IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

***In re*: John Kunco**	)	**Case No. 12-1662**

Motion To Remand Petitioner's Petition For Writ of Habeas Corpus To The District Court And, Alternatively, To Authorize The District Court To Consider Petitioner's "Second or Successive" Petition For Writ of Habeas Corpus

Sondra R. Rodrigues, Esq.
2 Penn Center Plaza, Suite 200
Philadelphia, PA 19102
215-271 – 0989

Craig M. Cooley
Staff Attorney
Innocence Project
40 Worth Street, Suite 701
New York, NY 10011
212-364-5361

Attorneys for Petitioner

Date: April 3, 2012

This case is about advancing technology and the reality that "[s]cientific conclusions are subject to perpetual revision." *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596-97 (1993). John Kunco's 1991 rape conviction is premised on bite mark evidence that is no longer valid, while DNA evidence not available at trial or during his initial post-conviction proceedings proves his innocence. The seismic shift with bite marks occurred in February 2009, when the National Academy of Sciences released a report entitled *Strengthening Forensic Science: A Path Forward* (*NAS Report*). Prior to the *NAS Report*, it was generally accepted bite marks could be individualized.[1] Now, based on the *NAS Report* – individualization *is not possible*.[2] Similarly, new DNA evidence proves Kunco's innocence and that his trial was fundamentally unfair.

I. Factual and Procedural Summary

A. The Offense and Trial

Kunco stands convicted of brutally raping Donna Seaman over an eight hour period on December 16, 1990.[3] Kunco has claimed his innocence since his arrest.[4] During the assault, the assailant shocked Seaman's vagina with a lamp cord for twenty minutes and bit her left shoulder – leaving a noticeable bite mark. Seaman could not visually identify her assailant because he immediately blindfolded her. Two days after her assault, Seaman told detectives her assailant's voice *sounded like* the former maintenance man at her apartment complex – John Kunco. Despite Seaman's voice identification, police did not arrest Kunco until January 26, 1991 – when they learned the bite mark could possibly be linked to Kunco. Once arrested, Kunco asserted his innocence, claiming he was with his girlfriend and newborn

---

[1] *See Amended Petition For Writ of Habeas Corpus*, Exs. 38-40. Kunco's *Amended Petition* can be found at Dist. Ct. Doc. No. 7.
[2] *See id.* at 35-39; *NAS Report*, at 173-76 (discussing the *NAS Report's* factual findings).
[3] A factual and procedural history can be found in Kunco's *Amended Petition for Writ of Habeas Corpus*, at 2-54.
[4] *See Amended Petition For Writ of Habeas Corpus*, at 13-14.

child sleeping when the assault occurred. No physical evidence collected incriminated Kunco.[5]

The Commonwealth's bite mark experts, Michael Sobel and Thomas David, examined the bite mark in May 1991 – *five months* after it was inflicted – using a UV-lighting technique that supposedly re-exposed the bite mark.[6] They then compared the UV-lighting photographs to Kunco's dentition and *individualized* the bite mark to him to the exclusion of all other people in the world.[7]

At trial, the Commonwealth premised its case on Sobel's and David's testimony and Seaman's voice identification and hammered home their testimony during closing arguments.[8] Their testimony influenced the jury's assessment of Seaman's voice identification by resolving any doubts it may have had with it. Their testimony also destroyed Kunco's alibi and credibility – not only was Kunco a rapist, he was a remorseless psychopath who forced his girlfriend, and the mother of his child, to testify falsely on his behalf. The jury convicted Kunco in two hours.

Their testimony also influenced the trial judge because, before sentencing Kunco, he acknowledged that, without their testimony, the Commonwealth could not have prosecuted Kunco.[9] The trial judge issued a harsh sentence because he believed the bite mark evidence proved Kunco's guilt, yet Kunco still proclaimed his innocence – a proclamation he found "insulting."[10]

Without the bite mark evidence, the Commonwealth had no case – a point conceded by Sobel and David in their 1994 *Journal of Forensic Science* (*JFS*) article, where they said that their testimony "was essential to establishing an

---

[5] *See id.* at 3-6.
[6] The actual black and white UV-photograph of the bite mark is attached hereto as Exhibit 1.
[7] *See Amended Petition For Writ of Habeas Corpus*, Exs. 4-5.
[8] *See id*. at 10-11, 13 (quoting trial testimony).
[9] *See id.* at 14.
[10] *See id.*

evidentiary link between the victim and [Kunco]. Without this critical piece of evidence, it is unlikely that there would have been sufficient evidence to support a conviction for this vicious crime." Thomas J. David & Michael N. Sobel, *Recapturing a Five-Month-Old Bite Mark by Means of Reflective Ultraviolet Photography*, 39 J. FORENSIC SCI. 1560, 1567 (1994).[11]

B. Direct Appeal, Post-Conviction, and Federal Habeas Proceedings

Kunco challenged the bite mark evidence on direct appeal, post-conviction, and federal habeas; he also pursed DNA testing.[12] On direct appeal, Kunco argued trial counsel failed to inform the trial judge and jury that the American Dental Association did not recognize forensic odontology as a subspecialty.[13] During post-conviction and federal habeas proceedings, Kunco challenged the UV-lighting technique. This Court recognized that Kunco's claim focused on the UV-lighting technique – not the theory of individuality. *See Kunco v. Attorney General of Commonwealth of Pennsylvania*, 85 Fed. Appx. 819, n.1 (2003).[14]

C. Scientific Developments and the *NAS Report*

In 1991, when Kunco was prosecuted, the scientific community generally accepted bite mark individuality. Science, though, evolves and it is inevitable, therefore, that theories or techniques once considered valid or generally accepted will fall to the wayside based on new research and analysis.[15] Bite mark identification can be added to this list thanks to the *NAS Report*.

---

[11] A copy of the *JFS* article can be found at *Amended Petition For Writ of Habeas Corpus*, Ex. 3.
[12] *See Amended Petition For Writ of Habeas Corpus*, at 19-25, 43-46.
[13] *See id*. at 16.
[14] *See id*. at 17-18, 28-29.
[15] New scientific research invalidated widely accepted techniques such as voice print identification, comparative bullet lead analysis, gunshot residue testing, and burn pattern analysis. *See* NAT'L RESEARCH COUNCIL, ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION (1979); NAT'L RESEARCH COUNCIL, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE (2004); NFPA 921: GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS (1992); NAT'L RESEARCH COUNCIL, BALLISTICS IMAGING (2008).

Questions about bite mark identification's validity surfaced during the earlier part of this decade due to several post-conviction DNA testing cases where bite mark experts individualized a bite mark to a prisoner, but DNA testing proved the prisoner's innocence.[16] These misidentifications motivated a *few* bite mark experts to re-evaluate bite mark identification's four fundamental premises: uniqueness, permanency, transferability, and examiner accuracy.[17] These few experts suggested that *none* of the four premises were empirically supported, but their views were not generally accepted.[18]

That the opinions of these very few experts were not generally accepted was significant in a *Frye* state where admissibility turns on general acceptance. *See Commonwealth v. Topa*, 369 A.2d 1277, 1281 (Pa. 1977). Pennsylvania prisoners cannot file new evidence PCRA petitions based on inadmissible evidence, *see Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1269-70 (Pa. 2008); *Commonwealth v. Yarris*, 731 A.2d 581, 592 (Pa. 1999), and such evidence was inadequate to establish that Kunco's trial was fundamentally unfair or the Commonwealth presented invalid scientific evidence.

In 2006, Congress directed the National Academy of Science to study the non-DNA identification fields such as bite mark identification. The NAS held public hearings and studied these fields for more than two years. On February 17, 2009, the NAS Committee released the *NAS Report*, which invalidated the four fundamental premises of bite mark identification: (1) there is no scientific basis for individualizing bite marks; (2) no study has been conducted to establish the uniqueness of bite marks; (3) there is no data indicating what percentage of the population could also have produced a bite mark; (4) proficiency tests reveal a substantial error rate; and (5) the skin's elasticity, the unevenness of the surface

[16] *See Amended Petition For Writ of Habeas Corpus*, at 31, nn. 60-61 (listing cases).
[17] *See id.* at 29-33 (discussing the four premises in greater detail).
[18] *See id*. at 31-32; Exs. 38-40.

bite, and healing process limit bite mark identification's utility. *See NAS Report*, at 173-76.[19]

The only forensic technique capable of achieving individualization is nuclear DNA testing. *See NAS Report*, at 7. The *NAS Report* validated what the few experts had suggested for a decade and represented a changing of the guards, where the minority view now represented the generally accepted view. Indeed, courts have repeatedly held that the NAS's factual findings regarding a forensic technique constitute the generally accepted view of the scientific community.[20]

D. Kunco's Current State and Federal Proceedings

Once published, Kunco retained three bite mark experts who opined that the *NAS Report* invalidated Sobel's and David's testimony.[21] On April 17, 2009, Kunco filed a PCRA petition arguing, *inter alia*, that their testimony rendered his trial fundamentally unfair, *see Dowling v. United States*, 493 U.S. 342 (1990), the Commonwealth presented invalid (or false) scientific evidence, *see Miller v. Pate*, 386 U.S. 1 (1967), the Commonwealth presented unreliable identification evidence, *see Manson v. Brathwaite*, 432 U.S. 98 (1977), and Kunco did not have the requisite facts to present a complete defense. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).[22]

---

[19] *See id*. at 35-39. The pre-publication copy of the *NAS Report* is attached as Exhibit 14 to Kunco's *Petition For Writ of Habeas Corpus* filed on January 29, 2010. All cites to the *NAS Report* in Kunco's *Petition For Writ of Habeas Corpus* and *Amended Petition* refer to the *pre-publication* copy, while the cites in the instant motion refer to the formally published version – a copy of which can be found at www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

[20] As one court wrote: "[E]ndorsement by the NRC of [a particular finding of fact] is *strong evidence of general acceptance within the relevant scientific community*." *State v. Johnson*, 922 P.2d 294, 335 (Ariz. 1996) (emphasis added). Another court wrote: "The courts have almost uniformly followed the recommendations of the National Research Council." *State v. Tester*, 968 A.2d 895, 906 (Vt. 2009). The Pennsylvania Supreme Court even acknowledged that "courts have traditionally deferred to pronouncements from the National Academy of Sciences." *Commonwealth v. Blasioli*, 713 A.2d 1117, 1119 n.3 (Pa. 1998) (citation omitted). Kunco articulated this argument in his *Memorandum of Law in Support of Petitioner's Amended Petition for Writ of Habeas Corpus*, at 12-19. The memo of law is Document 8 before the district court. *See* Dist. Ct. Doc. No. 8.

[21] *See Amended Petition For Writ of Habeas Corpus*, Exs. 38-40.

[22] *See id.* at 40.

Kunco pursued DNA testing after trial and during his post-conviction and federal habeas proceedings,[23] but the New Kensington Police Department (NKPD) lost or destroyed the most probative evidence, including Seaman's rape kit.[24] Kunco also continually wrote the Innocence Project (IP) between 1997 and 2005 until the IP accepted his case in November 2006. After conducting another evidence search, and negotiating with the Westmoreland County District Attorney's Office, both parties agreed to test the lamp cord used to shock Seaman for twenty minutes.[25] In 2009, a DNA lab identified two male DNA profiles on the cord – both *excluded* Kunco.[26] Kunco filed an amended PCRA petition on August 26, 2009, arguing that the DNA results bolstered his previously pled claims and demonstrated his actual innocence.[27]

Before the state courts ruled on his PCRA petitions, Kunco filed a habeas petition on January 28, 2010 with the district court and returned to state court after the district court granted his request for a stay and abeyance.[28] The state courts denied relief,[29] the Superior Court finding that Kunco did not diligently challenge Sobel's and David's testimony or pursue DNA testing.[30] The Superior Court reasoned that because two of Kunco's experts (Bowers and Pretty) had published articles questioning bite mark identification's validity as early as 2001, Kunco could have pursued relief years before the *NAS Report*.[31] Kunco filed his amended habeas petition on November 21, 2011 in the district court.[32]

---

[23] *See id*. at 17-18, 28-29, 43-46; Exs. 6, 9, 15, 16, 43, 44, 45, 46, 48, 50.
[24] On February 1, 2012, Kunco filed his *Request For Discovery And An Evidentiary Hearing*, *see* Dist. Ct. Doc. No. 21, where he discussed the NKPD's destruction issues.
[25] *See Amended Petition For Writ of Habeas Corpus*, Ex. 48.
[26] *See id*., Ex. 50.
[27] *See id*. at 47.
[28] *See* Dist. Ct. Doc. No. 4.
[29] *See Amended Petition For Writ of Habeas Corpus*, Exs. 42 (Superior Court), 52-53 (PCRA court).
[30] *See id*. at 42.
[31] *See id*. at 52-53 (summarizing the Superior Court's opinion).
[32] *See* Dist. Ct. Doc. No. 7.

II. Arguments

The district court misconstrued Kunco's *Amended Petition*. After summarizing Kunco's *initial* post-conviction and habeas proceedings, the district court described Kunco's current litigation in the following manner:

> The petitioner then embarked on a new quest seeking *to secure and introduce DNA evidence* which he alleged would prove his innocence since the basis for his conviction was premised on bite marks on the victim.[33]

After discussing the Superior Court dismissal the district court said: "Because the issue of DNA testing has been removed from consideration by the Pennsylvania Courts, this petition reverts to the issues raised in the petition filed at 2:00-cv-54[.]"[34] The district court's characterization is incorrect.

First, Kunco's initial PCRA petition challenged the theory of bite mark individuality; the DNA evidence did not surface until June 2009. Second, that the state courts denied relief based on the DNA evidence does not mean it must be "removed from consideration" during these proceedings. And third, Kunco's instant petition does *not* "revert to the issues" raised in his initial petition; his previous claims focused on the UV-lighting *technique*, while his current claims focus on the underlying *theory* of individuality – a separate (cognizable) challenge.

A. Kunco's Habeas Petition Is Not A Successive Petition

AEDPA does not define the phrase "second or successive." *See Panetti v. Quarterman*, 551 U.S. 930, 943 (2007); *Bencoff v. Colleran*, 404 F.3d 812, 816 (3d Cir. 2005). The Supreme Court has interpreted the phrase as a derivative of the "abuse-of-the-writ" doctrine developed in pre-AEDPA cases. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996).[35] This Court has held that "the abuse of the writ

---

[33] Dist. Ct. Doc. No. 24, at 2 (emphasis added).
[34] *Id*. at 2-3.
[35] *Panetti* ratified the view of the majority of the circuit courts that the meaning of "second or successive" is informed by the abuse-of-the-writ doctrine. *See United States v. Barrett*, 178 F.3d 34, 42-44 (1st Cir.1999); *James v.*

doctrine retains viability as a means of determining when a petition should be deemed 'second or successive' under [AEDPA]." *Bencoff v. Colleran*, 404 F.3d at 817; *accord Goldblum v. Klem*, 510 F.3d 204, 216 n.8 (3d Cir. 2007). Consequently, "a prisoner's application is not second or successive simply because it follows an earlier federal petition." *Bencoff v. Colleran*, 404 F.3d at 817.

A prisoner abuses the writ when he raises a claim that could have been raised in an earlier petition. *See McCleskey v. Zant*, 499 U.S. 467, 493 (1991). A court must determine whether the prisoner "has a legitimate excuse" for not raising the claim earlier. *Id.* at 490. The question, therefore, is whether the prisoner "possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim" in his first petition. *Id*. at 498. The prisoner, as a result, "must conduct a reasonable and diligent investigation aimed at including all relevant claims" in his first petition. *Id*. A prisoner, however, is not required to include "fruitless" claims, *see Wilson v. Beard*, 426 F.3d 653, 666 (3d Cir. 2005), or claims based on "mere speculation," *see Strickler v. Greene*, 527 U.S. 263, 286-87 (1999), in his first petition.

Kunco could not have raised his current claims in his first petition. The validity scientific evidence depends on three factors: (1) the validity of the *underlying theory*, (2) the validity of *the technique* applying that theory, and (3) the *proper application* of the technique on a particular occasion. *See* GIANNELLI & IMWINKELRIED, 1 SCIENTIFIC EVIDENCE §1-1, at 2 (3d ed. 1999). The first two factors – "are distinct issues," *id*., while the third factor raises additional issues: (a) the condition of any instrumentation used in the technique, (b) adherence to proper

---

Walsh, 308 F.3d 162, 167 (2d Cir.2002); *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir.2005); *In re Cain*, 137 F.3d 234, 235-36 (5th Cir.1998); *In re Bowen*, 436 F.3d 699, 704 (6th Cir.2006); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir.2001); *Allen v. Ornoski*, 435 F.3d 946, 956 (9th Cir.2006); *Reeves v. Little*, 120 F.3d 1136, 1138-39 (10th Cir.1997); *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir.2003).

procedures, and (c) the expert's qualifications. *See id*. Each factor can be separately challenged.

On direct appeal, Kunco challenged Sobel's and David's *qualifications*, arguing that the ADA did not recognize forensic odontology as a specialty.[36] During post-conviction and federal habeas, Kunco challenged the UV-lighting *technique*.[37] This Court recognized that Kunco's claims focused on the UV-light *technique* and not the underlying *theory* of bite mark individuality. *See Kunco v. Attorney General of Commonwealth of Pennsylvania*, 85 Fed. Appx. 819 n. 1 (2003).

Kunco's current claims focus on the *underlying theory* of individuality. In 2000, Kunco did not have the facts to challenge individuality because the scientific community generally accepted that bite marks could be individualized.[38] In fact, many courts held that bite mark individuality was so firmly-established that it was admissible without a "preliminary determination of reliability[.]" *State v. Richards*, 804 P.2d 109, 112 (Ariz. App. 1990).[39] This belief lasted until the *NAS Report*.[40]

While Bowers and Pretty published a few articles at the turn of the millennium questioning bite mark identification, their articles were not generally accepted and did not invalidate Sobel's and David's testimony or demonstrate that Kunco's trial was fundamentally unfair. When Bowers and Pretty published their articles, the notion that bite marks could not be individualized was at an *embryonic* stage and the scientific community did not embrace their views. Prior to the *NAS*

---

[36] *See Amended Petition For Writ of Habeas Corpus* at 16.
[37] *See id*. at 17-19, 28-29.
[38] *See id*., Exs. 38-40.
[39] *See* Kunco identified numerous cases in his *Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus,* at 5 nn.1-2. *See* Dist. Ct. Doc. No. 20.
[40] *See Amended Petition For Writ of Habeas Corpus*, Exs. 38-40.

Report, no court excluded bite mark identification or overturned a conviction on the understanding that bite mark individuality had been declared invalid.[41]

Thus, had Kunco challenged Sobel's and David's testimony based solely on the Bowers-Pretty publications, no court would have granted relief. Kunco's situation is analogous to *Reed v. Ross*, 468 U.S. 1 (1984), where the Supreme Court held that a prisoner's failure to raise a claim for which there is "no reasonable basis in existing law" constituted "cause" under the cause and prejudice analysis:

> It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others. Despite the fact that a constitutional concept may ultimately enjoy general acceptance… when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. *Id*. at 15.

Requiring a defendant to raise "a truly novel issue," the Supreme Court said, "is not likely to serve any functional purpose" because while there "is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it *is far more likely that the court will fail to appreciate the claim and reject it out of hand*." *Id*. (emphasis added). Pleading such a claim, therefore, "might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, someday, gain recognition." *Id*. at 15-16.

Before the *NAS Report*, Kunco's current claims were *factually* unripe and "fruitless" – and need not be raised. *See Wilson v. Beard*, 426 F.3d at 666. Even if Kunco had "suspicions" about Sobel's and David's testimony, he did not have the "evidentiary support," *Strickler v. Greene*, 527 U.S. 263, 286 (1999), to prove a

---

[41] Kunco identified numerous cases in his *Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus*, at 5 n.2. *See* Dist. Ct. Doc. No. 20.

constitutional violation, and, thus, had no "procedural obligation to assert constitutional error on the basis of mere suspicion[.]" *Id*.

When the NAS, on the other hand, studies a forensic technique for more than two years, and makes *unanimous* factual findings, these findings constitute the generally accepted view of the scientific community.[42] Thus, it is generally accepted that bite marks cannot be individualized and that experts cannot identity the likelihood of a coincidental match.[43] The *NAS Report*, consequently, provided the requisite facts to challenge Sobel's and David's testimony. In short, "some external impediment," *i.e*., *the scientific process*, prevented Kunco from pleading his current claims in his first petition. *McCleskey v. Zant*, 499 U.S. at 497.

Kunco also diligently pursued DNA testing, but the NKPD destroyed much of the evidence.[44] Moreover, the DNA testing needed to identify the male skin cells on the lamp cord, *i.e*., Y-STR testing, was not available until 2002-2003. Kunco repeatedly wrote the Innocence Project (IP) between 1997 and 2005, until the IP opened his case in 2006.[45] Simply put, two external impediments, *i.e*., primitive DNA technology and the NKPD, prevented Kunco from raising his DNA claims in his first petition.

In state court, Kunco acknowledged he could have *challenged* Sobel's and David's in 2001,[46] but he did so merely to explain why his challenge would have been fruitless. The Superior Court, though, capitalized on Kunco's acknowledgment, finding that he defaulted his claims by not pursuing relief in 2001 based on the Bowers-Pretty publications.[47]

---

[42] *See supra*, note 21. The NAS Committee did not issue a minority report.
[43] *See NAS Report*, at 173-176; *Amended Petition For Writ of Habeas Corpus*, at 35-39; Exs. 38-40.
[44] *See id*. at 19-24, 43-48; Exs. 6, 9, 15, 16, 43, 44, 45, 46, 48, 50. *See also* Dist. Ct. Doc. No. 21, at 4-10 (*Petitioner's Request For Discovery And An Evidentiary Hearing*).
[45] *See Powers v. State*, 343 S.W.3d 36, 59 (2011) (holding that a prisoner's delay in filing for DNA testing was "justified" because of the Innocence Project's enormous backlog of cases to review).
[46] *See Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus*, Ex. 1 at 43.
[47] *See Amended Petition For Writ of Habeas Corpus*, Ex. 42 at 6.

Prisoners can *challenge* any aspect of their conviction and sentence, but it is not the *ability* to make the challenge that matters. A prisoner's *challenge* can be meritless, exacting a significant burden on courts and courts cannot possibly want prisoners seeking relief each time the slightest of evidence is uncovered that *might* possibly give rise to a latent constitutional claim. As *Reed v. Ross*, 468 U.S. 1 (1984) emphasized, requiring prisoners to run to court each time an expert publishes an article questioning a forensic technique will overburden courts by forcing prisoners to file unripe and meritless petitions.[48]

Moreover, if the Superior Court's observation were true – that "evidence concerning the lack of reliability of bite-mark evidence was available to [Kunco] years"[49] before he filed his 2009 PCRA petition – the law books would be filled with opinions, pre-dating the *NAS Report*, excluding bite mark identification or overturning convictions based on the understanding that individuality was invalid. Sadly, this is *not* the case. Thus, if no prisoner, prior to the *NAS Report*, had ever obtained the very relief Kunco is now seeking based on the *NAS Report*, it is obvious that Kunco's current claims would have been fruitless before the *NAS Report*'s publication.

B. Evolving Scientific Evidence Claims Are Exempt From AEDPA's Successive Petition Requirements

Evolving scientific evidence claims are exempt from § 2244(b)'s requirements where materiality or prejudice can be established because "the writ is a bulwark against convictions that violate fundamental fairness." *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring). *Panetti* supports Kunco's position.

---

[48] By virtue of the Superior Court's holding in Kunco's case, however, state court prisoners must do just this – regardless of whether the expert's opinions have been scrutinized by the scientific community and deemed valid and generally accepted. This is an unreasonable requirement.

[49] *Amended Petition For Writ of Habeas Corpus*, Ex. 42 at 6 (quoting Superior Court opinion).

In *Panetti*, the Supreme Court held that competency-to-be-executed claims based on *Ford v. Wainwright*, 477 U.S. 399 (1986), were exempt from § 2244(b). Noting that *Ford* claims are "not ripe until after the time has run to file a first federal habeas petition," the Court concluded that Congress did not intend § 2244(b) "to govern" in this "unusual posture" – where a second-in-time petition raises a *Ford* claim "as soon as that claim is ripe." *Panetti v. Quarterman*, 551 U.S. 930 at 943. Three considerations supported its conclusion: (1) the implications for habeas practice of reading "second or successive" literally for such claims, (2) whether barring such claims advance AEDPA's objectives, and (3) the Court's pre- and post-AEDPA habeas jurisprudence, including the abuse-of-the-writ doctrine. *See id*. at 945-47. These considerations are not limited to *Ford* claims, *see id.* at 945, and must be considered in deciding whether other claims, that may not survive a literal reading of § 2244(b), may nonetheless receive merits review.

The Supreme Court also cautioned against interpreting § 2244(b) in a way that would foreclose altogether federal review of meritorious claims, or otherwise lead to perverse results, absent a clear indication Congress intended that result. *See id*. at 945-46. It was also reluctant to construe the statute "in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality [in the first petition]." *Id.* at 947.

Given the nature of evolving scientific evidence, prisoners are often not at fault for not raising these claims in their first petition. Here, when Kunco was prosecuted, bite mark individuality was generally accepted. Motivated by the DNA exoneration cases a few bite mark experts questioned bite mark identification's validity. Their embryonic views were not generally accepted until the NAS evaluated bite mark identification between 2006 and 2009, concluding

that bite marks cannot be individualized and experts cannot identify the likelihood of a coincidental match. *See NAS Report*, at 173-176.[50]

These findings are not surprising because "[s]cientific conclusions are subject to perpetual revision," *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. at 596-97, but their timing was problematic. By February 2009, Kunco's initial federal proceedings had been over for six years. The same can be said regarding his DNA claims because Y-STR testing was not available until 2002. Kunco would have pled his current claims in his initial petition had both sets of facts been available in 2000. Thus, an external impediment, *i.e.*, the scientific process, prevented him from raising his claims any earlier than February 2009.

Not every evolving science claim will be exempt – only those where materiality can be established, *i.e.*, there is a reasonable likelihood the invalid (or what we now know to be *false*) scientific evidence may have affected the jury's verdict. *See Miller v. Pate*, 386 U.S. 1 (1967). Kunco meets this standard and Sobel's and David's 1994 *JFS* article explains why, *i.e.*, both conceded the Commonwealth would not have secured a conviction without their testimony.[51] Materiality can also be established where, had the prisoner had access to the new scientific facts before trial, there is reasonable probability the outcome of his trial would have been different, *i.e.*, the prisoner can *finally* present a complete defense. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Here, had the *NAS Report* and DNA results been available prior to trial, there is a reasonable probability Kunco would have been acquitted.[52]

Before AEDPA, if science evolved, invaliding material forensic evidence supporting a prisoner's conviction, and the evolution occurred after a first petition

---

[50] *See Amended Petition For Writ of Habeas Corpus*, at 35-39.

[51] Kunco explained his materiality argument in his *Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus*, at 35-41. *See* Dist. Ct. Doc. No. 20, at 35-41.

[52] Kunco explained his complete defense argument in his *Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus*, at 41-47. *See* Dist. Ct. Doc. No. 20, at 41-47.

had been resolved, the prisoner could raise his evolving science claims in a second-in-time petition so long as they did not abuse the writ. *See McCleskey v. Zant*, 499 U.S. 467 (1991). In contrast, under a literal reading of "second or successive," federal courts would lack jurisdiction to consider any second-in-time evolving science claims unless the prisoner satisfies § 2244(b). Federal courts, therefore, could not resolve an entire subset of meritorious *and* timely claims dealing with evolving science: those, for example, where a prisoner can show the new scientific evidence *undermines confidence* in his conviction or that there is a *reasonable likelihood* the invalid scientific evidence presented at trial may have affected the jury's decision to convict.[53] Congress did not intend for such a perverse result. *See Panetti v. Quarterman*, 551 U.S. at 945-46. Barring these claims would promote finality – an AEDPA objective – but it would do so only at the expense of foreclosing all federal review of meritorious and timely claims that a prisoner could not have presented any sooner – certainly not an AEDPA goal. *Cf. See id.* at 946.

Kunco's "exemption" argument is supported by § 2244(d)(1)(D) – which says that AEDPA's one-year limitations period starts "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Read literally – 2244(d)(1)(D) plainly says that Kunco's one-year limitations period started on February 17, 2009 – the *NAS Report's* publication date. Thus, if §§ 2244(d)(1)(D) and 2244(b)(2) are both read literally, they are irreconcilable – something Congress did not intend. The question, therefore, is what interpretation best promotes AEDPA's and the great writ's objectives.

[53] Kunco, fortunately, is not one of these prisoners. The *NAS Report* and exculpatory DNA results demonstrate beyond clear and convincing evidence that, had Drs. Sobel's and David's testimony not been introduced at trial and the exculpatory DNA results been introduced, no reasonable juror would have voted to convict him. *See infra*, pp. 17-20.

Exempting second-in-time evolving science claims best promotes the objectives of *both* because the emphasis is on remedying convictions infected by fundamental unfairness (not just innocence) *and* diligence. AEDPA wants prisoners to diligently develop their claims to eliminate delays, *see Miller–El v. Cockrell*, 537 U.S. 322, 337 (2003), while the great writ plays a vital role in protecting constitutional rights. As recently explained in *Holland v. Florida*:

> When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the "writ of habeas corpus plays a vital role in protecting constitutional rights." It did not seek to end every possible delay at all costs. The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

130 S.Ct. 2549, 2562 (2000) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-88 (2000)). An exemption also takes into consideration the "practical effects" of a contrary interpretation, *Panetti v. Quarterman*, 551 U.S. at 945-4,[54] the "powerful" impact scientific evidence has on juries, *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. at 595, and the evolving nature of science. *See id.* at 596-97.

Where the scientific process prevented a prisoner from pleading claims in his first petition – the focus must remain on fundamental fairness and diligence – not simply innocence. While the conviction of an innocent person "may be the archetypal case of a manifest miscarriage of justice, it is not the only case." *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring in judgment). There is no "reason why 'actual innocence' must be both an animating and the limiting principle of the work of federal courts in furthering the 'ends of justice.'" *Id*.

[54] The practical effect being that prisoners would be forced to file state and federal habeas petitions each time an expert or scientists writes an article questioning the validity of a forensic theory or technique.

Fundamental fairness "is more than accuracy at trial," while "justice is more than guilt or innocence." *Id*. Even Judge Friendly emphasized that there are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151–154 (1970).

C. Kunco Satisfies 2244(d)(3)(C)'s *Prima Facie* Requirement

Kunco satisfies § 2244(b)(3)(C)'s *prima facie* requirement because it merely requires a "sufficient showing of possible merit to warrant a fuller exploration by the district court." *Goldblum v. Klem*, 510 F.3d at 219 (citation omitted). Kunco's allegations must "be accepted as true" unless they are "fanciful" or "demonstrably implausible." *Quezada v. Smith*, 624 F.3d 514, 521 (2d Cir. 2010). Thus, once the Court reviews Kunco's application, and "it appears reasonably likely" that it satisfies § 2244(b), the Court "shall grant" his application. *Goldblum v. Klem*, 510 F.3d at 219.

Kunco satisfies the new fact requirement. The new facts are the *NAS Report's* factual findings (not the Bowers-Pretty articles predating the *NAS Report)*, his experts' affidavits,[55] and the DNA results.[56] The *NAS Report* was released on February 17, 2009; the DNA results on June 30, 2009. Kunco satisfies the constitutional error requirement. The *NAS Report* and DNA results demonstrate that Sobel's and David's testimony is invalid and inadmissible, rendering Kunco's entire trial fundamentally unfair. *See Dowling v. United States*, 493 U.S. 342, 352 (1990); *Miller v. Pate*, 386 U.S. 1 (1967).[57]

---

[55] Their affidavits are premised on the *NAS Report's* factual findings – thus they could not have been obtained until the *NAS Report's* publication.

[56] Kunco diligently pursued DNA testing from 1991 until 2008. *See Amended Petition For Writ of Habeas Corpus*, at 19-24, 43-48; Exs. 6, 9, 15, 16, 43, 44, 45, 46, 48, 50.

[57] Kunco explained why Sobel's and David's testimony would be inadmissible at re-trial in his *Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus*, at 32-34. *See* Dist. Ct. Doc. No. 20, at 32-34. Kunco also explained why, but for constitutional error under *Dowling* and *Miller*, no reasonable juror would have voted to convict him. *See id*. at 32-41.

At the preliminary hearing, Seaman said she did *not* immediately identify Kunco, but instead made a tentative identification two days later at the hospital when Detective Dlubak impersonated a lisp and she said it *sounded like* Kunco.[58] Moreover, several investigators drafted crime scene reports that did not mention Seaman's identification.[59] At trial, though, Seaman said she *immediately* identified Kunco at the scene.[60] On cross, she acknowledged her testimony was inconsistent with her earlier testimony, but Sgt. Korman corroborated her trial testimony.[61] Detective Link, though, could not explain why his (Link's) reports did not mention Seaman's identification. He interviewed her at the scene and she merely described the perpetrator as a white male with a dark jacket, ball cap, and white pants.[62]

Based on these facts, Seaman's identification was questionable. Kunco's alibi, *i.e*., he was at home in bed with his baby daughter and girlfriend during the assault, made it more questionable. These facts make clear why the Commonwealth went to such great lengths to find one piece of evidence linking Kunco to the assault.[63] Sobel's and David's testimony, however, significantly enhanced Seaman's identification. It strains credulity to think that a jury hearing their testimony would not immediately place Kunco at the scene, *if only his teeth*, and not those of any other human being on earth, were linked to the bite mark.

---

[58] *See Amended Petition For Writ of Habeas Corpus*, at 4. A statement the prosecutor, following the preliminary hearing, confirms that Seaman did not immediately identify Kunco as her assailant. On February 9, 1991, the *Valley News Dispatch* quoted the prosecutor as stating: "It's no wonder the victim didn't make the identification immediately." *See id*.

[59] *See id*. at 11-12, 25-27.

[60] *See id*. at 11.

[61] *See id*.

[62] *See id*. 11-12. In post-conviction, Seaman told Kunco's post-conviction counsel that she did not *suggest* Kunco's name until two days after the assault. *See id*. at 24-25, Ex. 24.

[63] The Commonwealth retained Sobel and David after the other forensic evidence proved "inconclusive." *Sobel & David*, at 1561. The Commonwealth so desperately wanted to link Kunco to the crime with physical evidence that it authorized Sobel and David to perform a controversial, seldom used, and untested UV-lighting technique to recapture a five-month-old bite mark. *See Mark Hansen*, *Out of the Blue*, A.B.A. J., Feb. 1996, at 50-53 (commenting on the controversy regarding the UV-lighting technique). Sobel and David acknowledged that they knew of *only one case* in the country that used the UV-lighting technique to expose an old bite mark. *See id*. If the Commonwealth felt so confident about its case without the bite mark, it would not have gone to such great lengths to procure physical evidence linking Kunco to the crime.

Their testimony erased any reasonable or significant doubts the jurors may have had with her identification. Their testimony also destroyed Kunco's alibi, painting him as a remorseless psychopath who forced his girlfriend – and the mother of his child – to lie on his behalf to evade conviction.

Thus, but for constitutional error, *i.e.*, the admission of invalid scientific evidence, no reasonable jury would have voted to convict Kunco, especially if the jury also knew about the new DNA results. Kunco is entitled to relief even without the DNA results based on Sobel's and David's 1994 *JFS* article where they conceded that "[w]ithout this critical piece of evidence, it is unlikely that there would have been sufficient evidence to support a conviction for this vicious crime." *David & Sobel*, at 1567.

The same outcome occurs with Kunco's complete defense claim. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).[64] Had Kunco had the *NAS Report* and DNA results prior to trial – counsel would have destroyed the Commonwealth's case. The DNA results significantly undermine the claim that *Kunco* shocked Seaman. If Kunco was the perpetrator, a jury would reasonably expect to find his DNA on the lamp cord, especially because the assailant did not wear gloves. If Kunco's DNA is not on the lamp cord, a jury would reasonably conclude he is not the assailant, and if this is so, Sobel's and David's identification, as well as Seaman's identification, must all be wrong. And if all three are wrong, Kunco's alibi must be true – meaning Kunco must be innocent.

The *NAS Report* makes the innocence argument stronger. If trial counsel had access to the *NAS Report*, Sobel's and David's testimony would have been

[64] Kunco explained his complete defense claim in his *Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus*, at 41-47, and why, but for constitutional error, no reasonable juror would have convicted him. *See* Dist. Ct. Doc. No. 20, at 41-47.

inadmissible.[65] Without their testimony, the jury is left wondering why Seaman's testimony differed from her preliminary hearing testimony, why none of the officers who interviewed Seaman at the crime scene mentioned her voice identification in their reports, why Dlubak impersonated a lisp at the hospital two days *after* Seaman allegedly identified Kunco immediately at the scene, and why the police waited more than six weeks to arrest Kunco – even though Seaman supposedly identified Kunco immediately. A complete defense, based on the *NAS Report* and DNA results, would have resulted in Kunco's acquitted.

Likewise, if admissible, trial counsel's cross-examination would have completely discredited Sobel's and David's testimony with the *NAS Report* and his own experts – like Bowers and Pretty.[66] Relying on the new facts a jury would find Sobel's and David's testimony invalid, impacting their assessments of Seaman's voice identification and Korman's corroborating testimony. Thus, but for constitutional error, *i.e.*, the inability to present a complete defense, no reasonable juror would have voted to convict Kunco.

III. Conclusion and Prayer For Relief

1. An Order remanding Kunco's case back to the district court and instructing the district court to conduct a traditional AEPDA analysis for first-in-time petitions; or

2. An Order authorizing the district court to review the merits of Kunco's "second or successive" petition.

---

[65] *See Petitioner's Reply to Defendant's Answer To Petition For Writ of Habeas Corpus*, at 32-34; Dist. Ct. Doc. No. 20, at 32-34.

[66] *See Amended Petition For Writ of Habeas Corpus*, Exs. 38-40.

Respectfully submitted this the 3rd day of April, 2012.

/s/ Sondra Rodrigues
Sondra Rodrigues
Attorney-at-law

/s/Craig M. Cooley
Craig M. Cooley
Staff Attorney
Innocence Project
40 Worth Street, Suite 701
New York, NY 10011

Date: April 3, 2012

Certificate of Service

Undersigned counsel certify, under penalty of perjury, that they mailed via standard mail a true and accurate copy of Kunco's *Motion To Remand Petitioner's Petition For Writ of Habeas Corpus To The District Court And, Alternatively, To Authorize The District Court To Consider Petitioner's "Second or Successive" Petition For Writ of Habeas Corpus* to the following party on April 3, 2012:

Wayne Gongaware
Assistant District Attorney
Westmoreland County District Attorney's Office
2 N. Main Street, Suite 206
Greensburg, PA 15601

/s/ Craig M. Cooley
Craig M. Cooley

Dated: April 3, 2012

Certificate of Compliance

Undersigned counsel certifies that the submitted brief complies with the Third Circuit Court of Appeals' font and page length requirements for filing briefs. The word count for the submitted brief is 6844 words.

/s/ Craig M. Cooley
Craig M. Cooley

Dated: April 3, 2012