

**IN THE  
SUPERIOR COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

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**No. 1446**

**EDA**

**2009**

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**COMMONWEALTH**

**v.**

**ROBERT CONWAY  
(Appellant)**

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**BRIEF FOR APPELLANT**

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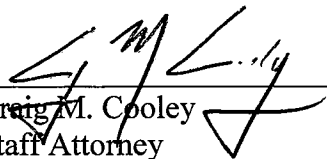
**Appeal from the Denial of Motion for DNA Testing Pursuit to 42 Pa. C.S. § 9543.1  
by the Honorable Gerald Corso of the Court of Common Pleas of Montgomery  
County, Pennsylvania, Criminal Division, No. 2925-87, entered June 11, 2009**

**ORAL ARGUMENT REQUESTED**

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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](http://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).<sup>1</sup>

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*

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<sup>1</sup> 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.”).<sup>2</sup>

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* §

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<sup>2</sup> *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 (Ct. 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](http://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](http://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).<sup>3</sup> When they arrived at Wooley's the front door was open – which was uncommon.<sup>4</sup> They searched inside the store and outside near her car, but could not find her.<sup>5</sup> 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.<sup>6</sup> He called Capitano's name, knocked on the bathroom door, pushed it open, and saw her feet and then her body.<sup>7</sup> 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.<sup>8</sup>

It was a bloody scene – with Capitano's feet near the bathroom door and her head jammed between two pipes next to the toilet.<sup>9</sup> Her assailant had forcefully tied her hands behind her back with a blue cloth.<sup>10</sup> The top of her blouse was ripped open, exposing her chest and approximately 25 stab wounds.<sup>11</sup> Her dress had been forcefully pushed up to her waist, while her pantyhose had been ripped open at the crotch.<sup>12</sup> There was blood in the sink, blood spatter on the walls and under the doorknob, and bloody paper towels in the corner.<sup>13</sup> 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.<sup>14</sup>

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<sup>3</sup> NT, Trial, 9/21/87, at 152-53, 154.

<sup>4</sup> *Id.* at 154.

<sup>5</sup> *Id.* at 155-56.

<sup>6</sup> *Id.* at 156, 157.

<sup>7</sup> *Id.* at 156.

<sup>8</sup> *Id.* at 159.

<sup>9</sup> *Id.* at 240, 269.

<sup>10</sup> *Id.* at 270.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 229-30, 272.

<sup>14</sup> *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.<sup>15</sup> 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.<sup>16</sup> Cause of death was stab wounds to the neck and trunk.<sup>17</sup> The number of stab wounds in the chest exceeded those through the dress, indicating the dress had been ripped open for at least part of the assault.<sup>18</sup> Dr. Fillinger said it was difficult to tell what kind of instrument was used, though some wounds suggested a single-edged blade.<sup>19</sup> 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.<sup>20</sup>

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

## 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.<sup>24</sup> 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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<sup>15</sup> *Id.* at 47.

<sup>16</sup> *Id.* at 53.

<sup>17</sup> *Id.* at 54, 62.

<sup>18</sup> *Id.* at 44.

<sup>19</sup> *Id.* at 55.

<sup>20</sup> *Id.* at 60.

<sup>21</sup> *Id.* at 66-67.

<sup>22</sup> *Id.* at 69.

<sup>23</sup> 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.

<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

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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<sup>25</sup> NT, Trial, 9/21/87, 16.

<sup>26</sup> *Id.* at 30-31.

<sup>27</sup> *Id.* at 28-29.

Capitano's property,<sup>28</sup> 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.<sup>29</sup>

## 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.<sup>30</sup> 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."<sup>31</sup> A mailman also testified that he saw Capitano alive and on the phone at approximately 10:41 a.m.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> The Commonwealth argued that the brevity of the timeline dictated that Conway must be Capitano's murderer.<sup>35</sup>

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<sup>28</sup> *Id.* at 31, 32, 36.

<sup>29</sup> NT, Trial, 9/23/87, at 612-16

<sup>30</sup> NT, Trial, 9/21/87, at 16; NT, Trial, 9/23/87, at 709.

<sup>31</sup> NT, Trial, 9/21/87, at 97.

<sup>32</sup> *Id.* at 111, 113.

<sup>33</sup> *Id.* at 152-53, 154.

<sup>34</sup> *Id.* at 212-13.

<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> Both sides also stipulated that none of the more than 30 fingerprints lifted from the scene came from Conway.<sup>39</sup> 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."<sup>40</sup> He thought it unusual to be so sweaty on a day that was not particularly warm.<sup>41</sup> Piccarreta's stepmother also described Conway as "sweaty."<sup>42</sup> 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.<sup>43</sup> Conway said he was perspiring due to the shock of what he saw as well as his

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<sup>36</sup> Apps. L-N.

<sup>37</sup> NT, Trial, 9/22/87, at 338-340.

<sup>38</sup> *Id.* at 373-74.

<sup>39</sup> *Id.* at 374; App. M.

<sup>40</sup> NT, Trial, 9/21/87, at 144.

<sup>41</sup> *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).

<sup>42</sup> *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.*

<sup>43</sup> NT, Trial, 9/22/87, at 382.

“force-march”<sup>44</sup> home to tell his wife what happened.<sup>45</sup> 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.<sup>46</sup>

The Commonwealth also argued that scratches on Conway’s arms proved his guilt, indicating that Capitano scratched him as he attacked her.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

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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<sup>44</sup> “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.

<sup>45</sup> NT, Trial 9/21/87, at 25.

<sup>46</sup> NT, Trial, 9/23/87, at 726.

<sup>47</sup> NT, Trial, 9/22/87, at 391.

<sup>48</sup> NT, Trial, 9/23/87, at 717.

<sup>49</sup> *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.

<sup>50</sup> *Id.* at 132, 144.

is the person who did the killing.”<sup>51</sup> Conway also told police (incorrectly) he thought Capitano’s feet were bound.<sup>52</sup>

**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.”<sup>53</sup>

Conway claimed, however, that he always carried his pocket knife and that he used it primarily for gardening.<sup>54</sup> Likewise, serology tests failed to identify human blood.<sup>55</sup> 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.<sup>56</sup>

**e. INFORMANT TESTIMONY**

The Commonwealth relied on testimony from a serial informant, Phillip Anthony Fioravanti.<sup>57</sup> On June 1, 1987, Fioravanti was placed next to Conway in the Montgomery County Prison’s medical department.<sup>58</sup> 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.<sup>59</sup>

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<sup>51</sup> NT, Trial, 9/23/87, at 720.

<sup>52</sup> 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.

<sup>53</sup> NT, Trial, 9/23/87, at 710.

<sup>54</sup> NT, Trial, 9/22/87, at 388.

<sup>55</sup> NT, Trial, 9/22/87, at 710.343.

<sup>56</sup> 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.

<sup>57</sup> *Id.* at 447; NT, Trial, 9/23/87, at 710.

<sup>58</sup> NT, Trial, 9/22/87, at 447, 485.

<sup>59</sup> *Id.* at 455; Apps. S-T.



