IN THE

SUPERIOR COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 1446 **EDA** **2009**

COMMONWEALTH

v.

ROBERT CONWAY
(Appellant)

BRIEF FOR APPELLANT

Appeal from the Denial of Motion for DNA Testing Pursuit to 42 Pa. C.S. § 9543.1 by the Honorable Gerald Corso of the Court of Common Pleas of Montgomery County, Pennsylvania, Criminal Division, No. 2925-87, entered June 11, 2009

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Bousley v. United States, 523 U.S. 614 (1998)	40
Davis v. Mississippi, 394 U.S. 721 (1969)	48
Delaware v. Van Arsdall, 475 U.S. 673 (1986)	52
Dist. Attorney's Office for the Third Judicial Dist., v. Osborne, 129 S.Ct. 2308 (2009)	3, 46, 47, 48, 51, 53
Kansas v. Ventris, 129 S.Ct. 1841 (2009)	3
Hoffa v. United States, 385 U.S. 293 (1966)	52
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House v. Bell, 547 U.S. 518 (2006)	40, 41, 42
On Lee v. United States, 343 U.S. 747 (1952)	52
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Schlup v. Delo, 513 U.S. 298 (1996)	4, 40, 41, 42
Strickler v. Greene, 527 U.S. 263 (1999)	24
United States v. Amerson, 483 F.3d 73 (2d Cir. 2007)	5, 29
United States v. Bagley, 473 U.S. 667 (1985)	24
United States v. McNeil, Criminal No. 06-373, 2007 WL 2234516 (W.D. Pa., Aug. 2, 2007)	34
United States v. Nixon, 418 U.S. 683 (1974)	52, 53
United States v. Nobles, 422 U.S. 225 (1975)	52
United States v. Sczubelek, 402 F.3d 175 (3d Cir. 2005)	30

United States v. Weikert, 504 F.3d 1 (1st Cir. 2007) 28, 29

Warney v. City of Rochester, 536 F. Supp. 2d 285 (W.D.N.Y. 2008) 36

Williamson v. *Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995) 31

Withrow v. Williams, 507 U.S. 680 (1993) 48

Yarris v. County of Delaware, 465 F.3d 129 (3d Cir. 2006) 25

State Cases

Buie v. State, Case No., 278732, 2009 WL 2611937 (Mich. App., Aug. 25, 2009) 27

Commonwealth v. Bennett, 827 A.2d 469 (Pa. Super. 2003) 49

Commonwealth v. Briggs, Case No., CP-08-CR-0000348-2004, 2005 WL 4309071 (Common Pleas Ct., Bradford Co., Oct. 12, 2005) 49

Commonwealth v. Brooks, 875 A.2d 1141 (Pa. Super. 2005) 44

Commonwealth v. Charles, 411 A.2d 527 (Pa. Super. 1979) 44

Commonwealth v. Heilman, 867 A.2d 542 (Pa. Super. 2005) 1

Commonwealth v. Houck, 948 A.2d 780 (Pa. 2008) 5, 28

Commonwealth v. Hudson, 414 A.2d 1381 (Pa. 1980) 49

Commonwealth v. Lyons, 833 A.2d 245 (Pa. Super. 2003) 22

Commonwealth v. McLaughlin, 835 A.2d 747 (Pa. Super. 2003) 44

Commonwealth v. Rieck Inv. Corp., 213 A.2d 277 (Pa. 1965) 43

Commonwealth v. Smith, 889 A.2d 582 (Pa. Super. 2005) 22, 30, 41

Commonwealth v. Weeks, 831 A.2d 1194 (Pa. Super. 2003) 44

Commonwealth v. Williams, 936 A.2d 12 (Pa. 2007) 40

Commonwealth v. Williams, 899 A.2d 1060 (Pa. 2006) 22

Commonwealth v. Williams, 909 A.2d 383 (Pa. Super. 2006) 1

Commonwealth v. Williams, 565 A.2d 160 (Pa. Super. 1989) 49

Commonwealth v. Yarris, 549 A.2d 513 (Pa. 1988) 25

Fain v. State, Case No., 2-08-002-CR,
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Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co., 788 A.2d 955 (Pa. 2001) 44

People v. Wesley, 533 N.Y.S.2d 643 (Cty. Ct. 1988) 4, 53

Reeder v. W.C.A.B. (Mercer Lime and Stone Co.),
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Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2008) 34

Shore v. State, Case No., AP-75049,
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State v. Duffy, Case No., 07-1942, 2009 WL 249629 (Iowa App., Feb. 4, 2009) 37

State v. McMillian, --- S.W.3d ---, 2009 WL 2341867 (Mo. App., July 31, 2009) 33

State v. Notti, 71 P.3d 1233 (Mont. 2003) 38

Steinhouse v. Herman Miller, Inc., 661 A.2d 1379 (Pa. Super. 1995) 50

Williams v. Erie County District Attorney's Office,
848 A.2d 967 (Pa. Super. 2004) 44

Federal Statutes

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State Statutes

42 Pa. C.S. § 9543.1 *et seq.* *passim*

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44 Pa. C.S. § 2316 28

Reports, Journal Articles, and Books

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LESLIE CROCKER SNYDER, ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC: PREPARED AT THE REQUEST OF JANET DIFIORE, WESTCHESTER COUNTY DISTRICT ATTORNEY (June 2007) 36

Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) 45

Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) 3

RACHEL KING, CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES (2005) 37

PRESIDENT'S DNA INITIATIVE, *Linking Crimes to Criminals: Forensic DNA Databases*, at www.dna.gov/dna-databases 30

PRESIDENT'S DNA INITIATIVE, *Solving Crimes*, at www.dna.gov/solving-crimes 47

NAT'L INST. OF JUST., DEPT. OF JUST., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (June 1996) 4

NAT'L INST. OF JUST., DEP'T OF JUST., POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (Sept. 1999) 46

NAT'L INST. OF JUST., DEP'T OF JUST., USING DNA TO SOLVE COLD CASES (July 2002) 5, 28, 39, 47

Nancy Ritter, *Postconviction DNA Testing Is at Core of Major NIJ Initiatives*, NIJ Journal No. 262, at www.ojp.usdoj.gov/nij/journals/262/postconviction.htm 47

JIM RIX, JINGLE JANGLE: THE PERFECT CRIME TURNED INSIDE OUT (2007) 37

Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597 (2006) 30

BARRY SCHECK, ET AL., ACTUAL INNOCENCE (2003) 31

U.S. DEP'T OF JUST., FEDERAL BUREAU OF INVESTIGATION, CODIS: COMBINED DNA INDEX SYSTEM BROCHURE, at http://www.fbi.gov/hq/lab/pdf/codisbrochure2.pdf 28

FEDERAL BUREAU OF INVESTIGATION, NATIONAL DNA INDEX SYSTEM STATISTICS, at www.fbi.gov/hq/lab/codis/clickmap.htm 29

News Articles

Rosailo Ahumada, *Suspect Identified in 1976 Killing in Modesto*, MODESTO BEE, Feb. 4, 2009 47

Jeff Carlton, *DNA Reveals True Perpetrator in 1982 Dallas County Rape*, DALLAS MORNING NEWS, Jan. 30, 2008 30

Maria Cramer, *Cold Hit Results In Arrest for 1984 Boston Rape-Murder*, BOSTON GLOBE, Dec. 3, 2008 47

Jim Dwyer, *Ronald Williamson, Freed From Death Row, Dies at 51*, N.Y. TIMES, Dec. 9, 2004 32

Jim Fitzgerald, *Convict Freed After 16 Years Sees Real Killer Sentenced In Murder*, A.P. STATE & LOCAL WIRE, May 3, 2007 37

Frank Green, *DNA Connects Virginia Prisoner To 2 Murders And 2 Rapes That Occurred 25 Years Ago*, RICHMOND TIMES-DISPATCH, Oct. 7, 2008 47

Tom Jackman, *Cold Hit Solves 1979 Virginia Murder*, WASH. POST, January 28, 2009 47

Mary Beth Lane, *Cold Hit Results in Prison Sentence for 1989 Ohio Rape-Homicide*, COLUMBUS DISPATCH, Jan. 26, 2009 47

Scott McCabe, *Recent Cold Hit Solves 1982 Maryland Rape-Murder; DNA Matched To Man Serving Life Sentence for Murder But Died Of Cancer in 2007 At Age 66*, D.C. EXAMINER, Feb. 2, 2009 47

Bill McKelway, *DNA Cold Hit Lead to Arrest in 1974 Rape in Henrico*, RICHMOND TIMES-DISPATCH, Oct. 14, 2008 47

Moises Mendoza, *30-year-old Des Moines Murder Case May Be Solved*, SEATTLE POST-INTELLIGENCER, Aug. 13, 2008 47

Robert Nelson, *"About Face,"* PHOENIX NEW TIMES, Apr. 21, 2005 37

Bethany Rodgers, *12-year-old DNA is Key in Rape Trial; '96 Crime is Reopened*, July 8, 2009, SOMDNEWS.COM, at www.somdnews.com/stories/07082009/indytop101346_32227.shtml 22

Bethany Rodgers, *Rapist Gets Two Life Prison Terms*, July 10, 2009, SoMDNews.Com, at www.somdnews.com/stories/07102009/indytop92616_32247.shtml 22

Gerry Smith, *Train Conductor Held in 1981 Strangling of Young Aurora Woman*, Chi. Trib., Aug. 2, 2008 47

Jim Steinberg, *Cold Hit Solves 1977 California Murder; Suspect Already Serving State Prison Sentence For Unrelated 1993 Robbery*, Fresno Bee, Dec. 24, 2008 47

Richard Winton, *Cold Hit Results In Arrest For 1990 Los Angeles Rape-Murder Of 82-Year-Old Woman*, L.A. Times, Jan. 13, 2009 47

DNA Links Inmate to '80 Rape, Balt. Sun, July 22, 2008 47

Justice Dep't. Acts to Clear DNA Backlog, Miami Herald, Aug. 2, 2001 3

Hearing Testimony

Testimony Before Senate Judiciary Committee, SB 589-Postconviction DNA Testing, March 26, 2001 (Opening Remarks of Senator Greenleaf) 40, 53

Testimony Before Senate Judiciary Committee, SB 589-Postconviction DNA Testing, March 26, 2001, at 2 (Statement of Michael Fisher, Pennsylvania Attorney General) 40

Testimony Before Senate Judiciary Committee, SB 589-Postconvction DNA Testing, March 26, 2001, at 3 (Statement of Bruce Castor, Montgomery County District Attorney) 40, 54

Website References

www.innocenceproject.org *passim*

www.innocenceproject.org/understand/Snitches-Informants.php 3

Facts about Kennedy Brewer, www.innocenceproject.org/Content/1176.php 35

Facts about Stephan Cowans, www.innocenceproject.org/Content/73.php 26

Facts about Jeffery Deskovic, www.innocenceproject.org/Content/44.php 37

Facts about Byron Halsey, www.innocenceproject.org/Content/690.php 27

Facts about Rickey Johnson, www.innocenceproject.org/Content/1120.php 33

Facts about Ray Krone, www.innocenceproject.org/Content/196.php 37

Facts about Larry Peterson, www.innocenceproject.org/Content/148.php 27

Facts about Ronald Taylor, www.innocenceproject.org/Content/1124.php 32

Facts about Doug Warney, www.innocenceproject.org/Content/281.php 36

Facts about Nicholas Yarris, www.innocenceproject.org/Content/302.php 25

Weather History, 2008 Farmer's Almanac, at www.almanac.com/weatherhistory 11

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I. JURISDICTION

Jurisdiction for this Appeal is provided for at 42 Pa. C.S. §742, relating to the exclusive appellate jurisdiction of the Superior Court from final Orders of the Courts of Common Pleas.

II. ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the Order by the Honorable Gerald Corso, of the Court of Common Pleas of Montgomery County, Pennsylvania, Criminal Division, Case No. 2925-87, entered June 11, 2009.

III. STANDARD AND SCOPE OF REVIEW

The standard of review of a PCRA court's denial of a petition for post-conviction relief is "whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error." *Commonwealth v. Williams*, 909 A.2d 383, 385 (Pa. Super. 2006). The scope of review is limited by the parameters of the PCRA. *See Commonwealth v. Heilman*, 867 A.2d 542, 544 (Pa. Super. 2005), *appeal denied*, 583 Pa. 669, 876 A.2d 393 (2005).

The PCRA provisions directly at issue in this appeal are 42 Pa. C.S. § 9543.1(c)(3), which requires that a petitioner seeking DNA testing:

> (3) present a prima facie case demonstrating that:
>
> (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[.]

and 42 Pa. C.S. § 9543.1(d)(2), which states:

> (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[.]

IV. ISSUE(S) PRESENTED

A. Whether the PCRA Court Erred when it Concluded that There is No Reasonable Possibility that DNA Testing Could Prove Robert Conway's Actual Innocence

V. STATEMENT OF THE CASE

Any factual summary of this case must begin by acknowledging the pain and humiliation suffered by Michele Capitano. She was brutally and senselessly murdered on September 25, 1986 for no apparent reason, her assailant stabbing her more than seventy times. The pain and humiliation suffered by Capitano creates strong emotions in all of those who have reviewed the facts of this case. Thus, it is understandable that these individuals want someone to be held accountable. When emotions enter into the guilt-innocence calculus, however, determining what truly happened can easily result in a miscalculation. Science, on the other hand, is immune to emotion and can decipher the trickiest of riddles with the smallest quantity of evidence. Accordingly, while the injuries and disrespect inflicted on Capitano produce strong visceral responses, they also tell us that we can identify the true perpetrator with DNA evidence. Indeed, Robert Conway's 1987 murder conviction represents a quintessential case for post-conviction DNA testing.

The record evidence is clear: Capitano's assailant manipulated, handled, or ripped several items of evidence that likely resulted in a transfer of his DNA (or skin cells) to the items of evidence. The assailant forcefully tied Capitano's wrists together with a blue cloth, ripped open Capitano's lab coat, dress, and pantyhose, and pushed up her dress

before he ripped her pantyhose. The assailant also rummaged through her purse, discarding some of its contents at the crime scene. Likewise, the medical examiner collected Capitano's fingernail clippings and scrapings because the evidence suggested she struggled with assailant. Pre-trial forensic testing of these items – as well as numerous additional items was inconclusive — i.e., they did not incriminate or conclusively exonerate Conway. The pre-trial forensic testing, however, relied on antiquated and unsophisticated forensic technology and, thus, was unable to determine whether there were trace amounts of an unknown male's DNA on these items. Consequently, the results were of limited probative value in terms of identifying the actual perpetrator and conclusively exonerating Conway. Indeed, the limited probative value of the pre-trial forensic results prevented Conway from introducing proof of third party guilt. Conway's conviction, therefore, is premised on circumstantial evidence, including what is perhaps the most unreliable evidence introduced in a criminal trial – jailhouse informant testimony. *See Kansas v. Ventris*, 129 S.Ct. 1841, 1849 n.2 (2009) (Stevens, J., dissenting) ("The likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored."); www.innocenceproject.org/understand/Snitches-Informants.php ("In more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant.") (last visited September 2, 2009).[1]

However, as U.S. Supreme Court Justice Harry Blackmun presaged two decades ago: "As technology develops, the potential for... [forensic] evidence *to provide conclusive results* on any number of questions will increase." *Arizona v. Youngblood*, 488 U.S. 51, 70 (1988) (Blackmun, J., dissenting) (emphasis added). Thanks to remarkable advances in DNA technology, Justice Blackmun's prediction rings true. DNA technology can now identify the guilty and exonerate the innocent with such precision that lawmakers and law enforcers have described it as "a kind of truth machine[.]"*Justice Dep't. Acts to Clear DNA Backlog*, MIAMI HERALD, Aug. 2, 2001, at 19A (quoting then U.S. Attorney General John Ashcroft); *Dist. Attorney's Office for the Third Judicial*

[1] University of Michigan Law School Professor Samuel Gross's study on exonerations likewise reports that nearly fifty percent of wrongful murder convictions involved perjury by someone such as a "jailhouse snitch or another witness who stood to gain from the false testimony." Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543-44 (2005).

Dist., v. Osborne, 129 S.Ct. 2308, 2316 (2009) ("Modern DNA testing can provide powerful new evidence unlike anything known before... It is now often possible to determine whether a biological tissue matches a suspect with near certainty.").[2]

With respect to Conway's case, modern DNA testing and the increasing use of DNA databanks can conclusively prove his actual innocence, even though the physical evidence had little – if any – probative value at the time of his trial. Modern DNA testing can transform the probative value of the physical evidence by identifying minute traces of male DNA on the items of evidence – trace evidence that the antiquated and rudimentary forensic technology could not reveal two decades ago when the Commonwealth prosecuted Conway.

DNA testing, for instance, can reveal the same unknown male DNA profile on two or more items of evidence – i.e., a redundancy. Indeed, because the assailant manipulated, handled, and ripped the blue cloth and Capitano's lab coat, dress, and pantyhose, it is reasonable to believe that the assailant's DNA (or skin cells) will be on each of these items – as well as mixed together with Capitano's fingernail scrappings. Indeed, this is precisely the reason why the Commonwealth sent these items to the FBI laboratory for forensic testing; the Commonwealth believed it could identify evidence from the assailant on these items of evidence. Thus, if the same male DNA profile is identified on two or more of these items, let alone all five items, the DNA must be from the assailant, because there can be no innocent explanation as to why this man's DNA is on various items of evidence so intimately connected to Capitano's murder. More importantly, had Conway's jury been informed that DNA testing produced a triple, quadruple, or even a quintuple redundancy of the same male DNA profile, *see Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding that defendant had constitutional right to present forensic evidence of third party guilt), it is "more likely than not that no reasonable juror would have found [Conway] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1996). Redundant results are reasonably likely, *see* §

[2] *Accord* 146 Cong. Rec. S11645-02, at *S11647 (describing "DNA testing" as "truth-seeking technology") (Senator Patrick Leahy's comments); NAT'L INST. OF JUST., DEPT. OF JUST., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (comments by then Attorney General Janet Reno); *People v. Wesley,* 533 N.Y.S.2d 643, 644 (Cty. Ct. 1988) (calling DNA evidence the "single greatest advance in the 'search for truth'... since the advent of cross-examination.").

9543.1(d)(2)(i) (PCRA court shall grant DNA testing if there is a "reasonable possibility that the testing would produce exculpatory evidence" establishing the petitioner's actual innocence), not only because Conway seeks to test several items that the assailant manipulated, handled, or ripped, but also because there have been several DNA exonerations and convictions based primarily on a redundant DNA profile.

The incriminatory and exculpatory value of the redundant DNA profile can be further amplified once run through or uploaded into a state or federal DNA databank such as CODIS, which "is a computer software program that operates local, State, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons." NAT'L INST. OF JUST., DEP'T OF JUST., USING DNA TO SOLVE COLD CASES 9 (July 2002); *Commonwealth v. Houck*, 948 A.2d 780, 782 n.3 (Pa. 2008). CODIS "enables State, local, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders." *Id.* While initially created so law enforcement could quickly and efficiently identify unknown – and potentially serial – offenders, CODIS has proved to be an invaluable tool for protecting the innocent and identifying the wrongly convicted. *See United States v. Amerson*, 483 F.3d 73, 87 (2d Cir. 2007) ("The greater accuracy and speed with which CODIS allows the government to apprehend and convict those guilty of crimes has, as we have seen, an equally important corollary — *its use in exonerating innocent people criminally suspected, convicted, or charged.*") (emphasis added). For instance, no reasonable juror would have convicted Conway had he introduced evidence that a redundant or single male DNA profile – identified on one or more items of evidence – hit to a previously convicted offender once uploaded into CODIS or Pennsylvania's DNA databank. *See* 44 Pa. C.S. § 2312 ("The State DNA Data Base is reestablished. It shall be administered by the State Police and provide DNA records to the FBI for storage and maintenance by CODIS."). Obtaining a DNA databank hit is reasonably likely because in 105 of the 242 DNA exonerations to date, the DNA evidence that exonerated the wrongly convicted prisoner also identified the true perpetrator once uploaded into CODIS or a State DNA databank. *See* www.innocenceproject.org (last visited September 4, 2009).

Finally, the incriminatory and exculpatory value of a DNA databank hit can be further reinforced if the offender identified by the databank hit confesses to Capitano's murder. Obtaining a confession from the actual perpetrator – after he is identified through a DNA databank hit – is reasonably likely because in 31 of the 105 DNA exonerations where the DNA results ultimately identified the actual perpetrator, the perpetrator eventually confessed when confronted with the DNA evidence. *See* www.innocenceproject.org (last visited September 4, 2009). No reasonable juror would have convicted Conway had he introduced evidence that a redundant or single male DNA profile – identified on one or more items of evidence – hit to a known or unknown offender once uploaded into CODIS or Pennsylvania's DNA databank.

Simply put, modern DNA testing can fundamentally alter the probative value of the physical evidence by exposing new, previously undetected biological evidence that can definitively identify Capitano's assailant and conclusively establish Conway's actual innocence. *See* § 9543.1(d)(2)(i) (PCRA court shall grant DNA testing if there is a "reasonable possibility that the testing would produce exculpatory evidence" establishing the petitioner's actual innocence). Despite the statistics supporting Conway's theories of innocence and the fact that each theory is premised on evidence, facts, and information contained in the record, the Honorable Gerald Corso denied Conway's section 9543.1 petition (petition), holding that Conway's innocence arguments were speculative and not supported by the record. *See* App. A, at 22-25. Judge Corso also denied Conway's petition because he (Judge Corso) failed to cumulatively consider the DNA results and any additional exculpatory evidence the DNA results could have produced – i.e., a DNA databank hit or a confession. Finally, there is no documentation whatsoever in the record indicating the evidence has been contaminated or materially altered. Despite the record, Judge Corso denied Conway's petition, in part, because "any number of individuals *could have come* in contact with the requested items," *id.* at 24 (emphasis added), thus contaminating the items. Judge Corso's rulings and holding are not supported by the record and are not free from legal error. This Court must vacate Judge Corso's decision and grant Conway's petition so he may adequately vindicate his limited liberty interest of developing evidence of his actual innocence pursuant to section 9543.1.

VI. STATEMENT OF FACTS

A. CRIME AND CRIME SCENE

On September 25, 1986, between 10:50-10:55 a.m., Michael Clerico and two real estate associates, Michael Burke and Rita McColgan, went to Wooley's Surgical Supply Store to see Michele Capitano (Capitano).[3] When they arrived at Wooley's the front door was open – which was uncommon.[4] They searched inside the store and outside near her car, but could not find her.[5] Clerico then noticed a receipt book and a watch on the floor near the back desk, as well as a pocketbook that had been rifled through. He followed the trail to the bathroom.[6] He called Capitano's name, knocked on the bathroom door, pushed it open, and saw her feet and then her body.[7] Burke and McColgan ran to their office down the street and called the police. Clerico stayed at the scene and was still there when the police arrived, which was minutes after Burke called.[8]

It was a bloody scene – with Capitano's feet near the bathroom door and her head jammed between two pipes next to the toilet.[9] Her assailant had forcefully tied her hands behind her back with a blue cloth.[10] The top of her blouse was ripped open, exposing her chest and approximately 25 stab wounds.[11] Her dress had been forcefully pushed up to her waist, while her pantyhose had been ripped open at the crotch.[12] There was blood in the sink, blood spatter on the walls and under the doorknob, and bloody paper towels in the corner.[13] Investigators concluded that the door was open (against the wall) during the attack because they found similar blood stains on the door and the wall next to it, but no blood behind the door.[14]

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[3] NT, Trial, 9/21/87, at 152-53, 154.
[4] *Id.* at 154.
[5] *Id.* at 155-56.
[6] *Id.* at 156, 157.
[7] *Id.* at 156.
[8] *Id.* at 159.
[9] *Id.* at 240, 269.
[10] *Id.* at 270.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 229-30, 272.
[14] *Id.* at 273-74.

B. EVIDENCE COLLECTED FROM AUTOPSY

Assistant Medical Examiner Dr. Halbert Fillinger conducted the autopsy on September 25, 1986 at 10:45 p.m.[15] He identified six defensive wounds on Capitano's left hand, as well as approximately 59 wounds to her chest and 9 to her neck, but no injuries to her vaginal and anal regions.[16] Cause of death was stab wounds to the neck and trunk.[17] The number of stab wounds in the chest exceeded those through the dress, indicating the dress had been ripped opened for at least part of the assault.[18] Dr. Fillinger said it was difficult to tell what kind of instrument was used, though some wounds suggested a single-edged blade.[19] In his opinion, the blade was at least three inches long (because some wounds were deeper than 4 inches) and the width was almost certainly no more than an inch.[20]

Dr. Fillinger collected vaginal, oral, and rectal swabs, and combings and adhesive lifts from the pubic area.[21] Dr. Fillinger testified that he did not collect Capitano's fingernail clippings or scrapings,[22] but a Montgomery County District Attorney's report indicates her fingernail clippings and scrapping were in fact collected and submitted to the FBI laboratory.[23]

C. PHYSICAL EVIDENCE

Investigators recovered an abundance of physical evidence that can be subjected to today's DNA technology, including STR, Y-STR, and mini-STR testing. In total, investigators collected and submitted approximately 80 items of evidence to the FBI laboratory.[24] Items most significant to Conway's DNA testing petition include:

- The bloodstained paper towels near Capitano's left hand (item no. 1)

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[15] *Id.* at 47.
[16] *Id.* at 53.
[17] *Id.* at 54, 62.
[18] *Id.* at 44.
[19] *Id.* at 55.
[20] *Id.* at 60.
[21] *Id.* at 66-67.
[22] *Id.* at 69.
[23] App. K. The report indicates: "Fingernail clippings, hair photographed and fingerprinted and palm printed." *Id.* at 1. The fingernail clippings, taken from both hands of the victim, are listed as item #40. *See id.* at 3. Indeed, one of the detectives testified he clipped the fingernails at the crime scene. *See* NT, Trial, 9/21/87, at 109.
[24] That number includes evidence taken from the scene, from Capitano, Conway, and Conway's residence. App. K, at 2-4.

- Fingernail clippings from both hands of Capitano (item no. 40)
- Piece of blue cloth tied around Capitano's wrists (item no. 47)
- Rape kit items (item nos. 48 thru 53)
- Capitano's blood stained lab coat (item no. 85)
- Capitano's blood stained tan dress (item no. 86)
- Capitano's blood stained half slip (item no. 87)
- Capitano's blood stained bra (item no. 88)
- Capitano's pantyhose (item no. 92)
- Capitano's purse and the contents thereof (item no. 10)

D. TRIAL

Conway's trial began on September 21, 1987. The critical issue at trial was the assailant's identity. For instance, during opening arguments, the Commonwealth argued:

> There are two things that will be established by the Commonwealth in this case. Number one, that the crime committed here was murder in the first degree, and number two that Defendant Robert Conway committed that crime.[25]

Defense counsel placed the assailant's identity at issue during opening arguments, as well:

> A crime did occur. There's no question at all but that Michele Capitano was murdered. The defense doesn't argue that at all. A murder was committed and you're going to hear all of the gruesome details. But the gruesome detail does not make it a fact that Mr. Conway committed the offense.[26]

The Commonwealth argued that Conway went into Wooley's with a knife to steal something for his wife, that he brought a piece of cloth to bind her, that he killed her by repeatedly stabbing her, that he took some of her belongings, and that he attempted (or at least was prepared) to sexually assault her.[27]

The defense, on the other hand, argued that Conway had the misfortune of discovering Capitano's body, that he had his wife call the police once he arrived home, that forensic tests failed to incriminate him, that no one ever saw him in possession of

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[25] NT, Trial, 9/21/87, 16.
[26] *Id.* at 30-31.
[27] *Id.* at 28-29.

Capitano's property, [28] and that the police engaged in tunnel vision and failed to investigate alternate suspects once Conway's wife called the police and informed them of her husband's grizzly discovery.[29]

1. PROSECUTION'S CASE

No one witnessed Capitano's murder and no physical evidence linked Conway to her murder. As a result, this forced the Commonwealth to prove Conway's guilt by relying on weak circumstantial evidence, including jailhouse informant testimony.

a. TIMELINE

According to the Commonwealth, the following sequence of events occurred in *seven minutes* — between 10:43 a.m. and 10:50 a.m. Conway entered Wooley's, accosted Capitano, subdued her, tied her hands together, stabbed her 78 times, ripped her stockings apart, thoroughly washed himself of any trace evidence, left Wooley's, and walked to the pizza shop where he purchased a bag of cheese crackers.[30] At the front end of the timeline, Anita Ferris said she called Capitano at Wooley's at 10:25 a.m. and that they spoke for fifteen minutes. The phone call ended when Ferris heard a male voice on the other end, at which point she asked Capitano if she had a patient, to which Capitano responded: "Oh, I don't know. I'll call you right back."[31] A mailman also testified that he saw Capitano alive and on the phone at approximately 10:41 a.m.[32]

At the back end of the timeline, Michael Clerico, Michael Burke, and Rita McColgan testified that they came to see Capitano at approximately 10:50 a.m., but found her dead in the bathroom.[33] The two calls to the police dispatcher came in from Burke and Conway's wife at 11:07 a.m. and 11:10 a.m., respectively.[34] The Commonwealth argued that the brevity of the timeline dictated that Conway must be Capitano's murderer.[35]

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[28] *Id.* at 31, 32, 36.
[29] NT, Trial, 9/23/87, at 612-16
[30] NT, Trial, 9/21/87, at 16; NT, Trial, 9/23/87, at 709.
[31] NT, Trial, 9/21/87, at 97.
[32] *Id.* at 111, 113.
[33] *Id.* at 152-53, 154.
[34] *Id.* at 212-13.
[35] NT, Trial, 9/23/87, at 727-30.

b. SEROLOGY, HAIR, FIBERS, AND FINGERPRINTS

Despite the brutality of Capitano's murder and the bloodshed it caused, the FBI laboratory tested dozens of items and found nothing linking Conway to Capitano's murder.[36] Special Agent Randall Stephen Murch testified that he identified human blood on several items, including paper towels from the scene, swabs from the scene, a rug from the scene, a piece of cloth, and Capitano's lab coat, dress slip, bra, and pantyhose. Additional blood tests revealed that the blood on these items was consistent with Capitano's blood and inconsistent with Conway's.[37] Furthermore, the Commonwealth and defense stipulated that Conway's hair and fibers were not found on Capitano or her clothing, nor were hairs or fibers from Capitano found on Conway or his clothing.[38] Both sides also stipulated than none of the more than 30 fingerprints lifted from the scene came from Conway.[39] The FBI laboratory did not perform DNA tests before trial.

c. CONWAY'S APPEARANCE AND BEHAVIOR

Lacking physical evidence or eyewitnesses to link Conway to Capitano's murder, the Commonwealth focused on Conway's appearance. Peter Piccarreta, who worked at the pizza shop down the street from Wooley's, testified that Conway knocked on the pizza shop's door at approximately 10:50 a.m. and purchased a snack from the snack machine. Piccarreta noticed that Conway was "all wet" and "perspiring."[40] He thought it unusual to be so sweaty on a day that was not particularly warm.[41] Piccarreta's stepmother also described Conway as "sweaty."[42] At 11:10 a.m., detectives dispatched to Conway's apartment also noted that the front of his shirt was wet, as was the front of his pants.[43] Conway said he was perspiring due to the shock of what he saw as well as his

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[36] Apps. L-N.

[37] NT, Trial, 9/22/87, at 338-340.

[38] *Id.* at 373-74.

[39] *Id.* at 374; App. M.

[40] NT, Trial, 9/21/87, at 144.

[41] *Id.* at 145. According to the Farmer's Almanac, the high temperature for September 25, 1986 in Willow Grove, P.A. (just 15 miles from Norristown), was 81 degrees. Weather History, 2008 Farmer's Almanac, available at http://www.almanac.com/weatherhistory/ (last visited Mar. 20, 2008).

[42] *Id.* at 137. At trial, however, Piccarreta clarified that she, herself, did not notice if Conway appeared soaking wet, but that her stepson had told her Conway appeared sweaty and wet. *Id.*

[43] NT, Trial, 9/22/87, at 382.

"force-march"[44] home to tell his wife what happened.[45] The Commonwealth argued, however, that Conway was not perspiring, but that he had washed off all traces of blood from his person and clothes before he left the scene.[46]

The Commonwealth also argued that scratches on Conway's arms proved his guilt, indicating that Capitano scratched him as he attacked her.[47] Conway claimed, however, he had no idea where the scratches came from, and speculated that they probably came from his cats or from gardening. Regardless of their origin, the FBI laboratory could not link Conway to Capitano's fingernail scrapings.

The Commonwealth also argued that Conway's decision to call the police from home — rather than from Wooley's or the pizza shop — evidenced his consciousness of guilt.[48] Conway argued, however, that the realtors who subsequently found Capitano's body acted in a similar fashion when they raced to their office to call the police.[49] Furthermore, Conway conceded that he stopped at the pizza shop to purchase cheese crackers before returning home, but argued that he was in a state of shock when he purchased the crackers and that he turned over the unopened package of crackers to police when they questioned him at his residence. Indeed, both Piccarretas testified that after Conway entered the pizza shop, he did not speak a word to either of them, as he quickly bought the crackers and left.[50]

Finally, the Commonwealth argued that Conway must be guilty because he knew Capitano's hands had been bound behind her back, yet none of the investigators (supposedly) knew this fact until he mentioned it during his questioning. The Commonwealth argued that "the only person that would positively know about [this fact]

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[44] "Force-march" is military jargon for a march that is longer or faster than usual. Conway served as a United States Marine from January 1975 to February 1977, when he was honorably discharged. App. O. Detectives who spoke with Conway recognized the military jargon.

[45] NT, Trial 9/21/87, at 25.

[46] NT, Trial, 9/23/87, at 726.

[47] NT, Trial, 9/22/87, at 391.

[48] NT, Trial, 9/23/87, at 717.

[49] *Id.* at 672. Michael Burke testified that he ran back to the realty office and called from there; no thought was given to using the phone at Wooley's. *See* NT, Trial, 9/21/87, at 158.

[50] *Id.* at 132, 144.

is the person who did the killing."[51] Conway also told police (incorrectly) he thought Capitano's feet were bound.[52]

d. CONWAY'S POCKET KNIFE

Investigators recovered a pocket knife from Conway. At trial, the Commonwealth argued that Conway used the pocket knife to kill Capitano: "Now, that knife fits the wounds that were inflicted. It does not have blood on it, and the Commonwealth's position is it was washed off."[53]

Conway claimed, however, that he always carried his pocket knife and that he used it primarily for gardening.[54] Likewise, serology tests failed to identify human blood.[55] Finally, despite the Commonwealth's contention that the knife "fit" Capitano's wounds, it offered no expert testimony on that point. Instead, the medical examiner simply stated that the blade that was used was at least three inches long and probably no more than one-inch wide. [56]

e. INFORMANT TESTIMONY

The Commonwealth relied on testimony from a serial informant, Phillip Anthony Fioravanti.[57] On June 1, 1987, Fioravanti was placed next to Conway in the Montgomery County Prison's medical department.[58] Fioravanti testified that Conway opened up to him on the following day, confessing that he murdered Capitano:

> He said that he got caught stealing in the store by the woman and him and the woman got into a fight and she hit him on the back of the head. And he said he, like, went into shock and he freaked out. Then he stopped talking for a while. Again he was scattered with his thoughts. Then he said I didn't mean to hurt her.[59]

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[51] NT, Trial, 9/23/87, at 720.

[52] App. P, at 4. Conway made other mistakes. For instance, his wife told police he wasn't sure if the victim had been stabbed or shot. App. Q, at 4.

[53] NT, Trial, 9/23/87, at 710.

[54] NT, Trial, 9/22/87, at 388.

[55] NT, Trial, 9/22/87, at 710.343.

[56] NT, Trial, 9/21/87, at 710. Police reports indicate Conway's pocket knife was 4 inches long, but supply no information about its width or whether it is sharp on only one side. App. H, at 32.

[57] *Id.* at 447; NT, Trial, 9/23/87, at 710.

[58] NT, Trial, 9/22/87, at 447, 485.

[59] *Id.* at 455; Apps. S-T.

Fioravanti also said Conway implied to him that he washed his pocket knife after stabbing Capitano to death because he told him the police would not find blood on his pocket knife.[60]

Defense counsel exposed several factors that undermined Fioravanti's testimony. First, Fioravanti had a documented history of exchanging information for leniency.[61] The Commonwealth conceded this during closing arguments: "He put himself up to it perhaps because he thought he could maybe get some benefit on his sentence[.]"[62] In 1979, Fioravanti pled guilty to four burglaries, but made a deal to testify against his cellmate, Charles Lee.[63] As a result, Lee was convicted and Fioravanti, who appeared in front of the Honorable Gerald Corso, received probation. Fioravanti subsequently violated his probation in 1986 and was awaiting sentencing when Conway allegedly made his incriminating statements to him. In exchange for his testimony against Conway, Fioravanti received six years probation and a long-term drug program. Tellingly, the transcript from the Lee case indicates Fioravanti testified or planned to testify against four or five defendants awaiting trial.[64]

Second, none of the correctional officers or other inmates in the medical department ever saw Conway approach or speak to Fioravanti.[65]

And third, Fioravanti did not offer details about the murder that investigators did not already know. In fact, the Commonwealth argued that Fioravanti was credible precisely because he gave such limited and general information regarding Capitano's murder.[66]

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[60] *Id.* at 456; Apps. S-T.

[61] *Id.* at 469. Fioravanti admitted that all of his thefts were for the purpose of financing his heroin addiction.

[62] NT, Trial, 9/23/87, at 731.

[63] NT, Trial, 9/22/87, at 465-66,

[64] *Id.* at 479-80.

[65] App. U, at 1 ("None of the Correctional Officers recalled seeing Robert Conway speaking with Philip Fioravanti... [Inmate Frederick] Jones considers himself a friend of Conway. Jones stated that he never saw Conway and Fioravanti talking together.").

[66] "And if he's lying to you, ladies and gentlemen . . . why wouldn't he say Bob Conway told me he went in with a knife, he stabbed the woman 78 times, he attempted to rape her, he ripped her panty house [sic] out, he lifted her dress up. He tied her up." NT, Trial, 9/23/87, at 731.

2. DEFENSE CASE

Conway denied murdering Capitano, maintaining that he came to Wooley's to purchase a cane for his wife and found Capitano's body in the bathroom.[67] He tried to undo the ligatures and checked to see if she was breathing, but then left when he realized she was already dead. In shock due to his grizzly discovery, Conway stopped at the pizza shop down the street, bought crackers from the vending machine, and continued his "force-march" home, where he told his wife about his discovery.

Dawn Conway, Conway's wife, immediately called Conway's psychologist, Dr. Edward Murphy, who had treated Conway since suffering a serious head injury in 1984.[68] Shortly there after, at 11:10 am, Dawn Conway called the police.[69]

Dr. Murphy testified that Conway suffered from cognitive, memory, and hearing deficits as a result of his head injury,[70] and that Conway sounded very upset on the phone, saying he had walked into a store and found a dead body.[71] Dr. Murphy also explained that Conway depended on his wife to take care of him and they were together "24 hours a day."[72] Thus, he was not surprised Conway went home to his wife first – after discovering Capitano's body – before he called the police.[73]

Defense counsel also emphasized that no physical evidence connected Conway to Capitano's murder and that no one saw Conway carrying anything after he left Wooley's.[74] Indeed, the witnesses who saw Conway immediately after he left Wooley's never mentioned seeing a speck of blood on his person, clothing, or shoes.

Finally, defense counsel presented testimony from Richard Keith Johnson – an inmate at the Montgomery County Correctional Facility. Johnson testified that he looked

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[67] In fact, as defense counsel told jurors during open statements, Conway intended to take the stand to assert his innocence. "[W]e're going to put him on the stand to tell you as best as he can recall what happened that day." NT, Trial, 9/21/87.

Near the end of the trial, on advice of counsel, Conway chose to exercise his Fifth Amendment right not to testify because the judge would not assure him that certain evidence – judged inadmissible during the Commonwealth's case in chief – would not be admitted against him on cross examination. *See* NT, Trial, 9/23/87, at 627-631. The trial judge stated: "I believe that it could have relevance to the matter at issue and as such I have not specifically excluded it." *Id.* at 629.

[68] NT, Trial, 9/23/87, at 557.

[69] NT, Trial, 9/21/87, at 213.

[70] *Id.* at 558, 568, 570-71.

[71] *Id.* at 569.

[72] NT, Trial, 9/22/87, at 562.

[73] NT, Trial, 9/21/87, at 158; NT, Trial, 9/23/87, at 672.

[74] NT, Trial, 9/21/87, at 31; NT, Trial, 9/23/87, at 722; NT, Trial, 9/22/87, at 372-74; NT, Trial, 9/21/87, at 36, 149-50, 229; NT, Trial, 9/23/87, at 541, 655.

out his cell window at 10 a.m. every morning to watch his father open his candy store, which was on the same street as Wooley's and the pizza shop.[75] On the morning of September 25, 1986 – at approximately 10:30 a.m. – Johnson said he was watching people go in and out of his father's candy store and that he saw two African-American men (who he knew by their street names as Cool Breeze and Kenny Blue) enter an alley next to Wooley's.[76] Kenny Blue left Johnson's line of sight and he (Johnson) could not see if Kenny Blue entered the store.[77] Johnson said Kenny Blue was gone for approximately 10 to 12 minutes before he rejoined Cool Breeze, who was walking across the parking lot. Johnson surmised that Kenny Blue entered Wooley's at approximately 10:40 a.m.[78] Defense counsel also questioned why investigators refused to pursue this lead, especially when Johnson received no benefits for the information. Instead, investigators immediately focused their attention on Conway as the prime (and only) suspect.[79]

3. VERDICT AND SENTENCING

On September 24, 1987, the jury convicted Conway of third-degree murder, unlawful restraint, and possession of an instrument of a crime.[80]

On May 1, 1989, the Honorable Gerald Corso sentenced Conway to ten to twenty years for murder, 2.5 to five years for unlawful restraint, and 2.5 to five years for possession of instruments of crime.[81] All terms were to run consecutively.

E. POST-CONVICTION DNA LITIGATION

On June 12, 2008, Conway filed his DNA testing petition pursuant to 42 Pa. C.S. § 9543.1, seeking testing on the following items: (1) blood-stained paper towels near Capitano; (2) fingernail clippings from Capitano's hands; (3) piece of blue cloth tied around Capitano's wrists; (4) rape kit items; (5) Capitano's lab coat; (6) Capitano's dress;

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[75] *Id.* at 608.
[76] *Id.* at 611.
[77] *Id.* at 612.
[78] *Id.* at 612-13.
[79] When the dispatcher notified his sergeant that Conway had found the victim, the sergeant stated: "Probably the guy that did it." Dispatcher transcript, District Attorney's Office, Norristown, PA, at 7.
[80] The jury acquitted Mr. Conway of first-degree murder, second-degree murder, attempted rape, indecent assault, robbery, and theft.
[81] NT, Sentencing, 5/1/89, at 34-35.

(7) Capitano's slip; (8) Capitano's bra; (9) Capitano's pantyhose; and (10) Capitano's purse and the contents thereof. App. B, at 29-34.

Conway identified four DNA testing scenarios that would establish his actual innocence: (1) a redundant male DNA profile on two or more items of evidence that is inconsistent with Conway's DNA profile;[82] (2) a male DNA profile from a single item of evidence that is inconsistent with Conway's DNA profile and that matches a profile of a known or unknown offender in a state or federal DNA databank; (3) a redundant male DNA profile that matches the profile of a known or unknown offender in a state or federal DNA databank; and (4) a DNA databank hit to a known offender and a confession from the offender.

On October 22, 2008, the Honorable Gerald Corso entered an Order ordering that the "Commonwealth shall take all steps reasonably necessary to ensure that any remaining biological material in it is possession relevant to Defendant's Motion be preserved pending the completion of these proceedings." App. E.

On November 10, 2008, the Commonwealth filed its Answer, arguing that: (1) Conway's petition was untimely; (2) the assertion that DNA testing will produce exculpatory evidence is speculative; and (3) sufficient circumstantial evidence exists to support the jury's verdict. App. C, at 8-17.

On December 30, 2008, Conway filed a Reply to the Commonwealth's Answer. App. D.

On February 2, 2009, Judge Corso entered an Order scheduling a Post-Conviction DNA Hearing for March 5, 2009, at 1:00 p.m. App. F.

On March 5, 2009, Judge Corso held a Post-Conviction DNA Hearing, at which time Conway and the Commonwealth argued the issues presented in their pleadings. App. G, at 1-56. Importantly, Conway, once again, articulated the four ways in which DNA testing would prove his actual innocence. *Id.* at 23-53.

On May 5, 2009, Judge Corso issued an Order denying Conway's petition because he "failed to present a prima facie case that DNA testing, a*ssuming exculpatory evidence*, would establish his actual innocence." App. H (emphasis added). In a footnote,

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[82] A redundancy occurs when the same DNA profile is identified on two or more items of evidence.

Judge Corso noted that "[b]ased on this determination, the court need not address the issue of the timeliness of the Defendant's petition." *Id.* at n. 1.

On May 15, 2009, Conway filed his timely notice of appeal to this Court. App. I.

On June 11, 2009, Judge Corso filed a written opinion affirming his May 5, 2009 Order denying Conway's petition. App. A. In his opinion, Judge Corso held that Conway satisfied all the preliminary statutory requirements, *see id.* at 20-21, and therefore the only issue before him was "whether, pursuant to Section 9543.1(c)(3)(ii)(a), the Defendant presented a *prima facie* case demonstrating that DNA testing of the specific evidence, *assuming exculpatory results*, would establish his actual innocence[.]" *Id.* at 21 (emphasis added).

Judge Corso held that Conway failed to satisfy section 9543.1(c)(3)(ii)(a)'s *prima facie* requirement because his "main argument depends upon assumptions for which there is no evidence in the trial record: that the assailant cut himself; and that Capitano scratched her assailant during a struggle." *Id.* at 22. Judge Corso wrote:

> The Commonwealth's forensic expert... opined that Capitano's defensive wounds indicated an attempt to ward off or grab the instrument being used to stab her. Consequently, the evidence at trial does not indicate that Capitano scratched the perpetrator during the struggle. Similarly, no evidence supports the contention that the assailant cut himself.

Id. From Judge Corso's perspective, then, Conway's request for DNA testing was "purely speculative and fail[ed] to establish a *prima facie* case for testing." *Id.* at 23.

Judge Corso also denied testing, in part, because the jury found Conway guilty "despite being advised that the Commonwealth was not relying upon any of the physical evidence retrieved from Wooley's to link [Conway] to the crime." *Id.* at 23. Thus, because the items that Conway "seeks to have tested were not used or offered as evidence against him at trial, [his] assertion that the presence of another person's DNA on them would prove his actual innocence is only speculation." *Id.* at 24.

Finally, Judge Corso denied testing, in part, because "any number of individuals could have come into contact with the requested items, thereby contaminating them." *Id.* Consequently, "a review of the items sought to be tested cannot demonstrate that the presence of another person's DNA would prove [Conway's] actual innocence." *Id.*

VII. ARGUMENTS

A. SECTION 9543.1'S STATUTORY REQUIREMENTS

To qualify for DNA testing pursuant to section 9543.1(c) a petitioner must:

(1) (i) specify the evidence to be tested;

(ii) state that the applicant consents to provide samples of bodily fluid for use in the DNA testing; and

(iii) acknowledge that the applicant understands that, if the motion is granted, any data obtained from any DNA samples or test results may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(2) (i) assert the applicant's actual innocence of the offense for which the applicant was convicted; and...

(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;

Pursuant to section 9543.1(d)(1), if a petitioner satisfies these requirements, the court "shall order" DNA testing if it determines 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) [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.

§ 9543.1(d)(1) (emphasis added).

The PCRA court can only deny DNA testing if it determines that "there is no *reasonable possibility* that the testing would produce exculpatory evidence that would establish the [petitioner's] actual innocence of the offense for which [he] was convicted." § 9543.1 (d)(2)(i). Thus, if there is a reasonable possibility the DNA results will produce or lead to exculpatory evidence establishing Conway's actual innocence, the PCRA court must grant Conway's petition.

Conway satisfied these requirements and is entitled to DNA testing.

Conway identified the evidence he sought to test; he asserted his actual innocence; he presented a *prima facie* case that the assailant's identity was at issue; he established that the evidence was subject to a proper chain of custody; he consented to providing a DNA sample and acknowledged that any DNA results could be used in future law enforcement investigations; and, lastly – if not most importantly – he identified four testing scenarios that would prove his actual innocence: (1) a redundant male DNA profile on two or more items of evidence that is inconsistent with Conway's DNA profile; (2) a male DNA profile on a single item of evidence that is inconsistent with Conway's DNA profile that matches the DNA profile of a known or unknown offender in a state or federal DNA databank; (3) a redundant male DNA profile that matches the DNA profile of a known or unknown offender in a state or federal DNA databank; and (4) a DNA databank hit to a known offender and a confession from the offender.

Conway's appeal focuses solely on whether he presented a *prima facie* case that DNA testing, assuming exculpatory results, would establish his actual innocence. *See* App. A, at 21.

B. JUDGE CORSO'S RULING THAT CONWAY'S INNOCENCE ARGUMENTS ARE SPECULATIVE IS NOT SUPPORTED BY THE RECORD

Judge Corso denied Conway's petition primarily because his "main argument depends upon assumptions for which there is no evidence in the trial record[.]" App. A, at 22. Moreover, by finding Conway's primary innocence argument "too speculative," Judge Corso "reject[ed] [his] argument that testing may produce a result that matches the profile of a known offender in a state or federal DNA databank." *Id.* at 24 ("[T]his type of argument simply adds yet another layer of speculation to [Conway's] already

speculative rationale for testing.") (internal quotations and citation omitted). Judge Corso's ruling is not supported by the record.

Contrary to Judge Corso's myopic view of the record, Conway's main theory of innocence – as well as his other theories of innocence – is based entirely on the evidence in the record. The record evidence is clear: the individual who murdered Capitano performed the following acts and manipulated, handled, and ripped the following items of evidence. First, the assailant forcefully tied Capitano's wrists together with the blue cloth. Thus, it is a known fact the assailant manipulated the blue cloth. Second, the assailant ripped Capitano's pantyhose. Consequently, it is a known fact the assailant handled Capitano's pantyhose. Third, the assailant pushed up Capitano's dress in order to rip her pantyhose. Accordingly, it is a known fact that the assailant handled and manipulated the lower portion of Capitano's dress. Fourth, the assailant ripped open Capitano's lab coat and dress, exposing her bra and chest area. Thus, it is a known fact that the assailant handled, manipulated, and ripped the upper portion of Capitano's dress and her lab coat. Fifth, the assailant rummaged through Capitano's purse, discarding some of its contents at the crime scene. Consequently, it is a known fact that the assailant manipulated and handled Capitano's purse.[83]

Given this known set of facts, there is a "reasonable possibility," *see* § 9543.1(d)(2)(i) (PCRA court shall grant DNA testing if there is a "reasonable possibility that *the testing* would produce exculpatory evidence" establishing the petitioner's actual innocence), that DNA testing will produce a redundant male DNA profile on two or more of these items. *See infra*, § VII.C.1, at 24-28 (discussing several DNA exonerations involving redundant DNA results). A redundancy occurs when the same DNA profile is identified on two or more items of evidence. More importantly, had Conway informed his jury that DNA testing produced a redundant male DNA profile on the blue cloth,[84]

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[83] The Commonwealth's pre-trial decisions support Conway's claim that there is a "reasonable possibility" DNA testing will produce probative evidence regarding the true assailant's identity – thereby exonerating Conway. Most notably, the Commonwealth sent each item of evidence – the blue cloth and Capitano's fingernail scrapings, lab coat, skirt, pantyhose, and dress – to the FBI laboratory for forensic testing. By sending these items to the FBI laboratory, the Commonwealth indirectly – if not directly – acknowledged that these items were probative and that forensic testing could possibly produce results identifying the true perpetrator.

[84] It is reasonably likely DNA testing will identify the assailant's DNA on the blue cloth (or ligature) he forcibly tied around Capitano's wrists. For instance, in August 1996, a man kidnapped and raped a twelve-year-old girl near an elementary school in southern Maryland. After raping the young girl,

and Capitano's fingernail scrapings,[85] purse, pantyhose, dress, and lab coat – a sextuple redundancy – no reasonable juror would have convicted him because there can be no innocent explanation as to why the same male's DNA is on several items of evidence so

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the man tied her hands and feet together with a ligature – a piece of T-shirt to be exact – and left her in the woods. For approximately twelve years, the case went unsolved. But the attacker's skin cells remained on the T-shirt he used as a ligature, and last year, investigators matched DNA from the ligature to James Clinton Cole. In July 2009, thanks largely to the DNA evidence, prosecutors secured two life sentences against Cole. *See* Bethany Rodgers, *12-year-old DNA is Key in Rape Trial; '96 Crime is Reopened*, July 8, 2009, SOMDNEWS.COM, at www.somdnews.com/stories/07082009/indytop101346_32227.shtml; Bethany Rodgers, *Rapist Gets Two Life Prison Terms*, July 10, 2009, SOMDNEWS.COM, at www.somdnews.com/stories/07102009/indytop92616_32247.shtml. Likewise, in *Commonwealth v. Lyons*, 833 A.2d 245 (Pa. Super. 2003), the victim was raped, sodomized, and strangled with a ligature. Subsequent DNA testing on the ligature identified the defendant's DNA. *See id.* at 259 ("Investigators also identified pubic hairs matching Appellant's DNA in M.R.'s underwear and on the ligature allegedly used to strangle her."). Due in large part to the DNA evidence, the jury convicted the defendant.

[85] With respect to Capitano's fingernail scrapings, the Commonwealth argued that Conway "cannot prove that the victim scratched her killer without conceding his own guilt." App. C, at 13. The Commonwealth cited *Commonwealth v. Smith*, 889 A.2d 582 (Pa. Super. 2005), for the proposition that the "victim's defensive wounds... are not a proper foundation for DNA testing on her fingernails." *Id.*

Citing *Commonwealth v. Smith*, Judge Corso agreed with the Commonwealth, holding that "the evidence at trial does not indicate that Capitano scratched the perpetrator during a struggle" and that "no evidence supports the contention that the assailant cut himself." App. A, at 22. Judge Corso erred.

During opening arguments, the Commonwealth repeatedly argued that Capitano scratched Conway's forearm as Conway tried to stab her because detectives identified "fresh" scratches on Conway's forearm shortly after her murder. *See* NT, Trial, 9/21/87, at 18, 23, 25. Likewise, Officer Joseph Byrnes (of the Norristown Police Department) and Detective Stanley Kadelski (of the Montgomery County District Attorney's Office) both testified that when they interviewed Conway immediately after his wife notified the police, they saw "fresh" scratches on his forearm, which they photographed. The Commonwealth introduced these photographs into evidence at trial as Commonwealth Exhibits 13, 37, and 38. *See* NT, Trial, 9/22/87, at 391, 392, 428, 429. Furthermore, the Commonwealth introduced evidence establishing that Capitano struggled with the assailant because her hands, wrists, and forearms exhibited several defensive wounds. *See* NT, Trial, 9/21/87, at 49-51.

The Commonwealth's and Judge Corso's reliance on *Commonwealth v. Smith* is misplaced. The Superior Court denied Smith DNA testing on the victim's fingernail scrapings because there was no evidence in the record indicating that the victim scratched the assailant. *See Commonwealth v. Smith*, 889 A.2d at 586 (describing Smith's fingernail scraping argument as "entirely speculative" and stating that "[i]n the face of such speculation, the absence of [Smith's] DNA cannot be meaningful and cannot establish his actual innocence of the murder."). In Conway's case, however, the Commonwealth repeatedly argued that Capitano scratched her assailant. The only disagreement Conway and the Commonwealth have regarding this argument is *who* Capitano actually scratched. Conway is adamant he was not the assailant, whereas the Commonwealth thinks otherwise. Regardless of this disagreement, the fact the Commonwealth presented evidence suggesting that Capitano scratched her assailant easily distinguishes this case from *Commonwealth v. Smith*. Thus, if DNA tests on Capitano's fingernail scrapings identified the same male DNA profile as identified on two or more items of evidence, this would "demolish" the Commonwealth's claim that Conway was the assailant. *See Commonwealth v. Williams*, 899 A.2d 1060, 1064 (Pa. 2006) (noting that "DNA testing... can demolish the prosecution's case[.]"). Moreover, if the unknown male DNA profile is run through or uploaded into a DNA databank and hits to a known or unknown offender, this would also establish Conway's actual innocence.

intimately connected to Capitano's murder.[86] Simply put, the male DNA profile must be the assailant's DNA.

Conway's second and third theories of innocence – a DNA databank hit – are an off-shoot of his redundancy theory of innocence and, thus, are also premised on the record evidence. As the record evidence makes clear, the assailant manipulated, handled, or ripped several items of evidence during Capitano's murder. Consequently, there is a reasonable possibility DNA testing will produce a redundant male DNA profile from two or more items of evidence or a male DNA profile from a single item. Regardless of whether it is the former or latter, had Conway introduced evidence that DNA testing produced a male DNA profile from one or more items and the male DNA profile hit to a known or unknown offender once run through or uploaded into a state or federal DNA databank, no reasonable juror would have convicted him. There is a reasonable possibility DNA testing will produce a DNA profile that hits to a known or unknown offender once run through or uploaded into CODIS. *See infra*, § VII.C.2, at 28-34.

Finally, Conway's confession theory of innocence is premised on his DNA databank theory – a theory premised on the record evidence. No reasonable juror would have convicted Conway had he introduced evidence that a single or redundant male DNA profile hit to a known offender once run through or uploaded into a state or federal DNA databank, and that the actual perpetrator confessed when confronted with the DNA results. There is a reasonable possibility that if DNA testing produces a DNA databank hit, Conway will be able obtain a confession from the true perpetrator. *See infra*, § VII.C.3, at 34-40.

Accordingly, contrary to Judge Corso's myopic – and clearly erroneous – view of the record, each theory of innocence – the redundancy, the DNA databank hit, and the confession – is premised on facts from the record. More importantly, each theory of innocence establishes Conway's actual innocence and there is a reasonable possibility that DNA testing will produce or lead to one or more of these results. Because Judge

[86] The same is true if DNA testing produced a triple, quadruple, or quintuple redundancy from the blue cloth, and Capitano's fingernail scrapings, purse, pantyhose, dress, and lab coat – i.e., no reasonable juror would have convicted Conway had it known that DNA testing identified the same male DNA profile on three, four, or five of items of evidence.

Corso's findings are not supported by the record this Court must vacate his decision and grant Conway's petition.

C. A PCRA Court Must Grant a Petitioner's Section 9543.1 Petition if There is a "Reasonable Possibility" or "Reasonable Likelihood" DNA Tests Can Produce Or Lead To Evidence that Would Establish Petitioner's Actual Innocence

Pursuant to section 9543.1(d)(2)(i), the standard for determining when the PCRA court must grant DNA testing is whether there is a "reasonable possibility that the testing [would] produce exculpatory evidence that would establish the applicant's actual innocence." The "reasonable possibility" standard is a lower standard than the "reasonable probability" standard used to evaluate *Brady* and *Strickland* claims. *See Strickler v. Greene*, 527 U.S. 263, 308 (1999) (noting that the "reasonable probability" standard is a more formidable standard that the "reasonable possibility" standard); *id.* at 299 (Souter, J., dissenting) ("We have treated 'reasonable likelihood' as synonymous with 'reasonable possibility'"); *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985). Thus, all Conway needs to establish – at least at this juncture – is that there is a "reasonable possibility" or "reasonable likelihood" DNA testing can produce evidence that would ultimately establish his actual innocence. This analysis does not simply involve analyzing the DNA results. Instead, the PCRA court must also consider the additional exculpatory evidence the DNA results can produce or lead to — i.e., a DNA databank hit or a confession — and determine whether all this evidence, collectively, would establish Conway's actual innocence.

It is reasonably likely that DNA testing on the blue cloth, and Capitano's fingernail scrapings, purse, pantyhose, dress, and lab coat will produce one of four exculpatory outcomes that would irrefutably identify the true assailant while conclusively establishing Conway's actual innocence.

1. Redundant Results

A redundancy occurs when the same DNA profile is identified on two or more items of evidence. In Conway's case, if the same male DNA profile is obtained from two or more of the following items – the blue cloth, and Capitano's fingernail scrapings, purse, pantyhose, dress, and lab coat – this would establish Conway's actual innocence

because there can be no innocent explanation as to why the same male DNA profile would be present on two or more items of evidence so intimately connected to Capitano's murder.

All Conway needs to establish — at least at this juncture — is that a redundant DNA profile is reasonably likely. Conway satisfies this requirement because there have been several DNA exonerations and convictions premised on redundant DNA results.

a. NICHOLAS YARRIS'S DNA EXONERATION

Redundant DNA results led to Nicholas Yarris's exoneration. Yarris spent twenty-two years on Pennsylvania's death row for a rape-murder he did not commit. The evidence against Yarris included his own inculpatory statements and multiple eyewitnesses placing him near the crime scene. *See Yarris v. County of Delaware*, 465 F.3d 129, 130-32 (3d Cir. 2006); *Commonwealth v. Yarris*, 549 A.2d 513, 518-19 (Pa. 1988). DNA testing uncovered the same male profile on three items: (1) gloves found in the victim's car; (2) semen stains found on the victim's clothing; and (3) scrapings of the victim's fingernails:

> PCR-enhanced DNA testing was performed on the gloves found in the victim's car, and the results indicated that Yarris was not the "habitual user" of the gloves. PCR-enhanced DNA testing was then performed on semen stains found on the victim's clothing, and the results indicated that the sample did not come from Yarris, but did come from two unknown males, one of whom was the "habitual user" of the gloves. PCR-enhanced DNA testing was then done on scrapings found under the victim's fingernails, which revealed that the scrapings were from the "habitual user" of the gloves.

Yarris v. County of Delaware, 465 F.3d at 133.

Faced with redundant proof that another man raped and murdered the victim, the Delaware County District Attorney's office requested that Yarris's conviction be vacated in December 2003.[87]

b. STEPHAN COWANS'S DNA EXONERATION

Redundant DNA results also led to Stephan Cowans's exoneration. On May 30, 1997, a Boston police officer was shot twice with his own weapon following a short struggle with an unknown assailant. The assailant ran from the scene, *leaving his*

[87] *See* www.innocenceproject.org/Content/302.php (last visited August 22, 2009).

baseball cap. He forcibly entered a nearby home, where he drank some water from a *glass*. The assailant then fled, leaving both the officer's weapon and the *sweatshirt* he had been wearing.

The injured police officer ultimately identified Cowans as his assailant. At trial, the Commonwealth used the officer's identification, as well as other identifications, to convict Cowans. The Commonwealth also relied on a latent fingerprint lifted from the *glass* used by the assailant; a fingerprint examiner said that the print matched Cowans's left thumb print.

In 2003 and 2004, Cowans sought DNA testing on the following items: (1) the glass; (2) swabs taken from the glass; (3) the baseball cap; and the (4) sweatshirt. DNA tests identified the *same* male DNA profile on the baseball cap, the swabs from the glass, and the sweatshirt and the male DNA profile was inconsistent with Cowans's DNA profile. Due to the redundant DNA results, the Commonwealth freed Cowans and declared him innocent in February 2004.[88]

c. LARRY PETERSON'S DNA EXONERATION

Redundant DNA results led to Larry Peterson's exoneration. A New Jersey jury convicted Peterson of rape-murder in 1989. Prosecutors argued that after Peterson strangled and raped the victim, he inserted tree sticks into her mouth and vagina. Prosecutors premised their case on the following evidence: (1) Peterson supposedly had fresh "fingernail" scratch marks on his arms shortly after the victim went missing; (2) Peterson confessed to three friends; (3) Peterson confessed to a jailhouse informant; (4) hairs recovered from the victim's pubic combings "matched" Peterson's pubic hair; (5) hairs collected from one of the sticks match Peterson's pubic hair sample; and (6) there was semen on the victim's jeans and sperm on her underwear.

A New Jersey trial judge granted Peterson's DNA testing motion in 2003. The State sent the hairs, rape kit, clothing, and fingernail scrapings to an independent DNA laboratory. In 2005, the lab reported the following results: the same male DNA profile was identified on the anal, oral, and vaginal swabs from the rape kit, as well as on the victim's fingernail scrapings; the DNA profile was inconsistent with Peterson's DNA profile. Based on the redundant DNA results, a New Jersey trial judge vacated Peterson's

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[88] *See* www.innocenceproject.org/Content/73.php (last visited August 22, 2009).

conviction in July 2005 and prosecutors ultimately dropped all charges on May 26, 2006.[89]

d. BYRON HALSEY'S DNA EXONERATION

A redundant DNA profile led to Byron Halsey's exoneration. In 1988, a New Jersey jury convicted Halsey for two heinous child rape-murders committed in 1985. Halsey, who was helping to raise the children, falsely confessed to the murders after being interrogated for nearly two days straight. At trial, prosecutors relied on Halsey's confession and witness testimony to convict Halsey — one witness being Clifton Hall.

In 2006, a New Jersey judge granted the Halsey's DNA motion and had the semen and cigarette butts from the crime scene sent to a private DNA laboratory. The male DNA profile from the semen was the same DNA profile recovered from the cigarette butt; the profile did not match Halsey's DNA profile. When prosecutors uploaded the unknown DNA profile into New Jersey's DNA databank, it matched Clifton Hall's DNA profile. At the time, Hall was in a New Jersey prison for three separate sex offenses (from 1991 and 1992) that occurred in the same area of New Jersey as the rape-murders that led to Halsey's wrongful conviction.[90] In July 2007, New Jersey officially exonerated Halsey.[91]

e. JAMES HENRY BUIE'S CONVICTION

On June 27, 2001, an unknown assailant sexually assaulted Bridgette Smith and two minors, ages thirteen and nine.[92] All three victims failed to identify their assailant. The State's DNA expert tested one of the minor's rape kits, her nightgown, a fitted sheet from the bed where the assaults occurred, a pillow case, and cigarette butts found at the scene. The DNA tests identified the same male DNA profile on the vaginal swab, rectal swab, fitted sheet, pillowcase, and cigarette butts. When the DNA profile was uploaded into CODIS, it matched James Henry Buie's DNA profile. The redundant DNA profile represented the linchpin of the State's case against Buie and the jury ultimately convicted Buie of two counts of sexual assault.

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[89] *See* www.innocenceproject.org/Content/148.php (last visited August 22, 2009).

[90] Halsey's case is yet another example of where a DNA databank hit can prove a prisoner's innocence. *See infra* § VII.C.2, at 28-34.

[91] *See* www.innocenceproject.org/Content/690.php (last visited September 1, 2009).

[92] Unless otherwise indicated, the following facts are gathered from *Buie v. State*, Case No., 278732, 2009 WL 2611937 (Mich. App., Aug. 25, 2009).

2. DNA DATABANK HIT

If DNA tests produce an unknown DNA profile – that is inconsistent with Conway's DNA profile – the DNA profile can be "entered into the FBI's Combined DNA Index System ("CODIS"), a massive, centrally managed database including DNA profiles from federal, state, and territorial DNA collection programs, as well as profiles drawn from crime-scene evidence, unidentified remains, and genetic samples voluntarily provided by relatives of missing persons." *United States v. Weikert*, 504 F.3d 1, 4 (1st Cir. 2007); *Banks v. United States*, 490 F.3d 1178, 1181 (10th Cir. 2007); 42 U.S.C. § 14132(a); *Commonwealth v. Houck*, 948 A.2d 780, 782 n.3 (Pa. 2008). CODIS "allows State and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system." H.R. Rep. 106-900(I), at 8 (2000).[93]

Pennsylvania has a DNA databank that is compatible with CODIS. *See* 44 Pa. C.S. § 2312 ("The State DNA Data Base is reestablished. It shall be administered by the State Police and provide DNA records to the FBI for storage and maintenance by CODIS."); 44 Pa. C.S. § 2315 ("The DNA identification system as established by the State Police shall be compatible with the procedures specified by the FBI"). Pursuant to 44 Pa. C.S. § 2316, certain offenders, parolees, probationers, and adjudicated minors must submit a DNA sample to be incorporated into Pennsylvania's DNA databank. Likewise, unknown DNA samples collected from unsolved offenses are also uploaded into the databank. *See* 44 Pa. C.S. § 2312(1). The General Assembly established (and subsequently re-established) Pennsylvania's DNA databank because "DNA data banks are an important tool in criminal investigations, in the exclusion of individuals who are

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[93] DNA databank systems that use CODIS contain two main criminal indexes and a missing persons index. When a DNA profile is obtained and entered into CODIS's forensic (crime scene) index, "the database software searches thousands of convicted offender DNA profiles (contained in the offender index) of individuals convicted of offenses such as rape and murder." NAT'L INST. OF JUST., DEP'T OF JUST., USING DNA TO SOLVE COLD CASES 1-2 (July 2002). Similar to the Automated Fingerprint Identification System (AFIS), CODIS "generates investigative leads in cases where biological evidence is recovered from the crime scene. Matches made among profiles in the forensic index can link crime scenes together; possibly identifying serial offenders." U.S. DEP'T OF JUST., FEDERAL BUREAU OF INVEST., CODIS: COMBINED DNA INDEX SYSTEM BROCHURE, at http://www.fbi.gov/hq/lab/pdf/codisbrochure2.pdf (last visited September 8, 2009).

the subject of criminal investigations or prosecutions and in deterring and detecting recidivist acts." 44 Pa. C.S. § 2302 (1).

As of June 2009, CODIS contained more than 7,137,468 offender profiles and 272,452 forensic profiles (from crime scenes).[94] As of June 2009, CODIS has produced over 93,200 hits assisting in more than 91,800 investigations. *Id.* With respect to Pennsylvania, CODIS contains over 198,478 samples from Pennsylvania offenders and 7,062 forensic samples, which have aided 2,712 investigations.[95]

While CODIS represents an important law enforcement tool, several courts have also recognized the significance of CODIS (or similar state DNA databanks) as it relates to proving a person's innocence either pre-trial or post-conviction. For instance, the First Circuit Court of Appeals commented that:

> CODIS is a valuable law enforcement tool. It may be used to match evidence found at one crime scene with evidence found at another crime scene, revealing a common perpetrator. It also may be used to match evidence from the scene of a crime to a particular offender's profile. These attributes allow the FBI to investigate crimes more efficiently and more accurately, both by identifying offenders and *by eliminating innocent suspects.*

United States v. Weikert, 504 F.3d at 4 (emphasis added).[96] The Second Circuit Court of Appeals made a similar observation:

> The greater accuracy and speed with which CODIS allows the government to apprehend and convict those guilty of crimes has, as we have seen, an equally important corollary — *its use in exonerating innocent people criminally suspected, convicted, or charged.*

United States v. Amerson, 483 F.3d 73, 87 (2d Cir. 2007) (emphasis added).[97] The Third Circuit Court of Appeals also made a comparable remark:

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[94] *See* FEDERAL BUREAU OF INVESTIGATION, NATIONAL DNA INDEX SYSTEM STATISTICS, available at http://www.fbi.gov/hq/lab/codis/clickmap.htm (last visited August 31, 2009).

[95] *See* http://www.fbi.gov/hq/lab/codis/stats.htm#Pennsylvania (last visited August 31, 2009).

[96] *See also* 146 Cong. Rec. H8572-01, H8575 (daily ed. Oct. 2, 2000) (statement of Rep. Canady) ("The purpose of [CODIS] is to match DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders. Clearly, the more samples we have in the system, the greater the likelihood we will come up with matches and solve cases."); *id. at* H8576 (statement of Rep. Scott) (explaining that the Justice For All Act of 2004 and CODIS will "save lives by allowing apprehension and detention of dangerous individuals while eliminating the prospects that innocent individuals would be wrongly held for crimes that they did not commit"); H.R Rep. No. 108-711, at 2 (2004) ("[T]he Justice For All Act of 2004... seeks to ensure that the true offender is caught and convicted for the crime.").

> DNA [databanks]... *help to exculpate individuals who are serving sentences of imprisonment for crimes they did not commit* and will help to eliminate individuals from suspect lists when crimes occur.

United States v. Sczubelek, 402 F.3d 175, 185 (3d Cir. 2005) (emphasis added).

All Conway needs to establish is that a DNA databank hit is reasonably possible or likely. Conway satisfies this requirement because there have been several DNA exonerations and convictions where the exoneration or conviction hinged on a DNA databank hit. *See* PRESIDENT'S DNA INITIATIVE, *Linking Crimes to Criminals: Forensic DNA Databases*, at http://www.dna.gov/dna-databases ("Given the recidivistic nature of many crimes *a likelihood exists* that the individual who committed the crime being investigated was convicted of a similar crime and already has his or her DNA profile in a DNA database that can be searched by the [CODIS].") (emphasis added) (last visited September 4, 2009).[98] Indeed, in 105 of the 242 DNA exonerations to date, the DNA evidence that exonerated the wrongly convicted prisoner also identified the true perpetrator once uploaded into CODIS or a State DNA databank. *See* www.innocenceproject.org (last visited September 4, 2009); Jeff Carlton, *DNA Reveals True Perpetrator in 1982 Dallas County Rape*, DALLAS MORNING NEWS, Jan. 30, 2008 (noting that in 81 of the first 216 DNA exonerations, the DNA results ultimately identified the real perpetrator); Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597, 602 (2006) (noting similar results).

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[97] *See* House Rep. No. 106-900(I), at *10 ("Promptly identifying the actual perpetrator of a crime through DNA matching exonerates any other persons who might wrongfully be suspected, accused, or convicted of the crime.").

[98] As the numerous DNA databank hit cases make clear, relying on a DNA databank hit does not "add yet another layer of speculation" to Conway's innocence arguments. App. A., at 24. Judge Corso rejected Conway's "argument that testing may produce a result that matches the profile of a known offender in a state or federal databank." *Id.* Judge Corso relied on *Commonwealth v. Smith*, 889 A.2d at 586 n.6, in rejecting Conway's databank hit argument. Judge Corso's reliance on *Commonwealth v. Smith* is misplaced. In *Smith*, this Court rejected the petitioner's DNA databank argument because the petitioner's "entire [innocence] argument" was speculative and "depend[ed] upon an assumption for which there [was] no evidence in the record." *Id.* at 585. All of Conway's innocence arguments, on the other hand, are supported by the record, *see supra*, § VII.B, at 20-24, and are therefore not speculative. Thus, because Conway's innocence arguments are supported by the record, his DNA databank hit argument is not speculative. In the end, it is Judge Corso's characterization of Conway's argument as speculative that is not supported by the record.

a. DENNIS FRITZ'S AND RON WILLIAMSON'S DNA EXONERATIONS

In 1982, Debra Sue Carter was raped and murdered in Ada, Oklahoma.[99] The crime went unsolved for five years. Police approached Ron Williamson because he lived near the apartment where Carter was murdered and had a reputation for vulgar language and a bad temper. Suspicions about Williamson then led police to question Williamson's only friend, Dennis Fritz, a junior high school science teacher and widower with one daughter. The prosecution's case was built around the testimony of a jailhouse informant, Terri Holland. Holland, who was facing check-kiting charges, told police that during a previous stint in jail she had heard Williamson confess that he had killed Carter. The police arrested Williamson and Fritz, theorizing that Fritz had been present when Williamson committed the crime. At trial, two other men testified that Fritz, while in jail awaiting trial, had confessed to them. Another witness, Glen Gore, testified that he had seen Williamson at the bar where Carter was working on the night of the murder, and that Carter had told him that Williamson was bothering her. An expert also testified that several hairs found on the victim were microscopically consistent with Williamson's and Fritz's. Williamson was sentenced to death, Fritz to life in prison.

Williamson's direct appeals failed. Only five days before his scheduled execution, a federal district court issued a stay and subsequently granted his habeas petition, concluding that Williamson's defense counsel had been ineffective in failing to request a competency hearing to evaluate Williamson's mental health.[100] In preparation for retrial, prosecutors submitted the hairs and other biological evidence from the crime scene for DNA testing and agreed to compare the results against samples from both Williamson and Fritz. The DNA results exculpated both men, and inculpated Glen Gore, the witness who had testified against Williamson, once uploaded into Oklahoma's DNA

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[99] Unless otherwise indicated, the facts in this section are drawn from BARRY SCHECK, ET AL., ACTUAL INNOCENCE 168-203 (2003).

[100] *See Williamson* v. *Reynolds*, 904 F. Supp. 1529, 1545 (E.D. Okla. 1995).

databank. After eleven years of incarceration, Fritz was reunited with his daughter, who was thirteen when he was convicted. Williamson died in 2004 of cirrhosis of the liver.[101]

b. RONALD TAYLOR'S DNA EXONERATION

In 1995, a Texas jury convicted Ronald Taylor for the 1993 rape of a Houston woman. The victim identified Taylor six weeks after her assault. Before trial, Taylor's attorneys filed a motion for DNA testing on the victim's rape kit, clothing, and bed sheet. The court granted the motion, but the Houston crime lab reported that it did not identify semen or sperm on any of these items. With no semen or sperm, no pre-trial DNA testing was performed. At trial, Taylor's attorneys attacked the victim's identification and argued that another individual, known as "Chili Charlie," was the likely offender because he fit the victim's description.

In 2006, the Innocence Project accepted Taylor's case, located the evidence, and sent the evidence to an independent DNA laboratory, which, contrary to the Houston crime lab's pre-trial results, identified semen on the victim's bed sheet. Subsequent DNA testing revealed a male DNA profile that, once uploaded to Texas's DNA databank, hit to Roosevelt Carroll – a sex offender who lived near the victim and whose street name was "Chilli-Chetter." The State released Taylor in October 2007 and the Texas Court of Criminal Appeals officially exonerated him in January 2008.[102]

c. RICKEY JOHNSON'S DNA EXONERATION

In 1983, a Louisiana jury convicted Rickey Johnson for a 1983 rape in Many, Louisiana. After viewing a three-man photo array, the victim identified Johnson as her assailant. Serology tests on the sperm evidence collected from the victim could not eliminate Johnson as a potential contributor.

The Innocence Project accepted Johnson's case in 2006 and quickly located the evidence, which it sent to a private DNA laboratory. In late 2007, mini-STR results produced a male DNA profile that, once uploaded into Louisiana's DNA databank, hit to John McNeal – a sex offender serving a life sentence for a 1983 rape committed at the same apartment complex where the victim in Johnson's case was assaulted. Once

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[101] *See* Jim Dwyer, *Ronald Williamson, Freed From Death Row, Dies at 51*, N.Y. TIMES, Dec. 9, 2004, at C11.

[102] *See* www.innocenceproject.org/Content/1124.php (last visited August 31, 2009).

prosecutors identified McNeal as the true assailant, they released Johnson and declared him innocent in January 2008.[103]

d. ROGER EUGENE FAIN'S CAPITAL CONVICTION

On June 1, 1987, Bonnie Bishop found the body of her sister, Linda Donahew, nude and blood-covered lying on the floor in a bedroom closet.[104] Donahew died from manual strangulation and a stab wound to her neck. The postmortem examination also revealed several hairs found clinched in her hands, biological fluid in her mouth, and three foreign pubic hairs in the genital area. In 1987, conventional serology and hair analysis failed to produce probative results leading to the assailant's identity. Donahew's rape-murder remained unsolved for nearly two decades.

Fourteen years later, in August 2001, a DNA sample was collected from Roger Eugene Fain, who was incarcerated for an unrelated crime. The sample was entered into CODIS. Four years later, in October 2005, cold case detectives re-opened Donahew's murder and had the hairs and biological fluid subjected to modern DNA testing. When DNA tests produced a male DNA profile from the oral swab, the detectives uploaded the DNA profile into CODIS, which ultimately hit to Fain's DNA profile. Due in large part to the CODIS hit, a Texas jury convicted Fain of capital murder and sentenced him to life in prison.

e. BLAKE D. MCMILLIAN'S CONVICTION

In 1984, a woman was found raped and murdered in Missouri. A post-mortem rape examination revealed seminal fluid on the victim's vaginal swab.[105] Serology tests failed to produce probative evidence that could identify the assailant. The case went cold for two decades. In 2004, however, Missouri authorities subjected the vaginal swab to modern DNA testing, which revealed a male DNA profile. When the Missouri authorities uploaded the DNA profile into CODIS it hit to Blake D. McMillian. Thanks to the CODIS hit, a Missouri jury convicted McMillian of murder and first-degree rape.

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[103] *See* www.innocenceproject.org/Content/1120.php (last visited August 31, 2009).

[104] Unless otherwise indicated, the facts in this section are gathered from *Fain v. State*, Case No., 2-08-002-CR, 2009 WL 2579580 (Tex. App., Aug. 20, 2009).

[105] Unless otherwise indicated, the facts in this section are gathered from *State v. McMillian*, --- S.W.3d ---, 2009 WL 2341867 (Mo. App., July 31, 2009).

f. TIMOTHY CARL SHANE'S CONVICTION

In 1993, an unknown assailant burglarized and raped a Kentucky woman. The police collected physical evidence, including cigarette butts from the crime scene.[106] Despite the physical evidence, no suspect was identified for ten years.[107] However, in 2002, investigators submitted the cigarette butts for DNA testing. One butt produced a CODIS-eligible DNA profile and when the profile was uploaded into CODIS in March 2004 it hit to Timothy Carl Shane – a Colorado prisoner. The DNA databank hit played a significant role in Shane's subsequent rape and burglary convictions.

g. RUSSELL WAYNE MCNEIL'S INDICTMENT

In April 2006, an unknown assailant committed several armed robberies in western Pennsylvania.[108] Subsequent to one of the bank robberies, investigators collected a partially smoked cigarette butt near the entrance to the bank. DNA testing on the cigarette butt produced a DNA profile that, once uploaded to CODIS, hit to Russell Wayne McNeil's DNA profile. McNeil had provided a DNA sample while he was incarcerated in California and this sample was uploaded into CODIS. The CODIS hit lead to a bank teller's identification of McNeil as the assailant, and ultimately resulted in a nine-count indictment against McNeil.

3. DNA DATABANK HIT PLUS A CONFESSION FROM THE ACTUAL PERPETRATOR

Pursuant to section 9543.1(d)(2)(i), a PCRA court can only deny a prisoner's petition if the PCRA 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." (emphasis added). In Conway's case, if DNA tests produce a DNA databank hit, it is reasonably likely that the databank hit *will produce* additional exculpatory evidence in the form of a confession from the actual perpetrator. Indeed, in 31 of the 105 DNA exonerations where the DNA results ultimately identified the actual perpetrator, the actual perpetrator

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[106] Unless otherwise indicated, the following facts are gathered from *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2008).

[107] DNA technology at the time required a much larger sample size in order to produce an accurate DNA profile. *See id.* at 342 ("DNA technology changed vastly from the time the Appellant committed the crime in 1993 to the time of the CODIS match in 2004.").

[108] Unless otherwise indicated, the foregoing facts are gathered from *United States v. McNeil*, 2007 WL 2234516 (W.D. Pa., Aug. 2, 2007).

eventually confessed when confronted with the DNA evidence. *See* www.innocenceproject.org (last visited September 4, 2009).

a. KENNEDY BREWER'S DNA EXONERATION

A DNA databank hit and a confession resulted in Kennedy Brewer's death row exoneration. In 1995, a Mississippi jury convicted Brewer of raping and murdering his girlfriend's three-year-old daughter; Brewer was sentenced to death. In 2001, DNA tests proved that Brewer did not commit the rape-murder, which resulted in his conviction being vacated. Prosecutors, however, said they intended to retry Brewer, so he remained in jail. While Brewer remained in jail, Brewer's post-conviction attorneys reached out to the Mississippi Attorney General and asked that the DNA profile developed from the 2001 DNA tests be uploaded into Mississippi's DNA databank. When the unknown profile was uploaded, it matched to Justin Albert Johnson, one of the original suspects. When police interviewed Johnson, he not only confessed to the 1992 rape-murder that put Brewer on Mississippi's death row, he confessed to an identical 1990 rape-murder (from a neighboring county) that led to Levon Brooks's wrongful conviction and life-sentence. With the DNA results and Johnson's confessions, the State dropped all charges against Brewer and Brooks in 2008.[109]

b. DOUG WARNEY'S DNA EXONERATION

A DNA databank hit and a confession led to Doug Warney's exoneration. A New York jury convicted Warney of capital murder in 1997 for a 1996 stabbing murder in Rochester, New York. Police collected a bloody knife, a bloody towel, a bloody tissue, the victim's fingernail scrapings, and several fingerprints from the scene. When police questioned Warney, he allegedly confessed. At trial, the State relied primarily on Warney's confession because pre-trial forensic tests were inconclusive.

In 2004, prosecutors submitted the victim's fingernail scrapings, as well as seven other items for DNA testing. The DNA results identified the same male DNA profile on the seven items of evidence as well as the victim's fingernails. In March 2006, prosecutors learned more:

> They were advised that a search of the Combined DNA Indexing System (CODIS) database maintained by the FBI had resulted in a match of the

[109] *See* www.innocenceproject.org/Content/1176.php (last visited August 31, 2009).

> DNA profile to Eldred Johnson, a person previously convicted of murder and several slashings and burglaries, who was then confined in a correctional facility in Utica, New York.

Warney v. City of Rochester, 536 F. Supp. 2d 285, 290 (W.D.N.Y. 2008).[110] Following the CODIS hit, the police determined that the fingerprints lifted from the crime scene also matched Johnson. When law enforcement interviewed Johnson, he "confessed to the murder for which Warney had been convicted in 1997. Johnson also stated that he had acted alone, and did not know Warney." *Id.* Due to the CODIS hit and Johnson's confession, prosecutors vacated Warney's conviction in May 2007.[111]

c. JEFF DESKOVIC'S DNA EXONERATION

A DNA databank hit and confession led to Jeff Deskovic's exoneration. In January 1990, Deskovic, a 16-year-old high school sophomore from Westchester County, New York, with no criminal background, was arrested in connection with the rape and murder of his 15-year-old classmate.[112] Investigators administered a polygraph test and told Deskovic he failed, whereupon Deskovic confessed. Prosecutors obtained an indictment based on the confession, despite the fact that they were still awaiting the results of early-generation DNA testing of semen from the crime scene. Three days after prosecutors filed the indictment, those tests excluded Deskovic as the source of the semen, but the State proceeded with the prosecution, theorizing that the semen might have come from an unknown consensual sexual partner of the victim's, and Deskovic was convicted. As a 2007 report commissioned by the Westchester County District Attorney later concluded, "[f]ollowing his conviction and sentence, Deskovic received all of the traditional elements of post-judgment due process, but he obtained no relief."[113]

Over the next ten years, Deskovic repeatedly requested that evidence from the crime be compared against records in state and federal DNA databases, but prosecutors denied his requests and courts refused to compel them to act. In June 2006, however, a newly-elected District Attorney agreed to perform modern DNA testing and to conduct a

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[110] Warney's case is yet another example where redundant DNA results proved a prisoner's actual innocence.

[111] *See* www.innocenceproject.org/Content/281.php (last visited August 31, 2009).

[112] Unless otherwise indicated, the facts in this section are drawn from LESLIE CROCKER SNYDER, ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC: PREPARED AT THE REQUEST OF JANET DIFIORE, WESTCHESTER COUNTY DISTRICT ATTORNEY 1-4, 20, 22, 31 (June 2007).

[113] *Id.* at 4.

databank search, which inculpated Steven Cunningham, who was then serving a life sentence for an unrelated murder committed in 1993. When law enforcement interviewed Cunningham, he confessed and ultimately pled guilty to the murder.[114] In late 2006, the District Attorney consented to Deskovic's immediate release.[115]

d. RAY KRONE'S DNA EXONERATION

A DNA databank hit and confession led to Ray Krone's exoneration. In 1992, Krone was convicted of murdering a Phoenix bartender and sentenced to death.[116] The prosecution's case rested predominantly on testimony from a forensic odontologist that Krone's teeth perfectly matched bite marks found on the victim's breast.

Krone sought DNA testing in state court on the saliva found on the victim's blouse and previously-untested blood on the victim's jeans. Prosecutors opposed the request on the ground that Krone had insufficiently impeached the scientific evidence used at trial. But the court granted Krone's request, and DNA testing of the saliva and blood yielded a CODIS hit to Kenneth Phillips — Arizona prisoner serving time for attempting to sexually assault a child, shortly after committing the murder of which Krone was convicted. When Krone's defense investigator interviewed Phillips in prison after the CODIS hit, Phillips made several incriminating statements further supporting the DNA results and the conclusion that Phillips — not Krone— actually murdered the victim.[117] Krone was released after spending ten years in prison, including almost three years on death row.[118]

e. MARTIN SINCLAIR DUFFY'S CONFESSION AND CONVICTION

A DNA databank hit and confession led to Martin Sinclar Duffy's first-degree murder conviction.[119] In 1986, Karen Weber's partially clothed body was found on the side of a gravel road in Iowa – she had been stabbed several times. Investigators

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[114] *See* Jim Fitzgerald, *Convict Freed After 16 Years Sees Real Killer Sentenced In Murder*, A.P. STATE & LOCAL WIRE, May 3, 2007.

[115] *See* www.innocenceproject.org/Content/44.php (last visited August 31, 2009).

[116] The facts in this section are drawn from Robert Nelson, *"About Face,"* PHOENIX NEW TIMES, Apr. 21, 2005; RACHEL KING, CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES 12-48 (2005).

[117] *See* JIM RIX, JINGLE JANGLE: THE PERFECT CRIME TURNED INSIDE OUT 345-46 (2007).

[118] *See* www.innocenceproject.org/Content/196.php (last visited August 31, 2009).

[119] Unless otherwise indicated, the facts regarding Duffy's conviction are gathered from *State v. Duffy*, Case No. 07-1942, 2009 WL 249629 (Iowa App., Feb. 4, 2009).

collected physical evidence from the scene, including several cigarette butts. Despite the physical evidence, Weber's murder went unsolved for more than two decades.

In 2006, Duffy was on probation for a DUI. Under Iowa state law, Duffy had to provide a saliva sample for DNA testing prior to being released from probation. Duffy's sample was analyzed and, when entered into CODIS, his DNA profile matched the DNA profile from the cigarette butts. After the CODIS hit, investigators questioned Duffy about Weber's murder and he eventually confessed to murdering Weber and was ultimately convicted of first-degree murder.

f. ANTHONY ALLEN SHORE'S CONFESSION AND CONVICTIONS

A DNA databank hit and confession led to Anthony Allen Shore's capital murder conviction.[120] Between 1986 and 1995, four women were sexually assaulted and murdered, while another woman was nearly murdered after being sexually assaulted by an unknown assailant. The murders occurred in 1986, 1992, 1994, and 1995, while the attempted murder occurred in 1993. All remained unsolved until 2003.

In 1997, Shore was convicted of molesting his two daughters. As part of his sentence, Shore was required to submit a saliva sample for Texas's DNA databank.

In 2003, investigators re-opened the 1992 rape-murder and submitted the evidence from the case to a private DNA laboratory. DNA testing produced a male DNA profile that, once entered into CODIS, hit to Shore's DNA profile. When investigators interviewed Shore and informed him of the DNA results, he not only confessed to the 1992 rape-murder, he also confessed to the three other rape-murders and the 1993 attempted murder. The DNA results and confessions ultimately led to his capital murder conviction and death sentence.

g. TONY RAY NOTTI'S CONFESSION AND CONVICTION

On May 20, 2000, someone shot and murdered Robert Slawek near a rest stop in Montana.[121] Near Slawek's body, investigators recovered six shell casings from a .25

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[120] Unless other indicated, the facts regarding Shore's capital conviction are gathered from *Shore v. State*, Case No. AP-75049, 2007 WL 4375939 (Tex. Crim. App., Dec. 12, 2007).

[121] Unless other indicated, the facts regarding Notti's capital conviction are gathered from *State v. Notti*, 71 P.3d 1233 (Mont. 2003).

caliber firearm, a hand-rolled cigarette butt, and a piece of cardboard from a .25 caliber ammunition box. Investigators sent the cigarette butt to the Montana crime lab for DNA testing and the crime lab ultimately confirmed that Slawek was not the source of the DNA on the cigarette but. The crime lab uploaded DNA profile into CODIS.

Meanwhile, in July 2000, Montana police arrested Tony Ray Notti regarding an unrelated sexual assault and obtained a DNA sample. In February 2001, investigators learned that Notti's DNA profile matched the DNA evidence from the sexual assault. When investigators had Notti's DNA profile uploaded into CODIS it hit to the DNA profile identified on the cigarette butts recovered from Robert Slawek's murder. When investigators interviewed Notti regarding Slawek's murder and told him of the DNA results, Notti confess to Slawek's murder. The DNA databank hit and his subsequent confession ultimately led to Notti's guilty plea.

h. DNA Tests Produce Cold Hit in Unsolved Case that Leads to a Confession from the Actual Perpetrator

In 1990, several brutal rapes and rape-murders on elderly victims occurred in Goldsboro, North Carolina, by an unknown individual dubbed the "Night Stalker."[122] During one attack, the assailant brutally raped and nearly murdered an elderly woman. Her daughter's early arrival home was the only thing that saved the woman's life. The assailant fled, leaving behind materials intended to burn the residence and the victim in an attempt to conceal the crime. In July 1990, the assailant brutally raped and murdered another elderly woman in her home. Three months later, the assailant raped and murdered a third elderly woman and her husband. He burned their house to conceal the crime, but fire personnel pulled the bodies from the house before it was engulfed in flames. DNA testing on the vaginal swabs from each victim produced the same male DNA profile, but investigator had no suspect(s).

In 2001, the crime lab re-tested the vaginal swabs with more advanced DNA testing, produced the same DNA profile, and entered the DNA profile into North Carolina's DNA database. In April 2001, the DNA profile hit to a man who had been

[122] Unless otherwise indicated, the facts regarding this case are summarized from NAT'L INST. OF JUST., DEP'T OF JUST., USING DNA TO SOLVE COLD CASES 1 (July 2002).

previously convicted of a prior shooting. When confronted with the DNA results the man ultimately confessed to all three murders.

D. JUDGE CORSO ERRED AS A MATTER OF LAW WHEN HE CONDUCTED AN ITEM-BY-ITEM ASSESSMENT INSTEAD OF A CUMULATIVE ASSESSMENT WHEN DETERMINING WHETHER DNA TESTING COULD PRODUCE OR LEAD EXCULPATORY EVIDENCE ESTABLISHING CONWAY'S ACTUAL INNOCENCE

To qualify for DNA testing, Conway must prove that DNA tests would produce or lead to exculpatory evidence establishing his "actual innocence." § 9543.1(c)(3)(ii)(A). Actual innocence "means factual innocence, not mere legal insufficiency[.]" *Commonwealth v. Williams*, 936 A.2d 12, 25 (Pa. 2007) (citations and quotations omitted); *accord Bousley v. United States*, 523 U.S. 614, 623-24 (1998). Pennsylvania courts have not defined what "actual innocence" means as it relates to section 9543.1. The U.S. Supreme Court and federal courts, on the other hand, recognize the following standard: To establish actual innocence, a prisoner must produce newly discovered evidence that makes it "more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. at 327; *accord House v. Bell*, 547 U.S. 518, 537-39 (2006).[123] The *Schlup* Court further stated that "[i]t is not the . . . court's independent judgment as to whether reasonable doubt exits that the standard addresses; rather the standard requires the . . . court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schulp v. Delo*, 513 U.S. at 329; *accord House v. Bell*, 547 U.S. at 538 (The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the *likely impact of the evidence on reasonable jurors.*") (emphasis added). Importantly, the "*Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence." *House v. Bell*, 547 U.S. at 538.

The actual innocence determination, moreover, is a cumulative – not an item-by-item – determination. This can be inferred from the statute's purpose of protecting the innocent and identifying the guilty,[124] and the statute's text requiring PCRA courts to

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[123] Judge Corso and the Commonwealth both agree the *Schlup* standard is the appropriate standard to use when assessing the actual innocence issue. *See* App. A, at 17; App. C, at 11-2.

[124] *See Testimony Before Senate Judiciary Committee*, SB 589-Postconviction DNA Testing, March 26, 2001 (Opening Remarks of Senator Greenleaf); *Testimony Before Senate Judiciary Committee*,

assume exculpatory results for the *evidence* to be tested, *see* § 9543.1(c)(3)(ii) ("DNA testing of the specific *evidence*, *assuming exculpatory results*, would establish... the applicant's actual innocence of the offense for which the applicant was convicted.") (emphasis added); *Commonwealth v. Smith*, 889 A.2d at 583, and to determine whether there is a "reasonable possibility that the testing *would produce* exculpatory evidence" establishing the petitioner's actual innocence. § 9543.1(d)(2)(i) (emphasis added).

The *Schlup* decision supports Conway's interpretation. As *Schlup* explained, the "actual innocence" determination must be made "in light of *all* the evidence." *Schlup v. Delo*, 513 U.S. at 328 (emphasis added).[125] Indeed, the Supreme Court stated that "all the evidence" included all reliable evidence "whether it be *exculpatory scientific evidence*, trustworthy eyewitness accounts, or critical physical evidence." *Id.* at 324 (emphasis added). Consequently, the PCRA court must consider not only all the DNA results, but any exculpatory evidence developed from the DNA results, such as a DNA databank hit or a confession from the actual perpetrator. *See supra*, §§ VII.C.2 & 3, at 28-40 (discussing that DNA testing can lead to a DNA databank hit and confession from the actual perpetrator).

A cumulative assessment is also required to provide Conway an adequate vehicle to vindicate his limited liberty interest of developing evidence of his innocence. When the General Assembly enacted section 9543.1, it created a limited liberty interest for those prisoners who claimed they were innocent, yet needed another – more sophisticated – avenue to prove their innocence. In accordance with the Pennsylvania Constitution's due process clause, the Commonwealth – be it the prosecutor or the PCRA court – cannot arbitrarily deny a petitioner from vindicating his limited liberty interest in developing evidence of his innocence. To adequately vindicate this liberty interest, therefore, DNA results cannot be viewed as if in a vacuum, unable to interact with additional evidence, information, or technology that can easily and conclusively expose the true exculpatory value of the DNA results. If a cumulative assessment is not conducted by the PCRA

SB 589-Postconviction DNA Testing, March 26, 2001, at 2 (Statement of Michael Fisher, Pennsylvania Attorney General); *Testimony Before Senate Judiciary Committee*, SB 589-Postconvction DNA Testing, March 26, 2001, at 3 (Statement of Bruce Castor, Montgomery County District Attorney).

[125] *Accord House v. Bell*, 547 U.S. at 538 ("*Schlup* makes plain that the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'") (citation omitted).

court or this Court, Pennsylvania's post-conviction procedures are rendered fundamentally inadequate to vindicate Conway's limited liberty interest in developing evidence of his innocence, violating his due process rights under the Pennsylvania Constitution.

Judge Corso erred as a matter of law when he denied Conway's petition because he performed an item-by-item assessment, instead of a cumulative assessment. The following passage captures Judge Corso's flawed item-by-item assessment:

> The blood-stained paper towels were located in the store's restroom, thus any number of individuals could have come in contact with them prior to the incident. Similarly, the presence of a third party's DNA on the blood-stained items of clothing would prove only that some other person previously had come into contact with them. The presence of another person's DNA under Capitano's fingernails would not exclude the Defendant as the assailant. The presence of another person's DNA on the blue cloth would not prove the Defendant's actual innocence because there is no evidence to indicate where the cloth came. Prior testing of the rape kit items did not reveal the presence of any biological material. Accordingly, even if DNA from another person was detected on the items to be tested, the Defendant could not be exculpated without evidence as to how and when the DNA was deposited.

App. A, at 24-25.

All four of Conway's innocence theories required Judge Corso to evaluate the DNA results collectively, as well as any information developed as a consequence of the DNA results, such as a DNA databank hit or a confession. From Conway's perspective, if one or more of the four following scenarios occur, it is "more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. at 327: (1) a redundant DNA profile on two or more items of evidence; (2) a redundancy plus a DNA databank hit; (3) a DNA databank hit from a DNA profile recovered from a single item of evidence; and (4) a DNA databank hit plus a confession.

Judge Corso's opinion, however, never mentioned or considered how a redundant DNA profile on the paper towels, Capitano's clothing, and her fingernail scrapings would have likely impacted a reasonable and properly instructed jury. *See House v. Bell*, 547 U.S. at 538. Likewise, Judge Corso's opinion never mentioned or considered how a DNA databank hit and a confession from the actual perpetrator would have likely impacted a reasonable and properly instructed jury. Judge Corso erred and his error

rendered Pennsylvania's post-conviction procedures fundamentally inadequate to vindicate Conway's limited liberty interest of developing evidence of his innocence pursuant to section 9543.1. This Court should reverse Judge Corso's decision and grant Conway's petition.

E. Judge Corso Erred as a Matter of Law When He Denied Conway's Petition Because the Evidence He Seeks to Test Does Not Support His Conviction

Judge Corso denied Conway's petition, in part, because the evidence he sought to test did not impact the jury's decision to convict him: "Adding to the speculative nature of the Defendant's argument is the fact that the jury found him guilty despite being advised that the Commonwealth was not relying upon any of the physical evidence retrieved from Wooley's to link the Defendant to the crime." App. A, at 23. Judge Corso then referenced the stipulation that the trial judge read to the jury, informing the jury that no forensic evidence linked Conway to Capitano's murder. *See id.* (citing NT, Trial, 9/22/1987, at 373-74). He concluded by stating: "Since the items the Defendant seeks to have tested were not used or offered as evidence against him at trial, the Defendant's assertion that the presence of another person's DNA on them would prove his actual innocence is only speculation." *Id.* at 24.

Judge Corso erred.

1. Judge Corso Incorporated an Impediment into Section 9543.1 the General Assembly Did Not Intend

For all intents and purposes, Judge incorporated a "nexus" requirement into section 9543.1, requiring petitioners to establish that the evidence they seek to test was used by the Commonwealth during its case-in-chief and relied on by the jury when it voted to convict a petitioner. Judge Corso erred because statutes must be interpreted as is, and courts may not arbitrarily incorporate a limitation not intended by the General Assembly. *E.g., Commonwealth v. Rieck Inv. Corp.*, 213 A.2d 277, 282 (Pa. 1965) ("it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include."). When the General Assembly enacted section 9543.1, it did not incorporate a nexus requirement. Had the General Assembly intended such a requirement, it could have easily incorporated one into the statute. Furthermore,

as a "matter of statutory interpretation, although 'one is admonished to listen attentively to what a statute says[;][o]ne must also listen attentively to what it does not say.'" *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 788 A.2d 955, 962 (Pa. 2001) (citation omitted). Because the General Assembly omitted a "nexus" requirement from section 9543.1, it must be viewed as a purposeful exclusion. *E.g., Commonwealth v. Charles*, 411 A.2d 527, 530 (Pa. Super. 1979).[126] Thus, Judge Corso arbitrarily erected a barrier the General Assembly did not intend. As a result, this Court must reverse Judge Corso's decision and grant Conway's petition.

2. JUDGE CORSO'S MISCONCEPTION OF PROBATIVENESS AND DNA TECHNOLOGY'S POWER WILL LEAD TO ABSURD AND UNJUST RESULTS

It is evident from Judge Corso's opinion that he has a fundamental misconception of DNA technology's discriminatory potential and how this new technology can alter the probative value of old evidence, previously examined with antiquated or unsophisticated forensic technology. Judge Corso's misconception, more importantly, will lead to absurd results – i.e., innocent people languishing in prison because they can not adequately vindicate their limited liberty interest of developing evidence of their innocence.

As evidenced by his flawed opinion, Judge Corso is of the view that the probative value of an item of evidence – or several items of evidence – remains fixed for all eternity, even in the face of new scientific advancements. For instance, because the FBI's pre-trial rudimentary serology tests on the blue cloth, and Capitano's fingernail scrapings, lab coat, pantyhose, dress, and purse were inconclusive, *see* App. N, at 1-2, these items of evidence had minimal – if any – probative value in terms of identifying the actual perpetrator and exonerating Conway.[127] For instance, the inconclusive results

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[126] For instance, although a petition for DNA testing is considered a PCRA petition, *e.g., Williams v. Erie County District Attorney's Office,* 848 A.2d 967, 969 (Pa. Super. 2004), section 9543.1 "does not say" a petitioner must file his petition within one year of when the date judgment of sentence became final as required by 42 Pa.C.S.A. § 9545(b). The Superior Court panels that have interpreted the statute of limitations question have concluded that because the General Assembly did not incorporate section 9545(b)'s one-year statute of limitations requirement into section 9543.1, the General Assembly did not intend for section 9545(b)'s one-year statute of limitations to be applicable to section 9543.1. *E.g., Commonwealth v. Brooks*, 875 A.2d 1141, 1146 (Pa. Super. 2005); *Commonwealth v. McLaughlin,* 835 A.2d 747, 750 (Pa. Super. 2003); *Commonwealth v. Weeks,* 831 A.2d 1194, 1196 (Pa. Super. 2003).

[127] It must be emphasized that *prior to the FBI's testing*, each item of evidence had *the potential to yield* highly probative results because we know for a fact that the assailant manipulated (or handled) these items. The Commonwealth was well aware of this because it sent each item of evidence to the FBI

prevented Conway from offering forensic evidence of third party guilt. *See Holmes v. South Carolina*, 547 U.S. 319 (2006). The important factor to keep in mind, however, is that the probative value of these items of evidence is directly proportional to the sensitivity and discriminatory potential of the pre-trial forensic technology used by the FBI laboratory. Conventional serology tests are not very sensitive because they require large samples to produce reliable and valid results. The FBI's pre-trial serology tests, therefore, could not determine if there were trace amounts of (male) epithelial (or skin) cells on the blue cloth and Capitano's lab coat, pantyhose, dress, and purse. Likewise, the FBI's pre-trial serology tests could not determine if there were trace amounts of (male) epithelial cells underneath Capitano's fingernail scrapings. Consequently, because the FBI's pre-trial serology tests were not very sensitive, they failed to produce probative evidence that could identify the assailant and exonerate Conway.

Contrary to Judge Corso's opinion, however, the probative value of evidence does not remain fixed throughout perpetuity. Instead, probativeness is *dynamic* or *fluid* concept that can change as technology advances. Indeed, advanced technology – such as modern DNA testing – can reveal new, previously undetected information about old evidence that can fundamentally alter the incriminatory or exculpatory value (or probativeness) of the old evidence. Indeed, the Court need only examine the DNA exoneration cases to appreciate the fluid nature of probativeness and how modern DNA testing can give new meaning and importance to old evidence once deemed insignificant and non-probative when tested with antiquated forensic technology.

Of the first 200 DNA exonerations, prosecutors presented forensic evidence in only 116 cases. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 81 (2008). Thus, prosecutors did not introduce physical evidence or forensic results in 84 convictions because pre-trial forensic results were inconclusive. Relying on Judge's Corso's misguided conception of probativeness, these 84 prisoners would not have received DNA testing because the jury's verdict and the State's case did not rely on any

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laboratory with the hopes of producing forensic evidence that could identify the assailant. As mentioned, had the Commonwealth truly believed that these items of evidence lacked any probative value whatsoever, it would have never sent the items of evidence to the FBI laboratory because to do so would have wasted precious tax-payer dollars. The potential to yield probative results from these items of evidence has not changed over the past twenty-three years. What has changed, however, are DNA technology and its ability to identify evidence that was once undetectable with antiquated forensic technology, such as conventional serology tests.

physical evidence or forensic results. These 84 prisoners, however, were ultimately exonerated when the so-called *non-probative* physical evidence was re-tested with modern DNA testing years after the prisoner's trial. In each case, modern DNA testing revealed new, previously undetected genetic information from the old evidence, fundamentally altering the incriminatory and exculpatory value of the evidence. *See, e.g., Dist. Attorney's Office for the Third Judicial Dist., v. Osborne*, 129 S.Ct. 2308, 2316 (2009) ("Modern DNA testing can provide powerful *new evidence unlike anything known before*... It is now often possible to determine whether a biological tissue matches a suspect with near certainty.") (emphasis added). Evidence once deemed irrelevant or non-probative when examined with antiquated or rudimentary forensic technology, now represented extremely probative evidence for both the Commonwealth and the prisoner; probative for the Commonwealth because it provided the true assailant's genetic identity and probative for the prisoner because it conclusively proved his actual innocence. Given DNA testing's extraordinary ability to transform the probative value of old evidence, exposing its true incriminatory and exculpatory nature, it is unsurprising that the National Institute of Justice urged prosecutors to seek DNA testing where pre-trial serology results were inconclusive. *See* NAT'L INST. OF JUST., DEP'T OF JUST., POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 40 (Sept. 1999) ("[W]here serology at the time was inconclusive... and new, more discriminating tests are now available, the prosecutor should order DNA testing.").[128]

Similarly, Judge Corso's reasoning undermines the fundamental argument in favor of cold case squads. For instance, the National Institute of Justice made the following comment regarding the use of DNA testing to solve cold cases:

> Just as evidence collected from a crime that occurred yesterday can be analyzed for DNA, today evidence from an old rape kit, bloody shirt, or stained bedclothes may contain a valuable DNA profile. These new analysis techniques, in combination with an evolving database system,

[128] As the DNA exoneration cases makes clear, Judge Corso's ruling would lead to absurd and unjust results. For instance, a prisoner whose conviction is based entirely on eyewitness testimony, a confession, or both, would be prohibited from testing the so-called non-probative or inconclusive evidence collected at the scene or from the victim. If this were the case, countless innocent men would still be languishing in prison for a crime (or crimes) they did not commit because numerous DNA exonerations involve early 1980s convictions that relied entirely on eyewitness testimony, a confession, or both. *See* www.innocenceproject.org (last visited August 31, 2009).

make a powerful argument for the reevaluation of unsolved crimes for potential DNA evidence.

NAT'L INST. OF JUST., DEP'T OF JUST., USING DNA TO SOLVE COLD CASES 3 (July 2002) (emphasis added); *accord* PRESIDENT'S DNA INITIATIVE, *Solving Crimes*, at www.dna.gov/solving-crimes ("DNA is also a powerful tool because when biological evidence from crime scenes is collected and stored properly, forensically valuable DNA can be found on evidence that may be decades old. Therefore, old cases that were *previously thought unsolvable may contain valuable DNA evidence capable of identifying the perpetrator.*") (emphasis added) (last visited September 4, 2009). Many cold case investigations involve re-evaluating old evidence – previously examined with antiquated or unsophisticated forensic technology – with modern DNA technology that is more sensitive and discriminatory.[129] If law enforcement relied on Judge Corso's distorted view of probativeness – and science for that matter – these cases, as well as many others, would not have been solved. This would have allowed the perpetrator to escape punishment and prevented the victim from obtaining justice and closure. *E.g.*, *Dist. Attorney's Office for the Third Judicial Dist., v. Osborne*, 129 S.Ct. at 2337 (Stevens, J., dissenting) ("Crime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes."); Nancy Ritter, *Postconviction DNA Testing Is at Core of Major NIJ Initiatives*, NIJ Journal No. 262, at www.ojp.usdoj.gov/nij/journals/262/postconviction.htm ("Wrongful convictions are also a public safety issue because when the innocent are convicted, the guilty remain free to commit other crimes.").

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[129] *See, e.g.,* Rosailo Ahumada, *Suspect Identified in 1976 Killing in Modesto*, MODESTO BEE, Feb. 4, 2009; Tom Jackman, *Cold Hit Solves 1979 Virginia Murder, But Suspect Is Dead; Victim Of Hit And Run In 1995; Car And Driver Never Identified*, WASH. POST, January 28, 2009; Scott McCabe, *Recent Cold Hit Solves 1982 Maryland Rape-Murder; DNA Matched To Man Serving Life Sentence For Murder But Died Of Cancer In 2007 At Age 66*, D.C. EXAMINER, Feb. 2, 2009; Mary Beth Lane, *Cold Hit Results in Prison Sentence For 1989 Ohio Rape-Homicide*, COLUMBUS DISPATCH, Jan. 26, 2009; Richard Winton, *Cold Hit Results In Arrest For 1990 Los Angeles Rape-Murder Of 82-Year-Old Woman*, L.A. TIMES, Jan. 13, 2009; Jim Steinberg, *Cold Hit Solves 1977 California Murder; Suspect Already Serving State Prison Sentence For Unrelated 1993 Robbery*, FRESNO BEE, Dec. 24, 2008; Maria Cramer, *Cold Hit Results In Arrest for 1984 Boston Rape-Murder*, BOSTON GLOBE, Dec. 3, 2008; Bill McKelway, *DNA Cold Hit Lead to Arrest in 1974 Rape in Henrico*, RICHMOND TIMES-DISPATCH, Oct. 14, 2008; Frank Green, *DNA Connects Virginia Prisoner To 2 Murders And 2 Rapes That Occurred 25 Years Ago*, RICHMOND TIMES-DISPATCH, Oct. 7, 2008; Moises Mendoza, *30-year-old Des Moines Murder Case May Be Solved*, SEATTLE POST-INTELLIGENCER, Aug. 13, 2008; Gerry Smith, *Train Conductor Held in 1981 Strangling of Young Aurora Woman*, CHI. TRIB., Aug. 2, 2008; *DNA Links Inmate to '80 Rape*, BALT. SUN, July 22, 2008.

In short, the reliance on cold case squads specifically – and DNA testing generally – represents yet another example where the criminal justice system has turned to scientific advancements to improve law enforcement investigations and the criminal process so that the guilty, the innocent, and the wrongly convicted are (correctly) identified, apprehended, or released quickly and efficiently. *See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S.Ct. at 2312 ("DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices."); *id.* at 2323 ("DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already."); *Withrow v. Williams*, 507 U.S. 680, 696 (1993) (Souter, J., concurring) (noting that "law enforcement has grown in constitutional as well as *technological sophistication*" since the U.S. Supreme Court decided *Miranda v. Arizona*) (emphasis added); *Arizona v. Youngblood*, 488 U.S. 51, 70 (1988) (Blackmun, J., dissenting) ("As technology develops, the potential for... [forensic] evidence to provide conclusive results on any number of questions will increase."); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (commenting that "fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions").

As the cold case success stories and the DNA exonerations make clear, modern DNA testing can transform the probative value of the evidence Conway seeks to test by producing new scientific evidence that irrefutably identifies Capitano's actual murderer and conclusively exonerates Conway. *See* App. B, at 24-34. Consequently, the Court must vacate Judge Corso's decision and grant Conway's petition.

F. Judge Corso's Finding that the Evidence May Be Contaminated is Not Supported by the Record and Will Lead to Absurd and Unjust Results

Judge Corso denied Conway's petition, in part, because he found that the evidence *might be* contaminated: "In considering the Defendant's claims, it must be noted that any number of individuals *could have come* into contact with the requested items, thereby contaminating them. As such, a review of the items sought to be tested cannot demonstrate that the presence of another person's DNA would prove the

Defendant's actual innocence." App. A, at 24 (emphasis added). Judge Corso's ruling is not supported by the record and will lead to absurd results.

Pursuant to section 9543.1(d)(1)(ii), a PCRA court may grant a petitioner's DNA testing request if 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." 42 Pa.C.S. § 9543.1(d)(1)(ii). Thus, before a PCRA court can deny testing pursuant to subsection (d)(1)(ii), it must make a factual finding – *supported by the record* – that there was an inadequate chain of custody resulting in the evidence being materially altered. The record in Conway's case does not – and cannot – support such a finding.

As pled in his petition, *see* App. B, at 34-36, Conway identified the chain of custody with respect to the evidence he seeks to test.[130] Dr. Fillinger conducted Capitano's autopsy on September 25, 1986 and collected vaginal, oral, and rectal swabs, a blood sample from her, and combings and an adhesive lift from her pubic region.[131] Dr. Fillinger transferred this evidence to Detective Durante.[132] On September 25, 1986, Detective Durante collected all of the evidence and fingerprints lifted from the crime scene, including Capitano's fingernail clippings.[133] On September 26, 1986, he also collected hair, blood, and saliva samples from Conway, as well as his clothing.

On September 19, 1986, Detective Durante sent the evidence to the FBI laboratory,[134] which tested the evidence and issued reports on November 21, 1986; December 5, 1986; December 31, 1986, January 7, 1987; August 12, 1987; and August 20, 1987.[135] Each report concluded with a statement that the evidence would be returned to the Montgomery County District Attorney's Office. The FBI returned the evidence to

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[130] Chain of custody "is an indirect method of proving the identity and integrity of evidence by showing its continuous whereabouts." *Commonwealth v. Briggs*, Case No. CP-08-CR-0000348-2004, 2005 WL 4309071 (Common Pleas Ct., Bradford Co., Oct. 12, 2005). Like the Commonwealth, Conway was not required to establish "the sanctity of the evidence beyond a moral certainty." *Commonwealth v. Bennett*, 827 A.2d 469, 481 (Pa. Super. 2003) (citation omitted). Similarly, Conway was not required to identify "every person who came into contact with evidence, nor must every possibility of tampering be eliminated; it is sufficient that evidence, direct or circumstantial, establishes a reasonable inference that identity and condition of the exhibit remained unimpaired" until delivered to its current place of storage. *Commonwealth v. Williams*, 565 A.2d 160, 171 (Pa. Super. 1989). Finally, "physical evidence may be properly admitted [and/or subjected to post-conviction DNA testing] despite gaps in testimony regarding its custody." *Commonwealth v. Hudson*, 414 A.2d 1381, 1387 (Pa. 1980).

[131] NT, Trial, 9/21/87, at 67, 69.

[132] *Id.* at 56, 309.

[133] *Id.* at 302; Apps. K, R.

[134] App. K.

[135] Apps. L-N.

the Commonwealth because the Commonwealth introduced various items of evidence at trial. Moreover, shortly before the March 5, 2009 hearing, the Commonwealth informed Judge Corso and Conway that the Montgomery County Detective Bureau had all the evidence Conway wanted to test. Importantly, none of the pre-trial evidence collection and submission reports, pre-trial testing reports, or post-conviction preservation reports mentions a single word about contamination. *See* Apps. K, L, M, N, R.

In its Answer opposing Conway's petition, the Commonwealth *speculated* that the evidence *may have been* contaminated: "[A]ll the... requested items were handled by the police during the investigation, tested by the FBI, and held in storage for many years since the crime. This long-history further expands the *possibilities* for third-party contamination." App. C, at 15 (emphasis added). This passage constitutes a "judicial admission" that the Commonwealth has no clue – or proof – whatsoever whether the evidence is in fact contaminated or materially altered. Indeed, the term "*possibilities*" unequivocally demonstrates that the Commonwealth lacks conclusive evidentiary proof that the evidence is in fact contaminated or has been materially altered.[136] Had the Commonwealth possessed conclusive proof of contamination or proof that the evidence had been materially altered, it surely would have incorporated this proof into its Answer or presented such proof at the March 5, 2009 hearing – it did neither.

Pursuant to the judicial admission doctrine, the Commonwealth's admission is conclusive and the Commonwealth is bound to the admission in subsequent litigation – i.e., this appeal. *See Steinhouse v. Herman Miller, Inc.*, 661 A.2d 1379, 1382 (Pa. Super. 1995) (holding that averments by a party in the pleadings "constitute binding judicial admissions, conclusive in their nature insofar as their effect is confined to the case in which they are filed."). More importantly, the Commonwealth's admission relieves Conway of any burden of having to prove that the evidence is *not* contaminated or *has not* been materially altered, *see Reeder v. W.C.A.B. (Mercer Lime and Stone Co.),* 871 A.2d 337, 340 (Pa. Commw. Ct. 2005) ("A judicial admission is a formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it.") (citing BLACK'S LAW DICTIONARY 51 (8th

[136] The Collaborative International Dictionary of English, for instance, provides the following definition for the word *possibilities*: "a thing or event that may not happen." http://define.com/possibilities (last visited September 1, 2009).

ed.2004)), because the Commonwealth's own admission dispositively establish that the evidence has not been contaminated or materially altered.

Despite the Commonwealth's admission, Judge Corso still found merit in the Commonwealth's speculative contamination argument. Judge Corso's ruling is more than ironic – it is hypocritical. Judge Corso criticized Conway's innocence arguments for "depend[ing] upon assumptions for which there is no evidence in the trial record[.]" App. A, at 22. Remarkably, though, Judge Corso's contamination argument suffers from the same fundamental defect – it is purely speculative because there is nothing in the record establishing that the evidence is contaminated or has been materially altered.[137] Indeed, Judge Corso acknowledged this very point when he wrote that "any number of individuals *could have come into contact* with the requested items[.]" App. A, at 24 (emphasis added). If something "could have" occurred it also means that the same something "could *not* have" occurred. This passage, therefore, represents an *argument* and not a *finding of fact* supported by the record. Had Judge Corso rendered a finding of fact, he would (and should) have cited to the appropriate documents in the record that support his finding. Judge Corso could not cite to the record because the Commonwealth did not present an iota of evidence establishing that the pre-trial collection and submission of the evidence, the pre-trial testing, or the post-conviction preservation contaminated or materially altered the evidence.

Judge Corso's and the Commonwealth's reasoning would also produce absurd and unjust results. Indeed, the Commonwealth could rarely crack old, unsolved cases with modern DNA testing where police collected and handled the evidence, a crime lab tested the evidence, and the evidence sat in storage for years. More importantly, Judge Corso's reasoning would effectively prevent prisoners from pursing DNA testing. In all 242 DNA exonerations to date, the "police handled" the evidence (because somebody had to collect the evidence from the crime scene), a law enforcement crime lab "tested" the evidence, and the evidence "was held in storage for many years" before the prisoner obtained DNA testing. *See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S.Ct. at 2336 n.7 (Stevens, J., dissenting).

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[137] By making this analogy, Conway is not conceding that his innocence arguments are speculative and not based on evidence in the record. To the contrary, his arguments are based entirely on evidence in the record. *See supra*, § VII.B, at 20-24.

Consequently, because Judge Corso's finding is not supported by the record this Court must vacate his decision and grant Conway's petition.

VIII. CONCLUSION AND PRAYER FOR RELIEF

Our criminal justice system is premised on the notion that fact-finders – be it the jury at trial or a PCRA judge during post-conviction proceedings – will be provided all reliable, valid, and admissible information needed to make accurate decisions regarding a defendant's culpability and sentence. As the U.S. Supreme Court wrote more than thirty-five years ago:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. *The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.* The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts[.]

United States v. Nixon, 418 U.S. 683, 709 (1974) (emphasis added); *accord United States v. Nobles*, 422 U.S. 225, 230 (1975). The criminal process's central purpose of discovering the truth, *see, e.g.*, *Portuondo v. Agard*, 529 U.S. 61, 73 (2000); *accord Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *United States v. Nobles*, 422 U.S. at 230, would be an unreal dream if fact-finders were forced to render life-altering decisions with an incomplete set of facts.

Conway's conviction – for all intents and purposes – is premised on "a partial or speculative presentation of the facts," *United States v. Nixon*, 418 U.S. at 709, because critical evidence has not been subjected to modern DNA testing. It is also premised on perhaps the most unreliable form of evidence that can be introduced at a criminal trial – jailhouse informant testimony. *See Banks v. Dretke*, 540 U.S. 668, 701 (2004) ("This Court has long recognized the 'serious questions of credibility' informers pose.") (citation omitted); *Hoffa v. United* States, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting) (noting that the incentives facing snitches result in "a serious potential for undermining the integrity of the truth-finding process in the federal courts."); *On Lee v. United States*, 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are dirty business' may raise serious questions of credibility.").

The record, however, is clear: Capitano's murderer manipulated, handled, or ripped several items of evidence, and in so doing he likely transferred his DNA to these items. The FBI laboratory tested these items and produced inconclusive results – i.e., the results did not incriminate or exculpate Conway. Thus, the jury was informed that the physical evidence was not critical (or probative) to the Commonwealth's case and to proving Conway's innocence.

The FBI laboratory's antiquated and rudimentary forensic technology, however, lacked the sensitivity and discriminatory potential to determine whether there was a redundant male DNA profile on two or more of these items of evidence. Thus, the FBI laboratory's rudimentary and antiquated forensic testing left unanswered a critical question that would have unquestionably affected the jury's guilt-innocence determination. Modern DNA testing, on the other hand, has the "unparalleled ability," *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S.Ct. at 2312, to reveal such information, immediately altering the probative value of the physical evidence by indisputably identifying Capitano's actual perpetrator and conclusively establishing Conway's actual innocence. Furthermore, CODIS provides yet another new technological avenue that can further enhance the incriminatory and exculpatory value of the DNA results. For instance, had the jury known that DNA testing produced a DNA profile that ultimately hit to a known or unknown offender once run through or uploaded into CODIS, no reasonable juror would have convicted Conway. The same holds true if Conway ultimately obtained a confession from the actual perpetrator. Consequently, because modern DNA testing can now answer the questions left unanswered by the FBI laboratory's antiquated forensic testing, the jury's decision to convict Conway is – for all practical purposes – premised on an incomplete set of facts.

When the General Assembly enacted section 9543.1 in 2002, it recognized that many convictions, particularly those from the 1980s, were premised on an incomplete set of facts because antiquated forensic technology did not have modern DNA technology's revolutionary capabilities. *See People v. Wesley*, 533 N.Y.S.2d 643, 644 (Cty. Ct. 1988) ("DNA Fingerprinting... will revolutionize the disposition of criminal cases."). The General Assembly, therefore, created a limited liberty interest for Pennsylvania prisoners so they may have the opportunity to potentially complete the incomplete with modern

DNA technology. *See Testimony Before Senate Judiciary Committee*, SB 589-Postconviction DNA Testing, March 26, 2001 (Opening Remarks of Senator Greenleaf) ("[T]hrough DNA science, mistakes can be prevented and injustices can be corrected."). Simply put, section 9543.1's limited liberty interest affords prisoners the opportunity to reveal "the truth." *Testimony Before Senate Judiciary Committee*, SB 589-Postconviction DNA Testing, March 26, 2001 (Remarks of Bruce Castor, [then] Montgomery County District Attorney) ("We [the Pennsylvania District Attorney's Association] believe the goal of [section 9543.1] must be *to determine the truth to free the innocent.*") (emphasis in original statement).

To exercise his limited liberty interest, and to gain access to the physical evidence for DNA testing, the prisoner must satisfy various requirements pursuant to section 9543.1(c)(3). Namely, he must present a *prima facie* case that the assailant's identity was at issue and that DNA testing can prove his actual innocence or – more specifically – that there is a reasonable likelihood DNA testing can produce exculpatory evidence establishing his actual innocence. Conway satisfied both requirements, identifying four testing scenarios that would establish his actual innocence. Importantly, Conway premised his testing scenarios (or theories of innocence) on evidence in the record and demonstrated how reasonably likely it was that one or more of these scenarios would occur. In so doing, Conway was entitled to DNA testing so he could, as Bruce Castor eloquently put it, "determine the truth."

Despite satisfying section 9543.1's statutory requirements, the Honorable Gerald Corso denied Conway the opportunity to discover the truth and to prove his innocence. In so doing, Judge Corso committed several factual and legal errors that prevented Conway from adequately vindicating the limited liberty interest – or substantive rights – afforded to him pursuant to section 9543.1. Indeed, Judge Corso made alleged findings of fact that have no factual basis in the record whatsoever, he arbitrarily imposed a nexus requirement into section 9543.1, misconstrued the power of DNA testing and how it can fundamentally alter the probative value of evidence, and failed to apply the appropriate legal standard when addressing the issue of whether DNA testing can prove Conway's actual innocence.

WHEREFORE, Conway respectfully requests this Court to reverse Judge Corso's decision and grant his section 9543.1 petition so he can pursue DNA testing and prove his actual innocence once and for all.

Respectfully submitted this the 16th day of September 2009.

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VERIFICATION

Steven F. Fairlie, Esq., and Craig M. Cooley, Esq. verify and certify that they are counsel for Robert Conway, Defendant/Appellant, in the foregoing matter and as such are authorized to make this verification

Mr. Fairlie and Mr. Cooley swear that the facts stated in the foregoing appeal/document are true and correct to the best of her knowledge, information and belief.

Dated: September 16, 2009

_____

Steven F. Fairlie, Esq.

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Craig M. Cooley, Esq.
ATTORNEYS FOR APPELLANT

CERTIFICATION OF SERVICE

I, Steven F. Fairlie, certify that I am on this the 16th day of September 2009, serving a copy of the appeal/document to:

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APPENDIX

Appendix A	PCRA Court's Opinion, Commonwealth v. Robert Conway, Case No. 2925, Entered June 11, 2009
Appendix B	Robert Conway's Post-Conviction DNA Testing Motion Pursuant to 42 Pa. C.S. § 9543.1, filed June 11, 2008
Appendix C	Commonwealth's Answer to Robert Conway's Post-Conviction DNA Testing Motion Pursuant to 42 Pa. C.S. § 9543.1, filed November 10, 2008
Appendix D	Robert Conway's Reply to Commonwealth's Answer, filed December 30, 2008
Appendix E	Court Order, entered October 22, 2008
Appendix F	Court Order, entered February 2, 2009
Appendix G	March 5, 2009 Post-Conviction DNA Hearing Transcripts, before the Honorable Gerald Corso
Appendix H	Court Order Denying Robert Conway's Motion for Post-Conviction DNA Testing Pursuant to 42 Pa. C.S. § 9543.1, entered May 5, 2009
Appendix I	Robert Conway's Notice of Appeal, filed May 14, 2009
Appendix J	Opinion Affirming Order Denying Robert Conway's Motion for Post-Conviction DNA Testing Pursuant to 42 Pa. C.S. § 9543.1, entered June 11, 2009
Appendix K	Letter to the FBI Laboratory, from John P. Durante & Oscar P. Vance, September 29, 1986
Appendix L	FBI Laboratory Receipt of Evidence Report, November 21, 1986
Appendix M	FBI Laboratory's Latent Fingerprint Report, December 31, 1986
Appendix N	FBI Laboratory's Serology Report, January 7, 1986
Appendix O	Robert J. Conway's Summary of Military Service, January 28, 1987

Appendix P	Montgomery County District Attorney's Office, Robert Conway's Tape Recorded Statement, September 25, 1986, at 12:17 pm
Appendix Q	Montgomery County District Attorney's Office, Ann Dawn Conway's Tape Recorded Statement, September 25, 1986, at 1:28 pm
Appendix R	Montgomery County Detectives Initial Crime Report, by Detective Cedric J. McKeever
Appendix S	Montgomery County District Attorney's Office, Anthony Fioravant's Tape Recorded Statement, June 8, 1987, at 10:47 am
Appendix T	Montgomery County Detectives Supplemental Report, by Detective Cedric J. McKeever, June 5, 1987
Appendix U	Montgomery County Detectives Supplemental Report, by Detective Cedric J. McKeever, August 13, 1987
Appendix V	FBI Laboratory's Serology Report, January 12, 1987