IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA – CRIMINAL DIVISION

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

OPINION AND ORDER OF COURT

This matter comes before the court on the defendant's third petition filed pursuant to the Post-Conviction Relief Act, (42 Pa.C.S. §9541, *et. seq.*).[1]

FACTUAL HISTORY:

The Pennsylvania Superior Court has summarized the underlying facts of this case on two prior occasions as follows:

> In the early morning hours on December 16, 1990, the victim, a middle-aged woman living alone, awoke to let her cat out of her apartment. She then returned to her bed without locking her door. Within five minutes, appellant entered her apartment and so began a nearly seven hour nightmare of sexual assault. Among the many gruesome and debasing acts appellant committed on his victim was blindfolding her, forcing her to perform oral sex and engage in vaginal intercourse, inserting two cucumbers into her rectum, placing a live electrical wire between her legs, and inserting metal ice tongs into her vagina. These brutal acts caused severe pain to the victim; her injuries required extensive medical treatment. In addition to the sexual assaults, appellant also struck the victim in the face and stomach several times, dragged her through the various rooms in the apartment and knocked out her false teeth.
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> At trial, the victim testified that although she could not see her assailant due to the blindfold, she recognized his voice, and the fact that he had a lisp, and could identify him as a maintenance man who previously

[1] The instant Opinion and Order of Court addresses only that portion of defendant's PCRA Petition that suggests that the 2009 NAS Report invalidates the expert testimony admitted at the defendant's trial relating to the comparison of bitemark evidence collected from the body of the victim in this case with dental impressions collected from the defendant following his arrest. The defendant's Supplemental PCRA Petition which requests PCRA relief based upon newly-discovered DNA evidence will be addressed in a separate Opinion and Order.

> worked in the apartment complex. When talking to police after the incident, she identified her attacker as the appellant.

Commonwealth v. Kunco, No. 1584 Pittsburgh 1998, (May 24, 1999), *quoting* Commonwealth v. Kunco, No. 995 PGH 1992 (July 8, 1993). Additional facts as summarized by the Superior Court are particularly relevant to the instant PCRA petition:

> Apparently, at some point during the seven hour attack, appellant bit the victim on the shoulder with such force that an imprint of his teeth was left in her skin. At trial, the Commonwealth offered the testimony of Dr. Thomas David, an expert in forensic odontology. David, who specializes in bite mark evidence, testified that in his opinion the bite mark on [the victim's] skin matched the teeth of appellant.

Commonwealth v. Kunco, No. 995 PGH 1992 (July 8, 1993).

PROCEDURAL HISTORY:

Following a jury trial on July 12, 1991, the defendant was convicted of Involuntary Deviate Sexual Intercourse, Unlawful Restraint, Recklessly Endangering Another Person, Indecent Assault, Rape, Simple Assault, Aggravated Assault and Terroristic Threats. The defendant's post-trial motions were denied by Judge Charles Loughran on February 2, 1992. Prior to sentencing, the defendant filed his first PCRA Petition, pro-se, on March 19, 1992. Counsel was appointed to represent him on this first PCRA. The issues presented by the defendant on that occasion involved allegations of ineffective assistance of trial counsel for failing to have certain items of evidence found at the crime scene tested for the presence of the defendant's blood, and ineffective assistance of counsel for failing to call certain fact and "alibi" witnesses. Judger Loughran denied the defendant's first PCRA Petition on April 29, 1992. The defendant was thereafter sentenced on May 18, 1992 to a period of forty-five to ninety years incarceration.

The defendant thereafter filed a direct appeal to the Superior Court, challenging both his conviction and the denial of his first PCRA petition. There, the issues presented by the defendant on appeal were: (1). Trial court error in admitting the defendant's statements at the beginning of the assault to the effect of "Do you know about Delores Dinati?" (Referencing a previous homicide victim in the City Arnold.); (2). Trial court error regarding the testimony of Dr. Thomas David (referencing defense counsel's cross-examination as to Dr. David's qualification as an expert) as to testimony about cases on which he had consulted that pleaded guilty; (3). Trial court error in admitting certain crime scene photos; (4). Ineffective assistance of counsel because trial counsel failed to inform the court that the American Dental Association (ADA) did not recognize forensic odontology as a specialty; (5). Trial court error in denying his first PCRA; and, (6). Challenges to the sentence imposed by Judge Loughran. The Pennsylvania Superior Court rejected the defendant's claims and affirmed the judgment of sentence by Memorandum Opinion dated July 8, 1993.[2]

The defendant filed a second PCRA petition, pro-se, on May 31, 1994. New counsel was again appointed to represent the defendant. After filing an amended PCRA petition, a second amended PCRA petition and a third amended PCRA petition, and after counsel was permitted to conduct extensive discovery and depositions, hearings were finally held before Judge Gary P. Caruso, Court of Common Pleas of Westmoreland County, and testimony concluded on March 13, 1998. Issues presented to Judge Caruso in this second PCRA proceeding included: (1). The ineffective assistance of trial counsel in failing to call witnesses; (2). Allegations that the defendant was denied a fair trial because the prosecution did not conduct a more diligent investigation; and (3). Ineffective assistance of counsel because trial counsel did not properly investigate the case and interview witnesses before trial. Also included in the defendant's

[2] 995 PGH 1992.

second PCRA were challenges to the admission of the Commonwealth's bite mark evidence at trial. Specifically, the defendant alleged that he was denied his right to counsel when his dental impressions were taken, and ineffective assistance of counsel for failing to insist upon a *Frye* hearing prior to the admission of expert testimony regarding the comparison of ultraviolet photographs of a bite mark with the dental impressions of the defendant.

Judge Caruso denied the defendant's second PCRA petition by Opinion and Order dated May 26, 1998. Regarding the defendant's challenges to the bite mark evidence, Judge Caruso noted that the right to counsel does not attach at the investigatory stage, that the defendant had not been denied his right to counsel, and that the defendant had consented to the taking of the dental impression. Finally Judge Caruso noted that, because this issue was not raised in the 1st PCRA, it had been waived, and the defendant could not be eligible for post-conviction relief. As to the allegations of ineffective assistance of counsel for failing to insist upon a *Frye* hearing, Judge Caruso ruled that the defendant personally waived this issue when he refused to allow trial counsel to continue the trial to allow trial counsel to pursue this issue, even after an extensive colloquy prior to trial. He also noted that the issue was somewhat raised in the defendant's Superior Court appeal and addressed by the Superior Court, which minimized the importance of the bite mark evidence in light of the victim's voice identification and, "perhaps most important, the presentation and demeanor of the appellant when he took the stand in his own defense." (Opinion dated May 26, 1998, Caruso, J. at p. 13). Thus, Judge Caruso determined that the issue of the bite mark evidence had not only been waived, but had been previously litigated. "Given the fact that the defendant personally waived this issue, the fact that the first PCRA counsel addressed this issue in the direct appeal; and the fact that the Commonwealth's expert witnesses

relied upon scientifically accepted bite mark comparison; this contention also will fail." (Opinion dated May 26, 1998, Caruso, J. at p 14).

The defendant appealed Judge Caruso's denial of his second PCRA petition to the Superior Court, which affirmed Judge Caruso's decision by memorandum opinion issued on May 24, 1999.[3] The issues raised in the Superior Court on this occasion, as presented by the defendant, were as follows:

1. Whether the PCRA court committed reversible error in failing to find that prior counsel was ineffective in failing to investigate information available as to witnesses Matthew Huet, Tammy Adamic-Callen and Craig Callen, which, had it been known and presented to the jury at the underlying trial, would have resulted in acquittal;

2. Whether the PCRA court committed reversible error in failing to find that Commonwealth agents interfered with Kunco's right to appeal by refusing to disclose the existence of other potential suspects:

3. Whether the PCRA court committed reversible error in failing to find after-discovered evidence, in the form of a recent recantation of the victim relative to the identification of Kunco as the actor, was sufficient for PCRA relief;

4. Whether the PCRA court committed reversible error in failing to find that prior counsel was ineffective for failing to suppress the suggestive voice identification of Kunco some two days after the incident occurred;

5. Whether the PCRA court committed reversible error in failing to find that prosecutorial misconduct occurred when the Commonwealth failed to disclose the existence of deteriorating bite mark evidence in light of the prejudicial effect its non-disclosure had on the ability of Kunco to examine evidence which was by nature deteriorating;

6. Whether the PCRA court committed reversible error in failing to find that Kunco was denied his constitutional right of counsel at "critical stage" of pretrial proceeding when evidence was gathered of a deteriorating bite mark by it being lifted several months after the incident using questionable "scientific" techniques;

[3] 1584 PGH 1998.

7. Whether the PCRA court committed reversible error in failing to find that Kunco's due process rights were violated (right to counsel) by the Commonwealth's securing of a warrant for dental molds from a magistrate *ex parte* without a court order, counsel, hearing or adversarial argument after the matter was assigned to the Court of Common Pleas and after defense counsel was known to the Commonwealth;

8. Whether the lower court committed reversible error in failing to find that the trial court erred when it admitted the testimony of purported scientific methods which were not established to have been accepted in the scientific community;

9. Whether the lower court committed reversible error in failing to find sufficient after-discovered evidence regarding the impeachment of Dr. West (a forensic dentist), and in the use of Dr. West's techniques in lifting bite marks several months after the incident had occurred.

The Superior Court adopted Judge Caruso's Opinion in determining that the defendant's issues except the last (regarding Dr. West) had either been waived, previously litigated and/or meritless. As to the last issue, the Superior Court determined that it was meritless. Here, the defendant alleged that he should have been granted a new trial on the basis of after-discovered evidence that the Commonwealth's experts who took ultraviolet photographs relied on scientific techniques and teachings of Michael West, who had been recently discredited for creating evidence in order to obtain convictions. After setting forth the standard by which after-discovered evidence should be considered, the Superior Court stated: "This Court has already held that the technique used by the Commonwealth's experts is scientifically recognized. Thus, the evidence relied upon by Appellant would be used solely to impeach the credibility of Commonwealth experts, Doctors David and Sobel, and does not constitute after-discovered evidence. As such, Appellant's claim fails." (Superior Court Opinion dated May 24, 1999, 1584 PGH 1998, at p. 7). The defendant's subsequent Petition for Allowance of Appeal to the Supreme Court was denied on November 16, 1999.

The defendant thereafter filed a Federal Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. (Civil Action No. 00-54). There, the defendant phrased his issues as follows: "4th, 5th and 6th amendments, inadequate representation, gross miscarriage of justice, prosecutorial misconduct, due process, bad faith destruction of evidence, fabricated evidence." The United States Magistrate Judge Kenneth J. Benson addressed the following issues:

1. Whether trial counsel was ineffective for failing to call witnesses Matthew Huet, Tammy Adamic-Callen and Craig Callen.

2. Whether Kunco was denied a fair trial because the police department and the district attorney's office failed to conduct a more thorough investigation by interviewing neighbors and potential witnesses; and, because trial counsel had rendered ineffective assistance by his failure to investigate the case and interview potential witnesses.

3. Whether Kunco was denied a fair trial because the police department and/or the District Attorney's Office destroyed evidence in bad faith. Specifically, Kunco claimed that the New Kensington police department compromised the scene before the State Police Records and Identification unit arrived, and that blood and hair samples were destroyed after his conviction.

4. Whether evidence of the victim's voice identification was improperly admitted at trial and whether trial counsel was ineffective for failing to seek suppression of that voice identification.

5. Whether bitemark evidence was not properly admitted at trial because:

   a. Kunco was denied his right to counsel when the evidence was tested;

   b. The Commonwealth committed prosecutorial misconduct in failing to disclose the existence of deteriorating bitemark evidence;

   c. Kunco was denied due process when a warrant was secured for molds of his teeth without a court order, counsel or an adversarial hearing;

   d. The trial court committed reversible error in admitting purported scientific methods which were not established to have been

accepted in the scientific community (without conducting a *Frye* hearing);

e. The trial court erred in failing to grant him a new trial based upon after-discovered evidence regarding the impeachment of Dr. West's forensic dentistry techniques for lifting bitemarks through ultraviolet light.

On June 20, 2001, United States Magistrate Judge Benson recommended that the Defendant's Federal Petition for a Writ of Habeas Corpus be denied. That recommendation was accepted by United States District Court Judge Alan Bloch on January 3, 2002, and the Defendant's federal Writ of Habeas Corpus was denied.

On appeal to the Third Circuit Court of Appeals, the Defendant again claimed that the admission of the forensic odontolgist's (Dr. West's) expert testimony at trial violated due process. (2003 WL 23154655 (C.A.3 (Pa.)). The Third Circuit Court of Appeals affirmed Judge Bloch's decision on December 29, 2003, stating that the admission of the testimony did not render the defendant's trial fundamentally unfair. The Third Circuit court noted that Kunco's expert (Golden), who called into question the reliability of the UV light photographic evidence recovery, was rebutted by the Commonwealth's expert, Dr. Robert Barsley, whose qualifications were never seriously questioned and who "persuasively supported the reliability of the UV technique." Secondly, the court noted that whatever ethical problems Dr. West might have had, there was never any evidence that he was involved in the procurement of the UV evidence, and furthermore, the UV bitemark photo produced an image of a bitemark right where the fresh one had been five months earlier, which supports the reliability of the UV evidence. Finally, the court noted that the comparison of Kunco's dental molds with the UV photograph yielded the same results as comparison with the glossy photo taken of the fresh bitemark, which supported reliability as well. 85 Fed.Appx. 819.

The instant series of PCRA proceedings, which technically constitute a third PCRA, was instituted by the Defendant, through The Innocence Law Project attorney Craig J. Cooley, on August 8, 2008, by way of a Motion to Furnish Records. This court issued an Order granting the defendant's Petition to Review Evidence and for a copy of Transcripts on September 23, 2008. Thereafter, the defendant, through attorney Cooley and local counsel David Millstein, Esq., filed a Motion for DNA Testing pursuant to 42 Pa.C.S. §9541, *et.seq.* (PCRA). An Order granting that Motion was filed on January 30, 2009. A Petition for Writ of Habeas Corpus and Post-Conviction Collateral Relief was filed on April 17, 2009. The Commonwealth filed an Answer to said Petition on May 26, 2009. An amended PCRA Petition was filed by the defense on August 26, 2009. A hearing was ultimately held on this matter on October 22, 2009, and briefs were ordered. The defense submitted a Memorandum of Law in support of the PCRA Petition on that same date. The defendant thereafter filed a Motion for Discovery pursuant to Pa.R.Crim.P. Rule 902(e) on December 4, 2009. The Commonwealth filed a brief in opposition to the defendant's PCRA Petition on December 29, 2009, and an Answer to the defendant's Motion for Discovery on January 14, 2010. The defendant's Motion for Discovery was denied by Order of Court filed on February 1, 2010. A supplemental Memorandum of Law was filed by the defendant on January 29, 2010, and another supplemental brief was thereafter filed on June 16, 2010.

DISCUSSION:

The issue presently before the court, while phrased in various forms in various filings, is essentially premised upon the findings of the National Academy of Sciences in a report entitled "Strengthening Forensic Science in the United States: A Path Forward." [4] This report was the result of a study on forensic science authorized by the United States Congress in 2005 and performed by a committee established by the National Academy of Sciences for that purpose in 2006.[5] The report, released on February 17, 2009 (hereinafter "NAS Report"), criticized the reliability of various disciplines within the forensic science community, including forms of forensic identification, techniques and protocol. Among those techniques criticized was that of forensic odontology,[6] specifically in the area of bite mark identification as a means of positively identifying a perpetrator through comparisons of bite mark evidence left following the commission of a crime and bite mark impressions obtained through established dental procedures. The defendant argues that the contents of the 2009 NAS Report call into question the reliability of his conviction and therefore entitle him to relief under the Post-Conviction Relief Act, 42 Pa.C.S. §9541, *et. seq.*

In order for his claims to be considered by the court, a PCRA defendant must establish that his PCRA petition has been timely filed. Any petition filed under the Post-Conviction Relief Act, including second and subsequent petitions, must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S. §9545(b)(2). "It is imperative to note that the

[4] © National Academy of Sciences, 2009, The National Academies Press, Washington, D.C.; www.nap.edu.

[5] *NAS Report* at pages 1-2. The committee's study took place from January 2007 through November 2008.

[6] "The application of the science of dentistry to the field of law." *(NAS Report* at page 173).

timeliness requirements of the PCRA are jurisdictional in nature. Statutory time restrictions may not be altered or disregarded to reach the merits of the claims raised in the petition." Commonwealth v. Harris, 972 A.2d 1196, 1199 (Pa.Super.2009) (internal citations omitted). *See also,* Commonwealth v. McKeever, 947 A.2d 782, 784-785 (Pa.Super. 2008) (The timeliness requirement is mandatory and jurisdictional; therefore, no court may disregard, alter, or create equitable exceptions to the timeliness requirement in order to reach the substance of a petitioner's arguments.)

The defendant herein acknowledges that the instant PCRA Petition is untimely; however, he alleges that the untimely filing can be excused pursuant to the newly-discovered evidence provision of 42 Pa.C.S.A. §9545(b):

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
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> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;
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> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
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> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. §9545(b). This newly-discovered evidence, he suggests, is the criticism of bite mark evidence and identification found in the NAS Report, dated February 17, 2009. If his

contention is accepted by this court, his filing of the instant petition on April 17, 2009 is within the sixty (60) days allotted by 42 Pa.C.S. §9545(b)(2).

The Supreme Court of Pennsylvania considered a similar issue in Commonwealth v. Fisher, 582 Pa. 276, 870 A.2d 864 (2005). There, Fisher alleged in a second PCRA petition that "a soon to be released study by the National Academy of Sciences (NAS) had determined that the methods utilized by the FBI in CBLA [comparative bullet lead analysis] cases were imprecise and flawed." Fisher at 283, 870 A.2d at 868. Fisher alleged that this information was had been unavailable to him prior to the release of the article published by the National Academies Press in November 2003; therefore, it constituted newly-discovered evidence and excused the untimely filing of the second PCRA petition.[7] In further support of his position, Fisher attached an affidavit by one William Tobin which stated that the opinion rendered by the FBI expert as to CBLA at trial "was not scientifically reliable and that there is no meaningful or comprehensive scientific research or study validating the premises required to support the practice of CBLA." *Id.*

Looking merely at the date of the release of the article in question, the PCRA court determined that this evidence met the requirements of "newly discovered evidence" so as to permit the untimely filing, but ultimately dismissed Fisher's PCRA petition after determining that the new evidence would not have resulted in a different outcome. The Superior Court agreed with the PCRA court's assessment.

The Pennsylvania Supreme Court disagreed with the lower courts' analysis as it related to the timeliness requirements of the PCRA. The Court acknowledged that the information contained in the article only became available to Fisher in November 2003 when it was reported.

[7] It was acknowledged that Fisher's second PCRA petition was filed within 60 days of the date that the article was released.

However, the Supreme Court noted that a reading of the National Academies Press article did not support Fisher's assertion that the "NAS study establishes that the methods utilized by the FBI in CBLA cases were 'imprecise and flawed.'" Fisher at 287, 870 A.2d at 870. Further, after considering the contents of the affidavit authored by Fisher's expert, William Tobin, as well as his *curriculum vitae,* the Supreme Court concluded that, insofar as Tobin had begun his research into the issue of the reliability of CBLA in 1998 and had authored articles containing his opinions as to the reliability of CBLA since 2002, this information had been available and discoverable for two years prior to the filing of Fisher's second PCRA in 2004. Fisher at 287-288, 870 A.2d at 871. Fisher's petition, the Supreme Court found, did not fall within the "newly-discovered evidence" exception to the timeliness requirements of the PCRA, and the PCRA court lacked jurisdiction to entertain the merits of that petition. *Id.*[8]

In determining whether the 2009 release of the NAS Report constitutes newly-discovered evidence pursuant to 42 Pa.C.S. §9545(b), this court must then consider the contents of the relevant portions thereof, including but not limited to the Summary found at pages 1-33 of the NAS Report, and that section entitled "Forensic Odontology" found at pages 173–176 of the NAS Report. While a hard copy of the report was not presented to this court by the defendant, the text of the NAS Report is readily available through the National Academies Press web site at http://www.nap.edu. This court must also consider the contents of the Affidavits supplied by the

[8] Despite it's holding on jurisdiction, the Court did address the merits of the underlying claim, and determined that the NAS report on the reliability of CBLA and Tobin's affidavit would merely have discredited the Commonwealth's witness with new criticism of his technique, and would not have been likely to compel a different verdict. Thus, even had Fisher filed his second PCRA in a timely manner, his claims still would have failed.

defendant's three experts, Charles Michael Bowers, DDS, JD; Iain Pretty, BDS, MSc, Ph.D., MFDSRCS; and David C. Averil, DDS.[9]

The NAS Report begins its discussion of bitemark evidence by noting that, although the field of forensic odontology is a specialty recognized by the American Academy of Forensic Sciences, "there is continuing dispute over the value and scientific validity of comparing and identifying bite marks." (NAS Report at 173). The committee found that even the techniques of obtaining bite bark evidence, which in theory are generally well-established and accepted, can be rendered unreliable based upon numerous factors, including the passage of time, the elasticity of human skin, swelling and healing and any unevenness of the surface bite. (NAS Report at pp. 173-174). The committee further noted that the American Board of Forensic Odontologists (ABFO)[10] has established expansive guidelines that list a number of methods for the analysis of bite marks. Specifically, the Report states: "The guidelines, however, do not indicate the criteria necessary for using a method to determine whether the bite mark can be related to a person's dentition and with what degree of probability. There is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match. This includes reproducibility between experts and with the same expert over time. Even when using the guidelines, different experts provide widely differing results and a high percentage of false positive matches from bite marks using controlled comparison studies." (NAS Report at 174).

The committee concluded generally that, while bite mark comparisons may be considered to be reliable insofar as they can serve to exclude suspects, "the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match." (NAS Report at p. 175).

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[9] Interestingly, aside from differing specifics of qualification, the three affidavits submitted by the three different experts on behalf of the defendant are remarkably identical in their content, their structure, their assessment of the evidence, their assessment of the NAS Report, and in their ultimate opinion.

[10] www.abfo.org.

In calling into question the scientific reliability of bitemark identification, the committee noted that "no scientific studies support this assessment, and no large population studies have been conducted. In numerous instances, experts diverge widely in their evaluations of the same bite mark evidence, which has led to questioning of the value and scientific objectivity of such evidence." (NASD Report at 176).[11]

While the NAS Report does criticize the lack of specific and uniform standards, the lack of exhaustive studies, and notes the problems inherent in both bite mark analysis and interpretation, the criticism repeatedly suggests that these deficiencies create an inability to predict and support the reliability of this science. The Report does not, however, conclude that the use of bitemark analysis and comparison has lost general acceptance in the scientific community of forensic odontology. Rather, it specifically acknowledges that "the majority of forensic odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification." (NAS Report at 176).[12] Even the defendants' experts, in their remarkably uniform affidavits, state: "the NAS Report did not invalidate bite mark identification entirely," nor did it report that bite mark identification fell into the realm of junk science; rather, "the NAS Report said, at least with respect to bite mark identification, is that there is currently inadequate data, be it base rate data, error rate data, or data regarding the transferability of bite marks, to individualize a known bite pattern to an unknown bite mark or even to offer an opinion as to the

[11] The NAS Report clearly questions whether the discipline of forensic odontology is "sufficiently grounded in science to be admissible under *Daubert* [*v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993)]." (NAS Report at 127, n. 1). Daubert, of course, was decided after the defendant's trial, which occurred in 1991. However, it is important to note that the Pennsylvania Supreme Court has rejected the Daubert standard of "scientific reliability" as a predicate to admissibility. Grady v. Frito-Lay, Inc., 576 Pa. 546, 839 A.2d 1038 (2003). Rather, Pennsylvania remains a "*Frye* state," which requires scientific evidence to have "general acceptance" in the particular scientific community from which it derives, in order to be admissible. *Id.* Therefore, for purposes of admissibility, the scientific reliability of bitemark evidence and bitemark identification is irrelevant, so long as the methodology, techniques and analysis have gained "general acceptance" in the community of forensic odontologists. The weight to be afforded that evidence, if any, was and is to be determined by the finder of fact.

[12] Given that Pennsylvania is not a *Daubert* state, but a *Frye* state, even had the NAS Report been available to the defendant at the time of trial, the testimony of the experts would still have been admissible under the *Frye* standard.

statistical likelihood of a coincidental match." (Affidavit of Bowers at page 10, paragraph 22); (Affidavit of Pretty at page 9-10, paragraph 18); (Affidavit of Averill at page 9-10, paragraph 20). Therefore, the NAS Report, much like the CBLA report considered in Commonwealth v. Fisher, 582 Pa. 276, 870 A.2d 864 (2005), does not necessarily suggest that which the defendant herein alleges.

A PCRA petitioner seeking to excuse his untimely filing under the newly-discovered evidence exception to the one-year limitation set forth in 42 Pa.C.S. §9545(b)(2) must also plead and prove facts that were truly "previously unknown," and not just facts that were previously known, but now presented through a newly discovered source.

> Exception (b)(1)(ii) "requires petitioner to allege and prove that there were *'facts'* that were 'unknown' to him" and that he could not have ascertained those *facts* by the exercise of "due diligence." *Commonwealth v. Bennett,* 593 Pa. 382, 930 A.2d 1264, 1270-72 (2007) (emphasis added). The focus of the exception is "on [the] newly discovered *facts,* not on a newly discovered or newly willing source for previously known facts." *Commonwealth v. Johnson,* 580 Pa. 594, 863 A.2d 423, 427 (2004) (emphasis in original).

Commonwealth v. Marshall, 596 Pa. 587, 596, 947 A.2d 714, 720 (2008). The contents of the expert affidavits filed by Bowers, Pretty and Averill raise questions as to whether the information, or "facts," contained in the NAS Report with regard to forensic odontology and bite mark identification were unavailable to the defendant prior to February 18, 2009, or whether they could have been discovered by him or his counsel at an earlier time through the use of due diligence.

It is clear from the official record that the defendant's current counsel, Mr. Cooley, and The Innocence Project, first filed a pleading on behalf of the defendant on August 1, 2008. It is also clear from the affidavits supplied by Dr. Bowers, Dr. Pretty and Dr. Averill, that "the prevailing view of bite mark identification slowly started to change during the earlier part of this

decade when DNA testing began to expose bite mark identification's unreliability... The NAS Report's conclusions and findings, however, finally validated what [a] small minority of forensic dentists (myself included) have been preaching for nearly a decade now: given the current state of research in the forensic science and bite mark communities, there is no scientific basis on which forensic dentists can claim that they can individualize a known bite mark pattern to an unknown bite mark." (Affidavit of Bowers p. 12-13, paragraphs 24b and e); (Affidavit of Pretty p. 11-12, paragraphs 20b and e); (Affidavit of Averill p. 11-12, paragraphs 22b and e).

Indeed, not only have Bowers and Pretty been preaching on this subject for nearly a decade, they have authored scholarly articles on this subject which have been published in scientific journals, and upon which the very committee who released the NAS Report relied in coming to its conclusions regarding forensic odontology found in the Report. In questioning certain scientists' refusal to acknowledge uncertainly in their fields, the committee noted that "Assertions of a '100 percent match' contradict the findings of proficiency tests that find substantial rates of erroneous results in some disciplines (i.e., voice identification, bite mark analysis)." (NAS Report at page 47, citing Dr. Bowers: C.M. Bowers, 2002. The scientific status of bitemark comparisons. In: D.L. Faigman (ed.). *Science in the Law: Forensic Science Issues.* St. Paul, MN: Thompson/West.) Dr. Bowers' research and publications were further cited by the committee in the NAS Report:

> "Even when using guidelines, different experts provide widely differing results and a high percentage of false positive matches of bite marks using controlled comparison studies." (NAS Report at page 174, citing Dr. Bowers: C. M. Bowers, 2002. The scientific status of bitemark comparisons. In: D. L. Faigman (ed.). *Science in the Law: Forensic Science Issues.* St. Paul, MN: Thompson/West.)
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> "Although the majority of forensic odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification, no scientific studies can support this assessment, and

> no large population studies have been conducted. In numerous instances, experts diverge widely in their evaluations of the same bite-mark evidence, which has led to questioning of the value and scientific objectivity of such evidence. (NAS Report at page 176, citing Dr. Pretty: I. A. Pretty, 2003. A Web-based survey of odontologists' opinions concerning bite mark analysis. *Journal of Forensic Sciences* 48(5):1-4 and citing Dr. Bowers: C.M. Bowers, 2006. Problem-based analysis of bite mark misidentifications: The riole of DNA. *Forensic Science International* 159 Supplement 1: s104-s109.)

Critically, the committee authoring the NAS Report that was released in February 2009 reported as follows: "The committee received no evidence of an existing scientific basis for identifying an individual to the exclusion of all others. That same finding was reported in a 2001 review, which 'revealed a lack of valid evidence to support many of the assumptions made by forensic dentists during bite mark comparisons.'" (NAS Report at 176, citing I. A. Pretty and D. Sweet, 2001. The scientific basis for human bitemark analysis – A critical review. *Science and Justice* 41(2):85-92.)[13]

It appears, from a review of the NAS Report and from the affidavits supplied by the defendant's experts, that while the NAS Report itself was certainly not available to the defendant until February 2009, much of the information upon which the committee relied in drafting the NAS Report was available long before the release of the NAS Report, and could have been discovered by the defendant (or his counsel) through the use of due diligence. The fact that the information is derived from a new source, reprinted in a new format or compiled in a new report does not, in and of itself, make the evidence "newly-discovered." *See, e.g.,* Commonwealth v.

[13] Indeed, in an article entitled "Forensic Dentistry: 2. Bitemarks and Bite Injuries," published in the January/February 2008 issue of *Dental Update*, 35(a) 48-61, Dr. Pretty compared two studies, one released in 1998 by D. Sweet and C. M. Bowers in the *Journal of Forensic Science* (43(2): 362-367), and one released in 2001 by Dr. Pretty and D. Sweet in the *Journal of Forensic Science* (46(6):1385-1391) and concluded that the degree of reliability when bitemark comparison purports to result in the positive identification of a particular suspect "to a reasonable medical certainty" was quite low. "While in many cases, [matching a bitemark to a single individual to the exclusion of all others] is not [possible] and therefore caution should be taken when assessing any bite injury using pattern analysis." I.A. Pretty. 2008. "Forensic Dentistry: 2. Bitemarks and Bite Injuries." *Dental Update*, 35(a): at p. 57.

Marshall, 596 Pa. 587, 596, 947 A.2d 714, 720 (2008). In this way, the instant case is not unlike Commonwealth v. Fisher, *supra,* in which the Supreme Court determined that the CBLA report and the affidavit supplied by Fisher's expert did not constitute "newly discovered evidence" to qualify as an exemption from the time requirements set forth in 42 Pa.C.S. §9545(b).

Based upon the public information available and the contents of the NAS Report itself, this court determines that the information regarding studies indicating the lack of reliability of bitemark comparisons insofar as they purport to identify a particular perpetrator to the exclusion of any other individuals was information that was available to the defendant long before the filing of the Writ of Habeas Corpus/PCRA in April 2009. The information was publicly available in January or February of 2008, when Dr. Pretty's article in the *Dental Update* was published.[14] Additionally, as Kunco officially became represented by The Innocence Project in August 2008, the information was, at the very latest, available to him through counsel at that time.[15] The filing of the instant PCRA petition in April 2009 was clearly far beyond the sixty (60) day filing period set forth in 42 Pa.C.S. §9545(b)(2).

For these reasons, this court finds that the instant PCRA petition filed in this matter, the defendant's third such petition, has not been filed in a timely manner in violation of 42 Pa.C.S. §9545. For this reason, this court lacks jurisdiction to entertain the merits of the defendant's third PCRA Petition.

[14] Although the court has elected to view the availability of this information to the benefit of the defendant, a review of the NAS report strongly suggests that the information has been available to the defendant since at least 2001. (NAS Report at 176).

[15] This does not suggest that the tolling of the statute is dependent upon a defendant's representation status, as that is clearly not the case.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA – CRIMINAL DIVISION

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

ORDER OF COURT

AND NOW, this 28 day of October, 2010, upon consideration of the "Motion for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post Conviction Relief act, 42 Pa.C.S. §9541, *et. seq.*" filed by the defendant, after oral argument, and after consideration of the multiple briefs and memoranda filed by the parties in this case, as well as related materials relevant thereto, for the reasons set forth in the preceding Opinion, this court finds as follows:

1. That the defendant's PCRA as to the bitemark evidence and expert testimony has not been timely filed pursuant to 42 Pa.C.S. §9545(b);
2. That the delay in filing cannot be excused by any of the exceptions set forth in 42 Pa.C.S. §9545(b); and,
3. That the defendant's third PCRA (entitled "Motion for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post Conviction

Relief act, 42 Pa.C.S. §9541, *et. seq.*") must therefore be **DISMISSED** because the court lacks jurisdiction to entertain the merits of the issues raised therein.

THE DEFENDANT IS NOTIFIED THAT ANY APPEAL TO THE SUPERIOR COURT OF PENNSYLVANIA FROM THIS COURT'S DISMISSAL OF HIS *PRO-SE* PCRA PETITION MUST BE FILED WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER OF COURT.

BY THE COURT:

Rita Donovan Hathaway, Judge

ATTEST:

_____
Clerk of Courts

cc: File
James P. Hopson, Esq., Assistant District Attorney
Wayne B. Gongaware, Esq., Assistant District Attorney
Craig M. Cooley, Esq., PCRA Counsel for the Defendant
David Millstein, Esq., PCRA Counsel for the Defendant