IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN KUNCO **Petitioner-Plaintiff,**	)	
v.	)	**Case No. 2:10-cv-00115-RCM**
BRIAN V. COLEMEN, WARDEN **Defendant-Respondent**	)	

Amended Petition for Writ of Habeas Corpus

Petitioner, John Kunco, through his attorneys, Craig M. Cooley and David J. Millstein submits the following *Amended Petition for a Writ of Habeas Corpus*, pursuant to Article I, § 9 of the United States Constitution, the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, 28 U.S.C. § 2201 and § 2241 et seq., including 28 U.S.C. § 2254; and under Rule 11 of the Rules Governing Section 2254 Cases, and Rule 15 of the Federal Rules of Civil Procedure.

Kunco respectfully moves this Court for a writ of habeas corpus declaring unconstitutional and invalid his convictions and sentence imposed for involuntary deviate sexual intercourse by threat of forcible compulsion, rape by forcible compulsion, and aggravated assault causing bodily injury in the Common Pleas Court for Westmoreland County, Pennsylvania.

I. Statement of Jurisdiction

Kunco invokes this Court's jurisdiction pursuant to 28 U.S.C. § 2241 et seq., including 28 U.S.C. § 2254.

Kunco is currently serving a sentence of 45-90 years in the Commonwealth of Pennsylvania and resides at the State Correctional Facility in Fayette, Pennsylvania (SCI-Fayette).

SCI-Fayette's Superintendant is Brian V. Coleman.

II. Statement with Respect to Exhaustion

The legal and factual basis of all claims presented in the instant *Amended Petition for Writ of Habeas Corpus* have been fairly presented to the Pennsylvania state courts, including the Westmoreland County Common Pleas Court and the Pennsylvania Superior Court.

Pursuant to a Pennsylvania Supreme Court Order, an individual convicted of a crime in Pennsylvania need not lodge a discretionary appeal to that court in order to exhaust direct appeal rights; appeal to the Superior Court will suffice. *See In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000). Thus, Kunco did not have to fairly present his federal claims to the Pennsylvania Supreme Court to exhaust his state remedies.

III. Statement with Respect to the Adequacy of Pennsylvania's Procedural Default Rules

Pennsylvania's default rules are inadequate to prevent the Court from substantively considering the merits of any federal claims that the Pennsylvania state courts may have deemed defaulted or untimely.

IV. Procedural and Factual History

A. The Offense

On December 16, 1990, at approximately 5:00 a.m., Donna Seaman awoke to find a man standing in her bedroom.[1] Because she is blind in one eye and farsighted in the other, she was

[1] NT, Trial, at 57-58.

unable to get a good look at the man.[2] The man told her to be quiet and told her she was going to have "the fuckingest day of [her] life."[3] 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.[4]

B. Investigation

1. Voice Identification

Seaman said her assailant spoke with a lisp.[5] Two days after her assault, while still recovering in the hospital, New Kensington 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. 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.

[2] *Id*. at 87
[3] *Id*. at 58
[4] *Id*. at 68, 324-325.
[5] *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 lisping 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.
>
> * * *
>
> 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).
>
> * * *
>
> 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.[6]

A statement by Wayne Gongaware, the prosecutor, following the preliminary hearing, confirms that Seaman did not immediately identify Kunco as her assailant. On February 9, 1991,

[6] NT, Prem. Hrg., at 38-39, 49.

the *Valley News Dispatch* quoted Gongaware as stating: "It's no wonder the victim didn't make the identification immediately."[7]

Moreover, several police officers, who reported 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 pursued.

2. The 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 scrapings.[8] 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.[9] Investigators also collected more than thirty pieces of physical evidence from Seaman's apartment that they submitted to the PSP crime laboratory,[10] 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.[11] The pubic and head hairs collected from Seaman were consistent with her hair samples.[12] The fingernail scrapings revealed human blood consistent

[7] 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.
[8] NT, Trial, at 344, 346-47.
[9] Exhibit 1.
[10] *Id*.
[11] *Id*. at 4.
[12] *Id*.

with Seaman's blood.[13] 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 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 post-conviction deposition, Detective Dlubak acknowledged that Kunco was not arrested until January 26, 1991 – or shortly after the Westmoreland County District Attorney's Office evaluated a blown-up 8 x 10 photograph of the bite mark on Seaman's left shoulder:

> 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.

Ex. 2, at 28, 29 ("I just showed [the prosecutor] the picture and I says [sic], this is funny. I said, I wonder if we can do anything with this."). After reviewing the blown-up picture, the District Attorney's Office finally approved Kunco's arrest. *See id*. at 29.

[13] *Id.*

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.

Ex. 3, at 1560.

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 mark. Drs. Sobel and David explained the prosecutor's request and their response in their 1994 *JFS* article:

> Since the other forensic evidence gathered was inconclusive, the bite mark now became crucial to the case. The prosecutor inquired as to what could be done to properly document the bite mark. The authors related that a case involving similar circumstances had been presented at a scientific meeting. Based on this information, the prosecutor authorized an examination of the victim with ultraviolet light in an attempt to "retrieve" and properly document the bite mark in question, which was already 3 to 4 months old.

Id. at 1561.

On May 19, 1991, *five months after* the assailant inflicted the bite mark, Drs. Sobel and David re-examined Seaman's shoulder with a UV-light source. According to their reports and *JFS* article, their examination revealed "a significant injury pattern" that "depicted… a human

bite mark [that] could be compared with models of [Kunco's] teeth previously obtained by Dr. Sobel." *Id*. at 1561, 1562.

After comparing Kunco's bite pattern to the bite mark, Drs. Sobel and David opined that Kunco – and only he – could have inflicted the bite mark. For instance, in his July 8, 1991 report, Dr. Sobel concluded: "Within a reasonable medical certainty, the bite mark on the back shoulder area of Donna Seaman was made by the teeth of John Kunco." Ex. 4. Likewise, in his July 8, 1991 report, Dr. David concluded: "After careful consideration it is my opinion… to a reasonable degree of dental certainty that the bite mark found on the victim was produced by the teeth of John Kunco." Ex. 5.

C. The Late Disclosure of the Bite Mark Reports

The Commonwealth disclosed Drs. Sobel's and David's reports on the morning of July 9, 1991 – the *day before* trial was scheduled to start. Given the extremely short notice, trial counsel had the option of requesting a continuance to adequately review Drs. Sobel's and David's reports and the bite mark evidence, and then to possibly consult with and retain an independent bite mark expert. Shortly after receiving the reports, trial counsel informed the trial judge he would move for a continuance, but needed to consult with Kunco first. When trial counsel consulted with Kunco shortly thereafter, Kunco told him he wanted to exercise his speedy trial right and did not want a continuance. Subsequent to this conversation, the trial judge held a brief hearing to discuss Kunco's – and trial counsel's – decision to forgo a continuance and to proceed to trial. During the hearing, the following colloquy occurred:

> The Court: For the record, as I understand it, the defendant and defense counsel have just been advised because of the recent receipt of a dental mark, I guess, bite mark, on the victim which matches the defendant's teeth, and they are unusual teeth, and this report has been given to defense counsel, and defense counsel initially advised me that he felt that in light of the recent receipt of this

evidence, that he must have a continuance to review this material and perhaps even obtain an expert of your own; is that right?

Mr. Caruthers: That is correct, Your Honor.

The Court: And that you've discussed this with your client, and that he doesn't want to do that. He wants to proceed with a trial against your advice; is that right?

Mr. Caruthers: That is correct, Your Honor.[14]

Trial counsel had Kunco testify so he could inform him on the record that proceeding to trial would not be in his best interest. During the colloquy, trial counsel asked the following questions or made the following statements:

Mr. Caruthers: [O]ther than this dental evidence, there really isn't too much to identify you to the crime other than Ms. Seaman's voice identification of you; correct?

. . .

Mr. Caruthers: Now, John, you understand that these charges against you are very, very serious charges; correct?

. . .

Mr. Caruthers: So you understand that if you're convicted of these charges, you're going to very possibly go away for a long period of time?[15]

The trial judge made the following comments during the colloquy:

The Court: Mr. Kunco, [trial counsel's] trying to explain to you… that in light of the, pardon the expression, of *damning evidence or serious evidence against you, very grievous evidence against you*, that it is his opinion that this case should be continued *so that he can be better prepared to defend you*. . . But if you want do [go to trial], the jury's downstairs, I'm ready, the DA is ready and defense counsel is ready, *but this will be difficult for your counsel to defend such damning evidence or serious evidence as – in effect, this is like fingerprints, but in this case it's a bite mark which they say matches you*… So with that evidence, that is not a trivial matter, that's a very serious piece of evidence which defense counsel feels he should contest. . .[16]

[14] NT at 4-5.
[15] NT at 9.
[16] NT at 13-14 (emphasis added).

Despite the "grievous" evidence against Kunco, and the fact trial counsel had not adequately reviewed this evidence, trial counsel did not intervene and prevent Kunco from exercising his speedy trial right. Kunco, therefore, proceeded to trial with an attorney who: (1) had not reviewed the bite mark evidence; (2) had not retained an independent bite mark expert; and (3) allowed his uneducated client to make a significant legal decision that he was ill-equipped to make.

D. Trial

1. Commonwealth's Case

a. Bite Mark Evidence

The Commonwealth premised its case on the bite mark evidence. At trial, Dr. Sobel testified that:

> I could say that within a reasonable dental certainty, that the bite on the left back shoulder area of Donna Seaman *was in fact inflicted by the teeth of John Kunco* ... I felt comfortable about this decision because there were no inconsistencies that I could come up with at all and everything fit perfectly[.][17]

Dr. Sobel added that he had "no doubt" Kunco inflicted the bite mark and that, next to fingerprinting, "*[d]ental identification… is the most accurate form of identification of an individual*."[18] Dr. Sobel also stated that because

> dental identification is based on class and individual characteristics of an individual's teeth… I'd say we can be very certain that if all these characteristics match, *that it is uniquely related to an individual*. The size relationships, the shape of the teeth… the fractured portions of a tooth, the worn areas, all of these taken together create a fingerprint picture of the individual.[19]

The following colloquy with the prosecutor ended Dr. Sobel's direct examination testimony:

[17] NT at 187 (emphasis added).
[18] *Id*. at 188 (emphasis added).
[19] *Id*. at 188-89 (emphasis added).

> Prosecutor: Okay. And, again, your opinion is the bite mark originated where, Doctor?
>
> Dr. Sobel: The bite mark originated from the teeth of John Kunco.[20]

Dr. David also testified that he individualized the unknown bite mark to Kunco:

> It is my opinion, to a reasonable degree of dental certainty, that the mark in question is indeed a human bite mark. It is also my opinion, to a reasonable degree of dental certainty, that the bite mark was made by the teeth of the defendant, John Kunco.[21]

b. Voice Identification

Contrary to her preliminary hearing testimony, Seaman said she *immediately* informed Sgt. Charles Korman – the first NKPD officer at the scene – that she recognized her assailant's voice as that of Kunco.[22] On cross-examination, Seaman acknowledged that her trial testimony was inconsistent with her preliminary hearing testimony.[23] Korman corroborated Seaman's trial testimony, testifying that Seaman "immediately" identified Kunco once he arrived at her residence.[24]

Detective Frank Link testified that he assisted Korman at the crime scene. He also testified that it was critically important to document the assailant's identity in his police report – if the assailant's identity is known at the time.[25] Despite Korman's claim that Seaman immediately identified Kunco, Link conceded that his investigative report mentioned nothing about Seaman's voice identification.[26] Link also testified that when he interviewed Seaman at her home immediately after the incident, she identified the perpetrator only as a white male with

[20] *Id*. at 189.
[21] *Id*. at 265.
[22] *Id*. at 74-75.
[23] *Id*. at 95, 99.
[24] *Id*. at 111.
[25] *Id*. at 283.
[26] *Id*.

a dark jacket, ball cap, and either white pants or white hands. According to Detective Link, Seaman gave no indication that her assailant was Kunco.[27]

2. Kunco's Defense

Kunco proclaimed his innocence and presented an alibi defense.[28] He testified that he was at home with his long-time girlfriend, Robin Turner, and their newborn baby at the time of the attack.[29]

Turner also testified on Kunco's behalf and said she was certain that he was home at the time of the attack because they had a newborn baby who slept with them and she woke up every few hours to feed the baby.[30] She said Kunco was asleep in their bed each time she woke up to feed the baby.[31]

Trial counsel also argued that, because Turner was herself a rape victim, it was unlikely she would lie about Kunco's whereabouts to protect a rapist.[32]

3. Commonwealth's Closing Arguments

During closing arguments, the Commonwealth hammered home the bite mark evidence, arguing that it proved Kunco's guilt beyond a reasonable doubt because the bite mark identification was better than a fingerprint:

> [Defense counsel] mentioned we don't have hair samples that match. We don't have fingerprints. Now, ladies and gentlemen, what we have is better than hair samples or fingerprints. Because… if we had found a hair in the apartment that matched that of John Kunco, that could be explained. Mr. Kunco was a maintenance man. He had been in Mrs. Seaman's apartment. If we had a fingerprint of John Kunco that could be explained for the same reason…. But… there's no way, no way on this earth, for Mr. Kunco to explain how his tooth marks got on Donna Seaman's shoulder unless you accept the fact that he's the

[27] Id. at 283-285.

[28] During opening statements, trial counsel stated: "I'm going to tell you right now, Mr. Kunco maintains very strongly that it was not him, that he was home in bed with his girlfriend, Robin Turner, at the time." *Id*. at 44.

[29] *Id*.

[30] *Id*. at 401.

[31] *Id*. at 404.

[32] *Id*. at 441, 443-44.

> one who attacked and brutalized Mrs. Seaman. That's the only explanation… That's why the evidence is better than fingerprints or hair evidence.
> …
> [Defense counsel] attempted to attack Dr. David's [and Sobel's] credibility and techniques… [Dr. David] showed you measurements that he made… Dr. David told you that the defendant's teeth had numerous unique characteristics, one of which was that he was missing certain teeth in various places in his mouth…. Now, ladies and gentlemen, any one of these details wouldn't necessarily conclusively determine who made a bite mark. But I believe that what Dr. David and Dr. Sobel testified to was when you take all this evidence together, each one, taken together as a whole, shows, as Dr. Sobel testified, that the bite mark on Donna Seaman's shoulder was as good as a fingerprint. And I submit to you it was that, ladies and gentlemen, for all intents and purposes. Ladies and gentlemen, I'd submit to you that John Kunco should have just signed his name on Donna Seaman's back, because the bite mark on Donna Seaman's shoulder belongs to John Kunco.[33]

4. Verdict

On July 12, 1991, the jury convicted Kunco of involuntary deviate sexual intercourse by threat of forcible compulsion, rape by forcible compulsion, and aggravated assault causing bodily injury.[34]

5. Sentencing

A sentencing hearing was held on May 18, 1992, at which time Kunco testified and proclaimed his innocence:

> First of all, I wanted to say, Mrs. Seaman, I feel sorry for what happened to you. It bothers me to know we got police officers out who don't do their job. Whenever I say I am an innocent man, I am an innocent man. I did not do this. If it takes me one hundred twenty years to prove my innocence, I am going to do it. I work hard in life trying to make something out of myself. You know, just because I drank a little or got in an argument with my girlfriend, I end up in jail for something I didn't do. I know I wasn't the best man out there, but I am not capable of doing anything like this to anybody. I could never do this to anybody.
> …
> My son kids around with me once in a while on the phone, and he says he will steal a car to come and see me. It bothers me my daughter is out there without a father. It bothers my boys. Robin, it is tearing her apart just knowing I am sitting in jail for something I didn't do.

[33] NT at 455, 456.
[34] *Id*. at 504

NT, Sentencing Hrg., at 5-6.

Kunco's attorney, Anthony Marsili, also argued that Kunco had continually proclaimed his innocence:

> On behalf of my client, he asked me to tell the Court once again that he does have sympathy toward the victim, Mrs. Seaman, concerning the incident. Also that he does not mean to show disrespect to the Court in reference to any type of defense or defiant act concerning his continued position of innocence. He maintained that consistently throughout the charges being filed, the preliminary hearing, the trial itself, and all those post-trial motions and hearings.

Id. at 16.

Before sentencing Kunco, the trial judge made the following comment regarding the Commonwealth's "perseverance" in ultimately developing "identification" evidence that made up for the "lack of" evidence implicating Kunco:

> I first want to… commend the District Attorney's Office, Mr. Driscoll, and Wayne Gongaware particularly, for their *perseverance* in this case of coming forward at a time when the case, I guess, *lacked the proofs* that I eventually saw in obtaining a specialist in a new form of identification that I never seen before [sic], a man from George, and I commend the police. I guess it was his idea to attempt to match up a bite mark identification, and I guess it was God's province that your client had such terrible teeth that allowed not only a demonstration of identification I never seen before [sic], but some positive identification in light of the fact a number of factors, not just a bite mark identification, but the size of the bite mark, missing teeth, et. cetera.
>
> You were not here for the trial, Tony. You are the post-counsel after trial. But I must say for Mr. Kunco to come here before me today and still proclaim his innocence in light of the adjudication and basis, it is absurd and insulting to me. In light of what [I] seen in the trial, it demonstrated your client is the one that did this act.
>
> …
>
> For your client to sit there and say he is innocent of this crime is insulting. I seen the evidence [sic], and the evidence is actually the evidence in this case as the expert said, that this is a better identification than a fingerprint, and it truly was. It clearly showed your client was the one that did this atrocious, sadistic, unthinkable act.

Id. at 19-20, 22.

Due to Drs. Sobel's and David's individualization testimony, the trial judge had no doubt that Kunco was guilty of Seaman's assault: "If I ever tried a case in my courtroom, I don't have any question that this man has committed the crime in question. No question in my mind." *Id*. at 27.

The trial judge sentenced Kunco to 45-90 years in prison and ordered him to pay $980 in restitution to Seaman upon his release from prison.

E. Post-Trial Motions Requesting DNA Testing and Polygraph Testing

On February 2, 1992, before sentencing, Kunco filed a handwritten motion requesting DNA testing. *See* Ex. 6, at 1 ("[H]ere, and now come's [sic] John J. Kunco as petitioner… asking for a dna test [to be] done to the blood hair's [sic] and fingerprint that was found at 821 North Street, Dec. 16, 1990."). The trial court never issued a ruling regarding this DNA testing motion.

On October 24, 1992, after sentencing, Kunco filed a motion requesting that he be subject to a polygraph examination in order to prove his innocence,[35] which the trial court denied on October 27, 1992.[36]

In December 1992, after sentencing, Kunco filed another handwritten *Motion For Testing of Samples and Evidence Found at Sence [sic] at Defendant's Cost*.[37] In his *Motion For Testing*, Kunco attached an article entitled *Application of DNA Technology In Criminal Investigations* and requested DNA testing on several pieces of evidence.[38] On December 31, 1992, the trial judge denied Kunco's *Motion For Testing*, holding that his motion was "meritless on its face."[39]

[35] Ex. 7.
[36] Ex. 8.
[37] Ex. 9.
[38] The article is attached incorporated as part of Ex. 9.
[39] Ex. 10.

E. Direct Appeal

Kunco raised several claims on direct appeal, including an ineffectiveness claim, alleging that trial counsel prejudiced him when he failed to inform the trial judge and jury that the American Dental Association (ADA) did not recognize forensic odontology as a specialty:

> [A]ppellant states that trial counsel should have informed the court that the American Dental Association (ADA) does not recognize forensic odontology as a specialty nor does there exist board certification in that field. Appellant reasons that had the court been made aware of this, the experts may have been held incompetent to testify or, at least, the jury may not have accorded their testimony much weight.

Ex. 11, at 13. The trial court denied relief and the Pennsylvania Superior Court affirmed:

> We do not believe that had the court been made aware of the fact that the ADA does not recognize forensic odontology, the experts would have been permitted to testify. Our supreme court previously upheld the testimony of a forensic odontologist notwithstanding the lack of official acceptance by the ADA.

Id.

Thus, Kunco challenged Drs. Sobel's and David's *qualifications*, but not the validity of their individualization testimony.

Kunco filed a discretionary appeal to the Pennsylvania Supreme Court on August 6, 1993, which the Court denied on December 14, 1993 (cite unreported).

F. Drs. Sobel's and David's 1994 *Journal of Forensic Science* Article

In 1994. Drs. Sobel and David published an article in the *Journal of Forensic Science* (*JFS*) detailing their work and testimony in Kunco's case. In the article, Drs. Sobel and David provide the following background information regarding the lack of evidence implicating Kunco and their subsequent involvement:

> The crime scene was processed and although a great deal of forensic evidence was collected, comparison of crime-scene evidence with blood and hair samples from the suspect proved inconclusive.

> Subsequently, all evidence in the file was reviewed by the prosecutor. Dr. Sobel was then contacted and asked to examine that 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. *Since the other forensic evidence gather was inconclusive, the bite mark now became crucial to the case*.

Ex. 3, at 1560-61 (emphasis added).

Drs. Sobel and David described the manner in which they exposed and recaptured a faint image of the five-month-old bite mark, and how they individualized the bite mark to Kunco.

They then made the following comments regarding how their individualization testimony impacted the jury's deliberations: "This [individualization] evidence was presented to the jury at trial, *and after two hours of deliberations*, the jury returned a guilty verdict on all counts of a multiple indictment." *Id*. at 1562 (emphasis added).

Drs. Sobel and David ended their article with the following statement:

> The use of [UV] light examination… successfully 'recaptured' a five-month-old bite mark on a surviving rape victim. This documentation was *essential to establishing an evidentiary link between the victim and the suspect*. *Without this critical piece of evidence, it is unlikely that there would have been sufficient evidence to support a conviction for this vicious crime*.

Id. at 1562, 1567 (emphasis added).

G. Initial Post-Conviction Proceedings

1. PCRA Court

a. Bite Mark Evidence

In his *Third Amended Post Conviction Act Petition and Motion for New Trial*, which post-conviction counsel filed on July 21, 1997, Kunco challenged the UV-light technique Drs. Sobel and David used to expose and document the five-month-old bite mark:

> The trial court committed reversible error and prior counsel… was ineffective in failing to raise this error, when admitting the testimony of Drs. Sobel and David without proper determination of the acceptability in the scientific community of

> the *ultra-violet methodology* utilized by the Commonwealth's purported experts. In this regard, the lower court should have examined the effect such late "recapturing" of a bite wound would have on the ability of the experts to "match" the faded markings, with the necessary precision, to the Petitioner's teeth.
> …
>
> Moreover, it should have been obvious to the lower court, that the techniques used by Dr. Sobel in evaluating the Petitioner's dental impressions to out of scale photographs of a bite mark was not a technique which was generally accepted in the scientific community.

Ex. 12, at ¶¶122, 130. (emphasis added).

Kunco also presented evidence discrediting Dr. Michael West, the individual who developed the UV-lighting technique and taught Dr. David how to use the technique:

> Moreover, the "expert" upon whom the Commonwealth's experts relied in performing this "scientific technique" has been discredited as a fraud, creating voodoo evidence to earn convictions. This fabricator of evidence, Michael West, has been the subject of several documentaries and articles, one, the cover story of the American Bar Association Journal. Moreover, convictions have been overturned which relied upon his untrustworthy techniques.

Id. at ¶ 132; *see also id*. at ¶¶ 133-140. Finally, Kunco offered Dr. Gregory Golden at his first PCRA hearing, who testified that the UV-lighting technique was unreliable.

On March 20, 1997, post-conviction counsel deposed Detective William Dlubak, wherein Dlubak testified that the Westmoreland County District Attorney's Office did not arrest Kunco until the NKPD blew up the picture of the bite mark and presented the enlarged picture to the District Attorney's Office. *See* Ex. 2, at 27-28, 29 ("I just show [the prosecutor] the picture and I says [sic], this is funny. I said, I wonder if we can do anything with this.").

The PCRA court denied relief:

> This Court has received expert testimony from both the defense and the Commonwealth regarding the use of the ultraviolet photographs in this particular case and the manner in which they were used for comparison purposes. It appears from this testimony that the methods used for comparison were of the type that were approved, established, scientific techniques, although including the novel use of ultraviolet photographs. The taking of dental impressions and the use of

> one-to-one photographs of the bite mark used in this case are scientifically accepted procedures used in bite mark comparisons. The Pennsylvania Superior Court has determined that the area of wound mark comparison is scientifically recognized.

Ex. 13, at 13-14.

b. DNA Testing

On December 28, 1994, post-conviction counsel filed Kunco's *Amended Post Conviction Petition*, alleging that trial counsel was ineffective for failing to obtain pre-trial DNA testing. *See* Ex. 14, at ¶¶ 39-46.

On February 1, 1995, Kunco's post-conviction counsel filed a *Motion For Inspection and Testing*, requesting access to the following items of evidence so they may be subjected to post-conviction DNA testing:

> f.) All hair samples gathered at the scene, including but not limited to, hair removed from dining room table, hair taken from victim's cat, hair found on victim's panty girdle, hair found on carrot taken from victim's bed, hair found on victim's bed, red brown hair taken from the fitted bottom sheet and blanket of victim's bed, hair taken from victim and hair taken from… John Kunco.
> g.) All blood samples gather at the scene, including but not limited to, blood found on metal tongs, blood taken from kitchen sink, blood taken from the right of the rear kitchen door, blood taken from white hand towel, blood taken from steak knife, blood taken from cucumbers and carrots found in various places in victim's residence, blood taken from bathroom sink, blood taken from carpet, blood taken from toilet paper, blood taken from bed linens, blood taken from victim's robe, blood taken from victim's nightgown, blood taken from panty girdle, blood taken from pillows, blood taken from victim and blood taken from… John Kunco.
> h.) Toliet paper taken from roll in bathroom.
> i.) Blue and pink robe found at scene.
> j.) All bed linens removed from victim's bed including but not limited to top flat bed sheet, bottom fitted bed sheet, pillows and pillow case, comforter, mattress pad and blankets.
> k.) Blue nightgown and panty girdle.
> l.) All cucumbers and carrots removed from scene.
> m.) White extension cord, female end of white extension cord and four (4) pieces of white extension cord shavings.
> n.) Metal and cardboard hanger found on floor of bedroom.
> o.) All pieces of denture found in various areas of victim's residence and complete denture found under left side of bed.

p.) Steak knife found on kitchen table.
q.) Cucumber removed from the anus of the victim at Citizens General Hosptial, New Kensington, PA.
r.) White towel and white hand towel.
…
u.) Rape kit from victim[.]

Ex. 15, at ¶ 16.

On March 22, 1995, post-conviction counsel argued the *Motion For Inspection and Testing*, and the PCRA court ordered the District Attorney's Office to determine whether the NKPD or PSP had preserved the sought-after physical evidence and to disclose all documentation relating to the physical evidence.

On April 28, 1995, after receiving no information from the District Attorney's Office or the NKPD regarding the sought-after physical evidence, post-conviction counsel served a *Subpoena Duces Tecum* on the NKPD, requesting that a NKPD representative produce all NKPD reports regarding Seaman's assault as well as all chain-of-custody reports relating to the physical evidence; the subpoena indicated that all reports were to be served to post-conviction counsel by May 3, 1995. The NKPD ignored the subpoena.

On May 2, 1995, post-conviction counsel faxed a copy of her *Motion For Order To Require Access To Public Records And Require Disclosure of Existence of Evidence* to the District Attorney's Office, [40] which thoroughly explained her diligent efforts to obtain information from the District Attorney's Office and NKPD regarding the physical evidence. Post-conviction counsel requested the following relief:

> a. The [NKPD] to provide to Counsel information of the existence of the evidence gathered at the crime scene and further, instructing the preservation of such evidence should it exist.

[40] Ex. 16.

> b. The [NKPD] to make available for inspection the complete police file regarding the investigation of the assault of Donna Seaman on or about December 16, 1990, and to make such file available within 24 hours.

Ex. 16, at ¶¶ 11a., 11b.

Shortly after sending the fax, post-conviction counsel received a fax from Sgt. Korman stating that the NKPD possessed only one item of evidence – a bloody bed sheet.[41] The NKPD did not provide any NKPD reports to post-conviction counsel.

On May 10, 1995, after diligently trying to ascertain whether the NKPD still possessed the physical evidence, post-conviction counsel filed a *Motion For Order To Require Access To Public Records And Require Disclosure of Existence of Evidence*.

On June 13, 1995, the PCRA court ordered the NKPD to "make immediately available" to post-conviction counsel "any and all evidence logs or other documents relating to the storage, removal and/or destruction of physical evidence held by the New Kensington Police Department for the period December 16, 1990 through the present, inclusive." Ex. 18.

Pursuant to the PCRA court's June 13, 1995 Order, post-conviction counsel sent Assistant District Attorney (ADA) Wayne Gongaware a letter on June 28, 1995, confirming the date of July 3, 1995 as when they would meet at the NKPD to inspect the NKPD's evidence logs and the physical evidence. Thereafter, on July 3, 1995, post-conviction counsel traveled to the NKPD, but upon arriving she was informed that Chief Link was not in and that the inspection had been cancelled.

On July 6, 1995, post-conviction counsel met with NKPD Chief Link and ADA Gongaware at the NKPD. During the meeting, Chief Link provided post-conviction counsel with "evidence logs" to review. Chief Link, however, forced post-conviction counsel to hastily review the evidence logs, forcing her to contact the PCRA court to ensure that she had adequate

[41] Ex. 17.

time to review the evidence logs. Thereafter, Chief Link showed post-conviction counsel a bag containing a blanket and told her that the blanket was the only item of evidence remaining. When post-conviction counsel asked about the whereabouts of the other physical evidence, Chief Link and ADA Gongaware both told her that the PSP had the other physical evidence, including Seaman's sexual assault kit.

On July 19, 1995, post-conviction counsel spoke with PSP Trooper Michael Jones, who told her that the PSP would not disclose any information or documentation regarding the physical evidence without a court order.

On July 24, 1995, the PCRA court ordered the PSP crime lab to provide post-conviction counsel with "true and correct copies of all documents pertaining to the submission of items for testing and the testing of any and all items relative to Incident No. A1-669292 and/or Lab Report No. G90-5618-C, including, but not limited to, documents reflecting the chain of custody of such items and results of testing, including testing for trace evidence in the form of hair and fiber analysis." Ex. 19.

On July 26, 1995, post-conviction counsel received a document from PSP analyst Scott Ermlick, which was signed by (retired) NKPD Police Chief James Chambers, indicating that the PSP returned all the physical evidence to the NKPD on February 7, 1991.[42] At a post-conviction deposition on March 19, 1997, James Chambers testified that he collected the evidence from the PSP crime lab on February 7, 1991, that he signed a chain-of-custody (or transfer) document, and that this was the document Scott Ermlick provided to post-conviction counsel on July 26, 1995.[43]

The PSP crime lab transferred the evidence back to the NKPD because the Commonwealth introduced certain items of physical evidence at trial, namely the panty girdle,

[42] Ex. 20.
[43] Ex. 21, at 7-10.

the lamp cord, and the bloody sheet. *See* NT at 323-326 (referring to Commonwealth Exhibits 55, 56, and 57). The Commonwealth moved to introduce the bloody sheet into evidence, but the trial judge denied its request. *See* NT at 328.

In the end, the NKPD claimed that all of the physical evidence, excluding those items introduced by the Commonwealth at Kunco's trial (i.e., the girdle and lamp cord) were destroyed due to flooding. The NKPD, however, did not identity when the alleged flooding occurred nor did it provide documentation identifying what cases and items of evidence were affected by the flooding.

On May 29, 1996, post-conviction counsel filed a *Petition For Rule To Show Cause/Second Amended P.C.R.A. Petition*, wherein she requested a court order giving her permission to search the evidence storage areas of the NKPD:

> WHEREFORE, Petitioner requests this Honorable Court [to] issue upon the Commonwealth a Rule to Show Cause why the Petitioner should not be allowed the opportunity to inspect the evidence storage area of the New Kensington Police Department to determine the existence of the evidence gathered at the crime scene for which Petitioner was charged.

Ex. 22, at ¶ 51. Post-conviction counsel also requested to depose several Commonwealth actors to determine the whereabouts of the physical evidence:

> Further, Petitioner requests the opportunity to depose Police Chief Link, William Dlubak, Sergeant Charles Korman, ADA Wayne Gongaware, Police Chief James Chambers, and State Trooper Michael E. Jones concerning the submissions of evidence for testing and the disposition of evidence once tested or in the alternative, schedule an evidentiary hearing at which the individuals listed may be subpoenaed to testify regarding the disposition and testing of evidence gathered at the scene which would be otherwise available to prove the innocence of Petitioner.

Id.

On June 24, 1996, the PCRA court granted post-conviction counsel's request for depositions.[44]

On July 21, 1997, after conducting several depositions, post-conviction counsel filed Kunco's *Third Amended Post Conviction Act Petition and Motion for New Trial*, wherein she presented the following claim: *The Bad Faith Destruction of Evidence Gathered At The Scene*. Within the claim she argued:

> 78. Petitioner John Kunco, believes and therefore avers that the information gained from the inspection and/or testing of items listed herein, particularly the reddish brown hair found on the fitted sheet where a significant portion of the assault occurred will establish someone other than the Petitioner raped Donna Seaman and, thereby exonerate the Petitioner.
>
> 79. It is the Petitioner's belief that should DNA testing be conducted on hair and blood samples gathered at the crime scene, which should have been in the possession of the Commonwealth, results would have indicated that someone other than the Petitioner was present in Donna Seaman's home at the time of the incident.

Ex. 12, at ¶¶ 78-79.

In its May 26, 1998 *Decision and Order* dismissing Kunco's PCRA petition, the PCRA court made a factual finding that "much of the evidence obtained from the scene has been destroyed by the police since the time of trial." Ex. 13, at 7. The PCRA court, more importantly, found that "[t]his resulted from flooding that had occurred in the evidence room of the local police department." *Id*. The PCRA court, however, did not identify when the alleged flooding occurred.

Post-conviction counsel did not pursue DNA testing on the girdle or lamp cord for various reasons. First, the PSP crime lab did not detect semen or sperm on the panty girdle.[45] Second, the PSP crime lab did not test the lamp cord. That the PSP crime lab did not test the

[44] Ex. 23.
[45] Ex. 1.

lamp cord suggested it was not suitable for testing – at least not with the technology available in the early 1990s. Third, the DNA technology available between 1991 and 1998, RFLP and DQ-Alpha, did not have the requisite sensitivity to develop a male DNA profile from skin cells deposited on a thin lamp cord. The technology necessary to develop a male DNA profile from male skin cells is Y-STR testing – which did not gain general acceptance until 2002-2003.

c. Voice Identification Evidence

Kunco developed facts regarding Seaman's voice identification during his initial PCRA proceedings.

In an April 20, 1995 interview, Seaman told Kathleen O'Boyle (Kunco's post-conviction counsel) and her legal assistant, Elizabeth Guardasoni, that she did *not* immediately identify Kunco as the perpetrator, but instead identified him two days later at the hospital, when Detective Dlubak did his voice impersonation.[46]

Kunco also deposed several officers who investigated the case. Detective Dlubak testified that when he arrived at Seaman's apartment, Sgt. Korman told him that Seaman recognized her assailant's voice as that of Kunco.[47] He also testified that once he arrived he contacted the PSP for assistance in processing the scene, and when PSP Trooper Michael Jones arrived at the scene he told Trooper Jones what Sgt. Korman had relayed to him regarding Seaman's voice identification of Kunco, and that he and Detective Frank Link assisted Trooper Jones's team in processing the scene.[48]

During Trooper Jones's PCRA deposition, however, post-conviction counsel asked Jones the following question: "Did you receive information from the New Kensington Police

[46] Ex. 24.
[47] Ex. 2, at 12.
[48] *See id*. at 11 ("I told them [the PSP CSI team] what was passed on to me."); *id*. at 12 ("[Sgt. Korman] mentioned to me that [Seaman] said it was a maintenance man, something to that effect… He said she recognized his voice.").

Department with regard to either the identity – let's start with the identity of the actor?" To which Trooper Jones replied: "No. I don't believe they had any idea who it was at that point." Ex. 25, at 17. Trooper Jones's *General Investigation Report* corroborates his deposition testimony because his report did not mention a word about Kunco or the identity of Seaman's assailant.[49]

Similarly, during Detective Link's PCRA deposition, he said he interviewed Seaman at the hospital directly after the assault, asked questions about how she knew Kunco, and drafted a report subsequent to his interview. Link's report, however, like Dlubak's initial report, did not mention a word about Kunco or the identity of Seaman's assailant.[50] During his deposition, Link said he was trained to incorporate all relevant and critical information into a comprehensive report. Link agreed that if the victim identified her assailant immediately after the crime, such information would be relevant and critical for investigative purposes.[51] Despite his training and years of experience, however, Link said he did not incorporate this critical information into his report because Sgt. Korman had already incorporated it into his report.[52] Moreover, Link testified that he was with Dlubak when he (Dlubak) performed his voice impersonation on December 18, 1990. When asked why Dlubak conducted a voice impersonation that day, *two days after* Seaman had already *allegedly* identified her assailant's voice, Link offered no explanation.[53]

The PCRA court said little regarding Seaman's voice identification, except that the jury had adequate evidence before it to consider how much weight it should be afforded:

[49] Ex. 54.
[50] Ex. 26, at 19-20, 33.
[51] *See id*.
[52] *See id*. at 21.
[53] *See id*. at 33-34.

> [R]eviewing the trial testimony it is apparent that the issue of the weight of the victim's identification of her attacker's voice was called into question. She was questioned concerning when she made the identification. She admitted that her testimony at trial was inconsistent with her testimony at the preliminary hearing on this issue. Given this examination of the victim concerning how and when she recognized [the] defendant's voice, the jury was capable of assigning whatever weight it wished to her identification.

Ex. 13, at 11.

2. Superior Court Proceedings

Kunco appealed the PCRA court's dismissal, raising several issues, including issues pertaining to the bite mark evidence, Seaman's voice identification, and the destruction evidence.

a. Bite Mark Evidence

Kunco's bite mark claims focused on the *manner* in which Drs. Sobel and David "exposed" and 'recaptured" the five-month-old bite mark – i.e., the UV-light technique.

Kunco argued that the trial court committed "reversible error" by "admitting testimony of purported scientific methods which were not established to have been accepted in [the] scientific community." Ex. 27, at 45, 59-64.[54] Kunco also claimed that newly-discovered evidence regarding Dr. Michael West – the individual who developed the UV-lighting technique with respect to bite mark identification – demonstrated that his due process rights were violated. *See id.* at 64-68.

The Superior Court affirmed the PCRA court's dismissal and said very little regarding Kunco's bite mark claims, except that it had "already held that the [bite mark] technique used by the Commonwealth experts [was] scientifically recognized." Ex. 28, at 7. Likewise, it said little regarding the voice identification claims and destruction of evidence claims: "The trial court

[54] At an October 23, 1997 PCRA hearing, Kunco introduced Dr. Gary S. Golden, a forensic dentist, who testified that the UV-light technique was not generally accepted by the scientific community in 1991 at the time of Kunco's trial – and it had yet to be generally accepted by the time he testified in 1997. *See* NT, PCRA Hrg., 10/23/97, at 4.

opinion comprehensively discusses and properly disposes of all issues… Accordingly, we affirm on the basis of that opinion with respect [to] those issues addressed by the lower court." *Id*. at 5.

Kunco filed another discretionary appeal with the Pennsylvania Supreme Court, which was denied on November 16, 1999 (unreported).

H. Initial Federal Habeas Proceedings

1. District Court Proceedings

On January 7, 2000, Kunco filed a *pro se* writ of habeas corpus with the United States District Court for the Western District Court of Pennsylvania,[55] alleging numerous federal constitutional claims including a claim that his trial was rendered fundamentally unfair under the Due Process Clause because the "trial court admitted expert testimony regarding an inculpatory bite mark photograph obtained by way of a 'controversial' photographic technique employing ultraviolet (UV) light." *Kunco v. Attorney General of Commonwealth of Pennsylvania,* 85 Fed. Appx. 819, 819-20 (3d Cir. 2003).[56]

On June 20, 2001, the magistrate judge issued a report recommending that Kunco's petition be denied.[57]

On January 3, 2002, the District Court adopted the magistrate's report and recommendation and denied the writ.[58]

2. Circuit Court of Appeals

On January 10, 2002, Kunco filed a timely request for a certificate of appealability.

On November 27, 2002, the U.S. Court of Appeals for the Third Circuit granted a certificate of appealability, "limited to the issue of whether after-discovered evidence regarding

[55] Ex. 30.

[56] Kunco filed a motion for the appointment of counsel on March 15, 2000, but the District Court denied his request for counsel on March 23, 2000. *See* Ex. 31. (request for counsel).

[57] Ex. 32.

[58] Ex. 33.

the reliability of the scientific method employed to recapture and present bite mark evidence to the jury demonstrates that the admission of expert testimony in this case violated appellant's due process right by denying him a fundamentally fair trial."

The Third Circuit denied relief. In its opinion, the Third Circuit phrased the issue in the following manner:

> A certificate of appealability was granted for the limited purpose of addressing Kunco's argument that after-discovered evidence proves that his due process rights were violated when the trial court admitted expert testimony regarding an inculpatory bite mark photograph obtained by way of a "controversial" photographic technique employing ultraviolet (UV) light. The pertinent after-discovered evidence essentially consists of testimony by forensic dental expert Dr. Gregory Golden that the UV technique was unreliable, as well as a series of articles suggesting that Dr. Michael West (a forensic odontologist who has made frequent use of the UV photographic technique and has some associations with the expert witnesses tendered by the prosecution at trial) has been denounced as unethical and incredible, that he has on occasion misrepresented evidence and data, and that his UV technology is not " founded on scientific principles.

Kunco v. Attorney General of Commonwealth of Pennsylvania, 85 Fed. Appx. 819, 819-20 (3d Cir. 2003).[59]

In denying relief, the Third Circuit "conclude[d] that Kunco… failed to offer any evidence that would lead [it] to believe that the UV photography was so unreliable that it undermined the fundamental fairness of his trial." *Id*. at 821.

Thus, Kunco did not challenge the notion that an unknown bite mark can be individualized to a known biter to the exclusion of all other biters in the world. Instead, as he did in state court, he challenged the *manner* in which the bite mark was exposed and recaptured.

I. Post-Conviction DNA Testing and Bite Mark Misidentifications

During the early 1990s, DNA testing was introduced into the criminal justice system. Although initially used as a law enforcement and prosecutorial tool to identify, prosecute, and

[59] The Third Circuit's opinion is attached hereto as Ex. 34.

convict guilty offenders, defense attorneys and prosecutors eventually used DNA testing to exonerate wrongly convicted prisoners, leading to twenty-seven DNA exonerations by 1996. *See* 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) (hereinafter *NIJ 1996 Report*). In 1994, Dale Brison became the first Pennsylvania prisoner to be exonerated with post-conviction DNA testing. *See id*. at 38-39 (discussing Brison's case); *Commonwealth v. Brison*, 618 A.2d 420 (Pa. Super. 1992) (holding that Brison was entitled to post-conviction DNA testing). By 2002, the number of post-conviction DNA exonerations had jumped to more than one hundred. *See* www.innocenceproject.org/Content/Larry_Mayes.php; BARRY SCHECK ET AL., ACTUAL INNOCENCE (2000). During this period, many states enacted post-conviction DNA testing statutes, with Pennsylvania enacting its statute in 2002. *See* 42 Pa. C.S. § 9543.1; *see also* NAT'L COMM'N ON THE FUTURE OF DNA TESTING, POST CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999).

The DNA exonerations revealed that various forms of evidence are inherently unreliable, including eyewitness testimony, jailhouse informant testimony, and forensic evidence. *See NIJ 1996 Report*, at 15. In terms of forensic evidence, several DNA exonerations involved misidentified bite marks where a forensic dentist initially individualized a bite mark to a defendant, only to have post-conviction DNA testing conclusively establish the defendant's innocence. *See* C. Michael Bowers, *Problem-Based Analysis of Bitemark Misidentifications: The Role of DNA*, 159S FORENSIC SCI. INT'L. S104, S106 (2006) ("This advent of independent scientific [DNA] analysis is having a direct effect on the credibility of dental bitemark experts… The later 1990s showed the initial influence DNA profiling had on criminal justice proceedings

containing bitemark testimony.").[60] Similarly, there were several cases where pre-trial DNA testing invalidated a forensic dentist's pre-trial conclusion that a suspect inflicted the unknown bite mark on the victim.[61]

J. The Bite Mark Community's Response to the Misidentified Bite Mark Cases

The great majority of bite mark experts disregarded these misidentifications, characterizing them as anomalies that rarely occur. More importantly, the bite mark community refused to re-examine the four fundamental premises of bite mark identification: (1) uniqueness; (2) permanency; (3) transferability; and (4) examiner accuracy. However, a *very small minority* of bite mark experts, including Drs. C. Michael Bowers and Iain Pretty, used these cases as an opportunity to re-examine these premises and the research that allegedly supported them.

For instance, in 2001, Drs. Pretty and David Sweet reviewed the scientific literature on bite mark identification and *independently* concluded that "[d]espite the continued acceptance of bitemark evidence in… North American Courts[,] the fundamental basis for bitemark analysis has never been established." Iain Pretty & David Sweet, *The Scientific Basis for Human Bitemark Analyses – A Critical Review*, 41 Sci. & Just. 85, 86 (2001).[62] In regards to the transferability issue, Drs. Pretty and Sweet concluded that while the human dentition may be

---

[60] *See Henry Weinstein, Death Penalty Foes Mark a Milestone*, L.A. TIMES, Apr. 10, 2002, at 1A (discussing Ray Krone's exoneration); http://www.innocenceproject.org/Content/Ray_Krone.php (discussing Krone's exoneration and the misidentified bite mark that led to his wrongful conviction); *O'Donnell v. State*, 782 N.Y.S.2d 603, 606 (N.Y. Ct. Cl. 2004) (discussing James O'Donnell's exoneration); http://www.innocenceproject.org/Content/James_ODonnell.php (discussing O'Donnell's exoneration and the misidentified bite mark that led to his wrongful conviction);

[61] A misidentified bite mark led to Edmund Burke's wrongful arrest, while pre-trial DNA testing ultimately exonerated him and identified the true perpetrator. *See Burke v. Town of Walpole et al*., 405 F.3d 66 (1st Cir. 2005); Peter Schworm, *Conviction Brings Justice in Mother's Slaying, But Toll on Family Endures*, BOSTON GLOBE, Sept. 28, 2006, at 1. A misidentified bite mark also led to Dale Morris's wrongful arrest, while pre-trial DNA testing ultimately exonerated him and identified the true perpetrator. *See* Ian James, *Suspect in Girl's Murder Freed after Four Months*, ST. PETERSBURG TIMES 1A, Feb. 28, 1998, at 1A; Todd Leskanic, *9-Year-Murder Inquiry - Solved - Guilty Plea Ends Case With Multiple Twists*, TAMPA TRIB., Dec. 30, 2006, at 1. A misidentified bite mark led to Anthony Otero's wrongful arrest, while pre-trial DNA testing ultimately exonerated him. *See Otero v. Warnick*, 614 N.W.2d 177, 178 (Mich. App. 2000).

[62] A courtesy copy of the article is attached hereto as Exhibit 35.

unique, there was no scientific research substantiating the claim that a detention's uniqueness is always transferred to human skin or another inanimate object. *See id*. at 90 ("[The question is] whether there is a representation of that uniqueness in the mark found on the skin or other inanimate object… The question of bitemark uniqueness [as compared to the uniqueness of the human dentition] remains unanswered.").

Similarly, in 2006, Dr. Bowers questioned the "examiner accuracy" assumption when he summarized the only four research projects aimed at measuring whether bite mark examiners can accurately link an unknown bite mark to a known biter. *See* C. Michael Bowers, *Problem-Based Analysis of Bitemark Misidentifications: The Role of DNA*, 159S FORENSIC SCI. INT'L. S104 (2006).[63] Each research project, he noted, produced "disturbingly high false-positive error rate[s]." *Id*. at S107.

The opinions expressed by Drs. Bowers, Pretty, and Sweet were *not* generally accepted by the scientific community. Instead, despite the growing number of misidentifications exposed by DNA testing, bite mark experts continued to proclaim that the four fundamental premises of bite mark identification were valid and supported by empirical research. For instance, in 2003, Dr. Pretty surveyed the bite mark community regarding the four fundamental premises. *See* Iain Pretty, *A Web-Based Survey of Odontologists' Opinions Concerning Bitemark Analyses*, 48 J. FORENSIC SCI. 1117 (2003).[64] With respect to the uniqueness premise, 91% of the bite mark experts surveyed said they believe the human dentition is unique to each individual, while 78% believed that this uniqueness is transferred or "replicated" to the human skin during the biting process. *Id. at* 1118. Moreover, 70% believed that "suitably trained" bite mark experts can "positively" identify an individual from a bite mark on human skin. *Id*. Lastly, 96% of the

[63] A courtesy copy of the article is attached hereto as Exhibit 36.
[64] A courtesy copy of the article is attached hereto as Exhibit 37.

American Board of Forensic Odontology membership believed that the human dentition was unique and that this uniqueness was transferred to the human skin during the biting process.[65] Dr. Pretty acknowledged the extraordinary support for bite mark identification and its underlying premises, but questioned whether scientific research supported the extraordinary support:

> The uniqueness of human dentition and assertion that this uniqueness is replicated in bite marks forms the central dogma of bite injury analysis. It is generally that the arraignment of… [an individual's] is unique when measured with sufficient resolution; however, the fact that these features are replicated, in the most significant bitemarks, is far more contentious. A recent review of the literature demonstrated that there is little empirical evidence to support this claim. It was therefore interesting to note that the *overwhelming majority* of odontologists, despite these concerns, are quite satisfied that bitemarks demonstrate sufficient detail of the suspect's dentition.

Id. at 1119 (emphasis added).

Similarly, in 2005, another forensic dentist summarized the state of bite mark identification in a bite mark treatise:

> It is indisputable that bitemark [identification] has become established as an important and useful tool in the administration of justice. In this process, the courts have already considered most of the concerns discussed above… And, as previously noted, bitemark evidence has been accepted in every state in which it has been considered. This now includes more than 37 jurisdictions in the United States, as well as the military court system.

Gerald L. Vale, *History of Bitemark Evidence, in* BITEMARK EVIDENCE 25 (Robert B. J. Dorion ed. 2005).[66]

Kunco's three bite mark experts, Drs. Bowers, Pretty, and Averill, all averred that bite mark identification remained generally accepted by the scientific community after they publicly questioned the underlying premises of bite mark identification, and even after numerous DNA exonerations exposed erroneous bite mark identifications. *See* Exs. 39-40.

[65] ABFO stands for the American Board of Forensic Odontology. The ABFO is the foremost bite mark association in the world. *See* www.abfo.org (last visited March 21, 2011).

[66] The article is attached hereto as Exhibit 41.

K. Wrongful Convictions, Forensic Identification Evidence, and Increased Scrutiny of the Non-DNA Forensic Identification Techniques

By 2006, there were nearly 200 post-conviction DNA exonerations. *See* www.innocenceproject.org. While many of these wrongful convictions were attributable to eyewitness misidentification, nearly 60% involved improper or unvalidated forensic science testimony. *See* Brandon L. Garrett & Peter J. Neufeld, *Improper Forensic Science Testimony and Wrongful Convictions* 95 VA. L. REV. 1 (2009); Michael J. Saks & Jonathon J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 Sci. 892 (2005); Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004, at 1. Many state and federal courts acknowledged the growing problems associated with the non-DNA forensic identification techniques and the crime laboratories that performed these techniques.[67]

L. Congress Directs the National Academy of Science to Study the Non-DNA Forensic Identification Techniques

Recognizing the "rising nationwide criticism of forensic evidence," *Ramirez v. State*, 810 So.2d 836, 853 (Fla. 2001), and "that significant improvements are needed in forensic science," *NAS Report*, at P-1, Congress directed the National Academy of Science (NAS) "to conduct a study on forensic science." *Id*. at S-1; P.L. No. 109-108, 119 Stat. 2290 (2005); H.R. Rep. No.

[67] For instance, Sixth Circuit Court of Appeals Judge Boyce Martin called crime labs "unreliable." *Moore v. Parker*, 425 F.3d 250, 269 (6th Cir. 2005) (Boyce, J., dissenting). Elsewhere, Federal District Court Judge Jed Rakoff wrote: "False positives – that is, inaccurate incriminating test results – are endemic to much of what passes for 'forensic science.'" *United States v. Bentham*, 414 F. Supp. 2d. 472, 473 (S.D.N.Y. 2006). And Federal District Court Judge Nancy Gertner commented on the disturbing correlation between wrongful convictions and erroneous forensic identifications, noting that "recent reexaminations of relatively established forensic testimony have produced striking results." *United States v. Green*, 405 F. Supp. 2d 104, 109 n.6 (D. Mass. 2005). Government officials like the governors of Illinois and Massachusetts also expressed concern about the growing number of wrongful convictions associated with non-DNA forensic identification testimony. *See Report of the Governor's Council on Capital Punishment*, 80 IND. L. J. 1, 23 (2005); REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 42 (Apr. 2002).

109-272, at 121 (2005). In the fall of 2006, the NAS established a committee to implement Congress' directive. The committee included research scientists, attorneys, and forensic practitioners. The committee met publicly on eight occasions between January 2007 and November 2008, hearing testimony on several issues relating to forensic science and the non-DNA forensic identification techniques. Between meetings, committee members reviewed "numerous published materials, studies, and reports related to the forensic science disciplines, engaged in independent research on the subject, and worked on drafts of the final report." *Id*. at S-2. The bite mark community, therefore, had two years to present the NAS Committee with empirical research substantiating bite mark identification's validity and reliability. The NAS Committee issued its final report on February 17, 2009. *See* STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD.[68]

M. The *NAS Report*'s Findings and Conclusions Regarding Bite Mark Identification

NAS Report invalidated the four fundamental premises of bite mark identification – uniqueness, permanency, transferability, and accuracy – 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

[68] The pre-publication copy of the *NAS Report* was attached as Exhibit 14 to Kunco's *Writ of Habeas Corpus* filed on January 29, 2010. See Doc. No. 1, Ex. 14. All cites to the *NAS Report* refer to the pre-publication copy.

unevenness of the surface bite, and swelling and healing severely limit the validity of bite mark identification.[69]

1. The Permanently Unique Assumption

The *NAS Report* debunked the first three assumptions (i.e., uniqueness, permanency, and transferability) when it concluded that:

> No thorough study has been conducted of large populations to establish the uniqueness of bite marks; theoretical studies promoting the uniqueness theory include more teeth than are seen in most bite marks submitted for comparison. There is no central repository of bite marks and patterns.

Id. at 5-36. The *NAS Report* also concluded that:

> Although the methods of collection of bite mark evidence are relatively noncontroversial, there is considerable dispute about the value and reliability of the collected data for interpretation. Some of the key areas of dispute include the accuracy of human skin as a reliable registration material for bite marks, the uniqueness of human dentition, the techniques used for analysis, and the role of examiner bias.

Id. at 5-37. The *NAS Report* added:

> Unfortunately, bite marks on the skin will change over time and can be distorted by the elasticity of the skin, the unevenness of the surface bite, and swelling and healing. These features may severely limit the validity of forensic odontology. Also, some practical difficulties, such as distortions in photographs and changes over time in the dentition of suspects, may limit the accuracy of the results.

Id. at 5-37.

2. Accuracy Assumption

The *NAS Report* invalidated the accuracy assumption when it commented:

> Failure to acknowledge uncertainty in findings is common [in forensic science]: Many examiners claim in testimony that others in their field would come to the

[69] The *NAS Report* repeatedly singled-out bite mark identification for its shoddy scientific foundation and its significant error rate. For instance, the *NAS Report* stated: "Much forensic evidence – including, *for example, bite marks*… is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline." *NAS Report*, at 3-18 (emphasis added). The *NAS Report* also stated: "The fact is that many forensic tests – such as those *used to infer the source of... bite marks* – have never been exposed to stringent scientific scrutiny." *Id*. at 1-6 (emphasis added). Similarly, the *NAS Report* stated that "there are important variations among the disciplines relying on expert interpretation. For example, there are more established protocols and available research for fingerprint analysis *than for the analysis of bite marks*." *Id.* at S-5 and S-6 (emphasis added).

> exact same conclusions about the evidence they have analyzed. Assertions of a "100 percent match" contradict findings of proficiency tests that find *substantial rates of erroneous results in some disciplines* (i.e., voice identification, *bite mark analysis*).

Id. at 1-9 and 1-10 (emphasis added). The *NAS Report* also commented on the "high percentage of false positive matches of bite marks using controlled comparison studies." *Id*. at 5-36.

3. Additional Pertinent Findings and Conclusions

a. Bite Marks Cannot Be Individualized

Bite mark experts cannot individualize an unknown bite mark to a known biter to the exclusion of all other biters in the world: "With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."*Id*. at S-5 (emphasis added); *id*. at 5-37 ("Bite mark testimony has been criticized basically on the same grounds as testimony by questioned document examiners and microscopic hair examiners. The committee received *no evidence of an existing scientific basis for identifying an individual to the exclusion of all others*.") (emphasis added); *id*. at 5-37 (noting that while "the majority of odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification, *no scientific studies support this assessment, and no large population studies have been conducted*.") (emphasis added). The *NAS Report* also added:

> More research is needed to confirm the fundamental basis for the science of bite mark identification. Although forensic odontologists understand the anatomy of teeth and the mechanics of biting and can retrieve sufficient information from bite marks on skin to assist in criminal investigations and provide testimony at criminal trials, *the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match*.

Id. at 5-36 (emphasis added).[70]

[70] The *NAS Report* acknowledged that, "[d]espite the inherent weakness in bite mark comparison, it is reasonable to assume that the process can sometimes reliably exclude suspects." *NAS Report*, at 5-37.

Moreover, bite mark experts cannot give an opinion as to the likelihood of a coincidental match because there is no base rate data regarding the characteristics of teeth and bite patterns:

> If a bite mark is compared to a dental cast using the guidelines of the ABFO, and the suspect providing the dental cast cannot be eliminated as a person who could have made the bite, *there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite*. This follows from the basic problems inherent in bite mark analysis and interpretation.

Id. at 5-36 (emphasis added).

b. No Standards for Determining Individuality

There are no empirically validated standards and procedures that allow forensic dentists to associate an unknown bite mark to a known biter to the exclusion of all other biters in the world: "[T]here is still no general agreement among practicing forensic odontologists about national or international standards for comparison." *Id*. at 5-37. Even when guidelines have been developed, "there is no incentive or requirement that these guidelines be used in the criminal justice system." *Id*. at 5-36. Consequently, "there is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match. This includes reproducibility between experts and with the same expert over time. Even when using the guidelines, different experts provide widely differing results and a high percentage of false positive matches of bite mark using controlled comparison studies." *Id*. at 5-35, 5-36.

c. Contextual Bias Issues

The *NAS Report* also acknowledged that bite mark identification, like all the forensic identification techniques, is very susceptible to context biases:

> As with other "experienced-based" forensic method, forensic odontology suffers from the *potential for large bias among bite mark experts* in evaluating a specific bite mark in cases in which police agencies provide the suspects for comparison and a limited number of models from which to choose from in comparing the evidence. Bite marks often are associated with highly sensationalized and

> prejudicial cases, and there can be a great deal of pressure on the examining expert to match a bite mark to a suspect.

Id. at 5-36.

4. Summary of Findings and Conclusions

The *NAS Report* summarized "the basic problems inherent" to bite mark identification:

> (1) The uniqueness of the human dentition has not been scientifically established.
> (2) The ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established.
>
> i. The ability to analyze and interpret the scope or extent of distortion of bite mark patterns on human skin has not been demonstrated.
>
> ii. The effect of distortion on different comparison techniques is not fully understood and therefore has not been quantified.
>
> (3) A standard for the type, quality, and number of individual characteristics required to indicate that a bite mark has reached a threshold of evidentiary value has not been established.

Id. at 5-37.

N. Post *NAS Report* Litigation and DNA Testing Litigation

1. PCRA Court Proceedings

a. Kunco's Federal Claims Premised on the *NAS Report*

On April 17, 2009, Kunco filed his *Petition for 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* (*NAS Report Petition*), along with a *Memorandum of Law* in support of his *Bite Mark Petition* (*NAS Report Memo of Law*). Kunco filed his *NAS Report Petition* and *NAS Report Memo of Law* pursuant to 42 Pa. C.S §9545(b)(1)(ii), arguing that the *NAS Report's* findings and conclusions constituted newly-discovered evidence that undermined all confidence in his conviction warranting relief.

The "factual predicates" that were previously unavailable to Kunco, and which breathed life into his new federal claims, were the findings and conclusions made by the preeminent scientific organization in the United States – the National Academy of Sciences.

Kunco fairly presented the facts and legal theories for several federal claims based on the *NAS Report's* factual findings and conclusions:

- Fundamental fairness claim: Kunco claimed that the *NAS Report's* findings and conclusions established that the individualization testimony presented at Kunco's trial is now deemed invalid by the scientific community, and, as a result, "its admission violate[d] fundamental concepts of justice." *Dowling v. United States*, 493 U.S. 342, 352 (1990). In other words, the admission of Drs. Sobel's and David's individualization testimony "undermine[d] the fundamental fairness of [Kunco's] entire trial." *Keller v. Larkins*, 251 F.3d 408, 413 (3rd Cir.2001); U.S. Const. Amend. XIV.

- Invalid/false evidence and failure to correct claim: Kunco argued that the *NAS Report* establishes that the Commonwealth presented invalid bite mark evidence and that it is reasonably likely that the invalid bite mark evidence may have affected the jury's decision to convict Kunco. *See Giglio v. United States*, 405 U.S. 150 (1972). Similarly, Kunco argued that the Commonwealth has failed to correct or offer an appropriate remedy for the invalid bite mark evidence. U.S. Const. Amend. XIV; *Napue v. Illinois*, 360 U.S. 265 (1959).

- Meaningful defense claim: Kunco argued that his conviction is invalid under the clearly-established federal constitutional guarantees of due process, effective assistance of counsel, and the right to present a meaningful defense based on the cumulative impact of the *NAS Report's* findings and conclusions. *See Crane v. Kentucky*, 476 U.S. 683 (1986); *United States v. Cronic*, 466 U.S. 648 (1984). In the absence of the *NAS Report*, trial counsel could not present a meaningful and effective defense, which in turn rendered the jury's decision to convict fundamentally unfair because the jury was deprived of essential facts and evidence that would have directly and substantially affected the its guilt-innocence decision. *See* U.S. Const. Amends. VI, XIV.

- Reasonable doubt claim: Kunco argued that, based on the *NAS Report's* findings and conclusions, his conviction is premised on invalid bite mark evidence, and, as such, his conviction violates his clearly-established 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. Amend. VI, XIV; *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

- Ineffective assistance of counsel claim: Kunco argued that, if the *NAS Report's* facts and conclusions were discoverable prior to trial or during his initial state post-conviction proceedings, his conviction is invalid under the clearly-established federal constitutional guarantee of effective assistance of counsel. *See* U.S. Const. Amend. VI; *United States v. Cronic*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 669 (1984).

b. Kunco's Bite Mark Experts' Affidavits

Kunco retained three well-credentialed and respected bite mark experts: (1) Dr. C. Michael Bowers; (2) Dr. Iain Pretty; and (3) Dr. David C. Averill.

All three signed separate affidavits opining that: (1) they had published articles questioning the four fundamental premises of bite mark identification before the NAS released the *NAS Report*, but that the scientific community did not generally accept or give much credence to their articles or opinions; (2) the *NAS Report* represented a "seismic shift" in the scientific community, where the minority (and non-generally accepted) view of bite mark identification become the generally accepted view; and (3) based on the *NAS Report's* findings and conclusions Drs. Sobel's and David's individualization testimony is no longer valid, reliable, or credible.[71]

All three affidavits are premised on the *NAS Report's* findings and conclusions – rather than their own previous research and publications.[72] To the extent each expert mentioned his previous research and publications – they did so simply to give context to how the scientific community viewed their research, publications, and opinions regarding bite mark identification. At the end of the day, though, their affidavits are premised on the *NAS Report's* findings and conclusions, and why they invalidate Drs. Sobel's and David's individualization testimony.

For instance, Dr. Bowers averred the following:

> At the time of Mr. Kunco's trial in 1991 and well before his trial, the bite mark and forensic science community firmly believed that adequately trained forensic dentists could accurately individualize a known bite pattern to an unknown bite mark. The bite mark community held firm to this belief well into the new millennium. Thus, in 1998, when Mr. Kunco received his last state post-conviction evidentiary hearing, the overwhelming majority of the bite mark community still firmly believed that trained forensic dentists could individualize a

[71] *See* Ex. 38, at 14; Ex. 39, at 13; Ex. 40, at 13.

[72] As noted *infra*, the Superior Court mischaracterized the substance of the affidavits from Kunco's bite mark experts. *See* Ex. 42, at 2.

known bite pattern to an unknown bite mark. On the other hand, a growing segment of the bite mark community during this period began questioning the *techniques* used by forensic dentists to document or expose apparent or latent bite marks. Thus, much of the litigation and controversy during this period focused on these *techniques*, rather than the underlying issue of whether forensic dentists could actually individualize bite marks. For instance, just as Mr. Kunco did in his previous state post-conviction petitions, several prisoners attacked the UV-lighting technique made famous by the now discredited Dr. Michael West. Again, these attacks focused on the *technique* used to expose latent bite marks and not on the underlying individualization issue. This is understandable because, at the time, there was little dissent regarding the belief that trained forensic dentists could individualize a known bite pattern and an unknown bite mark.

The prevailing view of bite mark identification slowly started to change during the earlier part of this decade when DNA testing began to expose bite mark identification's unreliability. During this period, there were several cases where forensic dentists linked a bite mark to a particular suspect, but subsequent DNA testing conclusively proved that the suspect could not be the assailant. In light of these misidentifications, a *small minority* of the bite mark community (myself included) set out to re-evaluate whether there is adequate empirical data to support bite mark identification's four fundamental premises: (1) uniqueness; (2) permanency; (3) transferability; and (4) accuracy.

The initial research suggested that *none* of these premises were adequately supported by legitimate, impartial, empirical research. More specifically, the research concluded what the NAS Report concluded: the dearth of empirical, peer-reviewed research in this area prevents forensic dentists from individualizing a known bite pattern to an unknown bite mark or opining as to the likelihood of a coincidental match. Regrettably, though, because the research represented a *small minority* of the bite mark community, the bite mark community and courts dismissed the research or gave it little weight and credibility.

Over the last decade, however, the mainstream scientific opinion regarding bite mark identification has slowly changed thanks in part to more research and to numerous additional DNA and non-DNA exonerations involving misidentified bite mark identifications.

The NAS Report's conclusions and findings, however, finally validated what this *small minority* of forensic dentists (myself included) have been preaching for nearly a decade now: given the current state of research in the forensic science and bite mark communities, there is no scientific basis on which forensic dentists can claim that they can individualize a known bite pattern to an unknown bite mark.

Ex. 38, at 11-13.[73]

c. Kunco's Pursuit of DNA Testing, the Innocence Project, the Exculpatory DNA Results, and the Federal Claims Based on the *NAS Report* and Exculpatory DNA Results

On April 17, 1997, Kunco sent a handwritten letter to the Innocence Project (IP), seeking the IP's assistance in securing post-conviction DNA testing.

Established in 1992, by Barry Scheck and Peter Neufeld, the IP is a "national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice." www.innocenceproject.org (last visited October 22, 2011). To date, 280 individuals have been exonerated with DNA testing, many of whom were represented by the IP. By the time Kunco contacted the IP in 1997, DNA testing had exonerated approximately 30 individuals nationwide. *See* 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).

Due to the IP's expertise in and success at locating physical evidence and litigating the complex legal and scientific issues surrounding post-conviction DNA testing, the IP began receiving thousands of requests each year from prisoners across the United States seeking DNA testing to prove their innocence. Thus, by the time Kunco contacted the IP in April 1997, the IP had a back log of several thousand requests, but only had two attorneys and a small group of volunteer law students to review the thousands of requests. Moreover, in 1997, the IP was not a non-profit organization; it was a legal clinic at Cardozo School of Law. Due to the lack of attorneys and resources, the IP could not respond to, let alone represent, every prisoner who contacted the IP.

[73] Drs. Pretty and Averill made similar assertions in their affidavits as well. *See* Ex. 39, at 10-13; Ex. 40, at 10-13.

Although the IP did not respond to Kunco's initial April 1997 letter, Kunco sent more handwritten letters to the IP on the following dates: May 10, 1997; November 18, 2000, and May 7, 2001.[74] These letters went unanswered until November 29, 2005 – more than eight years after he initially contacted the IP. By late 2005, the IP was a true non-profit with multiple staff attorneys and a larger intake department that could more quickly review and evaluate the numerous letters received each year by the IP. After searching for, obtaining, and reviewing critical documents pertaining to Kunco's case, the IP finally accepted Kunco's case on November 2, 2006 – nearly ten years after he initially contacted the IP. The IP sent Kunco a retainer, which he signed and returned on November 6, 2006.[75]

On September 29, 2006, prior to accepting Kunco's case, the IP spoke with Chief Korman and requested a "complete copy" of the NKPD's case file; the IP sent a follow-up letter to Chief Korman the same day.[76] Chief Korman never responded to the IP's request.

On September 4, 2007, the IP sent the NKPD a freedom of information request under Pennsylvania's Right to Know Law, 65 P.S. § 66.1 *et. seq*., requesting all evidence collection reports, evidence submission reports, crime scene reports, investigative reports, supplemental investigative reports, and sexual assault reports.[77] Chief Korman and the NKPD did not respond to the IP's request.

On October 2, 2007, the IP spoke with Dr. Richard Friedenheim – the physician who examined Seaman at the hospital immediately after her assault – to see if Dr. Friedenheim had any recollection of what may have happened to the rape kit he collected from Seaman. Dr.

[74] Kunco's counsel (Cooley) is willing to introduce these documents to the Court *in camera* if the Court wishes to review these letters.

[75] Kunco's counsel (Cooley) is willing to introduce these documents to the Court *in camera* if the Court wishes to review these letters.

[76] Ex. 43.

[77] Ex. 44.

Friedenheim said that once he collected the rape kit he transferred it to someone from the NKPD and that he does not know what happened to the rape kit after the NKPD took custody of it. After the call, the IP sent Dr. Friedenheim a follow-up letter.[78]

On October 23, 2007, the IP spoke with Kathy Zampogna of the NKPD and requested – once again – all crime scene reports, evidence collection reports, crime laboratory submission reports, crime laboratory reports, chain of custody reports, and hospital reports. After the call, the IP sent a follow-up letter to Zampongna.[79]

On November 8, 2007, the IP spoke with Chief Korman regarding the whereabouts of the sexual assault kit and other probative items of physical evidence. Chief Korman told the IP that the evidence it was seeking was destroyed in a flood, but he did not know when the flooding occurred.

On February 15, 2008, the IP sent a letter to the Westmoreland County District Attorney, John Peck, inquiring whether the District Attorney's Office would assist the IP in its evidence search efforts and if it would consent to DNA testing if evidence is located. On March 5, 2008, District Attorney Peck responded to the IP's inquiry and said that his "Office will contact the [NKPD] and the [PSP's] Greensburg Regional Laboratory to determine whether any evidence not admitted at [Kunco's] trial exists. When a determination is made, this Office will contact you." Ex. 47.

On September 23, 2008, at a hearing relating to Kunco's request to access the bite mark evidence, the District Attorney's Office informed the IP that the NKPD and the PSP crime laboratory did not have the rape kit or other probative items of physical evidence, but that it

[78] Ex. 45.
[79] Ex. 46.

would consent to DNA testing regarding the two items of evidence introduced at Kunco's trial – the girdle and the lamp cord.

On October 10, 2008, undersigned counsel (Cooley) met with ADA Gongaware and ADA James Hopson at the Westmoreland County District Attorney's Office and viewed the girdle and lamp cord. Advancements in DNA technology since Kunco's initial post-conviction proceedings made it possible to test both items of evidence, particularly the lamp cord.

On January 30, 2009, the Common Pleas Court entered a *Stipulated Order for Post-Conviction DNA Testing Pursuant* to 42 Pa. C.S. § 9543.1 (*DNA Order*).[80]

Pursuant to the *DNA Order*, the Commonwealth forwarded the girdle and electric cord to Orchid Cellmark Laboratories (Cellmark) in Dallas, Texas.

Cellmark did not detect male DNA (or biological fluid) on Seaman's girdle.

DNA tests on the lamp cord, however, produced a partial, mixed DNA profile, including at least one unknown male.[81] On June 8, 2009, the IP collected Kunco's DNA sample at SCI-Fayette and forwarded it to Cellmark.

On June 30, 2009, Cellmark issued a report excluding Kunco as a contributor of the lamp cord mixture.[82]

Pursuant to 42 Pa. C.S. § 9543.1(f)(1), after "the DNA testing conducted under this section has been completed, the applicant may, pursuant to section 9545(b)(2) (relating to jurisdiction and proceedings), during the 60-day period beginning on the date on which the applicant is notified of the test results, petition to the court for postconviction relief pursuant to section 9543(a)(2)(vi) (relating to eligibility for relief)."

[80] Ex. 48.
[81] Ex. 49.
[82] Ex.50.

As a result, Kunco filed his *Supplemental Petition for Post-Conviction Relief Based Upon Additional Newly Discovered DNA Evidence Pursuant to 42 Pa. C.S. § 9543.1 et seq. and Writ of Habeas Corpus* (*Supplemental PCRA Petition*) on August 26, 2009, alleging that the newly-discovered exculpatory DNA results bolstered his claims presented in his *Bite Mark Petition* and *Bite Mark Memo of Law*. Kunco argued that the cumulative impact of the newly-discovered exculpatory DNA results and the *NAS Report* demonstrated that his clearly-established federal constitutional rights were violated. In particular, he fairly presented the facts and legal theories for the following federal claims:

- Fundamentally fair trial claim: Kunco averred that the newly-discovered exculpatory, non-match DNA evidence proved that Drs. Sobel's and David's bite mark testimony was invalid, inherently unreliable, and misleading and that he is entitled to a new trial because admitting such evidence was "so extremely unfair that its admission violate[d] fundamental concepts of justice." *Dowling v. United States*, 493 U.S. 342, 352 (1990); U.S. Const. Amends. VI, XIV. Kunco argued that, individually and collectively, the *NAS Report* and the exculpatory, non-match DNA evidence demonstrated that his trial was rendered fundamentally unfair because of Drs. Sobel's and David's individualization testimony.

- Unnecessarily suggestive identification claim: Kunco argued that, individually and collectively, the exculpatory, non-match DNA results and the *NAS Report* demonstrate that his conviction is invalid under the clearly-established federal constitutional guarantee of due process because his conviction is premised substantially – if not entirely – on "identification" testimony that was conducted in an inherently suggestive manner and is invalid and unreliable. U.S. Const. Amend. XIV; *Manson v. Brathwaite*, 432 U.S. 98 (1977).

- Reasonable doubt claim: Kunco argued that, individually and collectively, the exculpatory, non-match DNA results and the *NAS Report* demonstrate that his conviction violates his clearly-established 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. Amend. VI, XIV; *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

- Ineffective assistance of counsel claim: Kunco argued that the exculpatory, non-match DNA results support his argument that if the *NAS Report's* facts and conclusions were discoverable prior to trial or during his initial state post-conviction proceedings, his conviction is invalid under the clearly-established federal constitutional guarantee of

effective assistance of counsel. *See* U.S. Const. Amend. VI; *United States v. Cronic*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 669 (1984).

d. The October 22, 2009 Hearing

The PCRA court held a hearing on October 22, 2009. Both parties argued the claims and facts presented in their respective pleadings (as discussed above).[83] At the end of the hearing, the PCRA court did not rule on Kunco's petitions, granting both parties an opportunity to file post-hearing briefs before she issued a ruling.

e. Kunco's Post-PCRA Hearing Petition

Kunco filed his brief on January 29, 2010 and fairly presented the facts and legal theories for the following federal constitutional claims:

- Invalid/false evidence and failure to correct claim: Kunco argued that the *NAS Report* establishes that the Commonwealth presented invalid bite mark evidence and that it is reasonably likely that the invalid bite mark evidence may have affected the jury's decision to convict Kunco. *See Giglio v. United States*, 405 U.S. 150 (1972). Similarly, Kunco argued that the Commonwealth has failed to correct – or offer an appropriate remedy – for the invalid bite mark evidence. U.S. Const. Amend. XIV; *Napue v. Illinois*, 360 U.S. 265 (1959).

- Ineffective assistance of counsel claim: Kunco argued that, if the *NAS Report's* facts and conclusions were discoverable prior to trial or during his initial state post-conviction proceedings, his conviction is invalid under the clearly-established federal constitutional guarantee of effective assistance of counsel. *See* U.S. Const. Amend. VI; *United States v. Cronic*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 669 (1984).

d. PCRA Court's October 28, 2010 Opinion Regarding the *NAS Report's* Impact

The PCRA court issued its opinion with respect to the *NAS Report* on October 28, 2010.[84] Judge Hathaway denied relief for two reasons.

[83] Ex. 51.

[84] Ex. 52. The PCRA court's October 28, 2010 opinion deals strictly with the *NAS Report* issues – and not the DNA issues. In its opinion, the PCRA court said it would issue another opinion regarding the DNA claims. *See id*. at 1 n.1.

First, according to PCRA court's review of the *NAS Report* and the affidavits of Drs. Bowers, Pretty, and Averill, the *NAS Report* did not invalidate Drs. Sobel's and David's individualization testimony and its findings and holdings did not constitute the generally accepted view of the scientific community. *See* Ex. 52, at 15 ("The Report does not… conclude that the use of bite mark analysis and comparison has lost general acceptance in the scientific community of forensic odontology."); *id*. at 16 ("Therefore, the NAS Report… does not necessarily suggest that which the defendant herein alleges.").

Second, the PCRA court held that Kunco's current claims attacking Drs. Sobel's and David's individualization testimony were untimely under *state law* pursuant to 42 Pa. C.S. § 9545(b)(1)(ii). According to PCRA court, because Drs. Bowers and Pretty had "been preaching on this subject for nearly a decade," *id*. at 17, and because the *NAS Report* cited their publications that pre-dated the *NAS Report*, *see id*. at 17-18, Kunco had the necessary facts to challenge Drs. Sobel's and David's individualization testimony as far back as 2001. *See id*. at 19 n.14 ("[A] review of the NAS report strongly suggests that the information has been available to the defendant since at least 2001."). For instance, the PCRA court wrote:

> It appears… that while the *NAS Report* itself was certainly not available to the defendant until February 2009, much of the information upon which the committee relied in drafting the *NAS Report* was available long before the release of the *NAS Report*, and could have been discovered by the defendant (or his counsel) through the use of due diligence.

Id. at 18. The PCRA court concluded by holding:

> Based upon the public information available and the contents of the *NAS Report* itself, this court determines that the information regarding studies indicating the lack of reliability of bitemark comparison insofar as they purport to identify a particular perpetrator to the exclusion of any other individuals was information that was available to the defendant long before the filing of [Kunco's] Writ of Habeas Corpus/PCRA in April 2009.

Id. at 19.

The PCRA court did not adjudicate Kunco's federal constitutional claims on their merits because it concluded that Kunco's PCRA petition was untimely, and, as a result, it did not have jurisdiction to adjudicate the merits of his federal claims.

On November 5, 2010, Kunco filed a timely notice of appeal to the Pennsylvania Superior Court.

e. The PCRA Court's December 27, 2010 Opinion Regarding the Exculpatory, Non-DNA Results

On December 27, 2010, the PCRA court entered it opinion denying relief with respect to the exculpatory, non-matching DNA results.[85]

The PCRA court acknowledged that the exculpatory, non-matching DNA results from the lamp cord could undermine Seaman's identification of Kunco: "[T]he fact that multiple DNA samples were retrieved from the lamp cord that was used by the victim's attacker… could… be used to attack the credibility of the victim in her identification of [Kunco]." Ex. 53, at 14.

The PCRA court also acknowledged that the DNA results from the lamp cord "could be used to attack the credibility of the bitemark experts presented by the Commonwealth at trial..." *Id*. at 15. The PCRA court also wrote

> Theoretically, the argument would suggest that if the defendant indeed left the bite mark on the victim's skin, and if he was indeed her attacker as she identified, and if he was the perpetrator who tortured, assaulted and sodomized the victim over a seven-hour time period, how could there be none of the defendant's DNA on… the lamp cord? While this argument certainly can be, and indeed has been, made, it serves only to impeach the credibility of the Commonwealth's witnesses and not to affirmatively exculpate the defendant.

Id. at 15.

The PCRA court ultimately denied relief because it found the evidence against Kunco to be "compelling" to sustain his conviction:

[85] Ex. 53.

> Even had the Commonwealth not presented any bitemark evidence in this case, the evidence against the defendant was compelling. The victim's identification of the defendant was solid and the defendant's alibi defense lacked a scintilla of credibility. The record in this case clearly establishes that, even if the defendant were granted a new trial, allowed to present the DNA evidence (or lack thereof), and even successfully lobbied against the introduction of the bitemark analysis testimony that was present in the defendant's trial, the outcome of the case would be no different. For this reason, the defendant has not carried his burden regarding after-discovered evidence, and he is not entitled to relief under the PCRA.

Id. at 18.

Although the PCRA court held that the new DNA results were "unavailable to either the Commonwealth or [Kunco] at the time of trial," *id*. at 12, it nonetheless questioned whether Kunco diligently pursued post-conviction DNA testing:

> [T]his court questions whether the defense truly used due diligence in requesting DNA testing on these items [i.e., the girdle and lamp cord]. DNA testing of physical evidence has been available in the Commonwealth… since shortly after the time of [Kunco's] trial and DNA analysis testimony has been accepted as admissible as since… *Commonwealth v. Crews*, 536 Pa. 508, 640 A.2d 395 (1994). Surely the defendant and his list of present and past counsel could have, and arguably should have, requested the testing that the defendant ultimately obtained to support the Supplemental Petition that is now before this court.

Id. at 12 n.7.

The PCRA court did not adjudicate Kunco's federal claims on their merits because it concluded that Kunco was not entitled to relief under state law. *See* Ex. 53, at 18 ("For this reason, the defendant has not carried the burden regarding after-discovered evidence, and he is not entitled to relief under the PCRA.").

On January 25, 2011, Kunco filed a timely notice of appeal to the Pennsylvania Superior Court.

2. Superior Court Litigation

Kunco timely filed his *Opening Brief* to the Superior Court and fairly presented the facts and legal theories for the following federal claims:

- 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.

- 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)

- 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.

- 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.

- 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).

- 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).

On September 20, 2011, the Superior Court issued its opinion denying relief and affirming the PCRA court's dismissal.[86]

[86] Ex. 42.

In regards to the *NAS Report*, the Superior Court held that, under state law, the *NAS Report* did not constitute "new facts," but rather a "newly discovered source of facts." Ex. 42, at 7. As such, it held that Kunco's bite mark claims were untimely. *See id*. ("[T]he PCRA court did not err in dismissing Appellant's PCRA allegations regarding the bite-mark evidence as untimely.").

In regards to the exculpatory, non-match DNA evidence, the Superior Court held that Kunco failed to establish that, under state law, he diligently pursued post-conviction DNA testing:

> … [Under the PCRA, Kunco] needed to plead and prove the previously unknown DNA results could not have been obtained by him earlier through the exercise of due diligence.
>
> In appears [Kunco's] first effort to secure DNA evidence occurred in or around 2009, when he obtained the DNA order under 42 Pa.C.S.A. § 9543.1. Regardless of whether the DNA evidence would have been available and admissible at the time of [Kunco's] trial, nothing in his PCRA pleadings or the record demonstrates he could not have obtained the DNA testing results well before 2009. Accordingly, [Kunco] did not establish his supplemental PCRA petition satisfied the time-of-filing exception under 42 Pa.C.S.A. § 9545(b)(1)(ii).

Id. at 8.

Because Kunco "did not establish his supplemental petition was timely," the Superior Court held that, "the PCRA court lacked jurisdiction to entertain the merits of the DNA allegations," and that the PCRA court "erred in addressing the merits of [Kunco's] DNA claim[s]." *Id*. at 9.

In regards to Kunco's federal claims, the Superior Court made the following comment:

> In reaching our result, we note [Kunco's] brief lists some fourteen issues, all of which… relate directly or indirectly to the NAS report/bite-mark and/or DNA evidence. To the extent we have not explicitly discussed the substance of any of those issues, we need not do so because we find the PCRA court lacked jurisdiction to hear any of [Kunco's] PCRA requests.

Id. at 9, n.2.

The Pennsylvania state courts, therefore, did not adjudicate Kunco's federal claims on their merits because they concluded that Kunco's PCRA petitions were untimely and that Kunco failed to diligently pursue the factual predicates of his federal claims.

Claim One

John Kunco's conviction is invalid under the clearly-established federal constitutional guarantee of due process because his conviction is premised substantially – if not entirely – on bite mark testimony that the scientific community now concedes is invalid. The jury's substantial dependency on the invalid bite mark evidence rendered Kunco's trial fundamentally unfair and his conviction unconstitutional. U.S. Const. Amend. XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

Donna Seaman told investigators on December 18, 1990 – two days after her assault – that the assailant's voice sounded like Kunco – the former maintenance man at her apartment complex.

Despite Seaman's voice identification, the District Attorney's Office and NKPD did not have Kunco arrested until January 26, 1991 – nearly six weeks after Seaman's brutal assault. The NKPD arrested Kunco only after the District Attorney's Office concluded that it could possibly link the unknown bite mark to Kunco.

In April 1991, five months after Seaman's assault, Drs. Sobel and David used a controversial, seldom used, and non-validated UV-lighting technique to expose and recapture the bite mark on Seaman's left shoulder.

At Kunco's trial, Drs. Sobel and David testified that individualizing an unknown bite mark to a known biter was an accurate, valid, and generally accepted form of forensic identification.

Drs. Sobel and David testified that the unknown bite mark on Seaman's left shoulder could have only come from Kunco and no one else. In other words, they individualized the unknown bite mark to Kunco.

Drs. Sobel and David testified that bite mark identification was as accurate and reliable as fingerprint identification.

Drs. Sobel's and David's individualization testimony represented the linchpin of the Commonwealth's case against Kunco. The Commonwealth has repeatedly acknowledged in its pleadings, briefs, and motions that the bite mark is the only physical evidence linking Kunco to Seaman's assault.

The Commonwealth hammered home Drs. Sobel's and David's individualization testimony during closing arguments.

The jury convicted Kunco after deliberating for only two hours.

During sentencing, the trial judge commented on the significance and impact of Drs. Sobel's and David's individualization testimony and handed down a stiff and lengthy sentence because he was absolutely convinced – based on the individualization testimony – that Kunco committed Seaman's assault.

Bite mark identification – or individualizing an unknown bite mark to a known biter – was generally accepted by the scientific community long after Kunco's trial and conviction.

In February 2009, however, the preeminent scientific organization in the United States – the National Academy of Science (NAS) – made factual findings concluding that bite mark experts cannot individualize an unknown bite mark to a known biter.

The NAS also made factual findings concluding that the four fundamental premises of bite mark identification – uniqueness, permanency, transferability, and accuracy – are invalid.

The NAS also made factual findings that bite mark experts cannot even opine regarding the likelihood of a coincidental match because there is no base rate data regarding the many characteristics of the human bite dentition.

The NAS's factual findings establish that Drs. Sobel's and David's individualization testimony is invalid, unreliable, and so extremely unfair that its admission violated fundamental concepts of justice. In other words, the probative value of their individualization testimony is now greatly outweighed by the prejudice to Kunco from its admission at his trial.

Drs. Sobel's and David's individualization testimony has no probative value at all at this point because it is invalid and is no longer generally accepted by the scientific community. On the other hand, the prejudice to Kunco is substantial and tremendous. Unlike other forms of non-DNA forensic identification evidence, like fingerprints or firearms identification, bite marks on the victim's skin are highly probative of guilt:

> Bite mark evidence is more persuasive on the ultimate issue of guilt than other analogous forms of evidence. For example, fingerprints tend to be circumstantial or associative; that is, they rarely decide a case alone, but tend to link a defendant to the scene of the crime or an object involved in the crime. By contrast, bite marks, in the usual case, will be conclusive of the guilt issue: the logical distance between the fact of biting and the ultimate issue of guilt is short. Thus, admission of irrelevant bite mark evidence may be particularly prejudicial to the defendant.

Adrienne Hale, *The Admissibility of Bite Mark Evidence*, 51 S. CAL. L. REV. 309, 326 (1978).

The prosecutor aggravated the prejudicial impact of Drs. Sobel's and David's individualization testimony by arguing that the bite mark represented Kunco's signature and was more probative and discriminating than fingerprints.

The exculpatory, non-match DNA results confirm that Drs. Sobel's and David's bite mark testimony is invalid, unreliable, and extremely prejudicial.

Drs. Sobel and David conceded in their 1994 *Journal of Forensic Science* article that without their individualization testimony the Commonwealth could not have met its burden of proving Kunco's guilt beyond a reasonable doubt. Drs. Sobel and David wrote that their individualization testimony "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, 1562, 1567 (1994) (emphasis added).

Kunco is entitled to relief because invalid scientific evidence forms the core nucleus of his conviction – violating fundamental concepts of justice and rendering his entire trial fundamentally unfair.

The constitutional error of allowing the invalid, non-probative, and highly prejudicial individualization evidence was not harmless. Drs. Sobel's and David's bite mark testimony had a substantial and injurious effect or influence in determining the jury's verdict. Drs. Sobel's and David's invalid individualization testimony not only provided a direct link between Seaman and Kunco, it enhanced the credibility of Seaman's voice identification, while completely destroying Kunco's alibi defense and credibility. In destroying Kunco's alibi defense, Drs. Sobel's and David's individualization testimony obliterated Kunco's credibility because he was not only a liar and a rapist, he was a remorseless psychopath who tried to evade conviction by forcing his girlfriend – and the mother of his child – to lie on his behalf.

Moreover, the harm of constitutional error is in direct proportion to the weakness of the Commonwealth's evidence outside of the unconstitutionally admitted evidence. Here, outside of the bite mark evidence, the Commonwealth presented no other credible and reliable evidence

linking Kunco to Seaman's assault. Kunco, on the other hand, presented strong and credible alibi evidence.

The exculpatory, non-match DNA results, more importantly, accentuates the weakness of the Commonwealth's case.

Kunco is entitled to relief.

Claim Two

John Kunco's conviction is invalid under the clearly-established federal constitutional guarantee of due process because the state courts permitted the Commonwealth to introduce "identification" testimony that was unnecessarily suggestive manner and unreliable. U.S. Const. Amend. XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

Drs. Sobel's and David's bite mark testimony represents classic "identification" testimony. Just as an eyewitness or victim "identifies" the assailant who accosted him or her, Drs. Sobel and David "identified" the biter who inflicted the bite mark on Seaman's left shoulder.

Drs. Sobel's and David's identifications were unnecessarily suggestive and, as a result, likely tainted by conscious or unconscious contextual biases.

According to the *NAS Report*, "scientific investigations... must be as free from bias as possible" and "practices [must be] put in place to detect biases (such as those from measurements, human interpretation) and to minimize their effects on conclusions." *NAS Report*, at 4-2.

Unfortunately, while "[s]uch research is sorely needed... it [is] lacking in most of the forensic disciplines that rely on subjective assessments of matching characteristics." *Id*. at S-6. This is so because "forensic science disciplines are just beginning to become aware of contextual bias and the dangers it poses." *Id*. at 6-2. As the *NAS Report* found, the "traps created by such

biases can be very subtle, typically one is not aware that his or her judgment is being affected." *Id*.

The *NAS Report* also found that bite mark identification, like all other forensic techniques, is very susceptible to context biases:

> As with other "experienced-based" forensic method, forensic odontology suffers from the *potential for large bias among bite mark experts* in evaluating a specific bite mark in cases in which police agencies provide the suspects for comparison and a limited number of models from which to choose from in comparing the evidence. Bite marks often are associated with highly sensationalized and prejudicial cases, and there can be a great deal of pressure on the examining expert to match a bite mark to a suspect.

Id. at 5-36.

For instance, Drs. Sobel and David conducted single-sample testing: they only compared Kunco's bite pattern with the unknown bite mark. Single-sample forensic testing is equivalent to an eyewitness show-up. A show-up is an identification procedure where an eyewitness is presented with a single suspect for identification. *See* TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, UNITED STATES DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999). Eyewitness research has continually recognized an assortment of problems associated with show-ups. *See* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998). The U.S. Supreme Court has even held that a show-up raises reliability concerns because it is a highly "suggestive procedure." *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977).

More importantly, the prosecutor provided Drs. Sobel and David with extraneous or "domain irrelevant" information before they evaluated the five-month-old bite mark. "Domain-irrelevant" information is information that is unnecessary to render an opinion.[87]

[87] For instance, in a rape case, a fingerprint examiner need not know that DNA analysts linked the prime suspect's DNA to DNA recovered from the victim's underwear. Likewise, in a firearms homicide,

According to their 1994 *JFS* article, before Drs. Sobel and David examined the bite mark they knew that: (1) Seaman said she recognized Kunco's voice; (2) the forensic evidence collected did not link Kunco to Seaman's assault; and (3) because the other forensic evidence proved did not link Kunco to the assault, the bite mark evidence was the last item of evidence that could possibly link him to the assault. Drs. David and Sobel wrote:

> The victim was able to identify the suspect, despite not having seen his face, because he spoke with a lisp and was known to her. The crime scene evidence was processed and although a great deal of forensic evidence was collected, comparison of crime-scene evidence with blood and hair samples from the suspect proved inconclusive.
>
> … Since the other forensic evidence… was inconclusive, the bite mark know became crucial to the case.

Thomas J. David & Michael N. Sobel, *Recapturing a Five-Month-Old Bite Mark by Means of Reflective Ultraviolet Photography*, 39 J. FORENSIC SCI. 1560, 1561 (1994).

The clear inference of this information was that the prosecutor believed Kunco was guilty, but he needed "direct" physical evidence linking Kunco to the assault in order to obtain a conviction. Thus, the prosecutor not only provided Drs. Sobel and David with domain irrelevant information (i.e., Seaman already identified Kunco through voice identification and no other forensic evidence incriminated Kunco), he created a clear expectation (i.e., "I think John Kunco is guilty. Thus, I think his bite pattern will match the bite mark"). This (expectation-inducing) domain irrelevant information significantly increased the likelihood that Drs. Sobel and David resolved any ambiguities regarding the five-month-old bite mark in a manner consistent with the prosecutor's expectation, even if this expectation was incorrect.

---

the prosecutor's firearms examiner need not know that five people identified the defendant as the shooter. In both examples, the irrelevant information — the DNA link and the eyewitness evidence — significantly increases the likelihood that observer effects or contextual biases will affect the fingerprint and firearms examiners' conclusions. *See NAS Report*, at 5-36.

The *NAS Report* establishes that Drs. Sobel's and David's individualization testimony is invalid, unreliable, and no longer generally accepted.

The admission of Drs. Sobel's and David's unduly suggestive, invalid, and unreliable "identification" violated Kunco's clearly-established federal due process rights and rendered his entire trial fundamentally unfair.

The erroneous admission of "identification" evidence was not harmless and had a substantial and injurious effect on Kunco.

Kunco is entitled to relief.

Claim Three

John Kunco's conviction is invalid under the clearly-established federal constitutional guarantee of due process because the Commonwealth presented bite mark testimony that the scientific community now considers invalid and there is a reasonable likelihood the invalid bite mark evidence may have impacted the jury's decision to convict Kunco. The Commonwealth, moreover, has failed to correct the injustice created by the invalid bite mark evidence. U.S. Const. Amend. XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

At Kunco's trial, Drs. Sobel and David testified that individualizing an unknown bite mark to a known biter was an accurate, valid, and generally accepted form of forensic identification.

The *NAS Report* establishes that Drs. Sobel's and David's individualization testimony is invalid.

The Commonwealth has not corrected Drs. Sobel's and David's invalid testimony.

Drs. Sobel and David's invalid individualization testimony played an indispensable role in the Commonwealth's case. Indeed, in their 1994 *JFS* article, Drs. Sobel and David acknowledged that their testimony "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, 1562, 1567 (1994) (emphasis added).

Thus, there is a reasonable likelihood that their invalid testimony may have affected the jury's decision to convict Kunco.

The exculpatory DNA results confirm that Drs. Sobel's and David's bite mark testimony was invalid.

Kunco is entitled to relief.

Claim Four

Kunco's conviction is invalid under the federal constitutional guarantees of due process and the prohibition against cruel and unusual punishment because the exculpatory DNA evidence and the *NAS Report* establish that an innocent man was convicted based on invalid bite mark evidence. U.S. Const. Amends. V, VI, VIII, & XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

Kunco is entitled to relief.

Claim Five

Based on the individual and cumulative impact of the *NAS Report's* findings and conclusions, as well as the exculpatory DNA results, John Kunco's conviction is invalid under the clearly-established federal constitutional guarantees of due process, effective assistance of counsel, the right to present a meaningful defense, and the right to an impartial finding that proves every element of an offense beyond a reasonable doubt based on reliable and properly-admitted evidence. In the absence of the *NAS Report* and exculpatory DNA results, trial counsel could not present a meaningful and effective defense rendering the jury's decision to convict unconstitutional because it was deprived of essential facts and evidence that directly affected its guilt-innocence decision. U.S. Const. Amends. VI, XIV.

Supporting Facts

The matters set forth in all other sections of this Petition are repeated and re-alleged as if set forth entirely herein.

At trial, Kunco had a clearly-established right to have effective counsel present a meaningful defense.

The linchpin to the Commonwealth's case was Drs. Sobel's and David's individualization testimony.

Trial counsel challenged Drs. Sobel's and David's testimony through vigorous cross-examination.

Trial counsel did not have access to generally accepted scientific evidence undermining the validity and reliability of Drs. Sobel's and David's individualization testimony. In 1991, when, when the Commonwealth prosecuted Kunco, DNA testing was in its infancy and the PSP crime lab did not have the capabilities to perform this type of forensic identification testing. The

scientific community, moreover, generally accepted the notion that bite mark experts could individualize an unknown bite mark to a known biter to the exclusion of all others in the world.

The inability to undermine Drs. Sobel's and David's individualization testimony with generally accepted scientific evidence allowed the Commonwealth to repeatedly argue to the jury and trial judge that Drs. Sobel's and David's individualization testimony was valid, reliable, and generally accepted, and that the bite mark on Donna Seaman's shoulder represented Kunco's signature.

After hearing Drs. Sobel's and David's individualization testimony, and the Commonwealth's closing arguments hammering home the validity and significance of their testimony, the jury deliberated for a mere two hours before it decided to convict Kunco.

During sentencing, the trial judge commented on the significance and impact of Drs. Sobel's and David's individualization testimony and handed down a stiff and lengthy sentence because he was absolutely convinced – based on the individualization testimony – that Kunco committed Seaman's assault.

The *NAS Report* constitutes generally accepted scientific evidence that invalidates Drs. Sobel's and David's individualization testimony.

The exculpatory, non-DNA results represent generally accepted scientific evidence that undermines the validity and reliability of Drs. Sobel's individualization testimony as well as Donna Seaman's questionable voice identification.

Trial counsel did not have access to or the resources to develop and present this evidence at the time of Kunco's trial.

Had trial counsel had access to the *NAS Report* and modern DNA technology, trial counsel could have used it to bar Drs. Sobel's and David's individualization testimony entirely

or to significantly undermine their credibility during cross-examination. Trial counsel could have also used this evidence to undermine the credibility of Donna Seaman's already questionable voice identification. Simply put, trial counsel's inability to develop and present this powerful, generally accepted, scientific evidence deprived Kunco of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing.

This inability, in other words, not only prevented trial counsel from effectively and meaningfully demonstrating to the jury that Drs. Sobel's and David's individualization testimony was invalid and not generally accepted, it prevented trial counsel from effectively and meaningfully demonstrating to the jury that the Commonwealth failed to meet its burden of proving every element of an offense beyond a reasonable doubt based on reliable and properly-admitted evidence.

The constitutional error is not harmless beyond a reasonable doubt.

Kunco is entitled to relief.

Claim Six

If the facts and conclusions contained in the *NAS Report* were available prior to or during trial, John Kunco's conviction is invalid under the clearly-established federal constitutional guarantees of due process and effective assistance of counsel because trial counsel failed to diligently uncover, develop, and present this evidence to the trial judge and jury to in order to bar Drs. Sobel's and David's individualization testimony entirely, or, at the very least, minimize the aggravating impact of their testimony by discrediting their credibility. Direct appeal counsel failed to raise this meritorious ineffectiveness claim on direct appeal. U.S. Const. Amends. VI, XIV.

Supporting Facts

A. Deficient Performance

The Commonwealth disclosed Drs. Sobel's and David's reports to trial counsel on the morning of July 9, 1991 – the day before trial was scheduled to start.

In his pre-trial report, Dr. Sobel concluded: "Within a reasonable medical certainty, the bite mark on the back shoulder of Donna Seaman was made by the teeth of John Kunco."[88]

In his pre-trial report, Dr. David concluded: "After careful consideration it is my opinion… to a reasonable degree of dental certainty that the bite mark found on the victim was produced by the teeth of John Kunco."[89]

Given the short notice, trial counsel had the option of requesting a continuance to review Drs. Sobel's and David's reports and the bite mark evidence and to possibly consult with and retain an independent bite mark expert.

[88] Ex. 5.
[89] Ex.6.

Shortly after receiving the reports, trial counsel informed the trial judge he would move for a continuance, but that he needed to consult with Kunco first.

When trial counsel consulted with Kunco, Kunco informed him to proceed to trial.

Shortly after trial counsel consulted with Kunco, the trial judge held a brief hearing to discuss Kunco's – *and trial counsel's* – decision to forgo a continuance and to proceed to trial. During the hearing, the following colloquy occurred:

> The Court: For the record, as I understand it, the defendant and defense counsel have just been advised because of the recent receipt of a dental mark, I guess, bite mark, on the victim which matches the defendant's teeth, and they are unusual teeth, and this report has been given to defense counsel, and defense counsel initially advised me that he felt that in light of the recent receipt of this evidence, that he must have a continuance to review this material and perhaps even obtain an expert of your own; is that right?
>
> Mr. Caruthers: That is correct, Your Honor.
>
> The Court: And that you've discussed this with your client, and that he doesn't want to do that. He wants to proceed with a trial against your advice; is that right?
>
> Mr. Caruthers: That is correct, Your Honor.[90]

Trial counsel subsequently had Kunco testify so he could inform him – on the record – that proceeding to trial would not be in his best interest. During his colloquy with Kunco, trial counsel asked or made the following questions or statements:

> Mr. Caruthers: [O]ther than this dental evidence, there really isn't too much to identify you to the crime other than Ms. Seaman's voice identification of you; correct?
>
> . . .
>
> Mr. Caruthers: Now, John, you understand that these charges against you are very, very serious charges; correct?
>
> . . .
>
> Mr. Caruthers: So you understand that if you're convicted of these charges, you're going to very possibly go away for a long period of time?[91]

[90] NT at 4-5.

The trial judge made the following comments during the colloquy:

> The Court: Mr. Kunco, [trial counsel's] trying to explain to you… that in light of the, pardon the expression, of *damning evidence or serious evidence against you, very grievous evidence against you*, that it is his opinion that this case should be continued *so that he can be better prepared to defend you*. . . But if you want do [go to trial], the jury's downstairs, I'm ready, the DA is ready and defense counsel is ready, *but this will be difficult for your counsel to defend such damning evidence or serious evidence as – in effect, this is like fingerprints, but in this case it's a bite mark which they say matches you*… So with that evidence, that is not a trivial matter, that's a very serious piece of evidence which defense counsel feels he should contest. . .[92]

Simply put, trial counsel's sole reason for not requesting a continuance was because Kunco wanted to go to trial. Trial counsel's decision to abdicate his decision-making authority, and to allow Kunco to decide a non-fundamental issue, was objectively unreasonable.

No reasonable trial counsel would have relinquished his decision-making authority given the facts of Kunco's case.

Prior to receiving Drs. Sobel's and David's report, trial counsel had conducted absolutely no investigation regarding the bite mark evidence because – up until that point – trial counsel firmly believed the Commonwealth's case rested solely on Seaman's dubious voice identification; trial counsel conceded this during his colloquy with Kunco.

After receiving Drs. Sobel and David's reports, however, trial counsel knew that bite mark evidence represented the linchpin to the Commonwealth's case. Indeed, the bite mark evidence represented the only physical evidence linking Kunco to Seaman's assault; trial counsel conceded this during his colloquy with Kunco – as did the trial judge.

Despite representing the single-most important and "damning" item of evidence, and despite not having researched or investigated the bite mark evidence, trial counsel refused to

[91] NT at 9.
[92] NT at 13-14.

request a continuance and, therefore, did not have the time to adequately investigate the bite mark evidence.

Because the bite mark evidence had the predictable impact of aggravating Kunco's culpability, trial counsel had a duty to determine whether its aggravating or "grievous" impact could be mitigated.

A reasonable trial counsel would have been singularly focused on pursuing, developing, and presenting any evidence that potentially undermined the bite mark evidence. In other words, a reasonable trial attorney counsel would have unilaterally decided – in spite of Kunco's unreasonable demand – to request a continuance so they could adequately investigate the bite mark evidence and to possibly consult with and retain an independent bite mark expert. Consequently, because trial counsel conducted absolutely no investigation before he abdicated his decision-making role to his client, his decision not to request a continuance was not strategic and was objectively unreasonable.

Appellate counsel performed deficiently and acted objectively unreasonable when they did not raise this meritorious issue on direct appeal.

There was no strategic or tactical reason for counsel's failures in these areas other than his own indifference, inexperience, or inability to prepare to represent someone where complex forensic identification evidence played a substantial role. Counsel, appointed to represent Kunco in a significant felony case, were obligated to bring such skills to bear which would provide Kunco with high quality legal representation in all phases of his trial and direct appeal. Counsel were obligated to investigate and present evidence to rebut the prosecution's case and to make the Commonwealth meet its burden of presenting valid and reliable evidence that proves each

and every element of the charged offenses beyond a reasonable doubt. Counsel failed in their obligations to provide effective legal assistance to Kunco.

B. Prejudice

Not requesting a continuance substantially and injuriously prejudiced Kunco.

To begin with, as the PCRA court repeatedly stated during the October 22, 2009 PCRA evidentiary hearing, had trial counsel requested a continuance he would have learned of the (alleged) scientific report(s) that made similar or the same findings and conclusions as the *NAS Report*. These reports, therefore, had to have made two important findings and conclusions: (1) an unknown bite mark cannot be individualized to a known biter; and (2) forensic dentists cannot opine as to the likelihood of a coincidental match because there is no base rate data regarding the characteristics of teeth and bite patterns. Had trial counsel developed this information, he could have pursued a number of avenues that would have resulted in Kunco's release or acquittal.

Trial counsel could have moved for a quasi-*Frye* hearing, pursuant to the Due Process Clauses of the United States and Pennsylvania Constitutions, compelling the Commonwealth to establish that the underlying theory of bite mark identification is valid and generally accepted. Such a hearing would have resulted in the exclusion of the bite mark evidence because the underlying theory of bite mark identification – i.e., that an unknown bite mark can be individualized to a known biter – was not generally accepted by the scientific community.

Similarly, the trial judge would have prohibited Drs. Sobel and David from opining as to the likelihood of a coincidental match because there was no generally accepted data base of dental and bite characteristics. This testimony could have also been excluded pursuant to Pa.R.E. 403.

Had the trial judge excluded Drs. Sobel's and David's testimony – and the bite mark evidence altogether – one of two things would have happened: (1) the Commonwealth would have dismissed the charges against Kunco; or (2) the jury would have acquitted Kunco because there was insufficient evidence to prove each and every element of the charges pending against Kunco beyond a reasonable doubt.

The undiscovered evidence also affected how the jury assessed Drs. Sobel's and David's credibility. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. Undermining the credibility of an expert witness is even more critical because testimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect. To accurately gauge a witness's credibility, however, the jury must be provided with valid and reliable information regarding a particular witness's competency and capabilities. The undiscovered, generally accepted scientific report(s) that concluded that unknown bite marks cannot be individualized to known biters would have demolished Drs. Sobel's and David's credibility, which in turn would have demolished the Commonwealth's case against Kunco, and created a reasonable probability of a different outcome.

Finally, had trial counsel requested a continuance, he could have also retained an independent expert or experts to evaluate Drs. Sobel's UV-lighting photographs and reports.

Kunco's current counsel retained three well-respected bite mark experts to review Drs. Sobel's and David's UV-lighting photographs and reports: (1) Dr. C. Michael Bowers; (2) Dr. Iain Pretty; and (3) Dr. David Averill.

Dr. Bowers reviewed the photographs and opined:

> Upon reviewing the aforementioned photographs of the bite mark on the victim's shoulder, it is my opinion that there is insufficient detail in the photographs to

> render an opinion as to whether a known bite mark created the unknown bite pattern. This is particularly so for Commonwealth Exhibit #23 – the black-n-white (UV-lighting) photograph taken by Drs. Sobel and David on May 19, 1991, more than five months after the bite mark was originally inflicted. While I have no doubt the marks or bruising exposed by the UV-lighting reveal a human bite mark, there is insufficient detail in these marks to conclude that a known biter inflicted the human bite mark. *Any bite mark identification(s) premised on these photographs are inherently unreliable and should not be trusted*.[93]
>
> Dr. Pretty reviewed the photographs and opined:
>
> Upon reviewing the aforementioned photographs of the bite mark on the victim's shoulder, it is my opinion that there is insufficient detail in the photographs to render an opinion as to whether a known dentition created the bite pattern. This is particularly so for Commonwealth Exhibit #23 – the black-n-white (UV-lighting) photograph taken by Drs. Sobel and David on May 19, 1991, more than five months after the bite mark was originally inflicted. While I agree that the bruising exposed by the UV-lighting reveal a human bite mark, there are insufficient details contained within these marks to enable a comparison of a suspect's dentition for the purpose of positive identification. It can be stated that this is a bite injury with a low forensic value. *Any bite mark identification(s) premised on these photographs are therefore inherently unreliable and should not be considered safe*.[94]
>
> Dr. Averill reviewed the photographs and opined:
>
> Upon reviewing the aforementioned photographs of the bite mark on the victim's shoulder, it is my opinion that there is insufficient detail in the photographs to render an opinion as to whether a known bite mark created the unknown bite pattern. This is particularly so for Commonwealth Exhibit #23 – the black-n-white (UV-lighting) photograph taken by Drs. Sobel and David on May 19, 1991, more than five months after the bite mark was originally inflicted. While I have no doubt the marks or bruising exposed by the UV-lighting reveal a human bite mark, there is insufficient detail in these marks to conclude that a known biter inflicted the human bite mark. *Any bite mark identification(s) premised on these photographs are inherently unreliable and should not be trusted*.[95]

Drs. Bowers and Averill both stated that had trial counsel contacted them in 1991, prior to Kunco's trial, they would have testified on Kunco's behalf and would have informed the jury

[93] Ex. 38, at ¶ 13.
[94] Ex.39, at ¶ 9.
[95] Ex. 40, at ¶ 11.

that the UV-lighting photograph lacked insufficient detail to conclude that Kunco inflicted the bite mark.

It is reasonably probable the jury would have acquitted Kunco had it been informed, by three well-credentialed forensic dentists, that the UV-lighting photograph of the five-month-old bite mark lacked sufficient detail to conclude whether a known biter inflicted the unknown bite mark.

Individually and collectively, trial counsel's objectively unreasonable decision not to request a continuance prevented him from developing and presenting significant exculpatory evidence.

The absence of this exculpatory at Kunco's trial undermines confidence in his conviction.

Similarly, appellate counsel's failure to raise this meritorious issue on direct appeal substantially prejudiced Kunco because he would have obtained relief had the issue been raised and litigated.

Kunco is entitled to relief.

Claim Seven

John Kunco's conviction is invalid under the state and federal constitutional guarantees of due process and effective assistance of counsel because of the cumulative prejudice from all of the constitutional errors in his case. U.S. Const. Amends. VI, XIV.

Supporting Facts

Constitutional claims of error are to be considered cumulatively as well as individually, and that cumulative error or the cumulative effect of prejudice from a range of claims may collectively provide a basis for relief whether or not the effect of individual deficiencies warrants relief.

Individually and collectively, each constitutional error was prejudicial and denied Kunco his clearly established state and federal constitutional rights.

Kunco is entitled to relief.

Prayer for Relief

WHEREFORE, Kunco requests the Court to issue the following relief:

1. To order the Commonwealth-Respondent to answer Kunco's petition pursuant to Rule 5(a) of the Rules Governing Section 2254 Cases ("The respondent is not required to answer the petition unless a judge so orders.");
2. To allow Kunco to "submit a reply to the respondent's answer or other pleading within a time fix by" the Court pursuant to Rule 5(e) of the Rules Governing Section 2254 Cases;
3. To hold an evidentiary hearing Pursuant to Rule 8 of the Rules Governing Section 2254 Cases; and
4. To issue a writ of habeas corpus, vacating Kunco's convictions and ordering the Commonwealth to retry him in a reasonable time period;

Respectfully submitted this 22nd day of November 2011.

/s/ *David J. Millstein*
David J. Millstein, Esq.
Millstein and Knupp
322 Armbrust Road
Youngwood, PA, 15601
724-837-3333
PA Bar. ID No. 05724

/s/ *Craig M. Cooley*
Craig M. Cooley, Esq.
The Innocence Project
40 Worth Street, Suite 701
New York, New York 10013
IL Bar ID No. 6282688

Dated and Signed under penalty of perjury: November 22, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN KUNCO **Petitioner,**	)	
v.	)	**Case No. 2:10-cv-00115-RCM**
BRIAN V. COLEMEN, WARDEN **Defendant**	)	

Exhibits For Amended Petition for Writ of Habeas Corpus

1. Pennsylvania State Police Crime, Request for Laboratory Analysis, December 17, 1990
2. Deposition of William Dlubak, Jr., Case No. 482 C 1991, Taken March 20, 1997
3. Thomas David & Michael Sobel, *Recapturing a Five-Month-Old Bite Mark by Means of Reflective Ultraviolet Photography*, 39 J. FORENSIC SCI. 1560 (1994)
4. Dr. Michael Sobel's July 9, 1991 Bite Mark Identification Report
5. Dr. Thomas David's July 9, 1991 Bite Mark Identification Report
6. *John J. Kunco v. Commonwealth of Pa*, Case No. 482 C 1991, Handwritten Motion Requesting Post-Conviction DNA Testing, Filed February 2, 1992
7. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Motion To Administer Polygraph Test*, Filed October 24, 1992
8. *Commonwealth of Pennsylvania v. John J. Kunco*, Case No. 482 C 1991, Order of Court Denying *Motion to Administer Polygraph Test*, Filed October 27, 1992
9. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Motion For Testing of Samples And Evidence Found At Sence [sic] At Defendant's Cost*, Filed December 1992
10. *Commonwealth of Pennsylvania v. John J. Kunco*, Case No. 482 C 1991, Order of Court Denying *Motion For Testing of Samples And Evidence Found At Sence [sic] At Defendant's Cost*, Filed December 31, 1992
11. *Commonwealth of Pennsylvania v. John Kunco*, Case No. 00995 Pittsburgh 1992, Opinion of the Superior Court of Pennsylvania, Filed July 8, 1993

12. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Third Amended Post Conviction Act Petition/Motion For New Trial*, Filed May 26, 1998

13. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Decision and Order From PCRA Court Denying Post-Conviction Relief*, Filed May 26, 1998

14. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Amended Post Conviction Act Petition*, Filed December 28, 1994

15. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Motion For Inspection and Testing*, Filed January 31, 1995

16. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, Motion For Order To Require Access To Public Records and Require Disclosure of Existence of Evidence, Filed May 2, 1995

17. Fax From Det. Sgt. Charles Korman to Kathleen O'Boyle, Dated May 2, 1995

18. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Order of Court*, Filed June 13, 1995

19. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, Order of Court, Filed July 24, 1995

20. Pennsylvania State Police Crime, Request for Laboratory Analysis, December 17, 1990; Transfer From Pennsylvania State Police to New Kensington Police on February 7, 1991

21. Deposition of James L. Chambers Case No. 482 C 1991, Taken March 19, 1997

22. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, *Petition For Rule To Show Cause/Second Amended P.C.R.A. Petition*, Filed May 29, 1996

23. *Commonwealth of Pa. v. John J. Kunco*, Case No. 482 C 1991, Order of Court, Filed June 24, 1996

24. Affidavit of Elizabeth E. Guardasoni, Filed July 22, 1997

25. Deposition of Trooper Michael E. Jones, Case No. 482 C 1991, Taken March 19, 1997

26. Deposition of Chief Frank Link, Case No. 482 C 1991, Taken March 20, 1997

27. *Commonwealth of Pa. v. John J. Kunco*, Case No. 01584 Pittsburgh 1998, *Brief For Appellant*, Filed Before the Pennsylvania Superior Court on December 2, 1998

28. *Commonwealth v. John Kunco*, Case No. 1584 Pittsburgh 1998, Superior Court Opinion, Filed May 24, 1999

30. *John Joseph Kunco v. Warden Johnson et al*., Civil Action No. 00-54, *Petition For Writ of Habeas Corpus*, Filed in the Western District of Pennsylvania on January 2, 2000

31. *John Joseph Kunco v. Warden Johnson et al*., Civil Action No. 00-54, *Request For Appointment of Counsel*, Filed March 10, 2000

32. *John Joseph Kunco v. Warden Johnson et al*., Civil Action No. 00-54, Magistrate Judge's Report and Recommendation, Filed June 20, 2001f

33. *John Joseph Kunco v. Warden Johnson et al*., Civil Action No. 00-54, Memorandum Order, Filed January 3, 2002

34. *John Joseph Kunco v. Attorney General of the Commonwealth of Pennsylvania, et. al*., 85 Fed.Appx. 819 (3d Cir. 2003)

35. Iain Pretty & David Sweet, *The Scientific Basis for Human Bitemark Analyses – A Critical Review*, 41 Sci. & Just. 85 (2001)

36. C. Michael Bowers, *Problem-Based Analysis of Bitemark Misidentifications: The Role of DNA*, 159S FORENSIC SCI. INT'L. S104 (2006)

37. Iain Pretty, *A Web-Based Survey of Odontologists' Opinions Concerning Bitemark Analyses*, 48 J. FORENSIC SCI. 1117 (2003)

38. C. Michael Bowers's Affidavit, Filed August 19, 2009

39. Iain Pretty's Affidavit, Filed August 18, 2009

40. David Averill's Affidavit, Filed August 19, 2009

41. Gerald L. Vale, *History of Bitemark Evidence, in* BITEMARK EVIDENCE (Robert B. J. Dorion, ed. 2005)

42. *Commonwealth of Pa. v. John J. Kunco*, Case Nos. 1810 WDA 2010, 281 WDA 2011, Opinion of the Pennsylvania Superior Court, Filed September 20, 2011

43. Letter from Matt Kelly (Innocence Project Case Coordinator) to New Kensington Police Department Police Chief Charles Korman, Sent September 29, 2006

44. Letter from Craig Cooley (Innocence Project Staff Attorney) to New Kensington Police Department Police Chief Charles Korman, Sent September 4, 2007

45. Letter from Craig Cooley (Innocence Project Staff Attorney) to Dr. Richard Friedenheim, Sent October 2, 2007

46. Letter from Kim Garoon (Innocence Project Law Student) to New Kensington Police Department (Kathy Zampogna), Sent October 23, 2007

47. Letter from Westmorland County District Attorney John W. Peck to Craig Cooley (Innocence Project Staff Attorney), Sent March 5, 2008

48. *Commonwealth of Pennsylvania v. John J. Kunco*, Case No. 482 C 1991, *Stipulated Order for Post-Conviction DNA Testing Pursuant to 42 Pa. C.S. § 9543.1*, Filed January 30, 2009
49. Cellmark's DNA Report, March 31, 2009

50. Cellmark's DNA Report, June 30, 2009
51. *Commonwealth of Pennsylvania v. John Kunco*, Case No. 482 CR 1991, Transcripts of October 22, 2009 Hearing

52. *Commonwealth v. John Kunco*, Case No. 482 CR 1991, Opinion and Order of Court, October 28, 2010

53. *Commonwealth v. John Kunco*, Case No. 482 CR 1991, Opinion and Order of Court, December 27, 2010

54. Pennsylvania State Police, General Investigative Report, Written by Tpr. Michael E. Jones, Badge No. 2302, Dated January 12, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN KUNCO	)	
Petitioner,	)	
	)	
v.	)	**Case No. 2:10-cv-00115-RCM**
	)	
BRIAN V. COLEMEN, WARDEN	)	
Defendant	)	
	)	

Certificate of Service

Undersigned counsel certify, under penalty of perjury, that they mailed via standard mail a true and accurate copy of Kunco's *Amended Petition For Writ of Habeas Corpus* to the following parties on November 22, 2011:

Wayne Gongaware
Assistant District Attorney
Westmoreland County District Attorney's Office
2 North Main Street, Suite 206
Greensburg, Pennsylvania 15601

Office of the Pennsylvania Attorney General
Appeals and Legal Services Division
16th Floor, Strawberry Square
Harrisburg, PA 17120

/s/ Craig M. Cooley
Craig M. Cooley

Dated: November 22, 2011