

ROBIN LOVITT V. PAGE TRUE, WARDEN
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1 the record.

2 A My name is George Root Riley, R-I-L-E-Y.

3 Q Dr. Riley, where do you live?

4 A I live in the State of -- in the

5 Commonwealth of Virginia.

6 Q Can you tell me about your educational

7 background, where you studied, what degrees you

8 received?

9 A I received my bachelor's degree from

10 Dickinson College in French and biology. I

11 received my Ph.D. degree from Georgetown University

12 in Washington DC in biology.

13 Following that, I did postdoctoral

14 training, first at the University of Washington in

15 Washington State in the genetics department. And

16 following that, at Seattle Biomedical Research

17 Institute in Seattle, Washington.

18 Q Where do you work, Dr. Riley?

19 A I currently work at Fairfax Identity

20 Laboratories in Fairfax.

21 Q Is your laboratory an accredited

22 laboratory to perform human identity testing?

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1 A Our laboratory is accredited by the

2 National Forensic and Science and Technology

3 Center.

4 And also it is accredited by the State of

5 New York as a forensic testing laboratory.

6 MS. LEVY: Your Honor, may I approach?

7 I would ask that this document be marked

8 as Petitioner's Exhibit No. 1.

9 MS. BALDWIN: Your Honor, what is the

10 exhibit?

11 MS. LEVY: I'll pass out copies.

12 MS. BALDWIN: Thank you.

13 MS. LEVY: May I approach the witness,

14 Your Honor?

15 THE COURT: Go ahead.

16 BY MS. LEVY:

17 Q I'll show you what has been marked as

18 Petitioner's Exhibit No. 1.

19 Is that a true and accurate copy of your

20 CV, Dr. Riley?

21 A Yes, it is.

22 MS. LEVY: I would move that Exhibit I be

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1 admitted as part of the record.

2 MS. BALDWIN: No objection.

3 THE COURT: I will receive that into

4 evidence.

5 (Thereupon, Petitioner's Exhibit No. 1

6 was admitted into evidence.)

7 BY MS. LEVY:

8 Q Dr. Riley, in your career in the field of

9 DNA testing, approximately how many DNA samples

10 have you personally tested?

11 A I have personally tested approximately

12 1,500 samples myself.

13 Q And approximately how many samples have

14 you reviewed the testing of?

15 A I have reviewed the testing of

16 approximately 10,000 samples.

17 Q How many samples have you supervised the

18 testing of?

19 A I have supervised the testing of

20 approximately 20,000 samples.

21 Q Dr. Riley, have you been qualified as an

22 expert in courts to present testimony in the field

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1 of human identity testing?

2 A I have been qualified in courts

3 approximately 20 times in various jurisdictions

4 around the United States, including the

5 Commonwealth of Virginia.

6 Q What percentage of your work, Dr. Riley,

7 is done for the prosecution versus the defense?

8 A The majority of the work that we do is

9 done for the prosecution. Some work is done for

10 the defense, though.

11 Q Can you describe the work that you have

12 done on this case?

13 A In this particular case, what I have done

14 is I have reviewed various materials, including

15 reports from the Commonwealth of Virginia on the

16 DNA testing itself, including some of the exhibits

17 from the previous trial, and also some of the raw

18 data, including gel image photocopies and the

19 Starcall tables, which includes the analysis of

20 some of those raw data.

21 Q As a result of your review of these

22 materials, have you formed any opinions in this

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1 case?

2 A I have.

3 **Q And what are those opinions?**

4 A The first is that retesting could have

5 been and should have been done on the scissors that

6 were presented as the murder weapon in this

7 particular case.

8 There were two areas that were tested.

9 Additional testing of at least one of

10 those areas could have and almost certainly would

11 have given additional results which could have

12 demonstrated that the genetic material on those

13 scissors could not have come from Mr. Lovitt, the

14 suspect in this particular case.

15 In addition, there could have been

16 additional areas that could have been tested which

17 would have given additional information.

18 The second is that the jacket in this

19 particular case, the suspect's jacket which was

20 tested and shown to have blood, the genetic

21 material on that almost certainly did not come from

22 the victim. It almost certainly came from

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1 Mr. Lovitt himself on his own jacket.

2 And additional testing of that DNA or of

3 that particular stain almost certainly would show

4 that.

5 **Q I would like to mark this document as**

6 **Petitioner's Exhibit 2.**

7 MS. LEVY: Would Your Honor like an

8 additional copy of this?

9 THE COURT: No.

10 MS. LEVY: May I approach the witness?

11 THE COURT: Yes.

12 BY MS. LEVY:

13 **Q Dr. Riley, I'm showing you what we have**

14 **marked as Petitioner's Exhibit 2.**

15 **Can you identify that document?**

16 A This document is a certificate of

17 analysis.

18 This is the report by Ms. Palmer on the

19 DNA testing that she did for the Commonwealth of

20 Virginia in this particular case.

21 **Q Now, if you could, Dr. Riley, turn to**

22 **page 2 of this document, the chart that is in this**

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1 case.

2 MS. LEVY: And I would request Your

3 Honor's permission. I have blown up the chart to

4 aid the witness in giving testimony on this issue.

5 May I present the blown-up chart?

6 THE COURT: Sure.

7 Can you see it?

8 MS. BALDWIN: No, I can't see it.

9 MS. LEVY: It is a blowup of page 2 of

10 the document I have just handed you.

11 MR. HARRIS: Put it over there where

12 everyone can see.

13 BY MS. LEVY:

14 **Q Dr. Riley, can you explain what tests**

15 **were done to generate the table by the**

16 **Commonwealth?**

17 A To generate this table, what was done is

18 biological evidence was -- DNA was extracted from

19 biological evidence and from reference samples from

20 a number of different people who were associated

21 with the case, including the suspect, Mr. Dicks --

22 I'm sorry, the victim, Mr. Dicks; the suspect,

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1 Mr. Lovitt; and his cousin, Mr. Grant.

2 In addition to that, they also extracted

3 DNA and tested that DNA to develop profiles from

4 the pair of scissors that was considered to be the

5 murder weapon, from the fingernail clippings that

6 were taken from Mr. Dicks, Mr. Lovitt's jacket, and

7 a stain swab that was taken from the cash register.

8 **Q If you don't mind, Dr. Riley, would you**

9 **just go through and explain very briefly what it is**

10 **these numbers mean in these columns?**

11 A Well, in the columns, there is a

12 left-hand column marked Item is the item number

13 that was given by either the police or the state

14 laboratory followed by the description.

15 The eight columns to the right of the

16 description are CSF1PO, TPOX, THO1, vWA, D16, D7,

17 13 and D5. Those are the names of the actual DNA

18 locations that were tested in this particular case.

19 Below each of those names is the result

20 for that particular DNA location.

21 And as you can see in that first row for

22 Item 1, which is the blood sample from Clayton

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<p>Page 38</p> <p>1 Dicks, there is an 8 and a 13. 2 And if you go down several rows to Item 3 5, which is the fingernail clippings, you will see 4 there is also an 8 and a 13. 5 The fact that there are two numbers there 6 just indicates that there are two results. Each 7 person has two copies of each -- two alleles. 8 One of those alleles comes from mom and 9 one comes from dad. So in this case, perhaps 10 Mr. Dicks' 8 came from his mother and the 13 came 11 from his father. 12 What you can see from the fingernail 13 clippings is that there is an 8,13. Mr. Dicks has 14 an 8,13. Those are the same, so we can't exclude 15 Mr. Dicks as being the possible source of the DNA 16 on the fingernail clippings at that particular 17 location. 18 If you keep going across, you will see 19 that under TPOX, the fingernail clippings have an 20 8,9. Mr. Dicks also has an 8,9. He can't be 21 excluded as a contributor of that DNA at that 22 particular locus.</p>	<p>Page 40</p> <p>1 excluded as a source of the DNA on the cash 2 register at CSF. 3 And if you look across the rest of the 4 row, you will notice that at each of the loci, 5 TPOX, THO1, and so on, the cash register profile 6 matches the profile from Mr. Grant. 7 So at all of those loci, Mr. Grant can be 8 excluded, whereas the other two gentleman are 9 excluded as a source of the DNA on the cash 10 register. 11 Q I'm going to turn your attention to what 12 is in these two columns, Stained Area B and Stained 13 Area B of the scissors. 14 And first could you just briefly explain 15 what do we know about stained area of the scissors? 16 A Stained Area A of the scissors, you can 17 see that at each of the different loci, each of the 18 different locations tested, under each of those 19 columns, you will see that there are two numbers. 20 And so there are two alleles. And you 21 would expect to see that if you had one person's 22 DNA on the scissors.</p>
<p>Page 39</p> <p>1 The same is true. There is a 7,7 under 2 THO1. Mr. Dicks has a 7,7. He is not excluded. 3 VWA, the fingernail clippings have an 4 11,14. Mr. Dicks has an 11,14. Again, at all of 5 the loci, all eight loci across the row, Mr. Dicks 6 shares the same DNA profile as seen in the 7 fingernail clippings, so Mr. Dicks can't be 8 excluded as the source of the DNA found on the 9 fingernail clippings. 10 You can see the same thing for those 11 stain swabs from the cash register, which is on the 12 bottom row under CSF. There is an 11,12. Now, on 13 that, Mr. Lovitt, for example, is excluded because 14 where the cash register shows an 11,12 under CSF, 15 Mr. Lovitt shows a 10,12. 16 Since he doesn't share the same pattern 17 there, he is excluded as a possible contributor. 18 As is Mr. Dicks. Mr. Dicks shows an 8,13, so he is 19 excluded as a source of the DNA on the cash 20 register. 21 However, Mr. Grant has an 11,12, the same 22 thing seen on the cash register, so he can't be</p>	<p>Page 41</p> <p>1 And if you look and compare those to 2 Mr. Dicks, you will see that in each of those loci, 3 for example CSF, the scissors in Stained Area A are 4 an 8,13. Mr. Dicks is an 8,13. He is not excluded 5 as the possible contributor of the DNA on the 6 Stained Area A of the scissors. 7 And that holds true for the rest of the 8 loci going across that row. So for all eight loci 9 Mr. Dicks cannot be excluded as a possible source, 10 a possible contributor of that DNA. 11 Q What is going on at Stained Area B of the 12 scissors? 13 A Now, Stained Area B, if you look at seven 14 of those loci, including CSF, TPOX, THO1, and then 15 skipping over vWA, if you look at D16, D7, D13, and 16 D5, it's pretty much the same results that you are 17 seeing in Stained Area A. 18 You have got two alleles, two numbers, 19 and they match Mr. Dicks. So Mr. Dicks is a 20 possible contributor at those loci. 21 If you look at the vWA column, you will 22 see for the Stained Area B that there is an 11,14,</p>

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1 and then there is a 17 in parentheses. Since there
2 is an 11,14 and Mr. Dicks is an 11,14, he can't be
3 excluded as a possible contributor of the DNA at
4 that particular locus.

5 However, in addition to the 11 and the
6 14, there is a 17 as well.

7 Since each person gets two different
8 copies of each gene, there should be only two if
9 there is only one person's DNA there.

10 That 17 means there is a second person,
11 there is a second contributor, there is a mixture
12 of DNA. You can only see it at that one locus, at
13 that one result. But that 17 had to have come from
14 somebody else.

15 **Q Now, can you walk us through, as quickly**
16 **as you can, the various possibilities for what that**
17 **third allele, for what that 17 could mean?**

18 **What combinations of genetic material**
19 **could that 17 reflect?**

20 A There is basically two different
21 possibilities that we could be having here.

22 Either we can see the results of

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1 the other person's 11. That is very common, and
2 it's very common, particularly in cases where you
3 have a major contributor and a minor contributor.

4 The reason the 17 is in parentheses here,
5 as indicated in the footnote, is because that
6 allele is present in lesser intensity, which simply
7 means that the second person's DNA, there is less
8 of it present in that sample.

9 **Q In addition to the masking that you have**
10 **described, which would be that all of the alleles**
11 **actually are present and showing up, are there**
12 **additional possibilities for what this 17 allele**
13 **could be?**

14 A Since the 17 allele is present in a lower
15 intensity -- that means there is less of that DNA
16 present -- it may be low enough so that you cannot
17 see that person's second copy. So you may not be
18 able to see the other copy of the gene that came --
19 say the 17 came from mom, and the other copy came
20 from dad.

21 If you can't see what it is, you can't
22 tell what it is. And it could be any of the other

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1 everybody's DNA, in which case there is actually
2 four different copies present, but two of those
3 copies are shared by those two people, which means
4 that you could have the results -- if we are
5 assuming that the 11,14 came from Mr. Dicks, then
6 the other person's result had to either be a 17
7 plus a 17, or had to be a 17 plus an 11, or a 17
8 plus a 14. That's if we can see all of the
9 results.

10 If that is true, if it's either a 17,11,
11 a 17,14, or a 17,17, then that would conclusively
12 exclude Mr. Lovitt as being a possible contributor
13 of that second person's DNA on the scissors.

14 **Q In your experience, Dr. Riley, how -- is**
15 **there a name for this phenomenon that we are seeing**
16 **at WVA (sic) that you have just described?**

17 A When alleles are shared by two people and
18 so you get a mixture of two people's DNA, instead
19 of seeing, say, an 11 -- you can't distinguish two
20 copies of 11 from one copy of 11.

21 In that case, what we typically call it
22 is masking. We say that one person's 11 is masking

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1 possible copies there.

2 So it could be an 11 -- you could have an
3 11,17; a 12,17; a 13,17; 14; 15; 16; 17; 18; 19;
4 20; 21; and there is even ones that are larger than
5 21.

6 So basically there is 12 different
7 possibilities that that could be if you can't
8 actually see that second gene.

9 **Q Of the 12 possibilities that the 17 could**
10 **be, how many of those could rule Mr. Lovitt out as**
11 **the contributor to the second DNA?**

12 A Eleven of those possibilities would rule
13 Mr. Lovitt out.

14 So 11 of those would exclude him as a
15 possible contributor, and one would include him as
16 a possible contributor.

17 **Q What's the probability, Dr. Riley, of**
18 **finding a 17 allele in the population?**

19 A The 17 allele at vWA is actually a very
20 common allele. Some of them are uncommon, and some
21 of them are quite common.

22 The 17 allele is found in -- using the

<p>Page 46</p> <p>1 Commonwealth of Virginia's database, in 48 percent 2 of Caucasians. So approximately one in two of 3 every Caucasian has a 17 allele. 4 It is found in 29 percent of the black 5 population, so about one in three of the black 6 population has that 17 allele. And in about 43 7 percent of Hispanics, so approximately one in two 8 Hispanics. 9 So you if took an aggregate of the 10 courtroom's population here, you would figure that 11 somewhere between one and two and one and three of 12 the people sitting in this courtroom actually have 13 a 17 allele. 14 Q Dr. Riley, based on your review of the 15 DNA testing and the DNA evidence in this case, what 16 is your opinion as to whether additional testing 17 could have been helpful in this case? 18 A I would say that additional testing could 19 have been and should have been done in this case. 20 It would have been very helpful. 21 Q What is your opinion as to whether 22 additional testing could have excluded Mr. Lovitt</p>	<p>Page 48</p> <p>1 extracted DNA, and they developed a DNA profile. 2 They actually did get results for that DNA profile. 3 However, they decided that the DNA results didn't 4 meet the standard of conclusiveness that they 5 require in their protocol to report those results 6 out. 7 And so as you can see on the line for 8 Item 12, second from the bottom marked "jacket," it 9 has got I-N-C marked, which means inconclusive, as 10 indicated in the footnote. 11 Under TPOX, it has three asterisks, which 12 means that there was no results at all for that 13 particular locus tested. 14 But seven of the eight loci, they 15 actually did get results. They didn't quite meet 16 the standard that is required by the laboratory. 17 And the reason for that standard is to 18 insure that the results are absolutely reproducible 19 and also to insure that results aren't biased 20 against a defendant. 21 Q I would like to mark this document as 22 Petitioner Exhibit 3.</p>
<p>Page 47</p> <p>1 as a contributor to the DNA at Area B of the 2 scissors? 3 A Additional testing could definitely have 4 given more results. 5 And for every piece of additional 6 information you have, you have the additional 7 possibility of gaining more information, both to 8 tell who actually contributed that DNA and to be 9 able to exclude people who didn't contribute that 10 DNA. 11 Q I want to move on to the second opinion 12 that you told us about earlier with respect to the 13 DNA profile on the jacket that was collected from 14 Mr. Lovitt. 15 Can you describe what testing was 16 performed on the jacket for Mr. Lovitt? 17 A So on the jacket, they both did testing 18 for blood and determined that blood was present, 19 although they apparently either didn't or were 20 unable to test for human blood. So they couldn't 21 tell whether that blood was human or not. 22 The second thing that they did was they</p>	<p>Page 49</p> <p>1 Dr. Riley, if I could turn your attention 2 to page 2138 of this document. 3 First of all, what is this document? 4 A This document includes the raw data, the 5 gel images, xerox copies of the gel images, from 6 the testing in this case, and it also includes 7 Starcall tables. And these are the tables that 8 show the analysis done on that raw data. 9 MS. LEVY: I would ask the Court's 10 permission to put an additional blowup of one of 11 these charts. 12 THE DEPUTY: May I recommend putting 13 this -- counsel, if you will set it right there, 14 then everyone can see it. 15 MS. LEVY: I want the Court to be able to 16 see it as well. 17 BY MS. LEVY: 18 Q Can you tell us, Dr. Riley, what this 19 chart is? 20 A I'm actually going to have a hard time 21 seeing the chart from here. 22 MS. BALDWIN: What page, Counsel?</p>

<p style="text-align: right;">Page 50</p> <p>1 THE WITNESS: The print is fairly small.</p> <p>2 MS. LEVY: This is on page 2138 of the</p> <p>3 document we have marked as Petitioner's Exhibit 3.</p> <p>4 BY MS. LEVY:</p> <p>5 Q From your copy, Dr. Riley, can you see it</p> <p>6 from your copy?</p> <p>7 A Sure, I can.</p> <p>8 Q Can you explain what this chart is and</p> <p>9 what it shows you?</p> <p>10 A The left-handmost column, which is marked</p> <p>11 at the top "Lane 9," and just below that is marked</p> <p>12 N99-9385 and then a couple of spaces 12, that is</p> <p>13 the result from the jacket. So that is the result</p> <p>14 of the analysis from the jacket.</p> <p>15 That's the actual data that was --</p> <p>16 Q What do the other columns represent?</p> <p>17 A The other columns represent other things</p> <p>18 tested.</p> <p>19 In this particular case, if you take a</p> <p>20 look at Lane 13, that is the fourth set of columns</p> <p>21 over, it says in 99-9385 space 6 space SBLD -- and</p> <p>22 that stands for suspect blood -- if you take a look</p>	<p style="text-align: right;">Page 52</p> <p>1 shows that the genotype was a 12 and a 10. And</p> <p>2 then you go across, and you take a look at the</p> <p>3 column marked -- Lane 13 columns marked suspect</p> <p>4 blood, the CSF is a 12 and a 10.</p> <p>5 That shows that Mr. Lovitt, whose jacket</p> <p>6 this was, can't be excluded as the source of the</p> <p>7 genetic material that was recovered from that</p> <p>8 jacket.</p> <p>9 If you go back to the jacket -- this is</p> <p>10 again the first set of columns -- and look at the</p> <p>11 vWA, there is two of them. It is a 17 and a 16.</p> <p>12 Go back to the suspect and you see</p> <p>13 that -- you have to go down several lines because</p> <p>14 there are a couple of loci that were not actually</p> <p>15 successfully analyzed on the jacket.</p> <p>16 You will see that the suspect also had a</p> <p>17 17 and a 16.</p> <p>18 So again, Mr. Lovitt can't be excluded as</p> <p>19 the source of this DNA.</p> <p>20 The same is true if you look at the lines</p> <p>21 from D7 from the jacket. There is a 12 and an 8.</p> <p>22 Mr. Lovitt for D7 has a 12 and an 8. For</p>
<p style="text-align: right;">Page 51</p> <p>1 at the third set of columns, which is to the left</p> <p>2 of Lane 13, it's marked Lane 12, and it has the</p> <p>3 same numbers. And then it says 1 and then space</p> <p>4 and then VBLD -- that stands for victim blood.</p> <p>5 So what you are seeing here is the</p> <p>6 results for the victim's standard, for the</p> <p>7 suspect's standard, and the results that they got</p> <p>8 from the jacket.</p> <p>9 Q Have you reviewed these results as a</p> <p>10 result of your work on this case?</p> <p>11 A I have.</p> <p>12 Q What did you learn from these data that</p> <p>13 you have reviewed?</p> <p>14 A The data here indicates that they did in</p> <p>15 fact get a partial DNA profile for the genetic</p> <p>16 material recovered from the jacket stain.</p> <p>17 That profile can then be compared.</p> <p>18 While, again, it doesn't meet the state</p> <p>19 laboratory's standards for reportable data, it is,</p> <p>20 however, clearly indicated what those results are.</p> <p>21 And if you take a look at the first lines</p> <p>22 marked CSF1P0 -- there is two of them -- and it</p>	<p style="text-align: right;">Page 53</p> <p>1 D13 on the jacket, there is a 12 and 11.</p> <p>2 Mr. Lovitt has a 12 and 11.</p> <p>3 For D5, there are actually three results,</p> <p>4 a 12, 11, and a 10 on the jacket. There are very</p> <p>5 weak results.</p> <p>6 If you take a look at Mr. Lovitt's</p> <p>7 results, he has a 12 and a 10. So he, again,</p> <p>8 cannot be excluded as the source of that genetic</p> <p>9 material found on his jacket.</p> <p>10 Now, if you go back to the column to the</p> <p>11 left of Mr. Lovitt, which is the victim, Mr. Dicks,</p> <p>12 the jacket has a CSF result of 12 and 10.</p> <p>13 Mr. Dicks is a 13 and an 8 at CSF, so he</p> <p>14 is clearly excluded as the source of the DNA</p> <p>15 material that was recovered from that jacket.</p> <p>16 VWA, the jacket is a 17 and a 16.</p> <p>17 Mr. Dicks is -- under the victim blood, Mr. Dicks</p> <p>18 is a 14 and an 11. He is excluded as the source.</p> <p>19 At D7, the jacket is a 12 and an 8.</p> <p>20 Mr. Dicks is an 11 and an 8. He is again excluded</p> <p>21 as the source.</p> <p>22 D13, the jacket is a 12 and 11.</p>

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1 Mr. Dicks is 14 and a 10. He is excluded.
2 And at D5, the jacket is 12, 11, and 10,
3 and Mr. Dicks is a 12 and -- I believe that is an
4 8.

5 There is also an 11 shown there, but that
6 is a known artifact, and that's indicated by the
7 percentage mark in the column under percent.

8 So he is excluded at all the loci for
9 which the jacket actually had results.

10 **Q Based on your review of this data, the**
11 **Commonwealth's argument to the jury that the stain**
12 **on the jacket belonged to the victim, is that**
13 **consistent with the DNA results that you have seen?**

14 A That's completely inconsistent with the
15 DNA results seen.

16 **Q Based on your knowledge and expertise in**
17 **the field of DNA testing, if this sample still**
18 **existed, what tests could be done?**

19 A They have a number of tests that could be
20 done that could actually result in a complete
21 profile from this jacket.

22 You could test either more or less DNA.

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1 **Q In your experience, Dr. Riley, how common**
2 **or how likely is it that a person's own genetic**
3 **material could be on their jacket?**

4 A It is actually quite common that their
5 own genetic material is on the jacket. That can
6 come from a number of different sources. It can
7 come from shed skin.

8 It can come from saliva. It can come
9 from nasal mucus. It can come to some extent from
10 tears and sweat. It can come from blood. It can
11 also come from semen.

12 Blood, saliva, mucus and shed skin flakes
13 as well as sweat are all very common sources of the
14 DNA on people's clothing, particularly articles of
15 clothing that don't get washed for a long time,
16 it's not at all uncommon to find somebody's own DNA
17 profile on their own clothing.

18 **Q What additional testing could have and in**
19 **your view should have been done with the scissors?**

20 A With the scissors, they should -- the
21 testing that you could do and should do is you can
22 retest the Area B where you actually saw an

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1 One of the things that was testified to by
2 Ms. Palmer who did the testing was that she thought
3 that some material from the jacket was inhibiting
4 the test itself.

5 By testing less of the DNA, many times
6 you can remove enough of the inhibition to actually
7 get a better result than if you use more DNA.

8 Similarly, there are many things that you
9 can do in terms of removing possible inhibitors.
10 If it was simply that there wasn't enough DNA
11 present, you could add more DNA to the reaction.

12 And in addition to that, if the -- since
13 she did not in fact use up all of the stain, you
14 could do other tests that have a higher level of
15 sensitivity than was used in this particular case.

16 You could also test additional loci,
17 additional genes. There are many different tests
18 that you could do, all of which would almost
19 certainly indicate -- give a full and conclusive
20 result showing that the genetic material on the
21 jacket actually was not the victim, but it was
22 Mr. Lovitt's blood, Mr. Lovitt's DNA.

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1 additional person's type.

2 That could be done with a more sensitive
3 system. It could be done with additional systems
4 that have different loci.

5 They used the PowerPlex 1.1. They
6 currently have another kit, PowerPlex 1.2, which
7 has an additional seven different loci that could
8 give results that would be able to exclude and much
9 more definitively define whose DNA could and could
10 not actually be present in that mixture.

11 **Q Mr. Riley, in your career, have you been**
12 **involved in cases in which DNA retesting exonerated**
13 **convicted defendants?**

14 A I have, yes.

15 MS. BALDWIN: I'm going to object, Your
16 Honor. That's irrelevant.

17 MS. LEVY: I have nothing further.

18 THE COURT: Sustained.

19 Cross-examination.

20 CROSS-EXAMINATION

21 BY MS. BALDWIN:

22 **Q Good morning, Dr. Riley.**

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1 I'm interested. Your testimony is that
2 retesting in this case, you said, could have and
3 should have been done?
4 A I would say yes, definitely.
5 Q What basis do you have for saying it
6 should have been done?
7 A In this particular case, the evidence
8 here is not at all clear in terms of whose DNA was
9 actually on the scissors which were presented as
10 the murder weapon.
11 Q Well, now that's not quite right, is it,
12 Dr. Riley?
13 Because there were two stains on the
14 scissors. You are aware of that, that there was a
15 Stain A and Stain B?
16 A Yes, I am.
17 Q And Stain A was blood?
18 A That's correct.
19 Q And that was on the blade of the
20 scissors?
21 A That was on the blade of the scissors,
22 yes.

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1 Q You don't have any kind of disagreement,
2 do you --
3 A No.
4 Q -- on the DNA test on that as being the
5 victim's blood?
6 A I wouldn't put it as being the victim's
7 blood --
8 Q I understand that you use the terminology
9 "he couldn't be excluded."
10 A That is correct.
11 Q But, in other words, you have no
12 disagreement with the testing that was done and the
13 results of that testing that were presented at
14 trial in this case regarding Stain A on the
15 scissors?
16 A That's correct.
17 Q So your testimony today is really
18 regarding Stain B.
19 Isn't that correct?
20 A Stain B, but also the handles of the
21 scissors --
22 Q Right.

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1 A -- which could also have been retested.
2 Q But on the Stain B and let's say the
3 handles of the scissors, that didn't involve any
4 bloodstains, did it?
5 A I don't recall whether that was actually
6 tested for blood or not.
7 Q So you don't recall that?
8 A I don't recall that.
9 Q So if I tell you that it was not a
10 bloodstain, then what you're really talking about
11 is not determining whether the victim's blood, the
12 victim's profile would have showed up on the handle
13 or in Stain B?
14 MS. LEVY: Your Honor, I have to object.
15 The handles were never tested for blood.
16 That's what the witness is testifying --
17 MS. BALDWIN: Is counsel testifying?
18 MS. LEVY: You mischaracterized the
19 witness's testimony. You asked him if --
20 MS. BALDWIN: Is counsel testifying, Your
21 Honor?
22 MS. LEVY: No. I'm stating an objection

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1 that she is mischaracterizing his testimony.
2 THE COURT: Objection overruled.
3 MS. BALDWIN: Thank you.
4 BY MS. BALDWIN:
5 Q If I tell you to accept as a matter of
6 fact that the Stain B on the scissors and the
7 stain -- the other potential, what you are talking
8 about, DNA material possibly on the handle of the
9 scissors, did not involve any blood, then really
10 what your testimony is today is that some other
11 perspiration or some other DNA material may have
12 identified someone other than Robin Lovitt.
13 Is that correct?
14 A Were the handles tested for blood?
15 Q I'm asking the questions.
16 A I saw no indication --
17 Q I'm asking you to accept that as a fact
18 for this question.
19 A So you are asking me to accept this as a
20 hypothetical, in fact?
21 Q Yes. You can -- hypothetical, and I'm
22 asking you to accept that as a fact for these

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<p>Page 62</p> <p>1 questions.</p> <p>2 A As a hypothetical -- I don't believe a</p> <p>3 fact is actually hypothetical. Is that true?</p> <p>4 Q I'm asking you --</p> <p>5 THE COURT: Let's just answer the</p> <p>6 question.</p> <p>7 BY MS. BALDWIN:</p> <p>8 Q Please answer the question.</p> <p>9 A Could you repeat it? I'm sorry.</p> <p>10 Q If I tell you that as a matter of fact</p> <p>11 that Stain B on the scissors and any other genetic</p> <p>12 material that may have been on the handle of the</p> <p>13 scissors was not a bloodstain -- there were no</p> <p>14 bloodstains involved at all -- then your testimony</p> <p>15 today regarding "would have and should have had</p> <p>16 further testing on those stains" can only involve</p> <p>17 showing that potentially someone other than Robin</p> <p>18 Lovitt handled the scissors.</p> <p>19 Is that correct?</p> <p>20 A The testing, additional testing could</p> <p>21 have shown that somebody other than Robin Lovitt</p> <p>22 handled and wielded those scissors, for example, in</p>	<p>Page 64</p> <p>1 summary suggested that that bloodstain was actually</p> <p>2 the victim's.</p> <p>3 Q Have you read the trial transcript in</p> <p>4 this case?</p> <p>5 A I have read portions of the trial</p> <p>6 transcript.</p> <p>7 Q Have you read the Commonwealth attorney's</p> <p>8 argument in this case?</p> <p>9 A I did in fact read that.</p> <p>10 Q And it is your testimony that the</p> <p>11 Commonwealth's attorney argued that that bloodstain</p> <p>12 was the victim's bloodstain on the jacket?</p> <p>13 A I don't believe he ever said as much in</p> <p>14 as many words.</p> <p>15 However, my reading of it indicated that</p> <p>16 he was suggesting that it was the victim's</p> <p>17 bloodstain.</p> <p>18 Q Are you aware that there were two DNA</p> <p>19 experts who testified at this trial?</p> <p>20 A No.</p> <p>21 Q You're not?</p> <p>22 A I'm aware of Ms. Palmer's testimony.</p>
<p>Page 63</p> <p>1 the homicide.</p> <p>2 Q Okay. But we are not talking about the</p> <p>3 bloodstain on the scissors, because the bloodstain,</p> <p>4 isn't it correct, is Stain A on the blades, and you</p> <p>5 have no qualms whatsoever with the testing results</p> <p>6 on that, the DNA testing that was presented at</p> <p>7 trial?</p> <p>8 A I have no qualms with the testing on</p> <p>9 Stain A.</p> <p>10 Q Stain B -- on Stain A. Thank you.</p> <p>11 I'm interested because your testimony is</p> <p>12 that in your opinion, the testing of the jacket in</p> <p>13 this case -- I believe you testified -- correct me</p> <p>14 if I'm wrong -- that it would have been helpful to</p> <p>15 have had this further analysis of the bloodstain on</p> <p>16 the jacket.</p> <p>17 Is that correct?</p> <p>18 A Yes, definitely.</p> <p>19 Q All right. Who would that have been</p> <p>20 helpful to?</p> <p>21 A That would have been helpful to the</p> <p>22 prosecution, among other people, who in their</p>	<p>Page 65</p> <p>1 Q Do you know Carol Palmer, who works for</p> <p>2 the Division of Forensic Science?</p> <p>3 A I don't know if I have actually met her</p> <p>4 in person.</p> <p>5 Q But you do know that she testified?</p> <p>6 A I do know that she testified, yes.</p> <p>7 Q All right. Regarding the results of the</p> <p>8 testing on the DNA?</p> <p>9 A That's correct.</p> <p>10 Q Are you aware that Dr. Chiafari testified</p> <p>11 in this case on behalf of the defense?</p> <p>12 A No, I am not.</p> <p>13 Q So you haven't read that trial</p> <p>14 transcript?</p> <p>15 A No, I have not.</p> <p>16 Q Let me ask you this.</p> <p>17 You said that you think it would have</p> <p>18 been helpful to have further tested this stain that</p> <p>19 was on the jacket.</p> <p>20 Are you aware that Carol Palmer testified</p> <p>21 at trial that that stain could not even be</p> <p>22 determined whether it was human blood?</p>

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<p>Page 66</p> <p>1 Are you aware of that?</p> <p>2 A I am.</p> <p>3 Q And you disagree with that?</p> <p>4 A I think that it could be determined that</p> <p>5 it was human blood in all likelihood, but you can't</p> <p>6 do that because it has been destroyed.</p> <p>7 Q Okay. So could have been, but you don't</p> <p>8 disagree with her testimony that she could not</p> <p>9 determine whether it was human or any other kind of</p> <p>10 blood?</p> <p>11 A I don't know that she even actually</p> <p>12 tested it to determine whether it was human blood.</p> <p>13 Q Are you aware of the statement that Robin</p> <p>14 Lovitt made in this case, any of the statements</p> <p>15 that he made to the police in this case?</p> <p>16 A Not directly, no.</p> <p>17 Q Are you aware that he made a statement to</p> <p>18 the police when they took his jacket, the jacket on</p> <p>19 which this stain was found, and told them that he</p> <p>20 was not wearing that at the time this occurred?</p> <p>21 Are you aware of that?</p> <p>22 A I believe I indirectly was aware of that.</p>	<p>Page 68</p> <p>1 Q Sorry.</p> <p>2 Are you aware -- have you spoken to the</p> <p>3 attorneys who represented Robin Lovitt in this</p> <p>4 case?</p> <p>5 A Not to the best of my knowledge.</p> <p>6 Q Are you an expert on the legal claims of</p> <p>7 ineffective assistance of counsel?</p> <p>8 A No, ma'am.</p> <p>9 Q Do you know that the attorneys in this</p> <p>10 case under no circumstances would have allowed for</p> <p>11 further testing of the scissors?</p> <p>12 A I have no knowledge of this.</p> <p>13 MS. LEVY: Object.</p> <p>14 BY MS. BALDWIN:</p> <p>15 Q And yet you still think that further</p> <p>16 testing should have been done?</p> <p>17 A Yes, ma'am.</p> <p>18 MS. BALDWIN: Excuse me just a minute.</p> <p>19 BY MS. BALDWIN:</p> <p>20 Q Once again, back to Stain A on those pair</p> <p>21 of scissors, which is the bloodstain, let me ask</p> <p>22 you a question about that.</p>
<p>Page 67</p> <p>1 I believe I heard that somewhere.</p> <p>2 Q So there is a defendant who is denying</p> <p>3 that he even wore the jacket when this occurred,</p> <p>4 and yet your testimony is further testing on that</p> <p>5 should have been done?</p> <p>6 A Oh, yes.</p> <p>7 Q Are you aware that Robin Lovitt made a</p> <p>8 statement to the police that he actually handled</p> <p>9 the cash drawer and took it to his cousin's house?</p> <p>10 A Indirectly, yes.</p> <p>11 Q So your testimony this morning that</p> <p>12 further testing could have shown potentially that</p> <p>13 Robin Lovitt did not handle the cash drawer, does</p> <p>14 that change your testimony?</p> <p>15 MS. LEVY: Objection, Your Honor. The</p> <p>16 witness never testified to such statements.</p> <p>17 BY MS. BALDWIN:</p> <p>18 Q Please answer the question.</p> <p>19 A I never testified to that.</p> <p>20 Q Well, you didn't testify that further</p> <p>21 testing of the cash drawer --</p> <p>22 A No, ma'am.</p>	<p>Page 69</p> <p>1 Your testimony this morning is that</p> <p>2 currently today there are tests that can be done</p> <p>3 that include additional loci than were used to do</p> <p>4 this testing?</p> <p>5 A That's true.</p> <p>6 Q But it is certainly not your opinion, is</p> <p>7 it, that on that bloodstain, the results of which</p> <p>8 you have no complaint about, that further testing</p> <p>9 today with additional loci would have changed that</p> <p>10 result in any way?</p> <p>11 A I don't expect that it would. I mean, I</p> <p>12 suppose it is possible, but I think it is unlikely.</p> <p>13 Q Is it fair to say that you have kind of a</p> <p>14 general scientific curiosity about what further</p> <p>15 testing would show on these articles that you have</p> <p>16 testified to today?</p> <p>17 A Yeah. I think it would be helpful for a</p> <p>18 number of reasons.</p> <p>19 Q As a scientist?</p> <p>20 A Well, as a member who presents science to</p> <p>21 the Court, I think it would be very helpful.</p> <p>22 Q And interesting to you probably as a</p>

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1 scientist?

2 A Yeah, sure. It would be interesting.

3 Most scientific things are unfortunately

4 interesting to scientists.

5 Q But you are certainly not testifying

6 today about what would have been a reasonable

7 strategy for trial counsel at the time of the trial

8 in representing their client?

9 A I don't actually know what constitutes a

10 reasonable strategy or not.

11 Q Fair answer.

12 One further question. Are you aware --

13 in the first part of your testimony today, you were

14 testifying about the -- on the Stain B of the

15 scissors, which is the stain that is not a

16 bloodstain, regarding the additional allele that

17 showed up on one of the loci.

18 Is that correct? Didn't you testify

19 about that?

20 A I testified about an additional allele on

21 Stain B.

22 Q On Stain B; correct.

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1 A I did not testify as to whether that was

2 a bloodstain or not.

3 Q Correct. But you had testimony this

4 morning about that.

5 And are you aware of the fact that your

6 testimony this morning almost exactly mirrors what

7 the testimony of Dr. Chiafari was at the trial?

8 A I did not read Dr. Chiafari's testimony.

9 MS. BALDWIN: No further questions, Your

10 Honor.

11 THE COURT: Redirect?

12 MS. LEVY: Nothing further, Your Honor.

13 THE COURT: May he be excused as a

14 witness?

15 MS. LEVY: Yes, Your Honor.

16 THE COURT: Thank you for testifying.

17 You are free to leave.

18 (Witness stood down.)

19 THE COURT: Call your next witness.

20 MS. LEVY: The Petitioner would call

21 Peter Neufeld.

22 (The witness was duly sworn.)

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1 Thereupon,

2 PETER NEUFELD

3 Called for examination by counsel for the

4 Commonwealth, having been duly sworn, was examined

5 and testified as follows:

6 DIRECT EXAMINATION

7 BY MS. LEVY:

8 Q Good morning, Mr. Neufeld.

9 A Good morning.

10 Q Would you state your name for the record,

11 please?

12 A Peter Neufeld.

13 Q Mr. Neufeld, where do you work?

14 A I am the co-founder and co-director of

15 The Innocence Project at the Cardoza School of Law

16 in New York City.

17 Q What does your organization do?

18 A I'm also in private practice as well, but

19 that's the bulk of my work.

20 Q What is The Innocence Project? What does

21 that organization do?

22 A The Innocence Project started about 1992,

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1 Your Honor.

2 We represent people all over the United

3 States who claim that they were wrongfully

4 convicted and now wish to secure DNA testing to

5 perhaps reopen those cases.

6 We have an active case load of about 200

7 cases. We have about 4,000 cases in the pipeline,

8 meaning people who have written to us asking for

9 our help, but we haven't decided yet whether we can

10 assign the case.

11 We have personally been involved in the

12 exoneration of about 60 men who had been convicted

13 and exhausted their regular appellate remedies, and

14 there have been altogether about 108 people right

15 now who have been exonerated through postconviction

16 DNA testing.

17 Q Mr. Neufeld, have you been asked to take

18 an appointment to serve on any commissions related

19 to postconviction DNA testing?

20 A Yes. But it is not just limited to

21 postconviction DNA test.

22 I was appointed by then Governor Cuomo in

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1 New York and more recently by Governor Pataki to
2 serve on the State Commission on Forensic Science.

3 And as one of the commissioners on that
4 commission, it is my job to collaborate in the
5 regulation of all of the crime laboratories in New
6 York State, all of the county crime laboratories,
7 the city crime laboratories, the state laboratory
8 system, the medical examiner's offices.

9 And we regulate the manner in which they
10 do forensic DNA testing, and we also regulate all
11 of the other forensic disciplines conducted by
12 these laboratories with the exception of
13 fingerprints.

14 **Q Have you ever been asked to testify**
15 **before any legislative bodies about the use or the**
16 **impact of postconviction DNA testing?**

17 A I have testified in Virginia.

18 I was asked to testify before what is
19 called I think the Virginia State Crime Commission
20 when they were considering new legislation that
21 would enable people who had been convicted to have
22 access to postconviction DNA testing.

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1 I have also offered testimony in about a
2 dozen other state legislatures also considering
3 similar legislation.

4 I testified before Congress about a year
5 and a half ago on similar legislation.

6 And when I leave here today, assuming
7 that I leave here at a reasonable time, I'm
8 scheduled to testify before the House of
9 Representatives this afternoon where they are
10 considering the Innocence Protection Act which will
11 afford convicted offenders in all 50 states access
12 to postconviction DNA testing.

13 **Q We will try to get you out of here at a**
14 **reasonable time to do that, Mr. Neufeld.**

15 **Can you describe the work you have done**
16 **on this case?**

17 A Certainly. By the way, I should add that
18 one of the things we also have to do at the
19 Innocence Project and we do through the state
20 commission is we not only look at laboratory
21 methods all the time, but we also look at the
22 manner which laboratories report their results,

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1 that is written reports, the quality of testimony.

2 We help different entities come up with
3 standards and new methods for teaching criminalists
4 how to write reports and how to professionally and
5 ethically testify about those results in criminal
6 proceedings such as this.

7 I'm sorry. You asked --

8 **Q What materials have you reviewed in**
9 **connection with the Lovitt case?**

10 A In connection with this case, I looked at
11 some of the testimony, particularly Ms. Palmer, who
12 was the criminalist called by the prosecution.

13 I looked at closing statements and the
14 reply closing statement as well of the prosecutor.

15 I looked at laboratory reports, you know,
16 forensic reports.

17 **Q As a result of the review of the**
18 **materials you have described and the work you have**
19 **done, have you formed any opinions in this case?**

20 A Well, a number of opinions, actually.

21 **Q What are those opinions?**

22 A There are --

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1 MS. BALDWIN: Your Honor, is he being
2 qualified as an expert in some testimony? I would
3 object to --

4 MS. LEVY: We would offer Mr. Neufeld as
5 an expert in the use and impact of postconviction
6 DNA testing.

7 MS. BALDWIN: Well, I object to that,
8 Your Honor. In what context? Is he a scientist?
9 Is he an expert attorney? Is he -- you know, so
10 far it seems to me that the testimony is he is an
11 advocate for a certain -- for inmates who say they
12 are innocent, and he has testified before Congress
13 about that.

14 I don't see where there is any expertise
15 that has been shown here --

16 MS. LEVY: Your Honor --

17 MS. BALDWIN: -- as far as -- it sounds
18 like he is being offered as an expert, as somebody
19 who can say when DNA should or should not be done
20 in a case, and I don't see in expertise in that.

21 MS. LEVY: Your Honor, Mr. Neufeld is one
22 of the two leading experts in the country on the

<p>Page 78</p> <p>1 use and impact of DNA testing. 2 MS. BALDWIN: Is counsel testifying 3 again? 4 MS. LEVY: I'm responding to your 5 objection. 6 THE COURT: She is saying -- 7 MS. LEVY: He is one of the leading 8 experts -- 9 THE COURT: -- why he should be an 10 expert. 11 MS. LEVY: And he has been recognized by 12 both the Virginia legislature and Congress as one 13 of the two leading experts on this issue. 14 His knowledge, his skills, his experience 15 and training in the field more than satisfy the 16 requirements of 702 -- 17 THE COURT: And expert in what? 18 MS. LEVY: In the use and the impact of 19 DNA testing in postconviction cases -- 20 THE COURT: By an attorney in a 21 postconviction proceeding? 22 MS. LEVY: Correct.</p>	<p>Page 80</p> <p>1 benefit from additional testing. 2 We have had a number of cases like this 3 case where there was some DNA testing done at the 4 original trial level where we have been able to go 5 back and now do additional testing and exonerate 6 people who were initially convicted in fact. 7 So there was some DNA testing in one of 8 the early stages of the technology which were 9 inculpatory. But by going back and doing more 10 rigorous testing, more discriminating testing, more 11 sensitive testing, we were get dispositive 12 exculpatory results. 13 So that's the kinds of things that we 14 look for routinely in cases. And this is that kind 15 of case. So when I looked at Palmer's reports, I 16 then looked at what was the evidence at trial, and 17 I then looked at what was said about that evidence 18 in closing remarks. 19 And the opinions I have deal with each of 20 those issues. 21 First of all, let me say that I was very 22 troubled by the closing statements in terms of the</p>
<p>Page 79</p> <p>1 THE COURT: I think he is an expert in 2 that. 3 MS. BALDWIN: Very well, Your Honor. 4 BY MS. LEVY: 5 Q What opinions have you reached in this 6 case based on your review of the evidence you have 7 described earlier? 8 A Well, there are a number of conclusions 9 that I reached. 10 One of the things you have to appreciate 11 is when we get cases, we get hundreds of cases. We 12 get cases also referred to us from other lawyers 13 like this to reanalyze. 14 And what we do is we go back, and we want 15 to see what kinds of scientific testing was 16 conducted initially. We want to see whether or not 17 their reporting having to do with that scientific 18 testing reasonably reflects the results. 19 We want to see whether the testimony in 20 court ethically and reasonably reflects those 21 results, and then we want to go back and see 22 whether or not this is the kind of case which would</p>	<p>Page 81</p> <p>1 discussion about the probative value of the DNA 2 profile on Stain B from the scissors. 3 MS. BALDWIN: Your Honor, I object. This 4 isn't even within the realm of what he has been 5 qualified for. He has testified -- sounds to me 6 like a scientific conclusion about the 7 appropriateness of a test result. 8 MS. LEVY: Your Honor, this is -- the 9 witness has testified -- 10 MS. BALDWIN: It's irrelevant -- 11 MS. LEVY: That this is what he does 12 routinely as part of his work, that he has also 13 testified before Congress and the Virginia 14 legislature about exactly this method. 15 And we would offer -- we would submit 16 that the objection would go to the weight of, and 17 not the relevance of his testimony. 18 MS. BALDWIN: I just don't see where his 19 testimony is relevant at all. 20 This is an individual who is not -- it is 21 not even within the realm of what Your Honor has 22 qualified him for, which is apparently a general</p>

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<p>Page 82</p> <p>1 discussion of when DNA is used in cases and when is 2 isn't.</p> <p>3 THE COURT: Well, the clerk's office, you 4 know, as I understand it, destroyed this evidence.</p> <p>5 MS. BALDWIN: That's correct, Your Honor.</p> <p>6 THE COURT: What I would like to hear 7 from him is -- and I think he is an expert in 8 postconviction use of DNA to exonerate people, I 9 suppose.</p> <p>10 You know, how does that prejudice Lovitt, 11 I mean, in the context of this case.</p> <p>12 And I think that's something that is 13 relevant here.</p> <p>14 He is not a scientist that I know of, but 15 I think he could say what the destruction of this 16 evidence did in the context of Lovitt's case to 17 prejudice him, you know, in some way that would 18 require, you know, a new trial.</p> <p>19 MS. BALDWIN: I would just object to any 20 testimony where he would be commenting on the 21 appropriateness or validity of the forensic 22 scientists' results and their testimony in this</p>	<p>Page 84</p> <p>1 prejudice to Mr. Lovitt based on your review of the 2 materials in this case by the fact that the DNA no 3 longer exists?</p> <p>4 A Well, let's start with the scissors. 5 Okay?</p> <p>6 The criminalist wrote a report. And in 7 that report, she found an additional -- I assume 8 the Court has already heard enough science from 9 someone else that I don't have to go through all of 10 that. And if I say something that assumes too 11 much, please stop me.</p> <p>12 The criminalist in this case, Ms. Palmer, 13 wrote a report in which she says specifically that 14 she found an extra allele for one of the stains on 15 the scissors, an allele that did not belong to the 16 deceased.</p> <p>17 However, she said because she only saw 18 this one allele and it was very, very weak, that 19 one could draw absolutely no conclusions from the 20 appearance of that allele.</p> <p>21 That's what it says in her report. 22 Despite that explicit written conclusion,</p>
<p>Page 83</p> <p>1 case, because I don't think it is relevant to that.</p> <p>2 THE COURT: Well, I don't know. He can 3 say as a lawyer this is something that I would -- I 4 mean, some lawyers know more than some scientists.</p> <p>5 MS. BALDWIN: Well, if he is being 6 qualified as an expert attorney in capital 7 litigation, then I would have an objection to that 8 without voir diring him on that.</p> <p>9 THE COURT: Well, I don't think he has 10 been qualified as an expert attorney in capital 11 litigation, but I think he is an expert on the use 12 of DNA in setting aside convictions.</p> <p>13 MS. BALDWIN: And I understand.</p> <p>14 THE COURT: And how -- you know, what he 15 looks at and what he does.</p> <p>16 I think that's fair, and I think you can 17 go into that.</p> <p>18 BY MS. BALDWIN:</p> <p>19 Q Mr. Neufeld -- 20 A Can we give -- I'm sorry. 21 Q I would like for you just to respond to 22 what Judge Bach has asked, which is what is the</p>	<p>Page 85</p> <p>1 you have a situation here where the prosecutor in 2 their closing remarks said that one purpose of DNA 3 testing is to see whether or not you can exclude a 4 suspect.</p> <p>5 And you now know that in this particular 6 case you couldn't exclude this suspect, Mr. Lovitt. 7 And, therefore, that becomes other evidence of his 8 guilt.</p> <p>9 As someone who looks at these records all 10 of the time, I can only tell you that that is 11 grossly misleading the jury --</p> <p>12 MS. BALDWIN: Your Honor, I object. 13 There is no issue in the case regarding the 14 appropriateness of the prosecutors' argument in 15 this case. This is irrelevant.</p> <p>16 MS. LEVY: Your Honor, this goes directly 17 to the issue of the materiality of the evidence 18 destruction in this case.</p> <p>19 THE COURT: Objection overruled. 20 THE WITNESS: Because once the 21 criminalist lays out, as they would to any lawyer 22 or a judge, that the evidence has no probative</p>

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<p>Page 86</p> <p>1 value, when she says specifically one can draw no 2 conclusion one way or the other, that's very clear. 3 For an advocate to then start drawing 4 conclusions from that evidence is inappropriate. 5 The reason that becomes critical in the 6 postconviction context, Your Honor, is that now, if 7 that scissors still existed, there is no question 8 that there is technology that could give you, in 9 all likelihood, a profile of a second donor if 10 indeed there was a second donor for that stain. 11 I read Dr. Riley's report, or his 12 affidavit, I should say. So I am aware of his 13 conclusions. 14 And certainly I work with, you know, 15 dozens of DNA scientists on a regular basis on all 16 of the cases that we are working on and also in 17 drafting legislation in the 25 states that now have 18 postconviction DNA legislation. 19 And there is no question that, number 20 one, given the existence of additional markers 21 right now; and, two, given the fact that the most 22 sensitive marker and therefore the most powerful</p>	<p>Page 88</p> <p>1 for instance. 2 You may know the case -- it was a pretty 3 high profile case that we were involved in. It was 4 a gentleman named Admil Luima (phonetic) who had 5 been tortured by police officers in a precinct 6 bathroom in New York City, when the gloves that 7 were used in assault had been washed by the police 8 officer, but the FBI was able to unthread -- 9 MS. BALDWIN: Your Honor, I'm sorry, but 10 what does this have to do with Robin Lovitt's case? 11 MS. LEVY: Your Honor, this goes directly 12 to the materiality of the destroyed evidence. 13 The witness is attempting to explain to 14 the Court what could be done and what implications 15 it could have for Robin Lovitt if the evidence had 16 not been destroyed. 17 MS. BALDWIN: Your Honor, maybe I can 18 short circuit this. 19 We can stipulate that the evidence that 20 was destroyed could have had other DNA tests done 21 on them today. 22 Isn't that what he is here to say?</p>
<p>Page 87</p> <p>1 marker, namely the one that tests for gender, was 2 not available in the Virginia state crime 3 laboratory in 1999 -- I know that for a fact from 4 my conversations with Dr. Ferrare (phonetic), who 5 is the director of that laboratory -- but that it 6 is available now in that laboratory. 7 Additional testing in all likelihood 8 would be able to tell, number one, the gender of 9 any second donor. Number two, it would be able to 10 flesh out a better profile from Stain B. 11 But more importantly, something that we 12 do in all of our cases is we go back to the item of 13 evidence and we are trying to figure out are there 14 other places on that item which are more likely to 15 produce probative evidence. 16 And this is not a question for a 17 scientist. This is a question for something that 18 we, who are forensic investigators, if you will, do 19 whenever we look at a case. 20 What one would do in this case if it was 21 at The Innocence Project is we would take that 22 scissors apart. We would look in the screwholes,</p>	<p>Page 89</p> <p>1 MS. LEVY: We can move on then. 2 THE WITNESS: I'm here to say a bit more 3 than that, if I may, Your Honor. 4 THE COURT: Go ahead and let her ask you 5 the questions. 6 BY MS. LEVY: 7 Q With the stipulation that additional 8 testing could have been done, what in your 9 experience based on your work in the field, what 10 could that testing have shown -- 11 A (Simultaneous) Well, that's the whole 12 point -- 13 MS. BALDWIN: (Simultaneous) Your Honor, 14 there's no way he could know that, no way he could 15 know that. 16 And there is no way this witness is 17 competent to testify to that, what additional 18 testing could show on evidence that has been 19 destroyed. 20 THE WITNESS: Your Honor, I can't say 21 what it will show, but I can say what it has the 22 potential to show. And I'm certainly not going to</p>

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1 give an opinion on what it will show.
2 THE COURT: He can testify on what it has
3 the potential to show.
4 BY MS. LEVY:
5 Q Please go ahead.
6 A So what I'm trying to say is -- I'm just
7 trying to cite as an example the one reason we as
8 postconviction lawyers would take scissors apart
9 and have it taken apart is I know from this other
10 case, for instance, that although they couldn't get
11 DNA markings from the regular leather glove, when
12 they went into the threading, the stitching, blood
13 got buried in that stitching that wasn't washed
14 out.
15 Similarly, one of the best places to find
16 biological material on an item or implement that is
17 handled by people is in the inner workings of that
18 item because it doesn't easily get cleaned from
19 there, so you would unscrew it.
20 Obviously what we would do is we would
21 instruct our forensic scientist to look at the
22 handle.

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1 After all, it's a handle. It is handled
2 by somebody much more than a blade is, and the
3 handle is much more likely to have biological
4 material.
5 Because we know, as people who
6 investigate these cases, that when a person handles
7 an item, sometimes they may have their fingers near
8 their mouth or their nose, and the kind of cellular
9 material that you could get DNA from would then be
10 transferred to the handle, and it gets tested.
11 I also know that the type of
12 fingerprinting that was done in this case would --
13 is unlikely to undermine the robustness --
14 MS. BALDWIN: Your Honor, is he an expert
15 on fingerprinting now?
16 THE WITNESS: No.
17 MS. LEVY: If she could let the witness
18 finish his statement.
19 THE COURT: She has a right to object.
20 MS. LEVY: Certainly, but --
21 MS. BALDWIN: This is like a monologue
22 here, Judge. It is not even question and answer.

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1 It's an advocate who is giving a speech in court,
2 and I object.
3 THE COURT: Go ahead and ask questions.
4 BY MS. LEVY:
5 Q Mr. Neufeld, moving on from scissors, can
6 you explain to the Court what opinions you have
7 reached regarding the jacket?
8 A Well, the jacket is actually a very, very
9 serious matter.
10 The jacket is a serious matter because
11 one of the things that we do in the Commission of
12 Forensic Science is we actually try and advise and
13 guide criminalists in all of the laboratories on
14 how to report data.
15 And the most important thing that we
16 teach them on a regular basis is that if you see
17 something, you must report it.
18 And that what you are supposed to do when
19 you report it is if you have certain concerns and
20 or explanations about the value of what you are
21 seeing and what you are reporting, then you can
22 describe it that way.

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1 So, for instance, in this particular
2 case, when I initially wrote my own affidavit, I
3 had not seen the underlying bench notes from the
4 laboratory that did DNA testing on the jacket.
5 I just saw the report, and I saw the
6 chart that was produced as part of that report.
7 And on that chart, it said in terms of
8 typing the genetic profile of the jacket, it said
9 that although it tested presumptively positive for
10 blood, that the results were inconclusive.
11 There is an I-N-C in the boxes for each
12 of the markers, inconclusive.
13 I later realized after I wrote my
14 affidavit in this case, when I saw and studied the
15 bench notes in the case, that in fact, they had
16 obtained a profile, albeit a weaker profile than
17 they had obtained for other pieces of evidence --
18 MS. BALDWIN: Your Honor, he is giving
19 scientific evidence about conclusions made by the
20 State's forensic scientist.
21 He is not competent to testify to that.
22 THE COURT: Objection overruled.

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<p>Page 94</p> <p>1 BY MS. LEVY:</p> <p>2 Q Mr. --</p> <p>3 A It is our practice and what we teach</p> <p>4 forensic scientists all over the country is that</p> <p>5 when you see results, you publish them.</p> <p>6 You include them in the report, and if</p> <p>7 you have an explanation to qualify those results,</p> <p>8 you put an asterisks, a footnote, or something of</p> <p>9 that kind. You don't write "incomplete" when in</p> <p>10 fact you get a profile.</p> <p>11 And when I looked at the profile in this</p> <p>12 case as reported by the Virginia crime laboratory</p> <p>13 in the bench notes and saw that it was a profile</p> <p>14 for the bloodstain on the jacket, on Mr. Lovitt's</p> <p>15 jacket, which was completely consistent with Mr.</p> <p>16 Lovitt --</p> <p>17 MS. BALDWIN: Your Honor, now I'm going</p> <p>18 to object on the grounds of hearsay. What is he</p> <p>19 talking about? Is he talking about something found</p> <p>20 in a document?</p> <p>21 MS. LEVY: Why don't we clear this up.</p> <p>22 MS. BALDWIN: Is this his own analysis of</p>	<p>Page 96</p> <p>1 furnished to the defense attorney, obviously, and</p> <p>2 the prosecutor -- that the results were simply</p> <p>3 inconclusive.</p> <p>4 And it just says, INC, INC, INC.</p> <p>5 When I later on look at the underlying</p> <p>6 data, the data produced by the same laboratory, and</p> <p>7 I looked at Lane 9, which I have been told is the</p> <p>8 lane which --</p> <p>9 MS. BALDWIN: Is that in evidence, Your</p> <p>10 Honor?</p> <p>11 MS. LEVY: It is Petitioner's Exhibit 3.</p> <p>12 THE WITNESS: One moment, Your Honor.</p> <p>13 MS. BALDWIN: If he could refer to what</p> <p>14 he is talking about.</p> <p>15 THE WITNESS: Yeah, I will.</p> <p>16 Which -- just one question. Which page</p> <p>17 did you say the --</p> <p>18 BY MS. LEVY:</p> <p>19 Q 2138.</p> <p>20 A Thank you.</p> <p>21 Q Of what you have marked as Petitioner's</p> <p>22 Exhibit 3.</p>
<p>Page 95</p> <p>1 some document?</p> <p>2 Hearsay, irrelevant --</p> <p>3 MS. LEVY: Your Honor, may I approach the</p> <p>4 witness?</p> <p>5 BY MS. LEVY:</p> <p>6 Q Mr. Neufeld, I hand you what has been</p> <p>7 previously marked as Petitioner's Exhibit 3, and I</p> <p>8 direct your attention to page 2138 of that exhibit.</p> <p>9 That will assist you, if you could tell</p> <p>10 me --</p> <p>11 A Actually, the page I would like, if you</p> <p>12 have it, is the part of Ms. Palmer's report which</p> <p>13 has the chart.</p> <p>14 Q I will hand you what has been previously</p> <p>15 marked as Petitioner's Exhibit No. 2 for that</p> <p>16 purpose.</p> <p>17 A In Petitioner's Exhibit 2, which is a</p> <p>18 report from Ms. Palmer of the Division of Forensic</p> <p>19 Science, with respect to Item No. 12, the jacket,</p> <p>20 unlike the profiles that are actually given</p> <p>21 numerical values, for the profile of the jacket,</p> <p>22 she reports -- and this is the report that is then</p>	<p>Page 97</p> <p>1 A Referring to the first set of data on</p> <p>2 page 2138, looking at what is Lane 9, Item No. 12,</p> <p>3 the jacket.</p> <p>4 I see that this neutral objective machine</p> <p>5 that scans these gels produced a genetic profile</p> <p>6 for at least five different genetic markers for the</p> <p>7 jacket stain.</p> <p>8 And that the profile it produced for</p> <p>9 those five genetic markers --</p> <p>10 MS. BALDWIN: I have to object, Your</p> <p>11 Honor. I'm sorry.</p> <p>12 He is not a scientist. He is not an</p> <p>13 expert in interpreting Carol Palmer's scientific</p> <p>14 results.</p> <p>15 MS. LEVY: Your Honor, he is not offering</p> <p>16 this testimony as a scientist. That was done by a</p> <p>17 previous expert who is an expert.</p> <p>18 MS. BALDWIN: Then it's irrelevant.</p> <p>19 MS. LEVY: Mr. Neufeld is talking about</p> <p>20 what he relied upon in order to reach -- he is</p> <p>21 presenting this at your request.</p> <p>22 THE COURT: Why don't you do this,</p>

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1 Mr. Neufeld?

2 Why don't you go ahead and say what you
3 would have done as a lawyer as a result of this.

4 And I understand -- I think I understand
5 what is going on here.

6 THE WITNESS: Well, the first thing I
7 would do, first of all, if I saw this data in a
8 postconviction context, quite frankly, is the
9 failure to disclose this in the same way as the
10 chart is disclosed, I would consider it a Brady
11 violation as a lawyer filing papers.

12 MS. BALDWIN: Objection, Your Honor.

13 THE WITNESS: (Simultaneous) Just to
14 apprise you of that.

15 MS. BALDWIN: The subject claim --

16 THE COURT: Objection sustained.

17 THE WITNESS: Okay.

18 What we do, not just as a lawyer, but
19 somebody in the State Forensic Commission with
20 responsibility to regulate the crime laboratories,
21 is that we would not permit this kind of reporting
22 to --

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1 And that being the case, when you have
2 evidence which on its face is somewhat exculpatory
3 and inculpatory is argument -- an inculpatory
4 argument is nevertheless made from data which you
5 know to be exculpatory is misleading.

6 THE COURT: Okay. In this hearing
7 today -- I don't know that they are stipulating
8 anything -- but the evidence is that, you know,
9 this is not the victim's stain.

10 I don't know if it was a bloodstain, but
11 it was not the victim's stain. It was probably
12 somebody else's, and mostly likely the owner of the
13 jacket's.

14 What are you saying the prosecution did?

15 I mean, I don't know that they are
16 arguing anything different except that that was
17 Lovitt's stain.

18 BY MS. LEVY:

19 **Q Have you reviewed the closing arguments**
20 **from the prosecution with respect to the stain on**
21 **the jacket?**

22 A I have looked at the closing arguments of

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1 THE COURT: You know, that's the report
2 that we have got.

3 We have got that report. What difference
4 does it make as far as Robin Lovitt's --

5 MS. LEVY: Mr. Lovitt --

6 THE WITNESS: Oh, I'm sorry. Fine.

7 In response to that question, Your Honor,
8 the difference it makes is that when you look at
9 the district attorney's closing remarks, which
10 suggest by inference that this stain on the front
11 of the jacket is a transfer stain that comes from
12 the victim's blood during the struggle, that is
13 clearly a misleading argument.

14 The reason it is a misleading argument,
15 Your Honor, is that the government was in
16 possession of data which strongly indicated that
17 that stain had as its source Mr. Lovitt's own
18 blood.

19 There is no other way to interpret that
20 data. The likelihood of those five markers coming
21 from anybody else, their witnesses can tell you
22 better than me are remotely tiny.

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1 the prosecutor, and if you want to refer me to
2 particular pages --

3 MS. LEVY: Why don't we mark --

4 THE COURT: What does this have to do
5 with the clerk destroying the evidence?

6 MS. BALDWIN: There is no claim, Your
7 Honor, in this case about the Commonwealth
8 attorney's characterization in their final argument
9 of what the evidence shows.

10 There is no claim.

11 MS. LEVY: This goes to directly to
12 materiality. And in the papers and before this
13 Court, the Commonwealth has argued this is not a
14 DNA case. This trial wasn't a DNA trial. It
15 didn't have to do with DNA.

16 What the prosecution argued with respect
17 to what the DNA showed or what --

18 MS. BALDWIN: The materiality isn't in
19 issue either, Your Honor.

20 MS. LEVY: Materiality is absolutely
21 relevant --

22 MS. BALDWIN: (Simultaneous) With what?

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1 MS. LEVY: -- to whether or not there can
2 be relief based on the evidence destruction in this
3 case.
4 And that's all this witness is here to
5 testify about.
6 MS. BALDWIN: There is no issue of
7 materiality.
8 The most they could get, once again, if
9 we were in the middle of a criminal trial is a
10 showing of bad faith on the part of the
11 Commonwealth for destroying the evidence.
12 MS. LEVY: Well, Your Honor --
13 MS. BALDWIN: We are not in a trial, and
14 this has nothing to do with materiality. It is not
15 a Brady claim.
16 MS. LEVY: I would ask that Your Honor
17 allow the parties to brief that issue, because we
18 have disagreement on what the law is.
19 And I will submit to the Court that these
20 arguments that there could never be any relief
21 based on evidence destruction were made by the
22 Commonwealth in their motion to dismiss and

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1 rejected by the Virginia Supreme Court in its order
2 including --
3 THE COURT: Yeah, you can brief that.
4 What I'm trying get to is let's say that
5 this stain was Robin Lovitt's DNA, you know,
6 assuming without deciding that is a fact, so what?
7 MS. LEVY: Mr. Neufeld can testify. If
8 you prefer for it to come from him.
9 THE COURT: Okay.
10 MS. LEVY: The Commonwealth argued in
11 their closing argument that it was the blood of the
12 victim and the DNA test results showed it was
13 not --
14 MS. BALDWIN: Your Honor, is counsel
15 testifying again, because the record doesn't show
16 that. And is counsel testifying --
17 THE COURT: But assuming without deciding
18 the Commonwealth did argue that, how does the
19 destruction of the DNA make any difference?
20 MS. LEVY: Because --
21 THE COURT: No. I'm not asking you.
22 MS. LEVY: The destruction of the DNA is

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1 directly relevant to the issue of whether this was
2 a material issue in this case, that the evidence is
3 destroyed and that Mr. Lovitt can no longer test
4 it, no longer have the ability on appeal like every
5 other convicted death row inmate to contest it and
6 to disprove that.
7 THE COURT: Let's say they agree that it
8 wasn't the victim's DNA.
9 MS. BALDWIN: Your Honor, the
10 Commonwealth's own expert at trial, the
11 Commonwealth's own expert testified she could reach
12 no result on that, no conclusion on that. It was
13 inconclusive.
14 That evidence is there is no evidence of
15 what that stain was and who it belonged to.
16 The Commonwealth's expert testified to
17 that.
18 THE COURT: Yeah. But what Mr. Neufeld
19 is saying is there really was evidence as to
20 whose --
21 MS. BALDWIN: Well, I understand what he
22 is saying, but he is not a scientist.

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1 That was a scientific conclusion.
2 MS. LEVY: Well, Dr. Riley testified to
3 the same thing, Your Honor.
4 MS. BALDWIN: Your Honor, I think this
5 whole area is irrelevant to the issue of
6 destruction of evidence. It is not relevant to any
7 Brady issue in this case or the claim of
8 ineffective assistance in the case.
9 THE COURT: Go ahead and ask him.
10 BY MS. LEVY:
11 **Q Mr. Neufeld, I will move along. I**
12 **think -- you have told the Court what you think**
13 **about the scissors and the jacket. I want to move**
14 **along to one further area of testimony, and that is**
15 **whether you have done any research on jailhouse**
16 **informants and the use -- in postconviction**
17 **exoneration procedures.**
18 MS. BALDWIN: Oh, I'm going to object to
19 that, Your Honor.
20 Is he qualified now in jailhouse
21 informants?
22 He is here on DNA, the use of DNA

<p>Page 106</p> <p>1 postconviction proceedings.</p> <p>2 BY MS. LEVY:</p> <p>3 Q Have you done any empirical research on</p> <p>4 this issue, Mr. Neufeld?</p> <p>5 A Yes. And we --</p> <p>6 Q What is that research?</p> <p>7 A I published a book, Your Honor --</p> <p>8 MS. BALDWIN: I object. I object and ask</p> <p>9 for a ruling.</p> <p>10 THE COURT: The objection is sustained.</p> <p>11 BY MS. LEVY:</p> <p>12 Q Mr. Neufeld, in conclusion, based on your</p> <p>13 review of the DNA evidence in this case, what</p> <p>14 additional testing would have been done and what</p> <p>15 affect would it have had on Mr. Lovitt's</p> <p>16 postconviction?</p> <p>17 A Well, let me first say this, what we do</p> <p>18 before we accept any case at The Innocence Project</p> <p>19 is we try and do an evaluation of whether or not</p> <p>20 the case has any of the indicia of the kind of case</p> <p>21 that we want to take on for the potential for a</p> <p>22 postconviction exoneration. That's what we do. We</p>	<p>Page 108</p> <p>1 were 80 percent sure that this was the right</p> <p>2 person.</p> <p>3 MS. BALDWIN: Once again, the same thing,</p> <p>4 Your Honor. I object.</p> <p>5 What? Are we going into -- this is an</p> <p>6 attorney on the stand who is arguing what he thinks</p> <p>7 happened in the case.</p> <p>8 THE COURT: He can --</p> <p>9 MS. BALDWIN: He is qualified in DNA.</p> <p>10 THE COURT: I want to give you just as</p> <p>11 broad a latitude as I can, but this needs to really</p> <p>12 be related to how did the clerk destroying this</p> <p>13 evidence somehow --</p> <p>14 MS. LEVY: Okay.</p> <p>15 BY MS. LEVY:</p> <p>16 Q I will just ask you that question.</p> <p>17 The destruction of the evidence in this</p> <p>18 case, Mr. Neufeld, what prejudice has resulted to</p> <p>19 Mr. Lovitt from that?</p> <p>20 A Well, there is two different kinds of</p> <p>21 prejudice.</p> <p>22 With respect to the jacket itself, we</p>
<p>Page 107</p> <p>1 do that kind of careful review.</p> <p>2 And what we did with the first hundred</p> <p>3 postconviction DNA exonerations is we</p> <p>4 systematically went through all hundred</p> <p>5 exonerations to try and figure out what are the red</p> <p>6 flags.</p> <p>7 What are the kinds of bells and whistles</p> <p>8 that go off that should at least trigger one's</p> <p>9 concern in a postconviction setting to do further</p> <p>10 testing and further investigation. Okay?</p> <p>11 And that's what I did here. I performed</p> <p>12 that same kind of methodological approach.</p> <p>13 So the fact that there is a jailhouse</p> <p>14 snitch is something that we did consider because we</p> <p>15 considered it in all other hundred cases that we</p> <p>16 have looked at and found it to be a very</p> <p>17 significant variable.</p> <p>18 That's number one.</p> <p>19 Number two, we heard -- we read portions</p> <p>20 of the testimony dealing with an eyewitness, an</p> <p>21 eyewitness who initially did not make an</p> <p>22 identification, who subsequently said that they</p>	<p>Page 109</p> <p>1 would say that it is materially exculpatory</p> <p>2 evidence on its face. We can't say that yet about</p> <p>3 the scissors because we haven't done the testing on</p> <p>4 the scissors, so we don't know what the results</p> <p>5 will be.</p> <p>6 But with respect to the jacket and what</p> <p>7 is already printed in the bench notes of this</p> <p>8 laboratory, it would be materially exculpatory</p> <p>9 evidence on its face, and therefore the destruction</p> <p>10 is very, very prejudicial to Mr. Lovitt.</p> <p>11 With respect to the scissors, the</p> <p>12 expectation is that further testing, given the more</p> <p>13 sophisticated methods available right now, would</p> <p>14 produce a profile.</p> <p>15 Not only might that profile identify the</p> <p>16 person who handled that scissors, which I guess is</p> <p>17 presumptively the murder weapon in this case, at</p> <p>18 least from what I have been told, but more</p> <p>19 importantly, you could then take that profile and</p> <p>20 you could run it through Virginia's convicted</p> <p>21 offender database, and you might get a hit.</p> <p>22 The reason that's very significant, Your</p>

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1 Honor, is twofold.

2 One, Virginia has more cold hits from its
3 convicted offender database than any state in the
4 United States.

5 I represented a man just six months ago
6 in Virginia, a guy named Marvin Anderson, who had
7 spent 15 years in prison for a crime he didn't
8 commit. It was a rape robbery.

9 And he was not only exonerated through
10 the DNA testing, but then we took the profile, the
11 complete profile that we got from the evidence, and
12 we ran it through Virginia's convicted offender
13 database, and we got a hit on another person who
14 was out there committing rapes who has now been
15 indicted for that crime, as Marvin Anderson has
16 been exonerated.

17 Similarly in this case, if you have got a
18 complete profile anywhere in that evidence, okay,
19 you could then run it against Virginia's convicted
20 offender database.

21 And if you got a profile, that profile
22 may very well be of the true perpetrator.

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1 **Lovitt beyond any doubt committed the crime?**

2 A It doesn't prove that someone commits a
3 crime or doesn't commit a crime. DNA testing
4 proves that someone's DNA is in a certain place.

5 **Q So it could conclusively prove that?**

6 A Certainly additional DNA testing would
7 have the potential to --

8 **Q Sure.**

9 A -- match him --

10 **Q Sure.**

11 A -- as opposed to matching someone else.

12 **Q Or how about matching about a hundred
13 other people who might have handled those scissors
14 that were on the bar?**

15 A You know, part of it depends on where the
16 evidence is recovered and what the nature of the
17 evidence is.

18 Is it blood evidence? I mean, one of the
19 issues which we think about --

20 **Q Let me narrow this down.**

21 A I'm sorry. Can I just finish my answer?

22 One of the things that you would want to

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1 I don't know that for a fact. I don't
2 know what the other evidence is in this case, but I
3 do know that exclusions can be very powerful
4 evidence of innocence.

5 But exclusions in connection with a match
6 to another person in the state convicted offender
7 database can provide overwhelming evidence of
8 innocence and certainly can change the outcome of
9 any case.

10 So the failure -- the inability now of
11 the defense to test either the scissors or go back
12 and do the jacket, given the different evidence
13 that exists in both of those things, is
14 extraordinarily prejudicial to him at this point.

15 THE COURT: Cross-examination.

16 CROSS-EXAMINATION

17 BY MS. BALDWIN:

18 **Q Mr. Neufeld, based on what you know about
19 the scissors in the case --**

20 A Yes.

21 **Q -- isn't it just as likely that further
22 DNA testing could conclusively prove that Robin**

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1 consider is, because we do this as lawyers all the
2 time in criminal cases, is you look at other kinds
3 of circumstantial evidence.

4 So, for instance, if someone is handling
5 a scissors, there is a real chance they could cut
6 themselves while they are handling the scissors.

7 If their own blood is recovered from the
8 scissors, that's different qualitatively than if
9 sweat is recovered from there --

10 **Q I want to stop you just a minute --**

11 A Or skin cells.

12 **Q We want to talk about this case.**

13 A Well, I am.

14 **Q No. Let me stop you just for a minute.**

15 **Let me ask you a question because we know certain
16 facts in this case.**

17 **The DNA evidence testing that was done on
18 the handles of the scissors and on -- not on the
19 blades of the scissors, but the DNA testing that
20 was done on the handles that showed up with this
21 additional allele, and so further testing might
22 show who that other allele belonged to, that**

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1 testing, that had nothing to do with blood
2 evidence.
3 So I want you to consider that fact in my
4 question.
5 My question is, isn't it just as likely
6 that further testing of that handle and the places
7 on the scissors that had DNA matter that was not
8 blood, that it could have shown a hundred other
9 people handled it?
10 A I'm sorry. I have a question with your
11 premise.
12 You just said, The DNA that was already
13 done on the handle.
14 The report that I read indicated that
15 there has been no DNA testing on any handle, that
16 the DNA testing was done near the tip of the blade
17 and then further up the blade, close to the handle,
18 but not on the handles.
19 Q We are talking about further up the
20 handle.
21 A Okay. So could you rephrase the question
22 then, please?

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1 Q Yeah. Isn't it just as likely that a
2 hundred other people who handled the scissors on
3 the bar could show up as the DNA profile on that
4 DNA profile that was in -- that was incomplete,
5 that was further up the handle, and that was not
6 blood?
7 MS. LEVY: Objection. It wasn't on the
8 handle, Your Honor.
9 It was on the blade.
10 THE WITNESS: I can't comment on the
11 significance of that testing, because I have no
12 idea, for instance, how many people handled that
13 scissors.
14 BY MS. BALDWIN:
15 Q Okay. Let me give you a little more
16 information, then.
17 A Okay.
18 Q A pair of scissors. They are behind a
19 bar in a pool hall.
20 Can't you assume from that that it's
21 going to be a fair number of people who have
22 probably handled those scissors?

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1 Are you disagreeing with that?
2 A Am I disagreeing with an assumption?
3 Q Yes, with that assumption.
4 A No, I'm not disagreeing with an
5 assumption.
6 Q (Simultaneous) Okay. Let me ask --
7 A Excuse me. Can I finish my answer,
8 please?
9 Q Well, I thought you did.
10 A No, I hadn't.
11 What I'm saying is that what I don't want
12 to do and what I haven't done so far is make any
13 assumptions.
14 So for instance, when I talked about the
15 testing results on the scissors, I have no idea
16 what they will be.
17 The jacket is another story because we
18 already have a presumptive result.
19 Q I'm not asking about the jacket.
20 A Sure.
21 Q Right now I want to talk about the
22 scissors. And those scissors were a pair of

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1 scissors that were at a pool hall behind a bar.
2 A Right.
3 Q And the blood evidence that came up with
4 the DNA profile was on the blade of the scissors.
5 A Right.
6 Q Right? You agree with that.
7 And then you are also aware that there is
8 absolutely no contested evidence in this case
9 regarding the validity of that DNA profile as being
10 the victim's blood.
11 A Right.
12 Q Okay. Thank you.
13 Are you aware of the fact that in this
14 case Dr. Chiafari testified as a DNA expert for the
15 defense?
16 A I don't know about his testimony. I just
17 saw the --
18 Q You didn't read his testimony?
19 A Excuse me?
20 Q Did you not read his testimony?
21 A I did not read his testimony. I read the
22 criminalist for the government's testimony.

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1 Q Okay. Are you aware of the fact then
2 that -- or are you not aware of the fact that
3 Dr. Chiafari testified that essentially you could
4 not eliminate Robin Lovitt from that additional
5 allele on the scissors?
6 A If you tell me he said it, then he said
7 it.
8 Q So it was fair evidence for the
9 Commonwealth's attorneys to argue that in closing
10 argument?
11 A Well, actually, I don't think --
12 Q Because that was the evidence.
13 A I disagree with you on that, frankly.
14 Q On what?
15 A As an ethical matter.
16 Q Oh, wait a minute --
17 A The duties --
18 Q Let me ask you another question.
19 A I'm sorry. Can I finish my answer,
20 please?
21 Q Well, I think you did.
22 A No, I haven't.

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1 Q No. I asked if you would agree with me
2 or not.
3 A And I want to explain why I wouldn't
4 agree with you.
5 Q Okay.
6 A The reason I wouldn't agree with you,
7 quite frankly, is that the duties of a prosecutor
8 and the duties of a defense attorney under the Code
9 of Professional conduct are somewhat different in
10 the course of a criminal trial.
11 The duty of a defense attorney is to be a
12 zealous advocate within the bounds of the law and
13 ethics.
14 The duty of a prosecutor is to make sure
15 that justice is served and the truth comes out.
16 And if the prosecutor has certain
17 information about the evidence, perhaps from their
18 own experts, which leads them in a certain
19 direction as to what the full impact of that
20 evidence is, then just because a witness for the
21 defense may say something that is inappropriate or
22 unprofessional or incomplete is not something that

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1 the prosecutor ethically should jump on.
2 Q That's fine if you want to have that
3 opinion.
4 A I'm sorry. It's not my opinion.
5 That's the commentary from the American
6 Bar Association Code for Conduct of Prosecutors.
7 Q Prosecutors are not allowed to comment on
8 the evidence?
9 A That was not what I said.
10 Q They are not allowed to --
11 THE COURT: Don't argue back and forth.
12 Go ahead and ask another question.
13 MS. BALDWIN: You're right, Your Honor.
14 BY MS. BALDWIN:
15 Q Mr. Neufeld, you are an advocate for
16 persons who claim they are innocent who are in
17 prison, are you not?
18 A I'm an advocate for the use of DNA
19 testing in the criminal justice system to not only
20 exonerate people who have been wrongfully
21 convicted, but to use very aggressively and very
22 effectively by law enforcement to investigate

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1 crime, identify the real perpetrator, and punish
2 them.
3 One of the things I do on the crime
4 commission is I have aggressively expanded the size
5 of the DNA database of convicted offenders. I have
6 lobbied to get more money for police departments
7 and crime laboratories so they can expand the use
8 of the testing in solving crime and to help victims
9 and victim's families and basically so the public
10 will have greater confidence in the criminal
11 justice system.
12 It is not a one-sided affair.
13 Q Now, you have testified that the
14 prosecutor argued in this case that that blood was
15 Robin Lovitt's. Is that what you're --
16 A Which blood are you referring to?
17 Q The blood on the jacket.
18 A I'm saying that there was an inference
19 raised by the prosecutor by commenting on the
20 location of the blood and how there had been this
21 close proximity with the victim that clearly the
22 inference that was being drawn by the jury at that

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1 point was that that blood was a transfer, okay, a
2 swiping that occurred during that struggle.
3 **Q And that is based on your analysis, your**
4 **review of the record of their argument?**
5 A It certainly is based on my review of the
6 record of their argument and the fact that, as
7 someone who has been critiquing trials for the last
8 25 years, there would be no reason for the
9 prosecutor to comment on that blood at all unless
10 it was being done for that specific purpose.
11 Otherwise, it had no relevance to the
12 case.
13 **Q Or unless it was evidence in the case.**
14 A Excuse me?
15 **Q Or unless that was the evidence in the**
16 **case.**
17 A Well, it is either -- the evidence -- the
18 only reason you would argue about blood on the
19 jacket is if you wanted to suggest that the blood
20 was a swiping that occurred during a struggle
21 between Mr. Lovitt and the deceased. That's the
22 only reason.

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1 And what I'm saying is when you have raw
2 data in your hands as the prosecutor which tells
3 you that the profile of that bloodstain matches
4 Mr. Lovitt and not -- and excludes the victim, that
5 that is an argument that one should not be making
6 ethically.
7 That's what I'm saying.
8 **Q Even if that's the evidence in the case?**
9 A That is not the evidence in the case.
10 **Q Answer the question, please. Even if**
11 **that's the evidence in the case?**
12 A Even if what is the evidence in the case?
13 That it could be Mr. Lovitt's?
14 **Q That you cannot --**
15 A I'm sorry. That it could be --
16 **Q That you cannot exclude Lovitt -- excuse**
17 **me, cannot exclude the victim.**
18 MS. LEVY: I object to the question --
19 THE WITNESS: I disagree. I think that
20 the evidence is reported by the Virginia crime
21 laboratory --
22 BY MS. BALDWIN:

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1 **Q I'm not asking what the evidence is in**
2 **this case.**
3 THE COURT: I think you should move on.
4 MS. BALDWIN: All right. Yes, sir. One
5 last question.
6 BY MS. BALDWIN:
7 **Q Mr. Neufeld, are you aware that Robin**
8 **Lovitt told the police that he wasn't wearing that**
9 **jacket when the crime occurred?**
10 A I have no awareness about what Robin
11 Lovitt told the police.
12 MS. LEVY: I object to that question and
13 register my objection for the record that the
14 statement of Robin Lovitt was never introduced into
15 the trial.
16 MS. BALDWIN: That was not the question.
17 THE COURT: Do you have any redirect?
18 MS. LEVY: No.
19 THE COURT: Thank you for testifying.
20 THE WITNESS: Thank you very much, Your
21 Honor.
22 THE COURT: Call your next witness --

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1 well, let's take a ten-minute break, no more than
2 ten minutes.
3 (A recess was taken.)
4 THE COURT: Call your next witness.
5 MS. LEVY: The petitioner calls Clifford
6 Kleback.
7 (The witness was duly sworn.)
8 Thereupon,
9 CLIFFORD KLEBACK
10 Called for examination by counsel for the
11 petitioner, having been duly sworn, was examined
12 and testified as follows:
13 DIRECT EXAMINATION
14 BY MS. LEVY:
15 **Q Good morning, Mr. Kleback. Can you state**
16 **your full name for the record?**
17 A Sure. My name is Clifford Paul Kleback.
18 **Q What do you do for a living?**
19 A I'm a deputy clerk with the Arlington
20 County Circuit Court.
21 **Q How long have you been in this position?**
22 A About since March 17 of '97.