, in 2,000 plus pages of trial transcripts, and in nearly thirty years of pleadings, not once has the DAO ever argued or remotely suggested Sharon Ginsberg participated in Sheila's murder. In fact, during the punishment phase and sentencing hearings, the DAO told jurors Sharon was an innocent "victim" in two ways: (1) she had to sit through Mr. Brookins's murder trial and listen to the details of her mother's horrific murder; and (2) although innocent of Sheila's murder, Mr. Brookins and others "falsely accused" her of murdering Sheila.[14]

[14] NT, Punishment Phase Hrg., 7/20/1992, p. 51; NT, Sentencing Hrg., 6/17/1997, pp. 8-9.

Second, during her opening statement, the prosecutor said, "You will hear testimony that the *persons* who murdered Sheila Ginsberg… left traces of *himself* near the body of Sheila Ginsberg."[15] The statement, of course, is internally inconsistent, as it starts with a plural noun ("persons") and ends with a singular, gender-specific pronoun ("himself"). However, the remainder of the prosecutor's opening statement was consistent regarding one theme: John Brookins – *and he alone* – murdered Sheila:

> This is a case of first degree murder, intentional, willful, deliberate malice, just killing malice as hardness of heart, cruelty of disposition, *cold, calculated, calm*. You will hear testimony that *John Brookins was cool, calculated, calm* and even offered to console the son of Sheila Ginsberg. You will hear that his life went on as usual.[16]
>
> ……
>
> And you will heart there is another John Brookins and that is the John Brookins who was cool and calm, who was in the apartment of Sheila Ginsberg. You will hear that *is the John Brookins who murdered Sheila Ginsberg*.[17]
>
> ……
>
> Ladies and gentlemen, you will hear that the Commonwealth does not dispute exactly had he did; that he did walk around the apartment; that he did walk around in the dark; that he did wash his hands before he left; that he did not tell anyone, *not because he found [Sheila's] body but because he murdered Sheila Ginsberg*.[18]
>
> …….
>
> At the end of this trial, I will come to you and ask for a verdict. During the trial, I will tell you that John Brookins was asked why he didn't call the police and that John Brookins said, 'I didn't call because I was the only one there.' At the end of this trial, *I will come to you and I will ask you to say to John Brookins, you are right. You were the only one there.* You are guilty of first degree murder…[.][19]
>
> …….
>
> At the end of this case, *I will ask you to say the truth is that John Brookins murdered Sheila Ginsberg* and I will ask for a conviction of first degree murder.[20]

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[15] NT, Trial, 7/2/1992, p. 18.
[16] NT, Trial, 7/2/1992, p. 20.
[17] NT, Trial, 7/2/1992, pp. 20-21.
[18] NT, Trial, 7/2/1992, p. 26.
[19] NT, Trial, 7/2/1992, pp. 26-27.
[20] NT, Trial, 7/2/1992, p. 27.

Third, the jury instructions also make clear the DAO believed Mr. Brookins – *and he alone*– murdered Sheila. For instance, when explaining first-degree murder, the trial court said: "The *Commonwealth contends that the Defendant did kill Sheila Ginsberg.*"[21] After jurors asked a question regarding the differences between first-, second-, and third-degree murder, the trial court, in part, said:

> First, that Sheila Ginsberg is dead. Now, there is no dispute about that…. Second, that the Defendant killed her. That, of course, is the one that you have to deliberate upon; that is the one that is in question, that particular element.
>
> *The Commonwealth contends that the Defendant did kill Sheila Ginsberg.* The Defense contends that the Defendant did not kill Sheila Ginsberg… [.][22]

Fourth, regarding the prosecutor's "person and/or persons who murdered Sheila" comment referenced *supra*, the DAO claims this statement and the one below, which the prosecutor made immediately following her opening statement, make "plain" the DAO hadn't "ruled out the possibility that [Mr. Brookins] acted with another, possibly Sharon Ginsberg, in murdering [Sheila]."[23]

> I would just state for the record, for the last week, I've been arguing that the Commonwealth could not prove whether [Mr. Brookins] acted alone or in concert; that has been the basis of my motion, to exclude testimony of the witnesses called by the Defense. I have not charged [Mr. Brookins] with conspiracy. I agree with that, but the fact that a charge is not on the information does not mean that I am limited to say he acted alone.[24]

Interestingly, however, during Mr. Brookins's federal habeas litigation, the DAO said the exact opposite when addressing the "context" of the prosecutor's comments:

> [Mr. Brookins] also complains that the prosecutor referenced in her opening statement "the person and or persons" who murdered Ms. Ginsberg, thereby suggesting that [Mr. Brookins] could also be convicted as an accomplice. [Mr. Brookins's] claim is belied by the record. A review of the context in which this reference was made *shows that the prosecutor never suggested, either in opening or closing statements, that*

[21] NT, Trial, 7/17/1992, p. 10.
[22] NT, Trial, 7/17/1992, pp. 41-42.
[23] Rp. 92.
[24] NT, Trial, 7/2/1992, p. 28.

> *anyone other than Petitioner killed Ms. Ginsberg.* N.T. 7/2/92, pp. 26-27. *The brief reference to "person and/or persons" was simply a matter of oratory style and did not suggest a different theory of the case in which Petitioner could be liable as an accomplice.* As such, no impropriety occurred and no cautionary instruction was warranted.[25]

In short, the record evidence plainly establishes the following: based on how the DAO presented and argued its case, the jurors who convicted Mr. Brookins of first-degree murder based their verdicts on the belief Mr. Brookins – and he alone –murdered Sheila.

This is significant because the DNA testing statute requires the petitioner to identify DNA results that would "establish" his "actual innocence." 42 Pa. C.S. § 9543.1(a)(6)(i). This means the exculpatory DNA results must "make it more likely than not that no reasonable juror *would have* found him guilty beyond a reasonable doubt." *Commonwealth v. Conway*, 14 A.3d at 109 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (emphasis added). The phrase "would have" is past tense, meaning the actual innocence focus must be based on how the exculpatory DNA results *would've* impacted the evidence and arguments presented to the petitioner's jury.

This is critical because the DAO misinterpreted the actual innocence assessment in its PCRA court pleadings. The question isn't whether the DAO would jointly prosecute Sharon and Mr. Brookins – as co-conspirators – at a hypothetical new trial, if DNA testing produced an exculpatory redundancy implicating Sharon. How the DAO views the exculpatory DNA results is irrelevant. The critical question is this: based on the DAO's evidence and theory at trial, had jurors known that Sharon's DNA was recovered from (1) Sheila's shirt, sweater, bra, and fingernail scrapings, (2) the scissors, (3) the trophy, and (4) the afghan, is it more likely than not none of these jurors would've found Mr. Brookins guilty of first-degree murder? The answer is: YES, *i.e.*, none would've convicted.

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[25] *John Brookins v. Michael Wenerowicz (Warden)*, 2:14-cv-2645 (Doc. 12, p. 32; Filed July 21, 2014) (emphasis added).

Lastly, Mr. Brookins's DNA testing motion isn't time-barred for the simple fact DNA testing can prove his actual innocence. His actual innocence claim isn't some imaginative narrative an obviously guilty defendant concocted to delay execution of his sentence or the administration of justice. Far from it.

Undersigned counsel has never litigated a case where six people testified on the defendant's behalf at his trial and implicated someone else as the murderer. Yes, six people testified on Mr. Brookins's behalf said Sharon Ginsberg either outright confessed to murdering her mother or made statements clearly implying she'd murdered her mother. Indeed, when the BPD asked Barry Ginsberg, Sharon's brother, who could've violently attacked Sheila, the first person he identified was Sharon.[26]

That Mr. Brookins's actual innocence claim is credible undermines the PCRA court's untimeliness finding. So too does the fact the BPD and DAO have all the requested physical evidence, meaning if the Court grants DNA testing these items and others *will be tested*: (1) Sheila's shirt, sweater, bra, and fingernail scrapings, (2) the scissors, (3) the trophy, and (4) the afghan.

The Commonwealth has all the evidence and Mr. Brookins identified a DNA testing result that – when assumed – proves his actual innocence. The Court, consequently, must vacate the PCRA court's denial and grant DNA testing.

STATEMENT OF FACTS

A. Discovering Sheila Ginsberg's body

On December 21, 1990, Barry Ginsberg flew into Philadelphia from Ft. Lauderdale to visit his mother, Sheila, and half-sister, Sharon, for the holidays. Sheila lived at the Lakeview Manner Apartments in Bristol, Pennsylvania. When Barry arrived at Sheila's apartment shortly after 7:00 p.m. on December 21, 1990, he found her front door ajar, the lights off, and the television on with its volume turned up. He then found a horrific murder scene, as someone had brutally murdered Sheila.

[26] Rpp. 215-217.

He found Sheila in the living room between the sofa and coffee table, with an afghan draped over her body, her chest exposed, and a pair of scissors embedded in her chest.[27]

B. The investigation

1. Autopsy findings of overkill

Dr. Halbert Fillinger performed Sheila's autopsy and identified sixteen significant external injuries and eight significant internal injuries. He noted Sheila's shirt, sweater, and bra had been pushed up, exposing her breasts. The sweater had two tears in the left front and one tear in the middle front.[28]

Dr. Fillinger identified multiple blunt force trauma injuries to Sheila's head and face. The perpetrator struck her multiple times with a marble trophy base, meaning the perpetrator held the metal trophy top and repeatedly struck Sheila's head and face with the marble base, fracturing her skull.[29]

Dr. Fillinger also identified two stab wounds to the right side of Sheila's head, and three substantial stab wounds to her chest. The force with which the perpetrator stabbed Sheila was considerable because the scissors penetrated Sheila's ribs and breastbone, puncturing her heart and liver.[30]

Lastly, Dr. Fillinger determined Sheila had been manually strangled as well because her hyoid bone had been fractured.[31]

Although Sheila's shirt, sweater, and bra had been pushed up, because her breasts were exposed, the BPD and Dr. Fillinger found no evidence she'd been sexually assaulted. For instance, Sheila's pants were still on and buttoned and there was no evidence the perpetrator tried to remove

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[27] NT, Trial, 7/2/1992, pp. 40-48, 69-71.
[28] NT, Trial, 7/8/1992, pp. 6-8.
[29] NT, Trial, 7/8/1992, pp. 15-16, 34-40.
[30] NT, Trial, 7/8/1992, pp. 25-27, 44-49.
[31] NT, Trial, 7/8/1992, pp. 50-53.

her pants. People close to Sheila, however, said she routinely kept money in her bra because Sharon frequently stole the money she kept in her white purse. The BPD and Dr. Fillinger found no money in Sheila's bra or white purse. Nothing else, though, was or presumed missing from Sheila's apartment.

2. The scene characteristics strongly suggested the perpetrator had a close relationship with Sheila

Whoever murdered Sheila knew her and was beyond angry with her:

First, Sheila's murder wasn't your run-of-the-mill stabbing murder; it was overkill. The perpetrator used blunt force trauma, manual strangulation, and a pair of scissors to inflict numerous, *unnecessary* wounds. If the perpetrator simply wanted to rob Sheila, there were several ways to commit a straight-up robbery that didn't involve and/or require physically harming Sheila. Here, though, the perpetrator *extended* their time at the scene, increasing their own risk of apprehension, by inflicting numerous *unnecessary* wounds to Sheila *after* she'd obviously been incapacitated.

Second, that perpetrator killed Sheila strongly suggests Sheila knew the perpetrator. If the perpetrator was a stranger who'd learned from the streets that Sheila kept cash in her white purse or bra, the perpetrator wouldn't have felt compelled to murder Sheila because she didn't know him or her. Put differently, there were numerous ways to commit a straight-up robbery that didn't involve murdering Sheila.

Third, manual strangulation, blunt force trauma, and stabbing are classic forms of personalized murders, *i.e.*, murders where the perpetrator must invade the victim's personal space to commit the murder. Personalized murders generally involve a personal or familial relationship between the victim and perpetrator.

Fourth, the BPD found no signs of forced entry, meaning Sheila presumably knew the perpetrator and let the perpetrator into her apartment. The lack of forced entry also strongly suggests the perpetrator was unarmed, meaning the perpetrator presumably didn't go to Sheila's apartment with the intent of murdering her.

Fifth, after brutally killing Sheila, the perpetrator felt the need to cover Sheila's face with an afghan. This fact strongly suggests the perpetrator had a close personal or familial relationship with Sheila. Why the need to cover Sheila's face with an afghan, when doing so increased the time the perpetrator had to spend at the scene, which increased the risk of apprehension.

Sixth, the weapons used were ones of *opportunity*, meaning the perpetrator used items inside Sheila's apartment as weapons, *e.g.*, the trophy and scissors. This strongly suggests, if not outright proves, the perpetrator went to Sheila's apartment unarmed, meaning the perpetrator presumably entered Sheila's apartment with no desire to rob or murder her because the great majority of robbers use a weapon to help facilitate the robbery. If the perpetrator entered Sheila's apartment with no intent to rob her, something had to have happened between Sheila and the perpetrator because the perpetrator felt the need to weaponize the marble base trophy and scissors.

3. The initial investigation leads to one logical suspect: Sharon Ginsburg

The BPD's initial investigation made Sharon Ginsburg the strongest suspect.

First, the overkill findings strongly suggested the murderer had a close personal or familial relationship with her.

Sharon is Sheila's daughter.

Second, the overkill findings also strongly suggested the murderer had a remarkable amount of anger for Sheila.

Several people described, in great detail, Sharon's out-of-control drug habit at the time of Sheila's murder and her proclivity to react violently when she didn't get what she wanted, particularly when she wanted money from Sheila or someone else to buy drugs. These people, notably, were those closest to Sheila who knew the true dynamics of Sheila's relationship with Sharon.

Third, Sharon had a clear motive to murder Sheila. Sheila was withholding money from Sharon's welfare checks and this made Sharon irate because she needed the money for drugs.[32]

a. The fingerprint evidence

The BPD lifted three latent fingerprints from the door jam (S-9) collected near the front door of Sheila's apartment and submitted them to the FBI laboratory. The FBI linked these three fingerprints to Sharon.[33]

b. Barry Ginsberg

The BPD interviewed Barry on December 21, 1990. Barry described Sharon as "a drug abuser" and said Sheila and Sharon had frequent "fights… over money."[34] The BPD re-interviewed Barry on January 9, 1991,[35] where he identified Agnes Wilkie as a close friend of Sheila's. The BPD report summarized Barry's description of a violent argument between Sharon and Sheila that occurred Christmas of 1988:

> Barry related that two Christmas[es] ago there was a police report that he and Sharon had gotten into an argument. During the course of the argument Sharon pulled a knife, which was a weapon of opportunity, and she went after Barry with the knife. Barry stated that he had to wrestle with Sharon to get the knife off of her. He also stated that there was another incident where he and one of his friends came to his mother's apartment where Sharon began to act out and that she went into the parking lot of Lakeview Manor and proceeded to break out the windows in not only his vehicle but his friend's vehicle.[36]

Barry said he "believe[d]" Sharon had been "addicted" to drugs for "fourteen years" and was now using "crack" and "cocaine" as her "substance of choice." Barry said Sharon had received "psychological" and "substance abuse" treatment, but once she completed these programs, she always returned to Sheila's and "ask[ed] for money" and/or "took food" from Sheila's house.

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[32] Rpp. 223-231.
[33] NT, Trial, 7/7/1992, pp. 151-152.
[34] Rp. 215.
[35] Rpp. 216-218.
[36] Rpp. 216-218.

In November 1990, Barry said Sheila had called and told him she and Sharon had a "violent argument," but Barry couldn't recall what prompted the argument. Barry also said he'd purchased airline tickets for Sheila and Sharon so they could travel back to Florida with him after the 1990 holidays. He'd purchased the tickets primarily for Sharon, so "he could get her away from the drug influence and so she could get into a rehab and straighten her life out[.]" Sheila, however, argued against taking Sharon to Florida. Sheila told Barry she'd told Sharon "she had… better get a job because" she (Sheila) and Barry weren't going to give her spending money in Florida.[37]

In May 1990, Barry sent a Mother's Day card to Sheila, but the message inside the card focused on Sharon's drug abuse and destructive decision-making:

> Dear mom,
>
> Please give Sharon this letter & check read it to hear [sic] and cash her check for her. I know it is tough for you to court order her into treatment but, you have to no matter what. She has a disease that is progressive and if she doesn't get help she'll die or get arrested after loosing housing, welfare, and Ricky. I love her to [sic] much to see any of that happen to her and I'll do what ever [sic] it takes to prevent it. Of course she will hat you she hates herself more. I hope you have a great Mother' Day. Here is some… pictures from when you were here.
>
> With love always
>
> Barry G. xoxo[38]

c. Agnes Wilkie

A defense investigator interviewed Wilkie before trial.[39] In a June 3, 1992 interview, Wilkie said, "Sharon was the worst daughter a mother could have."[40] Wilkie said Sheila had repeatedly told her Sharon stole food and money from her (Sheila). Wilkie also said, "All her life Sharon was violent

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[37] Rpp. 216-218.
[38] Rpp. 256-257.
[39] Counsel has no idea if the BPD interviewed Agnes Wilkie. Counsel requested a complete copy of the discovery the DAO provided to trial counsel, but the DAO refused to voluntarily provide counsel with the discovery and the PCRA court refused to order the DAO to provide the requested discovery.
[40] Rpp. 223-225.

and out of control" and that Sheila "had [Sharon] committed for taking dope." Wilkie also said, "We [the Lakeview Manor residents] all thought it was Sharon who killed her mother."

In December 1990, Sheila told Wilkie she'd been withholding money from Sharon's welfare checks and saving it for their Florida trip so Sharon would have spending money. This, however, angered Sharon greatly, prompting her to repeatedly ask Sheila for the money so she could buy "dope." Wilkie said Sheila and Sharon frequently "fought over" this money. Wilkie also said Sheila had received additional money the week of her murder because she "got paid" on Tuesday, December 18, 1990, which was the last day Wilkie spoke with Sheila.

In a June 4, 1992 interview, Wilkie said, "Sharon and Sheila had real fights. They hit each other. Sharon had a temper." Wilkie added, "When Sharon demanded her money back that Sheila was keeping for her trip to Florida, I told Sheila to give it back to her, they fought about the money. Sharon wanted it back." Wilkie also said she "heard" Sharon worked as a prostitute and often met men at the Ballpark Tavern ("BPT").[41]

d. Roy Jennings

Jennings was another close friend of Sheila's who lived upstairs from her. The BPD interviewed Jennings on December 21, 1990. When detectives asked if Sheila had "problems with anyone, which might result in violence," Roy mentioned one person: Sharon. He said Sharon went to Sheila's apartment "several times a week" for money. Jennings explained how Sharon had come to Sheila's apartment on Sunday, December 16, 1990 and argued with Sheila "over money." Sheila told Sharon she "wasn't going to sponge off" her and Barry in Florida. Jennings said he'd told Sheila "not to trust" Sharon because of her drug use and the fact she'd stolen things from her in the past.[42]

[41] Rpp. 226-227.
[42] Rpp. 218-220.

e. Paul Cottman

Cottman dated Sharon at the time of Sheila's murder. The BPD interviewed Cottman on March 20, 1991, where he described Sharon's actions on December 21, 1990.[43] Cottman went to Sharon's residence (1713 Foster Avenue, Bristol, PA) at 12:30 p.m. on December 21, 1990 and found Sharon on the living room couch sleeping. He woke her up and they watched soap operas until 3:00 p.m., at which point Sharon had what Cottman called a "crack-attack" and demanded money from Cottman so she could buy crack. When Cottman refused, she said, "Fucking dick, you won't give me the money." Cottman said Sharon took a shower and left a 5:30 p.m. to go to Sheila's house to get the money.

In a June 13, 1992 interview, Cottman said, "I saw [Sharon] hit her mom when we first went out about the second month of 1990… Her mom wouldn't give her meat out of… [the] freezer."[44]

f. Daniel Lyden

In a January 15, 1992 interview, Lyden said he'd known Sharon since she was nine.[45] He was living with Sharon (1713 Foster Circle, Bristol, PA) at the time of Sheila's murder. Lyden said Sharon "was a prostitute and coke/crack user and dealer" – who "often" had more than twelve "visitors" a day. In the days leading up to Sheila's murder, Lyden said Sharon "was strung out on drugs and had not slept in three days." Lyden said, "Sharon was constantly high on drugs and she had a very bad temper." He also said Sharon was "very violent" and "would kill if she was high" because "she just didn't give a shit." Lyden described an incident where Sharon went "after a neighbor with a piece of pipe" and another incident where Sharon "went after a guy inspecting the house with a knife."

On December 21, 1990, Lynen said Sharon had left the house in the late afternoon and had told him she was going to Sheila's house to "pick up some money that she had left with [Sheila] the

[43] Rpp. 191-194.
[44] Rpp. 257-260.
[45] Rpp. 241-248.

day before." He said Sharon "often" went to Sheila's and stole meat, groceries, and money. Lyden knew Sheila well and said she never left money "laying around" her apartment "for fear" Sharon would steal it. On December 21, 1990, when Paul Cottman and BPD officers told Sharon about Sheila's murder, Lyden said Sharon "acted like she was upset," but she "didn't shed a tear." Lyden said, "I think [Sharon] killed [Sheila] and so do a lot of other people."

g. Betty and Domenic Marucci

Sharon has a son named Ricky. Sharon lost custody of Ricky multiple times before Sheila's murder. Betty and Domenic Marucci frequently served as Ricky's foster parents during these times. The BPD interviewed the Marcuccis on January 2, 1991.[46] During the interview, Betty and Domenic described how they'd frequently seen and interacted with Sharon when she was high or strung out.

In a June 3, 1992 interview, Betty again explained how Sharon had repeatedly lost custody of Ricky because of her drug abuse. Betty, moreover, said she was "surprised" the BPD hadn't arrested Sharon for Sheila's murder. She also said Sheila "would never open up her door to anyone unless she knew them."[47] She said Sharon always went to Sheila's to borrow money, ask for food, or use Sheila's car and that she "always" stole from Sheila.

In another interview, Betty said Ricky had come to live with them in the spring of 1985, after Sharon had struck Ricky in the back of the head with an iron, causing permanent blindness in one eye. Ricky was three at the time.[48] Betty said Sheila had called her on December 19, 1990, the day before the murder, and told her about Barry's holiday visit. Sheila told Betty she wanted to have a nice Christmas, not like prior Christmases where Sharon got drunk and high and caused trouble for everyone.

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[46] Rpp. 261-262.
[47] Rpp. 264-265.
[48] Rpp. 266-267.

Betty also said she (Betty) was "well aware" of Sharon's "severe drug problem" and that Sharon been arrested "several times" for prostitution. Betty was also aware of the "physical abuse" Sharon inflicted on Ricky. Likewise, Betty said Sheila had repeatedly told her how Sharon knew when her (Sheila's) "checks" arrived each month, and that Sharon always went to her (Sheila's) apartment on these days and demanded money from her. When Sheila refused, Sharon always became "violent."

On December 21, 1990, the day Barry found Sheila's body, Betty said Detective Al Eastlack and another BPD officer came to her home, told her about Sheila's murder, and said they suspected Sharon would attempt to kidnap Ricky. Betty said it was apparent to her the BPD viewed Sharon as "the primary suspect" in Sheila's murder. A day or two before Sheila's funeral, Betty said the BPD had called and told her she could take Ricky to the funeral, but the BPD feared Sharon might kidnap Ricky at the funeral. The officer who'd called, though, reassured Betty not to worry because the BPD would have plenty of plain-clothed officers at the funeral.

h. Marjorie Kaplan

Marjorie Kaplan was a BPT bartender. The BPD interviewed her on March 20, 1991 and March 22, 1991.[49] Kaplan said Sharon prostituted at the BPT. She was afraid of Sharon "because of her quickness to violence." She said Sharon frequently talked about the violence she'd committed against others, like throwing an ax through a woman's window. Kaplan described Sharon as someone who could "quickly" turn off and on her emotions, but that many of her emotions were exaggerated and manufactured. Kaplan also said Sharon frequently asked her for money under the guise she needed it for her son Ricky, but Kaplan didn't realize Sharon had lost custody of Ricky. When Kaplan learned she'd been hoodwinked, she "confronted" Sharon and told her she'd no longer give her money.

[49] Rpp. 232-234.

On the day of Sheila's viewing, Kaplan spoke with Sharon at the BPT, and that Sharon had told her "a lot of people" had accused her (Sharon) of killing Sheila. During this conversation, Kaplan asked Sharon "about the murder," and Sharon claimed "the police" had a "prime suspect" and that the "prime suspect" was Sheila's "boyfriend."

In a July 7, 1992 interview, Kaplan said she frequently heard Sharon say she "wanted to kill somebody or hurt somebody."[50] Kaplan also said Sharon was a crack addict and "hooker" who "solicit[ed]" men outside the BPT.

4. Sharon's statements to the BPD[51]

a. December 21, 1990

On December 21, 1990, the BPD interviewed Sharon. During the interview, Sharon appeared "highly emotional," "intoxicated," "under the influence of some sort of drug," and "quite hysterical." Sharon told the BPD she'd last spoke with Sheila between 9:00 and 10:00 p.m. on December 20, 1990 when she called Sheila. Sharon said Sheila "was due to go shopping with one of her neighbors" on December 21, 1990. In terms of December 21, 1990, Sharon claimed she "walked over to" Sheila's apartment at 5:30 p.m. and knocked on the front door but no one answered. She claimed she then walked to the BPT.[52]

b. December 24, 1990

On December 24, 1990, the BPD re-interviewed Sharon, who claimed she was home (1713 Foster Circle) with Daniel Lyden at 2:00 p.m. on December 20, 1990. At some point that afternoon, she smoked a joint and went to the BPT. At 9:30 p.m., she claimed she called Sheila from the BPT.

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[50] Rpp. 235-236.

[51] The interviews listed in this section merely summarize the BPD reports undersigned counsel has obtained; it doesn't mean these interviews represent all the statements Sharon gave to the BPD and DAO. While counsel has obtained several pre-trial BPD reports, they've not obtained the DAO's entire case file, *i.e.*, the case file the DAO turned over to trial counsel before and during trial. Thus, the BPD's and DAO's case files may very well contain more reports summarizing additional statements by Sharon – and Barry Ginsberg.

[52] Rp. 212.

Sharon claimed it didn't "sound as if" Sheila was drinking when they talked. Sheila supposedly told Sharon she was going to Ft. Dix the next day (December 21, 1991) with Roy Jennings. Sheila also allegedly told Sharon she was watching T.V. and was in for the night. Sharon mentioned nothing about discussing Barry's (December 21st) arrival with Sheila. After speaking with Sheila, Sharon claimed she had a few more drinks and went home where she arrived at 1:00 a.m. (December 21, 1990).[53] Sharon mentioned nothing about hitchhiking back home, then hitchhiking back to the BPT for more drinks, and then hitchhiking back home once more that night.

Sharon claimed she woke up at 5:00 p.m. on December 21, 1990 and walked to Sheila's apartment. When she arrived, she claimed Sheila's front door was locked and Sheila's car wasn't in the Lakeview Manor parking lot. Sharon claimed she went to Sheila's to retrieve $50.00 of "her money" Sheila had been "holding" for her. Sharon claimed Sheila's apartment was dark and quiet and she didn't hear a radio or T.V. on inside the apartment.

c. April 19, 1991

The BPD re-interviewed Sharon on April 19, 1991.[54] At the outset, Sharon repeatedly asked if the BPD had "found anything" inside Sheila's apartment. When detectives asked what she was referring to, Sharon said she'd "heard" the BPD had found hairs at the scene. When asked to explain her whereabouts on December 20, 1990, Sharon again placed herself at the BPT making a call to Sheila between 9:30 p.m. and 10:00 p.m. This time, though, she claimed she'd called Sheila to see when Barry was arriving the next day (December 21, 1990). She also claimed Sheila had asked her to come to her apartment the next day, before 6:00 p.m., so they could clean the apartment for Barry's arrival. Sheila also allegedly told her she was going to Ft. Dix the next day with Roy Jennings.

[53] Rpp. 268.
[54] Rpp. 270-272.

After finishing her call with Sheila, Sharon claimed she ordered and ate two ham and cheese sandwiches, before "thumbing" a ride home around midnight. She said her "boyfriend," Paul Cottman, was at her house when she arrived home. Sharon claimed she stayed at home for ninety minutes before "thumbing" a ride back to the BPT at 1:30 a.m. (on December 21, 1990). Sharon claimed she spoke with Bonnie, a BPT bartender, until 2:00 a.m., when she "thumbed" another ride back home, where she stayed the remainder of the night/morning.

On December 21, 1990, Sharon claimed she got up before 5:00 p.m., because she'd walked to Sheila's apartment in the late afternoon, arriving between 5:00 and 5:30 p.m. She claimed Paul Cottman was at her house when she left to walk to Sheila's. Unlike her first statement, where she claimed she didn't see Sheila's car in the Lakeview Manor parking lot, this time she claimed she saw Sheila's car. She claimed she didn't see any lights on inside or hear or see a T.V. playing. She claimed she knocked on Sheila's front door, but no one answered. Unlike her first statement, where she claimed the door was locked, Sharon hedged this time and claimed she "halfheartedly tried the door and thought it was locked."

Assuming Sheila was somewhere in Lakeview Manor, because her car was in the parking lot, Sharon claimed she went upstairs to talk with Roy Jennings. Unfortunately, counsel is missing page three of Sharon's April 19, 1991 statement. Page four of the statement mentioned something about Sharon refusing to take home a pair of scissors Sheila had bought for her because she (Sharon) didn't want Ricky to play with scissors.

d. June 15, 1991

The BPD arrested Sharon on drug charges on June 15, 1991. Once in custody, Sharon gave a statement while sitting in her living room.[55] She claimed she'd overheard Mr. Brookins confess to Rodney Simmons – on May 15, 1991 – that he'd murdered Sheila and didn't know how to tell her

[55] Rpp. 273-274.

(Sharon) about the murder. According to Sharon, after the BPD interviewed her and Mr. Brookins on May 15, 1991,[56] she and Mr. Brookins went to her residence later that night. At some point that night, Sharon left her house, but returned shortly thereafter.

As Sharon approached her residence, however, she claimed she overheard Mr. Brookins talking with Rodney Simmons in her living room. Sharon "stood outside the window and listened" while Mr. Brookins "told" Simmons "he had killed" Sheila and didn't know how to tell her (Sharon) about it. Sharon also claimed Mr. Brookins told Simmons he believed he'd "lost his hair pick" at the scene during the murder. Sharon claimed she "confronted" Mr. Brookins that night, "right after she heard [his confession]." When she "confronted" Mr. Brookins, she allegedly told him "she was going to the cops to tell them what he'd said." Once confronted, Sharon claimed Mr. Brookins "threatened to hurt her real bad if she told the police[.]"

While giving her statement, Sharon claimed she saw Mr. Brookins drive by her house in a red Camaro and stare at her through the front window. Sharon "appeared… extremely upset and afraid" and told the BPD Mr. Brookins was "going to kill her for talking to the police." She also told the BPD Mr. Brookins had "beaten her on several occasions." The BPD stopped the red Camaro immediately thereafter, but Mr. Brookins "was not in it."

C. Mr. Brookins's arrest

1. The fingerprint evidence

The BPD lifted latent fingerprints from Sheila's telephone receiver, her television remote control, and the underside of the toilet seat in her bathroom and submitted them to the FBI laboratory. The FBI linked these fingerprints to Mr. Brookins.[57]

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[56] Counsel doesn't have Sharon's May 15, 1991 statement.

[57] NT, Trial, 7/6/1992, pp. 21-26, 104-105, 107; NT, Trial, 7/7/1992, pp. 155-163, 163-164, 164-171.

2. Mr. Brookins's statements to the BPD

The BPD questioned Mr. Brookins thrice: April 2, 1991, May 15, 1991, and June 14, 1991. None of these interrogations were audio or video recorded. On June 15, 1991, the BPD filed a criminal complaint against Mr. Brookins charging him with Sheila's murder, which resulted in his June 19, 1991 arrest. Once arrested, the BPD interrogated Mr. Brookins again, and again didn't record the interrogation. According to the BPD, Mr. Brookins gave inconsistent statements each time – and he never claimed to have seen Sharon murdering Sheila.

D. More evidence and witnesses against Sharon Ginsberg

After Sheila's murder but before Mr. Brookins's trial, several women came forward and said (1) Sharon admitted to them to murdering Sheila or made statements to them strongly suggesting she'd murdered Sheila or (2) they'd seen Sharon at Lakeview Manor near the time of Sheila's murder on December 20, 1990.

1. Tammy Stroman

Through investigation, trial counsel learned of Tammy Stroman, who testified at trial. She said on December 20, 1990, around dusk, she picked up Sharon at the corner of Lloyd and Venice Ashby. Sharon said she needed a ride to Sheila's house to "get some money." Stroman drove Sharon to Lakeview Manor. An hour or so later, Stroman said she and her boyfriend, Michael, saw Sharon walking along Venice Ashby. They pulled alongside her and asked if she wanted a ride. Sharon said yes and entered Stroman's car again. Once inside, Stroman asked if she'd got the money "she wanted" from her mother. Sharon said, "Yes, I got the money." Stroman saw the wad of cash Sharon had and said it was "an inch to an inch and half thick" and comprised of "fifties and twenties."[58]

[58] NT, Trial, 7/14/1992, pp. 74-77.

2. Sandy Wilson

Through investigation, trial counsel learned of Sandy Wilson, who testified at trial. Wilson said she was at Lakeview Manor around dusk on December 20, 1990 smoking cocaine with Tony (LNU) – a white Italian man – in front of one of the Lakeview Manor apartment buildings.[59] She said it wasn't "completely dark yet" or "dark dark," but it was "fairly dark."[60] She and Tony had been at Lakeview Manor for ten minutes when she saw Sharon "running around the building coming from the left side of the building with blood on her hands."[61] She got a "good look" at Sharon's hands and she definitely saw blood on them. She described the blood as "partially dry" with some "still… wet."[62] She said it looked like Sharon had wiped her bloody hands on her pants.[63]

When Sharon approached her and Tony, she told Sharon, "You better hope you haven't done anything or you're going up shit's creek without a paddle." To which Sharon replied, "Oh, fuck you."[64] Wilson described Sharon as "hysterical" because she kept holding her hands up to her face.[65] Wilson said she and Tony left Lakeview Manor shortly thereafter. After learning of Sheila's murder, Wilson said she had a conversation with Sharon where she asked Sharon why she'd killed "her mother." Sharon replied, "I wanted to get high… [and] that bitch needed to die."[66]

3. Florence Barrole

Through investigation, trial counsel learned of Florence Barrole and an incident that occurred between Barrole and Sharon in late December 1990 – *after* Sheila's murder. Barrole testified at trial. According to Barrole, she, Lisa Crotta, and Tammy Stroman went to a "speak easy" at "the Terrace."

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[59] NT, Trial, 7/14/1992, pp. 23-24, 26.
[60] NT, Trial, 7/14/1992, pp. 25, 28.
[61] NT, Trial, 7/14/1992, pp. 25, 28.
[62] NT, Trial, 7/14/1992, p. 32.
[63] NT, Trial, 7/14/1992, p. 32.
[64] NT, Trial, 7/14/1992, pp. 32, 37.
[65] NT, Trial, 7/14/1992, p. 30.
[66] NT, Trial, 7/14/1992, p. 10.

As they exited the speak easy, they ran into an "angry" Sharon, who told them someone had sold her "fake crack." Sharon also said, "I could kill that bitch [*i.e.*, the woman who'd sold her the fake crack] and if I could kill my own mother, I'd [sic] could kill that bitch."[67]

4. Melinda Hallock and Pamela Holdren

a. Melinda Hallock

Through investigation, trial counsel learned of Melinda Hallock and an incident that occurred between Hallock, Pamela Holdren, and Sharon at the BPT in the spring of 1991 – *after* Sheila's murder. Hallock testified at trial. According to Hallock, on the night in question, Sharon saw her (Hallock) in the BPT parking. Sharon "was hollering," "screaming," and "pointing her finger" at Hallock as she accused her "of something." As Sharon walked closer, Pamela Holdren intervened and pushed Sharon "up against the wall and said, "Look, sister… stop it or calm down." This prompted Sharon to repeatedly say, "My mom, I really fucked her up. And I will fuck you up to [sic]."[68] At trial, Hallock said, "I know what she was talking about. She was talking about the murder of her mother."[69] Holdren eventually let Sharon go, and she stormed off. Holdren then turned to Hallock and said, "Did you hear what she said to me? She just said that she killed her mom."[70]

b. Pamela Holdren

Holdren also testified at trial and mimicked Hallock's account of the BPT incident. Holdren worked as a BPT "dancer." When she arrived at the BPT that night, Hallock approached her and said, "[Sharon] is going to stab me."[71] At this point, Holdren accosted Sharon and said, "What's your problem?" Sharon replied, "I am going to fuck Mindy up." Hallock went by Mindy. Sharon then said, "I am going to fucking stab her," and said either, "I stabbed my fucken grandmother" or "I

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[67] NT, Trial, 7/14/1992, p. 178.
[68] NT, Trial, 7/14/1992, p. 123.
[69] NT, Trial, 7/14/1992, p. 123.
[70] NT, Trial, 7/14/1992, p. 124.
[71] NT, Trial, 7/14/1992, p. 153.

stabbed my damn mother" and "I'll stab her, too." Holdren was certain she clearly heard Sharon say, at least once, "I stabbed my mother and I'll stab her, too." She also heard Sharon say, "I fucken killed her and I put her down."[72]

Holdren added, "[Sharon] was so mad at Mindy because Mindy went to [Sharon's] boyfriend's house and was partying with them, getting high, and she thought that Mindy wanted her boyfriend and she wanted to stab Mindy and she was serious."[73] At the end of her direct-examination, Holdren said, "[F]or the record[,] when I do swear on the Bible, I am telling the truth, everything I'm saying. I'm not lying."[74]

5. Patricia Johnson

Through investigation, trial counsel learned of Johnson and an incident that occurred during the early morning hours of December 21, 1990 – *well before* Barry Ginsberg had discovered Sheila's body. Johnson testified at trial. In December 1990, Johnson lived with her son, daughter, and boyfriend, Tony Jackson, at 2110 Foster Avenue Circle in Bristol. Tony Jackson and Mr. Brookins are first cousins, so Johnson knew Mr. Brookins well. She also knew Sharon. Johnson said she worked from 3:30 p.m. (on December 20, 1990) until 12:30 a.m. (on December 21, 1990).

After work, Johnson went home, arriving at 1:00 a.m. on December 21, 1990. Once home, she and Tony talked about their Christmas plans before retiring for the night. However, between 4:30 and 4:40 a.m., someone knocked on their front door. It was Sharon. Tony answered the door and asked Sharon why she was knocking so early in the morning. Sharon replied, "Have you seen Johnny?" Tony replied, "No. Why? And what are you doing here this time of morning?" Sharon replied, "Well,

[72] NT, Trial, 7/14/1992, pp. 153-154.
[73] NT, Trial, 7/14/1992, p. 154.
[74] NT, Trial, 7/14/1992, p. 155.

my mother's been murdered. She was stabbed in the chest with a pair of scissors."[75] This was fifteen hours before Barry found Sheila's body.

6. Pamela Simmers

a. November 24, 1991 statement

On November 24, 1991, a Bucks County Jail ("BCJ") inmate named Pamela Simmers filed an *Inmate Request Form* where she described a conversation she had with Sharon at the BCJ during the fall of 1991.[76] In her request, Simmers said, "I need to find out how to get ahold of a lawyer of an inmate name[d] John Brookins." Simmers then wrote a "girl" named "Sharon" had told her that she'd "kill[ed] her mother" by "stabbing" her because "she wanted money for drugs." Simmers also wrote, "[Sharon] kept saying I can't believe what I did."

b. December 16, 1991 statement

In a December 16, 1991 interview, Simmers said her conversation with Sharon occurred in the BCJ dayroom while Sharon was braiding her (Simmers's) hair.[77] While braiding her hair, Simmers said Sharon began "sobbing." When she asked Sharon what was wrong, Sharon said, "I can't believe I did it." When Simmers asked what she'd done, Sharon replied, "I killed my mother." Simmers initially believed Sharon's mother had died of natural causes and that Sharon simply believed she'd had something to do with her mother's natural passing. When Simmers said, "I know how you feel," Sharon replied, "No, I really killed my mother." When Simmers replied, "What do you mean?" Sharon said, "I stabbed my mother with a pair of scissors," and then said, "I needed money for drugs." Sharon then said, "I kept stabbing her, I can't believe I did that."

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[75] NT, Trial, 7/14/1992, pp. 111-112.
[76] Rp. 277.
[77] Rpp. 278-279.

Once Sharon calmed down, Simmers asked how she'd "got caught." Sharon said a friend had helped her move the body and had called the police, but in doing so her friend's fingerprints "got on the phone." As they walked back to their BCJ cells, Sharon said, "They probably can't pin it on me."

E. Trial

1. The DAO's motive argument

At trial, the DAO suggested Sheila was angry at Sharon and Mr. Brookins because Sharon had run up a $200 phone bill speaking to Mr. Brookins from jail a few months before his December 7, 1990 release.[78] The DAO also suggested Sheila had demanded the $200 from Mr. Brookins – and that this money dispute was, perhaps, the reason Mr. Brookins murdered Sheila.[79]

2. The DAO's single-perpetrator theory

The DAO's theory was straightforward: Mr. Brookins – and he alone – murdered Sheila. For instance, during her opening statements, the prosecutor repeatedly told jurors Mr. Brookins – and he alone – killed Sheila.[80] Likewise, the jury instructions also make clear the DAO believed Mr. Brookins – and he alone – murdered Sheila. For instance, when explaining first-degree murder, the trial court said: "The *Commonwealth contends that the Defendant did kill Sheila Ginsberg*."[81]

3. The physical evidence

a. The hair evidence

Sharon is mixed race. Sheila is white, while Sharon's father is black. The BPD collected hair samples from Sharon and submitted them to the FBI laboratory.

The FBI's Chester Blithe examined the hair evidence. Blithe identified two Negroid hair "fragments" on the two left sofa cushions (S-12, S-13) collected from Sheila's apartment and three

[78] On December 7, 1990, Mr. Brookins was released from prison after serving a two-year drug sentence.
[79] NT, Trial, 7/8/1992, pp. 109-110; NT, Trial, 7/9/1992, pp. 97-99.
[80] NT, Trial, 7/2/1992, pp. 20, 20-21, 26-27.
[81] NT, Trial, 7/17/1992, pp. 10, 41-42.

Negroid hair "fragments" on the two middle sofa cushions (S-14, S-15).[82] Blithe identified one Negroid hair "fragment" on Sheila's pants (A-1),[83] two Negroid hair "fragments" on Sheila's shirt (A-2), one Negroid hair "fragment" on Sheila's sweater (A-8), two Negroid hair "fragments" on the afghan (A-9), one Negroid hair "fragment" on the two sheets used to transport Sheila's body from the scene (A-7, A-8),[84] and one Negroid hair "fragment" on the carpet (X-3) collected from Sheila's apartment.[85]

Blithe said none of these Negroid hair "fragments" were "suitable" for comparison, meaning he didn't associate them to Mr. Brookins.[86]

On cross-examination, though, Blithe conceded that once the FBI had learned the BPD's primary suspect was black, he narrowed his focus to seeking out and identifying only those hairs or hair fragments that exhibited Negroid characteristics, meaning he consciously disregarded hairs and hair fragments exhibiting mixed race characteristics – like Sharon's.

For instance, Blithe admitted he'd "found several types of hairs" on the sofa cushions (S-10 through S-15), but only reported on and testified about the Negroid hair "fragments."[87] Blithe's June 10, 1992 report reinforces this point. In his report, Blithe wrote:

> Hairs of Negroid racial origin which are not suitable for significant comparison purposes were found among the debris from Q11, Q12, Q15, Q16, Q62 through Q65 and Q67.[88]

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[82] NT, Trial, 7/7/1992, pp. 52, 53. The S-___ numbers correspond to the BPD's December 21, 1990 property receipt – which is attached at Rpp. 181-187. These items were collected from the scene.
[83] The A-___ numbers correspond to the BPD's December 22, 1990 property receipt – which is attached at Rpp. 179-180. These items were collected during Sheila's autopsy.
[84] NT, Trial, 7/7/1992, pp.53-54, 54-55, 55-56, 60-61.
[85] NT, Trial, 7/7/1992, pp. 47-48.
[86] NT, Trial, 7/7/1992, p. 67.
[87] NT, Trial, 7/7/1992, pp. 64-65.
[88] Rpp. 205-207.

Q11 is Sheila's pants (A-1), Q12 is Sheila's shirt (A-2), Q15 is the sheet used to transport Sheila's body (A-7), Q16 is Sheila's sweater (A-8), Q62 through Q65 are the sofa cushions (S-12, S-13, S-14, S-15), and Q67 is a 10 x 10 piece of carpet (X-3).[89] Blithe's June 6, 1992 report mentioned nothing about the "several" non-Negroid hairs or hair fragments removed from these items.

Blithe also conceded he'd collected as many as twenty non-Negroid hairs and hair fragments from the carpet, but only reported on and testified about the one Negroid hair fragment.[90] Furthermore, Blithe admitted he'd returned all the non-Negroid hairs and hair fragments – removed from Sheila's clothing (A-1, A-2, A-3, A-4, A-8), the afghan (A-9), the white sheets (A-6, A7), the carpet (X-3), and the sofa cushions (S-10 through S-15) – to the BPD *before* the FBI had received, and he'd examined, Sharon's hair samples. Thus, Blithe never compared Sharon's hair samples with the numerous non-Negroid hairs and hair fragments recovered from these items.[91]

Blithe "examined" Sharon's head hair samples and said they exhibited "mixed racial" characteristics, meaning they contained both Caucasian and Negroid characteristics.[92] Although Blithe didn't compare Sharon's head hair samples to the fourteen unknown Negroid hair "fragments," Blithe opined that Sharon "was not the contributor" of these Negroid hair "fragments." When the prosecutor asked him how he concluded this without comparatively assessing Sharon's head hairs with the unknown Negroid hair "fragments," Blithe said:

> The hairs that I examined, that I identified as being from an individual of the black race, were clearly hairs from an individual of the black race; there was no apparent racial admixtures in those hairs. The hairs from Sharon Ginsberg did exhibit racial admixture. In my opinion, Sharon Ginsberg was not the contributor of those hair fragments that I identified as come from an individual of the black race.[93]

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[89] Rpp. 179-189, 199-203, 205-207.
[90] NT, Trial, 7/7/1992, p. 63.
[91] NT, Trial, 7/7/1992, pp. 65, 66, 69.
[92] NT, Trial, 7/7/1992, p. 58.
[93] NT, Trial, 7/7/1992, p. 58

Lastly, Blithe date-stamped the Negroid hair "fragments," by claiming they reflected "recent contact."[94] His reason: transfer generally requires contact, meaning if a Negroid hair "fragment" was recovered from Sheila's body, this probably meant she'd come in contact with a black person shortly before her murder.

b. The blood evidence

The BPD didn't submit a sample of Sharon's blood to the FBI laboratory, meaning the FBI, BPD, and DAO didn't know Sharon's blood type and therefore couldn't determine if it was consistent with the blood recovered from the scene.

Furthermore, Dr. Fillinger obtained a blood sample from Sheila (X-2) during her autopsy, which the BPD submitted to the FBI. However, when Richard Reem, the FBI's serologist, tested X-2, he claimed it was too degraded to run the three enzyme tests the FBI used to type a person's blood, *i.e.*, the PGM test, the haptoglobin test, and the Gc test.[95] Reem, consequently, tested a blood stain from Sheila's shirt (A-2), and *assumed* the blood came from Sheila.[96] Reem typed Sheila's blood as: PGM 1-2+, haptoglobin type 2, and Gc type 1F-1S.[97]

Reem said the blood on Sheila's underwear (A-3), sweater (A-8), and the scissors was "consistent with" the blood identified on Sheila's shirt (A-2).[98] Reem also identified human blood – "consistent with" the blood identified on Sheila's shirt (A-2) – on the two right sofa cushions (S-10, S-11), one of the middle sofa cushions (S-14), and the carpet (X-3).[99]

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[94] NT, Trial, 7/7/1992, pp. 71-72.
[95] NT, Trial, 7/7/1992, p. 84.
[96] NT, Trial, 7/7/1992, p. 87.
[97] NT, Trial, 7/7/1992, p. 88.
[98] NT, Trial, 7/7/1992, pp. 89-90, 91.
[99] NT, Trial, 7/7/1992, pp. 99, 101, 102.

Reem found no blood on the marble trophy base (S-4), the metal trophy top (S-3), or the interior and exterior door knobs (S-1, S-1A).[100] Reem didn't examine Sheila's fingernail scrapings (A-12) for the presence of blood.[101]

4. The other evidence

The DAO's primary evidence against Mr. Brookins were the fingerprints lifted from the (1) telephone receiver, (2) remote controller, and (3) toilet seat.

Also, the BPD detectives testified and told jurors Mr. Brookins gave inconsistent statements.

Lastly, Margert Albright, a Lakeview Manor tenant who lived several apartments down from Sheila (H-9 to H-3), claimed she'd just sat down to watch the 11:00 p.m. news on December 20, 1990 when she heard a lady's voice yell, "No, no, please. I said no." Albright said the lady sounded "scared." At 11:30 p.m., once the news ended, Alright retired to her bedroom. Shortly thereafter, she heard the same lady's voice yell, "He's killing me, he's stabbing me. Please, somebody help."[102] Interestingly, the tenants in H-8, H-7, H-6, H-5, H-4, H-2, and H-1 didn't hear this lady's desperate screams, only Albright did. Albright lived in H-9, while Sheila lived in H-3.

Also, the DAO never presented Sharon or Rodney Simmons, despite the fact Sharon allegedly overheard Mr. Brookins confess to Simmons.

F. Punishment phase hearing and sentencing hearing

During the punishment phase hearing, the prosecutor described Sharon as an innocent victim:

> Ladies and gentlemen, in every case there is a victim. Certainly in this case Sheila Ginsberg was the ultimate victim. The Ginsberg family were victims. *In particular, Sharon Ginsberg was a victim; she not only had to*

[100] NT, Trial, 7/7/1992, pp. 91-92.
[101] NT, Trial, 7/7/1992, p. 93.
[102] NT, Trial, 7/9/1992, pp. 78-82. Mr. Brookins and counsel believe Albright's testimony is false and manufactured. *Infra* pp., 72-74. Albright gave this statement in June 1992 – eighteen months after Sheila's murder – when ADA Diane Gibbons and Detectives Potts appeared at her front door shortly before trial. The DAO – at that point – still didn't have a "smoking gun" to undermine Mr. Brookins's defense that Sharon killed Sheila.

> *sit through this trial and listen to the details of her mother's death, she had to sit there and be falsely accused of committing the murder herself.*[103]

Jurors acquitted Mr. Brookins of the death penalty, sentencing him to life imprisonment. At his sentencing hearing, the prosecutor presented Sharon as an innocent *victim* who gave the following *victim* impact statement:

> I don't know what to say, trying to ruin my life today, I can't go on with my life right. I don't have my mom to go talk to anymore. She was the only one I have in my life. Why did you have to take my mom. You destroyed my life, every holiday that comes I can't see my mother. This is where you put her underneath the ground, why? Today I have my life trying to go on with my life is hard. She's not there. Oh God, why you John ruined my life, why you destroy me? You didn't have to do this. Every day I'm sleeping I have these dreams your [sic] there. She was always good. Today you can see your mother, you could see her on the holidays, I can't. Today I don't understand why you did this to her. I don't know what else to say. I hope you rot and you pay this price every day. We have to come to this Court to see your face. All the things you did to me, try to frame me and stuff. Today I'm trying to go on with my life, today is hard.[104]

G. Mr. Brookins's PCRA proceedings

During his PCRA proceedings, Mr. Brookins provided an eyewitness account of what he saw on December 20, 1990 when he went to Shelia's apartment to meet Shelia and Sharon to help Shelia prepare for Barry's arrival the next day. On June 15, 2011, during Mr. Brookins's PCRA hearing, Mr. Brookins handed the PCRA court statements he'd prepared that contained his eyewitness account.

Upon entering Sheila's apartment, where he expected to meet Sharon and Shelia, he found Sharon screaming and standing over Shelia, who had an afghan wrapped around her head. He reported that he pushed Sharon away and touched Sheila's wounds. He turned down the television, touching the remote control, and picked up the telephone to call 911, but decided against calling 911 when he realized the reality of the situation, *i.e.*, here's a black man inside a murdered white woman's

[103] NT, Punishment Phase Hrg., 7/20/1992, p. 51.
[104] NT, Sentencing Hrg., 6/17/1997, pp. 8-9.

apartment calling 911 to report said murder, and said black man had just been release from prison only weeks earlier. As Mr. Brookins contemplated calling 911, Sharon fled the apartment.[105]

H. The current DNA testing proceedings

1. The DNA testing motion

a. The physical evidence

In his June 2019 DNA testing motion, Mr. Brookins asked to test the following items:

BPD Receipt #	Description	Trial Exhibit
A-1	Sheila's pants	
A-2	Sheila's shirt	
A-4	Sheila's bra	
A-8	Sheila's sweater	C-61[106]
A-6	White sheet used to transport Sheila's body	
A-7	White sheet used to transport Sheila's body	
A-11	Scissor embedded in Sheila's chest	Entered as C-39[107]
A-12	Sheila's 10 fingernail scrapes[108]	
S-2	Scissors recovered under coffee table	
S-3	Metal trophy piece	Entered as C-41[109]
S-4	Marble trophy base[110]	Entered as C-42[111]

[105] NT, PCRA Hrg., 6/15/2011, pp. 36-48.
[106] Sheila's sweater was admitted into evidence on July 8, 1992. NT, Trial, 7/8/1992, p. 139.
[107] The scissors were admitted into evidence on July 7, 1992. NT, Trial, 7/7/1992, pp. 18-19.
[108] Dr. Fillinger collected these items during Sheila's autopsy and the BPD labeled the items A-1 through A-12. Rpp. 17-180.
[109] The top of the trophy was admitted into evidence on July 7, 1992. NT, Trial, 7/7/1992, p. 27.
[110] The BPD collected these items from the scene on December 21, 1990 and labeled the items S-1 through S-45. Rpp. 181-187.
[111] The marble based was admitted into evidence on July 7, 1992. NT, Trial, 7/7/1992, p. 28.

X-2	Sheila's blood sample[112]	
X-3	Carpet (10' x 10')	
X-4	Scaping from celling chase	
X-9	Blood residue from scrapings of bloodstain on floor[113]	
-	Gloves seized from Paul Cottman's car[114]	
-	Sheila's white purse[115]	C-36[116]
-	All the non-Negroid hairs or hair fragments Chester Blithe removed from Sheila's clothing, the white sheets, the carpet, and sofa cushions[117]	
-	Sharon's hair samples[118]	

In its *Answer*, the DAO conceded the BPD and the trial court still possessed the above items.[119] Also, the DAO didn't make degradation, contamination, or chain of custody arguments to block testing.

b. DNA testing scenario proving actual innocence

Mr. Brookins's actual innocence testing scenario is straightforward: a redundancy identifying Sharon's DNA on (1) Sheila's shirt, sweater, bra, and fingernail scraping, (2) the scissors, (3) the trophy,

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[112] Dr. Fillinger collected a sample of Sheila's blood during the autopsy, and he gave this sample to Analytic Bio-Chemistries Inc. ("ABC"). The BPD collected Sheila's blood sample on January 16, 1991 from ABC and labeled it X-2. Rp. 188.

[113] The BPD collected the carpet, celling chase scraping, and floor scraping from the scene on January 7, 1991. Rp. 189.

[114] The BPD collected these gloves on March 20, 1991 but didn't provide a property receipt number for them. Rpp. 190-194.

[115] The BPD collected the pursue on December 22, 1990 from the scene but didn't provide a property receipt number for it. Rp. 254.

[116] The white purse was admitted into evidence on July 6, 1992. NT, Trial, 7/6/1992, pp. 184-185.

[117] Blithe testified he collected over twenty non-Negroid hairs and hair fragments from these items of evidence and he returned them to the BPD. NT, Trial, 7/7/1992, pp. 63-65.

[118] Blithe testified the BPD had collected Sharon's hair samples and submitted them to the FBI. NT, Trial, 7/7/1992, p. 58. Blithe returned Sharon's hair samples to the BPD. Although chain of custody reports may exit for Sharon's hair samples, counsel has no chain of custody reports regarding Sharon's hair samples.

[119] Rp. 96, fn.12

(4) the afghan wrapped around Sheila, and (5) the hair evidence. *Cf. Commonwealth v. Conway*, 14 A.3d at 110 (finding that a redundancy theory is a "plausible" innocence theory).[120]

2. Counsel's attempt to obtain Sharon's DNA sample

Undersigned counsel and his investigator located Sharon in Ft. Lauderdale, Florida and interviewed her on June 20, 2019. At the very end of her forty-minute interview, which occurred right outside of her apartment, counsel asked Sharon if she'd voluntarily provide a sample of her DNA. Sharon turned ghost white, began to visibly shake, and stared at counsel for nearly a minute before she finally said, "Sure. I got nothing to hide. I'm innocent." It was after 10:00 p.m. at this point, so counsel asked if they could return the following morning with a DNA collection kit to collect her DNA sample. Sharon said, "Sure. I didn't kill my mother."

The next morning, June 21, 2019, counsel and his investigator purchased an $80 DNA collection kit at Walgreens. They then went to Sharon's apartment to collect her DNA sample. She wasn't home, so they returned later that afternoon. She wasn't home in the afternoon either, so they returned later that night. She wasn't home again.

What's interesting about the DAO's PCRA court pleadings, however, is Sharon told the DAO that counsel and his investigator came to her apartment "on multiple occasions" on June 21, 2019. Sharon's apartment, though, was dead empty all three times counsel and his investigator returned on June 21, 2019. No lights. No movement. No nothing. The question, therefore, becomes this: how did Sharon know counsel and his investigator returned to her apartment multiple times when her apartment was dead empty?

The answer is simple: Sharon had to be hiding out in her apartment complex somewhere surveying counsel and his investigator. This begs the next obvious question: if Sharon was truly innocent, why'd she hide from counsel and his investigator after telling them she'd have no problem

[120] Rpp. 52-60.

giving them a sample of her DNA? The answer is simple: Sharon murdered her mother and knew quite well her DNA would be on the scissors, Sheila's clothing, Sheila's fingernail scrapings, and the hair fragments recovered from Sheila's body and clothing would be linked to her.

3. The PCRA court's opinion

a. Timeliness finding

The PCRA court found Mr. Brookins DNA testing untimely.[121] The PCRA court correctly noted: (1) the PCRA's one-year limitations period doesn't apply to DNA testing motions under 42 Pa. C.S. § 9543.1;[122] (2) the DNA testing statute doesn't "specify restrictions or limitations on the time for filing" a DNA testing motion;[123] and (3) because Mr. Brookins is serving LWOP, the filing of his DNA motion can't and doesn't delay execution of his LWOP sentence.[124]

However, the PCRA court cited 42 Pa. C.S. § 9543.1(d)(1)(iii), which, in relevant part, reads: the PCRA court "shall order" DNA testing "upon a determination, after review of the record of the applicant's trial, that the… motion is *made in a timely manner* and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice."[125]

To decipher the "made in a timely manner" phrase, the PCRA court turned to *Commonwealth v. Edmiston*, 65 A.3d 339 (Pa. 2013).[126] The Supreme Court affirmed the denial of Steve Edmiston's DNA testing motion for multiple reasons, two of which the PCRA court focused on: (1) Steve Edmiston knew "of the existence of the physical evidence" for twenty years and (2) Steve Edmiston wasn't "a likely candidate to be exonerated by DNA testing."[127]

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[121] Appendix, PCRA opin., p. 5.
[122] Appendix, PCRA opin., p. 5 (citing *Commonwealth v. Walsh*, 125 A.3d 1248, 1252 (Pa. Super. 2015)).
[123] Appendix, PCRA opin., p. 4.
[124] Appendix, PCRA opin., p. 7.
[125] Appendix, PCRA opin., p. 5.
[126] Counsel is quite familiar with *Edmiston* because, as a New York Innocence Project Staff Attorney, he helped draft Steve Edmiston's 2009 DNA testing motion filed before the Cambria County Common Pleas Court, and he helped draft Steve Edmiston's appellate brief to the Pennsylvania Supreme Court.
[127] Appendix, PCRA opin., p. 6.

Based on *Edmiston*, the PCRA court found Mr. Brookins's DNA testing motion untimely because: (1) Mr. Brookins wasn't "a likely candidate to be exonerated by DNA testing"; and (2) Mr. Brookins "has known" about the physical evidence he now wishes to test for "nearly thirty years."[128]

Regarding the second finding, the PCRA court said Mr. Brookins could've sought DNA testing on all the items listed above in his 2010 *Glove DNA Motion*. That he didn't, made his current motion untimely.[129] The PCRA court then criticized the *Glove DNA Motion* by saying it appeared to be a "fishing expedition designed solely to sow doubt over his conviction based upon the possible involvement of… Sharon Ginsberg[.]"[130] Moreover, based on his 2019 DNA testing motion, the PCRA court claimed Mr. Brookins was "apparently attempting to expand his fishing expedition[.]"[131] Lastly, the PCRA court claimed Mr. Brookins used his 2019 DNA motion to "evolve" his defense theory by trying to implicate Sharon.[132]

b. Actual innocence finding

The PCRA court found DNA testing couldn't produce results proving Mr. Brookins's actual innocence. The PCRA court based this global finding on the following sub-findings:

First, the PCRA court said what Mr. Brookins "fails to acknowledge," is that his DNA testing request "represents an attempt to cast suspicion upon another individual who may or may not have been involved in [Sheila's] murder[.]"[133]

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[128] Appendix, PCRA opin., p. 6.
[129] Appendix, PCRA opin., pp. 6-7.
[130] Appendix, PCRA opin., p. 7.
[131] Appendix, PCRA opin., p. 7.
[132] Appendix, PCRA opin., p. 7. Mr. Brookins addresses the PCRA court's finding *infra*, but this, perhaps, is the most absurd finding. Mr. Brookins's trial defense was Sharon murdered Sheila and he presented six witnesses who testified Sharon made incriminating statements regarding Sheila's murder. Thus, Mr. Brookins's defense hasn't "evolved"; it's remained constant and cemented for three decades.
[133] Appendix, PCRA opin., pp. 7-8. With all due respect to the PCRA court, this is another absurd finding for the obvious reason: Mr. Brookins's primary reason for obtaining DNA testing is to link Sharon to the critical items of evidence because, had his jurors known about this type of incriminating redundancy, it's more likely than not none would've convicted him of first-degree murder. The PCRA court may think Sharon's innocent, but what the PCRA court *thinks is irrelevant*. The focus must be on the jurors who heard the DAO's evidence and theory.

Second, the PCRA court said Mr. Brookins "d[id] absolutely nothing to dispel or repudiate the overwhelming evidence upon which [his] guilt and subsequent conviction [are] based."[134] The PCRA court identified the "overwhelming evidence" as: (1) Mr. Brookins's fingerprints on the phone receiver and remote control; (2) the fourteen Negroid hair fragments found on and around Sheila; and (3) Margaret Albright's testimony where she claimed she heard a "lady" scream something to the effect, "He's killing, he's stabbing me. Please somebody help."[135]

Third, the PCRA court said it couldn't assume exculpatory DNA results, as the DNA testing statute requires, because to do so would require it "to disregard or reject the other circumstantial evidence upon which the jury's determination of [Mr. Brookins's] guilt was presumably based."[136]

Fourth, the PCRA court said even if DNA testing identified Sharon's DNA on multiple items, this, "in and of itself," was insufficient to "establish [Mr. Brookins's] actual innocence, or even prove that Sharon… was in fact the murderer." The PCRA court parroted the DAO's argument and said it wouldn't be surprising to discover Sharon's DNA on (1) Sheila's shirt, sweater, bra, and fingernail scraping, (2) the scissors, (3) trophy case, and (4) afghan because Sharon "frequently visited her mother in her apartment[.]"[137]

c. The defense witnesses who implicated Sharon

Lastly, the PCRA court criticized undersigned counsel for highlighting the fact six women came forward and implicated Sharon in Sheila's murder. The PCRA court said counsel's mentioning of these women was pointless because "the jury did not find [these] witnesses credible" at trial and it "rejected" their testimony.[138]

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[134] Appendix, PCRA opin., p. 8.
[135] Appendix, PCRA opin., p. 8.
[136] Appendix, PCRA opin., p. 8.
[137] Appendix, PCRA opin., p. 8.
[138] Appendix, PCRA opin., p. 10. Again, the PCRA court simply doesn't understand DNA testing's purpose. Based on its verdict, the jury obviously rejected the testimony of these six women, but what the PCRA court fails to consider is the fact Mr. Brookins didn't have DNA testing in 1992 to link Sharon to the critical items

ARGUMENTS

I. The PCRA court erred when it concluded Mr. Brookins's DNA testing motion is untimely. U.S. Const. admts. 6, 8, 14; Pa. Const., art. I, §§ 9, 10, 14.

A. Introduction

The PCRA court found Mr. Brookins's DNA testing motion untimely under § 9543.1(d)(1)(iii) and *Commonwealth v. Edmiston*, 65 A.3d 339 (Pa. 2013). The PCRA court erred:

First, *Edmiston* is factually and legally distinguishable.

Second, the PCRA court's finding conflicts with *In re Payne*, 129 A.3d 546 (Pa. Super. 2015) and *Conway*.

Third, Mr. Brookins *is* a likely candidate to be exonerated by DNA testing.

Fourth, although *Edmiston* put the cart before the horse, and presumed DNA testing couldn't possibly exonerate Steve Edmiston, this consideration is inconsistent with the DNA testing statute's text which requires PCRA courts to *assume* exculpatory results.

Fifth, if DNA testing incriminates Sharon, the DAO can prosecute Sharon for Sheila's murder, meaning DNA testing can't and won't prejudice the DAO.

B. The case law

In 2002, the General Assembly enacted 42 Pa. C.S. § 9543.1, which "permits an inmate to seek DNA testing of evidence used to convict him where such testing may establish" his "innocence." *Commonwealth v. Heilman*, 867 A.2d 542, 543 (Pa. Super. 2005). Section 9543.1's purpose is "to make sure… we do not have anyone in our prisons or on death row who is innocent." *Commonwealth v. Conway*, 14 A.3d at 114 (quoting the "esteemed" Senator Stewart J. Greenleaf, one of the statute's sponsors). Consequently, when interpreting the DNA testing, the PCRA court and this Court must

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of evidence. It's more likely than not the jurors would've found the testimony of these six women quite credible had they known that DNA testing linked Sharon to multiple items, including Sheila's sweater, shirt, and bra, and the scissors, trophy, afghan, and the hairs.

"liberally interpret" § 9543.1 "in favor of the class of citizens who were intended to directly benefit therefrom, namely, those wrongly convicted of a crime." *Commonwealth v. Conway*, 14 A.3d at 113; *accord In re Payne*, 129 A.3d at 554.

The PCRA's one-year limitations period doesn't apply to § 9543.1. *Commonwealth v. Walsh*, 125 A.3d 1248, 1252 (Pa. Super. 2015). Consequently, a petitioner "*may… at any time*" request DNA testing if he seeks testing "on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction." 42 Pa. C.S. § 9543.1(a)(1).

Confusingly, though, § 9543.1(d)(1)(iii) says the PCRA court "shall order" DNA testing, but only after "determining" whether: (1) § 9543.1(c)'s requirements "have been met," (2) the evidence "to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect," and (3) the applicant "made" his "motion… in a *timely manner* and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice." Adding additional confusion is the fact the General Assembly didn't define the phrase – "in a timely manner." *Commonwealth v. Edmiston*, 65 A.3d at 356.

Thus, § 9543.1(a)(1) explicitly states petitioners can file their DNA testing motions "at any time" after their convictions. Section 9543.1(d)(1)(iii), however, conditions the granting of DNA testing on a finding that the applicant "made" his "motion… in a *timely manner*[.]" Sections 9543.1(a)(1) and 9543.1(d)(1)(iii) are, obviously, irreconcilable. However, under statutory interpretation principles, "whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or position shall prevail." 1 Pa. C.S. § 1934. Here, because § 9543.1(d)(1)(iii) is "last in order of… position" it prevails, meaning PCRA courts must make some sort of timeliness assessment before granting DNA testing. However, as mentioned, the Court must "liberally" interpret § 9543.1(d)(1)(iii)'s timeliness requirement "in favor of the class of citizens who were intended to

directly benefit [from § 9543.1], namely, those wrongly convicted of a crime." *Commonwealth v. Conway*, 14 A.3d at 113; *In re Payne*, 129 A.3d at 554.

Edmiston represented the first time the Supreme Court interpreted the "in a timely manner" phrase. The Supreme Court said there isn't a bright line time limit associated with § 9543.1(d)(1)(iii). It said § 9543.1(d)(1)(iii) requires the PCRA court to examine "case-specific factors" to determine whether the applicant timely presented his DNA testing motion. *Commonwealth v. Edmiston*, 65 A.3d at 357. The Supreme Court did this and focused on the following case-specific facts when it found Steve Edmiston's DNA testing motion untimely:

First, it gave great weight to the fact Steve Edmiston was on death row because, the filing of his DNA testing motion immediately delayed execution of his death sentence." Thus, the Supreme Court said Edmiston filed his motion "only to delay further the execution of the [death] sentence." *Id.* at 357.

Second, "at the time of trial, [Edmiston] indicated… he was satisfied with the DNA testing that had been conducted, and [he] declined further testing." *Id.*

Third, Edmiston filed his second PCRA petition after § 9543.1's enactment but didn't request DNA testing in his second PCRA petition, nor did he seek testing when he amended and supplemented his second PCRA petition. "It was not until after his second PCRA petition was nearing completion [in 2009] that [Edmiston] finally sought DNA testing." *Id.*

Fourth, Edmiston was represented by multiple, experienced capital defenders "who *knew* of the [DNA testing] statute," the "[DNA] technology," and "the evidence," and "who were *vigorously* pursuing post-conviction relief on his behalf." *Id.* (emphasis added).

"Under these circumstances," the Supreme Court said, "[PCRA] courts should exercise a healthy skepticism when faced with requests for DNA testing." *Id.*

The Supreme Court, however, didn't stop here, as it intertwined its timeliness finding with its finding that Steve Edmiston was "not a likely candidate to be exonerated by DNA testing," *Commonwealth v. Edmiston*, 65 A.3d at 357, because of his detailed confession:

> [Edmiston's] confession was not made in isolation, but included an admission of rape and murder in a case where police had not yet found the victim's body, and [Edmiston] drew for the police a map directing them to the exact location in a remote and isolated rural area, where the corpse of the victim was found. [Edmiston] told police "you will find a dead raped little girl," further advising police they would find the victim's body off a certain road and covered with branches. When police used the map provided by [Edmiston], with the assistance of Mr. Kruis, they found the victim's body at the location specified by Appellant. Police also found the victim's shorts in [Edmiston] truck; the hairs in [Edmiston] truck were microscopically similar to the victim's own hair; the tire tread and wear pattern near the child's body were consistent with the tires on [Edmiston's] truck; and [Edmiston's] claim that the blood in his truck was his own and resulted from a cut on his arm was rebutted by prison officials who admitted [Edmiston's] to prison and noted no significant cuts on his body.
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> Given this evidence, it is not surprising [Edmiston] declined DNA testing at the time of trial, following the inability of the preliminary, pre-trial DNA tests to identify or inculpate [Edmiston]; a decision to seek further testing, of course, could have sealed [Edmiston's] fate. That fact, in turn, is probative of the delay and purpose of [Edmiston's] belated request for DNA testing, forwarded only as his serial PCRA petition was approaching conclusion… [.]

Id. at 357-358.

This Court relied on *Edmiston* in *Commonwealth v. Walsh*, 125 A.3d 1248 (Pa. Super. 2015) when it said: "In analyzing timeliness for purposes of [§] 9543.1(d)(1)(iii), the court must consider the facts of each case to determine whether the applicant's request… is to demonstrate his actual innocence or to delay the execution of sentence or administration of justice." *Id.* at 1255.[139]

This Court found the defendant's DNA testing motion untimely for the following reasons:

[139] Mr. Brookins cites and discusses *Walsh* because the DAO cited it in its PCRA court pleadings. Rp. 87.

First, Walsh went to trial for attempted murder and aggravated assault in May 2004, *i.e.*, a time when DNA testing was readily available. *Id.* at 1258.

Second, before filing his motion, Walsh had filed three unsuccessful PCRA petitions. *Id.*

Third, like *Edmiston*, intertwined into the Court's timeliness finding was its finding that the defendant's "absence of evidence" theory didn't proof him factually innocent. *Id.* at 1255. The Court then quoted and emphasized (in bold) the portion of *Edmiston* where the Supreme Court connected its untimeliness finding to its finding that Steve Edmiston wasn't a "likely candidate to be exonerated by DNA testing." *Id.* at 1256 (quoting *Commonwealth v. Edmiston*, 65 A.3d at 357).

C. Why the PCRA court's timeliness finding is wrong

1. *Edmiston* and *Walsh* are distinguishable

The PCRA court placed great emphasis on *Edmiston*, but *Edmiston* and *Walsh* are distinguishable:

First, Steve Edmiston was on death row and awaiting execution, meaning the filing of his motion immediately delayed his execution because the state courts had to adjudicate it, and the federal courts had to review the state courts' adjudication during Edmiston's federal habeas proceedings. Here, Mr. Brookins is serving LWOP and he's already litigated his federal habeas petition, meaning his DNA testing motion can't delay execution of his sentence. Likewise, because Mr. Brookins must sit in prison every day, justice is being administered daily in his case. Thus, Mr. Brookins's DNA testing motion can't and doesn't delay execution of his LWOP sentence or the administration of justice.

Second, unlike in *Edmiston*, there was no pre-trial DNA testing, meaning Mr. Brookins never declined additional DNA testing at trial.

Third, the defendants in *Edmiston* and *Walsh* both filed their DNA testing motions *after* filing *multiple* PCRA petitions. Steve Edmiston filed two. Thomas Walsh filed three. Mr. Brookins filed and litigated only one.

Fourth, unlike Steve Edmiston, who'd been represented by multiple, experienced capital defenders since the mid-1990s before he filed his 2009 DNA testing motion, the appointed attorneys who represented Mr. Brookins during his initial (and lone) PCRA proceedings didn't "vigorously" represent him. In fact, based on the record, his appointed attorneys *and* the PCRA court did – literally – *nothing* for nearly a decade.

On January 18, 2000, Mr. Brookins filed his *pro se* PCRA petition. On January 31, 2000, the PCRA court appointed counsel. One month later, the PCRA court, for unknown reasons, appointed new counsel, law partners John Fioravanti and David Knight. Fioravanti and Knight never filed a single motion or pleading, forcing Mr. Brookins to file a motion to proceed *pro se*, which the PCRA court granted. Thus, by November 2000 Mr. Brookins was acting *pro se*.

On November 30, 2000, the PCRA court held a hearing, but for unknown reasons, the only issue addressed was Mr. Brookins's expungement motion.[140] On February 16, 2001, the PCRA court granted and denied in part the expungement motion.

Mr. Brookins initially appealed the partial denial of his expungement motion but withdrew his appeal in December 2001. Unbeknownst to the PCRA court, however, Mr. Brookins's January 18, 2000 PCRA petition hadn't been adjudicated – a fact not brought to the PCRA court's attention until September 2006.

On August 2, 2005, to amend his January 18, 2000 PCRA petition, and presumably to prompt the PCRA court to finally address said petition, Mr. Brookins filed another PCRA petition. The PCRA

[140] The jury acquitted Mr. Brookins of robbery and the expungement motion sought to expunge the robbery charge from his record.

court, however, refused to adjudicate the amended PCRA petition because it incorrectly assumed it had denied the January 18, 2000 PCRA petition. After the Bucks County Clerk's Office *incorrectly* informed Mr. Brookins he couldn't amend his January 18, 2000 PCRA petition because it had already been denied, Mr. Brookins appealed on October 24, 2005.

On September 13, 2006, this Court quashed the appeal and remanded his case, instructing the PCRA court to adjudicate the January 18, 2000 PCRA petition. On September 14, 2006, the PCRA court appointed Ronald Elgart. For the next three years, the PCRA court scheduled and cancelled various hearings. More importantly, Elgart didn't file a single pleading until July 1, 2009 – when he filed an amended PCRA petition and a motion to depose witnesses. Between September 2006 and July 2009, Mr. Brookins sent several letters to the PCRA court asking it to remove Elgart because Elgart was doing nothing on his case. On September 8, 2009, Mr. Brookins filed a motion requesting to proceed *pro se*.

On the same day Elgart filed Mr. Brookins's amended PCRA petition, July 1, 2009, the PCRA court had an evidentiary hearing scheduled but continued it again so Mr. Brookins could depose Paul Cottman. More than a year later, on August 13, 2010, Elgart deposed Cottman. On October 29, 2010, Elgert filed the *Glove DNA Motion*. The PCRA court, as mentioned, ultimately denied the *Glove DNA Motion* and Mr. Brookins's PCRA petition on June 27, 2012.

Thus, from September 2006 to June 2012 – six years – Ronald Elgart filed three pleadings and conducted a one-day evidentiary hearing on June 15, 2011.

With all due respect to Ronald Elgart, his representation of Mr. Brookins came nowhere near the "vigorous" representation Steve Edmiston received from *multiple* experienced capital defense attorneys from the mid-1990s until 2009 – when he filed his DNA testing motion. Furthermore, based on counsel's review of Elgart's *Glove DNA Motion*, unlike Steve Edmiston's DNA testing motion which *undersigned counsel drafted* for Edmiston and his capital defenders when he was with the New York

Innocence Project, Elgart's motion displayed a very rudimentary understanding of DNA testing and technology. *Cf. United States v. McAllister*, 55 M.J. 270, 275 (2001) ("With the rapid growth of forensic-science techniques, it has become increasingly apparent that complex [DNA] cases require more than general practitioners.")

These facts aren't mentioned to throw shade at Ronald Elgart or raise a PCRA counsel ineffectiveness claim against him. They're mentioned because the Supreme Court in *Edmiston* gave significant weight to the fact *multiple*, *experienced* capital defenders, *including undersigned counsel*, represented Steve Edmiston (at once) and these defenders "vigorously" litigated his first and second PCRA petitions before they filed Edmiston's 2009 DNA testing motion.[141] Based on this zealous and "vigorous" representation, which started nearly fifteen years before Edmiston filed his 2009 DNA testing motion, the Supreme Court said it was safe to assume Steve Edmiston filed his DNA testing motion simply to delay execution of his death sentence.

Here, Mr. Brookins's first appointed attorneys didn't file a single pleading, the PCRA court was so lackadaisical regarding his case it didn't realize it had never adjudicated his PCRA petition, and Ronald Elgart filed only three pleadings in six years and his *Glove DNA Motion* exhibited a very rudimentary understanding of DNA testing, DNA technology, and the DNA testing statute. These facts are night-and-day different than those in *Edmiston*.

Likewise, the filing of Mr. Brookins's 2019 DNA testing motion can't delay execution of his sentence.

Consequently, based on these facts, the assumption applied in *Edmiston*, *i.e.*, Steve Edmiston presumably filed his DNA testing motion to delay execution of his death sentence, can't and shouldn't be applied here.

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[141] Undersigned counsel also did considerable work on Steve Edmiston's supplemental petition regarding his second PCRA petition based on the National Academy Science's 2009 report calling into question many of the forensic identification techniques.

Fifth, the Supreme Court in *Edmiston* criticized Steve Edmiston for not seeking DNA testing when he filed his second PCRA petition in 2004. Instead, Edmiston waited another five years to file his 2009 DNA testing motion. Here, Mr. Brookins sought DNA testing in 2010, although on a very limited scale compared to his 2019 DNA testing motion. Based on *Edmiston*, this fact must work in Mr. Brookins's favor, even if the scope of his testing request was limited due to Ronald Elgart's rudimentary understanding of DNA testing and technology.

Sixth, unlike *Edmiston* and *Walsh*, Mr. Brookins is a likely candidate to be exonerated by DNA testing.

Steve Edmiston supposedly confessed to the rape-murder that landed him on death row and supposedly drew a map for authorities to assist in locating the child's body. The defendant in *Walsh*, on the other hand, presented an "absence of evidence" innocence theory which couldn't prove his factual innocence.

Mr. Brookins, however, presents a straightforward *redundancy* innocence theory – a theory embraced by this Court in *Conway*: If DNA testing identifies Sharon's DNA on two or more of the following items, it's reasonably likely none of Mr. Brookins's jurors would've convicted him of first-degree murder: (1) Sheila's shirt, sweater, bra, and fingernail scrapings, (2) the scissors, (3) the trophy, and (4) the afghan. Mr. Brookins's discusses the actual innocence standard in greater detail *infra*, pp. 56-60, but the point here is DNA testing can prove his factual innocence.

In the end, a fact-specific examination of Mr. Brookins's case reveals three important things: (1) he didn't receive the "vigorous" representation Steve Edmiston received; (2) DNA testing can prove his innocence; and (3) he filed his DNA testing motion to prove his innocence, not to delay execution of his LWOP sentence.

2. *Conway and Payne*

While the PCRA court cited *Edmiston* in its timeliness analysis, it failed to cite and discuss *In re Payne*, 129 A.3d 546 (Pa. Super. 2015). An *en banc* panel of this Court granted DNA testing in *Payne*, despite the fact John Payne filed his DNA testing motion twenty-six (26) years after his conviction (1986 to 2012) and after he'd filed three PCRA petitions. *Id.* at 556. Similarly, this Court granted DNA testing in *Conway*, despite the fact Robert Conway filed his DNA testing motion twenty-one (21) years after his conviction (1987 to 2008). *Commonwealth v. Conway*, 14 A.3d at 102-103.

If John Payne and Robert Conway weren't time-barred, Mr. Brookins shouldn't be time-barred because he filed his DNA testing motion twenty-seven (27) years after his conviction (1992 to 2019), he only litigated one PCRA petition, and he sought limited DNA testing during his first PCRA petition.

3. Prejudging whether DNA testing will produce exculpatory DNA results is inconsistent with the DNA testing statute's text and purpose

The PCRA court, like the Supreme Court in *Edmiston*, found Mr. Brookins's DNA testing motion untimely, in part, by *presupposing* DNA testing would *inculpate* him based on the "overwhelming" trial evidence. The PCRA court, therefore, didn't assume exculpatory results as the statute mandates. The PCRA court erred.

First, the statute's text required the PCRA court to "assume" exculpatory results. 42 Pa. C.S. § 9543.1(c)(3)(ii): "DNA testing of the specific evidence, assuming exculpatory results, would establish" the applicant's actual innocence. *Accord In re Payne*, 129 A.3d at 561; *Commonwealth v. Conway*, 14 A.3d at 110. Consequently, when a PCRA court *only* examines the trial evidence, and relies on the trial evidence to predict the DNA results, like the PCRA court did here, this "cart before the horse" approach violates the statute's text.

Thus, the PCRA court had to start with the premise DNA testing *will* identify an exculpatory redundancy linking Sharon's DNA to: (1) Sheila's shirt, sweater, bra, and fingernail scrapings, (2) the

scissors, (3) the trophy, (4) the afghan, and (5) hair evidence. It then had to ask whether it's more likely than not that, had Mr. Brookins's jurors known about the exculpatory redundancy linking Sharon to these items, none would've convicted him of first-degree murder. "It is not difficult to imagine" how an exculpatory redundancy linking Sharon to these items would "deal a devastating blow to the soundness of the jury's verdict in this case[.]" *In re Payne*, 129 A.3d at 562.

Second, it's not rocket science to realize the trial evidence convinced the applicant's jury to convict him of the charged offense(s). Consequently, by simply rehashing the trial evidence, and claiming the jury's guilty verdict(s) proves the trial evidence had to be substantial or overwhelming is wrong and inconsistent with the statute's text and purpose.

Furthermore, during his five years as a New York Innocence Project Staff Attorney, undersigned counsel helped exonerate numerous innocent people. In each case, prosecutors repeatedly claimed DNA testing couldn't possibly exonerate these people because the trial evidence "overwhelmingly" established their guilt. In fact, nine of these exonerations involved juveniles who'd supposedly confessed to rape-murders, and prosecutors pounced on these confessions to argue what the PCRA court argued here: the evidence of guilt is so overwhelming, DNA testing can't possibly prove the applicant's actual innocence. DNA testing, however, did just that: it proved all these juveniles were actually innocent of their respective rape-murders.[142]

Third, the PCRA court's approach is inconsistent with the DNA testing statute's purpose – which is to free the innocent and identify the guilty. *News Release*, Greenleaf Post Conviction DNA Bill Signed Into Law, July 11, 2002. This purpose, more importantly, drives how courts must interpret and apply the statute, as courts must "effectuate" the General Assembly's "intention." 1 Pa. C.S. § 1921.

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[142] The Dixmoor Five, *see* www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/the-dixmoor-five.html. The Englewood Four, *see* www.innocenceproject.org/four-chicago-men-exonerated-of-1994-murder-and-rape-by-new-dna-evidence-linking-the-crime-to-a-convicted-murderer/.

Consequently, if the statute's purpose is to identify the innocent, allowing a PCRA court to deny DNA testing based on its *claimed ability to presage the outcome of the requested DNA testing* significantly – if not entirely – defeats the General Assembly's purpose. Again, because every applicant is – and will be – a "convicted" defendant, every PCRA court can easily do what the PCRA court did here. Examine the trial evidence and myopically reason:

> There had to be substantial or overwhelming evidence of the defendant's guilt based on the jury's verdict(s), so I can't grant DNA testing because, if I granted testing, I'd be disrespecting the jury's findings. Also, the likelihood of exculpatory results is nil based on this substantial or overwhelming evidence of guilt.

In the end, the PCRA court's "cart before the horse" approach is inconsistent with the DNA testing statute and wrong as a matter of law.

4. The DAO won't be prejudiced if DNA testing links Sharon to Sheila's murder

The PCRA court's and DAO's untimeliness arguments are premised on the notion if DNA testing is performed, and it links Sharon to several incriminating items, the DAO can't prosecute Sharon and re-prosecute Mr. Brookins because it'd be too difficult to obtain a conviction thirty-years after Sheila's murder. Modern DNA technology's sensitivity and accuracy make the PCRA court's and DAO's concerns far-fetched. *Commonwealth v. Reese*, 663 A.2d 206, 208 (Pa. Super. 1995) (describing DNA testing as "accurate" and "precise").[143]

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[143] Using the DAO's logic, the DAO would never prosecute cold, unsolved cases because witnesses die and memories fade. Remarkably, though, in April 2019 the DAO filed murder charges against William Korzon, alleging he killed his then wife in March 1981. Yes, March 1981, nearly *forty years* after his wife went missing. And here's the kicker: law enforcement has never found Korzon's wife's body, meaning the DAO sees no problem prosecuting a forty-year-old murder case with no body, faded memories, and limited witnesses. Vinny Vella, *Nearly 40 years later, Bucks DA charges man in wife's cold-case murder*, PHILA. INQUIRER, April 18, 2019, at www.inquirer.com/news/pennsylvania/william-korzon-gloria-murder-cold-case-warrington-bucks-county-20190418.html

If the DAO is confident enough to prosecute William Korzon, the DAO surely won't have a problem prosecuting Sharon or retrying Mr. Brookins. In Mr. Brookins's case, moreover, the record contains the memorialized testimony of nearly thirty DAO witnesses and the DAO will have access to modern DNA technology to test as much physical evidence as it deems necessary to prove its burden beyond a reasonable doubt.

Historically, the DAO's prejudice argument had a certain appeal considering the types of "new" evidence prisoners used to collaterally attack their convictions, *e.g.*, recantations or new witness statements. When the questionable reliability of a recantation or new witness statement was coupled with the fact memories fade and witnesses disappear or die, many courts were reluctant to consider the merits of a prisoner's belated new evidence.

DNA testing, however, has fundamentally altered the criminal justice landscape: pre- and post-trial. *District Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009) ("Modern DNA testing can provide powerful new evidence unlike anything known before."). The above concerns aren't implicated when a prisoner files a § 9543.1 petition, even twenty-seven years after trial.

First, DNA evidence is far more accurate than recantations and new witness affidavits, even where the biological evidence is more than twenty or thirty years old. Many DNA exonerations involve prisoners who served more than twenty-plus years in prison. For instance, undersigned counsel's first DNA exoneration involved Lawrence McKinney. McKinney was convicted in 1978 of a 1977 rape. In 2008, thirty (30) years after McKinney's conviction, counsel filed a DNA testing motion. The Shelby County District Attorney's Office ("SCDAO") consented to the motion. The DNA testing excluded McKinney and he was officially exonerated on June 30, 2009 – thirty-two (32) years after the rape.[144] That the SCDAO didn't object to testing speaks volumes, especially here, because the SCDAO knew if DNA testing linked another man to the victim's rape, it could easily prosecute this man based on the DNA testing – even thirty-two years after the rape occurred.

Simply put, DNA evidence "can demolish the prosecution's case" even years after a prisoner's conviction. *Commonwealth v. Williams*, 899 A.2d 1060, 1064 (Pa. 2006). The National Commission on the Future of DNA Evidence recognized this truth two decades ago:

> The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA testing has been

[144] www.innocenceproject.org/cases/lawrence-mckinney/.

> steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects... The strong presumption that verdicts are correct, one of the underpinnings on restrictions on post-conviction relief, has been weakened by the growing number of convictions that have been vacated by exclusionary DNA test results.[145]

Second, if DNA testing implicates Sharon, and the DAO retries Mr. Brookins as a co-conspirator, it can easily do so. The DAO presented nearly thirty witnesses at Mr. Brookins's trial. Thus, if need be, the DAO can introduce the recorded testimony from any witnesses or deceased trial witnesses under Pa.R.E. 804(b)(1).[146] Also, the physical evidence still exits, meaning the DAO can conduct additional forensic testing which "will add to the reliability of the reconstruction of the events of that tragic day." *Commonwealth v. Conway*, 14 A.3d at 112.

Third, the New York Innocence Project is paying for all DNA testing. Thus, Bucks County – and its taxpayers – won't be financially burdened if DNA testing is granted.

E. Conclusion regarding untimeliness finding

Based on the foregoing facts, authorities, and arguments, the PCRA court's untimeliness finding is incorrect as a matter of law. Thus, this Court should reverse this finding, adjudicate the substantive actual innocence issue, and ultimately grant DNA testing because DNA testing can prove Mr. Brookins's actual innocence.

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[145] POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, NAT'L INST. JUST, U.S. DEPT. JUST. 9-10 (1999).

[146] In criminal cases, former testimony is admissible against the defendant if the defendant had a full and fair opportunity to examine the witness. *Commonwealth v. Bazemore*, 614 A.2d 684 (Pa. 1992).

II. The PCRA court erred when it concluded there was no reasonable probability modern DNA testing could produce exculpatory results that would prove Mr. Brookins's actual innocence. U.S. Const. admts. 6, 8, 14; Pa. Const., art. I, §§ 9, 10, 14.

A. The proper analysis for assessing whether – the assumed exculpatory results – would prove Mr. Brookins's actual innocence

Under the DNA testing statute, an applicant must prove DNA testing can produce "exculpatory evidence" establishing his "actual innocence." 42 Pa. C.S. § 9543.1(c)(3)(ii)(A). Thus, the PCRA court must first identify the applicant's theory or theories of innocence as it pertains to DNA testing. Mr. Brookins's primary innocence theory is a redundancy theory, *i.e.*, DNA testing will identify Sharon's DNA on (1) Sheila's shirt, sweater, bra, and fingernail scrapings, (2) the scissors, (3) the trophy, (4) the afghan, and (5) Sharon's hair will be located on Sheila's clothing. Once the PCRA court identifies the applicant's theory of innocence, it must *assume* DNA testing will produce the envisioned exculpatory results. 42 Pa. C.S. § 9543.1(c)(3)(ii); *accord In re Payne*, 129 A.3d at 561; *Commonwealth v. Conway*, 14 A.3d at 110. This requirement is commonsensical for at least two reasons:

First, if PCRA courts aren't required to do so, they can effectively gut the DNA testing statute by simply pointing to the trial evidence and reasoning: "Based on the jury's verdict(s), the evidence against the defendant had to be substantial or overwhelming, making it impossible or very unlikely DNA testing will produce exculpatory results." The General Assembly, presumably, foresaw PCRA courts using this type of arbitrary, "cart before the horse" reasoning, and knew the statute's purpose wouldn't be fully or adequately vindicated if PCRA courts aren't required to assume exculpatory DNA results.

Second, the assumption requirement forces the PCRA court to address the fundamental question at hand: whether the applicant's envisioned exculpatory DNA results would establish his actual innocence.

This leads to the "actual innocence" standard. To meet the "actual innocence" standard, the assumed exculpatory DNA results must make it "more likely than not that," had the applicant's jurors known about the exculpatory DNA results, none "*would have* found him guilty beyond a reasonable doubt." *Commonwealth v. Conway*, 14 A.3d at 109 (quoting *Schlup v. Delo*, 513 U.S. at 327). There are two critical things about the "actual innocence" standard that must be emphasized because the DAO, in its PCRA court pleadings, misrepresented this standard.

First, the DAO argued an "item-by-item" approach to the actual innocence standard. The DAO is wrong because, like *Brady* prejudice assessments, the actual innocence assessment is a cumulative assessment: the "actual innocence" determination must be made "in light of all the evidence." *Schlup v. Delo*, 513 U.S. 328.

Second, the phrase "would have" is past tense, meaning the focus must be on the jurors who heard the DAO's trial evidence, arguments, and theories at trial.

More specifically, the focus must be on how the exculpatory DNA results *would've* interacted with the trial evidence and whether the exculpatory DNA results *would've* undercut and/or destroyed the DAO's evidence/arguments and/or bolstered or made more credible/believable the applicant's evidence/arguments. If the exculpatory DNA results had this impact, *i.e.*, significantly undermining the DAO's evidence/arguments, while bolstering the defendant's evidence/argument, the PCRA court must then ask whether it's reasonably likely, had *the defendant's jurors* known about the exculpatory DNA results, none would've found the applicant guilty of the convicted offense(s). Consequently, the actual innocence focus isn't and can't be on a *post hoc* theory of the crime or evidence/arguments the DAO never presented at the defendant's trial.

B. The impact of an exculpatory redundancy linking Sharon to multiple items

Based on the DAO's trial theory and evidence, *i.e.*, Mr. Brookins – and he alone – killed Shelia, as well as the six defense witnesses who said Sharon confessed to murdering Sheila, if DNA testing

produces an exculpatory redundancy linking Sharon to two or more probative items of evidence, it's more likely than not that, had Mr. Brookins's jurors known about this exculpatory redundancy, none would've convicted him of first-degree murder.

Linking Sharon's DNA, but not Mr. Brookins's DNA, to these probative items, would've *destroyed* the DAO's theory that Mr. Brookins's – and he alone – murdered Sheila, especially when the redundancy is coupled with the testimony of the six women who said Sharon confessed to murdering Sheila. No reasonable juror would've convicted Mr. Brookins of first-degree murder based on the redundancy and the testimony of the six women.

The PCRA court and DAO, however, do their best to try to undermine the exculpatory impact of a redundancy.

First, the PCRA court and DAO argue that finding Sharon's DNA on the above items would be unremarkable and expected because Sharon frequently visited her mother. In other words, both claim if Sharon is linked to these items, her DNA isn't from the murder, but from an innocent encounter between Sheila and Sharon that occurred before the murder.

This argument, though, is ludicrous. To believe that Sharon's DNA got onto these items innocently before the murder, and that *her* DNA – but not the killer's DNA, *i.e.*, John Brookins's – stayed on these items throughout the murder is preposterous. Take, for instances, the scissors. According to the DAO, Mr. Brookins plunged the scissors into Sheila's skull and chest multiple times, meaning he had to have held the scissors with great force and strength.

However, if DNA testing only identifies Sharon's DNA on the scissors, to believe the PCRA court's and DAO's "innocent prior contact" DNA argument, jurors would have to believe the following: Mr. Brookins forcibly held the scissors while brutally stabbing Sheila, yet in doing so his DNA didn't transfer to the scissor, and, more importantly, Sharon's DNA – which was supposedly on the scissors before the murder – remained on the scissors unscathed. No juror in their right mind

would've followed this line of reasoning because it's laughably absurd, and the same argument applies to the trophy and Sheila's bra and clothing.

For instance, why would Sharon's DNA be on Sheila's bra, especially the parts we know the perpetrator manipulated to expose Sheila's breasts? Ditto regarding the parts of Sheila's shirt and sweater the perpetrator manipulated to get to the bra? The answer is simple: if Sharon's DNA is located on these incriminating locations, it didn't get there innocently, it got there murderously.

Second, the DAO argues a completely different theory of Sheila's murder – one not presented to Mr. Brookins's jurors – to undermine the exculpatory impact of a redundancy incriminating Sharon. According to the DAO, if DNA testing producing a redundancy incriminating Sharon, such a result would be doubly-incriminating, as it would simply show Sharon murdered Sheila and Mr. Brookins acted as her co-conspirator.

The DAO is wrong. The actual innocence inquiry can't consider a "conspiracy" narrative of Sheila's murder because (1) the DAO never charged Mr. Brookins with conspiracy, (2) the DAO introduced no evidence proving or suggesting Mr. Brookins committed the murder with someone or at someone's behest, and (3) the DAO repeatedly stated – *on the record* – Sharon was an innocent, falsely accused victim who had nothing to do with Sheila's murder.

Furthermore, the DAO never explained how Mr. Brookins could be tried as a co-conspirator if DNA testing produces a redundancy linking Sharon to multiple items, but not Mr. Brookins. A conspiracy requires an *agreement* between at least two people. *Commonwealth v. Hennigan*, 753 A.2d 245, 253 (Pa. Super. 2000). Thus, based on the DAO's conspiracy theory, Sharon and Mr. Brookins had to have entered Sheila's apartment with an agreed upon plan to murder Sheila.

Here's the problem, though: the crime scene characteristics reveal Sheila's murder wasn't planned, *i.e.*, the lack of forced entry and the fact the perpetrator used objects *inside* Sheila's apartment to kill her (the scissors and trophy). Sharon's quick-triggered temper and drug-induced tantrums fit perfectly into the "unplanned" murder crime scene characteristics.

Furthermore, if Sharon and Mr. Brookins went to Sheila's apartment to help Sheila prepare for Barry's holiday visit, but during the visit Sharon murdered Sheila in a drug-induced frenzy after Sheila had refused to give her money, Mr. Brookins can't be tried as a co-conspirator because there was no agreement between the two. Sharon just "cracked out" and murdered Sheila without any warning to Mr. Brookins. Likewise, if Mr. Brookins arrived late to Sheila's apartment and walked in on Sharon murdering Sheila, Mr. Brookins can't be tried as a co-conspirator because he never entered into an agreement with Sharon. Simply put, outside of the redundancy linking Sharon to multiple items of evidence, the DAO hasn't identified a single pre-murder fact that proves – beyond a reasonable doubt – Mr. Brookins entered into an agreement with Sharon to murder Sheila.

Moreover, the only way the DAO could possibly prove the existence of a pre-murder agreement would be if Sharon testified. How else would the DAO prove – beyond a reasonable doubt – the existence of a pre-murder agreement? Circumstantial evidence? What circumstantial evidence? What – Mr. Brookins's presence inside Sheila's apartment? His presence doesn't prove the existence of an agreement. It simply proves he was inside Sheila's apartment sometime *after* the murder:

> Mere association with the perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient. Rather, the Commonwealth must prove that the defendant shared the criminal intent, *i.e.*, that the [defendant] was an active participant in the criminal enterprise and that he had knowledge of the conspiratorial agreement.

Commonwealth v. Lambert, 795 A.2d 1010, 1016 (Pa. Super. 2002) (quotations and citation omitted).

Here's the kicker, though: if Sharon testified, she'd have to admit she lied for thirty years and that she was, in fact, the person who brutally murdered her mother. Sharon, however, gave at least four pre-trial statements – December 21, 1990, December 24, 1990, April 19, 1991, and June 14, 1991 – where she denied any involvement in Sheila's murder. Moreover, in her June 14, 1991 statement, she claimed Mr. Brookins confessed to murdering Sheila. Lastly, at the sentencing hearing, Sharon scolded Mr. Brookins for falsely accusing her of killing her mother. Based on these facts, if Sharon testified and said she conspired with Mr. Brookins's to murder Sheila, who in their right mind would find her credible?

In the end, the DAO's conspiracy theory can't be considered when addressing the actual innocence issue for testing purposes. Also, the theory is DOA – dead on arrival – because DNA linking Sharon to Sheila's murder doesn't prove Sharon and Mr. Brookins agreed to anything, it simply proves Sharon has lied for the last three decades and that she, in fact, brutally murdered her mother so she could get high.

C. The DAO's conspiracy argument relies on a *post hoc* theory of Sheila's murder it never presented at trial

Based on the DAO's conspiracy argument, the DAO believes § 9543.1's standard for granting DNA testing is whether the DAO would re-prosecute the petitioner if DNA testing identified a prior felon's or another person's DNA on critical items of evidence. The DAO is wrong.

1. The actual innocence assessment isn't about how the DAO views/interprets the DNA results

What the DAO *thinks* about the assumed exculpatory DNA results and *what it would do* based on these results is irrelevant. This is so because the DAO isn't a neutral body like the jury; it's an adversarial agency with an agenda. Under the DAO's logic, few petitioners convicted of murder would receive DNA testing. For instance, if a DAO prosecuted a defendant under a single-perpetrator theory – like the DAO did here – there's nothing stopping the DAO from swapping horses when the

defendant requests DNA testing by making a similar argument the DAO makes here, *i.e.*, an unknown DNA profile simply means the defendant *conspired* with the person connected to the unknown DNA profile.

The same is true for defendants convicted of rape. If a DAO prosecuted a defendant under a single-perpetrator theory, there's nothing stopping that DAO from swapping horses when the defendant requests DNA testing. The DAO could simply argue DNA testing shouldn't be conducted because it can't prove the defendant's innocence because, even if DNA testing identifies an unknown male DNA profile from the victim's rape kit, an unknown male profile simply means the defendant *conspired* with this unknown man to commit the rape.

Significantly, this type of prosecutorial "horse swapping," which is a classic example of *cognitive dissonance*,[147] happened so often when post-conviction DNA testing gained traction in the mid-1990s that Peter Neufeld, co-founder of the Innocence Project, coined the phrase: the unindicted co-ejaculator. Jacqueline McMurtrie, *The Unindicted Co-Ejaculator and Necrophilia: Addressing Prosecutors' Logic-Defying Responses to Exculpatory DNA Results*, 105 J. CRIM. L. & CRIMINOLOGY 853 (2015) ("*Unindicted Co-Ejaculator*").

DAOs, unfortunately, continue to display cognitive dissonance by swapping horses and articulating some amazingly absurd *post hoc* theories why they would still retry a defendant if DNA testing produced exculpatory results by incriminating another person. For instance, the *Unindicted Co-Ejaculator* article refers to the Dixmoor Five case from Cook County, Illinois. Undersigned counsel litigated and Peter Neufeld litigated Dixmoor Five representing Jonathan Barr.

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[147] "Cognitive dissonance is people's tendency to reduce or avoid psychological inconsistencies. It is painful for us to believe one thing, but to be presented with evidence of another. So, when people voluntarily commit to a particular belief or position and new evidence comes in to contradict that belief or position, our self-concept is threatened and our cognitive processes work unconsciously to suppress such information if possible." Robert Prentice, *Cognitive Dissonance and the Case of the Unindicted Co-ejaculator*, at https://ethicsunwrapped.utexas.edu/cognitive-dissonance-case-unindicted-co-ejaculator (last visited March 27, 2020).

In the Dixmoor Five case, a fourteen-year-old girl was raped and murdered in November 1991. Five juveniles were charged and convicted – and three signed written confessions.[148] After obtaining these confessions, authorities received the pre-trial DNA testing results. DNA testing identified a single male DNA profile from the victim's rape kit that, remarkably, *excluded all five juveniles*. At trial, to explain away the exculpatory DNA results, the prosecutor made what undersigned counsel coined as the "wandering necrophiliac" argument: the man who left behind his DNA probably wandered across the decedent's body and decided to have sex with her corpse to the point where he ejaculated into the decedent's vagina.

In 2010, once the Innocence Project and three other projects joined forces, prosecutors agreed to retest the evidence with modern DNA testing. In 2011, the new DNA testing linked the unknown sperm to Willie Randolph – a rapist who'd been released from prison only weeks before the victim's rape-murder and who lived only blocks from the victim.

In what's perhaps the most troubling form of cognitive dissonance undersigned counsel has ever witnessed, the appellate prosecutors made the same "wandering necrophiliac" argument regarding Willie Randolph to argue against the juveniles' exonerations: Willie Randolph, the prosecutors claimed, could've come across the victim's dead body and had vaginal intercourse with her corpse. Anita Alverez – the Cook County State's Attorney ("CCSAO") at the time – even went on *60 Minutes* and endorsed the "wandering necrophiliac" theory.[149]

Despite the CCSAO's absurd position, the post-conviction court vacated the juveniles' convictions and granted them certificates of innocence. It did this because it asked and answered the right question: had jurors known about the CODIS hit to Willie Randolph, is it reasonably likely none

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[148] Undersigned counsel's co-counsel in the Dixmoor Five case, Steve Drizin and Laura Nirider, recently did a podcast on the Dixmoor Five case that discussing the "wandering necrophiliac" argument: www.wrongfulconvictionpodcast.com/podcast/s10e3-wrongful-conviction-false-confessions-dixmoor-5.

[149] The *60 Minutes* episode is on YouTube: https://www.youtube.com/watch?v=YSo_9Xo_78E.

of them would've convicted these juveniles of rape-murder? The post-conviction court didn't care about what the CCSAO thought about the Willie Randolph hit; it was only concerned with how the jurors would've assessed, interpreted, and weighed the Willie Randolph CODIS hit.

Here, the DAO's revisionist position, *i.e.*, it never eliminated Sharon as a suspect in Sheila's murder and would prosecute her *and* Mr. Brookins as co-conspirators if DNA testing incriminated her, is yet another example of cognitive dissonance and horse swapping. The focus must be on what Mr. Brookins's jurors *would've done – based on the DAO's theory of the murder at trial* – had they known Sharon's DNA, but not Mr. Brookins's DNA, was on several pieces of critical evidence. Under this *proper* focus, the answer is simple: it's more likely than not that the jurors would've acquitted Mr. Brookins of first-degree murder.

2. *Commonwealth v. Reese* illustrates how PCRA courts must gauge the actual innocence standard

Although a pre-DNA testing statute case, *Commonwealth v. Reese*, 663 A.2d 206 (Pa. Super. 1995) is quite probative regarding how PCRA courts must assess the DNA testing statute's actual innocence standard. In *Reese*, the defendant was convicted of a single-perpetrator, stranger rape in 1982. At trial, the victim identified the defendant as her assailant. Also, the prosecutor presented a forensic chemist who told jurors he'd recovered sperm from the victim's rape kit. The "clear implication" of the sperm evidence "was to corroborate the victim's account of the evening and testimony of a sexual assault *by [the defendant]*." *Id.* at 209-210 (emphasis added).

During PCRA proceedings, the defendant requested DNA testing, which the PCRA court granted. The DNA testing excluded the defendant as the sperm donor, prompting the PCRA court to hold an evidentiary hearing. At the hearing, the prosecutor wanted to introduce the following evidence, which the Commonwealth possessed and knew of before the defendant's trial, but strategically chose not to present it at the defendant's trial:

First, testimony from the officers who interviewed the victim after the rape that the victim told them the perpetrator "complained to her… he was unable to ejaculate during the assault." *Id.* at 209.

Second, the prosecutor wanted the victim to testify so she could explain how she had a live-in boyfriend at the time of the rape, and that they had sex "on a regular basis." *Id.*

The prosecutor argued the PCRA court had to hear this evidence to "rebut" the defendant's claim that "the DNA test results were truly exculpatory." *Id.* It wasn't truly exculpatory, the prosecutor claimed, because this testimony "establish[ed]" the "rapist did not ejaculate," meaning the sperm likely came from the live-in boyfriend because the victim and boyfriend had sex "regularly[.]" *Id.*

The PCRA court refused to consider the prosecutor's *post hoc* theory and evidence regarding the origin of the sperm evidence because of how the prosecutor presented the sperm evidence at trial:

> The jury was also advised that seminal fluid samples were obtained from the clothing worn by the victim the night of the attack. The clear implication of the evidence offered at trial was to corroborate the victim's account of the evening and testimony of a sexual assault by [the defendant].

Id. at 209-210.

The PCRA court, therefore, focused on the critical question: had the defendant's jury known that DNA testing excluded him as the sperm donor, "would" this information "have affected" its verdict? *Id.* at 209. The PCRA court answered in the affirmative and granted a new trial, prompting the Commonwealth to appeal. On appeal, the Commonwealth argued the PCRA court erred by refusing to admit and consider the above evidence during the PCRA hearing. This Court disagreed and affirmed the PCRA court's (1) exclusionary ruling and (2) new trial grant.

Most notably, this Court said:

> The weakness with the Commonwealth's argument rests in the fact that the evidence it sought to have the PCRA court review *was not evidence which was introduced and heard by the jury at trial.* The jury was not advised of the assailant's comment and was not told about the victim's sexual activity. However the jury did hear testimony in which the victim detailed the attack, and identified [the defendant] as the attacker.

> The jury was also advised that seminal fluid samples were obtained from the clothing worn by the victim the night of the attack. The clear implication of the evidence offered at trial was to corroborate the victim's account of the evening and testimony of a sexual assault by [the defendant]. Because the jury did not hear evidence of other explanations for the deposit of this seminal fluid, *it would have been improper for the PCRA court to have considered it when examining whether the DNA evidence was exculpatory and whether it would likely have resulted in a different verdict if admitted at trial.* The narrow issue before the PCRA court was whether the DNA evidence *would have* affected the outcome of the trial had it been introduced. We find that the PCRA court properly restricted the evidence during the hearing to that which was relevant to this question. *While the Commonwealth's proposed evidence may in fact be proper rebuttal testimony in a new trial, it was irrelevant to the matter under consideration before the PCRA court.*

Id. at 209-210 (emphasis added).

It's important to understand how the Commonwealth in *Reese* tried to game the system because the DAO, here, is trying to game the system in the same way. In *Reese*, the way the prosecutor presented the sperm evidence made it clear what inference the prosecutor wanted jurors to draw, *i.e.*, the sperm must've come from the defendant, meaning the defendant must be the perpetrator. However, before trial, the Commonwealth knew what the perpetrator had said regarding his inability to ejaculate and that the victim had a live-in boyfriend.

The prosecutor, though, *strategically* decided not to present this evidence, and understandably so, because these facts would've significantly undercut the incriminating inference he wanted jurors to draw from the sperm evidence. In other words, had jurors known about the above facts, they could've easily disregarded the sperm evidence, reasoning it probably came from the live-in boyfriend, and instead focused on the victim's identification and the Commonwealth's other evidence. The prosecutor, however, presumably didn't want the jury to focus on these factors for the following reasons:

First, "the victim was assaulted in a dark isolated area." *Id.* at 208.

Second, although the victim spent "substantial" time "in close proximity" with the perpetrator, she "was not able to describe his facial features to the police." *Id.*

Third, the defendant "was never linked to the crime by any physical evidence," including fingerprints, fibers, or hairs. *Id.*

Fourth, the vehicle the perpetrator approached the victim in, which the victim described to the police, "was not connected" to the defendant. *Id.*

Fifth, the victim's identification of the defendant "may have been prompted by the actions of her boyfriend." *Id.*

In short, the prosecutor strategically decided not to present the above evidence at trial because he wanted the jury to focus on the sperm evidence, and to find that the sperm came from the defendant.

The Commonwealth's true gaming of the system, however, came during the PCRA proceedings. The perpetrator's claimed inability to ejaculate and the fact the victim was having frequent sex with her live-in boyfriend harmed the Commonwealth's case, so it decided not to present these facts to *the critical fact-finder*: the jury. However, once post-conviction DNA testing destroyed the Commonwealth's incriminating inferential semen argument, *i.e.*, the semen had to come from the defendant, the Commonwealth made two absurd and unfair requests to the PCRA court:

First, although the Commonwealth strategically refused to present the above facts at trial because not doing so *strengthened* its case, it effectively asked the PCRA court for a *mulligan* by arguing the following:

> Well, now that we know the sperm didn't come from the defendant, the Commonwealth would like a do-over, but the Commonwealth doesn't want the do-over to be another *jury* trial. Instead, the Commonwealth wants you – the PCRA court – to find the sperm evidence isn't truly exculpatory based on evidence the Commonwealth could've presented at the defendant's trial, but didn't.

Second, the Commonwealth not only wanted a mulligan so it could present its *post hoc* theory regarding the sperm evidence, it didn't want to present this *post hoc* theory to a jury, even though the *post hoc* theory was based on evidence it could've presented to the initial jury. Instead, it wanted the PCRA court to be the critical fact-finder regarding this "old" – not new – evidence, it had strategically decided not to present to the initial jury.

The unfairness in the Commonwealth's approach is obvious. If endorsed, prosecutors could ask for and receive a mulligan anytime a defendant develops new facts that undermine the Commonwealth's evidence and theory at trial. Prosecutors would simply have to argue:

> Wait, Your Honor, I have evidence I didn't present at trial that undermines the defendant's new facts. Yes, I didn't present this evidence at the defendant's first trial because it didn't help my case, but now I can use this evidence to undermine the defendant's new evidence to prevent him from even receiving a new trial. Thus, instead of granting the defendant a new trial, and letting the jury consider and weigh the defendant's new facts, I'm asking the Court to hold a PCRA hearing where the defendant can present his new facts, the Commonwealth can present this old evidence, and the Court can decide whether the Commonwealth's old evidence undermines the defendant's new facts, and if so, to deny the defendant a new trial.

The absurdity and unfairness of this reasoning speaks for itself.

Yes, *Reese* is a post-testing, pre-DNA testing statute case, but the DAO is making the same *sleight of hand* argument the Commonwealth made in *Reese*. Here, though, the DAO is doing it to prevent Mr. Brookins from ever receiving DNA testing that can prove his innocence.

More specifically, *Reese* is relevant because the *process for addressing and answering* the question under § 9543(a)(2)(vi), *i.e.*, whether the defendant's new facts "would have changed" the trial's outcome, is identical to the actual innocence question under § 9543.1(d)(2)(i), *i.e.*, had the defendant's jury known about the exculpatory DNA results, whether it's more likely than not the jury "would have" acquitted the defendant of the charged offense(s).

The DAO's primary counter-argument regarding the actual innocence standard is *identical* to the Commonwealth's argument in *Reese*. At trial, the DAO didn't mention a word about Sharon or the fact Mr. Brookins murdered Sheila with the assistance of an unnamed co-conspirator. More significantly, the DAO vigorously challenged Mr. Brookins's primary defense that Sharon, not him, murdered Sheila.

First, the DAO tried to prevent the six women from testifying who each said, at a pre-trial hearing, Sharon made incriminating statements about Sheila's murder.

Second, when the trial court allowed these women to testify, the DAO attacked them on cross-examination, alleging each had manufactured their testimony because they didn't like Sharon.

Third, the "clear implication" of DAO's opening statements, trial evidence, and closing arguments as well as the the trial court's jury instructions was that Mr. Brookins – and he alone – murdered Sheila.

Fourth, during Mr. Brookins's penalty and sentencing hearings, the DAO repeatedly described Sharon as a victim who Mr. Brookins falsely accused of murder.

Fifth, when the DAO presented the Negroid hair fragments collected from Sheila's clothing and person, it never argued or suggested the fragments came from anyone other than Mr. Brookins. In fact, the FBI hair examiner said he never compared Sharon's hair samples to the fragments. Thus, the point of presenting the Negroid hair fragments was to support the DAO's *singular* theory: Mr. Brookins is black, and the hair fragments are Negroid, meaning Mr. Brookins – and he alone – murdered Sheila.

In short, the DAO strategically and vigorously dismissed all evidence implicating Sharon in Sheila's murder. And let's be honest: the DAO could've charged Sharon as a co-conspirator before trial. In law enforcement lingo, the information these women came forward with is called a CLUE,

i.e., if Sharon made incriminating statements to six people who didn't know one another, it's safe to assume she probably had something to do with Sheila's murder.

Consequently, the DAO strategically decided it didn't want Mr. Brookins's jury to decide Mr. Brookins's fate based on a co-conspiracy argument/prosecution. It did so, Mr. Brookins believes, for at least two reasons: (1) it truly believed Sharon *wasn't* involved in Sheila's murder; and/or (2) charging Sharon as a co-conspirator decreased the likelihood of obtaining a guilty verdict and/or death sentence against Mr. Brookins because he could more persuasively argue Sharon murdered Sheila and not him.

Now, however, if DNA testing links the Negroid hair fragments to Sharon, the DAO's sole argument to undercut this *exculpatory redundancy* is to swap horses and endorse the very narrative it strategically, vigorously, and repeatedly dismissed at Mr. Brookins's jury trial, even though it had every opportunity to argue this narrative in 1992 by jointly trying Mr. Brookins and Sharon for Sheila's murder.

Reese identified the fatal problem with the DAO's approach: the DAO never presented evidence or argument *to the jury* suggesting Mr. Brookins *and* Sharon worked as co-conspirators to murder Sheila and the trial court's jury instructions identified only one person *the jury could find guilty* of Sheila's murder: John Brookins. As *Reese* emphasized, when assessing a *past tense* standard like § 9543(a)(2)(vi), the focus is on what the petitioner's jury "*would have*" done had it been presented these new facts and theories. And § 9543.1(d)(2)(i)'s actual innocence standard mandates the same approach as § 9543(a)(2)(vi).

Thus, like the Commonwealth in *Reese*, the DAO here is asking for a mulligan, but it wants a mulligan to prevent DNA testing, not to prevent a new trial as in *Reese*. The PCRA court, therefore, should've done what the PCRA court did in *Reese* and adjudicate § 9543.1(d)(2)(i)'s actual innocence issue based on the evidence and theory the DAO presented to Mr. Brookins's jury. The PCRA court didn't and for that reason it erred as a matter of law. Moreover, had it properly analyzed the actual

innocence standard, it would've concluded it's more likely than not that, had Mr. Brookins's jurors known DNA testing linked Sharon to several probative items, none would've convicted him of first-degree murder.

D. The circumstantial evidence against Mr. Brookins is no stronger than the circumstantial evidence against the defendants in *Conway* and *Payne*

Undersigned counsel represented Robert Conway in *Conway*. One of the Commonwealth's primary arguments before the PCRA court and this Court was that DNA testing wasn't "appropriate" because the circumstantial trial evidence was "overwhelming." *Commonwealth v. Conway*, 14 A.3d at 110. This Court rejected the "overwhelming" evidence argument because the "weight" of a DNA redundancy would've "obviously… outweighed" the Commonwealth's circumstantial evidence. *Id.*

This Court's holding is significant because the circumstantial evidence against Robert Conway was stronger than the circumstantial evidence against Mr. Brookins:

First, Robert Conway admitted to being at the murder scene because he said he found the victim's body and touched it to see if she was alive.

Second, the Commonwealth introduced testimony from a jail inmate who said Robert Conway confessed to murdering the victim.

Here, like Robert Conway, Mr. Brookins admits he walked into Sheila's apartment when Sharon was standing over Sheila's lifeless body, and he admits he touched Sheila's phone and remote controller. The DAO, however, unlike *Conway*, never introduced a confession from Mr. Brookins.

In *Payne*, the Commonwealth made a similar "overwhelming" evidence argument, which this Court rejected, despite the fact the Commonwealth's trial evidence consisted of three witnesses who said John Payne made multiple incriminating statements regarding the burglary/murder. *In re Payne*, 129 A.3d at 550.

Here, Mr. Brookins's conviction is based on the following evidence:

First, the fingerprints on the phone receiver and remote control.

Second, his pre-trial inconsistent statements.

Third, Margret Albright's claim she heard a woman yell, "No, no, please. I said no. Someone help," shortly after 11:00 p.m. on December 20, 1990. And then, after watching the 11:00 p.m. news, Albright claimed she heard the same woman yell, "He's killing me, he's stabbing me. Please, somebody help."

Fourth, while the FBI hair examiner never linked the Negroid hair fragments to Mr. Brookins, the way the DAO presented the fragments created the clear impression they must've come from Mr. Brookins because he's black.

Contrary to the PCRA court and DAO, this *isn't* overwhelming evidence of guilt.

First, the fingerprints are like Robert Conway admitting he touched the victim. Also, Mr. Brookins admits he was at the scene immediately after Sharon murdered Sheila.

Second, while Mr. Brookins's inconsistent statements were admissible at trial, "this is not equivalent to saying that such evidence *is sufficient in itself to prove the guilt of an accused*." *Commonwealth v. Woong Knee New*, 47 A.2d 450, 460 (Pa. 1946) (emphasis in original). The Supreme Court added:

> Those experienced in the administration of criminal justice know that sometimes an accused person will, although innocent, make statements contrary to the facts about his whereabouts at the time the crime was committed because the jury might believe that the connection between his whereabouts and the crime were *not* merely coincidental.

Id. at 460 (emphasis in original); *accord Bram v. United States*, 168 U.S. 532, 547 (1897).

Reinforcing the fact that inconsistent statements aren't always incriminating and can't generally block DNA testing, is the fact petitioners who've confessed can and do obtain DNA testing. *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011).[150]

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[150] Notably, the DNA testing awarded in *Wright* ultimately led to Anthony Wright's exoneration when it linked a prior felon to the victim's rape-murder. Also, the City of Philadelphia settled Anthony Wright's civil suit for $10 million. Mensah M. Dean & Mark Fazlollah, *Philly man, wrongly imprisoned for 25 years, gets nearly $10 million from city*, PHILA. INQUIRER, June 6, 2018, at https://www.inquirer.com/philly/news/crime/anthony-wright-louise-talley-10-million-settlement-dna-evidence-rape-murder-nicetown-25-years-philadelphia-20180606.html.

Third, as in *Conway*, "there was no prior history between [Mr. Brookins and Sheila] that would have suggested the occurrence of the violent incident that resulted in [Sheila's] death." *Commonwealth v. Conway*, 14 A.3d at 112.

Fourth, Margret Albright's testimony is fabricated and there's no doubt about it:

To begin with, to believe her testimony, one must believe Albright heard this woman's desperate plea for help shortly after 11:00 p.m., yet ignored her plea to watch the 11:00 p.m. news. Then, after watching the 11:00 p.m. news, she heard an even more desperate, graphic, and deadly plea for help, but, again, ignored it by not immediately calling authorities.[151]

Next, according to Albright, she clearly heard the woman's voice that night because her bedroom window was open. Albright, in fact, said she always kept her bedroom window open.[152] That's right, on December 20, 1990, the day before the first day of winter,[153] Albright's bedroom window was open at 11:30 p.m., even though the mean temperature that day in Trenton, New Jersey, which isn't far from Bristol, Pennsylvania, was only 37.8 °F and the low was 28.2 °F.[154]

Furthermore, when the BPD interviewed Albright in late December 1990 or early January 1991, Albright never mentioned to the BPD what she testified to at trial.[155]

Additionally, no other Lakeview Manor tenants, particularly those in H-8, H-7, H-6, H-5, H-4, H-2, and H-1, heard what Albright claimed she heard. Ditto regarding the tenants above Sheila's apartment. For instance, Roy Jennings lived directly above Sheila, but he didn't report hearing Sheila cry for help because a man was stabbing her.

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[151] According to Albright, she had a telephone next to her bed when she heard this more graphic and desperate plea, but she didn't call the authorities. NT, Trial, 7/9/1992, p. 80.
[152] NT, Trial, 7/9/1992, p. 79.
[153] https://www.timeanddate.com/calendar/seasons.html?year=1970.
[154] https://www.almanac.com/weather/history/NJ/Trenton/1990-12-20#.
[155] NT, Trial, 7/9/1992, p. 82.

More importantly, the first time Albright mentioned the "he's stabbing me" narrative was when lead prosecutor, Diane Gibbons, and BPD detective, Robert Potts, knocked on her front door in June 1992 – eighteen months after Sheila's murder.[156] By June 1992, however, the DAO knew exactly what Mr. Brookins would argue at trial: Sharon murdered Sheila, not him. The DAO also knew about the six women who said Sharon confessed to murdering Sheila. What better way to undermine this defense and these defense witnesses than to find a witness – at the 11th hour – who could claim she or he heard Sheila yell something to the effect, "*He's* killing, *he's* stabbing me." Remarkably, when ADA Gibbons and Detective Potts interviewed Albright in June 1992 this is exactly what Albright supposedly told them.

Here's the problem, however. To believe Albright's narrative is true, and that ADA Gibbons and Detective Potts didn't suggestively or coercively produce her statement, one has to believe these things: (1) on December 20, 1990, Albright heard this woman's deathly cries for help but did nothing; (2) Albright (like all Lakeview Manor tenants) learned of Sheila's *stabbing* murder on December 21, 1990 or shortly thereafter, and once she did, she immediately figured out Sheila had to be the woman yelling for help, but she never told the BPD this when it initially interviewed her shortly after Shelia's murder; however (3) in June 1992, immediately before Mr. Brookins's trial, Albright thought it was finally time to tell the BPD and DAO what she supposedly heard that night, but she only did this because the BPD and DAO *came knocking on her door* and asked for a private, unrecorded meeting with her in her living room, not because she had a crisis of conscience about not disclosing what she supposedly heard that fateful night some eighteen months earlier. These things simply don't add up.

[156] NT, Trial, 7/9/1992, pp. 81-82.

Moreover, based on Albright's sequencing, the assault leading to Sheila's murder had to have lasted nearly thirty minutes. According to Albright, she first heard Sheila call for help shortly after 11:00 p.m. After the 11:00 p.m. news, *i.e.*, 11:30 p.m., Albright heard Sheila yell she was being stabbed. The physical evidence, however, doesn't support this "protracted assault" narrative.

Based on Albright's testimony, Sheila couldn't have been struck in the head with the marble trophy base (fracturing her skull) or manually strangled (breaking her hyoid bone) before 11:30 p.m. because Sheila was capable of yelling, "He's killing me. He's stabbing me." A skull-fracturing blow to the head with the marble trophy base would've immediately incapacitated Sheila. Ditto regarding the manual strangulation, meaning both couldn't have happened before the stabbing based on Albright's testimony.

Thus, based on Albright's testimony, Sheila had to be stabbed with the scissors first. However, if Sheila was stabbed with the scissors *after* 11:30 p.m., and the skull-fracturing trophy blow and hyoid-breaking manual strangulation both happened *after* the stabbing, why did Sheila cry for help *before* 11:00 p.m. The answer is simple: the DAO and BPD – at the 11th hour – manufactured Albright's narrative to undermine Mr. Brookins's primary trial defense that Sharon murdered Sheila.

Fifth, the Negroid hair fragments could have come from Sharon because – as a mixed-race person – her hair exhibits both Caucasian and Negroid characteristics.

In the end, DNA testing can prove Mr. Brookins's actual innocence and this Court should grant him that testing by reversing the PCRA court's dismissal order.

CONCLUSION

WHEREFORE, based on the foregoing facts, authorities, and arguments, Mr. Brookins respectfully requests the Court to vacate the PCRA court's order and find: (1) his DNA petition timely; and (2) a redundancy linking Sharon Ginsberg to two or more probative items of evidence would prove Mr. Brookins's actual innocence, *i.e.*, it's more likely than not that, had his jurors known about the exculpatory redundancy, none would've convicted him of first-degree murder. Based on these findings, Mr. Brookins respectfully requests the Court to remand his case back to the PCRA court with instructions that DNA testing move forward once the parties agree on the DNA laboratory and testing protocol.

Respectfully submitted this the 30st day of March, 2020.

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CERTIFICATE OF SERVICE

On March 30, 2020, counsel e-filed this pleading via PAC-File, meaning the Commonwealth was served electronically.

CERTIFICATE OF COMPLIANCE

Mr. Brookins's opening brief exceeds 14,000. Thus, Mr. Brookins filed a motion requesting permission to exceed the word count.

PENNSYLVANIA SUPERIOR COURT
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	)	
Respondent-Appellee,	)	**551 EDA 2020**
v.	)	**CP-09-CR-0005060-1991**
	)	**First-degree murder**
	)	**Post-Conviction DNA Testing**
JOHN BROOKINS	)	
Petitioner-Appellant.	)	

PCRA Court Opinion

IN THE COURT OF COMMON PLEAS
BUCKS COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. CP-09-CR-0005060-1991
	:	POST-CONVICTION RELIEF ACT
v.	:	
JOHN DAVID BROOKINS	:	

OPINION

I. INTRODUCTION

Appellant, John Brookins ("Mr. Brookins" or "Appellant"), has appealed to the Superior Court of Pennsylvania from this Court's Order of January 14, 2020, denying and dismissing his Post Conviction DNA Testing Motion.

We file this Opinion in accordance with Pa.R.A.P. 1925(a).

II. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this case, which involves the brutal murder of Sheila Ginsberg on December 21, 1990, more than twenty-nine (29) years ago, has been repetitively recounted in the numerous briefs and opinions that have been previously filed with various courts. The most recent Opinion, issued by the Honorable Rea B. Boylan on December 31, 2012, and which we incorporate herein and attach hereto as Exhibit "A," contains a thorough recitation of the facts, testimony and other relevant evidence that were introduced at Appellant's murder trial, which began on July 2, 1992, and concluded with his conviction by a jury of First Degree Murder on July 17, 1992.[1]

[1] After Appellant timely filed a Notice of Appeal, the Superior Court of Pennsylvania affirmed his judgment of sentence, and the Supreme Court of Pennsylvania denied his petition for permission to appeal. (*See* Commonwealth v. Brookins, 723 A.2d 228 (Pa.Super. 1998) (unpublished memorandum), *appeal denied*, 736 A.2d 602 (Pa. 1999)).

Judge Boylan's Opinion was issued in support of her June 27, 2012 Order, which denied Appellant's petition for post-conviction relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. The Order of June 27, 2012 was subsequently affirmed by the Superior Court of Pennsylvania on September 5, 2013.[2] The Superior Court's unpublished memorandum Opinion, No. 2118 EDA 2012, affirming Judge Boylan's Order, is attached hereto as Exhibit "B." The Supreme Court of Pennsylvania denied Appellant's petition for allowance of appeal on March 24, 2014.

Appellant next sought relief by filing, *pro se,* a Petition for Writ of Habeas Corpus with the U.S. District Court for the Eastern District of Pennsylvania on May 7, 2014. On June 30, 2017, Federal Magistrate Judge David J. Strawbridge issued a report recommending the denial of Appellant's petition, and on June 15, 2018, Federal District Judge Gene E.K. Pratter issued an Order overruling Appellant's objections and adopting Judge Strawbridge's recommendations, thereby dismissing Appellant's petition. The Third Circuit Court of Appeals denied Appellant's request for a certificate of appealability on January 17, 2019. (*See* Commonwealth's Answer in Opposition to Post-Conviction DNA Testing Motion, 9/9/19.)

Appellant filed the instant Post-Conviction DNA Testing Motion, pursuant to 42 Pa.C.S. § 9543.1, through counsel on June 27, 2019. This Court directed the Commonwealth to file a response to the motion on or before August 12, 2019, and after its request for an extension was granted, the Commonwealth filed its "Answer in Opposition to Post-Conviction DNA Testing Motion" on September 9, 2019. Appellant filed a "Reply to Commonwealth's Answer Regarding Petitioner's Post-Conviction DNA Testing Motion" on September 19, 2019, to which the Commonwealth then filed a "Sur-Reply in Opposition to Post-Conviction DNA Testing Motion" on the same date. Lastly, Appellant submitted to our Chambers a "Reply to DAO's Sur-Reply" on September 23, 2019.

After careful review of the record, this Court determined that Appellant was not entitled to the relief he was seeking in his request for DNA testing, and on September 24, 2019, we issued a Notice of Intent to Dismiss Pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure.

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[2] Appellant initially filed a *pro se* PCRA petition on January 18, 2000, but after a tortuous procedure process, Judge Boylan eventually took over this case on November 24, 2008, and subsequently denied Appellant's PCRA petition on June 27, 2012, along with an intervening "Motion to Subject Seized Gloves for [DNA] testing," which Appellant had filed on October 29, 2010.

On January 14, 2020, this Court entered a subsequent Order denying and dismissing Appellant's Post-Conviction DNA Testing Motion. On January 27, 2020, Appellant filed a timely Notice of Appeal along with a contemporaneous eleven-page Concise Statement of Errors on Appeal. Although Appellant's counsel's Concise Statement is in the form of an advocate's brief, and therefore cannot accurately be termed "concise," it raises two substantive claims of error, reproduced *verbatim* below, which we shall address in this Opinion.

III. APPELLANT'S CONCISE STATEMENT OF ERRORS ON APPEAL

1. The PCRA court erred when it concluded Mr. Brookins's DNA testing motion was untimely because his motion can't "delay the execution" of his LWOP sentence. U.S. Const. admts. 6, 8, 14; Pa. Const., art I, §§ 9, 10, 14.

2. The PCRA court erred when it concluded there was no reasonable probability modern DNA testing could produce exculpatory evidence that would prove Mr. Brookins's actual innocence of first-degree murder. U.S. Const. admts. 6, 8, 14; Pa. Const., art I, §§ 9, 10, 14.

IV. DISCUSSION

Appellant has requested DNA testing pursuant to 42 Pa.C.S.A. § 9543.1, Postconviction DNA Testing, which states in relevant part:

> (a) Motion.-
> (1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.
> (2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion. ...
> ...
> (c) Requirements.-In any motion under subsection (a), under penalty of perjury, the applicant shall:
> (1) (i) specifiy the evidence to be tested
> ...
> (2) (i) assert the applicant's actual innocence of the offense for which the applicant was convicted;
> ...
> (3) present a prima facie case demonstrating that the:
> (i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(A) the applicant's actual innocence of the offense for which the applicant was convicted;

...

(d) Order.-

(1) Except as provided in paragraph (2), the court shall order the testing requested in a motion under subsection (a) under reasonable conditions designed to preserve the integrity of the evidence and the testing process upon a determination, after review of the record of the applicant's trial, that the:

(i) requirements of subsection (c) have been met;

(ii) evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect; and

(iii) motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.

(2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that:

(i) would establish the applicant's actual innocence of the offense for which the applicant was convicted;

...

42 Pa.C.S.A. § 9543.1

The Superior Court of Pennsylvania has observed in Commonwealth v. Smith, 889 A.2d 582 (Pa.Super. 2005), that:

> [u]nder a recently enacted provision of the Post Conviction Relief Act[FN1] (PCRA), an inmate may seek forensic DNA testing of "specific evidence that is related to the investigation or prosecution" that resulted in his conviction. 42 Pa.C.S.A. § 9543.1(a). There are, however, several statutory requirements that a petitioner seeking postconviction DNA testing must meet. Most relevant to the case at bar, the petitioner must present a *prima facie* case that the requested DNA testing, assuming that it yields exculpatory results, would establish his "actual innocence" of the crime of which he was convicted. 42 Pa.C.S.A. § 9543.1(c)(3). If, after reviewing the record of petitioner's trial, the court determines that there is "no reasonable possibility that the [DNA] testing would produce exculpatory evidence that would establish the [petitioner's] actual innocence", the court shall not order the testing. 42 Pa.C.S.A. § 9543.1(d)(2).
>
> FN 1: 42 Pa.C.S.A. §§ 9541-46.
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> From the clear words and plain meaning of these provisions, there can be no mistake that the burden lies with the petitioner to make a *prima facie* case that favorable results from the requested DNA testing would establish his innocence. We note that the statute does not require petitioner to show that the DNA testing

> results would be favorable. However, the court is required to review not only the motion, but also the trial record, and then make a determination as to whether there is a reasonable possibility that DNA testing would produce exculpatory evidence that would establish petitioner's actual innocence.

Smith, 889 A.2d at 583, 584. (emphasis added)[3]

The Superior Court has further stated that, when reviewing the denial of a motion for post-conviction DNA testing,

> [o]ur standard of review in this case is as follows:
>
> > Generally, the trial court's application of a statute is a question of law that compels plenary review to determine whether the court committed an error of law. When reviewing an order denying a motion for post-conviction DNA testing, this Court determines whether the movant satisfied the statutory requirements listed in Section 9543.1. We can affirm the court's decision if there is any basis to support it, even if we rely on different grounds to affirm.

Commonwealth v. Walsh, 125 A.3d 1248, 1252-53 (Pa.Super. 2015) (*quoting* Commonwealth v. B. Williams, 35 A.3d 44, 47 (Pa.Super. 2011) (internal citations omitted)).

A. Appellant's request for DNA Testing was not made in a timely manner

In his first substantive claim of error in his appeal from our Order denying his request for DNA testing, Appellant argues that this Court erred in concluding that his request was untimely. While Appellant is correct in asserting that 42 Pa.C.S.A. § 9543.1 does not specify any restrictions or limitations on the time for filing a request for DNA testing,[4] this Court is cognizant that 42 Pa.C.S.A. § 9543.1(d)(1)(iii) requires the court to order testing "upon a determination, after review of the record of the applicant's trial, that the motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice."

In Commonwealth v. Edmiston, 65 A.3d 339, 357-359 (Pa. 2013), the Supreme Court of Pennsylvania initially observed that the "timeliness requirement of a motion for post-conviction

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[3] To establish "actual innocence," the Defendant must demonstrate that the newly discovered evidence must make it 'more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.' Commonwealth v. Conway, 14 A.3d 101, 109 (Pa.Super. 2011).

[4] *See* Commonwealth v. Walsh, 125 A.3d 1248, 1252 (Pa.Super. 2015) ("The PCRA's one-year time bar does not apply to motions for the performance of forensic DNA testing under Section 9543.1") (*quoting* Commonwealth v. Brooks, 875 A.2d 1141, 1146 (Pa.Super. 2005)).

DNA testing is an issue of first impression," and then affirmed a PCRA court's denial of a request for DNA testing on the basis that the request was not made "in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice." The Court observed that the "[a]ppellant had known of the existence of the physical evidence he now seeks to test since his trial over twenty years ago," and "careful examination of the record reveals that Appellant is not a likely candidate to be exonerated by DNA testing." The Court counseled that under the circumstances of that case, "courts should exercise a healthy skepticism when faced with requests for DNA testing." Id. at 357.

We believe that Edmiston is similar and applicable to the instant matter, and despite Appellant's strenuous arguments to the contrary, we have concluded that Appellant is also not a likely candidate to be exonerated by DNA testing. For nearly thirty (30) years, Appellant has known of the existence of the items he wishes to be tested, and in fact he submitted a "Motion to Subject Seized Gloves for [DNA] testing" over nine (9) years ago, on October 29, 2010. As noted previously, Judge Boylan denied that motion on June 27, 2012. As Judge Boylan observed, it was only speculation that those gloves may have even been related to the murder of Sheila Ginsberg, and the results of any testing done on them would be far from sufficient to establish a prima facie case of Appellant's actual innocence.

Appellant initially only requested DNA testing of the aforementioned pair of gloves, rather than the list of nineteen (19) items he has identified in his current request for DNA testing.[5] That list now includes, in addition to those gloves once again, the pair of scissors used as the murder weapon. Since Appellant was obviously aware of the availability of DNA testing when he made his initial request to test the gloves, and he was aware that all of the evidence regarding which he now seeks testing was available when he made that request almost a decade ago, he could have presumably identified and requested testing of *all* items involved in the victim's death

[5] The nineteen (19) items that Appellant has requested DNA testing be performed upon include the victim's pants, shirt, bra, and sweater; two white sheets used to transport the victim's body; scissors embedded in the victim's chest; the victim's ten fingernail scrapes; scissors recovered from under the coffee table; metal trophy piece; metal trophy base; the victim's blood sample; a 10' x 10' piece of carpet; "scaping from celling chase (sic);" blood residue from scrapings of bloodstain on floor; gloves seized from Paul Cottman's car; the victim's white purse; all the non-Negroid hairs or hair fragments removed from the victim's clothing, the white sheets, the carpet and sofa cushions; and Sharon's hair samples. Appellant incorrectly refers to the victim as "Shelia" throughout his Post-Conviction DNA Testing Motion.

that could provide potentially exculpatory evidence, including those scissors, at that time in 2010.

Appellant's request for DNA testing of the gloves, however, had the appearance of a fishing expedition designed solely to sow doubt over his conviction based upon the possible involvement of the victim's daughter, Sharon Ginsberg, in the murder of her mother, Sheila Ginsberg. Now, nine years later, Appellant is apparently attempting to expand that fishing [redacted], as well as his evolving theory involving the participation of Sharon Ginsberg in the murder of her mother, by requesting additional items be tested. Obviously, with the passage of time, it may well be difficult and perhaps impossible to ascertain or recreate the circumstances involving the collection and observation of those items sought to be tested.

Although Appellant has been sentenced to incarceration for life without parole, and therefore his request cannot delay the execution of his sentence, we are nevertheless, in accordance with Edmiston, *supra*, extremely skeptical of Appellant's request. Accordingly, we find his request untimely, and apparently made in furtherance of an evolving and unpersuasive theory in support of a claim of actual innocence.

B. Appellant's request for DNA testing was not granted because there was no reasonable probability that such testing would produce exculpatory evidence that would establish Appellant's actual innocence

Inextricably intertwined with Appellant's first allegation of error involving the untimeliness of his request is his second substantive claim that this Court erred when it concluded there was no reasonable probability DNA testing could produce exculpatory evidence that would establish Appellant's actual innocence.

In his most current version of the events surrounding the murder of Sheila Ginsberg,[6] Appellant now admits that he was present at the murder scene, but alleges that he observed Sharon Ginsberg murder her mother. He therefore requests that the nineteen items he has identified in his petition for DNA testing be examined for traces of Sharon's DNA, and/or the absence of his DNA. What is striking about Appellant's request, and what he fails to acknowledge, is that it represents an attempt to cast suspicion upon another individual who may

[6] See Judge Boylan's comprehensive review of the factual background in her 2012 Opinion, attached hereto as Exhibit "A." More specifically, see the summary of the inculpatory trial evidence presented against Defendant, at page 32 of her Opinion.

or may not have been involved in the victim's murder, and does absolutely nothing to dispel or repudiate the overwhelming evidence upon which Appellant's guilt and subsequent conviction were based.

That evidence included, *inter alia,* the following: Appellant's fingerprints were found on the telephone receiver and the toilet in the victim's bathroom; the toilet seat was left up and there was no suggestion that other male visitors had been present in the apartment; the volume of the television in the victim's apartment "was very, very loud" when the police arrived at the murder scene; Appellant's bloody fingerprint was found on the TV remote control device; fourteen hair fragments of "(African American) racial origin" found on or around the victim were not attributable to Sharon Ginsberg; and the testimony of a neighbor, Margaret Albright, indicated that through her open window around 11:00 p.m. on December 20, 1990, she heard an apparently frightened woman say "No, no, please. I said no" and "please, somebody help." Later, when the 11:00 p.m. news was over, the following was heard: "He's killing, he's stabbing me. Please, somebody help." (*See* Exhibit "A," Opinion, 12/31/2012, pp. 3-5, 8.)

In addition, Appellant's current theory alleging Sharon Ginsberg's complete responsibility for the murder of her mother essentially asks this Court to disregard or reject the other circumstantial evidence upon which the jury's determination of Appellant's guilt was presumably based. That evidence included Appellant's apparent consciousness of guilt when he was first approached by investigators and failed to properly identify himself and denied being in the victim's apartment around the time of the murder; the observation that while the victim's lower extremities were clothed, her blouse and bra were pushed up exposing her breasts; her head was wrapped and/or covered with an afghan that was usually kept folded on the back of the sofa; and the discovery of a handwritten letter from the victim addressed to Appellant concerning her displeasure over a $200.00 telephone bill for which she claimed Appellant and her daughter were responsible, as well as personal letters of a romantic nature from Appellant to the victim expressing his love for her and his intention to pay the telephone bill.

We also noted that, in her December 31, 2012 Opinion, Judge Boylan described the brutality of the murder as follows:

> On December 22, 1990, Halbert Fillinger, Jr., M.D., a forensic pathologist, performed an autopsy of the victim in the morgue at St. Mary's Hospital. N.T. 7/8/92 II, pp. 6-7; N.T. 7/7/92, p. 14. Dr. Fillinger observed hemorrhaging of the right eye, asymmetrical swelling of the head, and sixteen external injuries to the

victim's body, including tears, scrapes, lacerations, and bruising. N.T. 7/8/92 II pp. 10-33. The scissors were embedded at least five inches into the victim's chest. N.T. 7/8/92 II, pp. 10-11, 26-28. Additionally, Dr. Fillinger identified eight significant internal injuries, including skull penetration consistent with an object such as scissors, protruding wounds, and bone fractures. N.T. 7/8/92 II, pp. 33-42.

Dr. Fillinger opined that a great deal of force and strength was used to create that amount of swelling, to penetrate the skull with scissors and then remove them, and to fracture the breast bone. N.T. 7/8/92 II, pp. 33, 36-39, 41-43, 48-49. Dr. Fillinger also opined that the broken hyoid bone was consistent with manual strangulation. N.T. 7/8/92 II, pp. 51-52.

Dr. Fillinger determined that the cause of death was multiple injuries of the neck and trunk – specifically, multiple blunt impacts to the head and multiple stab wounds to the neck and trunk. N.T. 7/8/92 II, pp. 55-57.

At the time of her death, the victim was five feet four inches tall and weighed approximately one hundred and sixty pounds. N.T. 7/8/92 II, p. 11. In December of 1990, Sharon Ginsberg was five feet tall and weighed approximately eighty to ninety pounds. N.T. 7/9/92, p. 74. In April of 1991, defendant, a black male, was five feet eight inches tall, weighed one hundred and eighty pounds, and had a muscular build. N.T. 7/9/92, p. 76.

Opinion, 12/31/2012, p. 6.

Despite the zealous advocacy of Appellant's counsel and his strenuous arguments concerning the recent advancements in DNA testing technology, this Court is constrained to conclude, based upon review of the factual record, that the requested DNA testing of the nineteen items identified in Appellant's petition will not produce exculpatory evidence that would establish his actual innocence. It is clear that even if the requested testing did produce evidence of Sharon Ginsberg's DNA on those items, as he suggests in his petition and supporting briefs, it would still not be sufficient to dispel or repudiate the evidence detailed above, which the jury undoubtedly relied upon when it concluded that Appellant was guilty of First Degree Murder.

In other words, we recognize that if the testing requested by Appellant did produce evidence of Sharon Ginsberg's DNA on those particular items, that, in and of itself, would not be sufficient to establish Appellant's actual innocence, or even prove that Sharon Ginsberg was in fact the murderer. As the Commonwealth observed, it would not be surprising to discover DNA of the victim's daughter on items belonging to the victim since it was acknowledged, and expected, that Sharon Ginsberg frequently visited her mother in her apartment, even if for the sole purpose of extracting money from her for drugs.

It is apparent that Appellant's request for DNA testing is also based upon the presumption that his DNA would be absent from the items he seeks to be tested. The Superior Court of Pennsylvania, however, "has routinely held that the absence of the accused's DNA, *by itself*, cannot satisfy Section 9543.1(d)(2)(i)'s "actual innocence" standard." Commonwealth v. Payne, 129 A.3d 546, 558-59 (Pa.Super. 2015) (*citing to* Commonwealth v. Heilman, 867 A.2d 542, (Pa.Super. 2005); Commonwealth v. Smith, 889 A.2d 582 (Pa.Super. 2005); and Commonwealth v. Brooks, 875 A.2d 1141 (Pa.Super. 2005)). We accordingly determined that the absence of Appellant's DNA on the subject items, by itself, would not demonstrate his actual innocence or negate the substantial circumstantial and physical evidence presented at his trial which the jury presumably relied upon in convicting him of Sheila Ginsberg's murder.

Appellant's expressed strategy in these post-conviction proceedings has been to attempt to cast doubt upon the jury's verdict and his conviction, with the ultimate objective of achieving a new trial, by suggesting that the victim's daughter was the actual murderer while he coincidentally happened upon the crime scene. He therefore posits that if the jury had been exposed to any such evidence even remotely supporting his theory, then the jury would have been infused with sufficient reasonable doubt to render it incapable of finding him guilty of murder. It is clear, however, that Appellant's theory does not present a *prima facie* case wherein favorable results from the requested DNA testing would establish Appellant's actual innocence. Accordingly, we do not find Appellant's DNA proffer to be a sufficient or appropriate basis for granting his request for DNA testing.

Finally, we note that Appellant's PCRA counsel has attempted, in support of his request to obtain DNA testing, to resurrect issues involving the testimony of witnesses who testified on Appellant's behalf at his trial. Such an effort, however, fails to acknowledge that the attempt to deflect the jury's focus away from Appellant and onto another potential murder suspect was essentially the strategy employed by Appellant's trial counsel in 1992. Obviously, the jury did not find those witnesses credible and rejected that strategy. We determined that this effort by Appellant's PCRA counsel has not provided any additional legal or factual foundation to support his request for DNA testing.

V. CONCLUSION

This Court was not persuaded by Appellant's arguments professing his innocence of the murder of Sheila Ginsberg twenty-nine years ago. Furthermore, we recognized that his requested

DNA testing would not refute or repudiate the overwhelming evidence presented at his trial that convinced a unanimous jury of his guilt, and we found no merit in his efforts to prove his innocence through such testing. Therefore, in accordance with 42 Pa.C.S.A. § 9543.1(d), which mandates that the court shall not order the testing requested if the court determines after review of the record that there is no reasonable possibility that the testing would produce exculpatory evidence that would establish the applicant's actual innocence, this Court denied Appellant's motion for DNA testing. We therefore respectfully submit that our Order of January 14, 2020, denying and dismissing Appellant's Post Conviction DNA Testing Motion, should be affirmed.

BY THE COURT:

GARY B. GILMAN, J.

N.B. It is your responsibility to notify all interested parties of the above action.

COMMONWEALTH OF PENNSYLVANIA v. JOHN BROOKINS
NO. CP-09-CR-0005060-1991

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