

IN THE COURT OF COMMON PLEAS
OF MONTGOMERY COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
Plaintiff-Respondent)

v.)

Case No. 482 C 1991

MICHAEL THOMPSON)
Defendant-Petitioner)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR POST
CONVICTION DNA TESTING PURSUANT TO 42 Pa. C.S.A. § 9543.1**

Petitioner, Michael Thompson, hereby submits his Memorandum of Law in Support of Motion for Post Conviction DNA Testing Pursuant to 42 Pa. C.S.A. § 9543.1. The motion is presented in good faith and premised on the following facts and points of authority.

Respectfully submitted this ____ day of October 2008.

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I. Introduction

Michael Thompson is currently serving a 20 to 40 year sentence for the March 1990 rape of Karen Croom. Thompson claims he is innocent of this crime and seeks DNA testing pursuant to 42 Pa. C.S.A. § 9543.1 to prove his innocence. He is entitled to DNA testing because exculpatory results will prove his actual innocence. *See* 42 Pa. C.S.A. §§ 9543.1 (c)(3)(ii)(A-B).

On March 28, 1990, Croom was traveling along Route 202 in Montgomery County looking for the Goddard Avenue exit when she noticed another vehicle following her. She continued driving, but pulled over when she saw a red or blue light flashing on the dashboard of the vehicle following her—a vehicle she described as a Jeep Cherokee.

A man exited the vehicle and approached her vehicle. He flashed a silver badge and told her he was a plain-clothed police officer who had followed her for the past thirty minutes. The man asked for her license and told her he pulled her over for erratic driving and because her vehicle resembled one used by drug traffickers.

The man ordered Croom to move her vehicle to a nearby parking lot; she complied. He then ordered her out of the vehicle while he searched it and waited for back-up. When Croom asked him if “this was for real,” he screamed at her and told her he was tired of being hassled and that she was the eighth vehicle he pulled over that night. After his response, Croom complied and exited her vehicle. She was unsure where exactly he stopped her, but based on her description police believed he stopped her on Goddard Boulevard, across from the shopping mall, and approximately 1.5 miles from the Sheraton Hotel.

While Croom stood by the man's vehicle, she felt a prick in her arm; the man then forced her into his vehicle while she kicked and screamed. He told her: "Sit down, put your head down, shut up." At this point, she felt woozy; her legs went numb and her heart began racing. When she stopped fighting, he blindfolded her with a sleeping mask. Once in his vehicle, she noticed he tied the doors shut, preventing her from escaping. While they drove, she begged him not to kill her. He told her to shut up and put her head on the seat. When he parked, he took her by her arm and led her to what she described as a "motel-like" building where he repeatedly raped her for several hours.

After the assault, he drove her back to her vehicle. Once at her vehicle, he let her go; she entered her vehicle and drove to the Sheraton Hotel and told management what happened and they contacted the police who arrived shortly thereafter at 3:25 am. Officer Pilcicki spoke with her for about 20-25 minutes. He then transported her to Sacred Heart Hospital in Norristown where medical personnel examined her and collected a rape kit and her clothing.

Despite being near midnight (and dark) when she first confronted her assailant and blindfolded the remaining time, Croom was able to describe her assailant as being approximately 6', between 175-180 pounds, and in his mid to late 30s. She was uncertain of his eye color, but described his skin as pitted or pock-marked (i.e., acne scars). She also said he was clean shaven, had "sunken eyes," and had a dark complexion with a slightly receding hairline and loose facial skin. She said he wore an oxford type button-down shirt, a waist length leather jacket, black pants, grey/black socks and black shoes. The jacket was very simple and did not have any flaps or zippers. She provided this

description to Detective Robert E. Pilcicki and to Detective Christopher Kulzer. She also gave this description to Detective Bruce A. Saville.

On April 23, 1990, Chief Detective Oscar Vance hypnotized Croom in order to develop more information about the hotel and her assailant. She was unable, however, to provide any new information. The case grew colder when Croom failed to identify the motel where the assault occurred after visiting approximately 20 different motels. Between April 1990 and October 1991 the Upper Merion Police Department failed to identify a single suspect and did not show Croom a single photo or photo array that included potential suspects.

On October 3, 1991, the Upper Merion Police Department learned that the Pennsylvania (and Delaware) State Police had arrested Michael John Thompson for a series of roadway robberies along I-95 and Rt. 202. Thompson pulled women over, flashed a badge, told them he was a plain-clothed police officer, asked for their license and registration, and stole their purse when they retrieved this information. Significantly, Thompson robbed men and women and he *never* physically attacked or sexually assaulted any of his female victims. Instead, he simply took their personal belongings and absconded. Likewise, he drove a Chevy Cavalier during his robberies, rather than a Jeep Cherokee (or similar Jeep). Lastly, he had never been arrested for a violent offense like rape or kidnapping.

More importantly, Thompson did not match key physical characteristics offered by Croom, nor did he match the composite created by law enforcement. He did not have scars on his face; he did not have wrinkles (or crow's feet) on the side of his eyes; he did not have a receding hairline; and he was nearly 10 years younger than she described (she

placed her assailant in his late 30s; he was 27 when the rape occurred). Despite the significant difference in modus operandi, vehicle, and physical appearance, Upper Merion detectives contacted Croom, *informed her they had a suspect*, and asked her to come to Montgomery County to view a photo array that included the suspect. On October 11, 1991, *eighteen months after the assault*, Detective Bruce Saville, one of the officers who interrogated Thompson, showed her a photo array that included six photographs (Thompson's photograph was #4). After she viewed the photos for a short period, she picked Thompson's photo (photo #4).¹

At trial, the Commonwealth premised its entire case on Croom's identification. Despite the fact investigators and medical personnel collected an abundance of physical evidence, the Commonwealth *failed to link a single item of evidence* to Thompson. The prosecutor conceded this point during opening and closing statements when he informed the jury that it would have to rely solely on Croom's identification to find Thompson guilty. After *deliberating for twelve hours*, the jury ultimately convicted Thompson.

Thompson's case is the quintessential case for post-conviction DNA testing. To begin with, it is a "classic" single perpetrator *stranger* rape case where the absence of the defendant's semen and sperm will prove his actual innocence.² Moreover, his conviction is based on an identification made *nearly two years after* the offense. As the DNA

¹ It should be noted that Detective Saville is the same detective that elicited the false confession from Bruce Godschalk that led to Godschalk's wrongful convictions for two rapes he did not commit. The Innocence Project represented Godschalk and proved his innocence in 2002 with DNA testing. See www.innocenceproject.org/Content/154.php (last visited October 7, 2008).

² *E.g.*, *Commonwealth v. Brooks*, 875 A.2d 1141, 1147 (Pa. Super. 2005) ("This is not a rape-murder case where the absence of the defendant's semen could prove his innocence"); *People v. Travis*, 771 N.E.2d 489, 493 (Ill. App. Ct. 2002). ("*Rokita*... was the classic sole perpetrator case; if the DNA was not that of the defendant, the defendant did not commit the crime.").

exonerations have repeatedly established, eyewitness identification is inherently unreliable, particularly where the victim is the sole eyewitness,³ where the victim and the assailant are complete strangers,⁴ where investigators employ highly suggestive identification techniques,⁵ and where the victim does not identify the assailant for a prolonged period of time after the crime.⁶ Of the 221 DNA exonerations to date, eyewitness misidentifications have played a role in 75 to 80% of them.⁷

Moreover, Croom told detectives and testified at trial that her assailant was quite hairy and that she had “a great deal of hair” on her after the assault. The police collected numerous hairs from Croom’s person and clothing—none of which matched Thompson’s hair samples. In 1993, the hair evidence could not be subjected to DNA testing because mitochondrial (mtDNA) and STR DNA testing was not available. Now, however, if the hairs are rootless, the hair shafts can be subjected to mtDNA testing. Conversely, if the hairs have intact roots, they can be subjected to STR or mini-STR DNA testing.

³ *United States v. Wade*, 388 U.S. 218, 230 (1967) (“The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim’s understandable outrage may excite vengeful or spiteful motives.”).

⁴ The “primary concern expressed in cases discussing the problems with eyewitness identification relates to a witness observing and subsequently identifying a stranger... The accuracy of identification testimony is nevertheless much higher when matching a visual observation of a suspect to an already existing memory, as opposed to the identification of a stranger, where all relevant features must be mentally recorded from scratch.” *Moss v. Hofbauer*, 286 F.3d 851, 862 (6th Cir. 2002); accord *United States v. Wade*, 388 U.S. at 228 (“The identification of strangers is proverbially untrustworthy.”).

⁵ *United States v. Wade*, 388 U.S. at 228 (“A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.”).

⁶ *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

⁷ See www.innocenceproject.org (last visited June 20, 2008).

Accordingly, that the Commonwealth premised its entire case on Croom's questionable identification raises serious questions about the accuracy of Thompson's conviction. The jury's extended deliberations reinforce this point; had the evidence overwhelmingly demonstrated his guilt, the jury would not have deliberated for twelve hours. These questions and concerns, which could not have been conclusively answered with DNA technology in the early 1990s, can now be answered with modern DNA technology.⁸ Indeed, investigators and medical personnel collected a wealth of physical evidence from Croom's person and clothing (e.g., a rape kit and numerous hairs) that can be subjected to modern DNA tests to determine whether in fact the Commonwealth convicted an innocent man. The results of such testing can and will prove Thompson's actual innocence. As a result, he is entitled to DNA testing pursuant to 42 Pa. C.S.A. § 9543.1.

II. Statement of Facts

A. The Crime

Karen Croom was traveling Route 202 just after midnight on March 29, 1991, when she noticed a dark-colored Jeep Cherokee following her.⁹ When the vehicle activated a red or blue light on its dashboard, she pulled over to the roadside thinking it was a police officer.¹⁰ The vehicle stopped behind her and a man exited the vehicle and

⁸ As Justice Blackmun presaged two decades ago: "As technology develops, the potential for... [forensic] evidence to provide conclusive results on any number of questions... [will] increase." *Arizona v. Youngblood*, 488 U.S. 51, 70 (1988) (Blackmun, J., dissenting).

⁹ NT, Trial, 2/19/93, at 58, 72. Croom was searching for the Sheraton Hotel on Goddard Avenue, where she had reserved a room for the night so she could attend a business meeting the following day.

¹⁰ *Id.*

approached her driver-side window.¹¹ He displayed a silver badge in a black fold-out wallet and asked for her license.¹² He explained that he had followed her for some time, and that she had been “all over the road.”¹³ He then told her that her vehicle resembled a vehicle used by area drug traffickers.¹⁴ He then asked her to pull into a nearby parking lot.¹⁵ Once in the parking lot, he said he called for backup to help with the drug search, and that it would be a short time before his backup arrived.¹⁶ Croom said she began feeling uncomfortable at this point, and asked him, “Is this for real?,” to which he angrily replied, “This is the eighth car I’ve pulled over tonight and I’m tired of this.”¹⁷

He suggested that she sit in the back of his vehicle so he could search her vehicle.¹⁸ She exited her vehicle and leaned against the back door of his Jeep.¹⁹ He returned to the driver’s side of the Jeep, and then came back around the rear of the vehicle, where he suddenly grabbed her and stuck a needle in her right arm while throwing her in the back seat of his Jeep.²⁰ She struggled with him for approximately

¹¹ *Id.* at 63.

¹² *Id.* at 63.

¹³ *Id.* at 65.

¹⁴ *Id.*

¹⁵ *Id.* at 65, 69.

¹⁶ *Id.* at 74.

¹⁷ *Id.* at 75.

¹⁸ *Id.* at 76.

¹⁹ *Id.* at 77-78.

²⁰ *Id.* at 78.

thirty seconds,²¹ until he threatened her and blindfolded her.²² Towards the end of the struggle, she said she began feeling woozy and lethargic and her heart rate significantly increased.²³ He placed her on the floor in the back of the Jeep, with her legs underneath the front passenger seat, her head planted face down on the seat, and her arms spread across the back seat.²⁴ She said he then returned to the driver's seat, exited the parking lot, and drove for approximately 30 to 35 minutes.²⁵

When the car stopped, he led her by her arm out of his Jeep and into a room at a motel-like structure.²⁶ Although blindfolded, she was able to describe the room and the motel in detail at trial.²⁷ The man placed her on the bed, told her not to move, and made several trips between the room and his Jeep.²⁸ After making several trips, he moved her to the edge of the bed and reached his hand in between her legs.²⁹ When he realized she

²¹ *Id* at 81.

²² *Id* at 82.

²³ *Id* at 92.

²⁴ *Id* at 83.

²⁵ *Id* at 93. She said she was also able to see the dashboard clock by tilting her head back and looking down her nose underneath the blindfold, and thus claimed she was able to accurately keep track of the driving time. *Id.*

²⁶ *Id* at 96.

²⁷ *Id.* at 118-119. She described the room as “fairly large,” having two double beds with green patterned bedspreads, a large window, a door to the far right, some piece of furniture in the front, and a bathroom with a white shower-tub with glass walls. TT1 118-119. She described the exterior of the building as “a motel-like building, stucco, maybe only 10 units, no coke machine, no office, no vacancy sign.” *Id.* at 119.

²⁸ *Id* at 97.

²⁹ *Id* at 99.

had wet her pants, he became angry and led her into the bathroom where he washed her genitals and legs.³⁰

After washing her, he led her back to the bed and took off her shoes, socks, pants, and underwear.³¹ He then squeezed her thighs and inserted his finger into her vagina.³² She believed he ejaculated at least once or twice as he rubbed himself against her thighs.³³ He then pushed her shirts up over her chest and removed all of his own clothing except for his underwear.³⁴ He then moved her forward on the bed, bumping her head on the wall, and removed her shirts entirely.³⁵ He removed his underwear and put his penis in her face.³⁶ He then got off the bed, put on a condom, and had sex with her for several minutes in various positions on the bed.³⁷ She believed he ejaculated inside of her at least once and that he must have *ejaculated at least three and possibly four times* throughout the assault.³⁸ She told the police that *he was quite hairy* and that she had “a great deal of hair” on her after the assault.³⁹

³⁰ *Id* at 99.

³¹ *Id* at 103.

³² *Id* at 104.

³³ *Id* at 173.

³⁴ *Id* at 105, 173.

³⁵ *Id*.

³⁶ *Id* at 107.

³⁷ *Id* at 110.

³⁸ *Id* at 175.

³⁹ NT, Trial, 2/22/93, at 35; 168.

After he finished, he took her to the bathroom, placed her in the shower, and washed her from the neck down.⁴⁰ He then took her back into the room, threw her clothes at her, and told her to get dressed.⁴¹ He got dressed and went through her purse, asking her questions about her name, driver's license, credit cards, and the people in her address book.⁴² She said he wrote down some names from her address book and threatened to harm them if she went to the police.⁴³

He placed her in his Jeep, drove her to her vehicle, and told her to go to her hotel and act as if nothing happened.⁴⁴ When she arrived at the Sheraton Hotel, she told the front desk staff that she had just been raped.⁴⁵ The police arrived shortly thereafter, interviewed her, and took her to the hospital.⁴⁶

1. The Sexual Assault Examination

At the hospital, medical personnel conducted a rape examination and collected Croom's clothes, her address book, and a rape kit, which included fingernail clippings, her underwear, pubic combings, and vaginal, oral, and anal swabs and slides.⁴⁷ Her clothing consisted of a white sweatshirt, a blue t-shirt, a white t-shirt, a blue sweatpants,

⁴⁰ NT, Trial, 2/19/93, at 111.

⁴¹ *Id* at 112. She did not know where her clothes had been placed during the assault. *Id.* at 190.

⁴² *Id* at 113.

⁴³ *Id* at 114.

⁴⁴ *Id* at 120.

⁴⁵ *Id* at 122.

⁴⁶ *Id* at 123-24.

⁴⁷ NT, Trial, 2/23/93, at 22, 34, 77; Ex. 8.

and blue socks.⁴⁸ Upper Merion investigators took custody of the rape kit and clothing at the hospital later that night.⁴⁹

2. Croom's Description

From the hospital, the police transported Croom to the police station where several officers interviewed her.⁵⁰ She described her assailant as having “very dark hair, slight receding hairline, short in the front longer in back, smaller eyes, sunken slightly with skin around them, long nose, kind of small mouth, [and] acne or pock marks.”⁵¹ She also said he was about 6’ tall, 180 pounds, and looked between 35 to 40 years-old. She said he wore “a dark leather waist-length jacket, a white oxford dress shirt with black pinstripes, penny loafer shoes and [...] dark slacks.”⁵² She worked with Detective Kulzer to create a composite of her assailant.⁵³

3. The Investigation

The day after the incident, Croom and Detective Saville visited approximately twenty local motels to try to identify the location of her assault. Their search proved futile; she could not identify any of the hotels as being the one.⁵⁴ Three weeks later, on April 23, 1990, Detective Vance hypnotized her in an attempt to elicit further information

⁴⁸ Ex. 9.

⁴⁹ Ex. 8.

⁵⁰ NT, Trial, 2/19/93, at 127-28.

⁵¹ *Id* at 129; Ex. 1.

⁵² NT, 2/22/93, at 28.

⁵³ *Id* at 44-45.

⁵⁴ *Id* at 164.

about her assailant and the assault.⁵⁵ The hypnosis failed to generate any new leads and nearly a year-and-a-half passed before the police made any progress.⁵⁶

4. Michael Thompson Becomes a Suspect

Thompson first came to law enforcement's attention when the Pennsylvania State Police (PSP) and Delaware State Police (DSP) investigated a string of police-impersonation purse snatchings along the Route 95 and Route 202 corridor between Delaware and Pennsylvania.⁵⁷ During these purse-snatchings, Thompson followed *male* and female motorists and either flashed his headlights or pulled alongside their vehicles and displayed a badge.⁵⁸ Once the drivers pulled over, he represented himself as a detective or police officer and requested their license. When they retrieved their purses or wallets to remove their licenses, Thompson grabbed the purses or wallets and fled in his vehicle.⁵⁹ The PSP and DSP ultimately identified him through his vehicle, which *was a light-colored Chevrolet Cavalier*.⁶⁰

On October 3, 1991, the Upper Merion Police Department learned that the PSP and DSP arrested Thompson for the abovementioned offenses.⁶¹ Upper Merion investigators obtained Thompson's mug shots and on October 11, 1991, *more than a year-and-a-half after the assault*, they contacted Croom and asked her to come to the

⁵⁵ NT, Trial, 2/22/93, at 173.

⁵⁶ *Id.*; Ex. 2.

⁵⁷ Ex. 3.

⁵⁸ Ex. 6.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ex. 3.

police station to look at several photos.⁶² When she arrived, they showed her an aerial photo of the Concord Motel, which she could not identify, although she “noticed similarities.”⁶³ They also showed her a photo array consisting of eight photographs, including one of Thompson (photo #4). Croom identified Thompson as her assailant.⁶⁴ Investigators subsequently arrested and charged Thompson charged with Croom’s assault.⁶⁵

While Thompson conceded responsibility for the purse and wallet snatchings, he proclaimed (and still proclaims) his innocence regarding Croom’s violent and prolonged sexual assault. Indeed, Thompson targeted both male and female victims. Moreover, he never physically or sexually assaulted his female victims; he merely used the police ruse to gain access to their purses. Thus, his motive was purely monetary—not sexual or sadistic.⁶⁶ Furthermore, Pennsylvania authorities could not link Thompson to a Jeep Cherokee or similar vehicle. As mentioned, he used a Chevy Cavalier to perpetrate his roadway robberies.⁶⁷

5. The Physical Evidence and Forensic Results

Victoria Cordova of National Medical Services Laboratory examined the rape kit specimen and Croom’s clothing. The swabs and smear slides tested negative for semen

⁶² NT, Trial, 2/19/93, at 134.

⁶³ *Id.* at 135.

⁶⁴ NT, Trial, 2/22/93, at 152; Ex. 5.

⁶⁵ NT, Trial, 2/19/93, at 155.

⁶⁶ Exs. 4, 6.

⁶⁷ Ex. 4, 6.

and sperm, as did her clothing.⁶⁸ Cordova also analyzed several hairs recovered from Croom's sweat shirt, black tank top, white tank top, and sweat pants:

- **Sweatshirt**: Cordova identified blond head hairs, Caucasian dark auburn hairs, and Caucasian pubic hairs on the sweat shirt.
- **Black Tank Top**: Cordova identified a blond head hair, a Caucasian brown hair, and a Caucasian pubic hair on the black tank top.
- **White Tank Top**: Cordova identified a dark brown Caucasian pubic hair on the white tank top. This hair was dissimilar to Croom's pubic hair samples and thus could have originated from the assailant.⁶⁹ Moreover, the dark brown hair had *an intact root*.
- **Sweat Pants**: Cordova identified one light brown and one dark brown Caucasian body hairs on the sweat pants.⁷⁰ The light brown hair had *an intact root*.

Cordova concluded that the Caucasian head hairs identified on the sweatshirt and the black tank top exhibited similar characteristics and could share a common origin. Moreover, these hairs were *dissimilar* to Croom's pubic hair samples and thus could have originated from the assailant. Finally, Cordova said that the Commonwealth never submitted Thompson's hair samples to her for examination.

The Commonwealth sent the unknown hair samples collected from Croom's clothing and Thompson's hair samples to the FBI laboratory for additional testing. Wayne Oaks, an examiner with the Hair & Fibers Unit, compared the unknown hairs with

⁶⁸ NT, Trial, 2/22/93, at 80-83.

⁶⁹ *Id.* at 96.

⁷⁰ *Id.* at 85-90.

Thompson's hair samples. Oaks reported that most of the unknown hairs were not suitable for comparison purposes. Thus, he could not make any conclusions regarding whether the hairs could have originated from Thompson. The only hairs suitable for comparison purposes were several blond Caucasian head hairs that did not match Thompson's hair samples.⁷¹

The Commonwealth also had Croom's address book and photographs in her purse examined for fingerprints because the assailant repeatedly touched and handled these items. While the examination revealed several prints of value, none of them could be linked to Thompson.⁷²

6. Trial

Thompson went to trial in February 1993.⁷³ The primary issue at trial was the assailant's identity. To prove the assailant was Thompson, the Commonwealth relied entirely on Croom's identification, because none of the physical evidence could be linked to Thompson. The prosecutor conceded this point during opening statements and closing arguments when he urged the jury "to focus" its "attention on" Croom's "identification testimony":

You will not hear any testimony linking those hairs to that man or excluding those hairs from that man. They're inconclusive. So you're going to have to focus your attention on the identification testimony in this case and the credibility of [Croom]... [T]hose other things that are inconclusive don't make much sense because she knows, she was the only one there, she was the only one standing face to face with that man, she

⁷¹ NT, Trial, 2/23/93, at 22-34.

⁷² Exs. 11, 17.

⁷³ NT, Trial, 2/19/93, at 1.

was the only one that had the opportunity to see him that night. She's the only one who knew what he looked like.⁷⁴

Thompson presented a mistaken identification defense.⁷⁵ He also emphasized the lack of physical evidence, the many problems with Croom's identification,⁷⁶ and the numerous discrepancies between his physical appearance and Croom's initial description of her assailant.⁷⁷

After deliberating for *twelve hours*, the jury found Thompson guilty. The trial judge imposed a 20 to 40 year sentence.⁷⁸

II. Arguments

In 2002, the Pennsylvania legislature enacted 42 Pa. C.S.A. § 9543.1, which “permits an inmate to seek DNA testing of evidence used to convict him where such testing may establish his innocence of the crime(s) of conviction.” *Commonwealth v. Heilman*, 867 A.2d 542 (Pa. Super. 2005); *Commonwealth v. McLaughlin*, 835 A.2d at 750. To qualify for testing, petitioners must satisfy § 9543.1's prerequisites. See *Commonwealth v. Smith*, 889 A.2d 582, 583 (Pa. Super. 2005). Thompson satisfies these prerequisites and is entitled to DNA testing.

A. Thompson Can Specify the Evidence He Wants Tested and Demonstrate How Exculpatory Results Would Establish His Actual Innocence

⁷⁴ NT, Trial, 2/19/93, at 30-31.

⁷⁵ NT, Trial, 2/23/93, at 148-149 (“This is a case that involves identification. The strength or weakness of the Commonwealth's case all stands or falls on the issue of identification[.]”)

⁷⁶ *Id.* at 149, 162, 171.

⁷⁷ *Id.* at 160-161.

⁷⁸ NT, Trial, 2/24/93, at 56, 35.

Pursuant to 42 Pa. C.S.A. § 9543.1(c)(1)(I) and (c)(3)(ii)(A), Thompson must identify the evidence to be tested and establish how exculpatory results would prove his innocence. *See Commonwealth v. Smith*, 889 A.2d 582 (Pa. Super. 2005). Thompson satisfies these requirements.

1. **Evidence to Be Tested**

a. **Croom's Clothing and Rape Kit**

During her rape examination, medical personal collected the following items from Croom: (1) a white sweatshirt; (2) a blue t-shirt; (3) a white t-shirt; (4) blue sweatpants; (5) blue socks; and (6) a rape kit (i.e., vaginal, anal, and oral swabs and smear slides, fingernail scrapings and clippings, pubic combings, and underwear). Thompson would like to test these items of evidence.

Shortly after collecting her clothing and the rape kit, medical personnel transferred custody of these items to the Upper Merion Police Department (UMPD).⁷⁹ On April 9, 1990, Detective T. McGinley transported these items to National Medical Services (NMS) and transferred custody to Victoria Cordova who subsequently examined the items for the presence of hairs, fibers, semen, and sperm.⁸⁰ On October 31, 1990, NMS transferred custody of these items to Detective Saville who placed them into the UMPD "quartermaster."⁸¹

Cordova used acid phosphatase (AP) mapping to identify the possible presence of semen on the rape kit items and Croom's clothing. Her tests were negative. Despite the

⁷⁹ Ex. 8.

⁸⁰ Ex. 10.

⁸¹ Exs. 12, 13.

negative results, the evidence should be re-examined for three reasons. First, there are newer, more sensitive serological tests that can identify semen from old samples. Second, the negative results may be misleading and incorrect. Third, Cordova may have been incompetent and performed the tests or interpreted her results incorrectly.

Newer serological tests, which attempt to identify p30 in a sample,⁸² are far more sensitive than older serological methods, such as AP mapping and cross-over electrophoresis.⁸³ For instance, the Seratec PSA test is at least *100 times more sensitive* than tests using cross-over electrophoresis and at least *10 times more sensitive* than the AP mapping test.⁸⁴ In nearly 17% (17 cases) of the casework samples tested in a recent study, the Seratec PSA test found positive p30 levels in samples that had previously tested negative for p30 and where there was no visible sperm.⁸⁵ Consequently, if the rape kit items and Croom's clothing are subjected to the Seratec PSA test, there is a good chance semen might be detected on all or some of these items.

⁸² P30 is a prostate-specific antigen that is produced in the epithelial cells that line the ducts of the prostate. P30 (like AP) is emitted from the prostate into the semen. Thus, if ejaculation occurs, there is a high concentration of P30 in the discharged seminal fluid. See Edwin L. Jones, Jr., *The Identification of Semen and Other Body Fluids*, in 2 FORENSIC SCIENCE HANDBOOK 353 (Richard Saferstein ed., 2d ed. 2005); F. Samuel Baechtel, *The Identification and Individualization of Semen Stains*, in 2 FORENSIC SCIENCE HANDBOOK 363-64 (Richard Saferstein ed., 1st ed. 1988).

⁸³ Cross-over electrophoresis has long been widely used in forensic casework in serology labs because it is inexpensive and easy to use. It is used to determine whether a substance is semen by placing a suspected semen sample in one well of an electrophoretic plate and antibodies created from a known sample in the other well. A small electric potential is then applied. If the suspected sample is semen, the antigens in the sample and the antibodies from the control will be drawn toward one another to form a visible line between the two wells. See Richard Saferstein, CRIMINALISTICS 351 (8th ed., 2004).

⁸⁴ See S.J. Denison, et al., *Positive Prostate-Specific Antigen (PSA) Results in Semen-Free Samples*, 37 CAN. SOC. FORENSIC SCI. J. 197, 200 (2004).

⁸⁵ *Id.*

Second, AP mapping “is the most commonly employed test used for the presumptive identification of semen.”⁸⁶ AP is “popular because it is present in large quantities in human semen, very stable, and relatively quick and easy to analyze.”⁸⁷ However, while “AP is a relatively stable enzyme, negative tests conducted on older evidential items should be interpreted with caution because the enzymes will lose activity over time.”⁸⁸ How a particular item of evidence was stored impacts how long the AP enzyme will remain active in a sample. For instance, “the longer, warmer, and more humid the storage conditions, the shorter the enzyme’s half-life.”⁸⁹ Thus, simply because Cordova failed to identify AP on these items of evidence, does not conclusively prove the absence of AP or seminal material. Instead, the manner in which the evidence was stored could have appreciably shortened the enzyme’s half-life. In short, there is a real possibility that Cordova’s results represent a false negative (i.e., the failure to identify a substance, when the substance is actually present).

Finally, as demonstrated by recent DNA exonerations, there is a strong possibility Cordova may have simply erred in her analyses. The IP has worked several cases where the State’s forensic serologist failed to identify semen or sperm on an item of evidence prior to trial, but upon re-examination of the evidence during post-conviction DNA

⁸⁶ Edwin L. Jones, Jr., *The Identification of Semen and Other Body Fluids*, in 2 FORENSIC SCIENCE HANDBOOK 331 (Richard Saferstein ed., 2d ed. 2005); accord Robert C. Shaler, *Modern Forensic Biology*, in 1 FORENSIC SCIENCE HANDBOOK 536 (Richard Saferstein, ed, 2d ed. 2002) (noting that AP testing is a “venerable technique for locating semen”).

⁸⁷ *Id.*

⁸⁸ Shaler, *supra*, at 536.

⁸⁹ *Id.*

proceedings an independent DNA laboratory was able to identify semen or sperm on the evidence.⁹⁰

b. Hairs Collected from Croom's Clothing

Cordova collected eighteen different hairs from Croom's clothing and placed them on eighteen separate slides.⁹¹ Thompson would like to test these hairs.

On November 13, 1991, Cordova transferred custody of the eighteen hair slides to Detective Saville.⁹² On November 14, 1991, Officer David Lacy (of the UMPD) transported the evidence to the FBI laboratory in Washington, D.C.⁹³ Following its

⁹⁰ Indeed, one of the Innocence Project's most recent exonerations—involving Ronald Taylor—proves this very point. At his 1994 rape trial, the State's serologist testified she examined the bed sheet where the rape occurred and found no signs of semen; the alleged lack of semen prevented the Houston Crime Laboratory from pursuing DNA tests that would have exonerated Taylor prior to trial. However, when the Innocence Project accepted his case, and had the bed sheet re-examined by a private DNA laboratory, the laboratory identified a semen stain and developed a DNA profile that ultimately exonerated Taylor and identified Roosevelt Carroll—a twice convicted sex offender—as the actual assailant. *See* Mike Tolson & Roma Khanna, *Mix-up on DNA Deals HPD Lab Another Blow*, HOUS. CHRON., Oct. 4, 2007, at A1; Roma Khanna, *DNA Tests Point to a Sex Offender as Actual 1993 Rapist: Convicted in 2 Earlier Attacks, He Lived Just Blocks from the Man Who Paid for the Crime*, HOUS. CHRON., Oct. 5, 2007.

In 1992 a Manhattan jury convicted Michael Mercer of a Harlem rooftop rape. Prior to trial, the State's serologist reported that the vaginal swabs tested negative for seminal fluid. When Mercer moved for DNA testing during the late 1990s, the post-conviction court denied his request due to the serologist's initial negative results. However, when a private DNA laboratory re-examined the swabs in 2003, using *conventional* serology techniques, it identified seminal material, which it subjected to STR DNA testing. The DNA tests produced a full profile that exonerated Mercer and identified a convicted serial rapist as the true perpetrator. *See* Robert D. McFadden, *DNA Clears Rape Convict After 12 Years*, N.Y. TIMES, May 20, 2003.

Likewise, a New Jersey court recently vacated Larry Peterson's 1989 rape-murder conviction after DNA testing excluded him as a potential contributor of the seminal material identified on the vaginal and oral swabs. Importantly, when the State's serologist examined the swabs in 1989, she did not detect seminal material. However, when the Innocence Project accepted Peterson's case and sent his evidence to a private DNA laboratory, the laboratory identified seminal material using *conventional* serology techniques. *See* Laura Mansnerus, *Citing DNA, Court Annuls Murder Conviction from 1989*, N.Y. TIMES, July 30, 2005.

⁹¹ Ex. 14.

⁹² *Id.*

⁹³ Ex. 16.

standard practice, the FBI laboratory returned the hair evidence to the UMPD after it completed its testing.

2. DNA Tests

The different types of DNA testing that can prove Thompson's innocence will be briefly discussed.

a. Short Tandem Repeat (STR) Techniques

Conventional STR and mini-STR tests focus on autosomal DNA markers. Autosomes are non-sex chromosomes. The genetic markers on autosomes *are shuffled* with each generation because half of an individual's genetic information comes from his or her father and half comes from his or her mother.⁹⁴ Thus, these tests are far more discriminatory than lineage marker DNA tests, *see infra*, because the genetic markers are *shuffled* with each generation thereby creating distinctive genetic profiles for each person.

(1). Conventional STR Testing

STR DNA testing offers several advantages over the first generation of DNA tests. First, it requires a minuscule amount of biological evidence. Second, it can be used on degraded samples. Third, it can be used to detect and decipher mixtures. Fourth, it can be used to detect masking so different profiles can be properly differentiated. Lastly, it is highly discriminatory.⁹⁵

⁹⁴ See JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 201-03 (2d ed. 2005).

⁹⁵ See *United States v. Boose*, 498 F.Supp.2d 887, 890-91 (N.D. Miss. 2007) (STR testing is "the most widely used by DNA labs . . . because it is capable of a high degree of accuracy, showing an overwhelmingly large probability that a suspect's DNA matches an evidence sample.").

Unlike first generation tandem repeat DNA tests, STR sections are comprised of much smaller repeat units, from 2 to 7 bases (as compared with 8 to 80 in earlier tests), and the total size of an STR is smaller, usually less than 500 bases (as compared with several thousand base pairs found in earlier tests).⁹⁶ The smaller number of base pairs means very small amounts of biological evidence—less than 1 nanogram (1 billionth of a gram)—can be easily amplified (using polymerase chain reaction (PCR)) and accurately profiled. As one prominent DNA textbook explains:

Modern-day PCR methods, such as multiplex STR typing, are powerful because minuscule amounts of DNA can be measured by amplifying them to a level where they may be detected. Less than 1 ng of DNA can now be analyzed with multiplex PCR amplification of STR alleles compared to 100 ng or more that might have been required [with earlier tests] only a few years ago.⁹⁷

The ability to utilize PCR is critical because “it permits a very tiny amount of DNA, such as would be found on a postage stamp, cigarette butt, or coffee cup, to be amplified to produce an amount large enough to be analyzed.”⁹⁸ Thus, Thompson can use STR testing on the two hairs recovered from the white tank top and sweat pants that had intact roots.

The shorter base pairs also make STR testing highly effective on degraded samples:

Fortunately, because STR loci can be amplified with fairly small product sizes, there is a greater chance for the STR primers to find some intact DNA strands for amplification. In addition, the narrow size range of STR alleles benefits analysis of degraded DNA samples . . . The potential for

⁹⁶ See NAT’L INST. OF JUST., DEP’T OF JUST., THE FUTURE OF FORENSIC DNA TESTING 39-40 (Nov. 2000).

⁹⁷ Butler, *supra*, at 146.

⁹⁸ *Id.* at 39.

analysis of degraded DNA samples is an area where multiplex STR systems really shine over previously used DNA markers.⁹⁹

Because Thompson's case is nearly twenty years old, STR testing will prove invaluable if any of the evidence has degraded.

STR testing can detect and decipher mixtures. Mixtures arise when two or more individuals contributed biological material to the sample being tested. Prior to STR and PCR testing, detecting mixtures was challenging.¹⁰⁰ However, as "detection technologies have become more sensitive with PCR sensitivity . . . the ability to see minor components in the DNA profile of mixed samples has improved dramatically over what was available with [earlier] methods only a few years ago."¹⁰¹ In particular, using "highly polymorphic STR markers with more possible alleles translates to a greater chance of seeing differences between the two components of a mixture."¹⁰²

STR testing can detect masking in a mixed sample. When two contributors to a mixed stain share one or more alleles, the alleles are "masked" and the contributing genotypes may not be easily decipherable. However, "by examining the STR profiles at other loci that have unshared alleles," a mixed sample "may be able to be dissected properly into its components."¹⁰³ This may prove valuable in Thompson's case,

⁹⁹ *Id.* at 146, 147.

¹⁰⁰ See COMM. ON DNA TECH. IN FORENSIC SCI., NAT'L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 158 (1992) ("Conventional serology is further limited, in that analysis of mixed-fluid stains in which two or more contributors are involved can mask an individual donor.").

¹⁰¹ *Id.* at 156.

¹⁰² *Id.* at 155.

¹⁰³ *Id.* at 157.

particularly for the swabs and smears slides because Croom's vaginal secretions may have overwhelmed or masked the assailant's DNA.

Finally, STR testing is the most discriminatory DNA test. The statistical probability of an STR match between two unrelated persons in the Caucasian American population has been conservatively estimated at 1 in 575 trillion.¹⁰⁴ Thus, given the United States' population, an STR profile is "effectively unique."¹⁰⁵ As the Tenth Circuit Court of Appeals recognized:

As far as scientists have determined, DNA is the most reliable means of identifying individuals. There is an infinitesimal chance that any two individuals will share the same DNA profile unless they are identical twins. Thus, a DNA match between two samples excludes the rest of the population from suspicion to a near 100% certainty.¹⁰⁶

(2). Mini-STR Testing

The newest form of STR testing is mini-STR testing, which is premised on the same principles as STR (i.e., DNA tests which look for short tandem repeats). Mini-STR testing, however, works incredibly well with "highly degraded DNA as well as very low amounts of DNA,"¹⁰⁷ because the PCR primers anneal closer to the repeat region than conventional STR kit primers.¹⁰⁸ Mini-STR testing may prove beneficial in Thompson's

¹⁰⁴ NIJ 2000 Report, *supra*, at 19.

¹⁰⁵ *Id.* at 25.

¹⁰⁶ *Banks v. United States*, 490 F.3d 1178, 1188 (10th Cir. 2007).

¹⁰⁷ Butler, *supra*, at 148.

¹⁰⁸ See *id.* at 150 ("[I]t is likely that miniSTRs will play a role in the future of degraded DNA analysis probably to help recover information that has been lost with larger loci from conventional [STR testing]."); see also P. Grubweiser et al., *A new "mini-STR Multiplex" Displaying Reduced Amplicon Lengths for the Analysis of Degraded DNA*, 120 INT'L. J. LEGAL MED. 115 (2006); Pablo Martin, Oscar Garcia, Cristina Albarran et al., *Application of Mini-STR Loci to Severely Degraded Casework Samples*, 1288 FORENSIC SCI. INT'L 522, 524 (2006)

case because the case is nearly twenty years old and degradation may be an issue. Likewise, mini-STR testing can be used on the minute roots from the two hairs with intact roots recovered from Croom's white tank top and sweat shirt.

b. Lineage Marker DNA tests

STR testing, as mentioned, focuses on the non-sex chromosomes that are repeatedly shuffled from generation to generation. Y-STR and mitochondrial DNA (mtDNA) tests, on the other hand, represent lineage markers, which are passed down from generation-to-generation without changing (except for mutational events).¹⁰⁹ Paternal lineages can be traced with Y chromosome markers (Y-STRs), while maternal lineages can be traced with mtDNA sequence information. Although not as discriminatory as autosomal STR tests, Y-STR and mtDNA still “have an important role to play in forensic investigations.”¹¹⁰

(1). Y-STR Testing: Paternal Lineage

Y-chromosome testing is valuable because Y-chromosomes are only found in males. Males and females have two sex chromosomes: males have an X chromosome and a Y chromosome (X,Y), whereas females have two X chromosomes (X, X). Because the vast majority of crimes where DNA is helpful involve male perpetrators (i.e., rape-murders), Y-STR tests can prove more beneficial than standard STR testing in certain

(“[O]ur data indicate that the mini-STR [tests] offer an effective tool for recovering information in degraded forensic samples that generated negative results or partial profiles with commercial STR kits.”); C. Romano, E. Di Luise, D. Di Martino et al., *A Novel Approach for Genotyping of LCN-DNA recovered from highly degraded samples*, 1288 FORENSIC SCI. INT’L 577 (2006).

¹⁰⁹ Butler, *supra*, at 201-03.

¹¹⁰ *Id.* at 201.

circumstances.¹¹¹ For instance, Y-STR tests can produce interpretable results where standard STR tests may be limited by the evidence, such as in mixtures where high levels of female DNA may overwhelm the minor amounts of male DNA. However, using “Y chromosome specific PCR primers can improve the chances of detecting low levels of the perpetrator’s DNA in a high background of the female victim’s DNA.”¹¹²

Y-STR testing’s only downside is that it is not as discriminatory as conventional STR tests because a male’s Y-STR profile will be shared with all males in his paternal lineage. Thus, a father and his sons will have the same Y-STR profile, as will the sons and their paternal grandfather or uncles.

Y-STR testing may prove critical in Thompson’s case, particularly with respect to the rape kit swabs and smear slides. Croom’s vaginal secretions, for instance, may have overwhelmed or masked the assailant’s DNA on these items. Y-STR tests, however, can zero in on any male DNA mixed in with or overwhelmed by Croom’s secretions and identify who contributed the biological evidence.

(2). Mitochondrial DNA Testing: Material Lineage

STR testing requires nuclear DNA (nDNA) or DNA from the chromosome’s nucleus.¹¹³ Mitochondrial tests, however, focus on the cell’s mitochondria, which are

¹¹¹ See Cassie Johnson, *Validation and Uses of a Y-Chromosome STR 10-Plex for Forensic and Paternity Laboratories*, 48 J. FORENSIC SCI. 1 (2003).

¹¹² Butler, *supra*, at 203; see also *Profile: Killer Instinct; Melinda Elkins works seven years to prove her husband's innocence in murder of Judy Johnson and rape of Brooke Sutton*, Dateline NBC, Oct. 7, 2007 (discussing how Y-STR played a critical role Clarence Elkins’s exoneration); Chief Justice Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 BERKELEY TECH. L.J. 671, 688 n.91 (2007) (discussing Clarence Elkins’s case and the importance of Y-STR testing).

¹¹³ See Butler, *supra*, at 17.

energy-producing organelles residing in the cell's cytoplasm (located outside the cell's nucleus).¹¹⁴ Unlike the nucleus—where there can only be one per cell—there are several hundred mitochondria per cell. However, similar to the nucleus, mitochondria contain their own DNA, which differs from nDNA, and which is inherited from the individual's *mother*.

Compared with traditional nDNA testing, mtDNA testing offers three primary benefits. First, its structure and cell location makes mtDNA more stable, enabling investigators or defense attorneys to test old or degraded samples.¹¹⁵ Second, mtDNA is available in larger quantities per cell, enabling the testing of smaller samples.¹¹⁶ Finally, and perhaps most importantly, mtDNA can be extracted from samples in which nDNA cannot, specifically bone fragments and *hair shafts*.¹¹⁷ Mitochondrial DNA's primary limitation is that—unlike with nDNA—maternal relatives share identical copies of mtDNA, so mtDNA is not a unique identifier.

¹¹⁴ See NIJ 2000 Report, *supra*, at 46.

¹¹⁵ See Butler, *supra*, at 242 (noting it is “this amplified number of mtDNA molecules in each cell that enables greater success (relative to nuclear DNA markers) with biological samples that may have been damaged”); Alice R. Isenberg, *Forensic Mitochondrial DNA Analysis: A Different Crime-Solving Tool*, 71 FBI L. ENFORCEMENT BULL. 8, at 16 (2002) (noting that mtDNA's location in the cell and its circular structure “protect[] it from deterioration”); Charlotte J. Word, *The Future of DNA Testing and Law Enforcement*, 67 BROOK. L. REV. 249, 251 (2001) (reporting mtDNA's use in post-conviction cases and other cases in which samples are very old).

¹¹⁶ See NIJ 2000 Report, *supra*, at 48; *State v. Council*, 515 S.E.2d 508, 516 & n.12 (S.C. 1999).

¹¹⁷ *E.g.*, Butler, *supra*, at 241; *United States v. Coleman*, 202 F.Supp.2d 962, 965 (E.D. Mo. 2002) (observing that bone and hair shafts can be tested for mtDNA). Mitochondrial DNA is also universally accepted by courts. See *United States v. Chase*, 2005 WL 757259, at *3, *5 (D.C. Super., Jan. 10, 2005); *United States v. Coleman*, 202 F.Supp.2d 962 (E.D. Mo. 2002); *State v. Council*, 515 S.E.2d 508 (S.C. 1999).

Mitochondrial DNA may prove critical in Thompson's case. First, because his case is nearly twenty years old, some of the samples might have degraded. Second, mtDNA can be used on the numerous (rootless) hairs recovered from Croom's clothing.

3. Establishing Actual Innocence

To qualify for DNA testing, Thompson must prove that the envisioned DNA tests will establish his actual innocence. The actual innocence threshold is a cumulative assessment. This can be inferred from the statute's mandate that the Court must assume exculpatory *results* for the *evidence* to be tested. See 42 Pa. C.S.A. § 9543.1(c)(3)(ii) ("DNA testing of the specific *evidence*, assuming *exculpatory results*, would establish... the applicant's actual innocence of the offense for which the applicant was convicted") (emphasis added); *Commonwealth v. Smith*, 889 A.2d 582, 583 (Pa. Super. 2005). Thus, Thompson must show and the Court must assume that the results of *all* the DNA *tests*, considered collectively, will establish his actual innocence.

While the Pennsylvania Supreme Court has said that actual innocence "means factual innocence, not mere legal insufficiency," *Commonwealth v. Williams*, 936 A.2d 12, 25 (Pa. 2007) (citations and quotations omitted); accord *Bousley v. United States*, 523 U.S. 614, 623-24 (1998), it (as well as the Superior Court) has yet to articulate what "actual innocence" standard governs the § 9543.1 inquiry. The U.S. Supreme Court, for instance, has articulated three different actual innocence standards for different situations.¹¹⁸ As explained *infra*, regardless of what standard actually governs § 9543.1's actual innocence inquiry, exculpatory DNA results will satisfy each of them.

¹¹⁸ In *Schlup v. Delo*, 513 U.S. 298 (1996), the Court held that a federal court may consider a federal habeas petitioner's defaulted claims if the petitioner produces newly discovered evidence that makes it "more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Id.* at 327; accord *House v. Bell*, 126 S.Ct. 2064, 2076-77

a. **Semen or Sperm on the Rape Kit Items or Croom's Clothing**

The Commonwealth argued that Thompson—and *only he*—kidnapped and assaulted Croom. Likewise, Croom testified she had not had consensual sex in the days and weeks leading up to her assault. Thus, if semen or sperm are identified on the rape kit items or Croom's clothing, this can lead to only one conclusion—the semen or sperm came from the assailant. Accordingly, if DNA tests on the semen or sperm produce a DNA profile that is inconsistent with Thompson's DNA profile this would prove his actual innocence. Simply put, then, this case represents the “classic” single-perpetrator stranger rape where the absence of the defendant's semen and sperm will prove his actual innocence.¹¹⁹

(2006). While the *Schulp* standard is “demanding and permits review only in the ‘extraordinary’ case,” it “does not require absolute certainty about the petitioner's guilt or innocence.” *Id.* Moreover, because a *Schlup* “claim involves evidence the trial jury did not have before it, the inquiry requires the... court to assess how reasonable jurors would react to the overall, newly supplemented record.” *Id.* at 2078.

In *Sawyer v. Whitley*, 505 U.S. 333 (1992), the Court held that to prove that a capital prisoner is “actually innocent” of the death penalty, he “must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.” *Id.* at 336. The “clear and convincing” standard makes the *Sawyer* standard more demanding than the *Schulp* standard.

Finally, in *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court assumed, without deciding, that “a truly persuasive demonstration of ‘actual innocence’ made after trial would... warrant federal habeas relief if there were no state avenue open to process such a claim.” 506 U.S. at 417. The “threshold showing for such an assumed right would necessarily be *extraordinarily high*,” the Supreme Court explained, and the petitioner's evidence there fell “far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist.” *Id.* at 417 (emphasis added).

¹¹⁹ See *Commonwealth v. Brooks*, 875 A.2d 1141, 1147 (Pa. Super. 2005) (“This is not a rape-murder case where the absence of the defendant's semen could prove his innocence”); see also *In re Braxton*, 258 F.3d 250, 254 (4th Cir. 2001) (“because the prosecution's theory of the case at trial was that a lone assailant murdered and sodomized Van Hart, it is reasonable to infer that the person whose seminal fluid was recovered from Van Hart's anus is her killer.”); *People v. Travis*, 771 N.E.2d 489, 493 (Ill. App. Ct. 2002) (“*Rokita*... was the classic sole perpetrator case; if the DNA was not that of the defendant, the defendant did not commit the crime.”).

Indeed, *no reasonable juror* would convict a defendant for rape where the biological evidence collected from the victim, shortly after the assault, did not match the defendant's DNA profile. Moreover, no ethical or reasonable prosecutor would prosecute an individual for a sexual offense where DNA tests on the semen or sperm recovered from the victim did not match the individual's DNA profile. There have been numerous cases recently where prosecutors dropped rape or rape-murder charges against a defendant after DNA tests on the biological evidence collected from the victim or the scene excluded the defendant—even if the victim(s) identified the defendant as the assailant or the assailant made incriminating statements or confessed.¹²⁰

These cases not only demonstrate the significance of non-match DNA results in sexual offenses, they demonstrate the “special role” prosecutors play in the criminal justice system. *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Banks v. Dretke*, 540 U.S. 668, 696 (2005); *Commonwealth v. Cherry*, 378 A.2d 800, 803 (Pa. 1977).¹²¹ The prosecutor's “duty... [is] to do justice, not merely ‘win’ convictions.” ABA STDS. FOR CRIM. JUST.: PROSECUTION FUNCTION, Std. 3-3.4 (3rd ed. 1993) (commentary).¹²² As a result, a prosecutor must “refrain from prosecuting a charge that [he or she] knows is not supported by probable cause.” PENNSYLVANIA DISCIPLINARY RULES OF PROF'L CONDUCT, Rule 3.8(a); *accord* ABA MODEL RULES OF PROF'L CONDUCT, Rule 3.8(a). Thus, because prosecutors “must exercise sound discretion in the performance of his or

¹²⁰ Ex. 18.

¹²¹ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2004) (characterizing government officers as “minister[s] of justice”).

¹²² MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (2004) (stating that the prosecutor's “duty is to seek justice”).

her functions,” ABA STDS. FOR CRIM. JUST.: PROSECUTION FUNCTION, Std. 3-1.1(b) (3rd ed. 1993), and “refrain from improper methods calculated to produce a wrongful conviction[.]” *Berger v. United States*, 295 U.S. 78, 88 (1935), justice and logic dictate that where DNA results from a sexual offense do not match a suspect’s DNA, the most appropriate and just course of action is to dismiss the charges and free the suspect. *See United States v. Wade*, 388 U.S. 218, 256 (1967) (White, J., concurring and dissenting in part) (noting that prosecutors “have the obligation to convict the guilty and to make sure they do not convict the innocent”).¹²³

b. Redundant Results

Thompson’s innocence can also be established with redundant results. A redundancy occurs when the same genetic profile is identified from more than one item of evidence.¹²⁴ For instance, if the same male DNA profile—that is inconsistent with

¹²³ However, if a zealous prosecutor pursued charges where the DNA results excluded the defendant, he or she runs the risk of jeopardizing their career, and worse yet, being disbarred for pursuing a case where objective science clearly trumped a witness’s or witnesses’ identification[s]. Perhaps the strongest case emphasizing this point is the Duke Lacrosse rape case, where Durham County, North Carolina District Attorney Mike Nifong pursued rape charges against several Duke Lacrosse players despite the fact DNA results excluded the players. *See* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 *FORDHAM L. REV.* 1337 (2007) (discussing the case in detail). The North Carolina State Bar disbarred Mr. Nifong, in part, because he pursued charges against these players even though objective DNA evidence contradicted the victim’s statements. Moreover, in light of the DNA results, the North Carolina Attorney General’s Office declared all the players innocent because “[n]o... physical evidence... corroborated [the victim’s] testimony.” *Id.* at 1347 (citing the North Carolina Attorney General’s Office’s official report). The Attorney General’s Office concluded, “[b]ased on the significant inconsistencies between the evidence and the various accounts given by the accusing witness, the Attorney General and his prosecutors determined that the three individuals were innocent of the criminal charges... .” *Id.* (citing the North Carolina Attorney General’s Office’s official report).

¹²⁴ Indeed, redundant results led to Nicholas Yarris’s exoneration. Yarris spent twenty-two years on Pennsylvania’s death row for a crime he did not commit. Mr. Yarris was convicted of a rape-murder and the evidence against him at trial included inculpatory statements and multiple eyewitnesses placing him near the crime scene. *See Yarris v. County of Delaware*, 465 F.3d 129, 130-32 (3rd Cir. 2006) (describing evidence of guilt at trial in context of Yarris’s subsequent Section 1983 action for wrongful conviction); *Commonwealth v. Yarris*, 549 A.2d

Thompson's DNA profile—is obtained from several hairs recovered from Croom's clothing, this would prove his actual innocence. Moreover, if this profile is similar to a male DNA profile developed from the rape kit items or Croom's clothing, these results would also prove Thompson's actual innocence.

c. DNA Data Bank Hit

If STR testing produces an unknown male DNA profile—that is inconsistent with Thompson's DNA profile—the profile can be “entered into the FBI's Combined DNA Index System (“CODIS”), a massive, centrally managed database including DNA profiles from federal, state, and territorial DNA collection programs, as well as profiles drawn from crime-scene evidence, unidentified remains, and genetic samples voluntarily provided by relatives of missing persons.” *United States v. Weikert*, 504 F.3d 1, 4 (1st Cir. 2007); *Banks v. United States*, 490 F.3d 1178, 1181 (10th Cir. 2007); 42 U.S.C. § 14132(a).¹²⁵ CODIS “allows State and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for

513, 518-19 (Pa. 1988) (direct appeal opinion outlines the evidence used to convict Yarris). Post-conviction DNA testing uncovered the same male profile on three items—gloves found in the victim's car, semen stains found on the victim's clothing, and scrapings of the victim's fingernails:

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

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

Faced with redundant proof that another man raped and murdered the victim despite Yarris's inculpatory statements, the Delaware County District Attorney's office requested that Yarris's conviction be vacated. *Id.*

¹²⁵ The DNA results could also be uploaded into Pennsylvania's DNA database, as well.

which there are no suspects to DNA samples of convicted offenders on file in the system.” H.R. Rep. 106-900(I), at 8 (2000).¹²⁶ As one court noted:

CODIS can be used in two different ways. First, law enforcement can match one forensic crime scene sample to another forensic crime scene sample, thereby allowing officers to connect unsolved crimes through a common perpetrator. Second, and of perhaps greater significance, CODIS enables officials to match evidence obtained at the scene of a crime to a particular offender’s profile.

United States v. Kincaid, 379 F.3d 813, 819 (9th Cir. 2004).

As of June 2008, CODIS contained more than 6,031,000 profiles of individual offenders and over 225,400 profiles derived from crime scene evidence and other sources. *See* Federal Bureau of Investigation, National DNA Index System Statistics, available at <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited September 20, 2008). As of June 2008, CODIS has produced over 71,500 hits assisting in more than 71,800 investigations. *Id.* With respect to Pennsylvania, CODIS contains over 181,011 samples from Pennsylvania offenders, which have aided 2,186 investigations. *See* <http://www.fbi.gov/hq/lab/codis/stats.htm#Pennsylvania> (last visited September 17, 2008). As the First Circuit Court of Appeals explained:

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

¹²⁶ DNA database systems that use CODIS contain two main criminal indexes and a missing persons index. When a DNA profile is obtained and entered into CODIS’s forensic (crime scene) index, “the database software searches thousands of convicted offender DNA profiles (contained in the offender index) of individuals convicted of offenses such as rape and murder.” NAT’L INST. OF JUST., DEP’T OF JUST., USING DNA TO SOLVE COLD CASES (July 2002), available at, www.ncjrs.gov/txtfiles1/nij/194197.txt. Similar to the Automated Fingerprint Identification System (AFIS), CODIS “generates investigative leads in cases where biological evidence is recovered from the crime scene. Matches made among profiles in the Forensic Index can link crime scenes together; possibly identifying serial offenders.” U.S. DEP’T OF JUST., FEDERAL BUREAU OF INVEST., CODIS: COMBINED DNA INDEX SYSTEM BROCHURE, at <http://www.fbi.gov/hq/lab/codis/brochure.pdf> (last visited Sept. 17, 2008).

more accurately, both by identifying offenders and by eliminating innocent suspects.

United States v. Weikert, 504 F.3d at 4.¹²⁷ More importantly, by identifying the actual culprit this will prevent future wrongful convictions. *See United States v. Amerson*, 483 F.3d 73, 87 (2d Cir. 2007) (“The greater accuracy and speed with which CODIS allows the government to apprehend and convict those guilty of crimes has, as we have seen, an equally important corollary—its use in exonerating innocent people criminally suspected, convicted, or charged.”).¹²⁸

Thus, DNA testing can not only exonerate Thompson, it can identify the true perpetrator. Indeed, in 82 of the first 215 DNA exonerations in the United States, DNA testing eventually led authorities to the true perpetrator. *See* Jeff Carlton, *DNA Reveals True Perpetrator in 1982 Dallas County Rape*, DALLAS MORNING NEWS, Jan. 30, 2008 (citing Innocence Project statistics).¹²⁹ For instance, if the same unknown male DNA profile is identified from several different hairs recovered from Croom’s clothing, Thompson would ask that this DNA profile be uploaded into CODIS and Pennsylvania’s

¹²⁷ *See, e.g.*, 146 Cong. Rec. H8572-01, H8575 (daily ed. Oct. 2, 2000) (statement of Rep. Canady) (“The purpose of [CODIS] is to match DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders. Clearly, the more samples we have in the system, the greater the likelihood we will come up with matches and solve cases.”); *id.* at H8576 (statement of Rep. Scott) (explaining that the Justice For All Act of 2004 and CODIS will “save lives by allowing apprehension and detention of dangerous individuals while eliminating the prospects that innocent individuals would be wrongly held for crimes that they did not commit”); H.R. Rep. No. 108-711, at 2 (2004) (“[T]he Justice For All Act of 2004... seeks to ensure that the true offender is caught and convicted for the crime.”).

¹²⁸ *See* House Rep. No. 106-900(I), at *10 (“Promptly identifying the actual perpetrator of a crime through DNA matching exonerates any other persons who might wrongfully be suspected, accused, or convicted of the crime.”).

¹²⁹ For instance, in the Innocence Project’s most recent DNA exoneration involving Kennedy Brewer (from Mississippi), the DNA testing which exonerated Brewer, identified Justin A. Johnson as the actual murderer who killed two young girls during the early 1990s. *See* Shaila Dewan, *New Suspect Is Arrested in 2 Mississippi Killings*, N.Y. TIMES, Feb. 8, 2008.

DNA databank. If it hits to a previously convicted offender, this would *also* prove his actual innocence.

B. The Evidence Thompson Seeks to Test Was Not Subjected to DNA Testing Because the Technology Did Not Exist at the Time

Before the Court may grant DNA testing, it must determine that the petitioner could not have sought the testing prior to trial because the DNA technology was not available. *See* 42 Pa. C.S.A. § 9543.1(a)(2). Thompson satisfies this requirement because the DNA tests he seeks to employ—STR, Y-STR, mini-STR, and mitochondrial DNA—were not available when the Commonwealth prosecuted him in 1993.¹³⁰

C. The Assailant’s Identity Was at Issue during Thompson’s Trial

To obtain DNA testing, the assailant’s identity had to be at issue during the trial. *See* § 9543.1(c)(3)(1). The assailant’s identity was the critical issue at Thompson’s trial. Indeed, during closing arguments, the Commonwealth acknowledged that: “[T]he identification issue is the key to this case. Because if you conclude that this happened, the issue you have to decide is that that’s the man who did it.”¹³¹ Similarly, Thompson’s trial counsel placed the assailant’s identity squarely at issue during closing arguments when he said: “This is a case that involves identification. The strength or weakness of the Commonwealth’s case all stands or falls on the issue of identification[.]”¹³²

¹³⁰ *See* JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS (2d ed. 2005); NAT’L INST. OF JUST., DEPT. OF JUST., FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 17-19 (2000); 2 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENCE EVIDENCE ch. 18 (3d ed. 1999) (discussing admissibility of DNA evidence).

¹³¹ NT, Trial, 2/23/93, at 210.

¹³² NT, Trial, 2/19/93, at 148-149.

D. Thompson Consents to Providing a DNA Sample

Pursuant to 42 Pa. C.S.A. § 9543.1(c)(1)(i)-(ii), Thompson consents to providing a sample of his bodily fluids and acknowledges that genetic information obtained from his samples may be used to investigate other offenses.

E. Thompson Asserts His Innocence and Filed His Motion So He Can Conclusively Establish His Innocence

Pursuant to 42 Pa. C.S.A. § 9543.1(d)(1)(iii), Thompson's DNA testing petition is timely filed, and done so for the sole purpose of establishing his long proclaimed innocence rather than "delay[ing] the execution of sentence or administration of justice." His motion is timely because the "PCRA's one-year time bar does not apply to motions for the performance of forensic DNA testing under Section 9543.1." *Commonwealth v. Brooks*, 875 A.2d 1141, 1146 (Pa. Super. 2005); *Commonwealth v. Heilman*, 867 A.2d 542 (Pa. Super. 2005); *Williams v. Erie County Dist. Attorney's Office*, 848 A.2d at 971; *Commonwealth v. McLaughlin*, 835 A.2d at 750.

F. Evidence Search and Order to Preserve Evidence

When the aforementioned evidence was last accounted for, it was in the Commonwealth's custody. Moreover, there is nothing in the record suggesting that the evidence was destroyed or lost. Indeed, the Upper Merion Police Department, the Pennsylvania State Police, National Medial Services, and the FBI have not produced a single document demonstrating that they destroyed the sought-after evidence. Thus, Thompson requests that the Court issue an order compelling the Commonwealth to do two things: (1) produce destruction of evidence documentation that indicates when the Commonwealth destroyed any of the evidence (if in fact it destroyed any of the

evidence);¹³³ and (2) if the Commonwealth cannot produce this documentation, it must conduct a comprehensive search for the sought-after evidence at the Upper Merion Police Department, National Medical Services, and the FBI laboratory or any other agencies and/or facilities that might reasonably be expected to be housing the sought-after evidence.

Pennsylvania’s DNA testing statute not only gives the Court the authority to compel a comprehensive search, the Court—*itself*—is obligated to ensure that the sought-after evidence is located and properly preserved. For instance, once Thompson files his motion, “the Commonwealth and *the court shall* take the steps *reasonably necessary* to ensure that any remaining biological material in the possession of the Commonwealth or the court is preserved pending the completion of the proceedings under this section.” 42 Pa. C.S.A. § 9543.1(b)(2) (emphasis added). Thus, if the Commonwealth and the Court must take “reasonable” steps to properly preserve the evidence, this necessarily implies that the Commonwealth must adequately search for the sought-after evidence.¹³⁴ Indeed, if such a search is not conducted and the evidence is not located, then how can the Commonwealth and Court reasonably expect to properly preserve the evidence?

The Innocence Project’s experience litigating hundreds of post-conviction DNA access cases over the last eighteen years has led us to the firm conclusion that absent conclusive proof of destruction of each and every item of potential DNA evidence in a case, one or more such items—fully capable of resolving, beyond any doubt, the

¹³³ Such documentation must have been created contemporaneously when the Commonwealth destroyed the evidence.

¹³⁴ If the Commonwealth refuses to conduct an adequate search, then the Court is ultimately responsible, pursuant to 42 Pa. C.S.A. § 9543.1(b)(2), for compelling the Commonwealth to conduct such a search.

petitioner's guilt or innocence—may still be in State custody. This conclusion has been the direct result of our experience in numerous cases in which evidence that has been reported as “lost” or “destroyed” has later been discovered intact after a more diligent search. Indeed, when such evidence has in fact been destroyed, there will usually be specific documentation of the destruction of every item, even if the evidence was destroyed in bulk. If there is not, one simply cannot have confidence that the evidence is truly “gone.”

Evidence has been ultimately located in such places as the back of a storage closet, the trial judge's locker, and between the wall and a prosecutor's desk. In addition, sometimes evidence is labeled under the victim's name rather than the defendant's name, or is simply misfiled within or among other unrelated case evidence boxes, but is eventually discovered when a truly diligent search is performed. In other cases—after evidence was located in the original storage location—it became clear that prior searches by officials were half-hearted or perhaps not performed at all. A few of the many specific examples of such discoveries are set forth in Exhibit 19.¹³⁵

III. Conclusion and Requested Relief

Thompson's case represents the classic single-perpetrator rape where DNA testing can prove his actual innocence. Moreover, there are several shortcomings and questions regarding Croom's identification that DNA testing can now conclusively answer—the primary one being whether the Commonwealth convicted an innocent person more than fifteen years ago.

¹³⁵ Williams's request for a comprehensive search is also supported by a developing body of case law in other jurisdictions. *See Moore v. Commonwealth*, NO:79-CR-976 (Jefferson Cir. Ct., Sept. 4, 2007); *Arey v. State*, 929 A.2d 501 (Md. Ct. App. 2007); *Blake v. State*, 909 A.2d 1020, 1024-25 (Md. Ct. App. 2006); *People v. Pitts*, 4 N.Y.3d 303 (2005).

WHEREFORE, Thompson requests the following relief:

1. An Order compelling the Commonwealth to conduct an adequate and reasonable search of Commonwealth and private facilities that might reasonably be expected to be housing the sought-after evidence;
2. An Order compelling the Commonwealth to properly preserve any of the sought-after evidence if it is discovered during the course of the Commonwealth's comprehensive search. The Order shall require the Commonwealth to properly preserve the evidence until his state and federal post-conviction proceedings are considered final under federal law;
3. A Scheduling Order mandating the Commonwealth to timely respond to Williams's motion with 60 days;
4. A hearing on the instant motion;
5. An Order releasing the sought-after evidence to an accredited DNA laboratory that is agreed upon by the Commonwealth and undersigned counsel;
6. Any other order that the Court deems necessary to adequately protect Thompson's state and federal constitutional rights.

Respectfully submitted this ___ day of October 2008.

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Exhibit List

1. Upper Merion Police Department, Field Supplementary Report, Detective Bruce Saville, April 2, 1990
2. Upper Merion Police Department, Field Supplementary Report, Detective Bruce Saville, April 5, 1990
3. Upper Merion Police Department, Field Supplementary Report, Detective Bruce Saville, October 3, 1991
4. Commonwealth of Pennsylvania v. Michael Thompson, Criminal Complaint, October 1, 1991
5. Upper Merion Police Department, Field Supplementary Report, Detective Bruce Saville, October 11, 1991
6. Probable Cause Affidavit, November 12, 1991
7. Upper Merion Police Department, Field Supplementary Report, Detective Bruce Saville, November 13, 1991 (collected Thompson's blood and hair sample on November 12, 1991; transported samples to NMS on November 13, 1991)
8. Karen Croom's Medical Record, Sacred Heart Hospital, March 29, 1990
9. Memo from Upper Merion Police Chief Clement G. Reedel to Toxicon Associates, Ltd, April 9, 1990
10. Upper Merion Police Department, Field Supplementary Report, T. McGinely, April 4, 1990
11. Memo from John P. Durante, Director of Montgomery County District Attorney's Office Forensic Science Unit, to Detective Bruce Saville, June 15, 1990
12. National Medical Services, Inc., Analysis Requisition and Property Receipt/Chain of Custody, October 31, 1990
13. Upper Merion Police Department, Field Supplementary Report, Detective Bruce Saville, October 31, 1990
14. National Medical Services, Inc., Analysis Requisition and Property Receipt/Chain of Custody, November 13, 1991
15. Memo from John P. Durante, Director of Montgomery County District Attorney's Office Forensic Science Unit, to Chief Clement Reedel, February 16, 1992

16. Upper Merion Police Department, Field Supplementary Report, Detective David Lacy, November 14, 1991
17. Pennsylvania State Police, Bethlehem Regional Laboratory, Laboratory Report, Walter N. McKinnon, February 10, 1993
18. Cases Where Prosecutors Dropped Charges After DNA Results Excluded the Individual Who Was Initially Charged and Arrested with a Sexual Offense
19. Vanessa Potkin's Affidavit.