

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**.

18
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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.**¹ 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.² 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

26 ¹As 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 ²Exs. 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
28

1 contributors of the hairs, meaning the hairs had to have come from an unknown third party.³

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.⁴ 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.**⁵ 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 ³Ex. 6.

22 ⁴First, 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 ⁵The 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.⁶

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

28 ⁶*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.⁷

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.⁸ It was still too dark
20 to capture a good description of the driver.⁹ 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.¹⁰

24 ⁷*Id.* at 1065-66.

25 ⁸NT, Trial, at 67.

26 ⁹According 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
(last visited Oct. 11, 2007).

28 ¹⁰*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.¹¹ At this point, Ms. Bosh
3 determined that the SUV was silver, but she could not see the driver.¹² 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.¹³

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.¹⁴ 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.¹⁵ 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.¹⁶ Ms. Bosh did not see the SUV stop or park.¹⁷

13 At this point, Mr. Bosh exited her vehicle and walked toward her residence.¹⁸ The time, by
14 her estimation, was roughly 6:40 a.m; she also said it was dark.¹⁹ 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.²⁰ Ms. Bosh continued toward her residence; when
18

19 ¹¹Id. at 69.

20 ¹²Id. at 103.

21 ¹³Id. at 69.

22 ¹⁴Id. at 65, 101.

23 ¹⁵Id. at 69-70, 101.

24 ¹⁶Id. at 83, 102.

25 ¹⁷Id. at 108.

26 ¹⁸Id. a 70.

27 ¹⁹Id. at 110.

28 ²⁰Id. at 71, 108-09.

1 she arrived at the front porch steps, she bent over to pick up the newspaper.²¹ 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.²²

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.²³ 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.²⁴
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.²⁵

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.²⁶ 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.²⁷ 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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21
22 ²¹Id. at 71.

23 ²²Id. at 72, 110.

24 ²³Id. at 111.

25 ²⁴Id. at 72, 76, 115.

26 ²⁵Id. at 71, 77, 122-23.

27 ²⁶Id. at 73.

28 ²⁷Id. at 73-74, 115.

1 of his vehicle; he also told him the individual was “running pretty fast.”²⁸ 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.²⁹

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.³⁰
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.³¹ *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.”³² 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.³³ 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.”³⁴

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 ²⁸*Id.* at 138.

23 ²⁹*Id.* at 140, 144.

24 ³⁰*Id.* at 115.

25 ³¹Ex. 2.

26 ³²*Id.* at 75, 118, 249.

27 ³³*Id.* at 155.

28 ³⁴*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.³⁵

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.³⁶ 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.³⁷
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.³⁸ 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.³⁹ As Mr. Smith continued to follow her, Ms. Bernardini noticed that his GEO Tracker had a
20 prominent roof rack.⁴⁰

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

24 ³⁶Id. at 294, 355.

25 ³⁷Id. at 355, 357.

26 ³⁸Id. at 357-358.

27 ³⁹Id. at 168-69, 359-60.

28 ⁴⁰Id. 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.⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴ After the collision, he exited his vehicle and asked why
20 he was stopped.⁴⁵ 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 ⁴¹Id. at 359-60.

25 ⁴²Id. at 178, 180.

26 ⁴³Id. at 362-63.

27 ⁴⁴Id. at 362.

28 ⁴⁵Id. at 211-12.

1 not detect the smell of alcohol on Mr. Smith.⁴⁶

2 Police transported Mr. Smith back to the Harrison Township Police Department where Sgt.
3 Ropeleswki interviewed him.⁴⁷ 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.⁴⁸ 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.⁴⁹ Sgt. Ropelewski took two Polaroids of Mr. Smith and released him to his
8 father's custody.⁵⁰

9 The next day—November 26, 1999—Sgt. Ropelewski read a newspaper account regarding
10 Danielle Bosh's sexual assault and called Detective Cawley.⁵¹ Detective Cawley spoke with Sgt.
11 Ropelewski and retrieved the two Polaroids Sgt. Ropelewski took.⁵² 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.⁵³ 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.⁵⁴ 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 8.⁵⁵ Immediately thereafter, Detective Cawley
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19 ⁴⁶Id. at 216.

20 ⁴⁷Id. at 183.

21 ⁴⁸Id. at 202-03.

22 ⁴⁹Id. at 185-86; Ex. 3.

23 ⁵⁰Id. at 203.

24 ⁵¹Id. at 190.

25 ⁵²Id. at 252.

26 ⁵³Ex. 4.

27 ⁵⁴Id.

28 ⁵⁵Id.

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.⁵⁶

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.⁵⁷ 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.⁵⁸ Dr. Munoz and Nurse Kane also
20 collected Ms. Bosh’s underwear, sweat pants, and sweat shirt.⁵⁹ 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

25 ⁵⁶Id.; NT, Trial, at 253-54, 278-79.

26 ⁵⁷NT, Trail, at 130-31, 357.

27 ⁵⁸Ex. 2.

28 ⁵⁹Ex. 5.

1 pants.⁶⁰ The Allegheny County Police Department submitted the rape kit to the Allegheny County
2 Coroner's Office for testing.⁶¹ 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.⁶²

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.⁶³

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.⁶⁴

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.⁶⁵

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

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.⁶⁷ Mr. Myers, however, failed

22 ⁶⁰Id.

23 ⁶¹Ex. 2.

24 ⁶²Id.

25 ⁶³Id.

26 ⁶⁴Id.

27 ⁶⁵Id.

28 ⁶⁶Id.

⁶⁷Ex. 6.

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

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.⁶⁹ 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.⁷⁰ 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

25 ⁶⁸NT, 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 ⁶⁹See *infra*, n.86.

28 ⁷⁰Ex. 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.⁷¹ 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."⁷² 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.⁷³ The prosecution and its forensic experts claimed that no physical
9 evidence linked Mr. Smith to Ms. Bosh's sexual assault.⁷⁴

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.⁷⁵ 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.⁷⁶ Michael and Mark Fiem corroborated Mr. Smith's claim
15 of when he left their Greentree townhouse.⁷⁷

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.⁷⁸

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

22 ⁷²Id. at 423.

23 ⁷³Id. at 423-443.

24 ⁷⁴Id. at 229, 232, 235-36, 239.

25 ⁷⁵Id. at 348-55.

26 ⁷⁶Id. at 354-55.

27 ⁷⁷Id. at 293-342.

28 ⁷⁸Id. 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;”⁷⁹ and
6 (2) “What is reasonable doubt, as pertains to guilty or not guilty?”⁸⁰ 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?”⁸¹ The trial judge
10 refused to answer this question and instructed the jury to continue its deliberations.⁸² 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.⁸³ 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
23

24 ⁷⁹Id. at 477.

25 ⁸⁰Id. at 478.

26 ⁸¹Id. at 483.

27 ⁸²Id. at 485.

28 ⁸³Id. 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.⁸⁴ 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."⁸⁵ Individually and collectively, both
18 facts demonstrate "identity" was at issue.⁸⁶ 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 ⁸⁴An 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 ⁸⁵NT, Trial, at 419.

27 ⁸⁶Several 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).

1 Trial counsel’s strategy will be considered unreasonable if Mr. Smith establishes “that an
2 alternative not chosen **offered a potential** for success substantially greater than the course actually
3 pursued.” Commonwealth v. Howard, 719 A.2d 233, 237 (1998) (emphasis added). Discrediting
4 a victim’s identification with exculpatory DNA evidence—instead of cross-examination—represented
5 an alternative with a “potential for success substantially greater than the course actually pursued.”
6 Id. The DNA technology available in 1999 and 2000 had the **potential** to “demolish” a prosecutor’s
7 case—particularly one premised on eyewitness identification. E.g., Commonwealth v. Williams, 899
8 A.2d at 1064 (“DNA testing... can demolish the prosecution’s case”).⁸⁷ Several additional factors
9 support Mr. Smith’s claim trial counsel acted objectively unreasonable when he failed to pursue
10 DNA testing.

11 a. **DNA Testing Was Available and Generally**
12 **Accepted at the Time the Commonwealth**
13 **Prosecuted Mr. Smith**

14 Trial counsel could have pursued two types of PCR-based DNA testing prior to trial: one
15 where the genetic markers are based on repeated sequences (i.e., RFLP); and another where the
16 genetic markers are based on nucleotide site polymorphism (SNP) (i.e., DQ-Alpha). With respect
17 to SNPs, trial counsel could have pursued two types of PCR-based testing: DQ-Alpha testing and
18
19

20 ⁸⁷Analyzed under the U.S. Supreme Court’s ineffectiveness framework, the issue is
21 whether trial counsel’s action not to pursue DNA testing constitutes a strategic decision; if so, his
22 decision is “virtually unchallengeable.” Strickland v. Washington, 466 U.S. at 690; accord Wiggins
23 v. Smith, 539 U.S. 510, 521 (2003); Darden v. Wainwright, 477 U.S. 168, 186 (1986). However,
24 to qualify as a strategic decision, trial counsel had to **reasonably investigate** the physical evidence,
25 the circumstances of the case, and whether DNA testing had the potential to advance Mr. Smith’s
26 innocence claim. E.g., Strickland v. Washington, 466 U.S. at 691 (“counsel has a duty to make
27 reasonable investigations or to make a reasonable decision that makes particular investigations
28 unnecessary.”); Mayfield v. Woodford, 270 F.3d 915, 927 (9th Cir. 2001) (“Judicial deference to
counsel is predicated on counsel’s performance of sufficient investigation and preparation to make
reasonably informed, reasonably sound judgments.”); Commonwealth v. Hughes, 865 A.2d 761, 813
(Pa. 2004); Commonwealth v. Basemore, 744 A.2d at 735. Accordingly, the issue is not whether
trial counsel should have pursued DNA testing; instead, the issue is whether the investigation
supporting trial counsel’s decision not to pursue DNA testing was itself reasonable. Cf. Wiggins v.
Smith, 539 U.S. at 523. Trial counsel failed to reasonably investigate the aforementioned
issues—even when certain police and laboratory reports should have prompted him to investigate and
pursue these issues.

1 amplified-fragment length polymorphisms (AMP-FLP).⁸⁸ Both methods had the potential to produce
2 exculpatory results from various items of evidence, and both were generally accepted in the relevant
3 scientific community. *E.g.*, NIJ 2000 Report, *supra*, at 17; SCIENTIFIC EVIDENCE, *supra*, § 18-5 at
4 53 (noting that by July 28, 1999, there were 98 appellate decisions which found PCR-based DNA
5 testing generally accepted in the scientific community).⁸⁹ In regards to DNA tests focused on
6 repeated sequences, trial counsel could have pursued restriction fragment length polymorphism
7 (RFLP).⁹⁰ As evidence by the NIJ's 2000 Report, RFLP testing was generally accepted well before
8 the Commonwealth prosecuted Mr. Smith in May 2000. *Id.*

9 **b. Mitochondrial DNA Testing Was Available**
10 **and Generally Accepted at the Time the**
11 **Commonwealth Prosecuted Mr. Smith**

12 Trial counsel could have pursued mitochondrial DNA (mtDNA) testing—particularly on the
13 head and body hairs recovered from Ms. Bosh's sweat pants.⁹¹ Between 1996 and May 2000, several

14 ⁸⁸*E.g.*, NAT'L INST. OF JUST., DEPT. OF JUST., FUTURE OF FORENSIC DNA TESTING:
15 PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 17-19 (2000) (hereinafter NIJ
16 2000 Report); KEITH INMAN & NORAH RUDIN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS 41-
17 52 (1997) (describing PCR-based testing methodologies).

18 ⁸⁹*Accord Commonwealth v. Francis*, 648 A.2d 49 (Pa. Super. 1994) (noting that in
19 1992 the Commonwealth and the trial counsel “agreed in principle that PCR-DNA testing would be
20 performed by an impartial laboratory in a manner which would protect against possible tampering
21 and would later permit either party to have an independent test performed if necessary.”).

22 ⁹⁰RFLP involves the use of the DNA loci that contain “variable number tandem
23 repeat” (VNTR) sequences, which are stretches of DNA in which a short nucleotide core sequence
24 of base pairs is repeated in tandem along the chromosome. As a result of VNTR sequencing, the
25 length of a given allele, which is measured by the number of repeated base pairs, varies from person
26 to person. *See* NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 14-
27 15 (1996). VNTR loci are particularly useful in forensic DNA analysis because they have a very
28 large number of different alleles. *See Armstead v. State*, 673 A.2d 221, 227 (Md.1996). RFLP
analysis yields distinct DNA profiles because the exact number of repeats, and therefore the length
of the VNTR region, varies from one allele to another, and different VNTR alleles can be identified
by their length. *See* NRC, *supra*, at 14-15. DNA fragments containing VNTRs are detected by
specially constructed molecular “probes,” which are short segments of single-stranded DNA with
radioactive components that bind to specific DNA sequences. *See id.*; NIJ 2000 Report, *supra*, at 37-
39.

⁹¹The FBI crime laboratory began utilizing mtDNA testing in June 1996. *See* Butler,
supra, 272. The first trial in which prosecutors introduced mtDNA results occurred shortly thereafter
in August 1996 in State of Tennessee versus Paul William Ware. *See State v. Ware*, 1999 WL
233592, at *13, 17 (Tenn. Crim. App., Apr. 20, 1999) (affirming trial court's admission of mtDNA
testimony); Mark Curriden, *A New Evidence Tool: First Use of Mitochondrial DNA Test in a U.S.*
Criminal Trial, 82 A.B.A. J. 18, at 18 (1996).

1 state and federal courts found mtDNA generally accepted, reliable, and admissible.⁹² Although no
2 Pennsylvania **appellate** court had yet officially recognized mtDNA's general acceptance, by the time
3 the Commonwealth prosecuted Mr. Smith, a number of Pennsylvania trial courts had found it
4 reliable, generally accepted, and admissible.⁹³ Likewise, Pennsylvania defense attorneys moved to
5 seek mtDNA testing in order to potentially exonerate their clients. For instance, in *Commonwealth*
6 *v. Chimel*, defense counsel moved for mtDNA testing in May 2000:

7 On May 1, 2000, defendant filed an omnibus pre-trial motion which included a
8 "Motion for Funding to Conduct Mitochondrial DNA Testing." (Dkt. Entry No. 264.)
9 At the time of oral argument, defense counsel asserted that advances in DNA testing
10 would possibly enable the Commonwealth to retrieve DNA from the sweater mask
11 hairs and the blood smears to retrieve "mitochondrial chromosomes inherited from
12 the mother" of the source of the hairs or blood. (Dkt. Entry No. 307, pp. 51-52.) Over
13 the objection of the Commonwealth, the defense sought funding to conduct
14 mitochondrial DNA testing and specifically requested "that David Chmiel, his
15 brother Martin, and Thomas Buffton be tested with the hair samples available." (*Id.*,
16 p. 53.) Defendant made no comparable request for blood from Angelo Cuppelli "for
17 comparative analysis." (*Id.*, pp. 50-55.) Consequently, when we filed a
18 Memorandum and Order granting the defendant's motion, we further directed the
19 Commonwealth "to provide the defense with hair samples from Thomas Buffton and
20 Martin Chmiel for mitochondrial DNA testing purposes" and the defendant to furnish
21 the Commonwealth with his "hair samples for mitochondrial DNA testing."

22 2003 WL 25287182, at *25 (Pa. Com. Pl., Aug. 20, 2003).

23 **c. The Police and Laboratory Reports**
24 **Contained Information Which Would Have**
25 **Prompted a Reasonably Competent**
26 **Attorney to Pursue Further Investigation**
27 **and Fact Development**

28 ⁹²E.g., *State v. Pappas*, 776 A.2d 1091, 1111 (Conn. 2001) (upholding trial court's
admission of mtDNA); *Adams v. State*, 794 So. 2d 1049, 1065 (Miss. Ct. App. 2001) (holding that
mtDNA satisfied all procedural safeguards); *Shekells v. State*, No. 296-80438-99, 2001 WL
1178828 (Tex. Crim. App. 2001) (affirming the admission of an mtDNA match criticized by a
defense expert as "incompetent"); *State v. Scott*, 33 S.W.3d 746, 759 (Tenn. 2000) (finding mtDNA
covered by a state statute declaring DNA evidence admissible); *People v. Klinger*, 713 N.Y.S.2d 823
(County Ct. 2000) (mtDNA evidence admissible under the *Frye* standard); *State v. Underwood*, 518
S.E.2d 231, 240 (N.C. Ct. App. 1999) (upholding the trial court's admission of mtDNA); *State v.*
Council, 515 S.E.2d 508, 518 (S.C. 1999); CONSTANCE L. FISHER ET AL., LAB. DIV., FED. BUREAU
OF INVESTIGATION, PUBLICATION NO. 01-05, MITOCHONDRIAL DNA: TODAY AND TOMORROW 2
(2001) (reporting that mtDNA evidence is admissible in 26 states: Alabama, Arkansas, California,
Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan,
Minnesota, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas,
Tennessee, Vermont, Virginia, Washington, and West Virginia).

⁹³E.g., Leigh Jones, *Type of DNA Ruled Reliable in Rape Trial*, N.Y. L.J., Sept. 7,
2000, at 1) (stating that Maryland, Michigan, New York, North Carolina, **Pennsylvania**, Tennessee,
and the Eastern District of Ohio have found mtDNA to be reliable) (emphasis added).

1 The police and laboratory reports provided critical information which indicated two
2 important facts: (a) Ms. Bosh was “certain” Mr. Smith was her assailant;⁹⁴ and (b) several items of
3 evidence had the potential to produce biological material which could have been subjected to DNA
4 testing to produce exculpatory results. This information should have prompted trial counsel to
5 conduct a more thorough investigation regarding the DNA testing issue. E.g., Wiggins v. Smith, 539
6 U.S. at 525 (“The scope of their investigation was also unreasonable in light of what counsel
7 actually discovered in the DSS records.”); Commonwealth v. Rainey, 928 A.2d 215 (Pa. 2007) (“The
8 reasonableness of a particular investigation depends upon evidence known to counsel, as well as
9 evidence that would cause a reasonable attorney to conduct a further investigation.”);
10 Commonwealth v. Hughes, 865 A.2d 761, 813-14 (Pa. 2004) (same).

11 With respect to the former, regardless of whether detectives employed an unduly suggestive
12 identification procedure, reasonably competent trial counsel—when faced with a “certain” or
13 “positive” identification—would have pursued the most objective and conclusive evidence to discredit
14 Ms. Bosh’s identification given how determinative—reliable and unreliable—identifications are to a
15 jury. As Justice Brennan explained two decades before Mr. Smith’s trial:

16 despite its inherent unreliability, much eyewitness identification evidence has a
17 powerful impact on juries. Juries seem most receptive to, and not inclined to
18 discredit, testimony of a witness who states that he saw the defendant commit the
19 crime.

19 [E]yewitness testimony is likely to be believed by jurors, **especially when it is**
20 **offered with a high level of confidence**, even though the accuracy of an eyewitness
21 and the confidence of that witness may not be related to one another at all. **There is**
22 **almost nothing more convincing than a live human being who takes the stand,**
23 **points a finger at the defendant, and says ‘That’s the one!’**

24 Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (citations omitted)
25 (emphasis added).⁹⁵

26 As the U.S. Supreme Court recognized, “the **only** duty of a jury in cases in which

27 ⁹⁴Ex. 4.

28 ⁹⁵Accord Manson v. Brathwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting)
29 (“juries unfortunately are often unduly receptive to [identification] evidence”); State v. Romero, 922
30 A.2d 693, 702 (N.J. 2007); LAWRENCE TAYLOR, EYEWITNESS IDENTIFICATION 2 (1982) (noting that
31 eyewitness identification evidence is “taken by the average juror as absolute proof” even though
32 “[t]he unreliability of such evidence is now widely accepted among lawyers and psychologists”).

1 identification evidence has been admitted will often be to assess the reliability of that evidence.”
2 Watkins v. Sowders, 449 U.S. at 347 (emphasis in original). It was well known well before Mr.
3 Smith’s trial, however, that juries were not entirely accurate at distinguishing between reliable and
4 unreliable identifications—even when evidence of innocence far outweighed evidence of guilt. Id. at
5 352 n.5 (Brennan, J., dissenting). In short, “the vagaries of eyewitness identification are
6 well-known; the annals of criminal law are rife with instances of mistaken identification.” United
7 States v. Wade, 388 U.S. at 228. Indeed, out of the first 62 DNA exonerations—**all occurring**
8 **before Mr. Smith’s trial**—52 involved misidentifications. See JIM DWYER, PETER NEUFELD &
9 BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE
10 WRONGLY CONVICTED app. a (2000). Of the 209 DNA exonerations to date—misidentifications
11 played a role in 75%. See www.innocenceproject.org (last visited Dec. 7, 2007); State v. Romero,
12 922 A.2d at 702 (citing Innocence Project statistics).

13 Accordingly, by May 2000 reasonably competent counsel would have realized that vigorously
14 cross-examining Ms. Bosh regarding her identification was not “an absolute assurance of accuracy
15 and reliability.” United States v. Wade, 388 U.S. at 237 (“even though cross-examination is a
16 precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and
17 reliability.”). Again, as Justice Brennan, explained:

18 cross-examination is both an ineffective and a wrong tool for purging [unreliable]
19 identification evidence from the jurors’ minds. It is an ineffective tool because all
20 of the scientific evidence suggests that much eyewitness identification testimony has
21 an unduly powerful effect on jurors. **Thus, the jury is likely to give the**
erroneously admitted evidence substantial weight, however skillful the
cross-examination.

22 Watkins v. Sowders, 449 U.S. at 356-57 (Brennan, J., dissenting) (emphasis added). Social science
23 research supported (and still supports) Justice Brennan’s position. For instance, in order for cross-
24 examination to be effective, the following conditions must be met:

- 25 1. Attorneys must have an opportunity to identify the factors that are likely to
26 have influenced an eyewitness’s identification performance in a particular
27 case.
- 28 2. Attorneys must be aware of the factors that influence eyewitness
identification performance.
3. Judges and juries must be aware during the trial, and consider during

1 deliberations, the factors that influence eyewitness identification.

2 BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS,*
3 *PSYCHOLOGY, AND THE LAW* 144 (1995). With respect to the first assumption, research suggests this
4 is the weakest link in the argument in favor of cross-examination as an adequate safeguard against
5 wrongful convictions premised on misidentifications. As two researchers explained:

6 The attorney must rely on the police to ask the right questions concerning viewing
7 conditions at the scene of the crime and to note the eyewitness's answers correctly.
8 Of course, the investigating officers must, in turn, rely on the eyewitness to report the
9 viewing conditions accurately. Furthermore, the attorney is frequently absent from
identification tests (not by choice)... In such cases, the attorney must, once again, rely
on the eyewitness, police officer, and defendant to report any suggestive element of
an identification.

10 Id. at 157-58. In regards to the second assumption, the "attorney knowledge research raises serious
11 questions about the extent to which attorneys are familiar with the facts that influence eyewitness
12 performance." Id. at 167. After reviewing other variables and research, two researchers concluded:

13 Under this combined set of conditions—reliance on witness and police memories for
14 crime information, and less-than-complete information about the threats to
eyewitness accuracy—we think it likely that cross-examination in many criminal cases
is built on a shaky foundation.

15 Id. at 168.

16 DNA evidence, however, offered an absolute assurance of accuracy and reliability. Thus,
17 contrary to the U.S. Supreme Court's opinion, at the time of Mr. Smith's trial, DNA evidence
18 trumped cross-examination as the "most effective way to ascertain truth." Watkins v. Sowders, 449
19 U.S. at 349 ("cross-examination has always been considered a most effective way to ascertain
20 truth."); People v. Weasley, 533 N.Y.S.2d 643, 644 (Albany Co. Ct. 1988) ("DNA Fingerprinting...
21 constitute[s] the single greatest advance in the 'search for truth', and the goal of convicting the guilty
22 and acquitting the innocent, since the advent of cross-examination."). In short, trial counsel's
23 decision not to investigate and pursue DNA testing—in light of Ms. Bosh's "certain" identification
24 and DNA's exonerative potential—was unreasonable.⁹⁶

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27 ⁹⁶E.g., People v. Weasley, 533 N.Y.S.2d at 644 ("In the area of eyewitness testimony,
28 which has been claimed to be responsible for more miscarriages of justice than any other type of
evidence, again, where applicable, DNA Fingerprinting would tend to reduce the importance of
eyewitness testimony.").

1 The unreasonableness of trial counsel's decision is compounded by the fact there was
2 physical evidence to test. Trial counsel's failure to thoroughly review the police and crime
3 laboratory reports and to consult with a qualified DNA expert prevented him from identifying which
4 physical evidence could be subjected to DNA testing. Had trial counsel thoroughly reviewed the
5 physical evidence and consulted with a qualified DNA expert, the DNA expert would have suggested
6 to test the following items of physical evidence: (1) the oral rectal smear/slide; (2) the two rectal
7 swabs; (3) the fourteen nail clippings; (4) Ms. Bosh's underwear; and (5) the head hair and body hair
8 recovered from Ms. Bosh's underwear:

9 **One Rectal Slide:** The rectal slide is probative and intimately connected to Ms.
10 Bosh's sexual assault. For instance, trial counsel had a report in which Ms. Bosh told
11 detectives "the suspect... placed his penis on her buttocks and between the crease of
12 her buttocks... and... he pressed his penis on the outside of her anus but it did not go
13 in."⁹⁷ It is possible the assailant transferred minute amounts of sperm near and
14 around Ms. Bosh's rectum. DNA testing could have been performed on sperm
15 identified from the slide.

16 **Two Rectal Swabs:** The rectal swabs are probative for the very reasons the rectal
17 slide is probative. DNA testing could have been performed on semen identified on
18 the swabs.

19 **Fourteen Nail Clippings:** The fingernail clippings are probative and intimately
20 related to Ms. Bosh's sexual assault.⁹⁸ For instance, trial counsel possessed a report
21 wherein Ms. Bosh told the police she "claw[ed] at [her assailant's] face with her
22 hands."⁹⁹ Another police report said: "Bosh stated that she was fighting back by
23 trying to kick the man and scratching at his face with her hands."¹⁰⁰ Thus, it's likely
24 there was a transfer of skin cells between the assailant's face and Ms. Bosh's
25 fingernails. The skin (or epithelial cells) could have been subjected to DNA

26 ⁹⁷Ex. 4.

27 ⁹⁸Police collected fingernail scrapings well before DNA evidence entered the criminal
28 justice system. E.g., Cupp v. Murphy, 412 U.S. 291, 292 (1973):

29 Suspecting that the spot might be dried blood and knowing that
30 evidence of strangulation is often found under the assailant's
31 fingernails, **the police asked Murphy if they could take a sample
32 of scrapings from his fingernails.** He refused. Under protest and
33 without a warrant, the police proceeded to take the samples, which
34 turned out to contain traces of skin and blood cells, and fabric from
35 the victim's nightgown.

36 (emphasis added).

37 ⁹⁹Ex. 1.

38 ¹⁰⁰Ex. 7.

1 testing.¹⁰¹

2 **Ms. Bosh's Bikini Style Underwear:** Ms. Bosh's underwear is probative and
3 intimately related to her sexual assault. Notably, it is possible the assailant's semen
4 or sperm transferred to her buttock, which in turn may have been transferred to her
underwear once she pulled them back up after the assailant fled the scene. DNA
testing could have been performed on semen or sperm identified on the underwear.

5 **Head and Body Hair Recovered From Ms. Bosh's Sweat Pants:** The hairs are
6 probative and intimately related to Ms. Bosh's sexual assault because they were
7 recovered from the sweat pants she wore during her assault.¹⁰² Trial counsel learned
8 late in the game that Mr. Myers excluded Mr. Smith and Ms. Bosh as possible
9 contributors of the hairs; nonetheless, trial counsel had every opportunity to ask for
a continuance to consult a forensic specialist or DNA expert to determine whether
the hairs could be subjected to DNA testings; trial counsel failed to request a
continuance. Depending on whether the hairs had roots, they could have been
subjected to PCR-based testing (if there were roots) or mtDNA testing (if there were
no roots).

10 Trial counsel had a duty to reasonably inspect and investigate the physical evidence despite
11 Ms. Retsch's report indicating she failed to identify biological material on the abovementioned
12 items.¹⁰³ The duty to reasonably investigate the Commonwealth's expert's opinions and work
13 product is not limited to cases where the expert generates incriminating evidence; especially, when
14 the alleged absence of exculpatory evidence is equally as damaging as incriminating results. Indeed,
15 the Commonwealth presented Ms. Retsch and Mr. Myers not to link Mr. Smith to Ms. Bosh's
16 assault, but to explain why certain offenses or crime scenes—like Ms. Bosh's—do not produce
17 biological evidence which can identify the true assailant and exonerate the unjustly accused.
18

19
20 ¹⁰¹Many recent investigations or exonerations have turned on DNA tests performed
21 on fingernail clippings. *E.g.*, Prepared Remarks of Attorney General John Ashcroft, *DNA Grant*
22 *Announcements*, Pgh., PA., Sept. 20, 2004, available at,
23 www.usdoj.gov/archive/ag/speeches/2004/ag092004_dna.htm (last visited Oct. 21, 2007) (“Across
24 the country, we have seen critical DNA evidence come from a few cigarette butts, from a child
25 victim's blood on the baby blanket in the offender's possession, **and from underneath a victim's**
26 **fingernails after she fought her assailant in terror.**”) (emphasis added); Anemona Hartcollis,
DNA Testing May Help in 1990 Case, N.Y. TIMES, Oct. 23, 2007 (discussing how a New York trial
judge ordered prosecutors to subject a victim's fingernail scrapings to DNA testing to determine
whether DNA links a defendant to a 1990 murder); *DNA Links Man to 2004 Sex Grab*,
Goldcoast.com, Oct. 7, 2007, at [www.goldcoast.com.au/article/2007/10/04/3432_gold-coast-](http://www.goldcoast.com.au/article/2007/10/04/3432_gold-coast-news.html)
news.html (last visited Oct. 14, 2007); Melissa Vargas, *Man's DNA Was Found Under Nails of*
Victim, FT. WORTH STAR-TELEGRAM, Oct. 10, 2007, at B1; *State Trooper Arrested in 2006*
Blairsville Dentist Murder Case, PGH. TRIB. REV., Sept. 27, 2007.

27 ¹⁰²*Id.* at 227, 230.

28 ¹⁰³Ex. 2.

1 Accordingly, trial counsel had a duty—especially during this day and age with DNA’s exonerative
2 powers—to reasonably investigate Ms. Retsch’s claim that the aforementioned items of evidence did
3 not have potentially exculpatory biological evidence.¹⁰⁴

4 To reasonably investigate Ms. Retsch’s claim, trial counsel needed to consult with and retain
5 a qualified DNA expert, who could have examined the items of evidence to determine whether she
6 produced accurate conclusions. Had trial counsel consulted with and retained a qualified DNA
7 expert, chances are the expert may have—contrary to Ms. Retsch’s findings—identified biological
8 evidence which could have produced exculpatory DNA results. Such a result is not uncommon; the
9 Innocence Project has litigated several cases where re-examination of the physical evidence revealed
10 that the State’s forensic expert(s) failed to identify highly probative biological evidence during their
11 pre-trial examination(s).¹⁰⁵

12 Moreover, in the absence of a reasonable investigation, trial counsel could not meaningfully
13 and effectively confront and cross-exam Ms. Retsch, e.g., United States v. Cronic, 488 U.S. 648, 656
14 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the
15 prosecution’s case to survive the crucible of **meaningful adversarial testing.**”) (emphasis added);
16 Dees v. Caspiri, 904 F.2d 452, 455 (8th Cir. 1990) (“Counsel had a duty to garner the expertise

17
18 ¹⁰⁴E.g., Richey v. Bradshaw, 498 F.3d 344 (6th Cir. 2007); Dugas v. Coplan, 428 F.3d
19 317, 331 (1st Cir. 2005); Soffar v. Dretke, 368 F.3d 441, 476 (5th Cir. 2004); Maxwell v. Mahoney,
20 1999 U.S. App. LEXIS 26592 at *4-5 (9th Cir. Oct. 20, 1999); Baylor v. Estelle, 94 F.3d 1321, 1324
21 (9th Cir. 1996); Driscoll v. Delo, 71 F.3d 701, 709 (8th Cir. 1995); United States v. Tarricone, 996
22 F.2d 1414, 1419 (2d Cir. 1993); Sims v. Livesay, 970 F.2d 1575, 1580-81 (6th Cir. 1992). As
Justice Stevens once wrote: “[Truth],’... is best discovered by powerful statements on **both sides
of the question.**” United States v. Cronic, 488 U.S. 648, 655 (1984) (emphasis added). Trial
counsel’s failure to seek DNA testing in Mr. Smith’s case, however, substantially impaired the
discovery of truth; trial counsel’s failure prevented Mr. Smith from making a “powerful statement”
discrediting Ms. Retsch’s findings.

23 ¹⁰⁵Indeed, one of Innocence Project’s most recent exonerations—involving Ronald
24 Taylor—proves this very point. At his 1994 rape trial, the State’s serologist testified she examined
25 the bed sheet where the rape occurred and found no signs of semen or seminal fluid; the alleged lack
26 of semen prevented the Houston Crime Laboratory from pursuing DNA tests which would have
27 exonerated Mr. Taylor prior to trial. However, when the Innocence Project accepted the case, and
28 had the bed sheet re-examined by a private DNA laboratory, the laboratory identified a semen stain
and developed a DNA profile which ultimately exonerated Mr. Taylor and identified Roosevelt
Carroll—a twice convicted sex offender—as the actual assailant. See Mike Tolson & Roma Khanna,
Mix-up on DNA Deals HPD Lab Another Blow, HOUS. CHRON., Oct. 4, 2007, at A1; Roma Khanna,
*DNA Tests Point to a Sex Offender as Actual 1993 Rapist: Convicted in 2 Earlier Attacks, He Lived
Just Blocks from the Man Who Paid for the Crime*, HOUS. CHRON., Oct. 5, 2007.

1 necessary to cross examine [the State’s expert].”), thereby depriving Mr. Smith of his clearly
2 established confrontation rights. E.g., Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (“the
3 Confrontation Clause guarantees an **opportunity** for effective cross-examination.”) (emphasis in
4 original); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). The failure to meaningfully and
5 effectively cross-examine Ms. Retsch substantially prejudiced Mr. Smith because her scientific
6 expertise likely had an impact on the jury’s decision to convict Mr. Smith.¹⁰⁶

7 **d. The Circumstances Surrounding the**
8 **Offense and Ms. Bosh’s Identification Did**
9 **Not Counsel Against Seeking DNA Testing**

10 The circumstances surrounding Ms. Bosh’s sexual assault did not counsel against pursuing
11 DNA testing. In Commonwealth v. Williams, 899 A.2d. at 1065, the Pennsylvania Supreme Court
12 identified factors which may cause a trial counsel to think twice about pursuing DNA testing—and
13 may form a reasonable basis not to pursue DNA testing. Id. (“Not seeking DNA testing that has the
14 potential to convict a client may be a very reasonable strategy.”). For instance, in *Williams*, the
15 victim “immediately and repeatedly identified appellant as her attacker” because she knew the
16 “appellant eight or nine months prior to the incident, seeing him nearly every day during that period.”
17 Id. Mr. Smith’s case is distinguishable. Ms. Bosh did not immediately identify him; instead, she
18 tentatively identified him at first; only after detectives informed her they intended to arrest someone
19 that day, did she qualify her identification by claiming she was “certain” Mr. Smith was her assailant.
20 Likewise, Ms. Bosh and Mr. Smith were complete strangers; unlike the victim in *Williams*, Ms. Bosh
21 did not observe and interact with Mr. Smith on a daily basis. Additionally, Mr. Smith did not claim
22 any affirmative defense (e.g., consent); instead, he pled not guilty and presented an alibi defense.
23 Furthermore, there is no record of more than one potential biological evidence donor. In short,
24 considering the totality of the circumstances, the likelihood that DNA testing would somehow harm
25 Mr. Smith were minimal at best. Trial counsel should have pursued DNA testing; not to pursue the
26 testing was objectively unreasonable.

27 ¹⁰⁶E.g., Ake v. Oklahoma, 470 U.S. 68, 82 n.7(1985) (citation omitted) (“Testimony
28 emanating from the depth and scope of specialized knowledge is very impressive to a jury. The
same testimony from another source can have less effect.”).

1 e. Mr. Smith Requested Testing and Trial
2 Counsel had a Duty to Consult with Mr.
3 Smith on Important Decisions

4 Mr. Smith requested DNA testing prior to trial. As the Pennsylvania Supreme Court recently
5 stated: “Generally, where a defendant requests pre-trial DNA testing, counsel should advise him such
6 test has the potential to strongly inculcate, not just exonerate. **If the defendant still wishes to have**
7 **the test, counsel should accede to this demand.**” Commonwealth v. Williams, 899 A.2d at 1065
8 (emphasis added). Thus, pursuant to *Williams*, trial counsel’s actions fell below professional norms.
9 E.g., Strickland v. Washington, 466 at 691 (“The reasonableness of counsel’s actions may be
determined or substantially influenced by the defendant’s own statements or actions.”).

10 Even if *Williams* cannot be retroactively applied to trial counsel’s actions, trial counsel was
11 nonetheless bound by the U.S. Supreme Court’s attorney-client jurisprudence. According to this
12 precedent, an “attorney undoubtedly has a duty to consult with the client regarding ‘**important**
13 **decisions,**’ including questions of overarching defense strategy.” Florida v. Nixon, 543 U.S. 175,
14 187 (2004) (emphasis added).¹⁰⁷ In order to reasonably consult your client regarding an “important
15 issue,” trial counsel must adequately investigate the “important issue.” In Mr. Smith’s case, trial
16 counsel failed to adequately investigate the DNA testing issue; as such, trial counsel could not offer
17 the type of consultation envisioned by the Federal and Pennsylvania Constitutions.

18 More importantly, however, is the principle that “there are **basic rights** that the attorney
19 cannot waive without the fully informed and publicly acknowledged consent of the client.” Taylor
20 v. Illinois, 484 U.S. 400, 417-417-18 (1988) (emphasis added); accord Jones v. Barnes, 463 U.S.
21 745, 751 (1983) (emphasis added) (“It is also recognized that the accused has the ultimate authority
22 to make certain **fundamental decisions** regarding the case, as to whether to plead guilty, waive a
23 jury, testify in his or her own behalf, or take an appeal.”) (emphasis added). Put simply, defendants
24

25 ¹⁰⁷Accord Strickland v. Washington, 466 U.S. at 688 (counsel has duty “to consult
26 with the defendant on important decisions and to keep the defendant informed of important
27 developments in the course of the prosecution.”); Morris v. Slappy, 461 U.S. 1, 21 (1983) (Brennan,
28 J., concurring in judgment) (“Counsel is provided to assist the defendant in presenting his defense,
but in order to do so effectively the attorney must work closely with the defendant in formulating
defense strategy.”).

1 must be the “ultimate authority” regarding “fundamental decisions.”

2 In this day and age—where “subjecting a client to DNA testing is very likely to settle whether
3 there will be a conviction or not,” Commonwealth v. Williams, 899 A.2d at 1064—the question of
4 whether to pursue DNA testing constitutes a “fundamental decision.” Indeed, because several courts
5 have recognized that defendants possess a due process right to post-conviction DNA testing, e.g.,
6 Harvey v. Horan, 285 F.3d 298, 312-316 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing
7 en banc); Wade v. Brady, 460 F.Supp.2d at 226, 243-51 (D.Mass. 2006), this, by logic, implies that
8 the right to pursue DNA testing must exist pre-trial as well.

9 Moreover, the decision to pursue DNA testing is analogous to the decision whether to plead
10 guilty—a decision which trial counsel cannot unilaterally decide. As the U.S. Supreme Court
11 explained in *Boykin v. Alabama*, trial counsel must seek the defendant’s knowing and intelligent
12 consent before pleading him guilty because a “plea of guilty is more than a confession which admits
13 that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and
14 determine punishment.” 395 U.S. 238, 242 (1969); accord Florida v. Nixon, 543 U.S. at 187 (noting
15 that pleading guilty “is an event of signal significance in a criminal proceeding” because a
16 “defendant waives constitutional rights that inhere in a criminal trial”). In short, the defendant’s
17 knowing and intelligent consent is critical because by pleading guilty the defendant gives up the one
18 mechanism which can possibly prove his innocence or mitigate his culpability—i.e., an adversarial
19 criminal trial.

20 The decision whether to pursue DNA testing must be viewed through the same constitutional
21 lens. When trial counsel unilaterally decided to forgo DNA testing in Mr. Smith’s case, it
22 represented an “event of signal significance,” Florida v. Nixon, 543 U.S. at 187, because it
23 eliminated the single greatest mechanism for the **ascertainment of truth**—particularly in sexual
24 assaults where the assailant likely transferred biological evidence to the victim.¹⁰⁸ Without DNA

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26 ¹⁰⁸E.g., Prepared Remarks of Attorney General John Ashcroft, *DNA Grant*
27 *Announcements*, Pgh., PA., Sept. 20, 2004, at,
28 http://www.usdoj.gov/archive/ag/speeches/2004/ag092004_dna.htm (last visited Oct. 21, 2007)
(noting that DNA “plays no favorites. It cuts through prejudice. It validates truth.”); *Justice Dep’t.*
Acts to Clear DNA Backlog, MIAMI HERALD, Aug. 2, 2001, at 19A (quoting Attorney General
Ashcroft as saying “DNA technology can operate as a kind of truth machine, ensuring justice by

1 tests, the only weapon available to expose the truth was cross-examining Ms. Bosh—i.e., a witness
2 who was “certain” Mr. Smith was her assailant. As noted, cross-examination is a significantly less
3 powerful weapon compared to DNA technology. Consequently, given DNA’s exonerative powers,
4 when confronted with the question of whether to pursue DNA testing, “an attorney must both consult
5 with the defendant and obtain consent to the recommended course of action.” Florida v. Nixon, 543
6 U.S. at 187. Stated differently, decisions whether to pursue DNA testing “are of such moment that
7 they cannot be made for the defendant by a surrogate.” Id.

8 Accordingly, trial counsel should have acquiesced to Mr. Smith’s request for DNA testing.
9 His unilateral decision not to pursue DNA testing was objectively unreasonable under the
10 circumstances and disregarded Mr. Smith’s constitutional right to be the “ultimate authority”
11 regarding “fundamental decisions.”

12 **f. Summary**

13 Considering “all circumstances,” trial counsel’s decision not to pursue DNA testing was
14 objectively unreasonable. E.g., Strickland v. Washington, 466 U.S. at 688 (“the performance inquiry
15 must be whether counsel’s assistance was reasonable considering all the circumstances”). First,
16 DNA tests were available prior to Mr. Smith’s trial which could have proved his innocence. Second,
17 the police and laboratory reports contained information which would have prompted a reasonably
18 competent attorney to adequately investigate whether DNA testing should be performed. Notably,
19 the reports revealed Ms. Bosh “was certain” Mr. Smith was her assailant. Given the influential
20 nature of identifications on juries, trial counsel should have used the most effective weapon available
21 to undermine Ms. Bosh’s identification—i.e., DNA evidence. Likewise, had trial counsel reasonably
22 researched the issue—and hired a qualified DNA expert—the police and laboratory reports identified
23 various items of physical evidence which could have been subjected to DNA testing. Third, trial
24 counsel had a duty to reasonably inspect and investigate the physical evidence despite Ms. Retsch’s

25 _____
26 identifying the guilty and clearing the innocent.”); 146 Cong. Rec. S11645-02, at *S11647
27 (describing “DNA testing” as “truth-seeking technology”) (Senator Patrick Leahy’s comments);
28 People v. Weasley, 533 N.Y.S.2d 643, 644 (Albany Co. Ct. 1988) (“DNA Fingerprinting...
constitute[s] the single greatest advance in the ‘search for truth’,... since the advent of cross-
examination.”).

1 report indicating she failed to identify biological material on various items of evidence. Fourth, the
2 circumstances surrounding Ms. Bosh's sexual assault and subsequent identification did not counsel
3 against pursuing DNA testing. Fifth, Mr. Smith informed trial counsel he wanted to pursue DNA
4 testing. And sixth, trial counsel did not have the authority to unilaterally decide to forgo DNA
5 testing; he was constitutionally obligated to obtain Mr. Smith's consent.

6 C. **The Chain of Custody Regarding the Items Sought to Be Tested Is**
7 **Sufficient to Establish that the Items Have Not Been Altered in Any**
8 **Material Respect**

8 Although Mr. Smith is not pursuing DNA testing pursuant to 42 Pa.C.S.A. § 9543.1, he
9 would still show that the "evidence to be tested has been subject to a chain of custody sufficient to
10 establish that it has not been altered in any material respect." 42 Pa.C.S.A. § 9543.1(d)(1)(ii).

11 Chain of custody "is an indirect method of proving the identity and integrity of evidence by
12 showing its continuous whereabouts." Commonwealth v. Briggs, 2005 WL 4309071 (Common
13 Pleas Ct., Bradford Co., Oct. 12, 2005); accord Commonwealth v. Hudson, 414 A.2d 1381 (Pa.
14 1980). Like the Commonwealth, Mr. Smith is not required to establish "the sanctity of the evidence
15 beyond a moral certainty." Commonwealth v. Bennett, 827 A.2d 469, 481 (Pa. Super. 2003).
16 Similarly, Mr. Smith is not—like the Commonwealth at trial—required to identify "every person who
17 came into contact with evidence, nor must every possibility of tampering be eliminated; it is
18 sufficient that evidence, direct or circumstantial, establishes a reasonable inference that identity and
19 condition of the exhibit remained unimpaired" until delivered to its current place of storage.
20 Commonwealth v. Williams, 565 A.2d 160, 171 (Pa. Super. 1989). Finally, "physical evidence may
21 be properly admitted [and/or subjected to post-conviction DNA testing] despite gaps in testimony
22 regarding its custody." Commonwealth v. Hudson, 414 A.2d 1381, 1387 (Pa. 1980).¹⁰⁹

23 According to the **limited discovery** Mr. Smith received regarding the rape kit's chain of
24

25 _____
26 ¹⁰⁹Mr. Smith contends he need only present a *prima facie* case regarding chain of
27 custody simply because he is in no position to adequately track who and what agencies possessed
28 the rape kit. As the Illinois Appellate Court aptly stated: "It asks too much to require petitioning
defendant in these cases to plead and prove proper chain of custody at the outset, for the evidence
at issue will undoubtedly have been in the safekeeping of the State, not the defendant." People v.
Price, 801 N.E.2d 1187, 1199 (Ill. App. Ct. 2003) (citations omitted).

1 custody,¹¹⁰ Dr. Munoz and Nurse Kane examined Ms. Bosh (at Sewickley Valley Hospital) and
2 collected specimen for her rape kit on the morning of November 25, 1999.¹¹¹ At 11:30 a.m.—on the
3 same day—Detectives Cawley and Kozlowski took custody of the rape kit.¹¹² After they took custody
4 of the rape kit, the Allegheny County Police Department (ACPD)—**at some point**—submitted the rape
5 kit to the Allegheny County Coroner’s Office (ACCO) for testing.¹¹³ Ms. Retsch and Mr. Myers—**at**
6 **some point**—examined the rape kit specimen.¹¹⁴ On March 21, 2000, Ms. Retsch submitted her
7 official report, while Mr. Myers submitted his on May 10, 2000.¹¹⁵

8 After Ms. Retsch and Mr. Myers completed their examinations, the ACCO accidentally sent
9 the rape kit to the Pittsburgh Police Property Storage Facility instead of the ACPD’s Evidence
10 Storage Facility. According to an August 18, 2007, fax from Robert Askew (a forensic scientist with
11 the ACCO):

12 During review of this case... a clerical error was detected. Laboratory Exhibits #1-#4
13 (i.e., the rape kit being Exhibit #1) were inadvertently released to the Pittsburgh
14 Police Property Storage Facility as opposed to the Allegheny County Police
15 Department Property Storage Facility. Upon discovery of the error the items were
16 returned to the laboratory in order to facilitate transfer to the appropriate agency. The
items were returned in a single sealed convenience container. The container was
opened and all of the integrity seals of the Exhibits were inspected and found to be
intact. The Exhibits will be repackaged in a convenience container and released to
the Allegheny County Police via standard laboratory procedure.¹¹⁶

17 On August 17, 2007, Robert Keys—an Investigator for the Allegheny County Public
18 Defender’s Office—contacted Sgt. Rich Mullen (of the ACPD); Sgt. Mullen verified that the ACPD’s
19 Evidence Storage Facility does in fact possess the rape kit, and that the rape kit’s contents have not

21 ¹¹⁰The rape kit includes Ms. Bosh’s sweat pants and underwear.

22 ¹¹¹Ex. 5.

23 ¹¹²Id.

24 ¹¹³Due to inadequate documentation, when the ACPD submitted the evidence cannot
25 be determined.

26 ¹¹⁴Again, due to inadequate documentation, when Ms. Retsch and Mr. Myers
examined the evidence cannot be determined.

27 ¹¹⁵Ex. 2.

28 ¹¹⁶Ex. 8.

1 been altered in any material way.¹¹⁷ The ACPD is currently preserving the rape kit's contents so
2 DNA testing may be conducted.

3 **D. Mr. Smith Consents to Providing a Sample of His Bodily Fluid and**
4 **Acknowledges that it Will Be Entered into a Law Enforcement Database**
5 **Where it May Be Used to Investigate Other Offenses**

6 Again, even though Mr. Smith is not seeking DNA testing pursuant to 42 Pa.C.S.A. § 9543.1,
7 he still consents to providing a samples of his bodily fluids and acknowledges that genetic profiles
8 obtained from his samples may be used to investigate other offenses. See 42 Pa.C.S.A. §
9 9543.1(c)(1)(i)-(ii).¹¹⁸

10 **E. Exculpatory DNA Results Would Exonerate Mr. Smith**

11 Under several scenarios, exculpatory DNA results would exonerated Mr. Smith. For
12 instance, if biological evidence is recovered from the rectal slide and/or swabs, which produce an
13 identifiable profile excluding Mr. Smith, this would exonerate Mr. Smith. The Commonwealth
14 argued that a **single perpetrator** accosted, attacked, and rubbed his penis on Ms. Bosh's buttock;
15 the Commonwealth never argued—nor did the jury consider—that any possible biological fluid may
16 have come from a consensual sex partner. Thus, if biological evidence is recovered, and an
17 identifiable profile developed—which excludes Mr. Smith—the only reasonable inference is that the
18 biological evidence came from the assailant. Moreover, if an STR profile is developed, Mr. Smith
19 would ask the Commonwealth to run the profile through CODIS to determine whether the profile
20 can be linked to another offense or offenses.¹¹⁹ If the profile matches to a previously convicted sex

21 ¹¹⁷Ex. 9. The ACPD's Evidence Storage Facility is located at 400 Lexington Street,
22 Pittsburgh, Pennsylvania 15208.

23 ¹¹⁸Ex. 10.

24 ¹¹⁹CODIS is an FBI-created, national database that catalogues DNA profiles from
25 numerous sources, including, *inter alia*, federal and state convicts, persons who have been charged
26 in an indictment or information with a crime, DNA samples recovered from crime scenes, and from
27 relatives of missing persons. 42 U.S.C. § 14132(a); Banks v. United States, 490 F.3d 1178, 1181
28 (10th Cir. 2007). CODIS “allows State and local forensics laboratories to exchange and compare
DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no
suspects to DNA samples of convicted offenders on file in the system.” H.R. Rep. 106-900(I), at 8
(2000), 2000 U.S.Code Cong. & Admin.News at pp. 2323, 2324.

DNA database systems which use CODIS contain two main criminal indexes and a
missing persons index. When a DNA profile is obtained and entered into CODIS's forensic (crime
scene) index, “the database software searches thousands of convicted offender DNA profiles

1 offender or felon, this would exonerate Mr. Smith.

2 Similarly, if biological evidence is recovered from Ms. Bosh's fingernails, and an identifiable
3 profile is developed excluding Mr. Smith, this too would establish his innocence; especially, if the
4 profile is consistent with a profile generated from the anal slides and/or swabs or any other item of
5 evidence—i.e., redundant results.¹²⁰ The Commonwealth argued that Ms. Bosh scratched her
6 assailant's (i.e., Mr. Smith's) left eye. During opening statements DDA Necessary commented:
7 "When the County Police arrested [Mr. Smith]... they took a photograph of him, and you will see
8 under his left eye that he has a scratch."¹²¹ Moreover, during her closing arguments, she argued:

9 [S]he doesn't... know if she was able to scratch him or not, but she didn't scratch
10 him... hard enough to get anything under her nails... .

11 But one thing we do know, from the police taking the photograph of the Defendant

12 (contained in the offender index) of individuals convicted of offenses such as rape and murder."
13 NAT'L INST. OF JUST., DEP'T OF JUST., USING DNA TO SOLVE COLD CASES (July 2002), *available*
14 *at*, www.ncjrs.gov/txtfiles1/nij/194197.txt. Similar to the Automated Fingerprint Identification
15 System (AFIS), CODIS "generates investigative leads in cases where biological evidence is
16 recovered from the crime scene. Matches made among profiles in the Forensic Index can link crime
17 scenes together; possibly identifying serial offenders." U.S. DEP'T OF JUST., FEDERAL BUREAU OF
18 INVEST., CODIS: COMBINED DNA INDEX SYSTEM BROCHURE, at 2. As one court noted:

16 CODIS can be used in two different ways. First, law enforcement can
17 match one forensic crime scene sample to another forensic crime
18 scene sample, thereby allowing officers to connect unsolved crimes
19 through a common perpetrator. Second, and of perhaps greater
20 significance, CODIS enables officials to match evidence obtained at
21 the scene of a crime to a particular offender's profile.

19 United States v. Kincaid, 379 F.3d 813, 819 (9th Cir. 2004).

20 ¹²⁰A redundancy is when the same genetic profile is recovered from more than one
21 item of evidence. For instance, in Mr. Siehl's case, if an identifiable profile—which excludes Mr.
22 Siehl—is obtained from Mrs. Siehl's fingernail scrapings (item nos. 2-3), which matches a male
23 profile obtained from the hair removed from her fingernail (item no. 8), and a male profile obtained
24 from a bathroom bloodstain (item nos. 21-32), this would establish Mr. Siehl's innocence.

22 Indeed, redundant results led to Nicholas Yarris's death row exoneration; Mr. Yarris
23 spent twenty-two years on Pennsylvania's death row for a crime he did not commit. Mr. Yarris was
24 convicted of a rape-murder and the evidence against him at trial included inculpatory statements and
25 multiple eyewitnesses placing him near the crime scene. See Yarris v. County of Delaware, 465 F.3d
26 129, 130-32 (3rd Cir. 2006) (describing evidence of guilt at trial in context of Yarris's subsequent
27 Section 1983 action for wrongful conviction); Commonwealth v. Yarris, 549 A.2d 513, 518-19 (Pa.
28 1988) (direct appeal opinion outlines the evidence used to convict Yarris). Post-conviction DNA
testing uncovered the same male profile on three items—gloves found in the victim's car, semen
stains found on the victim's clothing, and scrapings of the victim's fingernails. See Yarris v. County
of Delaware, 465 F.3d at 133. Faced with redundant proof that another man raped and murdered the
victim, the Delaware County District Attorney requested that Yarris's conviction be vacated. Id.

128 ¹²¹NT, Trial, at 47.

1 afterwards, is that he has a very small scratch... under his left eye.

2 Now the Defendant claims that that was from hitting his head on the steering wheel
3 of the car. I ask you how do you get scratched that way. It might be that she hit his
4 nose, but how do you get scratched?

4 I submit to you you can get scratched from Danielle scratching him.¹²²

5 Thus, if an identifiable profile is developed excluding Mr. Smith, the only reasonable conclusion
6 would be that the biological evidence came from the assailant. Again, if an STR profile is
7 developed, Mr. Smith would request the Commonwealth to run it through CODIS; if a hit
8 occurs—identifying a previously convicted offender—this would establish Mr. Smith’s actual
9 innocence.

10 Similarly, if biological evidence is recovered from Ms. Bosh’s underwear, and an identifiable
11 DNA profile is developed excluding Mr. Smith, this would establish his innocence; particularly, if
12 the profile is consistent with a profile generated from the anal slides and/or swabs, fingernail
13 clippings, or the hairs recovered from Ms. Bosh’s sweat pants. Again, the Commonwealth argued
14 that only one assailant attacked Ms. Bosh; likewise, it never mentioned a consensual sex partner.
15 As a result, the only reasonable conclusion is that the biological evidence came from the assailant.
16 If an STR profile is developed, Mr. Smith would ask the Commonwealth to run the profile through
17 CODIS to see if it links to a previously convicted felon.

18 Finally, if the hairs recovered from Ms. Bosh’s sweat pants produce a DNA profile excluding
19 Mr. Smith, yet corresponding with a profile generated from the anal slides/swabs, Ms. Bosh’s
20 fingernails, and/or her underwear (i.e., redundant results), this would establish Mr. Smith’s actual
21 innocence. If an STR profile is developed, Mr. Smith would ask the Commonwealth to run it
22 through CODIS to see if it links to a previously convicted felon.

23 **VI. Conclusion**

24 Mr. Smith had a clearly established right to effective assistance of counsel. Pursuant to this
25 right, trial counsel had a duty to reasonably investigate, thoroughly review the physical evidence, and
26 to consult and obtain Mr. Smith’s consent regarding fundamental decisions. Trial counsel failed to
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28 ¹²²Id. at 444-45

1 adequately review the physical evidence to determine whether it could be subjected to DNA testing,
2 despite the fact the assailant's identity represented the critical issue prior to (and during) trial, and
3 the police and crime laboratory reports contained information which would have prompted a
4 reasonably competent defense attorney to adequately investigate the DNA testing issue. Had trial
5 counsel adequately investigated the issue, and hired a qualified DNA expert, he would have learned
6 there were several items of evidence which could have been subjected to DNA tests.

7 Trial counsel's unilateral decision not to pursue DNA testing fell below reasonable
8 professional norms. By May 2000 reasonably competent trial counsel would have realized that the
9 best weapon to expose a victim-witness's mistaken identification was with DNA testing—not cross-
10 examination. Likewise, the circumstances surrounding Ms. Bosh's assault and subsequent
11 identification did not counsel against seeking DNA testing. Finally, because the question of whether
12 to pursue DNA testing represented a "fundamental decision," trial counsel had a duty to adhere to
13 Mr. Smith's request for DNA testing. Trial counsel's decision not to pursue DNA testing was
14 objectively unreasonable.

15 Mr. Smith satisfies the first two prongs of his ineffectiveness claim; his claim has arguable
16 merit—because the perpetrator's identity was at issue; and trial counsel did not have a reasonable
17 basis not to pursue DNA testing. As such, he is entitled to DNA testing to prove prejudice and his
18 long proclaimed innocence.

19 Mr. Smith respectfully requests the Court to grant him access to DNA testing.

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Respectfully Submitted this 3rd day of 2008

/s/ Craig Cooley
Craig M. Cooley
Staff Attorney
Innocence Project
100 Fifth Avenue, 3rd Floor
New York, New York 10011
Illinois Bar #6282688

MICHAEL J. MACHEN
Public Defender

SUZANNE M. SWAN
Chief – Appellate Division

A handwritten signature in cursive script, appearing to read "Daniel Delisio".

DANIEL DELISIO
PCRA Counsel of Record

Attorneys for James Smith

Exhibit List

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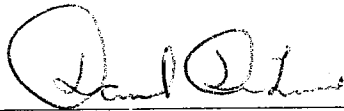
- Ex. 1 County of Allegheny Bureau of Police, Supplemental Report, By Dets. Cawley & Kozlowski, Dated November 25, 1999 (9:00 A.M.)
- Ex. 2 Allegheny County Coroner's Office, Division of Laboratories, Forensic Science Section, Report of Laboratory Findings, By Criminalist Jennifer L. Retsch, Dated March 21, 2000
- Ex. 3 Voluntary Statement, By James T. Smith, Dated November 25, 1999
- Ex. 4 County of Allegheny Bureau of Police, Supplemental Report, By Dets. Cawley & Kozlowski, Dated November 26, 1999 (2:10 P.M.)
- Ex. 5 County of Allegheny Bureau of Police, Supplemental Report, By Dets. Cawley & Kozlowski, Dated November 25, 1999 (11:30 A.M.)
- Ex. 6 Allegheny County Coroner's Office, Division of Laboratories, Forensic Science Section, Report of Laboratory Findings, Supplemental I, By Criminalist Thomas C. Meyers, Dated May, 10, 2000
- Ex. 7 Commonwealth of Pennsylvania, Affidavit of Probable Cause, By Detective Joseph Crawley, Dated December 2, 1999
- Ex. 8 Allegheny County Office of the Medical Examiner, Forensic Laboratory Memorandum, By Forensic Scientist Robert D. Askew, Dated July 7, 2007
- Ex. 9 Law Offices of the Public Defender, County of Allegheny, Memorandum, By Inv. Robert Keys, Dated July 18, 2007
- Ex. 10 James T. Smith's Verification, Dated August 15, 2007

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

COMMONWEALTH OF PENNSYLVANIA : CC No. 1999 16946
v. :
JAMES SMITH, :
Defendant, :

CERTIFIED STATEMENT

The following is a summary of the substance of the expected testimony or evidence to be offered by witnesses at any hearing the Court would schedule after the results of the requested DNA testing have been obtained. *See* 42 Pa.C.S.A. § 9545(d)(1) and *Commonwealth v. Brown*, 767 A.2d 576, 582-583 (Pa.Super. 2001).



Daniel DeLisio

PCRA Counsel of Record

Witnesses:

1.) James T. Smith Jr.. DOB 7/28/1969, SCI Fayette, Box 9999, Labelle, PA 15450-0999. If Mr. Smith is called to testify it is anticipated that he will testify to the following things:
1.) conversations he had with his trial counsel, Attorney Schwab, regarding his request for DNA testing on any evidence that would establish his innocence of the crimes for which he stood trial

2.) Attorney Gregory Schwab, 445 Ft Pitt Blvd #250, Pittsburgh PA 15219. Tel: 412 456-4161. If Attorney Schwab is called to testify it is anticipated that he will testify to the following things: 1.) conversations he had with his client James Smith Jr., regarding James Jr.'s request for DNA testing on any evidence that would establish his innocence of the crimes for which he stood trial 2.) why he did not request DNA testing of the physical evidence recovered from Ms. Bosh's person and clothing during her examination at the emergency room following her attack, to wit, the oral/rectal smear slide, two rectal swabs, fourteen of Ms. Bosh's nail clippings and the fingernail scrapings from underneath her fingernails taken before they were clipped, Ms. Bosh's underwear, and the head and body hair found on Ms. Bosh's sweatpants.

3.) Any and all scientific experts necessary to explain the results of the DNA testing and their bearing on the factual issues in this case.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

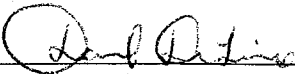
COMMONWEALTH OF PENNSYLVANIA : CC No. 1999 16946
v. :
JAMES SMITH, :
Defendant, :

PROOF OF SERVICE

I, Daniel DeLisio, Appellate Counsel, do hereby certify that a true and correct copy of this PCRA Petition has been served upon the following counsel of record:

Ronald Wabby, Deputy District Attorney
Office of the District Attorney
Appellate Division
410 Allegheny County Courthouse
436 Grant Street
Pittsburgh, Pennsylvania 15219
412-350-4377

Helen Lynch, Esq.
Criminal Court Administrator
307 Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA 15219

By  _____
Daniel DeLisio
PCRA Counsel

Date: January __3__, 2008

EXHIBITS

Supplemental Report

ACP Form-2

Name, Surname or Alias	Date & Time of Report	Case No.	Officer No.
BOSH, DANIELLE	11/25/99 9:00 AM	D-1393-99	12356-99

Interview: Bosh, Danielle
 W/F/23 DOB: 6/27/76

On 11/25/99 at 9:00 AM, Dets. Cawley and Kozlowski interviewed Danielle Bosh at Sewickley Valley Hospital. Chief Besong of Leetsdale Police was also present for the interview. Danielle was treated for a cut on her upper lip and a contusion to her head. Danielle had reported that she was assaulted and sexually assaulted outside of her home at approximately 6:40 AM this date.

Danielle stated that she works for PNC Bank at the USX Tower in Pittsburgh and that she had worked the 9:45PM - 6:00AM shift this past evening. She left work at approximately 6:10 AM this morning from the USX parking garage. Danielle stated that she then drove through downtown Pittsburgh and then got onto Route 65N toward her home. She states that while on Route 65N in the area of Bellevue, she noticed that a vehicle seemed to be following her. She stated that it kept a distance of about 4-5 car lengths behind her and that whenever she changed lanes, the vehicle would change lanes with her. She was asked if she could describe the vehicle and stated that at that time she could see that it was a light gray, newer model sport-utility vehicle. Danielle was asked what the lighting condition was and stated that it was just getting light at this time. She was also asked if she could see how many people were in the vehicle and stated no.

Danielle stated that at one point she pulled into the Giant Eagle on Route 65 and that the vehicle pulled in behind her but parked farther away from where she did. She then went into the store and didn't see anyone get out of the other vehicle. She stated that she was in Giant Eagle for less than five minutes and when she came out she didn't notice the other vehicle nor did she really look for it. Danielle then drove out onto Route 65N and continued on toward her home when she then noticed that the same vehicle was again behind her. When she got to the area of Route 65 where her home is located, Danielle made a right onto Rapp St. and then another right onto Broad St. where she then parked on the corner of Rapp and Broad. She stated that there is no parking on Route 65 so she must park on one of these side streets. Danielle stated that the vehicle that had been following her also pulled onto these streets behind her. She stated that the vehicle slowly passed by her on Broad St. after she had parked. Danielle stated that she was able to get a better look at the vehicle at this time and saw that it was a silver colored, newer model sport utility vehicle, possibly a "Tracker" or a "Honda", with four doors and a black spare tire mounted on the back with white lettering on it. She did not see the licence plate nor could she tell how many people were in the vehicle. Danielle stated that the vehicle continued to drive slowly down Broad St. and that it was 3-4 car lengths away from her when she last saw it. She had gotten out of her vehicle at this time and turned left onto Rapp St. toward Route 65 where her home is located. Danielle stated that at this point she was very nervous about this vehicle.

Danielle stated that when she got near the end of Rapp St. she heard someone walking behind her. She turned around briefly and saw a man walking about 15-20 feet behind her. She states that the man was looking at her and that she did not know him. She thought that it might be a man who lives on the same street as her named Ryan but was not sure. She was asked if the man said anything to her and stated no.

Reporting Officers/Badge Numbers		Assigned Station	
Dets. Cawley/Kozlowski #447/467		SA/CA	
Approving Supervisor	Rank	Shift Commander	Rank
<i>C. Cawley</i>	<i>Sgt</i>		
		Review Officer	
			EXHIBIT

County of Allegheny Bureau of Police

Continuation Report

Page No.	Date/Time This Report	Case No.	CUR No.
2	11/25/99 9:00 AM	D-1393-99	12356-99

DATE TIME

Interview: Bosh, Danielle continued.....

Danielle stated that she then turned around and continued walking toward her home which is five or six houses down from the corner of Rapp St. She states that when she got to the front steps of her house, she saw a newspaper lying on the sidewalk. She then bent down to pick up the newspaper, with a bag of groceries in one hand, and then turned to see if the man was still behind her. At this point she saw that the man was right behind her and he instantly attacked her by grabbing her and putting his hand over her mouth. Danielle stated that the man grabbed her from the front and wrapped his right arm around her head and over her mouth. She said he then threw her down onto the steps which are in front of her house. His hand came off of her mouth at this point and she began to scream. Danielle states that the two of them were wrestling at this point and that the man was hitting her in the face with his hands and also banging her head against the concrete steps. She stated that she was fighting back by trying to kick him and clawing at his face with her hands. Danielle was asked if she caused any injury to the man when she was doing this and stated that she wasn't sure. She stated that she got a good look at the man's face at this time and did not know him. She also stated that the man smelled strongly of alcohol and cologne.

Danielle stated that she was still screaming at this point when the man told her to turn onto her stomach. He was also telling her to "Shut up" or her would "Kill her". She stated that she didn't turn over so the man grabbed her and rolled her over onto her stomach. The man then pulled down her pants and underwear. She was asked what kind of pants she was wearing and stated sweatpants. Danielle stated that she was crying at this time and then felt the man's penis touch her buttocks. The man then said to her, "Does this dick feel good?", or "How does this dick feel?" The man also put his penis between the crease of her buttocks. She was asked if his penis was inside of her and stated no. She states that the man was on top of her and holding her down at this time. Danielle was asked if the man's penis was erect at this time and stated that she thought that it was at least partially erect. She was also asked if the man ejaculated and stated no.

Danielle stated that at this point, the front porch light to her house came on and the man got up off of her and ran down Route 65 on the sidewalk toward Rapp St. She states that she is not sure where the man went from there. Her father then came running out of the house and after the man. She states that she then ran into the house where she then saw her mother. She states that she composed herself and then ran up to Broad St. with her brother Tim Bosh (22) and her boyfriend Thomas Pipkins (24). There they found her father Dan Bosh who was standing on Broad St. and had been unable to locate the man. She states that her boyfriend and brother then got the keys to her car and went out to look for the man while she went back to her house and waited for police.

Danielle was asked to give a detailed description of the man and stated that he had light brown skin, either hispanic or black and possibly of mixed racial background, 25-30 years of age, 5'6" to 5'7" tall with stocky build, brown eyes, no facial hair, no visible scars, wearing a long sleeve polo shirt with the horse and rider polo logo on the chest that had buttons all the way down the front and was possibly beige in color. The man was also wearing a dark colored baseball hat, possibly black, with a brim that was curved down on the sides. She was uncertain if there was an insignia on the hat. The man was also wearing a bead type necklace around his neck with black and white colored beads. Danielle later drew a description of this necklace which will be included with this file. She was not sure what type of pants or shoes the man was wearing and could describe his hair only as short because he was wearing a hat.

Danielle stated that she was carrying her purse with her when the attack occurred and the man never attempted to take her purse.

County of Allegheny Bureau of Police

Continuation Report

Page No.	Date/Time This Report	Case No.	SCR No.
3	11/25/99 9:00 AM	D-1393-99	12356-99

Narrative

Interview: Bosh, Danielle continued.....

Danielle stated that she suffered a cut on her upper lip when the man was hitting her in the face and also a bump on her head when he was banging it against the steps. She was asked if the man touched her on any other private parts of her body with his hands and stated no. She was asked if she would recognize the man again if she saw him and stated yes. She was also asked if she had ever seen this man down at her workplace and stated no. She stated that 25-30 people work with her from 9:45PM - 2:00AM and between 6-9 people work with her from 2:00AM - 6:00AM. She has not noticed anyone following her before or around her workplace. She does not know who this man is knows of no one who might do this to her. Danielle was asked if anyone else may have been a witness to this such as other vehicles passing on Route 65. She stated that she didn't see anyone else around when this occurred and she doesn't remember any vehicles passing by. It should be noted that Danielles house is approximately 20 feet from the steps where she was assaulted.

ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
 FORENSIC SCIENCE SECTION
 10 COUNTY OFFICE BUILDING
 PITTSBURGH, PENNSYLVANIA
 CYRIL H. WECHT, M.D., J.D., CORONER
 FREDERICK W. FOCHTMAN, Ph.D., DIRECTOR & CHIEF TOXICOLOGIST

CONFIDENTIAL
REPORT OF LABORATORY FINDINGS

Submitted herewith please find the confidential report of the results of this laboratory's examination conducted in connection with the following case:


Laboratory Case Number 997082 SEX ASSAULT Date March 21, 2000
 Case Name Danielle Bosh OTN # _____
 Submitting Agency ACP GI
 District Attorney D.D.A. Janet Necessary Other Authorities _____
 Suspect(s) or Defendant(s) James T. Smith, Jr. OTN # H1986316
 _____ OTN # _____
 _____ OTN # _____
 _____ OTN # _____
 _____ OTN # _____
 _____ OTN # _____
 _____ OTN # _____
 _____ OTN # _____
 _____ OTN # _____
 _____ OTN # _____

Crime Lab User Fee: \$ 1,443.75

IMPORTANT NOTICE

The Division of Laboratories must be notified when an OTN # becomes available for the suspect(s)/defendant(s) in this case.
 Please call 350-4425 or FAX 350-3861 this information immediately.

Unless special arrangements have been made, THE EVIDENCE MUST BE REMOVED WITHIN 10 DAYS of the above date or DISPOSAL OF THE EVIDENCE MAY RESULT.


 Frederick W. Fochtman, Ph.D., Director & Chief Toxicologist

Pages: 7 1 cr
 Revised 1/00
 TM

EXHIBIT
 2

Entered on ICIS 

8-18-06

CYRIL H. WECHT, M.D., J.D., CORONER
ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION REPORT

Danielle Bosh SEX ASSAULT

997082

CASE NAME

LAB CASE NUMBER

EXHIBIT NO

Suspect: James T. Smith, Jr.

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Exhibit #1 consisted of one (1) sealed Tri-Tech, Inc. Sexual Assault Evidence Collection Kit labeled to be from Danielle Bosh and found to contain the following hospital specimens:

A) Item A consisted of one (1) purple top and one (1) yellow top tube of whole blood labeled to be from Danielle Bosh. The sample was blood grouped and found to be ABO Type O.

B) Item B consisted of one (1) unsealed white envelope labeled "Vaginal Swabs and Smears No Contact." This sample was not collected.

C) Item C consisted of one (1) sealed white envelope labeled "Rectal Swabs and Smear outer rectal area where male's penis touched her." This envelope was found to contain the following articles:

1.) Article 1 consisted of one (1) microscope slide containing the rectal smear from Danielle Bosh. The smear was microscopically examined for the presence of spermatozoa. No spermatozoa were found.

2.) Article 2 consisted of two (2) rectal swabs from Danielle Bosh. A chemical test for the presumptive presence of semen was performed on the swabs with negative results in each instance. The swabs were microscopically examined for the presence of spermatozoa. No spermatozoa were found.

CYRIL H. WECHT, M.D., J.D., CORONER
ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION REPORT

Danielle Bosh SEX ASSAULT

997082

CASE NAME

LAB CASE NUMBER

EXHIBIT NO

Suspect: James T. Smith, Jr.

#1
Cont.

D) Item D consisted of one (1) sealed white envelope labeled "Oral Swabs and Smear" that was found to contain the following articles:

1.) Article 1 consisted of one (1) microscope slide containing the oral smear from Danielle Bosh. The smear was microscopically examined for the presence of spermatozoa. No spermatozoa were found.

2.) Article 2 consisted of two (2) oral swabs from Danielle Bosh. A chemical test for the presumptive presence of semen was performed on the swabs with negative results in each instance.

E) Item E consisted of the saliva sample from Danielle Bosh. No tests were performed at this time.

F) Item F consisted of the pubic hair standards from Danielle Bosh. The standards were comprised of four (4) dark brown hairs and hair fragments, ranging in length from approximately 2.4 cm to 4.0 cm. This is an inadequate number of hairs for microscopic comparison purposes.

G) Item G consisted of one (1) sealed white envelope labeled "Pubic Hair Combing Danielle Bosh." No hairs were observed in this envelope.

CYRIL H. WECHT, M.D., J.D., CORONER
ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION REPORT

CASE NAME Danielle Bosh SEX ASSAULT LAB CASE NUMBER 997082

Suspect: James T. Smith, Jr.

EXHIBIT NO

#1
Cont.

- H) Item H consisted of the head hair standards from Danielle Bosh. The standards were comprised of sixteen (16) medium to dark brown hairs and hair fragments, ranging in length from approximately 2 cm to 33 cm. This is an inadequate number of hairs for microscopic comparison purposes.
- I) Item I consisted of the fingernail clippings from Danielle Bosh. The clippings were comprised of fourteen (14) nail fragments that appear to be artificial. Two (2) dark colored fibers were observed on the underside of the nail clippings. No blood or hairs were observed on the clippings.
- J) Item J consisted of one (1) unsealed white bag labeled "Foreign Material Danielle Bosh None Found." This item was not examined.
- K) Item K consisted of one (1) pair of women's white bikini-style underpants labeled to be from Danielle Bosh. The front panel and the outer crotch panel of the underpants appear to be a lace material. Multiple fabric separations were observed in the lace material of the front panel. These fabric separations do not appear to be recent. The underpants were examined for the presence of seminal material using a monochromatic light source.

CYRIL H. WECHT, M.D., J.D., CORONER
ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION REPORT

Danielle Bosh SEX ASSAULT

997082

CASE NAME

LAB CASE NUMBER

EXHIBIT NO

Suspect: James T. Smith, Jr.

#1K
Cont.

Four (4) areas were selected for testing. A chemical test for the presumptive presence of semen was performed on these areas with negative results in each instance. The underpants were examined for the presence of blood. No red-brown stains were observed on the underpants. No hairs or obvious foreign fibers were observed.

#2

Exhibit #2 consisted of one (1) sealed Sirchie Suspect Evidence Collection Kit labeled to be from James T. Smith, Jr. and found to contain the following specimens:

- A) Item A consisted of one (1) purple top tube of whole blood labeled to be from James T. Smith, Jr. The sample was blood grouped and found to be ABO Type O.
- B) Item B consisted of the saliva sample from James T. Smith, Jr. No tests were performed at this time.
- C) Item C consisted of the pubic hair standards from James T. Smith, Jr. The standards were comprised of eighty-nine (89) black hairs and hair fragments, ranging in length from approximately 0.2 cm to 4.5 cm.
- D) Item D consisted of the head hair standards from James T. Smith, Jr. The standards were comprised of seventy (70) dark brown hairs and hair fragments, ranging in length from approximately 1 cm to 9 cm.

CYRIL H. WECHT, M.D., J.D., CORONER
ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION REPORT

Danielle Bosh SEX ASSAULT

997082

CASE NAME

LAB CASE NUMBER

EXHIBIT NO

Suspect: James T. Smith, Jr.

#3

Exhibit #3 consisted of one (1) stapled brown paper bag labeled "Item E
 Outer Clothing Sweatshirt Bosh, Danielle CCR: 12356-99 Det. Cawley."
 This bag was found to contain one (1) navy blue sweatshirt with a "Duquesne
 University Mom" emblem at the center of the chest area of the sweatshirt. The
 sweatshirt was examined for the presence of seminal material using a monochromatic
 light source. Eight (8) areas were selected for testing. A chemical test for the
 presumptive presence of semen was performed on these areas with negative
 results in each instance. The sweatshirt was examined for the presence of fabric
 separations and blood. No red-brown stains nor fabric separations were observed.
 Numerous hairs and fibers were collected; three (3) dark colored fibers, two (2)
 red fibers, twelve (12) medium brown hairs and hair fragments, ranging in length
 from approximately 1 cm to 33 cm, and one (1) black and white animal hair,
 approximately 3 cm in length.

#4

Exhibit #4 consisted of one (1) stapled brown paper bag labeled "CCR:
 12356-99 Item E Outer Clothing Sweatpants Bosh, Danielle
 Det. Cawley." This bag was found to contain one (1) pair of gray sweatpants.
 The sweatpants were examined for the presence of seminal material using a
 monochromatic light source. Three (3) areas were selected for testing. A
 chemical test for the presumptive presence of semen was performed on these
 areas with negative results in each instance. The sweatpants were examined for
 the presence of blood. Four (4) brown stained areas were selected for testing.

VOLUNTARY STATEMENT

DATE 11/25/99 TIME 8:30am PLACE Harrison Twp, PA

I, James J. Smith age 30, reside at 329 East Union Rd

I am giving this statement to _____, who has identified himself as a police officer of Harrison Twp. and he has duly warned me of my legal Miranda rights.

Prior to and during the making of this written statement, I have and do hereby knowingly, intelligently and voluntarily waive my Miranda rights. I know as my legal rights I do not have to make this statement if I do not wish to do so. I do make the following statement to the aforementioned person of my own free will and without any promises and without compulsion or persuasion by any person or persons whomsoever:

I was following a lady whom I thought I knew. Apparently I didn't. She got frightened and pulled into the police station. After I realized I did not know her I turned around and left. As I was going down 28 South I saw a police cruiser put there lights on. I panicked and lost control of my vehicle and wrecked into some mailboxes. I ~~do~~ have a problem with exposing myself and when I saw the police lights I panicked.

I have read this statement consisting of 1 page(s), each page of which bears my signature, and I do affirm that all facts and statements are true and correct.

James J. Smith
(Signature of person making voluntary statement)

Voluntary statement taken by:

EXHIBIT
3

County of Allegheny Bureau of Police

Supplemental Report

ACP Form-2

Name of Subject	Date & Time of Report	Case No.	CR No.
BOSH, DANIELLE	11/26/99 2:10 PM	D-1393-99	12356-99
Photo Array			

On 11/26/99 at 2:10 PM, Dets. Cawley and Kozlowski showed a six photo array to Danielle Bosh at her residence. This array included suspect James T. Smith Jr. and was arranged as follows:

- Photo 1: BCI# 218004
- Photo 2: BCI# 287906
- Photo 3: BCI# 281572
- Photo 4: BCI# 295367
- Photo 5: BCI# 256611 - Suspect James T. Smith Jr.
- Photo 6: BCI# 289175

Bosh was instructed to look at all of the photographs and see if she could identify any of the men pictured as the one who assaulted her. After studying the photos for a few moments, Bosh singled out photograph #5 (James T. Smith Jr.) and stated that it "looked like" the man who assaulted her and then stated that she was "pretty sure" that this was the man. She was asked if she was certain and stated that she was "not 100% certain". She was then asked to rate the photograph on a scale of one to ten with one being least similar to the suspect and ten most. She then rated the photograph an eight. Bosh was then told that these detectives anticipated making an arrest in the case however she was not told who the suspect was or if the photograph that she had singled out was the suspect. She then requested to see the photo array again and after studying it further stated that she now certain that photograph #5 was the man who had assaulted her. Bosh was asked why she was now certain and stated that she was now remembering more details about the attackers face and that after looking at the pictures again, she was now certain that the man in photograph #5 was the one who attacked her.

Bosh was then asked several questions concerning the details of the sexual assault. She had stated in her initial interview that the suspect had placed his penis on her buttocks and between the crease of her buttocks but that penetration did not take place. She was asked if the suspect attempted to penetrate her and stated that he pressed his penis on the outside of her anus but it did not go in. She stated that she was squeezing her buttocks together to try and prevent him.

Reporting Officers/Badge Numbers			Assigned Station	
Dest. Cawley/Kozlowski			SA/CA	
#447/467				
Approving Supervisor	Rank	Shift Commander	Rank	Review Office
<i>[Signature]</i>	Sgt			EXHIBIT <input type="checkbox"/>
				4

11/25/99 3

County of Allegheny Bureau of Police

Supplemental Report

ACP Form-2

[Redacted header information]

Bosh, Danielle	11/25/99 11:30AM	D-1393-99	12356-99
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[Redacted information]

Recovery of Sexual Assault Kit - Danielle Bosh

On 11/25/99 at 11:30 AM Dets. Cawley and Kozlowski took possession of a Sexual Assault Evidence Collection Kit which was recovered at Sewickley Valley Hospital from victim Danielle Bosh. The kit was collected by Dr. Munoz and Sally Kane RN. Included as part of the kit were the clothing that Bosh was wearing. This included sweatpants, underwear and a sweatshirt.

ITEM E. One Sexual Assault Evidence Collection Kit recovered from Danielle Bosh at Sewickley Valley Hospital and turned over to Dets. Cawley and Kozlowski by Sally Kane RN at 11:30 AM On 11/25/99

Reporting Officers/Badge Numbers		Assigned Station	
Dets. Cawley/Kozlowski #447/467		SA/CA	
Approving Supervisor	Rank	Shift Commander	Rank
<i>[Signature]</i>	Sgt		
		Review Officer	

EXHIBIT 5

ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION
10 COUNTY OFFICE BUILDING
PITTSBURGH, PENNSYLVANIA
CYRIL H. WECHT, M.D., J.D., CORONER
FREDERICK W. FOCHTMAN, Ph.D., DIRECTOR & CHIEF TOXICOLOGIST

CONFIDENTIAL
REPORT OF LABORATORY FINDINGS

Submitted herewith please find the confidential report of the results of this laboratory's examination conducted in connection with the following case:

Laboratory Case Number 997082 Sex Asslt Date May 10, 2000

Case Name Danielle Bosh OTN # _____

Submitting Agency ACP GI

District Attorney D.D.A. Janet Necessary Other Authorities _____

Suspect(s) or Defendant(s) James T Smith Jr. OTN # H-1986316

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

_____ OTN # _____

Crime Lab User Fee: \$ 318.75

IMPORTANT NOTICE

The Division of Laboratories must be notified when an OTN # becomes available for the suspect(s)/defendant(s) in this case. Please call 350-4425 or FAX 350-3861 this information immediately.

Unless special arrangements have been made, THE EVIDENCE MUST BE REMOVED WITHIN 10 DAYS of the above date or DISPOSAL OF THE EVIDENCE MAY RESULT.

Frederick W. Fochtman
Frederick W. Fochtman, Ph.D., Director & Chief Toxicologist

Pages: 3 , 1
Revised 1/00

UR . jr

Exhibit "A"

Entered on ICIS je
000518 EXHIBIT je
6

TRIL H. WECHT, M.D., J.D., CO NER
ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION REPORT

CASE NAME Danielle Bosh Sex Asslt. LAB CASE NUMBER 997082

EXHIBIT NO

SUSPECT: John T. Smith Jr.

SUPPLEMENTAL I

#5 The white envelope labeled "20 + Pulled Pubic Hairs of Danielle Bosh" was found to contain thirty-five (35) brown hairs.

#1 H) The white envelope labeled "Pulled Head Hairs...Danielle Bosh" was found to contain sixteen (16) dark brown to light brown hairs. The hairs have the appearance of having been chemically treated.

#2 D) The white envelope labeled "Pulled Head hairs....James T. Smith Jr" was found to contain numerous dark brown hairs.

#3 The coin envelope labeled "Hairs and Fibers from Sweatshirt" held a folded paper packet which held one (1) animal hair and twelve (12) dark brown to light brown hairs and hair fragments. The hairs exhibited gross morphological characteristics similar to those of the head hair standards of Danielle Bosh (Exh #1H).

CYRIL H. WECHT, M.D., J.D., CORONER
ALLEGHENY COUNTY CORONER'S OFFICE
DIVISION OF LABORATORIES
FORENSIC SCIENCE SECTION REPORT

CASE NAME Danielle Bosh Sex Asslt LAB CASE NUMBER 997082

EXHIBIT NO

#4 The coin envelope labeled "Hair fragments from Sweatpants" was found to contain the following:

- One (1) dark brown body hair.
- One (1) dark brown head hair. The microscopic characteristics displayed by the hair were outside the range of characteristics displayed by the head hair standards of Danielle Bosh (Exh #1H) and John T. Smith Jr. (Exh #2-D).

4

Excluded

Respectfully submitted,

Thomas C. Meyers
Thomas C. Meyers
Criminalist



Docket Number

Police Incident

Warrant Control

(Issuing Authority)

Number: 12356-99

Number:

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

Your affiants are detectives with the Allegheny County Police Dept. On 11/25/99, your affiants interviewed a twenty-two year old female named Danielle Bosh at Sewickley Valley Hospital. Bosh was being treated for head and facial injuries after reportedly being attacked by an unknown male in front of her residence on that date.

Bosh stated that she finished work at approximately 6:10AM that date and was driving home on Route 65N when she noticed a vehicle following her. She described it as a silver colored, small sized sport utility vehicle. When she got near her residence

[REDACTED] she turned onto a side street to park her car. The vehicle continued to follow her and slowly passed her as she parked. She then noticed that it was a four door sport utility vehicle, possibly a "Tracker" or a "Honda". Bosh stated that she then exited her car and began walking toward her residence. About half way there she noticed a man walking behind her that she didn't know. When she got to the front of her residence, she reached down to pick up a newspaper that was there and then looked to her side to see if the man was still behind her. Bosh stated that the man was right behind her and immediately grabbed her and put his hand over her mouth. He then threw her to the ground and physically assaulted her by slapping her in the face and banging her head off the concrete steps. Bosh stated that she was fighting back by trying to kick the man and scratching at his face with her hands. She is uncertain if she caused any facial injuries to him.

Bosh stated that the man then rolled her over onto her stomach and pulled down her sweatpants and underwear. She states that she then felt the man put his penis onto her buttocks and that he tried to put his penis inside of her anus. At that moment, the porch light to her house went on and the man ran south on Ohio River Blvd. Bosh's father ran out of the house and chased the man but could not find him. Bosh does not believe that the man ejaculated.

Bosh described the man as a dark skinned white or hispanic male or a light skinned black male, possibly of mixed racial background, She stated that he was approximately 25-30 years old, 5'6" - 5'7" tall with stocky build, short hair with brown eyes and a clean shaven face. She stated that he was wearing a long sleeved polo shirt with a horse and rider polo logo on the chest and that the shirt was possibly beige in color. He was also wearing a dark colored baseball hat with a brim that was curved down on the sides and a beaded necklace on his neck.

On 11/26/99, your affiants received information from Sgt. Robelewski of Harrison Twp. P.D. about an incident that occurred in their community on 11/25/99. He related that at 8:15 AM that date, a woman pulled into the parking lot of Harrison Twp. P.D. and informed him that a vehicle had been following her from Pittsburgh. Robelewski stated that the vehicle had also turned into the police lot and quickly drove off. He described it as a silver colored sport utility vehicle. He then searched for the vehicle and located it. The vehicle was eventually pursued by Tarentum Police into Fawn Twp. where it was stopped. The vehicle was a 2000 Chevrolet Tracker, silver in color with four doors. The driver and sole occupant was James T. Smith Jr., age 30. Smith was cited for Harassment for this incident. Two photos were taken of Smith at Harrison P.D. The photos show that he is a dark complexioned male with brown eyes and stocky build. In the photograph Smith is shown to be wearing clothing that matches the description of clothing given by Bosh, including a beige or tan colored polo shirt with a horse and rider polo logo, and a dark baseball cap with curved brim. CONTINUED...

I, THE AFFIANT, BEING DULY SWORN ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Affiant Signature: Det. Joseph Cantel Date: 12/2/99 Issuing Authority Signature: [Signature] Date: 12/2/99 (SEAL)



COUNTY OF ALLEGHENY

PAGE #2

Docket Number
(Issuing Authority):

Police Incident
Number: 12356-99

Warrant Control
Number:

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

Bosh was shown a photo array on 11/26/99 and identified the photograph of James Smith as the suspect that assaulted her.

When Bosh was treated at Sewickley Valley Hospital on 11/25/99, her fingernails were clipped and will be sent to the Allegheny County Crime Lab for analysis to examine for skin samples of the suspect. Swabs of Bosh's buttocks and anal area were taken and will be analyzed for presence of seminal fluid.

Your affiant requests a search warrant to obtain a tube of blood from James T. Smith Jr. for use in DNA analysis and/or any standard laboratory tests conducted in sexual assault investigations. It should be noted that a previous search warrant was obtained for James T. Smith Jr's blood and other items on 11/27/99 however the blood was unable to be obtained before that warrant expired.

I, THE AFFIANT, BEING DULY SWORN ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Det. Joseph Law 12/2/99 *[Signature]* 12/2/99 (SEAL)
Affiant Signature Date Issuing Authority Signature Date

Page of Pages

**ALLEGHENY COUNTY OFFICE OF THE MEDICAL EXAMINER
FORENSIC LABORATORY
FORENSIC SCIENCE SECTION
10 COUNTY OFFICE BUILDING
PITTSBURGH, PENNSYLVANIA**

KARL E. WILLIAMS, M.D., MEDICAL EXAMINER
FREDERICK W. FOCHTMAN, Ph. D., LABORATORY DIRECTOR & CHIEF TOXICOLOGIST

CONFIDENTIAL

REPORT OF LABORATORY FINDINGS

Submitted herewith please find the confidential report of the results of this laboratory's examination conducted in connection with the following case:

Lab Case No: 99LAB7082 Report #3: SEXUAL ASSAULT Report Date: June 29, 2007
Case Name: DANIELLE BOSH
Agency ACP GI Agency Case No. 1235699 Case Officer
CC:

Victim(s)
DANIELLE BOSH

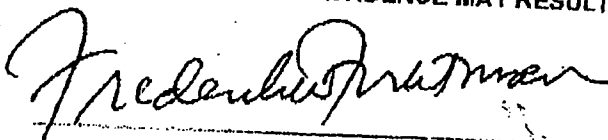
Suspect(s) JOHN SMITH OTN H1886316

The Crime Lab User Fee:

IMPORTANT NOTICE

The Division of Laboratories must be notified when an OTN becomes available for the suspect(s) / defendant(s) in this case. Please call (412) 350-4425 or FAX (412) 350-3861 this information immediately.

Unless special arrangements have been made, THE EVIDENCE MUST BE REMOVED WITHIN 10 DAYS of the above date or DISPOSAL OF THE EVIDENCE MAY RESULT.



Frederick W. Fochtman, Ph. D., Director & Chief Toxicologist

RECEIVED JUL 06 2007

Initials *ed*

EXHIBIT

8

ALLEGHENY COUNTY OFFICE OF THE MEDICAL EXAMINER
FORENSIC LABORATORY

Agency Case No: 1235699
Case Name: DANIELLE BOSH

Laboratory Case No: 99LAB7082
Report #1

SEROLOGY REPORT

MEMO TO FILE

To Whom It May Concern:

During review of this case (ACP GI CCR# 12356-99) a clerical error was detected. Laboratory Exhibits #1-#4 were inadvertently released to the Pittsburgh Police Property Storage Facility as opposed to the Allegheny County Police Property Storage Facility. Upon discovery of the error the items were returned to the laboratory in order to facilitate transfer to the appropriate agency. The items were returned in a single sealed convenience container. The container was opened and all of the integrity seals of the Exhibits were inspected and found to be intact. The Exhibits will be repackaged in a convenience container and released to the Allegheny County Police via standard laboratory procedure.

Respectfully submitted,



Robert D. Askew
Scientist





MICHAEL J. MACHEN, ESQUIRE
DIRECTOR

LAW OFFICES OF THE PUBLIC DEFENDER

County of Allegheny

400 COUNTY OFFICE BUILDING • 542 FORBES AVENUE
PITTSBURGH, PENNSYLVANIA 15219-2904
PHONE (412) 350-2401 • FAX (412) 350-2390

DATE: 7/18/07

CASE # CC 1999-16946

CASE: Smith, James T.

CHARGE: Rape (PCRA Appeals)

ATTORNEY: APD Delisio

INVESTIGATOR: Robert T. Keys

SYNOPSIS: Location and custodian of physical evidence: Danielle Bosh (victim).

DETAILS: (7/18/07) Following research by Sgt. Rich Mullen, ACPD (473-3366); the stated evidence was located and is in the custody of the ACPD evidence room, 400 Lexington Street, Pittsburgh, Pa 15208. According to Sgt. Mullen, he personally opened the "rape kit" and viewed article one: (1) microscopic slide (rectal smear); and article two: (2) rectal swabs. Sgt. Mullen stated that he re-sealed the kit after confirming the presence of the physical evidence on 7/18/07.

ACPD Evidence Room Custodian: Detective Walt Kazor; 412 473-3376.

NOTE: A written chain of custody letter from ACPD is attached.

Investigation is complete.



Robert Keys, Investigator

EXHIBIT
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Verification of James Thomas Smith

1. My name is James T. Smith, and I am currently incarcerated in the State Correctional Institution - Fayette. In 2000, I was convicted of attempted rape, as well as other related crimes (CC No. 1999 16946). I make this statement under penalty of perjury.
2. Under 42 Pa. Cons. Stat § 9543.1, I am moving for DNA testing to prove my innocence. I consent to provide samples of bodily fluid for the purpose of DNA testing.
3. I understand that, if this motion is granted, any data obtained from any DNA samples or test results may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against me in other cases.
4. I did not attempt to rape or otherwise assault the victim on the morning of November 25, 1999, or at any other time. I have continuously maintained, for the past 8 years, that I am actually innocent of the crimes for which I was convicted.
5. At trial, I maintained that mine was a case of mistaken identity. I believe that the victim who testified against me was mistaken when she placed me at the crime scene. I seek DNA testing solely for the purpose of obtaining scientific evidence to prove that I was not the man who committed the crime.

Dated: 8/15/07

Sworn to By: James T. Smith

August 15, 2007

Notary Public: Richelle L. Marling

Commission expires: June 30, 2010

EXHIBIT
10

