IN THE

SUPREME COURT OF PENNSYLVANIA

No. 37 WAP 2016

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

LAKISHA MARIE WARD-GREEN,

Appellant.

BRIEF OF THE PENNSYLVANIA INNOCENCE PROJECT AND THE INNOCENCE NETWORK AS *AMICI CURIAE* IN SUPPORT OF APPELLANT LAKISHA MARIE WARD-GREEN

Appeal from the Judgment of the Superior Court of Pennsylvania
dated June 10, 2016 at No. 1337 WDA 2015,
reversing the Order of the Court of Common Pleas of Allegheny County
entered August 26, 2015 at No. CP-02-CR-0009803-2011

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QUESTION PRESENTED

The first question on which allocatur was granted was "[w]hether the exception to the timeliness requirement of the PCRA for after-discovered facts requires the petitioner to file her PCRA Petition before verifying unknown, but suspected, facts through expert analysis."[1]

(*Amici* propose the following answer: In cases requiring expert analysis, the limitations period commences when a petitioner, through the exercise of due diligence, receives the expert report that is essential to her claim.)

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[1] *Amici* submit this brief solely on the first question for which allowance of appeal was granted.

INTEREST OF *AMICI CURIAE*[2]

The Pennsylvania Innocence Project and the sixty-eight other members[3] of the Innocence Network (together, the Innocence Network) are dedicated to providing pro bono legal and investigative services to wrongly convicted individuals seeking to prove their innocence. Oftentimes, the Innocence Network members handle cases in which new scientific developments reveal that an innocent person was wrongfully convicted based on now-discredited evidentiary science and expert analyses.

Accordingly, the Innocence Network has a strong interest in ensuring that the Court's decision in this case endorses a rule that would permit individuals access to courts to raise their innocence claims based on newly discovered facts and advances in forensic science.

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[2] This brief was not authored in whole or in part, or paid for in whole or in part, by any person or entity other than *amici*, their members, or their counsel.

[3] *See* Innocence Network, Members, http://innocencenetwork.org/members/ (last visited Apr. 25, 2017).

PRELIMINARY STATEMENT

Over the last twenty-five years, forensic science has changed dramatically. Scientific methodologies and conclusions that were once considered accurate and reliable are now discredited: for example, arson science, shaken baby syndrome, microscopic hair analysis, and bite-mark analysis. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) ("Serious deficiencies have been found in the forensic evidence used in criminal trials."). Tragically, many innocent people have been convicted based predominantly on that flawed science.[4] This case directly impacts those people and their opportunity to challenge their wrongful convictions under Pennsylvania law.[5]

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[4] *See* Brandon Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009) (conducting a study of overturned criminal convictions and finding that invalid forensic science contributed to at least 60% of the wrongful convictions); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491 (2006) ("The legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics."); *see* Innocence Project, DNA Exonerations in the United States, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Apr. 24, 2017) (stating that 46% of those exonerations obtained by DNA evidence overturned convictions that involved misapplied forensic science).

[5] Importantly, this case also directly impacts the ability of Pennsylvania courts to review and overturn wrongful convictions, an often overlooked, yet critical responsibility of the judiciary. *See* Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xiii-xvi, xxxiii-xxxvi (2015) (arguing that "judges have an affirmative duty to ensure fairness and justice" in the criminal context, including exonerations).

Typically, these claims of "shifted science" are procedurally presented for the first time under the "newly-discovered facts" exception to the Post Conviction Relief Act ("PCRA"), which provides petitioners a short, sixty-day window in which to raise a claim of innocence based on the discovery of new material facts (or the application of new science) that predicate a cognizable claim. *See* 42 Pa.C.S. § 9545(b)(2). While this is only a small subset of PCRA claims, it is an important one. Thus, when the sixty-day clock commences is critical, and could mean the difference between the exoneration of an innocent person or her continued unlawful incarceration.

This case presents a unique opportunity for this Court to fashion a rule that would apply to shifted-science cases, and other cases where expert evidence is essential to presenting a PCRA claim based on newly discovered facts. Many times, PCRA petitioners learn of new facts or forensic science developments through a newspaper story, something on television, or even obtaining a copy of a scientific study from another prisoner. But, after learning of these unverified new facts, it takes time to develop them, locate pro bono counsel and an expert, and have that

expert apply developing forensic science to the specific facts of a petitioner's case.

The sixty-day clock cannot start when a petitioner first hears of new scientific developments, or else the numerous cases of innocence noted below could never have been brought to light. Accordingly, *amici* here urge this Court to endorse the following rule: *in cases requiring expert analysis, like the present case or shifted-science cases, the sixty-day limitations period should not start before a petitioner is able, through the exercise of due diligence, to obtain an expert report that is essential to her claim.*

ARGUMENT

I. The First Question Presented Affects Shifted-Science Cases and Requires Recognition That Discovery of the "Fact" of a Change in Forensic Science Does Not Suffice to Start the PCRA Sixty-Day Limitations Period.

In granting Ms. Ward-Green's petition for review, this Court framed the first issue on appeal as whether the sixty-day clock starts for a "new facts" petitioner "before verifying unknown, but suspected, facts through expert analysis." This is precisely the issue faced in shifted-science cases, where an incarcerated individual comes across suspected facts and new scientific developments while in prison, but has

yet to procure an expert opinion that connects all the dots and establishes the petitioner's right to relief.

For example, DNA testing was first used as a basis for conviction in a criminal case in 1987, *see Andrews v. State*, 533 So.2d 841 (Fla. Ct. App. 1988),[6] and it was first applied to overturn a wrongful conviction in 1989.[7] Since then, DNA forensic science has developed significantly, and that progress is likely to continue into the future.[8] In other words, to pinpoint one date on which the myriad research and expert opinions on DNA testing ultimately coalesced to support a particular petitioner's PCRA claim is impossible.[9]

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6 *See* Lisa Calandro, Dennis J. Reeder, & Karen Cormier, *Evolution of DNA Evidence for Crime Solving – A Judicial and Legislative History*, FORENSIC MAG. (Jan. 6, 2005, 3:00 AM), http://www.forensicmag.com/article/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislative-history.

7 *See First DNA Exoneration*, NW. L. SCH., http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html (last visited April 13, 2017). Since 1989, the use of DNA testing has led to numerous exonerations, nearly half of them overturning convictions that were originally obtained on the basis of misapplied or faulty forensic evidence. *See* Innocence Project, *supra* note 1.

8 *See* PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE: VOLUME 2, §§ 18.01-07 (5th ed. 2012).

9 Indeed, as the PCRA court noted in Ms. Ward-Green's case, "42 Pa.C.S. § 9543.1 for Post Conviction DNA Testing was enacted in 2002 to address such concerns." *See Commonwealth v. Ward-Green*, 141 A.3d 527, 534 (Pa. Super. Ct. 2016) (quoting the PCRA court).

For another example, in which discredited evidentiary science gradually has been phased out, in 2000 the FBI started routinely using mitochondrial DNA testing instead of microscopic hair comparison analysis as DNA testing became more available. Years later, compelled by a few high-profile exonerations of wrongful convictions that had been based on hair comparison evidence, the FBI, collaborating with the Department of Justice, Innocence Network founding member the Innocence Project, and the National Association of Criminal Defense Lawyers, audited all pre-2000 criminal cases involving microscopic hair analysis and concluded that FBI experts had provided inaccurate scientific testimony in over 90% of the cases reviewed.[10] In the years prior to 2000, individuals challenging their convictions obtained through microscopic hair analysis via PCRA petitions would not have been able to show that the general scientific consensus on the reliability of such evidence had fully shifted. And, even now, they would need an

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10 *See* Press Release, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*, FBI (Apr. 20, 2015), https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review; Spencer S. Hsu, *Justice Dept., FBI to review use of forensic evidence in thousands of cases*, WASH. POST (July 10, 2012), https://www.washingtonpost.com/local/crime/justice-dept-fbi-to-review-use-of-forensic-evidence-in-thousands-of-cases/2012/07/10/gJQAT6DlbW_story.html.

expert opinion applying that shift to the particular facts of their case to have a justiciable "claim."

Similarly, other formerly accepted types of evidence that are slowly disappearing from mainstream approval include shaken baby syndrome, bite marks, polygraph tests, arson science, and shoe-tread analyses.[11]

But what of those people who were wrongly convicted based on that faulty evidence? This Court's decision will have far-reaching impact on those cases. Attempting to distill the natural evolutionary timeline of forensic science into a single trigger date for a limitations period is a singularly convoluted task, particularly if the relevant science has not been applied by an expert to the specific facts of a case. In other words, changes in science happen over time, and they require expert analysis and application to a particular petitioner's case before

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11 *See e.g.*, *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1051 (N.D. Ill. 2015)("There appears to be little, if any, scientifically valid data to support the accuracy of bite mark comparison, and the data that does exist is damning."); C.Z. Cory & B.M. Jones, *Can Shaking Alone Cause Fatal Brain Injury? A Biomechanical Assessment of the Duhaime Shaken Baby Syndrome Model*, 43 MED., SCI. & L. 317 (2003); M.T. Prange et al., *Mechanical Properties and Anthropometry of the Human Infant Head*, 48 STAPP CAR CRASH J. 279 (2004); FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS, PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf; PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE: VOLUME 1, §§ 8.01-15, 13.01-11, 16.01-14 (5th ed. 2012).

they can be brought to a PCRA court. Accordingly, any rule in this case should account for shifted-science cases.

II. *Amici*'s Rule Is Necessary for Many Petitioners to Be Able to Present Their Claims of Innocence in Shifted-Science Cases.

The PCRA's sixty-day filing period should start at the point when petitioners have a substantiated basis for a challenge to their convictions (*i.e.*, from the date when a claim could reasonably be brought). In cases involving changing forensic science (like the shifted-science cases of many of *amici*'s clients) or newly discovered facts that require expert analysis (like Ms. Ward-Green's case), that point does not occur until an expert, after having reviewed the specific facts of the case in light of prevailing scientific consensus, communicates to the petitioner a basis that is essential for her PCRA claim. Any other rule, like the Superior Court's here, could effectively prevent individuals from seeking relief from their wrongful convictions. Accordingly, this Court should endorse *amici*'s proposed framework, for at least the following two reasons.

First, from an individualized perspective, people who were convicted based on what is now known to be inaccurate forensic science

should have a reasonable opportunity to challenge their wrongful convictions. Here are just a few examples:

- ***Bunch v. Indiana*, 964 N.E.2d. 274 (Ind. Ct. App. 2012)**

In 1995, Kristine Bunch was convicted of felony murder of her son, who had died in a fire in their mobile home. *Id.* at 279. Ms. Bunch was convicted and sentenced to sixty years imprisonment based in large part on fire-science testimony from multiple purported experts. *Id.* at 279-81. Eleven years later, after learning of advances in fire victim toxicology analysis that contradicted the supposedly airtight evidence offered at her trial, Ms. Bunch filed for post-conviction relief. *Id.* at 282. Fire victim toxicology analysis had first emerged as a legitimate component of fire investigations in 2001, when it was included in the National Fire Protection Association 921 Guide for Fire and Explosion Investigation (NFPA 921)—a leading peer-reviewed publication in that field. *Id.* at 287-88. But Ms. Bunch was not able to substantiate her claim of innocence, drawing on the developing science,[12] until 2006. Accordingly, under the Superior Court's rule in this case, Ms. Bunch's claim would have been time barred.

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[12] Due to the continual, gradual development in the field, the NFPA 921 is updated every three years with new research and methodologies. *See id.* at 292.

- ***Han Tak Lee v. Tennis*, No. 4:08-CV-1972, 2014 WL 3894306 (M.D. Pa. June 13, 2014)**

In 1990, Han Tak Lee was convicted of arson and murder in connection with the death of his daughter in a cabin fire. *Id.* at *1. Mr. Lee's conviction, and resulting mandatory life sentence, was based primarily on the supposedly scientific conclusions of a few experts who testified, based on burn patterns in the cabin, that the fire had been set deliberately. *See id.* at *5-6. Fifteen years later, after a "revolution in fire science" that "toppled old orthodoxies and cast into doubt longstanding assumptions regarding fire scene analysis," Mr. Lee finally obtained an expert report that utterly discredited the evidence upon which his conviction was based. *See id.* at *3.[13] In other words, it was not until years after burn-pattern analysis was generally known to be flawed that Mr. Lee was able to secure an expert report substantiating his claim of innocence. But under the Superior Court's rule in this case, Mr. Lee's claim would have been time barred.[14]

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[13] Indeed, Mr. Lee's expert testified, and the government conceded, that the prosecution's methodology led to an error rate of "90% or more"—a rate "greater than one would have achieved through random guessing." *See id.* at *3.

[14] Notably, Mr. Lee originally filed a PCRA petition in state court in 1995, based on ineffective assistance of counsel. *See Han Tak Lee v. Glunt*, 667 F.3d 397, 401 (3d Cir. 2012). But the trial court did not rule on that petition for over a decade, during which time Mr. Lee amended his original petition to add his claim of shifted

- ***Commonwealth v. Perrot*, Nos. 85-5415, 5416, 5418, 5420, 5425, 2016 WL 380123 (Mass. Super. Ct. 2016)**

George Perrot was convicted in 1992 of burglary and rape based in large part on the testimony of Wayne Oakes, an FBI forensic hair investigator, who concluded at trial that hairs found at the scene of the crime definitively matched those of Mr. Perrot. *See id.* at *15-18. Since then, hair analysis has been effectively discredited. In addition to the FBI's study noted above, the National Academy of Science published a report in 2009 "rejecting a forensic hair analyst's competency to opine on a comparison's statistical significance." *Id.* at *25. And in 2012, the FBI audited those cases in which hair microscopy examiners had testified, and specifically determined that in Mr. Perrot's case, Oakes had "made erroneous statements when testifying regarding microscopic hair comparison." *Id.* at *24. Put differently, although individualized hair analysis had been known to be inaccurate for years, it was not until 2012 that Mr. Perrot discovered that the specific expert's

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science. *Id.* Ultimately, the trial court dismissed his petition and the Superior Court affirmed, so Mr. Lee was forced to seek *habeas* relief in federal court, which was eventually granted. *Id.*; *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159, 169 (3d Cir. 2015).

testimony in his case was wrong.[15] But under the Superior Court's rule in this case, even after Mr. Perrot had served the better part of thirty years in prison because of false forensic science, his claim for post-conviction relief would have been time barred.

- ***People v. Bailey*, 144 A.D.3d 1562 (N.Y. App. Div. 2016)**

In 2002, Renee Bailey was convicted of second-degree murder in connection with the death of a toddler who attended the daycare Ms. Bailey owned. *See id.* at 1563 (*Bailey II*); *People v. Bailey*, 999 N.Y.S.2d 713, 715-16 (N.Y. Crim. Ct. 2014) (*Bailey I*). The jury convicted Ms. Bailey based on the testimony of doctors who concluded that the child's death was due to "non-accidental brain injury . . . from violent shaking" (*i.e.*, shaken baby syndrome (SBS)). *Bailey I*, 999 N.Y.S.2d at 716. But in the decade or so after Ms. Bailey's conviction, there occurred a "progressive change in the attitude toward pediatric head trauma," to the extent that doctors now no longer rule out short falls and simply assume SBS in cases of infant death due to head trauma. *See id.* at 717-719. Accordingly, in 2014, in light of the more-recent developments in

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15 In essence, the 2012 FBI report, though a recantation by the FBI and not an expert's report applying shifted science to the specific facts of Mr. Perrot's case, effectively acted as such by alerting Mr. Perrot to the existence of a potential, justiciable challenge to his conviction.

SBS research, Ms. Bailey obtained expert testimony contradicting the forensic science offered at trial that substantiated her claim of innocence. *See id.*

The list goes on.[16] The connecting thread of these stories is this: in every case, the petitioner's conviction was based on a type of forensic science that has since been discredited, but it was not until *after* the science shifted that the petitioner could obtain an expert's analysis applying the newly accepted principles to the specific facts of the petitioner's case. So in these cases and many more, it is not until the petitioner obtains that particularized analysis that she has a substantiated basis upon which to bring a PCRA claim. It is at that point when the sixty-day limitations period should start, because it is only then when a PCRA petition can "provide a reasonable opportunity for those who have been wrongly convicted to demonstrate the injustice of their conviction." *Commonwealth v. Peterkin*, 722 A.2d 638, 643 (Pa. 1998).

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16 *See, e.g.*, Garrett & Neufeld, *supra* note 4, at 35-84 (discussing many cases in which invalid forensic science led to convictions); Innocence Project, The Cases, https://www.innocenceproject.org/all-cases/#unvalidated-or-improper-forensic-science,exonerated-by-dna (last visited Apr. 24, 2017) (listing 158 cases in which invalid forensic evidence contributed to wrongful convictions).

Second, from a practical perspective, petitioners need adequate time to prepare a reasonable claim under the PCRA, and starting the sixty-day clock from the date of receipt of an expert's report would afford petitioners that time.

The timeline of a PCRA petition in a shifted-science case is instructive. Typically, petitioners begin searching for PCRA counsel soon after learning of facts they suspect might discredit the scientific evidence used in their cases.[17] This process alone may take quite some time, even if the petitioner has adequate resources (which is generally not the case), as counsel usually needs time to review the record before

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[17] Notably, many prisoners do not have consistent or reliable access to generally public records, a fact this Court has expressly made allowance for in the past. *See Commonwealth v. Burton*, No. 9 WAP 2016, 2017 WL 1149203, at *16 (Pa. Mar. 28, 2017) (holding that public records can be deemed "unknown" for pro se prisoner PCRA petitioners). And just like petitioners' access to public records is limited, so too is their ability to discover or recognize what would otherwise be "new facts" that would trigger the sixty-day clock under the Superior Court's rule. Indeed, the Superior Court's decision is particularly unreasonable as it applies to incarcerated petitioners (and especially those that are pro se), because it effectively requires generally unsophisticated individuals to remain perpetually abreast of all the latest scientific breakthroughs relevant to their convictions. *See generally Wilson v. Beard*, 426 F.3d 653, 661 (3d Cir. 2005) (holding that due diligence did not require prisoner to monitor local news twelve years after conviction when there was no reasonable basis to conclude that local news would provide information on prisoner's case); *Poole v. Woods*, No. 08-cv-12955, 2011 WL 4502372, at *17 (E.D. Mich. Aug. 9, 2011) (holding due process claim based on discovery of faulty bite mark evidence was timely under applicable limitations period of AEDPA; "this Court does not equate reasonable diligence with requiring Petitioner to regularly scour the Detroit Free Press and Michigan Court Reporters more than a half-decade after his direct appeal was exhausted in the off-chance that something unforeseeable yet useful to his case would be found").

accepting the representation. And because these types of cases generally involve complex scientific evidence, it is even more important to secure a qualified expert who is willing to testify. This crucial step is time consuming for anyone, but for indigent petitioners[18] it can often take well beyond the sixty-day period. But, without the expert's assistance, a petitioner will usually be unable to articulate sufficiently the link between the change in evidentiary science and the particular facts of the petitioner's case to satisfy minimum pleading standards. *See* Pa. R. Crim. P. 905, cmt (stating that PCRA petitions that "lack particularity" are "defective"). Any other start date for the limitations period would effectively act as a bar to petitioners seeking relief from their unlawful convictions.

CONCLUSION

For these reasons, *amici* respectfully request that this Court reverse the Superior Court's decision. On the first issue for review, *amici* specifically request that this Court hold that in cases requiring

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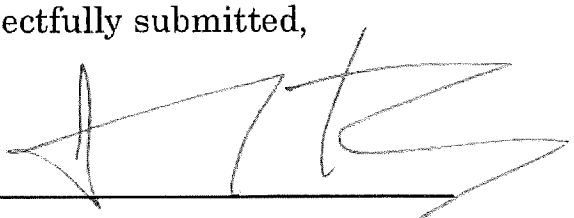
[18] In *amici*'s experience, often a petitioner's entire family will join in the effort of raising enough money to pay for an expert's services. And although petitioners can apply to the court for the appointment of an expert witness, that decision "is within the sound discretion of the PCRA court" and such requests are not often granted. *See Commonwealth v. Jordan*, No. 1981 WDA 2014, 2016 WL 82291 (Pa. Super. Ct. Jan. 6, 2016).

expert analysis, the limitations period commences when a petitioner, through the exercise of due diligence, obtains the expert report that is essential for her claim.

Respectfully submitted,



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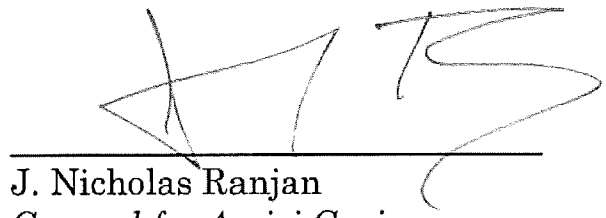
CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 531(b)(3) and 2135(d), the undersigned certifies that this Brief complies with the type-volume limitations of Pa. R. App. P. 531(b)(3), because this Brief contains 3,543 words, excluding those parts exempted by Pa R. App. P. 2135(b).



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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, pursuant to Pa. R. App. P. 2185 and 2187, I filed the foregoing brief by hand with the Prothonotary for the Pennsylvania Supreme Court, and served it by first-class mail on the following counsel of record:

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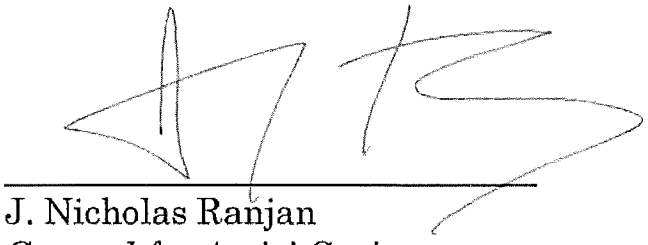

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