IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

STEPHEN REX EDMISTON,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

E.D. Allocatur Docket 2011

No. 613 CAP

BRIEF FOR *AMICUS CURIAE*

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I. INTEREST OF *AMICUS CURIAE*

The Pennsylvania Innocence Project ("the Project") is a nonprofit legal clinic and resource center founded in 2009 and housed at Temple University. The Project provides *pro bono* legal services to indigent prisoners throughout the Commonwealth of Pennsylvania who are seeking to prove their actual innocence of the crimes for which they were convicted. The Project screens, investigates, and litigates post-conviction claims of innocence based on DNA and non-DNA evidence. In addition, the Project works to reform the underlying causes of wrongful convictions.

The Project has experience litigating post-conviction DNA testing claims pursuant 42 Pa.C.S. § 9543.1 as well as litigating non-DNA claims in post-conviction. The DNA Testing Statute affords an opportunity for those who have been convicted of a crime they did not commit to access biological material that could conclusively establish their innocence and further provide new evidence that could serve as a basis for the granting of a new trial or even agreed-upon exoneration.

II. SUMMARY OF THE ARGUMENT

The primary objective of the Project's *amicus* brief is to identify for the Court the most fundamentally fair and sound analytical framework upon which to evaluate post-conviction DNA testing requests under the DNA Testing Statute. DNA testing continues to prove what numerous cases have already shown—that convicted defendants may actually be innocent despite the presence of what appeared on the trial record to be overwhelming evidence against them. There is a very real possibility that DNA testing may prove Steve Edmiston's case to be yet another example of this disturbing phenomenon.

The clear framework of the statute requires an "impact-based" rather than "likelihood-based" analysis—that is, a reviewing court must first assume that DNA testing will produce exculpatory DNA results, and then determine how such results would have *impacted* the jury's decision to convict. If the impact of the exculpatory DNA results would be such that that a reasonable or properly-instructed jury would not have convicted the prisoner had it known of the exculpatory DNA results, then the prisoner is entitled to DNA testing.

An impact-based framework is mandated by the DNA Testing Statute, and differs fundamentally from a likelihood-based framework. Under a likelihood framework, a court's task would be to evaluate the incriminating evidence against the prisoner, and then determine, in light of the incriminating evidence, whether it is reasonably likely DNA testing will produce exculpatory results. In other words, the court is tasked with trying to foretell the outcome of DNA testing before DNA testing is actually performed weighed against the quantum of incriminating evidence presented at trial. A framework premised upon a court's ability to presage the outcome of DNA testing, before DNA testing is actually conducted, is unconstitutionally arbitrary and fundamentally inadequate to vindicate a prisoner's limited

liberty interest in obtaining post-conviction DNA testing and developing conclusive scientific evidence of his or her innocence. A court's focus should—and must—be on the impact of the assumed exculpatory results if it wishes to stay within the bounds of the Eighth and Fourteenth Amendments of the United States Constitution and Article One, Sections One and Thirteen of the Pennsylvania Constitution.

Applying this impact-based framework to Steve Edmiston's case, Mr. Edmiston is entitled to DNA testing under the DNA Testing Statute because the assumed exculpatory DNA results would lead to a reasonable possibility that Mr. Edmiston is actually innocence. In other words, assuming exculpatory DNA results, no reasonable and properly-instructed jury would have convicted Mr. Edmiston with that information in evidence. If the DNA shows that someone else's sperm was in Bobbi Jo Matthew's body and that blood in Steve Edmiston's car was not hers, it conclusively establishes the falsity of the Commonwealth's case—including the supposedly "overwhelming" evidence against him. Exculpatory DNA evidence also Mr. Edmiston's alleged 'confession' in another light, and could destroy the credibility of the state's principal witnesses. Scientific truth is available here. To push that aside because of the presence of other, non-scientific, and potentially flawed evidence serves no legitimate personal or societal interest.

The question is not whether the DNA test is likely to be exculpatory; that is to be presumed. The question is whether such exculpatory DNA evidence would have caused a properly instructed jury reasonable doubt of the defendant's guilt of the crime for which he was charged or of an aggravating factor for the death penalty. Because the answer to that question is undeniably yes, Mr. Edmiston is entitled to postconviction DNA testing.

III. ARGUMENT

A. THE PROPER ANALYSIS FOR THIS COURT TO ADOPT FOR ANALYZING POSTCONVICTION REQUESTS FOR DNA TESTING UNDER 42 PA.C.S. § 9543.1 IS TO EVALUATE THE IMPACT EXCULPATORY DNA RESULTS WOULD HAVE HAD ON THE JURY'S VERDICT AND TO REVIEW ALL PROPOSED EXCULPATORY DNA RESULTS CUMULATIVELY.

1. DNA Testing Can Provide Invaluable Evidence of Innocence Even in Light of Seemingly Overwhelming Evidence of Guilt at Trial.

> *DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices.*
>
> *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2312 (2009) (Roberts, C.J.)

There is no question now, after over 270 people have been exonerated of crimes they did not commit through the use of DNA evidence and over 3,600 investigations have been closed based upon DNA evidence in the Commonwealth of Pennsylvania alone, that DNA testing has the capability of solving crimes and proving innocence. In drafting and unanimously passing the DNA Testing Statute, the Pennsylvania Legislature clearly intended to provide reasonable access to this powerful tool to those convicted of crimes where biological evidence could shed light on the identity of the true perpetrator.

Since 1989, post-conviction DNA testing has freed 272 innocent people, 11 of those are from Pennsylvania. Of the 272 cases, 68 involved some form of "confession" to the crime—either one that the individual made, or one created by police or an informant. *See*, Case Profiles at http://www.innocenceproject.org/case (last visited July 13, 2011). In nearly every one of those cases, police, prosecutors, and judges involved in the conviction believed the evidence of guilt to be very strong. *See*, Riter, *It's the Prosecution's Story, But They're Not Sticking To It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 834 (2005) ("In many cases where convictions appeared to be based upon solid, and in

some cases overwhelming, evidence, results of post-conviction DNA testing have proven actual innocence."). And in many of the cases—indeed, more than half—the innocent person had to engage in protracted litigation just to obtain DNA testing. *Id*. at 827 (reviewing first 180 DNA exonerations). In each case, DNA testing proved that the evidence presented at trial—which once looked so strong—was simply wrong, and that the person convicted was, in fact, innocent.

The trial court here, of course, would have granted access to biological material for DNA testing but for the then-controlling decisions of *Commonwealth v. Young*, 873 A.2d 720 (Pa. Super. Ct. 2005) and *Commonwealth v. Wright*, 935 A.2d 542 (Pa. Super. Ct. 2007), *reversed by, vacated by, remanded by Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011). *See*, Trial Court Opinion at 7 ("Nevertheless, based on the authority of *Commonwealth v. Wright* and *Commonwealth v. Young*, we will deny Defendant's motion."). But like the 272 exonerees to date, there is untested biological evidence in Mr. Edmiston's case that has the potential to determine whether he actually committed this crime. Certainly, testing of the seminal fluid has the potential to establish his actual innocence of the sexual assault that was an aggravating factor to his death penalty verdict. Moreover, as the trial court observed, assuming exculpatory results of DNA testing of the blood in the truck, as required under the DNA Testing Statute, it is highly unlikely that the young girl was beaten in Mr. Edmiston's car. Such evidence would be in direct contradiction to the Commonwealth's only theory of guilt against him.

If courts can learn anything from the DNA exoneration cases, the lesson should be that the evidence at trial is often not as strong as it appears, and therefore courts should approach requests for post-conviction DNA testing without rigid or fixed judgments about the evidence. To do so would be to risk joining a group of prosecutors, judges, and defense counsel who have failed to recognize the possibility of innocence in cases where the evidence appeared strong

partly because the inmate appeared to have confessed to the crime, only to be proven wrong by DNA evidence. A few of the many examples include:

- Trial counsel for former Texas inmate Chris Ochoa told Wisconsin Innocence Project attorneys that there was "not a chance" that Ochoa was innocent because, among other things, he confessed to the crime, provided details of the crime that police claimed only the perpetrator could have known, and testified convincingly against his codefendant. Findley and Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 332. DNA testing proved Ochoa and his co-defendant were innocent and, further, identified the true perpetrator. *Id*.
- The prosecutor in the case of Florida death-row inmate Frank Lee Smith accused defense attorneys of "playing games" by requesting DNA testing in an effort to delay Smith's execution. DNA testing eventually proved Smith was innocent. (Sadly, Smith died in prison during the legal fight over whether he was entitled to DNA testing.) Freedberg, *DNA Clears Inmate Too Late*, St. Petersburg Times, December 15, 2000.
- The prosecutor in Douglas Warney's case opposed DNA testing by arguing that: "The jury knew that there was blood in that house that didn't belong to the victim or the defendant. And DNA testing isn't going to tell you any more." Craig, *Quest For Genetic Testing in Warney Case Rejected*, Rochester Democrat and Chronicle, December 17, 2004. DNA testing later exonerated Warney and identified the true perpetrator. Dwyer, *Inmate to Be Freed as DNA Tests Upend Murder Confession*, The New York Times, May 16, 2006.

- After mistaken identified by the victim in a police line up that Dennis Brown volunteered to be a filler for, he was convicted of rape. *Profiles*, Innocence Project New Orleans, http://ip-no.org/exonerees/profiles/dennis-brown (last visited July 15, 2011). Prosecutors relied upon the victim's misidentification to charge Mr. Brown and made uncorroborated claims that he confessed to the crime. *Id.* 20 years later, the prosecutors dropped all charges against Mr. Brown as DNA testing conclusively exonerated him. *Id.*
- The police investigator who questioned Walter Tyrone Snyder in 1985 left the interrogation room claiming Mr. Snyder cried and confessed during the interrogation. Barry Scheck, et al. *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 61-62 (2000). Mr. Snyder maintained his innocence, disputing the fact that he confessed. *Id.* Mr. Snyder was exonerated after six years when the prosecution joined the Innocence Project to get Mr. Snyder a gubernatorial pardon. *Know the Cases*, Innocence Project, http://www.innocenceproject.org/Content/Walter_Snyder.php (last visited July 15, 2011).

As these cases demonstrate, courts in other states have heeded the lessons of the DNA exoneration cases by ordering DNA testing regardless of whether the other, untested evidence of guilt appears strong. Other courts have expressly recognized that the apparent strength of the prosecution's case is no basis for denying DNA testing that has the potential to undermine that evidence. *See*, *e.g.*, *People v. Henderson*, 799 N.E.2d 682, 690 (Ill. App. 2003) (ordering post-conviction DNA testing despite the court's agreement that the evidence against the defendant was "indeed overwhelming" because Illinois' postconviction DNA statute is not limited to cases

"where the proposed scientific testing will, by itself, completely vindicate a defendant"); *State v. Peterson*, 836 A.2d 821, 826 (N.J. Super. 2003) (under New Jersey's postconviction DNA testing statute, "the strength of the evidence against a defendant is not a relevant factor in determining whether his identity as the perpetrator was a significant issue"); *Bruner v. State*, 88 P.3d 214, 216 (Kan. 2004) (holding that, under Kansas' postconviction DNA testing statute, it is improper to deny testing on the basis that the evidence was overwhelming"); *Powers v. State*, 2011 Tenn. LEXIS 595 (Tenn. June 16, 2011) (rejecting State's position that testing should be denied because evidence against defendant was "overwhelming").

It is certainly worth noting that a recent case from the Superior Court, currently awaiting decision from this Court as to a request for review by the Commonwealth, also rejects the "overwhelming evidence" argument in favor of DNA testing. In *Commonwealth v. Conway*, 14 A.3d 101, 110 (Pa. Super. Ct. 2011), the Superior Court wrote:

> We tarry not with the Commonwealth's second argument [that the evidence against Conway was "overwhelming"], since the relative weight of the Commonwealth's circumstantial evidence would obviously be outweighed by the discovery of relevant DNA evidence constituting substantial direct evidence of the identity of a separate assailant. Moreover, the statutory language requires reviewing courts to evaluate the "actual innocence of the offense" component by "assuming exculpatory results" will be obtained from the proposed testing.

Conway, 14 A.3d at 110.

United States Supreme Court precedent agrees with the proposition that DNA testing should be granted notwithstanding strong evidence of guilt presented at trial. In *House v. Bell*, 547 U.S. 514 (2006), the Court considered a Tennessee case in which, according to the dissenting justices, the evidence against the defendant was overwhelming. That evidence, outlined in the dissent, included that the victim's daughter heard a deep-voiced man (the defendant had a "deep voice") lure the victim out of her house late on the night of her murder by

saying (falsely) that her husband had been in a car wreck near the creek; witnesses who saw the defendant emerge from the embankment near where, shortly thereafter, the victim's body was discovered; the defendant initially told police he had never left his girlfriend's trailer on the night of the murder but then changed his story; the defendant had abrasions and bruises on his knuckles, arms, hands, and chest, consistent with injuries that would have been expected on the attacker; the girlfriend telling police that the defendant left her home at about the time of the murder and returned home later "panting and sweating, shirtless and shoeless, and with various injuries"; the defendant attempted to conceal his pants from police which had been stained with the victim's blood. *House*, 547 U.S. at 566-568.

Despite this powerful evidence, DNA testing was conducted which established that the semen on the victim's nightgown and panties came from her husband, not the defendant. *Id*. Additional evidence suggested that the stains on the defendant's pants could have been deposited on the clothing after the crime, while the pants were in police custody being transported to the crime laboratory, and new witnesses offered testimony post-conviction that the victim's husband regularly abused his wife and had confessed to the killing. *Id*. at 549. In light of this evidence, the Supreme Court ruled that, despite the once-overwhelming appearance of the evidence, the new evidence made it "more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Id* at 554. This case powerfully demonstrates that initial assessments that the evidence of guilt was strong cannot trump the need to examine significant new evidence, because that new evidence might reveal that the evidence was not so "overwhelming" after all.

2. As This Court Has Correctly Held, the Existence of An Alleged Confession is Not a Bar to Granting Postconviction DNA Testing Under the DNA Testing Statute.

This Court was correct in *Commonwealth v. Wright* in holding that the veracity of a confession is a separate question than the confession's admissibility, preventing a fully litigated confession from being a per se bar to a convicted individual establishing a prima facie case under section 95423.1(c)(3). In *Commonwealth v. Wright*, this Court said:

> [b]ecause, as we have discussed, the question of voluntariness of a defendant's confession and the question of the defendant's actual guilt or innocence are fundamentally different issues, a finally litigated ruling that a confession has been given knowingly and voluntarily is not binding on courts in subsequent phases of the case considering the wholly separate question of whether DNA testing may establish an individual's actual innocence, the confession notwithstanding. . . . [A] confession, in and of itself is not a *per se* bar under Section 9543.1(c)(3) to a convicted individual establishing a prima facie case that DNA testing would establish actual innocence of the crime for which he or she was convicted.

Commonwealth v. Wright, 14 A.3d 798, 814 (Pa. 2011) When judging the admissibility of a confession, a court does so "with complete disregard to whether or not [the defendant] in fact spoke the truth." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961); see also, *Commonwealth v. Bracey*, 461 A.2d 775, 779 (Pa. 1983) (holding that question of confession's admissibility is "uninfluenced by the truth or falsity of the confession."). Further, "a finder of fact is . . . not compelled to believe the matters contained in the confession and to automatically return a verdict of not guilty." *Wright*, 14 A.3d at 816. As the above 5 examples and the other 63 exonerations show, an alleged confession cannot show overwhelming evidence of guilt because those confessions can be false or fabricated.

Mr. Edmiston's alleged confession was fully litigated and found to be admissible at the trial level. However, like the alleged confessions in the cases of Messrs. Ochoa, Warney,

Brown, Smith, and Snyder, the issue of whether there was an actual confession was debated at trial. Troopers Brown and Schaffer never recorded or memorialized Mr. Edmiston's alleged confession. N.T., Trial, 7/7/89, at 81-83. In addition, Mr. Edmiston states the map he drew during interrogation was for hunting spots, not the location of the victim's body, and the map presented at trial was not the map he drew during his interrogation. N.T., Trial, 7/12/89, at 235-42. Mr. Edmiston's confession cannot bar him from presenting a *prima facie* case because its factual accuracy has never been conceded. Mr. Edmiston's vehement opposition to the alleged confession set forth by Troopers Brown and Schaffer raises factual issues that must be examined in light of any exculpatory DNA results.

3. The Unanimous Passing of the DNA Testing Statute Created a Limited Liberty Interest to Prisoners of Developing Scientific Evidence of Their Innocence.

The United States Constitution provides that "[n]o State shall… deprive any person of life, liberty, or property, without due process of law." U.S. CONST., AMDT. 14, § 1; *accord* AMDT. 5. The Pennsylvania Constitution provides that all trials must follow the "law of the land." PA. CONST. ART. I, § 9. Under the federal Constitution, the Due Process Clause "imposes procedural limitations on a State's power to take away protected entitlements." *District Attorney's Office v. Osborne*, 129 S.Ct. at 2319; *accord Jones v. Flowers*, 547 U.S. 220, 226-239 (2006). The same would necessarily be true for Section 9, the "law of the land" provision of the Pennsylvania Constitution. *See*, *Palairet's Appeal*, 67 Pa. 479 (1871) ("By the "law of the land", is meant, not the arbitrary edict of any body of men… but due process of law").

By providing a statutory means to test DNA evidence which could, in turn, lead to exonerating evidence sufficient to lead to a release from incarceration, the Legislature created an

enforceable liberty interest entitled to procedural due process protection. *Osborne*, 129 S.Ct. at 2320. *See also Evitts v. Lucey*, 469 U.S. 387, 399-401 (1985) (holding that once a state creates any statutory right and puts procedures in place to effectuate that right, those procedures must comport with procedural due process in application). In *Osborne*, the Supreme Court determined that the petitioner possessed a state-created liberty interest because his state (Alaska) had a post-conviction statute that permitted a convict to seek relief from his conviction, and that as a result, some due process protections were implicated. As Chief Justice Roberts explained, such a state-created post-conviction remedy "can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Id*. at 2319 (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981)).

Like Alaska, Pennsylvania created a statutory procedure for seeking post-conviction relief based upon newly-discovered scientific evidence. The DNA Testing Statute "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 543 (Pa. Super. Ct. 2005). Consequently, the DNA Testing Statute affords Pennsylvania prisoners like Mr. Edmiston a "liberty interest in demonstrating his innocence with new [scientific] evidence[.]" *District Attorney's Office v. Osborne*, 129 S.Ct. at 2319. Moreover, if probative biological evidence is tested and the DNA results exclude the petitioner (*i.e.*, the results are exculpatory), this means an unknown third-party is the donor of the biological evidence, and the likely culprit. Thus, because post-conviction DNA testing by its very nature is a mechanism used to develop conclusive scientific evidence of *third-party guilt*, Pennsylvania prisoners also have a limited liberty interest in developing scientific evidence of third-party guilt. Most importantly, however,

all citizens of the Commonwealth have a vested interest in assuring that the true perpetrator is caught and punished.

A prisoner's limited liberty interest in developing scientific evidence of his innocence and third-party guilt are interests entitled to due process protection. *See Meachum v. Fano*, 427 U.S. 215, 226 (1976) ("The touchstone of due process is protection of the individual against arbitrary action of government.") (internal quotation marks omitted).[1] As such, it "requires fair procedures for its vindication." *Swarthout v. Clay*, 131 S.Ct. 859, 862 (2011) ("When… a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication"). For instance, the government must, in some circumstances, afford the prisoner certain subsidiary procedural rights that are necessary to adequately vindicate the parent right. *Osborne*, 129 S.Ct. at 2320. *See also*, *Connecticut Bd. of Pardons v. Dumschat.* 452 U.S. 458, 463 (1981); *Wolff* v. *McDonnell*, 418 U.S. 539, 556-58 (1974). In short, state post-conviction procedures violate due process "if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 S.Ct. at 2320-21.

As currently interpreted by the Superior Court, a prisoner can adequately vindicate his limited liberty interest by developing scientific evidence of his innocence and third-party guilt under the DNA Testing Statute. *See*, *Conway*, 14 A.3d at 109 (noting that "the statutory language requires reviewing courts to evaluate the "actual innocence of the offense" component by "assuming exculpatory results"). Only an impact-based analysis, that is a framework that focuses on the impact such exculpatory evidence would have had on "properly instructed jurors,"

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[1] Examples of arbitrary government action include "the exercise of power without any reasonable justification," *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998), conduct that "shocks the conscience" and violates the "decencies of civilized conduct," *Rochin v. California*, 342 U.S. 165, 172-73 (1952), and conduct that "transgresses any recognized principle of fundamental fairness in operation." *Medina v. California*, 505 U.S. 437, 448 (1992).

is consistent with the statutory language and due process considerations. *See id.* (citing to *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

However, because prosecutors across the Commonwealth have repeatedly urged reviewing courts to conduct a likelihood-based assessment under subsection (d)(2)(i)—that is, DNA testing should be denied where the likelihood of exculpatory results is remote in light of overwhelming evidence—the Project believes it is imperative that the Court have a firm understanding of why only an impact-based assessment is true to fundamental due process, and, in this case, protective of the right to be free from cruel and unusual punishment.

4. Interpreting Subsection (d)(2)(i) to Require an Impact-Based Assessment Is the Only Constitutionally Sound Framework for Interpreting the DNA Testing Statute.

The Project agrees with the analytical framework set forth in *Conway* because it is an impact-based assessment, and, thus, constitutional under the Due Process and Cruel and Unusual Punishment Clauses of the United States and Pennsylvania Constitutions. *See* U.S. Const. Amends. VIII, XIV; Pa. Const. § 1, Arts. 1, 13; *District Attorney's Office v. Osborne*, 129 S.Ct. 2308 (2009). *Conway* rejects the "likelihood-based assessment" approach and instead holds that a reviewing court is *not* required to evaluate the incriminating trial evidence first and then decide whether it is reasonable likely that DNA testing will actually produce exculpatory results. The quantum of incriminating trial evidence, therefore, plays a minimal role—if any—under *Conway*. Indeed, a reviewing court must start with the assumption that DNA testing *would* yield exculpatory results. Next, the court must determine whether it is reasonably possible those results would establish the petitioner's actual innocence—*i.e.*, whether it is reasonably possible that no properly-instructed juror would have convicted the prisoner had the assumed exculpatory

DNA results been available at trial. If the court so determines, then the prisoner is entitled to DNA testing under the DNA Testing Statute.

Pursuant to subsection (d)(2)(i), a reviewing court "shall not order" DNA testing if the "court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that … would establish the applicant's actual innocence of the offense for which the applicant was convicted." Based on the Project's experience litigating post-conviction DNA testing claims under the DNA Testing Statute, prosecutors across the Commonwealth have repeatedly argued incorrectly that subsection (d)(2)(i) forces reviewing courts to conduct a likelihood-based assessment with the primary focus being on the quantum and type of incriminating evidence (*e.g.*, a confession, guilty plea, or eyewitness testimony) against the prisoner, and whether this evidence makes it unlikely that DNA testing would actually produce exculpatory DNA results. Prosecutors, for instance, regularly argue that the higher the quantum of incriminating evidence, the lower the "possibility" that DNA testing "would produce" exculpatory results proving a prisoner's actual innocence.

First, as should be obvious from a plain reading of the statute, this interpretation flies in the face of the statute's clear meaning. The DNA Testing Statute requires the court to assume that testing would yield "exculpatory results." 42 Pa. C.S. §§ 9543.1(c)(3)(ii) (petitioner must present "a *prima facie* case demonstrating that the … DNA testing of the specific evidence, *assuming exculpatory results*, would establish…the applicant's actual innocence") (emphasis added) and (d)(2)(i) (court to determine reasonable possibility that "exculpatory results" would establish innocence in light of the entire record). Simply put, courts must, under the plain language of the statute, acknowledge that the results of any testing would be "exculpatory."

The issue, then, is whether in assessing the entire record a "reasonable possibility" exists that the "exculpatory evidence" … "would establish the applicant's actual innocence." 42 Pa. C.S. § 9543.1(d)(2)(i). It is here that prosecutors consistently misapply the proper framework for analysis, asking trial courts to review evidence in a sort of balance mode: whether, weighed against the other evidence available, the applicant has shown his actual innocence. In other words, prosecutors advocate an interpretation of the DNA Testing Statute that requires reviewing courts to negatively presage the outcome of DNA testing even before DNA testing is actually conducted. Using this approach would always end in no testing, because it is simply reviewing the weight of evidence presented at the trial against itself and asking whether it was sufficient to convict. Since the answer to that question will always be 'yes,' no court using that analysis could ever order testing. Moreover, too often those assumptions ignore very real scenarios that would establish actual innocence.

A "process" premised upon a reviewing court's ability (or lack thereof) to foretell results from DNA testing before testing is actually conducted is unconstitutionally arbitrary under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1 and 13 of the Pennsylvania Constitution, especially where DNA testing represents the only "conclusive means" for a death row prisoner to "exonerate himself." *Little v. Streater*, 452 U.S. 1, 12 (1981).[2] As the United States Supreme Court has repeatedly acknowledged, "the Eighth Amendment requires a greater degree of accuracy … than would be true in a noncapital case," *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993); *Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Ake*

[2] Even were Mr. Edmiston a non-capital petitioner, a likelihood-based assessment would still violate due process and *Osborne's* requirement that a post-conviction statute afford prisoners fair procedures so they may adequately and fairly vindicate the substantive right(s) provided to them under the post-conviction statute. The fact that Mr. Edmiston is a capital prisoner simply reinforces the importance of this principle due to the finality of the punishment he is facing.

v. Oklahoma, 479 U.S. 68, 87 (1985) (C.J., Burger, concurring); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980), and, as a result, "the risk of error that the law can tolerate is correspondingly diminished" in capital cases. *Schriro v. Summerlin*, 542 U.S. 348, 363 (2004) (Breyer, J., dissenting). This is why death penalty cases "must be accompanied by unique safeguards," *Spaziano v. Florida*, 468 U.S. 477, 469 (1984), and why death sentences must be premised on considered reasoning rather than whim or mistake. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Eddings v. Oklahoma*, 455 U.S. 104, 118-19 (1982) (O'Connor, J., concurring); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (Burton, J., dissenting) ("Where a life is to be taken, there must be no avoidable error of law or uncertainty of fact.").

Obviously, unless either DNA testing is actually conducted or reviewing courts are required to assume exculpatory results, there is no way of knowing whether DNA tests can prove a prisoner's actual innocence. To suggest otherwise is circular nonsense, especially in light of the numerous DNA exonerations where the prisoner's conviction was supposedly premised on overwhelming incriminating evidence that made it very unlikely that DNA testing would actually produce exculpatory results. *See* Brandon L. Garrett, *Judging Innocence,* 108 COLUM. L. REV. 55, 107 tbl.8, 109 (2008) (documenting that in 50% of cases in which DNA evidence exonerated a convicted person, reviewing courts had commented on the exoneree's likely guilt and in 10% of the cases had described the evidence supporting the conviction as "overwhelming").

Furthermore, as evidenced by Professor Garrett's research and the Project's experience, a likelihood-based inquiry significantly increases the chance that reviewing courts will decide that the prisoner is almost certainly guilty based on the trial evidence, and, thus, conclude that the results of DNA testing would not show "actual innocence." The United States Supreme Court recently acknowledged that such a one-sided inquiry is unconstitutionally arbitrary. *See Holmes*

v. South Carolina, 547 U.S. 319, 331 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."). *See also*, *Wade v. Brady*, 612 F.Supp.2d 90, 98 (D. Mass. 2009) ("In light of this record, judicial guesswork as to the likely results of testing creates a 'significant and needless risk of erroneous deprivation'.") (citation omitted).

Most post-conviction DNA testing statutes in the United States direct trial courts to assume that the testing will produce the most exculpatory results possible for the defendant, and to allow testing if those exculpatory results would sufficiently undermine confidence in the conviction to warrant a new trial. *See* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern 'Post-Conviction' DNA Statutes*, 28 Cal. W. L. Rev. 355 (2002). Pennsylvania's statute, of course, is no different. Only if a court finds "no reasonable possibility" that the testing "would produce exculpatory evidence that … would establish the applicant's actual innocence of the offense" may testing be denied. 42 Pa. C.S. § 9543.1(d)(2)(i). It does not matter that the other evidence against the applicant appeared strong and that the exculpatory results therefore seem unlikely. In other words, an applicant is entitled to testing if his best-case scenario would establish his actual innocence (*i.e.*, undermine confidence in the conviction) regardless of whether that best-case scenario seems likely—which, of course, explains the presumption of "exculpatory results" since it rarely will seem likely given that there has been a conviction. *See*, *e.g.*, *State v. Peterson*, 836 A.2d 821, 827 (N.J. Super. 2003) (noting that postconviction DNA testing statutes do not "require a convicted person to make a threshold showing that there is a 'reasonable probability' DNA testing will produce favorable results").

The deferential treatment given to requests for post-conviction DNA testing clearly addresses the fact that what is at stake with claims like Mr. Edmiston's is nothing more than testing. Mr. Edmiston does not, at this point, ask for any ultimate relief with respect to the DNA evidence, and he will not be freed from prison because his request for testing is granted.

Rather, Mr. Edmiston asks only that the court test the hypothesis that his best-case scenario may be true. If DNA testing proves Mr. Edmiston's best-case scenario—identifying the true perpetrator of the sexual assault through a match to either an alternate suspect or a known offender in the CODIS databank—then this will prove him actually innocent of the sexual assault charges, a key aggravator in the death penalty verdict.

Post-conviction DNA testing is about one thing: whether DNA testing, assuming exculpatory results, has a "reasonable possibility" of establishing a prisoner's innocence.[3] It is not, and has never been, about the likelihood that DNA testing will actually produce exculpatory

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[3] Pennsylvania's DNA Testing Statute is different from virtually all other similar state statutes. Most statutes require that an applicant show a "reasonable probability" that exculpatory DNA evidence would establish innocence. *See*, *e.g.*, Ariz. Rev. Stat. 13-4240(B)(1) (2011) (court shall order testing upon finding that, inter alia, "a **reasonable probability** exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing"); Cal. Penal Code 1405(c)(1)(B) (2011) (petitioner must explain why, inter alia, 'in light of all of the evidence, how the requested DNA testing would raise a **reasonable probability** that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of the conviction"); Mo. Rev. Stat. 547.035.2(5) (2011) (petitioner must allege, inter alia, that "[a] **reasonable probability** exists that [he] would not have been convicted if exculpatory results had been obtained through the requested DNA testing."); N.Y. Crim. Proc. Law 440.30(1-a) (2011) (court to order testing upon finding, inter alia, that "there exists a **reasonable probability** that the verdict would have been more favorable to the defendant"); N.C. Gen. Stat. 15A-269(b)(2) (2011) (court to grant testing if, inter alia, "if the DNA tested had been conducted on the evidence [at trial], there exists a **reasonable probability** that the verdict would have been more favorable to the defendant"); Tenn. Code Ann. 40-30-404(1) (2011) (court shall order testing upon finding that, inter alia, "[a] **reasonable probability** exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing"); Wisc. Stat. 974.07(7)(a)(2) (2011) ("It is **reasonably probable** that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent ... ."") (all emphasis added). Pennsylvania, by contrast, requires only that a court find a "reasonable possibility" that the exculpatory evidence would establish innocence. This highly deferential standard, written well after all of the above-quoted statutes, indicates the Legislature's intent to allow testing of DNA whenever rationally related to the claim of innocence.

results. Thus, the process reviewing courts use to evaluate DNA testing access claims must focus solely on assuming DNA testing produces exculpatory results as required under the statute. Therefore, to comport with due process and fundamental fairness, reviewing courts of this Commonwealth must adhere to the impact-based assessment articulated by the Superior Court in *Conway*.

This impact-based assessment is constitutional, practical, and the only fundamentally fair way for reviewing courts to evaluate a prisoner's post-conviction DNA testing request under the DNA Testing Statute. An impact-based assessment enables Pennsylvania prisoners to adequately and fairly vindicate the substantive right provided to them under the DNA Testing Statute, namely, proving their innocence with conclusive scientific evidence.

5. DNA Testing Results Must Be Viewed Cumulatively Under the DNA Testing Statute To Determine the Impact on a Claim of Actual Innocence.

In passing the DNA Testing Statute, the General Assembly certainly "did not intend to encourage 'fishing expeditions' or the needless expenditure of Commonwealth funds to pursue frivolous claims of innocence," but it most certainly did "seek to ensure the most fundamental principle of American jurisprudence, namely, that an innocent man not be punished for the crimes of another." *Conway*, 14 A.3d at 114. Given the DNA Testing Statute's overarching purpose, therefore, it "should be regarded as a remedial statute and interpreted liberally in favor of the class of citizens who were intended to directly benefit therefrom, namely, those wrongly convicted of a crime." *Id*. at 113.

Pursuant to the DNA Testing Statute, a petitioner must, in pertinent part:

(3) present a prima facie case demonstrating that the:

(i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(A) the applicant's actual innocence of the offense for which the applicant was convicted;

(B) in a capital case, the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(C) in a capital case, a mitigating circumstance under section 9711(e)(7) under the circumstances set forth in subsection (c)(1)(iv).

As this Court recently explained:

> The plain language of subsections (c)(3)(i) and (c)(3)(ii)(A), read together, establishes two basic requirements a convicted individual requesting DNA testing… is obliged to establish in his or her written motion: 1) a *prima facie* case demonstrating that identity of the perpetrator of the crime was at issue at trial, and 2) a *prima facie* case that DNA testing of the specific evidence identified in the motion, *assuming it yields exculpatory results*, would establish his or her actual innocence of the crime for which he or she was convicted.

Commonwealth v. Wright, 14 A.3d 798, 814 (Pa. 2011) (emphasis added). *Accord*, *Commonwealth v. Conway*, 14 A.3d at 110 ("the statutory language requires reviewing courts to evaluate the 'actual innocence of the offense' component by '*assuming exculpatory results'* will be obtained from the proposed testing") (emphasis added).

Actual innocence means that "the newly discovered evidence must make it 'more likely than not that no reasonable juror would have found [petitioner] guilty beyond a reasonable doubt.'" *Commonwealth v. Conway,* 14 A.3d at 109 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This standard, therefore, "requires a reviewing court 'to make a probabilistic determination about what reasonable, properly instructed jurors would do,' if presented with the

new evidence." *Id*. (quoting *Schlup v. Delo*, 513 U.S. at 329). Moreover, when conducting an actual innocence inquiry, a reviewing court must consider the impact of all DNA testing results *cumulatively*, not individually.

That the determination of actual innocence must be a cumulative analysis, and not based upon an item-by-item review, can be inferred from the statute's purpose of protecting the innocent and identifying the guilty. Furthermore, the statute's text requiring reviewing courts to assume exculpatory results for the *evidence* to be tested, *see* 42 Pa. C.S. § 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), and to determine whether there exists a "reasonable possibility that the testing would produce exculpatory evidence" establisng actual innocence, § 9543.1(d)(2)(i), only makes sense when read allowing for a cumulative review of all evidence.

The United States Supreme Court decision in *Schlup v. Delo* supports this reasoning. As *Schlup* explained, the "actual innocence" determination must be made "in light of *all* the evidence." *Schlup v. Delo*, 513 U.S. at 328 (emphasis added). *Accord House v. Bell*, 547 U.S. at 538 ("*Schlup* makes plain that the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial'.") (citation omitted). Indeed, the Court stated that "all the evidence" included all reliable evidence "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. *Schlup*, 513 U.S. at 324. Consequently, a trial court reviewing a request for postconviction DNA testing must consider not only all the DNA results, but any exculpatory evidence that could be developed from the DNA results, such as a DNA databank hit or a confession from the actual perpetrator.

Thus, while a single exculpatory DNA result may not establish a prisoner's actual innocence, the cumulative impact of multiple exculpatory DNA results may very well do that; if so the prisoner is entitled to DNA testing under the DNA Testing Statute.

If a prisoner satisfies the two *prima facie* prerequisites under subsection (c), the analysis proceeds to subsection (d). Subsection (d)(2)(1) provides:

> (2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is *no reasonable possibility* that the testing would produce exculpatory evidence that:
>
> (i) would establish the applicant's actual innocence of the offense for which the applicant was convicted;

42 Pa.C.S. § 9543.1(d)(2)(i) (emphasis supplied).

Collectively, then, "the *prima facie* requirement set forth in Section 9543.1(c)(3) and reinforced in Section 9543.1(d)(2) requires that an appellant demonstrate that there is a reasonable possibility that favorable results of the requested DNA testing would establish the appellant's actual innocence of the crime of conviction." *Commonwealth v. Conway*, 14 A.3d at 109 (internal quotations and citations omitted). Notably, as the New Jersey Superior Court has observed, "even if a trial court concludes, in light of the overwhelming evidence of a defendant's guilt presented at trial, that it is unlikely DNA testing will produce favorable results, the court may not deny a motion for DNA testing on that basis." *State v. Peterson*, 836 A.2d at 827. In *Peterson*, the New Jersey Superior Court allowed DNA testing on what the State felt was an "overwhelming" case. *Id*. The DNA testing was ultimately performed, and revealed the presence of an unknown male's DNA on material from swabs of the victim's body and from under her fingernails. On May 26, 2006, the prosecution dropped all charges against Mr. Peterson.

Further, as discussed above, Mr. Edmiston has a limited liberty interest created through the enactment of the DNA Testing Statute. This interest can only be adequately vindicated if the reviewing court applies a cumulative analysis to all items proposed to be tested; it cannot happen were a court to view the results in a piecemeal vacuum. Here, as the trial court acknowledged, the cumulative impact of the various DNA tests requested would have the effect of establishing Mr. Edmiston's "actual innocence." Trial Court Opinion at 7 ("if exculpatory results of the swab testing were coupled with exculpatory blood sample tests, the cumulative effect might be sufficient to demonstrate the required prima facie evidence of actual innocence and establish a reasonable possibility that the testing would produce exculpatory evidence establishing actual innocence").[4]

[4] Of course, it should be clear that, although emerging with the correct result, the trial court applied an incorrect, "likelihood-based" analysis: assuming that "testing would produce exculpatory evidence" rather than assuming that the exculpatory results would establish actual innocence, as required under the DNA Testing Statute.

B. REVIEWING THIS REQUEST FOR POSTCONVICTION DNA TESTING PURSUANT TO THE PROPER IMPACT-BASED ASSESSMENT, AND CONSIDERING THE RESULTS OF ALL DNA TESTING CUMULATIVELY, MR. EDMISTON IS ENTITLED TO DNA TESTING UNDER THE DNA TESTING STATUTE.

1. Applying the *Conway* Impact-Based Analysis, Mr. Edmiston is Entitled to Postconviction DNA Testing.

In his pleadings before Judge Fike, Mr. Edmiston identified various DNA testing scenarios that would conclusively establish his actual innocence pertaining to Bobbi Jo Matthews's death and the death penalty. Pursuant to *Conway* and the DNA Testing Statute, the Court must first assume that DNA testing will produce one or more of these exculpatory results, and then determine whether it is reasonably likely that these exculpatory results could prove that Mr. Edmiston is innocent of Bobbi Jo Matthews's death and/or the death penalty. Under *Conway's* impact-based inquiry Mr. Edmiston is entitled to DNA testing because it is reasonably likely that a reasonable and properly-instructed jury would not convict him or sentence him to death if it knew of any of the below-mentioned exculpatory DNA results.[5]

a. The Commonwealth's Theory of Guilt and Aggravation

At trial, the Commonwealth claimed that Mr. Edmiston kidnapped two-year-old Bobbi Jo Matthews, placed her in his truck, and proceeded to rape and murder her in his truck. The Commonwealth premised its theory of guilt on antiquated forensic identification techniques, such as conventional serology and microscopic hair identification. These forensic techniques, importantly, lack the sensitivity and discriminatory power of modern DNA testing. Thus,

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[5] Assuming *arguendo* that the Court concludes that DNA testing can only prove Mr. Mr. Edmiston's "actual innocence" with respect to the sexual assault which was a basis for his death penalty verdict, Mr. Mr. Edmiston is still entitled to DNA testing under the DNA Testing Statute. *See* 42 Pa. C.S. § 9543.1(c)(3)(ii)(B).

because the Commonwealth's case is premised on antiquated forensic evidence, DNA testing can conclusively establish Mr. Edmiston's actual innocence.

Similarly, during the sentencing hearing, the Commonwealth sought to prove two aggravators: (1) Mr. Edmiston tortured Bobbi Jo; and (2) he committed the murder during a felony, to wit: rape and deviate sexual intercourse. *See* 42 Pa. C.S. §§ 9711 (d)(6,8). To prove these aggravators, the Commonwealth relied on the same antiquated forensic evidence. The jury found both aggravators and sentenced Mr. Edmiston to death. Consequently, because the Commonwealth's case in aggravation is premised on antiquated forensic evidence, DNA testing can also conclusively establish that Mr. Edmiston is actually innocent of the death penalty.

(1) The Semen and Sperm Evidence

Dr. Katherine M. Jasnosz collected vaginal, oral, and rectal swabs and slides during Bobbi Jo's autopsy. At trial, Bruce Tackett of the Pennsylvania State Police Crime Laboratory 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.

NT, Trial, 7/10/89, at 182.

Dr. Jasnosz also testified, and her "medical opinions proved that both the anus and vaginal tracts had been penetrated by a penis[.]" *Commonwealth v. Edmiston*, 634 A.2d 1078, 1084 (Pa. 1993). The Commonwealth argued that Tackett's and Dr. Jasnosz's testimony proved beyond a reasonable doubt that Mr. Edmiston raped Bobbi Jo before he murdered her.

This evidence influenced the jury's guilt-innocence and sentencing decisions, especially its decision to sentence Mr. Edmiston to death because it went to the heart of the second (rape)

aggravator, *see* 42 Pa. C.S. § 9711(d)(8), by representing the only physical evidence to corroborate this aggravator. *House*, 547 U.S. at 554 (holding that factfinders must examine all "conflicting evidence" when making decisions of guilt or innocence). Moreover, Tackett's testimony corroborated Mr. Edmiston's alleged 'confession' that he raped and murdered Bobbi Jo. Based on Tackett's testimony and Mr. Edmiston's alleged confession, a reasonable jury could easily conclude that the sperm identified on Bobbi Jo's vaginal and rectal swabs came from Mr. Edmiston. Moreover, if the sperm came from Mr. Edmiston, the same jury could easily conclude that Mr. Edmiston not only raped Bobbie Jo, he also murdered her. Thus, if DNA testing produces a male DNA profile from the semen and sperm that excludes Mr. Edmiston, such a result would establish that Mr. Edmiston did not rape Bobbi Jo, and that he is "actually innocent" of Bobbi Jo's rape, murder and of the death penalty. Judge Fike, for instance, concluded that while exculpatory DNA results regarding the semen and sperm "might not" demonstrate Mr. Edmiston's actual innocence of Bobbi Jo's murder, it "might very well" prove that he is actually innocent of receiving the death penalty:

> Although, by itself, a finding of DNA attributable to a third party might not present a prima facie case demonstrating Defendant's actual innocence of the homicide, such a result might very well present such evidence of innocence of the alleged rape and associated charges. Likewise, although application of logic would indicate no reasonable possibility that the swab testing would produce exculpatory evidence establishing Defendant's actual innocence of murder, there would exist a reasonable possibility that identification of semen or sperm with a third party would establish Defendant's innocence of the charged or uncharged conduct constituting an aggravating circumstance.

Trial Court opinion at 6.

Furthermore, had the aforementioned exculpatory DNA results been available prior to Mr. Edmiston's trial, he could have used them to attack the reliability of his confession at trial. *See Crane v. Kentucky*, 476 U.S. 683, 689-690 (1986); *Lego v. Twomey*, 404 U.S. 477, 485-486 (1972). Had the jury known that the semen or sperm recovered from Bobbi Jo did not come

from Mr. Edmiston, this information would have impacted how much weight and credibility it would have given to Mr. Edmiston's alleged confession—which in turn would have affected its guilt-innocence and sentencing determinations. A reasonable and properly-instructed jury would give little, if any, weight to Mr. Edmiston's alleged confession had it known of the exculpatory semen results, especially when the results are coupled with the fact that investigators did not adequately record and memorialize Mr. Edmiston's alleged confession. In short, it is reasonably likely that no reasonable and properly-instructed jury would find that Mr. Edmiston raped Bobbi Jo, *see* 42 Pa. C.S. § 9711(d)(8), let alone murdered her, had the jury known that the semen and sperm did not belong to Mr. Edmiston because there is no evidence whatsoever to prove this aggravator beyond a reasonable doubt—outside Mr. Edmiston's uncorroborated and unrecorded alleged confession.

(2) Blood Evidence

Bruce Tackett identified several type O bloodstains in Mr. Edmiston's truck. These bloodstains included:

- A bloodstain from the driver's side seat (Item 10, Commonwealth's Ex. 27-A)
- A bloodstain from the driver's side seat belt buckle (Item No. 2, Commonwealth's Ex. 27-B)
- A bloodstain from the upholstery under the driver's door window (Item No. 4, Commonwealth'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 (Commonwealth's Ex. 34)
- Tackett also identified a type O bloodstain on Mr. Edmiston's pants.

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

The blood evidence, like the sperm evidence, impacted the jury's guilt-innocence and sentencing decisions, especially its decision to sentence Mr. Edmiston to death because it went to the heart of the first (torture) aggravator, *see* 42 Pa. C.S. § 9711(d)(6), by representing the only physical evidence to corroborate this aggravator. Furthermore, Tackett's testimony again corroborated Mr. Edmiston's alleged confession that he raped, pummeled, and murdered Bobbi Jo. Based on Tackett's testimony and Mr. Edmiston's alleged confession, a reasonable jury could easily conclude that the blood identified in Mr. Edmiston's truck and on his pants came from Bobbi Jo. Based on this finding, moreover, the same jury could have also easily concluded that Mr. Edmiston tortured Bobbi Jo prior to and during her murder. Thus, if DNA testing reveals that the blood in Mr. Edmiston's truck is not from Bobbi Jo, such a result would establish that he is actually innocent of Bobbi Jo's murder and of the death penalty.

Had the aforementioned exculpatory DNA results been available prior to Mr. Edmiston's trial, he could have used them to attack the reliability of his confession at trial. Had the jury known that the blood recovered from Mr. Edmiston's truck and pants did *not* belong to Bobbi Jo, this information would have impacted how much weight and credibility it would have given to Mr. Edmiston's alleged confession which, in turn, would have impacted the guilt-innocence and sentencing determinations. A reasonable and properly-instructed jury would give little, if any, weight to Mr. Edmiston's alleged confession had it known of the exculpatory blood results, especially when the results are coupled with the fact that investigators did not adequately record and memorialize Mr. Edmiston's alleged confession. In short, it is reasonably likely that no

reasonable and properly-instructed jury would find that Mr. Edmiston tortured Bobbi Jo, *see* 42 Pa. C.S. § 9711(d)(6), let alone murdered her, had the jury known that the blood did not belong to Bobbi Jo because there is no evidence whatsoever to prove this aggravator beyond a reasonable doubt—aside from Mr. Edmiston's uncorroborated and unrecorded alleged confession.

b. Cumulative Impact Theory

The Court, as mentioned, must consider the impact of all exculpatory DNA results cumulatively—rather than individually. Thus, DNA testing may well prove (1) that the sperm and semen recovered from Bobbi Jo Matthews's body did not come from Mr. Edmiston, and (2) that the blood on Mr. Edmiston's pants and in his truck did not come from Bobbi Jo Matthews. The cumulative impact of these exculpatory results is such that that no reasonable or properly-instructed jury would convict Mr. Edmiston of Bobbi Jo's murder or sentence him to death. Judge Fike, for instance, concluded that the cumulative impact of exculpatory blood and semen results "might be sufficient to demonstrate the required prima facie evidence of actual innocence and establish a reasonable probability that the testing would produce exculpatory evidence establishing actual innocence." Trial Court opinion at 7. If exculpatory blood and semen results "might be sufficient" to demonstrate actual innocence, exculpatory blood and semen results are sufficient to demonstrate Mr. Edmiston's actual innocence of Bobbi Jo's murder.

IV. CONCLUSION

This is a mere request for testing to prove a viable and reasonable hypothesis. Time and again, DNA evidence has shown that convictions predicated upon "unusually strong" and even "overwhelming" evidence were wrongly procured. Looking at the testing requested here, and the fact that exculpatory DNA results would, under the dictates of the DNA Testing Statute, raise a reasonable possibility of Mr. Edmiston's actual innocence of sexual assault and murder, this Court must allow the testing to go forward. This result is compelled when applying the proper, constitutionally-sound analysis driven by the impact such evidence would have had on Mr. Edmiston's jury, as opposed to looking at any "likelihood" that the evidence would not be exculpatory. For all of the reasons outlined above, this Court should grant Mr. Edmiston's petition for postconviction DNA testing.

Respectfully submitted,

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Amicus Curiae [6]

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