

IN THE  
SUPERIOR COURT OF PENNSYLVANIA  
WESTERN DISTRICT

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No. 1810  
No. 281

WDA  
WDA

2010  
2011

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COMMONWEALTH  
(Respondent-Appellee)

v.

JOHN KUNCO  
(Petitioner-Appellant)

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PETITIONER-APPELLANT'S OPENING BRIEF

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**Appeal from the Denial of Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et. seq.* and 42 Pa. C.S. § 9543.1 *et seq.* by the Honorable Rita Hathaway of the Court of Common Pleas of Westmoreland County, Pennsylvania, Criminal Division, No. 482 Crim. 1991, entered on October 28, 2010 and December 27, 2010**

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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 are the Orders by the Honorable Rita D. Hathaway, of the Court of Common Pleas of Westmoreland County, Pennsylvania, Criminal Division, Case No. 482 C 1991, entered on October 28, 2010 and December 27, 2010.

Kunco filed a timely notice of appeal regarding Judge Hathaway's October 28, 2010 order. The Court docketed the case, assigning it the following case number: No. 1810 WDA 2010.

Kunco filed a timely notice of appeal regarding Judge Hathaway's December 27, 2010 order. The Court docketed the case, assigning it the following case number: No. 281 WDA 2011.

On March 9, 2011, Kunco filed a *Motion to Consolidate* requesting that Case Nos. 1810 WDA 2010 and 281 WDA 2011 be consolidated because his constitutional claims are premised on the collective impact of the newly-discovered bite mark and DNA evidence.

On March 11, 2011, the Court granted Kunco's *Motion to Consolidate*.

## **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 post-conviction relief act. *See Commonwealth v. Heilman*, 867 A.2d 542, 544 (Pa. Super. 2005).

## **IV. Issue Presented**

1. Whether the PCRA court erred in concluding that Petitioner-Appellant, John Kunco, could have filed his newly-discovered evidence PCRA petition, *see* 42 Pa. C.S. §§ 9545(b)(1)(ii), as early as 2001, when the facts supporting Kunco's newly-discovered evidence claim are premised on the findings and conclusions made by the National Academy of Sciences in its February 2009 Report entitled *Strengthening Forensic Science in the United States: A Path Forward (NAS Report)*.

2. Whether the PCRA court erred in concluding that the *NAS Report's* findings and conclusions do not constitute the generally accepted view of the scientific community pursuant to *Commonwealth v. Topa*, 369 A.2d 1277 (Pa.1977) and its progeny.
3. Whether the PCRA court erred in concluding that the criticisms and opinions of a few bite mark experts can constitute the generally accepted view of the scientific community pursuant to *Commonwealth v. Topa*, 369 A.2d 1277 (Pa.1977) and its progeny.
4. Whether the PCRA court erred in concluding that Pennsylvania prisoners can file newly-discovered evidence PCRA petitions, pursuant to 42 Pa. C.S. §§ 9545(b)(1)(ii), with inadmissible scientific evidence that is not generally accepted by the scientific community.
5. Whether the PCRA court erred in concluding that the collective impact of the *NAS Report* and newly-discovered exculpatory DNA results would not have compelled a different outcome had Kunco been granted a new trial.
6. Whether the PCRA court erred by not reaching the following meritorious issues – all of which were raised in Kunco's *Petition for Writ of Habeas Corpus and For Collateral Review from Criminal Conviction Pursuant to the Post-Conviction Relief Act*, 42 Pa. C.S. § 9541 *et seq.* and his *Memorandum of Law in Support of Supplemental Petition for Post-Conviction Relief Based Upon Newly-Discovered DNA Evidence Pursuant to 42 Pa. C.S. § 9543.1 et seq. and Writ of Habeas Corpus*:
  - a. Whether the *NAS Report's* findings and conclusions regarding bite mark identification rendered Kunco's trial fundamentally unfair under state and federal law. *See* U.S. CONST. AMEND. VI, XIV; PA. CONST., Art. I, §§ 1, 9.
  - b. Whether the *NAS Report's* findings and conclusions regarding bite mark identification establish that the Commonwealth presented inherently suggestive identification evidence in violation of Kunco's clearly established state and federal constitutional rights. *See Neil v. Biggers*, 409 U.S. 188 (1972).
  - c. Whether the *NAS Report's* findings and conclusions regarding bite mark identification establish that the Commonwealth presented false evidence in violation of Kunco's clearly established state and federal constitutional rights. *See* U.S. CONST. AMENDS. VI, XIV; PA. CONST., Art. I, §§ 1, 9.

- d. Whether the *NAS Report's* findings and conclusions regarding bite mark identification establish that the Commonwealth knew, or should have known, that Drs. Sobel's and David's trial testimony was invalid, misleading, and grossly unreliable in violation of Kunco's clearly established state and federal constitutional rights. *See* U.S. CONST. AMENDS. VI, XIV; PA. CONST., Art. I, §§ 1.
- e. Whether the *NAS Report's* findings and conclusions regarding bite mark identification establish that Kunco's conviction violates his clearly-established state and federal constitutional rights to an impartial jury and to a jury verdict based solely upon properly-admitted evidence and argument that proves every element of an offense beyond a reasonable doubt. *See* U.S. CONST. AMENDS. VI, XIV; PA. CONST., Art. I, §§ 1, 9; *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).
- f. Whether the *NAS Report's* findings and conclusions regarding bite mark identification establish that Kunco's clearly established state and federal constitutional right to effective assistance of counsel was violated. *See* U.S. CONST. AMENDS. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); PA. CONST., Art. I, §§ 1, 9; *Commonwealth v. Pierce*, 786 A.2d 203, 213 (2001). Specifically, whether:
  - i. Trial counsel acted ineffectively by not filing a motion to exclude the bite mark evidence in light of Drs. Sobel's and David's pre-trial bite mark reports, and if so, whether trial counsel's ineffectiveness prejudiced Kunco.
  - ii. Trial counsel acted ineffectively by not retaining an independent bite mark expert to evaluate Drs. Sobel's and David's pre-trial bite mark reports and the bite mark evidence, and if so, whether trial counsel's ineffectiveness prejudiced Kunco.
  - iii. Trial counsel acted ineffectively by not objecting to Drs. Sobel's and David's trial testimony, and if so, whether trial counsel's ineffectiveness prejudiced Kunco.



- iv. Direct appeal counsel acted ineffectively by not raising these meritorious claims, and if so, whether direct appeal counsel's ineffectiveness prejudiced Kunco.

## V. Statement of the Case

As the United States Supreme Court noted in its landmark decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), "Scientific conclusions are subject to perpetual revision." *Id.* at 596-97. No other case proves this point more compellingly than John Kunco's case. The scientific community's understanding of bite mark identification has changed dramatically in the twenty years since Kunco's trial and conviction. In light of these dramatic changes, we now know that the bite mark testimony used to convict Kunco is not valid and no longer generally accepted by the scientific community. To protect the criminal justice system's integrity, and to maintain the public's confidence in the system, the Court must recognize and give significant credence to these new scientific developments. In so doing, the Court will immediately recognize that these new scientific developments undermine all confidence in Kunco's conviction warranting relief.

Kunco stands convicted of brutally raping Donna Seaman over an eight hour period on January 16, 1990. During the assault, the assailant shocked Seaman's vagina and anus with a lamp cord for nearly twenty minutes and bit the back of her left shoulder – leaving a noticeable bite mark. Seaman could not visually identify her assailant because he had immediately blindfolded her. Two days after her assault, however, Seaman told detectives that her assailant's voice sounded like that of Kunco – the former maintenance man at her apartment complex. Despite Seaman's voice identification, authorities did not immediately arrest Kunco.

The police finally arrested Kunco on January 26, 1991 – more than a month after Seaman's assault – when they learned that the bite mark on Seaman's shoulder could possibly be linked to him using bite mark identification.

Kunco asserted his innocence, claiming he was with his girlfriend and newborn child when the assault occurred. Investigators collected an abundance of physical evidence – none of which could be linked to Kunco via non-DNA forensic testing.

The Commonwealth's bite mark experts – Drs. Michael Sobel and Thomas David – examined the bite mark in May 1991 – *five months after* the bite was inflicted and the wound had healed. Despite the fact the bite mark was no longer visible under normal light conditions, Drs.

Sobel and David utilized a controversial and rarely used UV-lighting technique that allegedly re-exposed the bite mark's unique characteristics.. They then compared the UV-lighting photographs of the bite mark to Kunco's dentition and concluded that Kunco – and only he – could have inflicted the bite mark on Seaman's shoulder. In other words, Drs. Sobel and David *individualized* the unknown bite mark to Kunco to the exclusion of all other biters in the world.

At trial, the Commonwealth's premised its case on Drs. Sobel's and David's individualization testimony. Without the bite mark evidence, the Commonwealth had no case against Kunco – a point conceded by its own bite mark experts in a 1994 *Journal of Forensic Science (JFS)* article. In that article, Drs. Sobel and David wrote that the bite mark “was essential to establishing an evidentiary link between the victim and [Kunco]. Without this critical piece of evidence, it is unlikely that there would have been sufficient evidence to support a conviction for this vicious crime.” Thomas J. David & Michael N. Sobel, *Recapturing a Five-Month-Old Bite Mark by Means of Reflective Ultraviolet Photography*, 39 J. FORENSIC SCI. 1560, 1567 (1994).

Drs. Sobel's and David's individualization testimony influenced how the jury assessed and weighed Seaman's voice identification by conclusively resolving any doubts the jury may have had as to whether Seaman correctly identified her assailant's voice as that of Kunco. Their testimony also destroyed Kunco's alibi defense and credibility. Not only was Kunco a rapist, he was a remorseless psychopath who forced his girlfriend, and the mother of his child, to testify falsely on his behalf.

That the jury convicted Kunco clearly indicates it found Drs. Sobel's and David's individualization testimony credible and critically important to the Commonwealth's case. More importantly, the jury's verdict means it interpreted their individualization testimony to stand for the following: (1) an individual's teeth and bite pattern are unique and remain unique throughout the course of his life; (2) when a perpetrator bites the victim's body, the unique characteristics of his teeth and bite pattern are transferred to the victim's body – regardless of the body part bitten; (3) the procedures utilized by qualified bite mark experts can accurately identify the unique teeth and bite pattern characteristics inflicted onto the victim's skin;<sup>1</sup> (4) the skin's natural healing

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<sup>1</sup> The following terms will be used interchangeably throughout the brief: bite mark expert, forensic dentist, and forensic odontologist. They all refer to the type of expert at issue in this case – i.e., a person who examines an unknown human bite mark and compares it to a suspect's dentition/bite pattern to determine whether the suspect inflicted the unknown bite mark.

process did not remove the unique teeth and bite pattern characteristics inflicted on Seaman's left shoulder on December 16, 1991; (5) the unique teeth and bite pattern characteristics inflicted on Seaman's left shoulder on December 16, 1991 can be accurately re-exposed five months after the assailant inflicted the bite mark; (6) there is a valid scientific basis for conclusively associating an unknown bite mark from human skin to a known biter to the exclusion of all other biters in the world; and (7) qualified bite mark experts are capable of accurately linking an unknown bite mark from human skin to the known biter to the exclusion of all other biters in the world.

In 1991, when Kunco was tried and convicted, the scientific community generally accepted the aforementioned premises – particularly the premise that qualified bite mark experts could individualize an unknown bite mark to a known biter. Science, however, is an evolving enterprise as it continually seeks to refine, modify, and expand a body of knowledge. It is therefore inevitable that certain theories or techniques that were once considered valid, reliable, or generally accepted by the scientific community, will fall to the wayside as additional research is conducted and new facts and information are developed. New scientific research, for instance, eventually invalidated such widely accepted forensic techniques as voice print identification, comparative bullet lead analysis, gunshot residue (GSR) testing, and burn pattern analysis. Bite mark identification – or the technique used to individualize an unknown bite mark to a known biter – can now be added to this list thanks to new research by the National Academy of Science.

Questions about bite mark identification's validity and reliability surfaced during the earlier part of this decade thanks to post-conviction DNA testing. There were several cases where forensic dentists individualized an unknown bite mark to a suspect, but subsequent DNA testing conclusively proved that the suspect could not have been the assailant – or for that matter – the individual who inflicted the bite mark. In light of these conclusive misidentifications, a *very small fraction* of the scientific community began re-evaluating whether there was adequate empirical data to support bite mark identification's four fundamental premises: (1) the dental features of the biting teeth are unique (uniqueness); (2) this uniqueness remains constant throughout a person's lifetime (permanency); (3) the unique dental features are transferred and recorded every time the person bites into an impressionable object, such as human skin (transferability); and (4) trained forensic dentists can accurately determine whether a mark or wound on a person's body is a human bite mark, and link the unknown human bite mark to the one and only person who could have inflicted the bite mark (examiner accuracy). *See* C. Michael

Bowers, *The Scientific Status of Bitemark Comparisons*, in DAVID L. FAIGMAN, ET AL., MODERN SCIENTIFIC EVIDENCE: FORENSICS 483 (2008).

This *very small group* of bite mark experts suggested that *none* of the four premises were adequately supported by empirical research, and that the dearth of research prevented forensic dentists from individualizing an unknown bite mark to a known biter or opining as to the likelihood of a coincidental match. Unfortunately, because only a *very small group* of bite mark experts endorsed this controversial opinion, their views and opinions were not generally accepted by the scientific community.

That the opinions of these very few bite mark experts were not generally accepted is significant – especially in a *Frye* state, like Pennsylvania, where the admissibility of scientific evidence hinges entirely on general acceptance. Because the scientific community did not generally accept the controversial opinions of these very few bite mark experts, Pennsylvania prisoners could not file newly-discovered evidence PCRA petitions based on their opinions. Newly-discovered evidence is evidence that is *admissible* in court; if it is not admissible, it is not evidence, and, therefore, cannot be considered newly-discovered evidence. In other words, a prisoner must present new *admissible facts* – not simply a few experts whose controversial opinions fall outside the generally accepted views of the scientific community.

In 2006, Congress directed the National Academy of Science (NAS) – the preeminent scientific organization in the United States – to evaluate the forensic science community, particularly the non-DNA forensic identification fields such as bite mark identification. Congress' directive to the NAS was in response to the rising number of wrongful convictions related to improper, erroneous, and unvalidated forensic science testimony, including misidentified bite marks. The NAS held public hearings and studied the non-DNA forensic identification fields for two years. In February 2009, the NAS published its findings in a report entitled *Strengthening Forensic Science in the United States: A Path Forward (NAS Report)*.

The *NAS Report* invalidated the four fundamental premises of bite mark identification when it concluded that: (1) there is no evidence of an existing scientific basis for identifying an individual to the exclusion of all others; (2) no thorough study has been conducted of large populations to establish the uniqueness of bite marks; (3) if a bite mark is compared to a dental cast, and the suspect providing the dental cast cannot be eliminated as a person who could have made the bite mark, there is no established science indicating what percentage of the population

or subgroup of the population could also have produced the bite mark; (4) bite mark examiners rarely undergo proficiency testing and the limited proficiency tests reveal a substantial error rate; and (5) the elasticity of the skin, the unevenness of the surface bite, and swelling and healing severely limit the validity of bite mark identification.

The *NAS Report* validated what the *very small minority* of bite mark experts had been preaching for nearly a decade – i.e., there is no scientific basis on which forensic dentists can individualize an unknown bite mark to a known biter. According to the *NAS Report*, the only forensic technique capable of individualization is nuclear DNA analysis. The *NAS Report*, therefore, represented a changing of the guards, where the minority view now represented the generally accepted view. Indeed, Pennsylvania courts, and courts across the country, have routinely held that where the NAS or National Research Council make findings of fact regarding a forensic technique, those factual findings constitute the generally accepted view of the scientific community.

Thus, the current and generally accepted view of the scientific community is that bite mark experts cannot individualize an unknown bite mark to a known biter to the exclusion of all other biters in the world. This is significant because Pennsylvania prisoners now have generally accepted and *admissible* evidence that can trigger 42 Pa. C.S. § 9545(b)(1)(ii)'s newly-discovered evidence exception. Kunco's initial newly-discovered evidence petition is premised entirely on the *NAS Report's* generally accepted findings and conclusions regarding bite mark identification.

The *NAS Report* invalidates Drs. Sobel's and David's individualization testimony, and, as a result, would likely compel a different outcome if Kunco is granted a new trial. To begin with, Drs. Sobel's and David's testimony is no longer admissible because individualization is not possible and not generally accepted by the scientific community. Moreover, as Drs. Sobel and David conceded in their 1994 *JFS* article, Kunco would likely not have been convicted without their individualization testimony.

Post-conviction DNA testing also undermines confidence in Kunco's conviction. In 1991, the Commonwealth did not perform pre-trial DNA testing. In 2009, however, a private DNA laboratory tested the lamp cord the assailant used and manipulated to shock Seaman's vagina and anus for twenty minutes. DNA testing identified two male DNA profiles – neither of which came from Kunco. Collectively, the *NAS Report* and DNA results prove that Kunco is

entitled to a new trial because this evidence is of such a nature and character that a different verdict would likely result if Kunco is granted a new trial.

## **VI. Statement of Facts**

### **A. The Offense**

On December 16, 1990, at approximately 5:00 a.m., Donna Seaman awoke to find a man standing in her bedroom.<sup>2</sup> Because she is blind in one eye and farsighted in the other, she was unable to get a good look at the man.<sup>3</sup> The man told her to be quiet and told her she was going to have “the fuckin’ day of [her] life.”<sup>4</sup> The man sexually assaulted her for several hours, during which time he bit the back of her left shoulder – leaving a visible bite mark.

The assailant also removed the electric cord from her bedroom lamp, exposed the wires from the cord, pushed them together to create an electrical current, and forced the wires inside Seaman’s vagina and anus electrocuting her. Seaman stated he electrocuted her for approximately twenty minutes and that he did not wear gloves while doing so.<sup>5</sup>

### **B. Investigation**

#### **1. Voice Identification**

Seaman said her assailant spoke with a lisp.<sup>6</sup> Two days after her assault, while still recovering in the hospital, Detective Dlubak interviewed Seaman. During his interview, Dlubak impersonated a person who spoke with a lisp. When Seaman heard Dlubak’s voice impersonation, she said the voice sounded like that of the former maintenance man at her apartment complex – John Kunco. Kunco, she said, spoke with a lisp. Detective Dlubak made the following entries in his police report:

**December 18, 1990, 11:30 a.m.**: victim reinterviewed at Hospital indicated actor’s voice is deep and speaks with lisp... Victim identifies the ex-maintenance man as the person who attacked, tortured and raped her by the distinct voice and lisp that she had heard before when the actor worked at the apartment building.

**January 22, 1991**, [no time] [reporting officer] spoke with Matt Huet landlord and former employer of Kunco. Mr. Huet stated that Mr. Kunco speaks with a notable lisp.

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<sup>2</sup> NT, Trial, at 57-58.

<sup>3</sup> *Id.* at 87

<sup>4</sup> *Id.* at 58

<sup>5</sup> *Id.* at 68, 324-325.

<sup>6</sup> *Id.* at 58, 79.

At the preliminary hearing, Seaman testified she did *not* immediately identify Kunco, but instead identified his voice two days after her assault when Detective Dlubak interviewed her at the hospital:

Q: And from what you are saying is at that time you didn't indicate to them [the police]... you didn't indicate your suspicion of Mr. Kunco at that time [immediately after the rape]?

A: No.

Q: And it wasn't until later when Detective Dlubak came to your hospital bed and imitated a slurred lispng speech?

A: Yes.

Q: And that sounded like the person that attacked you?

A: Right.

Q: So, as far as that's concerned you made your identification based partly on what, on this voice that Sergeant Dlubak imitated for you?

A: Yes.

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Q: So, your identification then was only made known to the police after Sergeant Dlubak came in and talked to you and imitated that slurred speech?

A: (Nods head affirmatively).

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Q: How long after this took place did Detective Dlubak come in to talk to you in the hospital when he slurred his speech for you and you said I –

A: About two days later.<sup>7</sup>

A statement by Wayne Gongaware, the prosecutor, immediately following the preliminary hearing, confirms that Seaman did not immediately identify Kunco as her assailant.

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<sup>7</sup> NT, Prem. Hrg., at 38-39, 49.

On February 9, 1991, the *Valley News Dispatch* quoted Gongaware as stating: “It’s no wonder the victim didn’t make the identification immediately.”<sup>8</sup>

Moreover, several police officers, who rushed to Seaman’s apartment shortly after she contacted the police, drafted police reports that did not include a single reference indicating that Seaman recognized her assailant’s voice as that of Kunco.

Once Seaman suggested that her assailant’s voice sounded like Kunco, he became the only suspect the New Kensington Police focused on.

## **2. Physical Evidence**

The police transported Seaman to the hospital where medical personnel performed a rape examination and collected rape kit samples that included pulled and combed head and pubic hairs, vaginal slides and swabs, and fingernail scraping.<sup>9</sup> Medical personnel turned over the evidence to the New Kensington Police Department (NKPD), which submitted it to the Pennsylvania State Police (PSP) Greensburg Regional Crime Laboratory.<sup>10</sup> Investigators also collected more than thirty pieces of physical evidence from Seaman’s apartment that they submitted to the PSP crime laboratory,<sup>11</sup> including red hairs collected from the bed sheet on the bed where much of the assault occurred and the lamp cord the assailant used to shock Seaman’s vagina and anus.

The PSP crime laboratory performed rudimentary serological tests on the rape kit items that did not detect semen or sperm.<sup>12</sup> The pubic and head hairs collected from Seaman were consistent with her hair samples.<sup>13</sup> The fingernail scrapings revealed human blood consistent with Seaman’s blood.<sup>14</sup> For unknown reasons, the PSP crime laboratory did not test the lamp cord. In short, none of the physical evidence collected from Seaman could be linked to Kunco. None of the evidence, however, was subjected to DNA testing.

## **3. The Bite Mark**

Shortly after being transported to the hospital, medical personnel and the police noticed the bite mark on Seaman’s left shoulder. Cognizant of its potential forensic value, the police

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<sup>8</sup> The *Valley News Dispatch* article is part of Kunco’s *Third Amended Post Conviction Petition* filed on May 26, 1998. It can be located in the Appendix at A93.

<sup>9</sup> NT, Trial, at 344, 346-47.

<sup>10</sup> Exhibit 3.

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

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



photographed the bite mark, but in doing so they did not place reference scales next to the bite mark.

#### **4. Kunco is Arrested**

Despite Seaman's December 18, 1990 voice identification, authorities did not arrest Kunco until January 26, 1991 – more than a month after the assault. Kunco was not arrested until the prosecutor was informed that the bite mark on Seaman's left shoulder could possibly be linked to Kunco. Indeed, during his PCRA deposition, Detective Dlubak conceded that Kunco was not arrested until late January 1991 because the Westmoreland County District Attorney's Office was evaluating the bite mark evidence:

Q: ... Can you explain the reason for the delay in the arrest of Mr. Kunco?

A. ... I think at that time we concentrated on the picture of the bite mark and I think during that period we had the picture blown up 8 x 10 and I think I brought it over to the District Attorney's Office.

*See* NT, Det. Dlubak Dep., at 28. After reviewing the blown-up picture, the District Attorney's Office finally approved the arrest warrant. *See id.* at 29.

#### **5. The Commonwealth's Bite Mark Experts**

The Commonwealth retained Drs. Michael Sobel and Thomas David to evaluate the bite mark. When Drs. Sobel and David reviewed the photographs taken by the police, they informed the prosecutor that they could not use the photographs because they had no reference scale. In their 1994 *JFS* article Drs. Sobel and David explained why they could not make an identification without a reference scale:

This bite mark was photographed by law-enforcement officials. However, none of the photographs included a reference scale.... Subsequently, all evidence in the file was reviewed by the prosecutor. Dr. Sobel was then contacted and asked to examine the bite mark photograph obtained by the police. The prosecutor was informed that the photograph depicted a human bite mark, but because there was no reference scale, comparison with a potential suspect was not possible.

*David & Sobel*, at 1560.<sup>15</sup>

The lack of a reference scale, however, did not deter the Commonwealth. Instead, the prosecutor asked Drs. Sobel and David what could be done to adequately document the bite

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<sup>15</sup> The article is attached hereto as Ex. 4.

