IN THE COURT OF COMMON PLEAS
OF CAMBRIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	)	
Respondent,	)	
	)	**CAMBRIA COUNTY**
	)	
v.	)	**Case No. 1025-88**
	)	
	)	
STEPHEN REX EDMISTON,	)	
Petitioner.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR POST CONVICTION DNA TESTING PURSUANT TO 42 Pa. C.S. § 9543.1 and FOR POST CONVICTION DISCOVERY PURSUANT TO Pa. R. Crim. P. 902(E)(1) & 42 Pa. C.S. § 9545(d)(2)

Petitioner, Stephen Edmiston, hereby submits his Memorandum of Law In Support of his Motion for Post Conviction DNA Testing Pursuant to 42 Pa. C.S. § 9543.1 and Motion for Post Conviction Discovery Pursuant to Pa. R. Crim. P. 902(E)(1) & 42 Pa. C.S. § 9545(d)(2). His motion is presented in good faith and premised on the following facts and points of authority.

Respectfully submitted this ____ day of November, 2008.

_____
ROBERT BRETT DUNHAM
Pa. Bar No. 56422
Defender Association of Philadelphia
Capital Habeas Unit
The Curtis Center Building, Suite 545 West
601 Walnut Street
Philadelphia, Pennsylvania 19106
(215) 928-0520

TIFFANY MURPHY
Pa. Bar No. 94670
Midwestern Innocence Project
University of Missouri-Kansas City
School of Law, Suite 028
5100 Rockhill Road
Kansas City, MO 64110-2499

CRAIG M. COOLEY
Innocence Project, Inc.
Staff Attorney
100 Fifth Avenue, 3rd Floor
New York, New York 10011
(212) 364-5361

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I. Introduction

Stephen Edmiston is currently on Pennsylvania's death row after having been convicted of the murder, rape, and torture of two-year old Bobbi Jo Matthews in October, 1988. *See Commonwealth v. Edmiston*, 851 A.2d 883 (Pa. 2004); *Commonwealth v. Edmiston*, 634 A.2d 1078 (Pa. 1993). Edmiston claims he is innocent of these charges and seeks DNA testing on several items of evidence presented by the Commonwealth at trial to prove his innocence. He is entitled to DNA testing because exculpatory results would prove his actual innocence. *See* 42 Pa. C.S. §§ 9543.1 (c)(3)(ii)(A-B).

The Commonwealth has argued that, in the early morning hours of October 5, 1988, someone kidnapped Bobbi Jo Matthews from her residence. Several relatives who lived with her testified that they had seen an unidentified man in the residence talking to Bobbi Jo shortly before her disappearance. Remarkably, none of these individuals said a word to the intruder. Instead, they each fell back asleep either on the couch in the living room or in Bobbi Jo's own bedroom. At some point, however, according to the Commonwealth's evidence, the intruder kidnapped and ultimately raped, tortured, and murdered her. The Commonwealth claimed (and continues to claim) that Edmiston was (and is) the intruder and murderer. Edmiston claimed (and continues to claim) that he did not kidnap, rape, torture, or murder Bobbi Jo.

Edmiston's case is a quintessential case for DNA testing. First, the Commonwealth's theory of the case was the classic single perpetrator rape-murder, in which the assailant raped and killed a young, sexually inactive child and deposited biological material onto her. This physical evidence was presented both as evidence of guilt and of aggravating circumstances justifying a death sentence. When the Commonwealth prosecuted Edmiston in 1989, it subjected the vaginal swabs from the victim's rape kit to Restriction Fragment Length Polymorphism (RFLP) – a first generation DNA

test that is far less sensitive and discriminatory than today's DNA technology. In conducting these tests, the Commonwealth recognized both the materiality and persuasive power of a DNA match in this case. But because of its limited sensitivity, the RFLP results merely identified Bobbi Jo's DNA on the vaginal swabs. Her DNA, however, presumably overwhelmed or masked the assailant's biological evidence. Such a result for an RFLP test would not have been uncommon under the circumstances. Likewise, RFLP required "relatively large amounts of high-quality DNA" in order to produce an interpretable DNA profile.[1]

But it also could have been that Bobbi Jo was not raped at all.

In Edmiston's case, the Commonwealth's serologist, Bruce Tackett – alone among all experts who reviewed the evidence – testified that he found a very small quantity of semen and "a couple" tailless sperm on the vaginal swabs. (Trial NT 7/6/89, at 195.) The serology testimony is itself sharply contested in this case. Fortunately, over the past twenty years DNA technology has significantly advanced. Today's DNA technology is far more sensitive and discriminatory than the DNA tests available when the Commonwealth prosecuted Edmiston in 1989. Thus, the semen and sperm, which Tackett claimed to have been present, can be tested with modern DNA technology to determine whether semen and sperm are actually present, and if they are, to ascertain the assailant's identity and determine whether the Commonwealth wrongly convicted and sentenced Edmiston to death.[2]

Second, there is evidence that Bob Brown – the victim's grandmother's boyfriend – was the

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[1] NAT'L INST. OF JUST., DEP'T OF JUST., THE FUTURE OF FORENSIC DNA TESTING 16 (2000).

[2] As Justice Blackmun predicted 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).

intruder the night she disappeared. Several relatives who lived with the victim said that they thought the intruder was Brown. For instance, Christina Burns – who shared a bedroom with the victim – said that she thought the intruder was Brown because he was the same height as Brown. She even yelled out "Bob" at one point. Likewise, Harold Matthews – the victim's father – testified that he woke up around 3:30 am on the living room couch and saw a man standing beside the fire place. He said the man looked more like Brown – his mother's boyfriend – than Edmiston and that because he looked familiar to him he rolled back over on the couch and went back to sleep. Furthermore, Danielle Burns – another relative of the victim who shared the same bedroom as her – said that she awoke in the middle of the night and saw a man standing in the bedroom doorway. She said the man entered their bedroom, sat on the victim's bed, placed his hands on the victim's mouth, and kissed her forehead. She said the man left the bedroom and walked back into the living room. While she was unable to get a good look at the man, she said she heard someone call the man "Bob" at one point.

Third, the Commonwealth premised its case upon a highly suspect "confession" and a map drawn by Edmiston that allegedly showed where he dumped the victim's body after he supposedly raped and murdered her. At trial, Edmiston denied having any contact at all with Bobbi Jo Matthews, denied confessing, and admitted to drawing a map, but only in response to Trooper David Schaffer's question as to whether he knew a good place to hunt. After he verbally provided him directions, Schaffer asked him to draw a map of how to get to the *hunting* location. Importantly, Schaffer and the Pennsylvania State Police (PSP) did not electronically record Edmiston's interrogation. Nor did they ask him to write or sign any statement. Thus, it is Schaffer's word (after shoddy police work) versus Edmiston's as to whether Edmiston actually confessed. Moreover, other facts also bring the veracity of the police work in this case into question, for there is significant

disagreement as to whether Schaffer or another PSP Trooper fabricated another version of the map.[3] Where DNA testing can refute or substantiate an alleged confession or incriminating comments, history teaches us that such testing must be pursued to protect the innocent from erroneous conviction and to ensure our criminal justice system's integrity.[4] Unlike confessions, which the police can easily fabricate (particularly when – as here – the interrogation is not recorded),[5] DNA evidence is immune to emotion and fabrication. Absent planted evidence or breaks in the chain of custody, DNA testing can reveal the truth with an unprecedented level of certainty.[6]

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[3] As trial counsel argued during trial and closing arguments, the forgery is shown through the initials signed on the map. Edmiston said he did not sign the map. Troopers Shaffer and Leroy Brown said the map was drawn in pencil but the map introduced into evidence is drawn in pen. Also, the notepads the map was drawn on could have been changed. In Shaffer's notepad, the page before the map talked about Stephen's alibi. Trial NT 7/14/89, at 14-15.

[4] As Justice Goldberg wrote more than four decades ago: "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

[5] *See* CHARLES O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 153 (4th ed. 1976) (recognizing that the recorded voice is "[o]bviously" the best evidence of what occurred during an interview because "[t]he words themselves are there; the tones and inflection provide the true meaning; the author of the statement is identifiable"). Indeed, in more than 25% of the 218 DNA exonerations, innocent defendants made incriminating statements, delivered outright confessions, or pled guilty. *See* www.innocenceproject.org (last visited August 12, 2008); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, N.C. L. REV. 891 (2004). In the overwhelming majority of these cases, the law enforcement agencies that elicited these false confessions or incriminating statements did not electronically record the defendant's interrogation.

[6] DNA evidence can identify the guilty and exonerate the innocent with such precision that lawmakers and law enforcers have described it as "a kind of truth machine[.]" *Justice Dep't. Acts to Clear DNA Backlog*, MIAMI HERALD, Aug. 2, 2001, at 19A (quoting then U.S. Attorney General John Ashcroft as saying "DNA technology can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent."); *accord* 146 Cong. Rec. S11645-02, at *S11647 (describing "DNA testing" as "truth-seeking technology") (Senator Patrick Leahy's comments); NAT'L INST. OF JUST., DEPT. OF JUST., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (comments by then Attorney General Janet Reno).

Fourth, the Commonwealth premised its case on blood results produced by rudimentary serology techniques. For instance, Bruce Tackett testified that Bobbi Jo had type "O" blood and that he identified type "O" bloodstains in several locations in the front cab of Edmiston's truck. (*See* NT 7/6/89, at 170-71.) Tackett, however, did not pursue DNA testing to confirm that the bloodstains in fact came from the victim. Despite the limited discriminatory potential of conventional blood typing, the Commonwealth still argued that the blood in the truck came from Bobbi Jo, even though Edmiston had type "O" blood, as well.[7] As recent research demonstrates, due to its limited discriminatory potential, conventional serology results can easily create a false impression of guilt.[8] Thus, because modern DNA testing is far more discriminatory than conventional serology, DNA tests can now conclusively determine whether the blood in the truck is Bobbi Jo's or Edmiston's.[9]

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[7] Before DNA testing, jurors and courts gave great weight to conventional blood testing results because they were "difficult to refute." *Little v. Streater*, 452 U.S. 1, 14 (1981) ("Unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute.").

[8] For instance, conventional serology supported nearly 40% of the first 200 convictions that DNA exposed as erroneous, including Pennsylvania's wrongful conviction and death sentencing of Nicholas Yarris. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUMBIA L. REV. 55 (2008). In Yarris's case, his blood type matched the blood evidence. However, DNA evidence conclusively excluded him and demonstrated the falsity of his supposed confessions to a prison snitch and a correctional officer. *See Yarris v. County of Delaware*, 465 F.3d 129 (3rd Cir. 2006).

[9] *See* Micah A. Luftig & Stephen Richey, *DNA and Forensic Science*, 35 NEW ENG. L. REV. 609, 612 (2001) ("DNA evidence can be used to overturn previous serologically based guilty verdicts because of its higher discriminatory power."); NAT'L INST. OF JUST., DEP'T OF JUST., THE FUTURE OF FORENSIC DNA TESTING 14 (Nov. 2000) ("Criminal cases require a higher standard of proof. Although a combination of blood groups and serum proteins often gave small probabilities for a match between two unrelated individuals, and were sometimes used in criminal investigations, more powerful methods were desirable."); NAT'L INST. OF JUST., DEP'T OF JUST., POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 40 (Sept. 1999) ("where serology at the time was inconclusive or not highly discriminating, and new, more discriminating tests are now available, the prosecutor should order DNA testing.").

Fifth, the Commonwealth also premised its case on hair identification evidence. For instance, Tackett testified that hairs from a blanket recovered from Edmiston's truck "positively matched" Bobbi Jo's hair samples. As the DNA exonerations have routinely demonstrated, however, hair identification is notoriously unreliable and extremely prejudicial.[10] In several capital and non-capital cases, for example, DNA testing revealed that hairs that supposedly "matched" or were "consistent with" the defendant's hair, could not possibly have originated from the defendant.[11] If DNA testing on the semen and sperm excludes Edmiston as a potential contributor and tests on the blood in the truck exclude Bobbi Jo as a potential contributor, such results will "demolish" Takckett's unreliable hair testimony. *See Commonwealth v. Williams*, 899 A.2d 1060, 1064 (Pa. 2006) ("DNA testing. . . can demolish the prosecution's case").

Sixth, and finally, this is a capital case. As the United States Supreme Court has repeatedly recognized, the "qualitative difference between death and other penalties calls for a *greater degree of reliability* when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added). Consequently, when "a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). As a result, the Supreme Court has embraced procedures that minimize the risk of error in capital

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[10] *See Williamson v. Reynolds*, 904 F.Supp. 1529, 1556 (E.D. Okla. 1995) ("The few available studies reviewed by this court tend to point to the method's unreliability.").

[11] For instance, the "hair evidence that supposedly linked" Michael Blair to a 7-year-old girl's murder "has been disproved by DNA testing that was not available during Mr. Blair's 1994 trial." Wendy Hundley & Tiara M. Ellis, *DA Evidence Doesn't Link Blair to Girl's Death*, DALLAS MORNING NEWS, May 24, 2008, at 1A. Due to the new DNA results, the prosecutor agreed to vacate Mr. Blair's conviction *and death sentence* because "no other credible forensic evidence connects him to the crime." *Id. See also* Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying Daubert Isn't the Only Problem*, 43 TULSA L. REV. 285, 301-09 (2007) (discussing several DNA exonerations involving hair identification).

cases.[12] Despite these special procedures, however, the risk of error in capital cases is still great, as evidenced by the increasing number of death row exonerations.[13] In a case like Edmiston's (i.e., a single perpetrator rape-murder), however, DNA testing can significantly minimize the risk that the Commonwealth will execute a factually innocent person, as demonstrated by Nicholas Yarris's 2004 death row exoneration out of Delaware County, Pennsylvania. *See Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006) (describing how DNA testing proved Yarris's innocence).[14]

Simply put, Edmiston's disputed "confession," the disputed map, and Tackett's rudimentary serology and dubious hair testimony, raise serious questions about Edmiston's first-degree murder conviction and death sentence. Those questions can be conclusively answered if several items of evidence are subjected to DNA testing pursuant to 42 Pa. C.S. § 9543.1.[15]

Pursuant to section 9543.1, a petitioner may seek DNA testing so long as he or she satisfies

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[12] *See Baze v. Rees*, 128 S.Ct. 1520, 1550 (2008) (Stevens, J., concurring in judgment) (noting that the Supreme Court has "relied on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases."); *accord Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion).

[13] As Justice Stevens recently explained, "the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender." *Baze v. Rees,* 128 S.Ct. at 1550 (Stevens, J. concurring in judgment). Consequently, "[w]hether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. *Id.*; *accord Kansas v. Marsh*, 548 U.S. 163, 207-211 (2006) (Souter, J., dissenting) (commenting on the "repeated exonerations of convicts under death sentences"); *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002) ("we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.").

[14] The Commonwealth also has an interest in DNA testing because it "too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed[.]" *Ake v. Oklahoma*, 470 U.S. 68, 83-84 (1985).

[15] Edmiston would note that his innocence claim is not limited to these issues: for example, there are other serious allegations concerning the actual cause of death. However, DNA testing has the potential to exonerate Edmiston by conclusively establishing the falsity of these portions of the Commonwealth's case.

the requirements set forth in the statute. Edmiston satisfies these requirements. First, he specifies what items of evidence he wants tested. Second, he consents to provide bodily fluid samples and acknowledges that law enforcement may use these samples "in the investigation of other crimes and may be used as evidence against [him] in other cases." § 9543.1(1)(iii). Third, he asserts he is actually innocent of the crime for which he stands convicted. § 9543.1(c)(2)(i). Fourth, he asserts that he is actually innocent of the two aggravators that support his death sentence: Edmiston did not (1) torture Bobbi Jo or (2) commit the murder in the course of raping her. §§ 9711(d) (8) & (13). Fifth, the perpetrator's identity "was at issue in the proceedings that resulted in [his] conviction and [death] sentence." § 9543.1(3)(i). Sixth, his trial occurred before January 1, 1995, and the DNA technology he seeks to employ was not available when the Commonwealth prosecuted him in 1989. § 9543.1(a)(2). And seventh, exculpatory DNA results will prove his "actual innocence of the offense for which [he] was convicted." § 9543.1 (3)(ii)(A). Edmiston is entitled to DNA testing.

II. Statement of Facts

A. Pre-Trial Events

1. Bobbi Jo Goes Missing

According to the Commonwealth's case at trial, in the early morning hours of October 5, 1988, someone kidnapped two-and-a-half year old Bobbi Jo Matthews from her residence. Several relatives, who lived with Bobbi Jo, testified that they had seen an unidentified man in the residence talking to her shortly before her disappearance. Significantly, these relatives said that the man looked more like Bob Brown – Bobbi Jo's grandmother's boyfriend – than Edmiston.

a. Christina Burns

At the time of Bobbi Jo's disappearance, twelve-year-old Christina Burns shared a bedroom with Bobbie Jo. On the night of the murder, Christina went to bed around 9:00 pm. She is not sure

why or what time she woke up, but when she did, she saw a man standing in their bedroom. She could not see the man's face and could not recall whether he had a mustache or beard or whether he had red, black, or brown hair; but she thought the man was Bob Brown because he was the same height as Brown. Christina even yelled out "Bob" at one point.[16] She heard the man talking to Bobbi Jo, but she could not make out what exactly he was saying to her. She did, however, hear Bobbie Joe yell "mommy, mommy." She said the man kissed Bobbi Jo on the forehead at one point. She could not remember whether the man had been standing or sitting on the bed when he was speaking to Bobbi Jo.[17] She said the man left the bedroom and walked into the kitchen. The next thing she remembers is her mother waking her up early in the morning asking her if she had seen Bobbi Jo.

b. Harold Matthews

Harold Matthews is Bobbi Jo's father. He said Bobbi Jo went to bed around 8:30 pm on October 4, 1988. After his daughter went to bed, Matthews stayed up and watched television for some time on the living room couch. He fell asleep between 12:30 and 1 am. Around 3:30 am, he was awakened by a man standing beside the fireplace.[18] The man faced him, and while Matthews could not see him clearly, he could describe him. Matthews could not remember what the man was wearing, but said he had on a ball cap, that his hair was dark, short, and curly, that he was approximately 5'11", and that he had a mustache or beard and a slim-shaped face.[19] On cross-examination, Matthews admitted that the man looked more like his mother's boyfriend, Bob Brown, than Edmiston. Because the man looked familiar to him, he did not think he was in danger, so he

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[16] Trial NT 7/15/89, at 20-23, 26.

[17] *Id*. at 24-25.

[18] *Id.* at 36-39.

[19] *Id*. at 41-42.

rolled back over on the couch and went back to sleep.[20]

c. Danielle Burns

Thirteen-year-old Danielle Burns, another relative of Bobbi Jo, slept in the same bedroom as Bobbi Jo. Danielle had tucked Bobbi Jo into bed that night and had gone to bed shortly thereafter.[21] Danielle awoke in the middle of the night when she heard strange noises in the bedroom that sounded like someone talking. When Danielle looked up, she saw a man standing in the doorway. Danielle could not see what the man looked like. The next thing she knew, the man was sitting on Bobbi Jo's bed.[22] She could only see the side of the man's face; he had long hair, a mustache, and a beard, and was wearing a ball cap.[23] She testified that she had seen him touch Bobbi Jo and place his hand over her mouth while Bobbi Jo had tried to holler "mommy, mommy." He had told Bobbi Jo that her mommy was not home. The man had then left the bedroom and walked into living room.[24] He came back into the bedroom shortly thereafter, kissed Bobbi Jo's forehead, and went back into the living room. About five to ten minutes later she heard a car leave.[25] At trial, Danielle admitted she had not paid attention to the man the entire time he was in the room because she had been sleepy and groggy.[26] Likewise, at one point, she said she had heard someone call the

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[20] *Id.* at 63-64.

[21] *Id.* at 73.

[22] *Id.* at 76-77.

[23] *Id*. at 79.

[24] *Id.* at 80-81.

[25] *Id.* at 84.

[26] *Id.* at 90.

man "Bob."[27]

2. Edmiston Becomes a Suspect

How Edmiston became a suspect is not a mystery. The mystery is who first suggested he may have been the intruder in the house the night Bobbi Jo disappeared. According to trial testimony and the police reports, it was either Nancy Dotts (Bobbi Jo's grandmother) or Harold Matthews (her father). According to police reports, when investigators interviewed Matthews on October 5, 1988, he said that when he described the stranger to Dotts, she told him the description sounded like her boyfriend's (Bob Brown) nephew Stephen Edmiston.[28] Likewise, when investigators interviewed Dotts on October 5, 1988, she offered a similar account; she suggested to Matthews that the stranger sounded like Edmiston.[29] However, when Dotts testified at trial, she said when she returned home during the early morning hours of October 5, 1988 and realized Bobbi Jo was missing, Matthews had responded by accusing Edmiston of kidnapping Bobbi Jo. She said she did not mention Edmiston's name when Matthews described the intruder. Instead, she said Matthews told her prior to giving her the intruder's description that Edmiston was in fact the intruder.[30]

3. Edmiston's Interrogation

Immediately after Dotts and Matthews mentioned Edmiston as a potential suspect, PSP Trooper David Shaffer contacted him and arraigned an interview with him for October 6, 1988 at

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[27] *Id.* at 97.

[28] Ex. 7. When Matthews called the PSP to report Bobbi Jo missing, he told Trooper Jeffery L Fenton: "I want to report that my daughter . . . had been kidnapped. I was sleeping on the couch, and I woke up and this guy Steve came in. I don't know his last name, I didn't think anything of it because he had been here before. I went back to sleep then. I didn't talk to him." Ex. 10.

[29] *Id.*

[30] Trial NT 7/5/89, at 144, 148.

11:30 am. Edmiston *voluntarily* went to the PSP station, without an attorney, and met with Shaffer and Trooper Leroy Brown on October 6. While we know that Edmiston voluntarily met with and spoke to Shaffer and Brown, what transpired during their initial meeting and subsequent interrogation is hotly contested, as both sides offered markedly different stories of what happened and what Edmiston supposedly did and said during the meeting and interrogation. The Commonwealth's failure to record, electronically or in writing, Edmiston's alleged conduct, statements, and confession makes the resolution of this issue nearly impossible, unless, of course, DNA testing is performed. As noted *infra*, DNA testing has the potential to conclusively undermine or substantiate Edmiston's alleged confession.

a. Trooper Shaffer

According to Shaffer, when Edmiston arrived at the PSP station he (Shaffer) read Edmiston the Miranda warnings and Edmiston signed a waiver sheet.[31] Shortly thereafter, Edmiston consented, verbally and in writing, to having his truck searched, saying he had nothing to hide.[32] Shaffer and Brown searched Edmiston's truck, which he parked in the back of the PSP station. During the search, Shaffer said he saw what appeared to be blood on one of the front seat belt buckles and on the middle of the front seat. He also testified to having observed small blonde hairs on a blanket and said that they were very fine hairs, like a child's hair.[33]

After the search, Shaffer confronted Edmiston with the physical evidence and accused him of kidnapping and murdering Bobbi Jo. Shaffer testified that he had asked Edmiston to explain the blood and hair evidence, but Shaffer did not believe Edmiston's explanations and became convinced

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[31] Trial NT 7/7/89, at 29-33; Ex. 7.

[32] *Id.* at 39, 43.

[33] *Id.* at 44-45, 48.

that Edmiston had kidnapped and murdered Bobbi Jo. Shaffer testified that he had eventually asked Edmiston where Edmiston had left Bobbie Jo's body and had asked him to draw a map. According to Shaffer's trial testimony, Edmiston had picked up a pencil, hesitated for moment, and then drew a map with reference points.[34] Shaffer testified that Edmiston had explained the different reference points on the map, that he ultimately had confessed by saying that he did not know why he had committed the crime and that he had not meant to kill Bobbi Jo, and that Edmiston had started to cry once he made these admissions.[35]

During cross-examination, however, Shaffer admitted that Edmiston did not verbally confess to him, but that when Shaffer had asked Edmiston whether he had murdered Bobbi Jo, Edmiston had shaken his head yes and put his head down. Shaffer interpreted Edmiston's actions as a confession.[36] Shaffer also failed to electronically record Edmiston's interrogation and he failed to take a written statement from him after Edmiston allegedly drew the map and made these incriminating gestures.[37]

b. Trooper Brown

According to Brown, after he and Shaffer had searched Edmiston's truck, Shaffer gave Edmiston a tablet and asked him to draw a map of where he had dumped Bobbi Jo's body.[38] Brown said that Edmiston had hesitated a minute, but then drew a map and gave it to Shaffer, who examined

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[34] *Id.* at 50.

[35] *Id.* at 52-54.

[36] *Id.* at 80. Notably, there was no testimony presented at trial as to whether such a reaction was equally consistent with a despairing psychological response to having been falsely accused of a capital offense.

[37] *Id.* at 81-83. Shaffer drafted a report detailing Edmiston's alleged confession, but he wrote his report on October 13, 1988 – a week after Edmiston alleged statements and confession. Ex. 7.

[38] Trial NT 7/10/89, at 102.

the map and then left the room.[39] Once Shaffer left the room, Brown spoke with Edmiston and asked him what the PSP would find when they found Bobbi Jo. Brown testified that Edmiston allegedly responded, "You will find a dead, raped, little girl."[40] Brown also testified that Edmiston allegedly told him that he had raped Bobbi Jo inside his truck at the location where he dumped her body and that he had hit her four to five times until she stopped moving. While crying, Edmiston also allegedly had told Brown that Bobbi Jo had been a "brave little girl" and that her body was just off the road covered with some branches.[41] Brown, like Shaffer, did not electronically record his conversation with Edmiston, nor did Brown have Edmiston write a written statement.[42]

c. Edmiston's Version of Events

Edmiston's version of events differs markedly from those of Shaffer and Brown. On October 5, 1988, a PSP trooper had contacted Edmiston and asked him if he would come to the barracks regarding the incident with his brother the night before.[43] He went to the PSP barracks the next day (October 6, 1988) at 11:20 am. Once at the barracks, Shaffer had escorted him to the interrogation room and told him he had some questions for him about the incident with his brother the night

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[39] *Id.* at 103.

[40] *Id.*; Ex. 12.

[41] *Id.*

[42] Brown authored a report detailing Edmiston's alleged confession, but prepared that report on October 15, 1988 – a week after Edmiston's alleged statements and confession. Ex. 12.

[43] Trial NT 7/12/89, at 205. In the early morning hours of October 5, 1988, between 12:30 and 1:30 am, Edmiston and his brother got into a heated argument that attracted the neighbor's attention. The neighbors called the Pennsylvania State Police (PSP) and the PSP sent two troopers to check the Edmiston's residence. Troopers David Powell and Barry Houser checked the residence and learned about the argument between Edmiston and his brother. According to Powell's report, everything checked out okay. Exs. 4-5. Robert Davis is the PSP Trooper who contacted Edmiston on October 6, 1988. As mentioned, Edmiston agreed to meet with Shaffer at 11:30 am on October 6, 1988. Ex. 9.

before.[44] Shaffer and Brown explained the Miranda waiver form to Edmiston, which Edmiston willingly signed because he saw no harm in answering questions about the fight he had had with his brother. Prior to signing the waiver form, neither Schaffer nor Brown had mentioned Bobbi Jo.[45] After five minutes of "polite" conversation and after Edmiston had explained his whereabouts for the previous two days, Shaffer mentioned Bobbi Jo's name and asked if Edmiston knew her; Edmiston said that he did not.[46] Shaffer also asked Edmiston if he knew Nancy Dotts and Harold Matthews; Edmiston said he knew Dotts because she dated his uncle, Bob Brown. Shaffer then asked him if he would allow the PSP to search his truck; Edmiston consented and signed a consent form.[47]

Shaffer and Brown searched his truck and found blood, hair, and a pair of shorts in his truck. They returned to the interrogation room and asked Edmiston to explain the evidence.[48] Edmiston said that the blood came from either him or his brother; he said he cut himself on a vase the night before and that George cut himself when he fell outside the Pepper Tree Inn the night before. Edmiston said the hair could have come from anyone, perhaps Cassie Ledford, his best friend's daughter.[49] He said he had never seen the shorts before.[50] At this point, Shaffer accused Edmiston of kidnapping and murdering Bobbi Jo. Edmiston denied having killed Bobbi Jo, said that he did

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[44] *Id*. at 209.

[45] *Id.* at 211.

[46] *Id.*

[47] *Id.* at 213-14.

[48] *Id.* at 221.

[49] *Id.* at 222.

[50] *Id.* at 223-24. At trial, he said the shorts admitted into evidence were not the shorts shown to him at the barracks.

not know Bobbi Jo's family, and did not know where her family lived. Shaffer then called him "sick" and said that he needed to "see a psychiatrist" because he had molested his own children.[51] Edmiston denied molesting his daughters and killing Bobbi Jo.[52] Importantly, Edmiston said Shaffer was the one who said that the police would likely find "a dead, raped little girl."[53]

Brown changed the subject and asked him about his hobbies. Edmiston said he liked to fish. Brown said he liked to hunt. Edmiston said he did not like to hunt because he was a nature person and loved being outdoors and he did not like to kill things; the fish he catches he throws back.[54] Shaffer asked him if he had ever hunted. He said no, but he said many of his friends hunted. Shaffer asked where his friends hunted or where a good hunting spot might be. Edmiston identified two areas: a place towards Levi, which is out toward the Power Line Mountains between Blandburg and Altoona, and a place near Fire Tower Road. Shaffer said he and his son wanted to plan a hunting trip for later that year and that they were looking for a good hunting spot. He asked Edmiston how to get to these two areas. Edmiston verbally gave him directions.[55] Shaffer did not understand the directions so he (Shaffer) tore a piece of paper from his tablet, slid it across the table to Edimston, and asked him to draw a map. Edmiston said he grabbed a pencil and sketched a map.[56] At trial, Edmiston said that the map introduced by the Commonwealth was not the one had drawn because

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[51] Prior to Bobbi Jo's disappearance and murder, Edmiston had been accused of molesting his daughters.

[52] *Id.* at 226.

[53] *Id.* at 227.

[54] *Id.* at 229-30.

[55] *Id.* at 231-32.

[56] *Id.* at 233-34.

the one he had drawn had lines on it from the tablet.[57] He explained the various differences between his map and the map introduced into evidence.[58] For instance, he had not drawn an "X" on the map, which supposedly indicated where he had dumped Bobbi Jo's body.[59]

After Edmiston drew the map, Shaffer once again questioned him about the blood and hair evidence in his truck. Shaffer did not believe him and once again accused him of being responsible for Bobbi Jo's death. Edmiston once again denied killing her.[60] After Shaffer accused him a second time of murdering Bobbi Jo, Edmiston testified that he asked for an attorney. Shaffer said he did not need an attorney because he was going home soon.[61] Shortly thereafter, Brown and Shaffer left the interrogation room for approximately twenty minutes. They returned with Trooper Wrabel, placed Edmiston under arrest, and told him he'd be arraigned at the magistrate's office later that afternoon.[62]

4. Bobbi Jo's Body is Recovered

Trooper Richard Davidson located Bobbi Jo's body at approximately 5:15 pm on October 6, 1988.[63] She was lying on her back covered with mud, small branches, and leaves, and wearing a purple top. She had a puncture wound to her upper chest and when they turned her body over, "her intestines were hanging out her bottom side."[64]

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[57] *Id.* at 235.

[58] *Id.* at 236-37.

[59] *Id.* at 240-42.

[60] Trial NT 7/13/89, at 3.

[61] *Id.* at 6.

[62] *Id.* at 11.

[63] Trial NT 7/5/89, at 186-87.

[64] *Id.* at 187.

B. Trial

1. The Commonwealth's Case

The Commonwealth premised its cases on four items of evidence: (1) Edmiston's alleged confession; (2) blood recovered from Edmiston's truck; (3) hair recovered from his truck; and (4) the semen and sperm evidence identified on the vaginal and anal swabs.

a. Semen and Sperm Evidence

Dr. Katherine M. Jasnosz collected vaginal, oral, and rectal swabs and slides (Item 17, State's Ex. 22) during the autopsy. At trial, Tackett testified that he identified semen and sperm on the vaginal and rectal swabs:

> I examined those items for the presence… of semen. I performed a presumptive color test looking for… acid phosphatase. If that is positive, I then perform an extract looking for the presence of spermatozoa… The vaginal swabs were found to contain spermatozoa and so were the rectal swabs. After I extracted, I was able to conclude that there was seminal material present in… the vaginal and rectal swabs.[65]

Dr. Jasnosz also testified. Her "medical opinions proved that both the anus and vaginal tracts had been penetrated by a penis[.]" *Commonwealth v. Edmiston*, 634 A.2d at 1084. The Commonwealth argued that the testimony of Tackett and Dr. Jasnosz proved that Edmiston raped Bobbi Jo before he murdered her.

b. Blood Evidence

The PSP recovered several bloodstains from Edmiston's truck that tested positive for type "O" human blood. These bloodstains included:

- A bloodstain from the driver's side seat (Item 10, State's Ex. 27-A)
- A bloodstain from the driver's side seat belt buckle (Item No. 2, State's Ex. 27-B)

[65] Trial NT 7/10/89, at 182.

- A bloodstain from the upholstery under the driver's door window (Item No. 4, State's Ex. 27-C)
- A bloodstain from the driver's side seat (Item No. 3)
- A bloodstain off the seat cover that was cut off (State's Ex. 34)

The PSP also identified a human bloodstain on Edmiston's pants that also turned out to be "type O human blood."

The Commonwealth argued that the blood was from Bobbi Jo because she had type O blood. Indeed, the Commonwealth claimed that after raping Bobbi Jo in the cab of his truck, Edmiston pummeled her causing her to bleed in his truck.

c. Hair Evidence

The PSP collected several blond hairs from Edmiston's truck. Tackett testified that these hairs exhibited the same microscopic characteristics as Bobbi Jo's hair.[66] The Commonwealth argued that the hairs came from Bobbi Jo and proved Edmiston's guilt.

d. Edmiston's Confession

The Commonwealth hammered home the fact that Edmiston confessed to murdering and raping Bobbi Jo and to drawing a map that allegedly showed where he had dumped her body. The Commonwealth argued that Edmiston's confession proved his guilt.[67]

2. Edmiston's Case

Edmiston proclaimed his innocence and premised his defense on three factors: (1) an alibi; (2) a fabricated confession; and (3) a misleading map. In regards to the alibi, Edmiston testified he was with his brother and mother most of the night and into the early morning hours on October 4 and

[66] Trial NT 7/10/89, at 175. His opinion concerned State's Exs. 28-A, 28-B, 28-G, and 27-D, plus 30, 31, and 32. *Id*. at 168.

[67] Trial NT 7/14/89, at 44.

5, 1988. Moreover, in order to have kidnapped Bobbi Jo, he would have had to drive nearly an hour, while he was drunk, to a residence he had never visited. In regards to his alleged confession, Edmiston denied having made incriminating statements and argued that Troopers Shaffer and Brown fabricated his alleged incriminating statements. Additionally, while admitting that he had drawn a map, he explained that he drew the map only after Shaffer had asked him if he could show him (Shaffer) where to go hunting; he denied that his map contained directions as to where investigators would find Bobbi Jo's body. Finally, Edmiston presented Dr. George Herrin, a molecular biologist and DNA expert from Cellmark Diagnostic. Dr. Herrin testified that he subjected the vaginal swabs to RFLP DNA testing, along with Bobbi Jo's and Edminston's blood.[68] While the results did not identify Edmiston's DNA, they did not exculpate him either. Dr. Herrin testified that the only DNA profile developed from the DNA evidence was Bobbi Jo's profile.[69]

3. Verdict

The trial judge convicted Edmiston of first-degree murder, rape, statutory rape, and involuntary deviate sexual intercourse.[70]

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[68] Trial NT 7/11/89, at 127. RFLP DNA testing represented the first generation of DNA tests that were introduced in the mid to late 1980s. While RFLP testing was far more discriminatory than traditional serology tests, it required a "relatively large amounts of high quality-DNA" in order to produce a reliable and accurate DNA profile. NAT'L INST. OF JUST., DEP'T OF JUST., THE FUTURE OF FORENSIC DNA TESTING 16 (2000).

[69] Trial NT 7/11/89, at 136-37.

[70] Trial NT 7/14/89, at 63-68. Despite the fact Tackett could not definitively identify who contributed the seminal material or blood evidence, Tackett's testimony presumably impacted the jury's decision to convict Edmiston and sentence Edmiston to death because he was a scientific expert, *see Ake v. Oklahoma*, 470 U.S. 68, 82 n.7 (1985) ("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."), and because it related to a rape-murder. *See House v. Bell*, 126 S.Ct. 2064, 2079 (2006) ("Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this [forensic] evidence link [petitioner] to the crime; it likely was a factor in persuading the jury not to let him go free.").

C. Sentencing

1. Commonwealth's Case

During the penalty hearing, the Commonwealth sought to prove two aggravators: (1) Edmiston tortured Bobbi Jo; and (2) he committed the murder during a felony, to wit: rape and deviate sexual intercourse. To prove these aggravators, the Commonwealth relied upon the same evidence it introduced during the guilt-innocence hearing: (1) Edmiston's purported confession; (2) the blood and hair evidence; and (3) the semen and sperm evidence.

2. Verdict and Sentence

The sentencing jury found both aggravators: (1) Edmiston tortured Bobbi Jo; and (2) that he committed the murder in the course of rape and deviate sexual intercourse. *See* 42 Pa. C.S. §§ 9711(d)(6, 8). The jury found one mitigator: Edmiston did not have a significant criminal history. *See* 42 Pa. C.S. § 9711(e)(1). The jury determined that the two aggravating circumstances outweighed the mitigating circumstance and sentenced him to death.

III. DNA Testing Arguments

In 2002, Pennsylvania enacted 42 Pa.C.S. § 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 meet section 9543.1's prerequisites. *See Commonwealth v. Smith*, 889 A.2d 582, 583 (Pa. Super. 2005). Edmiston satisfies each requirement and is entitled to DNA testing.[71]

[71] Edmiston would further argue that he is independently entitled to DNA testing under Article I, § 1 of the Pennsylvania Constitution, which establishes an inherent and indefeasible right to defend life and liberty. Nowhere is that right more important than when an innocent man on death row requires the assistance of the courts to provide him access to available DNA testing, without which he is denied the opportunity to defend his life and liberty.

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

Pursuant to 42 Pa. C.S. § 9543.1(c)(1)(I) and (c)(3)(ii)(A), Edmiston 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. Ct. 2005). Edmiston satisfies these requirements.

1. Types of DNA Testing

Before identifying the evidence, Edmiston will briefly discuss the different types of DNA testing that can prove his innocence.

a. Short Tandem Repeat Testing (STR)

STR DNA testing offers several advantages over the first generation of DNA tests, including the RFLP testing used in Edmiston's case. 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 DNA profiles can be properly dissected into their proper components. Lastly, it is highly discriminatory. *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's 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).[72] The smaller number of base pairs means very small amounts of biological evidence, less

[72] *See* NAT'L INST. OF JUST., DEP'T OF JUST., THE FUTURE OF FORENSIC DNA TESTING 39-40 (Nov. 2000).

than 1 nanogram (1 billionth of a gram), can be easily amplified (using polymerase chain reaction [PCR]) and accurately profiled. As one leading DNA textbook explained:

> 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.[73]

Thus, the ability to employ PCR amplification may be critically important 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."[74]

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 because allele dropout via preferential amplification of the smaller allele is likely to occur since both alleles in a heterozygous individual with similar size.[75]

Because Edmiston's case is twenty years old, STR testing will prove invaluable if any of the evidence has degraded.[76]

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

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[73] JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 146 (2D 2005).

[74] *Id*. at 39.

[75] *Id*. at 146, 147.

[76] Degredation is likely, given that the evidence has been stored over the years in a box in the Cambria County Courthouse without adequate temperature controls or other precautions to preserve its integrity.

mixtures was challenging.[77] 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.[78] 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."[79]

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."[80] 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.[81] Thus, given the United States' population, an STR profile is "effectively unique."[82] As the Tenth Circuit Court of Appeals recently noted:

> 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

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[77] *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.").

[78] *Id*. at 156.

[79] *Id.* at 155.

[80] *Id*. at 157.

[81] NIJ 2000 Report at 19.

[82] *Id.* at 25.

identical twins. Thus, a DNA match between two samples excludes the rest of the population from suspicion to a near 100% certainty.[83]

b. Y-STR Testing

STR testing focuses 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 from his or her mother. *See* Butler, *supra*, at 201-03. 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). *Id.* Paternal lineages can be traced with Y chromosome markers (Y-STRs), whereas maternal lineages can be traced with mtDNA sequence information. *Id.* Although not as discriminatory as STR tests, Y-STR and mtDNA still "have an important role to play in forensic investigations." *Id.* at 201.

Y-chromosome testing is valuable because Y-chromosomes are only found in males. Male 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 circumstances.[84] 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

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

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

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." Butler, *supra*, at 203.[85]

Y-STR testing may prove critical for several items of evidence in Edmiston's case. For example, Dr. Herrin testified that he only identified Bobbi Jo's DNA from the vaginal swabs. Such a result indicates Bobbi Jo's vaginal secretions may have overwhelmed the small quantity of semen and sperm that Tackett identified on the vaginal swabs or that Tackett was simply wrong when he testified that he identified semen and sperm. Y-STR tests, however, can zero in on any male DNA mixed in with and overwhelmed by Bobbi Jo's vaginal secretions. Simply put, Y-STR testing can show whether any male DNA is present, and if so, provide a DNA profile of the male donor.

c. Mini-STR Testing

The newest form of STR testing is mini-STR testing, which is premised on the same principles as STR and Y-STR (i.e., DNA tests that look for short tandem repeats). Mini-STR testing, however, works incredibly well with "highly degraded DNA as well as very low amounts of DNA," Butler, *supra*, at 148, because the PCR primers anneal closer to the repeat region than conventional STR kit primers. *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]."); 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).[86] Mini-

[85] *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).

[86] *See also* 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) ("our data indicate that the mini-STR [tests] offer an effective tool for recovering information in

STR testing may prove beneficial because Tackett testified that he identified a small number of sperm on the vaginal and anal swabs. As such, mini-STR testing may prove more sensitive than regular STR testing.

2. Establishing Actual Innocence

To qualify for DNA testing, Edmiston must prove that the envisioned DNA tests would establish his actual innocence. *See* 42 Pa. C.S. § 9543.1(c)(3)(ii)(A). The actual innocence threshold is a cumulative assessment. This can be inferred from the statute's mandate that, at the pleading stage, 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. Ct. 2005). Thus, the Court must assume that the results of *all* the DNA *tests*, considered collectively, will establish his actual innocence.[87]

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). The Pennsylvania courts, however, have not delineated what "actual innocence" means as it relates to 42 Pa. C.S. § 9543.1. The United States Supreme Court, on the other hand, has articulated three different actual innocence standards for different situations.

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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).

[87] This "cumulative" assessment is identical to the "prejudice" assessment a court must undertake when considering a petitioner's claim that the Commonwealth failed to disclose exculpatory or impeachment evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *See Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995).

While all three represent significantly high standards, exculpatory DNA result*s* will satisfy each standard.

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*, 547 U.S. 518, 537-38 (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." *House*, 547 U.S. at 538. 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*.

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).

As noted *infra*, the evidence Edmiston seeks to test is directly related to Bobbi Jo's assault, murder, and rape. Thus, exculpatory results will establish innocence under each standard because no reasonable juror would have found Edmiston guilty beyond a reasonable doubt had these results been introduced at trial.

3. Evidence to Be Tested

Edmiston seeks to test two forms of evidence: (1) the blood samples collected from the cab of Edmiston's truck; and (2) the vaginal and rectal swabs and slides collected during Bobbi Jo's autopsy.

a. Blood Samples from Cab of Edmiston's Truck

The Commonwealth argued that Edmiston attacked Bobbi Jo in the cab of his truck, which caused Bobbi Jo to bleed, and that the blood recovered from the cab of his truck came from Bobbi Jo rather than Edmiston. Rudimentary serological tests indicted that several of these stains were type O – the same blood type as Bobbi Jo's *and Edmiston's*. DNA testing can now conclusively determine whether the blood came from Bobbi Jo or Edmiston. Accordingly, if the blood came from Edmiston, this would establish his actual innocence. Indeed, no reasonable juror or court would have convicted him had they known that the blood, ostensibly lost by Bobbi Jo as a result of the alleged attack by Edmiston, came from Edmiston instead of Bobbi Jo.

The blood samples that Edmiston wishes to test include:

- the blood sample from seat belt buckle (Item 2)
- the blood sample from bottom left side b/t cab & bed (Item 3)
- the blood sample from upholstery under drivers door window (Item 4)
- the blood sample from middle floor hump (Item 8)
- the blood sample from drivers side seat (Item 10)

- the blood sample from middle seat (Item 11)[88]

b. The Vaginal and Rectal Swabs

The Commonwealth argued that Edmiston raped Bobbi Jo before he murdered her. Dr. Katherine Jasnosz identified significant damage to Bobbi Jo's vaginal region and collected vaginal and rectal swabs and slides. Bruce Tackett tested the vaginal and rectal swabs and slides and testified that he identified semen and sperm on the swabs. Because Bobbi Jo was two-years-old and sexually inactive, the biological evidence had to have come from the assailant, as the Commonwealth argued. The Commonwealth argued that Edmiston was the assailant and that the biological material came from him (*and only he*).

Dr. Jasnosz's and Tackett's testimony influenced the verdict because the Court found Edmiston guilty of rape and deviate sexual intercourse. Likewise, it affected the jury's penalty phase verdict because the jury found as an aggravating circumstance that Edmiston murdered Bobbi Jo in the course of raping her. *See* 42 Pa. C.S. § 9711(d)(6) (the defendant committed the killing while in the perpetration of a felony). On direct appeal, the Pennsylvania Supreme Court made the following comment regarding Dr. Jasnosz's testimony:

> Dr. Jasnosz's medical opinions prove that both the anus and vaginal tracts had been penetrated by a penis to prove rape and involuntary deviate sexual intercourse and that the necessary medical testimony had been given a reasonable degree of medical certainty.[89]

Consequently, if DNA testing is conducted, and the results show no male biological material or exclude Edmiston as a possible contributor of the biological material, this would establish his actual innocence of the death penalty and of the underlying first-degree murder, rape, and deviate

[88] The Item Numbers correspond with the Item Number in Corporal Douglas M. Wrabel's October 13, 1988, Request for Laboratory Analysis Form. Ex. 11.

[89] *Commonwealth v. Edmiston*, 634 A.2d 1078, 1084 (Pa. 1993).

sexual intercourse convictions. *See* 42 Pa. C.S. §§ 9543.1(c)(3)(ii)(A-B).[90] No reasonable juror would convict a defendant of raping and murdering a two-year-old child where DNA tests proved that the biological evidence could not have come from the defendant. Moreover, no reasonable or ethical prosecutor would prosecute a defendant for capital murder (or rape) if he or she knew that the DNA results proved that the defendant could not be the source of the biological evidence.[91] Indeed, there have been numerous recent cases where prosecutors dropped rape or rape-murder charges against a defendant after DNA tests (on vaginal swabs, slides, or victim's clothing) excluded the defendant—even if the victim identified the defendant as the assailant or the defendant confessed to the offense.[92]

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[90] As mentioned, this is a classic rape-murder where the absence of Edmiston's semen can prove his innocence. *Cf. Commonwealth v. Brooks*, 875 A.2d 1141, 1147 (Pa. Super. Ct. 2005) ("This is not a *rape-murder* case where the absence of the defendant's semen could prove his innocence; or a case where there were signs of a struggle and the perpetrator left behind skin, hair, or blood samples.") (emphasis added).

[91] Ex. 17. At trial and in the initial post-conviction proceedings, the Court (Judge Long) denied Edmiston access to Children & Youth Services (CYS) records for the Dotts/Matthews family. When Edmiston subsequently obtained these records, they provided evidence of sexual abuse in the household. Thus, even if sperm is present, that does not mean that Bobbie Joe was raped at the time of the murder. Under any circumstances, however, both the absence of semen and sperm or the presence of semen and sperm would prove Edmiston's innocence both of the underlying offense of rape and murder *and* of the aggravating circumstance that he committed the murder during the perpetration of a rape.

[92] Further, even if the evidence exonerated Edmiston only of rape and deviate sexual intercourse, but not of murder (a result that is foreclosed by the Commonwealth's actual theory of the case), his innocence of the aggravating circumstances that he supposedly committed the killing during the perpetration of a rape would require reversal of his death sentence, as well. *See Commonwealth v. Bolden*, 753 A.2d 793, 799 (Pa. 2000) (where a jury that has found at least one mitigating circumstance "but one of the aggravating circumstances was erroneously determined, the penalty of death [must be] vacated"); *Commonwealth v. Karabin*, 559 A.2d 19, 24 (Pa. 1989); *Commonwealth v. Caldwell*, 532 A.2d 813, 817-18 (Pa. 1987); *Commonwealth v. Aulisio*, 522 A.2d 1075, 1080 (Pa. 1987); *cf. Commonwealth v. LaCava*, 666 A.2d 221, 237 (Pa. 1995) (reversal required where prosecutor's improper argument concerning non-statutory aggravating factor may have affected weighing process); *Commonwealth v. DeHart*, 650 A.2d 38, 49 (Pa. 1994) (same re: instruction burdening weighing of mitigation); *Commonwealth v. Blount*, 647 A.2d 199, 210 (Pa. 1994) (same).

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).[93] 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); *Commonwealth v. Cherry*, 378 A.2d 800, 803 (Pa. 1977) (in "advocating the cause for this Commonwealth, prosecutors are to seek justice, not only convictions.").[94] 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); *Commonwealth v. Eskridge*, 529 A.2d 700 (Pa. 1992) ("a prosecutor must abandon the prosecution if, in his professional judgment, justice will be promoted by doing so."). Thus, because prosecutors "must exercise sound discretion in the performance of his or 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 single-perpetrator rape case) do not match the defendant'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. at 256 (White, J., concurring and dissenting

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[93] Model Rules of Prof'l Conduct R. 3.8 cmt. (2004) (characterizing government officers as "minister[s] of justice").

[94] Model Code of Prof'l Responsibility EC 7-13 (2004) (stating that the prosecutor's "duty is to seek justice").

in part) (noting that prosecutors "have the obligation to convict the guilty and to make sure they do not convict the innocent.").[95]

The samples that Edmiston seeks to test include:

- Six swabs: 2 oral, 2 vaginal, 2 rectal (Item 17)

4. Exculpatory Results from the Blood and Seminal Material Debunks Tackett's Scientifically Invalid Hair Identification Evidence

During the trial and the penalty hearing, Tackett testified that several hairs recovered from Edmiston's truck "positively matched" Bobbi Jo's hair characteristics and that it was "very unlikely" that the hairs came from someone other than Bobbi Jo. Tackett's hair testimony is not only misleading and scientifically unjustified, there is good cause to believe it is incorrect.

To begin with, the phrase "positive match" is grossly misleading, as it implies that the hairs actually came from Bobbi Jo. It is "well-established," however, "that microscopic analysis (as opposed to DNA analysis) of hair samples cannot establish an identical match or provide any type of positive identification." *Crawford v. State*, 597 S.E.2d 403 (Ga. 2004) (C.J., Fletcher, dissenting).[96] Additionally, Tackett's quasi-statistical claim that it was "very unlikely" that the hairs

[95] Moreover, a zealous prosecutor who pursues charges in the face of DNA results excluding the defendant, runs the risk of jeopardizing his or her career, and worse yet, being disbarred for pursuing a case in which objective science clearly trumped other evidence. Perhaps the strongest case emphasizing this point is the Duke lacrosse rape case, which Durham County, North Carolina District Attorney Mike Nifong pursued rape charges against several Duke University 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 Bobbi Jo's (questionable) 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 [Bobbi Jo's] testimony." *Id*. at 1347 (citing the North Carolina Attorney General's Office's official report).

[96] *See, e.g., Scott v. State,* 581 So. 2d 887, 892 (Fla. 1991) ("it is important to recognize that hair comparisons do not constitute a basis for positive personal identification"); *State v. Faircloth,* 394 S.E.2d 198, 202 (N.C. App. 1990) ("Unlike fingerprints, however, comparative

came from someone else besides Bobbi Jo has no foundation in science. While "probability standards for fingerprint and [DNA] evidence have been established and recognized by the courts, no such standards exist for human hair identification." *Williamson v. Reynolds*, 904 F. Supp. 1529, 1556 (E.D. Okla. 1995).[97] Thus, momentarily setting aside the issue of Edmiston's actual innocence, the presentation of this scientifically false and materially misleading testimony constituted an independent violation of his due process rights. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.").[98]

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microscopy of hair is not accepted as reliable evidence to positively identify a person"); *State v. Butler*, 24 S.W.3d 21 (Mo. App. 2000), *rev'd on other grounds*, 108 S.W.3d 18 (2003) ("As [the expert] acknowledged in her testimony, and as the authoritative articles confirm, there is no scientific basis for testifying that a hair comes from a particular individual").

[97] *See also* Peer Review Report: Montana v. Jimmy Ray Bromgard, at www.innocenceproject.org/docs/bromgard_print_version1.html ("there is not - and never was - a well established probability theory for hair comparison.").

[98] The presentation of false testimony about the certainty of Tackett's analysis violated due process irrespective of the ultimate accuracy – or in this case, inaccuracy – of the underlying analysis. "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction [is] implicit in any concept of ordered liberty [and] does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . ." *Napue*, 360 U.S. at 269, *quoted in Commonwealth v. Strong*, 761 A.2d 1167, 1171 (Pa. 2000). The failure to disclose the falsity of Tackett's misrepresentations relating to the supposed scientific reliability of his opinions also violated *Brady v. Maryland*. Exculpatory evidence includes evidence of an impeachment nature that is material to the case against the accused." *Napue*, 360 U.S. 2at 269; *Strong*, 761 A.2d at 1171 ("Exculpatory evidence favorable to the accused is not confined to evidence that reflects upon the culpability of the defendant. *Exculpatory evidence also includes evidence of an impeachment nature that is material to the case against the accused*.") (emphasis added). Impeachment evidence is evidence that can be used to challenge the credibility of a prosecution witness *or* that can be used to challenge the prosecution's case. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (*Brady*'s disclosure requirements apply to any materials that, whatever their other characteristics, can be used to develop impeachment of a prosecution witness). The undisclosed falsity of Tackett's claims relates to both.

More importantly, hair identification is notoriously unreliable. *Id*. ("The few available studies reviewed by this court tend to point to the method's unreliability.").[99] Indeed, the DNA exonerations have repeatedly exposed its unreliability by demonstrating that so-called "positive matches" are anything but "positive." *See* www.innocenceproject.org/understand/Unreliable-Limited-Science.php (last visited August 10, 2008).[100] Chief Justice Fletcher of the Georgia Supreme Court acknowledged this reality when he wrote: "[H]air misidentification has caused more wrongful convictions than any other individualization science." *Crawford v. State*, 597 S.E.2d 403 (Ga. 2004) (C.J., Fletcher, dissenting) (citation omitted).[101]

Consequently, if DNA tests on the vaginal and rectal swabs produces a male profile that is inconsistent with Edmiston's profile, this would prove his actual innocence notwithstanding Tackett's hair testimony. The same can be said if DNA tests on the blood recovered from Edmiston's truck is inconsistent with Bobbi Jo's blood. Simply put, exculpatory results from either the seminal material or blood evidence will "demolish" Tackett's hair testimony. *Commonwealth*

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[99] *See also* Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil*, 27 Colum. Hum. Rts. L. Rev. 227 (1996).

[100] *See also* www.innocenceproject.org/causes/ (twenty-one out of one-hundred-and-thirty wrongful convictions were initially supported by faulty hair identifications); NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (out of twenty-eight erroneous convictions, six had hair comparison testimony supporting the original conviction); Stephanie L. Smith & Charles A. Linch, *A Review of Major Factors Contributing to Errors in Human Hair Association by Microscopy*, 20 AM. J. FORENSIC MED. & PATHOLOGY 269 (1999) (discussing two incorrect inclusion cases).

[101] *See also* Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying Daubert Isn't the Only Problem*, 43 TULSA L. REV. 285, 301-09 (2007) (discussing several DNA exonerations involving hair identification).

v. Williams, 899 A.2d at 1064. Even beyond this, the demonstrated falsity of state police testimony on its supposedly scientific evidence would further undermine the credibility of the state police on other hotly disputed issues, including the alleged confession (that is unsupported by any contemporaneous recording or any written statement by Edmiston) and the alleged crime scene map (redrawn by the state police).

B. The Assailant's Identity Was at Issue During Edmiston's Trial

To obtain DNA testing, the assailant's identity had to be at issue during the trial. *See* 42 Pa. C.S. § 9543.1(c)(3)(1). Edmiston satisfies this requirement. He placed the assailant's identity at issue when he presented an alibi defense that several people substantiated, including Michael Ledford, William Ledford, Robert Patterson, and June Patterson. *E.g.*, *Commonwealth v. Williams*, 899 A.2d 1060, 1063 (Pa. 2006) (an alibi defense "by its nature" places the assailant's identity at issue); *Commonwealth v. Roxberry*, 602 A.2d 826, 827 (Pa. 1992). All of these people testified that they saw Edmiston between 2:30 and 3:30 am on October 5, 1988.[102] Likewise, during opening statements and closing arguments, trial counsel explained Edmiston's alibi defense and argued that it was impossible for him to have committed the murder because he could not be in two places at one time.[103]

[102] Trial NT 7/11/89, at 195-214 (William Ledford's testimony); Trial NT 7/12/89, at 3, 4, 9 (Michael Ledford's testimony); 32, 33 (Robert Patterson's testimony); and 79-84 (June Patterson's testimony).

[103] Trial NT 7/5/89, at 8-10 (opening statements); Trial NT 7/14/89, at 17-18 (closing arguments).

1. Edmiston's Knowing and Voluntary Confession Does Not Moot the Identity Issue and Does Not Prevent Him From Proving His Actual Innocence

The trial court and the Pennsylvania Supreme Court, on direct appeal, construed Edmiston's map and his alleged statement to Trooper Brown that investigators will find a "dead, raped little girl" as a voluntary and knowing confession. *See Commonwealth v. Edmiston*, 634 A.2d 1078, 1087 (Pa. 1993) ("The trial court did not err in concluding that the confession was voluntary."). Such a confession does not moot the identity issue and cannot bar DNA testing.[104] While the trial court deemed Edmiston's confession legally admissible, the court did not have before it evidence of police misconduct on other aspects of the Commonwealth's case against Edmiston, which would be material in assessing both the credibility of the state police testimony concerning the substance of the statements made by and to the troopers during the interrogation and in assessing the conditions of the interrogation. Denominating the "confession" knowing and voluntary in such circumstances puts the cart before the horse. Furthermore, even if a trial court deems an alleged "confession" knowing and voluntary, such a finding has nothing to do with the accuracy of the alleged "confession."[105]

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[104] It should be noted that the following issue is currently pending before the Pennsylvania Supreme Court: "Whether the existence of a voluntary confession precludes a prima facie finding that exculpatory results from DNA testing under 42 Pa.C.S. § 9543.1 would establish actual innocence." *Commonwealth v. Wright*, 951 A.2d 263 (Pa. 2008) (order granting petition for allowance of appeal).

[105] A confession must be knowing and voluntary to be admissible. *E.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 285-88 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). A confession is voluntary and intelligent when all the circumstances surrounding the confession indicate that the statements were not induced by any violence, threats, promises, or other improper influences that would have overcome the accused's free will. *See Colorado v. Connelly*, 479 U.S. 157, 161 (1986); *Schneckloth v. Bustamonte*, 412 U.S. at 225 ("Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."); *Commonwealth v. D'Amato*, 526 A.2d 300, 305-06 (Pa. 1987). The Pennsylvania

The DNA exonerations have repeatedly established this unfortunate reality. In 25% of the 223 DNA exonerations, defendants made incriminating statements, provided knowing and voluntary statements, or pled guilty. *See* www.innocenceproject.org/understand/False-Confessions.php (last visited October 30, 2008). Thus, DNA testing has discredited numerous confessions that trial judges and appellate courts have deemed knowing, voluntary, and admissible. Simply put, "[c]onfessions, even those that have been found to be voluntary, *are not conclusive of guilt*." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (emphasis added).

Had exculpatory DNA results been available prior to trial, such results would have established Edmiston's actual innocence, regardless of whether he knowingly and voluntarily confessed before trial. *See Osborne v. District Attorney's Office*, 521 F.3d 1118, 1140-41 (9th Cir. 2008); *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d. 366, 370 (E.D. Pa. 2001).[106] Accordingly, to deny Edmiston's DNA testing request because he allegedly confessed "would ignore the emerging reality of wrongful convictions based on false confessions and the

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Supreme Court made this clear in its direct appeal opinion when it explained:

> One looks at the duration and methods of interrogation, the conditions of detention, the manifest attitude of the police toward the accused, the accused's physical and psychological state, and all other conditions present which may serve to drain one's powers of resistance to suggestion and undermine his self-determination.

Commonwealth v. Edmiston, 634 A.2d 1078, 1087 (Pa. 1993). Consequently, the issue of whether the confession is *accurate* and *truthful* is irrelevant. *E.g.*, *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Rogers v. Richmond*, 365 U.S. 534, 542 (1961). As a result, knowing and voluntary confessions can be (and frequently are) unreliable. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (distinguishing between voluntariness and reliability, and recognizing that some voluntary confessions may prove to be unreliable).

[106] It should be noted that Edmiston does not concede that he in fact confessed. To the contrary, he steadfastly maintains he never confessed or made incriminating statements to Troopers Shaffer and Brown. Instead, Edmiston is merely pointing out that the Commonwealth introduced his alleged confession at trial and did so by arguing that he made his incriminating statements voluntarily and knowingly.

capability of DNA testing to reveal the objective truth and exonerate the innocent." *Osborne*, 521 F.3d at 1140. Several DNA exonerations, including three from Pennsylvania, prove this very point.

a. Nathaniel Hatchett (Michigan)

One of the most recent DNA exonerations involved a false confession. Nathaniel Hatchett spent nearly twelve years in prison (1996 to 2008) for a rape and kidnapping he did not commit. Police arrested Hatchett driving the victim's car three days after her attack. Once in custody, he confessed to the rape and kidnapping and the victim identified him as her assailant. DNA testing on the biological evidence recovered from the victim's body, however, failed to link Hatchett to the rape. In light of the DNA results, prosecutors dismissed all charges in April 2008. The lead prosecutor stated: "We could have fought for a new trial, but our job is to seek justice. It was served today." Amber Hunt, *DNA Clears Man Imprisoned 12 Years for Rape*, DETROIT FREE PRESS, April 14, 2008.

b. Nicholas Yarris (Pennsylvania)

In 1981, the Commonwealth charged Nicholas Yarris with attempted murder after assaulting a police officer during a traffic stop. Police officers subsequently placed him in solitary confinement in a Delaware County prison. While in prison, Yarris learned of Linda Mae Craig's unsolved rape-murder. Hoping to obtain his release from prison, Yarris told detectives he had information about Craig's murder; specifically, that he raped Craig, but that another man murdered her. *See Commonwealth v. Yarris*, 549 A.2d 513, 520 (Pa. 1988). The day after Yarris incriminated himself, the Commonwealth charged him with kidnapping and capital murder.

The trial judge admitted his incriminating statements, finding that he made them knowingly and voluntarily. *Id.* Likewise, the Commonwealth also introduced forensic evidence and eyewitnesses evidence that "overwhelmingly" proved Yarris's guilt. *See Commonwealth v. Yarris*,

731 A.2d 581, 583 (Pa. 1999); *Yarris v. County of Delaware*, 465 F.3d 129, 132 (3d Cir. 2006). A jury convicted Yarris of first-degree murder, rape, and kidnapping and sentenced him to death.

The Pennsylvania Supreme Court affirmed his conviction and death sentence, *see Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988), and the trial judge's decision to admit his confession. *Id.* at 523-24. Shortly thereafter, Yarris pursued post-conviction DNA testing (prior to 42 Pa. C.S. § 9543.1's enactment). In 1989, the PCRA judge granted his request, despite his confession and other evidence supporting his guilt. *See Yarris v. County of Delaware*, 465 F.3d at 133. The testing produced "inconclusive" results. *Id.* In 1989, Yarris requested additional tests "using a newer and more accurate type of DNA testing known as PCR-enhanced DNA testing."[107] Again, the "District Attorney eventually agreed to additional testing of the evidence in September 1992[.]"[108] The PCR-based DNA tests also produced inconclusive results.

Yarris sought federal habeas relief. In April 2003, pursuit to federal habeas discovery, the district judge granted Yarris's third request for DNA testing. *Id.*[109] PCR DNA tests were performed on the gloves found in Ms. Craig's car, her semen-stained clothes, and her fingernail scrapings. The results indicated: (1) Yarris was not the "habitual user" of the gloves; (2) the semen did not come from Yarris, but from two unknown males, one of whom was the "habitual user" of the gloves; and (3) the fingernail scrapings came from the "habitual user" of the gloves.

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[107] *Id*.

[108] *Id*.

[109] Notably, to be granted discovery in federal habeas actions, petitioners must demonstrate "good cause." RULES GOVERNING SECTION 2254 CASES, Rule 6(a). Good cause is shown "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is[] entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (citation omitted). Thus, the fact the district court judge awarded post-conviction DNA testing meant the DNA testing had the potential to develop facts that could establish his actual innocence.

On August 19, 2003, the PCRA granted Yarris a new trial. *Id.* On August 26, 2003, Yarris and the Commonwealth jointly filed a petition requesting that his conviction be vacated. *Id.* On September 3, 2003, the PCRA court vacated his conviction and death sentence. On December 9, 2003, the Commonwealth dropped all charges, and on January 16, 2004, the Commonwealth released him from prison.

c. Bruce Godschalk (Pennsylvania)

In 1987, a Montgomery County jury convicted Bruce Godschalk of two rapes that occurred within a month of one another in the same housing complex. Godschalk confessed to both rapes. The trial judge admitted his confession because he gave it knowingly and voluntarily. The Commonwealth introduced his confession at trial. Godschalk repudiated his confession, arguing detectives coerced it from him. Godschalk's convictions were premised in part on his confession, eyewitness testimony, and testimony from a jailhouse informant who said Godschalk confessed to him while in jail awaiting trial. *See Commonwealth v. Godschalk*, 679 A.2d 1295, 1296, 1297 (Pa. Super. Ct. 1996); David Rudovsky & Seth F. Kramer, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 548 (2002).

Prior to 42 Pa.C.S. § 9543.1's enactment, Godschalk sought DNA testing. The PCRA court denied his request, finding that his confession represented "overwhelming evidence of [his] guilt, completely separate from any identification testimony." *Godschalk v. Montgomery County DA's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001) (quoting the PCRA court). The Superior Court affirmed, holding that his conviction "rest[ed] largely on his own confession[.]" *Commonwealth v. Godschalk*, 679 A.2d at 1297.

In 1999, Godschalk filed a section 1983 action in federal court to obtain DNA testing. *See Godschalk v. Montgomery County DA's Office*, 177 F. Supp. 2d at 370. The District Court

acknowledged that "[t]here is absolutely no evidence in the transcript that plaintiff's confession was obtained through coercion, undue pressure or other improper police interrogation techniques. There is no evidence that the interrogating detective put words in plaintiff's mouth." *Id.* at 369. Despite his confession, the District Court granted his motion, recognizing that DNA's "well-known powerful exculpatory effect" could prove Godschalk's innocence, even in the face of "overwhelming evidence" of guilt. *Id.* at 370. As the District Court explained:

> [I]f by some chance no matter how remote, DNA testing on the biological evidence excludes plaintiff as the source of the genetic material from the victims, a jury would have to weigh this result against plaintiff's uncoerced detailed confessions to the rapes. *While plaintiff's detailed confessions to the rapes are powerful inculpatory evidence, so to any DNA testing that would exclude plaintiff as the source of the genetic material taken from the victims would be powerful exculpatory evidence.* Such contradictive results could well raise reasonable doubts in the minds of jurors as to plaintiff's guilt.

Id. (emphasis added).

Godschalk and the Commonwealth sent the biological evidence to two independent laboratories. When the laboratories tested the semen from both rape kits, both laboratories confirmed a single assailant committed the rapes and that the assailant could not be Godschalk. *See* Rudovsky & Kramer, *supra*, at 550-51. On February 14, 2002, the Commonwealth dismissed all charges and released Godschalk from prison.

d. <u>Barry Laughman (Pennsylvania)</u>

In 1987, an Adams County jury convicted Barry Laughman of Edna Laughman's rape-murder. *See Laughman v. Commonwealth*, 2006 WL 709222, *1 (M.D. Pa., Mar. 17, 2006). Laughman confessed and moved to suppress the confession prior to trial, claiming that detectives coerced it from him. *Id.* The trial judge determined that Laughman gave his confession knowingly

and voluntarily. *Id.* The Commonwealth introduced his confession at trial. *Id.* On appeal, the Superior Court affirmed the trial judge's decision. *Id.*

Laughman sought DNA testing pursuant to 42 Pa. C.S. § 9543.1. On June 20, 2003, the PCRA court granted his motion – despite his finally litigated confession. *See Laughman v. Commonwealth*, 2006 WL 709222, at *2. The subsequent DNA testing excluded Laughman as a contributor of the crime scene DNA. *Id.*; John T. Rago, *A Fine Line Between Chaos & Creation: Lessons of Innocence from the Pennsylvania Eight*, 12 WIDENER L. REV. 359, 384-94 (2006). Prosecutors released Laughman from prison on November 21, 2003, and eventually dismissed all charges on August 26, 2004, after the PCRA court granted him a new trial. *See* Associated Press, *Charges dropped against man freed from prison by DNA test* (Aug. 24, 2004).

These cases demonstrate that DNA testing can prove a petitioner's actual innocence even when: (1) the petitioner confessed; (2) forensic evidence linked him to victim; (3) an eyewitness placed him near the crime scene at the time of the offense; and (4) a jailhouse informant testified that the defendant confessed to him in jail.

C. The Evidence Edmiston Seeks to Test Was Not Subjected to DNA Testing Because the Technology Did Not Exist

Before the Court may grant a DNA testing request, 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. § 9543.1(a)(2). Edmiston satisfies this requirement. Edmiston seeks three types of DNA testing: (1) STR testing; (2) Y-STR testing; and (3) mini-STR testing. None of these DNA tests were available in 1989 when the Commonwealth prosecuted him.[110]

[110] *E.g.*, JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 272 (2d 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).

D. The Chain of Custody Regarding the Items Sought to Be Tested Is Sufficient to Establish that the Items Have Not Been Altered in Any Material Respect

The Court may only grant a petitioner's DNA testing request if the "evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect."42 Pa.C.S.A. § 9543.1(d)(1)(ii). Edmiston satisfies this criterion.

Chain of custody "is an indirect method of proving the identity and integrity of evidence by showing its continuous whereabouts." *Commonwealth v. Briggs*, 2005 WL 4309071 (Bradford C.C.P., Oct. 12, 2005); *accord Commonwealth v. Hudson*, 414 A.2d 1381 (Pa. 1980). Like the Commonwealth, Edmiston is not required to establish "the sanctity of the evidence beyond a moral certainty." *Commonwealth v. Bennett*, 827 A.2d 469, 481 (Pa. Super. Ct. 2003) ("It is well settled that the Commonwealth 'does not have to establish the sanctity of its exhibits beyond a moral certainty.'" (quoting *Commonwealth v. Miller*, 371 A.2d 1362, 1365 (Pa. Super. Ct. 1977)). Similarly, like the Commonwealth, Edmiston is not required to identify "every person who came into contact with evidence, nor must every possibility of tampering be eliminated; it is sufficient that evidence, direct or circumstantial, establishes a reasonable inference that identity and condition of the exhibit remained unimpaired" until delivered to its current place of storage. *Commonwealth v. Williams*, 565 A.2d 160, 171 (Pa. Super. Ct. 1989); *Commonwealth v. Pedano*, 405 A.2d 525 (Pa. Super. Ct. 1979). Finally, "physical evidence may be properly admitted [and/or subjected to post-conviction DNA testing] despite gaps in testimony regarding its custody." *Commonwealth v. Hudson*, 414 A.2d 1381, 1387 (Pa. 1980).[111]

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[111] Edmiston contends that he need only present a *prima facie* case regarding chain of custody because he is in no position to adequately track who and what agencies possessed the blood samples and rape kit. As the Illinois Appellate Court aptly stated: "It asks too much to require petitioning defendant in these cases to plead and prove proper chain of custody at the outset, for the evidence at issue will undoubtedly have been in the safekeeping of the State, not

In regards to the rape kit, Trooper Vaneman collected it on October 7, 1988 at the Allegheny County Morgue once Dr. Jasnosz completed her autopsy.[112] In regards to the blood samples, various PSP Troopers collected them on October 7, 8, and 9, 1988, as well as on March 30, 1989.[113] Trooper Vaneman and Corporal Wrabel submitted the rape kit and blood samples to the PSP crime laboratory and Criminalist Bruce Tackett on October 13, 1988 and March 30, 1989.[114] Tackett examined the items and issued reports on January 4, 1989 and April 7, 1989.[115] At the bottom of both reports is the following message: "DISPOSITION: EVIDENCE MUST BE PICKED UP WITHIN THIRTY (30) DAYS."

On May 20, 2005, undersigned counsel (Dunham and Murphy) and their investigator (Gary Hendrix), traveled to the Cambria County Courthouse to view and document the remaining items of evidence.[116] Upon inspection of the evidence, they verified that the Cambria County Courthouse Property Room still had custody of the rape kit (including all six swabs) and the blood samples from Edmiston's truck. There is no documentation or evidence that these items of evidence have since been destroyed or lost.

Pursuant to section 9543.1(b)(2), "[u]pon receipt of a motion under subsection (a) or notice of the motion, as applicable, the Commonwealth and the court shall take the steps reasonably necessary to ensure that any remaining biological material in the possession of the Commonwealth

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the defendant." *People v. Price*, 801 N.E.2d 1187, 1199 (Ill. App. Ct. 2003) (citations omitted).

[112] Ex. 2.

[113] Exs. 3, 6.

[114] Exs. 13, 15.

[115] Exs. 13, 15.

[116] The Commonwealth's Counsel (Assistant Attorney General Stuart Suss) was also present.

or the court is preserved pending the completion of the proceedings under this section." As such, Edmiston requests the Court to issue a limited order directing the Commonwealth to preserve the sought-after blood and rape kit evidence "pending the completion of the proceedings under this section."

E. Edmiston Consents to Providing a Sample of His Bodily Fluid and Acknowledges that it Will Be Entered into a Law Enforcement Database Where it May Be Used to Investigate Other Offenses

Pursuant to 42 Pa.C.S. § 9543.1(c)(1)(i)-(ii), Edmiston 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.

F. Edmiston Asserts His Innocence and Has Filed His Motion So He Can Conclusively Establish His Innocence

Pursuant to 42 Pa.C.S. § 9543.1(d)(1)(iii), Edmiston'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. Ct. 2005); *Commonwealth v. Heilman*, 867 A.2d 542 (Pa. Super. Ct. 2005); *Williams v. Erie County Dist. Attorney's Office*, 848 A.2d at 971; *Commonwealth v. McLaughlin*, 835 A.2d at 750.

IV. Discovery Arguments

Edmiston's section 9543.1 petition constitutes a request for post-conviction relief. *See Williams v. Erie County Dist. Attorney's Office*, 848 A.2d 967, 969 (Pa. Super. Ct. 2004). Pennsylvania courts evaluate post-conviction petitions challenging a defendant's conviction or sentence as petitions filed under the Post Conviction Relief Act (PCRA), *see* 42 Pa. C.S. §§ 9541-46, regardless of the title of the document filed. *See Commonwealth v. Chester*, 733 A.2d 1242, 1250-51

(1999); *Commonwealth v. Hutchins*, 760 A.2d 50 (Pa. Super. Ct. 2000). Consequently, Edmiston may request discovery in order to fully and fairly develop his DNA testing claims along with any other constitutional claims that may arise as a result of the DNA testing results. Moreover, the DNA testing is relevant to claims already pending in this Court in a PCRA petition that alleges his actual innocence.

A. Requested Discovery

Edmiston requests access to the following information from the PSP crime laboratory (lab): (1) all editions and versions of the lab's quality control manual dating back to 1988;[117] (2) all annual audit reports relating to its operations dating back to 1988;[118] (3) all annual reviews or audit reports relating to the lab's quality control system dating back to 1978;[119] (4) all documentation, reports, manuals, memos, computer disks or articles, generated after 1988, relating to the general acceptance or validity of those procedures utilized by Bruce Tackett in preparation for Edmiston's trial;[120] (5) all technical procedural manuals, relating to blood analysis, semen analysis, and hair identification dating back to 1988;[121] (6) all records, documentation, reports, memos, manuals, or computer disks,

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[117] AMERICAN SOCIETY OF CRIME LABORATORY DIRECTORS, LABORATORY ACCREDITATION BOARD MANUAL, ASCLD Rule 1.4.2 (2003) ("All elements of a laboratories quality system must be clearly documented and in a quality manual which is kept current under the responsibility of a quality manager.").

[118] ASCLD Rule 1.4.2.3 ("each lab must conduct an annual audit of its operations").

[119] ASCLD Rule 1.4.2.4 ("The quality system requires that laboratory management conduct a review at least once yearly to ensure the continued suitability and effectiveness of such a system.").

[120] ASCLD Rule 1.4.2.5 ("Procedures used must be generally accepted in the field or supported by data gathered and recorded in a scientific manner.").

[121] ASCLD Rule 1.4.2.7 ("The written technical procedures should include descriptions of sample preparation methods, controls, standards, and calibration procedures. They should also include a discussion of precautions, possible sources of error, and literature references.").

dating back to 1988, relating to the calibration of the instrumentation utilized by Bruce Tackett in preparation for Edmiston's trial;[122] (7) all documentation, reports, bench memos, papers, notebooks, computer disks, or articles relating to Incident Nos. C3-297089, A2-555460, A3-555460; (8) the case record generated for Edmiston's trial[123] – including all: (a) bench notes or narratives describing the examinations performed by Bruce Tackett or any other lab employee who worked on physical evidence relating to Edmiston's case and trial; (b) photographs taken by Bruce Tackett or any other lab employee who took photographs of the physical evidence relating to Edmiston's case and trial; (c) photocopies/xeroxes made by Bruce Tackett or any other lab employee who photocopied or xeroxed documents, lab reports, bench notes, or photographs relating to Edmiston's case and trial; (d) drawings or diagrams made by Bruce Tackett or any other lab employee who drafted diagrams or depictions of the crimes scenes, the physical evidence, or results from forensic examinations relating to Edmiston's case or trials; (e) worksheets created or completed by Bruce Tackett or any other lab employee who created worksheets relating to Edmiston's case and trial; and (f) computers disks that contain objects identified in (a) through (e) created by Bruce Tackett or any other lab employee who assisted in the preparation of Edmiston's trial; (9) all reports, from 1988 on, that document when or if Bruce Tackett's casework was technically reviewed, who conducted the reviews, the outcomes of the reviews, and whether corrective actions had to be taken, and if so, what corrective action was taken; (10) all copies of the lab's testimony review policy dating back to

[122] ASCLD Rule 1.4.2.13 ("Instruments/equipment must be properly calibrated and calibration records maintained for all calibrated instruments.").

[123] ASCLD Rules 1.4.2.14-15 ("A laboratory case record consists of both examination documentation and administrative documentation which may be received or generated by the laboratory. The laboratory must maintain each case record in a designated location or locations, as specified by its policy, under a unique case designator, usually a laboratory case number.").

1988;[124] (11) all reports, memos, or documents, from 1988 on that identifies when Bruce Tackett's testimony was reviewed, who performed the review, and whether corrective action had to be taken due to discrepancies in his testimony or reports; (12) all editions and versions of the lab's proficiency testing policy manual dating back to 1988; (13) all records, reports, memos, or computer disks that identify or store the actual proficiency tests taken by Bruce Tackett after 1988; (14) all documents, reports, memos, records, or computer records that identify Bruce Tackett's proficiency tests results relating to all forms of serological testing dating back to 1988; and (15) all documents, reports, memos, records, or computer disks that identify Bruce Tackett's proficiency tests results relating to all forms of hair identification or trace evidence analysis dating back to 1988. Finally, Edmiston requests all documents, records, memos, and computer disks, regarding Dr. Herrin's DNA testing at Cellmark Diagnostic Laboratories.

B. Exceptional Circumstances Warrant Discovery

There are "exceptional circumstances" that warrant discovery. *See* Pa. R. Crim. P. 902 (E)(1) ("no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of exceptional circumstances."). These circumstances include: (1) this is a capital case; and (2) recent events involving PSP crime laboratory examiners raise significant questions regarding the lab's oversight and the accuracy and integrity of its examiners. Of the two circumstances, the later one substantially increases the likelihood that the requested discovery will expose additional constitutional violations because these cases represent "specific and concrete" examples of PSP lab examiners offering inaccurate conclusions, false evidence, fabricating evidence to inculpate an innocent person, or offering unsubstantiated testimony aimed at supporting the Commonwealth's theory of guilt.

[124] ASCLD Rule 1.4.2.18 ("The laboratory must have a written procedure whereby the testimony of each examiner is monitored at least once each year.").

1. Capital Cases Require Reliable Post-Conviction Fact-Determination Procedures

There is no greater wrong under the law than the execution of an innocent person. *See Schulp v. Delo*, 513 U.S. 298, 324 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."). That prospect, by itself, represents an exceptional circumstance because of the death penalty's "severity and irrevocability." *Enmund v. Florida*, 458 U.S. 782, 797 (1982). As the United States Supreme Court has frequently held, the finality of death magnifies the "need for reliability," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and, accordingly, the need for reliable pre-trial and *post-conviction* fact-determination procedures. *See McFarland v. Scott*, 512 U.S. 849, 855 (1994); *Ake v. Oklahoma,* 470 U.S. 68 (1985) (when capital defendant's mental status is at issue, due process and Eighth Amendment require the State to furnish the defendant with a competent psychiatric expert who can develop and present substantial facts concerning whether mental health defenses are available at both the guilt and penalty phases of a trial). Granting the requested DNA testing and the aforementioned discovery will allow Edmiston to develop additional facts regarding his actual innocence claim and any new constitutional claims that may surface once he receives and reviews the aforementioned discovery. *See infra* (discussing potential constitutional claims).

2. Fraudulent Conduct and Erroneous Conclusions Rendered by PSP Agents and Examiners

The PSP and its crime laboratory system have been no strangers to controversy and error. Indeed, the conduct and errors of several former PSP troopers and examiners, including Janice Roadcap, Scott Ermlick, Merrell Brandt, and Ranae Houtz, raise substantial questions regarding the PSP's ability (or inability) to adequately train, monitor, and discipline its troopers and examiners. In addition, Edmiston has documented numerous irregularities in various aspects of the state police

conduct in this case that support an inference of (at worst) intentional misconduct, incompetence, and/or (at the very least) widespread error. This combination of factors creates the exceptional circumstances warranting discovery.

a. Janice Roadcap

Roadcap served as a forensic chemist for the PSP crime laboratory during the 1970s and 1980s. As thoroughly explained in Exs. 18, 19, and 20, Janice Roadcap's fraudulent and unscientific conduct played significant roles in Stephan Crawford's and Barry Laughman's wrongful murder convictions. In Laughman's case, Roadcap offered speculative and unsubstantiated testimony as to why her serology results, which excluded Laughman as a possible contributor of the semen evidence prior to trial, did not exonerate him. Laughman was exonerated in August, 2004.[125] In Crawford's case, Roadcap presented fraudulent blood and fingerprint testimony to support the Commonwealth's claim that Crawford was present at the murder scene when the victim was murdered. Indeed, Roadcap altered her original lab report, eliminating the exculpatory information, and issued another report that included the fabricated blood and fingerprint evidence. Once Roadcap's original lab report surfaced, the Commonwealth conceded the need for a new trial and eventually dismissed all charged in July, 2002.[126]

b. Scott Ermlick

Ermlick was a forensic serologist with the PSP's Greensburg Regional Laboratory during the 1980s and 1990s. Ermlick provided the critical blood (or serology) testimony in *Commonwealth v. Kevin Seihl*, No. 1058-1991 (Cambria C.C.P.). The Innocence Project (and Mr. Cooley) currently represent Siehl in his section 9543.1 motion before this Court. In his section 9543.1 motion (which

[125] Exs. 18, 19.

[126] Exs. 18, 20.

is attached hereto as Ex. 21), Siehl thoroughly discussed the various problems with Ermlick's blood testimony.[127] Indeed, Ermlick claimed that he could individualize a bloodstain to a particular person using conventional serology even though the scientific community widely recognizes the falsity of this claim. *See* PETER DE FOREST ET AL., FORENSIC SCIENCE: AN INTRODUCTION TO CRIMINALISTICS 231 (1983); *Duncan v. Ornoski*, 528 F.3d 1222, 1238 (9th Cir. 2008) ("[B]lood evidence cannot be tied to a specific individual… [it] can only be used to rule out a certain percentage of the population as potential donors of a particular sample."). Likewise, Ermlick claimed that a positive presumptive blood test on Siehl's shoes indicated the presence of *human* blood even though the scientific community widely recognizes that presumptive blood tests cannot definitively establish the presence of human blood. *See* DeForest et al., *supra*, at 248 ("Most authorities agree that positive presumptive tests *alone* should not be taken to mean that blood is definitely present. A positive tests suggests that the sample *could be* blood . . . .") (emphasis in original). Due in part to Ermlick's unjustifiable testimony, this Court recently entered an order granting Siehl's request for DNA testing.[128]

c. Merrill Brant

Brant served as a fingerprint examiner for the PSP crime laboratory system during the 1980s and 1990s. Brant provided false and inaccurate fingerprint testimony in *Commonwealth v. Kevin Seihl*, No. 1058-1991 (Cambria C.C.P.).[129] Brant identified a fingerprint on the shower head in the bathtub where the victim was discovered. The victim's landlord discovered her body in the bathtub with the shower water running. Brant linked the print to Siehl's right thumb. The Commonwealth argued that Siehl turned the shower on immediately after he murdered the victim. However, because

[127] Ex. 21, at 9-21 (discussing Ermlick's blood testimony).

[128] Ex. 22 (Siehl's DNA testing order).

[129] Ex. 21, at 21-25.

Siehl had access to the victim's residence and bathroom before the murder, and had in fact been in her residence the night of the murder, the Commonwealth had to establish that he created the print at or near the time of her murder – and not at a previous time. To accomplish this, the Commonwealth turned to Brant, who first testified that the position of Siehl's thumb indicated that he must have been outside the shower when he created the print:

> Commonwealth: Does [the fingerprint's position] indicate anything to you?
>
> Brant: That would indicate to me that when Mr. Siehl touched that showerhead, he was on the outside of the tub, not inside taking a shower.[130]

Brant then time-dated the print, suggesting that Siehl deposited the print at or near the time of the print because it had yet to deteriorate:

> From my experience and articles that I have read on fingerprinting, fingerprints usually start to deteriorate after 24 to 36 hours. I, myself, did not think that [the showerhead] print . . . started to deteriorate because you can see the ridge characteristics. It's almost identical to the inked impression.[131]

The confluence of these facts created the clear and damning inference that Siehl must have created the print at the time of the murder.

During PCRA proceedings, renowned fingerprint expert Herb MacDonell reviewed the fingerprint and Brant's testimony and concluded: (1) Brant misidentified the fingerprint; and (2) Brant's time-dating testimony was "absurd" because it lacked scientific foundation. MacDonell memorialized his conclusions into an affidavit (which is attached hereto as Ex. 23). With regard to the misidentification, MacDonell wrote:

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[130] Trial NT-Tpr. Brant, May 11, 1992, at 180.

[131] *Id.* at 174; Trial NT-Trp. Brant, May 12, 1992, at 29 ("All of the reference books and writings state that they start to deteriorate after 24 to 36 horse").

> I have examined the developed latent fingerprint and compared it to the right thumb print on the known fingerprint card of Kevin Siehl and conclude that the developed latent fingerprint could not have been made by Mr. Siehl's right thumb.[132]

MacDonell explained that he identified a "gross dissimilarity" between Siehl's right thumb print and the latent showerhead print.[133]

In regards to Brant's time-dating testimony, MacDonell stated: "I find []his statement absurd."[134] He added:

> How can anyone make a judgement [sic] of an unknown? Specifically how could Brant [sic] know the original condition of the latent fingerprint, which is a requirement to measure its alleged deterioration? Latent fingerprints which were deposited on metal are known to allow excellent processing after months if not years. Brant also stated . . . , "From my experience and articles I have read on fingerprinting, fingerprints usually start to deteriorate after 24 to 36 hours." *I would like Trooper Brant to cite his references because that is contrary to the classic reference in this discipline."*[135]

A leading forensic science textbook concurs with MacDonell:

> [T]ime-dating, is a perturbing perplexity. . . . In fingerprinting, for example, when a latent fingerprint is found at a crime scene that was previously accessible to the person whose inked print matches the latent print, it is imperative to resolve whether the latent print was placed at the location at some other time than when the crime was committed. *But fingerprinting is not yet up to the task of answering this questions*.

FORENSIC SCIENCE: AN INTRODUCTION TO SCIENTIFIC AND INVESTIGATIVE TECHNIQUES vii (Stuart H. James & John J. Norby eds. 2d 2005) (emphasis added).[136] So too does a recent journal article,

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[132] Ex. 23.

[133] *Id.*

[134] *Id.*

[135] *Id.* (emphasis added).

[136] *See also Cook v. State*, 940 S.W.2d 623, 632 (Tex.Crim.App. 1996) ("The State's witness testified they were six to twelve hours old, which placed appellant at the scene at the time the murder was committed. However, the witness, Sgt. Collard, admitted, in writing and in response to a grievance filed against him in 1978, *his 'expert opinion' regarding the age of the*

which explained that there are simply too many variables to account for to accurately time-date a fingerprint:

> Examiners in the field know that latent prints are affected by many different factors. However, the intricacies of their combined effects may never be fully understood. Subject factors include stress, metabolism, diet, health, age, sex, occupation, quantity and quality of finger contamination, and so forth. Transfer conditions include the surface texture, physio-chemical structure, curvature, temperature, temperature difference, pressure, contact time, and so forth. Some environmental factors include temperature, humidity, ultraviolet and other radiation, dust, precipitation, condensation, friction (handling or other natural movement), air circulation, atmospheric contamination, and so forth. To reliably test the effects of one variable, all others must be held constant. This is virtually impossible to achieve with so many different factors, many of which are frequently unknown to even the most experienced examiners. Even if the effects of changing just three separate factors could be fully understood and documented, the effects of exposure to variables of all three at the same time would not necessarily be predictable.

Kasey Wertheim, *Fingerprint Age Determination: Is There Any Hope?*, 53 J. FORENSIC IDENTIFICATION (Jan./Feb. 2003), at www.crime-scene-investigator.net/AgeOfFingerprints.html (last visited Oct. 15, 2007).[137] As mentioned, due in part to Brant's false testimony, the Court recently entered an order granting Siehl's request for DNA testing.[138]

d. Ranae Houtz

Houtz served as a forensic serologist for the PSP's Bethlehem Regional Laboratory between 2000 and 2003. In June 2003, the PSP had to re-examine more than 600 cases Houtz examined after PSP supervisors learned she made four mistakes on her annual proficiency tests. Following the

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fingerprints was not in fact an expert opinion, was a mistake which could not be supported by any scientific evidence or by any other latent fingerprint expert, and that the district attorney had pressured Collard to present the false and misleading evidence against Collard's wishes.") (emphasis added).

[137] *Accord* ANDRE A. MOENSSENS, FINGERPRINT TECHNIQUES 130 (1971) ("It is not possible to determine accurately how long a latent impression will remain on an object or how old an impression is.").

[138] Ex. 22.

mistakes, Houtz went through a 6 month remedial training class but, after mistakes continued, she resigned. Her mistakes ranged from failing to accurately identify semen stains to improperly transcribing her notes into reports. The PSP sent memos to 27 district attorney's offices throughout the Commonwealth warning them of Houtz's mistakes and that errors may have occurred in cases in their respective counties. *See* Keith Herbert & Jeff Shields, *Troopers List Cases Possibly Tainted; A Forensic Scientist's Work Has Been Questioned,* PHILA. INQUIRER, June 20, 2003, at B11.

e. Commonwealth v. Jay C. Smith

The PSP's fraudulent and unethical conduct in Jay C. Smith's death penalty prosecution is nothing short of breath-taking in one respect and truly frightening in another respect. The Commonwealth charged Smith (and William Bradfield) with murdering their co-worker, Susan Reinert, and her two children in June, 1979. Bradfield and Reinert were engaged and taught at the elementary school where Smith was the principal. The Commonwealth argued that Smith and Bradfield "conspired to murder Mrs. Reinert in order to recover the proceeds of insurance policies on her life which named her fiancé as beneficiary." *Commonwealth v. Smith*, 615 A.2d 321, 322 (Pa. 1992). The jury convicted Smith and sentenced him to death. At trial, the Commonwealth presented physical evidence linking Smith to the murders as well as other testimonial evidence which, together, the Pennsylvania Supreme Court regarded as sufficient to sustain Smith's conviction. *See Commonwealth v. Smith*, 568 A.2d 600, 605 (Pa. 1989). Nevertheless, the court vacated his conviction and death sentence and ordered a new trial because the trial judge admitted prejudicial hearsay testimony from one of Bradfield's associates. *Id*. at 605-09.

At Smith's first trial, a critical issue was the location of Reinert's murder. While the police discovered her body in Pennsylvania, she could have been killed elsewhere and her body moved afterwards to the place of its discovery. The Commonwealth argued that she was murdered in

Pennsylvania, while Smith argued that she was murdered in Cape May, New Jersey. Had she been murdered in Cape May, only Bradfield could have committed the murder. Thus, any evidence suggesting that Reinert was murdered in Cape May, New Jersey was "extremely material" to Smith's case. *Commonwealth v. Smith*, 615 A.2d at 323.

At the first trial, PSP Corporal John Balshy testified (on cross-examination) that he was present during Reinert's autopsy and that "he had used adhesive lifters to remove granular particles which looked like sand from between the [Reinert's] toes." *Id.* The Commonwealth, however, "excoriated Corporal Balshy, implying that he had fabricated his testimony about the adhesive lifters." *Id.* The Commonwealth then "presented the testimony of other state police officers who had attended the autopsy and did not remember the sand or the adhesive lifters, attempting to prove that Balshy's testimony was false." *Id.* Indeed, the "prosecutor even recommended to the deputy executive attorney general that he investigate the feasibility of prosecuting Balshy for perjury." *Id.*

A few days later, while Smith's trial was still in progress, the PSP "discovered the missing adhesive lifters in their evidence locker at the state police barracks. Despite their significant relation to the facts at issue in the trial, the Commonwealth [and the PSP] suppressed the discovery." *Id.* Then for "more than two years, while [Smith's] case was on direct appeal to this court, the Commonwealth [and PSP] continued to suppress the fact that it had in its possession the disputed exculpatory evidence, vigorously arguing all the while that this court should affirm [Smith's] death sentence." *Id.* at 323-24.

As the Pennsylvania Supreme and Superior Courts acknowledged, it is "a gross understatement to conclude . . . that 'neither the Attorney General's Office nor the Pennsylvania State Police can take any great pride in the manner in which this case was handled during the trial and on appeal." *Id.* at 324 (quoting *Commonwealth v. Smith*, 591 A.2d 730, 733 n.3 (Pa. Super. Ct.

1991)). The Pennsylvania Supreme Court ultimately barred the Commonwealth from re-prosecuting Smith because the PSP's and Attorney General's fraudulent and unethical conduct violated his double-jeopardy rights. The court stated:

> Deliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of Corporal Balshy's role in the production of the evidence rather than its own role in the suppression of evidence constitute prosecutorial misconduct such as violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause.

Id. The court also added:

> Because the prosecutor's [and the PSP's] conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, [Smith] must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Id. at 325.

The misconduct in these cases is particularly relevant to Edmiston's case because (1) it highlights the systemic deficiencies in monitoring, training, and proficiency during time periods relevant to this case; (2) it involves the same sort of false and unsupported assertions of scientific certainty that are present in this case; (3) it involves the same types of scientific evidence that are at issue in this case; (4) it involves presentation of inaccurate, scientifically unsupported, and possibly fraudulent testimony by state police witnesses in this county; and (5) the wide range of problematic state police expert testimony in these cases mirrors the wide range of highly questionable state police expert testimony in Edmiston's case.

3. The Requested Discovery May Give Rise to Additional Constitutional Claims

As the wide-spread problematic state police conduct in these cases suggest, there is a strong possibility that granting the aforementioned discovery will lead to an array of constitutional claims independent and in addition to Edmiston's actual innocence claim. First, the disclosure may reveal

that Edmiston's conviction and death sentence are premised on false testimony. *See Miller v. Pate*, 386 U.S. 1, 5 (1967) ("the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence"); *accord Napue v. Illinois*, 360 U.S. 264 (1959). For instance, Tackett's bench notes or other memos may contradict his claim that he identified semen and sperm on the vaginal and rectal swabs. The disclosure of such information would render Edmiston's rape, statutory rape, and involuntary deviate sexual intercourse convictions invalid, as well as his death sentence, which is premised in part on the rape conviction. Likewise, Tackett's bench notes may indicate the presence of semen and sperm, yet with an ABO blood group substance different than Edmiston's blood type.[139] Such evidence would exculpate him of his rape conviction and render his death sentence invalid, as well.

If the requested discovery reveals either of these situations, this would also give rise to additional claims. To begin with, such conduct would constitute a *Brady* violation, even if Tackett and the PSP failed to disclose this information to Cambria County prosecutors.[140] The

[139] Such conduct, unfortunately, is not uncommon in the forensic science community. *See* Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An "Intellectually Honest" Assessment*, 17 GEO. MASON UNIV. CIV. RTS. L.J. 299, 385-86 & n.406 (2007) (listing several examples).

[140] *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety-Division of State Police*, 411 F3d 427, 442 (3d Cir. 2005) (The prosecutor's duty to disclose extends beyond the information that he or she possesses, to include information in the hands of police investigators working on the case."); *Commonwealth v. Gibson*, 951 A.2d 1110, 1127 (Pa. 2008) ("The prosecution's duty under *Brady* incorporates disclosure of all exculpatory evidence, regardless of whether the defense specifically requests such materials, and extends to evidence in the possession of police agencies of the same government bringing the prosecution."); *Commonwealth v. Carson*, 913 A.2d 220, 244 (2006); *Commonwealth v. Lambert*, 884 A.2d 848, 854 (2005). As the Third Circuit explained in *Gibson*: A prosecutor is "the 'architect' of the criminal proceeding" and therefore "has a responsibility not just to disclose what he or she knows, but to learn of favorable evidence known to others acting on the government's behalf, weigh the materiality of all favorable evidence and disclose such evidence when it is reasonably probable that it will affect the result of the proceedings." *Gibson v. Superintendent*, 411 F.3d at

Commonwealth (or its agents) suppressed Tackett's notes; his notes were exculpatory; and the suppression, without question, prejudiced Edmiston. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Commonwealth v. Paddy*, 800 A.2d 294, 305 (Pa. 2002). Likewise, if such conduct is revealed, it gives rise to a due process claim, namely that Tackett's testimony was so unreliable (because it was false) that it rendered Edmiston's trial and sentencing hearing fundamentally unfair, *see Pulley v. Harris*, 465 U.S. 37, 41 (1984), because he offered testimony on "a crucial, critical highly significant factor." *Brown v. O'Dea*, 227 F.3d 642, 645 (6th Cir.2000); *accord Ege v. Yukins*, 485 F.3d 364, 375-78 (6th Cir. 2007). It would also give rise to a due process claim that Edmiston's conviction and sentences were based upon a misapprehension of fact material to the guilt and penalty verdicts. *See Townsend v. Burke*, 334 U.S. 736 (1948); *accord Gregg v. Georgia*, 428 U.S. 153, 190 (1976); *California v. Ramos*, 463 U.S. 992, 1004 (1983). A sentence premised on such false and misleading testimony is arbitrary and capricious, and denied Edmiston the heightened reliability required by the Eighth Amendment in capital cases. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Finally, guilt and penalty verdicts based upon specious testimony violated Edmiston's Sixth and Fourteenth Amendment rights to a jury verdict based solely upon properly admitted evidence and argument that proves every element of an offense and every element of an aggravating circumstance beyond a reasonable doubt. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000)*; United States* v. *Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan* v. *Louisiana,* 508 U.S. 275, 278 (1993).

Such conduct would also substantiate Edmiston's *Schulp*-like "actual innocence" claim, *see Schlup v. Delo*, 513 U.S. 298, 321-322 (1995), so a federal court can consider his defaulted (or

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waived) state-court claims. *See Commonwealth v. Edmiston*, 851 A.2d 883, 291 (Pa. 2004) ("Appellant raises thirteen principal claims, with some of those issues including subparts. Many of the claims are waived for failure to raise them on direct appeal or before the PCRA court . . . ."). Lastly, such conduct would also support Edmiston's free-standing Eighth Amendment actual innocence claim, *see Herrera v. Collins*, 506 U.S. 390, 417 (1993), Pa. Const. Art. I, § 1, as well as his claim that he is actually innocent of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333 (1992).

V. Conclusion and Relief Sought

Edmiston's case represents the classic rape-murder in which DNA testing can prove his actual innocence. Thus, it is unsurprising that he satisfies section 9543.1's statutory requirements: (1) subjecting the vaginal and rectal swabs and blood samples to DNA testing can prove his actual innocence; (2) Edmiston placed the assailant's identity at issue when he presented an alibi defense; (3) he consents to provide a DNA sample; and (4) chain of custody has been adequately established, the evidence still exists, and is in such condition that the particular tests he requests can produce reliable and accurate DNA results.[141]

[141] Indeed, Edmiston qualifies for testing under the National Institute of Justice's (NIJ) and American Bar Association's (ABA) guidelines for post-conviction DNA testing. In 1996, the NIJ published a report profiling twenty-eight cases where DNA testing exonerated a previously convicted defendant. *See* NAT'L INST. OF JUST., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996). In response to the report's concerns, and to maximize the value of DNA evidence in the criminal justice system, (then) Attorney General Janet Reno established the National Commission on the Future of DNA Evidence. *See* NAT'L COMM'N ON THE FUTURE OF DNA TESTING, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS iii (1999). The Commission drafted a report that provided criminal justice actors (e.g., prosecutors, defense attorneys, and judges) with information and guidelines for addressing post-conviction DNA testing requests.

The Report categorizes post-conviction DNA testing requests into five categories and provides a "sound framework for analysis of requests." *Cherrix v. Braxton*, 131 F.Supp.2d 756, 764 (E.D. Va. 2001). Category 1 cases are cases in which police collected biological evidence

that still exists, and if the evidence is subjected to DNA testing, exclusionary results will exonerate the petitioner. *See id.* at xiii, 4. The Commission's first example of a Category 1 case mirrors Edmiston's case:

> Petitioner was convicted of the rape of a sexually inactive child. Vaginal swabs were taken and preserved. DNA evidence that excludes the petitioner as the source of the sperm will be dispositive of innocence. . . . Bobbi Jo's age and sexual status guarantee that the swab contains biological material related to the crime.

Id. at 4. The Commission recommends that DNA testing be allowed in Category 1 cases, and Edmiston's case clearly represents a Category 1 case.

In August 2000, the ABA House of Delegates passed a resolution urging federal, state, and local jurisdiction to adhere to the following principle concerning biological evidence collected during criminal investigations:

> All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.

In 2007, in response to the resolution, the ABA enacted its standards for DNA evidence. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE (2007). Under the ABA standards, a person convicted of a "serious crime . . . should be permitted to have DNA evidence in the possession of the prosecution or one of its agents tested . . . after conviction if:

> (i) the testing requested was not available at the time of trial . . . ,
> (ii) the results of testing could create a reasonable probability that the person:
> (A) is innocent of the offense,
> (B) in a capital case, did not have the culpability necessary to subject the person to the death penalty, or
> (C) did not engage in aggravating conduct that caused a mandatory sentence or sentence enhancement.

Std., 16-6.1(a)(ii) (A thru C).

Edmiston qualifies for DNA testing under these standards. First, his capital murder conviction constitutes a "serious crime." Second, STR, Y-STR, and mini-STR testing was not available when the Commonwealth prosecuted him in 1989. Third, DNA testing can create a reasonable probability that he is actually innocent. To begin with, if DNA tests on the vaginal swabs produce a male DNA profile that is inconsistent with Edmiston's profile, this would unequivocally prove his actual innocence. Likewise, if DNA tests on the blood samples from Edmiston's truck produce a DNA profile that is inconsistent with Bobbi Jo's, this too would prove his actual innocence. Fourth, these same results would also prove that Edmiston "did not

Likewise, there are "exceptional circumstances" that warrant discovery. *See* Pa. R. Crim. P. 902 (E)(1). These circumstances include: (1) this is a capital case and a refusal to grant DNA testing and the requested discovery could result in the execution of an innocent person; and (2) recent events involving PSP crime laboratory examiners raise significant questions regarding the lab's oversight and the accuracy and integrity of its examiners in areas directly relevant to the question PSP conduct in this case.

WHEREFORE, Edmiston requests the following relief:

1. An Order mandating the Commonwealth to preserve the sought after blood and rape kit evidence until his state and federal habeas corpus proceedings are considered final under both state and federal law;
2. A Scheduling Order mandating the Commonwealth to timely respond to Edmiston's motion within 60 days;
3. An Order directing the PSP and the Commonwealth to disclose the aforementioned memos, documents, bench notes, note books, records, charts, diagrams, sketches, and computer files relating to Criminalist Bruce Tackett's employment with the PSP and his hair, blood, and serology work in Edmiston's case;
4. An Order directing the PSP and the Commonwealth to disclose all memos, documents, bench notes, note books, records, charts, diagrams, sketches, and computer files relating to the DNA testing performed by Cellmark Diagnostic.

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engage in aggravating conduct that caused a mandatory sentence or sentence enhancement." The fact that Edmiston qualifies for testing under the ABA Standards carries significant weight because the United States Supreme Court has "long . . . referred to [the] ABA Standards as guides to determining *what is reasonable*." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (emphasis added).

5. An Order directing the PSP and the Commonwealth to send the following evidence to a forensic DNA laboratory that is mutually agreed upon by undersigned counsel and the Commonwealth for DNA testing purposes:

-the blood sample from seat belt buckle (Item 2);

-the blood sample from bottom left side b/t cab & bed (Item 3);

-the blood sample from upholstery under drivers door window (Item 4);

-the blood sample from middle floor hump (Item 8);

-the blood sample from drivers side seat (Item 10);

-the blood sample from middle seat (Item 11);

-2 oral, 2 vaginal, 2 rectal swabs (Item 17).[142]

Respectfully submitted this ___ day of November 2008.

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ROBERT BRETT DUNHAM
Pa. Bar No. 56422
Defender Association of Philadelphia
Capital Habeas Unit
The Curtis Center Building, Suite 545 West
601 Walnut Street
Philadelphia, Pennsylvania 19106
(215) 928-0520

TIFFANY MURPHY
Pa. Bar No. 94670
Midwestern Innocence Project
University of Missouri-Kansas City
School of Law, Suite 028
5100 Rockhill Road
Kansas City, MO 64110-2499

CRAIG M. COOLEY
Innocence Project, Inc.
Staff Attorney
100 Fifth Avenue, 3rd Floor
New York, New York 10011
(212) 364-5361

[142] The Item Numbers correspond with the Item Number in Corporal Douglas M. Wrabel's October 13, 1988, Request for Laboratory Analysis Form, which is attached hereto as Exhibit 11.