IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA RORRER,	:	
	:	
Petitioner	:	
v.	:	**CIVIL ACTION NUMBER 19-01398**
	:	
WENDY K. NICHOLAS,	:	
	:	
Respondents	:	

MOTION FOR DISCOVERY AND CONSOLIDATED MEMORANDUM OF LAW

Petitioner Patricia Rorrer, through undersigned counsel, respectfully moves for permission to conduct discovery in this matter. Discovery is necessary in order to enable Petitioner to make a gateway showing of actual innocence so that she may overcome the procedural bars and the untimely filing of her habeas petition and aid the Court in its review when it considers the merits of her constitutional claims. In support of this motion, Petitioner states the following:

1. In February and March 1998, Ms. Rorrer was tried and convicted in the Lehigh County Court of Common Pleas of two counts of first-degree murder and kidnapping involving the death of Joanne Katrinak and her infant son, A.K.

2. On April 2, 2019, Ms. Rorrer filed a petition for writ of habeas corpus. On May 29, 2019, this Court ordered the matter placed in stay and abeyance to allow Ms. Rorrer to exhaust her state court remedies.

3. On June 6, 2019, the Court appointed the Federal Community Defender Office (FCDO) to represent Ms. Rorrer, who had previously proceeded *pro se*. On July 5, 2019, the FCDO informed the court that Ms. Rorrer wished to pursue an appeal in the state court and keep the stay

in place, and that she would notify the Court within 30 days of the completion of her state appellate proceedings. On August 13, 2019, the Court granted Ms. Rorrer's request.

4. On December 14, 2020, the Pennsylvania Supreme Court denied Ms. Rorrer's petition for allowance of appeal, concluding her state appellate proceedings. On January 11, 2021, undersigned counsel notified the court that Mr. Rorrer's state court proceedings had concluded and requested 60 days to prepare a memorandum of law.

5. Before undersigned counsel can fully address the claims raised in Ms. Rorrer's habeas petition and make a gateway showing of actual innocence in order to overcome the procedural defaults and the late filing of her petition under 28 U.S.C. § 2244(d), Ms. Rorrer needs access to discovery from the Federal Bureau of Investigation (FBI) and the Pennsylvania State Police (PSP) regarding DNA testing and any chain of custody records for the DNA evidence presented at trial.

6. Ms. Rorrer's conviction is based on circumstantial evidence. She lived several hundred miles away in North Carolina at the time the victims were abducted in Pennsylvania and killed. The only forensic evidence allegedly linking her to the crime scene consists of six hairs found on the driver's seatback of the victim's vehicle. Some of those hairs were tested by the FBI in 1997 and by an independent lab, Orchid Cellmark, in 2008, and each time, one of the hairs was found to match Ms. Rorrer's DNA profile. Ms. Rorrer contends that the hairs sent to the FBI for testing before trial and the hairs sent to Orchid Cellmark for post-conviction testing in 2008 were her own exemplar hairs, switched with the seatback hairs originally collected from the crime scene.

7. Ms. Rorrer has been able to obtain some records from the FBI indicating that the hairs may have been switched, but has been unable to obtain the FBI's complete record regarding

the DNA testing done in her case. Undersigned counsel has requested chain of custody records from the PSP, but that request was denied.

8. Undersigned counsel, in consultation with DNA expert Huma Nasir, believes that Ms. Rorrer requires access to the complete records relating to the DNA testing and chain of custody of the DNA evidence kept by the FBI and PSP, as outlined in Ms. Nasir's declaration, in order prove her allegation that that the hairs used for DNA testing were switched and that Ms. Rorrer is actually innocent.

A. Background

i. The Commonwealth's evidence at trial

9. Joanne Katrinak was married to Andrew (Andy) Katrinak, and A.K. was their infant son. N.T. 2/6/98 at 28. Ms. Katrinak and A.K. went missing from their Catasauqua, Pennsylvania home on December 15, 1994. N.T. 2/6/98 at 32-34. That evening, Andy called police and reported that Ms. Katrinak was missing, that the hasp to their basement door had been pried open, and that the phone line in the basement had been cut. N.T. 2/6/98 at 48, 269.

10. Ms. Katrinak's car was found later that night just yards away from the house in the parking lot of McCarty's Bar and Grill. N.T. 2/6/98 at 42. However, A.K.'s and Ms. Katrinak's bodies were not found until April 9, 1995, when a farmer discovered them in wooded area near Heidelberg Township in Lehigh County. N.T. 2/6/98 at 49; N.T. 2/10/98 at 187-88. Ms. Katrinak had been beaten and shot in the face with a .22 caliber weapon, but the medical examiner could not determine the cause of death for A.K., concluding that he was either suffocated or died of exposure. N.T. 2/6/98 at 50-52, 63.

11. The investigation initially focused on Andy Katrinak, but later shifted to Ms. Rorrer, who had been in a relationship with Andy from 1984 to 1990. N.T. 2/6/98 at 299-300; N.T.

2/9/98 at 41-42. Ms. Rorrer and Andy had separated, but remained friendly and maintained occasional contact. N.T. 2/6/98 at 53. During the investigation, Andy told police that Ms. Rorrer had called the Katrinak home three days before Ms. Katrinak and A.K. disappeared and had a brief hostile exchange with Ms. Katrinak, during which Ms. Katrinak told her not to contact Andy again. N.T. 2/6/98 at 289-90; 2/9/98 at 49. At trial, Andy provided an alibi for his whereabouts on December 15, 1994 and testified that he was doing construction work at Tom and Kathy Holschwander's house in Kreidersville, PA, about 20 minutes away from the Katrinak home. N.T. 2/6/98 at 247-49.

12. The Commonwealth's theory at trial was that Ms. Rorrer became angry as a result of her phone call with Ms. Katrinak and drove several hundred miles from her home in North Carolina to Pennsylvania to abduct and kill Ms. Katrinak and A.K. N.T. 2/6/98 at 53, 98. The Commonwealth asserted that Ms. Rorrer was familiar with the wooded area where the bodies were found because she had stabled and ridden horses in the area several years earlier. N.T. 2/6/98 at 78.

13. The police never located the murder weapon, and the Commonwealth presented no eyewitnesses who saw Ms. Rorrer in Pennsylvania around December 15, 1994. N.T. 2/6/98 at 23. The Commonwealth called numerous witnesses who offered circumstantial evidence of Ms. Rorrer's guilt. This evidence included the fact that Ms. Rorrer had previously owned a .22. caliber handgun, that she allegedly made vague statements about getting "caught" to her infant daughter when she was arrested, and that she made efforts to obtain alibis for her whereabouts around December 15, 1994 that ultimately could not be substantiated. N.T. 2/6/98 at 61-63, 88-90-92, 95.

14. The only evidence linking Ms. Rorrer to the murder was her alleged DNA match to the hairs found in Ms. Katrinak's car. Investigators collected a number of items from Ms.

Katrinak's car and from the forest area where the bodies were found, including numerous hairs, fibers, a cigarette butt, and pieces of fingernail with potential organic material attached. 8/2/95 PSP Report; 8/24/95 PSP Report. The Commonwealth submitted certain items for DNA testing: six hairs found on the driver's seatback of Ms. Katrinak's car, and two hairs found in the forest area near the bodies, all of which were supposedly similar in appearance to Ms. Rorrer's hair. N.T. 2/12/98 at 58, 67; N.T. 2/20/98 at 172, 181-82. The FBI tested the two hairs from the forest area using mitochondrial DNA testing and concluded that Mr. Rorrer could not be excluded as the source of the hairs. N.T. 2/20/98 at 182. The FBI conducted both mitochondrial DNA testing and nuclear PCR DNA testing on one of the hairs collected from the seatback of the car and concluded that Ms. Rorrer was a "match," or that the odds of the hair belonging to another Caucasian female were 1 in 74,000. N.T. 2/20/98 at 82, 87, 180.[1]

ii. Pretrial forensic investigation and DNA testing

15. PSP Trooper Ken Coia investigated Ms. Katrinak's vehicle and collected various hairs, fibers, and debris using Post-It notes. N.T. 2/11/98 at 296, 299-300. Those items were ultimately delivered to PSP Forensic Analyst Thomas Jensen for analysis, and he selected six hairs collected from the driver's seatback of Ms. Katrinak's car for further examination. 8/2/95 PSP Report at 3. Mr. Jensen examined the items and labeled the six hairs collected from the driver's seatback of the victim's car as Item 3e. *Id.* Mr. Jensen concluded that these hairs did not appear to match the victim, her husband or their child. *Id.* He divided the six hairs collected from the driver's seatback into two groups: three hairs that he mounted on slides and three hairs that remained unmounted. *Id.* He observed what appeared to be blood on at least one of the unmounted hairs and

[1] *See* 3/14/21 Declaration of Huma Nasir (hereinafter, "Nasir Dec.") at ¶ 12 (explaining difference between mitochondrial DNA testing and nuclear PCR DNA testing).

on two of the mounted hairs. *Id.* He also observed that the six hairs varied in color and all were darker on the root end. *Id.* Mr. Jensen made no observations about whether or not any of the six hairs had discernible root material. *Id.*

16. Mr. Jensen sent the three unmounted hairs to the FBI for testing. *See* 8/2/95 PSP Report at 3. The hairs were received by the FBI in July 12, 1995 and assigned laboratory number 50712022. 10/13/95 FBI Report at 1. Mr. Jensen testified at trial that he selected the three unmounted hairs to be the first sent to the FBI because one of the three hairs had a "much better root tag" for PCR DNA testing. N.T. 2/11/98 at 251. He also testified that he wanted the FBI to try to determine the source of the red material on the shafts of the hairs. N.T. 2/11/98 at 251.

17. The FBI receipt for the six hairs simply states that the PSP wanted the hairs to undergo DNA testing. *See* FBI Receipts of Evidence at 2. Thereafter, FBI analyst Harold Deadman, Ph.D., labeled the three unmounted hairs as "Q1." N.T. 2/20/98 at 70. He made no mention in his report of whether the three hairs had a discernible root. 10/13/95 FBI Report. Focusing on the apparent blood on the outside of the hairs, Dr. Deadman swabbed the three unmounted hairs and, through DNA testing of the material on the swabs, he discovered a mixture. N.T. 2/20/98 at 71. In his October 13, 1995 report, he concluded that he was unable to determine the source of the original DNA material on the outside of the hairs. 10/13/95 FBI Report at 2. Mr. Jensen later admitted at trial that he had touched the hairs sent to the FBI with his bare hands and contaminated the samples, compromising the FBI's ability to determine the source of the potential blood on the hairs. N.T. 2/12/98 at 8-9.

18. The FBI did not conduct any DNA testing on the hairs themselves in October 1995. The last paragraph of the October 1995 report states: "The submitted items and the probed membranes are being returned to your office under separate cover by registered mail. In addition

to the evidence in this case, any remaining processed DNA . . . is also being returned under separate cover." *See* 10/13/95 FBI Report at 2.

19. On November 8, 1995, police in North Carolina executed a search warrant seeking hair and blood samples from Ms. Rorrer. N.T. 2/17/98 at 248-49. It appears that Ms. Rorrer's hairs were not counted when they were collected.[2] The PSP received a "sample" of Ms. Rorrer's hairs and Mr. Jensen selected 14 hairs, which he mounted on slides for examination. 12/22/95 PSP Report at 1. At trial, the Commonwealth asserted that Ms. Rorrer's exemplar hairs were darker than the hairs collected from the seatback hairs, and Mr. Jensen testified that his analysis indicated that Ms. Rorrer's hairs had been previously dyed. N.T. 2/12/98 at 35-38. The FBI received a blood sample from Ms. Rorrer on November 16, 1995, which it labeled K6, and hair samples from Ms. Rorrer on January 17, 1996, June 10, 1996, and August 6, 1996. 5/6/96 FBI Report at 1; 5/30/97 FBI report at 1.

20. On May 30, 1997, FBI analyst Joe DiZinno, Ph.D., reported the results of mitochondrial DNA testing done on the Q1 hairs, as well as the two hairs collected from the forest area. The mtDNA sequence obtained from the Q1 hairs matched sequences from forest hairs and matched the sequence obtained through a blood sample provided by Ms. Rorrer. 5/30/97 FBI Report at 2. He concluded that Ms. Rorrer could not be excluded as a source of the hairs. *Id.* at 2.

21. At trial, Dr. Deadman testified that when Dr. DiZinno returned the Q1 hairs after his mitochondrial testing, the hairs had been mounted on slides. N.T. 2/20/98 at 79-80. For the first time, Dr. Deadman noticed root material attached to at least one of the Q1 hairs and tested the root

[2] At one point during trial, the prosecutor commented that the doctor who collected Ms. Rorrer's exemplar hairs had plucked 39 hairs from her head, but he did not indicate where that information came from and undersigned counsel does not have access to any documents or reports containing an inventory or count of Ms. Rorrer's exemplar hairs. N.T. 3/3/98 at 274.

using PCR DNA testing. N.T. 2/20/98 at 80-81. In his September 16, 1997 report, Dr. Deadman concluded that the PCR profile of the Q1 hair matched Ms. Rorrer's profile, obtained from the K6 blood sample. 9/16/97 FBI Report at 2. He stated that the chances of a random match with another Caucasian were 1 in 37,000 and that the chances of a random match with another Caucasian female were 1 in 74,000. *Id.*; N.T. 2/20/98 at 86.

22. As part of the pretrial DNA testing, the three mounted seatback hairs were also sent to the FBI for analysis on June 24, 1996, about a year after the PSP first sent the unmounted hairs to the FBI. 5/30/97 FBI Report at 1. The FBI labeled those three hairs Q4, Q5, and Q6, but was unable to dissolve the mounting glue on the slides and therefore was unable to test the three mounted hairs *Id.* at 1, 3; N.T. 2/20/98 at 86. The FBI made no mention of whether or not the Q4-Q6 hairs had any discernible roots. The FBI returned the mounted hairs to the PSP at the conclusion of all DNA testing on December 5, 1997. *See* 12/4/97 FBI Receipt.

iii. Post-conviction proceedings and independent DNA testing

23. Ms. Rorrer was convicted at trial of two counts of kidnapping and first degree murder and sentenced to life in prison and a consecutive term of 10 to 20 years' imprisonment. *Commonwealth v. Rorrer*, No. 3080 PHL 98 at *1 (Pa. Super. Ct. Oct. 22, 1999) (memorandum opinion). On direct appeal, Ms. Rorrer raised issues challenging the trial court's evidentiary rulings and its denial of her motion for change of venue, alleged numerous claims of ineffective assistance of trial counsel, and appealed the denial of her request for additional DNA testing of a hair found in Ms. Katrinak's hand at the crime scene, which the Commonwealth had conceded did not belong to Ms. Rorrer. *Id.* at 2-14. The Pennsylvania Superior Court denied the claims on appeal and affirmed Ms. Rorrer's conviction on October 22, 1999. *Id.* at 14.

24. Ms. Rorrer filed her first Post-Conviction Relief Act Petition (PCRA) in 2001. That petition was dismissed by the PCRA court in 2002 and the dismissal was affirmed by Superior Court on March 12, 2003. *Commonwealth v. Rorrer*, 166 EDA 2003 at *1, 5 (Pa. Super. Ct. Dec. 3, 2003) (memorandum opinion). In 2006, Ms. Rorrer filed a counseled Petition for Post-conviction DNA testing under 42 Pa. C.S. § 9543.1 and requested independent DNA testing of the following: 1) a fingernail fragment and mass of material attached to it that was found on Ms. Katrinak's chest; 2) the mounted seatback hairs that the FBI was unable to test; 3) the hair found in Ms. Katrinak's hand; 4) all of the unmounted hairs sent to the FBI for the purpose of running them through the Combined DNA Index System (CODIS), which was launched after Ms. Rorrer's trial; and 5) the cigarette butt found in the wooded area near the bodies. 9/15/06 Amended Post-Conviction Relief Act Petition at ¶¶ 23-88.

25. At a subsequent hearing, PCRA counsel argued that the DNA results from the pretrial testing of the unmounted hairs were unreliable because of potential chain of custody issues. He explained that Thomas Jensen contaminated the unmounted hairs, that the unmounted hairs originally received by the FBI must not have had roots, or they would have been tested for nuclear DNA, and that Ms. Rorrer's exemplar hairs were never counted, suggesting that Dr. Deadman received Ms. Rorrer's exemplar hairs when he noticed a root and conducted nuclear DNA testing in 1997. N.T. 12/1/06 at 58-59.

26. The PCRA court subsequently ordered the Commonwealth to preserve and make available for testing the six seatback hairs, the fingernail fragment, and the cigarette butt found at the forest area. 3/15/07 Court of Common Pleas Order. It also ordered the Commonwealth to provide chain of custody records relating to the six seatback hairs. *Id.*

27. Pursuant to the court order, Orchid Cellmark received all six seatback hairs – Q1 (the previously unmounted hairs tested by the FBI), and Q4-Q6 (the original mounted hairs) –from the PSP on April 12, 2007. *See* 8/22/07 Letter from Orchid Cellmark. They were described in its inventory as either light brown or blond, but darker toward the roots. *Id.*; Cellmark Inventory at 4-5. Orchid Cellmark's description of the slides in its inventory appeared to correspond with the way the slides were presented at trial as part of Exhibit C-17-1. Cellmark Inventory at 4-5; N.T. 2/12/98 at 73-77. Cellmark determined that a root existed on the Q4 hair and it could be subjected to PCR DNA testing. Cellmark Inventory at 4; 7/30/08 Orchid Cellmark Report at 1. In 2008, Cellmark was able to remove the Q4 seatback hair from its mounting and concluded that the Q4 seatback hair was a match to Ms. Rorrer. Cellmark Inventory at 4; 7/30/08 Orchid Cellmark Report at 2. The odds of a random match were now, according to Cellmark, 1 in 10 sextillion. 7/30/08 Orchid Cellmark Report at 2.

28. Orchid Cellmark was unable to test any of the other seatback hairs, the cigarette butt, or the fingernail fragment, which appeared to be lacking the mass of material described in the initial PSP reports. Cellmark Inventory at 3; 7/30/08 Orchid Cellmark Report at 1. After reviewing the results of the DNA test, the PCRA court dismissed Ms. Rorrer's petition. 6/24/09 Court of Common Pleas Opinion at 15.

29. In 2015, Ms. Rorrer was able to obtain, through a Freedom of Information Act (FOIA) request from the FBI, a document indicating that the unmounted hairs received by the FBI for testing in 1995 lacked any roots that would make them available for nuclear DNA testing. The document, which is undated, states the following: "Found in car on drivers headrest, three hairs, nine inches long, no roots attached, and blood on two of the three. . . . Presently at FBI lab for

analysis. Exemplars of [Ms. Rorrer's] blood and hair will be secured and sent to lab for comparison." *See* "No Roots" FBI Report.

30. That same year, Ms. Rorrer filed another counseled PCRA petition alleging that the "No Roots" FOIA report demonstrated that Ms. Rorrer's exemplar hairs must have been switched with the unmounted seatback hairs originally sent to the FBI in 1995. 2/22/16 Amended Post-Conviction Relief Act Petition at ¶¶ 10-16; 2/22/16 Seatback Hairs Memorandum at 9-10. She asserted that the October 13, 1995 FBI report, which first summarized the FBI analysis of the three unmounted hairs, demonstrated that those three hairs were returned to the PSP on October 13, 1995. 2/22/16 Seatback Hairs Memorandum at 4. Accordingly, the unmounted hairs later tested by Dr. DiZinno and Dr. Deadman were Ms. Rorrer's exemplar hairs, sent to the FBI by the PSP after having obtained them from Ms. Rorrer in November 1995. *Id.* at 10-11, 15.

31. With respect to the mounted seatback hairs tested by Orchid Cellmark in 2008, Ms. Rorrer argued that those hairs were also switched by the PSP before being sent to Orchid Cellmark. *Id.* at 11. Ms. Rorrer pointed out that that the slides originally sent to the FBI had been tampered with when the FBI attempted to open the slides to conduct DNA testing, but the slides received by Orchid Cellmark were said to be intact. *Id.* at 11-14. The PCRA court dismissed the petition and the Superior Court affirmed the dismissal on October 26, 2017. *Commonwealth v. Rorrer*, No. 1919 EDA 2016, 2017 WL 4861621, at *1 (Pa. Super. Ct. 2017).

B. Claims for Relief

32. Ms. Rorrer has raised a number of constitutional claims in her pro se habeas petition that allege her actual innocence, ineffective assistance of counsel, and various due process violations. As discussed in Part C, below, it is infeasible to address the prejudice resulting from those constitutional violations until this Court determines whether Ms. Rorrer has made a gateway

showing of actual innocence. Accordingly, Ms. Rorrer intends to seek leave to file an amended petition addressing the claims below once she has been able to obtain discovery relating to the DNA evidence.

i. Actual innocence

33. In her pro se petition, Ms. Rorrer asserts actual innocence both as a gateway to overcome the untimely filing of her habeas petition and any other procedural bars, and as a freestanding basis upon which she is entitled to habeas corpus relief. 4/2/19 Pro Se Habeas Petition at 14, 47. Innocence constitutes a substantive ground upon which to relieve Ms. Rorrer of her unconstitutional incarceration. *See, e.g., House v. Bell*, 547 U.S. 518 (2006) (remanding capital case for evidentiary development on whether petitioner was actually innocent; the petitioner subsequently was exonerated).

34. In *Herrera v. Collins*, 506 U.S. 390 (1993), a plurality of the Supreme Court assumed that a freestanding substantive claim of actual innocence is cognizable under federal law. *Id.* at 417, 419, 430-37; *see also House*, 547 U.S. at 555 (reiterating *Herrera* principles).[3] Chief Justice Rehnquist, writing for the plurality in *Herrera*, stated that the showing required to obtain habeas relief on an actual innocence claim is a "truly persuasive demonstration of 'actual innocence.'" *Herrera*, 506 U.S. at 417. Such a showing would require an "extraordinarily high" burden. *Id.*; *see also House*, 547 U.S. at 554.

35. If Ms. Rorrer is able to obtain the necessary discovery from the FBI and PSP allowing her to demonstrate that the hairs tested by the FBI and Orchid Cellmark were switched

[3] While *Herrera* was a capital case, freestanding innocence claims in non-capital cases also have been held to be cognizable in federal habeas proceedings. *See Osborne v. District Attorney's Office for Third Judicial Dist.*, 521 F.3d 1118, 1131 (9th Cir. 2008) (citing standard set forth in *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc)).

with her own exemplar hairs, there will be no remaining credible evidence that she abducted and killed Joanne Katrinak and A.K. In accord with the Fourteenth Amendment's guarantee of Due Process, such a showing would require that Ms. Rorrer's conviction and sentence be vacated.

ii. Due process and ineffective assistance of counsel claims relating to DNA evidence

36. In her pro se petition, Ms. Rorrer asserts that the seatback hairs collected from Ms. Katrinak's vehicle were switched with Ms. Rorrer's own exemplar hairs, resulting in a nuclear DNA match. 4/2/19 Pro Se Habeas Petition at 27. Ms. Rorrer has alleged that the Commonwealth violated her right to due process when it suppressed the "No Roots" FBI report, which would have allowed her to independently interrogate the DNA evidence and analysis before and during trial. *Id.* at 16, 24. *See Brady v. Maryland*, 373 U.S. 83 (1963). She has also alleged that the Commonwealth failed to correct false testimony at trial, arguing that the Commonwealth presented false evidence of a DNA match at trial through Dr. Deadman and Dr. DiZinno. *See Napue v. People of State of Ill.*, 360 U.S. 264 (1959). Ms. Rorrer has also argued that trial counsel was ineffective for failing to utilize an independent DNA expert to challenge the chain of custody at trial and to conduct independent DNA testing of the other items found at the forest crime scene. *Id.* at 26-28. *See Strickland v. Washington*, 466 U.S. 668 (1984).

37. Because Ms. Rorrer has not had access to the complete FBI and PSP records regarding DNA testing and chain of custody, she has not been able to demonstrate whether and how the hairs were switched, and whether trial counsel had access to the records necessary to challenge the DNA evidence at trial. Full discovery from the FBI and PSP would allow Ms. Rorrer to identify and address the appropriate constitutional claims, in addition to actual innocence, resulting from the potential switch and tampering of DNA evidence.

iii. *Brady* violation resulting from the Commonwealth's suppression of Walter Traupman's statement to police

38. In her pro se petition, Ms. Rorrer asserts that the Commonwealth suppressed an eyewitness statement from Walter Traupman, who reported seeing Ms. Katrinak and Andy fighting on the street near two vehicles on the day of Ms. Katrinak's disappearance, in violation of *Brady v. Maryland*. Mr. Traupman reported the altercation he saw on the day that it happened, and then followed up with the PSP after he saw Ms. Katrinak's and Andy's photos in the newspaper and realized that they were the two people involved in the fight. 7/27/97 Walter Traupman Deposition at 20-21. Mr. Traupman eventually went in and provided a statement to Trooper Robert Egan, and recalled providing his name, date of birth and phone number. *Id.* at 22-24. He told police that he had witnessed Andy pounding on the hood of a car and yelling "what do you mean it's not my kid." *Id.* at 56.

39. When Mr. Traupman returned to follow up on his statement, Trooper Egan ultimately removed him from the PSP barracks and physically assaulted him. *Id.* at 26. Trooper Egan prepared a report memorializing Mr. Traupman's statement, but he identified the witness as Walter *Troutman* and stated that he was 55 years old, although Mr. Traupman was 69 years old in 1995. 7/24/06 Post-Conviction Relief Act Petition at 8. The report did not include Mr. Traupman's address or phone number. Mr. Traupman came forward in 2002 when he read about Ms. Rorrer's case in the newspaper and contacted PCRA counsel to provide a statement. 8/27/03 Petition to Remand.

40. Ms. Rorrer asserts that the Commonwealth's failure to provide the defense with complete and accurate biographical information for Mr. Traupman as part of Trooper Egan's statement made it impossible for trial counsel to find Mr. Traupman and call him as a witness at trial and constituted evidence suppression and a *Brady* violation. 4/2/19 Pro Se Habeas Petition at

6, 24. Ms. Rorrer raised the *Brady* claim relating to Mr. Traupman in two PCRA petitions, and both times, the state courts rejected the claim because it found that Mr. Traupman's testimony would not have changed the outcome of the trial in light of the DNA evidence from Orchid Cellmark establishing Ms. Rorrer's guilt. 6/24/09 Court of Common Pleas Opinion at 12-13; *Rorrer*, 2017 WL 4861621 at *9 (finding Traupman claim barred as previously litigated and rejecting argument that evidence of hair switch invalidates DNA evidence PCRA court previously relied on to find lack of prejudice).[4] As a result, Ms. Rorrer cannot adequately litigate this *Brady* claim and establish materiality and prejudice until she has obtained full discovery from the FBI and PSP and demonstrated her actual innocence.

iv. *Napue* and *Brady* violations relating to the testimony of Joseph Kiscka

41. In 2015, former Catasauqua police officer Joseph York contacted PCRA counsel and informed him that Officer Joseph Kiscka had told him that he that he believed Ms. Rorrer was not guilty of the murder of Ms. Katrinak and A.K. 2/22/16 Joseph Kiscka Memorandum at 3-4. Officer York affirmed that Officer Kiscka said that when he responded to the Katrinak home on the night after Ms. Katrinak's disappearance, he specifically checked the basement door and determined that it was secure. *Id.*, Exhibit C. At trial, however, Officer Kiscka had testified that he saw that the door hasp had been pried open when he first responded the Katrinak home the night Ms. Katrinak went missing. N.T. 2/10/98 at 53-54. Officer Kiscka related to Officer York that he had reported to the District Attorney's office that the door had not been tampered with but was told to keep his mouth shut if he wanted to keep his job. 2/22/16 Joseph Kiscka Memorandum,

[4] The Superior Court noted that in response to Ms. Rorrer's renewal of the Traupman claim in her 2016 PCRA, the Commonwealth provided statements from Trooper Egan discrediting Mr. Traupman. *Rorrer*, 2017 WL 4861621 at *3. To the extent that the Superior Court has rejected the Traupman claim on alternative basis, Ms. Rorrer contends that she is entitled to an evidentiary hearing to resolve any credibility issues.

Exhibit C. Accordingly, if Officer York's affidavit is truthful, Officer Kiscka's testimony at trial regarding the basement door was false, and the Commonwealth suppressed the information he provided when he came forward to a member of the District Attorney's Office. *See Napue*, 360 U.S. 264; *Brady*, 373 U.S. 83.

42. The Superior Court rejected Ms. Rorrer's claim on the basis that it was untimely because it was not newly discovered, since Officer York stated that he had contacted a member of the defense team after his conversation with Officer Kiscka in 1999 but never heard back. *Rorrer*, 2017 WL 4861621 at *8. Ms. Rorrer contends that any procedural default with respect to this *Napue* claim should be excused once she is able to obtain discovery and demonstrate actual innocence. *See Schlup v. Delo*, 513 U.S. 298 (1995). To the extent that the Superior Court denied Ms. Rorrer's claim on an alternative basis – that Officer Kiscka provided an affidavit directly contradicting Officer York – Ms. Rorrer asserts that she is entitled to an evidentiary hearing to resolve any credibility issues and findings of fact.

v. Ms. Rorrer's rights to due process and a fair trial were violated by the trial court's denial of her pretrial request for a change of venue

43. Before trial, defense counsel conducted a public opinion poll that showed that 74% of respondents in Lehigh County had heard of the murder of Ms. Katrinak and A.K. and 40% believed Ms. Rorrer was guilty. 10/22/99 Direct Appeal Opinion. Defense counsel argued that the poll results, in combination with the sensationalist and incriminating press coverage of Ms. Rorrer and the case, demonstrated that the community was inherently prejudiced against her and that she could not receive a fair trial in Lehigh County. 1/20/98 Court of Common Pleas Opinion at 4-5.

44. The Sixth and Fourteenth Amendments and Article I, Section 9 of the United States Constitution guarantee the right to an impartial jury. In addition, due process has long required that a jury verdict must be "based solely upon the evidence and the relevant law" and not on

information received from outside sources. *Chandler v. Florida*, 449 U.S. 560, 575 (1981) ("A jury's exposure to inadmissible evidence from outside sources violates due process and is especially prejudicial because the jury's receipt of such information is not accompanied by any procedural safeguards."). The Superior Court's decision affirming the trial court's denial for a change of venue was an unreasonable determination of the facts in light of the evidence presented at the pretrial hearing on the motion for change of venue and an unreasonable application of *Chandler*. 28 U.S.C. § 2254(d).

vi. Cumulative prejudice

45. If Ms. Rorrer is able to obtain discovery and demonstrate her actual innocence, it will serve as an independent basis for relief from her conviction. The other constitutional claims outlined above also support relief from her conviction. However, should this Court find that Ms. Rorrer is not entitled to relief for failing to show prejudice from any single claim, she would be entitled to relief because the cumulative effect of the errors discussed above rendered her trial fundamentally unfair, violating her right to due process.

46. This Court may consider the aggregate prejudice resulting from both ineffective assistance of counsel errors and due process violations. *See Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007). The *Strickland* test requires that prejudice be evaluated in light of the cumulative effect of all constitutional deficiencies by counsel. *See* 466 U.S. at 690 (requiring consideration of counsel's actions "in light of all of the circumstances"); *id.* at 694 (defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *id.* at 695 (noting that the question to be answered is whether, "absent the errors, the factfinder would have had a reasonable doubt respecting guilt"); *see also Berryman*

v. Morton, 100 F.3d 1089, 1102-03 (3d Cir. 1996) (the cumulative effect of each instance of counsel's deficient performance was sufficiently prejudicial to require relief).

47. When a court finds cumulative error or prejudice, it eliminates the need to analyze the individual prejudicial effect of each error. *Cf. Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (cumulative prejudice from state's failure to reveal multiple pieces of exculpatory evidence undermined fairness of trial and entitled defendant to relief); *Taylor v. Kentucky*, 436 U.S. 478, 487-88 (1978) (cumulative prejudicial effect of prosecutor's misstatements and improper jury instructions undermined fairness of trial, necessitating relief); *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974) (considering totality of prosecutorial misconduct in context of entire trial to decide if misconduct was sufficiently prejudicial to violate defendant's due process rights); *United States ex rel. Sullivan v. Cuyler*, 631 F.2d 14, 17 (3d Cir. 1980) ("the cumulative effect of the alleged errors may violate due process, requiring the grant of the writ, whereas any one alleged error considered alone may be deemed harmless").

48. The Third Circuit has "recognize[d] that errors that individually do not warrant habeas relief may do so when combined." *Albrecht*, 485 F.3d at 139. "[A] cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Id.* (quoting *Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003)).

49. Most recently, in *Collins v. Sec'y of Pa. Dep't of Corr.*, this Court reaffirmed that cumulative error is not simply a way of measuring prejudice but rather a stand-alone claim that due process was violated as a result of multiple errors: "The cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so

undermined the verdict as to constitute a denial of his constitutional right to due process." 742 F.3d 528, 542 (3d Cir. 2014). "Cumulative errors are not harmless if they had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*

50. A determination of whether Ms. Rorrer suffered prejudice from the cumulative effect of the due process and Sixth Amendment violations discussed above requires her to demonstrate that the DNA evidence allegedly establishing her guilt is invalid and that she is actually innocent of the crimes charged. Accordingly, as discussed below, Ms. Rorrer requires access to complete discovery from the FBI and PSP before she can establish prejudice with respect to any of her constitutional claims, individually or cumulatively.

C. This Court must decide, as a threshold issue, whether Ms. Rorrer can demonstrate that her innocence serves as a gateway through which the Court may rule on the merits of any untimely or procedurally defaulted claims

51. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners have one year to file a federal habeas petition, which begins to run from "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1)(A). Ms. Rorrer filed her federal habeas petition in April 2019, several years after her judgment became final, even accounting for statutory tolling, thus making her petition untimely under the AEDPA statute of limitations. However, "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

52. Under *McQuiggin*, "to prevent a 'fundamental miscarriage of justice,' an untimely petition is not barred when a petitioner makes a 'credible showing of actual innocence,' which provides a gateway to federal review of the petitioner's otherwise procedurally barred claim of a constitutional violation." *Reeves v. Fayette SCI*, 897 F.3d 154, 160 (3d Cir. 2018). Therefore, if

Ms. Rorrer makes the requisite showing of actual innocence, this Court may review the merits of her claims notwithstanding the AEDPA statute of limitations.

53. Under *Schlup v. Delo*, 513 U.S. 298, 314-16 (1995), a gateway claim of actual innocence has a lesser burden of proof than a freestanding innocence claim as discussed in *Herrera v. Collins*, 506 U.S. 390, 417 (1993). A gateway claim of innocence must merely raise sufficient doubt of guilt to undermine confidence in the outcome of the trial. *Schlup*, 513 U.S. at 316. To establish the requisite probability, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id*. at 327.

54. As the Supreme Court has emphasized, "[T]he *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt – or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 537, 555 (2006) (where petition satisfied gateway innocence standard announced in *Schlup* but not higher standard for freestanding innocence discussed in *Herrera*).

55. "To satisfy this standard, first, a petitioner must present new, reliable evidence and second, show by a preponderance of the evidence that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Reeves*, 897 F.3d at 160 (internal quotation marks omitted). Ms. Rorrer believes she can meet this burden once she is afforded access to necessary discovery from the FBI and PSP demonstrating that the hairs tested by the FBI and Orchid Cellmark were switched with Ms. Rorrer's exemplar hairs. Thus far, she has presented evidence, newly disclosed in response to a FOIA request in 2015, that the hairs received by the FBI did not have roots allowing them to conduct PCR DNA testing. *See* "No Roots" FOIA Report.

Ms. Rorrer asserts that additional reports, notes, photos, and memoranda from the FBI and PSP pertaining to the DNA samples and their chain of custody would establish that the hairs tested by the FBI using PCR DNA analysis were Ms. Rorrer's own exemplar hairs, which were switched with the hairs collected from the seatback for the vehicle. Additionally, Mr. Rorrer asserts that additional records from the PSP will establish that the mounted hairs sent to Orchid Cellmark were also switched before trial and that Orchid Cellmark similarly tested Ms. Rorrer's own exemplar hairs.

56. Discovery from the FBI and PSP, as outlined by DNA expert Huma Nasir in her declaration, *see* Nasir Dec. at ¶ 19, would allow Ms. Rorrer to determine whether additional DNA testing could exonerate her or identify the true perpetrator and would enable her to demonstrate her actual innocence. If Ms. Rorrer can establish that the tested hairs were switched with Ms. Rorrer's own exemplar hairs by the Commonwealth, any reasonable juror would have reasonable doubt as to Ms. Rorrer's guilt. *House*, 547 U.S. at 537.

57. Before this Court can reach the merits of Ms. Rorrer's constitutional claims, Ms. Rorrer must make a threshold showing of actual innocence, the "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315 (quoting *Herrera*, 506 U.S. at 404); *see also Satterfield v. Dist. Attorney Philadelphia*, 872 F.3d 152, 163 (3d Cir. 2017) ("District Court must determine whether such a showing [of actual innocence] has been made as a threshold matter").

58. Moreover, without discovery allowing Ms. Rorrer to challenge the validity of the DNA evidence allegedly establishing her guilt, it is impossible for her to demonstrate, and for this Court to evaluate, the cumulative prejudice resulting from the potential *Brady* and *Napue* violations discussed above. When considering whether evidence that has improperly been withheld

from the defense is material requiring vacation of a conviction, a court must consider all of the evidence as a whole. The evidence must be considered not only on its own merit but in terms of what the evidence would have meant for the investigation of the case and preparation for trial. Even if withheld evidence might have been deemed inadmissible, it may still have had value in leading to other admissible evidence, supporting a discovery request or in finding additional witnesses. *See Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (materiality of *Brady* violation "turns on the cumulative effect of all such evidence suppressed by the government").

59. Without discovery, Ms. Rorrer cannot demonstrate that the evidence the Commonwealth potentially withheld with respect to Walter Traupman, Officer Kiscka, and the "No Roots" report was material and would have undermined the confidence in the verdict. *See Kyles*, 514 U.S. at 435. Nor can she demonstrate prejudice resulting from the cumulative effect of all the errors discussed above, which potentially rendered her trial fundamentally unfair.

60. Ms. Rorrer thus respectfully requests access to discovery from the FBI and PSP, as outlined in Ms. Nasir's declaration, so that she may have access to the records necessary in order to make a threshold showing of actual innocence before proceeding to address her constitutional claims on the merits.

D. The Law Governing Discovery in Habeas Corpus Proceedings

61. According to Rule 6(a) of the Rules Governing Section 2254 cases in the United States District Courts, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (hereafter "RULES GOVERNING 2254 CASES") 6(a). *See generally* JAMES LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS

PRACTICE AND PROCEDURE § 19.4 (4th ed. 2001); James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 671.03[7][a] (3d ed. 2003).

62. The United States Supreme Court set forth the "good cause" standard in *Bracy v. Gramley*: a habeas petitioner has shown good cause for discovery when "specific allegations before the court show reason to believe that the petitioner *may*, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." 520 U.S. 899, 908-09 (1997) (emphasis added) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).[1] Under such circumstances, "it is the *duty* of the courts" to grant the petitioner's discovery requests in order "to provide the necessary facilities and procedures for an adequate inquiry." *Id.* at 909 (emphasis added) (quoting *Harris*, 394 U.S. at 300).[2] "The very nature of the writ [of habeas corpus] demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291. A habeas "[p]etitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that

[1] *Harris v. Nelson* led to the adoption of the RULES GOVERNING 2254 CASES. In particular, the discovery provisions of Rule 6 are intended to be "consistent with *Harris*." RULES GOVERNING 2254 CASES advisory committee's note 6; *Bracy*, 520 U.S. at 909.

[2] *Accord McDaniel v. United States District Court*, 127 F.3d 886, 888 (9th Cir. 1997) (where Petitioner "presented specific allegations . . .[he] is entitled to discovery"); *Marshall v. Hendricks*, 103 F.Supp.2d 749, 760 (D.N.J. 2000) ("A court's blanket denial of discovery is an abuse of discretion if discovery is indispensable to a fair development of the material facts") (citations omitted); *Johnston v. Love*, 165 F.R.D. 444, 445 (E.D. Pa. 1996) (Rule 6's "history makes clear that its purpose is to ensure that the facts underlying a habeas corpus claim are adequately developed, and that it is a court's obligation to allow discovery in cases in which a petitioner has provided a sufficient basis for believing that discovery may be necessary to adequately explore a petitioner's claim for relief." Accordingly, "reading Rule 6(a) in light of *Harris*, . . . a court may not deny a habeas corpus petitioner's motion for leave to conduct discovery if there is a sound basis for concluding that the requested discovery might allow him to demonstrate that he has been confined illegally."); *Gaitan-Campanioni v. Thornburgh*, 777 F.Supp. 1355, 1356 (E.D. Tex. 1991) ("Although discovery is permitted only by leave of the court, the court should not hesitate to allow discovery, where it will help illuminate the issues underlying the applicant's claim.").

evidence sought would lead to relevant evidence regarding his petition." *Payne v. Bell*, 89 F. Supp. 2d 967, 970 (W.D. Tenn. 2000).

63. The Advisory Committee to the Rules Governing 2254 Cases noted that "[d]iscovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing." RULES GOVERNING 2254 CASES advisory committee's note 4.

64. Where good cause has been shown and discovery is appropriate, the United States District Court in this judicial district and other districts within the Third Circuit have ordered discovery to habeas corpus petitioners.[3]

[3] *See, e.g.*, *Boxley v. Beard*, No. 09-cv-828, 2020 WL 134212 (E.D. Pa. Jan. 13, 2020) (ordering disclosure of police documents relevant to petitioner's *Brady* claim and ordering disclosure of ballistics evidence); *Jette v. Glunt*, No. 12-cv-02379, 2019 WL 3387048 (E.D. Pa. July 25, 2019) (ordering disclosure of Department of Human Services records pertaining to petitioner and victim and disclosure of victim's written account for in-camera inspection); *Africa v. Oliver*, No. 18-cv-4235, 2019 WL 95455 (E.D. Pa. Jan. 2, 2019) (ordering disclosure of Office of Victim Advocate records contained in petitioners' Parole Board files); *Lopez v. Beard*, No. 04-cv-4181, 2017 WL 1293389 (E.D. Pa. Mar. 3, 2017) (ordering disclosure of discovery related to Commonwealth witness' plea agreement and polygraph test results); *Small v. Beard*, No. 09-cv-2023 (M.D. Pa. Oct. 3, 2014) (ordering disclosure of documents relevant to *Brady* and ineffective assistance of counsel claims); *Natividad v. Beard*, No. 08-cv-449 (E.D. Pa. Apr. 3, 2013 & Aug. 19, 2011) (ordering disclosure of police reports, police notes, witness statements and cooperation agreements relating to claim of *Brady* violations); *Miller v. Beard*, No. 10-cv-3469 (E.D. Pa. Oct. 13, 2011) (ordering disclosure of a Commonwealth witness's criminal extract and pre-sentence investigation in connection with a *Brady* claim); *Gibson v. Beard*, No. 10-cv-445 (Sept. 16, 2011) (ordering the prosecutor to disclose all Brady information previously provided to petitioner); *Romero v. Beard*, No. 08-cv-528 (E.D. Pa. Aug. 31, 2011) (ordering disclosure of the results of polygraph tests and statements to police in connection with a claim regarding the presentation of false testimony); *Ligons v. Beard*, No. 09-cv-5095 (E.D. Pa. May 27, 2011) (ordering discovery of an undisclosed photo array); *Gwynn v. Beard*, No. 08-cv-5061 (E.D. Pa. March 19, 2010) (ordering discovery related to petitioner's claims of violations of Due Process and of *Brady v. Maryland*, 373 U.S. 83 (1963)); *Washington v. Beard*, No. 07-cv-3462 (E.D. Pa. Jan. 19 2010) (ordering discovery related in part to petitioner's claims of ineffective assistance of counsel, Due Process and Eighth Amendment violations); *D'Amato v. Beard*, No. 2:05-cv-2019 (E.D. Pa. Nov. 9, 2006) (ordering *Brady* discovery including police file and prosecution materials); *Breakiron v. Horn*, 00-cv-300, 2008 WL 4412057 at *23, 31 (W.D. Pa. Sept. 24, 2008) (noting prior order granting *Brady* discovery including documents in prosecutor's file, and granting relief on resulting *Brady* claim);

E. Ms. Rorrer has shown good cause for discovery of evidence relating to DNA testing and chain of custody from the FBI and PSP, and discovery is appropriate and relevant

65. As explained below, Ms. Rorrer provides "specific allegations . . . show[ing] reason to believe that [she] may, if the facts are fully developed, be able to demonstrate that [s]he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09.

66. Access to the complete records maintained by both the FBI and the PSP regarding Ms. Rorrer's case, as outlined in DNA expert Huma Nasir's declaration, *see* Nasir Dec. at ¶ 19, is necessary in order to allow Ms. Rorrer to demonstrate that the hairs found to match her before trial and during post-conviction DNA testing were actually her own exemplar hairs, switched with the original seatback hairs by law enforcement.

67. With respect to the unmounted hairs tested by the FBI before trial, Ms. Rorrer maintains that the original hairs collected from the seatback did not have roots, despite Thomas Jensen's claim at trial that he selected the hair with the largest root to send to the FBI for testing. N.T. 2/11/98 at 251. Ms. Rorrer's assertion that the original hairs lacked roots is supported by the fact that when the FBI originally received the hairs, they opted to conduct mitochondrial DNA

Johnson v. Folino, No. 04-cv-2835 (E.D. Pa. Jan. 4, 2007) (discovery granted for various categories of information relevant to petitioner's claim that the Commonwealth committed numerous *Brady* violations and that his counsel were ineffective for failing to raise and litigate those issues); *Abdul-Salaam v. Beard*, 02-cv-2124 (M.D. Pa. Aug. 11, 2005) (discovery of blood sample for DNA testing); *Morris v. Beard*, No. 01-cv-3070 (E.D. Pa. July 22, 2005) (granting petitioner permission to subpoena any FBI records concerning handwriting analysis sought during the course of its criminal investigation of a prosecution witness); *Jones (Aaron) v. Beard*, No. 96-cv-7544 (E.D. Pa. Feb. 2, 2005) (ordering discovery of documents from Philadelphia homicide file tending to show that the defendant may not have been involved in the murder; all documents evidencing any benefits, incentives, or privileges provided to Commonwealth witnesses; and all materials tending to impeach the testimony or credibility of the government informants); *Stokes v. Beard*, No. 04-cv-767 (E.D. Pa. May 26, 2004) (granting discovery of files of Postal Inspector Service; inspection and copying of original Philadelphia Police Department Homicide File; and complete set of exhibits introduced into evidence by the Commonwealth at suppression hearing and at trial).

testing, a new technology that allowed them to test the shaft of a hair lacking a root, rather than nuclear PCR DNA testing on the root itself. *See* Nasir Dec. at ¶ 15; N.T. 2/20/98 at 161-62. The FBI met with the prosecution and the PSP on October 11, 1996 to present information about mitochondrial DNA testing, which at that point had only been used in one criminal trial in the United States. *See* 10/16/96 FBI report.[5]

68. As explained in Ms. Nasir's report, mitochondrial DNA testing is only used for "possible identification" or to exclude a suspect; it cannot identify a single person like nuclear PCR DNA testing can. *See* Nasir Dec. at ¶ 12; N.T. 2/20/98 at 180. If the hairs received by the FBI in 1995 had had roots, they likely would have conducted PCR DNA testing, which was an established method for testing DNA and which would have provided a definitive match to an individual. *See* Nasir Dec. at ¶ 15. Further, if the hairs received by the FBI had roots available for PCR testing, it would have been unnecessary to hold a conference to explain the mitochondrial DNA testing process to the prosecution and PSP in October 1996.

69. Neither Thomas Jensen nor the two FBI analysts who examined the seatback hairs made any notation regarding the presence or absence of a root on the any of the six hairs when they were first received, which supports the claim that the hairs originally sent to the FBI did not have roots. *See* 8/2/95 PSP Report, 10/13/95 FBI Report; 5/30/97 FBI report; Nasir Dec. at ¶ 13(b). As Ms. Nasir notes in her declaration, "in the absence of any notes regarding presence of root, it can be reasonably inferred that hair roots were not present." Nasir Dec. at ¶ 13(c).

[5] The October 16, 1996 FBI report is redacted and does not refer to mitochondrial DNA testing by name, but it is reasonable to infer that the FBI was referring to that process when the report is compared to Dr. DiZinno's trial testimony, which stated that the FBI had just established their mitochondrial DNA testing lab in June 1996. *See* N.T. 2/20/98 at 162.

70. Ms. Rorrer's assertion that the unmounted hair ultimately tested by the FBI lacked a root is supported by the "No Roots" FBI report obtained in 2015, which describes the three unmounted hairs as "three hairs, nine inches long, no roots attached, and blood on two of the three. . . . Presently at FBI lab for analysis." *See* "No Roots" FBI Report; Nasir Dec. at ¶ 13(e). However, the document Ms. Rorrer received as part of her FOIA request is undated, and it is unclear who authored it or what lengthier report it may have been a part of. Further discovery of the FBI records is necessary in order to determine who authored the report, and on what basis that person made the determination that the hairs received by the FBI had "no roots attached." *See* Nasir Dec. at ¶ 19.

71. As Ms. Nasir states in her declaration, "[i]t would be unexpected to find a root is discovered in 1997 attached to the hairs in question, after two years and two different forensic analysts having examined the hairs microscopically and not mentioning any roots." Nasir Dec. at ¶ 17. Further, as Ms. Nasir explains in her declaration, the FBI's failure to note the presence or absence of a root on the unmounted hairs upon receipt makes in unclear whether they were able to test an entire hair root or merely a "root portion" when they matched the unmounted seatback hair to Ms. Rorrer in 1997. *See* Nasir Dec. at ¶ 16; 9/16/97 FBI Report. Accordingly, Ms. Rorrer requires access to FBI records clarifying whether or not a root was present on the hair subjected to PCR DNA testing by the FBI in 1997, as outlined in Ms. Nasir's declaration. *See* Nasir Dec. at ¶ 19.

72. The October 13, 1995 report suggests that the original unmounted seatback hairs received by the FBI – those with "no roots attached" – were sent back to the PSP on that date, after Dr. Deadman had examined the hairs to determine the source of the apparent blood on the outside. The report states: "The submitted items and the probed membranes are being returned to your office under separate cover by registered mail. In addition to the evidence in this case, any

remaining processed DNA . . . is also being returned under separate cover." *See* 10/13/95 FBI Report.

73. Because the unmounted hairs were later subjected to DNA testing in comparison with Ms. Rorrer's exemplar hairs, the statement in the October 1995 report suggests that at some point later, the PSP returned the unmounted seatback hairs for further testing, presumably after exemplars were obtained from the suspect, Ms. Rorrer. Ms. Rorrer has been able to access some FBI receipts showing that various items were received either by hand delivery or mail and some items were mailed back prior to the completion of DNA testing in December 1997. *See* FBI Receipts of Evidence. However, none of the records obtained by Ms. Rorrer through her FOIA request to the FBI contain postal receipts showing whether and when the various forensic samples were sent to the PSP by mail.

74. In 2019, undersigned counsel made a FOIA request regarding chain of custody of the Q1 hairs, and the FBI provided a shipping manifest documenting the return of the Q1 hairs to PSP in December of 1997, by which time all FBI DNA analysis had been completed. *See* 12/4/97 FBI Receipt. The notations in various FBI reports and evidence receipts indicate that there were other evidence transfers made to the PSP in addition to the mailing at the conclusion of the testing in December 1997 and that the documents obtained thus far are incomplete. *See* 10/13/95 FBI report; FBI receipts of Evidence at 3. As outlined in Ms. Nasir's declaration, Ms. Rorrer needs access to the FBI's complete file of documents relating to the DNA testing done in Ms. Rorrer's case in order to determine when each item tested was received by the FBI, returned to the PSP, and potentially returned to the FBI for further testing. *See* Nasir Dec. at ¶ 19.

75. Undersigned counsel made a Right to Know request to the Pennsylvania Office of Open records on February 25, 2020 requesting all chain of custody evidence relating to physical

evidence collected in Ms. Rorrer's case. That request was denied on April 6, 2020. *See* 4/6/20 PSP Letter. Because the PSP presumably maintains records indicating when the various items submitted for forensic testing were sent to and received from the FBI, Ms. Rorrer needs access to the complete documents in possession of the PSP as well, as outlined in Ms. Nasir's declaration. *See* Nasir Dec. at ¶ 19.

76. Additionally, PSP records relating to chain of custody and to the maintenance and analysis of the mounted hairs and the fingernail fragment will help Ms. Rorrer determine whether the mounted hairs sent to Orchid Cellmark in 2007 were also switched with Ms. Rorrer's own exemplar hairs and whether the other evidence sent to Orchid Cellmark for testing was tampered with. Ms. Rorrer contends that all six of the seatback hairs were potentially switched with her own exemplar hairs sometime between November 8, 1995, when her exemplar hairs were collected, and June 24, 1996, when the PSP sent the mounted hairs to the FBI. N.T. 2/12/98 at 73-77; 5/30/97 FBI Report at 1.

77. On December 22, 1995, the PSP reported receiving a "sample of head hairs" collected from Ms. Rorrer on November 8, 1995. 12/22/95 PSP Report. Fourteen hairs were randomly selected from that sample and mounted onto slides and some of those slides were later sent to the FBI as exemplar hairs for comparison. *Id.*; 5/30/97 FBI Report. Thus, the PSP possessed additional exemplar hairs from Ms. Rorrer that were not counted, inventoried, or mounted. Ms. Rorrer contends that the PSP could have switched those hairs with the original seatback hairs, creating new mounted hair slides and unmounted hair samples to send to the FBI for testing along with Ms. Rorrer's exemplar hairs.

78. Because neither Mr. Jensen nor the two FBI analysts who examined the hairs made any notation about the presence of absence of a root on any of the six hairs, "it can be reasonably

inferred that hair roots were not present" on the three mounted seatback hairs either. Nasir Dec. at ¶ 13(c);(d). Accordingly, it would be similarly unexpected to for Orchid Cellmark to find a root available for DNA testing in 2008. As Ms. Nasir states in her declaration, it "is important to note that until this point, no root had been identified by Thomas Jensen or Harold Deadman on these hairs." Nasir Dec. at ¶ 18.

79. Further, in Ms. Nasir's expert opinion, "not recording the presence or absence of hair roots is highly incompetent and jeopardized any testing that could be performed on the hair evidence," constituting "gross negligence." Nasir Dec. at ¶ 13(c). This failure thus calls into question the reliability of the testing and maintenance of all the hair samples maintained by the PSP and FBI in Ms. Rorrer's case.

80. Although the evidence at trial indicates that the Q4, Q5, and Q6 slides received by Orchid Cellmark in 2007 were the same slides utilized by the prosecution at trial, Ms. Rorrer has no photographs or documentation establishing that the slides used at trial were the same slides on which the three seatback hairs were originally mounted pursuant to the August 2, 1995 PSP report. At trial, Mr. Jensen testified that the photographs shown in Exhibit C-17-1, which depicted the slides containing the mounted seatback hairs, were taken in December 1997, after the slides were returned from the FBI. N.T. 2/12/98 at 155. He stated that he did not take any photographs when he made the initial visual comparisons between the mounted seatback hairs and Ms. Rorrer's exemplar hairs, but it is unclear whether the slides containing the mounted seatback hairs were ever photographed before December 1997. N.T. 2/12/98 at 155. Accordingly, Ms. Rorrer requires access to all of the PSP records documenting the chain of custody for the seatback hairs, and any photographs taken of hairs or the slides before they were sent to the FBI for resting in June 1996, as outlined in Ms. Nasir's declaration, to determine whether the mounted hairs sent to the FBI and

later, to Orchid Cellmark, were the same hairs Mr. Jensen originally mounted for analysis in August 1995 or whether they were switched with her own exemplar hairs. *See* Nasir Dec. at ¶ 19.

15. Discovery should be granted to allow for a full and fair opportunity for Ms. Rorrer to make a gateway showing of actual innocence. Thus, Ms. Rorrer requests that this Court order the Commonwealth to produce documents, records, photographs, and reports relating to all DNA analysis conducted in Ms. Rorrer's case by both the FBI and PSP, as outlined in paragraph 19 of Ms. Nasir's declaration.

16. Ms. Rorrer has shown the requisite good cause for discovery. The allegations contained in the Petition raise serious factual questions regarding the only evidence implicating Ms. Rorrer in the crime. Thus, "specific allegations before the court show reason to believe that [Ms. Rorrer] may, if the facts are fully developed, be able to demonstrate that [s]he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09. In this case, the fully developed facts relating to the DNA testing and chain of custody would allow Ms. Rorrer to make a gateway showing of actual innocence, overcome her petition's lack of timeliness and any other procedural bars, and allow her to develop and litigate the constitutional claims raised in her habeas petition.

20. Ms. Rorrer has made discovery requests to the Commonwealth and FOIA requests to the FBI and only received an incomplete record of the testing and chain of custody documentation in her case. Undersigned counsel attempted to request records from the PSP regarding DNA testing and chain of custody last year and that request was denied. Without this discovery, Ms. Rorrer cannot fully develop her gateway showing of actual innocence.

21. The requirement that habeas petitioners seek leave to conduct discovery is based upon the Supreme Court's concern that some petitioners might otherwise abuse the discovery process by making discovery requests based in "fantasy . . . rather than in fact." *Harris*, 394 U.S.

at 300; RULES GOVERNING 2254 CASES advisory committee's note 4. Here, Ms. Rorrer's requests are not abusive or onerous. They are concisely tailored to the factual allegations and the particular needs of this non-capital case. Discovery will permit development of both a gateway actual innocence showing and substantive habeas corpus claims and is "the most appropriate way to obtain the information that will test the validity of the applicants' claims." *Gaitan-Campanioni*, 777 F. Supp. at 1359.

WHEREFORE, for the foregoing reasons, Ms. Rorrer respectfully requests that this Court grant her Motion for Discovery. Ms. Rorrer also seeks leave to file an amended habeas petition and memorandum of law fully addressing her constitutional claims once the discovery process has been completed.

Respectfully submitted,

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Date: March 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be filed and served electronically through this Court's Electronic Case Filing System upon Christine F. Murphy, Esq. and Heather F. Gallagher, Esq.

/s/ Claudia B. Flores
CLAUDIA B. FLORES

DATE: March 15, 2021