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IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MDA 2013 No. 1113

COMMONWEALTH OF PENNSYLVANIA,
Appellant

VS.

JOHN MARSHALL PAYNE, III,
Appellee.

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA INNOCENCE PROJECT AND THE INNOCENCE PROJECT, INC. IN SUPPORT OF APPELLEE

On Reconsideration From The October 3, 2014, Memorandum Opinion Affirming The May 23, 2013, Order Granting Request For Post-Conviction DNA Testing Pursuant To 42 Pa. C.S. § 9543.1 On CP-67-CR-1000291-1986

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I. INTEREST OF *AMICI CURIAE*

The Pennsylvania Innocence Project (the "Pennsylvania Project") is a nonprofit legal clinic and resource center founded in 2008, housed at Temple University's Beasley School of Law, and a member of the Innocence Network. The Pennsylvania Project's board of directors and advisory committee include practicing lawyers, law professors, former United States Attorneys, former state court prosecutors, and the deans of the law schools of Temple University, Villanova University, Drexel University, the University of Pennsylvania, and Rutgers-Camden. The Pennsylvania Project provides *pro bono* investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania whose claims of actual innocence are supported by the results of DNA testing or other, powerfully exculpatory evidence or whose claims, after a preliminary investigation, evince a substantial potential for the discovery of such evidence. In addition, the Pennsylvania Project works to remedy the underlying causes of wrongful convictions to better ensure that no one will be convicted and imprisoned for a crime they did not commit and to lessen the risk that a wrongdoer will escape justice because an innocent person was convicted in their stead.

The Innocence Project is one of the 69 member organizations of the Innocence Network. The Network is dedicated to providing pro bono legal and investigative services to wrongly convicted individuals seeking to prove their

innocence. The Network represents hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands.

The Network and its members also seek to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Inasmuch as post-conviction DNA testing can (1) exonerate the convicted innocent, (2) identify perpetrators who so far have escaped justice, and (3) help to illuminate those aspects of the criminal justice system that lead to the conviction of actually innocent citizens, *amici* have a compelling interest in ensuring that courts reviewing requests for post-conviction DNA testing apply the most liberal construction of laws possible to allow easy access to such powerful evidence.

II. SUMMARY OF ARGUMENT

When the Pennsylvania Legislature unanimously passed the Post-Conviction DNA Statute, 42 Pa. C.S. § 9543.1, the intent of that body was clear: provide an easy and reliable avenue for those convicted of crimes they did not commit to harness the exonerative power of DNA. In interpreting requests under that statute, this Court should honor that intent by applying a liberal standard for requests where DNA testing has the ability to show an applicant's "actual innocence." This case presents such a situation. John Marshall Payne, III, was convicted in 1986 of second degree murder, aggravated assault and burglary for a crime that occurred five years earlier in December of 1981. Mr. Payne was convicted solely on circumstantial evidence and despite the fact that there was extensive physical evidence collected, none of the evidence linked Mr. Payne to the crime.

Under § 9543.1, in order for the PCRA court to grant testing Mr. Payne need only show a prima facie case that DNA testing would establish his actual innocence. In the context of granting DNA testing under the statute, a PCRA court must order the testing unless there is "no reasonable possibility" that favorable DNA results could establish "actual innocence." That is, there is no reasonable possibility that "no reasonable juror would have found [the applicant] guilty beyond a reasonable doubt." The strong presumption of the DNA statute is that DNA testing should be ordered.

Amici have represented many innocent persons who were exonerated as a result of DNA testing despite the existence of trial evidence that appeared "overwhelming." The 329 DNA exonerations to date have demonstrated that the results of DNA testing can discredit even the most airtight convictions and provide irrefutable evidence about the true perpetrators of the crimes— information which an innocent person, who has no information about the crime, could never provide in his or her own defense.

Amici respectfully submit that the PCRA court's order granting DNA testing should be affirmed: the statute must be liberally interpreted to benefit those in prison who are actually innocent by ensuring access to all who meet the minimum statutory requirements. Since the PCRA court (and this Court's memorandum opinion) applied the appropriate standard, that decision is entitled to deference and should be affirmed.

III. ARGUMENT

A. The Court Should Affirm The Order Granting Petitioner's Motion For Post-Conviction DNA Testing And Endorse A Liberal Interpretation Of The DNA Testing Statute To Effectuate Its Purpose.

1. The Post-Conviction DNA Statute Must Be Liberally Interpreted To Benefit The Class Of Individuals Intended To Directly Benefit Therefrom.

When the Legislature adopted Section 9543.1 ("the DNA Statute"), the clear intent of the authors was to ensure the easy access to post-conviction DNA testing to prove factual innocence. At a hearing introducing the DNA Statute for consideration by the Pennsylvania Senate, sponsor Senator Stewart Greenleaf (R – Montgomery County) remarked:

> This legislation would provide [DNA] testing and provide a payment process for it and a process in which an individual could easily present their case, and a judge could then decide whether they would be allowed to have the testing or not, and they would be allowed to have it if the evidence would prove their innocence ... [A]s we have seen in the press, there are occasions when DNA is used to convict an individual, and, of course, there are occasions when DNA can convincingly establish the innocence of an individual. And so we will now join 13 other States in this nation that will provide for this process and to make sure that we do not have anyone in our prisons or on death row who is innocent.

Floor Statement of Senator Stewart Greenleaf, Senate Journal, June 19, 2001, at 745.

As this Court has observed, the DNA Statute "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." *Commonwealth v. Conway*, 14 A.3d 101, 113 (Pa. Super. Ct. 2011). Pennsylvania's DNA Statute is written with the heavy presumption that DNA testing should be granted. *See* 42 Pa. C.S § 9543.1(d)(1) (noting the court "shall order the testing requested" where the requirements of subsection (c) are met); 42 Pa. C.S. § 9543.1(d)(2) (disallowing court from ordering testing unless "there is no reasonable possibility that the testing would produce exculpatory evidence" to establish petitioner's actual innocence). This is clear in the Legislature's allowing the lowest threshold for applicants requesting testing, 42 Pa. C.S.§ 9543.1(c)(3) (requiring applicant meet "prima facie" showing that exculpatory DNA testing would establish "actual innocence") and for courts in granting testing, 42 Pa. C.S.A. § 9543.1(d)(2) (mandating testing unless "no reasonable possibility" that testing would produce exculpatory evidence to establish actual innocence).

"Actual innocence" in the context of the DNA testing statute means that the results of the DNA testing make it "more likely than not that no reasonable juror would have found [them] guilty beyond a reasonable doubt." *Conway*, 14 A.3d at 109 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This standard requires a reviewing court "to make a probabilistic determination about what reasonable, properly instructed jurors would do," if presented with the results of the DNA testing. *Id.* While this standard is "demanding," it "does not require absolute certainty about the petitioner's guilt or innocence." *House v. Bell*, 547 U.S 518,

519 (2006). As explained by the Supreme Court of Tennessee, when interpreting a statute with an identical express purpose and similar text: "'the trial court should postulate whatever realistically possible test results would be most favorable to [the] defendant in determining whether he has established' the reasonable probability requirement under that jurisdiction's DNA testing statute." *Powers v. State*, 343 S.W.3d 36, 55 (Tenn. 2011) (quoting *State v. Peterson*, 836 A.2d 821, 827 (N.J. Super. Ct. App. Div. 2003)).

The requirement that testing may only be denied where there exists "no reasonable possibility" that exculpatory DNA evidence will show innocence is truly for those situations where the requested DNA testing would be performed on evidence that has no nexus to the crime at issue. For example, this Court has affirmed the denial of testing where testing "would reveal nothing," *Commonwealth v. Heilman*, 867 A.2d 542 (Pa. Super. Ct. 2007) (denying testing of fingernail scrapings where no evidence of a struggle between decedent and assailant), or where a testing request is based upon "conjecture or speculation," *Commonwealth v. Williams*, 35 A.3d 44, 50 (Pa. Super. Ct. 2011). *See also*, *People v. Figueroa*, 36 A.D.3d 458 (N.Y. App. Div. 2007) (denying testing on blood collected near the victim's body on the street where there was no basis to believe the blood came from anyone but the victim and defendant's alternate theory was highly speculative). The case presented to the Court here is not such a case; the

evidence to be tested is tied directly to the crime and carries the possibility of revealing truths unknown.

2. The Evidentiary Strength Of DNA Testing Justifies A Low Threshold To Access.

Even in cases with substantial or even seemingly overwhelming evidence of guilt—and, by definition, every convicted individual has been found guilty "beyond a reasonable doubt"—DNA testing has the potential to disprove guilt. DNA testing can, indeed, reveal uncomfortable truths about police and prosecutorial misconduct (*Halsey v. Pfeiffer*, 750 F.3d 273, 285 (3rd Cir. 2014)), the unreliability of forensic evidence thought to be sound (*United States v. Gates*, No. F-6602-81, Certificate of Actual Innocence (D.C. Super. Ct. May 4, 2010) (reversing conviction obtained based upon testimony that a hair "matched" a hair found on victim),[1] and even unattributable but grotesque error, (Illinois v. Gonzalez, No. 94-CF-1365, Order (Ill. Cir. Ct. Lake Cnty. Mar. 9, 2015) (reversing conviction for rape and abduction based on eyewitness misidentification). Where biological evidence could exonerate a convicted individual, the letter and spirit of the DNA Statute should be followed and testing should go forward despite the weight of the seemingly "overwhelming" evidence.

To date, since 1989, at least 329 wrongfully convicted people have been

[1] *See also* Keith Alexander, *Wrongly Imprisoned, Donald Gates Adjusts To Freedom After 28 Years*, WASHINGTON POST (Jan. 9, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/08/AR2010010803716.html.

exonerated and released from prison on the strength of post-conviction DNA testing.[2] Through the representation of wrongly convicted individuals, *amicus* has learned that what appears to be overwhelming evidence of guilt at trial is not a guarantee of *actual* guilt. Many of the 329 DNA exonerees were convicted on evidence far more "overwhelming" than that used to convict Mr. Payne; yet through DNA testing those men and women were able to show to a scientific certainty they were not guilty of the crimes for which they were convicted. Furthermore, in at least 161 of those 329 cases – nearly half – DNA testing identified the actual perpetrator of the crime.[3]

Ostensibly overwhelming evidence of guilt can be inaccurate for many reasons. For example, much of what has passed historically as reliable scientific evidence, such as hair comparison analysis, bite mark comparisons, firearm tool mark analysis and shoe print comparisons, have never been scientifically validated.[4] Many studies have proven that eyewitness identifications, a factor in approximately 75 - 80% of wrongful convictions, are prone to error.[5] And, even in

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[2] *See* The Innocence Project, http://wwww.innocenceproject.org (last viewed May 11, 2015).

[3] http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide (last visited May 11, 2015).

[4] *See* The Innocence Project, *Unreliable or Improper Forensic Science*, http://www.innocenceproject.org/understand/Unreliable-Limited- (last visited May 11, 2015).

[5] *See* The Innocence Project, *Eyewitness Misidentification*, http://www.innocenceproject.org/understand/Eyewitness-Misidentification (last visited May 11, 2015) (stating that eyewitness misidentification plays a role in nearly 75% of convictions

cases in which the defendant confessed or made inculpatory statements under police interrogation—as is alleged in the present case—such statements may later proved to be false, particularly when the defendant is young and/or mentally challenged; in about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions, or pled guilty.[6] Additionally, incentivized testimony—including particular incentives that are not disclosed to the jury—were critical evidence used to convict an innocent person in more than 15% of wrongful conviction cases.[7]

In short, there are myriad contributing factors to wrongful convictions, but DNA testing has the potential to prove or disprove guilt or innocence. Accordingly, courts have a responsibility to grant access to this testing.

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overturned through DNA testing). *See also*, *Commonwealth v. Walker*, 92 A.3d 766, 780 (Pa. 2014) ("Thus, as demonstrated above, there is no doubt that wrongful conviction due to erroneous eyewitness identification continues to be a pressing concern for the legal system and society."); *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (thoroughly examining the reliability of eyewitness testimony); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8-9, 279 (2011) (finding that eyewitness misidentification was a factor in 190 of the first 250 DNA exoneration cases).

[6] *See* The Innocence Project, *False Confessions*, http://www.innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions (last visited May 11, 2015). *See also*, Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW. HUM. BEHAV. 3-38 (2010) (citing to a study in which 63% of false confessions involved defendants under the age of 25 and 32% under 18; 22% were mentally retarded; and 10% had a diagnosed mental illness).

[7] The Innocence Project, *Informants*, http://innocenceproject.org/causes-wrongful-conviction/informants (last visited May 11, 2015).

3. Post-Conviction DNA Testing Has Led To Eleven Exonerations In Pennsylvania Thus Far; The History Of Several Wrongly Convicted People Played A Role In The Passage of Section 9543.1.

Of the at least 329 nationwide exonerations resulting from post-conviction DNA testing, eleven were from Pennsylvania. One of those included Bruce Godschalk, convicted of two separate rapes that occurred at related apartment buildings in Montgomery County. Key to Mr. Godschalk's conviction was two alleged confessions: one to a former cellmate of his in jail, and one to a Montgomery County Detective. Key to establishing the reliability of Mr. Godschalk's statement to police was that Mr. Godschalk's confession included a fact known only to police at the time. *Commonwealth v. Godschalk*, 679 A.2d 1295, 1297 (1996) (affirming trial court's denial of post-conviction DNA testing). In that case, this Court affirmed the trial court's denial of DNA testing because Mr. Godschalk's conviction rested "largely on his own confession" rather than "*largely* on identification evidence," which failed to satisfy the threshold for DNA testing. *Id*. On appeal to federal court, Mr. Godschalk alleged that the Commonwealth violated his constitutional rights by denying him DNA testing. *Godschalk v. Montgomery District Attorney's Office*, 177 F.Supp. 2d 366, 369 (E.D.Pa. 2001). The District Court granted Mr. Godschalk's motion for summary judgment noting,

> [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. [fn 1: Of course, DNA testing might also reveal that plaintiff was indeed the source of the genetic material, thereby providing further inculpatory evidence to bolster the jury's verdict.] Such contradictive results could well raise reasonable doubts in the minds of jurors as to plaintiff's guilt. **Given the well-known powerful exculpatory effect of DNA testing, confidence in the jury's finding of plaintiff's guilt at his past trial, where such evidence was not considered, would be undermined**.

Id. (emphasis added). When that testing took place, the results fully exonerated Mr. Godschalk.[8] The DNA testing revealed that police suggested facts to Mr. Godschalk—whether intentionally or negligently—which bolstered the reliability of his "confession."[9] Mr. Godschalk's exoneration occurred in 2002—the same year the Pennsylvania Legislature passed the DNA Statute.

4. Experiences From Other States Demonstrate the Potential for Post-Conviction Exoneration Following Overwhelming Evidence at the Time of Conviction.

Of the at least 329 people who have been exonerated by post-conviction DNA testing, there are many examples demonstrating the fallibility of evidence at trial. In most of those 329 cases, the police, prosecutors, victims, and judges

[8] *See* The Innocence Project, *Case Profile of Bruce Godschalk*, http://innocenceproject.org/cases-false-imprisonment/bruce-godschalk (last visited May 11, 2015) (detailing Mr. Godschalk's exoneration).

[9] *See* Brandon Garrett, *The Substance of False Confessions*, 62 STANFORD L. REV 1051 (2010) (finding from a review of trial transcripts from 38 DNA exoneration cases involving a false confession, 36 exonerees reportedly volunteered key details about the crime, including facts that matched the crime scene evidence, scientific evidence or victims' accounts of the crime).

involved in the conviction believed that the evidence of the defendant's guilt was very strong. *See* Hilary S. 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 Cases*, 74 Fordham L. Rev. 825, 834 (2005) ("In many cases where convictions appeared to be based on solid, and in some cases overwhelming, evidence, results of post-conviction DNA testing have proven actual innocence."). And in many of these cases, the innocent person had to engage in significant litigation in order to obtain the DNA testing that proved they could not have committed the crime for which they were serving time in prison or sentenced to death. *Id.* at 827. In each of these 329 cases, DNA testing proved the evidence that had been presented at trial—evidence that had been strong enough to convict a defendant beyond a reasonable doubt, and evidence which appellate judges later described as overwhelming in many cases— had led to an inaccurate guilty verdict. DNA testing proved the convicted person to be innocent. If courts can learn anything from DNA exoneration cases, the lesson should be that evidence of a defendant's guilt is often not as reliable as it appears, juries are not infallible, and it would therefore be a mistake to rely on non-forensic trial evidence, however convincing, as a reason for rejecting the opportunity to obtain scientific validation or invalidation of the defendant's guilt through forensic testing.

Pennsylvania, of course, is not alone in seeing cases built upon seemingly

solid evidence completely eviscerated by DNA testing. One need only look across the river to New Jersey to see the dangers of denying DNA testing even in the face of seemingly overwhelming evidence of guilt. In *State v. Halsey*, 748 A.2d 634, 636 (N.J. Super. 2000), the petitioner gave a confession which provided gruesome details about the crime which corresponded to known physical evidence recovered from the murder scene and the child victims' bodies. *Halsey*, at 637-38. Yet there is more to Mr. Halsey's story than this court opinion. After the Superior Court of New Jersey affirmed the denial of Mr. Halsey's request for post-conviction DNA testing, Mr. Halsey continued to pursue the matter. After additional proceeding, the Union County Prosecutor's Office eventually agreed to perform limited DNA testing. Six years after Mr. Halsey's request for testing was denied by state courts, in the words of the Third Circuit Court of Appeals, "**a DNA test and a follow-up investigation confirmed, beyond dispute, that Halsey was innocent**." *Halsey v. Pfeiffer*, 750 F.3d 273, 285 (3rd Cir. 2014). Indeed, the DNA profile developed from crime scene evidence identified the monster who had sexually assaulted and strangled a 7-year-old girl and driven nails into the head of her 8-year-old brother: Clifton Hall. *Id*. Hall was originally interviewed about the crimes but police ceased their investigation of him after Mr. Halsey's purported – and unrecorded – "confession." *Id.* at 280. Hence, the *Halsey* case is an excellent example of why courts should hew to the interpretation that the "no reasonable possibility" standard

means that requested DNA testing has no nexus to the crime for which the petitioner was convicted.

There are numerous such examples from all over the country showing that had purportedly "overwhelming" evidence of guilt been a barrier to DNA testing, a convicted innocent person would still be imprisoned. The Oklahoma cases of Roy Williamson and Dennis Fritz provides an instructive example of this dangerous confluence. In 1982, a 23 year-old waitress was found raped and murdered; hair, semen and fingerprints were all found at the scene. Despite the fact that none of the fingerprints matched either Mr. Williamson or Mr. Fritz, they were charged with the murder nearly five years later.[10] The prosecution bolstered its weak case with testimony from a jailhouse informant that Mr. Fritz had allegedly confessed to him—a confession which came one day before the prosecution would have been forced to drop the charges against Mr. Fritz. Another informant testified that she had heard Mr. Williamson threaten to harm his mother as he had the victim. Both men were convicted, with Mr. Williamson sentenced to death. After 11 years

[10] The Innocence Project, *Case Profile: Dennis Fritz,* http://www.innocenceproject.org/Content/Dennis_Fritz.php (last visited May 11, 2015); The Innocence Project, *Case Profile: Ron Williamson,* http://www.innocenceproject.org/Content/Ron_Williamson.php (last visited May 11, 2015).

imprisonment, DNA testing not only exonerated Mr. Williamson and Mr. Fritz, but inculpated another man, who had actually served as a prosecution witness at trial.[11]

Wrongful convictions on the basis of informant testimony may also involve "contamination" by police. That is, just as police may provide information that "only the perpetrator would know" to suspects which then gets repeated in false confessions, so, too, are informants fed information by police and prosecutors (or sometimes even other jailhouse sources) that makes their testimony appear more reliable.[12]

An Illinois court wrongfully convicted David Gray of rape largely as a result of such contamination.[13] Mr. Gray was tried and convicted for the violent rape of a 58 year-old woman, who was raped and stabbed 33 times by a man who had come to look at a motorcycle she was selling.[14] The victim told police that the perpetrator touched the motorcycle's rearview mirror before ripping her telephone from the wall after asking to use it. She also described him as wearing "wineish"

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[11] *Id.*

[12] *See*, Garrett, supra note 5, at 118.

[13]The Innocence Project, *Case Profile: David Gray*, http://www.innocenceproject.org/cases-false-imprisonment/david-a-gray (last visited May 11, 2015).

[14] *Id.*

colored shoes.[15] Mr. Gray's first trial ended in a hung jury. Before Mr. Gray was retried, the prosecutor visited the jail where Mr. Gray was held and found Mr. Gray's cellmate, who became "a crucial witness in Gray's retrial." The informant testified that Mr. Gray had not only confessed to committing the offense with a second perpetrator (contrary to the victim's description of only one perpetrator), but that Mr. Gray admitted ripping the telephone from the wall, wearing wine-colored shoes, and having worn gloves (explaining the absence of fingerprints). The informant also testified that Mr. Gray had admitted that he arranged for his alibi witnesses to lie. The prosecution's closing explained to the jury that Mr. Gray's "confession" to the informant contained information that "'would have been unknown to any person other than police officers, members of the State's Attorney's Office,'" defense counsel, and the real perpetrator.[16] After serving 20 years, DNA testing exonerated Mr. Gray, and put the lie to the informant's false testimony.[17]

New York's infamous Central Park jogger case was another example of DNA exonerating defendants who had been convicted on convincing evidence of

[15] Garrett, supra note 5 at 118.

[16] *Id.* at 120-22.

[17] *Id.* at 123.

guilt.[18] There, not one but *all five* co-defendants gave detailed descriptions of raping the victim, complete with apologies and explanations of their motivations.[19] At their trial a forensic analyst testified that a hair found on the victim was "similar" to one of the defendant's hair "to a reasonable degree of scientific certainty."[20] Despite the fact that all five co-defendants had confessed to the crime, DNA evidence later exonerated all five of them and identified the true rapist, who admitted his culpability and that he had committed the crime alone.

As these cases demonstrate, DNA testing can provide evidence of actual innocence, even in cases where other evidence of guilt appears strong. Put simply, modem DNA testing is capable of unparalleled accuracy and is the gold standard of forensic analysis:

> Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid–1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue….

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[18] *See* The Innocence Project, *Case Profile of Kevin Richardson*, http://www.innocenceproject.org/cases-false-imprisonment/kevin-richardson?searchterm=richardson (last visited May 11, 2015).

[19] Saul Kassin & Gisli Gudjonsson, *True Crimes, False Confessions*, SCI. AM. MIND (June 2005), *available at* http://www.scientificamerican.com/article/true-crimes-false-confess/.

[20] *See* The Innocence Project, *Case Profile of Kevin Richardson*, http://www.innocenceproject.org/cases-false-imprisonment/kevin-richardson?searchterm=richardson (last visited May 11, 2015).

> DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others.

District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62 (2009).

Other courts have recognized that the apparent strength of the prosecution's case is not a reason to deny a defendant access to DNA testing that could potentially exonerate him or her. See, e.g., *People v. Henderson*, 799 N.E.2d 682, 690 (Ill. App. Ct. 2003) (ordering post-conviction DNA testing despite the court's agreement that the evidence against the defendant "was indeed overwhelming," because Illinois' post-conviction DNA testing 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. Ct. App. Div. 2003) (under New Jersey's post-conviction DNA testing statute, "the strength of the evidence against a defendant is not a relevant factor in determining whether his identity as a perpetrator was a significant issue"); *Bruner v. State*, 88 P.3d 214, 216 (Kan. 2004) (holding that, under Kansas' post-conviction DNA testing statute, it is improper to deny testing on the basis that the evidence was overwhelming).

5. Applying A Liberal Standard To 42 Pa. C.S. § 9543.1 Motions Will Not Impair The Interests Of The Commonwealth In Finality Of Judgments And Conservation Of Judicial Resources.

The Commonwealth offers no real policy opposition to a broad reading of Section 9543.1; indeed, any policies that could be offered would pale in

comparison to the risk of erroneously depriving an individual of liberty. *See*, *e.g.*, *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (citing *United States v. Nobles*, 422 U.S. 225, 230 (1975)) ("[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent.").

Undoubtedly, the Commonwealth has an interest in the finality of its verdicts—as do all citizens. Indeed, if the results of the DNA test confirm Mr. Payne's guilt, the Commonwealth's interest in the finality of judgments will be well served. But if the results are exculpatory, an innocent man will be freed from incarceration, the Commonwealth will be afforded a second chance to convict the actual perpetrator, and justice will also be well served.[21]

Additionally, although some degree of solace is provided by final judgments to victims and victims' family members, wrongful incarceration similarly works an incredible hardship on the convicted and his family. *See* Jennifer Thompson-Cannino, Ronald Cotton, and Erin Toreno, *Picking Cotton: Our Memoir of Injustice and Redemption* (2009) (Thompson, who survived a brutal rape, described how she was transformed into an advocate for innocence after DNA

[21] See The Innocence Project, *DNA Exonerations Nationwide*, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide (last viewed May 11, 2015). In at least 161 of the 329 DNA exoneration cases – nearly half – DNA testing identified the actual perpetrator of the crime. *Id.*

testing discredited her eyewitness identification of Robert Cotton as her rapist that led to his eleven years of wrongful imprisonment).[22]

Concern for scarce judicial resources also favors a liberal application of the DNA Statute. There is no question that the Commonwealth has expended significant resources to deny Mr. Payne access to potentially exculpatory DNA evidence. United States District Judge Nancy Gertner, in denying a Massachusetts' prosecutor's motion to dismiss an application for DNA testing, aptly captured the short-comings of the Commonwealth's position:

> Scarce administrative and judicial resources are also not threatened by post-conviction DNA testing. In cases where the convicted individual has agreed to foot the bill for testing, prosecutors need only grant access to DNA evidence already in their possession. If the test provides results that are inculpatory or inconclusive, the defendant will provide no new tax on resources. And if the test results are exculpatory, the State may willingly release the individual. Even if a new trial is necessary, our society has clearly expressed a value judgment that a reliable determination of guilt or innocence is worth the cost of a fair trial.

Wade v. Brady, 460 F. Supp. 2d 226, 249 (D.C. Mass. 2006).

In sum, there are no legitimate policy concerns or legitimate state interest affected by liberalized access to DNA evidence under the DNA Statute.

B. DNA Testing Here Can Establish "Actual Innocence" By Either Detecting A Redundant DNA Profile On Multiple Pieces Of Evidence, Or By Establishing A Profile That Matches A Profile In CODIS.

[22] *See also*, the cases of Fritz, Williamson, Halsey, and the five Central Park jogger defendants, discussed supra at 14-18, for examples of cases where DNA testing not only exonerated the convicted defendant, but also matched to another individual.

Even putting aside the reasons why this Court should apply a liberal standard for reviewing post-conviction requests for DNA testing, the record shows that the PCRA court made no error in ordering testing in this case. The crime for which Mr. Payne was convicted was a murder, aggravated assault, and burglary committed by a perpetrator or perpetrators unknown to the victim. This is a case perfect for which the post-conviction DNA testing statute was intended. There is no question that DNA testing on the evidence can now prove whether or not Mr. Payne is innocent of this crime, as he has maintained for nearly three decades. In ordering testing under either possibility, the PCRA court did not abuse its discretion. The Commonwealth's argument does not address the very real (not just "reasonable") possibility that DNA testing can establish Mr. Payne's "actual innocence" by employing numerous DNA testing methods unavailable at the time of his trial.

Here, despite the Commonwealth's assertions to the contrary, the PCRA court correctly found that the evidence at Mr. Payne's trial less than airtight. The Commonwealth argues that DNA test results are incapable of proving Mr. Payne's actual innocence because the jury convicted Mr. Payne of felony murder based on a conspiracy theory and there were purportedly multiple perpetrators involved. However, the mere fact that there may have been multiple perpetrators came solely from the unrecorded inculpatory statements Mr. Payne purportedly made to various

individuals—including two jailhouse informants and a police officer. The majority of the Commonwealth's circumstantial case was provided by the testimony of those civilian witnesses: two jailhouse informants, Sonny Oglesby and Christopher Gibson; and Deborah Wallick, who suffered separate credibility issues based on her professed heavy usage of LSD at the time she says she heard Mr. Payne talk about the murder as well as her prior conviction for hindering a prosecution. Appellee's Reply Br. at 4, Feb. 24, 2015. Indeed, there was no forensic evidence of purportedly multiple perpetrators presented at trial. Moreover, that no physical evidence collected at the crime scene matched Mr. Payne is not a preclusion to DNA testing.

The Commonwealth's statement of the factual history of this case demonstrates that there is a wealth of physical evidence likely handled by the perpetrator which could be subjected to DNA testing which could provide probative information regarding Mr. Payne's innocence or guilt. *See* Resubmitted Appellant Br. at 6-10, Feb. 5, 2015. Items of evidence to be tested for DNA evidence deposited by the perpetrator include:

- the telephone,
- head and pubic hairs from the victim's bed,
- fingernail clippings collected from the victim,
- clothing worn by the victim,

- the screwdriver that may have broken the window,
- the window panel, and
- Kleenex found in the victim's bedroom.

Mr. Payne's "actual innocence" could be demonstrated by finding: (1) a redundant unknown DNA profile on multiple pieces of evidence; or (2) producing a DNA databank hit to a previously convicted offender or arrestee. Any of these findings would suffice to establish new and material facts that would, make it more likely than not that no reasonable juror would have found Mr. Payne guilty beyond a reasonable doubt.

If a genetic profile is detected on multiple items of physical evidence known to be manipulated by the perpetrator in Ms. Rishel's murder, this "redundancy," as it is known, will establish and confirm the genetic profile of the true assailant and conclusively establish that the DNA profile belongs to the true assailant. DNA testing of these items would provide powerful proof of Mr. Payne's actual innocence if it reveals that the same person—someone other than Mr. Payne—left DNA on multiple items of probative evidence which the assailant touched. For example, if DNA test results were to establish the same genetic profile on the telephone, head and pubic hair left on the victim's bed, and the screwdriver used to break the window, such evidence would be critical to establishing the identity of the perpetrator. These multiple DNA "touches" could conclusively demonstrate

that the DNA detected is from the perpetrator, rather than from casual contact unrelated to the offense. The potential exonerative evidence produced by finding a redundant DNA profile on multiple pieces of evidence as well as the DNA databank theory has been recognized by this Court as viable in a post-conviction DNA testing request. *Conway*, 14 A.3d at 112-113. [23] In *Conway*, this Court endorsed a CODIS-based theory of establishing actual innocence, opining that "DNA banks are an important tool in criminal investigations, in the exclusion of individuals who are the subject of criminal investigation or prosecution." 14 A.3d at 113 (citing 42 Pa. C.S. § 2302(1)). Under *Conway*, CODIS can establish "actual innocence" whenever the evidence against the convicted defendant was wholly circumstantial and it is reasonably possible that DNA will be obtained from the evidence collected. *Id.* at 112-13.

That is applicable in this case—the evidence against Mr. Payne was the type of evidence known to lead to wrongful convictions. In addition to having the potential to exonerate Mr. Payne, DNA testing has the potential to identify the actual culprit. Justice is not served by having innocent people in jail and the guilty on the street. More than 11.5 million DNA profiles exist in the FBI's Combined

[23] The Central Park jogger case discussed supra is instructive: whereas guilt was presumed on the part of five defendants, DNA test results excluded all five defendants and a redundant DNA profile was found on numerous probative items of evidence, which corroborated the confession of the actual perpetrator, who had committed a similar crime in the same area using a similar modus operandi.

DNA Index System ("CODIS") database, enabling the identification of suspects nationwide.[24] As of March 2015, CODIS has produced over 280,451 hits assisting in more than 267,461 investigations. In Pennsylvania alone, CODIS has aided over 5,762 investigations and the database over 324,000 profiles.[25]

Other courts have endorsed DNA testing in cases where CODIS could establish actual innocence. Just recently, the Tennessee Court of Criminal Appeals reaffirmed that "'realistically possible' DNA test results include the possibility that testing will not only fail to identify the petitioner's DNA on the item tested but will also simultaneously identify the DNA profile of another known sex offender from the CODIS database." *State v. Nelson*, W2012-00741-CCA-R3CD, 2014 WL 295833, *7 (Tenn. Crim. App. Jan. 27, 2014). *See also Powers v. State*, 343 S.W.3d 36, 53 (Tenn. 2011) (affirming that CODIS allows DNA from a crime scene to potentially match a previously unsuspected individual, which could allow the defendant to show the unsuspected individual acted alone, or at least give a better opportunity to create reasonable doubt about his conviction).

Because DNA testing could reasonably establish Mr. Payne's "actual innocence" of the murder—via a redundancy theory, a CODIS identification, or the

[24] *CODIS: Combined DNA Index System*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics (last visited May 11, 2015).

[25] *CODIS: Pennsylvania Statistical Information*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics/#Pennsylvania (last visited May 11, 2015).

revelation of an unknown individual with no tie to either Mr. Payne or the victim—the PCRA court's determination is free from error and should be affirmed.

IV. CONCLUSION

As recognized by the Legislature when it unanimously enacted our DNA testing statute in 2002, DNA evidence has the unique power to free the innocent and convict the guilty. But that can only happen when those who may have been wrongly convicted can gain access to the very evidence that could set them free. Pennsylvania's post-conviction DNA testing statute balances the need to prevent gamesmanship with the very real need to ensure that the innocent are not imprisoned and the true perpetrators of those crimes do not escape justice. Mr. Payne has met every element of the post-conviction DNA testing statute and is entitled to have the evidence preserved tested to try and develop evidence of his actual innocence.

The Commonwealth's reluctance to search for the truth by opposing a simple DNA test should not sway this Court from its rightful holding: the PCRA court correctly ruled that Mr. Payne's request for testing should be granted as there exists, at the very least, a "reasonable possibility" that exculpatory results would establish his actual innocence. *Amici curiae* respectfully requests that this Court affirm the PCRA court's granting of DNA testing in this matter.

Respectfully submitted,

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Dated: May 18, 2015

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

On behalf of all *Amici Curiae*, and as required by Rule 2135(d) of the Pennsylvania Rules of Appellate Procedure, I certify that, according to the word-count feature of the Microsoft Word word-processing program, the foregoing Brief contains **6,287** words, excluding those parts of the brief exempted by Pa. R.A.P. 2135(b).

Dated: May 18, 2015

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PROOF OF SERVICE UNDER PA. R.A.P. 121

On behalf of *Amici Curiae*, I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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