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202-544-3000

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Criminal Division – Felony Division

\_\_\_\_\_  
UNITED STATES OF AMERICA  
  
v.  
  
KIRK L. ODOM  
\_\_\_\_\_

Criminal No. F-2473-81  
(CLOSED)

**MOTION FOR POST-CONVICTION DNA TESTING  
UNDER THE INNOCENCE PROTECTION ACT**

Kirk L. Odom, through undersigned counsel, moves this Court for post-conviction DNA testing pursuant to the Innocence Protection Act, D.C. Code § 21-4133. Mr. Odom was convicted of rape while armed, sodomy, armed robbery, and first degree burglary while armed at a trial at which Mr. Odom swore under oath that he did not commit the crimes. He has never wavered from his assertion that he is innocent. The government’s case relied on eyewitness identification evidence of the complaining witness made under circumstances particularly conducive to misidentification and on the testimony of a Federal Bureau of Investigation hair examiner who presented “unfounded testimony at trial that exaggerated the probative value of a [purported] hair match” of a head hair found on the victim’s nightgown to Mr. Odom.<sup>1</sup>

<sup>1</sup> FBI Special Agent Myron Scholberg gave testimony against Mr. Odom regarding a purported hair match similar to the concededly unfounded testimony FBI Special Agent Michael Malone gave against Donald Gates. See Letter of Michael T. Ambrosino and Patricia A. Riley, Special Counsels to the United States Attorney for the District of Columbia, to Chief Judge Satterfield, at 2, n. 3 (November 15, 2010) (conceding that the government relied upon “unfounded testimony at trial that exaggerated the probative value of the hair match” to convict Donald E. Gates of felony murder and rape that he did not commit).

Mr. Odom meets all of the statutory requirements for post-conviction DNA testing of evidence seized in the investigation and prosecution that resulted in his convictions.

But even if DNA results cannot be obtained, whether because the government failed to safeguard the evidence, or because the evidence, though found, yields no data, Mr. Odom will move this Court to vacate his wrongful convictions under D.C. Code § 22-4135. The new evidence that requires that Mr. Odom's convictions be vacated even in the absence of DNA results includes the transformation in the understanding of the reliability of eyewitness identification testimony, particularly the malleability of memory, the presence of factors that influence accuracy, and the meaning of professions of certainty under circumstances such as those present here.

As will be shown, this case bears a striking resemblance to the case of Jennifer Thompson and Ronald Cotton. There, too, a black man broke into the apartment of a white woman at night while she slept. There, too, he held a weapon to her head. There too, his victim, who had been raped, sodomized and terrorized, participated in a series of identification procedures in which she gained increasing confidence in her identification until she was "certain" at trial. But, of course, as Ms. Thompson explained in her justly famous editorial in *The New York Times*, she "was certain, but [she] was wrong."<sup>2</sup> Ronald Cotton was exonerated by DNA.

The new evidence also includes the transformation in the understanding of the validity and evidentiary relevance of a purported hair match. This new evidence, much of it the result of

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<sup>2</sup> Jennifer Thompson, Editorial, "I Was Certain but I Was Wrong," *The New York Times*, A15 (Sunday, June 18, 2000). See also Jennifer Thompson-Cannino & Ronald Cotton, *Picking Cotton: Our Memoir of Injustice and Redemption* (2009); *State v. Cotton*, 394 S.E.2d 456 (N.C. App. 1990). For advances in the social sciences on eyewitness identification see *Benn v. United States*, 978 A.2d 1257 (D.C. 2009).

the revolutionary role of DNA in unmasking wrongful convictions, has demonstrated that yesterday's confidence in the "science" of hair microscopy was grievously misplaced. It has exposed microscopic hair comparison testimony of the kind used to convict Donald Gates, Kirk Odom, and too many others, as "fatal nonsense."<sup>3</sup>

Mr. Odom requests a prompt hearing on this motion.

## I. STATEMENT OF FACTS

### A. Introduction

S█████ Y█████ a white woman, who was then twenty-seven years old and living alone, was brutally attacked by a black man who, before dawn on February 24, 1981, scaled a tall wall, pushed apart metal bars, climbed into her apartment through a window, and awoke his sleeping victim by placing a gun to her temple. The gunman blindfolded Ms. Y█████ raped and sodomized her, and ransacked her apartment, then left with her cash, traveler's checks and foreign money. As the prosecutor told the jury, "[N]o one ought ever have to suffer what she suffered through that morning, to wake up in your own bed, in your own home, and find a man with a gun to your head, threatening to kill you if you don't comply with his demands."<sup>4</sup>

The sole issue at trial was the identity of the assailant. Kirk Odom, an intellectually-challenged eighteen year-old African American, was drawn into the case six weeks after the offense when a police officer who had a conversation with him decided that he resembled a composite drawing of the assailant. By the time of trial, after a series of identification

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<sup>3</sup> Barry Scheck, Peter Neufeld, Jim Dwyer, *Actual Innocence*, at 214 (2003).

<sup>4</sup> Brief for Appellant at 22 (quoting transcript), *Kirk L. Odom v. United States*, D.C. Court of Appeals, No. 82-65 (hereinafter "Def. br. at \_\_\_"). The transcript of Mr. Odom's trial has not been located. This account is based primarily on materials filed on the record in the Superior Court, the Court of Appeals and the United States Supreme Court, as well as on police, prosecution and defense records as noted.

procedures in which Ms. Y [REDACTED] gained increasing confidence in her selection of Mr. Odom, Ms. Y [REDACTED] was "'certain' of her in-court identification."<sup>5</sup> Special Agent Myron Scholberg then provided powerfully corroborating proof of her identification of Mr. Odom through his testimony that Mr. Odom's hair matched a hair left by the perpetrator. This was portrayed as highly probative since a match of hairs from two different people was said to be a very rare phenomenon.

**B. The Offense, Ms. Y [REDACTED] Opportunity to View and her Descriptions of her Assailant**

Ms. Y [REDACTED] had gone to bed at about 1:00 a.m. on February 24, 1981, "exhausted from work and study."<sup>6</sup> Her alarm, which she had set for 6:00 a.m., had not yet gone off.<sup>7</sup> The sun had not yet risen.<sup>8</sup> Ms. Y [REDACTED] testified at trial that only a "dim light" filtered into the bedroom.<sup>9</sup> This dim light was soon extinguished by a blindfold that left Ms. Y [REDACTED] completely in the dark.<sup>10</sup>

Ms. Y [REDACTED] chilling description of what ensued is contained in her witness statement that was prepared at the police station on February 25, 1981, the day after the offense. It states:

I was awakened by someone putting a hard object to the side of my head and then I noticed that it was a gun. Then this man told me he had a gun and for me not to move or say anything or else he would

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<sup>5</sup> Brief for Appellee at 7 (quoting transcript), *Kirk L. Odom v. United States*, D.C. Court of Appeals, No. 82-65 (hereinafter "Gov't. br. at \_\_\_").

<sup>6</sup> Gov't. br. at 2.

<sup>7</sup> Complainant witness statement at 1 (Feb. 25, 1981) (hereinafter "Y [REDACTED] statement at \_\_\_"). Ms. Y [REDACTED] affirmed that the police statement was "true and accurate" and adopted it as her testimony before the grand jury on May 19, 1981. Grand jury testimony of S [REDACTED] Y [REDACTED] at 1 (May 19, 1981) (hereinafter "Y [REDACTED] G.J. at \_\_\_").

<sup>8</sup> The National Oceanic and Atmospheric Administration weather report for February 24, 1981 indicates that sunrise occurred at 6:48 and listed the condition at sunrise as "foggy."

<sup>9</sup> Gov't. br. at 2.

<sup>10</sup> Y [REDACTED] statement at 1.

kill me. Then he put a white rag in my mouth. I told him that I was afraid that I was going to smother because I have a cold and I have to breathe through my mouth. He told me he did not care if I had a cold and for me to shut up or I would be dead. Then he told me to turn over and he put the gun to my back and I had better do as I was told or I would be dead. Then he tied a scarf around my head to hold the gag in and then he tied another scarf around my eyes and blindfolded me. He either wrapped it several times or he tied several scarves around my head because I couldn't see any light after he tied my eyes. Then he pulled my hands behind my back and tied them. Then he pulled the covers off of me and he tied my feet. Then he asked me where was the money. I told him that I did not have any. Then he went over to the dresser and I could hear him going through the dresser drawers and I could hear him saying where is the money. ... I told him that there wasn't very much but I had \$400.00 in Travelers Checks. Then he said, "Yea, I would like to see me cash those Travelers Checks." Then he looked around some more and then he came over to me and I could tell that he was cutting my nightgown off of me. Then he cut my panties off with a pair of scissors. Then he stood by the side of the bed and he took off all of his clothes. Then he got on the bed and he kneeled on the bed straddling my legs and he inserted his penis in my rectum a little way. Then he rubbed his penis on the lips of my vagina and he tried to insert himself deeper in my rectum but he was unable to do it. Then he cut my legs apart and then he opened my legs and he inserted his penis in my rectum again but he still couldn't get very deep. Then he put pillows under my hips and he told me to lift up when he did this and that was the only conversation during this incident. Then he inserted himself again and this time he entered me all the way. He did not stay on me very long and I don't think he climaxed and then he got off of me. Then he tied my feet together again. ... Then he went into the living room and I could hear him going through my things. ... I could hear his jacket rustling. Then he moved away towards the door. Then there was a silence and I waited a few minutes. ... My hands were tied together and my feet were tied together and I got off the bed and hopped down the hall. ... I had to tell the operator that it was an emergency and she got the police. I untied my hands and got my robe and then the police arrived.<sup>11</sup>

At trial, Ms. Y [REDACTED] testified that she viewed the gunman full face from a distance of only two feet, she saw him again in profile, as he reached across her to turn off the alarm that had

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<sup>11</sup> Y [REDACTED] statement at 1-2 (minor errors in spelling and grammar have been corrected).

gone off at 6:00 a.m., and she looked at his full face again before he blindfolded her.<sup>12</sup> All told, she testified that “more than a full sixty seconds,” but not “quite two minutes” elapsed between the time she first saw the gunman and when he blindfolded her.<sup>13</sup>

At 7:05 a.m., within approximately five minutes of the gunman’s departure, police officers arrived at Ms. Y [REDACTED] apartment in response to her call for help.<sup>14</sup> Metropolitan Police Department Detective Robert Catlett of the Sex Squad arrived at 7:30 a.m.<sup>15</sup> Detective Catlett would stay on the case through trial, and he would be with Ms. Y [REDACTED] at every significant point in which she was involved in the investigation. Detective Catlett took Ms. Y [REDACTED] description of her assailant at her apartment on the morning of February 24, 1981.<sup>16</sup> Then he accompanied her to George Washington University Medical Center for an examination.<sup>17</sup> On February 25, 1981, he met Ms. Y [REDACTED] at the police station where he took the written statement recounted above, and in which she gave a slightly modified description of her assailant.

Several versions of Ms. Y [REDACTED] early description of the gunman exist and they contain slight variations. The essential features from all of them are that the assailant was a young black man who was medium complexioned, of medium height, slim, clean shaven, with close-cropped hair and armed with a large gun.<sup>18</sup>

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<sup>12</sup> Gov’t. br. at 2.

<sup>13</sup> Gov’t. br. at 3 n.2 (quoting transcript).

<sup>14</sup> Gov’t. br. at 4.

<sup>15</sup> Metropolitan Police Department form 123, “Report of Investigation” (undated) (hereinafter “PD 123”).

<sup>16</sup> Gov’t. br. at 4.

<sup>17</sup> Grand jury testimony of Det. Robert Catlett at 5 (June 8, 1981).

<sup>18</sup> The initial description is contained in a police notebook. It states: “N/M 20-30, 5’6”-5’8”, slight wire[y] build[,] medium complexion, short hair[.] Brown gloves without fingertips, nylon jacket. Long barrel gun.” Although the provenance of the notebook page is not certain from the available record, it was likely Detective Catlett’s, provided as his Jencks material, inasmuch as

While at the police station on February 25, 1981, Ms. Y [REDACTED] also participated in the first of many identification procedures. She met with police artist James Proctor who drew a composite sketch.<sup>19</sup> She described the process of making the drawing in her testimony to the grand jury as follows: "I looked at some photographs to help when the police artist and I were discussing, so that we could make a composite, so I could recognize him."<sup>20</sup> Afterwards, she viewed between 200 and 400 photographs of suspected sex offenders. The photographs did not include Mr. Odom. She made no identification.<sup>21</sup>

### C. How Kirk Odom Becomes a Suspect

Kirk Odom had a conversation with a police officer on April 3, 1981, that would begin the road to his eventual conviction. The exchange had nothing to do with the assault on Ms. Y [REDACTED] but the officer involved believed that he resembled the composite drawing that had been distributed among police and he notified the Sex Squad.<sup>22</sup> Detective Catlett retrieved a two-year-old black and white photograph of Mr. Odom and assembled a photo array containing nine other black and white photographs. On April 13, 1981, he took the array to Ms. Y [REDACTED] to view. This was the second photo array that Ms. Y [REDACTED] had been shown, but the first time that Detective

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he testified at trial that he took Ms. Y [REDACTED] initial description of the perpetrator. Gov't. br. at 4. The PD 123 contains the following description: "Negro, male young, early twenties, 5'7" to 5'9", medium brown complexion[,] wirey and slim but not skinn[[]y, close cut hair, did not remember facial hair, gloves with fingers cut out, Nylon jacket, blue & long barrel handgun." In her written statement on February 25, 1981, Ms. Y [REDACTED] described her assailant as "Black, male, young, he is in his late teens or early twenties, 5'6"-5'8", 120-130 lbs, short hair, medium complexion, clean shaven, Nylon zipper front jacket that was blue or dark in color. He was armed with a dark colored long barrel gun."

<sup>19</sup> The composite sketch was introduced at trial as government exhibit 7, Superior Court Exhibit Summary, *United States v. Kirk L. Odom*, F-2473-81 (hereinafter "Exhibit summary"). A copy is attached as Appendix 1.

<sup>20</sup> Y [REDACTED] G.J. at 5.

<sup>21</sup> Gov't. br. at 5.

<sup>22</sup> *Id.*

Catlett had brought photographs to her to view. Earlier, on March 31, 1981, she had come to the station to look at eight Polaroid photos. She had pointed to one as resembling her attacker, but said that he was too old and too heavy.<sup>23</sup> Whether by coming to her residence Detective Catlett had signaled a heightened interest in the outcome of the second photo array cannot be known.

Detective Catlett testified that before Ms. Y █████ looked at the array, he instructed her to look at facial features, not hair, because hair changes. This instruction implicitly acknowledged that not all of the photographs were of clean shaven men with close-cropped hair.<sup>24</sup>

The composition of the photo array was the subject of a pretrial motion to suppress identification testimony. At the pretrial hearing, “defense counsel argued that ‘several of the men in the photographs are fairly old. Several of them have mustaches. All of them are inconsistent with her original description of the suspect....’”<sup>25</sup> Denying the motion to suppress, the trial judge stated that “six of the ten photographs were of individuals who ‘appear to be of the same age, all clean shaven, hair styles different, features are similar. All appear to be young with the exception of [one who] appears to be older.’”<sup>26</sup> By implication, at least four and perhaps five of the ten did not appear to be of the same age, several were not clean shaven and many did not have short hair (instead they had “different” “hair styles”).<sup>27</sup>

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<sup>23</sup> *Id.*; Def. br. at 4.

<sup>24</sup> Gov’t. br. at 5. The photo array has not been located.

<sup>25</sup> Memorandum of the United States in Opposition to Petition for a Writ of Certiorari at 3 (quoting transcript), *Kirk L. Odom v. United States*, United States Supreme Court No. 83-5368.

<sup>26</sup> *Id.* (quoting transcript).

<sup>27</sup> In his closing, defense counsel stated:

Now, remember her initial description of the assailant, especially that he had short cropped hair, just like [Mr. Odom] has, and presumably had back in February, short cropped hair, no facial hair, just like [Mr. Odom] had back in February. Then look at the eight pictures there, the ten pictures. You will notice that eight of

Ms. Y [REDACTED] made a tentative identification of Mr. Odom from the second photo array. She told the grand jury, "I thought that one of those photographs might be the person."<sup>28</sup> At trial, she stated that she needed to see the man's whole body and hear him speak before making a "complete identification."<sup>29</sup> <sup>30</sup> Detective Catlett replied that he would arrange a lineup where she could do that.<sup>31</sup>

On May 19, 1981, Ms. Y [REDACTED] had the opportunity to view the man she had tentatively selected from the photo array and to hear his voice at a live lineup, as Detective Catlett had promised she would. Before she appeared at the lineup, on that very morning, Detective Catlett again showed her the photo array from which she had selected Mr. Odom's photograph. She testified before the jury that she expected to see the person she had tentatively selected in the photo array at the lineup, but she also said that she "did not feel she had [Mr. Odom's] photograph in [her] mind" when she viewed the lineup.<sup>32</sup>

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those pictures either have – are older men, much older, with mustaches, with long hair, with sideburns, and even if she told Detective Catlett words to the letter [sic], she cannot ignore the fact that two of those pictures are young men, much younger than the rest, and they are clean shaven and they have short hair. Two out of the ten.

*Id.* at 5 (quoting transcript).

<sup>28</sup> Y [REDACTED] G.J. at 5.

<sup>29</sup> Gov't. br. 5 (quoting transcript).

<sup>30</sup> Detective Catlett testified more robustly at trial, claiming that Ms. Y [REDACTED] said: "I can't be one hundred percent positive without seeing him in person, but I believe this is your man." Gov't. br. at 5 (quoting transcript).

<sup>31</sup> Gov't. br. at 5-6.

<sup>32</sup> Reply Brief at 4 n.3 (quoting transcript), *Kirk L. Odom v. United States*, D.C. Court of Appeals, No. 82-65.

Mr. Odom wore shield number five and stood in the center of the seven person line. He, alone, was standing on a box so that he would appear the same height as the other men.<sup>33</sup> A photocopy of a photograph of the lineup shows Mr. Odom to be a dark complexioned young man; he is the darkest person in the lineup. He is also clean shaven. Most of the other men in the line-up (four out of six, wearing shield numbers 13, 12, 6, and 10) appear to have mustaches. Some are also visibly older than Mr. Odom.<sup>34</sup> Ms. Y [REDACTED] asked to hear the men speak twice, once while she closed her eyes because she had been blindfolded most of the time her assailant spoke to her.<sup>35</sup> She also requested to see the men in profile. "Finally, when asked, she identified the man wearing shield no. 5[.]"<sup>36</sup>

Immediately after she identified Mr. Odom at the lineup, Ms. Y [REDACTED] appeared before the grand jury in *United States v. Kirk L. Odom* and recounted what had occurred. She testified as follows:

Q. Did you listen to the men in the lineup speak?

A. Yes, I did.

Q. Did you listen to them before you made your identification.

A. Yes, I did. Before I thought I knew who it was, but I did not say that I thought I knew who it was until after I listened to him speak.

Q. Did you then tell the police which one you thought it was?

A. Yes.<sup>37</sup>

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<sup>33</sup> The box could not be seen by observers of the lineup.

<sup>34</sup> The lineup photograph was introduced at trial as government exhibit 9. Exhibit summary. A copy is attached as Appendix 2.

<sup>35</sup> Gov't. br. at 6. The videotape of the lineup was shown to the jury. It has not been located.

<sup>36</sup> *Id.*

<sup>37</sup> Y [REDACTED] G.J. at 6.

At trial, Ms. Y [REDACTED] provided this more dramatic description of her experience:

[I]mmediately when I walked into the room, one man's face just seemed to jump out at me, and it was very scary.

I recognized him and I felt afraid that he could see me, and I had to remind myself that I knew it was impossible for him to see me, you know, it was a very physical shock to see that man.<sup>38</sup>

Ms. Y [REDACTED] told the jury that her assailant "had left her with an image of his face etched in her mind."<sup>39</sup>

#### **D. The Government's Corroborating Testimony**

Only one other civilian witness testified for the government. Robert Beckham, who lived behind Ms. Y [REDACTED] apartment, recalled seeing a man wearing a black or blue jacket walk by his home about 7:00 a.m. on February 24, 1981.<sup>40</sup> He made no identification.

Forensics experts who analyzed physical evidence associated with the scene of the crime or linked to the perpetrator accounted for the remainder of the government's case. Of these, the most important was the testimony of FBI hair analyst Myron Scholberg. In its brief the government writes: "Hair analysis by Federal Bureau of Investigation Special Agent Myron T. Scholberg, an expert in microscopic analysis, showed that a hair found on Miss Y [REDACTED] nightgown was microscopically like appellant's head hair."<sup>41</sup> The United States explained the probative value of Agent Scholberg's conclusion that the hairs were microscopically similar. It wrote: "This was significant because it is a very rare phenomenon; only eight or ten times in the past ten years, while performing thousands of analyses, had Scholberg reported that he could not

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<sup>38</sup> Gov't. br. at 6 (quoting transcript).

<sup>39</sup> Gov't. br. at 4.

<sup>40</sup> Def. br. at 4.

<sup>41</sup> Gov't. br. at 7.

distinguish even microscopically between two or three known samples.”<sup>42</sup> <sup>43</sup> The prosecutor argued in closing that there was “no reason in this world to disbelieve” him.<sup>44</sup> <sup>45</sup>

No other testimony purported to link Mr. Odom to this offense. Maureen Higgins, an FBI serologist, testified that she had found intact sperm cells on Ms. Y [REDACTED] robe and pillow case.<sup>46</sup> She could provide no information regarding the characteristics or the source of those cells. She could not say that they were connected in any way to Mr. Odom.<sup>47</sup> A fingerprint examiner testified regarding a latent print that was recovered from the apartment that matched Ms. Y [REDACTED]<sup>48</sup> No latent prints were recovered that matched Mr. Odom.

#### **E. Mr. Odom and his Alibi Defense**

When he was arrested on May 4, 1981, more than two months after the February 24, 1981, crimes with which he would be charged, Mr. Odom was eighteen years old, but he had the

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<sup>42</sup> *Id.*

<sup>43</sup> Special Agent Michael Malone testified in a similar fashion at Donald Gates’ trial. According to the government’s brief, he explained that it was “‘highly unlikely’ that the hair found on the victim came from someone other than [Mr. Gates]. Malone indicated that in approximately 10,000 hair examinations he had performed over an eight year period, there were only two instances in which hairs from two different people were so similar that he could not differentiate them.” Gov’t. br. at 8-9, *Donald E. Gates v. United States*, D.C. Court of Appeals No. 82-1529. The United States has conceded that this testimony was “unfounded.” See note 1.

<sup>44</sup> Def. br. at 19, n.13.

<sup>45</sup> In fact, “there is not and never has been any statistical basis for hair comparison.” Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Conviction*, 95 Va. L. R. 1, 47 (2009). The National Research Council of the National Academy of Sciences’ recent landmark report on the forensic sciences was devastating in its critique of hair analysis. It found that “[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population” and that “[t]here appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a ‘match.’” National Research Council, National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward*, (“NRC Report”) at 160-61 (2009).

<sup>46</sup> Gov’t. br. at 7.

<sup>47</sup> Def. br. at 5.

<sup>48</sup> The latent fingerprint was introduced by the government as exhibit 10. Exhibit summary.

educational attainments and the intellectual ability of someone much younger. He left school in 1979, after reportedly completing the 10<sup>th</sup> grade at a vocational high school. But just two years before, at fourteen or fifteen, he had attended a school that was an extension of the Area C Mental Health Clinic where he was functioning on a *third grade level*, according to records reviewed by the presentence report writer.<sup>49</sup> This third grade functioning was said to represent “tremendous” academic progress for Mr. Odom.<sup>50</sup> The PSI writer reported that he had learning disabilities and emotional problems.<sup>51</sup> Post-conviction psychological tests showed more serious limitations. Mr. Odom’s full scale IQ was 73, placing him in the fourth percentile of the population on which the test was based.<sup>52</sup> His verbal scale IQ was 74. His performance IQ was also 74.<sup>53</sup>

The fortuity that a sister came home from the hospital with her newborn child on the day that the offense had been committed allowed Mr. Odom and his mother to recall their whereabouts on February 24, 1981, even though months separated that date from the day of Mr. Odom’s arrest. Mrs. Odom testified that Kirk was sleeping in his bedroom between 6:00 and 7:00 a.m. on February 24, 1981, the day the baby arrived at home.<sup>54</sup>

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<sup>49</sup> Presentence report at 5.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Psychological evaluation at 10 (March 26, 1984). This score was said to place Mr. Odom in the “borderline” range. *Id.*

<sup>53</sup> In *Atkins v. Virginia*, the Supreme Court cited approvingly authority that places Mr. Odom’s scores within the “cutoff” for a diagnosis of mental retardation. *Atkins*, 536 U.S. at 304, 309, n.5 (U.S. 2002).

<sup>54</sup> Def. br. at 5; Gov’t. br. at 8.

Kirk Odom testified that he had been at home asleep that morning and that he did not commit the crimes with which he was charged.<sup>55</sup> He also told the jury that he did not own a blue nylon jacket and that he did not know what a traveler's check was.<sup>56</sup> The perpetrator, it will be recalled, remarked on the difficulty he would have negotiating such checks.<sup>57</sup>

A skilled felony one prosecutor elicited a "nonsensical" response from Mr. Odom when he challenged a discrepancy between the weeks (five or six) and months (three) that Mr. Odom testified that he had been working before the start of trial. The government describes the cross-examination in its brief as follows:

[Mr. Odom] admitted that after finishing school in the tenth grade, he had been unemployed until he obtained a job at Hechinger's about three months prior to trial, where he was still working; later, however, he stated that he had been working there for only five or six weeks. When asked to explain this discrepancy in his testimony, he stated nonsensically, "I got up earlier in the morning."<sup>58</sup>

In his closing, the prosecutor argued that Mr. Odom's "nonsensical" answer showed that he was a liar:

Ladies and gentlemen, I suggest to you that there is a simple explanation for all of that, and that is that it is easy to tell the truth. The truth never changes, no matter how many times you tell it. But it is awfully hard to keep a lie straight isn't it?<sup>59</sup>

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<sup>55</sup> Def. br. at 5; Gov't. br. at 7.

<sup>56</sup> Gov't. br. at 7.

<sup>57</sup> Y [redacted] statement at 1 ("Yea, I would like to see me cash those Travelers Checks.").

<sup>58</sup> Gov't. br. at 8 (quoting transcript at 49).

<sup>59</sup> Gov't. br. at 13 (quoting transcript at 49). The briefs and citations to transcript make clear that the argument referred to the discrepancy with respect to the length of Mr. Odom's employment. On appeal, the government wrote: "Whatever the wisdom of the prosecutor's choice of the word 'lie,' it was perfectly proper for him to argue that appellant's meaningless explanation for his contradictory stories was an indication that he was not telling the truth." Gov't br. at 13.

After just two hours of deliberation, the jury convicted Mr. Odom on all counts.<sup>60</sup>

## II. APPLICATION FOR POST-CONVICTION DNA TESTING

Mr. Odom applies to this Court for post-conviction DNA testing of all biological material relating to this case to prove what he has always maintained: he is actually innocent. He meets all of the statutory requirements for post-conviction DNA testing.

### A. "In Custody"

First, Mr. Odom is "in custody pursuant to the judgment of the Superior Court of the District of Columbia for a crime of violence." D.C. Code § 22-4133(a). On January 6, 1982, Chief Judge H. Carl Moultrie I sentenced Mr. Odom to five to fifteen years for burglary while armed, eight to thirty years for rape while armed, three to nine years for sodomy while armed and four to twelve years for armed robbery for a total sentence of twenty to sixty-six years in prison. This sentence satisfies the custody requirement under settled law, whether Mr. Odom is serving the sentence in prison or on parole. Mr. Odom served nearly twenty-two years in prison before being paroled.

### B. "At Any Time"

The Innocence Protection Act allows an application for post-conviction testing to be made "at any time" so long as the applicant remains in custody and the evidence was not previously subject to DNA testing of the kind sought. D.C. Code § 22-4133(a). No evidence in this case was previously subjected to DNA testing of any kind. Such testing did not exist at the

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<sup>60</sup> Docket entries, *United States v. Kirk L. Odom*, F-2473-81 (indicating that the jury deliberated for one hour and forty minutes on September 8, 1981, and twenty-five minutes on September 9, 1981).

time of Mr. Odom's conviction. Mr. Odom's application is therefore timely. D.C. Code § 22-4133(a)(3)(A).

### C. "Biological Material"

The Innocence Protection Act allows for the post-conviction testing of "biological material." "Biological material" is defined by the statute to include "a sexual assault forensic examination kit, semen, vaginal fluid, blood, saliva, visible skin tissue, or hair which apparently derived from the perpetrator of a crime...." D.C. Code § 22-4131(2). FBI serologist Maureen Higgins concluded that semen and sperm cells from the perpetrator were present on two pillow cases and on Ms. Y [redacted] robe.<sup>61</sup> FBI hair analyst Myron Scholberg examined two "Negroid" hairs left by the perpetrator.<sup>62</sup> By definition, Mr. Odom has a right to obtain DNA testing of

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<sup>61</sup> The FBI report of Agent Higgins' analysis contained the following conclusions:

Semen containing spermatozoa, male reproductive cells, was identified on Q 7 [multi-colored pillowcase] and Q 9 [robe]. Grouping tests conducted on the seminal stains on Q 7 did not disclose the presence of any blood groups substance(s). The seminal stains on Q 9 were unsuitable for conclusive grouping purposes. Chemical tests for the presence of semen were positive on Q 5 [gold pillowcase]. However, semen could not be conclusively identified since no spermatozoa were found. No semen was found on Q 1 through Q 4, Q 6 or Q 8.

Report of the FBI at 2 (Aug. 28, 1981).

<sup>62</sup> The FBI report of Agent Scholberg's examination contained the following conclusions:

A single black head hair fragment of Negroid origin found on specimen Q 1 [night gown] is microscopically like the K 3 [known sample] head hairs from ODOM, and, accordingly, could have originated from him.

\*\*\*

Specimen Q 11 [hair taken from Ms. Y [redacted] by hospital staff] is comprised of a single hair fragment of Negroid origin that is not suitable for significant comparison purposes.

these items. In addition, all of the linens, clothing and rape kit (if any) must be examined to determine if biological material is present that may hold the key to the identity of the perpetrator.

**D. "Seized or Recovered as Evidence"**

According to the FBI records, the following items were recovered from Ms. Y [REDACTED] apartment and subjected to chemical analysis:

- Q 1 Red and white nightgown from bed (Item 1);
- Q 2 Multi-colored top sheet from bed (Item 2);
- Q 3 Multi-colored bottom sheet from bed (Item 3);
- Q 4 Solid gold pillowcase from bed (Item 4)
- Q 5 Solid gold pillowcase from bed (Item 5)
- Q 6 Multi-colored pillowcase from bed (Item 6)
- Q 7 Multi-colored pillowcase from bed (Item 7)
- Q 8 Blue panties from floor beside bed (Item 8)
- Q 9 Orange robe that complainant was wearing (Item 16).<sup>63</sup>

In addition to the hair recovered from Ms. Y [REDACTED] night gown (Q 1), the following questioned hairs were analyzed:

- Q 10 Pubic hair combings from complainant;
- Q 11 Glass vial containing hair taken off of victim by hospital staff.<sup>64</sup>

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No other hairs of Negroid origin were found on or in specimens Q 1 through Q 10. Report of the FBI at 2(July 7, 1981).

<sup>63</sup> FBI Laboratory Worksheet Re: Microscopic Analyses – Chemical Analyses at 1-2; Metropolitan Police Department letter to FBI Director submitting items for examination at 1-2 (June 10, 1981).

<sup>64</sup> *Id.* at 2, 6.

All of these items satisfy the statutory provision that testing be sought only of biological material “seized or recovered as evidence in the investigation or prosecution that resulted in conviction.” D.C. Code § 22-4133(a) (1).<sup>65</sup>

**F. “Within the Actual or Constructive Possession of the District of Columbia or the United States”**

This evidence is or should be “in the actual or constructive possession of the District of Columbia or the United States.” D.C. Code § 22-3133(a)(2). The exhibit summary indicates that Ms. Y [REDACTED] clothing, including her nightgown (exhibit 3), robe (exhibit 4), underwear (exhibit 5), and belt and scarf (exhibit 6), each in a separate bag, were introduced at trial by the United States.<sup>66</sup> It further indicates that bed linen including sheets (exhibits 12 and 13) and pillow cases (exhibits 14, 15, 16, and 17), each in a separate plastic bag, were introduced at trial by the government.<sup>67</sup> Finally two “cardboard mailer[s] with slides” were introduced at trial, without objection, as government exhibits 18 and 19.<sup>68</sup> These slides contained questioned hair removed from Ms. Y [REDACTED] nightgown and the known head hairs from Mr. Odom that were the subject of FBI Special Agent Myron Scholberg’s analysis.

To date, neither the Special Proceedings Division of the United States Attorney’s Office nor the Metropolitan Police Department Property Office has responded to Mr. Odom’s requests, through counsel, made in writing in June 2010, for assistance in locating and preserving this evidence.

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<sup>65</sup> So, too, would a rape kit if one were take at George Washington Hospital where Ms. Y [REDACTED] was examined following the attack. *See* note 15.

<sup>66</sup> Exhibit summary.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

## F. Affidavit of Innocence

This motion is supported by “an affidavit by the applicant, under penalty of perjury, stating that the applicant is actually innocent of the crime that is the subject of the application,” as required by D.C. Code § 22-4133(b)(1).<sup>69</sup> Although the affidavit is new, the assertion of innocence is not.

Mr. Odom has *always* maintained that he is innocent. He testified at trial under oath and presented an alibi defense. He told the presentence report writer that he “didn’t have anything to do with the charge itself. One day, the police showed this picture to me and said that it looked like me. I said it didn’t look like me. ... The police took my name and address and several months later<sup>70</sup> I was placed under arrest.”<sup>71</sup>

In a letter to his defense counsel after his conviction Mr. Odom wrote:

Dear: Mr. Greenlee. This is Mr. Odom I want to know why I have to do time for something I don’t know about. That lady don’t know me and I don’t know her or were she live at. and I want to know why they pitch me Can’t we do something about it cause I don’t want to spend time in here away from my little girl. And I think that somebody just don’t want me on the street or the police told her to say it was me. All I know is I didn’t do it so can’t you do something about it cause I don’t want to stay down here for a long time. I told you all and everything I know and what I remember. Do you think it wood be good if I move out of D.C. Wood you ask the judge if that’s o.k. with him cause I didn’t do it so write me back and tell me what he said cause I can’t take this anymore cause I want to be with my family and my little girl before she gets big. I just don’t want to be down here cause I know I don’t belong down here and my people know “too.”

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<sup>69</sup> The affidavit of innocence is attached as Appendix 3.

<sup>70</sup> In fact it was one month later, but, as has been shown, Mr. Odom had difficulty in assessing the passage of time.

<sup>71</sup> Presentence report at 3.

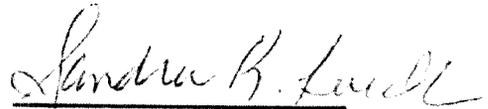
Kirk L. Odom.<sup>72</sup>

**G. DNA Evidence Would Demonstrate Mr. Odom's Actual Innocence**

Finally, the Innocence Protection Act requires that Mr. Odom “[e]xplain how the DNA evidence would help establish that the applicant is actually innocent despite having been convicted at trial or having pled guilty.” D.C. Code § 22-4133(b)(4). The foregoing statement of facts amply satisfies this requirement. Evidence excluding Mr. Odom as the donor of hairs or the semen, sperm, or other biological material left by the rapist would make Mr. Odom’s actual innocence manifest.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this motion be granted, and that this Court order post-conviction DNA testing of all biological material seized or recovered as evidence in the investigation and prosecution of Kirk Odom.

Respectfully submitted,



Sandra K. Levick # 358630  
Chief, Special Litigation Division  
Public Defender Service  
633 Indiana Avenue, N.W.  
Washington, D.C. 20004

Slevick@pdsdc.org  
202-824-2383 (direct)  
202-824-2983 (fax)

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<sup>72</sup> Letter from Kirk L. Odom to Richard Greenlee, postmarked January 26, 1982. A copy is attached as Appendix 4.

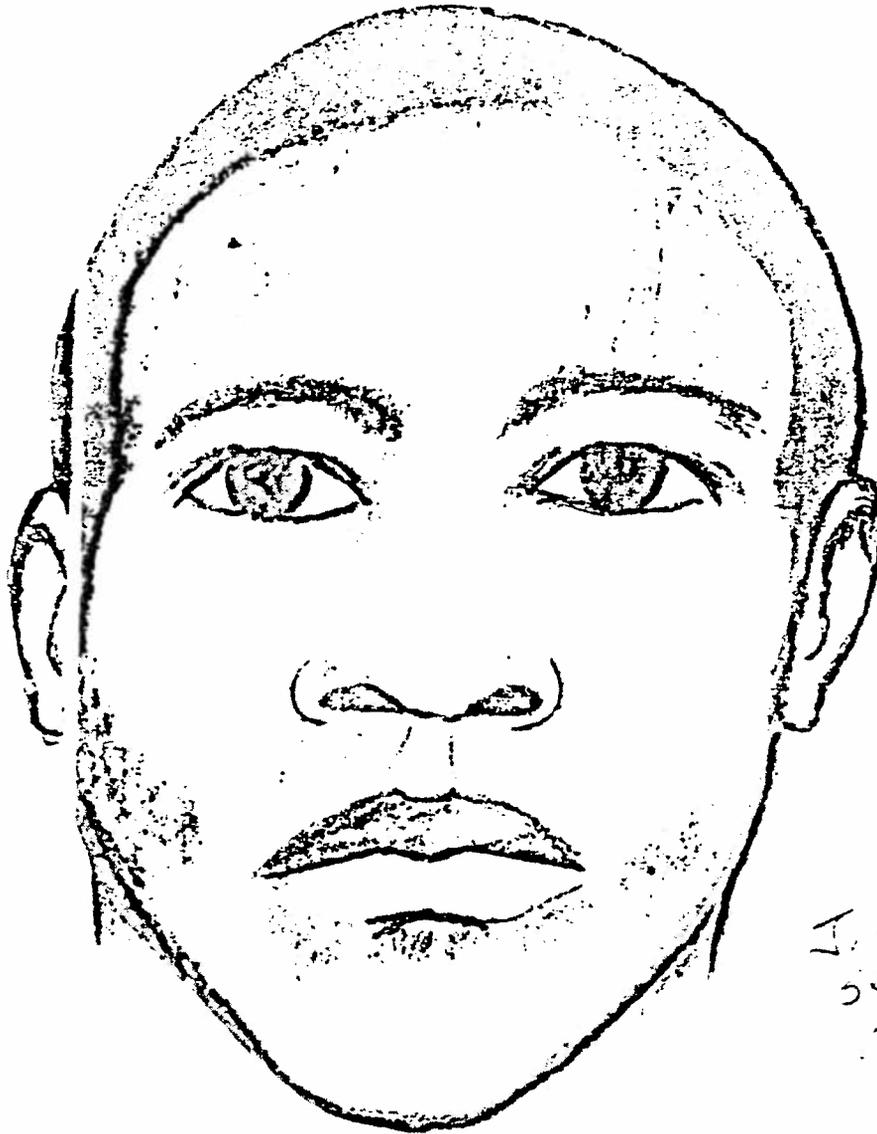
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for Post-Conviction DNA Testing under the Innocence Protection Act has been served by hand and by electronic mail on Mary Ann Snow, Chief, Special Proceedings Division, 555 4th Street, N.W., Washington, D.C. 20001, this 14th day of February, 2011.



Sandra K. Levick  
Sandra K. Levick

# **APPENDIX 1**



5-11-81  
5-11-81  
5-11-81

SX 81-117

BURGLARY & RAPE WHILE ARMED

CCN #095-111

ON FEBRUARY 24, 1981, ABOUT 0600 HOURS, THE BELOW DESCRIBED SUBJECT FORCED THE BARS FROM THE WINDOW AND ENTERED A RESIDENCE IN THE 200 BLOCK OF 13th STREET, SOUTHEAST. THE SUBJECT SEXUALLY ASSAULTED THE COMPLAINANT AND LEFT HER TIED AND GAGGED.

LOF: BLACK, MALE, 18 to 25 YEARS, 5'7" to 5'9", MEDIUM COMPLEXION, SLIM, CLOSE CUT HAIR AND CLEAN SHAVEN. HE WAS LAST SEEN WEARING A BLUE NYLON JACKET AND ARMED WITH A LARGE DARK HANDGUN.

ANY INFORMATION PLEASE CONTACT THE SEX BRANCH ON 727-4151 or 727-4252.

Department of the District of Columbia

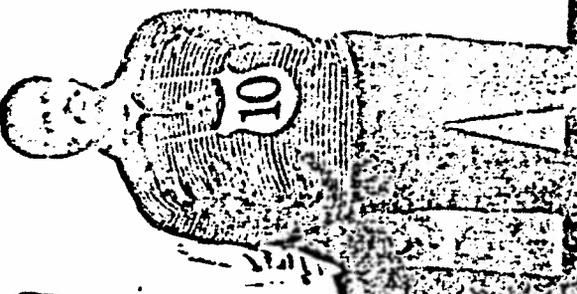
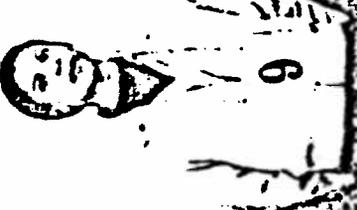
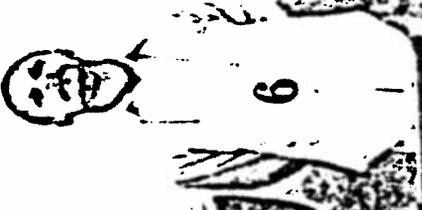
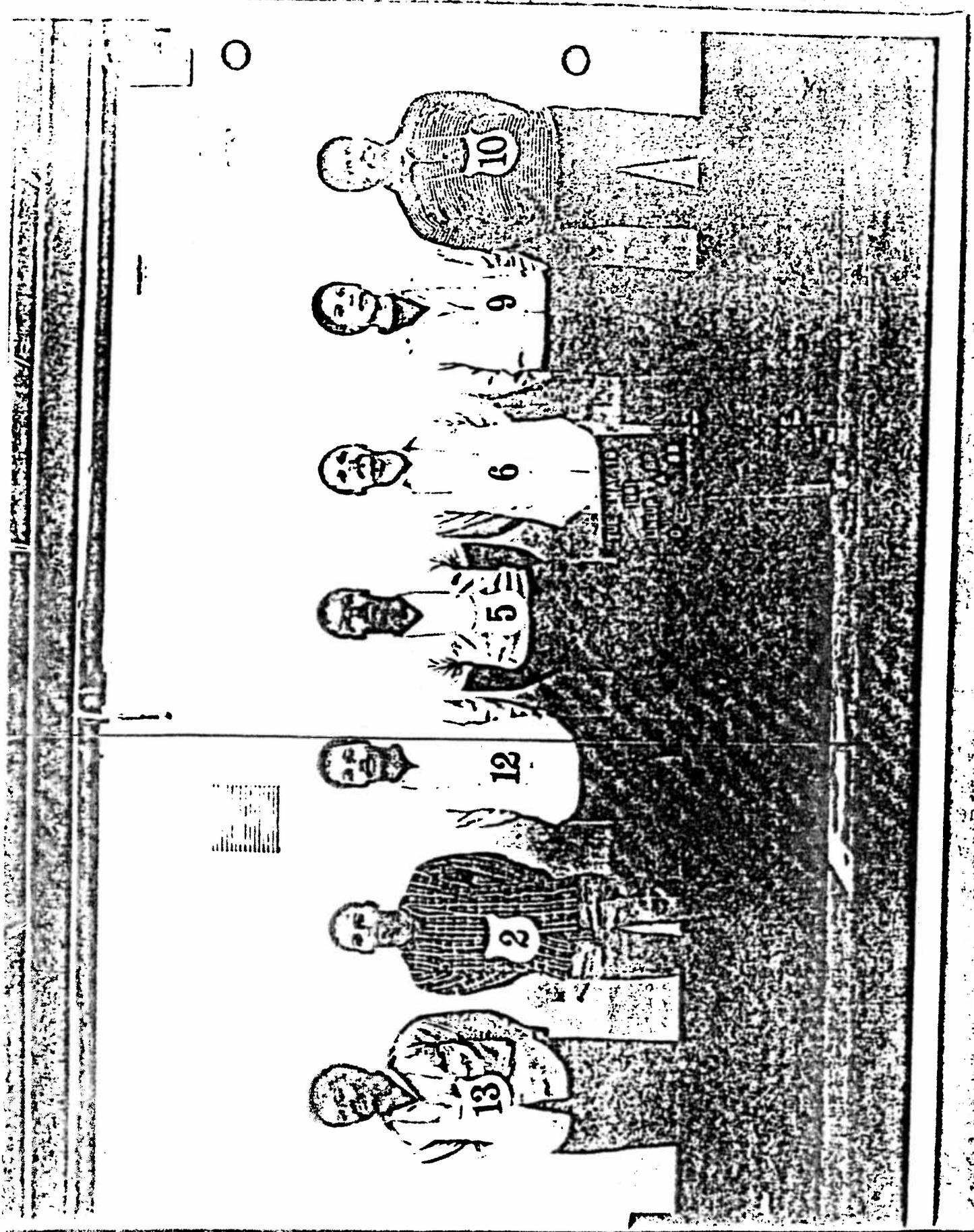
John S. Eddy, Jr.

\*\*\*  
[Small graphic logo]

7-1-81

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## **APPENDIX 2**



THE MARYLAND  
LEGISLATURE  
1911

## **APPENDIX 3**

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
Criminal Division – Felony Division

UNITED STATES OF AMERICA

v.

KIRK L. ODOM

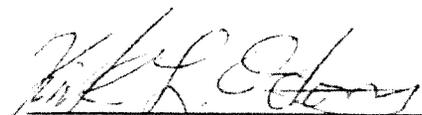
Criminal No. F-2473-81  
(CLOSED)

**AFFIDAVIT OF INNOCENCE**  
**PURSUANT TO THE INNOCENCE PROTECTION ACT**

I, Kirk L. Odom, hereby affirm that I am actually innocent of the crimes for which I was convicted that are the subject of the attached motion.

I declare under penalty of perjury under the laws of the United States, 28 U.S.C.A. § 1746, that the foregoing is true and correct.

Executed on this 11th day of February 2011

  
Kirk L. Odom

Glenetta M. Harris  
Notary Public, District of Columbia  
My Commission Expires 4/14/2012

District of Columbia: SS  
Subscribed and Sworn to before me,  
this 11th day of February, 2011  
  
Notary Public, D.C.  
My commission expires 4/14/2012

# **APPENDIX 4**

Dear Mr. Greenlee This is Mr. Odum I want to  
know why I have to do time for something I don't  
know about. That lady don't know me and I don't  
know her or where she live at and I want to  
know why they pitch me can't we do something  
about it cause I don't want to spend time in  
here away from my little girl and I think  
that somebody just don't want me on the street  
or the police told her to say it was me. I  
know is I didn't do it so can't you do some  
thing about it cause I don't want to stay  
down here for a long time. I ~~told~~ you all  
said every thing I know and what I remember  
do you think it wood be good if I move  
out of D.C. wood you ask the Judge if  
that's ok. with him cause I didn't do it  
so write me back and tell me what he  
said cause I can't take this anymore  
cause I want to be with my family and  
my little girl before she gets big. I just  
don't want to be down here cause I know  
I don't belong down here and my people  
know too! Nick L. Odum

Miss S. Odora 2002-0911  
1901 D. ST. S.E.,  
Washington D.C., 20003

F.M.

Mr. Green Lee  
Public Defender Service  
451 INDIANA AVENUE, N.E.  
Washington D.C. 20001