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IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PA.

CRIMINAL DIVISION

* * *

COMMONWEALTH OF PENNSYLVANIA)	
)	
)	
vs.)	
)	No. 482 C 1991
)	
JOHN KUNCO,)	
)	
Defendant.)	

* * *

HEARD: November 29, 2016
BEFORE: Christopher A. Feliciani, Judge

* * *

PROCEEDINGS

* * *

A P P E A R A N C E S

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On Behalf of the Defendant:
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well?

DEPUTY DEPALMA: Yes.

THE COURT: Yeah, that's fine.

Who can I say is lead counsel?

MS. THOMPSON: I am, Your Honor.

THE COURT: Ms. Thompson. It's okay if each of you handle different witnesses, but I would appreciate it if whoever does the direct examination also would handle objections, if there's anything on cross, and it will just make things a little bit more orderly.

So with that, there is a motion to sequester witnesses. Are there any witnesses in the courtroom currently?

MR. FABRICANT: Yes.

THE COURT: Okay. So except for the first witness who is being called, everyone else, if you could wait out in the hallway, and we'll call you one at a time.

Ms. Thompson, your first witness, unless you wanted to make an opening statement.

1 MS. THOMPSON: I would like just
2 to discuss very briefly, Your Honor, a
3 little bit about the basis for relief
4 that we're asking for. And I also
5 would like to introduce two more
6 members of our team. Matt Kellner is
7 the paralegal who's working with us,
8 and he will be handling some of the
9 technology that we're dealing with.
10 And Ben Baker, the student who's
11 working with us, so he's also up, here
12 and I hope that's okay.

13 THE COURT: That's fine.

14 MS. THOMPSON: Your Honor, also,
15 I'm wondering if it would be worth it
16 to have a little bit of argument about
17 the DNA testing just because we are
18 arguing in the alternative to the
19 grant or vacate of the conviction, and
20 it's your, obviously, it's your call,
21 but we are prepared to argue on that
22 issue as well.

23 THE COURT: The DNA testing of,
24 with regard to the blanket?

25 MS. THOMPSON: That and also the

1 order, we are requesting an order for
2 an evidence search for the several
3 other items of evidence that we
4 believe are still within the custody
5 and control of the Commonwealth.

6 THE COURT: And I know the last
7 time we had a conference by phone,
8 Mr. Hopson, you indicated that you've
9 done an exhaustive search, and the
10 only thing that's been located is this
11 blanket.

12 MR. HOPSON: That is correct,
13 Your Honor.

14 THE COURT: Was there a rape kit
15 that was in the possession of the
16 police at one time?

17 MR. HOPSON: I believe there may
18 have been, that's why I subpoenaed
19 District Judge Gongaware, he's a
20 little more familiar with that, and he
21 can probably address that about
22 anything with evidence. But I do
23 remember personally I went in every
24 room looking at every bag to see what
25 name was on there, and the only thing

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we found was the blanket.

MS. THOMPSON: We do find in our experience that things get separated, and that's happened already in this case. The girdle and the cord that were used during the attack were separated from the blanket. We know that there were clothing, there was clothing collected from the victim at the scene, as well as a rape kit and a tong was used in the torture. All of those items have gone to the Greensburg Lab. We have information that they were with Troop A, they have been spread in hither and yon, and there might be things at the Clerk of Courts Office and these other locations. So we do believe that a search might help us locate them. We've had success in Pennsylvania on several occasions with those just turning up.

THE COURT: You're saying a search, do you want to search?

MS. THOMPSON: We would hire a

1 private investigator, whatever is
2 easiest for the Commonwealth and to
3 make sure that we're not testing or
4 taxing any physical needs of the
5 Commonwealth. But we would like that
6 search to occur.

7 THE COURT: Is there an
8 objection to that?

9 MR. HOPSON: Your Honor, the
10 problem that I have with that is if he
11 should be granted a new trial, we're
12 going to get to that in discovery
13 then.

14 THE COURT: I don't know what
15 you mean.

16 MR. HOPSON: If he's granted a
17 new trial, we're going to get to that
18 in discovery.

19 THE COURT: To the evidence?

20 MR. HOPSON: Yeah. If he
21 cannot -- and again, if he's denied
22 the PCRA, it's been the Commonwealth's
23 position that he cannot make a prima
24 facia case, that absence, that his DNA
25 not being at the scene would show his

1 actual innocence. So I would revisit
2 it, if we, once we deal with the PCRA,
3 I think we could revisit the idea
4 about an evidence search. I don't
5 have an objection to that.

6 THE COURT: Okay. So you want
7 to argue the issue of the DNA evidence
8 that's available currently, at least
9 what we know about, you want to argue
10 why that should be tested before we go
11 any further?

12 MS. THOMPSON: Absolutely. The
13 evidence that we do have is this
14 blanket upon which a great deal of the
15 attack occurred. Now it's never been
16 tested, it's never been run through
17 any presumptive tests. It is highly
18 possible that there is semen on that
19 blanket, that there is saliva.
20 There's a possibility that the
21 perpetrator himself might have been
22 wounded and that blood might have been
23 left on that blanket, not to mention
24 just the very basic touch DNA just
25 from all of the movement and the fact

1 that he was lying on the blanket for a
2 good 45 minutes.

3 We also know that red hairs that
4 did not Match Mr. Kunco or the victim
5 were found on that blanket.

6 So we are already aware that
7 there is a very large trove of
8 biological material that is likely on
9 that blanket. Mr. Hopson has insisted
10 that we are arguing that the absence
11 of DNA is going to prove innocence.
12 We're actually arguing the exact
13 opposite. We believe that all of this
14 evidence could very likely provide an
15 unknown male DNA profile, and that
16 unknown profile, if it does not match
17 Mr. Kunco, and we are to assume the
18 exculpatory here, if that unknown
19 profile does not match Mr. Kunco, if
20 it is a full profile, we can upload it
21 into CODIS and get not only the name
22 of the actual perpetrator, but their
23 entire rap sheet.

24 So we believe that testing could
25 be incredibly probative here and, in

1 fact, exclude Mr. Kunco entirely. And
2 this follows on a testing that was
3 done in 2009 that has already excluded
4 Mr. Kunco from that cord that was
5 central to the attack. So we're not
6 starting with the sense of not knowing
7 where we're going. We already know
8 that Mr. Kunco has been included from
9 some of the DNA, and we believe what's
10 on the blanket could be even more
11 clear.

12 THE COURT: How is it that the
13 blanket wasn't available the last time
14 there was DNA testing available?

15 MR. HOPSON: As I understood it,
16 we had spoken to Chief Zellers, who is
17 since deceased, and he had indicated
18 to us that there was nothing. The
19 Innocence Project came back to us
20 after that asking for us to look
21 again, when we did, that's when we
22 found the blanket. But, Your Honor, I
23 point out though that they have to
24 present a prima facie case
25 demonstrating that, assuming

1 exculpatory results, it would
2 establish his actual innocence. So
3 that takes us back to this bite mark.
4 So again, the bite mark question
5 is the crucial question here. And
6 that's why if he gets a new trial on
7 the bite marks, then DNA testing will
8 probably be ordered in discovery.
9 That's why I think we have to address
10 this first.
11 Remember, we're not dealing here
12 with a situation pretrial. The
13 defendant was convicted by a jury of
14 his peers, 25, 26 years ago. So it is
15 all their burden to prove, and their
16 burden to show, make a prima facie
17 case, for this testing and assuming
18 exculpatory results and the cases that
19 I cited in my initial answer, I think
20 Heilman and Brooks were there, and
21 they just indicate that they have to
22 show more than the absence, they have
23 to present more than just the absence
24 of the defendant's DNA at the crime
25 scene. That does not establish actual

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innocence.

THE COURT: So your argument then is if the blanket is tested for DNA and there's an absence of Mr. Kunco's DNA on the blanket, that doesn't prove his innocence?

MR. HOPSON: That is correct.

THE COURT: It's a factor that might have been considered by a jury though, right?

MR. HOPSON: Yes, but it has to show actual innocence. With the evidence that was presented at trial, it's the Commonwealth's position that wouldn't happen. Now that's why I believe the Innocence Project has filed the PCRA, because they need, and I don't want to put words in their mouth, but they need to knock out, they can't knock out the eye witness testimony, they need to knock out the voice identification I should say. They want to try to knock out these bite marks.

MS. THOMPSON: Your Honor, the

1 Commonwealth is actually complaining
2 two very separate pots. The
3 postconviction relief is separate from
4 a request for DNA testing. On the
5 request for DNA testing, we merely
6 need to show that assuming exculpatory
7 results, those results could provide
8 proof of actual innocence.

9 The Payne case, which I cited on
10 our last teleconference, is very clear
11 that those results, the exculpatory
12 assumed results, need only show within
13 the realm of reason that actual
14 innocence is possible.

15 So that means no matter the bad
16 fact in the case, if it is within the
17 realm of reason that testing could
18 prove innocence, that testing must be
19 granted. And here, even with the bite
20 mark, which we do not believe to be
21 valid, and we have brought our
22 witnesses here to discuss that, and we
23 will discuss it later on today. But
24 even putting that aside, we believe
25 that testing on the blanket most

1 certainly could prove Mr. Kunco's
2 actual innocence. As I noted before,
3 if we get a full STR profile that is
4 uploaded to CODIS, we could have a
5 name of the actual perpetrator.

6 THE COURT: But see, that helps.
7 I understand Mr. Hopson's argument.
8 But what evidence was presented at the
9 trial with regard to this blanket?
10 Was there evidence from the victim or
11 some other source that this is where
12 the assault occurred, on this
13 particular blanket?

14 MR. HOPSON: The Commonwealth
15 attempted to put the blanket into
16 evidence. The Court did not allow it.
17 There was an objection, and the Court
18 didn't allow the blanket being put
19 into evidence.

20 MS. THOMPSON: But we know from
21 the police report --

22 THE COURT: What was the basis
23 for the Commonwealth trying to
24 introduce the blanket though? What
25 purpose was there for --

1 MR. HOPSON: I believe there was
2 blood on the blanket.

3 THE COURT: But no source?
4 There was no identification as to
5 whose blood it was?

6 MR. HOPSON: No.

7 MS. THOMPSON: I believe the
8 blanket was actually on the bed, and
9 that was where it was recovered.

10 THE COURT: So did the victim
11 testify that this is where the assault
12 occurred, on this blanket?

13 MR. HOPSON: She testified that
14 this happened on the bed, on the
15 blanket. She testified she was
16 bleeding.

17 THE COURT: I'm going to defer a
18 decision on the DNA testing. But I
19 can tell you, I'm going to just make
20 it clear at this point, there's just
21 an inherent feeling that I have that
22 if DNA testing is able to be done on
23 the blanket and there was evidence at
24 trial that it was on this blanket
25 where the assault occurred and there

1 could be exculpatory or inculpatory
2 evidence of some other person on the
3 blanket, it should be tested.

4 MR. HOPSON: But that would fly
5 in the face of the rule and the cases
6 I cited. And I also read the pain
7 case. The Payne case was a little bit
8 different than this case, because all
9 the, the only evidence in the Payne
10 case were three, I believe jailhouse
11 informants, saying that the defendant
12 had confessed to them that he took
13 part in an assault. So the Court
14 reasoned, well, that was their, it was
15 only on their credibility and they had
16 serious credibility problems, and in
17 addition to that, there were, the
18 Commonwealth argued, I believe, well
19 he was charged with conspiracy, so
20 even if, but they said if his DNA's
21 not there, then it could, the DNA
22 testing could prove actual innocence
23 in that case.

24 That's very different in this
25 case where we have a bite mark that

1 was consistent with the defendant's
2 dentition, a voice identification from
3 the victim, who didn't have
4 credibility issues, and plus
5 circumstantial evidence about what the
6 defendant testified, what the
7 defendant once said at a party
8 regarding sexual fantasies, which I
9 don't want to get into that at this
10 point.

11 THE COURT: I'm going to defer a
12 decision on the DNA testing.

13 MS. THOMPSON: If I could just
14 add one last issue. The Commonwealth
15 did conduct serology testing on that
16 blanket, and on the blanket they did
17 find blood that was consistent with
18 the victim. And as I noted before,
19 they also found these hairs. So we do
20 know the Commonwealth did conduct
21 testing on that blanket because of its
22 probative value, Your Honor.

23 THE COURT: That was the only
24 thing that was determined to be on the
25 blanket, the victim's blood?

1 MR. HOPSON: Correct, Your
2 Honor.
3 MS. THOMPSON: And the hair.
4 THE COURT: That was done before
5 the trial, not as part of one of these
6 PCRA actions?
7 MR. HOPSON: No, it was done
8 before trial.
9 THE COURT: At the time of the
10 trial, was it possible to conduct
11 extensive DNA testing?
12 MR. HOPSON: DNA was not
13 available at that time. And that's
14 one of the problems too. If we just
15 do touch DNA here, many people handled
16 this evidence.
17 THE COURT: Well, your argument
18 is that maybe it will come up in the
19 database if there's someone else's
20 DNA, other than detectives and police
21 and anyone else who touched it or the
22 victim.
23 MS. THOMPSON: That's absolutely
24 right.
25 THE COURT: Or family members or

1 whatever. Well, let's just proceed on
2 the PCRA for now, but I can say that
3 I'm inclined to order testing on the
4 blanket. That's my inclination. I
5 understand what your cases say, but I
6 feel that --

7 MR. HOPSON: I would ask that
8 the Commonwealth at least, that, one,
9 the Commonwealth be allowed to brief
10 it. And if the Court's still inclined
11 to order the testing, then I would
12 request that the Commonwealth send it
13 to their lab for the DNA testing.

14 THE COURT: You don't have any
15 objection to that, do you?

16 MS. THOMPSON: I actually do. I
17 would prefer that we --

18 THE COURT: Someone has to agree
19 on something. There has to be some
20 common ground.

21 MS. THOMPSON: I do not mean to
22 make this day longer, Your Honor, but
23 I do believe that one of the issues we
24 have with testing is that we do have
25 hairs, and we know that we have hairs.

1 The Commonwealth does not have a state
2 lab that is equipped to conduct
3 mitochondrial DNA testing. So this is
4 not a matter of being recalcitrant, we
5 actually do not have the facility to
6 do some of the advanced testing that
7 we would like to do.

8 THE COURT: Okay. Well, we'll
9 cross that bridge when we get to it.

10 MS. THOMPSON: Just very
11 briefly, with regard to Section 9543
12 and the request that we're here for
13 today, we believe that Mr. Kunco is
14 entitled to the vacatur of his
15 conviction or at least a new trial,
16 based on two of the enumerated reasons
17 under the statute.

18 First, that the newly discovered
19 evidence in this case, if presented at
20 Mr. Kunco's trial in 1991, would have
21 affected the outcome, and we do not
22 believe he would've been found guilty.

23 Secondly, we do believe the
24 issues here, with regard to the
25 forensic evidence, implicates some due

1 process issues. Specifically, Your
2 Honor, in March of this year the
3 American Board of Forensic Odontology
4 issued new guidelines for the first
5 time in 40 years, indicating that bite
6 mark individualization testimony is
7 scientifically unsound. Dr. Freeman
8 will be testifying as the president of
9 that body about the reality of the
10 science behind bite marks and why they
11 do not work here.

12 A month later on April 6th and
13 April 9th, the two Commonwealth
14 experts who testified at Mr. Kunco's
15 trial that his teeth were responsible
16 for the bite mark on the victim's
17 body, gave an affidavit to this Court
18 stating that they could no longer
19 connect Mr. Kunco to that bite mark
20 under the guidelines.

21 Now that second affidavit that
22 they've recently turned in to the
23 Court stated that they could only say
24 that because now they have to adhere
25 to the guidelines. But the truth of

1 the matter is even if they have a
2 suggestive belief they have not and
3 they cannot say that that bite mark
4 can only be attributed to Mr. Kunco.
5 And based on the failure of that
6 evidence, if we went back in time and
7 if we presented this new information
8 about bite mark science, we believe
9 that a jury would no longer be swayed
10 as to Mr. Kunco's involvement in this
11 crime. And it would not just be this
12 new evidence, we would have to add it,
13 and he would have put it in the mix
14 with all of the other things that we
15 now know about bite marks.

16 Since the time of the Kunco's
17 incarceration, 28 individuals who
18 were convicted on bite mark evidence
19 have been -- sorry, who have been
20 convicted and indicted on bite mark
21 evidence, have had those convictions
22 overturned and been exonerated through
23 DNA testing, 28 cases, 5 since the
24 last time Mr. Kunco was before this
25 Court.

1 With regard to the due process
2 issues, the Third Circuit recognized
3 that a fundamental guarantee of due
4 process requires Courts to overturn a
5 conviction where the basic tenants of
6 fairness have been violated through
7 the introduction of unreliable
8 forensic evidence. Quote, as our
9 understanding of scientific truth
10 grows and changes, the law must follow
11 the truth in order to secure justice.
12 And that's from the Han Tak Lee v.
13 Tennis, that's 2014 Westlaw 389 4306
14 at page 19.

15 What has happened here is that
16 by convicting Mr. Kunco on this
17 demonstrably scientifically fraud
18 evidence, we have basically robbed him
19 of his ability to prove his innocence
20 on reliable scientific evidence, and
21 that we believe has led to this man
22 being wrongfully incarcerated for a
23 quarter of a century.

24 THE COURT: How do you explain
25 though, and I don't want to get into

1 this real deeply at this point, but
2 the fact that there was independent
3 evidence of guilt that was presented,
4 including testimony of voice
5 identification, and I believe there
6 was some other evidence also, in
7 addition to the bite mark that was
8 presented.

9 MS. THOMPSON: Much of that
10 remainder evidence is actually
11 incredibly problematic. The voice ID
12 for instance was the ID of a police
13 officer who had actually never spoken
14 to or heard Mr. Kunco's voice, and he
15 just spontaneously imitated what he
16 thought would be a voice with a lisp.
17 That voice had absolutely nothing to
18 do with Mr. Kunco. The victim didn't,
19 wasn't given a chance to hear
20 Mr. Kunco's voice. And based on an
21 imitation, she said that was
22 Mr. Kunco, that was my attacker. That
23 doesn't make sense on its face.

24 THE COURT: So up to the time of
25 the trial, the victim, there was never

1 any situation where she actually heard
2 the defendant's voice?

3 MS. THOMPSON: Not once. And
4 she also never saw Mr. Kunco's face,
5 excuse me, the attacker's face. She
6 was blind in one eye, far sided in the
7 other, she wasn't wearing her glasses,
8 and she testified that she had never
9 seen her attacker's face. So there's
10 actually no adequate ID of Mr. Kunco
11 that even puts him at the scene.

12 And as for that last bit of
13 remainder evidence with regard to Kit
14 Jeffries stating something about
15 produce at a party, Mr. Kunco's
16 girlfriend at the time was also at
17 that party and heard nothing of the
18 sort. This is kind of underscored by
19 the fact that she had provided a very
20 solid alibi, and she also was proven
21 to be a credible witness regarding Mr.
22 Kunco's whereabouts on the night of
23 the crime, which was at home, in bed
24 with her and their newborn child.

25 THE COURT: Okay. Go ahead, I

1 interrupted you.

2 MS. THOMPSON: That was actually

3 really it. And I, at this time, would

4 be happy to --

5 MR. FABRICANT: Just before --

6 THE COURT: Did you want to add

7 something? This is what I was trying

8 to avoid. Go ahead.

9 MR. FABRICANT: I just want to

10 talk a little bit about the

11 materiality of bite mark evidence as a

12 general matter in forensic sciences.

13 In that bite mark evidence is uniquely

14 prejudicial for a variety of reasons.

15 And I think one of the really

16 essential things, one of the reasons

17 that there have been so many wrongful

18 convictions based on bite mark

19 analysis is that there is no innocent

20 explanation for a bite mark to be

21 found on a victim. Unlike DNA

22 evidence, unlike fingerprints, unlike

23 tool marks, any other forensic

24 technique doesn't actually place the

25 teeth of the defendant on the victim's

1 body. That in and of itself is, in
2 most states, a felony assault. It's
3 essentially identifying the defendant
4 as the culprit and accusing the
5 defendant of a crime.

6 So in that circumstance, and
7 also with the type of bite mark
8 evidence at issue here, is that you
9 are able to depict the defendant as an
10 animal. Scientific evidence that
11 demonstrates the animal nature of the
12 defendant and conclusive evidence is
13 that this is the individual who bit
14 this person. It's essentially a
15 directive verdict. So even if the
16 other evidence was stronger than, it's
17 incredibly weak, but even if it were
18 stronger, it's really hard to overlook
19 just how prejudicial bite mark
20 evidence is. And as Your Honor will
21 learn through the course of today and
22 through our briefing, there's
23 absolutely no scientific basis to bite
24 mark analysis at all.

25 THE COURT: Okay. Thank you.

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Mr. Hopson?

MR. HOPSON: Your Honor, I just wanted to -- the testimony at trial, and the Commonwealth is going to offer trial transcript as evidence, was that the victim identified, the victim testified that she identified Mr. Kunco by voice to Detective Charles Korman right after. And there was also evidence in the case that the victim had known the defendant for about six months, because he was a maintenance man in the building, and he would give them coffee at times.

THE COURT: She had exposure to the defendant before this assault occurred?

MR. HOPSON: That is correct, Your Honor.

THE COURT: And she had spoken to him, and she was familiar with his voice.

MR. HOPSON: And when she characterized his lisp, a police officer did speak with a lisp, and she

1 identified him unequivocally, as John,
2 the voice, unequivocally at trial, as
3 John Kunco. And as far --

4 THE COURT: Based upon comparing
5 what the police officer, how he --

6 MR. HOPSON: No, based on her
7 recognition of --

8 THE COURT: Well, the officer
9 was interviewing her, and he said, I
10 think the way it happened was, the
11 officer said did it sound like this,
12 and then he demonstrated what the lisp
13 sounded like, and she said yeah, it's
14 what it is.

15 MR. HOPSON: That was the second
16 time she identified him by voice. The
17 first time was to Detective Korman
18 after the assault. I believe that
19 you'll find that in the trial
20 transcript.

21 And as far as bite mark evidence
22 being prejudicial, all evidence is
23 prejudicial, it just has to be
24 unfairly prejudicial.

25 And I want to also point out

1 that this would not, I would submit to
2 the Court before we get into anything,
3 it's not a subjective opinion of Dr.
4 David or Dr. Sobel, it is an expert
5 opinion. An expert opinion judicially
6 is admissible.

7 THE COURT: Okay. So, Ms.
8 Thompson, if you're ready, you can
9 call your first witness.

10 MS. THOMPSON: We call Dr.
11 David, and I am actually going to hand
12 it off to Mr. Fabricant at this point.
13 Thank you.

14 THE COURT: Okay.
15 Mr. Fabricant. Dr. David, are you in
16 the courtroom? Come on up, sir, we'll
17 swear you in up here.

18 * * *

19 DR. THOMAS DAVID, having been
20 first duly sworn, was examined
21 and testified as follows:

22 * * *

23 THE COURT: And just for all the
24 attorneys from out of town, I can hear
25 best if you're in front of one of the

1 microphones. If you want to move
2 around a little bit, there's
3 microphones in the jury box. As long
4 as you're close to one of them, I can
5 hear you. I prefer you stay here, but
6 if you want to move that's fine.

7 MR. FABRICANT: We have a couple
8 of slides that we're going to use
9 during this. Just for the
10 Commonwealth's information, it's the
11 color photograph of the bite mark, the
12 UV photograph of the bite mark. What
13 else is --

14 MR. HOPSON: You do have the
15 trial evidence, those photographs were
16 put in at trial, were they not?

17 MR. FABRICANT: Yeah.

18 MR. HOPSON: So you have them.
19 That's why the Clerk's didn't have
20 them?

21 MR. FABRICANT: They're
22 available online, these photos.

23 MR. HOPSON: Okay.

24 MR. FABRICANT: Bitemarks.org
25 has a whole article.

1 THE COURT: Are they missing
2 from the Clerk's files? You said the
3 Clerk doesn't have them?

4 MR. HOPSON: That is correct,
5 Your Honor.

6 MR. FABRICANT: I believe that
7 we downloaded ours online. There's a
8 website that the information's
9 available. And there's also, Dr.
10 David wrote an article about this and
11 included photographs.

12 MR. HOPSON: Okay.

13 THE COURT: All right. So when
14 you're back at the evidence presenter,
15 just keep your voice up as loud as you
16 can. I don't have a mic back there.

17 * * *

18 DIRECT EXAMINATION

19 BY MR. FABRICANT:

20 Q. Good morning, Dr. David.

21 A. Good morning.

22 Q. I want to first talk a little bit about the
23 American Board of Forensic Odontology, the ABFO I'm
24 going to refer to it as.

25 THE COURT: I'm sorry, could we

1 at least just have him identify
2 himself, occupation, and that sort of
3 thing?

4 MR. FABRICANT: I'm sorry.

5 BY MR. FABRICANT:

6 Q. Dr. David, would you state your name for the
7 record and your occupation and where you reside?

8 A. Thomas J. David, I'm a dentist, and I live in
9 Marietta, Georgia.

10 Q. And, Dr. David, did you testify in this case
11 originally?

12 A. Yes, I did.

13 Q. And that was in 1991?

14 A. I believe.

15 MR. FABRICANT: Your Honor,
16 shall I proceed or is there other
17 information that needs to be on the
18 record? I'm used to doing
19 cross-examination, so it's hard.

20 THE COURT: Dr. David was one of
21 the witnesses who testified at the
22 trial?

23 MR. FABRICANT: Right.

24 THE COURT: You can proceed.

25 BY MR. FABRICANT:

1 Q. So I'd like to first talk a little bit about
2 the American Board of Forensic Odontology, the ABFO, all
3 right? You are what's known as a diplomate in the
4 American Board of Forensic Odontology, right?

5 A. Correct.

6 Q. And you've been a diplomate since 1987?

7 A. I believe so.

8 Q. And you were a diplomate in 1991, right?

9 A. Correct.

10 Q. And that was when you testified in this case?

11 A. I believe so, yes.

12 Q. In other words, you were Board Certified at
13 that time?

14 A. Correct.

15 Q. And the ABFO is the only forensic dentistry
16 organization that offers Board Certification; is that
17 right?

18 A. Not exactly.

19 Q. What are the others?

20 A. There's another organization that is not
21 credentialed by the Forensic Specialities Accreditation
22 Board. It's like a diploma mill, if you will. So
23 technically you're incorrect, but practically you're
24 correct.

25 Q. And it's the only organization that offers

1 Board Certification for victim identification, right?

2 A. Again, not exactly. There is another Board.
3 A number of questioned document examiners split off from
4 the academy and formed their own Board and then added
5 other specialties, and so there is another Board, and
6 it's the ABFD, the American Board of Forensic Dentistry,
7 although it's essentially a diploma mill, if you
8 understand what that means. But technically there are
9 two boards.

10 Q. Why don't you describe a diploma mill?

11 A. I'm sorry?

12 Q. Please describe a diploma mill.

13 A. When they were formed, I received
14 communication from them that if I paid them \$1,800.00, I
15 could become a diplomate for life.

16 Q. And that was the only requirement?

17 A. I believe you had to pass a jurisprudence
18 exam, but there was no testing of your forensic
19 capabilities essentially.

20 Q. And so the American Board of Forensic
21 Odontology offers Board Certification in bite mark
22 analysis, right?

23 A. They offer Board Certification, including all
24 aspects of forensic odontology, including bite mark
25 analysis.

1 Q. Right. So the ABFO offers Board
2 Certification in bite mark analysis?

3 A. Well, the Board Certification is not just in
4 bite mark analysis. It's in all areas of forensic
5 odontology. Bite mark analysis happens to be one of
6 those areas, but the Board Certification is not specific
7 to bite marks.

8 Q. Right. And when you testified in this case,
9 you said that you were Board Certified, right?

10 A. I was Board Certified in Forensic Odontology.

11 Q. And you were certified in bite marks?

12 A. Bite marks would be included under the
13 certification, but the certification was not specific to
14 bite marks alone.

15 Q. And why are you making this distinction?

16 A. Because you keep calling it certification in
17 bite marks, and the certification is not in bite mark
18 analysis, it's in forensic odontology.

19 Q. Right. And part of forensic odontology is
20 bite marks, yes?

21 A. That's correct.

22 Q. And part of your certification is related to
23 bite marks, yes?

24 A. To the extent that bite marks are included
25 under forensic odontology, yes.

1 Q. Part of and included are the same thing,
2 right?

3 MR. HOPSON: Objection, Your
4 Honor. I think he's answered the
5 question.

6 THE COURT: I think you want him
7 to say he's Board Certified in bite
8 marks and there is no such thing.

9 BY MR. FABRICANT:

10 Q. Is that your testimony that, Dr. David?

11 A. There is no certification specifically in
12 bite marks. The certification or the diplomate status
13 is in forensic odontology, which includes bite marks,
14 dental identification, age estimation, a number of other
15 areas. But the certification is not specific to bite
16 marks.

17 Q. And the ABFO sets standards and guidelines
18 for bite mark analysis, right?

19 A. Yes, they have.

20 Q. And there are no other organizations in the
21 United States that set standards and guidelines for bite
22 marks, right?

23 A. Not to my knowledge.

24 Q. And when you testify, you always tell the
25 jury or a judge about your Board Certification, right?

1 A. Typically, yes.

2 Q. And the jury will learn about your
3 qualifications, right?

4 A. Yes.

5 Q. And some of those qualifications relate to
6 bite mark analysis, right?

7 A. That's correct.

8 Q. And that's so you'll be declared an expert?

9 A. If the case involves bite marks, probably so.

10 Q. And so you offer your Board Certification in
11 an effort to become, declared an expert?

12 A. That's part of the requirements for bite,
13 background information, yes.

14 Q. Would it be fair to say that you're proud of
15 the work that you've done with the ABFO?

16 A. I would think so, yes.

17 Q. You've been a diplomate for 30 years, right?

18 A. Yes.

19 Q. And you're proud of the work that you've put
20 into the organization?

21 A. I'm sorry?

22 Q. You're proud of the work that you've put into
23 the organization?

24 A. Yes.

25 Q. And you're proud of the work of the

1 diplomates?

2 A. Generally speaking, yes.

3 Q. And you distinguished your organization from
4 this diploma mill, so would it be fair to say that the
5 ABFO represents the best and the brightest in forensic
6 dentistry?

7 A. I would think so.

8 Q. And if you're interested in becoming a
9 forensic dentist, really, your only option is the ABFO?

10 A. Well, there were others who have joined the
11 other organization. I don't know what their motivations
12 are, but if you want a certification that means
13 something I think you would, yes.

14 Q. So the top practitioners are ABFO Board
15 Certified Diplomates?

16 A. I mean certainly there are a lot of very
17 competent people that belong to our Board. I don't know
18 a lot of the people that belong to the other Board, so
19 it's difficult for me to say that they may or may not be
20 talented.

21 Q. So you may, it may not be important to be
22 Board Certified?

23 A. Well, I think that it demonstrates a certain
24 level of competency.

25 Q. So it is important to be Board Certified?

1 A. I think so.

2 Q. And part of being a diplomate and just being
3 a forensic dentist generally is to keep up with related
4 developments in your field, right?

5 A. You generally try to, yes.

6 Q. And keep up to date on new research that's
7 produced?

8 A. I'm generally aware of research that's
9 available in the field.

10 Q. So you keep up to date with new research?

11 A. I try to.

12 Q. But you may not?

13 A. Sometimes I may not hear of something in a
14 timely fashion.

15 Q. But you feel like eventually you hear
16 basically everything?

17 A. Usually.

18 Q. Can you think of a time where there was
19 important research that was developed that you didn't
20 know about and learned maybe years later?

21 A. Not off the top of my head. I can't recall.

22 Q. You also keep up with media reports of bite
23 mark analysis, right?

24 A. Generally, yes.

25 Q. And you keep up with critiques of bite mark

1 analysis from the larger scientific community?

2 A. Critiques, are you referring to written
3 critiques or media articles or --

4 Q. Critiques from the scientific community,
5 either reports or in the media?

6 A. Generally, yes.

7 Q. And fair to say you disagree with most of
8 them?

9 A. I'm sorry?

10 Q. I'll withdraw it. And part of what the ABFO
11 does is produces an ABFO Diplomates Reference Guide,
12 right, known as the manual, the ABFO Manual?

13 A. The diplomates reference manual was produced
14 by the Board, and it outlines procedures for the
15 organization itself to run, and then there are also
16 guidelines and standards in there about different areas
17 of forensic odontology.

18 Q. And the reference manual covers bite mark
19 analysis, right?

20 A. Yes.

21 Q. And covers bite mark comparison, right?

22 A. I believe so, yes.

23 Q. Are you not sure? Should we get the manual?

24 A. You're specifying analysis and comparison,
25 and there is a difference. I don't recall specifically

1 if it's delineated that way in the reference manual.

2 Q. Right. And so the difference between bite
3 mark analysis and bite mark comparison is that one is
4 that you're interpreting an injury, that's the analysis,
5 right?

6 A. That's part of the analysis, yes.

7 Q. And comparison is when you compare teeth to
8 an injury, right?

9 A. If there is sufficient evidence, yes.

10 Q. So that's the distinction I was drawing,
11 that's a correct distinction, yes?

12 A. Yes. In other words, analysis does not
13 always result in comparison.

14 Q. Right. That wasn't my question. I was just
15 making the distinction between these two areas, right?

16 A. Correct.

17 Q. And that's a simple question, right?

18 A. When you phrase it that way, yes.

19 Q. And to become Board Certified, there's a
20 process, right?

21 A. Yes.

22 Q. Part of that process requires you to become
23 familiar with the reference manual?

24 A. You would hope so, yes.

25 Q. So yes?

1 A. Yes.

2 Q. You don't hope so, that's part of the
3 requirement, right?

4 A. It's not a requirement that you become
5 familiar with the reference manual, it requires you to
6 be familiar with the field of forensic odontology. You
7 could use other reference materials to become familiar
8 with it. But if you wanted to learn the standards and
9 guidelines that the Board has, you would need to look at
10 that material.

11 Q. Right. And to become Board Certified, you're
12 saying that you could ignore the reference manual?

13 A. You could. I wouldn't recommend it, but you
14 could.

15 Q. But you're tested on your familiarity with
16 the reference manual to become Board Certified, aren't
17 you?

18 A. Some of the questions may involve guidelines
19 and standards, yes.

20 Q. So your answer is yes, you're tested on the
21 manual, right?

22 A. Not specifically on the manual, no.

23 Q. Information that is only included in the
24 manual?

25 A. Well, there's a lot more material that's --

1 Q. That's not my question, Dr. David. I'm
2 asking you if you're tested on information within the
3 reference manual to become Board Certified?

4 A. Sometimes you might be. The questions change
5 from year to year. So sometimes the questions may
6 include material that is directly lifted out of the
7 reference manual, but sometimes it might not. I don't
8 know which questions they choose randomly from one year
9 to the next when they give the exam.

10 Q. Oh yeah, where do they pick random questions
11 from?

12 A. Well, there was a pool of questions that were
13 generated when the examination went digital, so to
14 speak, and those questions are randomly changed from
15 year to year.

16 Q. And you don't know where they come from?
17 They come from the sky?

18 A. They come from a pool of questions.

19 Q. Where did this pool come from?

20 A. Originally when the Board examination went
21 online, there were a number of individuals who met and
22 submitted questions that were vetted through the
23 organization that handles the online exam. And when
24 they were vetted, then there was a pool of questions,
25 and they select from that pool of questions.

1 Q. And who selects?

2 A. I'm not sure exactly who selects the
3 questions. I would suspect that the C&E Committee does,
4 but I don't know that for a fact. I've never been on
5 the C&E Committee.

6 Q. Let's go back to the manual, Dr. David. The
7 manual includes approved message for collecting
8 evidence, right?

9 A. Yes.

10 Q. It includes methods for documenting evidence,
11 right?

12 A. Yes.

13 Q. It includes various methods of photography,
14 for example?

15 A. Correct.

16 Q. And it includes various definitions of
17 scientific terms and dental terms, right?

18 A. Yes, I believe so.

19 Q. Are you not sure?

20 A. I believe so. I haven't memorized the entire
21 manual.

22 Q. As you sit here today, are you aware of
23 whether or not the manual has any definitions to
24 scientific terms in that manual today?

25 A. I think that there are, yes.

1 Q. But you're not sure?

2 A. I haven't memorized the entire reference
3 manual.

4 Q. I didn't ask you if you'd memorized the
5 manual. I asked you whether or not the manual includes
6 definitions of scientific terms, yes or no?

7 A. I believe that it does.

8 Q. But you're not sure?

9 MR. HOPSON: Objection, Your
10 Honor. He can show him the manual if
11 he has a question about it.

12 THE COURT: The objection is
13 sustained. I think he's answered the
14 question adequately.

15 BY MR. FABRICANT:

16 Q. So are you familiar with the manual today?

17 A. I'm generally familiar with the manual. I
18 have not memorized the manual.

19 Q. I didn't ask you if you'd memorized it. I
20 asked you if you're familiar with it. Is your answer
21 yes?

22 A. I'm generally familiar with the reference
23 manual.

24 Q. And are you familiar with the current
25 version?

1 A. Generally, yes.

2 Q. And you're familiar with the area of the
3 forensic odontology manual that the ABFO Board produces,
4 which you based your affidavit in this case on, right?

5 A. Well, some of the material in the reference
6 manual was different at that time than it is now.

7 Q. The manual as it existed when you signed this
8 affidavit, you were familiar with that section of the
9 manual, right?

10 A. Yes.

11 Q. So I want to go back to 1991, and let's talk
12 about the guidelines as they were in place in 1991 in
13 the ABFO reference manual, okay?

14 A. Okay.

15 Q. In 1991, just before we get to that, are you
16 aware if there had ever been any wrongful convictions
17 attributable, at least in part, to bite mark analysis,
18 in 1991?

19 A. I'm sorry?

20 Q. In 1991, were you aware of any wrongful
21 convictions related to bite mark analysis?

22 MR. HOPSON: Objection. For the
23 purposes of a PCRA, Your Honor, and in
24 seeking a new trial, it's not relevant
25 what other, what happened in other

1 cases.

2 MR FABRICANT: Yes, it is.

3 MR. HOPSON: The defendant has a
4 certain burden to prove. If he's
5 claiming newly discovered facts, he's
6 got certain things he's got to show.
7 He can't show, well there's been
8 wrongful convictions in other cases.
9 That doesn't apply. He has to stick
10 with this specific case on a
11 postconviction relief.

12 MR. FABRICANT: Your Honor, if I
13 may, both the affidavits that Dr.
14 David signed indicated that the ABFO
15 guidelines changed in response to
16 wrongful convictions. So it's
17 certainly relevant to his testimony
18 here today.

19 THE COURT: The objection is
20 overruled.

21 BY MR. FABRICANT:

22 Q. In 1991, were you aware of any wrongful
23 convictions attributable to bite mark analysis or
24 comparison?

25 A. I'm not sure that I was in 1991, no.

1 Q. And when you testified in this case in 1991,
2 there had never been a DNA exoneration, right?

3 A. Not that I recall, no.

4 Q. And in 1991, you conducted your analysis
5 consistent with the ABFO reference manual at that time,
6 right?

7 A. Yes.

8 MR. FABRICANT: Judge, I'm going
9 to introduce the affidavits now. I
10 don't know if we need to formally
11 introduce these into evidence.
12 They've been submitted to the Court by
13 both sides.

14 THE COURT: Is there a
15 stipulation as to --

16 MR. HOPSON: I'll stipulate to
17 the affidavits. Which affidavit?

18 THE COURT: It would be helpful
19 for me if you marked them as court
20 exhibits, and then I had them as court
21 exhibits.

22 MR. FABRICANT: For the record,
23 Defense Exhibit A is an affidavit in
24 this that was signed by Drs. David and
25 Sobel, April 9, 2016. And I'm asking

1 that the second affidavit be marked as
2 Defense Exhibit B. It's an affidavit
3 also signed by Drs. David and Sobel,
4 dated August 17, 2016.

5 THE COURT: Okay. There's no
6 objection to either one of those?

7 MR. HOPSON: No objection, Your
8 Honor.

9 THE COURT: Exhibits A and B are
10 admitted.

11 MR. FABRICANT: Your Honor,
12 would you like a copy of these?

13 THE COURT: I'll take the
14 originals, the exhibits that are
15 marked. Unless you still need them?

16 MR. FABRICANT: I've got them.

17 BY MR. FABRICANT:

18 Q. So again, Dr. David, you testified a moment
19 ago that you did your analysis within ABFO guidelines in
20 this case, yes?

21 A. Yes.

22 Q. You did your comparison within ABFO
23 guidelines in this case, yes?

24 A. Yes.

25 Q. And you would not have gone outside of ABFO

1 guidelines at that time?

2 A. Not that I recall, no.

3 Q. And before you testified in this case, you
4 submitted a written report, right?

5 A. Yes.

6 Q. And that was actually the day before you
7 testified?

8 A. I don't know the exact date that the report
9 was submitted, but I know it was submitted before I
10 testified.

11 Q. And in that report, you wrote that after
12 careful consideration, it is my opinion that the injury
13 in question is a human bite mark. It is also my opinion
14 to a reasonable degree of dental certainty that the bite
15 mark found on the victim was produced by the teeth of
16 John Kunco. Please find enclosed a statement for my
17 time and rendered on your behalf.

18 So when you testified or when you wrote that
19 the bite mark found on the victim was produced by the
20 teeth of John Kunco, that's individualization testimony,
21 right?

22 A. Essentially, yes.

23 Q. And when you testified in this case in front
24 of the jury, you also gave individualization testimony,
25 right?

1 A. I believe so.

2 Q. And that's when you told the jury basically
3 to a reasonable degree of dental certainty that John
4 Kunco had made the bite mark at issue?

5 A. I believe that was probably my testimony,
6 yes.

7 Q. Well, you gave this answer: It is my opinion
8 to a reasonable degree of dental certainty that the bite
9 mark was made by the teeth of the defendant, John Kunco.
10 That's on page 265 of the trial transcript, line 1
11 through 3; does that sound right?

12 A. Yes.

13 Q. And you signed an affidavit indicating that
14 you had given individualization testimony in this case,
15 right?

16 A. Yes.

17 Q. And you were confident at that time that you
18 had, that the technique of bite mark analysis and
19 comparison is capable of identifying the biter.

20 A. You said that time. Which time is that time?

21 Q. 1991.

22 A. Okay. I just want to clarify what time we're
23 talking about.

24 Q. Thank you.

25 A. So would you repeat the question?

1 Q. You were confident in your testimony at that
2 time?

3 A. Yes.

4 Q. That you could identify John Kunco as the
5 biter in this case?

6 A. To a reasonable degree of dental or
7 scientific certainty, yes.

8 Q. That's the highest level that you were
9 allowed to give at that time, right?

10 A. Correct.

11 Q. And it's a conclusion known as
12 individualization?

13 A. Yes, I believe so.

14 Q. And at that time, individualization within
15 the forensic community, particularly within the ABFO,
16 was widely accepted?

17 A. Generally, yes, it was.

18 Q. Nobody really doubted the ability to identify
19 the biter?

20 A. I think there were people that had some
21 problems with it, and there were a number of
22 controversial cases.

23 Q. In 1991?

24 A. Prior to 1991, yes, there were.

25 Q. What were they?

1 A. The Malone case in Illinois, I believe had at
2 least six experts. There were like three on one side
3 and three on the other side, or three and four. That
4 was a case from the '70s. The Marks case in California
5 was from the '70s. There may be other cases, which I
6 can't recall at the time, but there were numerous cases
7 prior to 1991 that were controversial that had
8 proverbial battles of the experts, if you will.

9 Q. Right. So the Malone case, you had experts
10 that were looking at the same data and coming to
11 opposite conclusions, right?

12 A. Yes.

13 Q. That was interrupting the injury on the skin,
14 right?

15 A. Generally, yes.

16 Q. And so you had Board experts who were looking
17 at the same thing and coming to a different conclusion?

18 A. Correct.

19 Q. And when you testified that the bite mark was
20 made by the teeth of the defendant, John Kunco, in 1991,
21 today, the most that you could say is that Mr. Kunco
22 cannot be excluded from having made the bite mark?

23 A. Based on the modification of the ABFO
24 guidelines, that would be correct. I would say whatever
25 I wanted, but it would be outside of the guidelines that

1 are in place today.

2 Q. Right. So you don't offer individualization
3 testimony anymore?

4 A. Not in an open population I believe.

5 Q. And you signed an affidavit stating that you
6 would no longer give individualization testimony in this
7 case today?

8 A. Based on the modification of the guidelines,
9 yes.

10 Q. You signed an affidavit saying you would not
11 testify. I understand what you say the basis is. We've
12 gone through what the basis is. You would not testify
13 the same way today as you did in 1991?

14 MR. HOPSON: Objection. He
15 answered that question.

16 THE COURT: I didn't hear the
17 answer.

18 A. Based on the modification of the ABFO
19 guidelines, my testimony today would be different than
20 my opinion in 1991.

21 BY MR. FABRICANT:

22 Q. Right. You were ABFO Board Certified then,
23 right?

24 A. Correct.

25 Q. You're ABFO Board Certified today, right?

1 A. Correct.

2 Q. You testified within the guidelines in 1991,
3 right?

4 A. Correct.

5 Q. You would testify within the guidelines
6 today, right?

7 A. Based on the change in the guidelines, I --

8 Q. That's not my question. You today would
9 testify --

10 MR. HOPSON: He was answering
11 the question, Judge.

12 THE COURT: Is there an
13 objection?

14 MR. HOPSON: Let him --

15 THE COURT: Let him answer the
16 question first. I think he was
17 answering it.

18 MR. FABRICANT: Okay.

19 BY MR. FABRICANT:

20 Q. Go ahead.

21 A. My opinion in 1991 was the highest level of
22 certainty. The ABFO guidelines have changed since that
23 time and recommend that the highest level of certainty
24 not be sanctioned in an open population. Now that is
25 not a standard. So I could say whatever I wanted, but

1 it would be outside of the guidelines. But staying
2 within the guidelines, my opinion would be different
3 than it was in 1991. And that's what I signed in the
4 affidavit.

5 Q. Right. You testified within the guidelines
6 then, today you would testify in the guidelines, right?

7 A. Yes.

8 MR. HOPSON: Objection. Asked
9 and answered.

10 THE COURT: Sustained. Move on.

11 BY MR. FABRICANT:

12 Q. And so when you say that the most, the
13 highest level of conclusion within your Board -- you
14 were president of the ABFO once, weren't you?

15 A. Yes.

16 Q. And when you say that the highest level of
17 association that can be made is that somebody cannot be
18 excluded, right, you don't know how many other people
19 might also be excluded, right?

20 A. In what context are you asking that question?

21 Q. I'm saying if you exclude somebody, you don't
22 know how many other people might also be excluded?

23 A. There are other people who could be excluded
24 and other people who could be included.

25 Q. Right. Could be, ten other people might be

1 excluded?

2 A. Without a context in terms of a case, it's
3 hard for me to give you a number --

4 Q. We're talking about open population.

5 A. -- at random. But you can pick a number at
6 random, but unless you put it in context of an open
7 population, a closed population, it's hard for me to
8 agree or disagree about a number that you pick at
9 random.

10 Q. Why don't you define for the Court what an
11 open population is?

12 A. An open population essentially means that
13 anyone who was in the area at the time may have been the
14 biter in a given situation. A closed population would
15 mean that a limited number of people had access to the
16 victim, which is typical in a child abuse situation
17 where a limited number of individuals will have access
18 to a child.

19 Q. So in an open population, when you say that
20 somebody cannot be excluded, you don't know how many
21 other people might also be excluded?

22 A. No, you don't.

23 Q. Could be 20 other people could be excluded?

24 A. Could be almost any other number, depending
25 on how many people you look at. But you can only

1 include or exclude the people that are made available
2 for you to examine.

3 Q. Right. But the highest level that you can
4 say today is that you cannot exclude?

5 A. According to the recommendations of the ABFO,
6 yes.

7 Q. Do you disagree with these recommendations?

8 A. No, I don't. But I'm just saying that
9 because those are recommendations of the Board doesn't
10 mean that you are mandated to follow them. It's not a
11 standard. A standard you have to follow to the level.
12 A guideline is something that you can deviate from, as
13 long as you explain why you deviated from that
14 guideline. So I'm saying that different individuals in
15 times past have deviated from the guidelines. So I
16 choose to work within the guidelines, but I know that
17 other people have given opinions outside the guidelines
18 at the time in the past.

19 Q. And there have been ethics complaints filed
20 against those individual's, right, by David Senn?

21 A. I don't believe that was the case.

22 Q. You don't believe --

23 A. The individual I'm thinking about is not what
24 you're referring to.

25 Q. His statements, indeed without a doubt,

1 didn't lead to an ethics complaint by the ABFO?

2 A. Yes, they did. But I wasn't --

3 Q. Right. Because it was outside the

4 guidelines, right?

5 A. I wasn't thinking of that case at the time

6 that I gave you my explanation, but what you're

7 referring to would also be included in that.

8 Q. Right. So in other words, David Senn filed

9 an ethics complaint against Dr. David West for

10 testifying outside the guidelines?

11 A. I don't know who David West is.

12 Q. I'm sorry, Michael West.

13 A. I'm not sure what ethics complaint.

14 Typically ethics complaints are confidential. So I

15 don't know who filed an ethics complaint in a given set

16 of circumstances, unless I was personally involved

17 general speaking.

18 Q. You didn't read the countless articles about

19 Dr. West and the ethics complaints? How do I know about

20 it?

21 A. I know that there were ethics complaints.

22 But specifically who filed them, I wasn't necessarily

23 aware of who filed them.

24 Q. So you're familiar that there was an ethics

25 complaint filed?

1 A. Correct.

2 Q. And you're familiar that it was filed against
3 Dr. Michael West?

4 A. I believe so.

5 MR. HOPSON: Objection at this
6 point. Anything with Dr. West is
7 irrelevant. I understand that he, Dr.
8 Sobel testified that he stays within
9 the guidelines.

10 THE COURT: It's going to his
11 credibility at this point. This
12 doctor's explaining that a Board
13 guideline is not mandatory. It's not
14 something that he has to follow. He
15 can deviate. Now you're telling me
16 that there have been ethics complaints
17 filed against other doctors who have
18 deviated from the Board guidelines; is
19 that the purpose of the question?

20 MR. FABRICANT: Yes, Judge.

21 THE COURT: So for credibility
22 purposes, I need to understand this
23 doctor's understanding of how the
24 guidelines function in his field.

25 BY MR. FABRICANT:

1 Q. You're aware that there was an ethics
2 complaint filed against Dr. West?

3 A. Yes.

4 Q. You're aware that it was testimony what he
5 gave when he gave conclusions that were indeed without a
6 doubt?

7 A. I don't know all the particulars of the
8 complaint. I know that there was a complaint filed.

9 Q. You're aware that there was a complaint filed
10 because he gave testimony that went beyond the
11 guidelines, right?

12 A. I don't know the specifics of the complaint.
13 I never saw the complaint.

14 Q. That's not my question.

15 A. I know that there was a complaint filed, but
16 I never read the complaint. Because it's typically
17 confidential, they don't circulate copies of the
18 complaint in an ethics matter, and I've never read the
19 complaint.

20 Q. You never read any of the articles that --

21 A. I've read articles.

22 Q. Let's base it on the articles. You're aware
23 that the media has reported that Dr. West was sanctioned
24 with an ethics complaint for testifying beyond the
25 guidelines?

1 A. I don't know that it was specific to
2 testimony beyond the guidelines.

3 Q. And you just testified that giving
4 individualization testimony in an open population is a
5 guideline and not a standard?

6 A. That's my understanding, yes.

7 Q. You don't believe that it's a standard that
8 you cannot give individualization testimony in an open
9 population?

10 A. I don't recall that that was added as one of
11 the standards, I believe it's a guideline.

12 Q. Okay. We'll footnote that one. So just to
13 get back into this highest level of linkage, when you
14 say that it cannot be excluded, we've established that
15 you don't have any idea how many other people might also
16 be excluded?

17 A. No, not unless you put it in context with the
18 circumstances of a given situation.

19 Q. Right, in an open population, you have no
20 idea?

21 A. You don't know how many people might be
22 included in an open population.

23 Q. So in addition in the change of guidelines,
24 which you've testified that you would adhere, in fact
25 you voted on the change of guidelines, right?

1 A. Which change of guidelines?

2 Q. The ones that removed individualization and

3 probabilistic testimony, you voted on that, right?

4 A. I'm not sure that -- well, if it was voted on

5 by the general diplomates, I voted, but I'm not sure I

6 was on the Board of Directors at the time, and if it

7 required a Board of Directors vote, I may not have voted

8 on it.

9 Q. In 2015 were you on the Board of Directors?

10 A. No, I was not.

11 Q. Were you a diplomate in 2015?

12 A. Yes.

13 Q. Guidelines have to be approved by the

14 diplomates, yes?

15 A. I believe so. If it was a Board vote, I

16 would not have voted. If it was a diplomate wide vote,

17 I would've voted.

18 Q. And when the guidelines change, the

19 diplomates have to vote, yes?

20 A. Typically they do.

21 Q. Yes or no?

22 A. Typically they do. There's been a lot of

23 arguments about whether a change in guidelines in

24 certain circumstances are things that are voted on by

25 the diplomates versus the BOD. There have been

1 disagreements about those issues. I know because when I
2 was president and sat on the executive committee, there
3 was a lot of discussion about which issue required a
4 diplomates vote and which issue required a Board of
5 Directors vote. So from time-to-time, there was
6 disagreement about it, and from time-to-time there may
7 have been a Board of Directors vote or a diplomates
8 vote.

9 Q. So it happens ad hoc?

10 A. It happens ad hoc?

11 Q. Changes in guidelines happen ad hoc?

12 A. Typically, yes.

13 Q. So somebody just decides to change the
14 guidelines?

15 A. Well, generally there's some impetus for
16 doing it.

17 Q. Right. And your testimony -- well, we'll get
18 into why they changed in a minute. But I want to talk a
19 little bit more about the other levels of linkage that
20 are now not approved by the ABFO, including
21 probabilistic testimony, right? So you can't say that
22 John Kunco made the teeth anymore, but you can't also
23 say that he probably made the bite mark, right? You
24 can't say the probable biter anymore?

25 A. Correct. Under the new guidelines, the three

1 linkage terms are included, excluded, or inconclusive.

2 Q. I thought it was cannot exclude?

3 A. We're arguing over semantics.

4 Q. Are we?

5 A. Yes.

6 Q. So when you say that you cannot exclude

7 somebody, you think that's precisely the same as saying

8 that so and so could have been?

9 A. By argument, if you cannot exclude someone,

10 they are included.

11 Q. So it's like flipping a coin, he's either in

12 or he's out?

13 A. It's a matter of semantics.

14 Q. Right. I mean --

15 A. You can say cannot exclude or you can say

16 include.

17 Q. Right. And so the conclusion is either he

18 did or he didn't?

19 A. Either your excluded or not excluded or it's

20 inconclusive.

21 Q. And so you can't say that somebody was likely

22 to have done it, right, within the guidelines?

23 A. That's not a term that I would typically use.

24 Q. Well, formally, one of the approved linkage

25 conclusions was probable biter, right?

1 A. Previously, correct.

2 Q. And this meant that he probably bit the
3 victim, right?

4 A. Correct.

5 Q. You can't say that anymore?

6 A. Under the modified --

7 Q. Yes, we understand that's under the
8 guidelines. All of these questions are about the
9 guidelines.

10 A. The modified guidelines?

11 Q. Yes.

12 A. Okay. Under the modified guidelines, no,
13 that would not be sanctioned.

14 Q. You certainly can't say that that individual
15 who created the bite mark to exclusion of everybody on
16 the planet anymore, right?

17 A. I've never said that.

18 Q. Let's talk a little bit about why the ABFO no
19 longer sanctions individualizations and conclusions, all
20 right?

21 A. Okay.

22 Q. Sound good? And I'm just going to quote from
23 the affidavit that -- you did two affidavits here, I'm
24 going to quote from ours here first. Paragraph 14, Your
25 Honor, I think ours is Exhibit A, and this is when we're

1 talking about -- I'll read from paragraph 13. You said
2 in accordance with the best practices at the time, you
3 -- actually, I'm going to go back to that, that you
4 examined no other suspects. We'll talk about that in a
5 minute.

6 I want to focus here on why this changed. In
7 paragraph 14, the affidavit that you signed for us,
8 Defense Exhibit A, you say the scientific knowledge and
9 understanding on which these conclusions were based,
10 however, has changed significantly since they were given
11 in 1991. Today we would not proffer such testimony,
12 since it is inconsistent with current ABFO guidelines
13 and with current scientific understanding of the
14 limitations of bite mark comparison. You went on to
15 state in paragraph 15 that in response to a number of
16 wrongful convictions associated with bite mark
17 comparison evidence, the ABFO on March 16, 2016,
18 published a change to its guidelines to recommend
19 against individualization testimony, like the testimony
20 we provided in Mr. Kunco's case and in any cases
21 involving bite mark comparison.

22 You signed that affidavit, right? That's the
23 affidavit that you signed?

24 A. Yes.

25 Q. And I sent you a draft of the affidavit

1 first, right?

2 A. Correct.

3 Q. And then you sent me back an edited version

4 of that affidavit, right?

5 A. Correct.

6 Q. So in other words, I gave you an opportunity

7 to edit, add, subtract, whatever you wanted, right?

8 A. Correct.

9 Q. And that was what you signed here, right?

10 A. Correct.

11 Q. In paragraph 14 of the affidavit that you did

12 for the Commonwealth, you say essentially the same

13 thing. Today we could not proffer such testimony, since

14 it is inconsistent with current ABFO guidelines and with

15 current scientific understanding of the limitations of

16 bite mark comparison evidence. You signed that

17 affidavit as well, right?

18 A. Yes. And you'll note that it says in that

19 affidavit that that is according to the guidelines, not

20 the standards?

21 Q. Right. And when you signed this under oath

22 and your other affidavit under oath, you said that it's

23 not consistent with current scientific understandings of

24 the limitations of bite mark analysis, yes?

25 A. Yes.

1 Q. So I want to focus on the wrongful
2 convictions aspect of why the guidelines changed now,
3 all right? You keep track of the wrongful convictions,
4 right?

5 A. I general do, yes.

6 Q. And you actually e-mailed me about a wrongful
7 conviction from this year, right? The Keith Haward
8 case?

9 A. I e-mailed you about it?

10 Q. Didn't you ask me if it was true that the
11 defense expert had also agreed with the prosecution in
12 that case?

13 A. I don't recall e-mailing you about that
14 issue.

15 Q. You don't?

16 A. No, I don't.

17 Q. Okay. And you actually gave a talk on
18 wrongful convictions at the American Academy of Forensic
19 Sciences annual meeting, right?

20 A. Yes.

21 Q. And you know that these wrongful convictions
22 bring discredit to bite mark analysis, right?

23 A. They have, yes.

24 Q. And to the ABFO?

25 A. Indirectly, yes.

1 Q. And you read our briefing in this case,
2 right? You read our brief in this case?

3 A. I'm not sure what you're referring to.

4 Q. When we, when you signed the affidavit and we
5 filed the brief, based on that affidavit, you read that
6 brief, right?

7 A. Are you referring to a petition?

8 Q. Petition?

9 A. I'm not a lawyer, I don't know what you mean
10 by brief versus petition.

11 Q. Okay.

12 A. So I'm not sure what document you're
13 referring to.

14 Q. Okay. The petition. You read it?

15 A. I recall reading the petition, yes.

16 Q. Made you angry, right?

17 A. I disagreed with how you characterized the
18 affidavit that we submitted to the Court.

19 Q. Right. You knew I was talking about that
20 document when I first asked you that?

21 A. No, I did not. When you said brief, I
22 thought you were talking about something else.

23 Q. Okay. In that brief, we documented 28
24 wrongful convictions and indictments, right?

25 A. I don't recall specifically, but certainly it

1 probably was in there.

2 Q. Is that a much larger number that you
3 discussed in the AAFS meeting, right?

4 A. Well, I mean, you're dealing with a different
5 set of circumstances, because when you consider
6 indictments where people didn't even go to trial, that's
7 a different scenario than wrongful convictions.

8 Q. Right.

9 A. And then wrongful convictions that may or may
10 not have involved DNA as the method for the exoneration,
11 so you get to a higher number, but when you simply limit
12 it to DNA exonerations in cases that had bite mark
13 testimony, it's smaller than the number that you're
14 referring to.

15 Q. Right, it brings less discredit to the ABFO?

16 A. No, I'm simply referring to DNA exonerations
17 in cases involving bite mark evidence.

18 Q. Then why are you making that distinction?

19 A. Because generally what most of the
20 exonerations are a result of.

21 Q. But why are you making that distinction?

22 A. Because I was trying to limit it to something
23 that would be specific.

24 Q. You were trying to limit it, right?

25 A. The use of DNA exonerations that involve bite

1 mark cases, I was trying to not get involved in cases
2 that never went to trial or didn't involve DNA, because
3 then it gets a little bit more complex, whether there
4 was other evidence, I was trying to limit my focus in
5 the presentation.

6 Q. You talked about the wrongful indictment,
7 those were cases where ABFO Board Certified Diplomates
8 said the defendant made the bite mark, and they were
9 wrong, right?

10 A. Apparently, yes.

11 Q. And so putting aside the justice issues, the
12 science issues means that those experts, when they said
13 that that defendant made that bite mark, they were
14 wrong?

15 A. In the cases where DNA was used, typically
16 that would be a showing that they were wrong.

17 Q. Now in this presentation you gave in 2014,
18 you called it an examination of bite mark DNA
19 exoneration cases, past, present, and future
20 perspectives, right? And you gave that in February 21,
21 2014?

22 A. Yes.

23 Q. I was in the audience, right?

24 A. I believe so.

25 Q. And when you dismissed all the wrongful

1 convictions that didn't involve DNA, you dismissed where
2 experts themselves had said I had gotten it wrong, like
3 Skip Sperber in the Bill Richards case?

4 A. Well, the Richards case hadn't been finished
5 at that point in time, it was still ongoing.

6 Q. And you also said in that case, one of the
7 other distinctions you made during this kind
8 disaggregating the wrongful convictions were that not
9 all of them had been individualization testimony, right?

10 A. That's correct.

11 Q. Some of them had been lesser levels of
12 linkage, right?

13 A. There had been equivocal testimony in about
14 half of those case.

15 Q. Unlike this case where you gave
16 individualization testimony?

17 A. Correct.

18 Q. And those were cases where the experts said
19 in essence that the defendant probably made the bite
20 mark, or that his teeth were consistent with a bite
21 mark?

22 A. There were a variety of different opinions in
23 some of those other cases. Several of them just said he
24 couldn't be excluded or something to that effect. I
25 don't recall whether there was any opinions that said

1 probable, but I know that there were several cases that
2 said he couldn't be excluded or he was included or
3 something to that effect. The verbiage changes from
4 time to time.

5 Q. And in every single one of those cases, the
6 ABFO Board Certified Diplomate was wrong?

7 A. I don't know whether he was wrong. When you
8 give an equivocal opinion --

9 Q. These are DNA cases, right?

10 A. If you give an equivocal opinion, it allows
11 for the possibility that you're not a hundred percent
12 certain or certain to a reasonable scientific certainty.
13 You're saying he's included. That means someone else
14 could be included as well. So in a case where the
15 opinion and bite mark testimony is equivocal, you're
16 allowing for the fact that someone else may have done
17 it.

18 Q. You're making an association where the
19 defendant cannot actually be associated when you say
20 that all this is consistent, it means that well it may
21 be consistent, but it's not him?

22 A. It allows for the fact that someone else may
23 have committed that act.

24 Q. Right. Because it's a subjective judgment as
25 to whether or not somebody matches a bite mark or not?

1 A. I don't like to use the word match.

2 Q. Makes a connection or not. It's a subjective
3 judgment, right?

4 A. What is a subjective judgement?

5 Q. Associating some teeth with a bite mark is a
6 subjective judgment?

7 A. It's an opinion based on experience,
8 training, and scientific background information.

9 Q. Which is a subjective judgment.

10 MR. HOPSON: Objection, Your
11 Honor. He's mischaracterizing it.
12 That's an expert opinion.

13 THE COURT: Well, he's asking
14 the witness to say what it is. Is it
15 subjective or is it more of an
16 objective --

17 A. It's based on both objection and subjective
18 information, but it is an opinion.

19 BY MR. FABRICANT:

20 Q. Doesn't your own reference manual call it a
21 subjective opinion?

22 A. I'm sorry?

23 Q. I'll withdraw it.

24 THE COURT: No, I'm interested
25 to know the answer.

1 BY MR. FABRICANT:

2 Q. Doesn't your own reference manual call it a
3 subjective opinion?

4 A. I don't recall.

5 THE COURT: Does it? I mean, I
6 assume you know the answer to the
7 question.

8 MR. FABRICANT: Yes, it does. I
9 will get back on that particular one
10 on --

11 THE COURT: You're losing me on
12 some of this because you're asking
13 important questions and then when he
14 doesn't know the answer, you should
15 know the answer to that question.

16 MR. FABRICANT: I do, I'm sorry.

17 THE COURT: You should have the
18 manual right in front of you where it
19 says it's a subjective opinion. If
20 that's the case, then I need to know
21 that.

22 MR. FABRICANT: Judge, can I
23 have five minutes? Or I can continue
24 going, and I can get back to --

25 THE COURT: I'd prefer not,

1 let's come back.

2 MR. FABRICANT: I just --
3 Exhibit H of our brief, and our
4 witnesses will also testify to the
5 subjectivity of bite mark analysis.
6 And you would agree that --

7 THE COURT: I don't care about
8 that at this point. You confronted
9 the doctor about whether or not the
10 manual characterizes it as subjective
11 opinion testimony. And he doesn't
12 know, or at least he wasn't able to
13 answer your question.

14 MR. FABRICANT: Right. I was
15 surprised by it because it's
16 universally accepted, but I will find
17 a specific reference to that.

18 BY MR. FABRICANT:

19 Q. One of the arguments that you made during
20 your presentation at this, at the AAFS meeting, was that
21 there were a couple of dentists that were responsible
22 for an outside number of the wrongful convictions,
23 right?

24 A. Yes.

25 Q. And one of those dentists, somebody that

1 we've already discussed today, Dr. Michael West, right?

2 A. Correct.

3 Q. What would you say, Dr. West's reputation is

4 in the forensic odontology community today?

5 A. He doesn't really have a reputation anymore,

6 he's not involved in it.

7 Q. And so you don't think that there are any

8 opinions today?

9 A. I think he's essentially been discredited.

10 Q. He's considered a fraud, right?

11 A. I don't know that I would characterize it

12 that way, but I think he's been discredited.

13 Q. Why has he been discredited?

14 A. Because of the wrongful convictions that he

15 was involved in that involved DNA and indirectly DNA.

16 All of the cases weren't technically DNA, but indirectly

17 most of them were related to that.

18 Q. And Dr. West was an ABFO diplomate, right?

19 A. He was.

20 Q. And he was widely published?

21 A. He published articles, yes.

22 Q. And he was accepted as an expert in courts

23 around the country, right?

24 A. Yes, he was.

25 Q. Federal court, yes?

1 A. I would assume so. I don't know that for a
2 fact, but I would assume so.

3 Q. And Dr. West was one of the pioneers of the
4 field, right?

5 A. Pioneers of what field?

6 Q. Bite mark analysis.

7 A. I wouldn't say that.

8 Q. He was a pioneer in the use of UV light,
9 right?

10 A. He was one of the individuals that was
11 actively involved in advocating for the use of UV
12 photography, but he was not the only one. There were a
13 number of others that were involved as well.

14 Q. And when you testified in this case, you were
15 asked about your training in UV light, right, because
16 you used UV light?

17 MR. HOPSON: Objection to
18 anything about UV lighting. That was
19 not in their petition for
20 postconviction relief. That's the
21 first thing. Their petition was the
22 unreliability of bite mark evidence.

23 Second, the Supreme Court of the
24 United States has already decided on
25 the issue of the ultraviolet bite mark

1 in this particular case.

2 THE COURT: In this case?

3 MR. HOPSON: Yes. Because we

4 had, we were before the Third Circuit

5 on this. The Third Circuit denied

6 petitioner's relief, and the Supreme

7 Court of the United States denied

8 allocatur on it. So I object -- I

9 don't have any problem with him

10 questioning about his analysis of the

11 bite mark in this case, but it's not

12 relevant under, anything about the

13 ultraviolet light is not relevant,

14 it's already been decided.

15 MR. FABRICANT: His analysis in

16 this is based on the UV light. I

17 can't ask him about his analysis

18 without asking about the UV light. He

19 claimed to be able to reveal a bite

20 mark five months after it was

21 inflicted using UV lights, the entire

22 basis. He wrote an article about

23 this.

24 MR. HOPSON: Okay, fine. That's

25 what he did. That's already been

1 decided. He can ask -- he can ask him
2 about the analysis, but we can't get
3 into the UV light, that has already
4 been decided.

5 THE COURT: How do you separate
6 them? It's already been decided in
7 what context, Mr. Hopson?

8 MR. HOPSON: That using
9 ultraviolet light to recapture the
10 bite mark was a legitimate technique.

11 MR FABRICANT: This is before
12 the guidelines changed, before bite
13 marks were discredited, obviously, I
14 can't ask him about his analysis, if I
15 can't ask him the basis of his
16 analysis.

17 MR. HOPSON: But they didn't
18 raise that in their petition. They
19 never raised a word about the
20 ultraviolet light.

21 THE COURT: I read their
22 petition, and it does include the
23 doctor's use of ultraviolet testing
24 with a UV light.

25 MR. HOPSON: Okay. But I object

1 to him questioning regarding the use
2 of the ultraviolet light. He can ask,
3 I mean --

4 THE COURT: How do you separate
5 them?

6 MR. HOPSON: About discrediting
7 the ultraviolet light. That's already
8 been decided.

9 THE COURT: So your argument is
10 the --

11 MR. HOPSON: That's legitimate.
12 If he wants to ask him about, that he
13 used ultraviolet light, I don't have a
14 problem with that.

15 THE COURT: Okay. Let's hear
16 the question, and then I'll decide
17 what the objection is. I'm not sure
18 what the objection is.

19 BY MR. FABRICANT:

20 Q. You were asked about your training in this
21 case regarding UV light, right?

22 A. Yes.

23 Q. When you testified in this case, you were
24 asked about that training, right?

25 A. Yes.

1 Q. And it was a new technique, yes?

2 A. Relatively.

3 Q. Relative to what?

4 A. At that time, it was relatively new.

5 Q. It was a new technique?

6 A. At that time, yes, it was relatively new.

7 Q. And your answer to that was that you had

8 attended AAFS lectures, American Academy of Forensic

9 Science lectures, right?

10 A. Yes.

11 Q. That's like the one that you gave, right?

12 That's one of those lectures?

13 A. Yes.

14 Q. And I give those lectures too, right? You've

15 been to them?

16 A. I believe so.

17 Q. And then you were pressed on this a little

18 bit, you were asked about individual training, right?

19 Who stood next to you and watched you conduct this,

20 right?

21 A. I believe I recall something to that effect.

22 Q. And you were asked to make sure that it was

23 being done correctly, right?

24 A. Correctly? I'm not sure I understand what

25 you mean by correctly.

1 Q. That's generally what training means, right?
2 It's somebody who knows how to do it is watching
3 somebody who doesn't know how to do it, they make sure
4 that they're doing it correctly, right?

5 A. Well, there are numerous ways to learn a
6 technique, and if you've attended presentations and
7 you've spoken to individuals that have used this and
8 asked them about how to go about doing it, you don't
9 necessarily need to have them standing over your
10 shoulder. If you take an ultraviolet photograph,
11 sometimes if you do everything correctly, you may get
12 nothing at all. But if you've done it correctly and you
13 get an image, you can tell that you have done it
14 correctly, because otherwise, you don't get anything.
15 If you get nothing on the image, then either you did it
16 incorrectly or there was nothing to recapture. It could
17 be either one of those two possibilities, but it's not
18 something that somebody stands there over your shoulder
19 and says oh you need to do this or you need to do that.
20 Because prior to digital imaging when this was started
21 and you were using film and cameras, you had to bracket
22 the exposure and change -- take multiple exposures,
23 because you didn't even know if you would get a viable
24 image until after the film was processed. Whereas
25 nowadays, if you take an ultraviolet photograph with

1 digital imaging, you know immediately whether you have a
2 viable image.

3 Q. Is that it?

4 A. Yes.

5 Q. So you were asked at trial whether you were
6 trained by an individual, right?

7 A. I don't specifically recall that.

8 Q. Do you remember being asked the following
9 sets of questions, this is on page 211 beginning at line
10 3: Question, okay. Now my question to you is whether
11 or not anyone watched you perform your ultralized violet
12 photography to see if you were doing it correctly?

13 Answer, well, what you're question is
14 alluding to --

15 Question, no. My question to you, Doctor, is
16 did anybody watch you do the photography to see that you
17 were doing it correctly.

18 Answer, at times they did, yes.

19 Question, who was that?

20 Answer, well, it would depend on which
21 instance you're talking.

22 Question, well, tell us one, Doctor.

23 Well, Dr. Sobel was there when I took the
24 ultraviolet photograph on the victim. I'm talking --

25 Question, line 17, I'm talk about your

1 training, doctor. You said that these people, you
2 received training, and I'm asking you whether or not you
3 ever received training in which someone watched you do
4 this to see if you were doing it correctly?

5 There was an objection, and then I'm moving
6 on to page 212 line 4.

7 Question, okay. Would you please answer my
8 question. Did anybody watch while you were learning
9 this process? Did anyone watch you do this to see if
10 you were doing it correct?

11 Answer, on a number of occasions, Dr. Michael
12 West was present with me. He is one of the gentlemen
13 who has pioneered the use of this technique in the
14 field.

15 You gave that testimony, right?

16 A. I believe so.

17 Q. You testified truthfully in that, right?

18 A. Yes.

19 Q. You wouldn't have lied under oath about your
20 training, right?

21 A. No.

22 Q. And he was the pioneer, right?

23 A. He was one of the pioneers. Tom Krause was
24 another one.

25 Q. And when I sent you that proposed affidavit,

1 I had lines about that you had received training from
2 Dr. West in the affidavit, right?

3 A. I don't specifically --

4 MR. HOPSON: Objection, Your
5 Honor, here's why. Objection to
6 relevance because, and I'm confused,
7 maybe Mr. Fabricant can enlighten me
8 on this. But I thought what we were
9 here for today was to make a
10 determination if there was new facts,
11 new evidence that have been discovered
12 that would entitle the defendant to a
13 new trial, get him around the time bar
14 of the PCRA. He's referring to the
15 trial testimony, and it seems almost
16 like he's cross-examining Dr. Sobel
17 about his trial testimony. I didn't
18 think that's what we were here for
19 today. If the Court wants, if we're
20 going to do that, fine. But I thought
21 that the question was today was there
22 new evidence, is there some new fact
23 or new evidence that would get the
24 defendant around the PCRA time bar and
25 the other procedural bars that would

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entitle him to a new trial.

MR. FABRICANT: Judge, our petition, amongst other things, is based on the discrediting of bite mark analysis. It's based on this expert witness signing an affidavit to that effect in essence, training this witness in the use of the technique that was used at trial in this case, which has also been discredited is directly relevant. And the fact that he received training from a discredited witness that had not been discredited at the time of trial is also relevant to the state of science as it was then and as it is today.

MR. HOPSON: But that goes to cross-examination --

MR. FABRICANT: That's what I'm doing.

MR. HOPSON: And impeachment.

THE COURT: It is.

MR. HOPSON: But newly discovered evidence can't be used solely for impeachment.

1 THE COURT: But what they're
2 doing at this point though is trying,
3 attempting to establish that his
4 opinion testimony that he gave at the
5 time has been changed because of new
6 standards and guidelines; is that a
7 generic way of saying what you're
8 arguing?

9 MR. FABRICANT: Yes, within the
10 forensic dentistry community and the
11 broader scientific community.

12 THE COURT: So now you're going
13 back through all of his training, some
14 of which was provided by individuals
15 who have been discredited in the
16 field, at this point, we're talking
17 about Dr. West. Yeah, I think it's
18 all relevant.

19 MR. HOPSON: Well, is that now
20 the claim now that the new fact is
21 that Dr. West has been discredited?

22 THE COURT: It's all part of the
23 general, their general argument. And
24 I don't want to make your argument for
25 you, but the general argument is that

1 the opinion testimony offered in 1991
2 has been determined currently that
3 it's unreliable, can't be used, and
4 that his training that he received
5 from individuals that they have, in
6 fact, been discredited in the manner
7 of which they taught this particular
8 science has --

9 MR. HOPSON: But Dr. West came
10 up with the ultraviolet photography,
11 which has been decided by the Supreme
12 Court.

13 THE COURT: When you say it's
14 been decided by the Supreme Court, I
15 don't know what you mean by that.

16 MR. HOPSON: They denied
17 allocatur. There was a question of
18 the technique of ultraviolet
19 photography.

20 THE COURT: What year was that
21 though?

22 MR. HOPSON: I can't remember
23 when we did it before the Third
24 Circuit.

25 THE COURT: Is your argument

1 that things have changed even since
2 the Supreme Court has denied allocatur
3 on the case?

4 MR. FABRICANT: Absolutely.

5 MR. HOPSON: But that's previous
6 litigation, Your Honor. That's been
7 decided.

8 THE COURT: I'm going to allow
9 the testimony. I think just to make
10 it easier for me, it's important that
11 I understand the background. I think
12 that's where you're going with it. I
13 think Mr. Hopson's objection is more
14 if we could just get to the specific
15 issues that you've raised in the case.
16 But I understand why you're going
17 through the process. Let's just try
18 to expedite it as much as we can,
19 within reason.

20 MR. FABRICANT: Thank you,
21 Judge.

22 THE COURT: The objection is
23 overruled.

24 BY MR. FABRICANT:

25 Q. So when you sent me back the affidavit with

1 your edits, you deleted the line that you received
2 direct hands on training from Dr. Michael West, the
3 pioneer in the use of ultraviolet technique in the field
4 of forensic odontology; you deleted that, right?

5 A. I may have. I don't specifically recall.

6 MR FABRICANT: I'm giving a copy
7 of this to the Commonwealth and ask
8 this to be shown to the witness.

9 THE COURT: Why don't you hand
10 this to the witness, Mr. Fabricant.

11 MR. FABRICANT: I'm sorry.

12 THE COURT: So, Doctor,
13 Mr. Fabricant is going to hand you
14 what's been marked as Court Exhibit C.
15 Could you examine that document,
16 please?

17 MR. FABRICANT: Judge, would you
18 like a copy?

19 THE COURT: Yeah.

20 Do you recognize what's
21 contained in Exhibit C?

22 A. Yes.

23 THE COURT: And what is that?

24 A. There is a cross out where it says I received
25 direct hands on training from Dr. Michael West, the

1 pioneer of the use of ultraviolet technique in the filed
2 of forensic odontology.

3 THE COURT: Is that the document
4 that you prepared or that you redacted
5 certain things from whenever you
6 received it from Mr. Fabricant's
7 office?

8 A. Yes.

9 MR. FABRICANT: I'd ask that be
10 introduced in evidence as Defense
11 Exhibit C.

12 THE COURT: Any objection,
13 Mr. Hopson?

14 MR. HOPSON: No objection, Your
15 Honor.

16 THE COURT: Exhibit C is
17 admitted.

18 BY MR. FABRICANT:

19 Q. And you deleted that line because Dr. West is
20 considered a fraud?

21 A. No, I did not. I deleted it primarily
22 because of the fact that the use of the term pioneer
23 essentially implies that he was the only one involved in
24 the use of that technique, and there were other
25 individuals, so I did not want to misrepresent the fact

1 that he was the only individual involved.

2 Q. But you didn't delete the, the pioneer. You
3 could've made an, a pioneer, right? You deleted the
4 whole thing.

5 A. I wasn't sure that it was relevant to the
6 point of this affidavit which was modifying my linkage
7 opinion in this particular case.

8 MR. HOPSON: Which again goes
9 back to my original objection, Your
10 Honor. Their petition originally was
11 that Dr. Sobel recanted his testimony.
12 There was nothing about Dr. West in
13 their original petition.

14 THE COURT: The objection is
15 overruled. Let's just hear it.

16 BY MR. FABRICANT:

17 Q. And you actually cited, you wrote an article
18 about this case, right?

19 A. Correct.

20 Q. And it was published in the Journal of
21 Forensic Sciences?

22 A. Yes.

23 MR. FABRICANT: And I'm going to
24 ask that this be marked as Defense
25 Exhibit D, I think we're at. Do you

1 have a copy of this? We've got
2 another one?

3 MR. HOPSON: I need a copy.

4 MR. FABRICANT: I'm handing
5 what's been marked as Defense Exhibit
6 D.

7 THE COURT: Are you familiar
8 with what's been marked as Exhibit Z,
9 Doctor? Or D?

10 A. It's a copy of my article.

11 THE COURT: You can proceed.

12 BY MR. FABRICANT:

13 Q. And actually in the article that you wrote
14 about this case, you cited Dr. West's literature, right?

15 A. I believe I may have. I don't specifically
16 recall. I mean, I wrote the article a --

17 Q. Take a look at the article. Look at footnote
18 number three.

19 A. Yes, Dr. West is cited as one of a group of
20 authors. Dr. Krause is also cited, and I'm cited twice,
21 as well as another individual. There are a number of
22 individuals that are cited.

23 Q. The lead author is who?

24 A. The lead what?

25 Q. The lead author of the article? The first

1 name?

2 A. Is me.

3 Q. On footnote number three?

4 A. On footnote number three, it's Michael West.

5 Q. The literature that you cited --

6 A. Yes.

7 Q. Dr. West is --

8 A. Footnote number three. You said lead.

9 Q. Okay. Let's talk about some of the other

10 things that you cited in that. When you cited in that

11 article that UV light was capable of revealing, this UV

12 light was capable of revealing this injury five months

13 later, that the footnote that you cited was a lecture

14 that you gave at the AAFS, right? Footnote number one?

15 A. Yes.

16 Q. So in other words, you gave a case report at

17 the AAFS meeting, a lecture, talking about what you had

18 done in the case, and that's what you relied on in

19 working on this case?

20 A. Partially, yes.

21 Q. And you cited no evidence in that article

22 about how often the technique gets it right and gets it

23 wrong, right?

24 A. No. That wasn't the purpose of the article.

25 Q. Okay. So putting aside the wrongful

1 convictions and putting aside your training by Dr. West,
2 you're confident in your own abilities, right?

3 A. Generally, yes.

4 Q. Let's talk about where you get that
5 confidence. And you said before you have 30 years of
6 experience, right?

7 A. Yes.

8 Q. And you've been declared an expert by courts
9 around the country?

10 A. That's correct.

11 Q. In many, many cases, right?

12 A. Correct.

13 Q. You actually teach other people how to
14 testify as an expert witness?

15 A. I have from time to time.

16 Q. And you've consulted on hundreds of bite mark
17 cases?

18 A. I have.

19 Q. And you charge \$3,000.00 a day to testify?

20 A. I do at this point in time, yes.

21 Q. That's what you charged us, right?

22 A. Correct.

23 Q. And bite mark experts -- and you've never
24 taken a proficiency test, right?

25 A. Well, you'd have to define proficiency test.

1 Q. Did you ever take a test that showed how
2 often you get it right or you get it wrong when you
3 associate somebody with a bite mark?
4 A. We are currently --
5 Q. No, not currently. Have you ever taken that
6 test?
7 A. Not according to what you're describing, no.
8 Q. And that's not a requirement to become Board
9 Certified?
10 A. That's correct.
11 Q. Is that you have no idea what your personal
12 error rate is?
13 A. No. Assuming that --
14 Q. And you have to idea what the error rates of
15 the --
16 A. Assuming that there's always a right or a
17 wrong answer, which is often difficult to answer in bite
18 mark cases.
19 Q. Right. So you have no idea how often you get
20 it right or how often you get it wrong?
21 A. There is not a specific listing of that sort
22 of information that I'm aware of.
23 Q. Right. And you have no idea what the error
24 rates of the field is?
25 A. No, I don't.

1 Q. There's no way for a jury to know how often
2 you get it right and how often you get it wrong?

3 A. As I said, giving a right or a wrong answer
4 is often a difficult thing to do.

5 Q. When you make an association and you say that
6 John Kunco made that bite mark, can we agree that if DNA
7 excludes him, you got it wrong?

8 A. It depends on the circumstances of where the
9 DNA came from.

10 Q. Let's move to the change in scientific
11 understanding that led to the guidelines change that you
12 signed in both of your affidavits. In paragraph 14 of
13 the guideline, or the affidavit that you signed for us,
14 you said that you would not proffer this testimony today
15 in light of the change in scientific understanding,
16 correct?

17 A. Yes.

18 Q. And you said in the one that you signed for
19 the Commonwealth, also in paragraph 14, that you could
20 not proffer such testimony today, right?

21 A. I don't --

22 Q. Should I read it again?

23 A. I'll assume that what you're reading is --

24 Q. I'll read it. Paragraph 14, Commonwealth --
25 I think this is Defense Exhibit B. Last sentence, today

1 we could not proffer such testimony, since it is
2 inconsistent with ABFO guidelines and with current
3 scientific understanding of the limitations of bite
4 marks, right?

5 A. Yes.

6 Q. I'm going to talk a little bit about the
7 sources that change in scientific understanding, all
8 right? And we've establish already that you've read our
9 briefing, right?

10 A. Yes.

11 Q. I'm sorry, our petition. And I e-mailed you
12 in advance to this hearing the President's Council of
13 Advisers on Science and Technology's report on bite
14 marks?

15 A. Correct.

16 Q. And the Texas Forensic Science Commission's
17 report on bite marks, right?

18 A. Correct.

19 Q. And you testified earlier that you keep up
20 with the general scientific developments in your field?

21 A. Correct.

22 Q. The current research?

23 A. Generally, yes.

24 Q. And the reports with scientific entities,
25 yes?

1 A. Yes.

2 Q. And one of the sources -- let me just ask
3 you, would it be fair to say that over the last few
4 years there have been a number of critiques offered by
5 the larger scientific community in bite mark analysis?

6 A. There have been critiques, yes.

7 Q. And one of those critiques was from the
8 National Academy of Sciences in 2009, right?

9 A. Correct.

10 Q. And in 2009, they concluded that there was no
11 scientific basis for bite mark analysis, right?

12 A. No, I don't agree with that. In their
13 summary, they indicated that you could, there was
14 reliable information to allow exclusion with the use of
15 bite mark evidence. They were critical of bite mark
16 analysis, but their ultimate summary was that it was
17 still reliable for exclusionary purposes.

18 Q. I think that the line was, and correct me if
19 this sounds familiar to you, that it is reasonable to
20 assume that experts could sometimes exclude somebody?

21 A. Correct.

22 Q. Are you indicating that that's scientific
23 validation from the National Academy of Sciences?

24 A. Based on the information that they gathered,
25 they concluded that it still would reasonably be used

1 for exclusionary purposes.

2 Q. And that's not what we did here, right?

3 A. I'm sorry?

4 Q. We didn't exclude anybody here, right? You

5 gave individualization testimony?

6 A. That's correct.

7 Q. And they concluded that there was no

8 scientific basis for individualization testimony, right?

9 A. And that opinion was in 2009, and this trial

10 was in 1992.

11 Q. Right. That's why we're here today.

12 A. Yes.

13 Q. And another source of the scientific critique

14 was from the Texas Forensic Science Commission, right?

15 A. Correct.

16 Q. And they came to the same conclusions as the

17 National Academy of Sciences, right?

18 A. Not exactly, no.

19 Q. Well, they concluded that there was no

20 scientific basis for individualization testimony, right?

21 A. They indicated that they believe that the use

22 of bite mark evidence should be suspended, pending four

23 pieces of scientific validation that they requested.

24 Q. One of those is proficiency testing, right?

25 A. Correct.

1 Q. Because they were concerned there was no way
2 to measure how right or how wrong experts were?

3 A. That's generally the reason you do
4 proficiency testing.

5 Q. And they conducted an independent six month
6 examination of bite mark analysis, right?

7 A. I'm sorry?

8 Q. They did a six month investigation of bite
9 mark analysis in comparison, right?

10 A. I don't know the specific length of time.

11 Q. But it only focused on bite mark analysis,
12 you're aware of that, right?

13 A. I know that they were talking about bite mark
14 analysis.

15 Q. The report that I sent you was a report only
16 on bite mark analysis, right?

17 A. Correct.

18 Q. And another source of the critique from the
19 larger scientific community was the PCAST report, the
20 President's Council of Advisers on Science and
21 Technology, right?

22 A. Correct.

23 Q. At they too found there was no scientific
24 basis for individualization or probabilistic testimony,
25 right?

1 A. Yes. They believe that there was no
2 scientific basis for it, and that even with research, it
3 was likely that there would be, and they did not
4 recommend even providing funding for research.

5 Q. Right. And that was because skin is an
6 unreliable medium to record a bite mark, right?

7 A. I would not agree with that.

8 Q. But that was their conclusion, right?

9 A. I disagree with that conclusion.

10 Q. That's not my question. My question was that
11 was their conclusion, right?

12 A. They concluded that, and I would disagree
13 with that conclusion.

14 Q. Right, Forensic Dentist Tom David disagrees,
15 but the President's Council of Advisers of Science and
16 Technology disagrees with you, right?

17 A. Yes. I was simply pointing out that I
18 disagreed with that opinion.

19 Q. And the National Academy of Sciences
20 disagrees with you, right?

21 A. Disagrees with me about what?

22 Q. That skin is a reliable medium to record a
23 bite mark?

24 A. Well, but they also say --

25 Q. No. No. Dr. David, my question is did the

1 National Academy of Sciences find that skin was an
2 unreliable medium to record a bite mark?

3 A. I don't recall whether they used the term
4 unreliable. There is certainly distortion in skin
5 medium, but I'm not sure that they characterized it as
6 unreliable.

7 Q. Right. So let me ask you if this sounds
8 familiar, from page 174 of the --

9 A. Saying that they characterized it as --

10 Q. I'm going to ask you a question, and then you
11 can answer it please.

12 THE COURT: You have to let him
13 know what it is you're referring to.

14 MR. FABRICANT: That's what I
15 was going to say. I was going to ask
16 him if this sounds familiar.

17 THE COURT: What are you
18 referring to?

19 MR. FABRICANT: To the National
20 Academy of Sciences report that we've
21 been discussing.

22 THE COURT: Why don't you just
23 read what it says, tell him what it's
24 from, and ask him if he agrees or
25 disagrees.

1 BY MR. FABRICANT:

2 Q. I'm going to read you a line from the NAS's
3 report in 2009 that you testified you're familiar with.

4 A. Okay.

5 Q. Unfortunately, a bite mark on the skin will
6 change over time and can be distorted by the elasticity
7 of the skin, the unevenness of the surface bite, and
8 swelling and healing. These features may severely limit
9 the validity of forensic odontology. Also, some
10 practical difficulty such as distortions in photographs
11 and changes over time in the dentition of suspect may
12 limit the accuracy of the results.

13 A. It does not say unreliable. And that was --

14 Q. Right. You got me there, Dr. David. But
15 does it say that skin is a reliable method of recording
16 a bite mark?

17 A. Skin can be disported. However despite the
18 distortion in certain cases there are sufficient
19 characteristics to allow an accurate assessment.

20 Q. Based on what data are you making that
21 statement?

22 A. Because of the fact that sometimes you can
23 still see characteristics in a bite mark that are
24 represented in a given set of teeth.

25 Q. Can you point us to some literature that

1 you're relying on?

2 A. No, I can't.

3 Q. Because there is none, right?

4 A. Not that I'm aware of.

5 Q. Right. So it's just your opinion?

6 A. Correct.

7 Q. And, again, we have no idea how often you're

8 right or you're wrong. One of the other sources of the

9 change in scientific understanding was the construct

10 validity test, right?

11 A. I'm sorry?

12 Q. One of other sources for the change in the

13 scientific understanding was the construct validity test

14 that Dr. Freeman and Dr. Iain Pretty conducted, right?

15 A. Yes.

16 Q. And another source of that critique was the

17 research that was done by Dr. Mary Bush and Peter Bush

18 at SUNY Buffalo, right?

19 A. Correct.

20 Q. Nevertheless, despite these scientific

21 critiques, you feel confident in your testimony in this

22 case?

23 A. Generally, yes.

24 Q. Would you agree that skin changes as it

25 heals?

1 A. I'm not sure what you mean by changes.
2 Certainly it undergoes certain changes, but that's a
3 very generic question.

4 Q. Right. Because people's skin heals
5 differently, right?

6 A. Depending on medical history factors and age,
7 it can heal differently in different individuals.

8 Q. Right. And so it depends on the individual
9 properties of a particular person, right?

10 A. Generally, yes.

11 Q. And the severity of the injury, right?

12 A. That would be a factor as well.

13 Q. Some people bruise easily?

14 A. Correct.

15 Q. Some people don't, right?

16 A. Yes.

17 Q. And that's not done in a predictable way,
18 right? You can't say that skin will change three,
19 four millimeters over the course of a week because
20 of swelling or bruising of a particular individual,
21 right?

22 A. Well, there are general timeframes, but
23 individuals may differ within a given timeframe.

24 Q. Right. So it's not predictable?

25 A. Not that specifically, no.

1 Q. And you did your analysis in this case five
2 months after the injury?

3 MR. HOPSON: Objection, Your
4 Honor. Again, we're getting into
5 cross-examination of trial. We're not
6 here to retry the case. I can
7 understand him questioning about the
8 National Academy of Science and what
9 he agrees with or doesn't agree with.
10 I can understand that question, one of
11 the problems is there's no testing
12 done. But getting into cross-
13 examining him about his trial
14 testimony is not relevant for today's
15 purposes.

16 THE COURT: All right. The
17 objection is sustained.

18 BY MR. FABRICANT:

19 Q. Do you believe that DNA evidence is more
20 reliable than bite mark in comparison evidence?

21 A. It can be, but it's not automatically more
22 reliable. It depends on how the testing was done. I
23 mean, according to information on the Innocence Project
24 website, when they looked at different forensic
25 disciplines and the percentage of wrongful convictions

1 and they looked at different disciplines, DNA actually
2 had a higher percentage of wrongful convictions than
3 bite marks, and that material came off of your website.
4 Q. Right. Right. And do you know why? Do you
5 know why DNA?
6 A. No, I don't.
7 Q. Because the technology changed. It got
8 better.
9 A. I don't know the specifics of why.
10 Q. So why are you testifying then?
11 A. I'm simply looking at the material.
12 Q. This material, right?
13 A. Correct. And DNA has a higher rate of
14 wrongful convictions than bite marks, according to that
15 graph which came off of your website.
16 Q. Right. And what other research did you do
17 into these DNA cases?
18 A. Didn't do any.
19 Q. So you have no information that --
20 A. I'm simply pointing out the fact that DNA is
21 not necessarily automatically better than bite marks.
22 It can be, but it depends on whether it's done
23 correctly. The same thing would be true of bite marks.
24 It can be done. If it's done correctly, it can be
25 reliable. But there is an, there's a possibility of

1 error with everything, including DNA, which is bench
2 science.

3 Q. And when you said that the, in your opinion,
4 that the teeth of John Kunco made that bite mark, right,
5 you didn't say but I might be wrong, did you?

6 A. That's not typically included.

7 Q. That's not what you said though, right?

8 A. No, I did not say that.

9 Q. And do you believe that if there is DNA
10 testing that could be done in this, it should be done?

11 A. I would assume that some of it has already
12 been done.

13 Q. Do you believe that it should be done, if
14 it's available to be done?

15 A. That's not a decision for me to make.

16 Q. I'm asking --

17 MR. HOPSON: I'm objecting to
18 that because that goes to --

19 THE COURT: What's the
20 relevance? Whether he thinks it
21 should --

22 MR. FABRICANT: Whether his own
23 opinion is strong enough to secure a
24 conviction of a life sentence, or
25 whether DNA should be, trump your

1 opinion.

2 MR. HOPSON: But the problem

3 that we have, Your Honor --

4 THE COURT: What's the

5 objection? Don't tell me what the

6 problem is. What's the objection?

7 MR. HOPSON: The objection is to

8 relevance.

9 THE COURT: Sustained.

10 BY MR. FABRICANT:

11 Q. Are you comfortable with bite mark analysis

12 being the only physical evidence in a particular case?

13 A. Am I comfortable with it? I don't get to

14 choose what other evidence there is in the case.

15 Q. That's wasn't my question.

16 THE COURT: Rephrase the

17 question.

18 BY MR. FABRICANT:

19 Q. Do you think that a conviction should be

20 upheld, based only on bite mark evidence as the only

21 physical evidence in the case?

22 A. Again, that's not my decision to make. The

23 jury makes the ultimate decision. They hear all the

24 evidence in the case and make a decision, based on what

25 they hear.

1 Q. I'm asking you what your opinion is?

2 A. I'm comfortable with the opinion that I gave
3 at that time.

4 Q. I'm asking a different question though.

5 THE COURT: Rephrase the
6 question for me again.

7 BY MR. FABRICANT:

8 Q. Do you think a criminal conviction should
9 stand only as bite mark evidence being the physical
10 evidence in the case?

11 MR. HOPSON: Objection. Because
12 the witness can't really answer that
13 because that is, the matter of
14 evidence or the weight of evidence is
15 a question for the judiciary.

16 THE COURT: I think you're
17 calling for a legal conclusion. I
18 think the witness is unable to give a
19 legal conclusion. You can rephrase
20 the question. I'm not going to tell
21 you how to do it, but I'm sure you can
22 rephrase it that's more specifically
23 designed to get the answer that you're
24 looking for.

25 BY MR. FABRICANT:

1 Q. Do you think that your opinion should be the
2 final word in any criminal conviction?

3 A. No, I don't think that my opinion should be
4 the final word. The jury looks at all the evidence and
5 makes --

6 Q. I'm not talking about juries. We're talking
7 about postconviction here.

8 MR. HOPSON: He answered the
9 question. He said he doesn't think
10 his opinion should be the final word,
11 but the jury has to look at all the
12 evidence.

13 BY MR. FABRICANT:

14 Q. And that's because you don't believe that
15 bite mark analysis should be the only physical evidence
16 in a case, right?

17 A. I didn't say that. I said that it's not my
18 decision to make.

19 Q. What I'm asking you is you don't believe that
20 bite mark evidence should be the only physical evidence
21 in the case?

22 A. I didn't say that.

23 MR. HOPSON: Objection. Again,
24 he's still asking for a legal
25 conclusion.

1 MR. FABRICANT: No, I'm not.
2 I'm asking for his opinion, and I have
3 a good faith basis for asking this
4 opinion as well.
5 THE COURT: Where are you going
6 with it?
7 MR. FABRICANT: This is my last
8 question. I want to know whether or
9 not the expert witness who testified
10 in Mr. Kunco's case personally
11 believes that it's sufficient evidence
12 to uphold this conviction.
13 THE COURT: Well, that goes back
14 to your asking him for a legal
15 conclusion.
16 MR. FABRICANT: Well, whether or
17 not his scientific testimony is
18 sufficient to sustain the conviction.
19 THE COURT: He's testified that
20 he feels comfortable in the opinion
21 that he gave in 1991.
22 MR. FABRICANT: Right. But he's
23 also testified that today he could not
24 and would not give that opinion.
25 THE COURT: And I've heard all

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of that.

MR. FABRICANT: Right. I guess it goes to why not.

MR. HOPSON: But, Your Honor, see, that's a question of either the weight or sufficiency of the evidence. That's a legal conclusion that Dr. David can't give.

MR. FABRICANT: No, I don't think it is. This is an expert witness who testifies in criminal cases. He has an opinion about all the wrongful convictions, about why they were wrongful convictions, about the level of linkage in the convictions. He testified that he follows all the developments in the field, and he has obviously paid special attention to the work of the Innocence Project and our categorizing these expert opinions.

MR. HOPSON: And he --

MR. FABRICANT: And then subjective opinion -- I'm sorry. That's my argument, Judge, is that I

1 feel like this witness has talked
2 about all the different bases for the
3 wrongful convictions. He's
4 disaggregated all of them. We're
5 talking about what we are arguing is
6 a wrongful conviction in this case.
7 He has testified, and I have good
8 faith belief that his personal opinion
9 is that it should not be the only
10 physical evidence in this case. And
11 I'm asking him that specific question.

12 MR. HOPSON: I don't have a
13 problem with that.

14 THE COURT: Let's ask him this
15 first. First of all, do you have an
16 opinion? Don't tell me what it is.
17 But do you have an opinion as to
18 whether the evidence that was
19 submitted in this case and the
20 opinion that you gave concerning the
21 bite mark was sufficient upon which
22 for a jury to convict Mr. Kunco in the
23 case?

24 A. Do you mean the bite mark evidence alone?

25 THE COURT: The bite mark

1 evidence alone, yes.

2 A. I don't know. I don't know the basis on
3 which the jury came to their conclusion. So I don't
4 know how much weight they gave to my testimony. That's
5 not for me to know.

6 THE COURT: But based upon the
7 bite mark evidence alone, and you
8 conducted the test, you gave your
9 opinion, do you feel that that is
10 sufficient upon which a jury could
11 find someone or Mr. Kunco guilty of
12 the crime charged in this case?

13 MR. HOPSON: Excuse me, Your
14 Honor, that goes to sufficiency of the
15 evidence, which is a legal conclusion.

16 THE COURT: Are you objecting?
17 You're taking exception to my
18 question?

19 MR. HOPSON: Well, because
20 you're asking him what -- the question
21 is what's the sufficiency of the
22 evidence, and that's a legal
23 conclusion. That's the first thing --

24 THE COURT: I just want to know
25 if this witness is comfortable with

1 the opinion that he gave in 1991 that
2 without any other evidence that a jury
3 on that opinion alone would be
4 justified in making a decision one way
5 or the other. Because the only other
6 evidence from any understanding is the
7 testimony about the defendant's lisp.
8 There is no identification testimony.
9 It is bite mark testimony and voice
10 identification alone; is that
11 accurate?

12 MR. HOPSON: There is voice
13 identification, yes.

14 THE COURT: That's what I said,
15 voice identification and bite mark
16 testimony. So exclude the voice
17 identification. Based upon the
18 opinion that you gave, knowing what
19 you know today, based upon the
20 standards and how they've changed,
21 would you still feel comfortable
22 giving that opinion and would a jury
23 be justified in accepting and relying
24 upon your opinion testimony today as
25 you gave it in 1991?

1 A. I'm comfortable with the opinion that I gave
2 in 1991, based on the guidelines at that time. I have
3 agreed to modify my opinion, based on the change in the
4 guidelines to the extent that, yes, I still believe it
5 was a bite mark, and that Mr. Kunco cannot be excluded
6 as the biter.

7 THE COURT: So your opinion
8 would change in conformity with the
9 way the guidelines and the regulations
10 have changed?

11 A. Correct.

12 THE COURT: Anything else?

13 MR. FABRICANT: Nothing further.
14 I'm sorry, if I could confer with
15 counsel for a moment.

16 BY MR FABRICANT:

17 Q. Just one point, based on the article that's
18 already in evidence, you wrote that, you wrote in your
19 conclusion beginning on page 1,562, the last sentence of
20 your article, without this critical piece of evidence,
21 it is unlikely that there would've been sufficient
22 evidence to support a conviction for this vicious crime,
23 right? You wrote that, right?

24 A. I want to see where you are. That's my --
25 that was my personal opinion at the time.

1 MR. FABRICANT: Okay. Thank
2 you.
3 THE COURT: Let's take a ten
4 minute recess before you cross-
5 examine.
6 You can step down. Watch your
7 step.
8 A. Your Honor, what do you want me to do with
9 this article?
10 THE COURT: You can leave
11 everything right there.
12 (COURT RECESSED -- 11:25 A.M.)
13 * * *
14 (COURT RECONVENED -- 11:43 A.M.)
15 THE COURT: Dr. David, come on
16 back up please.
17 MR. HOPSON: Before I begin,
18 Your Honor, just for the record, the
19 Commonwealth would offer the
20 transcript of the trial in 1991 as
21 Commonwealth's Exhibit No. 1.
22 THE COURT: All right. No
23 objection to that I assume?
24 MS. JARAMILLO: No, Your Honor.
25 THE COURT: Commonwealth's

1 Exhibit 1 is admitted, and you can
2 cross-examine the witness.

3 * * *

4 CROSS-EXAMINATION

5 BY MR. HOPSON:

6 Q. Dr. David, to start with, have you recanted
7 your trial testimony?

8 A. No, I have not.

9 Q. And as your testimony, you indicated that
10 your opinion would be, your wording would be different
11 because of new guidelines, correct?

12 A. I indicated that one of my two opinions would
13 still be the case today, that the injury, in fact, is a
14 bite mark. That I have modified my linkage opinion of
15 the bite mark to the defendant, to wit, changing it from
16 the highest level of certainty to cannot exclude.

17 Q. And that's not because of any legal
18 requirement, that's because of the guidelines, correct?

19 A. Correct. It's in response to the change in
20 the ABFO guidelines.

21 Q. And a legal, the legal terminology is
22 reasonable degree of medical certainty, correct?

23 A. I'm not sure what you're referring to.

24 Q. I'll withdraw that. When you testified at
25 trial, you said your opinion was that John Kunco was the

1 biter to a reasonable degree, I believe of dental
2 certainty?

3 A. Correct.

4 Q. And the reasonable degree of dental certainty
5 is the language required for expert testimony, correct?

6 A. Well, that opinion was my linkage opinion,
7 but you may be talking about a legal opinion when you
8 offer any opinion, and that's why it can get confusing,
9 and that was one of the reasons that the ABFO
10 guidelines, when they changed from reasonable scientific
11 or dental certainty, they changed it to the biter, to
12 avoid the confusion of is your opinion to a reasonable
13 certainty versus your linkage opinion is to a reasonable
14 certainty. It got confusing at times.

15 Q. So could you still say under the current
16 guidelines that John Kunco would not not be excluded to
17 a reasonable degree of dental certainty?

18 A. Yes. Some states require that all of your
19 opinions have to be to a reasonable degree of scientific
20 certainty, and so that's why sometimes you can get
21 confused about is that linkage opinion versus legal
22 verbiage that's required by a court in a given
23 jurisdiction. And so that was one of the reasons that
24 the highest linkage opinion was changed from what it was
25 in 1991 to the biter to avoid some of that confusion.

1 Q. Now I want to talk about the science aspect
2 of this, because there was some reference about science.
3 Now this bite mark analysis, is it a bench science?
4 A. No, it is not.
5 Q. What's an example of a bench science, Doctor?
6 A. Toxicology and DNA typically would be
7 considered bench sciences.
8 Q. Because in toxicology there's measurable
9 testing devices and there's a certain amount of alcohol
10 in a person's blood, correct?
11 A. That would be one example, yes.
12 Q. Or DNA is, the profile matches, the DNA
13 profile matches. It would be an unlikelihood of someone
14 else having the same DNA profile?
15 A. Yeah, there are measurable parameters.
16 Q. Okay. And that also goes -- would analyzing
17 controlled substances fall under that?
18 A. I would expect so.
19 Q. Because there are measurable parameters, is
20 the substance either cocaine --
21 MR. FABRICANT: Objection. This
22 witness has not been qualified as an
23 expert in any other area.
24 THE COURT: Sustained. He's
25 just making a comparison, but he's not

1 offering testimony I don't think.

2 MR. HOPSON: No.

3 THE COURT: But sustained.

4 BY MR. HOPSON:

5 Q. Now in any case, whether back in 1991 or now,
6 you're giving an opinion, correct?

7 A. That's correct.

8 Q. And there's no measurable parameter in bite
9 mark comparison, correct?

10 A. Well, sometimes there are things that can be
11 measured. Sometimes there will be sufficient evidence
12 in a bite mark that you can measure the width of a tooth
13 or something like that. But other than those
14 parameters, a lot of the other things that you have to
15 consider are not strictly measurable.

16 Q. And back in '91, you were qualified as an
17 expert witness in that trial, correct?

18 A. Yes.

19 Q. And that was based on your training and
20 education and experience?

21 A. Correct.

22 Q. Now you would say not excluded today,
23 correct, that John Kunco is not excluded?

24 A. Correct.

25 Q. And back at the trial, you just didn't simply

1 testify John Kunco was the biter, correct?

2 A. I said that to a reasonable degree of dental
3 certainty, he bit the victim.

4 Q. But you based that on certain factors that
5 you elaborated for the jury, correct?

6 A. Correct.

7 Q. And what were some of those factors, Doctor?

8 A. Well, the bite mark itself showed a number of
9 distinct features.

10 MR. FABRICANT: Objection.

11 Relevance. We weren't allowed to get
12 into the actual individual analysis.
13 I'm happy to do it, but I'll want to
14 recross on that.

15 MR. HOPSON: Well, Your Honor, I
16 think it's important. It's in the
17 trial transcript. I mean, I can leave
18 it to that. I don't have to -- I can
19 just have him summarize.

20 THE COURT: The objection is
21 overruled.

22 BY MR. HOPSON:

23 Q. Just summarize what the, you said distinct
24 characteristics were between the petitioner's dentition
25 and the bite mark?

1 A. There were a number of distinct features in
2 Mr. Kunco's dentition that were represented in the bite
3 mark, specifically --

4 MR. FABRICANT: Judge, I'm sorry
5 to interrupt. If we're going to get
6 into the actual analysis that he's
7 going to testify in this case, I would
8 like to have one of our witnesses come
9 in, so that they may respond to this,
10 because I didn't anticipate that we
11 were going to get into the nitty
12 gritty of what he's going to talk
13 about. What he's saying is consistent
14 in this --

15 THE COURT: One of your experts?

16 MR. FABRICANT: Yes.

17 THE COURT: Who is it?

18 MR. FABRICANT: Dr. Freeman.

19 THE COURT: Okay. Let him come
20 in.

21 Do you want to have Dr. Freeman
22 come in? We'll get him, unless he's
23 hiding out there somewhere.

24 (WHEREUPON, DR. FREEMAN ENTERS THE COURTROOM)

25 MR. FABRICANT: If I could just

1 have 20 seconds for a word with him so
2 he understands what's going on.

3 THE COURT: Okay.

4 You can continue, Mr. Hopson.

5 BY MR. HOPSON:

6 Q. Dr. David, if you could summarize what the
7 distinctive characteristics were?

8 A. Mr. Kunco was missing tooth number seven,
9 which would be the upper right lateral incisor. And so
10 tooth number six directly abutted tooth number eight
11 without tooth number seven in between. He also had a
12 peg lateral. Tooth number ten was a peg lateral. In
13 other words, it was present, but misshapen, so there
14 would not --

15 Q. If I could stop you a second, Doctor.

16 MR. FABRICANT: For the record,
17 Judge, we object to this line of
18 questioning. I think that our
19 argument is based on the change in
20 science, the standards that have
21 changed within the American Board of
22 Forensic Odontology. This witness's
23 concession that he would not testify
24 as, today as he did before that both
25 the science and wrongful convictions

1 allege the wrongful, the change in
2 guidelines. I believe what the
3 Commonwealth is going to do is in an
4 effort to elicit his opinion in this
5 particular case and essentially have
6 him give the same testimony that he
7 gave at trial and kind why he gave
8 that testimony, but our argument is
9 that really, to our petition, said Dr.
10 David's personal opinion and about how
11 he did this is irrelevant to our
12 argument.

13 MR. HOPSON: Your Honor, okay,
14 maybe we could do it this way then,
15 because it's going to be important
16 that the Court reviews the trial
17 transcript. This was just not simply
18 a case out of Dr. David saying this.
19 Dr. David went through, and Dr. Sobel,
20 both gave all remarkable consistencies
21 between the petitioner's dentition and
22 the bite mark. And that's going to be
23 relevant because of what they say this
24 new evidence is for.

25 MR. FABRICANT: Our argument

1 will go to any bite mark case. That
2 the larger methodology that was at
3 issue here, including the UV light,
4 which we were not allowed to get into
5 deeply, other than the fact that he
6 was trained by disgraced dentist is,
7 we weren't allowed to get into that.
8 The individual analysis that he did in
9 this case in terms of what he claims
10 matched five months later, I didn't
11 cross him on any of that.

12 THE COURT: What I'm confused
13 about is it's sounding to me like if
14 he were asked today, 2016, to do this
15 analysis on what evidence is
16 available, and the same evidence which
17 was available in 1991, it sounds like
18 he would go through the exact same
19 procedure in trying to identify a
20 match to the bite mark, but his
21 ultimate opinion would be different,
22 the wording would be different, based
23 upon the guidelines; is that fair?

24 MR. HOPSON: That is correct,
25 Your Honor. He would still testify to

1 all the characteristics and because of
2 the guidelines.

3 THE COURT: So what's the new
4 evidence?

5 MR. FABRICANT: The new evidence
6 is the discrediting of the entire
7 field and that admission by the ABFO
8 that the science does not support
9 individualization testimony, and
10 that's why the guidelines changed.
11 This witness has testified that the
12 guidelines changed in light of
13 contemporary scientific understanding,
14 which he signed two affidavits to that
15 effect.

16 THE COURT: So you would be
17 able, in your opinion if you cross-
18 examined this witness in the presence
19 of the jury today, you would be able
20 to completely discredit his opinion,
21 based upon the ABFO guidelines?

22 MR. FABRICANT: I believe that
23 his, well, he would not -- he
24 testified at trial that John Kunco bit
25 the victim.

1 THE COURT: I understand that.
2 That's why I said today his testimony
3 would be the same methodology, but his
4 opinion would say, instead of saying
5 it was Mr. Kunco's teeth marks, he
6 can't, he would say it's my opinion
7 that I cannot exclude him from being
8 the biter.

9 MR. FABRICANT: Well, we would
10 have arguments prior to trial that
11 that would be an irrelevant opinion,
12 essentially it's a coin flip, or that
13 bite --

14 THE COURT: But that's the
15 guideline. Today the guideline says
16 you can give an opinion, but it has to
17 be an exclusionary type opinion.

18 MR. FABRICANT: I understand
19 that, Judge, but the, a couple things.
20 One is that we don't believe that
21 Frye, that it would survive a Frye
22 challenge prior to trial. And that
23 the testimony that was offered that
24 was individualization would not be
25 offered today, and that that had a

1 real impact on the outcome of the
2 trial.

3 THE COURT: Sure, I understand
4 that.

5 MR. FABRICANT: So that's our
6 argument. So if we, if we wanted to
7 go through, I guess it's to persuade
8 Your Honor this was somehow a patch or
9 something like that. The purpose of
10 this demonstration doesn't seem to be
11 relevant to our argument.

12 MR. HOPSON: Well then, Your
13 Honor, what's relevant though is the
14 record of the trial, because --

15 THE COURT: All right. Then
16 I'll review the trial transcript.

17 MR. HOPSON: Okay.

18 THE COURT: The objection is
19 sustained. Can you at last point me
20 to the relevant pages in the
21 transcript where this doctor
22 testified?

23 MR. HOPSON: I believe so.

24 MR. FABRICANT: Page 203.

25 MR. HOPSON: Page 203.

1 MR. FABRICANT: To 277.

2 THE COURT: Okay. Thank you.

3 MR. HOPSON: And, also, Dr.

4 Sobel's too, Your Honor. And I think

5 that started on page, Dr. Sobel was

6 page 149 to I believe around page 220.

7 THE COURT: Okay. Thank you.

8 BY MR. FABRICANT:

9 Q. And, Dr. David, then, of all your testimony,

10 would the only thing would change, would be the linkage

11 opinion saying the biter was John Kunco?

12 A. Correct.

13 Q. And that would just change John Kunco is not

14 excluded?

15 A. Correct.

16 Q. Because of all the things you testified to at

17 trial?

18 A. Correct.

19 Q. And all the things Dr. Sobel testified to?

20 A. Correct.

21 Q. Now back in 1991, Doctor, you --

22 A. Your Honor, does the other witness need to be

23 here now?

24 MR. HOPSON: I would renew my

25 motion for sequestration then, since

1 we're not getting into that.

2 THE COURT: All right. So the

3 doctor who just was invited in, you're

4 now kicked out again. Not physically

5 kicked out, we're just going to

6 sequester you.

7 (WHEREUPON, DR. FREEMAN EXITS THE COURTROOM)

8 THE COURT: Okay. Go ahead.

9 BY MR. HOPSON:

10 Q. First off, Doctor, the Board was founded in

11 1976, correct?

12 A. Correct.

13 Q. And are you aware back at the time of trial,

14 are you aware that there would've been any forensic

15 odontologists who would've disagreed with your

16 conclusion?

17 A. I think that there certainly might have been

18 forensic odontologists who might have disagreed with my

19 opinion.

20 Q. And I mean there were workshops before 1991

21 about bite mark analysis, correct?

22 A. Correct.

23 MR. FABRICANT: Objection. I'm

24 just not sure what we mean by

25 workshops.

1 THE COURT: Rephrase the
2 question. Sustained.

3 BY MR. HOPSON:

4 Q. What were the workshops before 1991?

5 A. The ABFO had a workshop, I believe starting
6 in 1984, and there might have been a second one prior to
7 1991, I'm not positive about that. But there was at
8 least one, if not two ABFO sponsored workshops prior to
9 1991.

10 Q. And you can't say, Doctor, that every
11 forensic odontologist back then would've agreed with
12 your conclusion, correct?

13 A. I don't necessarily think so, no.

14 MR. HOPSON: May I approach the
15 witness, Your Honor?

16 THE COURT: Yes.

17 BY MR. HOPSON:

18 Q. Doctor, are you aware of an article in the
19 International Dental Journal published by a D. K.
20 Whittaker, 1975, that questioned the accuracy of bite
21 mark analysis?

22 A. I've heard of the article.

23 Q. I have a copy of it here, if you could just
24 take a look at it. Is that the article, Doctor?

25 A. I want to look at the conclusion here. Yes,

1 I believe it is.

2 MR. HOPSON: Thank you, Doctor.
3 The Commonwealth would offer
4 Commonwealth's Exhibit No. 1 into
5 evidence pending any objection.

6 THE COURT: Any objection?

7 MR. FABRICANT: No objection.

8 THE COURT: Exhibit 1 is
9 admitted.

10 MR. FABRICANT: I think it's
11 Exhibit 2, Judge.

12 MR. HOPSON: Exhibit 2, I'm
13 sorry.

14 THE COURT: Commonwealth's
15 Exhibit 2 is admitted. 1 was the
16 transcript from the trial.

17 BY MR. HOPSON:

18 Q. And the American Board of Forensic Odontology
19 is not like a secret society, right? It's public
20 organization?

21 A. Correct.

22 Q. And do you believe that back in 1991, the
23 defendant could have found someone to contest your
24 conclusions?

25 A. I feel relatively certain that he could have,

1 yes.

2 Q. And are you aware that his then trial counsel
3 asked to continue the case to have another forensic
4 odontologist look at your reports?

5 A. That was my understanding.

6 MR. FABRICANT: Objection.

7 We're getting into the analysis again.

8 MR. HOPSON: No, I'm just asking
9 if he was aware that --

10 MR. FABRICANT: I'll withdraw
11 it.

12 BY MR. HOPSON:

13 Q. And, in fact, that Mr. Kunco did not agree to
14 continue the case to allow his trial counsel --

15 MR. FABRICANT: I'm sorry, I
16 renew my objection.

17 THE COURT: Do you want to
18 respond this time?

19 MR. FABRICANT: How is that
20 relevant?

21 MR. HOPSON: It's highly
22 relevant, Your Honor, because for
23 newly discovered evidence, it's their
24 burden to prove that it couldn't be,
25 it couldn't have been found by

1 reasonable diligence. The fact that
2 Mr. Kunco would not agree to the
3 continuance to allow his trial
4 counsel, David Caruthers, to have
5 someone else look at this shows --

6 THE COURT: Was there other, was
7 there another expert at the time
8 though who would've reached the same
9 conclusion that exists in 2016?

10 MR. HOPSON: Well, Dr. David
11 just testified that he thought that
12 there would've been, and I put in an
13 article that's from 1975 questioning
14 bite mark comparison.

15 THE COURT: But not on the same
16 standards and the same rationale that
17 we're here on today.

18 MR. HOPSON: But, yes, Your
19 Honor, because it was something to
20 question the conclusion of the expert
21 witness.

22 THE COURT: So the person who
23 wrote this article, this Dr.
24 Whittaker, he could've been called as
25 an expert hypothetically, and he

1 would've said that it's unreliable, UV
2 is unreliable, and it's not accepted
3 in --
4 MR. HOPSON: I don't know about
5 the UV testing --
6 THE COURT: -- the dental
7 community.
8 MR. HOPSON: I don't know about
9 the UV testing, but he would've said
10 that bite mark comparisons are
11 unreliable.
12 THE COURT: How do you respond
13 to that?
14 MR. FABRICANT: That there have
15 been critiques of bite mark analysis
16 through the years, certainly that's
17 true. Our argument is based on the
18 consensus of the scientific community
19 changing from 1991 to 2016, most
20 significantly for our purposes of or
21 argument within the ABFO, the Board
22 Certified entity of forensic
23 odontologists have also recognized at
24 last that individualization and
25 probabilistic conclusions are not

1 scientifically valid and, therefore,
2 they do not sanction them anymore.

3 So the fact that you could've
4 gotten somebody to come in and
5 disagree with him, doesn't mean that
6 the science at that time, which was
7 almost universally accepted, according
8 to this witness, individualization was
9 accepted. All these bite mark experts
10 are testifying in the same way. So
11 the fact that you could've offered a
12 critique at that time would not have
13 precluded Dr. David from coming in and
14 giving individualization testimony,
15 which he's testified repeatedly he
16 would not give today.

17 THE COURT: But according to
18 what Mr. Hopson is saying, this
19 witness who wrote this article
20 could've come in and said that
21 individualization testimony is not
22 accepted in the community, it's
23 unreliable. So he knew all this
24 before 1991, this Dr. Whittaker knew
25 what the experts were saying in '91,

1 he knew it 20 years earlier?

2 MR. HOPSON: That's my
3 understanding. He --

4 THE COURT: The objection is
5 overruled. You can ask the Doctor
6 that question.

7 BY MR. FABRICANT:

8 Q. Okay. Now, again, are you aware that trial
9 counsel, David Caruthers, requested a continuance,
10 wanted to request a continuance?

11 A. That's my understanding.

12 Q. To have another forensic odontologist look at
13 that. And I think it, actually it starts on page 6 of
14 the trial transcript.

15 I think it's page 11, question from David
16 Caruthers, now, John, the other thing is that we talked
17 about the fact that what I wanted to do was to take this
18 information and a dental impression that they got and
19 the pictures that they took and get an expert of our
20 own, another forensic odontologist who would possibly
21 evaluate this and see if indeed this was your bite mark
22 or if this doctor was mistaken. We talked about that,
23 right?

24 Answer, yes.

25 Okay. Now, John, as far as that's concerned,

1 I told you that the problem with that is obviously we'd
2 have to continue the case, right?

3 Yes. Answer, yes.

4 Question, and I also told you that if we
5 continue the case, the problems with Rule 1100, namely,
6 that on July 24, 1991, that you would have 180 days,
7 you'd be in jail for 180 days and thus a nominal bond
8 should be granted. That Rule 1100 would be stopped by
9 us asking for a continuance. We discussed that,
10 correct?

11 Answer, yes.

12 And after all these discussions, it was your
13 feeling that you wanted to go ahead with this trial; is
14 that correct?

15 Answer, correct?

16 MR. FABRICANT: Judge, if I just
17 may respond briefly to that point.
18 The idea that you could've gotten
19 somebody to come in and say that it
20 wasn't John Kunco's bite mark is not
21 really our point. I mean, I think it
22 goes, actually the fact that you could
23 get another expert to come and say the
24 opposite of what Dr. David had said is
25 what we were getting at when we talked

1 about the Malone case is that in
2 science when two experts are looking
3 at the same data and come to opposite
4 conclusions, it suggests that it's
5 unreliable technique, and that's what
6 Dr. Adam Freeman --

7 THE COURT: That's what I'm
8 interested to know. Was the science,
9 in 1991 was the science that this
10 doctor used upon, to base his opinion
11 on, was it accepted in the dental
12 community? This report seems, what
13 you're telling me, at least the offer
14 is that it wasn't. Is that accurate
15 or not?

16 MR. HOPSON: Your Honor, the
17 problem is, and I looked at the
18 diplomate's reference manual.

19 THE COURT: I think we should
20 just ask the witness. That's what I'd
21 like, to hear it from him. If Dr.
22 David can tell me that the science
23 that he used in 1991 at the time was
24 not accepted in the community, and Mr.
25 Caruthers had this information

1 available to him at the time, and Mr.
2 Kunco refused to agree to a
3 continuance, then the case is over.
4 So ask him.

5 BY MR. HOPSON:

6 Q. Dr. David, this article by Dr. Whittaker that
7 would've been obviously published in 1975, it would've
8 been public record; is that correct?

9 A. I would assume so, yes.

10 Q. And it would've discredited your testimony,
11 correct?

12 A. Well, to the extent that he related it to
13 this case it might. But his article is very generic in
14 nature. And he's using pigs and wax bites, which are
15 not the same as bites in human skin. So he's talking
16 about different materials. He's making a general
17 conclusion. But the scientific community accepted the
18 validity of bite mark testimony.

19 Secondly, I would disagree with Mr.
20 Fabricant's characterization that the evidence that we
21 interpret is data. The reason that there is
22 disagreement about opinion testimony is that it's not
23 bench science or immeasurable data. The same as there
24 are disagreements among medical examiners as to cause
25 and manner of death. It's scientifically based

1 testimony that requires education, training, and
2 experience, and there are often disagreements among
3 medical examiners about cause and manner of death.
4 Because unless it's based on hard data, then it's an
5 opinion. You use general scientific principles and then
6 you use your experience to come to a conclusions, and
7 experts can disagree about those conclusions. Someone
8 might have agreed that it was a bite mark and had a
9 lesser linkage opinion than mine. I don't know what
10 they would've said, but there were certainly other
11 individuals there that might have disagreed with parts
12 of my analysis. But that's expert witness opinion, and
13 it's not based on hard data.

14 Q. And the forensic odontology community, if I'm
15 reading the manual right, still accepts bite mark
16 comparison?

17 A. That is correct.

18 Q. And so you were an expert, you gave an
19 opinion, and you would be an expert today, give an
20 opinion, and some other exert might --

21 MR. FABRICANT: I'm sorry, is
22 there a question?

23 MR. HOPSON: I was --

24 THE COURT: Go ahead. Continue.

25 BY MR. HOPSON:

1 Q. And there might be another expert that has a
2 different opinion than you, correct?

3 A. Yes.

4 Q. And that would've been the same back then,
5 there were people that evidently found there were
6 problems in bite mark comparison, as far back as 1975?

7 A. Yes, there are people who might have
8 disagreed with various parts of my opinion.

9 Q. And I think you testified on direct about
10 there were Board Certified experts that come to
11 different conclusions, correct?

12 A. Yes.

13 Q. And as far as you know, and you're not an
14 attorney, but has there been any judicial decision in
15 validating this testimony?

16 MR. FABRICANT: Objection.

17 THE COURT: What's the
18 objection?

19 MR. FABRICANT: He's asking for
20 a legal conclusion about his knowledge
21 of jurisprudence. We'd be happy to
22 provide the Court with briefing.

23 MR. HOPSON: I'll withdraw that.

24 I have no further questions,
25 Your Honor.

1 THE COURT: Okay. I'll let you
2 conduct the redirect examination, but
3 let's --
4 MR. FABRICANT: I only have like
5 two questions.
6 THE COURT: You have two, go
7 ahead.
8 * * *
9 REDIRECT EXAMINATION
10 BY MR. FABRICANT:
11 Q. Dr. David, the ABFO represents, as we talked
12 about earlier, the forensic odontology community for
13 better or for worse; is that right?
14 A. Generally, yes.
15 Q. And in 1991, the ABFO accepted
16 individualization testimony, right?
17 A. That's correct.
18 Q. And that's not true today, right?
19 A. Correct.
20 MR. FABRICANT: That's it.
21 THE COURT: Mr. Hopson anything
22 else?
23 MR. HOPSON: Nothing further,
24 Your Honor.
25 THE COURT: Okay. Can you step

1 down. Watch your step.

2 Is the doctor excused?

3 MR. HOPSON: I have no further
4 questions for him.

5 THE COURT: Does anyone, is
6 there a need for him to stay though
7 for this afternoon?

8 MR. FABRICANT: I think, I'm
9 sure that Dr. David has to catch a
10 plane, but since we did, we brought
11 him here, and I can imagine some
12 scenario where we might want to get
13 him back on the stand, so I would ask
14 him to stay long enough so he doesn't
15 miss his plane.

16 THE COURT: Which is when? What
17 time's your flight?

18 DR. DAVID: I have a five-
19 something flight and I've got an
20 hour-and-a-half drive to the airport,
21 so I need to be gone probably no later
22 than 2:30 or 3:00. I would say 2:30
23 to be on the safe side.

24 THE COURT: I would think at the
25 latest.

1 MR. FABRICANT: Is that all
2 right, Judge?
3 THE COURT: That's fine with me.
4 MR. FABRICANT: I don't
5 anticipate it. Do you have other
6 plans, Dr. David?
7 DR. DAVID: No, I just don't
8 want to miss my plane.
9 MR. FABRICANT: I don't want you
10 to either.
11 THE COURT: We're not going to
12 start until 1:30 the best case
13 scenario. I have some bench warrants
14 that I have to hear at 1:00. I'm
15 going do them at 1:00. Assuming we
16 get done by 1:30, we'll start at 1:30.
17 MR. FABRICANT: Then we probably
18 won't need him.
19 THE COURT: That's what I'm
20 thinking.
21 MR. FABRICANT: Okay. That's
22 fine.
23 THE COURT: Who is your next
24 witness?
25 MR. FABRICANT: We have to

1 decide who we're going to put on.

2 DR. DAVID: Am I to stay here or

3 leave?

4 THE COURT: Hold on one second.

5 The next witness, is it going to be an

6 expert?

7 MR. FABRICANT: Yeah, they're

8 both experts.

9 THE COURT: I'm thinking that if

10 he has to leave by 2:30 --

11 MR. FABRICANT: That's fine,

12 Judge.

13 THE COURT: You may have to come

14 back another day, if they have a need

15 for you, but that's between you and

16 the witness. So you're free to go,

17 Doctor.

18 DR. DAVID: Thank you.

19 THE COURT: So we'll resume at

20 1:30.

21 (COURT RECESSED -- 12:14 P.M.)

22 * * *

23 (COURT RECONVENED -- 1:33 P.M.)

24 THE COURT: Dr. David is still

25 here.

1 DR. DAVID: I'm going to leave
2 in --
3 THE COURT: Okay. I just wanted
4 to make sure you didn't misunderstand
5 I did excuse you.
6 DR. DAVID: No. I'm going to
7 leave here shortly.
8 THE COURT: I'm not driving you
9 to the airport, if you miss your
10 flight.
11 Next witness.
12 MS. JARAMILLO: Your Honor, we
13 call Dr. Cynthia Brzozowski to the
14 stand.
15 THE COURT: Dr. Cynthia
16 Brzozowski.
17 MR. FABRICANT: I'm not sure Dr.
18 David should still be in here for this
19 testimony.
20 THE COURT: I'm not sure it
21 matters at this point. He's already
22 testified.
23 MR. FABRICANT: He can't be
24 recalled, okay.
25

1 * * *

2 DR. CYNTHIA BRZOZOWSKI, having been
3 first duly sworn, was examined
4 and testified as follows:

5 * * *

6 DIRECT EXAMINATION

7 BY MR. JARAMILLO:

8 Q. Good afternoon. Please state your name for
9 the record and spell your last name.

10 A. Dr. Cynthia Brzozowski, B, as in boy, R, as
11 in Robert, Z, as in Zebra, O-Z-O-W-S-K-I.

12 Q. What is your occupation?

13 A. I am a dentist, and I've maintained a private
14 practice on Long Island, New York for the last 30 years.

15 Q. Where did you attend college?

16 A. University of Pennsylvania.

17 Q. What year did you graduate and with what
18 degree?

19 A. A BA Degree in 1981.

20 Q. Where did you go to dental school?

21 A. The Dental School of Boston University. I
22 received my DMD Degree in 1986.

23 Q. Did you complete a residency?

24 A. I did. I completed a general residency
25 program at the Veteran's Administration Hospital in

1 Brooklyn, New York.

2 Q. That's a dental residency; is that correct?

3 A. Yes.

4 Q. Where do you hold a dental license?

5 A. I am licensed to practice in the state of New
6 York.

7 Q. Did you review the materials in this case?

8 A. Yes, I did.

9 Q. Could you list the materials that you did
10 review?

11 A. Yes. I reviewed the trial testimonies of Dr.
12 Sobel and Dr. David, the reports of Dr. Sobel and Dr.
13 David, as well as the UV photograph taken five months
14 after the infliction of the injury, and the colored
15 photograph taken the day of the attack.

16 Q. Dr. Brzozowski, let's discuss your forensic
17 affiliations. What -- list any positions that you have
18 held in any forensic organizations that you've been
19 involved in over the years.

20 A. So I am a Fellow of the American Academy of
21 Forensic Sciences. I've been a member since 1994. I am
22 a member of the American Society of Forensic Odontology
23 since 1993. I served as Secretary from 2013 to 2015 for
24 that organization. I am Vice President for the Suffolk
25 Society of Forensic Dentistry, as well as a member of

1 the New York Society of Forensic Odontology. And I am a
2 Diplomate of the American Board of Forensic Odontology
3 since 2006.

4 Q. And have you served in any position in the
5 American Board of Forensic Odontology, the ABFO?

6 A. Committee or --

7 Q. Have you served on the Board?

8 A. Yes, I served -- I was elected to the Board
9 of Directors in 2013. No, I'm sorry, 2010 to 2013, and
10 then I am currently serving my second term, finishing in
11 2017.

12 Q. And you testified that you first became
13 affiliated or became a diplomate with the ABFO in 2006;
14 is that correct?

15 A. Yes.

16 Q. What requirements, if any, did you fulfill to
17 become an ABFO certified diplomate?

18 A. I worked with my local Medical Examiner's
19 Office to fulfill the required number of forensic cases.
20 I attended the American Academy of Forensic Sciences
21 annual meetings, as well as the ASFO annual meetings. I
22 presented, attended workshops and courses to fulfill the
23 requirements, and I successfully passed the board exam
24 in 2006.

25 Q. In order to pass the board exam, did you need

1 to become familiar with materials that the ABFO offers?

2 A. I did with the ABFO manual.

3 Q. Can you describe what the ABFO diplomates
4 reference manual is?

5 A. So the manual is the governing document for
6 the organization. It establishes the guidelines and
7 standards for the best practices of forensic odontology.

8 Q. And what, if any, committees have you served
9 on or are currently serving on for the ABFO?

10 A. I am on the Bite Mark Committee.

11 Q. When did you begin?

12 A. In February of 2016.

13 Q. And what does the Bite Mark Committee do?

14 A. This year, we were asked to rewrite the bite
15 mark section of our manual, including recommendations
16 for changes in our guidelines and standards for bite
17 mark analysis.

18 Q. And in your practice over the years, have you
19 performed different types of forensic consulting work?

20 A. I have.

21 Q. I'd like you to describe one of those types
22 of work. Can you talk about what forensic dental
23 identification work involves?

24 A. Forensic dental identifications are generally
25 performed in medical legal death investigations where

1 the deceased is no longer visually identifiable. The
2 forensic dentist will compare dental records of a known
3 individual from their treating dentist and compare that
4 with postmortem dental records of the deceased to make a
5 comparison and come to a conclusion as to whether those
6 two individuals are the same.

7 Q. Can you -- which organizations have you done
8 this type of work for?

9 A. So I've maintained a contact with my medical
10 examiners for the last 23 years performing, the majority
11 of work I do is performing forensic identifications. I
12 have also been a member or a forensic odontologist for
13 DMORT, Disaster Mortuary Operational Response Team.
14 This is a division of the government that's activated
15 for large scale or national disasters for the purposes
16 of identifying the deceased.

17 Q. Would you say this is a significant part of
18 your practice?

19 A. Forensic dental identification, yes.

20 Q. And does it involve in any way interpreting
21 issues on skin?

22 A. No.

23 Q. And so let's discuss another type of forensic
24 consulting work that you do. Can you describe bite mark
25 analysis work?

1 A. So the first step of bite mark analysis would
2 be determining whether a pattern injury is a human bite
3 mark or not. If it is not a human bite mark or if it's
4 inconclusive, there's not enough information to
5 determine that it's a human bite mark, then no further
6 analysis would be performed. If it has been determined
7 to be, if it has been determined that the pattern injury
8 is a human bite mark, then the next step would be to
9 evaluate the evidentiary information of that pattern, of
10 that bite mark, before making a comparison to the
11 dentition. Meaning, was it photographically documented
12 properly, was there a scale in place when it was
13 documented.

14 Q. And if you get to that point where you can
15 make a bite mark comparison, can you describe what that
16 is?

17 A. Basically comparing the unique tooth marks to
18 the dentition of the suspect and coming to a conclusion.

19 Q. And what type of bite mark analysis or
20 comparisons have you performed?

21 A. What kind of bite mark comparisons? The
22 majority of information that I've been given by law
23 enforcement has been to just evaluate pattern injuries,
24 determining whether they are human bite marks. I have
25 done some comparisons.

1 Q. And have you testified in a bite mark case?

2 A. I have not testified in bite mark comparison,
3 no.

4 MS. JARAMILLO: Your Honor, at
5 this point, I would tender Dr. Cynthia
6 Brzozowski as a qualified expert in
7 the field of forensic odontology
8 pursuant to Pennsylvania Rule 702.

9 MR. HOPSON: No objection, Your
10 Honor.

11 THE COURT: All right. She's
12 qualified as an expert in forensic
13 odontology.

14 BY MS. JARAMILLO:

15 Q. Dr. Brzozowski, are you being paid for your
16 testimony today?

17 A. No, I am not, just my expenses, travel
18 expenses.

19 Q. Why did you agree to testify on behalf of
20 Mr. Kunco today?

21 A. I view my participation just as my ethical
22 duty.

23 Q. Let's go back to 2006, when you first joined
24 the ABFO. At that point when you became a diplomate,
25 did you believe that bite mark comparison was based on

1 valid science?

2 A. I did.

3 Q. And do you believe that now?

4 A. I do not.

5 Q. How would you characterize this process from
6 joining the ABFO and believing that the process was
7 based on scientific evidence to the way that you feel
8 about it today?

9 A. So my opinion has pretty much evolved over
10 the last decade being a Board Certified Forensic
11 Dentist. I worked very hard at becoming Board
12 Certified. I had a lot of pride in my organization. I
13 had faith in my predecessors that taught me. But I
14 became discouraged with each wrongful conviction that
15 went unaddressed, with each committee report that was
16 dismissed, and for each research study that exposed the
17 flaws of bite mark comparison method was discredited,
18 and at times the research analyst was demeaned or
19 ridiculed publically for their work.

20 Q. Are you familiar with the list that the
21 Innocence Project keeps tallying the total of wrongful
22 convictions and indictments based on bite mark, or based
23 on entirely or in part bite mark testimony?

24 A. Yes.

25 Q. And how many wrongful convictions and

1 indictments have we documented today?

2 A. There are 28.

3 Q. So let's discuss some of the problems that
4 led to those wrongful convictions. First of all, where
5 is a bite mark --

6 MR. HOPSON: Objection to
7 relevance. I could understand if she
8 has anything on this particular case,
9 but I don't think the other cases
10 would be relevant.

11 MS. JARAMILLO: Your Honor, this
12 is directly relevant to her testimony.
13 She -- and it's directly relevant to
14 our pleadings as well. She is an
15 expert witness testifying to the
16 change in science, and that is
17 partially based on the wrongful
18 conviction.

19 THE COURT: The objection is
20 overruled.

21 BY MS. JARAMILLO:

22 Q. So where is a bite mark interpreted from?

23 A. Bite marks can be interpreted on various
24 mediums, the most controversial being that on human
25 skin.

1 Q. And you say it's controversial, what issues
2 does human skin present?

3 A. Well, skin is a temporarily deformable
4 substrate, unlike a more permanently deformable
5 substrate, such as Styrofoam. Skin is always changing
6 in unpredictable ways. It could be swelling, healing,
7 contused, and in some cases decomposed.

8 Q. So why would that matter, if skin is
9 unpredictable?

10 A. If skin cannot accurately record a bite mark
11 because of distortion, then it is really difficult or
12 impossible to associate any bite mark to a particular
13 dentition.

14 Q. And just to make sure we're clear, when you
15 say dentition, what are you taking about?

16 A. I'm talking about a person's set of teeth.

17 Q. So are you aware of any research in this
18 particular area on whether or not skin is a reliable
19 medium?

20 A. Yes.

21 Q. Who conducted that research?

22 A. Dr. Mary Bush and Peter Bush from the
23 University of Buffalo.

24 Q. During what time period was that study
25 conducted?

1 A. From 2008 to 2011.

2 Q. And how did they conduct the studies?

3 A. The studies were conducted on cadaver skin

4 under ideal laboratory conditions.

5 Q. What is an ideal laboratory condition?

6 A. Being that it was cadavers, there was no

7 movement of the body that would simulate movement of a

8 victim in a real life situation. There were no

9 dentitions or models that were used to create the bite

10 marks, and there was no vital inflammatory response that

11 you would find in the living tissue.

12 Q. And so again, what were they testing for?

13 A. They were testing to see if skin could

14 reliably record a bite mark.

15 Q. And what were their findings?

16 A. So their findings were basically intuitive.

17 The -- there were two conclusions or results of the

18 study that had, I think, a lot of relevance on bite mark

19 comparison methods. That being that one dentition could

20 create a mark differently each time on the cadaver skin.

21 And two, that several dentitions could match a bite mark

22 that was created by another dentition.

23 Q. So going back to your testimony that skin is

24 unpredictable in recording a bite, why is that

25 important?

1 A. Well, if there's no method for accounting for
2 distortion, the analyst could interpret any differences
3 between let's say the bite mark and the dentition to
4 perhaps include or match to a suspect that was the focus
5 of an investigation.

6 Q. So would you consider that a subjective --

7 A. It's a subjective -- yes. Subjective
8 interpretation.

9 Q. So during the same time period, there was
10 another report that was significant. Are you familiar
11 with the 2009 National Academy of Sciences report?

12 A. Yes.

13 Q. And we'll just go through this very
14 generally, but what were the conclusions regarding bite
15 mark analysis?

16 A. So the report was done, the result of a
17 scientific panel that reviewed the critical literature
18 for bite marks, and they determined that there is no
19 scientific basis for identifying an individual to the
20 exclusion of all others, based upon a bite mark and
21 skin. And secondly, that there's no established
22 database for tooth characteristics or bite mark pattern
23 that could substantiate or support the rarity of such a
24 match.

25 Q. So around that time during the Bush research

1 and during the NAS report 2009 to 2011, what was the
2 ABFO's response?

3 A. The ABFO pretty much criticized the research
4 studies. There was some, there was some outline
5 disagreement. I think that most felt that there was
6 more scientific studies that were needed to address the
7 issues.

8 Q. And how did you personally feel about it?

9 A. Personally, I took it seriously. I felt that
10 there needed to be more scientific studies to address
11 the problems, and I think that was in part one of the
12 reasons why I accepted the nomination to run for the
13 Board of Directors in 2009 just after the NAS report
14 came out.

15 Q. During the same period of time in 2009, what,
16 if anything, did the ABFO know about wrongful
17 convictions?

18 A. I think the majority of people, members of
19 the Board, did not or were not aware of the wrongful
20 convictions. I think they went unaddressed at most of
21 the annual meetings. I believe that the underlying
22 assumption was that these were the rogue dentists who
23 overstated the validity of the evidence and/or was an
24 inexperienced dentist.

25 Q. So there was some knowledge of wrongful

1 conviction?

2 A. There was some knowledge.

3 Q. And after the Bush research and the NAS
4 report came out and some of these wrongful convictions
5 started cropping up, at that point, did the ABFO
6 disavowal individualization testimony?

7 A. No, it was still supported.

8 Q. So let's talk about the guidelines in the
9 ABFO. So going back to 2006 when you first became a
10 Board Certified Odontologist with the ABFO, what did the
11 guidelines state at that time?

12 A. The guidelines stated or supported
13 individualization testimony. In other words, the biter,
14 one individual to the exclusion of all others, with
15 reasonable medical certainty could've inflicted the
16 bite. There was also the probable biter, the possible
17 biter, not the biter, or inconclusive.

18 Q. And in 2006, were those possible conclusions
19 sanctioned generally within the scientific community?

20 A. They were generally accepted by the
21 scientific community and among other forensic
22 odontologists.

23 Q. Now you testified earlier of your knowledge
24 of the known wrongful convictions and indictments based
25 in part at least on bite mark testimony. Today, what do

1 you know of the reputations of the bite mark analysts
2 who have been involved in any of those wrongful
3 convictions?

4 A. Most are experienced and held in high esteem
5 by other members of the organization, and I think for
6 the most part well intentioned in their testimony. And
7 were past presidents of the ABFO as well. Once again,
8 they were held in high esteem.

9 Q. When did the guidelines change?

10 A. The guidelines changed in 2016.

11 Q. If you could explain briefly why that
12 occurred?

13 A. Well, I think there were many contributing
14 factors, but ultimately, I believe that the changes
15 occurred because of the construct, the results of the
16 construct validity test, which I do believe Dr. Freeman
17 will be testifying to later.

18 Q. Can you give a general statement about what
19 the results of that test were?

20 A. Yes. So this study designed by Dr. Freeman
21 and Dr. Pretty was basically to assess the first step of
22 a flow chart used to proceed with a bite mark comparison
23 case, and that first step being is that pattern injury a
24 human bite mark. And the results show that there was a
25 very high level of disagreement among Board Certified

1 members as to what constitutes or what is a human bite
2 mark.

3 Q. And that would be the step before you even
4 get to comparing a mark to teeth; is that correct?

5 A. Yes.

6 Q. So what do the guidelines state now?

7 A. The guidelines state that if there is
8 sufficient information in that bite mark to proceed with
9 a comparison, then the only conclusions that can be
10 stated today are that you can exclude a dentition, not
11 exclude a dentition, or it is inconclusive.

12 Q. So if you were to make a comparison and say
13 that a particular set of teeth could not be excluded
14 today, could you also say how many other sets of teeth
15 could not be excluded?

16 A. No.

17 Q. Let's talk about the latest report that
18 weighs in on bite mark comparison. Are you familiar
19 with the President's Council of Advisers or Science and
20 Technology's report, otherwise known as the PCAST report
21 to come out recently?

22 A. Yes.

23 Q. And can you go through the conclusions
24 regarding bite mark comparison in that report?

25 A. So this scientific panel concluded that there

1 was no foundational validity to bite mark method,
2 meaning that there are no scientific studies or
3 proficiency tests to determine the accuracy or the error
4 rate or the reliability of our methods. They stated
5 that it is a subjective interpretation, you know, based
6 on expert interpretation of that pattern injury, and
7 that it relies heavily on human judgment, and therefore,
8 is prone to human error, as well as inconsistencies and
9 cognitive bias.

10 Q. So you testified earlier that you reviewed
11 the materials in this case. I'd like to show --

12 MS. JARAMILLO: Your Honor, I'd
13 like to have a couple of photos that
14 were exhibits in the trial in this
15 case displayed, if we're able to do
16 that.

17 MR. HOPSON: I would object,
18 Your Honor. I think we've already
19 established that we've got to review
20 the trial transcript for this. We
21 don't want to get into her trial
22 testimony, you know, get into Dr.
23 Brzozowski's testimony at trial. We
24 just want to get, see what she would
25 testify to. I could see her

1 testifying, based on her review of the
2 record.

3 THE COURT: So you're asking
4 her, you want her to identify
5 photographs that were used at trial
6 and explain why those --

7 MS. JARAMILLO: Your Honor,
8 these are photographs that are part of
9 the record. This is the color photo
10 that was discussed with Dr. David when
11 he was here, that was taken on or
12 about the day of the injury. And then
13 also the UV light photo that was taken
14 five months after the injury, that
15 actually was displayed for a bit
16 during his testimony. These were
17 trial exhibits. I just, I would argue
18 that Dr. Brzozowski obviously did not
19 testify at trial. She's here as an
20 expert witness. And this is certainly
21 relevant to our petition in that what
22 an expert would say today about
23 evidence goes to the change in
24 guidelines and directly to the science
25 behind why those guidelines were

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charged.

MR. HOPSON: Your Honor, she's not showing what the new evidence would be in doing that. If this is a case, if the witness testifies, well I reviewed the records and this is what I would've said, I could understand that. But not going over all the evidence again, because it's got to be new evidence that they're presenting. They're trying to show that there's new evidence. That's their requirement.

THE COURT: So what is your argument then? That the new standards are not evidence in --

MR. HOPSON: My objection to reviewing trial documents would not be relevant to what new evidence is. That's what they're here for today, to show what the new evidence or the new fact is.

THE COURT: Well, the new fact is change in the guidelines, which basically eliminates this form of

1 opinion testimony from being submitted
2 today. So this would help me in
3 understanding what the new procedures
4 are.

5 MR. HOPSON: Under the law, the
6 cases, there's two cases, Commonwealth
7 v. Edminston, and that is 65 A.3d 339,
8 and the other one is Commonwealth v.
9 Padillas, 997 A.2d 356. Edminston,
10 who would have been the -- questioning
11 the precision of microscopic hair
12 analysis, and the majority court ruled
13 that these reports and stuff were new
14 sources for information, but it was
15 not actually a new fact. And that's
16 the problem here. What's the new
17 fact? And if we're saying these
18 guidelines, well, I mean I have some
19 points on that too.

20 MS. JARAMILLO: Your Honor,
21 the --

22 MR. HOPSON: The problem is --
23 go ahead.

24 THE COURT: No, finish.

25 MR. HOPSON: The problem is

1 there's a four prong test they have to
2 meet under these cases. One, the
3 evidence was not available at the time
4 of trial and could not have been
5 discovered through the exercise or
6 reasonable diligence.

7 Two, it's not merely cumulative
8 or corroborative.

9 Three, it's not used only for
10 the purpose of impeachment.

11 And four, that given all of
12 that, a different outcome would likely
13 result.

14 They have to meet all four
15 prongs of that. Simply going over the
16 trial testimony, especially if she's
17 just going to go over to impeach what
18 he said, is not going to satisfy that
19 prong on the test.

20 THE COURT: Well, I'm confused.
21 Maybe you can both help me with this.
22 I'm confused about the context that
23 you're asking me to consider your
24 petition. It sounds to me like this
25 is not new evidence, this is a new

1 finding or a new rule that's being
2 applied, based upon the science which
3 has changed.

4 MS. JARAMILLO: Well, Your
5 Honor, the new fact in this case --

6 THE COURT: What's the new fact?

7 MS. JARAMILLO: Is that based on
8 the science and the wrongful
9 conviction, the guidelines changed,
10 and thus, the trial odontologists, who
11 were the Commonwealth's experts, would
12 testify in a very significantly
13 different way today, than they were
14 able to testify in 1991. In 1991,
15 they were both able to and did say
16 that this injury found on the victim's
17 skin, that we interpreted five months
18 after the victim was attacked, came
19 from the teeth of the defendant,
20 Mr. John Kunco, specifically to one
21 set of teeth. Today, based on the
22 change in science, and then ultimately
23 the change in guidelines because of
24 that, those dentists are not able to
25 testify in that way.

1 THE COURT: Just stop right
2 there. Is it your argument that that
3 explanation that she just gave does
4 not amount to a new fact or new
5 evidence?

6 MR. HOPSON: That is correct,
7 because, one, they're guidelines.
8 Those are guidelines. Those are
9 rules. That's not a fact. That's a
10 rule. And the Commonwealth v. Watts
11 case that I referred to in my answer
12 does differentiate between what fact
13 and law is. And moving one step
14 further, I thought that, okay, that
15 aside, it also indicated something
16 like the new fact was going to be
17 somehow the bite mark testimony is no
18 longer valid. Now I can understand, I
19 can understand if they're trying to
20 push for that and if this witness has
21 something to say why, I'd be
22 interested in hearing to see what her
23 disagreements were.

24 THE COURT: I think that's what
25 she was getting to.

1 MR. HOPSON: Well, why Dr.
2 Sobel's and Dr. David's conclusion
3 were incorrect. But what -- I don't
4 know what the new fact is. Because
5 all that would be would simply be
6 contradicting the trial testimony of
7 the Commonwealth's experts back in
8 1991. That is used solely for
9 impeachment. So that's my problem
10 with that aspect of the argument.

11 MS. JARAMILLO: Your Honor, I'm
12 not even sure that we're in
13 disagreement here. What I would like
14 Dr. Brzozowski to testify to is her
15 interpretation, based on the
16 guidelines today, and the studies that
17 have been conducted that show that
18 there, the bite mark analysis was not
19 based on valid scientific methods.
20 What was wrong with their testimony
21 ultimately, what she would be able to
22 testify to today as a certified
23 forensic odontologist. I feel like a
24 lot of this other stuff that's being
25 brought in is something that should be

1 argued. It's really the
2 interpretation of the law. If we
3 could get this testimony on, he can
4 make that argument. But when ADA
5 Hopson is bringing up the Watts case,
6 that case deals entirely with new law
7 being a judicial opinion and has
8 nothing to do with guidelines. The
9 new fact in this case is that we heard
10 Dr. David say he has now signed two
11 affidavits that he would not testify
12 that the bite mark was made by the
13 teeth of John Kunco. He would not do
14 that today is very definitely a new
15 fact in this case.

16 MR. HOPSON: Your Honor, I
17 believe he testified he could not do
18 it because of the guideline.

19 THE COURT: Both the affidavits
20 have different words. The defense
21 affidavit stated he would not, and
22 your affidavit says he could not
23 testify in the same manner that he did
24 back in 1991. I'm going to overrule
25 the objection. It's helpful for me to

1 understand the context under which
2 they're presenting the new evidence or
3 what the new evidence and new fact is.
4 So I need to hear what her
5 interpretation is and how she would
6 have interpreted the evidence and
7 whether the opinion would've been
8 different. So go ahead.

9 MS. JARAMILLO: Okay.

10 BY MS. JARAMILLO:

11 Q. So, Dr. Brzozowski, you said you've reviewed
12 the, both the color photo in this case that was taken, I
13 believe it was either the day of or the day after the
14 injury occurred, and then also the UV light photo that
15 was taken about five months after the injury occurred.
16 So if we could just, here's the color photo, and if we
17 could also just flash up for a moment the UV photo.

18 After seeing the evidence in this case and
19 reviewing the materials, as an ABFO certified diplomate
20 today, what would you do next?

21 A. Well, I would definitely not do any further
22 comparison today. I do not believe that there is enough
23 evidentiary information to even determine that this is
24 even a human bite mark, let alone go to a comparison to
25 a dentition.

1 Q. And what are the problems with making a
2 comparison in this particular case?

3 A. With the colored photograph, I have several
4 issues. The fact that this an orientation photograph
5 just to show the location of where the bite mark is on
6 the body. It is not a close up photograph that would
7 show the necessary detail that you would need to make a
8 determination that that injury is a bite mark or to go
9 forward with a comparison. There is no scale in place
10 to resize that to a life size image to do a comparison
11 to a dentition.

12 Dr. Sobel had attempted to resize the
13 photograph using the piping on the dressing gown.
14 Unfortunately, the piping is on the upper arm of the
15 victim. It is not in the same plane as the injury,
16 which is on the back. Therefore -- in order to resize
17 an image, the scale must be in the same plane as that
18 injury. The camera that was documenting this injury was
19 not perpendicular to the plane of the bite mark,
20 therefore, there is an angular distortion that cannot be
21 rectified and, therefore, that would preclude doing any
22 kind of measurements off of this photograph.

23 MS. JARAMILLO: Your Honor, if
24 Dr. Brzozowski, if it's helpful, would
25 it be alright if she approached the

1 screen to point anything out?

2 THE COURT: Sure.

3 BY MS. JARAMILLO:

4 Q. If it's helpful to you and you want to
5 approach, feel free.

6 A. Do you understand some of the things that I
7 said, or would you --

8 THE COURT: I understand.

9 BY MS. JARAMILLO:

10 Q. Dr. Brzozowski, I would ask just to clarify
11 what you're talking about when you say the piping.

12 A. Sure.

13 (WITNESS STEPS DOWN)

14 THE COURT: Actually, it might
15 be easier to use this one so the court
16 reporter can be able to hear you.

17 A. So the piping is right here on the dressing
18 gown, and obviously in through here. It's impossible
19 for that piping to be in the same plane as that injury
20 there. In order to resize this image to a life size
21 image, if you were comparing to a dentition, this scale
22 would have to be in the same plane as that, as the gown.

23 Q. And, Dr. Brzozowski, the lighter blue color
24 under the injury, is that also part of the piping?

25 A. Yes, I believe that's also part of the

1 piping.

2 Q. And --

3 A. The coloration in this is not very good.

4 Q. Right. And what if -- are there any issues
5 with that, that you were talking about earlier, about
6 being in the same plane or not being in the same plane?

7 A. Well, it's not really very clear in his
8 testimony what portion of that piping he used to resize
9 the image. There are some areas where the piping is
10 creased or folded, so it's not very clear exactly where
11 he used that piping and how he measured that.

12 Q. So would it be fair to characterize your
13 testimony that the piping could measure different --

14 A. Differently in --

15 Q. -- widths, depending on where you're looking.
16 And if we could then turn to the UV light photo. If you
17 could just also give us your thoughts of any problems
18 that you see with this particular photo?

19 A. So like most UV photographs, this is a very
20 grainy image, and it lacks really any detail that would
21 be needed to do a comparison to anybody's teeth. If I
22 were given this photograph or the colored photograph
23 today by my law enforcement agency and I was asked to
24 evaluate it, I would say there is insufficient evidence
25 or information to even determine that this is a human

1 bite mark, and, therefore, I would not go further with
2 any comparison. The fact that this was of an injury
3 that healed over a five month period, there is no way
4 for, to account for how that injury changed in any way
5 as it healed over a five month period. There's
6 absolutely no way to take that into consideration. And
7 then to do specific measurements from this and compare
8 it to Mr. Kunco's dentition is just not acceptable.

9 THE COURT: Okay.

10 MS. JARAMILLO: She can be
11 seated unless you have any --

12 THE COURT: No, I don't have any
13 other questions.

14 A. I do have one other thought.

15 BY MS. JARAMILLO:

16 Q. Go ahead.

17 A. Dr. David also attempted to explain
18 discrepancies in this photograph as well as the colored
19 photograph as to why some teeth marked more heavily than
20 others. He attempted to explain that by the way the
21 victim moved at the time of infliction and the angle of
22 the biter's head. And this is absolutely pure
23 speculation as he was not there at the time of the
24 infliction, and this is unverifiable information.

25 THE COURT: Okay.

1 BY MS. JARAMILLO:

2 Q. Dr. Brzozowski, do you believe that any
3 criminal conviction should be based on bite mark
4 comparison today?

5 A. As of today, no.

6 Q. I want to just refer you to Dr. David's
7 conclusion in his report again, and then I'll ask you a
8 question about that. Dr. David stated in his report
9 that to a reasonable degree of dental certainty that the
10 bite mark found on the victim was produced by the teeth
11 of John Kunco. Was this an acceptable conclusion in
12 1991?

13 A. Yes, it was.

14 Q. Was it an acceptable conclusion, based on the
15 scientific community and the forensic odontology
16 community when you became a Board Certified Forensic
17 Odontologist in 2006?

18 A. It was.

19 Q. And is it an acceptable conclusion today?

20 A. It's not.

21 Q. And why not?

22 A. Our guidelines have changed. We can no
23 longer conclude that one individual to the exclusion of
24 all others inflicted that bite mark. We know that skin
25 is a poor medium for recording bite marks. There are no

1 scientific studies today to support the reliability or
2 accuracy of bite mark comparison methods. And it's a
3 subjective interpretation, based on expert opinion and
4 today there is no consensus between experts as to what
5 is even a bite mark.

6 Q. So in light of your testimony today, what
7 makes the ABFO's change in guidelines in March of 2016,
8 new and different from what they had done before?

9 A. Could you please restate that?

10 Q. Sure. What is different about the ABFO
11 guidelines today than what has ever been done before?

12 A. Well, we can no longer use individualization
13 testimony.

14 MS. JARAMILLO: Thank you.

15 THE COURT: Is that all?

16 MS. JARAMILLO: Yes.

17 THE COURT: Cross-examination.

18 * * *

19 CROSS-EXAMINATION

20 BY MR. HOPSON:

21 Q. Doctor, are you aware of any court cases that
22 have precluded bite mark comparison testimony?

23 A. No.

24 Q. And if I understood the manual right, Doctor,
25 unless I misread it, it does not preclude bite mark

1 comparison; is that correct?

2 A. No, it does not.

3 Q. Okay. Would you agree with me that this

4 manual is a set of abstract rules or principles to be

5 applied to facts of bite marks?

6 A. I wouldn't call them abstract rules, but they

7 are recommendations.

8 Q. So would you agree that there are a series of

9 recommendations to be applied to individual facts or

10 individual cases?

11 A. Yes.

12 Q. And would you agree with me that even looking

13 at the diplomates reference manual, bite mark comparison

14 is still accepted in the odontology community?

15 A. That depends on who you talk to. But, yes.

16 Q. Okay. And along those lines, Doctor, I just

17 wondered how many bite mark cases have you done in

18 court?

19 A. Are you asking me how many pattern injuries I

20 have evaluated, or are you asking me how many final

21 comparisons and reports I have done?

22 Q. How many final comparisons and reports have

23 you done?

24 A. About five.

25 Q. Okay. And evidently, the ABFO was founded in

1 1976?

2 A. Yes.

3 Q. Doctor, were you aware of this published
4 paper in 1975 which actually addressed some of the
5 concerns that you testified to today about problems in
6 bite marks in skin, human skin?

7 A. Is this Devore?

8 Q. Whittaker actually.

9 A. Okay. Yes, I'm familiar with this article.

10 Q. And that came out in 1975, correct?

11 A. I don't see a date on this.

12 Q. Look at the back abstract page there.

13 A. I do not see a date on this.

14 Q. I'm sorry, I directed you to the wrong page.
15 Right there.

16 A. 1975.

17 Q. Thank you. So even as far back as 1975 there
18 was some question about bite mark analysis, correct?

19 A. Yes.

20 Q. And I also noticed, I guess you've read the
21 President's Council on Advised, Council of Advisers on
22 Scientific and Technology report?

23 A. The PCAST report, yes.

24 Q. And I noticed that it looks like in the bite
25 mark comparison, they referenced a lot of studies that

1 had been done. I noticed a paper in 1999, correct?

2 A. I don't have a copy of that in front of me,
3 so I could not say.

4 Q. These are pages 64 and 65 of the PCAST. Do
5 you see --

6 THE COURT: Has that report been
7 introduced into this record?

8 MS. JARAMILLO: It has not been
9 introduced for the hearing. It is in
10 our pleadings, Your Honor.

11 MR. HOPSON: Since it is in the
12 pleadings, Your Honor, I think it's
13 evidence that the Court can consider.

14 THE COURT: Yeah, I just want to
15 make sure I have it somewhere.

16 BY MR. HOPSON:

17 Q. On page 64, I think the third paragraph, they
18 reference the 1975 paper, correct?

19 A. Yes.

20 Q. And then I think the next paragraph they talk
21 about the 1999 paper?

22 A. 1998.

23 Q. 1998. And do they refer to two papers in
24 2001? It might be on the next page.

25 A. There's the Arheart and Pretty study in 2001,

1 is that what you were referring to?

2 Q. Yes. These are all published papers,
3 correct?

4 A. Yes.

5 Q. And there were I think two studies, correct?
6 Was there another one that references?

7 A. On this page, there's only one.

8 Q. Okay. Try the next page, Doctor.

9 A. There is nothing on this page. I didn't see
10 a reference on the second page.

11 Q. I see a 2010 paper here, third paragraph.

12 A. Okay.

13 Q. So there is a paper in 2010 that they
14 referred to?

15 A. Yes. I just don't know what specifically
16 that paper is or where it's published. It just states
17 in 2010 paper 29 examiners with various levels, are they
18 referring to that reference? I'm just not sure which
19 paper this was.

20 Q. That's just from page 65 of the PCAST report.

21 A. No, they're referring to a study here that
22 I'm not sure which is specifically --

23 MS. JARAMILLO: Objection. Your
24 Honor, he can move the PCAST report
25 into evidence if he'd like to, but she

1 needs to have the entire thing so that
2 she can have the context. She's got
3 one page at a time.

4 THE COURT: She's just being
5 asked sort of blindly as to what
6 you're referring to.

7 MR. HOPSON: I'm just asking if
8 it refers to papers that question bite
9 mark reliability and when they were
10 published. And the PCAST report has
11 that.

12 THE COURT: But she doesn't know
13 what you're referring to. You're just
14 asking her about a paper. So
15 they're -- apparently I don't know
16 what you're referring to either.
17 There was a paper in 2010, a study
18 done?

19 MR. HOPSON: The PCAST report
20 refers to it.

21 THE COURT: Who did the study
22 and what was the purpose of the study?
23 That would be helpful.

24 MR. HOPSON: Okay.

25 THE COURT: Maybe you just want

1 to give her the report and then ask
2 her specifically about it. I'm sure
3 there was something more specific in
4 the report about the study.

5 BY MR. HOPSON:

6 Q. Okay. Why don't we do it this way then.
7 Doctor, would you read that paragraph that starts in the
8 1999 paper?

9 A. In the 1999 paper, 29 forensic dental experts
10 as well as 80 others including general dentists, dental
11 students, and lay participants were shown color prints
12 of human bite marks from 50 court cases and asked to
13 decide whether each bite mark was made by an adult or a
14 child. The decisions were compared to the verdict from
15 the cases. All groups performed poorly.

16 Q. Okay. So that's a study there saying that
17 there was poor performance in bite mark comparison,
18 correct?

19 A. Yes.

20 Q. And read the paragraph, if you could, about
21 the 2001 paper.

22 A. In a 2001 paper, 32 ABFO certified diplomates
23 were asked to report their certainty that 4 specific
24 bite marks might have come from each of the 7 dental
25 models consisting of the 4 correct sources and 3

1 unrelated samples. Such a closed set design where the
2 correct source is present for each question sampled is
3 inappropriate for assessing reliability because it will
4 tend to underestimate the false positive rate.

5 Q. So that questions the reliability of bite
6 mark comparison also, correct?

7 MS. JARAMILLO: Objection.

8 THE COURT: Objection.

9 MS. JARAMILLO: Mischaracter-
10 ization.

11 MR. HOPSON: Just for the fact
12 that these papers exist that are
13 questioning the reliability of bite
14 marks, Your Honor.

15 THE COURT: Well, that last one
16 that you referred to, it doesn't
17 really draw the same conclusion that
18 you're suggesting from what it sounded
19 like to me.

20 MS. JARAMILLO: Your Honor --

21 MR. HOPSON: Well, it talked
22 about a false positive rate.

23 THE COURT: It said it would be
24 unreliable.

25 MS. JARAMILLO: Right.

1 MR. HOPSON: That's what I'm
2 trying to point out, that there were
3 studies saying that bite marks were
4 unreliable.

5 THE COURT: What was your
6 objection?

7 MS. JARAMILLO: Your Honor, the
8 PCAST report is critiquing those
9 studies and reports. I guess I'm not
10 understanding the relevance, and I do
11 feel like the testimony --

12 THE COURT: I'm not --

13 MR. HOPSON: Well, they're
14 not --

15 THE COURT: Are you trying to
16 establish that there was other
17 evidence that Mr. Caruthers could've
18 used at the time to challenge the bite
19 mark testimony that was offered?

20 MR. HOPSON: That's going to be
21 relevant in --

22 THE COURT: But I mean is that
23 why you're asking this line of
24 questioning right now?

25 MR. HOPSON: Yes.

1 THE COURT: Okay. The objection
2 is overruled.

3 MR. HOPSON: Okay. Thank you.

4 BY MR. HOPSON:

5 Q. Doctor, back in 1991, could you say if there
6 was, could you say that there was no forensic
7 odontologist or any expert back in 1991 who would've
8 disagreed with Dr. David and Dr. Sobel's conclusion?

9 A. I cannot say that, but I was also not a Board
10 Certified Forensic dentist at that time. I only became
11 boarded in 2006.

12 Q. So you don't know then, correct?

13 A. I don't know.

14 Q. Okay. It's possible though?

15 A. I can't answer that.

16 Q. Okay. Doctor, you reviewed the trial
17 testimony in this case, correct?

18 A. Yes.

19 Q. Did you review Dr. David and Dr. Sobel's
20 reports also?

21 A. Yes.

22 Q. Based on what you said, you don't agree with
23 what they said?

24 A. Specifically what are you referring to?

25 Q. Well, you don't agree with the fact that

1 their conclusion was that this was a human bite mark?

2 A. I do not agree with their conclusion that it
3 was a human bite mark.

4 Q. And you wouldn't have gotten any further?

5 A. I would not have gone any further.

6 Q. So you would contradict their testimony,
7 correct?

8 A. I would contradict their testimony, based on
9 the science that we know today.

10 Q. Well again, but you know of no -- bite mark
11 comparison is still accepted in the odontology
12 community, correct?

13 A. It's accepted by some.

14 Q. Well, the guidelines don't preclude it,
15 correct?

16 A. They don't.

17 THE COURT: But do the
18 guidelines preclude individualization
19 opinion testimony?

20 A. Yes, they do.

21 THE COURT: They do preclude
22 that sort of opinion testimony today?

23 A. Yes, they do.

24 THE COURT: And that's one
25 distinction, because in 1991, a doctor

1 who was qualified as an expert could
2 give individualization opinion
3 testimony?

4 A. Yes.

5 THE COURT: Whereas today,
6 regardless of whether it was Dr.
7 David, you, or any other expert, the
8 guidelines and the community would
9 preclude that type of testimony or
10 opinion testimony today?

11 A. Yes.

12 THE COURT: Okay.

13 MR. HOPSON: Well, one follow up
14 on that.

15 BY MR. HOPSON:

16 Q. But Dr. David and Dr. Sobel could still
17 testify to the consistency between the dentition and the
18 bite mark? I know you wouldn't agree with it, but they
19 could still testify to that?

20 A. Well, that's not a conclusion. I mean
21 that's -- they can show the consistencies, but that's
22 not a conclusion.

23 Q. Right.

24 A. It's an opinion.

25 Q. And they would be experts like yourself, it

1 would be an expert opinion, correct?

2 A. Yes.

3 MS. JARAMILLO: Objection. She
4 has no way of knowing whether they
5 would be qualified as expert
6 witnesses.

7 THE COURT: Assuming they were.
8 Overruled.

9 BY MR. HOPSON:

10 Q. And when you talk about the science, are you
11 talking about forensic metrology?

12 A. When I'm referring to the science?

13 Q. Of bite mark comparison?

14 A. I'm referring to the fact that there are no
15 studies to validate that we can come to the same
16 conclusions about a pattern injury being a human bite
17 mark, or any scientific studies that show that we could
18 reliably measure something in skin and compare it to a
19 stone model of somebody's teeth.

20 MR. HOPSON: If I may just have
21 a moment, Your Honor.

22 No further questions, Your
23 Honor.

24 THE COURT: Okay. Any redirect?

25 MS. JARAMILLO: No further

1 questions, Your Honor.

2 THE COURT: Okay. Thank you,

3 Doctor. Watch your step.

4 Next witness?

5 MS. THOMPSON: The defense calls

6 Dr. Adam Freeman.

7 * * *

8 DR. ADAM FREEMAN, having been

9 first duly sworn, was examined

10 and testified as follows:

11 * * *

12 DIRECT EXAMINATION

13 BY MR. FABRICANT:

14 Q. Good afternoon, Dr. Freeman.

15 A. Good afternoon, Mr. Fabricant.

16 Q. Would you please state and spell your name

17 for the record?

18 A. Sure. My name is Adam, A-D-A-M. Last name

19 is Freeman, F-R-E-E-M-A-N.

20 Q. And would you tell the Court what it is that

21 you do for a living and where you were educated?

22 A. I'm a general dentist in Westport,

23 Connecticut, and that's what I do for a living. Where I

24 was educated, I went to dental school at Columbia

25 University.

1 Q. Do you hold any licenses in dentistry?

2 A. I do. I hold a license in the states of

3 Connecticut and New York.

4 Q. Do you have any academic appointments in --

5 I'm sorry. You have a speciality in forensic dentistry

6 as well, right?

7 A. I do. I'm Board Certified in Forensic

8 Dentistry.

9 Q. Do you have academic appointments or have you

10 had in the past?

11 A. I did through 2014. I was an Assistant

12 Medical Professor in the Department of Pathology at

13 Columbia University and on the Admissions Committee

14 there.

15 Q. In terms of your forensic work, we described

16 the various roles that you played within the ABFO?

17 A. Sure. In the ABFO currently, I'm the

18 president of the organization, but I've also served as

19 the Secretary, the Vice President, the Present-Elect,

20 the Board of Governors, I Chaired the Bite Mark

21 Committee for a number of years, the Patrology

22 Committee, and I'm probably leaving out something, but

23 those are the major pieces.

24 Q. And do you have affiliations with the, what's

25 known as the ASFO?

1 A. I do. I'm a member of the ASFO. I'm a past
2 president of the ASFO.

3 Q. That's the American Society of Forensic
4 Odontology?

5 A. That is the American Society of Forensic
6 Odontology.

7 Q. And you -- the National Institutes of
8 Standards and Technology, would you explain to the Court
9 what role this government agency is playing in forensics
10 currently?

11 A. Sure. I think as part of the NAS report, one
12 of their recommendations was a national look at
13 forensics in the United States. The National Institute
14 of Standards and Technology has taken that on and is
15 looking into all areas of forensic endeavors in the
16 United States, and they've created numerous numbers of
17 OSACs within that, and I happen to be on the Odontology
18 OSAC --

19 Q. Were you invited on that or did you apply?

20 A. Actually, I was asked to join. I was invited
21 to become part of that.

22 Q. And OSAC, just for the Court's information,
23 stands for what?

24 A. That's a good question.

25 Q. Organization of Scientific?

1 A. Scientific Area Committees, yes.

2 Q. And would you describe for the Court your
3 forensic consulting experience and practice?

4 A. Sure. I consult for the medical examiner in
5 the state of Connecticut, as well as other areas in the
6 northeast. I've done work for the medical examiner in
7 Rhode Island, and I've work for the FBI for missing
8 persons, and I represent the American Board of Forensic
9 Odontology at Interpol's Disaster Victim Identification
10 working group.

11 Q. And the -- just to be clear, you're speaking
12 not on behalf of the ABFO today, but as your capacity as
13 an expert in forensic dentistry?

14 A. That's correct.

15 Q. Are you being paid for your testimony here
16 today?

17 A. No.

18 Q. Why is that?

19 A. Sometimes you just have to do the right thing
20 and work for public service.

21 MR. FABRICANT: I would ask that
22 Dr. Freeman be declared an expert.

23 MR. HOPSON: No objection, Your
24 Honor.

25 THE COURT: In --

1 MR. FABRICANT: In forensic
2 odontology, I'm sorry.
3 THE COURT: Forensic odontology.
4 Any objection?
5 MR. HOPSON: No objection, Your
6 Honor.
7 THE COURT: He is qualified as
8 an expert in the field of forensic
9 odontology.
10 BY MR. FABRICANT:
11 Q. Just to be clear, Dr. Freeman, forensic
12 dentistry and forensic odontology are the same thing,
13 right?
14 A. They are synonyms, yes.
15 Q. So would you describe how you first became
16 involved in forensic dentistry?
17 A. Sure. Actually, 9/11 happened, and due to
18 the location of my office to New York City, we lost
19 several patients there, and that sort of spurt on my
20 interest of the identification processes, since we were
21 asked for records. I took a week long course at the
22 Armed Forces Institute of Pathology, and met, I believe
23 it was actually the current president of the ABFO, Brian
24 Chrz, who had recommended to me that I further my
25 education by taking Dr. Senn's, in the audience, his

1 fellowship in forensic odontology.

2 Q. And did you take that fellowship?

3 A. I did apply for that fellowship, was accepted
4 and spent my year or so with that program on and off.
5 It's not a year straight.

6 Q. Right. And during your training with this
7 program and the other training that you received during
8 this period, what would you learn about
9 individualization probabilistic testimony?

10 A. At the time, the ABFO allowed for
11 individualization and surely that was the, we were
12 taught that individualization as part of bite marks was
13 part of the entirety of bite mark testimony, you could
14 do that.

15 Q. And in 2009, the ABFO guidelines, what did
16 they state about the various conclusions that were
17 available to forensic dentists?

18 A. In 2009, I believe it was medical reasonable
19 certainty was the top sort of tiered conclusion linking
20 a suspect to a patterned injury. And then it was
21 probable. Then cannot exclude, exclude, and
22 insufficient information.

23 Q. And when you joined the -- I'm sorry, what
24 year did you become Board Certified?

25 A. I became Board Certified in 2009. I took my

1 fellowship in 2003.

2 Q. And when you became Board Certified, what, if
3 any, of the information did you have or was discussed
4 around wrongful convictions?

5 A. Wrongful convictions were definitely
6 something that were discussed. They were discussed
7 mostly as a couple of rogue dentists, a couple of bad
8 apples that had some wrongful convictions.

9 Q. Dr. West in particular, Dr. Michael West?

10 A. Dr. West played a large role in our
11 discussions in wrongful convictions, yes.

12 Q. Did there come a time where your opinion
13 changed in terms of rotten apples?

14 A. Yes.

15 Q. Would you describe how that happened?

16 A. Sure. As time moved on and I realized that
17 people who I had great respect for and continue to have
18 great respect for who may have stated what they believed
19 at that time was valid, since either recanted their
20 testimony or it was determined that it was incorrect.

21 Q. And you sought to educate yourself around --

22 A. I think as an educated person you always try
23 to educate yourself and continue on educating yourself,
24 yes.

25 Q. And you became aware of the list that the

1 Innocence Project keeps of wrongful convictions and
2 indictments?

3 A. I did become aware of that.

4 Q. So apart from the wrongful convictions, and
5 we've heard a little bit, I guess you haven't today, but
6 was there a critique from the larger scientific
7 community around bite mark analysis?

8 A. Sure. I think bite marks have been beat up
9 pretty good in the scientific community about the lack
10 of the scientific underpinnings to some of the
11 conclusions that we had.

12 Q. And in 2009, was there a response in the --
13 I'm sorry. In 2009, the NAS was published. You were
14 familiar with that report, right?

15 A. I am. The NAS report was published in 2009.

16 Q. And following that report, were there any
17 changes in the ABFO guidelines?

18 A. Yeah. Following that, the ABFO responded by
19 making it more difficult actually to become Board
20 Certified. We changed our requirement from two bite
21 marks that you needed to become Board eligible to seven
22 bite marks, and there was the beginnings of some talk
23 about other changes.

24 Q. But individualization was still supported?

25 A. Individualization was still supported.

1 Q. I'm just going to show you one of the flow
2 charts that's been discussed in court a little bit today
3 about the decision marking, and I would ask that just
4 for demonstrative purposes, this is an accurate
5 representation of a flow chart?

6 A. That is a flow chart that was drafted,
7 presented to the Board and withdrawn prior to the Board
8 the Diplomates at large being able to vote on it.

9 Q. Right. And the first step in the flow chart
10 remains the same today though, right? You determine
11 whether it's a bite mark, suggest of a bite mark? First
12 you determine whether or not there is sufficient -- why
13 don't you tell me?

14 A. Sure. The first step is to determine whether
15 or not the injury you're looking at is, in fact, a human
16 bite mark. Today we've removed one of the terms that
17 are, is in that flow chart, which is the one to the
18 farthest left, which says suggestive of a bite mark.
19 That term is no longer available to somebody. It is
20 either it is a bite mark, it's not a bite mark, or
21 there's insufficient information for the current
22 guidelines today.

23 Q. And at some point, you and Dr. Pretty
24 conducted a test of ABFO Board Certified Diplomates
25 about their ability to identify a bite mark?

1 A. We were actually trying to, taking that flow
2 chart, what we were doing is we were trying to validate
3 that first step. And a group of us, Dr. Pretty and
4 myself, being sort of the lead authors, did a study to
5 try to validate that first step.

6 Q. And before we get into the nitty gritty, can
7 you describe the results of that test?

8 A. Sure. Essentially what the test was, it was
9 something we called the construct validity test. There
10 is no way we often know whether or not a bite mark is,
11 in fact, a bite mark. It's opinion. And so what we
12 were looking for, since we didn't have that absolute
13 fact, we were looking for levels of agreement among
14 people with similar training and expertise, so we used
15 people that were already Board Certified, people that
16 had been tested, gone through the process of being
17 vetted, and we used that population to determine whether
18 or not there was agreement when they were presented
19 images of a patterned injury, as to whether or not that
20 patterned injury represented a bite mark.

21 Q. And generally speaking, what were the
22 results?

23 A. In a few cases there was high levels of
24 agreement, but in the vast majority of cases, there was
25 a lack of agreement as to whether or not something

1 reached that, the evidentiary value, whether the injury
2 they're looking at was, in fact, a bite mark.

3 Q. Will you -- more specifically, about how many
4 injuries were looked at, how many Board Certified
5 Experts, and walk us through this?

6 A. What we did is we requested from the Board as
7 many images as we could garner of patterned injuries.
8 We asked for injuries that had both orientation photos,
9 as well as photos that had a scale, so that every one of
10 the photos that we presented in the study had a scale
11 associated with it. We combed through the numerous
12 submissions and cut it down to one hundred. Those were
13 then sent with a letter from the president at the time,
14 Dr. Peter Loomis, requesting that diplomates participate
15 in this online study, where they were essentially asked
16 two questions. The first question being, is there
17 enough evidentiary value here to determine whether or
18 not this is a human bite mark? And if so, is it
19 suggestive of a bite mark following our guidelines, was
20 it suggestive of a bite mark, not a human bite mark, or
21 not a human bite mark?

22 Q. And is this a graph representing the various
23 responses?

24 A. So that's half the graph. There's another,
25 that's the other half of the graph of the responses that

1 we got. And all we did is graph the information. So --
2 Q. I'm going to ask you to walk up and walk the
3 Court through the graph so he can explain it, if it's
4 okay with the Court?

5 THE COURT: Okay.

6 (WITNESS STEPS DOWN)

7 BY MR. FABRICANT:

8 Q. Go to the first one and have Adam
9 demonstrate, Dr. Freeman demonstrate.

10 A. So what we're looking at here first -- can I
11 turn this a little bit, Your Honor?

12 THE COURT: Yes.

13 A. I guess I will not.

14 THE COURT: Actually, if you
15 want, you can -- you're on the
16 computer, never mind.

17 A. So we're looking at the bottom. The bottom
18 is just the case number. That was the photograph number
19 so we had something that we could always link back to.
20 The red marking are people who said the injury that
21 they're looking at is not a human bite mark. The yellow
22 are people that said that is suggestive of a human bite
23 mark. And the green represents those who said that is
24 absolutely a human bite mark. The black that you see,
25 the tiny black, are people who determined that there

1 was, either they didn't answer the question or they
2 determined that there was not enough evidentiary value
3 to say whether or not this was, wasn't, or that they
4 hadn't got enough information to determine whether it
5 was a bite mark.

6 BY MR. FABRICANT:

7 Q. In looking at this, at these data, what was
8 your personal response to this?

9 A. Well, I and others had the benefit of sitting
10 down before the presentation was given to determine
11 whether or not, to give everybody sort of a heads up on
12 what was going on, and everybody in the room, which were
13 part of the leadership of the ABFO, determined that
14 these data needed to be presented.

15 Q. And was there alarm, acceptance, what was
16 the --

17 A. I think that there was overwhelming shock at
18 the results. I mean, quite frankly, I think all of the
19 people that were involved at the front end of this
20 thought that this piece, this first step was going to be
21 the slam dunk to our study. The proposal was that there
22 would be a series of studies to validate that decision
23 tree, this being just the first step, and we all sort of
24 thought that this would be the easy piece.

25 Q. And was there any distinction made between

1 the hierarchy people on the Board of Directors in terms
2 of how they did compared to the rank and file?

3 A. There was one point where there was a group
4 of people that I would call on the leadership of the
5 ABFO who had suggested that maybe if we looked at a
6 smaller group of people who maybe were a little bit more
7 experience in bite marks, and we looked at their level
8 of disagreement between each other, that the results
9 would be better.

10 Q. And what were the results?

11 A. Similar.

12 Q. You can take a seat.

13 (WITNESS RETAKES STAND)

14 Q. Were there bite marks that were similar to
15 this in the study?

16 A. There were bite marks that were of similar
17 evidentiary value to that.

18 Q. And what would, do you remember what the
19 results were?

20 A. Those would be typically the types of
21 injuries that there was widespread disagreement on.

22 THE COURT: Why is that?

23 A. Because there's just not a lot of evidentiary
24 value. Currently in discussions with the ABFO, one of
25 the things that we constantly discuss is that we need to

1 restrict ourselves to those injuries that have the
2 highest evidentiary value, and that is not one.

3 BY MR. FABRICANT:

4 Q. And the same year that the results of this,
5 of your construct validity test were released, did you
6 have opportunity to present these results again, and if
7 so, where?

8 A. Yes. We were requested by the Texas Forensic
9 Science Commission to come and present the study to
10 them.

11 Q. And would you describe how the, that
12 testimony went and what the Texas Forensic Science
13 Commission's findings were?

14 A. I mean, I think that I was happy with the way
15 the presentation went. There was, it was definitely a
16 heated debate and argument at the Texas Forensic Science
17 Commission, and I think that they held the study in high
18 regard and that it had a significant impact in their
19 decision.

20 Mr. Fabricant, can I go back to the question
21 that His Honor asked me?

22 Q. Sure.

23 A. About also this particular injury. Just to
24 give you a sense, that injury would not even be allowed
25 into the study as it sits, because there is no scale in

1 it, and that was one of our determining factors to have
2 a scale in the image, if it was going to be part of our
3 study. So that image in and of itself would not even
4 have been allowed to become part of our population.

5 Q. Could that image be resized?

6 A. Without a scale.

7 Q. Right.

8 A. No.

9 Q. Why is that?

10 A. Because there's no reference to do so. I
11 read that they tried to use the piping on her, that gown
12 to do, to resize it. But, for instance, if you look at
13 the piping to the right, it's significantly thicker than
14 sort of where the depression is there. So maybe at
15 about four o'clock, the piping is thick. And at the
16 five or so o'clock or six o'clock position, the piping
17 is significantly narrower. So there's no consistency
18 there. There is no scale.

19 Q. Would it be fair to characterize that any
20 measurements that were taken were meaningless?

21 A. Any measurements from that injury, from that
22 photograph would be meaningless.

23 Q. I've had this marked as Defense Exhibit E.
24 I've provided a copy of it to the Commonwealth. Would
25 you take a look at this document, Dr. Freeman, and see

1 if you recognize this?

2 A. Yes.

3 Q. What is that?

4 A. This is the report from the Texas Forensic
5 Commission.

6 Q. Is that a fair and accurate representation of
7 the report that was issued?

8 A. It appears to be, yes.

9 MR. FABRICANT: I would ask that
10 this be moved into evidence.

11 THE COURT: Any objection?

12 MR. HOPSON: No objection, Your
13 Honor.

14 THE COURT: Exhibit E is
15 admitted.

16 BY MR. FABRICANT:

17 Q. Reading from the beginning of the middle of
18 the page of 12 of the Texas Forensic Science Commission,
19 would you read the middle paragraph beginning with
20 after?

21 A. After addressing these historical issues, the
22 Commission turned its focus to the remaining questions
23 facing the community. First, can forensic odontologists
24 reliably and accurately identify whether a pattern
25 injury is a bite mark? Second, if they are able to

1 determine that the pattern injury is a human bite mark,
2 can they reliably and accurately distinguish between
3 pattern injuries made by adults versus those made by
4 children? Third, is there any support for the
5 contention that where there is forensic evidence, hold
6 on a second, forensic evidence is of high enough quality
7 a well trained forensic odontologist can reliably and
8 accurately exclude an individual from having been the
9 source of that bite mark?

10 Q. If you could just read the next paragraph,
11 please.

12 A. At the current time, the overwhelming
13 majority of existing research does not support the
14 contention that bite mark comparison can be performed
15 reliably and accurately from examiner to examiner due to
16 the subjective nature of the analysis. While the
17 research is too extensive to repeat in the body of this
18 report, see Exhibits A through G, one recent study by
19 Drs. Iain Pretty and Adam Freeman was of tremendous
20 concern to the Commission, see Exhibit B, because the
21 bite mark panel spent significant time reviewing the
22 study and consulting with its authors and critics it is
23 summarized here.

24 Q. I'm just going to ask you to read the next
25 two paragraphs. My apologies for putting you through

1 your pages for like this, Dr. Freeman.

2 A. No problem. The study entitled The Construct
3 Validity Bite Mark Assessment Using the ABFO Bite
4 Decision Tree (Freeman Pretty Study), asked ABFO Board
5 Certified Diplomates to review photographs of 100
6 pattern injuries. The diplomates were asked to answer
7 the following three questions: Was there sufficient
8 evidence to render an opinion on whether the injury was
9 a human bite mark? Two, using the ABFO decision tree as
10 a guide, was the injury a human bite mark? And three,
11 if a human bite mark, did it have distinct and
12 identifiable arches in individual tooth marks?

13 Q. The next two paragraphs, and that will be it.

14 A. 38 ABFO Diplomates completed the whole study,
15 an additional 6 partially completed the study. The
16 study revealed an enormous spread of decisions among the
17 diplomates on the basic question of whether the pattern
18 injury was a human bite mark. The diplomates agreed
19 unanimously in only four of the cases. They achieved 90
20 percent agreement in eight of the cases.

21 Do you want me to keep going?

22 Q. Last one.

23 A. The inability of the ABFO Diplomates to agree
24 on the threshold question of whether a pattern injury
25 constitutes a human bite mark was of great concern to

1 the Commission. Also of significant concern, (and
2 discussed extensively at the November, 2015, meeting in
3 Forth Worth), is the that fact that the Freeman, Pretty
4 study was not published in a timely manner due to
5 various political and organizational pressures within
6 the ABFO. For many Commissioners who have experience in
7 other areas of forensic science, such a resistance to
8 publish scientific data contradicts the ethical and
9 professional obligations of a profession as a whole, and
10 is especially disconcerting when one considers the life
11 and liberty interest at stake in criminal cases.

12 Q. Thank you. What was your personal response
13 to the results of your test?

14 A. To the test, again, I was shocked like
15 everybody else. I thought that this would be the
16 simplest piece of the decision making process.

17 Q. And did your personal view of bite mark and
18 comparison change?

19 A. Sure. I think my opinion changed over a
20 period of time, but, and continues to change. And I
21 hope that it continues to change as more science becomes
22 available.

23 Q. In your opinion today, is bite mark analysis
24 valid and reliable evidence that should be used in
25 criminal court?

1 A. I struggle with that question. I surely feel
2 like in criminal courts, any inclusive method I
3 personally would not do. Using a bite mark to
4 potentially exclude somebody I would feel more
5 comfortable. For instance, if somebody had, if I looked
6 at a bite mark and there were clearly six upper teeth
7 and a suspect had only one upper tooth, I would feel
8 very comfortable excluding that person.

9 Q. So a radical discrepancy?

10 A. It would have to be a radical discrepancy.

11 Q. At first you would have to identify a human
12 bite mark?

13 A. And first I would have to give my opinion
14 that it was a human bite mark, and we've already seen
15 that there's, that is not a standardized piece.

16 Q. Would you describe in lay terms what an ideal
17 looking human bite mark, the kind of cases where you got
18 high levels of agreement?

19 A. And this has been something that we've been
20 discussing in the ABFO and what that definition is in
21 the last months at length. Ideally what we would like
22 to be able to discern are theoretically six upper teeth,
23 six lower teeth, we'd be able to determine individual
24 teeth within that mark, a midline, so we could determine
25 whether or not where the center line for the teeth are.

1 Those would be, that would be sort of what I would
2 consider a high evidentiary value pattern, a bite mark.

3 Q. And so following the -- do you remember what
4 the conclusions of the Texas Forensic Science Commission
5 were?

6 A. I think so far they've created a moratorium
7 on bite mark comparisons in criminal courts.

8 Q. And are you participating, continuously
9 participate with the Texas Forensic Science Commission,
10 and if so, in what capacity?

11 A. Sure, yeah. There's a panel of several
12 people, but I believe four of those people are forensic
13 odontologists, forensic dentists, and I have been asked
14 to be one of them to review those criminal cases where
15 bite marks played a part in the conviction.

16 Q. Right. The Commission, is it fair to say, is
17 concerned about wrongful conviction and looking at prior
18 cases?

19 A. I think that is exactly the case.

20 Q. And following the Commission's findings and
21 the construct validity test, what was the next step that
22 the ABFO took?

23 A. The next step was sort of really a quantum
24 leap of the ABFO and something that I'm really proud of.
25 The ABFO really went from, where at the time, our

1 conclusions were, at that time, the biter, the probable
2 biter, can't exclude as the biter, and inconclusive.
3 And all of that, I mean, obviously the first two pieces
4 had some level of individuality. There were some
5 probable, either you're the biter to a medical
6 reasonable degree of certainty, or the probable biter,
7 and we went to I can either exclude, cannot exclude, or
8 there's insufficient information. This was really a
9 quantum leap, a quantum jump for the ABFO.

10 Q. And there's been some discussion about
11 guidelines versus standards. Is it fair to say that one
12 of the standards is that you cannot give
13 individualization testimony in an open population?

14 A. That is one of three, there are very few
15 standards in bite mark analysis and comparison, and that
16 is one of the standards.

17 Q. And after the guidelines changed, did you
18 feel that the organization or you personally had some
19 responsibility as a result of the guideline change?

20 A. I mean, yeah, sure. I had some
21 responsibility. I had shared the Bite Mark Committee
22 for a number of years and that process had started. And
23 then I was on the Executive Committee and continued on
24 the Bite Mark Committee as that process evolved.

25 Q. And in other words, in terms of past cases,

1 did you feel like, that there was something that ought
2 to be done?

3 A. Absolutely. And this is something that I
4 discussed with the Board of Directors at my first
5 meeting where I became president, that I felt that it
6 was our duty to notify potential dependents that this
7 quantum, sort of shift had taken place, that
8 individualization was no longer accepted by the ABFO.

9 Q. And at some point, you became aware of the
10 Kunco case and contacted Dr. David; is that right?

11 A. Well, I had a discussion with you, Mr.
12 Fabricant, about the best way to notify people of this
13 quantum, sort of change in our thinking, and at that
14 time you had let me know about your concerns in the
15 Kunco case.

16 Q. And the -- I'm sorry, I'll withdraw that.
17 Just to, if you would go back to this opinion, you
18 reviewed materials in this case; is that right?

19 A. I reviewed Dr. David's testimony, Dr. Sobel's
20 testimony, I believe one of the affidavits, two images
21 that were provided to me, this one, as well as a UV one.
22 And I think that was the materials that I reviewed.

23 Q. And based on your expert opinion, would you
24 walk the Court a little bit through some of the problems
25 that you observed? One with this photograph and then --

1 well, actually, why don't we put the side by side ones
2 together. And will you walk the Court a little bit
3 through how in your view were some of the issues with
4 this?

5 A. Well, I mean, first, there's not a lot of
6 detail in the color photo there. I have trouble seeing
7 individuality in specific teeth and their orientation.
8 And this is very similar to cases that were shown at the
9 academy meetings very often. Somebody would show a case
10 like this and say you see this, don't you see this,
11 this, this. And quite honestly many of us would sit
12 there and go, God, that person's way better than I am at
13 this because I don't see that. And in this picture I
14 surely don't see -- actually, in the absence of being
15 told by the victim that she was bitten, this is probably
16 a case where I would say there's either, the old
17 guidelines I would've said this is suggestive of a bite
18 mark and surely would not have done a comparison. Or
19 today, I would just say there's not enough information
20 for me to move forward to a comparison.

21 Q. And the conclusion that you came to, you came
22 to those independently?

23 A. Of course.

24 Q. In other words, you didn't consult with
25 anybody, you reviewed this on your own and came to the

1 conclusion that you just testified to?

2 A. Absolutely.

3 Q. There was some talk about measurements and
4 the way that they did the overlay. Could you walk the
5 Court a little bit through some of the problems with
6 that?

7 A. Sure. If you look at the image on the right,
8 which is the UV photograph taken some five months later,
9 number one, we don't know how much or what percentage
10 that injury is healed. They do have in it an ABFO
11 number two scale. An ABFO number two scale was, in
12 fact, developed by the American Board of Forensic
13 Odontology, our Board, to assist in taking good bite
14 mark photographs. One of the key pieces of that scale
15 are, on the right side you can see that there's a
16 circle, and you have trouble seeing that there's two
17 other circles actually on that scale. And the purpose
18 of those circles is to be able to determine whether or
19 not the photograph is, the ruler is at 90 degrees or
20 perpendicular to the camera. And that's very important
21 because if you take a circle and you take it off angle,
22 a circle starts to look more elliptical. So it's
23 important that a circle be photographed directly on it.
24 So that was the purpose of those three circles. You
25 can't see the three circles in this particular

1 photograph, so you have no way of telling whether or not
2 that ruler is, in fact, 90 degrees to the camera.

3 Additionally, one of the key things is you
4 need to make sure that the scale is on the same plane as
5 the injury itself. And you can see in that picture that
6 it isn't. You can see the right leg seems to be
7 sticking up farther than let's say the upper left leg,
8 the other side of that "L." So any measurements that
9 you would've done from that scale would be some
10 percentage off. My understanding is what they did is
11 they use that to then resize the other injury that
12 didn't have a scale, and I can see no scientific
13 validity in doing that.

14 Q. Go ahead.

15 A. Okay. I can see absolutely no scientific
16 validity in doing that because we have no idea how much
17 that injury has healed.

18 Q. And you read the final conclusions of experts
19 in this case?

20 A. I did.

21 Q. And did you have an opinion about them?

22 A. I think that probably in 1991, 1992, when
23 they offered those opinions, they felt very comfortable
24 with them, they were sanctioned by the Board. Surely
25 today I don't think that most Board Certified Forensic

1 Odontologists would come to such a, it's not sanctioned
2 by the Board to create that level of individualization,
3 and on injury of this quality, I mean, it would be
4 absurd.

5 Q. And, Dr. Freeman, this hasn't been easy
6 testimony for you give, has it?

7 A. No. It's, in fact, been very difficult.

8 Q. Will you explain to the Court why?

9 A. Well, two of the people that, one of the
10 people that testified and one of the people in the
11 gallery are mentors of mine. They're people that helped
12 me become Board Certified, helped teach me. And it is
13 never comfortable criticizing their work, their
14 opinions, even though it happened in 1991. So, no, this
15 is definitely not a comfortable situation.

16 Q. Do you think that ABFO folks will get your
17 testimony from this case?

18 A. I'm quite sure they will not only get the
19 testimony, but that there will be people who will
20 surgically size every word that I've said here today to
21 determine anything that I could've said that could be
22 construed even slightly wrong or as opposed to looking
23 at the bigger picture of this case.

24 Q. And could you describe as you're finishing
25 your presidency of the ABFO what you're most proud of

1 and where you're at today?

2 A. Becoming Board Certified professionally was
3 one of the proudest moments of my career in dentistry.
4 As far as being president of the ABFO, it has been a
5 difficult year. The ABFO is definitely fractured as far
6 as bite marks go. When it comes to identification, I
7 think we are incredibly proud of the work that we do.
8 But I think probably, not just my presidency, but my
9 term from Bite Mark Chair to today, sort of the
10 evolution of the bite mark standards and guidelines, I
11 think I played a large role in that, and I'm very proud
12 of that work.

13 MR. FABRICANT: Thank you, Dr.
14 Freeman. I have nothing further.

15 THE COURT: Okay. Cross-
16 examine.

17 * * *

18 CROSS-EXAMINATION

19 BY MR. HOPSON:

20 Q. Doctor, you know of no court decision
21 precluding the admission of bite mark comparison
22 testimony, correct?

23 A. I am aware of that.

24 Q. That there's no court decision?

25 A. Yes, that's correct.

1 Q. Whether it's under the Frye standard or the
2 Daubert standard?

3 A. I am aware of that.

4 Q. And are you aware that the Frye standard is
5 the applicable standard in Pennsylvania?

6 A. I am aware of that.

7 Q. And on the guidelines, Doctor, evidently they
8 do not preclude testimony of bite mark comparison
9 either, correct?

10 A. I never said that the guidelines would
11 preclude bite mark comparison. I said that I personally
12 would not do a bite mark comparison that would link a
13 suspect to a bite mark, but the guidelines are very
14 clear that you can either include or exclude somebody as
15 a potential biter.

16 Q. And the guidelines too, I was just reading
17 here on one page, and if you need me to show you this I
18 will. It just says, part of the functions and purposes
19 are to provide central professional services for the
20 judicial and the executive branches of government; is
21 that correct?

22 A. It is correct.

23 Q. So that deals with these guidelines, our
24 guidelines for court testimony, would you agree?

25 A. That is part of the, yes, absolutely.

1 Q. And knowing that the victim in this case
2 testified that she was bitten, would that change your
3 opinion regarding the conclusion that it was a bite
4 mark?

5 A. I think that the job of a forensic
6 odontologist is to be dispassionate about their
7 analysis. And so facts like that create just cognitive
8 bias. I would prefer in a case like this not to be
9 given facts from the case, but just to be given the
10 images and let me do a dispassionate analysis of that
11 information.

12 Q. And you did review the trial testimonies of
13 Dr. David and Dr. Sobel?

14 A. I did review both of their trial testimonies.

15 Q. And you don't agree with them, correct?

16 A. I don't agree with their, the conclusion --
17 no, I don't agree with them.

18 Q. And that's what you would do or would've done
19 if you testified, would have contradicted their
20 testimony?

21 A. Had I testified at this time, I would have
22 probably contradicted that testimony. But I wasn't
23 Board Certified in 1991, and it was 1992, it was a very
24 different bite mark world back then. So I can't really
25 speculate what I would've done back then, based on my

1 training and knowledge in 1991.

2 Q. But the testimony you offered here today
3 would've contradicted their trial testimony?

4 A. Absolutely.

5 Q. Okay. And, Doctor, back in 1991, and I know
6 you weren't Board Certified then, but do you think there
7 were no other forensic odontologists that would've
8 disagreed with Dr. David and Dr. Sobel's conclusions?

9 A. I'm sure that there were. I mean it's really
10 speculative, but I think that, I'm sure that there
11 would've been forensic odontologists that had, if given
12 the opportunity, would've disagreed with their testimony
13 back then.

14 MR. HOPSON: No further
15 questions. Thank you.

16 * * *

17 REDIRECT EXAMINATION

18 BY MR. FABRICANT:

19 Q. Dr. Freeman, could anybody in 1991 have said
20 that the ABFO precludes individualization testimony.

21 A. In 1991, could they have precluded it, no.

22 Q. Had the PCAST report been issued in 1991?

23 A. No.

24 Q. Had the NAS report come out in 1991?

25 A. Certainly not.

1 Q. Had there ever been a wrongful conviction
2 based on marks in 1991?

3 A. I don't believe so.

4 Q. And when you said in -- so just to be clear,
5 no ABFO Board Certified Diplomate could come into court
6 in 1991 and say that that opinion of individualization
7 or probabilistic testimony is beyond the guidelines?

8 A. No, those were part of the guidelines.

9 Q. Nobody could say the standard that you could
10 not individualize in an open population?

11 A. I don't believe so, no.

12 Q. We could only do that after March, 2016?

13 A. That's correct.

14 Q. And when you said that, when the victim
15 testified that she had been bitten in this case, right,
16 and you mentioned --

17 A. I didn't testify to that. I testified
18 that --

19 Q. I'm sorry, that the victim testified that she
20 had been bitten. And you said that you would've only
21 wanted the data, right? So the injury comparison and
22 because of the influence that information could have; is
23 that right?

24 A. I think one of the biggest problems that we
25 have in forensic endeavors as a whole and something that

1 NAS is looking very heavily at is bias as a whole, and
2 so when you start giving me contextual information, what
3 happened to her, she says she was bitten, all of that
4 stuff, we should be able to reach similar conclusions in
5 the absence of that. I think that my job is to be
6 dispassionate about, and focus with blinders on, on my
7 piece of what is a much grander piece. Ultimately, the
8 trier of fact gets to look at all of that. You all look
9 at all of that information. I have a very, very myopic
10 view of forensic odontology.

11 Q. Right. Like a fingerprint expert doesn't
12 rely on somebody who left the fingerprint to say I
13 pushed my finger there?

14 A. Exactly.

15 Q. And when you said that the strong, the
16 highest level of conclusion today is that you cannot
17 exclude, we don't know how many other people could also
18 be excluded, right?

19 A. There's no science that suggests that we have
20 conception of how many other people could've made that
21 injury.

22 Q. So it's difficult for a jury to determine how
23 probative that information would be, right?

24 A. Exactly, which is why personally, not the
25 Board's opinion, but personal opinion, is because I

1 can't quantify that, and I think that in some ways would
2 be prejudicial to make that statement and that I can't
3 really back that up with any scientific underpinnings.
4 I don't think today I would make those kinds of
5 conclusions.

6 MR. FABRICANT: Thank you.

7 THE COURT: Anything else, Mr.
8 Hopson?

9 MR. HOPSON? Just one follow up.

10 * * *

11 RECROSS-EXAMINATION

12 BY MR. HOPSON:

13 Q. When you talk about the bite mark comparison,
14 you're just looking at that individually, not the entire
15 body of evidence in a case, correct?

16 A. That is correct.

17 MR. HOPSON: Okay. Thank you.

18 THE COURT: Anything else?

19 MR. FABRICANT: No, Your Honor.

20 THE COURT: Okay. Thank you,
21 Doctor. Watch your step.

22 Any other witnesses?

23 MR. FABRICANT: No.

24 THE COURT: Are you still
25 planning on calling Dr. Sobel? He was

1 unavailable today; is that right?

2 MS. THOMPSON: Your Honor,

3 unless you would like to hear from

4 him, I think that we have covered our

5 basis, and we do not need to call him

6 in.

7 THE COURT: Okay. Mr. Hopson?

8 MR. HOPSON: Well, I still think

9 they should because they claim, unless

10 they're saying they're not claiming he

11 recanted his testimony.

12 MS. THOMPSON: They both signed

13 the exact same affidavit, so --

14 THE COURT: It sounds to me like

15 it would just be cumulative testimony.

16 It would be the same the same as what

17 Dr. David's testimony was.

18 MR. HOPSON: Okay. It's up to

19 the Court. That's their witness.

20 THE COURT: I don't want to make

21 them call him just to call him,

22 especially since we'd have to come

23 back another day if you're going to do

24 that.

25 So you're choosing not to call

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Dr. Sobel?

MS. THOMPSON: Yeah, at this time.

THE COURT: Okay. Do you have anyone that you're calling?

MR. HOPSON: No witnesses, Your Honor. But I have two exhibits. The Commonwealth would submit Commonwealth's Exhibit No. 3, which is the obituary of Donna Seaman, the victim, to show that she is dead.

She has since deceased. And the other is the court docket sheet on this case indicating that on January 30, 2009, the Clerk of Courts packaged the evidence, and it was sent Orchid Cellmark for DNA analysis, and the Clerk of Courts no longer has the evidence in the case, and I don't know where it would be.

MS. THOMPSON: I'm sorry, just a moment of clarification. When you're saying they no longer have it, does that mean that they received it, and then they don't know what happened

1 after they --

2 MR. HOPSON: They turned it over

3 to Cellmark and haven't gotten it

4 back.

5 MS. THOMPSON: Okay. Just in

6 response to both of those pieces of

7 evidence, my apologies, we did find

8 the wrong Donna Seaman. We did refer

9 to her in our petition, our response,

10 that she was still alive and were

11 incorrect. So she has passed.

12 And then with regard the

13 Cellmark return of the evidence, we

14 are going to check with them. They

15 were since purchased by another

16 laboratory, and so we will have to

17 track down the paperwork there. But I

18 think this once again goes to

19 underscore the need for a search to

20 make sure that we can account for all

21 of the evidence in this case.

22 THE COURT: When was the -- when

23 did the Clerk submit the evidence --

24 MR. HOPSON: It looked like

25 January 30, 2009. And I believe the

1 victim in the case passed away in
2 2012. I submit those, Your Honor,
3 because it goes to the prejudice to
4 the Commonwealth to retry the case.
5 And I also have a memorandum of law
6 for the Court, and nothing further at
7 this time from the Commonwealth, Your
8 Honor.

9 THE COURT: All right. So I'm
10 assuming that, Ms. Thompson, that you
11 wish to submit a brief in support of
12 your position at this time?

13 MS. THOMPSON: I would. If I
14 could say a few words in summary of
15 today's very long testimony. As we
16 stated at the top of this day, we are
17 here requesting relief, under the
18 Postconviction Relief Act, and we are
19 asking that the Court vacate
20 Mr. Kunco's conviction or
21 alternatively order a new trial.

22 Now to obtain that relief there
23 is a timeliness issue, and one of the
24 exceptions to the one year deadline
25 for that is about the defendant

1 establishing new facts in a case. So
2 all the noise about facts that we've
3 been talking about is to get over that
4 timeliness exception.

5 Now in Watts, the case that Mr.
6 Hopson has referred to several times,
7 with regard to the PCRA, a new fact is
8 defined as the event that prompted the
9 analysis which must be established by
10 presumption or evidence. It is the
11 event that spawns a new claim. And
12 what we've heard here today is that
13 the events in March of this year by
14 the ABFO establishing a completely new
15 regard for how bite marks are handled
16 is that new event.

17 The affidavits of the experts
18 who testified at Mr. Kunco's trial
19 saying they now could not testify to
20 individualization testimony about bite
21 marks is a new event. And because of
22 those new events, we now are able to
23 look at what the evidence was that was
24 brought to trial in 1991 and what it
25 means for Mr. Kunco today.

1 In 1991, the only item of
2 physical evidence, the only thing that
3 was left was this bite mark. To
4 obtain relief, again, under the
5 statute, Mr. Kunco must show that the
6 unavailability at the time of trial of
7 exculpatory evidence that has
8 subsequently become available and
9 would've changed the outcome of trial,
10 hadn't been introduced, would be
11 sufficient to obtain relief. And with
12 this bite mark, knowing now what we
13 did not know then, the bite mark could
14 not be attributed to Mr. Kunco. It
15 simply could not.

16 You've heard Mr. Freeman state
17 that literally it would be absurd. He
18 said that the March shift by the ABFO
19 was a quantum shift. You heard Ms.,
20 sorry, Dr. Brzozowski state that she
21 could not even this mark a bite mark.

22 So what we are looking at now is
23 evidence that simply could not isolate
24 Mr. Kunco as the person who caused
25 this mark on the victim's body. That

1 leaves us with very circumstantial
2 evidence that is inconsistent and ripe
3 with errors that don't make sense. So
4 we believe that in light of this, in
5 light of what you've heard today, Mr.
6 Kunco is entitled to a new trial or
7 vacatur of his convictions. Thank
8 you.

9 MR. HOPSON: Your Honor, four
10 points I'd just like to make. Number
11 one, the guidelines and under the
12 Watts case, the Watts case that I
13 cited in my original response, does
14 not limit law specifically to judicial
15 opinions. It actually goes into a
16 nice definition of the difference
17 between law and fact. I think one of
18 the most important parts of that is
19 that they call law the embodiment of
20 abstract principles applied to actual
21 events. Both of their witnesses
22 testified that these were
23 recommendations that would be applied
24 to specific instances. That is very
25 close to the definition of law, not

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new fact.

The second point, if they are arguing that this new, this rejection of bite mark comparison is after discovered evidence, they've got to satisfy the four prong test. They have got to say that the information was not available and could not have been discovered through reasonable diligence. It was not corroborative or cumulative. It was not used solely for the purpose of impeachment, and if used, the outcome of the trial would be different.

They really have a problem with three prongs of that test. Number one, there were already criticisms, there were criticisms of bite mark comparison as far back as 1975. And as far as the reasonable diligence argument goes, nothing is more telling than the fact that the petitioner himself refused to allow his trial counsel to continue the case to challenge the testimony of Dr. David

1 and Dr. Sobel.

2 THE COURT: Could I just

3 interrupt you? How could the

4 Commonwealth possibly overcome the

5 argument that even with the most

6 diligent of searches performed by Mr.

7 Kunco's counsel in 1991, that he could

8 have found an expert who would've said

9 that individualized opinion testimony

10 from a dentist is unacceptable at that

11 time?

12 MR. HOPSON: They could have.

13 There were already articles on that,

14 Your Honor.

15 THE COURT: In 1991? It's

16 impossible.

17 MR. HOPSON: As far back as

18 1975.

19 THE COURT: I haven't seen

20 anything that --

21 MR. HOPSON: That article was

22 criticizing --

23 THE COURT: Well, you're saying

24 that, but is there something in that

25 article that in 1991 said that it is

1 wrong or unacceptable in the science
2 of dentistry --

3 MR. HOPSON: But the problem
4 with that --

5 THE COURT: Let me finish the
6 question and then you can answer. Is
7 it unacceptable in the dentistry
8 scientific community for a dentist to
9 give an opinion saying that using
10 individualized opinion testimony, is
11 there anything that would've come up
12 with a diligent search by the attorney
13 at that time?

14 MR. HOPSON: I don't think the
15 guidelines would've shown that, but
16 again, the guidelines are not, these
17 new guidelines are not new facts.
18 They're guidelines. They qualify as
19 new law. If you really read the
20 definition in the Watts case, you'll
21 see that.

22 THE COURT: And you two both
23 strongly disagree on that premise.

24 MR. HOPSON: We disagree. And
25 second, if they're just simply saying

1 that bite mark comparisons are not
2 reliable, which both of their
3 witnesses testified that they would
4 contradict Dr. David and Dr. Sobel,
5 that's the next problem, because all
6 their testimony would be, would be to
7 impeach Dr. David and Dr. Sobel. And
8 even if we're going to say, okay, they
9 could not have found, they could not
10 have found anybody to say it's not
11 valid then, still it's impeachment of
12 their testimony, because as Dr. David
13 testified, his testimony would be all
14 the same except the conclusion would
15 be not excluded. But there would
16 still be all the evidence of a
17 remarkable, not just consistency, but
18 the remarkable consistency between
19 petitioner's dentition and the bite
20 mark. So it would only be used for
21 impeachment.

22 And third, when you put all of
23 that evidence together, the remarkable
24 consistencies, the voice ID by the
25 victim, which actually, she didn't

1 have credibility issues, and the
2 circumstantial evidence of the
3 defendant's statement about sexual
4 fantasies involving fruits and
5 vegetables, with all that, the outcome
6 would not change.

7 And one other point, the last
8 point I want to make is pursuant to
9 Rule 95.43(B), that's entitled 42,
10 even if the petitioner has met the
11 requirements of Subsection A, the
12 petition shall be dismissed, shall be
13 dismissed, if it appears at any time
14 that because of the delay in filing
15 the petition the Commonwealth has been
16 prejudiced, either in its ability to
17 respond or in its ability to retry the
18 petition. And it specifically says
19 this subsection does not apply if the
20 petitioner shows, shows, the
21 petitioner must show that the petition
22 is based on grounds of which the
23 petitioner could have discovered by
24 the exercise of reasonable diligence
25 before the delay became prejudicial to

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the Commonwealth.

Well, evidence came out here about papers in 1991, 2001, 2009. The victim died in 2012, that could've been discovered before the delay became prejudicial to the Commonwealth, because now the delay is extremely prejudicial because the victim is deceased. And we, at this point, don't have the evidence from the Clerks.

THE COURT: Okay.

MS. THOMPSON: Your Honor, we would be happy to read the victim's testimony right back into the record. So we have all of the information that the victim could provide in addition to her police reports, in addition to her hospital records that are still with us.

I also just want to point out that as Dr. Freeman testified, there was nobody available in 1991 who would've been able to provide this information, this negative information

1 about bite marks that Mr. Hopson seems
2 to want to be able to give him. It
3 just wasn't possible, because that was
4 not --

5 THE COURT: In other words, at
6 that time, no expert in the world
7 could have come into court and said
8 that individualized opinion testimony
9 is unacceptable.

10 MS. THOMPSON: That's absolutely
11 correct.

12 MR. HOPSON: Objection, Your
13 Honor. They didn't present evidence
14 in --

15 THE COURT: You're objecting to
16 what?

17 MR. HOPSON: They're arguing
18 facts not in evidence.

19 THE COURT: But you're objecting
20 to what? I'm making a statement.
21 What are you objecting to?

22 MR. HOPSON: They had to provide
23 evidence that there was no forensic
24 odontologist that could've come in and
25 said that.

1 THE COURT: They did. That's
2 what Dr. Freeman said. Unless I'm
3 mistaken, that's exactly what he said,
4 and I believe --

5 MR. HOPSON: He said that the
6 guidelines didn't allow it.

7 THE COURT: The other expert who
8 testified for the defense also, in a
9 nutshell, basically said the same
10 thing, and that's what promoted my
11 question to you. How can the
12 Commonwealth overcome that fact that
13 there's no way that Mr. Caruthers
14 Could've found a witness in 1991 to
15 have contradicted that reality? I
16 don't care what efforts he would've
17 taken, there is no way he could've
18 found a dentist or a doctor that
19 could've come into court and said
20 individualized opinion testimony is
21 unacceptable. It's impossible because
22 that opinion in the community did not
23 exist at that time.

24 MR. HOPSON: But that's why it's
25 a law. It's a set of rules for the

1 guidelines. That's the problem,
2 they're confusing facts and law. The
3 Watts case makes that clear.

4 There was one case now that I
5 cited also, Brandon I believe it was,
6 and it dealt specifically, it was a
7 judicial opinion, but it dealt
8 specifically with the rule of
9 testimony. And that's what these
10 guidelines are, rules of testimony.
11 Even their witness said that. In
12 Brandon, the forensic pathologist who
13 testified was not the one, was not the
14 one who did the report. A subsequent
15 judicial decision came down saying
16 that the forensic pathologist who does
17 the report is the one who has to
18 testify. The Court in Brandon ruled
19 that was not new fact, that was new
20 law. That was a new rule of law. And
21 frankly, even though it's not a
22 judicial decision, that's what it is.

23 But even failing that, Your
24 Honor, even if you're going to say
25 that, hey, they -- I still do not, I

1 still submit that they could've found
2 somebody to challenge that bite mark.
3 I think that's what the fact is. The
4 reliability or imprecision of bite
5 mark comparison, not the rules or
6 guidelines. But even if not, the only
7 issue that is, it's impeachment
8 testimony.

9 MS. THOMPSON: Your Honor, let's
10 just assume for the sake of argument
11 that the guidelines are, in fact, new
12 law, just for the sake of argument.
13 That still leaves the fact that we
14 have the Commonwealth's witnesses, not
15 Mr. Kunco's witnesses, but the
16 Commonwealth's witnesses at trial
17 saying now, in 2016, that they would
18 not and could not provide the
19 individualization testimony that they
20 did in 1991. That is a new fact. And
21 that again gets us straight back to
22 meeting the time bar and meeting the
23 new exculpatory information that leads
24 to the relief under the statute.

25 MR. HOPSON: They said they

1 could not because of the guidelines.
2 The rules preclude them doing it.

3 MS. THOMPSON: And the science,
4 Your Honor.

5 THE COURT: Okay. Well, submit
6 your brief. You'll need the
7 transcript I assume.

8 MS. THOMPSON: Yes. Would you
9 like us to brief both the DNA issue
10 and the issue that we just --

11 THE COURT: If you could, yeah.
12 Although I'm not sure that it's going
13 to be necessary to get to both issues.
14 But brief both issues. It's going to
15 take probably at least 30 days for the
16 transcript, maybe less than that. I'd
17 like to move this as expeditiously as
18 possible.

19 MR. HOPSON: 30 days for the
20 Commonwealth and the defense, or 30
21 days after the defense for the
22 Commonwealth?

23 THE COURT: 30 days after the
24 transcript, you submit your brief, and
25 then the Commonwealth will have 30

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days thereafter.

MR. HOPSON: After the transcript or after their brief?

THE COURT: After you get their brief.

MR. HOPSON: Okay. Is there anything else that needs to be addressed today? And I would really like both sides, in addition to whatever else that you feel there's a need to address, this issue of whether this new ABFO guideline equivalence is equivalent of a new fact or newly discovered evidence versus new law, and whether it triggers the newly acquired evidence factor to be considered in a PCRA. That seems to be the first area of dispute between the defense and the Commonwealth. I have my own opinion as I sit here today, but there is such a disparity in the opinion here, I'd like you both to brief that strongly, if you would please.

MS. THOMPSON: Your Honor, I

1 just realized this, one more
2 bureaucratic thing. When we were on
3 our teleconference, you had asked that
4 Mr. Kunco say on the record that he is
5 waiving any concerns with regard to
6 your prior works as a Public Defender.

7 THE COURT: I totally forgot
8 about that. So Mr. Kunco was made
9 aware of the fact that I was employed
10 in the Public Defender's Office in
11 1990, 1991?

12 MS. JARAMILLO: Yes, Your Honor,
13 we had that discussion with him
14 immediately after we had our status
15 conference with you, and he waives any
16 conflict of interest that may or may
17 not be there.

18 THE COURT: Okay. And for the
19 record, Mr. Kunco, I did work in that
20 office at that time, and I do have a
21 general recollection of a discussion
22 with your attorney at the time
23 concerning your case. Although it
24 wasn't a one-on-one discussion, it was
25 sort of an office conversation. I

1 don't have specific recollection of
2 what was discussed, just that we had a
3 discussion about this case, but I do
4 remember the facts. So you've been
5 made aware of that?

6 THE DEFENDANT: Yes.

7 THE COURT: Is that correct?

8 THE DEFENDANT: Yes.

9 THE COURT: And is your attorney
10 correct that you're waiving any
11 potential conflict that might arise
12 with the Court because of my
13 employment at that time?

14 THE DEFENDANT: I've discussed
15 everything with the attorneys.

16 THE COURT: And you are waiving
17 any potential conflict, even though I
18 don't believe that there is one?

19 THE DEFENDANT: Yes.

20 THE COURT: All right. So I'll
21 wait for the briefs and make a
22 decision as quickly as possible after
23 we get them.

24 MR. FABRICANT: Thank you, Your
25 Honor.

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MS. THOMPSON: Sorry, last thing
before everyone leaves. Is it
possible to get a transport order for
Mr. Kunco?

THE COURT: Yes. The order is
to direct that Mr. Kunco is to be
returned to SCI Fayette immediately.

(COURT ADJOURNED -- 3:33 P.M.)

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C E R T I F I C A T E

* * *

I hereby certify that the proceedings are
contained fully and accurately in the notes taken by me
at the hearing of the within cause and that this copy is
a true and correct transcript of the same.

Victoria Villalpando
Official Court Reporter

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