

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

CC No. 1999 16946

v.

JAMES SMITH,  
Defendant,

**JUDGE:** Lawrence J. O'Toole

**PCRA MOTION FOR POST  
CONVICTION DNA TESTING**

Filed on behalf of:  
JAMES SMITH,  
Defendant

Counsel for this Party:

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6 IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

7  
8 Commonwealth of Pennsylvania,  
9 Plaintiff-Respondent,  
10 vs.  
11 James T. Smith,  
12 Defendant-Respondents

Case No:1999-169  
MOTION FOR POST-CONVICTION DNA  
TESTING PURSUANT TO 42 Pa.C.S.A. §  
9541.

13  
14 Petitioner, James T. Smith, hereby submits his motion for post-conviction DNA testing  
15 pursuant to 42 Pa.C.S.A. § 9541. The motion is presented in good faith and premised on the  
16 following facts and points of authority.

17 Respectfully submitted this 3RD day of **January 2008**.

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1 **I. Introduction**

2 Although an Allegheny County jury convicted James T. Smith of attempted rape and related  
3 offenses, legitimate questions still linger regarding the evidence used to convict him—questions  
4 which can be conclusively answered with today’s DNA technology. In particular, Mr. Smith’s case  
5 represents an excellent case in which post-conviction DNA testing can conclusively prove a  
6 defendant’s innocence (or guilt)—i.e., his case involves a single perpetrator (stranger) rape where  
7 there was a likely transfer of biological evidence between the assailant and the victim. The  
8 Commonwealth concurs with this sentiment because **it consented to Mr. Smith’s request for DNA**  
9 **testing.**<sup>1</sup> Mr. Smith’s case also represents a prime example where trial counsel failed to pursue pre-  
10 trial DNA testing when such testing existed and had the potential to produce results which would  
11 have completely undermined the victim’s identification and exonerated Mr. Smith. To prove trial  
12 counsel’s failure to pursue DNA testing prejudiced him, however, DNA testing must be performed  
13 and exculpatory results produced. Thus, the instant motion seeks DNA testing for two significant  
14 reasons: to prove Mr. Smith’s innocence, which in turn would prove that trial counsel’s  
15 ineffectiveness prejudiced him.

16 The Commonwealth claimed Mr. Smith assaulted Danielle Bosh on Thanksgiving morning  
17 1999. In particular, the Commonwealth argued that Mr. Smith followed Ms. Bosh home from her  
18 work during the early morning hours, where he accosted and assaulted her near her father’s  
19 residence. Ms. Bosh told detectives and medical personal she felt the assailant’s penis make contact  
20 with her buttock and that she scraped his face as she tried to fend him off.<sup>2</sup> After she reported the  
21 assault, medical personnel and police collected a wealth of evidence from Ms. Bosh’s person; a nurse  
22 from Sewickley Valley Hospital collected a rape kit, which included vaginal swabs and smears,  
23 rectal swabs and smears, and fingernail clippings; the nurse also collected Ms. Bosh’s underwear and  
24 sweat pants. The Commonwealth’s forensic experts’ pre-trial reports indicated they failed to detect

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26 <sup>1</sup>As comprehensively explained *infra*, despite having the Commonwealth’s consent  
27 to testing, Mr. Smith must nonetheless litigate the DNA testing issue due to trial counsel’s  
ineffectiveness.

28 <sup>2</sup>Exs. 1.

1 semen or sperm on her underwear and the vaginal and rectal swabs and slides; they also failed to  
2 detect the presence of blood underneath her fingernail clippings.

3         Thus, prior to trial, Mr. Smith and trial counsel knew that the Commonwealth's case centered  
4 heavily on Ms. Bosh's identification of Mr. Smith. Shortly after her assault, police arrested Mr.  
5 Smith and photographed him; detectives subsequently incorporated this photo into a photo array  
6 which they showed Ms. Bosh; after she viewed the photo array, she identified Mr. Smith as her  
7 assailant, and told detectives she was "certain" Mr. Smith was her assailant. Besides Ms. Bosh's  
8 identification, the Commonwealth introduced evidence that shortly after Ms. Bosh's offense, Mr.  
9 Smith tried to follow another woman home. The Commonwealth introduced Sheila Bernardini, who  
10 claimed Mr. Smith followed her car on Thanksgiving morning. Unlike Ms. Bosh, when Ms.  
11 Bernardini noticed Mr. Smith and became frightened, she drove to the nearest police department  
12 where she flagged down a police officer and pointed out Mr. Smith's vehicle before he drove away;  
13 police arrested Mr. Smith shortly thereafter; Mr. Smith told police he mistakenly believed Ms.  
14 Bernardini was an old graduate school friend. It was during this arrest that police collected the  
15 photograph which they incorporated into Ms. Bosh's photo array.

16         Mr. Smith realized it would be terribly difficult to undermine Ms. Bosh's  
17 identification—given Ms. Bernardini's testimony—without biological evidence establishing his actual  
18 innocence. As a result, Mr. Smith informed trial counsel he wished to have DNA testing performed  
19 on the aforementioned items of evidence. Notwithstanding Mr. Smith's request, trial counsel had  
20 a duty to reasonably investigate the DNA testing issue in light of Ms. Bosh's identification and Ms.  
21 Bernardini's testimony; Mr. Smith's request only enhanced this duty. Trial counsel failed to adhere  
22 to this duty; he failed to reasonably investigate, and thoroughly review the physical evidence, and  
23 research the different forms of DNA testing; had trial counsel adhered to his duty, he would have  
24 learned that several items of evidence—including the fingernail scrapings, the rectal swabs, Ms.  
25 Bosh's underwear, and two hairs recovered from her sweat pants—could have been subjected to  
26 different types of DNA testing, despite the pre-trial reports of the Commonwealth's forensic experts.  
27 Notably, the Commonwealth's hair expert excluded Ms. Bosh and Mr. Smith as potential  
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1 contributors of the hairs, meaning the hairs had to have come from an unknown third party.<sup>3</sup>

2 In the instant motion, Mr. Smith seeks the DNA testing he requested at trial. Ordinarily, a  
3 petitioner seeking post-conviction DNA testing would file a motion pursuant to 42 Pa. C.S.A. §  
4 9543.1. Mr. Smith satisfies all of § 9543.1's statutory requirements except one.<sup>4</sup> The one  
5 requirement which he cannot satisfy is § 9543.1(a)(2). Pursuant to this requirement:

6 To obtain post-conviction DNA testing, an applicant must prove: If the evidence was  
7 discovered prior to the applicant's conviction, the evidence shall not have been  
8 subject to the DNA testing requested because the technology for testing was not in  
9 existence at the time of the trial or the applicant's counsel did not seek testing at the  
time of the trial in a case where a verdict was rendered on or before January 1, 1995,  
or the applicant's counsel sought funds from the court to pay for the testing because  
his client was indigent and the court refused the request despite the client's indigency.

10 Mr. Smith cannot satisfy § 9543.1(a)(2)'s requirements because: DNA technology existed at the time  
11 of his trial; the jury rendered its verdict after January 1, 1995; and the court never refused funds for  
12 DNA testing. See Commonwealth v. Williams, 899 A.2d 1060, 1063 (Pa. 2006). Trial counsel's  
13 ineffectiveness represents the only reason Mr. Smith did not receive DNA testing prior to his May  
14 2000 trial.

15 As the Pennsylvania Supreme Court made clear in *Williams, supra*, this requirement is  
16 **jurisdictional**; a trial judge may not consider a § 9543.1 petition for DNA testing if this or another  
17 requirement is not satisfied; **even if, as in Mr. Smith's case, the Commonwealth consents to**  
18 **testing.**<sup>5</sup> In *Williams*, the petitioner's trial counsel—like Mr. Smith's—failed to seek DNA testing for  
19 petitioner's 1996 trial. Realizing petitioner could not qualify for DNA testing pursuant to §

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21 <sup>3</sup>Ex. 6.

22 <sup>4</sup>First, he can specify which items of evidence he wants tested. Second, he consents  
23 to provide bodily fluid samples and acknowledges that law enforcement may use these samples “in  
24 the investigation of other crimes and may be used as evidence against the [him] in other cases.” §  
25 9543.1 (1)(iii). Third, he asserts he is actually innocent of the crimes for which the jury convicted  
him of—i.e., attempted rape and related offenses. Fourth, the perpetrator's identify “was at issue in  
the proceedings that resulted in [Mr. Smith's] conviction and [life] sentence.” § 9543.1 (3)(I). And  
fifth, exculpatory DNA results would prove his “actual innocence of the offense for which [he] was  
convicted”. § 9543.1 (3)(ii)(A).

26 <sup>5</sup>The Commonwealth consented because it recognized Mr. Smith's case—a single  
27 perpetrator rape case—clearly qualified as a Category One case according to the National Institute of  
28 Justice's report regarding post-conviction DNA testing requests. See POSTCONVICTION DNA  
TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, NAT'L INST. JUST, U.S. DEPT. JUST.  
(Sept.1999) (hereinafter NIJ 1999 Report).

1 9543.1—because his trial occurred after January 1, 1995—petitioner filed a PCRA petition pursuant  
2 to 42 Pa. C.S. §§ 9541-9546, “alleging trial counsel’s ineffectiveness for failing to request DNA  
3 testing to show appellant’s blood did not match the semen specimens from the vaginal swab, the  
4 victim’s clothing, and the victim’s bedding.” *Id.* at 1062. Post-conviction counsel realized petitioner  
5 could seek post-conviction discovery in order to prove trial counsel’s failure to seek DNA testing  
6 prejudiced him. The discovery would be DNA testing of the physical evidence. *Id.* In response, the  
7 Commonwealth argued petitioner’s ineffectiveness claim was “moot because he c[ould] obtain relief  
8 (i.e., DNA testing) under §9543.(a)(1).” *Id.* at 1063. Moreover, the Commonwealth “maintained that  
9 if [petitioner] file[d] such an application and the evidence is available for testing, the Commonwealth  
10 w[ould] not oppose it.” *Id.* Despite the Commonwealth’s offer not to oppose—or waive §  
11 9543.1(a)(2)’s requirements—the *Williams* court held that petitioner’s inability to satisfy §  
12 9543.1(a)(2) prevented him from pursuing DNA testing under § 9543.1. *Id.* As the court explained:

13 [T]he statute limits post-trial testing for very salient reasons: If post-trial testing were  
14 routinely available, few would seek pre-trial testing; it would behoove counsel to go  
15 to trial without testing, then seek DNA testing if convicted, there being nothing but  
16 an up-side to a convicted client. **DNA testing that is available cannot become  
after-discovered evidence, and cannot be treated as a second chance lottery  
ticket.** Creating a rule that encourages such gamesmanship is not appropriate.<sup>6</sup>

17 *Id.* (emphasis added). Instead, petitioner’s only opportunity to obtain DNA testing was through his  
18 ineffectiveness claim. *Id.*

19 Accordingly, because Mr. Smith cannot pursue DNA testing under §9543.1, he must litigate  
20 his ineffectiveness claim to obtain DNA testing. To obtain ineffectiveness relief, Mr. Smith must  
21 establish: (1) the underlying claim is of arguable merit; (2) counsel’s performance lacked a  
22 reasonable basis; and (3) counsel’s ineffectiveness prejudiced him. *E.g.*, Commonwealth v. Pierce,  
23 786 A.2d 203, 213 (2001). Failure to address any prong will defeat the claim. *See Commonwealth*  
24 *v. Basemore*, 744 A.2d 717, 738 n. 23 (Pa. 2000). Mr. Smith satisfies the first two prongs. First,  
25 because the perpetrator’s identity was at issue during his trial, “counsel’s failure to pursue evidence  
26 which may have challenged [Ms. Bosh’s] identification of [Mr. Smith] presents an issue of arguable  
27 merit.” Commonwealth v. Williams, 899 A.2d at 1064. Second, trial counsel’s decision not to

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28 <sup>6</sup>*Id.* at 1065 n.4 (emphasis added).

1 pursue DNA testing was unreasonable in light of several factors. Establishing prejudice, however,  
2 “presents problems in this situation,” *Id.* at 1065, because prejudice can only be established if DNA  
3 tests are conducted—and the results are exculpatory. *Id.* The *Williams* court cured this problem by  
4 holding that, once a petitioner establishes the first two prongs, he may pursue DNA testing to prove  
5 prejudice (or the third prong):

6 By first requiring appellant to establish counsel lacked a reasonable basis for not  
7 pursuing DNA testing, the prejudice prong is capable of being resolved. If appellant  
8 demonstrates counsel lacked a reasonable strategy, DNA testing can then be  
conducted; the results would allow the PCRA court to address the prejudice prong  
comprehensively.<sup>7</sup>

9 Consequently, because Mr. Smith satisfies the first two prongs, the Court must grant his DNA testing  
10 request so it and the appellate courts may adequately and accurately address the prejudice prong.

## 11 **II. Statement of Facts**

12 Mr. Smith’s case involves two separate incidents: (1) Danielle Bosh’s sexual assault; and (2)  
13 Sheila Bernardini’s car stalking case. Although a jury only convicted Mr. Smith of Ms. Bosh’s  
14 sexual assault, Ms. Bernardini’s case played a role in why police arrested Mr. Smith for Ms. Bosh’s  
15 offense.

### 16 **A. Danielle Bosh’s Offense**

17 On the morning of November 25, 1999, shortly after 6:00 a.m., Danielle Bosh was traveling  
18 home from work (PNC Bank in downtown Pittsburgh) on Pennsylvania State Route 65 when she  
19 noticed—what she believed to be—a small truck swerving in the lane behind her.<sup>8</sup> It was still too dark  
20 to capture a good description of the driver.<sup>9</sup> As she traveled further down Route 65, Ms. Bosh  
21 noticed that the vehicle was actually a small sports utility vehicle (SUV) and that the SUV appeared  
22 to be following her.<sup>10</sup>

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24 <sup>7</sup>*Id.* at 1065-66.

25 <sup>8</sup>NT, Trial, at 67.

26 <sup>9</sup>According to the U.S. Naval Observatory Astronomical Applications Department,  
27 sunrise on November 25, 1999 was 7:17 a.m. See [http://aa.usno.navy.mil/data/docs/RS\\_OneDay.php](http://aa.usno.navy.mil/data/docs/RS_OneDay.php)  
(last visited Oct. 11, 2007).

28 <sup>10</sup>*Id.* at 67-68.

1 For instance, when she pulled into the Giant Eagle Supermarket in Leetsdale Township, the  
2 SUV followed her and parked in Giant Eagle's parking lot as well.<sup>11</sup> At this point, Ms. Bosh  
3 determined that the SUV was silver, but she could not see the driver.<sup>12</sup> Ms. Bosh entered the Giant  
4 Eagle, purchased some items, and returned to her car; she was unsure whether the driver of the SUV  
5 exited the SUV; she herself never saw anyone exit the SUV.<sup>13</sup>

6 After she returned to her car, Ms. Bosh resumed traveling home on Route 65. Once on Route  
7 65, she immediately realized the SUV was following her again.<sup>14</sup> The SUV followed her the entire  
8 way home; once home, Ms. Bosh had to find a parking space because she could not park directly in  
9 front of her house; she found the first available parking space nearest her house.<sup>15</sup> Immediately  
10 before exiting her vehicle, the SUV passed slowly past her at a close range (within six feet) and  
11 proceeded down the street. Ms. Bosh described the SUV as "a silver Tracker or maybe a Honda"  
12 with a spare tire on the back with white lettering.<sup>16</sup> Ms. Bosh did not see the SUV stop or park.<sup>17</sup>

13 At this point, Mr. Bosh exited her vehicle and walked toward her residence.<sup>18</sup> The time, by  
14 her estimation, was roughly 6:40 a.m; she also said it was dark.<sup>19</sup> As she approached her residence,  
15 the crunching of gravel—as if someone was walking nearby—startled her. This caused her to speed  
16 up her pace and to look behind her; when she turned around, she thought she saw her neighbor  
17 walking approximately twenty feet behind her.<sup>20</sup> Ms. Bosh continued toward her residence; when  
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19 <sup>11</sup>Id. at 69.

20 <sup>12</sup>Id. at 103.

21 <sup>13</sup>Id. at 69.

22 <sup>14</sup>Id. at 65, 101.

23 <sup>15</sup>Id. at 69-70, 101.

24 <sup>16</sup>Id. at 83, 102.

25 <sup>17</sup>Id. at 108.

26 <sup>18</sup>Id. a 70.

27 <sup>19</sup>Id. at 110.

28 <sup>20</sup>Id. at 71, 108-09.



1 she arrived at the front porch steps, she bent over to pick up the newspaper.<sup>21</sup> As she bent over, she  
2 tried to capture a glimpse of the person walking behind her. At this point, however, someone  
3 grabbed her from behind and placed a hand over her mouth—at which point she began screaming and  
4 struggling with the assailant.<sup>22</sup>

5 The assailant spun her around, threw her down against the concrete front porch steps, and  
6 slapped her in the face a couple times.<sup>23</sup> Ms. Bosh continued to struggle with her  
7 assailant—“scraping” at his face with her sharp acrylic nails; she felt confident she inflicted scratches  
8 on the assailant’s face because of her sharp nails and because she felt his smooth, clean cut skin.<sup>24</sup>  
9 During the struggle she stood face to face with her assailant; she said he wore a black necklace with  
10 three beads, a plain black hat, and a beige polo shirt with a red rider insignia; she also said he reeked  
11 of an “unbearable” smell of alcohol and “heavy” cologne.<sup>25</sup>

12 The assailant demanded that Ms. Bosh turn over; when she refused, he forcibly flipped her  
13 over on her stomach and pulled down her sweat pants and underwear.<sup>26</sup> At this point, the assailant  
14 tried to penetrate her with his partially erect penis; Ms. Bosh felt his penis make contact with her,  
15 but he never penetrated her. Immediately after his penis made contact with her, Ms. Bosh’s father  
16 turned on the front porch light and appeared at the front door—at which point, the assailant fled the  
17 scene.<sup>27</sup> Ms. Bosh’s father chased the assailant down the street. As he did so, he crossed paths with  
18 Officer Shawn Flemming of the Leetsdale Police Department who was traveling home from his night  
19 shift in his personal vehicle. Officer Flemming told him he had just seen an individual run in front  
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22 <sup>21</sup>Id. at 71.

23 <sup>22</sup>Id. at 72, 110.

24 <sup>23</sup>Id. at 111.

25 <sup>24</sup>Id. at 72, 76, 115.

26 <sup>25</sup>Id. at 71, 77, 122-23.

27 <sup>26</sup>Id. at 73.

28 <sup>27</sup>Id. at 73-74, 115.

1 of his vehicle; he also told him the individual was “running pretty fast.”<sup>28</sup> Ms. Bosh’s father failed  
2 to catch the assailant. Notably, when Officer Flemming viewed a photo array, he failed to identify  
3 Mr. Smith as the individual he saw run past his vehicle.<sup>29</sup>

4 Police transported Ms. Bosh to Sewickley Hospital’s emergency room where medical  
5 personnel examined and treated her for scrapes and bruises sustained during the assault. Before  
6 medical personnel collected any physical evidence, they permitted Ms. Bosh to wash her hands.<sup>30</sup>  
7 After she washed her hands, medical personnel collected various pieces of physical evidence,  
8 including rape kit samples (i.e., vaginal and rectal swabs and slides), head and pubic hair samples,  
9 Ms. Bosh’s acrylic nails, and scrapings from underneath her acrylic nails.<sup>31</sup> *See infra* (discussing in  
10 detail the physical evidence and the results of any forensic testing).

11 While medical personnel examined Ms. Bosh, Allegheny County Detective Joseph Cawley  
12 interviewed her. During the interview, Ms. Bosh described her assailant as a “stocky” built, “mixed  
13 race or black” male, who stood about 5’6” or 5’7” and weighed roughly 160 pounds; she also said he  
14 looked “approximately 25 to 30 years in age.”<sup>32</sup> After the interview, Detective Cawley contacted  
15 Detective William Palmer—the Allegheny County Police Department’s computerized sketch artist.  
16 During her interview with Detective Palmer, Ms. Bosh described her assailant as having “caramel  
17 colored” skin.<sup>33</sup> When Detective Palmer told her that his computer system could only select white  
18 or black features, she told him her assailant had features closer to a “white person’s style.”<sup>34</sup>

19 **B. Sheila Bernardini’s Offense**

20 At approximately 7:40 a.m. the same morning (November 25, 1999), Sheila Bernardini—a  
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22 <sup>28</sup>*Id.* at 138.

23 <sup>29</sup>*Id.* at 140, 144.

24 <sup>30</sup>*Id.* at 115.

25 <sup>31</sup>Ex. 2.

26 <sup>32</sup>*Id.* at 75, 118, 249.

27 <sup>33</sup>*Id.* at 155.

28 <sup>34</sup>*Id.*

1 nurse—left work after working the night shift at Allegheny General Hospital. She traveled home on  
2 Pennsylvania Route 28. As she traveled Route 28, she merged into the passing lane. Once in the  
3 passing lane, she noticed a vehicle in the non-passing lane begin to drift into her lane; whereupon  
4 she beeped the horn. This caused the vehicle to swerve back into the non-passing lane. After Ms.  
5 Bernardini passed another vehicle, she noticed the vehicle she honked at pulled behind her in the  
6 passing lane and started to follow her.<sup>35</sup>

7 Mr. Smith was driving the vehicle Ms. Bernardini honked at; the vehicle was his silver “GEO  
8 Tracker.” Mr. Smith was on his way to his parents’ house in Deer Lakes Township; he spent the  
9 night with two friends—Mark and Mike Feim—at their Greentree townhouse. He left the Feim’s  
10 townhouse at approximately 7:05 a.m. to travel to his parents’ house to spend Thanksgiving with  
11 them.<sup>36</sup> When he left the Feim’s townhouse, he eventually traveled to Route 28. It was on Route  
12 28 he recalled encountering Ms. Bernardini. After she honked at him, and both of them made eye  
13 contact, he immediately believed she looked very much like his graduate school friend Michelle.<sup>37</sup>  
14 This, he thought, was why the female driver honked at him—she thought she also recognized him.  
15 Not having seen Michelle in a while, Mr. Smith wished to talk with her, so he tried to capture her  
16 attention with a hand gesture. When this did not work, Mr. Smith decided to follow her.<sup>38</sup> Mr.  
17 Smith followed Ms. Bernardini’s vehicle as she exited Route 28 and proceeded through Natrona  
18 Heights, at one point following her through a McDonald’s drive thru and shopping center parking  
19 lot.<sup>39</sup> As Mr. Smith continued to follow her, Ms. Bernardini noticed that his GEO Tracker had a  
20 prominent roof rack.<sup>40</sup>

21 Scared that an unknown man was following her, Ms. Bernardini eventually traveled to the  
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23 <sup>35</sup>Id. at 166-168.

24 <sup>36</sup>Id. at 294, 355.

25 <sup>37</sup>Id. at 355, 357.

26 <sup>38</sup>Id. at 357-358.

27 <sup>39</sup>Id. at 168-69, 359-60.

28 <sup>40</sup>Id. at 172-73, 175-76.

1 Harrison Township Police Station. Intent on talking with his graduate school friend Michelle, Mr.  
2 Smith followed her (Ms. Bernadini) into the Harrison Township Police Station parking lot.  
3 Although Mr. Smith questioned whether the female driver was in fact Michelle—after she refused to  
4 stop and talk with him at McDonald’s and the shopping center—he was not certain of this until he  
5 pulled into the Harrison Township Police Station parking lot and captured a full view of Ms.  
6 Bernadini’s face.<sup>41</sup> Once he realized Ms. Bernadini was not in fact his graduate school friend  
7 Michelle, he turned around, exited the parking lot, and headed toward his parents’ house.

8 When Ms. Bernardini pulled into the police station, she waved down Sergeant Michael  
9 Ropelewski who was entering his patrol car. She told Sgt. Ropelwski that the silver GEO  
10 Tracker—which was exiting the parking lot—had followed her all the way from Route 28. Sgt.  
11 Ropelewski immediately exited the parking lot and gave chase to Mr. Smith; he radioed other police  
12 departments to assist him in his pursuit.<sup>42</sup> Tarentum Police Officer Robert Lang heard the radio  
13 dispatch and positioned his patrol car on an on-ramp near Route 28. Shortly thereafter, Officer Lang  
14 spotted Mr. Smith’s GEO Tracker exiting Route 28 onto Bull Creek Road. Officer Lang activated  
15 his lights and siren in an attempt to stop Mr. Smith. After Officer Lang caught up to him, Mr. Smith  
16 panicked because he possessed a small amount of marijuana in his pocket and he did not have his  
17 license on him.<sup>43</sup> Once he panicked, he sped up in order to discard the marijuana, but when he tossed  
18 it out the window he lost control of his vehicle and ran into some mailboxes. The collision caused  
19 him to hit his face off the steering wheel.<sup>44</sup> After the collision, he exited his vehicle and asked why  
20 he was stopped.<sup>45</sup> Officer Lang informed him that the Harrison Township Police Department  
21 requested he be stopped and detained for questioning. Notably, as Officer Lang detained him, he did  
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24 <sup>41</sup>Id. at 359-60.

25 <sup>42</sup>Id. at 178, 180.

26 <sup>43</sup>Id. at 362-63.

27 <sup>44</sup>Id. at 362.

28 <sup>45</sup>Id. at 211-12.

1 not detect the smell of alcohol on Mr. Smith.<sup>46</sup>

2 Police transported Mr. Smith back to the Harrison Township Police Department where Sgt.  
3 Ropeleswki interviewed him.<sup>47</sup> Sgt. Ropeleswki did not force Mr. Smith to undergo any field  
4 sobriety tests because Mr. Smith did not reek or smell of alcohol; in fact, none of the officers who  
5 participated in Mr. Smith's arrest smelled alcohol on him.<sup>48</sup> Mr. Smith provided a written statement  
6 to Sgt. Ropeleswki explaining why he followed Ms. Bernadini—i.e., he thought she was his graduate  
7 school friend Michelle.<sup>49</sup> Sgt. Ropelewski took two Polaroids of Mr. Smith and released him to his  
8 father's custody.<sup>50</sup>

9 The next day—November 26, 1999—Sgt. Ropelewski read a newspaper account regarding  
10 Danielle Bosh's sexual assault and called Detective Cawley.<sup>51</sup> Detective Cawley spoke with Sgt.  
11 Ropelewski and retrieved the two Polaroids Sgt. Ropelewski took.<sup>52</sup> Detective Cawley contacted Ms.  
12 Bosh, informed her the police may have identified her assailant, and asked if she would view a photo  
13 line-up which included the suspect. Detective Cawley (and another Allegheny County Detective)  
14 presented the photo array to Ms. Bosh at her residence.<sup>53</sup> Ms. Bosh viewed the photos, pointed at  
15 Mr. Smith's photo and said the photo "looked like" her assailant; she then said she was "pretty sure"  
16 that this was her assailant.<sup>54</sup> On a scale of 1 to 10—1 being the least similar to the assailant and 10  
17 the most—Mr. Bosh rated Mr. Smith's photograph an 8.<sup>55</sup> Immediately thereafter, Detective Cawley  
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19 <sup>46</sup>Id. at 216.

20 <sup>47</sup>Id. at 183.

21 <sup>48</sup>Id. at 202-03.

22 <sup>49</sup>Id. at 185-86; Ex. 3.

23 <sup>50</sup>Id. at 203.

24 <sup>51</sup>Id. at 190.

25 <sup>52</sup>Id. at 252.

26 <sup>53</sup>Ex. 4.

27 <sup>54</sup>Id.

28 <sup>55</sup>Id.

1 told her he intended to arrest someone that day. Once informed of this, Ms. Bosh re-examined the  
2 photos; after she re-examined them, she said she was now “certain” Mr. Smith was her assailant and  
3 that she remembered “more details about the attacker’s face” after she viewed the photos for a  
4 second time.<sup>56</sup>

5 Based on Ms. Bosh’s photo identification, Detective Cawley obtained an arrest warrant and  
6 arrested Mr. Smith. Police transported Mr. Smith to the Allegheny County Jail where intake officials  
7 processed him. During processing, intake officials measured him at 5'9", 180 pounds. The first time  
8 Ms. Bosh saw Mr. Smith in person occurred at his preliminary hearing—nearly four weeks after the  
9 attack—when he was handcuffed and shackled and sitting at the courtroom table by himself.<sup>57</sup> Shortly  
10 into the hearing, she identified Mr. Smith as her assailant. The Allegheny County District Attorney’s  
11 Office charged Mr. Smith with: one (1) count of attempted rape; one (1) count of aggravated assault;  
12 one (1) count of simple assault; one (1) count of indecent assault; and one (1) count of making  
13 terroristic threats.

14 **C. Physical Evidence and Chain of Custody**

15 Medical personnel and police collected a wealth of evidence from Ms. Bosh’s person which  
16 **could have** been (and still can be) subjected to DNA technology. Dr. Munoz and Sally Kane (a  
17 registered nurse) examined and treated Ms. Bosh at Sewickley Valley Hospital; part of their  
18 examination included collecting specimens for a rape kit, which included: (1) vaginal swabs and  
19 smears, (2) rectal swabs and smears, and (3) fingernail clippings.<sup>58</sup> Dr. Munoz and Nurse Kane also  
20 collected Ms. Bosh’s underwear, sweat pants, and sweat shirt.<sup>59</sup> On November 25, 1999, shortly  
21 after Dr. Munoz and Nurse Kane collected the rape kit specimen, (Allegheny County) Detectives  
22 Cawley and Kozlowki took custody of the rape kit and Ms. Bosh’s underwear, sweat shirt, and sweat  
23  
24

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25 <sup>56</sup>Id.; NT, Trial, at 253-54, 278-79.

26 <sup>57</sup>NT, Trail, at 130-31, 357.

27 <sup>58</sup>Ex. 2.

28 <sup>59</sup>Ex. 5.

1 pants.<sup>60</sup> The Allegheny County Police Department submitted the rape kit to the Allegheny County  
2 Coroner's Office for testing.<sup>61</sup> Criminalist Jennifer L. Retsch examined the rape kit's content,  
3 including Ms. Bosh's clothing. Ms. Retsch's examinations revealed the following:

4 **One Rectal Smear/Slide:** Ms. Retsch microscopically examined the  
5 **only** rectal slide for the presence of sperm; she failed to detect  
6 sperm.<sup>62</sup>

7 **Two Rectal Swabs:** Ms. Retsch chemically and microscopically  
8 examined the **two** swabs for the presence of semen. Neither exam  
9 detected the presence of semen.<sup>63</sup>

10 **Nail Clippings:** Ms. Retsch visually examined the **fourteen** nails for  
11 the presence of blood or hairs; she failed to detect blood or hair.<sup>64</sup>

12 **Ms. Bosh's Bikini Style Underwear:** Ms. Retsch chemically  
13 examined the underwear for the presence of semen and visually using  
14 a monochromatic light source; she failed to detect semen with either  
15 examination. She also visually inspected the underwear for the  
16 presence of blood or hairs; she failed to detect blood or hairs.<sup>65</sup>

17 Ms. Retsch incorporated her findings into her March 21, 2000 official "Report of Laboratory  
18 Findings."<sup>66</sup>

19 Besides Ms. Retsch's examinations, Criminalist Thomas Meyers examined Ms. Bosh's sweat  
20 pants and recovered **two hairs—a head and body hair**. Mr. Meyers microscopically examined the  
21 hairs and excluded Ms. Bosh and Mr. Smith as possible contributors.<sup>67</sup> Mr. Myers, however, failed

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22 <sup>60</sup>Id.

23 <sup>61</sup>Ex. 2.

24 <sup>62</sup>Id.

25 <sup>63</sup>Id.

26 <sup>64</sup>Id.

27 <sup>65</sup>Id.

28 <sup>66</sup>Id.

<sup>67</sup>Ex. 6.

1 to timely disclose his exculpatory findings; he did not disclose them until the first day of trial.<sup>68</sup>

2 **D. Pre-Trial and Trial**

3 **1. Mr. Smith's Request For DNA Testing**

4 Besides Mr. Myers' untimely report, trial counsel timely received all the police and crime  
5 laboratory reports identifying what items of evidence medical personnel and the police collected.  
6 Upon receiving and reviewing these reports, Mr. Smith informed trial counsel he wanted DNA  
7 testing performed on items of evidence which would establish his innocence. Notwithstanding Mr.  
8 Smith's request, trial counsel had an independent duty to investigate the DNA testing issue because  
9 the Commonwealth's case rested heavily on Ms. Bosh's identification of Mr. Smith.<sup>69</sup> Mr. Smith's  
10 request only enhanced trial counsel's duty.

11 Trial counsel, however, failed to adequately review the physical evidence and to reasonably  
12 research the different forms of DNA testing to determine whether DNA testing could be performed  
13 on certain items of physical evidence. Had trial counsel reasonably reviewed and-researched these  
14 issues, he would have learned that certain items of evidence could have been subjected to DNA  
15 testing. Likewise, trial counsel failed to move for a continuance after Mr. Myers disclosed his  
16 exculpatory hair report to adequately investigate whether DNA testing could be performed on the  
17 head and body hairs recovered from Ms. Bosh's sweat pants. Had trial counsel reasonably  
18 investigated the issue, he would have learned that the hairs could have been subjected to DNA  
19 testing. Likewise, reasonably competent trial counsel would have pursued DNA testing because  
20 there were few, if any, circumstances which counseled against DNA testing. For instance, Ms. Bosh  
21 and Mr. Smith were complete strangers; as such, she did not immediately identify him when  
22 detectives showed her the photo array.<sup>70</sup> Similarly, this is a clear-cut single perpetrator rape case;  
23 there is no evidence of more than one assailant or biological evidence donor. Thus, trial counsel's

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25 <sup>68</sup>NT, Trial, at 6-10; see also Ex. 6. Trial counsel moved for a dismissal based on the  
26 Commonwealth's failure to timely disclose exculpatory evidence; the trial judge denied the request.  
Id.

27 <sup>69</sup>See *infra*, n.86.

28 <sup>70</sup>Ex. 4.



1 decision not to pursue DNA was objectively unreasonable.

2 **2. The Commonwealth's Case**

3 The Commonwealth premised its case entirely on Ms. Bosh's out-of-court and in-court  
4 identifications of Mr. Smith and on Ms. Bernardini's testimony.<sup>71</sup> As Deputy District Attorney  
5 (DDA) Janet Necessary said: "Obviously, the victim's identification of James Smith as her attacker  
6 is a very important piece of evidence in the case."<sup>72</sup> DDA Necessary made this clear when she spent  
7 the great majority of her closing argument trying to identify factors which bolstered the reliability  
8 of Ms. Bosh's identification.<sup>73</sup> The prosecution and its forensic experts claimed that no physical  
9 evidence linked Mr. Smith to Ms. Bosh's sexual assault.<sup>74</sup>

10 **3. The Defense's Case**

11 Mr. Smith denied sexually assaulting Ms. Bosh and presented an alibi defense. He testified  
12 that—at the time of Ms. Bosh's assault (i.e., roughly 6:40 to 6:45 a.m.)—he was asleep at his friends'  
13 Greentree townhouse.<sup>75</sup> He did not wake-up until shortly before 7:00 a.m. and did not leave the  
14 townhouse until shortly after 7:00 a.m.<sup>76</sup> Michael and Mark Fiem corroborated Mr. Smith's claim  
15 of when he left their Greentree townhouse.<sup>77</sup>

16 With respect to the Sheila Bernardini incident, Mr. Smith explained—as he initially did to  
17 detectives—that the entire incident represented one big misunderstanding; he truly believed Ms.  
18 Bernardini was his graduate school friend Michelle. Once he realized Ms. Bernardini was not in fact  
19 his friend, he immediately quit following her.<sup>78</sup>

20  
21 <sup>71</sup>NT, Trial, 64-89, 132-36 (Danielle Bosh's testimony).

22 <sup>72</sup>Id. at 423.

23 <sup>73</sup>Id. at 423-443.

24 <sup>74</sup>Id. at 229, 232, 235-36, 239.

25 <sup>75</sup>Id. at 348-55.

26 <sup>76</sup>Id. at 354-55.

27 <sup>77</sup>Id. at 293-342.

28 <sup>78</sup>Id. at 357-61.

1                                   **4.     Verdict and Sentencing**

2             The lack of direct and physical evidence linking Mr. Smith to Ms. Bosh’s sexual assault  
3 raised doubt in the jury’s eyes. For instance, on May 15, 2000, after deliberating for nearly two  
4 hours—3:26 p.m. to 5:25 p.m.—the jury sent the trial judge the following questions: (1) “Will the  
5 Judge please read the instructions on what is needed to find the Defendant guilty or not guilty;”<sup>79</sup> and  
6 (2) “What is reasonable doubt, as pertains to guilty or not guilty?”<sup>80</sup> Once the trial judge answered  
7 these questions, by re-reading the reasonable doubt and burden of proof instructions, he sent the jury  
8 back to continue its deliberations. After deliberating for two more hours—until 7:20 p.m.—the jury  
9 sent another note to the trial judge asking, “When was the lineup picture taken?”<sup>81</sup> The trial judge  
10 refused to answer this question and instructed the jury to continue its deliberations.<sup>82</sup> At 8:35  
11 p.m.—more than five hours after it began deliberating—the jury reached a verdict; the jury acquitted  
12 Mr. Smith of aggravated assault, but convicted him of (1) criminal attempted rape and/or involuntary  
13 deviant sexual intercourse; (2) simple assault; (3) indecent assault; and (4) making terroristic  
14 threats.<sup>83</sup> On July 14, 2000 the trial judge sentenced Mr. Smith to an aggregate term of 13½ to 27  
15 years in prison.

16             The jury’s deliberations clearly indicated it needed additional evidence in order to tip the  
17 scales of justice in Mr. Smith’s favor. Such evidence could have come in the form of exculpatory  
18 DNA results. Due to trial counsel’s failure to pursue DNA testing, however, the jury could not  
19 consider such evidence.

20 **V.     Arguments**

21             **A.     Mr. Smith’s Petition is Timely**

22             On May 15, 2000, an Allegheny County jury convicted Mr. Smith of attempted rape and  
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24                                   <sup>79</sup>Id. at 477.

25                                   <sup>80</sup>Id. at 478.

26                                   <sup>81</sup>Id. at 483.

27                                   <sup>82</sup>Id. at 485.

28                                   <sup>83</sup>Id. at 486.

1 related offenses. On July 14, 2000, the trial judge sentenced Mr. Smith to thirteen-and-one-half to  
2 twenty-seven years in prison. Mr. Smith filed a timely notice of appeal and on April 2, 2002, the  
3 Pennsylvania Superior Court affirmed his conviction and sentence. Due to appellate counsel's  
4 failure to timely inform Mr. Smith of the Superior Court's decision, he failed to file a timely appeal  
5 to the Pennsylvania Supreme Court.

6 On October 15, 2003, Mr. Smith filed a pro se state post-conviction petition pursuant to 42  
7 Pa. C.S.A. § 9541 (PCRA petition) in the Common Pleas Court of Allegheny County. On February  
8 28, 2005, the trial judge appointed the Allegheny County Public Defender's Office to represent Mr.  
9 Smith and to file an amended PCRA petition on his behalf. Mr. Smith's court-appointed PCRA  
10 attorney—Daniel DeLisio—filed an amended PCRA petition. The filing of the initial amended PCRA  
11 petition resulted in the reinstatement of Mr. Smith's right to seek allowance of appeal in the  
12 Pennsylvania Supreme Court. Mr. Smith originally forfeited this right due to appellate counsel's  
13 failure to timely inform him of his appellate rights once the Superior Court issued its decision  
14 affirming his conviction and sentence. Once the trial judge reinstated his allocatur rights, the trial  
15 judge dismissed Mr. Smith's amended PCRA petition without prejudice so he could pursue his  
16 appeal to the Pennsylvania Supreme Court. On September 14, 2006, Mr. DeLisio filed a Petition  
17 for Allowance of Appeal with Pennsylvania Supreme Court, which it denied on January 4, 2007.  
18 By filing this § 9541 petition on January 3rd 2008, it is timely under the PCRA Act.

19 **B. Trial counsel Was Ineffective For Not Pursuing DNA Testing**

20 Mr. Smith had a clearly established right to effective assistance of counsel when the  
21 Commonwealth prosecuted him in May 2000. E.g., Strickland v. Washington, 466 U.S. 668, 686  
22 (1984); McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). To obtain relief pursuant to an  
23 ineffectiveness claim, Mr. Smith must establish: (1) the underlying claim is of arguable merit; (2)  
24 counsel's performance lacked a reasonable basis; and (3) counsel's ineffectiveness prejudiced him.  
25 E.g., Commonwealth v. Pierce, 786 A.2d at 213. At this point, Mr. Smith need only demonstrate  
26 his ineffectiveness claim is of arguable merit and that trial counsel did not have a reasonable basis  
27 for not pursuing DNA testing. See Commonwealth v. Smith, 899 A.2d at 1064-65. Once he satisfies  
28 the first two prongs, he is entitled to DNA testing to prove prejudice. Id. Mr. Smith satisfies the first

1 two prongs and is entitled to DNA testing.

2 **1. Trial Counsel's Ineffectiveness Was Neither Previously Litigated**  
3 **Nor Waived**

4 Mr. Smith's ineffectiveness claim is not previously litigated; he did not raise the issue on  
5 direct appeal to the Superior Court. Mr. Smith's ineffectiveness claim has not been waived. See 42  
6 Pa. C. S. §9543(a)(3). Pursuant to Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), a petitioner  
7 should wait to raise ineffectiveness claims until collateral review. Thus, any ineffectiveness claim  
8 will be waived only after a petitioner has had an opportunity to raise that claim on collateral review  
9 and failed to avail himself of that opportunity. Id. at 738.

10 **2. Mr. Smith's Ineffectiveness Claim is of Arguable Merit**

11 Mr. Smith's ineffectiveness claim has arguable merit because the assailant's identity was at  
12 issue during his trial. E.g., Commonwealth v. Williams, 899 A.2d at 1064. Mr. Smith not only  
13 challenged Ms. Bosh's identification, he presented an alibi defense.<sup>84</sup> Even though the jury—as  
14 indicated by its verdict—found Ms. Bosh's identification more credible than Mr. Smith's alibi  
15 defense, such a verdict does not mean the perpetrator's identity was not at issue. Id. at 1063. More  
16 importantly, during DDA Necessary's closing argument, she made the following comment: "The  
17 issue in this case is, of course, the identity of the perpetrator."<sup>85</sup> Individually and collectively, both  
18 facts demonstrate "identity" was at issue.<sup>86</sup> Thus, "the first prong of the ineffectiveness test has been  
19 met, and" the Court must "turn to the reasonable basis inquiry." Id. at 1064.

20 **3. Trial Counsel Did Not Have a Reasonable Basis Not to**  
21 **Pursue DNA Testing**

22 <sup>84</sup>An alibi "places the defendant at the relevant time in a different place than the scene  
23 involved and so removed therefrom **as to render it impossible for him to be the guilty party.**"  
24 Commonwealth v. Roxberry, 602 A.2d 826, 827 (Pa. 1992) (internal quotations and citation omitted)  
(emphasis added); see also Commonwealth v. Williams, 899 A.2d 1063 ("appellant presented an  
25 alibi defense, which by its nature challenges identification.").

26 <sup>85</sup>NT, Trial, at 419.

27 <sup>86</sup>Several cases—which pre-date Mr. Smith's conviction and Pennsylvania's DNA  
28 testing statute—hold that DNA testing should be pursued where the petitioner's conviction is  
premiered on the victim's identification. E.g., Commonwealth v. Robinson, 682 A.2d 831, 836-37  
(Pa. Super. 1996); Commonwealth v. Reese, 663 A.2d 206, 208-09 (Pa. Super. 1995);  
Commonwealth v. Brisson, 618 A.2d 420, 425 (Pa. Super. 1992).

